New Faces Join DAP Statewide Support

The Disability Advocacy Program (DAP) is welcoming new faces this fall, including new Senior Statewide Support Attorney Jennifer (Jenna) Karr of Empire Justice Center (Empire Justice). Jenna started this September to replace Kate Callery.

As one of three Statewide Support Attorneys, Jenna will provide information, technical assistance, training, and support to advocates throughout New York State on matters related to DAP. She will also provide leadership on policy issues, undertake legislative and administrative advocacy and participate in complex litigation. More about the scope of all the services provided by the DAP State Support team is in the article below.

Jenna brings deep knowledge of Social Security law and subject matter expertise to her new role. She has been providing direct representation to clients as part of the DAP Practice Group at Empire Justice since 2015. Her prior legal work included DAP advocacy at the DAP unit of the Legal Aid Society of Northeastern New York from 2008 to 2012. Her direct services work includes many federal court appeals. As a supervisor at Empire Justice, Jenna has provided trainings to advocates internally and elsewhere, and she brings leadership on critical issues facing our clients. She is well-known to the DAP community, and has taken key roles in multiple initiatives, including the launch of a reentry outreach project, and a best practices workgroup with other DAP supervisors across the state.

Jenna will remain based in Western New York, in the Rochester office of Empire Justice. She joins fellow DAP Statewide Support Attorneys Emilia Sicilia of Empire Justice’s Yonkers office and Ann Biddle of the Urban Justice Center (UJC) in New York City.

Ann is a familiar face in the DAP community, well known as a DAP coordinator based at Legal Services NYC. She now becomes a DAP Statewide Support Attorney through UJC.

As an organization, UJC is new to the Statewide Support side of DAP. In July, UJC began providing state support services to DAP providers as a subcontractor to Empire Justice. However, the organization has a long history of providing direct representation to DAP clients with mental health impairments, with significant impact litigation in the realm of disability benefits. This includes a role as lead counsel in Amin v. Colvin, a lawsuit pending against the Social Security Administration (SSA) for its failure to docket non-disability appeals. Prior impact litigation includes Padro v. Astrue, a class action against SSA for systematic denial of due process, and two class ac-

(Continued on page 2)
What is DAP Statewide Legal Support?

Most readers of this newsletter are advocates at a program funded under the Disability Advocacy Program (DAP) in New York State and are familiar with the program and the direct services provided to clients. Many, however, are not necessarily familiar with the statewide support services provided by DAP under a separate contract.

Under the Last Request for Proposals (RFP), 13 DAP providers were granted funding to provide DAP services throughout the state. DAP also funds one agency, the Empire Justice Center (Empire Justice), to provide statewide legal support and administrative services to programs providing direct services under DAP. Empire Justice subcontracts with the Urban Justice Center to help provide the support services in New York Center. The three DAP Statewide Support Attorneys are Emilia Sicilia and Jenna Karr of Empire Justice, and Ann Biddle of the Urban Justice Center (UJC).

What exactly do the Statewide Support Attorneys do? Under the DAP contract, they provide training, information, consultation, electronic database administration and reporting, and legal services to DAP-funded providers. This encompasses many activities, including:

- Publishing of this quarterly newsletter;
- Offering periodic state-wide CLE/trainings;
- Coordinating periodic regional Task Force meetings;
- Providing legal advice and research, and cocounseling on cases involving systemic issues;
- Taking referrals for individual federal court cases;
- Hosting a quarterly DAP Supervisors Forum to discuss current issues, training ideas, updates of national-level advocacy and other developments;
- Participating on the DAP listserv, which is maintained and coordinated by the Western New York Law Center (WNYLC) and the Empire Justice Center;
- Advocating with SSA regional staff regarding systemic issues, and facilitating outreach with local DAP advocates;
- Representing New York DAP advocates as part of a national coalition of SSI Advocates that meets regularly with SSA; and
- Frequent comment-writing and other formal and informal advocacy; and
- Coordinating DAP case data statewide and submitting reports of DAP openings and outcomes to New York State Office of Temporary Disability Assistance (OTDA). See here for the Biennial Report submitted to the Legislature regarding DAP.

In short, DAP Statewide Support is here to help DAP advocates! Be sure to each out to Emilia, Jenna, and Ann with your questions, thoughts, and suggestions.

New Faces Join DAP Statewide Support - Continued

(Continued from page 1)


Looking ahead, DAP Statewide Support will also provide more opportunities for staff at DAP-funded programs to take on training roles, a development intended to increase inclusivity and diversity of DAP presenters, and to provide professional growth opportunities to advocates across the state. We will continue to build community statewide, offering statewide trainings and meetings as well as occasional regional meetings.

DAP State Support at Empire Justice will add another new face this fall with the creation of a new Program Coordinator position. Hiring remains underway for the position, hopefully before the end of the year. This new position will be focused on data reporting and trainings.
Historic COLA Increase for 2023

The Social Security Administration (SSA) announced a record-breaking cost-of-living adjustment (COLA) increase to Social Security and Supplemental Security Income (SSI) benefits for 2023. Monthly benefits will increase an astonishing 8.7 percent, the largest since 1981. Last year’s COLA increase was also a record-breaker at 5.9 percent.

The monthly SSI benefit rate will increase $73, from $841 to $914, compared to last year’s $47 increase. The SSI rate for couples will increase from $1,261 to $1,371. The SSI resource limits remain unchanged at $2,000 for individuals and $3,000 for couples. The New York State supplement (SSP) will continue at $87 for individuals and $104 for couples living alone; the living with others supplements remain at $23 and $46, respectively. We will post the 2023 New York State SSI benefit chart when it becomes available.

Social Security’s disability thresholds are also increasing. Substantial Gainful Activity (SGA) for Non-Blind workers will increase from $1,350 to $1,470 per month. The SGA for Blind workers increases from $2,260 to $2,460 per month. The Trial Work Period (TWP) threshold increases from $970 to $1,050 per month, and the Quarter of Coverage amount will increase to $1,640. The maximum taxable earnings for OASDI (old-age, survivors, and disability insurance) purposes will increase to $160,200 for 2023.

There is more good news for Medicare recipients. The Medicare Part B premium rate will decrease, from $170.10 in 2022 to $164.90 in 2023. Specific information about 2023 Medicare changes is available at www.medicare.gov.

These changes will take effect in January 2023, except for SSI recipients, who normally receive their benefits on the first of the month. Because January 1, 2023, is both a holiday and a weekend, they will receive their benefits two days early, on December 30, 2022! See SSA’s Fact Sheet on 2023 Social Security Changes.
SCOTUS Amends the FRCP for Social Security Appeals

The Supreme Court of the United States (SCOTUS) recently adopted amendments to the Federal Rules of Civil Procedure (FRCP) that will apply to appeals of Social Security claims. The new supplemental rules, which take effect on December 1, 2022, govern all stages of a federal court action under 42 U.S.C. § 405 (g) and are meant to create a simplified, uniform procedure for the district courts to follow.

The current procedure allows each district court, all ninety-four of them, to establish local rules or standing orders governing Social Security appeals. The district courts decide the form of complaints, service, answers, motions, briefing and the timing for each stage. But a study by the Administrative Conference of the United States, a federal agency whose mission is to make government “work better,” showed a lack of relative uniformity throughout the United States. Instead, the districts’ rules vary widely.

Where the new rules conflict with local rules or standing orders, district courts will need to amend. For example, Rule 5 eliminates joint statements of fact “as the means of review on the administrative record,” which some district courts have required. Supplemental rules six through eight establish deadlines to file the plaintiff’s brief (within thirty days of the answer), the commissioner’s brief (within thirty days of the plaintiff’s brief), and the reply brief (within fourteen days of the commissioner’s brief). This change will effectively cut in half the timeframes established by some district courts, including in New York.

The new rules were proposed by the Judicial Conference of the United States. The Judicial Conference is comprised of the Chief Judge of the United States, chief judges from each circuit court of appeals, a district judge from each of the twelve geographic circuits, and the chief judge of the United States Court of International Trade. The Conference, created by Congress in 1922, promulgates policy regarding the administration of federal courts in the United States.

Based on the Administrative Conference’s recommendations, the Judicial Conference proposed supplemental rules that apply exclusively to Social Security appeals. According to the Conference’s Committee on Rules of Practice and Procedure, two questions needed to be answered: whether adopting uniform rules as opposed to allowing district courts to write their own rules was appropriate, and whether the benefit of uniform rules outweighed the presumption of trans-substantivity, i.e., the uniform treatment of all cases under the FRCP.

The Committee decided the benefits of uniform rules for Social Security cases outweighed local autonomy and trans-substantivity and, in August 2020, proposed supplemental rules for public comment. The Judicial Conference reported “modest” response to this request for comment; most district court and magistrate judges supported the new rules. The Conference noted, however, that the Department of Justice (DOJ) opposed based on the theory of trans-substantivity. Instead, the DOJ recommended the development of a model local rule. The National Organization of Social Security Claimants’ Representatives (NOSSCR) submitted comments to the Judicial Conference, emphasizing the need for local discretionary control instead of setting Social Security cases apart. NOSSCR noted there would be less of a need to file an appeal in federal court if SSA complied with their own policies at the administrative levels.

The rules were unanimously approved (the DOJ abstained from voting), adopted by the Supreme Court, and transmitted to Congress. See FRCP Amendments.

Jennifer Karr, Senior Statewide Attorney for DAP, participated in the Western District of New York (WDNY) committee that proposed changes to their Local Rule 5.5 to conform with the new supplemental rules. Other district courts throughout the Second Circuit are presumably making their own changes. Advocates are advised to check their local rules.

Will these changes result in an increase in requests for additional time to meet the new, strict filing deadlines? Please keep us informed of whether your district courts duly grant these requests, or of other challenges faced under the new rules.
A recent article in *The New York Times* highlighted the barriers many recipients of Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) face if they want to marry. The article features a couple that met on-line, fell in love, and became engaged, only to endlessly postpone their marriage because Lori receives Childhood Disability Benefits (CDB) based on a diagnosis at age fifteen of disabling ankylosing spondylitis.

Current laws prevent disabled individuals eligible for CDB – also known as Disabled Adult Children or DAC – from receiving benefits if they marry. A “child” may be eligible for benefits based on the account – or earnings record – of a dead, disabled, or retired parent in several circumstances, including if able to prove disability before age 22. A long-time recipient of SSI, for example, may become eligible for Social Security Title II benefits without an earnings record of their own when a parent dies or retires. The claimant must, however, have become disabled before age 22 and be unmarried. See 42 U.S.C. § 402(d)(1)(B); 20 C.F.R. § 404.351; POMS DI 10115.001.

What if the claimant was married but the marriage ended by divorce or annulment before the application for CDB? Under the Social Security Administration’s (SSA) byzantine rules, the claimant would be eligible. See POMS RS 00203.020. But the claimant would not be eligible if she had previously received benefits under the same wage earner’s account as, for example, a minor whose benefits terminated at age 18, became disabled before age 22, but married and divorced in between. If, however, the marriage was annulled or void, entitlement might be possible. See POMS RS 00203.015. But if the claimant married another CDB recipient, she could be or remain eligible for CDB. See POMS RS 00203.035.

These exceptions, however, do not apply to the majority of current 1.1 million CDB recipients who, like Lori, want to get married. She and her fiancé cannot afford to lose her monthly benefits, or the Medicare coverage that is attached to her continued eligibility. Lori contacted Representative Jimmy Panetta, a Democrat in California’s 20th Congressional district. Earlier this year, he introduced the *Marriage Equality for Disabled Adults Act*, which includes a provision nicknamed “Lori’s Law” that would remove the marriage restriction. But according to Ayesha Elaine Lewis, a staff attorney with the Disability Rights Education and Defense Fund, while change at the federal level is “a real possibility…it will be a long and challenging journey.”

SSI recipients face similar challenges if they want to marry. Under SSI’s strict income rules, any income of their spouses would be “deemed” to them, which could make them ineligible for benefits. [See the April edition of this newsletter for SSA’s deeming guide.] And disabled SSI recipients in relationships are at risk of losing their benefits, and possibly their Medicaid, even if not married under SSI’s “holding out” provisions. Individuals are considered married for SSI purposes and thus subject to deeming rules if legally married or “living together in the same household and holding themselves out as a married couple to the community in which they live.” See POMS SI 00501.150.

Remaining single remains the only viable option for many couples in these situations.
SSA Updates Transgender Guidance

In the July 2022 edition of this newsletter, we reported on the Social Security Administration’s (SSA’s) plans to update its guidance for processing requests for Social Security numbers (SSNs) by transgender individuals. According to a press release issued on March 31, 2022, by Acting Commissioner Kilolo Kijakazi, the agency anticipated that SSA will allow people to self-select their sex on SSNs applications in the fall of 2022. According to a more recent press release issued on October 19, 2022, SSA has implemented this policy change and the new option is now available.

In the press release, Acting Commissioner Kijakazi said: “This new policy allows people to self-select their sex in our records without needing to provide documentation of their sex designation.” People who update their sex marker in Social Security’s records will need to apply for a replacement SSN card. They will still need to show a current document to prove their identity, but they will no longer need to provide medical or legal documentation of their sex designation now that the policy change is in place.

Currently, Social Security’s record systems are unable to include a non-binary or unspecified sex designation. The agency is exploring possible future policy and systems updates to support an “X” sex designation for the SSN card application process.

Send Us Your Decisions!

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

We would love to hear from you!

Contact Jennifer Karr, jkarr@empirejustice.org or Emilia Sicilia, esicilia@empirejustice.org
In yet another in a series of reported decisions, the Court of Appeals for the Second Circuit has reaffirmed the importance of its long-standing “treating physician rule,” as set forth in 20 C.F.R. §§ 404.1527 & 416.927. Although those regulations have been replaced by 20 C.F.R. §§ 404.1520c & 416.920c in claims filed on or after March 27, 2017, the Court of Appeals has continued to review older claims under the prior rule. [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.]

In Rucker v. Kijakazi, 48 F.4th 86 (2d Cir. Sept. 6, 2022), the court found the Administrative Law Judge (ALJ) had failed to assess the plaintiff’s mental Residual Functional Capacity (RFC) properly, particularly regarding her ability to work consistently, as well as her limitations regarding social interactions. Various treating sources had opined that the plaintiff, who has various mental impairments including low intellectual functioning, was extremely limited in terms of work-related activities. The court concluded that substantial evidence did not support the ALJ’s decision that the plaintiff could perform “simple work alone except for normal supervision.” The ALJ failed to identify what evidence supported her conclusion. The court cited Social Security Ruling (SSR) 85-15, which emphasizes the extent to which reactions to demands of work stress are highly individualized. It rejected the Commissioner’s argument that the jobs relied upon by the ALJ to demonstrate the plaintiff’s performance in certain categories that had not been a focus of treatment. Finally, the ALJ improperly relied on some normal mental status examinations and positive progress reports in the face of other, less positive reports and episodes of hospitalizations and suicidal ideation. Nor should the ALJ have relied so heavily on a single consultative examination without any effort to reconcile the differences with the treating opinion.

The court agreed with the District Court that substantial evidence supported the ALJ’s determination that the plaintiff’s physical limitations were not severe enough to limit her RFC. It thus remanded only for consideration of her mental RFC.

(Continued on page 8)
Remand Order is Appealable

The Court of Appeals for the Second Circuit offered a primer on jurisdiction in a summary order affirming the district court’s decision remanding the claim. *Graces v. Commissioner of Social Security*, 2022 WL 4350109 (2d Cir. Sept. 20, 2022). The pro se plaintiff had appealed the decision finding the Administrative Law Judge (ALJ) had failed to develop the record or comply with the treating physician rule, presumably seeking reversal rather than remand. Although the Court of Appeals declined to do so, it refused to dismiss the appeal on jurisdictional grounds. It rejected the Commissioner’s argument that the plaintiff could not appeal a favorable—or at least partially favorable—decision.

The court reviewed the basis of its jurisdiction, concluding the plaintiff may appeal a “sentence four” remand, which gave her some but not all the relief she requested. Citing *Melkonyan v. Sullivan*, 501 U.S. 89, 99-100 (1991), the court explained the distinction between remands under sentence four versus those under sentence six of 42 U.S.C. § 405(g). Under sentence four, a district court may remand in conjunction with a decision affirming, modifying, or reversing the agency decision, while under sentence six, a court may remand in light of additional evidence without making a substantive ruling. Remands under sentence four are final and appealable, while those under sentence six are not. See *Raitport v. Callahan*, 183 F.3d 101, 103-04 (2d. Cir. 1999).

The Court of Appeals concluded that the district court had not abused its discretion in remanding the claim and affirmed its decision.

Another great decision for Attorney Peter Gorton of Binghamton! But advocates should note a rather ominous dissent by Judge Menashi, former clerk to Supreme Court Justice Samuel Alito and appointed to the Second Circuit by former President Trump. He criticized the court, claiming it misread the ALJ’s decision and that it substituted its own judgment for that of the agency by reweighing the evidence. He reviewed both the circuit and ALJ decisions in great detail, arguing that there was more than enough evidence, under the admittedly low bar of the substantial evidence standard, for a reasonable person to conclude the plaintiff could work. He also argued that nothing in the treating physician rule justified the court’s departure, in his opinion, from the substantial evidence standard; the rule did not override the standard but rather incorporated it. He criticized the majority for remanding the claim when it apparently concluded no reasonable person could accept the evidence as adequate, claiming the court was turning judicial review into a “ping-pong game.” We hope his dissent is not a sign of things to come…

“Old” Treating Physician Rule - Continued

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SSAB Encourages SSA to Use Data to Assess Equity

The Social Security Advisory Board (SSAB) is a bipartisan, independent federal government agency established in 1994 to advise the President, the Congress, and the Commissioner of Social Security on matters of policy and administration of the Old-Age, Survivors, and Disability Insurance and the Supplemental Security Income programs. The Board has seven members, appointed by the President, Senate, and House of Representatives. Among its functions is analyzing the Social Security Administration’s (SSA’s) retirement and disability programs and making recommendations, including recommendations on the quality of services that SSA delivers to the public. In that role, the SSAB recently encouraged SSA to measure the impacts of service changes on different populations to inform program administration. See Using Evidence to Improve Service Equity (September 2022).

In its three-part paper, the SSAB reviewed federal management initiatives in the context of SSA. It described administration and agency priorities across customer experience, evidence, and equity. In December 2021, the Biden administration released an executive order (EO) on prioritizing customer experience. The EO required SSA to analyze all services that require original or physical documentation or an in-person appearance and recommend reforms where statutorily feasible. SSA was also directed to develop a mobile-accessible, online process so someone applying for or receiving services from SSA can upload any form, documentation, evidence, or correspondence without traveling to a field office. These changes should give SSA new and better data on how people interact with the agency over time. The Board encouraged SSA to examine the differences between people’s perceptions of the agency’s services and its performance metrics.

The paper also emphasized the Office of Management and Budget’s (OMB) 2021 emphasis on “learning agendas” to identify and prioritize strategies for answering critical policy questions relevant to the agency’s mission and operation. SSA published its learning agenda in March 2022, with six of its ten priority questions supporting the agency’s strategic goal to optimize customer service. The SSAB also reviewed the President’s and OMB’s executive orders (EO) to incorporate a comprehensive approach to equity in all planning. [President Biden’s EO and SSA’s reaction have been discussed in prior editions of this newsletter.]

In the second part, citing challenges faced by SSA during the COVID-19 pandemic, the SSAB noted significant downward trends in the numbers of people receiving benefits. Disability (DI) awards fell 15 percent in 2021 after falling 11 percent in 2020. Supplemental Security Income (SSI) awards have fallen even more sharply — 27 percent in 2021 after falling 18 percent in 2020. [See the January 2021 edition of this newsletter for more on the decline in SSI applications.] The SSAB encouraged SSA to review how barriers to non-in-person service affected access, quality, and perceptions among various population groups. It recommended that SSA review, expand, and make public its research to examine how SSA’s program administration exacerbates or reduces existing disparities in its service delivery.

SSA needs to understand service channel preferences among the various populations served by the agency. Those channel preferences include on-line services such as mysocialsecurity, in-person field office service, 800 number and field office phone service, vid-
Data to Assess Equity - Continued

(Continued from page 9)

eo services, mail services, and direct and third-party outreach. Each category presents challenges to some claimants, including lack of internet access or literacy, for example. SSAB recommended that before SSA implements any changes in service delivery, it should ensure it has collected the appropriate data to evaluate whether the service change affects how different people access and use its services.

Finally, the SSAB addressed opportunities SSA has to measure whether the intended impact of its services is equitably distributed among the public. It acknowledged that assessing whether SSA provides services equitably is difficult when the agency does not comprehensively collect or publish program data by race, ethnicity, and other population characteristics that correlate with underserved populations. [See prior editions of this newsletter for further discussions of lack of SSA data.] While acknowledging that SSA is making slow progress with data exchanges and voluntary information to collect the data, it recommended that SSA also examine the share of service variations across socioeconomic groups that cannot be associated with observable applicant and case characteristics, such as individual LGBTQ+ communities and smaller racial and ethnic groups.

The SSAB made seven specific recommendations to SSA that are available in the report.

Lawsuit Alleges Fraud in Consultative Examinations

Don’t we all complain about consultative examinations (CEs), the one-time examinations ordered by the Disability Determination Services (DDSs) in disability determinations? Either they are too short, or a client reports they never said “that,” or they did not have an interpreter? They are also often ordered in cases where there is already an opinion from the treating physician. See the April 2022 edition of this newsletter summarizing a recent position paper by New York Legal Assistance Group (NYLAG), the Urban Justice Center (UJC), and Community Legal Services of Philadelphia (CLS) raising these and other CE concerns.

These concerns are shared by advocates around the country. BurnettDriskill, a Missouri law firm, has filed a series of lawsuits against Midwest CES, the company that contracts with the Missouri’s Disability Determination Services (DDS). The suits allege that Midwest CES committed fraud in its consultative exams. The law firm recently filed a lawsuit, Jodie Murrill v. Midwest CES, under the False Claims Act, which allows private individuals, on behalf of the United States and taxpayers, to sue an entity that is defrauding a government program. To back up its allegations, the lawsuit relies on over 250 individuals who have reported serious allegations against Midwest CES, including the submission of reports attesting claimants were able to button their clothes despite not wearing clothing with buttons or that they could turn doorknobs despite there being no doorknobs in the facility. The lawsuit is pending in the United States District Court for the Western District of Missouri.

A number of the lawsuits are currently pending. The Social Security Administration has not commented although the President of Midwest CES has responded to the press, claiming his company helps to prevent fraud.
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 duration requirement applies to the inability to engage in SGA as well as the underlying impairment itself.
SECOND CIRCUIT DECISIONS

Schillo v. Kijakazi, 31 F.4th 64 (2d Cir. Apr. 6, 2022)

The court affirmed the District Court decision under the pre 2017 opinion evidence regulations that applied in this case. It 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 check-box 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, and the plaintiff’s testimony. 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.


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 concussion 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).

Sezepanski 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.

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.”
Is Your Blood “Sweet” or Do You Eat Too Much Spinach?

End Note

Do you ever wonder why mosquitoes attack some people but not others? Leslie Vosshall, the head of Rockefeller University’s Laboratory of Neurogenetics, and Maria Elena Debaldia conducted a study to test the leading theory: female mosquitoes (males don’t bite) are attracted to body odor. The study lasted three years and followed one participant in particular whose scent was 100 times more attractive as compared to the least attractive participant. The participants were asked to wear stockings on their arms for up to six hours a day. The stockings were then used in a two-choice olfactometer assay. The results showed it was the body odor of the participant that attracted the mosquitoes. Specifically, the scientists identified the presence of carboxylic acids on their skin, which is found in spinach, vitamin C, vinegar, aspirin, and lemons. Now you know!

Contact Us!

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