

► April 2021
Issue 2 2021

DISABILITY LAW NEWS

New Musculoskeletal Listings Now in Effect

In the January edition of this newsletter, we reviewed the Social Security Administration's (SSA's) new listings for claims involving musculoskeletal impairments published on December 3, 2020. Although we had some hope these regulations would be withdrawn by the new administration, they did indeed go into effect on April 2, 2021.

On that effective date, SSA issued further guidance on the new listings, including Emergency Message (EM) 21027. The EM provides additional guidance for evaluating the "documented medical need" for a wheeled and seated mobility device (WSMD) and applying the "close proximity of time" standard with respect to the imaging requirement.

The new listing added the requirement to show one of the following: the need for a two-handed assistive device, need for a one-handed assistive device plus inability to use the other hand, or inability to use either hand for work-related activities. When evaluating function, the EM provides for consideration of the "most restrictive" assistive device when the claimant has a documented medical need. According to the EM, the "most restrictive device" is the device that involves the greatest limitation on the claimant's use of the upper extremities, which is the focus of the functional criteria. "Documented need" does not require a prescription for specific assistive device, but the evidence must describe

any limitation(s) in upper or lower extremity functioning and the circumstances for which the claimant needs to use the assistive device. Evidence could include:

- Documentation of the use and description of any assistive device(s);
- Inability to bear weight on the lower extremities;
- Instability;
- Inability to rise from a seated position without assistance or the use of both arms;
- Significant weakness in the legs; or
- Amputation of the lower extremities at or above the ankle with inability to use a prosthesis.

The new listing also adds the requirement that all applicable listing requirements must be present simultaneously, or "within close proximity of time." "Close proximity" means all the relevant criteria must appear in the medical record within a four-month period. According to the EM, in claims with imaging requirements, adjudicators should determine whether it can be "reasonably expected" that the findings on imaging were present within a close proximity of time of the other elements. But a claim should not be denied, or additional development required, simply because the imaging was not taken within a "close proximity of time" to the other required listing elements. "In most cases, no additional imaging or development is necessary

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Disability Law News®
is published four times per year
by:

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April 2021 issue.
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www.empirejustice.org

New Musculoskeletal Listings - Continued

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unless there was a potentially corrective surgery or other intervention between the timeframe of the imaging and the other findings.” In determining whether it can be “reasonably expected” that the findings were present within a close proximity of time of the other elements, the adjudicator should consider factors including, but not limited to:

- Are the findings consistent with the other evidence? If the signs and symptoms are consistent with what we would expect from the specific findings and there is no other explanation for the signs and symptoms (for example, a recent injury), then you will generally “reasonably expect” that the findings would be present.
- What kinds of findings were present on imaging? If the findings on imaging are the kind that generally remain static or worsen, you will generally find that you can “reasonably expect” them to continue to be present. If the findings are the kind that can improve over time, you might not “reasonably expect” them to continue to be present, particularly if they are far removed from the date of adjudication.
- How recent is the imaging? If the findings are the kind that may improve over time or if the imaging is several years old, you might not “reasonably expect” the findings to remain present.
- What is the longitudinal medical history? If there was surgery or other intervening treatment that could improve the findings that were seen on imaging, you will generally not “reasonably expect” that the findings would remain present.

SSA also issued a series of Q&As about the new listings. According to SSA, 90% of claims allowed due to musculoskeletal impairments are made using the medical-vocational guidelines at Step 5 of the sequential evaluation, which have not changed. Only 10% are approved due to meeting or medically equaling a musculoskeletal listing. SSA does not expect this to change. SSA also cites conclusions of the SSA Office of Chief Actuary (OCACT) estimating there will be a small net increase in SSI awards under the new listings, while there will be a small net decrease for SSDI. The OCACT also claims there is no evidence to indicate that determinations under the new listings will differ in a significant way by age, sex, or race/

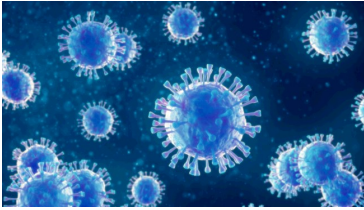
ethnicity. Of note, it appears the OCACT based its estimates on a study done by SSA, using the earlier version of the listings. And given that SSA has not tracked race data for a number of years, it is curious how OCACT was able to extrapolate any information about race and ethnicity. See page 4 of this newsletter. The Q&As are available [here](#) and the OCACT report [here](#).

Advocates should be aware that the new regulations will apply to all claims that were pending on the April 2, 2021 effective date. So, for example, if a hearing was held in February 2021 in which an advocate argued a claim under the old listings, but a decision was not issued before April 2, 2021, the new regulations will govern the decision. It is not clear whether SSA has issued guidance to Administrative Law Judges (ALJs) about scheduling supplemental hearings or sending post-hearing interrogatories to medical experts. Advocates with pending claims may want to consider requesting supplemental hearings if it appears, for example, different arguments or additional evidence would be necessary to prove pending claims under the new listings.

The new listings also provide that federal courts will review decisions using the rules that were in effect at the time the decisions were issued. In remanded claims, these final rules will be applied to the entire period at issue. Query whether SSA has the authority to create retroactive rules? Remanded claims applying the new rules could lead to further litigation regarding retroactivity.



One Year Later, SSA Remains Largely Closed to Public



More than one year since the beginning of the COVID-19 pandemic, the Social Security Administration remains largely closed to the public. SSA and advo-

cates are continuing a shift toward video hearings when possible, and at the field office (FO) level, in-person services are available by appointment only and for dire need circumstances. Here are the key developments since our last update in [January 2021](#).

EM Regarding Long-Term COVID-19

SSA has issued an Emergency Message (EM) regarding the adjudication of claims involving a diagnosis or allegation of COVID-19. See article on page 7 of this newsletter.

OHO Operations Continue

As of March 8, 2021, OHO has resumed issuance of dismissals for untimely filed hearing requests and failure to appear at a hearing. ALJs will now be required to develop the record for good cause by issuing a Request to Show Cause. See article on page 7.

OHO is holding hearings on non-disability hearings and it has provided guides for [video](#) and for [telephone hearings](#).

As of March 2021, claimants can access exhibits through their mysocialsecurity.gov accounts

New e-1696 Form

SSA has a new electronic version of the Appointment of Representative Form, an [e-1696](#). Per SSA, representatives can use this form to initiate an SSA-1696 notice of appointment online where they and their claimants can complete, sign, and submit the form electronically with no personal contact. This is a two-step process the representative must initiate. Once the claimant completes the second step and submits the signed document, the service will automatically route the document for processing.

As with many of these “innovations,” it may take time for Field Offices to learn how to effectuate the changes. Advocates who have tried to use the new form have run into difficulties. Shandanette Chase of

Legal Services NYC shares this tip: open your e-signed PDF in Chrome to avoid needing to re-enter a password. Please keep us informed of other challenges – or successes – you encounter with this and other new technologies. See also the [EM](#) on the topic.

Unemployment Benefits

Clients should be reminded that receipt of unemployment benefits (UIB) will impact the amount of Supplemental Security Income (SSI) a person may receive. SSA counts UIB dollar-for-dollar against SSI benefits (after the \$20 unearned income disregard) and does not apply the same favorable exemptions it applies to wages. However, SSA is rolling out a new policy to disregard federal COVID UIB as disaster and emergency relief funds and not count it as income or a resource (for a certain period of time).

With the dramatic increase in UIB claims, there have been multiple fraud schemes in which filers submit applications for UIB using other people’s information. SSA’s website provides steps to take if a client believes they are a victim of a fraud scheme.

Field Office Services

SSA is temporarily allowing people to mail in an original or certified secondary identity document with their paper SSN application (SS-5) if they cannot request a replacement SSN card online, or if they are unwilling or unable to mail the primary identity document. See the SSA COVID website for a list of documents. Acceptable documents for name changes are also listed. See [EM 21018](#).

From December 2020 through March 2021, SSA mailed outreach notices to people it has identified as potentially eligible for SSI.

SSA has listed links to iAppeals and paper forms on its COVID website for all levels of appeals and waivers.

Stimulus Payment

The Internal Revenue Service is issuing a third stimulus payment to recipients of SSI and Social Security Disability this month. Payments will generally issue the same way as benefits are paid. Prepaid debit cards will not be issued this round.

(Continued on page 4)

SSA Issues Factsheets Based on Demographic Data

On March 31, 2021, the Social Security Administration (SSA) posted new factsheets with data on poverty, benefits, and other information on Social Security disability (SSD) beneficiaries for different groups (African Americans, Women, Hispanics, Educational Status, Widow(er)s, Military Veterans, and Age Group). The postings are notable because of SSA's failure in recent years to collect data related to several demographics, including race. SSA stopped reporting this data for Supplemental Security Income in 2002 and for Old Age, Survivor's, and Disability Insurance in 2009.

The new factsheets are based on data from a recent Census household survey (CPS) that is matched to SSA administrative records for disability beneficiaries, including disabled workers, disabled widow(er)s, and disabled adult children. Beneficiaries who are concurrent recipients of SSI are included. The data does not appear to include SSI-only recipients.

As reported in our October 2020 and January 2021 newsletters, advocates have been calling on SSA to resume collecting and reporting data concerning race and ethnicity, noting that it is a crucial first step to addressing inequities. Historically there have been known disparities in allowance rates at SSA's initial application stage and hearing levels. President Biden's Executive Order on Advancing Racial Equity and Support for Underserved Communities, in establishing an interagency working group on data, cited the lack of data as impeding efforts to measure and advance equity.

While it is important for advocates to continue to press SSA to make its own data available across all its programs, these new factsheets do provide helpful analysis. For example, they reveal that about one quarter of African Americans on Social Security disability are concurrent SSI recipients. The ability to match this data also suggests it could be looked to for other analyses, at least within the SSD program.

SSA Halts “No Match” Letters

The Social Security Administration (SSA) has announced it will discontinue mailing employers educational correspondence (EDCOR). EDCOR notices informed employers that name/SSN combinations on a submitted W-2 cannot be matched to SSA's records. Advocates had objected to these “no-match” letters. They argued the letters did not address SSA's stated concern that all employees receive full benefits to which they are entitled. And they expressed concern that employees, including U.S. Citizens, would be fired based on an employer's incorrect assumption that a no-match letter indicates the worker lacks immigration status.

Advocates also feared the no-match letters would make employees more vulnerable to employer abuse. They encouraged SSA not to divert resources from the agency's core mission towards enforcing the prior Administration's immigration enforcement agenda. Advocates suggested SSA could instead send a similar letter known as Decentralized Correspondence (DECOR) that could accomplish the same purpose without risk to employees.

Empire Justice Center was one of many agencies that signed onto a letter in 2019 urging SSA to end the “no match” letters.

One Year Later - Continued

(Continued from page 3)

There are reports of SSA erroneously counting the stimulus payment toward the SSI resource limit. Advocates should look out for this issue and refer to EM 20014,

which instructs that the funds are not to be counted for 12 months. Please also share any instances of these improper suspensions or overpayments with Michelle Spadafore at mspadafore@nylag.org.

2021 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.

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 in 2021.

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

PARENT TO CHILD					SPOUSE TO SPOUSE				
	*	EARNED 1 Parent	EARNED 2 Parents**	UNEARNED 1 Parent	UNEARNED 2 Parents**	EARNED OSS B	EARNED OSS C	UNEARNED OSS B	UNEARNED OSS C
REDUCTION BEGINS	0	1713.02	2507.02	834.01	1231.01	879.02	879.02	417.01	417.01
ELIGIBILITY CEASES	0	3363.50	4157.50	1659.25	2056.25	2529.50	2773.00	1242.25	1364.00
REDUCTION BEGINS	1	2110.02	2904.02	1231.01	1628.01	1276.02	N/A	814.01	N/A
ELIGIBILITY CEASES	1	3760.50	4554.50	2056.25	2453.25	2926.50	N/A	1639.25	N/A
REDUCTION BEGINS	2	2507.02	3301.02	1628.01	2025.01	1673.02	N/A	1211.01	N/A
ELIGIBILITY CEASES	2	4157.50	4951.50	2453.25	2850.25	3323.50	N/A	2036.25	N/A
REDUCTION BEGINS	3	2904.02	3698.02	2025.01	2422.01	2070.02	N/A	1608.01	N/A
ELIGIBILITY CEASES	3	4554.50	5348.50	2850.25	3247.25	3720.50	N/A	2433.25	N/A
REDUCTION BEGINS	4	3301.02	4095.02	2422.01	2819.01	2467.02	N/A	2005.01	N/A
ELIGIBILITY CEASES	4	4951.50	5745.50	3247.25	3644.25	4117.50	N/A	2830.25	N/A
REDUCTION BEGINS	5	3698.02	4492.02	2819.01	3216.01	2864.02	N/A	2402.01	N/A
ELIGIBILITY CEASES	5	5348.50	6142.50	3644.25	4041.25	4514.50	N/A	3227.25	N/A
REDUCTION BEGINS	6	4095.02	4889.02	3216.01	3613.01	3261.02	N/A	2799.01	N/A
ELIGIBILITY CEASES	6	5745.50	6539.50	4041.25	4438.25	4911.50	N/A	3624.25	N/A

REGULATIONS

Waiting Period for Claimants with ALS Eliminated

Social Security Disability Insurance (SSDI) claimants know all too well about the five-month waiting period. Pursuant to 42 U.S.C. § 423(c)(2), disability benefits will not be paid for five consecutive months after the established date of onset of disability. A claimant who is found disabled as of January 1, 2021, for example, will not be eligible for benefits until June 2021. Advocacy to “Stop the Wait” is ongoing. NOSSCR and others are hoping to get the Stop the Wait Act re-introduced in Congress, which would address both the disability five-month waiting period and the Medicare twenty-four month waiting period.

But claimants diagnosed with amyotrophic lateral sclerosis (ALS) will no longer have to wait five months to begin collecting their SSDI benefits. The

ALS Disability Insurance Access Act of 2019 (Pub. L. 116-250) was signed into law in December 2020. And in March, President Biden signed a technical amendment (Pub. L. 117-3), making the elimination of the five-month waiting period applicable to claims based on ALS approved on or after July 23, 2020, regardless of when the claim was filed. The original legislation eliminated the waiting period only for claims filed on or after December 23, 2020. The Social Security Administration (SSA) has issued Emergency Message (EM)-21003 REV 2, which explains these revisions to adjudicators.

Bridging the Digital Divide



The Federal Communications Commission (FCC) has announced a new Emergency Broadband Benefit Program for eligible households to receive a monthly discount off the cost of broadband service from an approved provider. The program, which will start on May 12, 2021, will provide eligible households with discounts of up to \$50 a month for broadband service, and up to \$75 a month if the household is on Tribal lands. It also will provide a one-time discount of up to \$100 on a computer or tablet for eligible households.

The Emergency Broadband Benefit Program is open to households that participate in an existing low-income or pandemic relief program offered by a broadband provider; Lifeline subscribers, including those that are on Medicaid or accept SNAP benefits; households with kids receiving free and reduced-price lunch or school breakfast; Pell grant recipients; and those who have lost jobs and seen their income reduced in the last year.

Eligible households can enroll through an approved provider or by visiting <https://getemergencybroadband.org>

SSA Issues EM on Cases Involving COVID-19

On April 16, 2021, the Social Security Administration (SSA) issued Emergency Message (EM) 21032, Evaluating Cases with Coronavirus Disease 2019 (COVID-19), providing guidance regarding the adjudication of claims involving an allegation or diagnosis of COVID-19. While there are no changes made under this EM, the guidance outlines a number of existing rules and policies that may come in to play with this new category of claims. Effective December 16, 2020, SSA has been flagging cases where there is an allegation of COVID-19 as a medical condition. See EM 20060.

There are a few aspects of the EM-21032 that could prove useful. First, the EM clarifies that a diagnostic test with a positive result for the virus is not required. A medically determinable impairment can be established by a positive test but also by a diagnosis “with signs consistent with COVID-19 (e.g., fever, cough, etc.)” This is important given the unreliability and unavailability of testing, particularly at the start of the pandemic. It also reminds adjudicators of the policies allowing for onset date to be inferred when medical evidence is not available. *Id.*, citing to POMS DI 25501.450.

Also helpful is the EM’s discussion of the durational requirement. It notes that the long-term effects of COVID-19, a new impairment caused by COVID-19, or any pre-existing impairment that worsened due to COVID-19 should be considered related to the period of acute COVID-19 infection for purposes of determining the durational period. As an example, it warns of the rehabilitation period that could be necessary following a period of ventilator therapy.

Rather than an exhaustive list of symptoms, SSA cites to the CDC’s current guidance regarding long-term effects for the latest information and acknowledges that the medical community is still learning about the disease. The EM recognizes the uncertain and evolving nature of the disease and its long-term effects. “While COVID-19 is primarily a respiratory disease, emerging data suggests that it may also lead to cardiovascular, renal, dermatologic, neurological, psychiatric, or other complications.”

The EM does recognize some specific symptoms commonly occurring among so-called “long-haulers”: fatigue, shortness of breath, joint pain, and difficulty thinking and concentrating. Yet, a major

concern among advocates is that subjective symptomatology such as these are routinely discounted by adjudicators. A recent article about these claims discussed this issue and asked whether an influx of COVID-19 claims may result in policy reform. SSA’s current regulations and policies – most especially its demotion of treating physician evidence and emphasis on objective evidence – represent serious obstacles to changing how SSA evaluates cases involving subjective symptoms.

These challenges are compounded by lack of treatment and medical records to document the full extent of a claimant’s limitations. This is especially so for low-income and Black and brown claimants, whose claims are often hindered by the lack of access to treatment and other disadvantages related to poverty and racial inequality.

EM-21032 does make some mention of lack of treatment in the context of COVID-19. Citing to POMS DI 24501.021C, the EM instructs adjudicators to consider:

[i]ssues related to the COVID-19 pandemic, including, but not limited to, evictions, medical facility closures, quarantines, job loss, and insurance loss, may affect a person’s ability to seek treatment to minimize symptoms. Consider whether a person’s lack of treatment is the result of these COVID-19 related issues when evaluating the consistency of his or her statements with the objective medical evidence.

Adjudicators are also encouraged to look at equivalence if particular evidence is not available to satisfy a listing. As there is no specific listing for COVID-19, claims should be reviewed for medical equivalence to existing listings. “COVID-19 may affect respiratory, cardiovascular, renal, neurological, or other body systems. In most cases, the listing relevant to a new MDI(s) caused by COVID-19, or any MDI(s) that has worsened because of COVID-19 will be the appropriate listing to consider.”

SSA has stated that the EM was developed based on information from various resources including the CDC, the National Institutes of Health, and SSA’s National Disability Forum outreach events held on September 22, 2020, November 18, 2020, and April

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Changes Proposed to TPD Student Loan Discharge Program

Prior editions of this newsletter have addressed concerns about the availability and fairness of the procedures for finding permanently disabled Social Security Disability and SSI beneficiaries eligible for discharge of their federal student loans. Beneficiaries and advocates often face unreasonable burdens, not the least of which may be proving disabilities are total and permanent. [See the [June 2016 edition](#) of this newsletter for tips on how to help, including ways of determining if the beneficiary's disability finding was classified as Medical Improvement Not Expected.] Advocates argue that the Department of Education should be able to identify eligible beneficiaries, sparing them these bureaucratic challenges.

Last [January](#), we reported on complaints about the extent to which the Department of Education has failed to help potentially eligible borrowers get the relief to which they are entitled. Now student loan advocacy organizations, including Student Defense, Community Legal Aid Society of Delaware, and Justice in Aging, jointly submitted a Rulemaking Petition under Section 553(e) of the Administrative Procedure Act, to pressure the Education Department to streamline the Total & Permanent Disability (TPD) Discharge program.

The petition calls on the Department to use the information it already has regarding the disabled status of

these 400,000 borrowers to automatically forgive their student loan debt. In 2019, the Department was able to implement widespread automatic TPD discharges for borrowers identified by the Veteran's Administration as totally and permanently disabled due to a service-connected disability. Advocates argue that the Department should enact a similar automated discharge system for borrowers determined to be disabled by the Social Security Administration as well.

The Biden Administration had announced temporary measures to loosen the TPD requirements by temporarily waiving post-discharge monitoring periods during the current COVID-19 pandemic. Beneficiaries whose student loans are in a discharged status must submit ongoing annual paperwork for three years following their discharge to certify their disabled status and employment earnings (if any). Approximately 41,000 disabled borrowers had their loan reinstated during the pandemic. Retroactive to March 2020, borrowers who had their discharges reversed for failure to submit required paperwork are eligible to have loans re-discharged.

Advocates have urged the Department of Education to do more to identify the approximately 400,000 disabled beneficiaries potentially eligible for TPD.

SSA Issues EM on Cases Involving COVID-19 - Continued

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15, 2021.

EM-21032 has a retention date of October 16, 2021. SSA may still issue an SSR on the topic but SSR development and issuance is a relatively long process

and SSRs are not as easy to revisit as an EM. With information about both the science and claims still changing, it is likely that we will see this EM renewed and updated prior to the potential issuance of an SSR.

Send Us Your Decisions!

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

We would love to hear from you!

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

ADMINISTRATIVE DECISIONS

Appeals Council Remands Claim

Vianka Colon, a paralegal with the New York Legal Assistance Group, recently received that most rare of decisions - a fully favorable from the Appeals Council. Vianka's client has bipolar disorder, PTSD, OCD, generalized anxiety disorder, major depressive disorder, antisocial personality disorders, and various physical complaints. Yet, the ALJ found the claimant did not suffer from a severe psychiatric impairment at step two and denied the claim because she could adjust to other work in the national economy.

Vianka appealed the case to the Appeals Council and wrote a persuasive brief in which she argued that the claimant's mental impairments were indeed severe, as supported by the medical record. In addition, she ar-

gued that the ALJ failure to adequately consider the claimant's subjective complaints was inconsistent with SSR 16-3p. The ALJ found the psychiatric opinions in the record only somewhat persuasive under the new evaluation of opinion evidence regulations because their "opinions appear to be based more on the claimant's subjective complaints than clinical observations." Upon review of her argument, the Appeals Council sent the case to a medical examiner (ME). Based on the hearing record, including the psychiatric opinions the ALJ had found only somewhat persuasive, the ME found the claimant's impairments met Listings 12.04, 12.06, 12.08, and 12.15.

Congratulations to Vianka for her great advocacy.

ALJ Reopens Claim

Michael Telfer of the Legal Aid Society of Northeastern New York not only convinced an Administrative Law Judge (ALJ) to grant his client's disability claim; he also persuaded the ALJ to reopen two prior claims.

Mike's client had filed an application for Social Security Disability Insurance (SSDI) in June 2016 and concurrent applications for SSDI and SSI benefits in March 2018 and October 2019. Mike's case involved an appeal of the October 2019 applications, which alleged an onset of December 2017. The claimant had alleged a September 2015 onset in the earlier applications.

Mike relied on HALLEX I-2-9-20(A), arguing that reopening was required because the alleged onset date of December 2017 was during a previously adjudicated period. Per the HALLEX, "[i]f the claimant raises the issue of reopening in a new application (express or implied), the date of the request for reopening is the filing date of the new application."

Mike argued his client's current applications should be considered a timely implied reopening request for the denials dated July 2018. Per 20 C.F.R. §§

404.988(b) & 416.1488(b), a claim can be reopened within four years (SSDI) or two years (SSI) of the initial denial upon a showing of good cause. Good cause includes the furnishing of new and material evidence. 20 C.F.R. §§ 404.989 & 416.1489. Mike provided new and material evidence supporting the 2016 and 2018 applications. It included records from the client's treating physician concerning her treatment for Multiple Sclerosis during the 2016 application period, as well as records from the Department of Social Services (DSS). Mike argued this new and material evidence relating to an earlier period implied his client was requesting reopening of a prior decision and should be considered a timely implied request for reopening, citing HALLEX I-2-9-10(B).

The ALJ granted a fully favorable decision at the hearing, including reopening both prior applications and awarding retroactive benefits under them. The client is still waiting for her Title II Award Notice but was issued \$27,074 in SSI retroactive benefits. Great work on Mike's part combing through some of these more obscure HALLEX sections to win big for his client.

COURT DECISIONS

SCOTUS Rules Against Issue Exhaustion

Is a claimant 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)? No, according to the recent decision of the U.S. Supreme Court in *Carr v. Saul*, 141 S.Ct. 1352, 2021 (Apr. 22, 2021). Justice Sotomayor delivered the opinion, holding petitioners had not forfeited their claims.

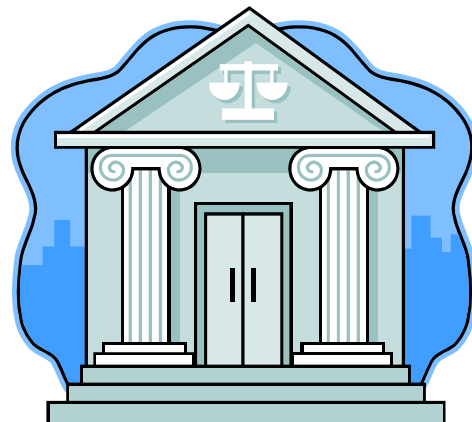
The issue in question in *Carr* and its companion cases was whether the ALJ was properly appointed. In 2018, the U.S. Supreme Court ruled that the appointment of Security and Exchange Commission (SEC) ALJs was unconstitutional under the Appointments Clause of the U.S. Constitution. *Lucia v. Securities and Exchange Commission*, 138 S.Ct. 2044 (2018). Although *Lucia* did not address Social Security Administration (SSA) ALJs, SSA responded by “re-appointing” its ALJ corps on July 16, 2018. See the [July 2018](#) and [April 2019](#) editions of this newsletter for more on the implications of the decision on the constitutionality of SSA ALJ appointments, including Social Security Ruling (SSR) 19-2p.

In the aftermath of *Lucia*, 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. These plaintiffs were essentially precluded from doing so since their administrative proceedings had already been concluded by the time *Lucia* was decided. But Courts of Appeals for the Eighth and Tenth Circuits adopted the Commissioner’s forfeiture argument. The Third, Fourth, and Sixth Circuits held the opposite. The Supreme Court resolved the conflict in the circuits by holding that given the non-adversarial nature of SSA hearings, issue-exhaustion is not required.

The Court relied heavily on its earlier decision in *Sims v. Apfel*, 530 U.S. 103 (2000), which found that issue-exhaustion at the Appeals Council was not re-

quired. Both *Sims* and *Carr* emphasized that issue exhaustion is not mandated by either statute or regulation. In both cases, the Court refused to impose a judicially created issue-exhaustion requirement in Social Security appeals. As in *Sims*, the Court emphasized the non-adversarial nature of the proceedings. Since the hearings are more inquisitorial in nature, they are not comparable to judicial proceedings. It also considered the extent to which the ALJ would be ill-suited to decide such a constitutional question, and the futility of an issue-exhaustion requirement. The Court found these two points of particular importance in “tip[ping] the scales” against imposing an issue-exhaustion requirement. Justice Sotomayor noted, however, that in the sphere of more routine, non-constitutional objections in individual benefits determinations, “the scales might tip differently.” The Court also rejected the Commissioner’s argument that the plaintiff’s challenges were untimely.

Ultimately, all nine justices concurred with the outcome of Justice Sotomayor’s opinion, although one needs to score card to follow who concurred with which section and who did not. Scholars of Supreme Court opinions and politics will undoubtedly enjoy the nuances. But the over-all outcome is good news for claimants, especially *pro se* claimants, for whom a requirement that all legal issues must be raised at the administrative levels could be more than challenging.



Supreme Court to Rule on SSI Expansion in Territories

On March 1, 2021, Supreme Court granted certiorari in *U.S. v. Valleo-Madero*, a case that could lead to the expansion of Supplemental Security Income (SSI) benefits to the United States territories. The briefing is scheduled to be completed by August 16, 2021, and oral argument is expected to be heard in the session beginning October 2021. A ruling could result in the end to unequal treatment in the SSI program based on residency, with enormous implications for poor and low-income people with disabilities living in U.S. territories.

Under review is a decision by the First Circuit finding that it is a violation of the equal-protection component of the due process clause of the Fifth Amendment to offer Supplemental Security Income benefits in the 50 states and the District of Columbia, as well as in the Northern Mariana Islands pursuant to a negotiated covenant, but not extending it to Puerto Rico. *U.S. v. Vaello-Madero*, 956 F.3d 12 (1st Cir. Apr. 10, 2020). The First Circuit's decision was first reported in the April 2020 issue of this newsletter; later developments were discussed in the October 2020 and July 2020 editions.

The petition for certiorari had been filed by former Acting Solicitor General Jeffrey Wall. While President Biden had expressed his disapproval of this policy while a candidate, the new Administration has not taken action in the case. Some have speculated that the Biden Administration may propose a legislative change.

The issue of SSI eligibility in U.S. territories had also been advancing in the Ninth Circuit, which has before it a decision of the U.S. District Court for the District of Guam that followed very closely the reasoning in *Valleo-Madero* in ruling the exclusion of SSI for Guam residents to be unconstitutional. *Schaller v. SSA, et. al.*, No. 20-16589 (9th Cir. 2021), *Schaller v. U.S. Social Security Admin., et. al.*, No. 18-cv-00044 (D. Guam Jun. 19, 2020)(J. Tydingco-Gatewood). The proceedings in *Schaller* are now stayed pending the outcome of *Valleo-Madero*.



NDNY Remands Claim

Mike Telfer of the Legal Aid Society of Northeastern New York obtained a voluntary remand in a Northern District of New York appeal that relied in part on observations and statements the Administrative Law Judge (ALJ) made at the hearing.

The ALJ had determined the opinion of the one of the Licensed Clinical Social Workers (LCSW) who treated the claimant was not persuasive because it was allegedly inconsistent with her treatment notes. (The claim was decided under the 2017 Evaluation of Opinion Evidence regulations.) But the record only contained one treatment plan authored by that LCSW and none of her notes. At the hearing, the ALJ discussed at length the obvious gap in the record with the claimant's non-attorney representative. The representative advised the ALJ that it was the provider's policy not to release progress notes. She informed the ALJ that while there were records in the file from a Nurse Practitioner, the LCSW treated the claimant more frequently and had completed an assessment. The ALJ suggested that in "every case" the representative had with that provider, she should let his office know so a subpoena could be issued for the treatment notes. He then spoke on the record about the importance of these records. Records of the counseling sessions helped him see progression, downward progression, or lack of progression. The ALJ also observed that if he had the notes, he could obtain the provider's insight and learn "all kinds of new things"; the notes could be "very helpful." Following this conversation, however, he confirmed with the representative that the record was complete.

Post hearing, the ALJ made no efforts to obtain or subpoena the treatment notes in question. Nor did the ALJ reference the obvious gap in the record in his decision or mention his conversation with the representative, other than to assert she had agreed the record was complete. Mike argued on appeal that despite the representative's assertion, the ALJ had a duty to develop the record. He cited the ALJ's discussion on the record about the importance of the missing treatment notes. He also cited helpful caselaw to argue that therapy notes would address issues not reflected in medication management notes. *See Thornton v. Comm'r of Soc. Sec.*, 2020 WL 622889, at *4 (W.D.N.Y. Feb. 11, 2020). Had the ALJ obtained the claimant's records, the ALJ might have found the LCSW's opinion more persuasive, which could have

resulted in a fully favorable decision. *See Cannizzaro v. Saul*, 2020 WL 5628066, at *4 (W.D.N.Y. Sept. 21, 2020) (remanding where missing therapy notes impacted weighing of opinions that could have changed RFC assessment). The ALJ's failure to subpoena the treatment records precluded him "from relying on any purported inconsistencies as a basis" to find the LCSW's opinion unpersuasive. *See Tammy H. v. Comm'r of Soc. Sec.* 2019 WL 4142639, at *11 (N.D.N.Y. Aug. 30, 2019).

Mike also argued that the ALJ misinterpreted the evidence. The ALJ asserted the form completed by the LCSW did not provide an option to indicate a limitation "less than marked, which may in itself lead the provider to inadvertently render a somewhat exaggerated opinion." The form in question, however, did offer the options of moderate, marked, and extreme limitations. The ALJ had repeated this incorrect interpretation at the hearing where he noted the form "doesn't give the practitioner the opportunity to write mild or moderate" noting "[i]t's only marked or extreme." The ALJ asserted the form may have led the LCSW "to inadvertently render a somewhat exaggerated opinion." At the hearing, the ALJ expressed that "sometimes practitioners when reviewing these forms may think" their only options are marked, extreme, or leaving a section blank. He stated it might "not necessarily be the best way for them . . . from their perspective to approach it" as "they might not know what a marked or extreme limitation means to us." When the representative advised the ALJ the terms were defined on the form, the ALJ dismissed her, noting "a lot of them probably don't even read the definitions."

Mike argued that if the ALJ believed the LCSW's intent in filling out the form was ambiguous or inadvertent, he should have recontacted her for clarification instead of substituting his own medical judgment. *See Bauer v. Comm'r of Soc. Sec. Admin.*, 2018 WL 4181769, at *5 (W.D.N.Y. Aug. 31, 2018) (remanding to recontact medical provider where ALJ questioned basis of his opinion). The ALJ's comments were particularly striking considering he agreed with the representative that the LCSW's comments on the form indicated she put thought into the form. Regardless, the ALJ's presumption of what the LCSW might have believed constitutes legal error.

(Continued on page 13)

SSA Finally Says Yes!

Marissa Sobel of Urban Justice Center and Emilia Sicilia of Empire Justice Center persuaded the Social Security Administration (SSA) to voluntarily remand a client's case solely for the calculation of benefits. This case may set a record as the longest pending claims for benefits. Over the past 22 years, the client had nine hearings, six Appeals Council remands, and one additional appeal in the U.S. District Court for the Eastern District of New York.

The client applied for Social Security Disability (SSD) benefits in 1998 after two motor vehicle accidents. In January 2000, an ALJ determined she was not disabled. Following Appeals Council review, the case was remanded only to be heard and denied repeatedly by two of the five ALJs accused of systemic bias in the *Padro v. Colvin* class action. No. 11-cv-01788, 2013 WL 5719076 (E.D.N.Y. Oct. 18, 2013). In 2014, the Appeals Council granted retrospective relief pursuant to the class action settlement in *Padro*. Sometime between this remand order and processing of the claim at the hearing office, SSA lost the exhibit file, which existed in paper hard copy. The client re-submitted all medical records available to her to aid in reconstructing the file. In 2016, a hearing was held before an ALJ who issued an unfavorable decision, which was affirmed by the Appeals Council. The client filed a civil action in the Eastern District of New York in 2018.

In 2019, U.S. District Court Judge Brian M. Cogan ordered a remand to the Commissioner for further proceedings. Judge Cogan believed the case presented a close call between remand for another hearing and

remand for calculation of benefits. He found no obvious reason why the opinions of the client's treating physicians restricting the claimant from work activity should be discounted. He also noted the claim had been pending for 20 years at the time of the decision, and that "plaintiff should have the benefit of a legally correct and final answer on her application for benefits."

Upon remand, ALJ Margaret A. Donaghy held hearings in September 2019 and January 2020. She issued a partially favorable decision in February 2020, finding the client eligible for a closed period of benefits from May 1, 2000, to June 30, 2004. The ALJ found medical improvement as of July 1, 2004, citing a lack of evidence of follow-up treatment with the treating physician as the reason for medical improvement. The date last insured is December 31, 2004, so this decision made the client ineligible for a substantial amount of retroactive benefits as well as ongoing benefits. The client appealed again to the Eastern District of New York.

After the parties participated in a court-ordered settlement discussions, SSA finally saw the light and agreed with Marissa and Emilia to voluntarily remanded the case solely for the calculation of benefits. The client is expecting close to half a million dollars in retroactive benefits. Big kudos to Marissa and Emilia for finally getting justice for this claimant and to the late Victor Torres, who was instrumental in developing the case in preparation for the first *Padro* remand hearing.

NDNY Remands Claim - Continued

(Continued from page 12)

Mike also argued the ALJ further erred by failing to consider or even mention the opinion of another treating LCSW. *Beason v. Saul*, No. EDCV 19-00590-AS, 2020 WL 606760, at *3 (C.D. Cal. Feb. 7, 2020) (remanding where the ALJ failed to articulative persuasiveness of a medical provider's opinion). Ultimately, Mike argued that under the new regulations the ALJ was unable to analyze the supportability of the LCSW's findings since he lacked her complete records. And the ALJ failed to mention the supporting explanations the LCSW had provided on her opinion form.

Clearly overwhelmed by Mike's compelling argument, SSA offered a voluntary remand, which Mike and his client accepted. On remand, the ALJ must take further action to obtain any relevant treatment records and develop the medical history; further evaluate the opinion evidence; complete the administrative record resolving the above issues; and issue a new decision. Here is hoping all Mike's hard work obtaining this remand pays off at the next hearing.

Dismissals Resume at OHO with New Procedures

As of March 8, 2021, the Social Security Administration's (SSA's) Office of Hearing Operations (OHO) resumed issuance of dismissals for untimely filed hearing requests and failure to appear at a hearing. The moratorium on most – though not all – dismissals was put in place at the OHO level on October 8, 2020, after an informal quality review found what SSA described as many improper dismissals due to “system issues,” including reminder notices containing incorrect information. According to NOSSCR and other sources, despite the moratorium, there was still wide variation in dismissal rates – from 0% to 20% – during the period September 26, 2020, to February 26, 2021.

Dismissals are now resumed in full, with some changes in procedures. A Chief Administrative Law Judge (CALJ) Memo, dated March 5, 2021, outlining current policy is available on the [DAP COVID-19 Google shared drive](#). With failures to appear at hearings, OHO will now be required to develop the record for good cause by issuing Form HA-L90, Request To Show Cause For Failure To Appear. [Note that under 20 C.F.R. §§ 404.957 & 416.1457, a request to show cause was otherwise not required if the hearing notice indicated that the hearing request could be dismissed without further notice if the claimant failed to appeal and the ALJ did not find good cause. The administrative law judge (ALJ) would have to consider good cause, but not necessarily develop the record on the issue.]

Although SSA's Request to Show Cause Form HA-L90 identifies a shorter timeframe for a response, OHO will provide 30 days from the date on the request before a dismissal is issued to account for potential mail delivery and processing delays. If a request to show cause was sent 30 days prior to February 6, 2021, but the claimant did not respond, OHO will resend the request (HA-L90).

Dismissals may not be issued unless staff either sent the notice of hearing 75 days in advance or the claimant waived the right to advance notice in writing. A claim also cannot be dismissed for failure to appear at a phone or video hearing if the claimant never consented to the format.

Prior to changes effectuated on February 23, 2021, if OHO staff mailed a hearing notice at least 75 days before the hearing date or at least 20 days before a rescheduled hearing date but did not receive an acknowledge from the claimant, OHO was required to contact the claimant or representative by sending a reminder to return the acknowledgement or calling and personally speaking to the claimant or representative.

Per the CALJ Memo, however, OHO procedures have been modified to conform with 20 C.F.R. §§ 404.938(c) and 416.1438(c), which only requires *attempted* contact. [HALLEX I-2-3-20B](#) has been revised to reflect this change to *attempted* contact. The new HALLEX provisions require OHO staff to resend the reminder notice or call the telephone numbers listed in the file at least twice before issuing a request to show cause. But they also allow OHO staff to leave a message with an answering machine or voice mail following a specific script. Staff must check several listed systems for alternate contacts if a number used appears to be inactive or out of service.

ALJs have been instructed to “continue to exercise broad flexibility in determining whether good cause exists for failing to appear” at a hearing. All dismissals are now subject to an in-line quality review and cannot be finalized and issued before the review takes place. ALJs have also been re-trained on the procedures.

Spotlight on CDRs

Early in the current pandemic, the Social Security Administration (SSA) halted many Continuing Disability Reviews (CDRs). Even if decisions were issued in some cases, they were not effectuated if it meant ongoing benefits would be discontinued. But several months ago, SSA began processing and issuing CDR decisions at all levels. According to a recent [press release](#) from SSA Commissioner Andrew Saul, these workloads are being handled through the mail and over the phone, often requiring multiple contacts with beneficiaries, thus slowing down the process. The cases are also stymied by the fact that only 70% of consultative examiners (CEs) are scheduling in-person examinations. As a result, SSA has had to reduce its planned medical CDRs by 30%.

CDRs determinations and appeals differ in several significant ways from initial disability determinations. As opposed to making a new disability determination, the adjudicator in a CDR must compare the claimant's condition at the time of the last favorable determination – the “comparison point date” (CPD) – with the claimant's current condition to determine if there has been medical improvement (MI). And that medical improvement must be related to ability to work. In other words, it must affect the claimant's residual functional capacity (RFC). There is a different eight step Sequential Evaluation process for CDRs, as compared to the usual five-step process. See 20 C.F.R. §§ 404.1594(f) & 416.994(f), compared with 20 C.F.R. §§ 404.1520 & 416.920.

The CDR appeals process also differs from initial claims. Claimants are afforded an opportunity to have a face-to-face hearing at the reconsideration stage before a Disability Hearing Officer (DHO) at the state agency, which in New York is the Division of Disability Determinations. See 20 C.F.R. §§ 404.915 & 416.1415. And claimants can elect to have their benefits continued during the appeal process through the

Administrative Law Judge (ALJ) level. See 20 C.F.R. §§ 404.1597a, 416.996. But benefit continuation is not automatic & it must be specifically elected at each stage of the appeal process within ten days of the denial notice.

At all levels of review, advocates should make certain the adjudicator has obtained the CPD medical evidence and included it in the evidence file in the CDR case, per 20 C.F.R. §§ 404.1594 & 416.994a. Without this CPD evidence, it is difficult or impossible for the adjudicator to make an accurate finding of medical improvement, which is, of course, vital to the congressionally mandated medical improvement review standard for CDRs. Instead, CDR cases devolve into little more than second guesses of the initial awards, especially in cases involving mental health issues. Individuals whose initial award were based on Intellectual Disabilities are particularly at risk, since the testing originally relied upon was done when they were children, and tests are usually not repeated once they become adults.

What about those cases where there may have been some improvement of the impairment for which the claimant was first found disabled? SSA must consider not only impairment(s) present at the CPD, but also current impairments. 20 C.F.R. §§ 1594(b)(5) & 416.994(b)(1)(v). And the adjudicator will decide disability through the date of the adjudicator's determination or decision (as opposed to through the initial termination). Social Security Ruling (SSR) 13-3p. See also POMS DI 28005.210B.3, which advises adjudicators to find “that disability continues if the current impairment(s) warrants continuance, regardless of whether longitudinal medical evidence shows a retroactive period (after the CPD) of possible non-disability.”

Lexis Property Matches Lead to Erroneous Terminations



Since 2018, the Social Security Administration (SSA) has been relying on information from a data broker to determine whether Supplemental Security

Income (SSI) applicants and recipients own unreported real property. Accurant for Government, a product of LexisNexis, uses “name only” matches as the basis for its searches, the results of which are often inaccurate, according to a report by the National Consumer Law Center (NCLC) and Justice in Aging entitled Mismatched and Mistaken: How the Use of an Inaccurate Private Database Results in SSI Recipients Unjustly Losing Benefits.

SSI is a means tested program. Applicants must demonstrate they do not have income over SSI’s strict limits and prove they do own any non-exempt resources. A home in which the SSI recipient resides is considered exempt from the resource limits. But non-home real property (NHRP) that does not serve as an applicant’s or recipient’s principal residence is counted as a resource that can make an individual ineligible for SSI. And this is where Accurant comes into the picture. SSA uses data purchased from Accurant to determine whether beneficiaries have previously undisclosed ownership interest in NHRP. But as indicated in the Justice in Aging and NCLC report, the data is shockingly lax, largely because it is based on matches of only first and last names without further identifying detail. As a result, people of color and immigrant communities are disproportionately impacted. Name only matches are especially inaccurate in these populations, likely because “clustering” of common surnames is more common among ethnic minorities than among non-Hispanic and white populations.

According to SSA, it does not rely on the Accurant data base to suspend SSI benefits without getting more information from the individual. The SSA employee is supposed to review the Accurant information with the SSI recipient prior to taking action. And if the recipient does not agree with the information, the SSA employee should investigate further, including assisting the SSI applicant or recipient with documenting ownership, its market value, or encum-

brances. But the report posits that in fact SSA employees too often suspend benefits on the Accurant report and nothing more. The SSI beneficiary is then faced with proving a negative – that they do not own the property in question. The report provides several compelling examples of SSI recipients whose SSI benefits were suspended based on the inaccurate Accurant data. Without the assistance of dedicated advocates, they were unable to prove they did not own the property in question.

The report raises other significant issues with Accurant. Lexis appears to be evading the Fair Credit Reporting Act (FCRA) by claiming Accurant is not a consumer report and thus not bound by the FCRA’s requirements to adhere to certain standards of accuracy. And as a result, SSA avoids the FCRA requirements to provide notice to consumers before taking any adverse action based on the report. The report reviews the caselaw that has developed around this issue with Accurant and other data services.

In the report, Justice in Aging and the NCLC also examine SSA’s failure to provide due process protections to recipients. Examples collected in preparing the report indicate SSA offices are sometimes failing to notify SSI recipients of their appeal rights or failing to provide continuing benefits through reconsideration pending review of a timely appeal. And the notices recipients receive often fail to identify the property in issue, only giving vague information about why benefits are to be suspended.

The report makes several recommendations, including encouraging SSA to stop using Accurant until stricter matching criteria are in place. It should also ensure that local offices conduct independent investigations before taking adverse action. Congratulations to all our colleagues who helped make this important report possible.

OIG Reports on SSA Telephone Service

Most components of the Social Security Administration (SSA) remain closed to in-person visits, so the public continues to rely heavily on telephone services for information. In July 2020, Representative John Larson, Chair, and Tom Reed, Ranking Member of the Subcommittee on Social Security, asked the Office of the Inspector General (OIG) to review SSA's telephone service during the COVID-19 pandemic. In response, OIG analyzed SSA's telephone service for June 2020 compared with June 2019. See [A-5-20-50998](#).

The OIG reported SSA's field offices and national 800-number received 30 percent more calls in June 2020 than June 2019. SSA received approximately 13 million calls during and after business hours in June 2020. The field offices received most of the additional calls. The OIG also found calls received fewer busy signals. And the number of callers who hung up without speaking to an employee was lower for the field offices but higher for the 800-number.

Callers to the field offices waited less time for service while callers to the 800-number waited longer. The average speed of answer for the field offices was 1.4 minutes. Callers waited on average 12.6 minutes for their calls to be answered by the 800-number. SSA's responses were comparable to that of other federal agencies but fared better compared to industry call centers.

How did changes in SSA workloads and staffing affect these response rates? According to SSA, it did not alter its staffing allocations because of the pandemic. But it did equip field offices and Telephone Service Center (TSC) employees with technology to answer calls remotely. And SSA made field office general telephone numbers available to the public for the first time. Furthermore, the SSA reduced hours for the national 800-number. OIG was unable to analyze customer feedback, as SSA did not use post-call surveys for field office calls and turned off that feature for the 800-number.



Contact Us!

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BULLETIN BOARD

This “Bulletin Board” contains information about recent disability decisions from the United States Supreme Court and the United States Court of Appeals for the Second Circuit. These summaries, as well as earlier decisions, are also available at <https://empirejustice.org/wp-content/uploads/2020/07/Recent-2d-Circuit-Decisions-July-2020.pdf>. Synopses of non-precedential summary orders issued by the Second Circuit are available at: <https://empirejustice.org/wp-content/uploads/2021/05/2d-cir-summaries-May-2021.pdf>

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

SUPREME COURT DECISIONS

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

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

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

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

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

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

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

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

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

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

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

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

SECOND CIRCUIT DECISIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

END NOTE

Are You Tired of Zoom Meetings?

Since many of us began working from home at the start of the current pandemic last March, we have likely spent more hours in Zoom – or its equivalent – meetings than we care to count. How is all this time staring at our co-workers’ and our own faces affecting us? According to a recent study reported in [The Hill](#), it is probably triggering our “fight or flight” survival reflexes.

Jeremy Bailenson, director of Stanford University’s Virtual Human Interaction Lab, reports the brain is particularly attentive to faces, especially ones we interpret as being very close: “From an evolutionary standpoint, if there was a very large human face close by to you, and it was staring right in your eyes, you were likely going to engage in conflict or mating. Neither responses are a good fit for a work meeting.” Although meeting participants are physically distant, they are making prolonged eye contact through the

screen at a seemingly close distance for longer periods of time. And nonverbal cues can be distorted. Just as stressful can be staring at your own image. Consciously or unconsciously, it can lead to self-criticism and negative mental health consequences. Bailenson confirms what we already suspect. Even after we are physically back in our offices, “videoconferencing is here to stay.” But according to Bailenson, “With slight changes to the interface, Zoom has the potential to continue to drive productivity and reduce carbon emissions by replacing the commute.” New technology, including virtual reality, will likely improve these virtual interactions. In the meantime, try to suppress those flight or fight responses.

Thanks again to Jere Fletcher for alerting us to this article.

