Empire Justice Center

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# DISABILITY LAW NEWS

## Exempt Funds Given More Protection

The protections afforded Social Security and SSI recipients under 42 U.S.C §407 may take on new meaning in New York next year. Known as the anti-attachment statute, §407 has long provided that, with few exceptions, Social Security and SSI benefits are exempt from creditors. DAP advocates, however, know all too well the problems that beneficiaries face when their benefits are nonetheless seized from their bank accounts by creditors. Much has been written in these pages about the efforts in the courts and on the federal and state levels to alleviate these problems. See, for example, the March 2008 and November 2007 editions of the *Disability Law News*, available at www.empirejustice.com.

Some of those efforts have finally paid off in New York! Thanks to the hard work of members of New Yorkers for Responsible Lending (NYRL) and others, the Exempt Income Protection Act (S.6203/A.8527) was recently passed by New York's legislature. The Act will better protect statutorily exempt income from access by creditors. Protections under the Act are afforded not only to Social Security benefits, but also retirement, workers compensation, unemployment insurance, and public/private pensions. The legislation also protects a minimum amount of funds in all bank accounts from debt collection, regardless of the source. If signed into law by Governor Paterson, the Act will take effect January 1, 2009.

Under the new Act, the first $2,500 in an account that has had statutorily exempt payments deposited either electronically or by direct deposit in the last 45 days before a restraining notice was served on the bank is protected. If there is $2,500 or less in the account, the account cannot be restrained and the restraining notice is void. If there is more than $2,500 in the account, only the balance above $2,500 can be restrained. The banking institution will send the restraining notice and exemption forms to the debtor. Should a debtor receive notice that funds s/he believes are exempt have been restrained, the debtor needs to complete the exemption forms quickly; otherwise the money may be released by the bank to satisfy a judgment or an order.

If the debtor takes no action, the funds above $2,500 remain restrained. If the debtor completes and returns the forms, but the creditor takes no action, the entire account is released to the debtor. If, however, the creditor objects and serves a motion on the bank and the debtor, a hearing will take place to determine if the funds are exempt. If the bank does not receive an order from the court within twenty-one days, the account is released to the debtor.

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Even if no exempt funds have been deposited into an account, the first $1,716 is protected and any restraint is void. Amounts over $1,716 can be restrained, however. Exemption forms will be sent to the debtor and the same results will occur as stated above, based on the actions taken by the debtor and creditor. The protected amount is based on a formula tied to the state minimum hourly wage rate. This amount will increase to $1,740 on July 24, 2009, and will continue to rise with the increase in minimum wage.

The Act contains a significant cost of living adjustment provision. Beginning in 2012 and every three years thereafter, the amounts protected by this bill will be adjusted based on the change in the cost of living. The amount will be published every three years by the Superintendent of Banks, along with the date of the next scheduled adjustment.

The Act also instructs the banks on how to deal with "mixed" accounts. If an account contains both exempt funds and other funds, the judgment creditor or collection unit must apply the lowest intermediate balance principle of accounting. Additionally, within seven days of the postmarked exemption claim form returned by the debtor, the creditor must direct the banking institution to release the portion of funds in the account that are deemed exempt under this rule.

In addition to the difficulties faced when their exempt funds have been seized, debtors have had their problems compounded by imposition of fees levied by the banks. The Act provides some relief. Fees are disallowed in all cases in which a restraining notice is not imposed. If the banking institution restrains an account but the restraint was unlawful, it cannot charge a fee to the debtor, no matter the terms of the agreement between the institution and the debtor.

While this Act promises to provide some relief in New York, efforts are still underway on the federal level. As reported in the November 2007 edition of this newsletter, the Department of Treasury Office of the Comptroller of the Currency and Office of Thrift Supervision, The Federal Reserve System, The FDIC and The National Credit Union Administration have promulgated "Proposed Guidance on Garnishment of Exempt Federal Benefit Funds." *See* 72 Fed. Reg. 55273-55276 (September 28, 2007). Advocates have questioned the efficacy of this "guidance," which "encourages," rather than requires financial institutions to have policies and procedures in place. It seems to be a way to placate lawmakers, while adding little of substance.

The Social Security Administration (SSA) itself – which has generally taken a hands-off approach to these problems – recently issued a report to Congress on the issue of financial institutions deducting fees and garnishments from Social Security benefits. After reviewing the practices and procedures of a number of financial institutions, SSA's Office of the Inspector General (OIG) identified several safeguards that should be enacted to protect Social Security recipients. Among other recommendations, it suggested that the Department of Treasury could establish a code to assist banks in easily identifying which deposits are exempt. It also recommended that SSA revisit its interpretation of the federal exemption to clarify whether it simply provides a defense to creditors or an absolute bar to freezes. The report (A-15-08-28031) is available at http://www.ssa.gov/oig/office_of_audit/audit2008.htm.

Many thanks to Syracuse University law student Elizabeth Hasper for her help in parsing this helpful new legislation. Check out the next *Legal Services Journal* for more details.

## SSA Website Sports New Look


The Social Security Administration (SSA) recently unveiled its newly designed webpage. Although allegedly revised to make it more user friendly, some advocates may be having trouble reading the fine print. For example, "Program Rules" (the link to the Law, Regulations, SSRs, POMS, etc.), which used to be on the bottom-right hand side of the page is now in small, tiny print at the very bottom of the page. The site can still be reached at: http://www.socialsecurity.gov/.

# Gay Father Sues SSA

A disabled gay father from Florida is suing the Social Security Administration (SSA) because his February 2006 application for Child Insurance Benefits (CIB) remains unanswered. Gary Day, represented by Lambda Legal, claims that the delay is a result of anti-gay discrimination.

Day submitted an application for benefits, along with birth certificates and court documents showing his legal status as the children's parent and was told that he would receive a response within 45 days. A year later, Lambda contacted the SSA and was told that there were unspecified "legal questions and policy issues" preventing a determination of Day's eligibility. Two years after the initial application, Mr. Day has still not received an answer. The SSA's unresponsiveness, said Lambda in a press release, amounts to "either a failure on the part of the agency to do its job or blatant discrimination based on the fact that these children have two dads."

Although Mr. Day remains in limbo, a recently released legal opinion by the Justice Department's Office of Legal Counsel (OLC) – to which the SSA agreed to be bound, according to a footnote in the opinion – should allow more gay parents to receive benefits for their children. The opinion was a response an SSA inquiry regarding whether the Defense of Marriage Act, which bars the government from extending federal benefits to gay and lesbian couples, would also bar the payment of CIB to the son of two Vermont lesbians.

The two women, Karen and Monique, entered into a civil union under Vermont law in 2002. Monique gave birth to a son, Elijah, in 2003, and while Karen did not formally adopt him, she is listed on his birth certificate as his "2nd parent" and on other documents as his "civil union parent." In 2005, SSA found Karen eligible for disability benefits, after which she then filed an application for CIB on behalf of Elijah.

The opinion answers the SSA's question with a firm 'no' and states that while the Defense of Marriage Act restricts the definition of marriage for purposes of federal law, the Social Security Act "does not condition eligibility for CIB on the existence of a marriage or on the federal rights of a spouse." Instead, eligibility turns on the State's recognition of a parent-child relationship, specifically the right of a child to inherit under state law. The fact that Elijah's right of inheritance comes from Vermont's recognition of same-sex civil union, the opinion says, is irrelevant to the question of whether DOMA prevents Elijah from collecting benefits under the Social Security Act.

OLC's response differs from that issued by the Congressional Research Service in 2004. That report, which was outlined in the November 2004 edition of the *Disability Law News* concluded that DOMA precluded SSA from recognizing same sex marriages. That's progress for you!

Thanks to David Heal, University of Michigan law student, for his help in researching this issue.

## Save the Date

The Statewide Partnership Conference, to be held in Albany from September 22 -24, 2008, will feature a number of DAP sessions. On Monday afternoon, September 22, 2008, there will be statewide Task Force Meeting. The focus of the meeting will be SSA's electronic initiatives and how to deal with them, from e-filing to e-files. We will share suggestions for office hardware and software.

Over the course of the following two days, there will be five DAP sessions, which will focus on HIV disease. We will follow a sample HIV case through the Sequential Evaluation to the Appeals Process. Sessions will include an overview of the HIV listing, including both the current and proposed versions; a medical presentation on HIV disease; an exploration of using nonexertional impairments typical of HIV cases to get past Step 5 of the Sequential Evaluation; confronting vocational testimony; and winning on appeal.

# SSI Immigrant Struggle Continues

Many recent editions of this newsletter have chronicled the problems encountered by elderly and disabled immigrants who are ineligible for Supplemental Security Income (SSI) solely because of their immigration status. Advocates will recall that one exception under the law is for those immigrants with refugee status – but only during their first seven years in this country.

One of the dilemmas faced by such refugees is the difficulty of actually achieving citizenship status within that seven year period. Recent attempts at legislative fixes to this problem have failed. A modicum of relief for these individuals was recently afforded by the settlement to a class action lawsuit challenging the policies of the Department of Homeland Security. *Kaplan v. Chertoff* was national class action on behalf of all disabled and elderly refugees and asylees (and certain other humanitarian immigrants) who have been or will be cut off of SSI after seven years. As a result of the settlement, immigrants who are receiving SSI, or who have already lost their SSI because of the seven-year limit, may request that their immigration applications be "expedited." In other words, they can ask that their applications be moved to the front of the line.

The United States Citizenship and Immigration Services (USCIS) recently sent notices to those identified as *Kaplan* class members informing them of their rights under the settlement. A copy of the letter is attached as DAP #496. Attorneys for the plaintiff class are concerned that CIS may have missed a number of people. If you know of any immigrants who have lost their SSI benefits due to the seven year limit and have not had it restored, but did not receive this letter, contact mfroehlich@clsphila.org.

Attorneys for the plaintiff class have also published a series of questions and answers about the lawsuit, available at the website of Community Legal Services at http://www.clsphila.org/Content.aspx?id=919.

Advocates should be aware that New York residents are entitled to additional relief under the New York state court lawsuit holding that elderly, blind and disabled persons who are ineligible for SSI solely because of immigration status must be provided with public assistance at the SSI related standard of need, rather than assistance at the significantly lower welfare standard. *Khrahpunskiy v. Doar*, 2008 NY Slip Op 351; 2008 N.Y. App.Div. LEXIS 316. For more details, see the March 2008 edition of the *Disability Law News*, available at www.empirejustice.org.

Advocates who have clients who are losing their SSI benefits because of the seven year time limit and are facing a housing or energy emergency (eviction or shut off) should contact Barbara Weiner at the Empire Justice Center in Albany (518) 462-6831, Ext.. 104, or bweiner@empirejustice.org for outside NYC; or Scott Rosenberg if the person lives in NYC.

# Help Stimulate the Economy

Under the Economic Stimulus Act of 2008 (P.L. 110-185), individuals with qualifying income of $3,000 or more in 2007 may be eligible for payments between $300 and $600 ($600 and $1200 if married and filing a joint return), plus $300 for each qualifying child under age 17 as of December 31, 2007. Qualifying income includes Social Security benefits, certain Railroad Retirement benefits, certain veterans' benefits and earned income, such as income from wages, salaries, tips and self-employment.

To receive the payments, beneficiaries must file federal income tax returns for 2007 before October 15, 2008, but will not need to do more than that to be eligible. The Internal Revenue Service (IRS), however, estimates that there are approximately 439,000 elderly and/or disabled individuals in New York State who are eligible for the economic stimulus rebate but have not filed. The IRS has launched a summer push to encourage those who have not yet filed to do so. See http://www.irs.gov/irs/article/0,,id=184063,00.html.

So make sure you encourage any eligible clients to apply if they haven't already done so. For more information on the stimulus program and how it affects Title II and SSI recipients, see the March 2008 edition of the *Disability Law News.*

# Heads Up on Important Medicaid Changes

Effective April 2008, Medicaid resource levels rose dramatically, as shown in this chart. This resource change is only effective for Medicaid recipients who do not receive SSI. SSI recipients are still bound by SSA's stingy resource rules of $2,000 for an individual and $3,000 for an eligible couple. The NYS Department of Health recently issued a General Information System (GIS) message discussing the resource changes, available at http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/08ma013.pdf

| Household Size | 2008 Resource Level |
|---|---|
| 1 | $13,050 |
| 2 | $19,200 |
| 3 | $22,200 |
| 4 | $25,050 |
| 5 | $27,900 |
| 6 | $30,750 |
| 7 | $33,600 |
| 8 | $36,600 |
| 1 | $39,450 |
| 10 | $42,300 |
| Each additional | $2,850 |

Also effective April 1, 2008, drug/alcohol screenings, assessments, mandated drug and alcohol treatment, and monitoring of compliance with such treatment are no longer a condition of Medicaid eligibility. Therefore, applicants/recipients must not be denied Medicaid benefits due to previous drug/alcohol requirements, or any continuing drug/alcohol requirements associated with Temporary Assistance.

# Medicaid Managed Care Expanded

Mandatory Medicaid Managed Care is creeping upstate. Advocates will recall from previous articles in this newsletter that SSI beneficiaries are no longer exempt from mandatory managed care. SSI recipients will be required to enroll in a managed care plan, rather then receiving their health case on a fee-for-service basis. See the January and September 2007 editions of the *Disability Law News*, and Trilby de Jung's article on "New York Expands Mandatory Medicaid Managed Care to Include SSI Recipients" in the October 2006 edition of the *Legal Services Journal*, available at www.empirejustice.org. These articles outline some of the parameters of the program, as well as the provisions for exemptions.

Implementation of program for SSI recipients began downstate and has made its way to several upstate counties. Recipients in New York City, Nassau, Onondaga, Oswego, Suffolk, and Westchester counties have already been phased in to the program. According to the May 2008 newsletter of the NYS Department of Health, they were joined by residents of Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, Allegany and Rockland counties in March 2008. As of May 2008, Livingston, Monroe, Ontario, Seneca and Yates were added to the list. The DOH newsletter is available at http://www.health.state.ny.us/health_care/medicaid/program/update/2008/2008-05.htm.

# REGULATIONS

## Preponderance vs. Substantial Evidence: What, When, Where, Why?

It always makes us a wee bit nervous when SSA announces that it intends to "clarify" some item. Is this some shorthand for making a wholesale regulatory or policy change without anyone really noticing?

With that paranoid backdrop, take a look at SSA's proposed rules to clarify when the agency applies the preponderance of the evidence standard as opposed to the substantial evidence standard. 73 Fed. Reg. 33745 (June 13, 2008). It appears from the proposed regulations that SSA will apply the preponderance of the evidence test at all levels of the administrative process, except that the Appeals Council applies the substantial evidence standard when it reviews an administrative law judge's decision to determine whether to grant a request for review.

The regulations provide definitions for both terms:

> Preponderance of the evidence means such relevant evidence that as a whole shows that the existence of the fact to be proven is more likely than not.
>
> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

SSA is accepting comments on its proposed "clarifications" until August 12, 2008. It will be interesting to figure out what is going on with this one!

## Several Listings Extended

SSA is extending the effective dates of six body systems in its Listings of Impairments to July 1, 2010. The affected body systems include:

Growth Impairment (100.00)
Respiratory System (3.00 and 103.00)
Hematological Disorders (7.00 and 107.00)
Endocrine System (9.00 and 109.00)
Neurological (11.00 and 111.00)
Mental Disorders (12.00 and 112.00).

The final rule was effective May 30, 2008. 73 Fed. Reg. 31025 (May 30, 2008).

# Is 60 the New 50 in SSA's World?

SSA proposes to modify its Grid rules by revising the definition of persons "closely approaching retirement age" from "60-64" to "60 or older." The purpose of these changes is to acknowledge that SSA makes disability determinations for individuals over age 64. Surprise! 73 Fed. Reg. 35100 (June 20, 2008).

The upward adjustment of full retirement age (FRA), applicable to Title II claims, would seem to make this particular step a no-brainer. Indeed, SSA states, "This modification would make the definition consistent with our definition of FRA and acknowledge that we make disability determinations for individuals over age 64 under Title XVI. The proposed changes are technical corrections and would not have any substantive effect. . . ."

Still lurking in the background, however, is the specter of upward expansion of the beginning ages for categories above "younger individual": "In 2005, we published an NPRM that would have redefined all of the age categories. However, this NPRM does not incorporate the changes suggested in the 2005 NPRM nor modify our existing policy in any manner. . ."

Comments on the proposed age changes are due by August 19, 2008.

# AR Rescinded and New Regulations Issued

In the January 2008 Disability Law News, we alerted you to SSA's plan to restore national uniformity by extending the policy set out in Acquiescence Ruling (AR) 99–1(2) to the rest of the nation. (AR) 99-1(2) 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. In December 2007, SSA proposed 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.

SSA has issued final rules rescinding AR 99–1(2) and adopting new regulations to implement the rationale of the *Florez* holding. 73 Fed. Reg. 28181-28182, 28033-28036 (May 15, 2008). The rules were effective June 16, 2008. We applaud Chris Bowes of CeDar who was counsel in the *Florez* case almost 10 years ago!

# SSA Disability Finding Binds Medicaid

In accordance with 42 C.F.R. §435.541, an SSA disability determination is binding on a Medicaid case until the determination is changed by SSA or there is a change in the individual's circumstances.

The New York State Department of Health issued an INF on June 11, 2008, on this issue. The INF is available from the Online Resource Center, or directly from the NYSDOH at http://www.health.state.ny.us/health_care/medicaid/publications/docs/inf/08inf-3.pdf

# How Much Will I Get From SSA?

Naturally, anyone who has filed a claim for Social Security benefits will ask, how much will I get from SSA? On May 13, 2008, SSA announced a new online tool to calculate potential benefits. 73 Fed. Reg. 27605.

With SSA's new online Retirement Estimator, individuals will be able to calculate estimates of potential retirement benefits in real-time, based in part on their SSA-maintained records and in part on user-entered information, such as the last year of Social Security earnings. In addition to quick estimates of retirement benefits at specific points such as full retirement age, users may also submit a number of "what if" scenarios based on information they provide regarding future earnings and retirement dates. The estimates can be printed and saved.

SSA currently has four benefit calculators on its Web site - the Quick, Online, WEP and Detailed calculators (http://www.ssa.gov/planners/calculators.htm). The Quick Calculator provides a simple, rough estimate based on user-entered date of birth and current year earnings. For more precise estimates, the Online, WEP and Detailed calculators require that the user have access to his or her Social Security Statement in order to manually key each year of lifetime earnings for use in the benefit computation.

SSA predicts that the Retirement Estimator calculator will provide a safe, user-friendly and convenient tool that will: (1) Contribute to financial literacy by helping members of the public plan for retirement; (2) help to promote SSA's online benefit application; and, (3) save Agency resources.

The Retirement Estimator will be released to the public on July 19, 2008.

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# Beat the Heat with AC

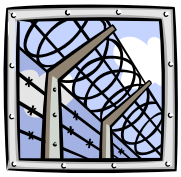
People susceptible to heat-related illnesses who lack air conditioning may be able to obtain air conditioners this summer through New York State's Home Energy Assistance Program (HEAP). Governor Paterson just announced a $2.4 million HEAP-funded multi-agency cooling initiative targeted toward medically needy individuals. In order to qualify, households must:

- lack an air conditioner;
- meet HEAP income guidelines; AND
- have a physician's written statement verifying that an air conditioner is medically necessary for someone in the household.

In New York City, households with an elderly person (age 60 or older) should apply for the air conditioning benefit through the Department for the Aging. All other New York State and New York City residents can apply through their local Department of Social Services/Human Resources Administration office.

For more information, see the governor's press release at http://www.ny.gov/governor/press/press_0529081_print.html

# Fleeing Felons Profitable for SSA



Don't expect to see the Social Security Administration (SSA)'s "fleeing felon" provisions rescinded anytime soon. Advocates will recall that these provisions, which extended the fleeing felon prohibitions from the SSI program to the Title II program in January of 2005, prohibits "the payment of Title II benefits to a beneficiary who is fleeing (for a period of more than 30 days) to avoid prosecution, custody, or confinement for a felony-and to a beneficiary who is violating a condition of probation or parole-unless the Agency determines that good cause exists for paying such benefits**."**

According to a report by SSA's Office of Inspector General (OIG), the Title II program has saved about $404.3 million as a result of the suspension of benefits to fugitive felons:

> This includes (1) $47.3 million in fugitive felon overpayments that were recovered; (2) $218.6 million in ongoing monthly benefits that were withheld from the fugitive felons while their warrants remained unsatisfied; and (3) $138.4 million in ongoing monthly benefits that were withheld from beneficiaries while they were incarcerated following their apprehension. Also, we estimate that SSA had the potential to save an additional $249.6 million as of March 2008. This includes (1) $89.5 million in benefits that will likely be withheld over the next 12 months from beneficiaries whose warrants remain unsatisfied and (2) $160.1 million in overpayments that had not yet been recovered from the fugitive felons. Finally, we estimate that SSA did not save approximately $60.3 million. This includes (1) $41.8 million in overpayments that were waived or deemed uncollectible and (2) $18.5 million that was paid to beneficiaries with outstanding felony warrants that will not be recovered because of the Fowlkes Ruling.

http://service.govdelivery.com/service/view.html?code=USSSA_73

Remember that under the Second Circuit's decision in *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005), SSA cannot conclude simply from the fact that there is an outstanding warrant for a person's arrest that he is "fleeing to avoid prosecution." 10 U.S.C. §1382(e)(4)(A). Thus, there must be some evidence that the person knows his apprehension is sought. See AR-06-01(2).

For helpful materials for dealing with fleeing felon problems, see http://www.reentry.net/ny/library.cfm?fa=detail&id=83206&appView=folder.

# GAO Recommends Integration of Services

The Government Accountability Office (GAO) released a report in May suggesting that Congress authorize the creation of an entity that would develop a cost-effective federal strategy for integrating services and support to individuals with disabilities.

This report comes a few years after the GAO designated federal disability programs as a "high-risk area" because, it said, these programs are based on antiquated concepts that do not reflect recent advances in medicine and technology and changes in labor market conditions. The report also highlighted low return-to-work rates, which it says are exacerbated by several factors, including SSA's limited span of authority over benefits and services offered by other agencies and the timing of support offered to beneficiaries. The GAO noted that SSA continues to be plagued by delays in processing disability claims.

The full GAO-08-635 report is available at http://www.gao.gov/new.items/d08635.pdf

# COURT DECISIONS

## District Court Reverses and Pays *Stieberger* Claim

In every *Disability Law News*, we summarize class actions from the past that have resulted in large numbers of disability claimants getting favorable relief in their cases. Pay attention to these cases because you never know when a *Stieberger*, or *Dixon*, or *McMahon* issue may crop up in one of your recent DAP cases and you have to know what action to take.

Take for example the case *Stern v. Commissioner*, where Senior District Court Judge Frederick J. Scullin Jr. from the Northern District of New York overturned the decision of an Administrative Law Judge (ALJ) who denied disability benefits on a *Stieberger* review to a claimant with cerebral palsy. The SSI claims in this case were filed over 25 years ago, thus older than some of our DAP advocates!

Plaintiff's original file was lost. Although most of the medical evidence of record consisted of treatment that occurred after the relevant time period, Judge Scullin found the evidence was sufficient to show that the disabling impairments existed during the relevant time period.

The majority of the medical evidence in the record indicated that the plaintiff met Listing 11.07D (Cerebral Palsy) since birth. Medical evidence from 1986 noted that plaintiff suffered from cerebral palsy since birth and a long-term seizure disorder since she was fifteen years old. Plaintiff's treating physician, in April 2002, noted that she suffered from cerebral palsy with right hemiparesis and was born with a right club foot. He also noted that she needed an assistive device to ambulate and that she had met the definition of Listing 11.07D since birth.

In evidence submitted to the Appeals Council after the ALJ's decision, plaintiff's treating pediatrician from 1969-1980 noted that plaintiff suffered from a club foot, seizure disorder, and left upper extremity congenital weakness. The doctor also noted that plaintiff had met Listing 11.07D since birth. Plaintiff's treating physician and treating pediatrician agreed that due to her cerebral palsy, plaintiff had difficulty ambulating due to a disturbance in gait, which required her to use an assistive device to ambulate. Opinions from other treatment providers supported these findings.

The ALJ, however, found that the plaintiff had the residual functional capacity for sedentary work with limited use of the non-dominant upper extremity. He concluded that the plaintiff was not disabled during the time period in question.

The ALJ did not give the treating physician's opinion controlling weight because the treating physician stated that he could not recall the particulars of plaintiff's case. Judge Scullin found that although the treating physician could not initially recall the particular facts of plaintiff's case, this did not mean that after looking at the treatment record and refreshing his recollection, he was unable to provide a competent opinion.

The ALJ relied instead on the medical opinion of a nurse practitioner who noted that plaintiff's left leg was stiff but her gait steady. Judge Scullin determined that this was not an acceptable medical source under the regulations. He also noted that the ALJ failed to discuss the length of the treatment relationship of the treating physician with the plaintiff and to properly assess the evidence provided by that physician. Judge Scullin found that the ALJ improperly substituted his judgment for that of competent medical opinion. Under 20 C.F.R. §§404.1427 and 416.927, the ALJ should have given controlling weight to the plaintiff's treating physicians' opinions who found that her medical impairments met Listing 11.07D since birth.

*(Continued on page 11)*

*(Continued from page 10)*

Judge Scullin concluded that plaintiff's impairment met Listing 11.07D and due to the strong evidence of disability and the long delay, a remand for further consideration would serve no purpose. The Court instead reversed the decision and remanded the case for calculation of benefits. The retroactive period covered by the *Stieberger* order covered a five year period from 1980-1985. The plaintiff had also filed a claim for Disabled Children's Benefits (DAC) during that time period. The earlier onset date that Judge Scullin applied in this case put the start of plaintiff's disability before her 22nd birthday and will allow her to recover (DAC) benefits on her parent's earning record.

Overall this was a fine decision by Judge Scullin. Although Louise Tarantino of the Empire Justice Center took this case to federal court, the underlying administrative record, including the old medical records submitted to the Appeals Council, were the result of incredible sleuthing by the private attorney who represented Ms. Stern at the administrative level, Kristen King of Albany. The decision in *Stern v. Astrue* is available as DAP #497.

# FTR Legacy Lives On

Readers of these pages will recall numerous articles chronicling the saga of Administrative Law Judge (ALJ) Franklin T. Russell (FTR) of the Syracuse Office of Adjudication and Review (ODAR). Frustration with ALJ Russell on the part of some tenacious advocates, including David Ralph of the Elmira office of LAWNY, resulted in the *Pronti* litigation. Plaintiffs alleged that the now retired ALJ Russell displayed a generalized bias against disability claimants.

Following a remand by Judge David G. Larimer of the Western District of New York, the Social Security Administration (SSA) actually issued an administrative decision ("Agency Decision") finding that ALJ Russell had in fact denied claimants due process by depriving them of full and fair hearings. SSA agreed to remand any cases pending in District Court over which ALJ Russell presided. It subsequently agreed to remand any of Russell's cases pending at the Appeals Council as well. *See Pronti v. Barnhart*, 339 F.Supp.2d 480 (W.D.N.Y. 2004) (*Pronti I*); *Pronti v. Barnhart*, 441 F.Supp.2d 466 (W.D.N.Y. 2006) (*Pronti II*).

Apparently not all *Pronti* pipeline cases were immediately identified. A case in the Northern District that had been decided by ALJ Russell was only recently remanded. Magistrate Judge Peebles had originally upheld ALJ Russell's decision in September 2006. Plaintiff's attorney filed objections, citing *Pronti*. On May 28, 2008, District Court Judge Frederick Scullin ordered defendant SSA to address the issue of the "Agency Decision" cited in *Pronti*, following which SSA stipulated to a voluntary remand of the case. So memories of FTR linger on….make sure that you don't have any lurking in your file cabinets.

In fact, the Empire Justice Center has filed a class action lawsuit in the Western District of New York seeking relief for all those claimants who were denied benefits by ALJ Russell, primarily on the same grounds and under the same circumstances for which SSA criticized ALJ Russell in the Findings that it submitted to the court in *Pronti*, but not covered by SSA's agreement in *Pronti*. The government's motion to dismiss in *Hogan et al. v. Barnhart* is currently pending before Judge Larimer. Please let us know if you have any clients who fit that description.

# Listing Level Diabetes Qualifies Child for SSI Benefits

In April 2008, the U.S. District Court for the Eastern District of New York remanded *Rivera v. Astrue*, a child's SSI case that had been ongoing for three years, for calculation and payment of SSI benefits. District Judge Nina Gershon overruled the Administrative Law Judge's (ALJ's) decision that the child was not eligible for SSI because the decision was not supported by substantial evidence and the ALJ failed to consider important factors in his analysis.

The child was diagnosed with diabetes in 2001. He was hospitalized in December 2003. In March 2004, he was treated in the Emergency Room, where he was treated with IV fluids and Insulin for eight and ten hours respectively and diagnosed with ketoacidosis.

The ALJ failed to consider the emergency room hospitalizations and the diagnosis of ketoacidosis in making his decision that the child's diabetes was not medically or functionally equivalent to the listings. The ALJ additionally held that while the child had a marked limitation in the domain of health and physical well-being, he did not have a limitation in caring for himself and therefore did not qualify for SSI benefits.

Judge Gershon disagreed with the ALJ and found the emergency room visits equated to hospitalizations, and were "recent" and "recurrent" for purposes of Listing 109.08. The regulations do not define "recent," "recurrent" or "hospitalizations," but Judge Gershon rejected the government's attempt at a semantic distinction that ER visits did not qualify because the child was not "admitted."

Judge Gershon also held that even if the child did not medically meet the listings, the record illustrated that he had a marked limitation in both the domains of health and physical well-being, and caring for one's self. His condition was thus functionally equivalent to the Listings. The limitation in caring for himself arose from his psychological problems and his trouble in taking his medication and following the strict diet. His treating psychologist found the child to have problems with stress, which worsened after his diabetes diagnosis. He concluded that child's denial about this life-long disease could be self-destructive, especially when he did not check his blood sugar level or follow his diet.

Judge Gershon also relied on statements made by the child's mother that he must be monitored in his activities, as well as the findings from the treating physician, who treated the child both before and after his diagnosis and determined that the child's ability to deal with his diabetes showed no improvement and endangered his life.

This decision can be found as DAP #498. Congratulations to Mike Hampden and Erin McCormack of the Partnership for Children's Rights for convincing the District Court to pay benefits in this case.

# Court Reverses 12.05 Claim

An offer of a voluntary remand can be very tempting in a federal court appeal. Between 1995 and 2005, the number of Social Security disability claims remanded - rather than affirmed - by federal district courts increased by 36 percent. On average, during that time period, the courts upheld SSA's decisions to deny benefits in 44 percent of the cases and reversed in six percent. Fifty percent of the claims were remanded back to the agency for further review. See the May 2007 edition of the *Disability Law News.*

But what if you are so convinced of the merits of your case that you want to try to convince the District Court Judge to reverse rather than remand? Kate Callery of the Rochester office of the Empire Justice Center did just that in a recent case. She refused the government's offer of a remand based on the inadequacy of the questioning of the vocational expert; she insisted instead that her client met Listing 12.05 for mental retardation. Judge Charles Siragusa of the Western District of New York was similarly convinced, and agreed to remand the claim solely for the calculation of benefits.

In *Santiago v. Astrue*, 2008 WL 2405728 (W.D.N.Y. June 11, 2008), the Court rejected the ALJ's finding that despite valid IQ scores of 57, 59 and 63, there was no evidence of lack of adaptive functioning manifested before age 22. The ALJ had also incorrectly relied on the claimant's alleged denial that she attended special education classes and her admission that she could perform daily activities inconsistent with lack of adaptive functioning. Instead, the Court cited *Muncy v. XL*, 247 F. 3d 728, 734 (8th Cir. 2001), for the proposition that "a person's IQ is presumed to remain stable over time in the absence of any evidence of a change in a claimant's intellectual functioning." Judge Siragusa also cited the Commissioner's own acknowledgement "of inferring a diagnosis of mental retardation when the longitudinal history and evidence of current functioning demonstrate that the impairment existed before the end of the developmental period." 65 Fed. Reg. 50746, 50753 (Aug. 21, 2000).

Judge Siragusa thus held that the Commissioner's regulations do not require evidence of low IQ scores before age 22. He found substantial evidence that the claimant's retardation was manifested during the developmental period. He referred to her second grade reading level and the lack of evidence of any sudden trauma that could cause a reduction in IQ. He also found that Ms. Santiago met the requirements of both 12.05B &C, in that she a secondary impairment sufficient to meet the "significant work-related limitation of function" of 12.05C. Because the Commissioner of Social Security had recently approved her for receipt of benefits from the date of the ALJ's decision, the Court's decision means she will also receive benefits back to her application date in 2004.

Moral of the story? When it looks like the odds are better than 50-50, it may be worth the risk!

# What's In Your Wallet?

Close your eyes and go through your wallet. Can you tell the difference between a one dollar and twenty dollar bill? Visually impaired persons go through this exercise daily, vulnerable to mistaking a Jackson for a Washington, or some other dead president. Recent litigation may resolve this issue for millions of visually impaired Americans.

In May 2008, the U.S. Court of Appeals for the District of Columbia Circuit, in the case *American Council of the Blind v. Paulson*, 525 F.3d 1256, upheld a lower court's decision that U.S. paper currency violates §504 of the Rehabilitation Act by discriminating against visually impaired individuals. The American Council of the Blind brought the action against the U.S. Secretary of the Treasury.

Individuals who are blind or otherwise visually impaired must rely on others to determine the denomination of the bills, or purchase a portable machine that reads the bills. However, along with being expensive, the machine has difficulty reading twenty dollar bills.

The National Federation of the Blind opposed the initial lawsuit in 2002 and the Court's recent decision, arguing that any change to the currency is a policy issue, not a requirement to be imposed by law. It also stressed that the lawsuit misrepresents the ability of blind individuals to use money and prevent fraud.

In 1995, the National Research Council of the National Academy of Sciences found over 3.7 million Americans have a visual impairment, with over 200,000 of those being completely blind. The number of individuals with a visual impairment is projected to increase as the population ages because most of these impairments are a result of age-related diseases.

Out of 171 countries that issue currency, only the U.S. has bills that are the same size and color for all denominations and that do not accommodate the blind. The American Council of the Blind suggested that the changes in currency could include adjustment in size, color or shape of the currency, embossed dots, foil, microperf (Optically Variable Technology), or raised printing.

The estimated cost of changing the currency to accommodate the visually impaired is similar to the costs associated with other currency changes that have been made by the Secretary of the Treasury, including those to prevent counterfeiting. This cost could be reduced if changes were made at the same time as other redesign plans, which is every seven to ten years, according to the Bureau of Engraving & Printing.

Both the District Court and the Court of Appeals held that the Secretary of the Treasury failed to meet his burden of demonstrating that providing accommodations to the visually impaired would impose an undue burden. Although the Secretary argued that the visually impaired had other options such as using credit cards, receiving help from others, using special equipment to read the denominations, or folding the bills differently to tell the bills apart, the Court of Appeals held that coping mechanisms or alternative modes of participating in commerce are not sufficient methods of dealing with the denial of access to the visually impaired.

The case was remanded to the District Court to consider Plaintiff's request for injunctive relief.

Thanks to law intern Elizabeth Hasper for an excellent summary of this important disability decision.

# OIG Faults SSA For Its Role in Pay Day Loan Abuses

As announced in the May 2008 edition of the *Disability Law News*, the Social Security Administration (SSA) is in the process of reviewing its procedures in regard to controversial "pay day" loans. SSA recently sought comments to anticipated changes to problematic agency payment procedures that currently permit benefit payments to be deposited into a third party's "master" account when the third party maintains separate "subaccounts" for individual beneficiaries. SSA states that it is considering changes because of concerns about the increasing use of this procedure by payday lenders who target Social Security beneficiaries. 73 Fed. Reg. 21403 (April 21, 2008). Comments were due by June 21, 2008.

A hearing on this problem was also scheduled before the Subcommittee on Social Security of the Committee on Ways and Means on Tuesday, June 24, 2008, to examine how certain payday lending and other financial institution practices may harm vulnerable Social Security beneficiaries, and may undermine the intent of the Social Security Act. At that hearing, SSA's Office of Inspector General (OIG) presented a scathing report, blaming SSA for its role.

According to the OIG:

> Non-bank FSPs [financial service providers], including payday lenders, obtain direct access to at least $34 million in monthly SSI payments to more than 63,000 recipients because, at the recipient's request, SSA provides them access to benefit payments. Most of the affected individuals were from minority populations, and nearly all the individuals are disabled. Most of these disabled SSI recipients suffer from some form of mental disability. We found that SSA policies, though somewhat contradictory, sanction this practice. Further, we found that SSA field offices encourage homeless recipients without traditional banking relationships to send their payments to non-bank FSPs. Such practices subject a vulnerable population of individuals to high transaction fees and, potentially, to predatory payday loans.

The OIG acknowledged that SSA is currently considering a change to its payment procedures that permit benefit payments to third-party accounts**.** The full report is available at http://www.ssa.gov/oig/ADOBEPDF/A-06-08-28112.pdf. Let's hope that these much needed changes proceed at a faster pace than some of SSA's initiatives!

# ADMINISTRATIVE DECISIONS

## ALJ Reduces Overpayment

If the world of Social Security disability is not byzantine enough, just venture into the world of overpayments! Ellen Heidrick of Southern Tier Services in Bath, a division of LAWNY, successfully navigated such a trip recently. She represented a SSI beneficiary who had been charged with an overpayment of $9,293.12 based on excess resources. While her client was willing to enter into an agreement to repay SSI, he disputed the amount of the overpayment.

The resources that SSI had counted to calculate the overpayment included the cash surrender value of the client's life insurance policy ($3,529.90), the balance of his checking account ($1,398.07), and the value of his certificates of deposit (CDs) ($1,026.25). Ellen convinced an ALJ that, first, the cash surrender value of the insurance policy should be reduced by SSI's $1,500 burial fund exclusion, since her client had signed a statement designating the policy as a burial fund. See POMS SI 01130.410D.1. The cash surrender value would then exceed the general $2,000 resource limit by only $24 if reduced by the burial fund exclusion. Ellen asked that that *de minimus* amount be waived under POMS SI 02260.035.

Ellen also challenged the computation on the grounds that her client did not actually own the CDs for all the months in question. She cited bank records to support her argument. Finally, she cited POMS SI 02260.025 to argue that the claimant should be allowed to settle for a lower repayment because repaying the entire amount would be against equity and good conscience. Ellen persuaded the ALJ that her client did not willing and knowingly fail to report the checking account and CDs.

The ALJ agreed on all counts. He referred to the extent to which the representative had "very skillfully" pointed out the pertinent provisions of the POMS in her memorandum of law. He also agreed that "there is no convincing evidence that the claimant willfully and/or knowingly created this overpayment, given the intensely complex resource rules applicable under the SSI program, the shifting nature of his holdings over time, and the fact that some assets - such as, in particular, the case surrender value of a life insurance policy - are not generally known by the public."

The ALJ reduced the overpayment to $2,424.32, and allowed Ellen's client to repay that amount through a limited withholding schedule of $50.00 per month. Kudos to Ellen! Her "very skillful" letter memo and the ALJ decision are available as DAP #499.

# Intent to Return Home Defeats Resource Disqualification

For SSI applicants or recipients, the value of a home is exempt from countable resources as long as is the principal place of residence. If an individual moves out of the home for any reason, including a stay in a medical facility, an inquiry must be made into intent to return to the home. If there is intent to return, then the resource exemption continues.

This issue was the subject of a hearing for a client of Beata Banas of Legal Services for the Elderly in Buffalo. Beata's 78 year old client applied for SSI but was denied because the life estate in her home was counted as an available resource. The client was in an assisted living facility for ongoing treatment of a medical condition. She expressed a desire and intent to return to her home, where she had left all her belongings, including clothing and furniture. She was improving at the medical facility and could conceivably return to her home with the assistance of a home health aide.

Administrative Law Judge (ALJ) Maryellen Weinberg, who conducted a video hearing from her Brooklyn ODAR office, found that the claimant's life estate interest in her property was excluded from consideration as a resource because it remained her principal place of residence, notwithstanding that she was currently in an assisted living facility. The claimant's intent to return to her home was real and credible, according to the ALJ. The claimant was otherwise eligible for SSI based on her age and the ALJ awarded benefits going back almost three years. The claimant had waited almost two years for a hearing!

Congratulations to Beata for bringing justice home to Buffalo in this case. The hearing decision is available as DAP #500.

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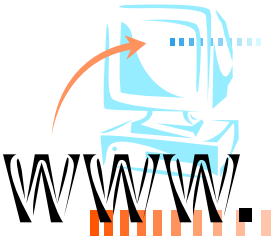
# Ready to Go Paperless?




Tired of lugging reams of medical records over to your local ODAR? Frustrated with faxing records and bar codes? The Social Security Administration (SSA) is touting the Medical Records Express system as an efficient and timely way to submit health and school records. If you have paper records, you can scan them and send them online via SSA's Electronic Records Express (ERE) secure website. There are other options if you have electronic records.

What do you need to use Social Security's Electronic Records Express secure website?

According to SSA, you only need internet access; a web browser; a computer that supports an encryption level of 128-bits (most computers purchased in the last five years support 128-bit encryption); a user ID and password to access the Electronic Records Express secure website. No special software is required to use the Electronic Records Express secure website.

To register for a user ID and password, you have to contact the "Professional Relations Officer" at DDD. So far, we have mixed reviews about accessing the process; please let us know how you fare. In the meantime, for more information on ERE, visit http://www.ssa.gov/ere/index.html.

More on this and other aspects of SSA's new electronic era will be covered during our upcoming State-wide Task Force meeting at the Partnership Conference in Albany on September 22, 2008.

# Reps Not to Blame for ODAR Delays?

In the "we could have told you so" department, the Office of the Inspector General (OIG) of the Social Security Administration (SSA) recently released a report concluding that the late submission of medical evidence was not a significant issue at hearing offices. The report, entitled "Timeliness of Medical Evidence at Hearing Offices (A-05-08-28106)," was the result of a request by the Commissioner that OIG evaluate and document the extent to which delays in the submission of evidence affects the timeliness of the hearing and appeal process. The Commissioner was obviously looking for data to support his proposed changes to the hearing process, including a requirement that evidence must be submitted at least five days before the hearing to ensure that the ALJ has enough time to review it. In the October 29, 2007 Notice of Proposed Rulemaking (NPRM), the Commissioner pronounced: "Our program experience has convinced us that the late submission of evidence to the [Administrative Law Judge] significantly impedes our ability to issue hearing decisions in a timely manner."

Not quite, said the OIG. The Office of Disability Adjudication and Review (ODAR) had identified two points in the hearing process most affected by late submission of evidence by claimants and their representatives: instances where the hearing had to be postponed because of the submission of evidence, and cases that were held up post hearing waiting for the submission of new evidence. OIG found that only .2 percent of hearings were postponed due to late medical evidence and about 1.8 percent of the workload in process was significantly delayed after the hearing because of late evidence.

ODAR management posited that hearing offices were not correctly coding the postponed cases, which led to new issuances of guidance as the proper inputting of the codes used in SSA's Case Processing and Management System (CPMS). SSA has continued to protest that the codes might not have used correctly even after the new guidance, but to date, the new guidance issuances have not caused an increase in the number of cases coded as postponed due to late evidence. OIG acknowledged that that it was possible to increase the number of cases in this status by changing the definition of untimely. OIG, however, relied on the definition used by SSA management. OIG did note that ODAR provided hearing offices with inconsistent guidelines for the timely processing of medical evidence.

OIG also observed that cases were delayed at other points in the process, covered under CPMS's *Pre-Hearing Development* and *ALJ Review Pre-Hearing* status codes. Within these two status codes, about 5.4% of the workload in-process was untimely. According to the March 2007 audit completed by the OIG, ALJs indicated that in some instances there was a great amount of evidence to examine, which caused them to exceed ODAR's ten day benchmark. Additionally, some ALJs stated that they had too many cases on their dockets, making it difficult to provide quality decisions in cases while also meeting the Agency's goal for average processing time. The OIG found this evidence to be significant in showing the importance of timely medical evidence throughout the hearing process.

The pre-hearing medical evidence issues and post-hearing medical evidence issues indicate that about 7.2% of cases in-process was significantly delayed. OIG concluded, however, that the majority of these medical issues occur before the hearing is even scheduled, and thus are neither directly associated with the problems identified by the Commissioner in the NMPR, nor would they be remedied by the proposed process changes.

As outlined in the March 2008 edition of the *Disability Law News*, the Commissioner has suspended implementation of the five day rule under pressure from Congress and others. In light of the new OIG report, which is available at http://www.ssa.gov/oig/office_of_audit/audit2008.htm, the Commissioner will be hard pressed to continue to blame representations for the delays that plague ODAR. Many thanks to summer intern Elizabeth Hasper from Syracuse Law School for her help in summarizing this report.

# WEB NEWS

## Free Legal Web Resource Debuts

Move over WedMD. A new website offers free legal information for consumers who want to do some research before they visit a lawyer. The website offers a free, virtual law library with legal documents contributed by practicing attorneys. Contributing lawyers get publicity and credit for adding to the public database.
www.JDSupra.com

## Support for Depressed Lawyers

According to a Johns Hopkins University study, of 28 selected occupations compared statistically, lawyers were most likely to suffer from depression. Depression among attorneys occurs twice as often as in the general population. A website was developed by a Buffalo lawyer for more information about lawyers and depression.
www.lawyerswithdepression.com

## Civil Right to Counsel Launches Site

A new website sponsored by the National Coalition for a Civil Right to Counsel. The site provides advocacy tips and resources on the issue of a right to counsel in civil cases.
http://www.civilrighttocounsel.org/

## Pro Bono Net News

Pro Bono Net is a national nonprofit organization dedicated to increasing access to justice through innovative uses of technology and increased volunteer lawyer participation. One of its programs is probono.net news.
http://news.probono.net


## Hospital Language Assistance Available

New communications assistance regulations are in effect for all private and public hospitals throughout New York. The new rules are intended to improve access to health care and protect patients from medical harm arising from failed communications. Anyone, regardless of immigration status, whose ability to communicate in English is limited, or is hearing or vision impaired has a right to free communication assistance. More information is available from the NY Immigration Coalition.
www.thenyic.org

# CLASS ACTIONS

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

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

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

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

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

***McMahon v. Sullivan, Perales and Schimke***
91 Civ. 621 (Curtin, J) ("the DAC/SSI Medicaid Case")

Description - Plaintiffs challenged NYDSS's failure to implement 42 U.S.C. §1383c(c) which requires continued Medicaid eligibility for disabled adults who lose SSI solely because of eligibility for or an increase in Social Security Children's Disability Benefits (CDB), formally known as Disabled Adult Child's (DAC) benefits. Plaintiffs claimed that defendants fail to ensure that Medicaid benefits continue.

Relief - HHS and OTDA have corrected the problem prospectively and retroactively to July 1, 1987. Additionally, the parties completed negotiations to correct the problem for dually entitled recipients (individuals entitled to both disability benefits on their own record and Children's Disability Benefits on a parent's account.) The case has been resolved with 4,500 class members getting some satisfaction.

Information - Empire Justice Center (585-454-4060); Heritage Centers (716-522-3333); Wendy Butz (Medicaid liaison person) (518-473-0955) or Gail Gordon (212-417-6500).

# Are Rep Payees Dedicated Enough?

It is often challenging enough to prevail in SSI children's claims, only to then grapple with the challenges of the "dedicated account" rules. Section 1631 (a)(2)(F) of the Social Security Act requires that payees (which are required for recipients under 18 years of age) establish and maintain an account in a financial institution for past-due – or retroactive – payments for SSI recipients under age 18. These "dedicated accounts" must be separately maintained and the money may only be used for certain specified expenditures. See POMS GN 00602.140 for permitted expenditures. Any expenditure "knowingly" made by the payee for items not permitted constitutes "misapplication" and are recoverable from the payee.

SSA distinguishes **misapplication** – when a payee *knowingly* uses dedicated funds for expenditures not permitted, from **misuse –** when the funds are used for a purpose other than the use and benefit of the beneficiary. See POMS GN 00602.140.B.5. POMS SI 02220.060 states that the unauthorized use of funds is done knowingly when the rep payee knew that the expense was unauthorized. In making such a finding, SSA relies on the allowable Use of Funds Statement the rep payee was required to sign. See POMS SI02101.010.

The POMS give some guidance on what expenditures SSA should approve. Preapproval requests for items classified as "other" (not medical treatment and job skills or items and services related to the child's impairment specified) are encouraged, but not required. A decision on that type of request is an initial determination with appeal rights. Misapplication determinations are also initial determinations and subject to appeal rights.

So what could/would SSA do if the funds are spent on something other than the allowable items, or those approved by SSA? SSA can sue the rep payee. Recovery efforts include referral to the Department of Justice (DOJ). See POMS SI 02220.35.

Overpayments will not be referred to the DOJ if they are less than $3000.00 or $5,000.00 in estate cases. There do not appear to be any such low limits for misuse or misapplication cases. Interestingly, any funds returned due to misapplication go back to the *general fund*, not the dedicated account. Funds returned due to misuse are paid back to the dedicated account.

While the payee does have appeal rights, the few reported cases available did not end well for the rep payees. They were all found to have knowingly misapplied the funds, based on the signed copies of the Dedicated Account Use of Funds Statement.

For example, in *Strasenburgh v. Barnhart*, 2004 WL 1896995 ( D Maine), the parent/rep payee purchased clothing and computer games for the beneficiary. Expenditures for educational software had previously been deemed allowable by the Commissioner. The spending on clothing and sports games were found to be misapplications of funds. It was noted that counsel for the Commissioner acknowledged a willingness to work out a payment plan.

In *Smith v. Barnhart, 2005 WL 1868293* (N.D. Iowa), the mother/rep payee made twenty-one unapproved withdrawals from the dedicated account. She spent the $5,226.93 on living expenses that she could not recount, as well as a trip to Disneyland. She had previously asked for and been given approval for some expenditures. After being turned down for others, however, she stopped asking because she thought she would be refused. She also admitted that she knew the Disneyland trip was not a proper use of funds. Not surprisingly, she was found to have misapplied the funds. Mom also made the argument that her daughter had a property right in the money and thus, the restrictions amounted to a regulatory taking. The court found no vested property right, so no taking. Mom lastly argued that the funds should be returned to the child, not to the Commissioner. That argument failed as well, based on the court's determination that the policy determination was the intent of Congress.

Perhaps the best advice we can give our clients is to seek preapproval for any unusual expenditures. With creative use of the guidance provided in the POMS, many expenditures may arguably be related to the impairment.

Thanks to LJ Fisher of the Rochester office of the Empire Justice Center for sharing this information with us.

# 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

## Exercise Your Brain

Scientists agree that there is no magic bullet to stave off Alzheimer's disease or memory loss. Scientists don't necessarily agree on strategies to lower the risk of acquiring the disease. They do know, however, that we generate new brain cells, and new connections between them, throughout our lives. According to a June 3, 2008 article in the *Wall Street Journal*, the more mental reserves people build up, the better they can stave off age-related cognitive decline.

P. Murali Doraiswamy, chief of biological psychiatry at Duke University and co-author of "The Alzheimer's Action Plan," compares the brain to a series of cell towers sending messages: "The more cell towers you have, the fewer missed calls." He recommends mental stimulation to keep the brain spry.

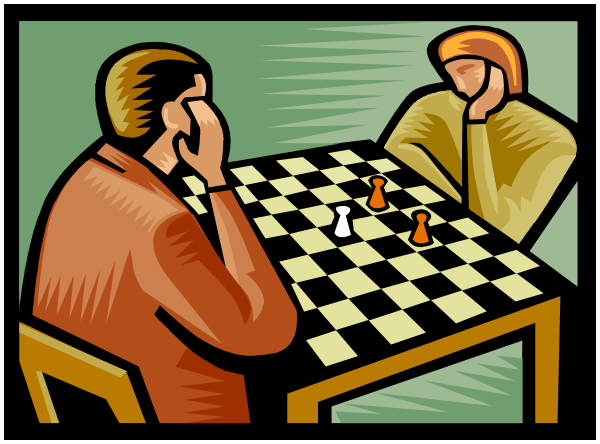
In addition to the usual recommendations of brain-teasers, puzzles and computer games, the article suggests a few modifications to your daily routine to give your brain a "neurobic" workout. "Neurobics" is a term coined by the late neurobiologist Lawrence Katz for engaging different parts of the brain to do familiar tasks.

For example, brushing your teeth or dialing the phone with your non-dominant hand can strengthen the pathways in the opposite side of your brain. Or you can shower or eat dinner with your eyes closed. According to Dr. Dorasiwamy, "The brain loves novelty."

Other suggestions include activities that challenge your brain on many levels, including learning to play a musical instrument or speak a new language. Games such as chess or bridge can also help, since they require you to strategize and socialize simultaneously.

The article also reiterates the usual adages about the value of sleep, diet and exercise, tying them to scientific findings about brain health. Stress, on the other hand, depresses the growth of nerve cells. Yoga, meditation, exercise and social interaction can help alleviate the effects of stress induced cortisol.

So, if only an ALJ hearing were stress-free, maybe it could count as your neurobic exercise for the day!



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