

DISABILITY LAW NEWS

We're In the Money: SSA Pays COLA for 2012

The Social Security Administration (SSA) announced a cost-of-living adjustment (COLA) for 2012, the first since 2009. Monthly Social Security and Supplemental Security Income (SSI) benefits for more than 60 million Americans will increase by 3.6 percent. This marks the first increase in the Consumer Price Index (CPI) since 2008; since the Social Security Act ties any increase in benefit levels to an increase in the CPI, a much needed cost-of-living adjustment will finally be implemented.

The new levels for 2012 are as follows:

The monthly SSI federal benefit rate for an individual will increase from the previous level of \$674 to \$698 and the monthly rate for a couple will increase from \$1,011 to \$1,048. The New York supplement will remain at \$87 for individuals and \$104 for couples living alone; the living with others supplement remains at \$23 and \$46, respectively. A 2012 New York State SSI benefit chart is available at: <http://www.empirejustice.org/assets/pdf/issue-areas/disability-benefits/2012-ssi-benefits-level-chart.pdf>.

The Substantial Gainful Activity (SGA) threshold for Non-Blind has increased to \$1,010 and for Blind has increased to \$1,690. The Trial Work

Period (TWP) threshold remains the same at \$720.

The maximum taxable earnings for OASDI (old-age, survivors and disability insurance) purposes will increase to \$110,100 in 2012. The quarter of coverage amount has also increased to \$1,130.

Most beneficiaries will see an increase in Medicare Part B monthly premiums from \$96.40 per month to \$99.90 per month in 2012. Some higher earning beneficiaries will have higher premium rates. <http://www.cms.gov/apps/media/press/factsheet.asp?Counter=4140>



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Can You Keep A Secret?



It was reported in the *Wall Street Journal* on December 15, 2011, that ODAR is in the process of instituting a new policy that the identity of the ALJ assigned to each

claimant's case will be secret until the time of the actual hearing. Although there apparently has not been an official announcement of this new policy as the date of publication of this newsletter, some representatives around the country have already received notices about it.

The alleged rationale for this new policy is to prevent the purported practice of some advocates who - according to ODAR - “forum shop” to avoid particular ALJs. Advocates have raised concerns, however, that this new policy will impair their ability to assist ODAR by meeting the needs of individual ALJs, and

will also make it very difficult to manage their practices. Not only do different judges benefit from different preparation by representatives, but some need you to set aside more time than others, some need claimants to be prepared in different ways, some need written arguments in advance, and some need you to be prepared to make specific presentations at the hearing. Furthermore, the new policy will frustrate SSA regulations requiring claimants to seek recusal of a particular ALJ as early as possible.

Stay tuned to these pages and the DAP list serve for more information about this new policy as it unfolds.

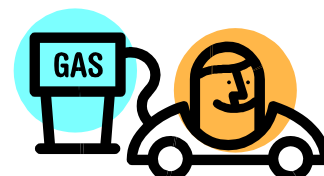
Travel Reimbursement Clarified

With the demise of “temporary remote” hearing sites (see the June 2011 edition of the *Disability Law News*), claimants and representatives now have to travel longer distances to hearing offices. The Social Security Act and regulations allow for reimbursement of travel expenses in certain circumstances. See, e.g., 20 C.F.R. §§ 404.999a-d and 416.1495-1499. Per 20 C.F.R. § 404.499c(d) & 416.1498(d), reimbursement is allowed only if the distance from the person’s residence or office to the hearing site exceeds 75 miles. The amount of reimbursement cannot exceed the maximum allowable for travel to the hearing site from any point with the geographic area of the ODAR having jurisdiction.

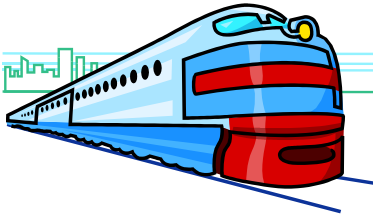
Advocates seeking reimbursement for themselves and their clients will attest that confusion reigns over this issue. At a recent NOSSCR (National Organization of Social Security Claimants) conference, ODAR Deputy Commissioner Glenn Sklar acknowledged that there has been “tremendous confusion” at the ODAR level. He emphasized that there have been no

changes in SSA’s policies and promised to ensure that all hearing offices follow current policy. He did suggest getting prior approval from the hearing office for unusual travel requests such as airfare. He also reiterated that a claimant is still eligible for reimbursement if s/he declines a video hearing and then has to travel more than 75 miles to the in-person hearing site.

He noted, however, that reimbursement is not available if a change in location to a more distant hearing site is made at the request of the claimant or the representative. This qualification is set forth in 20 C.F.R. §§ 404.999c(d)(4) & 416.1498(d)(4).



I've Been Workin' On the Railroad



The Railroad Retirement Act is a federal law that provides retirement and disability annuities for qualified railroad employees,

spouse annuities for their wives or husbands, and survivor benefits for the families of deceased employees who were insured under the Act. These benefit programs are administered by the U.S. Railroad Retirement Board (RRB). It also administers the Railroad Unemployment Insurance Act, and has administrative responsibilities under the Social Security Act for certain benefit payments and railroad workers' Medicare coverage. www.rrb.gov.

Railroad Retirement benefits can be affected by entitlement to Social Security benefits. Since 1975, dually entitled beneficiaries generally receive one check from the RRB. SSA determines the amount due. The Railroad Retirement benefit is then reduced by the Social Security benefit.

Railroad Retirement benefits share some similarities with Social Security benefits, but there are differences. Gene Doyle has alerted to us to one major difference. Unlike disability claims under the Social Security Act, disability annuities are still available from RRB where drug or alcohol abuse (DAA) is

material to a disability claim. Gene has provided us with a Legal Opinion (L-2008-06) from the RRB General Counsel, which addresses disability due to DAA. The opinion is available as DAP #543.

Gene is also working on another case involving the intersection of the RRB and SSA. He is appealing a decision by the RRB refusing to allow the claimant's 1992 application for Social Security benefits to serve as an application for Railroad Retirement disability benefits, despite an RRB regulation that allows for a protective filing date based on an earlier Social Security application. 20 C.F.R. § 217.20(b). The sole reason was that SSA failed to forward his Social Security/SSI disability applications to RRB.

According to Gene, it appears from POMS that, as a matter of policy, SSA never forwards Social Security disability applications to RRB. *See e.g.* POMS § RS 01601.230[C][1] and [2] [available at: <http://policy.ssa.gov/poms.nsf/lnx/0301601230>]. SSA's policy renders the relevant RRB regulation a nullity. Gene, ever the vigilant advocate, is pursuing this issue with SSA as well. He will keep us posted on both fronts.

NOSSCR Position Open

The National Organization of Social Security Claimants' Representatives (NOSSCR), located in Englewood Cliffs, New Jersey, has an opening for a staff attorney. The ideal candidate will have extensive knowledge of both Title II and Title XVI programs, will have appeared at administrative hearings, and will have excellent research capabilities. Salary commensurate with experience. If interested, please send a resume and statement of interest to Nancy G. Shor, Executive Director, NOSSCR, 560 Sylvan Avenue, Englewood Cliffs, NJ 07632; fax to 201-567-1542; or email to nancy.shor@nossacr.org.

REGULATIONS

Final Regs on Prehearing Decisions Issued

In the September 2010 edition of the *Disability Law News*, we reported on proposed regulations governing further review of prehearing decisions - including partially favorable decisions made based on prehearing case reviews or fully favorable attorney advisor decisions. The regulations have been finalized and were published in the Federal Register on October 21, 2011, with an effective date of November 21, 2011.

<http://www.gpo.gov/fdsys/pkg/FR-2011-10-21/pdf/2011-27236.pdf>.

In short, the new regulations revise the procedures for how claimants who request hearings before administrative law judges (ALJs) may seek further review of their fully favorable revised determinations based on prehearing case reviews or fully favorable attorney advisor decisions. SSA will notify claimants who receive partially favorable determinations based on prehearing case reviews that an ALJ will still hold a hearing unless all parties to the hearing notify SSA in writing that the hearing requests should be dismissed.

SSA received only one comment about the proposed regulations, which was the comment letter from DAP Coordinator Ann Biddle, former DAP Coordinator Kevin Cremin and Chris Bowes of CeDar. They had offered suggestions on how to make the regulations more readable, many of which SSA adapted. Their comment letter is available as DAP # 532.

In light of the publication of these final regulations, SSA has rescinded Social Security Ruling (SSR) 97-2p. SSR 97-2p dealt with prehearing reviews. SSA announced that since the new regulations cover most of the issues addressed in SSR 97-2p, it no longer needs the limited additional information in the SSR. It has been rescinded as obsolete.

<http://www.gpo.gov/fdsys/pkg/FR-2011-10-21/pdf/2011-27234.pdf>.

New ADHD Guidelines Issued

The American Academy of Pediatrics (AAP) recently issued updated guidelines for the diagnosis and treatment of attention-deficit/hyperactivity disorder (ADHD). The new guidelines recommend that treating sources recognize that ADHD is a chronic condition and treat it accordingly. Patients will generally require special long-term mental health care. According to the AAP, "ADHD is a condition that generally persists for years and its effect on young patients can extend well into adulthood. For that reason, an approach that keeps a long-term perspective in mind is appropriate."

The AAP also recommended that clinicians should assess a child being evaluated for ADHD for condi-

tions that frequently co-exist with ADHD. These include oppositional defiant disorder and conduct disorder. The recommendation notes that symptoms of these other conditions may be reduced in the course of the ADHD treatment.

The guidelines were published online in the journal *Pediatrics* on October 16, 2011. Thanks to Amy Leach of the Norwich office of Legal Services of Mid-New York for alerting us to these new guidelines. Amy notes that they may be helpful to advocates struggling with ADHD cases, especially when requesting information from treating sources.

Revised Congenital Disorders Listing Proposed

SSA has announced a Notice of Proposed Rule Making (NPRM) for evaluating congenital disorders that affect multiple body systems. The NPRM was published in the Federal Register on October 25, 2011. <http://www.gpo.gov/fdsys/pkg/FR-2011-10-25/html/2011-27357.htm>.

According to SSA, the revisions reflect program experience and address adjudicator questions raised since the last revision to Listing 10.00 in 2005. Among the revisions proposed are to:

- Revise the name of the body system from “Impairments That Affect Multiple Body Systems” to “Congenital Disorders That Affect Multiple Body Systems”;
- Reorganize the introductory text for the adult listings (section 10.00) and childhood listings (section 110.00);
- Clarify guidance on required genetic testing by further explaining what type of testing is acceptable for SSA’s purposes and how the acceptable testing should be used and documented;

- Expand listings for non-mosaic Down syndrome (10.06 and 110.06) and provide guidance in the introductory text for this disorder;
- Remove the term “profoundly impaired” from listing 110.08A; and
- Replace the term “interferes very seriously” in listing 110.08B with “very serious interference.”

SSA specifically notes that only the non-mosaic form of Down syndrome is considered under the listing. According to SSA, the mosaic form is much less common than the non-mosaic form, and its effects are less likely to be of listing level severity. The proposed rules clarify that impairments caused by mosaic Down syndrome will be evaluated in the appropriate body system as either meeting or equally the listings.

Comments are due by December 27, 2011.

GAO Reviews SSI Kids Program

The Government Accountability Office (GAO) has begun a preliminary review of the SSI Children’s program. In testimony before the Congressional Subcommittee on Human Resources and Committee on Ways and Means, the GAO stated that its work in this area is ongoing and offered no recommendations at this point. It plans to issue a final report in April 2012. Highlights of the testimony can be read at GAO-12-196T, available at <http://www.gao.gov/highlights/d12196thigh.pdf>.

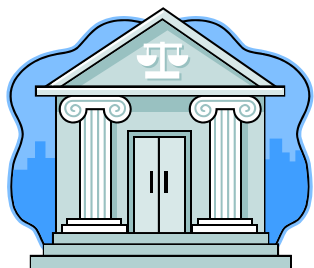
According to the GAO, the numbers of children applying for and receiving SSI benefits due to mental impairments has increased over the past ten years, and now constitute a majority of child beneficiaries. Although half of the children applying for benefits each year are denied, children with mental impairment represent a growing share of those approved. The GAO considered factors for this increase, including but not limited to increases in the number of children living in poverty and increases of diagnoses of children with certain mental impairments.

The GAO analyzed program data and interviewed SSA officials, personnel in field offices and state disability determination services (DDS). It noted that SSA considers a combination of medical and non-medical information in determining eligibility, including use of prescription medications, school records and teacher assessment. Although the officials acknowledged the critical nature of the teacher assessments, the GAO observed that examiners face challenges in obtaining this information, as teacher are often reluctant to complete the assessments.

The GAO also noted that SSA is not conducting timely continuing disability reviews (CDRs) of children on SSI. SSA acknowledged the importance of these reviews, estimating that the CDR process yields a savings - to - cost ratio of \$12.50 to \$1. It pointed, however, to resource constraints for recent decreases in the number of childhood CDRs performed.

COURT DECISIONS

Court of Appeals Defines Representative's Role



In a recent EAJA (Equal Access to Justice Act) decision, the Court of Appeals for the Second Circuit admonished a federal magistrate for blaming the claimant's representative for gaps in the record. Although the

case involves an appeal of an attorney fees award, the underlying issue was whether the attorney for the plaintiff had fulfilled his obligation to present evidence establishing disability. The Court of Appeals found that he had, and held that the District Court's reduction of his fee award was not justified. *Vincent v. Commissioner of Social Security*, 651 F.3d 299 (2d Cir. 2011).

In the District Court, the Magistrate Judge had agreed that the ALJ had failed to develop the record fully and ruled that the claim should be remanded. In so doing, however, he noted that the Ms. Vincent's attorney should have addressed the underdeveloped issues as part of "his ethical obligation to act with reasonable diligence." The "missing" evidence pertained to the ALJ's credibility determination. It involved a question about an apparent exaggeration of Ms. Vincent's work history, which could have been the result of a data entry error, and corroboration of her special education history, which had not been obtained partly because SSA had requested it under her married name. The judge also faulted the representative for failing to submit a brief to the Appeals Council.

When Ms. Vincent's representative moved for fees under EAJA, the Magistrate reduced the requested award by two-thirds based on purported deficiencies in his role in representing Ms. Vincent at the administrative level. The Magistrate relied on the "special circumstances" provision of the EAJA statute to justify his decision. The Court of Appeals acknowledged that the special circumstances exception can be

invoked in the context of the adequacy of representation. It noted, however, that because such reductions could deter representatives' willingness to appeal Social Security denials, clarity was important. It concurred that the duty of the ALJ to investigate and develop the record does not relieve counsel of the duty to provide competent representative, including the obligation to bring to the attention of the ALJ everything that shows the claimant is disabled. But it found that in *Vincent*, the representative had fulfilled his obligation. In fact, the ALJ had not denied benefits based on lack of evidence but rather on his refusal to credit evidence. Furthermore, the ALJ gave the plaintiff or representative no notice of his credibility concerns at the hearing.

The Court found that as a result, the district court "demanded too much of counsel." Counsel should not have "to anticipate and refute all conceivable credibility issues...." His perceived failure to anticipate what were essentially collateral issues to the finding of disability were not "special circumstances" justifying a reduction in his EAJA award. The Court went on to note that the Magistrate's requirements were not in "accord with the realities of representation in the Social Security disability context," specifically citing the limited resources of clients and legal services providers. [Note that the Empire Justice Center filed an *amicus* brief in this case, emphasizing the untenable burdens that the Magistrate's decision would put on legal services providers.]

The Second Circuit also faulted the Magistrate for requiring the representative to file a brief with the Appeals Council. It cited *Sims v. Apfel*, 530 U.S. 103, 111 (2000), as well as 20 C.F.R. §404.975 for the proposition that the regulations permit but do not require the filing of a brief with the Appeals Council. Furthermore, the Supreme Court refused in *Sims* to impose an exhaustion requirement in non-adversarial proceedings such as Social Security appeals.

(Continued on page 7)

Case Remanded for Consideration of Listing 12.05C

Jeffrey Nieznanski of the Bath office of LAW-NY recently won a remand from U.S. District Court Judge Richard Arcara. His appeal involved the claim of a 48 year old woman who had been diagnosed as mentally retarded in the course of an examination for bariatric surgery. Her IQ scores were 70, 68 and 66. In fact, the examiners concluded that she was not capable of giving informed consent. In addition to obesity and limited intelligence, the claimant also suffers from a number of other medical impairments, including fibromyalgia. She lived with her parents, had no friends, and had had trouble in school.

Following the hearing, the ALJ ordered another consultative examination, which revealed IQ scores of 71, 72 and 75. The ALJ, however, never mentioned those scores in his decision. Nor did he even consider the claim under Listing 12.05C. He merely made a perfunctory finding that the claimant did not meet Listing 12.05D. Judge Arcara found the ALJ's failure to analyze the listing properly to be error. He faulted the ALJ for failing to reconcile the various IQ scores in the record. The ALJ also improperly assessed whether the claimant's impairment began

before age 22, as required by Listing 12.05. The Court held that the ALJ did not examine the evidence thoroughly nor did he apply the correct legal standard.

The Court also found the ALJ erred in failing to call a vocational expert. Instead, the ALJ had denied the claim on the Medical-Vocational Guidelines (the "grids"). The ALJ had conceded that the claimant's borderline intellectual functioning was a severe impairment at step two of the Sequential Evaluation, but went to conclude that she did not have any significant non-exertional impairments. Judge Arcara found this to be error. He ordered that on remand a vocational expert should specifically consider the effect of the claimant's borderline intellectual functioning on her ability to work.

The decision in *Gordon v. Astrue* is available as DAP #544. The Empire Justice Center served as co-counsel with Southern Tier legal Services in this case. Congratulations to Jeff Nieznanski for this victory!

Representative's Role—Continued

(Continued from page 6)

Ultimately, the Court of Appeals found that counsel representing Social Security claimants cannot be penalized "for failing to address issues collateral to the disability determination as to which counsel had no notice." The responsibility for the gaps in the records in *Vincent* fell exclusively on the ALJ. The attorney's representation was "more than adequate."

In remanding the EAJA claim for further proceedings, the Court of Appeals noted that this case was the second case in two years involving this Magistrate

reducing the same attorney's fees. It therefore ordered that the case be transferred to a different judge.

Ms. Vincent was "more than" ably represented in the underlying appeal by Mark Schneider of Plattsburgh, and was represented on the EAJA appeal by Mark Curley of New York City. As noted above, Empire Justice Center appeared as an *amicus*.

District Court Defines ALJ's Role

In remanding a claim solely for the calculation of benefits, U.S. District Judge Michael A. Telesca of the Western District of New York admonished the ALJ for taking an adversarial role in the proceedings. *McAninch v. Astrue*, 2011 WL 4744411 (W.D.N.Y. October 6, 2011). Among other things, the ALJ had justified her refusal to accord controlling weight to the opinions of the claimant's treating psychiatrists because they had not responded to the questionnaires she had sent them.

The questionnaires, sent to two treating psychiatrists as well as the claimant's therapist, consisted of fifty-nine questions requiring detailed narrative answers. The Court noted that some of the questions had been answered already by these or other sources; many were redundant, with some having as many as fifteen subparts. Judge Telesca acknowledged that the ALJ has a duty to develop the record. He held, however, that the questionnaires could not be justified under that duty. Rather, the questionnaires "demonstrate that the ALJ took on an extremely adversarial stance vis-à-vis Plaintiff, contrary to the letter and spirit" of the non-adversarial nature of the proceedings. Citing ALJ bias cases such *Pronti v. Barnhart*, 339 F.Supp.2d 480, 492 (W.D.N.Y.2004), he referenced the claimant's right to have a fair and impartial decision-maker. He went on to note that because the questionnaires were not even provided to the Plaintiff's attorney, they amounted to an ex-parte cross-examination of the Plaintiff's medical providers. He found this to be a clear error of law.

The Court also faulted the ALJ for rejecting the opinions of the treating psychiatrists based on her own handwriting analysis. She concluded that they had been written by the claimant's therapist rather than the psychiatrists themselves. First, the Court found that even if written by the therapist - a non-acceptable medical source under the treating physician regulations at 20 C.F.R. §416.927 - the ALJ could not reject them out of hand. Second, Judge Telesca held that there is no legal requirement that a doctor must personally write a report that he or she signs in order for it to be accorded controlling

weight. He found that even if the ALJ's dubious handwriting analysis were correct, there was no reason to assume that the reports did not accurately reflect the views of the treating psychiatrists who signed them.

Judge Telesca also found that the ALJ erred in relying on non-medical evidence of the claimant's alleged daily activities to find him not disabled. He criticized the ALJ for her attitude, reflected in the decision, that the claimant could not be disabled unless totally and completely incapacitated. He noted that "the Court is unaware of any rule or regulation requiring that a claimant seeking disability on the basis of a mental impairment be precluded from having friends, a spouse, or a companion."

As if icing on the cake, the Court went on to find that the ALJ erred in relying on opinions of non-examining review physicians to contradict the treating source opinions. He also found that ALJ erred in relying on vocational expert testimony based on a hypothetical question that did not incorporate all the claimant's mental limitations.

Ultimately, Judge Telesca remanded the case for payment, finding that the treating physicians' opinions demonstrated that the plaintiff met the criteria of Listing 12.04 based on depressive syndrome. The case had already been remanded previously for consideration of the same treating source opinions back in 2006.

Dennis Clary of Lewiston, who was a DAP advocate a few years back, secured this decision, which will undoubtedly be cited in many memos in the future. Thanks, Dennis!

Judge Remands Queens Claims to New ALJs

In the June 2011 edition of the *Disability Law News*, we reported on a class action lawsuit filed in U.S. District Court for the Eastern District of New York alleging systemic bias on the part of five of the Administrative Law Judges (ALJs) in the Queens ODAR (Office of Disability Adjudication and Review) office. The lawsuit, *Padro et al v. Astrue*, claims, among other things, that the ALJs have continued to blatantly and intentionally issue denials based on errors of law despite repeated warnings from the judges in the Eastern District.

The judges continue to issue their warnings. On October 11, 2011, Judge Allyne Ross, in remanding a claim for further development, agreed with the plaintiff that remand to a different ALJ was appropriate. The original ALJ, who is one of the five named ALJs in the Queens lawsuit, not only failed to develop the record; he also exhibited hostility to towards the plaintiff with repeated inquiries into her language skills and reliance on an interpreter despite her recent naturalization as a U.S. citizen.

The Court faulted the ALJ for disregarding a mental impairment questionnaire that appeared to be from the treating psychiatrist because it was unsigned and did not name the source. Similarly, he ignored another questionnaire limiting the plaintiff because it “did not provide any clinical findings or observations.” In fact, the report included the answer “see attached” at several important points, although failed to include an attachment. The Court held that these were significant gaps in the record that the ALJ was obligated to reconcile.

In addition to the gaps in the record, the ALJ also explicitly tied his credibility determination to the plaintiff’s alleged inability to communicate in English despite having passed her citizenship test. The Court held that the plaintiff’s prior naturalization did not rationally support a conclusion that she should be able to understand the complicated legal proceedings at the hearing.

The ALJ’s focus on the plaintiff’s ability to speak English, failure to apply the treating physician rule and properly develop the record caused the Court to question his impartiality. It found that “a fresh look

by another ALJ would be beneficial.” It rejected the Commissioner’s objection that the plaintiff had failed to seek disqualification of the ALJ at the earliest opportunity in the administrative proceedings. Additionally, it found that the plaintiff had properly raised the claim to the Appeals Council when she challenged the ALJ’s credibility determination. *Yolanda Giraldo v. Astrue*, Case 1:10-cv-012505-ARR is available as DAP #545.

Judge Ross issued a similar decision in August 2010, remanding a decision by another of the Queens ALJs to a different ALJ, again citing the standard set forth in *Sutherland v. Barnhart*, 322 F.Supp.2d 282, 292 (E.D.N.Y. 2004):

(1) a clear indication that the ALJ will not apply the appropriate legal standard on remand; (2) a clearly manifested bias or inappropriate hostility toward any party; (3) a clearly apparent refusal to consider portions of the testimony or evidence favorable to a party, due to apparent hostility to that party; (4) a refusal to weigh or consider evidence with impartiality, due to apparent hostility to any party.

In *Lawler v. Astrue*, Case 1:09-cv-01077-ARR, the ALJ failed to assess evidence from the treating physicians impartially, demonstrated an incomplete understanding of the definition of sedentary work, and failed to consider plaintiff’s request for a closed period of disability. Although the Judge found persuasive evidence of disability for a closed period, she remanded the claim for consideration of disability through the plaintiff’s date last insured to a different ALJ. In addition to disregarding the law, the first ALJ exhibited bias and inappropriate hostility toward the plaintiff. Following the hearing but before the decision, he ordered an investigation by SSA’s Office of the Inspector General. He warned plaintiff’s counsel that the investigation could result in indictment of the plaintiff as well as immigration problems.

Chris Bowes of CeDar represented the plaintiff in *Lawler*, which is available as DAP #546.

Calling All Medical Experts

We have heard horror stories of vocational experts (VEs) testifying by cell phone while driving across the New York State Thruway. How about medical experts (MEs) by phone? HALLEX I-2-5-42 states that live medical expert testimony in person, by video conference, or telephone conference are the preferred methods, although written interrogatories may be used. (HALLEX I-2-5-57 sets forth similar provisions for vocational testimony.)

When asked about ME testimony by phone at a recent NOSSCR (National Organization of Social Security Claimants Representatives) conference, ODAR Deputy Commissioner Glenn Sklar reiterated that a claimant has the right to object to telephone testimony. He emphasized that the claimant cannot veto such testimony, however. If the objection is sustained, written interrogatories would be used in lieu of the “live” testimony. He suggested raising objections as early as possible.

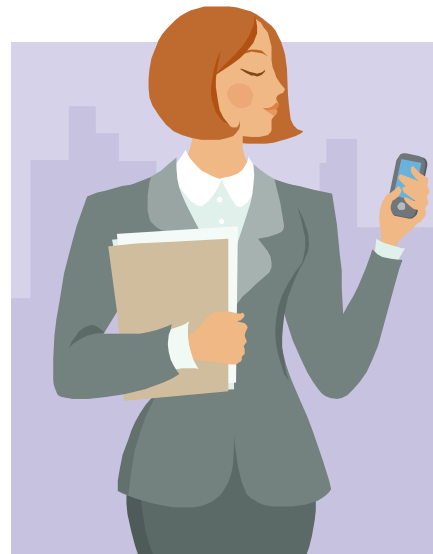
But how early can a representative object if there is no prior notice that the ME will be “appearing” by telephone? In a recent decision from the U.S. District Court for Connecticut, the court remanded where the claimant did not have prior notice that the ME would be testifying by telephone. *Edwards v. Astrue*, 2011 WL 3490024 (D. Conn August 10, 2011). Although the court would not go so far as to rule that telephonic testimony was illegal, it found that the failure of the ALJ to give the claimant prior notice of the form of the testimony was not harmless error. It held that ALJs must provide claimants with notice that a witness will be testifying electronically; absent any new rules, MEs should not be allowed to testify telephonically over a claimant’s timely objection.

The court agreed that the plaintiff was prejudiced by the lack of notice and by the ALJ’s refusal to sustain her objections. The judge cited Supreme Court holdings on the right to confrontation as essential to fair cross-examination. He also noted that at least once during the hearing, the ME “cut out,” and admitted that he was having difficulty hearing. He concluded that these interruptions could have impeded the flow of cross-examination. Although the ALJ found the ME’s testimony “persuasive,” the District Court Judge could not agree that the ALJ would have

reached the same conclusion if the ME had testified in person or by video teleconference.

In his decision, the judge thoroughly reviewed the case law in this area, including those cases finding that telephonic testimony violated SSA’s regulations. He noted in particular that the Commissioner, after extensive study and review of their efficacy, promulgated regulations governing video teleconferencing. SSA has not, however, done the same regarding telephonic hearings and testimony. To the contrary, regulations allowing telephonic testimony at hearings were proposed in 2007 but never promulgated. Proposed Amendments to the Administrative Law Judge, Appeals Council and Decision Review Board Levels – SSA-2007-0044, published in the Federal Register on October 29, 2007 (72 Fed. Reg. 61218). The Court “hinted” that in absence of specific regulations governing such testimony, deference should not be accorded to the HALLEX provision cited above.

So - keep us informed of what is happening with your ME testimony. In fact, feel free to contact us telephonically.



ADMINISTRATIVE DECISIONS

Abuse of Discretion Leads to Remand

Do you think Administrative Law Judges (ALJs) spend as much time complaining about advocates as we spend complaining about them? For a long time, it seemed that all we could do was complain but never get any relief from ALJs who seemed biased or prejudiced against our clients, or who abused their discretion during the hearing process. Two recent Appeals Council decisions give us some hope that maybe we are no longer just “spitting into the wind” with these cases.

Advocate Cindy Hendrickson of the Legal Aid Society of Mid-New York complained to the Appeals Council when ALJ Koennecke of the Syracuse ODAR denied a case that was remanded from federal court back to the same ALJ for further proceedings. Cindy noted that her client, aged 51-54 during the proceedings, had a grade school education in Puerto Rico and spoke almost no English. Past relevant work was in a school cafeteria, which was medium work. The claimant had back problems and confirmed neuropathy in her legs due to diabetes, as well as severe depression and anxiety, with reports stating her abilities were “poor” in multiple areas.

Despite the federal court’s mandate that the ALJ’s previous finding of ability to do medium work was not supported by substantial evidence, the ALJ again found that the claimant could do medium work (with no new evidence to support the conclusion). On appeal, the Appeals Council determined that ALJ Koennecke’s refusal to abide by the federal court remand would be referred to another component of the Appeals Council for further investigation. On remand to a different ALJ, the claimant got a fully favorable decision.

Cindy also reported that she has a second decision from this ALJ on appeal to the Appeals Council for a comparable failure to abide by a federal court remand. She is hopeful that the Appeals Council will

give her a similar result, remand to a different ALJ and investigation of the ALJ’s refusal to follow federal court directives.

Another advocate, Diane Campbell of LAW-NY in Ithaca, was also successful in getting the Appeals Council to remand an unfavorable decision from ALJ Koennecke to a different ALJ. In Diane’s case, the Appeals Council found that the ALJ had abused her discretion in failing to accept that a claimant had environmental limitations - avoiding exposure to respiratory irritants - simply because the claimant was a smoker - without full consideration of the claimant’s COPD. The Appeals Council also noted that it was referring the claimant’s allegation of bias “to another component to separately review, investigate and take any internal action(s) it deems appropriate.”

These are difficult cases with delicate issues related to claims of bias or abuse of discretion on the part of a presiding ALJ. Congratulations to both Cindy and Diane for persevering, persisting and prevailing on these cases. Their success gives us hope that our complaints regarding ALJ bias issues may finally be heard and acted upon.

Appeals Council Remands 2002 Cessation

E. Cynthia Richards of the Legal Aid Society of Mid-New York in Binghamton reminds us of what she calls the Legal Aid mantra - “Never Give Up.” In obtaining a remand from the Appeals Council, she notes that she did not give up and “the Universe finally turned our way.”

Cynthia’s client’s benefits had been terminated with cessation effective as of 2002, despite her significant mental illness. Cynthia helped her appeal her claim through the Appeals Council. Chris Cadin of Legal Services of Central New York in Syracuse took the claim to U.S. District Court, and obtained remand. On remand, the Appeals Council combined the cessation case with a 2004 application that had been denied at the hearing level. It also notified the claimant that it was reopening a favorable determination on a subsequent 2006 application. It remanded all these claims to the first ALJ in an order dated June 25, 2007. On remand, the ALJ denied all the claims.

The Appeals Council found much to criticize in the ALJ’s decision. It concluded that he had not complied with its 2007 Order in that he identified January 2005 as an amended onset date, despite that Appeals Council’s Order and the representative’s arguments to the contrary. He also ignored the representative’s request that the claimant undergo psychological IQ testing in her native language of Spanish. Finally, he found that despite her non-exertional impairments, she would be able to perform “low stress” jobs. The Appeal Council held that the ALJ’s finding was not supported by substantial evidence because he had failed to obtain vocational expert evidence to determine the true erosion of the claimant’s occupational base.

On remand, the Appeal Council ordered the ALJ to evaluate the entire period in question beginning in October 2002. Among other things, it ordered the ALJ to obtain evidence from a vocational expert, and if “warranted and available,” from a mental health expert. Since the case had previously been remanded to the same ALJ, it ordered that it be assigned to a different ALJ. See HALLEX I-2-1-55.D.11.

Cynthia had also argued bias on the part of the ALJ, citing *inter alia* that although the ALJ acknowledged at the hearing that he would consider her request for IQ testing in Spanish, he ultimately refused to do so. The Appeals Council concluded that although there was no “abuse of discretion,” a remand was necessary because the ALJ’s decision was not supported by substantial evidence. It referred Cynthia’s allegations of bias “to another component to separately review, investigate and taken any internal action(s) it deems appropriate.” [See HALLEX I-3-1-25, requiring the Appeals Council to refer all claims of bias to the office of Executive Director, Office of Appellate Operations. See also the March 2011 article in the *Disability Law News*, discussing SSA’s inability to make findings of bias in individual appeals, and outlining its intention to apply the “abuse of discretion” standards set forth in SSR 83-13 at the Appeals Council level.]

Kudos to Cynthia for her perseverance in this case – and let’s hope that the universe continues to go her way on remand!

ALJ Finds TONI “Inflated”

Buffalo Bruce Caulfield of Neighborhood Legal Services has scored a victory for a client with borderline intellectual functioning. The claimant had been tested on two separate occasions with a TONI (Test of Non-Verbal Intelligence) IQ test, which is generally considered a screening test. Bruce has frequently argued that the TONI is not a good substitute for the WAIS (Wechsler Adult Intelligence Scale), which is considered a more comprehensive assessment of verbal comprehension and perceptual reasoning than the TONI. See the September 2011 edition of the *Disability Law News*, available at www.empirejustice.org.

In a recent case, an ALJ agreed with Bruce, acknowledging that “TONI scores tend to be somewhat inflated compared the Wechsler Adult Intelli-

gence Scale.” He accepted the TONI score of 75 in this case, combined with tests of adaptive functioning demonstrating that the claimant was functioning in the mentally retarded range, to conclude that Bruce’s client was within the borderline range of intellectual functioning. As a result, he found that her ability to work at all exertional levels was so compromised by her non-exertional impairments and that she was unable to work.

Congratulations to Bruce, who once again demonstrates that if you keep hammering away, someone eventually listens.

ALJ Finds No Marital Relationship, No Resource Barrier for SSI

Eligibility for Supplemental Security Income (SSI) benefits requires not only a finding of disability, but also compliance with detailed rules related to deeming of income and availability of resources below a certain level. Recently, DAP advocate Sally DeLuca of the Brooklyn Office of Legal Services NYC convinced an Administrative Law Judge (ALJ) that her 62 year old Russian client should not be ineligible for SSI even though she continued to live with her ex-husband, and owned a home in Florida for several years.

We have all seen that the economic downturn has forced people to be creative about finding affordable housing, making for strange bedfellows, as it were. But in Sally’s case, she convinced the ALJ that her client and her ex were in fact not bedfellows at all, but merely roommates. The couple was divorced in 2003, but continued to live with each other in separate parts of their apartment for economic reasons. Sally’s client was found ineligible for Title II benefits on her ex-husband’s account because the marriage had not lasted for at least ten years. Other indicia of no marital relationship included Sally’s

client resuming use of her maiden name, her refusal to cook and keep a kosher kitchen for her kosher practicing ex-husband, and the omission of the ex-husband’s name on any property documents relating to her home in Florida. This evidence was sufficient to rebut any finding that a marital relationship existed, according to the ALJ.

With respect to the property in Florida, the ALJ found that the bad economy ate away at any equity interest the claimant may have had in the home, putting it figuratively, if not literally, under water. The mortgage on the home was in excess of the market value of the property, making the claimant’s equity non-existent. The ALJ thus found that the claimant did not have any ownership interest in property over the \$2,000 resource limit.

Sally did some creative lawyering on this case, to her client’s benefit. How do you say “Hooray” in Russian? Congratulations to her.

WEB NEWS

SSA Launches Spanish Online Services

The Social Security Administration (SSA) announced that the agency's applications for retirement and Medicare and for Extra Help with Medicare prescription drug costs, are now available in Spanish. The new online services are available at www.segurosocial.gov.



Confirming Delivery by Certified Mail



Have you delivered documents to the Appeals Council or served a federal court complaint by certified mail, but have not gotten back confirmation of service, or the confirmation came back blank? Apparently many advocates have experienced these difficulties and shared a link to the U.S. Postal Service website to confirm the date of delivery of a certified document.

<https://tools.usps.com/go/TrackConfirmAction!input.action>

Social Security Benefits Data Now Online

SSA stopped mailing out annual estimates of benefits to future Social Security recipients earlier this year as part of a cost-saving measure. To get future benefits information, individuals will now have to go to SSA's website. SSA says that the online tool is more accurate than the paper statements were because it allows you to plug in different variables that could change monthly benefits, including age of retirement or different future income. SSA estimates it will save \$60 million annually with the online initiative. The agency does intend to resume paper statements to people age 60 and over sometime next year.

www.socialsecurity.gov/estimator and click on "Estimate Your Retirement Benefits"



New Resource for ID Theft Introduced



If you are a victim of identity theft or are just trying to prevent it from happening to you, a new website offers a variety of resources. The non-profit Consumer Federation of America launched a website with the goal of helping consumers sort through a multitude of information, and misinformation, about identity theft. The site has fact sheets with tips on protecting yourself from identity theft, as well as information on protecting children and military members from identity theft. www.IDTheftinfo.org

Calculate Medicaid Eligibility Under Pickle Amendment

SSA announced that for the first time since 2009 there will be a cost of living adjustment in Social Security and SSI benefits effective January 1. (See related article on page one.) This adjustment will also affect the calculation of Pickle Amendment eligibility for Medicaid in 2012. Gordon Bonnyman of the Tennessee Justice Center updated this table and instructions that enables advocates to calculate Medicaid eligibility under the Amendment quickly and simply.

<http://www.nslc.org/wp-content/uploads/2011/12/2012-Pickle-chart.pdf>

WHAT IS...

What is...The Mental Status Exam?

The mental status exam (MSE) is the cornerstone in the evaluation of any patient presenting with a medical, neurologic or psychiatric disorder that affects thought, emotion or behavior. The exam is also important in assessing changes in thought processes caused by use of medication.

The MSE involves the systematic assessment of a patient's function through consideration of several factors including, 1) appearance, which can provide information about social judgment or the ability to tend to basic needs (e.g. dirty or disheveled), 2) social interaction, i.e. the nature and quality of the patient's interaction with the interviewer or family members, 3) orientation to time and place, 4) appropriateness of behavior, 5) affect, or emotional tone as inferred by the tester, 6) mood, or the patient's report of his emotional state, 7) use of spoken and unspoken language (e.g. pressured speech, flight of ideas, speech retardation, dysphasias), 8) attention and concentration, tested by serial 7s, 9) short and long-term memory, 10) ability to perform calculations and make abstractions,

11) ability to reproduce geometric figures, 12) thought content (e.g., delusions?), 13) perception in all five senses (e.g., hallucinations?), 14) social and moral judgment, and 15) degree of impulse control, especially pertaining to the potential for harming oneself or others.

The elements of the MSE are designed to identify and characterize abnormalities typically observed in patients with either a functional disorder or an organic disorder. A trained interviewer can generally assess the mental status of a patient in about 15 minutes. A written summary of the MSE generally addresses only those points essential to the deliver of care to the patient.

For more information on the MSE, see <http://www.psychpage.com/learning/library/assess/mse.htm>, and <http://emedicine.medscape.com/article/293402-overview>.



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](http://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

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.

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

Genier v. Astrue, 606 F.3d 46 (2d Cir. 2010)

Court of Appeals remanded for further proceedings where the ALJ's decision was based on a serious misunderstanding of the claimant's testimony. The claimant's testimony relating to his ability to perform household chores *at the time of the hearing* did not pertain to the time when he completed the questionnaire or to any time prior to his bariatric surgery. Since the ALJ's adverse credibility finding, crucial to the rejection of the claim, was based on a misreading of the evidence, the court held that it contradicted the obligations to consider all relevant medical and other evidence, citing 20 C.F.R. §404.1545(a)(3).

Zabala v. Astrue, 595 F.3d 402 (2d Cir. 2010)

Commissioner's decision upheld where ALJ's failure to consider a report from plaintiff's psychiatrist because it was "incomplete and unsigned," while incorrect, did not necessitate remand since the correct application of the treating physician would still lead to the conclusion that the plaintiff could return to her past relevant work. Case involved a "closed period" of disability, based on an agreement by counsel at the hearing to amend the time period in issue to the period before the plaintiff allegedly began performing substantial gainful activity (SGA). The Court rejected the plaintiff's arguments on appeal that the ALJ should have done more to develop the record regarding the actual work activity. It also held the plaintiff's attorney had the authority to amend the period under review.

Moran v. Astrue, 569 F.3d 108 (2d Cir. 2009)

Finding that the ALJ had inadequately developed claimant's record by means of a brief and limited hearing where the ALJ had neither thoroughly examined claimant's work history nor properly qualified reports against claimant's testimony, the Second Circuit remanded for further proceedings. The Court lamented remanding a case that was already thirty years old, but held that the remand was based on the ALJ's failure to develop the record, rather than because the ALJ's decision was not supported by substantial evidence. The claimant had been awarded benefits retroactive to 1991, but had appealed denials of his 1980 and 1987 applications under the provisions of two different class actions: *Dixon v. Shalala*, 54 F.3d 1019, 1021 (2d Cir. 1995), which challenged the Commissioner's application of the "severity" step of the Sequential Evaluation; and *Stieberger v. Sullivan*, 792 F.Supp. 1376, modified, 801 F.Supp 1079 (S.D.N.Y. 1992), challenging the Commissioner's policy of non-acquiescence in Circuit case law.

Poupore v. Astrue, 566 F.3d 303 (2d Cir. 2009)

The Court agreed the opinion of the treating orthopedist that the claimant could perform "sedentary, light-duty" supported the ALJ's finding that the claimant had the residual functional capacity (RFC) for light work. It found that the need to get up and move around from time to time does not preclude an ability to perform sedentary work. It also upheld the ALJ's credibility finding, observing that the ALJ correctly noted the claimant's level of daily activities, including caring for his one year child. Finally, the Second Circuit adopted the Commissioner's argument that 20 C.F.R. §404.1560(c)(2)(2003) abrogated *Curry v. Apfel*, 209 F.3d 117 (2d Cir. 2000), clarifying that the Commissioner need not provide additional evidence of RFC at Step five of the sequential evaluation.

Lamay o/b/o KPD v. Astrue, 562 F.3d 503 (2d Cir. 2009), cert denied 130 S.Ct. 1503 (U.S. 2010)

In a case involving an unrepresented parent in a child's SSI claim, the Court found that that the plaintiff had made a knowing and intelligent waiver of her right to counsel. In holding that additional disclosures advising the plaintiff of the availability and benefits of representation required by prior case law are not mandatory under the Social Security Act, the Court acknowledged a split in the circuits on this issue.

Kohler v. Astrue, 546 F.3d 260 (2d Cir. 2008)

In a mental impairment case, the Second Circuit held that the ALJ's failure to adhere to the regulations requiring the application of a "special technique" at Steps two and five of the sequential evaluation constituted grounds for remand. The court agreed with several other circuits in finding remand appropriate where the ALJ's noncompliance with 20 C.F.R. §404.1520a(e)(2) resulted in an inadequately developed record in terms of the four functional areas: activities of daily living; social functioning; concentration, persistence, or pace; and episodes of compensation. The court also criticized the ALJ for focusing in isolation on the treating source's use of the word "stable," and for failing to consider the opinion of the nurse practitioner, where she was the only medical professional available in the very rural "North Country" of New York State.

END NOTE

Take a Walk in the Park

Feeling stressed? Need a break? Who doesn't at this time of year, especially if you are putting in long hours reading files or writing memos? Michael Posner, an emeritus professor at the University of Oregon, reminds us that our brains, like any muscle, get tired after working for sustained periods. Posner, who studies attention, says that this is particularly true if we are concentrating intensely.

But what is the most effective way to take a break? According to Marc Berman, a post-doctoral researcher at the Rotman Research Institute in Toronto and fellow researchers at the University of Michigan, a walk in the woods improved memory and attention by 20%. Taking a walk down a busy street did not provide the same cognitive boost. Even looking at pictures of nature improved cognitive performance more than a city walk.

But it's December in New York, you might say. Some of the studies, however, were conducted in an arboretum in Michigan in the winter. As Dr. Berman told the *Wall Street Journal* in an article published on August 30, 2011, "[y]ou don't necessarily have to enjoy the walk to get the benefit. What you like is not necessarily going to be good for you."

According to Berman and his associates, nature engages our "involuntary attention," where we are drawn to something interesting that does not require intense focus. Obviously, walking down a busy city street requires a bit more attention. If you aren't near nature, Dr. Berman suggests a quieter city street with some natural elements to look at.

So bundle up and go outside.

