Empire Justice Center

*May 2008*
*Issue 3, 2008*

# DISABILITY LAW NEWS

## ODAR Backlogs Persist

Advocates and claimants are all too familiar with the inordinately long waits for Social Security hearings to be scheduled. The latest edition of the NOSSCR (National Organization of Social Security Claimants' Representatives) *Forum* (March 2008) lists the average processing times by individual ODARs (Office of Disability Adjudication and Review) and Regions as of February 29, 2008. Region 2 (New York, New Jersey, Puerto Rico and U.S. Virgin Islands) ranks seventh out of twelve, with a 526 day average processing time.

Several ODARs within New York State, however, are significant outliers, with Buffalo posting an average processing time of 726 days - or 134th out of 143 ODARs. The Syracuse ODAR comes in at #114, with 609 days. The Bronx office is close behind at #112, with 599 waiting days. Queens has a mere 505 days at #83, with Jericho at 507. Albany finishes the race in 91st place, with 518 days, while New York City's Manhattan office whips out cases in 448 days.

Social Security Administration (SSA) Commissioner Michael Astrue's ongoing efforts to reduce these backlogs have been chronicled in these pages over the past year. In a recent communication to SSA employees, Astrue touted several initiatives, including the hiring of 175 new Administrative Law Judges and 143 additional ODAR support staff. The Syracuse, Albany, New York and Queens ODARs, among others, will see new ALJs in place in the near future. NOSSCR members David Ettinger of the Legal Aid Society of Middle Tennessee will be in Manhattan and Gal Lahat of Texas will be moving to Queens. Buffalo, despite being one of the slowest ODARs, was not tapped to receive any more judges. Protests from Senator Schumer and local Congressman Brian Higgins and others have apparently resulted in the promised assignment of a judge in the Rochester satellite office. *See* http://www.buffalonews.com/cityregion/story/323692.html and http://www.democratandchronicle.com/apps/pbcs.dll/article?AID=2008804290334.

The Commissioner also announced that extra funding appropriated by Congress will also allow him to lift the current hiring freeze and permit SSA components at least one-for-one hiring authority, with the ability to replace as many employees who leave the agency this year. This is a timely initiative, as a recent GAO (Government Accountability Office) report predicts that the impending retirement of SSA's most experienced staff in its Field Offices (FOs), coupled with growth in claims by aging

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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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**www.empirejustice.org**

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Baby Boomers, will take it toll on the ability of FOs to handle work load. According to the report, entitled "Reduced Workforce Faces Challenges as Baby Boomers Retire," FOs largely met their demands between fiscal years 2005-2007 despite fewer staff and increased demands. Among other strategies, FO staff encouraged claimants to take advantage of the internet and other electronic services. They also deferred work considered lower priority, including recertifications.

Claimants nonetheless complained of longer waiting times and more unanswered calls to FOs; staff reported more stress and less time for training. The GAO warned that SSA needs a clear plan to address these problems. SSA countered that the GAO underestimated the effect that funding shortfalls had on creating these problems, and is finalizing its strategic plan to address these challenges. GAO -08-737T is available at www.gao.gov.

In his report to employees, Commissioner Astrue cites various online initiatives as another example of efforts to reduce backlogs. The Quick Disability Determination (QDD) procedures were also credited with reducing processing time. Astrue's Broadcast is available as DAP #486.

Another perspective on the causes of SSA backlogs was reported in the New York Times on April 1, 2008. Several "whistle-blowers" are suing their long term disability insurance carriers under the federal False Claims Act, arguing that companies like Unam and Cigna Corporation are forcing them to apply for Social Security disability benefits as a condition of continued receipt of benefits under their individual policies. They claim that the insurers know that they do not meet the stricter Social Security criteria, and that their claims are choking the Social Security system with extra paper work.

Several claimants quoted had either short term disabilities or partial disabilities that met the criteria of their insurance polices but not that of SSA. If the claimants refuse to appeal denials of their SSA claims, the insurers can terminate their benefits. Lawyers for the plaintiffs argue that the insurers have been sending tens of thousands of dubious claims to SSA, costing the system hundreds of millions of dollars over the last decade. According to the plaintiffs, the insurers have enough information to be able to weed out the dubious claims before referring them to SSA. The article is available at: http://tinyurl.com/6gqsj9.

Private disability insurers have been in the news in another case, as well. The Supreme Court recently heard oral argument in the case of *MetLife v. Glenn*, 06-923. The plaintiff in that ERISA case claims that insurers, in their dual role of both deciding disability claims and paying on them, have an inherent conflict of interest. That conflict, asserts Glenn, gives insurers like MetLife an incentive to deny the claim. Most federal courts have recognized the insurers' "dual-role." The question of how much weight to give the conflict when deciding claims, however, is not clear. Our own Ann Biddle helped to author an *amicus* brief in the Supreme Court. Ms. Glenn is subsisting on Social Security disability benefits while she waits for the Supreme Court to decide her claim. Let's hope it is not as backlogged as some of the New York ODARs!

# SAVE THE DATE

## 2008 PARTNERSHIP CONFERENCE

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

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

# Myth of Benefits Misuse Exposed

Whether or not you agree with Ronald Reagan's famous (infamous?) comment about "Welfare Queens" taking unfair advantage of the various social safety-net programs available in the United States, few will deny that the comment created a nationwide perception of massive fraud in the public assistance system. This perception exists to this day.

It was this perception that propelled the Congress in 1996 and again in 1997 to significantly tighten the rules pertaining to children's SSI disability under Title XVI of the Social Security Act. It was this same perception that caused the Congress in March 2004 to include in the Social Security Protection Act (P.L. 108-203) directives to the Social Security Administration (SSA) to investigate perceived misuse by Representative Payees, often referred to as "rep payees," concerning the Social Security benefits they receive each month for their respective beneficiaries. Specifically, the legislation required the SSA Commissioner to conduct "[a] statistically valid survey to determine how payments to individuals, organizations, and State or local government agencies that are representative payees for benefits paid under Title II or XVI are being managed and used on behalf of the beneficiaries for whom such benefits are paid."

In October 2004, SSA entered into a contract with the National Research Council, the principal operating agency of the National Academy of Sciences, to thoroughly vet the Rep Payee system. A blue ribbon committee was appointed consisting of members from the U.S. Bureau of Labor Statistics, directors of the University of California Institute for Health and Aging, and the University of Illinois Survey Research Laboratory, a professor from the Iowa State University Center for Survey Statistics and Methodology, an associate professor from the University of Kentucky College of Public Health, a fellow from Washington College of Law, and two independent consultants. The committee was called "The Committee on the Assessment of the Social Security Representative Payee Program of the National Research Council."

In 2007, the results of the investigation were quietly published, with little notice, in a 182-page book entitled "*Improving the Social Security Representative Payee Program: Serving Beneficiaries and Minimizing Misuse.*" It immediately put truth to the myth of rampant misuse, defined as any case in which the rep payee receives payment for the use and benefit of another person and converts such payment, or any part thereof, to a use other than for the use and benefit of such other person.

Based on SSA's own figures, the number of rep payees who misuse funds was found to be less than 0.01 percent over 5.3 million rep payees. Those 5.3 million rep payees receive over $4 billion each month for their beneficiaries. (Note: More than 7 million people receive Social Security benefits, most of them children or disabled elderly adults. Children's monthly SSI benefits are to be used for the child's benefit, including clothing, food and rent.)

The Committee did find that the system to detect misuse - information given to SSA by beneficiaries or third parties, studies by the Office of the Inspector General based on random sampling, and an annual accounting form filled out by each rep payee showing how much is spent in a number of categories - could be improved. It made a number of recommendations, but the Committee concluded that even with its recommended procedures in place, the amount of the misuse would only be about 0.2 percent.

The 2007 book contains six chapters and seven appendices and a separate 90-page appendix describing the methodology used. The most important chapters appear to be chapter 4 "Defining and Discovering Misuse" and chapter 5 "New Approaches to Detect Misuse." The book can be purchased from the National Academies Press, and significant portions are available on line by Googling the name of the book. The website is http://books.nap.edu/catalog.php?record-id=11992.

What the political impact will be of this important study remains to be seen. Even so, every public interest attorney should have the study's results at his/her fingertips so as to be capable of refuting the often heard, disparaging theme of widespread welfare fraud. The system is working and government officials and the public needs to know this.

Thanks to Howard S. Davis, volunteer Pro Bono Attorney, Partnership for Children's Rights, for preparing this article.

# Disabled Benefit from Food Stamp and Medicare Changes

Thanks to recent administrative changes made by the NYS Office of Temporary and Disability Assistance (OTDA) and the Department of Health (DOH), more disabled and elderly individuals should be able to access the Food Stamp Program and the Medicare Savings Program here in New York. Here's a quick summary of the major changes:

**Food Stamps: (Virtual) Elimination of resource test**

For most households in New York, as of January 1, 2008, there is no longer a resource test for food stamps. OTDA implemented a federal food stamp option called "expanded categorical eligibility," which resulted in the virtual elimination of the resource test.

## Food Stamp Expanded Categorical Eligibility Chart

| **Family Size** | **For households *without* an elderly (60+) or disabled person:**<br><br>**130% of Poverty**<br><br>**Monthly Gross Income Maximum**<br><br>**Oct 1, 2007 – Sept 30, 2008** | **For households *with* an elderly (60+) or disabled person:**<br><br>**200% of Poverty**<br><br>**Monthly Gross Income Maximum**<br><br>**Oct 1, 2007 – Sept 30, 2008** |
|---|---|---|
| 1 | $1,107 | $1,702 |
| 2 | $1,484 | $2,282 |
| 3 | $1,861 | $2,862 |
| 4 | $2,238 | $3,442 |
| 5 | $2,615 | $4,022 |
| 6 | $2,992 | $4,602 |
| 7 | $3,369 | $5,182 |
| 8 | $3,746 | $5,762 |
| Each Additional Person | + $377 | + $580 |

Resources don't count if you meet these income guidelines. If, however, someone in the household has been disqualified from food stamps, the other members of the household are subject to the regular food stamp resource rules ($3000 maximum for elderly/disabled; $2000 for everyone else).

If your clients are receiving temporary assistance while their SSI cases are pending, they are probably already receiving food stamps. However, DAP advocates may want to ask clients who are not on Temporary Assistance (TA) whether they are receiving food stamps, and to encourage those who are not to apply. Although food stamps are not intended to meet a household's entire food needs, they can really help put food on the table, and also act as a vital income supplement.

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Also, after you win your SSI case (congratulations!), remember that for food stamp purposes, the client can retain his/her retroactive Social Security/SSI award indefinitely, since lump sums are counted as resources for food stamp purposes and resources no longer count. Of course, they will be counted as resources for purposes of SSI eligibility nine months after receipt.

For more details about the new food stamp categorical eligibility policy, see the OTDA policy directives: 07 ADM 09 and 08 INF-03. Both are available on the Western New York Law Center's Online Resource Center. http://onlineresources.wnylc.net

**Medicare Savings Program – elimination of asset test AND interview requirements**

This change will benefit clients who are approved for SSD and entitled to Medicare.

The Medicare Savings Program (MSP) is the generic "catch-all" term for the various Medicare Buy-In Programs – the programs that pick up the cost of Medicare Part B premiums for low income beneficiaries and automatically qualifies them for the Part D (prescription drug) low income subsidy. Medicare beneficiaries with gross incomes at or below 135% of the federal poverty level can qualify for MSP. Clients apply for MSP at the local Medicaid office.

There have been two major changes to the MSP in New York State:

1) In order to make it easier for low income beneficiaries to access MSP, DOH has completely eliminated the interview requirement as of January 1, 2008. This means that disabled and elderly Medicare beneficiaries can apply for MSP without having to travel to the local Medicaid office! (Prior to January 1, MSP applicants had to appear at in-person interview or appoint an authorized representative to attend the interview in their place.) NYS DOH GIS message 07 MA 027 announces the new "no interview required" policy. You can get the GIS message and its attachments, including a copy of the MSP application form at http://onlineresources.wnylc.net/pb/docs/07ma027.pdf

2) The asset test has been eliminated from all three MSPs (QMB, SLMB and QI-1) as of April 1, 2008, in accordance with statutory changes made to MSP as part of the 2008 NY state budget process. *This means that assets will no longer be considered in determining MSP eligibility in New York State!* DOH is in the process of submitting a state plan amendment to the Centers for Medicare and Medicaid Services (CMS). We anticipate that a GIS message will be released by early summer confirming that the asset test has been eliminated for MSP eligibility purposes as of April 1, 2008. Beneficiaries eligible under these new rules can file their applications now, even before the GIS has been released.

A description of the various MSPs and their income guidelines for 2008 is available at the DOH website, http://www.health.state.ny.us/health_care/medicaid/program/update/savingsprogram/medicaresavingsprogram.htm

For more information about the information in this article, please contact Cathy Roberts at 518 462-6831 x 23 or croberts@empirejustice.org. Thanks to Cathy for taking the time to help out her former DAP colleagues by providing this valuable information.

# REGULATIONS

## Immune System Disorders Listing Revised

The Social Security Administration (SSA) recently published final changes to the Immune System Disorders listings. 73 Fed Reg. 14570 (March18, 2008). The final rules are effective June 16, 2008. Some highlights of the final rule include:

Every immune system disorder now includes provisions for evaluating the impairment based on functional criteria, mirroring the current 14.08N (repeated manifestations of the disorder with at least two constitutional symptoms or signs and marked limitation in at least one of the following areas: activities of daily living, maintaining social functioning or completing tasks in a timely manner due to deficiencies in concentration, persistence or pace).

Section 14.00G provides that effects of treatment, such as side effects of medication, for all immune system disorders, in addition to HIV/AIDS, must be considered at Step 3 of the sequential evaluation (listing level severity).

Section 14.00G1.f. notes that the interactive and cumulative effects of treatments may be greater than the effects of each treatment considered separately. The example given is treatment for HIV infection together with treatment for Hepatitis C. SSA also states that medications used in treatment may have effects on mental function such as cognition, concentration and mood.

Section 14.00G.2 acknowledges that some individuals may show an initial positive response to drug treatment, but that the initial positive response may be followed by a decrease in the effectiveness of the medication.

Section 14.00F is specific to HIV infection. SSA has clarified that a claimant need not have all supporting medical documentation (medical history, and clinical findings and laboratory findings and diagnoses) in order to determine that the claimant has manifestations of HIV infection. For example, a lack of lab tests should no longer preclude a finding by the ALJ that the PCP (pneumocystis carinii pneumonia) listing is met because PCP is frequently diagnosed presumptively. Additionally, "no evidence of bacterial pneumonia" was added to the list of evidence that is supportive of a presumptive diagnosis of PCP. Guidance for presumptive diagnosis of CMV (cytomegalovirus) disease and candidiasis of the esophagus, as well as an explanation of how toxoplasmosis of the brain is presumptively diagnosed, is included. 14.00F.3.i-iv.

There is expanded guidance on repeated manifestations of HIV infection (14.08K). Pancreatitis, hepatitis, peripheral neuropathy, glucose intolerance muscle weakness, cognitive or other mental limitation have been listed as examples. Nausea, vomiting, headaches and insomnia have been added to the list of signs and symptoms as well.

In an unusual move, SSA is requesting more comments on the HIV/AIDS listings. The comments are due by May 19, 2008. Back in 2003, SSA published an advance notice of proposed rulemaking (ANPRM). There was opportunity for preliminary input at that time; public meetings were held and extensive and detailed comments were submitted by individuals and advocacy groups at that time.

Subsequently, proposed changes to the HIV/AIDS listings were published in August 2006. 71 Fed Reg. 44431- 44464. Comments on those proposed changes were due in October 2006. (See September 2006 *Disability Law News*). So why didn't SSA feel ready to issue final HIV listing changes based on the 2006 proposed rule? According to SSA:

*We have decided to publish this ANPRM partly because we need additional information and partly because we believe that some of the changes suggested in the public comments [to the 2006 proposed rule] were too extensive to include in a final rule without giving the public a chance to comment on them.*

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# SSA Seeks Comments on Protecting Benefits from Payday Loans

The Social Security Administration (SSA) is seeking comments regarding an anticipated change in a problematic agency payment procedure. The procedure currently permits benefit payments to be deposited into a third party's "master" account when the third party maintains separate "subaccounts" for individual beneficiaries. SSA states that it is considering this change because of concerns about the increasing use of this procedure by payday lenders who target Social Security beneficiaries. 73 Fed. Reg. 21403 (April 21, 2008).

The Federal Register notice states that SSA is aware of check-cashing services that set up a master account at a financial institution with subaccounts in beneficiaries' names. If the individual wishes to access her benefits, the check-cashing company then writes a check and charges a check-cashing fee.

In addition, some lenders require borrowers to preauthorize their bank to transfer benefit funds from the borrower's account to the lender. In some instances, the lender may require the use of a specified bank and may provide in the loan agreement that the beneficiary cannot discontinue this arrangement until the loan is repaid.

All of these practices appear to violate 42 U.S.C. §407(a), which prohibits transfer or assignment of the right to future benefit payments and protects from levy, attachment, garnishment or other legal process.

It is important for advocates who have seen the devastating effect these predatory practices have had upon low income, disabled SSI or Social Security beneficiaries to submit comments to SSA. SSA includes in the request for comments a set of specific questions it would like to see addressed. Comments are due by June 20, 2008.

If you have clients who have been adversely affected by any of these predatory practices, please let Louise or Kate know so that we can include those cases in any comments.

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The Empire Justice Center has signed on to a comment letter that was drafted by a working group composed of representatives of several organizations with expertise in HIV treatment and representation of HIV positive claimants. The comment letter is available as DAP #487.

In addition to other suggestions, the comment letter:

- Emphasizes the need for better consideration of subjective evidence of claimants who are non-responsive to treatment, and asks that SSA address those issues through written guidance and training provided to SSA disability examiners and adjudicators.

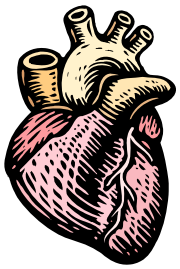
- Provides suggestions for specific changes to the listings to reflect current understanding of appropriate objective and subjective indicators of those impairments, in particular, the need to reference co-infection with Hepatitis B or Hepatitis C in the Listings (Sections 14.08(D) & 114.08(D)) and to accept subjective evidence related to diarrhea (Sections 14.08(I) & 114.08(I)).

- Requests that chronic pancreatitis be added as a "stand-alone" listing.

- Requests that additional, specified manifestations, such as morphological abnormalities, metabolic abnormalities, infarction and cardiac problems, and impaired mental functioning, be referenced in Sections 14.08(K) & 114.08 (L) [the former 14.08 (N) & 114.08(N)].

Thanks to LJ Fisher of the Empire Justice Center's Rochester office for providing this excellent summary of the revised Immune System Disorders listing and the main points of the comment letter.

# Cardiovascular Listings Up for Review



Although Social Security's cardiovascular listings were revised only two years ago in April 2006, (See March 2006 *Disability Law News* for details), SSA is now "requesting your comments on whether and how we should update and revise the criteria we use to evaluate claims involving cardiovascular disorders in adults and children. . . .We are requesting your comments as part of our ongoing effort to ensure that the listings are up-to-date. After we have considered your comments and suggestions, other information about advances in medical knowledge, treatment, and methods of evaluating cardiovascular disorders, and our program experience using the current listings, we will determine whether we should revise any of the cardiovascular listings. If we propose specific revisions to the listings, we will publish a Notice of Proposed Rulemaking (NPRM) in the Federal Register." 73 Fed. Reg. 20564 (April 16, 2008).

Periodically SSA reviews its medical criteria for determining disability. This announcement is an "advance" notice of rulemaking or, a request for general comments and ideas. Later, there will be a notice of rulemaking, with chapter and verse presented for public comment, but there is not any particular schedule for revision. The cardiovascular listings are set to expire on January 13, 2011, but SSA typically extends listings provisions that they are not ready to revise.

Advocates with experience in cardiovascular cases, or with relatives who are cardiologists, should take this opportunity to advise SSA about changes that would benefit our clients with cardiovascular disease. Comments are due by June 16, 2008.

# SSA Staff Privacy Policies Finalized

In December 2007, the Social Security Administration (SSA) proposed rules designed to "better preserve the anonymity of, and to better protect the physical well-being of, our employees who reasonably believe that they are at risk of injury or other harm if certain employment information about them is disclosed." (See January 2008 *Disability Law News* for details). On May 7, 2008, SSA issued final rules adopting the proposed rules without change. 73 Fed. Reg. 25507. The final rules were effective upon publication.

The changes are twofold: removal of Part 401, Appendix A ("Employee Standards of Conduct") subsection (b)(3)(c)(4); and, addition of subsection "e" to 20 C.F.R. §402.45:

> (e) Federal employees. We will not disclose information when the information sought is lists of telephone numbers and/or duty stations of one or more Federal employees if the disclosure, as determined at the discretion of the official responsible for custody of the information, would place employee(s) at risk of injury or other harm. Also, we will not disclose the requested information if the information is protected from mandatory disclosure under an exemption of the Freedom of Information Act.

# Collection of Race and Ethnicity Data Proposed

The Social Security Administration (SSA) announced that two "information collection packages," are pending at SSA and will be submitted to the Office of Management and Budget (OMB) within 60 days from the date of the notice in the March 21, 2008 Federal Register. 73 Fed. Reg. 15252.

One of these items is a revision of the Internet application for Retirement, Survivors and Disability benefits, including: (1) the addition of new race/ethnicity questions; (2) the ability for third parties to complete applications in ISBA (Internet Based Social Security Applications) and (3) redesign changes that will make the application less time-consuming.

The other is a questionnaire to collect information on an applicants' race and ethnicity. Currently, SSA has no reliable, statistically valid means of capturing race/ethnicity data. While SSA collects some race/ethnicity data on the Application for a Social Security Card, SSA does not receive the data through other means of enumerating individuals. Moreover, SSA does not collect it during the disability application process. SSA believes that adding race/ethnicity to its benefits applications will produce data that can be used to ensure the benefits decision process is being conducted in a fair manner.

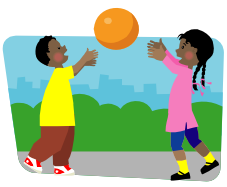
While the questionnaire revision applies only expressly to the Internet application process, apparently SSA has made similar changes, or will, to the SSI application and to the other means of submitting applications, such as, over the telephone with a SSA representative who keypunches it directly into his/her database, and on paper. The questionnaire will be directed to Title II and Title XVI claimants.

# SSI Youth Transition Demonstration Project Extended

The Social Security Administration (SSA) gave notice that it is extending a demonstration project, which began in 2003, to test the effectiveness of altering certain SSI program rules as an incentive to assist youth with disabilities in their transition from school to work. 73 Fed. Reg. 13601 (March 13, 2008). New York's projects are located in the Bronx and Buffalo.

The alternative program rules include: 1) continuation of benefits to Title II or SSI beneficiaries who are found no longer disabled through a CDR or SSI age-18 redetermination, so long as they continue to participate in the demonstration project; 2) apply the SSI student-earned income exclusion beyond age 21 if they remain in school; 3) provide an earned income exclusion of $65 plus 3/4ths (instead of ½) of any additional earnings; and 4) approve PASS plans that have either career exploration or postsecondary education as a goal.

We welcome feedback from DAP advocates in the Bronx and Buffalo on how this youth transition demonstration project has been working.



# SSA Proposes Easier Rep Payee Reviews

The rigorous scrutiny that the Social Security Administration (SSA) imposed on prospective representative payees may have been a disincentive for some people to volunteer to act in that capacity. SSA has issued proposed regulations that would streamline the representative payee interview process by not requiring a current payee to appear for another in-person interview for a subsequent payee application. 73 Fed. Reg. 12923 (March 11, 2008).

The preface to the proposed rule states that the current regulations, 20 C.F.R. §§404.2024(b) and 416.624(b), appear to provide only one exception to the in-person interview. The new rule would add another exception, when such an interview is impracticable because conducting it would cause "undue hardship," *e.g.*, traveling a great distance to the field office. Public comments were accepted through May 12, 2008.

# Chronic Fatigue Syndrome Advisory Committee Meets

The next time you are confronted with a Medical Expert (ME) who denies the reality of chronic fatigue syndrome (CFS), you might consider asking whether s/he is aware of the latest guidance from HHS's Chronic Fatigue Syndrome Advisory Committee (CFSAC).

"CFSAC was established on September 5, 2002. The Committee was established to advise, consult with, and make recommendations to the Secretary, through the Assistant Secretary for Health, on a broad range of topics including (1) the current state of knowledge and research about the epidemiology and risk factors relating to chronic fatigue syndrome, and identifying potential opportunities in these areas; (2) current and proposed diagnosis and treatment methods for chronic fatigue syndrome; and (3) development and implementation of programs to inform the public, health care professionals, and the biomedical, academic, and research communities about chronic fatigue syndrome advances. . . ."

According to an announcement in the March 11, 2008 Federal Register, the committee was scheduled to hold a public meeting on May 5 & 6 in Washington, D.C. 73 Fed. Reg. 13004.

# Rules Govern Calling SSA Employees as Witnesses

Not surprisingly, the Social Security Administration (SSA) has a rule for just about everything, including how a litigant would go about calling an SSA employee to testify or produce documents in a legal proceeding to which SSA is not a party.

The final rule, effective upon publication in the May 8, 2008 Federal Register (73 Fed. Reg. 26001), updates the address to be used to request testimony of an SSA employee.

The revised text of 20 C.F.R. §403.120(c) reads:

(c) You must send your application for testimony to: Social Security Administration, Office of the General Counsel, Office of General Law, Suite No. 56, P.O. Box 26430, Baltimore, Maryland 21207, Attn: Touhy Officer. (If you are requesting testimony of an employee of the Office of the Inspector General, send your application to the address in Sec. 403.125).

# You Never Know Unless You Ask: Getting Retro Benefits Released

As DAP advocates know all too well, a case is not finished once you get a favorable decision. In many cases, effectuating the decision and getting all benefits paid is every bit as difficult as winning the case.

Since May 2006, getting retroactive benefits paid has become more difficult with the implementation of changes to the installment payment of SSI benefits. Installment payments must be paid in no more than 3 payments. Each payment will be made at 6-month intervals. Each of the first and second installment payments cannot exceed 3 times the FBR (plus any federally administered State supplement), unless the exception for increasing the installment amount applies (see SI 02101.020B.4.). The first and second installment payment should each be for this maximum amount if the balance due equals or exceeds this amount. The third (and final) installment payment will include the remainder of the past-due benefits.

The standard limitation on the amount of each of the first and/or second installment payment may be increased by the total amount of debts and expenses that the SSI recipient may incur for food, clothing, shelter, including the purchase of a home, or medically necessary services, supplies or equipment, or medicine.

But what about other pressing expenses that are not covered by the POMS provision? Jody Davis of Legal Assistance of the Finger Lakes in Geneva faced this problem when her client contacted her and asked if her retroactive benefits could be released for the purchase of an automobile that she needed to attend her therapy appointments. The rural area in which she lived had no public transportation and she could not attend these sessions if she did not have a car. Of course, the SSA claims representative (CR) had told the client that the retroactive benefits could not be released early to purchase a car. Even Jody's initial intervention would not sway the CR.

But Jody is not an experienced disability advocate for nothing. She contacted the client's therapist, who gladly provided a letter documenting that the client's transportation problems were an obstacle to meeting her needs for consistent and ongoing treatment. Jody drafted a letter to the CR citing the POMS and attaching the therapist's letter. Jody reports that within one week of sending the letter, her client received a notice informing her that the final installment of retroactive SSI benefits was being released early for purchase of an automobile.

Chalk up another one for the good guys! As usual, Jody went the extra mile for her clients. Jody's redacted letter to the claims rep. and the therapist's letter are available as DAP #488.

# COURT DECISIONS

## District Judge Overturns Magistrate's Recommendations

Is anyone else outraged that an SSI application filed in 1996 still has not been resolved? We know that Peter Racette of the Legal Aid Society of Northeastern New York's Plattsburgh office must feel some indignation on his client's behalf, but also some relief that a Magistrate's unfavorable recommended decision was not adopted by the District Court Judge.

Peter's case involved a 1996 SSI application, a September 1998 unfavorable ALJ decision, an October 2000 Appeals Council remand, an April 2001 second unfavorable ALJ decision and then no review by the Appeals Council until May 2004. Peter filed this case in the NDNY in 2004, but did not receive the Magistrate's recommended decision until September 2006. The Magistrate recommended denial of benefits. Peter filed objections with the presiding judge, Norman Mordue.

In March 2008, Judge Mordue ruled favorably on two of the three objections Peter made. The decision is mostly interesting for his treatment of the treating physician rule. The claimant was from Puerto Rico and spoke very limited English. Her internist treated her for mental impairments, including prescribing medication. The internist specifically stated in her records that she thought the client should be treated by a psychiatrist. She was trying to find a psychiatrist to whom to refer her, but could not find an available psychiatrist who spoke Spanish. The internist did speak Spanish, and completed a comprehensive report describing the claimant's mental limitations.

The ALJ rejected the internist's conclusions because she was not a psychiatrist. Although the hearing decision did not specifically say so, it was implicit that no weight was assigned to the internist's opinion because it was not mentioned thereafter. Judge Mordue found that the ALJ failed to apply the first step of the treating physician rule: consistency with other substantial evidence. Further, Judge Mordue continued, even assuming the treating physician report was inconsistent with other substantial evidence, the ALJ failed to consider all the factors in the treating physician regulation for determining what weight should be assigned to the opinion. Here, the ALJ applied one factor - medical specialty - to the exclusion of the other four factors listed in the regulation and assigned no weight whatsoever to the opinion.

The second issue on which Judge Mordue ruled in Peter's favor involved the hypothetical question to the vocational expert (VE). The ALJ's hypo asked if the client could return to her past work if her mental limitations were mild. The VE said yes. The ALJ then asked if she could return to her past work if the mental limitations were moderate. The VE said no. The ALJ then asked if there was other work in the national economy if the mental impairments were moderate. The VE again said no. Of the six mental work activities specified by the ALJ, the last was ability to understand, remember and carry out detailed instructions. Judge Mordue agreed with Peter's argument that there was no evidence to support the finding that the client had any capacity for detailed instructions.

Unfortunately, Judge Mordue agreed with the Commissioner that there was substantial evidence to support the finding that the client was only mildly limited in the other five basic mental work functions addressed by the ALJ. Peter argued that the ALJ was selectively reading the evidence and citing the one or two references indicating mild limitation and ignoring the 17 or 18 indicating significant limitation. Judge Mordue rejected Peter's argument, and instead adopted the same reasoning in his decision.

The client's Spanish speaking therapist had provided three or four detailed reports that left no doubt that this woman was not mentally capable of competitive work. The Court, however, did not require applica-

*(Continued on page 13)*

# Remand Ordered to Consider Retrospective Opinions

Many of our cases are not quick fixes; they need painstaking work to collect evidence and may often require multiple trips to the hearing office to present and argue the merits. As long as there is no adverse final decision, advocates can hold out hope ultimately for payment of benefits, somehow, someday, somewhere!

Veteran DAP advocate Candace Appleton of Nassau Suffolk Law Services recently received a remand order in a federal district court case that has been in the Social Security Administration system for more than six years. Candace's client's application for DIB and SSI was first denied after an ALJ hearing in 2004. The Appeals Council remanded for another hearing, which was held in 2006 before the same ALJ.

The ALJ read the Appeals Council remand order very narrowly and did not allow Candace to develop new evidence of impairments or question the vocational expert based on new evidence. The ALJ again denied the claim for benefits, finding that the 60+ year old claimant could return to her past relevant work as a hotel housekeeper and kitchen helper. However, since the claimant had filed a subsequent application in January 2005 and been found disabled and eligible for benefits, the ALJ did issue a partially favorable decision and found eligibility as of January 2004 but not before.

Candace appealed to federal court to get benefits for the retroactive period March 2002 to December 2003. She argued that the ALJ had failed to provide a full and fair hearing because the ALJ viewed the Appeals Council remand order too narrowly and failed to carry out all the directives on remand. Additionally, the ALJ failed to consider a retrospective opinion from the claimant's treating physician.

District Court Judge Joanna Seybert of the EDNY agreed with both of Candace's arguments and remanded the case for further proceedings consistent with her opinion. Although Candace's client has to go through yet another hearing, it will probably be with a different ALJ and, at age 65, she stands a pretty good chance of winning.

Congratulations to Candace for sticking with this case and pushing for a fully favorable decision for her client. We've got a feeling that something good is coming. The decision in *Marshall v. Astrue* is available as DAP #490.

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*(Continued from page 12)*

tion of the treating physicians rule to those opinions as they were only those of a therapist - albeit Spanish speaking. (The Consultative Examinations - CEs - were all done through interpreters.) The ALJ, Magistrate, and even the District Court Judge all seized on one or two little things the therapist said that the claimant could do as substantial evidence to support a conclusion that she only had mild mental limitations. Peter notes that he thinks they stretched the notion of "substantial evidence" about as far as it can go.

Nonetheless, Peter achieved a successful outcome in the form of a remand for his client. Since the original ALJ has already heard the case twice, it will in all likelihood be assigned to a different ALJ. We're willing to bet that Peter's client is happy that he is on her side. The decision in *Cartagena v. Commissioner of Social Security* and Peter's objections to the Magistrate's Report and Recommendation are available as DAP #489.

# District Court Allows §504 Claim vs. SSA for Blind Claimants

A district court in California has denied the Social Security Administration's (SSA) motions to dismiss an action that seeks to compel the agency to provide notices and other communications in accessible formats for program participants with visual impairments. *American Council of the Blind, et al v. Astrue*, 2008 WL 1858928 (N.D. Cal. April 23, 2008). The decision is an important victory for the estimated 3,000,000 participants in Social Security programs who are blind or have low vision, the overwhelming majority of whom are over the age of 80. According to one of the class counsel, Gerry McIntyre of the National Senior Citizens Law Center, the decision provides considerable cause for optimism that SSA will be required to change its current practice of providing the same standard print format for notices to people with visual impairments that it provides to everyone else. Plaintiffs, in challenging SSA's policy, are seeking to represent a class of all visually impaired beneficiaries of and applicants for Social Security, Supplemental Security Income (SSI), Special Veterans Benefits, and Medicare, as well as representative payees in those programs who have visual impairments.

Plaintiffs asserted federal question jurisdiction based on claims under §504 of the Rehabilitation Act and the Due Process Clause. The government argued that federal question jurisdiction was precluded by 42 U.S.C. §405(h), which bars federal question jurisdiction in cases "arising under" the Social Security Act and stipulates that they can only be brought under 42 U.S.C. § 405(g) and then only if plaintiffs exhaust all 405(g) administrative remedies. The catch here is that 405(g) administrative remedies are restricted to claims for benefits; plaintiffs' claims were not claims for benefits and thus the administrative remedies were not available.

The court, William Alsup, U.S.D.J., ruled that the case did not arise under the Social Security Act since "[t]he Rehabilitation Act, not the Social Security Act, establishes the basis for plaintiffs' discrimination claims because the Rehabilitation Act creates the duty on the part of the agency to provide meaningful access to participants." The court also noted that applying 405(h) "risks depriving plaintiffs of any judicial review" and that the case therefore falls under the exception to 405(h) established by the Supreme Court in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) for cases in which applying 405(h) would result in no judicial review at all.

The government also argued that §504 of the Rehabilitation Act did not authorize a private right of action and that plaintiffs should therefore pursue their remedies under the Administrative Procedure Act. Judge Alsup concluded, however, that §504 was available with respect to claims for equitable relief.

Plaintiffs were represented by the National Senior Citizens Law Center, Disability Rights Education & Defense Fund, Inc., Oregon Advocacy Center and Heller, Ehrman, LLP (a San Francisco firm), which has committed substantial resources to the case.

According to Gerry, it is not yet clear how the case will proceed from this point on, although further litigation is probable. A copy of the decision is available as DAP #491. We will keep you posted on developments in this important litigation.

# District Court Reverses Child's Claim

U.S. District Court Judge John Curtin recently agreed with Sarah Frederick of the Heritage Centers in Buffalo that her twelve-year-old client's case should be reversed rather than remanded. Judge Curtin, noting that the claimant had been five years old at the time that his application for SSI benefits had first been filed, found that the record contained persuasive proof of the boy's marked limitations in the domain of interacting and relating with others.

The ALJ in the case had determined that E.G. was markedly impaired in the domain of acquiring and using information, but less than markedly impaired in any of the other domains of functioning. E.G. had alleged disability based on behavior problems and emotional disturbance. He was diagnosed with Attention Deficit Disorder and Oppositional Defiant Disorder.

While the Court agreed that substantial evidence supported the ALJ's finding of a less than marked impairment in the domain of attending and completing tasks, it could not find that the record "yields such evidence as would allow a reasonable mind to accept the ALJ's conclusion that E.G. had a less than marked limitation in the domain of interacting and relating with others."

Judge Curtin found that the ALJ improperly rejected the opinion of the non-examining review physician, who had opined that E.G. suffered from a marked impairment in the domain of interacting and relating. He also failed to provide any explanation for his rejection of the consultative examiner's assessment, or for his implicit rejection of other substantial evidence of impairment in the domain. The Court cited the substantial evidence of record from the school psychologist documenting E.G.'s escalating behavioral problems, including his aggression and inability to get along with his classmates. Judge Curtin faulted the ALJ for acknowledging the reports but not explaining why he rejected them "in favor of a determination which was based entirely on the absence of any showing the E.G. had received medical attention to address his condition." The District Court concluded that this was an improper evaluation.

Thanks to Sarah, E.G. and his family will finally receive the benefits to which they are entitled. Judge Curtin's decision in *Elizabeth Diaz o/b/o E.G. v. Commissioner of Social Security*, 2008 WL 821978 (W.D.N.Y. March 26, 2008) and is available as DAP #492.

# New York County Bar Ethics Opinion Available


Remember hearing about an ethics opinion that permitted - and indeed required - you as an advocate to withhold an adverse medical opinion that you might have obtained in the course of developing a disability claim? The New York County Bar Association issued Opinion 698 on July 28, 1993, that states in part "in a proceeding before an administrative law judge or other official on an application for Social Security disability benefits, a lawyer need not disclose relevant medical information about the client if the administrative judge or officials do not request such information and if the statutes or rules governing such proceedings do not independently require disclosure."

Of course, there are many and varying schools of thought among advocates as to whether other statutes or rules do require disclosure. Suffice it to say that there is wide spectrum of opinion on this matter. Thanks to Susan Sternberg of Legal Aid in NYC, however, you now have a legible copy of the oft photo-copied Opinion 698 at your disposal as DAP #493.

# ADMINISTRATIVE DECISIONS

## ALJ Finds Lead Poisoning Meets Organic Listing

Advocates who represent children in SSI claims are all too familiar with arguing disability based on ADHD (Attention Deficit Hyperactivity Disorder) and/or low IQ or learning disabilities. But how many of those kids may have ended up with those diagnoses because of exposure to lead paint when they were younger? Undoubtedly many more of these young clients than we may realize were exposed to lead paint - and may have tested positive for lead poisoning.

Katie Courtney recently prevailed in a case where the ALJ found that the claimant met Listing 112.02(a)(8)(9) and (10) and (B)(2)(b) for organic mental disorders. He based his finding on the boy's history of lead paint poisoning. This case involved a claim that had been remanded from U.S. District Court. Katie faced the often daunting prospect of returning before the same ALJ who issued the original denial. The second time around, the ALJ acknowledged the claimant's severe borderline intelligence and oppositional defiant. Despite having refused to find that the claimant had any marked impairments at the first hearing, the ALJ agreed that his claim actually met Listing 112.02. The ALJ based his decision in part on the testimony of a medical expert (ME) at the hearing regarding the significance of the child's earlier lead levels.

The ALJ's - and ME's - association of the exposure to lead paint and ADHD and low IQ is very significant. Even if the medical sources have not associated the lead exposure to the claimant's cognitive and behavioral problems, ALJs can sometimes be convinced of the serious of the claim if you can suggest a medical basis - such as lead poisoning - for the diagnosis. Remember to comb your medical records for any evidence of lead testing, and point it out to the ALJs.

For more information on the growing research on the effects that even low levels of lead can have on functioning, *see* "Protecting Our Children from Lead. The Success of New York's Efforts to Prevent Childhood Lead Poisoning" at 2, 3. New York State Department of Health, May 25, 2001. (Available at www.health.state.ny.us/nysdoh/lead/index.htm). According to recent research, blood levels lower than 10 are also associated with these problems. *See* http://www.cdc.gov/nceh/lead/CaseManagement/caseManage_main.htm.

And for more on the prevalence of lead poisoning and the social implications of lead exposure, see "A Matter of Racial Justice: The Alarming Disparities of Lead-Poisoning Rates in New York State." The article appeared in the January/February 2008 edition of *Poverty and Race* the monthly journal of the Poverty and Race Research Action Council. It was authored by Mike Hanley of the Empire Justice Center, and is available as DAP #494.

Congratulations to Katie for a cutting-edge victory on remand.

# Second Bite at Apple Pays Off

A remand order from district court, whether by stipulation or decision by the federal court judge, gives a claimant another "bite at the apple." More often than not, these remands result in wins for our clients.

That is exactly what happened in another case that Katie Courtney of the Empire Justice Center in Rochester handled following a voluntary remand from U.S. District Court. The claimant was a twenty-one-year woman who suffered from the sequelae of a nonmalignant brain tumor that had affected her pituitary gland. Her claim was originally a claim for childhood disability benefits, but by the time of the hearing, she had turned eighteen. On remand, Katie had the burden of proving that the young woman was disabled under both the childhood and adult standards. And prove it she did!

As luck would have it, the case had originally been heard by a "traveling" ALJ, so on remand it was reassigned to an ALJ from the Buffalo ODAR. Thus, Katie avoided the added burden of having to persuade the ALJ that he had been wrong in the first place. She managed to convince the second ALJ that her client met the criteria for growth impairments at Listings 100.02(A) and 100.03(B). This was particularly challenging in light of the fact that while the claimant's height had initially dropped from the 40$^{th}$ to the 5$^{th}$ percentile, it had stabilized. *See Ware v. Commissioner of Social Sec. Admin.,* 439 F.3d. 1001, 1005 (9$^{th}$ Cir. 2005), citing POMS §DI 24598.020 for the proposition that "sustained" in Listing 100.02A requires a continuing reduction in growth velocity.

Katie also persuaded the ALJ that as an adult, the claimant met Listing 11.18 for neurological impairments as evaluated under 12.02(C3). Evidence, particularly that involving her need for a highly structured environment, demonstrated that she had resulting organic brain damage meeting the listing criteria.

Congratulations to Katie for her double victory.

# Childhood Disability Trainings Manuals Available On Line

Those advocates who may be a bit more long in the tooth than others will remember the so-called "Headless Child" Training Manual published by Social Security for its adjudicators. SSA Publication SSA 64-076, entitled "Childhood Disability Evaluation Issues," was issued in March 1998. It got its name from the rather odd picture gracing its cover page. Despite its name, it includes invaluable nuggets that can be useful in kids' cases dealing with mental retardation and maladaptive behavior.

The Compendium of Childhood Questions and Answers complied for SSA adjudicators in 2001 following the most recent revision of the SSI childhood disability regulations, states that "[t]he March 1998 Childhood Training Manual (it has a pink cover) is still relevant for childhood adjudication because it provides guidance for evaluating mental retardation (MR) and behavioral issues. Adjudicators should refer to that manual when they have questions about MR or behavioral disorder cases. Information from that manual will appear as a Social Security Ruling (SSR)." Q&A II-1.

To the best of our knowledge no such SSR has been issued. So where can one find this gem? Many advocates still have dog-eared copies buried in their file cabinets. So far, however, we have been unable to locate an official electronic version. In the meantime, it will be available on the Empire Justice Center website at, http://www.empirejustice.org/content.asp?contentid=3148 under the Disability Benefits training section.

We chose to post SSA 64-076, along with the equally valuable Q&As on the website rather than as DAP #s so that they can be accessed by ALJs or District Court judges if you want to cite rather than attach them to your memoranda. The DAP numbers are only accessible to those who are registered on the on-line resource center.

Thanks to Mike Hampden for his help in unearthing these treasures.

# WEB NEWS

## Contacting SSA Made Easy

A listing of the names and addresses of all Social Security Administration (SSA) Field Office managers in New York State:
http://www.ssa.gov/oag/foia/impac/ny.htm;

A listing of the addresses, and telephone and fax numbers for all SSA Field Offices in Region II: http://www.nls.org/pdf/WIL-Listing-FY2004.pdf.

## Court Decisions Available Free Online

A new project is making federal decisions available online, free of charge. The public resource website will offer Supreme Court decisions back to the 1700s and all U.S. appeals courts decisions dating back to 1950. After clicking on the link to the website, below, click on the courts.gov link. A number of directories are available: the "b" subdirectory contains books (see the index file for more information); the "c" subdirectory contains 1,858 volumes of case law converted to XHTML; the "f" subdirectory contains an initial release of some experiments in ultrafiche scanning (see the readme for more information); the "hein" subdirectory contains the Federal Cases, donated by William S. Hein & Co. (see the readme for more information); and the "pacer" subdirectory contains documents recycled from the U.S. PACER system (see pacer.resource.org for more information).
http://public.resource.org/

## Can You See Me?

New York's state Capitol has added a new measure of transparency with Project Sunlight, a database that includes campaign finance reports, lobbyist lists and information on proposed legislation. New options of the open government web site include the ability to export, or move data, to spread sheets. Additionally, the web site now offers a search function that can let someone look up the approximate spelling of a name. Project Sunlight is sponsored by Attorney General Andrew Cuomo.
http://www.sunlightny.org/snl1/app/index.jsp

## Create PDFs at No Cost


The Information Technology gurus among us have been busy giving us information about how to create pdf files without a specific program (i.e., Adobe Acrobat). For those of you who cannot create pdf files from a Word, WordPerfect, excel, etc. file, FileForum has a free pdf creator. To install this program go to: http://fileforum.betanews.com/detail/doPDF/1171636577/1

Another pdf creation option is Zamzar, which allows you for free to convert any document into PDF, including Excel worksheets and any web pages. Go to: Zamzar.com , browse and pick the file you want, select what type of file you want to convert it to, then enter your email. In a few minutes, you will receive an email with a link to the converted document; click it and download the document. Zamzar also can change PDF documents back into Word documents.

Lastly, another IT specialist recommends that if you are using some version of WordPerfect later than 5.2, you can create the pdf file with "File-Publish To-PDF," or, you can download for free "Primo-PDF," a freeware program that lets you generate pdf documents from almost any windows program you might be using:
http://www.primopdf.com

# CLASS ACTIONS

***Martinez v. Secretary,*** No. 82-4816, (E.D.N.Y.)
("the Title II delay case")

Description - Certified class challenged delays in the hearing process in claims for Title II disability benefits.

Relief - SSA is required to send notice to Title II claimants with the acknowledgment of the request for hearing stating that claimants have a right to a decision in a reasonable time. Claimants are entitled to bring separate federal mandamus actions where delay is unreasonable.

Citation - Unpublished order dated April 24, 1986.

Information - Toby Golick, Bet Tzedek Legal Services, Cardozo School of Law (212-790-0240).

***Sharpe v. Sullivan***, No. 79-1977 (E.D.N.Y.)
("the SSI delay case")

Description - Certified plaintiff class challenged delays in holding administrative hearings, issuance of hearing decisions, and issuance of payments, on SSI claims. In 1980 Judge Haight entered order placing time limits on each step, and requiring SSA to pay interim benefits when time limits were exceeded. In 1985 Judge Haight vacated these time limits in light of *Heckler v. Day*, U.S. 104 (1984), and in 1990 entered a new order, below.

Relief - 1990 orders require (1) SSI disability cases: (a) OHA must issue notices explaining delay and right to sue after 120 days from hearing request, and (b) SSA must pay interim benefits if regular benefits have not been paid within 60 days of favorable hearing decision (with certain exceptions, e.g. non-cooperation); (2) SSI nondisability cases: SSA must pay interim benefits within 60 days of favorable hearing decision, or within 60 days of favorable hearing decision, or within 90 days from hearing request.

Citations - *Sharpe v. Secretary*, No. 79-19777 (S.D.N.Y. July 10, 1980) (unpublished order), aff'd 621 F.2d 530 (2d Cir. 1980), vacated No. 79-1977 (S.D.N.Y. 1985) (unpublished), revised, No. 79-1977 (S.D.N.Y. March 6, 1990) (unpublished).

Information - Johnson Tyler, South Brooklyn Legal Services (718-237-5500).

***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 of New York (646-442-3302). abiddle@lsny.

# 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

## Does M*O*N*E*Y Spell Relief?

A recent study published in the May 3, 2008 medical journal *Lancet* correlates higher levels and instances of pain with income and education. According to the study, which was authored by Alan B. Krueger and Arthur A. Stone, about 28% of Americans are in pain at any given time, and those with less education and lower income experience more pain.

Kreuger, a professor of economics at Princeton, and Stone, a professor of psychiatry and behavioral science at Stony Brook University, asked a representative sample of 4,000 Americans to record their activities and the occurrence and intensity of pain over a 24-hour period. The survey did not distinguish between mental and physical pain, because, as the authors acknowledge, all pain is subjective. Participants with less than a high school degree reported twice the average pain rating throughout the day than college graduates. Those with annual incomes below $30,000 rated pain twice as high as those with incomes above $100,000: those in households making less than $30,000 a year spent almost 20% of their time in pain, compared with less than 8% for those in household with incomes above $100,000.

The study also found that workers in blue collar jobs reported more frequent and more severe pain than those who work in white collar professions. And, perhaps not surprisingly, reports of pain for that group were lower when they were not working. Again not surprisingly, those who reported a work-related disability (13%) experienced high rates of pain. For the most part, however, pain did not go away when people stopped working.

Debunking previous studies, women did not report more pain than men. At younger ages, women reported slightly lower average pain ratings than men, but higher than men at older ages. Reports of pain were higher among blacks and Hispanics than whites and Asians. Average pain ratings were also higher when the respondents were alone, and were inversely related to self-reported life and health satisfaction.

Study results also reflect incidences and degree of pain during certain activities. Those activities triggering the most pain included caring for adults and during medical care. On the other hand, the number of intervals with "happy" ratings was significantly higher when respondents were working, eating and drinking, relaxing, or traveling, with the highest number occurring while watching television. Those reporting pain over much of the day spent almost 25% of their time watching television while others spent 16%.

The authors acknowledged the "direction of causality is unknown," especially in terms of reports of life satisfaction. In other words, which came first: the pain or the lower life satisfaction? Many more causality question could be raised. For example, do those with higher income report less pain because of better access to health care? Do blue collar workers experience more pain because their jobs are more physical? Which came first, the chicken or the egg? The complete article is available as DAP #495.

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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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