



# Social Security NEWS

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## Message From the Chair

Hon. James D. Wascher

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Thank you for your membership in the Social Security Law Section of the Federal Bar Association. The Board of Directors of the Section is committed to maximizing the value that you receive from your membership. Please contact me at [james.wascher@ssa.gov](mailto:james.wascher@ssa.gov) if you have any suggestions for how we can serve you better.

This is the second issue of *Social Security News* under the leadership of newsletter editor N. David Kornfeld, a respected Chicago area attorney who represents Social Security disability claimants. He is always looking for articles or commentaries on legal and other issues of interest to our members. If you feel the urge to release your inner muse, please contact Nat at [ndksocialsecuritylaw@gmail.com](mailto:ndksocialsecuritylaw@gmail.com).

Another of our Board members, disability law practitioner Jerrold A. Sulcove, is preparing a free webinar entitled "Work and the Social Security Law Process: Damned if You Do, Damned if You Don't," which will explore the effect of a claimant's work activity before and during the disability application and appeal process. You will be able to view Jerry's presentation later this winter on your desktop computer, laptop or tablet. The FBA will provide you with information regarding the date and time of the webinar, and how you can view it. We would like to present a webinar on behalf of the Social Security Law Section at least annually. Please let me know if you have ideas for a future program, or if you would



Hon. James D. Wascher

*James D. Wascher is the Chair of the Social Security Law Section and an Administrative Law Judge serving in the Chicago Hearing Office of the Social Security Office of Disability Adjudication and Review. The views expressed in this message are solely his, and do not necessarily reflect the view of the Social Security Administration, the Federal Bar Association or the Social Security Law Section.*

like to be a presenter.

In October 2013, the FBA announced an initiative under which any FBA section could offer its own LISTSERV through which section members could communicate with one another on questions and issues of concern. The Social Security Law Section enthusiastically agreed to participate. Unfortunately, the level of activity in these LISTSERVs did not justify the FBA's cost to maintain them, so they have been discontin-

CHAIR CONTINUED ON PAGE 16

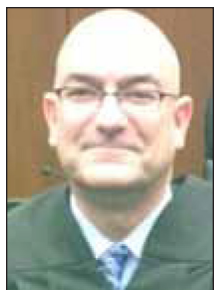
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### ALSO IN THIS ISSUE

<i>Letter from the Editor</i> .....	2
<i>Federal Case Law Update</i> .....	3
<i>From The Bench : Social Security Judging</i> .....	4
<i>The Neglected Suicide Epidemic among Social Security Disability Applicants</i> .....	9
<i>Unemployment and Social Security Benefits</i> .....	11

## Letter from the Editor

*N. David Kornfeld*



*N. David  
Kornfeld*

*For the past three decades N. David Kornfeld has practiced Social Security Disability Law in the Chicago area, representing both adults and children before the Social Security Administration as well as in Federal Court.*

Welcome to the Winter 2015 issue of the FBA Social Security Section Newsletter. I am especially pleased with this issue and I hope that you find the contents interesting, enlightening, and useful. This is my second issue as editor which I think makes me now an old hack at this. One of the great things about being editor is that you can read a great speech that was given by a Federal Court Judge on Social Security adjudication, and actually write to him for permission to reprint the speech. Thus this issue features a reprinting of a speech that Senior District Court Judge Pratt gave providing his unique perspective from the bench. Judge Pratt was nominated and confirmed as a District Court Judge in 1997 and later served as Chief Judge for the Southern District of Iowa beginning in 2006; he assumed senior status in 2012. What makes Judge Pratt's perspective especially unique is that he began his career in 1973 working in Legal Aid and at his core is an understanding of the plight of the disabled applicant and the struggles that each applicant faces. It is my hope and expectation that we will hear more from Judge Pratt down the pike with some of his newer perspectives

and concerns given the increase in the number of Federal Court filings in disability cases in the last few years. Special thanks to Judge Pratt for allowing us to reprint his remarkable 2009 speech. We are also pleased to feature an article entitled *Unemployment and Social Security Benefits* written by the Senior Attorney for Legal Services of New Jersey, Kevin Liebkemann. Special thanks also again to Section Board Member Attorney Casey Saunders for his federal case law update. This issue also features my article entitled *The Neglected Suicide Epidemic among Social Security Disability Applicants*, which contains a compelling thesis dealing with this sobering phenomenon. My hope for this issue is that the articles here will be a springboard of sorts for you dear reader to take up pen and paper (or computer and mouse whatever the case may be) and to write your own article for this publication. Send all submissions to the email address noted on the first page of this issue. Finally, special thanks again to Judge Wascher for his leadership, and for continuing to have faith in me to serve as editor. Best to all. Enjoy the issue.

# Federal Case Law Update

## Casey L. Saunders

**Seventh Circuit rejects ALJ's RFC finding and adverse credibility determination.** *Beardsley v. Colvin*, 758 F.3d 834 (7th Cir. 2014). The claimant, who was closely approaching advanced age, had suffered an injury to her knee; however, she declined to have knee surgery, opting for injections instead. At issue was the administrative law judge's weighing of the medical evidence, and his determination of the claimant's credibility. The medical record included conflicted opinions on the claimant's residual functional capacity. The first opinion came from a consultative examiner, who opined that the claimant was limited to sedentary work. The second was an opinion from a DDS physician, who determined that the claimant was capable of light work. The administrative law judge found the claimant was capable of light work for three reasons: (1) the claimant's daily activities; (2) the opinion of the DDS physician; and (3) the claimant's decision not to undergo knee surgery. Had the administrative law judge determined the claimant limited to sedentary work, the relevant grid rule would have found her disabled in lieu of her age and skills. See 20 C.F.R. pt. 404, subpt. P, app. 2 § 201.12. The court held that none of the reasons relied upon by the administrative law judge adequately supported his determination that the claimant was capable of light work. First, the court failed to understand the reasoning behind the administrative law judge discrediting the claimant's statements about her daily activities because the "fairly limited" daily activities could not "be objectively verified with any reasonable degree of certainty." The court stated such reasoning would allow administrative law judges to ignore any claimant's report of severe pain simply because such statements are impossible to verify with complete certainty. *Compare Wall v. Astrue*, 561 F.3d 1048, 1069–70 (10th Cir. 2009) (holding the same language constituted a "common sense observation that the ALJ would not treat Claimant's testimony as 'strong evidence' of her disability ..."). Further, the court found other evidence of record corroborated the claimant's testimony, and any possible inconsistencies in the claimant's statements were trivial. Finally, the court criticized the administrative law judge's use of the claimant's daily activities, because the per-

formance of such activities do not equate to the claimant performing competitive work. Next, the court rejected the administrative law judge's reliance on the DDS physician over the consultative examiner. It was the court's finding that the administrative law judge failed to provide a good explanation for rejecting the consultative examiner's opinions. Instead, the administrative law judge stated that the DDS physician's opinion was "consistent with the record as a whole." Contrarily, the court found evidence in the record that contradicted the DDS physician's opinions and a simple conclusory statement otherwise was not enough to elevate the DDS physician's opinions over the opinion of the consultative examiner. An administrative law judge may consider a claimant's treatment history. However, to base an adverse credibility determination on a claimant's infrequent treatment or failure to follow prescribed treatment, the administrative law judge must investigate a claimant's explanations on these matters. Here, the court found the administrative law judge did not attempt in determining why the claimant choose injections over knee surgery. Further, the record showed the claimant was uninsured and was uncertain how she could pay for the expensive knee surgery—an issue the administrative law judge neglected to explore during the hearing. Therefore, the claimant's decision against having knee surgery was insufficient in supporting the administrative law judge's conclusions.

**Ninth Circuit reverses ALJ decision, while dissenting opinion demonstrates the influence of contemporary news stories on judges.** *Ghanim v. Colvin*, 763 F.3d 1154 (9th Cir. 2014). *Ghanim* addresses two of the more common issues raised in federal court: (1) rejection of the treating providers' opinions; and (2) adverse credibility determination. However, *Ghanim* demonstrates how contemporary news stories can influence a judge. In his dissenting opinion, Chief Judge Alex Kozinski cites a recent Wall Street Journal article involving disability fraud perpetrated by ex-police and ex-firefighters from New York. (citing Pervaiz Shallwani & Damian Paletta, *Ex-*

### Casey L. Saunders

Attorney Casey L. Saunders practices in Oklahoma, concentrating in Social Security Law. Mr. Saunders also serves on the Federal Bar Association, Social Security Section Board.

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# From The Bench: Social Security Judging

*Hon. Robert W. Pratt*

“I, XXX XXX, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as XXX under the Constitution and laws of the United States. So help me God.” 28 U.S.C. § 453.

All federal judges begin their careers by taking this oath.

The “poor” most frequently appear before Article III courts—other than when they appear in criminal cases for sentencing—when they bring complaints seeking judicial review of final administrative decisions of the Social Security Administration (SSA). This area of the law is highly specialized and differs from the “adversarial” world. Because it differs so greatly from most civil and criminal law, we judges often need to be reminded about the importance of these claims.

Other than the work of sentencing and the consideration of requests for immediate injunctive relief, I believe there is no more important work for federal judges than the review of Social Security and Supplemental Security Income (SSI) cases.

While I was a law student, I worked in a legal aid office. When I became a lawyer, I wanted to work in legal aid, and I was fortunate enough to secure such a position upon graduation. This was before the Legal Services Corporation was established by Congress in 1974. When I worked for the Legal Aid Society of Polk County (Des Moines), Iowa, it was funded by the federal Office of Economic Opportunity and the United Way. Much of my work involved appearing before administrative bodies, representing unemployed people in front of Job Service of Iowa and those seeking disability benefits from the SSA.

Later I joined a law firm that had an extensive labor union clientele. As a result, workers’ compensation became a large part of my practice. The workers’ compensation law in Iowa is administered by the Industrial Commissioner, who is appointed by the governor. However, unlike either Job Service or SSA, the Industrial Commissioner determines “contested cases,” which means that the full panoply of pleading, discovery, experts, and evidentiary presentations, or what we think

of as a “trial,” is available to both the employee and the employer. It soon became clear to me that while both workers compensation and Social Security disability were “wage replacement” programs with a medical entitlement, they were administered quite differently. I also learned that workers entitled to benefits under one program often were entitled to benefits under the other and that it was incumbent on me, as the attorney, to maximize benefits for my clients.

With the advent of the “continuing disability review” process, when SSA began terminating recipients of both Social Security Disability Insurance (SSDI) and SSI, my private practice expanded exponentially. During this period, the U.S. Supreme Court unanimously found that the agency’s policy regarding the administration of claims for those who had, or claimed to have had, severe mental impairments, was illegal.

Government actions involving the administration of the Social Security and SSI programs also advocated a controversial legal policy called “non-acquiescence.” Simply put, the SSA announced that it would not follow any court decisions except those of the U.S. Supreme Court. [\*4] This policy ran headlong into remand orders of district and appellate courts throughout the country. The secretary’s rationale was that the administration was running a national program, much like the Internal Revenue Service administering tax laws or the National Labor Relations Board administering the National Labor Relations Act, and it would not be able to administer those laws effectively by following district and circuit precedents. This led to many confrontations in federal courts between claimants and the administration, and led many courts to remind the secretary of the function of the judicial branch of government established in *Marbury v. Madison*: “It is emphatically the province and duty of the Judicial Department, to say what the law is.” 5 U.S. 137, 177 (1803).

The court of appeals in my own circuit told Secretary Margaret Heckler, who was ordered by a district judge to personally appear, that, “It is fundamental that the power of a court to make an order carries with it the power to enforce that order and the inquiry as to the question of disobedience has been, from time immemorial, the

*Hon. Robert W. Pratt*

*The Honorable Robert W. Pratt currently serves as a Senior District Court Judge in the United States District Court for the Southern District of Iowa having previously served as Chief Judge from 2006-2012.*

special function of the court.” The executive branch’s failure to follow congressional and federal court mandates eventually resulted in legislative and regulatory changes that have made the process more predictable and certain. Some of the SSA’s attempts to counsel or discipline administrative law judges (ALJs) resulted in the association of ALJs suing the secretary in federal court. All of these controversial executive branch policies have reinforced in my mind the absolute need that independent life-tenured judges have not only the authority but also the commitment to give these cases the review contemplated by Congress and the Supreme Court.

As this area of the law developed, the different roles of trial judges and ALJs became apparent. Reviewing these claims as a federal district judge who determines whether the final administrative decision of the commissioner is supported by “substantial evidence on the record as a whole” has given me a better understanding of the difficult job of the ALJ. Furthermore, I now have a much better understanding of why these cases deserve the attention of the Article III judiciary in the district courts and the courts of appeals.

During the fiscal/calendar year ending in 2008, the SSA held more than 500,000 hearings. The claims involved applications for disability benefits under title II of the Social Security Act, known as “insured benefits claims.” They also involved claims for SSI under title XVI of the act, a means-tested benefit for those uninsured for title II. Upon a finding of disability, monthly cash benefits are made available to the beneficiary and, in some cases, to his or her dependents. Eligibility for cash benefits brings either Medicare or Medicaid. Needless to say, these benefits can mean the difference between an existence of dignity or one that is far below the poverty level.

The Social Security application is a four-step administrative process. After an application is made at an SSA district office, the decision to award or deny benefits is made by an agency of state government, usually a division of the Department of Vocational Rehabilitation known as Disability Determination Services (DDS). Using questionnaires filled out by claimants, DDS gathers medical evidence from the treating sources. Frequently, DDS arranges for consultative examinations by specialists. Medical doctors determine whether the claimant meets the criteria to be found disabled due to the severity of the impairment (meeting or equaling a listed impairment), or whether the claimant retains the residual functional capacity for some kind of work activity. Vocational experts are then consulted to determine whether the claimant retains the ability to do past relevant work or some other kind of work. For the most part, the claimant is never seen at the agency and, except for the questionnaires, has no opportunity to be heard.

A claimant who is dissatisfied with the determination made by the state agency can file a request for a hearing. The administrative file is then sent to the recently re-named Office of Disability Adjudication and Review. There, the claimant is entitled to a de novo hearing at which an ALJ presides. By statute and

regulation, an ALJ must be an attorney who has practiced for at least seven years. He or she is selected to be an ALJ by the Office of Personnel Management and employed by the SSA.

At the hearing before the ALJ, the SSA is unrepresented. No lawyer or other official is present to oppose the claim. The Supreme Court, addressing the process of adjudication, has referred to the proceedings as “inquisitorial rather than adversarial.” *Sims v. Apfel*, 530 U.S. 103, 111 (2000). Herein lies the ALJ’s most difficult work: As the Court said in *Sims*, “It is the ALJ’s duty to investigate the facts and develop the arguments both for and against granting benefits . . .”

In contrast, civil and criminal cases in an Article III court are adversarial, i.e., each party is represented by counsel who present evidence and argue why their client should prevail. Although a disability claimant can choose to be represented by an attorney or non-attorney, the ALJ must develop the record fully and fairly for both parties before deciding who will prevail. Given what the Eighth Circuit has called the “unique non-adversarial nature of administrative proceedings,” in which “an ALJ bears a responsibility to develop the record fairly and fully, independent of [\*5] the claimant’s burden to press his case,” the work of a Social Security ALJ is both extremely difficult and incredibly important. Compare this to Justice Ruth Bader Ginsburg’s description of the role of the court in an adversarial system in *Greenlaw v. United States*:

In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to the courts the role of neutral arbiter of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a pro se litigant’s rights. But as a general rule, “[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the fact and arguments entitling them to relief.” (citation omitted) . . .

“[Courts] do not, or at least should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their case than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us.” (citation omitted) 128 S. Ct. 2559, 2564 (2008).

In a Social Security case, if the record is undeveloped, even where the claimant was represented by an attorney, we judges who review these claims in our appellate capacity may not rely on the “party presentation” model that Justice Ginsburg describes in *Greenlaw*.

Judicial review in such cases, although necessarily deferential to the agency's determination, must nonetheless be undertaken with a recognition that the "beneficent purposes" underlying the Social Security Act are best served by ensuring that the agency has developed a complete evidentiary record.

The difference in roles of ALJ and district judge can have a large impact on the substantive decision of the SSA. After the ALJ renders his or her decision, if the claimant intends to seek judicial review, the claimant must file a written submission within 60 days to the Appeals Council, which "sits" in suburban Washington, D.C. Within 60 days after the Appeals Council's notice that the request for review has been denied and that the ALJ's decision has become the final decision of the commissioner, the claimant must seek judicial review. The final possible three steps in this process are review by federal district courts and circuit courts of appeal and sometimes by the Supreme Court.

The purpose and the mission of the administrative process is to provide timely and legally sufficient hearings and decisions so as to present a respected administrative law system capable of delivering trial-type justice in an efficient manner. The goal of the SSA is to engender the public's trust and confidence that decisions will be based only on the law and the evidence. The difference between adversarial and administrative advocacy has large implications for lawyers and the manner in which they do their job and the necessity of seeing the ALJ as "co-worker" and not an enemy. Lawyers often forget that sitting down with the ALJ and attempting to obtain the appropriate evidence in a timely fashion can inure to the benefit of all participants in the Social Security adjudication process.

In the adversarial system, the judge stands between opposing parties, each of whom feel strongly about the righteousness of his or her particular positions. I am often reminded of the famous question posed by my favorite judicial philosopher, Rodney King, who asked: "Can't we all just get along?" If we could all get along, there would be no need for lawyers or judges.

In the administrative system, on the other hand, all parties at all stages of administrative adjudication should work together to develop a factual record so that an intelligent and, yes, "defensible" decision can be made. Doing so not only helps the claimant but also develops the needed public credibility for the entire system of social benefits provided for in this country. I have learned from my Social Security practice that working with ALJs and their staffs is not only easier than working as an adversary, but it is also productive. Sitting down with ALJs and determining what needs to be done to get a case to where an intelligent decision can be made is the job of every claimant's lawyer.

With regard to the substance of disability adjudication, ALJs and Article III judges alike must rely on documentary evidence and sworn in-person testimony to establish the record facts. The difficulty in that was captured by a colleague who was conducting a bench trial in my courtroom. One day,

as he walked by my desk, he observed: "How am I supposed to know who is telling the truth? That's why we have juries." I frequently tell jurors in voir dire and post-trial discussions that they have a more difficult job than I do. And I mean it. Jurors are the ones who decide what the facts are. ALJs function as professional jurors when they decide the very difficult issues before them.

Unlike district judges such as myself, ALJs cannot "delegate" this most important aspect of judging. Moreover, thousands of appellate decisions define for them what "jury instructions" they must follow. The crushing caseloads of ALJs across the country and ever-increasing demands of judicial statisticians continue to require more "production" or "dispositions" from each ALJ.

According to the Federal Court Management Statistics for the 12-month period ended September 30, 2008, district courts had 13,138 filings, and the SSA had a backlog of more than 800,000 claims. Neither ALJs nor Article III judges will run out of work in the immediate future. However, that difference in their respective workloads illustrates the type of review a case can receive in each forum. An ALJ must review the document file, hear the testimony, write a decision, and then move on to the next case. An Article III judge, on the other hand, reviews only a tiny fraction of the cases heard by an ALJ because most people are either satisfied with the ALJ's decision or choose not to pursue the matter further. For that reason, an Article III judge can afford to spend more time with each case, often with the aid of one or more law clerks.

As all ALJs know, a district judge has the job of sitting as an appellate judge when reviewing final agency actions, whether actions of the SSA or of some other agency. Almost all of my judicial review proceedings come from the SSA. The record presented to the Article III court, having passed through [\*6] the successive stages of administrative review where, at each stage, more can be added, is often voluminous. Determining where to start the review, sometimes without adequate help from either the claimant's or the commissioner's counsel, can be daunting. Having said that, I think review of these cases is some of the most important work within the jurisdiction of the district court. For the most part, the claimants are hard-working, law-abiding citizens, to whom life has dealt an unfortunate hand.

Why are cases remanded from Article III courts to the agency for further administrative development or payment of benefits? Here are the 10 most common reasons.

The first reason involves the way the cases are reviewed at each level of the proceedings. At DDS, the first medical records are gathered and reviewed by doctors who opine that the claimant either meets or equals a listed impairment, or has a residual functional capacity to engage in substantial gainful activity. I have no statistics on how many cases are reviewed at DDS, but the number must be staggering. In my home state of Iowa, the DDS webpage states that 63.3 percent of initial claims are denied, and 84.9 percent of claims are denied on reconsideration. DDS decision makers work with

what they have at hand, mostly raw medical records. By the time the cases come to the Office of Disability Adjudication and Review, claimants have the opportunity to be represented by attorneys who are able to obtain medical opinion evidence and represent the claimant at a face-to-face administrative hearing. In spite of the opportunity for a better record, ALJs review a great many cases, day in and day out. Although the time spent with each case varies with each ALJ, it is safe to say that each judge reviews several cases each day.

By contrast, significantly fewer cases arrive at the doorstep of the U.S. District Court. After the case is briefed by both the claimant's (now the plaintiff's) attorney and by regional counsel for the commissioner, the judge and a law clerk have the luxury to take as much time as necessary to reach a decision. Often, on initial review of a record, I am inclined to affirm the ALJ's decision that has become the final decision of the commissioner. However, as my law clerk and I go through the record again, page by page, looking closely at each notation made by the doctors and psychologists, a different decision emerges after several drafts. Often the decision writes itself, and in a different way than anticipated. If we had to do that every day four or five times, the decisions would be entirely different. That is why, in my opinion, Congress passed the judicial review provisions of the Social Security Act.

The second reason for remands is failure to discuss not only the evidence that supports the administrative decision but also to discuss the evidence on the other side. This omission often makes it appear to the reviewing court that only the evidence supportive of a factual finding of "non-disability" was considered. A frank discussion of the evidence that supports disability, and why selection of that view of the evidence is not a "reasonable one," is often lacking. Remember that the district court is "instructed" to review administrative decisions and to "canvass the entire record and to evaluate all the evidence" taking into account whatever in the record fairly detracts from the ALJ's decision.

A third reason for remands is the failure to assess and discuss the claimant's residual functional capacity (RFC). I need go no further than to quote the en banc opinion of the Eighth Circuit Court of Appeals in *McCoy v. Schweiker*, 683 F.3d 1138 (1982), a case that challenged the validity of the medical vocational guidelines:

Probably the most important issue will be the question of RFC, and it is important to note how the Guidelines define it. Take the example of "light work." This category of exertional capacity is defined as the ability to lift up to 20 pounds at a time, with frequent lifting or carrying of objects weighing up to ten pounds, and a good deal of walking or standing, or else sitting with some pushing or pulling of arm or leg controls. The grid does not apply if one's RFC is to do this kind of work only intermittently. The claimant must be able to perform "a full or wide range of light work," 20 C.F.R. § 404.1567(b), on a "sustained" basis, Appendix 2, B 202.00. The RFC that must be found if the grid is to be used, in the case of sedentary and

medium work, as well as light work, is not the ability merely to lift weights occasionally in a doctor's office; it is the ability to perform the requisite physical acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world.

Judge Richard Arnold added in a footnote that "RFC will generally be the most important issue under the Guidelines."

The fourth reason for remands is the failure to build a bridge from the evidence to the conclusion as to the claimant's RFC. This is closely related to the third reason. Many times, we see cases in which the ALJ discusses the evidence in detail, makes a finding that the claimant is not credible, and finds an RFC with no explanation of how the ALJ went from point A to point B to point C.

A fifth and very common reason for remands is finding the claimant's testimony not credible based on daily activities. Many courts have written that claimants need not be bedridden or forced to vegetate in a dark room to be found disabled. That which a claimant can do from time to time around his or her own house, or even for a close relative, does not necessarily translate into the kind of sustained effort required in competitive employment. That a person can perform some activities with frequent rest breaks is not evidence of an RFC.

The sixth reason for remands is the failure to describe accurately and fully what the treating physician has found and why the ALJ is discrediting that opinion. Various circuits have a rule that reads more or less like a jury instruction regarding the treating doctor: One must have a good reason not to credit his or her testimony. I work in the rule this way:

A treating physician's opinion is due controlling weight if it is well supported by medically acceptable clinical and laboratory diagnostic techniques and not inconsistent with other substantial evidence in the record.

20 C.F.R. § 404.1527(d)(2).

Often it appears that the ALJ is concerned with finding and relying on a non-treating source without taking the time to tell why he or she is not accepting what the treating doctor says.

A seventh reason for remands is failure to state accurately what limitations [\*63] a claimant has that the ALJ has found in propounding a hypothetical question to the vocational expert. In *Baugus v. Secretary of Health & Human Services*, the court wrote:

As we have held on numerous occasions, a hypothetical question must "set out all of the claimant's impairments." . . . In the present case it is not clear what factors the vocational expert considered in giving his conclusion. Here the expert is in effect told to ignore all of the claimant's disabilities and physical restrictions. This is clearly improper. . . . [T]he same ALJ in this case erroneously excluded pain from his second hypothetical

and asked the expert to consider “only the clinical or laboratory findings that are supportive of any of the diagnoses that are set forth in these documents.” We hold this to be error. The ALJ must precisely set forth all of the claimant’s disabilities when he poses a hypothetical question.

717 F.2d 443 (8th Cir. 1983).

An eighth reason for remands is the tendency to substitute lay medical diagnosis for that of medical professionals. Perhaps the best description of this area comes from Judge Richard Posner, and the type of cases in which it happens most frequently are those involving mental impairments:

The psychiatrist’s testimony, though conclusional (but then no one pressed him to elaborate the grounds for his conclusions), was the only direct testimony concerning the critical issue of the date of onset of Wilder’s disabling depression. Severe depression is not the blues, it is a mental illness; and health professionals, in particular psychiatrists, not lawyers or judges, are the experts on it. The question what stage a physical or mental illness had probably reached some years before it was first diagnosed is a medical question, and the uncontradicted evidence of the only disinterested expert to opine upon it is entitled to considerable weight.

64 F.3d 335 (7th Cir. 1995).

The ninth reason for remands is similar to the sixth. The temptation to “play doctor” is very strong when one spends years and years reading medical records. Doctors often commit the same error when they opine either in writing or speaking what the law is. While the doctor may be in the ballpark, based on his experience, usually the mark is missed. This is why a doctor’s opinion is not given much weight when it concerns whether or not the patient qualifies for disability benefits. Likewise, when a judge or a lawyer decides what a diagnosis should be or what restrictions are reasonable for a particular patient based on a diagnosis, the mark is usually missed by a mile. In my opinions, I often cite *Rohan v. Chater*, 98 F.3d 966 (7th Cir. 1996), in which Judge Cummings, writing for the court, states: “ALJs must not succumb to the temptation to play doctor and make their own independent medical findings.” That advice applies to lawyers as well as judges at all levels of the process.

A final reason for remands is the failure of advocates and lawyers to work together in a non-adversarial manner. It is very frustrating to the court when it becomes obvious that a record is not fully developed because the ALJ and the lawyer did not work together to establish whether or not

a claimant is disabled. Lawyers are as much, if not more, to blame for this failure as the ALJs. In a case that I decided shortly after I took the bench in 1997, I criticized the claimant’s attorney for failing to obtain medical records that supported his client’s testimony. I said: “The practice of Social Security law is not a game of cat and mouse.” The claimant had testified that she regularly saw her treating psychiatrist, but, as the ALJ pointed out in her decision, medical records available to her showed only two visits to the psychiatrist. The lawyer claimed that he later sent the records to the Appeals Council, but they did not appear in the record, so he attached them to his brief. I made it clear that I did not consider the records that were not presented to the commissioner. Nevertheless, I wrote that for the system to work, the ALJ and the lawyer must work together in a non-adversarial way. I cited *Battles v. Shalala*, 36 F.3d 43, 44 (8th Cir. 1994), in which the court wrote: “An administrative hearing is not an adversarial proceeding. The goals of the Secretary and the advocates should be the same: that deserving claimants who apply for benefits receive justice.”

As many Article III judges have remarked over the years, federal jurisdiction, while limited, is varied indeed. A judge must move quickly to keep up with his or her docket, and the changing dynamics of trial judging are frequently affected by matters very much beyond our control. A defective product, a change in sentencing law, or state law changes dramatically alter the nature of the cases that come before us. However, if anything remains constant, it will be our continuing duty to act as a check on the administrative decisions of the SSA. While we have many obviously “big cases” involving banks, securities, intellectual property, and patents, we must not overlook the fact that Social Security and Medicare applicants are entitled to our time and talents as well.

Being fortunate enough to be nominated, confirmed, and appointed to serve on the federal bench often leads to what Judge Ed Devitt called “judgitis” or what others refer to as “forgetting where you came from.” It is true that the life of a federal judge is too often removed from the everyday struggles of workers and their families. Giving these claims the priority they deserve and acting as a check on the power of the executive branch is very much in keeping with our oath of office. Our oath and these citizens’ claims remind me of Anatole France’s observation: “[T]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”

*(Note from the editor: Judge Pratt reports that he gave the following speech in 2009. The text of the speech was printed in the Spring 2010 issue of ABA’s Litigation Magazine and is being reprinted here with the permission of both the ABA and Judge Pratt. We look forward to publishing Judge Pratt’s updated perspectives in a future issue)*

# The Neglected Suicide Epidemic among Social Security Disability Applicants

*N. David Kornfeld*

As a Social Security claimant's attorney, it is bound to happen sooner or later. You will get a call with some very bad news from a friend or relative of a claimant you are representing. You will learn that your client has passed away. Despite your hard work to get the claim approved, your client's disability claim was denied. This is common at the initial level, so you would have advised your client not to get discouraged—that you'd assist with the appeal. You would have expressed your optimism for ultimately prevailing on appeal and you would have encouraged your client to be patient despite the long delays in Social Security's processing times. Your client, usually suffering both physical and mental impairments, either does not hear your words or if the claimant does it is short lived and he is unable to continue holding onto the lifeline of hope you've offered. All that dominates is the pain and the suffering which seems to be getting worse on a daily basis. One day, the claimant—your client—chooses to overdose on medications.

When you hear the news, a sense of disbelief takes hold. This simply cannot be. You remember the most recent phone call. You review the last email where you were getting the local Congressperson's office to try to help expedite the claim. You wonder if this still would have happened if the claim had been approved at the initial level. You ask yourself dozens of questions beginning with the word "why?" – and none of those questions have a definitive answer.

This past fall, this exact scenario took place at my law office. This was the first time in my three decades of practice that one of my clients chose to end his life via suicide while the claim was pending. I have had a few clients over the years choose suicide after winning their cases, but I'd never lost a client to suicide while the claim was still pending. Winning disability benefits does not guarantee that a disabled person will not later choose to end his or her life. Suicides happen, and Social Security disability claimants are particularly vulnerable. As the great poet Gwendolyn Brooks wrote, "we are all vulnerable." But even the hardest of individuals can descend into despair when pain, illness, and injury conspire with a deteriorating mental state. For a person already on the brink of despair from the stressors

of disabling conditions, a denial of the disability claim can be the final straw.

My client's main problem was a form of peripheral neuropathy with a significant overlay of depression. At the initial level we obtained three treating physician reports in support of the claim. One was from a treating psychiatrist. We also obtained an independent medical report showing that my client's condition satisfied one of Social Security's listings. My client, a gentleman in his mid 50s, previously had been very high functioning. With the strong evidence we had submitted, it was unexpected when his claim was denied. But it was. After the claim was denied at the initial level, we filed for reconsideration. There was an unprecedented backlog at the Illinois Disability Determination Services, and the case sat unassigned for three months. We repeatedly called and urged that the case be assigned and the claim approved, but the backlog at DDS was the worst it had been in all of my years of practice.

Since losing my client, I have heard from several other attorneys who have lost clients to suicide while their disability claims were pending. Those attorneys shared their experiences with me. What I suspect and fear is that in the current climate of more denials and longer delays, claimant suicides at the reconsideration and ODAR hearing levels have increased and will increase even more. If you are reading this and have lost a client to suicide while waiting for Social Security to decide your client's claim, I would like to hear from you.

In the past year, I have had two other overtly suicidal clients. One gentleman suffers from both orthopedic problems and severe depression. He was represented by a "national" law firm at his first hearing, after which his claim was denied by the ALJ. After the Appeals Council declined to grant review, his representative abandoned him and declined to pursue a court appeal. The appeal was this man's last chance to obtain Title II benefits, as his disability insured status already had expired. I accepted the case for a court appeal. While the claim was in Federal Court, and then later after the court remand but before the second hearing was scheduled, this client called my office on multiple occasions and expressed

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his despair. I did my best to encourage him to get mental health treatment. We were in touch with his girlfriend, and we encouraged her to get involved, as well. However, on two occasions we received what we thought was “the call.” On one occasion when I was at lunch, the claimant spoke with my assistant and informed him that he was going off into the woods where there was a creek, and that he would simply end things there. My assistant quickly contacted me and we immediately contacted the local police department in the small town where my client lived. We also promptly contacted my client’s girlfriend, and she went to his home. Fortunately, his plans were derailed and he got some much needed help. A few months later, I received a despondent message from the claimant. He thanked me repeatedly in the message for all of my help but said he just could not hang on any longer. Stunned and fearing the worst, I immediately tried to reach his girlfriend. To my relief, she assured me things had calmed down since the phone message. When this client’s hearing came up a few months later before a different ALJ, I remember being acutely aware that his life literally was at stake. I didn’t think he would survive yet another ALJ denial. Fortunately, the ALJ who heard the claim on remand was wise and astute enough to understand the longitudinal medical record and see the devastation this man’s impairments had wreaked on his life, beginning prior to the date last insured. We knew when we left that hearing room that my client would prevail; the relief was palpable.

ALJs rarely hear or see the type of relief that attorneys see—after a long, long struggle—when someone in the government actually listens. There often are tears when this happens. Knowing that your representation made the difference is extraordinarily gratifying, and it is one of the highlights of being a Social Security practitioner.

A second client of mine does not yet have a favorable disability decision. She has severe endometriosis and severe mental illness including a bipolar disorder, but her claim has been denied twice by the same ALJ. We just received the second ALJ denial this past week. My client has attempted to kill herself with overdoses of her medication on two occasions already, and she repeatedly has expressed suicidal ideation in recent months. I will continue to fight to obtain benefits for her, but what will happen over the next year or two is uncertain. I am very concerned she will choose again to try to end her life, but that this time she will “succeed.” I suspect there are many disability claimants who commit suicide after their claims are denied, but the ALJ or other agency adjudicator is never advised of this or even aware a suicide has occurred.

In the not-so-distant past, erroneous state agency determinations had a much better chance of being corrected at the hearing level. The ALJ level of review served as a backstop for many improper denials at the initial and reconsideration levels. Unfortunately, in the last couple of years the trend at the ODAR ALJ level has been to issue an increasingly large percentage of unfavorable decisions. Social Security each year issues a Waterfall Chart documenting data pertaining to

disability dispositions at all levels of the administrative review process. Initial allowance rates have decreased in recent years. Since 2008 over 2.5 million individuals annually have applied for disability benefits. Applications increased to around 2.7 million in 2009, then peaked in 2011 at approximately 3.3 million applications. Since then, applications fell to below 3.0 million again in 2013. Allowance rates have fallen from 37 percent in 2009, to 33 percent in 2012 and 2013, but the applicable standards and laws have not changed during this period. In terms of sheer numbers, the change in percentage has had a significant impact for individuals applying for disability. Compared to prior years, in 2012 and 2013 more than 100,000 additional claims each year were denied. Every day then – there have been around 400 individual applicants, 400 families receiving devastating news, 400 additional stories of denial. Similarly, the Waterfall Chart shows that hearing level allowance rates have declined dramatically in recent years. In the 2008 and 2009 fiscal years, the allowance rate was at 63 percent for the ALJ hearings level. By 2012 the ALJ allowance level had fallen to 52 percent and in 2013 the allowance rate had fallen further to only 48 percent. Again, the standards for disability had not changed. I maintain that what had changed is the subtle and not-so-subtle pressure on adjudicators and judges to deny more claims and to view disability benefits generally as an undeserved handout. The political climate became especially charged with the 2012 federal deficit, the fiscal crisis, and the 2013 budget sequestration and government shutdown. In this charged political climate, blame for the nation’s economic woes had been placed on those individuals representing the so called 47 percent of the population who, in presidential candidate Mitt Romney’s misguided words, are “dependent upon government, who believe that they are victims, who believe the government has a responsibility to care for them, who believe that they are entitled to health care, to food, to housing, to you-name-it. That that’s an entitlement. And the government should give it to them.” And who are these 47-percenters? Well – it includes not only all recipients of SSI Supplemental Security Income disability benefits, but also many of those who receive Social Security Disability Insurance benefits and Social Security retirement benefits. Thus, in the 2012 presidential campaign, the word “entitlement” became a dirty word extending to many types of governmental benefits, even to those not traditionally associated with the term entitlement.

Compared to the 2008/2009 allowance rates, in 2013 ALJs denied approximately 110,000 more claims. Anecdotal 2014 information reflects continued lower approval rates; thus another 110,000 “extra” claims are going to be denied this year, compared to the 2008-2009 period. 2014 also saw Congress focusing attention on ALJs who approve cases at too high a rate. Congress has called some of the highest payers to defend their higher approval rates at House Oversight hearings. I suspect that when all is said and done, the final 2014 Wa-

SUICIDE CONTINUED ON PAGE 17

# Unemployment and Social Security Benefits

*Kevin Liebkemann*

This article examines what happens when people apply for Social Security Disability (SSD) and/or Supplemental Security Income (SSI) benefits based on disability, while also applying for or receiving unemployment insurance (UI) benefits. Special legal and factual issues arise in these claims that require some understanding of all three programs. In the course of reviewing cases and program rules, this article will offer observations on how adjudicators and advocates can improve record development and decision making in these claims.

## A. Clash of Definitions

Perhaps the most common misconception is that SSD/SSI claims are inherently inconsistent with UI. As the old argument goes, UI claimants assert an ability to work while SSD/SSI claimants certify that they cannot work. How could one person claim both and still be credible?

That argument is flawed because UI programs often encourage and allow people with significant disabilities to seek employment and collect UI benefits if they meet program criteria. Also, the SSD and SSI programs permit and encourage people with disabilities to try and work, to an extent. Most agree that these aspects of the UI and SSD/SSI programs are beneficial and desirable, as they encourage people with disabilities to seek, acquire, and maintain employment.

As a result, there are plenty of situations in which a person might meet a UI program work certification requirement, while still meeting the SSD/SSI disability definition. It follows that adjudicators and advocates need to understand where such overlap occurs. That understanding starts with basic knowledge of the SSD/SSI disability definition, and UI work certification requirements.

### *SSD/SSI Disability Definition and Examples*

An SSD/SSI claimant is disabled if he or she cannot perform "substantial gainful activity" due to a medical impairment. 20 C.F.R. §404.1505. The disability must be expected to last at least 12 months or result in death. *Id.*

SSA official policy is clear that, with limited exceptions, this would mean an inability to perform and sustain full-time competitive employment (e.g. an eight hour per day, 5 day per week schedule). SSR 96-8p. The disability programs fully accept that a person can be able to do some work, and still meet the disability definition. Examples would include:

-A person only capable of non-substantial part-time work (example: person's back gives out for the day after 3 or 4 hours of sitting or standing).

-A person capable of sporadic work who could not sustain work over time (example: person who is functional for days or even weeks at a time, but then has extended episodic bouts of incapacitating depression).

-A person who could only work with significant disability accommodations (example: person with an intellectual disability who receives special supervision in a sheltered workshop). 20 C.F.R. §404.1573 (c)

-A person who works full-time, but the actual value of their work is not substantial (example: severely disabled person's uncle hires and pays him out of sympathy and family obligation, even though he does little significant work activity). 20 C.F.R. §404.1574 (b)

-A person who meets one of Social Security's "listings," but who retains the ability to do some work. 20 C.F.R. Pt. 404, Subpt. P, App. 1

Social Security considers people who meet certain medical-vocational profiles disabled, even though they may be able to perform some work activity. 20 C.F.R. Pt. 404, Subpt. P, App. 2; SSR 82-63.

Social Security accepts there are other situations in which a disability beneficiary can work and still retain benefits:

-SSD (Title II) beneficiaries can receive a trial work period in which they can do substantial competitive work for up to 9 months

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and still retain disability benefits. 20 C.F.R. §404.1592.

- An SSD/SSI claimant or beneficiary who unsuccessfully attempts substantial work, and fails due to their disability within 6 months, will sometimes not have that work count against them for purposes of determining disability status under SSA's unsuccessful work attempt rules. 20 C.F.R. §404.1574 (c).
- Established SSI (Title XVI) beneficiaries experience a sliding scale reduction of cash benefits depending on their countable income. Thus, to a point, they can retain SSI benefits while doing some work activity.
- Social Security has other work incentive programs that permit and encourage beneficiaries to attempt work, while retaining disability benefits for a limited time (See Social Security Redbook, [www.socialsecurity.gov/redbook/](http://www.socialsecurity.gov/redbook/)).

As these examples demonstrate, SSD/SSI applications are not certifications that a claimant cannot do any work. This distinction is important in correctly determining how to treat concurrent applications for SSD/SSI and UI benefits.

#### UI Work Certifications

Each state has its own criteria for certifying ability to work in UI cases. Some states allow UI applications even if the claimant is medically restricted to only part-time work, work with disability accommodations, or other work limitations. Other states require UI claimants to certify they can do non-restricted full-time work. The nature of each state's certification is usually contained in the applicable state statute or administrative code, and sometimes clarified in state court jurisprudence.

It follows that full record development in SSD/SSI claims that involve concurrent UI applications or benefits requires evidence of the particulars of the applicable state's UI work certification. Otherwise, it would not be possible to determine whether the UI work certification was potentially inconsistent with an SSD/SSI application. Even if they were inconsistent, other explanations for concurrent applications should be considered, as discussed below.

#### **B. Social Security Rules Concerning UI benefits**

SSA rules contain guidance on cases involving application or receipt of UI benefits. Many of these rules bind SSA adjudicators at all levels of the administrative process (See SSR 13-2p, #15).

##### *Credibility rules*

"Other sources may provide information from which inferences and conclusions may be drawn about the credibility of the individual's statements...Examples of such sources include public and private agencies." SSR 96-7p. Thus, information obtained from a state UI agency may

be used to draw credibility inferences in Social Security disability claims.

##### *Methods for determining receipt of UI benefits*

SSA sub-regulatory guidance includes rules and procedures for cases involving UI benefits. For example, SSA has methods of independently verifying receipt of UI benefits through several databases. See POMS SI 00830.230; POMS SI 02310.065.

##### *Opinions of other government agencies*

SSA regulations and policy have rules for weighing opinions of other government agencies, which are basically summarized by stating that SSA is not bound by other agency determinations, but they must be considered. 20 C.F.R. §404.1504; 20 C.F.R. §416.904; SSR 06-3p.

##### *Cristaudo Memos*

SSA Chief Administrative Law Judge memos from Judge Frank Cristaudo were published on Nov. 15, 2006 and Aug. 9, 2010, providing policy guidance on how ALJs should consider a claimant's receipt of unemployment benefits during a claimed period of disability. Key quotes from the memos include:

-"...the receipt of unemployment insurance benefits does not preclude the receipt of Social Security disability benefits."

- "The receipt of unemployment benefits is only one of many factors that must be considered in determining whether the claimant is disabled."

- "...a person can qualify for Social Security disability benefits even though he or she remains capable of performing some work."

- "...it is SSA's position that individuals need not choose between applying for unemployment insurance and Social Security disability benefits."

"The Court [in *Cleveland v. Policiv Management Systems Corp.*, 526 U.S. 795 (1999)] noted that, under the presumptions embodied in our five-step sequential evaluation process, a person can qualify for Social Security disability benefits even though he or she remains capable of performing some work. Similar logic applies to applications for unemployment benefits."

##### *Income counting rules*

The Supplemental Security Income (SSI) program will consider UI benefits to be unearned income (20 CFR § 416.1121(a)), causing a dollar for dollar reduction of SSI Title XVI benefits after a \$20 per month general disregard. Thus, a high enough UI benefit could make a claimant income-ineligible for SSI benefits. Unearned income causes no reduction in SSD (Title II) benefits.

### *SSI rule requiring application for other benefits*

Applicants are not eligible for SSI if they do not apply for other benefits for which they may be eligible, including unemployment compensation benefits. 20 C.F.R. §416.210. Thus, SSI disability claimants may be required to file for UI in some situations. For example, an SSI claimant who might be able to do some part-time work with substantial accommodations, may be required to file for UI in states where such is consistent with UI work certification requirements.

While it is appropriate to consider UI applications as a factor, SSA adjudicators may violate agency policy if they automatically find disability claimants who apply for UI less credible. Adjudicators should first consider possible explanations why applications for both disability and UI benefits might be reasonable before making adverse credibility determinations (see scenarios listed in section A above). Advocates should assist in developing the record on the issue by submitting evidence and arguments supporting any explanations for concurrent disability and UI applications.

### **C. Jurisprudence**

Most cases regarding the intersection of UI and SSD/SSI benefits involve credibility determinations. As there are many cases on this issue, this article will examine sample cases on various major points.

#### *False or Inconsistent Statements*

When a disability claimant made inconsistent statements to an unemployment office, a court determined it was proper for SSA to discount his credibility in his disability claim. *Lopez v. Commissioner of Social Security*, 60 Fed. Appx. 911 (3rd Cir. 2003). Another court found that stating false facts on an employment application can justify finding a claimant not credible in a disability application. See *Prochaska v. Barnhart*, 454 F.3d 731 (7th Cir. 2006). The rules in *Lopez* and *Prochaska* are not controversial. However, adjudicators should be careful to avoid common errors in determining whether statements made in one application are in fact inconsistent with those made in others.

Comparing the consistency of claimant statements about what they can do, even when they are made close in time, is likely to result in mistakes without further inquiry. That is because very few disabilities produce static functional limitations. Symptoms, and correspondingly, functional limitations, can and often do vary considerably even in the short term. For example, a person with a chronic back condition might be moderately functional on one day, and then nearly incapacitated on the next. A person with epilepsy or sickle cell anemia might function totally normally some days, but be incapacitated by symptoms for days at a time when their conditions become symptomatic.

SSA recognizes that intensity of symptoms from mental illnesses can fluctuate greatly over time. SSA policy is that

adjudicators should employ “great care” to avoid conclusions about a person’s ability to function in a work environment based on any single examination or snapshot in time of what they can do. 20 C.F.R. Pt. 404, Subpt. P, App. 1, Social Security Listing 12.00 C.3. Function can also be attenuated by settings that are less demanding, highly structured, or more supportive than the typical workplace. *Id.* For example, a person with a panic disorder might function normally while at home by themselves, and then in response to stress or some other stimulus be incapacitated by anxiety attacks the next day.

Consequently, claimants might file for unemployment on a “good” day, optimistic about what they can do, and begin looking for a job. The next week, after several “bad” days of near incapacity, the same claimant may decide to apply for SSD. That person’s descriptions of activities and limitations may vary considerably in the two applications despite being only a week apart, and still be totally accurate, without any dishonesty or intent to deceive.

As a result, adjudicators should avoid snap decisions on whether claimant statements are inconsistent just by comparing what is listed in the two benefit applications. To avoid making mistakes in the credibility analysis (e.g. mistakenly finding a truthful claimant not credible), adjudicators should develop evidence regarding the reasonable variability of the claimants’ symptoms and functional abilities between the times of applications.

#### *Timing Cases*

Some adjudicators attempt to determine claimant credibility by examining the timing of UI applications compared to the SSD/SSI application. One court found no adverse credibility inference where the claimant only received UI before the date he alleged disability. *Bevelle v. Commissioner of Social Security*, 2008 WL 5351020 (E.D. Mich. 2008). In another case, an ALJ found a disability claimant not credible in part due to a UI application, but the claimant cancelled UI benefits a month after claiming disability. The 9<sup>th</sup> Circuit Court of Appeals ruled the ALJ finding was in error, and that the prompt refusal of UI benefits actually supported the claim. *Ghanim v. Colvin*, Docket No. 12-35804 (9<sup>th</sup> Cir. 2014).

However, an application for UI filed a month before the claimant alleged disability was used as part of a court’s analysis to affirm an ALJ’s denial of disability benefits in *Henriquez v. Astrue*, 482 F.Supp. 2d 50 (D. Mass. 2007). In yet another case, a Court agreed that an ALJ was entitled to discount a claimant’s credibility because she applied for disability benefits immediately upon the expiration of her unemployment benefits. *Davenport v. Commissioner of Social Security*, 167 Soc.Sec.Rep.Serv. 186 (E.D. Mich. June 30, 2011).

The logical basis for finding a claimant incredible based on timing of applications is questionable. Given that official SSA policy provides that there are many grounds

for overlapping SSD/SSI and UI applications, the inquiry should focus on whether such grounds exist. Some “timing” cases are also inconsistent with SSA policy, which states that claimants are not required to choose between filing SSD/SSI and UI applications.

Cases like *Henriquez* and *Davenport* are also inconsistent with the well-recognized legal principal that there are circumstances in which claimants should be permitted to alternatively file even mutually exclusive claims (For example, see Federal Rules of Civil Procedure, Rule 8). Given the complexity of the SSD/SSI disability standard and the 12 month duration requirement, even the most conscientious disability claimants may find it difficult to predict whether they will meet the SSA disability standard. Especially in SSI claims, waiting to file the claim (e.g., to determine whether a disability will meet the duration requirement, or whether attempts to work will be successful) carries a penalty because one can only collect SSI benefits starting in the month after the date the SSI application was filed. Credibility standards like those stated in *Henriquez* and *Davenport* may unjustly penalize claimants just for filing claims necessary to protect legitimate rights and interests.

#### *Minority View: UI + SSD/SSI = Not Credible*

Despite clear policy guidance from SSA that disability claimants need not choose between filing for UI and SSD/SSI, some courts persist in finding that disability claimants filing for UI are per se not credible: “Because an application for unemployment necessarily indicates an ability to work, plaintiff’s receipt of unemployment insurance benefits is evidence that negates her claim that she is disabled.” *Lanier v. Astrue*, 2010 WL 234955 (E.D. Mo., January 15, 2010) (No. 4:09 CV 223 DDN); See also *Mason v. Astrue*, 2008 WL 2783235 (W.D. Mo. 2008 (unpublished) (No. 07-3102 CV-S-RED); *Swigonski v. Astrue*, 2009 WL 3734845 (W.D.NY 2009 ) (No. 07-CV-385).

The court in *Lanier*, and others with similar holdings, employs a fallacy that makes decisions prone to error. The court in *Lanier* accepted as a given that, “...an application for unemployment necessarily indicates an ability to work.” *Id.* In many cases, that is not true. Claimants often cannot accurately predict whether their conditions will improve or get worse over time, or whether the stress of attempting substantial competitive work will exacerbate them. People with newly acquired disabilities may honestly, but incorrectly, believe they can return to work. When claimants make their UI certifications, they are certifying to their hopes and beliefs on the complex and difficult to predict question of whether they can successfully sustain a return to work effort over the long term. Finding people automatically not credible for acting on what are often honestly held hopes and beliefs on a very difficult to predict issue is likely to lead to erroneous and unjust results.

Most courts adopting the *Lanier* approach fail to men-

tion or consider the nature of the applicable UI certification, and automatically assume that it was facially inconsistent with the Social Security disability standard. As mentioned in section A above, many state UI certifications permit benefits in situations that would be consistent with the Social Security disability definition. It follows that adjudicators and advocates should develop the record sufficiently to allow well-informed decision making.

#### *Majority View: Consistency with SSA Policy*

Most cases take an approach consistent with SSA policy as stated in the Cristaudo Memos. These consider an overlapping UI application to be a factor in the credibility determination, though not one which automatically results in a finding that the claimant is incredible or not disabled. For example, a court found that the ALJ did not err in using an application for UI benefits as one negative credibility factor among others, after consideration of the Cristaudo Memo. *Long v. Astrue*, 2011 WL 3847081 (D.S.C. Aug. 30, 2011). An earlier court decision similarly found that a UI application was a non-dispositive factor:

“...while we have previously held that the employment is not proof positive of ability to work...we are not convinced that Social Security claimant’s decision to apply for unemployment benefits and represent to state authorities and prospective employers that he is able and willing to work should play absolutely *no* role in assessing his subjective complaints of disability.” *Schmidt v. Barnhart*, 395 F.3d 737 (7th Cir. 2005).

In *Schmidt*, the claimant argued that collection of unemployment was irrelevant because people might “...actively seek work and wind up unable to physically perform the job once it is received.” *Id.* The court found that, “...there may indeed be particular people to whom Schmidt’s analysis applies, but he fails to even suggest that he is in their number.” *Id.* Thus, inadequate record development was again an issue. The court in *Schmidt* put the burden on the claimant to provide an explanation for the overlapping benefit applications with supporting proof.

Another Court put the burden on the Commissioner of SSA to prove that the UI and SSD/SSI applications were inconsistent, In *Carmickle v. Commissioner*, the Court recognized that a person limited to part-time work might legitimately meet both UI and Social Security Disability standards. The Court found in the claimant’s favor, stating that,

“...the record here does not establish whether Carmickle held himself out as available for full-time or part-time work. Only the former is inconsistent with his disability allegations. Thus, such basis for the ALJ’s credibility finding is not supported by substantial evidence.” *Carmickle v. Commissioner*, 533 F.3d 1155 (9th Cir. 2008).

As in the *Schmidt* case, the record was not well developed

on the issue. However, unlike in the *Schmidt* case, the *Carmickle* court put the burden on the Commissioner to show an inconsistency, rather than on the claimant to prove that the applications were consistent.

Another court credited explanations that a claimant might seek a job in ignorance of the nature of his conditions, only to be unsuccessful in a job attempt due to disabilities. He may only work a short while or receive gratuitous employment. *Anderson v. Astrue*, 2011 WL 2416265 (N.D. Ill., 2011). Another court found the ALJ erred in questioning the credibility of a disability claimant on the ground that she was receiving UI benefits. *Richards v. Astrue*, 370 Fed.Appx. 727 (C.A. 7 (Ill.) April 13, 2010). In *Richards*, the claimant testified that she sought UI only because she had no other source of income. The court acknowledged that “A desperate person might force herself to work - or in this case, certify that she is able to work - but that does not necessarily mean she is not disabled.” *Id.* As with the *Carmickle* case, it appears the courts in *Anderson* and *Richard* put the burden on the Commissioner of SSA to show that the applications were inconsistent.

In a recent case the ALJ discounted a disability claimant’s credibility in part due to receipt of UI benefits. The 7<sup>th</sup> Circuit Court of Appeals reversed and remanded in part because the ALJ decision failed to articulate sufficient consideration of the issue, and the record was not adequately developed. *Scroggham v. Colwin*, Docket No. No. 13-3601 (7<sup>th</sup> Cir. Aug. 27, 2014). The Court noted “... it is especially possible that an applicant might, at the early stages of the disease’s manifestation, be unsure of the limits of his physical capabilities and only later determine that his inability to find work was due to the fact that the physical toll taken by the disease was greater than he had thought.” *Id.*

An example of a better developed record appears in the case of *Roper v. Astrue*, where the plaintiff’s attorney argued persuasively that her client was compelled to apply for UI benefits as per 20 C.F.R. § 416.210, and that “Oregon law allows receipt of unemployment benefits if an individual is able to perform “some” work, which is consistent with the Social Security Administration’s definition of disability based upon an individual’s inability to perform full time work.” *Roper v. Astrue*, Docket No. 09-1447-TC (D.Or. October 06, 2011). Counsel also cited the Cristaudo Memo, and the court overturned the Commissioner’s negative credibility finding that was based on receipt of UI benefits.

In examining these cases, *Roper* provides important lessons for adjudicators and advocates. Developing the record allows adjudicators to make informed credibility determinations, while failing to do so likely results in erroneous decisions based on speculation.

#### *Other Important Aspects of Record Development*

Asking particular questions about a UI application can provide disability adjudicators and advocates with probative information to help fully develop the record. For example, UI appli-

cants typically must apply for many jobs. Asking how many jobs claimants applied for, how many interviews they got, and why they did not get any jobs can often reveal information about the claimant’s disability. In some cases, UI applicants get hired but are fired shortly after. Asking the reasons they were fired can reveal information about their functional limitations. In some cases, claimants apply for UI but are rejected because the UI agency finds they are unable to work. UI agencies sometimes refer claimants with disabilities to the state vocational rehabilitation agency, which may have medical and vocational evidence relevant to the disability claim.

Delving into a disability claimant’s personal, financial, and medical situation can reveal much. A UI eligible claimant who is destitute, homeless, lacking adequate medical care and looking at a long delay for a disability determination might file for UI and attempt work out of desperation, even against their doctor’s reasonable advice. A claimant with a severe mental impairment may not understand program requirements, or have sufficient insight to know their own limitations. In other words, such claimants may be medically disabled despite their UI application. While the UI application might still be considered as a credibility factor, adjudicators should not let that overcome competent medical evidence of disability.

Anecdotally, advocates note that record development on the credibility issue is sometimes poor at all administrative levels at SSA. While some ALJs raise and develop the issue at hearings, some do not. It’s not unusual for the claimant’s first notice that SSA was holding the UI application against them to come in the written unfavorable ALJ decision, after the record closes. Often, the record only contains a print-out of the UI benefits obtained from a matching database and a conclusion that such renders the claimant not credible. Advocates seeking to avoid such results, and adjudicators seeking better accuracy in decision-making, should better develop the record.

Such development can include a clear explanation of the state UI certification requirements. When claimants file for both UI and SSD/SSI, advocates do well to promptly document in both files the reasons why the claimant filed for both types of benefits. Doing so removes any implication that the claimant was trying to hide anything.

Advocates should be aware that some UI programs require claimants to report application or receipt of disability benefits. Some UI programs have offsets when disability benefits are collected, possibly creating UI overpayments when disability claims are successful.

In conclusion, the intersection between Social Security disability standards and UI remains somewhat disjointed although Social Security has made efforts to improve matters through policy guidance. Some disability adjudicators and courts continue to apply significantly different standards. However, through awareness of the issues and better record development, disability advocates and adjudicators can help improve accuracy in decision-making.

*Cops, Firefighters Charged with Disability Fraud*, Wall St. J. Jan. 8, 2014, at A2). The majority opinion criticized the administrative law judge's reasoning for rejecting both the treating providers' opinions and the claimant's testimony for failing to "holistic[ly] review" the evidentiary record. The court recognized the treatment notes reflected improvement in the claimant's symptomology, and the claimant's ability to perform basic chores; however, the administrative law judge needed to view such evidence in the context of the "overall diagnostic picture." In sum, the majority found the record as a whole did not support the ALJ's findings on both his rejection of the treating providers' opinions and the claimant's credibility. In his dissent, Chief Judge Alex Kozinski agreed with the administrative law judge that both the claimant's testimony and the treating providers' opinions were inconsistent with the treatment notes and prior statements by the claimant. At

best, Judge Kozinski reasoned, the record would support more than one reasonable interpretation, which would mandate the reviewing court to uphold the administrative law judge's decision. What is interesting about Judge Kozinski's dissent is the influence the recent scandals involving defrauded the Social Security Administration had on his opinion. As noted above, this case involved only mental impairments, which according to Judge Kozinski are easy to fake. (citing Pervaiz Shallwani & Damian Paletta, *Ex-Cops, Firefighters Charged with Disability Fraud*, Wall St. J. Jan. 8, 2014, at A2). While not pointing to the majority directly, Judge Kozinski stated that "many appellate judges [appear] blissfully unaware" of the serious and costly nature of these fraudulent claims. In light of his stated opinions, the inconsistencies in the claimant's statements troubled Judge Kozinski, who believed the majority was giving the claimant "an undeserved victory."

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CHAIR CONTINUED FROM PAGE 1

ued. However, if you ever have a question or concern that you would like to discuss with your fellow Social Security Law Section members, you can request the national FBA to send an email blast to all Section members asking for input.

In March 2010, then-Social Security Administration Commissioner Michael Astrue announced that the number of disability hearings pending had dipped below 700,000 for the first time in nearly five years, and down 71,000 from its all-time peak in 2008. Sadly, it now appears that the number of hearings pending has topped 1,000,000, by far its highest level ever. There are many reasons why this has occurred: the large increase in the number of disability claims filed during the Great Recession, the rising number of Baby Boomers who are aging into disability, the many experienced administrative law judges who are retiring from SSA service, the declining resources allotted by Congress to hire and retain Hearing Office support staff, and SSA's renewed emphasis on, and scrutiny of, the quality of ALJ decisions, which has led many judges to take more time in rendering their decisions.

Among those who have offered up administrative law judges as convenient scapegoats for the increasing hearing backlog is Prof. Richard J. Pierce, Jr. of the George Washington University Law School, a prominent administrative law scholar. Prof. Pierce recently told *The Washington Post* that ALJs "don't have the slightest idea what they're doing." He has repeatedly called for the abolition of the ALJ adjudicative system for deciding disability appeals, allowing the decisions of State agency examiners to stand. Prof. Pierce said that these examiners are "actually trained people," in contrast to ALJs, who he said "don't know diddly about medicine" and "have no training whatsoever."

To follow Prof. Pierce's criticisms to their logical conclusion, we should not allow judges or juries to decide medi-

cal malpractice, personal injury, Americans with Disabilities Act (ADA) and other cases involving medical issues, because judges and jurors lack formal medical training.

Here are a few facts that Prof. Pierce either ignores or is ignorant of. Although both State agency examiners and ALJs are tasked with making medico-legal decisions, State agency examiners are not required to be lawyers (although some have law degrees) and are not health care professionals. In contrast, all ALJs must be licensed attorneys. Most have an extensive and significant trial background as Social Security staff attorneys in the disability area or as claimants' representatives, or both. ALJs receive training on medical issues, although it appears that the medical training that State agency examiners receive is more extensive. To the extent that this is a problem, it is easy to remedy simply by offering ALJs more medical training, both at the outset of their service and throughout their tenure.

In Prof. Pierce's 2011 law journal article, "What Should We Do About Social Security Disability Appeals?" he stated that "[t]he initial bureaucratic decision [to grant or deny disability benefits] is made by a team that consists of a disability examiner and a medical adviser," who together analyze the paper record and solicit any additional medical evidence that may be needed in order to render a decision. "Unlike a disability examiner," Prof. Pierce noted, "the ALJ has no medical adviser." The truth of the matter is that State agency examiners have increasingly less contact with, or input from, medical consultants. Instead of offering their own independent medical opinions concerning a claimant's medical impairments and the effects of those impairments on the claimant's work-related functional abilities, State agency medical consultants are currently asked only to approve or disapprove the examiner's own residual functional capacity assessment, which

typically is formulated without prior input from any health care professional. Face-to-face conversations between examiners and medical consultants are rare indeed. In contrast, an ALJ is able to call a medical expert as a witness at any hearing, and can question the expert in detail about the claimant's alleged impairments and their functional effects.

Prof. Pierce also ignores the fact that State agency examiners have their own case backlog, for most, if not all, of the same reasons that underlie the ALJ hearing backlog. For example, in Illinois, a claimant seeking reconsideration of an adverse State agency decision must wait an average of four months before her case is even assigned to

an adjudicator and then another six months to receive a decision from that adjudicator. The problem, Prof. Pierce, is a systemic one, related largely to case volume, and is not limited to the hearing level of adjudication.

Law Professors Jon C. Dubin and Robert E. Rains authored an excellent rebuttal of Prof. Pierce's article. Their issue brief can be found on the website of the American Constitution Society. In addition, the Spring 2012 edition of the journal *Regulation* contained another rebuttal of Prof. Pierce's article, authored by ALJs Jeffrey S. Wolfe and Dale D. Glendening. Both of these pieces should be read with care, especially by Prof. Pierce and those in Congress or the SSA who may be inclined to base policy decisions on his views.

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## SUICIDE CONTINUED FROM PAGE 10

terfall Chart will reflect a further decline in overall approval rates at the ODAR ALJ hearing level. What does this mean? It means that every working day across America, people receive and will continue to receive ALJ denials of benefits in cases which might have been approved just four or five years ago. Every day then – another 400 individuals, 400 families, 400 additional stories of devastation. One other disturbing development for 2014 at the ODAR ALJ level is the return of the greater than one year backlog time frame from hearing request to decision, with the trend pointing to even greater delays for 2015. Whether ODAR will return to the two-year backlogs which were common in 2010 is uncertain, but the return of the steadily increasing backlog is a serious concern to those who must wait longer to receive decisions—all the while living without the much needed disability stipend.

Is it any wonder then that the Administration and its decision making corps have been denying more cases at rates that are the highest they have been in over four decades? And finally, is it any wonder that our clients may be dying either from their physical impairments, or from suicide when the despair and pain sets in and our clients perceive that nobody cares? This despair grows with denial after denial as cases languish on appeal.

Administrative Law Judges, notwithstanding the political maelstrom over entitlements in general and the implicit and explicit pressure on them to deny more claims, need to be acutely aware that many of the claimants those ALJs serve are suffering from severe mental illness often exacerbated by painful physical impairments. The Seventh Circuit Court of Appeals recognized as early as 2010 that, “many of the Social Security Administration's administrative law judges seem poorly informed about mental illness” *Spiva v. Astrue*, 628 F.3d 346, 348 (7th Cir. 2010). With respect to suicide, this was tragically evident in the recent decision of *Nimmerrichter v. Colvin*, 4 F. Supp. 3d 958 (N.D. Ill. 2013). In the *Nimmerrichter* case, the claimant first tried to kill himself in July, 2003, with three additional attempts through 2006. He applied for disability

benefits in January, 2008, alleging an onset of disability back to 2003. In January, 2009, Mr. Nimmerrichter tried for a fifth and final time to kill himself by taking an overdose of painkillers, and this attempt was “successful” (however inappropriate that term is when speaking of suicide). Mr. Nimmerrichter's claim had been denied at the initial level and at reconsideration; by the end of the summer of 2008, he had requested a hearing by an ALJ. That hearing would not take place until June, 2010, almost a year and a half after the claimant's death. Based on the claimant's physical impairments (severe degenerative cervical and lumbar impairments), the ALJ found that Mr. Nimmerrichter was disabled as he was limited to sedentary work, but that he was entitled to benefits only as of his 50th birthday in February, 2008. Mr. Nimmerrichter's widow appealed the case to obtain additional back benefits, and the case was assigned to United States District Judge Jeffery Cole.

Judge Cole found that the ALJ's failure to find a disabling mental impairment from 2003 forward was an egregious error. The ALJ had received testimony from a psychologist, and the denial of benefits for the earlier period had in part relied on this testimony. But the Court found that the ALJ had ignored significant evidence. The ALJ had cut off the widow's testimony, and the ALJ's decision neglected that testimony. To make matters worse, the ALJ had cherry picked a few positive treatment notes from the medical record despite that most of the chart notes were not positive but instead reflected “a deeply troubled individual struggling to understand his inability to function as he once had.” *Nimmerrichter* at 970. Judge Cole cogently concluded,

How could an ALJ ignore pages of evidence, including hospitalizations for suicide attempts and a successful suicide, while focusing on a few snippets of evidence pertaining to days when Mr. Nimmerrichter felt better or was in a good mood? How could a “medical expert” conclude under the facts of this case that Mr. Nimmerrichter had “bounc[ed] back nicely” following one or

more of the unsuccessful suicide attempts? (The fifth attempt was successful). How could both the ALJ and the medical advisor upon whom the ALJ relied so completely ignore Mr. Nimmerrichter's statements and his widow's testimony? . . . It is difficult to imagine; but that is exactly what happened. Nonetheless, the record demonstrates that the only possible outcome in this case is a finding that Mr. Nimmerrichter was disabled. *Nimmerrichter* at 972.

In the United States, suicide rates have risen sharply since the year 2000, especially among middle aged Americans. A May, 2014 *New Yorker* article entitled "The Neglected Suicide Epidemic" could very well be amended in the Social Security context to read "The Neglected Suicide Epidemic among Social Security Disability Applicants." The *New Yorker* article points out that in May of 2013:

[C]iting the "substantial" rise in suicide among the middle-aged, the Centers for Disease Control and Prevention described suicide as "an increasing public health concern." That realization has begun to spread: in the same month, *Newsweek* ran a cover article called "The

Suicide Epidemic," noting that, around the world, self-harm takes "more lives than war, murder, and natural disasters combined." In America, these numbers—which many experts believe are lower than the actual figures, owing to under-reporting—cannot simply be attributed to the toll of a long recession, or increasing gun ownership: clinical depression is also on the rise. Suicide rates declined in the nineteen-nineties, but since 1999 more Americans have killed themselves each year than in the one before.

As in the general population, there is an epidemic of suicides among disability applicants that is only getting worse as higher percentages of claims are denied, and as delays continue to be burdensome for disability applicants at all levels of the adjudicative process. It is my hope that this article will serve as a wake up call for ALJs and for the Administration generally. I hope we can hear more stories similar to the one wherein the wise ALJ granted benefits and most likely averted a suicide. I hope we can hear fewer bleak reports of suicides which all too commonly follow denials in meritorious claims—claims involving serious mental impairments which are ignored entirely or considered inadequately.



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