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DISABILITY LAW NEWS

Social Security Ruling Affects New Applications

Social Security Ruling (SSR) 11-1p, issued and effective on July 28, 2011, precludes the filing of a subsequent application for benefits while an appeal is pending. This SSR revokes the rules that the Social Security Administration (SSA) had issued more than ten years ago, allowing a new application to proceed to the hearing level while a prior application was pending at the Appeals Council. That policy, effective December 30, 1999, was a response to what were considered at the time to be inordinate waiting periods at the Appeals Council.

Under SSA policy prior to December 30, 1999, a claimant could receive a protective filing date on a subsequent claim, but that claim would not be developed or adjudicated until the pending review request was decided. Although a few subsequent claims did slip through this policy, as a general matter a claimant could not have a subsequent claim adjudicated while an appeal was pending. The 1999 policy permitting development of the subsequent claims was described at POMS DI 12045.027 and HALLEX I-5-3-17.

Innumerable claimants were able to take advantage of that policy by reapplying and, in many cases, receiving benefits, albeit with later onset dates, while their appeals languished at the Appeals Council. Although there were snags in the system, including

the possibility of the Appeals Council or the Administrative Law Judge (ALJ) reopening a favorable subsequent application under certain circumstances, the policy offered claimants a viable option. SSA's new SSR changes all that.

Under SSR 11-1p, claimants will generally have to choose between filing an appeal and filing a new application. SSA justifies this change by citing decreased processing times and greater efficiencies at the Appeals Council. According to SSA, the change is necessary to avoid duplication of effort caused by the increase in the numbers of subsequent applications being filed, and to reduce workload at the DDS levels, where staff reductions through attrition and hiring freezes have been most significant. The SSR does provide for the filing of a subsequent application while an appeal is pending, but only in limited situations and at the discretion of the Appeals Council. It also allows for a protective filing date for a subsequent application if the Appeals Council ultimately denies the appeal, but again, only "under certain circumstances."

In the addition to the SSR itself, published in the Federal Register July 28, 2011, and available at www.ssa.gov, SSA has issued EM-11052 REV, which has already been revised twice

INSIDE THIS ISSUE:

REGULATIONS	6
COURT DECISIONS	12
ADMINISTRATIVE DECISIONS	15
WEB NEWS..	18
WHAT IS...	19
BULLETIN BOARD	20
END NOTE	22

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(Continued on page 2)

New Social Security Ruling —Continued

(Continued from page 1)

(<https://secure.ssa.gov/apps10/public/reference.nsf/links/09262011014635pm>) and CJB (Chief Judge Bulletin) 11-03 (<https://secure.ssa.gov/apps10/public/reference.nsf/links/0805201102227PM>). Office of Appellate Operations (OAO) Executive Director Patricia Jonas also issued a memorandum to all OAO employees, which is available at Empire Justice Center's on-line resource center as DAP #542. These pronouncements, however, raise more questions than they answer.

The SSR provides, for example, that if a claimant opts to pursue an appeal and has additional evidence that shows a “critical or dire need situation,” the claim will be expedited by the Appeals Council. But there are no clear procedures, especially for *pro se* claimants, for getting this evidence before the Appeals Council. Representatives of the Appeals Council have assured advocates that evidence brought to a field or district office by a *pro se* claimant will be forwarded to the Appeals Council. See EM-11052 REV. It will be up to the Appeals Council, however, to decide if the evidence shows a dire or critical situation.

Per the SSR, if additional evidence is submitted that relates to the period on or before the date of the ALJ decision, and it is determined to be “new and material,” the Appeals Council will consider the evidence under its current procedures in 20 C.F.R. §§404.970 (b) & 416.1470(b). In addition, if the new evidence shows a “critical or disabling condition,” the Appeals Council will expedite review. Again, the terms “critical” and “disabling” in this context are not defined, but presumably have the same meaning as in other contexts. See, e.g., HALLEX I-3-1-51, which defines “critical” in terms of dire need or terminal illness. Deciding whether or not the evidence demonstrates a disabling condition seems to put the cart before the horse, but representatives of the Appeals Council have indicated that new evidence will be reviewed on an expedited basis to see if it “suggests” disability. If so, the claim will be assigned to an analyst out of the Appeals Council’s “first in, first out” processing order.

If, however, additional evidence is submitted that does not relate to the period on or before the date of

the ALJ decision, SSR 11-1p provides that the evidence will be returned to the claimant pursuant to 20 C.F.R. §§404.976(b) & 416.1476(b) when it acts upon the Request for Review. It will inform the claimant “under certain circumstances” that the date of the Request for Review will be considered a protective filing date for a new claim. Under this provision, a new Title II claim must be filed within six months of the Appeals Council notice; a new Title XVI/SSI claim within 60 days of the notice. But what does “under certain circumstances” mean? Discussions with the Appeals Council indicate that such a protective filing date will be granted in all cases where evidence is proffered but rejected, pursuant to the regulations cited above.

It is therefore crucial that advocates make sure all relevant evidence is forwarded to the Appeals Council. Representatives of the Appeals Council have indicated that submission of new evidence will trigger a review to determine if a claim should be expedited – yet another reason for advocates to submit all relevant evidence in a timely fashion.

Finally, the SSR provides a limited exception under which a new application can be filed while a claim is pending at the Appeals Council. If additional evidence is submitted that does not relate to the period on or before the date of the ALJ decision, but shows a “new critical or disabling condition,” the Appeals Council *may* permit the filing of a new application before it completes its review. According to the Jonas Memorandum cited above, these “requests” will be handled through the OAO Executive Director’s office. But, again, who decides what a “new critical or disabling condition” is?

The scenario in which the claimant is seriously injured in an accident on the way home from the ALJ hearing could lead to a “new critical or disabling condition” warranting a new application. When faced with such situations, representatives should advocate for application of the “exception.” But would a change in age that would dictate an allowance under the Grid be considered a new condition? According to the Appeals Council, probably yes. What if a claimant who was denied based on a finding that drug and alcohol addiction was material has now been

(Continued on page 3)

New Social Security Ruling —Continued

(Continued from page 2)

“clean” for the six months the case has been pending, and is still disabled? Not clear. And how does the claimant, in particular a *pro se* claimant, take advantage of this provision? *Advocates should specifically request “permission” to file a new application when submitting evidence to the Appeals Council.* The field offices are supposed to submit any new evidence to the Appeals Council that *pro se* claimants present (see EM-11052 REV2), but will the claimant know to advocate for a new application, or will s/he be encouraged to withdraw the pending appeal?

Under these new procedures, however, a claimant will have to decide, in most situations, whether to file a new application or a request for review. Will the field office accept a new application before the 60 days to appeal has expired? The Jonas Memorandum seems to say that the answer is “yes”; the representative and claimant will then be contacted to choose one process if the claimant goes on to file an appeal.

The new SSR does allow for the filing a new application concurrent with an appeal if the new claim is not a “duplicate” of the one on appeal. For example, a new claim under a different title or benefit type should be permitted. According to the Jonas memo, a new claim should also be permitted if the prior claim was a CDR or an age 18 redetermination. Subsequent claims of any type will be permitted if the prior claim is pending in federal court or has been remanded by a federal court.

In many instances, however, claimants will be presented with the Hobson’s choice of deciding which claim to pursue. Those claimants who already have filed appeals, and now attempt to file new applications, will also be forced to decide how to proceed. In fact, in order to file a new application, a claimant will have to make a written request to withdraw his/her appeal if the exception does not apply, and will need a Notice of Dismissal from the Appeals Council before the new application is accepted. The Appeals Council will not automatically dismiss a claim, but must consider under the regulations whether there are other parties of interest. See 20 C.F.R §§404.971 & 416.1471. The Appeals Council will also allegedly determine if the claim could be decided favorably before it will issue a dismissal. How long will a

claimant have to wait for a decision on a request to withdraw? Not clear, but the Appeals Council has indicated that it will only expedite requests that involve critical claims. And will the date the claimant requests withdraw constitute a protective filing date? Again, according to the Appeals, it will, *but only if a protective filing date is requested.*

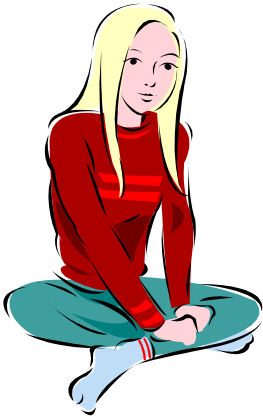
As advocates are well aware, claimants often feel pressured to forego their appeals when faced with the possibility of getting benefits sooner by filing anew. But will claimants, again especially *pro se* claimants, be properly apprised of their rights when they make these decisions? Will they realize that they could be foregoing their rights to Title II benefits if, for example, their insured status has expired during the pendency of the prior abandoned claim? The most recent revisions to EM-11052 REV2 include a chart with a series of “if” - “then” scenarios to be followed if a claimant asks to file a new application and there is an appeal pending. If a claimant chooses to withdraw the appeal in order to file a new application, the claimant must be advised; that by withdrawing the appeal, he or she relinquishes all appeal rights on the claim; the withdrawal request must be in writing; to include a statement in the withdrawal request that he or she fully understands the effort of the withdrawal and intends to file a new application; the withdrawal request must be signed by the claimant or claimant’s representative; and to submit the signed withdrawal request to the Field Office.

Unfortunately, there are still no clear provisions for how the claimant learns the effect of the withdrawal. Perhaps there will be yet another revision to the EM? And to date, there is no form that a claimant can use to withdraw an appeal. Query whether the Appeals Council will devise such a form and, perhaps more importantly, will provide claimants with an explanation of the potential consequences of withdrawing their appeals. And the ultimate query - can SSA legally preclude a claimant from filing an application?

We will keep you informed about the nuances of this new SSR as they emerge.

Thanks to Ethel Zelenske of NOSSCR for her input in this article – and on this crucial issue.

Young Adult SSR Issued



On September 12, 2011, the Social Security Administration (SSA) published another significant Social Security Ruling: SSR 11-2p, entitled “Documenting and Evaluating Disability in Young Adults.” 76 Fed. Reg. 56263-56271, available at www.gpo.gov. The purpose of this SSR, according to SSA, is to consolidate information from

the regulations on documenting and evaluating disability in young adults, and to provide guidance as to how SSA’s policies are to be used in determining disability under the rules.

In one of the many footnotes in this SSR (56 in all), SSA further points out that “[f]or simplicity, we refer in this SSR only to initial claims for benefits. However, the policy interpretations in this SSR also apply, with some exceptions, to age-18 redeterminations under section 1614(a)(3)(H)(iii) of the Act and 20 CFR 416.987 and to CDRs under sections 223(f) and 1614(a)(4) of the Act and 20 CFR 404.1594 and 416.994. When there is a difference in how the policy applies to age-18 redeterminations or to CDRs, we explain how the policy differs.” See note 6.

On the whole, SSR 11-2p appears to be a helpful consolidation of the rules for determining disability in adults, serving as a reminder to adjudicators of many things they are wont to ignore. It should be particularly useful in those confounding age-18 reviews that result in discontinuance of SSI benefits for individuals who previously had “listing-level” disability under the childhood standard. Per the SSR, “[t]he abilities, skills, and behaviors that young adults use to do basic work activities are essentially the same as those that older adolescents use for age appropriate activities.” It goes on to point out that although the domain analysis that applies in children’s claims does not apply to young adults, the domains “describe aspects of functioning that are relevant to our evaluation of a young adult’s work-related limitations.” By way of example, the SSR states:

...absent medical improvement or new evidence demonstrating that the prior finding was in error, a young adult who had an extreme limitation in the ability to interact and relate with others as a child will probably have extreme limitation in social functioning as an adult. Similarly, unless the impairment(s) has improved or there is new evidence indicating that the prior finding was in error, a finding of marked limitation in the ability to attend and complete tasks as a child is likely to translate to a marked limitation in the ability to concentrate, persist, or maintain pace in work-related task completion as an adult.

The SSR also contains what should be useful nuggets pertaining to the use of school and special education records in young adult claims. It refers back to the helpful guidance in the 2009 Childhood SSRs, in particular SSR 09-2p, which “applies equally to people age 18-22 that are still in special education.” SSR 11-2p emphasizes the importance of school information related to “transition services.” And again, as in SSR 09-2p, it reminds adjudicators that IEP (Individualized Education Programs) transition goals may be set so low that achievement of the goals does not necessarily reflect a lack of limitations.

SSR 11-2p also reminds adjudicators that evidence about a young adult’s functioning from school programs may indicate how well a young adult can use his or her physical or mental abilities to perform work activities. For example, school reported difficulties in understanding, remembering and carrying out simple instructions might indicate difficulties with work activities. Similarly, difficulties in communicating appropriately and spontaneously, maintaining attention for extended periods in the classroom, or relating to authority figures and responding appropriately to correction or criticism during school could translate into work difficulties.

Per the SSR, evidence of community experiences and job placements, whether or not substantial gainful activity, is relevant to the evaluation of young adult claims. Of note, evidence that a young adult has had

(Continued on page 5)

LS-NYC Plans DAP Trainings

Legal Services NYC (LS-NYC) is sponsoring a three-day festival of DAP continuing legal education programs on October 25th, 26th, and 27th. All events will be held at LS-NYC's central office, which is now located at 40 Worth Street, 6th Floor, New York, New York 10013. **For DAP-funded advocates in New York State, the entire program will be free.** The full program, which includes 11 sessions, offers training on Steps 4 & 5 of the Sequential Evaluation, Res Judicata and Reopening, Advocacy before the Appeals Council, Writing Pre-Hearing Memos, Federal Court Practice including EAJA fees, SSI Non-Disability Eligibility, Questioning Vocational Experts, Title II Auxiliary Benefits, and Handling SSI Children's Cases.

Register for any or all of the trainings at <https://www.learningcenter.legalservicesnyc.org/catalog>.

Trainers include: Ann Biddle, Chris Bowes, Kate Callery, Tanya Douglas, Ian Feldman, Michael Hampden, Susan Horwitz, Nelson Mar, Barbara Samuels, Louise Tarantino, Victor Torres, and representatives from the Office of the Regional Commissioner. If you have any questions about the mechanics of signing up for a session, please contact: learningcenter@ls-nyc.org.

Young Adult SSR Issued —Continued

(Continued from page 4)

multiple job placements as part of a transition plan might indicate unsatisfactory performance. Information about how much support the young adult may have needed is also relevant. And there is a wealth of guidance about evaluating work activity and participation in vocational programs (Section 301).

The SSR also reiterates that “working involves many factors and demands that may be stressful,” and “one person’s reaction to the stress associated with the demands of work may be different from another’s, even among people with the same impairments”; sources familiar with the young adult might be able to provide insight. The SSR refers adjudicators to SSR 85-15 for further discussion of mental disorders and stress, reaffirming that it remains a viable tool for advocates.

In determining “medically determinable impairments” (MDIs), adjudicators are reminded that young adults often have the same kinds of impairments as children, such as ADHD or language and learning disorders. And the SSR provides guidance on the application of the Medical-Vocational Guidelines (the grids), noting that the guidelines might not be applicable in many young adult cases. For example, if a young adult has a substantial loss of one or more of the basic mental demands of competitive unskilled work (as set forth in SSRs 85-15 & 96-9p), “the occupational base will be significantly eroded, despite vo-

ational factors that we would ordinarily consider favorable.”

The SSR acknowledges that young adults are more likely to have recent educational experiences that might provide for direct entry into skilled work and would need only basic communication skills for unskilled work. But impairments that affect communication must still be taken into account. For example, a young adult would be found not disabled even if illiterate under the grid rules. Illiteracy or limited reading ability, however, could be an indication of an underlying impairment (MDI) such as borderline intellectual functioning (BIF) that could affect residual functional capacity (RFC).

These are just a few of the highlights in the new SSR, which went into effect on September 12, 2011. Remember that there are also examples of ways in which the same types of evidence could indicate that a young adult is not disabled, which are just as likely to be cited by adjudicators as the ones noted above. Even if you don't have a young adult's claim that is active right now, it would be a great idea to read this SSR soon and often. And keep us informed of your successes with it, or your concerns about how it is - or is not - being applied.

REGULATIONS

SSA Proposes Skipping Step 4 in Denial Cases

Under the sequential evaluation process that SSA employs in determining disability, evidence of past relevant work (PRW) is necessary at step 4 of the analysis. Only if a claimant is unable to return to PRW may SSA go on to make a step 5 determination of disability using either the grid rules or vocational expert testimony. Pursuant to proposed regulations issued September 13, 2011, SSA would give adjudicators the discretion to skip step 4 in cases where it has “insufficient evidence” to make PRW findings. The agency noted that its proposed rules would “promote administrative efficiency” and help it to “make more timely determinations.” 76 Fed. Reg. 56357 (Sept. 13, 2011). Comments are due by November 14, 2011. <http://www.gpo.gov/fdsys/pkg/FR-2011-09-13/pdf/2011-23396.pdf>.

Under the proposed expedited process, if the adjudicator does “not have sufficient evidence about your past relevant work to make a finding at the fourth step, we may proceed to the fifth step of the sequential evaluation process.” The adjudicator has the discretion to make the decision whether to use the proposed expedited process, i.e., deciding whether “sufficient evidence” regarding PRW exists. SSA will “not require an adjudicator to make a reasonable effort to collect additional evidence [re PRW] if he or she could use this expedited process.”

The proposed rule would require the adjudicator to return to step 4 to further develop PRW information and determine whether the claimant can perform such work if a finding of disability was warranted at step 5 based on (1) the “special medical-vocation profiles,” (2) the Medical-Vocational Guidelines (the grids), either directly or as a framework, or (3) “an inability to meet the mental demands of unskilled work.”

On the other hand, if by proceeding to step 5, the adjudicator can determine that the claimant is not dis-

abled based solely on age, education and RFC, then the adjudicator need not return to step 4. According to SSA, the Social Security Act does not require a finding regarding past relevant work before it determines that the claimant is **not** disabled.

SSA says that the process to gather work history is “time-consuming,” “labor-intensive,” and leads to “delays” and “requires us to divert our limited resources.” SSA’s current budget situation seems to now be driving policy changes that the agency believes could result in “administrative efficiency,” especially in expediting the denial of cases. However, we question SSA’s statement that the proposed process “would not disadvantage any claimant.”

Please feel free to share your thoughts about these proposed changes so that we can submit timely comments that reflect DAP advocates’ concerns.



SSA Issues New POMS on PRW

Past relevant work is a hot topic at SSA. In addition to the proposed regulations discussed on page 6, SSA has issued new POMS covering a host of issues regarding Step four (Past Relevant Work - PRW) determinations: <https://secure.ssa.gov/apps10/public/reference.nsf/links/09192011023623PM>. Per SSA's summary, the new sections are as follows:

DI 25005.001 Determination of Capacity for Past Relevant Work (PRW) -- Basics of Step 4 of the Sequential Evaluation Process - information about the basic policies for step 4 of sequential evaluation.

DI 25005.015 Determination of Capacity for Past Work-- Relevance Issues - details on how to determine if past work is relevant, and examples of work that SSA may consider or will never consider relevant.

DI 25005.020 Past Relevant Work (PRW) as the Claimant Performed It – evaluation of past relevant work (PRW) as the claimant performed it. The section includes information on how to evaluate composite jobs, work done in a foreign country, part time work, work with mandatory overtime, alternative work schedules, and work with employer accommodations.

DI 25005.025 Past Relevant Work (PRW) as Generally Performed in the National Economy – evaluation of PRW as generally performed in the national economy. It includes tips on how to locate an occupation in the Dictionary of Occupational Titles (DOT) and gives examples of types of work that may not have a DOT occupational counterpart.

DI 25005.050 Making the Past Relevant Work (PRW) Determination - how to make the step 4 determination. This section also addresses how to evaluate a not severe impairment that prevents PRW because of its unique features.

Significantly, the POMS mandate adjudicators to perform a function-by-function comparison of the claimant's residual functional capacity (RFC) with the demands of the past work as actually performed or as generally performed. Among the highlights, the new POMS confirm SSA's "policy" that illegal work (work that was criminal activity), even if it resulted in substantial gainful activity (SGA) level earnings, should not be considered PRW. Nor should volunteer work, unsuccessful work attempts, or work done during a closed period of disability. Part time work, seasonal work, and work done during certain periods of disability, however, might be relevant. The inability to obtain licensure because of physical/mental limitations might be relevant to a determination, even though the inability to obtain a license in and of itself would not be; the limitations themselves might preclude the ability to perform the past relevant work.

The guidance on how issues about past work as generally performed versus as actually performed should be adjudicated is also significant. Adjudicators must obtain information from the claimant about how past work was actually performed, rather than try to determine it from the Dictionary of Occupational Titles (DOT). A "composite" job (i.e., a job with significant elements of two or more occupations and thus no counterpart in the DOT), cannot be considered "as generally performed." Additionally, assessment of a claimant's RFC to perform PRW must take into account work that required more than forty hours per work as actually performed. The standards, however, for evaluating employer provided accommodations are convoluted at best.

More analysis to come, but these new POMS are very significant - check them out! While there are undoubtedly aspects that will be used to deny claims, there are many aspects that should prove useful to advocates. They became effective on September 20, 2011.

How Much is That Doggy in the Window?

SSA has updated POMS SI 01130.430 to clarify that it does not count animals or pets as resources when deciding a claimant's eligibility for SSI. Just so you know, pets can include cats, dogs, hamsters, horses, monkeys, or snakes. The same POMS were revised in 2005 to exclude all household goods and personal effects, regardless of dollar value. Note that animals owned for investment purposes, such as a horse or dog for breeding, for resale, or investment may be considered countable resources.

Regulations Allow SSA to Ban Individuals

SSA published regulations effective September 2, 2011, which allows it to ban certain individuals from entering its offices. Citing the rising number of threats of violence against SSA personnel, SSA promulgated a final rule permitting the banning of any individual who (1) uses force or threats of force against SSA personnel or offices, including sending threatening letters or other communications; (2) engages in disruptive conduct that impedes SSA personnel from performing their duties; or (3) engages in disruptive behavior that prevents members of the public from obtaining services.

The regulations provide that a ban will be issued only after an agency manager determines that the individual poses a threat to the safety of SSA personnel or visitors, SSA offices, or the operational effectiveness of the agency. The banned individual will be provided with written notice of the ban, which will inform the individual that the ban applies to all SSA offices nationwide. Individuals will be provided with in-person services only if no alternative means, such as using the toll-free number, or the internet, are available. The notice will also provide specific details of the prohibited conduct that served as the basis for the ban.

A banned individual may appeal the ban within sixty days of the notice with a written request that clearly states why the ban should be lifted and provides relevant documentation that supports removal of the restriction, including medical documentation, applicable psychiatric evaluations, work history, and any criminal record. The banned individual must prove by a preponderance of the evidence (meaning that it is more likely than not) that he or she no longer poses a threat to the safety of SSA personnel, visitors, offices, or the operational effectiveness of the agency. The ban will remain in effect while the appeal is pending. The banned individual may also request periodic review of the ban decision, but these reviews are limited to every three years beginning with the date of the original notice of the ban, or the appeal decision.

SSA has determined that it had good cause for dispensing with the usual notice and comment period before issuing these regulations, again citing the dramatic rise in the number of threats to SSA personnel and property. The rule is now found at 20 C.F.R. §422.901 et seq. SSA is, however, inviting public comments, which are due by November 1, 2011. See 76 Fed. Reg. 54700 (September 2, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-02/pdf/2011-22492.pdf>.

SSA Adds Cardiac Conditions to Compassionate List



In July 2011, SSA announced 12 additional Compassionate Allowances conditions involving severe heart diseases, bringing the total number of conditions in the expedited disability process to 100. Compassionate Allowances are a way to quickly identify diseases and other medical conditions that, by definition, meet Social Security's standards for disability benefits. These conditions primarily include certain cancers, adult brain disorders, and a number of rare disorders that affect children.

The Compassionate Allowances initiative is one of two parts of the agency's fast-track system for certain disability claims. When combined with the Quick Disability Determination (QDD) process, SSA last

year approved more than 100,000 cases under this system, usually in less than two weeks. This year, the agency expects to fast-track nearly 150,000 cases.

SSA has held seven public hearings and worked with experts to develop the list of Compassionate Allowances conditions. The hearings also have helped the agency identify additional ways to improve the disability process for applicants with Compassionate Allowances conditions. As a result, beginning in August, SSA is eliminating development of work history for an applicant who has a condition on the list.

More information on the Compassionate Allowances initiative is available at www.socialsecurity.gov/compassionateallowances.

SSA Embraces the Electronic Age

Whether it is eliminating completion of paper forms, or directing advocates to use electronic access to client information or to get direct payment, SSA is taking a very 21st century approach to the wonders of technology.

In July 2011, SSA revised its regulations to reflect that it was no longer requiring state agency personnel to complete Form SSA-538, Childhood Disability Evaluation Form, when making an initial or reconsideration decision on a child's disability. 76 Fed. Reg. 41685 (July 15, 2011), effective upon publication.

SSA noted that it now uses “a Web-based tool that assists our adjudicators in making disability determinations in several States, and we plan to expand its use to other States. We are revising our regulation to reflect the new tool. We are not changing the requirement that State agency medical and psychological consultants must affirm the accuracy and completeness of their findings of fact and discussion of the supporting evidence, only the manner in which they may provide the required findings and affirmation. We expect that this revision will improve our efficiency by increasing our use of electronic resources.” The new rule is found at 20 C.F.R. §416.924(g).

In August 2011, SSA asked for comments on its program of online access to records before rolling it out to the general public. The program has been available to advocates in selected locations for some months, and SSA sought comments from those users

on how the system might be improved. 76 Fed. Reg. 45902 (August 1, 2011). <http://www.gpo.gov/fdsys/pkg/FR-2011-08-01/html/2011-19406.htm>

In September 2011, issued final rules that require representatives to use the agency's electronic services on matters for which the representative requests direct fee payment. 76 Fed. Reg. 56107 (Sept. 12, 2011). <http://www.gpo.gov/fdsys/pkg/FR-2011-09-12/html/2011-23232.htm>.

SSA is revising its regulations to add 20 C.F.R. sections 404.1713 and 416.1513, and to amend sections 404.1740 and 416.1540, “to require that claimant representatives use our electronic services . . . on matters for which the representatives request direct fee payment. . . . We are also adding the requirement to use our available electronic services on matters for which the representative requests direct fee payment as an affirmative duty in our representative conduct rules. These revisions reflect the increased use of technology in representatives' business practices. We expect that the use of electronic services will improve our efficiency by allowing us to manage our workloads more effectively. These rules do not require claimants to use our available electronic services directly; they only require their representatives to use the services on matters for which the representatives request direct fee payment.”

These final rules are effective on October 12, 2011.

Online Access Available at Appeals Council

Online access to eFolders is now available for cases at the Appeals Council level, as well as the Administrative Law Judge (ALJ) level. That means that an advocate who is enrolled for online access will be able to review Appeals Council exhibit files on SSA's secure website in cases if an Appointment of Representative (1696) is on file. If not yet enrolled, visit <http://www.ssa.gov/representation/eFolder.htm>.

Advocates will also be able to submit new evidence electronically to the Appeals Council. Although evidence may still be submitted by mail or fax, bear in mind that the Appeals Council is allegedly now 95% electronic. Any paper submissions will be scanned into the exhibit file, except in those few remaining “paper” files.

There are, however, two important caveats. First, a Request for Review by the Appeals Council cannot be filed electronically. A paper form HA-520 is still required. Second, advocates must obtain new, Appeals Council specific bar codes before submitting evidence to the Appeals Council.

Bar codes used at the ALJ level will NOT work at the Appeals Council. Nor will bar codes be automatically generated by the Appeals Council upon the filing of a Request for Review. A request for a new bar code can be made in writing, by fax or by telephone. Office of Appellate Operations (OAO) Executive Director Patricia Jonas suggests calling the Congressional and Public Affairs Branch at 1-877-670-2722 to request a new bar code.

Hearing Listing To Be Revised?

The Social Security Administration is soliciting comments on the medical criteria used to determine when hearing loss is disabling. Although no new regulations have been proposed, SSA is apparently considering changes as part of its “ongoing effort to ensure that our criteria are effective and reflect the latest advances in medicine.” In particular, SSA has posed the following questions:

- Are the criteria consistent with recent advances in medical knowledge, treatment, or methods of evaluating hearing loss?
- Are there any problems that you see with the present medical criteria? For instance, are the criteria difficult to understand? Are they appropriate for the impairment?
- Do the criteria require tests that are not available in some areas of the country? Are any of the required tests outdated?

- What revisions would you suggest for making the criteria more accurate or relevant?
- What are the specific reasons that the revisions are necessary?
- How could we make the changes?
- What results and benefits do you anticipate from the proposed revisions?

Please send your recommendations by e-mail to Listings.Comments@ssa.gov, by telefax to (410) 966-3372, or by letter to Director, Office of Medical Listing Improvement (OMLI), Social Security Administration, 4420 Annex Bldg., 6401 Security Boulevard, Baltimore, MD 21235-6401. Please share this letter with your colleagues, associates, and others, who also may want to comment. You can contact Tiya Marshall at tiya.marshall@ssa.gov or Joanna Firmin at joanna.firmin@ssa.gov if you have any questions.

OTDA Issues Interim Assistance INF

On September 15, OTDA/CEES (Office of Temporary Disability Assistance/Center for Employment and Economic Supports) issued 11 INF-10: “Electronic Interim Assistance Reimbursement (eIAR) Implementation Questions and Answers.” This INF contains OTDA’s “most recent set of questions and answers pertaining to the Electronic Interim Assistance Reimbursement (e-IAR) process.”

The eIAR process, which was implemented November, 2010, “is a project designed, implemented, and mandated by the Social Security Administration (SSA) to automate the Interim Assistance Reimbursement (IAR) paper check process by utilizing a SSA secure website known as Government-to-Government Services Online (GSO).

The computerized process allows the SSA to calculate the initial and post-eligibility IAR amount owed to the Social Services Districts (SSDs). The amount due is based on the SSD workers’ reported IA payment information inputted into and transmitted

through the GSO. In addition, the system includes a comprehensive e-mail alert system, retains an electronic record of the IAR determination for review and query, and automatically notifies SSD workers via e-mail of the reimbursement determination and payment.”

The INF is available at:
<http://www.otda.ny.gov/policy/directives/2011/INF/11-INF-10.pdf>

Links to the four attachments at cited in the directive are at:
<http://www.otda.ny.gov/policy/directives/2011/>

The Q&As are in Attachment 1 at:
<http://www.otda.ny.gov/policy/directives/2011/INF/11-INF-10-Attachment-1.pdf>

Thanks to Jim Murphy of the Cortland office of Legal Services of Central New York for alerting us to this “behind the scenes” look at the IA process.

SSA Offices Closing Earlier



As if it wasn't hard enough to get through to the local field and district offices, now a new barrier has been imposed: effective August 15, 2011, Social Security field offices nationwide began closing to the public 30 minutes early each day. For example, a field office that was previously open to the public Monday through Friday from 9 a.m. to 4 p.m. will close daily at 3:30 p.m.

According to the SSA press release announcing this change, it was the direct result of congressional budget cuts: "Congress provided Social Security with nearly \$1 billion less than the President requested for the budget this fiscal year, which makes it impossible for the agency to provide the amount of overtime needed to handle service to the public as we have in the past." Agency employees will continue to work their regular hours, but will presumably have more time to do necessary paper-work, or computer work, as the case may be. SSA hopes that this shorter public window will allow employees to complete face-to-face service with the public without incurring the cost of overtime.

Test Your Knowledge of SSA History

Do you how much Ernest Ackerman of Cleveland, the first recipient of Social Security retirement benefits in March 1937, received? Was it:

- a. \$177
- b. \$17.77
- c. \$7 or
- d. 17 cents???

Test your knowledge about this and much more SSA trivia at <http://www.ssa.gov/history/quizpuz.html>

New POMS Govern Collection of VA Evidence

SSA has "completely" revised POMS DI 22505.022 - Developing Medical Evidence of Record (MER) from the Department of Veterans Affairs (VA) Veterans Health Administration (VHA) Medical Facilities - to reflect VA and SSA electronic business processes. According to SSA's announcement of the revisions, the "new procedures are mandatory and reflect the VA commitment to respond to SSA and Disability

Determination Services medical evidence requests in a timely, accurate, secure, and complete manner."

Of particular note is SSA's instruction to adjudicators to "[m]ake **every reasonable effort** to help the claimant obtain relevant VHA medical records." [Emphasis in original.] Something to bear in mind when you are struggling to get those VA records?

Medicaid Managed Care Drug Coverage Changes Loom

Beginning in October, Medicaid managed care recipients, as well as individuals getting Family Health Plus, will get their prescription drugs through their managed care plan, rather than through fee-for-service Medicaid. *This change affects approximately 3 million Medicaid and FHP recipients across New York State and may make it more difficult for your DAP clients to access their prescription drugs.*

For more details, see the article on the nyhealthaccess.org website at <http://wnylc.com/health/news/24/> or look at the fact sheet at

<http://www.empirejustice.org/issue-areas/health/medicaid--related-programs/medicaid-managed-care-fact.html>

COURT DECISIONS

Federal Court Finds Disability, Reverses, and Orders Payment



According to 2010 data from the Social Security Administration (SSA), only 4% of cases in federal district court are reversed for payment of benefits. Getting an order of reversal, therefore, is understandably cause for

joy and jubilation for plaintiff's counsel. A recent case from the N.D.N.Y. that was reversed for payment probably made Chris Cadin of Legal Services of Central New York one such very happy fellow.

In the case of *Cook v. Astrue*, 2011 WL 2490996 (N.D.N.Y. 2011), the Plaintiff applied for DIB and SSI in early 2005, alleging an inability to work since 2004 due to various mental and emotional impairments. The Commissioner initially denied Plaintiff's applications, and an Administrative Law Judge (ALJ) then issued a decision finding no disability.

In his decision, the ALJ found that the Plaintiff's severe impairments, including major depression, social/generalized anxiety and obsessive compulsive disorder, did not meet or equal a listing; her post-traumatic stress syndrome (PTSD) was not severe. The ALJ also found that the Plaintiff retained the residual functional capacity (RFC) to perform work at all levels of exertion. But the ALJ also determined that due to her non-exertional mental impairments, the Plaintiff was limited to a low stress environment with no production pace requirements or supervisory duty, and only simple decision-making.

Further, the ALJ concluded that the Plaintiff should avoid crowds and the use of telephones. The ALJ then determined that the Plaintiff could maintain time and attendance if all of these restrictions were observed. As a result, the ALJ found that the Plaintiff could return to her past job as a library page. In the alternative, considering her age, work experience and

RFC, there existed jobs in the national economy that Plaintiff could perform.

After the Appeals Council adopted the ALJ's decision, Chris filed an action in the N.D.N.Y., advancing four chief arguments in support of her contention that the Commissioner's decision should be reversed: 1) that the ALJ erred in finding that her PTSD was not a severe impairment; 2) that the ALJ's RFC assessment was flawed; 3) that the ALJ erred by finding that she was capable of performing her past relevant work as a library page; and 4) that the ALJ's hypotheticals presented to the vocational expert were flawed.

Magistrate Judge Bianchini found that the ALJ did not err with respect to Plaintiff's PTSD. Not only was there evidence to support such conclusion, but any error was harmless because the ALJ found other severe impairments and continued on with the sequential analysis.

Regarding the RFC assessment, the Magistrate found that the ALJ committed reversible error when he disregarded the testimony of Plaintiff's treating psychiatrist as well as the testimony of her social worker/mental health coordinator in favor of the Plaintiff's testimony. Plaintiff's social worker/mental health coordinator submitted a letter describing Plaintiff's work at a transitional, vocational program for people with mental illness, noting that Plaintiff had numerous limitations in her ability to function in a normal work environment. The social worker described how numerous attempts and various support measures failed to produce a successful transition into normal, competitive, remunerative work environments. Similarly, Plaintiff's psychiatrist found her to have marked limitations with regard to understanding, remembering and carrying out detailed instructions, as well as marked limitations in responding appropriately to work pressures and changes in a normal work

(Continued on page 13)

Federal Court Finds Disability—Continued

(Continued from page 12)

setting. These findings directly contradicted the ALJ's findings.

Despite the fact that the treating psychiatrist's opinions were presumptively entitled to controlling weight, the ALJ decided to instead credit the Plaintiff's self-reports of her abilities over this professional opinion of a treating source. The ALJ accepted Plaintiff's testimony because he believed she had "no motivation" to overstate. But the court here noted that Plaintiff was very nervous and anxious during the hearing and was also mentally ill. She had a strong desire to please the ALJ by telling him what she believed he wanted to hear. Further, most of her answers were equivocal until the ALJ prodded her for the answer he wanted to hear. The ALJ's discounting of the opinion of Plaintiff's treating social worker in favor of Plaintiff's statements also constituted reversible error for the same reasons.

The ALJ advanced two reasons to support his finding that the Plaintiff could perform her past relevant work as a library page: 1) Plaintiff's own statements that she could go back to work, and 2) the testimony of the vocational expert (VE). As noted above, the Court found that it was error for the ALJ to credit Plaintiff's statements in light of the substantial amount of evidence that indicated her true, documented limitations were much more severe.

The ALJ's reliance on the testimony of the VE was misplaced because the hypothetical questions presented to the expert were flawed. The hypothetical questions presumed that Plaintiff could maintain the time and attendance requirements customarily required by employers. Based on this assumption, the VE concluded that Plaintiff could perform her past work. However, the assumption that she could maintain time and attendance was based almost entirely on Plaintiff's own statements and did not accurately represent her true limitations. Thus, the Court found, the testimony of the VE could not amount to substantial evidence. The same flaw then undermined the ALJ's 5 step analysis which he based on the same VE testimony.

The court found persuasive proof of disability in this case. Plaintiff's treating psychiatrist and social

worker opined that she had numerous marked limitations. The Magistrate found that substantial evidence existed in the record to indicate conclusively that the Plaintiff was disabled, in particular that she was unable to perform the nonexertional demands of competitive, remunerative employment on a full-time basis. In contrast, the evidence cited by the ALJ (primarily Plaintiff's testimony) was suspect for the reasons stated above and was contradicted by credible and compelling reports from Plaintiff's treating providers and her employer. Accordingly, the court found proof of disability to be persuasive and concluded that a remand for further evidentiary proceedings would serve no purpose. The Court remanded the case for calculation of benefits.

Congratulations to Chris Cadin for this significant victory.

Thank you to Albany Law School intern Matthew Vassallo for this analysis.

Artificially Conceived Child Not a Child for SSA

In March 2011, we reported on a January 2011 decision from the Third Circuit holding that twins born by artificial insemination after the death of their biological father were entitled to Social Security survivors' benefits on his account. *Capato ex rel. B.N.C. v. Commissioner of Social Sec.*, 631 F.3d 626 (3rd Cir. January 4, 2011). The Third Circuit relied on *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004) to find that the twins were the children 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.] It found that it had no need to consider the intestacy laws of Florida, the state where the father died, under §416 (h), since parentage was not in dispute in this case.

The same article referenced a similar case, which was pending before the Eighth Circuit. The Eighth Circuit has now weighed in, holding that the daughter born to Patti Beeler by artificial insemination after her husband's death is not entitled to benefits on his account. *Beeler v. Astrue*, --- F.3d. ---, 2011 WL 3795103

(August 29, 2011). Although there was no dispute as to paternity, the court found that a child's eligibility under the Commissioner's regulations is controlled by the applicable state laws governing intestacy. In so ruling, the court deferred to the Commissioner's interpretation of the regulations in issue.

The Eighth Circuit expressed its disagreement with both the Ninth and Third Circuit outcomes, opining that the courts misread the legislative history. It acknowledged the conflict in the circuits, citing *Schafer v. Astrue*, 641 F.3d 49 (4th Cir. 2011), in which the Fourth Circuit agreed with the Commissioner. Note that it was the Commissioner who appealed in *Beeler*.

Ironically, the Iowa intestacy laws were amended while this action was pending to allow intestate succession rights to posthumously conceived children in certain circumstances. The Court held, however, that the new law was not applicable to Beeler's daughter. Of note, New York laws have not been similarly amended.

Legal Work Not Sedentary?

Most legal work is not necessarily thought of as aerobic activity – although back in the days when you were schlepping innumerable paper files to and from ODAR it might have seemed that way. In fact, the *Dictionary of Occupational Titles* classifies “attorney” as a sedentary position. But a federal court judge in Newark, New Jersey, recently held that an insurance company erred in denying long term disability to an attorney based on the assumption that his past work was sedentary.

Acknowledging that the plaintiff was “no ordinary lawyer,” the court found that the “ever-traveling and on-the-go litigator,” who had been billing 2,000 hours per year, spent most of his time outside the office, litigating cases, developing a client base, lecturing on environmental law and serving on a government commission. He was often out of state, traveling by air and carrying heavy files. After the attorney was seriously injured in a car accident, he was no longer able to maintain that schedule. In fact, after he was diagnosed with regional pain syndrome and post-traumatic stress disorder, he was barely able to perform any of his duties.

The plaintiff's own lawyer criticized the insurance company's practice of denying benefits on an “own-occupation policy” by adopting a standardized definition of the occupation without looking into the specific facts of how the job was actually performed. For more information on *Simon v. Prudential Life Ins. Co. of America*, see <http://tinyurl.com/3zcr8gp>.

Advocates should remember, however, that this argument cuts both ways – at least in the Social Security disability world. See, for example, *Jasinski v. Barnhart*, 341 F.3d 182 (2d Cir.2003), where the Court of Appeals held that the claimant could return to her past relevant work as a teacher's aide, which she actually performed at a sedentary level, although the DOT defined its exertional requirements as light in nature. And see SSA's new POMs on evaluating past relevant work as actually performed versus generally performed, which are discussed on page 7 of this newsletter.

ADMINISTRATIVE DECISIONS

HIV Listing Claim Prevails at Appeals Council

Buffalo Bruce Caulfield of Neighborhood Legal Services reports a significant victory at the Appeals Council. The Appeals Council found that his client met listing 14.08K. It relied on clear medical evidence demonstrating the claimant's low CD-4 counts and other symptoms that the ALJ had blatantly ignored. In fact, the ALJ had merely noted that the claimant, who had been HIV positive since age 14, was doing very well with adherence to medications. He dismissed listing 14.08 in one sentence.

Instead, the ALJ devoted most of his thirteen page decision to what might be described as a tirade about the claimant's alleged substance abuse. In a convoluted decision, he found her testimony that she was

no longer using drugs and alcohol incredible, yet he found she was credible concerning her symptoms and limitations when she was abusing drugs and alcohol. He also ignored all the treating source evidence of record.

Luckily for the claimant, the Appeals Council quickly – within three months of the ALJ's decision – recognized the error of his ways. It reversed the ALJ's decision, specifically finding that her substance abuse was not a contributing factor material to her determination of disability.

Appeals Council Reverses ALJ Findings

Ellen Rita Heidrick of the Southern Tier Legal Services division of LAW-NY is celebrating her first fully favorable decision from the Appeals Council. Ellen's client's SSI benefits had been terminated following an age 18 review. Ellen argued at the ALJ hearing and to the Appeals Council that her client met listing 12.05C. The ALJ agreed that the young man's IQ scores, all of which were in the mild mental retardation or borderline range, were severe and met the first prong of listing 12.05C – an IQ score between 60 and 70. The ALJ found, however, that his second impairment of social anxiety was not severe.

The Appeals Council disagreed, finding that the client's anxiety disorder was indeed severe. The Appeals Council found that the ALJ had relied too heavily on the findings of an earlier consultative examiner, to the exclusion of a later one and – significantly – an examination performed in conjunction with a subsequent application that was approved. In fact, the Appeals Council granted review based in part on its new and material evidence provisions, relying on the new

evidence developed in conjunction with the subsequent claim. Although Ellen was chagrined that the Appeals Council did not agree that the client meets listing 12.05C, she was pleased with its ruling that he cannot perform work without support or maintain a full 40-hour week schedule.

Ellen also notes that if not for the subsequent application and the new consultative report it generated, this case might not have had the same favorable outcome. Yet another reason for concern over the new Social Security Ruling SSR 11-1p, discussed on page one, which prohibits the filing of new applications while appeals are pending. In the meantime, congratulations to Ellen for making the most out of the old rules while she could!

ALJ Rules on 12.05C

In another case involving listing 12.05C, “Buffalo Bruce” Caulfield of Neighborhood Legal Services convinced an ALJ to order IQ testing before the hearing. Bruce’s client had already undergone a consultative examination, at which he was inexplicably given a TONI (Test of Nonverbal Intelligence), on which he scored an IQ of 76. TONI tests are often administered when a claimant is unable to speak English or otherwise communicate effectively enough to undergo a WAIS (Wechsler Adult Intelligence Scale) examination.

Bruce persuasively argued to the ALJ that TONI scores are typically higher than WAIS-IV scores, which is considered a more comprehensive assessment of verbal comprehension and perceptual reasoning. Bruce cited Section D.1.6.d of listing 12.00:

Generally, it is preferable to use IQ measures that are wide in scope and include items that test both verbal and performance abilities. However, in special circumstances, such as the assessment of individuals with sensory, motor, or communication abnormalities, or

those whose culture and background are not principally English-speaking, measures such as the Test of Nonverbal Intelligence, Third Edition (TONI-3), Leiter International Performance Scale-Revised (Leiter-R), or Peabody Picture Vocabulary Test—Third Edition (PPVT-III) may be used.

Bruce’s client was English speaking, and his file was devoid of any evidence of sensory, motor or communication abnormalities. It was unclear why the Division of Disability Determinations would have ordered a TONI in the first instance.

The ALJ agreed with Bruce, and ordered WAIS-IV testing, which did indeed reveal lower IQ scores in the 12.05C range. Those scores, combined with the claimant’s mood disorder and spine dysfunction, prompted the ALJ to award benefits under listing 12.05C. The claimant is now receiving SSI thanks to Bruce’s powers of persuasion.

Benefits Awarded in Selective Mutism Case

In an unusual childhood SSI case, an ALJ recently awarded benefits based on listing 112.07 Somatoform, Eating and Tic Disorders. The ALJ found medically documented proof under Section 3.b. of that listing of “persistent nonorganic disturbance” of speech in the case of a young girl who refused to speak. Although the claimant was difficult to evaluate because of her lack of cooperation, several evaluators had determined that she also had significant expressive and receptive language delays, as well as psychiatric problems.

Alan Block of Neighborhood Legal Services in Buffalo notes that one of the turning points in the case was the report of a consultative examiner, who finally pinned down the diagnosis of “selective mutism.” The ALJ agreed that in addition to the diagnostic cri-

teria required for the listing, she also met the “B” criteria in that she had marked impairments in age-appropriate cognitive/communicative function, and age-appropriate social functioning. Kudos to Alan for pushing the envelope in this case.

TRAC Analyses of SSA Data Generate Controversy

According to an analysis conducted by TRAC (Transitional Access Records Clearinghouse), despite the SSA's long standing goal of reducing the number of pending disability cases, very recent SSA data show that these matters continue to head in the opposite direction and climbed to 746,712 at the end of June. <http://trac.syr.edu/tracreports/ssa/259/>. The increase -- up 7.5% from what it was a year ago -- marked the fourth straight quarter that the number of these cases has climbed. These trends were consistent with earlier data released by TRAC for the previous quarter. <http://trac.syr.edu/tracreports/ssa/253/>.

SSA was quick to dispute TRAC's initial findings. In a press release issued on June 20, 2011, Commissioner Astrue characterized TRAC's analysis as "sloppy and irresponsible." Astrue argued that while the number of cases waiting for hearings might have increased, the waiting time had nonetheless gone down during the period in issue. <http://www.ssa.gov/pressoffice/pr/trac-report.htm>. Not surprisingly, TRAC responded, defending its report: http://trac.syr.edu/tracreports/ssa/253/include/side_2.html.

The Transactional Records Access Clearinghouse (TRAC) is a data gathering, data research and data distribution organization at Syracuse University.

<http://trac.syr.edu/aboutTRACgeneral.html>. It has issued another report that has garnered even more attention. That report analyzes the disparity among ALJ decisions in individual ODARs: <http://trac.syr.edu/tracreports/ssa/254>. Needless to say, SSA quickly responded to that report with another press release in which it criticized TRAC's "methodological sloppiness" and for "comparing apples and oranges." <http://www.ssa.gov/pressoffice/pr/trac-report-2.htm>.

That study has made its way into the popular press (see, e.g., http://www.usatoday.com/money/workplace/2011-07-01-disability-denials_n.htm) and the halls of Congress. The House Subcommittee on Social Security has already held a hearing on the role of ALJs and has asked the agency's inspector general to investigate the agency's oversight of judges. <http://waysandmeans.house.gov/News/DocumentSingle.aspx?DocumentID=255152>.

We will be anxious to see what TRAC tackles next....

Appeals Council Notices Misdated

Appeals Council notices – both remand and denial notices – dated July 29, 2011 through August 10, 2011, were issued erroneously. Per Patricia Jonas, Executive Director, Office of Appellate Operations, a coding error at Central Printing resulted in these notices being rejected and resent at a later date. These electronically signed notices were resubmitted to Central Printing and mailed August 15-17, 2011 - but they retain the original dates noted above.

Despite the earlier dates on these notices, they will be presumed to have been mailed on August 19, 2011,

and received by the addressees on or before August 24, 2011.

If you received a denial notice with one of the July 29th through August 10th dates, your client's 60 day appeal period should not begin to run until August 24, 2011. Presumably, SSA will not object to appeals filed within that later time frame. It will probably be necessary to allege these facts in your complaint – and it is always helpful to include a date stamped envelope to bolster your claim just in case!

WEB NEWS

Searching Social Security Regulations, Law and Cases Just Got Easier



A new research tool on the NOSSCR (National Organization of Social Security Claimants' Representatives) website has made searching for all manners of authority related to practicing before the Social Security Administration (SSA) much easier. Easy-to-use links connect to SSA webpage for the latest statutes, regulations, POMS, Rulings and Hallex provisions. Another link enables Google searches for case law and law journals.

<http://www.nosscr.org/links.html>

GAO Study Examines Work-Related Overpayments

Disability Insurance (DI) overpayments detected by SSA increased from about \$860 million in fiscal year 2001 to about \$1.4 billion in fiscal year 2010, though the full extent of overpayments to beneficiaries who have returned to work and are no longer eligible is unknown. A recent Government Accountability Office (GAO) undertook an initial study that examined SSA's efforts to identify, prevent, and ultimately collect overpayments related to ineligibility due to work activity.

<http://www.gao.gov/products/GAO-11-756T>

Website Allows National Search for Quality MDs and Hospitals

The Robert Wood Johnson Foundation launched a national online directory for patients to find reliable information on the quality of health care provided by physicians and hospitals in their communities. From Maine to California, medical patients can scroll over a U.S. map and find Web-based resources to help them choose a doctor or hospital in their town based on whether patients received recommended tests and treatment, the outcomes of their care, their experience with providers, or the overall cost of care.



<http://www.rwjf.org/qualityequality/product.jsp?id=72540>

Health Care Needs for Young Adults Explored

Young adults who exit Supplemental Security Income (SSI) after their age-18 eligibility redetermination may have greater health-related unmet needs than those who remain on SSI, according to a recent Health Services Research study. Access to care, particularly insurance coverage (either Medicaid or non-Medicaid), seems to be a critical factor in explaining differences in health care, according to the study.

<http://www.dentistryiq.com/index/display/news-display/1467702781.html>

New Diagnostic Criteria for Fibromyalgia Approved

In 2010, the American College of Rheumatology made a provisional approval of new diagnostic criteria for fibromyalgia. The article can be found at

http://www.rheumatology.org/practice/clinical/classification/fibromyalgia/2010_preliminary_diagnostic_criteria.pdf

WHAT IS...

What is...Migraine Related Nausea

Many people with migraines also experience stomach problems and nausea with their headaches. In fact, migraines are the type of headache most likely to make patients nauseated. Eight out of every 10 people in the U.S. who are diagnosed with migraines report experiencing nausea. Although millions of people suffer from migraines with nausea, scientists have not yet been able to determine exactly why.

Certain groups of people are more likely to experience nausea with a migraine. This includes women and people who are prone to motion sickness. Between 5% and 20% of the general population experiences motion sickness. And movement-related nausea is experienced by about 50% of the people who get migraines.

The landmark American Migraine Prevalence and Prevention Study, conducted by the National Headache Foundation, found that those with frequent migraine headache-related nausea experienced more severe pain and worse outcomes than those with rare or no nausea. Frequent nausea also seemed to serve as a predictor of patients' satisfaction with their treatments and ability to perform everyday activities.

According to migraine specialists, millions of people have a hard time finding relief from medication because of migraine-related nausea as well as pain. Some patients with nausea delay or skip taking their oral treatment. Recognizing nausea may be a key to reducing the overall burden of migraine for certain sufferers.

The combination of disabling pain and associated symptoms of migraines often prevent people from performing daily activities. While symptoms and incidence vary among patients, typical attacks can last from four to 72 hours and the symptoms occurring during pre and post headache phases can last several days. Patients experiencing nausea with their migraines were found to have greater odds of experienc-

ing many migraine side effects; often these symptoms present themselves more acutely in these patients than in those who did not suffer nausea with their migraines. Treating nausea may go a long way towards reducing the suffering experienced by patients with frequent migraines.

For more information on Migraines and Migraine-Related Nausea, see www.MigraineNausea.com www.headaches.org.



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

Genier v. Astrue, 606 F.3d 46 (2d Cir. 2010)

Court of Appeals remanded for further proceedings where the ALJ's decision was based on a serious misunderstanding of the claimant's testimony. The claimant's testimony relating to his ability to perform household chores *at the time of the hearing* did not pertain to the time when he completed the questionnaire or to any time prior to his bariatric surgery. Since the ALJ's adverse credibility finding, crucial to the rejection of the claim, was based on a misreading of the evidence, the court held that it contradicted the obligations to consider all relevant medical and other evidence, citing 20 C.F.R. §404.1545(a)(3).

Zabala v. Astrue, 595 F.3d 402 (2d Cir. 2010)

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

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

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

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

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

Lamay o/b/o KPD v. Astrue, 562 F.3d 503 (2d Cir. 2009), cert denied 130 S.Ct. 1503 (U.S. 2010)

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

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

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



END NOTE

Are You Suffering from PVS?

Labor Day has come and gone, the summer is officially over and everything seems to be back in full-swing again. For some, the beginning of Fall is an invigorating time. Others, however, dread the end of vacations or more relaxed summer schedules. It is a time of year, according to a recent article in the *Wall Street Journal*, when therapists report an increase in people seeking help. Although there are few studies or statistics about this, researchers have dubbed it “Post Vacation Syndrome” – or PVS.

PVS, while probably not a disability, can manifest itself with irritability, anxiety, lack of motivation, difficulty concentrating, and a feeling of emptiness. These emotions can last up to a few weeks post vacation. (Experts warn that if these symptoms last longer or become more severe, they may actually be signs of serious depression rather than end of summer melancholy.)

Some people experience a minor version at the end of the weekend. Between 39-75% of Spanish workers experience it when returning to work after what is typically a month long vacation in August in Spain.

While several studies find that vacations do lift our spirits, those effects are usually short-lived. As the *WSJ* article notes, “[e]ven the best jobs don’t compare well to carefree days at the beach.” The transition may be hardest for those of us who made long to-do lists but did not quite get through them during the summer. And for some, the problem is compounded Seasonal Affective Disorder (SAD), which can begin to set in as the hours of daylight wane in early autumn.

What to do? Experts recommend getting fit. Those who added exercise to a regime of anti-depressants fared better, according to a recent study in the *Journal of Clinical Psychiatry*. Exercising outdoors, espe-

cially in the morning, can also help combat SAD. Savor the highlights of your summer and your vacation, and plan some long weekends or other fun “mini-vacations” to look forward to. Avoid “retail-therapy,” but do shop for foods high in omega 3, fatty acids, vitamin B-12 and vitamin D to lift your mood. And remember, next summer is only nine months away...

