Empire Justice Center

June 2015
Issue 2 2015

DISABILITY LAW NEWS

SSA Stops Collecting Overpayments for Same-Sex Couples

The Social Security Administration (SSA) has announced it will hold all Supplemental Security Income (SSI) actions that would result in an overpayment due to deeming of income or resources based on recognition of a same-sex marriage, or applying the couple's payment rate or resource limit to a member of a same-sex couple. Emergency Message (EM)-15016, issued May 6, 2015, provides that future SSI can be reduced or terminated based on the income or resources of a same-sex spouse, but not prior months. https://secure.ssa.gov/apps10/reference.nsf/links05052015024754PM. No new overpayment notices will be issued to SSI recipients married to persons of the same sex.

The Emergency Message follows the filing of a lawsuit to stop the agency from collecting overpayments from married couples of the same sex receiving SSI benefits. As reported in the March edition of the *Disability Law News*, Justice in Aging, Gay & Lesbian Advocates & Defenders (GLAD), and Foley Hoag LLP filed a class action lawsuit charging that SSA discriminated against married individuals of the same sex who receive SSI by failing to recognize their legal marriages. *Held v. Colvin,* filed as a nation-wide class-action lawsuit in the United States District Court for the Central District of California, challenged SSA's continuing to issue benefits as if the recipients were single even after the *Windsor* decision struck down the Defense of Marriage Act (DOMA).

Well after *United States v. Windsor*, – – U.S. —, 133 S.Ct. 2675, 2695, 186 L.Ed.2d 808 (2013), SSA did not recognize the marriages of same-sex couples, even in cases where SSI recipients informed SSA they were married. SSI benefits for unmarried individuals are higher than for married individuals, but SSA continued to issue benefits as if the married individuals were single. But when SSA finally began recognizing those marriages in 2014, it also began issuing overpayment notices for the prior months, even though many of the recipients had informed SSA of their status. Under the new EM, no new overpayment notices will be issued.

If you know any LGBT SSI recipients in this situation who have already received notices of overpayment, they could be potential class members in the case. Please contact Justice in Aging Litigation Director, Anna Rich, at arich@justiceinaging.org.

INSIDE THIS ISSUE:

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

Empire Justice Center
1 West Main Street, Suite 200
Rochester, NY 14614
Phone: (585) 454-4060

The newsletter is written and edited by:
Louise M. Tarantino, Esq.
Catherine M. Callery, Esq.

June 2015 issue.

Available online at:

www.empirejustice.org

SSA Issues HALLEX on Evidence Submission Regulations

Since April 15, 2015, advocates have been bound by SSA's new rules on the submission of evidence. The new regulations, found at http://www.gpo.gov/fdsys/pkg/FR-2015-03-20/html/2015-05921.htm, were summarized in the March 2015 edition of this newsletter. http://www.empirejustice.org/issue-areas/disability-benefits/rules--regulations/final-submission-of-evidence.html#.VYGlIctFC70. In short, they require claimants and representatives to inform Social Security about, or submit, all evidence that relates to a claim for disability.

SSA has provided further "guidance" about the new rules in its revised HALLEX sections, which have been summarized by NOSSCR:

I-2-1-5 "Conducting Prehearing Case Analysis and Workup" is a new section with instructions to the hearing office staff on conducting prehearing case analysis and workup. This includes determining whether the claimant informed the Agency about any additional evidence not in the record and instructions on obtaining the evidence if needed.

Chapter I-2-5 has several new sections with instructions about prehearing case review:

I-2-5-2 is a new section entitled "Prehearing Case Review by the Administrative Law Judge." In conducting a prehearing case review, the ALJ will evaluate the claim file to determine whether it is necessary to obtain evidence the claimant informed the agency about that relates to whether he or she is blind or disabled, or to obtain updated medical evidence or testimony from the claimant's treating source or other medical source. The ALJ will also determine whether a consultative examination or medical or vocational expert testimony is needed, and whether additional non-medical evidence should be considered. The ALJ is instructed to issue a subpoena if necessary.

I-2-5-13 – "Claimant informs Hearing Office of Additional Evidence," a new section, provides instructions for developing both medical and non-medical evidence, including the processes for hearing office staff to follow when the claimant informs the agency about additional evidence but does not submit it.

I-2-5-14 is entitled "Obtaining Medical Evidence from a Medical Source" and includes instructions on how to obtain a signed medical release form (SSA 827) and how to obtain the identified but unsubmitted evidence. The ALJ or ODAR Staff will ask the claimant or representative to identify the claimant's medical sources and to provide all evidence that relates to the claim from those sources.

I-2-5-13 and I-2-5-14 explain that the hearing office can authorize payment for medical records requested by a claimant or representative if the claimant or representative has made a good faith effort to obtain the evidence. Examples include: "a treating source has not responded to multiple requests for evidence; an unrepresented claimant cannot afford to pay for the evidence; an unrepresented claimant has a physical, mental, educational, or linguistic limitation(s) that prevents him or her from requesting or obtaining the evidence, or is otherwise unable to obtain the evidence for reasons beyond their control; and a representative who is ineligible for compensation by a claimant, such as a legal services organization, and has no funding to pay for the evidence." In these situations the ODAR staff will assist the claimant or representative in obtaining the evidence by paying a reasonable amount for the existing medical evidence in accordance with the payment rates established by the appropriate State agency.

I-2-6-78 "Closing the Hearing" is a revised section now stating the ALJ will remind the claimant he or she must inform the ALJ about, or submit, all evidence that relates to the claim. If a claimant has a representative, the ALJ will remind the representative he or she must do so. "The ALJ must ask the claimant and the representative if they are aware of any additional evidence that relates to whether the claimant is blind or disabled."

I-2-7 "Posthearing Actions" contains several updated instructions for determining the need for, obtaining, and proffering additional evidence received after an ALJ hearing. Many of the identified procedures are identical to those for obtaining evidence prehearing.

(Continued on page 3)

Amy Leach Remembered

Amy (Amelia) Leach recently lost her battle against multiple myeloma. Amy was dedicated nurse who became a DAP paralegal at the Legal Aid Society of Mid-New York (LASMNY), covering Chenango, Broome and occasionally Onondaga County cases. Amy left her work at LASMNY a little over two years ago to concentrate on her health, but stayed in touch with DAP advocates and even attended the WNY DAP Task Force Picnic last August.

Amy was a fierce advocate who truly cared about her clients. As her colleague Jim Murphy said, she was a "mom" and friend to everyone, and was often the life of the party. According to her obituary, she will be remembered as "Momma Leach" for the numerous lives she touched. http://www.legacy.com/obituaries/pressconnects/obituary.aspx?pid=174696422.

We will all miss Amy's enthusiasm and passion. Contributions in her memory can be made in her name to Sidney Kimmel Comprehensive Cancer Institute at John Hopkins, The Harry and Jeanette Weinberg Building, Suite 1100, 401 North Broadway, Baltimore, Maryland 21287.

SSA Issues HALLEX on Evidence—Continued

(Continued from page 2)

I-3-2-15 "Claimants Inform the Appeals Council About Additional Evidence" is the only new section dealing specifically with the Appeals Council. This new section includes instructions to OAO Staff to follow when the claimant informs the agency about additional evidence but does not submit it. As in I-2-5-13, the claimant is instructed to inform the agency about or submit to the agency all evidence, in its entirety, known to him or her that relates to whether or not he or she is blind or disabled. A representative must help the claimant obtain the information or evidence the claimant must submit.

This HALLEX notes evidence generally does not include a representative's analysis of the claim, or include oral or written communication between a claimant and the representative subject to the attorney client privilege (or would be if the non-attorney representative were an attorney.) This HALLEX section also warns, "If a representative has a pattern of not submitting evidence that relates to the claim(s), or if the claimants of a particular representative develop a pattern of not submitting evidence to us or not informing us about evidence that relates to their claims(s), an administrative appeals judge will consider whether circumstances warrant a referral to the Office of General Counsel as a possible violation of our rules."

The transmittals announcing these revisions can be found at http://www.ssa.gov/OP_Home/hallex/hallex.html.

Representatives have also obtained a copy of a recent ALJ training outline on the new regulation, which is available at DAP #570.

Undoubtedly representatives will still have more questions than answers about their duties and obligations under these regulations. Are they as draconian as some think? Or will they impose few practical changes to our day-to-day practices, as others speculate? To what extent, for example, will advocates be able to avoid submitting duplicates or volumes of seemingly unrelated evidence by informing ODAR of the existence of the evidence and affirmatively asking if submission is necessary, per 20 C.F.R. §404.1512(c) ("When you submit evidence received from another source, you must submit that evidence in its entirety, unless you previously submitted the same evidence to us or we instruct you otherwise")?

Please keep us informed of your experiences—both positive and negative—with these new regulations. And thanks to NOSSCR for its ongoing analysis of the regulations and HALLEX provisions.

REGULATIONS

Children's Growth Disorders Listings Revised

Two years after issuing a notice of proposed rulemaking (NPRM), SSA has now published final rules revising the Listings pertaining to children's growth disorders. These include Listing 100.00 Low Birth Weight (LBW) and Failure to Thrive; Listing 103.00 Respiratory System; Listing 104.00 Cardiovascular System; Listing 105.00 Digestive System; Listing 106.00 Genitourinary Impairments; and Listing 114.00 Immune System Disorders. The final rules appeared in the April 13, 2015 Federal Register and went into effect on June 12, 2015. 80 Fed. Reg. 19522 (Apr. 13, 2015), available at http://www.gpo.gov/fdsys/pkg/FR-2015-04-13/pdf/2015-08185.pdf.

The final rule was adopted with minimal changes from the NPRM published May 22, 2013. According to SSA's summary: "Several body systems in the Listing of Impairments contain listings for children based on impairment of linear growth or weight loss. We are replacing those listings with new listings for low birth weight (LBW) and failure to thrive; a new listing for genitourinary impairments; and revised listings for growth failure in combination with a respiratory, cardiovascular, digestive, or immune system disorder." The revisions encompass both Listings language, in several sections, and text elsewhere in the regulations.

In response to comments, SSA agreed it was "appropriate to provide guidance for evaluating LBW in infants who are born at 32 weeks gestational age. We revised the table in 100.04B to provide a birth weight value of 1250 grams or less for the gestational age of 32 weeks. . . ." Note SSA did not provide birth weight values for gestational ages less than 32 weeks. "The birth weight values that we would provide for infants born at less than 32 weeks would be less than 1200 grams and, thus, the birth weight would meet the criterion in 100.04A. . . ."

In response to another comment that called for requiring developmental testing done within six months before the adjudication, SSA agreed evidence about a child's development must be recent and current in relation to a disability determination, it revised listings 100.05B and 100.05C2 to clarify this requirement. According to SSA, however, the facts in a specific case determine whether the evidence is current. Determining factors include, but are not limited to, the age of the child, the amount of delay, and the developmental trajectory documented over time. SSA did not set specific timeframes for when developmental testing must be performed, but specified the evidence must reflect the child's current development.

Please be sure to review all applicable Listings and regulations if you are representing a child with impairments related to growth disorders.

Air Conditioners Available Under HEAP

On April 24, 2015, OTDA/CEES issued and posted 15 LCM-03: "2014-2015 Home Energy Assistance Program (HEAP) Cooling Assistance Component (CAC)." The LCM explains that the HEAP CAC provides for the purchase and installation of air conditioners and fans. It also explains that the "HEAP CAC is available for HEAP eligible households with at least one individual with a documented medical condition that is exacerbated by extreme heat. No additional HEAP cash benefits are available."

Applications were accepted by local districts starting May 1. Assistance is provided on a "first come, first served" basis, so clients who would benefit from this program should be encouraged to apply right away.

The LCM is available at http://otda.ny.gov/policy/directives/2015/LCM/15-LCM-03.pdf

Cancer Evaluations Undergo Changes

SSA is revising, effective July 20, 2015, the disability Listings criteria for cancer, formerly categorized under the heading of Malignant Neoplastic Diseases. SSA extends the expiration date of the current Listings 13 and 113, which were finalized October 6, 2009, effective November 5, 2009, until that date. 80 Fed. Reg. 28821 (May 20, 2015) available at http://www.gpo.gov/fdsys/pkg/FR-2015-05-20/pdf/2015-11923.pdf

The Notice of Proposed Rulemaking (NPRM), foreshadowing these changes, was published December 17, 2013. See December 2013 *Disability Law News*. The text of the new rules has changed somewhat from the NPRM, in response to comments reviewed in this announcement. There's a bit of quibbling over nomenclature, and some of it may merit study by advocates—in particular, the comments relating to the terms progressive, persistent, and unresectable. The comments also are instructive where they relate to choices of findings and conditions not to be included in the final version.

In the final rules, the following will be significantly revised or added:

13.02 Soft Tissue Cancers of the Head and Neck, 13.05 Lymphoma, 13.10 Breast, 13.12 Maxilla, Orbit, or Temporal Fossa, 13.13 Nervous System, 13.20 Pancreas, 13.23 Cancers of the Female Genital Tract, and 13.29 Malignant Melanoma

The childhood cancer Listing will also undergo a variety of changes. For example, T-cell lymphoma assessment will be consolidated into 113.06. There are other revisions and additions as well.

We welcome feedback from advocates who handle these cases as to the efficacy of these final rules.

Can Migraines Equal a Listing?

Every now and then, we are reminded of helpful nuggets in the POMS or HALLEX, previously overlooked or long forgotten. How about POMS DI 24505.015, which reminds adjudicators to consider equivalency to the epilepsy listing at 110.03 when reviewing migraine headache claims?

POMS DI 24505.015.B.7.b, entitled Finding Disability Based on the Listing of Impairments, includes this example:

> A claimant has chronic migraine headaches for which she sees her treating doctor on a regular basis. Her symptoms include aura, alteration of awareness, and intense headache with throbbing and severe pain. She has nausea and photophobia and must lie down in a dark and quiet room for relief. Her headaches last anywhere from 4 to 72 hours and occur at least 2 times or more weekly. Due to all of her symptoms, she has difficulty performing her ADLs. The claimant takes medication as her doctor prescribes. The findings of the claimant's impairment are very similar to those of 11.03, Epilepsy, non- convulsive. Therefore, 11.03 is the most closely analogous listed impairment. Her findings are at least of equal medical significance as those of the most closely analogous listed impairment. Therefore, the claimant's impairment medically equals listing 11.03.

The POMS section contains other useful examples of possible equivalencies to the musculoskeletal and mental listings.

A tip to store in your back pocket.

Listing Changes for Blood Disorders Issued

SSA adopted final rules, effective May 18, 2015, updating the Hematological Disorder Listings for adults and children found at 7.00 and 107.00. 80 Fed. Reg. 21159 (Apr. 17, 2015), available at http://www.gpo.gov/fdsys/pkg/FR-2015-04-17/pdf/2015-08849.pdf. These Listing changes were first published as a NPRM in November 2013. See December 2013 *Disability Law News*.

SSA adopted several changes suggested by commenters in the NPRM. By and large, though, the agency adopted the rules as proposed. Specific changes include revision of Listing sections 7.00C1 and 107.00C1 to provide examples of acquired hemolytic anemias, with similar changes in final sections 7.00D1, 107.00D1, 7.00E1, and 107.00E1. SSA also provided examples of acquired disorders of thrombosis and hemostasis, as well as disorders of bone marrow failure. The agency also added hereditary spherocytosis to the list of examples presented in 7.00C1, and to the list of common examples of hemolytic anemias in children in 107.00C1 to make the child listings consistent with the adult listings.

With respect to evaluating sickle cell anemia, SSA agreed with commenters that people with sickle cell disease are chronically sick. SSA added language to final sections 7.00C4 and 107.00C4 that directs evaluation under listings 11.00, 111.00, 12.00, and 112.00 if a claimant has had a stroke. It also added language in final sections 7.00C4 and 107.00C4 explaining that the agency will consider functional limitations associated with chronic red blood cell (RBC) transfusions under final listing 7.18 for adults, the functional equivalence rules for children, as well as the listings for any affected body systems. The additional language also addresses complications resulting from chronic RBC transfusion, such as iron overload.

SSA adopted a comment that suggested counting the hours a person receives treatment in a comprehensive sickle cell disease center under final listings 7.05B and 107.05B, which requires hospitalizations for complications of hemolytic anemias last at least 48 hours. The Agency received a similar comment regarding comprehensive hemophilia treatment centers. SSA explained in final sections 7.00C2 and 107.00C2 that it will count the hours the person receives treatment in a comprehensive sickle cell disease center if the treatment is comparable to the treatment provided in a hospital emergency department. The agency also revised final listings 7.08 and 107.08 and final sections 7.00D2 and 107.00D2 in response to the comment regarding comprehensive hemophilia treatment centers.

The Agency adopted other clarifying language at several places in the Listings. Careful reading of these Listing changes is imperative when presenting a case based on hematological disorders.

SSA Updates Overpayment POMS

In the past year, SSA has made revisions to a number of POMS sections governing overpayments:

- GN 02201.013 Administrative Tolerances Title II Overpayments
- GN 02201.019 Title II Overpayment Waiver Request
- GN 02201.021 FO Actions Title II Overpayment Waiver Request
- GN 02201.023 PSC Actions Title II Overpayment Waiver Request
- SI 02260.040 Adverse Changes in Financial Circumstances Following Waiver Denial
- GN 02250.310 Amount to Consider for a Title II Waiver Request
- AM-14052 Overpayment Explanation Reminders
- EM-14058 Res Judicata – Duplicate Requests for Wavier of a Title XVI Overpayment
- SI 02260.025 SSI Overpayment Waiver – Against Equity and Good Conscience

SSA is in the process of revising the Title II rules on Against Equity and Good Conscience at GN 02250.150

OIG Studies Overpayments

SSA's Office of the Inspector General (OIG) reviewed the records of 1,532 disabled beneficiaries between 2003 through 2014, and determined 44.5% of them had overpayments assessed during that time. The highest percentage of overpayments (37%) resulted from work activity or changes in income, with 23% caused by medical improvement. SSA reminded OIG those overpayments were unavoidable, because it is required by statute to continue payments for the duration of an appeal of a Continuing Disability Review (CDR).

OIG's study also revealed that SSA had recovered 37.4% of the overpayments, with 48.3% still being recovered. Only 14.3% were waived. Despite the study's emphasis on the number and amount of overpayments, OIG acknowledged the overpayment rate for 2004 was only 3.1% of all benefits paid.

Audit Report A-01014024114 (June 2015) – Overpayments in the Social Security's Disability Programs—A 10 -Year Study – can be found at http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-14-24114.pdf.

Study Focuses on Primary Disabling Impairments

An article published in the *Social Security Bulletin* focuses on the relationship between employment and earnings of Disability Insurance (DI) beneficiaries and working-age Supplemental Security Income (SSI) recipients and their primary impairments. "Employment, Earnings and Primary Impairments Among Beneficiaries of Social Security Disability Programs" by David R. Mann, Arif Mamun, and Jeffrey Hemmeter, also provides information on the distribution of beneficiaries by impairments.

In the recent decades, there has been a substantial growth in the two major disability programs, DI and SSI, administered by the Social Security Administration (SSA). As the programs have grown, the distribution of the disabling conditions among Social Security disability program beneficiaries has also changed. According to the article, of 25 primary impairment categories, affective disorders (15.4 percent), back disorders (13.0 percent), and intellectual disability (11.8 percent) are the most prevalent. In total, mental impairments account for 43.7 percent of primary impairments, while back disorders and musculoskeletal diseases together account for more than 22.4 percent. Of the other primary impairment categories, none represent more than 6.4 percent of disability.

Since the DI and SSI programs have different purposes, the distribution of primary impairments within each program differs somewhat from the collective distribution. DI-only beneficiaries compared to SSI are more likely to have back disorders (18.8 percent versus 5.9 percent) or musculoskeletal disease (12.7 percent versus 5.5 percent) as their primary impairment. Also, DI-only beneficiaries report a higher prevalence of other primary impairments often associated with aging, such as circulatory system diseases (7.9 percent versus 4.3 percent) and nervous system diseases (7.7 percent versus 5.0 percent).

The article further states that SSI-only beneficiaries are more likely to have affective disorders, schizoaffective disorder, and other mental impairments as their primary impairments. The authors posit the different impairment distributions are consistent with the purpose of each program: "wherein DI benefits support individuals who are more likely to suffer negative health shocks, and SSI payments supports those who are more likely to have life-long impairments that impede work."

The article can be reviewed on the SSA website at http://www.socialsecurity.gov/policy/docs/ssb/v75n2/v75n2p19.html. And thanks to Howard University law student Stephanie Johnson for her help in wading through this data.

ADMINISTRATIVE DECISIONS

ALJ Halts CDR While Client in Ticket to Work Program

Attorney Kyla L. Ratliff of the Poughkeepsie office of Legal Services of the Hudson Valley recently convinced an Administrative Law Judge (ALJ) that SSA lacked jurisdiction to initiate a Continuing Disability Review (CDR) because her client was enrolled in the Ticket To Work Program (TTWP).

According to 20 C.F.R. § 411.105, the TTWP provides eligible individuals expanded educational and vocational opportunities to increase the likelihood they will reduce their dependency on disability benefits. The regulations also provide that SSA will not begin a CDR during a period in which an individual is using a Ticket to Work. 20 C.F.R. § 411.165. But to maintain eligibility for the TTWP, an individual must demonstrate she is making timely progress toward self-supporting employment. 20 C.F.R. § 411.180.

Kyla's client had received a notice she had not made the expected progress with her education or training for her second 12 months Progress Review under the TTWP. She timely appealed and received a favorable decision finding she continued to meet the requirements for TTWP and would continue to be excused from medical reviews. A few days later, however, she received a second notice advising her that due to her improved condition, she was no longer disabled.

With assistance from Kyla, the client once again filed an appeal. In addition to the regulations, Kyla relied on the 2008 Amendments to the TTWP and Self Sufficiency Program (73 FR 29324-01) and "Your Ticket to Work" published in April 2014 by SSA. Kyla argued SSA lacked jurisdiction to initiate a CDR. She also argued termination of claimant's benefits would be a basic violation of due process: SSA cannot assure a participant through its regulations and publications there would be no CDR while participating in the TTWP, yet terminate benefits based upon the review.

The ALJ agreed, ruling that based on SSA's own regulations, publications, and notices, it lacked jurisdiction to initiate the CDR. The statute, 42 U.S.C.A. §1320(b)(19)), provides there can be no medical improvement evaluation while participating in and making the appropriate progress in the TTWP. The ALJ also agreed with Kyla's due process argument. She found the client was exempt from the medical improvement process, and her benefits had been improperly terminated.

Kyla was particularly grateful for this "technical" win, as it might have been hard to prove her client had not medically improved since the comparison point date. She is also grateful for the help she received from colleagues on the DAP Listserv in formulating her arguments. Congratulations, Kyla! And thanks to Howard University School of Law intern Stephanie Johnson for her help in summarizing Kyla's case.

Autism Spectrum Case Approved

Alan Block of Neighborhood Legal Services in Buffalo reports a favorable ALJ decision for a teenager with autism. Alan credits the strong evaluations he obtained from his client's special education teachers. Alan also obtained a helpful report from the client's physician at the Children's Guild Foundation Autism Spectrum Disorder Center in Buffalo, who had diagnosed the child with pervasive developmental disorder, not otherwise specified (PDD-NOS). She opined the child met the spectrum for an autism spectrum disorder due to difficulty with social cues and restricted behaviors. The ALJ agreed these reports were more complete and more current than those of SSA's consultative examiner and the state agency review physician.

Of note, the child's diagnosis was presumably made under the criteria of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, IV- Text Revision* (DSM-IV-TR). The DSM-IV-TR included three diagnoses within that category: Autistic Disorder, Asperger Disorder, and PPD-NOS. The DSM 5, which was published in May 2013, has eliminated those diagnoses, in favor of "Autism Spectrum Disorder."

The new DSM 5 criteria consider two categories of symptoms: social communication, and repetitive and restrictive behaviors. There are now three levels of severity in each of these categories. Level 1 requires support, Level 2 requires substantial support, and Level 3 requires very substantial support. The DSM includes descriptions of deficits and behaviors associated with each level. These new levels may prove helpful in terms of demonstrating functional impairments.

DSM 5 also introduces a new diagnosis, Social (Pragmatic) Communication Disorder, which may capture some children who were formerly diagnosed with PDD-NOS. These might be children who demonstrate social-communicative impairments without repetitive behaviors or restricted interests associated with the Autism Spectrum.

Familiarity with these DSM changes will be critical for advocates as clinicians begin using the new criteria in their reports. In the meantime, congratulations to Alan for his persuasive advocacy in his recent victory.

ME Emphasizes Complications Due to Lead Poisoning

Medical Experts (MEs) are appearing more frequently these days, sometimes hurting and sometimes helping our cases. Cate Lynch of the Rochester office of the Empire Justice Center recently encountered an ME who helped. Her case involved a young child with several impairments, including severe delays in cognitive and communication skills, loss of hearing in both ears, and asthma. The ALJ sent the record to an ME for review. The ME agreed with those impairments, but also emphasized the child's high lead levels. The ME stated the lead poisoning would be a "lifelong problem," with the effects continuing, possibly causing "seizures too." The ME found the overall opinions and symptoms in the record consistent with what would be expected from lead poisoning.

In addition, the ME encouraged follow up with local authorities regarding the lead hazards, stating: "Lead poisoning is a Serious Public Health problem. . . The [Center for Disease Control] uses 5 micrograms [per deciliter to identify Children. This child has 10 units …Lead poisoning causes cognitive, behavior, seizure, brain, and kidney damage."

Exposure to high levels of lead poisoning can be crucial evidence in convincing an Administrative Law Judge (ALJ) there is a basis for the child's problem. Articles in earlier editions of this newsletter provide more detail on how to make arguments based on evidence of lead poisoning. http://www.empirejustice.org/issue-areas/disability-benefits/health-medical-issues/medicaid-to-pay-for.html#.VYB9XMtFC70; http://onlineresources.wnylc.net/EJC/DAP_News/May2008.pdf.

Friendly reminder: make sure to check medical records in children's cases involving cognitive and behavioral problems for any evidence suggesting lead poisoning. And thanks to summer intern Stephanie Johnson for her summary of this case.

COURT DECISIONS

Second Circuit Awards EAJA Fees

North Country lawyer Mark Schneider must live by the adage "if at first you don't succeed, try, try again." After Mark was successful on an appeal to the United States Court of Appeals for the Second Circuit from an unfavorable District Court decision, he found himself back at the Circuit challenging the same District Court's denial of his application for attorney's fees under the Equal Access to Justice Act (EAJA). Remarkably, Mark was successful on both trips to the Second Circuit.

In *Padula v. Colvin*, 2015 WL 2115626 (2d Cir. May 7, 2015), the Second Circuit ruled in a summary order that the position of the government was not substantially justified, thus entitling the plaintiff to an award of attorney's fees under EAJA.

After the Commissioner denied Plaintiff's application for Social Security benefits, the District Court affirmed the decision as supported by substantial evidence. On appeal, the Second Circuit remanded the case to the ALJ, finding the ALJ had not considered all relevant medical and other evidence when it determined Plaintiff's symptoms were not credible. After the remand, the Plaintiff moved for attorney's fees under EAJA for work performed prior to his appeal. To merit an award of fees under EAJA, a plaintiff must show both that he or she was a prevailing party, and that the government's position in the litigation was not substantially justified. The District Court sided with the Commissioner, finding that even though Plaintiff was the prevailing party, the Commissioner's position was substantially justified.

The Second Circuit assessed whether the District Court's determination that the Commissioner's position was substantially justified was an abuse of discretion. Reviewing the evidence, the Circuit court found the Commissioner made no attempt to defend the ALJ's failure to consider the treatment notes of Plaintiff's psychiatrist. The Commissioner's sole contention was that the ALJ reasonably relied on the treatment notes of some visits, where Plaintiff did not report the symptoms at issue. The Second Circuit found the Commissioner had not carried its burden of showing that its position was substantially justified. The Court also found, however, Plaintiff's request for 81.8 hours of work performed was excessive and decreased the EAJA award for work performed in the Circuit by 40% to 49.1 hours. The court then reversed and remanded the case for assessment of the appropriate amount of fees and costs under the EAJA for the District Court case.

Congratulations to Mark Schneider for both victories at the Second Circuit. Clearly, he is not an advocate who takes denials lightly. Thanks to Albany Law School intern Sarah Kempf-Brower for her analysis of this decision.

Is RFC's "Fair" Foul?

Medical source statements using categories such as "fair" or "moderate" can often cause confusion at hearings with vocational testimony and in ALJ decisions. What are the real meanings of those terms and how were they defined—or not defined—in a particular case? Judge David Larimer of the Western District of New York took on this issue in *Borsching v. Colvin*, --- F.Supp.3d. --- (2015), 2015 WL 1868360 (W.D.N.Y. April 23, 2015).

Ms. Borsching's medical history included adjustment disorder, depression, bipolar disorder, anger management issues, social phobia, and anxiety. She also had physical impairments. Her primary care physician had opined she had no useful ability to function in social situations, could not respond appropriately to coworkers, and could not tolerate customary work pressures. A Medical Source Statement (MSS) was submitted to the Appeals Council from her treating psychiatrist, who also quantified a number of restrictions. Although the Appeals Council tacitly accepted the report as new and material evidence, it did not review or discuss it when it declined review.

The ALJ, in formulating his hypothetical questions to the vocational expert on whose testimony he relied, failed to incorporate the limitations imposed by the plaintiff's treating physician. He only accorded "some weight" to the doctor's opinions because "the mental medical source statement provided by [the treating physician] is misleading, in that a rating of 'fair' may in fact preclude the ability to perform work-related activities despite the common meaning of the word."

According to Judge Larimer:

> While the ALJ's Shakespearean conviction that "fair is foul" (*Macbeth* 1:1:12) apparently refers to the pre-printed mental RFC form's use of an "unlimited/good/fair/poor" rating scale, the ALJ committed error when he relied on the alleged ambiguity of the word "fair" to reject the entirety of Dr. Shelly's mental RFC report, which rates plaintiff's ability to interact socially, engage in routine functions, or react to stress as uniformly "poor."

2105 WL1868360, at *4. The ALJ's semantic confusion did not justify his rejecting the opinion. If anything, according the Court, it triggered the ALJ's obligation to seek clarification. The ALJ further erred by failing to take into consideration any of the other factors relevant to the assessment of a treating physician's opinion, including his long treatment relationship, his credentials, or the other evidence supporting his conclusion.

Judge Larimer went on to fault the Appeals Council for failing to address the new evidence from the treating psychiatrist, which included a retrospective opinion relevant to the time period before the ALJ. He noted the treating physician rule applies with equal force at the Appeals Council. The Appeals Council's failure to specify the weight given to the psychiatrist's opinion was reversible error. Judge Larimer remanded the case for proper application of the legal standards and for additional information and clarification, as necessary.

Plaintiff Borsching was well represented in this appeal by Attorney Mark McDonald of Geneva.

Equitable Tolling Applied to Save Federal Cases

Every attorney's nightmare is missing a filing deadline and dooming a plaintiff's case to dismissal. In addition to a claimant losing the right to his or her day in court to pursue legitimate grievances, the specter of attorney malpractice hovers, giving us all the shivers. Two recent cases from the United States District Court for the Northern District of New York presented situations that could have turned out very badly for the Social Security plaintiffs, and their attorneys.

In *Ocasio v. Colvin*, 2015 WL 3447643 (N.D.N.Y. May 28, 2015), the court found equitable tolling applied when the Commissioner moved for dismissal based on the statute of limitations.

Plaintiff's request for review of the denial of her applications for Disability Insurance Benefit (DIB) and Supplemental Security Income (SSI) was denied by the Appeals Council, who sent a notice to Plaintiff's counsel notifying of the right to commence a civil action within 60 days of the decision. The deadline to file was September 3, 2014; Plaintiff filed the complaint on September 5th. In response to the Commissioner's motion to dismiss based on the statute of limitations, Plaintiff argued that her counsel properly filed her complaint on July 25, 2014 when a paralegal from the law firm electronically filed two cases and received a "receipt" from the court documenting the filings.

Upon reviewing the status of recent federal court filings, the paralegal noticed on September 5, 2014, that the firm had not received the appropriate documents pertaining to plaintiff's claim. The paralegal contacted the court, which did not find that any complaint had been filed for the Plaintiff. The clerk's office requested that the receipt be sent to the court and advised re-filing the action. Despite Plaintiff's counsel's testimony, the court's independent review found Plaintiff's counsel had only filed one case on July 25, but not Plaintiff's action. The September 5, 2014 filing of the complaint was thus beyond the statute of limitations.

The court reasoned that unless equitable tolling applied, the case must be dismissed. The court found Plaintiff exercised due diligence in hiring an attorney who should have filed a timely appeal. The court also found Plaintiff had no way of knowing the filing would not be done, and should or could not have done anything further. While the court reasoned the mistakes made in this case were less egregious than in *McCracken v. Astrue*, discussed below, because of the mistaken belief the case had been properly and timely filed, neither Plaintiff nor Plaintiff's counsel would have discovered the problem. The court denied the Commissioner's motion to dismiss, holding equitable tolling was appropriate. Whew!

In the earlier case of *McCracken v. Astrue*, 2013 WL 371672 (N.D.N.Y. January 29, 2013), cited in *Ocasio*, the Court also granted equitable tolling. The Appeals Council sent its denial of review notice on April 8, 2011, starting the 60-day period to file a federal court action. During this time, Plaintiff's counsel sought and acquired a change of forum from the Southern District of New York to the Northern District of New York after Plaintiff moved. Plaintiff's counsel wrongly assumed the local rules between the two districts were identical, and did not file the action electronically. Additionally, counsel for Plaintiff also sent the action to the wrong court address.

Plaintiff's action was returned to her counsel's firm on December 29, 2011, and was not e-filed until January 27, 2012, because counsel was not aware he had forgotten to pay his Northern District biennial dues for the past two periods. The Commissioner moved to dismiss the case based on the statute of limitations.

The court determined Plaintiff had shown both extraordinary circumstances and reasonable diligence necessary to initiate equitable tolling. The court distinguished the case from ones in the past in which attorneys misled or ignored clients, as "counsel's ongoing failures despite a continued, concerted effort to successfully litigate [Plaintiff's] case, still rise to the level of extraordinary." The court found counsel's errors would not individually merit equitable tolling, but in the aggregate should be categorized as extraor-

(Continued on page 13)

Court Remands to Consider Functioning Outside Structured Setting

In children's SSI cases, the Commissioner's regulations require consideration of how well a child functions both within and outside the confines of any structured setting, such as a special education classroom or a day treatment program.

Senior Judge Thomas McAvoy from the Northern District of New York recently remanded a case because the ALJ failed to carry out this mandate in the regulations. In *Bonet ex rel. T.B. v. Colvin* 2015 WL 729707 (N.D.N.Y. February 18, 2015), the Court ruled that on remand, the ALJ must consider the effects of the child's highly structured environment, and how he functioned outside this structure.

In *Bonet*, the plaintiff applied for SSI on behalf of her minor son, who suffered from ADHD and Oppositional Defiance Disorder. He had been a student at a day treatment program since kindergarten because of behavioral and academic difficulties. The ALJ found the child had a marked limitation in one domain, interacting and relating to others, but did not have an impairment or combination of impairments that met or medically equaled the severity of the Listings. On appeal, Plaintiff argued the child suffered from marked limitations in at least two domains, including attending and completing tasks, and caring for self. Plaintiff contended the ALJ relied on records that described positive aspects of the child's school performance and ignored reports from teachers that he required constant supervision in a highly structured treatment program. Plaintiff also contended the ALJ failed to consider properly the effects of the educational placement on the child's conduct.

The court ruled the ALJ did not take into consideration the difference between the child's school and home setting, and instead discredited Plaintiff's statements regarding the child's behavior when he was at home. The court found the failure to compare the two settings constituted failure to apply the appropriate legal standard with regards to the effect of a "structured or supportive setting;" this failure was grounds for reversal. The court remanded the case to apply the correct standard and consider the effects of a highly structured environment on the child's ability to attend and complete tasks, and care for himself.

Empire Justice Center attorneys Kate Callery and Louise Tarantino represented the plaintiff in this action. Thanks to Albany Law School intern Sarah Kempf-Brower for her summary of this case.

Equitable Tolling Applied—Continued

(Continued from page 12)

dinary. The court found Plaintiff could not have assumed her decision to move, which spurred the change of venue, could have resulted in Plaintiff having to follow up continuously with her counsel or the court, and denied the Commissioner's motion to dismiss.

Both these cases illustrate the many perils in litigation that can be avoided by reading the rules, keeping bar admissions current, checking filing receipts carefully, and generally staying on top of everything going on in cases. Thanks to Albany Law School summer intern Sarah Kempf-Brower for her excellent analysis of these two cases.

Magistrate Judge Remands for Calculation of Benefits

Magistrate Judge Marian Payson of the Western District of New York not only decided the Administrative Law Judge (ALJ) erred in finding a child SSI claimant not disabled; she determined the ALJ reached his mistaken conclusion on an otherwise complete record. She remanded the claim for the calculation of benefits.

In a thorough and well-reasoned decision, Magistrate Judge Payson agreed the ALJ had relied too heavily on the child's IQ scores in finding less than marked limitations in the domain of acquiring and using information. Citing relevant case law and Social Security Ruling (SSR) 09-3p, she found low-average IQ scores did not constitute substantial evidence in the face of other evidence of significant limitations in academic progress.

Magistrate Judge Payson also agreed the ALJ had failed to give proper consideration to the opinions of the child's special education teacher, relying instead on the non-examining state agency consultant. The ALJ did not give good reasons for rejecting the limitations identified by the teacher. Judge Payson cited SSR 06-3p for the proposition that non-medical sources such as teachers are valuable sources for assessing impairment severity and functioning. The ALJ claimed the teacher's opinions were not supported by the record as a whole, yet failed to identify what evidence—other than the IQ scores and the state agency opinion—was inconsistent with her opinion. In her discussion, Magistrate Judge Payson set forth a helpful compendium of supporting case law.

Magistrate Judge Payson disagreed that the child had marked limitations in the domain of interacting with others. He had been diagnosed with ADHD, oppositional defiant disorder, and borderline intellectual functioning. While acknowledging he had some behavioral problems relevant to this domain, she concluded the ALJ's finding of less than marked limitations was supported by substantial evidence. She did note, however, that the ALJ could have more fully explained his evaluation of the conflicting evidence in this domain.

The ALJ had found marked limitations in the domain of attending and completing tasks. Since Magistrate Payson determined there was persuasive evidence of marked limitations in the second domain of acquiring and using information, she concluded a remand would serve no useful purpose. The case was remanded solely for the calculation of benefits.

Kate Callery of the Rochester office of the Empire Justice Center represented the child in U.S. District Court. It is reported at *Vazquez ex rel. J.V. v. Colvin*, 2015 WL 1241251 (W.D.N.Y. 2015).

Get Your Medical Records Electronically!

In the March edition of this newsletter, we sang the praises of Michelle Spadafore and Amy Leipziger for their success in persuading Healthport and IOD to waive copying fees for legal services providers. http://www.empirejustice.org/issue-areas/disability-benefits/non-disability-issues/misc/medical-record-copy-fees.html#.VYBYKstFC70.

Now Michelle advises us we can set up an account for e-delivery of those records, saving trees, money, and time. To set up an account, you need to complete and submit application forms, which were provided by Michelle to the DAP listserv and are available as DAP #571.

For Healthport - Complete the form, making sure to note on it and in your email that you are a non-billable NYS legal service provider. Be sure to include the customer number(s) assigned to your program. Healthport uses the customer number(s) to set up electronic delivery. Email the completed form to HealthportConnect@HealthPort.com.

For IOD - Review information provided and contact edelivery@iodincorporated. Make sure to note that you are a non-billable NYS legal service provider. If there is any problem in processing the non-billable status, contact Rachel Roberts (rroberts@iodincorporated.com).

WEB NEWS

NOSSCR Search Tool Shines

When advocates were unable to access the POMS on the Social Security website recently, a colleague suggested using the NOSSCR website search engine. It worked like a charm, so we are sharing this search tool with you.

http://www.nosscr.org/research-advocates.

Want Access to Client's SSP Info? There's A Form for That

Advocates should be aware that OTDA will not accept the SSA-1696 form to allow access to a client's State Supplement Program (SSP) information. OTDA's counsel's office determined the 1696 form references release of information only to SSA; it needed its own form signed. A copy of LDSS-5024, OTDA's SSP designated representative form is available on OTDA's website.

http://otda.ny.gov/programs/applications/5024.pdf.

CFPB Publishes Fact Sheet on Garnishment Protections

The Consumer Finance Protection Bureau (CFPB) recently published a fact sheet for consumers advising them that Social Security and VA benefits are generally protected from garnishment to pay a debt to a private person or company, and that most debt collectors cannot garnish money in a bank account to pay a debt if it contains those funds.

http://www.consumerfinance.gov/blog/consumer-advisory-your-benefits-are-protected-from-garnishment/.

The CPRB also provided access to a new sample letter to tell a debt collector that a consumer's Social Security or VA benefits are protected from garnishment.

Get All the SSA Data You May or May Not Want

SSA released its Annual Statistical Supplement for 2014, with innumerable tables, charts and statistics—a wonk's dream, available at:

http://www.ssa.gov/policy/docs/statcomps/supplement/2014/index.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. These summaries, as well as summaries of earlier decisions, are also available at www.empirejustice.org.

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

Astrue v. Capato, ex rel. B.N.C., 132 S.Ct. 2021 (2012)

A unanimous Supreme Court upheld SSA's denial of survivors' benefits to posthumously conceived twins because their home state of Florida does not allow them to inherit through intestate succession. The Court relied on Section 416(h) of the Social Security Act, which requires, *inter alia*, that an applicant must be eligible to inherit the insured's personal property under state law in order to be eligible for benefits. In rejecting Capato's argument that the children, conceived by in vitro fertilization after her husband's death, fit the definition of child in Section 416 (e), the Court deferred to SSA's interpretation of the Act.

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 possibility 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.

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

***McIntyre v. Colvin*, 758 F.3d 146 (2d Cir. 2014)**

The Court of Appeals for the Second Circuit found the ALJ's failure to incorporate all of the plaintiff's non-exertional limitations explicitly into the residual functional capacity (RCF) formulation or the hypothetical question posed to the vocational expert (VE) was harmless error. The court ruled that "an ALJ's hypothetical should explicitly incorporate any limitations in concentration, persistence, and pace." 758 F.3d at 152. But in this case, the evidence demonstrated the plaintiff could engage in simple, routine tasks, low stress tasks despite limits in concentration, persistence, and pace; the hypothetical thus implicitly incorporated those limitations. The court also held that the ALJ's decision was not internally inconsistent simply because he concluded that the same impairments he had found severe at Step two were not ultimately disabling.

***Cichocki v. Astrue*, 729 F.3d 172 (2d Cir. 2013)**

The Court held the failure to conduct a function-by-function analysis at Step four of the Sequential Evaluation is not a *per se* ground for remand. In affirming the decision of the district court, the Court ruled that despite the requirement of Social Security Ruling (SSR) 96-8p, it was joining other circuits in declining to adopt a *per se* rule that the functions referred to in the SSR must be addressed explicitly.

***Selian v. Astrue*, 708 F.3d 409 (2d Cir. 2013)**

The Court held the ALJ improperly substituted her own lay opinion by rejecting the claimant's contention that he has fibromyalgia despite a diagnosis by his treating physician. It found the ALJ misconstrued the treating physician's treatment notes. It criticized the ALJ for relying too heavily on the findings of a consultative examiner based on a single examination. It also found the ALJ improperly substituted her own criteria for fibromyalgia. Citing the guidance from the American College of Rheumatology now made part of SSR 12-2p, the Court remanded for further proceedings, noting the required finding of tender points was not documented in the records.

The Court also held the ALJ's RFC determination was not supported by substantial evidence. It found the opinion of the consultative examiner upon which the ALJ relied was "remarkably vague." Finally, the court agreed the ALJ had erred in relying on the Grids to deny the claim. Although it upheld the ALJ's determination that neither the claimant's pain or depression were significant, it concluded the ALJ had not affirmatively determined whether the claimant's reaching limitations were negligible.

***Talavera v. Astrue*, 697 F.3d 145 (2d Cir. 2012)**

The Court of Appeals held that for purposes of Listing 12.05, evidence of a claimant's cognitive limitations as an adult establishes a rebuttable presumption that those limitations arose before age 22. It also ruled that while IQ scores in the range specified by the subparts of Listing 12.05 may be *prima facie* evidence that an applicant suffers from "significantly subaverage general intellectual functioning," the claimant has the burden of establishing that she also suffers from qualifying deficits in adaptive functioning. The court described deficits in adaptive functioning as the inability to cope with the challenges of ordinary everyday life.

***Cage v. Commissioner of Social Security*, 692 F.3d 118 (2d Cir. 2012)**

The Court of Appeals held the burden of proving that drug or alcohol addiction is not material to a disability claim rests with the claimant. It also affirmed the ALJ's finding that the claimant would not be disabled absent drug addiction or alcoholism ("DAA") was supported by substantial evidence even though there was no medical opinion specifically addressing materiality. It ruled that a "predictive medical opinion" addressing the issue of materiality was not necessary.

***Brault v. Social Sec. Admin. Com'r*, 683 F.3d 443 (2d Cir. 2012)**

The Court ruled an ALJ is not required to state expressly his reasons for accepting challenged vocational testimony, nor is the ALJ required to grant the claimant an opportunity to inspect and challenge the VE's evidence. The claimant had challenged the VE's method of "extrapolating" from data to arrive at the numbers of available jobs in the economy, relying on a line of cases holding that although the Federal Rules of Evidence do not apply in Social Security claims, the "spirit" of Rule 702 regarding scientific evidence should. *See, e.g., Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). The court refused to extend the *Daubert* type rule to the Second Circuit. It acknowledged an ALJ need never question the reliability of VE testimony, and agreed evidence cannot be "conjured out of whole cloth," but concluded "the extent to which an ALJ must test a VE's testimony is best left for another day and a closer case."

Institute of Medicine Recommends Validity Testing

SSA currently prohibits the use of symptom validity testing (SVT). See POMS DI 22510.006.D, precluding the purchase of SVT to address questions of credibility or malingering. According to the POMS, "there is no test that, when passed or failed, conclusively determines the presence of inaccurate self-reporting."

But will that prohibition change in light of a recent study by the Institute of Medicine (IOM)? At the request of SSA, the IOM convened a committee to explore the value of psychological testing in SSA disability determinations. The committee found SVTs and PVTs (performance validity tests):

> … provide information about the reliability of psychological test results and can therefore be an important addition to the medical evidence of record. However, validity tests should only be given in the context of broader psychological testing and should only be used to interpret information from the testing in question.

The committee stressed validity tests do not provide information about whether or not an individual is disabled. It recommended, however, that SVTs be required in in claims involving mental disorders unaccompanied by cognitive complaints, or disorders in which physical symptoms are disproportionate to the medical findings, such as chronic pain conditions. And all non-cognitive psychological tests should be accompanied by an assessment of symptom validity.

The committee also recommended cognitive psychological testing be required in claims of cognitive impairments not accompanied by objective medical evidence. Such tests should also include a statement of evidence of the validity of the results.

The committee concluded that standardized psychological tests, including validity tests, are valuable and may increase the accuracy and consistency of SSA's disability determinations. The report is available at http://www.iom.edu/~/media/Files/Report%20Files/2015/SSA_RB.pdf.

How Much is Property in Puerto Rico Worth?

No, we are not in the market for a vacation home. Rather, the issue of valuation of foreign property comes up when trying to show that your SSI client does not have excess resources. Thanks to Mika Aoyama, a paralegal in NYLAG's DAP unit, for sharing the following information on how to get information on the value of property in Puerto Rico.

You can request a value certificate for the property online from the Agency for the Collection of Municipal Taxes in Puerto Rico (CRIM PR) here: https://serviciosenlinea.gobierno.pr/CRIM/Default.aspx. There is a small fee ($2.50) for the certificate. You need the SSN and name of the owner of the property and the parcel number (número de catastro). If you do not have the parcel number, you can search for it here: http://www.satasgis.crimpr.net/flexviewers/cdpr_crim/. It is worth noting that to find the parcel number, you have to have other information about the property (such as the street address).

The certificate is sent to the email address you provide during the request process. A description of the value certificate and other documents available through CRIMPR is provided here (in Spanish): http://www2.pr.gov/Documents/Listado%20de%20Servicios%20En%20Linea.pdf.

END NOTE

Stand Up!

How many hours each day are you standing up or moving around at work? According to a recent *Washington Post* article, experts say you should be up and about at least two hours, and better yet, four. But the average office worker sits about ten hours a day, and then may go home and sit some more.

All that sitting is associated with higher risk of heart disease, diabetes, obesity, cancer, and depression, as well as joint and muscle problems. Even going to the gym before or after work may not make up for sitting all day in between.

How can you get up and about more at work when you might feel chained to your computer? Gavin Bradley, director of Active Working, an international group aimed at reducing excessive sitting, recommends standing as a start. He suggests standing or pacing while on the phone. Hold a walking meeting. Get up and walk to your colleague's office rather than send an e-mail. Use the stairs instead of the elevator. Or get a sit-stand or treadmill desk. According to Bradley, the goal is mixing up activities.

Our metabolism slows down significantly after sitting for just thirty minutes, leading to all sorts of bad things. Research by James Levine, an obesity expert at the Mayo Clinic, shows that those who seem to eat a lot and not work out but never gain weight walk, stand and move throughout the work day. Another plus with more activity, according to Levine, was a 15% increase in productivity.

So get up and get going.