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Greater Upstate Law Project, Inc.

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DISABILITY LAW NEWS

GAO Study Addresses ALJ Bias

Many of us have been frustrated about particular ALJs who appear to be biased against certain claimants, whether due to their race, gender or type of disability. Yet, we all know how difficult it is to address these concerns, either systemically or in individual cases. The Government Accounting Office (GAO) recently had a similar experience with the Social Security Administration (SSA).

At the request of Congress, the GAO investigated whether discrepancies between allowance rates for various racial groups exist within the Disability Insurance (DI) and SSI programs and to examine what steps SSA has taken to address unwarranted racial and ethnic disparities. The GAO Report to Congress, *SSA DISABILITY DECISION MAKING: Additional Measures Would Enhance Agency's Ability to Determine Whether Racial Bias Exists* (GAO-02-831), concluded that SSA's efforts to study potential racial disparities in ALJ decisions were too statistically flawed to be useful and also recommended that SSA take additional steps to address possible racial bias in ALJ decision-making.

SSA's Statistics and Follow-up Flawed

The GAO's current study was a follow up to its 1992 report (GAO/HRD-92-56), which found that DI allowance rates (including both DDS and ALJ decisions) were 33 % for African Americans compared with 40 % for whites. The GAO advised that SSA investigate further and, if needed, take appropriate actions to correct and prevent any unwarranted racial disparities. SSA's subsequent study, which took place over four years and involved approximately 50 full-time staff and three outside consultants, found no evidence that race significantly influenced ALJ decisions.

According to the GAO, however, SSA's study was flawed due to weaknesses in sampling and statistical methods: "methodological weaknesses preclude conclusions being drawn from it." (Both the 1992 and 2002 GAO reports are available at **www.gao.gov**.) Among other problems, SSA no longer stratifies ALJ decisions by race before identifying a random sample for quality assurance review, nor does it systemically collect race data in the assignment of social security numbers. The GAO noted that these factors would also hamper any future studies of racial disparities.

In addition to criticizing SSA's study, the GAO also seemed less than impressed with the "limited" steps SSA has undertaken at the hearing level to address possible racial bias in decision making. OHA mandated compulsory diversity sensitivity training for all ALJs. Incumbent ALJs were given "at least" 1½ days of training in 1992-93; new ALJs undergo a one-day course as part of their three-week orientation. Although OHA increased its effort to recruit minorities for ALJs and other legal positions, according to the GAO, there have not been significant changes in the racial/ethnic profile of ALJs. In 1992, 91.8% of the ALJs were white; in April 2002, 89% were white.

SSA's Complaint Process Criticized

The GAO was also critical of SSA efforts to institute a complaint process at

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OHA. SSA published notice of procedures for the new ALJ complaint process in the October 30, 1992 Federal Register (57 Fed. Reg. 49186). The instructions can be found at **www.ssa.gov**, and at POMS GN 03103.300 (Complaints of Alleged Bias or Misconduct by ALJs). SSA is supposed to notify claimants of the process through notices posted in all hearing offices (SSA Publication No. 05-10071 – available as DAP #375). Complaints may be filed at any SSA office, sent in the mail, or called in to the SSA's 800 telephone number.

The process supposedly supplements and is coordinated with the normal appeals process. Any complaints made in the context of a request for Appeals Council review are referred to the Appeals Council for consideration. If the complainant did not request Appeals Council review, the complaint is referred to the appropriate regional Chief ALJ, with findings reported to the Chief ALJ. OHA's Special Counsel Staff is also notified of all complaints, and they receive copies of all bias or unfair hearing claims made at the Appeals Council. The Appeals Council deals with the vast majority of the complaints.

In response to a complaint, OHA may take remedial action against an ALJ, such as counseling, additional training, mentoring or reprimand. OHA's Special Counsel may also conduct a further investigation. Regardless of which office handles the complaint, OHA is supposed to acknowledge the receipt of the complaint and notify the complainant of the results. According to staff, the Office of the Special Counsel receives only about 700 to 1,000 complaints per year (out of 400,000 to 500,000 hearings), and the Appeals Council refers 90% of these because of allegations of bias or misconduct. Few complaints are related to race (5.01% during the first six months of 2001), and only about 15-20 per year result in full field investigations.

According to the GAO, this complaint process lacks any useful mechanism for detecting patterns of possible racial discrimination. Despite SSA's declaration that it would analyze data for these purposes, its methods of collecting, documenting and filing complaints make this difficult. The GAO cited SSA's instructions to complainants to describe in their own words how they believe they were treated unfairly as an example of how difficult it is for OHA to readily identify a claim alleging racial bias. Similarly, OHA does not use a standardized cover sheet to summarize key aspects of the review that would allow OHA to quickly identify patterns of allegations involving race. Nor does OHA staff record key information about the complaints in an electronic database so that patterns of bias would be more easily identified.

Instead, SSA files the complaints manually and in chronological order by hearing office (yes, this is 2003!!!). Finally, OHA does not obtain demographic information such as the race, ethnicity or sex of complainants. As the GAO astutely notes, this information would be helpful in establishing patterns of conduct in those situations where the complainant, aware of his or her own circumstances, may not have known to allege racial bias.

The GAO recommended that SSA address these shortcomings in variety of ways, including ongoing analyses of date, reporting the results of such analyses in SSA's annual and biennial reports on ALJ decision-making. It also recommended that OHA adopt a form or other mechanism for summarizing key information in each ALJ complaint, use available data to identify race and/or ethnicity of complainants, and place the complaint information in an electronic format. SSA concurred fully with these recommendations and agreed to take steps to implement them.

SSA's Response to GAO Study

At a recent NOSSCR conference, Sarah A.L. Humphreys, Assistant Special Counsel at OHA in Falls Church, Virginia, discussed the GAO report and the concerns it raised about possible racial bias in ALJ decisions. Ms. Humphreys also referred to a report by the Gender Bias Task Force for the Ninth Circuit, which published its findings in 1994. See, *The Effects of Gender Bias in the Federal Courts*, 67 So.Cal.L.R. 731 (1994). According to Ms. Humphreys, that Task Force surveyed ALJs, claimants, representatives and federal judges. Most of the white male ALJs and 66% of the representatives did not think that gender made a difference in the OHA process, but all of the female ALJs and most of the respondents felt that gender mattered. In the face of these two studies, SSA was clearly on the defensive.

According to Ms. Humphreys, bias, in the context of the GAO study, is defined as a "state of mind or predisposition that sways judgment and renders an ALJ unable to decide fairly." As opposed to bias, however, the common problems that she and her staff see in the complaints that are filed include procedural irregularities, mischaracterization or improper quoting or weighing of the evidence, a perception of bias because of the claimant's status (*i.e.*, DA&A, immigrant, etc.), ALJ hostility, rudeness, impatience, disrespect, adversarial questioning, not allowing a representative to ask questions, etc. As an example of offensive conduct, she quoted one ALJ who said, "You can't believe what a druggie or alcoholic tells you." Another favorite was the ALJ who told the representative, "You realize, don't you, that your case is going down the toilet?" But worst of all was the ALJ who carefully explained to a thirteen-year-old claimant, in the form of questioning him about his suicide attempt, how

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to hang himself successfully.

Nonetheless, Ms. Humphreys believes that most of these comments can be dealt with by "talking to" the ALJ in question. If the Regional Chief ALJ reports that a particular ALJ has not been responsive to this approach, the Office of Special Counsel may become involved. If the ALJ's actions are not perceived to be biased, or if the ALJ is simply misapplying the law, a mentor will be assigned. If, however, the actions appear intentional or reflect an improper pattern of behavior, the Chief ALJ and the Special Counsel, along with the Associate Commissioner, determine what official action to take, including filing charges before the U.S. Merit System Protection Board.

Ms. Humphreys reminded advocates that the federal courts, in reviewing claims of bias, have required claimants to rebut the presumption of lack of bias with a showing of actual bias: a state of mind or predisposition outside of the facts of the individual case. According to Ms. Humphreys, the courts generally recognize that ALJs are human and can lose their tempers. Thus, critical or seemingly hostile remarks will not usually support a claim of bias, unless they show such a high degree of antagonism as to make a fair decision impossible.

[*Editor's Note:* This language is taken from *Liteky v. U.S.*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed 2d 474 (1994), which has been adopted in Social Security cases. *See, e.g., Brown v. Apfel*, 192 F.3d 492 (5th Cir. 1999); *Rivera v. Shalala*, 1995 WL 681044 (S. D.N.Y. 1995). *See also Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 72 L.Ed. 1 (1982) for the proposition in the Medicare context that the claimant must rebut a presumption of lack of bias. Courts have been willing, however, to recognize ALJ bias. *See, e.g., Ventura v. Shalala*, 55 F.3d 900 (3d Cir. 1995); *Hummel v. Heckler*, 736 F.2d 91 (1984). *See also Grant v. Commissioner of Social Security*, 111 F.Supp. 3d 556 (M.D. Pa. 2000), holding that an exhibition of bias in an ALJ's written decisions need not be demonstrated.]

Ms. Humphreys reiterated Social Security's agreement with the GAO's recommendations. In response to questions from the audience, she noted that ALJ statistics may soon be regularly published and thus available without the need for requests under the Freedom of Information Act (FOIA). She predicted, however, that when this happens, ALJs at both ends of the spectrum would move towards the middle in their decision-making. She did acknowledge that in the past 15 to 20 years, only 46 ALJs have been removed from office for any reason, and an additional ten left under pressure.

One questioner, a former OHA decision writer, reminded Ms. Humphreys that a longitudinal picture of ALJ behavior is crucial to determining if bias exists, as is a review of the hearing tapes. As he pointed out, the nuances of tone and language often demonstrate disparate treatment among claimants of different racial and ethnic backgrounds. She was not able to provide a clear answer on how to protect advocates who file complaints against a particular ALJ. She hoped to "rely on the integrity of the process." Finally, Ms. Humphreys recommended that advocates forward her copies of any judicial decisions involving complaints of ALJ bias. Her address is: Sarah A.L. Humphreys, Assistant Special Counsel, OHA/SSA, 5107 Leesburg Pike, Falls Church, VA, 22041-3255; (703) 305-1170.

Procedures for Bias Complaints

Where does all this leave us in terms of those troublesome ALJs? First of all, advocates should remember that bias claims must be raised first at the hearing level. See 20 C.F.R. §§404.940 & 416.1440; HALLEX I-2-160. The burden is on the claimant and/or representative to object if the ALJ is prejudiced or partial or has any interest in the matter. It is up to the ALJ to decide if he or she proceeds or withdraws. If the ALJ does not withdraw, the same objections may be raised at the Appeals Council. Of course, this puts claimants and advocates in a difficult position. Also, advocates frequently do not have specific grounds to make a bias claim prior to a hearing. More often than not, the evidence of hostility or bias comes out during the hearing or in the decision. Then, it becomes a matter to be raised with the Appeals Council.

Remember that the Appeals Council is supposed to refer all bias/unfair hearing complaints to the Special Counsel; advocates should consider sending copies to the Special Counsel as well (see address above). The Appeals Council sends the Chief ALJ only those cases in which the bias/unfair hearing complaint was found to be supported by the record. Perhaps advocates should consider, however, sending copies of complaints – particularly egregious ones – directly to the Regional Chief ALJ as well as the Special Counsel. The Regional Chief ALJ for New York is C. Stephen Wright, 26 Federal Plaza, New York, N.Y. 10278.

It might be particularly effective to cross reference complaints about the same ALJ, either in complaints to the Chief ALJ, the Appeals Council, or the Special Counsel. And of

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course, advocates should encourage claimants, even those whose claims are not in the appeals process, to follow the complaint procedures if they believe they have been discriminated against or mistreated by an ALJ or other OHA staff. If claimants have reason to believe that race or ethnicity was an issue, they should make sure that factor is noted prominently in their complaints. Finally, make sure that your local hearing office is displaying a copy of the notice to claimants about their right to complain (SSA Publication No. 05-10071).

Successful Bias Complaints

Sometimes the Appeals Council does listen to these complaints. As reported elsewhere in this newsletter, PILOR Senior Paralegal Dorothy Barber recently succeeded in convincing the Appeals Council to remand a claim to a different ALJ because of the way the first ALJ had treated the claimant. And, as discussed above, bias complaints have been successfully raised in federal court. Additionally, although the federal court judges are often hesitant to order that a claim to be remanded to a different ALJ for fear of interfering with the administrative process, there is precedent for this action. See, e.g., *Ventura v. Shalala*, 55 F.3d 900 (3d Cir. 1995). Advocates have also reported instances where the court has strongly suggested that SSA appoint a different ALJ.

More wholesale attacks on a particular ALJ have also been successful, albeit complicated and long-drawn. Many advocates will recall the long saga involving the notorious Judge Helen Anyel of the New York City OHA. The history of those proceedings is described more fully in the *Class Actions* section of this newsletter. The court, however, in denying defendant's Motion to Dismiss and certifying the plaintiff class, noted that the claimants' failure to raise bias complaints at the hearing level was not a jurisdictional bar in situations like those alleged in which the ALJ evinces a general rather particularized bias. *Kendrick et al. v. Sullivan*, 784 F. Supp. 94 (S.D.N.Y. 1992).

Similarly, plaintiffs in the *Grant* case cited above challenged the patterns and practices of a Pennsylvania ALJ. That case was also certified as a class. The district court's decision allowing the plaintiffs to proceed to trial on the bias claim *[Grant v. Sullivan*, 720 F.Supp 462 (M.D. Pa. 1989)] was overturned by the Third Circuit Court of Appeals. *Grant v. Shalala*, 989 F.3d 1332 (3rd Cir. 1993). The Court of Appeals held that such a trial examining the mindset and thought processes and prejudices of the ALJ would be a distraction to the integrity of the administrative agency. Ultimately, following investigations by two separate SSA panels, the District Court granted summary judgment for the plaintiffs' on their claims that the ALJ acted with bias. *Grant v. Commissioner*, 111 F. Supp. 2d 556 (M.D. Pa 2000). The various decisions make for fascinating reading about the pros and cons of this type of litigation. Also, the descriptions of the behaviors of the ALJ in question, who has since died, remind us just how extreme a complaint must be to get the attention of SSA!

So — the moral of the story? Keep those complaints coming, especially in terms of consolidated or cross-referenced Appeals Council cases. Consider complaints to the Office of Special Counsel. And consider - but very carefully – litigation. At least one advocate in the state is working on raising a generalized bias claim in an individual federal court appeal. Be sure to let GULP know about your complaints, especially those where the Appeals Council has responded favorably. It may inspire other advocates with similar experiences to complain, thus helping to establish a pattern of behavior on the part of an ALJ.

Law Review Article on DA&A

A recent law review article traces the history of Social Security's treatment of drug addiction and alcoholism as disabling conditions. Entitled *Should Addicts Get Welfare? Addiction & SSI/SSDI*, the article appears in the Fall 2002 issue of the Brooklyn Law Review.

Part I of the article reviews the historical developments of the current rules. Part II reviews the studies assessing the results of the 1996 legislative changes eliminating disability benefits on the basis of addiction. In Part III, the author explains and analyzes the underlying arguments for and against providing SSI and SSDI benefits to alcoholics and drug addicts. This part begins with a working model for understanding the nature of addiction itself and describes the differences in perspective that underlie policy decisions.

Part IV presents several possible alternatives for approaching the problem in the future, and the advantages and disadvantages of each one. Finally, the Conclusion recommends that addiction receive less punitive treatment in eligibility decisions for benefits.

The author, Dru Stevenson, is a public benefits advocate and researcher with Greater Hartford Legal Aid.

Converting Early Retirement to DIB Payments

Take the following scenario: Joe is injured on the job. He files for workers' compensation ["WC"] and for social security disability benefits ["DIB"], and, because he is 62 years old and needs some money immediately, he also files for early retirement ["ER"]. Of course, the early retirement, which is based only on proof of age and insured status, comes through very quickly and Joe starts to receive a monthly check for $1,200. The DIB, however, takes a little longer. Let's assume though that Joe's injury was quite severe and after his 5-month waiting period, his award notice arrives. Let's also put the worker's compensation claim aside for the moment so we can look at the relationship between Joe's ER payment and his disability payment.

Under Social Security rules (20 C.F.R. § 404.406 *et. seq.*), Joe's receipt of ER will affect the amount of his DIB benefit. Indeed, Joe will lose 5/9th of 1% of his Primary Insurance Amount ["PIA"] for each month he got ER, and, thereafter, this reduction will continue as long as Joe receives a benefit (whether disability or old age).

If Joe wants to maximize his DIB, he has an alternative. Joe can file a Statement of Claimant (SSA form 795) asking to withdraw his ER claim and then payback all the ER benefits he received. In this event, the ER will be treated as if it had never happened, and Joe's DIB goes back to the full PIA. When Joe reaches age 65 (or whatever age his full retirement might be), he will automatically be switched from the Disability Trust Fund to the Old Age Trust Fund and he will continue to get the full PIA to which he is entitled.

In assessing whether it makes sense to withdraw an ER claim so as to get the higher DIB payment, the claimant's age, health and how long they received early retirement before getting DIB would be necessary.

Now let's go back to WC. Let's say that the amount of workers' compensation to which Joe is entitled, when combined with his DIB payment, exceeds 80% of what he earned before he became disabled. That means that he will lose some or all of his disability benefit, depending on how much the combined benefits exceed the allowable (80%) limit. In this instance, the road to maximizing Joe's benefits might be for him to refuse the DIB payment and stick with his ER payment, because workers' compensation only offsets a disability benefit; it does not offset a retirement benefit.

Of course, once a person takes early retirement, which currently can be as much as 20% below the full PIA (and will eventually descend to 30%, as the age of full retirement rises between now and 2022), the person will always receive a reduced benefit no matter how old they get. But if a substantial workers' compensation award is in the offing, they may come out ahead on monthly income by taking reduced retirement rather than losing an even greater proportion of their DIB. Obviously, each case will fall on its own facts and doing the math for each client to determine the plusses and minuses, will be necessary.

SSI and Post-World Trade Center Disaster Relief

Richard Hill, SSA Deputy Regional Chief Counsel, issued a letter in July 2002 responding to questions raised by NYLAG regarding how SSI would treat disaster relief which is provided for pain and suffering, rather than tangible items or shelter costs.

"…Generally the assistance received by disaster victims from private or religious charitable organizations is excluded from income and resources for SSI purposes. For example, assistance for support and maintenance provided under the Stafford Act and comparable assistance from State and local governments and private disaster assistance organizations is not considered income or resources under SSI. The Stafford Act provides for services such as temporary housing and repair/replacement assistance, food, clothing, medical and relocation assistance and unemployment compensation."

"Although SSA believes it would be unusual for a private or religious charitable organization to make such payments, there, at least, are two instances where assistance other than support and maintenance could affect SSI eligibility. The Stafford Act does not provide for exclusion of payments for a death benefit or compensation for 'pain and suffering.'"

"For SSI purposes, death benefits only count as income to the extent the amount exceeds the expenses of the deceased person's last illness and funeral expenses. Remaining death benefits count as resources in the second month after the month they are received. An individual would be ineligible if the funds exceed the resource limit. If an individual spends the funds so they do not exceed the resource limit, the individual would be eligible in the following month."

"If there are any individuals you are aware of or who would like information before accepting charity payments, the Agency would be happy to review their cases or contact them to answer their specific questions."

Please contact Barbara Samuels if you have this issue.

REGULATIONS

Proposed Regulations Change Child's Listing

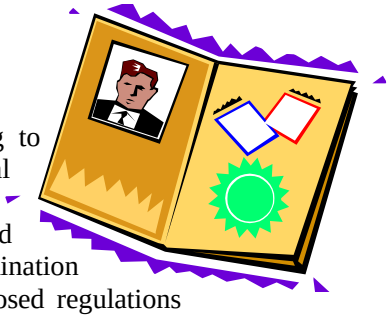
Doesn't it seem like SSA loves to propose new regulations at the end of December – perhaps when many of us are not around to notice? This year is no exception.

On December 23, 2002, SSA proposed changes to the *Listings for Multiple Body Systems* for children's disability claims, including changing the name of this body system listing from "Multiple Body Systems" to "Impairments That Affect Multiple Body Systems;" expanding, updating, and reorganizing the introductory text; removing current listing 110.07; making conforming changes, when applicable, in related regulations, and making non-substantive editorial changes." See 67 Fed. Reg. 78196-78202, available online via GPO Access [**wais.access.gpo.gov**].

As noted by Paul Ryther, our regulatory watchdog, among the changes that may be of interest is that the definition for Down syndrome now refers to presence of "a chromosomal condition," "before birth"; the current language refers to disability commencing at birth. The revisions move from describing Down syndrome as being established by "clinical findings, including the characteristic physical features," to a statement that, "The extra chromosomal material changes the orderly development of the body and brain. Down syndrome is characterized by a complex of physical characteristics, delayed physical development, and mental retardation. It is often accompanied by heart disease, vision defects, chronic respiratory infections, and other conditions."

The revision also provides some clarification of the differences between non-mosaic Down syndrome (the sole subject of Listing 10) and mosaic Down syndrome. Comments are due by February 21, 2003.

Pilot Project Requires Photo ID



SSA announced that it will conduct pilot projects requesting *photographic identification* from individuals filing for Title II and Title XVI disability benefits in specified geographic areas covered by the pilot projects. In addition, SSA wants to require individuals to allow their photographs to be taken and made part of the claims folder. An exception to the photograph requirement would be permitted when an individual has a sincere religious objection. According to SSA, this process would strengthen the integrity of the disability claims process by helping to ensure that the individual filing the application is the same individual examined by the consultative examination (CE) physician. The proposed regulations can be found at 67 Fed. Reg. 69161-69164, available online via GPO Access [**wais.access.gpo.gov**]. Comments are due by January 14, 2003.

Wage Garnishment to Collect Overpayments?

SSA proposed new rules pursuant to the Debt Collection Improvement Act of 1996 on the use of *administrative wage garnishment* (AWG) to collect overpayments and administrative debts arising from Title II and Title XVI payments. 67 Fed. Reg. 69164 (November 15, 2002). Adding to its arsenal of methods to collect overpayments, these proposed regulations will allow SSA to order an employer to withhold a portion of an individual's disposable pay and remit that sum to SSA without the need for any court process. While the proposed rules provide some protections to debtors, they raise some serious questions about due process rights. Comments are due January 14, 2003.

New SSR on Interstitial Cystitis

SSA recently issued a new Social Security Ruling (SSR 02-2p) on Interstitial Cystitis (IC), published in the Federal Register on November 5, 2002 [Volume 67, Number 214], pp. 67436-67439, available online via GPO Access [**wais.access.gpo.gov**].

According to SSA, this "Ruling clarifies the policies of the Social Security Administration for developing and evaluating title II and title XVI claims for disability on the basis of Interstitial Cystitis (IC). IC is a complex, chronic bladder disorder characterized by urinary frequency, urinary urgency, and pelvic pain." The Ruling was effective immediately.

This Ruling explains that IC (a complex, chronic bladder disorder), when accompanied by appropriate symptoms, signs, and laboratory findings, is a medically determinable impairment that can be the basis for a finding of "disability." It also provides guidance for the evaluation of claims involving IC. The SSR provides authority for determining that disability exists at Step 3 of the sequential evaluation process (SEP), both for adults and children.

Testing Redesign Continues

In June 2002, SSA extended the pilot projects in several states, including New York, testing "redesign features." The features testing continued were the "single decision maker" procedure and the elimination of reconsideration. SSA stated that they expected that the selection of cases for these tests would end on or before December 30, 2002.

However, SSA announced in the December 10, 2002 Federal Register (Volume 67, Number 237), p. 75895, available online via GPO Access [**wais.access.gpo.gov**] [DOCID: fr10de02-63], "We are extending our selection of cases to be included in these tests from December 30, 2002, until no later than June 30, 2003. If we decide to continue selection of cases for these tests beyond this date, we will publish another notice in the Federal Register."

Watch for it in 6 months.

SSA Enters Digital Age

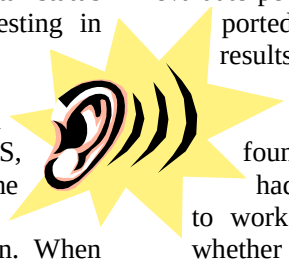
On December 26, 2002, SSA announced two new baby steps into the world of communication via digitized electronic signals. See 67 Fed Reg. 78848-78849, available online via GPO Access [**wais.access.gpo.gov**]. One step will expand services available to beneficiaries, i.e., enabling SSI beneficiaries (and spouse or parent deemors) to report their wages electronically. Testing begins in April 2003. Comments should be submitted within 30 days i.e., by January 26, 2003.

The other step will enable representative payees to electronically report their expenditures of beneficiary funds. Testing (6 months) begins within 40 days for certain organizational representative payees, presumably after the 30-day comment period has expired and the comments have been dealt with. See also 67 Fed. Reg.76429-76431 (December 12, 2002), available online via GPO Access [**wais.access.gpo.gov**] for information about SSA pilot program testing wage reporting via SSA's infamous "800" telephone number with either voice recognition or key padding.

ADMINISTRATIVE DECISIONS

Is the Appeals Council Actually Listening?

In the past several months, PILOR paralegal Doris Cortes has won four remands from the Appeals Council – all reversing the same ALJ! One involved a claimant with a head injury and a diagnosis of an amnesic disorder. The consultative examiner who evaluated him prior to the hearing was unable to administer a Weschler Memory Scale because of a language barrier. He was only able to estimate his intellectual functioning. The Appeals Council (AC) ordered the ALJ, on remand, to obtain a consultative mental status examination with psychological and cognitive testing in Spanish.



Advocates should note that this could be a mixed blessing: the Spanish version of the WAIS, known as the EIWA, is scaled differently from the current WAIS, and claimants consequently tend to obtain much higher IQ scores on the Spanish version. When SSA revised the mental impairment listings in August 2000, it specifically declined to add provisions that testing be in an individual's primary language, or that testing could be administered through a translator. See 65 Fed. Reg. 50752-53 (August 21, 2000). Instead, it provided for exceptions to formal testing where standardized measures appropriate for social, linguistic and cultural background were not available.

In Doris's case, the AC also ordered the ALJ to evaluate the claimant's mental impairment in accordance with the "special technique" described in 20 C.F.R. §416.920a. This admonition has shown up in several recent AC decisions. It is based on changes made to the mental impairment regulations in August 2000, renaming the special "procedure" used to evaluate severity to the "technique." Advocates will recall that the regulations eliminated the requirement that ALJs and the AC must attach a Psychiatric Review Technique Form (PRTF) to all decisions; instead, the findings are to be incorporated into the decisions. See 20 C.F.R. §416.920a(e)(1).

In all of Doris's other three victories, the AC found that the ALJ failed to recontact the treating physicians, and ordered him to do so on remand. One of the decisions even cites Second Circuit treating physician case law, including pre- *Schisler* cases! Who thought the AC was even aware of it?! Two of the decisions are particularly detailed and co-authored by the same Administrative Appeals Judge – Dorothea J. Lundelius. The level of detail in these decisions seems to cut both ways for the claimants.

In the first decision, for example, while the AC reproved the ALJ for failing to provide a rationale for his residual functional capacity (RFC) finding of "light" work, it also suggests that a medical expert (ME) may be necessary to evaluate perceived discrepancies between the claimant's reported levels of adaptive functioning and formal test results. The AC also zeroed in on references to alcohol and marijuana use in a CE report and in the treatment notes, despite the fact that the ALJ found that the claimant's history of substance abuse had not caused significant limitations in his ability to work. The AC instructed the ALJ to determine whether drug addiction or alcoholism were contributing factors material to a disability if disability was found.

In the next case, the ALJ rejected the opinion of the claimant's treating physician in favor of a less helpful one from the Physician's Assistant (PA). The ALJ found that mostly the PA saw the claimant. The AC ruled, however, that the ALJ's finding that the treating physician's opinion was unsupported is "unsubstantiated absent clarification from [the treating doctor]." The AC also ordered the ALJ to evaluate the claimant's obesity under SSR 00-3p, as well as clarify his use of a walker under SSR 96-9p, which contains points of consideration and development in the use of medically required assistive devices. The ALJ had discounted the claimant's testimony regarding his need for the walker as exaggeration. The AC noted, however, that use of the walker had in fact been prescribed.

In another significant finding, the AC ordered the ALJ to further develop whether the claimant can read and write in English. As the AC stated: "Although a claimant may speak and understand some English, if he is unable to read or write, then he is illiterate, regardless of his literacy in a foreign language (HALLEX I-5-312) or education in another country." The ALJ was ordered to take whatever steps necessary under HALLEX I-5-312 III B to determine the claim-

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Whatever Happened to My IRA?

Privately held retirement funds can wreak havoc on SSI eligibility. A fund that can be turned into cash is a resource. POMS SI 01120.210 B., D.2. If not reported, it will cause an overpayment. Raquel Ramos at the Mercy Advocacy Program experienced an adventure in these murky waters.

Raquel's SSI client first showed up in 2001 to consult about some other benefits. The client's retirement funds had been established with payroll deduction contributions while the client was working, and, "out of sight, out of mind." When the client applied for SSI, they had long been forgotten. Raquel's interview technique brought them to the surface, and the client and Raquel realized there was more than the resource allowance held in retirement plans.

Raquel advised the client to make decisions about managing the money and reporting it to SSA. The client agreed to consider the options, but then did not contact her again.

Fast-forward about 16 months. The client returned to Raquel, saying that a week or two before, the funds were converted to cash and put in the bank. The client reported SSA possessing the money. The client wanted help with an SSI overpayment. The overpayment applied to the month when the client had transferred the funds, and the following month when the notice was sent.

The most obvious option, to convert the money to allowed and excluded resources (which could include establishing a supplemental needs trust), was undesirable both because the client did not have enough spending ideas for a project like that, and because it would not take away the overpayment. In fact, penalties for not applying for other benefits lurked in the shadows if the client took this option. POMS SI 00510.001 D.4.

Raquel learned that the fund was payable only in a lump sum. However, it could be "rolled over" to an IRA. Eventually, the client decided to set up the funds in an IRA providing periodic payments. As such, the principal amount of the fund was no longer considered as a resource. POMS SI 00830.160 B.1; SI 01120.210 B.

Raquel represented her client in the personal conference on the overpayment. Result: overpayment determination withdrawn! Raquel successfully made her argument under POMS SI 01120.210 E.3 and 01150.200 *et seq.*, for conditional eligibility while in the process of converting the funds to periodic payments. Raquel also made the argument that with an income stream to recognize now, SSA will save far more over the coming years than the amount of the overpayment. The Claims Representative agreed, giving the client no interruption in her entitlement to payments!

Fortunately in this case, the specter of ineligibility for failing to apply for a other benefits could not come out of the shadows since no one at SSA notified the client that the funds were considered subject to that rule before she converted them to periodic payments.

Congratulations to Raquel!

(Continued from page 8)

ant's ability to read and write English.

On the down side of this AC analysis, however, is the AC's suggestion to the ALJ that the claimant may have engaged in additional past relevant work at a lighter exertion level than the ALJ determined. It also ordered the ALJ to further explore the claimant's alcohol use.

Based on new and material evidence submitted by Doris, this new activist Appeals Council also ordered that the claim be designated as a "TERI case" pursuant to HALLEX I-2-140, and expedited on remand. [TERI cases are critical cases involving terminal illnesses]. On the one hand, it is great to see the AC actually paying attention to these cases, especially new evidence that we have submitted. On the other hand, wouldn't it be nice if the AC, in light of the fact that evidence showed that this claimant now has inoperable colon cancer, had just reversed the claim rather than remanding it with a two page list of considerations on remand?

In Doris's final victory, the ALJ was criticized for rejecting the opinion of the treating physician as to RFC based on the physician's alleged failure to offer objective evidence without recontacting the doctor. Even more significant, however, is the Appeals Council's affirmance of a favorable decision by the state agency on a subsequent application. [*Doris's client received an "Affirmation and Order of Appeals Council" pursuant to HALLEX TI-I-5-317, which spells out the procedures the AC is supposed to follow in cases where there are subsequent applications while claims are pending at the AC.*]

On remand, the ALJ is limited to consideration of disability prior to the date of the subsequent application. This alleviates the problem advocates often run into on remand, where the ALJ takes the position that the whole time period, including that covered by a subsequent allowance, is up for grabs. Great job, Doris!

Possible ALJ Bias Warrants New Judge on Remand

A recent Appeals Council (AC) victory by Dorothy Barber reminds us yet again how much we will miss her when she leaves PILOR in January. The case involved another example of an ALJ's failure to re-contact the treating physician. In this case, however, the AC remanded the claim to a different ALJ, agreeing with Dorothy's complaint that the ALJ had made "a rather cruel comment" that her agoraphobic client seemed to enjoy staying home and reading at the public's expense.

The AC agreed, "this statement is inappropriate and may give the appearance of bias." Dorothy had pointed out to the AC that it had previously criticized this same ALJ been for inappropriate behavior. He had been referred to counseling on the proper conduct of hearings and the content of decisions in light of his moral judgments regarding claimants' lifestyles.

Interestingly, this very detailed decision was also co-authored by Administrative Appeals Judge Dorothea J. Lundelius. This case represents yet another amazing feat by Dorothy. We will all – especially our clients – greatly miss Dorothy's tenacity, talents and passion. Good luck to her.

On-the-Record Decisions Expedite Appeals Process

Kerie Stone, formerly of MFY Legal Services and now in private practice, has been effectively utilizing requests for on-the-record decisions to expedite the appeals process for her clients.

- S.S. is a 58-year-old man with a college education and a 20-year history of work as a social work manager. Thus, he had both education and skills. However, S.S. suffered from a variety of exertional and nonexertional limitations as a result of numerous impairments including: emphysema, bipolar disorder, early Alzheimers, chronic pneumonia, hepatitis C and tardive dystonia. After hiring Kerie, S.S. was hospitalized for his breathing problems and told by his doctors that he could not return to live in a fifth floor walk-up. But, unless he got his benefits, he could not move.

In a letter outlining new evidence of the claimant's physical and mental limitations and explaining the urgency of obtaining a favorable decision, Kerie asked ALJ Rowe to issue a decision on the record. In his decision, Judge Rowe found that the claimant could not return to social work, manager work or any other form of SGA; he found onset as of the last day the claimant worked and that disability would continue for at least twelve months into the future.

- G.S. is a 63-year-old lady who worked as a mail processor for an insurance company. She suffered from a torn rotator cuff for which surgery was not entirely successful, partially blocked coronary arteries, eczema and arthritis. Both her cardiologist and orthopedist stated she was totally disabled but the State Agency denied the claim. In this instance, too, Kerie requested an on-the-record decision summarizing the source and content of the additional medical documentation she was able to obtain. ALJ Poverstein, in Jericho, agreed that the claimant was disabled and paid the case without a hearing.

On-the-record decisions can be a useful tool in appropriate cases. Choosing the right case is important; informing the ALJ why it is "the right case" is equally important.

Let's hear it for Kerie!

Protective Filing Date for Non-Class Member

Margarita A. thought she had filed concurrent applications for SSD and SSI when in fact she had actually responded to *Stieberger*/*SONY* (*State of New York*) notices. When *Stieberger*/*SONY* relief was denied, she filed a request for a hearing. It was not until a hearing was scheduled that Margarita's representative, Victor Torres, Brooklyn Legal Services Corporation A, uncovered that he was not dealing with an initial SSD/SSI denial but *Stieberger*/*SONY* appeals.

On review of the claimant's file, Victor discovered that she was not even a class member in either action. Victor then decided to try to convince the ALJ to grant Margarita a protective filing date as of the date she responded to the *Stieberger*/*SONY* notices in exchange for her agreeing to withdraw her request for such relief. He argued that the claimant was mentally impaired and believed that she filed applications when she responded to the class notices. ALJ Vecchio agreed to the protective filing date and found the claimant psychiatrically disabled back to 2000.

The Past as Prologue

"Buffalo Bruce" Caulfield of Neighborhood Legal Services chalked up some sweet victories over the past two months. He secured a $39,000 retroactive payment for a client who had already been through two hearings and two trips to the Appeals Council with private counsel before she had the good fortune to find Bruce. Bruce's investigation turned up 93 pages of additional evidence covering the years 1995-2002. He managed to convince the ALJ that his 42 year old, college educated woman met Listing 12.06 based on her Post Traumatic Stress Disorder. Wow!

Bruce also proved the importance of case development in another case involving mental retardation (MR). The claimant had a psychological consultative examination, which revealed that his full scale IQ was 70. He also suffered from a hip injury, thus arguably meeting the second prong of listing 12.05C for mental retardation. Bruce secured the client's school records from 1977-83, which showed IQ scores of 70 as well with a classification of "Educable MR." Bruce was thus able to successfully argue a longitudinal history of functioning at borderline to MR levels.

Kim Walker of PILOR had a similar experience. With the help of super sleuth Warren Wightman, an administrative assistant placed at PILOR by the Lifespan program, she was able to track down her client's South Carolina school records from 1964 showing that he tested in the retarded range. Although the ALJ ultimately granted the claim on the Grid, the school records undoubtedly influenced him, particularly in his finding that the claimant did not have the intellectual capacity to perform more than simple, unskilled work.

Proving U.S. Citizenship Clinches SSI Benefits

Appointed guardian for a mentally impaired 96 year old lady who was born in Canada, Nina Keillan from Legal Services for the Elderly, had the daunting task of trying to demonstrate the woman was an American citizen to help her get SSI.

While born in Canada, the client came to the U.S. as a small child where she lived in Montana with her parents. In 1921, her parents were naturalized in Great Falls, Montana and the client was naturalized under her father's petition. However, the only document Nina could find was the Canadian birth certificate; there was no naturalization certificate and no U.S. passport. Additionally, the client's mental condition prevented her from providing any other information. In sum, the client did not have any of the evidence listed in the SSI regulations, 20 C.F.R. § 416.1610(a), to prove that she was a U.S. citizen.

But in the absence of a specified document, evidence of voting in the U.S. is acceptable proof, 20 C.F.R. § 416.1610 (c). It was known that the client had voted. However, before having to find that evidence, Nina contacted Alice Briloff at SSA's Regional Office in Manhattan who tracked down the number of the naturalization certificate from Great Falls. The client can now be approved for SSI. Good legwork on Nina's part guaranteed this client's benefits.

Child's Case Referred for Investigation

The claimant is a 10 year old boy who was born with multiple problems: a club foot, a hernia which was repaired during his first year, asthma and a mobility problem that has not yet been finally diagnosed. Numerous doctors at numerous hospitals and clinics have seen him. The child, his mother and Gwyneth Eliason, his representative from NYLAG, appeared at a hearing in the Bronx recently.

Before proceeding to the merits of the claim, the ALJ stated his intention to refer the mother to the Office of the Inspector General (OIG) and to the Regional Chief ALJ for investigation because one of the physician's who saw the child stated in her report, "there seems to be 'a Munchausen by proxy' operating here." The doctor's statement went on to explain that the child got a lot of attention from his mother when he was sick, which is not the definition of Munchausen by proxy.

The ALJ was not clear on what basis he intended to make the referral, but suggested that he felt that doing so was his only option, presumably having decided that the mother was at fault for the child's medical problems. Is this a new construction of the "fraud and similar fault" regulations? Has anyone else seen anything like this happening? Let us know.

Bilateral Manual Dexterity Still Matters

Greg Phillips, a private attorney in Rochester who is a member of the Western New York Task Force, recently prevailed at a hearing for a client with DeQuervain's tendonitis, a condition involving inflammation of the tendon sheath which, in this case, affected the client's wrists. Advocates may recall that Greg called upon the collective wisdom of DAP Listserv participants in preparation for this case in light of the demise of the example that used to appear in the preface to the Medical-Vocational Guidelines (the Grid).

For those who may have already forgotten the good old days, the example in Section 201.00(h) indicated that most sedentary jobs require bilateral manual dexterity. Greg argued that SSR 83-10 essentially says the same thing. Amazingly, however, he managed to convince the ALJ that his client met Listing 1.02B. Section 1.02B requires proof of major dysfunction of a major peripheral joint in each upper extremity (i.e., shoulder, elbow, or wrist-hand), resulting in inability to perform fine and gross movements effectively. Greg's client, who had bilateral DeQuervain's, more than met this listing. Great job, Greg.

SSD Application Provides Protective Filing Date for SSI

Andrea Sasala of Nassau Suffolk Law Services worked very hard to maximize her client's benefits by insisting on a protective filing date for an application that was never filed!

Andrea's client applied for Title II Benefits in October 2000. He did not apply for SSI at that time. An ALJ hearing was held on July 23, 2002 on the Title II claim. An SSI application was not available at OHA. Andrea argued for a protective filing date for SSI, using the date of the SSD application. The client went to the local Social Security office on the day of the hearing and filed an SSI application that was faxed to the ALJ and Andrea on the same day.

On August 14, 2002, the ALJ issued a fully favorable decision on the issue of disability but denied the protective filing date, thereby eliminating five months of benefits for Andrea's client as well as Medicaid protection for incurred bills.

The ALJ decision reported that a failure to provide information is not "misinformation" within the meaning of 20 C.F.R. § 416.351, and because the claimant testified that he was unaware of the SSI program when he filed his Title II application, obviously had not inquired about SSI.

Andrea was dismayed. The ALJ's legal reasoning did not make sense to her (or to us!). She had successfully obtained protective filing dates for other clients in front of other ALJs. Her own research and the advice and encouragement she received from the DAP Listserv (thanks Dappers!) prompted Andrea to submit a copy of POMS SI 00601.027 to the ALJ. She asked the ALJ to reconsider his denial of a protective filing date. The ALJ reopened his earlier decision and revised it on September 27, 2002.

The July 23, 2002 SSI application "is deemed to have been protectively filed on October 4, 2000, when the claimant filed his Title II claim, because the Social Security Administration failed to advise the claimant of the opportunity to file an SSI claim at that time, and failed to send a notice to the claimant advising him of the need to file a written SSI application within 60 days. 20 C.F.R. § 416.350 and POMS Section SI 00602.27; see also 20 C.F.R. § 416.351."

Andrea was grateful that the ALJ was willing to reconsider his stance. She says that the lesson in this for her practice is to ascertain as early on as possible that a claimant has indeed filed an SSI application. It is not something we can take for granted. Clients with some work history do not know what benefits they have applied for and rarely have documentation. They do not know their PIA and, lately, it is not available in the hearing file. Good advice for all of us to follow.

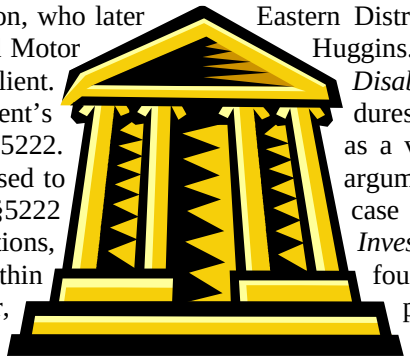
COURT DECISIONS

Bank Account Restraint Lifted

We all know that Social Security and SSI are exempt from attachment under 42 U.S.C. §407, right? Then why do they keep getting attached? Advocates will recall reading in these pages in recent months about court cases, particularly the *Lopez* case in the 9th Circuit, that have made us feel less secure about these previously sacrosanct protections. And how many times have we heard from clients whose funds have been attached despite the protections of Section 407?

Michael Bonsor of Southern Tier Legal Services recently got one of those calls from a client whose joint account was attached by a judgment creditor. The account consisted primarily of his Social Security disability funds in addition to some small amounts that his wife had borrowed from her father.

Ten years earlier, Mike's client had cosigned a car loan with Ford Motor Credit Company for his son, who later defaulted on his payments. In August, Ford Motor Credit obtained a judgment against Mike's client. In September, Ford Motor restrained the client's bank account pursuant to CPLR §§ 5201 & 5222. Under CPLR §5222(d), the debtor is supposed to receive a notice in the form prescribed by §5222 (e), which sets forth a partial list of exemptions, including Social Security and SSI, either within the year before service of a restraining order, or within four days of the service. The notice advises the debtor to act promptly by contacting the person sending the notice (i.e., the creditor) or an attorney, and also refers to a "procedure" under CPLR §§ 5239 & 5240. Not surprisingly, the client got the notice after his account was already frozen.



After getting nowhere with Ford Motor on his own, Mike's client contacted Southern Tier Legal Services, and Mike went into action. Mike made numerous attempts to negotiate with Ford Motor's attorneys throughout the month of October. After being assured that the account would be released, Mike learned in November that his client had been arrested on bad check charges. Mike then began a special proceeding in New York State Supreme Court pursuant to CPLR §§5239 & 5240. On November 19th, the court issued an Order to Show Cause and a temporary restraining order. The next day, the account was "unfrozen," but not before Mike's client was forced to move from his apartment because he could not pay the rent, had seventeen checks dishonored, and faced criminal proceedings.

Mike obtained a default judgment against Ford Motor and is now seeking damages on behalf of his client. Mike's well researched and persuasive pleadings are available as DAP # 376.

Mike did a fabulous job for his client, but it was obviously no small feat. His client lost the benefit of his Section 407 exemption in the meantime. And how likely is it that Mike's client, on his own, would have been able to successfully prosecute his claim? Those are the questions that Johnson Tyler and Raun Rasmussen of South Brooklyn Legal Services asked before they filed a case in federal court in the Eastern District back in May 2001 on behalf of Bernie Huggins. This case, described in the September 2002 *Disability Law News*, challenges the CPLR procedures described above on due process grounds and as a violation of §407. The court rejected those arguments, relying on an earlier Second Circuit case involving AFDC benefits [*McCahey v. L.P. Investors*, 774 F.2d 543 (2d Cir. 1984)], which found that CPLR §5222 met the demands of due process. *Huggins v. Pataki*, 2002 WL 1732804 (E.D.N.Y. July 11, 2002).

Huggins is on appeal to the Second Circuit, with briefs due at the end of January 2003. Johnson and Raun hope to convince the court that the CPLR procedures are simply too burdensome, especially in light of how easy it is for financial institutions to identify exempt funds because of direct deposit. GULP, WNYLC and Legal Services for the Elderly in Buffalo are planning to file an *amicus* brief in *Huggins*.

Please let Kate or Louise at GULP know about any examples you have of clients trying to wend their way through the CPLR procedures.

Blind Bus Driver Found Disabled!

Kate Callery of GULP won another reversal this month after declining the government's offer of a remand. In a case ably prepared by PILOR's Dorothy Barber, Kate convinced Judge Telesca of the Western District that there was no need for a remand despite the government's claim that the record was incomplete. The ALJ had found that the claimant, who was legally blind in one eye, had limited vision in the other eye, and had numerous physical problems, was able to return to her past relevant work as a school driver and/or monitor. Not with our kids on the bus, thank you!

Judge Telesca held that the ALJ had failed to accord proper weight to the opinions of the claimant's various treating physicians in determining her residual functional capacity. He ruled that she should have been found disabled under the Grid based on her age, education and past work experience. Sometimes it pays to just say no.

"Fleeing Felon" Benefits Reinstated

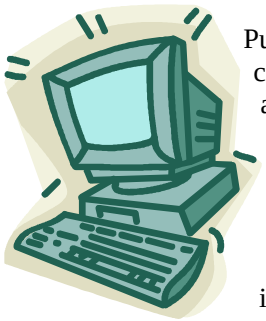
Last month's newsletter began with the reminder that if you commit the crime, you have to do the time. But at least one PILOR client recently learned otherwise.

A former client for whom PILOR had obtained disability benefits contacted the office to report that his benefits were being terminated because of an outstanding Massachusetts warrant. Sarah Gilmour, former DAP paralegal and now PILOR attorney, successfully negotiated with the Assistant District Attorney (ADA) in Springfield to dismiss the charges in the interest of justice. Not only was the warrant sixteen years old, there had been no named victims. The ADA was also swayed by the fact the defendant's disability benefits had been terminated under SSI's new "Fugitive Felon" provisions (42 U.S.C. §1382(e)(4); 20 C.F.R. §416.1339). Sarah is also in negotiations with a New Jersey DA in another case, where she is helping the client make arrangements to pay off an outstanding fine.

So, the good news is that there may be hope in some of these "fleeing felon" cases. As DAP advocates were reminded last month at the Western New York Task Force, there may well be mistakes or loopholes that can be used to a claimant's advantage. An Assistant Public Defender from Monroe County explained some of the ins and outs of criminal procedure to the Task Force. He also emphasized that, on occasion, a warrant may have in fact been cleared up, but the paperwork was not completed. Or in instances of very old warrants, the crime may no longer be classified as a felony. In other words, it is at least worth looking onto some of these cases. On a practical note, he pointed out that most courts have web sites, which can be helpful in tracking down addresses and phone numbers. (See related article on PACER, below).

The bad news is the manner in which Sarah's client was greeted at SSA when he tried to ask for continued benefits pending his reconsideration. The claims representative apparently informed him in no uncertain terms that the answer was "no!" Although there admittedly may not be great grounds for appeal in a number of these fleeing felon cases, our clients should nonetheless be accorded their procedural rights. Let's work to make sure that SSA does not get too carried away in its zeal to help make the streets safe again!

Document Images Available on PACER



Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District, and Bankruptcy courts, and from the U.S. Party/Case Index. A Link to the Northern District PACER site is available at the court's website **www.nynd.uscourts.gov**. To register, fill out one of the registration forms available on this site. In addition to court docket sheets, users can now obtain copies of orders and judgments in civil actions filed after January 1, 2001. Documents are available at a cost of $.07 cents per page with a cap of $2.10 for any one document.

CLASS ACTIONS

Kendrick, et al. v. Sullivan, 90 Civ. 3776 (S.D.N.Y.) (Ward, J) ("the ALJ bias case")

Description - June 1990 complaint on behalf of proposed class of persons who appeared, or would appear, before ALJ Helen Anyel (of the New York City OHA), alleges that the ALJ is biased against claimants seeking Social Security benefits and unfit to decide claims. The court certified a class and denied SSA's motion to dismiss. SSA also commenced a formal removal proceeding before the Merit Systems Protection Board ("MSPB").

Relief - SSA suspended Anyel with pay from June 1991 to May 1995, and then agreed to an MSPB approved settlement suspending her without pay for one month in 1995, and prohibited her from presiding in Social Security Act cases for one year. Pursuant to a 1995 *Kendrick* settlement, SSA mailed notices in April 1997 offering full reopenings for all claims dismissed, denied, or terminated by Anyel in New York or Chicago from 9/25/77 to 5/22/95.

Citations - *Kendrick v. Sullivan*, 784 F. Supp. 94 (1992) (district court certified class and denied motion to dismiss), subsequent settlement, *Kendrick v. Shalala*, (December 27, 1995). See also, multiple MSPB decisions (1/16/92 unpublished recommended decision of MSPB Chief ALJ, Edward J. Reidy; *SSA v. Anyel*, 58 M.S.P.R. 261 (6/25/93); 8/11/94 unpublished proposed settlement of MSPB action; 9/16/94 recommended decision of MSPB Chief ALJ Paul G. Streb; 1/25/95 final decision and order of MSPB).

Information - Toby Golick, Cardozo School of Law (212-790-0240); Ann Biddle or Malcolm Spector, Legal Services for the Elderly (212-391-0120) .

McMahon v. Sullivan, Perales and Schimki, 91 Civ. 621 (Curtin, J) ("the DAC/SSI Medicaid case")

Description -- Plaintiffs challenged NYDSS's failure to implement 42 U.S.C. §1381(c) which requires continued Medicaid eligibility for disabled adults who lose SSI solely because of eligibility for or an increase in Social Security Child's Insurance Benefits, also known as Disabled Adult Child's (DAC) benefits. Plaintiffs claim that defendants fail to ensure that Medicaid benefits continue

Relief — HHS and OTDA have corrected the problem prospectively and retroactively to July 1, 1987. Additionally, the parties completed negotiations to correct the problem for dually entitled recipients (individuals entitled to both disability benefits on their own record and Disabled Adult Children benefits on a parent's account). The case has been resolved with 4,500 class members getting some satisfaction.

Information — Greater Upstate Law Project, Inc. (585-454-6500); Heritage Centers (716-522-3333); Wendy Butz (Medicaid liaison person) (518-473-0955)

Balzi, Brogan, et al. v. Stone & Callahan, 85 Civ. 8706, 90 Civ. 7805 (SDNY) (Knapp, J.) ("the rep payee case")

Description - Plaintiffs challenged SSA's and OMH's policies and practices regarding the appointment of representative payees for recipients of Social Security benefits who became inpatients at OMH psychiatric facilities. Plaintiffs alleged that OMH facilities provided inadequate information and legally deficient notice both in appointing themselves representative payee for plaintiffs and in carrying out their obligations as representative payee. Additionally, plaintiffs alleged that SSA failed to meet its statutory obligations by neglecting to ensure appropriate appointment of representative payees, adequate notice to plaintiffs and prompt replacement of representative payees when plaintiffs return to the community.

Relief - Final settlement signed January 7, 1997 with many favorable provisions for inpatients including provisions about an inpatient's right to notice of the application of a facility to become the representative payee and the right of inpatient's to inform OMH that they do not wish to pay for their institutionalization.

Citations - 90 CV 7805 (WK) unpublished order 1/7/97

Information - Catherine Callery, Greater Upstate Law Project (585-454-6500), William Brooks, Touro Law School Clinic (516-421-2244).

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.

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

Walton v. Barnhart, 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, 530 U.S. 103 (2000)

The Supreme Court held that a Social Security or SSI claimant need not raise an issue before the Appeals Council in order to assert the issue in District Court. The Supreme Court explicitly limited its holding to failure to "exhaust" an issue with the Appeals Council and left open the possiblity that one might be precluded from raising an issue.

Forney v. Apfel, 118 S. Ct. 1984 (1998)

The Supreme Court finally held that individual disability claimants, like the government, can appeal from District Court remand orders. In *Sullivan v. Finkelstein*, the Supreme Court held that remand orders under 42 U.S.C. 405(g) can constitute final judgments which are appealable to circuit courts. In that case the government was appealing the remand order.

Lawrence v. Chater, 116 U.S. 604 (1996)

The Court remanded a case after SSA changed its litigation position on appeal. SSA had actually prevailed in the Fourth Circuit having persuaded that court that the constitutionality of state intestacy law need not be determined before SSA applies such law to decide "eternity" and survivor's benefits claims. But now, SSA says that constitutionality must first be determined, so the Fourth Circuit will presumably revisit the issue.

Shalala v. Schaefer, 113 S. Ct. 2625 (1993)

The Court unanimously held that a final judgement 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

Shaw v. Chater, 221 F.3d 126 (2d Cir. 2000)

The Second Circuit has reaffirmed its support and approval of retrospective medical evidence and its continued insistence that SSA adhere to its own treating physician rule. In addition, the Second Circuit has found as a matter of law that an SSI application must be treated as a concurrent SSD application.

Curry v. Apfel, 209 F.3d 117 (2d Cir. 2000)

The Second Circuit found that SSA failed to meet its burden at Step 5 because the consultative examiner's report was so vague as to "render it useless". As SSA failed to introduce evidence sufficient to meet its burden at Step 5, the Court then remanded only for calculation of benefits.

Williams v. Apfel, 204 F.3d 48 (2d Cir. 1999)

The Second Circut remanded the case for further administrative proceedings to determine Ms. William's ability to perform any other work in the national economy (a Step 5 determination). This case is significant because the district court judge had concluded that Ms. Williams was unable to perform her past relevant work and awarded benefits to her on that basis. The Commissioner, not the plaintiff, then appealed, arguing that the district court erred in granting Williams' motion for judgment on the pleadings when it should have remanded the case for a Step 5 determination.

Snell v. Apfel, 177 F.3d 128 (2d Cir. 1999)

The Second Circuit reversed and remanded on the grounds that the Appeals Council failed to provide adequate reasons for its decision, may have ignored favorable evidence, and should have fully developed the record. The Court made clear that it will not accept perfunctory conclusions by SSA. The Court also refused to let the Commissioner attempt to offer explanations at the appellate level; it would "not accept appellate counsel's *post hoc* rationalization for agency action" as to why, in the case of Ms. Snell's second treating physician, the agency accepted one less favorable evaluation over another more favorable one.

Melville v. Apfel, 198 F.3d 45 (2d Cir. 1999)

The Second Circut rejected the argument that workfare can never be considered evidence of claimant's ability to perform SGA. It ordered remand for proper consideration of the plaintiff's work activity, setting forth what such an evaluation should include.

Brown v. Apfel, 174 F.3d 59 (2d Cir. 1999)

The Second Circuit remanded a case for further proceedings based on the additional evidence submitted in the appeal to the Appeals Council. The Court remanded because the new evidence submitted to the Appeals Council undermined the findings upon which the ALJ decision rested. The Court was also sharply critical of the agency's failure to develop the record and of the ALJ's substitution of his own judgment of that of a physician.

Rosa v. Callahan, 168 F.3d 72 (2d Cir. 1999)

Remanding the case for futher administrative proceedings to correct various errors, the Second Circuit held that: (a) the ALJ cannot set her own expertise against that of the treating physician and then reject the treating physician's opinion; (b) the ALJ has a duty to contact treating and other medical sources to clear gaps in the administrative record even when represented by counsel; (c) the ALJ erred in applying the Medical Vocational Guidelines (the "Grid") to deny benefits in a case in which it was undisputed that the claimant suffered from non-exertional impairments; and the Commissioner must present affirmative evidence to sustain its burden of proof and demonstrate a claimant has the residual functional capacity to meet the demands of sedentary work.

Tejada v. Apfel, 167 F.3d 770 (2d Cir. 1999)

The Second Circuit remanded the case for a new hearing and determination confined to Step 5 of the sequential evaluation. The Court instructed the Commissioner to either find other work that the claimant could perform or pay benefits. Further, the Court urged the Commissioner to expedite the proceedings on remand as Ms. Tejada's application for benefits had been pending for more than five years.

Overcoming Overpayments in Kids' SSI Cases

In a recent DAP listserv posting, Mike Hampden of Legal Services for Children in New York City set out some interesting thoughts on avoiding overpayment recovery in children's SSI cases. As Mike noted, he had been looking for a "magic bullet" for knocking out recoveries of overpayments in kids' SSI cases, since his organization only represents children and usually their objective in these cases is preventing a reduction of benefits to a child still in pay status.

Mike felt some confusion stemming from the fact that most of the reported cases do not distinguish between, and analyze separately, the rights and obligations of the child on the one hand and the representative payee on the other. They just rule on whether "the waiver" is granted or denied. Typically, the courts analyze first whether the representative payee was at fault, and then move on to the "defeat the purposes of the Act" issue by considering whether the beneficiary will suffer hardship.

Finding this approach muddy and possibly incorrect, Mike undertook his own analysis. He concluded that we will be more likely to succeed on behalf of the child if we break down the issue into two distinct elements: waiver of repayment by the representative payee, and waiver of repayment by the child.

The authority for this approach is SSR 64-7 and SSR 84-6a, which, when read together provide that SSA should engage in a two-step process to determine, first, whether the overpayment should be recovered from the representative payee, and then, whether it should be recovered from the child. In the most common situation, the representative payee was not without fault, and even if the overpayments were used for the benefit of the child, the representative payee may be found personally liable for repayment.

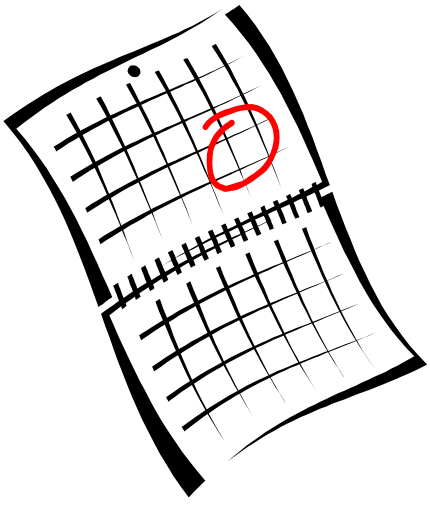
However, this does not dispose of the issue whether the overpayment can be recovered out of the child's benefits. If the overpayments were used for the benefit of the child, "the question remain[s] as to whether the overpayment should be recovered from him." SSR 84-6a. However, in determining this question, "the child is presumed to be 'without fault' as to an overpayment of such benefits in the absence of evidence to the contrary." SSR 64-7. The fault hurdle, usually the toughest in these cases, is now past, and then we can move on to the hardship question that is usually easier (and where, incidentally, we have the benefit of the presumption that recovery from any claimant receiving SSI will defeat the purposes of the Act. 20 C.F.R. § 416.553.)

Thus, in many cases, we can expect to win because we have the benefit of two presumptions that automatically satisfy the statutory requirements for a waiver. Two cases in which the rights of the representative payee and those of the beneficiary were analyzed separately are *Greenberg* v. *Commissioner of Social Security*, 1998 WL 229849 (D. Conn. 1998) and *Abrams* v. *Schweiker*, 543 F.Supp. 589 (N.D. Ga. 1982). The fact that, as many cases state, the representative payee and the beneficiary may be jointly or severally liable for repayment, does not contradict this approach. The operative phrase is "may be."

Thanks to Mike for taking the time to analyze this issue for all of our benefit.

2003 Calendar

Every year, Paul Ryther, the counting man, gives us a handy calendar for calculating those pesky deadlines. Paul's 2003 calendar is attached to this newsletter. Thanks to Paul for doing our counting for us.



WEB NEWS

Disability Websites

Add these links to your list of interesting disability related websites:

http://www.thebody.com — An AIDS and HIV information resource

http://www.clsphila.org/abc1.htm — Community Legal Services' Advocating on Behalf on Children site — good for kids' SSI info

www.hdadvocates.org — Health and Disability Advocates (formerly the SSI Coalition) — good for kids' SSI info

http://www.ssas.com — SSAS offers information about Social Security and its programs, but is not affiliated with the Social Security Administration (SSA) or any other agency

http://nnlm.gov/hip/easy.html — collection of links to easy-to-read Web sites for health-related information

Poverty Law Manual for New Lawyers Available

The National Center on Poverty Law has published a poverty law manual for new lawyers. In this manual, they cover the basics of the principal legal issues facing low-income clients and address some of the skill issues particular to poverty law practice. At the same time, they recognize the impossibility of covering everything newer lawyers need to know in a single volume. Thus, they have endeavored to include, in the overview articles published, references to Web sites and other resources that offer more detailed information. Many of the authors are attorneys at national support organizations, which also offer helpful assistance. The manual concludes with some "questions you always wanted to ask" (and their answers) about poverty law and legal services lore. Substantive articles include TANF, Food Stamps, Public Housing, several Health related articles, Domestic Violence, and Family Law. All articles are available at **www.povertylaw.org** without a subscription. Check it out.

Benefits Check-up Online

Bill and Melinda Gates of Microsoft fame have funded a new website **www.BenefitsCheckUp.org**. The disabled and aged can access that website from one location, input their personal info and zip code and a list of all eligible state and national programs for benefits will be available. Relatives living out of state can do it for others by just knowing their zip code. Since the website is its infancy, there may be some bugs. No, on a Microsoft product??? The website is powered by the National Council on the Aging.

Which Immigrants are Eligible for SSI?

I have a client who entered the U.S. in 1991 as a refugee. In 2000 she applied for SSI. Is she is still eligible for SSI even though her eligibility as a refugee has expired because she is a "qualified alien" who was lawfully residing in the U.S. on 8/22/1996…?

The short answer is "yes". The explanation is longer.

The sheer complexity of immigrant eligibility rules for public benefits is almost as effective a deterrent to access as are the restrictions contained in the rules themselves. Nowhere is this more evident than in the immigrant eligibility rules of the Supplemental Security Income (SSI) program.

First, a bit of history. The origin of the immigrant rules that we must now deal with lies in the Personal Responsibility Act of 1996 (PRWORA), which changed "welfare as we know it". Although the most publicly-argued aspect of the welfare debate in 1996 revolved around the time limiting of federal welfare benefit eligibility and the end of the entitlement of poor children to those benefits, much of the actual savings attributed to the welfare reform legislation were based on the rules restricting the access of immigrants to federal means tested benefit programs. Congress was most focused on the SSI program, which, in its view, was beginning to "disproportionately" serve poor elderly and disabled immigrants as compared to citizens.

As initially enacted, PRWORA would have resulted in the termination of SSI benefits to untold numbers of disabled and elderly immigrants. The changes in the immigrant eligibility rules were targeted not only at future immigrants, the people coming to the United States after the date of PRWORA's enactment, but were also designed to purge the rolls of most pre-1996 recipients as well. However, the prospect of large numbers of frail immigrants being rendered homeless and destitute through the loss of their SSI benefits caused a significant public outcry. As a result, a year after PRWORA was enacted and just before the benefits of hundreds of thousands of immigrants would be terminated, Congress amended the rules to allow those immigrants who were lawfully in the country and in receipt of SSI on 8/22/1996, to keep their benefits.

At the same time, Congress also restored the SSI eligibility of blind or disabled immigrants with a "qualified alien" status who were lawfully residing in the United States on the date PRWORA was enacted. However, the restrictive SSI eligibility rules for "qualified alien" immigrants arriving in the country after 8/22/1996 remained intact. These immigrants continue to be ineligible for SSI unless they were admitted to the U.S. on the basis of humanitarian considerations, for example refugees or asylees are lawful permanent residents who can be credited with a significant work history (40 qualifying quarters) or are connected to the armed services, either actively or with an honorable discharge.

Who Are "Qualified Aliens"

Except for those immigrants who Congress grand fathered back into the SSI program because they were receiving benefits on 8/22/1996, no immigrant, pre- or post-1996, is eligible for SSI unless, as a preliminary matter, he or she is a "qualified alien" at the time of application for benefits. (There is a provision for the special treatment of very old applications, those filed before 1/1/1979, but this is unlikely to affect very many immigrants at this date.)

The term "qualified alien" refers to non-citizens with particular immigration statuses. After PRWORA, only "qualified alien" immigrants are eligible to receive *any* public benefit, not just means-tested benefits such as SSI, food stamps, Medicaid or public assistance. "Qualified aliens" were defined by PRWORA to include:

- humanitarian entrants (refugees, asylees, persons whose deportation is withheld, Cuban/Haitian entrants and Amerasians);
- persons paroled into the U.S. for at least one year (usually on public interest or humanitarian grounds);
- lawful permanent residents (LPRs or "green card" holders), and
- certain battered spouses and/or children eligible to petition for permanent residency status as spouses and/or children of U.S. citizens or lawful permanent residents and are in the process of doing so.

By restricting access to public benefits to "qualified aliens", Congress excluded a large category of immigrants who had formerly been eligible for federal benefits as persons "permanently residing under color of law" (PRUCOL immigrants). (In New York, these immigrants are still eligible for Safety Net benefits and for state funded Medicaid.)

However, for the purpose of establishing SSI eligibility, classification as a "qualified alien" at the time of application for benefits is only the beginning of the story. Eligibility for SSI also depends on the date the immigrant entered the United States. Those who were not already residing in the U.S. on 8/22/1996, or if in the U.S., were not "lawfully residing" here, must meet additional requirements.

(Continued on page 21)

(Continued from page 20)

Immigrants Lawfully Residing in the U.S. on 8/22/96

"Qualified alien" immigrants who are blind or disabled and who were *lawfully residing* in the United States on 8/22/1996 are eligible for SSI. POMS SI 00502.142. (Immigrant eligibility for SSI based on age was effectively eliminated by PRWORA unless the immigrant meets additional criteria.) To be considered lawfully residing, the immigrant must show both that he or she was "lawfully present" in the U.S. in August of 1996 and residing here, i.e. not just here temporarily. The term "lawfully present" encompasses not only immigrants who are in a "qualified alien" status but also certain immigrants who were in a status formerly considered PRUCOL. (See POMS SI 00501.430.) For example, immigrants in deferred action status in August of 1996, or on whose behalf an immediate relative petition had been filed but who had not yet gotten their green card, become eligible for SSI once they get their green card.

However, someone who was in the U.S. on 8/22/1996, but not in a lawful status, will not be eligible for SSI unless he or she meet additional requirements, even after getting a green card, i.e., a battered spouse who was living in the U.S. before August of 1996 but whose husband refused to file any immigration papers on her behalf. Even if she is ultimately successful in petitioning under the Violence Against Women Act (VAWA) and gets her green card, she will not be eligible for SSI without meeting additional criteria if her application was approved by INS *after* 8/22/1996.

SSI Eligibility Rules for Post-1996 Immigrants

Of those immigrants who come into the U.S. after August of 1996, or who were in the U.S. but not lawfully residing here (collectively referred to here as *post-1996 immigrants*), it is primarily those who are admitted to the U.S. in a humanitarian status who are eligible for SSI if they are disabled or elderly and poor. However, their period of eligibility is limited to the first seven years after their status was granted. In addition, honorably discharged veterans of the U.S. armed services and their dependents, as well as active duty service members and their dependents, are also eligible for all means-tested benefits, including SSI. Though their eligibility is not time limited, sponsor deeming and liability is likely to apply to those whose status was adjusted after December 31, 1996.

Aside from humanitarian immigrants whose eligibility is limited to seven years from the date their status was granted, and armed service-connected immigrants, the only other groups of post-1996 immigrants who are eligible for SSI are:

- those who become citizens, or
- LPRs who can be credited with 40 qualifying quarters of coverage under Title II of the Social Security Act. (See POMS SI 00502.135)

Lawful permanent residents can receive credit not only for their own quarters but also for the quarters of a spouse earned during the marriage, or a natural or adoptive parent, earned before the LPR turns age 18. To receive credit for the qualifying quarters of a spouse, the LPR must still be married to, though not necessarily living with, the spouse. If the spouse on whose quarters the LPR wants to rely is deceased, the quarters earned by the deceased spouse can be credited to the LPR as long as they were still married at the time of the spouse's death.

An LPR may also be credited with the qualifying quarters of a "holding-out" spouse, earned during the time the holding-out relationship existed, as long as the relationship continues at the time the determination of eligibility is made. An LPR child of a natural or adoptive parent living in a holding-out relationship may also receive credit for the quarters earned by the holding-out spouse during the relationship as long as the LPR is under age 18 at the time the determination of eligibility is made and the relationship continues to exist.

The qualifying quarters of the stepparent of an LPR can be credited from the quarter of the marriage of the LPR's natural or adoptive parent to the stepparent through the quarter the LPR turns 18, as long as the marriage occurred before the LPR was 18 and has not ended at the time the eligibility determination. The stepparent's quarters are not lost if the natural or adoptive parent and the stepparent later divorce.

There are two limitations on the eligibility of 40 quarter LPRs for SSI benefits. First, no credit will be given for any quarter after December 31, 1996 if, during that quarter, the LPR, or the parent or spouse on whom (s)he is depending for credit, received any means-tested benefit. Means-tested benefits include Medicaid, SSI, public assistance and food stamps.

Second is the "five year bar". With the exception of humanitarian entrants and armed services connected immigrants, all other post-1996 immigrants must be in a "qualified alien" status for five years before they become eligible for any federal means-tested benefit. Thus, even if an LPR could be credited with 40 qualifying quarters after having entered the U.S. less than five years before, he or she would not be eligible for benefits until the bar expires.

Thanks to Barbara Weiner, GULP's immigration specialist, for this informative. For a quick chart outlining immigrant eligibility to benefits, go to **http://www.gulpny.org/Public%20Benefits/Immigrants%20Access/Non_Citizen_Eligibility.pdf**.

END NOTE

Brain Scans May Identify Schizophrenia and ADHD

Scientists are a little closer to developing an early test for schizophrenia using magnetic resonance imaging (MRI). The sooner doctors can diagnose the disease, they quicker they can start treating it. Early treatment of schizophrenia tends to be more successful.

Years ago, researchers working with MRIs showed that people with schizophrenia had brains that were structurally different. Then MRIs revealed similar changes in people who were at high risk of developing the disease because they had relatives with schizophrenia. Now, in a study coming out of Australia and England, researchers have used the scans to identify abnormalities in the brains of people who do not even have the disease yet.

Researchers found that those who were destined to become psychotic later were different in terms of their MRI scans from those who were not. In the study, researchers studied 75 young people, some of whom had symptoms that worried psychiatrists. Of the group, 23 people eventually got the disease. They all had less tissue in certain areas of their brains than the others in the study.

Even though the research is promising, there is much more work to do. What the researchers did with MRIs was combine the individual scans of the people with schizophrenia to create a composite picture. Now they have to come up with a way to pinpoint pre-schizophrenic changes patient by patient. (This study was discussed on National Public Radio on December 10, 2002).

Brain scans are also being used to diagnose attention deficit hyperactivity disorder (ADHD). Clinical tests use computers to measure concentration and brain scans to detect differences from normal brains. The use of scans in diagnosing ADHD is controversial because the tests are expensive, researchers are still learning to interpret them, and one scan involves injecting the child with radioactive material.

The vast majority of doctors still believe the most reliable way to diagnose ADHD is by observing a child and paying attention to problems he or she has at school and home. But critics say the diagnosis of ADHD is too subjective and often pathologizes normal childhood behavior or worse, fails to detect the real problem, such as a learning disorder.

One test that has been developed is the McLean Motion and Attention Test, or M-Mat. During the M-Mat, children watch as either a five-point star or and eight-point star flashes on a computer screen. The child is told to tap the space bar when the eight-point star appears. Children with ADHD either act too quickly or become distracted, making far more errors. An infrared motion-analysis system tracks the child's movements during the tests. Based on studies of thousands of children, those with ADHD move three times more than normal children. If ADHD is diagnosed, the child is re-tested after taking medication to see whether he or she responds.

Critics are concerned about limitations of the test and are concerned about over-reliance on a computerized test over subjective assessment. But those interested in the M-Mat can contact the hospital at **www.mcleanhospital.org**, to find one of several clinics around the country using it.

Researchers are also using brain-scanning techniques to better identify ADHD. While scientists agree that there are striking differences in the brain images of people with ADHD, most say it is premature and impractical to use brain scans to diagnose the disorder. However, some doctors are using a brain-scanning method called Spect, which requires the injection of a small amount of radioactive material to illuminate brain activity.

Several problems exist with the scan: many insurance plans will not cover the $1,000 or more cost of the test and the long-term effect of exposing young brains to radioactive material has not been researched. The best way to find someone who does the scans is to ask an ADHD specialist or try **www.amenclinic.com** for places that perform Spect scans.

It is important to note that many children being treated for ADHD show marked improvement on medication and additional testing probably is not necessary. But the test can be helpful for parents who question the diagnosis or for children who are not showing signs of improvement from medication.

2003

JANUARY

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JULY

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OCTOBER

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DECEMBER

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