

SOCIAL & SECURITY & YOU

FROM THE OFFICE OF ATTORNEY WILLIAM CRAWFORTH

FALL 2012

Message From Attorney Crawford

SECRET ALJ POLICY TO BE REVERSED?

As reported in the Spring 2012 issue of SS&Y the Social Security Administration began keeping the identity of the judge at hearings before the Office of Disability Adjudication and Review (ODAR) a secret in December 2011. Interestingly, the various ODAR branches aren't even handling this on a uniform basis.

For example, at the Detroit, Livonia, Grand Rapids and Lansing ODARs the identity is revealed upon arrival at the check-in window. However, in Oak Park and Mt. Pleasant the Claimants and attorneys do not learn the identity of the judge until entering the hearing room.

The rationale for the policy shift has been explained as a solution to "judge shopping", although this is virtually impossible to do, save declining a video hearing. Currently, a Claimant can decline a video hearing & insist upon an in-person hearing.

Since the change in policy I have simply advised all Claimants to refuse a video hearing and insist on a face-to-face hearing before an ALJ.

There has been a great outcry from Social Security representatives and the banner has been carried to Congress by the National Organization of Social Security Claimant Representatives (NOSSCR), of which I am a member. NOSSCR's monthly

publication, Social Security Forum, has been filled all year with complaints from representatives as to how disruptive this policy is to their practices and how it adversely affects Claimants.

The effect on my practice has been assignment on 4 occasions to a judge who has recused himself from hearing my cases because we are personal friends. This, despite the ODAR staff repeatedly being told of this recusal. The result has been scrambling to get coverage by another ALJ (fortunately, the chief judge in that office has been willing to step in) to avoid an adjournment.

The challenges to the new policy have been both political (complaints to Senators and Congressional Representatives and testimony before Congress) and legal. Representatives have taken to filing a Freedom of Information Act request (FOIA) in an effort to force SSA to reveal the name of the ALJ. When the name has not been forthcoming lawsuits in U.S. District Court have been filed.

The Senate Appropriations Committee has questioned the policy in its fiscal year 2013 appropriations bill. While acknowledging the goal of maintaining the integrity of the hearing process, the committee "strongly encouraged" SSA to consider policies more targeted at suspected abuse, such as sanctions to individual representatives or changing the regulations allowing a Claimant to opt out of a video hearing.

However, the issue may be moot, if the rumor I heard in late July is accurate. A highly placed source reports that a change is imminent. The source reports that the "secret judge" program will be eliminated but Claimant's will no longer be able to refuse a video hearing.

Time will tell.



OBAMACARE SURVIVES SCOTUS

The Affordable Care Act, popularly known as Obamacare, was upheld by the Supreme Court of the United States by a 5-4 margin when Chief Justice, John Roberts, surprisingly joined the court's 4 liberal members in upholding the law under the U.S. Constitution's taxing power rather than the interstate commerce clause.

Attorney Crawford happened to be in the Detroit Workers' Compensation Agency on the morning the decision was released and was furiously checking his phone, along with

most of the others present. And we were all surprised to learn that the deciding vote was Chief Justice Roberts and not the court's usual swing vote, Justice Anthony Kennedy.

In fact, Chief Justice Roberts wrote the majority decision, rejecting the use of the commerce clause to uphold the sweeping federal insurance mandate, relying instead on an interpretation barely argued by the Obama administration during oral argument. Justice Robert's rationale seemed to be analogous to "if it walks like a duck and quacks like a duck, it's a duck", regardless of what you call it. Since the penalty for the federal mandate is a tax, Justice Roberts reasoned that is no different than any other tax that aims to change behavior, such as those on cigarettes.

So for the time being the Affordable Care Act is the law of the land. And despite the pledge of several state's Republican governors (Michigan's governor Snyder is not among them) not to create the insurance exchanges crucial to providing the affordable coverage necessary to implement the Act, the federal government has the authority to do so for them.

Since most of the provisions of the Act do not go into effect until 2014 there is plenty of time for Congress to repeal or modify the Act prior to implementation. Of course, if President Obama is re-elected he can veto any changes so opponents will have to rest their hopes on the fortunes of Republican nominee, Mitt Romney.

Americans will have a clear choice this November in many areas and the Affordable Care Act is one of the most important.

SSA CONSIDERS REGULATION REQUIRING ALL EVIDENCE BE SUBMITTED

Currently, unless a judge specifically requests it, there is nothing requiring a representative to submit negative evidence to the ODAR in a disability case. Many ALJs require a statement that all evidence has been submitted, but there is nothing in the regulations requiring this nor are there any sanctions for not doing so.

Typically, Attorney Crawford submits all *treating* medical evidence but not so-called "independent" medical exams conducted in

connection with a contested Worker's Compensation or liability action. The reports of these examining physicians routinely state that there was no doctor-patient relationship established so the role of the examiner is suspect anyway.

Now that may be changing as the SSA has commissioned a study by the Administrative Conference of the United States (ACUS) to consider the SSA's statutory authority and current regulations regarding the duty of candor and the submission of all evidence in Social Security disability claims.

SSA CONSIDERS EXPANDING VIDEO HEARINGS

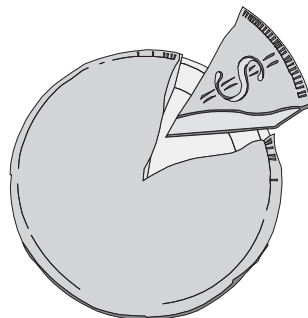
A collateral issue to the "secret judge" program is the desire of SSA to expand the use of video hearings. Without question, the use of video hearings gives the agency flexibility to deal with excessive wait times for hearings in certain ODARs.

A recent Office of Inspector General (OIG) report encouraging the expanded use of video hearings made suggestions for discouraging Claimants from requesting an in-person hearing. Among the suggestions were regulations denying reimbursement for travel expenses a Claimant and representative might otherwise qualify for when a video hearing is refused.

Currently, Social Security pays mileage if either the Claimant or representative travel more than 75 miles, one way, to a hearing site.

The OIG report also noted several challenges in the expanded use of video hearings, including reported equipment problems and lack of training on the equipment.

In 2011 video hearings comprised about 20% of all ALJ hearings, nationwide.



CONGRESS WEIGHING IN ON SSA WOES

As the solvency of the SSA trust funds becomes increasingly worrisome Congress has become more interested, although the political will to do something about the viability of the trust funds seems lacking.

In June the House Ways & Means Social Security Subcommittee held hearings on the disability appeals process. SSA Commissioner Michael J. Astrue testified and answered questions from the members on a variety of topics. Among them were the incentive for some representatives to delay the process to get a higher fee, the need for ALJ hearings, period, and the "secret judge" program.

Other witnesses addressed the prospects for a government advocate to argue against disability at hearings and other aspects of the Disability Service Improvement (DSI) which were proposed a few years ago but largely abandoned.

The Senate Finance Committee held a hearing in May on the impact of budget cuts on SSA's ability to manage its work load. The only witness was Commission Astrue. Questions from members focused on the "explosive growth" in the number of disability beneficiaries, the hearing backlog, fraud and a recent SS ruling that ALJ's cannot use social media, such as Facebook, as evidence in a disability hearing.

SS APPEALS NOW MUST BE FILED ONLINE

As of March 16, 2012 SSA is requiring appeals filed by representatives (Requests for Reconsideration & Requests for Hearings) be filed electronically, if the representative wants to be paid directly by Social Security. As all representatives presumably do want to be paid directly, this mandate has resulted in near universal on line filing when a representative is involved. In addition to the appeals forms themselves the Disability Report-Appeal must be filed electronically as well.

However, some crucial forms, such as the SSA 1696 (Appointment of Representative form) still must be filed in paper form. Confusing? Yes it is. Look for SSA to require all forms be filed on line in the not too distance future.

STUDIES, STUDIES, STUDIES

As always, S, S&Y has scoured the media and medical journals searching for interesting studies, especially the head scratchers.

Attorney Crawford has commented to clients & colleagues for years about the diagnosis of anxiety & depression when disability is an issue. Who wouldn't be anxious and/or depressed when in pain, in debt and unable to work? It would be abnormal *not* to be anxious or depressed.

So it was with interest he reviewed a study conducted by the Centers for Disease Control & Prevention (CDC) on the connection between arthritis & depression. The study estimates that 50 million Americans have a form of arthritis. 31% carried the diagnosis of anxiety and 18% were deemed depressed. And, not surprisingly, the higher one's level of pain the greater the frequency of either anxiety or depression or both.

And here's another shocker from a University of Washington study: people with diabetes, a debilitating disease that requires self-medication and monitoring, are twice as likely to be diagnosed with depression than those without.

We have heard from many years now about the risks of the high fat & sodium U.S. diet versus healthier diets in other parts of the world. But where was the data? And why?

Now a study of the Mediterranean diet (high in fish, fruits, vegetables and grains) performed by the University of Miami Miller School of Medicine, indicates that the brain's small blood vessels may be protected by this diet leading to lower rates of heart disease, stroke & metabolic syndrome.

A study coordinated by Wayne State University concludes that even seniors over age 65 can increase their longevity and quality of life by improving their diet. Again, the brain's small blood vessels were the focus. And the participants who adhered most closely to a Mediterranean diet were 40% less likely to develop Alzheimer's disease over 5.4 years than those with the lowest adherence.

A study at the Mayo Clinic of Arizona found that overeating may increase risk of memory loss.

We have been told for some time that nuts are a great source of healthy fats, protein, fiber & vitamin E. Now comes hard evidence in the form a variety of studies from such institutions as the University of Toronto and Loma Linda University that consumption of a variety of nuts lowers bad cholesterol, raises good cholesterol, and reduces the risk of gallbladder disease by 25%.

A study reported in the Gallup-Healthways well-being index ranked the happiest & unhappiest state populations. The winner? Hawaii, the American paradise. The top 10 states were all in the west and plain states, except New Hampshire. The distinction of the unhappiest state went to West Virginia. The bottom ten were all below the Mason-Dixon line or border states, except for Ohio & Nevada.

Attorney Crawford's wife is a dental hygienist. Accordingly, he (and she) are always interested in any studies related to the dental field. So it was with interest they reviewed the results of a Yale University study published in the American Cancer Society's online journal, *Cancer*, this spring. The study focused on exposure to dental x-ray exams since childhood, before stricter standards were imposed in the 1980's, and found such persons were nearly 5 times more likely to develop meningioma, a non-cancerous brain tumor.

Another *Cancer* study released this spring found that Hispanic smokers (both U.S. and foreign born) are 15% less likely die from lung cancer than either whites or blacks. Researchers are unsure as to the cause but speculate that it may be due genetic factors or environmental advantages.

Here's a great one. A study in the journal, *Science*, reports that fruit flies who were unable to mate and were given a choice of regular food or alcohol laced food chose the later more frequently than those who successfully mated. A lead researcher was quoted as saying "I think it's a pretty good bet that it will translate to humans"!

A study reported in the journal, *Neurology*, found that the incidence of sleepwalking was higher in persons with depression, sleep apnea and obsessive-compulsive disorder.

And finally, while not strictly a study, Attorney Crawford's hometown of Ann Arbor has scored highly, again, in another ranking of cities. Ann Arbor placed 7th in the small metro category of the Milken Institute's ranking of communities that support their aging populations. Areas such as health care, wellness, living arrangements convenience of transportation, financial well-being, employment education and community engagement were examined.

CONSUMER REPORTS PUBLISHES RETIREMENT BENEFIT ANALYSIS

Although most of Attorney Crawford's Social Security practice involves disability & SSI benefits, he does get questions and, occasionally, clients with retirement issues. There are some widely held misconceptions that lead to many people making bad decisions regarding SS retirement benefits.

Most people know that their retirement benefit will be reduced by 25% for life if they chose to take it at age 62, when it is first available. And many people are aware that if they keep working after drawing early retirement they will lose \$1 of benefits for every \$2 earned.

Fewer people know that if a worker delays drawing SS retirement benefits after the first date of eligibility their benefit will increase 8% per year up to age 70. Go find a government guaranteed investment that will yield 8% per year.

Of course every situation is different. Persons enjoying good health with a family history of longevity might choose to wait while a chronically ill person might elect to take the benefits early.

Consumers Reports published a *Money Advisor* issue in June 2012 that explains many of the trickier regulations as well as outlining the basics. A copy is available from Attorney Crawford's office. Just call if you are interested in receiving a copy.



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CHANGE IN POLICY ON SOCIAL SECURITY STATEMENTS

Until March 2011 when budget issues lead to a change, employed workers received a 4 page, green & white Social Security statement each year showing earnings by year and an estimate of disability & retirement benefits. In February 2012 SSA resumed mailing the statements but only to workers age 60 and older.

Effective May 1, 2012 other workers may again get a written copy of their statement by filing form SSA-7004, available at the SSA website, www.ssa.gov or www.socialsecurity.gov, at any field office or by calling 800-772-1213.

SSA would prefer workers access this information on line at the new "My Social Security" portal, www.socialsecurity.gov/mystatement.

DON'T MISS OUT ON BENEFITS

The National Council on Aging (NCOA) has a free comprehensive online site outlining over 2,000 public and private programs for low-income Medicare beneficiaries. The on-line address is www.benefitscheckup.org.

ONLINE SITES FOR SAVING

There are literally hundreds of online sites that provide free services to those who qualify. Many are well known, such as Craigslist for free classified listings or eBay classifieds. But there are lots more.

Go to www.findahealthcenter.hrsa.gov to locate a federally funded health care center.

Or find a free dental check-up at a local dental school. www.nidcr.nih.gov.

Free tax preparation is available for low & middle income qualifiers through the AARP website.

TIGER TICKET WINNERS

Several readers have won Tiger tickets in the annual Win Attorney Crawford's Tiger Tickets contest. Here are the lucky recipients.

Cathy from Detroit
Alma from Detroit
Rip from Ann Arbor
Peggy from White Lake
Kathy from Dearborn Heights
Jude from Ann Arbor

Congratulations and thanks to all that entered the contest.

