

DISABILITY LAW NEWS

Second Circuit Issues Ruling in *Clark*

The Court of Appeals for the Second Circuit issued a decision in March in the *Clark* case, which challenged the Social Security Administration's (SSA's) policy of terminating/denying benefits to claimants with outstanding probation or parole violation warrants. The Court ruled that SSA's practice of considering the issuance of a warrant equivalent to a determination that one is in fact violating a condition of probation or parole is contrary to the Social Security Act. It remanded the case back to the District Court for further proceedings. *Clark v. Astrue*, 602 F.3d 140 (2d Cir. 2010).

At issue in *Clark* was the provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. No. 104-193, §202, 110 Stat. 2105, 2185-86, denying Supplemental Security Income (SSI) eligibility during any month in which an otherwise eligible individual is violating a condition of probation or parole imposed under Federal or State law. 42 U.S.C. § 1382(e)(4)(A)(v). The same provision was made applicable to Title II benefits by the Social Security Protection Act of 2004, Pub.L. No. 108-203, §203, 118 Stat. 493, 509, codified at 42 U.S.C. §402(x)(1)(A)(v).

The Court of Appeals held that the plain meaning of the statute requires that SSA demonstrate by a preponderance of the evidence that a claimant or beneficiary is violating a condition of probation or parole before denying or suspending benefits. It rejected the Commissioner's argument that the fact of a warrant, issued on the basis of "probable cause" or "reasonable suspicion" to believe that one is violating a condition of probation or parole, is equivalent to a determination that one is in fact violating a condition of probation or parole. According to the Court:

While Congress may in some instances set a lower probabilistic threshold [footnote omitted], we disagree that it has done so here. And we hold, more generally, that unless it specifies clearly to the contrary, when Congress provides that a fact triggers civil legal consequences, it is requiring a finding that the fact is more likely than not true.

602 F.3d at 148.

The Commissioner did not argue that the warrants used to terminate or deny

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

The newsletter is written and
edited by Louise M. Tarantino,
Esq. and Catherine M. Callery,
Esq.

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Second Circuit Ruling in *Clark*—Continued

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benefits would satisfy a more-likely-than-not probabilistic threshold, and the Court declined to decide what relevance such a showing would have. It also noted, relying on examples set forth in the *amicus* brief filed by the Empire Justice Center and other not for profits organizations from across the country, that many of the warrants relied upon by SSA might be supported by probable cause but still not meet the higher more-likely-than-not standard. For example, a parolee might have been given permission to leave a jurisdiction by her parole office, but the permission was not properly recorded. The resulting warrant might be valid but would not justify a suspension of benefits by SSA.

In reaching its conclusion, the Court rejected the various arguments presented by the Commissioner. Simply because the evidentiary requirement imposed by Congress, for example, is burdensome does not change the fact that Congress requires it. The Court also concluded that the Commissioner's argument that the statute's use of the present tense permits prompter suspension than the Court's interpretation of the suspension provisions permits was circular. Similarly, it refuted the Commissioner's claim that the good cause provisions added to the statute justify the Commissioner's interpretation. It found that even if an interpretation of the statute that limits the good cause provisions to warrants for felony offenses might be "odd," it is not so odd as to ignore the plain language of the statute. Finally, it rejected as "somewhat paradoxical" the Commissioner's and the District Court's interpretation that the Second Circuit's decision in *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir 2005), which dealt with the meaning of

"fleeing" for recipients with outstanding felony charges, precluded the Court's ultimate finding.

Advocates will recall that *Clark* is a "companion" case in a sense to the *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir 2005) and the nationwide class action settlement in *Martinez*. [For more on the *Martinez* settlement, see the January newsletter of the Disability Law News at www.empirejustice.org or <http://www.nslc.org/areas/social-security-ssi/Martinez-Settlement>. Also, see the related article in this newsletter concerning the application of *Martinez* to Medicare eligibility.]

At of the date of publication of this newsletter, the Court of Appeals still had not issued its mandate. According to plaintiffs' counsel Jerry McIntyre of the National Senior Citizens Law Center (NSCLC), plaintiffs anticipate moving for certification of a nationwide class and for summary judgment when the case is returned to the district court. They will also need to substitute lead plaintiff Elaine Clark's ex-husband in her place since she died. No predictions at this point as to how the government will respond.

Jerry's advice for advocates with pending cases is APPEAL! APPEAL! APPEAL! The basis for appeal in every one of these cases is that no one has ever made a determination that the individual is actually violating a condition of probation or parole as the statute requires.

Great work on the part of Jerry McIntyre and his co-counsel at the Urban Justice Center and Proskauer Rose!

Newsletter Publication Schedule Changes

For the past twenty plus years, the *Disability Law News* has been published every other month. Given the extent of recent reductions to funding in the Disability Advocacy Program (DAP), we at the Empire Justice Center are no longer able to maintain this publication schedule. Starting with this edition, the *Disability Law News* will now be published once a quarter, with issues coming out in March, June, September and December. Furthermore, the *Disability Law News* will only be published electronically, except for a few paid paper subscriptions. And remember that you can always find - and search - back editions at www.empirejustice.org. Thank you for your understanding.

Martinez Class Members Provided Medicare Part B Protections

Thanks to *Martinez* class counsel, the Social Security Administration (SSA) has agreed to remedy a problem facing certain class members trying to get back into Medicare Part B. *Martinez* is the national “fleeing felon termination” class action case. (See January 2010 *Disability Law News* for discussion of *Martinez v. Astrue* decision and related article on page one of this newsletter.)

Although fleeing felon terminations for Social Security Disability (SSD) recipients do not result in a comparable disqualification for Medicare purposes, some class members were unable to keep paying their Medicare Part B monthly premiums when they lost their SSD cash benefits. SSA eventually terminated their Medicare Part B coverage due to failure to pay premiums. (Part A coverage for SSD recipients is free and therefore should have continued uninterrupted.) Low income beneficiaries should not have been affected if they were enrolled in a Medicare Savings Program, which pays the monthly Part B premium for people with incomes at or below 135% of the federal poverty level.

When SSA retroactively reinstated SSD cash benefits under the provisions of the *Martinez* settlement, those recipients who wanted to get back into Medicare Part B were told (1) they had to wait until the next general enrollment period and (2) they would be assessed a late enrollment penalty (a higher monthly premium) to boot! (The Part B General Enrollment Period is between January 1 and March 31 of each year, to become effective July 1st – there is no coverage for medical expenses incurred July 1st.)

Fortunately, *Martinez* class counsel successfully challenged SSA’s practice, and SSA has agreed to use its “executive discretion” to automatically enroll members back into Part B without applying any waiting period, and also to waive any premium penalties. Class members can opt out of ongoing or retroactive coverage.

The National Senior Citizens Law Center, part of *Martinez* class counsel, will be sharing more details on SSA’s implementation policy as it becomes available. In the meantime, if you have questions about Medicare for *Martinez* class members, or other Medicare or Medicaid questions, please feel free to contact Cathy Roberts at the Empire Justice Center at croberts@empirejustice.org or 518 462-6831. For more information on the *Martinez* settlement, visit the National Senior Citizens Law center website at <http://www.nsclc.org/front-page/areas/social-security-ssi/Martinez-Settlement>.



Update on New Puerto Rican Birth Certificates

As we told you in the March 2010 *Disability Law News*, Puerto Rico is issuing new birth certificates as of July 1, 2010. Although there is a \$5.00 charge, this fee is waived for people 60 and over and veterans. Also, although the website (<http://www.salud.gov.pr>) appears to be only in Spanish, once you choose info on birth certificates it gives you the option of English or Spanish. Lastly, any application for a new birth certificate dated before July 1, 2010, will be rejected as invalid, so advise clients to wait until that date to apply for a new birth certificate. Gracias to Empire Justice Center’s Doris Cortes for her up-to-date information on this process.

REGULATIONS

Greater Garnishment Protections Proposed

Rules proposed by five federal agencies would significantly increase protections from debt collection practices of freezing bank accounts that contain exempt Social Security and other protected federal benefits. 75 Fed. Reg. 20299 (April 19, 2010). Although State laws allow account holders to assert their rights to exemptions, the accounts may remain frozen until the challenges are resolved, causing extreme hardship to beneficiaries. [Note that some states such as New York already have more bank account protections that may be more generous. See July 2008 edition of the *Disability Law News*.]

The proposed rules would provide limited access to funds while a garnishment order is being challenged. Comments on the notice of proposed rulemaking (NPRM) are due by June 18, 2010. The NPRM only addresses payments made by direct deposit, not by checks.

Led by the Department of the Treasury, and joined by the Social Security Administration (SSA), the Department of Veterans Affairs, the Railroad Retirement Board, and the Office of Personnel Management, this rulemaking effort would require all financial institutions receiving a garnishment order for an account containing directly deposited federal benefit payments to conduct a review to determine whether any such payments were deposited to the account within 60 calendar days prior to the garnishment, known as the lookback period.

If so, the proposed rules would require the financial institution to allow the account holder to have access to any deposits made within the last 60 days. These funds are called the “protected amount.” Keep in mind that the protected amount is not the same as the amount of funds that may be ultimately exempt from garnishment. The rules provide that a benefit recipient may challenge the entire garnishment order; the protected amount simply represents the basic amount

that will be available to a beneficiary to allow a lifeline while any further challenge is being pursued. There is an exclusion from this process if the United States is the creditor seeking to collect a federal debt. If the individual has multiple accounts, the review and protected amount applies to each account. The financial institution must notify the account holder of the protections from garnishment that apply to exempt funds. This notice must be sent within two business days of completing the account review. The notice would also be required to contain other information, including notice of the right to claim exemption of additional amounts above the protected amount. A model notice is included with the proposed regulation.

The Agencies are asking for comments on the definition and effects of the proposed lookback period. Some advocates have identified problems with the 60 day lookback period, which was intended to protect the last two cycles of benefits payments for beneficiaries. The shortfall with the 60 day period occurs in months with 31 days; to cover a full two-month cycle of payments, the proposed 60-day lookback period should be increased to at least 62 days to cover this situation,

The proposed rules would enable financial institutions to identify federally exempt direct deposited funds by use of an easily identified code letter for payments originating from the Federal government, and a published list of entry details from each Agency originating the payment. Other provisions prohibit “continuing” garnishment orders, converting them into a one-time garnishment order. The rules would also restrict collection of garnishment fees in excess of the protected amount.

While the proposed rule is a great improvement over current practice, there are several significant gaps in

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Hearing Loss Listings Changed



The Social Security Administration (SSA) issued final rules revising the criteria of the Listing of Impairments involving hearing loss (Listing 2.00 Special Senses and Speech). The final rules are effective August 2, 2010. 75 Fed. Reg. 30693 (June 2, 2010).

In August 2008, SSA published a Notice of Proposed Rulemaking (NPRM), setting forth changes to the Listing pertaining to hearing loss. After reviewing and evaluating numerous comments, SSA made some revisions in the final rules the agency adopted. (The proposed rules were discussed in the September 2008 *Disability Law News*). Although Listing 2.00 also includes listings for visual disorders, disturbances of labyrinthine-vestibular function and loss of speech, the final rules only address evaluation of hearing loss. SSA last revised the listing for visual disorders in November 2006. The agency intends to separately publish rules for the other areas of the listing.

We will provide details of this Listing change in the September *Disability Law News*.

OIDAP Comment Period Extended

The Social Security Administration (SSA) has announced that the Occupational Information Development Advisory Panel (OIDAP) has extended the comment period on its report entitled [Content Model and Classification Recommendations for the Social Security Administration Occupational Information System \(September 2009\)](#) until June 30, 2010.

Advocates will recall that OIDAP was established by the Commissioner in 2008 to provide independent advice and recommendations on plans and activities to replace the DOT (Dictionary of Occupational Titles). For more information on OIDAP, see the July 2009 edition of the *Disability Law News*.

If you would like to submit comments online, go to <http://www.regulations.gov/search/Regs/home.html#docketDetail?R=SSA-2010-0018>.



Garnishment Protections—Continued

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its coverage. For example, the proposed rule does not address the problem of financial institutions setting off overdrafts and other debts of the account holder against exempt funds. Similarly, the rule does not protect exempt funds from bank fees, other than garnishment fees. The rule contains no procedure for early release of directly deposited exempt funds in excess of the protected amount that may have been deposited more than 60 days before. And, as noted, the 60 lookback period may be inadequate to provide two months worth of benefits as intended.

The Empire Justice Center is planning to submit comments on the proposed rule. Please let us know if you have any thoughts that you would like us to consider in formulating our comments.

And stay tuned for future developments, including how these regulations, if promulgated, will interface with New York's recent statutory changes.

COURT DECISIONS

Court of Appeals Issues Guidance on Credibility

In two recent summary orders, the Court of Appeals for the Second Circuit has provided guidance for the evaluation of credibility in disability claims. As advocates are aware, credibility determinations can often be the linchpin of cases, and all too often, Administrative Law Judges (ALJs) make these determinations somewhat cavalierly, to say the least. The decisions in *Meadors v. Astrue*, 2010 WL 1048824 (2d Cir. March 23, 2010) and *Genier v. Astrue*, ---F.3d---, 2010 WL 2105081 (2d Cir. May 27, 2010) should prove helpful to advocates struggling with credibility issues.

In a not so summary summary order, the Court in *Meadors* remanded the claim for application of the correct standard for assessing subjective complaints of pain. The Court, citing 20 C.F.R. §404.1529(c)(4) and Social Security Ruling (SSR) 96-7p, reiterated that the ALJ must follow a two step process in evaluating contentions of pain. First, the ALJ must determine whether the claimant suffers from a medically determinable impairment that could reasonably be expected to produce the pain alleged. The ALJ must then evaluate the intensity and persistence of the symptoms considering all the available evidence. To the extent that the contentions of pain are not substantiated by objective medical evidence, the ALJ must then engage in a credibility analysis. That analysis involves a review of the seven factors set forth in 20 C.F.R. §404.1529(c)(3)(i)-(iv). 2010 WL 1048824 *3.

The Court held that the ALJ failed to follow this two-step inquiry. Instead of considering the threshold question of whether Meadors had demonstrated an impairment capable of producing the pain alleged, the ALJ erroneously proceeded directly to a credibility determination. The ALJ's failure to apply the correct legal standard precluded the Court from conducting a meaningful review of his determination. In other words, the Court was unable to discern whether the ALJ found that Meadors's contentions were not con-

sistent with her lumbar radiculopathy versus whether her contentions were consistent, but the intensity and persistence were unsubstantiated and her allegations were not credible.

The ALJ simply noted in passing that the plaintiff's complaints of disabling back and leg pain were not well supported by substantial evidence. The Court held that by requiring that the claimant's allegations of pain be well supported by the medical evidence, "the ALJ imposed an undue burden on the Appellant at the credibility stage." *Id* at *4. The claimant need not produce evidence confirming the extent of the pain but rather medical evidence of an impairment that could reasonably be expected to produce the pain.

The Court remanded the claim for the ALJ to make an express finding as to whether Meadors's "laundry list of back ailments" could be expected to produce the pain alleged, and if so, to evaluate the intensity and persistence of the pain and then and only then undertake a credibility analysis. The Court noted in a footnote that the ALJ must take into consideration *all* the factors set forth in 20 C.F.R. §404.1529(c)(3), rather than overly focusing, as he did, on the claimant's daily activities. Additionally, the Court recognized that the "ALJ's characterization of those activities was less than fully accurate." According to the Court, the ALJ failed to acknowledge the help the plaintiff needed with performing these activities. The Court emphasized that while the ALJ must assess credibility of testimony, he cannot select only evidence that supports his conclusions, nor may he mischaracterize evidence or afford too much weight to a single factor.

As if that wasn't good enough, the Court also ruled that the ALJ had failed to accord proper weight to the opinion of the claimant's treating physician, deferring instead to evidence from specialists. The Court spe-

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Guidance on Credibility—Continued

cifically found that Ms. Meadors's primary care physician would have necessarily reviewed the findings and opinions of the specialists in formulating his opinion. The Court also ruled that none of the objective evidence relied upon by the ALJ undermined the opinion of the treating source. It vacated the portions of the ALJ's order giving little weight to the primary care physician, and remanded with the instruction that the ALJ afford his opinion proper deference.

Kudos to Jaya Shurtliff of Olinsky & Shurtliff in Syracuse for this great decision. Remember that although a summary order and thus not precedential, this can nonetheless be cited in future cases.

Genier v. Astrue, on the other hand, is a reported decision that will serve as precedent. The Court of Appeals similarly remanded the claim for further proceedings where the ALJ's decision to deny benefits was based on a misreading of the evidence and a misunderstanding of the claimant's testimony. The claimant, who suffered from morbid obesity and related impairments including mobility and breathing problems, sleep apnea, high blood pressure, and back pain, alleged disability in August 2005 when he was 27 years old.

The Administrative Law Judge (ALJ) stated that while these impairments could reasonably be expected to produce the symptoms alleged, he found that the claimant's statements were inconsistent with the record and thus not credible. The ALJ found that the claimant, in a questionnaire for the Division of Disability Determinations (DDD) indicated that he was able to care for his dogs, vacuum, do dishes, cook, and do laundry. The claimant in fact, however, indicated that he *attempted* to accomplish these tasks, but required assistance of a parent for each due to severe fatigue and lack of mobility.

The ALJ considered the assertions of pain and fatigue, but gave them no credit, finding them to be contrary to evidence of record, including the claimant's reports of his daily activities.

At the time of the hearing the claimant had reduced his weight from 494 pounds to 327 pounds after successful Bariatric surgery, and testified that while he continued to suffer from sleep apnea, high blood pres-

sure, and back pain, his symptoms had improved significantly. He also testified that while he continued to suffer from knee pain at the time of the hearing, he was able to stand or walk for 15 minutes at a time, regained the ability to climb stairs, and was sometimes able to clean, cook, and do other outdoor chores, including shoveling and plowing.

From this testimony the ALJ concluded that while the claimant's obesity and sleep apnea constituted severe impairments, they did not meet a listing. The ALJ also found that the claimant retained the residual functional capacity (RFC) to perform a wide range of medium work, could lift up to thirty pounds occasionally and up to twenty pounds regularly, and was able to sit, stand, and walk for six hours in an eight hour workday. He determined that the claimant was capable of substantial gainful activity and thus not disabled under the Medical Vocational Guidelines ("Grid Rules").

The Court of Appeals held that the ALJ's decision was based on a serious misunderstanding of the claimant's testimony, and therefore did not comply with the requirement to consider all the evidence of the record, including the claimant's testimony and other statements regarding daily activities. The claimant's testimony relating to his ability to perform household chores *at the time of the hearing* did not pertain to the time when he completed the questionnaire, nor to any time prior to his surgery.

The Court held that the claimant's testimony did not contradict his assertions that he had been impaired. Since the ALJ's adverse credibility finding, crucial to the rejection of the claim, was based on a misreading of the evidence, the court held that it contradicted the obligations to consider all relevant medical and other evidence, citing 20 C.F.R. §404.1545(a)(3). The court vacated the judgment of the district court and remanded the case for further proceedings.

Congratulations to Mark Schneider, a private attorney from Plattsburgh, on a fine victory in this case. Thanks to Albany Law School summer intern Patrick Manning for his excellent summary of this decision.

District Court Remands After Finding Illiteracy

In *Campbell v. Astrue*, -- F. Supp.2d --, 2010 WL 1993851 (N.D.N.Y. May 17, 2010), Magistrate Victor Bianchini of the United States District Court for the Northern District of New York issued a Report and Recommendation, adopted by Chief Judge Norman Mordue, remanding an SSI case for further proceedings where the Administrative Law Judge's (ALJ) decision to deny benefits was based on a finding of literacy that was not supported by substantial evidence. The District Court also found that the ALJ failed to adequately develop the record, improperly relied on a disability analyst's opinion as medical evidence, and failed to consider all relevant evidence of mental impairments.

In 2005, the claimant applied for disability at age 49 based on obesity, lower back impairment, hypertension, hyperlipidemia, ventral hernia, gastrointestinal reflux disease, psoriasis, fatty liver, depression and anxiety, diabetes, and an inability to read or write. After an initial hearing at which the claimant testified, the ALJ held a supplemental hearing with a vocational expert (VE), and found the claimant was not disabled. He held the claimant's diabetes, intellectual function, and obesity to be severe impairments, but that his depression and anxiety were non-severe. He also held that none of the claimant's impairments met a listed impairment. While the ALJ considered Mr. Campbell's subjective statements, he found the claimant to be "not credible."

The ALJ granted little or no weight to the consultative examining physician's opinion that the claimant had a moderate to marked limitation for prolonged standing or sitting and did not state what weight he afforded them. Instead, he relied on the VE's testimony that a person with the claimant's vocational limitations, work history, and RFC could perform the job of housekeeper and concluded that he was not disabled within the meaning of the Act. The ALJ did not consider, nor did he pose any hypothetical related to the claimant's illiteracy. Instead, the ALJ relied on the claimant's testimony that he read at a 7th grade level, despite numerous other references in the record to the claimant's illiteracy.

The District Court cited the Social Security regulations (20 C.F.R. §§ 404.1564(b), 416.964(b)), stating

an ALJ is only to use the numerical grade level completed by a claimant to determine educational ability if there is no other contradicting evidence, because it may not represent actual educational ability. While under the regulations a 7th grade through 11th grade level of formal education is only considered a limited education, the District Court found that the ALJ ignored repeated statements by the claimant that he could not read or write, and the record showed that he attended special education and had difficulties learning.

The record also showed that the claimant's wife had to complete his disability forms. Under questioning by the ALJ, the claimant stated that he had a co-worker complete his reports when he worked in hotel maintenance, helped his children with arithmetic but his wife had to help with reading, was able to repair cars, despite not being able to read manuals, through experience and observation. The District Court stated that this was all evidence of record indicating that the claimant was functionally illiterate.

While the Commissioner pointed to evidence that Mr. Campbell could read a ruler, drive, help his children with math, and his admission of ability to recognize certain words, the court noted that these activities did not demonstrate the ability to "read or write a simple message such as instructions or inventory lists," and fell short of the evidence required by the regulations to show literacy.

Although the consultative examiner psychologist testified that she tested the claimant's IQ and was also informed that he was illiterate, she failed to assess his ability to read or write. The ALJ did not order further testing, despite an affirmative duty to develop the record, and thus the sole evidence of literacy came from the claimant's statements. While the ALJ found that the claimant was not a credible witness regarding his own literacy, the District Court held that absence of credibility is not enough on its own to reject the testimony.

Whether the claimant was able to read or write is especially important in this case because the question is determinative of whether the claimant was disabled

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Supreme Court Denies Cert

The U.S. Supreme Court recently declined to review two disability claims arising from the Second Circuit Court of Appeals. On February 22, 2010, the Supreme Court denied *certiorari* in *Lemay o/b/o KPD v. Astrue*, 562 F.3d 503 (2d Cir. 2009). See --- S.Ct. ---, 2010 WL 596885 (U.S. Feb. 22, 2010). Advocates will recall that in *Lemay*, the Court of Appeals found that the plaintiff had made a knowing and intelligent waiver of her right to counsel.

The Supremes also denied *certiorari* in *Encarnacion ex rel. George v. Astrue*, 568 F.3d 72 (2d Cir. 2009) (“*Encarnacion II*”). See --- S.Ct. ----, 2010 WL 1265965 (U.S. April 3, 2010). In that case, the Second Circuit had rejected plaintiffs’ challenge to the SSA’s policy of 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 decisions of the Court of Appeals, which are summarized in the Bulletin Board section of this newsletter, remain the law.

Remand After Finding Illiteracy—Continued

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under the Medical Vocational Guidelines (the “Grid”). If he was illiterate, Rule 202.09 would have directed a finding of disabled, and in such a case a VE would have been unnecessary. SSR 83-14.

The District Court also stated that the residual functional capacity (RFC) should be reconsidered on remand, especially because the ALJ improperly relied on a disability analyst’s physical RFC assessment indicating the claimant could perform light work. The court held the ALJ mistakenly identified the analyst as a physician, but an analyst’s opinions are not entitled to evaluation as medical opinions. The ALJ also gave little or no weight to the consultative examining physician, who opined that Mr. Campbell had limitations in standing and sitting.

The District Court held that the ALJ improperly assessed the claimant’s mental impairments because he gave significant weight to opinions of a consultative psychologist, but did not mention or weigh the opinions of the State agency’s reviewing psychologist. Despite the regulation’s requirements to do so, the ALJ did not explain why his findings were contrary to the conclusion by the psychologist that the claimant’s mental impairments are severe, or why he did not give weight or even discuss her opinions. See 20

C.F.R. §416.927(f)(2)(ii); SSR 96-6p.

Good decisions on the effect of illiteracy on a claimant’s ability to engage in substantial gainful activity are hard to come by. We hope this case will provide some helpful authority, at least at the federal court level. The *Campbell* case was handled by Louise Tarantino of the Empire Justice Center’s Albany office, and was referred by the Legal Aid Society of Northeastern New York. Thanks to Albany Law School summer intern Patrick Manning for his summary of the *Campbell* decision.

ADMINISTRATIVE DECISIONS

Appeals Council Persuaded by New Evidence

Paralegal Amy Leach of the Norwich office of the Legal Aid Society of Mid-New York achieved the near impossible - a reversal by the Appeals Council based on a claim of mental retardation under Listing 12.05C. The case involved a redetermination under the adult standards of an eighteen year old who had been receiving SSI (Supplemental Security Income) as a child. See 42 U.S.C. §1382c(a)(3)(H)(iii) (P.L. 104-193) and 20 C.F.R. §416.987.

The Administrative Law Judge (ALJ) rejected a history of IQ scores and diagnoses of mental retardation, relying instead on his own assessment of the claimant's adaptive functioning. He ignored, however, evidence demonstrating the difficulties the claimant had performing sheltered work. He also failed to accord proper weight to a psychologist who examined the claimant for the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD) and opined that he was not ready for competitive employment. The ALJ "played doctor," holding that the psychologist, who subsequently became the claimant's treating psychologist, had conducted an interview that was "very short and certainly not enough to formulate the elaborate opinion."

Amy argued all this to the Appeals Council, and bolstered her claim with new evidence from the now treating psychologist, who specifically refuted the ALJ's misinterpretation of his evidence and opinions. Amy also submitted additional evidence from the psychologist and other sources regarding the claimant's limited adaptive functioning.

The Appeals Council, in reversing the ALJ's decision, relied on numerous reports in the record demonstrating long standing mental retardation and lack of adaptive functioning, as well as the new evidence submitted by Amy verifying the claimant's current level of functioning. The Appeals Council also cited the new evidence as proof that the claimant's mood

disorder constituted a secondary impairment in addition to his low IQ scores under Listing 12.05C.

While the redetermination claim was pending at the Appeals Council, Amy's client reapplied for SSI as an adult. He also applied for Childhood Disability Insurance Benefits (CDB, formerly known as Adult Disabled Children's benefits) under his parent's account based on his claim that he became disabled before age twenty-two. Both claims were granted. The Appeals Council specifically affirmed the findings in the subsequent applications. [For some of the ins and outs of the effect of Appeals Council decisions on subsequent claims, see POMS DI 12045.027 and HALLEX I-5-3-17.]

Congratulations to Amy on this amazing feat! Amy reports another victory involving a subsequent application. Her client's February 2008 denial was upheld by the Appeals Council and appealed to U.S. District Court by Chris Cadin of Legal Services of Central New York. While the appeal was pending, the claimant, who has severe mental impairments, was approved for benefits as of March 2009. In October 2009, Chris negotiated a remand in federal court, based on an agreement that the Appeals Council would order that the subsequent favorable decision not be disturbed. Amy has since prevailed on the remanded claim before the very same ALJ who was just reversed by the Appeals Council - with a favorable decision on the record without a hearing. Keep them coming, Amy!

Appeals Council Remands to Different ALJ

In another example of achieving the almost impossible, LJ Fisher of the Rochester office of the Empire Justice Center obtained a remand from the Appeals Council ordering that the claim be assigned to a different Administrative Law Judge (ALJ). Her client, who has HIV disease, first applied for SSI on February 18, 2004, and was denied by the ALJ on June 28, 2008. LJ had argued that he met 14.08N (now K) or alternatively lacked the RFC (residual functional capacity) for even sedentary work.

LJ appealed, and in light of the complexity of the medical evidence and issues, submitted a longer than usual memorandum. She argued that the ALJ failed to consider properly the evidence under the HIV listing. She pointed out that the ALJ's RFC finding was not supported by substantial evidence. The ALJ had also improperly asserted that the claimant's illness was a result of failure to follow prescribed treatment. The ALJ, however, failed to take into consideration the side effects of the claimant's medications. Additionally, the ALJ's assertion that the claimant's use of drugs and alcohol was material was not based on substantial evidence. Finally, LJ argued that there was evidence of ALJ bias.

Once again, while the appeal was pending, the claimant was found disabled on a subsequent claim on November 13, 2008. On April 27, 2010, the Appeals Council issued a decision affirming the finding of disability on the subsequent application and further finding that the claimant became disabled on October 5, 2007, under HIV listing 14.08B2 due to his fungal infections. The Appeals Council remanded the claim for further consideration of the period prior to October 5, 2007. Most significantly, upon review of the record and the recording of the hearing, the Appeals Council found that some of the ALJ's questions and comments appeared to be inappropriate, and send the case back to a different ALJ.

During the hearing, the ALJ had been rude, asking the client why he had children if he could not support them. He also repeatedly asked where the client got money for cigarettes and drugs, even after the client answered him. He argued with the client, insisting that the client was not being treated for Hepatitis C

even though both the client and LJ explained that one of the HIV medications he was taking was also used to treat his Hepatitis C. (Post hearing, LJ submitted a letter showing where that information appeared in the record as well as a Medline Plus article describing the treatment.) The ALJ also opined that the client could walk, although he was using a prescribed scooter at the time. He demanded the prescription for the scooter be submitted.

If that were not enough, in the decision, the ALJ wrote:

The record demonstrates that although hundreds of thousands of dollars of public funds paid for by taxpayers have been expended for two decades or more upon claimants [sic] treatment of HIV+/AIDS, the claimant remains non-compliant with treatment, medications, an [sic] appointments for his HIV, refuses treatment for his addictions and substance dependence, and continues to indulge his gratifications at public expense. This case falls within the meaning of PL 104-121 and the intent of congress in promulgating such rule. In effect, Congress has said 'Enough.' And, again if that were not enough, the ALJ added, "Nor can the claimant's bunion and hammertoe be treated by riding around on a scooter and taking vicodin, while ignoring other treatment options . . .

Among other things, LJ reminded the Appeals Council of the provisions of HALLEX admonishing ALJs to avoid emotionally charged decisions. According to HALLEX I-2-8-25D, for example, "[t]he ALJ must not use emotionally charged words; e.g., 'malingerer,' 'hypochondriac,' etc."; nor should he "use the decision as a forum for criticizing other government components, the courts, the representative or the claimant." Since this ALJ did that and more, the Appeals Council wisely chose to remand the claim to a different ALJ that we hope will be more temperate in his conduct and decision.

Way to go, LJ!

ALJ Agrees Claimant Meets 12.05B

Buffalo Bruce Caulfield, paralegal at Neighborhood Legal Services, convinced an ALJ to award benefits to his client under Listing 12.05D for mental retardation. The record, as Bruce pointed out, contained ample evidence of the claimant’s long standing cognitive impairment and diminished adaptive functioning. In fact, an SSA consultative examiner (CE) diagnosed him in 2008 with mild mental retardation, with IQ scores ranging from 54 to 64. The CE had specifically found that these results were considered to be a reliable and valid estimate of his current functioning.

A non-examining review physician for DDD (Division of Disability Determinations) nonetheless found the results of the CE’s examination to be a low estimate of the claimant’s current intellectual functioning. The review psychologist based his conclusion at least in part on school records from 1997 yielding a composite IQ of 70.

Bruce pointed out to the ALJ that the review psychologist’s reliance a Stanford-Binet score of 70 obtained when the claimant was only thirteen years old flew in the face of POMS DI 24515.055. According to that section, test results obtained at younger ages are less reliable and valid than results obtained at older ages. The section also points out that IQs tend to stabilize at age sixteen.

This, and Bruce’s other cogent arguments, convinced the ALJ that there was no question that the claimant met the listing. Bruce acknowledges the help he got from the DAP listserv in formulating his arguments. Bruce’s experience also underscores the importance of paying attention to – and then refuting – the rationale used by DDD to deny claims. Great work, Bruce!

Appeals Council Goes Electronic?

If you haven’t seen it yet, you will soon. Attached to some Appeals Council correspondence is a notice entitled “Electronic Disability Claims Processing.” Yes, the Appeals Council is going electronic. As more and more e-dib cases wend their way through the appeals process, some are obviously making their way to the Appeals Council. In these cases, the Appeals Council will provide you with a copy of the file and hearing recording on a compact disc (CD). The Appeals Council will also require that you submit additional material evidence via ERE (Electronic Records Express); the contract scanner in London, Kentucky; or faxing into the electronic folder at the Appeals Council. The future has arrived!

Contact Us!

Advocates can contact the DAP Support attorneys at:

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

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

Searching for the SEQY?

Advocates have frequently expressed their frustration when confronting questions about a claimant's past relevant work without the benefit of an official earnings record. Exhibit files often do not include these documents, or they are entered into the record late in the process.

Search no more...we hope. At a recent NOSSCR conference, SSA Deputy Commissioner for Disability Adjudication and Review Glenn Sklar announced that all exhibit files would henceforth include earnings records. And on April 21, 2010, Chief Administrative Law Judge Frank Cristaudo issued Chief Judge Bulletin CJB 10-02 mandating that the preliminary steps for assembling Certified Electronic Folders (CEFs) must include obtaining:

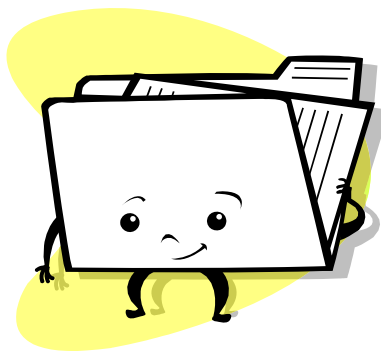
- Informational/Certified Earnings Record System (ICERS)
- Detailed Earnings Query (DQY)
- Summary Earnings Query (SEQY)
- New Hire, Wage and Unemployment Query (NDNH).

CJB 10-03 is available at <https://secure.ssa.gov/apps10> - a useful site, by the way, for important SSA policy and regulatory changes.

While the CJB deals with earnings records at the hearing level, obtaining them before that point from the district office may still be difficult. One claimant recently reported that a district office tried to charge for a copy of an earnings record. The District Office provided a form (SSA 7050), which allows the client to request the information for a fee of \$15 to \$80 based on the number of years requested. See the September 2007 edition of the Disability Law News at www.empirejustice.org for the travails of trying to obtain such records under POMS GN 03305.002.



Paper Files Available for *Pro Se* Claimants



Thanks to David Ralph of the Elmira office of LAWNY for reminding us of another useful Chief Judge Bulletin. CJB 07-07 - Conducting Electronic Hearings at Temporary Remote Sites (TRSs) - reminds adjudicators that “[i]f an unrepresented claimant requests assistance or cannot access the CD provided, the hearing office should provide a printed copy of the file to the unrepresented claimant prior to the hearing.” Generally, however, ODAR personnel will not print out files or supply laptops at TRSs.

tors that “[i]f an unrepresented claimant requests assistance or cannot access the CD provided, the hearing office should provide a printed copy of the file to the unrepresented claimant prior to the hearing.” Generally, however, ODAR personnel will not print out files or supply laptops at TRSs.

CJB 07-07 is one of several bulletins issued concerning the challenges posed by transporting PII (Personally Identifiable Information). CJB 07-06 outlines “Instructions for Providing a Copy of Electronic Folder (EF) to Claimant/Representative.” Per this CJB, ODAR’s “established business process” provides that a CD will be provided to the claimant or representative at two “critical intervals”: at workup when the case is exhibited, and the evening before or on the day of the hearing. Additionally, a request from a claimant for a copy of the electronic file should be honored at any time during the process.

Both bulletins are available at <https://secure.ssa.gov/apps10>.

WEB NEWS

Where is the Hip Bone Connected?

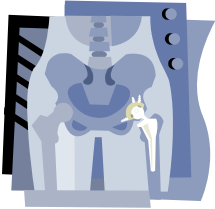


Figure out this and other interesting anatomy questions at a website recommended by Amy Leach, a paralegal at LASMNY in Norwich. Amy, who is also an RN. Amy notes that the website has a lot of good information besides anatomy lessons, including diagnoses, conditions, treatment, journal articles and other links.

www.eorif.com

Find More Medical References

And for all of us non-medical types, Susan Sternberg of the Legal Aid Society recommends this site, maintained by a librarian. The site provides links to medical information on a wide variety of topics related to medical issues arising in our Social Security practice, including child health, chiropractic, diagnostic tests, dictionaries, drugs, mental health, multilingual health information, senior health, and many more.

<http://hsl2.ucdenver.edu/education/med-ref/#environment>

Access “Know Your Rights” Info for Veterans

A new technical assistance publication, *ADA: Know Your Rights -- Returning Service Members with Disabilities*, is now available. The publication provides service members who have been seriously wounded in Operation Iraqi Freedom or Operation Enduring Freedom a basic understanding of their rights under the American with Disabilities Act (ADA) and where to turn for additional information and assistance.



http://www.ada.gov/servicemembers_adainfo.html

Limited English Proficient (LEP) Complaint Form Online



The Social Security Administration (SSA) has developed a new discrimination complaint form that limited English proficient (LEP) individuals or their representatives can complete when they are denied interpreter services at a District or ODAR office. The fill-in form includes an LEP discrimination category.

<http://www.ssa.gov/online/ssa-437.pdf>

For general information on SSA’s LEP policies, see <http://www.ssa.gov/multilanguage/>

TWP, SGA Charts Available

Thanks to Susan Sternberg of the Legal Aid Society in New York City for sharing with us a handy guide for the Trail Work Period (TWP) monthly levels and the Substantial Gainful Activity (SGA) levels - both blind and non-blind - over the years. She obtained the Work Desk Guide from a contact at the Brooklyn Office of Disability Adjudication and Review (ODAR). Also included is a similar guide obtained from the Buffalo ODAR that includes the quarterly and annual amounts needed over the years to obtain quarters of coverage.

The Guide is available as DAP #524.

Psychotherapy Notes Protected by HIPAA

How many times have you tried to no avail to get treatment notes from your client's treating psychiatrist or psychologist, only to have an ALJ (Administrative Law Judge) deny the claim because there were no treatment notes to back up an assessment from the treating sources? Or deny the claim even when you obtained the treatment notes because, in the ALJ's opinion, the treatment notes demonstrated that the claimant's condition was "stable," or in some other way contradicted the treating source opinion? These scenarios might provide fodder for appeals, but what about trying to deal with these issues at the ALJ level?

SSA's own Publication No. 64-103, issued January 2008, might help. This "Fact Sheet for Mental Health Care Professionals: Supporting Individuals' Social Security Disability Claims" reminds treating sources how important it is to provide information to SSA. It spells out the provisions of the Health Insurance Portability and Accountability Act (HIPAA), the Substance Abuse Act, and the Family Educational Rights and Privacy Act (FERPA) that permit them to disclose information.

The publication also reminds treating sources that "psychotherapy notes" as defined by HIPAA can be protected:

Social Security recognizes the sensitivity and extra legal protections that concern psychotherapy notes (also called "process" or "session" notes) and does not need the notes. As HIPAA defines the term, "psychotherapy notes means notes recorded in any medium by a mental health profes-

sional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date."

If you keep psychotherapy notes separate from your other medical records, you can send the set of records without the psychotherapy notes. If you do not keep psychotherapy notes separate from other parts of the medical records, you can legally disclose all of the records. However, you can choose to black out or remove the parts of the records that would be considered psychotherapy notes if kept separately. Another option is to prepare a special report detailing the critical current and longitudinal aspects of your patient's treatment and their functional status.

Thanks to Chris Cadin of Legal Services of Central New York for pointing out this nugget, which is available at <http://www.ssa.gov/disability/professionals/mentalhealthproffacts.htm>. Let us know if you are able to use it successfully to prevent ALJs from demanding all treatment notes.

The Secret Life of Commissioner Astrue...

Many of you may think of Social Security Commissioner Michael J. Astrue simply as the defendant in all those lawsuits against SSA. Commissioner Astrue, however, is also a published poet under the pseudonym of A.M. Juster. Read about his secret life and samples of his poetry at <http://www.firstthings.com/article/2010/05/regard-the-scuttlebutt-as-true>.

WHAT IS...

What Is...Complex Regional Pain Syndrome?

Complex Regional Pain Syndrome (CRPS), previously known as Reflex Sympathetic Dystrophy (RSD) is characterized by intense burning or aching pain or autonomic dysfunction, which worsens over time. RSD/CRPS most often results from an illness or trauma to a single extremity that did not directly damage the bones, joints, tissue or nerves in the affected limb. It is referred to as Causalgia when following a distinct nerve injury after forceful trauma to an arm or leg in the case of a gunshot wound or shrapnel blast. Other major/minor traumas, however, such as surgery, heart attacks, infections, fractures, and even sprained ankles can lead to RSD/CRPS. The precipitating injury may be so minor that the individual does not even recall sustaining an injury. Some other precipitants include, but are not limited to drug exposure, stroke with hemiplegia, and cervical spondylosis.

Normally, the nerves send pain signals through the spinal cord to the brain. With RSD/CRPS, problems arise when the spinal cord begins to send confusing signals to the brain, as well as to the injured area. These signals interfere with blood flow and sensory signals, often resulting in extreme pain. Immune response can be triggered causing sweating, discoloration, inflammation, temperature changes, and muscle spasms.

Treatment can lead to dramatic improvement and remission is possible and most effective within the first three months of symptoms. Clinical studies have shown that a delay in treatment may cause symptoms to worsen, resulting in long-term and even permanent physical and psychological problems. Over time, the condition can often become irreversible once the affected limb becomes cold and pale, undergoes skin and nail changes, and muscle spasms and tightening occurs. At this stage, available treatments tend to manage the underlying symptoms rather than treating the disorder directly.

Patient education and activity programs designed to increase mobility and promote use of affected area are considered the most important treatment for RSD/CRPS. Pain reducing, anti-inflammatory, as well as

psychotropic medications such as anti-depressants, antiepileptic drugs, muscle relaxants, and other drugs that produce generalized reductions in sympathetic outflow may also be used to treat the syndrome. Surgery is also an available treatment for some patients.

More medical information on RSD/CRPS is available at <http://www.mayoclinic.com> and <http://www.rsdfoundation.org>. More information can be found in “Titles II and XVI: Evaluating Cases Involving Reflex Sympathetic Dystrophy Syndrome/Complex Regional Pain Syndrome” [Social Security Ruling (SSR 03-02p)].

According to the provisions of SSR 03-02p, in a Social Security disability evaluation, RSD/CRPS is established in the presence of persistent complaints of pain that are typically out of proportion to the severity of any documented precipitating injury. To constitute a medically determinable impairment, one or more of the clinically documented signs of the syndrome in the affected region at any time following the documented precipitant must be present. These symptoms include swelling, abnormal hair or nail growth, osteoporosis, involuntary movements of the affected region of the initial injury, or autonomic instability in the form of changes in skin color or texture, decreased or excessive sweating, changes in skin temperature, or abnormal piloerector erection (goosebumps).

In cases where RSD/CRPS is alleged, SSR 03-02p states that documentation of medical signs or laboratory findings since the date of the precipitating injury is critical in establishing a medically determinable impairment. The Ruling states that since conflicting evidence in the medical record is not unusual in cases of RSD/CRPS due to the transitory nature and complicated diagnostic process involved, clarification of any such conflicts in the medical evidence should be sought first from the individual’s treating physician or other medical sources.

When evaluating duration and severity, as well as residual functional capacity (RFC), the SSR states

(Continued on page 17)

Childhood Poverty Affects Neurobiology

In May 2009, we reported on a Cornell University study showing that chronic stress from growing up in poverty can physiologically impact children's brains, impairing their working memory and diminishing their ability to develop language, reading and problem-solving skills. According to scientists at the annual meeting of the American Association for the Advancement of Science, researchers may be closer to learning about the specific mechanisms of how poverty-related stress affects neurological development.

W. Thomas Boyce, M.D., professor of pediatrics at the University of British Columbia, said that whether biology or environment has a stronger impact should no longer be the question "because clearly they are affecting each other." Other speakers related data on more than 1,500 individuals born between 1968 and 1975 taken from a 40-year demographic study of US households. There were "striking differences" in how the children's lives turned out as adults, depending on whether they were poor or comfortably well-off be-

fore the age of six. Poor children complete two fewer years of schooling, work 451 fewer hours per year, earn less than half as much, and were more than twice as likely to report poor overall health or high levels of psychological distress. Poor children were also fatter than their more affluent counterparts, and were more likely to be overweight as adults.

But according to Jack P. Shonkoff, M.D., professor of child health and development at Harvard University, learning the biological implications of poverty does not mean that children are predetermined to be less successful. Shonkoff suggests that this knowledge allows us to enhance early education and other social interventions. It provides "an amazing opportunity to learn more about the biology of misfortune and that will help us to develop some new ideas and create new interventions that may be able to mitigate the impact of adversity." See <http://news.aaas.org/2010/0221impacts-of-early-childhood-poverty.shtml>

What Is...—Continued

(Continued from page 16)

that effects of chronic pain and use of pain medications must be carefully considered because they may affect the patient's ability to maintain concentration/attention, adversely affect mood and behavior, and slow motor reactions times. These factors can interfere with an individual's ability to sustain work activity.

If an individual's statements about the intensity, persistence, or functionally limiting effects of pain or other symptoms are not sustained by medical evidence, SSR 03-02p states that an Administrative Law Judge (ALJ) must make a finding on the credibility of the individual's statements based on a consideration of the entire case record, including the individual's statements. RSDS/CRPS is not a listed impairment but, according to the provisions of the SSR, specific findings should be compared to any pertinent listing to determine if a medical equivalence may exist or whether the individual's impairment(s) meets or equals the severity of a mental listing through psychological manifestations related to the syndrome. In determining RFC, all of the individual's symptoms must be considered in deciding how such symptoms may

affect functional capacities and the usual vocational considerations (see 20 C.F.R. 404.1560-404.1569a and 416.960-416.969a) should be followed to determine the individual's ability to perform work.

According to SSR 03-02p, third party information is often critical in deciding the individual's credibility, including but not limited to; information from friends, neighbors, relatives, etc; statements from past employers, rehabilitation counselors, or teachers about the individual's impairments and limitations; statements from other practitioners with knowledge of the patient; statements from other sources with knowledge of the individual's ability to function in daily activities; and the individual's own record of his or her impairment and its impact in function over time. In accordance with SSR 96-7p, when additional information is needed to assess the credibility of the individual's statements about symptoms, the ALJ must make every reasonable effort to obtain additional information that could shed light on the credibility of those statements.

Albany Law School summer intern Patrick Manning researched and wrote this informative article.

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

Zabala v. Astrue, 595 F.3d 401 (2d Cir. 2010)

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

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

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

Encarnacion ex rel. George v. Astrue, 568 F.3d 72 (2d Cir. 2009) ("*Encarnacion II*"), cert. denied --- S.Ct. ---, 2010 WL 1265965 (U.S., Apr. 3, 2010)

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)

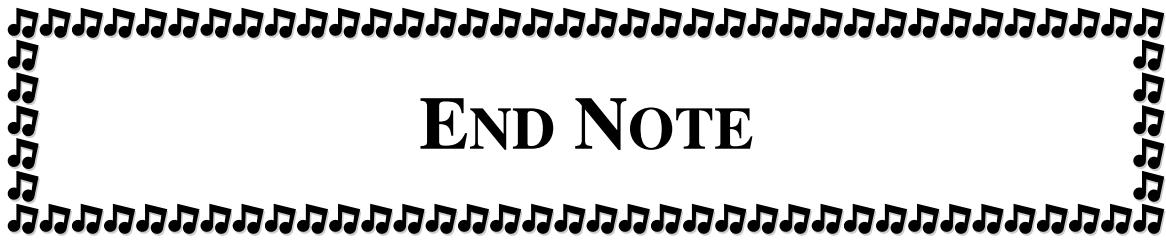
The Court agreed the opinion of the treating orthopedist that the claimant could perform "sedentary, light-duty" supported the ALJ's finding that the claimant had the residual functional capacity (RFC) for light work. It found that the need to get up and move around from time to time does not preclude 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), cert denied --- S.Ct. ---, 2010 WL 596885 (U.S., Feb. 22, 2010)

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

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

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



END NOTE

Happy Heart = Healthy Heart?

According to researchers at Columbia University, exercising, eating right, and not smoking may not be enough to avoid a heart attack – you may also have to be happy. The study, which was published in the *European Heart Journal* in February, is entitled “Don’t worry, be happy: positive affect and reduced 10-year incident coronary heart disease: The Canadian Nova Scotia Health Survey.” It is available at <http://eurheartj.oxfordjournals.org/content/31/9/1065.full?sid=c5c5de2d-b976-4a75-9963-678cca5f911b>.

During the course of the ten year study, researchers rated the happiness levels of more than 1,700 adults in Canada who did not have heart problems. The happiness levels were derived from self-reports and observed “positive affects.” Researchers employed several scales to rate depressive symptoms, hostility, and anxious symptom to adjust the self-reports. A five-point scale was used to measure individual happiness: joy, happiness, excitement, enthusiasm and contentment. Researchers looked at whether patients smiled and appeared able to enjoy some aspects of life, and whether they reported experiencing pleasure or excitement with some parts of their daily lives. Accounting for age, gender and smoking, for every point on the happiness scale, the individuals were 22 percent less likely to have heart problems.

Dr. Karina Davidson, the study’s lead author, acknowledges that happy people might be more likely to have healthier lifestyles. For example, higher positive affect was predictive of better sleep quality and fewer urges to smoke during cessation treatment.

Bottom line? Put on your happy face – and if you are short, smile even more. Another study published by the *European Heart Journal* on June 8, 2010, demonstrates that short people are more likely to develop heart disease than tall people. <http://eurheartj.oxfordjournals.org/content/early/2010/06/04/eurheartj.ehq155.full>

