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DISABILITY LAW NEWS

ALJ Statistics Make Waves

ALJ Approval Rates Spreadsheet

Thanks to Chris Bowes of CeDar in New York City and Jim Murphy of Legal Services of Central New York in Cortland, advocates can readily review the case outcome statistics of their favorite Administrative Law Judges (ALJs). Chris tracked down a website set up as the result of a Freedom of Information Act request made by *The Oregonian*. It allows users to plug in the name of a particular ALJ from anywhere in the county and learn his or her reversal and approval rates: http://www.oregonlive.com/special/index.ssf/2008/12/social_security_database.html?app. The results cover outcomes from 2005 through 2007 and part of 2008.

Jim, Chris and others have tabulated the results for all the ALJs in New York State in an easy to read spreadsheet that lists ALJs by ODARs. Jim's spreadsheet is available as DAP #510, and makes for fascinating reading. Rather than the straight approval/denial rates listed on the website, the spreadsheet shows the percentages based upon the total number of "on the merits" decisions. Those outcomes based on dismissals before assignment to a judge or approved after "informal remand" by the Division of Disability Determinations are listed separately. This allows for a more meaningful comparison among ALJs,

since the Chief ALJs are often credited with all or many of the "ministerial" decisions. Note, however, that the various rates of dismissals (other than those following an informal remand) among ODARs may in and of themselves be indicative of problems at some ODARs that dismiss cases too frequently or cavalierly.

Most advocates will readily be able to predict the approval rates of the ALJs with whom they are most familiar, but it is interesting to have anecdotal experiences "scientifically" confirmed. It is also interesting to note the outliers - again probably no surprises for advocates who regularly practice in front of them. Nor should it be a surprise that since denials probably take longer to write than approvals, those with bottom of the barrel approval rates tend to be low producers, while those "giving away the store" - in SSA's view - can churn out their decision more quickly.

OIG Report on ALJ Productivity

The issue of ALJ productivity was also the subject of a recent report by SSA's Office of the Inspector General (OIG). On August 8, 2008, OIG issued a report to the Congressional Subcommittee on Social Security regarding ALJ and hearing office per-

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Empire Justice Center
1 West Main Street, Suite 200
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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.

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formance. Members of the subcommittee had specifically asked for information on factors that affect ALJ and hearing office performance (in terms of sheer numbers, as opposed to outcomes or legal sufficiency), ODAR management tools, and SSA initiatives to increase ALJ productivity.

A number of the statistics gathered by the OIG are quite interesting. For example, the average number of decisions rendered per ALJ rose from 421 in Fiscal Year (FY) 2005 to 474 in FY 2007. Most ALJs produce between 300 and 600, not necessarily the 500 – 700 figure that Commissioner Astrue has set as the goal. [An earlier audit report by the OIG in February 2008 concluded that the Commissioner can and should hold ALJs accountable for “reasonable levels” of performance. See A-07-07-17072.] Tables showing productivity rates by ODAR are included as appendices to the report.

The OIG also observed that the highest producers tended to issue the highest number of favorable decisions. The higher producing ALJs had an average favorable rate of 72 percent while the lower producing had an average favorable rate of 55 percent. This difference resulted at least in part from the higher number of OTRs (“On the Record”) decisions issued by the higher producing ALJs: 35 percent to only 11 percent issued by the lower producing group. Not surprisingly, the higher producing judges spent less time on average reviewing files, requested and scheduled more hearings, and held shorter hearings. They also spent less time editing decisions. The lower producers tended to use more experts. In fact, 21 percent of the 29 lowest producing judges interviewed used medical experts in half of their hearings. The lower producers also had more postponements.

Based on its interviews and analyses, the OIG concluded that a number of factors influence ALJ productivity, including “internalized” reasons such as motivation and work ethic. Other external factors are relevant as well, including factors relating to case development by the disability determination services (DDSs), staff levels hearing dockets, individual preferences and agency policies. [The ALJs have weighed in regarding staff support levels. In an October 30, 2008 letter to Commissioner Astrue from the Association of Administrative Law Judges (AALJ), the ALJs’ union admonished SSA for pushing for in

creased productivity to 500-700 decision per year without acknowledging the need for increased support staff.]

The report also summarizes the various initiatives that SSA has undertaken to eliminate its hearing office backlog and, in turn, increase productivity, including the hiring of new staff, new automation such as e-files and e-pulling, and the DDS Informal Remand Project. [SSA also touts its recently proposed regulations under which the agency would be responsible for setting the time and place of an ALJ hearing. The comment period on the proposed regulations, published on November 10, 2008, 73 Fed. Reg. 66564, and summarized in the November 2008 edition of the *Disability Law News*, closed on January 9, 2009.]

The OIG noted that while Chief ALJs can use management tools to oversee ALJ performance and SSA can take disciplinary actions against ALJs, these are not common. In fact, there were no pending actions related to performance, as opposed to conduct. The full report is available at <http://www.ssa.gov/oig/ADOBEPDF/A-07-08-28094.pdf>.

OIG Report on Unfair Treatment Complaints

Ironically, another recent report by the OIG emphasizes how difficult it is for claimants and/or advocates raising problems with hearing offices regarding ALJ performance. Following numerous complaints from constituents about the Dover, Delaware ODAR, Rep. Wayne T. Gilcrest (R-MD) asked that the OIG address complaints of poor customer service and improper handling of claims in the Dover ODAR. He requested that the OIG investigate complaints of 1) requests for excessive and redundant medical evidence; 2) unwarranted dismissals; 3) improper handling of terminal illness, medically critical and dire needs claims; and 4) inappropriate comments by ALJs at hearings.

The OIG, in its report issued in October 2008, entitled *Customer Services Issues at the Dover Hearing Office*, A-12-08-28080, ducked the substance of the complaints and focused instead on how SSA handled them. It concluded that “ODAR could have been more proactive” by providing basic information about the status of each claim, and that “SSA did not ade-

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SSI Charts Updated

More thanks are in order to Jim Murphy of the Cortland office of Legal Services of Central New York. In the September edition of the *Disability Law News*, we announced that Jim had compiled all the SSI benefit level charts since 1976, which was available as DAP #507. Jim has now added the 2009 benefit level chart to his compendium. DAP #507, available on the Empire Justice Center's on-line resource center, has been updated to reflect the new information.

Jim has also updated his SSI Budget Worksheet that he created last year. The new version is updated with 2009 figures and will calculate budgets for years from 2000, including all those squirrelly deeming calculations. It is available as DAP #511.

Who knows how Jim manages to do all he does for DAP, especially since DAP work is only a small part of what he does? Advocates will recall Jim's presentation at last year's Partnership Conference on accessing SSA's e-files, which he has shared at Task Force meetings. Jim's recent Denny Ray Award was well-deserved indeed!

The 2009 Benefit Level chart, along with this year's Deeming chart, are also available separately as DAP #512. They are attached to this newsletter as well. Note, however, that these benefit levels may be subject to change if the Governor's proposed state supplement reduction, which is discussed on page four of this newsletter, goes into effect.

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quately track 'Unfair Treatment Complaints' and as a result, could not determine relevant trends, such as repeated bias complaints associated with an administrative law judge."

Sound familiar? Advocates have frequently bemoaned the lack of a meaningful complaint process within SSA. The issue arose in the *Pronti* litigation challenging bias on the part of now retired ALJ Franklin T. Russell. See *Pronti v. Barnhart*, 339 F.Supp.2d 480 (W.D.N.Y. 2004) (*Pronti I*) and *Pronti v. Barnhart*, 441 F.Supp.2d 466 (W.D.N.Y. 2006) (*Pronti II*). SSA's failure to finalize its "temporary" regulations, issued in 1991, has also been chronicled in these pages (see, e.g., the September 2006 edition of the *Disability Law News*), and has been the subject of various seminars and task force meetings. In fact, it was on the agenda of the most recent NOSSCR conference in October 2008, at which representatives of the Office of the Chief Administrative Law Judge (OCALJ) presented a session on its complaint procedures.

At the NOSSCR session, ODAR officials touted what are presumably their responses to some of the criticisms raised in the OIG report. The OCALJ is allegedly working on procedures to ensure that complaints are acknowledged in a timely manner. OIG found that in some cases, there was no indication that any acknowledgement had ever been sent to the

complainant. It has also updated its website, clarifying where complaints should be sent, and is distributing new posters describing the complaint process to all ODARs.

ODAR has indicated to the OIG that it is "taking steps" to better track complaints. The OIG had found that ODAR had no centralized database for tracking complaints. As a result, it could not respond to the OIG on the number of complaints made, or the actions taken, nor could it identify trends in misconduct or bias among ALJs. ODAR also assured the OIG that it has established an inter-component SSA work to "updated and finalize" the complaint process regulations.

In the meantime, the statistics made available on the Oregonian website and compiled for New York advocates by Jim Murphy will undoubtedly provide further fodder for complaints of bias and/or misconduct by certain ALJs or ODARs. Let's hope they will get someone's attention.

Thanks to Jim, Chris and others for their hard work in collating this data in a meaningful and accessible way. Remember that if you are appearing before a visiting ALJ not listed in the New York spreadsheet, you can still "check out" your visiting ALJ's stats on the *Oregonian* website.

NYS Proposes State Supplement Decrease



By now, we all know that New York State's financial picture is horrifying, awful, dreadful, appalling, terrible, abysmal, and as many other synonyms that you can come up with.

We also think that the State's budget proposal to make up some of its billions of dollars shortfall by reducing the small state supplement paid to SSI recipients is equally appalling, dreadful, and the rest of those same synonyms. The following is from the Executive Budget:

The current (January 2009) State Supplement to the federal SSI benefit for recipients living in the community is proposed to be partially reduced in June 2009, and then partially restored in January 2010. The June 1st effective date is necessary to allow the required 90 days for the federal government to implement the changes, assuming a March 1st budget enactment. Effective January 1, 2009, recipients living in the community saw their benefits increase over 2008 levels by between \$25 and \$55. The State supplements for these recipients would be decreased effective June 1, 2009 by between \$16 and \$28, leaving their overall benefit higher than the 2008 levels by between \$9 and \$34 as a result of the 5.8% cost of living increase to the federal benefit.

The average monthly caseload for SFY 2008-09 is approximately 652,000 and is projected to grow to 658,000 in SFY 2009-10. Savings to the State as a result of this partial pass-through reversal is projected at approximately \$9.2 million per month for June – December and then reduced to \$6.6 million per month for January – March 2010 – a total of \$84.1 million for 2009-10. The State supplement for recipients living in the community will be slightly increased (between \$5 and \$8) effective January 1, 2010.

Example for a Living Alone Single:

December 2008 Benefit:	\$724
January 2009:	\$761 (+37)
June 2009:	\$737 (-24)
January 2010:	\$744 (will be increased further by the 2010 federal COLA).

Last increased SSI State Supplement? For people living in the community (living alone or living with others), the last SSI State supplement increase (of \$1 for person in the living alone category) was effective January 1, 1999. Before that, the living alone supplement was increased from \$71.91 to \$86 effective Jan 1, 1989. At the same time, the supplement for recipients living with others increased from \$17.24 to \$23.

A separate chart with examples of how SSI State supplement reduction would affect SSI recipients living with others and couples is available as DAP# 513.

Although the State appears to believe that saving \$84 million by depriving poor, elderly and disabled persons already living below the federal poverty level of a few dollars more is a good way to balance its books, we think it is bad and ugly. We will keep you posted of advocacy efforts to try to get the Legislature to turn around this fistful of madness. With any luck, SSI recipients in New York will continue to receive the few dollars more that SSA gave them in its most recent record cost of living adjustment.



GAO Criticizes SSA's Evidence Collection and Denial Notices

The General Accountability Office (GAO) recently issued two reports concerning Social Security. In GAO-09-149, entitled "Collection of Medical Evidence Could Be Improved with Evaluations to Identify Promising Collection Practices," the GAO responded to concerns raised by Congress about the extent to which evidence collection was contributing the SSA backlog.

The GAO evaluated 1) the challenges in collecting records from claimant's own providers; 2) the challenges in obtaining high-quality consultative examinations; and 3) the progress SSA has made in moving from paper to electronic collection of medical evidence. The GAO found that obtaining timely and complete medical records is a challenge to the state Disability Determination Services (DDSs) in promptly deciding claims. Even though the DDSs pay for records, and many have in fact implemented more timely payments and some have increased the payments, 14 of the 51 DDSs nationwide reported that they did not receive records in 20% of their requests.

Recruiting and retaining qualified consultative examiners has also been a challenge. [See related article on problems with CEs on page 12 in this newsletter.] Allegedly 41 out of the 51 DDSs routinely ask claimants' own providers to serve as CEs, but 34 DDSs reported that providers never or almost never agree to do so. DDS directors speculated that current payment rates accounted for some of the difficulty recruiting and retaining providers.

According to the GAO, SSA has made progress moving to electronic collection of medical records, but nonetheless faces significant challenges. Although SSA seeks electronic records, only one large provider accounts for most of the record actually submitted. Almost half of the records submitted continue to be done in paper format. The GAO criticized SSA for taking only limited actions to identify the barriers to

electronic submission and for failing to develop strategies to address them.

The GAO recommends that SSA identify DDS collection practices that may be promising and evaluate them, in order to encourage their more wide-spread implementation. To do so, SSA needs more data. It also needs to identify and address barriers to the expanded use of online submissions. The complete report, which was issued on December 17, 2008, is available at www.gao.gov.



In the course of its investigation on the collection of evidence, the GAO identified another issue that it considered outside the scope of the original report. It examined a random selection of electronic folders with initial determinations that included denial notices to claimants. In brief, the GAO observed that the notices provided inconsistent and sometimes misleading information about the evidence obtained. Some notices contained confusing lists of reports from medical sources that did not clearly indicate the evidence that the DDS had actually used to reach its decision. Often, the notices did not, for example, distinguish between those providers who responded that they had no information and those who actually provided records. The GAO questioned whether these notices met the requirements of federal regulations requiring that the notices discuss, in language understandable to the claimant, the evidence used to reach a determination.

The GAO recommended that SSA modify its notices to denied claimants to identify the medical sources in a way that distinguishes 1) sources that provided medical records; 2) sources that responded but did not provide records; and 3) sources that did not respond. Although SSA generally agreed with the GAO recommendations, it noted that implementation would require more study and changes to its computer system. The report, GAO-09-183R, was issued January 9, 2008, and is also available at www.gao.gov.

The GAO recommended that SSA modify its notices to denied claimants to identify the medical sources in a way that distinguishes 1) sources that provided medical records; 2) sources that responded but did not provide records; and 3) sources that did not respond. Although SSA generally agreed with the GAO recommendations, it noted that implementation would require more study and changes to its computer system. The report, GAO-09-183R, was issued January 9, 2008, and is also available at www.gao.gov.

REGULATIONS

SSI Income and Resources Changes Proposed

Although SSA announced in the December 9, 2008 Federal Register (73 Fed. Reg. 74663), that it was making “technical” revisions to the SSI income and resources regulations, at least one of the proposed changes is fairly significant, in our opinion.

Several of the proposed changes reflect statutory changes made in earlier legislation, including the Social Security Protection Act of 2004 (SSPA). These proposals would change how SSA treats some workers as statutory employees as opposed to self-employed independent contractors. The change would allow these employees to deduct business expenses before calculating their income for tax years on or after January 2001. The proposed regulations would also exclude the payment of a refundable child tax credit from income for purposes of SSI eligibility. Such a payment would also be excluded as an SSI resource for the month of receipt and the following month, and became effective January 2001.

The SSPA amended the Social Security Act to create a uniform nine month resource exclusion period for certain tax refunds and for any unspent portion of past-due Social Security and SSI payments. The proposed regulation amends SSA’s rule to correctly reflect the source of this exclusion. Additionally, payments made for flood mitigation activities would not be counted as income or resources in the SSI program, effective October 2005. Medical benefits and compensation payments made under the Energy Employees Occupational Compensation Program Act would also be excluded from income and resources.

A major proposed change affects how SSA counts the home as a resource in instances where a victim of domestic violence leaves the home and resides elsewhere. Current SSI regulations only exclude a home as a resource so long as it serves as the individual’s principal place of residence or the individual maintains intent to return to the residence. According to SSA, advocacy groups, including the Empire Justice Center, expressed concern regarding the counting of a home as a resource for an individual who flees the

home because of domestic abuse, and who may return to a potentially dangerous situation simply to avoid losing SSI. The proposed regulation amends SSA’s resource rules to provide that when an individual has fled his or her home, and provides evidence of domestic abuse, the home would remain an excludable resource despite the physical absence from the home. The exclusion would continue until the individual establishes a new principal place of residence or otherwise takes action that makes the home no longer excludable. This proposed regulation would eliminate a potential financial disincentive to those attempting to leave abusive situations.

As way of background to this change in the resource regulation, in 2004 the Empire Justice Center (then the Greater Upstate Law Project) sent a letter to SSA expressing the concern that victims of domestic violence were losing SSI benefits because the residences which they fled were being counted as resources. SSA policy staff agreed, and in 2005 issued an Administrative Message reminding SSA District Office staff that continued treatment of the home as an excluded resource was critical for victims of domestic violence who were receiving or applying for SSI. At that time, SSA expressed its intention of promulgating regulations to reflect its policy position. These proposed regulations do just that. Copies of the Empire Justice Center correspondence and the 2005 Administrative Message are available as DAP# 514.

The last provision of the proposed regulations eliminates the prerequisite that an applicant for conditional benefits have liquid resources less than three times the monthly Federal benefit rate in order to qualify. This change was necessitated because for the first time in 2009, three times the federal benefit rate puts a person above the \$2,000 SSI resource level. On January 13, 2009, SSA issued an Emergency Message (EM-09003) implementing the proposed regulation.

Comments on these proposed regulations are due by February 9, 2009.

Protective Filing Period Shortened

In a December 17, 2008 Federal Register notice (73 Fed. Reg. 76573), SSA proposes “to revise our rules for protective filing after we receive a written statement of intent to claim Social Security benefits under title II of the Social Security Act (the Act). Specifically, we propose to revise from 6 months to 60 days the time period during which you must file an application for benefits after the date of a notice we send explaining the need to file an application. We are proposing this revision to make the time period used in the title II program consistent with the time period used in other programs we administer under the Act. We believe that eliminating the difference between the time periods in the programs we administer would make it easier for the public to understand and follow our rules.”

Comments to the proposal are due by February 17, 2009.

Download Available for Listening to Appeals Council CDs



In this new digital age, the days of listening to hearing tapes forwarded from the Appeals Council are long over. The Appeals Council now sends claimants or their representatives compact discs (CDs) of the hearing proceedings upon request. Advocates need to download “The Record Player” in order to listen to the CDs. Just the Player can be downloaded for free at: <http://www.fortherecord.com/page.asp?pageid=183>. Those experienced with Player, including DAP computer guru Jim Murphy, recommend patience with the download. There are apparently three versions. Be sure to select the version of Player that is compatible with your computer hardware.

But They’re Cousins...



If you can remember the theme song to “The Patty Duke Show,” popular on 1960s television, then you are closely approaching retirement age yourself!

The Social Security Administration (SSA) teamed up with Patty Duke to unveil its new online retirement application and launched the agency’s *Retire Online* campaign. Featuring cousins Patty and Cathy Lane from the hit sitcom, the campaign will let Americans know that it’s now easier than ever to retire online at www.socialsecurity.gov.

Acting as a spokeswoman for millions of other baby boomers, Ms. Duke is pitching the ease of filing for retirement benefits online. To apply, go to www.socialsecurity.gov and click on “Applying Online for Retirement Benefits.” You will be asked a

brief series of questions about you and your work. Need to look up some information? You don’t have to complete the application in one sitting. You can stop and restart the application without losing any of the information entered. Have a question? There are convenient “more info” links that you can click on to get an answer. And when you’re done, just click the “Sign Now” button to submit the application. There are no paper forms to sign, and usually no additional documents are required. If more information is needed, Social Security will contact you.

To see a demonstration of Social Security’s online retirement application and to view the new public service announcements featuring Patty Duke as cousins Patty and Cathy Lane, go to www.socialsecurity.gov/pattyduke.

What a wild duet!

The American with Disabilities Act Amendments in Effect

The Americans with Disabilities Amendments Act of 2008 (ADAA) went into effect on January 1, 2009. The Act makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of Equal Employment Opportunity Commission's (EEOC) regulations under the Americans with Disabilities Act of 1990 (ADA). The critical inquiry under the amended law is no longer whether the individual has a disability, which had been a primary battleground of past court decisions. Rather, the focus is directed to whether covered entities have complied with their obligations to reasonably accommodate disabled applicants and employees.

When Congress passed the ADA, it expected the definition of disability would be interpreted consistently with how courts had applied the definition of handicap under the Rehabilitation Act of 1973. In the last decade, that expectation has not been fulfilled. The decisions of the Supreme Court in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), and in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), narrowed the broad scope of protection intended to be afforded by the ADA, eliminating protection for many individuals.

Mitigating Measures

The ADAA rejects the requirement articulated by the Supreme Court in *Sutton v. United Airlines, Inc.*, and its companion cases that the decision whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures. To correct this, the ADAA states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability.

"Substantially Limits" and "Major Life Activities"

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Supreme Court reasoned that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as dis-

abled"; and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

Congress has directed the EEOC to revise the portion of its regulations defining the term "substantially limits" and to provide a new definition to indicate the departure from the strict and demanding standard applied by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* and numerous lower courts. The ADAA defines the term "substantially limits" to mean materially restricts.

Also in response to *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Act expands the definition of "major life activities" by including two non-exhaustive lists. The first list includes many activities that the EEOC has previously, recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating). The second list includes major bodily functions (e.g., functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions).

"Regarded As"

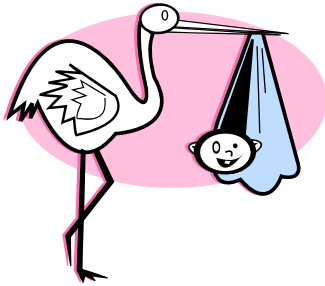
The ADAA also provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation. An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. The protections of the ADAA do not apply to impairments that are transitory and minor, defined as those with an actual or expected duration of six months or less.

"What Impact?"

What impact will the ADAA have on the workplace?

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Welcome New DAP Babies



Two new additions joined the DAP fold this past October – both at the Rochester office of the Empire Justice Center. Senior Paralegal Doris Cortes had a daughter - Amani - who joins big sister Amaya. Attorney Katie Courtney has a new son named Sean Austin. Both moms are a wee bit sleepy but back on the job!

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Some employers may not see much change. In states such as California, New Jersey and New York, state or local laws are even more expansive than the amended ADA, and employers in these states may already be used to the broader disability coverage under state and local laws.

Remember that if the disability is obvious, a duty to accommodate might exist even if the employee has not asked for an accommodation.

In one recent case, *Brady v. Wal-Mart Stores Inc.*, 531 F.3d 127 (2d Cir. 2008), the Second Circuit Court affirmed an award of \$900,000 to a former pharmacy assistant with cerebral palsy whose impairment obviously affected his gait and speech, but who never requested an accommodation. This is a very important Title I case because it describes how the ADA does not require an employee to request the reasonable accommodation but imposes the obligation on the employer to engage in the interactive process and provide the reasonable accommodations when it should have reasonably known that the employee was disabled. The EEOC has long stated that the ADA does not require the employee to request the reasonable accommodation and that an employer should engage in the interactive process once it is aware an accommodation has been requested or is needed, (See <http://www.eeoc.gov/policy/docs/accommodation.html#requesting>). This decision clarifies the obligation of employers to engage in the interactive process and how it can serve as a basis for a violation of the ADA.

Another important decision is *Roberts v. Royal Atlantic Corporation*, 542 F.3d 363 (2d Cir. 2008), which provides a very thorough analysis and explanation of the Title III accessibility requirements for places of public accommodation that is often not undertaken in our Circuit, as is apparent by the lack of case citations throughout the decision. The discussion of when a facility is “altered,” including the analysis of 504 case law and the Department of Justice (DOJ) implementing regulations, is well reasoned. Similarly, discussions of the terms “maximum extent feasible” and when the removal of barriers is “readily achievable” provides some direction on how to the accessibility provisions Title III should be analyzed.

Another important Title III case this year was *Camarillo v. Carrols Corp.*, 518 F.3d 153 (2d Cir. 2008). In *Camarillo*, the Court vacated the NDNY decision and determined that the plaintiff, a blind patron of a fast food restaurant, had standing to pursue her ADA claims. The Court found Title III requires places of public accommodation to ensure auxiliary aids and services are provided to ensure individuals with disabilities have access to all services. The restaurant here failed to ensure “effective communication” of its menu items. In addition the Court determined places of public accommodation must have appropriate policies and procedures in place and ensure staff are properly trained on how to provide these services.

Thanks to Empire Justice Center’s Michael Mulé for his analysis of the amendments to the ADA, and the relevant Second Circuit case law.

COURT DECISIONS

Northern District Judge Remands Kids' SSI Cases



Although the mantra in the Northern District of New York is hurry up and wait in Social Security cases, passing the time seems worth it when a good decision comes at the end. Two good decisions make the wait doubly bearable.

Chief Judge Norman A. Mordue recently issued Memorandum Decisions and Orders in two children's SSI cases handled by Louise Tarantino of the Empire Justice Center. Both cases had been pending at the District Court for nearly four years. Although both cases were remanded, the Judge made specific recommendations in each as to what should occur at the hearing level.

In the case of *Stover o/b/o EL v. Astrue*, 2008 WL 4283421 (NDNY 2008), Judge Mordue adopted a Report and Recommendation (R&R) from Magistrate George H. Lowe. The Magistrate had determined that the Administrative Law Judge's (ALJ) finding that the plaintiff did not meet or equal the ADHD Listing was not supported by substantial evidence. The government read the R&R as finding that the plaintiff did meet the Listing, and filed objections asking for a remand rather than reversal.

Judge Mordue found that the government's objections had no merit. He determined that the Magistrate had found that the ALJ's decision on the Listing was not supported by substantial evidence, and that the Court could not, in the first instance, make an independent determination as to whether the record supported a finding that plaintiff met or equaled a Listing. Judge Mordue ordered that, on remand, the Commissioner must address Listing 112.11 and apply the evidence to the requirements set forth therein.

In the case of *Armstead o/b/o VV v. Astrue*, 2008 WL 4517813 (NDNY 2008), Judge Mordue issued a decision disagreeing with an ALJ's finding that the plaintiff child did not have marked impairments in several domains of functioning. In this case, plaintiff's attorney from the Legal Aid Society of Northeastern New York submitted very good medical evidence to the Appeals Council. That evidence, a report from a treating psychiatrist, documented treatment prior the date of the ALJ's decision, recounted the child's medical history, rendered a diagnosis based both on the child's history and present behavior, and questioned a diagnosis of Tourette's Syndrome. The Judge found that the government's argument that the evidence should be disregarded because it was dated after the ALJ's decision was without merit.

The ALJ found that the child had no marked limitation in any domain of functioning. Plaintiff argued marked limitations in acquiring and using information, attending and completing tasks, interacting and relating to others, and caring for self. The Court found that the new evidence submitted to the Appeals Council required a finding that the ALJ's decision was not supported by substantial evidence in the three of the four domains argued by the plaintiff. Only the finding in the domain of interacting and relating to others was supportable.

Judge Mordue chastised the ALJ for picking and choosing among the evidence to support his decision of no marked limitations. The Judge also made very good findings in the domain of caring for self. Although the ALJ found less than marked limitation in this domain because the plaintiff was able to take care of his personal needs and complete household chores, there was no discussion about the plaintiff's pattern of reckless, risk taking behavior that should have been evaluated in this domain.

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Another Remand Makes a Trifecta

Chief Judge Norman A. Mordue issued another remand order in a case handled by Louise Tarantino and Rob Cisneros of the Empire Justice Center. In *Dickson v. Astrue*, 2008 WL 4287389 (NDNY 2008), Judge Mordue determined that the ALJ erred in finding that the plaintiff's mental impairment was not severe. As a result, the ALJ's residual functional capacity (RFC) determination was erroneous because he failed to consider any of the mental impairments.

Judge Mordue also agreed with plaintiff's argument that the ALJ failed in his duty to fully develop the record. The Court noted that the administrative transcript did not contain any statements from any of plaintiff's treating sources regarding how her impairments affected her ability to perform work-related activities. "The ALJ's failure to seek medical evalua-

tions from plaintiff's treating sources and to apply the proper standard to assess plaintiff's ability to meet the mental demands of work, deprived plaintiff of a full hearing."

Lastly, Judge Mordue agreed with plaintiff that the ALJ erred by relying on a vocational expert's response to a hypothetical question that did not include all of plaintiff's limitations, namely her mental impairments. Since the ALJ failed to consider mental impairments when he formulated the plaintiff's RFC, his hypothetical question was incomplete, and his decision was not supported by substantial evidence.

Here's hoping that Judge Mordue continues his (and our) winning streak.



(Continued from page 10)

Judge Mordue noted that "[O]ne of the relevant areas of inquiry in the 'caring for yourself' domain is whether the claimant 'is able to avoid behaviors that are unsafe or otherwise not good for you.'" Judge Mordue relied on evidence in the record before the ALJ, as well as the evidence submitted to the Appeals Council, for a finding that the ALJ's decision was not supportable.

On remand, Judge Mordue ordered that the Commissioner should consider the psychiatrist's report submitted to the Appeals Council, as well as the other evidence of record as discussed in the Court's opinion.

Good things come to those who wait. We just wish the wait was not quite so long for our clients in these cases.

Check Out Your CEs

Consultative examiners (CEs) hired by SSA (Social Security Administration) can sometimes break – or occasionally – make a case. Just who are these hired guns? SSA’s regulations at 20 C.F.R. §§405.1519 *et seq.* & 416.919 *et seq.*, govern when consultative examinations will be purchased and how they are conducted. Per 20 C.F.R. §§404.1519g & 416.919g, they will be purchased only from a “qualified” medical source, which is defined as a medical source who is currently licensed in the State and has the training and experience to perform the type of examination or testing requested. The regulations also set forth the parameters under which CEs conduct their examinations and complete their reports are also spelled out in the regulations.

But who exactly does SSA hire as CEs? As advocates are aware, most in New York are employed by “corporations” that contract with the New York State Office of Temporary and Disability Assistance (OTDA), which runs the Division of Disability Determinations (DDD), to provide the services. [As discussed on page five in this newsletter, a recent report by the GAO (Government Accountability Office) reveals that SSA has acknowledged difficulties in finding reliable CEs.] A recent case issued by the Appellate Division, Third Department, provides a glimpse into the workings of such contracts. The case illustrates how difficult it was for OTDA to terminate such a contract with Main Evaluations, Inc., even after learning, among other things, that it was never informed that the corporation’s “founder” and chief medical officer was the subject of professional disciplinary proceedings brought by the Office of Professional Medical Conduct that had ultimately resulted in the suspension of his medical license.

OTDA had argued that it properly terminated the contract upon learning this information in 2002. It asserted noncompliance with the terms of the contract, since Main, Inc., had falsely answered questions in the background questionnaires filled in as part of the bidding process as to whether any officers, directors, etc. were subject to investigations. OTDA nonetheless had to defend against a lawsuit and appeal by Main, Inc., that included allegations by the plaintiff that it had been denied equal protection. The decision in *Main Evaluations, Inc. v. State of New York*, issued

on December 18, 2008, is available at <http://decisions.courts.state.ny.us/ad3/Decisions/2008/504880.pdf>

A case from the Western District of New York provides a different glimpse into the world of CE contractors. In *Hernandez v. Industrial Medicine Associates*, 2006 WL 2669378 (W.D.N.Y. September 15, 2006), the plaintiff sued IMA, described in the lawsuit as a professional corporation providing disability evaluations, independent medical examinations, and other medical services, alleging employment discrimination. Plaintiff had accused CE Melvin Zax, Ph.D., of sexual harassment at the workplace. She complained to her employer, IMA, and had filed a complaint with Equal Employment Opportunity Commissioner (EEOC), which issued a “right to sue letter.” Zax regularly performs psychiatric and psychological examinations in Western New York.

The lawsuit involves plaintiff’s claim of a hostile work environment based in part on the sexual harassment and a retaliatory firing. For the most part, it is not particularly relevant to the CE process. It does, however, paint an interesting picture of the corporation. Also, it is quite specific about Zax’s behavior toward the plaintiff, which could be useful the next time one of his reports appears in a claimant file.

And of course, there is the pending litigation against a CE in the New York City area that has been previously reported in these pages. In *Foxworth, et al v. Barnhart*, 05-CV-3074 (NGG/VVP), plaintiffs alleged that SSA has improperly denied benefits to thousands of claimants based on the routinely haphazard, misleading and false consultative examination reports submitted by Dr. Mohammad Khattak, M.D., and his affiliated medical office, DHS. The complaint contains a litany of allegations about Khattak, including his regular practice of “examining” claimants while they were fully clothed. Khattak is no longer acting as a CE.

So - the moral of these stories? Advocates should try to learn as much as possible about the CEs whose reports appear in their clients’ files. One useful website is www.DoctorScoreCard.com, which provides links

(Continued on page 13)

Court Holds Learning Disability Can Be Secondary Impairment



A learning disability can be an impairment in its own right separate from mental retardation, and can thus constitute a “secondary” impairment under the listing for mental retardation, 112.05D. Southern District of New York Judge John Koeltl relied on both the *Diagnostic and Statistical Manual (DSM) IV - TR* and Social Security’s own directives to its adjudicators, as well as other court decision, for this holding. *See Williams o/b/o Buchanan v. Astrue*, 2008 WL 4755348 (S.D.N.Y. October 27, 2008). In particular, the Court cited SSA’s Childhood Evaluation Issues, SSA Publication 64-076.

SSA 64-076 is available as DAP #333 and consists of training materials for advocates and adjudicators. These documents address the policies implementing the Commissioner’s Report on Children’s SSI Redeterminations. The first set of materials include information regarding maladaptive behavior, including training tips, definitions of what “maladaptive behavior” consists of, mental disorders indicative of maladaptive behavior, lists of applicable medications and case adjudication issues. The second set of materials relates to mental retardation. A discussion of IQ scores, definitions, diagnoses, and treatment methodology is examined.

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Note that these training materials (variously referred to the “Headless Child Instruction” or “Pink Cover” manual) were issued prior to the promulgation of the final childhood regulations in January 2001, which change the way that functional equivalency is assessed. To the extent that these materials address

ways in which to meet a listing, however, they are still relevant. They are specifically incorporated into SSA’s more recent compendium of Q&As issued following publication of the final regulations. Both documents are available on the on-line resource center as DAP #333, and are available at www.empirejustice.org. Although not “official,” advocates can use the web address as a citation in legal documents and in other situations where references to the on-line resource center would not be appropriate.

In *Williams*, the ALJ had refused to consider the claimant’s learning disability an impairment separate and distinct from mental retardation. As a result, he did not even make a determination as to the severity of the learning disability. Had he found it severe, it would then of course “automatically” qualify as a secondary impairment under Listing 112.05D. Consequently, Judge Koeltl remanded the claim for further consideration of that and other issues raised by the claimant’s attorney, Steve Godeski, of the Bronx Neighborhood Office of the Legal Aid Society. The Court recommended that the ALJ obtain testimony of medical expert on remand.

Congratulations to Steve for obtaining this helpful ruling.

(Continued from page 12)

to all fifty states licensing and professional misconduct agencies. It covers a variety of medical specialties, including psychologists, nurse practitioners, and others, as well as medical doctors. For New York State specifically, check out <http://www.nydoctorprofile.com/welcome.jsp>.

Current licensure information in New York is also available at <http://www.op.nysed.gov/opsearches.htm>

It never hurts to check – who knows what will turn up!

ADMINISTRATIVE DECISIONS

Child’s Claim Granted Following Third Hearing

After three hearings, a soon to be fifteen year old will finally receive SSI. The child applied for Supplemental Security (SSI) in 2001, alleging ADHD (Attention Deficit Hyperactivity Disorder). Subsequent investigation revealed additional problems: Oppositional Defiant Disorder, Intermittent Explosive Disorder, Developmental Coordination Disorder, and a Learning Disability. The claimant was denied SSI even though a significant amount of evidence was submitted at his first two hearings, including evidence of an attempt by the child to burn down his house with his family members at home.

Advocates at Southern Tier Legal Services (STLS), however, would not take “No” for an answer. They appealed, and then appealed again! Following the second Appeals Council remand, Jeff Nieznanski submitted a letter memorandum to the ALJ, along with twenty-two new exhibits. He argued that his client had marked impairments in at least four domains: attending and completing tasks; interacting and relating to others; caring for self; and acquiring and using information. In response, the ALJ contacted him and offered an onset of December 2005.

Jeff was unwilling to accept this compromise, believing that the record contained substantial evidence of an earlier onset of disability in the file. He wrote

again to the ALJ, arguing for an April 2003 onset, which finally did the trick. According to Jeff, the ALJ seemed persuaded in part by the fact that the claimant, with the help of STLS and the Empire Justice Center’s Jonathan Feldman, is pursuing an education law claim against the school district for its failure to classify the child as a student with a disability. The ALJ had indicated after the August 2008 hearing that the teacher questionnaires did not support an onset date earlier than December 2005. Jeff used the concurrent education law claim as leverage to demonstrate that the less than compelling evidence from the school was tainted by the district’s failure to properly assess and place the child.

Kudos to Jeff and the other advocates at STLS who persevered to get their client and his family the benefits they deserve.



New SSI Trainings Added to the ORC

The On-line Resource Center (ORC) training section is growing by leaps and bounds!! Recently added to the ORC are two new SSI trainings that were recorded at the 2008 Partnership Conference. Look for “Winning on Appeal” and “Confronting Vocational Expert (VE) Testimony.” To view the course description for each training and to register, go to http://onlineresources.wnylc.net/online_training.asp. Click on the training you wish to view, complete the registration form and click submit. A link to the training will automatically be sent to your in-box.

ALJ's DA&A Materiality Finding Overturned

Some ALJ decisions can be truly mind boggling - and sometimes even the Appeals Council seems to recognize that. Case in point: a recent decision received by Al Lowman of Legal Advocacy for the Disabled at Erie County Department of Social Services in which the ALJ had determined that DA&A (drug or alcohol addiction) was material because the claimant was addicted to methadone. As Al succinctly put it to the Appeals Council, “[h]ow is claimant’s participation in a Methadone program and her *compliance* with her prescribed treatment plan material to her disability?”

The Appeals Council saw the light, finding that the ALJ’s conclusion that Methadone addiction was material was not supported by substantial evidence. It noted “that Methadone is commonly prescribed to treat opioid addiction and opioid withdrawal. Further, if Methadone is withdrawn from the medication regiment for such patients, opioid relapse would not necessarily be uncommon.” It found no medical evidence that the claimant was “addicted” to Methadone.

The same ALJ also blithely rejected evidence of the claimant’s treating physician because, according to his own handwriting analysis, the doctor’s signature on his assessments differed from that in his entry notes. [*Editor’s note: this seems to a “signature” trick on the part of this particular ALJ.*] The Appeals Council agreed with Al that the ALJ could not make this assessment without contacting the treating physician.

Finally, the ALJ rejected helpful reports from a Clinical Social Worker because she was not a medical doctor. Once again, the Appeals Council agreed with Al that the ALJ should have weighed the evidence from the social worker under Social Security Ruling (SSR) 06-3p. One wonders where the ALJ has been since the SSR was issued in 2006?

The Appeals Council remanded the claim for consideration of these and other factors overlooked or misjudged by the ALJ. Congratulations to Al for calling the ALJ to task on these blatant errors.

DAP Advocate Comes Out of Retirement to Win Remand

Many advocates around the state will remember DAP diva, Dorothy Barber, a paralegal in Rochester who “retired” several years ago. Dorothy was recently called out of retirement to help cover various maternity leaves at the Empire Justice Center. She quickly proved that she has not lost her touch.

Dorothy filed an appeal with the Appeals Council, objecting to an ALJ decision that relied on the Medical-Vocational Guidelines to deny a claim involving significant mental impairments. The Appeals Council agreed with Dorothy’s argument that the ALJ - who erroneously identified no nonexertional impairments - should not have relied on the “Grid”; it remanded the claim for, among other things, testimony of a vocational expert.

The Appeals Council also agreed with - and quoted back - Dorothy’s argument that the ALJ findings were inconsistent with respect to the claimant’s limi-

tations resulting from her mental impairments of major Depression, PTSD, and Borderline Intellectual Functioning. Dorothy pointed out that the ALJ had concluded “that the claimant is incapable of making adequate and sustained occupational, performance or personal/social adjustments on a sustained basis due to his mental impairment.” The Appeals Council even adapted the “sic” that Dorothy had used to point out that the ALJ had identified the female claimant’s impairments as “his.” Perhaps it helped that she both italicized and bolded that particular point!

Regardless of what fonts she uses, it is clear that Dorothy’s advocacy skills remain sharp. Of note - the Appeals Council issued its decision just one day short of a month of Dorothy’s memo. Our thanks for her continued work on behalf of our clients.

Compassionate Allowance Comes Too Late

An article in the November 2008 edition of the *Disability Law News* described SSA Commissioner Astrue's "Compassionate Allowance" initiative. At least one advocate took the Commissioner up on his offer of expediting the processing of disability claims for applicants whose medical conditions are so severe that their conditions obviously meet Social Security's standards.

LJ Fisher of the Rochester office of the Empire Justice Center requested a decision on the record (OTR) as a compassionate allowance on behalf of her client, who had a recently diagnosed metastatic adenocarcinoma of the lung, as well as HIV/AIDS with ring enhancing brain lesions. On January 7, 2008, LJ contacted the Office of Adjudication and Review in Buffalo, citing the new compassionate allowance standards at www.socialsecurity.gov/compassionateallowances. She also submitted supporting documentation from the claimant's treating physician. She received a fully favorable senior attorney decision dated January 13, 2009, finding that the claimant's condition met Listing 13.14 for malignant neoplastic diseases of the lungs. Unfortunately, her client passed away on January 11th.

Because the application was only for SSI (Supplemental Security Income), no benefits will be paid since the claimant did not have a spouse or children. Only a surviving spouse or parent of a minor

child claimant who lived with the claimant at the time of death or with the six months preceding death (as long as he or she did not cause the death!) can collect the retroactive benefits - or underpayment - owed to the deceased. See 20 C.F.R. §416.542(b)&(c). Obviously, neither the spouse nor the parent would be entitled to any on-going benefits. Note, however, SSI can still withhold interim assistance paid to the State or county for reimbursement. 20 C.F.R. §416.525. See POMS SI 02101.003 for general provisions regarding payment after the death of a claimant. For more on benefits due after a claimant dies, see also the September 2003 edition of the *Disability Law News*.

On a more mundane note, LJ received the decision, dated January 13, 2008, on January 12, 2008. How can that be? According to the November 2008 NOSSCR *Forum*, electronic signatures are another part of the Commissioner's initiatives to reduce the backlog. ALJs and senior decision writers are now authorized to sign decisions electronically using PIN numbers. As soon as the ALJ approves and "signs" the decision, it is uploaded into the centralized ODAR document management system and printed. The printed date is usually three days after the ALJ electronically signs and authorizes the decision. Too bad it could not have been dated earlier rather than later in this case.

2009 Tax Credit Outreach Campaign Kit Now Available

The Center on Budget and Policy Priorities is pleased to announce the availability of the 2009 Tax Credit Outreach Campaign Kit. This resource is intended to provide community groups, housing and social service agencies and employers with the materials and information needed to conduct community outreach efforts promoting the Earned Income Credit (EIC) and the Child Tax Credit (CTC). (EITC payments do not affect rent obligations in the federally-assisted housing programs.)

Today the United States is confronting the most serious economic downturn in many decades. As we head into 2009, an increasing number of low and moderate-income working families and individuals are struggling financially and, more than ever before, are likely to need help from two federal tax benefits, **the Earned Income Credit (EIC) and the Child Tax Credit (CTC)**.

This year, eligible families can get as much as \$4,824 from the EIC, and more if they also qualify for the CTC. Many will need to rely on these credits to help them keep up with household bills and even to help stave off more dire situations, such as mortgage foreclosure. Workers who have been holding jobs that have long provided security for their families may now be grappling with unemployment and do not know where to turn. They may not realize they could qualify for the credits. These and other pressing circumstances have pushed to the forefront the need for effective outreach to ensure that eligible workers know about the credits and how to claim them.

In 2007, 23.1 million eligible families and individuals claimed EICs worth \$44.6 billion. Yet, despite this impressive showing, millions more eligible individuals did not file for the credits and ended up forgoing millions of dollars for which they qualified. Now, when the stakes are so high for struggling families, outreach can help ensure that these vital benefits do not go unclaimed.

In addition to exploring six key elements of an effective Outreach Campaign, the Kit contains full-color posters, flyers, fact sheets, a full stock of outreach strategies and examples of where they are being used successfully, and a guide to finding even more information on the Tax Credit Outreach Campaign website, www.cbpp.org/eic2009.

A free copy of the Kit can be ordered by email at eickit@cbpp.org or by calling the Center on Budget and Policy Priorities at 202-408-1080. The Center is eager to work with organizations to enable Kits to be distributed to their own networks and is ready to help facilitate that process. The Center can provide technical assistance and training to help start or bolster an Outreach Campaign. Please contact the Center's Tax Credit Outreach team at 202-408-1080 if you have any questions or would like to order additional materials.



WEB NEWS

ODAR Statistics You Can Use



In case you missed the discussion on the DAP list serve or in a related article in this newsletter, Chris Bowes of CeDar in NYC uncovered a fantastic website with SSA hearing office statistics nationwide. You can search by ALJ name and get data on allowance and denial rates for the past four years. Be prepared the next time you face a visiting judge from wherever.

http://www.oregonlive.com/special/index.ssf/2008/12/social_security_database.html

Doctor Licensing Questions

New York State has a very good website to search for information related to a doctor's specialty or licensing. However, if you are looking for information for a doctor who may be licensed in another state, we have another website to recommend. The Doctor ScoreCard site also provides links to other states' data on professional misconduct and physician discipline.

<http://www.nydoctorprofile.com/welcome.jsp>

<http://www.doctorscorecard.com/>



Websites Doctors Like

Researching on the Web: Medical Library Association: The Medical Library Association has compiled a guide to help individuals sort through the myriad offerings on the Web. Included is an M.L.A. "Top 10" most useful consumer health Web sites. www.mlanet.org/resources/userguide.html

2009 Social Security Fact Sheet

As we reported in the November 2008 *Disability Law News*, for 2009, SSA made a record 5.8% cost of living adjustment in its benefit programs. An SSA fact sheet with all the relevant increases, including amounts needed for a quarter of coverage, substantial gainful activity (SGA) and Trial Work Period (TWP) thresholds, and the SSI student exclusion, is available at

<http://www.ilr.cornell.edu/EDI/publications/colafacts2009.pdf>

NY Times on Language and Disabilities

A feature in the NY Times online is a blog devoted to language usage issues. Those English majors among us love this stuff! A recent entry focused on the use of language in describing persons with disabilities.

<http://topics.blogs.nytimes.com/2009/01/06/language-and-disabilities/>

CLASS ACTIONS

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

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

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

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

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



Ford v. Shalala, 87 F. Supp. 2d 163 (E.D.N.Y. 1999) (the lousy notice case)

Description - The court ruled that notices of SSI financial eligibility and/or benefit amounts (“SSI financial eligibility notices”) violated the due process clause of the Fifth Amendment of the United States Constitution because of SSA’s failure to provide notice sufficient to permit a reasonable person to understand the basis for the agency’s action.

Relief - The *Ford* Judgment requires the Social Security Administration (SSA) to expeditiously prepare and implement a plan, consistent with the Memorandum Decision and Order, that modifies defendant’s automated SSI financial eligibility notices so as to provide information required in order to understand the reasons for an award, modification, termination or denial of SSI benefits, in such detail as is necessary to permit a reasonable person to understand the basis for the agency’s action on the following subject:

- Information and explanation about the individual’s living arrangement category;
- Information about resources’
- Benefits computations in worksheet form, including the federal benefit and state supplementation rates’
- The notice recipient’s rights to review the claim; and
- The legal authority for the agency’s action including either: (i) the appropriate legal citations or (ii) information as to how the appropriate legal citations can be obtained from the Social Security Administration.

Citations - *Ford v. Shalala*, 87 F. Supp. 2d 163 (E.D.N.Y. 1999) ruled that notices of SSI financial eligibility and/or benefits amounts (“SSI financial eligibility notices”) violated the due process clause of the Fifth Amendment of the United States Constitution: *Ford v. Apfel*, 2000 WL 281888, 2000 U.S. Dist. LEXIS 2898 (E.D.N.Y. January 13, 2000) (Judgment).

Information - General case information: www.wnylc.net/ford/ford.html

Inquiries - mail to ford_v_apfel@yahoo.com; Chris Bowes at CeDAR (212-979-0505); Peter Vollmer (516-870-0335); Gene Doyle (718-843-2290).

BULLETIN BOARD

This "Bulletin Board" contains information about recent disability decisions from the United States Supreme Court and the United States Court of Appeals for the Second Circuit.

We will continue to write more detailed articles about significant decisions as they are issued by these and other Courts, but we hope that this list will help advocates gain an overview of the body of recent judicial decisions that are important in our judicial circuit.

SUPREME COURT DECISIONS

Barnhart v. Thomas, 124 S. Ct. 376 (2003)

The Supreme Court upheld SSA's determination that it can find a claimant not disabled at Step Four of the sequential evaluation without investigation whether her past relevant work actually exists in significant numbers in the national economy. A unanimous Court deferred to the Commissioner's interpretation that an ability to return to past relevant work can be the basis for a denial, even if the job is now obsolete and the claimant could otherwise prevail at Step Five (the "grids"). Adopted by SSA as AR 05-1c.

Barnhart v. Walton, 122 S. Ct. 1265 (2002)

The Supreme Court affirmed SSA's policy of denying SSD and SSI benefits to claimants who return to work and engage in substantial gainful activity (SGA) prior to adjudication of disability within 12 months of onset of disability. The unanimous decision held that the 12-month durational requirement applies to the inability to engage in SGA as well as the underlying impairment itself.

Sims v. Apfel, 120 S. Ct. 2080 (2000)

The Supreme Court held that a Social Security or SSI claimant need not raise an issue before the Appeals Council in order to assert the issue in District Court. The Supreme Court explicitly limited its holding to failure to "exhaust" an issue with the Appeals Council and left open the 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

Kohler v. Astrue, 546 F.3d 260 (2nd 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 than those considered by the agency. Nor was 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.

Torres v. Barnhart, 417 F.3d 276 (2d Cir. 2005)

In a decision clarifying the grounds for equitable tolling, the Second Circuit found that the District Court's failure to hold an evidentiary hearing on whether a plaintiff's situation constituted "extraordinary circumstances" warranting equitable tolling was an abuse of discretion. The Court found that the plaintiff, a *pro se* litigant, was indeed diligent in pursuing his appeal but mistakenly believed that counsel who would file the appropriate federal court papers represented him. This decision continues the Second Circuit's fairly liberal approach to equitable tolling.

Pollard v. Halter, 377 F.3d 183 (2d Cir. 2004)

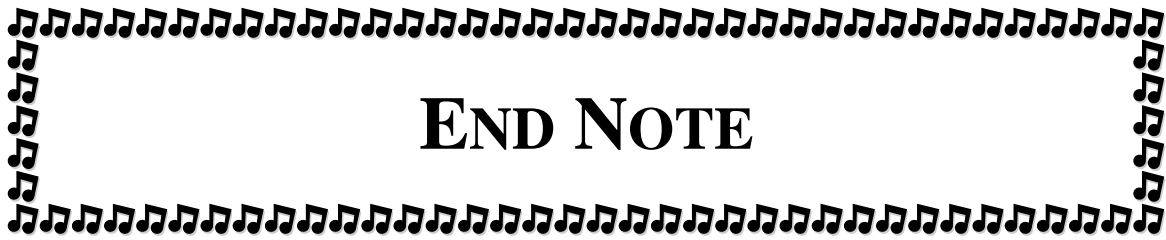
In a children's SSI case, the Court held that a final decision of the Commissioner is rendered when the Appeals Council issues a decision, not when the ALJ issues a decision. In this case, since the Appeals Council decision was after the effective date of the "final" childhood disability regulation, the final rules should have governed the case. The Court also held that new and material evidence submitted to the district court should be considered even though it was generated after the ALJ decision. The Court reasoned that the evidence was material because it directly supported many of the earlier contentions regarding the child's impairments.

Green-Younger v. Barnhart, 335 F.3d 99 (2d Cir. 2003)

In a fibromyalgia case, the Second Circuit ruled that "objective" findings are not required in order to make a finding of disability and that the ALJ erred as a matter of law by requiring the plaintiff to produce objective medical evidence to support her claim. Furthermore, the Court found that the treating physician's opinion should have been accorded controlling weight and that the fact that the opinion relied on the plaintiff's subjective complaints did not undermine the value of the doctor's opinion.

Encarnacion v. Barnhart, 331 F.3d 79 (2d Cir. 2003)

In a class action, plaintiffs challenged the policy of the Commissioner of Social Security of assigning no weight, in children's disability cases, to impairments which impose "less than marked" functional limitations. The district court had upheld the policy, ruling that it did not violate the requirement of 42 U.S.C. §1382c(a)(3)(G) that the Commissioner consider the combined effects of all of an individual's impairments, no matter how minor, "throughout the disability determination process." Although the Second Circuit upheld SSA's interpretation, affirming the decision of the district court, it did so on grounds that contradicted the lower court's reasoning and indicated that the policy may, in fact, violate the statute.



END NOTE

Just Remember This

Many of us – especially with each passing year – lament our seemingly decreasing ability to remember things. But according to a November 11, 2008 article in the *Wall Street Journal*, forgetting can be very useful. Gayatri Devi, a neuro-psychiatrist and memory expert in New York City says: “We focus so much on memory that forgetting has been maligned. But if you didn’t forget, you’d recall all kinds of extraneous information from your life that would drown you in a sea of inefficiency.”

That is apparently what was happening to Jill Price, who was mentally exhausted and bogged down by memories. She could recall in excruciating detail every day of her life since age fourteen, as detailed in the book she published last summer, “The Woman Who Couldn’t Forget.” She was so frustrated that she contacted memory experts at the University of California in Irvine. UC Irvine researchers have interviewed a number of other people claiming to have “autobiographical” memories. Only three others, however, have been confirmed.

Researchers at Stanford University Memory Laboratory have demonstrated that the brain’s prefrontal cortex area sorts out and retrieves memories. The lab’s director, psychologist Anthony Wagner, says that the more subjects forget mundane memories that compete to be recalled, the less work the cortex has to do recalling specific memories. He compared it to the dilemma of having to remember a new computer password every few months. The new one becomes easier to remember as the brain suppresses the old one.

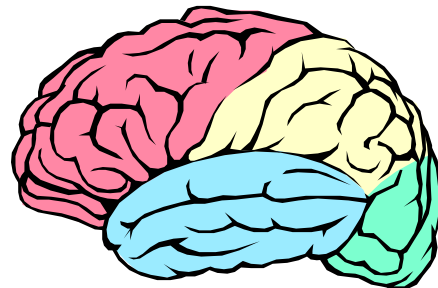
According to Dr. Devi, the brain is constantly evaluating, editing and sorting information: “Your brain is only taking a small amount in, and it’s already erasing vast amounts that won’t be needed again.” As Stanford’s Dr. Wagner points out, much of what happens in the course of a day doesn’t make much of an im-

pression because we are focusing on more specific things.

There is debate among the experts as to whether all those events to which we did not pay much attention are nonetheless stored on the “hard-drive” of our brains. Some experts believe that hypnosis can help retrieve long buried memories or associations; others believe that “recovered” memories are susceptible to distortion. Dr. Devi compares memory to billions of puzzle pieces, many of which look the same. As you retrieve memories, you reconstruct the puzzle and break it down again, with some pieces going back to different places.

If you actually want to remember more about each passing day, some scientists suggest keeping a journal. Not only do you have a tangible record, but the act of writing the events down causes you to reflect on them. “You’re elaborating on why they were meaningful, and you’re laying down an additional memory trace,” says neuroscientist James McGaugh of Irvine.

On the other hand, maybe there are some things we’d rather just forget...





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

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SSI Benefit Levels Chart effective January 1, 2009 (reflects the 5.8% federal COLA for January 2009)

Fed L/A Code	State Supp Code	New York State Living Arrangement	Individual			Couple		
			Federal	State	TOTAL ¹	Federal	State	TOTAL ¹
A	A	Living Alone	\$674	\$87	\$761	\$1,011	\$104	\$1,115
A, C (B)	B (F)	Living With Others (Living in the Household of Another) ²	674 (449.34)	23	697 (472.34)	1,011 (674.00)	46	1,057 (720.00)
A	C	Congregate Care Level 1 - Family Care <input type="checkbox"/> OCFS certified Family Type Homes <input type="checkbox"/> OMH or OMRDD certified Family Care Homes <i>NYC, Nassau, Rockland, Suffolk and Westchester Counties</i>	674	266.48	940.48	1,011	869.96	1,880.96
		<i>Rest of State</i>	674	228.48	902.48	1,011	793.96	1,804.96
A	D	Congregate Care Level 2 - Residential Care <input type="checkbox"/> DOH certified Residences for Adults <input type="checkbox"/> OMH or OMRDD certified Community Residences, Individualized Residential Alternatives and OASAS certified Chemical Dependence Residential Services <i>NYC, Nassau, Rockland, Suffolk and Westchester Counties</i>	674	435	1,109	1,011	1,207	2,218
		<i>Rest of State</i>	674	405	1,079	1,011	1,147	2,158
A	E	Congregate Care Level 3 - Enhanced Residential Care <input type="checkbox"/> DOH certified Adult Homes and Enriched Housing programs <input type="checkbox"/> OMRDD certified Schools for the Mentally Retarded	674	694	1,368	1,011	1,725	2,736
D	Z	Title XIX (Medicaid certified) Institutions ³	30	0 ⁴	30 ⁴	60	0 ⁴	60 ⁴
A	Z	(see below) ⁵	674	0	674	1,011	0	1,011

Minimum Personal Needs Allowances <input type="checkbox"/> Congregate Care Level 1 - \$130 <input type="checkbox"/> Congregate Care Level 2 - \$150 <input type="checkbox"/> Congregate Care Level 3 - \$178	Limits on Countable Resources <input type="checkbox"/> Individuals \$2,000 <input type="checkbox"/> Couples \$3,000	Revised 16 Oct 2008 <u>Statutory References:</u> Chap. 57 of L. 2006 and Chap. 57 of L. 2008
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¹ The combined federal and State SSI benefit provided to eligible individuals and eligible couples with no countable income.

² The *Living With Others* category includes recipients whose federal benefit has been reduced by the "value of the 1/3 reduction" (VTR) due to the federal determination that they are both: *a*) living in someone else's household, *and b*) receiving some amount of free or subsidized food and shelter (room and board).

³ Applies when an SSI recipient is residing in a medical facility, is not expected to return home within 90 days, and Medicaid is paying for at least 50% of the cost of care.

⁴ Recipients in nursing homes licensed by DOH receive an additional monthly grant of \$25 issued by OTDA called a State Supplemental Personal Needs Allowance (SSPNA). Residents of other medical facilities receive an SSPNA of \$5.

⁵ This zero federally-administered State supplement applies: *a*) when an SSI recipient is residing in a private medical facility and Medicaid is paying for less than 50% of the cost of care, *or b*) when a recipient resides in certain publicly operated residential facilities serving 16 or fewer residents, *or c*) while a recipient resides in a public emergency shelter for 6 calendar months during a 9 month period.

**NEW YORK
MONTHLY DEEMING BREAK-EVEN POINTS
EFFECTIVE 01/2009**

[Reference:](#)

[SI 01320.00](#)

PARENT TO CHILD

SPOUSE TO SPOUSE

	*	EARNED 1 Parent	EARNED 2 Parents**	UNEARNED 1 Parent	UNEARNED 2 Parents**	EARNED	UNEARNED
REDUCTION BEGINS	0	1473.01	2147.01	714.00	1051.00	759.01	357.00
ELIGIBILITY CEASES	0	2867.00	3541.00	1411.00	1748.00	2199.00	1077.00
REDUCTION BEGINS	1	1810.01	2484.01	1051.00	1388.00	1096.01	694.00
ELIGIBILITY CEASES	1	3204.00	3878.00	1748.00	2085.00	2536.00	1414.00
REDUCTION BEGINS	2	2147.01	2821.01	1388.00	1725.00	1433.01	1031.00
ELIGIBILITY CEASES	2	3541.00	4215.00	2085.00	2422.00	2873.00	1751.00
REDUCTION BEGINS	3	2484.01	3158.01	1725.00	2062.00	1770.01	1368.00
ELIGIBILITY CEASES	3	3878.00	4552.00	2422.00	2759.00	3210.00	2088.00
REDUCTION BEGINS	4	2821.01	3495.01	2062.00	2399.00	2107.01	1705.00
ELIGIBILITY CEASES	4	4215.00	4889.00	2759.00	3096.00	3547.00	2425.00
REDUCTION BEGINS	5	3158.01	3832.01	2399.00	2736.00	2444.01	2042.00
ELIGIBILITY CEASES	5	4552.00	5226.00	3096.00	3433.00	3884.00	2762.00
REDUCTION BEGINS	6	3495.01	4169.01	2736.00	3073.00	2781.01	2379.00
ELIGIBILITY CEASES	6	4889.00	5563.00	3433.00	3770.00	4221.00	3099.00

NOTE:

All income rates assume an FLA of A or C, that all children have no income, and that there is only one eligible child in the household .

If there are more than 6 ineligible children, add \$337.00 for each additional ineligible child.

This chart does not apply when there is a combination of earned and unearned income.

* Number of ineligible children

** Two parent household, even if only 1 parent has income.

Reduction begins - If the income in your case is greater than the table amount, then the SSI monthly payments are reduced.

Eligibility ceases - If the income in your case is equal to or greater than the table amount, the claimant is N01 due to deeming.

[SI 01320.500](#)

PARENT TO CHILD DEEMING - These figures are correct only if the eligible child has no countable income; and the ineligible children (if any) have no countable income; and the deemor(s) has either earned or unearned income (but not both); and there is only one eligible child in the household.

[SI 01320.400](#)

SPOUSE TO SPOUSE DEEMING - These figures are correct only if all income of the ineligible spouse and the eligible individual is either earned or unearned (but not both); and the ineligible children (if any) have no countable income; and the eligible individual's own countable income is less than the \$674 FBR.

[Payment Charts - NYNET](#)

INDIVIDUAL FBR \$674

COUPLE FBR \$1011

INELIGIBLE CHILD ALLOCATION \$337