Empire Justice Center

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DISABILITY LAW NEWS

Commissioner Astrue Suspends Five Day Rule

The Social Security Administration's (SSA) proposed regulatory changes to the appeals process, described in the November 2007 edition of the *Disability Law News*, have met with strenuous objections from the advocacy community, as well as from members of Congress. Comment letters from Empire Justice and NOSSCR (the National Organization of Social Security Claimants' Representatives) are available at http://www.empirejustice.org/content.asp?contentid=2916. Various congressional letters can be found at http://waysandmeans.house.gov/ResourceKits.asp?section=2593.

First and foremost among the criticisms have been those challenging the proposed changes involving submission of evidence. The regulations would have mandated that all evidence be submitted to the ALJ (Administrative Law Judge) five days before the scheduled hearing. Only limited exceptions to the five-day evidence submission restriction would exist; otherwise, the record would be closed. Similar draconian record closure provisions were proposed at the Appeals Council level (to be renamed the Review Board).

In response to the outcry, SSA Commissioner Michael Astrue announced on January 29, 2008, that he was suspending implementation of some of the more controversial aspects of the proposed rules, including the five-day rule. Astrue's letter to Congress announcing this development is available as DAP #477. In his letter, the Commissioner reiterated his belief that changes like the proposed five-day rule would be an important step toward holding hearings with complete medical records, and in turn, helping to reduce the backlog of appeals. He acknowledged, however, the legitimate concerns raised by advocates regarding the difficulty of obtaining records in a timely manner.

The Commissioner expressed his concern about these delays, and attached to his letter copies of letters that he had written to the American Medical Association and the American Hospital Association about delays in processing claimants' requests for records. In the letters, Commissioner Astrue reminds the leaders of the two associations that federal and state laws provide claimants with an absolute right to prompt access to their medical records.

Advocates should be aware that the federal law to which Astrue refers is the infamous HIPAA (Health Information Portability and Accountability Act). See 45 CFR §164.524(b)(2)(i)& (ii), which provides that a "covered entity" under HIPAA must respond to

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Empire Justice Center
1 West Main Street, Suite 200
Rochester, NY 14614
Phone: (585) 454-4060

The newsletter is written and edited by Louise M. Tarantino, Esq., Catherine M. Callery, Esq., Ann Biddle, Esq., and Paul M. Ryther, Esq.

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How Will the Stimulus Package Affect SSI Recipients?

Not all SSI recipients will be given the opportunity to be good Americans and help stimulate the economy this Spring. Under the newly enacted Economic Stimulus Act of 2008 (P.L. 110-185), individuals with qualifying income of $3,000 or more in 2007 may be eligible for payments between $300 and $600 ($600 and $1200 if married and filing a joint return), plus $300 for each qualifying child under age 17 as of December 31, 2007. Qualifying income includes Social Security benefits, certain Railroad Retirement benefits, certain veterans' benefits and earned income, such as income from wages, salaries, tips and self-employment. For people filing joint tax returns, only a total of $3,000 of qualifying income from both spouses is required to be eligible for a payment.

Unfortunately, SSI or other public assistance income does not count as qualifying income, and can not be used to meet the $3,000 threshold. Please note that receipt of SSI does not disqualify individuals from receiving the payments if they have at least $3,000 of other "qualifying" income. Additionally, receipt of the stimulus payments will not be counted as income or resources for two months for continued eligibility for SSI and other federal means tested programs (See §6428.2008(d) of P.L. 110-185).

To receive the payments, beneficiaries must file a federal income tax return for 2007, but will not need to do more than that to be eligible. According to the Social Security Administration (SSA), beneficiaries who are filing a 2007 tax return only to obtain the stimulus payments will not need replacement Forms 1099 in order for the IRS to determine if they are eligible to receive stimulus payments. An estimate of Social Security benefits received in 2007 is sufficient. To avoid a delay in receiving the stimulus payment, the tax return should be filed by April 15, 2008. Filing a return by October 15, 2008, however will insure getting a payment.

SSA has included information about the rebate program on its 800 # (1-800-772-1213). Some legal services programs have sponsored a tax preparation program for claimants, available at www.IcanEFile.org. For claimants without computers, it can be accessed at local public libraries, or some legal services offices. Help may also be available at AARP or VITA (volunteer) tax preparation sites. A county by county listing is available at http://www.otda.state.ny.us/main/reform/vitasites/asp. A listing of upstate volunteer tax sites is also available as DAP #479.

A Fact Sheet about the 2008 Stimulus payments prepared by the Empire Justice Center's C.A.S.H. (Creating Assets Savings and Hope) of Rochester, NY, program is available at DAP #480. Information is also available at the IRS website at: www.irs.gov or the IRS toll-free number at 1-800-829-1040. The IRS has created an instructional page explaining how beneficiaries can receive the payment: http://www.irs.gov/irs/article/0,,id=179096,00.html. It has also announced that it will be sending out special mailings to Social Security recipients alerting them to the program and explaining how to access the payments.

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a request for records within thirty days. There are a number of provisos, including one automatic thirty day extension. Although there are significant monetary penalties for violations of this and other HIPAA provisions, enforcement lies with the Department of Health and Human Services.

New York law has even stricter mandates. See NY Pub. Health Law Sec. 18(2) and NY Ment. Hyg. Law Sec. 33.16(b), which give providers only ten days to act on written requests for access to patients' own records. Again, however, enforcement is cumbersome at best. Advocates should nevertheless consider reminding providers of these laws when requesting records. A sample request is available as DAP #478.

Social Security Benefits Payable by Debit Cards

The Department of the Treasury announced that beginning this spring, people in Texas, Oklahoma, Arkansas, and Louisiana will be offered the option of receiving their Social Security or SSI benefits in the form of a prepaid debit card instead of a paper check. The program is expected to be rolled out nationwide later in 2008. The targeted audience for the debit card use is beneficiaries who do not have bank accounts.

The Treasury awarded the contract for the new program to Comerica Bank in Detroit. The cards offered will be Visa and Mastercard and can be used wherever those cards are accepted. There will be no monthly fee and no fee for overdrafts or declined transactions. The first withdrawal at an ATM will be free, with subsequent withdrawals within the network charged a 90 cent fee. A recipient using the new debit card could get the entire amount withdrawn by a bank teller. But the idea is to offer a more secure solution, instead of carrying around large amounts of cash.

The Treasury said that it chose Comerica Bank because of its experience running electronic benefits programs for state governments. Comerica makes money on some of the fees connected to the card, the float of the unused money in the accounts and interchange fees when the card is used at retailers, but consumers would not pay extra to use the new debit cards to buy goods at retailers. Priceless!

SAVE THE DATE

2008 PARTNERSHIP CONFERENCE

When: **September 22 - 24, 2008**

Where: **Albany Marriott**
189 Wolf Road
Albany, New York 12205

New ALJs Hired

On February 28, 2008, SSA Commissioner Astrue announced the hiring of 144 new ALJs. According to Astrue, a total of 175 new ALJs will be hired this year. The new ALJs will be brought on board in phases, with the first hires starting in April. Astrue hopes that these new judges will help reduce the backlog of cases pending at ODAR (Office of Disability Adjudication and Review). SSA's press release announcing the hiring is available as DAP #481.

REGULATIONS

Attorney Advisor Program Here to Stay

In the September *Disability Law News*, we told you that SSA issued interim final regulations on using attorney advisors, a concept very familiar to the more seasoned DAP advocates among us. Now, SSA has adopted those interim regulations as final. 73 Fed. Reg. 11349 (March 3, 2008).

The final rule permits "certain attorney advisors to conduct certain prehearing proceedings, and where the documentary record developed as a result of these proceedings warrants, issue decisions that are wholly favorable to the parties to the hearing. . . ." The rule became effective upon publication on March 3, 2008.

The Attorney Advisor program was given a trial several years ago, and put on ice but the implementing regulations, 20 C.F.R. §§404.942 & 416.1442, remain in the regulations, albeit with an express sunset provision of April 2, 2001.

"Attorney advisors have performed these duties in the past. In June 1995, we announced final rules establishing the attorney advisor program for a limited period of 2 years. The program's success prompted us to extend the program several times, until it finally ended in April 2001." The sunset now is August 10, 2009, "unless we terminate them earlier or extend them beyond that date by notice of a final rule in the Federal Register."

In the past, advocates found that attorney advisors were an effective tool in moving appropriate cases to on-the-record favorable decisions. We have already heard from advocates that the new crop of attorney advisors seem to be performing well. Let us know about your experience with these attorney advisor decisions.

Compassionate Allowances Hearings Continue

Announced in the February 28, 2008 Federal Register, 73 Fed. Reg. 10715, the Social Security Administration's Compassionate Allowances program continues with the scheduling of a second public hearing on April 7, 2008 between 8:45 a.m. and 5:30 p.m. in Boston, MA. The hearing will be held at the Broad Institute Auditorium of the Massachusetts Institute of Technology, Cambridge, MA. While the public is welcome to attend the hearing, only invited witnesses will present testimony. You may also watch the proceedings live via webcast beginning at 9 a.m. You may access the webcast link for the hearing on the Social Security Administration Web page at http://www.socialsecurity.gov/compassionateallowances/hearings0407.htm .

"The purpose of this hearing is to obtain your views about the advisability and possible methods of identifying and implementing compassionate allowances for children and adults with cancers. Our first hearing, on December 4-5, 2007, dealt with rare diseases. We will address other kinds of medical conditions in later hearings. . . . This notice constitutes a limited reopening of the comment period with respect to children and adults with cancers, as well as topics covered at the hearing on April 7, 2008."

The standard being pursued with this program, or "method," as the Administration describes it, is "to quickly identify diseases and other serious medical conditions that obviously meet the definition of disability under the Social Security Act (the Act) and can be identified with minimal objective medical information."

Exempt Benefits Not So Exempt?

Controversies over supposedly exempt Social Security and Supplemental Security Income (SSI) benefits continue to be in the news. As reported in recent editions of the *Disability Law News* (*see* the May and November 2007 editions, available at www.empirejustice.org,), benefits that should be exempt from creditors under 42 U.S.C. §407 are frequently seized under various creditor schemes. The latest one to come to light involves the use of so-called "pay day loan" agreements.

According to a recent front page article in the *Wall Street Journal*, pay day loan lenders have been targeting elderly and disabled recipients of SSD and SSI, since the lenders can be confident that they will have income every month. The lenders have forged arrangements with banks, under which the SSD and SSI beneficiaries have their checks directly deposited into accounts from which the banks automatically deduct the loan repayments, plus interest and fees, before the beneficiaries get access to their checks. Some of these loans have effective annual interest rates as high as 400%. The article, which includes many poignant stories of beneficiaries struggling to get out from under these schemes, is available on Empire Justice's on-line resource center as DAP #482.

There are efforts under way to bolster the effectiveness of the exemption protections. In previous editions, we have reported on *Mayers v. New York Community Bancorp, Inc.*, 2005 WL 2105810 (E.D.N.Y.2005), the bank restraint case in which sections of the CPLR were challenged on constitutional grounds. Johnson Tyler of South Brooklyn Legal Services (SBLS) reports that *Mayers* is very much alive. According to Johnson, *Mayers* was brought against North Fork Bank (NFB), Bank of America (BOA), and other banks that settled out of the case. To avoid mootness, a class action called *Sims* was filed against Bank of America in September 2006 by attorneys at the New York Legal Assistance Group (NYLAG). *Sims* and *Mayers* were consolidated in November 2007 for discovery issues. NYLAG is doing discovery on BOA, while SBLS and NYLAG are doing discovery on NFB. Plaintiffs hope to file a motion for summary judgment in *Mayers* this summer. NYLAG will be filing the same in *Sims* at about the same time.

On the legislative front, a bill was introduced last year in the New York State legislature by Assemblywoman Helene Weinstein, Senator Volker and others that is modeled on a Connecticut statute. It offers more protection to debtors with exempt funds, primarily by protecting from restraint the first $2,500 in an account that contains directly deposited exempt money. Thanks to the hard work of members of New Yorkers for Responsible Lending (NYRL) and others, the bill (A.8527 /S.6203) made it through both the Assembly Judiciary and Codes committees without any negative vote or any comment. The text of the bill and a bill summary are available at http://assembly.state.ny.us/leg/?bn=A08527.

The bill passed the Assembly on June 21, 2007, just prior to adjournment, but was not brought to vote in the Senate. It passed the Assembly again on March 3, 2008. Advocates are working hard to bring it to a positive vote in the Senate this session. If you have clients willing to share their stories, or would like to join the grassroots efforts to get this bill passed, please contact Kirsten Keefe at kkeefe@empirejustice.org.

SSI Issues: Cars, Bikes and Overpayments

Nobody said it would be easy for our clients once we got them Supplemental Security Income (SSI) benefits. Seemingly arcane income and resources rules abound in SSA's world, enough to keep recipients and advocates scratching their heads! So when is a car a gift, or a Harley Davidson a resource, or how is an overpayment valued? These are a few questions that were addressed on the DAP list serve and are reproduced here for your reading pleasure.

Recently a question arose as to how the gift of a car from an SSI recipient's father would affect SSI benefits. The answer to this question can be found at 20 C.F.R. §416.1218 and POMS Section SI 00830.520 - Gifts. A gift is defined as something a person receives that is not repayment for goods or services the person provided and is not being given as a legal obligation on the giver's part. Also, it must be given irrevocably.

A gift is considered unearned income and is subject to the general rules pertaining to income and income exclusions. The value of any noncash item, other than food or shelter, is not income if the item would become a partially or totally excluded nonliquid resource if it was retained in the month after the month of receipt. The value of one car of any value is totally excluded from resources as long as the car is used for transportation by the individual or member of the individual's household. Other vehicles are considered to be non-liquid resources. The individual's equity in the other automobiles is counted as a resource. The father may also pay for insurance on the automobile as long as he pays for the policy directly to the insurer.

A representative payee may use a large retroactive benefit payment for the purchase of or down payment on an automobile as long as it is used for the SSI recipient and is owned by the SSI recipient. And the representative payee may use some of the retroactive money for monthly payments on the automobile. A gift received as the result of a death is a death benefit and is addressed in POMS Section SI 00830.545. Thanks to Penny Vulcan of Nassau Suffolk Law Services for answering this question.

Now about that Harley Davidson…as noted above, the value of one car is totally excluded from resources if it's used for work transportation by someone in the SSI recipient's family. Now what if the mode of transportation is a motorcycle? According to the regulations, the term automobile includes, in addition to passenger cars, other vehicles used to provide necessary transportation. 20 C.F.R. §416.1218(a). So far, so good. But for some reason, the good folks at the Corning District Office cannot believe that someone would drive a motorcycle year round in the Southern Tier, so they are counting the hog as a resource. This one has not yet been resolved, but Ellen Heidrick of LAW-NY in Bath is gearing up for a fight. We'll keep you posted.

And lastly, isn't there a rule that says if the resources that cause an SSI overpayment are of lesser value than the overpaid amount, SSI is supposed to use the lesser amount, i.e., the value of the resource, as the overpayment? Yes, there is such a rule and our good friend Cathy Roberts, now an Empire Justice Center paralegal specializing in health care, gave us chapter and verse. POMS SI 02260.025C.3 Policy - SSI Overpayment Waiver - Against Equity and Good Conscience , Excess resource Rules:

> Waiver policy for SSI overpayments created because of excess resources involves the standard waiver rules and two unique waiver rules that are *only* applicable to overpayments which are the result of excess. If an overpayment is caused solely by excess resources, find "at fault" only if the individual "willfully and knowingly" failed to report excess resources. All or part of an SSI overpayment due to excess resources can be waived if one or more of the following waiver rules apply.
>
> Rule 3
>
> The individual is without fault **and** it is against equity and good conscience to recover the *full* amount of the overpayment because the total overpayment is greater than the amount by which the resources exceeded the resource limit. This is explained in SI 02260.025D.

Who knew that SSI income and resources rules could be so fascinating!

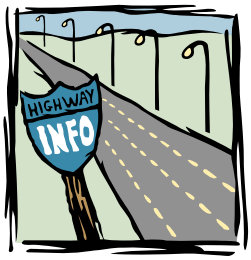
GAO Studies Effect of Reforms on DIB

The Government Accountability Office (GAO) recently released a report on how various Social Security "solvency" reform proposals would affect disability benefits. According to the GAO, most discussion of various proposals has focused on the impact of reforms on retirement benefits. The GAO acknowledged that disability beneficiaries, however, may have fewer alternative sources of income than traditional retirees.

The GAO's study used micro simulation models to analyze the effect of various proposals. It predicted that the reform elements studied would reduce median lifetime benefits for disabled workers by up to 27 percent and dependents by up to 30 percent of currently scheduled levels. The GAO cautioned Congress to consider the potential implications of reform on disability and dependent beneficiaries.

GAO-08-26 is available at http://www.gao.gov/new.items/d0826.pdf.

Apply On-line



Starting December 22, 2007, Social Security began allowing a claimant who has been denied at the initial level to appeal electronically. For some time now, claimants have been able to file the Disability Report-Appeal (Form SSA-3441-BK) electronically. Now, the Request For Hearing by ALJ (Form HA-501-U5) can also be filed electronically. SSA's description of the process can be found at: http://www.ssa.gov/d&s1.htm. Some claims representatives are encouraging use of electronic filing, noting that it cuts their processing time significantly. And given the outrageous waiting times claimants requesting hearings face, every little bit helps.

Thanks to Greg Phillips of Segar & Sciortino in Rochester for passing this on. As Greg reminds us, quoting Homer Simpson, "Oh, they have internet on computers now?!?"

SSI Break-Even Deeming Chart Available

The 2008 version of the SSI "Break-Even" Deeming chart for is now available at www.empirejustice.org. This handy guide allows advocates to tell at a glance whether a parent's or spouse's income will make a claimant ineligible for SSI, and the extent to which it would reduce monthly benefits. Remember that this chart only takes into consideration the federal benefit rate, not the New York state supplement.

COURT DECISIONS

Court Overrules ALJ's Second Guessing

According to U.S. District Judge Michael Telesca of the Western District, an ALJ cannot rely simply on his "own medical opinion, and his gratuitous observation that '[the claimant] is taking more narcotics than most people who are in immediate recovery from surgery,'" to override the opinion of a treating physician. In reversing the ALJ's decision and remanding the claim for the calculation of benefits, the Court found that the treating physician's opinion should have been accorded controlling weight.

The claimant, who suffers from back, neck and shoulder pain, had been denied at Step five of the Sequential Evaluation. Her treating physician, a board-certified physiatrist, had repeatedly indicated that she is totally disabled, but the ALJ gave his opinion "little weight." Judge Telesca, however, refuted the ALJ's various rationale, pointing out the physician had a lengthy relationship with the claimant and had carefully monitored her medication. He found that the ALJ had ignored substantial objective evidence of record supporting the physician's opinion and had misapplied the criteria of the treating physician rule. He specifically noted the ALJ's error in criticizing the physician for not sending the claimant for additional tests or to other specialists, holding that "it is not within the province of the ALJ to decide when and how often a treating physician needs to 'retest' a patient who is already being treated, presumably appropriately from the perspective of the physician, for chronic complaints."

Judge Telesca also criticized the ALJ's credibility assessment. He found it particularly egregious that the ALJ "second-guessed" whether or not the claimant needed a cane, when it had specifically been prescribed because of her history of falling. He also held that the fact that the doctor had discussed the claimant's disability claim with her was irrelevant, noting "that a doctor naturally advocates his patient's cause is not a good reason to reject his opinion as a treating physician."

Finally, citing *Smolen v. Chater*, 80 F.3d 1273, 1281-82 (9th Cir.1996), Judge Telesca held that "[a]bsent evidence of malingering, the ALJ is required to accept the claimant's testimony." Again relying on *Smolen* and 20 C.F.R. §416.929, he found that the claimant met her burden of producing objective medical evidence of one or more impairments, and showing that the impairment or combination of impairments could reasonably be expected to produce some degree of symptom. The ALJ inappropriately chose to reject evidence of her subjective symptoms. Judge Telesca also held that the ALJ's reference to the fact that the claimant had been on welfare in conjunction with assessing credibility showed "a shocking distrust of the plaintiff and her motivations," and was not legally supportable.

The claimant was ably represented at the administrative level by Jody Davis of Legal Assistance of the Fingers Lakes, a division of LAWNY, and in federal court by Kate Callery of the Empire Justice Center. Judge Telesca's decision in *Goldthrite v. Astrue* is available as DAP #483.

Judge Munson Remands, Retires

The Chief Judge of the United States District Court for the Northern District of New York recently announced that former Chief Judge Howard Munson retired from the Northern District bench effective January 31, 2008. Long-time Northern District practitioners will remember Judge Munson, who was appointed to the bench in 1976 by President Gerald Ford, as a unique personality and a real workhorse in the busy District Court. Under his leadership, the Northern District bench grew from two to five active Judges, and from one to five active Magistrates.

Shortly before his retirement, Judge Munson issued a decision in one of Chris Cadin's cases, *Sanchez v. Commissioner of SSA*. Judge Munson agreed with Chris's arguments that the Commissioner erred in failing to consider non-exertional impairments (mental impairments) when determining residual functional capacity (RFC). Judge Munson also agreed that the ALJ erred in finding that the plaintiff, with IQ scores between 52 and 60, did not meet Listing 12.05. Judge Munson ordered a remand to develop these issues, as well as to elicit vocational expert testimony since it was erroneous for the ALJ to apply the Grid rules in a case such as this with non-exertional impairments.

We're guessing that Chris will miss Judge Munson after getting such a good decision from him, which is available as DAP #484. Congratulations to Chris and best wishes to Judge Munson for a healthy and successful retirement.

Regular Mail Not Entitled to Strong Presumption of Receipt

In a case seeking review of an order of the Board of Immigration Appeals (BIA), the Second Circuit laid down principles that may be very applicable in our Social Security cases. The Second Circuit held that the BIA improperly applied a strong presumption of receipt of a notice that was sent by regular mail. The Court noted that although some presumption of receipt applies to mail sent by regular mail, the presumption is less stringent than that for mail sent certified.

In *Silva v. Mukasey*, --F.3d--, 2008 WL 451148 (2d Cir. Feb. 21, 2008), decided by the Second Circuit on February 21, 2008, the Court remanded the case back to the BIA to apply a less stringent standard in determining whether a notice sent by regular mail was received. The BIA had erroneously applied a stringent presumption of delivery standard that was more appropriate for delivery by certified mail. When the petitioner failed to meet that standard by submitting only an affidavit ("a bare claim of non-receipt") as opposed to documentary evidence from the Postal Service of affidavits from third parties, the Court held that the BIA had abused its discretion.

Since our Social Security claimants receive all their notices by regular mail, and routinely advise us that they did not receive notices that SSA alleges to have sent, this case should give a great deal of guidance to the agency and to District Courts in determining whether a claim can go forward.

New York's First Department Hands Refugees a Victory

On January 17, 2008 the New York Appellate Division, First Department, in a split decision of three to two, held that New York residents who are lawfully residing in the United States and who are elderly, blind or disabled, "...are entitled to receive public assistance in the amounts defined in Social Services Law (SSL) §209.2 as 'the standard of monthly need' or minimum levels deemed necessary by the Legislature for their adequate support." This ruling means that these elderly and disabled, lawfully residing immigrants who are ineligible for Supplemental Security Income (SSI) solely because of their immigration status must be provided with public assistance at the SSI related standard of need, rather than assistance at the significantly lower welfare standard. *Khrahpunskiy v. Doar*, 2008 NY Slip Op 351; 2008 N.Y. App.Div. LEXIS 316.

The Appellate Division affirmed Judge Jane Solomon's August 2005 lower court decision. *Khranpuskiy v. Doar*, 9 Misc.3d 1109, 806 N.Y.S.2d 445 (Sup.Ct., 2005). Both rulings confirm that New York cannot rely on the exclusion of elderly, blind and disabled immigrants from benefits under the SSI program to deny them higher public assistance benefits that are otherwise available to similarly aged or disabled U.S. citizens.

The facts of the *Khrapunskiy* case were never in dispute. The members of the plaintiff class are refugees and asylees who lost their SSI benefits because they reached the seven year federal time limit for receiving such benefits. The class also included lawfully residing immigrants who were never eligible for SSI because of their immigration status. Plaintiffs are all elderly, blind or disabled. Under the provisions of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PROWRA), no immigrant who enters the U.S. on or after August 22, 1996 is eligible for SSI benefits unless (s)he naturalizes, is a lawful permanent resident who can be credited with 40 qualifying quarters in the Social Security system, or is an active duty service members or honorably discharged veterans or their immediate dependents. The only exceptions to this exclusion from the SSI program are refugees and asylees and other humanitarian based immigrants. However, their eligibility for SSI only lasts during the first seven years after their entry into the U.S. in a humanitarian based classification. *See* 8 U.S.C. §§1612(a)(2)(A)-(H). If they have not become citizens by that time, they lose their benefits.

Beginning in 2003, thousands of elderly and disabled refugees and asylees who had been unable to complete the lengthy citizenship process began losing their SSI benefits. Advocates have searched, and continue to search, for a variety of solutions to this exclusion of elderly, blind and disabled immigrants from the main federal assistance program otherwise designed to support this particularly vulnerable segment of the low income population. Some states have enacted state replacement programs. Federal legislative proposals for the extension of the SSI eligibility of humanitarian based immigrants from seven to nine years have regularly been introduced. To date however, these proposals have not been successful.

In New York, in addition to supporting legislative solutions, advocates brought the *Khrapunskiy* lawsuit. Here, elderly, blind and disabled immigrants lawfully residing in the U.S. but excluded from SSI eligibility are eligible for public assistance. However, the welfare benefit standards are substantially below what an SSI recipient would receive through the federal benefit grant and the State supplement. State supplementation of the SSI grant is designed to achieve a benefit level minimally adequate for the support of the elderly, blind or disabled and is based on the State Legislature's annual adjustment of the "standard of need" set out in SSL §209.2. Relying on this standard of need for aged, blind and disabled persons, the *Khrapusnskiy* lawsuit argues that the State must provide assistance at that standard to lawful aged, blind and disabled immigrants who are ineligible for SSI solely because of their immigration status. Plaintiffs argue that this is required both by New York State's obligation under Article XVII, Section 1 of the state's constitution to provide "aid and care to the needy," and by the state and federal Equal Protection guarantee that prohibits New York from making distinctions in the level of benefits it considers adequate for the support of elderly, blind and disabled people based solely on immigration status.

New York State has filed a notice of appeal in this

(Continued on page 11)

ALJ's Gratuitous Comment Criticized by Court

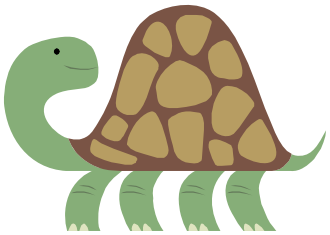
Too often, our clients are subjected to insulting and judgmental comments from ALJs. Judge Michael Telesca of the Western District of New York recently took an ALJ to task for such behavior. In remanding a case for further development as to whether or not the claimant's mental impairments were severe, the Court cited the ALJ's comments regarding the claimant's reliance on "welfare." The ALJ wrote that "[w]elfare provides for her, her mother relieved her of her child raising responsibilities….It appears that the claimant is content with her life and has no motivation to change."

Judge Telesca wrote:

> While the record is certainly susceptible to this or any other number of alternative interpretations, including a determination that because plaintiff suffers from a mental impairment, she is incapable of demonstrating responsible behavior, the ALJ's supposition was gratuitous, and not germane to the determination of whether or not plaintiff is eligible to receive disability or supplement security benefits.

Hear, hear! Judge Telesca's decision in *Gaylord v. Barnhart* is available as DAP #485.

Justice Delayed?



SSA's Office of Adjudication and Review (ODAR) is not the only bottle neck for Social Security appeals. As advocates know all too well, claimants can also wait inordinate amounts of time for decisions from the federal district courts. A recent article in Law.com confirms our suspicions about these delays. Data from the Administrative Office of the U.S. Courts shows that as of March 2007, 13 judges had at least 100 civil cases pending for longer than three years, and 22 judges had 50-plus motions pending for six months or more. A handful had more than 100 motions and more than 200 cases pending.

The article acknowledged that there are many reasons why this backlog has developed. The judges have complained that these statistics do not distinguish between individual cases and complicated, multi-district class actions. One judge in Minnesota, for example, only had three motions pending in prior reports, but was then deluged by lawsuits following a train derailment in his district.

The lists of the "slowest" judges, including several from New York, by number of pending cases and pending motions, is available at http://www.law.com/jsp/LawArticlePC.jsp?id=1200650742999.

(Continued from page 10)

case and is entitled to an automatic stay. However, plaintiffs' counsel can seek partial vacating of the stay for class members facing eviction or utility cut-off..

In New York City, advocates can contact either Jennifer Baum of the Legal Aid Society at (212) 577-3266 or jbaum@legal-aid.org or Jane Stevens of the New York Legal Assistance Group at (212) 613-5031 or jstevens@nylag.org. Outside of New York City, advocates should contact Barbara Weiner of the Empire Justice Center at (518) 462-6831, ex. 14, or bweiner@empirejustice.org. Thanks to Barbara Weiner for this excellent summary of this important litigation.

ADMINISTRATIVE DECISIONS

Claim Approved Nine Years and Three Hearings Later

What would a *Disability Law News* be without a recounting of one of Buffalo Bruce Caulfield's victories? Bruce, a paralegal at Neighborhood Legal Services, has triumphed yet again in a case that he estimates took only 85 hours and 35 minutes, spread out over the last nine years!

Bruce's client had been approved for benefits as a child in 1994 following an ALJ hearing. Bruce began representing her in 1998, when her benefits were discontinued pursuant to a Continuing Disability Review (CDR) reconsideration, which was upheld by an Administrative Law Judge (ALJ) in 1999. In 2002, the Appeals Council remanded the claim, which by then had morphed into an adult psychiatric claim as well as a childhood CDR based on borderline intellectual functioning, learning disabilities and depression, including suicidal gestures as a child. Both claims were denied by a different ALJ in 2003, but remanded again by the Appeals Council in 2005. In 2006, that same ALJ approved the claim, but with an onset date of January 2006.

Needless to say, Bruce returned to the Appeals Council, pointing out, among other things, that the ALJ had rejected the opinion of the treating psychiatrist as to disability in 2003, yet relied upon the opinion of the same doctor for finding disability in 2006. The ALJ had also rejected treatment notes and records from the treating sources, claiming that they were an amalgam of different hand writing styles, and therefore could not represent the opinion of the psychiatrist, the only person, according to the ALJ, whose opinion should be accorded weight. Bruce produced a letter from the treatment center explaining its treatment team approach and indicating that the psychiatrist read all the assessment and other clinical documents compiled by the members of the team, thus giving them validation. Bruce also relied on Social Security Ruling (SSR) 06-03p, which requires adjudicators to take the opinions of members of such treatment teams into consideration.

The Appeals Council agreed, and remanded the claim to a different ALJ. Ironically, it was assigned to the very ALJ who had granted benefits in the first place in 1994. He was persuaded by Bruce and the evidence that Bruce developed that the claimant had remained disabled as a child, since her condition was functionally equivalent to a listed impairment in that she had marked limitations in two domains. He also agreed that she continued to be disabled as an adult, in light of her diminished mental residual functional capacity. He found the claimant disabled from June 1997 to January 2006, and continuing.

Kudos to Bruce for his perseverance, and, always, for his uncanny ability to uncover just the right evidence to win his cases.

Claimant Finally Prevails at Third Hearing

We have previously reported on these pages that the third time is the charm. Unfortunately for the claimants who are subjected to that many hearings - and the years of waiting in between - that is too often true. Kate Callery of the Empire Justice Center in Rochester reports a recent victory in a case that began in 1999, and went to the Appeals Council two times before the claimant was finally found disabled. But Kate is happy to report that the claimant was not only found disabled for SSI benefits as of the date of her application; she was also found disabled as of her 22nd birthday in 1982, and thus eligible for Child Disability Benefits (CDB – formerly known as DAC, or Disabled Adult Child benefits). And the third ALJ had the decency to grant the claim on the record!

The claimant had previously received SSI benefits based on her seizure disorder. She had not appealed her continuing disability review, but had instead reapplied in 1999. At the time of first two hearings, her seizures were under control. She was of borderline intelligence and was treated for depression. None of these impairments alone, however, were convincingly disabling. She was also volunteering one day a week at a nursing home. Despite significant accommodations to maintain even that position, the first ALJ made much of her so-called work-activity.

Kate obtained evidence from the claimant's supervisors at her volunteer "job" about her need for support, as well as her emotional lability and unusual affect. She was frequently tearful and displayed dramatic mood swings. Kate also sought corroborating evidence from the claimant's case manager. Finally, she obtained evaluations from the claimant's long-time therapist, co-signed by the treating psychiatrist – a challenge even more daunting than usual as he had just left the mental health agency!

Most significantly, Kate persuaded the therapist and psychiatrist to submit a report opining that the claimant's long-term epilepsy had affected her emotional control, citing journal articles confirming this association between epilepsy and cognitive, emotional and behavioral changes. They noted that the claimant had been and continued to be very labile, in ways that seriously interfere with her ability to function. In their opinion, her emotional lability clearly would prevent her from engaging in competitive work.

That report undoubtedly convinced the ALJ that the claimant's impairments were real. He found her disabled based on her nonexertional limitations. Kate reports that the time and effort spent on this unusual case were well worth the effort, as the claimant will be eligible for significant retroactive SSI benefits, as well as Title II benefits under her deceased father's account.

"Iffy" Case Succeeds

As the case summaries reported on these pages usually demonstrate, it is the extra digging by advocates before the hearing that can turn an "iffy" case into a winner. Paul Ryther, private practitioner and well-known denizen of the DAP listserv, reports just such a victory.

Paul's client was a younger individual with past relevant work as a security system monitor. (Apparently there really are some of those jobs out there; they are not just a figment of our favorite vocational experts' imaginations.) She had, however, earned under the substantial gainful activity threshold. She was quite limited by her multiple sclerosis and irritable bowel syndrome - serious problems that are often hard to translate into successful disability claims due in part to their intermittent nature.

Paul managed to get documentation from the claimant's employer, describing the limitations of her particular job and the problems she had performing it. At the hearing, the VE testified to various jobs that she could perform. Based on this new evidence, however, Paul managed to fashion a hypothetical question that produced no jobs. The result? A fully favorable decision for the claimant!

When Is An Application Subsequent and Not Duplicate?

Every advocate's worse nightmare is to get a remand from the Appeals Council that reopens a subsequent favorable decision. Katie Courtney of the Empire Justice Center in Rochester, however, was recently able to undo such a nightmare.

Katie's client had filed an appeal *pro se* after her Childhood SSI benefits were terminated when she turned 19 years old. The appeal languished for so long at the Appeals Council that the claimant forgot about it. Eight years later, in 2005, she filed a new application, which was approved. She came to Katie in 2007, confused because she had been contacted by ODAR notifying her that a hearing was to be scheduled in her case. What case, she asked? It turns out that in November of 2007, the Appeals Council finally got around to reviewing and remanding the original appeal of her termination.

In the process of remanding the old claim, however, the Appeals Council determined that the claimant's subsequent application was a "duplicate" application. What is a duplicate application, you may ask? A "duplicate application" is one that is filed for the same benefit or same period of disability for which a previous claim has already been filed. See POMS GN 00204.028. It is the Field Office's duty to determine whether or not the second application is a duplicate. According to the language in POMS, only Title II claims can be a duplicate. SSI applications can only be subsequent claims, since any SSI application by definition can relate back only to the date of the application.

Katie justifiably feared that the Appeals Council's Order meant that the new, favorable determination was subject to review by the ALJ in conjunction with the remand. She wisely contacted the Appeals Council for clarification, arguing that the claimant's subsequent application was not a "duplicate." As Katie pointed out to the Appeals Council, her client's new – or subsequent – application was for SSI only. She was only awarded benefits as of the date of application in 2005. The decision in no way invaded the period ruled on by the ALJ in the pending appeal. She argued that the Appeals Council was without authority to disturb the subsequent allowance. The Appeals Council agreed. It amended its order, finding that it had no basis to reopen the "subsequent" claim for SSI filed in 2005, and therefore affirmed it.

As Katie reminded the Appeals Council, it is now well established that an individual may file a new disability application after an ALJ's unfavorable decision. POMS GN 03106.090. HALLEX provisions, however, specifically limit a favorable determination on the subsequent claim made while the request for review of the hearing decision in the prior claim is pending to the period beginning the day after the date of the ALJ's decision on the prior claim. HALLEX I-5-3-17 §I.A. HALLEX I-5-3-17 provides a step-by-step process for the Appeals Council to follow when dealing with subsequent determinations, favorable and unfavorable, when an appeal is pending. Note, however, that this section specifically does not apply to "duplicate" claims. See HALLEX I-5-3-17 §I.A ("These instructions do not apply to subsequent claims that are duplicate to prior claims that have previously been adjudicated (e.g., a claim for Title II disability benefits in which the date last insured expired before the Administrative Law Judge's (ALJ's) decision on the prior application for the same benefits)"). Just to confuse things even more, see HALLEX I-5-3-17 §III.B.2, which provides that the effect of the Appeals Council's action in adopting a subsequent allowance may render the subsequent application duplicate!

In terms of reviewing subsequent – but not duplicate – applications, HALLEX provides that the Appeals Council is bound by the reopening regulations at 20 CFR §§404.987-989 and 416.1487-1489. The most common situation in which the Appeals Council will review and reopen a subsequent, favorable determination is if it is within 12 months of the date of the notice of the initial determination on the subsequent claim. In such situations, the Appeals Council can consider if there is any new and material evidence relating to the prior claim. The danger is that it can also decide that the subsequent favorable decision was incorrect.

In all other situations, the Appeals Council review of the subsequent application is limited to the time limits and good cause requirements of 20 CFR §§404.988 and 416.1488. If there is no basis for reopening, the subsequent allowance may be referenced but may not be disturbed by the Appeals Council. HALLEX (TI) I-5-3-17. If the AC remand order is silent on the subsequent allowance, then the ALJ may determine if the subsequent allowance should be reopened in accordance with the applicable regulations. HALLEX (TI) I-5-1-3-17 Section III, B.2.

(Continued on page 15)

Does Drug Use Affect HIV Status?

A recent study by published in the journal *Drug and Alcohol Dependence* by Chun Chao, Ph. D., and colleagues of the department of epidemiology at Jonsson Comprehensive Cancer Center at the University of California at Los Angeles, concluded that the use of recreational drugs, like marijuana and cocaine, by persons with AIDS or HIV disease appeared to have little impact on CD4 or CD8 cells. Other studies, however, have found a connection between heavy use of alcohol or drugs and poorer medication adherence and overall health and survival in people living with HIV.

According to Leslie Kline Capelle of Health Advocates, this study could be useful to refute testimony by medical experts that ongoing substance use causes a poorer response to HAART medications, thus leading to findings such as a CD4 of less than 200 being related to the substance abuse. The pattern of heavy alcohol or drug use referred to in the article as correlating with overall poor treatment adherence and health decline - while certainly problematic in a claim - should be distinguished as addiction symptoms interfering with treatment compliance, rather than the substance use itself "causing" a changed response to medications.

e-Dib Files Made Readable

As announced in the March 2007 edition of the *Disability Law News*, eDib is here to stay. Most advocates have probably received at least some files in electronic format by now. Maybe you are still printing them out - and killing forests in the process! Others of you may have begun mastering the ins and outs or reading and manipulating the files on your computers.

An article in the March 2007 newsletter, available at http://www.empirejustice.org/content.asp?contentid=2283, lays out some of the basics for reading and converting files. It includes a reference to DAP #450, an SSA tip sheet if you are having trouble viewing Tiff files (the format used by SSA). It also refers to DAP #451, a document that discusses various commercial programs such as Adobe Professional, CuriaSoft or CaseMap, which are more sophisticated software options that may be helpful to manipulate and better use the information contained in the files.

Joe Kelemen, guru of all things technical at the Western New York Law Center, also recommends a free multi page viewer available at http://www.bravaviewer.com/reader.htm.

(Continued from page 14)

The bottom line? Don't be afraid to ask the Appeals Council to clarify its order if you believe a subsequent decision was improperly reopened. Congratulations to Katie for doing exactly that in her case. And thanks to Katie for elucidating us on the subtle differences between subsequent and duplicate applications!

WEB NEWS

Going Abroad? Getting Social Security?

If the French Riviera or the Amazon rainforest calls your name and you decide to live outside the U.S., can you continue to receive Social Security benefits? Oui, si, ja and jep! If you are a U.S. citizen, you may receive your Social Security payments outside the U.S. as long as you are eligible for them. If you are a citizen of one of the countries listed at SSA's website, Social Security payments will keep coming no matter how long you stay outside the U.S., as long as you are eligible for the payments. This list of countries is subject to change from time to time. SSA has another list of countries to which it is not allowed to send payments, however.
www.socialsecurity.gov/international

Attorney General Health Care Bureau Addresses Complaints

The New York Attorney General's Health Care Bureau protects - and advocates - for the rights of all health care consumers statewide. The Bureau operates a toll-free Health Care Helpline that assists New Yorkers with individual problems; investigates and takes law enforcement actions to address systemic problems in the operation of the health care system; and proposes legislation to enhance health care quality and availability in New York State. Their number is 1-800-428-9071.
http://www.oag.state.ny.us/health/health_care.html

Looking for Cheap Drugs?

Governor Eliot Spitzer and Lieutenant Governor David A. Paterson recently announced a new state website that allows consumers to easily compare prescription drug prices for the 150 most commonly prescribed drugs at pharmacies in their neighborhoods in order to purchase needed drugs at the best possible price. The site will help consumers access more affordable prescription drugs for themselves and their families. The website searches drug prices by zip code, city, or county; provides brand-name and generic drug prices; lists pharmacies' addresses and phone numbers; and provides driving directions. It was developed and will be maintained by the NYS Department of Health.
http://rx.nyhealth.gov/pdpw/

Web Site Explains Insurance Eligibility

The Healthy NY Website has a new software program to help state residents determine if they are eligible for the health insurance program for working people. The site has separate questionnaires for individuals, sole proprietors of a business and small business owners. Each has a series of questions that help determine if users qualify.
http://www.healthyny.com

Quality Care From a Distance

A recent news poll found that 21 percent of the U.S. population has provided care for an aging parent. One nonprofit group, Caring from a Distance (CFAD), hopes to ease the stress on caregivers through its online resources. The group launched a website for caregivers who are managing the needs of loved ones who live some distance away. The website utilizes a range of communication and social networking technology to reduce caregiver stress through improved family communication. The CFAD website features tips and toolkits; a secure place to store vital information for emergencies; a Washington, D.C. metro area service directory; and access to hundreds of national resources.
www.cfad.org

CLASS ACTIONS

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

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

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

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

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

Yvonne Robinson v. HHS and Treasury, 92 Civ. 7976 (Griesa, J.) ("the missing benefits case")

Description - Class of Social Security and SSI beneficiaries sued SSA and Treasury over defects in procedures for replacing lost, stolen, or otherwise missing benefits payments. Plaintiffs allege that replacement requests languish for years and that the government fails to provide adequate hearing or notice of any appeals rights.

Relief - If an individual requests replacement of a benefits check, the Government will replace the payment by issuing a "settlement check" before investigating whether the original check was cashed. If the Government later determines that the individual was not entitled to the replacement payment, it will issue an overpayment notice requesting that the individual repay the money to the Government.

If the individual did not receive and "electronic fund payment" (EFT), the Government must determine whether it has accurate direct deposit data. If the bank routing number is accurate, the Government must follow up with the bank to ensure transmittal of the original EFT payment. If the bank routing number is inaccurate, SSA will promptly instruct the DOT to issue a replacement payment. If the bank routing number is accurate, but the individual's number is inaccurate, SSA will first try to correct the problem but will replace the payment within 30 days.

Citations - The District court for S.D.N.Y. approved a final settlement in *Robinson v. Chater and Rubin*, 92 CV-7976 (S.D.N.Y.) (TPG), in June 1997.

Information - Ann Biddle, Legal Services for the Elderly (646-442-3302). abiddle@lsny.org

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

Could It Be SPD?

Many of us have known - or maybe even were - among the seemingly numerous children who could not stand to have seams in their socks or labels in their clothes. Studies have shown that 40% of children aged seven to ten are this sensitive to touch. But do they have a medical disorder? Researchers at places like the Sensory Therapies and Research (STAR) Center in Colorado might say yes, identifying those with extreme cases as children with sensory processing disorders (SPD).

SPD is not a disorder recognized in the American Psychiatric Association's bible - the *Diagnostic Statistical Manual -IV- Text Revision (DSM-IV-TR).* According to an article in November 29, 2007 edition of *Time* magazine, however, occupational therapists have long recognized and treated this disorder. In 1972, A. Jean Ayres, a UCLA psychologist and occupational therapist, published the first book on the condition, also known as sensory integration dysfunction. Defined as "mixed bag of syndromes," it involves difficulty handling information that comes in through the senses, including proprioceptive (pertaining to ability to sense the position and location and orientation and movement of the body and its parts) and vestibular senses, as well as hearing, sight, smell, taste and touch.

Kids treated for SPD at the STAR Center present with a variety of problems, ranging from those with low muscle tone and minimal ability to respond socially, to those who are too responsive, crashing into others or hugging them too hard. Some can't handle noises or clothing against their skin; some seem overly clumsy. Others can't handle certain types of foods or textures. But they don't quite fit the criteria for disorders such as ADHD (Attention Deficit Hyperactivity Disorder) or autism. In other circumstances, they might be labeled losers, loners, klutzes or troublemakers.

Lucy Jane Miller, a former protégé of Ayers and head of the STAR Center, is trying to get SPD included in the fifth edition of the *DSM*. Without official recognition, researchers have more difficulty winning grant money, and families have trouble getting reimbursed for treatment or finding accommodations for their children at school. Others, including Alice Carter, professor of psychology at the University of Massachusetts, Boston, think SPD is too vague to be included in the *DSM* at this point, but advocates for classifying it in the manual as a disorder that warrants further study, with the prospect of including it in *DSM-VI*, whose anticipated publication is 2025.

The article, entitled *The Next Attention Deficit Disorder*, is available at http://www.time.com/time/magazine/article/0,9171,1689216,00.html.

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Contact Us!

Advocates can contact the DAP Support attorneys at:

Louise Tarantino
(800) 635-0355
(518) 462-6831
ltarantino@empirejustice.org

Kate Callery
(800) 724-0490 ext. 5727
(585) 295-5727
kcallery@empirejustice.org

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

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

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