Empire Justice Center

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DISABILITY LAW NEWS

ALJs File Lawsuit Over Vacancies

Claimants are not the only ones who bring lawsuits involving the Social Security Administration. The Association of Administrative Law Judges, a union of ALJs, filed suit this summer against the U.S. Office of Personnel Management (OPM) over the hiring of ALJs. The lawsuit stems from SSA's announcement this past spring that it was opening applications for ALJ positions for the first time in nearly ten years. See the May 2007 edition of the *Disability Law News.*

The hiring process, when announced, was to remain open until mid May 2007, or until 1,250 applications are received - whichever came first. According to the ALJ union, the 1,250 came first - within three days of the formal posting of the announcement, but for improper reasons. In the lawsuit, the union claims one or more federal agencies received advance notice of the vacancy announcement and tipped off their own attorneys. As a result, according the allegations of the suit, those attorneys got to file first and thus received preferential treatment over other qualified attorneys in private practice. The suit, *Association of Administrative Law Judges v. U.S. Office of Personnel Management,* No. 07-0711, is pending, according to a recent report in the *National Law Journal.*

The article goes on to describe the "long-simmering unhappiness" between OPM and the ALJs. OPM oversees more than 1,400 ALJs nation-wide, assigned to 31 agencies, although SSA employs approximately 1,000 of them. As a result of previous litigation over the hiring program, OPM had basically shut it down, only to reopen it based on Congressional pressure to hire additional SSA ALJs to address the backlog of disability claims. OPM had hoped to have a new roster of names available for SSA by late October. According to OPM Director Linda Springer, however, that may now be delayed because of the new litigation.

The lawsuit also charges that OPM's recent rule requiring ALJs to maintain active bar memberships in the state where they sit is "arbitrary, capricious," and "not rational." ALJs have protested that many of them have taken inactive status, "judicial" status, or sit in states other than where they are licensed. OPM - in true SSA "speak" - has claimed that its ruling is simply a "clarification" of its long-standing policy of requiring ALJs to be licensed for appointment, according to a June 25, 2007 report in the *Washington Post.*

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www.empirejustice.org

Empire Justice Center Seeks Disability Benefits Law Paralegal

Empire Justice is a statewide, multi-issue, multi-strategy non-profit law firm focused on changing the "systems" within which poor and low income families live. With a focus on poverty law, Empire Justice Center undertakes research and training, acts as an informational clearinghouse, and provides litigation backup to local legal services programs and community based organizations. As an advocacy organization, we engage in legislative and administrative advocacy on behalf of those impacted by poverty and discrimination. As a non-profit law firm, we provide legal assistance to those in need and undertake impact litigation in order to protect and defend the rights of disenfranchised New Yorkers.

The Empire Justice Center has an opening in its Disability Advocacy Program Unit for a fulltime paralegal in its Rochester office. Responsibilities include: interviewing clients, reviewing Social Security files, requesting evidence in support of claims for disability benefits, preparing cases for administrative law judge hearings, conducting those hearings and handling appeals to the Social Security Administration's Appeals Council. Strong oral and written communications skills required. Bilingual in Spanish strongly preferred. Salary depending on experience.

Send letter of interest, resume, & three references to: Rebecah Corcoran; Empire Justice Center, One West Main St., Suite 200, Rochester, NY 14614.

OGC Phone List Available

Trying to reach someone in the Office of General Counsel for SSA in New York City? Thanks to Chris Cadin of Legal Services of Central New York in Syracuse, you can get a copy of the office's most recent telephone extension list. It is available as DAP # 463.

ALJs File Lawsuit—continued

(Continued from page 1)

The union's lawsuit contends, however, that "numerous incumbent" judges have not paid the annual fees to retain their licenses or have dropped out of the bar in their states, relying on an announcement by an SSA official in 1989 that they did not need to maintain active bar status after being appointed. The lawsuit contends that ALJs are now in the position of not knowing whether they need to resign or whether they can legitimately hold hearings or issue orders in light of the confusion over the ruling.

The ALJs have complained that they may have to pay years' worth of back dues, catch up on CLE (Continuing Legal Education) requirements, or even take bar exams again. So if you catch an ALJ studying those all too familiar BAR/BRI materials between hearings, you'll know why!

Food Stamps Increase for SSI Recipients

It's that time again -- the start of a new federal fiscal year, which means that the annual increases to the food stamp income guidelines and benefit amounts will go into effect on October 1, 2007. The Empire Justice Center has incorporated the changes into our food stamp budget worksheet, which you can get at http://www.empirejustice.org/library/FSBudWkSt1007-908update.pdf

The New York State Office of Temporary and Disability Assistance (OTDA) has released GIS 06 DC 008 with the new standards, available at http://www.otda.state.ny.us/GIS/2007/07dc008.rtf. The GIS contains not just the new guidelines for regular food stamp program participants; it also lists the new benefit amounts for the New York State Nutrition Improvement Project (NYSNIP), the USDA-approved demonstration project which provides automatic food stamps to single SSI live-alone recipients. But DAP advocates don't have to wait to read the GIS! Here is a chart with the new NYSNIP benefit amounts:

Food Stamp benefit amounts for SSI live-alone recipients receiving food stamps through the New York State Nutrition Improvement Project (NYSNIP)

New benefit amounts as of ***10/01/07*** per GIS 06 DC 008

HOUSEHOLD		MONTHLY FOOD STAMP BENEFIT AMOUNT		
		New York City	**Nassau/ Suffolk**	**Rest of State**
Monthly shelter costs are ***greater than*** $213/month AND person incurs a heating or cooling expense	Person has SSI income only	**$162**	**$162**	**$154**
	Person has SSI + other Income	**$162**	**$162**	**$145**
Monthly shelter costs are ***less than*** $213/month AND person incurs a heating or cooling expense	Person has SSI income only	**$111**	**$104**	**$88**
	Person has SSI + other Income	**$104**	**$96**	**$81**
Monthly shelter costs are ***greater than*** $213/month AND the person incurs **no** heating or cooling expense)	Person has SSI income only	**$34**	**$34**	**$34**
	Person has SSI + other Income	**$26**	**$26**	**$26**
Monthly shelter costs are ***less than*** $213/month AND the person incurs ***no*** heating or cooling expense	Person has SSI income only	**$24**	**$24**	**$24**
	Person has SSI + other Income	**$20**	**$20**	**$20**
Food stamp office has ***no information*** about the person's shelter or utilities	Person has SSI income only	**$24**	**$24**	**$24**
	Person has SSI + other Income	**$20**	**$20**	**$20**

Note: The Food Stamp Program is up for federal reauthorization this fall as part of the Farm Bill … we will let you know if any changes occur as a result of the reauthorization. Thanks to Empire Justice Center's Cathy Roberts for this update.

REGULATIONS

Quick Disability Determinations (QDD) Rules Finalized

For an agency that usually moves at a glacially slow pace, the Social Security Administration (SSA) shocked long time observers by proposing and finalizing its regulations on Quick Disability Determination (QDD) within two months. Perhaps global warming has even hit Baltimore!

On July 10, 2007, SSA issued proposed rules to extend its QDD process, which was part of the Disability Service Improvement (DSI) being piloted in Region 1, nationwide. (72 Fed. Reg. 37496). The comment period on these proposed rules closed on August 9, 2007. On September 6, 2007, SSA issued final rules extending QDD to all of the State disability determination services (DDSs). (72 Fed. Reg. 51173). The final rules remove from the QDD process the existing requirements that each State DDS maintain a separate QDD unit and that each case referred under QDD be adjudicated within 20 days.

According to SSA, this new rule was effective September 6, 2007. State agencies outside of the Boston region must notify SSA of the date by which they will be ready to accept QDD referrals. That date should be no earlier than October 9, 2007, and must be no later than March 4, 2008. State agencies must be ready to process claims referred under this rule no later than March 4, 2008.

The new regulations implementing QDD read as follows:

Sec. 404.1619 (416.1019) Quick disability determination process.

(a) If we identify a claim as one involving a high degree of probability that the individual is disabled, and we expect that the individual's allegations will be easily and quickly verified, we will refer the claim to the State agency for consideration under the quick disability determination process pursuant to this section and Sec.404.1620(c). (416.1020(c))

(b) If we refer a claim to the State agency for a quick disability determination, a designated quick disability determination examiner must:

(1) Have a medical or psychological consultant verify that the medical evidence in the file is sufficient to determine that, as of the alleged onset date, the individual's physical or mental impairment(s) meets the standards we establish for making quick disability determinations;

(2) Make quick disability determinations based only on the medical and nonmedical evidence in the files; and

(3) Subject to the provisions in paragraph (c) of this section, make the quick disability determination by applying the rules in subpart P of this part.

(c) If the quick disability determination examiner cannot make a determination that is fully favorable to the individual or if there is an unresolved disagreement between the disability examiner and the medical or psychological consultant, the State agency will adjudicate the claim using the regularly applicable procedures in this subpart.

We will eagerly await whatever New York's state agency, the Division of Disability Determinations, will do to implement QDD. We'll keep you posted.

Federal Review Official Pilot Program Suspended

One of the earmarks of the new Disability Service Improvement (DSI) redesign was use of the Federal Reviewing Official (FedRO). After a year long demonstration pilot of DSI in Region 1 (Boston), SSA has announced some proposed changes in the system.

SSA has issued a Notice of Proposed Rulemaking (NPRM) - "Proposed Suspension of New Claims to the Federal Reviewing Official Review Level, Changes to the Role of the Medical and Vocational Expert System, and Future Demonstration Projects." 72 Fed. Reg. 45701 (August 15, 2007).

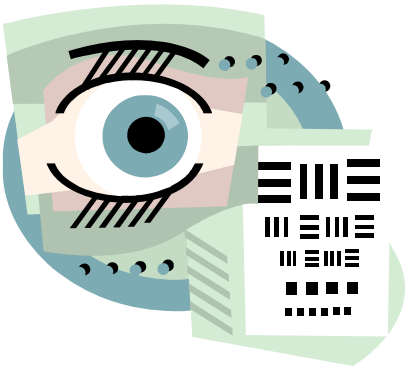
"We propose to modify our disability administrative adjudication processes to suspend new claims to the Federal reviewing official (FedRO) level, now operating in the Boston region. Claims already received will continue to be processed by the FedRO and a related component of the disability determination process, the Medical and Vocational Expert System (MVES), commonly known as the Office of Medical and Vocational Expertise (OMVE). We also propose to remove the MVES/OMVE from the disability adjudication process for new claims. We are making these proposals to ensure that we continually improve our disability adjudication process. Lastly, we are requesting comments on using the MVES/OMVE to develop and manage a national registry of experts.

This NPRM is therefore a dual event: suspension of the FedRO but maintaining the national experts' panel, "MVES / OMVE."

"Even though we propose to suspend new claims to the MVES/OMVE from the administrative review process under part 405 of our rules, we are considering using the MVES/OMVE in a more limited role to develop and manage a national registry of medical, psychological, and vocational experts to assist disability adjudicators in developing and/or clarifying information within the record. Once the MVES/OMVE has developed the registry, the MVES/OMVE would continue to manage the registry. Disability adjudicators at the State and Federal levels would be able to directly access the experts affiliated with the registry without having to go through the MVES/OMVE to arrange for expert assistance."

There is also a twofold comment period: To be sure that SSA considers your comments on its proposed changes, it must receive them no later than September 14, 2007. However, SSA also invites comments by November 13, 2007 on the merits of a national registry of experts, including MVES/OMVE management of the registry, and the rates to be paid to the experts affiliated with the registry.

New SSR Evaluates Visual Field Loss



The Social Security Administration (SSA) issued a new Social Security Ruling (SSR) for use in evaluating statutory blindness based on visual field loss. SSR 07-01p was issued on July 31, 2007 and is available at SSA's website, http://www.ssa.gov/OP_Home/rulings/di/01/SSR2007-01-di-01.html.

According to SSA, the ruling "clarifies how we use automated static threshold perimetry to determine statutory blindness based on visual field loss." It explains "How to use the information in the standard charts produced as part of automated static threshold perimetry to determine whether the visual field test satisfies our requirements"; "How to use the mean deviation (MD) to determine whether the individual has visual field loss"; and "How to evaluate cases in which severe visual field loss has not resulted in statutory blindness. . . ."

Attorney Advisor Program Resurrected

For many disability advocates who have, as they say, been around the block, SSA's interim final regulations on using attorney advisors is like déjà vu all over again.

"We are announcing this interim final rule to modify, on a temporary basis, the prehearing procedures we follow in claims for Social Security disability benefits or supplemental security income (SSI) payments based on disability or blindness. Under the interim final rule, we may allow certain attorney advisors, under managerial oversight, to conduct certain prehearing proceedings, and where the documentary record developed as a result of these proceedings warrants, issue decisions that are wholly favorable to the parties to the hearing." 72 Fed. Reg. 44763 (August 9, 2007).

Although the "interim final regulations" were effective as of the date of publication, there is a comment period until October 9, 2007.

The Attorney Advisor program was given a trial several years ago, and put on ice, but the implementing regulations, 20 CFR §§404.942 & 416.1442, remain in the regulations, albeit with an express sunset provision of April 2, 2001.

"Attorney advisors have performed these duties in the past. In June 1995, we announced final rules establishing the attorney advisor program for a limited period of 2 years. The program's success prompted us to extend the program several times, until it finally ended in April 2001." The sunset now is August 10, 2009, "unless we terminate them earlier or extend them beyond that date by notice of a final rule in the Federal Register."

In the past, advocates found that attorney advisors were an effective tool in moving appropriate cases to on-the-record favorable decisions. We are interested in hearing from advocates how they fare with this new crop of attorney advisors.

"Compassionate Allowances" Should Reduce Backlog

SSA is proposing a system for making "compassionate allowances" by quickly identifying individuals with obvious disabilities and paying those cases. According the Commissioner Astrue's Congressional testimony on this issue, SSA is looking to reduce backlogs and address shortfalls in the disability determination process with this new system.

SSA issued an advance notice of proposed rulemaking (ANPRM) on "compassionate allowances" on July 31, 2007 (72 Fed. Reg. 41649) and is accepting comments through October 1, 2007. Note that SSA is not proposing rules on this new process but seeking comments before issuing proposed rules. The notice states that SSA is considering the creation of a special "extensive list of impairments that we can allow quickly with minimal objective medical evidence that is based on clinical signs or laboratory findings or both."

The notice does not make it clear how the concept of compassionate allowances would fit in with existing provisions for expediting terminal illness or TERI cases, or the existing SSI provision for payment of benefits based on presumptive disability. It is also not clear how compassionate allowances will relate to the new rules on Quick Disability Determination (QDD). We will provide updates on any proposed or final rules on "compassionate allowances."

Although we laud any efforts to move cases along expeditiously, we wish that all of SSA's decisions were made promptly, properly and compassionately!

Miscellaneous Final Regulations

1. Direct Payment of Representative Fee

The interim final regulations broadening the system for direct payment by SSA of representatives' fees published in the April 5, 2007 Federal Register "are adopted as final rules without change." 72 Fed. Reg. 44765 (August 9, 2007). Those rules were entitled "Temporary Extension of Attorney Fee Payment System to Title XVI; 5-Year Demonstration Project Extending Fee Withholding and Payment Procedures to Eligible Non-Attorney Representatives; Definition of Past-Due Benefits; and Assessment for Fee Payment Services."

The rules "reflect in our regulations three self-implementing statutory provisions in the Social Security Protection Act of 2004 (SSPA) and three related self-implementing provisions in earlier legislation." The regulations address fees withholding & direct payment of fees for administrative representation and for federal court representation.

2. Personal Need Allowance

SSA announced final rules adopting a ten year old statutory provision allowing payment of the $30 personal needs allowance to institutionalized children. 72 Fed. Reg. 50871 (September 5, 2007).

"We are revising our regulations to reflect two provisions of the Balanced Budget Act of 1997 that affect the payment of benefits under title XVI of the Social Security Act (the Act). One of the provisions extended temporary institutionalization benefits to children receiving SSI benefits who enter private medical treatment facilities and who otherwise would be ineligible for temporary institutionalization benefits because of private insurance coverage. The other provision replaced obsolete terminology in the Act that referred to particular kinds of medical facilities and substituted a broader, more descriptive term."

The final rules are effective October 5, 2007. Proposed rules were published in March 2007. No comments were received and SSA published the text of the proposed rules unchanged in the final rules.

Court of Appeals Limits Oral Arguments

Looking forward to a trip down to Foley Square in the Big Apple to show off your oral argument skills? That might not happen too often under a new rule proposed by the Court of Appeals for the Second Circuit. The Circuit is moving from a procedure under which oral argument is the default and the norm, to one where oral argument will be had only if counsel requests it, and then only if "the facts and legal arguments are [not] adequately presented in the briefs and record, and the decisional process would . . . be significantly aided by oral argument."

According to the Court, "counsel for all parties must confer (by any convenient means) and must file, within 14 days after the due date of the last brief, a joint statement indicating whether the parties - specifying which, if fewer than all - seek oral argument, or whether the parties agree to submit the case for decision on the briefs."

The Court amended Local Rule 34 of the Local Rules for the Court of Appeals for the Second Circuit on an interim basis, effective immediately. It proposes adopting it as a final rule after publication and comment. Any comments (presumably only in writing and without oral argument) are due by September 27, 2007. The publication is available at: http://www.ca2.uscourts.gov//NDocsews/localrule34final.pdf.

Advocates may want to consider seriously requesting oral argument under the new rule in Social Security appeals. Veterans of Court of Appeals arguments can attest to the number to times they have seen oral arguments actually make a difference.

Miscellaneous Proposed Regulations

1. *Government Pension Offset*

SSA proposes: "To implement section 418 of the Social Security Protection Act of 2004 (SSPA), . . . to revise our regulations to explain that a State or local government worker will be subject to the Government Pension Offset (GPO) provision under title II of the Social Security Act (the Act), if any part of the last 60 months of government service was not covered by Social Security. We also propose to replace the words 'receiving' and 'received' with the word 'payable' when referring to the eligibility to or payout from a government pension.

This wording change will make the regulatory and statutory language consistent and help clarify when the GPO is applicable. In addition, we propose to revise our regulations to reflect a separate 60-month requirement that was made applicable to Federal employees by a 1987 law." 72 Fed. Reg. 43202 (August 3, 2007).

Comments must be submitted by October 2, 2007.

2. *Printing Social Security Forms*

Who knew that every time you photocopied a Disability Report Form to fill out with your client, or reproduced that work background questionnaire for the ALJ in your word processor to automatically fill in the fields with your collected data, you were breaking the law?

Well, scofflaws of the Social Security world, fret no more. The bar has been lifted with proposed regulations. 72 Fed. Reg. 45991 (August 16, 2007).

"The current regulation at 20 CFR 422.527 requires a person, institution, or organization (person) to obtain approval from the Social Security Administration (SSA) prior to reproducing, duplicating, or privately printing any application or other form prescribed by the Administration. Such approval has been required whether or not the person intended to charge a fee for SSA's application(s) or other form(s). Section 1140 (a)(2)(A) of the Social Security Act (the Act) prohibits a person from charging a fee to reproduce, reprint, or distribute any SSA application, form, or publication unless he/she obtains the authorization of the Commissioner of Social Security in accordance with such regulations as he may prescribe. (42 U.S.C. 1320b-10(a)(2)(A))."

"This proposed rule would implement section 1140(a)(2)(A) of the Act by adding SSA's publications to the pre-authorization requirement identified in 20 CFR 422.527 and by establishing that SSA's authorization is required only when the person intends to charge a fee. The proposed rule also would prescribe the procedures a person who intends to charge a fee must follow to obtain SSA's written authorization prior to reproducing, reprinting, and/or distributing SSA's applications, forms, or publications."

Deadline for comments is October 15, 2007.

Send Us Your Decisions!

Have you had a recent ALJ or court decision that you would like to see reported in an upcoming issue of the *Disability Law News?* We would love to hear from you! Contact Kate Callery, kcallery@empirejustice.org or Louise Tarantino, ltarantino@empirejustice.org with your decisions.

Policy for SSI Medicaid Managed Care Enrollees Issued

As we have reported previously, SSI beneficiaries are no longer exempt from mandatory managed care. SSI recipients will be required to enroll in a managed care plan, rather then receiving their health case on a fee-for-service basis. See the January 2007 edition of the *Disability Law News*, and Trilby de Jung's article on "New York Expands Mandatory Medicaid Managed Care to Include SSI Recipients" in the October 2006 edition of the *Legal Services Journal*, available at www.empirejustice.org.

Concerns have arisen as SSI recipients transition from fee-for-service Medicaid to managed case. The State Department of Health recently released a transitional care policy for new Medicaid Managed Care enrollees who are receiving an on-going course of treatment. The policy states that, in accordance with New York State Public Health Law and the Medicaid Managed Care model contract, health plans must continue a new member's on-going course of treatment for a transitional period of up to 60 days or until a new plan of care can be established. This means all services authorized by fee-for-service Medicaid must be covered by the plan until plan approved treatment can be put in place. This continued authorization is required if the enrollee has an existing relationship with, or elects to continue to receive care from, a non-participating provider and has a disabling, life threatening or degenerative condition.

The policy further states that these requirements apply to all services included in the Medicaid benefit package, including home health and skilled nursing services. It also states that health plans must have policies and procedures in place to ensure continuity of care for new enrollees and must establish a mechanism to provide timely access to medically necessary services while plan approval is pending.

Additionally, the Department of Health's policy states that Medicaid Managed Care enrollees have Fair Hearing rights identical to those available to fee-for-service Medicaid recipients. Specifically, health plan members have the right to request a fair hearing when their plan denies, suspends, reduces or terminates plan services or medical treatment.

The Department of Health has also made some changes to the enrollment and exemption process for Medicaid managed care enrollees on SSI and has revised the exemption forms.

New York Medicaid Choice, Medicaid's health plan enrollment broker, will be sending out a screening tool to all new enrollees requesting information about their health needs, and will forward the screening tool to the enrollee's health plan. The health plan will be required to contact the enrollees within 30 days of their enrollment for health screening and assessment.

With regards to exemptions, SSI recipients who have characteristics and needs similar to those in receipt of home and community-based waiver services or "waiver look-alikes" such as severely physically and developmentally disabled recipients will have an extra 30 days added to their auto-assignment clock. Thus, they will have a total of 120 days from the date of the first mandatory mailer to request a Medicaid Managed Care exemption and document their need for the exemption.

Additionally, SSI recipients who are under 18 and appear to be "waiver look-alikes" when their parents, guardians or other authorized representatives call New York Medicaid Choice for an exemption, will be disenrolled from their plan and given six months to document their need for an exemption. The required forms and their processing have also been simplified.

The duration of exemptions for SSI recipients with lifelong conditions will also be extended. Moreover, recipients who meet exemption criteria for conditions that will never improve will not have to prove their need for exemptions every year.

A copy of the policy is available as DAP# 464. Thanks to Diane Spicer of the Health Law Unit of the Legal Aid Society in New York City for sharing this information with us.

Detailed Earnings Records Not Available to Advocates?

A claimant's detailed earnings query - or DEQY - can sometimes be invaluable in a disability claim, particularly when the claimant is unable to recall details of his or her work record. The DEQY lists past employers by name and address, and details the dates of employment and the earnings from each job. It can help shore up a claim of an unsuccessful work attempt, or demonstrate a substantial work record obviously curtailed by disability. In any event, these records sometimes appear in a claimant's file and sometimes not. How can an advocate obtain one – especially if the case is not yet at ODAR, where it is within the ALJ's realm to request it?

Jody Davis of the Geneva office of LAWNY reports that the District Manager of the Geneva SSA Office has recently informed her that neither DEQYs nor SEQYs (Summary Earnings Queries) are available to claimants or representatives. This was apparently confirmed by Joann Rizzo of the Buffalo Regional Office, which is supposed to be issuing a memo about this non disclosure of earnings information based on POMS GN 03305.002.

POMS GN 03305.002, however, does not prohibit the release of DEQYs or SEQYs, although it does state that "[i]t will be extremely rare that a query may be disclosed in response to a consent request." It does set forth the "exceptional circumstances" when a query may be disclosed. The exceptions provide that the information in the "informed consent" form matches exactly all the information on a query, or the component handling the request documents that it has explained all of the information on the query to the individual giving the consent and the individual gives his/her permission to SSA to disclose the query. Sort of a double consent?

Other POMS sections, however, appear to specifically authorize DEQYs to be given to a claimant or representative for developing a claim for Social Security benefits, "as necessary." See POMS 03320.001 Disclosure of Tax Return Information – General. DEQYs and SEQYs are considered "tax return information" that is in SSA's possession and governed by agreements between SSA and the IRS.

David Ralph of the Elmira office of LAWNY reports that he has had success in obtaining DEQYs and SEQYs by enclosing a cover letter with his request, accompanied by an SSA-3288, noting that his client was retarded, illiterate, had an especially bad memory or another such rationale for why it is "necessary."

While we try to sort out SSA's position on this, advocates might be well-advised to use the SSA-3288 available at www.ssa.gov when making requests for DEQYs and SEQYs. Also, check "identifying information" on the SSA-3288, and specify on the form that you are requesting "self-employment earnings, employers and earnings amounts, all years [or pick the year claimant turned age 16 and include all years from then to present]."

Please keep us informed if you continue to have trouble – or even if you succeed – in obtaining DEQYs and SEQYs from SSA district and field offices. And thanks to Jody for alerting us to this potential problem, and to David for his helpful solutions.

COURT DECISIONS

Magistrate Remands for Evaluation of Treating Source Evidence

The crux of many of our disability cases is whether treating source evidence is given proper weight. Where treating source evidence is well-supported by objective testing and not inconsistent with other medical evidence in the record, treating sources should be given controlling weight. An ALJ's failure to apply this rule properly can result in a reversal of the decision.

In the case of *Alashkevich v. Commissioner of Social Security* (1:04-CV-0787 NDNY), Magistrate George Lowe recommended a remand because the ALJ failed to consider all the elements of the treating physician rule before deciding to give the treating source opinion "little weight." These elements included the length of the treatment relationship and frequency of examinations, the nature and extent of the treatment relationship, the medical evidence in support of the opinions, and any other factors that tend to support or contradict the opinions.

Additionally, the Magistrate was troubled by the ALJ's "picking and choosing" from the treating source's opinions: the ALJ discounted the treating physician's opinion as to physical limitations because he was not an orthopedic specialist and gave more weight to a non-examining SSA review physician. However, the ALJ credited the treating doctor's opinions as to mental limitations, also outside the scope of his specialty, and used them to discount the consultative examiner psychologist's opinions, which found a greater degree of limitation. The Magistrate found it "curious" that "the ALJ on the one hand refused to give controlling weight to [the treating doctor's] opinions because he was not a specialist, but then relied on his opinions to discount the opinions and limitations set forth by a specialist…"

Although this legal error provided sufficient grounds for remand, Magistrate Lowe also ordered that the remand proceedings should include further vocational expert (VE) testimony because the expert testimony presented at the first hearing was confusing and inaccurate. The VE identified three jobs the plaintiff could perform in response to the ALJ's hypothetical questions. Two of the jobs were beyond the scope of the ALJ's hypothetical questions, a point conceded by the defendant in its brief. The VE testimony on the third job was inadequate because there was apparently some confusion regarding how an "abnormal energy level" would affect plaintiff's ability to perform the jobs identified by the vocational expert.

The Magistrate noted that it appeared from the transcript "that neither the ALJ nor the vocational expert knew what 'abnormal energy level' meant and the vocational expert was unsure as to how it might affect Plaintiff's ability to work. Upon remand, the ALJ should ensure that the hypotheticals clearly and accurately portray the full extent of Plaintiff's impairments and capabilities and that the hypotheticals are fully understood by all participants."

Plaintiff's counsel, Louise Tarantino of the Empire Justice Center, raised each of these issues in her brief to the federal court. The defendant did not file any objections to Magistrate Lowe's recommended decision and District Court Judge Kahn adopted the decision in full. Copies of the Magistrate's decision are available as DAP# 465.

ADMINISTRATIVE DECISIONS

Appeals Council Remands Improper CDR

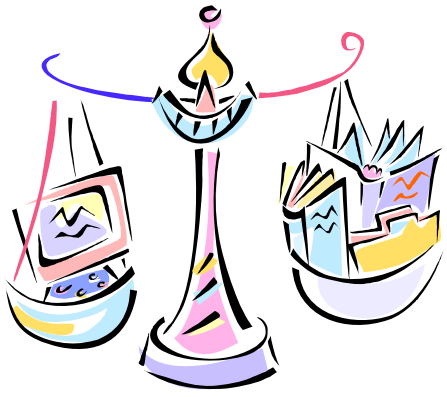
A beneficiary who is taking advantage of a Ticket to Work, or in certain vocational rehabilitation programs should not be subject to a CDR (Continuing Disability Review), right? Hypothetically right, but not always the case in practice, or so learned David Ralph of Chemung County Legal Services, a division of LAWNY. Despite the fact that his client had been issued a Ticket to Work, a CDR was commenced. Following a hearing at which David raised the vocational rehabilitation issues, the ALJ nonetheless found medical improvement and terminated the claimant's benefits.

David appealed to the Appeals Council, arguing that 20 C.F.R. §416.1338 provides that a claimant's disability benefits may continue after disability has ceased if she is participating – as was his client – in a an appropriate program of vocational rehabilitation services, employment services or other support services including the Ticket to Work Program and programs approved under section 301 of the Social Security Amendments of 1980 (Pub.L 101-508, §5113). The Appeals Council agreed, finding that the claimant's Ticket to Work had been issued prior to the initiation of the CDR. Despite SSA's claim that the CDR had technically begun earlier, the Appeals Council relied on 20 C.F.R. §411.175(b) to hold that the date on which the CDR "begins" is the date the notice is sent to the claimant informing her that SSA is beginning the review.

The Appeals Council remanded the claim for a determination of whether the claimant remains eligible for benefits continuation because she is participating in an appropriate vocational rehabilitation program. It also ordered the hearing office to notify the claimant of her right to have monthly checks continued until a decision is made.

David reports that the reinstatement of benefits is critical to this client, as she desperately needs the Medicaid coverage to which she should have been entitled under "1619" – SSI's incentive earning program that allows a beneficiary to continue receiving partial SSI benefits and/or Medicaid while working and earning less than the statutory threshold. If retroactively restored to benefits, even if the claimant is now over the income levels for the 1619 program, she may well be able to take advantage of the Medicaid Buy-In program, designed for working people transitioning off SSI.

David's knowledge of the intricacies of these various programs saved the day for his client. For more information on SSI's various incentive earnings programs, see http://www.nls.org/work_incentives.htm. You can also purchase the new 2007 Edition of *Benefits Management for Working People with Disabilities: An Advocates Manual*. For a detailed description of the manual and ordering information, see http://www.nls.org/benefits-management/brochure.htm.



ALJ Decision Preserves DLI

We have often said on these pages that the third time can be the charm. That was certainly the case in a recent victory obtained by the Empire Justice Center in Rochester. The claimant, who is now 60 years old, finally prevailed in her claim for Title II benefits, as well as additional retroactive SSI benefits after three hearings and two federal court appeals.

Needless to say, the case had a rather long and complicated history, beginning with an application for SSDI and SSI benefits on September 25, 1995. Although the claimant had originally alleged an onset of July 1, 1995, she subsequently amended her alleged date of onset to the date of her fiftieth birthday – June 2, 1997. She was insured for Title II benefits through December 31, 2001.

The claimant had two hearing before the same ALJ, in 1996 and 1999 respectively. The second hearing was a result of a remand from U.S. District Court based on a stipulation of the parties. Following another denial, the claimant returned to federal court. On December 4, 2005, U.S. District Court Judge Charles Siragusa issued a decision remanding the claim for yet another rehearing. See *Rivera v. Barnhart*, 2005 WL 3555501 (W.D.N.Y., December 9, 2005).

In the meantime, the claimant began receiving Supplemental Security Income (SSI) benefits effective April 2004, based on an application filed subsequent to the one at issue in this appeal. Because of the *res judicata* effect of the claim on appeal, she was only eligible for SSI benefits as of the date of her 2004 application. The appeal remained particularly significant in that she had to prove that she was disabled prior to that date, and more significantly, prior to December 31, 2001, the date her insured status for Title II benefits expired, in order to be eligible for Title II benefits.

In his Decision, Judge Siragusa had found that the ALJ had erred in failing to specify the weight he accorded to the opinions of the claimant's then-treating physician. He also concluded that the ALJ's determination regarding the claimant's credibility – or lack thereof – was not supported by substantial evidence. He also found that the ALJ had misapplied the sequential evaluation to the claim. Specifically, Judge Siragusa determined that the conclusion that she could return to her past relevant work was erroneous as a matter of law. Finally, he agreed that the ALJ's determination that the claimant was capable of medium work was not supported by substantial evidence.

The claimant argued that she has been capable of, at best, sedentary work or less since the date of her fiftieth birthday in 1997, and thus disabled under the Medical-Vocational Guidelines. Her treating physician had repeatedly opined during that time period that she was disabled. In fact, in one report, the doctor had specifically addressed the reasons she believed that the claimant was disabled, and refuted the findings, relied upon by the ALJ, of the one time consultative examiner who determined that her complaints of back pain was psychosomatic.

Prior to Hearing #3, the representative argued to the new ALJ that there was little, if anything, the treating physician could add to the already complete record. Additionally, she was no longer the treating physician, having left the practice several years ago. The claimant herself presumably had little to add to the testimony that she had already given on two separate occasions, and which Judge Siragusa, for all intents and purposes, found credible. The representative also pointed out that it would be difficult at this point for the claimant to testify in any detail to her condition as it was ten years ago.

The ALJ agreed, and issued a favorable decision on the record, finding the claimant disabled as of June 2, 1997 - the date of her fiftieth birthday - under Medical-Vocational Guidelines Rule 201.09. The claimant is hoping that she may see some of the seven years' worth of retroactive benefits due her before Christmas!

Kudos to Empire Justice for sticking with the case for the long haul.

Sickle Cell Listing Met

Katie Courtney of the Empire Justice Center in Rochester successfully negotiated a favorable decision on the record in a claim involving sickle cell anemia. The case had been remanded by the Appeals Council for a new hearing before the same ALJ - always a challenge in and of itself. Katie was able to present the case to the ALJ in a new light and convinced him to award benefits.

The claimant, who is a younger individual, had first been diagnosed with sickle cell disease in 1992. By 2001, she had pulmonary edema, marked splenomegaly, venous distention, and tachycardia secondary to her anemia. After that date, her sickle cell crises began increasing in frequency. By 2004, she had five documented crises with severe joint pain.

Katie supplied the ALJ with records documenting the claimant's emergency visits from 2004 through 2006, arguing that they demonstrated that the claimant met the requirements of Listing 7.05.A for sickle cell disease. Section A requires "documented painful (thromobtic) crises occurring at least three times during the 5 months prior to adjudication." By amending the claimant's alleged onset to 2004, Katie was able to convince the ALJ that her client was disabled.

Further complicating the case was the fact that while waiting for the hearing to be scheduled, the client had moved out of state with her family. Had the ALJ not been willing to decide the claim on the record, the case would have been transferred to a different ODAR and the claimant would have had to find a new representative. Katie's ability to negotiate a settlement spared all involved more complications and waiting.

Treating Doc Testimony Wins Case

Sue Lane-Kreutz, a paralegal with the Oak Orchard office of Neighborhood Legal Services, credits the testimony of her client's treating physician for her recent victory in a difficult case. But Sue deserves the credit for not only persuading the doctor, who is board certified in preventive and occupational medicine, to testify but also to forego her usual fee. As Sue notes, it is worth the time to call and actually talk with the treating physician, especially one who appears sympathetic to the claimant.

Sue and her client convinced the treating physician that his claim would be an up-hill battle without the doctor's help. The claimant had previously been diagnosed with bilateral carpal tunnel syndrome and epicondylitis (tennis elbow), which the treating physician had found to be work-related. He also had low-back arthritis and mild depression, but was diagnosed with Parkinson's disease during the course of his application process. His treating physician also attributed some of his symptoms, including irritability, forgetfulness, inability to concentrate, memory loss, and involuntary loss of coordination, to heavy metal poisoning affecting his peripheral nerves. His case was complicated by the fact that he had more than a high school education and past work that was semi-skilled or skilled, and was younger than 50 years old throughout the adjudicatory period.

The doctor's testimony convinced the ALJ that the claimant was not able to do the full range of sedentary work. She described the extent to which his condition had deteriorated to the point that he was not capable of full-time employment. The ALJ gave great weight to the reports and testimony of the treating physician, and found that the claimant's combination of exertional and nonexertional impairments are so restrictive that it precludes him from engaging in any kind of substantial gainful activity, even sedentary jobs, on a sustained basis.

Sue's powers of persuasion are evident in this case – convincing both the treating physician and the ALJ to side with her claimant was no mean feat. Her advice on taking the time and effect to make personal contact with a potentially sympathetic treating physician is well worth following.

Is A Picture Worth a Thousand Words?

Just ask David Ralph, an attorney with Chemung County Neighborhood Legal Services, a division of LAWNY. He used pictures of his client's unkempt home to convince the ALJ that his client's borderline intellectual functioning was disabling. The client's IQ scores of 85 verbal, 79 performance, and 80 full-scale on a recent WAIS were above those required to prove mental retardation under Listing 12.05 (70 or below). David, however, marshaled a significant amount of evidence demonstrating his client's limitations, persuading the ALJ that the client met the "B" criteria - if not the "A" criteria - of listing 12.05D.

In addition to the pictures, David submitted as evidence numerous letters and reports. Records from the claimant's DSS caseworker demonstrated his difficulty with basic life skills and appropriately interacting with others. The office manager from his former employer verified that he had to be closely supervised and could not be left alone to perform even the simplest of tasks. A VESID counselor indicated that even though the claimant did not have physical impairments, his perceptual motor skills and perceptual organizational skills were severely impaired. She also noted that his personal hygiene issues posed another significant impediment to work. She opined that he would need a job coach to even begin to survive in a work environment. Another former employer verified that even though the claimant had been let go because of downsizing, his inappropriate and disruptive behavior was intolerable.

The ALJ gave all these opinions great weight since those reporting had observed the claimant in work situations and were in the best place to assess his abilities. She gave particular weight to the opinions of the DSS caseworker, who had also testified at the hearing. She had testified that the claimant's home was the worst she had seen in her twenty-five years as a caseworker. Because the caseworker had actually visited the home, the ALJ accorded her testimony considerable weight. According to her description of the claimant's house, the rooms were so filled with furniture, debris, papers and trash that it was hard to tell the function of each room. And that was the least of it!

In all, the ALJ was convinced that based on his solely nonexertional impairments, the claimant's ability to perform work at all exertional levels was so narrow that a finding of disabled was appropriate. David's creative approach to salvaging a case that didn't fit neatly – no pun intended – into any category saved the day. And his leg work getting all the right people to say the right things is pretty impressive too!

Transgender Claim Granted on Record

Kelly McGovern, an AmeriCorp Volunteer at Chemung County Legal Services in Elmira, received a fully favorable determination on the record in a claim that had only been filed in August 2006. The claim involved a client who alleged a transgender disorder, dysthymic disorder, anxiety and depression. The client is the process of going through hormone therapy and awaiting surgery to be reassigned as a woman from a biological male.

During the course of the proceedings, the client underwent a name change - although SSA persisted in referring to her by her male name in the decision. Her depression and anxiety levels increase whenever she is not referred to in female terms. After a recent incident in her therapist's office, she ended up in the hospital for mental health treatment. She had previously been hospitalized for similar reasons.

According to the claimant's psychiatrist, she was unable to sustain gainful employment due to depression and problems interacting with others. He was of the opinion that both her gender identity disorder and depressive disorder significantly impaired her ability to carry out activities of daily living and maintain emotional stability. Mental health notes corroborated the claimant's feeling of depression, poor sleep and appetite, lack of energy, and suicidal ideation. Her GAF scores range between 38 and 55. The psychiatrist felt that her symptoms associated with depression and anxiety seriously impacted her ability to deal with people in a calm and rational manner. He opined that she had moderate restrictions for making even simple decisions or maintaining socially appropriate behavior without exhibiting behavior extremes.

The ALJ found the psychiatrist's opinions to be well-supported and consistent with the remainder of the record. Since, according to the ALJ, they spoke to the functional severity of the claimant's condition, they were accorded controlling weight. The ALJ concluded that the claimant lacked the sustained capacity during the course of a 40 hour week to meet quality, production and attendance requirements of competitive work, significantly eroding the occupational base she could otherwise perform at any level of exertion.

Congratulations to Kelly for securing such a prompt victory for her client – and sparing her the agony of attending a hearing. Kelly will be moving this month to the Geneva office of LAWNY to be an Equal Justice Works AmeriCorps attorney for the Law Students in Action project.

HRA Agrees to Remedy Work Exemption Problems

Many clients in New York City who have already won their Title II and/or Title XVI cases are still being called in for employability appointments before their SSI is paid. These clients may have had their Public Assistance cases closed or sanctioned for not attending a WeCARE or other employability appointment while they are waiting for their favorable SSI decision to be processed and paid. Since it often takes a few months to get a favorable SSI decision actually paid by the Social Security Administration, this problem comes up frequently.

Katie Kelleher of the Law Reform Unit of the Legal Aid Society reports that HRA has agreed to fix the problem. HRA agrees that individuals found eligible for SSA disability benefits (Title II or Title XVI) should be exempt from work activities. HRA is developing a procedure to exempt these clients, but until a policy directive is actually issued, advocates should contact the HRA Legal Department and remind them that such clients are supposed to exempt.

Katie recommends writing a letter to the HRA Legal Department to insure that these cases are resolved so that clients are exempted from work activities, are not sanctioned, or do not have their cases closed for failing to comply with work requirements.

A sample letter is available as DAP# 466. Simply add your client's details, attach a copy of the favorable SSI/SSD decision, and send to the HRA Legal Department. If you have received a favorable decision on the record but do not yet have a written decision, send the letter, noting the date of the hearing and attesting that Judge issued a favorable decision on the record. The letter should be sent to David Lock at HRA Legal: lockd@hra.nyc.gov; fax number 212 331-4465; phone number 212 331-5146. David Lock prefers email, with a copy of the favorable decision attached as a pdf file. Katie recommends also faxing a copy of the letter and decision to have proof that you sent it.

Katie reminds advocates that many sanctions and negative case actions are automatically posted by computer when the computer registers that a client has not appeared for an appointment or submitted a document. Thus, it is extremely likely that by the time HRA acts on your client's case to change your client's employability computer code to EXEMPT, there may be negative case actions looming on the case record. Therefore, any negative case actions that may have been taken against your client must also be corrected. The sample letter attached includes language asking HRA to correct any negative case actions that may have already been taken against your client.

Katie encourages advocates with questions to contact her at kkelleher@legal-aid.org, or 212-577-3307. Katie notes that these negotiations with HRA arose in the context of class action litigation brought by the Legal Aid Society and co-counsel Millbank, Tweed Hadley & McCloy against HRA on behalf of clients targeted for HRA's WeCARE employability program. The case - *Lovely H. v. Eggleston* - alleges that HRA lacks procedures necessary to provide reasonable accommodations to disabled clients needed by them to comply with the conditions of eligibility for public benefits at their local Job Centers. For background on the case along with reported decisions see http://www.legalaid.org/en/whatwedo/lawreform/civillawreformunit/activecases/disabilityrights/lovelyhveggleston.aspx

CLASS ACTIONS

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

Description - Plaintiffs challenged NYDSS's failure to implement 42 U.S.C. §1381(c) which requires continued Medicaid eligibility for disabled adults who loose SSI solely because of eligibility for or an increase in Social Security Child's Insurance Benefits, also known as Disabled Adult Child's (DAC) benefits. Plaintiffs claim 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 Disabled Adult Children 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).

Balzi, Brogan, et al. v. Stone & Callahan, 85 Civ. 8706, 90 Civ. 7805 (S.D.N.Y.)(Knapp, J.) ("the rep payee case")

Description - Plaintiffs challenged SSA's and OMH's (Office of Mental Health) policies and practices regarding the appointment of representative payees for recipients of Social Security benefits who became inpatients at OMH psychiatric facilities. Plaintiffs alleged that OMH facilities provided inadequate information and legally deficient notice both in appointing themselves representative payee for plaintiffs and in carrying out their obligations as representative payee. Additionally, plaintiffs alleged that SSA failed to meet its statutory obligations by neglecting to ensure appropriate appointment of representative payees, adequate notice to plaintiffs and prompt replacement of representative payees when plaintiffs return to the community.

Relief - Final settlement signed January 7, 1997 with many favorable provisions for inpatients including provisions about an inpatient's right to notice of the application of a facility to become the representative payee and the right of inpatients to inform OMH that they do not wish to pay for their institutionalization.

Citation - 90 CV 7805 (WK) unpublished order 1/7/97

Information - Catherine Callery, Empire Justice Center (585-454-6500), William Brooks, Touro Law School Clinic (516-421-2244)

WEB NEWS

Link Connects Law Student and Lawyers

The American Constitution Society for Law and Policy (ACS) recently announced the launch of *ACS ResearchLink: Connecting Law Students and Lawyers Committed to Justice*.

ACS ResearchLink creates a valuable online resource for the legal community by collecting legal research topics submitted by practitioners for law students to explore in faculty-supervised writing projects for academic credit. Practitioners will receive a copy of the resulting student papers, which ACS will post in a searchable online library. By connecting law students and faculty with the research needs of public interest organizations and advocates, ACS ResearchLink supports the public interest by enhancing the relevance and influence of student scholarship.

http://researchlink.acslaw.org/

GAO Improves Website

The Government Accountability Office (GAO) recently announced its newly redesigned Web site. The updated site makes the agency's work easier to find and it better explains what GAO is and what it does. Some of the new features include a prominent dynamic display of GAO's latest products, a streamlined "In the Spotlight" section, and a new "Key References" section with links for site visitors.

Based on user feedback comments, the site is now easier to navigate so visitors have better options to help them find what they are looking for. The GAO anticipates further improvements to the site in the future. In addition, GAO products, including reports and testimonies will continue to be posted daily.

www.gao.gov.

Federal Practice Manual Online

The ejustice site at the Shriver Center has a Federal Practice Manual for Legal Aid Attorneys, with some helpful features:

- hyperlinks to federal statutes, Supreme Court Case citations, and case pleadings available through the Shriver Center's Poverty Law Library
- full text of the manual is searchable by keyword
- documentary supplement that includes annotated model pleadings, are still being edited and will be posted online soon

http://www.ejustice.org/federal_practice_manual_2006/chapter_1/chap1sec1.html

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

Call 911

Sounds simple enough, but it turns out that any number of people – especially men – do not call 911 when experiencing symptoms of a heart attack. According to the *Wall Street Journal* on September 4, 2007, a recent Minnesota study found that out of 1,263 patients who suffered a major heart attack, only 37% of men from rural areas arrived at the hospital by ambulance. Forty-nine percent of the rural women opted for the ambulance. The rest either drove themselves or were driven by a friend or family member. Patients from urban areas called an ambulance 65% of the time, regardless of sex.

Some people experiencing symptoms such as chest pain, sweating, and shortness of breath do not take the symptoms seriously, or do not want to bother anyone else in case of a false alarm. One Baltimore woman told Joseph Ornato, chairman of emergency medicine at Virginia Commonwealth University in Richmond, that she was too embarrassed to call 911. She had called an ambulance when she had her first attack, and remembered all too well the flashing lights, sirens, and especially neighbors watching her be carried out in a stretcher. The second time, she opted to come by car.

But arriving at the hospital by car can have significant consequences not only for survival but for long-term health as well. According to the *WSJ* article, hospitals and communities throughout the country, partly in response to initiatives of the American College of Cardiology and the American Heart Association, are working to improve heart-attack care. Emergency squads are being better coordinated, and measures are being adapted to speed treatment time when a patient arrives at a hospital. And time is crucial to clearing blood clots that cause heart attacks and restoring blood flow. Delays - even those such as calling your own doctor first - mean delays in starting these life-saving measures.

In addition to getting to the hospital sooner, calling an ambulance may help prevent sudden death. Approximately five percent of patients go into cardiac arrest en route to the hospital. As Barbara Unger, head of cardiac emergency services at the Minneapolis Heart Institute pointed out to the *WSJ*, "If you go into a lethal arrhythmia while you're driving to the hospital, it's pretty hard to do CPR on you." An ambulance, however, is usually equipped with both equipment and personnel that can help spark your heart back into rhythm.

According to the Minneapolis study, rural patients who called 911 got treatment six minutes sooner than those who transported themselves. The difference was 18 minutes sooner for patients in urban areas. So - learn the symptoms of heart attacks (which can differ for men vs. women) and don't be afraid to call 911.

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