

DISABILITY LAW NEWS

Social Security Recipients Lose COLA Wars

Move over Coke and Pepsi. The COLA wars continue into 2010, and the big losers are recipients of benefits administered by the Social Security Administration (SSA). Of course we are talking about the Cost of Living Adjustment (COLA) that SSA has added to its benefit programs for every year of the programs' existence.

For 2010, however, SSA announced that there will be no increase in its benefit programs because there was no increase in the Consumer Price Index upon which any COLA is based. <http://www.ssa.gov/OACT/COLA/colasummary.html>. This means that some retirees, disability beneficiaries, and SSI recipients will get the same amount of benefits as last year, and some will actually get less money in the coming year due to Medicare premium increases and possible state supplement reductions.

For Title II beneficiaries of Retirement or Disability benefits, things will pretty much stay the same as far as monthly benefit amounts. Current beneficiaries will continue to pay Medicare Part B premiums of \$96.40 per month. New Part B beneficiaries will pay \$110.50 (because they did not have the premium withheld from their Social Security benefit in the

previous year). Beneficiaries who do not currently have the Part B premium withheld from their Social Security benefit will pay \$110.50. Higher-income beneficiaries pay \$110.50 plus an additional amount, based on the income-related monthly adjustment amount (IRMAA). http://questions.medicare.gov/cgi-bin/medicare.cfg/php/enduser/std_adp.php?p_faqid=2260

The maximum taxable earnings for OASDI (old-age, survivors and disability insurance) purposes will remain at \$106,800 for 2010. The amount of taxable earnings a person must have to be credited with a quarter of coverage will be \$1,120, up from \$1,090 in 2009.

For SSI recipients, the Federal Benefit rate (FBR) will continue at \$674 for an individual and \$1,011 for a couple. The trial work period earnings threshold will rise to \$720 per month in 2010, up \$20 from last year. The monthly amount deemed to constitute substantial gainful activity (SGA) for non-blind disabled persons will be \$1,000, up from \$980. The SGA earnings for blind individuals will remain at \$1,640. The student earned income exclusion will remain at

(Continued on page 2)

INSIDE THIS ISSUE:

REGULATIONS	4
COURT DECISIONS	10
WEB NEWS	15
BULLETIN BOARD	16
END NOTE	18

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

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

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

November 2009 issue.
Copyright© 2009,
Empire Justice Center
All rights reserved.
Articles may be reprinted
only with permission
of the authors.

Available online at:

www.empirejustice.org

Online Resource Center Debuts New Trainings



As reported in the September 2009 issue of the *Disability Law News*, the On-line Resource Center (ORC) serves as a valuable resource to new advocates, offering online trainings in several issue areas. New trainings for DAP Advocates added in October 2009 include the following:

Childhood Disability: The 2009 Childhood Social Security Rulings (SSRs) - This training provides a brief overview of the children's SSI program, including concepts of medical and functional equivalence to the Listings. Then, the 2009 SSRs are analyzed in detail, along with their impact on each domain of functioning and advocacy tips for using the SSRs in proving disability in children's SSI cases.

Introduction to Disability Law: This two part training will cover the fundamentals of disability law practice. Part one will define disability and explain in depth the Supplemental Security Income (SSI) program and Social Security Disability Insurance (SSDI) program and the differences between these two programs. Sources of law, resources and the appeals process will be presented. The method of analyzing whether disability exists using Social Security's 5-step Sequential Evaluation process will be introduced, focusing on the steps one through three with an emphasis on the listings of impairments. Part two of this training takes a more in depth look at developing and winning claims at step 5 of the sequential evaluation process, using the Grids and assessment of non-exertional impairments. The use of vocational experts and medical experts will be discussed, and a sample evidence file will be reviewed. Hypothetical examples are used to help understand the complex nature of Disability Law.

In addition to the trainings listed above, also recently added are **Medicaid 101** and **Welfare Work Rules 101**. To see a detailed course descriptions of all trainings offered on the Online Resource Center, and to register for any of the trainings listed, visit http://onlineresources.wnylc.net/online_training.asp.

Be sure to visit the Online Resource center in November and look for **Res Judicata, Reopening and Revival: The 3 Rs for Keeping Social Security Cases Alive**. This training was taped at the Western NY DAP Task Force Meeting in November. If you haven't already, check out the new Empire Justice Center website and register to receive current news, information, alerts, training notifications and more. www.empirejustice.org.

COLA Wars—Continued

(Continued from page 1)

\$1,640, with maximum earnings of \$6,600 for all of 2010. <http://edocket.access.gpo.gov/2009/pdf/E9-25930.pdf>; <http://www.ssa.gov/OACT/COLA/sga.html>.

As we wrap up baseball's Fall Classic, who more appropriate to quote than Yogi Berra when we observe that it's like déjà vu all over again with respect to New York State's proposal to decrease the state supplement payable to SSI recipients. The Governor's Deficit Reduction Plan (DRP) calls for cutting New York's SSI state supplement by \$14/month for those living alone and \$9/ month for those living with others. The cut would be effective in February 2010

since the federal government requires 90 days notice when states make changes in the state supplement amounts. The cut would result in \$11.4 million in "savings" through March 31, 2010.

You may recall that the State proposed a similar state supplement reduction in January 2009. See *Disability Law News*, January 2009. This proposed reduction was eliminated after a great outcry from the advocacy community representing the interests of SSI recipients. Advocacy efforts will be mobilized again to beat back this measure that so negatively impacts vulnerable, poor, disabled person. As Yogi also said, it ain't over 'til it's over, so stay tuned for further developments on this front.

POMS on Resources, Overpayments Updated

SSA has updated several sections of its Program Operations Manual System (POMS) related to resources in the SSI program and to handling overpayments.

New section SI 01140.150 restates SSA policy regarding “Qualified Tuition Plans,” aka 529 Plans (“QTP”). These plans are designed to save money for educational purposes while avoiding taxes. QTPs are resources of the “owner,” not of the “designated beneficiary,” (except, of course, for the designated beneficiary who also is the owner of the QTP). Transfer by an SSI recipient or applicant of ownership of a 529 Plan account or funds must be reviewed and may be treated as an uncompensated transfer.

This change was effective October 23, 2009, and is posted at <https://s044a90.ssa.gov/apps10/public/reference.nsf/8b709aba3e20a0dd852574da00547b45/ea47c9c766472085257657003da587!OpenDocument>.

With respect to overpayments, SSA issued a transmittal that contained rewritten and reformatted sections of the POMS designed to improve the clarity of the information and state more completely policy and procedures. According to SSA, the revisions did not change existing policy or procedures.

Summary of Changes

- SI 02201.005 Supplemental Security Income (SSI) - What Is an Overpayment?

SSA reformatted and rewrote this section, changing the terms “responsible” and “responsibility” to “liable” and “liability” to correct inconsistent and incorrect terminology. Policy and procedures relating to suspected overpayment fraud are deleted and placed in a new section: SI 02201.007.

- SI 02201.007 Supplemental Security Income (SSI): Overpayment Fraud

This new section contains policy and procedures on suspected overpayment fraud previously located in SI 02201.005.

- SI 02201.020 Supplemental Security Income (SSI) Overpayment: Who Is Liable for Repayment? Living Overpaid Individual

This section was reformatted, rewritten and expanded. The terms “responsible” and “responsibility” were changed to “liable” and “liability.” This section contains policy and procedures for determining representative payee liability previously found in SI 02201.021.

- SI 02201.021 Supplemental Security Income (SSI) Overpayment: Who Is Liable for Repayment? Overpaid Individual Is Deceased

This section was reformatted and rewritten. The terms “responsible” and “responsibility” were changed to “liable” and “liability.” This section contains policy and procedures on determining liability when the overpaid individual is deceased; this information was previously in SI 02201.023.

- SI 02201.023 Supplemental Security Income (SSI) Overpayment: Recovery From A Representative Payee

This section is completely rewritten to contain policy and procedures previously located in SI 02201.020, SI 02201.021 and SI 02201.023.

- SI 02201.025 Supplemental Security Income (SSI) Overpayment: Notifying Overpaid Individuals

This section was reformatted and rewritten to improve the clarity of the policy and procedures on notifying overpaid individuals.

These revisions to the POMS sections are posted at <https://s044a90.ssa.gov/apps10/public/reference.nsf/8b709aba3e20a0dd852574da00547b45/03fe9aa6a3f183748525764900445c34!OpenDocument>.

REGULATIONS

Rep Payee Conserved Funds Transfers Proposed

In an October 14, 2009 announcement, SSA is proposing a slight change to its rules for representative payees who are discontinuing their service as representative payees. 74 Fed. Reg. 52706. Comments deadline is December 14, 2009.

Prior to the proposed changes, a rep payee would either return the beneficiary's/recipient's funds in his/her hands to SSA for redistribution, or to the new rep payee, if there is one. Under the current regulations, 20 C.F.R. §§404.2060 & 416.660, the transferee is SSA's choice: "A representative payee who has conserved or invested benefit payments shall transfer these funds, and the interest earned from the invested funds, to either a successor payee or to us, as we will specify. If the funds and the earned interest are returned to us, we will recertify them to a successor representative payee or to the beneficiary."

The proposed change: the payee may be permitted to pay the funds directly to the beneficiary/recipient, but still, at SSA's direction and choice of transferee.

Note, also, that current policy differs from the current regulation. "A representative payee who has conserved or invested funds for a beneficiary, but is no longer serving as payee for the beneficiary, must return the funds to SSA for reissuance to either the successor payee or to the beneficiary in direct payment." POMS § GN 00603.055.

The new language proposed is: "A representative payee who has conserved or invested benefit payments shall transfer these funds, and the interest earned from the invested funds, to either a successor payee, to the beneficiary, or to us, as we will specify. If the funds and the earned interest are returned to us, we will recertify them to a successor representative payee or to the beneficiary."

SSA says this will be beneficial for many beneficiaries, as they may need funds right away to pay for rent or the like when they get out of foster care, and eliminating the step of returning funds to SSA only to be paid out to the beneficiary again will make the transfer quicker.

New and Improved Hearing Notices Issued

The Social Security Administration (SSA) has announced that it recently began using "a new, more user-friendly Notice of Hearing." According to SSA's newsletter touting this "new" notice, it informs claimants upfront that they must bring valid picture identification because of security requirements in government facilities. Also, "the notice's new language makes it easier to understand the legal information by eliminating provisions that can be complicated and confusing. And the new notice reflects changes in the law, including specific issues related to a claimant's appeal. These items are now presented in order of importance." <http://www.socialsecurity.gov/newsletter/archives/sept2009.html>.

Advocates report that a "new" notice with information about photo IDs and some other subtle differences did begin circulating fairly recently - although those notices (HA-L83) have a publication date of March 2007. If you have seen one with a more recent publication date, let us know - and keep us informed as to whether they are not only new but actually improved!



The Cancer Among Us: Malignant Neoplastic Diseases Listings Revised

The Social Security Administration (SSA) announced in the October 6, 2009 Federal Register final changes to some of the criteria in the Listing of Impairments used to evaluate claims involving malignant neoplastic diseases (cancer). 74 Fed. Reg. 51229. The changes are effective November 5, 2009.

According to SSA, the “revisions reflect our adjudicative experience, advances in medical knowledge, diagnosis, and treatment, and public comments we received in response to a Notice of Proposed Rulemaking (NPRM).” The NPRM came out in April 2008. The changes will be applied to applications pending or submitted on or after the effective date.

Some minor changes from the NPRM resulted from the public commentary, and are summarized in the Fed. Reg. notice. These included some adjustments to the definitions section. As often is the case, however, the response to comments contains valuable information for advocates.

SSA “revised the second sentence of current sections 13.00H2 and 113.00H2, which referred only to the ‘original’ tumor and any metastases, to also include recurrences and relapses. We also added a sentence at the end of final sections 13.00H3 and 113.00H3 to indicate that, if there is a recurrence or relapse after 3 years or another period specified in a listing in this body system, the impairment may again meet or medically equal the requirements of a cancer listing. These changes are only a clarification of our current rules, and ensure that we will not incorrectly find that people with recurrent tumors are no longer disabled.”

SSA added 113.09C to the thyroid gland cancer Listing for children to match the adults, even though the condition rarely occurs. The commenter “did not believe the listings are meant to exclude cancers simply because they are rare.”

We may note, of course, that the adult Listings are applicable to children as well (20 C.F.R. §404.1525), making this particular revision redundant. SSA recognizes as much: “In the NPRM, we explained in proposed section 113.00K4 that we would use listing 13.09C for children with this type of cancer. Because

we are adding listing 113.09C, we did not include that paragraph in these final rules.” Nonetheless, we also note that for some adjudicators the decision-making process is enhanced by having it expressly laid out for them.

In refusing to adopt one comment, SSA raises two vital evidentiary requirements distinctions, reiterating its intent as expressed in the NPRM, “to make a minor editorial change to current listing 13.13A1 for highly malignant central nervous system neoplasms to clarify that the requirement for documented metastases applies only to medulloblastoma or other primitive neuroectodermal tumors (PNETs), and not to [other named forms of cancer]. . . . [A]s we explained when we last made comprehensive revisions to the malignant neoplastic diseases body system in 2004 [69 FR at 67024]. . . . we could evaluate medulloblastomas or other PNETs that have not metastasized under listing 13.13A2.”

The final rule adds cancer of the vagina under Listing 13.23C, stating that “The criteria for listing-level cancer of the vulva are also appropriate for cancer of the vagina. Under the prior rules, we would have found medical equivalence to this listing in such cases.”

SSA, however, in reviewing comments on cancers of the female genital tract, pulls the rug out from under claimants who, though afflicted with survivable cancers that can cause minimal reduction in functional ability, nonetheless have to undergo the same debilitating effects of treatment as less fortunate cancer patients. A commenter pointed out that “women with these findings may undergo the same or similar surgery and chemotherapy as women with more advanced disease and that this treatment substantially limits those women's ability for gainful activity.” But, SSA reasoned, “even though they may be debilitated while they undergo treatment and for some time afterward, many of these women will have only minimal functional limitations 12 months after diagnosis. Therefore, it would be inappropriate for us to keep the prior listing, which would require us to find that all women with the listed criteria are disabled. We must evaluate these cases on an individual basis.”

Representatives' Fees Rules Change

SSA announced a final rule making revisions to fee payment restrictions, exempting from its oversight fees paid by third parties (including non-profits, more or less codifying Social Security Ruling (SSR) 85-3) and fees approved by a court in a guardianship or similar situation. 74 Fed. Reg. 48381 (September 23, 2009). The rule was effective 30 days from publication, October 23, 2009.

“We are revising our rules to allow representatives, in certain instances, to charge and receive a fee from third-party entities without requiring our authorization. We are also eliminating the requirement that we

authorize fees for legal guardians or court appointed representatives who represent claimants before us if a court has already authorized the fees. We are revising our rules to reflect changes in representatives' business practices and in the ways claimants obtain representation, and to improve the efficiency of our representative fee process.”

With the codification of the fee authorization revisions into regulations, SSA does not need the SSR 85-3 and has rescinded the Ruling, effective 30 days from publication. 74 Fed. Reg. 48621 (September 23, 2009).

Compassionate Allowance Hearings Continue



SSA will be holding the fifth in a series of Compassionate Allowance public hearings, this one “to obtain your views about the advisability and possible methods of identifying and implementing compassionate allowances for young adults with Schizophrenia.” 74 Fed. Reg. 56140 (October 30, 2009).

This hearing will be held on November 18, 2009, in San Francisco, CA. While the public is welcome to attend the hearing, only invited witnesses will present testimony. The proceedings will be telecast live via Webcast beginning at 9 a.m. (PST). You may access the Webcast line for the hearing at <http://www.socialsecurity.gov/compassionateallowances/>

Previous hearings, held in December 2007, April 2008, November 2008, and July 2009, concerned rare diseases, cancers, traumatic brain injury and stroke, early-onset Alzheimer's and related dementias, respectively.

The Compassionate Allowances initiative aims at considering ways to quickly identify diseases and other serious medical conditions that obviously meet the definition of disability under the Social Security Act (Act) and can be identified with minimal objective medical information.

SSA states it plans to conduct additional hearings on other conditions as time goes on.

Prototype Testing Extended

Who remembers reconsideration? Most advocates in New York have not had to deal with the reconsideration step of the administrative appeals process in quite some time. That's because New York is a “prototype state,” one of the lucky ten states selected to test out elimination of the reconsideration step, along with single decision maker. In fact, the test has

been going on for so long, it's hard to remember that it's not in place all across the country, and that it hasn't always been this way.

SSA recently announced extension of the disability prototype process until September 28, 2012. 74 Fed. Reg. 48797 (September 24, 2009).

Overpayment Recovery Limited

Thanks to Jim Sheldon of Neighborhood Legal Services in Buffalo for highlighting a very useful POMS provision relating to overpayment recovery. As Jim reminds us, under POMS GN 02210.030, a beneficiary can request a reduction in repayment rate to as low as \$10 per month even if unable to meet the criteria for a waiver of recovery of an overpayment. If the beneficiary is entitled to the full Medicare Part D low-income subsidy, the \$10 reduced rate is automatic. POMS GN 02210.030 B.6. This reduction is applicable even if recovery at that rate would take longer than 36 months.

For more on the Medicare Part D subsidy and who is eligible, see www.nyhealthaccess.org.



SSA Pilots Representative Call Center



Beginning November 16, 2009, SSA will begin a 30-day pilot for a new initiative, the Representative Call Center (RCC). If the pilot is successful, SSA plans to expand it.

The 30-day pilot will provide post-adjudication information for authorized attorneys and other representatives concerning their clients (1) aged 54 and under, and (2) whose SSNs are between 489-53-0000 through 773-99-9999. These claims are currently serviced by Mods 37 - 48.

The RCC telephone number is 877-626-6363. It will be open from 8:00 am to 5:30 pm, ESD. You will be asked for information about your client: name, address, SSN, date of birth, place of birth, and other identifying questions such as mother's maiden name, date of application, date of onset, and names of auxiliaries. Per SSA, the RCC is prepared to field all questions concerning effectuation of a claim. SSA asks that you wait at least 30 days from the date of the favorable decision before you make a call. SSA also asks that you limit your call to one client's case at a time.

President Names New Deputy Commissioner

Carolyn W. Colvin will be nominated as Principal Deputy Commissioner of Social Security by President Obama for a six year term, subject to confirmation by the Senate Finance Committee and a vote by the full Senate. Ms. Colvin previously served at SSA during the Clinton administration, first as Deputy Commissioner for Policy and External Affairs and later as Deputy Commissioner of Operations.

Which WAIS Was It?

Few advocates worth their salt have not argued claims under listing 12.05 for mental retardation. Successfully combing the record - or other sources - for IQ scores can often result in a victory in what otherwise appeared to be a more than up-hill battle. Listing 12.05C in particular can provide a basis for disability in those claims that simply could not be explained otherwise. That listing requires an IQ score between 60 and 70, with a secondary impairment not necessarily disabling in and of itself, but which imposes an additional and significant work-related limitation of function. In other words, the secondary impairment(s) need only be severe.

The IQ requirement of listing 12.05C can be met even if only one of a series of IQ scores derived from testing is 70 or below. According to the introduction to the mental impairments listings at 12.00D.6.c, where more than one test score is derived, the lowest is used in conjunction with listing 12.05. The listing refers specifically to the Wechsler series, referencing the verbal, performance and full scale scores IQs.

All fine and good when we were dealing with reports from the Wechsler Adult Intelligence Scale III (WAIS-III), which reported verbal, performance, and full scale scores. But what happens now that we are seeing reports derived from the new WAIS-IV, which does not give a verbal and performance IQ score? Instead, the WAIS-IV, published in 2008, uses new terminology, including Verbal Comprehension Index (VCI), Perceptual Reasoning Index (PRI), Working Memory Index (WMI) and Processing Speed Index (PSI), as well as a Full Scale IQ (FSIQ).

Not to worry – according to SSA and others, the terms VCI and PRI should be substituted for verbal IQs and performance IQs. The WAIS technical manual, published by Pearson Assessments, states:

The terms Verbal IQ (VIQ) and Performance IQ (PIQ) have been replaced with the terms Verbal Comprehension Index (VCI) and Perceptual Reasoning Index (PRI) respectively. The terms VCI and PRI should be substituted for the terms VIQ and PIQ in clinical

decision-making and other situations where the VIQ and PIQ were previously used. The VCI is composed of subtests measuring verbal abilities that require reasoning, comprehension, and conceptualization, and the PRI is composed of subtests measuring nonverbal reasoning and perceptual organization.

WAIS-IV Administration and Test Scoring Manual at 5.

SSA has apparently adopted this distinction. According to a Q&A issued by SSA, adjudicators should use the WAIS-IV as they used the WAIS-III or earlier editions. SSA opines in the Q&A, “[r]egarding the WAIS-IV Working Memory Index (WMI) and Processing Speed Index (PSI), these continue to be lesser factors than the primary FSIQ, VCI and PRI values, and are not considered or applied as IQ scores.”

SSA also notes in the Q&A that the test manual suggests that for children falling within the age range between the WISC-IV and the WAIS-IV, specifically age 16 years to age 16 years, 11 months, the WISC-IV might be more suitable for those who may have below average functioning.

By the way, the WISC-IV, or fourth edition of the Wechsler Intelligence Scale for Children published in 2003, also reports VCI and PRI scores instead of verbal and performance. “Users of the WISC-III and previous Wechsler intelligence scales should note the change in terminology for the composite scores . . . The terms Verbal IQ (VIQ) and Performance IQ (PIQ) have been replaced with the terms Verbal Comprehension Index (VCI) and Perceptual Reasoning Index (PRI) respectively.” David Wechsler, *WISC-IV Administration and Scoring Manual*, The Psychological Corporation, 2003, at p. 4.

ODAR Delays Shifting

The September 2009 edition of the *Disability Law News* reported on ODAR (Office of Disability Adjudication and Review) average processing times from hearing request to decision between May 2008 and May 2009 at some of your favorite ODARs. Recently released statistics for the month ending September 25, 2009, are listed below. The numbers in parentheses are the rankings and processing times for the period ending May 2009.

Note that while there were rather dramatic drops in processing times at some ODARs (Brooklyn and Jericho), Buffalo, Syracuse and the Bronx continue to jockey for last place among the Region 2 ODARS. The “rank” represents the office’s position among the 142 ODARs nationwide, ranging from shortest (1) to longest (142) processing time.

RANK	ODAR	DAYS
3 (32)	Brooklyn	294 (408)
33 (55)	Jericho	386 (457)
58 (51)	White Plains	435 (452)
85 (67)	Queens	482 (478)
88 (89)	Albany	487 (518)
91 (83)	New York	490 (508)
122 (110)	Buffalo	593 (591)
123 (129)	Bronx	605 (640)
130 (125)	Syracuse	629 (623)

What WAIS Was It?—Continued

(Continued from page 8)

Why these updates in IQ test instruments? Among other reasons, intelligence tests must periodically be “renormed” to account for the so-called “Flynn effect.” Despite anecdotal evidence otherwise, the intelligence of Americans has been steadily rising by as much as three IQ points a year, perhaps based in part on better education and nutrition. The “practice effect” – or the test takers familiarity with the test itself – may also explain why IQ scores rise over the years. Consequently, WAIS-IV results may well be more beneficial to your claimants in arguing listing 12.05 than more recent WAIS-III test results, which was developed in 1997.

For more on the history of the WAIS and WISC IQ tests, see the March 2007 edition of the *Disability Law News*, available at www.empirejustice.org. And for more on the new WAIS-IV, its subtests, and norming, see http://www.pearsonassessments.com/NR/rdonlyres/CD662F2D-5255-492D-B22D-3876A667C3D8/0/WAISIV2_6_08.pdf.

SSA’s Q&A (the origin of which has not yet been traced!) is available as DAP #521.

COURT DECISIONS

Second Circuit Addresses Credibility and RFC

We have seen an increase recently in the number of Summary Orders issued by the United States Court of Appeals for the Second Circuit. Although these Summary Orders do not have precedential effect, they may be used and cited, according to the Second Circuit's Local Rules and the Federal Rules of Appellate Procedure. In October, the Second Circuit issued two Summary Orders reversing adverse District Court decisions that upheld denials of benefits by the Commissioner of Social Security.

In the case of *Horan v. Astrue*, 2009 WL 3161379 (2d Cir. October 2, 2009), the Court of Appeals overturned an Administrative Law Judge (ALJ) decision finding a claimant not credible because that finding was not supported by substantial evidence and was the product of legal error. The Court noted that the ALJ's decision was based on testimony that the claimant did not give and on an inconsistency that did not exist. According to the Second Circuit, the ALJ's recitation of the claimant's testimony regarding his ability to engage in activities of daily living was just plain wrong. Additionally, a purported inconsistency between the claimant's testimony and the treating doctor's report did not exist. Since the ALJ's credibility determination was based largely on these factual errors, the Court refused to find that it was supported by substantial evidence.

Moreover, the Second Circuit also noted that a claimant with a good work record is entitled to substantial credibility when claiming an inability to work because of a disability, citing earlier reported Second Circuit cases on this issue. Experienced DAP advocate Chris Bowes from CeDar successfully represented the appellant in this case and is to be congratulated on getting this excellent decision.

In the case of *Burgin v. Astrue*, 2009 WL 3227599 (2d Cir. October 8, 2009), the Court refused to accept the Commissioner's arguments on two important issues arising in formulating residual functional capac-

ity (RFC): an ALJ's failure to take into consideration all impairments in combination, and the failure to properly consider treating physician opinions. The claimant presented evidence of diagnoses of major depression and bipolar disorder. However, the ALJ only included the diagnosis of bipolar disorder in determining RFC. Although the Commissioner argued that the ALJ's consideration of the bipolar disorder encompassed depression-related symptoms, the Court was unpersuaded because the medical evidence treated the two impairments as separate diagnoses. The ALJ was required to explicitly include consideration of this impairment in combination with her other diagnosis.

The Second Circuit also held that the ALJ erred in failing to discuss the opinion of one of the claimant's treating physicians when he made a determination that the claimant had the RFC for sedentary work. The ALJ gave greater weight to the opinion of a state agency medical expert on the claimant's ability to sit and stand, while ignoring the treating source's opinion that significantly limited the claimant's ability in these areas. The Court of Appeals refused to accept the Commissioner's position that the ALJ's analysis of the treating doctor's opinion could be "gleaned from the record." Rather, the Court required that the ALJ's consideration of treating source evidence must be explicit in the record.

Congratulations to Howard Olinsky, a private attorney from Syracuse, on his success in getting a decision from the W.D.N.Y. overturned in the Second Circuit.



Child Meets Listing, Entitled to Reversal for Payment



One of the hardest things to do in a Social Security case is to show that a claimant meets a Listing. But the feeling that an advocate gets when winning a case at this level is priceless. That same exhilaration extends to winning a case in federal court by convincing a judge that the claimant meets that golden Listing.

District Court Judge Thomas McAvoy provided that elation recently in the case of *Cook o/b/o CC v. Astrue*, 2009 WL 2601240 (N.D.N.Y. August 20, 2009), a child's SSI case where he ordered the Commissioner's decision reversed and remanded for payment of benefits because the child plaintiff met a Listing.

At the hearing level, the ALJ did not provide specific reasoning for his determination that the plaintiff's impairments did not meet Listing 102.08(A), a hearing impairment for children under the age of five. The Court found that this decision was not supported by substantial evidence and went on to discuss in detail the evidence that supported a finding of Listing level severity.

Once the Court determined that a Listing had been met, Judge McAvoy held that remand for further proceedings would serve no purpose, and ordered reversal for payment of benefits. Whoops of joy most certainly rang out from the office of Louise Tarantino of the Empire Justice Center, who represented the child plaintiff on appeal in this district court case.

Court Approves Remand to Different ALJ

In a contentious case challenging termination of child's SSI benefits, plaintiff requested that a stipulated remand from the federal court should be assigned to a different Administrative Law Judge (ALJ) because of a showing of bias, prejudice and hostility to plaintiff and her counsel by the original ALJ.

In the case of *Ocasio v. Astrue*, 2009 WL 2905448 (S.D.N.Y. September 4, 2009), the District Court Judge agreed that the ALJ's animosity toward plaintiff's counsel "tainted aspects of his determination," and took the unusual step of ordering a remand to a different ALJ. The judge also determined that the ALJ's favorable finding of disability for a short period of the total claimed period of disability should not be disturbed in any remand proceeding.

This case is instructive for advocates who practice in federal court on several issues. First, in cases where the Commissioner offers a stipulation of remand, it is imperative that plaintiff's counsel ensure that the remand proceedings are consistent with the claimant's best interests in the case. Here, for example, since the Commissioner would not agree to remand the case to a different ALJ voluntarily, it was incumbent upon plaintiff's counsel to either file a formal motion for

remand to a different ALJ, or to oppose the defendant's motion and specifically ask for this relief. Keep in mind, however, that most District Court judges see remand to a different ALJ as an extreme remedy, and will not issue the order without compelling reasons. This case presented those compelling reasons.

Second, the only way to protect a favorable portion of the ALJ decision on remand is to request that the federal court include in its order some limitation of the scope of review on remand, as the District Court judge did in this case. This result will not happen automatically, so plaintiff's counsel must ensure that the proper language is included in the stipulation for remand, or must file a motion or opposition asking for this relief.

Mike Hampden of the Partnership for Children's Rights represented the plaintiff in *Ocasio*. Congratulations to him for a fine job in this case.



Faulty RFC, Failure to Develop Record Warrant Remand

Determining residual functional capacity (RFC) requires an Administrative Law Judge (ALJ) to consider all medical evidence in the record, and then decide what is the most a claimant can do. Gaps in the medical evidence require that the ALJ develop the record more fully, and thereby preclude a proper RFC assessment. Advocates know this and usually argue this omission to the Appeals Council. When the Appeals Council fails to rectify the ALJ's error, advocates must turn to the federal courts for relief.

A large body of case law has developed in the Second Circuit requiring ALJs to fully develop the record with respect to a claimant's abilities and limitations, even when counsel is present in a case. There is also a significant amount of jurisprudence supporting the principal that an RFC assessment must take into account specific findings about what a claimant can do. A recent decision from the Northern District of New York illustrates that a remand is required when an ALJ fails to develop specific evidence of the ability to perform the exertional requirements necessary for a proper RFC determination. In *Lawton v. Astrue*, 2009 WL 2867905 (N.D.N.Y. September 2, 2009), the Magistrate held that the lack of a physical RFC form from any acceptable medical source created a "critical void," requiring the ALJ to develop the record and fill

the gaps. In this case, the record contained an RFC form from a disability analyst, which the Magistrate noted was not an acceptable medical source under the Commissioner's regulations.

The Magistrate also noted that the vocational expert's testimony was "infected" with a lack of substantial evidence because the ALJ's RFC determination was found to be deficient. The *Lawton* case includes many cites to leading Second Circuit cases on the relevant legal issues, including treatment of treating source evidence and credibility determinations, which the Magistrate found were supported by substantial evidence, but make for interesting reading nonetheless.

Mary Withington from the Legal Aid Society of Northeastern New York ably represented the plaintiff in this case. Congratulations to her on getting a remand in a case involving an ALJ who she says was "awfully stingy with the fully favorable decisions." Luckily for her, this ALJ has since retired.

Send Us Your Decisions!



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

ALJ Decision Reversed in Kid's Case

Judge John Curtin of the Western District of New York recently issued a decision in a childhood CDR (Continuing Disability Review) case reversing the Commissioner's decision to terminate benefits and remanding the claim for the calculation of benefits. *Scott p/n/g of SLC v. Astrue*, 2009 WL 2929823 (W.D.N.Y. Sept. 10, 2009).

The now ten year old child had been awarded benefits shortly after his premature birth in 1999 based on his low birth weight. His benefits were continued following a CDR in 2000. In 2005, he was diagnosed with ADHD and bi-polar disorder. That same year, however, he was found to have medically improved, a determination that was upheld on reconsideration by a Disability Hearing Officer (DHO) and subsequently by an Administrative Law Judge (ALJ). The DHO found that the claimant continued to have a marked impairment in the domain of acquiring and using information due to delays in language development. The ALJ, however, ignored that finding and concluded that the child only had a marked limitation in the domain of interacting and relating with others.

Judge Curtin, in reviewing the evidence, determined that the ALJ's finding of a marked limitation in the domain of interacting and relating with others was supported by substantial evidence. He also upheld the ALJ's determination of a less than marked limitation in the domain of attending and completing tasks. He concluded, however, that the ALJ's finding of a less than marked limitation in the domain of acquiring and using information was not supported by substantial evidence.

Among other errors, the court noted that the ALJ had failed to address CELF-4 scores that revealed more than two standard deviations below the mean in core language, receptive language and expressive language. Judge Curtin cited *F.M. v. Astrue*, 2009 WL 2242134 *8 (E.D.N.Y. July 27, 2009) (which was highlighted in the September 2009 edition of this newsletter) for the proposition that the CELF-4 is a "comprehensive standardized test designed to measure ability or functioning" in this domain.

Judge Curtin held that the record contained persuasive proof of a marked limitation, citing 20 C.F.R. §416.926a(e)(2)(iii), which provides that test scores two standard deviations below the mean demonstrate a "marked" limitation. The court also found that the ALJ had failed to consider properly evidence from the child's first grade teacher documenting marked limitations in intellectual skills, as well as in communication and social behavior.

Judge Curtin concluded that a remand for further proceedings would be futile, "as the only conclusion supported by the record evidence is that SLC suffers from a marked limitation in two domains, and is therefore disabled pursuant to the Commissioner's regulations." Music to our ears! Congratulations to SLC's attorney Denis Clary, who once upon a time was a DAP advocate.



NYS OTDA Issues ADM on Interim Assistance

The NYS Office of Temporary and Disability Assistance (OTDA) recently issued an Administrative Directive (ADM), 09 ADM-18, which advises Social Services Districts (SSDs) of the impact of the state-wide implementation of the Electronic Interim Assistance Reimbursement (e-IAR) process on Temporary Assistance (TA) Interim Assistance (IA) policy as now required by the Social Security Administration (SSA). This new policy will result in electronic information being provided to SSA and ultimately in the electronic transfer of interim assistance payments to local districts without the issuance of “paper checks.”

According to the ADM, the computerized process allows SSA to automatically determine the IAR payment due a SSD based on the SSD workers’ reported IA payment information inputted into and transmitted through a secure website. In addition, the new system will retain an electronic record of SSA’s determination for review; automate the SSA notices process with a comprehensive e-mail alert system; and, automatically notify SSD workers via e-mail of the reimbursement determination and payment. The e-IAR process does not change SSD notification requirements; the actions needed to obtain IAR authorization; the way the SSD determines the IA period; or, the manner in which the SSD calculates the IAR amount.

The ADM also notes that if the SSD fails to access the SSA website and transmit the required IA data within a maximum of twenty-five (25) working days

from the date the SSD received the initial e-mail notification, SSA will automatically send the entire initial SSI payment directly to the recipient in accordance with its regulations. In such case, the SSD will not receive any IAR. SSDs can request that the individual repay IA but there is no legal authority to require repayment.

Additionally, SSDs will no longer be required to disburse an individual’s initial SSI payment in accordance with the SSA’s direct payment method. Therefore, SSDs will no longer receive a TA recipient’s entire initial or post eligibility SSI payment by check, calculate and retain the IAR amount, and disburse any remaining balance to the TA recipient within ten working days of receiving the individual’s initial direct SSI payment from the SSA.

The full ADM is available at:
<http://www.otda.state.ny.us/main/directives/2009/ADM/09-ADM-18.pdf>

OTDA has agreed to meet with advocates to discuss any issues related to implementation of this electronic Interim Assistance Recovery program. Please let Louise or Kate know if you have concerns which should be raised with OTDA.



Contact Us!

 Advocates can contact the DAP Support attorneys at:

 Louise Tarantino: (800) 635-0355, (518) 462-6831, ltarantino@empirejustice.org

 Kate Callery: (800) 724-0490, (585) 454-4060, ext. 5727, (585) 295-5727, kcallery@empirejustice.org

 Ann Biddle: (646) 442-3302, abiddle@lsenyc.org

 Paul Ryther: (585) 657-6040, pryther@frontiernet.net

WEB NEWS

Looking for Medical Data?



The Health On The Net Foundation, which evaluates health and medical websites for conflict of interest, privacy, qualifications of the authors, etc. (see HON Code Principles at <http://www.hon.ch/HONcode/Patients/Conduct.html>) has a search engine called MedHunt, which provides results only from HON-accredited sites.

There is one for professionals and one for patients, and there are additional narrowing criteria available for searches.

<http://www.hon.ch/HONsearch/Patients/hunt.html>

<http://www.hon.ch/HONsearch/Pro/medhunt.html>

Hypothetically Speaking...

At a hearing with a vocational expert, do you have trouble keeping the ALJ's multiple hypothetical questions straight? Did he say 10 pounds, or 20 pounds? Did he say sit for two hours or eight hours? Advocates in the Eighth Circuit have developed a tool that may assist you in these situations. Whatever state you are from, this is a very useful skeleton outline for setting up hypothetical questions or tracking hypothetical questions at hearings. It can also be used as an outline for submitting arguments to the ALJ before the hearing, or asking for a fully favorable decision on the record.

http://www.eighthcircuitdisability.org/attachments/023_Judge%20Sandbothe%20Outline.pdf

Find All There is to Know About Healthcare

A new website that is a collaborative effort among the Empire Justice Center, the Legal Aid Society and Selfhelp Community Services provides terrific resources for anything you need to know about healthcare. Covered topics include Medicaid, Medicare, EPIC, Medicare Part D, Family Health Plus, Child Health Plus, Long term Care Insurance and HIPAA.

www.nyhealthaccess.org



Online Resource Center Trainings Available

Don't forget to check the WNYLC and Empire Justice Center Online Resource Center for up-to-date training materials. There is a comprehensive library of training videos available in numerous substantive areas of law, including, of course, Social Security law, public benefits, child support, domestic violence, community reinvestment, special education, language access issues, immigration, and many more. Whether you are a new advocate who needs immediate immersion, or a seasoned practitioner who needs a few more hours of CLE, check out the diverse offerings at this site.

<http://onlineresources.wnylc.net/welcome.asp?index=Welcome>

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

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.

Encarnacion ex rel. George v. Astrue, 568 F.3d 72 (2d Cir. 2009) ("*Encarnacion II*")

The Court rejected plaintiffs' challenge to SSA's policy preventing adjudicators from adding together less than marked limitations from separate domains and prohibiting SSA from adjusting the level of limitation in one domain to reflect the impact of limitations in other domains. The Court deferred to the Commissioner's interpretation of focusing on combined impairments within each domain rather than across domains. It held that the Commissioner's interpretation satisfies the test that each of a claimant's impairments be given at least some effect during each step of the disability determination process because SSA considers all impairments within each domain.

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)

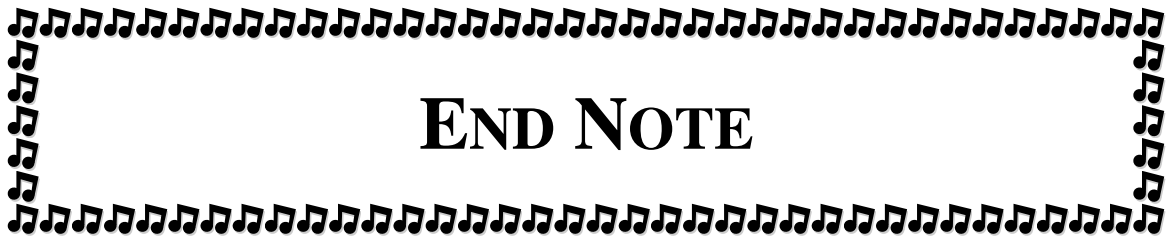
In a case involving an unrepresented parent in a child's SSI claim, the Court found that that the plaintiff had made a knowing and intelligent waiver of her right to counsel. In holding that additional disclosures advising the plaintiff of the availability and benefits of representation required by prior 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.

Burgess v. Astrue, 537 F.3d 117 (2d Cir. 2008)

The ALJ's finding that there was no objective evidence to support opinion of the treating physician that claimant's back impairment was disabling was unsupported, where both the ALJ and the medical expert on whom he relied erroneously assumed that MRI referred to in other reports was not actually in the file. The court noted that even if the MRI report was not in the exhibit file, the ALJ – once made aware of its existence – would have been obligated to request it. The court also rejected the Commissioner's attempt to argue that the MRI did not support the treating physician's opinion, since the court could not affirm on grounds different that those considered by the agency. Nor were the Commissioner or the District Court permitted to substitute their views for that of competent medical opinion. In remanding for further consideration of the treating physician opinion, the court summarized many of its leading treating physician cases.



END NOTE

Be Careful Who Your Friends Are...

Do you blog, twitter or share your inner most thoughts on Facebook, MySpace? If so, be careful about which inner most thoughts you share about your favorite Administrative Law Judges (ALJs). A September 13, 2009 article in the *New York Times* reports on several attorneys who have been sanctioned, disciplined or otherwise “caught” for intemperate remarks made in cyberspace.

Take Sean Conway, a Florida lawyer exasperated with a judge who among other things only gave defense attorneys one week to prepare for trials. In blogging about his frustration with this jurist, Mr. Conway described her as an “Evil, Unfair Witch.” He was reprimanded by the Florida bar. Despite protestations on free speech grounds by the American Civil Liberties Union, the disciplinary action was upheld by the State Supreme Court.

Or there is the lawyer who asked for a trial delay due a death in her family. Although the judge granted the delay, she refused the attorney’s further requests after she read her face book page, which chronicled the attorney’s nights of drinking, partying and motor-biking following the funeral. And the judge notified the senior partner at the lawyer’s firm. The lawyer has since removed the judge from her friends list.

A public defender lost her job and faces disciplinary action for her blogs. She named one judge “Judge Clueless,” and related thinly disguised details of her cases. She was investigated not only for revealing confidential information but also for describing actions - such as not notifying the court of her client’s on-going drug use - that might constitute assisting a criminal or fraudulent act.

Judges are not immune. Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit in California, was investigated for posting off-color

jokes on his family’s web page. Although cleared of wrong-doing, a three judge panel admonished him for judicial imprudence in failing to safe guard the site.

According to Michael Downey, who teaches legal ethics at Washington University Law School, lawyers’ cyberspace postings are limited by codes of conduct: “When you become an officer of the court, you lose the full ability to criticize the court.” Another expert on legal ethics – Stephen Gillers of New York University Law School – speculates that “twenty-somethings have a much-reduced sense of privacy” that may be at odds with centuries of legal traditions.

But with 86 percent of lawyers ages 25 to 35 on social networks like Facebook, things may be changing. In the meantime, be careful who your friends are....





Contact Us!

Advocates can contact the DAP Support attorneys at:

Louise Tarantino

(800) 635-0355
(518) 462-6831
ltarantino@empirejustice.org

Kate Callery

(800) 724-0490 ext. 5727
(585) 295-5727
kcallery@empirejustice.org

Ann Biddle

(646) 442-3302
abiddle@lsny.org

Paul Ryther

(585) 657-6040
pryther@frontiernet.net

SUBSCRIPTION INFORMATION

Disability Law News© is published six times per year by Empire Justice Center, a statewide, multi-issue, multi-strategy non-profit law firm focused on changing the “systems” within which poor and low income families live.

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 Empire Justice Center
1 West Main Street, Suite 200
Rochester, New York 14614

Please reserve my one-year subscription to the Disability Law News for \$75.00.

Name

Organization

Street Address

City

State

Zip

Phone Number

Fax Number

Email Address