Empire Justice Center

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DISABILITY LAW NEWS

Second Circuit Invalidates Key Part of SSA "Fugitive Felon" Policy

The U.S. Court of Appeals for the Second Circuit has ruled that the Social Security Administration's (SSA) policy of suspending or denying Supplemental Security Income (SSI) benefits whenever there is an outstanding felony warrant is contrary to the Social Security Act and the agency's own regulations. *Fowlkes v. Adamec*, ___F.3d___ (2d Cir. 2005) 2005 WL 3292551 (Dec. 6, 2005). The case is the first interpretation by an appellate court of the Social Security Act provision that makes a person ineligible for SSI benefits if the person is "fleeing to avoid prosecution" for a felony. 42 U.S.C. §1382(e)(4)(A). The Court held that 1) the act of "fleeing" requires intent, and 2) under the Commissioner's regulations, benefits cannot be suspended unless there is a warrant or order issued by a court or other authorized tribunal on the basis of a finding that the individual fled or was fleeing to avoid prosecution.

SSA had suspended Fowlkes's benefits on the basis of two Virginia warrants, one for petit larceny and the other for a voter registration offense. SSA argued, based on its operations manual (Program Operations Manual System or POMS) that intent was irrelevant, that it did not matter whether or not Fowlkes had knowledge of the pending charges, and that the mere existence of outstanding felony arrest warrants was sufficient to establish that he was "fleeing to avoid prosecution." The Court rejected this argument and found that "the plain language of the statute and its implementing regulation do not permit the construction contained within the manuals." The Court instead held that the word "fleeing" as used in the statute "is understood to mean the conscious evasion of arrest or prosecution." The Court found further support for this construction in the cases interpreting 18 U.S.C. §3290, which provides for tolling of the statute of limitations in federal criminal cases when the defendant is "fleeing from justice." *See, Jhirad v. Ferrandina*, 486 F.2d 442, 444 (2d Cir. 1973); *U.S. v. Rivera-Ventura*, 72 F.3d 277, 280 (2d Cir. 1995).

The *Fowlkes* Court also noted that the Commissioner's own regulation, 20 C.F.R. §416.1339(b)(1), "may be stricter than the statute, insofar as it provides" that a suspension is not effective until there is "a warrant or order *issued by a court or other authorized tribunal* on the basis of a finding that an individual fled or was fleeing from justice. Thus, the regulation does not permit the *agency* to make a finding of flight; rather, it demands a court or other appropriate tribunal to have issued a warrant or order based on a finding of flight." However, it should be noted

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that just the day before the decision in *Fowlkes*, the agency published for comment proposed new regulations that would, among other things, do away with this requirement of a finding by a court or other authorized tribunal. 70 Fed. Reg. 72411 (Dec. 5, 2005). See, accompanying article in this issue.

Practice tip - If this decision is not appealed, all suspensions and denials in New York, Connecticut, and Vermont based on alleged flight to avoid prosecution or confinement after conviction should be easily reversed since none of the suspensions or denials are in compliance with the Court's ruling. Until the agency decides what it will do in response to *Fowlkes*, it is important that all denials and suspensions be appealed so that the individual will have a live claim when SSA issues a possible Acquiescence Ruling. Although the scope of a potential Acquiescence Ruling is not clear at this time, it is also suggested that all suspensions and denials based on violating a condition of probation or parole be appealed, since here too the current SSI regulation requires that the suspension can begin only when there is a warrant or order from a court or other duly authorized tribunal based on a finding that the individual is violating a condition of probation or parole.

It should also be noted that the same provision that was at issue in *Fowlkes* has been extended to all Social Security Title II benefits as of January 1, 2005. This ruling, if not appealed, should apply to those cases as well. In addition, the same statutory language exists in three other important benefit programs; *i.e.*, Food Stamps, Temporary Assistance to Needy Families (TANF) and Veterans Benefits. This ruling, while not directly applicable to Food Stamps and TANF benefits, is a binding precedent for those programs in the Second Circuit and should be a basis for advocating for the states to change their policies insofar as they may be at variance with the Second Circuit's construction of the statutory provision. Of course, the provision of the Social Security regulation has no bearing on those programs.

The situation with respect to Veterans Benefits is somewhat different. Although the operative language of the statute is the same, these programs have a different route of judicial review through the Federal Circuit. The Second Circuit thus has no jurisdiction and this ruling would not be binding precedent.

Gerald McIntyre of the National Senior Citizens Law Center in Los Angeles (formerly of Southern Tier Legal Services in Bath) handled Mr. Fowlkes's appeal. Congratulations to him for his great work on the brief and at oral argument. The Empire Justice Center, along with Legal Services for New York City (LSNY), the Mental Health Project of the Urban Justice Center, the National Alliance for the Mentally Ill of New York City, Inc. (NAMI-NYC Metro), Connecticut Legal Services, Inc., Greater Hartford Legal Aid, Inc., New Haven Legal Assistance Association, and South Royalton Legal Clinic at Vermont Law School filed an *amicus curiae* brief in support of the appellant.

Local Districts to Provide Emergency Heating Assistance

Despite the wet Christmas that many of us experienced, it promises to be a cold winter for our clients – especially with heating costs expected to skyrocket. Remember that SSI households, along with other public assistance households – might be eligible for help from their local Department of Social Services.

The Office of Temporary and Disability Assistance (OTDA) has recently reminded the local districts of their responsibilities to meet utility and non-utility heating emergencies. OTDA's GIS message to local districts can be found at http://www.wnylc.net/onlineresources/pb/showquestion.asp?faq=85&fldAuto=1896. It contains a helpful chart of the eligibility requirements for TA households, SSI households and non-TA households. OTDA specifically reminded the local districts to suspend enforcement of previous utility repayment agreements so that households can have more money this heating season.

Thanks to Susan Antos of the Empire Justice Center for this update.

SSA Issues Administrative Message on DV Homesteads

Last year, advocates from the Empire Justice Center (then known as GULP) contacted SSA on behalf of victims of domestic violence who were facing complicated bureaucratic hurdles when they had to flee from their homes to escape abuse. In response, SSA agreed to seek a regulatory change so that a jointly owned home will not be counted as a resource to an individual who is forced to leave the home because of domestic abuse. Although SSA indicated that its current policies serve to prevent any undue hardship or danger to victims of domestic abuse, it agreed to issue a reminder item to its field offices in the meantime that SSA personnel are required to assist individuals in obtaining evidence and should take into consideration the individual's circumstances in determining resource availability. See the March 2005 edition of *Disability Law News*, available at www.empirejustice.org.

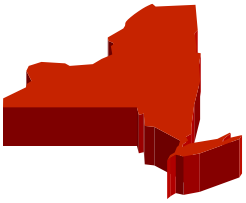
SSA has recently done just that. Last month, it issued an Administrative Message reminding claims representatives to use particular care and sensitivity when requesting evidence from individuals who are fleeing from a domestic abuse situation. AM-0521 is available on the Empire Justice Center's on-line resource center as DAP# 419.

The AM reminds claims representatives of how to interpret existing POMS in a manner that will be most helpful and beneficial to a fleeing spouse. For example, it emphasizes SSA's obligation to assist the beneficiary in obtaining evidence, recognizing that the fleeing spouse should not be required to obtain evidence of home ownership from her batterer. Similarly, it reminds claims representatives that deeming of the other spouse's income and resources should be terminated as of the first moment of the month following separation. Additionally, a fleeing spouse's interest in the marital home should not necessarily lose its status as an excluded resource if the fleeing spouse intends to return home. According to the AM, "There is no time restriction placed on the intent to return home policy." The existing provisions regarding Undue Hardship and Conditional Benefits are also available to help fleeing spouses.

SSA continues to promise that a regulatory change clearly providing for the "exclusion of a jointly-owned home for an individual who is fleeing a domestic violence environment will be issued in the near future." In the meantime, revisions to the existing POMS are in progress.

This is an example of a situation where at least the upper echelons of SSA seem to be trying to do the right thing. Please keep us informed of how this is working – or not working – for victims of domestic violence.

New York Deeming Chart Available



Ever have one of those cases where there is earned or unearned income in the household, and you were just not sure if there really was a viable SSI claim? But you could not face trying to do a deeming computation on your own? Just go to the Empire Justice Center's online resource center and find the chart for monthly deeming "break-even" points in New York for 2006. It is available as DAP#420.

A quick glance at the chart will tell you at which point your client's spouse's or parent's income will make the client ineligible for any SSI. Of course, before writing a case off based on excess income, remember that our clients' incomes – especially earned income of other family members - often fluctuate from month to month, and may change dramatically over the course of an application. And changes in living arrangements could make a difference as to SSI eligibility too. So you may have do that deeming calculation anyway. If so, Neighborhood Legal Services has deeming guide on-line at http://www.nls.org/ssideem.htm.

REGULATIONS

SSA Publishes Proposed "Fugitive Felon" Regulations

The Social Security Administration has published proposed new "fugitive felon" regulations. 70 Fed. Reg. 72411 (Dec. 5, 2005). They would 1) establish a new 20 C.F.R.§404.471 to extend the nonpayment provision to Social Security Title II benefits, 2) replace the existing Supplemental Security Income (SSI) regulation with an entirely new §416.1339 and 3) place in the regulations the good cause exceptions established in the Social Security Protection Act of 2004. The deadline for comments is February 3, 2006.

"Fleeing to avoid" - There are two extremely important changes from the existing SSI regulation. The first change results from the agency's stated intention "to clarify our interpretation of the statutory language "fleeing to avoid." The proposed regulations "clarify" this operative statutory language by deleting any reference to it in the text of the proposed regulations themselves. Instead, the proposed regulations simply state the individual will be ineligible for SSI for any month in which there is an outstanding arrest warrant for a felony. Section 416.1339(a). The proposed Title II regulation is essentially the same, stating that benefits will not be paid for any month in which there is an arrest warrant for a felony, except that in the case of Title II benefits, the warrant must have been in effect for more than 30 days. This difference is apparently the result of an anomaly in drafting the statute.

This attempt to "clarify" the meaning of "fleeing to avoid" collides head on with the decision of the Second Circuit issued the following day in *Fowlkes v. Adamec*, ___F.3d___ (2d Cir. 2005), 2005 WL 3292551 (Dec. 6, 2005). See, accompanying article in this issue. If the *Fowlkes* decision stands, it will be difficult for the agency to go ahead with implementation of this regulation when it has already been found to be unlawful even before it is published as a final regulation. On the basis of the *Fowlkes* decision alone, the agency should be urged to withdraw this ill-advised regulation and reconsider its position.

Order or warrant issued on basis of a finding - The other very important change from the existing SSI regulation is the elimination of the requirement that any suspension or denial take effect only if there is a warrant or order issued by a court or other authorized tribunal on the basis of a finding establishing that the individual was fleeing or had fled to avoid prosecution or custody or confinement after conviction or was violating a condition of probation or parole. This significant change in the very basis for imposing the sanction has been slipped in without even being mentioned in the supplementary information accompanying the proposed rule.

Ironically, if the Commissioner proceeds to publish this proposed regulation as a final rule, in the Second Circuit, the agency will be placed in the position of having to do precisely what the Commissioner has consistently stated the agency does not want to do and cannot afford to do, *i.e.*, determine the intent of each individual with an arrest warrant for a felony. As she stated in her brief in *Fowlkes*, "Requiring the Commissioner to inquire into, and possibly adjudicate, the subjective intent of felons is the antithesis of an efficiently administered taxpayer-funded benefits program." Everyone would agree that the agency is ill-equipped to make such determinations by itself. The only way to avoid that is to retain the provision of the current regulation that requires that action be taken to suspend or deny benefits only when there is an order or warrant which has been issued on the basis of a finding that the individual is fleeing or has fled to avoid prosecution.

Probation or parole violations - A similar situation exists with respect to suspensions and denials based on an individual violating a condition of probation or parole. Here again the proposed rule would eliminate

Proposed "Fugitive Felon" Regulations—continued

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the requirement of the current regulation that there be a warrant or order issued on the basis of a finding that the individual is violating a condition of probation or parole. This would make the regulation more consistent with SSA's practice of suspending benefits whenever there is any outstanding warrant connected with probation or parole. That, however, is not sufficient to fall within the statute. The statute does not say that benefits should be suspended when there is probable cause to believe the individual may be violating a condition of probation or parole. It says that benefits shall be suspended when the individual is violating a condition of probation or parole. [Thanks go to David Ralph of the Elmira Office of LAWNY for suggesting this line of inquiry. To date, there has been no litigation on this issue, however.]

In most jurisdictions, a warrant is issued without any finding of violation of parole. For example, if restitution or a fine were a condition of probation, the failure of the court to receive a scheduled payment might be the basis for issuance of a warrant. However, before the court can find the individual in violation, the individual must be given the opportunity to show that the violation was not willful, *e.g.*, that the payment was not made because of a financial inability to pay or that the payment was in fact made. If SSA eliminates the requirement for a finding by a court or other appropriate tribunal that the individual is violating a condition of probation or parole, then SSA will have to make that determination itself. Claims representatives will have to be trained on the different standards that each of the 50 states and other jurisdictions use for determining whether an individual is violating a condition of probation or parole.

Mandatory good cause - The criteria for good cause in the proposed rules, which are identical for SSI and Title II, track the criteria established in the Program Operations Manual System (POMS) earlier this year. POMS SI 00530.015 & GN 02613.025. The mandatory good cause criteria follow the criteria of the statute, except that they add a requirement (also found in the POMS) that the individual will only have 90 days in which to establish good cause once s/he contacts the agency. Unfortunately this, more often than not, is insufficient time to get a warrant vacated or otherwise establish eligibility for good cause. This is especially the case for beneficiaries with serious mental impairments who are the majority of those affected. The time is also insufficient when the warrant is very old and the records have been placed in archives that are difficult to access. Sometimes the 90 day period is insufficient for no reason other than overloaded court calendars, which make it difficult for local criminal courts to dispose of matters within that time period.

The proposed 90 day time limit for establishing mandatory good cause raises the question of whether this is an arbitrary restriction on the Commissioner's statutory obligation to pay benefits when the conditions for mandatory good cause under 42 U.S.C. §§402(x)(1)(B)(iii) & 1382(e)(4)(B) are met. Similarly, one might question whether the 90 day time limit with respect to both mandatory and discretionary good cause as applied to individuals with significant mental impairments violates the Commissioner's obligations under § 504 of the Rehabilitation Act. 29 U.S.C. §794.

Discretionary good cause - The criteria for discretionary good cause provide for two basic options and, with one exception, would remain the same as in the POMS. The Social Security Protection Act of 2004 gives the Commissioner broad discretion to allow good cause "based on mitigating circumstances," except that she has no discretion to allow good cause if the underlying offense or the probation or parole violation was violent or drug-related. She has, however, chosen to exercise her discretion very narrowly.

Proposed §§404.71(b)(2) & 416.1339(b)(2) provide for good cause when all four of the following requirements are met: 1) there is no violence, 2) there are no drugs, 3) the individual has not been convicted of or pled guilty to another felony since the date of the warrant, and 4) the law enforcement agency that issued the warrant reports that it will not extradite for the charges on the warrant or will not take action on the warrant for the individual's arrest. It is this last requirement which is often difficult to meet even when law enforcement authorities have no intention to extradite.

Another option for discretionary good cause is pro-

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SSA Issues New Rules for Service of Process

Effective December 9, 2005, for federal actions, service on the Commissioner is to be made at Regional Counsel's Office, or, as the amended regulation so succinctly puts it, at "the office in the Social Security Administration's Office of the General Counsel that is responsible for the processing and handling of litigation in the particular jurisdiction in which the complaint has been filed" instead of at General Counsel's Office in Baltimore.

This amendment to 20 C.F.R. §423.1 does not change the requirements to serve the United States Attorney General (Department of Justice, 5510 Star Building, Washington, D.C. 20530) and the local U.S. Attorney as well as the Commissioner. It merely changes where the Commissioner gets served.

Where might that be? SSA publishes a listing of Regional Counsel's offices by jurisdiction, and all the New York jurisdictions are in the same region. The address for Region II is:

> Office of the Regional Chief Counsel, Region II
> Social Security Administration
> 26 Federal Plaza, Room 3904
> New York, NY 10278-0004

The complete details of the regulatory amendment are available at 70 Fed. Reg. 73320-73323, December 9, 2005. These announcements also are available on SSA's website, along with the list of Regional Counsel's office addresses

So, what about "pipeline" cases? Those where the notice on the AC decision tells the claimant to serve the Commissioner at Rm. 417, Altmeyer Building, but you're filing today or later? You should be correct if you follow the current regulations and send to Regional Counsel. On the other hand, you can't go wrong by serving at both the notice address and the address in the regulations.

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vided by §§404.471(b)(3) & 416.1339(b)(3), when the individual can meet the first three requirements of the preceding paragraph as well as two additional requirements. Those two additional requirements are that (1) the warrant was issued 10 or more years ago and (2) (a) the individual's medical condition impairs the individual's mental capability to resolve the warrant, or (b) the individual is legally incompetent, or (c) a representative payee has been appointed, or (d) the individual is residing in a long-term care facility. One positive note here is that this provision does not include the requirement found in the current POMS that the warrant be the only existing warrant.

Advance notice - These proposed rules do not include the provision found in the POMS for giving advance notice of suspension to Title II beneficiaries, nor the provision for providing continued benefits for a 90 day period when an SSI recipient requests good cause. Although it would be better to include these provisions in the regulations, it is not clear whether SSA intends to change these practices since they have not generally included procedural provisions in the regulations.

Auxiliary beneficiaries - Although the proposed rules do not explicitly state that all new Title II claims must be fully developed regardless of "fugitive felon" status, it is clear that this is the case since the Title II provision affects only payment status and not eligibility. This is important, not just for the individual claimant, but also for any auxiliary beneficiaries who may become entitled on the claimant's earnings record, including some who may not have been born yet.

Comments are due on this proposed regulations no later than February 3, 2006. It is important that as many people as possible comment, even if the comment is not comprehensive and deals with only one or two aspects of the regulation. Those wishing to discuss proposed comments may contact Kate Callery, Louise Tarantino or Gerald McIntyre at the National Senior Citizens Law Center Los Angeles office (213) 639-0930, ext. 300 or gmcintyre@nsclc.org). Both the NSCLC and the Empire Justice Center will be commenting.

Failure to Comply May Mean Termination

The Social Security Administration (SSA) has issued proposed regulations that would punish beneficiaries who fail to comply with the agency's request for necessary information during a continuing disability review (CDR). Penalties for failure to comply include suspending benefits for up to one year.

For those recalcitrant beneficiaries who "remain noncompliant for a period of one year following your suspension, we will then terminate your disability benefits. Although our current title XVI (SSI) regulations generally provide for the termination of payments after 12 months of suspension, we are proposing to amend our regulations by adding this policy to our title II (DIB) regulations and by restating it in the title XVI CDR regulatory provisions."

The proposed regulations were announced in the December 5, 2005 Federal Register [Volume 70 Fed. Reg. 72416-72419, available online via GPO Access [wais.access.gpo.gov] [DOCID:fr05de05-25]. Comments are due by February 3, 2006.

SSA notes in its lengthy description of the CDR process that current regulations contain the general principle that beneficiaries have the responsibility to cooperate with the agency, or take any required action that it decides is necessary to complete the CDR or age-18 redetermination. SSA also notes that if a beneficiary does not cooperate, and does not have good cause for not cooperating as defined in the regulations, SSA will find that disability has ended. The current regulations do not allow this penalty for Title II cases.

"These proposed rule changes would allow us to make our rules consistent for all beneficiaries under both titles II and XVI, implement a more efficient CDR process, encourage beneficiaries to cooperate during the CDR process, and make the process less burdensome."

Under the proposed changes, "your failure to cooperate in the CDR process would result initially in a suspension rather than a termination of benefits based on a determination that you are no longer entitled to benefits. To have your benefits resumed, you would only have to contact your local Social Security office and provide the requested information and you would have up to 12 months to do so. Accordingly, you would not have to file an appeal in order to have your benefits resumed. In addition, you would not have to request, prepare for, and attend a hearing for your benefits to be resumed."

When the beneficiary coughs up the requested information, benefits would be reinstated retroactively and the CDR process would pick up from where it left off. Except, if it goes 12 months, it converts to a termination with appeal rights but no benefit continuation rights.

Study Analyzes Social Security Benefits and Women

Did you know that more women than men receive Social Security (24.8 million women, compared to 18.9 million men in December 2004)? Its progressive formula and life-time annuity payments benefit women, who generally earn less and live longer than men. At the same time, women's lower earnings and longer lives put them at more risk for living in poverty in old age than men. Women in retirement received average monthly worker benefits of $826 in December 2004, while men averaged $1,077. And while spousal and survivor benefits disproportionately help women, they favor some over others. Spousal and survivor benefits overwhelmingly go to women, since wives usually earn less than their husbands and outlive them. But spousal benefits, however, favor non-working women, adversely affecting work incentives for women who earn much less than their spouses.

So says a recent report published by the Urban Institute on Woman and Social Security. According to author Melissa Favreault, "[r]enewed attention to Social Security's long-term deficit offers an opportunity for reform to recognize women's changing roles without creating inequities, discouraging work, or harming the most vulnerable." She suggests, for example, that minimum benefits independent of marital status might more effectively reduce women's risk of poverty than the current system of spousal benefits. Other suggestions for change and a copy of the full report is available at http://www.urban.org/UploadedPDF/900902_women_ss.pdf.

Proposed Regulations Would Raise Grid Age Categories

On November 4, 2005, SSA issued a Notice of Proposed Rulemaking (NPRM) raising the age under each grid age category by two years. 70 Fed. Reg. 67101. SSA argues that, since there is evidence that the average health of older workers has improved and many older persons are working, the age categories in the disability grids should be adjusted upward.

According to the preface to the proposed rule, SSA believes that: "[I]t is now appropriate to redraw the lines established in 1978 [when the Grids were published]…This minimal increase is a reasonable adjustment to reflect public health factors which have had significant positive effects on the health of older workers and their ability to do other work." 70 Fed. Reg. 67102. SSA provides four reasons for the proposed age change: (1) "Overwhelming evidence" that the average health of the elderly population is improving; (2) An increase in the number of older persons working because of an increase in "healthy, active years" and opportunities for individuals with disabilities to work; (3) Congress's acknowledgment that "it is both reasonable and necessary for people to work longer before retiring"; and (4) SSA's adjudicative experience with the Medical-Vocational Guidelines ("the grids"), which "suggests" changes to "more accurately reflect the ages at which adjustment to other work becomes increasingly difficult."

These justifications are based on erroneous and misleading logic. Indeed, while the proposed regulation cites much evidence that would justify an increase in the retirement age, this evidence has little to do with the ability to work of persons with severe health problems who are not working and have applied for disability benefits. That is, the average health of a population reveals little about the individuals who apply for disability benefits, who by definition are not enjoying the average health of the population at large. For them, the "minimal increase" in the age categories will be extremely detrimental.

First, it should be noted that the proposed changes would not only increase the age categories by two years for those with exertional claims decided on the Grid, but would also increase the applicable age categories in quasi-grid (non-exertional) cases where the Grid rules can be applied as a framework (20 C.F.R. 404. Subpart P, Appendix 2, Rule 200.00(e)). Additionally, these age categories would, inevitably, impact situations in which the grid rules do not directly apply, where Grid age categories would likely be used by analogy. Thus all claimants will be subject to a greater or lesser extent to these proposed changes.

Second, the introduction to the proposed changes indicates that they are based on the general improvement in the health of older workers since the Grid rules were promulgated in 1978. No matter how much better the average health of the elderly population is since 1978, there is a significant population of workers in this society who continue to age more quickly, and whose health is still seriously at risk at an age below the average (see 70 Fed. Reg. 67102). "Average" is the middle of a range: approximately ½ of the elder population will always be below the average. Those people below the average are likely to be the same population that currently relies so heavily on SSD and SSI today. Not only do these people have degenerative and chronic conditions; they are often people with less education, who do or did heavier jobs, have little or no skills and have not been able to participate in the general enhancement of life expectancy.

Third, SSA relies on the fact that the economy has generally moved from a manufacturing to a service economy, and that jobs in this economy are increasingly less physically demanding. While the "percentage of workers in physically demanding jobs," may have fallen overall from 25% in 1950 to less than 8% in 1996 (70 Fed. Reg. 67102), the total number of under-educated people who have always worked at the lower levels of the economy, at physically demanding jobs for lower than average wages, continues -arguably - to be substantially higher than 8% and might even be higher than 25% of the total population over the age of 50. Further, while SSA states that the Department of Labor ["DOL"] projects that job growth will occur in non-physically intensive occupations such as computer operators and service providers (70 Fed. Reg. 67103), these jobs do not, and for the foreseeable future will not, encompass our clients. Our older clients do not have computer skills, will be very unlikely ever to develop computer skills (most of them do not even have access to computers), and the service jobs they have, and have had, tend to

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involve physical labor. For example, janitorial jobs, food preparation or other delivery jobs, even nurses aide or home health aides, all involve significant physical activity. Thus, the characteristics of our client population make adjustment to the kind of work SSA contemplates less, rather than more, likely.

Fourth, the NPRM makes no mention of the mental demands of work, and while mental demands are not considered in directly applying Grid rules, in the real world, the ability to do alternate work must take into account the mental demands of any job. Will a two-year age increase in the grids (or in using the grids as a frame-work where nonexertional limitations have to be considered) adversely affect the elderly population now working at the lower levels of the economy? Of course, they will. Being able to do alternate work in your 50's or later requires the memory, acumen and mental agility to learn new, and often quite technical, things, especially in a technology-driven world. People with little education, who have done low or non-skilled work all their lives, will be the least able to make this transition. Changing the age categories in the grid rules by even two years will cheat many of these people of the possibility of obtaining disability benefits for at least two additional years, and there is no safety net to assist these people while they wait.

Fifth, people born in the 1950s are the ones now reaching current grid ages that provide favorable outcomes. These folks do not belong to the computer generation. Granted, many in this age group may be highly skilled in the use of computers and may do work that involves computers, but many more do not or do not do so with any facility. There is both a racial and a cultural divide in this economy. In ten or twenty years this divide might disappear but, at this time, it still exists in terms of education, skills and training, and, it may be that age is *the* pivotal factor. This is not the time to raise the age categories, where such an increase affects a significant population of current workers who, for no fault of their own, do not have, and have not developed, the wherewithal to join the technological bandwagon.

Sixth, while there is no doubt that, on average, people in the U.S. are living longer, that does not negate the fact that many people are still becoming chronically sick and disabled at relatively young ages. For retirement, there is a safety net: people who cannot wait until full retirement age, can choose to take early retirement at age 62. But there is no safety net for the disabled, other than disability itself. With even a two-year age increase, many claimants will be excluded from the support they need and have to date been entitled to, based solely on unsupported and unrealistic assumptions proposed in these rules. The fact that a savings chart is included in the proposed regulations (70 Fed. Reg. 67107) makes it clear that the primary reason for proposing these regulations is cost-savings.

Finally, in publishing the proposed regulations, SSA has offered no study (or studies) to support the contention that work is more available for older Americans who have little education and little or no skills than it was in the 1970's. Empirically, the availability of jobs for older Americans has decreased: as companies down-size, older workers tend to be let go first and hired back last, if at all. Focusing on the general health of the nation does not speak to this issue. It is like comparing apples and oranges. Sick people should continue to be given the advantage of the same age categories they receive now, especially in the absence of a showing that individuals have skills that continue to be transferable.

If there is any good news here, it is that approximately 800 sets of comments – including those of Barbara Samuels of the LSNY - were submitted to SSA prior to the comment deadline of January 3, 2006. The overwhelming majority is negative. Let's hope SSA has the good sense to listen to the people, who it, rather ironically, likes to refer to as its "customers."

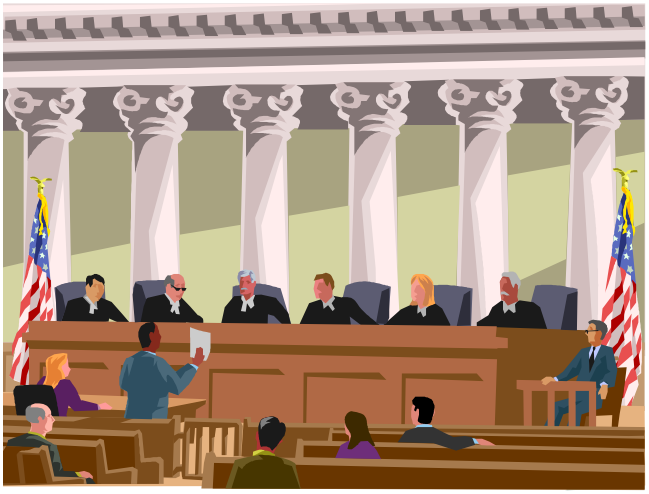
COURT DECISIONS

Supreme Court Upholds Student Loan Offset

Resolving a conflict in the circuits, the Supreme Court recently upheld the Department of Education's right to collect student loans that have been outstanding for more than ten years from ongoing Social Security benefits. In *Lockhart v. United States*, __U.S.__, 126 Sup. Ct. 699, 2005 WL 3299398, (Dec. 7, 2005) , the Supreme Court unanimously affirmed the Ninth Circuit's decision in favor of the government. For more background on *Lockhart* and on the Eighth Circuit's contrary decision in *Lee v. Paige*, 376 F.3d 1179 (8th Cir. 2004), *see* the September 2004 edition of the *Disability Law News*, available at www.empirejustice.org.

The decision was presented in the popular press as if the collection of student loans out of social security benefits for the first time had not previously been done. In fact, offset of such debts, along with numerous other types of debts owed to federal agencies, have clearly been permitted since the Debt Collection Improvement Act of 1996. Last month's edition of the *Disability Law News*, for example, feature an article on collection of Food Stamp overpayments. For more on federal debt collection and Social Security benefits generally, *see* Tarantino, Callery and Samuels, *Social Security Benefits' Antiassignment Protections Under Attack*, Clearinghouse Review, January-February 2003.

The issue in *Lockhart* was more arcane, dealing with the intersection of the Debt Collection Act and Higher Education Assistance Act of 1991, and involving the statute of limitations with respect to student loans. The Supreme Court, despite the disparities between the two statutes, upheld the government's right to use offset to recover on claims more than ten years old - creating yet another chink in the armor of the protections offered by the anti-assignments provisions of 42 U.S.C. §407(a). For some good news in this area, however, *see* the article in this newsletter describing Judge Ellen Yacknin's recent decision protecting a Social Security recipient's bank account.



Surveillance System Monitor Position Discredited

Many of us have been faced with that dreaded response from a vocational expert at the end of a hearing? Yes, the claimant could work as a surveillance system monitor, DOT No. 379.367-010….

Paul Ryther reminds us of a 2002 decision by Judge Charles Siragusa of the Western District that may provide some help in getting out from under that hypothetical response. In *Kuleszo v. Barnhart*, 232 F.Supp.2d 44 (W.D.N.Y. 2002), Judge Siragusa notes that the DOT description for surveillance system monitor indicates that is a governmental position found only in transportation. The DOT classifies this job as an unskilled sedentary job. The VE in question, however, testified about surveillance system monitors working in gambling casinos, and clarified that such a position required less than six weeks training. According to the court, "[t]his ambiguous response left open the possibility that training was required for more than 30 days, indicating a semiskilled position. This is certainly reasonable given that the job cited involved gambling casinos, which would require training as to the different games and ways in which gamblers cheat." The court also pointed out the EGOE (Enhanced Guide for Occupational Exploration) indicates that the job of a surveillance system monitor requires an aptitude for both finger dexterity and manual dexterity in the lower 33%. Since the plaintiff could do no fine manipulation, the claimant could not perform this particular job.

Judge Siragusa went to hold that even if the VE's testimony could be taken at face value, the plaintiff would still be entitled to a finding of disability under SSR 96-9p. According to the court, the "existence of only one unskilled sedentary job, i.e. surveillance system monitor, indicates that the full range of sedentary work is significantly eroded."

Another great decision for Mark McDonald of Bond & McDonald in Geneva

Payment of Benefits Ordered

Remanded for the calculation of benefits. These are the words we love to hear from the district court, especially after rejecting a less than completely favorable offer of remand from the government. And that is the result that Louise Tarantino got in another case before Judge Siragusa in the Western District where the claimant's entitlement to Title II benefits was at stake. As in *Rivera*, Louise's client, who had been represented by the Public Interest Law Office before it became the Empire Justice Center, had been through two hearings before the same ALJ. In the meantime, she had won SSI benefits based on her severe mental impairment, obesity and migraine headaches.

Louise convinced the court on appeal that the ALJ had violated the treating physician rule when he ignored evidence from the claimant's treating psychiatrist that her condition met a mental impairment listing. The treating psychiatrist's letter to the ALJ was the kind we all dream of – and despite the fact that the ALJ did not even mention it in his decision, it had clearly been submitted and was resubmitted to the Appeals Council. Judge Siragusa agreed, and noted that the ALJ had also ignored the favorable testimony of the medical and vocational experts who testified at the hearing. Similarly, the hypothetical questions to the VE on which he relied did not accurately reflect the claimant's impairments.

He also found that the ALJ erred in relying on some of the claimant's alleged activities, such as staying up late and listening to music and sitting in the sun, to find her not disabled, since the ALJ could cite to no medical evidence that such activities were inconsistent with her impairment. The fact that the claim had been pending seven years also helped persuade Judge Siragusa to remand solely for the calculation of benefits. *See Brown v. Barnhart*, 2005 WL 3200244, (W.D.N.Y., November 29, 2005.)

District Court Remand Preserves DLI

Just how many times can we represent the same claimant before the same ALJ before giving up? Well, when a claimant's DLI (Date Last Insured) is at stake, it may be worth a few tries. A recent decision by Judge Siragusa in the Western District in a case from the Empire Justice Center (formerly the Public Interest Law Office of Rochester) proves that point.

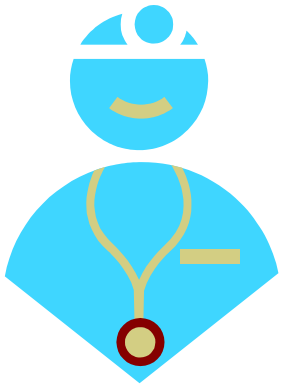
The client, who has long since been awarded SSI benefits under the Grid based on a subsequent application, had been denied Title II & XVI benefits in 1997. On appeal, SSA stipulated to a voluntary remand, following which the same ALJ denied the claimant again, despite a later amended onset date that still preserved her DLI and a strong treating physician opinion as to disability. Unfortunately, following the hearing, the ALJ had ordered another consultative examination, the results of which dramatically contradicted the treating source.

In order to preserve her entitlement to Title II benefits, the claimant appealed again. On appeal, Judge Siragusa agreed that the ALJ, in rejecting the treating physician's opinion, failed to follow the treating physician rule. "Notwithstanding the detailed reasons for not giving Dr. Romero's opinion controlling weight…the ALJ's decision in this case, however, does not reveal whether he gave *any* weight to Dr. Romero's opinion, and if he did give it some weight, what weight that was."

The court also found that the ALJ's reasons for disregarding the plaintiff's subjective complaints of pain were not supported by substantial evidence. Simply because Tylenol worked better for this plaintiff than other stronger medications was not enough for the ALJ to conclude that she must not be suffering from severe pain. So too, the claimant had not "lied" about her ability to understand English where she had clearly asserted that she spoke some English, but preferred to use an interpreter at the hearing.

Finally, the court found that the ALJ erred as a matter of law in finding that the plaintiff could return to her past relevant work because it did not fit within the definition of substantial gainful activity. He also agreed that the ALJ's finding of a medium RFC was not supported by substantial evidence. The ALJ had cited to no medical evidence of record to support his finding. Judge Siragusa remanded the case for a proper determination of the claimant's RFC under Step Five of the Sequential Evaluation at the time of her DLI. *See Rivera v. Barnhart*, 2005 WL 3555501 (Dec. 9, 2005)

Let's hope that the third time - before a different ALJ - is the charm!



Narcolespy Claim Reversed

In yet another recent case resulting in full payment of benefits, Maura Kennedy-Smith of the Ithaca office of Law New York convinced SSA to settle her client's claim based on her persuasive brief. Maura's client suffers from bipolar disorder, severe depression, narcolepsy, sleep apnea, arthritis in her left hip, high blood pressure, and a thyroid problem. Despite finding that her condition met Listing 12.04, the ALJ found that the claimant's past drug and alcohol abuse was material. When analyzing the claim since the date she had stopped using drugs, the ALJ went on to find that the claimant was capable of sedentary work, and relied on vocational testimony to deny her claim.

As Maura noted, this case did not fit into a tidy little box. The symptoms the claimant experiences from her sleep disorders do not *per se* affect her ability to sit, stand, lift and perform other exertional functions; they present nonexertional limitations that prevent her from sustaining alertness, wakefulness and attention and require her to take naps that cannot be accommodated in a competitive job. Maura successfully argued that the ALJ did not consider those limitations when formulating his hypothetical questions to the vocational expert. Nor did he give proper weight to the limitations that the claimant's treating physician recognized.

Based on Maura's brief, which is available as DAP #421**,** the government stipulated that the ALJ's decision be reversed and the case be remanded to the Appeals Council for issuance of a fully favorable decision finding the plaintiff disabled as of her alleged onset date. Congratulations to Maura on presenting a great case.

Court Upholds Magistrate's Listing Determination

It is not often that a court determines that a claimant meets a listing and orders remand for the calculation of benefits, but that is exactly what happened in *Ianni v. Barnhart*, --F.Supp.2d --, 2005 WL 3220220 (W.D. N.Y. Nov. 18, 2005). Former DAP advocate Dennis Clary argued that his client met Listing 11.04B for Cerebral Palsy, and Magistrate Foschio of the Western District agreed. His Report and Recommendation was adapted by Judge Arcara.

In recommending that the plaintiff met the requirements for the listing, Magistrate Foschio relied on the opinion of the treating physician, which the ALJ had not accorded sufficient weight. He also found that the ALJ had erred in relying instead on the treating physician's statement that despite the claimant's limitations, vocational rehabilitation for sedentary work would be beneficial. According to the Magistrate, the ALJ's determination that the treating physician did not think the claimant was totally disabled was beside the point: "once it is determined that a claimant's medical impairment meets the criteria established by the Listing of Impairments, the inquiry ends." To do otherwise, would be to illegally impose additional criteria for benefits. To underscore his point, Magistrate Foschio called upon that wonderful old adage: "the Social Security Act is a remedial statute which must be 'liberally applied'; its intent is inclusion rather than exclusion." Would that a few other ALJs remember that.

Although the Magistrate found that the evidence established a listed impairment and recommended payment of benefits, he went on to offer an alternative for the District Judge. At step five of the Sequential Evaluation, the ALJ had relied on the testimony of a vocational expert (VE) to find that the claimant could work as a surveillance system monitor. The VE had admitted that a hypothetical claimant whose medication "caused drowsiness which required the person to nap for an hour, two to three times a week, and also had periodic numbness in his arms and hands," could not perform such work. The Magistrate, however, determined that the ALJ's finding that the plaintiff's allegations as to the disabling side effects of his medications were not fully credible, was supported by the record, and thus was willing to uphold the ALJ's decision in regard to step five.

Wisely, Judge Arcara chose to remand for the calculation of benefits based on the listing. Kudos to Dennis Clary for this excellent decision.

Magistrate Finds DA&A Not Material

Sometimes a federal court really sees through an ALJ. That is apparently what happened in *Frankhauser v. Barnhart*, -- F.Supp.2d – 2005 WL 3238379 (W.D.N.Y. November 22, 2005), thanks to the able advocacy of paralegal Kathleen Traina and Attorney Al Lowman of the Erie County DSS's DAP program. Magistrate Foschio of the Western District found that ALJ Mazzarella ignored – and misconstrued – substantial evidence of record in finding that drug and alcohol addiction was material to the claimant's disability. He reversed the ALJ's decision and remanded for the immediate calculation and payment of benefits.

It was undisputed that the claimant had a long history of polysubstance abuse, including alcohol, marijuana and glue sniffing, beginning at age 11. There was also no dispute that he suffered from a personality and a bipolar disorder. Despite the claimant's long history of unsuccessful treatment, ALJ Mazzarella found that he was not disabled. Kathy appealed on his behalf, and the Appeals Council remanded the claim, with specific instructions to obtain additional information from a medical expert as to the nature and severity of the limitations arising from the claimant's personality and bipolar disorders that would remain absent drug and alcohol abuse.

On remand, the ALJ took testimony from a medical expert (ME), which was described by the court as "repeated questions…designed to separate what limitations and restrictions were properly attributed to Plaintiff's substance abuse from those properly attributed to Plaintiff's bipolar and personality disorders and which would remain absent Plaintiff's substance abuse." Following the ALJ's extensive questioning, Kathy asked the ME whether behaviors over which the claimant has no control, such as non-compliance with treatment and DA&A relapses, were in fact part of the claimant's disease. The ME concurred that this was part of the "disease process," and that bipolar patients were notorious for stopping their medications.

The ALJ nonetheless denied the claim a second time, claiming that the testimony of the ME supported his conclusion that the claimant would not be disabled if he ceased abusing alcohol and drugs and fully complied with his prescribed treatment. Magistrate Foschio found that the ALJ's reliance on the testimony of the ME was erroneous, both in that it violated the treating physician rule and was not supported by the record.

The claimant's treating psychiatrist had in fact stated that he could not disentangle the claimant's drug and alcohol abuse from his other mental impairments. Nevertheless, the ALJ claimed that the ME "was able to do so after careful review of the medical evidence in its entirety." It did not take all that careful a review, however, to determine that the ME was *not* able to separate the limitations caused by drug abuse from those caused by the bipolar and personality disorders. The ME's hearing testimony, as reviewed by the court, simply did not support the ALJ's finding. In fact, the ME had testified that if the claimant were compliant, his underlying problems would nonetheless interfere with his ability to remain consistently employed. She also stated that, like the treating psychiatrist, she was unable to separate the limitations caused by the claimant's substance abuse from those posed by his mental illness.

According to Magistrate Foschio, the ME's testimony "provides no basis on which the ALJ could rely in determining whether Plaintiff's substance abuse is a contributing factor material to his disability determination." The court thus relied on the Commissioner's Emergency Teletype stating that [w]hen it is not possible to separate mental restrictions and limitations imposed by the DAA and the various mental disorders shown by the evidence, a finding of 'not material' would be appropriate." Although noting that the Court of Appeals has not addressed whether such a teletype is binding on the courts, he cited *Ostrowski v. Barnhart*, 2003 WL 22439585, *4 (D. Conn. Oct. 10, 2003) for the proposition that it should be persuasive as it represents the "sound judgment" of the agency. [EM-96200 is available at http://policy.ssa.gov/.]

Magistrate Foschio, citing *Frederick v. Barnhart*, 317 F.Supp.2d 286, 293 (W.D.N.Y. 2004), also ruled that the ALJ erred in not determining *which* of the plaintiff's impairments would remain if he abstained from all substance abuse. A mere finding of improvement in a claimant's symptoms is not dispositive of materi-

(Continued on page 15)

Judge Yacknin Protects SSI Bank Accounts

The Honorable Ellen M. Yacknin, Rochester City Court Judge, has clearly not forgotten all that she saw and learned during her many years as a legal services attorney. Many will remember Ellen as GULP's (now known as the Empire Justice Center) Medicaid expert and litigator extraordinaire. Now that Judge Yacknin is on the bench, she continues to do extraordinary work. A case in point is her recent decision in *Contact Resource Services, LLC v. Gregory*, Index No. 2004 CV 2556.

Judge Yacknin, faced with appeared to be a routine City Court summary judgment motion in a debtor-creditor case, recognized that there was more than met the eye. The debtor, a disabled woman whose only income is Social Security Disability benefits, did not dispute the claim that she owed the plaintiff $2,610.82 plus interest and costs because she had defaulted on a credit card. In fact, Judge Yacknin granted summary judgment to the plaintiff for the amount sought.

The defendant debtor, however, simply could not afford to pay back the debt. Because her sole source of income is Social Security benefits, which are exempt from attachment under 42 U.S.C. §407(a), she argued that the plaintiff's use of a Restraining Notice to enforce its money judgment against her should be restricted. With the able assistance of her attorney, Peter Dellinger of the Empire Justice Center, she convinced Judge Yacknin to issue a Protective Order pursuant to NY CPLR §5240. The Court ordered the plaintiff to include "Special Instructions" in any restraining order it issues pursuant to NY CPLR §5222 in its efforts to collect its judgment. The special instructions notify the financial institution that in instances when Social Security Disability or Supplemental Security Income is the sole basis of the property in its possession, the Restraining Order shall not be effective. Judge Yacknin went on to devise a special check off box for the financial institution to complete and return.

Judge Yacknin's decision is remarkable in many ways, not the least which is the fact that defendant Gregory currently does not have a bank account subject to restraint. The defendant, however, convinced the court that the reason she had no bank account – despite needing and wanting one – was because she had to close her previous account after a prior judgment creditor had seized her SSD benefits. Not withstanding arguments from the plaintiff creditor that the court should not "assist this debtor or any other debtor in attempting to insulate or hide their assets from legitimate enforcement activities," Judge Yacknin accepted the plaintiff's request for a protective order.

Congratulations to Peter Dellinger for his creative work in this significant case. Judge Yacknin's decision is currently reported at 2005 WL 3487764. Let's hope that her decision helps pave the way to real reform in this area. For more information on another legal challenge to the difficulties faced by SSD/SSI recipients whose bank accounts are frozen, see the recent article on the *Mayers et al. v. New York Community Bancorp, et al.* in the September 2005 edition of the *Disability Law News*, available at www.empirejustice.org.

DA& A Not Material—continued

(Continued from page 14)

ality. Similarly, the court held that the fact that the plaintiff often failed to comply with treatment does not lead to a finding of not disabled. Citing great language from *Thompson v. Apfel*, 1998 WL 720676, *6 (S.D.N.Y. Oct. 9, 1998), the Magistrate recognized that psychological and emotional difficulties might constitute good cause for failing to follow prescribed treatment. Here, the court noted that the ALJ had not questioned the ME about this, but rather the issue was raised only by the representative – and the ALJ failed to comment on the ME's response.

This decision will undoubtedly be a helpful citation for advocates arguing against materiality in future DA&A cases, as well as in cases involving mentally impaired claimants who are unable to comply with treatment. Congratulations to Kathy and Al for a job well done.

ADMINISTRATIVE DECISIONS

Appeals Council Reverses ALJ in Kid's Case

Advocates often make the one argument in children's SSI cases that a diagnosis such as ADHD (Attention Deficit Hyperactivity Disorder) can result in marked impairments in several domains of functioning. Lisa Santora, a paralegal with the Erie County DSS Legal Advocacy for the Disabled Program, recently convinced the Appeals Council of just this.

In a six-page decision issued just two months after the Request for Review was filed, the Appeals Council agreed with Lisa that her young client had a marked impairment in the domain of interacting and relating to others. The ALJ had found a marked impairment in the domain of attending and completing tasks, but had determined that the little girl's disruptive behavior did not markedly interfere in any other domains.

Not so, said Lisa. She pointed the Appeals Council to the reports of several teachers who related the extent to which the girl's ADHD interfered with her ability to play cooperatively, to make and keep friends, to express anger appropriately and to interpret the meaning of facial expressions, body language hints, and sarcasm. The client's numerous bus suspensions and serious misbehavior at school underscored her problems in this domain, and helped overcome the unfortunate report from the treating physician indicating that she was only moderately limited in social functioning.

The Appeals Council reversed the ALJ's decision and issued a fully favorable decision! Kudos to Lisa for her role in this victory. The Appeals Council decision and Lisa's Memorandum are available as DAP#422.

Syracuse OHA Moves

It may not be Monopoly, but the Syracuse OHA is now on Park Place. The new address is:

1 Park Place, 5th Floor
300 South State Street
Syracuse, New York 13202

OHA can be reached by phone at (315) 479 3900. The fax number is (315) 479 3933. We'll still hold out for the Boardwalk.

Appeals Council Regrets Delay

It is not often that we get an apology from the Appeals Council. Jody Davis, a senior paralegal at the Legal Assistance of the Finger Lakes (LAFL) office of LAWNY, successfully appealed the dismissal of her client's hearing request. After granting her request for review and remanding the case for a hearing on the client's CDR (Continuing Disability Review), the Appeals Council concluded that it "regrets the delay involved."

Jody's client had failed to attend the scheduled hearing. Despite the fact that Jody appeared, the ALJ dismissed the request for hearing due to abandonment. The ALJ, in his dismissal, acknowledged that his action was inconsistent with HALLEX I-2-4-25 D, which provides that an ALJ may dismiss a request for hearing when neither the claimant who requested the hearing, nor the claimant's representative, appears at a scheduled hearing and neither shows good cause for the absence," but "[i]f a representative appears at a scheduled hearing without the claimant, dismissal is never appropriate."

The ALJ posited that he was not bound by these HALLEX provisions, but only by federal regulations. As both Jody and the Appeals Council correctly pointed out, however, in this instance HALLEX and the federal regulations are in agreement. Section 416.1457 of 20 C.F.R. also provides that an ALJ may dismiss a hearing request only if neither the claimant nor the representative appears. According to the Appeals Council, since Jody was there, the claim should not have been dismissed.

The Appeals Council ruled that on remand, the ALJ should determine whether or not the claimant has constructively waived the right to appear under HALLEX I-2-3-25D. That section provides that if a claimant's representative appears at a scheduled hearing without the claimant, the ALJ may determine that the claimant has constructively waived the right to appear *if* the representative is unable to find the claimant, the notice of hearing was mailed to the claimant's last known address, *and* the contact procedures of 20 CFR §§ 404.938 and 416.1438 have been followed. The ALJ must issue a Notice to Show Cause, giving the claimant an opportunity to demonstrate whether s/he had good cause to miss the scheduled hearing. To establish good cause for failure to attend a scheduled hearing, a claimant must show that neither the claimant nor the claimant's representative was properly notified of the scheduled hearing, or that an unexpected event occurred that did not provide them enough time in advance of the scheduled hearing to notify the ALJ and request a postponement. [N.B. Under HALLEX, in certain circumstances, the ALJ can dismiss the hearing request without issuing a Notice to Show Cause if neither the claimant nor the representative appears.]

The Appeals Council went to hold that if the ALJ determines that the claimant has constructively waived the right to appear, the ALJ must nevertheless complete the record and issue a decision. According to the governing HALLEX provisions, "if the claimant fails to respond to the Notice to Show Cause or fails to provide good cause for failure to appear at the scheduled hearing, the ALJ may then determine that the claimant has constructively waived his or her right to appear for a hearing, and the ALJ may issue a decision on the record. If the claimant provides good cause for failure to appear, the ALJ will offer the claimant a supplemental hearing to provide testimony."

Because this claim had already been remanded to the same ALJ once before, the Appeals Council directed that it be assigned to another ALJ. Since the claim is a CDR, the Appeals Council also ordered OHA to notify the claimant about the right to have monthly checks continued until a new decision is issued. Section 416.996 of 20 C.F.R. provides that benefits can be continued through the ALJ decision in CDR appeals. Section 416.996(e) governs the continuation – or reinstatement – of benefits following a remand by the Appeals Council.

Jody certainly made sure everything was covered – including the Appeals Council's remorse. Another great advocacy job by Jody Davis!

WEB NEWS

Medicare Part D Resources

We have all been inundated with information, questions, solicitations and hysteria about the new Medicare part D prescription drug plan fiasco. We have found several websites that provide comprehensive (and correct) information so that we may better advise our clients, family members and ourselves!

http://www.medicareadvocacy.org/News_Current%20News.htm
http://www.gmhc.org/policy/benefits/medicare_partD.html
http://www.health.state.ny.us/health_care/medicaid/program/update/2005/dec2005spec.

2006 Medicaid Levels Posted

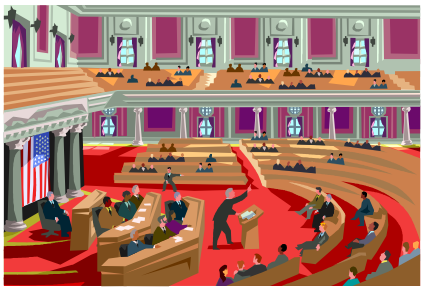
The Human Resources Administration (HRA) of New York City has updated its online chart showing new 2006 figures for numerous Medicaid categories statewide, including Family Health Plus, Child Health Plus, Medicaid Buy-in and regular Medicaid.

http://www.nyc.gov/html/hra/downloads/pdf/income_level.pdf

Online Congressional Directory

Have you ever urged a client to contact the local office of their U.S. Representative or Senators to get things unstuck at Social Security? "Congress Merge," a handy web service, converts any zip code into the detailed contact information your client needs:

www.congressmerge.com



Believe It or Not

In the Department of SSA irony, Chris Bowes of the Center for Disability Rights (CeDar) shares this entry with us. The government actually prosecuted the defendant in this case for theft of government money by way of his Title II overpayment. Schneider apparently worked full time for as a tele-service representative for the same SSA District Office that was responsible for managing his disability claim:

> From April 1997 to August 2000, Schneider, a Marine Corps veteran with serious mental disabilities that surfaced during his overseas tour of duty, was hired as a teleservices representative in the Auburn, Washington, and later Portland, Oregon, offices of the Social Security Administration (SSA). During this period, he continued to receive disability benefits from the SSA although he earned more income per month than the minimum amount required to constitute "substantial gainful work" under Title II of the Social Security Act. Strangely, Schneider worked full time in the same SSA office that handled his disability case, rendering the government's negligence a proximate cause of the very employment it now claims was unlawful. The government, which apparently did nothing to determine if Schneider was employable, should not now have the right to demand that the defendant be imprisoned.

United States v. Schneider, 2005 U.S. App. LEXIS 24841 (9th Cir. 2005). Believe it or not…

GAO Reviews Veterans Benefits

Previous reports in these pages have chronicled the GAO's surveillance of SSA's foibles. This month it is the Veterans Administration under the microscope. On December 7, 2005, the GAO (General Accountability Office) issued "Veterans' Disability Benefits: Claims Processing Challenges and Opportunities for Improvements (GAO-06-283T), dealing with the challenges and opportunities facing the Department of Veterans Affairs (VA) disability compensation and pension program. The study was prompted by Congressional concerns over long waits for decisions, large claims backlogs, inaccurate decisions, and significant discrepancies in average disability payments from state to state.

Like SSA's disability program, the VA's compensation and pension programs were designated as high-risk areas in January, 2003, because of continuing challenges to improving the timeliness and consistency of disability decisions and the need to modernize programs. According to the GAO, the "VA's outdated disability determination process does not reflect a current view of the relationship between impairments and work capacity. Advances in medicine and technology have allowed some individuals with disabilities to live more independently and work more effectively." In recent years, GAO has found that VA and other federal disability programs have not been updated to reflect the current state of science, medicine, technology, and labor market conditions.

The GAO specifically found that "several factors may impede VA's ability to significantly improve its claims processing performance. These include the potential impacts of laws, court decisions, and increases in the number and complexity of claims received. Opportunities for improvement may lie in more fundamental reform in the design and operation of disability compensation and pension claims programs." Sound familiar?

CLASS ACTIONS

Stieberger, et al. v. Sullivan, *84 Civ. 1302 (S.D.N.Y.) ("the non-acquiescence case")*

Description - Certified class of New York residents challenges SSA policy of non-acquiescence in Second Circuit precedents. The district court initially granted plaintiff's motion for a preliminary injunction. The Circuit vacated the injunction in light of parallel proceedings in *Schisler*. On remand, the district court granted, in part, plaintiffs' motion for summary judgment. The court declared SSA's non-acquiescence policy unlawful The court denied SSA's motion to dismiss. The court found that SSA non-acquiesced in the following four circuit holdings: (1) treating physician rule, (2) cross examination of authors of post hearing reports, (3) ALJ observations of pain, and (4) credibility of claimants with good work histories. The court left open for trial the question of whether SSA non-acquiesced with respect to three other Second Circuit holding: (1) findings of incredibility must be set forth with specificity, (2) weight must be given to decisions of other agencies, (3) conclusory opinion of treating physician cannot be rejected without notice of need for more detailed statement.

Relief - Re-openings available for almost 200,000 disability claims denied or terminated: (a) between 10/1/81 and 10/17/85 at any administrative level of review, or (b) between 10/18/85 and 7/2/92 at the hearing or Appeals Council level of review. Also, denials at any administrative level between 10/1/81 and 7/2/92 will not be given *res judicata* effect and thus will not bar subsequent claims for Title II disability benefits regardless of "date last insured."

Citation - *Stieberger v. Heckler,* 615 F. Supp. 1315 (S.D.N.Y. 1985), pre. inj. vacated, *Stieberger v. Bowen,* 801 F.2d. 29 (2d Cir. 1986), on remand, *Stieberger v. Sullivan,* 738 F. Supp. 716 (S.D.N.Y. 1990).

Information - Ken Stephens (kstephens@legal-aid.org), Legal Aid Society (ask for "Stieberger Hotline" 888-284-2772 or 212-440-4354), Christopher Bowes, CeDar (212-979-0505); Ann Biddle, Legal Services for the Elderly (646-442-3302).

State of New York, et al. v. Sullivan,
83 Civ. 5903 (S.D.N.Y.) ("the cardiac case")

Description - The Second Circuit in July 1990 affirmed the district court's judgment that declared invalid SSA's policy of relying exclusively on treadmill test results when evaluation claims filed by New York residents alleging disability due to ischemic heart disease. The district court required SSA to alter its policy with regard to steps 2 through 5 of the sequential evaluation, and to reopen past claims that were improperly denied.

Relief - Reopenings available for claims based on ischemic heart disease, hypertensive vascular disease, myocardiopathies, or rheumatic or syphilitic heart disease, if benefits were denied or terminated (a) between 6/1/90 and 12/4/89 at steps 3,4, or 5 of the sequential evaluation (i.e. prior to distributions of HALLEX/POMS instructions and training of DDS personnel). Persons must have been New York residents at time of decision subject to reopening, and must not have received a final adverse court judgment prior to 12/5/89. The pre-2/10/94 listing, and the *State of New York* instruction, continue to be controlling in New York Claims "initially adjudicated" prior to 2/10/94, and are also relevant to later claims when decision makers determine equivalence to the 2/10/94 listing.

Citation - *State of New York v. Heckler,* 105 F.R.D. 118 (S.D.N.Y. 1985) (certifying class); subsequent opinion, *State of New York v. Bowen,* 655 F. Supp. 136 (S.D.N.Y 1987) (granting motion of subclass for partial summary judgment); *State of New York v. Bowen,* 83 Civ. 5903 (S.D.N.Y 12/4/89) (unpublished Order and Final Judgment); *State of New York v. Sullivan,* 906 F.2d. Cir. 1990) (affirming district court's unpublished Order and Final Judgment).

Information - Ann Biddle or Malcolm Spector, Legal Services for the Elderly (646-442-3302).

DAP Conference Features NOSSCR Director

Over fifty DAP advocates from around the state gathered in Albany last month for a two-day conference that featured sessions on the sequential evaluations for newer advocates and advanced sessions on vocational testimony and mental impairment cases. The conference culminated with a sessions on ethics and a mock hearing starring ALJ Thomas Zolezzi, former OHA attorney Linn Baker as the vocational expert, and our own Peter Racette as advocate.

Kicking off the conference on Thursday afternoon was a joint Task Force meeting featuring Nancy Shor, the Executive Director of the National Organization of Social Security Claimants (NOSSCR). As always, Nancy's lively and informative presentation was well received. She updated the audience on a number of happenings at SSA, especially Commissioner Barnhart's recently proposed disability design regulations. [*See* the September 2005 edition of the *Disability Law News* for an overview of the proposed regulations.] Nancy reported that Commissioner Barnhart has been very defensive about these proposals and expects to issue final regulations in January.

Nancy predicts that the infamous twenty-day deadline to submit all evidence prior to hearings will be softened a bit to include good cause exceptions. She doubts the Commissioner will budge, however, on her proposal to replace the Appeals Council with a Decision Review Board. Nancy's guess is that the Commissioner's insistence on testing the program on a small scale (beginning in the Boston area) as opposed to starting it as pilot ensures that it will survive Barnhart's term, which expires in 2007.

As to the controversial ethical proposals regarding the submission of evidence, Nancy speculates that they will be scaled back somewhat. Although advocates may still be required to submit both helpful and hurtful evidence, they will not be obligated to *seek out* negative evidence. Beyond the disability design, the proposed grid rule changes (see the Regulations Section of this newsletter for more details) are clearly intended to save money. Another concept in the offing is a suggestion for a time-limitation on benefits, a la the TANF program. Also proposed is an expansion of the use of installment payments for past due benefits, changing the current formula to three rather than twelve months.

Nancy also touched upon another issue that is apparently near and dear to Commissioner Barnhart's heart: AeDib, or the accelerated electronic folder. Rest assured, however, that New York is last on the schedule for conversion to electronic folders. Nancy - and we - are still interested in problems that advocates are experiencing with access to paper folders, especially with video hearings.

Materials from the conference, along with webcasts of the introductory sessions, should be available at www.empirejustice.org in the near future. In the meantime, advocates can mark their calendars for the next statewide gathering, which will take place at the Partnership Conference in Albany on June 5-6, 2006.

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

Stay Home From Work?

Is this really the message employers want to give? It might be, according to Joy Davia, columnist for Rochester's *Democrat & Chronicle*, whose December 18, 2005 column, "Take health precautions for yourself, co-workers," is reprinted below with the permission of the *Democrat and Chronicle* (www.democratandchronicle.com):

Pick your poison:

Whooping cough is on the rise; the potential bird flu pandemic is all the rage; and the pesky flu will likely incapacitate lots of workers in the coming months. This hype has me wanting to fix a jumbo-size hand sanitizer pump onto my cubicle. Or stock protective masks under my desk — shielding me from coughing co-workers.

But before I break into full-blown hypochondria, there are lots of moves myself and others could make to prevent bugs from infiltrating the office. It's not just important for workers' well-being, but also for employers'.

This flu season, U.S. companies will likely spend almost $8 billion in paid sick leave, which equals about 70 million missed workdays, according to the global outsourcing firm Challenger, Gray and Christmas. So douse your hands regularly in soap and water, cover that cough and separate your eating and drinking things from sickly people at home, experts said. It's not too late for a flu shot, said Dr. Wayne Lednar, Eastman Kodak Co.'s medical director. Your body makes protective antibodies just two weeks after vaccination — so a shot the first or second week of January should shield you from flu germs still circulating at the middle to end of February, he said.

Given the recent delay in getting flu shots, Kodak is just now resuming its on-site flu clinics. (Kodak had its flu clinic for at-risk workers in October.) The later date has Lednar worried, however, since he fears workers will skip the shot because they'll be distracted by the holidays.

Even if you do get sick, you can still do your part and skip the office — a move that's apparently hard for lots of workers, since 80 percent of them said they often go to work sick, according to a Robert Half International survey. So to help you decide whether to spend your day in your bed or cubicle, here are some tips:

Is it a cold or flu? - You'll know. The flu will knock you out, making you unable to work. It'll hit you with many symptoms: from a cough to a fever to muscle aches, said Strong Health's Dr. Carlos Swanger.

Fever - Is it 101 degrees or higher? You likely have something that'll infect others. The sniffles with a fever of 99-100 degrees, however, might mean you just have a cold. "And people go to work with colds all the time," Swanger said.

Cough - A cough can linger weeks after a cold, which is more of an annoyance than contagious. If it's coupled with other symptoms, you might have something worse. Is your cough unusual? Maybe squeaky or high-pitched? You might have the very contagious whooping cough. Skip work and see your doctor.

Sore throat - Again, if it's paired with other symptoms, such as a fever, you might be contagious. If you have problems swallowing or breathing, you might have a serious bacterial infection, such as strep throat. A regular sore throat with no other symptoms — no fever, no tenderness when you press on your neck — is likely treatable with home remedies such as lozenges. Go to work; you should be fine in a few days. Workers, however, can always call their doctor to help make such decisions, he added. And don't forget about the sickness that's perhaps the most contagious of them all: viral conjunctivitis, which includes redness in the whites of your eyes and some itchiness and mild crusting. "Avoid work," Swanger said. "But if you do go in, at least limit contact with folks — no hand to hand contact."

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