

DISABILITY LAW NEWS

Court of Appeals Issues New Decisions

The May 2009 edition of the *Disability Law News* featured a trilogy of recent decisions from the Second Circuit. (The newsletter is available at the recently launched new and improved website of the Empire Justice Center at www.empirejustice.org.) In all three of those decisions, the Court of Appeals upheld unfavorable decisions by the Commissioner. In the intervening months, the Court has issued a number of additional decisions, three of which are summarized here and reach results more favorable to claimants.

In *Moran v. Astrue*, 569 F.3d 108 (2d Cir. 2009), the Court of Appeals vacated a decision of Magistrate Bianchini of the Northern District of New York affirming a denial by the Commissioner of two of Mr. Moran's prior claims. Claimant Moran, who has been suffering from anxiety, depression, and arthritis, among other conditions, for many years, first applied for Social Security benefits in 1980. His claim was denied in 1980, and again in 1986 and 1987. Moran applied a fourth time in March 1991. After an initial denial, the Commissioner found that Moran had been disabled as of March 12, 1991. He has been receiving benefits since then.

His earlier 1980 and 1987 applications, however, were subsequently reopened 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. (See www.empirejustice.org for summaries of these and other class actions.)

Following *Dixon* and *Stieberger* reviews in 2001, Moran was informed that both decisions had been reaffirmed. Moran then requested a hearing before an ALJ to challenge both decisions. After a twenty-four minute hearing at which Moran appeared *pro se*, the ALJ upheld the Commissioner's decision. Moran appealed to District Court, which granted judgment to the Commissioner. Moran then appealed to the Second Circuit.

The Court found that the ALJ had failed to assist the plaintiff in developing a record to support his application. This is evidenced by the fact that the transcript of Moran's hearing was less than thirteen pages long. Furthermore, the ALJ had failed in exploring the type of work Moran did in the 1980s, which is information directly related to the question of whether Moran was disabled at that

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time. Finally, the ALJ failed in following up on other pertinent issues related to Moran's claim. The Second Circuit found that under the particular circumstances of this case, "the ALJ's conduct [was] especially problematic" since it had already been determined in the context of his 1991 application that Moran was "conclusively and unquestionably disabled with a constellation of debilitating and degenerative musculoskeletal ailments for more than ten years prior to the hearing at issue."

The Court also criticized the ALJ for relying on a 1988 report by a physician concluding Moran could occasionally lift up to twenty pounds and bend, squat, and crawl. The Second Circuit asserted that the ALJ should have directly asked Moran about his physical limitations and, if Moran's testimony contradicted the physician's report, then the ALJ could have properly credited the report and discounted Moran's testimony. Without such testimony, especially where the ALJ had found Moran credible "for the most part," the ALJ was unable to balance it against the physician's report.

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 vacated and remanded for further proceedings consistent with its opinion. 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.

Of note is the Court's reliance on and reaffirmation of *Cruz v. Sullivan*, 912 F.2d 8 (2d Cir. 1990), which mandates that an ALJ affirmatively assist a *pro se* claimant in developing a record before adjudicating the merits of an application. The Court emphasized that the ALJ's duties are "heightened" where a claimant such as Moran has waived his right to counsel. Ironically, the Court also cites its recent decision in *Lamay v. Comm'r of Soc. Sec.*, 562 F.3d 503 (2d Cir. 2009) for this proposition. In *Lamay*, one of the trilogy of cases referred to above, the Court denied the claim of a *pro se* claimant, finding that the plaintiff had knowingly waived her right to counsel. Plaintiff in *Lamay* has sought a rehearing *en banc* before the

Court of Appeals.

The remaining two cases of last month's trilogy were both summary orders and not selected for publication in the Federal Reporter but are available on Westlaw. Advocates may recall that Federal Rule of Appellate Procedure 32.1 was amended to prohibit Courts of Appeals from restricting the citation of such "unpublished" decisions. See the May 2006 edition of the *Disability Law News*. Their precedential value may, however, be more limited.

In *Brickhouse v. Astrue*, 2009 WL 1758812 (2d Cir. June 23, 2009), the Second Circuit reaffirmed its treating physician rule yet again. It held that "the ALJ violated the treating physician rule," "erred in privileging the evidence given by the nonphysician consultant over that provided by Drs. Kohut and Bieber," as well as "erred in his weighing of the evidence as a whole."

Although the ALJ noted that claimant's treating physicians determined that she was "unable to perform a full range of sedentary work" and "totally disabled," the ALJ discounted these findings since the ALJ believed they contradicted other evidence in the record and had insufficient objective medical evidence to support them. Of note is the fact that eight different physicians, for varying reasons and to varying degrees, had concluded that Brickhouse had limitations and suffered from debilitating pain. Drs. Kohut and Bieber, however, had the most extensive relationships with her and offered opinions that most strongly supported her claim.

The Second Circuit stated, "The ALJ...found conflicts and weaknesses where none existed." Further, the ALJ followed the findings of a state disability adjudicator, "who was not a physician, who never saw the petitioner, and who appears to have relied on a report written by Dr. Seo, a physician hired by the Government who examined Brickhouse just once. This was error." In actuality, the opinions of Drs. Kohut and Bieber were supported by various medical tests and, given the consistency with the six other doctors' opinions, should have been given the proper weight in the ALJ's decision. The Second Circuit vacated the judgment of Judge Townes of the Eastern District of New York, and remanded the case in order to determine whether there is other work that Brick-

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Lost Stimulus Checks?

What happens if a Social Security or SSI recipient loses the \$250 stimulus check that he or she was supposed to receive? The Social Security Administration (SSA) has an answer for that one. See EM-09043 REV available at: <https://s044a90.ssa.gov/apps10/public/reference.nsf/8b709aba3e20a0dd852574da00547b45/60ff78a835551b4c852575cb0074c875!OpenDocument>

The EM (Emergency Message) sets out in detail the steps the District Office (DO) should take in situations where these checks were lost, stolen, or never received. Thanks to Cathy Roberts for alerting us to this procedure.



Court of Appeals Decisions—Continued

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house can perform.

In *Giddings v. Astrue*, 2009 WL 1813741 (2d Cir. June 26, 2009), the Court of Appeals vacated and remanded a decision by Magistrate Pebbles of the Northern District of New York, holding that ALJ Zolezzi had erred in concluding that claimant Giddings could “perform work at a light level of exertion” without sufficient evidence to support this residual functional capacity (RFC) finding.

The Court found that ALJ Zolezzi’s RFC determination is contradicted by both a previous ALJ’s determination and a doctor who had examined Giddings. ALJ Gibbons previously determined that Giddings was limited to sedentary work. ALJ Zolezzi erred in finding an RFC greater than that previously determined without even referencing the earlier one. His finding was also inconsistent with the findings of the one-time consultative physician Hargraves. Although not an opinion entitled to the deference of that of treating physician, the Court noted that ALJ Zolezzi failed to refer to any other medical opinion that contradicted that of the consultative.

The Second Circuit held that “ALJ Zolezzi failed to provide the compelling critique needed to overcome the uncontradicted medical opinion of Dr. Hargraves.” The other medical reports that ALJ Zolezzi

referenced did not deal specifically with Giddings’s exertional limitations, while Dr. Hargraves’s opinion actually did have medical evidence supporting his findings, including an MRI indicating degenerative disc disease. The Court also found that, “[t]hese portions of Giddings’s testimony - as to her inability to work continuously, even while changing positions, and her need to lie down to relieve pain - are consistent with, if not supportive of, Dr. Hargraves’s assessment of Giddings’s exertional limitations.”

The Court acknowledged that Giddings’s application had already been pending nine years, but held that there was not a sufficient basis to reverse the ALJ’s decision and award benefits. The Court also ducked the question raised by the parties as to the retroactive effect of the Commissioner’s post-*Curry* regulations. See *Curry v. Apfel*, 209 F.3d 117 (2d Cir. 2000) and 20 C.F.R. §404.1520 regarding the shifting of the burden of proof at Step five of the Sequential evaluation. The Court held that even if Giddings had retained the burden of proof as to RFC at Step five, the ALJ’s determination was not supported by substantial evidence.

Thanks to Buffalo Law School summer intern Stephanie Scalzo for her help in summarizing these cases.

SSA Issues Guidance for SSI Refugee Extension

On September 30, 2008, then President Bush signed the “SSI Extension for Elderly and Disabled Refugees Act” (“Extension Act,” Public Law 110-328). The legislation temporarily extends the eligibility of elderly and disabled refugees, asylees and various other groups of humanitarian based immigrants for Supplemental Security Income (SSI) from seven years to nine years. The time limit will automatically go back to seven years on September 30, 2011. It has taken the Social Security Administration (SSA) over six months to issue guidance to local SSA offices about how to implement the Act and to send notices to potentially eligible immigrants whose SSI was terminated between August 22, 1996, the date of the enactment of PRWORA (the Personal Responsibility and Work Opportunity Reconciliation Act, P.L. 104-193), and October 1, 2008, the effective date of the Extension Act. *See* POMS SI 00502.107.

The Extension Act

The Extension Act amends 8 U.S.C. § 1612(a)(2) by adding sub-paragraph “M” [8 USC § 1612(a)(2)(M)] to the provision of PRWORA that established the seven year limit on the SSI eligibility of refugees and other humanitarian immigrants. This restriction has been in place since August of 1996. Pursuant to PRWORA, elderly and/or disabled immigrants under the following categories are eligible for SSI only during the first seven years after attaining their humanitarian based immigration status:

- Refugees;
- Asylees;
- persons granted withholding of deportation or removal;
- Amerasians;
- Certified Victims of Trafficking, and
- Cuban/Haitian entrants as defined in Section 501 (e) of the Refugee Education Assistance Act of 1980 (see POMS SI 00502.108B).

Most other classifications of legal immigrants, including lawful permanent residents, were made completely ineligible for SSI by the provisions of PRWORA unless they became U.S. citizens. The Extension Act now provides some immigrants whose

SSI benefits were terminated because of the seven year limit an additional two years of benefits, through September 30, 2010. The continuation of benefits into a third year, through September 30, 2011, will be granted to immigrants who have an application for citizenship pending when their two years of extended benefits expire.

The legislative struggle to extend the limited eligibility of refugees and other humanitarian-based immigrants (hereinafter refugees) has been carried on for many years. The solution offered by the Extension Act is a limited one at best, and complicated to administer. It leaves its beneficiaries at risk of losing their benefits again at the expiration of the two year extension because of an inability to obtain U.S. citizenship, often because of their age or disabilities.

Eligibility Requirements for the Two Years of Extended SSI Benefits

To be eligible for the two year extension, the refugee must have lost his or her SSI benefits at some point between August 22, 1996, and October 1, 2008, solely because of the expiration of the seven year time limit. In addition, unless the refugee is under the age of 18, (s)he must also sign a declaration of good faith effort to pursue United States citizenship “...by filing and pursuing timely applications for naturalization, lawful permanent residence, and/or such other benefit under the immigration laws that may lead to United States citizenship.” (*See* SI 00502.107K.1 for a copy of the form declaration.) The declaration was drafted in cooperation with the Department of Homeland Security. Since it has only now been issued, those that have already begun to receive SSI under the two year extension but who have not yet signed this declaration will be called into the local SSA office to do so.

Most refugees will be ineligible for the two year extension if they have been lawful permanent residents for six years or more and do not yet have an application for citizenship pending. A refugee excluded under this provision should file an application for citizenship immediately. Unfortunately, retroactive SSI benefits will not go back to the effective date of the

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extension (October 1, 2008) but will only be retroactive to the date the application for citizenship was filed.

Refugees who are not yet lawful permanent residents but have an application for lawful permanent resident status pending will be ineligible for the extension unless the application for permanent status was filed within four years of their first beginning to receive SSI benefits. (Refugees and asylees are eligible to apply for lawful permanent resident status within one year of entering the United States as a refugee or being granted asylum.)

The following individuals are exempt from these two restrictive provisions:

- Refugees who were under 18 on October 1, 2008, or who are 70 years or older (the extended benefits can only go back to the date the individual turned 70 if that occurred after October 1, 2008);
- Cuban/Haitian entrants;
- Those granted withholding of deportation or removal, since individuals in this category are ineligible to apply for permanent resident status and hence are also barred from applying for citizenship; and
- Refugees with an application for citizenship pending.

All refugees eligible for the extension will get at least two years of extended benefits. Those with applications for citizenship pending at the expiration of their two years of extended benefits will continue to receive benefits until September 30, 2011.

Assessment of Continued Disability and Financial Eligibility During Extension Period

Refugees who applied for the extension before the issuance of the May 2009 Guidance were reinstated under interim procedures that required them to prove they met the immigration related requirements of the extension and were still financially eligible for SSI. The reinstatement, however, was done without obtaining their declaration of good faith effort to pursue citizenship and without an assessment of continued disability. They will be recontacted to verify these aspects of their eligibility for the extension.

With respect to continued disability, refugees who were manually reinstated and who are 55 or older will be presumed to continue to be disabled. For refugees under 55, if the medical re-exam diary date is still in the future, they too will be assumed to continue to be disabled. Those whose re-exam diary dates have matured and who indicate that their conditions are the same or worse will be eligible for continued benefits without the need for further documentation. A refugee who indicates his or her condition has improved will have to submit to a continuing disability review but will continue to receive benefits while the review is pending. If the refugee was entitled for benefits as a child and is now over 18, the “age 18 redetermination” will be initiated.

Refugees whose benefits had been scheduled to end during October or November of 2008 were manually reinstated without having to apply for the extension or verifying their eligibility. The suspension of benefits was suppressed by SSA for all refugees whose benefits were scheduled to terminate after December 1, 2008, because of the seven year limit. Individuals in both groups will be called in to SSA to verify that they meet the immigration related requirements of the extension and to sign the declaration of good faith. SSA has directed that for both these groups, continuing disability will be presumed unless the individual received benefits as a disabled child and is now over 18 years old. For these recipients, an age 18 redetermination must be initiated.

In the overwhelming majority of cases, refugees seeking extension benefits will be those whose benefits were terminated some time in the past and who are not currently receiving benefits. These will be individuals to whom notice by SSA alerting them to their potential eligibility for continued benefits has recently been sent. If eligible, their benefits should be reinstated effective October 1, 2008, or as of the date that they meet all eligibility factors, whichever is later. The guidance actually says whichever date is earlier but this is inconsistent with the provisions of the Extension Act, since there can be no earlier reinstatement date than October 1, 2008. *See* POMS SI 00502.107G.

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SSA has instructed the local offices to determine eligibility for extension benefits pursuant to the following procedures:

- Determine if the refugee is in one of the immigration categories covered by the Extension Act;
- If yes and the individual's record is in terminated status, obtain the evidence necessary to establish eligibility based on income and resources;
- If the refugee is 55 or older, assume he or she continues to be disabled and reinstate payments;
- If the refugee is under 55 and the re-examination diary date is still in the future, assume the individual is disabled and reinstate payment;
- If the re-examination date has passed, ask the immigrant if his or her disability continues (SSA Form 455); if the answer is "yes," reinstate benefits;
- If the refugee indicates that there has been improvement in his or her medical condition or the refugee received benefits as a disabled child and is now over 18, payments are to be reinstated and a disability review initiated.

New Applicants

Because the Extension Act in effect substitutes "nine years" for "seven years" in the language limiting the SSI eligibility of refugees, refugees who are within nine years of having attained their status are eligible to apply for SSI if they are now elderly, blind or disabled, even if they have never received SSI benefits in the past. These will be refugees who turned 65 years old or became blind or disabled after their seven year window of eligibility for SSI benefits had already passed. (According to its provisions, the Extension Act appears to exempt new applicants who have a citizenship application pending from this nine year limit, but according to the POMS, the "within 9 years of attaining status" limit is applicable even if the refugee has a citizenship application pending.)

The same restrictions and exemptions outlined above that apply to applicants for the two years of extended benefits apply to new applicants. However, refugees applying for SSI based on disability or blindness will first have to be determined eligible before benefits can be paid. Unless new applicants have citizenship

applications pending, their SSI benefits will terminate nine years from the date they initially attained their humanitarian based status or September 30, 2011, whichever comes first.

If you have questions or require further information, contact Barbara Weiner at (518) 462-6831, extension 104, or at bweiner@empirejustice.org. In anticipation of a conference call in early August with representatives of the Social Security Administration about the effectiveness of SSA's outreach notice to elderly and disabled refugees and other humanitarian based immigrants whose SSI benefits were terminated, Barbara is anxious to hear from advocates about whether the notices being sent out under these new provisions are actually reaching people.

And thanks to Barbara for this thorough and comprehensive summary of these very significant but very complicated changes!



Time for a New DOT?



The Dictionary of Occupational Titles (D.O.T.) published by the Department of Labor and relied upon by the Social Security Administration (SSA) for vocational determinations is unquestionably out of date. Jobs such as cell phone repair

technician or tanning bed attendants, for example, did not even exist when the DOT was last updated in 1991, and can thus not be included in the compendium of fascinating jobs offered up by vocational experts at disability hearings.

The Department of Labor has replaced the DOT with the O*NET and will not be updating the DOT. The O*NET differs from the DOT in an number of ways, not the least of which is that it describes just under 1,000 jobs, far fewer than the thousands listed in the DOT. Although the O*NET meets the Department of Labor's needs, it has not proven to be an adequate replacement for the DOT. SSA has determined to develop and maintain occupational information itself to meet its needs.

On December 9, 2008, SSA Commissioner Michael J. Astrue established the Occupational Information Development Advisory Panel (OIDAP) under the Federal Advisory Committee Act. The mission of the Panel is to provide independent advice and recommendations on plans and activities to replace the DOT. The Panel's web address is <http://www.ssa.gov/oidap/>.

The Panel is currently seeking input from the public on the type of information that SSA should include in whatever new "DOT" is created so that it can ensure proper residual functional assessment, as well as proper assessments of transferrable skills, and other evidence including work histories. Any input must be received by July 31, 2009, in order to be taken into consideration by the Panel in making its recommendations to SSA.

Nancy Shor, Executive Director of the National Organization of Social Security Claimants' Represen-

tatives (NOSSCR) has been appointed to the Panel. In her capacity as NOSSCR director, she has asked for input and ideas to present to the Panel by the July 31st deadline. According to Nancy, the Panel is considering doing more than simply eliminating obsolete jobs from the current DOT and adding new ones. The Panel is wrestling with questions such as:

- Should job descriptions include the mental and cognitive demands of work?
- Are there better ways to measure mental and cognitive limitations of claimants?
- Does unskilled work exist?
- Can transferable skills analysis be better performed by software?
- How can collecting and presenting data about individual claimants (their limitations, duties of past employment, etc.) be improved?
- Should a new occupational information system take job accommodations into account?
- How can we know that a particular job exists in significant numbers in the national economy?
- What Daubert considerations are pertinent to a new occupational information system?

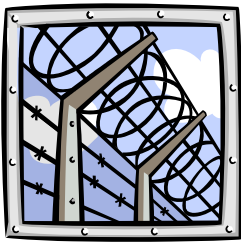
See the "key questions" presented in the document entitled "SSA Plans and Methods for Developing a Content Model," which is available at the Empire Justice Center's on-line resource center as DAP #518.

Nancy is asking that advocates review this material, and think about how problems presented by an aging DOT should be addressed. How should the questions listed above be answered? As Nancy notes, input by advocates with the real-world knowledge about the individuals who apply for disability benefits and about the disability determination process is critical to this the process.

The Empire Justice Center will collect advocates' comments and forwarding them to Nancy prior to July 31st. Please send your thoughts, suggestions, admonitions, etc., to kcallery@empirejustice.org. Or you can communicate with the Panel directly at OIDAP@ssa.gov by July 31, 2009.

REGULATIONS

Fleeing Felons: How Does SSA Find Out?



The Social Security Administration (SSA) works closely with law enforcement agencies to “identify individuals who are: (1) Fugitive felons, parole violators, or probation violators, as defined by the Social Security Act, from the Source Jurisdiction; and (2)

Supplemental Security Income (SSI) recipients, Retirement, Survivors and Disability Insurance (RSDI) beneficiaries, Special Veterans Benefit (SVB) beneficiaries, or representative payees for SSI recipients, RSDI beneficiaries, or SVB beneficiaries.” SSA recently announced that it was renewing its cooperative relationship with law enforcement to find more fleeing felons and probation/parole violators. 74 Fed. Reg. 27056 (June 5, 2009).

The renewal “will become effective no sooner than 40 days after notice of the matching program is sent to Congress and OMB, or 30 days after publication of this notice in the Federal Register, whichever date is later. The matching program will continue for 18 months from the effective date and may be extended for an additional 12 months thereafter, if certain conditions are met.”

SSA is accepting comments on this notice. Please see the Federal Register for instructions on filing comments.

Attorney Advisor Program Extended

The Social Security Administration (SSA) is extending for two years its rule authorizing attorney advisors to conduct certain prehearing procedures and to issue fully favorable decisions. The current rule is scheduled to expire on August 10, 2009 and will be extended until 2011. 74 Fed. Reg. 33327 (July 13, 2009).

In 2007, SSA issued an interim final rule permitting some attorney advisors to conduct certain prehearing procedures. 72 Fed. Reg. 44763. SSA instituted this practice to enable the agency to provide more timely service to the increasing number of applicants for

Social Security disability benefits and SSI payments based on disability. Pursuant to a 2008 final rule (73 Fed. Reg. 11349), attorney advisors could develop claims and, in appropriate cases, issue fully favorable decisions.

Since SSA expects the number of requests for hearings to continue to increase significantly in coming years, the attorney advisor program is an important part of ongoing efforts to decide cases efficiently, issue decisions timely, and reduce the number of claims pending at the hearing level.

Combat Pay Proposed to Be Excluded from Deeming



In the June 11, 2009 Federal Register (74 Fed. Reg. 27727), SSA proposes to revise its rules to clarify that, for Supplemental Security Income (SSI) purposes, the agency will not consider any combat-related military pay as income in determining whether spouses and children of members of the uniformed services are eligible for SSI. The proposed rules also would clarify that SSA does not consider combat-related military pay as income when determining the spouse's or child's proper payment amount. These proposed rules also would

provide that, when SSA determines whether spouses and children are eligible for SSI, retroactive payments of certain military pay would not be counted as resources for nine months following receipt. These proposed rules would protect spouses and children of members of the uniformed services from a reduction in, or loss of, benefits because their spouse or parent serves in a combat zone.

Comments on the proposed rules must be received by August 10, 2009.

Compassionate Allowance Hearings Continue

SSA Commissioner Michael Astrue will hold a hearing to obtain information about possible methods of identifying adults with Early-Onset Alzheimer's Disease and related dementias and the advisability of implementing compassionate allowances for people with these diseases. The agency has held similar hearings on several other serious health concerns in past months. 74 Fed. Reg. 32817 (July 9, 2009).

This hearing will be held on July 29, 2009, between 8:30 a.m. and 5 p.m., Central Daylight Time (CDT),

in Chicago. While the public is welcome to attend the hearing, only invited witnesses will present testimony.

The proceedings will be broadcast live via Webcast beginning at 9 a.m. CDT. You may access the Webcast line for the hearing on the Social Security Administration Web site at <https://www.ssa.gov/compassionateallowances/>.

Appeals Council List Updated



Finding a live body to talk to at the Appeals Council can be challenging, much less knowing the particular branches and codes used by the Appeals Council to assign cases. Thanks to Michelle Spadafore of the Aids Center of Queens County for directing us to SSA's most updated list of this invaluable information. Fax and phone numbers can be found at http://www.ssa.gov/OP_Home/hallex/I-04/I-4-3-104.html.

COURT DECISIONS

Second Circuit Decides *Encarnacion II*

Representing children in SSI claims can be frustrating on a number of levels. One recurring theme might be the case where a child has number of “moderate” limitations in several domains. It may be apparent to the advocate that those moderate limitations are equivalent to the two “marked” or one “extreme” limitations necessary to be found functionally equivalent to a listed impairment under the Commissioner’s regulations. But this concept of “adding up” or combining moderate limitations to make a “marked” is not permitted under the current childhood SSI regulations. This policy was challenged as a violation of the Social Security Act’s mandate that SSA consider the combined effects of child’s impairments “throughout the disability determination process.” 42 U.S.C. §1382c(a)(3)(G). It was, however, upheld in *Encarnacion ex rel. George v. Barnhart*, 331 F.3d 78 (2d Cir. 2003) (“*Encarnacion I*”).

In *Encarnacion I*, the Court of Appeals “left open, however, the possibility of a later suit alleging that: (1) the Commissioner did not, in fact, permit the SSA to “adjust the level of a claimant’s limitation within one or two domains to ‘look comprehensively’ at the claimant and account for the ‘interactive and cumulative effects’ of limitations in other domains,” or (2) the domains insufficiently account for significant aspects of childhood functioning. See *Encarnacion I* 331 F. 3d at 89 & n. 7 (citations omitted).

Plaintiffs took up that challenge and in 2003 filed *Encarnacion II*, alleging that the Commissioner’s policy prevents SSA from adding together less-than-

marked limitations from separate domains and prohibits SSA from adjusting the level of limitation in one domain to reflect the impact of limitations in other domains. Despite the Second Circuit’s invitation to bring this challenge, it recently upheld the District Court’s denial of the claims. In *Encarnacion ex rel. George v. Astrue*, 568 F.3d 72 (2d Cir. 2009) (“*Encarnacion II*”), 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.

Despite this disappointing ruling in *Encarnacion II*, advocates should keep in mind that the new Social Security Rulings governing the evaluation of functional equivalency in children may prove helpful in convincing adjudicators to pay more attention to the combined effect of a child’s impairments and limitations. The 2009 SSRs, which are reviewed in the March 2009 edition of the *Disability Law News*, emphasize among other things that adjudicators should consider the extent to which one impairment can cause limitations in several domains. According to the SSRs, this “whole child” approach would not be considered “double-weighting.” The 2009 SSRs are available at www.ssa.gov.



N.Y. Court of Appeals Rules on SSI Immigrant Case

On May 12, 2009, the New York State Court of Appeals issued a decision in *Khrapunskiy v. Doar*, 12 N.Y.3d 478 (2009), a class action case addressing the level of assistance the State is obligated to provide to elderly, blind and disabled legal immigrants who have been rendered ineligible for Supplemental Security Income (SSI) because of their immigration status. The Court held, in a five to two decision, that the State is not constitutionally required to provide income assistance to non-citizens at the same level that U.S. citizens are entitled to receive through the federal SSI program, supplemented by the State's Additional State Payment program [Title 6 of the Social Services Law (SSL)]. The Court reached this conclusion in spite of the fact that the State sets the standard of need for elderly, blind and disabled through the state's SSI supplement program. See SSL §209.2.

Plaintiffs argued that New York had a long history of recognizing the special needs of elderly, blind and disabled people and that their immigration status was irrelevant in determining their need. Prior to 1974, New York State provided public assistance to aged, blind and disabled persons through the Aid to the Aged, Blind and Disabled (AABD) program. In 1972, Congress established the SSI program, which provided federal benefits to the same class of people. Thereupon, New York discontinued AABD in 1974 and moved its elderly, blind and disabled residents into the federal SSI program. With respect to immigration status, only elderly, blind and disabled people who were not lawfully residing in the country were excluded. Because federal SSI payments were lower than the State's established standard of need in its AABD program and less than the State determined necessary for the support of this particularly vulnerable group of people, the Legislature created the Additional State Payments (ASP) program. This program, which is administered by the Social Security Administration (SSA) but funded by the State, provided recipients of SSI or persons whose income was too high for SSI but below the state set standard of need with an extra grant each month.

In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which made most categories of aliens ineligible for federal benefit programs, including SSI.

Refugees and other humanitarian based immigrants remained eligible for SSI, but only during the first seven years from their date of entry. (See related article on page 4 of this newsletter regarding the extensions of time limit to nine years.) In order to receive benefits beyond that date, the recipient had to become a U.S. citizen prior to the seven year deadline. Following the enactment of PRWORA, the New York State Legislature made immigrants who were rendered ineligible for the federal SSI program also ineligible for the State's supplemental assistance for aged, blind and disabled persons. This meant that the only assistance left available to elderly, blind and disabled immigrants was public assistance under the Safety Net Assistance (SNA) program at a much lower monthly benefit level.

Plaintiffs commenced this action in 2004 against defendant *Doar*, then Commissioner of the Office of Temporary and Disability Assistance (OTDA), alleging that the failure of the State to apply the standard of need to them at the same level as applied to U.S. citizens within the context of the SSI and ASP programs was due solely to their status as legal aliens and thus constituted a violation of Articles I and XVII of the New York State Constitution, and the Fourteenth Amendment of the U.S. Constitution. The plaintiffs sought preliminary and permanent injunctions ordering the defendant to provide assistance consistent with the standard of need provided in SSL §209, including retroactive assistance; and enjoining the defendant from implementing the relevant sections of the SSL in a manner that denied members of the class the appropriate level of assistance based solely on their alien status.

In August 2005, the State Supreme Court (New York County) granted plaintiffs' motion for summary judgment. The Court also granted their request for class certification, defining a class as "[a]ll persons identified to, or identifiable by, defendant as elderly, blind and disabled persons lawfully residing in New York State who have received, or are receiving, or will receive assistance at less than the standard of need set out in SSL 209 (2), solely because of their immigration status . . ." (Solomon, J., Decision and Order, p.14). 806 N.Y.S.2d 445 (N.Y. Sup. Ct. 2005).

(Continued on page 12)

(Continued from page 11)

On appeal, the Appellate Division affirmed the Supreme Court's decision, holding that the plaintiffs were entitled to receive state-based assistance, under the SNA program, at the level provided to U.S. citizens through the SSI and ASP programs. (Andrias, J.). 49 A.D.3d 201 (1st Dept 2008). Defendants then appealed to the Court of Appeals, which held in its May 2009 decision that - in contrast to the opinions of both the Supreme Court and Appellate Division - the plaintiffs were not entitled to the requested level of public assistance.

Regarding the Article XVII violation claim, the Court of Appeals stated that the decisions issued by the lower courts would require the creation of a new state program to administer the funds (the difference between SSI/ASP - \$761 - and SNA benefits - \$352). (Jones, J., majority opinion, p. 10). The Court maintained that the creation of programs was a legislative function - not a judicial one - and that Article XVII of the State Constitution did not "compel the State to assume the federal government's obligation when an elderly or disabled person becomes ineligible for continued SSI/ASP benefits." (Jones, J., majority opinion, 12 N.Y. 3d at 479.)

In response to the equal protection claim, the Court held that the statute did not create a suspect classification as it was drafted to mirror the federal law. (Jones, J., majority opinion, p. 11). To support its position, the Court distinguished the present case from *Matter of Aliessa v. Novello*, 96 N.Y. 2d 418 (2001) and *Matter of Lee v. Smith*, 42 N.Y. 2d 453 (1977), which dealt with a Medicaid and home relief program, respectively. The Court noted that these cases involved already existing state-funded programs. (Jones, J., majority opinion, p. 12). Here, the Court said that, as AABD had been dissolved in 1974, there were no state programs providing aid to this specific class and, consequently, there were no state residents receiving public assistance from New York at the level requested by the plaintiff class. (Jones, J., majority opinion, p.13). The Court summarized by stating that, "equal protection does not require the State to create a new public assistance program, in order to guarantee equal outcomes under wholly separate and distinct public benefit programs. Nor does it require the State to remediate the effects of PRWORA." (Jones, J., majority opinion, 12 N.Y. 3d at 489.)

The Court ultimately held that legal aliens were not entitled to state benefits at the same level as benefits provided to U.S. citizens through the federal SSI program supplemented by the State through the ASP program. In her dissent, Judge Ciparick looked to the legislative intent behind SSL §209, and concluded that the Legislature intended the standard of need in SSL §209.2 to apply to all elderly, blind and disabled residents, not just those receiving SSI. (Ciparick, J., dissenting opinion, 12 N.Y. 3d at 491-92.) Specifically, Judge Ciparick pointed to the reliance on a "standard of need" throughout the Social Services Law, rather than one's immigration classification, as a basis for eligibility. (Ciparick, J., dissenting opinion, *Id* at 491). The dissent also pointed out that the holding in *Lee* supported the plaintiffs' position as the Court stated in that case that the State could not abandon its duty to provide for the aged, blind and disabled by assigning such care to the federal SSI program if the result was that aged, blind and disabled SSI recipients were being forced to survive on amounts less than what was granted to other needy residents of New York State who were eligible for the home relief program. (Ciparick, J., dissenting opinion, *Id.* at 493.)

Additionally, the dissent stated that, regarding the equal protection claim, the defendant failed to provide a compelling government interest, as required to withstand strict scrutiny analysis. (Ciparick, J., dissenting opinion, *Id.* at 494.) Rather, the defendant argued that there was no equal protection claim because no state program providing assistance existed. (Ciparick, J., dissenting opinion, *Id.* at 495.)

The *Khrapunskiy* decisions, briefs and pleadings can be found in Benefits Law Database by logging onto the Online Resource Center at <http://onlineresources.wnyc.net/welcome.asp?>

Thanks to Albany Law School intern Samantha Howell for this concise and informative summary of the history of the *Khrapunskiy* case and the Courts' rulings.

SSI Funds Not Exempt for Overdrafts

Things were just starting to look a bit more secure for Social Security and SSI recipients with bank accounts. See related article on page 17 of this newsletter about Direct Express cards, and the July 2008 edition, available at www.empirejustice.org regarding New York's new Exempt Income Protection Act, which will better protect statutorily exempt income from access by creditors. Then the California Supreme Court reminded us that, as many of us learned when studying the Uniform Commercial Code in law school, the bank usually does win.

In *Miller v. Bank of America*, 46 Cal. 4th 630, 207 P. 3d 531 (2009), the court ruled that a state statute exempting Social Security and SSI funds directly deposited into a bank account from attachment does not prohibit a bank from seizing an incoming SSI deposit

to repay itself for overdrafts and associated fees.

In earlier litigation challenging bank setoff of overdrafts and related fees against Social Security and SSI benefits, the Ninth Circuit Court of Appeals also upheld the practice. See *Lopez v. Washington Mutual Bank FA*, 302 F.3d 900 (9th Cir. 2002). In *Lopez*, the court ruled that the terms of the account agreement constituted a consent to the setoff against incoming benefits; there was thus no violation of the Social Security Act anti-assignment provisions.

Class Certified in Food Stamp Litigation



As we reported in the May 2009 *Disability Law News*, any SSI recipient who received food stamps while residing in a group home between January 2005 and September 2008 may be eligible for retroactive food stamps as a result of the decision in *Graves v. Doar*. On May 19, 2009, the Appellate Division, Second Department, issued a decision certifying the class in *Graves v. Doar*. 2009 NY Slip Op 04060 [62 AD3d 874].

Although this decision means that individuals will no longer have to intervene into the *Graves* litigation to be awarded retroactive food stamps, OTDA has filed a notice of appeal from this decision and a motion to reargue the earlier Court decision. So, it is important to identify potential class members in the hopes that they will get their benefits once the litigation is finished. In the meantime, please feel free to contact class counsel Peter Vollmer [(516) 277-1156 PVollmer96@aol.com] and John Castellano [(631) 581-7100; JCastellano@mercyhaven.com] with any questions.

ADMINISTRATIVE DECISIONS

Appeals Council Reverses ALJ

Some cases really do end well, despite how long and how much effort it takes to get to that end. Doris Cortes, paralegal at the Rochester office of the Empire Justice Center, reports just such a victory. Following an unsuccessful hearing and appeal, Doris persuaded Kate Callery to take the case to District Court. As luck would have it, the government offered a voluntary remand. In the not so lucky department, the case was remanded to the same ALJ who had denied the claim in the first instance. For Doris, it was *déjà vu* all over again.

Undaunted, Doris appealed the second denial to the Appeals Council. While agreeing with the ALJ's determination that the claimant had the residual functional capacity (RFC) for light, unskilled work, the Appeals Council disagreed with the ALJ's determination that the claimant was able to communicate in English. It proposed finding him disabled as of his fiftieth birthday in 2005 under Medical-Vocational

Guidelines (the "grid") Rule 202.09.

The Appeals Council specifically referenced its audit of the hearing recording, noting that the claimant struggled to communicate in English and had to rely on the interpreter. It also noted that the claimant's medical providers had observed that he was unable to communicate in English, and that all the forms completed in association with his application were filled out by third parties. It concluded that the claimant was illiterate or unable to communicate in English, and thus disabled under Rule 202.09, even with a light RFC.

Felicitation to Doris for another job well done!



Court Remand Reversed by Appeals Council

In another example of Appeals Council activism, Katie Courtney of the Rochester office of the Empire Justice Center got a similar result without having to experience the *déjà vu* part. In her case, following a voluntary remand from U.S. District Court, the Appeals Council intervened and issued a fully favorable decision without remanding the claim back to the ALJ for another hearing.

The claimant had been found disabled as child, but his benefits were discontinued following an age 18 redetermination. In reviewing the ALJ's determination for a second time following the court remand, the Appeals Council relied on new evidence from a medical consultant to determine that the claimant meets Listing 12.05B. The medical consultant reviewed the evidence of record and concluded that the claimant

had significant deficits in adaptive functioning in addition to the IQ scores with the 12.05B range. The ALJ had previously dismissed the valid and reliable IQ scores established by an SSA consultative examiner. He relied instead on the opinion of a nonexamining review physician, who had concluded that the claimant was functioning in the borderline to average range of intelligence based on earlier school records, some of which were not even included in the exhibit file.

Too bad that the Appeals Council could not have seen the light the first time around, but kudos to Katie for pursuing the claim. And congratulations to Katie, who was recently named an "Outstanding Young Lawyer of the Year" by the Women's Bar Association of the State of New York.

ALJs Share “Best Practices”

The Fall Church Office of Adjudication and Review (ODAR) recently issued a “Message to Claimants’ Representatives” setting forth a list of “Best Practices for Representatives.” Noting that the practices listed are “merely suggestions,” the list was signed by the Deputy Commissioner, Chief Administrative Law Judge, and the Regional Chief Administrative Law Judges.

The top suggestions for practice before an ALJ hearing?

1. Do not submit duplicative evidence
2. Submit evidence as far in advance of the hearing as possible, using electronic records express
3. Before faxing evidence, check to ensure the evidence you are submitting matches the claimant
4. Make sure the barcode is the first item faxed in order to ensure proper identification of all record

5. Submit a cover letter with the evidence identifying what is being submitted and the date of the evidence
6. Avoid submitting voluminous evidence at the last minute
7. When faxing evidence from different sources into the electronic folder, separate sources by placing a bar code as the first document for each source and submit in chronological order
8. Do not submit non-medical evidence such as appointment of representative forms or fee agreements

The entire document, which includes some more specific and plenty more generic suggestions such as “establishing a good working relationship with hearing office staff and management,” is available as DAP #519. Maybe now we can submit our suggestions for “Best Practices for ALJs.”

ePulling Faces Problems



Electronic File Assembly (ePulling) is one of several pilot projects initiated by the Social Security Administration (SSA) to reduce the hearing office backlog. SSA expects it to be an improvement over its traditional file preparation process, which requires manual organization of documents in an electronic folder (EF).

File preparation using ePulling software automates the manual organization of documents in the EF. Specifically, ePulling software identifies and records relevant information (type of document, the source of the document, and the to and from dates of the document) for each page in the EF; identifies potential duplicate documents and sequentially numbers pages in the EF; and allows staff reviewing the EF to identify a specific type of document (such as X rays).

According to a recent study by SSA’s Office of the Inspector General (OIG), the results of the pilot pro-

gram have been disappointing. ODAR (Office of Disability Adjudication and Review) is facing challenges with the accuracy of the ePulling software, which in turn is increasing case preparation times. OIG analyzed data collected by ODAR and determined that despite the software’s contractual claims of 90 percent accuracy, ePulling accurately identified page-level information about 57 percent of the time. Even after enhancements to the program, there was little improvement. Furthermore, employees in ODAR offices involved in the pilot program reported that using ePulling took three to four hours compared to one to two using the traditional case preparation time

OIG recommended among other things that SSA develop better methods of assessing the success of ePulling, including analyzing the effect on productivity levels at ODAR. The full report is available at <http://www.ssa.gov/oig/ADOBEPDF/A-07-09-19069.pdf>.

WEB NEWS

Can You Hear Us Now?



Safelink Wireless is a government supported program that provides a free cell phone and airtime each month for income-eligible customers. New York recipients of Family Assistance, Food Stamps, Home Energy Assistance Program (HEAP), Medicaid, Safety Net Assistance, Supplemental Security Income (SSI), Veteran's Disability Pension, and Veteran's Surviving Spouse Pension benefits may qualify for this program. <http://tinyurl.com/3gm7z7>

Avoiding the Hot Sun in the Summertime

The Health Department & the NYC Dept for the Aging are promoting the installation of free air conditioners to low-income seniors over age 60 in NYC. Please see the 2009 Application and information for applying for free air conditioners for people who would meet the income guidelines for the HEAP program. At this link is also a link to information about asking Medicaid to pay for an air conditioner. Applications for free air conditioners should be submitted immediately, as supplies are limited. <http://onlineresources.wnyc.com/kbbase/entry/74/>



HEAP-funded air conditioners are also available on a limited basis outside of NYC if a client needs an air conditioner due to a medical condition and meets HEAP income guidelines. For more information, go to OTDA's website at <http://www.otda.state.ny.us/main/heap/cooling.asp>

Here's the list of providers outside of NYC (where you would go to apply for the air conditioner). <http://www.otda.state.ny.us/main/heap/documents/Cooling-contacts.pdf>

Online Sites Help Navigate New York's Courts



Three new computer programs that will help New Yorkers navigate the state legal system were recently unveiled. These DIY (Do It Yourself) programs ask straight-forward questions to help users prepare individualized court forms and instructions. The three state-wide DIY programs are the Support Modification Petition Program for Family Court, the Small Estates Affidavit Program for Surrogate's Court, and the Adult Name Change Petition Program for Supreme Court. The New York State Unified Court System partnered with Legal Assistance of Western New York (LawNY), Legal Services NYC, LawHelp/NY, and Pro Bono Net in this project. CourtHelp (<http://nycourthelp.gov>) and LawHelpNY (<http://lawhelp.org/ny>)

New York Senate Launches Updated Website

Before the New York State Senate got involved in some mind boggling monkeyshines, the august body launched a more interactive and updated website. Some of the features include thumbnail pictures of Senators with links to their own personal websites, an interactive calendar, a feature that allows you to comment on and "mark up" bills that they post to the website (currently they only have election related bills posted) and an official Senate blog. Throwing darts is optional! <http://www.nysenate.gov>



Direct Express Cards Available



Many Social Security and SSI recipients have encountered problems with receiving their monthly benefits in the mail or even by direct deposit into their bank accounts. Problems with lost or stolen paper checks are not uncommon, and of course,

exempt Social Security and SSI checks supposedly protected in claimant's bank accounts have nonetheless been subject to seizure by creditors. [The July 2008 *Disability Law News*, available at www.empirejustice.org, reported on New York's new Exempt Income Protection Act (S.6203/A.8527), which will better protect statutorily exempt income from access by creditors.]

The U.S. Treasury's optional Direct Express stored value/debit cards allow beneficiaries to receive their monthly payments without the hassles of paper checks or bank accounts. Since its inception in April 2008, the Direct Express card has attracted over 446,000 recipients. It can be used to make purchases and cash withdrawals wherever MasterCard debit cards are accepted, to obtain post office money orders, and to withdraw cash from ATMs.

The Direct Express card eliminates the expense of check cashing services, as well as the risk of stolen checks. It also substantially reduces the danger of ex-

empt Social Security and SSI funds being garnished by creditors. Because the card can only be used to receive Social Security and SSI, exempt funds are never comingled with nonexempt funds. According to the Treasury Department, Comerica, the bank that operates the Direct Express system, will not allow a freeze or garnishment of the money "on" the cards, except to the extent allowed by federal law (*i.e.*, child support, and offset of federal debts against Social Security but not SSI funds).

Additionally, Direct Express does not require a credit check or a minimum balance. Unlike bank accounts, there are no overdraft fees or bounced check charges. Rather, if the account has a zero balance, the transaction will be declined without a fee. Unlike many bank accounts, there is no monthly fee, although there is an optional \$.75 charge for a monthly statement. The first ATM withdrawal each month is free; subsequent withdrawals are \$.90. There is no charge for cash withdrawals at a MasterCard member bank.

SSA only notified beneficiaries receiving paper checks of the availability of Direct Express. It is, however, available to all recipients. More information about Direct Express can be found at www.usdirectexpress.com.

OTDA Tidbits: Grant Increase, New Commissioner

Two important pieces of information relating to the Office of Temporary and Disability Assistance (OTDA) came out recently. First, Governor David A. Paterson announced an increase to the public assistance grant that took effect July 1, 2009. This is the first grant increase in nearly two decades. The grant will be raised again in each of the next two years, resulting in a cumulative 33 percent increase by July 2011.

As of July 1, the public assistance grant for a family of three is \$321 a month, up from \$291 a month. As part of the 2009-10 budget, the Governor and the

Legislature agreed to increase the grant in each of the next three years, totaling \$353 a month in July 2010 and rising to \$388 from July 2011 forward. The State will support the counties' share of the costs of the grant increase for a period of three years.

The second piece of news is that OTDA Commissioner David A. Hansell resigned his position effective June 26, 2009, to become Principal Deputy Assistant Secretary of the Administration for Children and Families, in the U.S. Department of Health and Human Services. It is not yet clear who the new OTDA Commissioner will be.

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

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

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

Lamay o/b/o KPD v. Astrue, 562 F.3d 503 (2d Cir. 2009)

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

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

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

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

The ALJ’s finding that there was no objective evidence to support opinion of the treating physician that claimant’s back impairment was disabling was unsupported, where both the ALJ and the medical expert on whom he relied erroneously assumed that MRI referred to in other reports was not actually in the file. The court noted that even if the MRI report was not in the exhibit file, the ALJ – once made aware of its existence – would have been obligated to request it. The court also rejected the Commissioner’s attempt to argue that the MRI did not support the treating physician’s opinion, since the court could not affirm on grounds different that those considered by the agency. Nor 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.

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.

Can Social Security Numbers Be Guessed?

A recent study by researchers at Carnegie Mellon University posits that it is all too easy to guess many if not most of the nine digits in a Social Security number using information that is publicly available. According to Alessandro Acquisti, assistant professor of information technology and public policy and a co-author of the study, “our work shows that Social Security numbers are compromised as authentication devices, because if they are predictable from public data, then they cannot be considered sensitive.”

The first three digits of a Social Security number - or “area number” - are issued according to the zip code of the address provided on the application form. The middle numbers - or “group numbers” - indicate the time period when the number was issued. They transition slowly and often remain constant over several years for a given region. The last four digits are assigned sequentially. Consequently, the same first four or five digits are likely to appear in SSNs issued to applicants on consecutive days, particularly in small states. Since 1988, when Social Security began efforts to issue SSNs shortly after birth, the middle digits can be even more readily predicted. So, the current trend of asking people for only the last four digits of their Social Security numbers is hardly comforting.

The researchers found that by using the “Death Master File,” which is publically available, they were able to use the Social Security numbers of deceased

people born around the same time and place as the subject to guess the subject’s SSN correctly in an alarming number of instances. Records of an individual subject’s place and date of birth could be garnered from a variety of sources, including voter registration lists, commercial databases and even personal blogs and social networking sites.

According a recent article in the *Washington Post* describing the Carnegie Melon study, the Social Security Administration (SSA), for reasons unrelated to the study results, has been developing a system to assign numbers randomly that would make them less predictable. And of course SSA has never recommended that Social Security numbers be used for authentication.

Privacy and security experts cite the study as another example of the dangers of businesses using SSNs for identification. Peter Swire, a law professor at Ohio State University and chief counselor for privacy during the Clinton administration, is quoted in the *Washington Post* article as saying: “We can’t pretend anymore that SSNs can be kept secret. This report puts a nail in that coffin. We’ll need new approaches, and it will cost money for the government and the private sector to build the new approaches.”

The study is available at <http://blogs.heinz.cmu.edu/ssnstudy/>.



END NOTE

Do Clothes Make the Man - or Woman?

As we head into the “dog days” of summer, many of us are inclined to abandon our ties and sport jackets, or trade in our hose for bare legs and open toe sandals. But maybe we should think twice about that before we head off to the courthouse or the hearing room. A May 22, 2009 article in the *New York Times* describes the controversy created by a panel discussion about clothing in the courtroom at the annual Seventh Circuit Bar Association meeting in Indianapolis in May.

Commenting on good and bad trends in courtroom practice, Judge Joan H. Lefkow of the Northern District of Illinois suggested that some women should dress more appropriately in court. She apparently cited an incident where a lawyer appeared for a jury trial in a velour outfit looking like she was “on her way home from the gym.” Although the attorney in question won her case, Judge Lefkow observed that the issue of unseemly courtroom attire should be addressed – quietly – by law firms. She suggested that women looking for help might visit the web site *Corporette*, “a fashion and lifestyle blog for overachieving chicks.”

According to the *Times*, Judge Lefkow’s comment precipitated a lively discussion that quickly shifted from “schubbly to sexy.” Several judges - all male – threw in their two cents worth, complaining about women appearing in short skirts and “blouses so short that there’s no way the judges wouldn’t look.” One judge did add that male attorneys who sported loud ties were also a problem. Their remarks were countered by another female judge, who suggested that it might help if there were more female partners in law firms to dispense clothing advice to young women.

Reports of the story have engendered more lively discussion on the Internet. One woman responded on the ABA Web site with her own parody of a male

judge: “I’m sorry, Sugar, I’d love to listen to what you’re saying, but I have a penis. As such, I’m only able to use one sense at a time.” A male reader responded with “Yes, please ladies, by all means use your sexuality to get what you want (after all, that’s the only excuse you have for dressing in the manner described in this article).”

Law Professor Susan J. Koniak of Boston University found the entire discussion about revealing clothing absurd. According to Koniak, if clothing in court is such a distraction, “we should just have a bag when we walk in, a burqa... men, women, everybody.” Might be a little warm in the summer....





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