Empire Justice Center

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DISABILITY LAW NEWS

DAP Advocate Presented Denny Ray Award

The Dennison Ray Civil Legal Services Award was presented to David E. Ralph, senior staff attorney at Chemung County Neighborhood Legal Services in Elmira, at the 2006 Legal Assistance Partnership Conference.

In presenting the award to David and the other recipients, New York State Bar Association President Mark H. Alcott stated: *"These lawyers exemplify the best of New York State's legal community and I am proud to present them with one of the New York State Bar Association's most prestigious awards. Their commitment to provide vitally needed legal services to poor and disadvantaged members of our society is commendable and to be congratulated."*

David was nominated for the award in recognition of his long career in legal services and for his recent success in pursuing a difficult case of bias against a Social Security Administrative Law Judge (ALJ).

David has clearly shown an extraordinary commitment to the provision of creative, skilled and zealous representation to low-income and/or disadvantaged clients. Over the years, David has doggedly represented claimants before the Social Security Administration (SSA), in addition to his other work. Even in what might appear to be the most routine of cases, David never loses sight of what he learned in his favorite law school class: constitutional law. In fact, David jokingly refers to an Administrative Law Judge who gave him a compendium of legal arguments based on SSA's rulings, so that he would argue something other than due process in his cases. But for David, due process is not a joking matter. He works hard to ensure that his clients receive the protections to which they are entitled, and works hard to remind the rest of us that we should do the same.

Perhaps nothing better exemplifies David's commitment to these constitutional principals than his work on the *Pronti* case. Long frustrated by what he perceived as a hostile and biased Administrative Law Judge (ALJ), David sought relief from the courts, arguing that the ALJ's generalized bias against disability claimants denied them due process. *See Pronti v. Barnhart*, 399 F.Supp.2d 480 (W.D.N.Y. 2004). Although the litigation still continues, the Social Security Administration (SSA), in an extraordinary step, has acknowledged that the ALJ violated Social Security rules and regu-

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www.empirejustice.org

Denny Ray Award—continued

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lations and denied claimants due process. The ALJ is no longer hearing cases.

David's work in *Pronti* also underscores another of the criteria for this award: collaboration with pro bono volunteer attorneys from the private bar. David galvanized a number of private attorneys, as well as legal services advocates, to step forward and file affidavits in the *Pronti* case attesting to the behavior of the ALJ in question. These affidavits have been crucial to the litigation – and it was no easy task to secure them. Even more significantly, David has spearheaded a litigation team of two private attorneys who represent the plaintiffs in cases that have been consolidated with *Pronti.*

Their successful work on this case has been an extraordinary example of collaboration that would not have happened without David as the catalyst. In accepting his award, David acknowledged these willing and courageous colleagues who stepped forward in an effort to "slay the dragon" who threatened our clients.

David has also inspired, mentored and supported his colleagues, both in the context of the *Pronti* litigation, and over the years. His ability to convince both private and legal services attorneys to take the risk of stepping forward to complain about an ALJ before whom they continued to practice is just one example. On any given week, one need only review the answers to queries posed on WNYLC's Disability Advocacy Project "listserv" to see the extent to which David supports and mentors his colleagues. He frequently provides thoughtful and thorough answers and insights to complex questions – and with citations to SSA's rules and regulations rather than just the Due Process clause! He is also willing to share his wealth of practical experience in this area of law. Beyond the listserv, he is always available to colleagues on the phone, with words of wisdom tempered by David's own special dry wit.

We join the entire DAP community in congratulating David Ralph for his well deserved recognition as the winner of the 2006 Denny Ray award.

From left to right: Louise Tarantino, Empire Justice Center Albany office, David Ralph, Chemung County Neighborhood Legal Services and Kate Callery, Empire Justice Center Rochester office.

REGULATIONS

Final Regulations on Fines for Falsehood

The Social Security Administration (SSA) Office of Inspector General (OIG) has issued final regulations implementing civil monetary penalty provisions of the Social Security Protection Act of 2004 (SSPA). 71 Fed. Reg. 28574 (May 17, 2006). The regulations revise current civil monetary penalty provisions located at 20 C.F.R. §498.100, *et. seq*. The new regulations were effective June 16, 2006 (except for the new provision in the SSPA that is dependent on implementation of a centralized computer system, which has yet to occur). Civil monetary penalties may be as high as $5,000.

According to the preamble to the final rules, the SSPA amendment closed a loophole "for the failure to come forward and notify SSA of changed circumstances that affect eligibility or benefit amounts when the individual knew or should have known that the withheld fact was material and that the failure to come forward was misleading." 71 Fed. Reg. 28575. The preamble also clarifies that the change was not meant to apply to persons whose failure to come forward was not for the purpose of *improperly* obtaining or continuing benefits.

Advocates feared that these regulations, when proposed, would cause ethical dilemmas: would withholding evidence unfavorable to a client's claim - which many advocates perceive is part of their ethical duty to represent a client zealously - fall within these regulations? [See the May 2005 edition of the *Disability Law News* for a discussion of the proposed regulations.] In response to comments submitted by NOSSCR raising these concerns, the OIG stated that in deciding whether to impose a civil monetary penalty, it may consider any actions taken by an attorney representative pursuant to a State Bar code of professional conduct. 71 Fed. Reg. 28579. The OIG referred to 20 C.F.R. §498.106(a), which lists five factors that the Inspector General also "will" take into account, including the degree of culpability of the person committing the offense and such other matters as justice may require.

NOSSCR also submitted comments asking that additional guidance be provided for determining whether the person "knew or should have known" a statement or omission could be false or misleading, so that good faith allegations did not form the basis for a civil monetary penalty referral. In response, the OIG emphasized that the five factors will be considered and include consideration of any information that the person's failure to disclose information was not done for the purpose of improperly obtaining benefits, such as any physical or mental limitations and educational or linguistic limitations. 71 Fed. Reg. 28579.

[Perhaps even more encouraging to the age-old debate about what evidence should or should not be submitted is the fact that when SSA issued its final Disability Redesign regulations in March 2006, it deleted its proposed rule that would have required representatives to submit all available evidence, including adverse. See the May 2006 edition of the *Disability Law News.* SSA agreed to remove that language, requiring instead that evidence must be provided, without redaction, to support the claim. Note that that portion of the new DSI regulations will go into effect nationwide, and not just in Region 1, on August 1, 2006.]

The final civil monetary penalty regulations also cover two other SSPA provisions: (1) a representative payee who converts benefits for a use other than to benefit the beneficiary; and (2) individuals or entities who charge fees for services provided free by SSA without including a written notice that the service is available free of charge from SSA. The regulations are available at www.gpoaccess.gov/fr.

SSR on Tremolite Asbestos-Related Impairments Issued

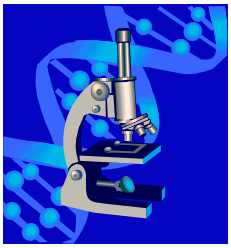
On May 26, 2006, SSA issued SSR 06-01p, "Titles II and XVI: Evaluating Cases Involving Tremolite Asbestos-Related Impairments." Tremolite is a type of asbestos sometimes found in the mineral vermiculite. People may be exposed to tremolite from vermiculite in mining and in work-related activities involving the production of horticultural items, construction and insulation materials, brake pads, and other items. People may also be exposed to tremolite from living in an area where such mining or activities occur or from products made from vermiculite. According to SSA, exposure to tremolite asbestos has occurred in the Libby, Montana area and may have occurred in other areas as well.

When tremolite asbestos is inhaled, it can cause serious lung damage, which may eventually result in chronic pulmonary insufficiency, such as asbestosis, disorders of pulmonary circulation, pleural plaques, pleural thickening, or pleural effusions. These impairments can cause difficulty breathing, and can result in prolonged right pulmonary artery hypertension, enlargement of the heart, and failure of the right ventricle (cor pulmonale). Inhalation of tremolite asbestos can also cause several types of cancers, such as primarily malignant mesothelioma of the pleura and bronchogenic carcinoma of the lung

The SSR specifies the clinical and laboratory evidence needed to demonstrate these conditions, and outlines how the evidence is reviewed under the Sequential Evaluation, including cross-references to applicable listings. The SSR also reminds adjudicators of the treating physician regulations found at 20 C.F.R. §§404.1527 & 416.927 and SSR 96-2, and the weight to be accorded their opinions in evaluating RFC (residual functional capacity).

SSA published technical corrections to SSR 06-01p on June 8, 2006, including correcting the effective date to May 26 instead of May 25, 2006. The final version of SSR 06-01p is available at www.ssa.gov.

SSA Publishes SSR on Proving Relationship by DNA



What if one child of a wage-earner is already collecting benefits off his or her account, and another sibling pops up? If Kid #2 proves by DNA testing that s/he is related to Kid #1, bingo! So says SSA's latest SSR, "Title II: Adjudicating Child Relationship Under Section 216(h)(2)(A) of the Social Security Act When Deoxyribonucleic Acid (DNA) Test Shows Sibling Relationship Between Claimant and a Child of the Worker Who Is Entitled Under Section 216(h)(3) of the Social Security Act on the Worker's Earnings Record."

SSR 06-02p was published on June 13, 2006, and effective on that date. According to SSA, "This Ruling provides that if the results of Deoxyribonucleic Acid (DNA) testing show a high probability that an entitled child is the sibling of a child claimant who is filing under the State law definition and we have already determined that the entitled child is the worker's natural child under one of the two federal law definitions in section 216(h)(3), we will rely on the 216(h)(3) determination when we determine whether the child claimant is the worker's child in accordance with section 216(h)(2)(A) of the Act. Under these circumstances, we will not determine whether the child who is entitled under one of the federal law definitions in section 216(h)(3) also meets the definition of child under State law."

One may wonder why an SSR was necessary, but maybe the more guidance to adjudicators, the better?

New PASS Regulations Finalized

SSA has finally published regulations bringing the Code of Federal Regulations up to date with legislation passed in 1995 pertaining to Plans to Achieve Self Support (PASS). [For more information on PASS programs, visit www.nls.org.]

The new regulations, announced in the Federal Register on May 16, 2006, implement §203 of the Social Security Independence and Program Improvements Act of 1994 (Pub. L. 103-296). This law amended §1633 of the Social Security Act to provide that, as of January 1, 1995, in establishing time limits and other criteria related to a PASS, SSA should take into account the length of time needed to achieve employment goals, within a reasonable period.

This requirement for a more individualized time limit changed the time limit requirements for PASS, which had provided for an initial period of not more than 18 months, an extension of up to an additional 18 months, and a maximum of 48 months. SSA is revising its rules to take into account individual needs and employment goals in determining what is a reasonable length of time. These revisions also add language describing the information that must be contained in a PASS.

According to SSA, because these regulations clarify requirements currently in the PASS rules and operating procedures, they do not reflect a change in policy. After the enactment of Public Law 103-296, SSA updated the POMS to reflect the need for a more individualized assessment of a PASS time limit. The new regulations went into effect June 15, 2006.

The proposed rules were published July 11, 2005. SSA received comments from five individuals and four advocacy organizations. SSA adopted one commenter's request to "provide a better explanation of what we mean by a feasible employment goal and a viable plan in §§416.1181(a)(4) and 416.1226(a)(4)," inserting a new subsec. (5) to clarify that "A plan is viable if it sets forth attainable steps to reach your goal and if it is financially sustainable, that is, the plan will leave you with enough money to meet living expenses while you set aside income or resources to meet your goal." In response to other comments seeking greater clarity and examples for guidelines, SSA responded that due to the "highly individualized" nature of PASS plans, greater definition would be inappropriate.

For the full text of the new regulations, see 71 Fed. Reg. 28262-28265 (May 16, 2006).

Work Incentive Initiatives Proposed

On May 16, 2006, SSA announced its intention to competitively award cooperative agreements to establish community-based work incentives planning and assistance projects. See 71 Fed. Reg. 28401-28413 (May 16, 2006). Section 1149(d) of the Social Security Act (as added by Section 121 of the Ticket to Work and Work Incentives Improvement Act (TWWIIA) of 1999, Pub. L. 106-170) requires SSA to establish these projects, called the Benefits Planning, Assistance and Outreach (BPAO) program. Section 407 of the Social Security Protection Act (Pub. L. 108-203) extended the authorization of this program through Fiscal Year 2009.

According to SSA, "The purpose of these projects is to disseminate accurate information to beneficiaries with disabilities (including transition-to-work aged youth) about work incentives programs and issues related to such programs, to enable them to make informed choices about working and whether or when to assign their Ticket to Work, as well as how available work incentives can facilitate their transition into the workforce. The ultimate goal of the work incentives planning and assistance projects is to assist SSA beneficiaries with disabilities succeed in their return to work efforts. . ."

Final Regulations on Salary Offset Published

In what may be the fastest turn around of proposed to final regulations, SSA published rules governing "Collection of Overdue Program and Administrative Debts Using Federal Salary Offset." The final rules were issued on July 5, 2006, a mere five months after the proposed rules were published on March 13, 2006. See 71 Fed. Reg. 38066-38071 (July 5, 2006).

According to SSA, these regulations modify regulations dealing with the recovery of benefit overpayments under Titles II and XVI of the Social Security Act, as well as recovery of administrative debts. They implement SSA's statutory authority for the use of Federal Salary Offset (FSO), whereby the salary-paying federal agency withholds and pays to SSA up to 15 percent of the debtor's disposable pay until the debt has been repaid. FSO is only applicable if the debtor is a Federal employee. It is only to be used to collect overpayments made to a person after he or she attained age 18, after that person ceases to be a beneficiary, and after SSA determines that the overpayment is otherwise unrecoverable.

The regulations are effective on August 4, 2006.

Installment Payments of Retro Benefits Modified

Effective for past-due benefits paid on May 22, 2006 or later, §7502 of the Deficit Reduction Act of 2005, (P.L. 109-171), enacted February 8, 2006, changes the installment formula for SSI past due benefits. This section describes when the past-due benefits must be paid in installments. The original installment formula required past-due benefits (after the State is reimbursed for interim assistance and/or direct payment of representative fees has been paid), that equaled or exceeded 12 times the FBR plus any optional State supplementation, be paid in installments.

Under the new formula, installment payments must be paid in no more than three payments. See SI 02101.020B.1. Each payment will be made at 6-month intervals. Each of the first and second installment payments cannot exceed three times the FBR (plus any federally administered State supplement), unless the exception for increasing the installment amount applies (see SI 02101.020B.4.) The first and second installment payment should each be for this maximum amount if the balance due equals or exceeds this amount. The third (and final) installment payment will include the remainder of the past-due benefits.

The standard limitation on the amount of each of the first and/or second installment payment may be increased by the total amount of the following debts and expenses:

Outstanding Debts

If the individual has outstanding debts relating to:

- food, clothing, shelter, or
- medically necessary services, supplies or equipment, or medicine.

Current or Anticipated Expenses

If the individual has current and/or expected expenses in the near future relating to:

- medically necessary services, supplies or equipment or medicine, or
- the purchase of a home.

The amount of the installment payment may be increased by the amount of the expenses. The individual may request an increase to the installment payment at any time.

What prompted this change, one may ask? Could it be that the interest earned on all those delayed SSI payments will help reduce the deficit?

State OTDA Issues Directive on Work Exemption

On May 16, 2006, the New York State Office of Temporary and Disability Assistance (OTDA) issued an Administrative Directive, 06-ADM-06, that sets forth its policy regarding exemption from work activity for PA clients who are required to file an SSI application by the local social services district. As you may remember, we at Empire Justice Center have been negotiating with OTDA on this topic for some time and are pleased that OTDA has finally put out an agency directive on the issue.

The policy is not perfect. For example, it does not exempt clients who file for SSI but are not referred by the local social services district. Work limited clients are also not exempt. The policy is, however, a good first step in protecting our SSI clients from unwarranted sanctions for failure to comply with work activity due to disability. Also, our clients' SSI cases will not be weakened by required work activity that could undercut their claims of disability. The ADM is available as DAP #427.

Food Stamp Household Rule Clarified

USDA's Food & Nutrition Service recently clarified that disabled individuals who live with others but cannot purchase and prepare their food separately due to their disability CAN establish separate household status for food stamp purposes without applying the 165% of poverty income rule. Under that rule, elderly and disabled individuals whose meals are purchased and prepared together with those with whom they live can be treated as separate households only if the income of those with whom they reside is no more than 165% of the Federal poverty income guideline. 7 C.F.R. §273.1(a)(3).

According to Cathy Roberts, Food Stamp Specialist at the Nutrition Consortium of NYS, under the new clarification, as long as a disabled individual's food is purchased and prepared separately from the individuals s/he live with - regardless of who purchases and prepares it separately - the disabled person can claim separate household status.

See http://www.fns.usda.gov/fsp/rules/Memo/06/061206.pdf, as well as Empire Justice Center's on-line resource center for a copy of the FNS memo

DV POMS Revised

SSA has revised several sections of its POMS pertaining to victims of domestic violence. The revision came about in response to advocacy by the Empire Justice Center on behalf of victims of domestic violence who were facing complicated bureaucratic hurdles when they had to flee from their homes to escape abuse.

Last year SSA issued an Administrative Message reminding claims representatives to use particular care and sensitivity when requesting evidence from individuals who are fleeing from a domestic abuse situation. AM-0521 is available on the Empire Justice Center's on-line resource center as DAP #419. SSA also promised to seek regulatory changes clearly providing for the "exclusion of a jointly-owned home for an individual who is fleeing a domestic violence environment."

In the meantime, SSA has made revisions to the existing POMS. Sections SI 00601.100 (Information/ Evidence - General), SI 01110510 (Sole vs. Shared Ownership), SI 01130.100 (The Home), and SI 01130.130 (Real Property Whose Sale Would Cause Undue Hardship, Due to Loss of Housing, to a Co-Owner) were all revised in March 2006. These revisions provide important protections for victims of abuse who are unable or afraid to obtain the required statements or documents of ownership from their abuser spouses. They also provide that a home may continue to be an excluded resource in some situations where the co-owner has fled an abusive situation.

Please keep us informed of how this is working – or not working – for victims of domestic violence.

New SSA Policy Limits Access

The Social Security Administration (SSA) has implemented a new policy that limits access to a claimant's file at the district office (DO). The new policy requires that if anyone besides the "authorized representative" (the person named on Form 1696 – attorney or non-attorney) wants to copy the file, that individual must be specifically designated by the claimant. This can be done by completing SSA's form 3288 (available on-line at www.socialsecurity.gov) or another written consent form. The designation must come from the claimant; it is not enough for the attorney or representative to designate another individual to copy the file on his or her behalf. POMS GN 03316.125. The definition of "authorized" and "designated" representation is found at POMS GN 03301.002.

The new POMS requirement appears to conflict with the regulations that make no mention of either an "authorized" or "designated" representative. A representative as defined in 20 C.F.R. §404.1703, is "an attorney who meets all the requirements of 404.1705(a), or a person other than an attorney who meets all of the requirements of 404.1705(b), and whom you appoint to represent you in dealing with us." Under the regulations, once an individual qualifies as a representative, he or she "may, on [the claimant's] behalf 1) obtain information about [the] claim to the same extent that the [claimant is] able to do….4) make any request or give any notice about the proceedings before us."

For cases pending at the hearing level, SSA does not distinguish between "authorized" and "designated" representatives. HALLEX I-2-1-35. HALLEX I-2-0-72 states that "a claimant has the right to appear before the ALJ either personally or through a designated representative." As an authorized representative (attorney or non-attorney), the only identification required is form 1696, which must be recorded in the SSA system.

However, at DOs, to identify the claimant, a representative or a person designated by the representative, will be required to provide the claimant's name, SSN, address, date and place of birth, along with one other piece of information such as mother's maiden name, claimant's last employer, benefit amount, the names of other people on the record. (See POMS GN 03360.050.B.3 –4). An individual who is not an authorized representative, must have the client present to give oral permission and may then also be asked for the same information as above, POMS GN 03360.005.B.4.d..

PRACTICE TIP: To avoid problems, have your client sign SSA form 3288 at the initial interview along with any other documents the client may need to sign.

DA&A EM Available

Proving whether a client's drug and/or alcohol addiction is material to his or her claim for disability can often be an uphill. Advocates are undoubtedly well aware of how difficult it is to convince mental health professionals to separate one from the other, especially when the client continues to use drugs or alcohol.

SSA has provided guidance to adjudicators for those situations. According to *Social Security Administration Emergency Teletype*, No. EM-96200 at Answer 29 (August 30, 1996), "When it is not possible to separate the mental restrictions and limitations imposed by DAA and the various other mental disorders shown by the evidence, a finding of 'not material' would be appropriate." This EM, which has also been referred to as EM 96-94, as well as other EMs can be found at *https://s044a90.ssa.gov/apps10/*. It is now available as DAP #428.

COURT DECISIONS

EAJA Fees Awarded Following Remand

A recent decision received by the Empire Justice Center in an EAJA (Equal Access to Justice Act) case gives new meaning to the expression "all is not lost." The claimant, represented in federal court by Kate Callery, is mentally retarded and suffers from a speech impairment. Although the government offered to stipulate to a voluntary remand, Kate instead moved for judgment on the pleadings, arguing that the plaintiff met Listing 12.05B or C.

Judge Larimer of the Western District of New York agreed that the plaintiff met the first prong of 12.05, in that his IQ scores were below 70. Nevertheless, he remanded the case since it was not clear whether the claimant met 12.05B or 12.05C. Judge Larimer ruled that it was within the province of the ALJ to make that determination, although he agreed that the ALJ had erred in failing to consider the listing in the first place. The Court, while agreeing that the standard to be applied in determining whether a secondary impairment meets 12.05C should be the "severity" test of Step two of the "Sequential Evaluation," also decided that more evidence was necessary as to whether the claimant's speech impairment met that standard. See *Antonetti v. Barnhart*, 399 F.Supp.2d 199 (W.D.N.Y.2005).

Following the decision, plaintiff moved for attorneys fees under the Equal Access to Justice Act, 28 U.S.C. §2412(d), which provides for attorneys fees to a prevailing party in claims against federal agencies to be paid by the government. The Commissioner opposed plaintiff's motion as excessive, arguing that the plaintiff should not be compensated for any time spent after rejecting the Commissioner's offer to remand. The Court disagreed, relying on *McLaurin v. Apfel*, 95 F.Supp.2d 111, 117 (E.D.N.Y. 2000) ("If a record demonstrates that a plaintiff could have reasonably expected to obtain a reversal, opposition by plaintiff to an offer of remand would not be excessive even if the court ultimately disagreed with plaintiff's arguments and remanded the case.").

Judge Larimer went on to refute the Commissioner's argument that the plaintiff's opposition to the remand offer "resulted in no appreciable advantage" or that "he would have attained the same result if he accepted the offer for remand rather than opposing it," quoting *McKay v. Barnhart*, 327 F.Supp.2d 263, 268 (S.D.N.Y. 2004). To the contrary, the Court held that it had agreed with the plaintiff that the ALJ had erred in several respects in addition to those conceded by the Commissioner, and that certain standards and regulations should be applied on remand.

Among the issues that the Court pointed to was its determination that the appropriate test to apply when determining whether a secondary impairment imposed a significant work-related limitation under Listing 12.05C is the "severity" test employed by the First, Eighth and Tenth Circuits, but not yet addressed by the Second Circuit. Judge Larimer thus found that contrary to the plaintiff in *McLaurin*, 95 F.Supp.2d at 117, the plaintiff had obtained favorable and "significant specific directives guiding the review [on remand] beyond those suggested by the Commissioner." He also found that despite the Commissioner's assertion otherwise, the actions of the plaintiff had contributed to the ultimate relief.

Judge Larimer's decision is significant in that many of the cases cited in his decision, as well as in plaintiff's Memorandum in Support of the Motion for Attorneys Fees, while containing helpful language on the standards to be applied in such situations, ultimately denied fees based on the individual facts. Let's hope that *Antonetti* will be a more helpful precedent in future claims. See *Antonetti v. Barnhart*, --F.Supp. 2d--, WL 2007656 (W.D.N.Y. 2006)The decision and memo are available at DAP #429.

Court Remands for Calculation of Benefits

Sometimes the second time is the charm. So learned Paul Ryther of DAP Listserv fame when he returned to U.S. District Court a second time in the same case. The claimant's 1999 application had originally been denied in 2000 and then again following a remand by Judge Siragusa of the Western District in 2003.

Judge Siragusa, citing his 2003 decision, pointed out that he had already found the ALJ's residual functional capacity (RFC) assessment erroneous. He showed little patience for the fact that the ALJ continued to rely on the opinion of a non-examining review physician in formulating the new RFC. Although the ALJ had obtained an RFC from the treating source, he failed to explain why he disregarded it. He also failed to mention that the treating physician had limited the claimant to sitting for less then thirty minutes uninterrupted, or walking or standing for less than fifteen minutes uninterrupted.

The Court also rejected the Commissioner's attempt to justify the ALJ's rejection of the RFC as incomplete and inconsistent with the evidence, because "this explanation suggested by the Commissioner is not offered by the ALJ in his decision." [While not cited by the Court, see also *Snell v. Apfel*, 177 F.3d 128 (2d Cir. 1998), where the Court of Appeals refused to accept a *post hoc* rationalization for an agency's behavior.] Because the ALJ failed to explain his conclusion, Judge Siragusa found that the Commissioner had failed to meet her burden of proof at the Fifth step of the Sequential Evaluation.

The Court also found that the ALJ's negative credibility determination was not supported by substantial evidence. Although the Court had previously found that some of the plaintiff's statements were arguably inconsistent with disability, he held that on remand the ALJ had failed to justify his conclusions of incredibility. In particular, Judge Siragusa found that the ALJ relied on statements made by the plaintiff to a consultative examiner, but failed to further develop those statements while the plaintiff was testifying. Their impeachment value was thus unclear.

Judge Siragusa relied on the testimony of the Vocational Expert - as clarified by the representative - that there were no jobs a hypothetical claimant could perform if he had to sit and stand at will to determine that remand would be futile. According to the Court, those portions of the treating physician's RFC that the ALJ had ignored supported such a finding.

Kudos to Paul for his successful work in this case. The decision is available as DAP #430.

Court Finds Two Marked Impairments

Judge Telesca of the Western District of New York recently reversed the Commissioner's decision to deny a childhood SSI claim, and remanded the case for the calculation of benefits. The claimant, who is now fourteen years old, was ten years old at the time of application. He suffers from borderline intelligence, Attention Deficit/Hyperactivity Disorder (ADHD), and a bipolar disorder. Although the ALJ agreed that the child had a marked impairment in the domain of acquiring and using information, he refused to find marked impairments in any other domains.

The Court overruled the ALJ, finding instead ample evidence of a marked impairment in the domain of attending and completing tasks. The Judge compared the child's behavior to the expectations set forth in the regulations at 20 C.F.R. §416.926(a)(h) for a child his age. He cited the evidence supplied by the child's psychiatrist, teachers and mother for examples of the extent to which the child is distracted and unable to maintain attention.

In his decision, Judge Telesca noted that the child had been approved for SSI on a subsequent application, reminding us once again of how such a decision may positively influence – subliminally or not – a judicial outcome. Michael Bonsor and Kate Callery of the Rochester office of the Empire Justice Center represented the claimant.

Magistrate Orders Payment of Benefits

The value of a subsequent favorable decision is also apparent in a victory obtained by Chris Cadin of Legal Services of Central New York in Syracuse. Magistrate Gustave DiBianco of the Northern District reversed the Commissioner and ordered calculation of a closed period of benefits in a case where Chris had attached a copy of the favorable ALJ decision his client had received on a subsequent application.

Magistrate DiBianco agreed with Chris that his client, who suffers from a Bipolar disorder, Major Depressive Disorder, learning disorder, Post-traumatic Stress Syndrome and Borderline Personality Disorder, was disabled as of the date of first application. He criticized the ALJ for quoting selected and largely irrelevant parts of the record portraying the plaintiff's problems as minor. The ALJ had also overemphasized the fact that the claimant had missed some of her early treatment appointment.

The Magistrate also relied on the new and material evidence that Chris had submitted to the Appeals Council, which included statements from her treating psychiatrist that she should not be working. He found that the Commissioner violated the treating physician regulations (20 C.F.R. §416.927) in finding that the plaintiff had only minor mental limitations when all the treating sources had found that she suffered from a major depression with psychotic features. He also agreed with Chris's argument that the ALJ erred in applying the Medical-Vocational Guidelines to deny the plaintiff. As the Magistrate pointed out, "Plaintiff's limitations are almost ***entirely*** nonexertional and stem from her serious mental problems and therefore, a VE was necessary to determine whether plaintiff could perform work with the serious mental limitations that she had."

Rather than remand for consideration of these factors, however, the Magistrate held that the records document that the plaintiff had mental dysfunction that had made it impossible for her to function in a work environment since the date of her first application. The Magistrate did acknowledge that the ALJ who decided the plaintiff's second application had additional evidence before him. Nonetheless, he was undoubtedly influenced in his decision by his knowledge that the claimant had already been found disabled.

Moral of the story? Don't forget to encourage your clients to reapply for benefits during those long waits while appeals are pending. It can't hurt (it generally will not become part of the administrative record unless you draw it to the court's attention), and it certainly can help – both in terms of getting your clients ongoing benefits sooner and potentially influencing the outcome on appeal.

Congratulations to Chris for his success in securing the maximum retroactive benefits for his client. *Rodgers v. Commissioner* is available as DAP #431.

Stay Issued in *Doe v. Doar*

In the May 2006 *Disability Law News,* we reported that the New York Court of Appeals denied the State's motion for leave to appeal in *Doe v. Doar*, 26 A.D.3d 787, 807 N.Y.S.2d 909 (4th Dept. 2006). *Doe v. Doar* is the statewide class action successfully challenging the regulation that reduced public assistance benefits to households containing children where at least one household member receives SSI (the "invisibility rule").

However, on May 31, 2006, the State obtained a discretionary stay from the trial court. This stay will remain in effect until counsel finalizes the remedial plan, and until the State has made a second motion for leave to appeal, at which point it will get an automatic stay. The Court of Appeals rejection of the state's earlier motion for leave to appeal was based on a technicality: the order below was not final because the trial court had directed the parties to develop a remedial plan for implementing the Court's order and the details were still being negotiated.

What does this mean for *Doe* class members? Unfortunately, they will not get relief either prospectively or retroactively until the Court of Appeals has decided whether to hear the appeal once the order is final, or if the discretionary stay is overturned on appeal. Class counsel Susan Antos and Bryan Hetherington of Empire Justice Center are hard at work trying to resolve these issues. We will keep you posted.

Credit Reports Lead to Bank Blacklisting

Here is a new one. SSA tells Ms. Smith to open a bank account so that monthly SSD checks and a retroactive award may be electronically deposited. Ms. Smith tries to open a bank account, but is turned away from one bank after another because she is on a "bank black list." Apparently, one of Ms. Smith's previous banks felt she mismanaged her account through overdrafts or alleged ATM theft (or perhaps something else), and believes she's a business risk.

Is this possible? Ask Ian Feldman or Johnson Tyler, both of whom have encountered this problem in New York City. The culprit is ChexSystems, a national credit bureau that reports bank debts and checking overdrafts to subscribing banks. ChexSystems currently maintains negative records on more than 19 million checking accounts. Customers can be reported for such offenses as suspected fraud, failing to pay overdraft charges within an allotted time, or abandoning an account with a negative balance. Data is held for five years from the date of the offense. About 80% of banks subscribe to the service.

What do you do if your client cannot open an account? Try a smaller bank (it may not subscribe to the service). Or try a bank that aggressively markets itself in low income neighborhoods. They make much of their money from bounced check fees and thus may welcome an SSI/SSD recipient (steady income) who can't manage his or her own money.

How about contesting the offense that got your client onto ChexSystems' black list? Good luck. According to a consumer reports reporter, "getting direct information about [ChexSystems] is roughly equivalent to oil wrestling a contortionist in a frictionless body stocking. There is almost no direct way to contact the company or to find reliable information about its practices…."

If you want more information about bank blacklisting, start with a superb law review article by James Marvin Perez entitled *Blacklisted: The Unwarranted Divestment of Access to Bank Accounts*, 80 N.Y.U.L. Rev. 1586 (November 2005). If you have a client affected by this practice, contact Johnson Tyler at SBLS (JohnsonT@sbls.org or 718-237-5548). Your client's headache may help in the *Mayers* litigation, which seeks to stop creditors from freezing bank accounts that contain only direct deposit SSI and SSD. (See September 2005 *Disability Law News* for an article describing the *Mayers* case.) Bank freezes generate huge bank fees, often bringing accounts into the negative range and triggering negative reporting to ChexSystems.

New DAP Baby Arrives

Congratulations to Maura Kennedy-Smith and her husband Bill on the birth of their son, Ronan Patrick Kennedy-Smith, born on April 2, 2006, weighing in at 8 lbs, 12 oz. Maura recently reported that "He's great...not walking yet, but plenty of smiles & gurgles & he just began rolling over." Maura returned to her DAP work at the Ithaca office of LAWNY on July 10, 2006, and will undoubtedly be sharing pictures at upcoming Task Force meetings and other DAP events.

ADMINISTRATIVE DECISIONS

Appeals Council Remands Fibromyalgia Case

Paralegal Sue Bosworth-Quinlan is not known for easily giving up – no matter how uphill the battle. Last month, she received a remand in a case that is another example of her perseverance. Her client's 1998 application had been denied by an ALJ in January 2000. While the claim was at the Appeals Council, the claimant prevailed on a new application filed in June 2000. The Appeals Council nonetheless refused to review her claim. The U.S. District Court, however, remanded it for further administrative proceedings. In implementing the District Court order, the Appeals Court ordered the ALJ to consider the issue of disability from 1998 through April 30, 2000.

Consider it he did. The ALJ magnanimously adopted the finding of disability since May 2000, but yet again refused to find the claimant disabled as of her 1998 application date. In so doing, the ALJ refused to recognize the claimant's fibromyalgia as a severe impairment. In fact, the ALJ – both on the record and in his decision – announced that he does not personally accept fibromyalgia as an impairment under the Social Security Act! Despite a request by Sue, he refused to recuse himself from hearing the claim after this pronouncement. [Remember that bias claims generally must be first raised at the hearing level. See 20 C.F.R. §§404.940 & 416.1440; HALLEX I-2-1-60.]

Sue pointed out to the Appeals Council that the ALJ has repeatedly made similar statements about fibromyalgia in other cases as well, and urged the Appeals Council to direct him to accept it as a valid impairment, and/or not allow him to preside over this or other claims involving fibromyalgia.

The Appeals Council "noted" that the ALJ was unwilling to accept fibromyalgia as a diagnosis despite SSA's policy that it is a medically determinable impairment (SSR 99-2p). It concluded "that the Administrative Law Judge's opinion regarding fibromyalgia prevented him from giving appropriate consideration to the claimant's description of her symptoms." It remanded the case to a different ALJ, noting, however, that the case had already been heard once by this ALJ. [See HALLEX I-3-7-40, which provides that Appeals Council remand orders are ordinarily assigned to the same ALJ who issued the decision or dismissal, except that the case will be assigned to a different ALJ if, e.g., it is determined that the claimant did not receive a full and fair hearing or it is a second remand.]

Sue's tenaciousness is a good example of what needs to be done to make SSA aware of these types of egregious behavior on the part of ALJs – and underscores yet again the need for a meaningful complaint process within SSA. Time will tell whether this admonishment on the part of the Appeals Council will have any effect on the ALJ in question, but we have no doubt that Sue will be following up!

Contacting the Appeals Council: A Phone Call Away

To contact the Appeals Council Branch Chief assigned to your client's case, you need the last two digits of the Social Security number and the "Circuit Jurisdiction" where the claim originated. All New York, Connecticut, and Vermont claims are Second Circuit. HALLEX I-4-3-104 then provides yet another "grid" for assigning your client's claim to one of twenty-seven branches. Each branch has the name of the corresponding branch chief, a phone number, and a FAX number. This HALLEX section was last updated October 31, 2005, and is available at www.socialsecurity.gov.

ALJ Reopens 1997 DIB Claim

Sally Deluca, of the Brooklyn Branch of LSNY, recently demonstrated the benefits of digging into the past. Sally agreed to represent a client, Maria, who had been approved for benefits based on her January 25, 2002 SSD/SSI application, but with an onset date of September 1, 2001. The client had alleged an onset of September 26, 1997. Sally set out to prove not only that Maria was disabled back in 1997, but also that under two prior applications, she should be paid back to 1997.

Sally learned that Maria had previously filed for DIB benefits in Puerto Rico in August, 1998, with an onset date of September 26, 1997. That case was denied on December 21, 1998, and client requested reconsideration, which was denied on May 21, 1999. The client believed her attorney in Puerto Rico had requested a hearing on the denial but the case in Puerto Rico could not be found.

In November, 1999, Maria had moved to New York for better medical treatment. After a few weeks staying with a friend, she wound up in a homeless shelter. Her medical condition worsened, resulting in multiple emergency room visits and several abdominal surgeries. On June 13, 2000, the client filed a second set of applications for DIB and SSI, again alleging disability from September 26, 1997. Those applications were denied on September 7, 2000. In April, 2004, Maria requested a hearing on these two previous denials.

Sally represented Maria at a hearing in July, 2005, and convinced the ALJ that Maria had good cause for late filing of a request for hearing on her earlier denials, based on Maria's credible testimony that the social worker at the shelter who received the denial did not explain the appeals process. Moreover the letters that SSA sent to Maria were in English; Maria reads, writes and speaks only Spanish. The ALJ also found that *res judicata* did not apply because there was new and material evidence addressing the issue of disability. The evidence consisted of records Sally obtained from Puerto Rico from 1997 and 1998, as well as evidence from New York providers from November 1999 through 2001.

A subsequent hearing on the merits was held on March 28, 2006, with two MEs (Medical Experts), an internist and a psychiatrist, to determine whether the client was disabled for the period of September 26, 1997 through August 31, 2000. Although Maria had multiple medical complaints since her original abdominal surgery in Puerto Rico in 1997, with subsequent abdominal surgeries for appendicitis and ovarian cysts in New York, the internist found no objective evidence of her hypoglycemia, weakness and general malaise. He and the psychiatrist found, however, that she met the somatoform listing. As a result Maria will be getting all her back SSD payments from the date of onset in September, 1997.

Kudos to Sally Deluca. Thanks to her hard work, Maria will receive benefits retroactive to 1997!

ODAR Removes CE from DDD Roster

On January 23, 2006, Acting Regional Chief ALJ Robert Wright issued a Memorandum to Hearing Office staff in Region I and II regarding Mohammad Khattak, M.D. According to the memo, Dr. Khattak had been removed as a consultative examiner in July 2005. Although reports from Dr. Khattak were not expunged from the records, adjudicators and decision writers were reminded to exercise care in reviewing them and determining the appropriate weight to be accorded them.

The rather cryptic memo goes to state that the weight given to the reports should be explained in the decisions, with questions directed to the Regional Attorney Unit. The memo is available as DAP #432. Could this memo have anything to do with the class action case filed by Charlie Binder earlier this year challenging the use of Dr. Khattak? For more on *Foxworthy et al v. Barnhart*, see the March 2006 edition of the *Disability Law News.* In the meantime, scour your files for reports by the infamous Dr. K.

12.05C Claim Approved

Tenaciousness is clearly the name of the game in the DAP world. Ellen Heidrick of Southern Tier Legal Services, a division of LAWNY in Bath, battled with an ALJ for over a year, returning after not one but four adjournments for additional evidence before finally prevailing. Ellen's client was a young woman with an IQ of 70, a learning disorder and posttraumatic stress disorder. The ALJ repeatedly argued with Ellen that a learning disorder could not meet the second prong of Listing 12.05C for mental retardation, which requires at least one IQ score between 60 and 70 and an additional impairment, not necessarily disabling in and of itself, that imposes significant limitations on the claimant's ability to work.

Although Ellen was never able to secure the RFC (residual functional capacity) evaluation that the ALJ so dearly wanted, she managed to get a statement from the supervisor at her client's part-time job indicating that she was not ready for full-time work. That, coupled with a statement from a VESID counselor that the client needed "specialized job development/job coaching services in order to successfully enter community based competitive employment," and a qualification from a consultative examiner recommending a vocational placement that allowed close supervision and supportive feedback of task accomplishments, saved the day – but not before a supplemental hearing with a vocational expert. Although the VE testified that a person with an IQ of 70 and a learning disability could work, he acknowledged under Ellen's cross examination that there were no competitive jobs for a person who needed close supervision and a supportive environment.

Ultimately, the ALJ - in a relatively brief decision given that all that had transpired leading up to it - agreed that Ellen's client met Listing 12.05C based on her IQ combined with learning disabilities and depression. He granted a closed period of disability, as the claimant had in fact begun working full-time during the long interim that it took for the case to conclude.

Ellen's various letter memos to the ALJ, including one outlining the case law on learning disabilities as secondary impairments to Listing 12.05C, can be found as DAP #433, available on Empire Justice Center's On-line Resource Center at www.empirejustice.org. Congratulations to Ellen for her tenacity.

ALJ Considers Pain in Granting Benefits

Greg Philips, a Rochester attorney with Segar and Sciortino and sometimes DAP Chef, reports that he received a fully favorable decision from an ALJ in a case in which the medical evidence on its face was equivocal at best. What saved the day was the claimant's testimony.

The medical evidence included a Functional Capacity Evaluation (FCE) done for VESID by a physical therapist, which concluded that the client could do light work with some restrictions. Prior to the hearing, the ALJ had offered a closed period up to the date of the FCE. Greg's client declined, and testified at the hearing that although he was never contacted by the PT after the FCE, he was in excruciating pain for two days following the FCE.

The ALJ, finding that the FCE did not fully account for the claimant's pain, gave it only limited weight. He went on to find the claimant credible and awarded on-going benefits. The ALJ specifically noted the claimant's outstanding work record, his diligent participation in physical therapy over one year without significant improvement, and the fact that the claimant had undergone the FCE because he wanted to be retrained by VESID.

Thanks to Greg for reminding us that it's not over until it's over – and that testimony, particularly in pain cases, can be the most important evidence.

"Fleeing Felons" Get Benefits Restored

Two recent cases from different ends of the state remind us that there is hope for some so-called "fleeing felons" confronted with SSA's draconian fugitive felon rules. Jas Sahni of Bedford-Stuyvesant Legal Services represented an individual who was denied SSD and SSI both on the basis of nondisability and on the basis of being a fleeing felon. According to Jas, SSA acted in an extremely egregious manner when it failed to give him or his client any notice or information about the alleged warrant. Thanks to Jas's own investigation, he learned that his client had a 31-year-old New York County warrant on an E felony.

As in many cases involving older warrants, no one in the criminal justice system was particularly interested in the client or his case. But since the warrant itself was on the books, SSA insisted that he was barred from benefits. Additionally, because the charge involved an assault, the new good cause exceptions to the fugitive felon bar did not apply. [See POMS SI 00530.015 & GN 02613.025 and the January 2006 edition of the *Disability Law News* for more on the good cause exceptions.]

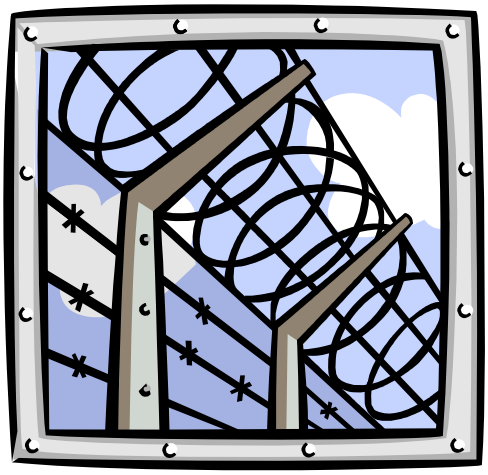
Jas managed to convince the ALJ hearing the claim that under the recent Second Circuit *Fowlkes* decision, his client had no intent to flee: he had been in New York all along and nobody wanted him, so he should not be considered fleeing. [For more on *Fowlkes* and SSA's acquiescence ruling in *Fowlkes* (AR 06-1(2)), as well as the current status of the fleeing felon rules in New York, see the May 2006 edition of the *Disability Law News*, available at www.empirejustice.org.] To make that decision more than a pyrrhic victory, Jas also succeeded in convincing the ALJ that his client was, indeed, disabled. So Jas won both the battle and the war.

In the second case, LJ Fisher of the Empire Justice Center in Rochester managed what might seem a particularly daunting task: she convinced a probation officer in Brooklyn to intercede in getting her client's outstanding bench warrant vacated and his sentence to probation terminated.

LJ's client had been receiving SSI benefits until the outstanding Brooklyn warrant caught up with him. Under the infamous "fugitive felon" regulations, SSA terminated his benefits, despite the fact that he is disabled as a result of his HIV disease. LJ argued that he was unable to travel to Brooklyn because of his health, and secured documentation from his treating sources that travel would be an extreme hardship for him. She asked that the charges against the client be dismissed in the interests of justice without his appearance.

Sometimes justice does prevail! The Probation Office arranged for a State Supreme Court judge to dismiss the charges, and vacate the warrant. According to LJ, what seemed important to the Probation Officer was the fact that her client had not had any further involvement with the criminal justice system. The client is once again collecting his much needed SSI benefits, thanks to LJ's intervention.

Interestingly, *Fowlkes* and AR 06-01(2) might not have been so helpful in LJ's case, since *Fowlkes* did not address probation and parole violators. If you have a "fleeing" probation or parole violator, please let us know. In the meantime, congratulations to both Jas and LJ for their work in these cases.



CLASS ACTIONS

Balzi, Brogan, et al. v. Stone & Callahan, 85 Civ. 8706, 90 Civ. 7805 (S.D.N.Y.)(Knapp, J.) ("the rep payee case")

Description - Plaintiffs challenged SSA's and OMH's (Office of Mental Health) policies and practices regarding the appointment of representative payees for recipients of Social Security benefits who became inpatients at OMH psychiatric facilities. Plaintiffs alleged that OMH facilities provided inadequate information and legally deficient notice both in appointing themselves representative payee for plaintiffs and in carrying out their obligations as representative payee. Additionally, plaintiffs alleged that SSA failed to meet its statutory obligations by neglecting to ensure appropriate appointment of representative payees, adequate notice to plaintiffs and prompt replacement of representative payees when plaintiffs return to the community.

Relief - Final settlement signed January 7, 1997 with many favorable provisions for inpatients including provisions about an inpatient's right to notice of the application of a facility to become the representative payee and the right of inpatients to inform OMH that they do not wish to pay for their institutionalization.

Citation - 90 CV 7805 (WK) unpublished order 1/7/97

Information - Catherine Callery, Empire Justice Center (585-454-6500), William Brooks, Touro Law School Clinic (516-421-2244)

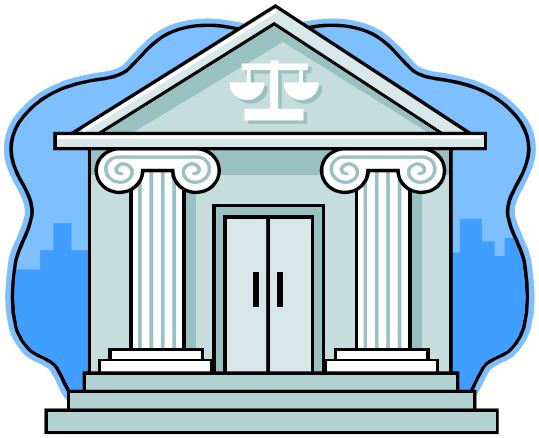
Miller v. Secretary, No. 87-1393T (W.D.N.Y.) (Telesca, J.)("the file access case")

Description - Plaintiffs challenged SSA's refusal to permit representatives to review hearing files sufficiently in advance of scheduled hearing dates. Settlement in 1988 requires SSA to send notice to all ALJs nationwide setting forth duty to provide access to the claimants' files, and when not possible, to evaluate whether there is good cause to postpone the hearing.

Relief - Nationwide instruction directs ALJs to provide adequate access to hearing files, and to consider adjourning hearings for good cause where such access is not provided. The instruction remains useful and can be found at *http://www.gu.lpny.org/Disability/Miller_%20Instructions.htm.*

Citations - Unpublished order (1988) requires national instruction to all ALJs of policy, and duties described above.

Information - Catherine M. Callery, Empire Justice Center (800-724-0490, 585-454-6500)



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.

WEB NEWS

Learn More About Traumatic Brain Injury (TBI)

Millions of people have experienced a traumatic brain injury (TBI), but they are unaware that TBI is the underlying cause of problems they subsequently experience, such as poor memory, difficulties in learning and behavioral changes. A new article summarizes current research on specific aspects of TBI, offers suggestions for future research planning, and suggests application of research findings to clinical practice and policy. The article is available at:

http://www.mssm.edu/tbicentral/resources/publications/tbi_research_review.shtml

Find Data on Various Children's Topics

When handling disability cases for children, we sometimes need statistics or data on youth risk behavior, poverty, education, obesity in children or countless other topics that would bolster our arguments. The Annie E. Casey Foundation publishes a *KIDS COUNT Data Book* that reports on the well-being of America's children, available at: *http://www.aecf.org/kidscount/sld/index.jsp.*

Information is also broken down county by county in New York State at:

http://www.ccf.state.ny.us/resources/touchstonesresource.htm
http://www.nyskwic.org/access_data/access_data.cfm.

How To Reach Disaster Assistance Service Centers

The massive flooding that plagued numerous areas of New York State earlier this summer caused unprecedented damage. Each county that has been determined to qualify for Emergency Disaster Assistance has a designated Service Center that can provide information about relief available. A list of these Disaster Assistance Service Centers is available as DAP#434.

NTAP Offers Training on MS Word

The National Training Assistance Project (NTAP) is offering a training for legal aid lawyers and paralegals to use MS Word as a fundamental tool of their trade, rather than a spiffy typewriter. *Please note: This training is geared for an intermediate audience.* If you do not have the ability to do basic functions (open, save, save as, print, close, cut, copy, paste, spell-check, basic font formatting, bullets & numbering), this training is not for you. The training on **August 16th** will be recorded and posted online. Register at: http://lstech.org/ntap/trainings/training_topics/CRP/CRP_Techies201

END NOTE

Have Another Cup of Coffee

Those of us who feel smug and self-righteous about becoming "Decaf Zombies" may not be so smart – literally. According to a recent report on National Public Radio's (NPR) *Morning Edition* on June 13, 2006, an experiment in Australia demonstrated that with the equivalent of two cups of caffeinated coffee, people were better able to read and understand an argument they disagreed with – with some even changing their minds.

Additionally, research in Austria has shown that coffee improves short-term memory and speeds up reaction times. Magnetic resonance imaging (MRI) demonstrated that coffee acts upon the brain's prefrontal cortex. According to Florian Koppelstatter of the Medical University in Innsbruck, "Caffeine modulates a higher brain function through its effects on distinct areas of the brain." The areas were involved in "executive memory," attention, concentration, planning and monitoring.

Coffee – both caffeinated and decaffeinated – may also decrease the risk of diabetes. A new study reported in Archives of Internal Medicine shows that coffee can offer protection against Type 2 Diabetes, which can develop as the result of obesity. It remains unclear, however, whether it is the caffeine or some other ingredient in coffee that provides the benefit. Women involved in the study who drank more than six cups of coffee per day were 22 percent less likely to develop diabetes than those who drank no coffee, while those who drank six or more cups of decaffeinated coffee were 33 percent less likely.

Finally, NPR also reported that studies show that coffee might offset liver damage caused by alcohol abuse. Alcoholics who drank more coffee were less likely to develop cirrhosis.

Caffeine, however, still has its detractors. Researchers at Duke University Medical Center, for example, claim that caffeine exaggerates stress in people who drink it daily. A study funded by the National Institutes of Health and reported in the July/August 2002 issue of Psychosomatic Medicine demonstrated that the effects of caffeine were longer lasting than previously thought. It also showed that caffeine consumption significantly raised systolic and diastolic blood pressure, as well as adrenaline levels. The caffeine appeared to compound the effects of stress both psychologically in terms of perceived stress levels and physiologically in terms of elevated blood pressures and stress hormones.

So how about another cup of coffee?

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