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DISABILITY LAW NEWS

Childhood SSRs Issued

The Social Security Administration (SSA) has published new Social Security Rulings (SSRs) dealing with the evaluation of functional equivalency in childhood disability claims and continuing disability reviews (CDRs). According to the preamble in each, the SSRs provide policy interpretations and consolidate information from the regulations, training materials and question-and-answer documents. SSRs 09-1p, 09-3p, and 09-5p through 09-8p were published in the *Federal Register* (74 Fed Reg. 7527 *et seq.*, February 17, 2009). SSRs 09-2p and 09-4p were published the next day (74 Fed Reg. 7625 *et seq.*). They will become effective thirty days after publication and remain in effect until further notice.

SSR 09-1p, *Determining Childhood Disability Under the Functional Equivalence Rule – The “Whole Child” Approach*, sets the tone. **SSR 09-2p, *Documenting A Child’s Impairment-Related Limitations***, provides specifics. SSRs 09-3p through 09-8p each relate to one of the six domains set forth in the regulations: Acquiring and Using Information, Attending and Completing Tasks Interacting and Relating with Others, Moving About and Manipulating Objects, Caring for Self, and Health and Physical Well-Being.

These SSRs should prove overall to be helpful to advocates representing

children in SSI claims. They generally take a functional approach to analyzing cases, but include helpful language on special education, and useful explanations of various language disorders. Additionally, they all emphasize that rating limitations caused by a child’s impairment(s) in each and every domain affected is not “double-weighting.” Rather, that approach legitimately recognizes the particular effects the child’s impairment(s) has in all domains involved in the activities limited by the impairment(s). They also contain language reminding adjudicators that some children have chronic physical or mental impairments with episodes of exacerbation (worsening) and remission (improvement) that may vary considerably over time. Any variations in the child’s ability to function must be considered. See note 17 in SSR 09-1p and note 7 in SSRs 09-3p, 4p, 5p, 6p, 7p and 8p.

On preliminary review, the SSRs in some instances are a condensed version of the regulations found at 20 C.F.R. §416.924a, but in others, provide more specific examples. Similarly, they incorporate some of the guidance previously set in the training materials published by SSA for adjudicators. See *Final QA Compendium May 2001*, issued by SSA in November 2004, and available at

(Continued on page 2)

INSIDE THIS ISSUE:

REGULATIONS	7
COURT DECISIONS	8
ADMINISTRATIVE DECISIONS	12
WEB NEWS	16
CLASS ACTIONS	17
BULLETIN BOARD	18
END NOTE	20

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(Continued from page 1)

www.empirejustice.org and on its on-line resource center as DAP #333. To a certain extent, especially in terms of the SSRs specific to the domains, they are repetitive of each other. Advocates, however, will undoubtedly find their own particularly useful nuggets in this collection. Some highlights - including those found in the footnotes - are outlined below.

SSR 09-1p, or “The Whole Child Approach,” reminds adjudicators to identify which of a child’s activities are limited and which of the domains are involved. The next step is to determine whether the child’s impairment(s) could affect those domains and account for the limitations. How the child functions every day and in all settings compared to other children in the same age group must be considered. This “Whole Child” approach recognizes that many activities require the use of more than one of the abilities described in the first five domains of functioning, and/or may be affected by a problem considered in the health and well-being domain. Per the SSR, it is incorrect to assume that the effects of a particular impairment must be rated in only one domain or that a combination must be always be rated in several.

The SSR sets forth several examples of activities that require two or more abilities. For example, shoe tying encompasses four domains: learning and remembering the sequence (Acquiring and Using); focusing on the task (Attending); using the fingers (Moving About); and taking responsibility for dressing (Caring for Self). Which domains are actually affected depends on the nature of the impairment(s). A child with a hand deformity may only be affected in one domain (Moving About). Pain or side effects of medication, however, might spread the problem to the domain of Attending and Completing. Note 12 reminds adjudicators that while children with mental impairments may often have limitations that are rated in several domains, physical impairments can also affect several domains. The SSR also gives examples of children with a single impairment (ADHD) that affects more than one domain, a child with a combination of impairments (hearing impairment and cleft lip) that is rated in only one domain, and a child with a combination of impairments (Borderline Intellectual Functioning and depression) that must be rated in more than one domain.

In terms of rating severity (Section III), the SSR emphasizes that any help and support the child receives must be taken into consideration. At this point, in or-

der to determine whether there is a marked or extreme limitation in functioning, the adjudicator should use the picture of the “whole child” constructed of the child’s functioning in each domain and then consider: 1) how many activities in the domain are limited; 2) how important are they (basic, marginal, or essential); 3) how frequently do the activities occur and how frequently are they limited; 4) where do the limitations occur (school, home or all settings); and 5) what factors are involved (support, structured setting, medication, etc.)?

According to SSR 09-1p, there is no set formula for this evaluation. For example, a serious limitation in only one activity could account for a marked limitation, as could one that does not affect the child on a daily basis, depending on the relative weight assigned to the considerations described above.

Adjudicators are also reminded in this SSR - and again in the other SSRs, particularly SSR 09-2p - that they should be alert to the possibility that limitation of several activities may point to a larger problem that may be undiagnosed or not yet identified and that requires further evaluation, including the development of evidence from medical sources or consultative examiners (CEs). Finally, they are reminded that the rating is not to be derived from an “average” of what the child can and cannot do. The fact that a child can do one activity particularly well should not negate the difficulties the child may have with other activities.

The SSR concludes with an example of how an eight year old with an anxiety disorder should be evaluated. It does not, however, actually rate the severity in this example, emphasizing that the additional evidence might be needed – in other words, avoiding an example that could be cited by advocates in support of finding limitations in a similar fact pattern! Finally, it notes that while SSR 96-6p requires the use of medical expert opinion before making a medical equivalency determination, there is no such requirement for functional equivalency.

SSR 09-2, Documenting a Child’s Impairment-Related Limitations, explains the evidence needed to document impairment related limitations; the sources of evidence; how evidence from early intervention and school programs (including special education) is considered and inconsistencies are addressed. According to SSA, evidence is needed to help determine: what activities a child is or is not able to per-

(Continued on page 3)

(Continued from page 2)

form; which are limited or restricted compared to other children of the same age who are not impaired; in what settings does the child have difficulties; what kind of help does the child need and how often; and does the child need a structured or supported setting and how often.

The SSR provides useful examples of the ways in which various medical sources, including those that are not considered “acceptable medical sources” under the regulations, can provide helpful evidence of functioning – once evidence from an acceptable medical source has established the existence of at least one medically determinable impairment. The SSR also explains in great detail the usefulness and significance of evidence from early intervention and school programs. It describes and defines the content and terms in comprehensive evaluations and IEPs (Individual Education Plans), including various classroom placements, accommodations, and 504 plans. Of note, the SSR touches upon the goals generally included in IEPs, pointing out that a child who achieves the goals may still have limitations because, for example, the goals may have been set low. On the other hand, inability to achieve the goals is likely an indication of severity.

The SSR also reminds adjudicators that a child’s functioning should be compared to other children of the same age who do not have impairments, and warns that they should understand which standard the source of information is using. As an example, the SSR points out that a teacher’s comment that a child is “doing well” could have various meanings depending on the standard used. It also reminds adjudicators of their responsibility to resolve inconsistencies in the record. It points out, however, that some inconsistencies may not be material and others may not be true inconsistencies. For example, a child with ADHD who has a longitudinal history of hyperactivity at home and at school may not display it at a CE. This, according to the SSR, is an example of a well known clinical phenomenon that children with ADHD may

behave better in a novel or one-on-one setting.

SSR 09-3p covers the domain of Acquiring and Using Information. It reminds adjudicators that the domain is not limited to consideration of IQ, achievement or grades. Rather, children acquire information at all ages for very different purposes: a baby shaking a rattle learning it produces sound, or a teenager learning the rules and mechanics of driving. It gives by way of example impairments other than mental retardation or learning disorders that can cause limitations in this domain: children with anxiety disorders who are so fearful of failing that they cannot perform learning-related activities at school such as test taking.

As in SSR 09-2p, adjudicators are reminded of the particular significance of school evidence. The kind and level of special education services may also be indicative of limitations. Citing 20 C.F.R. §416.924a (b)(7)(iv), however, adjudicators are reminded that lack of services does not mean the child does not have limitations. Their needs may go unnoticed or unmet for various reasons.

As in SSR 09-1p on the “Whole Child,” SSR 09-3p also emphasizes the extent to which an impairment may affect more than just the domain of Acquiring and Using. For example, language deficits may cause limitations in the domain of Interacting. Pain may interfere in the domain of Attending and Completing, and also have an effect on Acquiring and Using.

SSR 09-4p addresses Attending and Completing Tasks. It acknowledges that although a number of the examples provided refer to ADHD or other mental disorders, physical impairments can also interfere with abilities in this domain (e.g., pain, side-effects of medications). The SSR also reminds adjudicators that some children with attention problems may attend to some tasks but not all in all settings. Some children may “hyperfocus” only on things that interest them, such as video games. This can be common

(Continued on page 4)

Disability Law News Online



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(Continued from page 3)

in children with autistic spectrum disorders, who may hyperfocus, and in fact excel in one area, but are nonetheless severely limited in others. These children may well have impairments in several domains.

SSR 09-5p involves the domain of “Interacting and Relating with Others.” Among other things, the SSR reminds adjudicators that children who are not necessarily disruptive may also have limitations in this domain. They may be so withdrawn as to be unnoticed. Their impairments, however, may be just as significant as those with disruptive behaviors, since children’s understanding of self and the world comes from interactions with others. Note, however, that a child who simply prefers to be alone does not necessarily fall into this example

The SSR also points out a child with physical abnormalities may have problems making friends, as might a child with speech and language impairments. (Note 13 clarifies that in evaluating this domain, a child’s fluency in his/her primary language should be considered. Note 14 reminds adjudicators to be sensitive to cultural differences. For example, while children of Northern European backgrounds might learn to look others in the eye when addressing them, children of Asian backgrounds might avoid eye contact as a sign of respect.

It also distinguishes between speech and language, noting that speech is the production of sound for the purposes of communication, while language provides the message of communication. Language involves understanding what is said and heard (receptive) and expressing what one wants to say, either orally or in writing (expressive). [Advocates should note that SSR 98-1p remains another useful source for analyz-

ing speech and language issues, as well as mental retardation, in children’s cases.]

SSR 09-5p distinguishes between the domain of Interacting and Relating versus that of Caring for Self, with the former involving feeling and behavior in relation to other people, and the latter encompassing feelings about one’s self. By way of example, a girl with ADHD who interrupts conversations might be evaluated in the domain of Interacting, while if she impulsively ran out into the street, her behavior could fall with in the Caring for Self category. On the other hand, a child with Oppositional Defiant Disorder who disregards parental instructions and runs on a slippery mat might be evaluated in both domains.

SSR 09-6p, which concerns the domain of Moving About and Manipulating Objects, reminds adjudicators that both physical and mental impairments can affect a child’s ability to move about and manipulate objects. For example, a benign brain tumor can cause difficulty with balance, rheumatoid arthritis difficulty with writing, or a developmental coordination disorder slow hand-eye coordination or clumsiness. Somatoform disorders can affect this domain, as can the side effects of medications (e.g., some antidepressants can cause hand tremors).

It distinguishes between the domain of Moving About versus Health and Physical Well-Being, noting that Moving About considers a child’s ability to move his or her body, while the Health domain takes into account the cumulative effect of all physical and mental impairments and their treatments. It also notes that an impairment(s) or its treatment can have effects in both domains. Medications, for example, can have physical effects (nausea, headaches, allergic reaction

(Continued on page 5)

State Supplements Slashed

In the January *Disability Law News*, we told you that New York State is proposing to reduce the state supplement payable to Supplemental Security Income (SSI) recipients by \$16 to \$28. The cut is planned to go into effect June 1, 2009, unless the legislature takes some action or the Governor rescinds his proposal. To date we have heard neither.

Other states are also looking to reduce the state supplement “pot of gold” as a way to balance lopsided budgets. California has proposed to trim its state supplement to SSI recipients by \$55 to \$63. The state budget would also eliminate a regular cost of living adjustment (COLA) previously planned for the 2010 state supplement. If these proposed cuts in state supplements are enacted, the stimulus effect of any one-time payment to SSI recipients will largely be offset by lower ongoing benefit levels. (See article on page 6).

(Continued from page 4)

or insomnia) that will sap a child's energy or make the child feel ill. These overall effects might be evaluated in the Health domain, while the limits in motor functioning would fall within Moving About.

SSR 09-6p contains some useful discussions about pain, acknowledging that it may interfere with the ability to concentrate (Attending and Completing domain), and affect the Acquiring and Using domain. Interacting and Relating could also be affected in that pain might cause the child to be less active socially, or medications might cause restlessness or anxiety that could affect social functioning or emotional well-being (Caring for Self domain). Note 11 points out the use of a prosthesis or other adaptive equipment might also cause social stigmas, and thus straddle two domains.

SSR 09-7p involves the Caring for Yourself domain.

In this domain, SSA considers a child's ability to maintain a healthy emotional and physical state in an age-appropriate manner. It includes how well children get their emotional and physical needs met; how they cope with stress and changes; and how well they take care of their health, possessions and living areas. The domain does not, however, address children's physical abilities to perform self care such as bathing, dressing or cleaning their rooms. These activities would fall within the domain of Moving About; or in some instances, Health; or as highlighted in Note 10, Acquiring and Using, if for example a child's cognitive limits cause difficulty in dressing.

The SSR points out a child could have limitations in this domain due to medication or treatment. For example, an adolescent who is prescribed medication that causes weight gain refuses to take it because of embarrassment about his weight, thus endangering his health. Note 11 is significant in that reminds adjudicators that SSA will not consider a child fully responsible for failing to follow prescribed treatment. Also, the issue of failure to follow treatment will not arise unless and until there has first been a finding a disability, and a determination that with treatment the child would no longer be disabled, as dictated by SSR 82-59.

SSR 09-7p focuses on children's emotional wants and needs, recognizing that to be successful as they mature, children must be able to cope with negative feelings and express positive feelings appropriately. It lists several examples of appropriate responses, rang-

ing from an infant sucking on a pacifier or thumb when upset, to a teenager listening to music when stressed. On the other hand, an example of inappropriate behavior would be a teenager with a depressive disorder engaging in self-injurious behavior such as binge eating, substance abuse, or suicidal gestures. In addition to regulating emotional well-being, the SSR notes that a child must be able to satisfy physical wants and needs on a daily basis. Examples include recognizing when one is ill, seeking medical attention, following safety rules, and making decisions that do not endanger one's self.

SSR 09-8p deals with the Health and Physical Well-Being domain, which encompasses the cumulative

physical effects of physical and mental impairments and their associated treatments on a child's health and well-being. Unlike the other domains, this one does not address typical development and functioning, but instead addresses how such things as recurrent illnesses, medication side-effects and ongoing treatment affect a child's body. In Note 11, the SSR acknowledges that 20 C.F.R. §§416.924a(b)(8) and (b)(9) provide that the impact of chronic illness and effects of treatment are "factors" to consider in evaluating functioning. The difference between "factors" and the Health domain is that the factors address any kind of effect (mental or physical) that a child's impairment(s) has on functioning at every step in the sequential evaluation. The domain is only considered when determining whether the physical effects of an impairment functionally equal a listing.

Physical effects include weakness, dizziness, shortness of breath, fatigue, low stamina, psychomotor retardation, pain, allergic reactions, recurrent infections, poor growth, bladder or bowel incontinence, changes in weight or eating habits, stomach discomfort, nausea, seizures or convulsions, headaches or insomnia. Note 12 clarifies that SSA follows the definition of psychomotor retardation generally accepted by psychiatrists and psychologists, meaning the motor effects of psychiatric disorder, as opposed to that used by pediatricians and developmental specialists (combination of cognitive, communicative and motor limitations).

The SSR reminds adjudicators that these effects can be caused by medication, treatments, or therapies. Medical fragility should also be considered, in that some children may appear to be functioning appropriately only because of intensive medical or other care

Economic Recovery Starts With SSA

The *American Recovery and Reinvestment Act of 2009*, which President Barack Obama signed into law on February 17, 2009, provides for a one-time payment of \$250 to people receiving Social Security and Supplemental Security Income (SSI) benefits.

The one-time recovery payments will go out in May 2009 and all payments should be received by the end of May. In April, the Social Security Administration (SSA) will send a letter with additional information to each person who is eligible for the one-time payment. The payments will be sent automatically, meaning no action is required on the part of the person receiving benefits. The economic recovery payments will be made separately from a person's regular monthly payments.

All adults who receive Social Security benefits, including disabled adult children (but not minor children) are eligible for \$250 payment. In addition, all persons who receive SSI payments, including minor children, are eligible for the payment. Anyone who receives benefits or who was eligible to receive benefits during any of the three months prior to enactment (November and December of 2008 and January 2009) will receive the one-time payment as long as the address of record is in one of the 50 states, the District of Columbia, Puerto Rico, Guam, U.S. Virgin Islands, American Samoa, or the Northern Mariana Islands.

The payments will be made in the same way that regular monthly payments are made. People with direct deposit will receive their payments electronically. Those who receive paper checks will receive

their payments in the mail. People who receive regular payments through the *Direct Express* debit card will receive their one-time payments through the card.

Payments to SSI recipients will not count as income in the month received and will be exempt from resource counting for nine months following receipt. These benefits will, however, be subject to offset in the same manner as any other SSI or Social Security payment. Thus, those beneficiaries who have a pending overpayment or have an overpayment in another federal program will have their overpayment reduced by \$250 instead of receiving a cash benefit.

If someone receives both Social Security and SSI, only one payment of \$250 will be made. The economic recovery legislation also provides for a one-time payment to recipients of Department of Veterans Affairs (VA) and Railroad Retirement Board (RRB) benefits. However, if someone receives Social Security or SSI benefits and also receives VA and/or RRB benefits, s/he will only receive one \$250 payment. The Social Security Administration will send this payment.

To assist in processing the payments as efficiently as possible, please advise clients not to contact SSA unless a payment is not received by June 4, 2009. Information is available at www.socialsecurity.gov and will be updated regularly.

To learn more about the *American Recovery and Reinvestment Act of 2009*, visit www.recovery.gov.

(Continued from page 5)

necessary to maintain health and well-being. Correct evaluation of episodic illness is also emphasized. Per Note 13, brief episodes like ear infections are generally not considered. They will be, however, if associated with an underlying impairment such as an immune deficiency that increases a child's susceptibility to infection.

As noted above, SSA claims to have incorporated information from its regulations, training materials, and Q&A documents. In fact, many aspects of the May 2001 Q&As, reissued in November 2004 (available as DAP #333) are included in the SSRs. It

is not clear if the Q&As will remain in effect. Adjudicators should remember, however, what an invaluable source they are. Take for example §III-2, in which SSA posits that it is irrelevant why a child is disabled, except for limited drug and alcohol situations. In other words, adjudicators are not allowed to discount impairment based on family circumstances. A quick review of the Q&As in the context of learning these new SSRs could be time well spent.

The full text of the new SSRs can be found at www.ssa.gov. Keep us informed of your favorite - or not so favorite - nuggets as you begin to use these SSRs, or see them used by SSA adjudicators.

REGULATIONS

Musculoskeletal Listings Extended

In an annual rite, the Social Security Administration (SSA) has extended a Listing due to expire, this time the Musculoskeletal Listings, currently set to expire February 19, 2009. The effective date of the listing has been extended to February 18, 2011. 74 Fed. Reg. 5807 (February 2, 2009). Rumor has it that SSA is working on revising this listing altogether, so stay tuned for further developments.

SSA to Study DOT Replacement



The Social Security Administration (SSA) has assembled a federal advisory panel, the Occupational Information Development Advisory Panel (OIDAP), to provide expert guidance to the Occupational Information Development Project (OIDP). SSA initiated the OIDP to work on replacing the Dictionary of Occupational Titles (DOT) with an occupational information system designed for SSA's disability programs. Notification of the formation of the panel was published in the Federal Register on December 23, 2008 (73 Fed. Reg. 78864).

The panel is comprised of eleven external members and one SSA representative. Areas of expertise include occupational analysis, vocational rehabilitation, forensic vocational assessment, disability insur-

ance programs, psychiatry, occupational rehabilitation, disability advocacy, and SSA disability programs and policy. The Office of Program Development and Research's (OPDR's) Occupational Information Development team, which is heading up the project, has been joined by Dr. Robert J. Harvey of Virginia Tech for one year under the Intergovernmental Personnel Act. Dr. Harvey has extensive experience in job/occupational analysis and expertise in psychometric methods. Nancy G. Shor, Executive Director of the National Organization of Social Security Claimant's Representatives (NOSSCR) has also been appointed to the panel.

The Commissioner anticipates that it may take three to five years to develop a comprehensive new tool – so don't throw out your old DOTs just yet!

Send Your Problem Notices to NOSSCR

We have all undoubtedly experienced at least a hint of the frustration our clients must feel when we have tried to review a particularly incomprehensible notice from the Social Security Administration (SSA). The National Organization of Social Security Claimants' Representatives (NOSSCR) is looking for examples of some of the more egregious of these notices. According to the most recent edition of the NOSSCR *Forum*:

We are looking for problematic notices that are sent once a case is won. These are notices from the Office of Disability Operations and from the regional Payment Centers. In our experience, the worst offenders are notices in concurrent cases. We would like to receive samples of those from you. But don't hesitate to send other kinds of problematic notices as well.

To send NOSSCR your notices, please either scan and email to nosscr@att.net; fax to 201-567-1542; or mail to NOSSCR, 560 Sylvan Ave., Englewood Cliffs, NJ 07632. It would assist us if you include a cover message explaining the shortcoming(s).

NOSSCR plans on compiling these notices and forwarding them to SSA as part of an effort that is underway by SSA to improve its notices. As NOSSCR points out, the prospect of comprehensible notice is indeed a worthwhile project!

COURT DECISIONS

Judge Declines Request for New ALJ

What does it take to convince a U.S. District Court judge to order Social Security to reassign a claim to a different Administrative Law Judge (ALJ) on remand? Clearly more than what was presented to Judge Charles Siragusa of the Western District of New York in a recent case in which he refused to issue such an order.

In *Smith v. Astrue*, 2009 WL 185990 (W.D.N.Y. January 26, 2009), both parties agreed that remand for further proceedings was appropriate. The plaintiff, however, argued that based on the errors in the ALJ's decision, the ALJ might not apply the appropriate legal standards on remand. Plaintiff's counsel also alleged that the ALJ had upset the claimant at the hearing.

The Court found that there was no clear indication that the ALJ would not apply the appropriate standards on remand, and presumed that she would. He noted that the plaintiff did not allege that the ALJ harbored any personal hostility toward her. He also found, upon reviewing the transcript of the hearing, that the ALJ was courteous and patient toward the

plaintiff, whose unreasonable outbursts may have been attributable to cognitive or psychological problems.

The good news? The court acknowledged that it is undisputed that a court can direct a case be reassigned in certain circumstances. It cited *Sutherland v. Barnhart*, 322 F.Supp.2d 282, 292 (E.D.N.Y. 2004) for the factors to be considered: (1) a clear indication that the ALJ will not apply the appropriate legal standard on remand; (2) a clearly manifested bias or inappropriate hostility toward any party; (3) a clearly apparent refusal to consider portions of the testimony or evidence favorable to a party, due to apparent hostility to that party; (4) a refusal to weigh or consider evidence with impartiality, due to apparent hostility to any party. In *Sutherland*, the Court did find that the ALJ's behavior, including his refusal to allow the plaintiff's attorney to question the medical expert and his apparent sarcasm in the decision, warranted a new ALJ.

The plaintiff was represented by Charles Binder and Jeannine LaPlace of Binder & Binder.



Overpayment Case Remanded

District Court judges generally do not consider overpayment cases as frequently as they review disability claims. As a result, advocates may have to “instruct” them on some of the basics of overpayment laws and regulations, as well as how benefits are calculated. That tactic paid off for Kate Callery of the Empire Justice Center in Rochester, on behalf of a *pro se* claimant who had been represented by a lay advocate at the hearing level in his overpayment case.

The case involved an overpayment incurred by a minor child because of earnings of his representative payee parents. According to the Social Security Administration (SSA), the \$5,000 plus overpayment could not be waived because the father/representative payee was not without fault in causing and/or keeping the overpayment. SSA failed, however, to meet its initial burden of demonstrating the very existence of the overpayment. In fact, the record included copies of the various notices that had been sent to the claimant, showing the overpayment - or combination of overpayments and underpayments - as different amounts without ever explaining the discrepancies or how they were calculated. To add insult to injury, there were undocumented allegations in the record that the claimant had had numerous similar overpayments in the past, but there was no evidence of when they were or what had caused them. At the hearing, the claimant had testified that the prior overpayment of which he was aware involved a lump sum payment of veterans’ benefits and had nothing to do with earned income.

Judge Charles Siragusa of the Western District of New York agreed that SSA’s decision was not based on substantial evidence, noting the unexplained differences in the amounts owed and the mere conclusion about the cause of the overpayment. According to the Court, “[t]his is a far cry from the detailed explanation provided as the basis for the decision” in *Chileb v. Heckler*, 777 F.2d 842, 844, 847 (2d Cir. 1985), where a benefits authorizer explained the basis of the overpayment at the hearing.

The Court was also convinced by the claimant’s argument that it would be virtually impossible to know whether or not the payments he received were correct. The decision quotes at length the SSI regulations on

deeming as “an example of the quagmire involved in determining whether a non-eligible parent’s income will disqualify an applicant from receiving SSI payments.”

Finally, Judge Siragusa agreed that the ALJ had failed to assess the representative payee’s credibility, citing *Valente v. Secretary of Health & Human Svcs.* 733 F.2d 1036, 1045 (2d Cir. 1984). Additionally, the ALJ failed to take into account, pursuant to 20 C.F.R. §416.552, “any physical, mental, educational, or linguistic limitations...the individual may have.” In this case, the claimant’s father had alleged that he had adult ADHD, which in combination with the chaos in his household caused by his son’s very extreme disabilities, may have affected the timeliness of his wage reporting.

Judge Siragusa’s decision in *Ritter ex rel. C.R. v. Astrue* is available as 2009 WL 529522 (W.D.N.Y., March 2, 2009). The plaintiff will be ably represented on remand by Ellen Heidrick of the Southern Tier Legal Services office of LAWNY. We look forward to hearing how the claimant fares in his “second bite at the apple.”



Receiving SSD No Bar to EEOC Suit

A federal court in Illinois recently decided that the U.S. Equal Employment Opportunity Commission (EEOC) could not be blocked from continuing its pursuit of relief on behalf of a disabled sales manager employee because the employee had applied for and obtained Social Security disability benefits (SSD).

The employer had been sued by EEOC on June 13, 2007, because, the EEOC charged, the company violated the Americans with Disabilities Act (ADA) by refusing to reasonably accommodate the manager, who had back and neck impairments. The suit is pending in U.S. District Court for the Central District of Illinois.

The company had sought leave from the court to amend its answer in the case by asserting that based on the employee's statements to the Social Security Administration (SSA), the EEOC was judicially estopped from claiming that [the employee] was capable of performing essential functions of the job with or without reasonable accommodation.

In an eight-page order, the Magistrate Judge presiding over the case rejected the employer's application for leave to amend its answer. Citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), *In re Bemis Company*, 279 F.3d 419 (7th Cir. 2002), and *EEOC v. Sidley & Austin LLP*, 437 F.3d 695 (7th Cir. 2006), among other precedent-setting cases, the court wrote:

[T]he EEOC's interest in pursuing perpetrators of discrimination is much broader than simply obtaining relief for the victim of that discrimination. Narrowing that interest by placing on it the same boundaries that limit individual litigants would be ill-advised. * * * The EEOC was not (and could not have been) a litigant in the administrative proceedings before the SSA. It had no control or input into the application process. * * * The EEOC is not a proxy for [the employee]. Its interest in pursuing relief on [the employee's] behalf is a public interest in eliminating discrimination, and that interest is not as narrow as is [the employee's] interest. The EEOC is therefore not estopped by [the employee's] statements and conduct, and I conclude that the affirmative

defense of judicial estoppel is futile as a matter of law.

According to the EEOC, the sales manager worked under medical restrictions that prevented him from performing tasks that required rotation of his upper body or heavy lifting. However, the agency's investigation revealed that starting in 2003, new store management started requiring the sales manager to mop floors and perform other tasks inconsistent with his medical restrictions. These assignments led to further injury, necessitating a medical leave. Once the sales manager had recovered, the EEOC said, the employer refused to permit him to return to work and instead kept him on an involuntary, unpaid leave and eventually discharged him.

"Over the years, some employers have attempted to defend disability discrimination lawsuits on the basis of a victim's interactions with the Social Security Administration or on the basis that some individual action or agreement by the victim trumps the EEOC's statutory authority to act in the public interest," said the EEOC's regional attorney in Chicago. "Today's decision by the court in this case demonstrates, once again, that those arguments are non-starters."

This is an interesting example of the interplay between our Social Security work and the other legal issues in our clients' lives. Thanks to Susan Sternberg for bringing this case to our attention.



How Do SSI Recipients Fare at Age 18 Reviews?

A report published in the *Employment and Disability Institute Collection* and available at <http://digitalcommons.ilr.cornell.edu/edicollect/1253>, presents some findings that might not be surprising to advocates who have represented SSI recipients at their “age 18” reviews. “Changing Circumstances: Experiences of Child SSI Recipients Before and After Their Age-18 Redetermination for Adult Benefits (2009), by Jeffrey Hemmeter, Jacqueline Kauff, and David Wittenburg, analyses the dynamics of the transition from childhood SSI recipients into adulthood. The report relies on data from the Social Security Administration (SSA), the 2001-2002 National Survey of Children and Families, and earlier studies.

The authors primary objective was to examine differences in pre-age-18 subgroups to determine whether the differences influence post-age-18 participation and employment outcomes. They found that after controlling for factors such as disability severity, duration, and human capital (e.g., work experience or schooling), youth with mental and behavioral disorders other than mental retardation were much less likely to remain on SSI. Also, non-health factors, particularly education, employment and social indicators, play an important role in whether a child will remain on SSI after age 18.

The report is chock full of statistics and interesting factoids about children on SSI. It starts with the premise that one-third of childhood SSI recipients will lose eligibility when, as mandated by 42 U.S.C. §1382c(a)(3)(H)(iii), they undergo review under the adult standard. Children with a diagnosis of mental retardation, who comprise fifty percent of the childhood SSI population, were the most likely to be found eligible as adults. Mental disorders were the primary diagnosis for seventy-five percent of the population studied. Those who began collecting SSI at earlier ages, which were more likely to be those with primary impairments such as mental retardation, system disorders and other physical impairments, were also more likely to remain.

The SSI recipients with primary impairments classified as other mental and behavioral disorders had significant barriers to success on many levels – not the least of which is remaining on SSI after age 18! For example,

forty-five percent of them dropped out of school during the course of the study, as opposed to thirty percent of all SSI child recipients, and compared to ten percent of the general population. They also experienced higher arrest records. Post SSI-eligibility, their earnings were generally lower than what they received on SSI

The authors suggest that further research is needed to determine whether effective intervention options can be developed to better prepare and support those not likely to continue receiving SSI benefits after age 18. They acknowledge many of the factors that advocates recognize as problematic in these cases. For example, once SSI recipients leave the school system, they lose relatively easy access to services from one provider – the school – and face difficulties accessing adult services.

The authors also suggest that SSA review the role it has in influencing “human capital” decisions of child SSI recipients, including expanding work incentive opportunities and implementing extensions to the “Section 301” program, which allows children to remain on SSI if in an approved vocational rehabilitation program. They cite, without taking a position on, arguments that Congress should extent the childhood SSI program beyond age 18 to allow recipients to obtain skills to find jobs and live independently – an argument based on the premise that IDEA (Individuals with Disabilities Education Act) entitles children to special education services through age 21.

The authors also cite recommendations made by the Social Security Advisory Board (SSBA) in 2006 that SSA take a more active role in informing parents and educators about the implications of age 18 reviews, and broadening the opportunities for human capital development. The SSBA specifically recommended that SSA begin notifying youth and their caregivers about these opportunities as early as age 14. In short, more must be done to prepare the unfortunate one-third of the SSI child population for life without SSI!

ADMINISTRATIVE DECISIONS

Appeals Council Reverses “Intemperate” ALJ

How often does the Appeals Council reverse an ALJ’s finding that a claimant can do work at the medium exertional level and replace it with its own determination that she is unable to perform even sedentary work? Not often – but that is exactly what happened in a case ably handled by Neighborhood Legal Services *paralegal* Buffalo Bruce Caulfield. We emphasize the paralegal in Bruce’s title since that seemed to be the particular focus of the ALJ’s ire in this case.

In a case involving a 38-year-old Spanish speaking woman, Bruce argued to the Appeals Council that the ALJ, who was a “visiting” Administrative Law Judge from Johnstown, Pennsylvania, had ignored substantial evidence of record documenting the claimant’s myriad of physical and mental impairments in determining residual functional capacity (RFC). He also argued that the ALJ improperly failed to give controlling weight the claimant’s treating physicians, both medical and psychiatric. The Appeals Council basically adopted Bruce’s arguments in finding the claimant disabled.

That only tells a portion of the story in this case, however. Bruce also argued that the ALJ’s attempts to intimidate him raised serious questions of bias on the part of the ALJ. Although the Appeals Council ultimately refused to find evidence of bias, it agreed that the ALJ’s “tone was harsh and his extraneous comments in corresponding with the representative were unwarranted.” What an understatement!

In the course of the long and tortuous history of this case, the ALJ, among other things, overruled Bruce’s objections to vocational expert interrogatories (which was simply an attempt on Bruce’s part to clarify compound questions posed by the ALJ), and excluded proffered evidence. In so doing, he took every opportunity to make harsh and extraneous comments! Take, for example, the ALJ’s response to Bruce’s at-

tempt to clarify the interrogatories: since it is apparently “understood that a staff paralegal may not have the same training and expertise as an attorney, the objections border on the frivolous...[and] are overruled with caution to the paralegal representative to confine his conduct to professional standards.”

Things went downhill from there. Following the objections raised by Bruce’s supervising attorney, Alan Block, the ALJ wrote: “this cause has dragged on for too long and this person has remained on New York State Welfare while the case has dragged on. I’m not certain the legislators who fund your legal services would be overjoyed to see how much ‘zealous representation’ has been invested in this cause by the paralegal representative.”

When Bruce offered new exhibits in a timely manner, the ALJ claimed that he “is playing a litigation game just to see how many times he can get away with disrupting the decision cycle of this case. Apparently the paralegal representative hopes he can goad the undersigned into an intemperate response which can be presented to the appellate authorities as ‘bias’...A representative who plays the delay game may now commit legal malpractice and lose the claimant’s case entirely.”



Apparently it didn’t take much to drive this ALJ to “intemperate” behavior, but he was certainly wrong in predicting that this very accomplished paralegal’s zealous representation would lose the case entirely! Copies of the communication between Bruce,

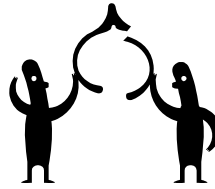
Alan and ALJ, as well as the decisions in this case make for entertaining - if not appalling - reading, and are available as DAP #515.

Closed Period Reconsidered

Buffalo Bruce Caulfield, in yet another feat, convinced the Appeals Council to reverse and remand a case in which the claimant had stipulated to a closed period of disability. Bruce, who had not represented the claimant at his first hearing, argued to the Appeals Council that the claimant had entered into the stipulation on the advice of his prior attorney, and that the claimant's cognitive and emotional deficits raised serious questions about his capacity to agree to a closed period.

Additionally, Bruce secured additional evidence pre-dating the hearing and of which the prior attorney was unaware that called into question the validity of the decision that the claimant's period of disability ended in June 2007. The new evidence included school records with earlier IQ test results and new physical and psychiatric evidence. The Appeals Council ruled that it was evidence that should be evaluated by the ALJ. The Appeals Council, in auditing the tape, also noted that although the Administrative Law Judge (ALJ) relied on vocational testimony, the vocational experts

present at both hearings were never called upon to testify.



In the “be careful what you wish for” department, the Appeals Council was quite clear that the claimant's Request for Review placed the entire record of the case before the Council, including the partially favorable aspects of the ALJ's decision. In fact, in addition to finding that the decision failed to evaluate the claimant's residual functional capacity (RFC) after June 2007, it found that it was not clear whether the ALJ's finding that the claimant had an RFC for reduced sedentary work prior to 2007 was supported. Thus, the entire claim will be subject to review on remand. We have no doubt, however, that the claimant will be well represented by Bruce, and that the risk he took in appealing will be worth it.

HALLEX Provisions Re Proffers Revised



The Social Security Administration (SSA) has announced that it will be revising HALLEX 1-2-5-57 to reflect that Administrative Law Judges (ALJs) will no longer need to proffer proposed pre and post hearing interrogatories to medical experts (MEs) and vocational experts (VEs) to claimants or representatives prior to submission. The responses to the interrogatories must still be proffered, however. This revision is consistent with CJB (Chief Judge Bulletin) 08-03

08-03

This new policy will make it difficult for advocates to formulate their own interrogatories to experts, since they will now not know what questions or hypotheticals the ALJs have posed. Ultimately, it may result in delays, with interrogatories being proposed in a series rather than simultaneously. Advocates should make sure, however, that ODAR officials are not misusing this new policy to withhold *responses* received from experts either pre or host hearing.

Keep us informed of how ALJs are – or are not – using this new policy.

GAF Scores: Help or Hindrance?

How many of us have cited low GAF (Global Assessment of Functioning) scores as indicators of disability in our mental impairment cases? We see a lot of hands out there. Now, how many times have Administrative Law Judges (ALJs) cited moderate to high GAF scores as an indication that a claimant can function and is therefore not disabled? Yes, lots of hands again. So, are both advocates and ALJs right in citing GAF scores to further their position? Read on.

According to the American Psychiatric Association's (APA) Diagnostic and Statistical Manual of Mental Disorders (*DSM*), a two-digit GAF score may be particularly useful in tracking the clinical progress of individuals in global terms, using a single measure. The GAF scale is to be rated with respect only to psychological, social, and occupational functioning. The instructions specify, "Do not include impairment in functioning due to physical (or environmental) limitations. . . ."

Although potentially useful in the clinical setting, it is not clear how useful GAF scores really are in the context of determining ability to work. It is well known, for example, that some mental disabilities can be totally disabling but nonetheless result in very high GAF scores in some individuals. Examples would be certain Panic Disorders and individuals with certain personality disorders. [E.g., *Guides to the Evaluation of Permanent Impairment* (5th Edition, AMA Press); See, examples of how to assess impairment for individuals with psychiatric impairments at 357-372]. GAF scores such as 60 or even 70 are possible for some individuals who could not regularly and consis-

tently perform full time employment.

Some advocates believe that it is the better practice not to rely on GAF scores at all – high or low. Others prescribe to the theory that, especially in the face of high GAF scores, it is better to address the "problem" up-front. At the very least, a thoughtful response to high GAF score requires inquiry of the treating psychiatrist who has treated the patient over time in her medical specialty. Preemptively, an advocate can contact the physician for further explanation; likewise, if troubled by the GAF score, the ALJ is required to follow up with the physician pursuant to 20 C.F.R. §§404.1527, 416.927.

It seems that new ALJs are being given only the GAF scales as part of their orientation and training, but are not informed of the limitations on the use of GAF scores as set out in other parts of the *DSM*. In one case, an ALJ requested that the advocate get clarification from a claimant's treating doctor on the significance of the GAF scores. The response provides some interesting arguments to counteract an ALJ's knee jerk reliance on the two-digit GAF code despite what other medical evidence may be in the record. A sample doctor's letter, legal arguments to the ALJ, a relevant chapter on mental impairments from the *AMA's Guides to the Evaluation of Permanent Impairment*, and an example of the *DSM's* GAF chart are all part of DAP #516.

Let us know what you are seeing from ALJs on the use of GAF scores to deny - or approve - claims.

VA Docs Required to Respond to Requests



Advocates know all too well the challenges involved when attempting to get reports and evaluations from treating physicians. Multiply that by the bureaucracy involved in trying to get reports from the Veterans Administration (VA). Those difficulties were further compounded by a VHA Directive issued in 2007, which inferred that VA health providers could not provide information in Social Security and SSI claims.

Thanks to the intervention of NOSSCR (National Organization of Social Security Claimants' Representatives), the VA has clarified its policy. VHA Directive 2008-071 (October 29, 2008) will make it significantly easier for veterans to get information from their primary care providers in the VA health system. The Directive clarifies that VA medical personnel are actually required to respond to requests from veterans. VHA Directive 2008-071 is available as DAP #517.

New Informational Letter Limits Medicaid Determinations

Medicaid determinations done by local Departments of Social Services can sometimes prove invaluable to pending Social Security and SSI disability claims. But it may be harder for advocates to take advantage of those determinations under a change in policy issued by the New York State Department of Health (DOH) last year.

As noted in the July 2008 edition of the *Disability Law News*, in accordance with 42 C.F.R. §435.541, an SSA disability determination is binding on a Medicaid case until the determination is changed by SSA or there is a change in the individual's circumstances. On June 11, 2008, however, DOH issued 09 OHIP INF-3, which limits when such evaluations will be done.

Generally, Medicaid disability reviews are required if a determination of disability would yield a Medicaid benefit for the Applicant/Recipient or a financial benefit for the Medicaid program. According to 09 OHIP INF-3, however, once a subsequent Social Security review determines that an individual is not disabled, a favorable disability determination that had been made for Medicaid purposes is negated. The re-

ipient/applicant must be removed from the SSI-related category for public assistance and Medicaid purposes. If at a later date, the Social Security disability determination is overturned on appeal, the category will be changed back for Medicaid purposes.

Under this new policy, a local disability team may refuse to do a "Medicaid only" determination for an individual who has already been denied by SSA, even if an appeal is pending. On the other hand, if an individual applies for Medicaid after an SSA denial, the state or local disability review team still must make a disability determination if the claimant alleges a different disabling condition than that considered by SSA, or alleges, under certain circumstances, that his/her condition has deteriorated. Advocates with claimants in this situation may want to make that argument - if at all possible - to local Medicaid agencies, since a favorable Medicaid determination may help the Social Security appeal in the long run.

The Informational Letter is available from the Online Resource Center, or directly from the NYSDOH at http://www.health.state.ny.us/health_care/medicaid/publications/docs/inf/08inf-3.pdf January 2008.

NY Prescription Saver Card Applications Available

The application for the **New York Prescription Saver (NYPS) Card**, is now available. It is located at the following link: <http://nyprescriptionsaver.fhsc.com>.

This is a discount card (it is not insurance), administered by the EPIC program for the following individuals:

- New York residents aged 50 to 64, **OR** people under 50 years-old who have been determined disabled by the Social Security Administration; **AND**
- have annual household income less than \$35,000 (single) or \$50,000 (married); **AND**
- are not on Medicaid (including Medicaid spend-down or Medicaid Buy-In for Working People with Disabilities).

Savings will vary depending on the quantity, type and brand of the drug purchased. In general, you can expect savings up to 60% off the price of generics, and up to 30% off the price of brand name drugs. You cannot use the card when Medicare Part D pays for a particular prescription drug, although you can use the card in the "donut hole" or for excluded drugs. The card will also be useful for people with disabilities who are in the two-year waiting period for Medicare. A list of the discounted drugs and participating pharmacies is available on the website above.

You may apply through the website above or by calling 1-800-788-6917, TTY: 1-800-290-9138. The card will be effective April 1st, 2009.

WEB NEWS

NLS Updates “At a Glance” Information

Neighborhood Legal Services in Buffalo is an excellent resource for a variety of “At a Glance” letters and information sheets related to Social Security and SSI. Topics include 2009 Social Security, Medicare and SSI changes, income and resource updates, overpayments and a variety of other topics.

<http://www.nls.org/ssahl.htm>

Find Answers on Doctor’s Disability Website

A doctor knowledgeable about Social Security practice built a website for Social Security disability applicants, their attorneys, other claimant representatives, and disability advocacy groups. It provides articles, links, graphs, and PDFs that can be downloaded, which relate to the Social Security disability program and application process. Mixed with program facts and figures are the doctor’s own writings about the program, about medical issues relating to Social Security disability, and about how the disability application and decision process might be improved.

www.disabilitydoc.com



Social Security Practice Blog Informs and Entertains



Another interesting website is home to a blog by an experienced Social Security lawyer, Charles T. Hall. His blog is “your source for news affecting the U.S. Social Security Administration.” Check it out.

<http://socsecnews.blogspot.com/>

Advice for Protecting SSNs

The ubiquitous Social Security number (SSN) is used for everything from reporting earnings, to getting into college, to setting up a cable television account. A privacy rights website offers some good advice for safeguarding this vital statistic from unwarranted and unwelcomed misuse.

<http://www.privacyrights.org/fs/fs10-ssn.htm>



CLASS ACTIONS

Zebley v. HHS, No. 83-3314 (E.D.Pa) (United States Supreme Court) ("the child's benefits case")

Description - This national class action challenged SSA's standard for determining equivalency in children's claims for SSI disability benefits. The Supreme Court declared SSA's standard unlawful in that it precluded consideration of children's functional limitations. SSA has since issued revised regulations for evaluating children's disability claims.

Relief - Reopening of children's claims denied or terminated under the past policy between January 1, 1980 and February 27, 1990, as well as those denied or terminated under the interim revised policy between February 27, 1990 and February 11, 1991.

Citation - 110 S.Ct 885 (1990), on remand, No. 83-3314 (E.D. Pa. March 14, 1991)(unpublished order)(setting terms for reopening past cases).



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

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

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

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

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

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

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

BULLETIN BOARD

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

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

SUPREME COURT DECISIONS

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

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

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

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

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

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

Forney v. Apfel, 118 S. Ct. 1984 (1998)

The Supreme Court finally held that individual disability claimants, like the government, can appeal from District Court remand orders. In *Sullivan v. Finkelstein*, the Supreme Court held that remand orders under 42 U.S.C. 405(g) can constitute final judgments which are appealable to circuit courts. In that case the government was appealing the remand order.

Lawrence v. Chater, 116 S. Ct. 604 (1996)

The Court remanded a case after SSA changed its litigation position on appeal. SSA had actually prevailed in the Fourth Circuit having persuaded that court that the constitutionality of state intestacy law need not be determined before SSA applies such law to decide "paternity" and survivor's benefits claims. Based on SSA's new interpretation of the Social Security Act with respect to the establishment of paternity under state law, the Supreme Court granted certiorari, vacatur and remand.

Shalala v. Schaefer, 113 S. Ct. 2625 (1993)

The Court unanimously held that a final judgment for purposes of an EAJA petition in a Social Security case involving a remand is a judgment "entered by a Court of law and does not encompass decisions rendered by an administrative agency." The Court, however, further complicated the issue by distinguishing between 42 USC §405(g) sentence four remands and sentence six remands.

SECOND CIRCUIT DECISIONS

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

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

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

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

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

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

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

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

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

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

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

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

END NOTE

Can Color Make Us More Creative?

It turns out that the red versus blue dichotomy is not just limited to dictating which states will be go Republican versus Democratic in elections. New research studying how the brain reacts to color indicates that red or blue can trigger very different brain reactions depending on the task involved. A study published in last month's issue of *Science* indicates that red may improve attention to detail, while blue sparks creativity.

The subconscious effect of color on the brain is a hot topic for researchers. It is partly driven by marketers, who want to maximize use of color to sell products. In fact, the lead researcher in the study, Juliet Zhu, is an assistant marketing professor at the University of British Columbia. She and co-author Ravi Mehta study how environmental cues affect behavior.

In Zhu's study, college students went through a series of tests involving computer screens colored either red or blue. The students, for example, were better able to memorize lists of words when the screen was red. On the other hand, when asked to think of different uses for a brick, the students who were shown a red screen came up with more practical answers, such as "building a house." Those who saw blue suggested what were perceived as more creative responses, such as making a paperweight or building a pet scratching post. When reviewing advertisements with red backgrounds, the students focused on what to avoid, such as toothpaste that fights cavities as opposed to tooth-whitening. Those shown blue preferred more creative ads showing travel images as opposed to zoom lenses.

The researchers speculate that because red is a color associated with danger, it may slow us down when doing detail-oriented tasks. We then may be better able to do things like memorize, proofread or read warning labels. Because blue is often associated with the sky, freedom or peace, it may spark a feeling of

exploration that stimulates creativity. According to Zhu, "It's really this learned association with these colors that drive these different motivations."

In an article about the study in the Rochester *Democrat and Chronicle* on February 8, 2009, Psychologist Andrew Elliot, Ph.D., of the University of Rochester cautioned that the study focused on hues without taking into account the intensity and brightness of the colors. Elliot, however, who is a leader in the field of color psychology, has recently published his own findings about the color red in the *Journal of Personality and Social Psychology*. Just in time for Valentine's Day, Elliot's study found that men were more attracted to women wearing red!





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