Empire Justice Center

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DISABILITY LAW NEWS

Medicaid to Pay for "Point-of-Care" Blood Tests for Lead Poisoning

Disability advocates know all too well the disastrous effect early exposure to toxic lead levels can have on young children. Childhood exposure to lead results in permanent brain damage and can severely affect a child's physical, cognitive, and behavioral development. Children exposed to lead are more susceptible to developing learning disabilities, such as Attention Deficit Hyperactive Disorders ("ADHD"), as well as suffering from speech and language problems, developmental delays, and lowered IQs. See, "Protecting Our Children from Lead. The Success of New York's Efforts to Prevent Childhood Lead Poisoning", pp. 2, 3 New York State Department of Health, May 25, 2001. (Available at www.health.state.ny.us/nysdoh/lead/index.htm). *See also* data from the Centers for Disease Control on lead poisoning at www.cdc.gov/nceh/lead/factsheets/leadfcts.htm.

As horrendous as the effects of lead poisoning are for these children and their families, proof of high lead levels can sometimes be crucial evidence in convincing an Administrative Law Judge (ALJ) that there is a basis for the child's problems. Several decisions in children's SSI cases illustrate the connection between lead poisoning and childhood disability. In a recent federal court decision, the adolescent claimant had suffered from lead poisoning since she was two years old. The Magistrate Judge granted her motion for judgment on the pleadings after finding that she had met the mental retardation listing, section 112.05F, due to her "marked limitation in age-appropriate cognitive and communicative function" as well as "a significantly subaverage general intellectual functioning with deficits in adaptive functioning." *Pimentel v. Barnhart*, 2006 WL 2012015 at *12 (S.D.N.Y. July 19, 2006).

In a case from the U.S. District Court for the Northern District of New York, the ten-year-old claimant suffered from ADHD as a result of lead exposure. The District Judge determined that the claimant's ADHD impairment met all of the specified criteria of Listing 112.11, which consisted of marked "inattention, impulsiveness, and hyperactivity." *Stover v. Comm'r of Soc. Sec.*, 2008 WL 4283421 at *5 (N.D.N.Y. Sept. 16, 2008).

Advocates should be vigilant when reading medical records for some evidence that a child had suffered lead poisoning at some point. Often, this evidence provides some objective ba-

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sis for claims of ADHD, low IQs, and behavioral impairments, that an ALJ may otherwise tend to dismiss or ignore.

All too often, however, the records in childhood SSI claims lack any evidence of testing for lead poisoning. That may change in the future thanks to newly implemented Medicaid regulations. In an effort to address the large number of childhood lead poisoning cases in New York State, Governor Paterson has directed Medicaid to begin reimbursing physicians and clinics for "point-of-care" blood lead testing of pregnant women and children under the age of six, effective September 1, 2009. This new policy is the next step in addressing the leading environmental poison of children in New York State.

"Point-of-Care" testing allows for immediate test results available in approximately three minutes. Although there is no "safe" blood lead level, any blood lead level of 10 µg/dL is considered to be a level of concern. If the "Point-of-Care" test shows a blood lead level of 8 µg/dL or higher another method of testing will be performed at a clinical laboratory that holds a NYS permit in toxicology-blood lead.

According to the newly implemented regulation at 10 NYCRR Subpart 67-1, local health units will take a variety of actions to follow-up depending upon the severity of the child's blood lead level. These actions include follow-up testing, risk reduction education, diagnostic evaluation, environmental management, case management and medical treatment. In pregnant women with elevated blood lead levels, prenatal health care providers are required to provide risk reduction counseling or refer the women to an occupational health clinic for individual guidance. Chelation therapy is used for children with extremely elevated blood lead levels as an immediate health intervention. Though chelation removes lead from the blood, lead does still remain in the body and permanent damage is still likely. http://www.merck.com/mmhe/sec24/ch297/ch297i.html?qt=chelation&alt=sh#sec24-ch297-ch297i-387.

"Point-of-Care" testing is actually a form of "secondary prevention," namely a step that is taken to identify children that have already been poisoned and then look for lead hazards in their environment. This initiative follows action taken earlier this year after

Governor Paterson, citing fiscal concerns, vetoed comprehensive lead poisoning "primary prevention" legislation that, after years of effort, had finally passed both the Senate and Assembly nearly unanimously last year. Under the "primary prevention" approach, efforts are made to find and eliminate lead-paint hazards *before* a child has been determined to have an elevated blood lead level.

In May, Governor Paterson issued an Executive Order creating an "Inter Agency Task Force" that will attempt to coordinate the lead poisoning prevention activities of several state agencies including the Department of Health, the Department of State (which is responsible for building code enforcement), and the Division of Housing and Community Renewal. Further, in the current state budget, the Governor made permanent a program for increased primary prevention efforts that had previously been simply a pilot program. That program, called the "Childhood Lead Poisoning Primary Prevention Program," targets lead poisoning prevention activities, such as building inspections in high-risk communities. With this increased focus on primary prevention activities, funding was increased in the 2009-10 Executive Budget by $2.5 million, amounting to a total of $15.6 million for all lead poisoning programs over the last three years.

In 2007, nearly 3,600 children under of the age of six in New York outside of New York City were diagnosed with lead poisoning. That number is in addition to pending cases in which children had been previously diagnosed. Advocates for the prevention of lead poisoning estimate that the actual number of children poisoned by lead is closer to 10,000 or 15,000 cases annually since not all children are tested for lead poisoning. In addition, since the damage caused by lead poisoning is permanent and will affect the child for his or her entire life, the cumulative social costs created by the failure to eliminate lead poisoning is literally billions of dollars annually in lost earnings, lost taxes, increased special education and SSI costs, and increased expenditures in the juvenile justice system.

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New 1696 Available On-line

The Social Security Administration (SSA) has recently revised its Appointment of Representative form (Form SSA-1696-U4). The new form was effective in June 2009, and is available at http://www.ssa.gov/online/ssa-1696.pdf. It corrects a very minor error at the end of the first paragraph in Part II. The 05-2008 version states: "(Completion of Part II satisfies this requirement.)" The new version changes this to "Part III."

Make sure you clear out all your old versions of the 1696. At the very least, be certain that you are using the 2008 version, which added language allowing the claimant to authorize SSA to release information to designated associates who perform administrative duties (*e.g*., clerks), partners, and/or parties under contractual arrangements (e.g. copying services) for or with a representative, in addition to the designated representative.

Blood Tests for Lead Poisoning—Continued

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Since children are most likely to be poisoned by lead through exposure to hazards from lead-paint in their homes, advocates should make sure to determine whether there is a record of any early childhood exposure to lead-paint that may have contributed to the disabilities under review. That would be especially important if the child had lived in, or now resides in, one of the "high-risk" zip codes identified by the state. (A list of those zip codes is available at: **http://tinyurl.com/lead-zips,** at page 8). Additionally, advocates should consider advising any clients with children, especially young children, living in those areas to have their homes inspected for lead-paint hazards by contacting their local health department or local municipal building inspection agencies. As part of the state's "primary prevention" plan for eliminating lead poisoning there is now increased availability of inspections in these high risk areas.

With respect to the state's new "secondary prevention" effort, the ease and availability of obtaining "Point-of-Care" testing is likely to increase the levels of testing for lead poisoning across the state. Prior to this policy, Medicaid only provided reimbursement for lead testing conducted at permitted clinical laboratories. Once this policy goes into effect, Medicaid will begin direct reimbursement, which will be expanded to include Physician Office Laboratories that hold appropriate CLIA certification and clinics that operate Limited Service Laboratories registered for blood lead analysis. Direct reimbursement by Medicaid for onsite testing will allow for more routine blood lead testing of children and pregnant women. This practice is vital to ensure early identification and to prevent further exposure.

Other steps have been taken as well. Pursuant to Public Health Law § 1370-a, health care providers are required to timely report all blood lead test results to the NYSDOH in order to maintain a statewide registry of blood lead levels in children. Recent legislation included in this year's budget is directed at linking the statewide immunization registry and the statewide registry of children's blood lead levels in order to promote lead testing of children by providers and improve NYSDOH's ability to examine testing rates.

In combination with the Governor's Inter-Agency Task Force, the Childhood Lead Poisoning Primary Prevention Program, and the improvements made to the state immunization registry, the "Point of Care" onsite testing program is an important step toward reducing lead poisoning in the state.

Thanks to summer law intern Stephanie Scalzo for her research and writing of this article, and to Empire Justice Center's Mike Hanley for his comments and additions.

New York Revises Power of Attorney

Significant changes to the use of powers of attorney in New York became effective September 1, 2009. Presently, this instrument is utilized in transactions that are much more complex than originally envisioned by the law. The revisions are intended to address gaps in the N.Y. General Obligations Law (GOL), which governs the powers of attorney, and to address the ambiguities surrounding the creation of powers of attorney. *See* GOL §5-1501 *et seq.*

Gifts Rider

The new statutory short form power of attorney requires that a major gifts rider accompany a grant of authority to make major gifts of at least $500. This major gifts rider must be signed by the principal, duly notarized, and witnessed by two persons in the same manner as the execution of a will. The creation of a major gifts rider is meant to ensure that the principal is aware of the seriousness of granting the agent such authority.

HIPAA

The powers of attorney revision adds the term "health care billing and payment matters" to the term "records, reports and statements" in order to allow an agent to examine, question, and pay medical bills on behalf of the principal, so long as the principal has executed a health care proxy.

Agent's Responsibilities

In order to eliminate an agent's abuse of the power of attorney, the agent will be held to a higher degree of accountability. The agent is now required to disclose to third parties that he is acting as an agent on behalf of the principal. An added section states that the agent has a fiduciary duty to the principal, and it also sets out the agent's role, the agent's fiduciary obligations and the legal limitations on the agent's authority. The agent will only receive compensation if it has been clearly designated by the principal.

Principal

In order to better inform the principal of the gravity of the document, the "Caution" section has been expanded. There is also a section explaining how the agent can revoke the power of attorney, and a section explaining that a principal has the ability to appoint someone to monitor the agent's actions.

Third Parties

Under the new revisions, third parties are required to accept a power of attorney unless reasonable cause is demonstrated. The revision also expands the definition of third parties, or financial institutions, to include securities brokers, securities dealers, securities firms, and insurance companies. Some examples of reasonable cause given in the statute include situations where the third party has actual knowledge of the death of the principal; has actual knowledge of the incapacity of the principal and the power of attorney is non-durable; has actual knowledge that the principle lacked capacity when the power of attorney was signed; or actual knowledge of an adult protective services referral. Further, it is unreasonable for the third party to require that the power of attorney be on the institution's own form.

Conclusion

These changes to powers of attorney should limit ambiguity and give the principal a better grasp of the authority the agent will obtain through this instrument. By giving the principal the knowledge necessary to navigate this instrument, it will reduce the possibility of abuse by his or her agent.

Thanks to summer law intern Stephanie Scalzo for reporting on these important changes.

REGULATIONS

Disabled for Student Loan, not Disabled for SSA?

It's not unusual for our clients to pursue educational opportunities in the hopes of being able to return to the world of work. And who doesn't take out a student loan, these days, to pay for schooling? Also, some of our clients are busily paying off their student loans when they become disabled.

A newly arisen disability status is cause for the loan to be discharged, under the statute and regulations for Perkins loans, the Federal Family Education Loan Program and the Ford Federal Direct Loan Program. The definitions also apply to Defense loans and NDSL loans.

A doctor must certify that the student previously found "disabled" is able to do "substantial gainful activity" (SGA) in order to get a new loan. The Department of Education (DoE) now proposes to define the terms "substantial gainful activity" and "totally and permanently disabled." The proposed definitions differ from those applied by the Social Security Administration (SSA).

Announced at 74 Fed. Reg. 36555 (July 23, 2009), the proposed regulations had a comment period which expired in August 2009. http://edocket.access.gpo.gov/2009/E9-16952.htm

Briefly, SGA would be defined here as [a] level of work performed for pay or profit that involves doing significant physical or mental activities, or a combination of both." Total and permanent disability is defined as:

> The condition of an individual who -
> (1) Is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that--
> (i) Can be expected to result in death;
> (ii) Has lasted for a continuous period of not less than 60 months; or
> (iii) Can be expected to last for a continuous period of not less than 60 months; or
> (2) Has been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected disability.

We'll let you know if these regulations are adopted. Please let us know if you see any negative fall out on claimants' Social Security cases.

More Compassionate Allowance Hearings Planned

As we have told you in past newsletters, SSA is holding a series of hearings across the country to get input on serious medical conditions that might qualify claimants for speedy, favorable resolution of their Social Security claims. Earlier hearings have focused on rare diseases, cancers, and brain injuries. A July 2009 hearing focused on early-onset Alzheimer's Disease. A press release from the hearing is available at www.socialsecurity.gov/compassionateallowances. Among the written testimony presented at the hearing was a presentation that may be of interest to disability advocates working with early-onset Alzheimer's Disease patients: http://www.socialsecurity.gov/compassionateallowances/data/Marson Testimony.pdf

COURT DECISIONS

Pro Se, Non-English Speaking Claimant Entitled to Remand

In *Bula v. Commissioner of Social Security*, 2009 WL 890665 (N.D.N.Y. March 30, 2009), Northern District of New York Magistrate Judge Gustave J. Di Bianco held that due to the multiple errors by the Administrative Law Judge (ALJ), the case should be reversed and remanded for further proceedings. The plaintiff argued that the ALJ incorrectly denied her application for Social Security Disability (DIB) and Supplemental Security Income (SSI) benefits because the ALJ had failed to provide a full and fair hearing to plaintiff. Plaintiff also argued that the ALJ's residual functional capacity (RFC) assessment was erroneous.

The ALJ Failed to Properly Inform Plaintiff of Her Right to Counsel

After appearing *pro se* at her hearing, plaintiff contended that at the time of the hearing she had not been properly advised by the ALJ of her right for a free attorney. Despite the fact that plaintiff had been advised in writing of her right to counsel, this type of notice is not necessarily sufficient. *See Leonard v. Comm'r of Soc. Sec.,* 05-CV-1084, 2008 U.S. Dist. LEXIS 60900, *18 (N.D.N.Y. Aug. 7, 2008). Under certain circumstances, merely advising a plaintiff of this right is inadequate.

In this case, the plaintiff did not speak English, and when advised of her right to counsel, the plaintiff tried to explain that she had been unsuccessful in obtaining counsel. In the transcript, containing many inaudible sections, plaintiff replied in a confusing manner to the ALJ's inquiry into why she had chosen to appear without any representative. Plaintiff made several other statements demonstrating her uncertainty with proceeding *pro se*. When the ALJ informed plaintiff that the hearing would be postponed for a later date if she decided to have a representative, plaintiff responded that "I don't know. I think I want to continue it ***or no***." (emphasis added). The district court stated, "the ALJ certainly did not inquire very carefully about plaintiff's desire to proceed without representation, and it is unclear whether plaintiff knowingly waived her right to have a representative."

The lack of counsel alone is inadequate to justify a remand if the plaintiff was not prejudiced as a result of the ALJ's error. Yet, under the circumstances of this case, the court found that plaintiff had been prejudiced by the lack of counsel. If plaintiff had a representative at the hearing, he or she could have assisted the ALJ in obtaining more current medical records, and could have addressed the problem of the inaudible transcript tape before the Appeals Council. Since the ALJ had not properly notified plaintiff of her right to counsel, this was further support for the court to remand.

The ALJ Failed to Fully Develop the Record

An ALJ is required to make "every reasonable effort" to obtain treating source evidence. The ALJ notified plaintiff at the hearing that she was going to obtain more recent medical records. However, these records were never attained since the ALJ merely sent letters to plaintiff's medical providers and never followed up when the providers did not respond. Since plaintiff was *pro se*, the ALJ had a heightened duty to develop the record. The court found that the ALJ erred by simply sending a letter to the plaintiff's treating sources.

The ALJ also erred in utilizing an RFC assessment prepared by non-examining physicians to determine that plaintiff could do medium work and lift fifty pounds. The assessment utilized by the ALJ was based only on a review of the records. Further, as support for the non-examining physician's opinion, the ALJ cited to a contradictory report by a consulting physician, who found that plaintiff's prognosis was 'guarded' and plaintiff had a 'moderate physical disability' for lifting, carrying pushing, and pulling. "It is unclear how this opinion supports a finding that

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Non-English Speaking Claimant—Continued

plaintiff can lift ***fifty*** pounds," according to the Magistrate. 2009 WL 890665*20 (N.D.N.Y.). The ALJ failed to develop the record and contact plaintiff's treating sources. Therefore the ALJ's finding that plaintiff could perform medium work was not supported by substantial evidence.

"The combination of plaintiff's…inability to speak English, the ALJ's statement that she would obtain the current medical records, and the fact…that the ALJ used non-examining sources to determine that plaintiff could perform 'medium' work, when there was no support in the treating sources' reports, supports this court's finding that the ALJ did not fully and fairly develop the record in this plaintiff's case." 2009 WL 890665*19 (N.D.N.Y.). To further compound the situation, the transcript record had numerous '(INAUDIBLE)' sections, as mentioned earlier. The district court believed that the inaudible sections of plaintiff's testimony were significant to the case and therefore the district court was unable to accurately review the testimony.

Plaintiff's Credibility

The ALJ determined that the plaintiff was not credible because she had missed a doctor's appointment. However, there was no evidence in the record that asserts that she had ever missed an appointment. The ALJ cited to an exhibit to support his finding, yet the exhibit was altogether unrelated to the ALJ's allegation. Further, due to the inaudible transcript record, the district court was unable to assess whether the ALJ's finding of credibility could be supported by substantial evidence.

Conclusion

The district court determined that remand was necessary because the ALJ failed to adequately inform plaintiff of her right to free counsel, the plaintiff exhibited signs of uncertainty with proceeding *pro se*, the ALJ had not obtained current medical records, the RFC relied on was not supported by substantial evidence, the ALJ had no evidence to determine that plaintiff was not credible, and the significant gaps in the testimony made it impossible for the district court to properly review the transcript. Note however, that this decision was issued before the Second Circuit's decision in *Lamay v. Commissioner of Social Security*, 562 F.3d 503 (2d Cir. 2009), which was unfavorable to a *pro se* claimant, and *Moran v. Astrue*, 569 F.3d 108 (2d Cir. 2009), which was favorable to a *pro se* claimant. Please let us know about any other decisions on this issue, so that we might be able to offer some constructive analysis on how to proceed after a *pro se* claimant loses at the ALJ stage.

The plaintiff was represented by Louise Tarantino of the Empire Justice Center. Thanks to summer law intern Stephanie Scalzo for her analysis of the *Bula* decision.

On-line Resource Center SSI Trainings Available

The On-line Resource Center (ORC) is chock full of on-line trainings. Advocates can view topics including handing child disability cases, how to maximize SSI/SSD for a client who has HIV, vocational experts and the sequential evaluation developing mental impairments at Steps 3, 4 & 5. Continuing Legal Education credits are available where noted.

To see a detailed course description and to register for any of the trainings listed below, visit http://onlineresources.wnylc.net/online_training.asp.

Confronting Vocational Expert ("VE") Testimony
Handling SSI Child Disability Cases
HIV As A Disabling Condition: Maximizing SSI/SSD
Sequential Evaluation: Developing Mental Impairments at Step 3, 4 & 5
SSI Non-Disability Eligibility
Winning on Appeal

Court Reverses Child's Claim

Kudos to Erin McCormack-Herbert, Staff Attorney at the Partnership for Children's Rights, for her recent favorable decision in *F.M. o/b/o B.M v. Astrue,* 2009 WL 2242134 (E.D.N.Y. July 27, 2009). U.S. District Court Judge Sifton, relying on Erin's excellent brief opposing the government's motion for remand, reversed and remanded for the immediate calculation of benefits.

B.M. is an eleven year old who is disabled by deafness in one ear, asthma, severe receptive and language delays, borderline intellectual functioning, and a language disorder not otherwise specified. Despite evidence of record, including several evaluations from teachers, that B.M. has marked limitations in several domains of functioning, the Administrative Law Judge (ALJ) denied the claim, finding that B.M. only had a marked limitation in the domain of "attending and completing."

The Commissioner sought remand, conceding that (1) the ALJ failed to discuss or evaluate B.M.'s CELF-4 standardized testing scores, which fell more than two standard deviations below the mean; and (2) the ALJ failed to consider the opinions of the State agency medical consultants who determined that B.M. has a marked limitation in acquiring and using information. The Court, however, agreed with Erin that the record supported a finding of a marked impairment in the domain of "acquiring and using information."

Judge Sifton rejected the Commissioner's arguments that the record did not support such a finding. He held that the Commissioner's reliance on the fact that tests results from the Wechsler Intelligence Scale for Children (WISC) and the Wechsler Individual Achievement Test (WIAT) placed B.M. in the 12 and 23rd percentiles respectively was insufficient to support a finding that B.M. is not disabled.

First, the Court questioned the testimony of the Medical Expert (ME) upon whom the ALJ relied. The Court noted that neither the ME nor the Commissioner offered any source for the ME's assertion that a marked impairment would only occur below the fifth percentile, although it noted that it was presumably based on the fact that a score in the fifth percentile is two standard deviations below the mean. (*See* 20 C.F.R. §416.926a(e)(2) defining a "marked limitation" as, *inter alia*, a having a valid score that is two standard deviations or more below the mean.) Judge Sifton found that the test scores were in conflict with other evidence of record concerning functioning, including evidence of classroom performance and observations of school personnel.

The Court also held that B.M.'s marked disability in one area of acquiring and using information (using complex language to share information and ideas) was not "canceled out" by his achievement scores. Judge Sifton noted that the cognitive abilities tested pertained to comprehension of information and not ability to engage with others in the learning process. He again rejected the testimony of the ME, and specifically held that "a child may be found to suffer from a marked limitation despite the fact that no individual area within the domain is markedly limited." He pointed out that B.M.'s teacher had observed that he had slight or obvious problems in all ten of areas reviewed in the domain of "acquiring and using." "Taken together, these limitations are consistent with and supportive of a finding that B.M. suffers from a marked limitation in this domain."

The Court also cited and relied upon several of the new Social Security Rulings (SSRs) for determining functional equivalence, noting specifically that SSR 09-5p states that communication is important to the consideration of "acquiring and using" as well as the domain of interacting with others.

The decision contains a number of invaluable "nuggets" that will undoubtedly be useful in future children's claims. In the meantime, what a great victory for Erin and her client! Erin's Memorandum of Law is available as DAP #520.

Errors on Credibility and Weight of Evidence Warrant Remand

In a recent decision remanding a claim for further proceedings, District Court Judge Charles Siragusa of the Western District of New York reiterated several rulings that are important to our disability cases. In *Griffith v. Astrue*, 2009 WL 9096630 (W.D.N.Y. March 31, 2009), Judge Siragusa addressed the weight to be given treating physician evidence, the weight to be given non-examining reviewers' opinions, and how credibility determinations should be conducted.

In this case involving a musculoskeletal disorder, Judge Siragusa found that the ALJ failed to properly apply the treating physician rule when he gave the treating doctor's opinion little weight because it was based on the plaintiff's subjective complaints. Citing *Green-Younger v. Barnhart*, 335 F.3d 99, 107 (2d Cir. 2003), the Court held that subjective complaints are an essential diagnostic tool and do not undercut the validity of a treating source's opinion. The Court also cited *Green-Younger* for the finding that "the State Agency Officials' reports, which are conclusory, stale, and based on an incomplete medical record, are not substantial evidence."

Lastly, Judge Siragusa found that the ALJ's credibility determination was erroneous since "he appears to have strained to find inconsistencies in plaintiff's testimony." The ALJ also erred by drawing a negative inference from the fact that the plaintiff did not have surgery for her back problems. The Court found that the ALJ should have clarified if surgery was in fact recommended, and if there were good reasons for declining surgery, citing Social Security Ruling (SSR) 96-7p.

Although the plaintiff requested that any remand proceedings be assigned to a different ALJ, Judge Siragusa did not grant that request and sent the case back to SSA for assignment to the same ALJ. On remand, however, the same ALJ granted a fully favorable decision on the record. So we won the battle and the war.

This case was handled by Kate Callery and Louise Tarantino from the Empire Justice Center.

Employment Assessment ADM Issued

On August 24, 2009, the Office of Temporary and Disability Assistance (OTDA) issued a new Administrative Directive informing districts "that all adult individuals applying for, or receiving public assistance, residing in households without dependent children may be required to comply with an employment assessment, regardless of their exempt or nonexempt status." The new ADM 09-14, entitled "Employment Assessments for Exempt Public Assistance Applicants and Recipients in Households Without Dependent Children," is available at http://www.otda.state.ny.us/main/directives/2009/ADM/09-ADM-14.pdf.

The new ADM does leave 08 ADM-05 in place, which provides guidance and resources on appropriately identifying and referring individuals with physical or mental impairments that impede their ability to work long-term to Supplemental Security Income (SSI). In fact, it specifically encourages districts to review 08 ADM-05, but at the same time permits districts to obtain employment assessments for those applicants for, or recipients of, public assistance "who have been determined by the district to be exempt from the requirement to participate in work activities, but nonetheless in the judgment of the district has the potential to improve his/her ability to work." These "exempt" individuals were previously exempted not only from work requirements but also from repeated assessments. Advocates should note, however, that current law permits assignment to various treatment, rehabilitation and training activities for people who have been found exempt from work assignment but who are deemed to have the potential to be restored to employability (SSL §131(7)(b); 18 NYCRR §385.2(e)).

Advocates have expressed concern that this new ADM could put recipients' exempt status at risk, or at the very least, return them to the merry-go-round of unnecessary assessments. Stay tuned to the Public Benefits listserv for more on this topic.

What's A Stieberger Manual?

There has been a flurry of exchanges on the DAP list serve recently inquiring about the availability of the "Stieberger Manual." Although experienced advocates know exactly what is meant by all things Stieberger, newer advocates may be left scratching their heads about this particular reference: is it a how-to book for who knows what, or a guide to driving with a clutch and shifting gears, or a reference to Talmudic Law?

The answer is none of the above. *Stieberger v. Sullivan* was a class action lawsuit filed in 1984 to challenge the Social Security Administration (SSA) policy of non-acquiescence in Second Circuit precedents. The district court initially granted plaintiff's motion for a preliminary injunction in 1985. The Second Circuit vacated the injunction in light of parallel proceedings in *Schisler* (another oldie but goodie better left to another article, although advocates should note that summaries of both *Stieberger* and *Schisler,* as well a number of other significant class action cases, are available at www.empirejustice.org). In 1990, on remand, the district court granted, in part, plaintiffs' motion for summary judgment. The court declared SSA's non-acquiescence policy unlawful. The court denied SSA's motion to dismiss. The court found that SSA non-acquiesced in the following four Circuit holdings: (1) treating physician rule, (2) cross examination of authors of post hearing reports, (3) ALJ observations of pain, and (4) credibility of claimants with good work histories.

SSA agreed to a settlement of the case that provided possible re-openings for almost 200,000 disability claims denied or terminated: (a) between 10/1/81 and 10/17/85 at any administrative level of review, or (b) between 10/18/85 and 7/2/92 at the hearing or Appeals Council level of review. Also, denials at any administrative level between 10/1/81 and 7/2/92 would not be given *res judicata* effect and thus would not bar subsequent claims for Title II disability benefits regardless of "date last insured."

Part of the settlement also required SSA to provide its decision makers with a manual of all Second Circuit disability cases that were to be given precedential effect. This, my friends, is the Stieberger Manual that has generated such interest recently. For New York disability advocates, the Stieberger Manual is as fine an example of literature as any of the classics. This compilation of favorable Second Circuit disability decisions gave our advocacy efforts an added boost at every level of SSA adjudication.

Now, more than a decade after its original release, the difficulty has been finding the actual Stieberger Manual. Although most legal services offices received paper copies of the Manual when paper is all there was, like most paper copies of things, the Manual got lost, or misfiled, or recycled as trash. Luckily, we have moved into the electronic age, and now know where the Stieberger Manual can be found on the internet. Thanks to responses from several disability advocates, we are able to provide you with the online citation to the manual in HALLEX (Hearing, Appeals and Litigation Law): http://www.ssa.gov/OP_Home/hallex/I-05/I-5-4-13.html#I-5-4-13-ATT-C .

According to one advocate, the Manual provides a good, at-a-glance overview of significant issues to look out for and a starting point for research on case law in those areas. Particularly for new advocates who are not that familiar with the legal issues in disability cases, the Stieberger Manual sets out issues on appeal that have been successfully litigated previously.

The only problem with the online version of the Stieberger Manual is that it only chronicles Second Circuit cases up to 1993 when the Manual was first published. SSA did continue to update the Manual with supplements through 2003. Although there was a 2000 sunset provisions to the Stieberger settlement, SSA continued to issue instructions on Second Circuit cases for several years thereafter. It no longer sends out these transmittals.

Thanks to the efforts of Gene Doyle, those updated cases are available on the Empire Justice Center website, in the Disability section. www.empirejustice.org. While these more recent cases are not incorporated in the topical index format of the original Manual, most include summaries of the cases that were transmitted to SSA adjudicators. More importantly, they are - again thanks to Gene - in pdf format and thus searchable.

ODAR Delays Shrinking?

Has anyone noticed that hearings are being scheduled more quickly these days? A comparison between average processing times published by Social Security for the month ending May 30, 2008, with the same period for 2009 shows an incremental improvement at a number of hearings sites. But the waiting time has actually increased at several New York ODAR (Office of Disability Adjudication and Review) sites: White Plains, Queens, and Syracuse.

Statistics on average processing times by number of days as of May 2009 at the various New York and New Jersey ODAR offices, published in the July 2009 edition of the NOSSCR *Forum*, are below. The "rank" represents the office's position among the 142 ODARs nationwide, ranging from shortest (1) to longest (142) processing time. The numbers in parentheses are the rankings and processing times for the period ending in May 2008.

RANK	ODAR	DAYS
32 (81)	Brooklyn	408 (500)
51 (45)	White Plains	452 (425)
55 (101)	Jericho	457 (554)
64 (88)	Newark	478 (519)
67 (63)	Queens	478 (462)
83 (98)	New York	508 (545)
89 (103)	Albany	518 (556)
110 (127)	Buffalo	591 (665)
125 (115)	Syracuse	623 (612)
129 (109)	Bronx	640 (577)

For the New York region (Region 2) overall (which also includes Puerto Rico, Newark and Voorhees), the average waiting time as of May 2009 was 483 days, ranking 5th out of ten regions. In May 2008, the New York region was ranked 7th, with an average processing time of 540 days.

While the jury may still be out in terms of the hard data above, SSA continues to tout its plan for reducing its backlog. *See* http://www.ssa.gov/hearingsbacklog.pdf for SSA's 2007 *Summary of Initiatives to Eliminate the SSA Hearings Backlog* (the Plan); and http://www.ssa.gov/disability/Semiannual_Report_FY08.pdf for its semi annual report for 2008. Among other objectives set forth in SSA's Strategic Goals, SSA hopes to reduce the number of pending hearings to 466,000 by FY 2013, and reduce the time its takes a claimant to receive a hearing decision to an average of 270 days. *See* http://www.ssa.gov/asp/StrategicGoal1.pdf.

According to a report issued in September 2009 by the General Accountability Office (GAO), SSA's Plan should help the agency reduce its hearings-level backlog. The likelihood that SSA will eliminate the backlog within its projected time-frame, however, depends on the extent to which SSA's assumptions for improved Administrative Law Judge (ALJ) hiring, availability, and productivity are achieved in practice. Both SSA and the GAO agree that SSA has about a 78% chance of achieving its goal. According to the GAO, however, that is dependent upon achieving significantly increased ALJ productivity levels *and* meeting its ALJ hiring goals. A misstep in either of these would reduce SSA's chances for meeting its 2013 goal to 34% and 53% respectively.

The GAO also expressed concern that SSA's Plan could have unintended consequences, including a potential effect on decisional quality and accuracy. It also criticized SSA's Plan because it does not include a systematic approach to identify and address these unintended consequences. It noted that the Plan, while including some components of sound planning, failed to include some key management information. This criticism was echoed in a report from SSA's Office of the Inspector General (OIG) issued in August 2009, which evaluated ODAR's current management information and Information Technology Advisory Board proposals.

GAO-09-398 - *Additional Performance Measures and Better Cost Estimates Could Help Improve SSA's Efforts to Eliminate Its Hearings Backlog* - is available at http://www.gao.gov/new.items/d09398.pdf. The OIG report - *ODAR Management Information* (A-07-09-29162) - is available at http://www.ssa.gov/oig/ADOBEPDF/audittxt/A-07-09-29162.htm.

ADMINISTRATIVE DECISIONS

Benefits Continued Under Ticket To Work Rules

It only took six years, but David Ralph – an attorney from the Elmira office of LAWNY who is well know to be nothing less than persistent – finally convinced an ALJ that his client's benefits should have not have been discontinued because she was participating in the "Ticket to Work" program.

David's client had her benefits terminated in 2004, following a reconsideration hearing before a Disability Hearing Officer (DHO). (*See* 20 C.F.R. §416.1414 -1418 regarding reconsideration hearings in Continuing Disability Review - or CDR - proceedings.) David argued that the benefits should not have been discontinued, regardless of whether or not the client's condition had improved, because she was participating in a vocational rehabilitation program under the Ticket to Work and Work Incentives Improvement Act of 1999. *See* 20 C.F.R. §§411.100 *et seq.*

Under 20 C.F.R. §§411.165 and 411.175(a) & (b), Social Security cannot begin, or in certain circumstances, continue a CDR during the period in which a beneficiary is using a Ticket to Work. Alternatively, even if there were a question as to whether the client had begun - or "assigned" - her Ticket to Work prior to the initiation of the CDR, David argued that her benefits should be continued under Section 301 of the Social Security Amendments of 1980 (Pub.L 101-508, §5113), which allows for the continuation of benefits if the beneficiary is participating in a rehabilitation program. *See also* 20 C.F.R. §416.1338.

The DHO acknowledged David's point, but ruled that he was without jurisdiction to rescind the cessation. Despite the DHO's recommendation that the claim be referred for review of benefit continuation under the provisions of Section 301, it went instead to an ALJ. The ALJ completely ignored David's arguments, and issued a decision finding medical improvement. David then persuaded the Appeals Council of the error of the ALJ's ways. In the summer of 2007, the Appeals Council remanded the claim back to the ALJ with instructions to investigate if and when the claimant was in a rehabilitation program. (David's progress up to this point was previously reported in September 2007 edition of the *Disability Law News.)*

Finally, on remand, the ALJ also saw the errors of his ways, and issued a short and to the point decision finding that the claimant's benefits had been erroneously ceased during a period in which she was participating in an appropriate program of vocational rehabilitation. He even thanked David in his decision for his compliance with the ALJ's request for additional evidence, and noted that his appreciation was reflected in the timely issuance of his decision. Timely?!? Maybe the ALJ issued his most recent decision in a timely fashion vis a vis the date of the last hearing. It took more than four years, however, to correct his mistake in the first place!

Luckily, the claimant had David on her side. David's knowledge of the intricacies of these various programs saved the day for his client. For more information on SSI's various incentive earnings programs, see http://www.nls.org/work_incentives.htm. You can also purchase the 2009 version of the *Benefits Management for Working People with Disabilities: An Advocates Manual.* For more information about the manual and to read excerpts as well ordering information, visit http://www.nls.org/benefits_management_manual.htm.

Claimant Prevails After Two Trips to the Appeals Council

In another example of David Ralph's perseverance, he just obtained a victory going back to a 2002 application – and it only took three hearings and two Appeals Council remands!

The claimant suffers from severe Post Traumatic Stress Disorder (PTSD) depression; mitral valve prolapse and tachycardia not amenable to further treatment and which contradicts any psychotropic medication at all; borderline IQ; and day treatment five day/week, for two to four hours per day. The first ALJ rejected the opinions of the treating physicians declaring their patient disabled. According to David, the ALJ could only see the claimant as a fully functional borderline IQ worker, despite all the evidence to the contrary. The Appeals Council admonished the ALJ twice about, among other errors, his failure to recontact the treating physicians.

The case was finally remanded to a different ALJ. [*See* HALLEX I-2-1-55J requiring remand to a different ALJ after two hearings.] Interestingly enough, the second ALJ then put the burden on David to follow up with the treating sources, and gave him very little time to do so – despite the length of time that the case had languished at ODAR following the remand order. Needless to say, David did that with a vengeance, and found, as he put, some very loquacious doctors. As a result, he gave the ALJ no choice but to accept their opinions.

David notes that he has logged over one hundred hours on this case. Once again, lucky for the claimant to have found David!

Appeals Council Reverses Age 18 Redetermination

Jody Davis, Senior Paralegal at the Legal Assistance of the Finger Lakes office of LAWNY, has achieved the seemingly impossible. At her request, the Appeals Council reversed an ALJ denial in an age 18 determination - cases that are usually hard enough to win at the ALJ level, much less at the Appeals Council.

Jody's client has a myriad of problems. He had originally been found disabled based on an equivalency to Listing 111.09A, Communication impairment (speech deficit) associated with documented neurological disorder. His eligibility was continued based on Listing 112.12A & B, Developmental Disorder, with cognitive/communicative and motor delays. He had subsequently been diagnosed with Asperger's Disorder, in addition to other learning, speech and personality disorders. He had gone through VESID and been placed in supported employment, where he had documented substantial difficulties getting along with supervisors and coworkers. Jody argued that he met Listing 12.10, Autistic disorder and other pervasive developmental disorders.

Despite compelling evidence to the contrary, the ALJ denied the claim. Among other errors, he gave limited weight to the testimony of the claimant's guardian because, according to the ALJ, "she did not testify although accorded the opportunity to do so." Jody pointed out to the Appeals Council that a review of the hearing tape would reveal that Jody had made the guardian available to the ALJ to answer any questions that he might have. The ALJ thus improperly discredited the assertions that the guardian had made in various reports in the record.

The Appeals Council, after reviewing Jody's arguments and a memorandum from its own medical consultant, agreed that the claimant's condition meets Listing 12.10. It noted that despite treatment efforts, special education, counseling and training, the claimant has not been able to perform consistently or sustain appropriate behavior.

Congratulations to Jody on this Appeals Council reversal!

Advocate Wins Double Whammy Plus

What are the chances of getting two fully favorable "on the record" decisions in one week for siblings? That is exactly what paralegal Amy Leach of the Norwich office of the Legal Aid Society of Mid-New York managed to do. In two cases involving the autism spectrum, Amy convinced an ALJ in one case and a senior decision writer in the other that both siblings are disabled.

Although neither the ALJ nor the senior decision writer found that the siblings' claims met the Listing 12.10 for autism, they agreed that both siblings' impairments are functionally equivalent to the listings. In deciding the case of the 14-year-old brother, who suffers from seizures and other neurological impairments, the ALJ relied on the opinions of the treating sources, particularly the treatment records for the seizure disorder, to find that the claimant had marked limitations in the domains of attending and completing tasks and interacting and relating with other. In reaching this conclusion, the ALJ noted that "[t]he medical record supports the characterization of the claimant's problems as set forth in the recent written communication from the representative, Amelia Leach, a registered nurse with unusual familiarity with the Asperger-type syndromes, and their overall/ universal impact on general daily functioning."

In the sister's case, the decision writer was not so effusive, but nonetheless concluded that the 12-year-old girl had marked limitations in the domains of acquiring and using information, interacting and relating with other, and caring for personal needs.

Kudos to Amy for quite a week's work! Following up on that roll, Amy reports that she recently received another favorable decision for a preschooler with global developmental delays. The ALJ agreed with Amy's argument that the child's speech and language difficulties resulted in marked impairments in the domains of acquiring and using language and interacting and relating with others. Amy notes how important it is to develop good evidence in these cases, and credits the reports of prior cases in this newsletter with keeping her up to date in this area. Thanks, Amy!

Appeals Council Update

A few years ago, it seemed as though the demise of the Appeals Council was near. Now, however, it looks the Appeals Council is alive and – depending on your perspective – well.

As advocates will recall, the implementation of DSI (Disability Service Improvement), which called for the substantial changes in the powers of the Appeals Council, has been limited in Region I and is unlikely to be rolled out elsewhere. In fact, the Appeals Council has been expanding its staff. A second site has been opened in Baltimore with five new branches, and new Administrative Appeals Judges (AAJs) and support staff are being hired.

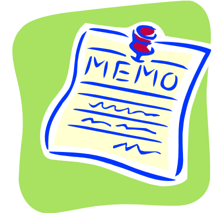
Advocates should bear this in mind when filing appeals. These new Appeals Council judges and analysts may not be all that up to speed on Social Security law. Thus, it may be more important than ever to present cogent arguments to the Appeals Council. If a blatant harmful error - perhaps made by one of the many new ALJs and decision-writers who themselves might not be up to speed - is not flagged and critiqued, the Appeals Council may well deny review.

The Appeals Council has also continued its slow journey into the twenty-first century. Nearly 60% of the cases handled at the Appeals Council are now electronic. The Appeals Council has also begun a pilot program at five of its branches in Falls Church that is testing the electronic submission of evidence using the Electronic Records Express (ERE), papers document with barcodes that are sent to a private scanning contractors, and FECS ("Front End Capture Server") faxing. Advocates and claimants will be notified if their cases are included in the pilot.

Finally, the Appeals Council continues to slog its way through its own backlog. Social Security reports that the average Appeals Council processing time for Fiscal Year 2008 was 238 days, down from a high of approximately 500 in 2000. It granted review in only 26.1% of its cases, down from 30.3% in FY 2007. It remanded 22.8%, compared to 27.2% in FY 2007. Its reversal rate remained about the same, at 2.6%.

WEB NEWS

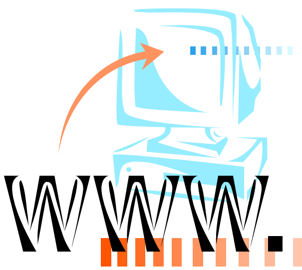
Find Chief Judge Bulletins on SSA Website



The Social Security Administration (SSA) website includes a variety of great information for disability advocates. A recent discovery are the Chief ALJ Bulletins, known as the Chief Judge bulletins. These bulletins provide information to SSA personnel involved in the hearings process. They may include such things as workload changes, system enhancements, or serve as notification of imminent or recently-approved revisions in the HALLEX (Hearings, Appeals and Litigation Law Manual). They may also provide reminder items on a variety of topics. Recent topics have included guidance on fleeing felon cases and use of vocational expert interrogatories.

https://secure.ssa.gov/apps10/

View Training on Electronic Records Express (ERE) and FIT



In April 2009, Iowa Legal Aid (with help from SSA and local NOSSCR members) put on a continuing legal education seminar on electronic filing and Electronic Records Express. The video of the training, the written materials, and the FIT template (long form and instructions for installing) are now available online. To access this information:

Go to www.probono.net; if already registered, sign in. If not already registered, register and sign in. Find "Choose your state" (in the left column) and select Iowa. Select Civil Law (in the left column). Select Library (in the top row of choices). Scroll down to the "Social Security." Section Select "Electronic Benefit Filing and ERE."

Looking for Obsolete Listings?

Do you sometimes need to know the details of a rescinded listing? Unless you keep paper copies of past volumes of 20 C.F.R., it may be tough to find these old listings. Never fear. SSA keeps this stuff on its website, tucked away in an obscure part of the POMS. DI 340: Listing of Impairments - Current http://tinyurl.com/lxbw3a; DI 341: Obsolete Versions of Part A, the Listing of Impairments http://tinyurl.com/q8ejqg; DI 342: Obsolete Versions of Part B, the Listing of Impairments http://tinyurl.com/l29qd6.

What to do About Identity Theft

Don't worry. SSA has an answer to identity theft problems. In an October 2007 pamphlet, Publication No. 05-10064, ICN 463270, the agency advises contacting SSA and The Federal Trade Commission at 1-877-IDTHEFT (1-877-438-4338). The pamphlet is available at

www.ssa.gov/pubs/10064.html

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.

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 possiblity 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 (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 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

M&Ms as Treatment for Spinal Injury?

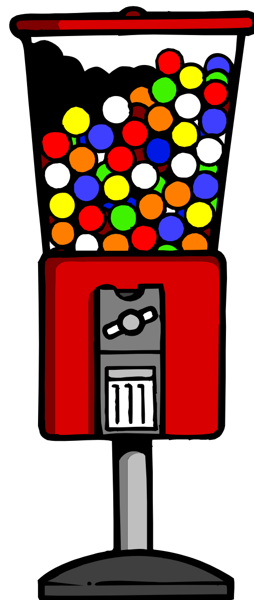
The same blue food dye found in M&Ms and Gatorade could be used to reduce damage caused by spine injuries, offering a better chance of recovery, according to new research. Researchers at the University of Rochester Medical Center found that when they injected the compound Brilliant Blue G (BBG) into rats suffering spinal cord injuries, the rodents were able to walk again, albeit with a limp. The only side effect was that the treated mice temporarily turned blue.

The results of the study, published in the "Proceedings of the National Academy of Sciences," build on research conducted by the same center five years ago. The rats given BBG immediately after their injury could walk again with a limp. Those that did not receive a dose never regained their mobility.

The dose must be administered immediately after the injury, before additional tissue dies as a result of the initial injury. Researchers are currently pulling together an application to be lodged with the FDA to stage the first clinical trials of BBG on human patients.

“Our hope is that this work will lead to a practical, safe agent that can be given to patients shortly after injury, for the purpose of decreasing the secondary damage that we have to otherwise expect,” said Steven Goldman, Chair of the University of Rochester Department Of Neurology.

Not only do those blue M&Ms taste better, they may be better for you!



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