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DISABILITY LAW NEWS

SSA Proposes Hearing Changes

For more than a year, the Social Security Administration (SSA) has been test driving cases in Boston's Region I under new disability claims process, Disability Service Improvement (DSI). The agency is now proposing to scrap some initiatives while speeding ahead with national implementation of others.

In the October 29, 2007 Federal Register, (72 Fed. Reg. 61217), SSA proposes rulemaking on the topic of "Amendments to the Administrative Law Judge, Appeals Council, and Decision Review Board Appeals Levels." SSA's new hearing model includes changes in evidence submission at the hearing level, overhaul of the Appeals Council, and limiting the period of disability under review. Comments are due by December 28, 2007.

In this Notice of Proposed Rulemaking (NPRM), SSA states, "Our experience has been that some aspects of the new procedures have been beneficial, while others have not worked as well as we had anticipated. [w]e believe that we need to modify some aspects of those procedures, extend what is working well to the rest of the country, and make changes where we can make our processes better. . ."

Submitting Evidence to the ALJ

Administrative Law Judges (ALJs) will have to schedule hearings at least 75 days in advance. The proposed rules, if adopted, would require submission of "all of the evidence to be relied upon in a case," "no later than 5 business days before the hearing." Objections to the issues to be addressed at the hearing also must be raised in writing 5 or more business days before the day of the hearing. Objections to the location or the time of the hearing must be raised in writing not later than 30 days after receiving notice. Subpoenas must be requested 20 days before the hearing.

Limited exceptions to the 5-day evidence submission restriction would exist. The request for permission to submit evidence late has to be made within the 5-business-day period "immediately preceding the hearing." Physical, mental or linguistic limitations that prevent the claimant from submitting the evidence on time would be an excuse, as would be some other unusual, unexpected, or unavoidable circumstance that prevents submitting the evidence on time. Agency action that misled the individual provides another exception.

Evidence can be submitted after the hearing with the ALJ's permission if the claimant meets one of the excep-

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tions and "there is a reasonable possibility that the evidence would affect the outcome of the case."

Requesting a Hearing; Prehearing Statements and Conferences

It would also get harder to request a hearing "the individual should include a statement of the medically determinable impairment(s) that he or she believes prevents him or her from working." There also is new language in these proposed rules about submitting evidence about "any impairment that forms the basis of the case."

The proposed regulations add a provision for prehearing statements. As described in the preamble, "At any time before the hearing begins, an individual could submit, or the ALJ could request the individual to submit, a prehearing statement on the issues arising in the case. In this statement, the individual should briefly discuss the issues; describe the supporting facts; identify witnesses; explain the evidentiary and legal basis upon which he or she believes the ALJ should find in his or her favor; and provide any other comments, suggestions, or information that might assist in preparing for the hearing."

The ALJ can call a pre-hearing conference, too, on "reasonable" notice. Attendance is mandatory since "if neither the individual nor the representative appears for the prehearing conference and there is not a good reason for the failure to appear, such as a death or serious illness in your immediate family or the destruction of important records by fire or other accidental cause, the individual's hearing request might be dismissed." The prehearing conference can be held by telephone.

While the proposed rule does not change the claimant's right to opt out of a video teleconference (VCT) hearing, the proposed rules would allow the ALJ free rein to call the vocational expert (VE), the medical expert (ME) or any other witnesses to appear by video teleconference or by voice-only telephone. The ALJ also will be permitted to direct the claimant to appear by telephone "under extraordinary circumstances," such as incarceration in a facility that will not allow a hearing or does not have VCT capability.

Review Board

A major change would transform the familiar old standby Appeals Council and the upstart Decision Review Board (DRB) into a new entity, the Review Board. Under DSI, the DRB only accepted appeals from select unfavorable ALJ decisions, so aggrieved claimants had no opportunity to request further review. SSA recognized that the DRB format would not work on a nationwide basis. "This concern arises primarily because of the difficulties in designing a predictive model that will identify the most problematic cases. In the Boston region, we committed to 100% review of all ALJ decisions by the Decision Review Board, which we obviously would not be able to sustain in a nationwide rollout, especially at a time when the number of cases pending at the hearing level exceeds 700,000, which is higher than it has ever been in our history. Consequently, we propose to end the Decision Review Board experiment in favor of allowing traditional appeals."

Like the Appeals Council, Review Board members will be administrative appeals judges. Any party who receives a wholly or partially unfavorable ALJ decision, or whose request for a hearing is dismissed, would have the right to appeal to the Review Board. SSA is proposing changes, however, to make the nature of the review at that level more like the review an appellate court would give to a district court decision.

Appellants may submit new evidence on appeal to the Review Board, but it must relate to the period on or before the date of the first ALJ decision, may be accepted only if there is a reasonable probability that it, alone or when considered with the other evidence of record, would change the outcome of the decision, and must fit one of the three good cause criteria set forth above for accepting late evidence at the ALJ hearing level.

Limiting evidence to the period up to the first ALJ hearing is a dramatic departure from current Appeals Council practice. To increase efficiency and streamline the hearing process, SSA seeks to limit the scope of the Review Board's inquiry:

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"We believe that the first ALJ hearing decision on a claim for benefits, regardless of whether that decision becomes our final decision, generally must close both the evidentiary record . . . and the period of time within which the claimant must establish entitlement to the benefits sought. Therefore, we propose in these rules that throughout any appeal to the Review Board, and during any subsequent administrative proceedings on remand from the Review Board or a Federal court, the proceedings will consider only the claimant's eligibility for benefits on or before the date of that first ALJ hearing decision on the claim for benefits." The introductory language goes on to expressly encourage the filing of new applications, at least if there's been a worsening of the claimant's condition, or a "new" impairment.

This limitation would apply only to evidence offered by a party. Should the Review Board believe additional evidence is needed to decide the issues in the case, it will be able to obtain that evidence itself or remand the case to an ALJ to obtain the evidence, and any evidence so obtained would be part of the record.

SSA wants to remove "new and material evidence" as a basis for reopening decisions made at the hearing or Review Board levels on a claim for disability benefits. "We believe this change is necessary because without it, a claimant who submits additional evidence to the Review Board that does not meet the standard described above for admitting the evidence would be able to circumvent our limits simply by asking to have our final decision reopened based on the additional evidence we declined to admit."

The Review Board would not review decisions *de novo* but only review factual findings using the substantial evidence standard.

The Review Board could take one of three actions on an appeal: 1) issue a new decision affirming, modifying, or reversing the ALJ's decision; 2) remand to an ALJ for further proceedings, or 3) summarily affirm the ALJ's decision if there are no significant errors an no significant legal or factual issues that warrant additional discussion. Who wants to take bets on how most of the Review Board cases will be handled?

In the interest of efficiency, cases remanded from the federal courts, if decided favorably by the ALJ, will be implemented directly without further review by the Review Board; unfavorable decisions would pass through administrative appeal to the Review Board before being ripe for court review again.

Transitional Rules

Assuming adoption of the proposed rules in present format, all cases pending before the Appeals Council will be transferred to the Review Board and reviewed under the new rules. Any hearings requested on or after the effective date will be treated under the new rules.

For hearing requests pending on the effective date, SSA proposes "to apply the new provision on limiting the period of time covered by the application for benefits in a different manner. For such cases, we will use the date of the first hearing or Review Board decision on the claim that is issued on or after the effective date of the final rules as the date by which entitlement must be established" and will "apply the rest of these proposed rules to the extent practicable, but will accord the claimant the benefit of the prior procedures where necessary to avoid disadvantaging the claimant or any other party. For example, if the claimant has new evidence to submit that would not be admitted under the new rules we are proposing here, but would have been admissible under the rules previously in effect, we will accord the claimant the benefit of those earlier rules and accept the evidence."

We are concerned with several of the proposed changes to the ALJ hearing and appeal process. Although promoting a more efficient and effective appeal system is a laudable goal, SSA's efforts appear decidedly lopsided by limiting the ability of claimants, particularly those who are unrepresented, to obtain and submit evidence, to articulate all the bases for their disabilities that may evolve over time, and to have a meaningful voice in coming to a correct, not just quick, decision in their cases. We will be presenting comments to these proposed regulations and welcome your input so that our disabled clients are not left in the dust of SSA's lean, mean hearing machine.

SSA Announces 2008 Cost of Living Increase

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 2008 will be 2.3%. This will raise the SSI FBR from $623 to $637 per month for an individual and from $934 to $956 for an eligible couple.

For retirees, a portion of the increase in monthly benefits will go to pay the increase in the Medicare Part B premium, which will be $96.40 per month for those individuals earning no more than $82,000 per year.

Other changes for 2008 include an increase in the earnings required for a quarter of coverage to $1,050 per month, and an increase in the substantial gainful activity (SGA) level to $940 per month for disabled persons and $1,570 for blind disabled persons.

SSA has a good fact sheet comparing 2007 with 2008 numbers at its website: http://www.ssa.gov/pressoffice/factsheets/colafacts2008.pdf. Additionally, an updated SSI Benefit chart for New York is available at Empire Justice Center's website, www.empirejustice.org, and as DAP# 467.

Doe v. Doar Settled

In previous editions of the *Disability Law News*, we have reported the progress of *Doe v. Doar*, the class action lawsuit challenging the New York State regulation that did away with SSI invisibility in public assistance households. On September 13, 2007, after over three years of litigation, *Doe v. Doar* concluded when Monroe County Supreme Court Justice David Egan signed a judgment declaring that 18 NYCRR 352.2(b) is invalid because it violates Social Services Law §§131-a; 131-c and 209. The decision will affect tens of thousands of low income families with disabled household members who were underpaid public assistance benefits and who will now collectively receive retroactive awards totaling tens of millions of dollars. For more information on the settlement, see the October 2007 edition of the *Legal Services Journal*, available at www.empirejustice.org.

Some aspects of the settlement will affect SSI claimants and beneficiaries. A person in a Family Assistance household who becomes eligible for SSI has his/her retroactive SSI benefits adjusted downward based on information that the local social services district provides to the Social Security Administration (SSA). The local district sends the SSA a form that reports the difference in the Family Assistance benefits payable to the household with and without the SSI recipient in the budget for each month that the person received retroactive SSI benefits. The award is reduced by this differential. Because many districts (not New York City), reported the prorated differential that resulted from *Doe* budgeting, these families received an underpayment of SSI benefits. OTDA has agreed to correct this underpayment in all *Doe* households where the household is currently eligible for public assistance. The Empire Justice Center is exploring whether there is a remedy available through the SSA for families that are not eligible for the OTDA retroactive benefit. If you have a client in such a situation, please contact Susan Antos at the Empire Justice Center.

Are Bank Freezes Thawing?

Seizures of exempt funds in bank accounts continue to be in the news. Both Tanya Douglas and Johnson Tyler of South Brooklyn Legal Services appeared on the CBS evening news last month, recounting the plights of clients who have had their accounts illegally frozen. *See* the May 2007 edition of the *Disability Law News* for more background on bank accounts and exempt funds in the news. While possible legislative fixes in response to the publicity slowly wend their way through various state and federal legislatures, a bevy of federal agencies has banded together to "protect" the accounts of bank depositors funded by exempt federal benefits.

The Department of Treasury Office of the Comptroller of the Currency and Office of Thrift Supervision, The Federal Reserve System, The FDIC and The National Credit Union Administration have promulgated "Proposed Guidance on Garnishment of Exempt Federal Benefit Funds." *See* 72 Fed. Reg. 55273-55276 (September 28, 2007).

According to the announcement, "This proposed guidance has been developed to encourage financial institutions to have policies and procedures in place with respect to handling garnishment orders and sets forth best practices, including procedures designed to expedite notice to the consumer of the garnishment process and release of funds to the consumer as quickly as possible…The agencies have developed this proposed guidance to encourage financial institutions to minimize the hardships encountered by federal benefit funds recipients and to do so while remaining in compliance with applicable law…"

Advocates have questioned the efficacy of this "guidance," which "encourages," rather than requires financial institutions to have policies and procedures in place. It seems to be a way to placate lawmakers, while adding little of substance. Comments are due on or before November 27, 2007.

In the meantime, Johnson Tyler, expert defroster of frozen accounts, reports that one more bank has been added to his list of institutions that will not honor restraints if there is no comingling. According to Johnson, Citibank looks back two months to determine comingling. Johnson has also learned that that any direct deposit of Social Security payments received by Citibank after a restraint is placed is available to the account holder and not to the creditor. A caveat, however, seems to be that the debtor must request this, and may have go through the chain of command to have the request honored.

Johnson previously reported that Banco Popular, New York Community Bank and Chase will also honor not restraints if the money in the account is clearly exempt under federal law. He believes, however, that they will freeze accounts that appear to contain comingled funds and, unlike Citibank, will not protect the subsequent direct deposit check.

Remember that samples of letters that Johnson has successfully used to "unfreeze" accounts are available as DAP# 413.

How Accessible is Your Doctor?

Despite laws requiring medical offices to be accessible to patients with physical disabilities, many disabled patients struggle through physical examinations on tables that are too high, or cannot navigate doctor's offices in their wheelchairs or scooters. Others simply avoid seeking necessary medical care. A recent report on national Public Radio highlights the difficulties that patients face, and suggests accommodations that providers can adopt. *See NPR: Medical Care Often Inaccessible to Disabled Patients.* http://tinyurl.com/279qmn. Thanks to Susan Sternberg of the Legal Aid Society for sharing this story.

Fleeing Felons Still Fleeing?

Although advocates may not be encountering many "fleeing felon" cases of late, a claimant may still show up who has been discontinued or more likely denied benefits based on an outstanding felony warrant. Remember that under the Second Circuit's decision in *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005), SSA cannot conclude simply from the fact that there is an outstanding warrant for a person's arrest that he is "fleeing to avoid prosecution." 10 U.S.C. §1382(e)(4)(A). Thus, there must be some evidence that the person knows his apprehension is sought. The Court also held that 20 C.F.R. §416.1339(b)(1) does not permit the agency to make a finding of flight; rather, a court or other appropriate tribunal must have issued a warrant or order based on a finding of flight.

McGregor Smyth of the Bronx Defenders' Civil Action Project & Reentry Net reminds advocates that Reentry Net has a set of practice materials for dealing with fleeing felon warrant issues at http://www.reentry.net/ny/library.cfm?fa=detail&id=83206&appView=folder. Reentry Net requires a quick, free registration, and is hosted on the Pro Bono Net platform. Particularly helpful is a link to "Find a Public Defender in Your State." Advocates often need to contact a public defender in another jurisdiction to help clear an outstanding warrant in order to reinstate a claimant's benefits.

While advocates need to know how to deal with these cases when they arise, the basic premise upon which SSA's "fugitive felon" rules are based remains questionable at best. The Urban Justice recently published an article entitled "SOCIAL INSECURITY *How the Social Security Administration's 'Fugitive Felon Program' Harms Disabled, Retired and Poor Americans Without Aiding Law Enforcement."* The policy piece by Bill Lienhard and Jennifer Parish of the Mental Health Project of the Urban Justice Center is available at http://www.urbanjustice.org/pdf/projects/Social_Insecurity_10_07.pdf. This article makes a compelling argument that SSA's rationale behind the fugitive felon program was to save money, not to get dangerous criminals off the street. Additionally, they also stress that the fugitive felon program disproportionately harms people with severe mental illness. The Mental Health Project made several recommendations, including suspending benefits only where people were actually fleeing, refining the data-match system to guard against mistakes and identity theft, and requiring SSA to assist people in obtaining information about alleged warrants or violations.

DAC/SSI/MA Interplay Continues to Confuse

Section 1383c(c) of 42 U.S.C. protects the Medical Assistance ("Medicaid") benefits of recipients of Supplemental Security Income ("SSI") benefits who lose their SSI eligibility solely because of receipt of or an increase in Social Security Children's Disability Benefits (CDB) benefits, formally known as Disabled Adult Child's ("DAC") benefits.

This protection was the subject of a class action lawsuit, *McMahon v. Perales*, 91cv621 (W.D.N.Y.), which was settled in 1995 with instructions to the county Medicaid agencies. See 92 LCM-41; 95 LCM-28 (Mar. 20, 1995); 95 ADM-11 (July 21, 1995); New York State Department of Health Medicaid Reference Guide at 54-55 (Aug. 1999). Unfortunately, from time-to-time, for inexplicable reasons, DAC recipients lose their Medicaid coverage or are advised that they have a spend-down. There are two individuals in the New York State Department of Health's Office of Medicaid Management who can help: Wendy Butz (518-473-0955) and Gail Gordon (212-417-6500).

REGULATIONS

Can You Stomach This? Digestive Disorders Listings Revised

After a 2001 Notice of Proposed Rulemaking (NPRM), 2002 publication of final rules which added a listing section, a 2004 NPRM for the limited purpose of accepting comments about proposals regarding chronic liver, and a 2004 public outreach session, the Social Security Administration (SSA) has finally issued final rules revising the Digestive Disorders Listings (5.00/105.00). The final rule was published in the October 19, 2007 Federal Register (72 Fed. Reg. 59398) and will become effective on December 18, 2007. Since the Listing was last updated comprehensively in 1985, it's probably about time for an overhaul.

Since the final rules go into effect shortly, what happens to the pipeline cases? SSA's official word is: "We will start to use these final rules on their effective date. We will continue to use our prior rules until the effective date of these final rules. When these final rules become effective, we will apply them to new applications filed on or after the effective date of these rules and to claims pending before us." With respect to claims that are pending in Federal court, SSA expects that the court would review the Commissioner's final decision in accordance with the rules in effect at the time the final decision was issued. If a court reverses the Commissioner's final decision and remands the case for further administrative proceedings after the effective date of these final rules, SSA will apply the provisions of these final rules to the entire period at issue in the claim.

SSA notes it is making the following general changes:

- Removing reference listings and, when appropriate, providing guidance in the introductory text of the listings.

- Removing or updating outdated listings.

- Adding criteria to the listing for chronic liver diseases and expanding the guidance in the introductory text on how to evaluate these diseases, including specific guidance on chronic viral hepatitis infections.

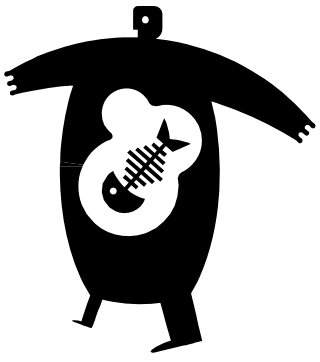
- Revising and adding criteria to the listing for inflammatory bowel diseases and expanding the introductory text to include guidance on how to evaluate these digestive disorders.

- Adding a listing for short bowel syndrome and providing guidance in the introductory text for this disorder.

- Expanding the introductory text to include guidance on how to consider the effects of treatment.

- Providing general guidance in the introductory text explaining how to evaluate digestive disorders that do not meet these listings.

As with SSA's other Listings, the preamble or introductory sections are "must reads" because of the wealth of explanatory information contained there, for both the adult and child listings.



COURT DECISIONS

District Court Rejects ME Testimony

How much weight should be given to the testimony of a medical expert (ME) hired by SSA who has merely observed the claimant at the hearing and reviewed the medical evidence? Not much, according to Judge Michael Telesca of the Western District. In *Velazquez v. Barnhart*, --- F.Supp.2d ----, 2007 WL 3197085 (W.D.N.Y., November 01, 2007), Judge Telesca held that:

> A psychiatric opinion based on a face-to-face interview with the patient is more reliable than an opinion based on a review of a cold, medical record and, as in this instance, the observation of plaintiff while giving his testimony at his disability hearing. *See Westphal v. Eastman Kodak Co.*, 2006 WL 1720380 *4, 5 (W.D.N.Y. 2006). The psychiatric treating model requires that a doctor treating a psychiatric patient conduct an interview, and medical examination of the patient. *Id.* ("Because of the inherent subjectivity of a psychiatric diagnosis, and because a proper diagnosis requires a personal evaluation of the patient's credibility and affect, it is the preferred practice that a psychiatric diagnosis be made based upon a personal interview with the patient.") (citations omitted)

2007 WL 3197085 *3. He found that it was error for the ALJ to rely on the testimony of the ME to the exclusion of more favorable evidence from the treating psychiatrist and even SSA's consultative examiner.

Judge Telesca remanded the claim, which had originally been decided by an ALJ in Puerto Rico. The claimant had complained of severe psychiatric symptoms, including hallucinations. According to the Court, three physicians, including plaintiff's treating doctor found that plaintiff's subjective complaints were consistent with a diagnosis of major depression. The judge found that the ALJ gave no explanation for disregarding their findings indicating the plaintiff had poor concentration, inability to maintain social relationships, and a tendency to isolate himself. The Court ordered further evidentiary proceedings to develop and analyze the evidence. Judge Telesca also criticized the ALJ for excluding the *pro se* claimant from the hearing during the testimony of the ME.

Congratulations to Ken Hiller of Buffalo for his successful prosecution of this case on appeal.

ADMINISTRATIVE DECISIONS

Appeals Council Issues Fully Favorable Decision

A recent victory by paralegal Bruce Caufield of Neighborhood Legal Services (NLS) in Buffalo reminds us yet again of the dangers of the Commissioner's proposed regulations, discussed elsewhere in this newsletter, which would limit the submission of new and material evidence at the Appeals Council. In Bruce's case, new and material evidence, combined with Bruce's skillful advocacy, resulted in a reversal by the Appeals Council.

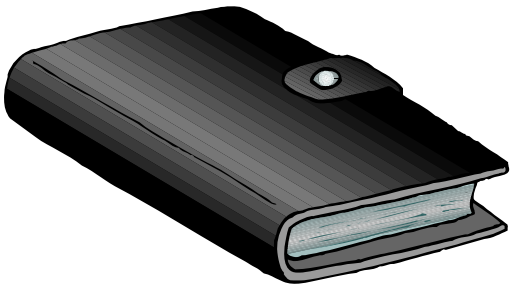
Bruce's client is a 34-year-old woman who suffers from severe lupus with attendant symptoms of joint pain, fatigue, malaise and low back pain, in addition to depression and panic attacks. Bruce submitted his client's journal of a record of her pain attacks, as well as a very helpful residual functional capacity (RFC) evaluation from the claimant's treating rheumatologist.

The ALJ, however, found this "record of purported panic attacks….to be entirely self-serving." She relied on treatment notes indicating that the claimant's depression had improved and that she no longer needed treatment to find that her depression and anxiety were not severe impairments. She found the claimant's allegations of the pain and symptoms associated with her lupus were not entirely credible, and concluded that the claimant could perform a wide range of sedentary work "with certain accommodations."

On appeal, Bruce argued, among other things, that the ALJ had misapplied the treating physician rule. He also submitted another RFC from the rheumatologist, as well as updated psychiatric records demonstrating that the claimant had been referred back to treatment just a few months after discharge due to an episode of decompensation and uncontrolled anger. The treating psychiatrist clarified that while the claimant had been temporarily discharged from treatment, her management of her panic symptoms had improved but not to a level at which she would have been capable of working.

The Appeals Council concluded that the claimant's mental impairments were not only severe, but that they met Listing 12.06 for anxiety disorders. It relied in part on the panic attack records that the ALJ had dismissed. The Appeals Council also placed great weight on the reports from the treating sources. Finally, it relied on the medical opinion that it obtained from its own medical expert. The ME opined that the claimant's recurring severe panic attacks met the criteria for listing 12.06.

Congratulations to Bruce for convincing the Appeals Council to issue a fully favorable decision, which is certainly not an everyday occurrence for any of us! A sample of his Panic Attack Diary is available in English as DAP # 468 and in Spanish as DAP # 469.



CDR Remand Fails to Resolve Issue

The world of CDRs (Continuing Disability Reviews) is never simple. The complexities of the CDR process were magnified in a case that Alan Block of Neighborhood Legal Services (NLS) in Buffalo has been handling. And they will undoubtedly increase in the course of the Appeals Council remand that Alan secured.

Alan's client was awarded childhood SSI benefits in 1984 at age 14 based on the asthma listing. In 2001, when the claimant was 30 years old, SSA determined that his asthma and seizure disorder were no longer disabling. For reasons that will go unknown, there were no intervening CDRs, nor was there the statutorily mandated "age 18" review.

The claimant appealed the termination, and following a hearing in December 2004, an ALJ upheld the termination, holding that the asthma and seizures were not disabling. Although the ALJ acknowledged that the claimant was currently experiencing serious mental health problems and a deterioration of his diabetes, the ALJ ruled that he could not consider those impairments because they arose during the three years between the cessation date in 2001 and the hearing in 2004. Instead, he "invited" the claimant to re-apply for SSI benefits.

Alan raised two points with the Appeals Council. He argued that the ALJ had followed neither the CDR sequential evaluation nor the regulations for evaluating initial claims, but rather had "cut and pasted" between the two. The Appeals Council agreed to some extent. It found that although the ALJ had cited the required steps in the medical improvement review standard, the decision contained several misstatements of the substantive requirements of the provisions. It acknowledged that the ALJ had made inappropriate references to the parts of the usual five-step process rather than the CDR process. On remand, it ordered the ALJ to consider and apply the steps of the medical improvement review standard in determining whether the claimant's disability ceased.

The Appeals Council was less definitive when it came to Alan's second point. Alan asked the Appeals Council to provide guidance as to which standard was to be applied regarding evidence of the claimant's condition between the date of cessation and the ALJ hearing. Alan noted that the Commissioner acquiesced in the Sixth Circuit in the case of *Difford v. Secretary of Health and Human Services*, 910 F.2d 1316 (6th Cir. 1990), *reh'g denied*, February 7, 1991, which required the hearing officer to evaluate and consider all the medical evidence, including medical evidence developed between the date of termination and the ALJ hearing. In Acquiescence Ruling 92-2(6), however, the Commissioner distinguished his policy from that announced in *Difford*, stating that:

> SSA interprets the term "current," as used in the statutory and regulatory language concerning termination of disability benefits, to relate to the time of the cessation under consideration in the initial determination of cessation. In making an initial determination that a claimant's disability has ceased, SSA considers the claimant's condition at the time SSA is making the initial determination. In deciding the appeal of that cessation determination, the Secretary considers what the claimant's condition was at the time of the cessation determination, not the claimant's condition at the time of the disability hearing/ reconsideration determination, ALJ decision or Appeals Council decision. However, if the evidence indicates that the claimant's condition may have again become disabling subsequent to the cessation of his or her disability or that he or she has a new impairment, the adjudicator solicits a new application.

Alan pointed out to the Appeals Council that notwithstanding AR 92-2(6), the Commissioner's litigation position on this issue has been ambiguous. For example, the Commissioner vigorously and successfully defended its policy outside the Sixth Circuit in *Johnson v. Apfel*, 191 F.3d 770 (7th Circuit). In other cases however, the Commissioner has disavowed its "national policy." In fact, at least two district court decisions reveal that the Commis-

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sioner's counsel has acknowledged the Commissioner will consider all medical evidence of disability, including that pertaining to the interval between the proposed termination date through the hearing date. *See, e.g., Nieves v. Barnhart,* 2005 WL 668788 (S.D.N.Y.) and *Cogswell v. Barnhart,* 2005 WL 767171*3 n.3 (D. Me).

In *Nieves*, Jim Baker of CeDar argued that the Commissioner's "national policy" outside the Sixth Circuit was actually at odds with the interpretation adopted by SSA. He pointed out that 20 C.F.R. § 416.1476(b)(2) is dispositive: "In reviewing decisions other than those based on an application for benefits, the Appeals Council will consider the evidence in the administrative law judge ["ALJ"] hearing record and any additional evidence it believes is material to an issue being considered." Furthermore, the official commentary that accompanied the publication of the current version of 20 C.F.R. §416.1476 in 1987 makes clear (1) that the phrase "other than those based on an application for benefits" refers to cessation cases and (2) that post-cessation evidence is material because an SSI claimant can reestablish eligibility during the post-cessation appeals process without having to file a new application. *See* Limit on Future Effect of Applications and Related Changes in Appeals Council Procedures, 52 Fed. Reg. 4001, 4003 (Feb. 9, 1987) (stating that "in SSI cases not based on an application for benefits (e.g., cases involving suspension or termination of benefits), the [Appeals Council] will consider additional evidence regardless of whether it relates to the period ruled on by the ALJ or to a subsequent period.")

Jim's argument in *Nieves* was obviously persuasive. The Commissioner admitted that the position taken in the underlying motion with respect to the relevant time period was erroneous, acknowledging that counsel was not aware of the error in the Commissioner's position until plaintiff's counsel identified it. The Commissioner's counsel apologized to the Court for the inconvenience resulting from the failure to acknowledge the error sooner. *See* 2005 WL 668788 *3. [Note that Jim points out that this policy apparently only applies in SSI claims. Title II cases present even more hurdles. And note that the Commissioner's proposed changes to the hearing process, discussed elsewhere in this newsletter, concerning closing the record at the ALJ level, may even further complicate this issue.]

In Alan's case, however, the Appeals Council hedged again, and muddied the waters further. It did not respond directly to Alan's request that the policy be clarified. Instead, it found that the plaintiff's diabetes, while not necessarily disabling, was a severe condition prior to the cessation date and should be considered further. It did not comment on the plaintiff's mental impairment, however. Rather, it suggested that on remand, the ALJ consider consolidating the claim with the new application that the claimant had subsequently filed.

We will be anxious to hear how Alan and his client fare on remand, which Alan predicts will be contentious at best! He is considering returning to the Appeals Council for clarification, but predicts that that would not be fruitful. The issue raised by Alan is a significant one, and one that advocates undoubtedly have or will encounter in CDR cases. Please keep us informed as to how various ALJs, the Appeals Council and District Courts are treating this issue in your cases. And thanks to Alan and Jim Baker for their attempts to try to clarify the CDR process.

New Chief ALJ Named

ALJ Mark Sochaczewsky was recently named Chief ALJ for Region II. The Office of Disability Adjudication and Review (ODAR) has ten regional offices. ODAR Region II, which is headquartered in New York City, services New York, New Jersey, Puerto Rico and the Virgin Islands. ALJ Sochaczewsky was previously stationed in the Bronx ODAR.

Pictures Pay Off

Ellen Rita Heidrick of the Southern Tier Legal Services office of LAWNY reports that she received a fully favorable "bench decision" decision in a case involving psoriasis. [See the January 2005 edition of the *Disability Law News*, available at www.empirejustice.org for more information on bench decisions. They were designed to "facilitate" the use of oral decisions in limited types of adult disability claims. See HALLEX I-5-1-17.]

Ellen's client suffered from severe psoriasis with lesions covering her entire body. The lesions caused itching and pain. When Ellen first interviewed the client in November 2005, she suggested that the claimant keep a photographic log of her psoriasis. The claimant photographed her partially clad body over a two-month period. These photographs showed lesions covering 70-80% of her body.

Ellen submitted copies of the photos to the ALJ in support of her argument that the claimant's condition met the requirements of listing 8.05, *Skin Disorders - Dermatitis.* That listing includes psoriasis "with extensive skin lesions that persist for at least 3 months despite continuing treatment as prescribed." Ellen also combed the treatment notes to find references to skin lesions that the treating sources observed, which reflected repeated diagnoses of psoriasis and examination findings of lesions covering "everywhere."

Ellen also obtained a completed questionnaire from the nurse practitioner who was involved in the claimant's care. She reported that the claimant's lesions had not resolved with treatment, including multiple creams, lotions, sunlamp, Methotrexate, and other medication. The nurse practitioner noted that this treatment had failed to improve or resolve the claimant's condition. In addition, she indicated that the listing for Dermatitis best described her patient's condition. Although the nurse practitioner's report had been co-signed by the treating physician, Ellen reminded the ALJ that the nurse's opinions were entitled to weight under SSR 06-03p, governing "other sources."

According to Ellen, the ALJ made mention of the photos at the hearing. She believes that they helped show the severity of the condition and garnered some compassion from the ALJ. He ultimately granted the case in a bench decision in which he found that the claimant met listing 8.05 and had marked limitations in social functioning as a result of her social anxiety stemming from her symptoms.

Kudos to Ellen for her creativity in presenting this case. Ellen's case, along with Bruce's case involving the use of a panic attack diary, underscore the value of developing evidence like this prior to the hearing. Such specific "proof' of symptoms can only help bolster credibility.

SSA Plans Public Hearings

The Social Security Administration (SSA) is planning two days of public hearings in early December to consider comments on its "Compassionate Allowance" initiative, a system for making quick favorable decisions for persons with obvious disabilities. [See September 2007 *Disability Law News* for a more detailed description of this plan.] The hearings will address possible methods of identifying and implementing compassionate allowances for children and adults with rare diseases. Future hearings will address other kinds of medical conditions.

According to the November 6, 2007 Federal Register announcement (72 Fed. Reg. 62607), the first hearing will be held on December 4 and December 5, 2007 in Washington, D.C.. Space limitations and time constraints require hearing attendance to be by invitation only. The notice, however, advises that interested persons may listen to the proceedings by dialing into a toll free number. If you plan to listen in, please send an e-mail to Compassionate.Allowances@ssa.gov by November 21, 2007.

In addition, SSA is accepting up to two pages of written comments about the compassionate allowances initiative with respect to children and adults with rare diseases, as well as topics covered at the hearing. The deadline for submission is December 21, 2007. SSA plans other public hearings on cancers, chronic conditions, and traumatic injuries.

SSA Refunds Offset Overpayments

Buffalo Bruce Caulfield of Neighborhood Legal Services strikes again! Bruce recently represented a client who had received SSI benefits as a child from age eight through eleven, based on her Oppositional Defiant Disorder, Posttraumatic Stress Disorder, Intermittent Explosive Disorder and an IQ of 70. She had been sexually abused and neglected until age six, when her grandmother took custody of her. The grandmother also served as representative payee.

At age eleven, in 1998, the child was placed in a residential setting. Her grandmother, who was also representative payee, neglected to report the move to SSI. Between March 1998 and July 1998, the grandmother received - and spent - $3,012 in SSI benefits on her own behalf.

In August of 2004, the claimant - then 17 - reapplied for benefits. Bruce successfully represented her at an ALJ hearing based on her borderline intellectual functioning and impulse control disorder. When SSI calculated her retroactive award, however, it withheld the $3,102 to offset the prior overpayment. Bruce encouraged his client to file for a waiver, since she was not given the opportunity to do so before the offset. When faced with the waiver request, SSA argued that there was no outstanding overpayment to be waived, as it had already been collected - or offset - out of the retroactive award.

Armed with regulatory and POMS citations, Bruce convinced SSA to consider the waiver request and refund the withheld money. Although an underpayment such as the retroactive award due Bruce's client may offset an established overpayment, the offset remains subject to any wavier determination. 20 C.F.R. §415.543. In fact, 20 C.F.R. §416.558 requires notice of any overpayment once SSA proposes recovery that expressly includes notice of the claimant's right to request waiver. POMS SI 02260.001(A)(2) specifically provides that "[t]he effect of an approved request for a waiver is to relieve the overpaid individual, his/her estate and his/her spouse of the obligation to repay the amount of the overpayment which is waived, even if the overpayment has been partially or fully collected."

Bruce reports that SSA ultimately agreed to waive the overpayment and refund the $3,102 to his client. Bruce had the able assistance of Alan Block of NLS and David Ralph of the Elmira office of LAWNY as consultants in this case.

Overpayments of $500 or Less Automatically Waived

You know you have heard that overpayments of $500 or less can be waived easily - if not automatically - but you just can't remember where you saw it. Search no more. Thanks to DAP listserv regulars Gene Doyle and John Castellano, you have the answer. POMS GN 02201.013 provides for automatic waiver of recovery of a Title II or Title XVIII (Special Veterans Benefits) overpayment without development on the basis that recovery impedes efficient administration of the Social Security Act if waiver is requested and the overpayment is $500 or less. SI 02260.030 provides similar relief for Title XVI (SSI) overpayments, although the adjudicator can conduct a full review if there is an indication on the face of the waiver/reconsideration that there was fault. John Castellano has shared a waiver request letter tailored for these situations, which is available as DAP# 470.

Closed Period Case Successfully Appealed

Advocates at Southern Tier Legal Services (STLS), a division of LAWNY in Bath, successfully appealed a case in which the claimant was awarded a closed period of disability. The closed period was largely based on the fact that the claimant had returned to work at the time of the hearing. The advocate who represented the claimant at the hearing level recognized that the claimant still had serious mental issues. She suffered from affective disorder, anxiety related disorder, post traumatic stress disorder (PTSD), depression and history of bulimia. Despite concerns that the claimant could lose her favorable outcome, she appealed the ALJ's decision of December 22, 2005, which found the claimant disabled during the period November 29, 2002 to June 29, 2005.

At the time of her September 22, 2005 hearing, the claimant had testified that she was not confident she would be able to continue working full time. The claimant had been working full time at a factory from June 29, 2005. Six days after the hearing, however, she attempted suicide on September 29, 2005. She was hospitalized as a result, but attempted to return to work on October 17, 2005. She was actually not able to return to uninterrupted employment until September 25, 2006.

STLS advocates presented evidence to the Appeals Council demonstrating that improvement in the client's impairments in 2005 was only temporary. The Appeals Council remanded the claim based on the new and material evidence. The Appeals Council also faulted the ALJ decision because it did not comply with the medical improvement regulations. The Appeals Council cited 20 C.F.R. §§404.1591 and 416.991 for the proposition that disability has ended if the claimant returned to work fulltime with no significant medical limitations. In this case, however, the Appeals Council pointed out that the ALJ had found that the client "had continuing family and legal stressors" and that working fulltime "was very stressful. Additionally, the [ALJ] decision noted that at the hearing the claimant was tearful, very emotional, angry, and easy to be upset." The Appeals Council also ordered remand because the hearing tape could not be located.

At the remanded hearing, the claimant's new advocate convinced the ALJ that there was not sufficient evidence of medical improvement of her impairments until the claimant's return to work full-time in September 2006. He successfully argued that her work activity commencing in June 2005 should have been considered a trial work period under 20 C.F.R. §404.1592(e)(3). He submitted employment records demonstrating that she was laid off from work in December 2005. She was employed again from January 30, 2006, until she was laid off again on June 5, 2006. She was, however, on disability leave from February 6, 2006, until June 12, 2006, following another psychiatric hospitalization. She was not rehired until September 25, 2006.

The ALJ's decision found that "the claimant has been disabled under section 1614(a)(3)(A) of the Social Security Act beginning on November 29, 2002, to June 29, 2005, and eligible for a trial work period commencing July 2005 to continue through March 2006; October 2006 is the first month after [the] trial work period in which the claimant engaged in substantial gainful activity; October through December 2006 is considered the three month re-entitlement period."

Congratulations to Jeff Nieznanski of STLS and Laura Weekly, formerly of STLS and now with legal Services of Central NY, for pushing the envelope with this case. Of course, this is yet another example of a case that unfortunately might turn out differently under the Commissioner's proposed new regulations. As discussed in this newsletter, the proposed regulations would close the record at the ALJ level, and limit the opportunity to submit new evidence to the Appeals Council.

Deciphering SSA Codes

Advocates may often skim through those parts of a Social Security file that contain pages and pages of seemingly incomprehensible computer printouts. Believe it or not, they actually mean something, and thanks to Gene Doyle, advocates may be able to decode them. Gene has made available old POMS sections interpreting codes in computer printouts of SSA's Supplemental Security Record (SSR). These chapters are no longer included on SSA's public website. Gene has been informed that these sections of the POMS are not available for "security" reasons.

Gene's version dates back to a November 15, 2002 POMS CD, but can still be quite useful in decoding SSRs. Gene recommends getting a complete SSR printout by requesting access to any "electronically stored" data on the claimant, including information on the SSR and MSSICS ("Modernized SSI Claims System," SSA's electronic application and post-eligibility file for SSI claims).

Gene warns that SSA Field Offices may be refusing SSR requests these days, again based on security concerns. In that regard, Gene notes that access to case files and to legal authorities, including POMS, was an issue in the implementation of the Judgment in *Ford v. Shalala*, 87 F.Supp.2d 163 (E.D.N.Y. 1999), although in the context of notices to claimants. Gene and Peter Vollmer (co-counsel in *Ford*) are concerned about this local trend, and hope that it may be possible to address it as part of *Ford* post-judgment dealings with SSA or in future litigation.

Peter [PVollmer96@aol.com] and Gene [POORman2@nyc.rr.com] would welcome feedback from advocates:

- Have clients or advocates contacted SSA to request free copies of case file materials or legal authorities?
- Has SSA provided the materials for free?
- How timely has SSA's response been?
- What excuses has SSA offered for not acting on or in outright denials of such requests?

In the meantime, POMS subchapters SM 01601 and SM 01602 are now available as DAP# 471. The opening page of each file has links to the various sections of the subchapter. Each section has also been bookmarked. Thanks to Gene Doyle for being a pack-rat!

Note that the SSRs referred to above differ from SSA's Numerical Identification File (NUMIDENT) printouts, also found in exhibit files. For help with deciphering NUMIDENT printouts, see DAP# 472, which includes POMS RM 00206.025 - How to Read a NUMIDENT Printout, as well as several pages explaining the various abbreviations and codes. These are all available thanks to pack-rat Ann Biddle.

POMS Require Translation

Although we sometimes feel like we need help translating the POMS, the POMS actually require SSA to translate a number of notices and publications into Spanish. Thanks to Michael Mulé, former Hanna S. Cohn Fellow and current Language Access guru at the Empire Justice Center, for compiling these POMS:

- GN 99001.000- Spanish Language Notices , http://tinyurl.com/2kyf56
- GN 99002.000- Spanish Applications and Forms, http://tinyurl.com/3xdpnh
- NL 00601.600 Spanish Language Notices- Spanish notice is sent to all individuals with Spanish language indicators, http://tinyurl.com/2wkb3d
- NL 00603.110 Spanish Language Notices- Identify those individuals, including representative payees, who should be sent Spanish notices, http://tinyurl.com/38mdkf
- NL 00603.600 (D)- Publications are available in other languages, multilingual gateway, http://tinyurl.com/38mdkf

CLASS ACTIONS

McMahon v. Sullivan, Perales and Schimke
91 Civ. 621 (Curtin, J) ("the DAC/SSI Medicaid Case")

Description - Plaintiffs challenged NYDSS's failure to implement 42 U.S.C. §1383c(c) which requires continued Medicaid eligibility for disabled adults who lose SSI solely because of eligibility for or an increase in Social Security Children's Disability Benefits (CDB), formally known as Disabled Adult Child's (DAC) benefits. Plaintiffs claimed that defendants fail to ensure that Medicaid benefits continue.

Relief - HHS and OTDA have corrected the problem prospectively and retroactively to July 1, 1987. Additionally, the parties completed negotiations to correct the problem for dually entitled recipients (individuals entitled to both disability benefits on their own record and Children's Disability Benefits on a parent's account.) The case has been resolved with 4,500 class members getting some satisfaction.

Information - Empire Justice Center (585-454-4060); Heritage Centers (716-522-3333); Wendy Butz (Medicaid liaison person) (518-473-0955) or Gail Gordon (212-417-6500).

Ford v. Shalala, 87 F. Supp. 2d 163 (E.D.N.Y. 1999) ("the lousy notice case")

Description - The court ruled that notices of SSI financial eligibility and/or benefit amounts ("SSI financial eligibility notices") violated the due process clause of the Fifth Amendment of the United States Constitution because of SSA's failure to provide notice sufficient to permit a reasonable person to understand the basis for the agency's action.

Relief - The *Ford* Judgment requires the Social Security Administration (SSA) to expeditiously prepare and implement a plan, consistent with the Memorandum Decision and Order, that modifies defendant's automated SSI financial eligibility notices so as to provide information required in order to understand the reasons for an award, modification, termination or denial of SSI benefits, in such detail as is necessary to permit a reasonable person to understand the basis for the agency's action on the following subject:

- Information and explanation about the individual's living arrangement category;
- Information about resources'
- Benefits computations in worksheet form, including the federal benefit and state supplementation rates'
- The notice recipient's rights to review the claim; and
- The legal authority for the agency's action including either: (i) the appropriate legal citations or (ii) information as to how the appropriate legal citations can be obtained from the Social Security Administration.

Citations - *Ford v. Shalala*, 87 F. Supp. 2d 163 (E.D.N.Y. 1999) ruled that notices of SSI financial eligibility and/or benefits amounts ("SSI financial eligibility notices") violated the due process clause of the Fifth Amendment of the United States Constitution: *Ford v. Apfel*, 2000 WL 281888, 2000 U.S. Dist. LEXIS 2898 (E.D.N.Y. January 13, 2000) (Judgment).

Information - General case information: www.wnylc.net/ford/ford.html

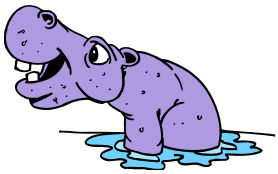
Inquiries - mail to ford v apfel@yahoo.com; Chris Bowes at CeDAR (212-979-0505); Peter Vollmer (516-870-0335); Gene Doyle (718-843-2290).

WEB NEWS

Tickle the Hippo for Health News

"Health Hippo" is an internet health information resource collection of policy and regulatory materials related to health care, hosted by FindLaw (a Thomson/West company). The site includes an excellent table that cross references Social Security Rulings to specific impairments and includes other Social Security disability related materials.

hippo.findlaw.com; hippo.findlaw.com/disability.html#table.1



Another Medical Dictionary: Look It Up

For a quick explanation of any medical term or acronym, check the excellent online dictionary offered by a medical school in England.

cancerweb.ncl.ac.uk/omd/

Find a Doc Nationally

If you're looking for a doctor in New York, check out http://www.nydoctorprofile.com/welcome.jsp.

If you're looking for doctors in other states, another place to check is: www.noah-health.org/en/usmd/state.html.

Hey, I know that Guy!

Under a contract with Social Security, the Employment and Disability Institute of Cornell's School of Industrial and Labor Relations published an annual training manual on the Social Security disability programs and their complex work incentives. Look for Ed Lopez on the website! Interactive access to the latest manual is available at this short-cut web address: tinyurl.com/3dqwy9

Follow the Money

Social Security and ten other federal agencies comprise the U.S. Financial Literacy and Education Commission and support its web portal, MyMoney.gov: "My Money.gov is the U.S. government's website dedicated to teaching all Americans the basics about financial education." www.MyMoney.gov

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

Is Popcorn Disabling?

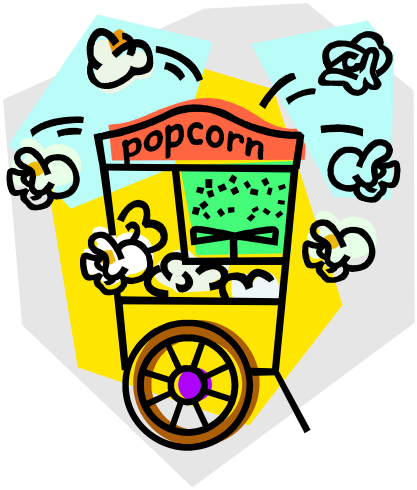
Beware of buttered microwave popcorn - at least in excess. According to a report in the *New York Times* on September 5, 2007, a Colorado man's shortness of breath was linked to his exposure to microwave popcorn. In a case of medical detective work, his doctor, who was at a loss to explain his diagnosis of hypersensitivity pneumonitis, asked him if he were around a lot of popcorn. He had already denied exposure to the more typical irritants that cause pneumonitis, such as bacteria, dust or mold found around farms or birds. The patient, who described himself as "Mr. Popcorn," admitted that he loved popcorn so much that he not only ate it twice a day; he also inhaled the aroma when he first broke open the microwaved bag.

The doctor, Cecil Rose, was director of the occupational disease clinical programs at National Jewish Medical and Research Center in Denver. She had previously consulted to flavorings manufacturers for years about "popcorn workers' lung." Dr. Rose was well aware that diacetyl, which adds the buttery taste to many microwave popcorns, has been linked to hundreds of cases of workers in food production and flavoring plants whose lungs have been damaged or destroyed. Diacetyl is found naturally in milk, cheese, butter and other products. When heated, it becomes vaporized. Inhaling the vapors over a long period of time can apparently cause the small airways in the lungs to become swollen and scarred, resulting in difficulty exhaling. The severe form of the disease - bronchiolitis obliterans or "popcorn workers' lung" - can be fatal. Levels of diacetyl measured in Mr. Popcorn's home were similar to those in microwave popcorn plants.

Diacetyl has previously been a workplace concern, but this is the first known case involving a consumer. According to Stephanie Childs, a spokeswoman for ConAgra Foods, the nation's largest maker of microwave popcorn, "…we are confident that our product is safe for consumers' normal everyday use in the home." Nonetheless, ConAgra plans to remove diacetyl from its microwave popcorn products "in the near future." Popweaver has already removed it from its product. Orville Redenbacher and Act II apparently still contain diacetyl.

The Food and Drug Administration is supposedly considering the safety of diacetyl, as is the Occupational Health and Safety Administration. According to Representative Rosa DeLauro, however, "the government is not doing anything." DeLauro is a Connecticut Democrat who leads a subcommittee with jurisdiction over the FDA's budget.

The good news? Mr. Popcorn stopped eating popcorn and his symptoms subsided. He also lost 50 pounds!



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