Is SSA Finally Reopening?

Social Security Administration (SSA) offices have been generally closed to in-person services since March 2020 because of the COVID-19 pandemic, with no walk-in service at all and an extremely limited number of field office appointments available based on dire need. Hearings have been held either by telephone or via Teams. After some indication of a January-based reopening of offices to the public that was retracted in December, it looks like SSA is finally moving towards “reentry.”

On January 20, 2022, Acting Commissioner Kilolo Kijakazi announced the agency has reached agreement with its three labor unions on a reentry plan. The following day, the Acting Commissioner provided a few more specifics. According to a January 21st announcement, SSA is planning reentry and implementation of telework schedules for most employees on March 30, 2022. Local offices will restore increased walk-in service in early April, although the public will still be encouraged to conduct most business online and schedule appointments. Limited in-person hearings with management judges will begin in March with plans to expand in the spring and early summer.

A report in the Federal New Network offers more details. According to the report, the agency’s reentry plan, released at the beginning of November 2021 as a “pre-decisional” document, was complicated by the spread of the omicron variant of COVID-19. But the American Federation of Government Employees (AFGE) has now reached an agreement with SSA. Under a Memorandum of Understanding (MOU), 45,000 employees would begin returning to the office on March 30, 2022. This date is subject to changes in pandemic conditions. According to Rich Couture, chief negotiator for the AFGE, the MOU is the first step to be followed by a series of reentry meetings. Continued telework options remain a critical part of the negotiations. The policies remain unclear and allowable telework days may vary by component.

Meanwhile, the Association of Administrative Law Judges announced on January 17, 2022, that it had reached a memorandum of understanding (MOU) with SSA dated January 14, 2022, providing for the return of all ALJs to the Office of Hearings and Appeals (OHO) worksites by June 3, 2022, with the ability to continue working remotely up to four days per week. ALJs can return on a voluntary basis by May 4, 2022. The exact dates are contingent on the provision of notice as well as with negotiations with other unions. As with the field offices, it is hard to discern exactly what level of access claimants can expect. SSA had previously announced that management level ALJs would begin in-person hearings in a limited number of cases.

(Continued on page 2)
Is SSA Finally Reopening? - Continued

In addition, the National Treasury Employees Union, which represents employees in OHO, has also negotiated an agreement that increases telework opportunities, extends scheduling flexibility, and ensures safety. It is not yet clear, however, when that reentry process will begin.

In conjunction with the resumption of in-person hearings, the agency also announced a new screening procedure to be completed within 24 hours of a scheduled hearing time. Claimants are to complete a COVID-19 screening questionnaire online or by phone. The screening process was set forth on December 3, 2021, via an “Emergency Request” for approval from Office of Management and Budget (OMB), 86 Fed. Reg. 68717. Advocates raised a variety of concerns via public comments, but NOSSCR reported that by the time it had filed its comments on December 10, 2021, OMB had already given its clearance to the package submitted by SSA. Other commentors so far include Empire Justice Center, Community Legal Services of Philadelphia, Disability Law Center in Boston, and Legal Aid Society of Columbus.

Many of the comments do not necessarily urge changes to the survey but instead caution against overreliance without follow-up to ensure that a person is not screened out unnecessarily. SSA is also urged to provide claimants recourse and alternative methods of screening if they have difficulty or barriers completing the survey within the 24-hour timeframe.

Claimants and their advocates have been outraged at the lack of adequate access to its services, particularly for those with little or no income, with a disproportionate impact on Black and brown communities and claimants for Supplemental Security Income (SSI). Calls for the agency to increase access and address the service failures have been growing. On January 5, 2022, Republican member of Congress John Katko called on SSA for a timeline for reopening and for a plan to safely expand access. He was joined by Democrat Kathleen Rice, also from Central New York. On December 8, 2021, a group of 15 Senate Republicans sent a letter to SSA urging its reopening and noting its negative impact on rural claimants. That letter had cited an OIG report from July 2021 finding a troubling backlog of unopened paper mail. The OIG report was summarized in the October 2021 edition of this newsletter.

The U.S. Senate had previously held a hearing in April 2021 and discussed some of the service failures and harm to beneficiaries. Media outlets are also continuing to cover the negative impact of closures, particularly at the field office level where it remains extremely difficult to reach the office for an appointment necessary to conduct in-person transactions.

Stay tuned as details for reentry plans develop.

SSA Publishes Annual Statistical Report

In November 2021, the Social Security Administration (SSA) released its annual statistical report for 2020 on the Social Security Disability Program. For data nerds, there are numerous charts and tables detailing total numbers of beneficiaries, applicants, etc. According to SSA’s highlights, disability benefits were paid to over 9.5 million people. But benefits were terminated for 892,811 disabled workers. Average beneficiary age was 55. The largest category of diagnoses was diseases of the musculoskeletal system and connective tissue (33.8 percent). The average monthly benefit received was $1,277.05.

SSA also released 2021 data on disability claims. Applications in 2021 decreased to 1,820,282 from 1,838,892 in 2020. But the number of claims approved in 2021 declined by 11.75%, from 648,121 in 2020 to 571,952 in 2021. There were 837,923 terminations in 2021, down 6.9% from the prior year. See the January 2021 edition of this newsletter for a discussion of the precipitous drop in Supplemental Security Income (SSI) applications.
SCOTUS Hears Puerto Rico SSI Case

On November 9, 2021, the U.S. Supreme Court heard arguments in *U.S. v. Vaello Madero* (No. 20-303), a case challenging the exclusion of residents of Puerto Rico from the Social Security Administration’s Supplemental Security Income (SSI) program. Based on the questioning that took place at oral argument, a majority of the Court Justices appear prepared to uphold SSI’s restriction to only the residents of the 50 states plus the District of Columbia and the Northern Mariana Islands.

The Supreme Court appears poised to overturn the First Circuit’s decision in *Vaello-Madero*, 956 F.3d 12 (1st Cir. Apr. 10, 2020), which ruled that the exclusion of Puerto Rico from SSI was an equal protection violation under the due process clause of the Fifth Amendment to the U.S. Constitution. In addition to affecting an estimated 700,000 residents of Puerto Rico, the Supreme Court’s decision is expected to also impact eligibility in other territories excluded from SSI: Guam, the Virgin Islands, and American Samoa. The First Circuit case was discussed in the April 2020 issue of this newsletter.

Many had criticized the Administration’s litigation position as “disturbing” given the policy’s racist origins in the *Insular Cases*, a line of caselaw that sanctioned the colonial relationship of the U.S. to the territories. The Department of Justice chose to defend the case, which had been appealed under the Trump Administration, even though President Biden had campaigned against Puerto Rico’s exclusion from SSI.

Rather than withdraw the petition for *certiorari*, President Biden instead called on Congress to amend the Social Security Act to extend SSI eligibility to Puerto Rico. HR 2713/S. 1228, the Territorial Equity Act, would extend SSI and other benefits to Puerto Rico and other territories. Most recently, the provision in Build Back Better would have done the same. But as this newsletter went to press, Build Back Better legislation appeared to have stalled because it was not believed that it would pass the Senate.

Sotomayor expressed the most serious concerns about the policy. “Puerto Ricans are citizens, and the Constitution applies to them.” She urged the court to review the policy in the context of the history of Puerto Rico’s discriminatory treatment by the U.S. government, including the history of the *Insular Cases*. Experts note that the impact of SSI exclusion is especially severe given the higher rate of disability and poverty in Puerto Rico compared to U.S. states, and that there is racially disparate impact because it has a majority Latinx and Black population.

The Deputy Solicitor General responded to questions about the *Insular Cases* by stating that “some of the reasoning and rhetoric [in the Insular Cases] is obviously anathema,” but that “the conclusion that parts of the Constitution wouldn’t apply to Puerto Rico doesn’t decide anything that is relevant in this case.”

Justice Brett Kavanaugh expressed the view that Vaello-Madero made “compelling policy arguments” but suggested that the solution should come from Congress. He was unconvinced that the Constitution required states and territories should always be on equal footing. He believed the territories clause of the Constitution authorizes Congress to regulate U.S. territories as it sees fit, even if those regulations “may seem anachronistic to some,” Kavanaugh said.

The Deputy Solicitor General insisted that the SSI exclusion is based on geography, not race or ethnicity. As in its briefing, the government insisted the exclusion was based on tax status, a position that Justices Sotomayor and Stephen Breyer appeared to find baseless.

The First Circuit decision had found it salient that the Mariana Islands were included in the SSI program, and that their inclusion signaled a discriminatory basis for excluding the other territories. This point appeared to be overshadowed during the Supreme Court argument by the concern that a ruling requiring all states and territories be treated similarly would result in the expansion of numerous federal benefit programs.

Counsel for Vaello-Madero attempted to distinguish SSI as unique in being an “exclusively federal program.” Justice Sotomayor made a similar point. But the ramifications the ruling could have in expanding eligibility for other federal programs appeared to be the greatest concern to the conservative members of the Court.

The briefs filed in the case were discussed in the July 2021 and October 2021 issues of this newsletter. The audio recording and transcript are available on the Court’s website.
Listings Expiration Dates Extended

The Social Security Administration (SSA) often gives itself extensions when it comes to its Listings of Impairments. In December, it extended four listings that were due to expire in February 2022: Cardiovascular System, 4.00 and 104.00; Digestive System, 5.00 and 105.00; Skin Disorders, 8.00 and 108.00; and Immune System Disorders, 14.00 and 114.00. The new expiration date for all four is now February 6, 2026.

SSA, in consultation with the Office of Management and Budget (OMB), found good cause to dispense with the requirements for notice and comment as the final rule makes no substantive changes. According to SSA, it intends to update the listings as necessary based on medical advances as quickly as possible, but not by the original February 2022 deadline.

SSA Clarifies TPS Policy

On October 22, 2021, the Social Security Administration (SSA) issued Emergency Message (EM) 21063, Claims Policy – Non-citizens in Temporary Protected Status (TPS) or Deferred Enforcement Departure (DED) Automatic Extension of status by DHS. A number of advocates, led by NOSSCR, raised with SSA that some Title II beneficiaries with TPS immigration status were seeing their benefits suspended “for no clear reason.” In its EM, SSA acknowledged reports of “some payment suspensions.” The EM clarifies the agency’s policy regarding TPS and DED when assessing a beneficiary’s lawful presence in the United States under SSA’s payment provisions.

Deferred Enforcement Departure (DED) Automatic Extension of status by DHS. A country may be designated TPS by the Secretary of Homeland Security due to conditions in the country that temporarily prevent its nationals from returning safely. Under the program, the Department of Homeland Security (DHS) will generally issue an Employment Authorization Document (EAD) valid for two to three years to a TPS-eligible person. A country’s TPS status may be extended by United States Citizenship and Immigration Services (USCIS).

Recipients of Title II retirement or Social Security disability benefits who are from countries designated as TPS are considered lawfully present in the United States for payment purposes; beneficiaries from countries for whom an extension is granted may continue to meet lawful presence during that TPS extension.

The EM reminds staff that a beneficiary with an expired EAD but who is within a TPS extension period should not be automatically suspended. Beneficiaries should not be required to present a valid or extended EAD. Instead, staff should check the country designation at the USCIS TPS website and also verify the individual immigration status using the Systematic Alien Verification for Entitlements (SAVE) data sharing system with USCIS.

A country’s lawful payment provisions are found at POMS RS 00204.020, Developing Lawful Presence of an Alien in the U.S., and POMS RS 00204.025, Evidence Requirements for Establishing U.S. Lawful Presence.
Supplement Security Income (SSI) advocates and claimants have long complained of the systemic failures by the Social Security Administration (SSA) to process non-disability appeals, and the especially harmful effects on SSI recipients. A new policy is aimed at improving one aspect, to extend the period for requesting continuation of benefits from 15 to 65 days following the receipt of the notice of adverse action.

On October 29, 2021, SSA issued Emergency Message (EM) 21064, Goldberg Kelly Payment Continuation Period, establishing a new timeframe for ensuring the continuation of benefits during the pendency of an appeal of a suspension or reduction of SSI benefits. Payment continuation during an SSI non-disability appeal is known as Goldberg Kelly benefits, after the Supreme Court case that established the right to advance notice of adverse action. Under SSA’s regulations, 20 C.F.R. § 416.1336, SSI benefits are continued at the same level if a person appeals within 10 days of receiving notice of the suspension or reduction of benefits. Because SSA assumes a person received a notice five days after the date, this period is essentially 15 days from the date on the notice.

The deadlines provided in the regulations have not changed, but the new EM permits more time by using an automatic finding of good cause based on the agency’s difficulty processing submissions in a timely manner. The EM acknowledges that COVID-19 has presented significant challenges for the SSI population to file appeals – including field office closures and mail problems. It adds that “these and other workload-related challenges have also affected our ability to efficiently and timely process a request for reconsideration and ensure that we protect a recipient’s constitutional due process right to [Goldberg Kelly] payment continuation.” Although the EM has a retention date of April 29, 2022, SSA recognized that the challenges will continue to affect our ability [sic] timely process requests for [Goldberg Kelly] payment continuation even after the end of the COVID-19 national public health emergency.”

EM-21064 instructs that unless Goldberg Kelly continuation is waived in writing, staff must continue benefits by automatically finding good cause if an appeal was filed after 15 days but by 65 days after the notice. After 65 days, SSA must develop for good cause rather than find it automatically.

As reported in our last newsletter, SSA had recently made other enhancements aimed at improving the processing of non-disability appeals or that enhanced processes directly related to that workload. In issuing EM-21051-REV, Mandating Use of the Dallas Appeals Application for Non-Medical Post Eligibility Supplemental Security Income Reconsideration Requests on August 2, 2021, SSA mandated use of the Dallas Appeals Application in all non-medical appeals. The application, also known as “Banana,” streamlines the amount of manual entry required to keep benefits continuing or to stop overpayment recovery. EM-21062, issued September 21, 2021, allows for better tracking and prioritizing of non-disability appeals in WorkTrack, where all submissions are reviewed and processed, by requiring these particular filings to be profiled and coded as either non-medical or medical reconsideration requests.

These systems changes, together with the extended Goldberg Kelly period, should address some of the technical obstacles to timely processing, as well as the insufficient timeframes provided under current regulations. These are promising and necessary improvements, but as acknowledged by SSA, the challenges involved are expected to persist beyond COVID-19. Without more resources to devote to processing submissions at the field office level, claimants will likely continue facing difficulty ensuring their appeals are timely processed and without undue disruption in benefits.
SSA to Reopen Pandemic Assistance Cases

Over the course of the current pandemic period, many concerns have arisen about how several types of COVID-19 disaster assistance are treated when determining countable income or resources for Supplemental Security Income (SSI). After changing its policy to exclude a broad array of disaster assistance, on December 9, 2021, SSA announced procedures to reopen hundreds of thousands of cases that had previously been denied prior to the change in policy.

Emergency Message (EM) 20169, Instructions for Reopening and Reevaluating SSI Claims Denied due to COVID-19 Disaster Assistance. Claimants denied based on the receipt of disaster assistance will have the opportunity to see their claims reopened and reevaluated.

On July 23, 2021, SSA had issued EM 20014 (later updated to EM-20014 REV 4), Effect of COVID-19-Related Financial Assistance on SSI Income and Resources, which broadly expanded what SSA considered disaster assistance. Among the types of assistance determined to meet the criteria for disaster assistance are both “regular” unemployment benefits and expanded or supplemental forms of unemployment such as Federal Pandemic Unemployment Compensation (FPUC) benefits and Lost Wage Assistance that are received during the pandemic period. In New York State, the pandemic period is defined as beginning in March 2020 and ongoing. For more guidance, see also EM-21050, Special Processing Instructions for Applying Supplemental Security Income (SSI) Income and Resource Exclusions to Pandemic-related Disaster Assistance.

The July 2021 issue of this newsletter has more details. As reported in October 2021, senior staff at SSA later reported to advocates that the agency has automatically processed and issued retroactive benefits to claimants previously underpaid due to receipt of pandemic assistance.

With the latest steps in EM-21069, SSA is addressing cases where a person was denied and where redress did not happen automatically because the case was closed. SSA will send outreach mailers to approximately 144,000 individuals instructing them to contact SSA for reevaluation of their eligibility for SSI. Mailers will issue to cases coded as having certain kinds of financial assistance. Denials may be reopened and revised within one year for any reason, and within two years for “good cause.” All these denials qualify for a “good cause” reopening under “an error on the face of the evidence” as described in POMS SI 04070.010.

There is no deadline by which individuals must respond and a person need not be identified or targeted with a mailer in order to qualify. The EM states that “cases may remain reopened indefinitely, until resolved.” Advocates should be aware that they will likely not receive notice after a denied claim. There are exceptions for instances where the representative is requesting the reopening, or when there is other indication that they are still engaged in representation. The general policy, however, is that SSA will not honor as ongoing a prior representation in a claim denied since March 2020; the agency will require new authorization from the claimant and updated forms.

While the policy is welcome, remedying the cases of those previously denied remains an area of concern. Advocates already report cases where this EM is not being properly applied, with eligible claimants being denied reinstatement by the field office and told instead to reapply, requiring additional advocacy by their representatives and in some instances intervention by SSA Regional Office staff. Michelle Spadafore of NYLAG is tracking the implementation of the new rules and whether they are being applied correctly. If you have any examples of these types of cases – both successful and unsuccessful – please share with her at mspadafore@nylag.org.

Curious to see more EMs? They are published periodically and available here.
SSA Halts Failure to Cooperate Suspensions

On December 23, 2021, the Social Security Administration (SSA) issued another Emergency Message (EM), which, if effective, will reduce the number of unnecessary suspensions and reductions in benefits. **EM21079, Temporary Hold on N20 (Failure to Provide Information) Suspensions – One-Time Only Instructions**, places a hold on any non-management determinations to suspend benefits based on a failure to provide information.

Prior to this EM, a technician could decide that a person was failing to provide information and place them in non-payment status known as N20. While N20 status required management approval, the determination itself could be made by non-management staff. SSA will be rolling out systems changes to restrict these determinations in the future so that they are made only by managers. The systems changes are targeted for completion in FY22. Until then, staff are instructed to put the determinations on hold.

What is N20 status exactly? **POMS SI 02301.235** instructs that it can be applied as the basis for non-pay when a person fails to provide information needed to determine continuing SSI eligibility and benefit amount. The POMS section provides for 30 days for an initial request for information and outlines steps to exhaust efforts and document the approval of a manager. The EM places these steps on hold for the technician and requires manager level and above to complete.

Many scenarios could result in N20 non-pay status and advocates see it occur with a worrisome amount of variation and discretion. SSI recipients are routinely asked to provide information during redeterminations, continuing disability reviews, and other post-eligibility events. For example, SSA may send a continuing disability review form to a recipient who either does not understand the form, or it may ask a person to provide financial documents following a data-match indicating excess resources. Last year, a coalition of advocates, including Empire Justice Center, raised concerns with SSA that the policy should not be applied at all during COVID-19, that it was being applied unequally, and that the procedures should be applied only by staff with special training, arguing that procedures were susceptible to misuse because of incentives to process cases without regard for accuracy or for a claimant’s circumstances.

The EM has a retention date of June 30, 2022.

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EMs on Electronically Signed 1696s Revised

Included in the array of Emergency Messages (EMs) issued by the Social Security Administration (SSA) at the end of 2021 was a revised version of an EM originally issued earlier in the year regarding the processing of electronically signed SSA-1696 Forms. On November 12, 2021, SSA issued **EM-20022 REV 3, Temporary Instructions for the Bundled Receipt and Processing of an Electronically Signed SSA-1696 and Certain Other Forms**. The revision clarifies that submissions through SSA’s e1696 portal do not require further verification of the claimant’s signature and intent to sign, as is required by other electronically-signed forms. The EM also clarifies procedures for any additional forms submitted with the 1696, and updated some of the POMS references made in the earlier version of the EM.

Curious to see more EMs? They are published periodically and available [here](#).
SCOTUS Rules on Windfall Offset Provision

In a decision penned by Justice Amy Comey Barrett and joined by all the justices except Justice Gorsuch, the U.S. Supreme Court held that civil-service payments based on employment as a dual-status military technician are not payments based on “service as a member of a uniformed service.” Babcock v. Kijakazi, --- S.Ct. ---, 2022 WL 119605 (Jan 13, 2022).

Mr. Babcock, a retired National Guard dual-status technician, appealed the Social Security Administration’s (SSA) reduction of his Social Security retirement benefits under SSA’s windfall elimination provision at 42 U.S.C. § 415(a)(7)(A)(III). Under the provision, SSA can reduce, or off-set, benefits when a retiree receives benefits under a separate pension program based on a job exempt from Social Security taxes. Congress, however, exempted pension payments “based wholly on service as a member of a uniformed service.”

Mr. Babcock had served as a member of the National Guard, for which he received a military pension that did not trigger the windfall elimination provision and did not affect his Social Security retirement benefits. He also worked, however, as a dual-service technician for the National Guard. The Court held that work was distinct from his National Guard military service. His Social Security retirement benefits could thus be reduced based on the pension from that job.

Justice Gorsuch dissented with “trepidation,” noting that Mr. Babcock was required to be a member of the National Guard and wear his military uniform in order to serve as a dual-status technician. In his opinion, Mr. Babcock’s Social Security benefits should not have been curtailed.

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
Second Circuit Reaffirms Treating Physician Rule - Again

As advocates contend with the Social Security Administration’s (SSA’s) new opinion evidence regulations, appeals involving the old treating physician regulations contend to bend their way through the courts. [See the January 2017 edition of this newsletter discussing the 2017 changes to the evaluation of opinion evidence for applications filed after March 27, 2017.] As has been reported in this newsletter previously, the Court of Appeals has repeatedly upheld the importance of opinions from treating sources in recent opinions. And it has issued yet another opinion strongly reinforcing the old regulations and its precedents under them.

In Colgan v. Kijakazi, --- F.4th ---, 2022 WL 18502 (2d Cir. Jan. 3, 2022), the court remanded for further action consistent with its decision, finding the Administrative Law Judge (ALJ) had erred in failing to accord controlling weight to the opinion of the Ms. Colgan’s treating physician. Plaintiff Colgan suffered from persistent headaches following a head injury she sustained when breaking up a fight among her students. Her physician was a concussion specialist who had treated her regularly since her injury. Medical treatment notes corroborated debilitating headaches that interfered with activities of daily living.

Although the ALJ agreed Ms. Colgan suffers from post concussive syndrome among other impairments, the ALJ rejected her physician’s opinion that she would be off task more than 33 percent of the day and absent more than four days each month, assigning it “little weight.” The court found that the ALJ failed to provide good reasons, as required by Second Circuit precedent, to discount that opinion.

The court criticized the ALJ for discounting the treating physician opinion in part because it was presented in check-box form. And it rejected the Commissioner’s argument that prior caselaw, including Holloran v. Barnhart, 362 F.3d 28, 32 (2d Cir. 2004), permitted an ALJ to discount opinions if provided in check-box form. Instead, it held that Holloran only set forth the “modest proposition” that an opinion is not entitled to controlling weight if provided in check-box form and not accompanied by meaningful medical evidence of record. It also distinguished the facts of Holloran, reasserting and clarifying “that the nature of an ALJ’s inquiry in disability factfinding turns on the substance of the medical opinion at issue – not its form – and ultimately whether there is reasonable evidence in the record that supports the conclusions…” It found the physician’s opinion was “supported by voluminous treatment notes gathered over the course of nearly three years of clinical treatment.” It specifically criticized the ALJ for, at the same time, assigning “significant weight” to the state agency psychologist’s opinion that had been provided on a check-box form.

The Second Circuit also refuted the ALJ’s conclusion that the opinion was internally inconsistent. It accused the ALJ of cherry-picking particular instances of improvement from the treatment notes to create an inconsistency. It also found the ALJ’s characterization of the treating source opinion as unsupported was based on misconstruction of the record. The court found that in proper context, the treatment notes regarding Ms. Colgan’s headaches supported her physician’s opinion that she would frequently be off-task and absent from work.

Finally, the court disagreed with the ALJ’s finding that Ms. Colgan’s ability to engage in activities of daily living, including caring for her two children, provided substantial evidence to discount her physician’s opinion. It applied the reasoning of Balsamo v. Chater, 142 F.3d 75, 81 (2d Cir. 1998) to find that ALJ erred in discounting the opinion of Ms. Colgan’s physician:

[W]hen a disabled person gamely chooses to endure pain in order to pursue important goals, such as attending church and helping his wife on occasion go shopping for their family, it would be a shame to hold this endurance against him in determining benefits unless his conduct truly showed that he is capable of working.

The court also reiterated its caution in Estrella v. Berryhill, 925 F.3d 90, 94 (2d Cir. 2019) that ALJs should not rely heavily on the findings of consultative examiners after a single examination. It found that the consulting psychologist’s cursory remarks could not constitute substantial evidence to undermine the treating physician’s opinion. It noted that there will often be medical opinions in a disability

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case that are not entirely consistent with each other since a claimant may see multiple physicians. “Given this reality of medical practice, the treating physician rule should not be construed so narrowly as to set aside a treating physician’s opinion whenever there are some indicia of inconsistency in the medical record. See Burgess, 537 F.3d at 128–29 (recognizing that ‘not all expert opinions rise to the level of evidence that is sufficiently substantial to undermine the opinion of the treating physician’).” Moreover, the various consulting opinions did not address or dispute the crux of the treating source’s opinion: that Ms. Colgan’s headaches would require her to be off-task 33 percent of the time and absent more than four days per month.

In sum, the court found that the ALJ’s decision, because of these errors, was not supported by substantial evidence. In its discussion of the standards of review, the court acknowledged the evidentiary threshold for substantial evidence is not high, quoting Biestek v. Berryhill, 139 S.Ct. 1148, 1154 (2019). But is noted that the standard is “not merely hortatory”; it requires a “reasonable mind” to concur in the ALJ’s factual determinations. One of the three circuit judges penned a lengthy dissent, believing the ALJ’s decision was supported by substantial evidence. He emphasized the deferential standard of review, citing Brault v. Soc. Sec. Admin., Comm’r, 683 F.3d 443, 448 (2d Cir. 2013), for the proposition that the substantial evidence standard means the court can reject the ALJ’s factfinding “only if a reasonable factfinder would have to conclude otherwise.” Query as to what this internal debate portends for future decisions?

Big congratulations to Attorney Peter Gorton of Binghamton for this significant decision, which will be reported and serve as precedent.

Reach Out to Your Public Affairs Specialists

DAP advocates had the opportunity to meet with representatives of Social Security’s Regional Public Affairs Office at recent Task Force meetings. The meetings, organized in conjunction with Everett Lo, now the Regional Communications Director, and Lillian Kreig, Deputy Regional Communications Director, were a great opportunity to learn about the office and meet the regional Public Affairs Specialists (PASs).

While much of their work involves public education and outreach, the regional office (ny.rpa@ssa.gov) or the PASs also can help with your local field offices. If you are experiencing difficulty reaching a local Social Security office, ask your Public Affairs Specialist for help. The PAS will need your client’s name, phone number, and ZIP Code, with a summary of the issue, which you may send by email. DO NOT INCLUDE SOCIAL SECURITY NUMBERS WHEN SENDING AN EMAIL, SINCE EMAIL ISN’T ALWAYS SECURE.

Public Affairs Specialists are assigned by counties:

Ravi Gopaul, Shirley Saxton, and Vincent Scocozza - Bronx, Dutchess, New York, Orange, Putnam, Richmond, and Westchester counties

Anthea Cox and Nilsa Henriquez - Kings, Nassau, Queens, and Suffolk

Elizabeth Pivonka and Ben Stump -Columbia, Delaware, Greene, and Northern & Western Counties

The PASs are also listed at https://www.ssa.gov/ny/community.htm.
Southern District Remands Age 18 Redetermination

Albert Hor, Senior Attorney at New York Legal Assistance Group (NYLAG), won a remand for his client in the Southern District. U.S. Magistrate Judge Barbara Moses agreed that Administrative Law Judge (ALJ) Flor M. Suarez violated the treating physician regulations.

The Magistrate Judge also agreed that the ALJ had inappropriately substituted her own opinion for that of the medical professionals, particularly regarding the plaintiff’s IQ. Gainous v. Commissioner of Social Security, 2021 WL 4847071 (S.D.N.Y. Oct. 18, 2021).

Albert’s client had a long history of mental health impairments and received Supplemental Security Income (SSI) benefits as a child. His benefits were discontinued following a statutorily mandated review under the adult disability standards at Age 18. See 42 U.S.C. § 1382c(a)(3)(H)(iii); 20 C.F.R. § 416.987. Because the client attained age 18 before March 27, 2017, the old treating physician regulations, found at 20 C.F.R. § 416.927, applied. See HALLEX I-5-3-30.IV.B.

The ALJ concluded the plaintiff did not meet any of the mental listings, including Listing 12.05 for intellectual disability, finding he did not meet the “B” criteria. Magistrate Judge Moses ruled the ALJ erred in discounting the opinions of the plaintiff’s treating sources, who jointly concluded he had marked limitations. The ALJ failed to consider properly the Burgess factors when evaluating the opinion evidence. Instead, she erroneously relied on the plaintiff’s alleged socializing, his so-called unremarkable mental status exams, his daily activities, and medical non-compliance.

The District Court found the ALJ erroneously “cherry-picked” evidence to support these findings, while the record as a whole suggested greater dysfunction. In particular, the plaintiff’s limited ability to bathe, dress, and take public transportation did not translate into the ability to perform the basic mental demands of work. The court also questioned the ALJ’s faulting a person with diagnosed mental illness for failing to pursue mental health treatment as a “questionable practice.” And the court emphasized that mental status exams did not necessarily reflect that a mental health patient may have good days and bad, underscoring the importance of longitudinal evidence instead.

The ALJ also improperly rejected an IQ score of 48 that was considered valid and reliable by the medical expert who testified at the hearing. Although the psychiatrist opined the score “may be artificially depressed just a little bit” due to depression, the ALJ erred in relying on the possibility the score could have been skewed based on her own observations that the plaintiff was well spoken and articulate and what the court described as a “selectively curated” description of his educational and employment history. Holding that the ALJ did not have the expertise to determine the plaintiff’s IQ, the court noted that the ALJ could have referred the plaintiff for further testing if she questioned the scores.

The Magistrate Judge also refuted some of the ALJ’s more egregious mischaracterizations of the record. For example, in claiming the plaintiff graduated from high school, the ALJ failed to consider that he had failed his Regents exams and had failed all his courses at community college. And despite the ALJ’s characterization that the plaintiff was “pursuing a career as a concert pianist,” the record only reflected he had expressed the wish to become a concert pianist; there was no evidence that he had taken any steps towards this dream.

Congratulations to Albert for this great decision. It’s obvious he knew the record well in this case, which the Magistrate noted was 1,140 pages long; he was able to demonstrate the ALJ’s many errors and mischaracterizations. His client will now have another opportunity to have his claim considered—this time, we hope, by a more reasonable ALJ.
Appeals Council Criticizes ALJ’s “Vagueness”

Attorney Mike Telfer of the Albany office of the Legal Aid Society of Northeastern New York recently received a very instructive Remand Order from the Appeals Council finding the terms given to the Administrative Law Judge (ALJ) to the vocational witness too vague.

Mike’s client suffers from autism spectrum disorder and ADHD, both of which the ALJ found severe. But the ALJ found, inter alia, that the claimant had only moderate limitations in adapting or managing himself. Mike appealed to District Court. His persuasive arguments convinced Social Security to agree to a voluntary remand. But following remand, the ALJ denied the claim again.

Undaunted, Mike filed exceptions with the Appeals Council. See 20 C.F.R. §§ 404.984 & 416.1484, outlining the special requirements of seeking review of an ALJ decision following remand by a federal court. Rather than filing a Request for Review within sixty days, a claimant must file exceptions to the ALJ decision within thirty days of the decision. The Appeals Council may assume jurisdiction based on the exception, or it may assume jurisdiction after the thirty days even if exceptions were not filed. If exceptions are not filed or the Appeals Council does not otherwise assume jurisdiction, the ALJ decision becomes final; the claimant can appeal again to Federal court.

Based on Mike’s objections, the Appeals Council also agreed that the ALJ had failed to evaluate the opinion of the claimant’s job coach, who offered a detailed assessment of the extent to which the claimant needs intense assistance at work. Since this claim was filed before the new evaluation of opinion evidence regulations discussed above went into effect on March 27, 2017, the ALJ was ordered to consider the opinion under 20 C.F.R. §416.927(f). Advocates will recall that subsection (f) was added in 2017 to incorporate the provisions of Social Security Ruling (SSR) 06-3p. SSR 06-3p governing the evaluation of opinions of sources not considered “acceptable medical sources” was rescinded in 2017 with the promulgation of the new regulations. For those cases still governed by the old regulations, however, these opinions must be considered and evaluated under 20 C.F.R. §416.927(f).

Mike’s client will now have a third opportunity for a hearing, but this time before a different ALJ. A case remanded by the Appeals Council a second time will be assigned to a different ALJ. HALLEX I-2-1-55.D.5. As Mike notes, he will be sure to challenge any of those vague terms that the ALJ throws out that usually leave us scratching our heads. Kudos to Mike for his perseverance in this case.
GAO Reports on Ticket to Work Program

The Government Accountability Office (GAO) released a report on SSA’s Ticket To Work and Self-Sufficiency program, which was established by Congress in 1999 to help beneficiaries obtain employment and reduce dependence on SSA disability benefits. Relying on SSA data from 2002 through 2018, the GAO estimated that five years into participation, participants’ average earnings were $2,451 per year more than non-participants. But the majority of participants remained unemployed five years after starting the program. The GAO determined that the costs of the program exceeded the savings to SSA by an estimated $802 million. Savings accrue when participants leave the rolls. It did find that participants were slightly more likely to leave the rolls than non-participants.

The GAO also found that SSA incurred significant overpayments because of payments made to participants, who are twice as likely to in incur overpayments five years after starting the program than non-participants. According to the GAO, participants face unique circumstances in reporting earnings. It recommended that SSA address some of the root causes of overpayments to participants in order to reduce the burden on affected participants and increase savings for SSA. SSA agreed with the GAO’s recommendation. GAO-22-104031 (Ticket to Work Helped Some Participants, But Overpayments Increased Program Costs)

GAO Criticizes DDS Oversight of Consultants

The GAO surveyed disability agencies that review claims in all fifty states, the District of Columbia, and Puerto Rico. Of the 52 agencies, the GAO found that 14 state agencies do not consistently perform the screening required by SSA of medical and psychological consultants hired to analyze claims. It concluded that nine agencies do not provide the required initial or refresher training. The GAO recommended that SSA take steps to ensure states conduct the required screening and training, with which SSA agreed.

Congress had specifically asked the GAO to investigate whether contracted paid consultants paid per completed case might be motivated to work more quickly at the expense of quality than consultants employed by the agencies. The majority of states use contracted consultants. (New York State’s Division of Disability Determinations is one of ten state agencies that use government employees.) GAO could not, however, find conclusive evidence of a link between how a state pays consultants and the quality of decisions. GAO-22-103815 (Actions Needed by SSA to Ensure Disability Medical Consultants Are Properly Screened and Trained)
OIG Studies SSA’s Telephone Service

In response to a July 2020 request by Congress, the Office of the Inspector General (OIG) of the Social Security Administration (SSA) reviewed SSA’s telephone performance during the COVID-19 pandemic. The OIG found that in Fiscal Year (FY) 2020 (October 2019 to September 2020), SSA received over 151 million calls at its field offices and the National 800-number. Fifty-one percent of those calls were handled, while 4% received busy messages, and 45% were abandoned. See *The Social Security Administration’s Telephone Service Performance (A-05-20-50999)*

The OIG’s report is replete with graphs comparing telephone responses from before and during the months that SSA field offices have been closed to the public during the pandemic and comparing responses by the field offices with the National 800-number. According to the OIG, SSA’s telephone services shifted more calls to field offices when the Agency limited in-person service and provided the public with more field office telephone numbers. The increased calls to the field offices resulted in increased busy signals and wait times. Advocates trying to reach field offices may be surprised to learn, however, that the average speed of answer for field office calls was far lower than previous years (2.4 minutes) versus 16.1 minutes for the National 800-number.

The OIG reviewed SSA’s efforts to adjust National 800-number operations, including hiring and training of more personnel. Although performance at the National 800-number began to decline at the end of FY 2020, it was still better than pre-pandemic performance. And according to the OIG, SSA’s performance compares favorably to other agencies.

In 2021, SSA also attempted to implement a new unified telephone system but has encountered obstacles. It continues to phase in a new unified telephone system. SSA is also making changes to its automated systems at its Teleservice Centers. Among the changes SSA has apparently put in place include an automated option to change an address.

OIG Compares DDSs COVID-19 Workloads

In December, the OIG compared State disability determination services’ (DDS) workloads during the COVID-19 pandemic period of April 2020 to March 2021 with workloads in prior years. It found that while DDS workloads fluctuated in prior years, the largest year-to-year changes occurred between April 2020 to March 2021. DDSs received 15.9 percent fewer initial claims and SSA send 40.2 percent fewer Continuing Disability Review cases (CDRs) to the DDSs. Despite the decrease in intakes, DDS processing times increased, and workloads increased. During the time, DDSs significantly decreased the use of consultative examiners, although the allowance/continuance rates remained relatively the same as prior years. The OIG plans further study to analyze why some workloads changed significantly. *A-01-21-51038 (Comparing SSA’s Disability Determination Services’ Workload Statistics During the COVID-19 Pandemic to Prior Years)*

OIG Reviews Success of VR Services

In another recent study, the OIG found that more beneficiaries (62%) had unsuccessful work outcomes after they received services from a state vocational rehabilitation (VR) agency than those who had successful outcomes (38%). While SSA does not have authority over State VR agencies, SSA does pay the agencies for services they provide to beneficiaries who meet certain conditions. Although SSA has limited ability to influence the agencies, it agreed with the OIG’s recommendation to continue to meet with them periodically and to inform them of the results of this satisfaction survey. *A-02-18-50544 (Beneficiaries Who Received Vocational Rehabilitation Services)*
In the October newsletter, we announced historic cost of living increases (COLA) to Social Security benefits and Supplemental Security Income federal benefit rates. The new rates are listed in SSA’s SSA’s Fact Sheet on 2022 Social Security Changes. The changes in the federal benefit rate are also reflected in the yearly SSI payment chart published by NYS Office of Temporary and Disability Assistance (OTDA).

We noted that 2022 Medicare changes would be posted by the Centers for Medicare and Medicaid (CMS) at www.medicare.gov. CMS recently posted the new Medicare rates, which also unfortunately appear to be historic increases. The Part B monthly premium, most relevant to DAP Clients, is set to increase in 2022 from $148.50 to $170.10. The premium rise is capped for lower-amount beneficiaries whose premium payment are deducted from their Social Security benefits to prevent benefit amounts from dropping below the 2021 payment level. The premium rises, however, the more income the beneficiary receives. The deductible for Part B Medicare is also increasing from $203 to $233 annually.

When announcing the rate increases, CMS attributed the increases at least in part to the high costs associated with Aduhelm, the controversial new Alzheimer drug. But on January 10th, Secretary of Health and Human Services (HHS) Xavier Becerra ordered CMS to reassess the 2022 Medicare increases based on a dramatic January 1st 50% price drop of Aduhelm. According to Secretary Becerra, “there is a compelling basis for CMS to reconsider the previous recommendation.”

At the time of publication of this newsletter, it remains unclear if and how the 2022 Medicare rates will be changed. But in a further development, on January 11th, CMS announced its preliminary decision that it will only cover the costs of Aduhelm for patients in approved clinical trials. CMS will provide a thirty-day comment period before the decision is finalized.

Contact Us!

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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/2022/01/Recent-2d-Circuit-Decisions-1-2022.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


The Supreme Court held that a claimant is not precluded from raising a legal issue for the first time in U.S. District Court if it was not raised before the Administrative Law Judge (ALJ). The underlying issue in question in Carr and its companion cases was whether the ALJ was properly appointed under the Appointments Clause of the U.S. Constitution. In the aftermath of Lucia v. Securities and Exchange Commission, 138 S.Ct. 2044 (2018) challenging the constitutionality of SEC ALJs, Carr and other plaintiffs challenged the legitimacy of the ALJs who had denied their disability claims and sought new hearings. The Commissioner argued the plaintiffs had forfeited their Appointments Clause challenges because they had not raised them before SSA during the administrative appeals process. The Supreme Court resolved a conflict in the circuits by holding that given the non-adversarial nature of SSA hearings, issue-exhaustion is not required.


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.


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.


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.


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.
SECOND CIRCUIT DECISIONS

Alexander v. Saul, 5 F.4th 139 (2d Cir. July 8, 2021)

The Second Circuit upheld a district court’s refusal to extend the time to appeal its decision affirming the Commissioner’s denial of an SSI claim. Although the Circuit was “sympathetic” to the plaintiff, it concluded the district court had not abused its discretion – even though the plaintiff filed her appeal and request for an extension only two days after the 60-day deadline expired. The district court had reasonably applied the “excusable neglect” factors rather “good cause” standard under Fed. R. App. P. 4(a)(5) because the plaintiff’s failure to appeal was at least partially due to her own inadvertence in failing to notify her attorney of her change of address rather than due to her alleged mental illness. The court refused to toll the Rule 4(a)(5) deadline as it is considered jurisdictional and less flexible than the statute of limitations governing the 60-day limit to seek judicial review under 42 U.S.C. § 405(g).

Scepanski 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. §§ 404.1520(c)(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.

Lesterhus 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.
This month, as we celebrate the birthday of the Reverend Martin Luther King and honor his legacy, we are reminded of his commitment to economic justice as well as racial justice. As noted in NOSSCR’s blog honoring Dr. King, more than fifty years ago in his Nobel Prize acceptance speech, Dr. King reminded us of the great economic gaps within rich nations like our own. As he pointed out in 1964, “There is nothing new about poverty. What is new, however, is that we have the resources to get rid of it.”

Social Security benefits lift more Americans above poverty than any other program, according to the Center for Budget and Policy Priorities. And Black Americans rely on Social Security benefits more than white Americans for their retirement and are more likely to rely on disability benefits given their higher rates of disability, according to the National Committee to Preserve Social Security and Medicare.

As disability advocates, our quest for economic justice for disability claimants is also one for racial justice. Indeed, virtually every obstacle faced by claimants during the application and appeals process can be shown to have a disparate impact on people of color. But, as we have written about in these pages, advocates yearly implore Congress to raise the Supplemental Security Income (SSI) resource and income limits from the current levels that shamefully fall well below the federal poverty line. Even this year, when many believed we had the best chance to pass the SSI Restoration Act or update the SSI rules via the Build Back Better, it appears we as a nation remain unwilling to devote resources to end poverty and its resulting inequities. The words of Dr. King should serve as a reminder to us all as we continue to work towards closing the great economic gaps in our rich nation.