Empire Justice Center

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DISABILITY LAW NEWS

Class Action Challenges Fleeing Felon Rules

On December 28, 2006, the Urban Justice Center, along with the National Senior Citizens Law Center and the law firm Proskauer Rose LLP, filed *Clark v. Barnhart*, a nation-wide class action lawsuit against the Social Security Administration (SSA) and Commissioner Jo Anne B. Barnhart in the United States District Court for the Southern District of New York. The Plaintiffs challenge the SSA's practice of suspending benefits of any recipient who has an outstanding warrant alleging a violation of probation or parole without a finding that the person is actually violating probation or parole.

As advocates will recall, the United States Court of Appeals for the Second Circuit struck down the SSA's practice of assuming that anyone with an outstanding warrant is fleeing prosecution and held that the SSA must first determine whether the person intended to flee prosecution before suspending benefits. See *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005). *Clark* challenges the SSA's implementation of the other subsection of the "fugitive felon" statute, which relates to probation and parole violators.

The named plaintiffs in *Clark*, which was filed as a nation-wide class action, come from various parts of New York State, Oregon, and Florida. All had been receiving either SSI or SSDI benefits due to their various disabilities. Their benefits were abruptly terminated by SSA based merely on allegations that they had violated conditions of their respective probations. There were no findings in any of the cases that the plaintiffs had actually violated probation. Each plaintiff presents a very compelling story of the severity of his or her impairments and the harm suffered by losing benefits. Several of them have contemplated suicide as a result.

The Complaint alleges that SSA's policy of suspending or denying SSDI or SSI benefits solely on the basis of an outstanding warrant alleging a violation of the conditions of probation or parole without regard to whether or not there has been a finding that such individual has in fact committed such a violation is unlawful.

The complaint is posted on the Urban Justice Center's website (www.urbanjustice.org) in the Mental Health Project's litigation section.

Plaintiffs' counsel are anxious to hear of other possible plaintiffs for this lawsuit. If you have a client who lost his/her benefits because of an outstanding warrant for allegedly violating probation or parole, please contact Jennifer Parish, one of the counsel for the plaintiffs, at (646) 602-5644 or jparish@urbanjustice.org.

INSIDE THIS ISSUE:

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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.

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Legal Aid Clinic Undermines VE Testimony

Students at Cornell's Legal Aid Clinic, under the guidance of Barry Strom, have formulated a comprehensive attack on a local VE (vocational expert) that might prove helpful to other advocates who confront the same VE. It also includes a helpful rebuttal of the VE's "analysis" of the number of surveillance system monitor jobs actually available in the upstate economy.

The students' memo initially challenges the VE's credentials, citing the fact that she has no degree in vocational rehabilitation or rehabilitation counseling. Although she is certified as a rehabilitation counselor, she obtained certification through an on the job apprenticeship program during a period when a degree was not required, as it currently is. See CRC Certification Guide, Commission on Rehabilitation Counselor Certification, available at: *http://www.crccertification.com/downloads/10certification/CRC_Certification_Guide_1106.pdf.* The memo also argues that the VE's lack of experience in placing individuals with purely mental impairments undermined the value of her testimony in a case involving a physical impairment.

At the hearing in question, the VE had testified that the only available job was that of "surveillance system monitor." Yet she failed to specify how that job, which is identified in the *Dictionary of Occupational Titles* (DOT) as sedentary, would be appropriate for an individual who can only sit for three hours in an eight hour work day. Even if the VE was assuming a "sit/stand" option, she failed to so specify. Nor did she explain whether – or how – the job could be performed while walking. As such, her testimony was not in accord with the DOT, and thus in violation of Social Security Ruling (SSR) 00-4p, which requires the VE to explain any differences between her testimony and the DOT.

Finally, the memo challenges the premises upon which the VE based her estimate of 180 surveillance system monitor (SSM) jobs available. The VE testified that she first took the number of all security jobs in the reason, and extrapolated that twenty percent of those would fit the definition of SSM. The memo challenged the VE's assumption of twenty percent, which was based on her own informal telephone survey of two or three security companies in the area. Even that specious estimate fails to take into account the number of those jobs that could be performed with the sit/stand option.

Thanks to Barry Strom for sharing this helpful analysis with us. The Cornell Legal Aid memo is available as DAP #442.

Break-Even Chart Available

The 2007 Deeming "Break-Even" Chart is now available. This handy reference allows you to determine at a glance if your client's SSI will be reduced based on income of parents or spouses. A copy is attached. It is also available as DAP #443.

Immigrants Continue to Face SSI/DHS Quagmires

The infamous Welfare Reform Act, technically the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA or Public Law 104-193), made significant changes, among other things, to the eligibility of non-citizens for Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) benefits. One of the most notorious provisions barred most immigrants arriving in the U.S. after August 22, 1996, from receiving SSI benefits. Disabled and elderly refugees and asylees entering the United States are among the few immigrant groups arriving on or after August 22, 1996, who remain eligible for SSI, although their eligibility is time-limited. Most other non-citizens are categorically denied.

Prior editions of this newsletter have chronicled the difficulties faced by those eligible refugees whose seven-year time limited status has begun to run out. Thanks to ongoing litigation, 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. See the September 2006 and March 2005 editions of the Disability Law News, available at *www.empirejustice.org*, for more information on the 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.

In an effort to address the underlying problem of SSI ineligibility for those refugees who are unable to obtain citizenship in the requisite seven years, a new nationwide class action has been filed against officials of the Department of Homeland Security (formerly the Immigration and Naturalization Services) and the Social Security Administration. The class, representing refugees, asylees and other humanitarian immigrants who face loss of their SSI benefits, is challenging the lack of timely processing of their applications for naturalization. The suit seeks more timely processing and continuation of SSI benefits beyond the current seven-year time limit until the claimants have a reasonable opportunity to complete the naturalization process. Plaintiffs are alleging a denial of due process and equal protection, as well as a violation of the Administrative Procedure Act. The complaint in *Kaplan v. Chertoff*, 2:06-cv-05304ER (E.D. Pa) was filed on December 5, 2006, by Community Legal Services in Philadelphia and a private firm in Philadelphia.

Recent listserv discussions have also reflected the problems faced by other non-citizens trying to collect benefits under the various permutations of the Welfare Reform Act. (For a summary of the categories of non citizens eligible and not eligible for various benefit programs, including SSDI & SSI, see the excellent chart prepared by Barbara Weiner in conjunction with Fordham Law School at *http://www.empirejustice.org/content.asp?ContentID=1000.)*

For example, what about a mother and 15 year old son who are seeking survivor's benefits on the earnings record of husband/father who died about 11 years ago? The father, who was not a citizen, lived and worked in the U.S. for more than ten years. The mother and son live in the Dominican Republic, have never lived in the U.S., and are not U.S. citizens. Under SSA's regulations, they can collect survivor's benefits if they are "in" the U.S., as opposed to being "outside" the U.S. See 20 C.F.R. §406.460(a). (They can then go back to the Dominican Republic as long as they return to the U.S. for 30 days every six months.) Although currently in New York on tourist visas good for six months, they were told by SSA that that was not good enough. Not so, according to POMS §RS 00204.010, read in conjunction with §RS 00204.025. They should be considered "lawfully present" in the U.S. by virtue of their tourist visas, and thus eligible for their Title II benefits if they comply with the six months/30 day provisions.

This is merely one example of the complex and convoluted provisions of the rules for receipt of Title II benefits by non-citizens. But is also an example of how digging deeply into the POMS, especially with the help of SSA and immigration mavens like Paul Ryther and Barbara Weiner, can uncover the keys for solving some of the difficulties and inequities that face non-citizens.

REGULATIONS

Final Rules Related to the CDR Process Issued

The Social Security Administration (SSA) issued final rules on suspension of Title II or SSI benefits during a continuing disability review (CDR) if the beneficiary fails to comply with SSA's request for information. 71 Fed. Reg. 60819 (Oct. 17, 2006). Proposed regulations were published in December 2005. The final rules went into effect on December 18, 2006.

Under the previous SSI regulations, benefits were suspended for up to 12 months if a beneficiary failed to provide "necessary information" to SSA. 20 C.F.R. §416.1322. Benefits were resumed when the information was provided; however, after 12 months of suspension, benefits were terminated. 20 C.F.R. §416.1335. The new regulations implement the same procedure for Title II beneficiaries undergoing a CDR and restate the policy in the SSI CDR process.

The final regulations provide that the failure to cooperate will result initially in a suspension rather than a termination of benefits based on a determination that the individual is no longer entitled to benefits. The individual must contact a local SSA office and provide the requested information within 12 months for benefits to resume. No appeal has to be filed to have benefits resumed as long as the contact is made within 12 months of the termination.

SSA also issued final regulations exempting work activity as a basis for a CDR. 71 Fed. Reg. 66840 (November 17, 2006). The new regulations implement a provision in the 1999 Ticket to Work legislation that that prevented SSA from scheduling a CDR solely as a result of work activity for Title II recipients who received benefits for at least 24 months; the 24 months do not need to be consecutive. 42 U.S.C. §421(m). The final regulations were effective December 18, 2006.

The statute and regulation apply only to CDRs that are triggered by earnings below the SGA level. The beneficiary is still subject to regularly scheduled CDRs and benefits may be terminated if earnings exceed the SGA level. Additionally, SSA cannot consider work performed during the current period of eligibility to be "past relevant work" at the last two steps of the sequential evaluation process for medical improvement CDRs if such consideration would lead to a finding of no disability. Such work, however, can be considered if it provides evidence that a beneficiary is still disabled.

SSPA Provisions Enacted

On November 17, 2006, SSA promulgated final rules that implement four statutory changes from the Social Security Protection Act of 2004 (SSPA). 71 Fed. Reg. 66860. The rules were effective December 18, 2006.

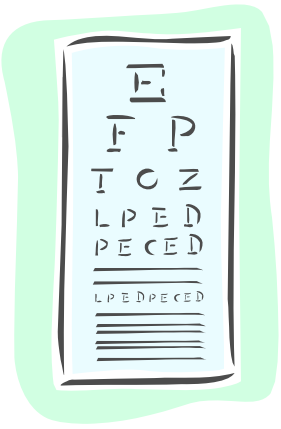
1) Rules for the Issuance of Work Report Receipts Section 202 of the SSPA requires SSA to issue a receipt every time the beneficiary or his/her representative reports a change in work activity. The receipt provision went into effect in March 2005. SSA is implementing a new centralized computer system that will create an electronic record. There is no estimate when this system will be operational.

2) Payment for Trial Work Period Service Months After a Fraud Conviction Under the SSPA, if a beneficiary is convicted by a federal court of fraudulently concealing work activity, there will be no eligibility for trail work period months and thus benefits are not payable for trail work period service months. This provision applies to trial work period months after March 2004.

3) Changes to the Student Earned Income Exclusion The SSPA removed the restrictions from the student earned income exclusion that the individual must be a "child," unmarried and not head of a household. Now, the individual must only be under age 22 and regularly attending any educational or vocational institution to prepare for gainful employment. The final rule includes students who are being home schooled if certain requirements are met.

4) Expansion of the Reentitlement Period for Childhood Disability Benefits The seven year restriction on reentitlement to childhood disability benefits if they were terminated due to SGA has been eliminated. This provision applies to benefits payable beginning October 2004.

Look For Final Rule on Visual Disorders Listing



Another Listing has been updated to reflect advancements in medicine. SSA issued a final rule revising the Listing criteria used to evaluate visual disorders. 71 Fed. Reg. 67037 (Nov. 20, 2006). These changes are effective February 20, 2007, and will remain in effect for eight years, unless SSA revises and reissues them sooner or extends the effective date.

Visual disorders are included in the Listings for Special Senses and Speech, 2.00 and 102.00, which also deal with hearing and speech disorders. SSA is only changing those sections dealing with visual disorders. The changes are in the Introductory Text and in the specific criteria in the Listings. Highlights include:

- Clarification of statutory blindness and the evidence needed to establish it in the Introductory Text.
- Changes to evaluation of visual acuity. See sections 1.00A and 102.00A.
- Listing 2.03-Contraction of the Visual Field in the Better Eye. There are changes to the specific criteria in the listing. Also, the same listing is added to the childhood listings as section 102.03.
- Listing 2.04-Loss of Visual Efficiency. Changes are in the criteria in this listing, including changes to Tables 1 and 2. The same listing is added to the childhood listings as section 102.04.

COURT DECISIONS

Court Remands for Consideration of Treating Physician Rule

In *Toni Barbara Lee v. Commissioner*, 2006 WL 3370524 (November 16, 2006, W.D.N.Y), Judge Charles Siragusa ordered a remand for further administrative proceedings in a claim that will look all too familiar to many advocates. The 39 year-old claimant complained of back pain, which had been diagnosed as sprain/strain, as well as arthrogenic back pain, with minimal finding on x-rays and MRIs. Her various doctors, however, imposed a number of limitations.

The claimant, who was initially *pro se*, had actually prevailed at her first hearing. The ALJ issued an "on the record" decision finding her disabled. The Appeals Council, however, on its motion review, remanded the claim. It specifically instructed the ALJ to obtain clarification from the treating physicians, to obtain additional documentation, elicit testimony from a medical expert, and consider the claimant's subjective complaints and all the other medical evidence in assessing her residual functional capacity (RFC). On remand, the claimant notified the ALJ that she could not attend the hearing due to her physical limitations, and requested that he render a decision without her. Only a vocational expert was present. The ALJ, in his second decision, found that she was able to perform sedentary work, and was thus not disabled.

The claimant then engaged the able assistance of Mark McDonald, an attorney in Geneva, New York, who represented her at the Appeals Council and in federal court. Judge Siragusa agreed with his argument that the ALJ had ignored the treating physicians' opinions. While finding that the main treating physician's RFC opinion was not necessarily sufficiently supported to be given controlling weight, the judge nonetheless held that the ALJ had failed to specify what weight he had accorded the opinion. The Court also relied on *Pronti v. Barnhart*, 339 F.Supp.2d 480, 490 (W.D.N.Y.2004) (quoting Social Security Ruling 96-8p), in holding that the ALJ did not properly explain the basis of his RFC finding, including a narrative discussion describing how the evidence supports each conclusion, citing specific medical facts (e.g., laboratory findings) and nonmedical evidence (e.g., daily activities, observations).

The Court also held that the ALJ had failed to follow the instructions of the Appeals Council. He also failed to evaluate the claimant's credibility properly. Judge Siragusa quoted SSR 96-7p for the proposition that "even though objective medical evidence may have been lacking, the ALJ could not, under the Commissioner's rules, reject plaintiff's subjective complaints outright." Finally, he found that where the record contained many reference to the claimant's weight, the ALJ had erred in failing to consider the claimant's obesity even though it was not listed as a diagnosis.

Judge Siragusa, with the concession of the U.S. Attorney, remanded the claim for further proceedings. Congratulations to Mark McDonald for a job well done.

Court Finds Child Meets Listing 112.05

More and more, it seems that ALJs are loath to accept valid IQ scores and award benefits under either Listing 12.05C for adults or 112.05D for children. Judge Michael Telesca of the Western District refused to let that happen in a recent child's case, where he reversed the ALJ's denial and ordered the calculation of benefits.

The child had a number of well-documented problems with speech and language, distractibility and impulsivity. He was diagnosed with Attention Deficit Hyperactivity Disorder and speech and language delays. He also had IQ scores between 60 and 70. A December 2000 test revealed scores of 67, 78 and 68. In February 2002, he had a Full-Scale of 70, performance 76, and verbal 68. Despite this compelling evidence, the ALJ ignored the representative's listing argument and went on to find that the child had no marked or extreme limitations.

In District Court, the government moved for remand, acknowledging that the ALJ had failed to give proper weight to a number of factors, including evidence from various IEPs (Individualized Educational Plans) that the child was highly distractible, impulsive, had a short attention span, was performing below grade level and functioning in the borderline range. While the Court commended the Commissioner for her frankness, it determined that the record was complete and that a remand would serve no further purpose.

Rochester attorney Lawrence Heller represented the child in federal court. Paralegal Mary Wilcox-Perry prepared the case at the administrative level. Larry reminds advocates how important it is to push these 112.00 listing arguments. We agree! Judge Telesca's decision is available as DAP # 444.

Benefits Awarded in Child's Case

Louise Tarantino of the Empire Justice Center took a risk and it paid off. She represented a twenty year old woman in a federal court case in the Western District of New York. The client's case had started out as a child's SSI case, but with the inevitable passage of time, morphed into an adult SSI case and a claim for Childhood Disability Benefits (formerly known as Disabled Adult Child – DAC – benefits) based on her parent's account.

Early on in the case, the government offered a voluntary remand. Louise wisely assessed the claim, and recognized that while the adult part of the case had in fact been given short shrift, the child's claim was fully developed. She refused the remand offer as to that part of the claim, and moved for a closed period of benefits on the child's claim. Despite the fact that the girl had made it through high school and had even excelled in a few areas, including Girl Scout awards, it was clear that she had only done this with much support. Her ADHD, depression, post traumatic stress disorder and anxiety all prevented her from achieving – or even managing – on her own.

Judge Michael Telesca agreed with Louise's assessment, and issued a decision remanding the child's portion of the case for the calculation of benefits. He relied heavily on the reports of the child's treating psychiatrist, who had testified at the first hearing. (The case had been remanded by the Appeals Council following the first hearing. While the treating psychiatrist did not testify at the second hearing, she provided a summary letter that was attached to the Complaint. Instead, at the second hearing, a medical expert testified, who found that the claimant did not meet several nonexistent listings!).

Ultimately, Judge Telesca found that this case was "a portrait of a disabled adolescent." Kudos to Louise for painting such a compelling picture. Louise's Memorandum of Law and the court's decision in *Mosher v. Barnhart* are available as DAP #445.

ADMINISTRATIVE DECISIONS

Two Claimants Prevail on Remand

"Buffalo Bruce" Caulfield of Neighborhood Legal Services strikes again – and again! Bruce recently received two fully favorable decisions from the same ALJ following remands.

In the first case, the ALJ reconsidered the case of a 16 year-old boy whose claim had been voluntarily remanded from U.S. District Court. The child, who had first applied when he was eleven years old, had been diagnosed with ADHD and Oppositional Defiant Disorder (ODD). The record was replete with evidence of behavioral problems, both at home, in school and on the bus. He had been classified emotionally-disturbed and placed in a 6:1:1 classroom. Despite supporting evidence of disability from his teacher and treating physician, the ALJ denied the claim.

On remand, however, Bruce gathered new evidence indicating that the boy had subsequently been diagnosed as bi-polar. He had several hospitalizations, and had been assigned GAF (Global Assessment of Functioning) scores as low as 20, indicating very serious problems. At last, the ALJ was convinced. In fact, a Medical Expert testified at the hearing that the claimant met Listing 112.04. The medical expert also testified that bipolar disorder is often misdiagnosed as ADHD in children. The ALJ concluded that the boy had been disabled since his application in May 2001 – underscoring yet again the value of retrospective diagnoses.

In the second case, the Appeals Council remanded the claim to the same ALJ based on an Appeals Council memo of which Bruce should be very proud. With painstaking detail, in his memo, Bruce reviewed the all the evidence that the ALJ had ignored, including a very helpful report in Spanish from the claimant's prior treating psychiatrist that the ALJ failed to have translated, despite Bruce's requests.

In addition to his failure to mention or consider significant evidence of the claimant's mental impairments, the ALJ also refused Bruce's request to subpoena medical records documenting the claimant's diabetic neuropathy, or obtain additional evidence concerning possible cognitive limitations. Finally, Bruce challenged the ALJ's finding that the claimant's treatment for impotency belied his claim that he did not participate in family social interactions, as "preposterous and no more than a tawdry effort to belittle him, raising very serious questions about the ALJ's integrity and intellectual honesty in developing the record."

Six months later, following the Appeals Council's remand, the ALJ issued a rather perfunctory fully favorable decision. He relied largely on the testimony of the medical expert who appeared at the hearing to find that the claimant's condition met both Listing 12.04 for depression and 12.08 for personality disorders. He also acknowledged the claimant's physical limitations resulting from his diabetes, and with little fanfare, found him credible.

Thanks to Bruce's hard work, the claimant will be eligible for benefits back to his date of application in April 2003. Bruce's excellent memo and ALJ's decision are available at the Empire Justice Center's online resource center as DAP #446.

Appeals Council Remands for Consideration of Selected Occupational Characteristics

Just when you may have started to think that battling VE (Vocational Expert) testimony was a hopeless task, there is light at the end of the tunnel. Brian Kujawa, Senior Paralegal with the Eire County's Legal Advocacy for the Disabled program, recently convinced the Appeals Council that the VE's testimony in his case conflicted with the Dictionary of Occupational Titles (DOT) and the Selected Characteristics of Occupations (SCO) by relying on O*NET.

O*NET – or the Occupational Information Network – is an on-line source of occupational information developed for the U.S. Department of Labor and supported by its Bureau of Labor Statistics. It is available at *http://online.onetcenter.org/*. It has been updated several times since its inception in 1998. According to Brian's research, O*NET, rather than the DOT and the SCO, have been used by both the New York State Department of Labor and VESID since 2000. Social Security, however, continues to rely on the DOT, which has not been updated since 1991. Apparently, according to SSA, O*NET does not have the same specifics on job demands as does the DOT

To the contrary, Brian used the specifics of O*NET in combination with the SCO to demonstrate to the Appeals Council that his client could not perform the jobs cited by the VE at the hearing. In particular, he relied on the O*NET "Details Report" in the Standard Occupational Classifications under which each job title was classified. The "details" relating to stress tolerance levels and contact with public, coworkers and supervisors proved particularly helpful. For all the jobs cited other then "laundry worker," the "importance" or "context" of those details were rated at 50/100 or higher. (Each SOC contains a "Details Report" that rates various aspects of the jobs within the SOC on a scale of 0 to 100 by "Importance," "Context," and/or "Level." Details relating to stress tolerance and contact with other are found under the Work Activities, Work Context, and Work Styles.)

Brian argued that the VE's testimony, based on the ALJ's hypothetical involving a claimant with the "non-exertional limitations of low stress, entry level, unskilled work dealing with things rather than people, with routine and repetitive tasks, no production line work, in a stable environment with limited contact with the public, coworkers and supervisors, involving simple instructions and tasks, was thus in conflict with the DOT and the SCO. He cited SSR (Social Security Ruling) 00-4p for his argument that the ALJ erred in relying on testimony not consistent with the DOT and SCO.

Although the Appeals Council did not refer to the O*NET in its decision remanding the claim back to the ALJ, it cited the "Selected Occupational Characteristics," noting that contact with supervisors and coworkers was rated as greater than fifty percent in importance in all but one of the jobs cited by the VE, with tolerance of stress as fifty percent or above. It ordered the ALJ to obtain supplemental evidence from a VE clarifying the effect of the claimant's assessed limitations on his occupational base. It also ordered the ALJ to formulate a hypothetical question that reflected the specific limitations established by the record as a whole. Finally, it ordered the ALJ to identify any conflicts between the vocational testimony and the DOT and its companion publication, the SCO, before relying on the testimony

As if that were not enough, Brian also managed to convince the Appeals Council that based on the figures supplied by the VE, the job of laundry worker does not exist in significant enough numbers in the local economy to satisfy the Commissioner's burden. Brian relied on the Bureau of Labor Statistics total job number as divided by the SCOs in the Buffalo-Niagara Falls Metropolitan Region, which in May 2005 was 536,000. He then argued to the Appeals Council that the VE's allegation of 150 laundry jobs in the region only constituted .028% of the regional work force.

Brian's creative and well-researched Appeal Council letter memo, as well as the Appeals Council Decision and Brian's office memo explaining the case, are available as DAP #447.

ALJ Finds Claimant Disabled Prior to DLI

Ever have what appeared to be a nice, straightforward grid case – until you suddenly realize that the claimant's DLI ("date last insured") predated the birthday that mandated the favorable grid result upon which you were relying? That is exactly what happened to Katie Courtney, a new advocate at the Empire Justice Center in Rochester. But Katie managed to save the day – and then some.

Katie's client was over 50 when he contacted her for representation. He had congenital heart problems stemming from acute rheumatic fever in 1973. He had undergone an aortic valve replacement in 1997, and in fact had been found disabled at the time. He, however, wanted to return to work, so agreed to a closed period of disability from October 1996 through November 1997. The claimant's work attempt proved unsuccessful, and he reapplied for benefits in April 1999. Unfortunately, he missed his hearing on that claim because he was incarcerated. After his release, he applied again and appealed his denial.

Katie had evidence from the claimant's treating cardiologist verifying that he was unable to work. His primary care physician reported that he had Class III heart failure and was disabled. (A New York State Heart Association class III classification indicates that the patient has marked limitation of activity, and is comfortable only at rest. See Huffington Center on Aging: Baylor College of Medicine at www.hcoa.org.).

Katie clearly had an argument that her client was disabled under Rule 201.05 as of his 50th birthday. The claimant's DLI of December 2003, however, predated his 50th birthday. It also coincided with his incarceration. Katie nonetheless managed to convince the ALJ that her client was unable to perform even sedentary work currently, as well as during the time that he was incarcerated. Not surprisingly, that was not all that easy, as there were scant medical records from the incarceration, and the client had performed work duty while in prison. The medical records, in conjunction with the claimant's credible testimony as to the limited work he did, persuaded the ALJ. He found that the claimant had been disabled since he stopped working in 1998, and thus eligible for Title II benefits pursuant to his 2004 application.

Congratulations to Katie for this significant victory. It reminds us once again how important it is to pay attention to DLI issues.

Social Security Workers Face IG Fines?

In a bizarre story reported in the National Law Journal, four Social Security Administration employees have been informed of proposed fines of as much as $3.5 million for actions taken in the course of their duties reviewing disability claims, according to a grievance filed by a federal employee union. The three attorneys and a supervisor have been told they face suggested penalties of $5,000 per violation for cases in which they allegedly used expert testimony improperly to help justify benefits decisions. The employees cited the testimony at the direction of an administrative law judge, union officials said.

This amounts to potential fines of between $100,000 and $215,000 each for the attorneys; the supervisor, who was involved with more than 700 cases, has been informed of a proposed fine of more than $3.5 million. SSA's inspector general office (IG), which union officials said has been investigating the matter for more than four years, proposed the penalties.

The alleged "material misstatements" stem from the employees' repeated use of testimony by a single expert who answered a series of general questions in a single case to assist in determining benefits eligibility. Those statements were then applied to later cases at the judge's direction, union officials said. That practice was taught in official training sessions and commonly used within the Office of Disability Adjudication and Review where the attorneys worked, they said.

Although we prefer that the IG go after someone other than Social Security disability clients, this is probably over the top. We'll keep you posted on this and other IG activities that we hear of.

SSAB Criticizes Hearing Process

The Social Security Advisory Board (SSAB) is an independent, bipartisan board created by Congress in 1994, and appointed by the President and the Congress to advise the President, the Congress, and the Commissioner of Social Security on matters related to the Social Security and Supplemental Security Income programs. As an advisory body, it has no authority to take any administrative actions and cannot resolve questions regarding individual claims. It is, however, considered very influential, and its reports and recommendations are generally not ignored. (See the November 2006 edition of the Disability Law News for President Bush's recent nominations to the SSAB.)

The SSAB released a report in September 2006, entitled *Improving the Social Security Administration's Hearing Process*, available at *http://www.ssab.gov/sumrImprovingSSAHearingProcess.shtml*. The SSAB expressed particular concerns with lack of consistency in decision making, processing times and backlogs, productivity, hearing office management, and the SSA-ALJ relationship, at one point in the report describing the adjudication system as "dysfunctional."

The SSAB, based on data examined, concluded that the ALJs may be applying law and agency policy differently, resulting in variations in allowance rates. Among other things, the SSAB speculated as to a correlation between increased production by ALJs in recent years and a slight increase in the allowance rate, noting that allowances take less time than denials. The Board also found that the extent of variance among ALJs suggests that they may be applying law and agency policy differently. The SSAB cited a peer review of ALJ findings published in December 2005 that noted continued inconsistent compliance with the 1996 Social Security Rulings (SSRs) promoted as the "unification rulings." The same report found that ALJs only informed claimants of their right to representation 77% of the time.

The statistics reviewed by the SSAB concerning the number of dismissals that were criticized on quality assurance reviews also suggested to the Board that a number of ALJs are simply not following agency policies. In the past ten years, one out of every seven to eight hearing requests resulted in a dismissal. Peer reviewers agreed with the ALJs in only 71% of these cases. According to the report, "[m]ore troubling is the type of cases that were dismissed. The reviewers disagreed with dismissals significantly more often in SSI-only cases, claims in which the applicant needed additional assistance due to a mental impairment, and cases in which the claimant was unrepresented."

The SSAB concluded that "[t]hese examples suggest that some ALJs are simply not following some policies. If policies are being misinterpreted, they should be clarified. If they are being sidestepped, they should be examined to determine if they are unreasonable or need modification. If they are clear and reasonable, they should be enforced consistently."

The Board had similar concerns with the ever rising processing times and pending caseloads, which have more than doubled since 2000. The SSAB recommends three ways to avoid what might otherwise be the inevitable continuing increase in processing times and backlogs. The first is to increase the resources expended on the hearing process. The Board pointedly referred to the cuts made by both the President and the Congress to SSA's proposed budgets in recent years.

Second, the Board suggests reducing the flow of cases into the hearing process. It is apparently sees the creation of the Federal Reviewing Officers under the new DSI (Disability System Improvement) regulations as a panacea in this regard. In its discussion of the merits of the DSI changes, especially the elimination of the Appeals Council, however, it once again raises the specter of the creation of a specialized Social Security Court.

Finally, it recommends an increase in production levels. Acknowledging the hard work and dedication of "many" of the ALJs and their staffs, it nonetheless noted that some are more productive than others, and "productivity can also be affected by factors such as management environment." It concluded that "[i]t is not reasonable to expect to reduce backlogs without adding resources, reducing the influx of hearings, or using technology to increase productivity." The

(Continued on page 12)

SSAB—continued

(Continued from page 11)

Board views the implementation of the electronic file (eDib), among other things, as potential solutions. In fact, the SSAB thinks that Video teleconferencing (VTC) could be so beneficial that it should be made mandatory! Currently, claimants can refuse a video hearing. See 20 C.F.R. §§404.936-938 & 416.1438-39; HALLEX TI (Temporary Instructions) I-5-1-16.III.C

The Board also found that the new structure for ODAR (Office of Disability Adjudication and Review) shows promise for improving the process, especially in terms of hearing office management. In its discussion of management problems, the SSAB acknowledged the difficulty of the role of the HOCALJ (Hearing Office Chief ALJ), noting that while they receive little compensation, they "do get, in plentiful measure, [ ] the headaches that come with responsibility without authority." It recommends providing HOCALJs with support, training, and other incentives.

Significantly, the report also recommends increased accountability on the part of ALJs. According to the SSAB, ALJs should be reminded when taking office that they are not Article III judges, but rather employees of the SSA, who are "to apply the agency's policies as laid out in rules, regulations, and other policy statements." The SSAB suggests that the Chief ALJ be empowered to develop production guidelines and delegate the duty of conducting performance reviews based on those guidelines. "Other elements of these reviews would include judicial comportment and demeanor, as well as adherence to law, regulation, and binding agency policy. The reviews need not involve a numerical rating or ranking but should provide useful feedback on performance. The Chief ALJ would also be responsible for developing training and counseling programs to deal with performance problems identified in the performance reviews and to issue reprimands or recommend disciplinary action as appropriate."

To protect against any interference with the ALJs' qualified decisional independence, the Board suggests a system under the auspices of OPM (Office of Personnel Management) to investigate any complaints ALJs raise. Additional training of ALJs and changes to the selection process were also among the suggestions made by the SSAB.

It remains to be seen which aspects of this report will actually be a catalyst for change at SSA, and which will collect dust. We vote for more ALJ accountability – but a very dusty Social Security Court proposal.

Personality Disorder Outline Available

On January 5, 2007, the Western New York DAP Task Force had the pleasure of hearing from psychiatrist George Nasra, M.D. His presentation on Personality Disorders and Disability is available as DAP #448.

Are HIV Claims Being Classified as TERI?

Readers of the HIV listserv may have been following the recent discussions concerning classification of HIV cases as TERI cases. What is a TERI case, you may ask? TERI cases are, according to SSA, "cases with an indication of terminal illness" that should be handled in an "expeditious" manner. See POMS DI 23020.045. The euphemism is used to avoid the word "terminal" on the claims file or other documents that might be reviewed by the claimant. A Form-2200 (TERI flag) is placed in the file.

The POMS describe the procedures for identifying and processing TERI cases. The claimant must have an impairment that is considered untreatable ("i.e., the impairment cannot be reversed and is expected to end in death"). SSA includes in that category:

- Chronic dependence on a cardiopulmonary life-sustaining device.
- Awaiting a heart, heart/lung, lung, liver or bone marrow transplant (excludes kidney and corneal transplants).
- Chronic pulmonary or heart failure requiring continuous home oxygen and is unable to care for personal needs.
- A malignant disease (e.g., cancer), and is home confined or institutionalized, with inability to care for personal needs and unresponsive to therapy.
- Diabetic with one or more of the following: multiple amputations due to diabetic gangrene, recurrent cardiovascular events (infarction, failure), recurrent cerebrovascular events with neurological deficit.
- Chronic liver disease; e.g., cirrhosis, hepatitis, with history of massive gastrointestinal hemorrhage.
- Comatose for 30 days or more.
- Newborn with a lethal genetic or congenital defect.

This list, however, is not intended to be all-inclusive.

Advocates are often successful in having AIDS cases classified as TERI. Various POMS sections involving determinations in HIV cases refer to possible TERI treatment. See, e.g., DI 24595.001 and DI 11055.241. Inquiries on the HIV listserv, however, raised the question of whether SSA has recently added to the requirements for proving TERI eligibility. Rumor had it that SSA had changed its criteria, as reflected in SSA Publication No. 05-10019 (Social Security for People Living with AIDS), available at *http://www.ssa.gov/pubs/10019.html.*

That publication includes a section entitled "How can I help speed up my claim?" Vital information includes:

- The names and addresses of any doctors, hospitals or clinics you have been to for treatment;
- How HIV/AIDS has affected your daily activities, such as cleaning, shopping, cooking, taking the bus, etc.; and
- The kinds of jobs you have had during the past 15 years.

Additionally, SSA will ask the treating doctor to complete a form indicating how the HIV infection has affected the claimant. See Forms SSA 4814 for adults or SSA 4815 for children.

HIV advocates have clarified, however, that nothing in this "policy" changes SSA's requirements for characterizing HIV/AIDS cases as TERI. In fact, the forms referred to in this section actually apply to "presumptive disability" determinations.

And what, you may now ask, is "presumptive disability?" According to DI 23535.001, a "claimant, including a child, applying for Supplemental Security Income (SSI) based on disability or blindness, may receive up to 6 months payments prior to the final determination of disability or blindness if he/she is determined to be presumptively disabled or blind and meets all other eligibility requirements." Presumptive disability (PD) determinations can be made at any point in the process by either the Field Office or the Disability Determination Service (DDS - or Division of Disability Determinations in New York State).

(Continued on page 14)

SSI Beneficiaries Enroll in Managed Care

As of October 2006, SSI beneficiaries in twenty-three upstate New York counties are no longer exempt from mandatory managed care. (SSI recipients in New York City have not been exempt since October 2005.) SSI recipients in these twenty-three upstate counties will be required to enroll in a managed care plan, rather then receiving their health case on a fee for service basis. There are, however, still a number of exclusions and exemptions that will allow (or require) some beneficiaries to maintain fee for service coverage.

When SSI recipients and SSI-related individuals enroll in a Medicaid managed care plan, they continue to receive all Medicaid benefits. All Medicaid managed care enrollees keep their Medicaid benefit cards and also receive a health plan ID card. Providers who serve this population will bill the health plan for some services and bill the Medicaid program for others, depending on whether the particular services in question are covered by the managed care plan or "carved out" of managed care. Some services are carved out of managed care by state statute; others are carved out by the contracts between the NYSDOH and the managed care plans. All behavioral health services for SSI and SSI-related Medicaid managed care enrollees are carved out from managed care, with the exception of inpatient and outpatient detoxification.

In New York City, mandatory enrollment packages are now going out to SSI recipients at the rate of 10,000 per month. Mandatory enrollment of SSI recipients has not yet begun in upstate counties, although the original target date for upstate enrollment was January of 2007. To date, 131,000 SSI recipients are now enrolled in mandatory managed care, with 83,000 of those in New York City.

For more information on mandatory managed care, and the ways in which recipients can apply for exemptions, see Trilby de Jung's article on "New York Expands Mandatory Medicaid Managed Care to Include SSI Recipients" in the October 2006 edition of the Legal Services Journal, available at www.empirejustice.org.

TERI—continued

(Continued from page 13)

The Field Offices are authorized to make such determinations based on observation and/or allegations of fifteen specific categories of impairments. See POMS DI 23535.005, which includes impairments such as total blindness, total deafness, amputation, stroke, and Down Syndrome, among others. Symptomatic HIV disease must be confirmed by medical sources.

Presumptive benefits may also be awarded by the DDSs in other cases identified by SSA as impairments with "high PD potential," including HIV disease. See POMS DI 23535.010, which also warns adjudicators of the "low PD potential" in claims involving mental impairments, respiratory disease and back pain. POMS §§ DI 23535.011 & 23535.012 set forth the responsibilities of the DDSs and field offices in PD cases involving claimants alleging Human Immunodeficiency Virus (HIV) infection.

Formal determinations in PD cases are to be expedited "to avoid interruption of payments," since payments will in fact "be interrupted" if a formal determination is not made within six month. POMS DI 23535.015. Note that payments based on PD/PB are not considered overpayments if it is later determined that the claimant is not disabled or blind unless the claim is disallowed due to ineligibility based on non-disability factors, or it is subsequently determined that the amount of payment was computed in error. POMS DI 23535.001.

So, a claimant with symptomatic HIV disease could potentially be classified as TERI and be awarded presumptive disability benefits. There do not appear to be any new policies limiting either determination. Thus, a client who is HIV symptomatic and on medications should still be able to assert TERI rights.

If you have heard otherwise, or have had problems with getting your client's claim classified as TERI, please let us know.

CLASS ACTIONS

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

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

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

Citation - Unpublished order dated April 24, 1986.

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

Sharpe v. Sullivan, No. 79-1977 (E.D.N.Y.)
("the SSI delay case")

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

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

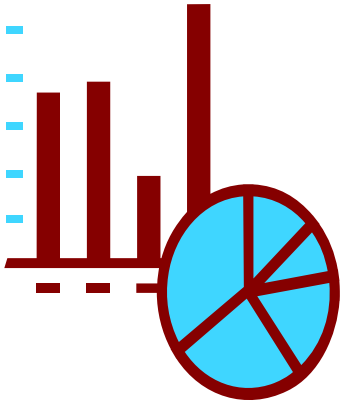
Citations - *Sharpe v. Secretary*, No. 79-19777 (S.D.N.Y. July 10, 1980) (unpublished order), aff'd 621 F.2d 530 (2d Cir. 1980), vacated No. 79-1977 (S.D.N.Y. 1985) (unpublished), revised, No. 79-1977 (S.D.N.Y. March 6, 1990) (unpublished).

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

WEB NEWS

SSA Online Offers New Reports

The Social Security Administration's (SSA) website is a treasure trove of information. Two new reports offer some interesting information:



- Updated Annual Statistical Report on the Social Security Disability Insurance Program, 2005. This annual report provides program and demographic information about the people who receive Social Security benefits as disabled workers, disabled widow(er)s, and disabled adult children. The basic topics covered are beneficiaries in current pay status; benefits awarded, withheld, and terminated; geographic distributions; Social Security beneficiaries who receive SSI; and the income of disabled beneficiaries.
  http://www.socialsecurity.gov/policy/docs/statcomps/di_asr/2005/index.html

- Fast Facts & Figures About Social Security, 2006. This annual booklet highlights data on the most important aspects of the Social Security and SSI programs, the people they serve and the benefits they provide.
  http://www.socialsecurity.gov/policy/docs/chartbooks/fast_facts/2006/index.html

Medicaid Eligibility Charts Available

The Human Resources Administration (HRA) in New York City issues a two-sided chart showing figures for all the different Medicaid programs. Highlights are:

- Box Number 3 has the Income and Resources figures for Medicaid for people age 65+, disabled, and blind -- the program our clients mainly use. (These figures also used by parents/grandparents who have minor-age children or other relatives living with them.)
- Box Number 4 has Family Health Plus levels – for people under 65 who are not disabled and do not have minor-age children or grandchildren living with them.
- Box Number 8 has Medicare Savings Program limits.
- Box Number 10 has Community Spouse income and resource allowances used in nursing homes, Lombardi program, and also to assess the risk that a spouse who does a "spousal refusal" will be sued in NYC only (not Nassau.)
- Box Number 11 has penalty rates for transfers of assets. Figure in NYC in 2007 is $9,375; Nassau is $10,123. To calculate the penalty period, divide the amount transferred by those numbers.
- Boxes 1-2 are levels for children under 21 and pregnant women.
- Box 7 is Medicaid level for singles under 65 and childless couples who are not disabled -- these are the public assistance levels (use the last line in that box). It is usually better to use Box 4 – Family HealthPlus – than these levels.

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

For more information on how to figure out eligibility and budgets, see *http://onlineresources.wnylc.net/healthcare/docs/spendownOUTLINE.pdf*

WEB NEWS

Federal Rules of Civil Procedure Amended

On December 1, 2006, certain of the Federal Rules of Civil Procedure were amended to provide consistent ground rules for parties dealing with Electronically Stored Information ("ESI") in discovery. A simple summary of four specific changes to the discovery process most likely to affect you as a result of these broader amendments to the Federal Rules is available at *http://www.mofo.com/news/updates/files/update02275.html.*

1. Amended Rule 34(b): Specifying the forms of production.
2. New Rule 26(b)(2)(B): Adjusted procedure for discovery of information from sources that are "not reasonably accessible."
3. Amended Rule 26(f): More discussion at the 26(f) conference.
4. New Rule 37(f): Safe Harbor for good-faith disposal of ESI.

Also check out the federal court website *http://www.uscourts.gov/rules/archive.htm*

Visiting Breast Cancer Site

If you visit the Breast Cancer site and click on "donating a mammogram" (pink window in the middle), you will be contributing to free mammograms for underprivileged women. The visit does not cost you anything. As long as enough people are visiting the site on a daily basis, the corporate sponsors/advertisers will donate a mammogram in exchange for the advertising space. *http://www.thebreastcancersite.com*

Resource for Medicaid Mavens

The Human Services Research Institute issues a periodic report which provides up-to-date information about lawsuits concerning Medicaid community services for people with developmental and other disabilities. A revised report is issued every 4-6 weeks.
http://www.hsri.org/index.asp?id=news

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)

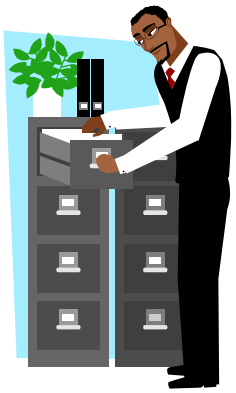
The Second Circuit addressed the issue of what constitutes "aptitudes" as opposed to "skills" in determining whether a claimant has transferable skills under the Grid rules. The Court found that there was an inherent difference between vocational skills and general traits, aptitudes and abilities. Using 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

ADHD Affects Workplace

Advocates are well acquainted with the diagnoses of ADD (Attention Deficit Disorder) or ADHD (Attention Deficit Hyperactivity Disorder) in children's SSI cases. Mental health researchers, however, estimate that ADHD affects more than four percent of the adult population. According to 2005 study in the *Journal of Occupational and Environmental Medicine*, approximately 120.8 million workdays per year are lost because of ADHD, with an economic loss of $19.6 billion.

Joseph Biederman, a professor of psychiatry at Harvard University, commented recently in the *Philadelphia Inquirer* on the profound effect of ADHD on the workplace: "If you are distracted and inattentive, those are things that will lead you not only to not be promoted, but to get fired." Biederman estimates that workers with ADHD are less likely to hold full-time jobs, and typically earn $10,000 a year less than the general population. His study was published in July 2006 in *Medscape General Medicine*.



J. Russell Ramsay, associate director of the University of Pennsylvania's Adult ADHD Treatment and Research Program confirms that Adult ADHD is not merely a nuisance kind of disorder. Rather, he told the *Philadelphia Inquirer* that "it is one of the most impairing disorders that we have in psychiatry."

The transition from school to workplace for young adults who were diagnosed with this psychiatric diagnosis and/or learning disability, and who received accommodations in school has not often been easy. A *Wall Street Journal* article on October 12, 2006, notes that few employers have adapted training or job expectations for workers with learning disabilities. Nor does the 1990 American with Disabilities Act require employers to offer the same broad services that schools must supply. Tensions between employers' claims of "undue hardship" on the business and employees need for accommodations have led to an 74% increase in claims to the Equal Opportunity Commission and state and local agencies citing "learning disability" as one basis for alleged discrimination, according to the data published by Cornell University's Employment and Disability Institute. Furthermore, according to a 2006 federal study of 11,000 students who received special-education services in school, only 40% are employed a year or two after high school graduation, compared to 67% of the general population.

Suzanne Bruyere of Cornell's Employment and Disability Institute told the *Wall Street Journal* that as more people become aware of their own learning disabilities, they are becoming "more confident" in asking for accommodations. In the past, many disabilities such as ADHD and learning disabilities went undiagnosed, or workers hid their impairments – or suffered the consequences of being considered lazy or stupid. And "unseen" disabilities generally did not generate as much sympathy as more obvious physical impairments.

Experts recommend acting promptly if a learning disability starts to interfere with a job. Avoid a period of poor performance by providing documentation and seeking accommodations early on. Perhaps more importantly, find a job where ADHD or learning disabilities don't hurt performance as much. Or, hire a good secretary or assistant. According to Michelle Norotni, a founder of the national Attention Deficit Disorder Association, "Back in the good old days, there used to be secretaries. Now with the advent of computers, ADHD people have to file their own reports," and handle their own calendars.

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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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