Empire Justice Center

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DISABILITY LAW NEWS

President Bush Names SSA Commissioner

President Bush announced on September 14, 2006, that he intends to nominate Michael J. Astrue, of Massachusetts, to be the next Commissioner of Social Security, for a six year term beginning January 20, 2007. Mr. Astrue previously served as Chief Executive Officer of Transkaryotic Therapies. Earlier in his career, he served as General Counsel at the U.S. Department of Health and Human Services (HHS). Previously, he served as Counselor to the Commissioner of Social Security at the U.S. Department of Health and Human Services. He also served as Acting Deputy Assistant Secretary for Legislation at the Department of Health and Human Services. Mr. Astrue received his bachelor's degree from Yale University and his law degree from Harvard University.

When Mr. Astrue served at HHS, SSA was still a part of the agency. From 1986 to 1988, Astrue was Counselor to then SSA Commissioner Dorcas Hardy. He also served as Associate Counsel to both Presidents Reagan and George H.W. Bush. After leaving HHS in 1992, he was briefly in private practice. In 1993, he began a career in the pharmaceutical industry, where he held various high-level positions, including CEO.

According to the NSCLC Washington Weekly, President Bush nominated Astrue to head the Food and Drug Administration in 2001 but the nomination was blocked by Senator Edward Kennedy, who felt that Astrue was too closely tied to the pharmaceutical industry. His nomination as Commissioner of SSA will similarly require confirmation by the U.S. Senate. It has been referred to the Senate Finance Committee, but confirmation hearings have not yet been scheduled

Current Commissioner Joanne Barnhart's term was due to expire in January 2007; she obviously was not renominated. Per rumors flying at the recent NOSSCR conference in Phoenix, she was anxious to see some of her proposals, especially the Disability Service Improvement changes, carried to fruition. She has allegedly been assured they will not be derailed. Only time will tell how quickly the train will steam ahead, however.

So why wasn't Barnhart reappointed? According to an article in the September 2006 edition of the NOSSCR *Social Security Forum,* the nomination of Astrue might be viewed in light of several other Bush appointments. Several days after Astrue's nomination, President Bush designated

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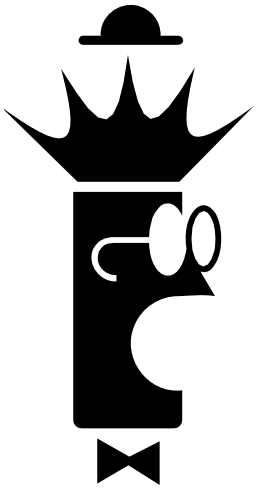
ODARs Going Electronic



Don't say we didn't warn you! Remember back to the 2006 Partnership Conference when we told you about eDib and gave you a CD with Social Security's new Electronic Folders (EF) format? Well, the time has come to start paying attention because New York's Offices of Disability Adjudications and Review (ODAR) are going electronic.

At a recent training on the EF at the Albany ODAR, staff said the program could be up and running as soon as February 2007. Barbara Samuels reported that a similar training in New York City presented a less optimistic starting date, closer to 18 months or early 2008. The reality is that eDib and the Electronic Folder is the new reality at all New York ODARs.

Don't panic (yet). ODAR staff said the process would be phased in slowly and that none of the existing paper cases would be converted to electronic files, except for cases selected to participate in the testing part of the phase-in, which is going on now. According to SSA, no additional software is needed for you to read the CD that ODAR will send you when your case is prepped for the hearing.

Perhaps one of the most confusing aspects was how additional evidence would be submitted prehearing: all evidence has to be submitted at least seven days before the hearing and has to be sent to a dedicated fax number with an appropriate barcode cover page. ODAR will send the barcodes, (yes plural because a different barcode is required for different types of evidence) with the notice of hearing. During the test phase, the notice of hearing specifically identifies if a case is electronic or paper.

Although not mentioned at the trainings, SSA staff and advocates anticipate that two screens - or split screen capacity - may be necessary, or at least helpful. An advocate can then view the file on screen, while using the other to work on letters or memo.

We have plenty of copies of SSA's CD tutorial on using the electronic folder, so feel free to contact us if you have misplaced your copy. Please let us know how the EF implementation is going in your area ODAR. If necessary, we'll schedule another training at our next statewide DAP conference.

New SSA Commissioner—continued

(Continued from page 1)

Sylvester J. Schieber to replace outgoing Chairman of the Social Security Advisory Board (SSAB) Hal Daub. He also intends to nominate Mark J. Warshawsky and Dana K. Bilyeu to the SSAB.

Schieber has been on the SSAB since 1998, and was a proponent of a plan to address the long-range financing of the Social Security trust funds known as the "Personal Security Account" (PSA). The PSA is a two-tiered account, half of which would pay a basic benefit, or flat amount of about 47% paid to the average worker in 1996. The second tier would be a personal account. Warshawsky was Assistant Secretary for Economic Policy in the U.S. Treasury Department from 2004 to 2006. His speeches from his Treasury Department days make clear that he supported privatization. Couple that with the President's remarks that he plans to put Social Security reform on his 2007 agenda.

Of course, all that was before November 7th….

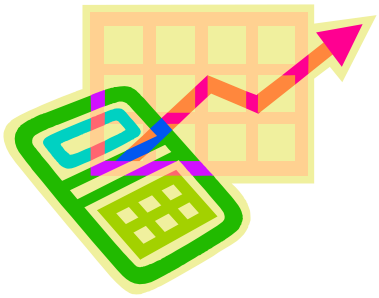
SSA Announces 2007 Cost of Living Increases

The Social Security Administration (SSA) has announced that the cost-of-living increase for Social Security benefits and for the SSI Federal Benefit Rate (FBR) for 2007 will be 3.3%. This will raise the SSI FBR from $603 to $623 per month for an individual and from $904 to $934 for an eligible couple.

For retirees, $5 of the increase in monthly benefits will go to pay the increase in the Medicare Part B premium, which will be $93.50 per month for those individuals earning no more than $80,000 per year. For the first time, however, there will be a means test for determining the amount of the Part B premium, with the result that some high income retirees could see their whole Social Security benefit increase go to pay the increase in Medicare Part B premiums. See related article on page 5.

Other changes for 2007 include an increase in the earnings required for a quarter of coverage to $1,000 per month, and an increase in the substantial gainful activity (SGA) level to $900 per month for disabled persons and $1,500 for blind disabled persons.

SSA has a good fact sheet comparing 2006 with 2007 numbers at its website: http://www.ssa.gov/pressoffice/factsheets/colafacts2007.pdf. Additionally, an updated SSI Benefit chart for New York is available at Empire Justice Center's website, www.empirejustice.org.



Public Warned About Email Scam

On November 7, 2006, Joanne Barnhart, Commissioner of Social Security, and Patrick O'Carroll, Jr., Inspector General of Social Security, issued the following warning about a new email scam that has surfaced recently:

The Agency has received several reports of an email message being circulated with the subject "Cost-of-Living for 2007 update" and purporting to be from the Social Security Administration. The message provides information about the 3.3 percent benefit increase for 2007 and contains the following "NOTE: We now need you to update your personal information. If this is not completed by November 11, 2006, we will be forced to suspend your account indefinitely." The reader is then directed to a website designed to look like Social Security's Internet website.

"I am outraged that someone would target an unsuspecting public in this manner," said Commissioner Barnhart. "I have asked the Inspector General to use all the resources at his command to find and prosecute whoever is perpetrating this fraud."

Once directed to the phony website, the individual is asked to register for a password and to confirm their identity by providing personal information such as the individual's Social Security number, bank account information and credit card information.

Inspector General O'Carroll recommends people always take precautions when giving out personal information. "You should never provide your Social Security number or other personal information over the Internet or by telephone unless you are extremely confident of the source to whom you are providing the information," O'Carroll said.

To report receipt of this email message or other suspicious activity to Social Security's Office of Inspector General, please call the OIG Hotline at 1-800-269-0271. (If you are deaf or hard of hearing, call the OIG TTY number at 1-866-501-2101). A Public Fraud Reporting form is also available online at OIG's website www.socialsecurity.gov/oig.

REGULATIONS

Final Rules Issued on Fraud and Misuse by Rep Payees

SSA issued final regulations on representative payment and on the administrative procedure for imposing penalties for false or misleading statements or withholding of information to reflect and implement certain provisions of the Social Security Protection Act of 2004 (SSPA). The rule appeared in the October 18, 2006 Federal Register (71 Fed. Reg. 61403) and goes into effect on November 17, 2006.

These changes include additional disqualifying factors for representative payee applicants, additional requirements for non-governmental fee-for-service payees, authority to redirect delivery of benefit payments when a representative payee fails to provide required accountings, and authority to treat misused benefits as an overpayment to the representative payee.

The SSPA also allows SSA to impose a penalty on any person who knowingly withholds information that is material for use in determining any right to, or the amount of, monthly benefits under Titles II or XVI. The penalty is nonpayment for a specified number of months of benefits under Title II that would otherwise be payable and ineligibility for the same period of time for payments under Title XVI (including State supplementary payments).

"In addition to the changes required by Public Law 108-203, we are clarifying financial requirements for representative payees. Our current regulations specify that the interest earned on conserved funds belongs to the beneficiary. However, the regulations do not specifically address interest earned on current benefits or how current benefits should be held. We are now specifying that a representative payee must keep any payments received for the beneficiary separate from the representative payee's own funds and ensure that the beneficiary's ownership is shown, unless the representative payee is the spouse or parent of the beneficiary and lives in the same household with the beneficiary. We also provide for an exception to this requirement for State or local government agencies when we determine that their accounting structure sufficiently protects the beneficiaries' interest in the benefits (i.e., accounting structure clearly identifies what funds belong to the beneficiary). We are further specifying that the payee must treat any interest earned on current benefits as the beneficiary's own property. In addition, we are clarifying that the payee is responsible for making records available for review if requested by us. . . ."

In response to one comment submitted to the proposed regulations, issued October 2005, and in recognition of the Second Circuit's *Fowlkes* decision, SSA removed the proposed provision that disqualified a person from serving as a rep payee if SSA thinks s/he has an outstanding felony warrant. SSA noted that it was reviewing all of the fugitive felon policies and will publish a final rule on this representative payee provision at a later time. SSA notes in shooting down another commenter that its "procedures for appointing persons who have a criminal history are provided in our operating instructions (found in the Program Operations Manual System (POMS), chapter GN 00502 . . . ."

Sometimes a comment doesn't get adopted, but still serves to trigger clarification of policy:

"Comment: One commenter expressed a concern that we might impose a penalty on a beneficiary if his or her representative payee made a false or misleading statement or intentionally withheld information to be used in determining the amount of, or the eligibility for, a benefit. The comment stated that such a penalty would unfairly punish the beneficiary because of the actions of another.

"Response: We agree that it would be unfair to penalize a person because of another person's actions and believe the regulation is clear in this regard.

(Continued on page 5)

Means Testing for Medicare Premiums Implemented

Effective December 26, 2006, SSA is adding regulations to implement the statutory provisions of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 ["the MMA"] instituting means testing for the Medicare Part B premium. 71 Fed. Reg. 62923 (October 27, 2006).

"The MMA provides that in 2007 the modified adjusted gross income threshold is $80,000 for individuals who file their Federal income taxes with a filing status of single, married filing separately, head of household, or qualifying widow(er) with dependent child and $160,000 for married individuals who file a joint tax return." The MMA enacted a new section of the Internal Revenue Code authorizing the Internal Revenue Service (IRS) to provide certain income information to SSA to use in determining the income-related monthly adjustment amount. The MMA requires that the threshold amount be adjusted yearly based on the Consumer Price Index.

It will be interesting to see how the agency will deal with discoveries that a beneficiary had more income, and thus was liable for a higher Part B premium, than reported by IRS. That will include folks with various forms of income otherwise exempt from federal income tax.

Computer Matching Program Expanded

Notice was published in October 5, 2006 Federal Register of an update of a computer information matching program between the Department of Housing and Urban Development (HUD) and SSA. 71 Fed. Reg. 58871.

"HUD is updating its notice of a matching program involving comparisons between income data provided by participants in HUD's assisted housing programs and independent sources of income information. The matching program will be carried out to detect inappropriate (excessive or insufficient) housing assistance . . . . The program provides for the verification of the matching results and the initiation of appropriate administrative or legal actions, primarily through public housing agencies (PHAs) and owners and agents . . . . Specifically, the notice describes HUD's program for computer matching of its tenant data to SSA's SS and SSI income benefits data."

Computer matching is expected to begin 30 days after publication of the notice in the Federal Register, unless comments are received that will result in a contrary determination, or 40 days from the date a computer matching agreement is signed, whichever is later. Comments were due November 6, 2006. For your information, there is a section on SSA's website on the various computer matching programs the agency is using. You can find it at http://www.ssa.gov/regulations/matching-agreements.htm.

Fraud and Misuse—continued

(Continued from page 4)

In addition, current processing instructions for administrative sanction (found in POMS chapter GN 02604) specifically state that we will not impose a sanction on a beneficiary because a representative payee makes a false or misleading statement on the beneficiary's behalf, unless there is evidence that the beneficiary knowingly caused the false statement to be made. Those existing instructions will apply to the knowing withholding of information by a representative payee if the information affects the amount of, or eligibility for, a payment. . . ." p. 61405.

COURT DECISIONS

District Court Applies *Ruppert* AR

For many Supplemental Security Income (SSI) claimants, the hard part of a case occurs after a finding of disability: the non-disability determination of income, resources, deeming and living arrangements impact how much SSI will be paid.

The Social Security Administration (SSA) counts "support and maintenance furnished in cash or in kind," as unearned income in the SSI program. In-kind support and maintenance, which is food and shelter received from someone in whose household he lives, is counted as unearned income and can reduce an SSI recipient's payment by one-third. In situations where an SSI recipient receives subsidized support in the form of reduced rent by a relative-landlord, the Second Circuit held in *Ruppert v. Bowen*, 871 F.2d 1172 (2d Cir. 1989), that further analysis is required when calculating SSI benefits.

In response to the *Ruppert* decision, SSA adopted an Acquiescence Ruling, AR 90-2(2), which explains how the agency will evaluate whether an SSI recipient obtains an actual economic benefit from a rental subsidy from a relative. The AR specifies that as long as the SSI recipient is paying at least the Presumed Maximum Value (PMV) in rent, no economic benefit occurs, no support and maintenance is being provided, and no reduction in benefits occurs. The PMV equals one-third the Federal Benefit Rate (FBR) plus $20.

With that background, we're happy to report a District Judge's opinion from the Eastern District of New York in which the Judge shows an understanding of the *Ruppert* AR, which seems to escape many Administrative Law Judges (ALJs) as well as SSA District Office staff. In *Giordano v. Barnhart*, 1:04-cv-4228 (E.D.N.Y. September 29, 2006), District Court Judge Sandra Townes properly applied the *Ruppert* AR in a case where an SSI recipient was paying more than the PMV in rent to his landlord father. The Court determined that the SSI recipient experienced no actual economic benefit from living with his father and so no in-kind support in the form of a rental subsidy could be imputed to him.

Despite this favorable finding, however, the Court remanded for additional proceedings because the record was incomplete as to whether the claimant received any other in-kind support and maintenance from his father in the form of food. In ordering the remand, the Court was mindful of the length of time that had it had taken the case to make its way through the administrative process and ordered that any further proceedings must be completed within 120 days of issuance of the order, citing the Second Circuit's decision in *Butts v. Barnhart*, 388 F.3d 377 (2d Cir. 2004).

Chris Bowes from CeDAR provided excellent representation to the plaintiff in this case. We'll have to see if SSA complies with the 120 day mandate for completion of the remand proceedings. The decision is available as DAP #439.

Magistrate's Report and Recommendation Upheld

"A proceeding before the Magistrate Judge is not a meaningless dress rehearsal." So says Judge Elfvin of the Western District, in upholding a Report and Recommendation (R&R) of Magistrate Judge Foschio recommending that the plaintiff's motion be granted and the claim remanded for calculation of benefits.

In *Montalvo v. Barnhart*, 02-CV-0494E(F) (W.D.N.Y. October 6, 2006), Judge Elfvin noted that the defendant's objections to the Magistrate's R&R contained no argument pointing specifically to why the R&R was wrong. Nor did they allege any errors of law or improper standard of review on the part of the Magistrate. Rather, they presented precisely the same arguments as presented to the Magistrate Judge. Judge Elfvin dismissed them as merely an attempt at gaining a second bite at the apple. Instead, Judge Elfvin found that the ALJ's determination that the plaintiff "was not disabled was supported by only slight, clearly not substantial, evidence." *Slip op.* at 7. He upheld the Magistrate Judge's finding that the ALJ had failed to accord proper weight to the opinion of the treating psychiatrist.

Magistrate Judge Foschio had found that the opinion of the plaintiff's treating psychiatrist that the plaintiff would likely decompensate if required to engage in a competitive work environment was supported by other evidence of record, including evidence from a vocational program that the plaintiff had attended, as well as a report from one of SSA's own consultative examiners. [As an aside, Judge Foschio cites Wikipedia for the definition of "decompensation.!"] He held that the psychiatrist's opinion was not refuted.

The Magistrate found that the ALJ erred in relying on fact that the psychiatrist had not rendered an "actual opinion" on the plaintiff's ability to work because he was unable to rate many of plaintiff's work related abilities. Similarly, the ALJ erred in relying on the fact that the psychiatrist was "merely reciting the limitations" as reported by the plaintiff. Magistrate Foschio did not cite *Green-Younger v. Barnhart*, 335 F.3d 99, 106 (2d Cir. 2003), the leading case refuting this proposition. He did, however, recognize that the plaintiff had been receiving psychiatric care at the same clinic for sixteen months. Surely, according to the court, the current and previous psychiatrists must have assessed her on some basis other than her own complaints. Nor was there any other evidence of record calling into question plaintiff's credibility.

Congratulations to Alan Block of Neighborhood Legal Services in Buffalo for convincing both Magistrate Judge Foschio and Judge Elfvin of the merits of his case. The decisions in the case, as well as the Commissioner's Objections and Alan's Response, are available as DAP #440 at the on-line resource center at www.empirejustice.org.

Son of *Pronti* Born

Readers of these pages will undoubtedly be familiar with the *Pronti* litigation, which charged now retired Administrative Law Judge (ALJ) Franklin T. Russell with generalized bias against disability claimants. *See Pronti v. Barnhart*, 339 F.Supp.2d 480 (W.D.N.Y. 2004) (*Pronti I*); *Pronti v. Barnhart*, 441 F.Supp.2d 466 (W.D.N.Y. 2006) (*Pronti II*). In the September 2006 edition of the *Disability Law News*, available at www.empirejustice.org, we reported on the conclusion of the *Pronti* litigation. As predicted, however, its legacy lives on.

On October 16, 2006, the Empire Justice Center filed *Hogan et al. v. Barnhart* in the Western District of New York, seeking rehearings for Mr. Hogan and the three other named plaintiffs, as well as the class they purport to represent, on the grounds that ALJ Russell's generalized bias denied them due process. Mr. Hogan and the other plaintiffs were all denied benefits by ALJ Russell, primarily on the same grounds and under the same circumstances for which SSA criticized ALJ Russell in the Findings that it submitted to the court in *Pronti I*. Plaintiffs have moved for class certification before Judge Larimer, who was the judge in *Pronti*. The class consists of all claimants, with cases pending since April 1997 (the date the Commissioner was first on notice of allegations of bias on the part of ALJ Russell), for Social Security and/or Supplemental Security Income disability benefits who received an adverse decision (wholly or in part) from ALJ Russell, and whose claims were on appeal or were within the time period to file an appeal, or whose claims were eligible to be reopened, as of April 1997.

Plaintiffs are represented by Kate Callery, Louise Tarantino, and Bryan Hetherington of the Empire Justice Center, and back in a special guest appearance, former DAP attorney Ed Lopez. So rest assured that *Pronti* may be gone but not forgotten.

Credibility Finding Overturned

In *Allord v. Barnhart*, 455 F.3d 818 (7th Cir. 2006), Judge Posner reversed an ALJ's credibility finding on the grounds that the witness's testimony was not so incredible that no reasonable trier of fact would have believed it. Judge Posner acknowledged that a trier of fact's credibility finding is ordinarily binding on an appellate tribunal; he nonetheless refuted as dubious at best the ALJ's finding that a lay witness's testimony about the mental illness of the claimant could not be believed because the witness had not acted upon her observations, such as by referring the claimant to a psychiatrist. According to Judge Posner, the ALJ's conclusion was also erroneous, as the witness had referred her claimant friend to a psychiatrist. Nor had she, as posited by the ALJ, referred the claimant to possible employers. Additionally, Judge Posner dismissed the ALJ's reliance on the fact that the witness was friendly with the claimant. To the contrary, their friendship heightened the potential credence of the testimony.

The Court refused to accept the government's argument of harmless error. Regardless of whether, as argued by the government, the ALJ could have found the witness incredible on other grounds, the grounds on which the ALJ relied were factually incorrect. Whether the ALJ would have made the same determination had he not erred was, according to Judge Posner, speculative at best. To satisfy the court, the witness would had to have testified in such a manner that no trier of fact could have believed her (*e.g.*, she testified that she met the claimant before she was born). Alternatively, the ALJ would have had to articulate sufficient other reasons for disbelieving the witness even if she had acted on her observations and referred the claimant to a psychiatrist and had not referred him to other work.

In addition to adding to the growing body of case law criticizing inadequate credibility determinations by ALJs, the *Allord* case also has helpful language on retrospective diagnoses of post-traumatic stress disorder. The court emphasized that an earlier less helpful contemporaneous opinion was rendered at a time when the disorder was less well understood. It also held that the ALJ should have given additional weight to a determination by the Department of Veterans Affairs.

Ninth Circuit Rules on Vocational Issues

In a case that may be of interest to DAP advocates, the Court of Appeals for the Ninth Circuit recently reversed a case of a sixty-two year old claimant who had been denied disability benefits. In the ALJ's view, her impairments were not disabling because they did not preclude her from performing a single occupation that existed in significant numbers in the economy. *Lounsburry v. Barnhart*, 464 F.3d 944 (9th Cir. 2006).

Ms. Lounsburry suffered from degenerative joint disease, adult-onset diabetes mellitus, hypertension, and sick sinus syndrome for which she was treated with a pacemaker. The court found that the ALJ erred in refusing to apply the Medical-Vocational Guidelines (the "grids") to her case, which would have dictated a finding of disability. Instead, the ALJ used the grids as a guideline because he found that Ms. Lounsburry had nonexertional impairments in addition to exertional ones. The court held, however, application of the grids was not discretionary here. Where a claimant suffers from both exertional and nonexertional limitations, the ALJ must consult the grids first.

The ALJ further erred in misapplying grid Rule 202.07, which generally directs a finding of "not disabled" in light of a claimant's transferable skills. According to the Ninth Circuit, however, the ALJ failed to consider Footnote 2 of to Rule 202.07, which incorporates language from Rule 202.00(c). Under Rule 202.00(c), claimants with transferable skills can be found disabled if they have skills that "are not readily transferable to a significant range of semi-skilled work…"

The court focused on the meaning of "significant range of work," holding that "work" under Rule 202.00(c) means distinct "occupations"; "significant numbers" is not a substitute for "significant range of…work." Citing SSR 83-10, the court construed "significant range of work" to require a significant number of occupations; a significant number of *jobs* is not enough. Thus, the court was not persuaded by the vocational testimony that 65,855 "companion" jobs existed in national economy, in light of the fact that "companion" was the only occupation identified.

For a local version of *Lounsburry*, *see Kuleszo v. Barnhart*, 232 F.Supp.2d 44 (W.D.N.Y. 2002), where Judge Siragusa made a similar findings. Although Judge Siragusa has since questioned his own decision from the bench, the Ninth Circuit decision should help make it more persuasive. For more on *Kuleszo*, see the January 2006 edition of the *Disability Law News*.

Empire Justice Comments on HIV Regulations

SSA's proposed changes to the Immune Systems listings were described at length in the September edition of the *Disability Law News*, available at www.empirejustice.org. Empire Justice has submitted comments in response to the proposals. We urged SSA to adopt comments submitted by the HIV Project of Lamba Legal and also added some additional comments for consideration. Both sets of comments are also available on the Empire Justice Center's website.

Fair Labor Standards Act Case Decided

On September 29, 2006, Magistrate Judge Jonathan Feldman of the Western District of New York held that it is a violation of the Fair Labor Standards Act (FLSA) not to credit SSI recipients with the value of the workfare that they provide to a local department of social services. The decision in the case, *Elwell v. Weiss*, is available on the Empire Justice Center's online resource center.

As DAP advocates are aware, if an SSI claimant who has been approved for benefits was receiving safety net assistance (SNA) while his or her SSI application was pending, the first retroactive SSI check will be paid directly to the county welfare department, or local DSS, as reimbursement for the "interim assistance" paid. The DSS is permitted to deduct any public assistance benefits paid to the claimant while his/her SSI application was pending, and then refunds the difference, if any, to the claimant. In many cases, the calculation is done by SSI based on information provided by the county DSS. SSI then forwards the "correct amount" to the county and remainder is sent directly to the claimant. In all cases, however, the claimant should receive a notice from the county explaining how the interim assistance reimbursement was calculated. See LDSS – 2425 (Repayment of Interim Assistance Notice).

It can be very important for claimants to review these notices, as some SSI applicants may have been required to work off their SNA grants as a condition of receiving public assistance. Generally, the counties will not take this into account in calculating their reimbursement, but rather will claim the entire amount of public assistance paid to the claimant.

The *Elwell* case was brought by Peter Dellinger of the Rochester office of the Empire Justice Center to challenge this practice in Schuyler County. The decision, relying on the Fair Labor Standards Act, requires the county to credit the recipient for workfare hours at the minimum wage when calculating the amount to be paid to the client. Although the county has appealed this case to the Second Circuit, Dellinger is hopeful that he will prevail.

In the meantime, keep in mind that FLSA has a two year statute of limitations. Persons in receipt of SSI who have been subject to interim assistance recovery within the last two years and who did not receive credit for workfare assignments made while their SSI applications were pending, may wish to consider filing FLSA complaints. Advocates can contact Peter Dellinger or Susan Antos of the Rochester and Albany offices of the Empire Justice Center, for more information or assistance.

Advocates should also bear in mind that SSI applicants should not be referred to work fare programs under 06-ADM-06. The administrative directive that sets forth the state Office of Temporary and Disability Assistance's (OTDA's) policy regarding exemption from work activity for PA clients who are required to file an SSI application by the local social services district. The ADM is available as DAP #427

Office of General Counsel Phone List Available

Thanks to Chris Cadin of the Central New York Legal Services in Syracuse for sharing with us the telephone directory for the Office of General Counsel for Region 2 in New York City. It is available as DAP# 441. Of course, you will have to know or guess the last name of the attorney you are trying to reach, but it is a start.

SSI Retroactive Benefits Calculated Incorrectly

Effective July 7, 2004, the Office of Temporary and Disability Assistance (OTDA) promulgated 18 NYCRR § 352.2 (b), which reduced the amount of public assistance benefits provided to households containing children when at least one household member receives SSI. This regulation was declared invalid by the Appellate Division, Fourth Department, in the statewide class action of *Doe v. Doar*, 26 A.D. 2d 787 (4th Dep't 2006), appeal dismissed 6 N.Y. 2d 891 (2006), but remains in effect as a result of a discretionary stay granted while the State Defendant pursues a second attempt to appeal to the Court of Appeals. Susan Antos and Bryan Hetherington of Empire Justice Center's Albany and Rochester offices, respectively, are counsel on this case.

Prior to the promulgation of this regulation, SSI recipients were deemed "invisible" in a public assistance household. The regulation now requires that the household be granted a pro-rated amount of benefits based upon a fraction that includes the number of public assistance recipients as the numerator and the total household size, including SSI recipients, as the denominator.

Doe counsel have discovered that social services districts outside the City of New York have been applying the *Doe* decision in a way that adversely affects retroactive SSI awards provided to persons who have been receiving Family Assistance. POMS SI 00830.403 requires that states report the difference between the amount of the TANF payment actually made to the family and the TANF payment that would have been made had the individual not been included in the grant. Based upon this reporting, SSA calculates a retroactive amount that subtracts this difference. Outside the City of New York, local districts have been providing SSA with a number based upon a pro-rated grant, presumably because of the *Doe* decision. Prior to the implementation of the *Doe* regulation, districts reported an incremental amount, which resulted in a higher payment to the household.

Doe counsel are in discussions with OTDA over this issue and hope to resolve it in a manner that will allow these families to get supplemental retroactive SSI awards. Until they resolve this matter, they encourage you to provide them with the names, addresses and case numbers of any class member who may have been affected by this practice. Additionally, they recommend that you request reconsideration of any benefit calculation for such class member. Your client will not be successful at reconsideration, but it will keep the issue alive. Upon an adverse reconsideration decision, you should request a hearing on your client's behalf. Please send Susan and Bryan copies of any adverse recon decisions or hearing decisions. They will help in their negotiations with the state.

ADMINISTRATIVE DECISIONS

ALJ Denies ODD Claim

Sometimes when it comes to ALJ decisions, truth is stranger than fiction. Although we do not usually highlight our losses on these pages, this story bears repetition – especially since we are confident there will be a successful appeal down the road. Alan Block of Neighborhood Legal Services in Buffalo represents a child whose case has already been remanded once, pursuant to a federal court stipulation. The same ALJ has just denied his client yet again – but this time with a new twist.

Alan's client had been diagnosed with ADHD, a learning disorder, asthma, allergies, and GERD (gastroesophageal reflux disorder). He had been assigned a GAF score (Global Assessment of Functioning per the DSM-IV) of only 43. According to the DSM, such a score represents "serious" symptoms. The ALJ, in an amazing gaffe of second-guessing medical experts, rejected the GAF score as conflicting with the treatment notes. But that pales by comparison to the ALJ's rejection of an entire diagnosis. By the time of the remanded hearing, Alan's client had an additional - or actually alternative - diagnosis of Oppositional Defiant Disorder (ODD). The ALJ announced that he did not recognize ODD as a medically determinable impairment, but rather as "maladaptive behavior." Citing Pub. Law 104-193 §211(C)(ii)(5)(b), he refused to consider it in the decision. Needless to say, he went on to find that the child is not disabled.

Alan posted this astonishing decision on the DAP listserv. He promptly received a flurry of responses, reminding him that although P.L. 104-193 eliminated certain specific references to "maladaptive behaviors" in the childhood mental disorders listings, it did not preclude consideration of the effects of such behavior on a child's functioning. At Section VI-A4 of SSA's March 1998 training for ALJs, ODD is stated to be a "mental disorder" that invariably is accompanied by maladaptive behavior. A "mental disorder," in turn, is stated to be a "medically determinable impairment." See p. 34 of ABC Childhood Disability Evaluation Issues, accessible http://www.clsphila.org/abc_march98_training.htm. [*Note that this Childhood Disability Training publication - also known as the "Headless Child Instruction" because of the picture on its cover - was superceded in May 2001 by a new compendium of Q&As promulgated by SSA following its issuance of the final "final" childhood regulations, which is available at http://www.clsphila.org/abc_for_advocates_files/training_material_Q_and_A.pdf. Section I-1 of that document, however, refers back to SSA's March 1998 Childhood Training Manual (Pink Cover).*]

Alan's case is all too reminiscent of a case reported in the July 2006 edition of the *Disability Law News*. Sue Bosworth-Quinlan appealed an ALJ denial in which the ALJ denied the existence of fibromyalgia. The Appeals Council remanded the claim to a different ALJ, noting that the ALJ's opinion regarding fibromyalgia prevented him from giving appropriate consideration to the claimant's description of her symptoms.

While we are hopeful that Alan will get a similar decision from the Appeals Council in his case, what about future cases of ODD or fibromyalgia heard by these ALJs? The behavior of these renegade ALJs underscores yet again the need for a meaningful complaint procedure within SSA where these types of ongoing problems can be addressed. In the meantime, make those complaints to the Appeals Council loud and strong – and make sure you let the Appeals Council know you are asking for relief beyond a reversal of your client's individual claim. But don't hold your breath….

Appeals Council Reverses ALJ Russell

As promised, the saga of ALJ Russell does not end. The Appeals Council recently issued a decision awarding benefits to the claimant in a case that was remanded from federal court pursuant to the agreement of the Commissioner in the *Pronti* litigation. [*See* page 8 of this newsletter for more information on the post *Pronti* litigation.] The Appeals Council actually issued a fairly comprehensive decision finding that the plaintiff meets Listing 12.05C.

The claimant had psychological testing in 2000, resulting in WAIS scores of 66 verbal, 78 performance, and 69 full scale. Unlike ALJ Russell, the Appeals Council relied on evidence of the claimant's academic difficulties to establish that she exhibited subaverage intellectual functioning with deficits in adaptive functioning prior to age 22, as required by Listing 12.05C. There was no evidence of intelligence testing prior to age 22. The Coordinator of the Guidance Office where the claimant had attended school many years before, however, reviewed her records and commented that her grades were such that she "would likely have been a candidate for special education." The Appeals Council cited this "retrospective" opinion as the basis for finding that the claimant was retarded prior to age 22. It went on to find that the claimant's depressive disorder and post traumatic stress disorder, in combination with her retardation, met the criteria for Listing 12.05C.

The claimant had been represented before ALJ Russell by Amanda Vig, formerly of Southern Tier Legal Services in Bath. Even if Judge Russell didn't acknowledge Amanda's creative advocacy, it's nice to see the Appeals Council recognize it. The claimant will now be eligible for more than six years of retroactive benefits.

12.05C Claim Granted

What happens at the hearing stays at the hearing, right? Not necessarily, but luckily for LJ Fisher's client, that happened in her case. LJ, of the Empire Justice Center in Rochester, put together the perfect case to present to the ALJ. Her client had IQ scores in the 60s. SSA's psychiatric CE (consultative examiner) had found that based on her major depressive disorder with psychotic features, the claimant had moderately impaired attention and concentration, and memory. She was also forgetful and would have marked difficulty relating to others and dealing with stress. The claimant's treating psychiatrist opined that she was extremely limited in her ability to get along with others, and maintaining concentration. She also had a marked impairment in activities of daily living.

Not surprisingly, LJ prepared for the hearing by submitting a prehearing memo setting forth her argument under Listing 12.05C. Despite what appeared to be the proverbial "open and shut" case, the ALJ called upon the services of a vocational expert VE at the hearing. The VE testified that a person with a 61 IQ and a recent and remote memory problem could do her past relevant work as a child care worker, as well as several other jobs. Undaunted, LJ followed up with a post hearing letter to the ALJ, rearguing 12.05C, and reminding the ALJ that listing level impairments are *per se* disabilities sufficient to create an "irrebuttable presumption of disability." She went on to analyze the jobs cited by the VE, pointing out that according to the Dictionary of Occupational Titles (DOT), they all required a higher level of concentration, persistence or pace than her client was capable of maintaining.

In the end, the ALJ issued a decision agreeing with LJ's 12.05C argument. Other than mentioning that the VE was present, he did not cite or refer to his testimony. He found the claimant disabled as September 2001. Kudos to LJ for setting him straight.

CLASS ACTIONS

Stieberger, et al. v. Sullivan, 84 Civ. 1302 (S.D.N.Y.) ("the non-acquiescence case")

Description - Certified class of New York residents challenges SSA policy of non-acquiescence in Second Circuit precedents. The district court initially granted plaintiff's motion for a preliminary injunction. The Circuit vacated the injunction in light of parallel proceedings in *Schisler*. On remand, the district court granted, in part, plaintiffs' motion for summary judgment. The court declared SSA's non-acquiescence policy unlawful. The court denied SSA's motion to dismiss. The court found that SSA non-acquiesced in the following four circuit holdings: (1) treating physician rule, (2) cross examination of authors of post hearing reports, (3) ALJ observations of pain, and (4) credibility of claimants with good work histories. The court left open for trial the question of whether SSA non-acquiesced with respect to three other Second Circuit holdings (1) findings of incredibility must be set forth with specificity, (2) weight must be given to decisions of other agencies, (3) conclusory opinion of treating physician cannot be rejected without notice of need for more detailed statement.

Relief - Re-openings available for almost 200,000 disability claims denied or terminated: (a) between 10/1/81 and 10/17/85 at any administrative level of review, or (b) between 10/18/85 and 7/2/92 at the hearing or Appeals Council level of review. Also, denials at any administrative level between 10/1/81 and 7/2/92 will not be given *res judicata* effect and thus will not bar subsequent claims for Title II disability benefits regardless of "date last insured."

Citation - *Stieberger v. Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985), prel. inj. vacated, *Stieberger v. Bowen*, 801 F.2d. 29 (2d Cir. 1986), on remand, *Stieberger v. Sullivan*, 738 F. Supp. 716 (S.D.N.Y. 1990).

Information - Ken Stephens (kstephens@legal-aid.org), Legal Aid Society (ask for "Stieberger Hotline" 888-284-2772 or 212-440-4354), Christopher Bowes, CeDar (212-979-0505); Ann Biddle, Legal Services for the Elderly (646-442-3302).

Dixon v. Sullivan, 83 Civ. 7001 (S.D.N.Y.) (Conner, J.) (the not severe case

Description - Certified class challenges SSA's standard for denying claims as "not severe." Preliminary injunction entered in June 1984, required readjudication of claims denied or terminated as "not severe" between 7/83 and 6/84, and prohibited issuance of "not severe" decisions after 6/84. The Second Circuit vacated the injunction in 6/87 in light of *Bowen v. Yuckert*, 482 U.S. 137 (1987), which upheld the "not severe" regulation as lawful on its face, and which authorized SSA to issue a new Ruling clarifying the severity requirement. The Circuit remanded *Dixon* for completion of discovery and trial on whether SSA misapplied the "not severe" regulation. On remand, the district court entered judgment for plaintiffs after issuing an opinion after trial based on a stipulated record. SSA appealed and the Circuit, after argument in September 1994, affirmed the judgment.

Relief - Reopening remains available, under an understanding between the parties based on the preliminary injunction, for claims denied or terminated as "not severe" between 7/83 and 7/84. The Circuit's affirmance of the district court's judgment provides for reopening for claims denied or terminated between 1976 and 7/83.

Citations - 589 F. Supp. 1494 (S.D.N.Y. 1984), 589 F.Supp. 1494 (S.D.N.Y. 1984) (granting prel. inj.), 589 F.Supp. 1512 (S.D.N.Y. 1984) (granting intervention), 600 F. Supp.141 (S.D.N.Y. 1985) (deciding individual claim of David Dixon), *prel. inj. aff'd*, 785 F.2d 1102, *prel. inj. vacated, and remanded*, 827 F.2d 765 (2d Cir. 1987), *on remand*, 126 F.R.D. 483 (S.D.N.Y. 1989) (subsequent opinion granting judgment to plaintiffs post trial on a stipulated record), *Dixon v. Sullivan*, 792 F.Supp. 942 (S.D.N.Y. 1993) (order issued 12/22/93 providing for readjudication of claims), *affirmed Dixon v. Shalala*, 54 F.3rd 1019 (2d Cir. 1995).

Information—Legal Aid Society, 1-888-218-6974 menu option #3 for the Dixon hotline.

WEB NEWS

Free Diabetes Kits Available

Xubex Pharmaceuticals, in cooperation with Bayer Diagnostics, is offering a free diabetes care kit. It includes an Ascencia blood glucose meter, Lancet devices, carrying case and strips. You can apply on line or call 1-866-699-8239. The application asks for information about the patient, prescribing physician (name and office phone), and the patient's diabetes care. Xubex Pharmaceuticals is a generic medicine patient assistance program that offers over 200 generic prescription drugs for a low cost of $20 - $30 for a 90-day supply. www.Xubex.com

Website Provides Data on Children and Poverty

The National Center for Children in Poverty, which is affiliated with Columbia University's Mailman School of Public Health, has extensive information available on a state-by-state basis on policies related to children and poverty. In addition they have fact sheets related to mental health issues in poor children and the need for Social Security benefits for this population.
http://www.nccp.org/about.html

Chronic Fatigue Syndrome Updated

Thanks to Greg Phillips of Segar & Sciortino in Rochetser for letting us know that the Centers for Disease Control and Prevention has recently updated its information on Chronic Fatigue Syndrome. The CDC link is:
http://www.cdc.gov/cfs/.

Deficit Reduction Act Training Materials Online

A training outline on the Deficit Reduction Act (DRA) that was presented at a training at the UJA-Federation is now posted at: http://onlineresources.wnylc.net/healthcare/docs/OutlineDRA.pdf

A fact sheet explaining the new citizenship documentation requirements and the exemption for people who have Medicare or SSI is posted at: http://onlineresources.wnylc.net/healthcare/docs/PROOF_OF_IDENTITY.pdf

This contains a link to a chart of documentation required for those who do not have Medicare or SSI:
http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/06ma021att.pdf

Medicare Part D, Continued

The Selfhelp training outline and Appendix on Medicare Part has also been updated, with the most current information on enrollment Outline http://onlineresources.wnylc.net/healthcare/docs/Part_D_Outline_9-11-06.pdf Appendix http://onlineresources.wnylc.net/healthcare/docs/Part_D_Appendix.pdf Drug Plan Lists and Contacts http://onlineresources.wnylc.net/healthcare/docs/Part_D_Appendix_Plan_Lists.pdf (Note - this is 2006 lists, not 2007 plans) Medicare Part D Wrap Kit - http://onlineresources.wnylc.net/healthcare/docs/wrapkit.pdf - A handy compilation of selected documents from the State Dept of Health and HRA to explain to pharmacists how to bill Medicaid for drugs that the Part D plan refuses to pay. (Warning - the "wraparound" is scheduled to end in January 2007 except for a few limited categories of medications)

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.

GAO Faults CDR Process

How many of us haven't been confused by the "medical improvement" standard used in CDRs (Continuing Disability Reviews)? So, it turns out, are a number of disability analysts. According to an October 2006 study by the GAO (Government Accountability Office), SSA (Social Security Administration) needs to clarify its guidance to adjudicators. *See Clearer Guidance Could Help SSA Apply the Medical Improvement Standard More Consistently*. GAO-07-8, available at www.gao.gov.

The GAO reviewed SSA's procedures for removing a beneficiary from the disability rolls if his or her medical condition has improved. It set out to examine the proportion of beneficiaries who have improved medically and to determine if factors associated with the standard pose challenges for SSA when determining whether beneficiaries continue to be eligible. To answer these questions, the GAO surveyed all 55 Disability Determination Services (DDSs) directions, interviewed officials, and reviewed data.

As result, the GAO is recommending that SSA clarify for adjudicators the degree of medical improvement required, the use of the exceptions to medical improvement, and the presumption of disability to be used in the assessments. SSA has somewhat begrudgingly accepted the GAO's recommendation, especially about the need for further guidance about the "exceptions." GAO, however, asserts that this is necessary since seven of the eleven disability examiners interviewed expressed uncertainty about how to apply the exceptions.

According to the GAO, limitations in SSA's guidance to adjudicators may result in inconsistent application of the medical improvement standard, especially in terms of the degree of improvement needed for termination. Also, the GAO found that most DDS examiners were conducting their analyses with the presumption that the beneficiary has a disability rather than from a neutral perspective, considered by SSA and GAO to be the correct perspective.

The GAO's report provides some historical background to the current CDR process. Based on pre-1980 studies showing that many beneficiaries of disability programs were no longer disabled but continuing to collect benefits, Congress passed a law requiring SSA to conduct CDRs beginning in 1982. The DDSs began the CDRs using the same standard that they used to evaluate initial claims. In 1981 and 1982, approximately 45 percent of beneficiaries reviewed had their benefits terminated. DAP advocates around in those dark days will remember them well. SSA faced extensive negative publicity, including stories of severely disabled beneficiaries who committed suicide after their benefits were wrongly terminated. In light of the publicity, as well as mounting litigation, including the *Stieberger* and *Schisler* class actions, SSA placed on moratorium on all CDRs in 1984. Later that year, Congress passed the Disability Benefits Reform Act of 1984, requiring SSA to find substantial evidence of medical improvement before terminating a recipient's benefits.

SSA resumed CDRs in January of 1986 using its new CDR sequential evaluation process, found at 20 C.F.R. §§404.1593 *et seq.* & 416.993 *et seq.* Under the evaluation process, two elements must be met before benefits can be terminated: Is there improvement in the beneficiary's medical condition, and if so, is the improvement related to the ability to work? Even if a recipient has not improved medically, the regulations allow SSA to discontinue benefits if one of the "exceptions" applies: the recipient has benefited from advances in medical or vocational technology, or has undergone a vocational program that could help him or her work; new or improved diagnostic techniques or evaluations reveal that the impairment is less disabling than originally thought, or the prior decision was erroneous.

SSA is supposed to conduct reviews based on the recipient's likely potential for medical improvement. Reviews are done - hypothetically- once every six to 18 months if a claim is classified as "medical improvement expected," every three years if "medical improvement possible," and every five to seven years if "medical improvement not expected." According to the GAO report, SSA has also developed a profile to determine the most cost effective method of conducting CDRs. Using data and statistical formulae, SSA assigns a score indicating whether there is high, medium or low expectation of improvement. Those beneficiaries with a high score are referred for a full

CDR Process—continued

medical CDR, while those with lower scores are sent "mailers," which may or may not be followed up on based on the self reports received.

The GAO found that overall few beneficiaries have been removed from the rolls based on medical improvement. Of those who have been reviewed between fiscal years 1999 and 2005, on average 2.8 percent of beneficiaries were found to have improved medically and to be able to work. The number of CDRs conducted during these years fluctuated, in part because of special funding from Congress in the late 1990s; the percent removed, however, remained fairly constant. Overall, approximately 5.3 percent of recipients were removed as a result of the CDR process, but that figure includes those removed for failure to cooperate and reasons other than medical improvement. On a yearly basis, only about 1.4 percent of all those people who left disability programs - or 13,800 beneficiaries – left because they were found to have medically improved. The rest "left" due to failure to cooperate (1.1%), conversion to retirement benefits (21%), death (32%), and "other" reasons (45%). "Other" reasons include those who were found to have earnings in excess of SGA (substantial gainful activity), or for SSI recipients, had exceeded the income or resource guidelines.

Among the concerns that the GAO had was lack of a clear definition on the part of SSA as to what degree of medical improvement is necessary. While SSA instructs adjudicators to disregard "minor" changes in a beneficiary's condition, SSA officials were unable to define minor. The DDS Directors interviewed had widely disparate views of what it means. There was also lack of guidance on what constitutes a reasonable relationship between the improvement and ability to work. Some DDS directors believed it to mean a large or very large increase, while others interpreted it as a requirement for a minor to moderate increase. Adjudicators also expressed uncertainty about the application of the "exceptions" to medical improvement.

Significantly, the GAO faulted SSA for allowing adjudicators to presume – incorrectly – that a beneficiary has a disability when conducting CDRs. According the GAO, SSA regulations and policy requires that the decision be made on a "neutral basis," with the adjudicator neither presuming that a beneficiary is still disabled because s/he was previously found disabled, or no longer disabled because s/he was selected for review. The GAO fears that as a result some DDSs may be setting a higher bar than required for these reviews.

The GAO also pointed to inadequate development of evidence and the judgmental nature of the process as two additional challenges. It cites to cases of recipients whose benefits were continued because the original disability decision was too vague, or lacked sufficient evidence to make a comparison. It also cites the challenges resulting from inadequate documentation, in that the amount of judgment on the part of the CDR adjudicator increases. This is particularly true, not surprisingly, in cases involving pain and certain types of psychological impairments, such as depression, where assessments of functionality are more subjective.

SSA, in its response to the GAO report, agreed that refresher training on MIRS (medical improvement review standard) was in order. It expressed concern that some of the DDS opinions cited by the GAO might suggest lowering the threshold for showing medical improvement: "we believe that requiring evidence of only de minimus or minor medical improvement would arguably circumvent and be contrary to the intent and spirit of the MIRS statutory provision." SSA is also confident that the additional measures it is already taking to ensure that examiners understand the information needed to make adequate decisions, and the guides adopted for decision writing at the appeals level, will enhance the ability of adjudicators to make comparisons during eventual CDRs.

What's next? Who knows, but advocates should monitor any changes that seem to happening in CDR adjudications. Some of the concerns raised by the GAO indicate that adjudicators could be making mistakes that harm beneficiaries. The over-all tone of the report, however, with its emphasis on the low numbers of beneficiaries actually culled from the roles, implies that SSA is erring more in the other direction. Ironically, it is SSA in this instance that is defending its more "liberal" interpretation. Keep us informed of any changes you observe.

END NOTE

ADHD Linked to Environmental Exposures

A new study supports previous research linking ADHD (Attention Deficit Hyperactivity Disorder) with prenatal exposure to tobacco and/or exposure to lead after birth. According to a report in September 19, 2006 Cleveland *Plain Dealer*, the study by scientists at the University of Wisconsin-Milwaukee provides one of the first estimates as to how many children may be affected by these environmental exposures. Researchers found that about one-third of attention deficit cases among children in the United States may be linked to exposure. The researchers analyzed information on nearly 4,000 U.S. children ages 4 to 15 that were part of a 1999-2002 government health survey, including 135 children treated for ADHD.

These new estimates corroborate an earlier report by the National Academy of Sciences in 2000, which found that about 3 percent of all developmental and neurological disorders in U.S. children are caused by toxic chemicals and other environmental factors; another 25 percent are due to a combination of environmental factors and genetics.

Authors of the new study, led by Joe Braun of the University of Wisconsin-Milwaukee, stated: "The findings of this study underscore the profound behavioral health impact of these prevalent exposures, and highlight the need to strengthen public health efforts to reduce prenatal tobacco smoke exposure and childhood lead exposure."

According to Dr. Leo Trasande, assistant director of the Center for Children's Health and the Environment at Mount Sinai School of Medicine in New York, "It's a landmark paper that quantifies the number of cases of ADHD that can be attributed to important environmental exposures." Trasande, who was not involved in the research, also underscored the importance of the study, in that it bolsters suspicions that low-level lead exposure previously linked to behavior problems "is associated with ADHD." The study found that even lead levels that the government considers acceptable appeared to increase a child's risk of attention deficit hyperactivity disorder. [*See* the Web News section of the January 2005 *Disability Law News* for more information on problems caused by low-level lead exposure.]

The study was published online in the journal Environmental Health Perspectives (http://ehponline.org).

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