Empire Justice Center

December 2012
Issue 4 2012

DISABILITY LAW NEWS

Second Circuit Rules on Listing 12.05

The Court of Appeals for the Second Circuit has made one of its first forays into the Social Security Administration's (SSA) listing for mental retardation. The result was some good news for advocates and some not such good news. The court joined a number of other circuits in holding that evidence of a claimant's cognitive limitations as an adult establishes a rebuttable presumption that those limitations arose before age 22, as is required by SSA regulations. But the court also held that a claimant must make separate showings of deficits in cognitive and adaptive functioning. In other words, IQ scores alone are not enough. *See Talavera v. Astrue,* 697 F.3d 145 (2d Cir. 2012).

In addressing the "capsule definition" in the introduction to Listing 12.05 for mental retardation, the court specifically held that while a qualifying IQ score 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. Furthermore, the deficits in adaptive functioning must arise from the claimant's cognitive limitations, rather than from another physical ailment or other infirmity.

The court concluded that Ms. Talavera did not meet her burden of establishing that she suffers from qualifying deficits in adaptive functioning. In particular, the court noted that Ms. Talavera "meaningfully participates" in the care of her two young children, completed ten years of education in regular classes, and attended a year of business training. Until the onset of her back problems, she experienced no difficulties accomplishing the tasks required during the course of her previous periods of employment. Moreover, prior to the IQ report establishing scores within the realm of Listing 12.05C (60-70), her cognitive faculties had not been questioned by other medical professionals who had examined her.

In an interesting twist, the Court of Appeals issued a separate, summary order regarding the obesity arguments raised in the appeal. Although the separate decision has no precedential value, it debunked Ms. Talevera's obesity arguments, finding that the ALJ had considered it adequately. The court also upheld the ALJ's decision to credit the opinions of certain treating physicians over others. *Talavera v. Astrue,* 2012 WL 4820808 (October 11, 2012).

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Disability Law News©
is published four times per year by:

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December 2012 issue.
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Second Circuit Rules on Listing 12.05—Continued

(Continued from page 1)
What will the *Talavera* decision mean for the future of Listing 12.05? Only time will tell, but in new claims, advocates will be well-advised to focus on developing evidence of deficits of adaptive functioning even if IQ scores fall within those specified in Listing 12.05.

What are deficits in adaptive functioning? The *Talavera* court described them as the inability to cope with the challenges of ordinary everyday life. 697 F.3d at 153. Per the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision* (DSM-IV-TR) at 42, "*Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." SSA's POMS DI 24515.056D2, "Evaluation of Specific Issues - Mental Disorders - Determining Medical Equivalence, also sets forth a definition of adaptive functioning.

How is adaptive functioning measured? There are various tests of adaptive functioning. See http://www.assessmentpsychology.com/adaptivebehavior.htm. One of the more commonly used is the Vineland, which assesses what a person actually does as opposed to what he or she is capable of doing. It must be administered by a psychologist, social worker, or other professional with a graduate degree and training in interview techniques.

What if no formal testing has been done? Advocates should comb the record for - or try to develop - other lay or professional evidence of lack of adaptive functioning in those areas set out in the DSM-IV-TR: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. Per the DSM-IV-TR, significant deficits in only two of these areas are necessary for a diagnosis of MR. Descriptions in the DSM-IV-TR of typical behaviors of a person in the mild mental retardation range may also be helpful in persuading ALJs that a claimant need not be completely helpless or totally disabled to meet Listing 12.05C. *See, e.g., Ali v. Astrue*, 2010 WL 889550, at *5 (E.D.N.Y. Mar. 8, 2010).

Please share with us your ideas and strategies for developing evidence of deficits in adaptive functioning - and keep us informed of decisions from ALJs, the Appeals Council, and the district courts post *Talavera.*

Appeals Council Issues Practice Guide

The Appeals Council has issued a handy practice guide, imminently suitable for bulletin boards. It is a flow chart detailing the procedures to be used for requesting Appeals Council Review and for submitting evidence. It reminds advocates that Requests for Reviews of Hearing Decisions (HA-520) must be completed in paper format. It also reiterates that claimants and representatives should never use a hearing level barcode for submissions to the Appeals Council. Per the chart, inquiries about the status of a pending request for review should be made through the Congressional and Public Affairs Branch at its toll-free number (1-877-670-2722) or via fax at 703-605-8021. To contact AC Ombudsman Terry Jensen, fax her at 703-605-8691. http://www.ssa.gov/appeals/documents/Appt_Rep_Guide_Req_AC_Review_Submit_Evidence.pdf.

SSA Pays Small COLA for 2013

The Social Security Administration (SSA) announced a modest 1.7% cost-of-living adjustment (COLA) for 2013. Monthly Social Security and Supplemental Security Income (SSI) benefits for more than 60 million Americans will see a slight increase as follows:

The monthly SSI federal benefit rate for an individual will increase from the previous level of $698 to $710 and the monthly rate for a couple will increase from $1,048 to $1,066. The New York supplement will remain at $87 for individuals and $104 for couples living alone; the living with others supplements remain at $23 and $46, respectively. A 2013 New York State SSI benefit chart is available at: http://www.empirejustice.org/assets/pdf/issue-areas/disability-benefits/ssi-benefits-levels-chart.pdf

The Substantial Gainful Activity (SGA) threshold for Non-Blind has increased to $1,040 and for Blind has increased to $1,740. The Trial Work Period (TWP) threshold increased to $750. The maximum taxable earnings for OASDI (old-age, survivors and disability insurance) purposes will increase to $113,700 in 2013. The quarter of coverage amount has also increased to $1,160.

Most beneficiaries will see an increase in Medicare Part B monthly premiums from $99.90 to $104.90 per month in 2013. Some higher earning beneficiaries will have higher premium rates. http://www.medicare.gov/your-medicare-costs/costs-at-a-glance/costs-at-glance.html.

For SSA's Fact Sheet on 2013 Social Security Changes, see http://www.socialsecurity.gov/pressoffice/factsheets/colafacts2013.pdf.

SSA Offices Closing Earlier

Citing budget cuts, Social Security district offices began closing their doors to the public 30 minutes early each day, effective November 19, 2012. That means that offices that were open from 9 a.m. to 3:30 p.m. will now close at 3 p.m. And beginning January 2, 2013, the district offices will close to the public daily at noon on Wednesdays.

According to the agency, "[w]hile agency employees will continue to work their regular hours, this shorter public window will allow them to complete face-to-face interviews and process claims work without incurring the cost of overtime. The significantly reduced funding provided by Congress under the continuing resolution for the first six months of the fiscal year makes it impossible for the agency to provide the overtime needed to handle service to the public as it has done in the past."

Note that the earlier closing times do not apply to the Offices of Disability Adjudication and Review. ODARs will be maintaining their regular hours. Some ALJ hearings, however, are scheduled at district offices and at permanent remote hearing sites. ODAR officials have promised that security guards will be present to admit claimants and representatives if the district office is closed. These officials ask that you bring the notice of hearing with you, and that your clients bring photo IDs, for the guard's inspection. Let us know if you experiencing problems with getting into hearings sites after hours.

SSA Will Stop All Paper Checks in March 2013

March 1, 2013, is the date that federal benefit payments will transition to all-electronic delivery. The U.S. Department of the Treasury is urging all recipients of federal benefits, including SSI and Social Security disability or retirement benefits to switch to direct deposit or the Treasury-recommended Direct Express program. The card allows federal benefit recipients to pay bills, withdraw cash and make purchases without paying check-cashing fees. The money on the Direct Express card is FDIC-insured, and many card services are free.

The Treasury Department's *Go Direct* public education campaign is working with more than 1,800 partner organizations throughout the country to spread the message about the electronic payment rule and educate federal benefit recipients about their options. The Treasury Department encourages beneficiaries who have questions about electronic payments to visit www.GoDirect.org to view several educational videos and print materials that explain how electronic payments work and how to use the Direct Express card.

Check recipients can sign up for direct deposit or the Direct Express card by calling toll-free 1-800-333-1795, visiting www.GoDirect.org, or talking to their local federal paying agency office. The process is fast, easy and free. Individuals will need their Social Security number or claim number, their 12-digital federal benefit check number and the amount of their most recent federal benefit check. If choosing direct deposit, recipients also will need their financial institution's routing transit number, (often found on a personal check) account number and account type (checking or saving). There are no sign-up fees or monthly fees to receive benefits electronically.

Anyone already receiving federal benefit payments electronically will continue to receive their money as usual on their payment day, and no further action is required.

Keep in mind that waivers of this seemingly ironclad rule are available for persons who are older than 90, have a mental impairment, or live in a remote location. There have been recent Congressional hearings on numerous issues surrounding this upcoming transition, including the difficulty of the waiver process. Margot Saunders at the National Consumer Law Center (NCLC) testified on the hardships wrought by the very rigid waiver application process. We will keep you informed of any changes in this process that may be implemented.

Margot and others have also been working on a variety of other issues around direct deposit and electronic benefit cards for receipt of federal benefits. One area of special concern is private label prepaid debit cards -- i.e., cards that are not Direct Express, but offered by other companies. One example is Metabank, which offers the NetSpend card. These cards carry a Visa or Mastercard logo, and typically charge consumers high fees for basic use, withdrawals, overdrafts, and in some cases serve as a gateway to high-cost credit and payday loans.

At present, private label cards are only loosely regulated by Treasury. Existing regulations need to be clarified and improved. Margot is in need of **client examples** to fuel further advocacy with Treasury on this issue.

Have you seen clients facing problems with private label/non-Direct Express cards? Please send a brief description by email to Margot Saunders at msaunders@nclc.org.

SSI Program Turns Forty

The Supplemental Security Income (SSI) program just celebrated its fortieth birthday. When President Richard M. Nixon signed the program into law on October 30, 1972, he said, “Millions of older Americans who live in poverty, along with the blind and the disabled, will be helped by a new Federal floor under their income. Free of the inequities and red tape which plague the present system, this program can mean a big step out of poverty and toward a life of dignity and independence.”

Advocates and SSI recipients might not agree that the current SSI program is free of inequities and red tape. While it has certainly helped many beneficiaries, it has not necessarily offered as big a step out of poverty as promised. The National Senior Citizen Law Center (NSCLC) is calling for the modernization of the SSI program to make it work better for the elderly and disabled poor in the 21st century. NSCLC has made several recommendations:

- Increase Federal Benefit Rate from $698 to $937 per month ($937 is federal poverty level for one person)
- Provide federal match for state supplementation
- Increase SSI resource limit from $2,000 for individuals ($3,000 for a couple) to $10,000 ($15,000 for a couple)
- Increase general income disregard from $20 to $110 per month and earned income disregard from $65 to $357 per month thereby restoring disregards to their 1972 level
- Eliminate reduction in benefits for in-kind support and maintenance
- Repeal the transfer penalty
- Eliminate the time limits on benefits for humanitarian immigrants, refugees and asylees
- Restore pre-1996 standards for SSI immigrant eligibility
- Require Social Security to track and report on its processing of non-disability appeals in the same manner as it as it does for appeals of disability determinations

For more on the NSCLC’s proposals to update SSI, see http://www.nsclc.org/wp-content/

SSA Adds New Compassionate Allowances Condition

The Social Security Administration (SSA) announced the addition of 35 Compassionate Allowances conditions, bringing the total number of conditions in the expedited disability process to 200. Compassionate Allowances are a way to quickly identify diseases and other medical conditions that, by definition, meet SSA’s standards for disability benefits. The program fast-tracks disability decisions to ensure that claimants with the most serious disabilities receive their benefit decisions within days instead of months or years. These conditions primarily include certain cancers, adult brain disorders, and a number of rare disorders that affect children.

According to SSA, nearly 200,000 people with severe disabilities nationwide have been quickly approved, usually in less than two weeks, through the program since it began in October 2008. By definition, these conditions are so severe that SSA does not need to fully develop the applicant’s work history to make a decision.

SSA held seven public hearings and worked with experts to develop the list of Compassionate Allowances conditions. The hearings also helped the agency identify ways to improve the disability process for applicants with Compassionate Allowances conditions.

For more information on the Compassionate Allowances initiative, please visit www.socialsecurity.gov/compassionateallowances.

REGULATIONS

How to Determine Disability Onset Date Clarified

SSA has released revised policy statements relating to the determination of onset date. https://s044a90.ssa.gov/apps10/public/reference.nsf/links/11192012100554AM. The background statement to the release opens by noting, "The policy for establishing an onset date is unique because the rules are different for each type of disability claim. . . ."

Through its Office of Disability Programs (ODP), SSA convened a workgroup that found that errors in determining the correct onset date were frequent, as well as problems with the following issues:

- significant confusion between the field office (FO) and the Disability Determination Services (DDS) concerning their components' roles and responsibilities for establishing an onset date. Revised Program Manual Operations System (POMS) instructions need to identify each component's responsibilities clearly.

- POMS instructions need to be simpler and more user-friendly

SSA archived numerous existing sections of POMS at DI 25501.001 though DI 25501.131, and added 28 new POMS sections, starting with DI 25501.200 Overview of Onset Policy.

SSA's POMS are all available at https://secure.ssa.gov/apps10/poms.nsf/home!readform

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Interviewing People with Mental Impairments Guidelines

SSA has issued a new Program Operations Manual System (POMS) section, DI 11005.076 Interviewing People with a Mental Impairment(s). According to SSA, "this new (POMS) section provides interviewing guidelines when people exhibit signs of a mental impairment (s)." (https://s044a90.ssa.gov/apps10/poms.nsf/lnx/0411005076). The POMS were effective in late September 2012.

Remember that SSA also 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. See September 2011 *Disability Law News* for more details.

Can't Ask, Don't Tell your Social Security Number

Under a revision to New York's General Business Law, asking for a person's Social Security number is prohibited in many cases.

New NY Gen. Bus. L. §399-ddd, L. 2012 Ch. 372 provides, "2. No person, firm, partnership, association or corporation, not including the state or political subdivisions, shall require an individual to disclose or furnish his or her social security number, for any purpose in connection with any activity, or to refuse any service, privilege or right to an individual wholly or partly because such individual refuses to disclose or furnish such number, unless one of the exceptions enumerated in subdivision three of this section applies."

The exceptions, briefly stated, apply when the request is for

- A fraud investigation
- A credit transaction initiated by the consumer
- Banking transactions
- Employment
- Collection of child or spousal support
- A criminal record check
- Blood or organ donation
- Enforcement of a court judgment
- Verifying a person's age for enrollment into a marketing program
- Providing insurance to people with Medicare or Medicaid

Considering that the Centers for Medicare and Medicaid Services (CMS) and the Department of Health (DOH) both are moving away from using the SSN and toward program-specific ID numbers, the legislature may soon adjust those last exceptions. Note also that the federal government prohibits the use of disclosure in a section of the Privacy Act that is not codified. See Section 7 of the Privacy Act of 1974, P.L. 93-579, 88 Stat. 1896.

The new chapter is available at: http://public.leginfo.state.ny.us/menugetf.cgi . NY Gen. Bus. L. §399-ddd, adopted August 14, 2012, was effective December 12, 2012.

DAA Teletype Extended

In the September issue of the *Disability Law News,* we reported on a recent Second Circuit "DAA" (Drug and Alcohol Addiction) case. In *Cage v. Commissioner of Social Security,* 692 F.3d 118 (2d Cir. 2012), the Court of Appeals held that 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 DAA, was supported by substantial evidence although there was no medical opinion specifically addressing materiality.

In apportioning the burden of proof, the court rejected the plaintiff's argument that SSA's Teletype, EM-96200 (Aug. 30, 1996), assigns the burden of proving materiality to the Commissioner. The Teletype, oft cited by advocates in arguing that the "tie" should go to the claimant in cases where it is difficult or impossible to predict what limitations would remain if the claimant stopped using drugs or alcohol, is available at: https://secure.ssa.gov.apps10/public/reference.nsf/links/0492003041931PM. The Court acknowledged that the Teletype could be read to endorse a presumption in favor of the claimant. It refused, however, to accord it deference, as it is an "unpromulgated internal agency guideline."

We questioned the continued viability of the Teletype, but noted that the court did not rule on that aspect of the Teletype; it only addressed the Teletype in the context of the burden of proof issue. We also noted the Commissioner's continued acknowledgement of the Teletype as a "reasonable implementation" of the DAA regulations and statute in *Parra v. Astrue,* 481 F.3d 742, 748 (9th Cir. 2007), *cert. denied,* 552 U.S. 1141 (2008). *See, e.g.,* http://www.usdoj.gov/osg/briefs/2007/0responses/2007-0408.resp.pdf.

Well, the Commissioner has once again extended EM-96200 to February 23, 2014. Rumors of a DAA Social Security Ruling (SSR) persist, but for now, the Teletype lives on.

Emergency Assistance Available for Energy Emergencies

With the heating season upon us, the Office of Temporary and Disability Assistance (OTDA) recently reminded local social services districts that they should explore the availability of HEAP (Home Energy Assistance Program) benefits before issuing Emergency Assistance for Adults (EAA) to meet utility or non-utility energy emergencies. See GIS 12 TA DC-032: "Processing Temporary Assistance (TA) Requests for Energy Emergencies," available at: http://otda.ny.gov/policy/gis/2012/12DC032.pdf.

Of note, however, the new GIS provides that if HEAP is not available, or an SSI individual is not eligible for HEAP, the local social services district must determine EAA eligibility for recipients of SSI or additional State payments seeking assistance with an energy (utility or non-utility) emergency.

Thanks to Jim Murphy for keeping us abreast of these publications.

Smile - You May Be On Candid Camera

SSA's Office of Disability Programs recently added a new POMS section to provide guidance on processing a continuing disability review (CDR) when a Cooperative Disability Investigations Unit (CDIU) report of investigation (ROI) appears in the file. In other words, how should the Disability Hearing Unit (DHU) handle reports of video surveillance or other investigations?

POMS DI 33025.036 - Disability Hearing Officer's (DHO) Use of Cooperative Disability Investigations Unit (CDIU) Report of Investigation (ROI) Evidence - instructs DHOs on the identification, treatment, and resolution of issues with using a CDIU ROI in the CDR decision.

The POMS section reminds adjudicators that the regulations on determining disability provide broad-based authority to consider any kind of evidence bearing on the issue of disability. The regulations specify that the term "evidence" means anything the beneficiary or anyone else submits or SSA obtains that relates to the claim. 20 CFR 404.1512(b); 416.912(b).

A Cooperative Disability Investigations Unit Report of Investigation (CDIU ROI) is also considered evidence. It may include copies of school or employment records (or both), as well as video surveillance, but the majority of an ROI is usually a report of third party interviews. These reports are to be weighed with the totality of the evidence to evaluate whether, and the extent to which the other evidence supports the reports. The ROI can be used to evaluate the credibility of a claimant's statements: "Surveillance information in both video and narrative form can provide snapshots of a claimant's observed functional ability."

The claimant should be notified if an ROI is in his or her file. The DHO must make the file available to the claimant, but the CDIU sanitizes ROIs to protect the identity of confidential informants and investigative techniques, or removes other information that can be properly withheld under the Privacy Act. 5 U.S.C. 522a(d) and 20 CFR 401.35. If the file includes a flag or notation indicating referral to the CDIU but there is no ROI in the file, the DHO is to remove the file or notation before allowing the claimant access to the file. Surveillance tapes will not routinely be included in the file, but may be requested.

The POMS section also contains sample language for the DHO to use when referring to the evidence obtained. It is available at https://secure.ssa.gov/apps10/public/reference.nsf/links/11212012092244AM.

Federal Student Loan Forgiveness Process Streamlined

On October 23, 2012, the Secretary of Education amended the regulations governing discharge of federal student loans based on total and permanent disability. *See Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program; Final Rule*, 70 Fed. Reg. 212, 66,088 (Nov. 1, 2012) (to be codified at 34 C.F.R. pt. 674.61). The new regulations, effective July 1, 2013, not only streamline the process borrowers must follow in order to apply for student loan discharge, but also streamline the process by which the Secretary determines whether a borrower is disabled. Most importantly, disabled borrowers are no longer required to receive a second finding of disability from the Department of Education if they have already been found permanently disabled by the SSA.

Under the current regulations, borrowers with federal student loans held by two or more lenders must complete a separate total and permanent disability discharge application for each lender. The new regulations streamline the process by requiring borrowers to submit only one application to the Secretary. *See* 70 Fed. Reg. 212, 66,126 (to be codified at 674.61(b)(2)(ii)(A). Eliminating the need for borrowers to submit separate disability discharge applications to each of their loan holders is an important change. The new process is intended to establish the Secretary as the single point of contact for the borrower throughout the loan discharge process, reducing the time required to process applications, and ensuring that all of a disabled borrower's federal loans are discharged. This will help prevent instances of "straggler" loans, which have occurred when a borrower forgets to include a loan while applying for discharges. *Id.* at 66,118.

The new regulations require the Secretary to provide the borrower with all of the information needed to apply for discharge of federal student loans based on total and permanent disability. *Id.* The Secretary identifies all of the borrower's Title IV loans, and directs the lenders to suspend efforts to collect from the borrower for 120 days while the total and permanent discharge application process is underway. *Id.* (to be codified at 674.61(b)(2)(ii)(B),(C)). Should a borrower fail to submit a discharge application to the Secretary within 120 days, collection on his or her loans would resume. *Id.* (to be codified at 674.61(b)(2)(iii)).

Once the Secretary receives a borrower's application, it sends a notice to the borrower that the application was received, and explains the process by which the Secretary will review the application. *Id.* (to be codified at 674.61(b)(2)(ix)(A),(B),(C)). If the Secretary approves the borrower's application, it notifies the borrower and his or her lenders that the borrower's discharge application has been approved, and directs the lenders to assign the borrower's loans to the Secretary. *Id.* (to be codified at 674.61(b)(3)(iii)). And if the Secretary determines that the application does not support a finding of total and permanent disability, it will notify the borrower of the reasons for the denial, at which point the borrower has 12 months to request a re-evaluation and provide the Secretary with additional information to support eligibility for discharge. *Id.* (to be codified at 674.61(b)(3)(vi)(A),(D)). The borrower does not have to submit a new application upon denial.

Most notably, the amended regulations streamline the process by which the Secretary determines whether a borrower is totally and permanently disabled. The current regulations require borrowers to submit a physician's certification that the borrower is totally and permanently disabled as defined in § 674.51(aa)(1). Significantly, the new regulations allow a borrower to submit either a physician's certification, or an SSA notice of an award for SSDI or SSI benefits indicating that the borrower's scheduled disability review will be within five to seven years. *Id.* (to be codified at 674.61(b)(2)(iv)(A),(B)).

Borrowers who receive an SSA award for disability benefits indicating that the borrower's scheduled disability review will occur within three years are not included under the new regulations. Several commenters suggested that borrowers who receive an SSA award with scheduled review within three years should also be included in the new regulations. The Department, however, declined to include those borrowers because the SSA three-year review schedule indicates that medical improvement is expected or possible for those borrowers. *See id.* at 66,092.

Advocates familiar with SSA's Continuing Disability Review (CDR) process will recognize these time

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Student Loan Forgiveness—Continued

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frames as associated with the classification of the impairment for which benefits were granted. See 42 U.S.C. §§421(i) & 1382c(a)(3)(H)(ii); 20 CFR §§404.1590(c) & (d), 416.990(c) & (d), which defines the categories:

- Medical Improvement Not Expected (MINE) cases: SSA will review once every 5 to 7 years.
- Medical Improvement Possible (MIP) cases: SSA will review once every 3 years.
- Medical Improvement Expected (MIE) cases: SSA will review 6-18 months following finding of disability.

Query whether these classifications will be readily available to the Department, or if the burden will be on the borrower to get them from SSA? And what about those MIE cases that are not reviewed in a timely fashion? The preamble to the regulations suggests that if a borrower originally classified as MIP or MIE is able to demonstrate that s/he has nevertheless remained on disability benefits more than five years without a CDR and has not performed substantial gainful activity, the loan may be dischargeable.

The new regulations allow an SSA award for disability benefits to serve as proof of a borrower's total and permanent disability for discharging federal student loans, and should improve consistency in eligibility determinations. Streamlining this area of disability law is a step in the right direction towards eliminating inconsistent results between findings of disability from the Department of Education and the Social Security Administration.

Remember, however, that these new regulations only govern *federal* student loans. Private student loan borrowers face a whole different set of obstacles, some of which were recently chronicled in a report by the Consumer Financial Protection Bureau. See http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-report-finds-private-student-loan-borrowers-face-roadblocks-to-repayment/. The CFPB has an Ombudsman program to assist borrowers with student loan issues. The National Consumer Law Center's Student Loan Borrower Assistance Project is another comprehensive resource for borrowers, their families, and advocates representing student loan borrowers. See http://www.studentloanborrowerassistance.org. Finally, South Brooklyn Legal Services (SBLS) has a new project with New York's Community Economic Justice Resource Center (NEDAP) in New York City to assist veterans statewide with student loan issues. The hotline number for this special project is (718) 237-5564.

Thanks to University of Buffalo law student Alexandra Lugo for her helpful summary of the new regulations.

Searchable DOT Available

Thanks to the technical skills of David Ralph and Jim Murphy of LawNY and Legal Services of Central New York respectively, with support from Joe Kelemen of the WNYLC, searchable versions of both the *Dictionary of Occupational Titles (DOT)* and the *Selected Characteristics of Occupations Defined in the DOT* (SOC) are now available. The DOT is already available on-line (http://www.oalj.dol.gov/libdot.htm); the SOC can be purchased for $49 (http://www.occupationalinfo.org/ or http://www.wave.net/upg/immigration/dot_index.html. These new versions, however, are searchable "pdf" versions that can be uploaded onto your computer. And, if loaded onto a laptop, they can be readily accessible at hearings.

Jim and David created these documents by scanning the originals and running an OCR (Optical Character Recognition) program on them. What that means to the luddites among us is that these versions are now searchable. You can simply search for the DOT designation (number) or name, and it will take you to that title. You can also copy and paste from the document. In addition, Jim and David have placed hyperlinks from the Table of Contents (on page 2 of the document) to the corresponding section of the book. They have also added bookmarks that correspond to the Table of Contents, together with a more detailed TOC than exists in the document itself.

Jim recommends using the Bookmarks window rather than the TOC. This version will work in either Acrobat Professional, or Acrobat Reader. He also encourages advocates to learn the difference between the "find" and "search" functions in Acrobat. For many purposes, the "find" feature is far more valuable than the "search" function. Move to a specific section with the bookmarks feature, and then start your search there using "find." Be sure to display the "prior view" buttons on your toolbar, in addition to the "next" and "prior" buttons and the "find next" and "find previous" buttons. Note also that the "Bookmarks" section is partially collapsed, but is expandable. As with the SCO, the Bookmarks window has links to the various charts that decipher the codes used by the DOT. It may be useful to open two windows of the document - one for searching the DOT numbers and the second for checking the coding descriptions and definitions.

Some additional tips from Jim and Dave:

- Remember that "("and")" are characters in a string search in Acrobat, so keep this mind when performing searches and use the shortest name possible; searching by number is probably best
- Because this version is from a scan, the OCR results may not be perfect; let Jim or Dave know of any errors
- If using the file on a laptop at ODAR, keep open a "Notepad" window to type in the DOT #'s as the VE testifies - then just copy and paste the designation in the "find" or "search" window
- If using a "slower machine" when searching for a DOT number, open the Bookmarks section, make sure that the "Occupational Group Arrangement" is expanded, click on the bookmark of the number in parenthesis that corresponds to the first number of the code and then, using the "find" feature (as opposed to the "search" feature), perform your "search"
- When looking for a word in job title only, go to the "Alphabetical Index" in the Bookmarks window, and use the "find" box again.

Since these pdf versions are quite large, they can be downloaded from WNYLC's site at http://onlineresources.wnylc.net/disability.htm. They will also be available at the Disability Benefits section of the Empire Justice Center website, under vocational issues: http://www.empirejustice.org/issue-areas/disability-benefits/misc-ssi-ssd-issues/. Finally, they can be accessed from the Online Resource Center as DAP #551.

Many thanks to Jim, Dave, and Joe for their herculean efforts in bringing the rest of us into the 21st century!

GAO Issues Reports on SSI Overpayments, UIB

The Government Accountability Office (GAO) has recently issued two reports dealing with Social Security disability programs. GAO-13-109 - entitled "SUPPLEMENTAL SECURITY INCOME - SSA Has Taken Steps to Prevent and Detect Overpayments, but Additional Actions Could Be Taken to Improve Oversight" - was released in December 2012, and is available at http://www.gao.gov/assets/660/650902.pdf. GAO-12-764 - Overlapping Disability and Unemployment Benefits Should be Evaluated for Potential Savings - was released on July 31, 2012, and is at http://www.gao.gov/products/GAO-12-764.

GAO-13-109 –Overpayments

The GAO found that SSI overpayment debt rose from $3.8 billion in FY 2001 to $7.3 billion in FY 2011. Overpayment recovery increased from $860 million to almost $1.2 billion in the same period. According to the GAO, unreported bank accounts and wages accounted for 37 percent of all SSI overpayments. It concluded that SSA lacks comprehensive, timely information about SSI recipients' financial institution accounts and wages, although it has developed new tools to improve its information collection. The GAO reviewed two of the new tools: Access to Financial Institutions (AFI), which conducts electronic searches of about 96 percent of financial institutions where SSI recipients have direct deposit accounts; and Telephone Wage Reporting (TWR), which allows recipients to call into an automated telephone system to report their monthly wages. SSA reported 36,000 successful wage reports for September 2012, although it estimates that about 600,000 recipients have wages. It is also attempting to increase reporting by representative payees via the TWR. SSA claims that it is developing a smart phone wage reporting application known as the SSI Mobile Wage Reporting (SSIMWR) to further increase timely reporting.

The GAO reported that most SSI overpayment debt (75%) was recovered by withholding of recipients' ongoing Title XVI and/or Title II benefits. It also noted that in FY 2011, SSA approved 76 percent of all SSI waiver requests. It criticized SSA for its lack of supervisory review of waiver determinations, including those for overpayments of $2,000 or less, which can be waived without approval per POMS SI 02260.025.

The GAO recommended that SSA should review its policy concerning waiver decisions of $2,000 or less, given that federal agencies are supposed to have controls in place to ensure that no individual can control all key aspects of a transaction or event. It also recommended that SSA explore ways to strengthen oversight of the waiver process through data analysis. While SSA agreed with the first recommendation, it argued that it does not have the resources to create and analyze data at the level of detail suggested.

Advocates who deal with overpayment cases may have their own criticisms and recommendations. For example, SSI recipients frequently are not provided with receipts for wage reports, despite provisions in the POMS. See, e.g., SI 00820.130 Evidence of Wages or Termination of Wages. Additionally, overpayment appeals or requests for waivers frequently languish at the district office level. SSA is allegedly working on more mechanized ways to log in and track these requests.

GAO-12-764 – Overlapping Disability and Unemployment Benefits

The GAO reports that in FY 2012, 117,000 individuals received concurrent benefits from Disability Insurance and Unemployment Insurance programs. While acknowledging that these individuals represented less than one percent of the total beneficiaries of both programs, the GAO stressed that they received $281 million in disability benefits and more than $575 million in unemployment benefits.

The GAO also acknowledged that under certain circumstances, individuals may in fact be eligible for concurrent benefits due to differences in the requirements of the two programs. In particular, it cited the difference between SSA's definition of substantial gainful activity (SGA) and the Department of Labor's (DOL) rules that allow states to determine a claimant if "able and available for work" even if the work does not rise to the level of SGA. [Advocates will recall the oft-cited "Chief Judge Bulletin" from 2006, reminding adjudicators that the receipt of unemployment benefits does not preclude the receipt of disabil-

New State Disability Report Issued

In another state directive relevant to DAP advocates, the Department of Health (DOH) and Office of Health Insurance Programs (OHIP) calls for ending the use of the twenty-five page "Medical Report for Determination of Disability" (LDSS-486T), and introduces a new one page LDSS-486T. See GIS 12 MA-027: "Medical Evidence Gathering for Disability Determinations - Adult Cases," available at: http://www.health.ny.gov/health_care/medicaid/publications/docs/gis/12ma027.pdf.

According to the announcement, this is "a revision in the process to be followed to gather medical information for adult disability determinations for submission to any Disability Review Team (DRT), whether it be the State or a local DRT. This message clarifies the necessary medical and non-medical documentation to be gathered and provides for a uniform medical information gathering and submission process statewide."

The GIS creates some additional, new, single page forms, and calls for a reduction in the use of consultative exams. Links to the five new forms are available at: http://www.health.ny.gov/health_care/medicaid/publications/pub2012gis.htm.

The new one page LDSS-486T is available at: http://www.health.ny.gov/health_care/medicaid/publications/docs/gis/12ma027att1.pdf

Although designed for use in state and local disability determinations, these assessments can often be useful in SSA determinations. Thanks again to Jim Murphy for pointing this out.

SSI Overpayments, UIB—Continued

(Continued from page 12)

ity benefits, which is available on the Online Resource Center as DAP #527.]

The GAO objected, however, to overlapping benefits, noting that SSA reduces disability benefits if beneficiaries receive certain other government disability benefits or workers compensation. No such offset exists for unemployment benefits. The GAO recommends that DOL work with SSA to evaluate whether there would be significant cost savings by eliminating or reducing overlapping disability and unemployment benefits.

Note that this report does not consider the concurrent receipt of unemployment benefits and SSI disability benefits, presumably because unemployment benefits are considered unearned income for SSI purposes and used to reduce SSI payments. See POMS SI 00830.230.

COURT DECISIONS

Will the Fifth Time Be the Charm?

After four hearings, prompted by three Appeals Council remands, U.S. District Court Judge Andrew L. Carter, Jr., ordered another remand for further proceedings consistent with Magistrate Judge Henry B. Pitman's report and recommendation in *Norman v. Astrue*, 2012 WL 4378042 (S.D.N.Y. September 25, 2012). The court denied the Commissioner's motion for judgment on the pleadings and overruled his numerous objections to Magistrate Judge Pitman's report.

In his Report and Recommendation, Judge Pitman concluded that plaintiff Norman's motion should be granted, the Commissioner's motion should be denied, and recommended that the case be remanded for further proceedings. *Norman v. Astrue,* 2012 WL 4364365 (S.D.N.Y., February 24, 2012). On remand, Judge Pitman recommended that the ALJ should consider whether the plaintiff meets the requirements of Listing 1.04A; explain the reasoning behind his ultimate determination; confirm that all relevant records from the plaintiff's treating physician have been provided to the SSA; explain the weight given to those opinions; reassess the plaintiff's credibility; and clearly explain the support for his ultimate conclusion. The Commissioner objected to Judge Pitman's report on four grounds.

First, the Commissioner objected to Judge Pitman's consideration of facts contained within a prior ALJ decision, arguing that the consideration of "non-final" decisions is prohibited by 42 U.S.C. §§ 405(g) and (h) of the Social Security Act. The court disagreed, stating that the requirements of §§ 405(g) and (h) are merely prerequisites for subject matter jurisdiction - which the plaintiff satisfied when he exhausted his administrative remedies and obtained a final decision after being denied review by the Appeals Council. The court found that the Commissioner was unable to cite support for his argument that once the Appeals Council vacates and remands an ALJ decision, the record of that decision ceases to be relevant and a reviewing court cannot refer to it. The court overruled the Commissioner's objection, finding that Judge Pitman's reference to relevant facts contained within a prior, vacated decision was not erroneous, as he was not reviewing the prior decisions for jurisdictional purposes, but merely referencing relevant facts.

Second, the Commissioner objected to Judge Pitman's requirement that, on remand, the ALJ should explain his reasoning for concluding that the plaintiff did not have an impairment that met the requirements of Listing 1.04A. The Commissioner asserted that the ALJ's conclusion was supported by substantial evidence. The court disagreed, relying upon the standard set forth in *Berry v. Schweiker,* 675 F.2d 464, 468 (2d Cir.1982). In *Berry,* the Second Circuit held that in a claim premised on one or more listed impairments, unless the reviewing court is able to reasonably infer the particular criteria that the ALJ found lacking, the ALJ should set forth a sufficient rationale in support of a decision not to find a listed impairment. Here, the court overruled the Commissioner's objection, agreeing with Judge Pitman's finding that the medical evidence demonstrated that plaintiff's impairments potentially meet the requirements of Listing 1.04A. The court stated that although some of the evidence regarding plaintiff's impairments was "not overwhelming," the ALJ failed to explain his reasoning in light of the conflicting evidence in the record.

Third, the Commissioner objected to Judge Pitman's recommendation that, upon remand, the ALJ should confirm that all relevant records from the plaintiff's treating physician have been provided to the SSA, and should explain the weight ultimately given to the treating physician's opinions. The Commissioner ar-

(Continued on page 15)

Supreme Court to Hear DOMA Case

The U.S. Supreme Court will consider the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), which defines marriage as a legal union between one man and one woman. On December 7, 2012, the Court accepted *certiorari* in *Windsor v. U.S.*, 699 F.3d 169 (2d Cir. 2012). *U.S. v. Windsor*, 2012 WL 4009654, 81 USLW 3116 (U.S. Dec 07, 2012) (NO. 12-307).

Although *Windsor* involves the issue of spousal deductions under federal tax law, the constitutionality of DOMA affects eligibility for a myriad of federal benefits - including Social Security benefits - for same sex couples. See the September 2012 issue of the *Disability Law News* for a summary of other recent cases challenging the constitutionality of Section 3 of DOMA.

If the Supreme Court finds Section 3 unconstitutional, same sex spouses may soon become eligible for those benefits. In anticipation, members of same sex couples in states recognizing their marriages should consider applying now. If DOMA is ruled unconstitutional, they may be eligible for additional months of retroactive benefits. Jerry McIntyre of the National Senior Citizens Law Center has prepared a webinar with more detail on how and why to apply for Social Security benefits, which is available at http://www.nsclc.org/wp-content/uploads/2012/11/SS-Benefits-and-Same-Sex-Marriage-121212.pdf.

Will the Fifth Time Be the Charm?—Continued

(Continued from page 14)

gued that the evidence was adequately developed for the ALJ to make his final determination, and the ALJ properly declined to give the treating physician's opinion controlling weight. The court overruled the objection, adopting Judge Pitman's recommendation, because the ALJ gave the treating physician's opinion less than controlling weight without applying the factors set forth in 20 C.F.R. § 404.1527(d)(2)-(6), and failed to provide a "good reason" for not giving the opinion controlling weight. Furthermore, the court emphasized, the fact that the treatment record did not contain the treating physician's notes or findings during a three-year period negates the Commissioner's assertion that the record was adequately developed for the ALJ to make his determination. The court held that it was necessary to remand the case in order to determine whether all relevant records from the plaintiff's treating physician were provided to the SSA.

Finally, the Commissioner objected to Judge Pitman's finding that the ALJ failed to properly assess the plaintiff's credibility, arguing that the ALJ's credibility assessment was supported by substantial evidence. Specifically, the Commissioner pointed to inconsistencies between the plaintiff's statements and the RFC assessment, and the fact that the plaintiff had been capable of performing light work since his alleged onset date. The court found that the ALJ committed legal error in evaluating the plaintiff's credibility. He failed to consider the additional factors required by 20 C.F.R. §§ 404.1529(c) (3)(i)-(vi) before rejecting plaintiff's subjective testimony, and failed to explain his reasoning such that a reviewing court would be able to decide whether his decision was supported by substantial evidence. The court emphasized that what was missing from the ALJ's analysis was an explanation as to why the plaintiff's subjective complaints were found less than fully credible.

Plaintiff Norman suffered from a myriad of physical and mental impairments, including cervical radiculopathy, wrist problems, lumbar sacral strain, blindness in one eye, and depression. Although some of the evidence may have been equivocal, the magistrate judge appeared frustrated by the ALJ's repetition of the same mistakes in the third and fourth hearing decisions, including his failure to analyze the listing properly and his disregard of the treating source opinions. Given the spate of recent decision finding harmless error in the face of similar legal errors, it is encouraging to see the court take these complaints seriously.

Thanks to University of Buffalo law student Alexandra Lugo for her excellent summary of the *Norman* case.

Benefits to be Restored for *Clark* Class Members

Readers of these pages will be familiar with the *Clark* litigation - a class action lawsuit challenging the Social Security Administration's practice of suspending and denying SSI and Social Security (Old-Age, Survivors, and Disability Insurance) benefits to people with outstanding warrants for alleged probation or parole violations. See the June 2012 edition of the *Disability Law News.*

Clark v. Astrue was originally filed in December 2006 by the Urban Justice Center's Mental Health Project, the National Senior Citizens Law Center (NSCLC), and *pro bono* counsel Proskauer Rose LLP. (See http://www.urbanjustice.org/ujc/litigation/mental.html for litigation documents.) The U.S. Court of Appeals for the Second Circuit ruled in March 2010 that SSA's practice is unlawful and that an outstanding warrant alone is not sufficient evidence that a person is in fact violating probation or parole.

In March 2011, the district court certified a *nationwide* class of individuals whose benefits were suspended or denied based solely on the existence of a warrant for an alleged violation of probation or parole and who either 1) were deprived of these benefits on or after October 24, 2006; 2) had an initial overpayment determination made on or after October 24, 2006; or 3) had an administrative appeal pending on or after October 24, 2006.

On April 13, 2012, the court ordered SSA to discontinue its practice of suspending and denying benefits based solely on an outstanding probation or parole violation warrant and to reinstate all previously suspended benefits retroactively.

SSA has submitted an implementation plan outlining the schedule of dates by which it expects to have complied with the court's order. The plan provides for class members to be restored in phases beginning October 2012 and ending by March 31, 2014.

According to Gerry McIntyre of the NSCLC, the benefits in question may total $1 billion. Advocates should be on the look out to identify potential class members, both in reviewing old claims and when interviewing new clients. And be sure that SSA has the current mailing addresses of these clients so that they can be notified of class relief in a timely fashion.

Class counsel has prepared several documents containing helpful information for clients and advocates:

- One-page flyer to notify potential class members and other individuals who might be affected;
- Two-page explanation of the implementation plan to provide to these individuals; and
- NSCLC's more detailed summary, which includes frequently asked questions.

The documents are available on the On-line Resource Center as DAP #552.

Appeals Council Conducts Own Motion Reviews

The Division of Quality of the Office of Disability Adjudication and Review (ODAR) issued its Fiscal Year 2011 Final Actions Report recently, summarizing the outcomes of the 3,692 favorable ALJ decisions it referred to the Appeals Council. The Council refused review in 78 percent of the cases. It remanded 18 percent, and issued "corrective" decisions in four percent. It took own motion review in 22 percent of the cases – a percent similar to its reversal/remand rate in appealed decisions.

The Appeals Council issued a less favorable decision in 28% (44) of the 147 cases (4%) in which it issued new decisions. In 22% (32 cases) it changed the basis but not the outcome of the decision. It issued a fully unfavorable in five cases. The leading basis for remand was "Opinion Evidence Evaluation & RFC."

The report, which was presented to the Senate Permanent Committee on Investigations, can be found at http://www.hsgac.senate.gov/subcommittees/investigations/hearings/social-security-administrations-disability-programs

WEB NEWS

HUD Sandy Disaster Relief Information Available

The U.S. Department of Housing and Urban Development (HUD) issued a Disaster Brochure and detailed FAQs (Frequently Asked Questions) on Hurricane Sandy, covering immediate assistance for evacuees, FHA and other mortgage issues, homeowner repair programs, public housing, Section 8, and fair housing concerns, in English, Spanish, Chinese, Hindi, Korean, Russian, Tagalog, and Urdu.

HUD's Hurricane Sandy page: http://portal.hud.gov/hudportal/HUD?src=/sandy

HUD Office of Fair Housing & Equal Opportunity (FHEO) disaster resources page: http://portal.hud.gov/hudportal/HUD?mode=disppage&id=FHEO_DISASTER_RESOURCES

SNAP Calculator Updated

The *Benefits Plus Food Stamp Calculator* has been updated to reflect the income changes in the food stamp (now SNAP) program. You can find the calculator on the *Benefits Plus* website along with other free tools.

http://benefitsplus.cssny.org/benefit-tool/benefit-tools

Find Free Legislative Information

The Library of Congress recently unveiled a new website that will eventually replace THOMAS.gov as the government's site for accessing free, fact-based legislative information. The site includes bill status and summary, bill text, House and Senate member profiles, and a number of new features, including effective display on mobile devices.

Congress.gov

Medicaid Managed Care and Pharmacy Information Website Online

The New York State Department of Health (DOH) announced the release of the Medicaid Managed Care and Family Health Plus Pharmacy Benefit Information Website. The initial phase of the website release is intended to provide easy access for members and providers looking for information on the drugs and supplies covered by different Medicaid and Family Health Plus managed care health plans. In the near future, DOH plans to release phase two of the project, which will allow interactive comparison of coverage searches.

http://pbic.nysdoh.suny.edu

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

***Vincent v. Astrue,* 651 F.3d 299 (2d Cir. 2011)**

In a case involving EAJA (Equal Access to Justice Act) attorney fees, the Second Circuit held that counsel representing Social Security claimants cannot be penalized on fee petitions "for failing to address issues collateral to the disability determination as to which counsel had no notice." The district court had found that although the ALJ had failed to develop the record, counsel should have should have addressed the underdeveloped issues as part of "his ethical obligation to act with reasonable diligence." The Court of Appeals found that the district court "demanded too much of counsel." Counsel should not have "to anticipate and refute all conceivable credibility issues…." His perceived failure to anticipate what were essentially collateral issues to the finding of disability were not "special circumstances" justifying a reduction in his EAJA award. The responsibility for the gaps in the records fell exclusively on the ALJ.

***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 did not comply with the ALJ's obligation 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.

***Encarnacion ex rel. George v. Astrue*, 568 F.3d 72 (2d Cir. 2009) ("Encarnacion II"), cert. denied 130 S.Ct. 2342, 176 L.Ed.2d 576 (U.S. 2010).**

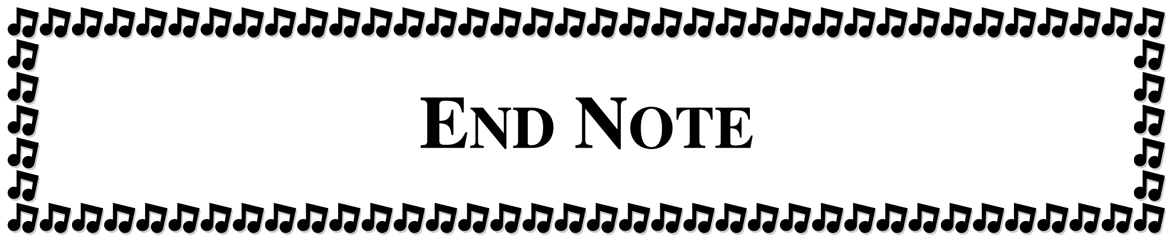
The Court rejected plaintiffs' challenge to SSA's policy preventing adjudicators from adding together less than marked limitations from separate domains and prohibiting SSA from adjusting the level of limitation in one domain to reflect the impact of limitations in other domains. The Court deferred to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

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

The Court agreed the opinion of the treating orthopedist that the claimant could perform "sedentary, light-duty" supported the ALJ's finding that the claimant had the residual functional capacity (RFC) for light work. It found that the need to get up and move around from time to time does not preclude an ability to perform sedentary work. It also upheld the ALJ's credibility finding, observing that the ALJ correctly noted the claimant's level of daily activities, including caring for his one-year old 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. Plaintiff's argument that the regulations should not be applied retroactively was deemed waived since it was not raised in the district court.

***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 the very rural 'North Country' of New York State.



Plan Your New Year's Resolutions Carefully

How many of us start the new year with all the best intentions? Get organized, go to the gym, lose weight, or quit smoking? And how many of us fall off the wagon before the end of January? Researchers studying the science of "self-change" are trying to understand the ways in which we may sabotage our chances for success. Some speculate that we may be too optimistic about those chances.

Psychology Professor Janet Polivy from the University of Toronto has studied dieters for decades. She has found that being overly optimistic and having unrealistic expectations can erode motivation and lead to failure. In one study, dieters who lost an average of one pound per week nonetheless abandoned their diets after a few weeks because they were not meeting their unrealistic goals of losing five to ten pounds. According to a report in the *Wall Street Journal* on December 18, 2012, Dr. Polivy has seen observed this cycle many times in her work and calls it the "false-hope" syndrome.

To avoid this, Peter Gollwitzer, a psychology professor at New York University, says that people need to have a plan. He told the *Wall Street Journal* that those with "implementation intentions" are more effective at reaching their goals. In other words, we need to spell out in advance what we will do when an obstacle to our goal arises. For example, if you automatically reach for a cookie when you walk in the cafeteria, come up with a plan to take an apple instead. You need an alternative response to overcome your habitual response.

Gollwitzer recommends avoiding "don't" - just telling yourself not to do something usually doesn't work well. He also suggests preparing an "if/then" plan to avoid temptation, being ready to ignore distractions or challenges, and replacing the habit you want to change with a ready and easy substitute. Maybe easier said than done…

Happy New Year!