Empire Justice Center

September 2006
Issue 5, 2006

DISABILITY LAW NEWS

New Ruling Emphasizes "Other Source" Evidence

The Social Security Administration (SSA) has issued a new Social Security Ruling (SSR 06-03p) entitled "Considering Opinions and Other Evidence From Sources Who Are Not 'Acceptable Medical Sources' in Disability Claims; Considering Decisions on Disability by Other Governmental and Nongovernmental Agencies." The Ruling was effective on publication. 71 Fed. Reg. 45593 (August 9, 2006) (see www.ssa.gov).

This new ruling may be most helpful in those cases where the therapist, based on weekly visits, can provide a detailed description and supportive opinion, while the MD who is there only for the occasional chat and medication management may not provide the best report. Or a nurse practitioner (NP) does the medication management so there is no "acceptable medical source" (i.e., MD or PhD) to sign a functional capacities evaluation. This SSR may well open doors long barred for many of our clients who obtain health care in clinic settings where treatment by an MD is rare.

The Commissioner, in "clarifying" agency policy, now says that SSA must consider opinions from these sources. Some of these sources are other medical sources, while others may be non-medical, such as lay witnesses. Their opinions will not be given binding effect, but they may be entitled to significant weight; they have to be considered applying the same criteria that are supposed to be applied in assessing an opinion from an acceptable medical source. This SSR differentiates among "other medical sources," "non-medical sources" who have dealt with the claimant in a professional capacity, and "non-medical sources" who have dealt with the claimant but not in a professional capacity.

The nurse practitioner suddenly gets a lot more credit: "The fact that a medical opinion is from an 'acceptable medical source' is a factor that may justify giving that opinion greater weight than an opinion from a medical source who is not an 'acceptable medical source' because, as we previously indicated in the preamble to our regulations at 65 FR 34955, dated June 1, 2000, 'acceptable medical sources' 'are the most qualified health care professionals.' However, depending on the particular facts in a case, and after applying the factors for weighing opinion evidence, an opinion from a medical source who is not an 'acceptable medical source' may outweigh the opinion of an 'acceptable medical source,' including the medical opinion

(Continued on page 2)

INSIDE THIS ISSUE:

REGULATIONS	3
COURT DECISIONS	8
ADMINISTRATIVE DECISIONS	13
CLASS ACTIONS	16
WEB NEWS	17
BULLETIN BOARD	18
END NOTE	20

Disability Law News© is published six times per year by:

Empire Justice Center
1 West Main Street, Suite 200
Rochester, NY 14614
Phone: (585) 454-4060

The newsletter is written and edited by Louise M. Tarantino, Esq., Catherine M. Callery, Esq., Barbara Samuels, Esq., Ann Biddle, Esq., and Paul M. Ryther, Esq.

September 2006 issue.

Available online at:

www.empirejustice.org

Evidence of Disability—continued

(Continued from page 1)

of a treating source. For example, it may be appropriate to give more weight to the opinion of a medical source who is not an 'acceptable medical source' if he or she has seen the individual more often than the treating source and has provided better supporting evidence and a better explanation for his or her opinion. Giving more weight to the opinion from a medical source who is not an 'acceptable medical source' than to the opinion from a treating source does not conflict with the treating source rules in 20 CFR 404.1527(d)(2) and 416.927(d)(2) and SSR 96-2p, 'Titles II and XVI: Giving Controlling Weight To Treating Source Medical Opinions.'"

Other non medical sources are also recognized: "An opinion from a 'non-medical source' who has seen the claimant in his or her professional capacity [e.g., a teacher, counselor or social worker] may, under certain circumstances, properly be determined to outweigh the opinion from a medical source, including a treating source …if the 'non-medical source' has seen the individual more often and has greater knowledge of the individual's functioning over time and if the opinion of the 'non-medical source' has better supporting evidence and is more consistent with the evidence as a whole."

Lay witness opinion, however, is not given such power to sway the decision-maker: "Since there is a requirement to consider all relevant evidence in an individual's case record, the case record should reflect the consideration of opinions from medical sources who are not 'acceptable medical sources' and from 'non-medical sources' who have seen the claimant in their professional capacity. Although there is a distinction between what an adjudicator must consider and what the adjudicator must explain in the disability determination or decision, the adjudicator generally should explain the weight given to opinions from these 'other sources,' or otherwise ensure that the discussion of the evidence in the determination or decision allows a claimant or subsequent reviewer to follow the adjudicator's reasoning, when such opinions may have an effect on the outcome of the case. In addition, when an adjudicator determines that an opinion from such a source is entitled to greater weight than a medical opinion from a treating source, the adjudicator must explain the reasons . . ."

Part II of the SSR deals with the weight to be accorded disability determinations by other agencies. The Commissioner's regulation at 20 C.F.R. §§ 404.1504, 416.904 provides that: "*A decision by any nongovernmental agency or any other governmental agency about whether you are disabled or blind is based on its rules and is not our decision about whether you are disabled or blind. We must make a disability or blindness determination based on social security law. Therefore, a determination made by another agency that you are disabled or blind is not binding on us*." A number of courts, however, have held that a disability determination by other governmental agencies, even though not binding, is entitled to great weight. Otherwise, the Commissioner would be free to ignore, for example, a Medicaid determination of disability that was based on the same statutory standard as a Social Security disability claim.

While the Commissioner continues to assert in the new SSR that SSA is not bound by such findings, the ALJ or other decision-makers must now deal expressly with evidence from such determinations. The SSR actually says that "evidence of a disability decision by another governmental or nongovernmental agency cannot be ignored and must be considered," but only admonishes adjudicators that they "should explain the consideration given to these decisions in the notice of decision for hearing cases and in the case record for initial and reconsideration cases."

That last distinction gets express treatment in Part I, in which the Commissioner notes without discussing that there is a difference between what a decision-maker must "consider," and what the decision-maker must explain in the decision. Unfortunately, courts – and advocates - may continue to be frustrated by being unable to decipher what an adjudicator considered when the adjudicator has not explained how the factor was applied in reaching the decision.

Thanks to Paul Ryther for analyzing this new SSR. Remember that since the Ruling is a clarification of the agency's previous policy, it can and should be used to argue that greater weight should have been given to "other source" evidence – even if the decision was made before the effective date of this Ruling.

REGULATIONS

SSI Income & Resources Rules Finalized

The Social Security Protection Act of 2004 (SSPA) made numerous changes to the SSI program's income and resources rules. SSA has now issued final regulations implementing these statutory changes. 71 Fed. Reg. 45375 (August 9, 2006), available online at www.ssa.gov.

Effective as final rules September 8, 2006 (although applicable generally to benefits payable after June 2004), SSA is revising the regulations dealing with calculating infrequent or irregular income; what interest and dividend income is excluded; how cash military compensation is counted; and when gifts for tuition or educational expenses are excluded from income or resources. SSA is also applying the exclusions required by the SSPA in determining the countable income and resources of an ineligible spouse or ineligible parent in deeming situations.

Excluded irregular income goes from $10 per month to $30 per quarter for earned income, and from $20 per month to $60 per quarter for unearned, applicable to benefits payable for months after June 2004. Effective September 8, 2006, the definition of "infrequent income" is tweaked to apply to money that "you receive . . . only once during a calendar quarter from a single source and you did not receive it in the month immediately preceding that month or in the month immediately subsequent to that month, regardless of whether or not these payments occur in different calendar quarters. We consider income to be received irregularly if you cannot reasonably expect to receive it."

Interest earned on resources now gets excluded from income: "when we determine your income, we will exclude interest or dividend income you earn on resources that are countable under section 1613(a) of the Act. In addition, we also will not count interest or dividend income you earn on resources that are excluded based on a Federal statute other than section 1613(a) of the Act. [42 U.S.C. §1382b(a)]. These amendments apply to benefits payable on or after July 1, 2004."

It is important to remember that even though the interest on counted resources is excluded from "income," it still will cause the resource to grow. That means a claimant can become ineligible for excess resources if the resource plus accumulated interest exceeds the limit.

For benefits payable after May 2004, gifts other than grants or awards, which actually are used to pay education tuition or fees, get an exclusion for nine months under SSPA. The regulations now cover this provision as well. The regulations now expressly state that, as worded in the preamble, "any portion of a grant, scholarship, fellowship, or gift intended to be used for tuition, fees, or other necessary educational expenses that is used for another purpose during the 9-month resource exclusion period will be counted as income in the month it is used for another purpose."

New Immune Systems Regulations Proposed

Following an Advance Notice of Proposed Rulemaking (ANPRM) in 2003 allowing preliminary input into its process, as well as a series of conferences in a few cities around the country, SSA has proposed changes to the Immune System Disorders listing, including the listing for HIV disease. The proposed changes, which cover Listings 14.00 for adults and 114.00 for children, were published in the Federal Register on August 4, 2006. 71 Fed. Reg. 44431-44464, available at www.ssa.gov. Minor corrections were made on August 15, 2006. Comments are due by October 3, 2006.

SSA has posited that its main purpose was to reorganize information, rather then remove any substantive guidance on how, in particular, HIV disease is evaluated. It did acknowledge, however, that the changes "reflect our adjudicative experience and advances in medical knowledge, treatment, and methods of evaluating immune system disorders," as well as the comments received in response to the ANPRM, and at the conferences.

The listing has indeed been reorganized, especially the introductory material, which is now presented in an easier to read Q & A format. The preface is organized into three categories: Autoimmune disorders; Immune deficiency disorders, excluding HIV infection; and HIV infection. A definition of each is included, along with an overarching definition: "We evaluate immune system disorders that cause dysfunction in one or more components of your immune system."

SSA also removed all "reference listings" – or those that simply referred back to the criteria of another listing, such as current listing 14.08G1's reference to the anemia listing at 7.02. Instead, introductory language provides "general guidance" referring to other relevant listings. Some reference listings, such as 14.06 for undifferentiated connective tissue disorders, have been replaced with specific criteria. Other listings, such as the Musculoskeletal and Skin Disorders Listings now include cross-references to the immune listings.

Other significant changes include the elevation of Sjögren's Syndrome, among others, to a listed disorder (14.10). Documentation of Sjögren's will generally follow the criteria in the most recent edition of the Arthritis Foundation's *Primer on Rheumatic Diseases.* The *Primer* is also relevant to other diagnoses, including that of Inflammatory arthritides. Note that Barbara Samuels of LSNY has copy of the 12th edition, and will make it available to DAP advocates as needed.

In terms of the HIV listing (14.08), §14.00F begins with the statement: "Any individual with HIV infection, including one with a diagnosis of acquired immune deficiency syndrome (AIDS), may be found disabled under 14.08 if his or her impairment meets the criteria in that listing or is medically equivalent to the criteria in that listing." This serves a reminder to adjudicators that one need not have a CD4 of less than 200 to meet or equal the listing. At the same time, the preface at §14.00F12 continues to emphasize that a reduced CD4 count alone does not document the severity or functional limitations of HIV infection, even one of less than 100.

Section 14.00F would add several tests to the list of laboratory tests used to document a definitive diagnosis of HIV infection, including those testing viral load. Section 14.00F1b continues to allow HIV infection to be documented in the absence of such test results by medical history or other laboratory or clinical findings, including diagnoses of other opportunistic diseases associated with HIV infection, such as Pneumocystis carinii pneumonia (PCP) or toxoplasmosis of the brain.

SSA would also accept "other appropriate evidence" as documentation of the manifestations of HIV infection in the absence of definitive diagnoses. Section 14.00F3b acknowledges: "For example, many conditions are now commonly diagnosed based on some or all of the following: Medical history, clinical manifestations, laboratory findings (including appropriate medically acceptable imaging), and treatment responses." It goes on to state that presumptive diagnoses can be made for PCP, cytomegalovirus (CMV) diseases, and toxoplasmosis of the brain. Therefore, lack of a sputum test or bronchoscopy to confirm the PCP diagnosis, or the absence of a brain biopsy to

(Continued on page 5)

Immune System Regulations—continued

(Continued from page 4)

confirm toxoplasmosis of the brain would no longer preclude a finding that the listing is met or equaled.

The section on effect of treatment would be significantly expanded under the proposed regulations for all immune disorders, including HIV infection. SSA agrees that the effects of treatment should be considered at Step three of the sequential evaluation, not just in considering residual functional capacity. It also acknowledges that claimants may experience interactive and cumulative effects of treatment not just for immune disorders but also for other disorders that people with immune disorders may have. §14.00G1f: "For example, many individuals with immune system disorders receive treatment both for their immune system disorders and for the manifestations of the disorders or co-occurring impairments, such as treatment for HIV infection and hepatitis C. The interactive and cumulative effects of these treatments may be greater than the effects of each treatment considered separately."

In considering the effect of treatment, the proposed regulations also consider the intrusiveness and complexity of treatment (e.g., dosing schedule, need for injections), and significantly, the effect of treatment on mental functioning (e.g., cognitive changes, mood disturbances). Variability of response to treatment would also be considered, with an emphasis on the longitudinal picture rather than good days and bad days.

Effects of treatment on autoimmune disorders would be considered under 14.00G3. Considerations would include more examples than previously included in 14.00B6e: long term effects of corticosteroid treatments, including ischemic necrosis, cataracts, weight gain, glucose intolerance, increased susceptibility to infection and osteoporosis, in addition to effects on cognition.

Section 14.00G4 clarifies the effect of treatment on immune deficiency disorders, excluding HIV infection. SSA specifically references the extent to which a frequent need for treatment such as intravenous immunoglobulin and gamma interferon therapy could interfere with the ability to work on a sustained basis. (14.00G4.) Chronic side effects such as shortness of breath, fever, headaches, high blood pressure, joint swelling, muscle aches, nausea or limitations in mental functioning will also be considered.

Treatment specific to HIV infection would be evaluated under §14.00G5. The list of possible side-effects to antiretroviral drugs and other medications used to treat HIV infection includes effects on mental function, cognition, memory, concentration and mood, as well as malaise, fatigue, joint and muscle pain and insomnia. §14.00G5b also recognizes "structured treatment interruptions (STI)," reminding adjudicators that STIs do not necessarily imply that the claimant's medical condition has improved or that the claimant is noncompliant.

Finally, the proposed regulations at 14.00G6 provide guidance for those situations where there is no record of treatment, including but not limited to needing to wait to determine the effect of treatment. The section also acknowledges that while lack of treatment may preclude a finding that the impairment meets a listing, an immune system impairment may still medically equal a listing or be disabling at Steps four or five.

Section 14.00H specifies how "symptoms" are to be evaluated, including "constitutional symptoms" or pain. "Constitutional" symptoms include pain, fatigue and malaise. SSA agreed with commenters who suggested including these criteria for evaluating the overall functional capacity impact of *all* immune disorders, not just HIV infections.

Section 14.00I, entitled "How do we use the functional criteria in these listings?," corresponds to the current §14.008, but as with several other changes, would apply to all immune disorders, not just HIV infection. This means that the more expansive definition of "marked" in the current section will be more broadly applicable. "HIV related fatigue" would now be symptoms such as pain, fatigue and anxiety.

Section 14.00J clarifies that the listings are only examples of immune system disorders severe enough to be considered disabling. It refers to the other listings that should also be considered

(Continued on page 6)

Don't Lose Your Social Security Card

New SSA regulations issued in July 2006, which adopted interim final rules published in December 2005, limit the number of "replacement" Social Security Number (SSN) cards a person may obtain. 71 Fed. Reg. 43054 (July 31, 2006). "These regulations reflect and implement . . . Section 7213(a)(1)(A) of Pub. L. 108-458 [the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), amending the Social Security Act, which] requires that we limit individuals to three replacement SSN cards per year and ten replacement SSN cards during a lifetime. The provision permits us to allow for reasonable exceptions from these limits on a case-by-case basis in compelling circumstances. . . ."

Astute observers will note that SSA will no longer issue "duplicate" cards, as identified in the interim regulations, but "replacement" cards instead. Exceptions to the limits on number of replacement cards include "legal" name change and "restrictive legend" (i.e., alien status) changes. Also, "We will grant an exception to the limits on a case-by-case basis if the individual provides evidence of hardship, such as a referral letter from a governmental social services agency indicating that the SSN card must be shown in order to obtain benefits or services."

SSA's preamble states that the reference to name changes was revised to limit them to "legal" changes, in order to provide "a more precise description of the kind of name change we intended as a basis for a replacement card . . . We . . . only accept name changes that can be verified by documentation obtained through a legal process." In other words, a common law name change, recognized in most states, will not suffice.

These regulations were effective December 16, 2005, the date of the issuance of the interim final regulations.

Immune System Regulations—continued

(Continued from page 5)

In comparison to the proposed preamble changes, the changes to the listings themselves are relatively minor, with the exception of the removal of the reference listings and addition of Sjögren's as described above. SSA professes to not make any substantive changes to 14.08 (HIV). Once again, the reference listings are removed. Listing 14.008B2 is reorganized to make it clearer that candidiasis involving only the esophagus, trachea, bronchi, or lungs, or any site other than the skin, urinary tract, or oral or vulvovaginal mucous membranes meets the listing. Listing 14.08C2 (PCP) would be moved from the listing for protozoan and helminthic infections to the listing for fungal infections, and redesignated 14.08B7, since it is now known that fungal infections cause PCP.

The "catch-all" 14.00N listing will be redesignated 14.00K. It would be expanded to include "pancreatitis, hepatitis, peripheral neuropathy, glucose intolerance, muscle weakness, and cognitive or other mental impairments" as new examples. "Nausea, vomiting, headaches or insomnia" would also be added as symptoms. "Restriction" and "difficulties" would be replaced with "limitations."

Similar changes are proposed to the childhood immune disorder listings at 114.00. All of these changes, if promulgated, would be effective for eight years. Of note is that claimants approved under the old listings will not be subject to review under the new ones.

Advocates will generally find that while some additional changes may have been welcomed, for the most part, these proposed changes should be helpful to claimants. Remember that they are currently in proposed form only, and will not be final until after SSA has reviewed the comments submitted and promulgates them in final form. Once again, comments are due to SSA by October 3, 2006.

Problems with Fee Withholding To Be Resolved?

Several advocates have posted complaints on the DAP listserv regarding withholding of attorneys' fees in cases where the fees have been waived by a legal services representative on the Appointment of Representative form (SSA 1696). Suggestions to rectify this problem included writing to the Office of Central Operations before any withholding occurs, calling the manager or supervisor of the District Office, or contacting the Regional Commissioner's office if all else fails. These are all great ideas to eliminate the delay in getting needed funds to our clients.

SSA recently announced that it was going to start collecting representative social security numbers as part of its record keeping system for reimbursing representatives, both attorney and non-attorney, when fees are paid out of funds withheld from past-due benefits when the claimant wins. 71 Fed. Reg. 42164 (July 25, 2006), available at www.ssa.gov.

"Changes in the Internal Revenue Service Federal Income Tax Regulations . . . require SSA . . . to issue 1099-MISC information returns for aggregate payments of $600.00 or more in a calendar year. The returns must be filed whether or not the services were performed for SSA. Therefore, representatives who meet the requirements to receive representational fee payments and do not waive payment from SSA could meet the reporting requirement of the IRC. Further, when the attorney or representative works for an employer (e.g., law firm, partnership or other business entity) and we have the employer's name, address and EIN [Employer Identification Number] information in our file a 1099-MISC information return will also be issued to the employer. . . ."

"Further, the Debt Collection Improvement Act of 1996, 31 U.S.C. 7701, requires all persons doing business with a federal agency to provide TINs/SSNs. . . ."

So, it would seem that if a representative fails to provide either a personal SSN or if a business does not provide EIN information, no payment could be issued out of retroactive benefits. We will see if this regulatory change may help our clients in the long run. SSA has invited public comment on this proposal. In the meantime, continue to carefully note your waiver of payment on the 1696 and follow through with the suggestions listed above to prevent withholding in the first instance.

Oral Requests Accepted? Don't Go There!

SSA is always looking for ways to make it easier for us and our clients to "do business" with the agency. At least that's its rationale for a change in procedures that would allowed SSA to accept oral requests from claimants in person or by telephone when requesting administrative review in Title II cases. Our advice on this one? Don't go there. We think a paper trail continues to provide protections for our clients in the "he said, she said" battle with SSA about whether a deadline was met or a request was actually filed. The notice appeared in the August 14, 2006 Federal Register and was effective as of that date. 71 Fed. Reg. 46535 available at www.ssa.gov.

Word just in that SSA has seen the error of its ways and rescinded its policy change! In the September 12, 2006 Federal Register, 71 Fed. Reg. 53737, SSA announced that it discovered this change would not provide the same protections to the claimant that exists in the current process. We could have told them that! However, SSA will honor any oral requests that it received from August 14, 2006, until the effective date of this withdrawal notice on September 12, 2006. Keep this in mind for those few claimants who may have tried to request administrative review through an oral request.

COURT DECISIONS

Pronti Litigation Concludes

The *Pronti* litigation has recently drawn to a close. Readers of this newsletter will undoubtedly be familiar with this case, which challenged the generalized bias of former Administrative Law Judge Franklin T. Russell. *See Pronti v. Barnhart,* 339 F.Supp.2d 480 (W.D.N.Y. 2004) (*Pronti I*), in which Judge David Larimer remanded Ms. Pronti's case, along with several others, for further proceedings regarding plaintiffs' claims of general bias on the part of the ALJ. The case was brought by Attorney David Ralph of the Elmira office of LAWNY; the companion cases were prosecuted by private attorneys Andy Rothstein of Elmira and Bill McDonald of Geneva.

Following the remand order, the Social Security Administration (SSA) actually issued an administrative decision ("Agency Decision") finding that ALJ Russell had in fact denied claimants due process by depriving them of full and fair hearings. *See* the March 2006 edition of the *Disability Law News.* SSA agreed to remand any cases pending in District Court over which ALJ Russell presided. It subsequently agreed to remand any of Russell's cases pending at the Appeals Council as well. And ALJ Russell, who was put on administrative leave after SSA's decision in November 2005, formally "retired" in June 2006.

After SSA filed its Agency Decision with the Court, the plaintiffs moved for a declaratory judgment that ALJ Russell is and was generally biased against all Social Security claimants, and asked the Court to determine that the Commissioner failed to provide full and fair hearings to all claimants, past and present, whose cases were decided by Russell. On August 3, 2006, Judge Larimer issued a decision denying plaintiffs' motion. ---F.Supp.2d ---, 2006 WL 2166189 (W.D.N.Y. 2006).

Although the Court declined to exercise its jurisdiction under 42 U.S.C. §405(g) to review the Agency Decision, Judge Larimer recognized that he had the authority to do so. 2006 WL 21661869 *12, n. 7. He held, however, that "[t]o do so would serve no useful purpose." Since he had essentially put on hold the determinations on the merits of the individual claims of the plaintiffs pending the outcome of the bias proceedings, he decided that "[i]n light of the favorable decision regarding the issues concerning ALJ Russell, there is no reason to delay the administrative proceedings any further." Id. at *13.

Judge Larimer also agreed with the plaintiffs' arguments that the Commissioner had not fully complied with the Court's remand order and instructions, in that the Commissioner "made no specific, direct findings on the issue presented: whether ALJ Russell had a general bias or not." Id. at *14. He nonetheless concluded that the plaintiffs had not been harmed as a result of the Commissioner's "evasive" tactics. Nor did he believe that plaintiffs could attack the processes employed by the Commissioner pursuant to the "Interim Procedures" in place for investigating complaints against ALJs, although he clearly agreed with the plaintiffs that the procedures are inadequate. He found, however, that the plaintiffs had not claimed they were unable to adequately present their evidence of bias, nor were they ultimately harmed by the manner in which the investigation - long and tortured as it was – was conducted.

Finally, Judge Larimer concluded that there was no case or controversy ripe for determination as to the named plaintiffs. He held that "a declaratory judgment by the Court that ALJ Russell holds a general bias against all claimants would serve no usual purpose in clarifying or settling the legal issues involved in these particular cases, and would not finalize any controversy between the plaintiffs and the Commissioner." Id. at *17. He acknowledged that although the Commissioner did not make an explicit finding regarding "general bias," the Agency Decision was clearly favorable to the plaintiffs. Additionally, he had been reassured that ALJ Russell was no longer

(Continued on page 9)

Pronti Litigation Continues—continued

(Continued from page 8)

acting as an ALJ. Finally, he concluded that he could not make a declaration as to the rights of other claimants not parties to the cases before him.

So – the end of an era? Certainly it is for those claimants and advocates who suffered through the frustration and disappointment of appearing before ALJ Russell. The work of David, Andy and Bill – and the other attorneys who supported the litigation with their affidavits detailing Russell's many transgressions – is to be applauded. First, it has the world a better place for claimants and their advocates. Second, it has put SSA on notice that advocates – and the courts – can and will successfully protest illegal behavior by ALJs. Finally, it has made the courts aware of the inherent inadequacies of SSA's own "complaint" process – an area that may be ripe for further adjudication.

And the era will live on. The Empire justice Center is preparing follow up litigation seeking relief for those claimants who were denied by ALJ Russell, but not afforded relief under *Pronti.* Do you know of claimants who received a denial, dismissal or partially favorable decision from ALJ Russell, but did not appeal (either to the Appeals Council or to Federal Court) within the 60-day time limit and ideally was *pro se* at the time? Maybe you have some current clients who had earlier applications that they did not appeal? Or perhaps you have contacts with local agencies that could help find such claimants? If so, please contact us as soon as possible.

And in the meantime, remember that - like David Ralph - you can fight City Hall.

Immigrants May Be Entitled to State Payments

A reminder (to some folks, and news to others): New York State refugees, asylees, and other immigrants who exceed the seven year time limit for SSI and therefore no longer receive that benefit, or immigrants who never received SSI at all solely because of immigration status, may be entitled to extra assistance from the State if they are in eviction proceedings or if they have been given a utility shut-off notice.

This assistance comes pursuant to an interim First Department ruling in *Khrapunskiy v. Doar*, the State Court lawsuit challenging public assistance levels for elderly, blind and disabled persons who are ineligible for SSI solely because of immigration status.

For more information, or to refer a disabled or elderly immigrant client who may be entitled to extra assistance because he or she is in eviction proceedings or has a utility shut off notice, please contact *Khrapunskiy* counsel, below:

Upstate advocates should contact Barbara Weiner at the Empire Justice Center (518-462-6831; bweiner@empirejustice.org),

Advocates from NYC and Long Island should contact Jennifer Baum at Legal Aid (212-577-3266, jbaum@legal-aid.org) or Constance Carden at NYLAG (212-613-5030, ccarden@nylag.org).

Judge Remands for Benefits in Kid's Case

It is satisfying to have a court agree with one's arguments – especially when it means the immediate calculation of benefits for the client. In a recent child's case in the Western District of New York, Judge Siragusa accepted the arguments made by the Empire Justice Center on behalf of an eight year old boy with low IQ scores and ADHD. He agreed that K.E. met Listings 112.05D & E for mental retardation.

In so doing, Judge Siragusa agreed with plaintiff's argument that the ALJ erred in ignoring the evidence of record that K.E.'s IQ scores were within the mentally retarded range. Despite the consultative examiner's conclusion that K.E.'s "true score fell somewhere between 57 and 76," Judge Siragusa noted that the tests scores below 70 were obtained on the Bayley Scales of Infant Development. The Court agreed that since they were based on a mean of 100 and standard deviation of 15, they were acceptable under the Commissioner's listings regulations.

Despite ignoring evidence of retardation, the ALJ had found that K.E.'s other impairments, including ADHD, developmental delays, and speech and fine motor delays, were all severe. Judge Siragusa agreed that they thus met the Commissioner's definition of a secondary impairment under Listing 112.05D. The Court relied on the language published by the Commissioner to this effect in conjunction with the promulgation of changes to the mental impairment listings in 2000. See 65 Fed. Reg. 50784 (August 21, 2000). The Court also referred to SSA Pub. No. 64-076 (March 1998) (Childhood Disability Evaluation 1998) at 49 & n.3 for the proposition that a "significant limitation" need not be "marked," to meet 112.05D.

In finding that K.E. also met Listing 112.05E, Judge Siragusa agreed with the plaintiff that K.E. had an extreme limitation in the domain of acquiring and using information. He found that the ALJ erred in not considering the report of K.E.'s teacher in reaching his conclusion that K.E. had only a marked impairment in this domain. For similar reasons, he also agreed that the ALJ erred in finding that K.E. had a less than marked impairment in attending and completing tasks. He faulted the ALJ for relying on one report that noted that K.E. could maintain fair attention under "ideal conditions." He also criticized the ALJ for relying on a report that characterized K.E. as a "sweet and cooperative little boy," when this was not supported by later teacher evaluations.

Finally, Judge Siragusa agreed that the ALJ had impermissibly relied on his own speculation that K.E.'s Ritalin, if at therapeutic levels, would improve his abilities in the domain of attending and completing tasks. He faulted the ALJ for substituting his own opinion for competent medical evidence.

Judge Siragusa's decision in *Katina Edmond o/b/o K.E. v. Barnhart* is available as DAP #434.

Medicare Part D Redeterminations Begin

DAP advocates may soon begin hearing from clients who have received "Notices of Review" from SSA for "Medicare Prescription Drug Assistance." What are these notices? They pertain to reviews of claimants' continued eligibility for "extra help" with Medicare Part D costs. For those who have been living on another planet for the past year of so, Medicare Part D provides prescription drug coverage. Read more about it and its implications for SSI/SSD recipients in the November 2005 edition of the *Disability Law News.*

Eligibility reviews for continued "extra help" – or subsidies – began in August. The Centers for Medicare and Medicaid Services (CMS) is conducting the reviews of those beneficiaries who are automatically eligible for "extra help" with the Part D premiums. Those include SSI only recipients, and those enrolled in Medicaid or Medicare Savings Programs (QMB, SLMB, QI-1. See the July and September 2004 editions of the *Disability Law News* for more on these programs).

SSA will be doing the redeterminations for those claimants who had to apply for the extra help. For more information about these redeterminations, see "A Brief Overview of Medicare Part D. Redeterminations for 2007," available as DAP #435 on the Empire Justice Center's on-line resource center.

Incomplete Hypothetical Leads to Remand

In another case from the Western District, Judge Siragusa choose to remand rather than reverse where the hypothetical question upon which the ALJ relied failed to describe the claimant's limitations completely. The claimant, who was represented on appeal by the Empire Justice Center, suffered from bilateral carpal tunnel syndrome. Despite acknowledged limitations in grasping, the ALJ found that she could perform work as call-out operator or the oft-cited position of surveillance system monitor.

On appeal, plaintiff argued that she could not perform either of these jobs because of her limitations in fine manipulation. Additionally, she argued that 48 surveillance system monitor positions regionally and 5,476 nationally were not significant enough numbers, citing among other precedents Judge Siragusa's own decision in *Kuleszo v. Barnhart*, 232 F.Supp. 2d 44, 55 (W.D.N.Y. 2002). In *Kuleszo*, Judge Siragusa not only found that the numbers cited by the VE were insufficient, but went on to hold:

> Even if the VE's testimony could be taken at face value that plaintiff could perform the job of surveillance system monitor, plaintiff would still be entitled to a finding of disability. SSR 96-9p states that a finding of "disabled" usually applies when the full range of sedentary work is significantly eroded. The existence of only one unskilled sedentary job, *i.e.* surveillance system monitor, indicates that the full range of sedentary work is significantly eroded.

232 F. Supp 2d at 55.

The government had initially opposed plaintiff's motion. At oral argument, however, the defendant's attorney conceded that the hypothetical was inadequate. Judge Siragusa thus relied on this concession in remanding the case, and did not reach the other issues raised by the plaintiff. At oral argument, however, he implied that he might rethink his decision in *Kuleszo.* He also raised the question of preservation of issues, in that the claimant's representative in this case had in essence agreed to the hypothetical that was posed.

The hypothetical had been sent to the representative after the hearing, and the representative had requested an addition as to limited grasping, but not as to limited manipulation. The representative had, however, ably argued in a post hearing memorandum that the claimant could not do the jobs cited, and challenged numerosity.

Judge Siragusa questioned whether the issue had been waived, citing *Logan v. Barnhart*, 72 Fed.Appx. 488 (7th Cir. 2003). In dicta, the Court in *Logan* relied on *Kepple v. Massanari*, 268 F.3d 513, 516-17 (7th Cir.2001), for the proposition that failure to raise an issue at the ALJ level could lead to forfeiture of the issue. According to *Kepple*, the Supreme Court's decision in *Sims v. Apfel*, 530 U.S. 103, 120 S.Ct. 2080, 147 L.Ed.2d 80 (2000), holding that for purposes of judicial review, a claimant does not waive an issue by failing to raise it before the Appeals Council, did not resolve whether a claimant waives an issue by failing to raise it before the ALJ.

Judge Siragusa did not follow this reasoning in his decision. Nor is it clear that other circuits would follow the Seventh Circuit in this regard. It should nonetheless serve as a reminder to all of us how important it is to raise issues and preserve the record at the hearing level.

Rob Cisneros of the While Plains office of Empire Justice did an excellent job of raising all the issues at the judicial level in this case. Judge Siragusa's decision in *Maysonet v. Barnhart* and Rob's memorandum, which includes a number of citations to cases involving fine manipulation in surveillance system monitor jobs, as well as the numerosity of such jobs, are available as DAP #436.

Reversal Ordered for Child's SSI Case

One of the DAP masters in handling children's SSI cases is Jim Baker from the Center for Disability Advocacy Rights (CeDar) in New York City. Jim recently obtained a fabulous magistrate's decision, which was adopted without change by the District Court.

In his 58 page decision, the Magistrate sets forth with great detail, and sympathy, the overwhelming symptoms of disability from which Jim's client suffered. Jim argued that his client had marked or extreme limitations in three domains of functioning: interacting and relating with others, attending and completing tasks, and caring for oneself. Jim also argued marked limitations in two other domains, acquiring and using information, and health and physical well-being. The evidence was abundant in each of these domains.

In the domain of attending and completing tasks, the Magistrate dismissed the Commissioner's argument that the child had less than marked limitation of function because the child's behavior seemed to improve during a two-month period where the child received weekly psychotherapy. The Magistrate noted that improved behavior in a highly structured setting did not undercut a finding of at least a marked and possibly an extreme limitation of functioning in that domain.

The Commissioner argued that the child had less than a marked impairment in the domain of interacting and relating with others because the treating doctor diagnosed a moderate conduct disorder. The Commissioner submitted that this diagnosis did not support a finding of a marked or extreme limitation. The Magistrate pointed to the *DSM-IV-TR* definition of a moderate conduct disorder, and found that it was consistent with a marked limitation in this domain.

The Commissioner argued that the child's GAF scores between 41 and 50 indicated only a moderate degree of interference in functioning, thus failing to meet the disability level set forth, i.e., a marked impairment. The Magistrate dismissed this argument, noting that the adjective moderate describes the degree of limitation of functioning in most social areas, not simply in one area, and that the Commissioner had to consider the interactive and cumulative effects of all impairments under her regulations.

Additionally, the child suffered from a speech disorder that was totally ignored by the ALJ. Given the interactive and cumulative effects of the child's social immaturity, physical aggression towards other, and limitations in speech and language, the Magistrate found a marked, if not an extreme, limitation of function in this domain.

The Magistrate made the same finding in the domain of caring for one's self. The five year old child was not able to feed himself due to severe esophagitis and was also unable to drink from a cup but used a bottle. Additionally, he had difficulty sleeping at night, suffered from nighttime bedwetting, had significant behavioral problems where he put himself in danger, needed constant supervision so he would not wander off or touch hot objects, and bit his lip constantly so that a blister developed. The ALJ had found less than a marked limitation in this domain because the child's weight was satisfactory despite not being able to feed himself. The Magistrate found this determination essentially irrelevant to the domain of caring for oneself.

Since he found marked, if not extreme limitations in the three domains discussed above, the Magistrate did not address the degree of limitation alleged in the other two domains. He also found the case appropriate for reversal for calculation of benefits as opposed to a remand for further administrative proceedings.

Jim's advocacy efforts were apparent in this Magistrate's decision and he deserves our congratulations. The Magistrate's decision in *Nazario o/b/o FT v. Commissioner of Social Security* (04 Civ. 2453, S.D.N.Y. May 25, 2006), adopted by the District Court on June 21, 2006, is available as DAP# 437.

ADMINISTRATIVE DECISIONS

Appeals Council Issues Reversal

All's well that ends well? An Empire Justice Center victory underscores that old adage. Doris Cortes, senior paralegal at the Empire Justice Center, represented a client before an ALJ and the Appeals Council, arguing that his IQ and speech disorder met either Listing 12.05B or C. Instead, the ALJ denied the case under the Medical-Vocational Guidelines (the "grid.")

When SSA offered a voluntary remand at the federal court level, Kate Callery boldly refused, sure that this case was a winner. Not so – see *Antonetti v. Barnhart,* 399 F.Supp.2d 199 (W.D.N.Y. 2005). Although Judge David Larimer of the Western District seemed to agree that the client was retarded and that he had a significant speech impairment, he nonetheless remanded the claim to give the Commissioner the opportunity to consider the listing. He did rule, however, that an impairment qualifies as a "secondary" impairment under 12.05C if it meets the severity test at Step two of the Sequential Evaluation.

Disappointed by the remand, Doris was preparing to forge ahead with another hearing, when, lo and behold, the Appeals Council issued a fully favorable decision. Still ignoring the 12.05B claim, the Appeals Council found that the claimant met 12.05C, noting among other things the number of times the claimant was inaudible or not understood on the transcript. Also of note is the fact that the claimant had been found disabled under 12.05C based on his retardation and depression pursuant to a subsequently filed application.

As an added bonus, as reported in the July 2006 edition of the *Disability Law News,* the Court awarded attorney fees to Empire Justice under EAJA (the Equal Access to Justice Act). *See Antonetti v. Barnhart,* 438 F. Supp. 2d. 145 (W.D.N.Y. 2006), holding that plaintiff could be compensated for the time spent after rejecting the remand offer. So all did end well.

Medical Expert Testimony Leads to Reversal

Advocates often have mixed feelings when they read on a hearing notice that a medical expert is scheduled to appear. But sometimes in addition to helping us bone up on our cross-examination skills, they can actually help us win the case. Andrea Sasala of Nassau-Suffolk Law Services recently used a medical expert's testimony to convince the Appeals Council to reverse an ALJ decision.

Andrea's client, who is 54 years old and suffers from low back pain, lumbosacral radiculopathy, right knee pain with lateral meniscus tear, diabetes, and migraine headaches, was denied on the first round. The ALJ found that he could perform light work, and was thus not disabled under the Grid. Andrea argued to the Appeals Council that the ALJ had ignored evidence from the treating physician. The Appeals Council took only two months to remand the claim.

On remand, the same ALJ essentially reissued the same decision, despite testimony from a Medical Expert that the claimant would have trouble doing sedentary work on a regular, reliable basis. Andrea returned to the Appeals Council, pointing out the numerous exhibits in which the treating physician and other examining physicians limited the claimant to sedentary work, consistent with the opinion of the medical expert. Based on the claimant's closely approaching advanced age, 12th grade education and skilled past relevant work, the Appeals Council found the claimant was disabled under Medical-Vocational Guidelines Rule 210.14.

Andrea reports that the whole process only took about nine months. Both she and her client were delighted by the outcome – as well they should be. Congratulations to Andrea for her determination.

The Third Time Is The Charm

Buffalo Bruce Caulfield of Neighborhood Legal Services is not one to give up easily. A recent victory of his is yet another example of his tenaciousness. Bruce's client, who applied for benefits in 1995, finally won after three hearings, two trips to the Appeals Council, and a federal court remand.

The claimant, who is now 48 years old, was 37 when she first applied, alleging morbid obesity, diabetes mellitus, anemia, bronchitis and incontinence. She weighed over 350 pounds at the time of application, and 450 pounds by 2005. Her claim was first denied by the ALJ in 1996. In 2002, the U.S. District Court remanded the claim for further findings on whether the claimant's obesity and spinal stenosis rendered her disabled. When the same ALJ yet again denied her claim, Bruce returned to the Appeals Council. This time, the Appeals Council remanded the case with orders to consider the claimant's alleged mental impairment and to obtain evidence from a vocational expert as the claimant's ability to work.

The case was heard again in February 2006 before a different ALJ, who finally listened to Bruce's arguments. This ALJ give proper credence to the treating physician's opinion that the claimant's combined impairments have totally compromised her ability to work competitively. The ALJ found that she could not return to her past relevant work as a personal care aide or security guard, since neither of those positions would permit unlimited breaks to accommodate her incontinence. Based on the hypothetical questions that the ALJ and Bruce formulated, the Vocational Expert agreed that she would be unable to find work that exists in significant numbers in the national economy.

Thanks to Bruce's perseverance, the claimant was found disabled prior to her date last insured in 1997. She was awarded retroactive SSI/SSD benefits of $62,169. Bruce estimates that between him and Alan Block, it took over one hundred hours to achieve that result!

Can You Hear This?

At the same time that Social Security is broadening its foray into the brave new world of electronic files, it is revisiting an earlier technological advance: digital recordings. For the past several years, essentially all hearing offices have been using digital recording equipment to record hearing proceedings. The recordings were saved digitally in the *For the Record* (FTR) file format. When advocates or claimants requested duplicates of the recordings, the Office of Appellate Operations (OAO) reformatted the four track FTR recordings into a two track compact disc audio (CDA) format. According to OAO, claimants or representatives could listen to the recordings on an audio CD player or personal computer with media players such as Windows or Winamp.

The quality of the reformatted recordings, however, has led many advocates to complain to SSA. As a result, SSA will begin issuing duplicate recordings in the original, proprietary file format (FTR) to representatives. OAO will include with each CD instructions for downloading the free FTR player, as well as instructions for using it. The CDA reformatted version will still be issued to claimants.

According to SSA, the FTR formatted recordings will be of better quality than the CDA reformatted version. The change will also be less time consuming and error prone. A copy of the June 1, 2006 memo from William Taylor, Executive Director of ODAR, explaining these changes, along with instructions for listening to the FTR CDs, is available on the Empire Justice Center's on-line resource center as DAP #438.

GAO Reports on SSA Concerns

The Government Accountability Office (GAO) has once again taken SSA to task on several issues. The GAO has issued a report entitled "Agency Is Positioning Itself to Implement Its New Disability Determination Process, but Key Facets Are Still in Development," GAO-06-779T, June 15, 2006.

In reviewing SSA's new DSI (Disability Service Improvement process – which was described in detail in the May 2006 *Disability Law News*), the GAO was asked to testify on (1) public and stakeholder concerns about the elimination of the Appeals Council and its replacement by the Decision Review Board and SSA's response to these concerns, as well as (2) the steps that SSA has taken to help facilitate a smooth implementation of the DSI process.

The GAO identified the stakeholders' concerns as generally falling into two areas: (1) increased workload for the federal courts, and (2) hardships for claimants attempting to maneuver potentially more difficult federal court rather than administrative appeals. SSA's responses to those concerns included its claim that the changes implemented by DSI will reduce the need for federal court. It also claimed that its enhanced reviews earlier in the process will make up for claimants' loss of the right to Appeals Council reviews.

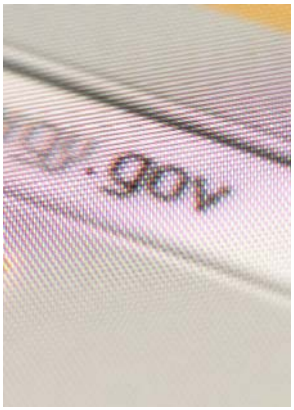
The GAO approved of SSA's plan to implement these changes gradually in the Boston region, but concluded that its timetable was still ambitious. The GAO recognized that to implement DSI successfully, SSA needs human capital development, technology advances and quality assurance improvements. While SSA has moved forward in some of these key areas, especially electronic files, it has left itself little time to deal with glitches along the way.

Similarly, according the GAO, SSA has laid a foundation for better Quality Assurance reviews by centralizing the reviews and creating writing tools to help ensure consistent decisions. Key facets of plans to monitor the implementation of the program in the Boston region, however, still need to be developed: "For example, performance measures for assessing the execution of the rollout are still unclear to us, and mechanisms for delivering feedback to staff on the clarity and soundness of their decision writing have not yet been fully developed."

GAO Report 06-196, issued on April 28, 2006, found that additional action is needed to prevent improper payments under the Social Security Protection Act (SSPA). Section 211 of the SSPA provides that noncitizens with Social Security numbers issued after 2003 need to demonstrate their work authorization status – for both current and past work – in order to collect benefits. SSA found that despite detailed procedures, there has been an absence of internal controls that have led to undetected errors. Ironically, most of SSA's errors were in favor of claimants: SSA improperly approved 17 of 199 claims in which claimants were issued Social Security numbers post 2003. Only one of the 41 claims that were disapproved was found to be erroneous. The GAO predicts that the number of claims affected will increase as more Social Security numbers are issued to noncitizens, especially to noncitzens whose work would not be considered "authorized" under a temporary visa.

Finally, GAO 06-49, issued on May 17, 2006, raised continuing concerns about identity theft. The GAO reviewed the distribution of Social Security numbers by "resellers" of personal data, who typically offer their services for background or criminal checks. While few resellers offered full Social Security numbers, there was no uniformity regarding how truncated numbers were released (first five numbers versus final four numbers). SSA acknowledged that it has no authority over how the numbers were issued or released, and the GAO found that were few if any laws or industry standards that address these issues. It concluded that Congress should consider standards for truncating Social Security numbers.

All GAO reports are available at www.gao.gov.



CLASS ACTIONS

Kendrick, et al. v. Sullivan, 90 Civ. 3776 (S.D.N.Y) (Ward. J) ("the ALJ bias case")

Description - June 1990 complaint on behalf of proposed class of persons who appeared, or would appear, before ALJ Helen Anyel (of the New York City OHA), alleges that the ALJ is biased against claimants seeking Social Security benefits and unfit to decide claims. The court certified a class and denied SSA's motion to dismiss. SSA also commenced a formal removal proceeding before the Merit Systems Protection Board ("MSPB").

Relief - SSA suspended Anyel with pay from June 1991 to May 1995, and then agreed to an MSPB approved settlement suspending her without pay for one month in 1995, and prohibited her from presiding in Social Security Act cases for one year. Pursuant to a 1995 *Kendrick* settlement, SSA mailed notices in April 1997 offering full reopenings for all claims dismissed, denied, or terminated by Anyel in New York or Chicago from 9/25/77 to 5/22/95.

Citations - *Kendrick v. Sullivan*, 784 F. Supp. 94 (1992) (district court certified class and denied motions to dismiss), *subsequent settlement, Kendrick v. Shalala.* (December 17, 1995). *See also,* multiple MSPB decisions (1/16/92 unpublished recommended decision of MSPB Chief ALJ, Edward J. Reidy; *SSA v. Anyel*, 58 M.S.P.R. 261 (6/25/93); 8/11/94 unpublished proposed settlement of MSPB action; 9/16/94 recommended decision of MSPB Chief ALJ Paul G. Streb; 1/25/95 final decision and order of MSPB.

Information - Toby Golick, Betzedek Legal Service, Cardozo School of Law (212-790-0240); Ann Biddle or Malcom Spector, Legal Services for the Elderly (212-391-0120).

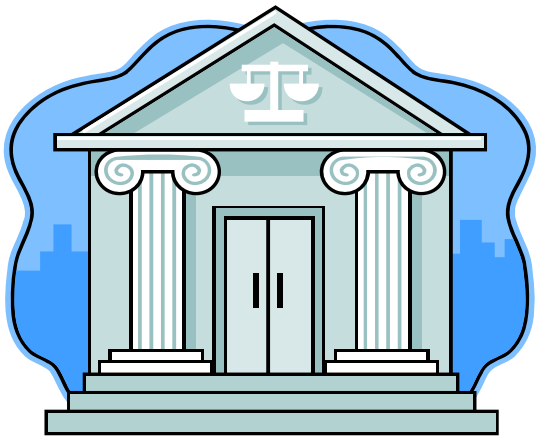
Greenawalt v. Apfel, 99-CV-2481 (E.D.N.Y. 1999) ("personal conference in SSI waiver case")

Description—Plaintiffs challenged SSA's practice of denying requests for waivers of overpayments in SSI cases without giving a claimant an opportunity for a personal conference.

Relief—The settlement in *Greenawalt* extended the personal conference procedure applied to SSI claimants residing in Pennsylvania [*see, Page v. Schweiker*, 571 F. Supp. 872 (E.D. Pa. 1983)] to all SSI claimants nationwide. As a result of the settlement in the case, SSA agreed to stop denying SSI overpayment waiver requests until claimants are given a personal conference.

Citations - None

Information - Peter Vollmer, Vollmer & Tanck, (516) 228-3381; Pvollmer96@aol.com.



WEB NEWS

SSA 50th Anniversary Edition

The Social Security Disability Insurance program celebrates its 50th anniversary in 2006. As part of SSA's recognition of this milestone, the agency has put out information from across decades of program data in a user-friendly format that is accessible to both the disability policy researcher and the interested private citizen. The topics covered are:
- program cost and size;
- entry into and exit from the disability programs;
- population factors influencing program size;
- changes in the program policy influencing program size;
- changes in incentives influencing program size; and
- projected future course for SSA programs.

http://www.socialsecurity.gov/policy/docs/chartbooks/disability_trends/index.html

History Lessons About Social Security

SSA's website also has an interesting section on the history of the agency and it various programs, including legislative history, early speeches and documents, and a historical chronology through the ages of Social Security.

http://www.ssa.gov/history/index.html

Study on Children Released

The Schuyler Center for Analysis and Advocacy (SCAA) released a new study entitled *Growing Up In New York: Charting the Next Generation of Workers, Citizens and Leaders*. It's a compilation of charts on child well-being in New York State. The study presents findings in seven areas – education, birth-to-five, health, mental health, economic security, child welfare and youth.

http://www.scaany.org/resources/Chartbook.php

Public Defender Contact Listed

Advocates handling fleeing felon cases may need to contact public defenders in far off places. Thanks to the folks who manage reentry.net, including McGregor Smyth at The Bronx Defenders, here is a link to find public defenders across the country:

http://www.reentry.net/link.cfm?6486.

For extensive resources on resolving fleeing felon issues, visit http://www.reentry.net/link.cfm?6487. Make sure to login first at www.reentry.net/login.cfm, or do a quick, free registration at www.reentry.net/ny/jointhisarea.cfm.

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. Thomas, 124 S. Ct. 376 (2003)

The Supreme Court upheld SSA's determination that it can find a claimant not disabled at Step Four of the sequential evaluation without investigation whether her past relevant work actually exists in significant numbers in the national economy. A unanimous Court deferred to the Commissioner's interpretation that an ability to return to past relevant work can be the basis for a denial, even if the job is now obsolete and the claimant could otherwise prevail at Step Five (the "grids"). Adopted by SSA as AR 05-1c.

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 possiblity 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 USC §405(g) sentence four remands and sentence six remands.

SECOND CIRCUIT DECISIONS

Torres* v. *Barnhart, 417 F.3d 276 (2d Cir. 2005)

In a decision clarifying the grounds for equitable tolling, the Second Circuit found that the District Court's failure to hold an evidentiary hearing on whether a plaintiff's situation constituted "extraordinary circumstances" warranting equitable tolling was an abuse of discretion. The Court found that the plaintiff, a *pro se* litigant, was indeed diligent in pursuing his appeal but mistakenly believed that counsel who would file the appropriate federal court papers represented him. This decision continues the Second Circuit's fairly liberal approach to equitable tolling.

Pollard v. Halter, 377 F.3d 183 (2d Cir. 2004)

In a children's SSI case, the Court held that a final decision of the Commissioner is rendered when the Appeals Council issues a decision, not when the ALJ issues a decision. In this case, since the Appeals Council decision was after the effective date of the "final" childhood disability regulation, the final rules should have governed the case. The Court also held that new and material evidence submitted to the district court should be considered even though it was generated after the ALJ decision. The Court reasoned that the evidence was material because it directly supported many of the earlier contentions regarding the child's impairments.

Green-Younger v. Barnhart, 335 F.3d 99 (2d Cir. 2003)

In a fibromyalgia case, the Second Circuit ruled that "objective" findings are not required in order to make a finding of disability and that the ALJ erred as a matter of law by requiring the plaintiff to produce objective medical evidence to support her claim. Furthermore, the Court found that the treating physician's opinion should have been accorded controlling weight and that the fact that the opinion relied on the plaintiff's subjective complaints did not undermine the value of the doctor's opinion.

Encarnacion v. Barnhart, 331 F.3d 79 (2d Cir. 2003)

In a class action, plaintiffs challenged the policy of the Commissioner of Social Security of assigning no weight, in children's disability cases, to impairments which impose "less than marked" functional limitations. The district court had upheld the policy, ruling that it did not violate the requirement of 42 U.S.C. §1382c(a)(3)(G) that the Commissioner consider the combined effects of all of an individual's impairments, no matter how minor, "throughout the disability determination process." Although the Second Circuit upheld SSA's interpretation, affirming the decision of the district court, it did so on grounds that contradicted the lower court's reasoning and indicated that the policy may, in fact, violate the statute.

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 form 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.

Draegert 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.

END NOTE

Can Lasers Help You Quit Smoking?

We have all undoubtedly experienced – either first or second hand - the difficulties of withdrawing from nicotine. As advocates, we have heard our clients recount their attempts to quit; or we have watched friends and family members struggle with their addictions; or we have either quit or tried to quit ourselves. Despite the well-publicized evils of smoking, it remains for many a habit hard to beat. According to a recent article in the *Wall Street Journal*, an estimated 44.5 million Americans continue to puff away.

Many of those smokers are looking for a "magic bullet" to help them stop. One of the latest gimmicks on the market is laser therapy, although smoking-cessation experts say that there is no credible evidence that it works.

Laser therapy, sometimes called laser acupuncture, involves the shining of a low density laser beam on specific pressure points such as the ears, nose and wrist. The theory behind the practice is to stimulate endorphins, which in turn curb nicotine cravings by relaxing the patient and reducing withdrawal symptoms. The process is allegedly similar to acupuncture, and is short and painless. According to the July 25, 2006 article in the *WSJ*, sessions usually take 20 to 40 minutes. Because the lasers used are in the red and infrared spectrum, they do not feel hot on the skin. No significant side effects have been reported.

Laser centers claim that some patients need only one treatment, although some will require follow up. Costs vary widely, but the article reports that several centers quoted rates of approximately $300 for one to three treatments. Not surprisingly, laser therapy is not covered by health insurance plan.

But does it work? Not according to several experts, including the director of the Center for Tobacco Research and Intervention at the University of Wisconsin. Michael Fiore says that there is no credible evidence that lasers or needle acupuncture will help someone quit smoking. According to Fiore, the laser centers "charge a significant amount of money and prey on the hopes that there will be a magic bullet." He recommends Food and Drug Administration approved treatments such as nicotine patches, antidepressants or a new drug called Chantix, which targets the brain's nicotine receptors. Counseling also helps, including a government funded hotline at 1-800-QUIT-NOW.

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Contact Us!

Advocates can contact the DAP Support attorneys at:

Louise Tarantino
(800) 635-0355
(518) 462-6831
ltarantino@empirejustice.org

Kate Callery
(800) 724-0490 ext. 5727
(585) 295-5727
kcallery@empirejustice.org

Barbara Samuels
(646) 442-3604
bsamuels@legalsupport.org

Ann Biddle
(646) 442-3302
abiddle@lsenyc.org

Paul Ryther
(585) 657-6040
pryther@frontiernet.net

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