SSA Offices Reopen After Extended Closure

After more than two years of being largely shuttered to the public with minimal and very restricted in-person appointments, Social Security Administration (SSA) offices finally reopened to the public on a walk-in basis on April 7, 2022. In our last newsletter, we had reported that SSA had, after some delay with its prior schedule for reopening, finally reached agreements with the unions regarding terms for reopening for in-person service for early April. The resumption of in-person operations could be described as a “soft opening” without extensive publicizing of the specific date. The date of the actual opening was announced by SSA the prior business day, on April 4, 2022.

Field Offices

SSA is still strongly encouraging the public to conduct as much business as possible online or by telephone rather than at the local field offices. The agency is warning the public that wait times without an appointment can be long. It notes that it is most busy in the morning, and at the beginning of the week and the beginning of the month.

Given the pent-up demand for services, there has been concern about the ability of SSA to manage the flow of in-person visitors. The offices reopened for a full range of services and the normal hours and SSA has hired retired staff to return on a temporary basis to provide assistance in triaging the crowds at the field offices.

NOSSCR and others are gathering feedback on how the reopening is unfolding.

Hearing Offices

For the hearing offices, SSA’s reopening has led to an expansion of in-person hearings. Until this month, in-person hearings were only scheduled and held with management-level administrative law judges (ALJs). Hearings are now being scheduled with line ALJs. SSA will be continuing its practice of asking claimants to complete a screening process prior to coming to the hearing office but the agency has stated that it will not turn away individuals who have not completed the form in advance.

Advocates should be aware and remind clients of masking and social distance requirements. There may be restrictions on how early one can arrive in advance of a hearing. Arrangements to see exhibit files must be made in advance, and the agency may no longer make available conference room to confer with clients or to review files. Only claimants and representatives may enter the hearing rooms and others will be restricted.

SSA has also issued a Chief Judge Bulletin extending some of the policy changes made with respect to handling dismissals during COVID. See page 8 for more information about those developments.

(Continued on page 2)
Telephone Complications

Complicating the reopening was that it occurred on the heels of a precipitous and chaotic deterioration in telephone service. Telephone access has been a long-standing challenge at SSA, but in February, advocates and claimants reported a dramatic exacerbation in technical problems reaching SSA by telephone at all levels as new telephone vendor and system updates took place. SSA’s website acknowledges the problem. SSA has reported that outdated phone systems had been in place for more than a decade and that the equipment is now failing. In addition, SSA had to institute workarounds to operate remotely during the pandemic.

As described in our last newsletter, SSA is in the process of transitioning to a modernized telecommunications platform that will unify the three legacy telephone systems (1-800 number, field offices, and headquarters). The 1-800 number is the first to be updated, in FY 2023. While there can be some improvement during less busy times, such as in the summer, the current schedule for upgrading the technology suggests that system can be expected to remain unreliable for many months in the future.

To further compound the difficulty contacting the local field offices in particular, SSA reversed its COVID-era policy of publicizing many local field office phone numbers and replaced them with the 1-800 number on the Office Locator page of its website. The change was effective with the April 7th reopening. According to SSA, the current online phone listings are consistent with OBRA 1990 (the law requires SSA to post local field office numbers under some but not all circumstances). The agency has said the policy is necessary to best serve the public because of the diminished capacity to handle phone calls now that field offices are open for walk-in traffic.

Although the switch prompted outrage from advocates, SSA is continuing its practice. The numbers are still listed in the “SSA Field Offices” dataset available here. Advocates are encouraged to maintain their own lists of local contact information, as was necessary to do pre-COVID.

The Regional Communications Directors remain an important for recourse for problems accessing the local field offices. In New York, Regional Communications Director Everett Lo and his staff can be reached at NY_RPA@ssa.gov. Individual Public Affairs Specialist for specific regions are as follows:

- Bronx, Dutchess, New York, Orange, Putnam, Richmond, and Westchester are assigned to Ravi Gopaul, Shirley Saxton, and Vincent Scocozza.
- Kings, Nassau, Queens, and Suffolk are assigned to Anthea Cox and Nilsa Henriquez
- Columbia, Delaware, Greene, and Northern Counties are served by Elizabeth Pivonka and Ben Stump
- In addition, Kristen Dama at Community Legal Services in Philadelphia and Michelle Spadafore of NYLAG are collecting complaints about the phone system.

Advocates are also encouraged to register for and utilize secure email partnerships with SSA to communicate with SSA by email. Jenna Karr at Empire Justice is available to aid DAP organizations with that process.

Save the Date!

The Partnership Conference will be back this fall, to be held in-person in Albany, New York. The Partnership Conference is a biannual civil legal services conference sponsored by the New York State Bar Association. The Steering Committee has not yet announced the final details, but is expected to be held on October 19 and 20, 2022. There will be two DAP sessions focusing on Long COVID and disability. The date and place for the task force meetings have not yet been finalized.
Supreme Court Permits Puerto Rico’s Exclusion from SSI

In an 8-1 decision issued April 21, 2022, the Supreme Court ruled in *U.S. v. Vaello Madero* that the exclusion of residents of Puerto Rico from the Supplemental Security Income (SSI) program does not violate the United States Constitution. Civil rights groups are condemning the decision as perpetuating the wrongful treatment of the residents of Puerto Rico as less than full citizens of the U.S., and as “undergirded by precedents that compound wrongs and historical practices that should have been rejected long ago.” A lone dissent by Justice Sonia Sotomayor described the majority decision as “especially cruel given those citizens’ dire need for aid.”

Currently, SSI is only available to residents of the United States, which, for purposes of SSI, is defined by statute as including only the 50 states, the District of Columbia, and the Northern Mariana Islands. Other U.S. territories are not included.

The majority opinion, written by Justice Brett Kavanaugh, applied the rational basis test to find it permissible to treat residents of the territories differently than if they lived in a state because of the different tax status applicable to territories, an outcome authorized by the Territories Clause of the Constitution. In particular, “the fact that residents of Puerto Rico are typically exempt from most federal income, gift, estate, and excise taxes - supplies a rational basis for likewise distinguishing residents of Puerto Rico from residents of the States for purposes of [SSI].” The majority, particularly at oral argument, expressed a concern that permitting SSI in the territories would open the floodgates for eligibility to other federal benefits.

As the lone dissenter, Justice Sonia Sotomayor found this reasoning insufficient, even under the deferential standard of rational basis. As had been considered by the lower courts, “SSI recipients are, by definition, low-income individuals who cannot afford to pay taxes.” Moreover, SSI is a uniquely “national program” that is operated and administered uniformly, without regard to State of residence.” Because of that, it would be irrational to tie an individual’s entitlement to SSI to that individual’s place of residency. The dissent declined to address whether the policy should have been subject to heightened scrutiny.

Justice Sotomayor also found the majority’s concern about “far reaching consequences” with respect to other programs inapposite:

In fact, it is the Court’s holding that might have dramatic repercussions. If Congress can exclude citizens from safety net programs on the ground that they reside in jurisdictions that do not pay sufficient taxes, Congress could exclude needy residents of Vermont, Wyoming, South Dakota, North Dakota, Montana, and Alaska from benefits programs on the basis that residents of those States pay less into the Federal Treasury than residents of other States.

The dissent also noted how tax status had not precluded eligibility for SSI in the Northern Mariana Islands. The First Circuit’s decision that had found Puerto Rico’s exclusion unconstitutional focused on this point, but the point was largely absent from the arguments in the Supreme Court.

In a noteworthy concurrence, Justice Neil Gorsuch forcefully rebuked the Insular Cases, a line of case law that sanctioned the colonial relationship of the U.S. to the territories, and that determined the full scope of the Constitution did not apply. Describing the cases as “shameful,” based on “ugly racial stereotypes,” and with no basis in the text of the original Constitution, Justice Gorsuch called for the Insular Cases to be overturned in the future. In a footnote, Justice Sotomayor agreed.

Some of the amicus briefs had called for the overturning the Insular Cases. However, the parties themselves did not ask this specifically and took the position that doing so was not necessary to resolve the dispute. Had the request been before the Court, Justice Gorsuch would not have joined the majority:

Because no party asks us to overrule the Insular Cases to resolve today’s dispute, I join the Court’s opinion. But the time has come to recognize that the Insular Cases rest on a rotten foundation. And I hope the day comes soon when the Court squarely overrules them.

The majority’s conclusion acknowledged that the President supported, as a matter of policy, the expansion of SSI to the territories. But as noted by Justice Sotomayor, the political process has been insufficient.

(Continued on page 4)
Is Acting Commissioner Kijakazi Legally Appointed?

According to an opinion issued by the Government Accountability Office (GAO), Acting Commissioner of Social Security Kilolo Kijakazi has been legally appointed. See Matter of Social Security Administration – Legality of Service of Acting Commissioner, B-333543 (Feb. 1, 2022). Because President Biden appointed her pursuant to Section 702(b)(4) the Social Security Act, 42 U.S.C. § 902(b)(4), rather than the Vacancies Act, 5 U.S.C. §§ 3345-3349d, neither the time limitations nor the restrictions on performance of the Vacancies Act apply to her appointment.

Acting Commissioner Kijakazi was appointed by the President after he removed former Commissioner Andrew Saul from office in July 2021. Deputy Commissioner David Black, who would have become the Acting Commissioner under the Act, resigned at the same time. The GAO decision details the nuances of the Social Security Act as to why Dr. Kijakazi, as Deputy Commissioner for Retirement and Disability Policy, was considered an officer and thus eligible for appointment.

Advocates will recall that previous Acting Commissioner Nancy Berryhill’s term was not so straightforward. Acting Commissioner Berryhill was appointed when Acting Commissioner Carolyn Colvin left office in January 2017. Because Berryhill was appointed – twice – under the Vacancies Act, the legitimacy of her appointment was called into question by the GAO in its March 6, 2018 letter to the President, B-329835. The Vacancies Reform Act generally limits the time that a position may be filled by an acting official to 210 days, although that period can be extended to 300 days in the year of a transitional Presidential inauguration such as 2017. Consequently, her term should have ended on November 16, 2017. The GAO noted, however, that SSA could provide for the performance of delegable functions and duties of the Commissioner, which is why federal court pleadings identified Ms. Berryhill in that manner for a short period of time.

In April 2018, Ms. Berryhill was again named Acting Commissioner while the President’s nomination of Andrew Saul as Commissioner was pending. According to the Commissioner, this re-appointment was authorized under a “spring-back” provision of the Vacancies Act allowing her to return to office once the President had nominated a Commissioner.

Why does all this matter? It was during this “spring-back” period that Berryhill ratified the appointment of all SSA Administrative Law Judges (ALJs), whose authority and constitutionality had been questioned under Lucia v. Securities and Exchange Commission, 138 S.Ct. 2044 (2018). See the July 2020 edition of this newsletter. Litigation continues as to whether Berryhill had the authority to ratify the ALJ appointments. If not, their decisions may be subject to challenge. See, e.g., Brian T.D. v. Kijakazi, --- F. Supp. 3d ---, 2022 WL 179540 (D. Minn. Jan. 20, 2022).

Puerto Rico’s Exclusion from SSI- Continued

(Continued from page 3)

Efforts to expand SSI have stalled, and the lack of voting representation in Congress hinders the ability of Puerto Rico’s elected representatives to advance the rights of its citizens.

The briefs filed in the case were discussed in the July 2021 and October 2021 issues of this newsletter. Oral argument was discussed in the January 2022 issue.
Can Old Overpayments Be Collected?

The Social Security Administration (SSA) recently removed a bar on recovery of old overpayments ten years or older. According to Emergency Message (EM)-22017, POMS GN 02210.003, 10-year Bar to Adjustment – Overpayment, has been archived. The policy set forth in that POMS section had prohibited adjustment of an overpayment more than ten years after the debt accrued when the means to collect by benefit withholding was available, but no recovery efforts were initiated. SSA’s justification? The policy was based on an outdated regulation of the Department of Health and Human Services; neither the Social Security Act nor the regulations bar such collections.

Does this mean there is no statute of limitations on collection of overpayments? Yes - and no. The overpayment must be assessed in a timely fashion. Under the rules of administrative finality, SSA must establish liability within the time frames for reopening a decision, which is generally two years for SSI claims and four years for Title II. See 20 C.F.R.§§ 404.988 & 416.1488. See, e.g., POMS SI 02201.005.E, which applying the rules of administrative finality to SSI overpayments, permitting the recovery of an SSI overpayment made more than two years in the past if the determination of the overpayment was made timely.

The EM cross references POMS GN 02205.005 - Contingent Liability for Title II Overpayment Recovery, meaning outstanding overpayments can be collected from any person receiving benefits on the same earnings record as the overpaid individual. Those individuals could include spouses, widows, children, or parents. See GN 02210.016 - Applying priority of adjustment – overpayment. If an overpayment was assessed against a mother or father years ago, for example, the benefits of a child receiving benefits on that same account could be “adjusted.”

And remember that even if adjustment of ongoing benefits is not an option, SSA has other means of collecting old, outstanding overpayments from other federal payments, including tax refunds, under the Treasury Offset Program. Several years ago, SSA faced much negative publicity when it attempted to collect old debts by those means.

New Edition of DSM Published

Many advocates are familiar with the Diagnostic Statistical Manual (DSM) published by the American Psychiatric Association (APA). The “Bible” for mental health professionals, it was extensively revised in 2013 as the DSM-5. The APA recently released a new version with text revisions, DSM-5-TR. It can be purchased here.

The revised version includes a new diagnosis (prolonged grief disorder); clarifying modifications to the criteria sets for more than 70 disorders; addition of International Classification of Diseases, Tenth Revision, Clinical Modification (ICD-10-CM) symptom codes for suicidal behavior and nonsuicidal self-injury; and updates to descriptive text for most disorders based on extensive review of the literature. In addition, DSM-5-TR includes a comprehensive review of the impact of racism and discrimination on the diagnosis and manifestations of mental disorders.
SSA Launches Online Tool and Redesign Efforts

The Social Security Administration (SSA) launched a protective filing date tool at the end of March, available at https://www.ssa.gov/benefits/ssi/start.html, for claimants to express an initial interest in applying for Supplemental Security Income (SSI) and establish a protective filing date. The tool can be used by individuals and third parties. SSA issued Emergency Message (EM) 22015 on March 18, 2022 outlining the process. The agency also has efforts underway to redesign and simplify its website, and to streamline and make available online the SSI application.

The new online protective filing date tool collects basic information, including a name, date of birth, Social Security number, address, phone number, and (optionally) an email address. Third parties are also asked for their name, contact details, and relationship to the person seeking benefits. In response, SSA will contact the person to schedule a time to take the application.

An appointment will be sent by mail (and email, if provided) within 14 days. As with other protected filings SSA could close out the online protected filing if the application is never actually completed or the person misses the appointment.

According to the EM, individuals who indicate a “priority life circumstance” on the form (military casualty/wounded warrior, 100% VA disability, homeless, TERI/terminal, recently released from a correctional facility, sign language interpreter needed, and visual accommodation needed) should have their request processed within three business days and others should have their cases worked in five business days. In those cases, staff will contact the person by telephone.

Early reports, however, indicate wide variation with the response time. Other concerns have included a degree of confusion in the ability of representatives to use the tool, with reports of some field offices insisting that it is only for claimants. SSA has clarified that third parties are very much encouraged to use the tool, but that a representative is only formally recognized as such after a claim is filed. Thus, it will be essential for a representative to file Appointment of Representation Form 1696 in order to be contacted once a claim is submitted.

When SSA cannot match the data provided (for example, if a person’s name and Social Security number do not match) the tool provides a message stating that the request cannot be processed. The tool will also reject an inquiry that may seem to be coming from a scam-bot. Thus, repeated efforts made in a short amount of time are likely to fail. The submission will also be blocked if the person already has an application pending with SSA.

The contact made with the tool does not constitute an actual application but assists in providing another avenue to establish a protective filing date. The tool is an effort to expand online access for SSI-eligible individuals at a time when communication with the agency is extremely difficult, and it is not possible to complete an SSI application online.

SSA does finally have efforts underway to develop a streamlined SSI application and make it available online. The agency is developing a new design based on a hybrid or bifurcated process whereby a claimant can file online with basic eligibility information, and SSA staff will subsequently contact the individual for further development tailored to the particular claim. It will be in development through FY 2023 with usability testing to take place in Summer 2022. Currently, the only way a person can start an SSI application online is if doing so concurrently with an application for Social Security Disability (SSD). Starting an SSI application in that manner still requires follow-up from SSA staff to complete the process.

As discussed on page 7 of this newsletter, the agency has stated that this effort is in line with its goal of advancing equity. As claimants and advocates are well-aware, the SSI application is burdensome, and carrying over the extensive 60-odd questions from the current paper form would result in an unwieldy online version. The extensive questioning is related to the overly-complex eligibility rules for the program, many of which are based in statute and regulation. Without legislative or regulatory policy changes, a bifurcated design could help make the application more accessible under the current eligibility rules.

In a related development, SSA announced on April 18, 2022 a Beta version of a redesigned website, available at https://beta.ssa.gov/. The redesign is an effort to simplify the content on its current website so that it will be easier for the public to use and access. The design is intended to be more user-friendly, with less presumed knowledge of the agency’s programs and services. SSA is asking for feedback via a button on the website and will use the input before replacing the current website with a new, final version later this year.
SSA Releases Equity Action Plan

On April 14, 2022, the Social Security Administration (SSA) released the agency’s Equity Action Plan in Agreement with EO 13985. The plan is issued in response to an Executive Order (EO) 13985, signed on January 20, 2021 by President Biden, directing all federal agencies “to pursue a comprehensive approach to advancing equity for all including people of color and other people who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.”

Under the EO, SSA was required to conduct an assessment of its programs and within one year provide a plan for advancing equity, including a plan to address barriers to enrollment in and access to benefits and services in its programs. In connection with the EO, the Office of Management and Budget issued a request for information last year and many legal services organizations submitted comments. SSA’s plan was publicized in conjunction with a larger rollout by the White House.

The plan identifies several strategies to advance equity. A primary area of focus of both advocates and the plan has been the collection of data on race and ethnicity. Changes in SSA’s enumeration process have led to a reduction in demographic data. Advocates have been calling on SSA to address this failure to make this information available. SSA has begun to now collect this data on a voluntary basis during the Social Security Number (SSN) card application process. SSA will also begin publishing data by race and ethnicity more broadly, including in its Annual Statistical Supplement, and conduct projections and models for race and ethnic groups with earnings, benefit amounts, income poverty, health, and wealth. Changes to the enumeration and other processes also include revisions to its policies toward the designation of sex for new SSN card applications.

The plan recognizes the disparities in outcomes experienced by unrepresented claimants and announces steps to support those individuals. Efforts include enhanced outreach to unrepresented claimants, targeted denial reviews at the reconsideration stage, implicit bias training, research and analysis toward sources of bias and factors that contribute to accessing representation, and working with the representative community to find ways, such as increasing the maximum fees available, to increase levels of representation.

The plan also recognizes the structural barriers such as discrimination that result in a lower benefit levels and participation in the Social Security disability (SSD) program compared to Supplemental Security Income (SSI). At the same time, the overly complex rules for SSI and the barriers to communicating with SSA result in a significant administrative burden in applying for SSI and remaining in pay. To address this, and also in response to EO 14058, Transforming Federal Customer Experience and Service Delivery To Rebuild Trust in Government, issued December 13, 2021, SSA will explore establishing a Customer Experience office, simplify forms and procedures, and seek data-sharing opportunities to limit the burden on claimants to provide information. As discussed on page 6 of this newsletter, the agency has launched a new online protective filing tool, and has an online SSI application process and new website in development.

Prior developments regarding EO 13985 were reported in the January 2021, April 2021, and July 2021 newsletters.
Chief Judge Bulletin Extends Dismissal Procedures

With the resumption of in-person hearings, the Social Security Administration (SSA) issued Chief Judge Bulletin (CJB) 22-02 on March 21, 2022, extending several dismissals procedures that had been implemented during the pandemic. The CJB consolidates the agency’s policies regarding dismissals for failure to appear and untimely filing, and applies policies across all modalities of appearances, including in-person, online Teams hearings, video teleconferencing (VTC), and telephone hearings.

The CJB notes that “due to the COVID-19 pandemic, as we continue to be flexible in applying the agency’s good cause provisions, ALJs may not find constructive waiver without first developing the record for good cause.” All dismissals are subject to In-Line Quality Review (ILQR) by a manager.

Other procedures introduced during the Pandemic and now extended also include the requirement that waivers of notice be memorialized on the record during the hearing. A new 75-day Notice of Hearing is required for in-person and VTC hearings the first time that particular type of hearing is noticed after the resumption of in-person hearings. After the initial 75-day notice, only 20 days notice is required.

ALJs are reminded that claimants must agree to telephone or online Teams hearing. The consent can be provided in writing or by phone. A completed Acknowledgement of Receipt of the notice of hearing does not constitute agreement for a telephone or video hearing.

The CJB has a retention date of September 21, 2022.

CE Concerns Raised

Has your client reported that an SSA consultative examiner (CE) demonstrated bias towards them as trans or gender nonconforming? Amy Marinacci of the Legal Council for Health Justice in Chicago is collecting redacted CE reports that mis-gender claimants or otherwise show bias. Please email redacted reports to Amy at amarinacci@legalcouncil.org or Elizabeth Ricks at Chicago at ericks@chicagohouse.org.

CE concerns have also been raised in a position paper released on March 2nd by New York Legal Assistance Group (NYLAG), the Urban Justice Center (UJC), and Community Legal Services of Philadelphia (CLS). The percentage of cases sent for CEs varies widely across states; a 2009 study found that while 48% percent of initial claims involved CEs (approximately one million CEs), the rates at which states sent claimants for CEs ranged from 25% to 70%.

The report focuses on New York and Pennsylvania, but it makes recommendations for SSA and DDSs nationwide:

- Reform SSA policy to require that SSA decision-makers assign greater weight to records and opinions from a claimant’s personal doctors than those provided by one-time CEs;
- Change the rule that allows incomplete CEs to determine the outcome of cases, especially when the claimant has a treating physician;
- Increase and tighten SSA’s supervision of CE providers through regular quality reviews and by implementing an accessible, accountable complaint procedure for claimants;
- Recruit and hire qualified and diverse providers to perform CEs; and
- Address the impact of structural inequality in SSA’s policies regarding when and how CEs are used.

- Eliminate the need for CEs in many cases by giving state agencies sufficient time to get medical records and medical opinions from a claimant’s own doctors;
Court Decisions

Court Affirms ALJ Decision Rejecting Treating Opinions

After a series of decisions reaffirming its long-standing “treating physician rule,” the Second Circuit affirmed a District Court decision under the pre 2017 opinion evidence regulations. Schillo v. Kijakazi, --- 4th ---, 2022 WL 1020381 (2d Cir. Apr. 6, 2022). The Court of Appeals found the ALJ properly accorded lesser weight to the opinions of two treating physicians because one was conclusory and vague and the other, rendered in checkbox format, was not supported by the medical evidence. And according to the court, both opinions as to the plaintiff’s tremors and sensory deficits were inconsistent with the medical evidence, which identified only mild tremors, as well as the plaintiff’s testimony.

The court acknowledged its decisions holding that a disabled person’s endurance of pain to pursue important goals should not be held against her, citing Colgan v. Kijakazi, 22 F.4th 353 (2d Cir. Jan. 3, 2022), summarized in the January edition of this newsletter. It noted, however, that the plaintiff did not testify that she persevered through pain when completing activities or had difficulty with manipulation. While the court observed this testimony alone might not have been sufficient to justify according lesser weight to the treating sources, it bolstered the conflicting evidence of record identified by the ALJ.

The court also agreed with the ALJ’s assessment that the opinion of the consultative examiner was entitled to even less weight. It rejected plaintiff’s argument that the ALJ could not make an RFC finding because she had declined to accord controlling weight to any of the medical opinions; the ALJ is entitled to weigh all available evidence to make RFC findings and her conclusion need not perfectly correspond with opinions of record. Finally, the court found that the ALJ’s failure to articulate the so-called Burgess factors for evaluating treating source opinions to be harmless error as it was evident she had applied the substance of the treating physician rule.

Second Circuit Increases 406(b) Fees

DAP advocates frequently move for and are awarded attorney fees on behalf of plaintiffs under the Equal Access to Justice Act (EAJA) when they prevail in U.S. District Court appeals. But fees may also be available for federal court work in Title II cases under 42 U.S.C. § 406(b). As opposed to the standard hourly rates applicable for EAJA fees, § 406(b) fees, like § 406(a) fees for work at the administrative level, are contingency fees based on a percentage of the retroactive award received by the claimant.

The Court of Appeals recently considered the fairness of such a § 406(b) award in Fields v. Kijakazi, 24 F.4th 845 (2d Cir. Jan. 28, 2022). The Second Circuit held that the District Court had erred in reducing attorney fees requested by plaintiff’s attorney, Binder & Binder, under 42 U.S.C. § 406(b), as a windfall. The Second Circuit, relying on its decision in Wells v. Sullivan (“Wells II”), 907 F.2d 367, 372 (2d Cir. 1990), and the Supreme Court in Gisbreath v. Barnhart, 535 U.S. 789, 808 (2002), held that to reduce a contingency fee solely on the grounds that the amount requested is a windfall, the court must be clear the fee was not earned by counsel. Here, the appeals court found that the plaintiff’s very experienced attorney represented him professionally, efficiently, and ultimately successfully in four ALJ hearings, several Appeals Council petitions, and two district court appeals. His request for a fee of $40,170, which was 25% of the plaintiff’s retroactive award, was not a windfall even though it constituted an hourly rate of $1,556.98 based on the 25.8 hours expended on representation in the federal court phases of the claims.
ALJ Failed to Develop Record

The Court of Appeals for the Second Circuit recently reenforced the duty of the Administrative Law Judge (ALJ) to develop the record in an appeal, especially if the plaintiff is pro se. See Lundie v. Kijakazi, --- F. App’x ---, 2022 WL 1154122 (Apr. 19, 2022). The record indicated the plaintiff had been psychiatrically hospitalized, but the ALJ failed to request medical records of the hospitalization. Nor did the ALJ contact the plaintiff’s parents, who would be likely to have firsthand knowledge of the plaintiff’s condition, especially since documentary and testimonial evidence indicated the plaintiff suffers from cognitive impairments.

The plaintiff successfully appealed to the Circuit on his own.

NDNY Magistrate Remands on SNOJ

Magistrate Judge David Peebles of the NDNY issued a Report and Recommendation to remand a claim for additional vocational testimony regarding local or regional job numbers. In James D. v. Commissioner of Social Security, 2022 WL 958525 (N.D.N.Y. Jan. 7, 2022), the court agreed that the number of jobs nationally for call out operator (5,876) “straddled the borderline of what constitutes a significant number in the national economy.” But the vocational witness failed to specify how many jobs exist locally or regionally. Relying on other Northern District cases, the Magistrate Judge posited that number might be important where the national numbers are insufficient. Although acknowledging it was likely the local or regional numbers would also be insufficient, the court nonetheless held that the burden was on the Commissioner to produce and consider these numbers.

The numbers for the position of call out operator were especially important in this case, because it was the only unskilled job the plaintiff could perform, as the court agreed that the position of surveillance system monitor did not exist in significant numbers. The vocational witness had testified that the claimant would not be able to perform the job of surveillance system monitor as performed in the modern workplace. The witness acknowledged that the claimant could perform the job as described by the Dictionary of Occupational Titles (DOT) but testified that in his experience, most surveillance system monitors are cross trained to do security work, which is a light, semi-skilled job, and thus beyond the claimant’s established residual functional capacity (RFC).

The ALJ rejected the vocational witness’s testimony, relying instead on the DOT. Magistrate Judge Pee-
Appeals Council Issues Interesting Remand Order

How often have you been pleased that you obtained a remand for your client from the U.S. District Court, even if it meant going back for another hearing before the Administrative Law Judge (ALJ)? But then you had to wait months for the Appeals Council to issue its own decision. Under 20 C.F.R. §§ 404.983 & 416.1483, when a federal court remands a claim, the Appeals Council may make a decision or may remand the case to an ALJ with instructions.

More often than not, the Appeals Council simply “affirms” the Federal court order, maybe with a few additional instructions. In a recent Remand Order received in an appeal litigated by the Empire Justice Center, the Appeals Council went a few steps further. It acknowledged the ALJ had not adequately evaluated the opinion of the treating psychiatrist under the 2017 regulations governing the valuation of opinion evidence at 20 C.F.R. § 416.920c. It found the ALJ indirectly addressed the consistency factor for evaluating opinion evidence in terms of the four areas of mental functioning but had failed to address the consistency of the rest of psychiatrist’s opinion, even indirectly. For example, the ALJ did not address why the psychiatrist’s opinion that the claimant would be absent from work more than four days per month was inconsistent with the record, especially where the opinion appeared to somewhat consistent with that of the consultative examiner whose opinion was found to be “persuasive.”

Nor, according to the Appeals Council, did the ALJ adequately address the supportability factor set forth in the regulations. Instead, the ALJ appeared to discount the entirety of the opinion as neither “inherently valuable nor persuasive” because it concluded the claimant is disabled, as issue reserved to the Commissioner. But in addition to the conclusion, the opinion listed and explained diagnoses, clinical findings, and treatment and responses. On remand, the ALJ was ordered to further explain why these aspects of the opinion were not supported by and consistent with the record.

The Order reads as if the Appeals Council is about to remand for calculation of benefits, but of course it does not. See the 2021 Waterfall Chart of page 15 of this newsletter, verifying that the Appeals Council allows only one percentage of cases. But the Order may provide some insight to advocates trying to formulate arguments to the Appeals Council in cases under the new opinion evidence regulations. For example, the ALJ erred in using boilerplate to find an opinion not persuasive without addressing how specific aspects of an opinion are inconsistent with or not supported by the record. Please share with us how your arguments under these regulations are faring.

Aged Court Remand Email Available

Wondering what has happened to the appeal that was remanded from the U.S. District Court months ago? How long can it really take for the Appeals Council to issue its own remand order pursuant to 20 C.F.R. §§ 404.983 & 416.1483? Who knows, but at least you may be able to check on the status at the Appeals Council by emailing: DCARO.OAO.Aged.Court.Remands@ssa.gov.

Thanks to Mike Telfer of the Legal Aid Society of Northeastern NY for this update.
Appeals Council Orders Consideration of Past Work

In another surprisingly detailed order following a court remand, the Appeals Council directed the Administrative Law Judge (ALJ) to reevaluate whether the claimant actually had past relevant work as a self-employed housekeeper. The ALJ had found the claimant could return to that past relevant work. The Appeals Council criticized the ALJ for not evaluating the claimant’s self-employment earnings. Spelling out the rules governing the evaluation of self-employment at 20 C.F.R. §§ 404.1575(a)(2) & 416.975(a)(2), the Appeals Council ordered the ALJ to determine whether the self-employment earnings qualified as SGA and could constitute past relevant work.

The Appeals Council also remanded for consideration of whether the claimant could complete the probationary period required of the jobs posited by the vocational witness at the first hearing. The ALJ had found the claimant could only interact with supervisors occasionally. The vocational witness had given contradictory testimony about the extent to which the jobs would require more than occasional contact with a supervisor during the probationary period. See Sczepanski v. Saul, 946 F.3d 152 (2d Cir. 2020), discussed in the January 2020 edition of this newsletter, which held that a claimant’s ability to complete probation is relevant to a disability determination.

Mike Telfer of the Legal Aid Society of Northeastern NY ably represented this claimant in obtaining a voluntary remand from the U.S. District Court and convincing the Appeals Council of the merits of his arguments.

Afghan Refugees Eligible for SSI

Under Section 2502 of the Afghanistan Supplemental Appropriations Act, 2022, Non-Special Immigrant Parolees from Afghanistan may be eligible for Supplemental Security Income (SSI) benefits. The Act covers citizens or nationals of Afghanistan (or individuals with no nationality who last habitually resided in Afghanistan) paroled into the United States between July 31, 2021, and September 30, 2022. It also allows the parolee’s spouse, children, and parents or legal guardians (if the parolee is an unaccompanied child) to be eligible for SSI if they are paroled after September 30, 2022.

To be eligible for SSI benefits, these people would also need to meet the other requirements of the program, such as being at least age 65 or disabled or blind, and having countable income and resources below certain limits. This temporary period of eligibility ends the later of March 31, 2023, or when the person’s parole period ends.

Afghan nationals who were admitted to the U.S. as special immigrants (because they either served as a translator or interpreter for the U.S. Armed Forces in Afghanistan or worked for or on behalf of the U.S. government in Afghanistan) are also eligible for SSI benefits for up to seven years from the date they entered as a special immigrant or adjusted to special immigrant status. See POMS SI 00502.106-Time-Limited Eligibility for Certain Aliens.
Bridging the Digital Divide?

Advocates are all too aware of how Supplemental Security Income (SSI) claimants and recipients struggle to afford internet access. The Federal Communications Commission’s (FCC) Affordable Connectivity Program (ACP) may provide a modicum of help for some. According to a recent blog from the Social Security Administration, recipients of Supplemental Security Income (SSI) may be eligible for discounted service. Households participating in Supplemental Nutrition Assistance Program (SNAP), Medicaid, Federal Public Housing Assistance, Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) may also be eligible.

The ACP provides a discount of up to $30 per month toward internet service for eligible households, or $75 per month for households on qualifying Tribal lands. Eligible households can also receive a one-time discount of up to $100 toward purchasing a laptop, desktop computer, or tablet from participating providers. To qualify for this one-time discount, households must contribute more than $10 and less than $50 toward the purchase price.

ODO Reduces Processing Modules

Effective February 13, 2022, the Office of Disability Operations (ODO), Social Security’s largest processing center (PC7), located in Woodlawn, MD, reduced the total number of processing modules from 36 to 30. ODO is responsible for processing disability claims and post-adjudicative actions for wage earners age 54 and younger who live in the United States and its territories. The changes will ostensibly streamline operations, improve overall customer service and efficiency, and address attrition.

The new module Social Security Number (SSN) ranges and telephone contact numbers are at: Representing Social Security Claimants—Processing Center Telephone Contact Information for Claimants Under Age 54 (ssa.gov)

Representatives can contact ODO’s Representative Call Center to inquire about their clients’ cases pending in ODO. For questions about fees, call the appropriate processing module based on the claimant’s SSN.
2022 Deeming Chart Available

Thanks to Leslie Molina-Bailey of the Community Service Society in New York City for sharing the most recent version of the “deeming” chart for Supplemental Security Income (SSI). This chart, which is updated annually, 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, and shows how much SSI for which a beneficiary will be eligible before the “break-even” point. It is available below and at https://empirejustice.org/wp-content/uploads/2022/03/2022-Deeming-Chart.pdf.

Although the chart is a handy reference, the specifics of actual deeming calculations can be quite daunting. Jim Murphy of Legal Services of Central New York has crafted this “deeming workbook” in Excel that will calculate budgets from 2000-2021.

Thanks to both Leslie and Jim for helping demystify SSI’s mystifying deeming rules.

<table>
<thead>
<tr>
<th>PARENT TO CHILD</th>
<th>SPOUSE TO SPOUSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>**</td>
<td>**</td>
</tr>
<tr>
<td>REDUCTION BEGINS</td>
<td>EARNED 1 Parent</td>
</tr>
<tr>
<td>0</td>
<td>1713.02</td>
</tr>
<tr>
<td>0</td>
<td>3363.50</td>
</tr>
<tr>
<td>REDUCTION BEGINS</td>
<td>1</td>
</tr>
<tr>
<td>ELIGIBILITY CEASES</td>
<td>1</td>
</tr>
<tr>
<td>REDUCTION BEGINS</td>
<td>2</td>
</tr>
<tr>
<td>ELIGIBILITY CEASES</td>
<td>2</td>
</tr>
<tr>
<td>REDUCTION BEGINS</td>
<td>3</td>
</tr>
<tr>
<td>ELIGIBILITY CEASES</td>
<td>3</td>
</tr>
<tr>
<td>REDUCTION BEGINS</td>
<td>4</td>
</tr>
<tr>
<td>ELIGIBILITY CEASES</td>
<td>4</td>
</tr>
<tr>
<td>REDUCTION BEGINS</td>
<td>5</td>
</tr>
<tr>
<td>ELIGIBILITY CEASES</td>
<td>5</td>
</tr>
<tr>
<td>REDUCTION BEGINS</td>
<td>6</td>
</tr>
<tr>
<td>ELIGIBILITY CEASES</td>
<td>6</td>
</tr>
</tbody>
</table>

Contact Us!

Advocates can contact the DAP Support attorneys at:

Kate Callery: (585) 295-5727, kcallery@empirejustice.org
Emilia Sicilia: (914) 595-0910 ext. 104, esicilia@empirejustice.org
Ann Biddle: (347) 592-2214, abiddle@lsnyc.org
### Table 3.23 – Fiscal Year 2021 Disability Decision Data

<table>
<thead>
<tr>
<th>Decision Level</th>
<th>Allow</th>
<th>Deny</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Initial Level</strong></td>
<td>36%</td>
<td>64%</td>
</tr>
<tr>
<td><strong>Reconsiderations</strong></td>
<td>13%</td>
<td>87%</td>
</tr>
<tr>
<td><strong>Administrative Law Judge Hearing</strong></td>
<td>51%</td>
<td>8%</td>
</tr>
<tr>
<td><strong>Appeals Council</strong></td>
<td>1%</td>
<td>2%</td>
</tr>
<tr>
<td><strong>Federal Court Decisions</strong></td>
<td>1%</td>
<td>7%</td>
</tr>
</tbody>
</table>

1 Federal Court data includes appeals of Continuing Disability Reviews.

**Data Sources:**

1. Initial and Reconsideration Data: SSA State Agency Operations Report
2. Administrative Law Judge and Appeals Council data: SSA Office Hearing Operations and SSA Office of Analytics, Review and Oversight (OARO)
3. Federal Court data: SSA Office of General Counsel

* Workload volumes for initial claims, reconsiderations, and hearings do not align with performance reported in our key performance measures table because the data definition captures broader activity.

Includes Title II, Title XVI, and concurrent initial disability determinations and appeals decisions issued in FY 2021, regardless of the year in which the initial claim was filed, and regardless of whether the claimant ever received benefits (in a small number of cases with favorable disability decision benefits are subsequently denied because the claimant does not meet other eligibility requirements.) Does not include claims where an eligibility determination was reached without a determination of disability. If a determination or appeals decision was made on Title II and Title XVI claims for the same person, the results are treated as one concurrent decision.

**NOTE:** Due to rounding, data may not always total 100%.

Prepared by: SSA, ODSSI (Office of Decision Support and Strategic Information)
Date Prepared: January 31, 2022
**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/resources_post/recent-2d-circuit-decisions-april-2022/](https://empirejustice.org/resources_post/recent-2d-circuit-decisions-april-2022/)

Synopses of non-precedential summary orders issued by the Second Circuit are available at: [https://empirejustice.org/resources_post/second-circuit-update-april-2022/](https://empirejustice.org/resources_post/second-circuit-update-april-2022/)

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**

**Carr v. Saul**, 141 S.Ct. 1352 (Apr. 22, 2021)

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

**Colgan v. Kijakazi, 22 F.4th 353 (2d Cir. Jan. 3, 2022)**

The court remanded, finding the ALJ erred in failing to accord controlling weight to the opinion of the treating physician under the pre 2017 opinion evidence regulations that applied in this case. The court held the ALJ failed to find good reasons under the old regulations for discounting the opinion of a concurrence specialist that the plaintiff would be off task 33% of the day and absent more than four days per month due to her headaches and other impairments. The ALJ also erred in discounting the opinion because it was presented in “check box” form; the opinion was supported by voluminous treatment notes. The court criticized the ALJ for “cherry-picking” particular instances of improvement to create inconsistencies with the treating source opinion. And it criticized the ALJ for relying too heavily on the opinions of consulting physicians, particularly where the consulting opinions did not address or dispute the crux of the treating source’s opinion.

**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).

**Szepanski 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(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.)
Finding Joy

Just as we were starting to feel optimistic about returning to “normal” life after two years plus of COVID-19, yet another variant has appeared, and cases have again begun to rise. And even when the latest variants seemed less threatening than previous surges, the invasion of Ukraine happened. It seems it is hard to avoid bad news these days. On top of the news, DAP advocates are reminded daily of the often-heart-rending struggles of our clients. There is so much misery in the world right now, many of us may feel guilt in feeling happiness or enjoying ourselves.

But according to Lynn Bufka, a clinical psychologist and associate chief of public transformation at the American Psychological Association (APA), it is not frivolous or selfish to seek happiness. She told the Wall Street Journal that feeling happy or good does not diminish someone else’s pain but in fact makes us feel more connected and perhaps gives us the energy and perspective to help others. And according to Dacher Keltner, professor of psychology and faculty director of the Greater Good Science Center at the University of California, Berkeley, times of stress are exactly the times to cultivate private moments of joy and fulfillment. Positive emotions have many physical and mental health benefits to get us through tough times. In 2019, the Annual Review of Psychology reported that positive emotions are directly linked to better health. And regular activities that you enjoy are important to mental health as well.

How to find joy in these troubling times? Experts advise starting with small steps if need be, such as literally stopping to smell the flowers or enjoying an “awe walk,” focusing on the trees and sky around you. Reconnect with friends or plan regular activities you used to enjoy. Or best yet, do something helpful for someone else, one of the most powerful ways to bring joy to ourselves.

Find your joy, and...
Share it with others!