# Social Security NEWS

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***Call for Submissions:***
*Please contact N. David Kornfeld, ndksocialsecuritylaw@gmail.com to discuss any potential articles or submissions.*

## Message from the Chair

*by Hon. James D. Wascher*

Thank you for your membership in the Social Security Law Section of the Federal Bar Association. As we begin a new year, the Social Security Law Section is launching three initiatives that we expect will add value to your membership in the section:

- After a two-year hiatus, we are proud to present this new issue of *Social Security News*. We now plan to resume publishing the newsletter on a quarterly basis. I am pleased to welcome N. David Kornfeld, an experienced Social Security disability law practitioner from the Chicago area, as the new editor of this publication. I also want to thank my colleague, Judge Jim Frasier, for revitalizing Social Security News as its immediate past editor. Each issue of the newsletter will contain a regular "New Case Update" feature to be authored by Section Board member Casey Saunders, as well as feature articles on legal issues of interest to our membership. We hope that you will consider submitting an article or commentary for a future issue of the newsletter. Send your ideas or articles to N. David Kornfeld at ndksocialsecuritylaw@gmail.com.
- The Social Security Law Section now has its own LISTSERV through which members of the Section can communicate with one another regarding hot topics, research questions and other issues of concern. Section Board member L. David Ferrari has agreed to be our moderator. Unless you opted out of the LISTSERV when the FBA announced this initiative last October, you will automatically receive an email in your inbox whenever a message is posted by another member of the list. Messages may be sent to SOCIAL-SECURITY-L@LISTSERV.FEDBAR.ORG. We hope that the LISTSERV will prove to be a useful forum for the discussion of important issues and the exchange of information. Please don't be bashful about posting a message.
- Later this year, the Social Security Law Section

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*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 views of the Social Security Administration, the Federal Bar Association, or the Social Security Law Section.*

### Also in this Issue



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# From the Editor

*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 Spring 2014 issue of the FBA Social Security Section Newsletter; it is my first one as Editor and I look forward to working on future issues in this capacity. In the meantime, I hope that you find the articles and information here to be both interesting and useful. The Federal Bar Association-Social Security Law Section is a unique and special group with members and officers comprised of both administrative law judges and private attorneys who represent claimants. As such one might expect some diversity of opinion to emerge from time to time. I for one think this is a healthy diversity. Dialogue between judges and advocates in the hearing room is constrained by both institutional and representational considerations. Ideally, in this Section's general forum as well as in this particular newsletter, a more open and candid discussion of issues and problems can take place. I would like to hear from more of our members including both judges and attorneys, and I invite you to call me or email me with ideas that you might be willing to write about. I am excited about the current issue. For the past year I had been wanting to put in an article format my percolated thoughts about the EAJA hourly rate issue, and this issue's deadline motivated me to get it done. Special thanks to Section Board Member Attorney Casey Saunders and to Attorney Gayle Troutman, for providing an excellent federal case law update. And special thanks also to Judge Wascher (I am going to keep calling him Judge) for having the faith in me to take on the editorship role, and to appoint me to the Section Board. I consider it a special honor. Enjoy the issue.

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plans to offer a free webinar on an emerging issue in Social Security disability law. You will be able to view and listen to this program on your desktop computer, laptop or tablet. I will be working with Section Board member Jerrold A. Sulcove to assemble a program that will be useful to all members of the Section. If you have a suggestion for a topic, or would like to help with the webinar, please contact Jerry at jerroldsulcove@blackanddavison.com or me at james.wascher@ssa.gov. We expect to offer a Social Security Law Section webinar annually or at least biennially.

In addition to these initiatives, the members of our Section Board have been hard at work on a series of position papers regarding Social Security disability policy changes that were proposed in a minority report issued by the Permanent Investigations Subcommittee of the Senate Homeland Security and Governmental Affairs Committee on issues such as representation of the government at disability hearings, closing the record, reforming the Grid Rules and improving consultative examinations. We hope to post the results of our work soon.

The current system for adjudicating Social Security disability claims is under seemingly relentless attack by congressional committees, the CBS television network's "60 Minutes" program and newspapers such as the Wall Street Journal (excoriating "Grand Theft Disability" and "[r]ampant abuse") and the Chicago Tribune (condemning the "rancid abuse of Social Security disability"). The FBA's Social Security Law Section is uniquely positioned to guide the debate concerning the systemic changes that almost certainly will come, because our members include administrative law judges, claimants' representatives and Social Security staff attorneys. We will need the active participation of all members of the Section in this process. And we will also need more members. Please take a moment to identify a lawyer or ALJ whom you know who is not currently a member, and urge him or her to join the FBA and our Section today. ■

# On Mathews-Sheets & beyond - EAJA cost of living adjustments to the hourly rate cap - further clarification from the Seventh Circuit may be on the horizon

*by N. David Kornfeld*

A new case which will be heard in the Seventh Circuit will hopefully resolve inconsistencies in the district courts regarding the means by which attorneys must prove up cost of living adjustments (COLA) under the Equal Access to Justice Act (EAJA).

The Equal Access to Justice Act, 28 U.S.C. 2412(d), re-enacted P.L. 99-80, 99 Stat. 183 (1985) is the fee-shifting statute applicable, inter alia, to Social Security disability claims in appeals to federal court wherein the claimant who becomes a prevailing party can obtain fees and costs, subject to the court finding the position of the United States was not substantially justified. 42 U.S.C. 2412(a), (d) (1) (A). The legislative purpose in enacting the Equal Access to Justice Act was to correct an inequity in the federal courts. Congress determined that many citizens were deprived of their rights because "the cost of securing vindication of their rights and the inability to recover attorneys' fees preclude resort to the adjudicatory process. When the costs of contesting a Government order, for example, exceed the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980), reprinted in 1980 U.S. CODE CONG. and AD. NEWS 4988.

The EAJA thus encouraged private attorneys to take on Social Security disability appeals to federal court providing an important means of compensating attorneys taking on these cases when prevailing in court, challenging unjustified administrative denials. In such cases the Plaintiff is to be paid for both litigation fees and costs. When the EAJA was originally passed the hourly rate cap was set at $75.00 per hour; this cap was increased to $125.00 per hour in 1996. Attorneys routinely sought an increase to the hourly rate based on inflation as the EAJA hourly rate was to reflect market rates and could be increased to reflect cost of living increases from enactment of the 1996 amendment to the date of whenever an EAJA petition would be filed. Increase in cost of living is an explicit grant of discretion to the court to increase fees under EAJA. 28 U.S.C. 2412 (d) (2) (A) (ii).

Historically, Plaintiff's attorneys routinely asserted that the increase in the Consumer Price Index (All Items, All Urban Consumers, United States City Average) (hereinafter, CPI) as published monthly (CPI Detailed Report, Bureau of Labor Statistics, Department of Labor) from the 1996 average to the average at the time of the initial petition, is an ordinary measure of "increase in the cost of living" as incorporated in EAJA. The EAJA accordingly allowed attorneys' fees at "prevailing market rates" but subject to a ceiling. The ceiling as set in 1996 was understood to be $125 per hour but could be increased when "the court determines that an increase in the cost of living or a special factor, such as limited availability of qualified attorneys for the proceedings involved justifies a higher fee." 28 U.S.C. 2412 (d)(2)(A)(ii).

With respect to the specific hourly rate requested, the Seventh Circuit's decision of *Mathews-Sheets v. Astrue*, 683 F.3d 560 (7th Cir.2011), an opinion written by Judge Richard Posner confirmed that a cost of living adjustment as reflected by inflation can provide support for an increase in the rate. However under the *Mathews-Sheets* decision such an adjustment was deemed not automatic, i.e. Judge Posner indicated that a district court has discretion to either grant the cost of living adjustment or not to grant the request for adjustment, depending on whether an adequate showing is made to justify the increase.

In *Mathews-Sheets* the Plaintiff's attorney initially requested an hourly rate of $225 per hour, a rate higher than what would have been afforded simply utilizing CPI data, without asserting or articulating any justification for the increase. Later after the Commissioner challenged the $225 per hour rate, the Plaintiff sought to justify an inflation adjustment at least to $170 per hour arguing that this was automatically justified. Judge Posner however stated in *Mathews-Sheets* that inflation does not entitle or automatically justify an increase; there still needs to be a showing. Secondly, Judge Posner indicated that if an attorney is seeking a fee over and above what inflation would warrant, as the Plaintiff's attorney in *Mathews-Sheets* originally did, then and only then would an attorney need to show something other than inflation such as the limited availability of attorneys to warrant an adjustment. Thus, Judge Posner described the two separate special factors as distinct specifically stating, "(i)t might seem that because the cost of living special factor is not automatic, the two enumerated special factors merge; the lawyer arguing for a cost of living increase must show limited avail-

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## On Mathews-Sheets and beyond continued from page 3

ability of lawyers able to handle such a case. *But that is not correct.* [emphasis added]. Inflation might have an impact across a range of fields of practice that would make it difficult to hire a competent lawyer even in a rather routine case in a field of law by no means esoteric; in such a situation a fee above the statutory fee might well be justified." *Mathews-Sheets* at 565. Thus under this decision inflation alone might well justify an adjustment according to Judge Posner. Judge Posner then stated, "(w)hen inflation is not a factor, the lawyer does have to show that there is something special about the particular type of case that justifies the higher fee. That special factor has not been invoked in this case." *Mathews-Sheets* at 565. That inflation alone may justify an increase in the hourly rate under the EAJA is the only reasonable interpretation of the *Mathews-Sheets* decision and the only one consistent with the EAJA statute. If a Plaintiff could establish the difficulty of hiring an attorney to take on Social Security cases in federal court, in theory at least an hourly rate over and above what would be permitted by inflation could be obtained. However as Judge Posner indicates, if a Plaintiff attempts to invoke the factor of limited availability to warrant an increase over and above what inflation would warrant, (for example the hourly rate of $225 as requested in *Mathews-Sheets*) additional proof would be needed. What Judge Posner stated then to the particular Plaintiff in *Mathews-Sheets* is that a showing would need to be made on remand establishing why the petitioner deserved a cost of living increase based on inflation; without such a showing, then (and only then) would the Plaintiff need to show limited availability, i.e. that no other "lawyer capable of competently handling the challenge that his client mounted to the denial of Social Security disability benefits" would be available in the relevant geographical to handle such a case. *Mathews-Sheets* at 565.

In a prior opinion, the Seventh Circuit had assumed the appropriateness of a cost of living adjustment, and noted that the government did not object to the one requested in that case. See *Tchemkou v. Mukasey,* 517 F.3d 506 (7th Cir. 2008) ("We believe that, given the passage of time since the establishment of the hourly rate, a cost-of- living adjustment is warranted. The Government does not object. . .to the increase in general. . .") *Tchemkou* at 512.

After *Mathews-Sheets* however, the Commissioner in the Seventh Circuit based on what I believe is an erroneous reading of the decision, began to challenge plaintiffs' requests for cost of living increases asserting that Judge Posner's decision in *Mathews-Sheets* warrants limitations to $125.00 per hour. While many district court judges rejected the Commissioner's challenges, on some occasions before certain district court judges, the Commissioner's arguments to limit the hourly rate to $125 proved to be successful. As one district court judge pointed out, although "the *Mathews-Sheets* court did not describe any particular method or manner by which a lawyer might demonstrate that inflation has increased the cost of legal services to persons seeking redress against the government" *Shipley v. Astrue*, 2012 U.S. Dist. Lexis 32541 (S.D. Ind. 2012) submitting the Department of Labor's Consumer Price Index data to support a request for an hourly rate higher than $125 is certainly relevant. As the Court in *Shipley* pointed out, "(c)hange in the CPI-U over time is widely used as an appropriate measure of inflation and to 'adjust payments for. . . obligations that may be affected by changes in the cost of living.'"

In my own post-*Mathews-Sheets* EAJA petitions, I have relied solely on inflation for an increase and have pointed out that in 1996 I charged an hourly rate of $150.00 per hour in non-contingency fee matters and that my current hourly rate for non-contingency fee matters is $250.00 per hour reflecting a 66 percent increase over this time frame versus a 45 percent increase in the EAJA hourly rate requested. I have also pointed out that I have been in the same office from 1996 to the present and affirmed that the rental has increased 35 percent over this time period. I further have pointed out that in 1996 and at all times prior to February of 2002 the maximum an attorney could charge and receive under Social Security's own streamlined fee agreement process for the administrative work on a disability claim before the Agency was $4,000.00. In February of 2002 the Administration raised the fee agreement limit to $5,300.00 and after June 22, 2009 the fee agreement approval limit was once again raised to $6,000.00; this remains the current limit. (See POMS, SSA's Program Operations Procedural Manual GN 03940.003). Thus I point out that the Administration's own fee agreement process ceilings are 50 percent higher than they were in 1996, and indeed since early 2002. This increase reflects the fact that Social Security acknowledges that the cost for legal services have significantly increased since 1996. Finally, I point out that further support that inflation justifies a cost of living increase to the EAJA hourly rate can be found in data from the Justice Department's and the United States Office of Personnel Management's own websites regarding pay scales for government attorneys for both the year 1996 and for the years 2010-2012. The career webpage for Social Security's Office of General Counsel utilizes the same OPM data. The Justice Department web page lists $62,467 as the annual salary for entry level GS-11 attorneys at step one for attorneys for Washington D.C.

The OPM data for GS-11 step one in 2012 for the Chicago area is slightly higher with an annual salary of $62,909. The same Chicago area GS-11 step one salary for 1996 however was only $37,650. The increase between 1996 and the period of 2010-2012 is 67%. This same 67 percent increase applies to the relevant time period for every GS-level including those above and below GS-11 with the exception of the two highest GS-15 steps which still showed a 60 percent increase. Given the fact that the government's own attorneys largely have had an increase of 67 percent over this time frame, I have argued that it is incongruous and indeed disingenuous for the Commissioner to argue that attorneys' fees for prevailing parties in the EAJA context should be limited to the 1996 $125 per hour limit. The law and the briefing that both plaintiff's and defendant's attorneys do in Social Security cases is in practice and theory similar and that a significant cost of living increase due to inflation for legal representation in these matters is also reflected in the percentage increase of what the government has paid its own attorneys over the relevant time period. I have not asked for a 67 percent increase but have limited my hourly rate requests to the increase which is reflected using the CPI-U data, an approximate 45 percent increase in the EAJA hourly rate since 1996. The majority of courts who have addressed the issue of a cost of living increase in the EAJA hourly rate post-*Mathews-Sheets* have rejected the Commissioner's argument to deny a cost of living adjustment. Based on factors similar to the ones I have utilized in my petitions, the hourly rate has repeatedly been adjusted. In addition to the 2012 *Shipley v. Astrue* case, numerous cases have similarly granted cost of living increases in the EAJA hourly rate. (See *Gonzalez v. Astrue*, 2013 U.S. Dist Lexis 44300 (N.D. Ind. 2012) (Judge Lynch); *Just v. Astrue*, 2012 U.S. Dist Lexis 94090 (N.D. Ill. 2012) (Judge Kocoras); *Scott v. Astrue*, 2012 U.S. Dist Lexis 19840 (N.D. Ill. 2013) (Judge Schenkier); *Dewolf v. Astrue*, 2012 U.S. Dist Lexis 111189 (N.D. Ill. 2013) (Judge Der-Yeghiayan); *Seabron v. Astrue*, 2012 U.S. Dist Lexis 77216 (N.D. Ill. 2012) (Judge Schenkier); *Chambers v. Astrue*, 2013 U.S. Dist Lexis 69871 (N.D. Ill. 2012) (Judge Pratt) *Claiborne ex rel. L.D. v. Astrue*, 877 F. Supp. 2d 622 (N.D. Ill. 2012) (Judge Finnegan) (finding that Plaintiff's attorney had presented sufficient information to warrant an EAJA hourly rate of $181.25); *Arnett v. Astrue*, 2012 U.S. Dist Lexis 105729 (N.D. Ill. 2012) (Judge Miller) (awarding over $19,000.00 in EAJA fees at the requested hourly rate of $175.13 per hour); *Mireles v. Astrue*, 2012 U.S. Dist Lexis 146103 (N.D. Ill. 2012) (Judge Feinerman); *Brent v. Astrue*, 2012 U.S. Dist Lexis 179238 (N.D. Ill. 2013) (Judge Martin); *Carnaghi v. Astrue*, 2012 U.S. Dist Lexis 176187 (N.D. Ill. 2012) (Judge Keys); *Roddy v. Colvin* 2013 U.S. Dist Lexis 77445 (N.D. Ill. 2013) (Judge Pratt); *Williams v. Astrue*, 2013 U.S. Dist Lexis 9133 (N.D. Ill. 2013) (Judge Gilbert); *Gibson v. Astrue*, 2013 U.S. Dist Lexis 9115 (N.D. Ill. 2013) (Judge Gilbert); *Kazmi v. Colvin*, 2013 U.S. Dist Lexis 54521 (N.D. Ill. 2012) (Judge Rowland), and *White v. Colvin*, 2013 U.S. Dist Lexis, 44300 (N.D. Ill. 2013) (Judge Shadur). As Judge Shadur noted in *White v. Colvin*, 2013 U.S. Dist Lexis, 44300 (N.D. Ill. 2013), "(i)n this instance White's counsel has more than amply brought to the fore a host of additional District Court opinions that have also rejected the Commissioner's distorted reading and have granted enhanced hourly rates for counsel based on the cost of living factor. This Court has reviewed both White's claim and the Commissioner's response in detail, and White has the better of it by far." White at 2. The Commissioner has succeeded in just a few cases which limited a Plaintiff to only $125 per hour. One early case decided by Judge Der-Yeghiayan, is not particularly relevant inasmuch as when provided with adequate proof of inflation Judge Der-Yeghiayan in one of my own cases *Dewolf v. Astrue* stated:

"In the instant motion, Dewolf is not asking for an increase in the hourly rate based upon economy-wide inflation since 1996. . . Instead, Dewolf argues that his attorney's costs in providing adequate counsel for this specific type of case have increased due to inflation since 1996 and Dewolf has provided statistics to support his request. Dewolf explains that his attorney's hourly rate for non-contingency fee matters has necessarily increased by 66% since 1996. Dewolf also points out that despite the 66% increase since 1996, he is only asking in the instant motion for a rate that is a 45% increase from $125 limit. . .Dewolf also indicates that his attorney is a solo practitioner, practicing out of the same office in which he practiced in 1996, and that his rental rate has increased by 35%. . . See, e.g., *Arnett*, 2012 WL 3079115, at *1 (noting that the plaintiff provided "evidence of how inflation has impacted her attorney's cost of doing business (showing rental rates increasing 23% from 1997 to 2011)"); *Just v. Astrue*, 2012 WL 2780142, at *2 (N.D. Ill. 2012) (noting that the plaintiff's "attorney, as an officer of the Court, represented that he has incurred additional expenses in the form of increases to rent, salaries, and health insurance premiums as a result of inflation"). Dewolf also contends that since 1996, the maximum amount that an attorney could recover under SSA's own streamlined fee agreement process for work performed on a disability claim before the Agency has been increased from $4,000.00 to $6,000.00, indicating that SSA also recognizes the

MATHEWS-SHEETS *continued on page 10*

# Federal Case Law Update

*by Casey L. Saunders and Gayle Troutman*

*Casey L. Saunders and Gayle Troutman are attorneys with practices in Oklahoma, concentrating in Social Security Law. Mr. Saunders also serves on the Federal Bar Association, Social Security Section Board.*

**Tenth Circuit remands ALJ decision indicating an ALJ must consider the combined severity of all impairments both severe and non-severe and further provides enlightenment regarding the appropriate development of an RFC. *Wells v. Colvin*, 727 F.3d 1061 (10th Cir. 2013).** The ALJ in Wells used the "special technique" found in 20 C.F.R. §§ 404.1520a(b)–(d) and 416.920a(b)–(d) to determine if the claimant's mental impairment was "severe" at step two. Id. at 1064. Even if a claimant's impairment is not severe, an ALJ is still required to consider and discuss the non-severe impairment as part of the residual functional capacity ("RFC") analysis at step four. Id. (citing 20 C.F.R. §§ 404.1545(a)(2) and 416.945(a)(2)). The issue before the court was determining how much discussion of non-severe impairments is required at step four. Id. The court noted the existence of recent unpublished decisions from this court reaching divergent results. Id. After reviewing the relevant regulations, the court held an ALJ must consider the combined effect of all of the claimant's impairments. Id. at 1065 (citing 20 C.F.R. §§ 404.1545(a)(2), 416.945(a)(2)). In addition, an ALJ is not allowed to rely on the step-two findings of non-severity as a substitute for a proper RFC analysis. Id. (citing Social Security Ruling 96–8p, 1996 WL 374184, at *4 (July 2, 1996)). The use of paragraphs B and C from 20 C.F.R., pt. 404, subpt. P., App. 1, § 12.00 do not qualify as an RFC assessment. Id. An RFC assessment requires a more detailed assessment by itemizing various functions found in paragraphs B and C. Id. Finally, the court explained RFC assessments also require a narrative discussion pointing to evidence, citing medical facts, and discussing nonmedical evidence. Id.

**Tenth Circuit indicates Plaintiff must show error was prejudicial. *Mays v. Colvin*. No. 13-5068 (10th Cir. Jan. 8, 2014).** In this recently published Tenth Circuit case, the Court reiterated the rule that, in order for a court claim to prevail in a Social Security case, the Plaintiff has to show how he or she was prejudiced by whatever error was committed. To make this showing, there must be a likelihood of a different result if the error had not been made. This rule applies to both due process errors and standard administrative errors. In the Mays case the Court found that the errors were harmless and declined to remand the case. Factually, an amended version of a treating doctor's medical source statement was mistakenly omitted from the administrative record. Mays alleged that this error constituted a due process error and rendered the ALJ's findings not supported by substantial evidence. The Court acknowledged that the error had been made, but went on to make a prejudice inquiry. The Court found that, because the ALJ had rejected the doctor's opinions in the first report because they were not supported by objective evidence, there was little likelihood that his findings would change with regard to the amended report. Therefore, the Court concluded that there was no prejudice shown and the due process claim could not stand. The Court went on to set out a summary of the specific process that must be followed when evaluating the opinions of treating physicians. The Court found that the ALJ had properly explained his reasons for rejecting the doctor's opinions and that substantial evidence supported his reasoning. The ALJ's decision was technically flawed because it did not expressly state that he declined to give the doctor's opinions controlling weight like the legal process required. However, the Court noted that it was implicitly clear that the ALJ had declined to give the opinions controlling weight, even if he did not directly say so. Because the Court was able to tell from the decision what weight the ALJ accorded the doctor's opinions, they declined to reverse the decision because of a technical error. The Court then went through each of the regulatory factors the ALJ was required to consider when weighing a doctor's opinions. The Court found the Plaintiff had failed to show that the record with regard to these factors warranted giving more weight to the doctor's opinions. Therefore, the Court concluded that the Plaintiff had failed to show that the ALJ had not considered the regulatory factors. Mays argued that the ALJ had erred by failing to discuss selected aspects of the evidence. Although Mays identified the evidence not discussed, the Court found this was not error because Mays failed explain why this evidence was significantly probative with regard to the ALJ's consideration of the treating doctor's opinions. The Court reiterated the rule that the appellate court will not develop an argument on behalf of a represented Plaintiff. The Court noted that contentions consisting mostly of record citations without further development, constitutes an insufficient argument. The Court further found that, although the ALJ did include some boilerplate language in his decision, this was not the sole basis for rejecting the doctor's opinions and did not detract from his other reasoning. Mays further argued that the ALJ had erred by failing to weigh the opinions of the state agency

medical consultants as required by law. However, the Court noted that Mays had not identified any prejudice from this error and its own analysis failed to demonstrate prejudice. Therefore, the ALJ's error was not considered reversible. The Court then affirmed the denial decision. So, what do we learn from this decision? Primarily, plaintiffs in Social Security cases are cautioned to specifically show how they were harmed by whatever error the ALJ may have committed. To do this, they must show there is a likelihood of there being a different result if the error had not occurred. That being said, the harmless error rule set out in *Allen v. Barnhart*, 357 F.3d 1140, 1145 (10th Cir. 2004) provides that a legal error in making a critical finding is not considered harmless unless the reviewing court can comfortably conclude no reasonable administrative fact-finder who followed the correct analysis could have resolved the disputed factual matter in any other way. Given the analysis in Mays, appellate counsel should be cautioned to not only show that an error was made, but also specifically show how a reasonable fact-finder could have made a different decision on a critical finding if the alleged error had not been made. The Mays decision is just another in a line of current court decisions addressing the developing harmless error rule in the Tenth Circuit. Appellate counsel should be aware of this development of the law in the Tenth Circuit and frame their appellate arguments accordingly.

**Eighth Circuit notes the difference between frequent and occasional handling and fingering. *Owens v. Colvin*, 727 F.3d 850 (8th Cir. 2013).** The central issue in Owens centers on the distinction between the terms "occasional" and "frequent." The ALJ denied the claimant at step four, and determined he could return to his past relevant work ("PRW") as an inspector/hand packager. In the residual functional capacity ("RFC") assessment, the ALJ determined the claimant could use both hands for "frequent to occasional" handling and fingering. The court noted the terms "frequent" and "occasional" are two separate terms of art, each with distinct meanings. See Social Security Ruling 85-15, 1985 WL 56857, at *7 (1985). The Dictionary of Occupational Titles (4th ed. 1992) considers frequent to mean an activity existing up to 1/3 to 2/3 of the time; and occasional as an activity existing up to 1/3 of the time. The claimant's PRW as an inspector/hand packager requires handling and fingering "frequently." The term "frequent to occasional" does not have an established meaning in the vocational context. The court remanded the case for clarification of the claimant's RFC.

**Seventh Circuit observes the lack of support from objective evidence does not automatically discredit a claimant's allegations of pain. *Pierce v. Colvin*, 739 F.3d 1046 (7th Cir. 2014).** The ALJ found the claimant not credible because her symptoms were not supported by objective evidence. The court noted the fact a claimant's allegations of pain are unsupported by objective evidence does not mean an ALJ can discount those allegations for this reason alone. Even without identification of a physical cause, pain can be disabling; however, in this situation the claimant's credibility becomes pivotal. The court found the ALJ had misstated some important evidence, and misunderstood the importance of other evidence. First, the ALJ erred by faulting the claimant for a lack of objective evidence, even when he knew she lacked insurance, which prevent the claimant from seeking treatment. The ALJ further erred by misstating the claimant's work record, and the claimant's unsuccessful attempt to hold a second job. The ALJ made a factual error by using a doctor's weight lifting limitation, a limitation made a year before the claimant's second back injury—the injury the same doctor said was disabling. Finally, the court determined the ALJ's credibility errors were not harmless.

**General Notice regarding change in Addresses for Service of Process.** On January 28, 2014, the Social Security Administration posted a notice in the Federal Register stating that, beginning January 1, 2014, the OGC offices with jurisdiction over the court cases in the various states had been changed. The consequence of this is that lawsuits filed beginning on January 1, 2014 must be served to the new OGC office. Lawsuits filed before January 1, 2014 should still be served to the OGC in the old office. Previously, cases from some states in the Tenth Circuit were handled out of the OGC office in Dallas and others handled out of Denver. Now, all states in the Tenth Circuit are being handled out of the OGC office in Denver. The address for service to the Denver office is as follows: Office of the Regional Chief Counsel, Region VIII, Social Security Administration, 1961 Stout Street, Suite 4169, Denver, CO 80294–4003. To find out where cases in other circuits are being handled, attorneys should consult the Federal Register. ■

# Growth in New Disabled-Worker Entitlements, 1970-2008 (excerpted)

*by David Pattison and Hilary Waldron*

*David Pattison and Hilary Waldron are Social Security Administration economists with the Administration's Office of Economic Analysis and Comparative Studies, Office of Retirement and Disability Policy*

*(Note from the editor: In the past year, a number of articles and programs have been written or have been shown regarding the "startling" rise of Social Security disabled worker claims. Such programs included a series aired on This American Life, All Things Considered and National Public Radio stations across the U.S. ("Unfit for Work: The Startling Rise of Disability in America") which sensationalized the growth of these claims. In response to this series, several former Commissioners of the Social Security Administration wrote a joint open letter vehemently disagreeing with this idea that the rise of claims was in anyway startling, unexpected or unforeseen. On the contrary, the Commissioners asserted that the growth was predicted by actuaries as early as 1994. Indeed, a recent authoritative study reveals that the reason for this increase in entitlements should not serve as fodder for the "startling rise"/sky is falling crowd, which improperly places blame on claimants and judges alike for the increase. The rise simply should not become a hotly debated political issue as the increases are largely attributable to and related to simple demographic issues. The following are excerpts from this very important article Growth in New Disabled-Worker Entitlements, 1970-2008 written by Social Security Administration economists David Pattison and Hilary Waldron. Mr. Pattison and Ms. Waldron work for the Administration's Office of Economic Analysis and Comparative Studies, Office of Research, Evaluation, and Statistics, Office of Retirement and Disability Policy. This article was originally released in the Social Security Bulletin, Vol. 73, No. 4, November 2013, by the Social Security Administration. References to charts, footnotes, page numbers, etc. have been deleted. For a copy of the full version see http://www.ssa.gov/policy/docs/ssb/v73n4/v73n4p25.html.)*

## Introduction

We find that three factors—(1) population growth, (2) the growth in the proportion of women insured for disability, and (3) the movement of the large baby boom generation into disability-prone ages—explain 90 percent of the growth in new disabled-worker entitlements over the 36-year subperiod (1972–2008). The remaining 10 percent is the part attributable to the disability "incidence rate."

The size of the working-age population in the United States has increased steadily since 1970. The number of workers insured for Social Security Disability Insurance (DI) benefits but not receiving benefits has grown almost as steadily. The number of workers becoming entitled to DI benefits—while much smaller (about 0.4 percent of the working-age population in 2008, or 0.6 percent of the exposed disability-insured population) - has also grown, increasing from 254,200 in 1970 to 897,000 in 2008. Much of this growth in newly disabled workers reflects the growth in the pool of workers insured for disability. This in turn reflects the growth in the US working-age population and the increasing proportion of women who, because of their rising labor force participation, are insured for disability.

**Population Growth**:

Population growth is a major driver of new disabled-worker entitlement growth. The effects of population change can be divided into two parts: overall growth and change in the age structure. Overall population growth is measured in this article by the size of the population aged 16–64. That population grew by just over 50 percent over the 1972–2008 period, an average annual rate of 1.13 log percent. Although the number of newly disabled workers did not always grow that fast, over the 36-year period as a whole it grew by 105 percent, or 1.99 log percent yearly, almost twice as fast as the population grew.

The population, however, does not grow at the same rate at all ages. The large cohort sizes associated with the baby boom and similar, but smaller, demographic cycles will lead to a changing age distribution as people who are a part of demographic booms or busts age through the life cycle. Because disability incidence is not constant across all ages, the changing age distribution would affect the overall disability incidence rate even if age-specific incidence rates were not changing.

Over our study period, workers in the large baby boom birth cohorts (born from 1946 through 1964) were ages 8–24 in 1970 and ages 44–62 in 2008. During that period, therefore, we expect that this movement of the baby boom population into the more disability-prone ages will add to the effect of overall population growth.

## Growth in Proportion of Women Insured for Disability

A second important driver in the growth of disabled-worker entitlements is the growth in the proportion of the population insured for disability. This is largely a story of the growth in the percentage of women insured for disability, which in turn is due to the growth in female labor force participation. For females aged 16 or older, labor force participation was about 40 percent in 1966 and about 60 percent in 2008. Labor force participation of women during

their prime earnings ages (25–54) was 45.2 percent in 1965 and 75.3 percent in 2005.

Although the dramatic gains in female labor force participation at younger ages have almost leveled off, there has been a less dramatic but continuing gain among women in their forties and fifties. At these ages, the persistent increase in their labor force participation has continued to contribute to growth in new disabled-worker entitlements.

Movement of the Large Baby Boom Generation into Disability Prone Ages

As discussed earlier, even if there were no changes in disability policy, worker health, or the economy, we would expect the number of disabled workers to grow in pace with the growth in the US working-age population. This study's working-age population grew from 143 million in 1972 to 219 million in 2008, an increase of 53 percent over 36 years, or 1.18 percent per year. However, because of the aging of the baby boom cohorts, the age composition of the population has also changed substantially over the 1972–2008 period. The size of the population at disability-prone ages first began to accelerate in the late 1980s and early 1990s. This movement of the baby boom cohorts into the disability-prone ages can be expected to have accelerated the growth in the number of new disabled workers during the 1990s.

**Disability Incidence Rate**

Once we account for growth in the insured population, any remaining growth in the number of disabled-worker entitlements is classified as growth in the "incidence rate"—the ratio of new disability entitlements to exposed disability-insured workers. The incidence rate is the residual element unexplained by growth in the population or in the proportion of the population insured.

Over the 1972–2008 period, growth in the unadjusted incidence rate averaged 0.39 percent per year. Over the same period, the adjusted incidence rate averaged 0.21 percent per year, a little over half of the unadjusted rate.

The incidence rate reflects a variety of factors, including both changes in the proportion of workers applying for benefits (because of either health trends, economic conditions, or expectations of being allowed) and changes in program stringency.

**Conclusion**

In this article, we find that although the raw or unadjusted growth in the number of workers becoming entitled to benefits under Social Security's DI program gives the appearance of an upward and accelerating trend, using such a measure may lead to misleading analytical conclusions. Once we adjust for population growth—compounded by the movement of the large baby boom generation into disability-prone ages and a continuing growth in the proportion of women at those ages who are insured for disability—we find that these factors explain 90 percent of the growth in new disabled-worker entitlements over the 36-year period (1972–2008) and 94 percent of the growth over the more recent 18-year subperiod (1990–2008). In addition, although an incidence rate measure that is unadjusted seems to indicate faster growth in disability incidence in the 1990–2008 period than in the earlier period (1972–1990), this apparent speedup disappears once the changing demographic structure of the insured population is taken into account. The growth in the adjusted incidence rate actually slows down, and the incidence rate's share of overall growth decreases. Although the adjusted growth in the incidence rate accounts for 17 percent of the growth in disability entitlements in the earlier period, it accounts for only 6 percent of the growth in the later one. ■

**On Mathews-Sheets and beyond** continued from page 4

need for an increase in compensation. . . Dewolf also calculates the inflationary amount he asserts based on Consumer Price Indexes (CPI) issued by the Bureau of Labor Statistics, United States Department of Labor. *Just v. Astrue*, 2012 WL 2780142, at 2 (N.D. Ill. 2012 (explaining that the "Consumer Price Index . . . is one acceptable method of showing inflation"). . . . Dewolf has put forth sufficient evidence to show that inflation actually affected his attorney's ability to deliver legal services to Dewolf. Dewolf has shown that an upward adjustment is warranted in this case and that the $181.37 hourly rate is reasonable. See, e.g., *Claiborne ex rel. L.D. v. Astrue*, 2012 WL 2680777, at *5 (N.D. Ill. 2012) (finding that the plaintiff was "entitled to an upward adjustment in the hourly rate to $181.25"); *Hudnall v. Astrue*, 2012 WL 2504883, at *2 (N.D. Ind. 2012) (finding that a $179 per hour rate was reasonable)." See *Dewolf v. Astrue*, 2012 U.S. Dist Lexis 111189 at pages 2-3 (N.D. Ill. 2013) (Judge Der-Yeghiayan.

Understanding Judge Posner's decision in Mathews-Sheets can be done by considering an extreme hypothetical example. Let us assume in this hypothetical world that the cost of legal services have remained the same since 1996. Lets say the fee cap in Social Security cases remained $4,000.00 for administrative work, let us assume hypothetically that OGC attorneys salaries remained the same as they were in 1996, lets go even further and say that a district judges entry salaries in 1996 had remained the same through 2012. Finally let us assume inflation otherwise has gone through the roof in multiple areas so much so that CPI measurements show a fifty percent increase. Okay, set aside whether this is realistic and play the game. NOW, you are the district judge. Do you have the discretion to deny a COLA increase simply based on CPI measurements? Can you properly limit the plaintiff to an hourly fee of $125 given the fact that the cost of legal services has remained the same? Or must you automatically apply CPI inflation numbers generally and give the plaintiff upwards of $185 per hour?

I believe that Judge Posner in *Mathews-Sheets* simply asserted the reasonable general proposition that an automatic application of CPI numbers is incorrect under EAJA and that simply citing CPI data may very well not be enough. Still a proper reading of Judge Posner's decision is that in the current real world that we live in, a judge should recognize that an hourly rate of $125 is meager without a proper COLA. Nevertheless under *Mathews-Sheets*, a prevailing plaintiff may have to show something related to the cost of legal services other than CPI, but again this should not be difficult to do in the real world and a proper COLA can be proven in our particular legal field in multiple other ways. Under *Mathews-Sheets*, plaintiff's attorneys simply needed to buttress COLA CPI arguments with additional arguments regarding the cost of legal services generally.

Nevertheless, in the recent Northern District of Illinois case of *Sprinkle v. Colvin* (09-CV-5042), Judge Norgle limited the Plaintiff's attorney to an hourly rate of $125.00 per hour failing to award any increase in the hourly rate to reflect a cost of living increase. Judge Norgle inexplicably rejected all of the Plaintiff's proffered evidence and argument for a COLA concluding that the Plaintiff failed to meet his burden of producing appropriate evidence in support of the requested hourly-fee cost of living increase. On appeal to the Seventh Circuit, the Appellant's attorney has argued that Judge Norgle abused his discretion in failing to award a cost of living increase to the EAJA statutory hourly rate. In part, the Appellant has asked the Seventh Circuit to clarify what an attorney must establish under the EAJA and what is actually required with respect to establishing the impact of inflation. It is this case which will hopefully resolve the ongoing inconsistencies in the district courts regarding the means by which attorneys must prove up the cost of living adjustments (COLA) under the Equal Access to Justice Act (EAJA). The case will likely be decided sometime later in 2014. ■