Empire Justice Center

January 2018
Issue 1 2018

DISABILITY LAW NEWS

Applications and Appeals Are on the Decline

Social Security has posted final numbers on disability claims filed and approved in 2017, as well as the number of beneficiaries drawing disability benefits. https://www.ssa.gov/OACT/STATS/dibStat.html. Applications for SSI disability benefits and SSDI disabled workers benefits have decreased each year since reaching a peak in 2010. Although Fiscal Year 2017 statistics regarding SSI applicants are not yet available, 2.17 million SSDI claims were filed in 2017. This is a 6.4% decrease from 2016, and a 26% decrease from the peak in 2010.

The number of claims approved actually went up by 2.4% in 2017, the first yearly increase since 2010. Still, the number of claims approved is down 28% from the peak. The number of claimants in current payment status declined by 1.29% in 2017. The number of beneficiaries has also decreased steadily since third quarter 2015. The number of SSI recipients under age 65 reached its highest point in 2013 and has decreased each year since. The termination rate increased to 9.30%, which is the highest of any year presented. It should be noted, however, that many terminations were based on claimants aging off disability benefits and on to retirement benefits.

There was also a significant drop in requests for hearings, with 698,579 requests for ALJ hearings in 2016 and 620,977 in 2017. Despite this 11% decrease in requests for hearings, the number of pending cases dropped by less than 6% during this time. Federal case filings, dissimilarly, have increased. There were 18,239 new federal court cases filed in 2016 and 18,445 in 2017, resulting in a modest 1.1% increase.

Why this decrease in applications? It may largely be due to baby boomers aging from disability-prone years to eligibility for full retirement benefits. And there are many reasons why claimants chose not to appeal denials, including, but not limited to, long wait times for ALJ hearings and fluctuating employment trends.

This decrease in SSDI claimants and beneficiaries has extended the predicted solvency of the SSDI trust fund. The 2017 Trustees' Report estimates the trust fund will pay all benefits until 2028, five years longer than predicted in 2016. After 2028, the trust fund could pay 93% of benefits. When a Social Security trust fund faced insolvency in the past, Congress took action to maintain SSA's ability to pay all benefits due. Congress continues to debate how and when to do so in the future.

(Continued on page 2)

INSIDE THIS ISSUE:

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

Empire Justice Center
1 West Main Street, Suite 200
Rochester, NY 14614
Phone: (585) 454-4060

The newsletter is written and edited by:
Louise M. Tarantino, Esq.
Catherine M. Callery, Esq.

January 2018 issue.

Available online at:

www.empirejustice.org

Save the Date

The 2018 NYSBA Partnership Conference is scheduled for October 2-4, 2018, in Albany. We are busy planning informative sessions for DAP advocates. Mark your calendars and plan to be there. More information will be available in coming months.

IRS Mileage Rate Increased

The IRS has announced the 2018 standard mileage rate for business purposes is 54.5 cents per mile, an increase of one cent from 2017. The change is relevant for claimants and representatives who obtain SSA reimbursement for travel expenses when traveling to hearings. Those mileage rates are summarized at gsa.gov/mileage and mirror the IRS's standard mileage rate.

The change may also be relevant to those deducting mileage as a business expense, though the IRS publication notes that the standard mileage rate is only one permissible method of calculating these expenses. The IRS has a different mileage rate for using an automobile to provide gratuitous services to a charitable organization, which could be important to representatives who provide pro bono assistance through nonprofits. That charitable rate, which is fixed by law and has not increased, is 14 cents per mile.

Applications and Appeals on the Decline - Continued

(Continued from page 1)

Thanks to our friends at NOSSCR (the National Organization of Social Security Claimant's Representatives) for digesting and summarizing this SSA data. NOSSCR's detailed report can be found in its Social Security Forum: Volume 39, No 11- December 2017. The data itself is at https://www.ssa.gov/oact/STATS/dibstat.html.

SSA's website contains a host of data of all kinds. For example, it recently highlighted Appeals Council wait times since 1989, when claimants waited an average of 133 days for a decision. The wait reached a low of 126 days in 1994, and a high of 505 days in 2000. For Fiscal Year 2016, the wait was, on average, 264 days. SSA reminds us that cases are not necessarily decided on a "first-in, first-out" basis, which can skew the averages. https://www.ssa.gov/appeals/DataSets/07_AC_Requests_For_Review.html

SSI, Medicare and Medicaid Rates Updated

NYS Office of Temporary and Disability Assistance (OTDA) issued and posted 17 INF-12: "Social Security Administration (SSA) Cost-of-Living Adjustment (COLA) for January 2018 and Updated SSI and SSP Benefit Levels Chart." The 2% COLA in Social Security benefits (see October 2017 Disability Law News) resulted in a $15.00 per month increase in the SSI Federal Benefit Rate (FBR) for 2018. While there is no change in the SSP levels, note that the personal needs allowance (PNA) for residents in Congregate Care Levels 1, 2, and 3 do increase. Here is the breakdown from the INF:

> Please note, the corresponding Personal Needs Allowance (PNA) for persons in Congregate Care Levels 1, 2 and 3 have increased from their 2017 level. Residents of Congregate Level 1 facilities will see an increase in their PNA of $3.00 dollars to $144.00. Congregate Care Level 2 recipients will see their PNA increase $3.00 to $166.00 and PNA for Congregate Care Level 3 recipients will increase $4.00 to $198.00. These increases are effective in January 2018.

The INF is available at: http://otda.ny.gov/policy/directives/2017/INF/17-INF-12.pdf. The SSI Benefits Level Chart is available as a link off the INF, or at: http://otda.ny.gov/policy/directives/2017/INF/17-INF-12-Attachment-1.pdf

The Centers for Medicare & Medicaid Services (CMS) has published the 2018 numbers for Medicare. 82 Fed. Reg. 55370 (Nov. 21, 2017). https://www.gpo.gov/fdsys/pkg/FR-2017-11-21/html/2017-24877.htm

The Part B premium rates with Income Related Monthly Adjustment Amount (IRMAA), and links to additional information, also are available on the CMS website at https://www.medicare.gov/your-medicare-costs/part-b-costs/part-b-costs.html

The Part B (traditional Medicare Medical Insurance) premium and deductible, effective for coverage starting January 1, 2018, are $134 (same as 2017) and $183.

The Part A (traditional Medicare Hospital coverage) deductible for inpatient hospital care and the co-insurance daily amounts for days 61-90 of a hospital stay, the daily co-insurance amount for "lifetime reserve days," and the co-insurance amount for skilled nursing facility stays, are announced at Fed. Reg. Vol. 82 55367 (Nov. 21, 2017). https://www.gpo.gov/fdsys/pkg/FR-2017-11-21/html/2017-24913.htm

Finally, the "2018 Part A Premiums for the Uninsured Aged and for Certain Disabled Individuals Who Have Exhausted Other Entitlement" amount is $422 per month in 2018. Certain individuals who must pay a premium to get Part A are entitled to a 45% reduction; they pay $232.

For Medicare beneficiaries whose Part B premiums are deducted from their Social Security RIB or DIB monthly payment, SSA's "hold harmless" provision will mean that some will pay Medicare Part B premiums less than $134; they also may see no increase in monthly benefit from the COLA because it gets eaten up by the Part B premiums.

On the Medicaid front, HRA just released its 2018 chart incorporating the new Medicaid income and resources levels announced by DOH. This is the first increase in income and resource levels for non-MAGI in three years. Income and Resource Limits for New York State Public Health Insurance Programs.

NYLAG's Evelyn Frank Legal Resources Program (EFLRP) has updated its Fact Sheet on Medicaid eligibility for Aged 65+/ Blind/Disabled with basics on applying for Medicaid and home care thru MLTC or Immediate Need – good for emailing out to intake callers asking for basic info.

KNOW YOUR RIGHTS: Fact Sheet Explaining Basic Rules on NYS Financial Medicaid Eligibility for People who are Disabled, Aged 65+, or Blind.

Recommendations Made for Improving Representative Payee Program

A recent report by the Social Security Advisory Board (SSAB) explores how to strengthen the representative payee (rep payee) program of the Social Security Administration, which serves more than eight million beneficiaries/recipients. *Improving Social Security's Representative Payee Program*. January 11, 2018. Washington: SSAB 2018. The full report is available at http://ssab.gov/Details-Page/ArticleID/1237/Improving-Social-Securitys-Representative-Payee-Program-January-2018?eType=EmailBlastContent&eId=5307d057-30af-4476-baf2-dd0fda05b063

The report outlines the current design and requirements of the rep payee program. In Fiscal Year (FY) 2016, close to six million rep payees managed $70 billion in benefits for nearly eight million OASDI and SSI beneficiaries. More specifically, family members serve as rep payees for 85 percent of all beneficiaries, and 63.5 percent are parents. SSA estimates that the demand for rep payees will continue to increase with an aging population. As the population ages and the need for new rep payees grows, SSA will have to recruit, identify, and monitor other suitable, non-family rep payees.

SSA FO (field office) employees handle the operations of the rep payee program. They are tasked with determining whether a beneficiary requires a rep payee, selecting the appropriate rep payee, monitoring some rep payees, and when necessary, changing rep payees. In June 2017, SSA acknowledged the agency does not have the expertise as "…trained auditors or social workers… and [is] not well suited to perform certain tasks that are related to the rep payee process." (SSA Acting Commissioner Nancy Berryhill, letter to Chairman Sam Johnson. "Report on SSA's Representative Payee Program.")

SSA has recently worked to improve its rep payee program by designing and introducing a new electronic rep payee system, funding research, increasing training efforts, initiating an outside contract to conduct on-site reviews, and increasing the number of potential rep payee reviews. SSA struggles, however, to maintain a consistent rep payee policy or comply with policies among FOs. FO staffs only receive a few hours of training on this sensitive issue. The SSAB recommended SSA standardize the capability determination process by using empirically-based assessment and decision making methods.

Once SSA establishes the need for a rep payee, it must designate one. The objective is to determine who will best serve the interest of the beneficiary. There are two types of rep payees - individual and organizational, with several classifications within each. The SSAB found that given an aging population, the "dissolution of family structure," and smaller family size, the preference lists may be outdated and should be further examined.

In certain situations, organizational rep payees may be the best or only viable option for some beneficiaries. Nearly 20 percent of beneficiaries served by organizational rep payees are served by fee-for-service (FFS) organizational rep payees. The SSAB recommends SSA establish a centralized process to certify new FFS organizational rep payees instead of having each FO do its own certification.

The SSAB also recognized the potential conflicts that arise with creditor rep payees. A creditor is an individual or organization that provides the beneficiary with goods or services (beyond financial management) for a fee. Rep payees should spend funds to create stable living environments and to ensure that basic needs are met for beneficiaries; creditors may have different interests. Creditor relationships occur, for example, in state foster care agencies since those agencies are often assigned automatically as the rep payee for children in foster care without an analysis of whether better choices are available. Particularly with highly vulnerable populations such as children and the elderly, SSA should consider all potential rep payees in order to find one that will act in beneficiary's best interests. The SSAB also raised issues involving SSA's criminal bar policy.

Recognizing the complexity of SSA rules and requirements, particularly in the SSI program, the SSAB recommended SSA create specialized rep payee expertise at the FO and/or regional level to

(Continued on page 5)

How Do I Correct My Earnings Record?

Ordinarily, earnings cannot be corrected beyond three years, three months, and 15 days from the end of the taxable year in which wages were paid. You can, however, correct your record after that length of time to:

- Confirm records with tax returns filed with the Internal Revenue Service;
- Correct errors due to employee omissions from processed employer reports or missing reports;
- Correct errors "on the face of the record"; that is, errors found by examining SSA records of processed reports; and
- Include wages reported by an employer as paid to an individual, but not shown in SSA records.

To correct a Social Security earnings record, contact SSA at 1-800-772-1213 (TTY 1-800-325-0778). It will be helpful to have information such as Forms W-2, pay stubs, etc.

https://faq.ssa.gov/link/portal/34011/34019/Article/3853/How-do-I-correct-my-earnings-record

Thanks to Jeff Nieznanski of Legal Assistance of Western New York for this information.

Representative Payee Program - continued

(Continued from page 4)

administer the rep payee program more uniformly, to answer questions for and train new rep payees, and to manage organizational rep payee workloads. It further recommended increased oversight of contracted monitoring through the inclusion of measurable performance standards to assess the monitoring process, including the development of quality, timeliness and quantity standards, and a method of assessing compliance with those standards.

The SSAB report acknowledged that decisions about rep payee assignment ultimately reflect judgments about self-direction and independence. It highlights SSA's POMS, which state: "The ability to access and control how one's money is spent is critical to feelings of self-worth and is one of the essential elements of self-determination and liberty." It recommended the Office of Management and Budget (OMB) study how best to coordinate the management of federal benefits for people who have been determined to be financially incapable with the recognition of alternative approaches such as Supported Decision Making (SDM). A key characteristic of an SDM system is the promotion and support of self-advocacy.

Thanks to Empire Justice Center paralegal Keith Jensen for summarizing this study.

GAO Recommends Measures to Enhance Accuracy and Consistency of Hearing Decisions

A recent study by the Government Accountability Office (GAO) examines (1) to what extent allowance rates vary across administrative law judges (ALJs), and factors associated with this variation; and (2) the extent to which SSA has processes to monitor the accuracy and consistency of hearing decisions.

The GAO estimated the allowance rate could vary by as much as 46 percentage points across the Social Security Administration's (SSA) approximately 1,500 ALJs. In addition to characteristics related to disability criteria, such as a claimant's impairment or age, GAO found claimants who have representatives, such as an attorney or family member, were allowed benefits at a rate nearly three times higher than those without representation.

Allowance rates also varied across ALJs from FYs 2007 through 2015. The average over-all allowance rate fell 15 percentage points during this period, from a peak of 70 percent in 2008 to 55 percent in 2015. The range in allowance rates across ALJs, however, remained fairly consistent. Specifically, for the years 2007 through 2015 combined, the GAO analysis estimated the allowance rate would vary by 46 percentage points for a typical claim, depending on the judge who heard the case. A claimant whose claim was heard by a judge appointed between 1995 and 1999 was allowed at a rate 1.5 times higher than a typical claim heard by a judge appointed after 2010.

SSA defended the variation rates GAO observed across judges, arguing they were not surprising; nor was the modest narrowing in this range over time. ALJs usually hear complex appeals that may not be clear-cut allowances or denials. As a result, according to SSA officials, given judges' decisional independence, different judges could look at cases with similar fact patterns and circumstances and come to different conclusions.

The GAO charted SSA disability allowance rates for the 25 most commonly recorded primary impairments, FY 2007-15. Ranging from high to low, the allowance rate for intellectual disorders was 88 percent, while that for borderline intellectual disorders and asthma was 44. It also analyzed other factors. Claimants with critical or terminal cases, for example, were allowed benefits at a rate 1.4 times higher than a typical claimant without a critical or terminal case. Claimants reporting shorter work histories (four years or less in the last 15 years before applying for disability benefits) were allowed at a rate 0.8 percent as high as a typical claimant with ten or more years of work history. Claimants with a college-level education or higher were approved 1.1 times higher than a typical claimant with a high-school education. DI claimants were allowed at a rate 1.7 times higher than a typical SSI claimant.

Claimants who had a representative - either an attorney or a non-attorney representative - were allowed at a rate 2.9 times higher than a typical claimant with no representative. From fiscal years 2007 through 2015, most claimants (77 percent) had an attorney representative, and 12 percent had a non-attorney representative. Claimants whose hearings involved testimony from a medical expert were allowed at a rate of 1.6 times higher than a typical claim without a medical expert present. Claimants whose hearings were held in person were allowed at a slightly higher rate (1.1 times higher) than a typical claimant with a hearing conducted remotely using videoconference technology. SSA objected to this finding, citing its own internal analysis, which found a small (0.6 percentpoint) difference in allowance rates between in-person and videoconferencing hearings after controlling for other factors.

GAO made two recommendations, including that SSA systematically evaluate its quality assurance reviews and take steps to reduce or better manage any unnecessary overlap among them. SSA concurred and plans to address them through a comprehensive assessment of its oversight.

GAO-18-37 is available at https://www.gao.gov/products/GAO-18-37. Thanks to Keith Jensen of the Empire Justice Center for reviewing this study.

Wage Reporting Changes Made

The Bipartisan Budget Act of 2015 (BBA) implemented several changes to improve efficiency in processing wage reports for Title XVI and Title II. Two provisions are intended to reduce processing time for wage reports:

> Section 824 (Payroll Date Exchange): Grants Social Security Administration (SSA) the authority to create an information exchange with payroll data providers in order to collect wage and employment information.
>
> Section 826 (Electronic Reporting of Earnings): Mandates that SSA implement a system that would permit Title II Disability beneficiaries to report their earnings via electronic means similar to what is available to Title XVI recipients.

SSA has issued emergency message EM-17021, encouraging technicians to begin keying the Employer Identification Number (EIN) in the Modernized Supplemental Security Income Claims System (MSSICS) and eWork when processing wages and work reports. The goal is to have as many records as possible with completed EIN fields, so when the information exchange begins and the electronic wage reporting application is released, wages will be updated to the record without intervention from technicians. SSA will use the EIN field in the MSSICS and eWork to match wage and employment data from the information exchange and from MySSA.

SSA has also announced the expansion of *my* Social Security online services to allow people who receive Social Security Disability Insurance (SSDI) benefits and their representative payees to report wages securely online. According to SSA, *this service is not yet available for Supplemental Security Income (SSI) recipients or for those who receive both SSDI and SSI benefits. SSA plans to add this capability in the future. SSI recipients should continue to report wages through SSI Mobile Wage Reporting, SSI Telephone Wage Reporting, or visiting a local field office.*

Who You Gonna Call?

The Office of Disability Operations established the Representative Call Center (RCC) in 2009. The RCC is a specialized unit of technicians who are responsible for answering calls from attorneys and non-attorney representatives. The RCC phone lines (877-626-6363) are fully staffed Monday through Friday, 8:00am through 5:45pm EST. After 5:45pm, all incoming calls to the RCC are directed to the unit's voice mailbox, where appointed representatives may leave detailed messages regarding their clients' case. Messages are retrieved daily and are returned within 48 hours.

If anyone has used this call center, we would be interested in hearing about your experiences.

Cynthia Richards Will Be Missed by All

Long time Legal Aid paralegal and disability advocate Cynthia Richard passed away on November 14, 2017, after a fall near her home. She will be deeply missed by colleagues and clients alike. Cynthia was a tireless advocate for the poor and under-served. She helped hundreds of clients over her decades long career at Legal Aid Society of Mid-New York, Inc., and Legal Aid for Broome and Chenango Counties.

Cynthia represented some of the most vulnerable members of the community – low income persons with severe physical and mental disabilities. But she never wavered in her determination and perseverance on their behalf; nor did she shy away from complex cases involving multiple legal issues. As just one example of her holistic approach to client service, Cynthia successfully represented a client who had a psychiatric breakdown leading to job loss and threat of foreclosure due to his inability to pay his property taxes. Cynthia stepped in and succeeded in getting his disability appeal heard on an emergency basis. She won the appeal and convinced the judge to reopen a prior application. Her quick action and strong advocacy resulted in a combined award of over $70,000, which provided the funds necessary to save her client's home.

Cynthia demonstrated tremendous compassion for all of those she helped. As result, many of her clients kept in touch with her long after their cases were resolved. Cynthia was equally admired by those at the hearing offices where she regularly appeared, who praised her excellent advocacy skills, and the care and concern she showed for her clients. To her colleagues she was "a great person and a kind soul who was always kind to everyone who walked through our doors," and "a tireless advocate with boundless enthusiasm for her work and clients."

While Cynthia's work was clearly her main passion, she also greatly enjoyed her pet felines, Chinese food, and trademark large colorful hats. She will be remembered with great affection and respect by all of us whose lives she touched.

Attorney Advisor Program Extended

The Social Security Administration (SSA) extended for six months its rule authorizing attorney advisors to conduct some prehearing procedures and issue fully favorable decisions. The current rule was scheduled to expire on February 2, 2018. The final rule extends the expiration date to August 3, 2018. 83 Fed. Reg. 711 (Jan. 9, 2018). https://www.gpo.gov/fdsys/pkg/FR-2018-01-08/html/2018-00058.htm

Although we have not seen many (if any) attorney advisor decisions lately, the program would seem to be a useful tool in clearing up some of the backlog at hearing offices. Maybe extending the program is a step in that direction. One can only hope.

Studies Contrast Getting On and Off Disability

Controversies surrounding Social Security's disability programs abound. One criticism frequently heard echoes the belief that growth in disability programs has caused the decline in labor-force participation. Not true, says Kathy Ruffing of the Center on Budget and Policy Priorities in an August 2017 report.

Most of the growth in the Social Security Disability Insurance program stemmed from demographic causes, such as population growth and aging of the baby boom generation. Rising SSDI receipt and falling labor-force participation are not affecting the same age groups. The Council of Economic Advisers agrees that disability benefits explain little of the decline in labor-force participation among prime working-age (25-54) males over a long, 50-year sweep.

An article in the *Social Security Bulletin*, Vol. 77 No. 3, 2017, also explored the causes of growth in the number of disabled workers on the Social Security Disability Insurance (DI) rolls from 1980 through 2010. This report identified possible contributing factors, including (1) demographic shifts, such as growing shares of younger and female workers entering the rolls; (2) changes in DI policies and in economic conditions (such as high unemployment) influencing workers to enter the program and stay longer in it; and (3) changing health trends, with certain disabling impairments (such as musculoskeletal impairments and mental disorders) becoming more prevalent among various population subgroups.

The study estimated the probability of a DI beneficiary's program exit because of recovery, death, or conversion to retired-worker beneficiary, by sex, age, and disability type. "Recovery" can be due either to a worker's return to substantial gainful employment (SGA) or to a Disability Determination Service (DDS) finding that a beneficiary is no longer disabled. According to the article, during the first nine years in the program, the dominant cause of exit for nearly all disability types is death. For disabled-worker beneficiaries in a given entitlement-year cohort, eight percent would exit the rolls because of recovery within 30 years, 38 percent would die, 39 percent would convert to retired-worker benefits, and the remaining 15 percent would still be on the rolls.

The article claims that over the first nine years on the rolls, women exit the program because of death at lower rates than men in all age groups; recovery rates are lower for younger women and for younger men. For the two oldest age groups (41-50, 51-55), recovery rates for men and women are almost identical. Overall, exit probabilities are higher for men than for women, and the differences are more prominent at older entitlement ages. According to the article, that result indicates the labor market developments in the 1980s contributed significantly to the growth in the rolls of DI disabled-worker beneficiaries, as female enrollment rapidly increased and many women remained on the rolls for longer periods due to their lower exit probabilities.

Exit probabilities by type of impairment may foreshadow future trends for DI. Because older individuals have higher propensities to encounter certain types of disabilities such as neoplasms and cardiovascular impairments, differences in exit probabilities by disability type and age at entitlement can illuminate how the advancing age of the baby boomer generation will affect the disability rolls.

Keith Jensen of the Empire Justice Center summarized these studies.

COURT DECISIONS

N.D.N.Y. Remands for Proper Evaluation of Evidence

In the Northern District of New York (N.D.N.Y.), an ALJ's lack of attention to detail led to a remand for the plaintiff in *Conklin v. Comm'r of Soc. Sec*., 3:16-cv-01361 (ATB) (N.D.N.Y. Jan. 4, 2018). In analyzing the consultative examiner's (CE) report, the ALJ read the phrase "[t]here should be no more than mild levels of physical exertion" as plaintiff's "ability to engage in physical exertion was no more than mildly limited." The plaintiff argued that a misreading of the evidence pertaining to his limitations is grounds for remand. Magistrate Judge Baxter agreed, and added that when the ALJ gives more weight to a particular doctor in forming the RFC and factoring credibility, a mistake in reading that doctor's opinion cannot be harmless error.

The court further sided with the plaintiff in holding that cigarette smoking does not, by itself, vitiate the credibility of a plaintiff with COPD. It noted that although smoking can be considered in assessing credibility, the ALJ must not only reference objective medical evidence to support that determination, but "relate this objective evidence back to the plaintiff's credibility determination." In Conklin's case, the ALJ referenced COPD, but did not connect the evidence back to why continuing smoking related to the severity of impairment.

The plaintiff further argued that additional material submitted to the Appeals Council about a hospitalization was new and material evidence, but the court disagreed. The Court also declined to address the issue of sufficiency of jobs in the national economy. Overall, this case underlines the importance, for both ALJs and attorneys, of carefully inspecting the decision for errors.

The Conklin decision is available as DAP# 590. Congratulations to Louise Tarantino of the Empire Justice Center and law clerk extraordinaire Stephanie Minerley for this victory.

Court Remands Due to Conflict with DOT in VE Testimony

In another N.D.N.Y. case, *Carbee v. Comm'r of Soc. Sec*., 2018 WL 333516, (N.D.N.Y. Jan. 9, 2018), District Judge Suddaby remanded for further proceedings, finding the ALJ's Step 4 and 5 findings were not supported by substantial evidence. The ALJ found Plaintiff capable of performing past relevant work as a fast food worker and, in the alternative, other jobs including mail clerk, photocopying machine operator, and office helper, based on the vocational expert's (VE's) testimony. Plaintiff argued he was unable to perform his past relevant work because this work required constant reaching; the RFC assessment indicated he was capable of only occasional bilateral overhead reaching. Plaintiff also argued the ALJ's decision violated SSR 00-4p because of the unresolved conflict between the VE's testimony and the SELECTED CHARACTERISTICS OF OCCUPATIONS (SCO) regarding reaching.

The Court noted that as Plaintiff correctly argued, the SCO does state that "reaching" is defined as "[e]xtending hand(s) and arm(s) in any direction" and also indicates that reaching is constant for the position of fast food worker and frequent for mail clerk, photocopying machine operator, and office helper. As a result, the Court found an apparent conflict existed between the VE's testimony and the SCO regarding reaching requirements.

The Court stated it appeared the VE was aware of the difference presented by the ALJ's hypothetical questions (indicating occasional bilateral overhead reaching) and the one posed by Plaintiff's attorney (indicating no reaching in any direction with the right arm). But her testimony did not reflect any acknowledgment of the conflict between the ALJ's hypothetical questions that ultimately led to the RFC finding and the requirements of constant or frequent reaching as indicated in the SCO. The ALJ's subsequent question regarding consistency with the D.O.T. similarly did not reflect an inquiry as to the amount of overhead reaching required by Plaintiff's past work and the other positions identified by the VE, but rather specifically only addressed off task time, absenteeism, and an eight-hour workday.

The Court found a material difference between the overhead reaching requirement indicated by the RFC assessment and the SCO's definition/specification of Plaintiff's past work as a fast food worker and the other jobs identified by the VE. Thus, a conflict existed between the VE's testimony and the D.O.T., which the ALJ should have resolved before relying on the VE's testimony for both the Step Four and Step Five findings. *See* SSR 00-4p (stating that, "[w]hen there is an apparent unresolved conflict between VE ... evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the VE ... evidence to support a determination or decision about whether the claimant is disabled"). Because the conflict remained and affected both the ALJ's Step Four and Step Five findings, remand was required for the Commissioner to properly determine whether Plaintiff could perform his past relevant work and/or other jobs existing in significant numbers in the national economy.

The Court also held the ALJ's "catch-all question" regarding the consistency of the VE's testimony with the D.O.T. was insufficient to satisfy the ALJ's affirmative duty to resolve any conflicts pursuant to SSR 00-4p. Therefore, remand was required because the Court could not determine whether substantial evidence supported the ALJ's Step Four and Step Five findings.

Plaintiff also argued that the ALJ's finding at Step One that plaintiff engaged in substantial gainful activity (SGC) was not supported by substantial evidence. Plaintiff argued the ALJ did not properly consider that he was working under special conditions through part of the onset period. The ALJ noted that "[a]lthough [Plaintiff] was described as having certain difficulties performing his job duties without the assistance of other employees, this was not outlined as being a special accommodation." The ALJ cited the Plaintiff's Work Activity Report indicating monthly earnings well above the significant gainful activity level and in which Plaintiff specifically reported that he did not receive any special conditions or make changes.

Plaintiff argued that his employment as a cable television installer was not substantial gainful activity because it was performed under special conditions.

(Continued on page 12)

EAJA Fees Approved

The other nice thing about winning a case in federal court, in addition to the plaintiff being awarded relief, is the ability of the plaintiff's attorney to collect an award of fees under the Equal Access to Justice Act (EAJA). As a prevailing party, even when the relief ordered is a remand as opposed to an outright reversal, plaintiff's counsel can file a motion seeking EAJA fees.

Although we are often able to negotiate fees with SSA's Office of General Counsel (OGC) or with the U.S. Attorney's office, we sometimes need to file a formal motion for EAJA fees. This is true particularly where the fee requested is somewhat large or the number of hours for which compensation is sought is high. SSA seems to follow the "20-40 hour" rule and will rarely stipulate to fees for more hours.

Mike Hampden of the Partnership for Children's Rights in NYC recently got a nice decision awarding him significant fees after filing a formal motion. Mike requested compensation for 58 hours of work in the case of *Estrella o/b/o M.R.E. v. Berryhill*, 2017 WL 2693722 (S.D.N.Y. June 22, 2017), described in the July 2017 Disability Law News.

The Court's decision on the EAJA motion holds that the "20-40 hour" rule must take into consideration individual factors in the case supporting a higher number of reasonable hours, including: reasonably large record; fully litigated motions with parties' briefs allowed to be twice the court's page limit; all relief requested by plaintiff awarded; and plaintiff's motion to expedite the decision prompted the court to give priority to the case. In addition, although the case involved the "arguably routine" issue of the adequacy of the ALJ's development of the record, plaintiff's arguments were case-specific, justifying more hours than a typical case; and the court's requirement of plaintiff sending a settlement letter to the AUSA added extra hours.

The Court also held that there is no blanket prohibition of clerical hours in EAJA cases, if the tasks were essentially paralegal in nature and billed at the paralegal rate. The Court approved the award payable directly to the attorney and mailed to the attorney where plaintiff had executed an assignment of fees that so provided. Mike was ultimately awarded over $10,000 in fees. The EAJA decision is available at *Estrella o/b/o M.R.E. v. Berryhill*, 2017 WL 6033042 (S.D.N.Y. Dec. 5, 2017).

Congratulations to Mike, first for winning his case, and second for getting the compensation he deserved in pursuing timely justice for his young client.

Conflict with DOT in VE Testimony- Continued

(Continued from page 11)

Plaintiff's testimony and the report of his former supervisor establish Plaintiff was performing this work under special conditions. After considering the evidence of record and the six examples of special conditions given in 20 C.F.R. § 404.1573(c), the Court found Plaintiff's argument regarding special conditions persuasive. Despite agreeing with Plaintiff, however, the court held where an ALJ continues the disability evaluation past Step One and considers medical evidence from the entire relevant period, an error in determining that a claimant performed substantial gainful activity at Step One is harmless.

On remand, the Court ordered the Commissioner to re-evaluate whether Plaintiff performed his work as a cable television installer under special conditions.

Congratulations to Mike Telfer of the Legal Aid Society of Northeastern New York for this very good remand decision.

Appeals Council Remands for CPD Evidence

Advocates are undoubtedly seeing more Continuing Disability Review (CDR) cases. Although the Social Security Administration (SSA) remains underfunded in terms of basic services, Congress has specifically allocated money for "program integrity," including CDRs.

CDRs contrast with initial applications. Rather than determine disability anew, SSA must demonstrate medical improvement before discontinuing, or terminating, a beneficiary's benefits. The appeals process and the sequential evaluation process for CDRs differ from reviews in initial claims, and may present new challenges for advocates wading into this area.

Of particular importance in CDRs is the concept of the "comparison point date" (CPD). In a CDR, SSA must compare the beneficiary's current impairments and limitations with those at the time the claim was approved or last reviewed (the CPD) to determine if there has been medical improvement, and if so, whether the improvement is related to the ability to work. Consequently, evidence from the CDR is critical. Yet all too frequently, exhibit files at either the DHU (Disability Hearing Unit) or OHO (Office of Hearing Operations, formerly ODAR) do not contain evidence from the CPD.

Advocates at the Legal Aid Society of Northern New York faced just that dilemma in a CDR appeal. Recognizing the file missed crucial CPD evidence, they repeatedly asked the Administrative Law Judge (ALJ) to upload the old evidence to the current claim. They argued that without it, the record lacked the foundation for a reasoned assessment of whether there is substantial evidence to support a finding of medical improvement, citing *Veino v. Barnhart*, 312 F.3d 578 (2d Cir. 2002). Following the ALJ's denial, they reiterated their argument to the Appeals Council, but to no avail.

The Appeals Council finally paid attention when the Empire Justice Center filed an appeal in United District Court. At that point, SSA agreed to a voluntary remand. The Appeals Council then issued an order chastising the ALJ for failing to include the CPD decision in the record, discuss the CPD evidence, or engage in a comparison of the claimant's present impairments with her impairments in the past. So now, more than two years later, the claim will (we hope) be reviewed properly on remand.

This is a cautionary tale. Advocates need to push early on to make sure the CPD evidence is included in the exhibit file in CDR claims. The Empire Justice Center has training materials available and can offer support for advocates in these cases. Also, a group of advocates has brought this problem of missing CPD evidence to the attention of SSA. Samples of cases where this has occurred have been helpful in demonstrating the problem. If you have CDR cases lacking CDP evidence, or cases in which you have asked to have the evidence included, particularly at the Appeals Council, please let us know.

ADMINISTRATIVE DECISIONS

Appeals Council Reverses on Listing 12.05

Add Attorney Andrea Sasala of Nassau/Suffolk Law Services Committee to the elite group of representatives who have actually convinced the Appeals Council to reverse an Administrative Law Judge (ALJ) decision. Andrea's client had Full Scale IQ scores below 70, as well several diagnoses of mild mental retardation and evidence of special education. Yet the ALJ failed to find his intellectual disability severe, and only perfunctorily considered Listing 12.05 in his decision.

The Appeals Council refused to adopt the ALJ's findings and conclusions, and sent the claim to a Medical Advisor for review. The Appeals Council agreed with the psychological consultant's opinion that the claimant met revised Listing 12.05B. [Advocates should be aware by now that new mental impairment listings have been in effect since January 2017. See http://empirejustice.org/resources_post/new-mental-impairment-listing-issued-2/. Among other changes, the new listings revised the criteria for evaluating intellectual disorders.]

In its decision, the Appeals Council reviewed the criteria of the recently revised listing for intellectual disorders. It found the first part of the listing was satisfied by the claimant's Full Scale IQ scores of 70 or below. It relied on those scores to find the claimant's ability to understand, remember, and apply information moderately to markedly limited under the "B" criteria of the Listing. The consultant had also noted the claimant's tendency to be careless and prone to mistakes. The Appeals Council also agreed to marked limitations in interacting with others based on evidence of the claimant's difficulties in getting along with others in the housing program where he lives. He becomes angry easily and is argumentative. He also has marked limitations with concentration, persistence, and pace, demonstrated by the difficulties he had at a prior work attempt, where he was too slow and was unable to learn a cashier job. He has moderate limitations in adapting or managing self. He is unable to care for his personal needs in an age appropriate manner, such as keeping track of medications or following recommendations. He also struggles with completing activities such as cooking and cleaning. He thus has at least two marked limitations, meeting the "B" criteria of Listing 12.05B.

Finally, the Appeals Council agreed with the consultant, who found Andrea's client had attended special education and had not graduated from high school. He thus satisfied the requirements of the third part of the listing, demonstrating that his disorder began before age 22. The Appeals Council found the claimant disabled as of his application date.

Congratulations to Andrea, who is now in the one percent! See SSA's 2016 "Waterfall Chart," available at https://www.ssa.gov/policy/docs/chartbooks/fast_facts/

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

***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, citing *Perez v. Chater*, 77 F.3d 41, 54 (2d Cir. 1996). The ALJ's decision was not supported by substantial evidence in light of the new and material medical opinion from the treating physician that the plaintiff would likely miss four days of work per month. Since the vocational expert had testified a claimant who would be absent that frequently would be unable to work, the physician's opinion, if credited, would suffice to support a determination of disability. The court also faulted the district court for identifying gaps in the treating physician's knowledge of the plaintiff's condition. 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."

***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.

END NOTE

It's On the Tip of My Tongue

How often have you struggled to remember a name or a word, only to have it pop into your head hours later? If it happens to you, you are not alone, nor are you necessarily on your way to dementia. Researchers call these more or less universal moments a "tip-of-the-tongue state." Lise Abrams, a psychology professor at the University of Florida, has studied this phenomenon for twenty years. She has found it occurs in all cultures and languages, even in sign language (a "tip-of-the-finger" state).

According to an October 22, 2017 *New York Times* article, we are more likely to forget temporarily, words or names we use less frequently. Using the names or words more often may help us recall them when we need them.

An October 19th *NYT* article on better ways to remember quotes Joseph LeDoux, director of the Emotional Brain Institute at New York University. He posits that since we now have so much information available to us instantaneously (i.e., Google), our judgment on what information we need to filter and store has been clouded. How do we select what to remember? He also points out that memory is fallible, and can change over time. And the brain has limitations on what it can process or handle. Nelson Cowan, a memory specialist at the University of Missouri, adds that multi-taskers do not realize what they are missing, and thus not taking in and remembering.

Some memory tips? Repetition may be the best technique for transforming short-term memories into long-term ones. But some of us will have to retrain our brains to focus on that one task. And the repetition should take place over time. U.C.L.A. psychology department chair Robert Bjork reminds us that cramming does not work. Incorporating what you are trying to remember into daily life increases your chances of retaining it. Testing yourself also helps. Finally, cues—both visual and verbal—can help. Remember that string tied around your finger trick? Or the ubiquitous post-it notes? Or an electronic reminder? Or all of the above? Most importantly, repeat and focus.

Now what was I going to say?