NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)

560 Sylvan Avenue • Englewood Cliffs, NJ 07632
Telephone: (201) 567- 4228 • Fax: (201) 567-1542 • email: nosscr@nosscr.org

Executive Director
Barbara Silverstone

October 4, 2017

Acting Commissioner Nancy Berryhill
Social Security Administration
6401 Security Boulevard.
Baltimore, MD 21235

Cc: Bea Disman, Chief of Staff
Theresa Gruber, Deputy Commissioner, OHO
Patricia Jonas, Deputy Commissioner, OARO
Patrick Nagle, Chief ALJ
Kelly Salzmann, Executive Director, OAO
Gina Clemons, Associate Commissioner, ODP

RE: SSR 17-4p and Program Uniformity Rules

Dear Acting Commissioner Berryhill,

I write on behalf of NOSSCR and its more than 3,000 members with serious concerns regarding SSA's program uniformity rules (published at 81 Fed. Reg. 90987 on December 16, 2016) and Social Security Ruling (SSR) 17-4p, which was published today at 82 Fed. Reg. 46339.

NOSSCR's membership shares SSA's goals of timely and accurate disability determinations. However, the program uniformity rule itself, the way that it is being interpreted by some Administrative Law Judges (ALJs), and SSR 17-4p all undermine those goals. NOSSCR has already shared members' experiences at specific hearing offices and with specific ALJs who are applying the program uniformity rules inaccurately or inconsistently; in several cases, claims have been denied and now require Appeals Council review. A copy of NOSSCR's August 24, 2017 memo to Judge Nagle recounting these stories and making several recommendations is attached to this letter, as is an additional list of reports from representatives.

Unfortunately, SSR 17-4p does not incorporate NOSSCR's suggestions; nor does it provide accurate or practicable guidance to claimants, representatives, or ALJs. We believe that rather than aiding in adjudication, the SSR will in fact lead to longer files, more delays, inappropriate disciplinary referrals, policy-noncompliant decisions, additional appeals to (and remands from) the Appeals Council and federal courts.

In many situations, it is not practicable for "representatives to submit or inform us about written evidence as soon as they obtain or become aware of it." During the lengthy wait from request for an ALJ hearing to receipt of a determination on the claim (the current national average processing time is 627 days), claimants may have dozens or even hundreds of medical appointments, tests, treatments, and hospitalizations. Requesting records each time a claimant with kidney failure receives dialysis or a claimant with schizoaffective disorder sees a psychiatric social worker could require numerous requests per week. In some states, disability claimants are entitled to one free copy of their records but must pay for subsequent requests. In other states, the first few pages of medical records cost more than subsequent pages.[1] Therefore, making frequent requests to providers months or years in advance of the hearing is not just aggravating to the providers, unlikely to be successful in obtaining evidence, and unnecessary given the long delays before ALJs review the file, but also impossibly expensive for many claimants.

SSR 17-4p imposes at least three requirements that go beyond the program uniformity regulations, while providing insufficient guidance as to how to meet these additional obligations.

First, the SSR provides a definition of "inform" not found in the regulations: "To satisfy the claimant's obligation under the regulations to 'inform' us about written evidence, he or she must provide information specific enough to identify the evidence (source, location, and dates of treatment) and show that the evidence relates to the individual's medical condition, work activity, job history, medical treatment, or other issues relevant to whether or not the individual is disabled or blind…". The SSR does not specify whether a claimant's listing of a provider on the Disability Report—Appeals (SSA-3441) form would be sufficient to meet this new definition of "inform."

Second, while 20 CFR 404.935 requires each party to make "every effort to ensure that the administrative law judge receives all of the evidence and must inform us about or submit any written evidence. . . no later than 5 business days before the date of the scheduled hearing," the SSR says "Representatives should not wait until 5 business days before the hearing to submit or inform us about written evidence unless they have compelling reasons for the delay." What amount of time would be appropriate, and what reasons for delay are compelling? SSA specifically chose a 5-business day deadline for submission of evidence, but is now essentially stating that adherence to this deadline violates SSA's rules of conduct. In many situations, claimants acquire representation very soon before a hearing or after a hearing has been postponed for them to seek counsel. This is merely one of many compelling reasons for evidence to be submitted or informed about shortly before the hearing.

Finally, the prefatory matter to the final rule says that "if a claimant informs an ALJ about evidence 5 or more days before the hearing, there would be no need for the ALJ to find that a [good cause] exception applies, because the claimant notified us prior to the deadline," but the SSR says "it is only acceptable for a representative to inform us about evidence without submitting it if the representative shows that, despite good faith efforts, he or she could not

[1] https://www.nosscr.org/state-medical-records-payment-rates. For example, in Illinois, there is a base "handling charge" of $27.33 plus postage and copying costs for any medical record request. Then, the first 25 pages cost $1.02 per page, pages 26-50 cost 68¢ per page, and any additional pages cost 34¢ each.

obtain the evidence." It is difficult to fathom how adherence to the program uniformity regulations could justify OGC referrals or the imposition of penalties against representatives, and yet the SSR indicates such circumstances will occur. The SSR does not describe the appropriate showing of a good faith effort to obtain evidence. Would a representative comply with this requirement if he or she does what SSA describes as "every reasonable effort" when discussing its own efforts to obtain evidence? According to 20 CFR 404.1512(b)(1) and 416.912(b)(1), the agency states that it has made "every reasonable effort" if it makes an initial request for medical evidence and one follow-up request 10-20 days later. The SSR is silent on whether this standard is also appropriate for representatives, or if there is a different standard to which representatives will be expected to adhere.

The SSR also does not explain how to reconcile its instruction to submit or inform the agency about written evidence as soon as they obtain or become aware of it with its prohibition on informing the agency about evidence without a showing of a good faith yet unsuccessful attempt to obtain the evidence. In a situation where a representative learns a medical record exists and requests it, should she

- Immediately inform the agency about the evidence and the request for it, thus not being able to discuss whether the good faith effort was unsuccessful (and requiring a second submission if the records are received), or
- Wait to see if the request is granted, thus not informing the agency immediately?

Given these issues, NOSSCR requests that SSA immediately rescind and replace SSR 17-4p. In addition to clarifying the topics discussed above, the new SSR should include a statement about ALJs' obligation to consider evidence submitted after the five-day deadline if they were informed of it before the deadline OR if good cause exists (see 20 CFR §404.935 and §416.1435)[2]. It should clearly indicate that ALJs must not exclude such evidence from consideration and that they must make individualized determinations on whether good cause exists for a late submission of evidence of which the ALJ had not been informed.[3] Given ALJs' inconsistent procedures for counting five business days, the SSR should fully explain how to calculate the deadline for submission of evidence. The new SSR should also refer to the agency's duty to develop the record.[4]

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[2] It would be appropriate to quote from the prefatory material to the final program uniformity rule: "if a claimant informs an ALJ about evidence 5 or more days before the hearing, there would be no need for the ALJ to find that an exception applies, because the claimant notified us prior to the deadline." 81 Fed. Reg. 90991

[3] "Because circumstances vary, we determine whether a claimant qualifies for an exception on a case-by-case basis." 81 Fed. Reg. 90988. Examples of reasons for good cause exceptions are clearly labeled as not encompassing every possible reason for granting an exception.

[4] "we did not intend to shift our burden to develop the record to claimants. In the proposed rule, as in this final rule, we recognize that some individuals, many of whom do not have appointed representatives, require our assistance in obtaining medical evidence needed to adjudicate their claims. Claimants who are unable to obtain evidence necessary to adjudicate their claims may inform us of this difficulty and we will continue to seek out evidence on their behalf to develop the record for their hearing. By adopting this final rule, we have not changed our longstanding policy of assisting claimants in developing the record." 81 Fed. Reg. 90989

We also request that SSA take the actions NOSSCR recommended in our August 24 memo to Judge Nagle, specifically:

- Provide NOSSCR with a copy of the memo to ALJs dated July 20, 2017 regarding how to handle cases where the ALJ was informed of evidence prior to the 5-day deadline. We have requested this memo through the FOIA process and by asking Judge Nagle but have not yet received it.
- Provide additional training to ALJs about appropriate implementation of program uniformity rules.
- Identify ALJs who repeatedly or egregiously misapply or misinterpret the program uniformity rule or the rules of conduct and standards of responsibility for representatives. Such ALJs should be subject to focused reviews, retraining requirements, and/or disciplinary action.
- Prioritize Appeals Council reviews of cases where evidence was excluded. In early 2016, the Appeals Council developed a list of 21 "priority processing" categories. Each week, a group of employees screens cases where new evidence was submitted to see if they fall into any of the priority categories, which include attaining age 55; indication or report of the claimant's death; VA disability rating of 70% or more; and several categories relating to diagnosis, treatment, or symptoms of various impairments. The Appeals Council should add a priority processing category for cases where evidence submitted less than five business days before the hearing was excluded by an Administrative Law Judge. This would help claimants obtain prompt remands or Appeals Council decisions and would allow SSA to identify situations where specific ALJs demonstrate a need for additional training about the program uniformity rule.

Thank you for your attention to this important matter. NOSSCR staff would be glad to discuss this issue with you at your earliest convenience. Please contact me if it would be possible to meet in person or by phone.

Sincerely,

Barbara Silverstone
Executive Director

Appendix: Recent stories from claimants' representatives about challenges with the program uniformity rule

ALJ of the Charlotte hearing office performed a hearing on a case that had been remanded from the Appeals Council. ODAR staff had not assigned exhibit numbers to evidence and a brief the representative had submitted after the remand and several weeks before the hearing. According to the representative, Judge Sims "spent at least 20 minutes of the 45 minutes he had allocated to the case questioning whether the exhibits could be considered. I had electronic receipts for everything [so] he said he was going to overlook the late filing! Nothing had been filed late, but he never seemed satisfied. My client thought that I had not timely submitted the records because of the ALJ's discourse, and he was angry with me."

A hearing was held in the Denver hearing office on May 1, 2017. The claimant had a medical visit on May 30. At the time of the hearing, neither she nor her representative knew she would be having this appointment. The representative promptly requested and submitted records from the appointment. On August 14, ALJ Mendelson issued a denial that specifically refused to consider evidence from the May 30 appointment because it was not disclosed five days before the hearing. This contradicts the final rule's guidance that "evidence of ongoing treatment, which was unavailable at least 5 business days before the hearing, would qualify under the exception in 20 CFR 404.935(b)(3) and 416.1435(b)(3)." The claim is now pending at the Appeals Council.

A hearing was held at the Pittsburgh hearing office on June 5, 2017. On May 25, the representative submitted a letter to the ALJ explaining that they had not yet received neurological records. The representative had requested the records on March 22 and was notified that there were no records for the patient. The representative made additional requests on May 8 and May 16 and was told by the provider on May 25 that records had been located and would be sent as soon as possible. The representative notified the ALJ of this development the same day but the ALJ found

> that the requirements of 20 CFR 404.935(b) and 416.1435(b) are not satisfied in the instant matter. The undersigned has considered the difficulties the claimant's representatives reported in obtaining the records. However, the claimant's representatives knew of the five-day rule for submission of evidence, yet delayed until March 21, 2017 before requesting the records at issue, [which] existed since March 2016 at the latest and they provided no reason for not requesting these records earlier. Thus, the undersigned finds that neither the claimant nor her representatives had identified any conditions satisfying the exceptions to the rules on the submission of written evidence. Nevertheless, the undersigned exercises his discretion to admit and consider this evidence.

The ALJ was informed of the existence of the records and thus there was no need to find that an exception applied or to exercise discretion.

An ALJ in the Tulsa hearing office issued an unfavorable decision in which he refused to consider evidence submitted two days after the hearing. The ALJ had been informed of the outstanding evidence at least five business days before the hearing. After the denial was issued, the representative was informed that the Tulsa hearing office only considers "inform" letters that include the representative's original request for medical records and that submitting an "inform" letter about evidence at least five business days before the hearing does not guarantee that the evidence will be considered.

NOSSCR

National Organization of Social Security Claimants' Representatives

MEMORANDUM

To: Terri Gruber, Deputy Commissioner, Office of Disability Adjudication and Review
Patrick Nagle, Chief Administrative Law Judge

From: Barbara Silverstone, Executive Director, National Organization of Social Security Claimants' Representatives (NOSSCR)

Date: August 24, 2017

RE: Request for immediate action regarding Program Uniformity regulation implementation

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This memorandum is to request that the Office of Disability Adjudication and Review (ODAR) take immediate action to ensure policy compliance by Administrative Law Judges (ALJ) with the program uniformity rule, specifically the part of the rule colloquially referred to as the "5-day rule" (20 CFR §404.935 and §416.1435). NOSSCR members have reported that ALJs are refusing to recognize the plain language in the regulation that informing the ALJ of evidence means that claimant or representative has complied with the regulation and that the evidence should be considered part of the record and exhibited as such for consideration by the ALJ when making his or her decision. As outlined in a separate memorandum, NOSSCR members are reporting that ALJs are in some instances refusing to consider such evidence and in other cases requiring a good cause exception to the 5-day requirement apply (contained in 20 CFR §404.935(b) and §416.1435(b)) before the evidence is considered.

In addition, ALJs are creating rigid rules (e.g. a certain number of attempts to obtain the evidence within a certain time period) when interpreting the meaning of the good cause exception contained in §404.935(b)(3)(iv) and 416.1435(b)(3)(iv), requiring the claimant or representative to have "actively and diligently sought evidence from a source," in order for it to be considered when submitted after the 5-day deadline. ALJs are creating rules that do not take into account the individual's circumstances resulting in the improper exclusion of evidence. In addition, these rules vary from ALJ to ALJ making the application of the "program uniformity" rule anything but uniform.

560 Sylvan Avenue, Suite 2200, Englewood Cliffs, NJ 07632 • (201) 567-4228 • (800) 431-2804 • Fax (201) 567-1542

NOSSCR respectively requests that you take immediate steps to ensure that ALJs are complying with the plain language of the regulation. Improper exclusion of evidence will result in additional appeals to the Appeals Council and federal court, which is unjust for claimants and a poor use of SSA's resources. We recommend:

1. **Provide Memo to ALJs regarding "inform" provision:** Provide NOSSCR with a copy of the memo NOSSCR requested (both through a FOIA request and a request to Chief Judge Nagle) to ALJs dated on or about July 20, 2017 regarding how to handle cases in which the ALJ was informed about evidence prior to the 5-day deadline.

2. **Distribute an Emergency Message to ALJs re: Inform:** Send an emergency message to ALJs regarding the obligation to consider evidence he or she has been informed about as in compliance with 20 CFR §404.935 (or §416.1435 in SSI or concurrent cases). The message should be placed on SSA's website so that it is publicly available. We request that the EM make the following points and consider including language from the preamble to either the proposed or final regulation regarding why SSA included inform as part of the regulatory language such as:

    a. Reiterate that the purpose of this rule is to ensure that the evidentiary record is as complete as possible when the ALJ writes his or her decision and should NOT to be used as a reason to exclude evidence:

    Potential language to include from regulation to support this point:

    "a complete evidentiary record is necessary for us to make an informed and accurate disability determination or decision," 81 FR 45079

    b. Clarify that a claimant can satisfy the submission requirements in §404.935 by submitting or informing the ALJ of its existence and state in no uncertain terms that an ALJ cannot exclude evidence about which he or she has been informed more than 5 days before the hearing:

    Preamble language that could be used to support this point:

    "if a claimant informs an ALJ about evidence 5 or more days before the hearing, there would be no need for the ALJ to find that an exception applies, because the claimant notified us prior to the deadline." 81 FR 90991

    "we propose changing our rules so that we provide claimants with additional time to inform us about or to obtain and submit written evidence." 81 FR 45082

    c. Clarify that the ALJ has a duty to obtain the evidence about which they are informed at least 5 days prior to the hearing and does not have an opportunity to simply exclude it. ,

An ALJ must ensure that they are adjudicating the claim based on as a complete evidentiary record as possible (i.e. to develop the record):

"On April 20, 2015, we implemented a final rule that requires a claimant to inform us about or submit all evidence known to you that relates to whether you are blind or disabled." 81 FR 14828. As we stated in the preamble to that proposed rule, we specifically added this option because we did not intend to shift our burden to develop the record to claimants. In the proposed rule, as in this final rule, we recognize that some individuals, many of whom do not have appointed representatives, require our assistance in obtaining medical evidence needed to adjudicate their claims. Claimants who are unable to obtain evidence necessary to adjudicate their claims may inform us of this difficulty and we will continue to seek out evidence on their behalf to develop the record for their hearing. By adopting this final rule, we have not changed our longstanding policy of assisting claimants in developing the record." 81 FR 90989

d. Ensure that ALJs know that the decision about whether a good cause exception applies, particularly whether the individual actively and diligently attempted to obtain the medical evidence, should be made based on an individualized determination given the individual's circumstances (including, for example, how recently a representative was hired):

"Because circumstances vary, we determine whether a claimant qualifies for an exception on a case-by-case basis." 81 FR 90988

3. **Update Training:** Update training modules and training materials to include the points outlined in number 2 above.

4. **Add Appeals Council Prioritization:** In early 2016, the Appeals Council developed a list of 21 "priority processing" categories. Each week, a group of employees screens cases with where new evidence was submitted to see if they fall into any of the priority categories: they include attaining age 55; indication or report of the claimant's death; VA disability rating of 70% or more; and several categories relating to diagnosis, treatment, or symptoms of various impairments. The Appeals Council should add a priority processing category for cases where evidence submitted less than five business days before the hearing was excluded by an Administrative Law Judge. This would help claimants obtain prompt remands or Appeals Council decisions and would allow SSA to identify situations where specific ALJs demonstrate a need for additional training about the program uniformity rule.

5. **Factor for focused reviews or retraining:** ODAR should implement ways to include the repeated inappropriate exclusion of evidence pursuant to the 5-day rule (e.g. by ignoring the fact that the

claimant/representative informed them about the evidence or because of inappropriate denial of good cause exceptions) as reasons to conduct focused reviews of an ALJ, require retraining regarding the 5-day rule, and/or take disciplinary action against ALJs who repeatedly violate the regulations and issue policy-noncompliant decisions.

NOSSCR Member Reports on Challenges With Program Uniformity Rule

Inform Issues

Ignoring "Inform"

- ALJ (Harrisburg): Five business days prior to a scheduled hearing on a federal court remand, I submitted a letter informing the ALJ of medical evidence I was awaiting from two sources. The letter was made an exhibit and included on the List of Exhibits attached to the subsequent decision. However, the decision stated that the ALJ declined to admit the evidence, which was submitted post hearing, and "The undersigned was not made aware of these outstanding records in advance of the hearing and the claimant's representative did not object to the status of the record at the hearing." I'm filing exceptions.
- ALJ (Jacksonville): sent a pre-hearing memo that addressed the five-day rule without mentioning the "inform" provision.
- ALJ (Columbus, OH): we have informed before the deadline and submitted before the decision is written and he simply excludes it without explanation other than saying it was submitted past the deadline. In several instances he has apparently just ignored our informing before the deadline.
- ALJ (San Rafael): The representative submitted a letter to the ALJ 7 business days before the hearing, noting that a medical source statement was still pending from the treating doctor. The MSS was received and submitted within five business days of the hearing, but the ALJ refused to include it in the record. She said that this was not a medical record but something the rep had created and thus different rules applied. The case has not yet been decided.
- ALJs (Morgantown, WV): When we have outstanding medical records, we always send a notice letter to the judge with a copy of the records request. On more than one occasion, the judges have flat out refused to consider the additional records, even when the notice had been mailed to them much more than 5 business days before the hearing. We have appealed in more than one case.
- ALJ (Columbia, MO): We had informed him of outstanding evidence from the claimant's only treating source, a psychiatrist, well in advance of 5 business days prior to the hearing. Our attorney reminded ALJ P on the record that we had outstanding records and this is a mental impairment only case with no other evidence to support claim. The ALJ said he was sending the case to decision writers and wasn't keeping the record open.
- ALJ (Pittsburgh) In a case where there was a letter submitted 5 business days before the hearing listing the outstanding medical evidence, she refused to accept evidence received and submitted two days before the hearing. A decision has not yet been issued.
- ALJ (HOCALJ, Colorado Springs): said the rule requires submission of the evidence before the hearing date, even if the ALJ was informed of the evidence before the deadline.
- At a recent Chicago Bar Association meeting, available on the web, several of the Chief ALJs in our region stated that "inform" was not sufficient.
- The most trouble I had was the Nashville ODAR because I had informed the ALJ of outstanding medical record requests even before the rule was to take effect in May. My client received a denial, but the ALJ did not make a reference to the records outstanding at the hearing and submitted afterwards. Even though he gave other reasons for the denial, it was clear he did not

really look at new evidence that came in about my client's dementia. The case is pending at the Appeals Council.

- In a May 2017 case in Florida, counsel was retained seven business days before the hearing. Counsel immediately informed the ALJ of outstanding medical evidence. The ALJ did not develop the file, allow the claimant a continuance, or accept the evidence that was submitted less than five days before the hearing.
- In late May of 2017 I had two hearings in the Billings, Montana office in which I believe the ALJ applied the rule incorrectly. My clients each had relatives that wanted to submit a written statement but we were close to the deadline. I told both clients I had to have the statements by the applicable dates (5 business days prior to hearing). Neither supplied them in time--one was caring for grandchildren and working and also having a new grandchild being born right at the time I needed the statement. The other was a long time ex-boyfriend and my client had no way to get him to do the statement on time. In any event, I wrote to the ALJ in both cases, informing him that these statements were expected, that I had not received them, but that I requested leave to submit them as received, even if less than 5 business days prior to the hearing. I then did receive both witness statements less than 5 business days prior to the hearings and submitted them. At the hearings, the ALJ excluded them from the record in each case and said I did not meet the good cause exceptions. This was despite having informed him 5 business days prior. I was confused and thought I was somehow reading the regulation wrong as I had informed him of this evidence within the requisite time period. I returned to my office and spent a great deal of time going over the reg but still believe the ALJ was applying it wrong. We did get favorable decisions in both cases.
- In a May 2017 hearing at the Wilkes-Barre FO, evidence from the claimant's treating podiatrist and primary care provider was excluded despite the ALJ noting that he or she had been informed of the outstanding evidence at least 5 business days before the hearing. The ALJ still issued a favorable decision.
- I have asked many judges about what they consider "inform" to mean. Many ALJs I have asked say they do not know. One ALJ told me that the definition was in the comments in the Federal Register. One ALJ has told me that she had rejected evidence because the representative had not told her all of the dates the person had been to that doctor but just when the person last saw the doctor. The ALJ allowed in the record of that most recent visit but none of the earlier visits. I have asked whether the forms detailing recent medical treatment, medications and work history (Forms 4633, 4632 and 4631) suffice to inform ODAR, but have not received an answer from any ALJ.

Requiring Good Cause Though Informed

- ALJ (Pittsburgh): asks us for a lengthy explanation at the hearing about what diligence we have performed to get evidence that we notified her that we did not have at least 5 business days before the hearing even if we get the evidence and submit it prior to the hearing. She tells us that she will take our explanation under advisement in deciding whether or not to exhibit and consider the evidence. She also requires a written explanation of our due diligence in obtaining the records. We have not gotten decisions on these cases so we do not know whether or not she will decide to admit the evidence but we should not be having these discussions at all.
- ALJ (Cleveland): I submitted a letter more than 5 business days before the hearing informing him of outstanding medical records. I had not encountered any problems with any other ALJs prior to this hearing concerning the format of the letter. ALJ told me at the

hearing that the letter was not sufficient, as it was not detailed enough in regards to the efforts that had been made to obtain the records so that he could determine whether or not every reasonable effort was made to obtain the evidence. He wanted to know the exact date we learned of the evidence and how, as well as the dates for the initial request being sent and date of any follow-up requests (including whether the follow-up was via mail, email, fax, telephone, etc.). So I submit a different format of letter to this ALJ now.

- ALJ (Tacoma): does not believe we need to simply inform her of outstanding evidence but also prove the good cause or else it is not coming in, even if submitted several days (but less than five) before the hearing.
- Judge (St. Louis Downtown): was informed at least 5 business days before a hearing about outstanding medical records via a letter that said "please do not issue a decision on this claim until you receive the records." The records were submitted on June 26, one week after the hearing. The ALJ excluded the records in a decision that incorrectly stated the "representative did not ask for the record to be held open" for the submission of this evidence. The decision excluded the records because they "were not requested or submitted timely". It was a partially favorable decision that granted the claimant approximately 2.5 fewer years of SSI than she would have received in a fully favorable decision.
- ALJ (Pittsburgh): asks for an explanation of our due diligence even if we submitted a letter at least 5 days before the hearing telling him about the evidence. He has stated that the "inform" letter is not enough and he is still going to make a good cause determination. The evidence that has been outstanding in our cases is recent medical treatment and he has found good cause and accepted the evidence. He has explained in the past that if outstanding records included treatment from before 2017, we should be making multiple requests for records from the same facility or else he has threatened that he would not find good cause.
- ALJ : said there was no good cause for admitting any records within 5 business days of the hearing. I had sent a letter explaining that we had diligently and timely tried to get these records but had not been able to get them 5 business days prior to the hearing. At the hearing, she refused to allow me to argue good cause. Every time I tried to defend myself she basically told me I should have been working on the case the entire 2 years I had the file. After much effort, I had the records in my email at 3:26 am the day of the hearing. I still attempted to submit the records with a good cause letter, but as of now they haven't been added to the exhibit list. My client did not tell me about the existence of these records until about 3 weeks prior to the hearing, even though we had asked on several occasions prior to that to give us information on who had treated her during the relevant time period.
- ALJ (Peoria): I submitted medical updates that informed the ALJ of outstanding medical records. At the hearing, I advised of our efforts to get records. The ALJ's position was that he was not informed of the records and therefore would not accept them. His believes that in order to satisfy the requirement, we have to send in a letter with the CFR cite outlining what records are outstanding and what efforts we have taken to obtain those records. I asked him for time to submit a post hearing brief because I believed we had satisfied the inform portion of the regulation.
- ALJ (Omaha): does not indicate on the record whether he will receive outstanding medical evidence into the record post hearing even though we inform him about the outstanding evidence five business days before the hearing. As we have debated with this judge about the program uniformity rule, he has requested good cause for evidence coming in late even when informed about it in advance. He just started taking these positions at the end of July and we have not received the decisions in these cases.

- The Chief ALJ in Minneapolis told reps at a meeting to expect to justify why records are not in within the 5-day deadline even if we informed the ALJ about evidence in a timely fashion. He said we need to be prepared to answer questions about when records were requested and how much follow up we did. We asked the chief ALJ about the all-evidence rule and what should we do if evidence comes in post hearing unexpectedly -- he said we need to submit a written motion to have it admitted.
- I practice in Vermont. When I fear that I will not get records timely submitted, I write a short letter to the ALJ telling him/her exactly what records I am waiting for and asking for late submission. In a case in which I had submitted a letter asking the ALJ to include a medical source statement that was received fewer than 5 business days prior to the hearing, the ALJ questioned me about good cause at the hearing. I explained that I had sent the questions to the doctor well in advance, asked the doctor to return them timely, and made follow-up calls. The ALJ announced that this was "good cause," and he agreed to admit the MSS. Nonetheless, I believe he is asking for more than the rule requires. In a different case, I received a denial, in which the ALJ did not admit a MSS submitted 2 days late, after a timely "inform" letter, stating there was no good cause. He said nothing about this at the hearing. He cited a New Hampshire district court case, which simply upheld the 5 Day rule (e.g., was not really relevant to his point) and went on to state it was harmless error anyway.
- I had submitted evidence fewer than 5 days before the hearing but had informed the ALJ of the evidence in advance by letter. The ALJ read from a memo he had next to him about the fact that the evidence needed to be submitted. I said that was inconsistent with the regulations, which allow me to identify the evidence. He said the regulations are designed to keep reps from simply identifying the info and not providing the records. We must still actively and diligently seek the evidence. In the end we agreed to disagree and he accepted the evidence with a finding that I had actively and diligently sought it.

Treating Represented Claimants Differently

- ALJ (Columbus, OH): believes the inform option only applies to unrepresented claimants.
- ALJ (HOCALJ, Fayetteville): If you are a claimant that is represented, a letter submitted informing SSA of outstanding records will not suffice. He has repeated this interpretation on the record to many attorneys. I asked him where in the ruling it states the notice requirement only applies to non-represented claimants and he says that is his belief. I asked if that was the rule, why didn't they specifically state that and he did not have an answer.

Other "Inform" Issues

- ALJ : (Columbus, OH): indicated that he will accept evidence into the record if we've informed before the deadline, but only if it is recent evidence. If the evidence is older and we do not have a viable explanation for its late submission he will exclude despite the fact that we informed before the deadline.
- ALJ (Cleveland): said at a hearing that even though he was informed of outstanding medical evidence in compliance with the rule, as well as my efforts to obtain it, he would still be reviewing the medical evidence that was not recent (appointments and such that had not occurred within a couple months or so of the hearing) and then only admitting the "non-recent" medical evidence if he determined an exception applied. The ALJ asked at the hearing why we did not request records from a particular provider until a certain date, even though this information was in a letter we had already submitted. The reason was because our client did not

inform us of the existence of the records until that particular day. This made it appear to my clients that I was throwing them under the bus. The decision is pending.

- ALJ (Oak Brook, IL): We had a hearing scheduled for 9/1/17. We informed the ALJ that the claimant was going to a neurologist for the first time a few weeks before the hearing. When the claimant had his appointment and an EMG [electromyogram] was ordered, we again let the ALJ know and merely asked to have the record held open until 9/7/2017 to get the records, although with the hope that we could get them prior to the hearing. We did this to protect us and the claimant so it would be included in the record. Instead, the ALJ postponed the hearing! We tried to get the judge to reconsider and keep in on the schedule but he refused. We had to call ourselves to push for a new date, and it's not rescheduled until November 1, 2017....two months later. Needless to say, the claimant (who is in dire need), was and is furious but we had to do this to protect him and us.
- We notified the ALJ 8 days prior to the hearing that we were waiting for ER records. They were submitted 4 days prior to the hearing. The hospital that sent the ER records also included some non-ER hospital records we didn't know about. The ALJ stated she will only admit the records from the ER visits and pull out any non ER hospital records, since we only informed her of the ER records. We do not submit part of medical records – it would be against the all-evidence rules for us to pull out pages from a document we received.

Good Cause Issues

- Judge (Atlanta Downtown): wanted to exclude a document from my client's long-term disability insurer continuing her LTD benefits. The document was dated about two weeks before the hearing but my client (and therefore I) was unaware of it until they sent her a copy less than five days before the hearing. Judge ultimately accepted it but there was a contentious argument on diligence.
- ALJ (Oak Brook): requires that the records be requested at least 60 days prior to the hearing. She says that HIPAA law allows docs 60 days to respond so unless there is an unforeseen or unusual circumstance that prevented us from requesting them at least 60 days prior to hearing she will exclude and/or not hold the record open.
- ALJ (St. Louis): said he will not consider a request to hold the record open unless the attorney requested the records at least 60 days prior to the hearing and the attorney documents attempts to obtain the records. Also, he said he will not hold the record open for records that were created less than 60 days prior to the hearing.
- ALJ (Birmingham): The claimant received an MRI less than a month after the hearing. The representative submitted the radiologist's report with a letter explaining that the evidence could not have been submitted 5 days before the hearing because it did not exist then. He found this was not sufficient justification for failing to comply with 20 CFR 404.935. The evidence was the only imaging of the claimant's lumbar spine; limitations relating to this region might reasonably have made the difference between a light RFC as determined by the ALJ and a sedentary RFC with a potential favorable finding under the Medical Vocational Rules for this 50+ year old. The case is pending at the Appeals Council.
- In a hearing right after July 4, I had submitted a memo at least 8 business days before the hearing explaining that I had been trying to get records for 7 weeks: one request by mail, two faxes, six phone calls, and also had the claimant attempt to get the records. The records were submitted to ERE a day before the hearing but the ALJ refused to admit the records because in her view I should have requested the records earlier. But the records were requested seven

weeks before the hearing and the appointment we needed was from June 8th- too much earlier and we would not have the record from the date needed.

- During testimony, my client, out of the blue, mentioned a physician that she had never told me about in our many contacts. The ALJ said he would not allow me to obtain those records because I "could have asked her before." Of course, I had asked her numerous times for all her doctors' info; she just kept that to herself until the hearing for reasons known only to her. We are awaiting the ALJ's decision.
- An ALJ was recently unsure as to whether he could accept paystubs because they were submitted at the hearing. This is despite the fact that the client had only begun working 3 weeks earlier, and a timely pre-hearing memo informed him of the work (the claimant wouldn't even have had a paystub 5 business days in advance). He ultimately accepted them.
- In a May 2017 case in Florida, the claimant obtained counsel seven business days before the hearing. The representative submitted a 1696 the same day, but was only given access to the claimant's electronic file one day before the hearing. The representative requested a continuance but this was denied. Evidence submitted within five business days of the hearing was excluded. The ALJ wrote that the "representative did not provide a late submission reason that meets one of the circumstances in §404.935(b)" and that counsel "did not explain why these outstanding records were not obtained earlier" but these statements were not accurate.
- I had a client bring to a hearing a letter written from his substance abuse counselor that was written the day before the hearing. The ALJ (from the Baltimore NHC) did not accept the letter because she said that there should have been ample time to obtain this letter prior to the hearing. My client testified that he requested the letter several months before the hearing; however, the counselor did not prepare the letter until the day before the hearing. The ALJ stated that it did not fall under any of the exceptions because the counselor gave no excuse for why he was unable to draft the letter sooner. I do not believe the ALJ's reasoning complies with the rule or its intent. However, we did receive a favorable decision.
- Last week I had a hearing at the Denver office for a client who had just had an EMG study a few days before the hearing, and the ALJ asked "well, why couldn't you obtain that before today?" which shows a significant lack of understanding as to how long it takes to get records (especially, in this case, from a busy public health clinic that doesn't respond in less than 30 days). She reluctantly gave me 10 days to submit it, which won't happen, which will require that I ask for an extension.
- Two ALJs in Pittsburgh have suggested that we should be ordering the records multiple times during the wait for the hearing or we are not being active and diligent.

<u>What Does "Five Business Days" Mean?</u>

- ALJ (Middlesboro, KY): I received a medical source statement from a treating physician on Monday, May 1, 2017 and submitted it the same day. The hearing was the following Monday, May 8. The ALJ excluded the evidence due to the 5 day rule and advised that he would allow me to submit written arguments regarding the admissibility. I did so and we await his decision.
- ALJ (Tacoma): at times miscounts the deadline, telling me that the letter I send informing of outstanding evidence five business days before each hearing was not timely when it was.
- In the Columbus, OH office, staff suffered from several weeks' confusion, regarding the proper way to calculate the five days. Currently, ALJ considers the 5 day deadline to be 5 business days preceding the date of the hearing. So, for instance, if the hearing was on 9/6/17 the 5 day deadline would be 8/30/17 (close of business). However, other ALJs consider it to be the day prior. So in this example it would be by close of business on 8/29/17.

- ODAR staff at the Peoria office have apparently been told to interpret "no later than" as meaning "more than" rather than "on or before." EXAMPLE: Hearing is Tuesday, August 22 at 2 p.m. Excluding the day of the hearing, Tuesday August 15 is "no later than" 5 business days, and the definition in POMS - that a business day ends at 11:59 PM, suggests that filing can be made up to 11:59 of the fifth business day. Instead, ODAR staff insist that it must be filed before midnight on August 14, the 6th business day before the hearing, i.e., "BEFORE five days." In the two cases where I've needed to submit something close to the deadline, the ALJs have agreed with me and allowed it in.
- I had one judge tell me it's 5 calendar days and another tell me 5 business days.
- As a Region One rep for many years we have seen problems that include ALJs adopting their own interpretations including making it a 6 Day Rule such that records submitted on Day 5 are excluded – I took two such cases to the AC and won remands.
- An ALJ in Minneapolis is interpreting the 5-day rule as a six-day rule, e.g., if the hearing is next week on a Thursday, he wants all evidence submitted by this week Wednesday. Interpretation of other ALJs generally is that the evidence is due this week Thursday, i.e., 5 business days.
- I had three hearings with one judge in the same day and in each case she provided a different interpretation. First, she suggested that it was not really 5 days, but 8 (one day for mailing it, one day for processing it, and one day for it to be added to the file. Then the 5 days were added to that number. At the next hearing, she said it was 7 days, as she no longer included the processing number. By the time we met for the third hearing, the number was now 6, as the 5 days did not include the day *before* the 5 day rule—which had to be added. In the end, she did not admit medical records in any of these three cases unless they were submitted at least 6 days before the hearing. She also refused to consider that there could be different interpretations of the rule. This was the case even though she provided three different ones on the same day, and the rule had just been put into effect. I contacted the chief judge in our region, sending him a letter explaining the different interpretations that judges had given me, without mentioning names. Although the judge never responded, an attorney who assists him contacted me about the letter. She said that she agreed with my interpretation—but she could not speak for the judge or anyone else. As I read it, and so indicated in the letter to the judge, if we submitted the documentation 5 days before the hearing (not 6), we were complying with the rule. I never received a concrete answer.

Other Issues

- ALJ (Oak Brook): denied post-hearing consultative examination request due to 5-day rule.
- ALJ (Savannah): In late July, I received a notice scheduling a hearing in early September. I also got a form to be signed by my client asking him to waive the 75 day advance notice rule; our Hearing Office now sends these out routinely. This particular client has a lot of trouble remembering when and where he has been treated, and so we are far from ready with the medical evidence. I therefore wrote back stating we decline to waive 75 day notice and asked for the hearing to be reset. Several weeks went by with no response from ODAR until I put in a call asking for status of the re-scheduling. I then got a call from Judge office, saying the Judge had declined my request for a continuance. Of course I had not formally filed for a continuance, but only declined to waive the rule. I decided to file a motion for continuance, but plan on appearing at the September hearing unless I hear to the contrary. Given that the 75 day notice was supposed to be a trade-off for the 5 day rule, I find ODAR's handling of this to be blatantly unlawful.

- Judge (Milwaukee): scolded rep for five minutes about the missing records for the hearing. We send a letter 10 days to 2 weeks in advance of the hearing outlining the nature of any outstanding records and our efforts to obtain them, and reminding him of his subpoena powers. He says that "you can drive a truck through the exception to the 5-day rule" so expects that we will have all records available by the hearing date even if we have to go in person to the medical provider to get them. He states that if it continues to be a problem, he will begin setting a supplemental hearing and requiring everyone to come back. He has not subpoenaed any of the outstanding records.
- ALJ (Washington): the HOD says she reviews all evidence submitted within 5 days of hearing and accepts or excludes based on whether she thinks it's outcome determinative.
- Judge (Morgantown): refused to accept updated 1696s and fee agreements that the client signs the day of the hearing with local counsel because of the five day rule. He and other ALJs still go through with the hearing but state on the record that there's no good cause for accepting the newly signed copies. This is also an issue for people who hire counsel less than five days before the hearing.
- I received a notice of hearing on April 14 that the hearing would be June 6 in N Charleston. I objected to not getting 75 days' notice but still having the 5 day rule applied. I was told the hearing was postponed by the HOD, so I didn't request records. Now I'm being told it was not actually postponed and there is no way I will be able to get the records in time.
- One ALJ in Charleston, SC refused to consider earnings records that ODAR had added to the file within 5 business days of the hearing. ODAR had added an updated earnings record, DEQY and New Hire report. He said, on the record, that he was not going to consider that evidence. He went on to issue a favorable decision. While that ALJ applied the rule to reports filed by ODAR/SSA, other ALJs continue to add reports to the record inside the 5 days.
- When the rule first went into effect, some ALJs at the Washington hearing office used it to forbid post-hearing briefs and memoranda.
- In a May hearing at the Minneapolis office, the ALJ said he wouldn't allow me to submit a post-hearing brief because I had already submitted a pre-hearing brief. I didn't push it because in the past this ALJ has threatened me with sanctions for submitting a Medical Source Statement post-hearing (an MSS I had not anticipated receiving).
- An ALJ at the Elkins Park office said that she was refusing to consider a brief filed less than five days before the hearing and then used the contents of the brief to question a VE as to whether claimant's past relevant work was a composite job.