

DISABILITY LAW NEWS

Are Changes to DAA Materiality Rules in the Mix?

The Social Security Administration (SSA) has taken an unusual step, asking for comments on the procedures the agency follows when evaluating drug addiction or alcoholism (DAA). In an odd twist, SSA is asking for our opinion about what, if any, changes we think it should make to the instructions used to evaluate these DAA claims. This is a great opportunity for us to let SSA know what we really think about these issues. But nagging questions remain: Why publish this request for comments now? SSA has submitted no proposed legislation to change the current DAA statutory provisions. We know of no recent publicity about this issue. Based on the questions posed by SSA below, some wide-ranging changes appear to be under consideration.

As background, a review of the DAA provisions might be helpful. The law provides that a person shall not be considered disabled for purposes of the Social Security Disability Insurance (DIB) or the Supplemental Security Income (SSI) programs if his or her DAA is a contributing factor material to SSA's determination of disability. 42 U.S.C. 423(d)(2)(C) and 1382c(a)(3)(J)). If SSA finds that a person is disabled and has medical evidence of DAA, the agency must

decide whether the DAA is material to a determination of disability. To do this, SSA evaluates which of the person's disabling physical and mental limitations would remain if he or she stopped using drugs or alcohol. SSA then determines whether any or all of these remaining limitations would be disabling. The DAA is material to SSA's determination of disability when it finds that the person's remaining limitations would not be disabling. 20 C.F.R. §§404.1535, 416.935.

To provide guidance on how it interprets the DAA provisions of the Act, SSA issued instructions in an Emergency Message (EM-96200) issued on August 30, 1996. <https://secure.ssa.gov/apps10/>. (See discussion of EM-96200 and various Circuit Court cases in January 2008 *Disability Law News*). SSA later included some of those instructions in the Program Operations Manual System (POMS). <https://secure.ssa.gov/apps10/poms.nsf/lrx/0490070050>. Since 1996, SSA has used these instructions and the regulations cited above to determine whether a person's DAA is a contributing factor material to a determination of disability.

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DAA Materiality Rules—Continued

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So, what does SSA want to know? It is interested in our opinions on how it currently evaluates disability claims involving DAA. Specifically, SSA is looking for suggestions on:

- What evidence should SSA consider to be medical evidence of DAA?
- How should SSA evaluate claims of people who have a combination of DAA and at least one other physical impairment?
- How should SSA evaluate the claims of people who have a combination of DAA and at least one other mental impairment?
- Whether SSA should include using cigarettes and other tobacco products in its instructions?
- How long a period of abstinence or nonuse should SSA consider in determining whether DAA is material to a finding of disability?
- Whether there is any special guidance SSA can provide for people with DAA who are homeless?

Comments are due by March 24, 2010. The Empire Justice Center will be filing comments, and we are happy to compile comments from other DAP advocates as well. NOSSCR and other legal services programs in NYC also plan to submit comments.

Ironically, we have been telling SSA what we think about their DAA rules and how they apply them in numerous administrative and federal court cases. In the past year, the federal district courts have issued several favorable decisions in DAA cases. For example, in *Klement v. Astrue*, 2009 WL 3837859 (N.D.N.Y. 2009), Magistrate Victor Bianchini held that an ALJ's finding that DAA was material to a finding of disability was not supported by substantial evidence. In that case, reports from the treating psychiatrist supported a finding that the plaintiff's mental impairments remained disabling even after she stopped using drugs and alcohol. The ALJ's failure to deal with this evidence clearly and completely warranted a remand.

Furthermore, the Magistrate Judge cited the Emergency Transmittal noted above as good authority for the proposition that where it is not

medically possible to separate out the effects of mental illness and substance abuse, an award of benefits should be made. Magistrate Bianchini also cited *Mitchell v. Astrue*, 2009 WL 3096717 (S.D.N.Y. 2009), a good recent case that sets out the DAA criteria to be followed, and *Orr v. Barnhart*, 375 F.Supp.2d 193 (W.D.N.Y. 2005), a good decision where Judge Larimer remanded for calculation of benefits, finding that the claimant's impairments would continue to exist even in the absence of her alcohol abuse; thus, alcoholism was not material to a finding of disability based on her mental disorders. Magistrate Bianchini also made an important ruling in the *Klement* case with respect to the Appeals Council's duty to undertake a meaningful review of new evidence submitted to it. Plaintiff in *Klement* was represented by Louise Tarantino of the Empire Justice Center.

In another recent Northern District case, *Stringer v. Astrue*, 2010 WL 55925 (N.D.N.Y. 2010), Magistrate Bianchini again cited EM-96200, noting that although the Second Circuit had not ruled on the issue of the binding authority of the Emergency Teletype, other district courts within the Circuit have found the teletype to be persuasive authority in that it represents the sound judgment of SSA.

Several other cases warrant our attention. In another Magistrate Bianchini decision, *O'Connell v. Astrue*, 2009 WL 606155 (N.D.N.Y. 2009), the Court held that the ALJ failed to make the prerequisite finding of disability before moving on to consider whether DAA was material. Substance abuse becomes material to a benefit determination only after the claimant is found to be disabled according to the sequential analysis, citing to 20 C.F.R. § 404.1535(a). According to the Court, the "plain text of the regulation" requires the ALJ to first use the standard sequential analysis to determine whether the claimant is disabled, "without segregating out any effects that might be due to substance use disorders."

The Magistrate Judge went on to discuss the applicable regulations, noting that the "key factor" in determining whether substance abuse is material is whether the Plaintiff would meet the definition of disabled if he stopped using drugs or alcohol.

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DAA Materiality Rules—Continued

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To make this determination, the ALJ will evaluate which of Plaintiff's limitations would remain if he stopped using drugs or alcohol, "and then determine whether any or all of [Plaintiff's] remaining limitations would be disabling." If the remaining limitations are not disabling, then drug and alcohol abuse is material, but if the remaining limitations are disabling, then drug addiction and alcoholism are not material. 20 C.F.R. § 404.1535(b)(1), (2)(i)-(ii). The plaintiff in *O'Connell* was represented by Ken Hiller.

In *Badgely v. Astrue*, 2009 WL 899432 (W.D.N.Y. 2009), District Court Judge Curtin remanded a *pro se* plaintiff's claim for further proceedings where the Administrative Law Judge's (ALJ) finding that the claimant was continuing to abuse drugs and alcohol despite her testimony was not based on substantial evidence.

Lastly, in *Glover v. Astrue*, 2009 WL 35290 (N.D.N.Y. 2009), Magistrate Peebles held that in analyzing the materiality of a plaintiff's alcohol and substance abuse problems to his mental health conditions, the ALJ was bound to analyze all the evidence, not focus solely on the evidence most favorable to her decision. Because reasonable doubt existed as to whether the ALJ deliberately chose only the medical evidence favorable to her determination of no disability by reason of plaintiff's drug and alcohol usage, the Magistrate recommended a remand for the purpose of reconsidering whether the evidence proffered by the plaintiff was sufficient to give rise to a finding of disability. Chris Cadin of Legal Services of Central New York represented the plaintiff in *Glover*.

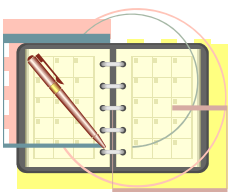
Lest this discussion lull advocates into thinking that all DAA cases are successful in federal court, rest

assured that there are numerous unfavorable decisions in each district court, discussion of which will be left for another day. We will leave you, however, with citations to a couple of cases addressing one of the topics on which SSA is seeking our input, whether the agency should include using cigarettes and other tobacco products in its instructions. Although we could argue the pros and cons of smoking, admittedly a rather one-sided debate in this day and age, few advocates would want to see a DAA type materiality test extended to smokers.

See for example, the case of *Janas v. Barnhart*, 451 F.Supp.2d 483 (W.D.N.Y. 2006), where Judge Arcara adopted the report and recommendation of Magistrate Judge Foschio remanding claim for payment of benefits of a closed period where the ALJ had placed undue emphasis on the absence of clinical findings in discrediting testimony and made findings not supported by the record. The fact that the claimant smoked should not make her incredible where there was no suggestion that smoking contributed to her condition. Additionally, her good work history enhanced her credibility, and no treating physicians questioned her credibility. Another case is *West v. Barnhart*, 2008 WL 2561991 (W.D.N.Y. 2008), where an ALJ erred in failing to contact claimant's treating physician to clarify the seriousness of her asthma and the extent to which stopping smoking would alleviate her symptoms.

We should view SSA's invitation to voice our opinions on the agency's handling of DAA cases as a great opportunity. As advocates, we know that these are difficult cases, so let's get our thoughts together and make some meaningful proposals for positive changes in this system. Remember, comments are due by March 24, 2010.

Save the Dates! Partnership Conference 2010



The 2010 Partnership Conference is currently in the planning stages and will be held June 14-16, 2010. A state-wide DAP Task Force meeting is planned for Monday afternoon and DAP advocates have submitted proposals for sessions of "non-disability" SSI issues for Tuesday. Hope to see many of you this June in Albany.

REGULATIONS

Education Savings Account (ESA) Rules Clarified



In February 2010, SSA updated POMS SI 01130.460 on Coverdell Education Savings Accounts (ESAs). A Coverdell ESA is an account(s) established to pay the educational expenses (i.e., elementary, secondary, and postsecondary school) of

an individual who is the designated beneficiary and is under age 18 or a special needs beneficiary.

Generally speaking, Coverdell ESAs (previously known as Education IRAs), are much like 529 accounts, only different in their establishment and administration. The POMS allows that \$2,000 per year per donor per designated beneficiary may be contributed to an ESA (that's a tax rule; see a tax advisor for additional nuances). Additionally, contributions may be made only for designated beneficiaries younger than age 18, or 18 and older if they are a "special needs beneficiary." Regulations defining a "special needs beneficiary" have not been released by the Internal Revenue Service (IRS), but SSA assumes an individual who is age 18 or older and eligible for Supplemental Security Income (SSI) due to blindness or disability is a "special needs beneficiary."

An ESA is excluded from resources for the designated beneficiary; a contribution to an ESA by an SSI recipient is treated as an uncompensated transfer, but is exempt if the designated beneficiary is "disabled" as defined for SSI benefits. An individual may contribute to his or her own ESA. Distribution of funds contributed by the designated beneficiary from an ESA becomes a countable resource if retained in the month after month of distribution, regardless of purpose of distribution. Distribution of funds contributed by another from an ESA becomes a countable resource if retained in the 10th month after

month of distribution, regardless of purpose of distribution.

Interest and dividends earned on an ESA are treated as growth from an investment, and are excluded from income. Distribution from an ESA is presumed to be made first from funds contributed by another, and only after that amount is used up, from funds contributed by the designated beneficiary, when contribution has been from more than one source. Distribution from an ESA used for non-educational purposes is income to the designated beneficiary, regardless of where the money goes. Furthermore, a distribution of funds from an ESA becomes income, even during the period when it is excluded from resources, at the point when it is actually used for non-educational purposes, or when it is not intended for educational purposes (i.e., the distribution may change its character from exempt to counted income while being retained, or it may be income at the moment of distribution). The POMS section defines permitted educational expenses and provides guidelines for determining the value of an ESA and accounting for its use.

An ESA may be maintained to age 30 + 30 days or until death + 30 days if the beneficiary dies before age 30 or is a special needs beneficiary.

The updated POMS section is located at <https://s044a90.ssa.gov/apps10/poms.nsf/lrx/0501130460>.

Proposed Rules Allow DDD to Approve QDD Cases

SSA proposes “to amend our rules to permit disability examiners in the State agencies to make fully favorable determinations in certain claims for disability benefits under Titles II and XVI of the Social Security Act (Act) without the approval of a medical or psychological consultant. The proposed changes would apply on a temporary basis only to claims we consider under our rules for Quick Disability Determinations (QDD) or under our compassionate allowance initiative.” 75 Fed. Reg. 9821 (March 4, 2010). In New York, the state agency, the Division of Disability Determination (DDD), would be able to make these fully favorable decisions. Comments are due by April 5, 2010.

The proposed permission would not apply in childhood disability SSI claims. The sunset provision is three years, subject to extension.

The announcement reminds us, “Under our current rules, a State agency disability examiner and a State agency medical or psychological consultant generally work together to make disability determinations at the first two levels of the administrative review process for adjudicating disability claims under titles II and XVI of the Act. The members of the team are jointly responsible for the determination. A State agency disability examiner can make the disability determination alone only when there is no medical evidence to evaluate and the claimant fails or refuses, without a good reason, to go to a consultative examination.”

Remember, these rules would only allow a DDD analyst to make a fully favorable decision in adult cases.

SSI Deeming Rules Change



Effective March 24, 2010, any combat-related military pay will not be considered as income when SSA determines whether spouses and children of members of the uniformed services are eligible for SSI. Additionally, SSA will not consider combat-related military pay as income when it determines the spouse’s or child’s proper payment amount. Retroactive payments of certain military pay will not count as resources for nine months following receipt. According to SSA, these rule changes “protect spouses and children of members of the uniformed services from a reduction in, or loss of, benefits because their spouse or parent serves in a combat zone.” 75 Fed. Reg. 7552 (February 22, 2010).

Rep Payee Funds Can Be Transferred to Beneficiary

SSA is “revising our regulations to allow a representative payee who will no longer be serving in that capacity to transfer accumulated benefit payments and interest directly to a beneficiary if we determine that it would be in the best interest of the beneficiary. This change will give us more flexibility in deciding how conserved funds should be handled in these circumstances. The change will also reduce or eliminate delays in the delivery of conserved funds to some beneficiaries.” 75 Fed. Reg. 7551 (February 22, 2010). In response to one comment received, SSA notes that the changes will not otherwise affect current rules on reissuing benefits if a payee misused funds, how the replaced benefits will be handled, or how SSA chooses a payee. This final rule will be effective March 24, 2010, and amends 20 C.F.R. §§404.2060, 416.660.

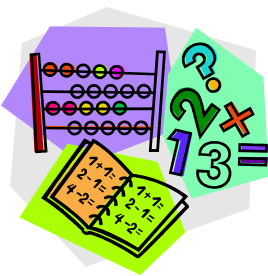
SSA Issues Name Change Directive

As only a bureaucracy the size of the Social Security Administration (SSA) can manage, it has recently issued POMS instruction that covers almost every imaginable scenario when a person might change his or her name, and needs to have that name change carryover to a Social Security account.

The link below is to the new policy instructions, POMS RM 10212, issued in February 2010, on name changes including name changes based on same sex marriages (including marriages in Canada and other countries), civil unions, domestic partnership, divorces, dissolutions or annulments

<https://secure.ssa.gov/apps10/public/reference.nsf/8b709aba3e20a0dd852574da00547b45/548fa43d1b54d699852576d200797315!OpenDocument>

2010 SSI Budgeting Workbook Available



Thanks to Jim Murphy of the Cortland Office of Legal Services of Central New York for updating his handy SSI budgeting/deeming workbook to include 2010 calculations. Most of the calculations are the same as last year, since there was no

cost of living adjustment (COLA) this year except for the change in the substantial gainful activity (SGA) amount and the trial work period threshold. [See the November 2009 edition of the *Disability Law News*.] The new version includes those changes and will

print with appropriate 2010 designations. The worksheet for retroactive calculations has also been updated to the year 2010.

Jim notes that the new version also includes a correction of a problem identified by Katie Kelleher of the Legal Aid Society in New York City regarding the calculation worksheet for couples. Accordingly, disregard all prior copies of the workbook, and begin using the 2010 version, which is available on the WNYLC's on-line resource center as DAP #511.

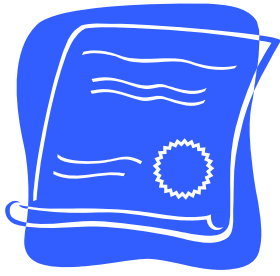
Direct Payment of SSI Fees Made Permanent

H.R. 4532, the "Social Security Disability Applicants' Access to Professional Representation Act of 2010" has passed both Houses of Congress and was signed into law by President Obama on February 27, 2010, just two days before the March 1st "sunset" date of the pilot program.

H.R. 4532 has two provisions. It makes permanent (1) direct payment of fees in SSI cases and (2) the program by which certain non-attorneys become eligible for direct payment of fees. This program, which has been in effect as a pilot program for

several years, provides for the withholding of attorney fees from retroactive SSI as well as retroactive Title II awards. It also allows for withholding of fees for non-attorney representatives who meet specific qualifications. The bill was passed in the Senate on February 22, 2010, by unanimous consent. The House of Representatives had already passed the bill by a vote of 412-6 earlier in February.

New Birth Certificate Policy Affects Puerto Ricans



There are some major changes coming for identity measures if a person was born in Puerto Rico. Puerto Rican birth certificates will become void as of July 1, 2010 - part of a new law designed to reduce identity theft and passport fraud.

The Commonwealth of Puerto Rico Department of Health will issue new birth certificates to people upon request. There will be a \$5 charge.

If you were born in Puerto Rico, you will need to reapply.

The address for the Department of Health in Puerto Rico is:

Demographic Registry

P.O. Box 11854

San Juan, Puerto Rico 00910

The U.S. State Department reports that 40 percent of the 8,000 cases of identity theft and passport fraud in the United States are related to stolen Puerto Rican birth certificates. Some think that birth certificates are too accessible in Puerto Rico where they are needed for enrolling children in school, registering to vote, and even signing kids up for dance lessons.

You will need to provide photo identification to receive a new birth certificate and send a \$5 money order. Checks are not accepted. Make your money order payable to the Secretary of the Treasury. Also include a self-addressed stamped envelope so the certificate can be mailed to you.

According to U.S. Customs and Immigration, a Puerto Rican birth certificate runs for about \$5,000 to \$10,000 on the black market. Puerto Ricans born on the island receive an American Social Security number and are eligible for a United States passport from birth.

For more information, call (787) 767-9120 ext. 2402 or visit the government of Puerto Rico's web site: <http://www.salud.gov.pr>. (Be forewarned, it's in Spanish).

Iraqi and Afghan Citizens Entitled to Special Refugee Status

Effective December 19, 2009, the five year bar for food stamps, TANF, SSI and federal Medicaid eligibility no longer applies to Iraqi and Afghan citizens who entered the U.S. with Special Immigrant Visas rather than as refugees or asylees. Prior to this date, their eligibility for these federal means tested benefits had been limited to a period of eight months. They are now to be treated the same as refugees and asylees for benefit purposes by virtue of an amendment contained in the Department of Defense Appropriation Act of 2010 (P.L. 111-118).

The New York Office of Temporary and Disability Assistance (OTDA) has not yet issued directions to the local Social Services Districts on how to implement this expansion of eligibility to Iraqi and Afghan Special Immigrants.

To date, the only acknowledgment of this change in the eligibility of Iraqi and Afghan Special Immigrants for benefits that we are aware of has been issued by the Food and Nutrition Service (FNS) of USDA, available at <http://www.fns.usda.gov/snap/rules/Memo/2010/020110a.pdf>.

We encourage advocates to reach to search their own files for Iraqi and Afghan clients who may have been cut off from food stamps or SSI after eight months and encourage them to reapply. Those who are currently receiving benefits but have been notified that their benefits will cease because of the eight month time limit should appeal such terminations. If you have any questions, feel free to contact Barbara Weiner at the Empire Justice Center. As soon as we are made aware of additional implementation guidance, we will let you know.

COURT DECISIONS

Court of Appeals Issues Rulings

Two recent rulings by the Second Circuit illustrate strikingly different versions of the treating physician rule. In *Zabala v. Astrue*, --- F.3d ---, 2010 WL 455480 (2d Cir., Feb. 11, 2010), the Court affirmed the Commissioner's decision denying benefits in the case of a woman suffering from depression and anxiety, while in *Gunter v. Commissioner of Social Security*, 2010 WL 145273 (2d Cir., Jan. 15, 2010), a different panel remanded under the treating physician rule.

Zabala v. Astrue

Plaintiff Zabala argued that ALJ Robin Artz erred when she failed to consider one of two different reports from the same psychiatrist because it was "incomplete and unsigned." The Second Circuit agreed with the plaintiff that the ALJ's reasoning was factually incorrect, but went on to determine that remand for consideration of the excluded report was not necessary. The Court acknowledged that such a failure to satisfy the treating physician rule would ordinarily require remand. Turning the case of *Schaal v. Apfel*, 134 F.3d 496, 504 (2d Cir. 1998), on its head, however, it noted that remand is unnecessary "where application of the correct legal standard could lead to only one conclusion."

The Court also distinguished *Snell v. Astrue*, 177 F.3d 128 (2d Cir. 1999), noting that in *Snell* the unconsidered treating physician reports asserted that the plaintiff was totally disabled and were significantly more favorable to the claimant than those that were considered. In *Zabala*, the Court determined that the excluded treating psychiatrist report was "essentially" duplicative of an earlier report by the same psychiatrist. The Court also noted that in both reports, the psychiatrist had indicated that he was "unable to assess" the plaintiff's work-related functioning. In a footnote, the Court strained to distinguish what might be characterized as greater detail in the later report, noting that the difference

related only to "prognoses," and was thus forward looking, rather than pertaining to the time period in question.

The *Zabala* 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) as a babysitter. 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. The Court essentially performed its own analysis of whether the plaintiff's activities constituted SGA. It also held the plaintiff's attorney had the authority to amend the period under review. Absent any showing that the plaintiff was coerced or deceived into stipulating to the closed period, "the attorney's conduct is imputed to the Petitioner." 2010 WL 455480 *5.

Ultimately, the Court of Appeals found that the ALJ's determination that the plaintiff could return to her past work as a self-employed jewelry salesperson was well-supported. It also upheld that ALJ's gratuitous determination at Step five of the Sequential Evaluation that the plaintiff was not disabled under the Medical-Vocational Guidelines (the "grids"). The Court quoted *Bapp v. Bowen*, 802 F.2d 601, 603 (2d Cir. 1986), for the proposition that "the mere existence of a nonexertional impairment does not automatically...preclude reliance of the guidelines." 2010 WL 455480 *7.

Gunter v. Commissioner of Social Security

The Court of Appeals issued a more generous decision, *albeit* by summary order, in *Gunter v. Commissioner of Social Security*, 2010 WL 145273 (2d Cir. Jan. 15, 2010). The Court held that the Commissioner failed to give good reasons for rejecting the opinion of the *pro se* plaintiff's treating

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District Court Remands 12.05C Claim

It is not unusual for a record to contain a number of different IQ scores, resulting from repeated testing over the years. And it is not unusual for the various scores to range significantly, with some meeting the requirements of Listing 12.05 for mental retardation and some not – even taking into consideration SSA’s policy of considering the lowest score in any one series. 20 C.F.R. Pt. 404, Subpt. P, App. 1, 12.00(D)(6) (c). U.S. District Court Judge William Skretny has held, however, that an ALJ must consider all of those scores when reviewing a claim under Listing 12.05.

In *Winn v. Astrue*, 2010 WL 301911 (W.D.N.Y. Jan. 19, 2010), the record contained results of six different IQ tests, with scores ranging from a high of 84 to a low of 64, and given over an fourteen year period. The most recent test, administered when the plaintiff was twenty-six years old, revealed scores of 70 or below. The ALJ, however, failed to even mention those results in his decision, citing only test results from 2001 and 2005. The Court found this to be reversible error. It noted that consideration of scores after plaintiff reached the age of twenty-two was

permissible, citing *McMillan v. Astrue*, 2009 WL 4807311, at *7 (N.D.N.Y. Dec. 7, 2009).

Judge Skretny also agreed that the ALJ erred in failing to consider whether the plaintiff actually met Listing 12.05C. The ALJ, in her decision, had considered the “B” and “C” criteria of the mental impairment listings generally, without considering the specific separate criteria of Listing 12.05C. [Advocates should be aware that this “template” analysis has been seen in other ALJ decisions as well.] As such, the Court remanded the claim for further consideration under Listing 12.05.

The plaintiff was represented on appeal by Kate Callery of the Empire Justice Center and will be ably represented on remand by Debbie Olszowka of Niagara County Legal Aid Society.

Court of Appeals Issues Rulings—Continued

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physician, noting that “the ALJ’s incantatory repetition of the words ‘substantial evidence’” was not sufficient. 2010 WL 145273 *2.

The ALJ had given controlling weight to the opinion of the treating physician “insofar as it is consistent with the substantial evidence of record,” but gave little weight to his opinion as to the plaintiff’s limitations in sitting “because it was not consistent with substantial of record.” The Court found this analysis “to fall far short of the ALJ’s duty to provide ‘good reasons’ for rejecting a treating physician’s opinion.” *Id.*

The panel speculated that the ALJ may have discredited the treating physician because non-examining physicians had reached different conclusions. While acknowledging that an ALJ is entitled to credit opinions of consulting physicians and resolve contradictions, the Court noted that they

cannot be resolved arbitrarily. The Court went on to point out that the ALJ’s reliance on the consulting physicians “as if they spoke with a unified voice appears to be factually as well as legally problematic.” *Id.* The Court also noted that one of the non-examining physicians made his assessment – as is often the case – without reviewing the complete, more fully developed record. The Court relied on an old classic – *Hidalgo v. Bowen*, 822 F.2d 294, 298 (2d Cir. 1987) – to hold that as such, the Commissioner’s evidence was not sufficiently substantial to override the treating physician’s assessment. Accordingly, it remanded the case for further review.

The moral of the story? Is it the luck of draw in terms of panel members? Maybe - although Judge Pooler sat on both panels. Or is it about the underlying fact - such as the difference between a treating physician report that did not quantify limitations versus one that did? Or is it phases of the moon?

Remand to Consider All Child's Impairments, Structured Setting, and Listing

In the past year, the U.S. District Court for the Northern District of New York has moved through a tremendous backlog, issuing numerous decisions in Social Security cases. We're happy to say that many of those decisions have been favorable to our clients. A recent decision in the case of *Gonzalez ex rel. C.C. v. Astrue*, 2009 WL 4724716 (N.D.N.Y. Dec. 02, 2009) is a good example.

In *Gonzalez*, the Court adopted the Report and Recommendation of Magistrate Victor Bianchini remanding the case for further consideration. The plaintiff filed an application for SSI on behalf of C.C., who was then 12 years old, claiming disability because of attention deficit hyperactivity disorder (ADHD), major depressive disorder, neurofibromatosis 1 ("NF-1"), migraines, headaches, and a learning disorder. The Court first held that the ALJ improperly dismissed C.C.'s NF-1 diagnosis. First, the record, though sparse, clearly indicated that C.C. was diagnosed with NF-1 and treated at Albany Medical College (AMC) since infancy, and the ALJ should have attempted to obtain more complete medical records from AMC or re-contacted the treating doctors to determine the basis, if any, for C.C.'s NF-1 diagnosis before rejecting the diagnosis for lack of "clinical and laboratory diagnostic techniques." See *Rosa v. Callahan*, 168 F.3d 72, 79 (2d Cir. 1999), see also *Dundas v. Astrue*, 2008 WL 4282621, at *5 (W.D.N.Y. Sept. 16, 2008) (remanding where the ALJ rejected a treating physician's diagnosis because "absolutely no clinical or diagnostic findings" confirmed the diagnosis, but the ALJ failed to re-contact the physician for an explanation of the basis for that diagnosis).

Second, the ALJ would have required C.C. to have genetic testing, absent which, the ALJ would find no evidence of this NF-1. The Court held, however, that "as a lay person, the ALJ was simply not in a position to know whether the absence" of a particular medical finding - in this case genetic testing - in fact precludes a diagnosis. See *Rosa*, 168 F.3d at 79. Third, the ALJ mischaracterized the record when he concluded that C.C. lacked "clinical indicia" of NF-1; C.C.'s child neurologist did not reject the diagnosis of NF-1,

but only noted that C.C. did not seem to fulfill all the criteria for NF-1 and therefore recommended "genetic testing to confirm or to eliminate the diagnosis of NF-1." Finally, the ALJ improperly rejected C.C.'s claims of frequent headaches and migraines because he thought that there was no evidence to suggest that the headaches were secondary to NF-1 other than his mother's statements; however, the NIH describes both headaches and ADHD as common symptoms or conditions associated with NF-1 and if the ALJ doubted the association, he should have re-contacted C.C.'s neurologists for clarification. See 20 C.F.R. § 416.912(e)(1). We're always glad when the District Court takes an ALJ to task for playing "Dr. ALJ."

The Court next held that the ALJ did not properly consider the effects of a structured setting on C.C.'s functioning. The ALJ mistakenly believed that C.C. was "mainstreamed in core subjects," whereas the record showed that C.C. has been in "self-contained" special education classes for his "core subjects" since at least fifth grade. Additionally, a recent review of C.C.'s educational needs recommended that he be placed in an even smaller and more highly supportive setting, specifically recommending that he be in a class with no more than nine other students and three teachers or support staff.

Finally, the Court held that the ALJ failed to provide a sufficient rationale for finding that C.C.'s impairments did not meet listing 112.11. The ALJ found that C.C. suffered from ADHD and depression but concluded: "However, said impairments fail to meet or equal the level of severity of any disabling condition contained in Appendix 1, Subpart P of Social Security Regulations No. 4." That single sentence constitute the ALJ's entire analysis of whether C.C.'s impairments met or equaled a Listing. The Court ordered on remand ALJ must provide a "sufficient rationale" for his conclusion that C.C. does or does not meet a listed impairment.

This looks like a good case on remand. The plaintiff was represented by Louise Tarantino of the Empire Justice Center, on a case referred by the Legal Aid Society of Northeastern New York.

Is Child Conceived After Parent's Death Entitled to Benefits?

An appeal pending at the Court of Appeals for the Eighth Circuit raises the thorny issue of whether a child who was conceived by *in vitro* fertilization and born more than two years after her father's death from leukemia is entitled to Social Security benefits on his account. In an unreported decision, a U.S. District Judge for the Northern District of Iowa ordered the Social Security Administration (SSA) to pay benefits to Patti Beeler on behalf of her six year old daughter, Brynn Beeler. *Beeler v. Astrue*, 1:09-cv-00019-JSS (N.D. Iowa, Nov. 11, 2009). The District Court, acknowledging that it was "navigat[ing] the murky waters of the Social Security," relied on *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004), to find that Brynn was a child of the insured within the meaning of the Social Security Act. [Note that *Gillett-Netting* has been adopted as Acquiescence Ruling (AR) 05-1(9) in the Ninth Circuit.]

Section 402(d) of the Act provides that a child is not a "child" unless entitled to inherit under the intestacy laws of the state where the insured was domiciled at the time of his death. Relying on *Gillett-Netting*, the Court found that the child was nonetheless a biological child under §416(h) since parentage was not disputed. The District Judge also found that despite a provision of Iowa intestate succession that limits inheritance rights to those children existing or "begotten" before the time of intestate's death, Brynn was nonetheless entitled to inherit under another provision. That section of the Iowa code provides

that a biological child can inherit if the evidence providing paternity is available during the father's lifetime, or if the child was recognized by the father as his child. The Court interpreted the facts surrounding the case - in which the father specifically banked sperm with an agreement that his wife, Brynn's mother, was the only one who could be inseminated with it, and in which the father agreed to accept and acknowledge paternity and responsibility for any resulting child - as "recognizing" the child under Iowa law.

SSA has appealed the district court decision to the Eighth Circuit Court of Appeals. In the meantime, Ms. Beeler is lobbying to clarify the law in Iowa. According to a February 2, 2010 article in the *Des Moines Register*, Patti Beeler has been held back in her fight with SSA "by a 150-year-old Iowa inheritance law written long before technology was available to allow the preservation of genetic material beyond a person's life." A bill that would specifically address the rights of children conceived after a parent has died is wending its way through the Iowa legislature. It has been narrowly drafted to address, among other things, concerns about granting inheritance rights to children long after an estate has been closed.

According to the article, eleven states have laws that address the rights of children conceived after the parent's death. New York, however, is apparently not one of them.



ALJ Complaint Tracking System Established

Complaining about Administrative Law Judge (ALJ) behavior can be a daunting task. Just peruse the many issues of this newsletter chronicling the *Pronti* litigation that took on one particular ALJ. Social Security Administration (SSA)'s lack of a meaningful complaint process has made it even harder. *See, e.g., Pronti v. Barnhart*, 339 F. Supp. 2d 480, 495 (W.D.N.Y. 2004), where Judge Larimer decried SSA's so-called "interim complaint procedures": "there are serious questions as to whether 20 C.F.R. §404.940 is an adequate mechanism when the bias alleged does not relate to a particular plaintiff, but is based on a claim that the ALJ is generally biased against all Social Security claimants."

So what has prompted SSA's recent announcement of a Proposed System of Records and Routine Use Disclosures entitled *Administrative Law Judge/Public Alleged Misconduct Complaints System*, 60-0356 (the *ALJ/PAMC* systems of records). Announced in the February 23, 2010 *Federal Register*, SSA will use the information covered by the system to manage and monitor complaints filed against ALJs. SSA acknowledged that:

At present, we do not have a good mechanism to track complaints about ALJs from initiation to resolution. This weakness makes it difficult for us to identify and resolve service delivery issues, and also impairs customer service. This system of records will help us improve service to the public by creating a centrally managed, electronic method to collect, monitor, and retrieve information concerning complaints about ALJs.

The new *ALJ/PAMC* system will allegedly provide information to SSA to allow it to better manage and respond to complaints; to process, review or investigate complaints filed; provide information related to the complaints filed, including the name of the ALJ accused of misconduct, the complainant and the complainant's representative if any; and provide management information to document and track complaints, including identifying patterns of

improper ALJ behavior that might require review or action. SSA also hopes this information will assist in "detering recurring incidences of ALJ bias or misconduct."

The information collected will include demographics of the complainants, including gender, race or ethnic background "if readily available." Some advocates may recall that SSA had been criticized in the past by the Government Accountability Office (GAO) for failing to collect this information. *See* GAO-02-831, *SSA DISABILITY DECISION MAKING: Additional Measures Would Enhance Agency's Ability to Determine Whether Racial Bias Exists*. [That GAO report, along with other concerns about SSA's complaint process, is discussed at length in the January 2003 edition of this newsletter.]

The Federal Register notice of the proposed system also sets forth "routine use disclosures" for the information collected. Thirteen of the fourteen routine use disclosures are to the other branches of government, including federal courts under certain limited circumstances. The final routine use involves releasing information not restricted under federal law to the General Services Administration (GSA) and National Archives and Records Administration (NARA) for use in conducting records management studies. The proposal also sets forth the safeguards that SSA will use to protect the privacy of the information collected, both electronically and in paper format.

Although not published as proposed regulations under the Administrative Procedure Act, the announcement does invite comments from the public, which will be made available for public inspection. According to the announcement, the tracking system goes into effect on March 14, 2010, "unless comments [are] receive[d] before that date that would result in a contrary determination." It is available at <http://edocket.access.gpo.gov/2010/pdf/2010-3495.pdf>. It remains to be seen if this effort by SSA to monitor complaints will make the complaint process any less futile.

GAO Makes Recommendations on ALJ Hiring and Management

The Government Accountability Office (GAO) has released a study of the Office of Personnel Management's (OPM) hiring and management of Administrative Law Judges (ALJs). GAO-10-14, entitled "RESULTS-ORIENTED CULTURES – Office of Personnel Management Should Review Administrative Law Judge Program to Improve Hiring and Performance Management," can be found at www.gao.gov.

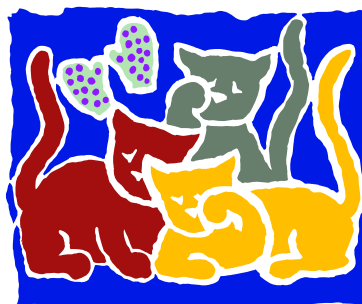
The report, which focuses on ALJs at the Social Security Administration (SSA) and the Department of Health and Human Services (HHS), provides background information on the role of OPM in processing ALJ applications, including examining applicants and certifying qualified candidates. Once the ALJ is hired, the agency and OPM share responsibility for managing performance. The GAO recognizes the unique conditions established by the Administrative Procedure Act (APA) for hiring and employment to protect the decisional independence of ALJs. The GAO nonetheless made recommendations to OPM regarding ALJ hiring and performance management.

The GAO expressed concern that despite the impending retirement of a number of ALJs, OPM reported that none of the agencies involved had identified or planned for future ALJ related skill and competencies gaps. SSA officials reported that they were very pleased with the quality of ALJs recently hired. They stated, however, that the process should have more flexibility in order for them to best meet their agency specific needs, particularly in light of the loss of institutional knowledge and technical skills with impending retirements of experienced ALJs.

In terms of "management," agencies such as SSA are prohibited by the APA from rating or tying an ALJ's compensation to performance. SSA managers reported that they nevertheless employ a variety of practices other than ratings to directly and indirectly manage ALJ performance. ALJ performance management was of particular concern in terms of productivity, especially given the Chief ALJ's "request" that ALJs issue 500-700 legally sufficient decisions each year. Several stakeholders, including the Association of ALJs and the Social Security Advisory Board expressed concern that the number of favorable decisions will increase as the number of decisions issued increases, in part because a favorable decision may require less ALJ time than a defensible decision denying benefits.

The GAO recommended developing standards or competencies to guide employee performance management. The report also reviewed other options that have been proposed over the years. OPM agreed with the hiring-related recommendation, but disagreed with applying the term "performance management" to ALJs. GAO clarified the statutory basis for its recommendations and retained its recommendations.

The report makes for some fascinating reading regarding what might be characterized as OPM's role in herding cats!



ODAR Delays Continue to Shrink

Recent editions of the *Disability Law News* have reported on ODAR (Office of Disability Adjudication and Review) average processing times from hearing request to decision. Statistics for the month ending December 25, 2009, are listed below. The numbers in parentheses are the rankings and processing times for the period ending October 2009. The “rank” represents the office’s position among the 142 ODARs nationwide, ranging from shortest (1) to longest (142) processing time.

In these latest figures, Brooklyn experiences a set-back in its race to the top, Rochester moves ahead, Albany bumps White Plains, and Buffalo continues its race to the bottom:

RANK	ODAR	DAYS
9 (3)	Brooklyn	302 (268)
26 (24)	Jericho	347 (354)
42 (85)	Rochester	387 (468)
44 (59)	Queens	390 (421)
62 (84)	Albany	420 (466)
67 (75)	White Plains	430 (451)
93 (91)	New York	469 (490)
125 (125)	Bronx	546 (557)
125 (133)	Syracuse	546 (576)
135 (131)	Buffalo	576 (573)

Similar statistics, including waiting periods by number of months, are now available at <http://www.ssa.gov/appeals/publicusefiles.html>.

SSA ALJ Data Goes Public

Prior editions of this newsletter have reported on Administrative Law Judge (ALJ) statistics that have been obtained by various news organizations under Freedom of Information Act (FOIA) requests. Advocates have pored over the statistics, usually confirming their own anecdotal assessments of various ALJ approval and denial rates. Now the Social Security Administration (SSA) itself is publishing this information.

SSA Commissioner Michael J. Astrue announced in January that the agency is making new data about beneficiaries and the agency's disability and hearing processes available to the public. The new data supports the President's Transparency and Open Government initiative. Information about ALJ

decisions, hearing office waiting times, and more can be found at <http://www.ssa.gov/appeals/publicusefiles.html>.

According to Commissioner Astrue, “These new datasets are just the beginning of our efforts. In February we will launch our Open Government webpage that will include improved access to our data in a variety of formats. In April we will publish our Open Government plan. Let me also reassure all Americans that while our goal is to become more open and transparent, we will continue to vigilantly protect the personal information the public entrusts to us. We will ensure that transparency does not put that information at risk.”

SSA Issues Migraine Guidance

Trying to prove disability based on headaches, particularly migraine headaches, can definitely cause headaches. Since migraine headache is usually a “rule out” diagnosis, by definition there will be a dearth of objective evidence. The claim will be based primarily on subjective symptoms.

The Social Security Administration (SSA) recently addressed some of these issues in response to questions posed by adjudicators. Q&A 09-036, which is found on SSA’s intranet at <http://policynet.ba.ssa.gov> but is not available to the public, updates previous guidance from the Office of Disability from the early 1990s. SSA acknowledges in the Q&A that despite significant changes in the diagnosis and treatment of migraine headaches since that time, there is little change in the guidance provided.

SSA reiterates in Q&A 09-036 that migraines cannot be considered a “medically determinable impairment” (MDI) solely on a diagnosis or reported symptoms. There must be clinical signs or laboratory findings. Once other possible causes have been ruled out by laboratory findings, migraines can be established as an MDI based on “signs” reported by a physician if accompanied by detailed descriptions of the headache event, which is defined as an “intense headache with more than moderate pain and with associated migraine characteristics and phenomena.”

The Q&A lists the detailed descriptions that should accompany a diagnosis of a migraine headache: premonitory symptoms, aura, duration, intensity, accompanying symptoms, and effects of treatment. Other acceptable indicators include a headache event that lasts from four to 72 hours if untreated or unsuccessfully treated, with two of the following: unilateral, pulsating (throbbing) quality; moderate (inhibits but does not wholly prevent usual activity) or severe (prevents all activity) pain intensity, worsened by routine physical activity (or causing avoidance of activity); and at least one of the following: nausea, vomiting, photophobia or phonophobia.

SSA emphasizes that migraine headaches will rarely be considered a disabling condition. Listing 11.03 for nonconvulsive epilepsy is the most analogous listing. The Q&A reviews those components of Listing 11.03 as they may be related to migraine headaches. SSA warns adjudicators, however, that the guidance in POMS DI 24580.001/SSR 87-06 is specific to epilepsy and not applicable to migraines. Nor do issues of noncompliance based on therapeutic blood levels apply, since there is no comparable standard of case for migraines.

The Q&A is available as DAP #523. If it causes more headaches, take two aspirin and don’t call us in the morning.



DSM Revisions Proposed

The *Diagnostic Statistical Manual of Mental Disorders* - or DSM - is slated for some major revisions to psychiatric diagnoses when the fifth edition is published in 2013 (DSM 5). The American Psychiatric Association (APA), which publishes what is often considered the “Bible” of the psychiatric profession, has for the first time unveiled proposed revisions on February 9, 2010, and invited the public to comment by April 30, 2010. The recommendations are posted online at DSM5.org.

Last revised in 1993 (DSM-IV-Text Revised), the encyclopedia of mental disorders was described by the *New York Times* in a February 10, 2010 article as determining “where society draws the line between normal and not normal, between eccentricity and illness, between self-indulgence and self-destruction – and, by extension, when and how patients should be treated.” Over the years, the DSM has generated controversy and criticism for what it defines as a medical disorder and what it doesn’t. For example, homosexuality used to be listed as a disorder. The proposed revisions are already stirring up controversies of their own.

Among the proposed changes that have made the news include the APA’s recommendation to make Asperger’s Disorder part of the autism spectrum disorder as opposed to a separate diagnosis. The autism spectrum disorder would incorporate autistic disorder (autism), Asperger’s disorder, childhood disintegrative disorder, and pervasive developmental disorder not otherwise specified. But according to Michael John Carley, executive director of the Global and Regional Asperger Syndrome Partnership in New York and author of *Asperger's From the Inside Out*, the change may be hard for some people with Asperger’s to accept. Carley, who was diagnosed with Asperger’s years ago, told National Public Radio’s Jon Hamilton in an interview aired on February 11, 2010, that “I personally am probably going to have a very hard time calling myself autistic.” Many people with Asperger’s take pride in a diagnosis that probably describes some major historical figures, including Albert Einstein and Thomas Edison.

Changes such as the one proposed for the Asperger’s diagnosis can have implications beyond just the diagnosis. According to Dr. Michael First, a professor of psychiatry who was involved in the fourth edition of the DSM but the fifth, told the *New York Times* that any change made to the DSM “has huge implications not only for psychiatry but for pharmaceutical marketing, research, for the legal system, for who’s considered to be normal or not, for who’s considered disabled.” For example, Melinda Bird, senior counsel with the advocacy group Disability Rights California, told NPR’s Larry Abramson that the incorporation of Asperger’s into the autism spectrum could make it easier for children to get special education services. She says California school districts regularly question whether kids with Asperger’s need special education services because they are often very verbal and bright. The new proposed guidelines could ease that confusion. On the other hand, some educators fear that losing the label will deprive them of an important tool that helped them understand what certain children need.

Another proposed revision with wide-spread implications involves the treatment of bipolar disorders in children. According to some reports, the number of children diagnosed with bipolar disorder has increased 4,000 percent since the mid-1990s. This increase in diagnoses and the increased use of antipsychotic medications in young children has not been without controversy in the medical and psychiatric communities, including disagreement of whether some children should be saddled with such a serious diagnosis for life. [For a fascinating account of the advent of the increase in the diagnosis in children and the more recent backlash, see <http://www.npr.org/templates/story/story.php?storyId=123544191>. And for a report of a recent study concluding that children on Medicaid are far more likely than children with private insurance to be prescribed antipsychotic medications, see http://www.nytimes.com/2009/12/12/health/12medicaid.html?pagewanted=1&_r=2&sq=psychotic%20drugs&st=cse&scp=1].

(Continued on page 17)

DSM Revisions Proposed—Continued

(Continued from page 16)

In response, the APA has proposed a new diagnosis: Temper Dysregulation Disorder. According to the APA, the new proposed disorder is not necessarily a lifelong condition and can only be diagnosed in children over six years of age.

DSM 5 would also change the terminology and definitions for mental retardation. The new diagnosis of “intellectual disability” would be tied less to IQ scores and more to functionality, although still retaining the reference to IQ scores of 70 or below. Among other things, the APA hopes to avoid problems with inaccuracy of testing. Other new terms entering the psychiatric lexicon would include “binge eating disorders” and “hypersexuality.” And “addiction” would become “substance abuse.”

The drafters are also recommending the creation of a scale of severity for every disorder – or the “dimensional assessment approach.” The emphasis on the scale represents a move away from the checklist approach taken previously in rendering diagnoses. Currently, for example, the diagnosis of depression requires five of nine criteria. Under the proposed system, a patient meeting only four criteria might be eligible for the diagnosis, depending on the severity of his or her symptoms. The APA explains its new approach at <http://www.dsm5.org/ProposedRevisions/Pages/Cross-CuttingDimensionalAssessmentinDSM-5.aspx>. For more on this dimensional assessment approach, see <http://www.npr.org/templates/story/story.php?storyId=123531958>.

Finally, for those GAF aficionados out there, the advisory committee is proposing changes to DSM’s current multi-axial approach. Axes I, II, and III would be collapsed into one axis that contains all psychiatric and general medical diagnoses, bringing the DSM-5 in closer accord with the single-axis approach used by the international community in the World Health Organization’s (WHO) *International Classification of Diseases* (ICD). A subgroup is examining Axis IV to determine if the codes in the 10th edition of the ICD should be adopted. Regarding Axis V – or the Global Assessment of Functioning (GAF), the Impairment and Disability Study Group is

considering ways in which disability and distress can be better assessed in DSM-5. It is recommending that DSM-5 more closely follow the concepts outlines in the WHO International Family of Classifications, in which disorders and their associated disabilities are conceptually distinct and assessed separately.

The APA has made its proposals available to the public in an easy to read format at <http://www.dsm5.org>. You can readily check to see if your favorite diagnosis is up for revision or not, compare the proposed revisions with the current DSM, and read the APA’s rationale for its proposed changes. The APA will also be accepting public comments on the proposals through April 20, 2010.

Remember that any changes won’t be finalized until 2013 - and given that SSA’s mental impairment listings currently track the DSM-III, don’t hold your breath for seeing the new revisions incorporated into the listings any time soon!

WEB NEWS

Low Income Persons Can Qualify for Free Phones



Low income New York residents who receive Food Stamps/SNAP, SSI, TANF, Section 8 or public housing, LIHEAP, Medicaid or the Free School Lunch Program, may be eligible for free cell phones and 200 free minutes. Households with income at or below 135% of federal poverty guidelines may also qualify. One caution is that any minutes used over the free 200 offered are very expensive.

<http://www.assurancewireless.com/Public/MorePrograms.aspx>

Tax Preparation Assistance Available

Volunteer Income Tax Assistance (VITA) is a free, IRS-sponsored program to help low- and middle-income workers have their taxes prepared and filed electronically at no cost. VITA also ensures that workers receive all the tax credits to which they are entitled.

Many workers eligible for the Earned Income Tax Credit (EITC) or Child Tax Credit (CTC) don't feel comfortable filling out tax forms themselves. However, commercial tax preparers charge significant fees to prepare a return and offer services that can otherwise be provided at no cost at a VITA site. People eligible for EITC and CTC have a no-cost option - they can have their returns prepared and filed at a VITA site.

Every county in New York State has at least one VITA site. View the list of Volunteer Income Tax Assistance Sites for tax year 2009: <http://www.otda.state.ny.us/main/reform/VITASites.pdf>. For sites located in Monroe County: <http://www.empirejustice.org/cash/cash-locations-and-hour.html>

Do You Recognize Common Email Mistakes?

A recent Wall Street Journal article contains important tips for anyone to consider before sending out your next e-mail. Avoid the following mistakes, described in the article.

1. Using vague subject lines.
2. Burying the news
3. Hiding Behind the "BCC" field
4. Failing to clean up the mess of earlier replies/forwards
5. Ignoring grammar and mechanics
6. Avoiding necessarily long emails
7. Mashing everything together into bulky, imposing, inaccessible paragraphs
8. Neglecting the human beings at the other end
9. Thinking email works best
10. Forgetting that email lasts forever



<http://gbcs.tamu.edu/DotNetNuke/LinkClick.aspx?link=Emails.pdf&tabid=114&mid=1054>

Will Incarceration Mean Losing Benefits?

An informative fact sheet from The Council of State Governments Justice Center offers an overview of Medicaid and SSI/SSDI programs and includes discussion of why individuals with mental illness may lose their benefits when they are incarcerated and what steps can be taken to ensure that those benefits are reinstated upon release.

http://consensusproject.org/the_report/appendix/federal-benefits

WHAT IS...

What Is...the McKenzie Method?

When reviewing medical records for a client with a neck or back impairment, you may see an entry noting that a treatment known as the McKenzie method was tried. So what is this? The McKenzie method, also known as Mechanical Diagnosis and Therapy (MDT), is a specialized method of physical therapy used to treat neck and back pain.

How does it work? The principles of the McKenzie method involve the understanding that the spine has normal curves. When the curves become flat, due to disease, injury or poor posture, patients experience pain and loss of movement. Using the McKenzie method, which involves postural re-education, manual techniques and repeated motions, the normal curves are restored.

The McKenzie Method involves an assessment which leads to the classification of spinal-related disorders. It is based on a consistent “cause and effect” relationship between historical pain behavior as well as the pain response to repeated test movements, positions and activities during the assessment process.

A systematic progression of applied mechanical forces (the cause) utilizes pain response (the effect) to monitor changes in motion/function. The underlying disorder can then be quickly identified through

objective findings for each individual patient. The McKenzie classification of spinal pain provides reproducible means of separating patients with apparently similar presentations into definable sub-groups (syndromes) to determine appropriate treatment.

These three mechanical syndromes are known as Postural, Dysfunction and Derangement.

- Postural: End-range stress of normal structures
- Dysfunction: End-range stress of shortened structures (scarring, fibrosis, nerve root adherence)
- Derangement: Anatomical disruption or displacement within the motion segment (all three mechanical syndromes – postural, dysfunction, and derangement – occur in the cervical as well as thoracic and lumbar regions of the spine.)

So, now you know that when you see that the McKenzie method was implemented in treating your client’s neck or back pain, there should be additional assessments and classification of the nature of his/her impairment. For more information, see <http://www.mckenziemdt.org/approach.cfm?section=int>.



BULLETIN BOARD

This “Bulletin Board” contains information about recent disability decisions from the United States Supreme Court and the United States Court of Appeals for the Second Circuit. These summaries, as well as summaries of earlier decisions, are also available [at www.empirejustice.org](http://www.empirejustice.org).

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

SUPREME COURT DECISIONS

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

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

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

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

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

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

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

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

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

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

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

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

SECOND CIRCUIT DECISIONS

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

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

Encarnacion ex rel. George v. Astrue, 568 F.3d 72 (2d Cir. 2009) ("*Encarnacion II*")

The Court rejected plaintiffs' challenge to SSA's policy preventing adjudicators from adding together less than marked limitations from separate domains and prohibiting SSA from adjusting the level of limitation in one domain to reflect the impact of limitations in other domains. The Court deferred to the Commissioner's interpretation of focusing on combined impairments within each domain rather than across domains. It held that the Commissioner's interpretation satisfies the test that each of a claimant's impairments be given at least some effect during each step of the disability determination process because SSA considers all impairments within each domain.

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

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

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

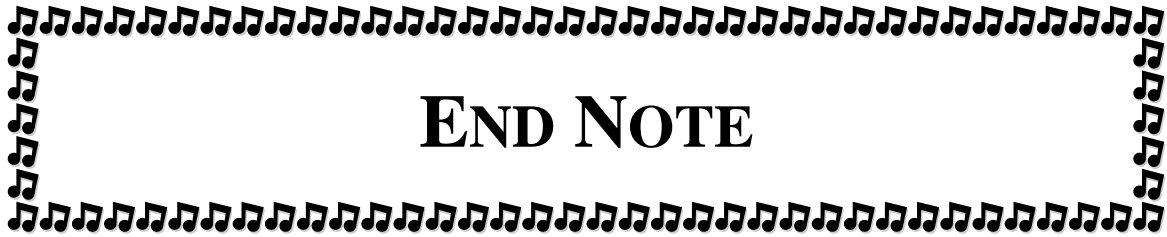
In a case involving an unrepresented parent in a child's SSI claim, the Court found that that the plaintiff had made a knowing and intelligent waiver of her right to counsel. In holding that additional disclosures advising the plaintiff of the availability and benefits of representation required by prior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

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

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

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

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



END NOTE

Stress Can Take Over the Brain

Neuroscientist Robert Sapolsky, Ph. D., found that stress has a significant impact on brain health. According to research, chronic exposure of the brain to toxic levels of cortisol is a primary cause of brain degradation. Cortisol is a hormone released when the body is under stress, and according to this study, extended or frequent exposure can become toxic to the brain. This toxicity causes damage to memory function and access, focus, and the health of individual brain cells. It can also create other hormonal imbalances as the overall health of the brain diminishes, causing symptoms such as lack of energy, moodiness, and suppressed immune functioning. Given its effect on memory, cortisol toxicity is believed to be one of the factors that cause Alzheimer's.

In a time when high stress jobs are often equated with status and success, protect your brain by taking care of yourself. Make time to eat carefully and well, exercise to blow off steam and keep physically healthy, and find methods of stress reduction and meditation that work in your life. Maybe join a yoga class, or maybe take 15 minutes each day to do a crossword puzzle. Remember too that the brain can be revitalized... just because the damage has already begun doesn't mean that you can't still help yourself by changing how you live.

