Empire Justice Center

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DISABILITY LAW NEWS

Congressional Hearing Highlights Delays

For our Social Security clients, waiting is always the name of the game. They wait for an initial decision, usually a denial; they wait for a hearing date, sometimes close to two years in some upstate ODARs (Office of Disability Adjudication and Review); they wait for a hearing decision; if it's unfavorable, they wait for an Appeals Council decision. Some die before decisions are issued; all get older and sicker.

The House Social Security Subcommittee held a hearing on February 14, 2007. NOSSCR (National Organization of Social Security Claimants Representatives) provided oral and written testimony focusing on the stories of claimants and the hardships they have endured while waiting for a decision. According to Nancy Shor, these stories made an impact on the Subcommittee members at the hearing.

Particularly interesting to Chairman Mike McNulty was a story involving a client from his district in Troy, New York. Ms. C is a 49 year old single mother who lives in Troy, and applied for Social Security disability benefits on May 2, 2005. She previously worked for ten years as a keyboard operator for the State of New York. Ms. C has not worked since December 2003. She was denied benefits in February 2006, nine months after her application was filed. Ms. C requested a hearing in April 2006.

Since filing for benefits in May 2005, Ms. C and her children were evicted from their apartment. Unable to provide a home for her children, she lost custody and the children now live with their father. For four months, Ms. C lived in a homeless shelter in Troy, and was finally able to leave just last week. She was recently hospitalized for depression because of the multiple stressors in her life. Ms. C also has a borderline IQ and bilateral neural stenosis in her cervical spine. She is in treatment for a depressive disorder at a local mental health clinic.

Ms. C calls her attorney every month to check on the status of her appeal. There is currently an 18-month wait for a hearing at the Albany hearing office. Her attorney asked to have this case decided "on the record," without the need for an in-person hearing. However, the request was denied. Assuming the 18-month processing time, Ms. C can expect to have her hearing in November 2007. Her attorney has been told by the Albany hearing office that the wait will only get longer: two administrative law judges (ALJs) have retired in the last two years; one ALJ is set to retire in May 2007; and one ALJ is now the

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Congressional Hearing—continued

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Acting Regional Chief ALJ. There has been only one ALJ replacement.

This was just one of the numerous delay scenarios that Subcommittee members heard about during the hearing. Unfortunately, the stories are typical of what's happening across New York and the nation.

The goal of NOSSCR's testimony was to support the need to provide SSA with increased and adequate funding, especially to hire ALJs and ODAR support staff. Without more funding, backlogs and delays are expected to grow; there will be fewer staff; a hiring freeze may be in place; and other workloads will not be given proper priority.

According to Nancy Shor, the solution is simple: the SSA must be given enough funding to get disability decisions made in a timely manner. As required by law, the Commissioner of Social Security submitted a budget request separate from the President's request. This request indicates that the agency needs $10.44 billion in administrative funding for FY 2008 for its administrative expenses, known as SSA's Limitation on Administrative Expenses (LAE). This is almost $1 billion more than the President requested. What can we do to combat ongoing SSA delays? Advocates can play an important role because they know the hardships their clients experience. Decisions about funding for federal agencies begin now for fiscal year (FY) 2008, which begins on October 1, 2007. If SSA is going to receive the funds it needs to reduce the backlogs at the hearing level, it is imperative that the House and Senate Budget Committees make provisions in the "Budget Resolution" to ensure that SSA will receive $10.44 billion to fund the agency's administrative budget. The House and Senate Budget Committees will vote on their versions of the Budget Resolution in early to mid March.

It is important that every Member of Congress urge the Chairman of their respective Budget Committee to include sufficient funding in the Budget Resolution to appropriate funds for SSA's Limitation on Administrative Expenses at the level requested by the Commissioner of SSA: $10.44 billion for FY 2008.

This is an opportunity to describe the impact of the delays on your clients and your experience with the lengthy processing times in hearing offices. This "puts a face" on the problem and will help build the case for increased funding for SSA. As disability advocates and private citizens, we can contact our New York Congressional delegation, particularly Congressman McNulty, and urge their support for adequate funding for SSA to do its job effectively and efficiently. A sample letter drafted by NOSSCR is available as DAP # 449.

Upcoming Training

Handling SSI Child Disability Cases

Advocates will benefit from an upcoming training on Handling SSI Child Disability Cases. This training will cover the child's SSI regulations, including the concept of functional equivalence, domains of functioning, using forms and more. Continuing Legal Education (CLE) credits will be offered, including Transitional Credit for new attorneys. Sessions are scheduled for **March 26th in Rochester**, **March 28th in Pleasantville** and **March 29th in Hempstead**.

Registration materials are available at: http://www.empirejustice.org/library/KidsSSI.pdf.

eDib is Here to Stay

Social Security's long touted leap into the 21st century has apparently finally made it to New York State, which is the last region in the country to go electronic. Advocates have begun seeing electronic claims files in recent weeks, and should be aware that they will be seeing more of them in the future.

According to SSA representatives who gave a presentation at a DAP Task Force meeting in Rochester this month, eDib is here to stay. Bruce Goldin, the national ODAR co-coordinator for all aspects of eDib, also announced that SSA chose to use the TIFF format for viewing documents electronically for a number of reasons, largely because TIFF will result in smaller and more secure images, something necessary in light of the size and volume of files that SSA will have. These reasons, according to Goldin, are simply not debatable at this point! Representatives will not have to convert files to TIFF format for submission to SSA, however, and SSA will convert TIFF files to PDF format for submission to federal court. More on viewing TIFF files below.

eDib is being introduced slowly in New York. Small cadres of ALJs (approximately three per ODAR office) are currently being assigned e-Dib cases, which are slowly percolating up from DDD (Division of Disability Determinations). In the Buffalo ODAR, only about four percent of the cases are currently electronic. Of the 13,000 appeals pending in that office, most will remain paper, including all non-disability and court remand claims. Those cases that are fully electronic are not being reviewed in Buffalo yet, unless they are TERI claims or "dire need" cases, which are being converted to paper for review. ODAR is reviewing so-called "hybrid" cases, which are paper but can be viewed electronically through eView – the system DDD was using prior to eDib. (See POMS DI 80820.010.)

The cadre of ALJs assigned to the fully electronic cases, at least in Buffalo, will not be expanded initially beyond senior attorneys in order to lessen the impact of new claims being heard before the older paper ones that have been pending for months. Additionally, the special cadre of ALJs will also be assigned some of the "hybrid" cases to maintain balance.

New York is still awaiting its "independence day assessment," after which it will be officially certified to go electronic. That is expected by the end of the month. Within one to two months after that, no paper will be retained with electronic files (EFs). See POMS §§DI 80701.010 & 80701.003 for information on the implementation of the Electronic Disability Process and certification process.

In the meantime, advocates have lots of question and some anxiety about these new procedures. Rest assured that many advocates who have been guinea pigs for eDib have favorable reports. Most questions at this point concern software and hardware that will be necessary to make the conversation from paper to electronic (but remember that printing the CD you receive is still an option for those who feel too technically challenged to enter the brave new world just yet).

SSA assures us that all that is needed is a web browser and a multi-page TIFF viewer. The tutorial that SSA has made available to representative and apparently comes with the CDs that have been provided to representatives so far lists examples of both. Most computers already have the TIFF viewers – it may just be the question of finding them. Some advocates have downloaded free software. SSA itself uses Microsoft Office Document Imaging, which is a "tool" on Microsoft Office. SSA has provided a tip sheet to use if you are having trouble viewing TIFF files. It is available as DAP # 450.

Remember that all you need initially is a way to view the electronic files – and possibly print it - and a decent fax machine to submit records to SSA. In terms of using the CDs that will be sent to representatives at this point, more sophisticated software may be helpful to manipulate and better use the information contained in the files. Again, advocates have downloaded free software. Others recommend commercial programs such as Adobe Professional, CuriaSoft or

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Refugees Continue to Lose SSI Benefits

Prior editions of this newsletter have included articles on the devastating problems faced by refugees who arrived in the United States after August 22, 1996, and whose SSI benefits are being terminated under SSI's seven-year time limit. *See, e.g.,* the January 2007 edition of the *Disability Law News,* available at http://www.empirejustice.org/content.asp?contentid=2074.

A recent article published by the Center on Budget and Policy Priorities presents a compelling argument for why Social Security should eliminate its draconian policy preventing refugees from receiving benefits beyond seven years. According to the report authored by Zoë Neuberger and entitled *LOSS OF SSI AID IS IMPOVERISHING THOUSANDS OF REFUGEES: Congress Could Prevent Further Hardship,* over 12,000 refugees and other humanitarian immigrants have already lost SSI benefits and another 40,000 such needy individuals will lose benefits over the next decade. The author advocates for Congressional elimination of the time limit. At the very least, she argues that as a stop-gap measure, Congress should extend the deadline. The full article is available at http://www.cbpp.org/pubs/recent.html.

Of note, President Bush's FY 2008 budget actually calls for a one-year extension of the current seven-year limit for SSI eligibility period for refugees, asylees and other humanitarian immigrants.

eDib is Here to Stay—continued

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CaseMap, as just a few examples. See DAP # 451, which includes articles discussing these options. Joe Kelemen and Tom Karkau at WNYLC are working on developing programs specific to DAP and the TIME program.

What about electronic submissions to SSA under eDib? Bruce Goldin reports that there will be four ways to submit evidence. First, luddites can continue to send paper by mail or traditional fax; or two, they can use contract scanning, whereby SSA will scan the information mailed, along with the bar code provided by SSA.

The third – and preferred method – will be through the use of "FECS (front-end capture software) fax," whereby advocates will use the bar code sent to them in EF cases to fax evidence to specially dedicated fax lines that scan and upload it into the e-file. Note that fax machines should not be set at the lowest DPI setting. SSA also suggests naming the document being faxed. SSA warns that the bar codes should be inspected before use, and not photocopied too many times, as they are subject to degradation. Also, be careful to block out any other bar codes that might appear on records being submited; a magic marker line through the extraneous bar code should be sufficient. If there is a problem with the bar code that you used to submit the material, SSA will get an error message and the advocate – hypothetically – will be notified.

Finally, the most sophisticated advocates can use the "Electronic Records Express," which is a secure web site to which authorized representatives can send electronic records directly. See http://www.ssa.gov/ere/index.html to register. SSA is working on expanding that option in the future, so that representatives will be able to view the EF on line, thus obviating the need for SSA copying three million CDs each year.

The Empire Justice will be conducting a survey in the near future of the programs and equipment - including fax machines - that DAP funded providers currently have, in hopes of helping programs sort out what they may need for this brave new world. The results of the survey will also be used to explore options for funding new purchases, including large screen monitors that may be useful or necessary to view the electronic file while working on a memo or letter brief.

In the meantime, don't rush out and make purchases until further notice.

New SSA Commissioner Sworn In

Michael Astrue was sworn in as the new Commissioner of Social Security on February 12, 2007. *http://www.ssa.gov/pressoffice/pr/astrue-pr.htm*. See also the November 2007 edition of the Disability Law News. Advocates should note that Commissioner Astrue should now be substituted for Ms. Barnhart, or Acting Commissioner Linda S. McMahon, in all federal court pleadings pursuant to Fed. R. Civ. P. 25(d)(1).

At his confirmation hearing before the Senate Finance Committee on January 24, 2007, Commissioner Astrue touted his background with the disability programs, noting that he ended SSA's non-acquiescence policy. He also shared with the Committee his own experience of helping his father apply for disability benefits in the mid-1980s.

In response to questions about implementation of SSA's new Disability Service Improvement initiatives, Commissioner Astrue stated that he plans to revisit the new process, and will explore whether some of the "least controversial" aspects can be rolled out nationwide. He also asserted that like Commissioner Barnhart before him, he intended to stay out of the Social Security privatization debate. Finally, he described himself as an "incrementalist," who is unlikely to make any sweeping organizational changes in the agency in the short term.

Despite Commissioner Astrue's reticence to jump on board DSI, former Commissioner Joanne Barnhart, as one of her last acts before her term ended, made appointments to the Decision Review Board (DRB), which will be replacing the Appeals Council. Appointments to the DRB Review Panel include both ALJs and AAJs (Administrative Appeals Judges who are current Appeals Council members. ALJs appointed are: Blanca de la Torre, Paula Garrety, Steve Hubbard, David Stephens. AAJs include: Barbara Johnson, George Lowe, Dorothea Lundelius, Richard White. Appointments were also made to the Advisory Panel, which is "to study the disability determination process, identify issues that impede consistent adjudication at all levels of the process and recommend improvements to that process." Appointees include: David Hatfield, Michael Heitz and Mary Kunz (ALJs); and Chris Field, Robert Johnson and Mark Millet (AAJs).

SSA has also issued a formal solicitation to "Develop Automated Profiling /Screening Tool to Identify Administrative Law Judge Disability Decisions That Are Likely To Be Appealed to Fed District Court AND Remanded/Reversed By The Court." The notice can be found at *http://www.fbo.gov/spg/SSA/DCFIAM/OAG/SSA%2DRFP%2D07%2D1011/listing.html*. SSA is soliciting vendors to come up a tool that

> …could be developed to help identify unfavorable ALJ decisions that contain characteristics associated with federal district court appeals and remands or reversals. The profiling model will be developed using data recorded at the time of the initial level determination, ALJ decision, Appeals Council review, and the court action. This information includes the applicant's age, education years, primary impairment, reason for the court remand, etc. The methods for selecting cases for DRB review are expected to evolve over time as more data are available and SSA gains more experience and knowledge in the use of computer-based tools. Any software will make use of current SSA databases and systems architecture already available, if applicable.

SSA is also soliciting for physicians to provide consultative examinations for Federal Reviewing Officers and ALJs, in hopes of establishing "networks of physicians" to provide these tests. So at least in some parts of SSA, DSI seems to be moving full steam ahead.

REGULATIONS

Video Conferencing Proposed in Waiver Requests

In the March 5, 2007 Federal Register, the Social Security Administration (SSA) proposed regulatory changes in the procedures for both Title II (DIB) and Title XVI (SSI) initial decisions on requests for waiver of overpayment. These proposed changes are specific to overpayment waiver requests on initial determination and do not apply to the general procedures for initial decisions nor to reconsideration procedures. 72 Fed. Reg. 9709. http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-3782.htm

In a nutshell, the current Title II waiver consideration procedures require a personal conference before a waiver request can be denied. The requirement springs from "the decisions in *Buffington, et. al. v. Schweiker* and *Califano v. Yamasaki.*" See SSR 94-4p. The personal conference provision was only required in Title II cases; SSA never implemented the same procedures in Title XVI cases. Of course, in Title XVI cases, the claimant/recipient has a right generally to a personal conference at the reconsideration stage, unlike the Title II claimant/beneficiary. See 20 C.F.R. §§404.913, see also 404.459(f); 416.1413, 416.1413b, see also 416.1340(f).

The proposed changes would (1) to enable video teleconference and voice-only teleconference to satisfy the personal conference requirement, and (2) add the personal conference requirement, with these options available, to the Title XVI procedures.

Why is allowing remote virtual conferencing such a great idea? "[A] face-to-face appearance at the field office is not always convenient for the beneficiary. Often, if an individual is not able to come to the face-to-face conference, field office personnel will go to the person to hold the conference. Offering additional appearance options for the conference would improve service to the beneficiaries and reduce costly home visits by field personnel" says SSA.

To encourage use of the remote virtual options, SSA proposes "to revise the regulations to allow for personal conferences to be conducted face-to-face at a place we designate (usually in the field office), by telephone, or by video teleconference."

SSA "will give the choice to the individual; the individual will still be provided the opportunity to appear face-to-face by choosing to come to us for the personal conference."

And the claimant/beneficiary/recipient gets the appearance of a lot of freedom in this matter: "If the individual elects to conduct the personal conference by video teleconference, the individual will designate the location for his or her end of the video teleconference."

In other words, SSA is cutting out its home visits for personal conferences. SSA will protect the right to an informed defense, so it says: "These proposed rules will not affect the individual's right to review the claims file, have a representative present for the proceedings, cross-examine witnesses, or submit documentary evidence."

There is, however, no mechanism in the proposed text for making the file review more convenient commensurate with the changes for the personal conference; only the personal conference itself is addressed. SSA's announcement glosses over this gap by stating, "For example, claimants who choose to conduct the personal conference via telephone or video teleconference will be given an opportunity to submit documentary evidence by mail or fax prior to the scheduled conference." The regulatory text, current and proposed, is silent as to how a file review accessible to the distant or travel-restricted claimant/beneficiary/recipient will be enabled.

For Title II, the only proposed change is at 20 C.F.R. §404.506(c). The Title XVI provision is a wholly new section, 20 C.F.R. §416.557.

The deadline for submitting comments is May 4, 2007.

Optometrists Are Acceptable Medical Sources

SSA, on the anniversary date of its notice of proposed rule-making, finalized its rule change making an optometrist (except in the Virgin Islands) an "acceptable medical source" for purposes of establishing medical visual disorders. 20 CFR §§ 404.1513(a)(3)&416.913(a)(3). In the Virgin Islands, an optometrist continues to be an acceptable medical source for measuring visual acuity and visual fields, only. See 72 Fed Reg. 9239-9242 (March 1, 2007).

In the announcement, SSA writes that "These revised regulations will allow us to make more decisions based on medical evidence supplied to us solely from optometrists, rather than having to purchase time-consuming and expensive consultative examinations with ophthalmologists. Therefore, these regulations will help some individuals with visual disorders qualify for benefits more quickly." There also is a hint that the revision follows some lobbying by the American Optometric Association.

The change is effective April 2, 2007.

Online Resource Center Video Trainings Now Available

Empire Justice Center and the Western New York Law Center (WNYLC) are pleased to announce the new on-demand Substantive Law Training Center as part of the Online Resource Center (ORC). In this new area of the ORC, we will provide access to our growing library of previously recorded training. Current video trainings that are now available to advocates cover topics such as language access rights, Medicare Part D, food stamps, emergency assistance, child support cooperation requirements and an assortment of basic area specific Social Security Disability trainings. Many thanks to IOLA for underwriting the WNYLC's webcasting and taping efforts.

For more detailed descriptions and to access these trainings, please visit the Empire Justice Center website at www.empirejustice.org – click into the Online Resource Center where you'll find a new "Online Training" button on the left-hand menu. Registration is required to view training videos. Click on the training video you wish to see, complete the registration form and a link to the training video will be sent to you by email.

We are also excited to announce that the New York State Continuing Legal Education Board has recognized Empire Justice Center as an accredited provider of continuing legal education (CLE) in alternative (non-traditional) course formats including live web streaming, online video and DVD formats. Continuing Legal Education credits will soon be available for selected training videos on the ORC. Look for additional video trainings to be added soon!

COURT DECISIONS

Equitable Tolling Cannot Save Self-Employment Case

Pursuant to 42 U.S.C.§405(c)(1)(B), (c)(4), a self employed individual must file tax returns showing income within a specified time period in order to be credited with quarters of coverage, which are needed to qualify for Social Security disability benefits. If no tax returns are filed within the specified time periods, there is a conclusive presumption that no income was earned and no quarters of coverage will be assigned. The Second Circuit recently issued a decision in which it held that the time periods set forth in the statute could not be equitably tolled due to mental illness.

In *Acierno v. Barnhart*, 475 F.3d 77 (2d Cir. January 24, 2007), a panel of the Second Circuit again agreed that the end result of their decision was harsh to a person who was clearly disabled, but that Congress, not they, had the power to determine when a statute was subject to equitable tolling.

Mr. Acierno was a self employed individual who failed to file income tax returns during several years when his mental impairments, side effects of the chemotherapy he was undergoing for testicular cancer, robbed him of the ability to perform these obligations of everyday life. When he finally decided to apply for Social Security disability benefits, several years had passed since he had engaged in any employment, as had the statutory limit limits for submitting evidence of self employment pursuant to 42 U.S.C.§405 (c)(1)(B), (c)(4). The ALJ denied his claim because he did not meet the "20/40 test"; that is, 20 quarters of covered employment out of the past 40 quarters (five out of the last ten years).

Mr. Acierno was unrepresented on his District Court appeal and failed to file any responsive papers to the Social Security Administration's motion for judgment on the pleadings. The District Court decided that Mr. Acierno was a self-employed person, despite some testimony that he was a wage earner, and that the legislative history of the statute clearly indicated Congressional intent against allow equitable tolling.

Mr. Acierno appealed to the Second Circuit and was appointed counsel to represent him. Mr. Acierno argued that the time limits contained in 42 U.S.C.§405 (c) should have been equitably tolled due to his mental illness, citing the Court's earlier decision in *Canales v. Sullivan*, 936 F.2d 755, 759 (2d Cir. 1991). The Second Circuit disagreed, noting that in Canales, the statute that was tolled was 42 U.S.C. §405(g), in which Congress specifically allowed for indefinite tolling of the 60-day time periods. To the contrary, the statute before the Court indicated Congressional intent to severely limit the time within which a claimant could seek judicial review except in exclusive situations that were not met in the instant case.

It is difficult to imagine how the Court wrote this disturbing decision with its hands tied, but maybe we should look to Congress for that answer as well.

DAP Conference Planned - June 11 & 12 --Save the Dates!

The Sage College of Albany will once again host our DAP Training Conference. Sessions will begin in the afternoon of Monday, June 11 and will continue until the early afternoon of Tuesday, June 12 2007. Stay tuned for the conference agenda and registration materials.

Second Circuit Rules on Insured Status Issue

While noting that that Court was "called upon to address a matter of human tragedy," the tragedy continued for the Petitioner because the Second Circuit ruled against her. In *Collier v. Barnhart,* 473 F.3d 444 (2d Cir. 2007), the Court held that Mrs. Collier did not meet the 20/40 rule, requiring that she worked at least 20 out of the previous 40 quarters (i.e., five out of the last ten years) to meet the insured status necessary for Social security disability benefits.

The Court addressed petitioner's attack on the constitutionality of the 20/40 rule, which Mrs. Collier argued discriminated against women like herself who were more likely to leave the workforce to parent fulltime. At the District Court level, the Magistrate Judge ruled that the 20/40 test withstood rational basis review because it served the legitimate goals of insuring that the Social Security system was self-sufficient, and limiting disability benefits to those dependent on employment income.

Although Mrs. Collier presented persuasive evidence that the 20/40 rule has a disproportionate impact on women, she failed to show that Congress was motivated by an "invidious discriminatory purpose" in enacting the 20/40 rule. The Court also found that Mrs. Collier's argument failed to pass the rational basis test because Congress could rationally decide to distribute a scarce resource pursuant to the 20/40 rule, where those who have worked and contributed more recently to the system, and are more dependent on earnings, should be eligible for benefits.

The Court was clearly sympathetic to Mrs. Collier, who suffered from Lou Gehrig's disease (ALS). They lauded her efforts to bring about legislative change, citing the introduction by her Connecticut Senator and Representative of the "Claire Collier Social Security Disability Insurance Fairness Act," which would make the 20/40 rule inapplicable in cases of terminal illness. The Court pointed to this legislative advocacy as the more appropriate forum for Mrs. Collier to seek redress from the Social Security Administration.

Do we detect a pattern with these Second Circuit decisions?

Benefits Ordered in Child's Case

Almost eleven years is a long time in the life of anyone, much less a ten year old child. That is how long the claimant in a child's case waited before Judge Telesca of the Western District of New York finally issued a fully favorable decision in his case. The child was ten years old when his mother first applied for SSI benefits on his behalf in 1996. By the time his appeal was filed in federal court, he was already fifteen years old. His case was pending before another judge for almost six years before it was transferred to Judge Telesca.

In remanding the claim for the calculation of benefits, Judge Telesca ruled that the evidence supported a finding that the child had a marked impairment in the domain of "interacting and relating with others." The Commissioner had already conceded that the child was markedly limited in the domain of cognition and communicative functioning based on his low IQ scores as well as reports from his teachers. The Court found that reports of numerous fights and suspensions supported a finding that the child's conduct disorder also caused a marked limitation in the domain of interacting and relating to others.

The Court, citing *Pollard v. Halter*, 377 F.3d 183, 189 (2d Cir. 2004), also ruled that the final childhood regulations, which were promulgated in 2000 while the case was pending at the Appeals Council, should apply.

Judge Telesca's decision in *Miller v. Barnhart* is available as DAP # 452. The child was ably represented on appeal by Louise Tarantino of the Albany office of the Empire Justice Center.

Court Remands for Literacy Determination

What does functional literacy mean for Social Security purposes? That is exactly the question that confronted the court in a recent case in the Western District of New York. Judge Larimer ultimately decided to remand the claim for further consideration of whether the claimant is in fact illiterate

Social Security's regulations simply define illiteracy as "the inability to read or write." 20 C.F.R. §404.1564(b)(1). A claimant is considered illiterate "if the person cannot read or write a simple message such as instructions or inventory lists even though the person can sign his or her own name." *Id.*

The issues of literacy often arises in terms of application of Medical-Vocational Guidelines (the "grid") Rule 201.17, which mandates of finding of disability for individuals limited to sedentary work who are illiterate or unable to communicate in English. It can also arise, as here, where the jobs cited by a vocational expert would require literacy.

In this case, on cross-examination, the plaintiff's advocate asked the vocational expert (VE) if the inability to read and write would eliminate any of the jobs to which he had testified. After clarifying that the claimant was "functionally illiterate," the VE responded that all the jobs cited would require some ability to read. The ALJ countered by eliciting testimony from the VE confirming that all the claimant's past relevant work, including mechanic, truck driver, equipment repairer and forklift operator, required an ability to read. The claimant then testified that in many of his previous jobs, either his supervisor or coworkers had covered for him, and that he had lost jobs because of his illiteracy. As to his truck driver job, the claimant testified that he drove mostly in Miami where the streets are numbered; he also had his girlfriend ride with him to help him read maps and street signs.

The ALJ rejected this testimony as "somewhat absurd," finding the claimant incredible. He also found the testimony contradicted testimony from the claimant's first hearing, in which he stated he could read at the third grade level. He concluded that the claimant had a limited education, or the equivalent of a seventh through eleventh grade education.

Acknowledging that the case law has set the standard for literacy quite low, Judge Larimer nevertheless concluded that the ALJ's decision was not supported by substantial evidence. He noted that there was no basis established for the claimant's testimony at the first hearing that he could read at a third grade level. Even if there were, the Court held that a reading level so low still calls into question whether the claimant is functionally illiterate. Judge Larimer was also troubled by the ALJ dismissal of the claimant's testimony as "absurd" without delving further into the circumstances surrounding his allegations that his girlfriend helped him drive. The judge cited several Supreme Court cases emphasizing the obligation of the ALJ to investigate the facts and develop arguments both for and against granting benefits. He concluded that remand for development of the record regarding literacy was necessary.

Congratulations to Rob Cisneros of the White Plains office of the Empire Justice Center for his creative work on this case. The decision, *Gross v. McMahon*, will be reported in the federal reporter, and is currently available as 2007 WL 419665 (W.D.N.Y. Feb. 8, 2007).

Additional Impairment Must Be Considered

Judge Charles Siragusa of the Western District of New York recently agreed with plaintiff's claim that the ALJ had ignored her most significant impairment during his five-step analysis of the claim. The Court remanded the claim for further administrative proceedings, including an evaluation of the claimant's credibility under 20 C.F.R. §404.1529.

The plaintiff, who was 34 years old at the time of her hearing, had been treated for bilateral carpal tunnel syndrome for several years. Diabetes was ruled out as a cause for her wrist pain. Approximately one year before her hearing, however, the claimant also began complaining of shoulder pain, for which she was treated at a pain management center and by her treating physician. Her shoulder pain was also mentioned in subsequent reports that were forwarded to the Appeals Council, as was an MRI report. The ALJ nonetheless only mentioned it in passing. The Court found that the ALJ's failure to include it as an impairment in his analysis constituted grounds for remand.

Judge Siragusa disagreed, however, with the plaintiff's claim that the ALJ had ignored the opinions of the treating physician, noting that the plaintiff's primary doctor had submitted a residual functional capacity evaluation in conjunction with the hearing limiting her patient to sedentary work. According to Judge Siragusa, the fact that the physician had reported that the claimant was totally disabled for Workers Compensation purposes was not controlling, citing *Robinson v. Apfel*, No. 97 Civ. 5495 (DC, 1998 WL 329273 a *4 (S.D.N.Y. June 22, 1998)(the opinion given in the context of a worker's compensation claim involved a wholly different statutory test).

The Court ducked the final issue raised by plaintiff involving the number of jobs available. The vocational expert at the hearing had testified that the claimant could not return to her past relevant work, but that she could perform that ubiquitous and infamous fall-back position – surveillance system monitor. Plaintiff relied on the case of *Lounsburry v. Barnhart,* 468 F.3d 1111 (9th Cir. 2006) for the proposition that only one occupation–even if there are a number of individual jobs within that occupation – is not enough to satisfy the Commissioner's burden. Judge Siragusa had made a similar finding in *Kuleszo v. Barnhart,* 232 F.Supp. 2d 44, 55 (W.D.N.Y. 2002). The Court in this case, however, found *Lounsburry* factually inapposite because, among other things, the plaintiff in *Lounsburry* was of advanced age and thus disabled under the Grid.

Judge Siragusa, in ordering remand for further proceedings, also agreed that it was unclear from the record whether the ALJ had properly considered the plaintiff's credibility. The ALJ merely noted that he had considered all the symptoms in accordance with the requirements of 20 C.F.R. §§404.1529 & 416.929 and SSRs 94-4p and 96-7p. The Court was thus unable to tell whether the ALJ had actually considered the plaintiff's work history or the full extent of her attempts at treatment, or why the ALJ discounted the plaintiff's testimony regarding the side-effects of her medication.

The decision in *DeJesus v. Barnhart* is available on Westlaw as 2007 WL 528895 (W.D.N.Y. Feb 13, 2007). Congratulations to Alecia Elston of Segar & Sciortino in Rochester.

ADMINISTRATIVE DECISIONS

Appeals Council Reverses ALJ

"Some decisions scream for reversal and remand." So argued Alecia Elston, an attorney with the Rochester firm of Segar and Sciortino. The Appeals Council listened. It actually reversed the ALJ's determination that Alecia's 61 year old client could return to her past work as an assembler, and instead issued a fully favorable decision based on the Medical-Vocational Guidelines.

While adopting the ALJ's assessment that the claimant retained the residual functional capacity (RFC) to perform a reduced range of light work, the Appeals Council agreed with Alecia that the RFC did not take into account the claimant's limited ability to concentrate and persist. It concluded that in light of her degenerative disc disease, depression and coronary artery disease, she was limited to unskilled work, thus precluding her return to her past semi-skilled position.

Alecia had argued to the Appeals Council that the ALJ had in essence prejudged her client, pointing out the ways in which it was obvious that his decision had been written before the hearing. Although the Appeals Council did not specifically address that point, it clearly took notice of Alecia's argument, noting that the ALJ had not acted upon the claimant's request to withdraw her Title II claim in light of her remote date last insured, nor had he incorporated the claimant's amended onset date into his findings.

The Appeals Council also found that the ALJ did not fulfill the requirements of Social Security Ruling (SSR) 96-7p in assessing and evaluating the claimant's allegations. It found the decision deficient as a matter of law in that the ALJ had not considered those factors enumerated under SSR 96-7p (prior work record; daily activities; location, duration, frequency and intensity of pain or other symptoms; precipitating and aggravating factors; type, dosage, effectiveness and side effects of medication; treatment other than medication; and other measures used to relieve symptoms).

Alecia was particularly pleased to receive the Appeals Council's fully favorable decision less than two weeks after she sent her argument to the Appeals Council. Congratulations to Alecia for convincing the Appeals Council that the ALJ's decision in her case was "just plain wrong!"

Medicare Premiums to Increase in 2008

Medicare Part B - available to those over 65 or who have been eligible for Social Security Disability Insurance (SSDI) benefits for twenty-four months - currently costs beneficiaries $93.50 per month. If that seems steep, just wait until next year, when Medicare Part B premiums in 2008 could increase by 17%, or $15.90, to $109.40 monthly. Individuals with annual incomes that exceed $80,000 and married couples with annual incomes that exceed $160,000 pay higher premiums. Medicare Part B premiums have increased by 60% over the past five years, compared with 14% for Social Security COLA.

Just when do disabled claimants get the privilege of paying these premiums? Coverage begins the 25th month after the date of entitlement/onset. See POMS HI 00801.146 Entitlement to HI for the Disabled https://s044a90.ssa.gov/apps10/poms.nsf/lnx/0600801146!opendocument. Therefore, some claimants can become eligible for Medicare Part B as soon as they start receiving their monthly checks, as long as more than twenty-four months have passed since the established onset of disability.

Appeals Council Remands for VE Testimony

Newly admitted Empire Justice Attorney Sara Valencia has had much to celebrate this month. Not only was she sworn into the New York State Bar, she also received a remand in a case that she had taken over at the Appeals Council. The Appeals Council agreed with Sara that her client could not return to her past work. In fact, the Appeals Council agreed that the client did not have past relevant work. It found that based on a review of the record and audit of the hearing tape, the claimant had only performed her past job as a finishing inspector for four or five months, and had only earned $2,357.96. The Appeals Council, citing 20 C.F.R. §416.974, concluded that that did not constitute substantial gainful activity. Thus, under 20 C.F.R. §416.960(b), it could not be considered past relevant work.

The Appeals Council remanded the claim for vocational testimony to clarify the effect of the claimant's assessed limitations on her occupational base, citing SSR 83-14. Ironically, a vocational expert had testified at the first hearing, but not as to other work the claimant could perform. The ALJ was apparently so convinced of the strength of his past relevant work finding that he did not bother to ask the VE any more questions! Now Sara will have a chance to hone her cross-examination skills at the remand hearing.

Listing 12.05C Claim Prevails

Sara Valencia of the Empire Justice Center in Rochester savored another sweet victory this month, when she received a fully favorable decision, issued on Valentine's Day, following her first hearing. The ALJ agreed with Sara's argument that her client continued to be disabled based on his mental retardation and hearing disorder. She convinced him that earlier IQ scores all above 70 should not be considered reliable because they were obtained less than one year after the previous exam, which had produced results below the 12.05C range. The ALJ relied on Sara's reference to POMS DI 24515.055, which observes that practice related increments in IQ tests are common for retest results within a year of prior testing.

The ALJ also accepted evidence that Sara pointed out as demonstrating that the claimant functions in the mentally retarded range, including the report of SSA's consultative examiner and his unsuccessful work attempts. Sara also managed to convince the ALJ that the client's current work activity did not constitute SGA (substantial gainful activity), and that because he was attempting to work, he was an excellent candidate for 1619 – SSI's incentive earnings program.

Congratulations to Sara for a job well done. And she is continuing to help the client make sure that all his earnings are properly reported, and that he is able to take advantage of the 1619 program. Through Sara's efforts, the local District Office is no longer refusing to take information about earnings without an appointment. The local office is now complying with the mandate of the Social Security Protection Act of 2004 that a claimant can report work activity by phone to the toll free number; in person or by phone to the local office; or by mailing pay stubs to the local office. SSA is also supposed to be working on efforts to expand the ways beneficiaries can report information. See 71 Fed. Reg. 66860 (Nov. 17, 2006).

ALJ Grants Benefits Following AC Remand

Paralegal Jim Denson of Nassau/Suffolk Law Services should be singing his own praises, following the recent victory he earned. Jim's client, who is in her mid-forties and is HIV positive, also suffers from severe depression, whose primary manifestation is anger and hostility towards others. Jim presented ample evidence of the limitations caused by her depression, including job loses due to altercations with co-workers, as well as the opinion of a treating psychiatrist that she was unable to work because of her psychiatrically based interpersonal difficulties. The ALJ nonetheless found that she could return to her past work as a secretary.

Jim wrote a very compelling argument to the Appeals Council, pointing out that the ALJ had failed to properly weigh, or even address, the opinion of the claimant's treating psychiatrist. Jim bolstered his argument by submitting, as new and material evidence, an updated RFC (Residual Functional Capacity) evaluation from the treating psychiatrist indicating that the claimant had poor to no ability to handle the mental demands of work.

Jim also argued that the ALJ had erred in elevating the opinion of a non-examining review physician over that the treating psychiatrist. He refuted the review physician's conclusion that his client could perform substantial gainful activity by pointing out that her recent work attempts were unsuccessful. He relied on 20 C.F.R. §416.973(b) for the proposition that unsatisfactory job performance is indicative of non-substantial gainful activity. He also pointed to evidence that the client's last job was considered supported employment, which is similarly not indicative of substantial gainful activity. 20 C.F.R. §416.973(c)(6). Finally, he emphasized the many financial stresses his client was under, which forced her to attempt to return to work, albeit unsuccessfully. He cited *Nelson v. Bowen,* 882 F.2d 45, 49 (2d Cir. 1989) ("When a disabled person endures pain to pursue important goals, it would be a shame to hold that endurance against her, unless her conduct truly showed that she is capable of working).

The Appeals Council adopted Jim's arguments. It criticized the ALJ for discounting the treating source opinion, and failing to explain why the treating opinion was discarded in favor of a one time examining psychologist and that of a social worker. The Appeals Council additionally found that the consultative examiner's report was internally inconsistent, in that it described the claimant as both cooperative and somewhat uncooperative. It also noted that while the ALJ had found that the claimant's "nonexertional impairments do not significantly reduce her residual functional capacity," "there are not impairments that are 'nonexertional,' but rather there are impairments that cause nonexertional limitations."

The Appeals Council also specifically relied on the new and material evidence that Jim had submitted, noting that "claimant's impairments might be more limiting than found in the hearing decision." This underscores both the value and the importance of updating evidence at the Appeals Council level.

On remand, the same ALJ issued a two page decision finding that the claimant met Listing 12.04, based in part on the testimony of a medical expert at the hearing who testified that the claimant was in a vegetative state. He agreed that the claimant had not performed substantial gainful activity (SGA) during her various work attempts.

Jim observes that this was a difficult case, particularly the SGA issues that he managed to overcome. He thought it worthwhile, however, to raise the issues of how poorly the claimant had performed her jobs because of her psychiatric problems, and how, as a result, the past work did not constitute SGA. We would be singing Jim's praises if only we were as talented as he is. What a victory!

Lengthy Appeal Pays Off

Perseverance is often the key to successful outcomes in disability appeals. Doris Cortes, senior paralegal at the Rochester office of the Empire Justice Center, learned that when she received a fully favorable decision from the Appeals Council. The decision followed a trip to federal court, a voluntary remand by the Commissioner, and yet another unfavorable decision by the same ALJ who had denied the claimant the first time round.

Doris's client had appeared pro se at his first hearing, and despite his testimony indicating paranoia and hallucinations, the ALJ found him not disabled. The ALJ found substance abuse material to his claim, relying on the report of a one-time consultative examiner. When the claimant contacted Doris after he had been denied, she advised him to reapply in addition to appealing. While his appeal was pending, he was found disabled on his subsequent application under Listing 112.03(A)(1) based on his paranoid schizophrenia.

Following the federal court remand, however, the same ALJ persisted in his belief that drug and alcohol were material to the claim, despite ample evidence from treating sources, and even a second SSA consultative examiner, that the claimant's psychiatric problems continued despite abstinence. The Appeals Council agreed with Doris's argument that the ALJ had ignored substantial evidence. It affirmed the determination made on the subsequent application that the claimant met Listing 12.03, and determined that, in fact, the claimant met the listing as of the date of his first application in 1999.

Interestingly, in addition to Doris's letter, the Appeals Council also relied on the memorandum from a medical consultant to the Appeals Council, which was made part of the Exhibit file but was never proferred to the claimant. Because the Appeals Council determined that the medical consultant's conclusion that the criteria of 12.03 were met was consistent with the medical record, it gave his opinion substantial weight.

The morals of the story? Be on guard for medical consultants at the Appeals Council level, the existence of which are not always revealed to the claimants or representatives. In this case, it was of less consequence than in a denial, of course. Second moral? Like Doris, keep trying. Her perseverance certainly paid off in this case.

ALJ Grants Menorrhagia Claim

Buffalo Bruce Caulfield, paralegal extraordinaire with Neighborhood Legal Services, reports a recent victory in a case involving a 21 year-year old woman suffering from extreme menstrual problems. The claimant also has hypothyroidism and a benign pituitary tumor.

Bruce argued that the excessive menorrhagia, and accompanying back pain, cramping, anemia and joint pain, caused his client to be fired from two job attempts because of medical absenteeism. He also supplied school records confirming that she had required home study in her last years of high school based on medical restrictions from her treating physician.

According to Bruce, the claimant's treating physician had documented her menstrual problems quite well, and the claimant had kept a detailed journal. Birth control medications had not been successful in alleviating the problems.

The ALJ agreed with Bruce's argument that the claimant could not perform substantial gainful activity. He determined that although she had no exertional impairments, she would miss four or more days each month due to her heavy bleeding and acute pain during menstruation. He concluded that because these limitations so narrowed the range of work that the claimant might otherwise be able to perform, a finding of disabled was appropriate under the framework of Section 204.00 of the Medical-Vocational Guidelines. "Missing four or more days of month from work would clearly be unacceptable to an employer."

Thus, citing SSR 85-15, he found that the claimant's non-exertional impairment would significantly erode the jobs available at all levels of exertion.

Congratulations to Bruce for his creative work in this case.

CLASS ACTIONS

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 Amendment 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).

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

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

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

Citations - None

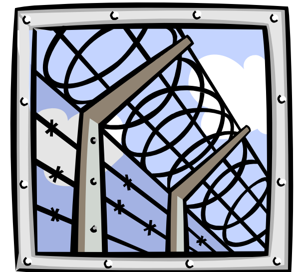
Information - Peter Vollmer, Vollmer & Tanck, (516) 228-3381; Pvollmer96@aol.com.

WEB NEWS

Urban Institute Issues Reports on Social Security Minimum Benefits

Two recent reports published on January 30, 2007, by the Urban Institute suggest the extent to which the establishment of a floor for social security benefits could help the elderly poor. *Minimum Benefits in Social Security Could Reduce Aged Poverty*, by Melissa Favreault, Gordon Mermin, C. Eugene Steuerle, Dan Murphy; and *Minimum Benefits in Social Security: Design Details Matter (Series/Older Americans' Economic Security)* by Melissa Favreault, Gordon Mermin, C. Eugene Steuerle, are available at: http://www.urbaninstitute.org/toolkit/newreports.cfm?page=3

How to Access Prison Records



Several advocates have posted very helpful suggestions to their colleagues who were seeking information from prison medical and psychiatric records.

This website lists the addresses and phone numbers of state facilities:
http://www.docs.state.ny.us/faclist.html

Requests for records should be addressed to facility from which your client was paroled. You can find this facility by entering the client name and "DIN" (Dept. ID Number) at:
http://www.docs.state.ny.us/inmateinfo.html

Use this website for locating current or former inmates. It gives all of their incarceration locations:
http://nysdocslookup.docs.state.ny.us/kinqw00

Outpatient Psychiatric: Records are kept at the nearest Mental Health Satellite Unit. The addresses/direct phone numbers can be found:
http://www.omh.state.ny.us/omhweb/forensic/manual/html/chapter4.htm.

An OMH Form 11 is required and available at:
http://www.omh.state.ny.us/omhweb/hipaa/manual/appendix3.pdf
You will also need the OCA HIPAA release, which is available at:
http://www.courts.state.ny.us/forms/Hipaa_fillable.pdf

Inpatient Psychiatric: If your client had to be committed to the Central NY Psychiatric Center (sometimes referred to as "Marcy," but not to be confused with Marcy Correctional Facility), records of that admission will only be obtained through a direct request to CNYPC along with an OMH Form 11:
http://www.omh.state.ny.us/omhweb/facilities/cnpc/facility.htm

Medicaid Information Updated

More information on Preferred Drug Lists (PDL) and Medicaid managed care expansion upstate is available in the Department of Health February update: http://www.health.state.ny.us/health_care/medicaid/program/update/2007/2007-02.htm

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)

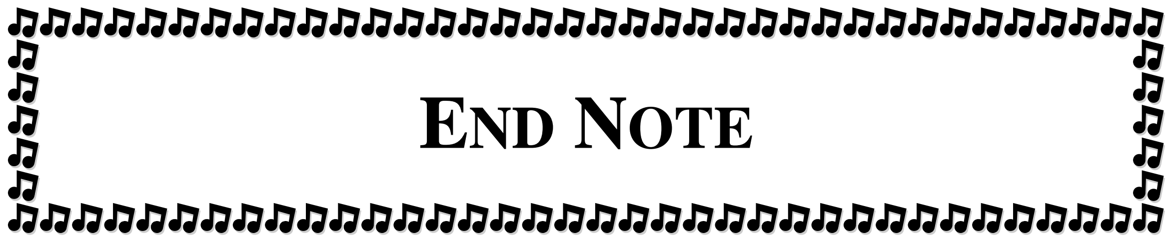
The Court ruled that federal courts might review the Commissioner's decision not to reopen a disability application in two circumstances: where the Commissioner has constructively reopened the case and where the claimant has been denied due process. Although the Court found no constructive reopening 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

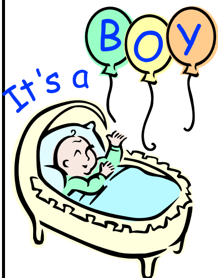
Showering Gets Ideas Flowing

Admit it. Many of your great ideas come to you while you're in the shower. It may be the only time you are alone in a hectic household. Or it may be that your channel surfing, multi-tasking brain finally focuses on one point: that steady stream of hot water washing over you! Or maybe it's more biology than psychology.

According to researchers, being in water is a pleasurable experience and pleasure is mood elevating, giving us more energy, helping us get alert and putting us in a better frame of mind. And while you're in the shower, the warm water running over your body stimulates nerve endings in the outer layer of skin, which contain beta-endorphins, natural opium-related compounds. These beta-endorphins cause a pleasurable and soothing sensation when released in the brain, triggering activity that can lead to new thoughts or ideas.

And there you are in the shower, usually alone and undisturbed, and the ideas that have been collecting during your restful, sleep period suddenly become crystal clear: great ideas borne out in the shower. And you thought it was the loofah and shower scrub!

New DAP Baby Arrives!



Congratulations to Ellen Heidrick of Southern Tier Legal Services in Bath and her husband Jim on the birth of their second son. Frank Douglas arrived on January 13, 2007, weighing in at eight pounds, eleven ounces. Frank has an older brother named Jessi.

Contact Us!

Advocates can contact the DAP Support attorneys at:

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