

DISABILITY LAW NEWS

Social Security Issues Regulations on ALJ Bench Decisions

The start of the New Year brings about new procedures at the Social Security Administration (SSA). Advocates should begin seeing the results of regulations that went into effect on October 20, 2004, authorizing Administrative Law Judges (ALJs) to issue oral bench decisions in wholly favorable decisions. The new rules amend 20 C.F.R. §§404.953(a) & 416.1453(a), and were published at 69 Fed. Reg. 61594 (October 20, 2004).

According to SSA, these rules were promulgated as part of its initiative at improving the disability determination process. ALJs were not precluded from issuing oral decisions under the preexisting regulations, and were in fact given the discretion to issue oral decisions under SSA's oral decision initiative in 2000. These new regulations were amended to "facilitate" the use of oral decisions. Such oral decisions allow the ALJ to incorporate by reference in a written decision the findings of fact, rationale and conclusions made on the record at the hearing.

The new regulations limit the use of wholly favorable oral decisions to those categories of cases that SSA identifies. According to the Temporary Instruction issued at HALLEX I-5-1-17, SSA has

determined initially that this procedure may be used at this time only in adult disability claims, *not including DAA claims*. Claims of disabled widows/widowers and disabled adult children under Title II, children under age 18 under Title XVI, "age-18 redeterminations" under Title XVI, and all continuing disability reviews are *not* included. A long or short form written decision will still be necessary in these cases, even, presumably, if an "on the record" decision is issued.

The ALJ must decide at the hearing that a wholly favorable decision is warranted, and announce it at that time. Also, there can be no changes to the findings of fact or the rationale for the ALJ's decision between the time the oral decision is made at the hearing and the written decision is issued. "When the ALJ decides that changes must be made to any of the findings of fact or the rationale of the oral decision, a written decision incorporating the oral decision by reference may not be issued. In such cases, the ALJ must use either the short-form or long-form decisional templates to write the decision; a decision incorporated into the notice will not be acceptable. The written decision will explain that it changes

(Continued on page 2)

INSIDE THIS ISSUE:

REGULATIONS	6
COURT DECISIONS	8
ADMINISTRATIVE DECISIONS	12
CLASS ACTIONS	17
WEB NEWS	18
BULLETIN BOARD	20
END NOTE	22

Disability Law News® is published six times per year by: Greater Upstate Law Project, Inc. 80 St. Paul Street Rochester, NY 14604 Phone: (585) 454-6500

The newsletter is written and edited by Louise M. Tarantino, Esq., Catherine M. Callery, Esq., Barbara Samuels, Esq., Ann Biddle, Esq., and Paul M. Ryther, Esq.

January 2005 issue. Copyright© 2005, Greater Upstate Law Project, Inc. All rights reserved. Articles may be reprinted only with permission of the authors.

Available online at:

www.gulpny.org

ALJ Bench Decisions—continued

(Continued from page 1)

some (or all) of what was announced at the hearing and discuss any changes in the findings and reasons as stated at the hearing.” HALLEX I-5-1-17, § III.F.

According to the new regulations, “if a wholly favorable decision is entered into the record at the hearing, the administrative law judge will also include in the record, as an exhibit entered into the record at the hearing, a document that sets forth the key data, findings of fact, and narrative rationale for the decision.” 20 C.F.R. §§404.953(b) & 416.1453(b).

HALLEX provides more details, including the document – or checklist – that the ALJ should use. See Attachment 1 to HALLEX I-5-1-17. It is also available as DAP #392, available on GULP’s online resource center at www.gulpny.org. This same checklist may be submitted by the claimant or his/her representative, and should become part of the record. The ALJ’s checklist, on the other hand, is entered into the record only when the ALJ announces a wholly favorable decision. If the ALJ begins a checklist and then decides not to issue an oral decision, the checklist becomes an ALJ “working paper” and is not entered into evidence. HALLEX I-5-1-17, §III.A & D.

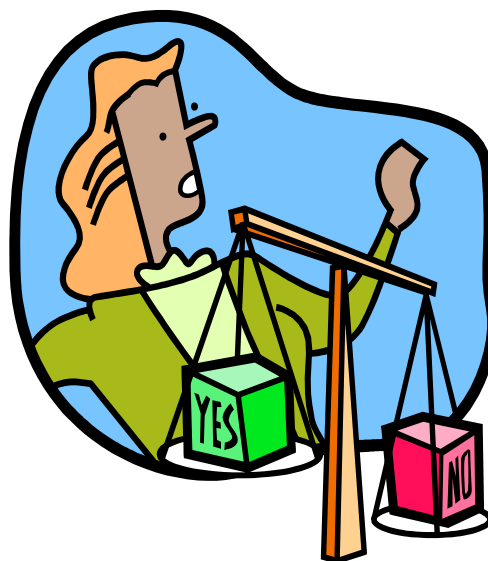
Note that the “checklist” does not negate the need for a “written decision.” HALLEX provides a template for the ALJ to use when issuing the “short form” written decision, incorporating by reference the Findings of Fact and rationale stated at the hearing. See Attachment 2 to HALLEX I-5-1-17. HALLEX also sets forth in detail exactly what is required for an oral decision, including the procedural history, the rationale and conclusion. HALLEX I-5-1-17, §III.C.

In the procedural history, the ALJ must state the issues to be resolved, and note whether the claimant is represented or if an interpreter was present. In the rationale portion, the ALJ must specify the weight given to the evidence, including conflicts between treating and non-treating sources. He or she must also resolve subjective allegations and issues of credibility. The oral decision must also follow the sequential evaluation, specifically announcing the shift in the

burden of proof to the Commissioner at Step Five. In the announcing the conclusion, the ALJs are admonished to make sure the decision is understandable, particularly for unrepresented claimants. They are also warned not to use the oral decision as a forum for criticizing the government, courts, representative or claimant!

The claimant and/or representative have a right to a record of the oral decision, but it will not be provided automatically. A written request is necessary, according to both the regulation itself and the HALLEX provisions. According to HALLEX I-5-1-17, §V, the record can be provided as a typed transcript, a tape recording, a compact disc, or when technically possible, an electronically propagated digital recording.

As the New Year progresses, keep us informed as to whether ALJs are actually issuing bench decisions and whether they are following these new procedures. And let us know how successful you are in persuading ALJs to adopt your checklists and Findings of Fact. Good luck!



Electronic Issuance of HEAP Benefits May Be A Problem for SSI Recipients



Supplemental Security Income (SSI) recipients who also receive food stamps have recently received notices telling them that their Home Energy Assistance Payment (HEAP) benefits are being issued electronically. In the past, HEAP benefits to SSI recipients have been issued in the form of a check. This new method of issuance may be creating problems for some SSI recipients.

Public benefits in New York are accessed through an electronic benefit transfer system (EBT) called QUEST, which allows users to obtain their cash benefits by a swipe card that can be used at ATM machines marked with the QUEST logo. Users can also get “cash back” for amounts not exceeding the amounts that supermarkets permit check writers and debit card users.

Unlike recipients of cash assistance, many SSI recipients who only use their EBT card for food stamps and Medicaid have no experience with the QUEST system; they have no idea how to access a cash benefit using an EBT card because they have never used the card in that way.

The notices that were just sent out to SSI recipients are confusing in a number of ways. They state “check your cash account balance to determine when HEAP benefit is available.” SSI recipients are not likely to know what this means. What cash account? One SSI recipient thought this meant the HEAP benefit was being directly deposited into her checking account, like her SSI benefit. A copy of the notice is available as DAP #393.

Although there is an 800 number on the form, it requires using an extensive touchtone menu (including the entering of a 19 digit card number), which may be difficult for elderly or disabled recipients. The recorded message begins by giving directions on how to reach a “non-surcharging ATM or store,” which may lead the caller to believe that they have reached the wrong number. Further, it does not contain basic information on the QUEST system or how to use it.

The notice indicates that the HEAP benefit automatically expires 90 days from the date of issuance and can only be re-issued if the request is made by September 30, 2005. The notice does not say how such a request is made.

The notice tells SSI recipients to wait 30 days after receipt of the notice to begin checking their account balance to see if the HEAP deposit has been made. This would lead a reasonable person to believe that the benefit would not expire until 90 days after the 30 days from the date of the notice, when the notice says that the benefits are first available. In fact, benefits are available before 30 days.

For example, for notices issued on November 26, benefits were available on (or before) December 7. Thus, although the recipient was told that benefits would not be available until the end of December, the benefits would expire 90 days from December 7, not 90 days from December 26 when the notice directs them to begin checking for their benefits. Thus the 90 period starts running before the person has been told to check their account to see if the benefits are available.

Having been alerted to the potential problems, the Office of Temporary and Disability Assistance (OTDA) has issued a clarifying GIS message to local districts. (GIS 04 TA/DC030, available at www.wnyc.net/pb/docs/gis04+adc030.pdf). OTDA has also committed to mailing brochures on using the QUEST system to all NYSNIP participants, and to changing their notices for the next HEAP year. Additionally, OTDA may take further action if a large number of HEAP grants to SSI recipients remain unredeemed. Please keep Susan Antos at GULP posted if you have clients who are affected by this issue.

Additionally, it looks as though OTDA is seriously considering having the SSI state supplement issued through the EBT system as opposed to the current system of issuing checks. OTDA is rebidding the statewide EBT contract and put some language in the RFP application to this effect. We will keep you posted.

Interpreter Challenge Succeeds

How many times have you been in a hearing where your client gives a long and seemingly complicated answer in a language other than English, and the interpreter turns to the ALJ and says “She said “yes”? Many of the linguistically challenged among us are at a great disadvantage in not being able to understand our clients’ native languages, and are at the mercy of SSA’s interpreters. Not so for Doris Cortes of the Public Interest Law Office of Rochester (PILOR).

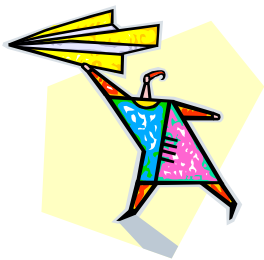
Doris, who speaks Spanish fluently, was recently at a hearing where the interpreter either left out or added some things to the client’s testimony. Of greater concern to Doris, however, was the interpreter’s attitude. She was appalled when the interpreter laughed at the claimant’s testimony about his prescription for Viagra. He similarly attempted to joke about the claimant’s testimony regarding his need to rest during the day.

Following the hearing, Doris wrote a letter of complaint to the ALJ presiding at the hearing, with a copy to the Chief ALJ for the hearing office involved. Doris pointed out how inappropriate it was for the interpreter to make jokes at her client’s expense, and what a chilling effect that could have on a claimant’s ability to testify at a hearing.

Doris has been assured by the chief ALJ that the interpreter will no longer be used by the OHA. Kudos to Doris for taking on this important issue.



Don’t Keep Those Cards and Letters Coming



It often seems that we never get the notices - particularly Title II notices - that we need, yet we continue to be inundated with other clients’ Title XVI notices long after we have closed their cases. SSA actually has POMS governing

“When a Representative’s Authority Expires.” GN 03910.060 provides that representation generally ends when SSA completes action on a claim and the appeal period has expired. Representation also ends when a claimant revokes an authorization, the representative notifies SSA that s/he has withdrawn, or the representative is suspended or disqualified by OHA. In Title II claims, representation is presumed ended when the representative submits a fee petition.

Despite these guides to claims representatives on how to determine if a representative is still involved, many advocates - particularly at this time of year - find their mailboxes full of SSI COLA (Cost of Living

Adjustment) letters. In addition to the annoyance to us, these letters, especially those that are not just routine COLA notices, can lead to more serious problems. Since our former clients see that we have received copies of their notices, they may assume that we continue to represent them. They may rely on us to their detriment to respond to issues raised in the notices.

A recent exchange on the DAP Listserv offered suggestions on abating the onslaught, but there does not appear to be a magic bullet. Some offices copy the first page of the notices and send them back en masse to the SSA District Office with a note that representation has ended. Others send a letter to SSA indicating that representation has ended in individual cases. Unfortunately, SSA does not seem to have a specific form revoking the 1696 (Appointment of Representative). The best practice, while burdensome, may be the individual letters to SSA. Then the only catch is getting SSA to honor them....

Are You A Veteran?

This simple question at intake may lead to an additional pool of benefits to which our clients may be eligible. There are three primary benefits available to veterans: service-connected disability compensation benefits; nonservice - connected pensions; and health benefits. Note that spouses and children may also be eligible for benefits. Veterans' income benefits may well be more each month than SSI benefits and many carry additional health benefits too.

Service-connected disability compensation is available to veterans with evidence of a disability, evidence that the disability was incurred during service, and evidence of a link between the current disability and the service. These benefits are paid regardless of income or assets. Once the VA finds that the disability is service connected, it assigns a percentage to the disability. Compensation depends, in large part, on the percentage assigned to the disability. These benefits are generous compared with SSI rates - a 50% disability rating for a single person pays \$646 per month while a 100% rating pays \$2,239 a month. There are other factors that may increase the compensation above these levels, but at least recognize that the payments levels can be generous. These benefits are not taxable and are not subject to garnishment, except for child support.

In some instances, the client may not be able to prove that his or her disability is service connected. That veteran may still be eligible for non-service-connected payments, sometimes called "improved pensions" or just pension benefits. To be eligible, the veteran needs to have 90 days of service, at least one of which in wartime (wartime is defined by Congress for this purpose and includes, for example, the Viet-

nam 'conflict' and the Gulf War); a permanent and total disability or unemployability (a favorable SSA determination is very helpful here); and meet the means tests for limited income and net worth (which are higher than many SSI rules, such as allowable assets of about \$50,000). For this category, there is no requirement to show permanent and total disability if the applicant meets the service and the income/net worth criteria and is aged 65 or older.

Veterans may also be eligible for health care, both hospital and outpatient care. An application will verify eligibility and assign a priority rating. A low priority rating often has little impact now on available treatment and services. In the future, however, if the VA does not receive sufficient funds from Congress to treat all the veterans who are enrolled, the vets with a low priority status may face cuts in services. Health care costs may be free or have co-payments, usually depending on the vet's income and resources.

For more information, or to obtain any VA applications, go to the website at www.va.gov.

There are veteran service organizations that will assist Vets with applications. The New York State Division of Veterans' Affairs represents veterans. Call 1-800-VETS NYS (838-7697) or visit www.veterans.state.ny.us, to find an office near you. Other organizations include: The American Legion, (317) 630-1323 or www.legion.org; AMVETS, (877) 726-8387 or www.amvets.org; Veterans of Foreign Wars, (816) 756-3390 or www.vfw.org; and Vietnam Veterans of America, (301) 585-4000 or www.vva.org.



What's In A Name—Or Number

What do all those letters and numbers following the social security number mean anyhow? Thanks to Greg Phillips of Segar and Sciortino in Rochester, we now have the answer. The numbers are codes assigned when someone applies for benefits. Social Security identifies the codes on its website (www.ssa.gov) in "Answers to Your Questions," under "Benefits" - "General Benefit Questions."

The direct link is http://ssa-custhelp.ssa.gov/cgi-bin/ssa.cfg/php/enduser/prnt_adp.php?p_faqid=1366&p_created=1095191811&p_sid=WU4Unerh. The list is also available on GULP's on-line resource center at www.gulpny.org as DAP # 394.

REGULATIONS

Cross-Program Recovery Rules Finalized

Ring in the New Year, the Social Security Administration (SSA) announced final regulations implementing the Social Security Protection Act of 2004 (SSPA) provisions authorizing cross-program recovery. 70 Fed. Reg. 11 (January 3, 2005), available online via GPO Access [wais.access.gpo.gov] [DOCID:fr03ja05-5]. Also available at <http://policy.ssa.gov/pnpublic.nsf/LawsRegs>. The proposed regulations were reviewed in the November 2004 *Disability Law News*, available at www.gulpny.org.

SSA notes that although they are issuing the rules as final rules effective on the date of publication, they are also requesting comments on certain material changes from the proposed rules previously published concerning expanded cross-program recovery. These changes would allow SSA to use cross-program recovery if: an individual is no longer receiving benefits under a particular program but is making regular monthly installments to refund an overpayment previously received under that program; or an individual is receiving monthly payments under a particular program and SSA is recovering a previous overpayment

made under that program by adjusting the amount of those monthly benefits. SSA will not implement these changes before considering comments, which are due by February 2, 2005.

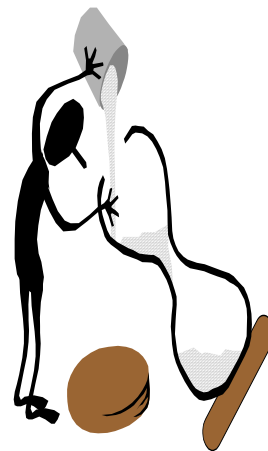
The SSPA expanded SSA's cross-program recovery authority to allow recovery of an overpayment occurring under any of its programs from benefits or payments due in any other of its programs at a rate not to exceed 10 percent of the monthly benefit. It allows for unlimited withholding of past-due benefits in one program to recover an overpayment paid under another program. It also allows for cross-program recovery even if the individual is entitled under the program in which the overpayment was made.

The regulations also provide that, if SSA finds that the overpaid person or that person's spouse was involved in willful misrepresentation or concealment of material information in connection with the overpayment, it can withhold the entire amount of the current monthly benefit.

Don't Forget Those Extra Three Months

At this time of year, some of our clients may begin receiving income tax refunds for child tax credits, earned income tax credits, or other federal income tax refunds. Under the Social Security Protection Act of 2004, they now have nine months to spend any of those refunds that might put them above SSI's resource limits. The same is true for past due - or retroactive - Social Security and SSI benefits. Any such payments received on or after March 2, 2004, will be excluded as countable resources for nine, rather than six, months.

For a more complete description of the many changes brought about by the SSPA, see <http://www.gulpny.org/Disability/SocSecProtectionActof2003.pdf>. This chart, developed by SSA, outlines the provisions of the Act with effective dates.



Final Rules Issued for Cancer Listings

New rules changing Social Security's Listings for Malignant Neoplastic Diseases became effective on December 15, 2004. The final rules affect Listings 13.00 for adults and 113.00 for children.

Section 13.00 now includes listings for all cancers, except for certain ones associated with HIV. Several that have been moved to this section include acute and chronic leukemia, myeloma, and malignant brain tumors.

In addition, key changes include sections addressing when longitudinal evidence is needed (13.00E); how

impairments are evaluated that do not meet a listing (13.00F); how effects of therapy are considered (13.00G); how long the impairment is considered disabling (13.00H); and evaluation of specific malignant neoplastic diseases such as lymphoma, leukemia, breast cancer and brain tumors (13.00K).

The final rule is available on the Federal Register website, www.gpoaccess.gov/fr/ or on the SSA policy web site, <http://policy.ssa.gov>. The final rule was published in the November 15, 2004 Federal Register (69 Fed. Reg. 67018).

GAO Encourages Better SSA-TANF Relations

The Government Accountability Office (GAO) issued a report on September 15, 2004 concluding that more could be done between SSA and TANF (Temporary Assistance to Needy Families) offices to encourage people with impairments to become self-sufficient. In light of the emphasis on work and responsibility stemming from the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, the GAO studied the extent to which TANF recipients with impairments are encouraged to apply for SSI; the extent that work requirements are imposed on TANF recipients applying for SSI, and range of services provided to them; and the extent that interactions exist between the SSI and TANF programs to assist individuals capable of working obtain employment.

The GAO's findings are not unlike those of New York State OTDA's (Office of Temporary and Disability Assistance) SSI Maximization Project, which studied the extent to which local county DSSs encourage Safety Net recipients to apply for SSI (*see Disability Law News*, September 2004, at 2, available at www.gulp.ny.org). The GAO found that most county offices surveyed referred TANF recipients with impairments to SSI; the level of encouragement and sup-

port varied, however. Most of the offices surveyed exempt TANF SSI applicants from work requirements, pursuant to state and county policies and practices allowing such exemptions. (Note that in New York, although this is true in some counties, Governor Pataki vetoed legislation that would have made this a statewide policy. *See Disability Law News*, September 2004, at 8.)

Most TANF offices offer non-cash services such as transportation and job training to SSI recipients. Utilization of these services is low, however, for a variety of reasons, ranging from lack of availability to fear of jeopardizing the SSI application. Finally, although the TANF offices generally had fairly good interactions with other agencies that could help recipients increase self-sufficiency, 95% of the county TANF offices reported that interactions with SSA could be improved.

The GAO has recommended a demonstration project where SSA would work more closely with TANF officials. The full report, entitled *TANF and SSI: Opportunities Exist to Help People with Impairments Become More Self-Sufficient*, GAO-04-878, is available at www.gao.gov.

COURT DECISIONS

Second Circuit Upholds Remand Order

Is a claimant entitled to benefits as a matter of law if the Commissioner fails to call a vocational hearing? The answer is “No,” according to a recent decision by the Court of Appeal for the Second Circuit.

In deciding *Butts v. Barnhart*, 388 F.3d 377 (2d Cir. 2004), however, Judge Winter made some interesting observations about the obligations of the Commissioner – including instructing district judges remanding claims for vocational testimony to consider imposing strict time limits on the Commissioner. He also held that the standard for reviewing a district court order of remand is “abuse of discretion” rather than a *de novo* review.

Plaintiff Butts had been denied disability benefits at Step five of the Commissioner’s “Sequential Evaluation.” Both the Magistrate Judge and District Court agreed that the Commissioner had erred in relying on the Medical-Vocational Guidelines in this case, but remanded the claim for further consideration. [In an interesting footnote, Judge Winter points out that the District Court erred in holding that Mr. Butts did not have nonexertional impairments, noting that limitations such as his inability to stoop, kneel, crouch or crawl are considered nonexertional under 20 C.F.R. §416.969a(c)(vi). *Butts*, 388 F.3d at 382, n. 3.]

On appeal, Butts did not argue that he was disabled as a matter of law. He apparently agreed that although he could not perform the full range of light work, there might be some work he could perform. “[R]ather, he argues that because there was no testimony by a vocational expert, the Commissioner failed to prove he was not disabled and, therefore, he is entitled to benefits as a matter of law.” 388 F.3d at 383. The Court of Appeals, however, held that because the Commissioner had failed to call a vocational expert, the record was incomplete and further findings were appropriate. Judge Winter went to some lengths to distinguish the court’s prior decision in *Curry v. Apfel*, 209 F.3d 117 (2d Cir. 2000), where the court

held that there would be no purpose in remanding the case because the Commissioner had been *unable* to prove that Curry could not work. 388 F.3d at 386.

The Court, however, noted two caveats: Citing his own decision regarding nonacquiescence in *Schisler v. Heckler*, 787 F.2d 76, 82 (2d Cir. 1986), Judge Winter stated: “were a claimant to show that Social Security ALJs reject [the distinction between cases where reliance on the grid suffices and those where the testimony of a vocational expert is essential] as a matter of policy and rely solely on the grid in all or most similar proceedings, other remedies, including judgment for the claimant, should be considered.” 388 F.3d at 387.

Judge Winter, mindful of the “often painfully slow process by which disability determinations are made,” also instructed the district court to direct that the proceedings on remand be completed within 60 days of the district court’s order, and if the deadlines are not observed, the court should order immediate calculation of benefits. In addition, he held that “in cases involving an ALJ’s failure to call a vocational expert, district courts that select remand as a remedy should consider imposing a time limit on the subsequent proceedings.” *Id.*

Finally, in what Judge Winter noted to be an issue of first impression in the Second Circuit, the court held that the proper standard of review regarding a district court’s determination to remand for further proceedings under Sentence Four of 42 U.S.C. §405(g) rather than calculation of benefits is “abuse of discretion.” 388 F.3d at 384-385. In adopting the abuse of discretion standard rather than a *de novo* review, Judge Winter followed decisions of the Seventh, Eighth and Ninth Circuits. Only the First Circuit, in *Seavey v. Barnhart*, 276 F.3d 1, 9 (1st. Cir. 2001) reviewed such decisions *de novo*. In *Butts*, the Court of Appeals found that the district court had not abused its discretion in ordering a remand for further proceedings.

Another Federal Court Rejects SSA's “Fleeing Felon” Interpretation

In the November 2004 *Disability Law News*, we updated recent litigation challenging the Social Security Administration's (SSA) position that an SSI recipient could be fleeing to avoid prosecution without intending to do so or without even knowing that a warrant or prosecution was outstanding. To date, no federal court has agreed with SSA's interpretation of the “fleeing felon” provisions.

Add another federal court to the growing list of those that disagree with SSA. A federal district court in California ruled in November 2004 that SSA erred in suspending SSI benefits for a recipient who was allegedly “fleeing to avoid prosecution” simply because she did not appear in court and left the jurisdiction when she knew charges were pending against her in Virginia back in 1990. *Garnes v. Barnhart*, No. C 02-4428 VRW (N.D. Cal. Nov. 5, 2004).

In his decision, the Chief Judge completely rejected SSA's expansive interpretation of the statutory provision that provides for suspension of SSI benefits when an individual is fleeing to avoid prosecution. 42 U.S.C. §1382(e)(4)(A). In particular, the court found SSA's contention that there was no intent requirement in the statute to be “unsupportable.” He concluded that SSA's interpretation was inconsistent with dictionary definitions and with the interpretation the courts have given to similar language in a federal criminal statute providing for tolling of the statute of limitations when an individual is “fleeing from justice.”

The court also found SSA's policy at odds with its own regulations, which require a warrant or order

“issued by a court or other duly authorized tribunal on the basis of an appropriate finding that the individual is fleeing, or has fled, to avoid prosecution. 20 C.F.R. §416.1339(b)(1)(I). SSA's policy to take steps to terminate benefits simply on learning of the existence of an outstanding warrant “would make this language superfluous.”

The plaintiff was successful before an Administrative Law Judge (ALJ), but had the decision overturned by the Appeals Council after own motion review. The federal court judge took the Appeals Council to task, noting that it made no findings regarding the plaintiff's mental competence or whether it was financially or logistically possible for her to resolve the legal issues pending against her in Virginia.

The *Garnes* decision is the fourth district court decision to find SSA's policy unlawful with respect to this statute. Additionally, this decision breaks new ground in its emphasis on the need for the agency to establish the individual's mental capacity to form the requisite intent, particularly when the individual is receiving benefits on the basis of a documented mental impairment.

Gerald McIntyre of the National Senior Citizens Law Center in Los Angeles represented the plaintiff in this case. Great job!



Order Your Benefits Management Manuals Now!

The 2004 edition of *Benefits Management for Working People With Disabilities: An Advocate's Manual*, authored and updated by Ed Lopez and Jim Sheldon, are available through GULP. The 210-page manual is by far the most comprehensive treatment of the many issues relating to work and benefits available. It contains a new chapter on Medicaid for Persons with Disabilities. An order form is available on GULP's websites at:

www.gulpny.org/Publications/Benefits%20Manual%20Brochure.pdf

Magistrate Remands to Different ALJ for Closed Period

Because of lengthy delays in the administrative and judicial appeals process in Social Security cases, many claimants file another application while an appeal is pending on their initial claim. Happily, many of these subsequent applications are approved at the initial application stage or, more rarely, after an ALJ hearing. There is some risk, however, that the Appeals Council will exercise its own motion review power to evaluate the second claim as part of the earlier case. Also, if the first case is remanded for further administrative action, there is the fear that some ALJs will try to reopen the subsequent claim as well.

With that backdrop, we are happy to report that a recent Magistrate's recommended decision gives us some hope that we will be able to surmount efforts to overturn second favorable decisions. In the case of *Serrano v. Barnhart*, 02-CV-1517, NDNY, the plaintiff was appealing an unfavorable decision issued by ALJ Franklin Russell. While her case was pending appeal, she reapplied and was awarded benefits on her second application in an on-the-record decision by ALJ Lischak.

In the first claim, SSA requested that the federal court case be remanded because the ALJ had committed some legal errors. Although requesting a remand, SSA would not agree to assign the case to a different ALJ and would not agree to limit the time period covered on remand to the period before ALJ Lischak's favorable decision. Plaintiff's attorney refused to accept the remand and asked the court for the relief

plaintiff sought, i.e., a different ALJ and a closed period of review.

Magistrate Judge David Peebles issued a decision granting SSA's request for a remand. Because the ALJ involved in the case "has been the subject of both controversy and significant criticism for his rigid views and potential predisposition against Social Security claimants," the Magistrate also recommended the "extraordinary measure of directing the reassignment of this matter to another ALJ on remand." The Magistrate cited the *Pronti* decision. See September 2004 *Disability Law News*.

The Magistrate also noted that only the closed period would be the subject of the remand, since the request to limit the period of review on remand to a closed period was not controversial or challenged by SSA. Lastly, the Magistrate recommended that because the case had been pending for some time, a sixty-day limit for completion of further proceedings would be appropriate, citing the *Butts* case discussed on page 8 of this newsletter. The government filed objections to the Magistrate's recommended decision, but only as to this issue of completing the remand proceedings within sixty days. No final decision has yet been issued.

The plaintiff was represented by GULP's Louise Tarantino in this case referred by the Legal Aid Society of Mid-New York. A copy of the Magistrate's recommended decision is available as DAP #395.

Federal Court Filing Fees to Increase



Effective February 7, 2005, the civil filing fee in all U.S. District Courts will increase from \$150 to \$250 in accordance with the Consolidated Appropriations Act of 2005. The Act was passed on December 8, 2004, amending 28 U.S.C. §1914(a). This increase should not affect too many of our clients, since most should be able to secure a fee waiver through a Motion to Proceed *in forma pauperis*.



Federal Court Remands DA&A Case

Judge Siragusa of the Western District recently issued a remand order in a case involving a claimant who was admittedly continuing to use marijuana throughout most of the time of her application. The judge agreed with plaintiff's contention that the record did not contain persuasive proof that her psychiatric symptoms were largely controlled when she was compliant with treatment or abstinent.

The ALJ in this case had found that the claimant's condition met Listing 12.09 for substance addiction, referring back to Listing 12.03, even though 12.03 is not one of the several listings referred to in 12.09! He went on, however, to find that her drug addiction was material to her claim. Plaintiff argued that although her symptoms admittedly were exacerbated by substance abuse, "it does not necessarily follow, however, that symptoms that emerge with intoxication would disappear without intoxication, where, as here, the record is 'fundamentally inconclusive.'" *Ostrowski v. Barnhart*, 2002 WL 22439585, *3 (D.Conn. Oct. 10, 2003).

The Court agreed that the ALJ's determination of materiality was not supported by substantial evidence. Judge Siragusa found that the record needed further development to support a decision that drug addiction was the cause of disability independent of any underlying mental condition, as well as further evidence to sustain a conclusion that her mental condition is stable when she is compliant with medication.

The judge cited with approval those cases from other circuits, as well as several district court decisions in New York, holding that the plaintiff bears the burden of proving that substance abuse is not a contributing factor material to the disability determination. He did, however, include in his remand order a number of specific recommendations based upon suggestions from the parties. Most significant among them, in addition to ordering the ALJ to seek input from the plaintiff's treating sources, is the requirement that materiality be evaluated in accordance with SSA Emergency Teletype No. EM-96-94 (August 30, 1996), particularly Answer 29 ("When it is not possible to separate the mental restrictions imposed by DAA and the various other mental disorders shown by the evidence, a finding of 'not material' would be appropriate.")

The Emergency Teletype cited by the judge can be found at www.ssas.com. The Social Security Advisory Service is a website that offers information about Social Security but is not affiliated with SSA. To access EM-96-94, click on the button for SSAS files near the bottom of the home page. Judge Siragusa's decision is available as DAP # 396 (which can be accessed on GULP's online resource center at www.gulpny.org).

GULPer Kate Callery, along with Michael Bonsor of PILOR, helped work this magic. We'll keep you posted on Mike's progress with the remand.

Electronic Case Filing Required

For those few advocates who have been living under a rock or toadstool for the past year or are new to federal court practice, all the courts now require electronic filing. Attorneys should register with the district courts in which they practice to use the Case Management/Electronic Case Filing System (CM/ECF). Each district court has its own rules, and most have tutorials and instructions on their web sites. Go to www.uscourts.gov, and click on Court Links at the top of the page.

Note that there are special rules for Social Security cases in order to preserve privacy that may vary from district to district. For example, in the Western District, the complaints are still filed the "old-fashioned" way, although a redacted version is entered into the electronic record. The transcripts, however, are served and preserved only in hard copy, and only counsel and court personnel are given access to the electronic records. On the other hand, the Southern District exempts Social Security cases from ECF all together. Begin the new year by getting up-to-date on CM/ECF!

ADMINISTRATIVE DECISIONS

Pit Bull Advocacy Results in Award and Large Retro

Tenacity cannot be taught. It is an instinct that many good advocates possess and exploit for the benefit of clients. A fifteen-year-old case handled by several advocates at the Legal Aid Society of Northeastern New York (LASNENY) demonstrates a doggedness that we find admirable.

The client first filed an application for Title II benefits in 1988, based upon a combination of impairments including, most significantly, chronic back, neck, arm and leg pain, and a problem in his right eye.

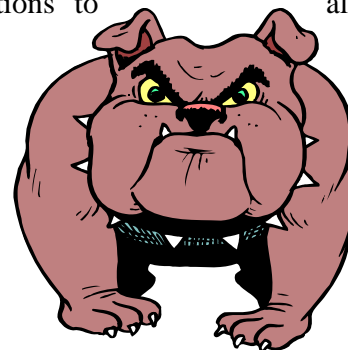
His case was denied at the Administrative Law Judge (ALJ) level in 1989 and he filed a request for review with the Appeals Council. In 1989, the Appeals Council remanded the case to the same ALJ, who again denied the claim after a hearing in 1991. The client went back to the Appeals Council, which denied the request for review. In 1991, the client filed a civil action in the Northern District of New York. In 1994, the parties stipulated to a new hearing, based upon the settlement in *Stieberger v. Sullivan*. Another administrative hearing was held in 1994 and again the claim was denied.

The client returned once again to federal court, and in 1997, the case was remanded. The ALJ then convened a remand hearing in 1999 and denied the

claim after that fourth hearing. The client went back to federal court a third time. Again, there was a stipulation for a new hearing in 2001, this time because the hearing tape of the 1999 hearing could not be located.

That hearing was ultimately held in August 2003 after several adjournments, one due to the untimely death of the vocational expert scheduled to testify, and one due to the illness of the ALJ. The fifth time was the charm and the ALJ issued a fully favorable decision after that hearing. The client received an award of \$148,959.00. Perhaps it was a recognition that the client, and his advocates, were not going to give up, but in this case perseverance did pay off.

Thanks to Joy Smith from LASNENY's Saratoga office, the last in a line of able advocates who handled this case, for this remarkable summary. Congratulations to all.



Finding NYC Interim Assistance Info

When filling out your DAP case closing forms, we ask that you be as accurate as possible in calculating the amount of interim assistance recovered in an SSI case for a Safety Net recipient. Many advocates, particularly those in New York City, have told us that it is difficult to get the interim assistance amount from the local DSS or HRA.

For New York City advocates, we have the name of an HRA contact who can provide the information you are looking for. The person to call in HRA's Division of Accounts Receivable Billing unit is Bill Neave. His phone number is 212-331-3840. He requires an authorization from the client to release benefit information to a representative. Let us know how this contact works out.

Listing 12.05C Argument Successful

Once in awhile, we find an Administrative Law Judge who actually gets it – Listing 12.05C, that is. Jody Davis, a seasoned paralegal at Legal Assistance of the Finger Lakes, now part of LAWNY, recently convinced a West Virginia ALJ that her client met the listing.

Jody's client is a 21-year-old woman who collected SSI benefits as a child. She did not challenge the termination of those benefits, so had to reapply. Luckily she found Jody to help her with her appeal. Jody proved not only that her client's IQ was below 70, but also that her adjustment disorder constituted a secondary impairment under 12.05C. The ALJ agreed that the current evidence established that the "claimant's capacity to manage even modest stress, accept supervision or function at socially acceptable levels is in grave doubt." He found that her "adjustment disorder results in frustration, anxiety, and depression due to intellectual limitations and a lack of maturity."

The ALJ quoted at length in his decision from "comments" offered by SSA's Office of Disability Programs, which emphasize, among other things, the extent to which adjudicators should refer to the DSM-

IV-TR for evaluating the degree of deficits in adaptive functioning required to satisfy the listing. The comments also reiterate that the regulations were amended in 2000 to "clarify" that SSA does not necessarily require evidence actually from the developmental period to establish that the impairment began before the end of the developmental period. Rather, evidence demonstrating or supporting onset before age 22 is sufficient.

In deciding this claim, the ALJ acknowledged that some of the claimant's earlier IQ scores were in the borderline rather than mildly retarded range. He recognized, however, that her impaired academic functioning, as well as evidence of deficits in intellectual functioning, work performance and general presentation demonstrated deficits in adaptive functioning. He noted that the earlier higher scores "can be explained by the probability that claimant had reached her intellectual potential at that earlier age and that as she grew older, she was 'left behind.'"

And Jody managed all this despite video teleconferencing and a vocational expert. Congratulations to Jody- and let's invite this visiting ALJ back!

ALJ Reopens CDR Denial

What happens when an advocate pushes the reopening envelope and the ALJ pushes it even further? Great things – especially when the advocate is Bruce Caulfield – another seasoned paralegal hailing from Neighborhood Legal Services in Buffalo.

Bruce's twenty-two year old client had been awarded SSI benefits under Listing 112.05C in March 1995 based on her mental retardation. Her benefits were terminated in September 2000 at her age 18 review. Her mother, who is herself learning disabled, never appealed. She reapplied in September 2001, but did not appeal her December 2001 denial. When she reapplied in June 2002, she found Bruce and the rest is history.

The ALJ determined that the claimant's September 2000 disability cessation notice was an "initial determination" subject to the reopening regulations. Although he did not articulate it in his decision, he obvi-

ously agreed that the claimant's June 2002 application constituted a constructive request for reopening within the two-year time period mandated by 20 C.F.R. §416.1488, and that the claimant had demonstrated "good cause" under 20 C.F.R. §416.1489.

The ALJ then applied the "medical improvement" standard for continuing disability reviews, and determined that there had been no medical improvement in the claimant's condition since she was initially determined to be disabled. He relied in part on a VESID evaluation revealing that she had significant barriers to competitive employment, including a high rate of absenteeism due to leg pain and "generally fragile work tolerance." She was unsuitable for job placement due to her problems with retention, distractibility, emotional immaturity, and slow pace. Her benefits were restored for the entire period.

Way to go, Bruce!

ADC/TANF Income Treated as Loan for SSI

Elizabeth White, a welfare advocate at Neighborhood Legal Services in Buffalo, recently managed to convince an ALJ - and possibly the Appeals Council - that income received under the AFDC program (“Aid to Families with Dependent Children”- now TANF - or Temporary Assistance to Needy Families) should not be counted as “income” for purposes of computing a claimant’s retroactive Supplemental Security Income (SSI).

When SSA first informed the claimant of the amount of her retroactive award, she was told that she did not owe any money to the Department of Social Services. (Presumably because she was on ADC, there was no “interim assistance” owed to the county. “Interim Assistance” agreements apply only to Safety Net Assistance - formerly Home Relief - cases. The government typically “recoups” federal benefits such as AFDC/TANF by reducing a claimant’s retroactive SSI award by her incremental share of her past ADC budget.) The claimant later learned, however, that a lien had been placed on her home by the county.

When the client finally found Beth White, she argued that because a lien had been placed on the client’s home that would recoup the AFDC benefits when the property was sold, the benefits constituted a loan. They should thus have been exempt income under 20 C.F.R. §416.1103(f) and not used to reduce her retroactive SSI payments.

Despite the fact that Beth had received a letter from SSA stating that AFDC income was not considered a loan for SSI purposes, the ALJ held otherwise. He noted a conflict between two sections of the SSI regulations: 20 C.F.R. §416.1124(c)(2) does not specifically exclude AFDC payments as unearned income for SSI purposes; 20 C.F.R. §416.1103(f), however, dictates that proceeds of a loan are not considered income.

According to the ALJ, “[w]here there is an apparent conflict, it is the responsibility of the Administrative Law Judge to resolve that conflict fairly and equitably, so that no untoward outcome will occur that unfairly punishes or impacts the claimant.” Following that guideline, the ALJ found that the AFDC payments should be considered a loan so that the claim-

ant would not be adversely impacted by the conflict between the two regulations. In other words, if the AFDC income were counted as income for SSI purposes, thus reducing her back award, *and* the county collected on its lien, the claimant would have “paid back” her public assistance twice. The ALJ implied, however, that AFDC payments, without proof of a bona fide loan agreement (i.e. a lien), would be countable income.

Not surprisingly, the Appeals Council - with the prompting of the Regional Commissioner - decided on its own motion to review the ALJ’s decision. That is where the plot thickens. Although the Appeals Council found that the ALJ’s decision was based on error of law and not supported by substantial evidence, it looks like Beth’s client may still win – either at the Appeals Council or on remand!

Basically, the Appeals Council agreed that the lien represented a valid loan for SSI purposes. It questioned, however, whether the claimant’s “Family Assistance” (FA - or New York’s version of TANF) payments were actually paid out of federal funds, or were paid with non-federal funds under a special provision of the NY Soc. Serv. Law §349.2. If the FA was federally funded, the payments would be considered income – *unless* proceeds of a bona-fide loan!

So, if Beth can prove to the Appeals Council within 30 days - or if not, to the ALJ on remand - that the payments were made with federal funds, it looks like they will be considered a loan and thus not counted as income. As an added bonus, the Appeals Council also implies that if the FA payments were made out of non-federal funds, they will still be excluded as income under the usual SSI rules! Apparently, the ALJ’s error of law was the part of his order that directed SSA to pay the claimant’s SSI underpayment directly to DSS. The Appeals Council ruled under the inalienability regulation (20 C.F.R. §416.533) that was not permissible.

Beth jumped through incredible administrative hoops to achieve this apparent victory for her client. We will keep you posted as to the ultimate outcome. But in the meantime – congratulations to Beth for coming up with this novel argument!

Claimant Meets Listings Despite DA&A

In yet another example of the power of combining an experienced advocate with a sympathetic ALJ, Victor Torres of Brooklyn Legal Services recently got a favorable “bench decision” in a case where his client continued to abuse prescription drug and alcohol subsequent to her application. [See related article on page 1 of this newsletter describing the new regulations authorizing favorable bench decisions.]

Victor’s client had abused substances most of her adult life, and had been in and out of treatment over the years. Although she had been given rather vague psychiatric diagnoses just prior to her application in December 2003, the main focus of her treatment was still substance abuse. It was not until Victor combed through her voluminous record that he began to uncover hints of past physical and sexual abuse by her father. His client had never even admitted this to her psychiatrist. With Victor’s encouragement, she finally did so, and got into meaningful psychiatric treatment shortly before her hearing. Her psychiatrist was able to recognize and appropriately treat her major depressive and post traumatic stress disorder.

Victor convincingly argued to the ALJ in a prehearing memo that his client had been misdiagnosed and mistreated, in large part because of her inability to admit

to her past abuse. He pointed out that it was not unusual for this to happen, nor is it unusual that symptoms of post traumatic stress would not surface for many years after the precipitating event. He also argued that her substance abuse should not be considered material to her claim. She was in fact “self-medicating,” as her abuse coincided with an increase in her symptoms. Also, despite the fact that she had continued to use substances subsequent to the date of her application, she had abstained since beginning proper treatment. Her symptoms had nonetheless continued.

The ALJ issued an oral decision from the bench granting benefits. His written decision consisted of relatively bare bones findings of facts – never even mentioning drug or alcohol abuse, and agreeing with Victor’s argument that the client’s major depressive disorder meets Listings 12.04.

Kudos to Victor for a job well done. Not only did he secure benefits for his client – even more importantly, his sensitive representation helped her get the treatment she needs. As Victor described it, it was a gut-wrenching case that he will not soon forget. We suspect that his client will not forget him either.

SSA’s Electronic Data Suspect

Remember that old adage, “garbage in, garbage out?” The GAO (General Accountability Office) has questioned the reliability of SSA’s electronic administrative data in its disability programs. The GAO reports that inadequate data entry controls have resulted in missing data in some electronic disability records. For example, in some cases studied by the GAO, the claimant’s educational level - a critical factor in the disability decision - was missing. Of even greater concern to the GAO is the lack of any policies or procedures at SSA to verify the electronic record against the case file, so there is no assurance that the codes entered validly reflect the claimant’s actual impairment or education level. SSA’s transition to a total electronic system should reduce some of these inaccuracies, in that the number of times data is reentered

will be limited. SSA’s planned changes, however, do not address the basic data entry problems identified by the GAO.

The moral of the story? Make sure you check your client’s file for accuracy of basic information. A simple mistake as to age or educational level can haunt a claimant for a long time. The complete report, entitled “SSA’s Disability Programs: Improvements Could Increase the Usefulness of Electronic Data for Program Oversight,” GAO-05-100R, is available at <http://searching.gao.gov/query.html?col=+&qt=+05-100R&charset=iso-8859-1&q1=&x=2&y=10>

Appeals Council Remands to Apply Treating Physician Rule

Sometimes less is more. Private attorney Jere Fletcher of Rochester sent the Appeals Council a one-page missive beginning with “O Treating Physician Rule, wherefore art thou?” In addition to arguing that the ALJ had ignored the opinions of the treating physician and consultative examiner, Jere pointed out that in the course of the hearing, the ALJ had faulted the claimant for not having carpal tunnel surgery. He went on to discuss the claimant’s choice of cars, and give an extemporaneous history of the origin of the handshake. (Apparently, according to the ALJ, it was a test to find out if a knife was hidden in the other person’s hand).

The Appeals Council was obviously more familiar with the whereabouts of the treating physician than the ALJ. It issued a four page remand order directing the ALJ, among other things, to recontact the treating

physician, and to give further consideration to his opinions pursuant to 20 C.F.R. §404.1529 and SSRs 96-2p and 96-5p. The Appeals Council also admonished the ALJ for finding the claimant’s alleged depressive symptoms to be a “non-severe” impairment without rating the degree of his functional limitations or following the “special technique” required by 20 C.F.R. §404.1520a. It also criticized the ALJ for failing to consider the claimant’s obesity under SSR 02-1p. Finally, it concluded that in assessing credibility, the ALJ had not evaluated the side-effects of the claimant’s prescribed medications, nor had he evaluated the other areas specified in 20 C.F.R. §404.1529 (c).

Jere certainly knew how to catch the attention of the Appeals Council!

Who’s Who At the Appeals Council



Who are all those different people who sign off Appeals Council decisions? David Ralph of Chemung County Legal Services (now part of LAWNY) recently reminded us of the various job titles at the Appeals Council.

According to 20 C.F.R. §422.205, Appeals Council “members” [now know as Administrative Appeals Judges (AAJ)] are in charge, and are the only ones who can do anything favorable for a claimant. If and when the Appeals Council actually accepts a case for review, it takes two of them to decide a claim – either negatively or positively. Only an Appeals Council member (and it just takes one) can deny a request for review of a hearing dismissal, the dismissal of a request for review, the denial of a request for review of a hearing decision whenever such hearing decision after such denial would not be subject to judicial review, or the refusal of a request to reopen a hearing or Appeals Council decision.

A decision to deny a request for review, on the other hand, can be made by an Appeals Officer (AO), who is appointed or designated by the Chair or Deputy Chair of the Council. At the end of the day, of course, it is the analysts at the Appeals Council who actually review the cases initially and make recommendations to the AAJs or AOs. *See, e.g.*, HALLEX I-3-120 & I-3-510. If the AO disagrees with the recommendation of the analyst, the case will require the concurrence of the AAJ before returning the case to the analyst. An AAJ can return the case to the analyst directly. HALLEX I-3-540.

For more on who’s who at which Branch of the Appeals Council and how to contact them, see HALLEX I-4-3-104, available at www.ssa.gov. The new ombudsman at the Appeals Council is Terry Jenson, replacing Beatrice Squires. Terry’s fax number is 703-605-7101.

CLASS ACTIONS

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

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

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

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

Information - Ken Stephens (kstephens@legal-aid.org), Legal Aid Society (ask for “Stieberger Hotline” 888-284-2772 or 212-440-4354), Christopher Bowes, CeDar (212-979-0505); Ann Biddle, Legal Services for the Elderly (212-391-0120)

Miller v. Secretary, No. 87-1393T (W.D.N.Y.)
 (Telesca, J.) (“the file access case”)

Description - Plaintiffs challenged SSA’s refusal to permit representatives to review hearing files sufficiently in advance of scheduled hearing dates. Settlement in 1988 requires SSA to send notice to all ALJs nationwide setting forth duty to provide access to the claimants’ files, and when not possible, to evaluate whether there is good cause to postpone the hearing.

Relief - Nationwide instruction directs ALJs to provide adequate access to hearing files, and to consider adjourning hearings for good cause where such access is not provided. The instruction remains useful and can be found at http://www.gu.lpny.org/Disability/Miller_%20Instructions.htm.

Citations - Unpublished order (1988) requires national instruction to all ALJs of policy, and duties described above.

Information - Catherine M. Callery, Greater Upstate Law Project (800-724-0490, 585-454-6500)



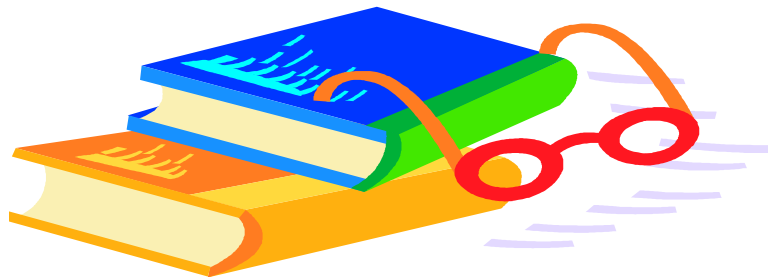
WEB NEWS-CONTINUED

Compilation of Kids SSI Materials

The Health and Disability Advocates website contains a compilation of materials from the Social Security Administration (SSA) and advocates that are essential in preparing and pursuing children's SSI cases. The materials include:

- 2004 Children's SSI Disability Manual
Parts 1 & 2
- Activities Sorted By Domain
- Adaptive Function From Development
Perspective
- AUCD Training Materials
- Children's Functional Assessment
- Child MR MB Training Pars A, B, C1
- Dedicated Savings Accounts
- Dedicated Savings Account Flyer For Clients
- Early Child Development and Learning
Milestones
- Early Intervention
- Final QA Compendium
- IDEA Materials
- Index To Children's Listed Impairments
- Milestones - Red Flags
- New Development In SSI Childhood Disability
- NOSSCR Disability Guide for Young Adults
- Relationship - FE Domains and Adapt
Behavior
- School Record Request
- SSA Teacher Questionnaire

www.hdadvocates.org/ProgramsChildren/intro.htm



Looking For Help on Dealing with Vocational Experts?

Social Security's Offices of Hearing and Appeals (OHAs) seem to be using vocational experts at more and more hearings. We could all use some guidance on how to cross examine vocational experts. Visit a website put together by a private Social Security attorney for some very helpful sources of information. A section on the website entitled "Vocational Expert Problems" lists helpful case citations, links to U.S. Department of Labor publications, Census Bureau data and more.

www.traverlaw.com

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. 1265 (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").

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.

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

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 from 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.

Draeger 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.

Shaw v. Chater, 221 F.3d 126 (2d Cir. 2000)

The Second Circuit has reaffirmed its support and approval of retrospective medical evidence and its continued insistence that SSA adhere to its own treating physician rule. In addition, the Second Circuit has found as a matter of law that an SSI application must be treated as a concurrent SSD application.


END NOTE

Will Water Melt That Fat Away?

It is that time of year again. How many of us haven't resolved to eat better, exercise more, and loss those extra holiday pounds? And what diet doesn't encourage us to drink at least eight glasses of water a day to help shed that weight? But does all that water actually help? Not according to a recent report by the Institute of Medicine. As reported in the *Wall Street Journal*, there is no scientific evidence that people need eight glasses of water each day to avoid dehydration.

Nor is there support for the theory that drinking lots of water, especially before meals, will fill you up and reduce hunger. Studies at the Pennsylvania State University found that people who drank extra water (or other beverages) before or during meals ate just as much as those who did not. German studies have also debunked the claim that water raises your metabolism, thus promoting weight loss. There does not seem to be support for the theory that extra water burns more calories. Nor it does to appear to burn more fat. Some bottled waters may claim to contain more alkaline than other bottled waters, which sup-

posedly helps your body alkalize fatty acids and sugars. Apparently none of the studies relied upon for these claims, however, support this theory.

On the other hand, drinking those eight glasses of water each day probably will not hurt you. And if you are replacing soda or other high-calorie drinks with water, you might even loss a few pounds. The bottom line, however: eat less, exercise and drink water when thirsty.





Contact Us!

Advocates can contact the DAP Support attorneys at:

Louise Tarantino: (800) 635-0355, (518) 462-6831, ltaranti@wnylc.com
 Kate Callery: (800) 724-0490 ext. 2, (585) 454-6500 ext. 2, (585) 295-5727, kcallery@wnylc.com
 Barbara Samuels: (212) 431-7200, ext. 129, bsamuels@legalsupport.org
 Ann Biddle: (212) 391-0120, ext. 13, biddleny@aol.com
 Paul Ryther: (585) 657-6040, pmryther@rpa.net

SUBSCRIPTION INFORMATION

Disability Law News© is published six times per year by Greater Upstate Law Project, Inc., an anti-poverty advocacy, coordination, and support center. A one-year subscription to the Disability Law News is \$75.00.

To order, please complete the information below and mail, together with your check, to:

Disability Law News
c/o Greater Upstate Law Project, Inc.
80 St. Paul Street, Suite 660
Rochester, New York 14604

Please enter my one-year subscription to the Disability Law News at \$75.00.

Name

Organization

Street Address

City

State

Zip

Phone Number

Fax Number

Email address

