Empire Justice Center

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DISABILITY LAW NEWS

SSA Responds in *Pronti*

Almost every edition of the *Disability Law News* contains something about ALJ Franklin Russell of the Syracuse Office of Hearings and Appeals. This edition is no exception – except perhaps for the exceptional news this time. For background on ALJ Russell and the *Pronti* litigation accusing him of systemic bias against disability claimants, *see* the May 2005 and November 2005 editions of the *Disability Law News*. Judge Larimer had remanded *Pronti* and several related cases in September 2004 under Sentence Six of 42 U.S.C. §405g for further administrative proceedings concerning plaintiffs' claims that ALJ Russell is generally biased against claimants. *Pronti v. Barnhart*, 339 F.Supp.2d 480 (W.D.N.Y. 2004).

One year later, the Social Security Administration (SSA) still had not confirmed that any administrative proceedings were pending, despite indications that some kind of internal investigation had been done. The plaintiffs in *Pronti*, spearheaded by David Ralph of the Elmira office of LAWNY, and private attorneys Bill McDonald and Andy Rothstein, returned to court and asked Judge Larimer to resume jurisdiction. In response, on November 30, 2005, SSA filed an amazing document entitled "in Re: Bias Allegations Against ALJ Franklin Russell, Final Agency Decision," signed by A. Jacy Thurmond, Jr., Associate Commissioner of Hearings and Appeals. It also filed 322 pages of accompanying exhibits, including a fascinating report and accompanying notes from ALJ David Nisnewitz. Nisnewitz-was appointed back in 2004 to "conduct an in-depth investigation into" the various complaints that had been filed against ALJ Russell.

Bottom line? Thurmond's submission concludes, "ALJ Russell failed to follow SSA regulations, policies and procedures. Further, his explanations, admissions and rational reveal some fundamental misinterpretations and misapplications of Social Security regulations, agency policies and procedures, and the vital role of the adjudicator in the administrative review process. It is apparent that his aforementioned failure to follow agency policies and procedures coupled with his frequently critical tone and contentious manner have deprived the claimants discussed above of full and fair hearings."

Although finding that statistics regarding ALJ Russell's higher than average denial rates did not alone demonstrate generalized bias against claimants, SSA did concur that specific Russell behaviors demonstrated a denial of due process. For example, his practice of keep-

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SSA Responds—continued

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ing files on attorney "infractions" was objectionable, as were his threats to report one attorney to the ethics committee of the state bar, contrary to HALLEX I-1-1-150. ALJ Russell's failure to give a mother the option of having her four-year old claimant son in the hearing room while she testified was found to be contrary to HALLEX I-2-6-60. Also, his routine use of supplemental hearings to take vocational testimony was considered inappropriate under HALLEX I-2-556. His "filing" of at least one request for recusal in the wastebasket violated HALLEX I-2-1-60(C). SSA was also not happy with what were found to be credible allegations that ALJ Russell announced that he would "crap all over the attorneys and their clients."

Perhaps more significantly, based on its review of the cases it considered, SSA agreed with plaintiffs' allegation that ALJ Russell discounted or gave improper weight to the treating physician opinions, as well as the allegation that ALJ Russell held claimants to a higher standard than appropriate when evaluating credibility. It also found Russell's review of cases where mental retardation and other types of mental impairments were at issue problematic.

What's next? SSA, in its conclusions, announced that it "takes seriously its duty to ensure that all claimants have full and fair hearings." Despite the fact that ALJ Nisnewitz filed his initial report in November 2004, however, SSA allowed ALJ Russell to continue to deny full and fair hearings to any number of claimants. Rumor has it that ALJ Russell is currently on "administrative leave." SSA is prepared to offer voluntary remands to all pending district court cases in which ALJ Russell was the deciding official for a new hearing before a different ALJ. In its response, it also indicated that it would "take further action, consistent with this opinion, at the administrative level." To date, however, SSA has not proposed any resolutions to Russell denials pending at the Appeals Council, or those denials that were not appealed.

Plaintiffs have filed a Motion for Declaratory Judgment, asking the court to declare that ALJ Russell is generally biased against all Social Security claimants and that the Commissioner has failed to provide fair hearings with respect to Social Security claims decided by ALJ Russell. Judge Larimer has issued a Scheduling Order requiring the Commissioner to respond by March 17, 2006, and to address several specific questions, including whether the Court has jurisdiction to rule that ALJ Russell is generally biased against all claimants. The Court is also requiring the Commissioner to supply the administrative record, if any, upon which its "decision" of November 30, 2005 was reached, and to address whether that record is sufficient for the Court to proceed to judgment. The Court has also asked the Commissioner to address directly what "further action" it intends to take.

In anticipation of further action, Empire Justice is looking for claimants who received a denial, dismissal or partially favorable decision from ALJ Russell, but did not appeal (either to the Appeals Council or to Federal Court) within the 60-day time limit since October 2002 (the approximate date that the Pronti litigation began) – ideally a claimant who was *pro se* at the time. Maybe you have some current clients who had earlier applications that they did not appeal? Or perhaps you have contacts with local agencies that could help find such claimants? Finally, if you recognize any of the claimants described in the Commissioner's response, please let us know. A copy of the Commissioner's response is available on the Empire Justice Center's on-line resource center as DAP #423.

Most importantly, keep on making those complaints and filing appeals about illegal and unseemly conduct by ALJs. Sometimes someone does listen. By way of analogy, consider the current investigation by the U.S. Department of Justice of the immigration court judges. It was presumably prompted by decisions like *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005), in which Judge Posner, citing the staggering number of times in which the Court of Appeals had reversed the Board of Immigration Appeals in the preceding year, found that the adjudication of immigration cases had "fallen below the minimum standards of legal justice." 430 F.3d at 830. His conclusions were based not just on a finding that ALJs made errors of law, but also on the repeated cases in which the immigration judges were rude, hostile or biased. Let's continue trying to capture the attention of the federal courts on this issue.

Once again, kudos to David, Bill and Andy for their incredible perseverance and hard work on this significant issue. Stay tuned!

SSI Non-Disability Eligibility Training

This training will cover the fundamentals of SSI eligibility, including: income and resources, living arrangements, deeming, transfer of assets and other penalties, non-citizen restrictions, residency and more. Trainings will take place March 16th in Buffalo, NY, March 22nd in Poughkeepsie, NY and March 23rd in Hempstead, NY. For additional information and registration information, go to *www.empirejustice.org/MasterFile/TrainingSupport/Trainings/Overview.htm#SSI0.*

Mark Your Calendars for the Partnership Conference

The statewide Partnership Conference, held in conjunction with the New York State Bar Association, will take place in Albany from June 5 –7, 2006. Disability advocates will be offered a full track of sessions pertaining to SSI and disability issues. Sessions will include an introduction to SSA's new electronic file system, which is supposed to begin in New York later this year. There will also be presentations on Kids' SSI, the newly revised cardiac listings, implementation of new Social Security laws and regulations, and techniques for dealing with problems at hearings. The sessions will run from Tuesday morning through Wednesday afternoon. A statewide Task Force meeting will be held on Monday afternoon.

Clear you calendars now for what promises to be an exciting and informative agenda.

Training Materials Available

Empire Justice Center has an array of training materials available at its website. For disability advocates, resources include outlines from the 2002 and 2004 Partnership Conferences, Basic Disability manual (updated March 2005), videos of past trainings, including Appeals Issues and Practice in Social Security cases (March 2004), The Sequential Evaluation Developing Mental Impairment Cases at Step 3, and also Developing Mental Impairment Cases at Step 4 & 5 (training December 2005 at DAP conference). We are instituting a procedure for making the videotaped trainings available for CLE credit, so visit the website for developing news on this front.

REGULATIONS

SSA Revises Cardiovascular Listing

The Social Security Administration (SSA) issued final rules regarding the Cardiovascular Listings of Impairment, 71 Fed. Reg. 2312 (Jan. 13, 2006). The final rules take effect on April 13, 2006. They are available at the Federal Register website, www.gpoaccess.gov/fr.

Adopted in 1994, the old rules were a reaction by the SSA to the decision in *New York v. Sullivan*, 906 F.2d 910 (2d Cir. 1990). Much of the focus of the new rules is on reorganizing the introductory material in section 4.00 and removing reference listings. SSA claims the new régime will be benign; however, that is yet to be decided. Some areas of key interest include:

- **Testing §4.00C**. The various tests and SSA's evaluation process of those tests are described in section 4.00C. The information on "significant risk" regarding testing has been modified by 4.00C8 and is an example of SSA's attempt to reorganize. The former section was 4.00C2c. SSA also clarified when it will pay for claimant testing. For example, Exercise Tolerance Testing, 4.00C7e, will only be paid for when it is necessary to make a determination or decision but not when there is sufficient evidence to evaluate the claimant's residual functional capacity. Any test result is considered "timely" 12 months after the date of the test

- **Chronic Heart Failure §4.02**. The new rules incorporate a dual paragraph requirement. Both paragraphs must be met in order to satisfy the listing. Additionally, chronic heart failure will now be described as an "extreme" limitation so that it "very seriously limits your ability to independently initiate, sustain, or complete activities of daily living." This replaces the previous language that required the claimant to have an "inability to carry on any physical activity." The new requirement only applies where the claimant would endure significant risk through exercise testing.

- **Ischemic Heart Disease §4.04**. The very specific characterization of "chest discomfort" has been changed to "symptoms" in order to accommodate individuals who experience discomfort in other parts of their bodies. Additionally, section 4.04 allows for an expedited decision and an elimination of the need to defer a decision if the criteria are met for three ischemic episodes within a 12-month period.

- **Peripheral Arterial Disease §4.14**. The new listing removes the former listing 4.12A concerning arteriograms. Two new listings were added for the use of resting toe systolic blood pressures and toe/brachial systolic blood pressure ratios.

It is unclear whether these changes, and others, to the cardiovascular listings will have a considerable effect. SSA states that it has "simplified the language of several of the provisions [it] proposed, corrected unintentional inconsistencies between part A and part B, and corrected other minor errors in the [Notice of Proposed Rule Making] NPRM." 71 Fed. Reg. 2332.

These new listings will be addressed in the upcoming Partnership Conference in Albany in June.

Final Rules "Clarify" Medical Equivalence

The concept of "medical equivalence" to a Listing - although not common - can be a useful tool in appropriate situations. There are three situations when a medical equivalence determination may be applicable: (1) when the claimant's impairment is listed but one or more of the specified criteria is missing from the medical evidence; (2) when the claimant's impairment is unlisted but a closely analogous listed impairment is used for comparison; or (3) the claimant has more than one impairment, none of which meet or equal a listed impairment, but when combined are determined to be medically equivalent to a closely analogous listing. 20 C.F.R. §§404.1520(d) and 416.920(d).

On March 1, 2006, SSA adopted final rules on "Evidentiary Requirements for Making Findings About Medical Equivalency." 71 Fed. Reg. 10419. The final rules are effective March 31, 2006, and are essentially unchanged from the proposed rules issued on June 17, 2005. 70 Fed. Reg. 35188. (See July 2005 *Disability Law News* for discussion of proposed regulations.)

SSA indicated two reasons for the new regulations:

1. Make the Title II and SSI regulations similar.

In 1997, SSA changed the SSI medical equivalence regulation for both children and adults, in the context of issuing SSI childhood disability interim regulations. As a result, the SSI regulation contains more detailed rules that incorporate previous SSA internal operating instructions. SSA has acknowledged that there is no substantive difference in determining medical equivalence in the SSI and Title II programs. As a result, SSA is revising 20 C.F.R. § 404.1526 to have the same language as 20 C.F.R. § 416.926.

Another change addresses who makes the medical equivalence finding. At the initial and reconsideration stages, the State agency medical or psychological consultant or "other designee" of the Commissioner has the responsibility for determining medical equivalence. At the ALJ or Appeals Council levels, the responsibility rests with the ALJ or Appeals Council. This currently appears only in the SSI regulation, 20 C.F.R. § 416.926(d). The final regulation makes a similar statement in the Title II regulation, 20 C.F.R. § 404.1526(e).

2. Clarify SSA policy on medical equivalence.

The regulations require that medical equivalence be based on "medical evidence" only. What is "medical evidence"? The SSI regulation, but not the Title II regulation, stated: "When we make a finding regarding medical equivalence, we will consider all relevant evidence in your case record." 20 C.F.R. § 416.926(a). In the prefatory material to the 2000 final SSI childhood regulations, SSA stated that "the phrase 'medical evidence' only in 20 C.F.R. 416.926(b) excludes consideration of only the vocational factors of age, education, and work experience. Other than these vocational factors, in accordance with §416.926(a), we will consider all relevant evidence in the case record when we make a finding regarding medical equivalence." 65 Fed. Reg. 54768 (Sept. 11, 2000).

Problems with the interpretation of the "medical evidence only" requirement arose in *Hickman* v. *Apfel*, 187 F.3d 683 (7th Cir. 1999). The ALJ had relied on nonmedical testimonial evidence to discount a report from a treating physician and found that the claimant's impairment did not equal a listing. The Seventh Circuit held that the ALJ could not rely on lay testimony to make his equivalency finding since the regulations require that the determination be based on "medical evidence alone." In May 2000, SSA published Acquiescence Ruling (AR) 00-2(7) for *Hickman* v. *Apfel*, 65 Fed. Reg. 25783 (May 3, 2000) to give notice that the *Hickman* holding differed from its policy that "all relevant evidence" be used to consider whether a claimant is disabled.

The *Hickman* AR also stated that although the "all relevant evidence in your case record" phrase in 20 C.F.R. § 416.926(a) does not appear in the Title II regulation, 20 C.F.R. §404.1526(a), "SSA applies the same equivalency policy under both titles."

Since the final regulation clarifies what SSA means by "medical evidence only", AR 00-2(7) has been rescinded effective March 30, 2006. 71 Fed. Reg. 10584 (March 1, 2006).

Representative Disqualification and Reinstatement Final Rule in Effect

As of February 17, 2006, the final rule implementing section 205 of the Social Security Protection Act of 2004 (SSPA), Pub.L. No. 108-203, is in effect. 70 Fed. Reg. 2871. This rule gives SSA discretion to reject particular individuals as claimant representatives. These individuals, either attorneys or non-attorney representatives, may be precluded from practicing before the SSA in three instances. First, they have been disbarred or suspended by a bar or a court where they have previously been admitted to practice. Second, they are banned from participating in any Federal program or other Federal administrative agency. Three, they have collected an excessive fee according to SSA regulation. For attorneys or non-attorney representatives, reinstatement is allowable through the rules set forth by the Commissioner. For attorneys or non-attorney representatives who have collected an excessive fee, they may be reinstated after making restitution to the claimant.

SSA has made disqualification the only admonition it will employ against representatives who are disbarred or suspended "by reasons of misconduct." Disqualification is codified in 20 C.F.R §§404.1745 and 416.1545. The decision to impose sanctions is left up to the discretion of SSA. 71 Fed. Reg. 2874. An SSA hearing officer will consider the reasons for the disbarment, suspension or federal program or agency disqualification. 20 C.F.R. §§404.1770(a)(2) and 416.1570(a)(2). The representative will not be barred from representing a claimant if the representative has been admonished by a court, or federal program or agency for a reason other then misconduct, such as, for example, failure to pay dues or attend continual education classes. *Id.* Another factor the hearing officer predicates his decision upon is whether the representative has been reinstated by the court, bar or federal program or agency. However, this is not a guarantee that charges will not be brought. *Id.*

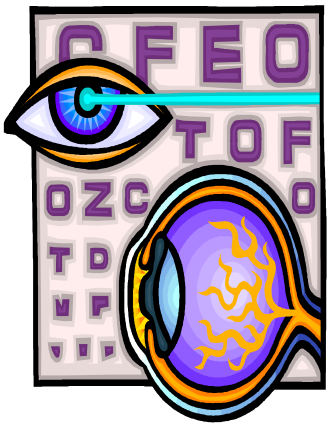
Re-admittance to appear before SSA requires the suspended party to petition the Appeals Council. The petitioner must prove he or she will conform to all SSA law, rules and regulations. Also, if the disqualification was due to a bar or court action, the petitioner must prove that he or she has been readmitted and is in good standing. If disqualification was due to a Federal program or agency exclusion, then it must be shown that the petitioner is currently allowed to appear before that program or agency. And, if the disqualification was due to the collection of excessive fees, a showing of full restitution must be made. 20 C.F.R. §§ 404.1799(d) and 416.1599(d).

Totalization Agreement Reached with Japan

The United States has agreements with numerous foreign countries that coordinate the social security programs of each nation with that of the U.S. A totalization agreement with Japan entered into force on October 1, 2005, according to a January 24, 2006 notice in the Federal Register. 71 Fed. Reg. 3913.

Is An Optometrist an Acceptable Medical Source?

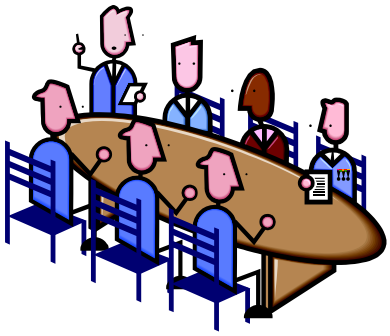
SSA has proposed upgrading the stature of optometrists for some purposes. Under current regulations, a licensed optometrist's evidence is reliable only "for the measurement of visual acuity and visual fields..." 20 C.F.R. §§ 404.1513(a)(3) & 416.913(a)(3). SSA has proposed "adjust[ing] the utility of optometrists as "acceptable medical sources" for limited purposes. As we know, only evidence from an acceptable medical source can establish a medical impairment. 20 C.F.R. §§404.1513(a) &416.913(a). The list of acceptable medical sources, as opposed to medical sources in general, is limited to MDs and DOs and psychologists with PhDs, but extends to various other branches of the medical professions for limited purposes. In the Title II regulation, that language is followed by the caution that "(we may need a report from a physician to determine other aspects of eye diseases)." In the Title XVI regulation, it is followed by the instruction to "(See paragraph (f) of this section for the evidence needed for statutory blindness)."



SSA proposes changing 20 C.F.R. § 404.1513(a)(3) to read: "for purposes of establishing visual disorders only (except, in the U.S. Virgin Islands, licensed optometrists, for the measurement of visual acuity and visual fields only)." The Title XVI proposed changes are slightly different: "for purposes of establishing visual disorders only (except, in the U.S. Virgin Islands, licensed optometrists, for the measurement of visual acuity and visual fields only). (See paragraph (f) of this section for the evidence needed for statutory blindness)."

Comments on the proposed changes are due on May 1, 2006. *See* 71 Fed. Reg. 10456-10459 (March 1, 2006), available at www.ssa.gov.

Board Income Excluded from SGA



To encourage individuals with disabilities to serve on advisory boards established under the Federal Advisory Committee Act (FACA), SSA has issued final regulations that exclude any income derived from such service when determining if the individual is engaging in substantial gainful activity under Titles II and XVI of the Social Security Act (the Act). In addition, SSA would not evaluate any of the services the individual is providing as a member or consultant of the FACA advisory committee when determining if the individual has engaged in substantial gainful activity. These rules were effective February 21, 2006. 71 Fed. Reg. 3217 (January 20, 2006).

COURT DECISIONS

Second Circuit "Fugitive Felon" Decision Stands

As we reported in the January 2006 *Disability Law News*, the Second Circuit Court of Appeals issued a decision on December 6, 2005 in *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005), that held that a finding of intent to flee was required before the Social Security Administration (SSA) could suspend benefits to a "fugitive felon." SSA did not file a request for rehearing *en banc* before the Circuit court, and has notified counsel that it will not seek of writ certiorari before the United States Supreme Court.

We anticipate that SSA will issue an Acquiescence Ruling explaining how the procedures used in fugitive felon cases in Second Circuit states (New York, Connecticut and Vermont) differ from its policy elsewhere in the country, i.e., a finding of intent to flee is required before benefits could be suspended.

Keep in mind that as good as the *Fowlkes* decision may be, affected SSI or SSD recipients must take some action to keep their cases alive and pending in the administrative process so they can benefit from any Acquiescence Ruling. In short, please be sure to advise claimants to appeal any proposed suspension of their benefits in a timely manner.

We will keep you posted about any developments in the *Fowlkes* litigation. Please let us know what you are seeing with fugitive felon cases in your area.

Appeals Become More Expensive

The cost of filing an action in federal court will increase from $250 to $350 on April 10, 2006, pursuant to the Deficit Reduction Act of 2005 (Pub. Law. No. 109-171). Circuit Court appeals will also be pricier. Docketing an appeal will rise from $250 to $450. Most SSI claimants, however, should be eligible for a fee waiver with a motion to proceed *in forma pauperis.*

Court Finds Communication Deficits Affect Ability to Interact

A child's limitations in communication can affect both the domain of acquiring and using information and the domain of interacting with others. Pointing out that SSA regulations require that a child's problems with speech and language be considered in both the Acquiring and Using Information and Interacting and Relating with Others domains, Judge Nina Gershon of the Eastern District found that the claimant had an extreme impairment in one domain and a marked in the other. *Robbins o/b/o Robbins v. Commissioner of Social Security,* 04 CV 2568(NG)(JMA) (January 25, 2006), the Opinion & Order in which is available as DAP #424.

Johan Robins is a nine-year-old boy who exhibited limited communication skills at the age of two. He had attended special classes and received speech therapy. Testing demonstrated that he has severe language delays, although most testers found him to be friendly and cooperative. He also suffers from asthma and motor skill delays.

The ALJ concluded that Johan only had a marked limitation in the domain of acquiring and using information. He found that he had no limitation in interacting and relating with other, based largely on Johan's testimony that he had a best friend. On appeal, the Commissioner argued for remand, claiming that the record was insufficient because it consisted of reports based on a single day of testing. Plaintiff argued that there was ample evidence before the ALJ establishing that Johan is disabled. The Court agreed.

Judge Gershon found that the ALJ had erred in disregarding the import of the claimant's low test scores, citing 20 C.F.R. §416.926a(e)(B) ("When we do not rely on test scores we will explain our reasons for doing so in your case record or in our decision."). She also found that the ALJ had improperly disregarded the opinions of the evaluators. Although several of the evaluators were not physicians - or in other words, not "acceptable medical sources" under the Commissioner's regulations - she concluded that "the ALJ erroneously substituted his own opinions for those of professionals who have observed and treated the claimant. *See Balsamo v. Chater,* 142 F.3d 75, 81 (2d Cir. 1998) (noting that ALJ cannot arbitrarily substitute his own judgment for competent medical opinion)." *Slip op.* at 14.

Judge Gershon found that Johan had an extreme limitation based on test scores that were three standard deviations below the mean. 20 C.FR. §416.926a(e)(3)(iii). "The ALJ did not address this regulation other than to minimize the role of the test scores." *Slip op*. at 14-15. She also concluded that Johan's day-to-day functioning was consistent with the scores.

The Court further held that Johan's language difficulties resulted in a marked limitation in the domain of Acquiring and Using Information. She noted that "[a]lthough a finding of a 'marked' limitation in one domain does not automatically warrant a finding of a 'marked' limitation in the other, here, the evidence supports a finding that the claimant has, at the very least, 'marked' limitations in both domains." *Id*. at 15-16. The evidence demonstrates that the claimant has problems expressing himself and understanding a joke or verbal cues and directions. "Although characterized as a social child who genuinely wants to play with others, it is indisputable that these speech and language limitations continue to prevent his effective communication and interaction with others within his community." *Id*. at 17.

Note that 20 C.F.R. §416.926a(i)(1)(iii) provides "Interacting and relating require you to respond appropriately to a variety of emotional and behavioral cues. You must be able to speak intelligibly and fluently so that others can understand you; participate in verbal turntaking and nonverbal exchanges; consider others' feelings and points of view; follow social rules for interaction and conversation; and respond to others appropriately and meaningfully." Children ages six through twelve "should be well able to talk to people of all ages, to share ideas, tell stories, and to speak in a manner that both familiar and unfamiliar listeners readily understand." 20 C.F.R. §416.926a(i)(2)(iv). Several of the examples of limited functioning in this domain involve difficulties in communication. 20 C.F.R. §416.926a(i)(3).

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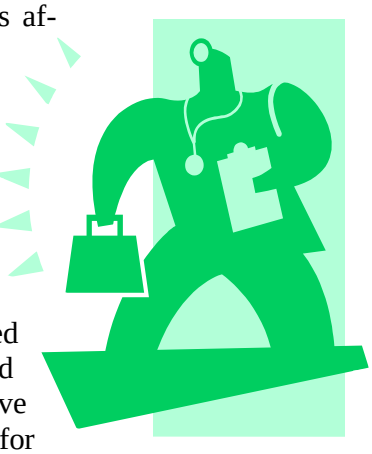
Class Action Challenges SSA Consultative Examiner

A case recently filed in United States District Court for the Eastern District calls into question the validity and reliability of one of SSA's regularly used consultative examiners. In *Foxworth, et al v. Barnhart*, 05-CV-3074 (NGG/VVP), plaintiffs allege that SSA has improperly denied benefits to thousands of claimants based on the routinely haphazard, misleading and false consultative examination reports submitted by Dr. Mohammad Khattak, M.D., and his affiliated medical office, DHS.



Plaintiffs' Amended Complaint, filed on January 24, 2006, sets forth a litany of examples of extremely brief medical examinations by Dr. Khattak during which he barely, if at all, touched the claimants or performed any tests. Yet in each case, he submitted medical reports that he had conducted full examinations and made extensive findings. In the case of Mr. Foxworth, for example, Dr. Khattak had the claimant remove his shoes, looked into his eyes and felt behind his ears. Dr. Khattak's report, however, alleged that he had performed range of motion tests, deep tendon reflex tests, and had observed claimant's upper and lower extremities. The report alleged that Dr. Khattak had observed no muscle atrophy in the claimant's cervical or lumbar spine or upper extremities, and observed no swelling or effusion of the lower extremities – all while Mr. Foxworth was fully clothed! Based at least in part on the damaging evaluation by Dr. Khattak, the claimant was denied.

In at least one administrative hearing where Dr. Khattak was called to testify, he admitted under oath that he examined claimants through their clothing in order to save time, see more claimants and earn more fees. Although the ALJ who conducted the hearing alerted other ALJs about Dr. Khattak's admissions, ALJs continued to rely on Khattak's reports to deny claimants.

Plaintiffs have alleged that SSA either knew or acted in deliberate ignorance or reckless disregard of the fact that many of Dr. Khattak's examinations and reports did not comply with SSA's own rules and regulations concerning consultative examinations. *See* 20 C.F.R. §§404.1519 & 416.919. Plaintiffs also allege that Dr. Khattak's signature may have been forged in many reports, violating 20 C.F.R. §§404.1519n(e) & 416.919n(e).

Plaintiffs seek reversals of the decisions by the Commissioner denying them disability benefits, or in the alternative, *de novo* hearings for them and class members without consideration of the misleading the false medical reports of Dr. Khattak and DHS. Plaintiffs' Motion for leave to amend their complaint to seek class relief is currently pending before Judge Garaufis. Plaintiffs are represented by Charlie Binder of Binder & Binder and Anselmo Alegria.

Communication Deficits—continued

(Continued from page 9)

Congratulations to Chris Bowes of the Center for Disability Rights (CeDAR) in New York City. He succeeded in convincing Judge Gershon that the fact that the child is "sweet," gets along with other kids and is interested in socializing does not diminish or otherwise contradict the finding that he cannot use language effectively for socialization; he could still have a marked limitation in both the domains of Acquiring and Using Language as well as Interacting and Relating with Others.

Curry Notices Resurface

Judging by recent DAP listserv chatter, claimants are still occasionally receiving *Curry* notices. What is a *Curry* notice, you might ask? Good question. We tried to answer that very question in the July 2004 edition of the *Disability Law News*, available at www.empirejustice.org.

In short, the notices stem from the Second Circuit's decision in *Curry v. Apfel*, 209 F.3d 117 (2d Cir. 2000), a case requiring that SSA affirmatively prove at Step five of the Sequential Evaluation what a claimant's limitations are. *Curry* was an individual case and did not provide class relief. SSA, however, acquiesced in *Curry* (AR 00-4(2)). Under the acquiescence regulations at 20 C.F.R. §§404.985(b)(2) & 416.1485(b)(2), SSA thus had to notify any claimants whose cases might be affected by the AR. Even though SSA later rescinded AR 00-4(2) in 68 Fed. Reg. 51317 (August 26, 2003) as obsolete based on new regulations "clarifying" its position regarding Step five, it still had to provide relief to those claims decided between the issuance of the AR and its rescission. Thus, we still see the occasional *Curry* notice.

Upon receipt of a *Curry* notice – or on his or her own initiative – a claimant may request readjudication. According to SSA's POMS GN 03501.015, "A request for readjudication should be granted if the adjudicator's review of the information about the claim shows that application of the AR *could* change the prior determination or decision. Just because readjudication is granted does not mean that the result of the prior determination will change when the AR is applied to the prior claim. Any readjudication will be limited to consideration of the issue(s) covered by the AR" (emphasis added).

If the readjudication request results in a less than fully favorable decision, the claimant has sixty days to appeal. If, on the other hand, the request for readjudication is denied because the claimant allegedly does not fall within the strictures of the AR, there are not appeal rights. So, for example, if the claimant seeks a *Curry* review, but it turns out her claim was decided at Step four, the readjudication request would be denied; she would not be given appeal rights. If, however, she was originally denied at Step five during the time between the issuance of AR 00-4(2) and its rescission, and is denied again on readjudication, she can appeal the issue of whether the AR should have affected the outcome of her claim.

Any more questions?

Federal Court Opinions Accessible

The Administrative Office of the U.S. Courts recently announced free access to written opinions through its Public Access to Court Electronic Records (PACER) system. The customary $.08/page charge no longer applies to written opinions. See: *http://pacer.psc.uscourts.gov/announcements/general/dc_ecf_opinion.html*

To register with PACER, go to: *http://pacer.psc.uscourts.gov/register.html*.

The PACER links to each federal court are found at: *http://pacer.psc.uscourts.gov/psco/cgi-bin/links.pl*

To list available opinions, click on the PACER link to a particular court and then select "Reports" at the top of the page. On the next screen, click on "Written Opinions" under the "Civil and Criminal Reports" heading. That will bring you to the "Written Opinions Report" page, where you can search by various characteristics including party name and "nature of suit" (See, e.g., codes 440-446 for Civil Rights cases and 861-865 for Social Security cases). Be sure to specify a range of dates in the "Filed between" fields.

The search will generate a report that includes a column marked "Doc. #." By clicking on the link in that column, you will see the length of the opinion and confirmation that there will be no charge for viewing the opinion. Then click on the "View Document" button to open the Adobe (pdf) document, which you can print and/or save.

Refugees and Asylees Face End of SSI Time Limit

What relief, if any, is available for refugees and asylees who are receiving notice that they are coming to the end of their seven-year period of eligibility for SSI benefits? As part of the legacy of the Welfare Reform Act of 1996, most immigrants who arrived in the United States after August 22, 1996, are not eligible for SSI unless they naturalize, are permanent residents who can be credited with a significant work history (40 qualifying quarters), or are connected to the armed services. The SSI eligibility of refugees and asylees entering after August 22, 1996 is limited to the first seven years in status.

In a lawsuit known as *Khrapunskiy v. Doar*, lawfully residing elderly, blind and disabled immigrants ineligible for SSI solely because of their immigration status challenged the constitutionality of the State's refusal to provide welfare assistance to such elderly and disabled immigrants at the standard of need in SSL 209. SSL 209 mandates a standard of need equal to the federal SSI benefit level and the state supplement. In a decision dated August 5, 2005, Judge Solomon agreed with the plaintiffs and issued a decision in their favor. The State appealed. That appeal is pending before the Appellate Division of the First Department.

Because the State appealed, Judge Solomon's decision is stayed pending the appeal. The appellate court, however, has agreed that the State must provide relief to those members of the plaintiff class who have a current utility shut-off notice; or who, with respect to class members in New York City, have received notice that an eviction proceeding has been brought against them in Housing Court; or, for those outside of NYC, have received a notice from the landlord demanding rent payment. Therefore, if your client's SSI benefits have been terminated because of his or her refugee status, and, as a result, is facing eviction or utility shut-off because of the reduction in income, please contact the attorneys representing the Khrapunskiy plaintiffs as soon as possible.

Advocates in districts outside of New York City should contact Barbara Weiner at the Empire Justice Center, by phone at (518) 462-6831 or by e-mail at bweiner@empirejustice.org. In New York City, advocates can contact either: Jennifer Baum, Legal Aid Society, at (212) 577-3266 or jbaum@legal-aid.org; Constance Carden, New York Legal Assistance Group at (212) 613-5030 or ccarden@nylag.org; or Idit Froim, Weil Gotshal & Manges, at 212-310-8810 or idit.froim@weil.com.

How Will Social Security Reform Impact African Americans?

A recent report by the Center on Budget and Policy Priorities predicts that the use of private accounts to replace or supplement traditional Social Security benefits would have a deleterious effect on African Americans. According to the report, entitled *African Americans And Social Security: The Implications Of Reform Proposals*, Social Security is a critical program for African Americans. Authors William Spriggs and Jason Furman note that approximately 4.8 million African Americans currently receive Social Security benefits, half of whom are retired workers; the other half are disabled workers or survivors of retired, disabled or deceased workers. Almost 800,000 are under eighteen.

The authors posit that African Americans benefit disproportionately from many of Social Security's features, including a progressive benefit structure and survivors and disability benefits. African Americans tend to have less wealth and a harder time finding work; Social Security helps fill in the gap in retirement savings to a larger extent than with white Americans. Contrary to a 1998 study by the Heritage Foundation finding that Social Security gives African Americans a lower rate of return than whites receive because African American men have shorter life expectancies than white men, the authors cite studies demonstrating that "African Americans get modestly higher rates of return from Social Security than do non-Hispanic whites. In other words, they receive a little more back for each dollar paid in payroll taxes than whites do."

The authors suggest that private accounts do not contain the features that make Social Security such an effective program for African Americans, such as a progressive benefit formula, disability benefits, and survivors benefits. Reducing traditional Social Security benefits and replacing them with private accounts would tend to make the system less favorable for them. Also, for a number of reasons, the risks involved with private accounts would be more acute for African Americans than for whites, and the potential rewards would tend to be smaller. The authors recommend a more sensible reform approach that restores solvency in a balanced manner while protecting and preserving the current Social Security system that would serve the African American community best.

The report is available at http://www.cbpp.org/1-18-06socsec.htm.

ADMINISTRATIVE DECISIONS

Appeals Council Reinstates Claim

What happens when the claimant fails to show up for the hearing, but the representative is there? According to 20 C.F.R. §416.1457(b), an ALJ may dismiss a request for a hearing only if neither the claimant nor the representative appears at the time and place of the scheduled hearing. Under HALLEX I-2-4-25 D, if the representative appears, the ALJ should determine if the claimant is an "essential" witness. If not, the ALJ may proceed with the hearing. If so, the ALJ must offer the representative a postponement. If the representative declines, the ALJ must still issue a decision.

None of these procedures were followed in a recent case in which Kathleen Traina, supervising paralegal at the Erie County DSS Legal Advocacy for the Disabled Program, appeared for her client. Instead, the ALJ issued a notice to Show Cause the day after the scheduled hearing at which the claimant failed to appear. In the meantime, the claimant contacted the ALJ's office and reported that she was working and did not want to pursue her claim. Despite a subsequent letter from Kathy arguing for a closed period of benefits, the ALJ dismissed the claim.

Kathy appealed to the Appeals Council, citing 20 C.F.R. §416.1515 and arguing that the ALJ should have contacted the claimant's representative before accepting the claimant's statement as knowingly made. She pointed out that the ALJ had neither questioned nor analyzed the length or type of employment at issue, or the actual earnings. The claimant also submitted a letter to the Appeals Council, stating that she wished to withdraw her earlier, uninformed decision to abandon her claim.

The Appeals Council succinctly cited the above regulation and HALLEX provision, and held that the claim should not have been dismissed. It ordered the ALJ to offer the claimant another opportunity for a hearing. Cheers are due to Kathy for representing her client to the fullest!

ALJ Awards SSD Benefits Twenty Years Later

Buffalo Bruce Caulfield, paralegal extraordinaire at Neighborhood Legal Services, accomplished what might seem impossible to us ordinary mortals. He not only got his client back on SSI benefits after a five year hiatus in a Colombian jail, but also secured SSD benefits – despite a DLI (Date Last Insured) of December 1991!

Bruce's client had first been awarded SSI benefits in New York City in March 1991, based on his schizophrenia, under mental impairment listing 12.03. At the time, he was found not insured for Title II benefits. Following his incarceration in a Colombian jail from 1998 through March 2002, he reapplied for SSI alleging an onset date of March 1990. He was denied both SSI and SSD. Apparently the district office had missed the original 1991 DLI on his first application, but picked it up the second time around.

Luckily for the claimant, he found Bruce to represent him at his hearing before a traveling ALJ. Bruce managed to convince the ALJ that his client continued to suffer from schizophrenia as well as borderline intellectual functioning, and that the new evidence was virtually identical to that on which his claim had been granted in 1990. The ALJ agreed. He considered the claimant's March 1990 SSI application a protective filing for Title II benefits, and awarded him SSD benefits as of that date. (*See* 20 C.F.R. 404.633 – Deemed filing date in a case of misinformation.)

Bruce reports that the claims representative calculating the benefits in this case assured him that Title II benefits are not suspended while a claimant serves time in prison in another country. The client thus ended up with a retroactive SSI award of $10,919 and retroactive of $21,734. Congratulations to Bruce for making time stand still!

Third Time Is The Charm?

Did it ever seem like an ALJ finally granted benefits just to make you and your client go away? Sue Lane-Kreutz of the Oak Orchard Office of LAWNY reports that her recent victory appeared to be just that. Sue had represented her client through two previous hearing, succinctly boiling down 65 exhibits and a two-foot thick exhibit file to a persuasive two page letter. She argued that her client met listing 4.40 for Ischemic heart disease, or alternatively, was disabled as a result of his cardiac condition combined with his severe mental impairments.

According to Sue, the ALJ dragged out the hearing, belaboring every point, and even debating whether nuclear cardiac testing was the same as thallium testing. He apparently finally took the vocational expert's word for it! In the end, he convinced the client to accept an amended onset of 2004 instead of 1999.

The ALJ's begrudging decision rationale was unusual. Although acknowledging that that the claimant's cardiac condition met Listing 4.04C, the ALJ also found that the claimant's cardiac condition, especially when combined with the impact of his mental impairments, would result in absences from work on more than one day month, which the vocational expert testified would be unacceptable to employers.

Advocates sometimes see ALJs make such alternative findings, *albeit* a little more clearly tied to the sequential evaluation than this was. But here the ALJ specifically acknowledged that the regulations do not address the propriety of such alternative dispositions. Instead, he relied on *Murell v. Shalala*, 43 F.3d 1388 (10th Cir. 1994): "the use of alternative dispositions generally benefits everyone: the [Commissioner] relieves a pressing work load by resolving cases thoroughly once; the courts avoid successive, piecemeal appeals; and litigants are spared the protracted delays that result when a case drags on incrementally, bouncing back-and-forth between administrative (re)determinations and judicial review thereof." Consequently, he found that it would "serve the interests of justice and judicial economy to enter alternative findings."

Kudos to Sue Lane-Kreutz for offering the ALJ "alternative" arguments on which to hang his hat. Her perseverance certainly paid off for her client.

Centralized Screening Division Intervenes

The Erie County DSS Legal Advocacy for the Disability Program recently received a fully favorable decision before any hearing was scheduled or even assigned to an ALJ. It arrived out of the blue from OHA's "Centralized Screening Division," which coincidentally has the same address as the Appeals Council. [Cases are apparently sent to the Division from the local OHAs based on certain profiles, and are reviewed – or "screened" – by staff attorneys and ALJs who rotate through on a voluntary basis.]

The ALJ found that the claimant met Listing 12.05C based on her IQ score of 61- which he found consistent with her over all level of functioning - in combination with her seizure disorder and decreased visual acuity. The ALJ considered the assessment made at the earlier level, and noted that neither review physician had a treating relationship with the claimant. He also found that their assessments were in conflict with the findings of the consultative examiner. Apparently, the review physicians did not even address the claimant's IQ score of 61, and picked and chose among the findings in the CE's report.

The ALJ not only granted the claimant's SSI claim on the record. He also reopened her 1991 SSI application and found her disabled back until that date. The claimant had originally filed for SSI in 1991, but never appealed. After her husband died, she reapplied in 1999, and again in 2004, but did not appeal either denial. The ALJ pointed out that only the claimant's seizure disorder had been considered in the earlier claims; her low IQ had never been addressed. Relying on SSR 91-5p (Mental Incapacity and Good Cause for Missing the Deadline to Request Review),

(Continued on page 16)

File Access Problems Persist

Rumor has it that AeDib, SSA's accelerated electronic disability claims process, will be coming to New York later this year. In fact, SSA has been invited to introduce this new "paperless file" to advocates at the upcoming Partnership Conference in Albany June 6th through 7th. This new system will allegedly be the panacea for all our problems, especially access to evidence files in advance of hearings.

In the meantime, advocates continue to struggle with getting exhibit files, especially from traveling ALJs or ALJs in Region 3 (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia) scheduling VTC (Video Teleconference) hearings in New York. Despite the provisions in HALLEX at I-5-1-16 §III.A that the servicing office should provide the claimant and or the representative an opportunity to review the claim file *before* it is transferred, this usually does not occur for a variety of reasons. [*See* the March 2005 edition of the *Disability Law News* at 15, available at www.empirejustice.org.] Advocates are then in the unfortunate position of having to negotiate with the various distant, or "assisting," OHAs in Region 3 for access to the exhibit files.

The Hearing Office Director (HOD) of one of the local OHAs in this region has assured us that prior to transferring cases to Region 3 OHAs, she sent each HOD a copy of the instructions that were promulgated in the *Miller* settlement, which dealt with file access issues. (A copy of the *Miller* instruction is available in the DAP Class Action section at www.empirejustice.org.) She also provided us with a listing of HODs and an alternate contact in each of the Region 3 OHAs. The list is available at the online resource center as DAP #402.

Additionally, HALLEX at I-5-1-16E provides that "Claimants and representatives participating by VTC must be provided access to the record. This may be done by providing the claimant and the representative a copy of the evidence of record or an opportunity to review the file at the local Social Security Field Office before the hearing is conducted, and/or through use of document cameras to display documents on the day of the hearing. Alternatively, if the claimant is represented, the hearing office may provide the representative with a copy of the exhibit list to review. The representative may then request copies of any documents he or she does not already have. Compliance with these procedures is necessary to fulfill the commitment the Agency has made, as discussed in the preamble to the final rules, to ensure that claimants who make VTC appearances have access to their records that is sufficient and equal to that of individuals who appear in person."

Despite these provisions, advocates are still frustrated by lack of file access. The Empire Justice Center has been in contact with the office of Chief ALJ for Region 3 in Philadelphia and NOSSCR about these persistent problems. Please let us know your experiences, so we can add them to our list of complaints.

Screening Division—continued

(Continued from page 15)

he reopened and revised her 1991, 1999 and 2004 applications.

Charlie Scibetta of Erie County's LAD program notes that this was a particularly strong claim. Indeed, it appears to be a case that should have been granted years ago, but the claimant never had the wherewithal to appeal until she secured a representative. It is nonetheless surprising to see OHA be so generous with its reopening powers – especially in light of the draconian revisions it has proposed to the reopening regulations. *See* the September 2005 edition of the *Disability Law News* for more information on the Commissioner's proposed Disability Redesign.

In the meantime, we will watch with interest the decisions of the Centralized Screening Division. Thanks to Charlie for sharing this with us.

Is the Fox Guarding the Henhouse?

Much is heard these days about identity theft, particularly involving the "stealing" of social security numbers. A recent GAO (Government Accountability Office) is not particularly heartening. The GAO, in response to concerns by Congress that many private contractors share social security numbers, found that for the most part, companies in the four business sectors it studied primarily relied on accepted industry practices and used the terms of their contracts to protect the personal information shared with contractors. On the other hand, Federal regulation and oversight of SSN sharing varied across the four industries GAO reviewed, revealing gaps in federal law and agency oversight. The report - Social Security Numbers: Stronger Protections Needed When Contractors Have Access to SSNs, GAO-06-238 (January 23, 2006) - is available at www.gao.gov.

Of even greater concern should be SSA's oversight of its own agency. On February 22, 2006, the Department of Justice announced the arrest of a former SSA employee and three coconspirators for allegedly accessing the agency's computer system to steal tens of thousands of dollars in Social Security benefit payments and other money from the elderly and disabled. The former employee used her access to beneficiaries' information to change the bank accounts designated by them for direct deposit of their Social Security benefit payments to bank accounts she and the others controlled. The DOJ press release is available at www.usdoj.gov/usao/nye/pr/2006feb21.htm.

According to SSA Regional Inspector General Ryan, "This investigation demonstrates the seriousness with which the Social Security Administration, Office of the Inspector General, responds to allegations of employee fraud and misuse of SSA confidential information. There is nothing more egregious than a colleague who has violated the sanctity and trust placed upon that individual as a member of the SSA community. The integrity of SSA employees is an integral part of our mission of protecting the programs and operations entrusted to us." Let's hope so…

Order Your Benefits Management Manuals Now!

The 2004 edition of *Benefits Management for Working People With Disabilities: An Advocate's Manual*, authored and updated by Ed Lopez and Jim Sheldon, are available through GULP. The 210-page manual is by far the most comprehensive treatment of the many issues relating to work and benefits available. It contains a new chapter on Medicaid for Persons with Disabilities. An order form is available on Empire Justice Center's webites at: www.empirejustice.org/Publications/Benefits%20Manual%20Brochure.pdf

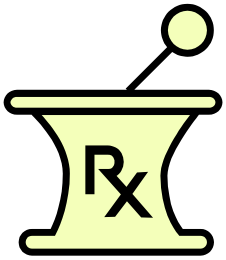
WEB NEWS

Are You A Pickle Person?

No, we are not talking about whether you like dill or gerkin. A "Pickle Person" is someone who has become ineligible for SSI - and thus automatic Medicaid - due to the receipt of Social Security benefits under Title II. Thanks to the Pickle Amendment, which was named after its congressional sponsor in 1977, "Pickle People" are *deemed* eligible for SSI, and thus continue their entitlement to Medicaid. The Sargent Shriver National Center on Poverty Law has created a quick and easy screen to determine who exactly is a "Pickle Person" and thus eligible for Medicaid. [For information about litigation involving New York's implementation of the Pickle Amendment and Childhood Disability Beneficiaries (CDB—formerly known as Disabled Adult Children—or DAC), see the Class Actions section of this newsletter.]
www.povertylaw.org/pickle_screening.htm.

Site Helps with Drug Costs

A web site maintained by New York Attorney General's office, with the help of the AARP, can save consumers up to $85 for prescriptions. The web site compares prescription drug prices at neighborhood pharmacies in New York State. According to an analysis by the AG's office, it helps save an average of $17 per prescription, with the biggest difference in price found being $85 for Depakote, a drug used to treat bipolar disorder, epilepsy, and migranes.
www.nyagrx.org



Medical Researching Secrets Disclosed

The Internet provides a multitude of sources for medical research. A DAP advocate shared this article from PLOS (Public Library of Science) Medicine on good search engines for medical research.

http://medicine.plosjournals.org/perlserv/?request=get-document&doi=10.1371/journal.pmed.0020228.

Link to pdf version of the article:

Http://medicine.plosjournals.org/perlserv/?request=get=pdf&file=10.1371/journal/pmed.0020228-L.pdf.

Volunteer Income Tax Assistance Sites Posted

VITA (Volunteer Income Tax Assistance) is available to assist low-income persons file their income tax returns. VITA is a free service. Information is available for the Capital District at *http://www.buildyourmoney.org/.* Information on VITA sites throughout New York is available at *www.empirejustice.org.*

Also, some New Yorkers can now e-file for free at the following site: *http://www.icanefile.org.* The Legal Aid Society of Orange County in California developed this site with a grant from LSC. It is targeted to low-income New Yorkers who are eligible for the earned income tax credit.

CLASS ACTIONS

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

Description - Plantiffs challenged NYDSS's failure to implement 42 U.S.C. §1381(c) which requires continued Medicaid eligibility for disabled adults who loose SSI solely because of eligibility for or an increase in Social Security Child's Insurance Benefits, also known as Disabled Adult Child's (DAC) benefits. Plaintiffs claim 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 Disabled Adult Children 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).

Ford v. Shalala, 87 F. Supp. 2d 163 (E.D.N.Y. 1999)
(the lousy notice case)

Description - The court ruled that notices of SSI financial eligibility and/or benefit amounts ("SSI financial eligibility notices") violated the due process clause of the Fifth Amendment of the United States Constitution because of SSA's failure to provide notice sufficient to permit a reasonable person to understand the basis for the agency's action.

Relief - The *Ford* Judgment requires the Social Security Administration (SSA) to expeditiously prepare and implement a plan, consistent with the Memorandum Decision and Order, that modifies defendant's automated SSI financial eligibility notices so as to provide information required in order to understand the reasons for an award, modification, termination or denial of SSI benefits, in such detail as is necessary to permit a reasonable person to understand the basis for the agency's action on the following subject:

- Information and explanation about the individual's living arrangement category;
- Information about resources'
- Benefits computations in worksheet form, including the federal benefit and state supplementation rates'
- The notice recipient's rights to review the claim; and
- The legal authority for the agency's action including either: (i) the appropriate legal citations or (ii) information as to how the appropriate legal citations can be obtained from the Social Security Administration.

Citations - *Ford v. Shalala*, 87 F. Supp. 2d 163 (E.D.N.Y. 1999) ruled that notices of SSI financial eligibility and/or benefits amounts ("SSI financial eligibility notices") violated the due process clause of the Fifth Ameendment of the United States Constitution: *Ford v. Apfel*, 2000 WL 281888, 2000 U.S. Dist. LEXIS 2898 (E.D.N.Y. January 13, 2000) (Judgment).

Information - General case information: www.wnylc.net/ford/ford.html

Inquiries - mail to ford v apfel@yahoo.com; Chris Bowes at CeDAR (212-979-0505); Peter Vollmer (516-870-0335); Gene Doyle (718-843-2290).

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.

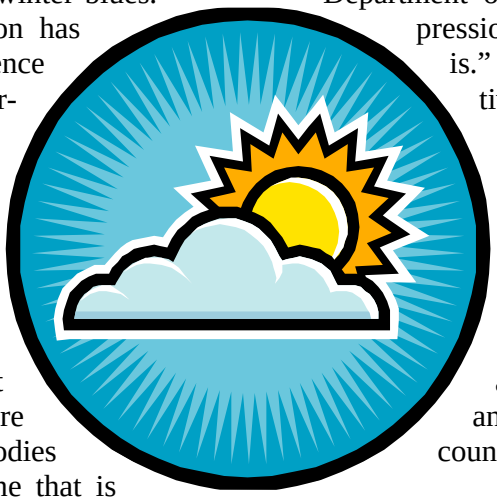
Draegert v. Barnhart, 311 F.3d 468 (2d Cir. 2002)

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

Are You Feeling SAD?

Now that the days are getting longer, maybe you are starting to feel better – or at least a little less likely to pull the covers over you head in the morning? If so, you might be on of the estimated 14 million Americans who experience SAD, or "Seasonal Affective Disorder," or its milder form, the "winter blues." "Six percent of the U.S. population has SAD, while another 14% experience winter blues," according to Dr. Norman Rosenthal, the nation's leading SAD expert and author of the newly revised *Winter Blues* published by the Guilford Press.



Both conditions are apparently caused by shortened exposure to daylight. Our internal clocks react to the shorter days and lower exposure to sunlight in the winter. Our bodies produce more melatonin, a hormone that is made almost exclusively at night. The more melatonin you make, the more likely you are to suffer from SAD or winter blues. And Patricia Anstett of the Detroit Free Press, in an article reprinted in the Rochester *Democrat and Chronicle* in January, reports that for unknown reasons, women are three times more likely to experience SAD than men.

Treatment options (short of moving to the Caribbean for the winter) include antidepressant medication, light or phototherapy, and a type of counseling known as cognitive behavioral therapy, or CBT. According to Dr. Jed Magen of the Michigan State University Department of Psychiatry, for people with depression, "Everything seems worse then it is." CBT helps them turn these negative thoughts into realistic thoughts. Psychiatrist and SAD specialist Dr. Alireza Amirsadri of Wayne State University School of Medicine says that light therapy is effective in about 70 percent of patients. Antidepressants work in about 50 to 60 percent of cases, and may be an option for people whose insurance will not cover light therapy or counseling.

The good news? According to the American Psychiatric Association, the peak season for SAD only runs through February. While March and April still may not be the sunniest months in New York, especially upstate, let's hope there will be a few days when we can find a patch of sunlight in which to bask.

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