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DISABILITY LAW NEWS

SSA Senior Leadership Replaced

The first day of the new Biden Administration brought about dramatic change at the Social Security Administration (SSA). On January 20, 2021, SSA announced that Mark Warshawsky was leaving the agency effective that day. Mr. Warshawsky was the deputy commissioner for Retirement and Disability Policy since 2017 and was considered to be "the apparent mastermind behind an ongoing regulatory war on disability beneficiaries." As this newsletter went to press, the status of SSA Commissioner Andrew Saul was considered very unclear.

Social Security Works and many others had called for an immediate change in SSA leadership, citing the agency's push to pass several damaging new rules. Some of these proposed rules were withdrawn by the Biden Administration on January 22, 2021, as outlined in the article on page 2.

Warshawsky will be replaced by Kilolo Kikakazi of the Urban Institute, whose work and research has included a focus on economic security and structural racism. In 2016, she declined to endorse a set of proposed reforms to expand coverage because she found the proposal failed to protect the most economically vulnerable workers. Her prior work suggests there could be an opportunity for advocates to encourage SSA to reverse some of the new rules that are very harmful to claimants and for advocates to push for better policies.

Saul also announced that his new Chief of Staff is Scott Frey. Notably, Frey is currently counselor to the President of the American Federation of State, County & Municipal Employees. Saul has been criticized for anti-union actions. SSA unions had recently announced votes of no confidence in the agency's leadership.

Calls for Saul's removal are growing growing louder. The White House included Saul on a list of "acting" commissioners, raising questions about whether he had been asked to resign by the Biden Administration. SSA's website, however, still lists him as "Commissioner." Saul was nominated by former President Trump and confirmed by the Senate in 2017.

By statute, Saul and his deputy commissioner, David Black, serve a fixed term that can end only for malfeasance and is otherwise scheduled to end in 2025, but see page 8 discussing the implications of the Supreme Court's *Seila Law* decision on Saul's appointment.

INSIDE THIS ISSUE:

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SSA Withdraws Potentially Devastating Proposed Regs

The Biden Administration acted swiftly to change the status of the proposed regulations from the Social Security Administration (SSA) that were pending review at the Office of Management and Budget (OMB), some seemingly on the verge of finalization. On January 22, 2021, SSA withdrew from OMB's consideration three sets of proposed rules: one set that changed the frequency of continuing disability reviews (CDRs), another addressing the provision of consultative examinations, and rules changing the Medical-Vocational Guidelines.

The withdrawal of the CDR rules represent a huge victory for disabled claimants. While the full scope and impact was not being disclosed by the agency when it proposed the rules, it was estimated the new rules would result in approximately 2.6 million additional reviews over the next 10 years. The rules eliminating the vocational factors had not yet been published for notice and comment but from what had been leaked to the press they were understood to have essentially ended the disability analysis at step three. The change would have been devastating to disabled claimants had the rules gone forward.

Save the Date — ROCALJ Meeting

Save the Date for a representative outreach meeting with Regional Office Chief Administrative Law Judge Aaron Morgan for Boston and New York, to be held February 23, 2021, from 1:00pm through 2:30pm EST.

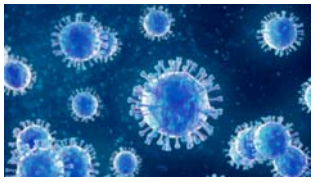
The agenda will include video hearings with Microsoft teams, communicating with Office of Hearings Operations (OHOs), best practices for sending information during the pandemic and more. Look out on the DAP listserv for the call-in information to be circulated closer to the meeting date.

Please Complete Our Survey!

We are exploring possible new formats for Disability Law News and welcome your input. Please complete the survey at this link by February 28th and answer a few short questions about your experience with the newsletter.

Your feedback is much appreciated!

SSA Continues Modified Operations During COVID-19



The Social Security Administration (SSA) is continuing to limit its operations during COVID-19, with almost all of its services provided remotely. Here the key developments since the update that appeared in our October 2020 newsletter.

In-Person Field Office Assistance

SSA has been reminding advocates that the public affairs staff in the regional office are available to help troubleshoot in dire need cases where you are having difficulty reaching or obtaining assistance from the local field office (FO).

The agency has clarified that if there is evidence necessary to implement benefit payment following a medical approval (PERC), the FO will initiate contact to request the evidence. Evidence needed by SSA may include an original document that cannot be sent by mail, such as Department of Homeland Security lawful presence documents. In those instances, a claimant will need to inform SSA they are unable to comply. In some circumstances, SSA may be able to pay provisional benefits during the pandemic based on the information available and review the original evidence at a later date.

"Streamlined" Waiver Process

As noted in our last newsletter, SSA issued new rules on August 27, 2020, for a streamlined waiver process for certain COVID-19-related overpayments. The period within which SSA was required to have identified all eligible overpayments concluded on December 31, 2020, and there is widespread concern and reports from advocates that the agency is failing the procedures outlined in the interim final rule that established the procedure.

SSA issued an update about the process on December 31, 2020, with a link to a relevant EM: "Under our rules, if you believe an overpayment was not your fault and you should not have to pay us back, you need to request a waiver of the overpayment debt. Certain debts may qualify for a streamlined waiver decision if: your overpayment debt happened between March 1 and September 30, 2020 because Social Security did not process an action due to the COVID-19 pandemic; and we identify the debt by December 31, 2020. SSA developed instructions (EM-20037) for employees to process streamlined waiver requests on 11/19/20."

Updated Failure to Cooperate Procedures

In urging SSA to provide more consideration to the difficulty complying with deadlines when there is so much disruption in mail service, advocates noted that the POMS governing SSA's failure to cooperate procedures required only one method of follow-up: phone or letter. Given the many COVID-19-related challenges faced by claimants right now, SSA was urged to require staff to do both. While SSA does not appear to have updated any of the relevant POMS, it informed advocates that it amended an emergency message relevant to failure to cooperate procedures that made that change. Unfortunately, the EM was marked "sensitive" and not published to the public.

SSA's communications department shared an excerpt of EM 20019 SEN 3 effective November 19, 2021. The shared excerpt itself references several other unpublished policies. The EM requires that in the event that a person failed to attend their consultative examination, that DDS follow up by both telephone and letter. The claimant has 10 days to respond, and COVID-19 concerns remain a good reason for missing, canceling, postponing, and rescheduling examinations. Similarly, DDS must contact a claimant by phone and mail before closing a claim for failure to comply with a request for evidence or action. Claimants have 10 days to respond; special handling procedures still apply.

The EM further states that "COVID-19 concerns remain a good reason for failure to cooperate with requests for evidence or action. For example, if a claimant contacts the DDS and indicates he or she needs assistance completing forms, and does not believe he or she can safely receive assistance due to Covid-19 concerns: Offer to collect the information by telephone, or if the claimant objects to completing the forms by telephone, hold case processing until the claimant receives assistance completing the forms, or the agency resumes normal case processing."

Reducing "Secret" Policies

Advocates had raised with SSA the lack of transparency in its procedures, noting that many of the new

(Continued on page 4)

SSA Modified Operations During COVID-19 - Continued

(Continued from page 3)
policies put in place to help protect claimants during the pandemic could not be used effectively if not accessible publicly. EM-20054, issued November 13, 2020, describes an additional signoff and review requirement for any publication to be deemed "sensitive," a change would presumably reduce the frequency of "secret" EMs such as the one described above.

Second Stimulus Payment

The IRS has begun issuing payments to individuals who received one the last round. This time, measures were in place for SSI and SSDI to receive the second stimulus automatically in the same manner as the last time. Those who had to use the "Non-Filers" tool to request payment the last time will receive the second stimulus automatically. Unfortunately, the tool remains no longer available for anyone else who is eligible for payment but did not receive payment the last round.

Advocates should look out for SSA erroneously counting the stimulus payment toward the resource limit. They should also alert clients that the payments issued by prepaid cards are again very easy to miss.

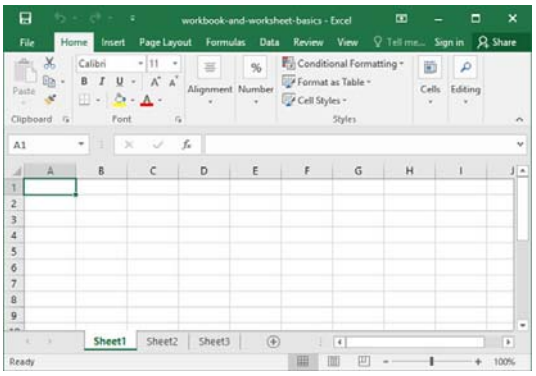
Unemployment Benefits

SSA's coronavirus website added information regarding the prevalence of fraudulent claims for unemployment benefits, encouraging SSI recipients in particular to notify their FO right away if someone has fraudulently claimed UIB benefits using their identity.

SSA Begins Tracking COVID-19 Cases

In Emergency Message (EM) EM-20060, issued December 16, 2020, SSA outlines the procedures for flagging cases in which a claimant has alleged COVID-19 as a condition.

Deeming Workbook Updated



Thanks to Jim Murphy of the Cortland office of Legal Services of Central New York for yet again updating his ever helpful Deeming Workbook. Jim's Workbook provides the break-even points at which a claimant will no longer be financially eligible for SSI based on income deemed to SSI beneficiaries from parents or spouses. The Workbook also calculates how much SSI a beneficiary will be entitled to before the "break-even" point. Advocates may know how daunting actual deeming calculations can be. The workbook Jim has created in Excel in an excellent tool that will calculate budgets in 2021 and can go back to 2000.

SSI Claims Drop Sharply During COVID-19 Closures

Among the damage wrought by COVID-19 has been that the Supplemental Security Income (SSI) application process has been rendered largely inaccessible to the most vulnerable claimants. In particular, the closure of Social Security Administration (SSA) field offices for in-person services is considered to have resulted in a sharp and troubling decrease in SSI claims at a time when low-income communities are experiencing a medical crisis. The SSI program has been described as having "collapsed" over the course of the pandemic. Both advocates and SSA have called for a response.

The *New York Times* published an op-ed on January 14, 2021, by Jonathan Stein, formerly of Community Legal Services in Philadelphia, and David Weaver, a retired SSA associate commissioner. They cited SSA data indicating that from July to November 2020, there were about 100,000 fewer awards of SSI compared to the same period in 2019. The number of new awards made in July 2020 was only 38,318, the lowest in 20 years of available data. Stein and Weaver note that "[a]t this rate, more than 230,000 low-income disabled and elderly Americans will miss out on vital cash benefits and access to health care (via Medicaid, which S.S.I. recipients generally qualify for) in one year." The authors argued further that in-person access to the field offices is important to assist a population that faced many learning, language, cognitive, and poverty-related barriers to services.

In an analysis prepared by SSA's Office of Analytics, Review and Oversight that looked at months January through August in 2020, there was wide variation in geographic impact with New York, Philadelphia, and Boston areas showing the largest drops in claims. The trend is consistent with the impact of the virus. SSA's analysis also indicated larger than average declines among individuals with limited English proficiency and aged 65 and older. There was little or no impact detected based on sex, impairment, education level, or "median-area" income. The analysis did not define "median-area" and whether, for example, it was based on zip code or a larger region. As discussed on page 15, SSA does not track race data.

As with many aspects of the pandemic, COVID-19 revealed some of the structural barriers to services that were already operating to limit access to the SSI program. While it is possible to start the process online if filing a concurrent claim for Social Security Disability (SSD) benefits, an SSI-only application must be taken in person. SSA made its application process available by telephone and for the first time began publishing its field office telephone numbers. Navigating that process, however, would still be a challenge for most claimants; phone access to the field offices remains both unreliable and inconsistent. As of last Fall, SSA made available limited in-person appointments for dire need situations only.

SSA has acknowledged the drop in claims as disconcerting and has engaged with advocates in addressing it. It is increasing its outreach efforts to affected communities and indicated an openness to exploring other efforts. Measures have included targeted mailings to low-income Title II disability and retirement beneficiaries not already receiving SSI. Advocates have urged the agency to prioritize the provision of funding for third party to assist claimants with applications, noting it as the most impactful way to reach the most vulnerable. SSA has also reported that it is improving accessibility of its internet application and that it is open to considering reform of the 23-page paper application, as well as other efforts aimed at simplifying eligibility and the application process.

VE Handbook Updated

The Social Security Administration (SSA) updated its Vocational Expert Handbook in June 2020. Everything you ever wanted to know about being a vocational expert can now be found here.

REGULATIONS

New Musculoskeletal Listings Published

The Social Security Administration (SSA) has announced new listings for claims involving musculoskeletal impairments. The new rule was published on December 3, 2020, with an effective date of April 2, 2021. The rule is very similar to that proposed in SSA's 2018 Notice of Proposed Rule Making (NPRM). Advocates including the Empire Justice Center offered comments on the proposed regulations, to which SSA responded in publishing the rule. SSA dismissed commenters' overall concerns that proposed changes would make it more difficult for claimants to meet or equal these listings, thus unnecessarily requiring more claims to be decided at Steps four and five of the sequential evaluation.

Advocates and other commenters argued against the removal of "inability to ambulate effectively" from the preamble to the listings. SSA, however, maintains that an inability to walk is not a requirement of the listings. SSA did agree claimants need not demonstrate they have prescriptions for devices such as canes. And it agreed to add wheeled or seated mobility devices to its list of assistive devices. But it "clarified" that the use of assistive devices is paired with restrictions on the use of upper extremities.

SSA also agreed with comments suggesting the use of alternate, comparable scales for rating muscle function other than a 0 to 5 grading scale. SSA refused to change its terminology to "arm" and "leg," but clarified that "[a]n upper extremity includes not just the arm, but also structures such as the fingers, hand, wrist, elbow, forearm, upper arm, and shoulder; and a lower extremity includes not just the leg, but also the toes, feet, ankles, lower leg, knee, upper leg, and hip." SSA did agree to add ''at or'' before ''above the wrists'' because amputation at the wrist causes essentially identical functional limitations as amputation just above the wrist. It accepted a suggestion that "talocrural joint" and "talocrural bones" be used to describe the ankle rather than "tarsal" joint. It also clarified that a Syme amputation will not meet the amputation listing. It added the term "pseudo claudication" as equivalent to "neurogenic claudication."

SSA refused to clarify that the terms ''compromise'' and ''impingement'' are not required for listings 1.15 (Disorders of the skeletal spine resulting in compromise of a nerve root(s)) and 101.15 (Disorders of the skeletal spine resulting in compromise of a nerve root (s)). Commenters argued that other terms such as ''displacement'' and ''foraminal stenosis'' also may indicate compromise of a nerve root. Instead, SSA clarified that those terms are *not* equivalent to "displacement" ("herniation") and "foraminal stenosis," which are required for the listings. Spinal arachnoiditis was removed but still should be evaluated under spinal cord disorders, 11.08 / 111.08.

SSA agreed to remove its proposed three-month deferral of decision, measured from commencement of treatment, to evaluate response to treatment. It also addressed concerns raised about failure to have prescribed, or failure to use, particular kinds of medication by acknowledging "that a person's musculoskeletal disorder may meet or medically equal one of these listings regardless of whether the person was prescribed opioid medication, or whether the person was prescribed opioid medication and did not follow this prescribed treatment." It reiterates that "SSR 18-3p specifically references the 'risk of addiction to opioid medication' as an example of a 'good cause' reason for not following prescribed treatment with opioid medication." Also, in response to comments, SSA added reference to the effects of obesity in the preamble. While the responses also recognize the effects of fibromyalgia, no express change to the new Listing was made.

SSA addressed concerns the introduction explicitly requires that all applicable listing requirements must

(Continued on page 7)

New Rule Allows AAJs to Hold Hearings

On November 16, 2020, the Social Security Administration (SSA) published a final rule allowing Appeals Council judges to hold hearings. According to SSA, Appeals Council judges – or Administrative Appeals Judges AAJs) – already had the authority to hold hearings and issue decisions, although this authority had not been exercised. It is now "clarifying" when and how these hearings can be held.

SSA received several hundred comments objecting to the December 2019 Notice of Proposed Rule Making (NPRM), including comments from Legal Services of NYC and the Empire Justice Center. Many commenters objected to SSA's expansion of the role of AAJs into the realm of Administrative Law Judges (ALJs), arguing it violated the Administrative Procedure Act and raised constitutional concerns. SSA rejected these arguments. It did, however, make several changes in response to comments, including removing its proposal to change the standard of review. Under the NPRM, the Appeals Council would not have reviewed a case unless the Appeals Council found a reasonable probability that any error, abuse of discretion, defect, or omission would change the outcome. SSA also agreed to add language to 20 C.F.R. §§ 404.976(b) & 416.1476(b) clarifying that additional evidence received by the Appeals Council but not exhibited or made part of the official record will nonetheless be included in the certified administrative record filed in federal court.

This new rule went into effect December 16, 2020, although SSA has not indicated when or if it might begin scheduling hearings before AAJs. And as noted below, this is another new regulation that may not withstand review by the new administration. In fact, after it was issued, several members of Congress issued a statement castigating the rule and expressing hope that it would be reversed by the Biden Administration.

New Musculoskeletal Listing Published - Continued

(Continued from page 6)

be present simultaneously. Commenters pointed out the requirement was contradictory to Acquiescence Ruling (AR) 15–1(4), adopting *Radford v. Colvin*, 734 F.3d 288 (4th Cir. 2013), which held ''[a] claimant need not show that each symptom was present at precisely the same time—i.e., simultaneously—in order to establish the chronic nature of his condition. Nor need a claimant show that the symptoms were present in the claimant in particularly close proximity." SSA rejected the comments and instead rescinded the AR, which was applicable only in the Fourth Circuit.

These are but a few highlights of the new listings and commentary. Several specifically address the listings as applied to children. Thanks to NOSSCR and Attorney Paul Ryther for helping parse these changes. But when dealing with musculoskeletal claims in the future, it will be important for advocates to review these new listings themselves. They are scheduled to go into effect on April 2, 2021, and applied to all claims pending on that date. SSA anticipates that Federal courts will review decisions using the rules that were in effect at the time the decisions were issued. In remanded claims, these final rules will be applied to the entire period at issue.

But…these and other recently enacted regulations may be subject to postponement or reconsideration, per a directive from the Biden Administration to agency heads urging them to "consider" postponing rules such as these that have been published in the Federal Register but have not taken effect. Stay tuned for further developments.

Seila Law Emergency Message Issued

In June 2020, the U.S. Supreme Court issued it decision in *Seila Law LLC v. Consumer Financial Protection Board*, 140 Sup. Ct. 2183 (2020). A divided court found the restrictions Congress had placed on the President's ability to remove the Director of the CFPB were unconstitutional. The Director, like the Commissioner of the Social Security Administration (SSA), could only be removed for cause, rather than at the will of the President. Chief Justice John Roberts, writing for the majority, ruled removal for cause should be limited to multimember bodies or inferior officers, and not to a single head of an agency such as the CFPB.

As discussed in the July edition of this newsletter, *Seila Law* raised the specter of whether SSA Commissioner Andrew Saul's appointment is constitutional. Based on *Seila Law*, some advocates have challenged the constitutionality of decisions – and potentially regulations – issued in the name of the Commissioner. In response to cases before Administrative Law Judges (ALJs), the Appeals Council, and in the federal courts raising this issue, SSA has issued Emergency Message (EM) – 21002 - Important Information Regarding Possible Challenges to the Authority of Administrative Law Judges and Appeals Council Members Pursuant to Seila Law v. CFPB. The EM, while providing background on the case and the challenges, reveals very little on SSA's approach to these challenges, other than advising adjudicators to flag the cases and proceed to process them "without discussing or making any findings related to the *Seila Law* issue." It implies that favorable decisions might be overturned if the Supreme Court eventually holds the Commissioner's appointment is unconstitutional.

Meanwhile, *Seila Law* has been in the news, as the Biden Administration decides which agency heads – including Commissioner Saul – will stay or go. It is unclear at this point how the new administration is interpreting its authority under *Seila Law* in terms of Saul's appointment, which technically does not expire until January 19, 2025. See the lead article in this newsletter for more about the Commissioner's tenuous status.

Final SSP Regulations Published

Back in October 2014, New York took over the administration of its State Supplement Program (SSP) from the Social Security Administration (SSA). SSP payments are supplements to Supplemental Security Income (SSI) benefits that only a few states have opted to make. Prior to 2014, New York paid SSA to process and issue the extra payments, which in New York are either $23 or $87 extra each month for individuals, and $46 or $104 for couples, depending on living arrangements. Since 2014, SSI recipients receive the SSP amounts as separate payments. Details and concerns about the state take-over were reported in earlier editions of this newsletter.

In the July 2020 edition of this newsletter, we outlined changes proposed by New York's Office of Temporary and Disability Assistance (OTDA) to regulations at 18 NYCRR Subpart 398-1 governing its administration of SSP. Empire Justice Center and others had submitted comments in opposition to the proposed regulations. Unfortunately, the proposed regulations were promulgated as final regulations in the New York State Register on January 13, 2021. In essence, the new regulations preclude the receipt of retroactive benefits for a subset of potential SSP recipients – and undo the work of advocates who have labored to secure retroactive benefits due those recipients. The subset includes those individuals or couples who would only be eligible for SSP benefits during their five-month waiting period for Title II benefits. Retroactive benefits will now only be paid to recipients in active receipt of SSP benefits. The revised regulations also preclude payment of SSP benefits to the heirs or debtors of deceased SSP beneficiaries. Nor will SSP claimants be given notice that they are being denied these benefits.

Other changes include a provision that information on family composition in the Supplemental Nutrition Assistance Program (SNAP) record will take precedence in determining the living arrangements on which payments are based. And SSP recipients will have to respond to OTDA requests for information/documentation within ten rather than thirty days.

The revised regulations went into effect on the date of publication – January 13, 2021.

Electronic Folders Available to Claimants

In the October 2020 edition of this newsletter, we reported that SSA had plans to allow claimants to access their electronic folders via the mysocialsecurity portal in the near future. That future has arrived. Claimants with mysocialsecurity accounts can now access case documents though the Message Center of their mysocialsecurity account. But they must first contact their local Field Office, hearing office, or Appeals Council branch where their claim is pending to request that a copy be sent to their Message Center. And they must turn on their Message Center notifications so they can receive an email or text alerting them the documents are available. See https://www.ssa.gov/appeals/electronic_case_document.html.

We also reported on expanded access for Appointed Representatives to electronic evidence files at the Disability Determination Services (DDS) level. In addition to allowing representatives access, the system allowing uploading of evidence directly to a claimant's eFolder via the "Upload New File" feature no longer requires a barcode, claimant, or destination information. See "AR Uploading Without a Barcode User Guide."

In the meantime, advocates continue to report challenges using Appointed Representative Services (ARS) at the DDS levels – or in New York the DDD (Division of Disability Determinations). According to SSA, problems with access likely stem from glitches with processing the Appointment of Representative Form 1696. If you have received notice that your 1696 was processed and you are the representative on record, but you cannot access the case, SSA recommends emailing OHO.HQ.ARS@ssa.gov with the following information:

- Rep name
- Rep ID
- Claimant name (first and last)
- Last 4 digits of the claimant SSN
- Error message received when attempting to access the case.

Alternatively, if you reach a claims representative at the field office who insists you are recognized as the appointed representative on the claim, be sure to ask them to check that your appointment is entered into both RASR and EDCS/eView. These are two separate systems into which your appointment must be entered for you to have eFolder access to a claim at the DDS level.

When that fails, advocates have recommended contacting your area Public Affairs Specialist. by email (ny.rpa@ssa.gov), phone (212-264-2500), or fax (833-914-1786), or contact a particular Public Affairs Specialist:

Manhattan, Bronx, Staten Island, Lower Hudson Valley: Shirley Saxton and Vincent Scocozza
Brooklyn, Queens, and Long Island: Shauntel Greene and Nilsa Henriquez

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Send Us Your Decisions!

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

We would love to hear from you!

Contact Kate Callery, kcallery@empirejustice.org or Emilia Sicilia, esicilia@empirejustice.org

Court Decisions

Second Circuit Issues Decisions

The Court of Appeals for the Second Circuit has issued two more decisions relying on the prior regulations for evaluating opinions of treating and other medical sources. The so-called "Treating Physician Rule" was abrogated by the Commissioner with new regulations issued in 2017 and effective on March 27, 2017, for applications filed on or after that date. The new regulations were outlined here and were the subject of a recent series of DAP training sessions in October, one of which is available here. But the Court of Appeals has continued to review claims filed prior to the effective date in a series of decisions reaffirming the old rule, as outlined here and discussed below.

In *Demars v. Commissioner of Soc. Sec.*, --- F. App'x ---, 2021 WL 48136 (Jan. 6, 2021), the court took the unusual step of remanding the claim for *calculation of benefits*, finding the ALJ erred in assigning little weight to the plaintiff's long-time treating orthopedist, citing the old treating source regulations. The court faulted the ALJ for relying on the *absence* of consistent notations in the treatment records that plaintiff needed assistive devices to ambulate. The silences were insufficient to outweigh otherwise extensive evidence of plaintiff's inability to ambulate. The court concluded that substantial evidence demonstrated the plaintiff meets Musculoskeletal Listings 1.03 or 1.02, and thus awarded benefits.

The court remanded in *Drake v. Saul*, --- F. App'x ---, 2020 WL 7294561 (Dec. 11, 2020), finding the ALJ failed to justify the weights afforded various medical experts, as required by the prior regulations. A cursory statement assigning no weight because the opinion is not supported by the evidence is inadequate. The ALJ failed to consider the relevant regulatory factors of former 20 C.F.R. § 404.1527. Even though the opinion in question was not necessarily rendered by a treating source, as his minimal interactions with the plaintiff were not enough to constitute an ongoing treating relationship, the opinion nonetheless should have been weighed appropriately. Similarly, the ALJ failed to give any explanation for granting great evidentiary weight to the opinion of a consultative examiner. And the ALJ's credibility determination regarding the plaintiff's testimony about the frequency and intensity of his headaches was not supported by substantial evidence. The ALJ erred in finding all the evidence of headaches subjective given that headaches are subjective symptoms not subject to objective testing. She further erred in assessing the plaintiff's compliance since the record supports that his financial situation prevented him from obtaining his medication. The court also found the ALJ relied too heavily on the fact that the plaintiff did not appear in distress at the hearing.

In addition to reiterating the importance of articulating reasons for the weight accorded to opinion evidence, both decisions contain holdings in other areas that should prove helpful to advocates.

Appeals Council Remands Age 18 Review

As noted above, new regulations for evaluating opinion evidence became effective for applications filed on or after March 31, 2017. But what about Age 18 redeterminations of childhood SSI claims, where the application date is not the critical date? Mike Telfer of the Legal Aid Society of Northeastern New York appealed a *pro se* claim to the Appeals Council in which the Administrative Law Judge (ALJ) had applied the prior regulations, presumably based on the date of the original application, which was well prior to March 17, 2017. The Appeals Council remanded, ordering the ALJ to apply the new opinion evidence regulations at 20 C.F.R. § 461.920c. It considered the "filing date" to be the date of the beneficiary's 18th birthday, which occurred after March 27, 2017. The Appeals Council cited as authority HALLEX 1-5-3-30.IV.B.Note. This HALLEX section, entitled Revisions to Rules Regarding the Evaluation of Medical Evidence, contains a wealth of information governing similar quirky situations where the question of which rules to apply arise.

ALJ Pays Back Claim

In another case, Mike Telfer reports that his advocacy finally paid off, after seven years of appeals. Mike's client had applied for Supplemental Security Income (SSI) benefits in 2012. Following denials by the ALJ and the Appeals Council, Mike appealed to the U.S. District Court for the Northern District of New York. On remand from the court, the ALJ again denied, but this time the Appeals Council remanded the claim. In the meantime, the client qualified for Widows Benefits, for which she applied in 2017.

On remand, the Administrative Law Judge (ALJ) considered both claims, with an amended alleged onset date of 2011. Mike successfully argued for the reopening of an earlier 2011 claim. The claimant has numerous severe impairments, including diverticulitis, Reynaud's phenomena, mixed connective tissue disorder, lumbar and cervical disc disease, bipolar disorder, and substance abuse in remission, based on which Mike convinced the ALJ she is and has been disabled.

Of note, during the many years her claim was pending, the client was forced to attempt work several times. She earned above the Substantial Gainful Activity (SGA) threshold for a number of months, which would technically disqualify her at Step one of the sequential evaluation. Mike, however, convinced the ALJ the actual value of her services was below the SGA level. He gathered evidence that her employer provided significant supports and accommodations, including a specialized chair and a special laundry bin lift. She also received special assistance from co-workers and was allowed to work irregular hours and take frequent breaks. As a result, the ALJ concluded that the value of her services was only 70% of what she was actually paid. The ALJ also discounted some of the work activity as unsuccessful work attempts. *See* POMS DI 24005.001, defining an unsuccessful work attempt as an effort to do work in employment or self-employment that discontinues or reduces to the non-Substantial Gainful Activity (SGA) level after a short time (no more than 6 months) because of the claimant's or beneficiary's impairment or the removal of special conditions related to the impairment that are essential to continued further performance of work.

Mike reports that his client will be eligible for $52,441.21 in retroactive SSI benefits, as well as ongoing SSI and Widows Benefits. She also anticipates receiving additional retroactive Widows benefits. Congratulations to Mike for his tenacity and creative advocacy.

WDNY Limits Use of Plaintiffs' Names in Opinions

Social Security disability claims involve highly personal information about claimants, information that most claimants would not want shared with the public. This concern is heightened with appeals to U.S. District Courts. With the advent of electronic case files and increased public accessibility to court records, the Judicial Conference of the United States limited remote access to case files and required parties to redact personal identifiers such as social security numbers and years of birth. See Federal Rules of Civil Procedure Rule 5.2(a), Privacy Protection for Filings Made with the Court, which also provides for the use of minor parties' initials instead of names. Rule 5.2(c) further provides that in social security appeals, only attorneys of record are allowed remote access to electronic files, which include the administrative records; files may be accessed by the public at the courthouse, but access is limited to the docket maintained by the court; and an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

All well and good, but what about those opinions issued by the courts, generally published under an adult claimant's full name and referencing sensitive personal information? Rule 5.2(d) & (e) provide for redaction pursuant to a protective order or under seal, but these are cumbersome procedures that district courts would presumably not welcome in numerous social security appeals. In the alternative, in 2018, the Judicial Conference recommended that individual judges or courts adopt a local practice of using only the first name and last initial of any government parties in the opinions in Social Security cases.

A number of districts have adapted this practice, including the U.S. District Court for the Western District, which issued a Standing Order in November 2020, mandating that non-governmental parties in social security appeals will be identified only by first name and last initial in all court opinions. Of note, this change applies only to opinions and does not affect pleadings or how cases are displayed in the PACER docket, which will continue to list the full names, expect in cases filed on behalf of minors. Advocacy is on-going in other districts to institute this change.

SSI Exclusion in U.S. Territories Remains Under Court Review

The prospect of potential expansion of the Supplemental Security Income (SSI) program to the U.S. territories remains pending in the courts. The U.S. Supreme Court is currently considering the government's petition for *certiorari* in *U.S. v. Vaello-Madero*, in which the Social Security Administration (SSA) is appealing the First Circuit's decision finding SSA's exclusion of Puerto Rico from the SSI program to be a violation of the equal-protection clause of the U.S. Constitution. *U.S. v. Vaello-Madero*, 956 F.3d 12 (1st Cir. Apr. 10, 2020)

The petition for *cert* was fully briefed as of November 24, 2020, and the case has been relisted several times since then, meaning it has been held over until the next week's conference, where requests for review are granted or denied.

Meanwhile, pending before the Ninth Circuit is the government's appeal of a decision issued by the U.S. District Court for the District of Guam that found it unconstitutional for SSA to exclude otherwise eligible individuals from the SSI program based on their residency in Guam. *Schaller v. SSA*, 18-cv-00044 (9th Cir. 2021), *Schaller v. U.S. Social Security Admin., et. al.*, No. 18-cv-00044)(D. Guam Jun. 19, 2020)(J. Tydingco-Gatewood). SSA recently filed its brief in which it argued that the exclusion was rational because the payment of benefits to residents of Guam may cause inflation there. Respondent Katrina Schaller's response is due on February 26, 2021.

The SSI program limits eligibility to residents of 50 states, the District of Columbia, and to the Northern Mariana Islands pursuant to a negotiated covenant. If these appeals fail, it could result in a significant expansion of benefits.

A prior update regarding these two cases appeared in the October 2020 issue of this newsletter. The First Circuit's decision was first reported in the April 2020 issue. In July 2020 we reported on the Guam decision and noted that the estimated number of people who might benefit from an expansion of SSI in Guam is 24,000; in Puerto Rico it is 700,000.

Can Workfare Wages Be Recovered by Interim Assistance?

As DAP advocates are aware, winning disability benefits for a claimant is sometimes only half the battle. Advocates want to ensure claimants obtain all the benefits to which they are entitled. These "post-entitlement" issues have been the subject of several recent CLE events and can be as complicated as disability claims, especially claims involving retroactive awards. Among the many issues that may affect a claimant's retroactive award is interim assistance, including the extent to which the local Department of Social Services (DSS) gives the claimant credit for any workfare performed. Two recent cases have helped clarify this problem. This first is a settlement approved by the United States District Court for the Eastern District of New York in the case of *Ohlsson v. Pierre,* and the second is a decision by the Albany County Supreme Court in the case of *Andersen v. Roberts.*

By way of background, many Supplemental Security Income (SSI) claimants rely on state and locally funded Safety Net Assistance (SNA) benefits to support themselves while they wait for a decision from the Social Security Administration (SSA). The SNA application requires that applicants consent to repay the SNA benefits that they receive during any of the months that they are determined to be eligible for SSI. The SNA benefits paid during a month that a person is later determined to be eligible for SSI is called "interim assistance." NY Social Services Law § 158(2). *See also* POMS SI NY02003.101 NY - Interim Assistance Reimbursement.

When a person has been determined eligible for SSI, a district may recover the interim assistance out of the retroactive SSI award through an automatic process. The proceeds of the SSI award are sent to the local DSS by SSA. DSS then sends a "Repayment of Interim Assistance Notice" (DSS Form 2425A) to the SSI claimant. The notice calculates the amount of interim assistance paid and to be retained by the social services district and the amount to be sent to the SSI beneficiary. If the person disagrees with the amount, they can request a fair hearing.

One issue affecting the amount of interim assistance withheld can arise when a claimant participates in work experience program (WEP), also known as workfare. Generally, adults who apply for public assistance are required to work or engage in work related activities such as training as a condition of receiving their SNA benefits. When a social services district believes that a SNA applicant or recipient is sufficiently disabled to meet the criteria for a finding of disability under the SSI program, the district will likely require the recipient to apply for SSI as a condition of eligibility. In such cases, SSI applicants are exempted from the work requirements and are not required to "work off" their grants. 06 ADM-6, p. 2. DAP advocates are all too familiar with the DSS Employability Assessments generated to determine whether a claimant is exempt. But when people in receipt of SNA apply for SSI on their own initiative, the district may require the recipient to participate in WEP.

When SNA recipients participate in WEP, they "work off" some or all the SNA provided to them with the value of their labor. What happens to the value of this labor when a SNA recipient's SSI is approved by the Social Security Administration and their district recovers interim assistance? Is the district required to credit the value of the work the person performed against this recovery? Prior to 1997, the State of New York applied the value of work (minimum wage times hours worked) against interim assistance recoveries. The State changed its policy in 1997, however, and began "clawing back" the wages rightfully earned by SSI recipients, denying SSI recipients any credit for the value of their work. But the two recent cases discussed below indicate the tide may be turning on this state-sanctioned wage theft.

Ohlsson v. Pierre

Ms. Ohlsson, a resident of Suffolk County, worked over 280 hours at two different locations as a condition of receiving SNA while she was wailing for a decision on her application for SSI. When she was awarded SSI, Suffolk County recovered the value of the SNA that she had been paid, without first applying a credit for the value of her work. Ms. Ohlsson requested a fair hearing and lost. She then brought a case in Federal Court under the Fair Labor Standards Act (FLSA) seeking payment for the value of her work, an equal amount in damages, and attorneys' fees for her counsel. On November 30, 2020, Magistrate Judge Linda Tomlinson approved the settlement for the full value of the relief requested by the Plain-

(Continued on page 14)

Can Workfare Wages Be Recovered- Continued

(Continued from page 13)
tiff. The approval is consistent with a similar case in the Western District of New York entitled *Elwell v. Weiss,* 2007 WL 2994308 (W.D.N.Y. Sept. 29, 2006).

Andersen v. Roberts

The *Andersen* case was brought in Albany County Supreme Court as a combined Article 78 and Declaratory Judgment action seeking relief for a putative class, requesting that the Court direct social services districts to credit the value of workfare against all recovered public assistance debt, not just interim assistance. This case built upon the Court of Appeals case, *Carver v. the State of New York,* 26 NY 3d 272, 275 (2015), which expressly held that the minimum wage requirements of FLSA applied to WEP and that the value of work had to be applied as a credit when public assistance debt was recovered by the interception of lottery winnings.

On August 10, 2020, while the *Andersen* case was pending, the NYS Office of Temporary and Disability Assistance (OTDA) issued GIS message 20 TA/DC079, which directs social services districts to issue a credit against public assistance debt for a pro-rated value of work done under WEP. But the message explicitly states that the credit is not to be applied against interim assistance recoveries. Shortly following issuance of the GIS, the State moved to dismiss the *Andersen* complaint. In a decision dated December 11, 2020, the Albany County Supreme Court refused, holding that there is still an issue as to whether the pro-rated manner of calculating the value of work is correct, and directly holding that the State's practice of not crediting the value of work against interim assistance recoveries violated the FLSA. Plaintiffs will now move for summary judgment to turn that ruling into a binding order prohibiting the State from providing full minimum wage credit.

The decisions, pleadings, and related documents in the *Ohlsson, Andersen and Elwell* cases can be found in the Benefits Law Database. If you are not a registered user, you will be required to register to use the BLDB, but there is no fee for doing so.

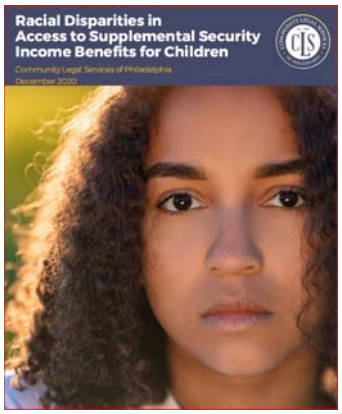
DAP advocates should be on the lookout for claimants who were assigned to WEP while their SSI applications were pending. Make sure you obtain and review the Repayment of Interim Assistance Notice (DSS Form 2425A) discussed above to determine if the workfare was properly credited. Cases and questions involving interim assistance refunds in these situations can be referred to Susan Antos at santos@empirejustice.org or Kristin Small at ksmall@empirejustice.org.

Thanks to Susan and Kristin for their work on this important issue and for sharing this information with us.

Disability Update Report Available On-Line

As part of periodic Continuing Disability Reviews (CDRs), beneficiaries may be required to complete the Disability Update Report – SSA Form 455, which now may be done online. In addition to completing the form online, beneficiaries can still submit it by mail or over the phone with a representative by calling the Social Security Administration's (SSA's) customer service number at 1-800-772-1213. See POMS DI 130.04.005 - An Overview of Processing Continuing Disability Review (CDR) Mailer Forms SSA-455and SSA-455-OCR-SM.

CLS Report and New EO Address Racial Disparities



Community Legal Services (CLS) in Philadelphia issued a report on December 8, 2020, shedding light on the racial disparities in the Supplemental Security Income (SSI) program for children and issuing a set of wide-ranging recommendations to the Social Security Administration (SSA) to address the problem.

Some of the CLS recommendations are aimed at improving the childhood disability program specifically. They include improved outreach, protections to youth leaving institutional settings, and ending suspension or terminations for custodial juvenile justice placements. The report identified a disproportionate impact on Black children from the disability policies related to asthma and sickle cell disease and called for regulatory change to eliminate the unreasonable burden on Black children with those conditions.

The report also recommends broad changes that would improve racial equity in all programs, such as requesting comments during the rule-making process that address racial disparities. It also recommends training adjudicators on how the medical evidence of record for claimants from marginalized communities may be hindered by the systemic inequities in access to healthcare. Recommendations to aid fuller development of the record for claimants from marginalized communities include leniency with deadlines and sending claimants for comprehensive evaluations.

Additionally, the report also calls for following the recommendations made by the GAO in 2002 to improve decision-making and "more readily identify patterns of misconduct, including racial bias." SSA must resume collecting and reporting race data, as it would be essential to all these efforts aimed at addressing racial inequities. Data had been available many years ago but SSA stopped reporting for SSI in 2002 and for Title II in 2009.

There have been other recent complaints to the agency about its failure to track and report data about race. As reported in our last newsletter, on October 1, 2020, a group of advocates urged SSA to collect and report data concerning race and ethnicity. A January 14 , 2021 New York Times op-ed by Jonathan Stein and David Weaver, discussed on page 5 of this newsletter, also called on the new Biden Administration to resume reporting on race demographics.

Changes in senior SSA leadership made by President Biden on his first day in office offer reason to believe that the new Administration will improve on the agency's response to these concerns. As noted on page 1, SSA has named as its Deputy Commissioner for Retirement and Disability Policy for Kilolo Kikakazi of the Urban Institute. Some of Kikakazi's prior work and research has included a focus on structural racism and the racial wealth gap. In 2019, for example, she authored a brief concerning African American economic security and how benefit amounts for African American workers and their families might be impacted by Social Security policies and proposals.

On a broader scale, the White House is directing the entire Executive Branch to examine and work to redress racial disparities. President Biden issued an Executive Order on January 20, 2021 ordering all federal agencies "assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups." Among other requirements, each agency must report its findings within 200 days of the Executive Order. By one year, the agencies must provide plan for addressing "Potential barriers that underserved communities and individuals may face to enrollment in and access to benefits and services in Federal programs."

Significant change is warranted and this is an opportunity for advocates to continue bringing these concerns to the forefront. At a minimum, it appears likely that SSA could resume the necessary collecting and reporting of data.

SSA Office of Inspector General Issues Reports

A-7-18-50394 – SSA's Use of Income Averaging When it Determined Substantial Gainful Activity for Disabled Beneficiaries

The Social Security Administration's (SSA's) Office of Inspector General (OIG) conducted a review of SSA's policy of allowing employees to exercise discretion when deciding whether and how to average earnings in substantial gainful activity (SGA) determinations. Regulations allow SSA to average earnings to determine SGA. 20 C.F.R. § 404.1544. The period for which the earnings are averaged must be continuous and without significant change in work patterns or earnings, but there is not an established monetary earnings amount that represents a significant change. POMS DI 10505.015. The OIG concluded, based on a sampling of 200 beneficiaries, that SSA's policy resulted in decisions not consistent and equitable among beneficiaries. It recommended SSA establish objective criteria.

A-06-17-50281 – SSA Beneficiaries Eligible for Total and Permanent Disability Federal Student Loan Discharge

Beneficiaries with total and permanent disabilities (TPD) are eligible to have Federal student loans discharged. SSA and the Department of Education accepts SSA's determination of "medical improvement not expected" (MINE) as evidence of TPD. See prior editions of this newsletter for more on these student loan discharges. In 2016, SSA and the Department of Education entered into a computer-matching agreement to identify those beneficiaries eligible to discharge. The OIG concluded that SSA needs to improve its process. It estimated SSA failed to identify 36,246 borrowers with MINE status, largely due to SSA's incorrect coding. It recommended that SSA identify current beneficiaries with incorrect medical diary codes and take appropriate action to correct matching errors. SSA agreed.

A-13-18-50714 – Follow-up on Disabled SSI Recipients Potentially Eligible for Childhood Disability Benefits

Many Supplemental Security Income (SSI) recipients may also be eligible for childhood disability benefits (CDB - formerly known as Disabled Adult Children Benefits or DAC) based on another wage earner's record under the Old-Age, Survivors and Disability Insurance (OASDI) program. An unmarried SSI applicant or recipient may be entitled to CDB if the child of a wage earner who is entitled to disability or retirement benefits or was insured at the time of death, and is age 18 or older and became disabled before age 22. OIG found that SSA failed to identify a number of potential CDB recipients. It also found that SSA had not implemented prior OIG recommendations for identifying these individuals. Among its current recommendations, OIG stressed the importance of instructing staff to follow up on assessing eligibility for other programs during redeterminations and initial claims. SSA agreed.

A-09-19-50848 – Follow-up on Underpayments Payable to Terminated Old-Age, Survivors and Disability Insurance Beneficiaries

In random samples, the OIG concluded that SSA failed to issue underpayments totaling $115 million to individuals whose benefits were terminated or to survivors of deceased beneficiaries despite improvements to its systems controls implemented in 2015. The OIG found SSA's corrective actions were not sufficient. It made several recommendations with which SSA agreed, including better identifying the population of terminated and deceased beneficiaries with underpayments.

Contact Us!

Advocates can contact the DAP Support attorneys at:

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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 earlier decisions, are also available at https://empirejustice.org/wp-content/uploads/2020/07/Recent-2d-Circuit-Decisions-July-2020.pdf. Synopses of non-precedential summary orders issued by the Second Circuit are available at: https://empirejustice.org/wp-content/uploads/2021/02/2d-cir-summaries-December-2020.pdf

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

Supreme Court Decisions

***Smith v. Berryhill*,** 139 S.Ct. 1765 (2019)

The Supreme Court held that an Appeals Council dismissal of a request for review is a final decision subject to judicial review. The Court unanimously held that where the Appeals Council has dismissed a request for review as untimely after a claimant has obtained a hearing from an ALJ on the merits, the dismissal qualifies as a "final decision . . . made after a hearing" within the meaning of 42 U.S.C § 405(g). It distinguished its earlier ruling in *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977), by emphasizing that as opposed to the denial of a request for reopening in *Sanders*, there had been a decision by an ALJ on the merits of the plaintiff's claim.

Biestek v. Berryhill, 139 S.Ct. 1148 (2019)

In a 6-3 decision, the Court declined to adopt a categorical rule that a vocational expert's supporting data must be provided in order for the testimony to constitute substantial evidence. But the majority acknowledged that in some cases it may be possible to draw an adverse inference against a VE who refuses to provide supporting data.

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.

Second Circuit Decisions

***Sczepanski v. Saul*, 946 F.3d 152 (2d Cir. 2020)**

The court held that ability to complete work during the probationary period is relevant to a disability claim. It remanded for further proceedings at Step five of the Sequential Evaluation to determine whether the claimant could perform work as required during the probationary period, including meeting the levels for absenteeism tolerated by the employer.

Estrella v. Berryhill, 925 F.3d 90 (2d Cir. 2019),

The Court of Appeals endorsed in strong terms the value of treating source evidence and affirmed its prior treating physician rule cases. The court faulted the ALJ for failing to consider explicitly the *Burgess* factors incorporated into the former opinion evidence regulations, which were replaced in 2017 by 20 C.F.R. §§ 404.1520c(a) & 416.920c (a). The new regulations were not considered by the court.

***Lockwood v. Comm'r of SSA*, 914 F.3d 87 (2d Cir. 2019)**

The Court of Appeals remanded because the ALJ had not met his affirmative obligation under SSR 00-4p to inquire about any possible or apparent conflicts between vocational testimony and the *Dictionary of Occupational Titles* (DOT). The court found the ALJ did not meet his burden simply by asking the vocational expert if her testimony was consistent, especially where the ALJ found the plaintiff could not reach overhead, but the three jobs to which the VE testified all required frequent or occasional reaching.

***Lesterhuis v. Colvin*, 805 F.3d 83 (2d Cir. 2015)**

The Court of Appeals remanded for consideration of a retrospective medical opinion from a treating physician submitted to the Appeals Council, citing *Perez v. Chater*, 77 F.3d 41, 54 (2d Cir. 1996). The ALJ's decision was not supported by substantial evidence in light of the new and material medical opinion from the treating physician that the plaintiff would likely miss four days of work per month. Since the vocational expert had testified a claimant who would be absent that frequently would be unable to work, the physician's opinion, if credited, would suffice to support a determination of disability. The court also faulted the district court for identifying gaps in the treating physician's knowledge of the plaintiff's condition. Citing *Burgess v. Astrue*, 537 F.3d 117, 128 (2d Cir. 2008), the court reiterated it may not "affirm an administrative action on grounds different from those considered by the agency."

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

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

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

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

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

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

End Note

Still Working From Home?

It has been almost one year since many of us began working from home, and many of us are still there, either full or part time. For most of us, the novelty wore off long ago. And some of us have settled into new routines – and maybe new bad habits. Rochester attorney Jere Fletcher has shared ten tips for recognizing those bad habits and fixing them.

- Not organizing your time - *The Economist* reported in November that people worked 30 minutes longer in April and May 2020 compared to January through March. It may be the result of failing to set boundaries between work and "home." Just because you are home 24/7 does not mean you should be working 24/7.
- Forgetting to drink water - It might seem silly but without those trips to the office watercooler, you can become dehydrated.
- Not giving your pets attention when you are working - Sure, pets may show up in zoom meetings, but you may get too distracted to pay attention to your pet during the day. And petting your animals can reduce stress.
- Not working in time to decompress or meditate - Scheduling time to relax and be present can be very beneficial in the long run.
- Not taking a moment for yourself in the morning before work begins - Take some time for a cup of tea or coffee and read the paper before starting work. Or even fake a commute.
- Working through your lunch break - You need an energizing pick-me-up during the day, even if not an official lunch break.
- Working all day without breaks - Even small breaks during the day can help. Talk a walk, do jumping jacks, wash your dishes.
- Trying to keep old rituals and routines - Some of the routines and rituals you relied on at the office may not translate to home – so make new ones. Get your coffee or go for a walk at a certain time.
- Too much screen time -Take a few minutes every 20 minutes to move your eyes from your computer – look out the window or at something else in your apartment – even if only for 20 seconds.
- Not making time to move - Even ten minutes of activity or stretching can help keep your blood flowing.