

STATE BAR OF MICHIGAN
Social Security

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From the Chair

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Dear Social Security Section:

At first, let me please remind all of you that we are planning on having a *live* seminar at Boyne Mountain on September 12-14, 2021. All of our speakers that were planning on coming in June have committed to the September seminar, and it should be a very nice time to be up north. There may be several social events added to the calendar as we get closer.

With regard to our original dates of June 13-15, we are hoping to possibly do another video seminar during that time, especially since some of you may have already reserved that time for you to be able to attend.

As always, both time and law march on. You may wish to be aware, however, that I just received two decisions from the Western District of Michigan (*Sandusky v Commissioner*, 1-19-cv-967, and *Gressler v Commissioner*, 1-19-cv-950), in which a judge and a magistrate of the United States District Court of the Western District of Michigan either reversed or upheld reversals based on the authority of *Earley v Commissioner*, 893 F.3d 929 6th Circuit 2018. Please continue to be aware of this issue. An ALJ may not simply and blindly adopt a previous ALJ decision's residual functional capacity (RFC) analysis. I even raised this issue in one of these cases in a pre-hearing brief, and if things change regarding raising of issues in these cases, that is always a good place to start raising a legal issue. It also helps that you can say you blindsided the judge.

I would note, however, that other federal court decisions I am seeing are succumbing to the thought that an ALJ can poke a few holes in a RFC statement from a treating physician and that will be enough to carry the day. All of us have to do better to the extent we can at trying to get more and more specific in terms of functional limitations when we are talking to doctors or soliciting their opinions.

I look forward to leading you for another year; please contact me at jrrinck@jrrinck.com with any questions or comments.

—James R. Rinck

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2020-2021

Recent 6th Circuit Cases & Pertinent Legal Findings

Richardson v Saul

United States District Court, E.D. Kentucky, Central Division., Lexington. January 05, 2021 --- F.Supp.3d ---- 2021 WL 37705. (1) the district court must reverse and remand, in a proceeding to obtain Social Security benefits, if the ALJ applied incorrect legal standards, even if the factual determinations are otherwise supported by substantial evidence and the outcome on remand is unlikely to be different. Social Security Act § 205, [42 U.S.C.A. § 405\(g\)](#). (2) When reviewing the ALJ's application of the legal standards, in a proceeding to obtain Social Security benefits, the district court gives deference to his interpretation of the law and reviews the decision for reasonableness and consistency with governing statutes. Social Security Act § 205, [42 U.S.C.A. § 405\(g\)](#).

Griffith v. Commissioner of Social Security

United States Court of Appeals, Sixth Circuit. February 03, 2021 987 F.3d 556 2021 WL 369735. (1) The government's argument that under the flexible balancing test articulated in *Mathews v. Eldridge*, [424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18](#), the decision not to allow social security disability claimants to challenge the factual finding that fraud had been involved in the creation of their medical reports did not violate due process, and weighed in its favor, was reasonable, and thus, substantially justified for purposes of denying plaintiffs' request for award of attorney fees under the Equal Access to Justice Act (EAJA); a reasonable person looking at the state of the law at the time could have believed the government's argument was correct because there was no binding precedent choosing to apply a minimum due process analysis instead of a *Mathews* analysis, and given the flexibility of the *Mathews* standard and the novelty of the issue, a reasonable person could have believed the government's arguments to be correct. (2) he government's argument that it complied with the Administrative Procedure Act's (APA) formal adjudication requirements when it decided not to allow social security disability claimants to challenge the factual finding that fraud had been involved in the creation of their medical reports was reasonable, and thus substantially justified, for purposes of denying plaintiffs' request for award of attorney fees under the Equal Access to Justice Act (EAJA); a reasonable person could have believed that the government raised the argument that it did not have to comply with the SSA, and had done all that was required by the APA's formal adjudication provisions when it complied with SSA provisions that were co-extensive with the APA's provisions on formal adjudication, given it was a matter of first impression. Social Security Act § 205, [42 U.S.C.A. § 405\(b\)\(1\)](#); [5 U.S.C.A. § 551 et seq.](#)

Jones v Berryhill

United States District Court, M.D. Tennessee, North-eastern Division. August 02, 2019 392 F.Supp.3d 831 2019 WL 3521760. (1) Although claimant’s application for social security disability insurance benefits was filed after March 27, 2017, and thus was not subject to the treating physician rule that required ALJ to generally give greater deference to the opinions of treating physicians than to the opinions of non-treating physicians, ALJ was required to consider the persuasiveness of all medical opinions (not only the acceptable medical source opinions) using the factors specified in the regulations. (2) Factors to be considered when weighing medical opinions in social security disability benefits cases include (1) supportability, (2) consistency, (3) relationship with the claimant, which in turn includes factors such as length of the treatment relationship, frequency of examinations, purpose of the treatment relationship, extent of the treat-

ment relationship and the existence of an examining relationship, (4) specialization, and (5) other factors that tend to support or contradict a medical opinion or prior administrative medical finding. 20 C.F.R. § 416.920c(c) (3) Substantial evidence supported decision, in social security disability insurance benefits case, to discount the diagnosis of claimant’s treating psychologist, who opined that claimant was disabled as a result of post-traumatic stress disorder (PTSD) and bipolar disorder; ALJ used the assessment of the Department of Veterans Affairs (VA) in conjunction with an agency psychological consultant’s report in making the residual functional capacity (RFC) determination, thus complying with the new medical source regulations, and treating source did not have claimant’s treatment records before him, but based his assessment on the representations of claimant and his wife about how PTSD was affecting claimant. [20 C.F.R. § 416.920c\(c\)](#). ★

Chart of Monthly Deeming Break-Even Points for a Federal SSI Payment

Effective January 2021

Month **JANUARY**
 Year **2021**
 Individual FBR - Adult **\$794.00**
 Individual FBR - Child **\$794.00**
 Couple FBR **\$1,191.00**
 Ineligible Child Allocation **\$397.00**

Number of Ineligible Children	Parent-To-Child								Spouse-To-Spouse				Spouse-To-Spouse-To-Child			
	All Income Is:								All Income Of Ineligible Spouse and Eligible Individual Is:				All Income Is:			
	Earned Income				Unearned Income				Earned Income		Unearned Income		Earned Income		Unearned Income	
	1 Parent		2 Parent		1 Parent		2 Parent		Reduction Begins	Eligibility Ceases	Reduction Begins	Eligibility Ceases	Reduction Begins	Eligibility Ceases	Reduction Begins	Eligibility Ceases
0	1,713.00	3,301.00	2,507.00	4,095.00	834.00	1,628.00	1,231.00	2,025.00	879.00	2,467.00	417.00	1,211.00	2,507.00	4,095.00	1,231.00	2,025.00
1	2,110.00	3,698.00	2,904.00	4,492.00	1,231.00	2,025.00	1,628.00	2,422.00	1,276.00	2,864.00	814.00	1,608.00	2,904.00	4,492.00	1,628.00	2,422.00
2	2,507.00	4,095.00	3,301.00	4,889.00	1,628.00	2,422.00	2,025.00	2,819.00	1,673.00	3,261.00	1,211.00	2,005.00	3,301.00	4,889.00	2,025.00	2,819.00
3	2,904.00	4,492.00	3,698.00	5,286.00	2,025.00	2,819.00	2,422.00	3,216.00	2,070.00	3,658.00	1,608.00	2,402.00	3,698.00	5,286.00	2,422.00	3,216.00
4	3,301.00	4,889.00	4,095.00	5,683.00	2,422.00	3,216.00	2,819.00	3,613.00	2,467.00	4,055.00	2,005.00	2,799.00	4,095.00	5,683.00	2,819.00	3,613.00
5	3,698.00	5,286.00	4,492.00	6,080.00	2,819.00	3,613.00	3,216.00	4,010.00	2,864.00	4,452.00	2,402.00	3,196.00	4,492.00	6,080.00	3,216.00	4,010.00
6	4,095.00	5,683.00	4,889.00	6,477.00	3,216.00	4,010.00	3,613.00	4,407.00	3,261.00	4,849.00	2,799.00	3,593.00	4,889.00	6,477.00	3,613.00	4,407.00

PARENT-TO-CHILD DEEMING: These figures are correct only if the eligible child has no countable income; and the ineligible children (if any) have not countable income; and the deemor(s) has either earned or unearned income (but not both); and there is only one eligible child in the household.

SPOUSE-TO-SPOUSE DEEMING: These figures are correct only if all income of the ineligible spouse and the eligible individual is either earned or unearned (but not both); and the ineligible children (if any) have no countable income; and the eligible individual's own countable income is less than the FBR for an individual.

SPOUSE-TO-SPOUSE-TO-CHILD: These figures are correct only if the eligible child has no countable income; and DEEMING the ineligible children (if any) have no countable income; and all income of the ineligible spouse and eligible individual is either earned or unearned (but not both); and there is only one eligible child in the household.

March 2021 Meeting on Video Hearings

Some of the Board Members had participated in the SSA Microsoft Teams meetings to learn about video hearings. There were many difference experiences. Some members experienced a video which was frozen much of the time. However, the stream did get better as the meeting progressed. Other members had no issues with the stream but of note it was done on fiber optic internet at home which is probably why there were no problems with the quality of the stream. It is important to know that internet strength is critical for a good stream.

As to getting a video hearing, they said that all ALJs are now trained and should be able to do a video hearing. We as attorneys simply have to let them now that we want to switch to a video hearing. They asked for a week's notice if we are interested. They also suggested that we "meet" with clients using the Microsoft Teams platform to get clients familiar with it before the day of the hearing.

Of note, ALJ John Rabaut talked about the number of cases. He said there's currently a national total of 318,000

cases pending with hearing requests and processing time from intake to closure is 308 days. Some of that is processing, but is also could be due to reconsideration. But even doubling that, it's a significant reduction in cases. There may be several other issues at play. For example, claimants may get the 2nd denial from reconsideration and give up, which reduces hearing requests. Also, the physical offices being closed could deter claimants from filing.

As a Board, we are still not convinced that video hearing are the way to go but we will see. It is good news that that SSA is contemplating that attorney and client can be in separate locations for the video hearing. Social Security claims that they have run test hearings using everything from cell phones, to PCs, to tablets and that it should work fine for our claimants. Interestingly enough, they said it would be fine for clients to come to our offices and do the hearings with us in the same room using one video device. Guess we can get COVID from our clients as long as there is no risk for them! ★

Case Study

By Sarah Schairbaum

I recently had a case that was flagged by my paralegal for lack of evidence. As a general rule, the more documentation of a client's impairments, the more substantial the evidence we can rely on – the longitudinal record that (hopefully) consistently shows the client's complaints and objective evidence supporting disability - the better the likelihood of a fully favorable decision. When this particular case was scheduled for hearing, we realized there were exactly 56 pages of medical evidence, many of which were very unintelligible handwritten notes from the client's primary care physician. The claimant had discontinued Adderall and was not taking any medication. My first inclination was to call the client and say, "Sorry, I can't help." However, I had recently watched a close colleague become disabled by the very same thing: mold toxicity. Knowing what my colleague had gone through, I decided to call my

client and at least hear what his testimony might sound like before making a decision on whether I could help him win his case. After listening to my client explain what he had been through, and determining he didn't have much to lose since he was by this time showing some improvement, we decided to proceed to a hearing with an ALJ.

While I do not claim to be a mold toxicity expert by any means now, I knew even less when taking this case. I have come to better understand that after exposure to certain levels of certain molds, one begins to experience very debilitating symptoms: brain fog, pain, muscle weakness, tingling and numbness, fatigue, headaches, depression, anxiety to name a few. A diagnosis may take several months or longer, during which time continued exposure can worsen the symptoms. In my client's case, he had been seeing a therapist who attempted to treat his initial

symptoms with coping strategies for what they thought was increased stress. His doctor did some basic bloodwork which came back normal. Other than that, according to my client, there was nothing else being done at the time or offered as an explanation for his illness. But, a few months later when his dog died from esophageal bleeding and blood was found in my client's urine indicating kidney problems, several things came together. He found black mold in his apartment, and when urinalysis tests were run looking for certain mycotoxins, two significant variants were found: Ochratoxin A (OTA) and Mycophenolic Acid (MPA). As described by the laboratory paperwork in the file:

OTA is a nephrotoxic, immunotoxic, and carcinogenic mycotoxin. This chemical is produced by molds in the *Aspergillus* and *Penicillium* families, exposure is done primarily through water damaged buildings. Minimal exposure can occur through contaminated foods such as cereals, grape juices, dairy, spices, wine, dried vine fruit, and coffee. Exposure to OTA can also come from inhalation exposure in water-damaged buildings. OTA can lead to kidney disease and adverse neurological effects. Studies have shown that OTA can lead to significant oxidative damage to multiple brain regions and is highly nephrotoxic. Dopamine levels in the brain of mice have been shown to be decreased after exposure to OT A. Some studies have hypothesized that OTA may contribute to the development of neurodegenerative diseases such as Alzheimer's and Parkinson's.

MPA is produced by the *Penicillium* fungus. MPA is an immunosuppressant which inhibits the proliferation of B and T lymphocytes. MPA exposure can increase the risk of opportunistic infections such as *Clostridia* and *Candida*. MPA is associated with miscarriage and congenital malformations when a woman is exposed in pregnancy.¹

While my client's medical records alone did not do much to explain the illness,² thankfully my client had retained a mold toxicity expert in the civil litigation against

his landlord. This expert, Dr. Lauren Tessier,³ provided the following informative explanation regarding the mold toxicity:

Chronic Inflammatory Response Syndrome, or CIRS, is a multi-symptom, multi-system illness, resulting from the body's impaired ability to properly clear biotoxins acquired from specific microorganisms... As a multi-symptom, multi-system illness, there are many ways in which the patient can present, with symptoms including but not limited to: fatigue; weakness, decreased assimilation of new knowledge, aches, headache & light sensitivity; memory impairment & decreased word finding; difficulty concentrating; joint pain, morning stiffness & cramps; unusual skin sensitivity & tingling; shortness of breath & sinus congestion; cough, excessive thirst & confusion; appetite swings, difficulty regulating body temperature and increased urinary frequency; red eyes, blurred vision, sweats (night), mood swings & icepick pain; abdominal pain, diarrhea & numbness; tearing of eyes, disorientation and metallic tastes, static shock & vertigo. Neurological, immune, endocrine and circulatory system dysfunction are included in typical case presentation. Symptoms may be so severe that quality of life is greatly depreciated, including inability to complete ADLs.

CIRS is not the only form of mold related illness that exists as it is widely accepted that fungal allergy and fungal infections are also possible. Mycotoxins by themselves have numerous health impacts, are documented in the indoor built environment, and animal studies have demonstrated that inhalation may be a significant route of exposure.

This case had two important takeaways for me. First is the information about mold toxicity itself. This can be a very debilitating condition for the reasons described by Dr. Tessier. I found it interesting that when my client's symptoms first presented there seemed to be very little widely known medical knowledge about mold exposure. In both the case described here as well as for my colleague,

1 Citing various PubMed index numbers.

2 Since there is not much treatment by way of medication or other therapies for mold toxicity other than waiting out the detoxification process, which can take years, trips to the doctor were few and far between.

3 Dr. Tessier is a naturopathic physician, a specialist in mold illness & CIRS and a Shoemaker Certified Physician. Much more can be read about mold toxicity on Dr. Ritchie Shoemaker's website, www.survivingmold.com

it took a significant amount of time to diagnose what was causing their symptoms, during which time their exposure continued and symptoms worsened.

I also found it interesting that a claimant could win with such little medical evidence. But what was in those 56 pages of medical evidence checked the boxes: He had documented objective results of mold exposure and elevated levels of certain mycotoxins in his system; and consistent, albeit few, reports of symptoms to his treating provider, the psych CE as well as his treating psychologist. Other than that, his treatment consisted of Vitamin C infusions and various supplements. The reason for this is because there is no medication he could take to help clear

these toxins from his body; the only medication is time. At the outset, as a disability attorney, I was concerned about what appeared to be a lack of ongoing treatment. I was also concerned that he had discontinued Adderall for his ADHD symptoms. However, as I learned more about the illness that accompanies mold toxicity, it made sense that there would be little medical evidence in terms of volume and certainly discontinuing medications as part of the detoxification process is logical. My client continues to improve, but he is a long way off from being functional enough to consistently work full-time.

I am happy to report my client received a fully favorable decision. ★

Long Haul COVID-19 and Disability Benefits

By Lisa Watkinson

A potentially large group of disability cases could be emerging in the months and years ahead: the COVID-19 long-hauler. For most of the population that acquires COVID-19, the symptoms are mild to moderate, lasting only a few weeks. However, there is a group of people that experiences persistent symptoms. Studies have shown approximately 10 percent of people who have had COVID-19 experience prolonged symptoms. Some studies have shown even higher amounts. Thus far, the United States has experienced almost 30 million COVID-19 cases, so there could potentially be millions of new disability cases. What is being done to help these people obtain social security disability benefits if they are unable to work as a result?

In order to qualify for benefits, a person must have a severe impairment that affects his or her ability to perform basic work activities. So what is long-haul COVID-19? According to the Centers for Disease Control, the most commonly reported long-term symptoms include:

- Fatigue
- Shortness of breath
- Cough

- Joint Pain
- Chest pain

Other reported long-term symptoms include:

- Difficulty with thinking and concentration (sometimes referred to as “brain fog”)
- Depression
- Muscle Pain
- Headache
- Intermittent Fever
- Fast-beating or pounding heart (also known as heart palpitations)

More serious, long-term complications that appear to be less common but that have been reported include:

- Cardiovascular: inflammation of the heart muscle
- Respiratory: lung-function abnormalities
- Renal: acute kidney injury
- Dermatologic: rash, hair loss
- Neurological: smell and taste problems, sleep issues, difficulty with concentration, memory problems

1 Hiltzik, Michael “[We’re facing a tidal wave of COVID-related disability cases](#), and we’re not ready” Los Angeles Times, March 8, 2021.

- Psychiatric: depression, anxiety, changes in mood

A catchall name is emerging. Francis S. Collins, M.D., Ph.D., Director of the National Institutes of Health, in announcing a new NIH initiative to study the long-haul COVID sufferer, noted “while the symptoms are still being defined, the effects can be collectively referred to as Post-Acute Sequelae of SARS-CoV-2 Infection (PASC).”

Once an impairment is established, the durational requirement must be met. The impairment must last or be expected to last for more than 12 months or be expected to result in death. This requirement is beginning to be met as the disease enters into its second year of existence.

Once the impairment and durational tests have been met, a long-haul COVID case is to be evaluated as any other disability case since Social Security has issued no new regulations about how these applications should be considered. In a statement to NPR, the SSA advised that the current disability policy rules should be sufficient for evaluating COVID-related applications, although the agency did not rule out taking additional action in the future. “Researchers are still learning about the disease, and we will continue to look at our policies as research

evolves, the statement said. However, the agency has begun to “ earmark” apparent cases so they can create a database of common symptoms.

Congress is getting involved also. U.S. Representative John Larson, who serves on the congressional subcommittee that handles Social Security issues, joined with another member of Congress to write a letter asking the SSA to work with scientists to understand what support longhaulers might need. Larson noted that it is challenging for the SSA to prepare for the situation because a number of important facts about long-haulers are still unknown. Nevertheless, “we know what’s coming. So, we have to make sure that we’re on top of this.”¹ In his view, the SSA faces a fundamental question: “What do we have to do to make sure that we’re there for these individuals?”²

With the possibility of millions of cases that could potentially overwhelm the disability program, the SSA needs to put in place specific recommendations for how the disability program should manage COVID cases. This would aid representatives, evaluators and judges who will be working on these cases in the very near future. ★

2 Centers for Disease Control and Prevention (November, 13, 2020). [Long-Term Effects of COVID-19](#).

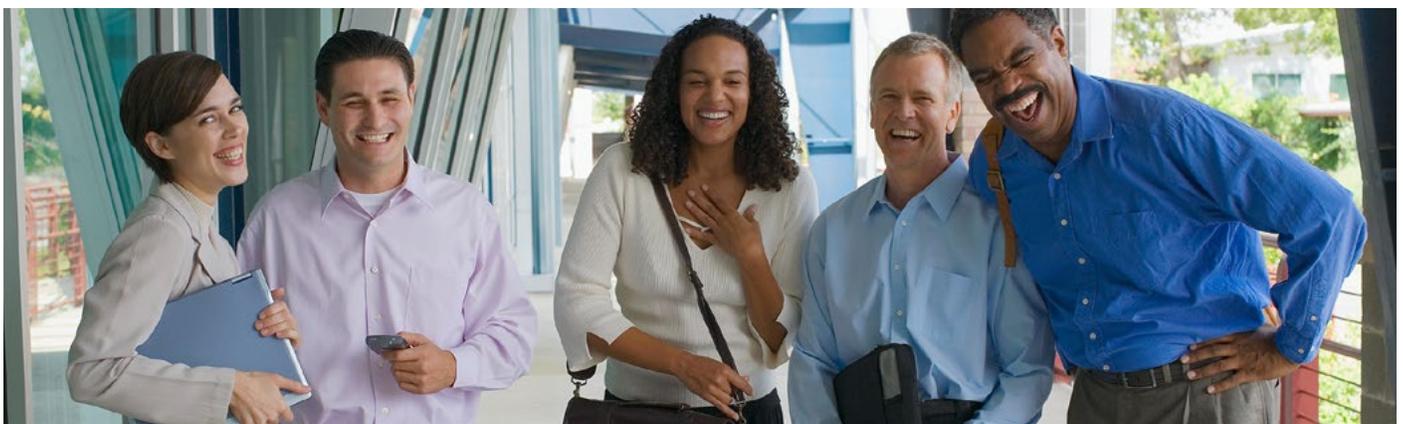
3 National Institutes of Health. (February 23, 2021). [NIH launches new initiative to study “Long COVID”](#).

4 Emaneul, Gabrielle “[When Does COVID-19 Become a Disability?](#) ‘Long-Haulers’ Push For Answers And Benefits. NPR, February 22, 2021.

5 Hitzik, “We’re facing a tidal wave.”

6 Emaneul, “When does COVID-19”¹²

7 Ibid.



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Marriage & Disabled Adult Child Benefits

Disabled Adult Child Benefit claims often present their own challenges and issues. Marriage is merely one complication. In general, to qualify for disabled adult child benefits, a claimant must satisfy the following criteria:

1. They are the insured person's child, based upon a relationship described in §§ [404.355](#) through [404.359](#);
2. They are dependent on the insured, as defined in §§ [404.360](#) through [404.365](#);
3. They apply;
4. They are *unmarried*; and
5. They are 18 years old or older and have a disability that began before they became 22.

20 CFR 404.350 [emphasis added].

Marriage is known as a terminating event. For example, if a claimant is receiving Disabled Adult Child benefits and then becomes married, they will no longer be entitled to benefits on the parent/wage earners earnings record. Unfortunately, the claimant will never be able to file on

this parent/wage earner's earnings record again, unless the marriage was void or annulled. POMS RS 00203.015, *Requirements for Re-entitlement to Child's Benefits*, <https://secure.ssa.gov/apps10/poms.nsf/lnx/0300203015>.

However, if a claimant was married and had the marriage terminated by divorce or death prior to the first application for Disabled Adult Child benefits on a parent's earnings record, the claimant will be considered "unmarried" for purposes of 20 CFR 404.350 and may be entitled to Disabled Adult Child Benefits if the other criteria are met. POMS RS 00203.020 *When a Child Who Has Been Married May Be Considered "Unmarried,"* <https://secure.ssa.gov/poms.nsf/lnx/0300203020>.

These odd applications by the Social Security Administration create a situation where an uninformed claimant may unknowingly eliminate their entitlement to benefits on their parent's earnings record by getting married. Accordingly, it is prudent to take the time to advise clients with potential Adult Child Benefit Claims of these implications prior to any nuptials. ★

Unemployment and Social Security Disability Benefits

When looking for guidance as to whether one can collect unemployment while filing for Social Security benefits, the 6th Circuit does give some guidance albeit it is prior to the pandemic unemployment. In *Luther v. Commission*, WL 3717769, June 26, 2012 (not reported in F.Supp), the court states that [A]lthough there is a reasonable contradiction between alleging an inability to work due to disability and, at the same time, certifying that one is able to engage in suitable full-time work, the receipt of unemployment benefits does not preclude the receipt of Social Security Disability benefits. However, it is one of the many factors that must be considered in determining whether Plaintiff is disabled.

Here, this Magistrate Judge agreed with Plaintiff's argument that "the mere receipt of unemployment insurance benefits does not prove ability to work." However, it is a

factor that the ALJ must consider. The Magistrate cites that the Sixth Circuit has held that collecting unemployment benefits (requiring recipients to state that they are seeking work) stands at odds with allegations of disability under the Social Security Act. See *Workman v. Comm'D of Social Sec.*, [105 F.Appx. 794, 801 \(6th Cir.2004\)](#) ("[a]pplications for unemployment and disability benefits are inherently inconsistent") (citing *Kinsella v. Schweiker*, [708 F.2d 1058, 1059 \(6th Cir.1983\)](#)); see also *Bowden v. Comm'r Social Sec.*, [1999 WL 98378, *7 \(6th Cir.1999\)](#) (the claimant "offers no reasonable explanation of how a person can claim disability benefits under the guise of being unable to work, and yet file an application for unemployment benefits claiming that she is ready and willing to work"). As correctly stated by the ALJ, the fact that Plaintiff collected unemployment benefits "does not preclude the receipt of

Social Security Disability benefits. However, it is one of the many factors that must be considered.”

In addition to the fact that Plaintiff collected unemployment benefits, in assessing Plaintiff’s credibility, the ALJ found: (1) Plaintiff’s “symptoms may not have been as serious as has been alleged” because he “failed to follow-up on recommendations made by the treating doctor”; (2) Plaintiff missed three out of six therapy appointments; (3) Plaintiff initially refused to have an EMG; (4) Plaintiff’s treatment has been “essentially routine and/or conservative in nature”; and (5) “[t]he fact that [Plaintiff] has not exhausted all medical means possible to improve the use of his hand undermines Plaintiff’s credibility.”

More recently, in *Luther v Commissioner*, E.D. Michigan, Southern District June 28, 2021 WL 3717769 (not cited in F.Supp) it was held that Plaintiff incorrectly argued that the ALJ drew an impermissible inference from the fact that he testified he was looking for work. The ALJ said that this fact suggested that plaintiff, himself, felt he could work at that time. After all, a person who believes he is incapable

of work generally will tend not to look for work. While the behavior is not conclusive, it is certainly a fact that an ALJ can consider along with the other relevant facts of the case in determining disability. Unlike the case Plaintiff relies on, the ALJ never said that this was evidence of an ability to work, *see, e.g., Gerstner v. Berryhill*, [879 F.3d 257, 265 \(7th Cir. 2018\)](#); *Ghiselli v. Colvin*, [837 F.3d 771, 778 \(7th Cir. 2016\)](#), but only that it was evidence that Plaintiff thought he was capable of working. After all, a person who is incapable of work will tend generally not to seek out that which he believes he cannot do. And, although a claimant can still be found disabled while collecting unemployment benefits or looking for work, *see Voigt v. Colvin*, [781 F.3d 871, 876–77 \(7th Cir. 2015\)](#), an ALJ may take this factor into account in assessing the subjective complaints of disability. *See Schmidt v. Barnhart*, [395 F.3d 737, 746 \(7th Cir. 2005\)](#); *Dowlen v. Colvin*, [658 F. App’x 807, 812 \(7th Cir. 2016\)](#). But, most importantly, it was but one of a list of reasons the ALJ gave for discounting the extent of Plaintiff’s complaints. (R. 30-31). ★

Mental Disorders and ADLs in 6th Circuit: Significant Cases

Gayheart v Commissioner of Social Sec.

[710 F.3d 365, 188 Soc. Sec. Rep. Serv. 528, Unempl. Ins. Rep. \(CCH\) ¶ 15125C \(6th Cir. 2013\)](#)

(Remand required due to ALJ’s discount of treating psychiatrist’s opinion based on claimant’s activities, impliedly inconsistent with social and daily living restrictions, of leaving home, driving, keeping medical appointments, visiting friends and neighbors, shopping with his wife, and attending three hearings, where record did not support finding that claimant “could do any of these activities on a sustained basis, which is how the functional limitations of mental impairments are to be assessed”).

Kiser v Commissioner of Social Security

[244 Soc. Sec. Rep. Serv. 381, 2017 WL 2982008 \(W.D. Mich. 2017\)](#)

(Claim based on depression, bipolar disorder, schizoaffective personality, anxiety disorder, PTSD, and attention deficit disorder (ADD) remanded for further proceedings where *inter alia* ALJ described claimant’s abilities much differently than what was supported in record and in treating psychiatrist’s report. For example, the ALJ’s

observation that claimant maintained a regular routine appeared to depend entirely on an isolated report that ignored another provider’s later notes recording that claimant continued to struggle with motivation as well as regular showering and grooming, ALJ also depended on records reporting that claimant was able to garden for a few hours, help put up decorations, or go swimming but claimant’s ability to perform limited range of activity for short periods of time was not inconsistent with claim.)

Martin v Commissioner of Social Security

[658 Fed. Appx. 255, 237 Soc. Sec. Rep. Serv. 267 \(6th Cir. 2016\)](#)

(District Court’s affirmance of administrative denial affirmed where ALJ discounted medical report that claimant was diagnosed with moderate problems related to social functioning and noted complaints of hallucinations and extreme anxiety, on reasoning that treating physician’s opinion was based on claimant’s subjective complaints of symptoms rather than objective medical evidence and that parts of the report contradicted the purported occupational limitations.) ★

Social Security February 2021 Seminar Presentation Summary

By Elizabeth Yard

During the February, 19, 2021 Section Seminar, we were fortunate to have a joint presentation by DDS Professional Relations Officer Brice Edmonds and SSA Claims Specialist Kristine Kladder. In order to view the presentation in full, please see the forum for a link. This will briefly provide you with a few practice tips and highlights of the presentation.

- If you go to SSA.gov and search for POMS, then click on “Recent Changes,” you’ll see a chronological list of recent changes to the POMS. It’s a helpful site to bookmark and check frequently to keep up to date on changes.
- Representatives now have ERE access to electronic files at the initial and reconsideration phases. Wait until receiving an Acknowledgement of your 1696 before attempting to access. Although not all information is available at the earlier phases, it is helpful to have some access prior to the hearing level. Ms. Kladder expressed hope that representatives will have access to additional sections of the file soon.
- Mr. Edmonds provided insightful information into the use of the forms completed during the initial application and reconsideration phase, particularly the Function Reports. I found the comparison of the First Party and Third Party Function Reports interesting.
- Also insightful was Mr. Edmonds’s power point presentation into how a determination is made, including the medical and vocational aspects. He further discussed the standards for childhood cases. I felt this is key information for the newer practitioner, and a great refresher for the more experienced representative. With cases moving quickly at the hearing level, the time to build a claim through both medical and vocational evidence is while the case is with DDS.
- When appropriate and possible, it may be helpful to obtain employment records demonstrating that a claimant may have struggled with absenteeism or with their job duties. Similarly, it is generally helpful in childhood cases to obtain school records, which should include teacher and counselor questionnaires, IEPs, and sometimes IQ testing.
- A list of Professional Relations Officers at the four DDS offices in Michigan (Kalamazoo, Lansing, Detroit, and Traverse City) was provided, along with emails and phone numbers. In Kalamazoo, Ellie Shaffer can be reached at (269) 337-3737 or Elaina.Shaffer@ssa.gov. Mr. Edmonds in Lansing can be reached at (517) 702-5440 or Brice.Edmonds@ssa.gov. Lindsey Martin in Detroit is at (313) 456-6858 and Lindsey.Martin@ssa.gov. The Traverse City Professional Relations Officer is Kristen Cronk, who can be reached at (231) 933-6803 or Kristen.Cronk@ssa.gov.
- Submission of the 1696 was recommended via U.S. Mail. At the present time, most SSA employees are working from home. There are a few people in the offices on a daily basis to check and scan in the mail. Faxes are routed differently, and may not be entered as quickly as those submitted via regular mail.
- I would strongly urge you to visit the forum and view the video of the presentation if you were unable to attend or if you feel you didn’t receive the full benefit of the presentation due to technical difficulties. I want to conclude by extending our gratitude to Ms. Kladder and Mr. Edmonds for their willingness to present to our Section. ★

Social Security Lawyers Section Mission

The Social Security Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, this site, public service programs, and publication of a newsletter. Membership in the Section is open to all members of the State Bar of Michigan.