Empire Justice Center

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DISABILITY LAW NEWS

Is SSA's DAA Transmittal Immaterial?

In March 2007, the Ninth Circuit Court of Appeals issued an opinion that may alter the way courts interpret portions of the Social Security Act that could affect thousands of disabled persons suffering from a combination of impairments that include drug and/or alcohol addiction. In *Parra v. Astrue*, 481 F.3d 742 (9th Cir. 2007), the court held that "when evidence exists of a claimant's drug/alcohol abuse (DAA), the claimant bears the burden of proving that his substance abuse is not a material contributing factor to his disability." *Id.* at 744-45. This holding is in sharp contrast to the widely accepted disposition that where evidence of materiality is inconclusive, the proverbial tie goes to the claimant.

As part of the Contract with America Advancement Act (CAAA), in 1996 Congress amended the Social Security Act to preclude an award of disability benefits if drug or alcohol abuse (DAA) is a contributing factor material to the Commissioner's determination that the individual is disabled. 42 U.S.C. § 423(d)(2)(c). Shortly thereafter, SSA's Office of Disability issued Emergency Teletype No. EM-96200 (formerly known as EM 96-94) ("the teletype") in response to initial questions posed by the amendment. The relevant portion of the teletype explains, "a finding that DAA is material will be made only when the evidence establishes that the individual would not be disabled if he/she stopped using drugs/alcohol." In many cases, addiction and other physical or mental impairments are so intertwined that it would be impossible to make such a determination.

Although the amendment itself does not address the disposition of such a claim, the teletype instructs that in those cases where a medical or psychological consultant "cannot project what limitations would remain if the individuals stopped using drugs/alcohol," the disability examiner "will find that DAA is *not* a contributing factor material to the determination of disability." This is consistent with subsequent agency documents. *See* POMS DI 90070.050(D)(3)(C); Hearings, Appeals, and Litigation Law Manual (HALLEX) I-5-3-14A.

In *McGoffin v. Barnhart*, 288 F.3d 1248 (10th Cir. 2002), the Court of Appeals granted deference to this instruction in its interpretation of the statute. In this case, the claimant was diagnosed with polysubstance abuse, dysthymic disorder/psychotic disorder, and borderline personality disorder. The ALJ concluded that the claimant's substance abuse was a contributing factor material to her disability, in part because her treating physician's assessment distinguished be-

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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., Ann Biddle, Esq., and Paul M. Ryther, Esq.

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tween the claimant's mental illness and her substance abuse. In remanding the case, the Tenth Circuit held that such distinction was not fatal to a claim; in fact, the passage of the 1996 amendment "made such distinction critical." *Id.* at 1252-53.

Citing the teletype, the Court held that where the "effects of a claimant's mental illness [can] not be separated from the effects of substance abuse, the abuse would be found not to be a contributing factor material to the disability determination." *Id.* at 1253. This interpretation is akin to the disposition adopted by the Eighth Circuit in *Brueggemann v. Barnhart*, 348 F.3d 689 (8th Cir. 2000): "In colloquial terms, on the issue of the materiality of alcoholism, a tie goes to [the claimant]." *Id.* at 695.

The Ninth Circuit, however, did not agree with this interpretation in *Parra*. The *Parra* court refused to defer to the teletype regarding the construction of the amendment, stating that these "internal agency documents… do not carry the force of law and are not binding on the agency." *Parra*, at 749. The Court not only held that the teletype was not authoritative, but found it to be unpersuasive as well. In the opinion of the Court, the teletype was inconsistent with the intent of Congress, which was to discourage alcohol and drug abuse, or at least not encourage it with a government subsidy.

Plaintiff Joseph Parra suffered from cirrhosis of the liver and was denied Social Security benefits upon a finding that his alcoholism was a material contributing factor to his disability. The District Court remanded the case back to the Administrative Law Judge for consideration of a subsequent medical examination. Unfortunately, Mr. Parra died as a result of his disease before his case was further adjudicated; consequently, his daughter was substituted as plaintiff. After two subsequent unfavorable decisions, the case ultimately reached the Ninth Circuit for the resolution of the question whether the claimant bears the burden of proving that DAA is not a material contributing factor to his disability. Rejecting all of the plaintiff's arguments, the Court agreed.

Parra argued that once a claimant satisfies the five-step sequential analysis for a disability claim, the Commissioner should bear the burden of proving that the benefits should be denied. The Court flatly rejected this argument, stating that at all times "the burden is on the claimant to establish [his] entitlement to disability insurance benefits." *Id*. at 748. The Court went on to hold that plaintiff Parra failed to carry this burden because his treating physician testified that cirrhosis is generally reversible and that he had no reason to believe that Parra's condition would not have improved with abstinence.

The doctor, however, stated several times that there was no way of knowing whether Parra's cirrhosis actually became irreversible before or after his date last insured. Noting that this testimony was inconclusive, Parra further argued that the teletype along with HALLEX I-5-3-14A precluded a finding of materially unless the medical evidence conclusively showed that a disability would resolve with abstinence.

In rejecting the argument, the Court stated that such an interpretation would provide an incentive to continue abusing drugs and/or alcohol and would effectively subsidize substance abuse. The court expressed a concern that "an alcoholic claimant who presents inconclusive evidence of materiality has no incentive to stop drinking, because abstinence may resolve his disabling limitations and cause his claim to be rejected or his benefits terminated." *Id*. at 750.

By affirmatively placing the burden of proving that DAA is not a material contributing factor to a finding a disability on the claimant, the Ninth Circuit effectively held that a tie goes to SSA. In his article *DAA-The Fractured Tail of Materiality*, presented at the October 2007 NOSSCR conference, attorney Lawrence Rohlfing argues that the decision in *Parra* is clearly erroneous and that it "creates an unnecessary conflict between the circuits in which the Ninth Circuit now stands alone." He argues that this decision is erroneous because (1) the teletype is consistent with the plain contextual language of the Act and other non-regulatory pronouncements of the Commissioner; and (2) the court should defer to non-regulatory pronouncements on substantive matters.

Rohlfing suggests that the partial citation to the Congressional record in *Parra* takes the intent of Congress out of context. He explains that the intent of Congress was to prevent individuals whose sole severe disabling condition is drug addition or alcohol-

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ism from receiving benefits; Congress expressed particular concern with those individuals, like Mr. Parra, who had developed another severe impairment, and intended that those individuals receive benefits and medical assistance to treat their disabling conditions.

Rohlfing further posits that the Court erroneously relied on *Lowry v. Barnhart*, 329 F.3d 1019, 1022 (9th Cir. 2003) and *Moore v. Apfel*, 216 F.3d 864, 868-869 (9th Cir. 2000) to determine that the teletype was not binding because both of these decisions bar pronouncements that are procedural rather substantive in nature. Because the teletype in substantive in nature, it is entitled to examination on the issue of deference. Furthermore, as Rohlfing points out, the Supreme Court has previously deferred to agency documents on matter of substance, despite their sub-regulatory status. *See*, *Washington v. Keffeler*, 537 U.S. 371 (2003); *Barnhart v. Walton*, 535 U.S. 212 (2002).

Rohlfing represents the Parra family on appeal and has filed a petition for a writ of certiorari with the United States Supreme Court, Docket # 07-408 http://www.supremecourtus.gov/docket/07-408.htm. The Solicitor General filed a response in opposition.

While we wait for the Supreme Court to decide whether it will grant the petition for writ of certiorari, what should advocates do? The Second Circuit has not addressed this issue in New York, but several District Courts have decided cases favorably to the claimant in instances where any DAA and another mental and/or physical impairment are so interconnected as to make a clear distinction impossible.

"The 'key factor' in determining whether [drug addiction] is a 'material' factor is whether the claimant would still meet the definition of disabled under the Act if she stopped using [drugs]. 20 C.F.R. §§404.1535(b)(1) & 416.935(b)(1)." *Frederick v. Barnhart*, 317 F. Supp. 2d 286, 290 (W.D.N.Y. 2004).

"If [plaintiff's] inability to succeed in drug treatment is found to be caused by an independent mental condition, then is her drug addiction a "contributing factor" material to a finding of disability, or is her disability, if she is disabled, the result of the underlying mental condition? In the first instance, the ALJ must make these determinations." *Williams v. Callahan*, 30 F.Supp. 2d 588, 594 (E.D.N.Y 1998).

"The ALJ must consider all of the effects of plaintiff's impairments, including those associated with alcoholism and, only after finding that plaintiff is disabled, determine which impairments would remain if plaintiff stopped using alcohol." *Orr v. Barnhart*, 375 F.Supp.2d 193, 201 (W.D.N.Y. 2005).

Thanks to Jessica Vaughn, a law student at Empire Justice Center's Albany office, for writing this article.

DAP Advocate in the News

All the news that is fit to print in the venerable *New York Times* recently included a letter from Johnson Tyler of South Brooklyn Legal Services. http://www.nytimes.com/2007/12/17/opinion/l17disabled.html

Johnson's letter, which appeared on December 17, 2007, aptly put the blame for SSA's delays on its failure to make correct decisions the first time around:

> Social Security can reduce the growing backlog of disability appeals by changing its quality assurance program. As a legal services lawyer, I often represent clearly disabled clients before administrative judges because of Social Security claims that should never have been denied in the first place. As you point out, two-thirds of such appeals are won. Why are so many strong cases denied at the application level? The Social Security Administration's quality assurance is a main culprit. It examines disability approvals for error, but not disability denials. Consequently, it's safer to deny a case with a tinge of gray than risk being sanctioned. These denied cases then end up in the long waiting line for review by a judge. By imposing oversight and consequences for erroneous denials at the application level, the hearing backlog, and the number of disabled workers living in poverty, could be significantly reduced.

For a related article on where the blame for the delays lays, see page 4 of this newsletter.

GAO Criticizes SSA's Response to Backlogs

The huge backlog of cases at the Social Security Administration (SSA), particularly at the hearing level, is all too familiar to advocates and our clients. As chronicled in almost all of the recent editions of this newsletter, it has grabbed the attention of the media and is at the forefront of the Commissioner's agenda. The Commissioner's newly proposed regulations on changes to the hearing process, described in the November 2007 edition of the *Disability Law News*, are part of SSA's response to the crisis. [The Empire Justice Center's comments to the proposed regulations, along with those by NOSSCR, are available at www.empirejustice.org.]

Now the Government Accountability Office has weighed in, determining that "better planning, management and evaluation could help address backlogs." The report acknowledges the daunting task faced by SSA: the number of backlogged claims between 1997 and 2007 has doubled. It also recognizes that insufficient funding has exacerbated the problem. It notes, however, "that several initiatives introduced by SSA in the last 10 years to improve processing times and eliminate backlogged claims have, because of their complexity and poor execution, actually added to the problem."

The GAO's review reads like a graveyard for SSA's past failed initiatives: "Hearings Process Improvement (HPI)," Disability Service Improvement (DSI)," "Process Unification," "The Prototype," the "Disability Claims Manager," the "Adjudication Officer." Even SSA officials acknowledged to the investigators that one project - HPI, which included reorganization of hearing offices into small groups - was responsible for dramatic increases in delays and processing times.

The report criticizes SSA for only partially implementing some of these programs, for underestimating their cost and complexity, or for failing to conduct end-to-end testing or do proper evaluations. In particular, the GAO criticizes SSA for its rushed implementation of DSI, as well as poor communication and inadequate financial planning. As noted in the November edition of the *Disability Law News*, the Commissioner has delayed implementation of this initiative nation-wide. The GAO notes, however, that there has been limited assessment of its effectiveness in the Boston region. Even the components of DSI involving time-frames for submission of evidence, which have been incorporated into the recently proposed regulations, have not been sufficiently tested. The GAO similarly criticized the Electronic Disability Process for inadequate advance testing.

The report gives mixed reviews to the Commissioner's most recent initiatives, including the use the Quick Disability Determination (QDD), service area reassignments, improvement of electronic processing and the use of FIT (Findings Integrated Template). The GAO recommended that SSA conduct a thorough evaluation of DSI before deciding what elements should be implemented nationwide. It also encouraged SSA to take steps to increase the likelihood that new initiatives will succeed by better anticipating the challenges of implementation, including appropriate staff in the design and implementation stages, by establishing feedback mechanisms to track progress and problems and by performing periodic evaluations.

SSA agreed in part with the GAO's recommendations, but did not fully agree with some if its conclusions. In particular, SSA argued that the GAO did not sufficiently emphasize its funding needs. SSA, to no avail, also pushed the GAO to recommend that the agency explore ways to improve ALJ performance. Of interest is the Commissioner's emphasis on increasing ALJ productivity, with a goal of 500-700 decisions per ALJ per year. The Commissioner reported the proactive steps the agency had taken in Fiscal Year 2007 in dealing with ALJ misconduct, including two reprimands and two suspensions, with several more pending before the Merit System Protection Board.

GAO-08-40, published in December 2007, is available at
http://www.gao.gov/new.items/d0840.pdf.

REGULATIONS

"High Risk" Visitors Subject to Enhanced Security

In an underplayed notice in the Federal Register, SSA has announced that commencing December 23, 2007, it will consider anyone with an outstanding warrant for a violent crime or an attempt to commit a violent crime to be a threat to the safety and security of SSA employees, security personnel, visitors and facilities when they are expected to visit an SSA office for a business-related purpose, even if they have never threatened or committed an act of violence against any of these SSA staff. 72 Fed. Reg. 71470 (December 17, 2007).

The change SSA is making in its "system of records" is to include "High Risk Alert functionality that will alert our offices about . . . potentially dangerous" beneficiaries, claimants, attorney or non-attorney representatives, or representative payees who "commits, or attempts to commit, a violent crime for which a court has issued an arrest warrant and the individual is not in the custody of a law enforcement agency, and we reasonably believe that the individual will contact SSA."

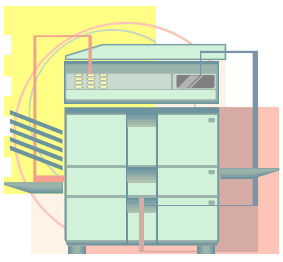
In brief, SSA will maintain a list, with individually identifying information about individuals culled from law enforcement information, and match this list against all individuals who visit or otherwise contact any field office. While the stated reason for this matching process is to protect staff, facilities and other visitors, one of the "routine uses" of the personally identifying information in the visitor information system that SSA already has will be sharing the news of the visit or other contact with law enforcement.

From now on, each time you visit an SSA field office, and maybe even each time you call them, you will be included in a record containing a list of felons and other law breakers.

A danger in this new extension of the "High Risk" label is that it will make it even more difficult for individuals with outstanding warrants for violent offenses to appeal benefit suspensions based on those warrants. This "High Risk" label may only reinforce the already prevalent practice of refusing to process appeals of such suspensions.

SSA promises to issue guidelines for field office managers to follow in implementing this system, including how to respond in the event of a match. The proposed change is subject to a short comment period, which has already passed. "The proposed altered system of records, including the proposed new routine use applicable to the system, will become effective on December 23, 2007, unless we receive comments warranting them not to become effective."

SSA Allows Reproduction of Forms



In lightning speed, SSA made final, effective January 28, 2008, an amendment to 20 C.F.R. §422.527 proposed on August 16, 2007. No comments were received on the proposal. 72 Fed. Reg. 73260 (December 27, 2007).

This change is beneficial to advocates, who have copied SSA forms or printed them off the Internet for use in representing clients without first getting SSA's permission to reproduce the form. Under the final regulations, you no longer have to get that permission, unless you intend to charge a fee for providing the form.

Personal Conferences May Be Impersonal

SSA adopted as final, regulations providing for personal conferences by video teleconferencing or by telephone in both Title II and Title XIV (SSI) overpayment waiver requests. 73 Fed. Reg. 1970 (January 11, 2008). The final rule is effective February 11, 2008. (*See* March 2007 *Disability Law News* for full description of proposed rules).

In another notice published the same day however, SSA immediately rescinded Social Security Ruling (SSR) 94-4p, which implemented the decisions in *Buffington, et. al. v. Schweiker* and *Califano v. Yamasaki* requiring personal conferences in Title II overpayment waiver requests before such a request could be denied.73 Red. Reg. 2074 (January 11, 2008).

For Title II cases, the change is at 20 C.F.R. §404.506 (c). The Title XVI provision is a wholly new section, 20 C.F.R. §416.557. The changes would (1) enable video teleconference and voice-only teleconference to satisfy the personal conference requirement, and (2) add the personal conference requirement, with these options available, to the Title XVI procedures.

SSA announces "we are revising the regulations to allow for personal conferences to be conducted face-to-face at a place we designate (usually in the field office), by telephone, or by video teleconference. We will give the choice to the individual; the individual will still be provided the opportunity to appear face-to-face by choosing to come to us for the personal conference, or may choose to participate by telephone or video teleconference."

The rules provide for a file review at least five days before the personal conference. At the file review, the individual and the individual's representative have the right to review the claims file and applicable law and regulations with the decision maker or another SSA representative who is prepared to answer questions. SSA will provide copies of material related to the overpayment and/or waiver from the claims file or pertinent sections of the law or regulations that are requested by the individual or the individual's representative.

At the personal conference, the individual is given the opportunity to appear personally, testify, cross-examine any witnesses, and make arguments; be represented by an attorney or other representative (although the individual must be present at the conference); and submit documents for consideration by the decision maker.

AR 99-1(2) Proposed for National Application

Since 1999, SSI households in the Second Circuit enjoyed application of Acquiescence Ruling (AR) 99-1(2), which implemented the Court's decision in *Florez on behalf of Wallace* v.*Callahan*, 156 F. 3d 438 (2d Cir. 1998), holding that the Social Security Act required SSA to exclude a stepparent's income from deeming when the eligible child's natural parent no longer resided in the family home. SSA continued to use 20 C.F.R. §416.1806 as the controlling regulation in similar cases for the rest of the nation.

SSA is proposing to change its regulations so that it will now deem a child's income and resources to include the income and resources of the stepparent only if the stepparent lives in the same household as the child and the natural or adoptive parent. 72 Fed. Reg. 72641 (December 21, 2007). If SSA adopts these proposed rules as final rules, it anticipates rescinding AR 99–1(2), consistent with 20 C.F.R. §416.1485(e)(4).

If adopted as final rules, the proposed rules would restore national uniformity by extending the policy set out in AR 99–1(2) to the rest of the nation. SSA believes the policy in these proposed rules will encourage stepparents to voluntarily accept responsibility for SSI eligible children who have been abandoned by their natural or adoptive parents.

Comments on the proposed rules are due by February 18, 2008.

New Privacy Policies Protect SSA Staff

In an effort to protect its employees, SSA is revising its information and privacy policies.

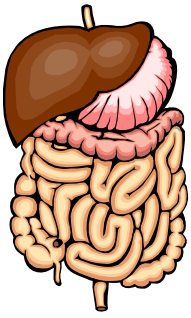
The reason for the changes is "to allow us to better preserve the anonymity of, and to better protect the physical well-being of, our employees who reasonably believe that they are at risk of injury or other harm if certain employment information about them is disclosed. These changes in the rules are intended to ensure uniform application of the policy for at-risk employees. We are again requesting comments on these final rules because we revised the language of the proposed rules to clarify our intent." 72 Fed. Reg. 69616 (December 10, 2007). The changes are final with the comment period, ending February 8, 2008.

The changes are twofold. First, remove Part 401, Appendix A ("Employee Standards of Conduct") subsection (b)(3)(c)(4); second, add subsection e to 20 C.F.R. §402.45:

(e) Federal employees. We will not disclose information when the information sought is lists of telephone numbers and/or duty stations of one or more Federal employees if the disclosure, as determined at the discretion of the official responsible for custody of the information, would place employee(s) at risk of injury or other harm. Also, we will not disclose the requested information if the information is protected from mandatory disclosure under an exemption of the Freedom of Information Act.

Paranoia runs deep.
Into your life it will creep.
It starts when you're always afraid.
Step out of line, the Man comes,
And takes you away.
You better Stop. Children,
What's that sound?
Everybody looks.
What's going on?

Evaluating Functional Limitations Due to Digestive Disorders



In October 2007, SSA published final rules revising the Digestive Disorders Listing (5.00/105.00). *See* November 2007 *Disability Law News* for details. In those rules, SSA indicated that it would issue an Advance Notice of Proposed Rulemaking (ANPRM) inviting public comments on whether it should add a functional listing for digestive disorders, and if so, what functional criteria would be appropriate. SSA is now requesting your comments and suggestions. 72 Fed. Reg. 70527 (December 12, 2007).

"After we have considered your comments and suggestions, other information about the functional effects of digestive disorders, and our adjudicative experience, we will determine whether it is appropriate to add a functional listing for digestive disorders. If we decide to add such a listing, we will publish for public comment a Notice of Proposed Rulemaking (NPRM) that will propose specific revisions to the rules."

Any comments must be received by February 11, 2008.

COURT DECISIONS

Reversal Based on Child's Functional Equivalence

DAP advocates know that handling children's SSI cases became much more difficult after Congress changed the definition of disability for children in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Children who were receiving SSI benefits at the time this Welfare Reform legislation was enacted were required to have their cases reviewed to determine if they met the new criteria. Believe it or not, some of these cases are still around and being litigated. A Magistrate in the Northern District of New York recently issued a favorable decision in such a case, reversing SSA's termination of a child's benefits and remanding for payment of SSI.

In the case of *Cruz o/b/o YR v. Commissioner of SSA*, the child YR was approved for SSI benefits in 1995 because of a history of speech and language delays, Attention Deficit Hyperactivity Disorder, combined type (ADHD), bipolar I disorder, dysthymic disorder, and separation anxiety disorder. In 1997, SSA proposed to terminate YR's benefits because of the change in the childhood disability criteria. YR's grandmother and guardian requested an ALJ hearing, which upheld SSA's action. The Appeals Council agreed to a remand because the hearing tapes were inaudible.

At the second hearing in 2002, a different ALJ also issued an unfavorable decision, which was upheld by the Appeals Council in 2004. The Legal Aid Society of Northeastern New York, which had been representing the child, referred the case to Louise Tarantino at the Empire Justice Center to commence a federal court action. After plaintiff filed her brief, the SSA Commissioner requested a remand because the ALJ had not considered whether the child had a marked limitation of function in the domain of "caring for yourself." Louise had raised this argument in her brief, asserting that the evidence supported a marked limitation in this domain, along with marked limitations in two other domains, which would make the child eligible for SSI.

Rather than consent to the remand for yet another hearing, Louise opposed the Commissioner's motion and asked instead for reversal and payment of benefits. By this time the child had reapplied and been found eligible for SSI after a third ALJ hearing. After waiting more than two years in federal court, Louise consented to have the case assigned to a Magistrate for final disposition. The case was reassigned to retired Magistrate Victor Bianchini, who previously served in the Western District of New York.

In December 2007, Magistrate Bianchini issued a 35 page order in which he agreed that YR had marked limitations of functioning in the domains of "interacting with others" and "caring for yourself." Louise had also argued that YR met the ADHD listing, which the Court agreed was possible but decided that a remand for consideration of that issue would be required. Since the Court reversed on the alternative ground of functional equivalence to a listing, this issue did not need to be decided. The decision in this case is available as DAP# 473.

As we often say, perseverance, patience and a healthy dose of stubbornness are required to handle cases at SSA. Louise exhibited all these attributes in winning this case.

Court Remands for Further Vocational Testimony

It is hard enough to cross-examine a vocational expert (VE) effectively. It is even harder when the Administrative Law Judge (ALJ) interrupts and does not let the advocate ask the relevant questions. That is what happened to Joanne Lewandowski, a paralegal at Neighborhood Legal Services (NLS), a division of LAWNY in Buffalo. She tried repeatedly to question the VE as to whether her client's need for a job coach would preclude the jobs that the VE had blithely claimed he could perform. The ALJ, however, cut her off each time, ultimately ruling that she should submit her additional "arguments" in writing.

To add insult to injury, the ALJ then proceeded to ignore Joanne's post-hearing argument that without coaching services, her client would be unable to remain at his job. Joanne had also provided ample corroborating evidence from the Supported Employment Program. The client, a 20 year old with a history of special education and mild mental retardation, did not meet Listing 12.05C in that he did not have a secondary impairment. He had been receiving extensive vocational services, including job development, job placement, and "follow-along" job coaching services. Although the services were more extensive at the beginning of his job placement, he continued to receive two hours monthly of job-coach monitoring/trouble shooting at his part-time maintenance position. He was earning less than substantial gainful activity.

At the hearing, the VE made the gratuitous comment that the claimant was a "poster child" for successful job coaching services. Joanne, however, had countered with evidence from the Supported Employment Program that the claimant continued to require the coaching services in order to sustain his employment. Not surprisingly, the ALJ found the claimant not disabled at step five of the Sequential Evaluation, determining that he could perform work at all exertional levels, although conceding that he had some nonexertional restrictions. While noting in his decision that the claimant "gets some assistance from a job coach," the ALJ failed to address Joanne's arguments or evidence.

On appeal, Alan Block of NLS convinced U.S. District Court Judge John Curtin that the ALJ erred in relying on what amounted to an inadequate hypothetical question, in that it did not include all the claimant's restrictions and limitations. Judge Curtin found that the claimant's need for supportive job coaching was well supported by the evidence of record, and should have been reflected in the ALJ's hypotheticals. He held that "[t]he ALJ's failure to acknowledge this relevant evidence or explain its implicit rejection is 'plain error.'" He remanded the claim for further proceedings, including the submission of a hypothetical question to a VE that includes all of the claimant's impairments, limitations and restrictions.

Congratulations to Alan and Joanne for their tenacious advocacy in this case. They are hopeful that on remand, they will be able to convince another ALJ that the claimant is indeed disabled. Judge Curtin's decision and Alan's Memorandum of Law in *Ferguson v. Barnhart* are available as DAP# 474.

As an aside, some of you may wonder how a claimant could work and still be found disabled, much less eligible for benefits. Remember that both the Title II and Title XVI programs have incentive earnings programs that would allow a claimant like Joanne and Alan's to have some earnings and still remain eligible for benefits. For more on these programs, see the *2007 Benefits Management for Working People with Disabilities: An Advocate's Manual*. To order the Benefits Manual see http://www.nls.org/benefits-management/brochure.htm for a brochure.

Social Security Cases Now Available on PACER

In order to protect the privacy of Social Security claimants, documents pertaining to their claims in federal court - other than docket sheets - were not available to the public on PACER (Public Access to Court Electronic Records). All that changed on December 1, 2007. In September 2006, the Judicial Conference adopted a proposed Federal Rule of Civil Procedure that specifically changes access in Social Security cases, allowing public Internet access to "an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or administrative record." Fed. R. Civ. P. 5.2(c)(2)(B). That rule, which has since also been approved by the Supreme Court, went into effect December 1, 2007.

According to a memorandum issued by James C. Duff, Director of the Administrative Office of United States Courts:

> As a result of these changes, judges and court staff should be aware that any order, opinion, or judgment docketed in a Social Security case on or after December 1, 2007, will, at some point, become available to the public through PACER. Judges and court staff should be very careful about including personal identifiers and other personal information in these documents, doing so only when absolutely necessary.

The memorandum, issued on October 3, 2007, is available as DAP# 475.

Of course, some decisions - often containing very personal information - end up being published and thus available to the public. This change, however, makes many more decisions readily available on-line. Rule 5.2(c)(2) provides that any person may have electronic access to the full record in a Social Security or immigration appeal at the courthouse. Remote access by anyone other than the parties and their attorneys, however, is subject to the limitations described above.

Advocates should be aware that Rule 5.2 also contains provisions concerning redaction of social security numbers and the names of minors. It also provides for filings made under seal, or, for good cause, protective orders to limit or prohibit a nonparty's remote electronic access to a document filed with the court. These provisions may be relevant in cases where claimants have serious concerns about any information concerning their status being made public. For example, the claimant may want to proceed anonymously in order to preserve his or her privacy regarding an HIV diagnosis, or a psychiatric impairment.

Check your local court rules for treatment of the administrative record in Social Security appeals on Pacer. In the Western District, for example, '[t]ranscripts of court proceedings will be conventionally filed and served since scanning that set of documents and filing or retrieving them electronically is impractical at this time." See Administrative Procedures Guide for the Western District, available at http://www.nywd.uscourts.gov/cmecf/tutorial_admin.php. The Guide also sets forth rules allowing documents to be filed under seal without the approval of the Court.

SSI Extension Bill Fails to Pass Senate

Advocates were optimistic last year when H.R. 2608 passed the House of Representatives on July11, 2007. That bill would have extended the period of SSI eligibility from seven to nine years for elderly and disabled refugees. (See the January, May and July 2007 issues of the *Disability Law News* for details on the dilemmas posed by the current seven year time limitation and the ongoing litigation to address this issue.)

Unfortunately, the Senate version of the bill got caught up in the SCHIP and Medicare skirmishes in the Senate. A "hotlined" version of the bill almost passed at the eleventh hour with much support in the Senate and even from the White House, only to be held up by one Senator (DeMint- R-SC). Advocates plan to start over this year!

ADMINISTRATIVE DECISIONS

Appeals Council Reconsiders Its Decision

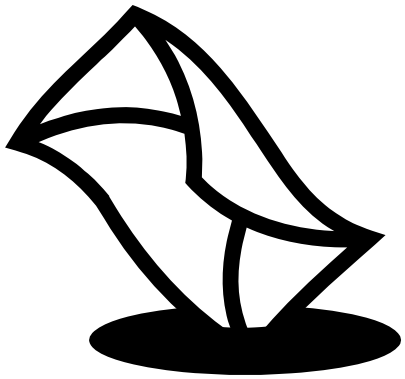
Don't take no for an answer. That seems to be the adage that Ellen Rita Heidrick, an attorney with Southern Tier Legal Services of LAWNY, followed when confronted with a refusal to her Request for Review from the Appeals Council. Ellen had sent what she argued was "new and material" evidence to the Appeals Council along with a memorandum of law on October 4, 2007. On October 19, 2007, the Appeals Council denied her request. The notice, however, contained no reference to the newly submitted evidence.

Undaunted, Ellen contacted the Appeals Council and asked it to reconsider its decision, arguing that the evidence she had submitted was both new and material under 20 CFR §§404.970(b) and 404.976(b). In addition, Ellen wisely asked the Appeals Council pursuant to 20 CFR §404.982 to extend the claimant's time in which to appeal to U.S. District Court in the event that it denied her request to reconsider its decision, but did not do so until after her time to appeal had expired.

In fact, in very short order, Ellen received the Appeals Council's new order remanding the claim for further consideration in light of the new and material evidence. Perhaps the evidence had simply "crossed in the mail," so that the Appeals Council was more amenable to reviewing it. In any event, bravo to Ellen for persuading the Appeals Council to reconsider. The alternative would have been an appeal to Federal Court with a similar request for remand for consideration for new and material, which in the best of circumstances would have taken at least another year to obtain the same result.

Ellen's tale is a cautionary one in that it reminds us of the value of new and material evidence. Yet the Commissioner's newly proposed regulations, featured in the November edition of the *Disability Law News*, would greatly restrict our ability to present such evidence to the Appeals Council, forcing claimants to instead reapply for benefits.

Advocates should also be aware that the sometimes the winds of change blow more quickly than they should. Another cautionary tale – even though the proposed regulations are not final and in effect, advocates report more instances than in recent years of the Appeals Council rejecting evidence submitted on the grounds that it is either not new or not material, i.e., it relates to the period on or before the date of the ALJ's hearing decision. Advocates should be forewarned to remember to argue explicitly why and how the evidence submitted meets the standard



Appeals Council Remands For New and Material Evidence

NLS paralegal Bruce Caulfield reports spending 42 hours vindicating an ALJ denial in a kid's case that he believed should have won the first time around. Despite ample evidence of extreme and marked impairments in several domains, the ALJ had found that the claimant had none. He concluded that her severe Attention Deficit-Hyperactivity Disorder (ADHD) and learning disabilities were improving with medication and therapy. After receiving the denial, Bruce argued to the Appeals Council that his now nine year old client was disabled by virtue of her ADHD, learning disabilities and gross motor delays.

In addition to the copious reports that Bruce had obtained at the hearing level, including helpful assessments from various teachers, he submitted additional evidence to the Appeals Council. Most significant was a report from the claimant's treating psychiatrist documenting a diagnosis of ADHD with a GAF of 45. He also produced school repots indicating severe delays resulting in an assessment that the claimant was performing at more than two standard deviations below the mean for her age group. Bruce argued that her impairments met ADHD Listing 112.11.

The Appeals Council agreed that the additional evidence submitted by Bruce was both new and material. It held that the psychiatrist's opinion was dated prior to the release of the ALJ's decision and thus material. It found that additional development, including a new consultative examination (CE) and the testimony of a medical expert, were necessary in light of the new evidence. It also found that the new teacher reports that Bruce had secured required evaluation.

On remand, the ALJ finally saw the light and agreed that the claimant met the ADHD listing. He acknowledged the effect of her various impairments on both her social and personal functioning, and concluded that she met the listing. This time round, instead of relying on the CE, he cited the medical expert, who testified at the hearing that the claimant met the criteria for the listing. He also gave far more credence to the reports of the teachers and treating sources, resulting in a very different portrait of the claimant than that portrayed in the first decision.

Once again, Bruce's perseverance paid off. Not only did he prevail, but he convinced the ALJ to reopen the claimant's earlier application – a request that the ALJ had completely ignored the first time round. Way to go, Bruce!

Advocate Nixes ISM

ISM - or "in-kind support and maintenance" - can be challenging for advocates to understand, and even more challenging for clients who are charged with it. Under SSI's ISM rules, the value of any support a claimant receives in the form of free - or subsidized - food and shelter is assessed and calculated as income. The intricate and complicated ways in which the support is valued can be found in the POMS §SI 00835.001 *et seq.*

Faced with a client whose benefits were discontinued because of the receipt of ISM, Helen Frieder of the Legal Aid Society in New York City responded with creative advocacy. Helen's client lost her SSI because her daughter, who does not live with her, was helping her with her rent. The client was, however, living with her 19 year old son. Helen convinced the daughter to switch her rental "subsidy" to her brother instead of her mother.

Since the client was able to meet her "pro rata" share of the household's basic expenses of food and shelter out of her monthly Title II check, she could legitimately be considered in SSI's "AB" living arrangement. [See DAP #467, available at Empire Justice's on-line resource center for the 2008 chart setting out SSI's living arrangements and payment levels for New York.] Once she was no longer receiving "ISM," only her SSD benefits could be counted as income.

Helen encouraged the claimant to re-apply for SSI after these new arrangements were put into place. As a result, the client's SSI was reinstated. Thanks to Helen's intervention, she is now receiving $85 a month in SSI benefits in addition to her SSD benefits of $595.

Insensitivity Requires Different ALJ on Remand

ALJs should not be permitted to insult our clients during the course of what can already be a humiliating experience for them. Doris Cortes, a paralegal with the Empire Justice Center in Rochester, called an ALJ to task for his demeaning treatment of her client - and the Appeals Council actually listened.

Doris's client was a 43 year old woman who was unable to speak English and suffered from a combination of physical and mental impairments. The ALJ, however, relied on the testimony of a medical expert (ME) to find that her mental impairments, while meeting the "A" criteria, did not meet the "B" criteria of Listing 12.04. The Appeals Council agreed with Doris's argument that the ALJ erred by not asking the ME to consider whether her impairments *equaled* the listing.

The Appeals Council also agreed that the ALJ erred in failing to follow up with the treating psychiatrist. Instead, the ALJ had simply rejected an evaluation that had been completed by the claimant's psychotherapist. The Appeals Council noted that the psychotherapist clearly worked with the psychiatrist, since the psychiatrist had cosigned a report from the same psychotherapist a few months earlier. It held that the ALJ should have recontacted both of them, particularly in light of the fact that there appeared to be a conflict between the two reports.

Perhaps most significantly, the Appeals Council agreed to remand the claim to a different ALJ based upon Doris's objections to what she described as "insensitive, malicious and degrading" questioning by the ALJ. She cited HALLEX I-2-8-35. The Appeals Council acknowledged auditing the tape, and made specific reference to the ALJ's questions to the claimant about her depression. When she testified through an interpreter that she had had three suicide attempts, the ALJ asked why she did not succeed. According to the Appeals Council, the interpreter hesitated before interpreting something else that the ALJ said at that point.

The Appeals Council held that although the provisions of HALLEX I-2-8-35 are directed to written decisions, "the concept for the need for sensitivity set forth for writing a decision have [sic] equal application to the hearing phase of the process." It stated that:

> The phrasing of this question appears unnecessary to resolve issues in this matter and is very insensitive. Accordingly, since the Administrative Law Judge demonstrated inappropriate judicial demeanor with respect to this claimant, the Appeals Council directs that, upon remand, this case be assigned to another Administrative Law Judge due to the insensitive nature of the comments involved.

We hope that Doris and her client face a more understanding ALJ at the next hearing – and we commend Doris for raising this issue so forcefully with the Appeals Council. The more advocates object to this kind of behavior on the part of ALJs, the better!

Advocate Convinces ALJ in 18-19 Review

Pursuant to 42 U.S.C. §1383c(a)(3)(H)(iii), all childhood SSI claims must be reviewed when the claimant turns age 18. The reviews are conducted by applying the criteria used in determining initial eligibility for individuals who are age 18 or older, rather than the "medical improvement" standard used in "Continuing Disability Reviews" (CDRs).

Trying to demonstrate disability for an 18 year old who, for example, was found disabled as child based on ADHD or learning disabilities can be daunting if, as is often the case, the claimant is no longer in school and not in any kind of treatment. The limitations that add up to "marked" impairments in two domains under the childhood criteria do not always readily translate to the adult Sequential Evaluation. And of course, lack of current evidence can be fatal to a case.

"Buffalo Bruce" Caulfield of NLS, however, recently prevailed in such a case where, in addition to the usual hurdles, the claimant was also working! Bruce's client was working part-time and earning $740 per month. He had no physical impairments. The only medical evidence was an unfinished neuropsychological evaluation diagnosing "an apparent developmental disorder and possible Asberger's Disorder." Luckily, however, the claimant had gone through VESID and was working with the services of a job coach.

Bruce convinced the claimant's job coach to testify at the hearing. He also obtained a detailed statement from the job coach setting forth the limitations that the claimant was having at his janitorial placement, and the extent to which he continued to need support. Finally, Bruce had the job coach complete an RFC (Residual Functional Capacity) evaluation that Bruce adapted for these purposes.

The ALJ noted that this was a difficult case, but determined that on balance, the claimant would be unlikely to get or keep a competitive job. He cited the testimony of the job coach and Bruce's prehearing memorandum. The winning memorandum, along with the RFC form and the ALJ's decision, are available as DAP# 476.

Bruce reports that ever since Kathleen Lynch, currently an attorney with the Western New York Law Center in Buffalo, but formerly a staff attorney with the Office of Hearings and Appeals in Buffalo, emphasized how invaluable pre-hearing memos were to the decision writers, he has done one in almost every case. He is convinced that that practice has increased his win rate. We agree – but think that Bruce's win rate is also related to his tireless and creative advocacy.

SSA Holds Compassionate Allowance Hearing

The Social Security Administration (SSA) has an obligation to provide benefits quickly to applicants whose medical conditions are so serious that their conditions obviously meet disability standards. SSA has plans underway to identify these cases and expedite them through the adjudicatory process.

Compassionate allowances are a way of quickly identifying diseases and other medical conditions that invariably qualify under the Listing of Impairments based on minimal objective medical information. Compassionate allowances will allow SSA to quickly target the most obviously disabled individuals for allowances based on objective medical information that it can obtain quickly. Many of these claims can be allowed based on confirmation of the diagnosis alone; for example, acute leukemia, amyotrophic lateral sclerosis (ALS) and pancreatic cancer. In these cases, allowances can be made as soon as the diagnosis is confirmed or the other necessary objective medical evidence is obtained. Social Security plans to hold four public hearings over the next year. The first hearing was held in Washington, D.C., on December 4 and December 5, 2007.

The purpose of the hearing was to obtain the public's views about how to implement Compassionate Allowances for children and adults with rare diseases. In addition to SSA personnel, panels of legal and medical experts provided testimony.

Testimony from the two-day hearing is available at SSA's website, www.socialsecurity.gov/compassionateallowances/hearings1204.htm. Future hearings will be held in 2008.

Claimant Found Disabled Under New Digestive Listing

In yet another example of Bruce Caulfield's string of victories in the hardest cases, he reports a favorable decision in an 18-19 review of a young woman who has been receiving SSI since birth. She had been found disabled as of her date of birth in 1988 based on "short bowel syndrome." At the time of her review, she was attending high school, working part-time in a fast food restaurant, and seemingly doing well.

Bruce represented the claimant at her reconsideration hearing before the Disability Hearing Officer (DHO). Although the original file was lost, he produced copious medical records documenting her problems, including a recent hospitalization for a bowel obstruction in 2006. He overcame the various reports that she was stable and otherwise healthy with evidence of her complicated medical regimen. Despite the fact that she ate normal lunches at the high school cafeteria and enjoyed snack foods, she required supplemental nutrition through an abdominal tube twice daily and during the night.

Bruce reports that the case was bolstered by the sympathetic testimony of the claimant's mother, who despite working full-time herself, administered the feedings nightly at 2:00 a.m. and 4:00 a.m. Bruce also secured reports from the claimant's treating physician indicating that the claimant had limited endurance and could only work four hours a day. The doctor reported that her nutritional and hydration status was very fragile.

The DHO was persuaded to consult with the Supervising Review Physician at the Regional OTDA, who concluded that the claimant's condition was equivalent to new Listings 5.06 and 5.07. [See the November 2007 edition of the *Disability Law News*, available at www.empirejustice.org, for more information on the new digestive listings.] The decision notes that new listing 5.06 addresses inflammatory bowel disease, while the new 5.07 addresses short bowel syndrome.

The DHO found that the claimant's clinical picture is a mix of problems associated with obstructions and strictures, with inflammation and the additional nutritional problems associated with both short bowel syndrome and a bowel that remains diseased with strictures. She is also anemic. He concluded that her impairment was equivalent to Listing 5.07 and 5.06B (1&6).

Bruce gives credit to the Review Physician and the DHO, but we give credit to Bruce as well for marshalling the evidence in this case.

12.05C Claim Prevails

Just how severe must a secondary impairment be to qualify as a "secondary" impairment under listing 1205C for mental retardation? Advocates will remember that 12.05C requires an IQ score between 60 and 70, and a "physical or other mental impairment imposing an additional and significant work-related limitation of function." According to case law - as well as the Commissioner's own regulations - the secondary impairment need only reach the *de minimus* severity level of the step two of the Sequential Evaluation. *See, e.g., Antonetti v. Barnhart,* 399 F.Supp.2d 199 (W.D.N.Y. 2005).

David Ralph of Chemung County Neighborhood Legal Services in Elmira convinced the ALJ to apply that standard in an otherwise challenging case. His client had, in addition to low IQ scores, a hearing impairment. David had persuaded the consultative examining (CE) audiologist to write a letter putting the hearing loss into more concrete terms in relation to hearing on the job, thus proving it was "significant." The audiologist acknowledged that the loss of function was one that a person with a normal IQ might well be expected to accommodate.

David's success in convincing the ALJ to grant this case based on the listing is particularly significant, since the case was compounded by a history of drug and alcohol abuse (DA&A). The 12.05 finding avoided – or resolved – the often thorny question of DA&A materiality. For just how thorny that question can be, see the cover story in this newsletter!

WEB NEWS

Monitoring Access to Mental Health Records

Facilities and programs that provide services to individuals with disabilities are required to keep records about the care and treatment of the people they serve. The New York State Mental Hygiene Law ("MHL") establishes basic rules of confidentiality and provides for access to records by individuals receiving services and persons legally authorized to speak on their behalf. The NYS Commission on Quality of Care has a link to policy guidelines on access to this information.
http://www.cqcapd.state.ny.us/Brochures/Access-to-MH-Records.htm

SSA Website Offers Assistance to Wounded Veterans

SSA has established expedited processing for claims of veterans who became disabled while on active duty on or after October 1, 2001. The expedited processing also applies to survivors' claims. SSA has reached an agreement with the Department of Veterans Affairs (VA) for the electronic transmission of medical records of veterans applying for benefits. Further information is available at a special website for wounded veterans:
www.socialsecurity.gov/woundedwarriors

Updated Food Stamps Chart Published

OTDA has released updated food stamp benefit charts for:

NYSNIP – New York State Nutrition Improvement Project, which provides standardized food stamp benefits to SSI live-alone recipients. See GIS 07 DC 022 http://www.otda.state.ny.us/main/gis/2007/07dc022.rtf

The Group Home Standardized Benefits pilot project. See 07 DC 019 http://www.otda.state.ny.us/main/gis/2007/07dc019.rtf

The updated payment amounts went into effect as of January 1, 2008.

People with Disabilities Housing Rights

This website helps people with disabilities learn about renting, buying and making their homes accessible, and about Fair Housing rights. Information is available state by state.
www.hud.gov/groups/disabilities.cfm

2008 Medicaid Payment Charts Online

For Medicaid advocates, here are links to various publications from NYS and NYC government sources on 2008 figures for Medicaid eligibility:

http://hiicap.state.ny.us/documents/07MA025Attachment2.pdf
http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/07ma025.pdf
http://www.nyc.gov/html/hra/downloads/pdf/income_level.pdf

CLASS ACTIONS

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

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

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

Citations - None

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

Dixon v. Sullivan, 83 Civ. 7001 (S.D.N.Y.) (Conner, J.) (the not severe case

Description - Certified class challenges SSA's standard for denying claims as "not severe." Preliminary injunction entered in June 1984, required readjudication of claims denied or terminated as "not severe" between 7/83 and 6/84, and prohibited issuance of "not severe" decisions after 6/84. The Second Circuit vacated the injunction in 6/87 in light of *Bowen v. Yuckert,* 482 U.S. 137 (1987), which upheld the "not severe" regulation as lawful on its face, and which authorized SSA to issue a new Ruling clarifying the severity requirement. The Circuit remanded *Dixon* for completion of discovery and trial on whether SSA misapplied the "not severe" regulation. On remand, the district court entered judgment for plaintiffs after issuing an opinion after trial based on a stipulated record. SSA appealed and the Circuit, after argument in September 1994, affirmed the judgment.

Relief - Reopening remains available, under an understanding between the parties based on the preliminary injunction, for claims denied or terminated as "not severe" between 7/83 and 7/84. The Circuit's affirmance of the district court's judgment provides for reopening for claims denied or terminated between 1976 and 7/83.

Citations - 589 F. Supp. 1494 (S.D.N.Y. 1984), 589 F.Supp. 1494 (S.D.N.Y. 1984) (granting prel. inj.), 589 F.Supp. 1512 (S.D.N.Y. 1984) (granting intervention), 600 F. Supp.141 (S.D.N.Y. 1985) (deciding individual claim of David Dixon), *prel. inj. aff'd,* 785 F.2d 1102, *prel. inj. vacated, and remanded,* 827 F.2d 765 (2d Cir. 1987), *on remand,* 126 F.R.D. 483 (S.D.N.Y. 1989) (subsequent opinion granting judgment to plaintiffs post trial on a stipulated record), *Dixon v. Sullivan,* 792 F.Supp. 942 (S.D.N.Y. 1993) (order issued 12/22/93 providing for readjudication of claims), *affirmed Dixon v. Shalala,* 54 F.3rd 1019 (2d Cir. 1995).

Information—Legal Aid Society, 1-888-218-6974 menu option #3 for the Dixon hotline.

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

Personal Care Attendants Most Depressed?

Many of our clients have worked as home health aides or nurses' aides, often leaving their jobs because of work related injuries. A number of them also suffer from depression. Might there be a correlation? Who knows - but recent data from the Substance Abuse and Mental Health Services Administration indicate that almost 11 percent of personal care workers reported depression lasting two weeks or more. "Personal care workers" include child care workers and those who help the elderly and disabled with daily needs.

The data was culled from the National Survey on Drug Use and Health between 2004 and 2006. Government officials tracked depression within 21 major occupations. The survey included full-time workers age 18 through 65, and measured those reporting depression lasting two weeks or longer. Personal care workers topped the list at 11 percent. Food preparation and serving-related was next at 10.3 percent. That category includes cooks, bartenders, waiters and waitresses. The least depressed? Engineers, architects and surveyors: only 4.3 percent admitted to depression. Health care and social workers were tied for third place at 9.6 percent.

According to the government report made available in October, work itself may prevent depression. The over-all rate of depression for full-time workers was seven percent, while 12.7 percent of those who were unemployed reported depression. The report also noted a $30 to $44 billion loss in productivity each year as a result of depression.

Where does the legal profession fit in? It can be found right in the middle of the list, with 6.4 percent reporting depression. Doesn't that you make you feel better?

The report is available at http://oas.samhsa.gov/2k7/depression/occupation.cfm.

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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

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

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

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