Empire Justice Center

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DISABILITY LAW NEWS

SSA Again Pays Small COLA for 2015

The Social Security Administration (SSA) announced a modest 1.7% cost-of-living adjustment (COLA) for 2015. Monthly Social Security and Supplemental Security Income (SSI) benefits for more than 64 million Americans will see a slight increase. The monthly SSI federal benefit rate for an individual will increase from the previous level of $721 to $733 and the monthly rate for a couple will increase from $1,082 to $1,100. The New York supplement will remain at $87 for individuals and $104 for couples living alone; the living with others supplements remain at $23 and $46, respectively.

A 2015 New York State SSI benefit chart is available at: http://otda.ny.gov/programs/ssp/2015-Maximum-Monthly-Benefit-Amounts.pdf. Thanks to Jim Murphy of Legal Services of Central New York, SSI benefit charts from 1976 to 2015 are available at http://www.empirejustice.org/issue-areas/disability-benefits/non-disability-issues/benefits-level-charts/ssi-benefit-levels-published.html.

The Substantial Gainful Activity (SGA) threshold for Non-Blind has increased to $1,090 and for Blind has increased to $1,820. The Trial Work Period (TWP) threshold increased to $780. The maximum taxable earnings for OASDI (old-age, survivors and disability insurance) purposes will increase to $118,500 in 2015. The quarter of coverage amount has also increased to $1,220.

Most beneficiaries will not see an increase in Medicare Part B monthly premiums from $104.90 per month in 2015. Some higher earning beneficiaries will have higher premium rates. For more details, see http://www.medicare.gov/your-medicare-costs/costs-at-a-glance/costs-at-glance.html. For SSA's Fact Sheet on 2015 Social Security Changes, see http://www.socialsecurity.gov/news/press/factsheets/colafacts2015.pdf.

The government wants to make sure that even these modest increases are safe from predators. Amid increased concern about the security of Americans' financial data, the federal government will boost security for federal benefits, such as Social Security payments, that are distributed by government-issued debit cards. These cards will contain an internal chip that makes them less vulnerable to fraud.

An Executive Order issued in October 2014 mandates a push to more-secure card technology for federal benefit cards as a way to respond to several

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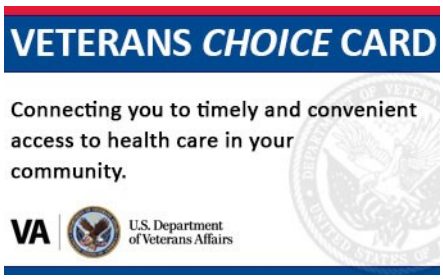
Federal Student Loan Disability Discharges Made Easier

Federal student loans may be collected out of Social Security benefits. An increasing number of Social Security disability recipients have student loan debts collected out of their benefits. Federal student loan debtors can qualify, however, for a "total and permanent disability" discharge of their debts. See the December 2012 edition of the *Disability Law News*.

A new Department of Education website now includes information on how to get a "total and permanent disability" discharge of federal student loan debt. There is also an online application. Until recently, the Department of Education did not even have a paper form specifically for applications for "total and permanent disability" discharge. http://www.disabilitydischarge.com/Application-Process/

Are Veterans' Choice Cards Really a Choice?

Starting in November, and continuing in the first weeks of December, the Veterans Affairs Department began mailing out "Choice Cards," which allow eligible veterans to seek and obtain care outside the VA hospital network if, for example, they face long waits for VA care or live far away from the closest VA clinic. The cards aren't golden tickets into private healthcare, however. Rather, they act more as informational insurance cards that identify the veteran and verify eligibility for care that was arranged for and approved by the VA sometime earlier. In addition, not all eligible veterans will get to choose their outside provider, and not all non-VA providers will treat eligible veterans through this program.



SSA Again Pays Small COLA for 2015—Continued

(Continued from page 1)

high-profile data breaches at retailers and financial institutions. http://www.whitehouse.gov/the-press-office/2014/10/17/fact-sheet-safeguarding-consumers-financial-security. The new cards, which are gradually being rolled out by U.S. card issuers, will contain a computer chip in addition to the traditional magnetic strip on the back to enhance security. Merchants are installing new card-reading devices at the cash register to accept the cards.

The change would impact people who do not have bank accounts and receive federal benefit payments through debit cards, including Social Security retirement and disability payments and veterans' benefits. The Treasury now requires beneficiaries to receive their payments either as a direct deposit into their bank account or via a debit card. As of mid-2013, about 5.5 million beneficiaries received their benefits through this debit-card program, called "Direct Express." Comerica Inc. is paid by the Treasury Department to issue cards for the Direct Express program. Chip cards have been used widely in Europe, Asia, and Canada for years but they have been slow to take hold in the U.S. Recent security breaches have renewed interest in rolling them out.

How Goes NYS's Takeover of SSP?

As reported in the last DAP news, New York State took over administration of the Supplemental Security Income (SSI) State Supplement Program (SSP) on October 1, 2014. http://www.empirejustice.org/issue-areas/disability-benefits/non-disability-issues/misc/new-york-takes-over-ssp.html#.VI9CnsstC70. By now, most SSI beneficiaries should be receiving two separate payments each month - one from SSI and one from NYS. Just to add some more acronyms to the mix, NY's Office of Temporary and Disability Assistance (OTDA) now administers the SSP.

Since issuing its new regulations in September (available at http://otda.ny.gov/legal/Adoption-State-Supplement-Program.pdf), OTDA has issued a number of other directives. In September, it posted GIS 14 TA/DC-040: "State Takeover of the SSI State Supplement Program (SSP)," which was issued on September 30, 2014. It is available at: http://otda.ny.gov/policy/gis/2014/14DC040.pdf. And on November 29, 2014, it issued 14 ADM-07: "State Administration of SSI State Supplement Program (SSP)," intended to provide local social services departments with an "overview" of the SSP and to highlight changes caused by the change in administration. http://otda.ny.gov/policy/directives/2014/ADM/14-ADM-07.pdf.

To date, advocates have not reported many problems with the takeover. But advocates and beneficiaries will need to become familiar with the changes as they continue to evolve, and be on the lookout for potential issues. For example, most beneficiaries will now receive two different retroactive awards, and presumably two sets of notices. At this point, someone whose SSI claim was approved after October 1st will undoubtedly also be entitled to retroactive benefits prior to that date. S/he will receive the usual multi-page award notice from SSI, detailing how the benefits - including the SSP - were calculated. But retroactive SSP benefits for the months after October 2014 will no longer be included in the SSI Award Notice.

What is not clear, however, is whether the advocate will receive a copy of whatever retroactive award notice is eventually generated by OTDA for the SSP portion of the back award. Apparently OTDA does not have access to the advocate's Appointment of Representative Form 1696 in the SSI file, so will not necessarily be automatically sending a copy of any notices to the representative. Advocates will be meeting with OTDA in January to address this and other questions. In the meantime, advocates may have to contact OTDA directly about retroactive SSP awards. Questions can be directed to the New York SSP Customer Support Center at 1-855-488-0541, which operates Monday - Friday from 8:30 - 4:45. The number is toll-free. Questions can also be emailed to otda.sm.ssp@otda.ny.gov, or faxed to 518-486-3459.

Similarly, the Interim Assistance Reimbursement (IAR) process with SSA remains the same as before the State takeover. But a separate process has been established for the Recovery of Equivalent Benefits (REB) under SSP, under which any deficiencies outstanding after IAR can be withheld from retroactive SSP. Advocates will now have to review both the IAR and REB recoveries.

As outlined in the ADM and the September *Disability Law News*, most changes will still be reported to SSA. For recipients who only receive SSP, however, reports should be made directly to OTDA. OTDA's webpage dedicated to SSP includes links to the various forms, along with the 2015 SSI/SSP benefits level chart and other important information:

- SSI Benefits Levels Chart at: http://otda.ny.gov/policy/directives/2014/ADM/14-ADM-07-Attachment-1.pdf
- Revised living arrangement definitions at: http://otda.ny.gov/policy/directives/2014/ADM/14-ADM-07-Attachment-2.pdf
- Medicaid Enrollment and Exchange Form at: http://otda.ny.gov/policy/directives/2014/ADM/14-ADM-07-Attachment-3.pdf
- Spanish version of that form at: http://otda.ny.gov/policy/directives/2014/ADM/14-ADM-07-Attachment-4.pdf

Please keep us informed of any problems you may see in the new SSI/SSP world. And thanks to Jim Murphy of Legal Services of Central New York for keeping us up to date on all these OTDA publications.

OIG Studies "Outlier" ALJs

At the request of Congress, the Social Security Administration's (SSA's) Office of the Inspector General (OIG) identified administrative law judges (ALJs) who had issued 700 or more dispositions and had allowance rates of 85 percent or higher in any two fiscal years since 2007. The OIG identified 44 ALJs - or about four percent of total ALJs - who met the "outlier" criteria. The report is available at http://oig.ssa.gov/audits-and-investigations/audit-reports/A-12-14-24092.

According to the OIG's random sample of 275 cases issued by these ALJs, 38 should not have been allowed. Thirty-one of the cases were properly processed, 216 had "quality issues," and 28 had missing information - such as the evidence file or ALJ decision - that prevented review. Among the reasons that OIG, in conjunction with the Office of Appellate Operation's Division of Quality (DQ), found the decisions deficient were: improper articulation of the residual functional capacity, (2) record not adequately developed, and (3) inadequate mental impairment evaluation. Of note, SSA had taken administrative or disciplinary action against 15 of the 44 outlier ALJs, mostly for failure to follow "agency policy." And DQ had conducted a "focused review" of four of the seven ALJs identified as outliers in 2013.

OIG referred the 216 questionable cases to DQ, which would have reversed five of the allowances, issued a less favorable decision on seven, issued a more favorable decision on one, remanded 108 back to the ALJ, and taken corrective action without changing the outcome in seven. OIG extrapolated from these results to estimate that the so-called outlier ALJs improperly allowed benefits in approximately 24,900 cases, resulting in questionable payments of $2 billion.

On the other hand, the OIG found that the ALJ outliers and cases with quality issues have decreased in recent years, coincident with SSA's increased "monitoring and oversight of ALJ workloads." Of course, this is the same time period during which the allowance rate at ODARs nationwide went from 63% to 48%. The rate is now below 50% for the first time in over 30 years.

Does the OIG also study outlier ALJs with low allowance rates? In 2012, it reviewed the Fiscal Year 2010 workloads of 24 ALJs with the highest and the lowest allowance rates. *Congressional Response Report: Oversight of Administrative Law Judge Workload Trends* (A-12-11-01138), February 2012. The OIG followed up with a study of appellate actions on the denials issued by the low-allowance ALJs. Not surprisingly, eleven of the 12 low-allowance ALJs had appeal rates above the national average. In addition, the Appeals Council reversed the denied cases associated with six of the 12 low-allowance ALJs at twice the national average rate. Also, while the remand rates for most of the low-allowance ALJs were closer to the average rate for all ALJs, one of the twelve ALJs had a remand rate more than twice the national average.

The OIG made several recommendations, several of which SSA has apparently implemented, including steps to communicate quality results to ALJs as well as monitor ALJ workloads. In August 2011, ODAR implemented its "*How MI Doing?*" (HMID) tool, which allows hearing office staff and ALJs to track their productivity over time and compare their performance at the local, regional, and national levels. It has also created an early monitoring system to measure ALJ workload and identify outlier behavior. That study is available at http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-13-13084.pdf.

REGULATIONS

Final Rules Revise Listing

SSA issued final rules revising the criteria for Listings 6 and 106, genitourinary disorders, effective December 9, 2014. 79 Fed. Reg. 61221 (October 10, 2014). http://www.gpo.gov/fdsys/pkg/FR-2014-10-10/pdf/2014-24114.pdf. Proposed changes were published on February 4, 2013. SSA indicates it made some changes in the final rules, compared to the proposed rules, because of comments received. The changes, however, appear to be minimal.

The comments and SSA's responses are instructive. One comment that was not adopted highlights a distinction between the criteria for Listings level disability based on weight loss under section 5.08 (Digestive Disorders) and under the new 6.05. (The childhood listing at 106.05 is not comparable as it does not include a weight loss component.) While the distinction is not major and the medical findings may seldom support both Listings sections, advocates may want to explore both avenues when the opportunity presents itself.

In one apparently positive note, SSA adopted changes proposed in a comment: "One commenter expressed concern about proposed listing 6.09, regarding how to explain 'CKD [Chronic Kidney Disease] complications requiring hospitalizations versus hospitalizations due to a group of co-morbid conditions, including CKD.' The same commenter also suggested that we add guidance in the introductory text to address acute worsening of CKD during hospitalizations for co-occurring conditions." SSA agreed, and provided clarification regarding CKD complications in final listings 6.00C8 and 106.00C5.

There is at least one change that's more restrictive than the proposed revisions. BMI evaluations for disability based on weight loss, for which there must be at least two at least 90 days apart, now must be made within the space of 12 months. An annual weight check-in with the doctor that goes a few days over a year will defeat use of the Listings to prove the case; this may or may not be significant for advocates.

SSA also clarified some definitions of terms in response to comments received. Thanks to attorney intern Damian Privitera for his help reviewing these changes.

EM Sets Waiver Rules

The Social Security Administration has issued a new Emergency Message (EM) that allows SSA to adopt a prior waiver determination if 1) the waiver was properly denied on the basis of fault and 2) the determinative issues, facts, and evidence presented are the same as before. In other words, res judicata does not bar a subsequent request for waiver for the same overpayment if the individual presents new determinative issues, facts, or evidence.

https://secure.ssa.gov/apps10/reference.nsf/links/11242014032245PM

Exclusions of German Reparations POMS Updated

Under a 1994 law, Holocaust compensation payments made to individuals based on their status as victims of Nazi persecution are excluded from being counted as income and resources in determining both eligibility for and the amount of benefits to be provided under any federally funded program based on financial need. This means payments made to victims of Nazi persecution do not count as income. Savings accumulated from reparations are not counted as resources. The same exemption applies to Medicaid, Food Stamps, and federally subsidized Housing programs.

In October 2014, the Social Security Administration (SSA) updated the POMS in two ways to ensure that the GHETTO PENSION or ZRBG does not reduce SSI or Social Security:

- New POMS clarify Ghetto Pension is exempt from being counted for Income and Resources for SSI. The new and amended POMS are: SI 00830.710, SI 01130.610, SI 00830.711, and SI 01130.711.

- New POMS clarify Ghetto Pension is exempt from the "Windfall Elimination Provision" (WEP) reduction for Social Security retirement benefits. See amended POMS GN 00307.290.

More information on these reparation programs is available at http://www.wnylc.com/health/entry/65/.

SSA Promulgates POMS on Transferable Skills

Does your client have skills that could be transferrable to another skilled or semi-skilled job? Does s/he really have skills, or are they merely traits? Yet another one of those squirrely areas that we may have to confront in hearings with vocational experts. New POMS Section DI 25015.017 provides a wealth of information about the Transferability of Skills Assessment (TSA).

The new POMS is broken down into five subsections that describe definitions and considerations relevant to the TSA (A); when a TSA is material (B); supplemental information to assist in the TSA (C); the steps in the TSA (D); and additional tips to assist in the TSA (E).

Advocates facing TSAs should be familiar with all these subsections, but of particular note is Subsection E's list of common jobs with skills highly likely to transfer to other light work:

- Auto repair
- Cooking
- Electrician
- Heavy equipment operator
- Inspecting
- Law enforcement
- Machining
- Maintenance mechanic
- Master carpenter
- Nursing
- Plumbing
- Sales

Common jobs with skills highly likely to transfer to other sedentary or light work? Assembly, clerical, and supervisor. But common jobs with skills that generally do not transfer to other work? Nurse's aide, specialized truck driving (basic driving ability is not a skill), and unusual or isolated vocational settings (like jobs in mining, agriculture, or fishing).

SSA Publishes Helpful Administrative Message

SSA has issued an Administrative Message (AM) that deals primarily with the use of the Medical-Vocational Guidelines, particularly Rule 204.00. The AM was published in conjunction with SSA's release of eCAT 9.0, which includes "enhancements" related to Rule 204.00. What is eCAT? According to SSA, it is a tool in that documents the evaluation process in disability claims, helping the analyst to document, analyze, and adjudicate claims. It stands for "Electronic Claims Analysis Tool. It can be found in most if not all electronic folders. http://www.socialsecurity.gov/newsletter/archives/2011/oct2011.html.

According to the AM, the new version of eCAT prevents adjudicators from inadvertently using Rule 204.00 to direct a determination. It reminds adjudicators that Rule 204.00, which describes an impairment that does not preclude heavy work as "generally sufficient" for a finding of not disabled, cannot be used to direct a determination, but may be cited as a "framework" for both allowances and denials. The most common type of allowance using 204.00 as a framework is when a claimant has a mental impairment preventing him or her from meeting the basic mental demands of unskilled work. The rule should only be applied at step five of the sequential evaluation.

The AM also includes some very helpful reminders to adjudicators for evaluating mental impairments that may be especially useful for advocates arguing lack of adaptive functioning in intellectual disabilities claims. For example:

- "Borderline intellectual functioning is a medically determinable impairment."
- "For claimants who allege attending special education classes, it is important to make a reasonable effort to obtain school records, particularly if the claimant was in a special education program in the last ten years."
- "Use care when looking at the issue of adaptive functioning in cases with Intelligence Quotient (IQ) scores falling within the range for listing 12.05 Intellectual Disability. The ability to drive, engaging in common everyday activities, and previous employment do not preclude a diagnosis of Intellectual Disability, and do not necessarily preclude a finding of disability under listing 12.05."

The AM is an internal SSA document but can and should be cited as: Office of Retirement and Disability Policy, Soc. Sec. Admin., AM-14056 (Sept. 15, 2014) (copy attached as Ex. A). (To the best of Plaintiff's representative's knowledge, AM-14056 is not available at Social Security's web site, i.e., www.socialsecurity.gov.)

New POMS may be forthcoming, but in the meantime the AM is available as DAP # 568.

Promised Foreclosure POMS Released

In the March 2014 edition of this newsletter, we reported that AM (Administrative Message) 9060, which provides guidance on Resource and In-Kind Support and Maintenance (ISM) evaluations for homes in foreclosure, had been extended pending promulgation of POMS. The anticipated POMS were issued on December 12, 2014. POMS SI 01130.120 covers Resource Evaluations for Real Property in Foreclosure; SI 00835.115 deals with In-Kind Support and Maintenance Evaluation for Homes in Foreclosure.

The POMS sections, like the AM, provide answers to various hypothetical scenarios that are generally helpful to homeowners facing foreclosure, including confirming that SSI beneficiaries will not be charged with ISM if they continue living in their homes without paying on the mortgage while the foreclosure is pending. The provisions for continuing to exclude the home as a resource both during and after foreclosure are also outlined.

CDR HALLEX Amended

With Social Security processing an increasing numbers of Continuing Disability Reviews (CDRs), there are bound to be increasing problems with that processing. One issue that advocates have confronted over the years involves the reinstatement of benefits pending appeal after a CDR case has been remanded by the Appeals Council or Federal Court.

Remember that a claimant can elect to receive interim benefits during the appeal process through the Administrative Law Judge (ALJ) level. 20 C.F.R. §§ 404.1597a & 416.996. So what happens if the ALJ denies the claim, benefits are discontinued, but then the Appeals Council or U.S. District Court remands the claim for a new hearing? The claimant should be able to "re-elect" to continue benefits, although this is sometimes easier said than done.

SSA has recently amended its HALLEX provisions to clarify how the Appeals Council will handle remands involving a claimant's right to benefit continuation. Transmittal No. I-3-79 details changes to HALLEX provisions I-3-7-40, including how the Appeals Council will notify hearing offices of potential payment continuation. http://ssa.gov/OP_Home/hallex/TS/tsi-3-79.html. Transmittal I-3-78 amends section I-3-0-86 to explain when a claimant is and is not entitled to benefit continuation in a CDR. http://ssa.gov/OP_Home/hallex/TS/tsi-3-78.html.

Getting a remand from the Appeals Council in a CDR case, even with the extra burden of getting benefits reinstated, is a great victory. Sometimes a victory in a CDR case may be as simple as getting the DHO (Disability Hearing Officer) evidence file from the Division of Disability Determinations - NYS's DDS. Thanks to Michelle Spadafore of NYLAG for reaching out the Office of the Regional Chief ALJ about this problem.

According to the instructions Michelle received, if you need a DHO file, you can go in person to the OTDA office to view the file on the computer or the paper file. You cannot make any copies but can take notes. If you only have a 3288 release but not a 1696 Appointment of Representative, you must bring the client with you. All the NYS DDS offices have apparently been advised of this policy. If a copy of the disc is needed, representatives will be directed to the Field Office. If there is a problem with the DDS and the business process established above, you may contact Susan Palais at 212-264-7317. If a problem arises at the FO level, you should contact the District Manager.

Hurry Up and Wait, Again!

Some new data about the back logs at SSA, effective for FY 2014, was issued at an October 29, 2014 budget briefing by SSA Associate Commissioner, Office of Budget, Bonnie Kind :

- Average processing time for new applications is 110 days. Average processing time for ALJ hearing decisions (time between the request and the decision after the hearing) is 454 days
- The average SSA 800 number wait time is over 22 minutes. But you simply get a busy signal 14% of the time.
- The agency processed 2,862,000 initial disability claims and 681,000 hearings. At the end of the FY, the agency still had 633,000 initial disability claims pending and 978,000 hearings pending.
- The agency completed 1,536,000 periodic Continuing Disability Reviews (CDRs) and 526,000 full medical CDRs. It processed 2,628,000 non-medical SSI redeterminations.

Coupled with the decrease in favorable ALJ decisions, down to 48% for FY 2013, and decrease in Federal Court remands, down to 42% in 2013, it is taking longer and longer just to get an unfavorable decision.

COURT DECISIONS

Judge Posner Strikes Again

The Seventh Circuit, and Judge Posner in particular, continued its pattern of criticizing the government's bases for denying Social Security benefits. In the recent decision *Herrmann v. Colvin,* --- F.3d ---, 2014 WL 6808294 (Dec. 4, 2014, 7th Cir.), Judge Posner reversed and remanded the district court's decision upholding SSA's denial of benefits.

In that case, the plaintiff suffered from, among other impairments, fibromyalgia, spinal disk disease, and photophobia. According to evidence from physicians, she walked "haltingly, had difficulty gripping objects, experienced difficulty in rising from a sitting position, had trouble concentrating in a bright room or when looking at a computer screen." As a result, she "[could not] do even light work on a full-time basis." Nevertheless, SSA deemed her disabled only when she reached age 55. The ALJ denied benefits for the years before she turned 55.

If all of the above information as supplied by the applicant's treating physicians and three SSA consultative examiners was true, the applicant "was disabled before she turned 55 and is therefore entitled to a back payment of Supplemental Security Income" according to Judge Posner. He says the precise definition of "light work" found at 20 C.F.R. § 404.1567 is the exact work that the doctors' diagnoses would indicate the applicant *can't* perform (emphasis in decision).

The error, therefore, lay with the ALJ's assessment of the relevant physicians' evidence. Posner struck back against the now typical ALJ statement that neither the treating physician's notes nor the findings of other physicians support the functional limitations drawn by that treating physician, and therefore that his findings will be given no significant weight. Where physician statements do not contradict one another, though they may not provide identical evidence, Posner says, "there are insufficient grounds for disbelieving the evidence of a qualified professional." Judge Posner also struck down the attempt at oral argument by SSA's lawyer to attribute some of the confusion in the ALJ's discussion of the evidence from the various physicians to a "scrivener's error. According to the court, while that might have been a possible explanation, "we can't assume it to be true on the basis of the lawyer's speculation." 2014 WL 6806294 at *2.

Earlier, the district court had conceded that "the ALJ's evaluation of [one doctor's] opinion may not be perfect." Judge Posner concluded that this imperfection - what he calls an understatement - plus the ALJ's refusal to give significant weight to other uncontradicted physician evidence "should have persuaded the district judge to reverse the denial of relief…and remand the matter to [SSA]."

Judge Posner also attacked the vocational testimony on which the ALJ relied. Following a line of cases in the Seventh Circuit, he questioned the accuracy and reliability of the bases for the vocational expert's (VE's) testimony, including what he characterized as the "obsolete" *Dictionary of Occupational Titles* (DOT) and VE's "estimates." Of note, Judge Posner cited *Brault v. Social Security Administration*, 683 F.3d 443 (2d Cir. 2012) as sharing his "profound" doubts as to the source and accuracy of VE statistics. The Second Circuit, however, has not been amenable to the type of arguments that the Seventh Circuit has adopted. While the *Brault* court agreed with the Seventh Circuit "that evidence cannot be substantial if it is 'conjured out of whole cloth," it left for another day and a closer case the question of "the extent to which an ALJ *must* test a VE's testimony." 683 F.3d at 450.

Thanks to attorney intern Damian Privitera for his helpful summary and analysis of this cutting edge case.

Third Circuit Limits VE Challenges

At the other end of the spectrum from Judge Posner's decision in *Herrmann* , the Court of Appeals for the Third Circuit recently upheld a decision of the Commissioner in *Zirnsak v. Colvin*, 2014 WL 6891226 (Dec. 9, 2014, 3d Cir.). Although the summary order has no precedential value either in the Third or Second Circuits, it serves a cautionary tale for advocates struggling with challenging vocational testimony.

The plaintiff challenged the ALJ's opinion denying her a closed period of benefits for several reasons, all of which were rejected by the Court of Appeals. Of particular interest was the plaintiff's objections to the hypothetical question posed to the vocational expert (VE) and the VE's responses. The plaintiff argued that the ALJ's decision was not supported by substantial evidence because the hypothetical question on which he relied failed to incorporate all of her limitations, particularly her short-term memory impairment. The court agreed that the impairments were supported by the medical evidence, a basic requirement for establishing limitations that must be included in the hypothetical question. But the court found that the medical evidence was disputed by other evidence of record, including the plaintiff's responses to questionnaires that she completed regarding problems she might have thinking or concentrating. According to the court, the ALJ need not include every impairment *alleged* by the plaintiff. It agreed with the District Court that the ALJ's hypothetical question was not deficient.

The Third Circuit also agreed that any conflict between the VE's testimony and the *Dictionary of Occupational Titles* (DOT) was not fatal. The plaintiff argued that the VE's testimony was inconsistent in two ways. First, the jobs cited - order clerk, charge account clerk, or telephone quotation clerk - all required GED reasoning level of three, which was inconsistent with the ALJ's finding that the plaintiff was "limited to simple and repetitive tasks involving routine work processes and settings." [The GED - or General Educational Development - is listed as part of the definition trailer in all DOT job descriptions; the components of the definition trailer levels are defined in the DOT's Appendix C.] Second, the jobs cited were inconsistent with the plaintiff's limitation to sedentary work with a "sit/stand" option.

The court acknowledged that the VE did not identify the reasoning level inconsistency, nor did the ALJ seek an explanation per SSR 00-4p. The court found, however, that the substantial evidence supported the ALJ's determination. In reviewing cases, it acknowledged a split in authority as to whether there is an inherent conflict between jobs requiring a level three reasoning level and a limitation to simple, routine tasks and unskilled work. But it agreed with those cases that found harmless error if the record nonetheless established that the claimant could perform at that level, and held that there is no bright line rule that there is a *per se* conflict between job requiring level three reasoning and a limitation to simple and routine work.

According to the court, the plaintiff had not actually argued that she was incapable of performing the cited jobs. And the court found that she could perform them based on her tenth grade education, previous experience as a clerk and bookkeeper, and limited medical evidence of psychological problems. Significantly, the court also noted that plaintiff's counsel did not question the VE regarding any inconsistencies.

As to the plaintiff's challenge to the strength level conflict, the court agreed that the ALJ had not elicited a reasonable explanation for the inconsistency between the VE's testimony that the plaintiff could perform the job of subassembler, which the DOT characterized as "light," with her sedentary residual functional capacity. Rather, the ALJ relied on the VE's explanation that the job could be performed with a sit/stand option. Her testimony was based on observations in the field. Although this was not, according to the court, a reasonable explanation, the ALJ's error was harmless since there were other jobs the plaintiff could perform.

The moral of the story? Challenging vocational testimony is undoubtedly among the hardest tasks a representative faces. But challenge we must, especially if *Zirnsak* is a harbinger of cases to come, in which a claimant is essentially precluded from raising objections to vocational testimony on appeal that were not raised at the hearing level.

Report and Recommendation Rejected, Plaintiff Prevails

Congratulations to Cynthia Eyler of Legal Aid Society of Northeastern New York (LASNNY), Canton office, for getting a remand for her client in *Wilson v. Colvin*, 2014 WL 4826787 (N.D.N.Y. September 29, 2014). This remand came after Cindy filed objections to the Magistrate Judge's Report and Recommendation (R&R) that affirmed the Commissioner's decision.

The R&R found that the Administrative Law Judge (ALJ) had not erred by failing to give the treating physician's opinion little weight. Even when new medical evidence from the primary physician was introduced, the ALJ noted the new evidence, but declined to consider it.

Plaintiff argued that the Commissioner erred in ignoring new and material evidence from a treating psychiatrist. The ALJ discounted the opinion of treating primary care physician that the plaintiff was incapable of performing the basic mental demands of unskilled work because there were no clinical or diagnostic findings to support the severity of limitations she found, nor any evidence that the treating primary care physician performed a mental status examination. On the other hand, the treating psychiatrist did assign a low Global Assessment of Functioning (GAF) score.

The District Judge refused to adopt the R&R based on the new medical evidence from the treating physician. On remand, the ALJ will be required to explain what weight should be accorded to the treating physician's opinion.

Good job Cynthia!

Multiple Gaps in the Record Lead to Remand

In another great case coming out of LASNNY's Canton office, *Lyons v. Colvin*, 2014 WL 4826789 (N.D.N.Y. September 29, 2014), the District Court ordered a remand to determine whether the Plaintiff had satisfied the requirements of Listing 12.05. Victoria Esposito represented the plaintiff in this case.

Plaintiff argued that the ALJ improperly determined that the record lacked evidence of significantly subaverage intellectual functioning with deficits in adaptive functioning prior to age 22, as required to support a finding of Intellectual Disability (ID) under Listing 12.05. A number of gaps were found in the record, including the absence of any indication of the education and training of the non-examining medical consultant. The ALJ had given evidence from this source significant weight, but failed to explain why this non-treating medical consultant was given more weight than the treating physician. Overall, the court found it was unclear whether the ALJ considered all of the Plaintiff's limitations together when determining that the Plaintiff did not exhibit Listing level deficits in adaptive functioning.

Plaintiff also contended that the ALJ erred by failing to explain adequately why she credited a 2004 IQ test over the treating physician's 2010 test. The court agreed with this contention, stating that the ALJ's failure to more fully reconcile the IQ scores required remand.

The Court found that gaps in the record raise a question as to whether the ALJ applied the correct standard in determining whether Plaintiff's combined severe impairments equaled a listed impairment. Therefore, the matter must be remanded for further determination.

Congratulations to Victoria Esposito and co-counsel Louise Tarantino of the Empire Justice Center on a terrific outcome in this case.

Magistrate Remands for Calculation of Benefits

It is rare for a case to be remanded for the purpose of calculating benefits. But sometimes the Commissioner's error is so obvious that the Court will find that the evidence persuasively establishes disability. The case of Abzal v. Colvin, Case No. 6:13-cv-1551 (N.D.N.Y. September 09, 2014) is one such case.

The Plaintiff was an Afghani refugee who came to the United States in 2004, from Kyrgyzstan, a former Soviet Republic. He has a variety of physical ailments. He also suffers from significant cognitive limitations as a result of having experienced three known concussions.

After reviewing the plaintiff's brief, the Commissioner offered to remand the case, but refused plaintiff's request that a different ALJ hear the case on remand. The plaintiff, who believed that the ALJ who heard his case was unfair, refused the offer of remand. The Commissioner moved for remand, to which the plaintiff responded reasserting his claim for judgment on the pleadings.

The ALJ had found that plaintiff did not meet Listing 12.05 after deeming the IQ testing, which found plaintiff's IQ to be 44, invalid. The court reviewed the report made by the doctor who conducted the IQ test, and found that there was no question that the plaintiff suffered from substantial deficits in adaptive functioning, as well as very low IQ scores. In the Court's view, the plaintiff clearly met Listing 12.05B. There was also no finding that the evidence in the record was sufficient to challenge the validity of the IQ testing.

Although it is very difficult to reject a remand offer, that decision paid off for this claimant. Congratulations to Empire Justice Center's Louise Tarantino on this great outcome for her client.

Deadlines Matter in Federal Court

A cautionary tale comes out of the Northern District of New York underscoring the importance of deadlines. The sixty day limitation period to file a federal court complaint has been deemed subject to equitable tolling, requiring a show of both extraordinary circumstances and due diligence. *Groves v. Commissioner of Social Security*, 2014 WL 5475292 (N.D.N.Y. October 29, 2014), however, exemplifies a series of unfortunate events that, in the court's view, did not constitute extraordinary circumstances and due diligence.

The attorney in this case argued that a combination of computer and health problems created extraordinary circumstances that should properly permit the tolling of the statute, allowing late filing. The attorney asserted that there were computer failures at the office that took a couple of days to be resolved. Even when the rest of the office computers were working, the attorney's computer was still having problems. When the documents were ready to be filed with the Court, four days past the due date, the attorney was unable to file this action because the scanner was not working. The court requires that new actions filed by attorneys be submitted electronically. The attorney argued that knee pain had also contributed to the filing delays.

Despite all of this, the court found that the facts of this case were nothing more than "garden variety neglect or miscalculation" that did not justify tolling. The attorney's motion focused on the efforts expended upon learning that the action could not be initiated via facsimile, a fact that the attorney should have known given prior experience. Nor did the attorney ever explain why the initial attempt to commence the lawsuit fell outside the relevant sixty-day period. Overall, the court dismissed the action as untimely filing.

Be warned, and be sure to meet your filing deadlines.

Another Word to the Wise...

What happens when you forget the little things like letting the Social Security Administration know of your appointment to the case or having the client sign a request? The case of *Koegel v. Colvin*, 2014 WL 5323951 (N.D.N.Y. October 17, 2014), is another cautionary tale of what happens when procedure is not followed, and the little things are left out.

In *Koegel v. Colvin*, the attorney did not complete an Appointment of Representation Form (1696) when he took over the case at the Appeals Council. Because the client did not sign the request for review, the Appeals Council would not accept the request since there was no record that the new attorney was the Plaintiff's representative, i.e. no 1696. The Appeals Council sent a letter to the attorney and the client instructing the attorney to complete Appointment of Representation form SSA-1696. The Appeals Council gave the attorney thirty days to respond; when he did not, the request for review was dismissed. The attorney filed a complaint to the court, but the court held that it lacked subject matter jurisdiction because the attorney had not exhausted administrative remedies.

Uh-oh. Now what? Be sure to cross and dot those letters. Your client's case, and your reputation, may depend on it.

More Post-*Windsor* POMS Issued

An edition of this newsletter would not be complete without an update on SSA's evolving instructions on implementing *United States v. Windsor*, — U.S. —, 133 S.Ct. 2675, 2695, 186 L.Ed.2d 808 (2013)—the Supreme Court's decision that struck down Section 3 of DOMA (Defense of Marriage Act).

In the September edition, we reported on SSA's decision to recognize not just valid marriages but all relationships that allow a partner to inherit intestate as a spouse would under state law for Title II purposes. SSA, however, will only recognize valid marriages for SSI purposes. Those SSI changes have been incorporated into POMS GN 00210.800-Same-Sex Marriage, SSI Same-Sex Couples, and SSI Deeming from a Same-Sex Ineligible Spouse.

The provision authorizes adjudicators to take steps to process cases that had been on hold pending the resolution of this policy. This is good news for some couples, but could result in overpayments retroactive to the date of the *Windsor* decision (June 26, 2013) for couples in which the income of the non-eligible spouse would have made the disabled or elderly spouse ineligible for SSI.

While these overpayments may and should be successfully waived on an individual basis, not all SSI recipients will file waiver requests. And all too often benefits are not continued while a request is pending. Advocates are considering a nationwide challenge to SSA's policy of collecting these overpayments.

Please be on the lookout for these cases, and contact Jerry McIntyre (gmcintyre@nsclc.or) or Anna Rich (arich@nsclc.org) of the National Senior Citizen Law Center know if you see efforts to recover overpayments in situations like this or if you want to discuss the issue.

WEB NEWS

Legal Aid Federal Practice Manual Available

SHRIVER CENTER
Sargent Shriver National Center on Poverty Law

The Shriver Center has published a revised and updated Federal Practice Manual for Legal Aid attorneys. A team of litigation experts revised this tool, an invaluable free resource for attorneys interested in affirmative advocacy.
http://federalpracticemanual.org/

New York State Updates Website

New York State unveiled a much needed redesign of its website recently, the first in 15 years. New York's 21st century update is hailed as setting "a new bar for digital government services through its user-centric approach." The website has new panels and links, and also has a personalized section on the home page for local news, resources and attractions. A new "My Services" feature lets visitors bookmark pages. The redesign elements and content management system will be extended to other state agencies next year.
http://www.ny.gov/

LSNYC Government Benefits Hotline Debuts

Legal Services for New York City (LSNYC) has launched a centralized Government Benefits Hotline (917-661-4500) for NYC clients in need of assistance with Public Assistance, SNAP (Food Stamps), HASA, one-shots, and Medicaid (primarily Spend Down and Home Care) matters. Hotline callers can obtain advice, referrals and appointments with advocates in each of the borough offices by calling the Central Hotline number Monday through Friday, between the hours of 10-4. Fliers announcing the hotline in English, Spanish, Haitian Creole, Chinese, Russian and Korean are available at http://www.legalservicesnyc.org/storage/lsny/PDFs/gb%20hotline%20all%20languages.pdf

2015 Pickle Amendment Chart Issued

The Pickle Amendment protects Medicaid eligibility for all recipients of Social Security Retirement Survivors and Disability Insurance (RSDI) who were previously eligible for RSDI and SSI benefits concurrently. These recipients are individuals who would be eligible for SSI, if all RSDI COLAs received since they were last eligible for and receiving RSDI and SSI benefits concurrently, were deducted from their countable income. The RSDI beneficiary may have lost his/her SSI benefit for reasons other than COLAs and still be considered a Pickle eligible. See Gordon Bonnyman's annually updated 2015 Pickle Amendment Chart.
http://www.healthlaw.org/publications/browse-all-publications/2015-Pickle#.VI8CTyvF9f1

New Housing Data Source

The Department of Housing and Urban Development (HUD) introduced a new site that can be used to research macro level data about housing and transportation costs at a street, neighborhood, zip code, city or state level. You can use the tool to calculate housing and transportation costs for your client s and yourselves.
http://locationaffordability.info/

CFPB Provides Guidance to Avoid Disability Income Discrimination

The Consumer Financial Protection Bureau (CFPB) recently issued a bulletin reminding lenders that requiring unnecessary documentation from consumers who receive Social Security disability income may raise fair lending risk. The bulletin calls attention to standards and guidelines that may help lenders comply with the law, and help ensure that recipients of Social Security disability income receive fair and equal access to credit.

The bulletin is available at: http://files.consumerfinance.gov/f/201411_cfpb_bulletin_disability-income.pdf

According to the CFPB, more than 15 million people receive Social Security disability income every year, including many who are veterans of the U.S. armed forces. For those relying on this income, qualifying for a mortgage can be a challenge when lenders ask for proof of how long they will receive their benefits. The Social Security Administration (SSA) provides these benefits for individuals with serious disabilities, but generally will not provide documentation regarding how long benefits will last. Some applicants have reported being asked for information about their disabilities or even for doctors' notes about the likely duration of their disabilities.

The bulletin discusses standards and guidelines on verification of Social Security disability income, including under the CFPB's Ability-to-Repay rule, the Department of Housing and Urban Development's (HUD) standards for Federal Housing Administration -insured (FHA) loans, the Department of Veterans Affairs (VA) standards for VA-guaranteed loans, and guidelines from Fannie Mae and Freddie Mac.

To verify income for Qualified Mortgage debt-to-income ratios under the Ability-to-Repay rule, lenders are required to look at whether the Social Security benefit verification letter or equivalent document includes a defined expiration date for payments. Unless the SSA letter specifically states that benefits will expire within three years of loan origination, lenders are advised to treat the benefits as likely to continue.

Under HUD's standard for documenting income for FHA-insured mortgages, lenders are directed not to ask a consumer with a disability for documentation about the nature of his or her disability under any circumstances. The VA standard for VA-guaranteed loans emphasizes that lenders do not need to get a statement from a consumer's physician about how long a medical condition will last. Fannie Mae and Freddie Mac have issued similar guidelines for loans that are eligible for their purchase, allowing consumers to use Social Security disability benefits as qualifying income for a mortgage.

The Equal Credit Opportunity Act (ECOA) prohibits creditors from discriminating against an applicant because some or all of the applicant's income is from a public assistance program, which includes Social Security disability income. As the CFPB bulletin notes, lenders can consider the source of an applicant's income for determining pertinent elements of creditworthiness. However, lenders may face fair lending risk if they require documentation beyond that required by applicable agency or secondary market standards and guidelines to demonstrate that Social Security disability income is likely to continue.

The bulletin reminds lenders that following the applicable standards and guidelines may help them avoid policies and procedures that violate ECOA. Additionally, clear articulation of verification requirements for Social Security disability income, proper training of employees involved in mortgage origination, and careful compliance monitoring can all help manage fair lending risk in this area.

This article is taken from a CFPB press release on the publication of its bulletin. The CFPB is an agency that helps consumer finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control over their economic lives. For more information, visit consumerfinance.gov.

GAO and OIG Focus on Fraud

Both the Government Accountability Office (GAO) and SSA's Office of the Inspector General (OIG) have issued reports dealing with SSA's efforts to combat fraud—again at the behest of Congress.

The GAO was asked to study physician-assisted fraud in SSA's disability programs. In light of SSA's reliance on medical evidence to determine disability, questions have been raised about the potential for fraud schemes that involve falsified medical evaluations. Remember that photo of the New York City firefighter jet skiing? (But see the September 2014 edition of this newsletter documenting the number of charges in the New York City "scheme" that were dismissed.)

The GAO reviewed (1) how well SSA's policies and procedures are designed and implemented to detect and prevent physician-assisted fraud, and (2) the steps SSA is taking to improve its ability to prevent physician-assisted fraud. The GAO visited five of the 54 Disability Determination Services (DDS) offices that were selected to obtain geographic and office structure variation, and analyzed DDS data to identify whether federally sanctioned physicians (as of the end of January 2014) may have submitted evidence on behalf of claimants. The GAO also interviewed SSA officials, as well as private disability insurers and others knowledgeable about SSA's programs to identify key practices for fraud prevention.

The study identified a number of areas that could leave SSA vulnerable to physician-assisted and other fraudulent claims. For example, SSA relies on front-line staff in the DDSs to review medical evidence. They report it is difficult to identify patterns given the large number of claims they review and the random assignment of claims. Additionally, SSA and the DDSs use performance measures that focus on prompt processing, so there is a disincentive for staff to follow up on potential fraud since the time spent doing so is counted against processing time. Anti-fraud training for staff was limited. And finally, SSA has not studied the risk associated - or if there is any - with accepting medical evidence from physicians barred from participating in federal health programs.

The GAO found that SSA's efforts to detect and prevent potential fraud have been hampered by lack of planning, data, and coordination. It recommended SSA identify ways to remove potential disincentives for detecting and referring potential fraud, enhance its training efforts, evaluate the threat of physician-assisted fraud, and ensure that new and existing fraud efforts are coordinated.

The report is available at http://www.gao.gov/products/GAO-15-19.

On the other hand, as part of its Semiannual Report to Congress, SSA's OIG noted that in Fiscal Year 2014, it received 121,461 allegations of fraud, opened 8,335 cases, and obtained 1,291 criminal convictions. Only 6% of the allegations had enough substance to merit investigation and only about 1% of the allegations resulted in a conviction. http://oig.ssa.gov/sites/default/files/semiannual/SARC%20Fall%202014%20INTERACTIVE_0.pdf.

Might Congress want to consider focusing its efforts to ferret out fraud elsewhere?

BULLETIN BOARD

This "Bulletin Board" contains information about recent disability decisions from the United States Supreme Court and the United States Court of Appeals for the Second Circuit. These summaries, as well as summaries of earlier decisions, are also available at www.empirejustice.org.

We will continue to write more detailed articles about significant decisions as they are issued by these and other Courts, but we hope that this list will help advocates gain an overview of the body of recent judicial decisions that are important in our judicial circuit.

SUPREME COURT DECISIONS

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

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

Barnhart v. Thomas, 124 S. Ct. 376 (2003)

The Supreme Court upheld SSA's determination that it can find a claimant not disabled at Step Four of the sequential evaluation without investigation whether her past relevant work actually exists in significant numbers in the national economy. A unanimous Court deferred to the Commissioner's interpretation that an ability to return to past relevant work can be the basis for a denial, even if the job is now obsolete and the claimant could otherwise prevail at Step Five (the "grids"). Adopted by SSA as AR 05-1c.

Barnhart v. Walton**,** 122 S. Ct. 1265 (2002)

The Supreme Court affirmed SSA's policy of denying SSD and SSI benefits to claimants who return to work and engage in substantial gainful activity (SGA) prior to adjudication of disability within 12 months of onset of disability. The unanimous decision held that the 12-month durational requirement applies to the inability to engage in SGA as well as the underlying impairment itself.

Sims v. Apfel**,** 120 S. Ct. 2080 (2000)

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

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

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

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

The Court unanimously held that a final judgment for purposes of an EAJA petition in a Social Security case involving a remand is a judgment "entered by a Court of law and does not encompass decisions rendered by an administrative agency." The Court, however, further complicated the issue by distinguishing between 42 USC §405(g) sentence four remands and sentence six remands.

SECOND CIRCUIT DECISIONS

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

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

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

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

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

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

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

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

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

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

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

***Brault v. Social Sec. Admin. Com'r*, 683 F.3d 443 (2d Cir. 2012)**

The Court ruled that an ALJ is not required to state expressly his reasons for accepting challenged vocational testimony, nor is the ALJ required to grant the claimant an opportunity to inspect and challenge the VE's evidence. The claimant had challenged the VE's method of "extrapolating" from data to arrive at the numbers of available jobs in the economy, relying on a line of cases holding that although the Federal Rules of Evidence do not apply in Social Security claims, the "spirit" of Rule 702 regarding scientific evidence should. *See, e.g., Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). The court refused to extend the *Daubert* type rule to the Second Circuit. It acknowledged that an ALJ need never question the reliability of VE testimony, and agreed that evidence cannot be "conjured out of whole cloth," but concluded that "the extent to which an ALJ must test a VE's testimony is best left for another day and a closer case."

END NOTE

How Dirty is Your Office?

It's that time of year when we share more than season's greetings and holiday cheer with our coworkers. We also share our germs - and it turns out that is pretty hard to avoid doing so. According to an article in the September 30, 2014 *Wall Street Journal*, those nasty germs lurk almost everywhere and can travel quickly.

Researchers at the University of Arizona conducted a study where they contaminated an office space with an artificial virus. The virus - which doesn't infect humans but looks, acts, and survives like common cold and flu viruses - was placed on a push-plate at the entrance to an office space with 80 co-workers. The virus had traveled to the break room within two hours, visiting the coffee pot handle, microwave buttons, and refrigerator door handles. It quickly made its way to the restrooms, office, and cubicles. Phones, desks, and computers were heavily contaminated. Within four hours, the virus was found on more than 50% of surfaces that were frequently touched and on the hands of half the employees. The researchers were particularly surprised by their results, given that many of the employees in the building didn't know each other. The good news is that after half of the employees were given hand sanitizers or disinfectants, the virus was detected on only 11% of the hands.

Given that adults on average touch their noses, eyes, or mouth 16 times an hour and then touch things like light switches, door knobs, water fountains, or you, how can you avoid germs? First of all, just because you are exposed to a germ doesn't mean you will become ill. That depends on a lot of factors.

Second, there are ways to avoid or minimize contact with germs. Some people, especially those with compromised immune systems, carry their own pens or use their elbows or knuckles to push elevator buttons. Some experts, such as those at the University of Arizona, believe in the efficacy of hand sanitizers. But other experts fear that hand sanitizers and disinfectants wipe out the good bugs along with bad. They might recommend eliminating what is probably one of the fastest ways germs spread - the handshake. Try a fist bump instead!