Clearinghouse REVIEW
Journal of Poverty Law and Policy
July–August 2011
Volume 45, Numbers 3–4

Close the Racial Wealth Gap

End Child Labor in America

Learn Adoption Assistance Guidelines

Enlist Private-Firm Lawyers to Volunteer

Form Medical-Legal Partnerships

Know Social Security Rules on Substance Abuse

Espouse Civil Gideon to Fulfill Shriver's Vision

SHRIVER CENTER
Sargent Shriver National Center on Poverty Law

Social Security and Supplemental Security Income Disability Cases **Involving Alcohol or Drug Use**

Developments in the Last Decade

By Linda Landry

Linda Landry
Senior Attorney

Disability Law Center
11 Beacon St. Suite 925
Boston, MA 02108
617.723.8455
llandry@dlc-ma.org

In 1999, three years after the Contract with America Advancement Act eliminated eligibility for social security or Supplemental Security Income (SSI) disability benefits if drug abuse or alcoholism was "material" to the disability determination, I wrote for Clearinghouse Review on how the Social Security Administration was implementing this provision.[1] At that time the agency had yet to revise 1995 regulations that implemented the drug or alcohol abuse provisions of the Social Security Reform Act of 1994. That legislation, which resulted in the creation of the abbreviation DAA (drug addiction and alcoholism), allowed disability benefit eligibility where drug or alcohol abuse was material to the disability finding, but the legislation mandated treatment, required that benefits be paid through a representative payee, and limited receiving of benefits to three years.[2] The 1996 Contract with America Advancement Act eliminated those restrictions and simply prohibited eligibility for disability benefits where drug addiction or alcoholism is material, leaving only 20 C.F.R. §§ 404.1535 and 416.935 as the relevant sections of the 1995 regulations.[3]

Fifteen years later the Social Security Administration still has not promulgated revised regulations implementing the Act's drug addiction and alcoholism provisions, and the irrelevant sections of the 1995 regulations remain on the books. Instead the agency posted revised subregulatory instructions and policy statements on both its public website, www.socialsecurity.gov, and its internal website, PolicyNet.[4] The Program Operations Manual System (POMS) was updated to include only provisions

[1]Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 105, 110 Stat. 847, 852 (March 29, 1996) (amending 42 U.S.C. §§ 423(d)(2), 1382c(a)(3)). See my *Handling Social Security and Supplemental Security Income Disability Cases Involving Alcohol or Drug Use: An Update*, 32 Clearinghouse Review 545 (March–April 1999).

[2]20 C.F.R. §§ 404.1535–404.1541 (2010) (Benefit Reforms for Individuals Based on Drug Addiction or Alcoholism, 60 Fed. Reg. 8140, 8148 (Feb. 10, 1995)); *id.* §§ 416.935–416.941 (Benefit Reforms for Individuals Based on Drug Addiction or Alcoholism, 60 Fed. Reg. at 8151); Social Security Reform Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464 (1994).

[3]See 20 C.F.R. §§ 404.1535, 416.935: How the Social Security Administration will determine whether one's drug addiction or alcoholism is a contributing factor material to the determination of disability. These regulations set forth the three-step disability evaluation to be used if there is medical evidence of drug or alcohol abuse.

[4]These subregulatory instructions are not published in the *Federal Register* for notice and comment and do not have the force and effect of law.

relevant to the Contract with America Advancement Act.[5] The agency also issued Hearings, Appeals, and Litigation Law (HALLEX) Rule I-5-3-14-A to guide administrative law judges and the Appeals Council on claims involving drug addiction and alcoholism.[6] HALLEX Rule I-5-3-14-A has been removed from the agency's public website with no explanation. The HALLEX still contains other rules that are less detailed on drug addiction and alcoholism evaluations. The subregulatory instruction that is potentially most useful for claimants has been a controversial emergency message, EM 96-200, which states that "Regional Offices must ensure that all disability adjudicators … receive this message."[7] It remains on the Social Security Administration's website and now shows a revised retention date of February 23, 2012.[8]

The subregulatory instructions have received a decidedly mixed reception from both the Social Security Administration's administrative adjudicators and the federal courts. Advocates anecdotally report widespread misapplication of the evaluation rules on drug addiction and alcoholism in the administrative appeals process. EM 96-200 has been the most controversial subregulatory instruction in two respects. The first is whether the emergency message places the burden on the Social Security Administration to prove materiality. The second involves the mental impairment provisions that have come to be known as the "tie goes to the claimant" provisions on drug addiction and alcoholism. Under these provisions a finding that drug addiction or alcoholism is *not* material is appropriate when the functional limitations that flow from abuse cannot be separated from those that flow from the mental impairment.[9]

Most federal courts—four Circuit courts of appeals among them—that took up the burden of proof held that the claimant bore the burden of showing that drug addiction or alcoholism was not material.[10] The Third Circuit, satisfied that the Social Security Administration had met its burden, declined to rule on the burden of proof.[11] However, even where the circuit court did not take up the issue, except in the District of Columbia Circuit the fed-

[5]Note that the following appears in the Program Operations Manual System (POMS) section on the Social Security Administration's public website: "Disclaimer: The POMS states only internal SSA guidance. It is not intended to, does not, and may not be relied upon to create any rights enforceable at law by any party in a civil or criminal action. Further, by posting the POMS, SSA is not thereby limited from exercising its otherwise lawful prerogatives. If the content of the POMS conflicts with the Social Security Act, another relevant statute, SSA regulations, or Social Security Rulings, those authorities have priority over the POMS" (Social Security Online, SSA's Program Operations Manual System Home (n.d.), http://1.usa.gov/lMGG0j).

[6]The Social Security Administration issued Hearing and Appeals Litigation Law (HALLEX) Rule I-5-314-A on November 14, 1997, to implement Section 105 of the Contract with America Advancement Act and revised the rule in August 2000. The agency notes the following about HALLEX rules on its public website: "Through HALLEX, the Deputy Commissioner for Disability Adjudication and Review conveys guiding principles, procedural guidance, and information to Office of Disability Adjudication and Review staff. HALLEX defines procedures for carrying out policy and provides guidance for processing and adjudicating claims at the hearing, Appeals Council, and civil action levels. It also includes policy statements resulting from Appeals Council en banc meetings under the authority of the Appeals Council Chair" (Office of Disability Adjudication, and Review, Social Security Administration, HALLEX (Hearings, Appeals and Litigation Law Manual) (n.d.), http://1.usa.gov/lJdDdC).

[7]Originally issued as EM 96- dated August 30, 1996, this emergency message was not assigned a number or posted to PolicyNet. It has since been given a number and posted for the convenience of adjudicators who need to see these questions and answers. The Social Security Administration uses emergency messages to notify its employees of emergency changes in operations instructions (Social Security Online, Emergency Message (Aug. 30, 1996), http://1.usa.gov/mTsyif).

[8]*Id*.

[9]*Id.*, EM 96-200 Questions 25, 27, 29.

[10]See *Parra v. Astrue*, 481 F.3d 742, 748 (9th Cir. 2007) ("We thus make explicit what was intimated by our earlier cases, that the claimant bears the burden of proving that drug or alcohol is not a contributing factor material to his disability."); *Doughty v. Apfel*, 245 F.3d 1274, 1280 (11th Cir. 2001) (We agree … that in materiality determinations pursuant to 42 U.S.C. § 423(d)(2)(C), the claimant bears the burden of proving that his alcoholism or drug addiction is not [material]"); *Pettit v. Apfel*, 218 F.3d 901, 903 (8th Cir. 2000) ("A claimant has the initial burden of showing that alcoholism or drug addiction is not material …."); *Brown v. Apfel*, 192 F.3d 492, 498 (5th Cir. 1999) (claimant bears burden of proof, but whether emergency message was raised to court is not clear).

[11]*McGill v. Commissioner*, 288 F. App'x 50 (3d Cir. 2008).

eral district courts held that the claimant bore the burden of proof.[12]

Whether "the tie goes to the claimant" is less settled where separating the functional limits imposed by drug addiction and alcoholism from those imposed by other impairments is impossible. Only the Eighth and Ninth Circuits have squarely wrestled with this issue. The Eighth Circuit, the first to cite EM 96-200 on the tie question, held in *Brueggemann v. Barnhart* that if the administrative law judge could not determine whether abuse was material, the claimant had met the burden.[13] District courts in other circuits have occasionally cited *Brueggemann* favorably on the tie question, although no court appears to have relied on the tie rule to reach its decision.[14]

Definitively taking the opposite position in *Parra v. Astrue,* the Ninth Circuit rejected the tie rule; the court explained that it would give the Social Security Administration the burden of proving materiality; furthermore, said the court, the rule, an unpromulgated internal guidance document, lacks the force of law and is neither legally binding on the agency nor judicially enforceable, absent the power to persuade.[15] In this case the court found EM 96-200 not persuasive because contrary to the Contract with America Advancement Act's purpose of discouraging substance abuse or, at least, refraining from encouraging substance abuse with a permanent government subsidy.[16]

In its sweeping rejection of EM 96-200 the *Parra* court's analysis of the deference due agency subregulatory policy statements suggested that the court was seeking ways to discount EM 96-200's potential binding effect. *Brueggemann* followed the guidance in EM 96-200 without discussing deference. But is the *Parra* court's deferential analysis correct or complete? Courts have occasionally ruled on when unpromulgated subregulatory instructions bound agency decision makers and the deference that federal courts should give these instructions.[17] However, the

[12]See, e.g., First Circuit: *Zarrilli v. Astrue*, Civ. No. 08-82-B-W, 2008 WL 4936613, at *3 (D. Me. Nov. 2008). Second Circuit: *Quimby v. Commissioner*, Civ. No. 1:09-CV-20, 2010 WL 2425904, at*5 (D. Vt. April 13, 2010); *Frankhauser v. Barnhart*, 403 F. Supp. 2d 261, 273 (W.D.N.Y. 2005); *Eltayyeb v. Barnhart*, No. 02 Civ.925(MBM), 2003 WL 22888801, at *4 (S.D.N.Y. Dec. 8, 2003). Third Circuit: *McPhaul v. Astrue*, Civ. No. 09-3207 (JLL), 2010 WL 3906957, at *6 (D.N.J. Sept. 29, 2010). Fourth Circuit: *Shoulars v. Astrue*, 671 F. Supp. 2d 801, 811 (E.D.N.C. 2009); *Wilmer v. Astrue*, Civ. No. 6:07cv00002, 2008 WL 112045, at *5 (W.D. Va. Jan 8, 2008); *Sanders v. Apfel*, No. 3:00CV296-H, 2001 WL 114360, at*6 (W.D.N.C. Jan. 26, 2010). Sixth Circuit: *Underwood v. Commissioner*, No. 4:08-CV-2540, 2010 WL 424970, at *6 (N.D. Ohio Jan. 22, 2010); *Armstrong v. Commissioner*, No. 1:07-cv-1212, 2009 WL 723988, at *5 (W.D. Mich. Feb.24, 2009). Seventh Circuit: *Mayes v. Astrue*, No.1:07-cv-0193-DFH-TAB, 2008 WL 126691, at *7 (S.D. Ind. Jan.10, 2008); *Sage v. Astrue*, No. 06-C-0465-C, 2007 WL 5414915, at *3 (W.D. Wis. May 24, 2007). Tenth Circuit: *Smith v. Astrue*, No.1:09-cv-000784-DB, 2010 WL 2925059, at *2 (S. Utah July 29, 2010); *Crosson v. Barnhart*, No. 06-2060-JWL, 2007 WL 460998, at *5 (D. Kan. Jan. 2, 2007).

[13]*Brueggemann v. Barnhart*, 348 F.3d 689, 693 (8th Cir. 2003). District courts in the Eighth Circuit have cited *Brueggeman* favorably as recently as last year (see, e.g., *Eastvold v. Astrue*, Civ. No. 03-3054 (MJD/RLE), 2010 WL 1286334, at *45 (D. Minn. Feb. 12, 2010) (on issue of materiality, tie goes to claimant)).

[14]See, e.g., *Underwood v. Commissioner*, No. 4:08-CV-2450, 2010 WL 424970, at *6 (N.D. Ohio Jan. 22, 2010); *Klement v. Astrue*, No. 1:08-CV=0640 (LEK/VEB), 2009 WL 3837859, at *8 (N.D.N.Y. Nov. 16, 2009) (finding some authority for tie argument where separating effects of mental illness and abuse is medically impossible and remanding for consideration of whether emergency message remains effective and, if so, whether it applies in this case); *Smith v. Astrue*, No. 06-1271-MLB, 2007 WL 2377113, at *6 (D. Kan. Aug. 10, 2007).

[15]*Parra v. Astrue*, 481 F.3d 742, 749–50 (9th Cir. 2007), cert. denied, 552 U.S. 1141 (2008). Whether the court needed to consider the tie issue is unclear. Parra, who died in 2000, had to prove disability before 1995, his last-insured date. Apparently based on expert testimony interpreting the medical evidence, the administrative law judge had found that Parra's cirrhosis would have been reversible until July 1999 if he had abstained.

[16]*Id.* at 749 ("At most these sources may represent the agency's unpromulgated interpretation of the statute's phrase 'contributing factor material to the determination of disability.' Such an interpretation is 'entitled to respect' but only to the extent that it has the 'power to persuade,'" citing *Christensen v. Harris County,* 529 U.S. 576, 587 (2000), quoting *Skidmore v. Swift and Company*, 323 U.S. 134, 140 (1944)).

[17]E.g., *United States v. Mead*, 533 U.S. 218 (2001) (discussing when *Chevron* deference applied, court noted that, as significant as Administrative Procedure Act notice and comment rulemaking was in pointing to *Chevron* authority, lack thereof did not always decide case); *Auer v. Robbins*, 519 U.S. 452 (1997) (informal interpretation of agency's own regulations is controlling unless plainly erroneous or inconsistent with regulation); *Schweiker v. Hansen*, 450 U.S. 785 (1981) (Social Security Administration's Claims Manual, forerunner of POMS, was not binding on agency); *Bordes v. Commissioner*, 235 F. App'x 853 (3d Cir. 2007) (POMS and HALLEX lack force of law and create no judicially enforceable rights); *Newton v. Apfel*, 209 F.3d 448, 459 (5th Cir. 2000) ("While the HALLEX does not carry the authority of law … 'where the rights of individuals are affected, an agency must follow its own procedures….'"); *Avery v. Secretary*, 797 F.2d 19 (1st Cir.1986) (POMS on pain analysis is binding and appended to decision).

analysis in social security cases is often cursory or situational, and pulling any common thread from these decisions, other than outcome determinism, is difficult. As noted, whether the *Parra* court even needed to consider the deference due to EM 96-200 in order to make its decision is unclear.[18] Acceptance of EM 96-200 will likely remain mixed, both at the agency decision-maker level and in the federal courts until the Social Security Administration sets forth the analysis of drug addiction and alcoholism in final regulations or in a social security ruling.

Three additional related developments on drug addiction and alcoholism should be noted. First, SSA clarified that disability benefit recipients whose drug or alcohol abuse was determined not to be material were not among the beneficiaries who must receive benefits through a representative payee.[19] However, the agency may determine on a case-by-case basis whether these beneficiaries need a payee to manage their benefits in their own best interests.[20] The practical result will be that many beneficiaries with drug abuse and alcoholism conditions will be determined to require a representative payee, but, unlike those *required* to receive benefits through a payee, these beneficiaries may appeal payee determinations and submit evidence of their ability to manage their benefits. Second, when the Social Security Administration recently published proposed regulations revising the mental impairment listings and evaluation rules, among the proposed revisions was the elimination of 12.09 and 112.09, the reference listings for alcoholism and drug addiction disorders, and the creation of new introductory paragraph 12.00H.[21] This change will not be final until the agency publishes the change in final regulations in the *Federal Register*. Third, last year the Social Security Administration published a request for comments on the evaluation of drug abuse and alcoholism that may be a contributing factor material to disability determinations.[22] The agency occasionally requests comments before drafting proposed rule changes and the request for comment on drug abuse and alcoholism evaluations is an indication that the agency may be considering future rulemaking on drug abuse and alcoholism policies. The agency reportedly received a great many responses with widely divergent views.

Author's Acknowledgment

I wish to thank my legal intern Jonathan R. Miller, Harvard Law School 2011, for his help on the research and drafting for this article.

[18]See *supra* note 15.

[19]POMS GN 00502.005 (2003) (Direct Payment Prohibitions); GN 00502.020 (2003) (substance abuse is often indication that beneficiary is incapable of managing benefits; direct payment is not prohibited and should be made if appropriate).

[20]See 20 C.F.R. §§ 404.2001 *et seq.*, 416.601 *et seq*.

[21]Revised Medical Criteria for Evaluating Mental Disorders, 75 Fed. Reg. 51336 (Aug. 19, 2010). The new introductory paragraph 12.00H reads: "Proposed 12.00H—How do we evaluate substance use disorders? We propose to add this section because we are also proposing to remove listing 12.09, Substance addiction disorders, for reasons we explain later in this preamble. We explain the requirement in the Act and our regulations that, if we find a person disabled and there is medical evidence establishing a substance use disorder, we must determine whether the disorder is a contributing factor material to the determination of disability. We also include a reference to our rules for this policy" (*id*. at 51345 (codified at 20 C.F.R. §§ 404.1535, 416.935).

[22]Drug Addiction and Alcoholism, 75 Fed. Reg. 4900 (Jan. 29, 2010).

Subscribe to Clearinghouse Review!

Clearinghouse Review: Journal of Poverty Law and Policy is the advocate's premier resource for analysis of legal developments, innovative strategies, and best practices in representing low-income clients. Each issue of the Review features in-depth, analytical articles, written by experts in their fields, on topics of interest to poor people's and public interest lawyers. The Review covers such substantive areas as civil rights, family law, disability, domestic violence, housing, elder law, health, and welfare reform.

Subscribe today!

We offer two ways to subscribe to Clearinghouse Review.

A **site license package** includes printed copies of each monthly issue of Clearinghouse Review and online access to our archive of articles published since 1967. With a site license your organization's entire staff will enjoy fully searchable access to a wealth of poverty law resources, without having to remember a username or password.

Annual site license package prices vary with your organization size and number of printed copies.

- Legal Services Corporation–funded programs: $170 and up
- Nonprofit organizations: $250 and up
- Law school libraries: $500

A **print subscription** includes one copy of each of six issues, published bimonthly. Annual rates for the print-only subscription package are as follows:

- Legal Services Corporation–funded programs: $105
- Nonprofit organizations: $250
- Individuals: $400

A print subscription for Legal Services Corporation–funded programs and nonprofit organizations does not include access to the online archive at www.povertylaw.org.

CUT HERE

Please fill out the following form to receive more information about subscribing to Clearinghouse Review.

Name _____

Organization _____

Street address _____ Floor, suite, or unit _____

City _____ State _____ Zip _____

E-mail _____

My organization is

- ☐ Funded by the Legal Services Corporation
- ☐ A nonprofit
- ☐ A law school library
- ☐ None of the above

What is the size of your organization?

- ☐ 100+ staff members
- ☐ 51–99 staff members
- ☐ 26–50 staff members
- ☐ 1–25 staff members
- ☐ Not applicable

Please e-mail this form to subscriptions@povertylaw.org.
Or fax this form to Ilze Hirsh at 312.263.3846.

Sargent Shriver National Center on Poverty Law
50 E. Washington St. Suite 500
Chicago, IL 60602