Empire Justice Center

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DISABILITY LAW NEWS

SSA Pays "un-COLA" for 2016

The Social Security Administration (SSA) uses the *Consumer Price Index for Urban Wage Earners and Clerical Workers* (CPI-W) to annually adjust benefits paid to Social Security beneficiaries and Supplemental Security Income (SSI) recipients. http://www.ssa.gov/oact/COLA/colasummary.html. As there was no increase in the CPI-W from the third quarter of 2014 to the third quarter of 2015, SSA announced a "diet COLA" (cost-of-living-adjustment) for 2016 with no increase in monthly benefits.

The monthly SSI federal benefit rate for an individual will remain at $733 and the monthly rate for a couple will stay at $1,100. The New York supplement will continue at $87 for individuals and $104 for couples living alone; the living with others supplements remain at $23 and $46, respectively. A 2016 New York State SSI benefit chart is available at: http://otda.ny.gov/policy/directives/2015/INF/15-INF-10-Attachment-1.pdf

Thanks to Jim Murphy of Legal Services of Central New York, SSI benefit charts from 1976 to 2015 are available at http://www.empirejustice.org/issue-areas/disability-benefits/non-disability-issues/benefits-level-charts/ssi-benefit-levels-published.html.

Although there is no COLA, some of SSA's benchmarks are tied to the national wage index rather than the CPI. Therefore, Substantial Gainful Activity (SGA) threshold for Non-Blind has increased to $1,130 per month. The SGA level for blind workers, however, is tied to the CPI and remains at $1,820. The Trial Work Period (TWP) threshold increased to $810 per month (from $780). The quarter of coverage amount has increased to $1,260. The maximum taxable earnings for OASDI (old-age, survivors and disability insurance) purposes will remain at $118,500 in 2016.

Most beneficiaries will not see an increase in Medicare Part B monthly premiums from $104.90 per month in 2016. Some higher earning beneficiaries will have higher premium rates. For more details, see http://www.medicare.gov/your-medicare-costs/costs-at-a-glance/costs-at-glance.html.

For SSA's Fact Sheet on 2016 Social Security Changes, see https://www.socialsecurity.gov/news/press/factsheets/colafacts2016.pdf

INSIDE THIS ISSUE:

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www.empirejustice.org

Questions for DDD?

The inner workings of New York's Division of Disability Determinations (DDD), the division of OTDA with which the Social Security Administration (SSA) contracts to make initial disability determinations, can seem mysterious. But DDD has four Medical Relations Officers (MROs) around the state that might be able to answer some of our general questions about problems:

Albany – John McGovern, phone: 518-626-3110 and email john.f.mcgovern@ssa.gov
Buffalo – David Zajdel, phone: 716-847-3640 and email david.zajdel@ssa.gov
Manhattan – James Gallagher, 212-240-3456, and email james.f.gallagher@ssa.gov
Endicott – Patricia Petko, 607-741-4195, and email patricia.petko@ssa.gov

Bear in mind that the MROs will probably not be able to answer case specific questions that would require an Appointment of Representative form 1696.

SSA Improves Non-Disability Form

Advocates and claimants know all too well the frustrations of tracking non-disability appeals. Requests for waivers of overpayments, requests for reconsiderations of overpayments, living arrangements, or resource determinations, for example, seem to languish in district offices interminably. And suspensions of benefits pending appeal are often instituted, despite timely requests for continued benefits.

As a result of much administrative advocacy, the Social Security Administration (SSA) has recently revised its Request for Reconsideration Form SSA-561-U2 (3-2015). The revised form includes "Goldberg-Kelly" due process reminders. Claims representatives taking SSI appeals must acknowledge whether the appeal was received within ten days after the claimant received the advance notice, or if there is good cause for extending the ten day period. If so, the form requires affirmative acknowledgment that payment will be continued. SSA has also instituted training for employees in local offices on how to process SSI non-disability appeals and the importance of affording due process to claimants requesting appeals.

Let us know if you see any changes in the local offices as a result of these new forms.

REGULATIONS

SSA Studies Possible Changes to Grid

In the September edition of this newsletter, we reported on the Social Security Administration's (SSA's) ANPRM (Advanced Notice of Proposed Rulemaking). SSA sought comments on how it should consider the vocational factors of age, education, and work experience in determining disability. Although not proposing any changes at this point, SSA was seeking comments "given today's work environment and advances in technology and medicine."

A number of organizations and individuals submitted comments by SSA's December 14th deadline, including the Empire Justice Center. Comments are available for review at http://www.regulations.gov. Use the search function to find docket number SSA-2014-0081. The letter from the Consortium for Citizens With Disabilities' Social Security Task Force is particularly compelling. It is replete with references to research and studies supporting its argument that the grid rules should not be changed:

- Age remains an important vocational factor because mortality, the prevalence of work-limiting impairments, and challenges with learning new tasks all increase with age. Changes to population-level life expectancy are not a good reason to raise age categories in the Grids, since living longer does not necessarily change how long individuals can work. There are also significant disparities in life expectancy based on gender, race, income, and education.

- Education, literacy, and prior work experience continue to be important determinants of an individual's ability to work and to adapt to different kinds of work.

- Given rapid changes in workplace technology, SSA should examine whether 15 years is still appropriate for determining which work is past relevant work experience. While changes in workplace technology, assistive devices, and the Americans with Disabilities Act have made some jobs easier for some people, this is not universal and should not be used to change the Grids.

The CCD comments are also available as DAP # 574.

Send Us Your Decisions!

Have you had a recent ALJ or court decision that you would like to see reported in an upcoming issue of the *Disability Law News?*

We would love to hear from you!

Contact Kate Callery, kcallery@empirejustice.org and /or Louise Tarantino, ltarantino@empirejustice.org

Workers' Comp Offset Continues Until Full Retirement Age

Until recently, the offset (reduction) of Social Security Disability Insurance (SSDI) benefits paid to a claimant who is also receiving Workers' Compensation benefits ended when the claimant reached age 65, and SSD benefits converted to retirement benefits.

Under the offset provisions, SSDI benefits were reduced so that total benefits received (WC plus SSDI) did not exceed 80 percent of the recipient's average current earnings from before the worker became disabled.

In 1983, Congress amended the definition of full retirement age ("FRA") for purposes of Social Security benefits. For those born before Jan. 2, 1938, FRA remained age 65. For those born thereafter, FRA has increased, ranging from 66 to 67 depending on the year of birth. See https://www.ssa.gov/planners/retire/retirechart.html.

Despite the 1983 amendments, the age at which the offset (reduction) of SSD benefits due an individual's receipt of Workers Compensation benefits was not changed; it remained 65. But as result of legislation adopted in December 2014, SSA will now be able to continue offsetting Social Security benefits through the workers FRA, up to age 67. Under the ABLE Act (now part of the Tax Increase Prevention Act of 2014 signed into law December 19, 2014), the age until which the Workers' Compensation offset applies has been tied to the increased FRA for Social Security. For individuals receiving Social Security Disability benefits and Workers' Compensation benefits, Social Security benefits will be reduced through their FRA, not just until the reach age 65. This change became effective December 19, 2015.

SSA, in its "rush" to implement the new law, issued proposed regulations on January 4, 2016, in 81 Fed Reg. 41-42, available at https://www.gpo.gov/fdsys/pkg/FR-2016-01-04/html/2015-33036.htm or https://www.gpo.gov/fdsys/pkg/FR-2016-01-04/pdf/2015-33036.pdf. Comments are due by February 3, 2016.

A good summary of the changes detailed above is available here: http://www.wci360.com/news/article/balancing-workers-compensation-and-the-social-security-offset. The text of the new law - Pub. L. 113 -295 - is available here: https://www.congress.gov/bill/113th-congress/house-bill/5771 .

Thanks to Greg Phillips of Segar and Sciortino and Paul Ryther in Rochester for keeping us up to date.

ADMINISTRATIVE DECISIONS

SGA Does Not Bar SSI Approval

What happens when you discover your client had earnings over the substantial gainful activity (SGA) level during at least five of the many months she was waiting for her SSI hearing? If you are Cate Lynch of the Rochester office of the Empire Justice Center, you convince the Administrative Law Judge (ALJ) that SGA only matters for SSI initial eligibility purposes; since the SGA wasn't within 12 months of onset, the claimant should be eligible.

Based on Cate's persuasive arguments, the ALJ, citing POMS SI 02302.010, agreed that once an SSI applicant is found disabled, earnings in subsequent months are considered under the Section 1619 of the Social Security Act, which embodies SSI's work incentive rules. The claimant did not earn SGA within the 12 months of her established onset, even though it was prior to the final determination in her case. Thus, the holding in *Barnhart v. Walton*, 535 U.S. 212 (2002) did not preclude her claim. The ALJ was also persuaded that the claimant's ongoing need for a job coach suggested supported employment during the months in question. He found her disabled under Listing 12.05C based on her low IQ scores and speech disorder.

In *Barnhart v. Walton*, 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. Various POMS, however, clarify that SGA beyond 12 months of onset should be considered under various SSI or SSD incentive earnings programs. See, e.g., POMS DI 13010.105 (Title II) & DI 13010.110E (Title XVI). A flowchart on the nuances of *Walton* prepared by Neighborhood Legal Services is Buffalo is available as DAP #575.

Kudos to Cate for not letting a little SGA stand in the way of a victory!

Are VTC Hearings on the Rise?

It is no secret that the Social Security Administration (SSA) wants to increase the number of hearings held by video teleconferencing (VTC). As reported in the September 2014 edition of this newsletter, SSA issued new regulations limiting a claimant's right to object to VTC. Per 20 C.F.R. §§ 404.936(d) & 416.1436(d), written objections must be submitted within thirty days of the initial notice–often well before clients obtain representation. The regulations do allow a claimant to assert good cause for failure to make a timely objection. Query how many of these objections are filed and/or allowed?

In the meantime, SSA did not quite meet its target of 30% of hearings to be held by VTC in Fiscal Year 2015. But 27% of all hearings were held by video, up from 20.1% in 2011. https://www.socialsecurity.gov/finance/

Appeals Council Issues Fully Favorable Decision

If at first you don't succeed, try and try again. That was apparently the mantra of Rochester attorney Jere Fletcher in a case where the Appeals Council—on reviewing the second denial by the ALJ subsequent to a stipulated sentence six remand from the Second Circuit—finally saw the light. The Appeals Council approved the claim as of the claimant's alleged onset in 2005 under Listing 12.05C.

The relevant IQ scores had apparently been obtained in the course of a subsequent application filed in 2010 while the federal court appeal was pending. When the court remanded the first claim, the Appeals Council reopened the second application, which had been approved initially, and consolidated it with the remanded claim. Following the second hearing, the ALJ changed the onset on the second claim to 2011, essentially denying the first claim again. The ALJ had reluctantly agreed the claimant was disabled, but only as of his fiftieth birthday in 2011, which was after his date last insured. But on review, the Appeals Council relied on a medical consultant's opinion that the claimant actually had met the listing for intellectual disability at 12.05C since his alleged onset in 2005.

The claimant will enjoy a substantial retroactive award thanks to Jere's persistence.

ALJ Applies Collateral Estoppel to Approve Claim

Collateral estoppel is not just an arcane theory you had to learn during law school in Civil Procedure class. Victoria Esposito of the Legal Aid Society of Northern New York successfully relied on it to win back her client's SSI benefits. Victoria's client had been awarded concurrent benefits in October 2000 following an ALJ decision. The SSI benefits were stopped in 2003 due to excess income deemed from the client's spouse, but the SSD benefits were continued. Following an August 2004 CDR, the client was found to be still disabled. Her SSD benefits have continued without interruption through the present.

In April, 2011, the client filed a claim for SSI as she no longer had deemed income from her spouse. Her claim was denied. In January, 2013, an ALJ affirmed the denial, ruling that collateral estoppel did not apply as "the claimant is here alleging functional limitations at a later time, being the time period beginning only as of April 2011." The Appeals Council denied the client's request for review.

The client then filed another SSI claim in March, 2014, which was again denied and the client again requested a hearing. At this hearing, she was represented by Victoria, who argued collateral estoppel indeed did apply. She argued 20 CFR § 416.1450(f) and HALLEX I-2-2-30 provide the ALJ must accept a factual finding made in a previous determination unless there are reasons to believe it was wrong.

The ALJ agreed with Victoria, relying on collateral estoppel to grant the SSI claim without applying the sequential evaluation. The client, received $4,315 in retroactive SSI and $278 per month in SSI benefits ongoing in addition to her ongoing SSDI. The ALJ did recommend that a CDR of the client's medical disability be performed "as soon as is practicable." Although that may mean the end of the claimant's benefits, depending on whether or not there has been medical improvement, the ALJ—thanks to Victoria's advocacy—followed the proper procedures.

Read That Appeals Council Remand Order Carefully

When cases are remanded from the federal district court and a new hearing is held before an Administrative Law Judge (ALJ), the ALJ's decision:

> ...will become the final decision of the Commissioner unless within **30 days** after receipt of the ALJ decision, the parties submit:
>
> - Written exceptions to the Appeals Council (AC) objecting to the ALJ's decision; or
> - A written request for an extension of time to file exceptions, and, based on these exceptions, the AC assumes jurisdiction of the case.
>
> The ALJ decision will also become the final decision of the Commissioner unless the AC decides to assume jurisdiction of the case within 60 days after the date of the ALJ's decision."

In other words, the representative is looking at 30 days, rather than the standard 60 days if he/she is not happy with the decision. (https://secure.ssa.gov/poms.nsf/lnx/0203106036).

It is all too easy to overlook that timeframe because the instructions from the AC do not look all that different from a typical AC remand decision. A recent case from the W.D.N.Y., reported in the NYLJ, highlights the dangers of misreading the AC remand order. *See Wlodarczyk v. Colvin*, 15CV456, NYLJ 1202739530477, at *1 (W.D.N.Y., Decided October 6, 2015), by Magistrate Judge Hugh Scott. The NYLJ summarized the case as follows:

> In 2006 an administrative law judge denied plaintiff disability and supplemental security income (SSI) benefits. In 2008 the Appeals Council (AC) declined review. District court reversed and remanded plaintiff's claim. In April 2010 the AC further remanded plaintiff's case to the ALJ, whose Feb. 23, 2011 decision granted plaintiff only SSI benefits as of Sept. 15, 2010. Timely exceptions were due by March 25, 2011. Plaintiff formally sought review on April 19. Defendants contend plaintiff did not timely file exceptions to the ALJ's Feb. 23, 2011 decision and noted that agency records did not reveal any exceptions filed until July 16, 2013. In May 2015, the AC found plaintiffs' July 16, 2013 exceptions untimely. Plaintiff's May 22, 2015 action sought judicial review of the ALJ's finding he was not disabled. Responses to defendant's dismissal motion were extended to Sept. 23, with replies due Oct. 1. At issue was whether plaintiff timely applied to the Appeals Council to review the ALJ's decision so as to preserve his right to seek judicial review before the district court, or whether plaintiff timely filed action under 42 USC § 405(g) and relevant Social Security regulations. Requiring further briefing, the court adjourned oral argument.

Read more: http://www.newyorklawjournal.com/id=1202739542516/Wlodarczyk-v-Colvin#ixzz3wOIPf8bw

Let's be careful out there and read every word of our remand orders!

Searching for VE Tips?

Cross-examining a vocational expert (VE) is one of the most challenging parts of our work. Administrative Law Judges (ALJs) always seem to be learning new tricks. See their 2013 training on YouTube: http://www.youtube.com/watch?v=efkGfajwGDQ. The printed materials are on the on-line resource center as DAP #576. So we need to learn tricks – or better yet – techniques of our own.

Jenna Karr of the Rochester office of the Empire Justice Center offers this tidbit, garnered from a hypothetical question posed in a recent case that actually incorporated all the claimant's limitations. The ALJ described a claimant of advanced age with a residual functional capacity for sedentary work with additional postural limitations. He went to add that although the claimant is "able to understand, remember, and carry out simple instructions":

> He is unable to interact appropriately with co-workers and supervisors on a consistent basis; he should have little or no contact with co-workers and supervisors on a consistent basis, and have no contact with the general public. He is able to consistently maintain concentration and focus for up to two hours at a time.

Jenna got a favorable decision in this case, as she had worked hard prior to the hearing to develop evidence and obtain assessments backing up these limitations. But she plans to incorporate some of these details in future cases with clients who need "low-stress" jobs. Many ALJs either don't define "low-stress" or give a brief explanation of what it means, relying on short-cut definitions such as "no quotas"). Jenna hopes that with a more descriptive, defined hypo of what low stress jobs look like, there would be fewer jobs.

Another tip comes from a recent decision by Judge Posner of the Seventh Circuit Court of Appeals. *Hill v. Colvin*, 807 F.3d 862 (7th Cir. 2015). In one of his scathing criticisms of the Commissioner's reliance on specious VE testimony, he questioned how certain jobs identified by a VE as unskilled really could really be unskilled. The Dictionary of Occupational Titles (DOT) also defined the jobs of dealer accounts investigator, furniture rental consultant, and counter clerk as unskilled, but Judge Posner's concurrence provides guidance on how one might cross-examine a VE to determine if the jobs are actually unskilled in today's job economy. He quotes the actual job requirements to challenge the assumption they could be unskilled, concluding they did not "sound like unskilled work."

Judge Posner also questioned the reliability of VE testimony in *Hill* based on "experience" when the VE gave no explanation of that experience. The VE acknowledged the DOT did not describe jobs that could be performed with only one fully functioning limb, but failed to describe the experience that formed his opinion the jobs he testified to could be performed with a limb restriction. Although some challenges to VE testimony may have less success in the Second Circuit, Judge Posner actually quoted the Second Circuit decision in *Brault v. Soc. Sec. Administration*, 683 F.3d 443, 449-50 (2d Cir. 2012) for the proposition that expert opinions may not be "conjured out of whole cloth."

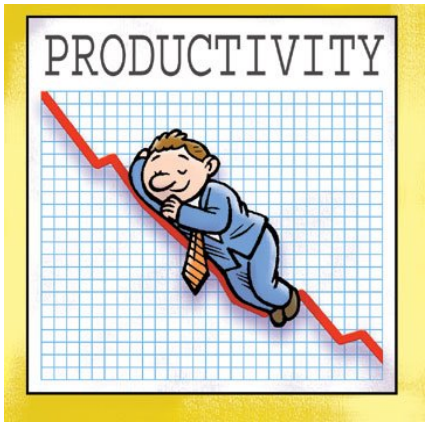
And from another source, the U.S. Equal Employment Opportunity Commission publishes guidance about various types of accommodations in the work place. "Questions and Answers about Epilepsy in the Workplace and the ADA" includes a discussion about accommodating a chef with a seizure disorder. http://www.eeoc.gov/laws/types/epilepsy.cfm. This type of information could be helpful during VE cross-examination to establish that an accommodation would be required to make a particular job possible. Remember that the VE should *not* be asked to consider what, if any, accommodations might be made that would enable the claimant to perform work. ["Reasonable accommodation" is a requirement under the Americans with Disabilities Act (ADA), to level the playing field for disabled individuals who seek en-

(Continued on page 9)

ALJ Productivity Drops

According to SSA's Office of the Inspector General (OIG), ALJ productivity dropped between 2010 and 2015. After reaching an average high of 2.42 dispositions per day in Fiscal Year (FY) 2011, daily dispositions dropped to 2.07 in 2014, with a slight rise to 2.10 in FY 2015. In its Statement on SSA's Major Management and Performance Challenges, the OIG found that despite its focus on quality and consistency of hearing decision, SSA faced worsening average processing times and increasing numbers of hearings pending. Average processing times over the same ten year period ranged from a low of 353 days in 2012 to a high of 480 days in FY 2015. Pending cases rose from 707,367 in FY 2010 to 1,060,907 in FY 2015.

The OIG cited four factors for these changes: 1) an increase in the number of hearing requests, 2) a decrease in the number of available ALJs, 3) the decrease in ALJ productivity cited above, and 4) a decrease in senior attorney adjudicator decisions. The OIG blamed the decrease in ALJ productivity on increased agency emphasis on decisional quality, leading to ALJs spending more time per case. Agency managers also started limiting new case assignments to ALJs from 1,200 cases annually in FY 2012 to 720 in FY 2015. https://www.socialsecurity.gov/finance/



Searching for VE Tips?—Continued

(Continued from page 8)
try into the competitive job market; it is not a requirement under the Social Security Act. *Weigel* v. *Target Stores*, 122 F.3d 461 (CA7 1997)]; *see also* SSR 00-1 (c); SSR 11-2p.

The letter by the Consortium for Citizens With Disabilities' Social Security Task Force (CCD), available at DAP # 574, submitted in response to SSA's request for comments on possible changes to the Medical-Vocational Guidelines discussed on page 3 of this newsletter, may also provide food for thought. For example, an illiterate claimant may be able to obtain a job with a Specific Vocational Preparation level of 0 that can be learned by brief demonstration. But what about additional on the job training that might include reading instruction manuals or warning signs, or writing notes during training sessions in order to remember new job tasks? The letter also reminds us of the valuable nuggets in SSR 85-15, including reference to an individual with a mental impairment who cannot tolerate his or her work being judged, not matter how remote or "superficial" the supervision is.

Finally, did you know that VEs—at least those certified as Rehabilitation Counselors—have a Code of Professional Ethics? The Commission on Rehabilitation Counselor Certification adopted the code in June 2009, a copy of which is available as DAP # 577. Guidance on a VE's obligations under the code when giving testimony could be a goldmine for cross-examination.

COURT DECISIONS

Second Circuit Strikes Again

In September, we reported with glee on a favorable treating physician decision from the Second Circuit—*Greek v. Colvin*, 802 F.3d 370 (2d Cir. 2015). Now, thanks to the same Geneva law firm of McDonald & McDonald, we have another helpful precedential decision. In *Lesterhuis v. Colvin*, 805 F.3d 83 (2d Cir. 2015), the Court of Appeals remanded for consideration of a retrospective medical opinion from a treating physician submitted to the Appeals Council.

The court agreed the ALJ's decision was not supported by substantial evidence in light of the new and material medical opinion from the plaintiff's treating physician. It reaffirmed its long-standing rule that evidence added to the record at the Appeals Council must be considered, citing *Perez v. Chater*, 77 F.3d 41, 54 (2d Cir. 1996). It found the opinion contradicted the ALJ's conclusion in important respects, and thus should have been considered. While not holding the treating physician's opinion should be given controlling weight on remand, the court noted that if given controlling weight, at least one aspect of the opinion would be dispositive.

At issue was the treating physician's opinion that the plaintiff would likely miss four days of work per month. The vocational expert had testified a claimant who would be absent that frequently would be unable to work. Thus, the physician's opinion, if credited, would suffice to support a determination of disability. The court noted the physician's opinion was not contradicted but was actually supported by other evidence of record from a non-doctor therapist.

The Second Circuit also faulted the district court for identifying gaps in the treating physician's knowledge of the plaintiff's condition. It noted it is the role of the ALJ or the Appeals Council, not the district court, to make medical and factual determinations about the evidence before the agency. Citing *Burgess v. Astrue*, 537 F.3d 117, 128 (2d Cir. 2008), the court reiterated it may not "affirm an administrative action on grounds different from those considered by the agency."

Congratulations to Bill McDonald for successfully litigating *Lesterhuis*.

Court Issues Two Remand Orders

The Court of Appeals issued two helpful, if non-precedential summary orders. Vocational experts (VEs) appear far more routinely than they used in disability appeals. But there are still those increasingly rare cases where the AJ relies on the Medical-Vocational Guidelines (the "grid") to deny a claim without vocational testimony. In *Sesa v. Colvin*, --- Fed. Appx. ---, 2015 WL 6118233 (2d Cir. Oct. 19, 2015), the Second Circuit found the ALJ erred in relying on the grids without considering whether the plaintiff's reaching limitations had more than a neglible impact on her ability to perform the full range of work. Quoting SSR 85-15, the court relied on its prior decision in *Selian v. Astrue*, 708 F. 3d 409, 421 (2d Cir. 2013): "Reaching is 'required in almost all jobs,' and a reaching limitation 'may eliminate a large number of occupations a person could otherwise do.'"

The plaintiff's treating physician had opined that Ms. Sesa had limitations in reaching and with repetitive reaching, handling, or fingering. The ALJ gave "little weight" to the opinion of the same physician that Ms. Sesa could only lift and carry ten pounds, but did not expressly reach the opinions about reaching. While not requiring the ALJ to reconcile every conflicting shred of evidence, the court found the ALJ failed to assess whether the plaintiff's reaching limitations were negligible, and remanded for a determination. If not, the ALJ must obtain vocational testimony.

Carolyn Kubitschek of New York City successfully appealed both *Sesa* and *Selian*.

In *Lopez v. Commissioner of Soc. Sec.*, 622 Fed. Appx. 59 (2d Cir. Dec. 3, 2015), the Court of Appeals reiterated its rule that the ALJ's obligation to help develop the record in a disability claim is heightened when a claimant appears *pro se*. First, the ALJ failed to explain to the claimant the importance of obtaining a more detailed statement from his treating physician, where there were two seemingly conflicting reports of record. Second, the ALJ should have investigated the unrepresented claimant's statement that she had been hospitalized.

Luckily for this *pro se* claimant, she found Chris Bowes of CeDar to represent her on appeal.

Held Lawsuit Appealed

Held v. Colvin, filed as a nation-wide class-action lawsuit in the United States District Court for the Central District of California, challenged SSA's continuing to issue benefits as if the recipients were single even after the *Windsor* decision struck down the Defense of Marriage Act (DOMA). Unfortunately, the lawsuit was dismissed, but is currently on appeal to the Ninth Circuit Court of Appeals.

Senator Elizabeth Warren and Representative Mark Takano and 119 Congressional colleagues, including both New York Senators, sent a letter to Acting Commissioner Colvin and Attorney Loretta Lynch urging SSA to implement the Supreme Court decision *U.S. v Windsor* and waive recovery of overpayments for all who were prejudiced by the SSA's failure to recognize their marriages in timely fashion.

In the meantime, the Emergency Message (EM) 15016 issued by SSA in May apparently remains in effect. It provides that future SSI can be reduced or terminated based on the income or resources of a same-sex spouse, but not prior months. No new overpayment notices will be issued to SSI recipients married to persons of the same sex.

Kid's SSI Case Remanded for Further Proceedings

Congratulations to Michael Hampden of the Partnership for Children's Rights in NYC. He recently obtained a remand in *Garcia o/b/o S.H.S. v. Colvin*, 2015 WL 7758533 (S.D.N.Y. Dec. 1, 2015). Mike hopes the decision will be useful in future kids' cases in a number of ways.

Garcia adds to the growing number of decisions in which standardized language tests (in this case, the CELF-4 and TOLD-1-4) were held to constitute "comprehensive standardized test[s] designed to measure ability or functioning in [a] domain" under 20 C.F.R. § 416.926a(e)(2)(iii). These test scores should be considered in the domains of acquiring and using information and interacting and relating with others. Scores more than two standard deviations (SDs) below the mean should trigger a finding of marked limitations in these domains if the child's day-to-day functioning is consistent with the scores. The ALJ's failure to explain why he found less-than-marked limitations in these domains in spite of the scores was an error requiring remand.

The decision also includes an extensive discussion of the ALJ's error in basing the decision on the child's "improvement," without assessing whether "such improvement reduced the claimant's functional limitations such that they are no longer, or never were, marked limitations" in a domain. The decision puts the point eloquently: "Improvement is, of course relative. One can show even significant relative improvement – but if the deficiency is sufficiently great, a marked limitation may remain."

The court also faulted the ALJ error for relying on IQ test scores that are out of date under Listing 112.05 - a frequent ALJ error. The court rejected the government's argument that later IQ scores were "at the same level" and therefore the child was not prejudiced by the error, in light of the low-average scores on the earlier test, and borderline scores on the later test.

In the domain of interacting and relating with others, the *Garcia* court found the ALJ cherry-picked the evidence by relying heavily on evidence that the child was well-behaved, cooperative and respectful – descriptions often found in school records, even in cases where the child has other serious limitations in the domain. It rejected the government's argument that the ALJ did not "solely" rely on this evidence in finding a less-than marked limitation; the emphasis the ALJ gave to it in his decision contradicted SSR 09-05 SSI, which states that "Children with impairment-related limitations in this domain may not be disruptive." The decision directed that on remand the ALJ must give appropriate consideration to the factors, such as speech-language limitations, that the regulations specify as relevant in the domain.

Significantly, under the court's remand order, the ALJ will not re-adjudicate his prior favorable finding of marked in one domain, at least for that portion of the disability period prior to the first ALJ decision. That finding will be deemed final under principles of administrative res judicata. Mike has litigated this point in other cases. *See, e.g.*, *Ocasio v. Astrue*, 2009 WL 2905448 (S.D.N.Y. Sept. 4, 2009).

On a final note, after this case had languished before a previous judge for two and one half years, Mike filed a motion to expedite the decision. The motion to the new judge was granted and the decision issued two weeks later. Congratulations to Mike—who never leaves any stones unturned!

District Court Remands to Correct Erroneous Severity Finding

DAP Attorney Shubh Nigam McTague recently left the Legal Aid Society of Northeastern New York (LASNNY) to pursue other legal work. Before she left, she wrote a federal court brief that paid off big dividends in an excellent decision from Judge Hurd, *Melendez v. Colvin*, reported at 2015 WL 5512809 (N.D.N.Y. Sept. 16, 2015).

In his decision, Judge Hurd addressed Step 2 severity and the role played by subjective complaints at Step 2. The claimant had a sleep study showing severe obstructive sleep apnea two months prior to the alleged onset date. The claimant testified at the hearing regarding her episodes of daytime drowsiness, including that work schedules had been changed to accommodate the drowsiness and that she had been in danger of termination due to the drowsiness. Ignoring this testimony, the Administrative Law Judge (ALJ) concluded sleep apnea was not severe because the claimant did not indicate the impairment caused any limitation on work-related activity. Judge Hurd found that the claimant's testimony indeed indicated work-related limitations; the ALJ had not explicitly found the testimony incredible. In response to the AUSA argument that no medical evidence from the period of alleged disability supported a diagnosis of sleep apnea, Judge Hurd held that while the existence of an impairment cannot be based wholly on subjective statements, **severity** of an impairment may be based on credible subjective complaints.

The decision also requires clarification of the ALJ's rationale in rejecting a treating physician's opinion on manipulative limitations. The ALJ rejected the opinion because the medical reports "suggested the limitations…were not based on anything besides the claimant's own reports." Judge Hurd found this discrediting might be permissible if it is a reference to an inconsistency between the doctor's opinion and other substantial evidence, but not if it was simply the ALJ disagreeing with the doctor's conclusions. Judge Hurd noted that subjective complaints are an essential diagnostic tool and an ALJ cannot reject an opinion solely because the opinion is based on subjective complaints—to do so illustrates the ALJ is substituting his or her lay judgement for that of the doctor's expertise.

Finally, Judge Hurd addressed the ALJ's use of the boilerplate credibility determination ("the claimant's medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment."). He renewed criticism in the N.D.N.Y. of the boilerplate credibility language, noting while the use of the boilerplate is inadequate to support a credibility determination, it does not necessarily invalidate the credibility determination if the ALJ elsewhere explains how other substantial evidence undermines the subjective testimony.

Judge Hurd found that the ALJ's reliance on the claimant's failure to use prescription pain medication was not adequate to support the credibility determination in light of the claimant's testimony about her lack of medical insurance. The ALJ had concluded "although the claimant does not have medical insurance, the undersigned believes that if the claimant's symptoms were so disabling, there would be some evidence of treatment." Judge Hurd flatly rejected this rationale, stating that it crossed the line into impermissible lay medical judgment. He also found failure to seek treatment is an impermissible grounds for evaluating credibility when the claimant cannot afford treatment. Judge Hurd cited to recent district court decisions addressing the interplay between credibility and inability to afford treatment, as well as Social Security Ruling (SSR) 96-7p.

Congratulations to Shubh and Mike Telfer of LASNNY who contributed to the brief. We will miss Shubh's great work in DAP cases, but appreciate her legacy with these kinds of decisions.

Pro Se Claimants Get Second Chance in District Court

We recognize the good work private attorneys do in Social Security cases. One of these, Mark Schneider from Plattsburgh, recently prevailed in two federal court cases where the claimants had appeared *pro se* at the administrative hearing.

In the case of *Gemmell v. Colvin*, 2015 WL 5603395 (N.D.N.Y. Sept. 23, 2015), Mark argued that the Administrative Law Judge (ALJ) erred in failing to properly develop the record for a *pro se* claimant, and also erred in the weight given to treating physician evidence. Magistrate Judge Hummel agreed, particularly with respect to the ALJ's failure to consider deterioration in the claimant's condition between the time of the consultative examinations and the later treating source visits. "As such, the ALJ was under a duty to investigate the possible deterioration of Gemmell's condition."

The Magistrate Judge also faulted the ALJ for failing to obtain a medical source statement (MSS) from the treating physician and advising the *pro se* claimant about the importance of a MSS from a treating source. Lastly, the Magistrate Judge determined that the ALJ erred in relying on the claimant's ability to perform activities of daily living in making an adverse credibility determination. In the first instance, the ALJ's finding was contradicted by the claimant's testimony about his limitations in performing housework and going shopping. "Moreover, a claimant may still be found disabled even if he or she testifies that they can perform some activities of daily living." The case was remanded to correct these errors.

Similarly, in the case of *Baylis v. Colvin*, 2015 WL 5642921 (N.D.N.Y. Sept. 24, 2015), Mark argued that the ALJ made a flawed residual functional capacity (RFC) assessment, and gave an inaccurate hypothetical question to the vocational expert (VE). The claimant was *pro se* at the ALJ hearing. Magistrate Judge Treece was troubled by the ALJ's failure to discuss how all of the claimant's impairments, including obesity, spinal stenosis, and borderline intellectual functioning could affect her RFC. The Magistrate Judge noted gaps in the record with respect to both the newly diagnosed spinal stenosis and the borderline intellectual functioning. The ALJ's failure to address the claimant's borderline intellectual functioning was particularly egregious because new evidence submitted to the Appeals Council after the hearing supported the claimant's claims of limitations related to her learning disabilities.

The court ordered that on remand, the claimant's treating physician should be re-contacted to provide assessments of the ability to perform work related functions. Also, the ALJ should consider how all of the claimant's impairments affect her ability to perform the full range of sedentary unskilled work. Magistrate Judge Treece also held the hypothetical question posed to the VE was flawed because it did not include all the claimant's limitations and did not limit her to unskilled work. Because of these errors, and the "internally inconsistent" finding at Step 5, the Magistrate Judge held that the Commissioner had not carried her burden at this step, also necessitating remand.

Congratulations to Mark Schneider for pulling out victories in both of these cases for needy, *pro se* claimants.

EAJA Rates Updated

Successful litigators no longer have to wait for the Office of General Counsel to update the federal EAJA (Equal Access to Justice Attorney Fee) rates. Thanks to Gene Doyle of People Organized for Our Rights, Inc. (P.O.O.R.), we now have ready access to the current rates, adjusted for inflation.

Gene has created three charts, showing the monthly and average annual hourly rates, adjusted for inflation, under EAJA. The three charts are based on the Consumer Price Index (CPI) for the following regions:

- New York-Northern New Jersey-Long Island
- Northeast Region
- U. S. City Average

The three charts are current through November 2015. Note that the average annual hourly rate for 2015 is based on the first 11 months of this year. They are available as DAP # 578. Gene will be updating these charts.

Gene has also developed a Microsoft Excel file, which contains three spreadsheets, showing the same CPI data and EAJA hourly rates found in the pdf charts. The spreadsheets allow for do-it-yourself updating. Just click on the "latest CPI data" link at the top of each spreadsheet to see the most recent three months' CPI data for each region. Then enter the latest data in the CPI column of the spreadsheet (beginning with December 2015). The spreadsheets will display the EAJA hourly rate for the updated month and, at the end of the year, the average annual rate.

The Bureau of Labor Statistics (BLS) of the U.S. Department of Labor (DOL) posts CPI data between the 14th and 20th of each month for the previous month. For example, the December 2015 CPI will be posted on January 20, 2016. For the exact release dates in 2016, see: http://www.bls.gov/schedule/news_release/201601_sched.htm.

The Excel file is available as DAP # 579.

SSA Studies Childhood CDR Rates

A recent study by the Social Security Administration's (SSA) Office of Retirement and Disability Policy concludes relatively few former childhood recipients return to the SSI roles later within ten years of a cessation of benefits. As a result, more CDRs (Continuing Disability Reviews) are in order.

SSA's report—Childhood Continuing Disability Reviews and Age-18 Redeterminations for Supplemental Security Income Recipients: Outcomes and Subsequent Program Participation—studied children who were originally found disabled because of low birth weight (LBW) versus those found disabled for other reasons (non-LBW). Nine percent of the LBW returned to SSI within ten years of cessation, while 13% of non-LBW returned. SSA also found that 14% of youths whose benefits were ceased in an age-18 redetermination returned to SSI within ten years.

The study contains many charts and statistics that some may find fascinating. Of note, SSA ceased benefits in about 34% of age-18 redeterminations. The cessation rates of LBW and non-LBW CDRs were 48% and 18.3%, respectively.

Research and Statistics Note No. 2015-03 (released October 2015) is available at https://www.ssa.gov/policy/docs/rsnotes/rsn2015-3.html.

WEB NEWS

New CMS Site Helps with Medicare Enrollment

People who are working but become eligible for Medicare have important decisions to make about when to enroll and whether to get Medicare Part B. Retirees with employer insurance or COBRA also must decide what to do when they first become eligible for Medicare. The Centers for Medicaid and Medicare Services (CMS) has a new web resource for employers to help Medicare-eligible employees and retirees understand Medicare and other retirement issues. Though geared to employers, the site is also a very useful resource for advocates and consumers.

Answers to many questions, including the following, will be found on the website:

- When is the best time to enroll to prevent coverage gaps and late enrollment penalties?
- Who gets Medicare automatically, and who needs to sign up for it?
- When can you enroll in Medicare Part B?
- How do you qualify for Medicare if you're not 65 or older?
- What if you have retiree or COBRA coverage?

The site offers up-to-date information about Medicare enrollment and other retirement topics.
https://www.cms.gov/Outreach-and-Education/Find-Your-Provider-Type/Employers/Employer-Community.html

Words Matter: Resource for Better Communication

Crafting an effective message for social justice change involves a balance of inclusive language and solutions-based messaging. The Advancement Project recently released ***The Social Justice Phrase Guide***, a resource to make conscious communications decisions.

The free downloadable pamphlet provides concrete examples of terms that are worth retiring, as well as more inclusive and effective ways to communicate your messages through five overarching guidelines:

- Talk about policies and solutions in realistic and accurate ways that spur the action social justice advocates want.
- Lift up unity, participation and cooperation over division, extreme individualism and competition.
- Reinforce prosperity over scarcity.
- Accurately and respectfully talk about people's identities, situations and roles in society.

Retire outdated and problematic phrases and metaphors.
http://b.3cdn.net/advancement/94da835bcf2d3e7631_bfm6yh5kg.pdf

How Does Your Internet Speed Compare?

So just how fast is that Internet speed you signed up for? Is it really as good as your Internet provider promised? Those are questions that a new state website hopes to answer for New Yorkers, who can now put their service to the test. By logging on to the site, Web users can determine whether their service is all that it's cracked up to be. The new site is sponsored by the office of Attorney General Eric T. Schneiderman. The goal is for consumers to determine whether they are receiving the Internet speeds they have paid for. http://internethealthtest.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.

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

Astrue v. Capato, ex rel. B.N.C., 132 S.Ct. 2021 (2012)

A unanimous Supreme Court upheld SSA's denial of survivors' benefits to posthumously conceived twins because their home state of Florida does not allow them to inherit through intestate succession. The Court relied on Section 416(h) of the Social Security Act, which requires, *inter alia*, that an applicant must be eligible to inherit the insured's personal property under state law in order to be eligible for benefits. In rejecting Capato's argument that the children, conceived by in vitro fertilization after her husband's death, fit the definition of child in Section 416 (e), the Court deferred to SSA's interpretation of the Act.

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.

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

***Greek v. Colvin*, 802 F.3d 370 (2d Cir 2015)**

The court remanded for clarification of the treating source's opinion, particularly as to the claimant's ability to perform postural activities. The doctor had also opined that Mr. Greek would likely be absent from work more than four days a month as a result of his impairments. Since a vocational expert testified there were no jobs Mr. Greek could perform if he had to miss four or more days of work a month, the court found the ALJ's error misapplication of the factors in the treating physician regulations was not harmless. "After all, SSA's regulations provide a very specific process for evaluating a treating physician's opinion and instruct ALJs to give such opinions 'controlling weight' *in all but a limited range of circumstances*. See 20 C.F.R. § 404.1527(c)(2); see also Burgess, 537 F.3d at 128." (Emphasis supplied.)

***McIntyre v. Colvin*, 758 F.3d 146 (2d Cir. 2014)**

The Court of Appeals for the Second Circuit found the ALJ's failure to incorporate all of the plaintiff's non-exertional limitations explicitly into the residual functional capacity (RCF) formulation or the hypothetical question posed to the vocational expert (VE) was harmless error. The court ruled that "an ALJ's hypothetical should explicitly incorporate any limitations in concentration, persistence, and pace." 758 F.3d at 152. But in this case, the evidence demonstrated the plaintiff could engage in simple, routine tasks, low stress tasks despite limits in concentration, persistence, and pace; the hypothetical thus implicitly incorporated those limitations. The court also held that the ALJ's decision was not internally inconsistent simply because he concluded that the same impairments he had found severe at Step two were not ultimately disabling.

***Cichocki v. Astrue*, 729 F.3d 172 (2d Cir. 2013)**

The Court held the failure to conduct a function-by-function analysis at Step four of the Sequential Evaluation is not a *per se* ground for remand. In affirming the decision of the district court, the Court ruled that despite the requirement of Social Security Ruling (SSR) 96-8p, it was joining other circuits in declining to adopt a *per se* rule that the functions referred to in the SSR must be addressed explicitly.

***Selian v. Astrue*, 708 F.3d 409 (2d Cir. 2013)**

The Court held the ALJ improperly substituted her own lay opinion by rejecting the claimant's contention that he has fibromyalgia despite a diagnosis by his treating physician. It found the ALJ misconstrued the treating physician's treatment notes. It criticized the ALJ for relying too heavily on the findings of a consultative examiner based on a single examination. It also found the ALJ improperly substituted her own criteria for fibromyalgia. Citing the guidance from the American College of Rheumatology now made part of SSR 12-2p, the Court remanded for further proceedings, noting the required finding of tender points was not documented in the records.

The Court also held the ALJ's RFC determination was not supported by substantial evidence. It found the opinion of the consultative examiner upon which the ALJ relied was "remarkably vague." Finally, the court agreed the ALJ had erred in relying on the Grids to deny the claim. Although it upheld the ALJ's determination that neither the claimant's pain or depression were significant, it concluded the ALJ had not affirmatively determined whether the claimant's reaching limitations were negligible.

***Talavera v. Astrue*, 697 F.3d 145 (2d Cir. 2012)**

The Court of Appeals held that for purposes of Listing 12.05, evidence of a claimant's cognitive limitations as an adult establishes a rebuttable presumption that those limitations arose before age 22. It also ruled that while IQ scores in the range specified by the subparts of Listing 12.05 may be *prima facie* evidence that an applicant suffers from "significantly subaverage general intellectual functioning," the claimant has the burden of establishing that she also suffers from qualifying deficits in adaptive functioning. The court described deficits in adaptive functioning as the inability to cope with the challenges of ordinary everyday life.

***Cage v. Commissioner of Social Security*, 692 F.3d 118 (2d Cir. 2012)**

The Court of Appeals held the burden of proving that drug or alcohol addiction is not material to a disability claim rests with the claimant. It also affirmed the ALJ's finding that the claimant would not be disabled absent drug addiction or alcoholism ("DAA") was supported by substantial evidence even though there was no medical opinion specifically addressing materiality. It ruled that a "predictive medical opinion" addressing the issue of materiality was not necessary.

END NOTE

Sorry I'm Late...

Do you suffer from planning fallacy? This may be one excuse for those of us who are chronically late. According to recent articles in the *Wall Street Journal*, that little known concept is described as a strong tendency to underestimate task completion. And it is a difficult behavior to change, despite the many disincentives and punishments out there for being late.

Tardiness can wreak havoc for us and others. It can annoy friends who are left waiting and can slow down workplace efficiency. Research at the University of North Carolina shows that 37% of meetings, for example, start late by an average of 15 minutes. Those same meetings can end up running late. And one meeting starting late can have a domino effect, or can become contagious. Researchers have found that once managers start waiting for latecomers to arrive before starting a meeting, others will start arriving later or leaving the meeting space until the latecomers arrive. Some suggest starting the meetings on time, regardless of the latecomers—unless the latecomer is the boss! Or confront the latecomers and subject them to the "walk of shame" as they rush into the meeting.

Others ways to combat tardiness? Better planning might be a start. Build in time between meetings to get from one to the next, for example. Set a warning alarm for when you need to get ready to leave and another for when you really have to leave. Don't answer the phone on your way out of your office. Reward yourself for arriving early. Instead of fretting that you are wasting time waiting for others, relax and enjoy a cup of coffee. Visualize yourself being on time—and remember the consequences of being late. Most importantly, plan better.

"Unpacking" a task by breaking it down into detailed steps might help provide a better estimate and lead to better planning. Researchers have found that people on average underestimate task-completion time by as much as 40%. Picturing a task from the perspective of an outside observer can help lead to more realistic predictions of how long the task will really take.

According to research at the University of San Diego, fast-paced Type A personalities tend to be more punctual. When tested, they estimated a minute passed in 58 seconds. The laid back, often late Type Bs thought a minute lasted 77 seconds. Those differences in perception can add up!

Let's be on time in 2016.