NDNY FEDERAL COURT BAR ASSOCIATION, INC.
www.ndnyfcba.org

NOTICE OF CLE PROGRAM

The NDNY-FCBA's CLE Committee

Presents

"Federal Court Practice for Social Security Disability Practitioners"

3.5 credits for Professional Practice

This program presents a unique opportunity to gain insight from members of the Social Security Administration defending federal court appeals, experienced attorneys appealing the final decision of the Commissioner of Social Security, and the Court members responsible for adjudicating such actions. The program offers a detailed look at instituting such actions in the Northern District, a statistical analysis of such cases, and trends in the practice.

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Thursday, March 16, 2017
9:00 a.m. – 12:15 p.m.
(Registration at 8:30 a.m.)

James M. Hanley Federal Building
100 S. Clinton Street
Syracuse, NY 13261

Program available via live video teleconference at

James T. Foley Courthouse
Suite 509
445 Broadway
Albany, NY 12207

U.S. District Courthouse
The Gateway Building
14 Durkee St.
Plattsburgh, NY 12901

R.S.V.P. for CLE by Thursday, March 2, 2017

Faculty

Honorable David E. Peebles
Chief United States Magistrate Judge
Northern District of New York

Honorable John P. Ramos
Hearing Office Chief Administrative Law Judge (Acting)
Office of Disability Adjudication and Review – Syracuse Hearing Office
Social Security Administration

Maggie McOmber, Esq.
Law Clerk to the Honorable William B. Carter
Recalled United States Magistrate Judge

Katherine Felice, Esq.
Law Clerk to the United States District Court
Northern District of New York

Stephen P. Conte, Esq.
Regional Chief Counsel
Office of the General Counsel – Region 2
Social Security Administration

Maria Fragassi Santangelo, Esq.
Senior Attorney
Office of the General Counsel – Region 2
Social Security Administration

Howard Olinsky, Esq.
Founding Partner,
Olinsky Law Group

Nathaniel V. Riley, Esq.
Associate Attorney,
Olinsky Law Group

Timed Agenda

9:00–9:05: **Introduction to Program and Participants (Nate Riley)**

9:05–9:35: **A View from the Bench (Judge Peebles):** Judge Peebles will discuss his approach to adjudicating Social Security appeals.

9:35–10:05: **Social Security Appeals Decision Making (Judge Peebles, Maggie McOmber and Katherine Felice):** Panel discussion on how the Court approaches the process of adjudicating Social Security cases, that will provide practical advice to federal court practitioners.

10:05–10:20: **Social Security Administration's workload statistics (Judge Ramos & Steve Conte):** A discussion of workload statistics and data analytics nationally and in the Northern District of New York.

10:20–1035: **Social Security Practice in the Northern District of New York Under General Order 18 (Nate Riley):** A primer on appealing final decisions of the Commissioner of Social Security and a discussion of the Social Security pilot program under NDNY General Order 18.

10:35–10:45: *Break (light refreshments will be provided courtesy of the FCBA)*

10:45–11:15: **Hot Topics in Social Security Practice (Part 1 of 2) – How Do Moderate Limitations in Concentration, Persistence, or Pace Impact the Claimant's Ability to Engage in "Simple" Work (Nate Riley):** Presentation covering the recent case law in the Second Circuit and its district courts regarding how an administrative law judge (ALJ) accounts for moderate limitations in concentration, persistence, or pace stemming from a claimant's nonexertional impairments. The speaker will cover the pertinent Social Security Administration regulations and rulings regarding nonexertional impairments underpinning these decisions, and impart some lessons learned from litigating this issue throughout the country.

11:15–11:45: **Hot Topics in Social Security Practice (Part 2 of 2) – Second Circuit Practice (Maria Fragassi Santangelo):** Discussion of the Second Circuit's jurisprudence regarding (1) the evaluation of medical source opinion evidence, (2) development of the administrative record, (3) the ALJ's assessment of the claimant's residual functional capacity, and (4) vocational issues.

11:45–12:15: **Panel Discussion on Attorneys' Fees (Howard Olinsky, Steve Conte, Maria Fragassi Santangelo):** Panel discussion involving the interplay between attorneys' fees under the Equal Access to Justice Act and Sections 406 (a) & (b) of the Social Security Act, including common defenses offered by the Social Security Administration and the importance of the Department of Treasury's Offset Program. Time will be left for questions.

The Northern District of New York Federal Court Bar Association has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York.

"Federal Court Practice for Social Security Disability Practitioners" has been approved for both newly admitted and experienced attorneys, and is in accordance with the requirements of the New York State Continuing Legal Education Board for **3.5** credits toward the **professional practice** requirement.*

This is a single program. No partial credit will be awarded.

This program is complimentary to all Northern District of New York Federal Court Bar Association members.

*** PLEASE REMEMBER TO STOP AT THE REGISTRATION DESK TO SIGN OUT AND TURN IN YOUR EVALUATION FORM.**

"Federal Court Practice for Social Security Disability Practitioners"
March 16, 2017

Table of Contents

Materials for:

Social Security Appeals Decision Making -
(Judge Peebles, Maggie McOmber and Katherine Felice)

THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF NEW YORK

GENERAL ORDER #18

****

In the Matter of:

THE ASSIGNMENT, MANAGEMENT AND FILING REQUIREMENTS OF THE DISTRICT'S SOCIAL SECURITY DOCKET

****

Amended this 22nd day of January, 2016

A. ASSIGNMENT OF SOCIAL SECURITY CASES

Effective **February 1, 2016,** it is **Ordered** that all cases in which a plaintiff seeks review, pursuant to 42 U.S.C. § 405(g), of a decision by the Commissioner of Social Security ("Commissioner"), shall be randomly assigned to a United States Magistrate Judge.[1] The Chief Judge may direct the reassignment of cases as needed to assure a more equitable distribution.

The United States has already indicated its general consent to Magistrate Judge jurisdiction in cases of this nature subject to its reserved rights to withdraw the consent in a given case and to withdraw its general consent. Promptly after the filing of all such cases, the Clerk shall direct a Notice of Social Security Case Assignment to all parties that accomplishes the following:

(1) Identifies the Magistrate Judge to whom the case is assigned;

(2) Confirms that any withdrawal of consent by the United States must be filed no later than the date the United States files the administrative record;

(3) Notifies plaintiff and/or plaintiff's counsel of plaintiff's right to consent to Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c);

(4) Provides a *consent/declination* form for plaintiff to complete and advises plaintiff that the executed form must be received by the Clerk within **21 days** of the date of the notice; and

(5) Advises the parties as to the court's procedure in the absence of consent.

If plaintiff timely consents, and if the United States does not timely withdraw consent, the case shall be deemed assigned to the Magistrate Judge without the necessity of an order of referral. In the event that the plaintiff does not timely consent, or if the United States timely withdraws its consent, the Clerk shall reassign the case to a U.S. District Judge consistent with General Order 12.[2] Such reassigned cases shall be referred to the same Magistrate Judge to whom the case was originally assigned for all pretrial, non-dispositive matters and for issuance of a report and recommendation.

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[1] This General Order suspends the requirement under Local Rule 72.3(d) to initially assign Social Security Cases to a District Judge. If the parties elect not to consent to the jurisdiction of a Magistrate Judge pursuant to 28 U.S.C. § 636(c), the Clerk shall then assign a District Judge, and the originally assigned Magistrate Judge will be placed in the referral role.

[2] General Order #12 - Case Assignment Plan for the Northern District of New York

Proceeding In Forma Pauperis. Unless the court otherwise directs, upon filing, the Clerk shall assign to a Magistrate Judge all motions and applications to proceed in forma pauperis. Upon receipt, the Clerk shall assign to a Magistrate Judge any referral or request from an appellate court for a determination regarding in forma pauperis status on appeal. All applications to proceed in forma pauperis are deemed referred pursuant to 28 U.S.C. § 636.

B. PILOT PROGRAM FOR ELECTRONIC SERVICE IN SOCIAL SECURITY CASES

A significant number of cases seeking review of the Commissioner's decision denying an application for benefits are filed in this District. The Court and the United States Attorney's Office for the Northern District of New York ("USAO-NDNY") share an interest in facilitating the efficient resolution of those complaints. To this end, the USAO-NDNY and Regional Counsel for the Social Security Administration have agreed to participate in a Pilot Program for Electronic Service in Social Security Cases ("Pilot Program"). This Section of the Order sets forth the terms of the Pilot Program.

THE COURT HEREBY **ORDERS**:

(1) The effective date of the Pilot Program shall be **February 1, 2016**, and shall run until further Order of this Court, provided that, during pendency of the Pilot Program, upon one month's notice, the USAO-NDNY and Regional Counsel for the Social Security Administration may unilaterally modify or terminate the Pilot Program in light of experience.

(2) The Pilot Program shall only apply to complaints instituted by a plaintiff against the Commissioner in which the only claim that is being brought is pursuant to 42 U.S.C. § 405(g). It shall not apply to any other complaint. In particular, the Pilot Program does not apply to (a) complaints that include claims against the Commissioner in addition to, or other than, those brought pursuant to 42 U.S.C. § 405(g); or (b) complaints that include defendants other than the Commissioner.

(3) Complaints filed pursuant to 42 U.S.C. §405(g), shall be filed with the Clerk of Court, pursuant to General Order 22, Section 4.2. Following case assignment and case opening, CM/ECF will generate a Notice of Electronic Filing (NEF) to the United States Attorney and Regional Counsel for the Social Security Administration.

A. Upon filing the Complaint by the Clerk, the NDNY CM/ECF system will serve the Complaint through a Notice of Electronic Filing to the USAO-NDNY and Regional Counsel for the Social Security Administration.

B. When filing the Complaint with the Clerk, Plaintiff shall also file a Social Security Identification Form[3] containing the full name and complete social security number of the plaintiff, including that of a minor plaintiff not otherwise identified by his or her full name. If the plaintiff's application for Social Security benefits was filed on another person's wage-record, that person's Social Security number shall also be provided. The identifying information is necessary for the Commissioner to obtain and produce the certified administrative record. The Social Security Identification Form will be lodged in CM/ECF as a restricted document and sent via Notice of Electronic Filing to the U.S. Attorney and Regional Counsel for the Social Security Administration through the NDNY CM/ECF system. Upon the filing of the Administrative Record, the Clerk shall remove the Social Security Identification Form from the docket.

C. Upon receipt of the Complaint and Social Security Identification Form by the USAO-NDNY and Regional Counsel for the Social Security Administration, the Government shall file a Notice of Appearance. Upon the filing of the Notice of Appearance, the Clerk shall remove the e-mail address that was used for service of the Complaint and Social Security Identification Form from the instant case. Thereafter, all Notices of Electronic Filing will be served upon the attorney representing the Social Security Administration in accordance with the Notice of Appearance.

(4) Service of a Complaint along with the Social Security Identification Form under the Pilot Program will be considered complete only when the three steps in paragraph 3(A), 3(B) and 3(C) above have been completed.

(5) If a plaintiff follows the steps above and service is effectuated in accordance with this General Order, the USAO-NDNY and Regional Counsel for the Social Security Administration agree not to raise insufficient service as a defense in the response to the Complaint. Nothing in this General Order or the Pilot Program, however, shall be deemed to be a waiver of service pursuant to Federal Rule of Civil Procedure 4(d). **Electronic service under the Pilot Program is intended to more efficiently move the processing of these cases through the litigation life cycle.**

[3] A Social Security Identification Form is available on the Court's website at nynd.uscourts.gov.

C. FILING OF THE ADMINISTRATIVE RECORD AND BRIEFING SCHEDULE

IT IS HEREBY

ORDERED that, after service of the Complaint and the Social Security Identification Form has been effectuated, the defendant shall file the certified transcript of the administrative proceedings, which shall constitute the defendant's answer **within 90 days** of said service, or a motion to dismiss[4] **within 90 days** of said service; and it is further

ORDERED that, if a motion to dismiss is denied, the defendant shall file the certified transcript of the administrative proceedings, which shall constitute the defendant's answer, **within 30 days** of service of said denial; and it is further

ORDERED that, after the filing of the certified transcript of the administrative proceedings, which shall constitute the defendant's answer, counsel for the parties or the party, if appearing pro se, shall submit briefs in accordance with the following requirements:

(1) **Within forty-five (45) days** from the filing of the certified transcript of the administrative proceedings, which shall constitute the defendant's answer, plaintiff shall serve and file a brief setting forth the grounds that plaintiff contends entitle plaintiff to relief. The brief shall contain the following items, under the appropriate headings and in the order here indicated:

(a) A statement of the issues presented for review, set forth in separately numbered paragraphs.

(b) A statement of the case. This statement should briefly indicate the course of the proceeding and its disposition at the administrative level and should set forth a general statement of the facts. The statement of the facts shall include plaintiff's age, education, work experience, if relevant, and a summary of other evidence of record. Each statement of fact shall be supported by reference to the page in the record where the evidence may be found.

(c) An argument. The argument may be preceded by a summary. The argument shall be divided into sections separately addressing each issue and must set forth plaintiff's contentions with respect to the issues presented and reasons therefor. Each contention must be supported by specific reference to the portion of the record relied upon and by citations to statutes, regulations, and cases supporting plaintiff's position. Cases from other districts and circuits should be cited only in conjunction with relevant cases from this jurisdiction, or if authority on point from this jurisdiction does not exist.

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[4] Any such motion to dismiss shall be briefed in accordance with Local Rule 7.1 (b)(2) and made returnable before the assigned District Judge or, if consent has been given pursuant to 28 U.S.C. § 636(c), the assigned Magistrate Judge.

(d) A short conclusion stating the relief sought. The issues before the Court are limited to the issues properly raised in the briefs.

(2) **Within forty-five (45) days** after service of plaintiff's brief, defendant shall serve and file a brief that identifies and responds to each issue raised by plaintiff. Defendant's brief shall conform to the requirements set forth above for plaintiff's brief, except that a statement of the issues and a statement of the case need not be included unless defendant is dissatisfied with plaintiff's recitation of the same.

(3) No party shall file or serve a brief that exceeds twenty-five (25) pages in length, double-spaced, unless leave from the assigned judge is obtained prior to filing the brief. All briefs shall be formatted as prescribed by Local Rule 10.1(a) and shall contain a table of contents and; and it is further

ORDERED that, upon receipt of the defendant's brief as provided herein, the Clerk shall forward the entire file to the assigned judge as determined in Part A of this Order. The assigned judge will treat the proceeding as if both parties had accompanied their briefs with a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure; and it is further

ORDERED that, when plaintiff wants the Court to remand the case based on new and material evidence, plaintiff must file a motion for remand pursuant to sentence six of 42 U.S.C. § 405(g). Motion filing and response papers must be filed in accordance with NDNY Local Rule 7.1. Upon plaintiff's filing of a motion for remand pursuant to sentence six, the parties' brief filing deadlines for an adjudication of the merits will be stayed until the court rules on the sentence six motion. If the motion is denied, plaintiff's brief will be due within 45 days from the date of the court's order, and defendant's brief will be due within 45 days of service of plaintiff's brief; and it is further

ORDERED that, generally no oral argument will be heard by the court. If, however, an oral hearing is requested and scheduled before the assigned judge, or ordered by the Court *sua sponte*, notice of same will be sent to the parties, and, at said hearing, counsel should be fully prepared to argue the facts, issues, and legal contentions in the case; and it is further

ORDERED that the Clerk shall serve a copy of this Order upon counsel for the parties herein upon the filing of the complaint; and it is further

ORDERED that this General Order shall apply to all District Judges and Magistrate Judges in the Northern District of New York, including visiting judges and recalled Magistrate Judges.

NOTIFICATION OF THE CONSEQUENCES OF FAILING TO FILE A BRIEF AS REQUIRED BY PARAGRAPH (1)(a-d)

A party's brief may be its only opportunity to set forth arguments that entitle the party to a judgment in its favor. The failure to file a brief by either party may result in the consideration of the record without the benefit of the party's arguments. In the event a plaintiff fails to submit a brief, the defendant may file a motion to dismiss for failure to prosecute, pursuant to Federal Rule of Civil Procedure 41(b), and the action may be dismissed with prejudice on the basis of the plaintiff's failure to file a brief.

DATED: January 22, 2016

Chief U.S. District Judge
Northern District of New York

Social Security CLE
Brief Formatting Cheat Sheet

- **Local Rule 7.1(a)(1): Memorandum of Law**
    - 25 page limit (unless leave from the assigned judge is obtained prior to filing)
    - Shall contain a table of contents
    - If a brief contains citations to authorities that are unpublished or only published on e-database, filing the cases is not required unless there is a *pro se* litigant
- **Local Rule 10.1(a): Form of Papers Generally**
    - 12 point type (or larger)
    - Double-spaced text in the body of the document
    - One-inch margins on all four sides of the page
    - Consecutively numbered pages
- **General Order #18**
    - The brief shall contain the following items:

        (a) A statement of the issues

        (b) A statement of the case

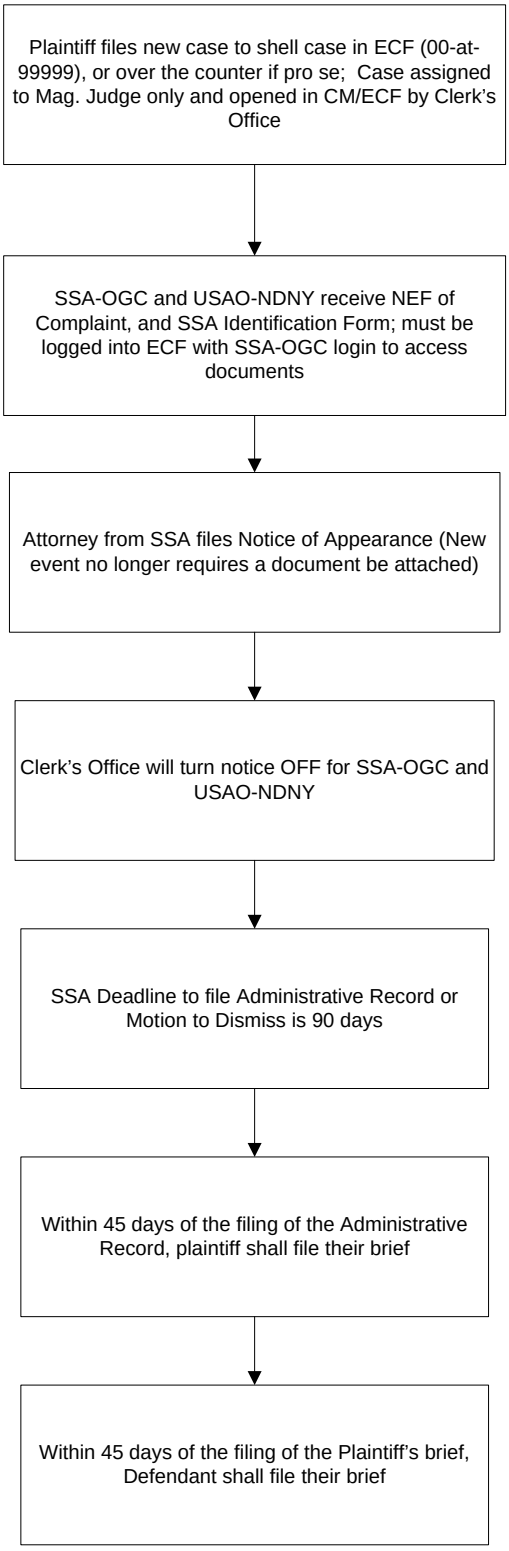
        (c) An argument:

            - Each contention must be supported by **specific reference** to the portion of the record relied upon and by citations to statutes, regulations, and cases supporting plaintiff's position.
            - Cases from other districts and circuits should be cited **only** in conjunction with relevant cases from this jurisdiction, or if authority on point from this jurisdiction does not exist

        (d) Short conclusion of relief sought

SOCIAL SECURITY FILING PILOT-2/1/2016

Notes: Plaintiff has 21 days to file consent to or declination of jurisdiction of Mag. Judge



Materials for:

Social Security Administration's workload statistics (Judge Ramos & Steve Conte)

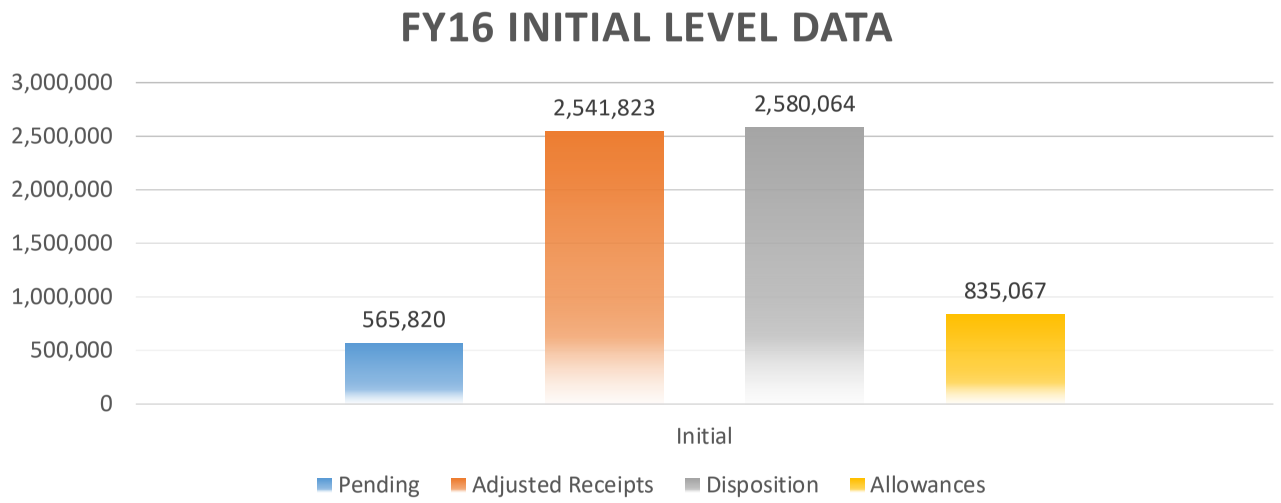
Social Security Disability Adjudication

Workload Statistics

A Brief Overview of the Disability Process

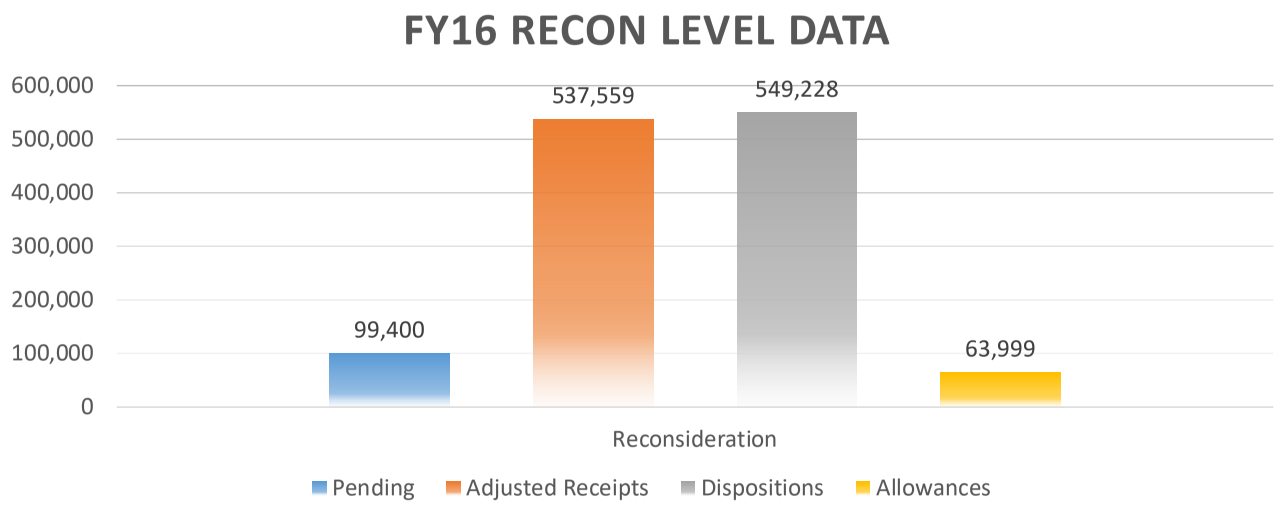
- Disability is the gateway to retirement from the workforce for many unfortunate people
- More than 2.5 million disability claims are filed each year
- Disability claims are considered at the initial and reconsideration stages by 54 State agencies known as the Disability Determination Services (DDS)
- Hearings and appeals are handled by federal employees in SSA's Office of Disability Adjudication and Review

FY16 Initial Level



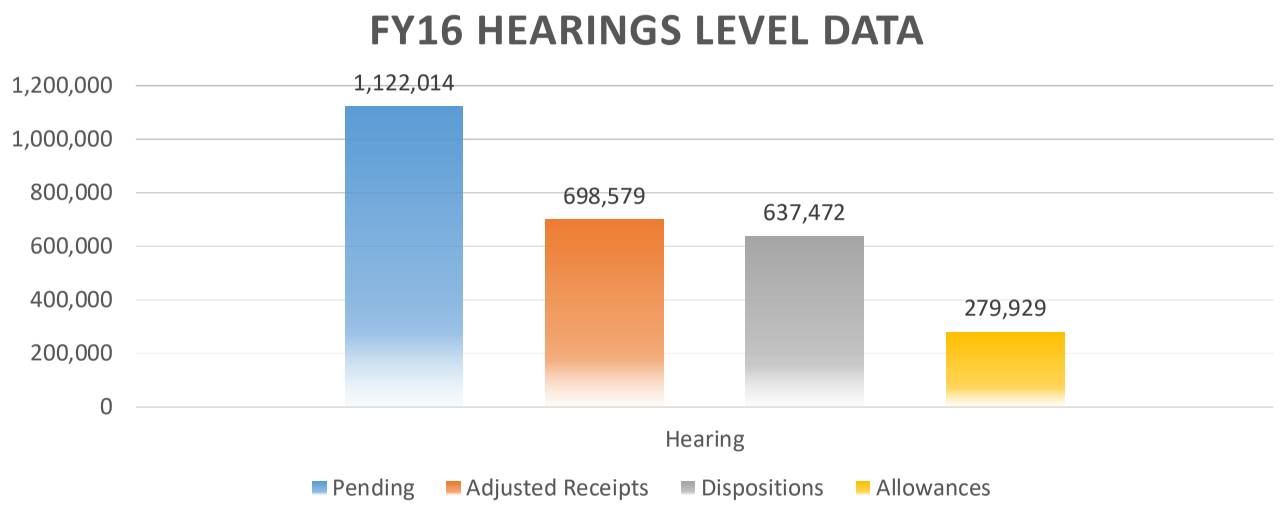
Source: DIODS - SAOR Standard Report, FY16
Note: Data do not include 53rd week.
Prepared by: ODAR/OESSI/DMIA on October 17, 2016

FY16 Reconsideration Level



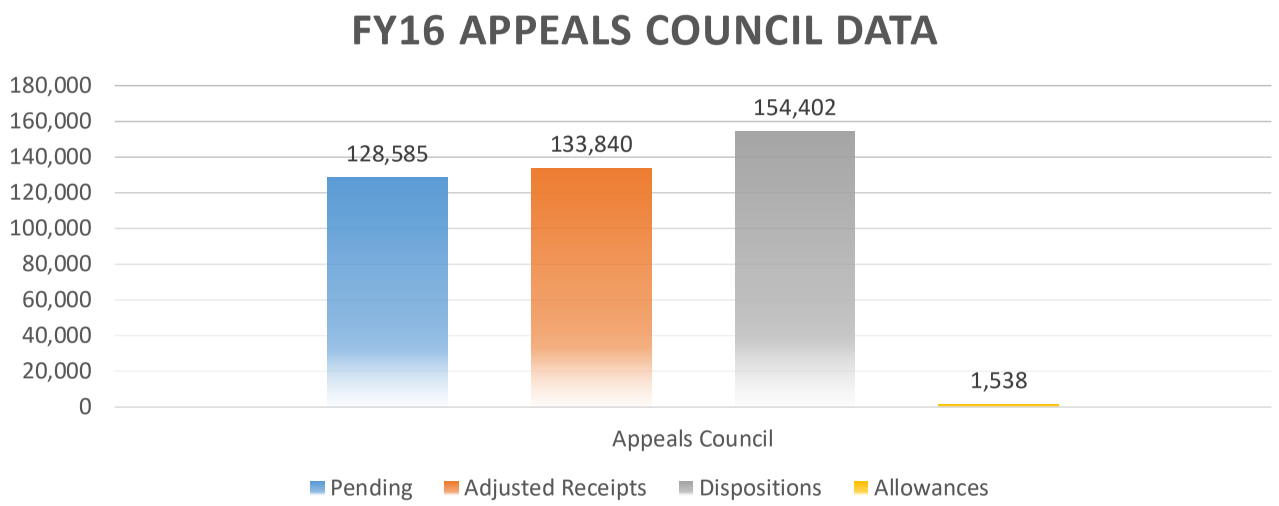
Source: DIODS - SAOR Standard Report, FY16
Note: Data do not include 53rd week.
Prepared by: ODAR/OESSI/DMIA on October 17, 2016

FY16 Hearings Operation



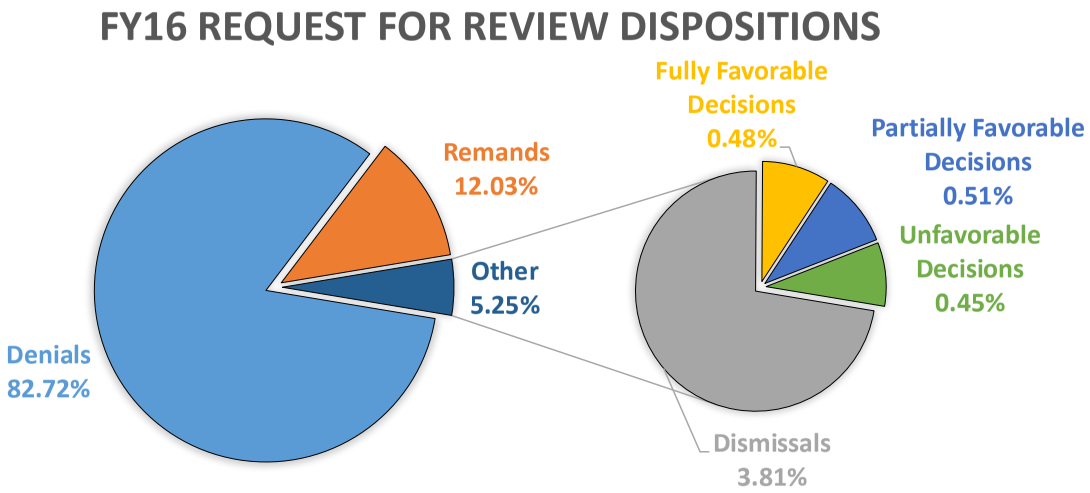
Source: CPMS MI
Note: Data do not include 53rd week.
Prepared by: ODAR/OESSI/DMIA on October 17, 2016

FY16 Requests for Review



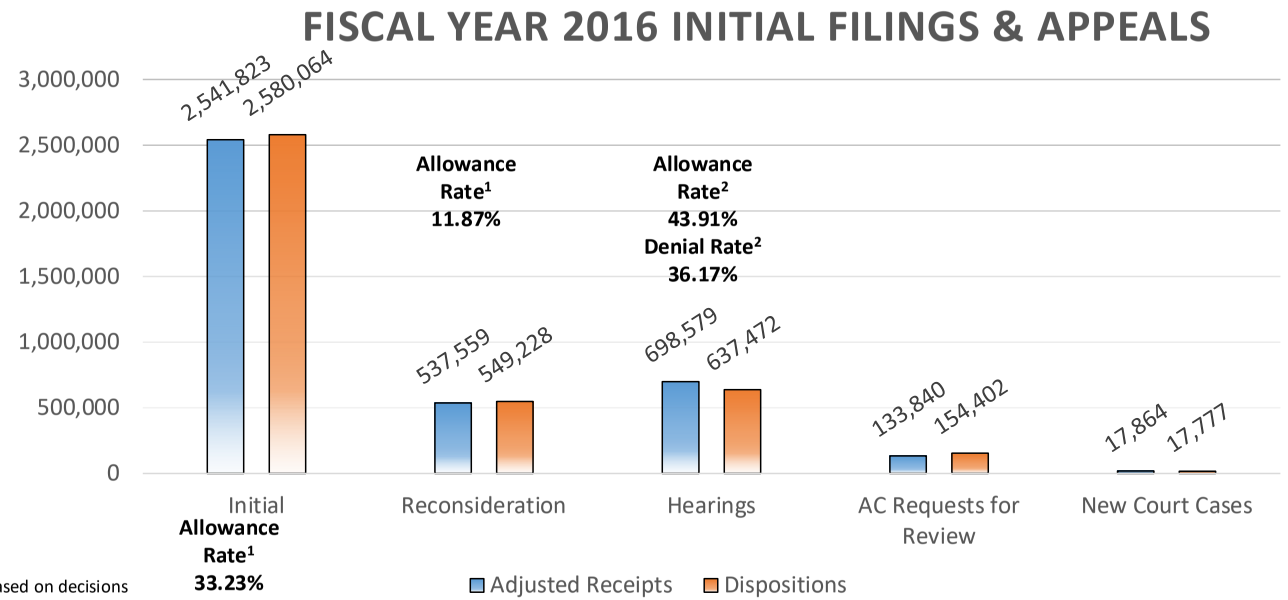
Source: ARPS MI – Appeals Council
Note: Data do not include 53rd week.
Prepared by: ODAR/OESSI/DMIA on October 17, 2016

FY16 Requests for Review



Source: ARPS MI – Appeals Council
Note: Data do not include 53rd week.
Prepared by: ODAR/OESSI/DMIA on October 17, 2016

Comparative Data FY 2016



[1] Rates based on decisions
[2] Rates based on dispositions
Note: Data do not include 53rd week.
Source: ARPS MI – Court (court data only; data sources for other levels are as previously mentioned)
Prepared by: ODAR/OESSI/DMIA on October 17, 2016

Materials for:

Social Security Practice in the Northern District of New York Under General Order 18

(Nate Riley):

SOCIAL SECURITY PRACTICE IN THE NORTHERN DISTRICT OF NEW YORK

PILOT PROGRAM UNDER GENERAL ORDER 18

THURSDAY, MARCH 16, 2017

JAMES M. HANLEY FEDERAL BUILDING

Section 205(g) of the Social Security Act (codified at 42 U.S.C. § 405(g))

"Any individual, after any ***final*** decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision . . . brought in the district court of the United States for *the judicial district in which the plaintiff resides*, or has his principal place of business . . . Commissioner of Social Security shall file a certified copy of the transcript of the record . . . The court shall have power to enter . . . judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing . . . [Commissioner's findings] as to any fact, if supported by substantial evidence, shall be conclusive."

FINAL (APPEALABLE) DECISIONS OF THE COMMISSIONER OF SOCIAL SECURITY

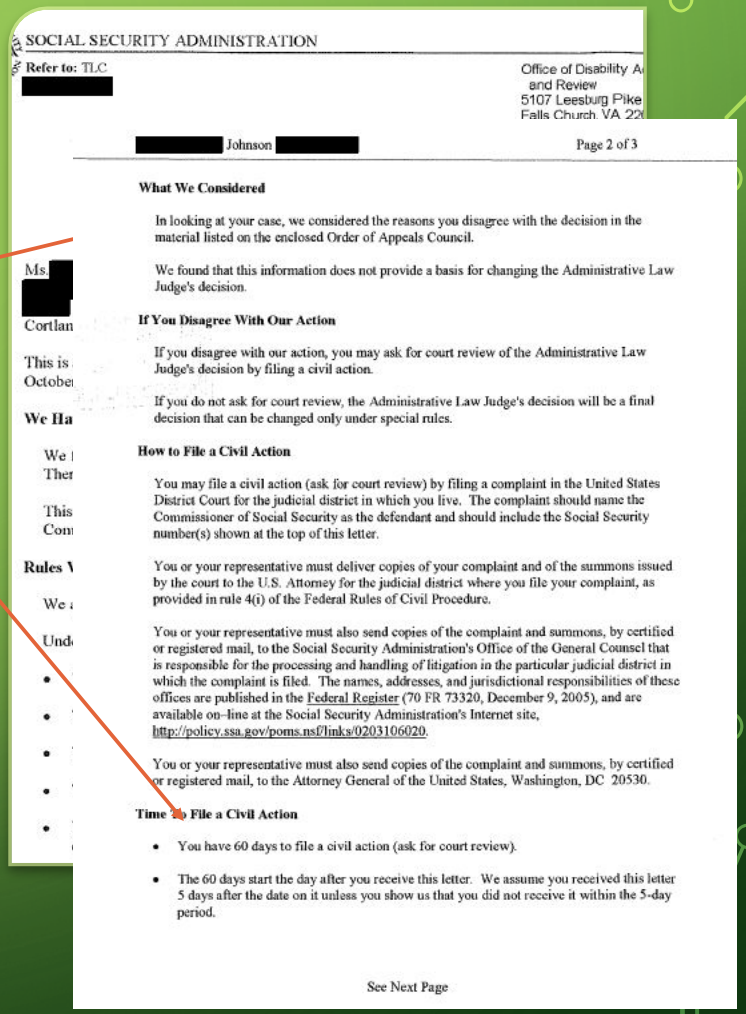
- The Social Security Administration ("Agency") regulations explain, in concise, easily understood language, the Administrative Review Process. See 20 C.F.R. § § 404.900, 416.1400.
  - "Initial Determinations" begin the process.
- Those Regulations also provide a non-exhaustive list of what the Agency considers non-initial determinations that "are ***not*** subject to judicial review." 20 C.F.R. § § 404.903, 416.1403.
  - Examples include, but are not limited to, the following:
    - (1) starting or discontinuing a CDR, (2) suspending benefits pending investigation of continuing disability, (3) recovering overpayments generally (many ways of accomplishing this – depends on situation), (4) refusing or disqualifying you as a claimant's representative, (5) denying your request for extension of time to review a decision or denying a request to expedite the process.
  - Not reviewable under the Social Security Act and the Administrative Procedures Act does not provide an independent basis for judicial review. See Califano v. Sanders, 430 U.S. 99, 108 (1977).
    - However, very limited exceptions persist that may, under very limited circumstances, permit judicial review of these ancillary actions of the Agency following the Commissioner entering a final decision. See, e.g., *Casey v. Berryhill*, 2017 WL 398309, ___ F.3d ___ (7th Cir. Jan. 30, 2017).

FINAL (APPEALABLE) DECISIONS OF THE COMMISSIONER OF SOCIAL SECURITY

The Act gives you 60 days to file. 42 U.S.C. § 405(g).

However the Commissioner's default notice, and regulations, build in a very generous 5-day mail rule, giving you 65-days to file from the date on your Appeals Council notice. See also 20 C.F.R. § 422.210(c) (presumed received 5 days after date of notice).

Here, Ms. Johnson's deadline fell on Saturday, March 11, 2017, however, because that falls on a weekend (or federal holiday), she had an extra two days, or until Monday, March 13, 2017 to timely file her federal court action seeking review. Fed. R. Civ. P. 6(a)(1)(C).



SOCIAL SECURITY ADMINISTRATION

Refer to: TLC [redacted]

Office of Disability A and Review
5107 Leesburg Pike
Falls Church, VA 22

[redacted] Johnson [redacted] Page 2 of 3

What We Considered

In looking at your case, we considered the reasons you disagree with the decision in the material listed on the enclosed Order of Appeals Council.

We found that this information does not provide a basis for changing the Administrative Law Judge's decision.

If You Disagree With Our Action

If you disagree with our action, you may ask for court review of the Administrative Law Judge's decision by filing a civil action.

If you do not ask for court review, the Administrative Law Judge's decision will be a final decision that can be changed only under special rules.

How to File a Civil Action

You may file a civil action (ask for court review) by filing a complaint in the United States District Court for the judicial district in which you live. The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this letter.

You or your representative must deliver copies of your complaint and of the summons issued by the court to the U.S. Attorney for the judicial district where you file your complaint, as provided in rule 4(i) of the Federal Rules of Civil Procedure.

You or your representative must also send copies of the complaint and summons, by certified or registered mail, to the Social Security Administration's Office of the General Counsel that is responsible for the processing and handling of litigation in the particular judicial district in which the complaint is filed. The names, addresses, and jurisdictional responsibilities of these offices are published in the Federal Register (70 FR 73320, December 9, 2005), and are available on-line at the Social Security Administration's Internet site, http://policy.ssa.gov/poms.nsf/links/0203106020.

You or your representative must also send copies of the complaint and summons, by certified or registered mail, to the Attorney General of the United States, Washington, DC 20530.

Time To File a Civil Action

- You have 60 days to file a civil action (ask for court review).
- The 60 days start the day after you receive this letter. We assume you received this letter 5 days after the date on it unless you show us that you did not receive it within the 5-day period.

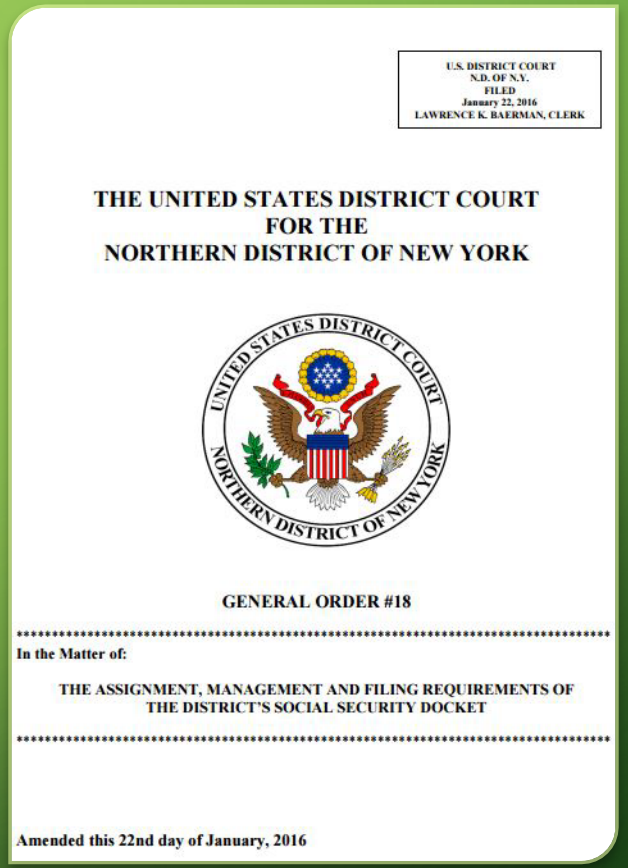
See Next Page

GENERAL ORDER 18 PILOT PROGRAM

(AMENDED JAN. 22, 2016; EFFECTIVE FEB. 1, 2016)

General Order 18's Pilot Program Purpose: given the overwhelming caseload in NDNY, GO 18 explicitly states as its purpose everyone's desire "to more efficiently move the processing of these cases through the litigation life cycle."

1) Electronic service of process upon the Agency;
2) Provides for automatic-assignment of Magistrate Judges;
3) Serves as a scheduling order for the filing of the Administrative Record and Briefing Schedule.



U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
January 22, 2016
LAWRENCE K. BAERMAN, CLERK

THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF NEW YORK

GENERAL ORDER #18

In the Matter of:

THE ASSIGNMENT, MANAGEMENT AND FILING REQUIREMENTS OF THE DISTRICT'S SOCIAL SECURITY DOCKET

Amended this 22nd day of January, 2016

GENERAL ORDER 18 PILOT PROGRAM:

FILING THE COMPLAINT & ELECTRONIC SERVICE OF PROCESS

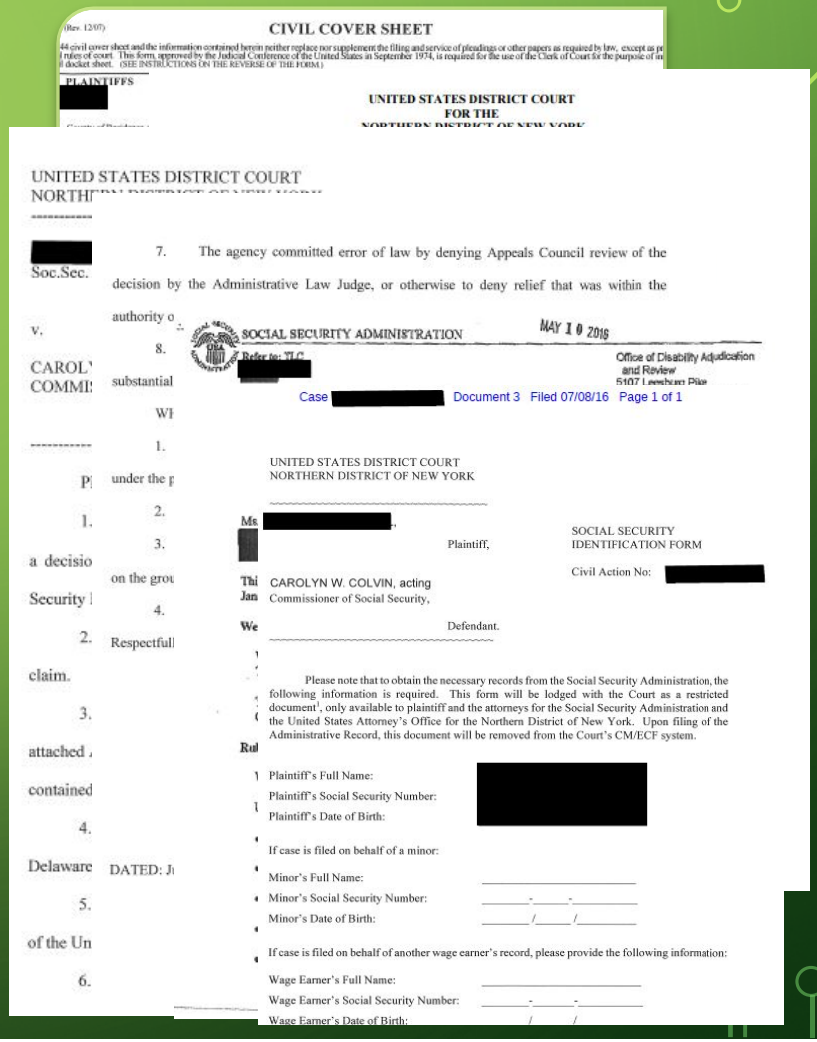
Applies to Complaints evoking review / jurisdiction pursuant to Section 205(g) (42 U.S.C. § 405(g)) of the Act.

Complaints (fact pleading under *Iqbal* & *Twombly*)

NO Service of process – GO 18 obviates the need to have the US Marshall serve the complaint upon the Agency.

Instead, the complaint is transmitted electronically to the government's designated email addresses: NY.OGC.DOJ.NDNY@ssa.gov & USANYN.SSA.Complaints@usdoj.gov.

GO 18 states the government has agreed that " if they are electronically served they will "not . . . raise insufficient service as a defense in the response to the Complaint," yet it continues to state that "[n]othing in this General Order or the Pilot Program, however, shall be deemed to be a waiver of service pursuant to Federal Rule of Civil Procedure 4(d)."



CIVIL COVER SHEET

PLAINTIFFS [redacted]

UNITED STATES DISTRICT COURT
FOR THE

UNITED STATES DISTRICT COURT
NORTH

[redacted] Soc.Sec.

v.

CAROL
COMMI

7. The agency committed error of law by denying Appeals Council review of the decision by the Administrative Law Judge, or otherwise to deny relief that was within the authority o

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SOCIAL SECURITY ADMINISTRATION MAY 10 2016

Refer to: TLC [redacted]

Office of Disability Adjudication and Review
5107 Leesburg Pike

Case [redacted] Document 3 Filed 07/08/16 Page 1 of 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Ms [redacted],

Plaintiff,

CAROLYN W. COLVIN, acting Commissioner of Social Security,

Defendant.

SOCIAL SECURITY IDENTIFICATION FORM

Civil Action No: [redacted]

Please note that to obtain the necessary records from the Social Security Administration, the following information is required. This form will be lodged with the Court as a restricted document', only available to plaintiff and the attorneys for the Social Security Administration and the United States Attorney's Office for the Northern District of New York. Upon filing of the Administrative Record, this document will be removed from the Court's CM/ECF system.

Plaintiff's Full Name:
Plaintiff's Social Security Number: [redacted]
Plaintiff's Date of Birth:

If case is filed on behalf of a minor:

Minor's Full Name: _____
Minor's Social Security Number: ___-___-___
Minor's Date of Birth: ___/___/___

If case is filed on behalf of another wage earner's record, please provide the following information:

Wage Earner's Full Name: _____
Wage Earner's Social Security Number: ___-___-___
Wage Earner's Date of Birth: ___/___/___

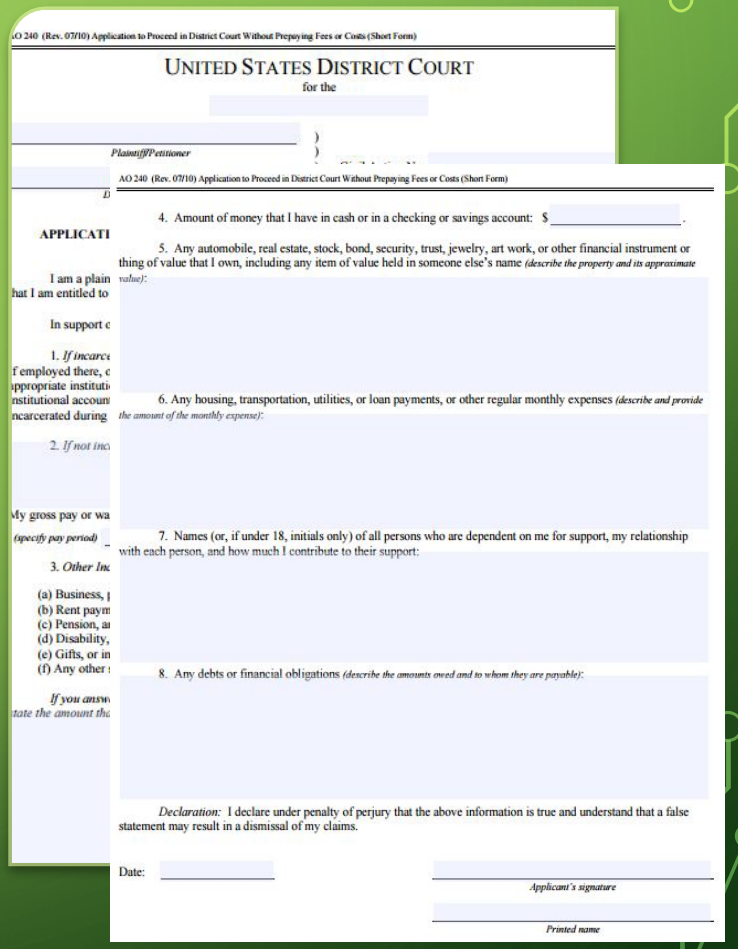
GENERAL ORDER 18 PILOT PROGRAM:

IN FORMA PAUPERIS ("IFP") APPLICATIONS

Intended to permit those who cannot afford the Court's filling fee (currently $400). If granted, it does not relieve the plaintiff of any additional litigation costs (including copying). See 28 U.S.C. § 1915(a); Loc. R. 5.4; *Adams v. Back*, No. 5:13-CV-0745 (DNH/DEP), 2013 WL 5236532, at *1 (N.D.N.Y. Sept. 17, 2013) (J. Peebles).

The most recent poverty guidelines from the Office of the Assistant Sec'y for Planning & Evaluation of the US Dep't of HHS calculates the poverty line for 2016 at $12,071/year for a single individual. See https://aspe.hhs.gov/computations-2016-poverty-guidelines (last visited March 1, 2017).

When the Client has a good faith basis for requesting IFP status, the form should be filed alongside the Complaint, and it should bear the signature of your client.



AO 240 (Rev. 07/10) Application to Proceed in District Court Without Prepaying Fees or Costs (Short Form)

UNITED STATES DISTRICT COURT

for the

Plaintiff/Petitioner

AO 240 (Rev. 07/10) Application to Proceed in District Court Without Prepaying Fees or Costs (Short Form)

4. Amount of money that I have in cash or in a checking or savings account: $_____.

5. Any automobile, real estate, stock, bond, security, trust, jewelry, art work, or other financial instrument or thing of value that I own, including any item of value held in someone else's name *(describe the property and its approximate value)*:

6. Any housing, transportation, utilities, or loan payments, or other regular monthly expenses *(describe and provide the amount of the monthly expense)*:

7. Names (or, if under 18, initials only) of all persons who are dependent on me for support, my relationship with each person, and how much I contribute to their support:

8. Any debts or financial obligations *(describe the amounts owed and to whom they are payable)*:

Declaration: I declare under penalty of perjury that the above information is true and understand that a false statement may result in a dismissal of my claims.

Date: _____

Applicant's signature

Printed name

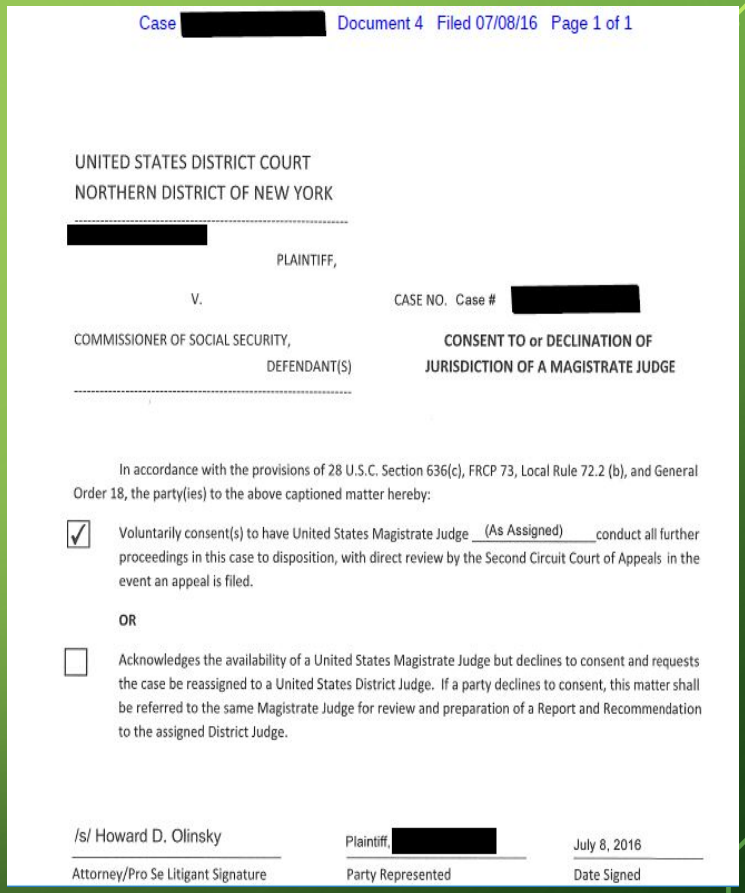
GENERAL ORDER 18 PILOT PROGRAM:
MAGISTRATE CONSENT

Suspends Loc. R. 72.3(d) – automatic assignment to Magistrate Judge.

Plaintiff may decline consent within 21 days of receiving magistrate consent / declination form.

Commissioner must decline consent "no later than the date the United States files the administrative record."

If the Commissioner does not actively withdraw consent, GO 18 assumes that the government consents, thus, if Plaintiff has consented, the case is heard by the Magistrate Judge with consent and becomes appealable upon entry of judgment. Fed. R. Civ. P. 73(c) (citing 28 U.S.C. § 636(c)(3)).



Case [redacted] Document 4 Filed 07/08/16 Page 1 of 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[redacted]
PLAINTIFF,

V. CASE NO. Case # [redacted]

COMMISSIONER OF SOCIAL SECURITY,
DEFENDANT(S)

CONSENT TO or DECLINATION OF JURISDICTION OF A MAGISTRATE JUDGE

In accordance with the provisions of 28 U.S.C. Section 636(c), FRCP 73, Local Rule 72.2 (b), and General Order 18, the party(ies) to the above captioned matter hereby:

☑ Voluntarily consent(s) to have United States Magistrate Judge (As Assigned) conduct all further proceedings in this case to disposition, with direct review by the Second Circuit Court of Appeals in the event an appeal is filed.

OR

☐ Acknowledges the availability of a United States Magistrate Judge but declines to consent and requests the case be reassigned to a United States District Judge. If a party declines to consent, this matter shall be referred to the same Magistrate Judge for review and preparation of a Report and Recommendation to the assigned District Judge.

/s/ Howard D. Olinsky	Plaintiff, [redacted]	July 8, 2016
Attorney/Pro Se Litigant Signature	Party Represented	Date Signed

FINAL (APPEALABLE) DECISIONS OF THE COMMISSIONER OF SOCIAL SECURITY

The Government has filed to dismiss under Fed. R. Civ. P. 12(b)(6), what can I do?

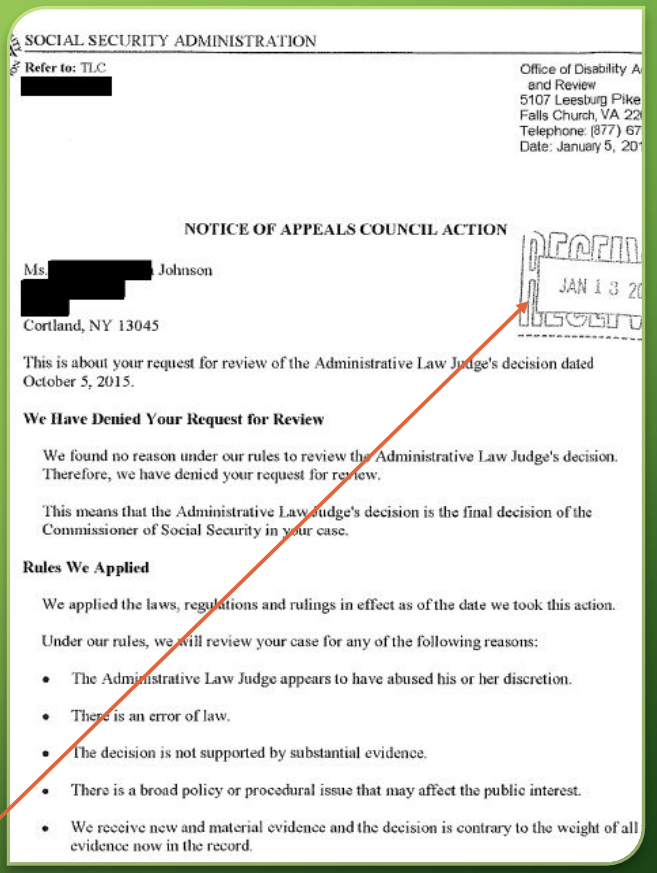
Maybe nothing. Some untimely complaints are just that, untimely, and you can't form a good faith argument for timeliness.

In some cases, *before filing suit*, you may have "good cause" for requesting, from *SSA* (not the Court), an extension of time to file your federal court action. 20 C.F.R. § 405.505 (citing Id. at § 405.20). See also SSR 91-5p (mental incapacity preventing federal court action).

After filing suit and being served with a 12(b)(6) motion, you may be able to argue equitable tolling principles. See generally *Torres v. Barnhart*, 417 F.3d 276 (2d Cir. 2005).

Additionally, Agency regulations create a presumption of receipt on the 65th day after the date of the Appeals Council Notice, which can be rebutted through evidence. See 20 C.F.R. § 422.210(c). Some cases have forgiven late filed complaints due to failure of the Agency to timely mail the notice or Plaintiff or her counsel receiving the notice more than 5 days after the date on the Appeals Council Notice, thereby rebutting the presumption it was received on the 65th day. *Matsibekker v. Heckler*, 738 F.2d 79 (2d Cir. 1984); *Bartolomie v. Heckler*, 597 F. Supp. 1113 (N.D.N.Y. Nov. 13, 1984).

However, these arguments require *evidence* in support (e.g. affidavits & a firm-wide policy file stamping documents "RECEIVED") to support such contentions. See generally *Reape v. Colvin*, No. 1:13-CV-1426 (GTS/CFH), 2015 WL 275865, at *3 (N.D.N.Y. Jan. 22, 2015) (dismissing complaint as untimely and rejecting bare allegations unsupported by evidence).



SOCIAL SECURITY ADMINISTRATION

Refer to: TLC
[redacted]

Office of Disability A
and Review
5107 Leesburg Pike
Falls Church, VA 22
Telephone: (877) 67
Date: January 5, 20

NOTICE OF APPEALS COUNCIL ACTION

Ms. [redacted] Johnson
[redacted]
Cortland, NY 13045

JAN 13 20

This is about your request for review of the Administrative Law Judge's decision dated October 5, 2015.

We Have Denied Your Request for Review

We found no reason under our rules to review the Administrative Law Judge's decision. Therefore, we have denied your request for review.

This means that the Administrative Law Judge's decision is the final decision of the Commissioner of Social Security in your case.

Rules We Applied

We applied the laws, regulations and rulings in effect as of the date we took this action.

Under our rules, we will review your case for any of the following reasons:

- The Administrative Law Judge appears to have abused his or her discretion.
- There is an error of law.
- The decision is not supported by substantial evidence.
- There is a broad policy or procedural issue that may affect the public interest.
- We receive new and material evidence and the decision is contrary to the weight of all evidence now in the record.

GENERAL ORDER 18 PILOT PROGRAM:

FILING OF ADMINISTRATIVE RECORD & BRIEFING SCHEDULE

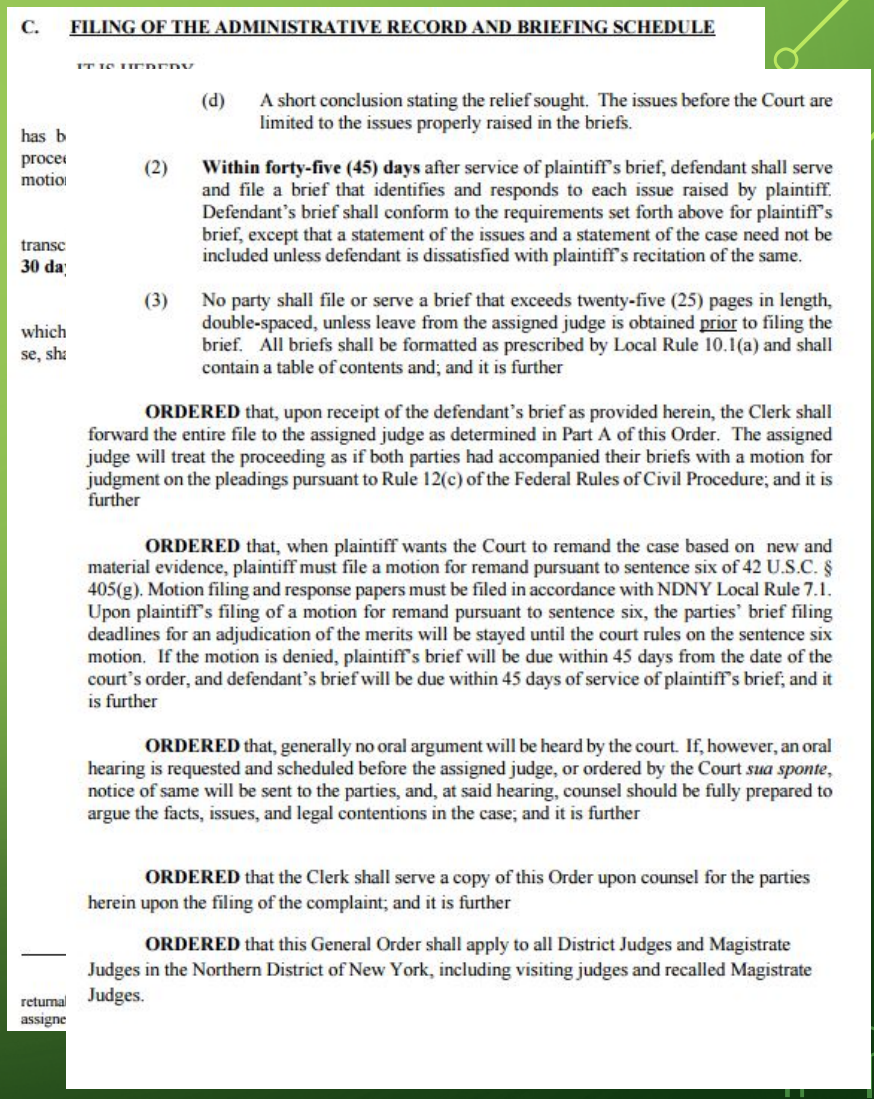
The Commissioner has 90 days from the date of electronic services to file an Administrative Record (or 30 days following denial of a motion to dismiss) and that record also serves as the Commissioner's Answer.

Plaintiff has 45 days from the date the Administrative Record is filed to file her brief (25 pages). See Fed. R. Civ. P. 6(a)(1). The form of the brief should follow the outline provided in GO 18.

Defendant has 45 days from the date of service of Plaintiff's brief to file a responsive brief (25 pages). See Fed. R. Civ. P. 6(a)(1). The government may stipulate to remand (rare).

Filing a reply is NOT warranted under GO 18, however, local rules allow you to seek leave and file a reply (10 pages) within 11 days. Loc. R. 7.1(b), (c). Rarely used.

Cross-Motions are NOT required.



C. **FILING OF THE ADMINISTRATIVE RECORD AND BRIEFING SCHEDULE**

IT IS HEREBY

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(d) A short conclusion stating the relief sought. The issues before the Court are limited to the issues properly raised in the briefs.

(2) **Within forty-five (45) days** after service of plaintiff's brief, defendant shall serve and file a brief that identifies and responds to each issue raised by plaintiff. Defendant's brief shall conform to the requirements set forth above for plaintiff's brief, except that a statement of the issues and a statement of the case need not be included unless defendant is dissatisfied with plaintiff's recitation of the same.

(3) No party shall file or serve a brief that exceeds twenty-five (25) pages in length, double-spaced, unless leave from the assigned judge is obtained prior to filing the brief. All briefs shall be formatted as prescribed by Local Rule 10.1(a) and shall contain a table of contents and; and it is further

ORDERED that, upon receipt of the defendant's brief as provided herein, the Clerk shall forward the entire file to the assigned judge as determined in Part A of this Order. The assigned judge will treat the proceeding as if both parties had accompanied their briefs with a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure; and it is further

ORDERED that, when plaintiff wants the Court to remand the case based on new and material evidence, plaintiff must file a motion for remand pursuant to sentence six of 42 U.S.C. § 405(g). Motion filing and response papers must be filed in accordance with NDNY Local Rule 7.1. Upon plaintiff's filing of a motion for remand pursuant to sentence six, the parties' brief filing deadlines for an adjudication of the merits will be stayed until the court rules on the sentence six motion. If the motion is denied, plaintiff's brief will be due within 45 days from the date of the court's order, and defendant's brief will be due within 45 days of service of plaintiff's brief; and it is further

ORDERED that, generally no oral argument will be heard by the court. If, however, an oral hearing is requested and scheduled before the assigned judge, or ordered by the Court *sua sponte*, notice of same will be sent to the parties, and, at said hearing, counsel should be fully prepared to argue the facts, issues, and legal contentions in the case; and it is further

ORDERED that the Clerk shall serve a copy of this Order upon counsel for the parties herein upon the filing of the complaint; and it is further

ORDERED that this General Order shall apply to all District Judges and Magistrate Judges in the Northern District of New York, including visiting judges and recalled Magistrate Judges.

returna
assigne

OBJECTIONS (NON-CONSENT) AND APPEALS (CONSENT OR ADOPTION OF THE REPORT & RECOMMENDATION)

- Caution: do not reflexively object to the R&R or appeal to the Second Circuit.
  - Done it only once in NDNY and it was, thankfully, successful. *Shaffer o/b/o Z.L.S.R. v. Colvin*, No. 5:15-cv-00769-BKS-DJS (N.D.N.Y. Sept. 29, 2016).
- You have 14 days to object to the Magistrate's R&R. Fed. R. Civ. P. 72(b).
- If you consented to the magistrate, you may appeal to the Second Circuit once final judgment is entered. Fed. R. Civ. P. 73(c).
- You have 60 days to appeal final judgment from the District Court. Fed. R. App. P. 4(a)(1)(B).

CONCLUDING REMARKS

- NDNY Guide to Social Security Practice for Attorneys
  - Note: this was compiled under the previous iteration of GO 18 (has *not* been updated with adoption of the pilot program, but will likely be updated in the future).
- Feel free to call or write with any questions you have related to substantive arguments or procedural matters and we can figure them out together. Nate Riley, 315-701-5780 x 303; nriley@windisability.com
- All of today's materials are available on CD and can be obtained electronically by simply contacting me.
- Practicing in federal court appeals is an intellectually stimulating privilege that I hope you enjoy as much as I do!

Materials for:

Hot Topics in Social Security Practice (Part 1 of 2) – How Do Moderate Limitations in Concentration, Persistence, or Pace Impact the Claimant's Ability to Engage in "Simple" Work

(Nate Riley)

HOT TOPICS IN SOCIAL SECURITY PRACTICE

HOW DO MODERATE LIMITATIONS IN CONCENTRATION, PERSISTENCE, OR PACE IMPACT A CLAIMANT'S ABILITY TO ENGAGE IN "SIMPLE" WORK

THURSDAY, MARCH 16, 2017

JAMES M. HANLEY FEDERAL BUILDING

Olinsky Law Group

WHAT IMPAIRMENTS MIGHT CAUSE LIMITATIONS IN CONCENTRATION, PERSISTENCE OR PACE ("CPP")?

- Mental, non-exertional impairments. See 20 C.F.R. § 404.1569a(c)(1)(ii)&(iii), 416.969a(c)(1)(ii)&(iii) ("difficulty maintaining attention or concentrating" and "difficulty understanding or remembering detailed instructions").
- Examples include, but are not limited to, the following:
  - Affective disorders (depression and bipolar disorder)
  - Anxiety
  - Neurocognitive disorders
  - Intellectual disorder (i.e. formerly mental retardation)
  - Pain

WHY SHOULD WE CARE ABOUT "MODERATE" LIMITATIONS IN CONCENTRATION, PERSISTENCE OR PACE ("CPP")?

- While Agency Regulations and Rulings do not define "moderate" mental limitations (see 20 C.F.R. § 404.1520a(c)(4), 416.920a(c)(4)) the Agency has instructed claimants should be described as "'Moderately Limited,' when the evidence supports the conclusion that the individual's capacity to perform the activity is *impaired*." See, e.g., *Reynolds v. Colvin*, No. 3:13–cv–396 (GLS/ESH), 2014 WL 4184729, at *4, nn. 15 & 16 (N.D.N.Y. Aug. 21, 2014) (citing Program Operations Manual System ("POMS") DI 24510.063)). Thus, a "moderate" restriction appears to represent more than a "minimal limitation" upon functioning in a given area. 20 C.F.R. § 404.1520a(d)(1)&(2), 416.920a(d)(1)&(2)).

(3) We have identified four broad functional areas in which we will rate the degree of your functional limitation: Activities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation. See 12.00C of the Listing of Impairments.

(4) When we rate the degree of limitation in the first three functional areas (activities of daily living; social functioning; and concentration, persistence, or pace), we will use the following five-point scale: None, mild, moderate, marked, and extreme. When we rate the degree of limitation in the fourth functional area (episodes of decompensation), we will use the following four-point scale: None, one or two, three, four or more. The last point on each scale represents a degree of limitation that is incompatible with the ability to do any gainful activity.

(d) *Use of the technique to evaluate mental impairments.* After we rate the degree of functional limitation resulting from your impairment(s), we will determine the severity of your mental impairment(s).

(1) If we rate the degree of your limitation in the first three functional areas as "none" or "mild" and "none" in the fourth area, we will generally conclude that your impairment(s) is not severe, unless the evidence otherwise indicates that there is more than a minimal limitation in your ability to do basic work activities (see § 404.1521).

(2) If your mental impairment(s) is severe, we will then determine if it meets or is equivalent in severity to a listed mental disorder. We do this by comparing the medical findings about your impairment(s) and the rating of the degree of functional limitation to the criteria of the appropriate listed mental disorder. We will record the presence or absence of the criteria and the rating of the degree of functional limitation on a standard document at the initial and reconsideration levels of the administrative review process, or in the decision at the administrative law judge hearing and Appeals Council levels (in cases in which the Appeals Council issues a decision). See paragraph (e) of this section.

(3) If we find that you have a severe mental impairment(s) that neither meets nor is equivalent in severity to any listing, we will then assess your residual functional capacity.

WHY SHOULD WE CARE ABOUT "MODERATE" LIMITATIONS IN CONCENTRATION, PERSISTENCE OR PACE ("CPP")?

- Additionally, even where the impairment itself is non-severe, the regulations (20 C.F.R. § § 404.1545(a)(2), 416.945(a)(2)) and Second Circuit precedent (*Dixon v. Shalala*, 54 F.3d 1019, 1031 (2d Cir. 1995)) require the ALJ to "consider" the impact of non-severe impairments upon the claimant's RFC. See also *Golembiewski v. Barnhart*, 322 F.3d 912, 918 (7th Cir. 2003) (failure to consider the "entire constellation of ailments – including those impairments that in isolation are not severe" when formulating the RFC constitutes reversible error). Thus, "moderate" limitations stemming from even non-severe impairments *may* impact the RFC in important ways and should be considered by the ALJ (and VE). See *McIntyre v. Colvin*, 758 F.3d 146, 151–52 (2d Cir. 2014) (ALJ "must evaluate" the "combined effect" of severe and non-severe impairments upon RFC, including deficits in CPP).
- Caution: some "moderate" limitations, particularly those associated with physical, exertional impairments, may have little impact upon the RFC. See, e.g., *Pellam v. Astrue*, 508 Fed. Appx. 87, 90 (2d Cir. 2013) (finding no error in ALJ's rejection of "moderate" and "mild" physical limtiations as too "vague").

WHY SHOULD WE CARE ABOUT "MODERATE" LIMITATIONS IN CONCENTRATION, PERSISTENCE OR PACE ("CPP")?

- Agency Ruling regarding the "basic demands" of "unskilled" work (SSR 85-15, 1985 WL 56857, at *4–5)
  - "The basic mental demands of competitive, remunerative, unskilled work include the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting. A substantial loss of ability to meet any of these basic work-related activities would severely limit the potential occupational base. This, in turn, would justify a finding of disability because even favorable age, education, or work experience will not offset such a severely limited occupational base."
  - Provides several illustrative examples of "favorable" physical profiles (i.e. young, able bodied individuals) that nevertheless result in a finding of "disabled" because their severe deficits in these areas result in an inability to engage in "simple" work.
- Excellent discussion of interplay between SSR 85-15 and RFC. *Jaramillo v. Colvin*, 576 Fed. Appx. 870, 876—77 (10th Cir 2014).

HOW DOES AN ALJ ACCOUNT FOR AT LEAST MODERATE LIMITATIONS IN CONCENTRATION, PERSISTENCE OR PACE ("CPP")?

- Several Circuit Court cases have held that an ALJ fails to account for at least moderate limitations in CPP when she reduces those restrictions to labor involving only "simple," "routine" or "repetitive" tasks ("SRRT") or "unskilled" work under the DOT *where the evidence does not support the SRRT limitation.* Some courts describe this as error in formulating the RFC, while others remand due to a Step 4/5 error in relying upon Vocational Expert testimony that did not accurately reflect the claimant's impairments:
  - *Ramirez v. Barnhart*, 372 F.3d 546, 551, 554 (3d Cir. 2004);
  - *Mascio v. Colvin*, 780 F.3d 632, 638 (4th Cir. 2015);
  - *Ealy v. Comm'r of Soc. Sec.*, 594 F.3d 504, 516 (6th Cir. 2010);
  - *Stewart v. Astrue*, 561 F.3d 679, 684—85 (7th Cir. 2009);
  - *Winschel v. Com'r of Soc. Sec.*, 631 F.3d 1176, 1180—81 (11th Cir. 2011).

HOW DOES AN ALJ ACCOUNT FOR AT LEAST MODERATE LIMITATIONS IN CONCENTRATION, PERSISTENCE OR PACE ("CPP")?

- Use of "hot topic" is a misnomer – outside the Second and Fourth Circuits, this issue has been addressed in Circuit Court decisions since the early 'oughts.
  - *Ramirez v. Barnhart*, 372 F.3d 546, 551, 554 (3d Cir. 2004) (hypotheticals presented to the VE "do not adequately convey all of [claimant's] limitations" because, among other deficiencies, the hypothetical "does not take into account deficiencies in pace. Many employers require a certain output level from their employees over a given amount of time, and an individual with deficiencies in pace might be able to perform simple tasks, but not over an extended period of time.")

HOW DOES AN ALJ ACCOUNT FOR AT LEAST MODERATE LIMITATIONS IN CONCENTRATION, PERSISTENCE OR PACE ("CPP")?

- In the Sixth Circuit, the Court remanded an ALJ decision that included "moderate difficulties" in CPP with an RFC of only "simple, repetitive type jobs" despite the ALJ purporting to credit fully opinions that included additional limitations in CPP, *Ealy v. Comm'r of Soc. Sec.*, 594 F.3d 504, 516 (6th Cir. 2010):

  "The ALJ's streamlined hypothetical omitted these speed- and pace-based restrictions completely. The hypothetical posed by the ALJ should have included the restriction that [claimant] could work two-hour work segments during an eight-hour work day, and that speed of his performance could not be critical to his job. Accordingly, [claimant's] limitations were *not fully conveyed to the vocational expert.*

  ....

  the ALJ relied upon [the expert's] assessment, yet the ALJ did not fairly reflect that assessment in the hypothetical because the court failed to include Ealy's time and speed restrictions."

HOW DOES AN ALJ ACCOUNT FOR AT LEAST MODERATE LIMITATIONS IN CONCENTRATION, PERSISTENCE OR PACE ("CPP")?

- The Seventh Circuit has remanded the decisions of the Commissioner that reduced moderate limitations in CPP to unskilled labor or SRRT. See *Stewart v. Astrue*, 561 F.3d 679, 684—85 (7th Cir. 2009); *O'Connor-Spinner v. Astrue*, 627 F.3d 614, 620 (7th Cir. 2010); *Yurt v. Colvin*, 758 F.3d 850, 857 (7th Cir. 2014).

HOW DOES AN ALJ ACCOUNT FOR AT LEAST MODERATE LIMITATIONS IN CONCENTRATION, PERSISTENCE OR PACE ("CPP")?

- The Eighth Circuit has offered a pair of decisions both reversing and affirming on this issue. The distinguishing factors? The medical evidence and the VE's testimony at the hearing.
  - In *Newton v. Chater*, 92 F.3d 688, 695 (8th Cir.1996), the Court found "no dispute" that the claimant suffered from seven moderate limitations and one marked limitation in CPP, and acknowledged these same doctors explained the limitations "did not significantly limit his *abilities* to follow short and simple instructions and make simple work-related decisions." Yet the VE testified that these deficiencies "related to basic work habits" and that a "moderate deficiency in these areas . . . would cause problems on an ongoing daily basis, '*regardless of ... what the job required from a physical or skill standpoint*.'" The Court thus held that the moderate and marked limitations should have been read to the VE whose "original response to the hypothetical question *may thus have been different if the question had already described all of Newton's functional limitations.*"
  - In *Howard v. Massanari*, 255 F.3d 577, 582 (8th Cir.2001), the Court cited favorably to *Newton*, and encountered a claimant that suffered from borderline intellectual functioning with the fully credit medical opinions finding moderate limitations in CPP, yet, in the narrative portions of those opinions, physicians indicated she was "'able to sustain sufficient concentration and attention to perform at least simple, repetitive, and routine cognitive activity without severe restriction of function'" and the Court affirmed the ALJ's colloquy with the VE that indicated only that she could engage in "simple" work.

HOW DOES AN ALJ ACCOUNT FOR AT LEAST MODERATE LIMITATIONS IN CONCENTRATION, PERSISTENCE OR PACE ("CPP")?

- The Eleventh Circuit, in *Winschel v. Comm'r Soc. Sec.*, 631 F.3d 1176, 1180—81 (11th Cir. 2011), recognizes that "[o]ther circuits have also rejected the argument that an ALJ generally accounts for a claimant's limitations in concentration, persistence, and pace by restricting the hypothetical question to simple, routine tasks or unskilled work."
  - The court noted that "*when medical evidence demonstrates* that a claimant can engage in simple, routine tasks or unskilled work despite limitations in concentration, persistence, and pace, courts have concluded that limiting the hypothetical to include only unskilled work sufficiently accounts for such limitations."
  - The *Winschel* decision is a watershed moment. It offers an excellent discussion of the Third (*Ramirez*), Seventh (*Stewart*), and Eighth Circuit (*Howard*) decisions remanding on this issue, as well as contrary Eighth (*Howard*)) and Ninth Circuit *(Stubbs–Danielson v. Astrue*, 539 F.3d 1169, 1173–76 (9th Cir.2008)) authority affirming where the "medical evidence" supported reducing moderate limitations in CPP to "simple" work. Something for everybody!

WHERE THE EVIDENCE *DOES* SUPPORT REDUCING MODERATE LIMITATIONS IN CPP TO "SIMPLE" WORK

- Thus, it was against this backdrop that the Second Circuit decided *McIntyre v. Colvin*, 758 F.3d 146, 151–52 (2d Cir. 2014).
  - The claimant suffered from only "disorders of the back and affective disorder" and a CE found "attention and concentration are intact" yet the ALJ found Plaintiff suffered moderate difficulties in CPP. *Id.* at 150.
  - The district court decision mentions no additional opinion evidence supporting limitations in CPP and indicates the ALJ limited Plaintiff to "simple, routine, low stress tasks." *McIntyre v. Colvin*, No. 3:12–CV–0318 (GTS), 2013 WL 2237828, at *4–5 (N.D.N.Y. May 21, 2013) (J. Suddaby).
  - The Second Circuit notes that the ALJ's RFC analysis "failed to mention explicitly [claimant's] non-exertional limitations" and that this failure to mention non-severe impairments was error. 758 F.3d at 151–52 (citing *Dixon*, 54 F.3d at1031).

WHERE THE EVIDENCE *DOES* SUPPORT REDUCING MODERATE LIMITATIONS IN CPP TO "SIMPLE" WORK

- The Second Circuit, relying upon the Eleventh Circuit's ruling in *Winschel*, recognized, the importance of the ALJ incorporating limitations in CPP into hypotheticals posited to the VE, "[an] ALJ's hypothetical question to a vocational expert must account for limitations in concentration, persistence, and pace . . . an ALJ's hypothetical should *explicitly* incorporate any limitations in concentration, persistence, and pace." *Id.*
- The Court went on to hold that limiting the claimant to "simple, routine, low stress tasks" may not result in harmful error if (1) "medical evidence demonstrates that a claimant can engage in simple, routine tasks or unskilled work despite limitations in [CPP]," and the challenged hypothetical is limited 'to include only unskilled work'; or (2) the hypothetical "otherwise *implicitly* account[ed] for a claimant's limitations in concentration, persistence, and pace[.]" *Id.*
  - The Second Circuit concluded the medical evidence demonstrated that claimant could engage in "simple, routine, low stress tasks," and that the ALJ's error was therefore "harmless." *Id.*

WHERE THE EVIDENCE *DOES* SUPPORT REDUCING MODERATE LIMITATIONS IN CPP TO "SIMPLE" WORK

- Thus, the *McIntyre* decision teaches us that while an ALJ generally cannot reduce moderate limitations in CPP to "simple" work (see, e.g., *Winschel*), there may be occasions in which the administrative record contains evidence (in the form of medical opinions or otherwise) that directly supports a "simple" work limitation even though the same evidence describes moderate limitations in CPP (see, e.g., *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1173-76 (9th Cir. 2008)).
  - In other words, this requires a careful, case by case, evaluation of the evidence to determine if such a limitations is supported by substantial evidence because, without such evidence, the ALJ commits reversible error.
  - There is no *per se* rule proscribing an ALJ from simultaneously finding (1) the claimant suffers moderate limitations in CPP, while also (2) issuing an RFC finding that limits the claimant to SRRT or unskilled work. So long as that finding is supported by medical evidence.

HOT TOPIC IN SOCIAL SECURITY FEDERAL COURT PRACTICE

- Since the *McIntyre* decision, the Fourth, Seventh, Ninth, and Tenth Circuits have issued decisions further articulating the metes and bounds of the CPP / SRRT issue:
  - In *Mascio v. Colvin*, 780 F.3d 632, 637–38 (4th Cir. 2015), the Court, citing *Winschel*, noted that while the ALJ's hypothetical to the VE did not include mental limitations, the "the vocational expert's *unsolicited* addition of 'unskilled work,' matched the ALJ's finding regarding [claimant's] residual functional capacity." The Court ruled that "an ALJ does not account 'for a claimant's limitations in concentration, persistence, and pace by restricting the hypothetical question to simple, routine tasks or unskilled work.'" The Fourth Circuit noted that *Winschel* and other sister circuit decisions recognized that the "ability to *perform* simple tasks differs from the ability to *stay on task*. Only the latter limitation would account for a claimant's limitation in concentration, persistence, or pace."

HOT TOPIC IN SOCIAL SECURITY FEDERAL COURT PRACTICE

- Since the *McIntyre* decision, the Fourth, Seventh, Ninth, and Tenth Circuits have issued decisions further articulating the metes and bounds of the CPP / SRRT issue:
  - In 2015, the Seventh Circuit reached a conclusion similar to the Sixth Circuit's decision in *Ealy*, finding reversible error where the medical evidence supported moderate limitations in CPP in several areas of assessment, yet the ALJ failed to ask the VE about each specific limitations articulated in the medical opinion evidence, and the narrative portion of the opinions the ALJ purported to fully credit offered no explanation of the claimant's ability to engage in "simple" work, *Varga v. Colvin*, 794 F.3d 809, 814 (7th Cir. 2015):

    "the ALJ did not address all of these difficulties in his hypothetical question to the vocational expert. Because a hypothetical posed to a VE must incorporate all of the claimant's limitations supported by the medical record—including moderate limitations in [CPP] —we find that the ALJ committed reversible error."

HOT TOPIC IN SOCIAL SECURITY FEDERAL COURT PRACTICE

- Since the *McIntyre* decision, the Fourth, Ninth, and Tenth Circuits have issued decisions further articulating the metes and bounds of the CPP / SRRT issue:
  - In the Ninth Circuit, the aforementioned *Stubbs-Danielson* decision indicated that the claimant was "not significantly limited" in her ability to engage in "short simple instructions" yet the ALJ found moderate limitations in CPP and issued an RFC including an SRRT limitation. The Court affirmed. 539 F.3d 1169, 1174 (9th Cir. 2008)
  - The following term, in *Brink v. Comm'r SSA*, 343 Fed. Appx. 211, 212 (9th Cir. 2009), the Ninth Circuit issued another decision providing further guidance on this issue,

    "In *Stubbs-Danielson v. Astrue*, 539 F.3d 1169 (9th Cir. 2008), we held that an "assessment of a claimant adequately captures restrictions related to concentration, persistence, or pace where the assessment is consistent with the restrictions identified in the medical testimony." *Id.* at 1174. The medical testimony in *Stubbs-Danielson*, however, did not establish any limitations in concentration, persistence, or pace. Here, in contrast, the medical evidence establishes, as the ALJ accepted, that Brink does have difficulties with concentration, persistence, or pace. *Stubbs-Danielson*, therefore, is inapposite.

    Although the ALJ accepted that Brink has moderate difficulty with concentration, persistence, or pace, he nevertheless concluded, contrary to the vocational expert's testimony, that Brink can perform certain light work. This conclusion was based on an incomplete hypothetical question, and is not supported by substantial evidence. The hypothetical question to the vocational expert should have included not only the limitation to "simple, repetitive work," but also Brink's moderate limitations in concentration, persistence, or pace."
  - The case returned to the Ninth Circuit again in 2015, and the Court again remanded on this issue. *Brink v. Comm'r SSA*, 599 Fed. Appx. 657, 657–58 (9th Cir. 2015).

HOT TOPIC IN SOCIAL SECURITY FEDERAL COURT PRACTICE

- Since the *McIntyre* decision, the Fourth, Ninth, and Tenth Circuits have issued decisions further articulating the metes and bounds of the CPP / SRRT issue:
  - The Tenth Circuit has recognized that an ALJ fails to express moderate limitations in CPP "in terms of work-related functions" or "[w]ork-related mental activities" when he limits the claimant to "simple, routine, repetitive, and unskilled tasks." *Jaramillo v. Colvin*, 576 F. Appx. 870, 876—77 (10th Cir. 2014) .
  - However, the Tenth Circuit even more recently held that an ALJ may account for moderate limitations in CPP with an RFC and VE testimony restricting the claimant to a specific vocational preparation ("SVP") of 1 or 2. *Vigil v. Colvin*, 805 F.3d 1199, 1203–04 (10th Cir. 2015).

HOT TOPIC IN SOCIAL SECURITY FEDERAL COURT PRACTICE

- Bifurcating the severity (Step 2) and Listing (Step 3) assessments from the RFC:
  - Earlier, I cited to the "special technique" the Commissioner employs when considering mental impairments, and this section of the decision (typically Finding Nos. 3 or 4) is where the ALJ will often explicitly state the claimant exhibits moderate difficulty in CPP. 20 C.F.R. § 404.1520a(d)(3), 416.920a(d)(3). *See also* 20 C.F.R. Part 404, Subpart P, Appendix 1, Listing 12.04, ¶ B (2015).

The severity of the claimant's mental impairment does not meet or medically equal the criteria of listing 12.04. In making this finding, I have considered whether the "paragraph B" criteria are satisfied. To satisfy the "paragraph B" criteria, the mental impairment must result in at least two of the following: marked restriction of activities of daily living; marked difficulties in maintaining social pace; or repeated e

With regard to concentration, persistence or pace, the claimant has moderate difficulties. The claimant alleged significant problems with memory and concentration, as well as fatigue and low energy, related to a combination of her impairments. During the April 2013 psychological consultative examination, the claimant did demonstrate below average performance on Digit

HOT TOPIC IN SOCIAL SECURITY FEDERAL COURT PRACTICE

- Bifurcating the severity (Step 2) and Listing (Step 3) assessments from the RFC:
  - Look at the evidence, not just the ALJ's "special technique" or Listing analyses:
    - The problem the claimant in *McIntye* encountered was a lack of evidence: seemingly *no evidence* supported any limitation in CPP whatsoever. Counsel's argument was based entirely upon the ALJ's Step 3 finding that he had moderate difficulties in CPP.
    - Some courts have outright rejected this approach, and find that the Step 2/3 and RFC assessments should remain distinct. See *Vigil v. Colvin*, 805 F.3d 1199, 1203 (10th Cir. 2015) ("The ALJ's finding of a moderate limitation in concentration, persistence, or pace at step three does not necessarily translate to a work-related functional limitation for the purposes of the RFC assessment.").
    - Other Courts, while mindful of the distinction, see no reason why the psychiatric review technique or ""PRT" findings could not influence the later RFC finding. See *Winschel*, 631 F.3d at 1180—81 (collecting cases).

HOT TOPIC IN SOCIAL SECURITY FEDERAL COURT PRACTICE

- Second Circuit district court citing *McIntyre*:
  - Twenty-six N.D.N.Y. decisions citing to *McIntyre* that mostly affirm or reverse on other grounds, or do not address the SRRT issue at all. *Brown v. Comm'r of Soc. Sec.*, 2016 WL 3351021, at *6 (N.D.N.Y. June 14, 2016) (remanding on other grounds but discussing SRRT issue and finding no error).
  - Six decision in WDNY citing to *McIntyre* that affirm. See *Miller v. Colvin*, 85 F.Supp.3d 742 (W.D.N.Y. 2015); *Steffens v. Colvin*, No. 6:14-CV-06727 (MAT), 2015 WL 9217058, at *4 (W.D.N.Y. Dec. 16, 2015).
  - Twenty decisions from E.D.N.Y. and S.D.N.Y. that are a mix of affirmances and reversals, with one interesting case holding that the moderate limitations in CPP resulted in the need for VE testimony. *Chaparro v. Colvin*, 156 F.Supp.3d 517, 537–39 (S.D.N.Y. 2016) (citing *Selian v. Astrue*, 708 F.3d 409, 417 (2d Cir.2013)).

LESSONS LEARNED FROM LITIGATING THIS ISSUE

- Substantial evidence, not the ALJ's decision, will dictate the outcome:
  - Does the opinion evidence support a finding of moderate limitations in CPP?
    - Are these contained in the PRT or in a mental RFC assessment?
    - Does the ALJ purport to fully credit those opinions?
  - Do treatment records support the opinion evidence and a finding of at least moderate limitations in CPP?
  - What was said about CPP during the ALJ's colloquy with the VE?
    - Are the ALJ's hypotheticals consistent with both the opinion evidence she purports to fully credit and with the RFC finding in the final decision?
    - Does the ALJ / VE quantify the CPP limitations into two hour blocks?
    - Does the Step 4 /5 finding recite jobs that require more than "simple" work (i.e. complex tasks or SVP 3 or higher)?

CONCLUDING REMARKS

- Feel free to call or write with any questions and we can figure them out together. Nate Riley, 315-701-5780 x 303; nriley@windisability.com
- All of today's materials are available on CD and can be obtained electronically by simply contacting me.
- Practicing in federal court appeals is an intellectually stimulating privilege that I hope you enjoy as much as I do!

Materials for:

Hot Topics in Social Security Practice (Part 2 of 2) – Second Circuit Practice

(Maria Fragassi Santangelo)

Hot Topics in Social Security Practice
Recent Second Circuit
Caselaw Trends

Presented by

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TREATING SOURCE OPINIONS

- Opinion evidence from an acceptable treating source is entitled to controlling weight if supported by and consistent with evidence of record

- No controlling weight - ALJs must evaluate and weigh in accordance with regulatory factors and articulate the reasons for the weight given the opinion

TREATING SOURCE OPINIONS

Remanded:

- *Greek v. Colvin* (published)

ALJ rejected treating source opinion on factually flawed reasoning

- *Morgan v. Colvin*

One-sentence explanation for assigning minimal weight insufficient

- *Winn v. Comm'r of Soc. Sec.*

ALJ improperly rejected treating source opinion in favor of opinions from consultative examiner and single decision maker without good reasons

- *Mariani v. Colvin*

ALJ substituted lay opinion of 50% use of dominant right hand where the medical opinion evidence was at "both ends of the spectrum" ("no use" to "intact dexterity")

TREATING SOURCE OPINIONS

Affirmed: ***Opinion Not Supported By/Inconsistent With Evidence***

- *Monroe v. Comm'r of Soc. Sec.* & *Domm v. Colvin*
  Internal inconsistencies in treatment notes

- *Krull v. Colvin*
  By pointing to contradictory evidence ALJ did not "cherry pick"

- *Reynolds v. Colvin*
  Examining sources also did not treat during the period at issue

- *Rock v. Colvin*
  Discounted only GAF score

OTHER SOURCES: Consultative ("CEs"), State Agency, and "Not Acceptable" Sources

Remanded:

- *Morgan v. Colvin*

  CE opinion stale and not reconciled with MRI findings

- *Evans v. Colvin*

  Failed to consider the applicable regulatory factors when weighing physician assistant's (PA's) opinion

Affirmed with Caution:

Domm v. Colvin

Deficient explanation for significant weight given to CE opinion

OTHER SOURCES

Affirmed: ***Appropriate Evaluation/Weight Given to CE Opinion***

- *LaValley v. Colvin* & *Monette v. Colvin*
  Versus nurse practitioner (NP) opinion

- *Barry v. Colvin*, 606 F. App'x 621
  ALJ properly omitted CE finding that could not maintain schedule

- *Christina v. Colvin*, 594 F. App'x 65
  State agency opinion also supported RFC

OTHER SOURCES

Appropriate Evaluation/Weight Given to CE Opinion (Cont'd)

- *Johnson v. Colvin*

  Minimal to no limitations for simple work despite borderline intellectual functioning (BIF)

- *Rock v. Colvin*

  State agency opinion trumped treating psychologist

- *Lewis v. Colvin*

  RFC for light work supported by CE findings of "mild" limitations, which were not "impermissibly vague" as per *Selian*

OTHER SOURCES

Affirmed:

- ***Appropriate Evaluation/Weight Given to State Agency Sources***

  Camille v. Colvin

State agency psychologist's assessment not stale simply because did not review subsequent treatment records that were not materially different from those already reviewed

- ***Appropriate Evaluation/Weight Given to "Not Acceptable" Sources***

  Bushey v. Colvin

Good reasons for not given PA opinion less weight (only treated for 2 months)

POST-DECISION EVIDENCE AND ALLOWANCES

- Additional Evidence Proffered to the Appeals Council
  - ➢ Regulatory (§§ 404.970(b), 416.1470(b))
    - "New and material evidence" must relate to the period on or before the ALJ's decision or the relevant period at issue (*e.g.*, on or before Date Last Insured)
    - Appeals Council grants review if it finds the ALJ's decision is contrary to the weight of the evidence currently in the record, including the new and material evidence
  - ➢ Subject to judicial review (*Perez v. Chater)*

- Evidence Proffered for the First Time to the District Court
  - ➢ Statutory (Sixth Sentence of 42 U.S.C. § 405(g))
  - ➢ Three-prong standard of *Tirado v. Bowen/Lisa v. Sec'y of HHS*
    1. New and not merely cumulative
    2. Material to the relevant period and ***probative (reasonable possibility of different outcome)***
    3. ***Good Cause for failing to present the evidence earlier***

POST-DECISION EVIDENCE AND ALLOWANCES

Remanded:

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

  Additional evidence deemed by the Appeals Council to be new and material evidence contradicted the ALJ's decision

  Note: Declined to rule on the sufficiency of the Appeals Council's Notice (§§ 404.967, 416.1467, HALLEX I-3-5-25, I-3-5-15 do not require elaborate explanation)

- *Evans v. Colvin*

  Appeals Council erred in declining to consider an opinion retrospective to the period at issue

POST-DECISION EVIDENCE AND ALLOWANCES

Affirmed: *Not "New and Material" Evidence Proffered to the AC*

- *Scott v. Colvin*
- *Guerra v. Colvin*

Affirmed: *Award on Subsequent Allowance Not New and Material Evidence Warranting Remand under § 405(g)*

- *Rivera v. Colvin*
- *Caron v. Colvin*

RECORD DEVELOPMENT AND RECONTACTING

Remanded:

Winn v. Comm'r of Soc. Sec.

ALJ failed to fully develop the record with regard to mental impairment

RECORD DEVELOPMENT AND RECONTACTING

Affirmed: ***No Duty to Seek or Recontact for Medical Source Statement/Additional Evidence Where No "Obvious Gap" in Record*** *(Rosa v. Callahan)*

- *Eusepi v. Colvin*

  No duty to affirmatively seek even where ALJ allegedly did not advise of importance of getting a treating source report

- *Abbott v. Colvin*

- *O'Connell v. Colvin*

  Evidence more than a decade old

RECORD DEVELOPMENT AND RECONTACTING

No Duty to Seek Medical Source Statement/Additional Evidence Where No "Obvious Gap" in Record (Cont'd)

- *Reynolds v. Colvin*

  No duty under rescinded recontact regulation (§§ 404.1512(e), 416.912(e)) where source did not treat during relevant period

- *Johnson v. Colvin*

  No duty to recontact for post-surgery report

- *Bushey v. Colvin*

  ALJ not required to order IQ testing

RECORD DEVELOPMENT AND RECONTACTING

No Duty to Seek Medical Source Statement/Additional Evidence Where No "Obvious Gap" in Record (Cont'd)

Monroe v. Comm'r of Soc. Sec.

- ✓ ALJ properly rejected the only medical source opinion in the record from a treating source

- ✓ Citing *Tankisi v. Comm'r of Soc. Sec.* and *Pellam v. Astrue*, Court held that recontacting for a medical source statement was not necessary where the record contained sufficient evidence from which an ALJ can assess the RFC

SUFFICIENCY OF THE RFC ASSESSMENT

Remanded:

Sesa v. Colvin

Having not expressly rejected treating source opinion on Sesa's reaching limitation, the Court faulted ALJ for failing to affirmatively determine whether the reaching limitation was non-negligible

SUFFICIENCY OF THE RFC ASSESSMENT

Affirmed:

McIntyre v. Colvin & *Cohen v. Comm'r of Soc. Sec.*

limitations found at step three adequately accounted for in RFC/VE hypothetical:

- Simple, routine, low stress tasks *for* moderate CPP limitations (*McIntyre*)
- Low stress environment having only occasional decision-making and changes in the work-setting *for* moderate limitations satisfying attendance standards (*Cohen*)

Note: SSR 96-8p

Assessed limitations in the psychiatric review technique (§§ 404.1520a, 416.920a) in terms of the paragraphs "B" and "C" criteria of the Listings (*e.g.*, moderate CPP limitations) are used only to rate the severity of mental impairment at steps two and three of the sequential evaluation. The RFC requires a more detailed assessment by itemizing various functions.

SUFFICIENCY OF THE RFC ASSESSMENT

Affirmed:

- *Domm v. Colvin*
  Citing *Cichocki v. Astrue, rejected argument ALJ failed to make function-by-function assessment*

- *Johnson v. Colvin*
  RFC supported by Johnson's testimony

- *Monroe v. Comm'r of Soc. Sec.*
  RFC supported by treating psychiatrist's clinical observations and documentation of Monroe's recreational activities

- *LaValley v. Colvin* (& *Johnson v. Colvin, supra*)
  RFC assessment properly took into account the combined affect of impairments

STEP FOUR/FIVE VOCATIONAL ISSUES

Remanded: *Step Four*

- *Abbott v. Colvin*

  Step four finding lacked appraisal of nonexertional mental limitations on past relevant work as a teacher

- *Michaels v. Colvin*

  Past relevant work required heavy computer use and treatment notes documented repeated complaints of symptoms with more than 2 or 3 hours of computer use

STEP FOUR/FIVE VOCATIONAL ISSUES

Affirmed: ***Step Four – PRW Demands Do Not Exceed Those of Past Relevant Work (PRW)***

- *Guerra v. Colvin*
- *Krull v. Colvin*

  Krull performed former job long enough to have learned it

STEP FOUR/FIVE VOCATIONAL ISSUES

Remanded: *Step Five*

- *Michaels v. Colvin*

  Alternative step-five finding flawed where the hypothetical to the vocational expert (VE) did not represent limitations regarding computer use

- *Sesa v. Colvin*

  Sole reliance on Medical-Vocational Rule without VE evidence error given nonexertional reaching limitation

STEP FOUR/FIVE VOCATIONAL ISSUES

Affirmed: *Step Five VE Hypothetical At Least Mirrors RFC*

- *McIntyre v. Colvin*
  - More restrictive VE hypothetical – added simple, routine, low-stress tasks
  - VE did not have to articulate a more specific basis for opinion (*Brault*)
- *Snyder v. Colvin*
- *Suttles v. Colvin*
  VE hypothetical incorporating well-supported RFC
- *Cohen v. Comm'r of Soc. Sec.*

Hot Topics in Social Security Practice

Recent Second Circuit Caselaw Trends

Compendium

The NDNY-FCBA's CLE Committee Presents

"Court Practice for Social Security Disability Practitioners"

Thursday, March 16, 2017

Presented by:

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I. EVALUATION OF MEDICAL SOURCE OPINION EVIDENCE

A. Evaluation and Weighing Treating Source Medical Opinion Evidence

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

The Court found that the ALJ erred by rejecting treating source opinion evidence on flawed reasoning, and failed to provide any other reasons for rejecting the opinion. The treating physician assessed that Greek was 100% disabled due to memory loss, intermittent confusion, and diabetes, and would likely be absent from work more than four days per month as a result of his impairment and treatment. The ALJ rejected this assessment, because the physician did not explain how Greek's memory loss and intermittent confusion would prohibit him from performing any type of postural activity. However, the parties agreed that the physician, who wrote "N/A" in the portion of the questionnaire regarding postural activities, actually did not determine that Greek was unable to perform any postural activities. The Court concluded that the doctor instead appeared to have simply indicated that Greek's ability to perform certain activities was not relevant to her assessment. Thus, the Court found that the ALJ's reasoning for rejecting the treating source's opinion was factually flawed. Additionally, the ALJ failed to follow any other steps outlined in Commissioner's regulations, including failing to provide an explanation for why the opinion(s) was not well-supported or inconsistent with other substantial evidence, as well failing to explicitly consider any of the factors for determining the weight given to a non-controlling opinion.

Mariani v. Colvin, 567 F. App'x 8 (2d Cir. 2014)

The Court concluded that the ALJ erred by finding Mariani could perform fine manipulation/fingering with his dominant right upper extremity 50% during a typical workday. The Court noted that none of the wide array of medical source opinion evidence, which ranged from a total loss of function to intact fine dexterity of the right hand, supported the "50%" use conclusion. While the ALJ properly declined to give controlling weight to the treating physician's conclusion of "no use" of the right hand as it was inconsistent with other evidence, the ALJ was neither free to set his own expertise against objective medical evidence. In this case, the Court determined that "[m]edical evidence at both ends of the spectrum … [wa]s not substantial evidence for a finding that the extent of the disability is fifty percent capacity."

Morgan v. Colvin, 592 F App'x 49 (2d Cir. 2015)

The Court concluded that the ALJ's one-sentence explanation for assigning minimal weight given to treating source opinion that Morgan was incapable of sustaining full-time employment failed to fulfill the ALJ's obligation to provide good reasons for the weight given said opinion. The Court noted that the opinion was consistent with other medical sources finding that Morgan's symptoms were corroborated by evidence of record, including a cervical spine MRI.

Winn v. Comm'r of Soc. Sec., 541 F. App'x 67 (2d Cir. 2013)

The Court found that the ALJ improperly rejected the opinions of Winn's treating physicians in favor of the opinions of the consultative examiner and the State Agency disability analyst, without providing good reasons for discrediting the opinions of the treating physicians.

Monroe v. Comm'r of Soc. Sec., 2017 WL 213363 (2d Cir. January 18, 2017)

Substantial evidence in the form of the Monroe's long-standing psychiatrist's own treatment notes contradicted his medical source statement that she would be off task 30 and 50% of the time during a typical workday, had little ability to deal with stress or the public, and was limited in behaving in a stable manner in social situations due to bipolar disorder. To this end, the ALJ appropriately noted internal inconsistencies contained within the psychiatrist's medical source statement that described Monroe's mood as "stable most of the time," as well descriptions in his treatment notes that her mood was "stable" more often than anxious or sad, contradicted the assessed restrictions. The Court also concurred with the ALJ's determination that the assessment was refuted by Monroe contemporaneously engaging in a wide range of recreational activities, including snowmobiling trips, horseback riding, four-wheeling and multiple vacation cruises. The Court ruled that the ALJ had "comprehensively explained her reasons" for discounting the psychiatrist's opinion, and in so doing did not impermissibly substitute her own expertise for that treating source opinion evidence. Thus, the Court ruled that the ALJ properly declined to afford the psychiatrist's assessment controlling weight.

Krull v. Colvin, 2016 WL 5417289 (2d Cir. September 27, 2016)

The Court found that the ALJ did not substitute his own lay opinion for medical evidence by assigning only partial weight to medical source opinion evidence that

was contradicted by substantial evidence. In so doing, the Court rejected Krull's argument that the ALJ "cherry-picked" evidence by declining to adopt the assessments of two examining sources finding moderate limitations performing complex tasks and maintaining social functioning. The ALJ appropriately determined that such limitations were contradicted by evidence in the record, including that Krull was able to work notwithstanding her mental health symptoms, took only anti-depressant medication and sought no other treatment for her mental health issues, and engaged in moderately complex tasks, including helping with the care of her grandchildren, using computers, and other daily activities.

Domm v. Colvin, 579 F. App'x 27 (2d Cir. 2014)

The Court found that the ALJ had properly pointed to substantial evidence for giving the treating source's narrative statement only probative weight, noting that the restrictive assessment was inconsistent with the source's own treatment notes, the conclusion of other medical sources, and Domm's testimony regarding her daily functioning.

Rock v. Colvin, 628 F. App'x 1 (2d Cir. 2015)

The Court upheld the ALJ evaluation of treating psychologist opinion simply iit only to the extent it assigned a GAF of 42, as such was unsupported by and inconsistent with other evidence of record (*see, infra*).

Reynolds v. Colvin, 570 F. App'x 45 (2d Cir. 2014)

The Court concluded, "largely for the reasons identified by the district court," that substantial evidence supported the ALJ's decision to give little weight to the 2011 retrospective opinions of two treating physicians where 1) neither doctor treated claimant until 2010, and 2) record medical evidence contradicted or failed to support their retrospective opinions.

B. Evaluation and Weighing Consultative, State Agency, and "Not-Acceptable" Treating Source Evidence

Morgan v. Colvin, 592 F App'x 49 (2d Cir. 2015)

In addition to the ALJ's deficient explanation for assigning minimal weight to treating source opinion (*see, supra*), the Court further faulted the ALJ for assigning great weight to the medical source statement by the consultative examiner that

Morgan's limitations should resolve in a month, noting that there was no indication that this source ever reviewed Morgan's MRI results; nor did the ALJ make any attempt "to square his conclusion regarding the [consultative examiner's] opinion with [the] MRI findings." the Court found the consultative examiner's examination findings stale, *i.e.*, rendered more than one year before the treating source's opinion.

Evans v. Colvin, 649 F. App'x 35 (2d Cir. 2016)

The Court found that the ALJ failed to consider the applicable factors when weighing opinion evidence from Evans's treating physician assistant (PA).

Domm v. Colvin, 579 F. App'x 27 (2d Cir. 2014)

While finding the ALJ had properly assigned probative weight to treating source opinion evidence and affirming the Commissioner's final decision (*see, supra*), the Court determined that the ALJ provided a deficient explanation for the significant weight assigned to the consultative examiner's opinion evidence. The Court reminded the Commissioner that where a treating source's opinion is not given controlling weight, as here, the ALJ was required by regulations (*i.e.*, 20 C.F.R. § 404.1527(e)(2(ii)) to explain the weight given to the opinions of other examining and nonexamining sources. Citing to its holdings in *Selian v. Astrue*, 708 F.3d 409 (2d Cir. 2013) and *Cruz v. Sullivan*, 912 F.2d 8 (2d Cir. 1990), the Court cautioned that "ALJs should not rely so heavily on the findings of consultative physicians after a single examination."

LaValley v. Colvin, 2017 WL 129154 (2d Cir. January 12, 2017)

The Court rejected LaValley's contention that the ALJ gave too much weight to the opinion evidence of consultative examiners over the evidence produced by the treating nurse practitioner. The Court specified that LaValley did not clearly demonstrate how the ALJ's determination would have changed simply by giving more weight to the treating nurse evidence, given the ALJ's findings were broadly consistent with the nurse's assessments. Additionally, to the extent LaValley's argument could be construed as contending the nurse practitioner was a treating source whose opinion was entitled to controlling weight, the Court disagreed, upholding the regulations providing that only "acceptable medical sources" may be considered "treating sources, which a nurse practitioner was not.

Barry v. Colvin, 606 F. App'x 621 (2d Cir. 2015)

The Court rejected Barry's argument that the ALJ erred by not incorporating a portion of the consultative examiner's medical source statement that Barry could not maintain a regular schedule. The Court noted that the ALJ, who is entitled to exercise discretion in reviewing the record evidence, was not bound by this specific finding of the consultative examiner. While the ALJ expressly cited the opinion that Barry could not maintain a regular schedule, the ALJ also noted that the consultative examiner acknowledged that Barry could understand and follow simple directions and relate to others. The Court further referred to other medical evidence of record that supported the ALJ's conclusion, including treating source evidence, and most importantly the opinion of the State agency psychologist, who specifically found no significant limitations in Barry's ability perform activities within a schedule, maintain regular attendance, or be punctual within customary tolerances.

Christina v. Colvin, 594 F. App'x 65 (2d Cir. 2015)

The Court concluded that opinion evidence from the consultative examiner and the Stage agency psychologist supported the ALJ's RFC determination. In so doing, the Court rejected Christina's arguments that the ALJ erred by dismissing a portion of the opinion of the consultative examiner that Christina might have difficulty adhering to a work schedule or production norms; and also failed to explicitly discuss portions of the notes by a State agency psychologist indicating that Christina's allegations of depression, anxiety, and panic attacks were supported by the record. The Court instead found that the ALJ's mental residual functional capacity (MRFC) was consistent with, and supported by much of the consultative examiner's report, particularly his opinion that Christina was able to understand, remember and carry out simple, as well as complex, instructions, get along with the public and coworkers, and sustain focused attention, allowing her to timely complete assigned tasks. The ALJ also discussed and addressed the State agency psychologist's limitations (*i.e.,* would require periodic supervision to sustain an ordinary routine, experienced periodic deficits in concentration and attention, and would require additional time and support to adapt to changes in the work setting), in the RFC determination. However, the ALJ also relied on the psychologist's opinion that these limitations were not substantial.

Monette v. Colvin, 654 F. App'x 516 (2d Cir. 2016)

The Court determined that the ALJ did not err by assigning more weight to the consultative examiner's opinion over that of the treating nurse practitioner, as she

was not an acceptable medical source. Regardless, the ALJ did not overlook the nurse practitioner's opinion, as Monette argued. Rather, the Court found that the ALJ considered and assigned weight to the opinion in accordance with the applicable regulatory factors. Similarly, the Court discounted the opinion of a treating social worker, because she was not an acceptable medical source, and her assessment was "so lacking in detail as to be minimally probative." Further disagreeing with Monette's "conclusory" faulting of the ALJ for not giving more weight to evidence from other various treating source, the Court specifically noted that the ALJ "deemed probative, and incorporated into his findings medical reports and opinions by Monette's various treating therapists and physicians."

Johnson v. Colvin, 2016 WL 5539890 (2d Cir. September 29, 2016)

The ALJ appropriately relied on consultative examiner opinion that Johnson had minimal to no limitations for the performance of simple work despite his borderline intellectual functioning (BIF) to conclude that he could perform work "*slightly slower than average pace, i.e., no more than 10% slower*." The Court pointed out the ALJ's discussion that Johnson had worked for many years despite a history of a learning disability. The Court also concluded that the statement sufficiently reflected Johnson's ability to maintain employment. Accordingly, any issue with specificity did not undermine the substantial evidence supporting the ALJ's finding.

Rock v. Colvin, 628 F. App'x 1 (2d Cir. 2015)

The Court upheld the ALJ assigning more weight to the opinion of the consultative examining psychologist than the treating psychologist, insofar as the latter's evaluation was generally inconsistent with the opinions of the consultative psychologist and the State agency review psychologist.

Lewis v. Colvin, 548 F. App'x (2d Cir. 2013)

The Court agreed that the RFC assessment for a significant range of light work was supported by the consultative examiner's assessment of "mild limitations for prolonged sitting, standing, and walking," and direction that Lewis should avoid "heavy lifting, and carrying." In so doing, the Court rejected Lewis's reference to its recent holding in *Selian v. Astrue*, 708 F.3d 409 (2d Cir. 2013) and his argument that such assessment was impermissibly vague.

Camille v. Colvin, 625 F. App'x 25 (2d Cir. 2016)

The Court ruled that the State agency psychologist's assessment was not stale simply because the psychologist did not review subsequent treatment records. In this regard, the Court determined that the later treatment notes did not differ materially from the evidence reviewed by the State agency psychologist. The Court went on to conclude that the State agency psychologist's assessment constituted "contrary opinion" sufficient to support the ALJ discounting the treating psychiatrist's opinion.

Monroe v. Comm'r of Soc. Sec., 2017 WL 213363 (2d Cir. January 18, 2017)

The Court found meritless Monroe's argument that the ALJ reversibly erred by concluding that the State agency psychologist's opinion was inconsistent with that of the treating psychiatrist when the psychologist only found that there was "insufficient evidence" to conclude whether a mental impairment existed. The Court determined, as did the district court, that such error was harmless, inasmuch as Monroe had not identified any prejudice, and the record establishes that the error did not affect the ALJ's decision (citing *Zabala v. Astrue*, 595 F.3d 402, 409 (2d Cir. 2010)). The Court ultimately found that the ALJ's decision to give little weight to the treating psychiatrist's assessment was "grounded in the substantial evidence contradicting his opinion; the ALJ's decision does not rest on the misconception that [the treating psychiatrist's] opinion conflicts with that of the [S]tate psychologist."

Eusepi v. Colvin, 595 F. App'x 7 (2d Cir. 2014)

The ALJ properly considered a physician assistant's (PA's) evaluations as to the severity of Eusepi's symptoms and the resulting limitations on her functional capacity, while appropriately disregarding the PA's opinion on the ultimate question of whether Eusepi was totally disabled and unable to work.

Bushey v. Colvin, 552 F. App'x 97 (2d Cir. 2014)

The Court held that the ALJ properly refused to give controlling weight to the opinion of a physician assistant (PA) insofar as he was not an acceptable medical source under the Commissioner's regulations. Moreover, the Court determined the ALJ gave good reasons for giving the PA's opinion less weight, as he had only treated Bushey for two months before issuing the opinion.

C. Post-Decision Evidence and Subsequent Allowances

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

This appeal centered on new opinion evidence from a treating physician of Lesterhuis that he would be limited to less than sedentary work and would likely be absent more than four times per month. The Court concluded that the ALJ's decision was not supported by substantial evidence, because the new and material evidence from the treating source contradicted the ALJ's decision, and there was no evidence to contradict the new opinion evidence. To this end, the Court specifically noted that the ALJ had before him the opinion of the therapist that supported the treating source opinion, which also concluded that Lesterhuis would be absent more than four days per month (although the ALJ gave little weight to the therapist's opinion because he was not an acceptable medical source). Notably, the Court also pointed to vocational expert evidence noting that an employee like Lesterhuis would be precluded from engaging substantial gainful activity if he missed four days of work per month.

Evans v. Colvin, 649 F. App'x 35 (2d Cir. 2016)

The Court concluded that the Appeals Council erred in declining to consider a VA rating of 100% disabled retrospective to the period at issue, because the Council found it related to a period after the ALJ's decision. While noting that the VA rating was not binding on the Commissioner because it is a determination by another governmental agency, the Court nevertheless noted that the retrospective rating was reached considering at least in part evidence *that related to the period in question*. Such circumstances, according to the Court, "precluded the Appeals Council from dismissing the VA evidence as irrelevant because it was unrelated to the period time period at issue."

Suttles v. Colvin, 645 F. App'x 44 (2d Cir. 2016)

Suttles argued that the Appeals Council erred by failing to consider a new IQ test and mental evaluation. The Court disagreed, reasoning that while the post-ALJ-decision evidence arguably reflected Suttles's condition during the period in question that warranted consideration by the Appeals Council as new and material evidence, the additional evidence provided "no reasonable possibility" of altering the ALJ's decision, inasmuch as it was not materially different from the evidence already before the ALJ and the vocational expert when they reached their conclusions.

Monette v. Colvin, 654 F. App'x 516 (2d Cir. 2016)

Monette was a veteran with a service-related impairment (*i.e.*, a "wounded warrior") and, as a result, his claim for disability insurance benefits (DIB) was fast-tracked through the administrative process as a "critical case." Consequently, the Appeals Council denied Monette's request for review of the ALJ's decision in a record time of five days. Monette argued that the Appeals Council's expedited denial was highly uncommon and denied him the due process right to present new evidence to it before rendering its denial. Monette specifically contended that a VA letter increasing his disability rating from 30 to 70% issued after the Appeals Council's denial was materially sufficient for the Appeals Council to grant review. Holding that "speed does not indicate inadequate review," the Court rejected Monette's argument, noting that agency policy required him to submit any additional evidence to the Appeals Council *with* his request for review. The Court further agreed with the Commissioner's position that Monette's statement in his letter to Appeals Council upon requesting review that he would submit additional evidence "if" it became available could not reasonably have been construed as a request for an extension of time. In any event, as the district court properly concluded, the additional evidence proffered to it, including the VA rating letter, was not material. Most of the evidence post-dated Monette's last date insured. And, although the VA rating letter reflected a retroactive increase of Monette's disability rating to 70%, the Court noted that determination did not find he had "total occupational and social impairment;" regardless, the letter would be of limited relevance as it was based on rules different than the agency.

Scott v. Colvin, 639 F. App'x 41 (2d Cir. 2016)

The district court declined to consider additional evidence submitted to it, concluding that while it supported Scott's allegation that he developed left-eye blindness, he did not allege blindness during the relevant period, and, despite complaints of minor vision problems, Scott's vision during the period at issue was measured as 20/20 in one eye, and 20/40 in the other.

Guerra v. Colvin, 618 F. App'x 23 (2d Cir. 2015)

The Court rejected Guerra's argument that the Appeals Council and the district court erred by failing to consider new evidence submitting after the ALJ's decision, specifically noting that most of the proffered medical evidence related to

the period after the ALJ's decision and, therefore, did not undermine the ALJ's evaluation of Guerra's condition during the relevant period.

Rivera v. Colvin, 592 F. App'x 32 (2d Cir. 2015)

The Court disagreed with Rivera's primary argument that the subsequent evidence upon which a subsequent award of benefits, as well as the award itself by a different ALJ, constituted new and material evidence warranting remand under 42 U.S.C. § 405(g). The Court held that the subsequent award reflected a worsening of Rivera's condition, and was not a different assessment of the same evidence considered in the ALJ's earlier decision. As such, the Court concluded that Rivera could not make the necessary showing for new and material evidence under the three-pronged test in *Tirado*.

Caron v. Colvin, 600 F. App'x 43 (2d Cir. 2015)

The Court concluded that the subsequent favorable decision was not material evidence warranting remand because one, it was not itself evidence of disability and two, more importantly, the decision was not relevant to Caron's condition during the time period at issue on appeal.

II. DEVELOPMENT OF THE RECORD/RECONTACTING SOURCES

Winn v. Comm'r of Soc. Sec., 541 F. App'x 67 (2d Cir. 2013)

The Court concluded that the ALJ failed to fully develop the record with regard to Winn's mental impairment. The Court specified that once the issue of an alleged mental disorder was raised, the ALJ had the responsibility to explain whether, based on the evidence of record, Winn suffered from a medically determinable mental impairment and, if so, to conduct the appropriate inquiry (*i.e.*, apply the psychiatric review technique) under the Commissioner's regulations at 20 C.F.R. § 404.1520a. The Court further noted that the record was incomplete with respect to the potential severity of Winn's alleged mental impairment, hence directing further development thereof.

O'Connell v. Colvin, 558 F. App'x 63 (2d Cir. 2014)

The Court rejected O'Connell's argument that the ALJ failed to develop the record by not obtaining treatment records (1) pertaining to a knee injury more than a decade prior to his DIB application; and (2) of ongoing treatment more than two

years after his date last insured. Citing *Rosa v. Callahan*, 168 F.3d 72, 79 n.5 (2d Cir. 1999), the Court determined that the ALJ was under no obligation to further develop the record in the absence of any obvious gaps or inconsistencies in the record, as here.

Eusepi v. Colvin, 595 F. App'x 7 (2d Cir. 2014)

Eusepi argued that the ALJ did not advise her of the importance of getting a treating source's report or grant her the opportunity to obtain the report. However, citing *Rosa v. Callahan*, 168 F.3d 72, 79 n. 5 (2d Cir. 1999), the Court held while the ALJ has a general duty to develop the record even where the applicants is represented by counsel, the agency is required affirmatively to seek out additional evidence only where there are "obvious gaps" in the administrative record.

Abbott v. Colvin, 586 F. App'x 21 (2d Cir. 2015)

Although remanded for a deficient step four analysis (*see, infra*), the Court found that the ALJ did not err in failing to seek additional information from the treating source where there were no "obvious gaps" in the record (citing *Rosa v. Callahan*, 168 F.3d 72, 79 n. 5 (2d Cir. 1999)).

Monroe v. Comm'r of Soc. Sec., 2017 WL 213363 (2d Cir. January 18, 2017)

The Court rejected Monroe's argument that, having rejected the only competent medical source opinion evidence (*i.e.*, treating psychiatrist's assessment (*see, supra*)), the ALJ's residual functional capacity (RFC) determination was not supported by substantial evidence. It cited to its holdings in *Tankisi v. Comm'r of Soc. Sec.*, 521 F. App'x 29, 34 (2d Cir. 2013) and *Pellam v. Astrue*, 508 F. App'x 87, 90 (2d Cir. 2013) for the premise that a medical source statement or formal medical opinion is not necessarily required where the record contains sufficient evidence from which an ALJ can assess the RFC. The Court noted that although the ALJ ultimately rejected the treating psychiatrist's assessment, the ALJ relied on his treatment notes providing contemporaneous assessments of Monroe's mood, energy, affect, and other characteristics relevant to her ability to sustain work. The Court further pointed to the ALJ's consideration of Monroe's well-documented social/recreational activities in the treatment notes. The Court concluded that the ALJ's RFC assessment was well-supported by the psychiatrist's "years' worth of treatment notes" and, consequently, it was not necessary for the ALJ to seek additional information regarding Monroe's RFC (citing *Rosa v. Callahan*, 168 F.3d 72, 79 n. 5 (2d Cir. 1999)).

Johnson v. Colvin, 2016 WL 5539890 (2d Cir. September 29, 2016)

The ALJ was not required to have recontacted Johnson's surgeon to request a post-surgery opinion on functioning. The Court reasoned that the record contained sufficient "other" evidence supporting the RFC finding, and the ALJ had properly weighed all the evidence of record. Accordingly, there was no "gap" in the record requiring recontact, and the ALJ did not rely on his own lay opinion.

Reynolds v. Colvin, 570 F. App'x 45 (2d Cir. 2014)

The Court rejected Reynolds's attempt to argue error in failing to recontact physicians under the "then-operative re-contact requirement" of 20 C.F.R. § 404.1512(e), who issued retrospective opinions, but did not treat Reynolds until after the period at issue (*see, supra*).

Bushey v. Colvin, 552 F. App'x 97 (2d Cir. 2014)

The Court ruled that the agency was only required to develop the record for 12 months preceding the date of Bushey's application for benefits. Citing *Rosa v. Callahan*, 168 F.3d 72, 79 n.5 (2d Cir. 1999), the Court further held that the ALJ was not required to order IQ testing, finding it reasonable to rely instead on evidence of Bushey's actual cognitive functioning including her writing ability, arithmetic skill, and self-reported performance activities.

III. RESIDUAL FUNCTIONAL CAPACITY (RFC)

Sesa v. Colvin, 629 F. App'x 30 (2d Cir. 2015)

Citing *Selian v. Astrue*, 708 F.3d 409 (2d Cir. 2013), the Court faulted the ALJ for failing to affirmatively determine whether Sesa's purported reaching limitation was "non-negligible." The Court noted that while the ALJ had given little weight to a restrictive treating source assessment regarding Sesa's ability to lift, carry, sit, stand, and walk, the ALJ did not expressly reject the physician's opinions that Sesa could not reach above shoulder level; could only so some reaching; had significant limitations with repetitive reaching, handling, or fingering; and could reach, including overhead, for only 10% of an eight-hour workday.

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

Omission of moderate limitations in McIntyre's ability to maintain concentration, persistence, or pace in the hypothetical to the vocational expert was of no moment where the hypothetical implicitly incorporated the limitations by limiting her to simple, routine, and low stress tasks.

Cohen v. Comm'r of Soc. Sec., 643 F. App'x (2d Cir. 2016)

Citing to *McIntyre v. Colvin*, 758 F.3d 146, 150 (2d Cir. 2014), insofar as the ALJ had already considered a treating source's moderate limitation in satisfying attendance standards at step three of the sequential analysis, the Court found that the ALJ had implicitly incorporated this limitation into the mental residual functional capacity (RFC) determination and subsequent hypothetical to the vocational expert.

Domm v. Colvin, 579 F. App'x 27 (2d Cir. September 23, 2014)

Citing to *Cichocki v. Astrue*, 729 F.3d 172 (2d Cir. 2013), the Court rejected Domm's argument that the ALJ failed to make a function-by-function assessment of her limitations, noting that the ALJ's RFC analysis provided a sufficient basis for meaningful judicial review.

Johnson v. Colvin, 2016 WL 5539890 (2d Cir. September 29, 2016)

The Court held that the residual functional capacity (RFC) was supported by Johnson's own testimony that, following his aortic replacement valve surgery, he could lift up to 15 pounds, walk a little further, work out at a gym 3-to-5 times per week, and do much of his own cooking, cleaning, and shopping. It was also supported by treating source opinion that Johnson had made clinical improvement after surgery and would benefit from increased exercise. The Court further found Johnson's challenge that this statement was vague is unavailing. While the statement alone might not have been adequate to support the RFC determination, it was still supported by other evidence of the record the ALJ considered.

Also, the Court rejected Johnson's argument that the ALJ did not consider the combined effect of Johnson's mental and physical limitations, noting such contention was belied by the record.

Monroe v. Comm'r of Soc. Sec., 2017 WL 213363 (2d Cir. January 18, 2017)

Although the ALJ ultimately gave little weight to the "off task" and social restrictions assessed by Monroe's treating psychiatrist, which was the only medical source opinion of record, the Court ruled the residual functional capacity (RFC) was well-supported by the psychiatrist's own clinical observations that often included stable mood. The RFC assessment was also corroborated by descriptions of Monroe's wide range of recreational activities, including snowmobile trips, multiple vacation cruises, four-wheeling, and horseback-riding as documented in the psychiatrist's treatment notes. No additional evidence supporting the RFC was needed.

LaValley v. Colvin, 2017 WL 129154 (2d Cir. January 12, 2017)

The Court pointed out that the ALJ expressly recognized that he must consider impairments in combination, and finding that there was no reason to suspect that the ALJ considered LaValley's impairments in isolation. Addressing LaValley's broader challenge of the supportability of the ALJ's determination that she was not disabled, the Court noted that the ALJ considered LaValley's testimony regarding her daily routine, various medical tests, and reports from numerous medical sources to conclude that she was not disabled. These sources constituted substantial evidence supporting the ALJ's decision that LaValley was not disabled, according to the Court.

IV. STEP FOUR/FIVE VOCATIONAL ISSUES

Abbott v. Colvin, 586 F. App'x 21 (2d Cir. 2015)

The Court found the ALJ's analysis at step four of the sequential analysis finding Abbott capable of performing her past relevant work as a teacher focused only on her physical limitations and "offered only passing mention of Abbott's identified nonexertional limitations." Because the decision lacked the requisite careful appraisal of how Abbott's nonexertional limitations would or would not affect her ability to function as a teacher, the Court remanded this matter for a clearer explanation of the ALJ's step-four denial.

Michaels v. Colvin, 621 F. App'x 35 (2d Cir. 2015)

The Court ruled that the ALJ erred in his step-four finding that Michaels could perform his past relevant work requiring heavy computer use when that treatment records during the relevant period documented Michael's repeated complaints that

using the computer more than 2 or 3 hours at a time caused symptoms caused him to refrain from further computer use.

Krull v. Colvin, 2016 WL 5417289 (2d Cir. September 27, 2016)

The Court concluded that substantial evidence supported the ALJ's step four finding that Krull could perform her past relevant work, noting that the ALJ appropriately determined that Krull performed her former semi-skilled (SVP 4) job long enough to have learned how to perform it. In so doing, the Court ruled that the "typical three-to-six month learning period... d[id] not constitute a six-month minimum."

Guerra v. Colvin, 618 F. App'x 23 (2d Cir. 2015)

The Court determined that the ALJ properly found Guerra could perform her past relevant work as an artist, pointing out that the requirements of this job were compatible with the residual functional capacity (RFC) determination.

Michaels v. Colvin, 621 F. App'x 35 (2d Cir. 2015)

Having found the ALJ's step-four finding flawed (*see, supra*), the Court concluded that the hypotheticals presented to the vocational expert were not sufficient to alternatively satisfy the Commissioner's burden at step five. The Court reasoned that the limitations in the hypotheticals by both the ALJ and Michaels did not accurately represent Michael's limitations regarding computer use, *i.e.*, that using the computer more than two or three hours at a time caused symptoms requiring him to refrain from further computer use. Insofar as the vocational expert's testimony did not indicate the amount of computer use necessary to perform the three positions identified that Michaels could perform (*i.e.*, receptionist, service representative, or telephone operator), it was unclear whether his limitations would prevent him from performing these jobs.

Sesa v. Colvin, 629 F. App'x 30 (2d Cir. 2015)

The Court ruled that the ALJ's reliance solely on the Medical-Vocational Rules without vocational expert evidence to deny Sesa's claim at step five was error. In so doing, it noted that reaching is "required in almost all jobs" as stated in SSR 85-15, and that it had remanded in *Selian v. Astrue*, 708 F.3d 409 (2d Cir. 2013) with specific instructions to determine whether a claimant's reaching limitation was negligible and, if not, to obtain testimony from a vocational expert.

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

The Court upheld the Commissioner's step-five denial of McIntyre's claim where the hypothetical to the vocational expert contained a mental restriction missing from the residual functional capacity (RFC) assessment. The ALJ concluded at step two that McIntyre suffered from severe back and affective disorders. While the ALJ posed a hypothetical to the vocational expert limiting McIntyre to a range of sedentary work involving "simple, routine, low stress tasks," the RFC conclusion was silent as to any restriction caused by a mental impairment. Nevertheless, the Court upheld the residual functional capacity determination, noting that the ALJ's consideration of the evidence of record, including a consulting psychologist's opinion, afforded an adequate basis for judicial review.

Additionally, the Court upheld it's ruling in *Brault v. Soc. Sec. Admin.*, 683 F.3d 443, 450 (2d Cir. 2012) in concluding that the vocational expert was not required to articulate a more specific basis for his opinion, inasmuch as the ALJ reasonably credited the expert's testimony based on his professional experience and clinical judgment, and the opinion was not undermined by any evidence in the record.

Snyder v. Colvin, 2016 WL 3570107 (2d Cir. June 30, 2016)

The Court agreed that the functional limitations contained in the hypothetical to the vocational expert "closely paralleled" the well-supported residual functional capacity (RFC) finding, thus discounting Snyder's argument that the Commissioner did not satisfy her burden at step five of the sequential analysis.

Suttles v. Colvin, 645 F. App'x 44 (2d Cir. 2016)

The Court determined that, because the ALJ did not err in assessing Suttles's residual functional capacity (RFC) assessment, the vocational expert's testimony identifying jobs in the nation economy (based on a hypothetical incorporating the demands of the RFC) constituted substantial evidence supporting the ALJ's step-five determination.

Cohen v. Comm'r of Soc. Sec., 643 F. App'x (2d Cir. 2016)

The Court upheld the ALJ's reliance on vocational expert testimony identifying jobs that an individual with Cohen's vocational profile and residual functional capacity (RFC) could perform.

V. OTHER

A. Global Assessment of Functioning (GAF) Scores

Monette v. Colvin, 654 F. App'x 516 (2d Cir. 2016)

The Court held that Monette's GAF scores, which were as high as 55 and 65 during the relevant period reflecting moderate symptoms or difficulties in social and occupational functioning, did not undermine the ALJ's findings.

Camille v. Colvin, 625 F. App'x 25 (2d Cir. 2016)

The Court rejected Camille's argument that the ALJ relied on favorable GAF scores exclusively, finding that the ALJ did not rely on them to the exclusion of other evidence.

Rock v. Colvin, 628 F. App'x 1 (2d Cir. 2015)

The Court concluded that substantial evidence supported the ALJ's determination that the GAF score was not entitled to significant weight inasmuch as it was based almost entirely upon subjective complaints during a single examination and inconsistent with Rock's work history and other medical assessments (citing *Poupore v. Astrue*, 566 F.3d 303 (2d Cir. 2009) and 20 C.F.R. § 404.1527).

B. Credibility

Evans v. Colvin, 649 F. App'x 35 (2d Cir. 2016)

The Court faulted the ALJ for "largely" ignoring evidence supporting Evan's complaints of pain, as well as her limited activities of daily living in assessing her credibility.

Monette v. Colvin, 654 F. App'x 516 (2d Cir. 2016)

The Court upheld the ALJ's credibility analysis, specifically noting Monette's testimony regarding the severity of his symptomatology was undermined in part by his failure to stop smoking marijuana in order to improve the effectiveness of treatment. Furthermore, the Court rejected Monette's argument that the ALJ should not have considered his marijuana use without applying 20 CFR

§ 404.1530, noting that this regulation does not apply unless a finding of disability is first made.

LaValley v. Colvin, 2017 WL 129154 (2d Cir. January 12, 2017)

LaValley challenged several observations by the ALJ as constituting improper bases to rejected her testimony, *i.e.*, that she had stated in a previous application for unemployment benefits that she was able to work, and incorrectly stated the period in which she received unemployment benefits; and, that the ALJ had personally observed her sitting still for 30 minutes without the need to stand up. The Court, however, ruled that the ALJ did not solely rely on this grounds, finding that the ALJ considered various sources of evidence and justifiably declined to give less than determinative weight to LaValley's testimony. Recognizing that daily activities was an appropriate factor to consider when assessing a claimant's level of pain, the Court referred to the ALJ's consideration of LaValley's daily routine, pointing out that she cleaned, washed laundry, and performed childcare, among other activities. The Court further referred to the ALJ's evaluation of numerous medical reports in determining how much credence to give LaValley's testimony. Furthermore, the Court rejected LaValley's contention that the ALJ erroneously premised the conclusion that she was not disabled on the ground that failed to follow medical advice to lose weight. Accordingly, the Court saw no reason to disturb the ALJ's credibility finding.

Snyder v. Colvin, 2016 WL 3570107 (2d Cir. June 30, 2016)

Citing SSR 16-3p (which was not in effect at the time of the ALJ's decision, although SSR 96-7p contains the same provision), the Court faulted the ALJ for factoring Snyder's lack of formal mental health treatment in the credibility analysis without seeking, or considering, an explanation as to why she did not seek treatment. Nevertheless, it deemed this omission to be of no moment given finding that substantial evidence of record overall supported the ALJ's credibility determination. The Court specifically rejected Snyder's contention that the ALJ erred by not crediting her testimony, noting that the ALJ expressly analyzed Snyder's claims of neck pain, arm numbness, obesity, and depression, and cited specific medical evidence to explain the conclusion that Snyder's alleged limitations were without support.

Guerra v. Colvin, 618 F. App'x 23 (2d Cir. 2015)

In rejecting Guerra's subjective complaint of pain that was too severe to work "at all," the Court acknowledged the ALJ's discretion in weighing Guerra's credibility, noting that "[n]ot only did her treating professionals judge that she could sit for long periods, but Guerra herself acknowledged that she read, watched television, and cross-stitched daily, all activities requiring extensive sitting time." Furthermore, Guerra elected to pursue "conservative therapy" for her spinal condition. Additionally, while the Court acknowledged the validity of Guerra's argument that the ALJ should have taken into account her long work record (citing *Rivera v. Schweiker*, 717, F.2d 719, 725 (2d Cir. 1983)), it nonetheless concluded "that on the facts of this case the ALJ's holding can stand."

C. Step-Two Determinations

Ornelas-Sanchez v. Colvin, 631 F. App'x 48 (2d Cir. 2016)

The Second Circuit remanded for further proceedings in this case, finding the ALJ made inadequate findings in applying the special technique evaluating the severity of Ornelas-Sanchez's mental impairments at step two of the sequential analysis. The Court faulted the ALJ for failing to provide an analysis of the evidence supporting the step-two finding that Ornelas-Sanchez's anxiety, depression, and history of substance and alcohol abuse in alleged remission were severe impairments. The Court moreover determined that the ALJ failed to adequately consider whether Ornelas-Sanchez's alleged intellectual disability constituted a severe impairment. While the Court acknowledged that the ALJ did go on to discuss the relevant evidence regarding this condition in assessing Ornelas-Sanchez's RFC, the lack of such evaluation at an earlier step called into question whether the ALJ had adequately considered the entirety of record when determining severity of her alleged intellectual disability. In this regard, the Court pointed to at least one IQ test score supporting a finding that Ornelas-Sanchez's intellectual disability was at listing-level severity at step three of the sequential analysis. Such finding would have eliminated the need to assess her RFC and proceed to the remaining steps (four and five) of the analysis. The Court further noted that even when assessing the RFC, it was not clear why the ALJ gave great weight to the opinion of the State agency psychologist. Ultimately, the Court concluded that the ALJ's analysis misapplied pertinent legal standards and did not permit meaningful judicial review.

Rivera v. Colvin, 592 F. App'x 32 (2d Cir. 2015)

As to Rivera's contention that the ALJ incorrectly found his anxiety and post-traumatic stress disorder (PTSD) were not severe impairments, the Court found the ALJ's step-two finding supported by substantial evidence. Even assuming the ALJ erred, it was harmless, according to the Court, because the ALJ considered Rivera's severe and non-severe impairments through the remaining steps of the sequential evaluation.

Rock v. Colvin, 628 F. App'x 1 (2d Cir. 2015)

The ALJ misinterpreted "R/O" in a "treating" psychologist's progress note as "ruled out" somatization disorder. Nevertheless, the Court ruled that whether a diagnosis of somatoform disorder had been ruled out had no bearing on the ALJ's ultimate determination that Rock was not disabled, insofar as no somatoform disorder had been diagnosed. Recognizing the paragraph "B" criteria of the Listings was identical for both a somatoform disorder and Rock's medically determinable "severe" anxiety disorder, the Court further ruled that it did not need to determine whether the ALJ erred in finding an absence of medically documented evidence of somatoform disorder, insofar as Rock failed to satisfy the criteria for either impairment.

D. Adjudications by Other Government and Non-government Entities

Evans v. Colvin, 649 F. App'x 35 (2d Cir. 2016)

The Court concluded that the Appeals Council erred in declining to consider a VA rating of 100% disabled retrospective to the period at issue, because the Council found it related to a period after the ALJ's decision. While noting that the VA rating was not binding on the Commissioner because it is a determination by another governmental agency, the Court nevertheless noted that the retrospective rating was reached considering at least in part evidence that related to the period in question. Such circumstances, according to the Court, "precluded the Appeals Council from dismissing the VA evidence as irrelevant because it was unrelated to the period time period at issue."

Monette v. Colvin, 654 F. App'x 516 (2d Cir. 2016)

A Veterans Administration rating letter submitted to the Appeals Council was not material, even though it reflected a retroactive increase of Monette's disability

rating to 70% during the period at issue. The Court noted that determination did not find he had "total occupational and social impairment," and regardless, the Court found the letter would be of limited relevance, as it was based on agency rules different than the Commissioner's.

Rivera v. Colvin, 592 F. App'x 32 (2d Cir. 2015)

The Court concluded that the ALJ properly considered two Veteran's Administration (VA) determinations, noting that while these determinations are not binding on the Commissioner, they are entitled some weight and should be considered.

Claymore v. Astrue, 519 F. App'x 36 (2d Cir. 2014)

The Court found that the ALJ properly considered the Veteran's Administration (VA's) decision that Claymore was entitled to unemployment benefits for disability, noting that the determination by another agency regarding a claimant's disability is not binding on the Commissioner.

E. Issue/Argument Waiver

Copetta v. Comm'r of Soc. Sec., 552 F. App'x (2d Cir. 2014)

The Court refuses to hear arguments raised for the first time by Copetta (pro se).

Reynolds v. Colvin, 570 F. App'x 45 (2d Cir. 2014)

The Court rejected Reynolds's argument that the ALJ failed to re-contact treating physicians, because the argument was not raised in the district court, and, in any event, was unavailing.

Caron v. Colvin, 600 F. App'x 43 (2d Cir. 2015)

Citing *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d, 129, 132 (2d Cir. 2008), the Court considered Caron's argument for remand based on the subsequent allowance forfeited, insofar as Caron knew of the evidence supporting the subsequent allowance before both the ALJ hearing and the district court's decision, but failed to present it earlier.

Materials for:

Panel Discussion on Attorneys' Fees
(Howard Olinsky, Steve Conte, Maria Fragassi Santangelo)

U.S. Department of Treasury
Bureau of the Fiscal Service
FS Form 13 – Authorization for Release of Information:

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Source: SSA OGC February 2017

Department of the Treasury

Bureau of the Fiscal Service

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BIOGRAPHY OF CHIEF MAGISTRATE JUDGE DAVID E. PEEBLES. Judge Peebles was sworn in and began serving as a United States Magistrate Judge on May 22, 2000, and is currently the Chief Magistrate Judge of the Northern District of New York. He received a Bachelor of Aerospace Engineering degree from the Georgia Institute of Technology in 1972 and a Juris Doctorate from the Syracuse University College of Law in 1975, both with honors.

Judge Peebles began his legal career as an Assistant Onondaga County District Attorney, and thereafter served as law clerk to the Hon. Howard G. Munson, United States District Judge for the Northern District of New York. He is also a former partner in Hancock & Estabrook, LLP, a firm with which he was affiliated since September 1978. While at Hancock & Estabrook, Judge Peebles served as chair of the Labor and Intellectual Property Law Departments, and was a member of the firm=s Executive and Practice Management Committees.

Judge Peebles has served on the Onondaga County Association Board of Directors, and on the boards of other charitable and community organizations. He has also authored articles for and spoken at programs offered by the New York State, Onondaga County Bar, and Northern District of New York Federal Court Bar Associations on a variety of topics, including federal practice. Since becoming a magistrate judge, Judge Peebles has served on the Federal Magistrate Judges Association Board of Directors, and co-chairs the Association's Rules Committee. He is also a member of the United States Courts Administrative Office Magistrate Judges Advisory Group, and Forms Working Group, and serves on a number of Second Circuit and Northern District of New York committees.

John Ramos, Acting Hearing Office Chief Administrative Law Judge, Syracuse NY Hearing Office, SSA Office of Disability Adjudication and Review

Administrative Law Judge John Ramos attended Syracuse University and Syracuse University College of Law. Judge Ramos was admitted to the New York State bar in 1986. Judge Ramos practiced civil litigation, labor law and workers compensation law in New York from 1986 to 1998. He then

served as a New York State Workers Compensation Board Administrative Law Judge (ALJ) and Senior ALJ until he was appointed as a Social Security Administration ALJ in 2009. Judge Ramos is currently serving as Acting Hearing Office Chief ALJ (HOCALJ) in the Syracuse ODAR office as of January 2017.

Stephen P. Conte, Esq., Regional Chief Counsel, SSA OGC New York
Mr. Conte joined the Office of the General Counsel, Department of Health and Human Services in 1992 in New York. He transferred to the Social Security Administration when it became an independent agency in 1995. He was appointed Supervisory General Attorney in December 2003, Deputy Regional Chief Counsel in April 2007, and Regional Chief Counsel for the Office of the General Counsel in New York in January 2010. Mr. Conte has extensive experience in virtually all aspects of SSA OGC's workload. Mr. Conte has been an advocate for SSA in cases at both the district court and circuit court of appeals levels and has extensive experience providing general law, employment law, and program law advice and opinions. Mr. Conte is a member of the federal government's Senior Executive Service, and in addition to his positions in OGC, he has held various positions at SSA, including Assistant Regional Commissioner for Management and Operations Support.
Mr. Conte graduated from Fordham School of Law in 1992 where he was named a Leonard F. Manning Scholar and was a member of Fordham's International Law Journal. He is a member of the New York and Connecticut Bars.

Katherine B. Felice, Esq., graduated from Colgate University and Syracuse University College of Law. Prior to her clerkship with the United States District Court for the Northern District of New York, Kate served as law clerk to Hon. Ralph L. DeLuccia, Jr., New Jersey Superior Court Judge, and wrote Social Security appellate briefs as an attorney with the Burton Blatt Institute.

Maggie McOmber, Esq., graduated from Smith College in 2002 and from the SUNY Buffalo Law School in 2006. Before she began clerking in 2015, she worked in private practice representing Social Security claimants at the AC and District Court levels.

Howard D. Olinsky, Esq., Mr. Olinsky is the founding partner of his firm and a disability attorney with experience advocating for people who are disabled before the Social Security Administration, Veterans Administration, Workers' Compensation Board and in the Federal Court system. He is a graduate of Syracuse Law ('85) and SUNY Oswego ('81). He is a board member of the Syracuse University's Burton Blatt Institute and a sustaining member of the National Organization for Social Security Claimants' Representatives (NOSSCR). He is admitted to New York and the Northern District of New York Bar Associations. His firm's Social Security disability practice has a national footprint, which has led Mr. Olinsky to secure admission to the United States Courts of Appeal for the Second and Sixth Circuits, the United States Supreme Court, and several federal district courts around the country.

Nathaniel V. Riley, Esq., Mr. Riley is an associate of Olinsky Law Group and focuses his practice in Social Security disability and civil monetary penalty appeals in federal court. He is a graduate of The John Marshall Law School in Chicago ('08) and the University of New Mexico ('05). Following law school, he clerked for the Honorable Judge Randye A. Kogan in the Circuit Court of Cook County. He is admitted to practice in Illinois, Michigan, New York and the Northern District of New York, and has successfully argued appeals before district courts throughout the country and the United States Courts of Appeal for the Third and Fourth Circuits. In the fall, he officiates high school and NCAA college football.

Maria Fragassi Santangelo became an Assistant Regional Counsel in Region II New York with the U.S. Department of Health & Human Services in 1994, and then with the Social Security Administration when it became an independent agency in 1995. She is a graduate from Rutgers University College of Pharmacy (B.S. 1989) and Seton Hall University School of Law (J.D. 1992). Maria's duties focus on program litigation, and include mentoring new attorneys, serving as the office's district coordinator for the Southern District of New York, presenting training on substantive program litigation topics, and leading the office's appellate review team for cases appealed to the Court of Appeals for the First and Second Circuits. She is a Special Assistant U.S. Attorney for the Southern, Western and Northern Districts of New York, and the Districts of Connecticut and Vermont. She has received several prestigious awards recognizing her achievements in program litigation, including a Commissioner of Social Security Citation in 2000 and 2011.