

DISABILITY LAW NEWS

HIPAA Hysteria Hits

The Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA) went into effect on April 14, 2003 amid a great deal of consternation and concern among health care providers. Dappers – not wanting to be left out – have wondered if they should be concerned as well. The short answer is “no, but...”

What is HIPAA?

Congress enacted HIPAA (P.L. 104-191) in 1996 to limit the ability of an employer to deny health insurance coverage to employees with preexisting medical conditions. The law also directed the Department of Health and Human Services (HHS) to develop privacy rules, including but not limited to the use of electronic medical records. HHS promulgated final rules that became effective on October 15, 2002, although “covered entities” were not required to comply until April 14, 2003. 45 C.F.R. §160 *et seq.*

The so-called “privacy rule” governs all health care providers and health care plans that transmit health care information in electronic form. HIPAA has been described as a consumer protection statute, which among other things gives individuals the right to obtain their own medical records (45 C.F.R. §164.524), to request amendments to records

(45 C.F.R. §164.526), and to learn where the records have been disclosed (45 C.F.R. §164.528).

For example, “covered entities” must supply individuals with medical records within thirty days of a request. See HHS’s four-page fact sheet summarizing the major components of HIPAA: <http://www.hhs.gov/news/facts/privacy.html>. (Note that these federal regulations create a minimal level of privacy, which can be superseded by state law. For a summary of New York’s privacy laws, visit http://www.healthprivacy.org/usr_doc/NY2002.pdf).

The Privacy Rule also prohibits covered entities from releasing PHI (personal health information) without permission. In fact, any patient who believes his or her health care information has been illegally exchanged may file a complaint with either the provider or HHS’s Office for Civil Rights. See <http://www.hhs.gov/ocr/privacyhowtofile.htm>. The provider can be liable for both civil and criminal penalties of up to \$250,000. Needless to say, health care providers are anxious to comply, which is where Dappers fit in.

HIPAA for DAP Advocates?

Although attorneys are clearly af-

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ected by HIPAA, most – at least DAP advocates – are not “covered entities” or “business associates” of covered entities. Attorneys who represent hospitals, providers, etc. presumably would be - see HHS’s guide for covered entities at <http://www.cms.hhs.gov/hipaa/hipaa2/support/tools/decisionsupport/default.asp>. DAP advocates, however, will not be obligated to comply with HIPAA’s copious notice and documentation requirements. We will, however, be dealing with health care providers who will be. The most significant day-to-day effect this will have on us will undoubtedly be an increased vigilance on the part of providers regarding “HIPAA compliant” releases and authorizations.

New HIPAA Compliant Authorizations

A number of hospitals and other health care providers have already issued new authorization forms that contain the required HIPAA elements. Samples are available as DAP #377 and on the GULP website (www.gulpny.org). Although some releases may require witnessed signatures, note that this is not mandated by the HIPAA regulations. See 65 Fed. Reg. 82518, where HHS, in the preamble to the Privacy Rule regulations, specifically states that verification of the individual’s identity or authentication of the individual’s signature is not required. The preamble also makes clear that copies of original signatures, as well as certain electronic signatures, are also permissible. 65 Fed. Reg. 82660.

Although several of the sample HIPAA compliant forms do not include a “re-disclosure” provision, other federal and state laws prohibit re-disclosure without specific authorization. See, e.g., 42 C.F.R. §2.32, NY Mental Hygiene Law §33.13, and NY Public Health Law §2782.5(a), prohibiting re-disclosure of records pertaining to alcohol or substance abuse, mental health treatment or HIV status, respectively, without express written consent.

We recommend that a paragraph such as “*I understand that any Protected Health Information disclosed pursuant to this Authorization to an individual or entity that is not covered by state and federal privacy laws and regulations may be subject to re-disclosure by the recipient [consistent with my consent and the Canon of Ethics] and may no longer be*

protected by federal or state laws,” be incorporated into DAP releases. If the health care provider or facility insists on its own particular release, consider including a separate release/authorization that sets forth the re-release language.

Finally, note that one of the sample releases makes clear that a specific release for behavioral and/or psychiatric records is necessary. (See discussion below re: psychotherapy notes). In all likelihood, the regulations at 45 C.F.R. §164.508(a)(2) will be interpreted to require specific requests for such records, so advocates would probably be well-advised to incorporate language specifying psychiatric records into releases as well. In some instances, providers may in fact require separate releases for mental health records.

SSA Form-827

The Social Security Administration (SSA) has also developed a new HIPAA compliant authorization of its own. SSA is not a covered entity under HIPAA, but, like DAP advocates, needs to provide HIPAA compliant authorizations to health care providers. Form SSA-827 is available as DAP #378 and is on the GULP website. It can also be found on SSA’s website: <http://www.ssa.gov/online/ssa-827.pdf>. Commissioner Barnhart’s message to health care providers (<http://www.ssa.gov/disability/professionals/hipaa-cossletter.pdf>) and SSA’s information sheet on Form-827 (http://www.ssa.gov/disability/professionals/ssa827_informationpage.htm) both provide invaluable information, including links back to HHS’s FAQs. Note that some consultative examiners may in fact be covered entities and bound by HIPAA disclosure requirement.

SSA’s fact sheets regarding its new authorization raise some other interesting points. For example, SSA specifically notes that under SSA-827, it will not be asking for or seeking “psychotherapy notes.” “Psychotherapy notes” are specifically defined in the HIPAA regulations at 45 C.F.R. §164.501. Although psychotherapy notes can be disclosed with proper authorization (45 C.F.R. §164.508(a)(2)), there are limitations on access to one’s own psychotherapy notes (45 C.F.R. §164.524(a)(1)(i)). Query whether this means that SSA – especially ALJs - will no longer

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request all those records of office visits that ALJs use more often than not to contradict the treating sources opinion or RFC?

Also of interest is SSA's assertion that it has worked closely with the Department of Education to ensure that Form SSA-827 meets the requirement for disclosure of educational information, as governed by the Family Educational Rights and Privacy Act (FERPA, 34 C.F.R. Part 99) and the Individuals with Disabilities Education Act (IDEA, 34 C.F.R. Part 300).

HIPAA's Future Effects?

So, in the end, DAP advocates should not expect too many changes as the result of HIPAA. But keep us posted on any problems or questions that do come up – and look for future articles in the LSJ and elsewhere on potential ramifications of HIPAA in other areas, such as subpoenas, DV victims, attorneys and other advocates who may be “business associates” of health care providers, and more.

Prehearing Order Passé?

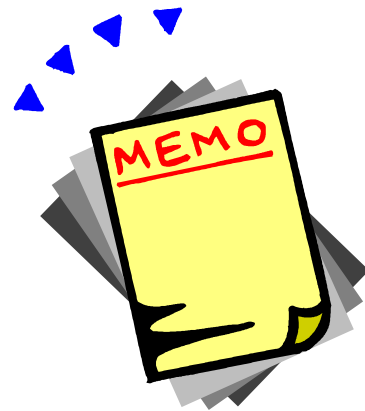
None of us has ever been particularly enamored with the various and sundry prehearing orders that we receive from different ALJs. We have also found it difficult to keep up with the demands and requirements of one judge versus another in the same hearing office. Many of us have questioned the ALJs' authority to make some of the demands. Well, we were right!

Jesse H. Butler, Acting Chief ALJ, sent out a memo on January 28, 2003 to all Regional Chief ALJs ordering them to advise all ALJs to “refrain from issuing these improper hearing orders.” He wrote in response to a complaint from NOSSCR Executive Director Nancy Shor. The examples she raised of prehearing orders inconsistent with agency policy and law included:

- Mandatory time frames for submission of evidence
- Sanctions for failure to comply with terms of the prehearing order
- Shifting of duty to develop the record by requiring the representative to submit *all* medical evidence

Chief ALJ Butler noted that the ALJ's duty to develop the record is inconsistent with these mandatory requirements and threatened sanctions. His memo is available as DAP #379 and will be available on the GULP website at www.gulpny.org.

It is still unclear the extent to which this memo has trickled down to the field. Let GULP know if local ALJs seem to be aware of it – or more importantly – seem to be following it. In the meantime, thanks once again to Nancy Shor for her great advocacy on our clients' behalf.



More Fugitive Felon Conundrums Appear

Advocates continue to be frustrated by the ramifications of SSI's "fugitive felon" provisions, discussed at length in the November 2002 edition of the *Disability Law News*. Under 42 U.S.C. §1382(e)(4) and 20 C.F.R. §416.1339, "fugitive felons" are ineligible for SSI benefits. Legislation ("Social Security Protection Act of 2003") already approved by the House of Representatives (H.R. 743) and now pending in the Senate (S. 439) will extend the prohibition to the Title II program as well. More humane "good cause" considerations have been proposed for Title II beneficiaries. The Committee Report for the bill encourages the Commissioner to review what constitutes "flight" in light of varying interpretations given by different agencies.

What if the warrant is dismissed...

In the meantime, advocates continue to battle the draconian ramifications of the SSI provisions. As reported previously, and again in the January 2003 in the *Disability Law News*, some advocates have been successful in fighting suspensions. Alan Block of Neighborhood Legal Services in Buffalo reports that he was able to intercede on behalf of a 51 year-old Title II/Title XVI recipient whose benefits had been suspended based on 1993 warrant from Los Angeles County resulting from the client's failure to complete a drug treatment program. The underlying felony charges had apparently involved criminal possession of controlled substances. Alan was able to supply the LA Public Defender (PD) with documentation of the client's Type II diabetes, renal failure, and hypertension requiring dialysis three times per week.

The PD in Alan's case successfully moved for a dismissal of the charges "in the interests of justice."

Jennifer Light of South Brooklyn Legal Services reports that the PD's office in LA—at least in Van Nuys—is very receptive to these cases, as are the judges. Her contact is Bill Weiss: (818)-374-2351.

Alan diligently tried to furnish all the proper paperwork to SSA in Buffalo to support his client's reconsideration. The client, however, passed away before the matter was resolved.

Can the benefits be reinstated...

Securing reinstatement of benefits, it turns out, may prove to be even more frustrating than dealing with the criminal justice system. As recent exchanges on the DAP Listserv demonstrate, resolving the criminal charges will not be enough for reinstatement of benefits in many, if not most, cases. The experience of Peter Racette of North County Legal Services in Plattsburgh is a case in point. After his client spent five months in jail in Massachusetts serving time on an outstanding warrant, SSA refused to reinstate his benefits. Peter argued that POMS SI 00501.050(A) (3) provides for reinstatement the month after the month in which SSA is notified in writing that the claimant is no longer "fleeing."

SSA, however, took the position that the claimant's benefits had been suspended retroactive to the issuance of the warrant in 1999, a year prior to when he even began collecting SSI benefits. As he had technically been in "suspense" for more than one year his benefits were *terminated* under 20 C.F.R. §416.1335, and thus the claimant had no recourse but to reapply. Peter argued that the suspension should not take effect until the date that SSA learned of the warrant and/or notified the claimant. Unfortunately, 20 C.F.R. §416.1339(b) can be read to make such a suspension effective as of the date of warrant.

When SSA suspends retroactively...

This is certainly how SSA is interpreting the reinstatement issue, not only in Peter's case, but in other cases reported on the Listserv as well. Also, Peter has learned through his discussions with Gerry McIntyre at the National Senior Citizen Law Center in Los Angeles that this is SSA's current policy. Given that most of the warrants reported to SSA have been "outstanding" for some time, this policy will lead to a large number of claimants losing their benefits rather than being reinstated.

Again, because 20 C.F.R. §416.1335 provides that benefits will be terminated following twelve consecutive months of suspension, SSA will require claimants

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whose benefits have been “retroactively” suspended for more than one year to reapply. Query whether 20 C.F.R. §§416.1335 and 1339 must be read together, especially in light of §416.1339(c), which specifically provides that payments of benefits will be resumed when the claimant is determined to no longer be fleeing prosecution? Undoubtedly this is an issue that will need to be resolved through litigation – which is no consolation to the client who is without benefits and who faces a potentially lengthy and frustrating reapplication process.

Another variation on this is an issue raised recently by David Ralph of Chemung Legal Services: what if, as in Alan’s case described above, the charges are dismissed? Shouldn’t that negate the existence of the warrant at all, and consequently allow for immediate reinstatement? This is yet another issue that will have to be tested in the administrative process and the courts. In the meantime, however, it is important to exhaust administrative remedies by appealing this and other related fleeing felon issues through the ALJ and Appeals Council stages.

And whose warrant was it anyway...

Another thorny issue arising in these cases includes mistaken identities. In a scenario raised on the Listserv, one man lost his SSI benefits because of an outstanding warrant in Massachusetts. Despite the fact that the Massachusetts warrant involves a woman with the same name and date of birth but a different social security number and address, SSA is nonetheless demanding that this claimant return to Massachusetts to clear up the warrant! This should be the type of problem amenable to resolution through SSA’s appeal process, right? Well, we’ll see....but, again, it is crucial to appeal – within ten days if possible to ensure continuation of benefits while reconsideration is pending – and then to appeal some more if necessary.

Expect to see an increased number of these mistaken identity cases, as well as identity theft cases. The identity theft cases may prove to be especially complicated. Again, as reported by Peter Racette, a claimant may very well be unaware of criminal charges incurred by some one who has stolen his identity. Putting aside the difficulties the claimant will face in clearing up the criminal charges (which cannot be ignored), he will also have to exhaust administrative

remedies within SSA as well. These are clearly cases where one can argue that the claimant could not be fleeing from charges of which she or he was unaware. Such claims, however, will probably only be resolved through litigation – unless, pursuant to the pending legislation discussed above, SSA actually does promulgate more helpful regulations in this regard. At this point, however, even in the few reported cases where ALJs have ruled in the claimant’s favor, the Appeals Council has apparently reversed. On this and other issues, Peter refers us to an excellent article by Gerry McIntyre that appeared in *Clearinghouse Review* in January 2003 and is available at www.nslc.org/news/03/03/fleeingfelon_CRjanfeb2003.pdf.

And will the history of the warrant live on?

McGregor Smyth of the Bronx Defenders Office offers some additional helpful points in these cases. He advises advocates to make sure that the warrants actually get removed from your client’s criminal history – otherwise he or she runs the risk of being arrested again or having SSI benefits suspended again. He suggests trying to convince an “official” in the court where the mistaken claim arose to write a letter to that effect on official letterhead. Then follow up with the court clerk where the warrant was issued to make sure the warrant listing is removed from the client’s rap sheet – or, if need be, the state agency that handles criminal history information. In Massachusetts, information about criminal history can be found at <http://www.lawlib.state.ma.us/aboutcrimrecord.html>. Presumably similar websites exist for other jurisdictions.

McGregor has also provided us with information about clearing warrants in New York. If not successful with the court clerk, he advises writing to the state Division of Criminal Justice, noting the case number that was dismissed, citing the warrant number that still appears on the client’s record, and requesting that it be cleared. The address is: New York State Division of Criminal Justice Services, Record Review Unit, 4 Tower Place, Albany, NY 12203-3764, (518) 485-7675.

As if all that were not enough, don’t forget another fall-out from fleeing felon suspensions: the resulting overpayments. As noted above, if SSA considers the suspension period to commence with the date the warrant is issued, claimants will face large overpay-

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Can SSI Lien On Me?

A recent DAP Listserv inquiry posed the question of whether SSI or Medicaid can impose liens – particularly on lump sum settlements in personal injury cases – for past benefits. Carol A. McKenna of the Rochester law firm of Faraci & Lange, LLP provided us with a great primer on the subject. According to Carol, there is no lien for back SSI payments, but receipt of settlement proceeds can render the SSI recipient financially ineligible due to excess resources. And of course, a beneficiary would generally be ineligible the month the settlement is actually received because of excess income.

While most recipients would rather have the money than continue on SSI, there are some who want/need to retain eligibility, usually to keep their Medicaid. In those cases, a supplemental needs trust may be in order.

On the other hand, the “public welfare official” for the district providing assistance does have a lien for Medicaid (and other public assistance) rendered on/after the date of the injury. In order for the lien to attach, the County must comply with the filing requirements set forth in §104-b(2) and (3) of the NY Social Services Law. But even if the County fails to perfect its lien, it still has a right of action under §104(1) of the Social Services Law and can sue to recover medical payments and other forms of public assistance from a recipient who is “discovered to have real or

personal property.” Unlike the lien, which runs only from the date of injury, the County’s right of recovery under §104(1) goes back 10 years.

Finally, in addition to these remedies, public welfare districts generally require public assistance applicants, as a condition of receiving assistance, to sign an “assignment of proceeds” agreeing to inform the district of any claims the recipient may have against third parties and assigning the proceeds of any such claim to the public welfare district. This assignment can be enforced in an action against the recipient.



The bottom line is that where there is a perfected lien, it must be paid, though a negotiated reduction of the lien is common, at least in Monroe County. Even if there is no lien, the government still has a right of action against the recipient to recover benefits. As such, Carol always advises clients to approach DSS, find out what they are claiming, and try to negotiate a reduction. The vast majority of clients would rather pay up than have the threat of a lawsuit hanging over their heads. For those who want to take their chances, Carol suggests having them sign an acknowledgment to the effect that they were informed by counsel of the right of action against them and knowingly chose to “take the money and run.”

Many thanks to Carol for this helpful information.

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ments – at the point when they have no income! Some claimants will legitimately – and maybe successfully- be able to argue that they were unaware of the warrants, and thus can be found to be without fault. As Peter Racette so aptly reminds us, these overpayments are but one of three distinct problems created by the fleeing felon provisions, along with the suspension itself and, as discussed above, the problems of reinstatement. It’s easy to lose sight of an overpayment when so much else is at stake, but reinstatement will be further complicated if they are left unattended

Thanks to all those, especially Peter and McGregor, who have shared their insights and strategies on this ongoing problem. We will continue to see these and other variations of fleeing felon cases in the months to come. Please keep us posted on your successes and frustrations as we try to seek solutions. And continue to share with us those strategies that have worked, and those contacts that have been helpful. GULP will compile a clearinghouse of those resources.



Twentieth Anniversary DAP Conference Planned

Back in 1983, the New York Legislature took a bold step and enacted legislation creating the Disability Advocacy Program (DAP). Contracts were awarded in 1984 and DAP was on its way providing services to poor disabled persons seeking federal disability benefits.

Twenty years later, we are still at it, having served almost 155,000 people and winning more than 60,000 cases over the life of the program. And we're not done yet!

In celebration of this milestone year, the Greater Upstate Law Project, Legal Services for New York City and Legal Services for the Elderly, your DAP support units, are throwing a party. Well, not exactly a party, but a training conference—the same thing to us!

On June 16 & 17, 2003, we will present the Twentieth Anniversary Disability Advocacy Program Conference. The conference will be held at the Sage College of Albany and will offer two days of training, complete with CLE credit, accommodations in the college's lovely dorms, meals, materials and camaraderie with other DAP advocates from across the state. An agenda for the conference is attached at the end of this newsletter.

Given the momentous nature of twenty years of advocacy, we have invited the "father" of DAP, Assemblyman Dick Gottfried, to join us and give some opening remarks. Assemblyman Gottfried was an original sponsor of the DAP legislation in 1983. We have also invited Senator Raymond Meier to join the opening session. Senator Meier

was instrumental in getting DAP an additional \$1 million in funding in 2002 (and continuing in 2003, we hope).

After the political hoopla, Nancy Shor of NOSSCR will give us an update on Social Security issues at the federal level. Bring your questions for Nancy.

The substantive training sessions will be presented on two simultaneous tracks, Track I for newer advocates and Track II for more experienced advocates. As noted, the preliminary agenda is attached. Registration materials with more detailed descriptions of the sessions will be sent out May 16, 2003. The registration materials will also be posted on GULP's website, www.gulpny.org. Registrations are due back to GULP by June 2, 2003.

The DAP conference is open to DAP funded programs only. The cost per participant will be \$35.00. This registration fee will cover all materials, CLE credits, lodging for one night and meals. The fee will be the same whether participants stay at the conference site or elsewhere. GULP is underwriting a substantial portion of the conference. If you have any questions about the conference, please contact Louise Tarantino at GULP's Albany office.

We are looking forward to seeing old friends and meeting new DAP colleagues at this conference. Since there is no Partnership Conference planned for 2003, this conference will be the major training activity for DAP advocates. See you there!

REGULATIONS

SSA Seeks Comments on Mental Disorders Listings

In a notice published in the Federal Register on March 17, 2003 (68 Fed. Reg. 12639-12641), SSA announced "We are planning to update and revise the rules that we use to evaluate mental disorders of adults and children who apply for, or receive, disability benefits under title II and Supplemental Security Income (SSI) payments based on disability under title XVI of the Social Security Act (the Act)."

Under consideration are 20 C.F.R. §§ 404.1520a and 416.920a, and Listings §§12 and 112. The comment deadline is June 16, 2003.

The current Listings expire July 2, 2003, unless extended or re-promulgated. "Although we have made some changes to the listings since we first published them, including changes to the listings in 2000 (65 FR 50746, corrected at 65 FR 60584), we have not comprehensively revised the adult listings since 1985 and the childhood listings since 1990."

There is at the moment no proposed new language. The comment opportunity offered by this announcement is free form: "The purpose of this notice is to give you an opportunity to send us comments and suggestions for updating and revising those rules as we begin the rulemaking process."

SSA is feeling behind the times and has been criticized by the GAO for failing to keep the Listings updated in light of medical advancements: "Many of our rules for adults are based on the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition, also called the DSM-III. That manual has been updated three times over the years since we first published comprehensive revisions of the adult mental disorders listings. Our childhood listings are based on the revision of the Third Edition (the DSM-III-R), which has been updated twice since we first published comprehensive revisions of those listings. We want to update the

terms in our listings so they are consistent with current medical terminology. (The current edition is the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, Washington, DC, American Psychiatric Association, 2000, also called the DSM-IV-TR.)"

In addition, "We recently funded research through the National Research Council (NRC) that assessed our current criteria for evaluating MR in the context of state-of-the-art scientific knowledge and clinical practice. In its final report, **Mental Retardation: Determining Eligibility for Social Security Benefits**, the NRC made a number of recommendations to us for revising our rules, and we are considering the recommendations now." The NRC report is available online at <http://www.nap.edu/books/0309083230/html/>

Other sources of expert information cited by SSA in this announcement are the following:

- **Usage of the Term "Mental Retardation"; Language, Image, and Public Education**, (June 14, 2002), available at <http://www.ssa.gov/disability/MentalRetardationReport.pdf>;
- **Mental Retardation: Definition, Classification, and Systems of Supports**, 10th Edition (American Association on Mental Retardation, Washington, DC, 2002).

The text of the Federal Register notice is available at Social Security's website, www.socialsecurity.gov. GULP hopes to submit comments in response to SSA's invitation to do so and we would appreciate hearing from interested advocates about these comments.

Your Picture Here: SSA Rules on Photo IDs

On May 1, 2003, SSA announced final rules implementing pilot projects wherein SSA will request photographic identification from individuals filing for Title II and Title XVI disability and blindness benefits in specified geographic areas covered by the pilot projects. In addition, SSA will require individuals to allow their photograph to be taken and SSA will make these photographs a part of the claims folder. SSA will permit an exception to the photograph requirement when an individual has a sincere religious objection.

SSA states “this process will strengthen the integrity of the disability claims process by helping to ensure

that the individual filing the application is the same individual examined by the consultative examination (CE) physician.” 68 Fed. Reg. 23192-23195, available online via GPO Access [wais.access.gpo.gov] [DOCID:fr01my03-5].

These regulations are effective May 31, 2003.

SSA proposes to conduct the pilots in four geographic areas, including selected SSA field offices located in New York City. The pilots will be in effect for a six-month period of time and will begin no earlier than the first day of the month following the month that the rules become effective.

Immune Listings Changes Proposed

SSA is planning to update and revise the Immune Disorder Listings (14.00 & 114.00). 68 Fed. Reg. 24896. (May 9, 2003). Interested parties are invited to submit comments and suggestions for updating and

revising these rules by July 8, 2003. A more complete announcement with links to the Notice of Proposed Rulemaking (NPRM) is available at GULP’s website, www.gulpny.org.

HUD, SSA, IRS Expand Computer Matching Program

A new computer matching program is planned that will share information among HUD, SSA and the IRS. In the notice in the May 5, 2003 Federal Register [68 Fed. Reg. 23753-23756], available online via GPO Access [wais.access.gpo.gov] [DOCID:fr05my03-96], HUD announces the revision of “a matching program involving comparisons between income data provided by applicants or participants in HUD’s assisted housing programs and independent sources of income information.”

Computer matching is expected to begin June 4, 2003 unless comments are received which will result in a contrary determination, or 40 days from the date a computer matching agreement is signed, whichever is later. Comments are due by June 4, 2003.



“In this computer matching program, tenant-provided information included in HUD’s automated files will be compared to data from the SSA and the IRS. HUD will normally request that the SSA conduct matching of earned income information and that the IRS conduct matching of unearned income information at least annually.”

“HUD will also request SSA matching of social security, supplemental security income, and special veterans benefits information monthly for residents due to be re-certified in four months, and daily (on the receipt of new certifications) for residents.”

ADMINISTRATIVE DECISIONS

ALJ Grants *Stieberger, Dixon* and Widow's Benefits

Paralegal Dorothy Barber left PILOR this month in a flame of glory. As many of you may know, Dorothy recently ended her stellar twenty-five year career (she started very young) as a disability paralegal to devote herself to her church ministry. Before she left, she secured retroactive *Stieberger, Dixon*, and widow's benefits with a finesse that surpassed even her usual style.

Dorothy's client, now sixty-eight years old, had been awarded SSI benefits in 1986, retroactive to her application in 1983, based on her mental retardation combined with numerous other physical impairments. At the time, however, the ALJ refused to reopen her earlier applications of 1978, 1979, 1981, and 1982. He refused to find she had good cause, despite her mental retardation, which had not come to light until 1986. And he found her disability did not begin until after her date last insured expired, thus costing her Title II benefits. His decision was never appealed, but the client's benefits were continued over the years following at least one CDR (Continuing Disability Review). She subsequently took advantage of her right to readjudication under *Stieberger* and *Dixon*. In 2000 and 2001, respectively, her re-adjudications were denied. She appealed and, luckily, persuaded Dorothy to represent her at her hearing.

In preparing for the hearing, Dorothy discovered that in 1990, the client had applied for and been denied widow's benefits. Unfortunately, the ALJ who reviewed that claim disregarded the evidence of retardation. She was concerned about the effect this would have on the current claim. She reminded the ALJ of the *Dixon* presumption of disability if the claimant received a favorable decision for a *subsequent* period of disability, which her client had. [The widow's claim was limited to the period from 1975 to

1983, presumably the seven years after her husband's death. *See* 20 C.F.R. §404.335(c)(1)].

Dorothy also pointed out that the widow's decision was erroneous in a number of ways, and that it had been decided under the old, much stricter widow's standard, which required proof of inability to perform any "gainful activity." *See* 20 C.F.R. §§404.1577 &1578. Dorothy nonetheless convinced the ALJ to consider the widow's claim as well under *Stieberger* and *Dixon*, even though it had not been re-adjudicated at the initial level. So, in the end, Dorothy managed to secure her client's entitlement to Title II benefits and to additional retroactive SSI. How we will miss Dorothy and her many talents!



“Hole in the Grids” Leads to Benefits

Maura Kennedy-Smith of Chemung County Neighborhood Legal Services Ithaca office recently posted a query to the DAP Listserv regarding an anomaly in the Grid Rules regarding her client.

Jack R. is a 52-year-old man with severe arthritis, hypertension, and anxiety. He is illiterate. Despite these limitations, Mr. R. held a job at the same lumber mill for over 30 years. Initially, he worked as a laborer, an unskilled job at the "heavy" level of exertion under the Dictionary of Occupational Titles (D.O.T). As he became ill, his employer switched his job to driving a loading truck, a "medium," semi-skilled job under the D.O.T.

The Social Security Administration (SSA) denied Mr. R.'s claim on the basis that he could perform light work. The Agency appeared not to have considered Mr. R.'s illiteracy in its determination. At first, this decision looked wrong on its face. As Maura looked further, however, she noticed that there is a "hole in the Grids" that could explain the initial determination.

Since there is no Grid rule at the light work table for an illiterate claimant over 50 with a semi-skilled work history, Mr. R.'s claim would depend on whether SSA was considering his work background as "semi-skilled" and whether this outweighed the fact that he is illiterate. After receiving several helpful responses to her query on the DAP Listserv, Maura wrote a memo for an on-the-record decision. She argued that

though there is no Grid rule for an illiterate claimant with a semi-skilled work history, the "illiterate" criteria of Grid rule 202.09 governs because the rules concerning semi-skilled work require literacy. *See Albritton v. Sullivan*, 889 F.2d 640, 643 (5th Cir. 1989). Maura also noted that 20 C.F.R. §404.1565(a) directs: "If you cannot use your skills in other skilled or semi-skilled work, we will consider your work background the same as unskilled." *See also Silveria v. Apfel*, 204 F.3d 1257, 1260 (9th Cir. 2000); *Barillaro v. Com-m'r of Soc. Security*, 216 F.Supp. 121,130-131 (E.D.N.Y. 2002).



In addition, she pointed out that the introduction to the Grids directs that a claimant over 50 with "skills that are not readily transferable to a significant range" of work within the claimant's functional capacity and whose "vocational scope is further significantly limited by illiteracy" should be found disabled. 20 C.F.R. Pt. 404, Subpt. P, App. 2, §202.00(c),(d)

In a fully favorable decision, the ALJ determined Mr. R.'s work background to be unskilled noting that he did not have any readily transferable skills. He thereby found him disabled pursuant to Grid rule 202.09.

Maura notes that those DAP Listserv postings really helped her sort out this case and thanks all who weighed in on this issue!

Accessing Prison Records

Some of our disability clients have spent some time as "guests of the state" in one prison or another. Often, they have been treated while in prison for the impairment they allege causes them to be disabled. Some clients have been injured while in prison and have required medical treatment for these injuries. How do we go about getting these records? This question was posted on the DAP Listserv recently and, true to form, someone knew the answer! One

advocate noted that she had had success finding the address for New York State facilities at www.docs.state.ny.us/faclist.html. The telephone number for the New York state Department of Correctional Services is (518) 457-8126. For Federal facilities, the website to obtain a list of Federal Bureau of Prisons locations is www.bop.gov. Records are retained for Federal facilities for 30 years.

Review and Reopening Result in Retroactive Benefits

Reopening previous applications can result in payment of substantial retroactive benefits for claimants. Under the Social Security Administration's (SSA) reopening rules, a determination may be reopened in SSI cases within two years of the initial determination for good cause. 20 C.F.R. §§416.1487-1489. (See related article on the Second Circuit decision on reopenings on page 14 of this newsletter.)

Diana Short, a paralegal at Nassau Suffolk Law Services in Riverhead, recently argued to the Appeals Council to reopen a prior application because the claimant met a Listing, and they did it!

Diana's client filed an original application in 1997. That claim was denied and the claimant did not appeal. In 1999, the claimant filed another SSI application and was found disabled by an ALJ as of the date of the second application. The ALJ refused to reopen the earlier application citing a lack of evidence pertaining to that time period.

On appeal, Diana submitted additional evidence to the Appeals Council and argued good cause to reopen on

the basis of new and material evidence. In addition to the supplemental evidence that Diana submitted, the Appeals Council used a medical advisor and treated his report as new and material evidence in support of the reopening claim. The medical advisor's report indicated that the claimant met Listing 1.04A (musculoskeletal) as of 1996, the onset date the claimant alleged in both of her applications. Therefore, the Appeals Council found that at least since the date of the original application in 1997, the claimant was disabled at Step 3 of the sequential evaluation, i.e., she met a listed impairment.

In reaching its decision, the Appeals Council cited Social Security Ruling (SSR) 96-6p, noting that it considered the opinions of the State agency medical consultants who evaluated the claim but found that those opinions were not supported by the weight of the evidence of record, particularly the new evidence.

Congratulations to Diana for pushing ahead and securing almost two additional years of benefits for her client.

Appeals Council Awards Benefits Under 12.05C

In an amazing victory, PILOR senior paralegal Doris Cortes won a reversal from the Appeals Council! Doris's name frequently graces these pages for her dogged work at the Appeals Council, winning remand after remand along with the occasional reversal. This time she actually persuaded the Appeals Council to reverse the ALJ's decision and find disability under 12.05C.

Doris's client had what appeared to be a clear-cut case for disability, with IQ scores in the 60s, and a secondary diagnosis of schizoaffective disorder. The ALJ, as is his wont, however, disregarded the IQ scores and found the client capable of sedentary work. The Appeals Council conducted its own review of the evidence and found not only that the cli-

ent met the Listing 12.05C, but also found that DA&A (Drug or Alcohol Addiction) was not material to the claim.

The Appeals Council went on to find that the opinions of the State Agency medical consultants that the client could perform work activity with limitations were not supported by substantial evidence and thus assigned little evidentiary weight. This victory seems particularly significant in light of SSA's rumblings regarding the listings for mental retardation. (See article on Page 8 of this newsletter regarding SSA's proposed changes to the Mental Impairment listings.)

Kudos to Doris for her tireless advocacy.

WEB NEWS

SSA Launches New Website

The Social Security Administration launched a redesigned website and moved it to a new address, www.socialsecurity.gov. According to SSA's press release, the new website is "easier to navigate, more attractive and more accessible to all visitors, including people with visual or other physical disabilities."

AARP: Evaluating Internet Health Information

The American Association of Retired Persons (AARP) offers this informative Web site on evaluating health information found on the Internet, www.aarp.org/confacts/health/wwwhealth.html. As the introduction explains, "the separating reliable from questionable health information can be a significant challenge." Fortunately, AARP provides a valuable crash course on assessing the quality of online sources, outlining the issues that require a healthy dose of consumer skepticism. The site also provides useful links for further information, such as the Food and Drug Administration guide to buying pharmaceuticals online and Medline Plus from the National Library of Medicine.

Finding Bills Online

The most recent action on pending federal bills is available at THOMAS, www.thomas.loc.gov. If you know the bill number, simply type it in the box and click on the search button. You will be linked directly to the text of the bill or, if there is more than one version, to a list of those versions from which you can select the one you want.

Federal Statutes Available

This site, through Cornell Law School Library, allows searches of federal laws by titles, citations, or popular names. It has a list of all titles and is the most recent version made available by the U.S. House of Representatives. www4.law.cornell.edu/uscode/.

Free Medical Journals Site

The Free Medical Journals Site is dedicated to the promotion of free access to medical journals over the Internet. Online medical publications are organized into clear categories: free full text, free one to six months after publication, free one year after publication, free two years after publication, new and cancelled. Over 800 titles are sorted alphabetically or by specialty, including Spanish and Portuguese listings. You can register for alerts on new free journals. www.freemedicaljournals.com/.

COURT DECISIONS

Second Circuit Rules on Reopening Claims

The Second Circuit has issued yet another excellent disability decision. In *Byam v. Barnhart*, 324 F.3d 110 (2d Cir. 2003), 2003 US App LEXIS 6050, the Second Circuit made two noteworthy inroads in the field of reopened claims: (1) it recognized “de facto” or constructive reopenings by the Social Security Administration (SSA) and (2) it clarified the basis for due process claims by mentally ill applicants.

Let’s look at reopenings generally first. SSA created its own exceptions to administrative finality by setting forth particular circumstances when a claim may be reopened after the appeal period has lapsed. See 20 C.F.R. §§404.488 and 416.1488. These are agency-created rules and are not mandated by the Social Security Act. As such, SSA’s determinations to reopen a claim are not initial determinations subject to review. See *Califano v. Sanders*, 430 U.S. 99 (1977) (judicial review required only if Act requires a hearing and Act does not require hearing on request to reopen old application; judicial review only if constitutional claim raised) and *Latona v. Schweiker*, 707 F.2d 79 (2d Cir. 1983) (no judicial review, even where SSA opted to provide a hearing on the matter).

To obtain judicial review when SSA denies a request to reopen a prior claim, advocates have argued that the agency’s actions in denying the request constituted a de facto reopening. In these circumstances, the courts have deemed the Commissioner to have constructively reopened the prior claim as a matter of administrative discretion, re-evaluated the claim on its merits, and issued a revised decision on the merits. The courts distinguish this scenario from *Sanders* in that *Sanders* applies where the Commissioner does not reopen the claim (just says no) and these cases, where the Commissioner did reopen the claim (then simply denied it again). Of course, because the Commissioner did exercise her discretion to reopen the claim and to issue a revised decision, the courts could review those new decisions.

The “de facto” argument has worked in several circuits, notably the Tenth Circuit, *Taylor for Peck v. Heckler*, 738 F.2d 1984 (10th Cir. 1984) (first claim for surviving child benefits denied because paternity not proven; at hearing on second application, ALJ had full adversarial hearing with 3 witnesses and 44 exhibits, made 7 separate findings of fact, then denied claim for failing to prove paternity; Commissioner deemed to have reopened prior claim), the Fourth Circuit, *Cleaton v. Sec’y HHS*, 815 F.2d 295 (4th Cir. 1987) (Secretary reopened the prior claim by considering the merits of the initial claim; construed as a reopening as a matter of administrative discretion permitted by the regulations; determination subject to judicial review), and the Eighth Circuit, *Brown v. Sullivan*, 932 F.2d 1242 (8th Cir. 1991) (boiler plate language in denial notices indicating that all the evidence in the record was reviewed and discussing merits of the claim sufficed to find agency had reopened prior claim as matter of administrative discretion). Note that in each case, SSA acted to evaluate the evidence, so that it is far more than the Commissioner simply denying the request to reopen.

Efforts to establish this theory in this Circuit have been mixed – until now. At least two district courts in the Second Circuit have approved the de facto opening theory. See *Malave v. Sullivan*, 777 F. Supp. 247 (S.D.N.Y. 1991) (Carter, J.) and *Guy v. Sullivan*, 736 F. Supp. 1255 (W.D.N.Y. 1990). Several other courts have rejected the theory, however, at least in part because no review on the merits was discerned. See, e.g., *Antonucci v. Chater*, 1996 US Dist. LEXIS 7785 (W.D.N.Y.) (Elfvin, J.) (no reopening where the ALJ discussed prior proceedings and evidence only to fill in the background, not a review on the merits) and *Grant v. Sec’y HHS*, 1995 US Dist. LEXIS 7150 (W.D.N.Y.) (threshold inquiry on the nature of evidence not to be read as a reopening).

(Continued from page 14)

With *Byam*, the Second Circuit approves the legal theory on reopening, even though it found the claimant did not make his case for a de facto reopening. In particular, the Circuit notes that the claimant would have to show that the ALJ did indeed make a substantive review, or merits review, of evidence in the prior claim, which is far more than a threshold inquiry into the nature of the evidence.

But the claimant in *Byam* did not lose because the Court went on to consider the due process claim that any notice she received had to be constitutionally defective because her mental impairment prevented her from pursuing administrative remedies while she was unrepresented. The Circuit last discussed this standard in *Stieberger v. Apfel*, 134 F.3d 37 (2d Cir. 1997), which found due process denied when the claimant's mental illness deprived her of the ability to understand the notice or the ability to act upon the notice. 134 F.3d at 40.

In *Byam*, the Circuit found error where only the first part was evaluated (the ability to understand) and no inquiry was made into the claimant's ability to act upon the notice. 324 F.3d at 120. Also the Court reminds us that *Stieberger* also requires a "particularized allegation of mental impairment plausibly of sufficient severity to impair comprehension," and found this requirement satisfied at least in part by her treating doctor's retrospective medical opinion. 324 F.3d at 121.

Finally, the Court opted to remand the case back to the agency for a hearing on whether to reopen the previous applications under SSA's regulations or to extend its deadlines to request review of adverse determinations under SSR 91-5p. It refused to pay the claim in part because the agency had not yet ruled on the merits of the previous applications. 324 F.3d at 121 - 122. Below, the claimant had asked for the prior claims to be reopened as part of the ongoing claim, and when that part was denied, she filed suit. So, she must try again to have the three prior claims reopened, but we have a good feeling about the 91-5p claim

Supreme Court To Consider Past Relevant Work Issue

How many of us have been frustrated when our client – who could easily win under the Grid Rules at Step Five – is denied at Step Four based on a finding that she can return to her past relevant work even though that job is obsolete? Or if not obsolete, the past job does not exist in significant numbers or is not available in this country? The Supreme Court will consider these issues this term. The Court granted *certiorari* in the case of *Thomas v. Commissioner*, 294 F.3d 568 (3d Cir. 2002) (*en banc*).

Thomas involved a plaintiff whose past relevant work was that of an elevator operator, which she contended is now obsolete. The ALJ, however, concluded that because she had the residual functional capacity to perform light work, she could therefore perform her past relevant work. Relying on Social Security Ruling (SSR) 82-40, the ALJ found that Step Four does not require any inquiry into whether the past work ac-

tually exists. On appeal, the Third Circuit held that for purposes of Step Four, "a claimant's previous work must be substantial gainful work which exists in the national economy." 294 F.3d at 572. The Court of Appeals did a thorough – and what might even be called elegant – review of the statutory and regulatory language involved, as well as the conflicting case law, to support its conclusion. Unfortunately, one can only suspect that some of the "deference to the Commissioner's interpretation" language in the dissent may appeal to the Supreme Court. A decision probably will not be expected until next term.

To learn more about *Thomas* and the treatment of other work related issues in the Sequential Evaluation, plan to attend the upcoming DAP Conference in Albany on June 16 & 17. One of the sessions will be devoted to these issues.

CLASS ACTIONS

Sharpe v. Sullivan, No. 79-1977 (E.D.N.Y.) (Haight, J) (“the SSI delay case”)

F.2d 530 (2d Cir. 1980), vacated No. 79-1977 (S. D.N.Y. 1985) (unpublished), revised, No. 79-1977 (S.D.N.Y. March 6, 1990) (unpublished).

Description—Certified plaintiff class challenged delays in holding administrative hearings, issuance of hearing decisions, and issuance of payments, on SSI claims. In 1980 Judge Haight entered order placing time limits on each step, and requiring SSA to pay interim benefits when time limits were exceeded. In 1985 Judge Haight vacated these time limits in light of Heckler v. Day, 467 U.S. 104 (1984), and in 1990 entered a new order, below.

Information—Johnson Tyler, South Brooklyn Legal Services (718-237-5500).

Martinez v. Secretary, No. 82-4816, (E.D.N.Y.) (Nickerson, J) (“the Title II delay case”)

Description—Certified class challenged delays in the hearing process in claims for Title II disability benefits.

Relief—1990 orders require (1) SSI disability cases: (a) OHA must issue notices explaining delay and right to sue after 120 days from hearing request, and (b) SSA must pay interim benefits if regular benefits have not been paid within 60 days of favorable hearing decision (with certain exceptions, e.g. non-cooperation); (2) SSI nondisability cases: SSA must pay interim benefits within 60 days of favorable hearing decision, or within 90 days from hearing request.

Relief—SSA is required to send notice to Title II claimants with the acknowledgment of the request for hearing stating that claimants have a right to a decision in a reasonable time. Claimants are entitled to bring separate federal mandamus actions where delay is unreasonable.

Citations—Unpublished order dated April 24, 1986

Citations—Sharpe v. Secretary, No. 79-19777 (S.D. N.Y. July 10, 1980) (unpublished order), aff’d 621

Information—Toby Golick, Bet Tzedek Legal Services, Cardozo School of Law (212-790-0240)



New Contact Information for *Dixon* and *Stieberger* Cases

- ▶ If you would like to check on the status of your client’s *Dixon* or *Stieberger* case, please send an e-mail to Ken Stephens (kstephens@legal-aid.org) with the client’s name, address, and SSN. If you prefer not to send SSNs by e-mail, you can leave that information on Ken’s voice-mail instead, at (212) 440-4257.
- ▶ If you need general information about the *Dixon* or *Stieberger* class actions, or advice about a client’s case, you can leave a message on Legal Aid’s Hotline voice mail at (888) 284-2772 or (212) 440-4354 and someone will call you back. You can also reach the Hotline by dialing Legal Aid’s main number, (212) 440-4300, and asking to be forwarded. If your call is not returned within a week, or if your question is urgent, you may call Ken Stephens at (212) 440-4257.

Waiting For Godot

Waiting for a hearing date at your local Office of Hearings and Appeals (OHA) often seems like waiting for nil—will it ever come? A recent query on the DAP Listserv raised the issue of hearing delays at the OHAs around the state.

Advocates responded describing waits from as short as two months in rare circumstances to as long as twenty months in others, with at least twelve long months as the norm. According to statistics from OHA, the average time from the request for a hearing to the time the hearing is held is as follows:

New York – 11 months, Queens – 13 months, Buffalo – 14 months, Albany – 12 months, Brooklyn – 17 months, White Plains – 11 months, the Bronx – 12 months, Voorhees – 12 months, Syracuse – 12 months, and Jericho – 11 months.

Claimants in Brooklyn have the dubious distinction of waiting longer than anywhere in the country for their hearings. Would that they were in Honolulu which, at five months, has the shortest wait (and better weather!)

As advocates have pointed out, however, one cannot make any assumptions or plan around these time frames. Even at the OHAs with the longest waits, cases are sometimes scheduled more quickly. For example, an influx of visiting ALJs can cut down on the wait. Or, as in the Buffalo OHA, cases assigned to those ALJs who issue decisions more quickly are likely to be heard more quickly.

In the meantime, clients understandably grumble. And clients suffer as the result of these long waits. For

those clients who have life threatening impairments or whose conditions significantly worsen during the wait, or whose financial circumstances are particularly dire, remember that the provisions of HALLEX 1-2-140 might apply. OHA's "Critical Case" provisions provide that critical case processing is warranted in four situations: 1) claimant's illness is terminal ("TERI" case), 2) claimant is without and unable to obtain food, medicine or shelter, 3) indication that claimant is suicidal or homicidal, or 4) case has been delayed an inordinate amount of time, i.e., pending more than 60 days longer than the average processing time for the office in question, and there is a public, congressional or other high priority inquiry on the case (that's a pretty long time in Brooklyn!)

HALLEX sets forth detailed rules on determining TERI cases. Advocates have been advised by various OHAs to make critical case requests sparingly. They can usually be made through one of the staff attorneys if the case is not yet assigned to an ALJ, or through the Chief ALJ.

Most advocates are probably aware of the limitations that the Supreme Court put on legal challenges to delays in *Heckler v. Day*, 467 U.S. 104 (1984). Individual lawsuits challenging unreasonable delays, however, are permissible under the provisions of two New York class actions for. The details of the *Sharpe* and *Martinez* cases are set forth in the Class Actions section of this newsletter. But before contacting *Sharpe* counsel or considering a mandamus action, remember that in light of the above statistics, the term "unreasonable" has taken on new meaning. Now, hurry up and wait.



BULLETIN BOARD

This "Bulletin Board" contains information about recent disability decisions from the United States Supreme Court and the United States Court of Appeals for the Second Circuit.

We will continue to write more detailed articles about significant decisions as they are issued by these and other Courts, but we hope that this list will help advocates gain an overview of the body of recent judicial decisions that are important in our judicial circuit.

SUPREME COURT DECISIONS

Barnhart v. Walton, 122 S. Ct. 1265 (2002)

The Supreme Court affirmed SSA's policy of denying SSD and SSI benefits to claimants who return to work and engage in substantial gainful activity (SGA) prior to adjudication of disability within 12 months of onset of disability. The unanimous decision held that the 12-month durational requirement applies to the inability to engage in SGA as well as the underlying impairment itself.

Sims v. Apfel, 120 S. Ct. 2080 (2000)

The Supreme Court held that a Social Security or SSI claimant need not raise an issue before the Appeals Council in order to assert the issue in District Court. The Supreme Court explicitly limited its holding to failure to "exhaust" an issue with the Appeals Council and left open the possibility that one might be precluded from raising an issue.

Forney v. Apfel, 118 S. Ct. 1984 (1998)

The Supreme Court finally held that individual disability claimants, like the government, can appeal from District Court remand orders. In *Sullivan v. Finkelstein*, the Supreme Court held that remand orders under 42 U.S.C. §405(g) can constitute final judgments which are appealable to circuit courts. In that case the government was appealing the remand order.

Lawrence v. Chater, 116 S. Ct. 604 (1996)

The Court remanded a case after SSA changed its litigation position on appeal. SSA had actually prevailed in the Fourth Circuit having persuaded that court that the constitutionality of state intestacy law need not be determined before SSA applies such law to decide "paternity" and survivor's benefits claims. Based on SSA's new interpretation of the Social Security Act with respect to the establishment of paternity under state law, the Supreme Court granted certiorari, vacatur and remand.

Shalala v. Schaefer, 113 S. Ct. 2625 (1993)

The Court unanimously held that a final judgment for purposes of an EAJA petition in a Social Security case involving a remand is a judgment "entered by a Court of law and does not encompass decisions rendered by an administrative agency." The Court, however, further complicated the issue by distinguishing between 42 U.S.C. §405(g) sentence four remands and sentence six remands.



SECOND CIRCUIT DECISIONS

Byam v. Barnhart, 324 F.3d 110 (2d Cir. 2003)

The Court ruled that federal courts might review the Commissioner's decision not to reopen a disability application in two circumstances: where the Commissioner has constructively reopened the case and where the claimant has been denied due process. Although the Court found no constructive reopening in this case, it did establish that "de facto" reopening is available in an appropriate case. The Court did, however, find that the plaintiff was denied due process because her mental impairment prevented her from understanding and acting on her right to appeal the denials in her earlier applications. The Circuit discussed SSR 91-5p and its *Stieberger* decision as support for its finding that mental illness prevented the plaintiff from receiving meaningful notice of her appeal rights.

Veino v. Barnhart, 312 F.3d 578 (2d Cir. 2002)

In a continuing disability review (CDR) case, the Second Circuit ruled that the medical evidence from the original finding of disability, the comparison point, must be included in the record. In the absence of the early medical records, the record lacks the foundation for a reasoned assessment of whether there is substantial evidence to support a finding of medical improvement. The Court held that a summary of the medical evidence contained in the disability hearing officer's (DHO) decision was not evidence.

Draeger v. Barnhart, 311 F.3d 468 (2d Cir. 2002)

The Second Circuit addressed the issue of what constitutes "aptitudes" as opposed to "skills" in determining whether a claimant has transferable skills under the Grid rules. The Court found that there was an inherent difference between vocational skills and general traits, aptitudes and abilities. Using ordinary dictionary meanings, the Court found that aptitudes are innate abilities and skills are learned abilities. The Circuit noted that for the agency to sustain its burden at step 5 of the sequential evaluation that a worker had transferable skills, the agency would have to identify specific learned qualities and link them to the particular tasks involved in specific jobs that the agency says the claimant can still perform.

Shaw v. Chater, 221 F.3d 126 (2d Cir. 2000)

The Second Circuit has reaffirmed its support and approval of retrospective medical evidence and its continued

insistence that SSA adhere to its own treating physician rule. In addition, the Second Circuit has found as a matter of law that an SSI application must be treated as a concurrent SSD application.

Curry v. Apfel, 209 F.3d 117 (2d Cir. 2000)

The Second Circuit found that SSA failed to meet its burden at Step 5 because the consultative examiner's report was so vague as to "render it useless." As SSA failed to introduce evidence sufficient to meet its burden at Step 5, the Court then remanded only for calculation of benefits.

Williams v. Apfel, 204 F.3d 48 (2d Cir. 1999)

The Second Circuit remanded the case for further administrative proceedings to determine Ms. Williams's ability to perform any other work in the national economy (a Step 5 determination). This case is significant because the district court judge had concluded that Ms. Williams was unable to perform her past relevant work and awarded benefits to her on that basis. The Commissioner, not the plaintiff, then appealed, arguing that the district court erred in granting Williams's motion for judgment on the pleadings when it should have remanded the case for a Step 5 determination.

Melville v. Apfel, 198 F.3d 45 (2d Cir. 1999)

The Second Circuit rejected the argument that workfare can never be considered evidence of claimant's ability to perform SGA. It ordered remand for proper consideration of the plaintiff's work activity, setting forth what such an evaluation should include.

Snell v. Apfel, 177 F.3d 128 (2d Cir. 1999)

The Second Circuit reversed and remanded on the grounds that the Appeals Council failed to provide adequate reasons for its decision, may have ignored favorable evidence, and should have fully developed the record. The Court made clear that it will not accept perfunctory conclusions by SSA. The Court also refused to let the Commissioner attempt to offer explanations at the appellate level; it would "not accept appellate counsel's *post hoc* rationalization for agency action" as to why, in the case of Ms. Snell's second treating physician, the agency accepted one less favorable evaluation over another more favorable one.

And Now Penalties, Too?!

SSA has numerous penalty tools available. Many have long been on the books and have rarely been invoked. Others have been enacted recently, though still rarely invoked. We may see them invoked more regularly in the future, so we need to know what they are, when they may be used, and what responses are available.

SSA has embraced “program integrity” as its new theme, which means in part a renewed dedication to the accurate payment of benefits. SSA has been the subject of several GAO reports that criticize the agency for inaccurate payments as well as for inadequate recovery of wrongly paid benefits. One report urged SSA to “evaluate current policies for imposing monetary penalties and administrative sanctions and take action to remove any barrier to their usage or effectiveness.” **SSI: Progress Made in Detecting and Recovering Overpayments but Management Attention Should Continue**, GAO-02-849 (9/02). One result may well be that SSA begins to use these penalty tools.

Burial Fund Penalties

Scanning the POMS, penalties pop up in odd places. For example, if an SSI recipient uses burial funds (which are normally excluded from resources) for a purpose other than that related to burial (SSA calls this ‘nonburial’ purposes), a penalty might apply. See SI 01120.505 (F). The penalty amount assessed is the amount of burial funds used. No penalty is assessed, however, when the individual’s total resources for that month, *adding in* the burial fund amount, would not have exceeded the allowable limit. Finally, the penalty is assessed out of the Federal benefit amount.

Transfer of Assets Penalties

A few years ago, SSA issued rules to penalize the transfer of assets by someone in order to qualify (or remain qualified for) SSI benefits. Now, a transfer of assets after December 14, 1999, for less than fair market value for the purpose of getting or retaining SSI eligibility may subject the applicant/recipient to a penalty period. The complete rules are found at POMS SI 01150.001. Here, the penalty is ineligibility

for SSI benefits, for a period not to exceed 36 months. The length of the penalty period is computed by taking the full-uncompensated value of the transferred asset and dividing it by the full Federal benefit rate *plus* the state supplement rate for that individual. The result is the number of months in a penalty period.

It remains permissible to dispose of assets for full market value, such as spending-down cash, selling property for market value, trading one property for another at equal market value, or giving property or cash away under allowable exceptions. And, there are exceptions to the transfer of asset rules, such as transfers to an allowable trust and the transfer of the home to certain allowable family members (such as spouse or disabled child). A transferred resource may also be “re-transferred” back to the initial transferor. Finally, there are instances where the resource was transferred away for purposes other than becoming or continuing to be SSI eligible

Penalties for Failure to Report (Title II)

SSA also has authority to assess penalties when recipients fail to report changes in a timely manner. See 20 C.F.R. §§ 404.453 and 416.722. For Title II purposes, a penalty may occur if a beneficiary makes a late report of an event that affects the amount of benefits in the following instances: (1) the annual earnings test, if the annual report is late and if a work deduction is required in the annual report year (POMS § GN 02604.100); (2) the foreign work test, if the report is late and if beneficiary received full or partial benefits for a month that is subject to the deduction and there was an overpayment due to the deduction that was not waived (GN 02604.100); and (3) the child-in-care test (meaning no child was actually in care at the time) if the report is late and if beneficiary received full or partial benefits for a month that is subject to the deduction and there was an overpayment due to the deduction that was not waived (GN 02604.100).

In these three instances, no penalty is charged if the person has “good cause” for failing to report the event timely. No penalty is charged if the failure to report

(Continued on page 21)

(Continued from page 20)

the event resulted in an overpayment, but the beneficiary is found to be 'without fault' in causing the overpayment. This applies even if recovery of the overpayment is not waived (meaning that the beneficiary did not meet the second prong of the waiver test). GN 02604.170. For other exceptions to the application of the penalty, see GN 02604.170.

The amount of the penalty is subject to very technical rules, described in GN 2604.120. Penalties under these rules are collected only from the Title II beneficiary who failed to report (and therefore who incurred the violation) and are not collected from any other beneficiary entitled to payments on the same account (unlike overpayments). Penalties are collected in full from current benefits, unless the beneficiary requests partial withholding. GN 02604.150(B)(1)(a). If current benefits terminate before the penalty has been collected fully, the remaining amount will be withheld from any subsequent benefits payable to the same beneficiary. Note that it is possible for a beneficiary with a representative payee to be charged with a penalty.

SSA's determinations to apply a penalty under these provisions are initial determinations that entitle the beneficiary to full appeal rights. Specifically, the beneficiary may appeal the amount of the penalty, whether the penalty was applied correctly, and good cause denials.

Penalties for Failure to Report (Title XVI)

SSI recipients also may run afoul of reporting rules. SSA may assess a penalty when a recipient fails to report on a timely basis an event that adversely affects SSI benefits (reduction, suspension or termination).

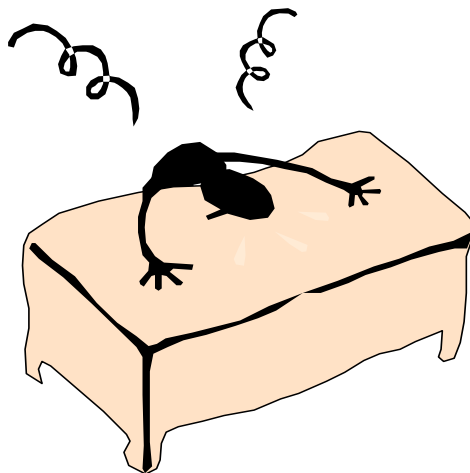
See SI 02301.100. For these events, a report is deemed timely if made within 10 days after the calendar month in which the event occurred. SI 02301.100(B)(6). SSA may assess the penalty even if the penalty did not result in an overpayment. SSA recognizes good cause exceptions, when the failure to report is not willful or when the recipient is without fault in connection with the overpayment caused by the change. (For this one, the rules for determining fault in an overpayment apply.)

Before the penalty is applied, the local office must develop and evaluate good cause. The offices are instructed to consider all the circumstances surrounding the failure to report, especially the claimant's ability to understand reporting requirements and whether the claimant acted in good faith. SI 02301.100 (F).

These penalties will be applied only against capable adult beneficiaries, meaning those adults who do not need a payee or who have a payee only because the DA&A rules apply. No children, legal incompetents, adults who need a payee, or the payees themselves may have penalties assessed.

These penalties are taken directly out of the Federal SSI benefit amount. The amount of the penalty is \$25 for the first offense, \$50 for the second offense, and \$100 for subsequent infractions. SI 02301.100. However, SSI penalties are not to be collected from a recipient by tax refund offset, from Title II benefits, or from State supplement payments. SI 02301.105 (B)(2).

In the July *Disability Law News*, we will discuss SSA's penalties aimed at eliminating fraud in the disability programs. Thanks to Ann Biddle for pulling together this information in a cohesive and informative manner.





END NOTE

Childhood Asthma Tied to Stress, Poverty, Mental Health

In the 1980s and 1990s, childhood asthma rates in the United States reached epidemic proportions. Although research indicates rates are now leveling off, the numbers remain high. Nearly 5 million U.S. children have been diagnosed with the respiratory illness. The numbers are rising most rapidly among preschoolers. Overall rates for African-American and Hispanic children are not declining; they are 30% to 100% higher than for white children. In fact, a growing body of research indicates the effects of asthma, including death and hospitalization, seem to fall disproportionately on minorities and urban populations.

Many in the research community feel a new urgency about the epidemic and are turning their attention to poverty, stress and mental health as potential underlying causes. A researcher at Harvard Medical School is investigating the long-term consequences of stressful inner-city life. The researcher suspects that when new parents in difficult circumstances feel helpless and worried, this triggers anxiety in young children. This worrying can prompt the brain to send out hormones and neurotransmitters, such as cortisol and adrenaline, that affect immune-system function. The intense stress can throw the immune system off kilter causing the lungs to be overly sensitive and easily inflamed starting at a very young age.

The Harvard researcher is recruiting 1,000 pregnant women of African-American, Haitian and Hispanic backgrounds for a five-year government funded study. She plans to track physiological changes in women and children in relationship to their life circumstances and indoor and outdoor environmental quality. Genetic susceptibility will also be studied. This is the first time anyone has tried to explore the potential causes of asthma by examining so many factors simultaneously. The results could show that the mental wear and tear of dealing with poor housing, lack of money and often-violent neighborhoods not only makes the disease worse, but also helps the dis-

ease take hold in the first place.

Other researchers are asking different questions. A Yale School of Public Health researcher is investigating why asthma rates among Puerto Rican children are the highest of all—30% of kids who live on the island and 11% of children of Puerto Rican descent who live on the U.S. mainland have been diagnosed with asthma. Based on previous research, psychological factors may be at work. For example, breathlessness is a very common symptom in both asthma and anxiety, particularly in panic attacks in children. If parents and doctors are perceiving breathing problems as physiological as opposed to psychiatric, that has major clinical implications.

In other words, treating the asthma could allow the underlying mental-health problems to get worse. It could be that asthma and psychiatric disorders feed off each other in one vicious circle. Rather than having to choose one over the other, the researcher says the first step is to find out if some young Hispanic asthmatics benefit from psychological counseling.

Adding psychological issues to the question of what is driving America's childhood asthma epidemics complicates matters, but at the moment, most in the research community welcome the inquiry. Genetics may prove to be a bigger issue than now known, along with other factors. But the growing sentiment seems to be that asthma is a syndrome caused and fueled by many things.

For more information about childhood asthma, visit the following websites:

- More about asthma management from the National Asthma Education and Prevention Program. <http://www.nhlbisupport.com/asthma/coalitioncorner/coalition.htm>

(Continued on page 23)

- Read a Sept. 2002 report on worldwide asthma rates from the National Institutes of Health. <http://ehpnet1.niehs.nih.gov/docs/2002/110-9/niehsnews.html>
- Read an Oct. 2001 report on the relationship between violence and asthma-related deaths in urban areas, from the National Institutes of Health. <http://ehpnet1.niehs.nih.gov/docs/2001/109p1089-1089wright/abstract.html>
- The Environmental Protection Agency offers tips on managing asthma in the school environment <http://www.epa.gov/iaq/schools/asthma/index.html>.
- More about asthma from the National Center for Environmental Health, part of the Centers for Disease Control. <http://www.cdc.gov/nceh/airpollution/asthma/>
- The Community Environmental Health Resource Center offers tools for assessing health hazards in housing. <http://www.cehrc.org/>
- Read an overview of childhood asthma from the American Lung Association. <http://www2.lungusa.org/asthma/ascchildhoo.html>

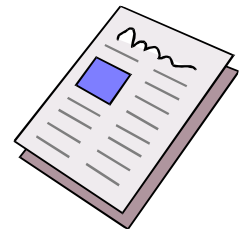
Information in this article appeared on National Public Radio (NPR).

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DAP Conference Agenda June 16-17, 2003 Sage College of Albany

Monday June 16, 2003

- | | | |
|------------|--|--|
| 12:00-1:15 | Registration (afternoon) | |
| 1:15-2:30 | Opening session: Assemblyman Gottfried and Senator Meier-Congrats on DAP 20 th anniversary
Nancy Shor, NOSSCR--Updates on Social Security Issues | |
| 2:30-2:45 | Break | |
| 2:45-3:45 | Track I
The sequential evaluation | Track II
Social Security Rulings |
| 3:45-4:00 | Break | |
| 4:00-5:30 | Track I
Step 5—Vocational experts | Track II
Understanding medical records |
| 5:30-6:30 | Room check-in | |
| 6:30-8:30 | Dinner—Talent Show | |

Tuesday June 17, 2003 (morning)

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|-------------|--|--|
| 9:00-10:00 | Ethics Panel | |
| 10:00-10:15 | Break | |
| 10:15-11:15 | Track I
Writing pre-hearing memos | Track II
Work-related issues |
| 11:15-11:30 | Break | |
| 11:30-1:00 | Track I
Mock Hearing with ALJ & VE | Track II
Advanced ALJ Issues |
| 1:00-1:15 | Closing session: Wrap up and farewells | |