

## SSA's "All" Evidence Rule

What does this mean for the SOAR Practitioner?

SSI/SSDI Outreach, Access, and Recovery (SOAR) is a national program designed to increase access to the disability income benefit programs administered by the Social Security Administration (SSA) for eligible adults who are experiencing or at risk of homelessness and have a mental illness, medical impairment, and/or a co-occurring substance use disorder.

SOAR-trained practitioners play a central role in gathering complete, targeted, and relevant information for SSA and DDS, and submit high-quality Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) applications. SOAR practitioners are trained to build relationships with medical providers and applicants in order to obtain all existing medical evidence. However, despite their best efforts, SOAR practitioners are not always able to obtain all medical evidence from providers or even get all medical details from the applicant. To the extent a reasonable effort was made by the SOAR practitioner, DDS will step in to further develop the claim before making a disability decision. Our ongoing support from SSA and DDS comes from the development of trust between our programs, which helps SSA and DDS make accurate decisions based on a complete record.

The SSA ruling, "Submission of Evidence in Disability Claims<sup>1</sup>," clarifies SSA's existing regulations which require that claimants and/or their authorized attorney or non-attorney representatives inform SSA about, or submit all evidence known to them that relates to their disability claim, with two exceptions to be discussed later in the article. It is important to note that SSA has not changed its policy on representatives and their duty to obtain and submit evidence and assist with SSA's or DDS' requests for evidence<sup>2</sup>. Further, SSA and DDS still have the duty to develop the file by obtaining outstanding medical records. This article will discuss the purpose of the ruling, outline key requirements, and present a few scenarios which a SOAR practitioner may encounter.

### Purpose: "Submission of Evidence in Disability Claims"

On March 20, 2015, SSA's "all" evidence rule went into effect. The rule appears to eliminate the question of whether or not unfavorable evidence must be submitted in Social Security disability cases. Claimants and representatives reportedly have withheld "unfavorable" evidence. Therefore, SSA has not received "complete" evidence in some cases.

This rule is being implemented at all levels of the SSA disability determination process, (i.e. DDS, ODAR and Appeals Council). This rule is one of SSA's anti-fraud measures to maintain public trust and has potential cost-savings. SOAR practitioners will need to have conversations with their clients about this rule. To illustrate, take the example of a SOAR applicant who is diagnosed with schizophrenia and asks his SOAR practitioner not to tell SSA because he is disabled due to back pain. In response, the SOAR practitioner should explain that this would be violating their ethical obligation if they don't inform or submit all evidence relating to disability.

The SOAR TA Center will continue to monitor how the evidence submission regulations are being implemented across the country. You may encounter situations which require clarification. We strongly encourage you to reach out to your local and regional SSA contacts for guidance. Also, please contact your SOAR TA Center liaison to discuss matters relating to evidence gathering and submission.

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<sup>1</sup> <https://www.federalregister.gov/articles/2015/03/20/2015-05921/submission-of-evidence-in-disability-claims>

<sup>2</sup> <https://secure.ssa.gov/poms.nsf/lnx/0203970010>

### **Representative Must Submit All Evidence Received**

- Must submit all evidence that the representative receives that “relates” to a disability claim
- Must submit favorable and unfavorable evidence even if not “material”
- May not withhold evidence based on impairment or date of evidence

### **Representative Must Inform Agency [SSA] About All Evidence**

- Must submit all evidence received and inform the Agency [SSA] of all evidence the representative does not receive
- “You must inform us about or submit all evidence known to you that relates to whether or not you are blind or disabled.”

### **There Are Two Privileged Communications Exceptions**

- Confidential communications between a claimant and an attorney or a non-attorney representative are protected unless the privilege is waived
  - Privilege does not cover any fact, e.g., work activity or medical treatment, relating to the disability claim
  - Oral communication with a medical source is privileged
  - Representative may still protect from disclosure their consultation with any medical source about the claimant’s medical condition. “If a representative takes notes during a discussion with a claimant medical source, those notes are protected from disclosure as work product.”
- Work product (but not facts about a claim) may be withheld, e.g., analysis, theories, and notes
  - A representative will have an opportunity to comment on any unfavorable medical opinion submitted
  - A representative may obtain another opinion from a medical source
  - Rule requires advocacy based on a complete factual record

### **Duty to Submit “All” Evidence Received In Its “Entirety”**

- Must submit all evidence “received” in “its entirety” unless – the exact “same” evidence was “previously submitted” [avoids duplication] or the Agency [SSA] instructs “otherwise”
- Submitting received evidence is a clerical task, i.e., does not involve legal judgment
- No medical impairment is irrelevant; evidence relating to all impairments must be submitted if received
- Evidence may not be withheld based on time relevance, e.g., prior to alleged onset date (AOD)
- No matter how voluminous the evidence received, it must all be submitted if received [Note: No VA records exception]
- No duty to request all evidence, but only to submit all evidence received [SSA has obligation to request]
- No duty to resubmit the “exact” evidence already submitted; must submit a document previously submitted if that document is different in any way from the one submitted
- All “completed” medical source statements, including “completed” forms
- Evidence generated for other purposes, e.g., workers’ compensation
- All non-medical evidence that relates to a claim

### **Duty to Inform Agency About Evidence Not Submitted**

- Must inform Agency [SSA] about all evidence or submit all evidence that relates to a claim, e.g., workers’ compensation proceedings, etc.
- Claimant must use “reasonable, good faith judgment” applying broad definition of “relates” to a claim

- Unclear whether there is a duty to inform Agency about any social media activity that relates to a claim, e.g., evidence of activities of daily living

### **“All” Evidence Does Not Mean “All” Evidence**

- “All” does not mean literally “all”
  - No duty to memorialize an oral communication
  - No duty to identify laypersons, e.g., family or friends, with knowledge of claimant
  - No duty to inform Agency [SSA] about potential adverse lay witnesses

### **Duty to Submit/Inform is Ongoing**

- Duty to submit to or inform Agency [SSA] of all evidence is ongoing during administrative proceedings
- An ALJ’s closing of the record does not end a representative’s duty
- Final rule may require submitting any evidence that “relates” to a claim after the closing of the record
- Duty to submit to or inform Agency [SSA] of all evidence includes proceedings before the Appeals Council

## Scenarios

### **Scenario #1**

I have reams and reams of VA records. DDS used to advise me to send only what pertains to the onset of disability. Should I send these records in its entirety?

- *Rule:* According to the rule, you would send ALL records to DDS, even those records sent which cover periods prior to onset date. Note: There is no VA records exception.
- Practice Tip: Have a conversation with your DDS liaison. If you don’t have a DDS contact, please contact your SOAR State Team Lead or the SOAR TA Center Liaison to assist you with establishing this relationship.

### **Scenario #2**

I received an amended Medical Summary Report (MSR) from the applicant’s medical doctor, which is not favorable to the case. Do I need to send it to DDS?

- *Rule:* Yes
- Practice Tip: Yes, you must send the amended report whether considered favorable or unfavorable. It is not considered work product. An example of a work product would be the MSR Interview Guide and Template, which is used for note taking. You would not be required under this *Rule* to send in the worksheet.

### **Scenario #3**

The applicant’s doctor completed a report, which I have in my possession. It is not favorable to the applicant because the doctor finds the applicant is malingering and can sustain full-time work. Do I have to send this in?

- *Rule:* Yes
- Practice Tip: Submit the unfavorable report. Follow-up with doctor to discuss his/her understanding of SSA disability criteria. If appropriate, you may request a revised report. Submit amended report to DDS. Build relationship with doctor.

### **Scenario #4**

I tell the DDS examiner that I received the applicant’s complete medical file from the applicant’s childhood pediatrician. These records include extensive vaccination records and school absence excuse letters. Also, the applicant wanted to only list herniated disc and asthma on the SSA application because that’s what the case is all

about, even though I found evidence of serious mental illness in these records. Am I obligated to disclose records which I don't think are relevant and only the diagnoses the applicant wants me to disclose as the authorized representative?

- **Rule:** Yes, to the first question. As the authorized representative you are obligated under this rule to disclose any known evidence you have pertaining to disability. You must submit records from the pediatrician in its entirety, regardless of whether it helps establish disability or you think it's relevant. No, to the second question. The representative is obligated to inform SSA of all known medical conditions.
- **Practice Tip:** Discuss your obligation with the applicant. Explain that they do not have to agree that those past conditions are related to their current disability. Explain that SSA wants to have a complete picture.

### Scenario #5

I requested only the discharge summary, which was received. Do I need to request the entire hospital stay and submit to DDS?

- **Rule:** (based on comments) No. SSA clarified that while representatives must submit all evidence "received," they do not necessarily have to request all evidence. SSA's response to comments reiterates the agency's [SSA's] duty to develop the file. SSA's response states "if claimant or their representative requests only the discharge summary from a hospital chart, we require them to submit only what they receive in response to a request in its entirety. We would not require them to request and pay for all of the other records from the hospitalization. The claimant or representative must inform SSA, however, of all evidence- presumably by listing the source of the evidence on various SSA forms and questionnaires. SSA's response to comments also notes medical records for an individual other than the claimant, sent accidentally by a treating source, are not considered relevant."
- **Practice Tip:** You do not have to **request** every source, just **report** every source.

## Liability

### SOAR Applicants

SSA has the authority under the Social Security Protection Act of 2004 (SSPA) to impose a civil monetary penalty on an applicant who fails to disclose information to SSA. Applicants may have a penalty imposed, e.g., criminal, civil, 6 months to a year period of ineligibility, overpayments and restitution.

### Attorney and Non-Attorney Representatives

Potential sanctions may be imposed on a representative for not "informing or submitting" known information relating to disability. If evidence looks like it's being held back, SSA may impose sanctions should a pattern of practice be found by SSA.

***The SOAR TA Center will continue to provide the SOAR community with updates on all guidance issued by SSA on this rule change, which may affect the way you have been handling some aspects of case development.***