

# DISABILITY LAW NEWS

## Courts Give, Congress Takes Away, Benefits to Non-Fleeing Felons

Benefits - or lack thereof - for felons and prisoners are in the news this month. The good news: the Social Security Administration (SSA) is poised to pay out more than \$500 million in benefits that were wrongfully withheld from so-called "fugitive felons." The bad news: Congress has passed legislation barring the receipt of these or any other retroactive benefits by prisoners.

### *Martinez Settlement*

Under the provisions of the nationwide class-action settlement in *Martinez v. Astrue*, SSA has agreed to repay people whose benefits have been suspended or denied since January 1, 2007, based on the mere existence of an outstanding arrest warrant. Over 200,000 people whose benefits have been suspended or denied since January 1, 2007, are potentially eligible for retroactive benefits in varying amounts; approximately 80,000 are potentially eligible for full retroactive reinstatement of benefits totaling over \$500 million.

SSA has begun sending out informational notices advising 28,000 class members who have had their Social Security (Title II) benefits suspended since January 1, 2007, that they may be able to have their benefits rein-

stated retroactively. SSA has also issued the first of several new POMS (Program Operations Manual System) sections dealing with the *Martinez* settlement. See POMS GN 02613.865 - 02613.885, available at [www.ssa.gov/regulations](http://www.ssa.gov/regulations).

The National Senior Citizen Law Center (NSCLC) has set up a website explaining the provisions of the settlement for both advocates and claimants, including handouts for consumers that can be copied and distributed. Jerry McIntyre of the NSCLC and one of the attorneys for the plaintiffs in *Martinez* will be conducting a webinar on the settlement on January 29, 2010. To register, go to: [http://www.consumerlaw.org/issues/seniors\\_initiative/webinar.shtml](http://www.consumerlaw.org/issues/seniors_initiative/webinar.shtml). SSA also has a section on its website pertaining to the settlement: [www.ssa.gov/martinezsettlement](http://www.ssa.gov/martinezsettlement)

### *New Legislation*

In response to a request from SSA, Congress quickly acted upon legislation that would bar any *Martinez* class members who are currently in prison from receiving any part of the settlement. SSA had identified 150 potential class members who would have

### *INSIDE THIS ISSUE:*

REGULATIONS	4
COURT DECISIONS	8
ADMINISTRATIVE DECISIONS	12
WEB NEWS	14
WHAT IS...	15
BULLETIN BOARD	16
END NOTE	18

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(Continued on page 2)

## Non-Fleeing Felons—Continued

(Continued from page 1)

been entitled to full retroactive reinstatement. President Obama signed “No Social Security Benefits for Prisoner Act of 2009,” Pub. L. No. 111-115, into law on December 15, 2009.

The legislation will also bar parole and probation violators from receiving retroactive payments. The prior law prohibited payment of benefits, including retroactive benefits, for any month in which the beneficiary was violating a condition of probation or parole. The new law also prohibits payment of retroactive benefits for periods prior to any violation until such time as the violation has ceased. This provision is likely to affect only a small number of beneficiaries. [While the *Martinez* settlement does not cover parole and probation violations, advocates will recall that there is also litigation pending at the Second Circuit Court of Appeals challenging SSA’s treatment of alleged parole and probation violators. See the May 2009 edition of the *Disability Law News* for more on *Clark v. Astrue*.]

Advocates involved in the *Martinez* litigation fear that there will be further Congressional action in this area, potentially reversing the results of *Martinez*. Congress has already asked the SSA’s Inspector General to review the ramifications of the settlement and to suggest additional legislation that might be necessary. “Congressional Response Report: The Social

Security Administration’s Fugitive Felon Program and the Martinez Settlement Agreement,” A-01-09-29177 (October 15, 2009) is available at [http://www.nsclc.org/areas/social-security-ssi/Martinez-Settlement/congressional-response-report/at\\_download/attachment](http://www.nsclc.org/areas/social-security-ssi/Martinez-Settlement/congressional-response-report/at_download/attachment).

### *Ramifications Beyond Martinez*

While *Martinez* was the justification for this legislation, its impact is not restricted to the *Martinez* class. It will prohibit all retroactive payments to prisoners. Although prisoners are already barred from receiving benefits while incarcerated, payment of retroactive benefits had been permitted. For more on nonpayment of SSI and SSD benefits to prisoners, see the September 2004 edition of the *Disability Law News*.

The bar on payments to prisoners convicted of felonies was expanded effective April 2000. Pursuant to Pub. L. No. 106-170, 42 U.S.C. §402(x) was amended to allow SSA suspend benefits for any beneficiary confined to a jail, prison or other penal institution for more than thirty days. Although this change is reflected in POMS §GN 02607.160, 20 C.F.R. §404.468 has not yet been brought up to date. Maybe SSA will just wait until the law is amended again!

Note that none of these provisions affect the entitlement of auxiliaries to benefits.

## New Faceless Names at the Appeals Council?

In the September 2009 edition of the *Disability Law News*, we reported on changes at the Appeals Council, including how it was progressing with working through its backlog. As part of that effort, the Appeals Council is reportedly training 200 new analysts. Advocates should keep that in mind when writing briefs and memoranda for the Appeals Council. Establishing a good reputation with a new analyst could benefit you for years to come. On the other hand, it will be very hard to change the impression an analyst forms if s/he finds exaggerations or end-runs in the first letters s/he reads from you or your office.

Rumor also has it that the Appeals Council is beefing up its quality assurance role. In other words, it may be taking more own motion reviews of favorable ALJ decisions with which it disagrees. Keep us informed if you begin seeing an increase in “own motion” reviews.

## GAO Studies Solvency Issues

A recent study by the Government Accountability Office (GAO) explores the intersection of addressing the solvency of the Social Security system and the need to protect benefits for the most vulnerable groups. The report addresses the following key questions: (1) what are the options for modifying Social Security benefits to address concerns about benefit adequacy and retirement income security for economically vulnerable groups? and (2) what effects could these options have on benefits those groups receive from SSI, Medicaid, and SNAP (Supplemental Nutrition Assistance Program, formerly the Food Stamp program)?

Various Social Security reform proposals include options intended to address concerns about benefit adequacy for vulnerable groups: (1) Guaranteeing a Minimum Benefit (2) Reducing Work Requirements for Eligibility; (3) Supplementing Benefits for Low-income Single Workers; (4) Adopting Earnings Sharing; (5) Reducing the Marriage Duration Required for Spousal Benefits; (6) Providing Care-giver Credits; (7) Increasing Survivor Benefits; and (8) Providing Longevity Insurance.

According to the GAO, “[i]ncreasing Social Security benefits to address concerns about adequacy for vulnerable groups of beneficiaries could result in a decline in benefits from these other programs. In fact, some beneficiaries could lose eligibility for benefits from the other programs altogether. On the other hand, some beneficiaries may not be affected because their incomes, even with increased Social Security benefits, would stay within the other programs' eligibility limits.”

A summary, as well as a copy of the full report (GAO-10-101R (December 7, 2009)), is available at <http://www.gao.gov/products/GAO-10-101R>.



## Chubby Checkers Twists for SSA



Move over Patty Duke. SSA's latest celebrity feature for Boomers stars Chubby Checker promoting the Medicare "Extra Help" program. New legislation entitles more Medicare beneficiaries to qualify for this subsidy for Medicare Part D prescription coverage. SSA's website provides explanations of the subsidy, changes in the law, and instructions on how to apply, along with application forms: <http://www.ssa.gov/prescriptionhelp/> And then there is the video of Chubby promoting this new "twist" in the program...

# REGULATIONS

## Endocrine Disorders Listing Undergoing Revision

In August 2005, SSA asked for input on how to revise its Listing of Impairments. In a December 14, 2009 notice, SSA proposes some radical changes to the Endocrine Listing for adults and children, Listings 9 and 109. 74 Fed. Reg. Fed. Reg. 66069. Listings criteria 9.01 - 9.08 are gone, “revised” out of existence. Children fare only slightly better, with children up to age 6 who require daily supervision to administer insulin meeting the Listing at 109.08.

SSA’s last major revision of the endocrine disorders Listing was published December 6, 1985, with amendments August 24, 1999, and April 24, 2002. However, “Since 1985, medical science has made significant advances in detecting endocrine disorders at earlier stages, and newer treatments have resulted in better management of these conditions. . . .”

According to SSA, “Many of the current listings in the endocrine system are “reference listings”—listings that are met by satisfying the criteria of other listings. Endocrine glands regulate the functioning of organs and other glands, and endocrine disorders can cause problems that are of listing-level severity and that meet the duration requirement when they affect those organs or other glands. We evaluate these effects under other body system listings. . . .”

Parts 9 & 109 of the Listings are not themselves removed. The introductory and explanatory sections are retained in this proposed regulatory change, with revised language. One might ask of SSA, “Why are we proposing to include guidance for evaluating endocrine disorders in sections 9.00 and 109.00 when there would be no endocrine disorders listings other than proposed listing 109.08?”

The answer: “As we explain in the proposed sections 9.00C and 109.00D, endocrine-related impairments that do not meet or medically equal any listing may nonetheless result in a finding of disability for both adults and children. We may find adults to be disabled based on their residual functional capacity, age, education, and work experience. Sections

404.1520(g) and 416.920(g). We may find children who apply for SSI benefits to be disabled based on impairments that functionally equal the listings. Sections 416.924(d) and 416.926a.”

In other words, this may be just another step SSA is taking along the path toward applying functional analysis in the Listings instead of medical findings.

SSA also notes that “[I]f these rules become final, we will not terminate any person’s disability benefits solely because we have removed any endocrine disorder listing, nor will we review prior allowances based on the endocrine disorders listings under the new rules. Unless we are otherwise required to do so (for example, by statute), we do not readjudicate previously decided cases when we revise our listings. We must periodically conduct continuing disability reviews to determine whether beneficiaries are still disabled. Sections 404.1589 and 416.989. When we do, we will not find that a person’s disability has ended based on a change in a listing. In most cases, we must show that the person’s impairment(s) has medically improved and that any medical improvement is “related to the ability to work.” Sections 404.1594 and 416.994. Even where the impairment (s) has medically improved, our regulations provide that the improvement is not “related to the ability to work” if it continues to meet or medically equal the “same listing section used to make our most recent favorable decision.” This is true even if we have deleted the listing section we used to make the most recent favorable decision. Sections 404.1594(c)(3)(i) and 416.994(b)(2)(iv)(A). When we find that medical improvement is not related to the ability to work (or, in the case of a person under age 18, the impairment still meets or medically equals the prior listing), we will find that disability continues, unless an exception to medical improvement applies.”

Comments to the proposed Listing change are due by February 12, 2010.

## SSI Income and Resources Amendments Adopted

In a little over a year, the Social Security Administration (SSA) issued proposed rule making, reviewed comments, then issued final regulations relating to some SSI income and resources regulations. SSA noted that it was making “technical” revisions to some regulations, and also amending rules relating to the exclusion of a home in domestic abuse situations. Lastly, SSA updated its conditional payment rule. 75 Fed. Reg. 1271 (January 11, 2010). The final rules go into effect on February 10, 2010.

Several of the amendments reflect statutory changes made in earlier legislation, including the Social Security Protection Act of 2004 (SSPA). These amendments change how SSA treats some workers as statutory employees as opposed to self-employed independent contractors. The change allows these employees to deduct business expenses before calculating their income for tax years on or after January 2001. The final regulations also exclude the payment of a refundable child tax credit from income for purposes of SSI eligibility. Such a payment will also be excluded as an SSI resource for the month of receipt and the following month. This change also became effective on or after 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 new regulation amends SSA’s rule to correctly reflect the source of this exclusion. Additionally, payments made for flood mitigation activities will 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 will also be excluded from income and resources, effective July 31, 2001.

A significant change affects how SSA counts the home as a resource in instances where a victim of domestic violence leaves the home and resides elsewhere. Under previous SSI regulations, a home could only be excluded as a resource so long as it served as the individual’s principal place of residence or the individual maintained 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 final 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 will remain an excludable resource despite the physical absence from the home. The exclusion will continue until the individual establishes a new principal place of residence or otherwise takes action that makes the home no longer excludable. This regulation eliminates 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 with our position 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 to promulgate regulations reflecting its policy position. These final regulations do just that. Copies of the Empire Justice center correspondence with SSA policy staff and the 2005 Administrative Message are available as DAP# 522.

The last provision of the new 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 for SSI. This change was necessitated because for the first time in 2009, three times the federal benefit rate put a person above the \$2,000 SSI resource level. On January 13, 2009, SSA issued an Emergency Message (EM-09003) implementing the then proposed regulation.

## SSA Seeking Comments on Other Listing Revisions



In late November 2009, SSA issued an Advanced Notice of Proposed Rulemaking and announced that it was seeking comments on potential changes to Multiple Body Systems, Listings 10 & 110, Genitourinary impairments, Listings 6 & 106, and Skin disorders, Listings 8 & 108. 74 Fed. Reg. 57970-57973. (November 10, 2009).

The comments deadline was January 11, 2010. Stay tuned for future announcements from SSA on changes to these Listings.

## DSI=DOA

SSA proposes “to eliminate the remaining portions of part 405 of our rules, which we now use for initial disability claims in our Boston region. We propose to use the same rules for disability claims in the Boston region that we use for disability adjudications in the rest of the country, including those rules that apply to the administrative law judge (ALJ) and Appeals Council (AC) levels of our administrative review process in parts 404 and 416 of our rules.” 74 Fed. Reg. 63688 (December 4, 2009).

Comments deadline is February 2, 2010. Please see the full notice for details on submitting comments.

Advocates affected by DSI of course are aware that this is merely the official notice and final wrap-up of a process of deconstructing the Disability Review Board, the Federal Review Officer system and the rest of DSI that has been dragging along the past couple of years. Clearly SSA saw the error of its ways and is ditching the DSI process sooner rather than later.

## Mac vs. PC, and Other Computer Queries

SSA invites the public to tell the agency how to set up its computer systems at a meeting of the Future Systems Technology Advisory Panel. 75 Fed. Reg. 1446 (January 11, 2010):

The Panel shall report to and provide the Commissioner of Social Security independent advice and recommendations on the future of systems technology and electronic services at the agency five to ten years into the future. The Panel will recommend a road map to aid SSA in determining what future systems technologies may be developed to assist in carrying out its statutory mission. Advice and recommendations can relate to SSA's systems in the area of internet application, customer service, or any other arena that would improve SSA's ability to serve the American people.

The Panel will meet on Wednesday, February 3, 2010, from 10:30 a.m. until 5 p.m. and Thursday, February 4, 2010, from 8:30 a.m. to 12 p.m. The agenda will be available on the Internet at <http://www.ssa.gov/fstap/index.htm> or available by e-mail or fax on request, one week prior to the starting date. Public comments will be heard on Wednesday, February 3, 2010, from 4:30 p.m. until 5 p.m. Persons interested in providing comments in person should contact the Panel staff to schedule a time slot.

Here's your chance to pitch your great computer idea to one of the largest computer users in the world. Who knows, maybe they'll put you in a snappy commercial.

## Foster Care Youth Can Apply for SSI Early

Effective January 13, 2010, SSA may accept an SSI application from a disabled youth in foster care up to **90 days** before federal foster care payments are expected to end. This is an exception to the general rule of accepting an SSI application in the month before the month of eligibility. This policy will aid disabled youth in foster care to make the transition to adult life by helping to insure that they have income and health benefits in place.

The policy is in the POMS at [SI 00601.011 Filing Supplemental Security Income \(SSI\) Applications for Disabled Youth Transitioning out of Foster Care](#), and SI 00601 TN 18, General Applications and Interviewing Policy.

## Listening Tour Seeks Comments



In early 2010, the U.S. Department of Labor's (DOL) Office of Disability Employment Policy (ODEP) and its Federal partners will hold a series of six Listening Sessions across the country on disability employ-

ment. New York is included in the Boston area hearing which is scheduled for March 2, 2010. Each Listening Session is an opportunity for members of the public to provide input to senior Federal officials on their ideas for more effective ways to employ women, Veterans and minorities with disabilities and what is currently working in their regions to increase employment of people with disabilities. ODEP seeks input particularly from:

- **Individuals & Consumers:** youth and adults with disabilities, parents and caregivers.
- **Employers:** public and private
- **Service Providers & Advocacy Organizations (such as Employment Services and Partners):** Independent Living Centers, One-Stops, State Vocational Rehabilitation Programs.

Partners Include:

U.S. Social Security Administration  
 U.S. Department of Health and Human Services  
 U.S. Department of Education  
 DOL Employment Training Administration  
 DOL Veterans' Employment and Training Service  
 DOL Women's Bureau  
 U.S. Office of Personnel Management

See <http://www.disabilitylisteningtour.com/> for more information.

## COURT DECISIONS

### SSA Notices Discriminate Against Blind and Visually Impaired

Ruling that the Social Security Administration (SSA) “has been quick to find lame excuses for noncompliance [with Section 504 of the Rehabilitation Act] but exceedingly slow to favor accommodations,” a federal court judge in California has ordered relief to a nation-wide class of visually impaired individuals who sought to compel SSA to provide alternative formats of communication.

The plaintiff’s sought to have SSA provide its standard print notices in alternative formats such as Braille, large print, audio CD, and e-mail, without regard to whether blindness was the basis for their benefits. At issue was a Special Notice Provision (SNP) of the Social Security Act that applied only to individuals who receive or apply for benefits on the basis of blindness. Under the SNP (42 U.S.C. §1383 (1)), only those individuals could choose to receive notice by certified mail, first class mail followed by a phone call, or first class mail. Not only did the SNP leave out alternative forms of communication; it also left in the lurch applicants with visual impairments other than blindness, and blind or visually impaired individuals receiving benefits based on age or as representative payees. The overwhelming majority of class members are over the age of 80, having lost their sight as a result of macular degeneration, diabetes or glaucoma.

The Court held that the SNP failed to measure up to the requirements of Section 504. It also found that SSA had not demonstrated that there would be an undue financial and administrative burden to provide alternative formats such as a Braille option or a Microsoft Word CD. It did reject plaintiffs’ request for e-mail communications on the grounds that the risk of personal identifying information being stolen was too great.

In 2008, when the Court denied the government’s motion to dismiss on jurisdictional grounds, the Court offered to stay its proceedings to allow SSA to prom-

ulgate regulations. Both parties, however, requested a decision on the merits. As a result of SSA’s litigation posture in the case, the Court refused to remand to allow the agency to pursue system-wide rulemaking. Instead, it ordered very specific relief, including 1) the development by April 15, 2010, of a Braille alternative and navigable Microsoft Word CD alternative; 2) notice by December 31, 2009, to all beneficiaries and authorized persons shown to be blind or visually impaired of the new communications policy effective April 2010, that the individual could request alternative accommodations (no benefits may be reduced or terminated for any individual who is blind or visually impaired after April 16, 2010, until this notice has been provided); 3) announcement of new communications policy on its website and staff training; and 4) certification of compliance under oath detailing what SSA has done to comply with the Court’s order.

SSA’s new policy and samples of notices are already available at <http://www.ssa.gov/notices/>. A copy of the decision in *American Council of the Blind, et al. v. Astrue*, No. C 05-04696-WHA (N.D. Cal. Oct. 20, 2009) is available at [http://www.nosscr.org/pdfs/blind\\_access.pdf](http://www.nosscr.org/pdfs/blind_access.pdf), and is also accessible on Westlaw as 2009 WL 3400686 (N.D. Cal., Oct. 20, 2009).

Jerry McIntyre and others at the National Senior Citizen Law Center, the Disability Rights Education and Defense Fund, the Oregon Advocacy Center, and Heller Ehrman LLP are responsible for this significant victory.



## Court of Appeals Upholds District Court

In a summary order, the Second Circuit upheld a decision by U.S. District Court Judge David Larimer of the Western District affirming the Commissioner. The case, which involved a 47 year old claimant alleging disability based on depression and anxiety, had previously been remanded from the District Court by stipulation for vocational testimony.

In *Calabrese v. Astrue*, 592 F.Supp.2d 379 (W.D.N.Y. 2009), *aff'd* 2009 WL 5031356 (2d Cir. Dec. 23, 2009), the Court held that on remand the ALJ properly relied on testimony of a vocational expert (VE) to determine that claimant's nonexertional impairments did not significantly restrict the range of work that she could perform. The VE did not testify as to specific jobs that the claimant could perform, but only assisted the ALJ in determining whether her non-exertional limitations significantly limited the range of work she could perform. In light of the ALJ's finding that the non-exertional impairments had little or no effect on her occupational base of sedentary work, the ALJ was justified in using the Grid and finding her not disabled. Because the ALJ concluded from the grids that the claimant was not disabled, he was not required to identify specific jobs she could perform.

The Court of Appeals also agreed that the hypotheticals posed to the VE accurately reflected the claimant's limitations. The ALJ did not err by failing to specify claimant's IQ scores in his hypothetical question to the VE where the hypothetical included findings that were based on her limited intelligence. The Court cited *England v. Astrue*, 490 F.3d 1017, 1023 (8<sup>th</sup> Cir. 2007) for the proposition that a hypothetical "need not frame the claimant's impairments in the specific diagnostic terms used in the medical reports, but instead should capture the concrete consequences of those impairments."

Finally, the Court found that the ALJ's credibility finding was amply supported by evidence that the claimant took no prescription strength pain medication despite her contention that she was experiencing pain of eight on a scale of one to ten; was noncompliant in taking prescribed medication; and admitted to her ability to cook, clean, do laundry, shop and handle her own finances.

Advocates will recall that these summary orders from the Court of Appeals may be cited in future cases, but do not have precedential effect.

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## ALJ Reversed in Obesity Case

Merely referring to a claimant's failure to lose weight does not constitute consideration of obesity under Social Security Ruling (SSR) 02-1p. In *Sotack v. Astrue*, 2009 WL 3734869 (W.D.N.Y. Nov. 4, 2009) (Hiller), Judge Telesca of the Western District remanded the claim for calculation of benefits where ALJ failed to consider the effects of obesity on the claimant's ability to return to her past relevant work.

The 30 year old claimant had alleged disability based on deep vein thrombosis, sleep apnea, a weak heart and leg pain. The Commissioner's argument to the contrary notwithstanding, the Court found that there was substantial evidence of record concerning the claimant's obesity. The ALJ's mere mention that claimant's physician had advised her to lose weight did not meet the requirements of SSR 02-1p. Nor was that a sufficient basis for a finding under the SSR

that the claimant had failed to follow prescribed treatment.

The Court held that the record contains substantial evidence of the limiting effects of claimant's obesity, including the treating physician's statement of claimant's limitations in standing, sitting, lifting, etc., based on her fibromyalgia, DVT, sleep apnea, obesity and cardiomyopathy. The treating physician also noted that claimant would need to rest due to pain for a total of two hours per day.

As such, Judge Telesca ruled that no purpose would be served by a remand for further proceedings. No doubt that was music to the ears of the claimant's attorney, Amanda Jordan of the law offices of Kenneth Hiller.

## Magistrate Demands Logic

How many times have we scratched our heads when reading ALJ decisions that defy logic? Luckily for Alan Bock, Magistrate Foschio of the Western District of New York recently decided that logic is required in ALJ decisions! The Magistrate agreed with Alan that ALJ Harvey erred in finding the claimant in a continuing disability review (CDR) not disabled under the Medical-Vocational Guidelines.

The claimant, who was 52 years old at the time the CDR commenced, had originally been found disabled in 1989 based on a seizure disorder and borderline intellectual functioning. Although his seizure disorder may have improved, there was no similar evidence of improvement in brain functioning. He continued to display the cognitive deficits that had been attributed to a serious head injury in the mid-1970s.

The Magistrate held that the ALJ's determination that claimant had some college education was not based on substantial evidence. Although he had completed two years of college before his head trauma, his current educational abilities contradicted his numerical

grade level. The Magistrate relied on Alan's reference to 20 C.F.R. §416.964(b) for this finding: formal education completed before an impairment began may no longer be useful or meaningful in terms of analyzing ability to work. He rejected the Commissioner's argument that because the claimant testified that he received his college education "before 1990," he must have earned his certificate before his head injury in the mid 1970s as illogical: the Commissioner's "bald assertion" was "mere speculation."

The Magistrate also held that the ALJ erred in failing to consider the claimant's borderline intellectual functioning as a nonexertional limitation, and instead relying on the Grid. He recommended that the claim be remanded for vocational testimony. U.S. District Court Judge Arcara adopted Magistrate Foschio's Report and Recommendation in *Pullam v. Astrue*, -- F.Supp.2d ---, 2009 WL 4571841 (W.D.N.Y. Dec. 07 2009).

Congratulations to Alan for his very logical work on this case.

## Failure to Consider All Impairments Leads to Remand

There is certainly one former ALJ from the Albany ODAR who will not be missed. Although this retired ALJ will remain nameless, many of you know who we're talking about! Well, here's another federal court decision reversing this ALJ's second unfavorable decision in a case.

Magistrate Peebles of the NDNY found that the ALJ failed to consider one of the claimant's significant impairments, her migraine headaches. As the Court noted, "[D]espite significant evidence of reports by the plaintiff of migraine and tension headaches extending over a period of many years, the ALJ did not even include headaches among the impairments listed at step two of his decision."

The Court went on to note that the RFC determination was not supported by substantial evidence because the ALJ plainly failed to consider the cumulative impact of all of plaintiff's impairments, most notably the contributing effects of her headaches. In this regard, it is significant that when questioned by plaintiff's counsel, the vocational expert, upon whose opinion

the ALJ's finding was premised, acknowledged that the existence of migraines affecting plaintiff's ability to work could create concern for an employer.

In conclusion, the Magistrate held that the ALJ's determination gave "short shrift to plaintiff's migraine headaches, and their impact, together with her other mental and physical conditions, upon her ability to perform work related functions, thereby infecting the ALJ's RFC finding, and in turn the conclusion that plaintiff is not disabled." Although the Court seemed concerned that the case was before this ALJ for two different hearings, once required by an Appeals Council remand, Magistrate Peebles did order a remand for further proceedings. At least the case will go to a different ALJ the next time around!

Congratulations to Joanna Davis of the Legal Aid Society of Northeastern New York's Saratoga Springs office for excellent advocacy, persistence and determination in pursuing benefits in the case of *Ebert v. Astrue*, 2009 WL 3764219 (N.D.N.Y. November 10, 2009).

## Court of Appeals Joins Electronic Age



The United States Court of Appeals for the Second Circuit will convert to a new case management system and electronic document filing (“CM/ECF”) effective January 20, 2010. Newly adopted Interim Local Rule

25.1 sets forth the Court’s filing requirements: [http://www.ca2.uscourts.gov/clerk/Rules/LR/Local\\_Rule\\_25\\_1.htm](http://www.ca2.uscourts.gov/clerk/Rules/LR/Local_Rule_25_1.htm)

The newly designed Clerk’s Office web page contains information regarding registration and detailed filing instructions. See <http://www.ca2.uscourts.gov/clerk/index.htm>. Attorneys already registered in another appellate court or district court(s) must still register for the Second Circuit.

Not surprisingly, the Second Circuit has retained the requirement for manual filing of briefs and appendices. Local Rule 25.1(g) requires CM/ECF filers to submit separately the requisite number of paper copies prescribed under LRs 30.1(b) and 31.1 in addition to filing electronically.

Advocates should also note that the Court has prom-

ulgated new local rules, effective January 1, 2010. Revised LR 31.2 describes a new procedure for setting briefing deadlines. Reply briefs must be filed in compliance with Federal Rule of Appellate Procedure 31. The automatic thirty day extension is eliminated. The rule also distinguishes between appeals on or before December 31, 2009, and those filed after.

District court deadlines for the filing of papers have also changed to conform to the time period amendments of the Federal Rules of Civil Procedure, which involve changing most deadlines of fewer than thirty days to multiples of seven (i.e., seven, fourteen, twenty-one). For attorneys who practice in the Western District of New York, a Standing Order, effective December 1, 2009, amends the local rules. See <http://www.nywd.uscourts.gov/document/standing%20order%2080.pdf>. In addition to changes regarding the Service and Filing of Papers (Rule 7.1(c)), other changes include the time to appeal and/or object to Magistrate Judges’ Actions or Reports and Recommendations (ten to fourteen days). LR 72.3(a)(2)&(3). Advocates should be sure to check the local rules of the district(s) in which they practice before relying on old deadlines.

## Legal Services Groups Announce New Resource for Health Advocates

The Empire Justice Center, The Legal Aid Society, and Selfhelp Community Services are excited to announce the launching of a new website called New York Health Access designed for New York State health advocates, caregivers, and consumers. The website provides articles, guides and training materials on access to health care services and health insurance programs for low-income New Yorkers.

As the economy continues to struggle, the website will be a valuable resource for information about alternatives for New Yorkers who lose health benefits or are no longer able to afford them. Postings include:

- information on eligibility, enrollment, retention and navigation of New York State’s public health insurance programs - Medicaid, Family Health Plus and Child Health Plus;
- information on programs targeted to senior citizens and individuals with disabilities who need assistance accessing Medicaid benefits or paying for and supplementing Medicare benefits; and
- information and resources for uninsured, underinsured and other individuals facing medical debt.

New York Health Access is a statewide collaboration made possible in part by grants from the New York State Office for the Aging and the New York Community Trust. The website is hosted by the Western New York Law Center and can be found at: <http://nyhealthaccess.org/>

# ADMINISTRATIVE DECISIONS

## ALJ Grants 12.05C Claim

How frustrating is it to be almost certain that your client has an IQ within the mentally retarded range, but there are no IQ scores available to prove your suspicions? Laura Weekly of the Legal Services of Central New York in Syracuse got those IQ scores by convincing the ALJ to send her client to a consultative examiner (CE) for intelligence testing, which revealed a Full Scale IQ score of 61.

Laura's client was a 59 year old woman with diabetes, osteoarthritis, right thumb tendonitis, and bilateral carpal tunnel. She had filed her current application in March 2007. She had had past work experience as a housekeeper, but was only insured for Title benefits through December 2001. She had alleged an onset date of January 2001.

Although Laura was unable to obtain school records or statements from family members verifying that the claimant was always intellectually limited, the ALJ nonetheless found that the claimant met listing 12.05C. The ALJ held that:

[w]hile the record does not contain results from intelligence tests administered to the claimant prior to the age of 22, her history of very low income from simple, unskilled work along with her history of special education in high school, her inability to read and her inability to take the GED despite five years of preparation, indicates that her mental retardation manifested during the developmental period. Moreover, the record does not show an intervening medical cause for the claimant's cognitive limitations and she exhibits sufficient deficits in adaptive functioning to support the diagnosis of mental retardation.

The ALJ credited the claimant's testimony as evidence that her past jobs involved only simple tasks "not inconsistent with her cognitive limitations." He also held that:

Although the record may indicate the claimant has not been aggressively pursuing treatment for any of her medical conditions, this does not undermine her allegations because the record shows that she has been uninsured at various times. Moreover, due to her mild mental retardation she may not recognize the importance of proper follow up treatment.

The ALJ also reopened the claimant's prior 2003, 2004 and 2005 initial denials, citing the IQ test as new evidence establishing mild mental retardation, adding "the claimant lacked the mental capacity to understand the procedures for requesting review due to her mental retardation and inability to read and write." He found her disabled back to March 31, 1998, thus ensuring her entitlement to Title II as well as SSI benefits.

Sounds like the decision of our dreams. Congratulations to Laura for making it reality!

## ODAR Delays Shrink?

Recent editions of the *Disability Law News* have reported on ODAR (Office of Disability Adjudication and Review) average processing times from hearing request to decision. Statistics for the month ending October 30, 2009, are listed below. The numbers in parentheses are the rankings and processing times for the period ending September 2009. The “rank” represents the office’s position among the 142 ODARs nationwide, ranging from shortest (1) to longest (142) processing time.

RANK	ODAR	DAYS
2 (3)	Brooklyn	268 (294)
24 (33)	Jericho	354 (386)
59 (85)	Queens	421 (478)
75 (58)	White Plains	452 (435)
84 (88)	Albany	466 (487)
85 (**)	Rochester	468 (***)
97 (91)	New York	475 (490)
125 (123)	Bronx	557 (605)
131 (122)	Buffalo	573 (593)
133 (130)	Syracuse	576 (629)

\*\*Note that Rochester appears as an independent ODAR separate from Buffalo for the first time in these ranking.

While the backlog is slowly being whittled away at ODAR, advocates fear that the floodgates from the DDSs (Disability Determination Services) are about to open. Nationally, the number of applications being filed has increased by 38.8%. If applications continue to climb at the same rate, DDS receipts could hit over 1,000,000 by the end of FY 2010. Not surprisingly, processing times at the initial levels are slowing down. Exacerbating the problem at some DDSs are furloughs of state workers, despite pleas from Vice-President Biden and SSA Commissioner Astrue to exempt DDS workers. In California, SSA has gone so far as to file a “Statement of Interest” in a lawsuit against Governor Schwarzenegger by a union that includes DSS workers.

To see how the American Bar Association is pitching in to help diminish the backlog, go to [http://www.abajournal.com/magazine/bucking\\_a\\_backlog/](http://www.abajournal.com/magazine/bucking_a_backlog/)

### 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](mailto:kcallery@empirejustice.org)  
 Louise Tarantino, [ltarantino@empirejustice.org](mailto:ltarantino@empirejustice.org)

# WEB NEWS

## 2010 SSI Benefits Levels Available

Since there was no COLA (Cost of Living Adjustment) for SSI (Supplemental Security Income) recipients in 2010, the benefits levels will stay the same in 2010. See the *Disability Law News*, November 2009. But if you want your very own copy of the SSI Benefit Level Chart specifically designed for 2010, you can obtain it at

<http://www.otda.state.ny.us/main/directives/2009/INF/09-INF-22.pdf>

## Want to Know Who Is Dead or Alive?



Are you trying to find out if a client, ex-spouse, old high school sweetheart or anyone else of interest is dead or alive? There are a number of “death indexes” available to provide you with this information. Who knew???

<http://www.deathindexes.com/ssdi.html>

[www.legacy.com](http://www.legacy.com)

<http://ssdi.rootsweb.ancestry.com/cgi-bin/ssdi.cgi>

## Find Out What Symptoms May Mean

Since most of us are not doctors or other health care providers, we may need some help interpreting common symptoms our clients may complain of. This is especially true if we are not happy with the health care professional’s diagnosis of those symptoms, for example, someone with dilated pupils must be a drug user. Enter an informative website on possible diagnoses for a variety of symptoms, and you may find an alternative answer that fits your client’s situation.

[www.wrongdiagnosis.com](http://www.wrongdiagnosis.com)

## Win, Lose or Draw: How Your ALJ Has Decided Cases

Recent articles from a Delaware newspaper highlight the dismal plight of numerous Social Security claimants who have been waiting enormous lengths of time for decisions, only to have most of their cases denied. Included in the article is a link to a national database of ALJ allowance and denial rates between 2005 and 2008. Statistics are ordered by hearing office locations, by state and by ALJ.



<http://php.delawareonline.com/federal/alj.php>

## Deciphering SSA Codes



Reading - or rather trying to interpret - SSA printouts can be like reading hieroglyphics. This link provides 456 pages of explanations of the codes used in the Master Beneficiary Record, the Supplement Security Record, Payment History System Update Record, Quarters of Coverage file, and more:

[http://www.cdc.gov/nchs/data/datalinkage/nchs\\_ssa\\_data\\_codebook\\_2009.pdf](http://www.cdc.gov/nchs/data/datalinkage/nchs_ssa_data_codebook_2009.pdf)

## WHAT IS...

### What is... Trigeminal Neuralgia?

Trigeminal neuralgia is characterized by sudden and intense facial pain that is often mentally and physically debilitating. The condition is most commonly found in women over age 50, and can be seen in patients with multiple sclerosis.

The trigeminal nerve sends facial sensations to the brain. Trigeminal neuralgia, also called tic douloureux, is a malfunction of that nerve that causes horrific attacks of facial pain. The attacks last from a few seconds to 10 minutes, and occur daily, every few days or at longer intervals. People suffering from this malady, however, are always on the edge of their seats, waiting for the next jolt of pain. A gentle breeze on the cheek, washing the face, shaving, brushing the teeth, eating, talking and hundreds of other innocuous stimuli can trigger paroxysms of pain.

Generally the first course of treatment is medication. Tegretol, Lioresal, and Neurontin have all been used for treatment. Over time, however, medications may lose their effectiveness.

Patients may also consider surgery, microvascular decompression of the nerve. In most sufferers, the cause of pain is a pulsating artery that encircles the trigeminal nerve. The artery's pulsations stimulate the painful attacks. A neurosurgeon can place spongelike material between the artery and nerve to stop the stimulation. Stereotactic radiosurgery (a highly precise form of radiation therapy) is another option.

This impairment was recently featured in a story on National Public Radio: <http://www.npr.org/templates/story/story.php?storyId=120140173>. Even Dr. Donohue recently addressed this disorder: see <http://www.detnews.com/article/20100108/OPINION03/1080315/Stabbing-face-pain-likely-due-to-nerve-disorder#ixzz0ciaXQLXC>.

More information is available at the Facial Pain Association, [www.fpa-support.org](http://www.fpa-support.org).



## 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 than 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

## What New Year's Resolution

Having trouble sticking to all those New Year's resolutions you just made? Maybe it is because you made too many. According to neuroscience research reported in the December 26, 2009 *Wall Street Journal*, a lot may have to do with asking too much of the prefrontal cortex of the brain, which is responsible for willpower.

The researchers recognize that self-control is not easy: 88% of all resolutions end in failure, according to a 2007 survey conducted by British psychologist Richard Wiseman. And it may be even harder to change your behavior if you try to break too many bad habits at once. Apparently asking the prefrontal cortex to help you lose weight and stop smoking at the same time may be just one thing too many for an overtaxed piece of tissue that is also in charge of focus, short-term memory and solving abstract problems.

Studies have shown that giving some subjects slightly more information to remember than other subjects caused them to succumb to temptation more readily. Undergraduates at Stanford University were given either a two-digit number or a seven digit number to remember, and then instructed to walk down the hall, where they were offered two different snacks: chocolate cake or fruit. Those trying to remember the seven digit number were twice as likely to take the cake as those assigned the two digit number. According to researcher Baba Shiv, the extra numbers took up valuable space in the brain, overloading the frontal cortex.

What to do? In addition to spreading you resolutions out over the year rather than all at once, neuroscientists and psychologists offer a few simple tricks. One is self-awareness. Comparing the prefrontal cortex to a muscle: if asked to hold too much for too long, it just gives out – so give it a rest. Also, willpower

requires real energy, so feed it. Roy Baumeister, a psychologist at Florida State University, demonstrated in 2007 that students who had fasted for three hours before being asked to perform a variety of self-control tasks such as focusing on a boring video or suppressing negative stereotypes had much lower glucose levels than students who were not asked to exercise self-control. So, since losing weight is one usually of our top resolutions, depriving the brain of calories can make it even harder to summon up the strength to quit smoking.

Finally, distraction helps. The famous marshmallow experiments done by Professor Walter Mischel at Columbia University demonstrated that those children who were able to resist the marshmallows by concentrating on other things learned to delay their gratification. In other words, practicing mental discipline can help beef up the prefrontal cortex.

So maybe it is better to just put off that diet for awhile....

