Empire Justice Center

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DISABILITY LAW NEWS

SSA Issues Disability Redesign Regulations

In what may be record time between the publication of proposed and final regulations, SSA Commissioner Jo Anne B. Barnhart has announced the final rule establishing a new disability determination process. It was published in the Federal Register on Friday, March 31, 2006. 71 Fed. Reg. 16424 (Mar. 31, 2006). The final regulations also can be obtained on the Federal Register web site: www.gpoaccess.gov/fr. For additional information from SSA, see: http://www.socialsecurity.gov/disability-new-approach/.

Nearly 900 comments were received in response to the July 27, 2005 proposed rule ("NPRM"). (See the September 2005 edition of the *Disability Law News* for a discussion of the proposed rule.) Some changes that will be helpful to claimants have been made in light of these comments. This article, which was prepared by the National Organization of Social Security Claimants Representatives (NOSSCR), provides very brief highlights of some key provisions that will impact claimants and their representatives.

Implementation. The new regulations are effective August 1, 2006. They will apply only to those cases that are processed under the new regulations from the time of application. But the changes will be rolled out gradually, on a region-by-region basis. The first region is Region I (Boston), which includes these states: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. This is considered a "small" region and will be the only location for at least one year. If a claimant moves, SSA will follow the process under which the claim was originally filed.

The new process. The final rule establishes a new 20 C.F.R., Part 405, which governs the process and consists of these levels:

- Initial determination (including "Quick Disability Decision," if appropriate) by state agency
- Federal Reviewing Official
- ALJ hearing (final decision if no DRB review)
- Review by Decision Review Board (but not claimant-initiated, except for dismissals)
- Federal court

Reviewing Official (RO). If the claim is denied initially, the individual will receive a notice explaining the right to appeal within 60 days to the RO. And, for the first time, this notice also will explain the right to representation at the RO level. ROs will be attorneys who are "centrally managed." The claimant

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will be allowed to submit evidence at any time, up to the time the decision is issued. If new evidence is submitted or the RO disagrees with the DDS decision (i.e., allows), the RO will "consult" with the new Medical and Vocational Expert System (MVES), but the RO will have the final decision-making authority. The RO also will have subpoena authority.

Administrative Law Judge (ALJ). A number of changes have been made, in particular, regarding the submission of evidence. The "goal" is to receive a hearing date within 90 days of requesting a hearing. The ALJ is required to send notice 75 days before the hearing, unless the claimant agrees to a shorter time. After receiving the hearing notice, the claimant has 30 days to object to the time or place of the hearing. Objections to the issues in the hearing notice must be filed at least 5 business days before the hearing. The final regulations relax the rules for submitting evidence before and after the hearing:

- Evidence must be filed five (5) business days before the hearing date. Section 405.331(a).
- Within five business days of the hearing, the ALJ "will" accept the new evidence if the claimant shows that: (1) SSA's action misled the claimant; (2) the claimant has a physical, mental, educational, or linguistic limitation; or (3) some other "unusual, unexpected, or unavoidable circumstance beyond the claimant's control" prevented earlier filing. Section 405.331(b).
- After the hearing but before the hearing decision, the ALJ "will" accept and consider new evidence if one of the three exceptions above is met and there is a "reasonable possibility" that the evidence, when considered alone or with the other evidence of record, would "affect" the outcome of the claim. Section 405.331(c).
- After the hearing decision (and if the DRB does not review the case), the ALJ "will" consider new evidence if one of the three conditions above is met and there is a "reasonable probability" that the evidence, when considered alone or with the other evidence or record, would "change" the outcome of the decision. The request must be filed within 30 days of receiving the hearing decision. Section 405.373.
- The ALJ also has the discretion, at the hearing, to hold the record open if there is outstanding evidence or the claimant is to undergo additional medical evaluation.
- There will be no requirement to submit adverse evidence. The final rule deletes the proposed regulation that required submission of all "available" evidence, including adverse evidence. The final rule does require that claimants provide evidence, without redaction, showing how their impairments affect functioning. 20 C.F.R. §§ 404.1512(c) and 416.912(c).

Decision Review Board (DRB). Much of the proposed rule regarding the DRB has been retained in the final rule. There will be no claimant-initiated appeals to the DRB, except for ALJ dismissals. However, in the preamble, SSA recognized that many commenters were very concerned about the elimination of the claimant's right to appeal and the impact on the federal courts. As a result, SSA emphasizes several points: implementation will be very gradual; the only claims affected will be those that go through the DSI process from the beginning; the Appeals Council will continue to operate in states where DSI is not implemented (for now, everywhere except Region I) and for all non-disability cases (including those in Region I).

For the initial test period in Region I, SSA will review **all** ALJ decisions, both favorable and unfavorable, in an effort to "fine-tune" the screening process. Other changes include:

- All claimants (and their representatives) will be able to file a written statement with the DRB (not just at the DRB's invitation or by asking permission). However, the statement can be no longer than "2,000 words" and must be filed within 10 days of receiving notice from the DRB or "within a certain time period" as requested by the DRB.
- Additional evidence may be submitted under the same criteria as submission of evidence

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2006 Partnership Conference Planned

The 2006 Legal Assistance Partnership Conference, co-sponsored by the New York State Bar Association Committee on Legal Aid and the Bar's Department of Pro Bono Affairs, is planned for June 5-7 in Albany. As in past years, we have scheduled an interesting array of DAP workshops.

On Monday, June 5, we will convene a *Statewide DAP Task Force* meeting from 1-3:30 pm. Please feel free to submit topics that DAP advocates would be interested in discussing at this meeting to any of the DAP support team (Louise Tarantino, Kate Callery, Barbara Samuels and Ann Biddle). We will cover the effect of the Second Circuit's decision in *Fowlkes* and the impact on the "fleeing felon" rule in New York; discuss issues related to ALJ bias and pending litigation; review logistics of the DAP program (case closing data, reports, etc.); as well as other topics.

On Tuesday June 6, we will present three DAP workshops: *AeDib: Social Security's Accelerated Electronic Disability Process*, a demonstration from SSA staff on the new electronic folder; *The More Things Change…*, a presentation by Nancy Shor of NOSSCR on the revised disability claims process and other Social Security updates; and *Children's SSI Cases: How Now Brown Cow*, with an emphasis on speech and language issues, presented by Chris Bowes, Jim Baker and Susan Conn.

For Wednesday, June 7, we have two DAP workshops planned, *ALJ Problems and Issues*, a panel on greatest hits and misses coordinated by Susan Welber and Jody Davis; and *A Heart-Warming Look at the New Cardiac Listings,* with a presentation by family nurse practitioner Ann Hirschman.

If you haven't already received your registration materials, you can find them at www.nysba.org.

We're looking forward to seeing DAP advocates from across the State at this great conference.

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after the ALJ decision (see above).

- Claimants will not receive the ALJ decision until the DRB screens it. It is expected that the DRB will screen ALJ decisions within 10 days to decide if it will review the decision. The DRB has 90 days to issue a decision after it sends notice of review to the claimant. The 90 days runs from the time that the notice of review is received by the claimant.

Reopening. In a major change from the proposed rule, the final rule keeps the current reopening rules in place for all claims adjudicated prior to the hearing level. This means that ALJs may reopen decisions at the state agency or RO level and the RO may reopen decisions at the state agency level. The only change in the final rule is at the post-ALJ decision level. Once an ALJ decision is issued and is the Commissioner's "final decision," reopening of the ALJ decision is limited to six months from the date of the decision and "new and material evidence" is not a basis for good cause.

Remember that these new provisions will NOT go into effect in New York until further notice. The regulations will only be effective in Region 1 for the next year. Only time will tell how quickly and to what extent they will be rolled out in other jurisdictions, especially larger ones such as our own Region 2. But if the speed at which these regulations moved from proposed to final is any indication of the Commissioner's interest in implementing them nationwide, look for the DRB to replace the Appeals Council here in New York in the not too distant future.

Thanks to Nancy Shor and Ethel Zelenske at NOSSCR for sharing this synopsis with us.

REGULATIONS

SSA Issues *Fowlkes* Acquiescence Ruling

The Social Security Administration (SSA) decided not to appeal the Second Circuit decision in *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005) and has issued an Acquiescence Ruling (AR). Social Security Acquiescence Ruling 06-1(2), 71 Fed. Reg. 17551 (Apr. 6, 2006). In addition, the Congressional Research Service (CRS) has issued a report on SSA's response to the *Fowlkes* decision.

The *Fowlkes* court ruled that SSA cannot suspend a Supplemental Security Income (SSI) recipient's benefits, on grounds that the recipient is fleeing to avoid prosecution for a felony, simply on the basis of an arrest warrant alone. The court held that the plain language of the statute required that there be a finding of intent and that the agency's own regulations prohibited suspending benefits until there was a warrant or order issued by a court or other appropriate tribunal based on a finding that the individual was fleeing to avoid prosecution. 42 U.S.C. § 1382(e)(4)(A); 20 C.F.R. § 416.1339(b).

The CRS report, "Social Security Administration: Suspension of Benefits for Fugitive Felons and the Agency's Response to the *Fowlkes* Decision." (April 27, 2006), briefly outlines the legislative and regulatory history and describes the *Fowlkes* opinion and the Acquiescence Ruling. The Ruling applies to Social Security Title II benefits as well as SSI and went into effect on April 6, 2006 in the Second Circuit states of New York, Connecticut and Vermont. It allows application retroactive to December 6, 2005, the date of the *Fowlkes* decision, if a person can show that the ruling would have changed the outcome of his or her case. SSA has indicated it will not follow the *Fowlkes* decision in the rest of the country where it will continue to suspend benefits on the basis of a warrant alone.

In addition, it should be noted that within the Second Circuit, the Acquiescence Ruling applies only to determinations that a person is fleeing to avoid prosecution or is fleeing to avoid custody or confinement. It does not apply to benefit suspensions or denials based on a determination that an individual is "violating a condition of probation or parole."

Practice Tip - Although the Acquiescence Ruling states it is retroactive only to December 6, 2005, advocates must remember that, given the nature of the affected population, many people who have lost their benefits may have a basis for reopening earlier determinations under SSA's general good cause regulations. 20 C.F.R. §§ 404.911 & 416.1411. Advocates might want to make special efforts to notify service providers, especially homeless service agencies and mental health providers, in their communities about the possibility of reopening these earlier cases.

Post *Fowlkes* litigation is a distinct possibility to deal with two issues not covered in the Acquiescence Ruling. First is the failure of the Ruling to cover suspensions based on "violating a condition of probation or parole." While probation and parole violation cases would not be subject to the Second Circuit's holding with respect to the statutory requirement of intent, they would fall squarely within the court's holding with respect to the agency's failure to follow 20 C.F.R. § 416.1339(b). This requires that the suspension not go into effect until after there is a warrant or order "issued by a court or other appropriate tribunal on the basis of an appropriate finding that the individual ... is violating, or has violated, a condition of his or her probation or parole." Advocates in the Second Circuit should argue that these people are also entitled to relief under *Fowlkes*.

Litigation might also be possible to reopen almost all cases going back to the beginning of 2005 when SSA adopted a policy of sending out notices that deliberately misstate the law by stating that "the law prohib-

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How Did They Find Out?

Every once in a while we get little reminders of that "how did they find out!" syndrome. Two recent computer matching programs announced by the Social Security Administration (SSA) provide such reminders.

SSA announced the renewal of an existing computer matching program that it is currently conducting with CMS (Centers for Medicaid and Medicare Services) in the March 16, 2006 Federal Register (71 Fed. Reg. 13652).

"The purpose of this matching program is to identify Supplemental Security Income (SSI) recipients and Special Veterans' Benefits (SVB) beneficiaries who have been admitted to certain public institutions. The program will thereby facilitate benefit reductions required under certain provisions of title XVI of the Social Security Act (the Act) for individuals in such institutions and benefit terminations required under certain provisions of title VIII of the Act for individuals no longer residing outside the United States." The Federal Register cite for the notice is http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/E6-3796.htm

SSA also announced in the same Federal Register an amendment to the computer matching program that it conducts with BPD [Bureau of Public Debt], which was expected to begin April 11, 2006.

The purpose of this matching program is to establish conditions under which BPD agrees to disclose to SSA ownership of savings securities to verify an individual's self-certification of eligibility for prescription drug subsidy assistance under the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA). SSA will determine whether the individual has income up to 150 percent of the Federal poverty guidelines). This agreement allows SSA to conduct the match on an annual basis.

"SSA will provide the BPD with a finder file containing Social Security Numbers (SSNs) extracted from the Medicare database, as specified in this Agreement, from the Medicare file of Part D subsidy eligibles . . . BPD will match the SSNs on the finder file with the SSNs on its savings-type securities (Series E, EE, and I) registration systems. . .SSA will then match BPD data with the Medicare Part D and Part D Subsidy File System of Record 60-0321. . . ." 71 Fed. Reg.13651, available online at http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/E6-3794.htm.

And that's how they found out!

Fowlkes Acquiescence Ruling—continued

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its us from paying SSI to individuals who have an outstanding arrest warrant for a crime which is a felony," thereby leading people to believe there was no basis for appeal. Earlier notices had tracked the statutory language. The notice language was changed shortly after lower courts issued rulings against the agency based, as in *Fowlkes*, on the plain meaning of the statutory language.

Thanks to Gerald McIntyre of the National Senior Citizens Law Center for this update on the issuance of the *Fowlkes* Acquiescence Ruling. Stay tuned for developments.

Widows & Widowers, Electronic Protective Filing Date Final Regs Issued

In what might be interpreted as SSA's effort to economize whenever possible, the agency issued two disparate rules in one Federal Register announcement and dispensed with comment periods for both rules. The final rules were effective April 27, 2006.

At 71 Fed. Reg. 24812 (April 27, 2006), SSA announced an amendment to 20 C.F.R. §404.336(e)(3), which sets forth conditions of eligibility for widow's/ widower's benefits of surviving divorced spouses of deceased wage earners. At subsection (e)(3), the regulation currently provides, "(e) You are unmarried, unless for benefits for months after 1983 you meet one of the conditions in paragraphs (e)(1) through (3) of this section: . . ." "(3) You are now at least age 50 but not yet age 60 and you meet one of the conditions in paragraphs (e)(3)(i) and (ii) of this section:

> "(i) You remarried after attaining age 50.
>
> "(ii) You met the disability requirements in paragraph (c) of this section at the time of your remarriage (i.e., your disability began within the specified time and before your remarriage)."

The amendment changes one tiny word in the subsection: "one" becomes "both," as in "(3) You are now at least age 50 but not yet age 60 and you meet both of the conditions in paragraphs (e)(3)(i) and (ii) of this section:"

SSA notes that the "[the current language] incorrectly states the conditions under which the insured person's surviving divorced spouse is deemed "unmarried" for purposes of entitlement to widow's or widower's benefits. Correcting the unintended error will restore the regulation to its longstanding substantive statement that reflects pertinent provisions of sections 202 (e)(3) and 202(f)(3) of the Act."

SSA also announced an amendment to 20 C.F.R.§ 404.630(b) to cover electronic protective filing date issues. Section 404.630 provides that "If a written statement, such as a letter, indicating your intent to claim benefits either for yourself or for another person is filed with us under the rules stated in §404.614, we will use the filing date of the written statement as the filing date of the application, so long as it meets certain requirements and is followed up timely with an actual application."

The requirement in "(b)" had been, "The statement is signed by the claimant, the claimant's spouse, or a person described in §404.612 [the regulation that sets forth "who may sign an application"]. If you telephone us and advise us that you intend to file a claim but cannot file an application before the end of the month, we will prepare and sign a written statement if it is necessary to prevent the loss of benefits."

Now, SSA covers Internet filers as well. First, as SSA explains, "Our regulations currently do not explain how we determine a claimant's application filing date when a proper applicant intends to file a benefit claim [Page 24813] and begins an Internet benefit application, but does not complete and file a signed application until a later date. Currently, if a proper applicant initially contacts us by telephone about filing an application for benefits, our documentation of that contact may constitute a protective filing in the event a completed application is timely filed after the month of the initial contact. We have decided to afford Internet filers protective filing dates like those we afford to other filers, and are revising our regulation to reflect this policy."

SSA is doing this by adding a sentence to the subsection: "If the claimant, the claimant's spouse, or a person described in Sec. 404.612 contacts us through the Internet by completing and transmitting the Personal Identification Information data on the Internet Social Security Benefit Application to us, we will use the date of the transmission as the filing date if it is necessary to prevent the loss of benefits."

But SSA is also revising the second sentence of the subsection: "If the claimant, the claimant's spouse, or a person described in Sec. 404.612 telephones us and advises us of his or her intent to file a claim but cannot file an application before the end of the month, we will prepare and sign a written statement if it is necessary to prevent the loss of benefits."

Rep Payee Survey Proposed

The Social Security Protection Act of 2004 (SSPA) authorized SSA to conduct a survey to determine how payments made to payees are managed and used on behalf of beneficiaries. SSA recently proposed a new recordkeeping system, the Representative Payee and Beneficiary Survey Data System, which is intended to fulfill the requirements of SSPA. 71 Fed. Reg. 16397 (March 31, 2006), available online at http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/E6-4666.htm.

"The proposed new system will maintain information collected during the course of a cross-sectional national survey of representative payees and a subsample of beneficiaries. The survey data in this proposed new system will be the basis for the mandated study and a subsequent report outlining the Agency's findings and recommendations for change or further review of SSA's representative payment policies. Information in this system will also be used for ongoing assessment of how payments made to representative payees are managed and used on behalf of beneficiaries."

"The proposed system of records and routine uses will become effective on April 26, 2006, unless we receive comments warranting them not to become effective." To our knowledge, no negative comments were submitted.

Digestive System Listings Extended

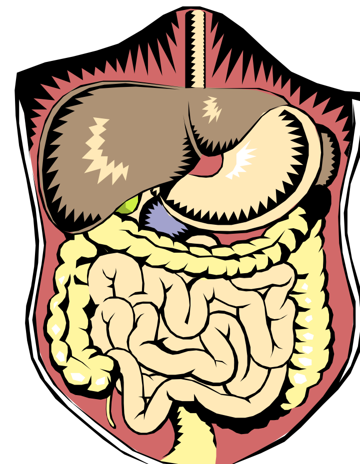
In a fairly common announcement, SSA has extended Listing that were due to expire this year. In the May 5, 2006 Federal Register (71 Fed. Reg. 26411) available online at http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/06-4242.htm, SSA is extending the expiration date, previously extended to July 3, 2006, of the current Digestive System Listings, sections 5.00 and 105.00, through July 2, 2007.

What's going on here is that SSA is working feverishly toward significantly revamped Digestive System Listings, but won't be able to complete the amendments before July 3, 2006 expiration date.

As background to SSA's current reworking of the Digestive System. In November 2001, the agency published a Notice of Proposed Rulemaking (NPRM) in the Federal Register (66 Fed. Reg. 57009) that proposed revisions to the digestive system listings.

Then, "On November 8, 2004, we published a notice providing a 60-day extension of the comment period on the NPRM for the limited purpose of accepting comments regarding chronic liver disease (69 Fed. Reg. 64702). We then held an outreach meeting in Cambridge, Massachusetts on November 14, 2004, regarding our listings for chronic liver disease. Finally, in final rules published on June 16, 2005 (68 Fed. Reg. 36911), we extended the expiration date for the digestive system listings until July 3, 2006."

Also, astute students of the Listings will remember that on April 24, 2002, SSA published final rules, entitled "Technical Revisions to Medical Criteria for Determinations of Disability" (67 Fed. Reg. 20018), which incorporated minor technical changes to the digestive listings to include references to modern imaging techniques and added listings 5.09 and 105.09 for liver transplantation.



COURT DECISIONS

Court Remands for Calculation of Benefits

Remands are nice, but remands for the calculation of benefits are even better! And that is just the result that Louise Tarantino of the Empire Justice Center got from Judge Siragusa of the Western District of New York.

The plaintiff, who was 33 at the time of his hearing, suffers from chronic pancreatitis, agorophobia, panic attacks, and back problems. He had a number of hospitalizations, including one for surgical draining of a pancreatic cyst and gallbladder removal, during which the surgeon injured his hepatic artery. He had a past history of alcohol abuse, which was no longer material to his claim. Despite treatment, in addition to his psychiatric limitations, he experienced acute abdominal pain and frequent diarrhea. His treating physician limited his physical activities, and acknowledged that his level of pain would often be severe enough to interfere with his ability to concentrate and sleep, and that it was likely he would on average be absent from work more than four days per month as a result of his impairments or treatment.

At the hearing, the plaintiff was ably represented by Ellen Heidrick of the Southern Tier Legal Services Office of LAWNY. Under her cross-examination, the vocational expert who testified at the hearing admitted that there would be no jobs that the plaintiff could perform if he were absent from work four or more days each month. The ALJ denied the claim nonetheless.

On appeal, Louise argued that the ALJ had ignored solid evidence from the plaintiff's treating sources, had erred in finding him not credible, and had ignored substantial evidence of record that he could not perform work available in the national economy. Judge Siragusa agreed on all three counts. Among other things, the court faulted the ALJ for failing to "explain in any fashion what inconsistencies he found between plaintiff's complaints and the clinical and diagnostic findings." He also relied heavily on the VE's testimony that there would be no jobs for a hypothetical claimant who would be absent from work four or more times per month to hold that reversal rather than remand was appropriate.

Congratulations to Ellen and Louise. Ellen's work reminds us how important a good record is to a successful appeal. The significant evidence of her client's pain and work restrictions that she obtained from his treating sources clearly made the difference. The decision in *Stewart v. Barnhart* is available as DAP #425 on the Empire Justice Center's on-line resource center.

Sixth Circuit Creates New Tool for Debtors?

Social Security and SSI benefits are exempt from creditors, right? Yes, according to federal statute (42 U.S.C. §407), but that does not always seem to work so well in the real world, where we frequently hear tales of seized bank accounts containing such benefits. Some courts have attempted to address the conflicts that arise when creditors seek to enforce judgments against Social Security recipients. See the September 2005 and January 2006 editions of the *Disability Law News* describing the decisions in *Mayers, et al v. New York Community Bancorp, et al* from the Eastern District of New York, and *Contact Resource Services, LLC v. Gregory,* from Rochester City Court.

The Sixth Circuit Court of Appeals has recently added a potential new tool for advocates in these cases. In *Todd v. Weltman, Weinberg & Reis Co., L.P.A.,* 434 F.3d 432, (6th Cir. 2006) (petition was rehearing *en banc* denied on April 24, 2006), the Court of Appeals ruled in favor of the judgment debtor in a case of a creditor that got a default judgment and then sought to enforce it by filing an affidavit supporting its application to attach or garnish property. Under Ohio law, the affidavit required an attestation that the creditor reasonably believes the property is not exempt from collection. While the attachment or garnishment is a later step after the freeze that we often see, this interpretation may have broader application. (New York's execution statute (CPLR §5230), however, does not have the requirement, although the creditor must at least allege that it has notified the debtor of his/her right to claim exemptions under CPLR §5222.)

In *Todd,* a lawyer for the firm representing the judgment creditor signed the affidavit. The judgment debtor sued the law firm under the Fair Debt Collection Practices Act for filing a false affidavit. The firm claimed its statements in the affidavit were made as a witness in a judicial proceeding, and as such entitled to absolute immunity from liability under *Briscoe v. LaHue*, 460 U.S. 325 (1983). In an interlocutory appeal, the Court of Appeals ruled that the immunity does not apply, opening the door for FDCPA statutory damages and attorneys' fees liability. At this point, the claim has been remanded to the District Court for further proceedings.

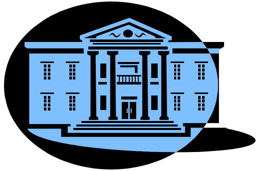
Magistrate Recommends Closed Period

Waiting for a federal court appeal to wend its way through the court can often take a long time – so long, that claimants can sometimes apply and be approved on a new application in the meantime. That is what happened in a recent case handled by Chris Cadin at Legal Services of Central New York in Syracuse. Chris's client, who was only 25 years old at the time of her hearing, already had an extensive record of mental health treatment. The ALJ, however, picked and chose among the records that he cited, concluding the claimant's main problem seems to be "…current lack of friends," and the she had" only minor mental limitations."

Magistrate DiBianco of the Northern District, who had been assigned the case by Judge Hurd, found otherwise, based on additional records that counsel had submitted to the Appeals Council, but also on a careful reading of the records before the ALJ. He found that the ALJ violated the treating physician rule, and erred in relying on the grids in the face of nonexertional impairments. He nonetheless found that reversal rather then remand was the appropriate remedy.

Chris's case underscores the significance that a subsequent favorable outcome can have on court proceedings. While it may not necessarily work every time, query whether knowing that the claim had already been decided favorably helped push the Magistrate towards reversal rather then remand in this case? Congratulations to Chris for helping to make that happen.

SSI Not Countable in PA Cases - Court of Appeals Rejects State's Motion to Appeal



On May 9, 2006, the New York Court of Appeals denied the State's motion for leave to appeal in *Doe v. Doar*, 26 A.D.3d 787, 807 N.Y.S.2d 909 (4th Dep't 2006), the statewide class action which had successfully challenged the regulation which reduced public assistance benefits to households containing children where at least one household member receives Supplemental Security Income (SSI).

The Office of Temporary and Disability Assistance (OTDA) had asked the state's highest court to review the unanimous decision of the Appellate Division which had struck down 18 NYCRR 352.2(b) because it violated three provisions of the Social Services Law: 131-c, which prohibits the consideration of SSI benefits when determining eligibility for public assistance, and Social Services Law 131-a and 209 which set the standards of need for public assistance and the SSI supplement.

The members of plaintiff class, which consists of 27,100 households across New York State, have had their public assistance illegally reduced and have not received the retroactive benefits to which they are entitled. This is because while the State's petition for leave to appeal was pending, the agency was entitled to an automatic stay under the CPLR 5519. Although the Court of Appeals did not explain the reasons for its conclusion, the judgment of the court below was likely not considered a final order because the parties had not yet reached agreement on the remedial plan, which the trial court had directed the parties to develop.

Now that the leave for appeal has been denied, the automatic stay is no longer in effect. Plaintiffs' counsel will press for immediate cessation of the application of the rule and a prompt resolution of the outstanding issues in the remedial plan. Stay tuned for updates on the public benefits list serve.

The decisions and pleadings are available on the Online Resource Center at : http://onlineresources.wnylc.net/welcome.asp?index=Welcome.

Susan Antos and Bryan Hetherington of the Empire Justice Center are lead counsel for the plaintiff class.

Supreme Court Allows Citation of Unpublished Decisions

Ever find the perfect quote from a case to support your argument, only to find this directive at the beginning of the opinion: "SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT," with a citation to Second Circuit Rule .23? According to the rule, since these summary decisions are "unreported" and not available to all parties, they may not be cited. Similar rules apply in many, although not all circuits.

That will all change as of December 1, 2006. On April 12th, the Supreme Court adopted a rule change, based on recommendations of the Judicial Conference, to allow citation to these "unpublished" opinions. This change was prompted in part by the recognition that the advent of electronic legal databases has made "unpublished" a misnomer. According to *law.com*, "Under the new rule, circuits will still be able to give varying precedentail weight to unpublished opinions, but they can no longer keep lawyers from citing them - in the same way lawyers cite rulings from other circuits or other authorities, such as law review articles."

Have You Seen "Fugitive Felon" Notices With Inadequate or Erroneous Warrant Information?

Of course not! However, other people do report having seen such notices. There have been frequent reports of clients receiving notices that do not contain the warrant number, the telephone number or the address of the law enforcement agency. Others contain cryptic abbreviations not likely to be understood by those receiving the notice, or by anybody else for that matter. Others simply contain wrong information.

For example, one notice advised the beneficiary to contact the Los Angeles County Sheriff in Cambridge, MA, while another advised the recipient to contact the LA County Sheriff in Fresno, CA (closer, just a little over 200 miles from LA). One person in San Francisco received a notice to contact the Orange County Sheriff in Philadelphia, PA and a person in Kentucky was told to contact the Summit County Sheriff in Summit Co., USA (there is no Summit Co. in Kentucky). This problem became more acute after notices began to be sent from payment centers or from Central Operations in Baltimore.

SSA wants to correct this problem. It has asked for our help by sending SSA copies of such defective notices so it can track the problem. However, it wants the client's name and SSN on the notice so it can track them. Thus, you will have to get your client's permission before sending the notice. If you see notices with 1) the wrong warrant number, 2) inappropriate abbreviation for the law enforcement agency, 3) no address or wrong address for the law enforcement agency, or 4) no phone number or wrong phone number for the law enforcement agency, please send a copy to Gerald McIntyre at the National Senior Citizens Law Center (NSCLC) (FAX 213-639-0934) so that he can follow up with SSA.

Mistaken Identity - Another notice problem is when notices are sent to the wrong person. This occurs when there is no SSN on a warrant or the number does not correspond to any number in SSA's database. SSA will act on these warrants anyway and attempt to make a match. Needless to say these matches are error-prone.

In one recent case a Nevada woman received a notice that her Social Security retirement benefits would be suspended because of a 34 year old New York warrant even though she had never been to New York. In this case SSA had a perfect match except for the SSN, and the individual's race, gender and middle name.

However, the birth date was the same. This woman was able to get a letter from the NYPD Fugitive Enforcement Division clearly establishing that the warrant was not for her. However, the fear is that many of the people getting these notices will not be able to advocate so effectively on their own behalf. For that reason it is important that we document mistaken identity cases so that we can put a stop to them. If you see one, please send a summary of what happened to Gerald McIntyre at NSCLC and send him a copy of the notice. Please remember to get the appropriate release from your client.

In Memoriam

We are saddened to report the untimely death of Charlie Scibetta, a DAP attorney with the Erie County Department of Social Services. Charlie passed away unexpectedly on March 13th. Charlie was a member of the Western New York Disability Task Force, and will be missed by all. He is survived by his wife, six children, fourteen grandchildren, his mother and two sisters. Our sympathy goes out to them, as well as his co-workers at ECDSS.

ADMINISTRATIVE DECISIONS

Appeals Council Offers Apology

Is the Appeals Council going out in a flame of glory, or is it that sometimes someone really does listen? It took awhile and a great deal of perseverance, but Sue Bosworth-Quinlan of the Legal Aid Society of Mid-New York finally got someone's attention in a particularly egregious case. In fact, she received an apology from the Appeals Council for an ALJ's "lack of judicial temperance and basic civility."

Sue's client is a 25-year-old woman, who was 19 when she first applied for SSI. She has been diagnosed with, at best, borderline intelligence. She was in special education, and has been in mental health counseling since age 16, with diagnoses ranging from Oppositional Defiant Disorder, Depressive Disorder, Adjustment Disorder with mixed disturbance of emotions and conduct, Borderline Personality Disorder and Impulse Control Disorder.

The ALJ first denied her claim in 2002, finding that her "limitations are a result of her conduct, not from a disease or illness." He found her not disabled under the Medical-Vocational Guidelines (the "grid"). The Appeals Council, following a stipulated remand from the U.S. District Court, remanded the case, holding that the record did not support the ALJ's finding that the claimant's limitations do not significantly compromise her ability to work. It ordered the ALJ to update the medical record, identify the medical evidence supporting his conclusion that the claimant has the mental ability to work, and obtain vocation expert evidence.

On remand, rather than being reined by the Appeals Council's admonitions, the ALJ took an even more extreme approach (and, no, this was not ALJ Russell). He determined that vocational evidence was not necessary, based on his conclusion that "this case, on rather elaborate remand re-determination, shows the same basic face of unconscionable unaccountability which it presented to this adjudicator in the first place, some three years ago." According to the ALJ:

> In deciding this case, one must ultimately ask this question: If social misbehavior and misconduct are to be excused as a mental disorder, then should this not apply as well to all who are incarcerated, throughout our society?…I believe that in no area of our public lives, including deliberations and determinations such as this instant one, should plain and outright irresponsibility and incorrigible behavior be condoned, or simply overlooked.

The ALJ seemed particularly perturbed that the claimant had, in his view, "no remorse" for her behavior, and has not made a "dedicated effort to improving her anger management…" Not surprisingly, he denied the claim again.

Undaunted, Sue went back to the Appeals Council, and this time someone listened. The Appeals Council found that the ALJ's remarks, including his emphasis on the fact that the claimant's children had been taken away from her, "clearly demonstrate a lack of impartiality on the part of the Administrative Law Judge and strongly suggest that the claimant may not have received the full and fair hearing to which she is entitled." The Appeals Judge also held that appropriate medical findings demonstrated that she had been diagnosed with medically determinable mental impairments. "The Administrative Law Judge's personal opinions cannot substitute for examining the medical evidence and following the Social Security adjudicatory process. In addition to assigning the case to another ALJ, the Appeals Council, on behalf of the Agency, extended its apology.

Kudos to Sue for making her complaints loud and clear enough for the Appeals Council to take notice.

Child's Combined Type ADHD Meets Listing

While we frequently celebrate our remands from federal court as "victories" on these pages, they are often only half the battle. We are happy to report, however, of a recent victory at the ALJ level following a federal court remand. In the federal court appeal, reported in the May 2005 edition of the *Disability Law News*, Louise Tarantino of the Empire Justice Center argued that the claimant met Listing 112.11 for Attention Deficit/Hyperactivity Disorder (ADHD). Since that argument had not been presented to the ALJ before, the federal court judge was reluctant to reverse the claim on those grounds, but instead remanded it for the ALJ to consider the listing. (Judge Siragusa's decision in *Johnson o/b/o JB v. Barnhart* is available as DAP #404.)

And consider the listing the ALJ did! In a surprisingly perfunctory decision for this particular ALJ, he found that the claimant's ADHD, *combined type*, met the listing with marked limitations in concentration, persistence and pace, and social functioning. According to the *Diagnostic and Statistical Manual of Mental Disorders (Fourth ed., Text Revision)* (*DSM-IV TR)*, a diagnosis of ADHD requires six or more symptoms of inattention *or* six or more symptoms of hyperactivity-impulsivity, lasting six months or more. See, DSM-IV TR, at 92. The combined type of ADHD enumerated in 314.01 in the DSM-IV-TR is diagnosed only when six or more symptoms of inattention *and* six or more symptoms of hyperactivity-impulsivity persist for at least six month. Further, they must co-exist in the patient "to a degree that is maladaptive and inconsistent with developmental level," and is therefore "marked" in degree of severity. Other DSM-IV codes are given when the patient manifests either inattention only, or attention deficit/hyperactivity only. See, DSM-IV-TR, at 87, 93.

Although we win many of our ADHD cases based on functional equivalency, this case underscores the fact that the ADHD Listing should not be overlooked – especially if your client has a diagnosis of combined type. Congratulations to Louise and Michael Bonsor of the Empire Justice Center's Rochester office, who represented the claimant at the hearing.

Help is Available for Evaluating PTs' Evaluations

Advocates frequently confront references to specific tests and measurements in reports and evaluations from physical therapists. How do we know what these tests are, much less whether they represent standardized objective, and valid measurements? And how can we counter the conclusions that therapists sometimes draw about our clients' effort, of perceived lack thereof? Physical therapist Alice Pena of Unity Health System in Rochester has provided a wealth of materials to help us sort these things out. Pena distributed a one page description of "Waddell's signs," and a copy of the "Oswestry Low Back Pain Disability Questionnaire." At a recent visit to the Western New York Disability Law Task Force, she also referred to a number of "peer review" articles analyzing various tests and instruments, including "Detecting Sincerity of Effort: A summary of Methods and Approaches." Copies are available as DAP #426.

ALJ Uses Framework for Questioning in Kid's Case

Amidst the flurry of complaints that we usually hear about difficult and sometimes inappropriate ALJ behavior, it is refreshing – and encouraging – to hear the opposite. Jody Davis, Senior Paralegal at Legal Assistance of the Finger Lake in Geneva, an office of LAWNY, reports a favorable experience with a Region 3 visiting ALJ in a child's disability claim.

According to Jody, the ALJ began the hearing by explaining that he follows a more extended process than he had observed in other cases from New York. He asked for more financial information about the household. He also announced that he would not put the child under oath. He had the child in the room briefly, but, per Jody, long enough to see him grab the mikerophone and answer questions addressed to her.

Most interestingly, the ALJ posed his questions using a method Jody had not seen before but which made sense to her. After explaining in an understandable way how SSA evaluates kids' cases, he went through the SSA Form 538 (Childhood Disability Evaluation Form), and asked the claimant's mother: "Dr. R, a physician who reviews cases for the disability determination service, reviewed your son's file and determined that he has... and that it results in less than marked limitation in acquiring and using information. Do you agree or disagree and why?" He methodically went through each domain, explaining what each domain covered, and the information the review physician considered before asking for the mom's response.

Jody found that this line of questioning organized the case and allowed the mom to comment where appropriate and say "my kid is fine in this area" when appropriate as well. He also allowed her to follow up with questions. Jody plans to try this line of questioning herself in other childhood claims in the future

Jody was also happy to report that she received a favorable decision in the case. The ALJ found "marked" limitations in acquiring and using information, attending and completing tasks, and health and physical well-being. He related the limitations to the child's seizure disorder, ADHD, a developmental disorder and ODD. As icing on the cake, the ALJ also reopened an earlier application. Congratulations to Jody – since we suspect that it was not just the luck of drawing this ALJ that helped win the case!

Visiting ALJ Issues Bench Decision

A one-page fully favorable decision with a one-page checklist attached? Yes, it really does happen. Michael Bonsor of the Empire Justice Center in Rochester reports that he received just such a "bench" decision in a case where his client was found disabled under Grid Rule 201.14. Social Security's regulations authorizing these bench decisions went into effect in October 2004. See the January 2005 edition of the *Disability Law News*, available at www.empirejustice.org.

These regulations, which are found at HALLEX I-5-1-17, were designed to "facilitate" the use of oral decisions in limited types of adult disability claims. The checklist, which can be a useful tool for advocates too, is also available as DAP # 392.

What is That ODAR I Smell?

What's in a name? Perhaps we will soon find out if a change in name portends any other changes. The Office of Hearings and Appeals (OHA) is now officially the Office of Disability Adjudication & Review (ODAR). See http://www.ssa.gov/oha/about_odar.html

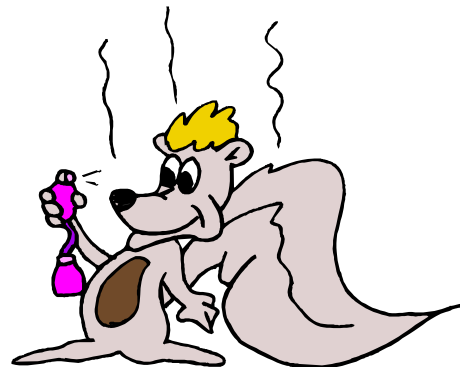
According to SSA, ODAR, which is still headquartered in Falls Church, is headed by Lisa de Soto, the Deputy Commissioner for Disability Adjudication and Review. There are two primary organizational components within ODAR -- Office of the Chief Administrative Law Judge and the Office of Appellate Operations.

> **Hearing Operations:** The Chief Administrative Law Judge is the principal consultant and advisor to the Associate Commissioner on all matters concerning the ALJ hearing process and all field operations. The Chief ALJ manages and administers the hearing organization consisting of ten regional offices, 140 hearing offices, and four satellite offices.
>
> **Office of Appellate Operations:** The Office of Appellate Operations consists of the Appeals Council and its entire support staff. The Executive Director of the Office of Appellate Operations also serves as the Deputy Chair of the Appeals Council and is a key advisor to the Associate Commissioner on program operations matters, adjudicative trends at both the administrative appeals and court levels and related ODAR functions.

Will any of these changes make it easier to find anyone at the Appeals Council? Danielle Barone of the Legal Aid Society of Northeastern New York reminds us that the HALLEX publishes a list of contacts for the various "branches" of the Appeals Council, some of which are actually located in Baltimore. See http://www.ssa.gov/OP_Home/hallex/I-04/I-4-3-104.html.

Query whether it makes sense to try to mail information directly to these "branches?" Certainly not an initial Request for Review, since there is no way of knowing to which branch it will ultimately be assigned. Although advocates debate whether the better practice is to file the Request for Review at the District Office (DO) or mail it directly to Falls Church (either is permissible but better to do one or the other to avoid confusion), all agree that getting a receipt is essential, either from the DO or by mailing certified mail, return receipt requested, since the Appeals Council has been known to lose things….

And although the Appeals Council may be short-lived under the Commissioner's Disability Redesign regulations outlined on page one of this newsletter, remember that those regulations will not be effective in New York for at least another year. So hold onto those Appeals Council phone lists for awhile longer.



Advocate Encourages Use of Pre-hearing Memo

Victor Torres, the DAP Supervisor at Brooklyn A office of LSNYC (Legal Services of New York City), has been successfully representing claimants for a number of years, and has gained invaluable experience and insight in the process. He shares with us here some of his thoughts on the value of submitting prehearing memoranda:

In the late 90's the Manhattan South Office of Hearings & Appeals (OHA) was created to address the backlog of cases in Brooklyn. Prior to scheduling hearings, the Manhattan South OHA mailed a hearing packet to claimants that included, among other things, a questionnaire for the claimant to complete as well as a questionnaire for the claimant's representative, if the claimant had one. Among the items asked in the representative's questionnaire was to identify the medical data on which you rely to prove your case and to cite the section of the listings and/or grids that you believed justified a finding of disability for your client. After briefly using the OHA questionnaire, which provided very limited space to answer those questions, I thought that it would be better to submit a memo, in the form of a letter, along with any additional medical data that I collected from my client's treating sources

Initially, I prepared this pre-hearing memo only on cases that were assigned to the Manhattan South OHA. But as time passed, I saw how well received these pre-hearing memos were and how they helped to expedite the appeal process by reducing the length of hearings and making them more focused. Thus, I decided to submit pre-hearing memos to the ALJs at the Brooklyn OHA where the office practice did not include pre-hearing questionnaires. I quickly discovered that the pre-hearing memos were having the same effect at the Brooklyn OHA as they had at the Manhattan South OHA and I decided that from then on I would submit a pre-hearing memo on every case that our program handled. The results have included shorter, more focused hearings, a lot of on-the-record favorable decisions and fewer traumatized clients who do not have to suffer the ordeal of appearing before an Administrative Law Judge.

An additional benefit of using a pre-hearing memo is to help turn the consultative examiner's [CE's] report, which is usually not beneficial to the claimant, into a vehicle that will help support the treating doctor's opinion. One of the standards of the "controlling weight" regulations, 20 CFR 416.927 and/or 20 CFR 404.1527, is that the treating doctor's opinion must be consistent with the record as a whole. So for example, in the case of a claimant suffering from a psychiatric impairment, the claimant usually complains to the CE of most or all of the same symptoms the claimant reported to his or her treating doctor and that the doctor, in turn, includes in his or her assessment of the claimant.

Additionally, the diagnoses of the treating physician and the CE are usually either the same or in the same grouping of mental disorders, although CEs tend to minimize severity. So where a treating doctor makes a diagnosis of major depression, the CE might make a diagnosis of dysthymic disorder. Both are mood disorders.

In our pre-hearing memo, we point out that while we do not agree with the CE's conclusions as to severity of the diagnosed condition, the CE's diagnosis is nonetheless consistent with the treating doctor's diagnosis, and the treating doctor is in the best position to assess the claimant's condition as well as its effects on his or her ability to function by virtue of the length of treatment, frequency of visits and the ability to supply a linear assessment of the claimant's condition throughout the course of treatment.

Another thing we like to do in a pre-hearing memo is to preemptively defuse any problematic issues so we don't get bogged down or sidetracked during the hearing. So, for example, I once had to deal with the issue of DA&A for a claimant who had detoxed from drugs and was now receiving psychiatric treatment but who continued to use illicit substances periodically. This particular claimant had a history of multiple suicide attempts and abusive relationships. We were able to convince the ALJ that every time she had an argument or fight with her domestic partner, she followed up by using drugs or alcohol and that doing so was directly attributable to her documented self-destructive behavior. I pointed out that there were entries in the treating doctor's records that, if properly

(Continued on page 17)

Order Your Benefits Management Manuals Now!
2006 Supplement Now Available

The 2004 edition of *Benefits Management for Working People With Disabilities: An Advocate's Manual*, authored and updated by Ed Lopez and Jim Sheldon, are available through Empire Justice Center. The 210-page manual is by far the most comprehensive treatment of the many issues relating to work and benefits available. It contains a new chapter on Medicaid for Persons with Disabilities. The manual also includes a 2006 Supplement with updated information. An order form is available on Empire Justice Center's website at: www.empirejustice.org/Publications/Benefits%20Manual%20Brochure.pdf

In addition, Ed Lopez and Jim Sheldon will be conducting a conference on May 25th, "Employment & Persons with Disabilities: The Impact of Employment on Disability Benefits and Medicaid." This training is co-sponsored by Empire Justice Center and Neighborhood Legal Services. For registration information, go http://www.nls.org/pdf/flyer-5-25-06.pdf.

Buffalo OHA on the Move

Effective May 23, the Buffalo Office of Hearings and Appeals (ODAR), now officially the Office of Disability Adjudication & Review ODAR) will have a new address.

Key Center, Suite 200
50 Fountain Plaza
Buffalo, NY 14202

Pre-hearing Memos—continued

(Continued from page 16)

read, supported this conclusion. Specifically, the claimant had made numerous suicide attempts in the past. After a telephone discussion, the ALJ agreed and granted a favorable "on-the-record" decision.

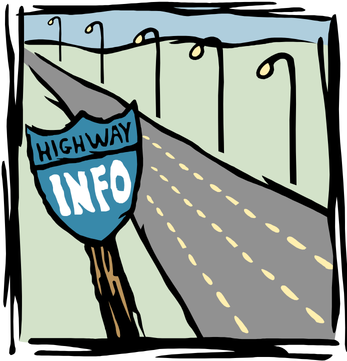
It is a recognized fact that two of the best ways to annoy a judge are to show up late for a hearing or, even worse, to show up unprepared. Conversely, by submitting a pre-hearing memo you not only show that you are prepared but that you are *thoroughly* prepared. Most judges love that because it makes their job easier. Further, a thoughtful, well-drafted pre-hearing memo enhances your credibility as an advocate in the judge's eyes. A pre-hearing memo, therefore, can achieve multiple goals.

Finally, an additional value of a pre-hearing memo is that it forces the representative to think strategically and specifically about the facts of a case and the application of the law; it can help the advocate focus on gaps in the record and to frame questions to allow the claimant to fill in the gaps with his or her testimony or the testimony of others; and if, having done all of the above, you still lose at the hearing, it provides a template for focusing the issues on Appeals Council review.

Thanks to Victor for this helpful perspective.

WEB NEWS

OTDA Directives Online



The New York State Office of Temporary and Disability Assistance (OTDA) has begun to make its LCMs (Local Commissioners Memoranda) available on its website under Policy Directives [http://www.otda.state.ny.us/directives/2006/default.htm], where Administrative Directives (ADMs) and Informational Letters (INFs) are also found OTDA's General Information System (GIS) Messages are also available (from 2001 to the present) at: http://www.otda.state.ny.us/GIS/default.htm.

OTDA's LCMs are just being posted prospectively, beginning with 06 LCM-1, dated March 31, 2006 [http://www.otda.state.ny.us/directives/2006/LCM/06-LCM-01.pdf]. But LCMs issued in recent years should also be available soon. A listing of the titles of many of the prior years' LCMs can be found in State OTDA's latest Guidance Documents Certification, published in the *New York State Register* on April 5, 2006 and available at: http://www.dos.state.ny.us/info/register/2006/apr5/pdfs/GD1.pdf.

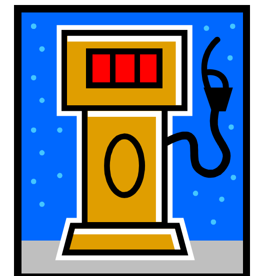
The New York State Office of Children and Family Services (State OCFS) has also been posting its LCMs, together with its ADMs and INFs, on its website under Policy Directives [http://www.ocfs.state.ny.us/main/policies/external/OCFS_2006/].

Medicare Part D Resources Posted

Web-based resources are available on the Medicare Part D Section of the Health Care Resources Page -- which is co-sponsored by Selfhelp, Empire Justice & the Western New York Law Center, and is accessible through the websites of all three organizations (or directly at http://onlineresources.wnylc.net/part_D.asp).

Lowest Gas Prices in Albany?

Check out www.albanygasprices.com for the lowest priced gas stations in the Albany area. Who says you don't get practical information from this newsletter?



CLASS ACTIONS

State of New York, et al. v. Sullivan,
83 Civ. 5903 (S.D.N.Y.) ("the cardiac case")

Description - The Second Circuit in July 1990 affirmed the district court's judgment that declared invalid SSA's policy of relying exclusively on treadmill test results when evaluation claims filed by New York residents alleging disability due to ischemic heart disease. The district court required SSA to alter its policy with regard to steps 2 through 5 of the sequential evaluation, and to reopen past claims that were improperly denied.

Relief - Reopenings available for claims based on ischemic heart disease, hypertensive vascular disease, myocardiopathies, or rheumatic or syphilitic heart disease, if benefits were denied or terminated (a) between 6/1/90 and 12/4/89 at steps 3, 4, or 5 of the sequential evaluation, or (b) between 12/5/89 and 2/4/94 at steps 2, 3, 4, or 5 of the sequential evaluation (i.e. prior to distribution of HALLEX/ POMS instructions and training of DDS personnel). Persons must have been New York residents at time of decision subject to reopening, and must not have received a final adverse court judgment prior to 12/5/89. The pre-2/10/94 listing, and the *State of New York* instructions, continue to be controlling in New York claims "initially adjudicated" prior to 2/10/94, and are also relevant to later claims when decision makers determine equivalence to 2/10/94 listing

Citation - *State of New York v. Heckler*, 105 F.R.D. 118 (S.D.N.Y. 1985) (certifying class); subsequent opinion, *State of New York v. Bowen*, 655 F. Supp. 136 (S.D.N.Y. 1987) (granting motion of subclass for partial summary judgment); *State of New York v. Bowen*, 83 Civ. 5903 (S.D.N.Y. 12/4/89) (unpublished Order and Final Judgment); *State of New York v. Sullivan*, 906 F.2d Cir. 1990) (affirming district court's unpublished Order and Final Judgment).

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

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@lsenyc.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.

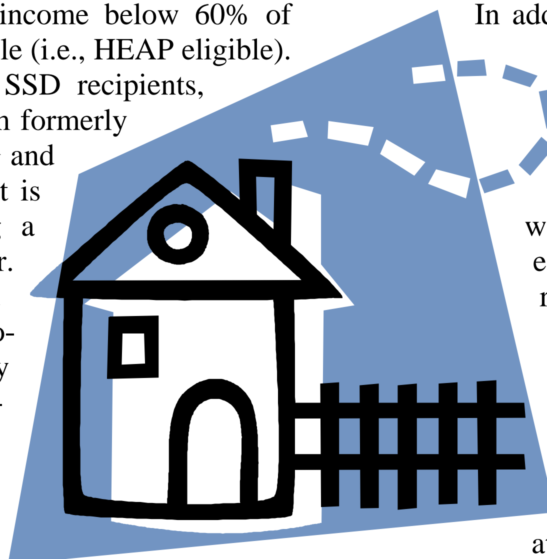
Draegert v. Barnhart, 311 F.3d 468 (2d Cir. 2002)

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.

EmPower New York Provides Energy Assistance

The New York State Energy Research and Development Authority (NYSERDA) has partnered with Honeywell DMC to implement the EmPower New York Program. The focus of the program is on cost-effective electric reduction measures, particularly lighting and refrigerator replacements, as well as other cost-effective home performance strategies such as insulation, and health and safety measures.

Electric distribution customers of a participating utility (see below) who live in a one to four family home, and either participate in a utility payment assistance program or have household income below 60% of state median income are eligible (i.e., HEAP eligible). Thus, many SSI, and some SSD recipients, may be eligible. The program formerly was available only to NYSEG and National Grid constituents. It is in the process of becoming a statewide program, however. Residents (homeowners and renters) who are within territories of utility services who pay into the "SBC" (systems benefits charge) are eligible. There are six utilities that fall into this category:



-NYSEG
-National Grid
-RG&E
-Orange and Rockland
-Central Hudson, and
-ConEd

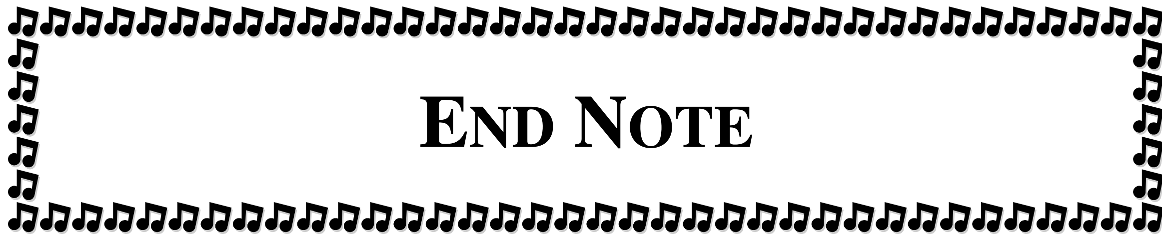
Although the program does not officially begin in the new territories until July 2006, people can go ahead and apply now. If consumers are not in one of these territories, they are not eligible (at least at this time). Municipal controlled utility customers are not eligible either.

There is a lot more information regarding the program, and clients can apply on their own, through the www.nyserda.org website: click on "GetEnergySmart" at the bottom, and then click on the tab for "Energy Efficiency for where you live" at the top of the page; there is a tab under "Energy Efficiency for where you live" for "Empower New York." http://www.getenergysmart.org/WhereYouLive/Power/overview.asp The number for questions or additional information is Honeywell DMC at 1-800-263-0960.

In addition to weatherization assistance to reduce heating bills, electricity cost reduction measures are possible. For example, inefficient refrigerators - often a large component of home electric bills - can be replaced with new efficient models at no cost to eligible customers, as well as lighting replacement and other services. Services are provided by Honeywell DMC.

Generally, there is no cost to the customer for replacement of customer owned items and services at premises owned by eligible customers. In rental situations, certain measures that directly benefit the eligible tenant or replace tenant-owned appliances are also eligible at no cost, without a landlord contribution.

Let your clients know about this extra assistance - every little bit helps stretch those SSI/SSDI dollars.



END NOTE

Can Surgical Implants Help Treat Depression?

A recent study at the Cleveland Clinic has shown that a treatment known as deep-brain stimulation (DSB) can help patients suffering from severe depression. Previously used to treat intractable pain and movement disorders such as Parkinson's Disease, the study showed the technology resulted in a clinically significant reduction in depression severity in four of the six patients followed. A prior study demonstrated that the deep-brain stimulation was effective in the treatment of obsessive-compulsive disorder as well.

Electrodes placed in specific parts of the brain emit pulses of electrical stimulation to block abnormal activities that cause symptoms such as pain, or obsessions and anxieties associated with psychiatric disorders. The electrodes are surgically implanted in the ventral anterior internal capsule region of the brain.

Neurosurgeon Ali Renzi, the lead investigator in the Cleveland Clinic Study, told the *Wall Street Journal* "This technology is now showing promises in psychiatric problems like depression and OCD. Beyond that, it may help treat stroke and other brain injuries."

According to the report published on April 25, 2006, the patients in the study all had a history of resistance to other treatments, including medication, psychotherapy, and electro-convulsive therapy. A recent article by David Dobbs in the Sunday *New York Times Magazine* on April 2, 2006, paints a dramatic portrait of just such a patient, who finally found relief from her debilitating depression with DBS (Deep Brain Stimulation). The woman, who was operated on in Toronto, Canada, described how the implant affected her: "It was literally like a switch being turned on that had been held down for years," she said. "All of a sudden they hit the spot, and I felt so calm and so peaceful. It was overwhelming to be able to process emotion on somebody's face. I'd been numb to that for so long." On the other hand, researchers quoted in the NYT article predict that DBS will not quickly become the next Prozac, especially given its current price tag of $40,000.

On a related note, the *New York Times* reported on April 22, 2006, that one of the nation's major health insurers will not pay for a different nerve-stimulating implant approved by the Food and Drug Administration for treatment of depression. Manufactured by Cyberonics, it is implanted in the upper chest to stimulate the vagus nerve as it rises through the neck. The device, which sells for about $15,000, has been used to treat epilepsy. Critics claim that clinical trials have not proved its effectiveness for treatment of depression. Aetna views vagus nerve stimulation to treat chronic depression as "experimental" and still in the investigational phase.

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