Empire Justice Center

November 2008
Issue 6, 2008

DISABILITY LAW NEWS

Court of Appeals Issues New Opinions

After a long period of relative silence, the Second Circuit Court of Appeals has issued two very helpful decisions in relatively short succession. In August, the Court ordered a remand for further consideration of treating physician evidence in *Burgess v. Astrue*, 537 F.3d 117 (2d Cir. 2008). Last month, the Court remanded a mental impairment claim for further for application of the correct legal standards. *Kohler v. Astrue*, --- F.3d ---, 2008 WL 4589156 (2d Cir. October 16, 1008). And in one of its "unpublished" decisions - *Burger v. Astrue*, 2008 WL 259517 (2d Cir. June 27, 2008) - the Court remanded for further development because the claimant was unable to afford treatment.

Burgess v. Astrue

In *Burgess*, the Court considered the claim of a woman who suffered injuries on the job to her knee and back when she was thirty-two years old. The Administrative Law Judge (ALJ) concluded that she could return to her past work as a salesperson, despite evidence from her long time treating physician that she was disabled.

The ALJ rejected the opinion of Dr. Smith, who had been Ms. Burgess's treating orthopedist since the time of her injury in 1997. The ALJ instead relied primarily on the hearing testimony of a Medical Expert who asserted that there was no objective evidence of nerve root impingement justifying Burgess's complaints of back pain. Dr. Abeles opined that Ms. Burgess may be "subjectively" disabled, but there was no objective reason she could not work.

Treating physician Smith, however, had declared Ms. Burgess disabled following his review of a 1999 MRI that indicated encroachment of a bulging disc into the neural foramen. According to Dr. Smith's testimony before the Workers' Compensation Board, the MRI report did not state directly that the disc was impinging on nerve root; it, however, "us[ed] other words that mean the exact same thing." He also testified that his clinical findings were consistent with the MRI.

Despite the fact that Dr. Smith's testimony and the MRI report were included in the Social Security record both the ALJ and ME Abeles assumed otherwise. They did, however, acknowledge that an MRI had been done. The District Court agreed that that the ALJ's belief that the MRI report was not in record was erroneous, but upheld his decision nonetheless, finding that the MRI did not provide objective evidence of nerve impingement.

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INSIDE THIS ISSUE:

Disability Law News©
is published six times per year by:

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November 2008 issue.

Available online at:

www.empirejustice.org

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The Court of Appeals, however, concluded that the MRI was both in the record and was objective evidence. It held that ME Abeles opinion was flawed by virtue of the fact that by his own admission he did not review a key piece of evidence in the case. It also criticized the ALJ, noting that even if the MRI had not been included in the record, the ALJ, once he became aware of its existence, should have requested it in light of his obligation to develop the record.

The Court also rejected the Commissioner's attempt to argue that the MRI was not supportive of Dr. Smith's opinion. It held that because the MRI was not part of the basis of the ALJ's denial, the court could not "affirm an administrative action on grounds different from those considered by the agency." Additionally, the Second Circuit found that the Commissioner's new argument that the MRI did not support the treating physician's opinion was not supported by the record. It pointed out that neither the Commissioner nor the District Court was permitted to substitute their views of medical proof for "competent medical opinion." It thus held that the ALJ's finding that there was no objective evidence to support Dr. Smith's opinion was unsupported by anything other than the flawed opinion of ME Abeles.

Ultimately, however, the Court concluded that a reversal was not appropriate. It held that there was evidence of record that might be considered as contradicting the opinion of treating physician Smith. The Court specifically held that ME Abeles's testimony could not be considered substantial evidence, nor could that of the consulting examiner who was also not aware of the MRI findings when he offered his opinion. It did, however, direct the Commissioner on remand to consider the reports of the Workers' Compensation doctor who had examined Ms. Burgess twelve separate times and appeared to have taken into account the MRI report in concluding that that her complaints were not credible.

On remand, the Court ordered the ALJ to consider expressly the MRI report and Dr. Smith's reports. If the ALJ declines to give controlling weight to Dr. Smith's opinion, he must, according to the Court of Appeals, provide Burgess with a comprehensive statement as to what weight is given and for what reasons.

In reaching this conclusion, the Court provides a handy compendium - with case citations - of some of its leading axioms concerning the weighing of treating physician evidence. For example, not all "expert" opinions rise to the level of evidence sufficiently substantial to undermine the opinion of a treating physician, especially if the expert did not examine the claimant or relied on the evaluation of a non-physician. Nor can the opinion of a treating physician be discounted merely because he has recommended conservative treatment, although evidence that a claimant takes only over-the-counter pain medication may help support a finding of nondisability if accompanied by other substantial evidence. Additionally, the longer a treating source has treated the claimant, and the more times s/he has seen the claimant, the more weight the Commissioner must give to his/her opinion. And, of course, the ALJ must "comprehensively" set forth the reasons for the weight assigned to any treating physician opinions.

Kohler v. Astrue

In overturning the Commissioner's denial of the claim of Kathy Kohler, the Second Circuit held that the ALJ's failure to adhere to the regulations requiring the application of a "special technique" at Steps two and five of the sequential evaluation for mental impairments constituted grounds for remand.

Some advocates may recall that back in the "good old days," ALJs were required to compete and attach the Psychiatric Review Technique Form (PRTF) to their decisions. The PRTF, which is still mandatory at the initial and reconsideration levels of review, provides documentation that the adjudicator has actually rated the degree of functional limitation in the four broad functional areas of activities of daily living; social functioning; concentration, persistence , or pace; and episodes of compensation. Although the regulations were amended in 2000 and no longer require that the ALJ complete and attach a PRTF to each decision, the written decision nonetheless "must include a specific finding as to the degree of limitation in each of the functional areas…" 20 C.F.R. §404.1520a(e)(2).

In Ms. Kohler's case, the ALJ agreed that her bipolar disorder was severe, but concluded with little analysis that it did not meet or equal a listed impairment. He

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went on to evaluate her functional capacity, concluding that she displayed "mild" symptoms that "appear well controlled" when properly medicated. He addressed how her bipolar disorder restricts her activities of daily living only in general terms, despite some evidence that her limitations were more than mild. He reviewed various medical reports, and concluded that Ms. Kohler could return to her past relevant work.

According to the Court of Appeals, "the ALJ failed to adhere to the regulations, as his written decision does not reflect application of the special technique and, in particular, lacks specific findings with respect to each of the four functional areas described in §404.1520a (c)." 2008 WL 4589156*6. The Court acknowledged that the consequence of such noncompliance was a matter of first impression in this circuit, although other courts of appeals had not been hesitant to remand when noncompliance resulted in an inadequately developed record in terms of the four functional categories.

Although some courts have performed a "harmless error" analysis before remanding, the Second Circuit concluded that the ALJ's lack of distinct analysis in this case prevented the Court from being able to conduct an adequate review. Thus, even if the ALJ's failure to adhere to the regulations "might under other facts be harmless [citations omitted], the record in this case does not allow us to say the ALJ's failure was harmless." The Court noted that the ALJ's failure to follow the "special technique" was exacerbated by his tendency to "overlook or mischaracterize relevant evidence, often to Kohler's disadvantage." 200 WL 4589156*7.

In another nugget that will undoubtedly prove useful for advocates in future cases, the Court also criticized the ALJ for focusing in isolation on the treating source's use of the word "stable" to describe Ms. Kohler's condition on several occasions. As the Court noted, subsequent treatment notes were "significantly less enthusiastic." *Id.*

Finally, the Court of Appeal admonished the ALJ for failing to take into consideration the opinion of the nurse practitioner treating Ms. Kohler. The Court acknowledged that her opinion was not entitled to controlling weight as she was not an acceptable medical source under the treating physician regulations. Citing somewhat dated cases and with no reference to SSR 06-3p, the Court, however, held the ALJ should have given the nurse practitioner's opinion some consideration, "particularly because [the nurse practitioner] was the only medical professional available to Kohler for long stretches of time in the very rural 'North Country' of New York State." *Id.*

Unpublished Decision

It is heartening to see the Second Circuit reinforce its treating physician rules, and again remind ALJs of their obligation to decide disability claims fully and fairly. Despite the dearth of published decisions of late from the Court of Appeals, the court has been issuing decisions - generally affirming the Commissioner - that are not selected for publication in the Federal Reporter, but are available on Westlaw or in the Federal Appendix. Advocates may recall that Federal Rule of Appellate Procedure 32.1 was amended recently to prohibit Courts of Appeals from restricting the citation of such "unpublished" decisions. See the May 2006 edition of the *Disability Law News*. Their precedential value may, however, be more limited.

A recent "unpublished" decision that advocates may well want to cite is one in which the Court of Appeals reversed the Commissioner. In *Burger v. Astrue*, 2008 WL 2595167 (2d Cir. June 27, 2008), the ALJ had found the claimant's testimony "only somewhat credible" in light of the absence of corroborative medical evidence. Ms. Burger had had only sporadic treatment and had not offered any assessments from her physicians. The Court of Appeals acknowledged that it was the claimant's burden to demonstrate that she could not return to her past work, and noted that her failure to seek medical treatment could cast doubt on her testimony. Ms. Burger, however, had testified that she could only seek occasional emergency medical care because she was uninsured and could not afford treatment. It held that the ALJ was obligated to help develop the record in order to ensure an accurate assessment of the claimant's residual functional capacity, including ordering consultative examinations.

SSA Announces 2009 COLA

On October 16, 2008, SSA announced its cost of living adjustments (COLA) for benefits effective January 2009. It is largest annual increase (5.8%) since 1982, and is based on the annual change in the Consumer Price Index.

The federal portion of monthly SSI benefits increases to $674 for individuals, $1,011 for couples. The current state supplemental payments in New York will remain the same: $87 for individuals living alone, $23 for living with others, and $104 for couples living in their own households, or $46 if the couple lives with others in the same household. http://www.ssa.gov/OACT/COLA/SSI.html

Other changes include:

- The student earned income exclusion for SSI recipients will increase to $1,640 per month but not more than $6,600 in 2009. http://www.ssa.gov/OACT/COLA/studentEIE.html
- Monthly fees allowed to institutional representative payees increase from $35 to $37 or, in the case of recipients and beneficiaries whose DAA requires a rep payee, from $68 this year to $72.
- Wage earners will earn a quarter of coverage, up to four, for each $1,090 of earnings in 2009. http://www.ssa.gov/OACT/COLA/QC.html
- The SGA threshold, based on the national average wage index instead of the CPI, increases to $980 per month, $1,640 for blind individuals, for 2009. http://www.ssa.gov/OACT/COLA/sga.html
- Disabled individuals who return to work accrue one Trial Work Period ("TWP") month for each month in 2009 during which they earn $700 or more.

Medicare changes were announced previously. The Part B premium for those with low incomes remains at $96.40 per month. The different changes for the rest of the population were announced in 73 Fed. Reg. 55089-55096 (September 24, 2008).

For all the details, including information on the retirement earnings test and exempt earnings amounts, visit SSA's website: http://www.ssa.gov/OACT/COLA/index.html.

Overpayment Waiver Threshold Increased

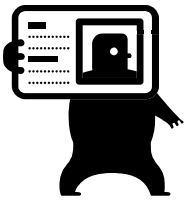
Did you know that if a claimant had an overpayment of $500 or less, it could be waived automatically – just by the asking – so long as there is no indication of fault? Effective September 27, 2008, that threshold has been increased to $1,000.01 for SSI overpayments.

Social Security recognizes that collection of such overpayments "impedes effective or efficient administration when the nation-wide average cost of recovering the overpayment equals or exceeds the amount of the overpayment." See https://secure.ssa.gov/apps10/poms.nsf/lnx/0502260030!opendocument. In fact, according to the same POMS, in most instances of overpayments of $30 or less, SSA will not even generate an overpayment notice. For amounts between $30 and $1,000.01, however, SSA will not automatically waive the overpayment unless a waiver request is made – and SSI Claims Representatives are admonished not to solicit waivers!

Note that the threshold has apparently not been increased for Title II overpayments. https://secure.ssa.gov/apps10/poms.nsf/lnx/0202201013!opendocument.

Thanks to Greg Phillips of Secor and Sciortino in Rochester for passing on this news to us.

Identity Theft Issues Abound



The illegal use of social security numbers (SSNs) continues to a major problem. Both the GAO (General Accountability Office) and the SSA OIG (Office of the Inspector General) have recently issued reports concerning the safeguarding of this information. On a related note, the IRS (Internal Revenue Service) has created a toll-free number for identity theft victims.

According to the GAO, many county governments are providing citizen's full or partial Social Security Numbers available online or in bulk to private companies. Public records - such as birth, marriage and death certificates, civil and criminal court case files, and property liens - that used to be accessible only in the county recorder's office can now be viewed remotely online in many states. Approximately 85 percent of counties nationwide make the records available, but only 16 percent of counties place any restrictions on the types of entities that can obtain those records. Furthermore, although about half of the states have passed laws that in some way limit the display of SSNs in new public records, most of these laws do nothing to wipe SSNs from documents already published and available.

The GAO notes that there are bills pending in Congress that would limit both private and government entities' ability to sell or display SSNs to other parties. According to the GAO, however, such a prohibition already exists:

> A 1990 amendment to the Social Security Act requires that SSNs obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990, be kept confidential, and no authorized person shall disclose any such social security account number or related record.

Despite this prohibition, SSA has not promulgated any regulations to implement or enforce it.

The GAO prepared its September 4, 2008 report - *Social Security Numbers Are Widely Available in Bulk and Online Records, but Changes to Enhance Security Are Occurring* - as Briefing for Senator Charles E. Schumer, Chairman, Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary. It is available at http://www.gao.gov/new.items/d081009r.pdf.

The OIG also criticized SSA for failing to do enough to detect the posting of work activity to SSNs that were misused for work purposes. SSA had several processes to detect some instances of SSN misuse in its records, such as isolating reporting anomalies related to children and deceased individuals. According to the OIG, however, SSA needs to strengthen its controls to help prevent misuse of an SSN from continuing once identified. It also concluded that SSA needs to improve its correspondence with victims of SSN misuse to educate them about the need to report suspected SSN misuse to the Federal Trade Commission and law enforcement. Additionally, the Agency needs to inform employers about wage items reported as incorrect to assist employers with detecting SSN misuse and preventing its continuation.

The OIG's report - *Social Security Number Misuse for Work and the Impact on the Social Security Administration's Master Earnings File* (A-03-07-27152) - is available at http://www.ssa.gov/oig/ADOBEPDF/A-03-07-27152.pdf.

Finally, the IRS has established a new toll free hotline for taxpayers to call identifying themselves as identity theft victims. The hotline will provide taxpayer access to automated messages and live IRS assistors. The IRS will have teams to take calls in English and Spanish between the hours of 8:00 am and 8:00 pm local time (Alaska and Hawaii follow Pacific Time). It will provide guidance to individuals identifying themselves as potential victims of identity theft, including actions to take when there currently is no tax related impact.

The toll-free number is 800-908-4490.

REGULATIONS

Comments Submitted on Representation Regs

The Empire Justice Center has submitted comments on SSA's "Proposed Rule on Revisions to Rules on Representation of Parties." The Notice of Proposed Rulemaking (NMPR) was published in the Federal Register on September 8, 2008. 73 Fed. Reg. 51963 (Sept. 8, 2008), and was summarized in the September edition of the *Disability Law News.* The comments, along with those offered by NOSSCR (National Organization of Social Security Claimants' Representatives) and the CDC (Consortium for Citizens with Disabilities), are available as DAP #508.

As pointed out in the comments by NOSSCR, in which the Empire Justice Center joined, the NMPR introduces new procedures and concepts that could make the process more complicated and create confusion for claimants and representatives. It would distinguish among the categories of "representatives," "principal representatives," "professional representatives," and "representational services." Electronic filing of certain SSA documents, including appeals, would be mandatory for "professional representatives." Professional representatives would also be required to "register" with SSA, and file "attestations" that s/he "knows, understands, and will comply with [SSA's] rules and regulations."

Some of the new proposals make sense. For example, under the proposed rules, SSA would recognize entities - as opposed to just individuals - as representatives. This could be helpful to legal services programs where staffing considerations often result in more than one advocate represents a claimant. Filing separate 1696s (Appointment of Representative forms) in those situations can be unwieldy. Allowing representatives to file applications on behalf of claimants could also be beneficial. Several other aspects of the revisions are necessary to comply with IRS rules involving payment of attorney fees. And others may be helpful in effectuating SSA's move to fully electronic files, including claims files accessible to representatives on-line.

Other aspects of the NMPR, however, such as mandatory electronic filings and the requirement that claimants use Form 1696 to both appoint and revoke representation, could prove cumbersome. So too may the proposal to create separate appeal processes for claims based on "medical factors" or whether a "professional representative" is appointed. Additionally, requirements under the "Rules of Conduct for Representatives" would require representatives to maintain paper - or hard - copies of attestations and 1696s, among other things.

The NMPR, along with many, many more comments, can be found at http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=SSA-2007-0068.

Grid Age Categories Changed

In June 2008, SSA proposed to modify its Grid Rules by revising the definition of persons "closely approaching retirement age" from "60-64" to "60 or older." See July 2008 *Disability Law News*. SSA adopted the proposed rules with minor grammatical changes. The new rule was effective October 29, 2008. 73 Fed. Reg. 64195.

Rep Payee Interview Rules Finalized

In March 2008, the Social Security Administration (SSA) issued proposed rules streamlining the representative payee interview process by not requiring a current payee to appear for another in-person interview for a subsequent payee application. The requirement for holding a face-to-face interview may be waived only if conducting the interview is impracticable and would cause undue hardship for the payee applicant such as when a payee applicant would have to travel a great distance to the field office. See May 2008 *Disability Law News*.

SSA finalized these rules with no changes from the proposed rulemaking. 73 Fed. Reg. 66520 (November 10, 2008). The final rules are effective December 10, 2008.

SSA Proposes Electronic Hearing Schedule

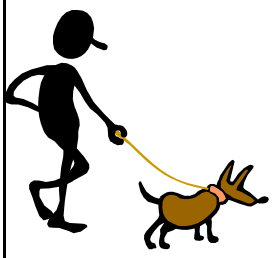
SSA anticipates a large increase in hearing requests in the coming year. The agency expects Administrative Law Judges (ALJs) to increase their productivity so that each ALJ processes at least 500 cases per year. Although many ALJs are already at this level, 502 of the 895 fully available ALJs processed fewer than 500 cases in FY 2006. SSA expects these low flying ALJs to step up their case handling.

One way that SSA proposes to insure that all ALJs are working to maximum capacity is by taking over control of scheduling hearings. Presently, each ALJ is responsible for managing his or her own hearing schedule. Under proposed regulations issued on November 10, 2008, 73 Fed. Reg. 66564, the agency will be responsible for setting the time and place of an ALJ hearing. This proposal would also assist in the development of the electronic scheduling initiative, which will ease the integration of the schedules of ALJs, experts, claimants, claimants' representatives, hearing recorders, and the availability of hearing rooms.

Under the proposed regulations, a claimant retains the right to object to a hearing by video teleconferencing, and the time or place of the hearing will be rescheduled to allow for an in-person hearing. However, the ALJ can mandate that expert witnesses, i.e., vocational expert, medical expert, will appear by video teleconferencing.

Comments to these proposed regulations are due by January 9, 2009.

HUD Revises Public Housing Pet Rules



The Department of Housing and Urban Development (HUD) is showing some of its own compassion in final regulations issued October 27, 2008. 73 Fed. Reg. 63833. This final rule amends HUD's regulations governing the requirements for pet ownership in HUD-assisted public housing and multifamily housing projects for the elderly and persons with disabilities.

Specifically, this final rule conforms these pet ownership requirements to the requirements for animals assisting persons with disabilities in HUD's public housing programs, other than housing projects for the elderly or persons with disabilities.

The final rules are effective November 26, 2008.

SSI Eligibility Extended for Some Refugees

Effective October 1, 2008, legislation signed by the President *temporarily* extended from seven to nine years the period during which refugees and other humanitarian-based immigrants are eligible to receive Supplemental Security Income (SSI) benefits without being a citizen. The seven year limit will be automatically reinstated on October 1, 2011.

Here is a little by way of background. In August of 1996, the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") was enacted. The law imposed various restrictions on the eligibility of lawful immigrants for federal benefits, including the SSI program. The SSI provisions were the most draconian, severely limiting access to the SSI program by immigrants entering the United States after August 22, 1996.

Even though elderly and disabled refugees and other humanitarian based immigrants, unlike most immigrants, were not barred from receiving SSI altogether, their eligibility for SSI was limited to their first seven years after entry. *See* 8 U.S.C. § 1612(a)(2). Keep in mind that the term "enter" has a special meaning in immigration law. It means "entry into status." For immigrants who arrive in the U.S. in status, (i.e., refugees), the entry date is the same date the person physically entered the United States. For others (i.e., asylees), the entry date is the date that asylum was granted, not when they physically entered the U.S. The seven year SSI time limit begins the date the person enters into the qualifying status, not the date s\he begins to receive SSI benefits, so those becoming elderly or disabled some time *after* they enter the U.S. would be eligible to receive SSI for less than the full seven years.

If, after seven years, the refugee or other humanitarian based immigrant had failed to become a citizen, his or her SSI benefits terminated automatically. Both because the citizenship process was seriously backlogged and because many of these elderly and disabled immigrants found it difficult to meet the language and civics requirements of the citizenship tests, the SSI benefits of thousands have been terminated during the last four years as the seven-year time limits began to expire.

The "SSI Extension for Elderly and Disabled Refugees Act," Pub. L. No. 110-328, amends Section 402 (a)(2) of PRWORA to extend the seven year SSI eligibility period for elderly or disabled humanitarian based immigrants (including refugees, asylees, persons granted withholding of removal, Cuban/Haitian entrants, Amerasians and victims of trafficking) to nine years during the period of October 1, 2008 to September 30, 2011, *provided* they meet certain requirements. Qualifying immigrants who reach the nine year limit during this period but who have a naturalization petition pending may receive up to one additional year of SSI. The law sunsets on September 30, 2011. Unless Congress can be persuaded to expand SSI eligibility for refugees and other immigrants, or eliminate the immigrant restrictions altogether, the seven year eligibility limit will again apply.

Eligibility for Extended SSI Benefits

Not all humanitarian based immigrants will benefit from the extension. First, the extension applies only to those whose benefits were terminated during the period from 8/22/96 to 9/30/08 solely due to the expiration of the seven-year eligibility limit. Second, unless the immigrant is under 18 years old or over 69, or a Cuban/Haitian entrant or a person granted withholding of removal, additional requirements apply. Thus, immigrants who entered the U.S. as refugees, asylees, Amerasians and victims of trafficking, must provide evidence:

- If they are not yet lawful permanent residents, that they applied for adjustment to permanent residence within four years after beginning to receive SSI benefits, *or*
- If they are currently in lawful permanent resident status, that they have held that status for less than six years, or
- That they have an application for naturalization pending or are waiting for their swearing in ceremony.

These restrictions exclude immigrants from the bene-

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fit of the extension if they failed to file for adjustment of status to lawful permanent resident even though they were eligible to do so or, if they have adjusted to lawful permanent resident status, they have not yet applied for citizenship although eligible to do so. This requirement does not apply to the very young (under 18) and the old (70 and older). It also does not apply to Cuban/Haitian entrants, not all of whom are eligible to adjust status to permanent resident, and persons granted withholding of removal, who are categorically *ineligible* to adjust to permanent resident status.

With the exception of children under 18, however, the new law requires everyone who does not have a naturalization application pending to sign a declaration that they have made a good faith effort to pursue U.S. citizenship. Nevertheless, until detailed instructions issue from SSA with regard to this declaration, it will not be required of anyone applying for the extension.

After September 30, 2011, the SSI eligibility period reverts back to seven years for anyone then currently in receipt of SSI benefits. Therefore, any elderly or disabled humanitarian based immigrant who entered the U.S. after September 30, 2004 will not benefit from this temporary extension of the SSI time limit to nine years.

SSA Procedures for Reinstatement and Payment of Benefits

Immigrants whose benefits were terminated some time between October 1, 2007, and now because of the seven year time limit should contact their local Social Security Administration (SSA) office immediately. SSA has not been able to stop the automatic termination of benefits for those whose seven year time limit was reached in October and November of this year, even though the extension went into effect October 1. Beginning in December, the cut off will no longer be automatic and recipients should receive an opportunity to demonstrate that they meet the eligibility requirements for the continuation of benefits through September 30, 2010 (2011 if they have an application for citizenship application pending at that time).

They will not be required to show evidence of financial eligibility. If they are between the ages of 18 and 69, however, they will be asked questions about the filing of an application for adjustment or for naturalization unless they are Cuban/Haitian entrants or have been granted withholding of deportation. Those whose benefits were cut off before October 1, 2007, will be asked to come into the SSA office for an interview to establish both that they meet the immigration status related requirements of the extension and that they are financially eligible for benefits.

Humanitarian immigrants who never received SSI because they became disabled or elderly seven years or more after they entered the U.S. will be able to apply for up to two years of SSI benefits effective October 1, 2008, if they otherwise meet the requirements of the extension, are financially eligible and entered the country less than nine years before their application for extended SSI benefits is filed. For example, a refugee who entered the U.S. in August of 2000 and turned 65 in August of 2007 would be able to apply for two years of SSI benefits, providing he or she is financially eligible. If the application for the two year extension is based on disability, the immigrant's application will be referred for a disability determination.

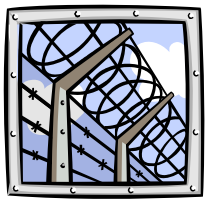
For those who qualify, SSI benefits will be paid back to October 1, 2008, in a lump sum and on a monthly basis for the remainder of the time period between the date of reinstatement and the expiration of the extension. Those whose benefits were cut off before October 1, 2007, or who were never eligible for SSI because of the seven year time limit, will be provided retroactive benefits only for those months back until October 1, 2008, in which they can show that they were financially eligible for SSI.

A client friendly question and answer guide to the provisions of the new law is available at: http://nilc.org/immspbs/ssi/SSI-Extension-FAQ-2008-10-01.pdf.

Thanks to Barbara Weiner for this excellent summary of the extension bill. Please feel free to contact Barbara at bweiner@empirejustice.org with any questions.

COURT DECISIONS

"Fleeing" Penalties Challenged Nationally



A nationwide class action suit has been filed challenging the Social Security Administration's (SSA) interpretation of the federal law that restricts payment of SSA benefits to persons who are "fleeing to avoid prosecution or custody or confinement after conviction" for a felony. *Martinez v. Astrue*, Case No. 08-Civ-4735CW (N.D. Cal. filed Oct. 15, 2008). SSA policy directs the suspension or denial of Social Security benefits, Supplemental Security Income (SSI) and Special Veterans Benefits (SVB) benefits to any individual with an outstanding warrant for a felony, regardless of whether the individual has any knowledge of the criminal charges. SSA applies the same policy to individuals seeking certification as representative payees.

Several federal district courts and the Court of Appeals for the Second Circuit have found SSA's policy unlawful. The Second Circuit decision, *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005), held that an individual cannot be deemed to be "fleeing" in the absence of a finding of intent. The court also ruled, as have several district courts, that the relevant SSI regulation, 20 C.F.R. § 416.1339(b), requires that there also be a court determination that the individual is fleeing.

The *Martinez* complaint seeks an injunction prohibiting the SSA from determining that an individual is "fleeing" in the absence of a finding by a court that the individual is in fact "fleeing" with the specific intent to avoid prosecution. In light of the widespread denial of due process in the processing of appeals of those who have been subject to SSA's policy, plaintiffs will also seek the readjudication of prior suspensions and denials.

The named plaintiffs illustrate some of the more egregious abuses in SSA's implementation of the "fleeing" penalty. Rosa Martinez's SSI benefits were suspended on the basis of a 1980 felony drug warrant issued in Miami, Florida, a city Ms. Martinez has never visited. Miami court records reveal that the "Rosa Martinez" implicated in the 1980 warrant is eight inches taller than the plaintiff and has a different Social Security number and place of birth. Nevertheless, the fact that the plaintiff Rosa Martinez shares the same name and date of birth as the individual arrested in Miami was considered sufficient basis for suspending her benefits. As regularly happens in these cases, when the plaintiff first tried to appeal the suspension of her benefits, she was informed that she could not appeal unless the warrant was vacated.

Another plaintiff, Jimmy Howard, who received SSI on the basis of a developmental disability and mental illness, had his benefits suspended because of a warrant issued by a juvenile court in Butler County, Ohio, when he was 12 years old. He had been charged with a crime at the time, and a hearing was scheduled for a determination of whether he was competent to stand trial, but he failed to appear because his mother had moved him to California, where he currently resides. He has no recollection of the matter or the charges.

Plaintiffs are represented by the National Senior Citizens Law Center, Munger, Tolles & Olson LLP, Urban Justice Center, Disability Rights California and the Legal Aid Society of San Mateo County. For more information, please contact Gerald McIntyre in NSCLC's Los Angeles office (213-639-0930; gmcintyre@nsclc.org).

New York District Court Upholds SSA in Probation/Parole Case

A federal district court in New York awarded summary judgment to SSA in a challenge to the agency interpretation of the Social Security Act provisions governing nonpayment of benefits to individuals who are "violating a condition of probation or parole." *Clark v. Astrue*, 522 F.3D 259 (S.D.N.Y. 2008); see 42 U.S.C. §402(x)(1)(A), 1382(e)(4)(A).

SSA policy under these provisions is to suspend or deny Social Security and SSI benefits whenever an individual has an outstanding arrest warrant for an alleged violation of probation or parole. Plaintiffs had challenged this policy on the basis that arrest warrants are issued on nothing more than probable cause to believe that an individual may be violating a condition of parole - such as when the individual fails to stay in contact with the probation officer or fails to pay a fine or restitution. Thus, plaintiffs argued that the issuance of an arrest warrant does not by itself constitute a determination that the individual is violating a condition of probation.

The Court based its ruling on the "good cause" provisions of the Social Security Protection Act of 2004, which authorize the restoration of benefits in several situations, including where a warrant has been vacated. "Because Congress authorized the SSA to restore benefits when an arrest warrant has been vacated, it follows that Congress also contemplated that a warrant constitutes a sufficient basis on which to suspend benefits in the first instance." The Court also found support for its ruling in the SSI regulation, 20 C.F.R §416.1339(b)(1)(i), which authorizes the suspension of benefits in the basis of a "warrant or order…issued by a court or other duly authorized tribunal on the basis of an appropriate finding that the individual…[i]s violating or has violated, a condition of his probation or parole." The Court stated that the Commissioner is entitled to deference in his interpretation of his regulation and concluded that the finding of probable cause required for issuance of a warrant was an "appropriate finding" within the meaning of the regulation.

Finally, the Court distinguished *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005), in which the Second Circuit ruled that an arrest warrant issued for failure to appear was not a sufficient basis for SSA to conclude that an individual was "fleeing to avoid prosecution." The Court noted that, in the *Clark* case, unlike *Fowlkes*, the warrants included an offense code indicating they were issued for a probation violation. "Thus, unlike in Fowlkes, the SSA does not suspend benefits on its own determination that a warrant was issued for a probation or parole violation."

Plaintiffs were represented by Proskauer, Rose, LLP, National Senior Citizens Law Center, and the Urban Justice Center. An appeal is being considered.

Court Certifies Nationwide Classes in Case of Blind Litigants

After denying the government's motions to dismiss in an action against the Social Security Administration (SSA) brought by blind and visually impaired individuals, a California District Court Judge has certified two separate classes in the case. See May 2008 *Disability Law News* for background on the litigation, *American Council of the Blind v. Astrue* (N.D.Ca.).

The Court certified one class consisting of all people with visual impairments who are applying for or receiving Old Age, Survivors & Disability Insurance (OASDI) or Supplemental Security Income (SSI) benefits. The Court also certified a second, smaller class of all people with visual impairments who are representative payees for individuals receiving OASDI or SSI benefits. The two classes are estimated to number approximately 3,000,000 people with the overwhelming majority of class members being 80 years of age or older. A copy of the October 2008 class action order is available at the website of the National Senior Citizens Law Center, one of the counsel on the case. http://www.nsclc.org/areas/social-security-ssi/court-approves-class-notice-in-ssa-blind-case

Food Stamp Class Action Provides Relief to NYC SSI Recipients

The Office of Temporary and Disability Assistance (OTDA) has begun issuing retroactive food stamps pursuant to the class action settlement in *Harris v. Eggleston*. New York City residents whose food stamps were terminated when they switched from public assistance to SSI after April 1, 1999, may be eligible for relief. Specifically, SSI recipients living alone could receive up to $2,331 in food stamps, SSI couples could receive up to $3,843, and SSI recipients living with others could receive up to $2,331.

For a complete description of the relief, see http://www.urbanjustice.org/pdf/projects/harris_stipulation_of_settlement_and_order.pdf

Eligible clients do not need to do anything to receive their back food stamps - they will be provided automatically. If you have clients that have not received the correct retroactive award or if you encounter other problems, contact Bill Lienhard or Leslie T. Annexstein at the Urban Justice Center.

Supreme Court Declines Review in DA&A Case

The January 2008 edition of the *Disability Law News* reported on a case from the Ninth Circuit Court of Appeals dealing with, *inter alia*, SSA's Emergency Teletype No. EM-96200 (formerly known as EM 96-94). The teletype reminds adjudicators that "a finding that DAA is material will be made only when the evidence establishes that the individual would not be disabled if he/she stopped using drugs/alcohol." In many cases, addiction and other physical or mental impairments are so intertwined that it would impossible to make such a determination.

In *Parra v. Astrue*, 481 F.3d 742, 744-45 (9th Cir. 2007), the court held that "when evidence exists of a claimant's drug/alcohol abuse (DAA), the claimant bears the burden of proving that his substance abuse is not a material contributing factor to his disability."

The *Parra* court also refused to defer to the teletype regarding the construction of the amendment, stating that these "internal agency documents… do not carry the force of law and are not binding on the agency." *Id.* at 749.

As outlined in the January 2008 article, the *Parra* decision is in conflict with decisions from other circuits. As a result, the attorney for Mr. Parra, who has since passed away, sought *certiorari* with the United States Supreme Court, which was denied. *Parra v. Astrue*, 128 S.Ct. 1068, 169 L.Ed.2d 808 (U.S. Jan 14, 2008) (NO. 07-408). While claimants in the Ninth Circuit will unfortunately be bound by the *Parra* decision, advocates in other circuits may well be breathing a sigh of relief!

Going to the Chapel...with an ALJ?

We all know that Social Security's Administrative Law Judges (ALJs) wield a lot of power and make decisions that can have a dramatic effect on persons who appear before them. But did you know that, in New York, federal administrative law judges also have the power to solemnize marriages? According to Domestic Relations Law (DRL) §11(3), a federal administrative law judge presiding in this state is able to perform a marriage. Thanks to Ian Feldman of the Urban Justice Center for unearthing this little known fact.

Commissioner Announces Compassionate Allowances Initiative

On October 27, 2008, SSA Commissioner Michael Astrue rolled out one of his pet projects - the Compassionate Allowances initiative. It may already seem obvious to some of us, but the initiative is touted as a way to expedite the processing of disability claims for applicants whose medical conditions are so severe that their conditions "obviously" meet Social Security's standards.

Currently, fifty impairments - 25 rare diseases and 25 cancers - can qualify as compassionate allowances. A list of these impairments can be found at www.socialsecurity.gov/compassionateallowances. Over time, more diseases may be added to this list. In fact, on November 10, 2008, the Commissioner announced a third in a series of hearings that are being held concerning rare diseases and cancers. The hearing, scheduled for November 18, 2008, in Fort Myers, Florida, will consider the advisability and possible methods of identifying and implementing compassionate allowances for children and adults with brain injuries. The meeting, beginning at 9:00 a.m., will be webcast. According to the Federal Register announcing the hearing, other medical conditions will be addressed at future dates. 73 Fed. Reg. 66563-66564 (November 10, 2008).

Commissioner Astrue touts this initiative as the second piece of his "two-track, fast-track system." According to SSA, when fully implemented and combined with the Quick Disability Determination process, this two-track system could result in six to nine percent of claims being decided in an average of six to eight days.

A review of the fifty impairments on the Commissioner's list will reveal very serious impairments that are not frequently the subjects of the typical appeal. New POMS attempt to distinguish how CALs (Compassionate Allowances) differ from QDDs (Quick Disability Determinations): https://secure.ssa.gov/apps10/poms.nsf/lnx/0423022017.

But what about TERIs (Terminal Illness cases)? Actually, the POMS also distinguish TERIs from both CALs and QDDs. See https://secure.ssa.gov/apps10/poms.nsf/lnx/0423020045!opendocument. SSA's most recent "List of Descriptors" for TERI claims does indicate some overlap with the "rare" but not necessarily terminal diseases on the CALs list. Advocates should be aware, however, that there may still be some flexibility in having a claim classified as a TERI, and thus entitled to expedited processing, even if the impairment in issue is not included on the CALs list.

No word yet on how to speed up those garden variety claims…

Pooled Trusts Offered in Western New York

The Center for Disability Rights (CDR) in Rochester is now offering a pooled income trust to disabled individuals who would otherwise qualify for Medicaid with a spend - down. The CDR trust is more affordable than the trust offered by NYSARC because clients do not need to provide twice their monthly spend-down amount to open the trust and monthly fees are limited to $20.00. Like NYSARC, CDR also charges an initial, non-refundable fee of $200.00, as well as an annual fee of $50.00. Currently, CDR staff is available to help explain the process and submit letters to local Medicaid offices to alert them once clients have opened trust accounts.

You must be a resident in one of the following 10 counties in order to join the CDR trust: Monroe, Ontario, Yates, Wayne, Steuben, Schuyler, Livingston, Genesee, Wyoming, Orleans.

A FAQ sheet on the trusts and a Joinder Agreement related to the trust are available as DAP#509.

WEB NEWS

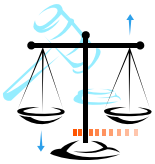
Technology Products Available for Nonprofits

In these days of economic distress, it's hard to believe that there are any freebies out there. Well, believe it. TechSoup (now known as TechSoup Global), one of the nation's oldest and largest nonprofit technology assistance agencies, offers nonprofits a one-stop resource for technology needs by providing free information, resources, and support. In addition to online information and resources, it offers a product philanthropy service called TechSoup Stock. Here, nonprofits can access donated and discounted technology products, generously provided by corporate and nonprofit technology partners.
www.TechSoup.org

Easy Access to Free Legal Research

And here's another amazing offering: free legal research through Lexis. There is no password needed as it is open to the public. Simply go onto the website and click on "FREE Case Law - *New!* Expanded Coverage." Although the scope of the available searches is limited to decisions in the last 10 years (except for Supreme Court cases), it is great for searching recent cases in: Supreme Court, all Circuit Courts, N.Y. Court of Appeals, N.Y. Appellate Divisions and other higher-level state courts nationwide. Basically, LexisOne provides free searches for all federal and state cases nationwide (except for trial court decisions) within the past 10 years. Also, if you have a case citation, you can plug it in and retrieve a case regardless of how old it is.
www.lexisone.com

New Rules in N.Y. Court of Appeals



For those of you who practice in New York state courts, be advised that the New York Court of Appeals has issued some new rules.
www.dos.state.ny.us/info/register/2008/nov5/pdfs/court.pdf

Urban Myth or Fact?

A recent scare about the safety of eating baby carrots prompted a colleague to let us know about a fact checking web-site that either debunks or confirms urban legends that often seem to take on lives of their own.
http://www.snopes.com/snopes.asp

Dictionary of Occupational Titles On-line

SSA continues to rely on the *Dictionary of Occupational Titles (DOT)* published by the Department of Labor for all things vocational. The DOT is a bulky, multi-volume treatise, but it is available on-line: http://www.oalj.dol.gov/libdot.htm. To find a specific title, scroll down the opening page to "Alphabetical index." You can also try http://www.occupationalinfo.org/, which may be easier to search if you do not know the specific title.

CLASS ACTIONS

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.

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).

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

How Long Can You Wait for Another Marshmallow?

How good are you in terms of delayed gratification? Would you have been one of the children in the "Marshmallow Experiment" that couldn't wait for the adult to come back into the room and ate your marshmallow treat right away? If you had been able to wait, you could have had two treats instead of only one. And, as it turns out, you might have done better on your SATs, had better social skills, and been better adjusted. That experiment, conducted by Columbia University psychologist Walter Mischel, followed the children from the late 1960s into their 40s.

Now such investigations into deferred gratification and impulse control have become more high tech, with the use of brain scans. According to a recent article in the *Boston Globe*, Yale University researchers have discovered that delayed gratification involves the anterior prefrontal cortex, an area of the brain involved in abstract problem-solving and keeping track of goals. Jeremy Gray, Yale psychology professor and coauthor of a study in the September's *Psychological Science*, reports that brain scans of 103 subjects indicate that delayed gratification involves "a sort of far-sightedness," or an ability to imagine a future event or goal.

John Jonides, a psychology professor at the University of Michigan, plans to perform brain scans on 40 of the original subjects in the "Marshmallow Experiment." Jonides predicts that if differences are found between the brains of good and poor delayers, there may be ways to train poor delayers. If, for example, the brain regions governing attention are involved, poor delayers could be trained to focus their attention more effectively. On the other hand, if the problems seem be associated with short-term memory, subjects can be trained to get that marshmallow out of their minds for awhile.

Professor Mischel himself suspects that the trick may be to shift activity from "hot" or more primitive areas deep in the brain to "cool," more rational areas in the higher center. He hopes to be able to teach children that skill. As he describes it, "the same child who can't wait a minute if they're thinking about how yummy and chewy the marshmallow is can wait for 20 minutes if they're thinking of the marshmallow as being puffy like a cotton ball or a cloud floating in the sky."

Daniel Benjamin, an assistant professor of economics at Cornell, says that neuro-economists are also exploring the "cool brain hot brain" theory. People's impulsive brains may lead them to bad economic choices rather then following their best interests, or long term goals. He points to experiments like the website stickk.com, which tries to help people use their "cool" brain to overcome impulses with a system of rewards. For example, if someone wants to lose 20 pounds, he could stake $200 on his goal, and then receive $10 for each pound he loses.

So, do you still want that marshmallow now?

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