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Handling the Social Security Disability Case —The View from the Bench

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HANDLING THE SOCIAL SECURITY DISABILITY CASE

N.Y.S. BAR ASSOCIATION

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THE VIEW FROM THE BENCH

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I. Problems Encountered by the Court in Social Security Disability Cases -

1. Volume of Cases -

(a) AO statistics: for 12 mos. ending 6/30/82 - 12,812 new Social Security cases filed; for 12 mos. ending 6/30/83 - 20,315 new Social Security cases filed.

(b) This represents total increase of 58.6% in all Social Security cases; within this increase is an 89.6% increase in claims for disability insurance benefits.

(c) N.D.N.Y. - fiscal 1982 - new Social Security filings - 121; fiscal 1983 - 232 new filings. As of November 1, 1983 - 359 pending social security cases excluding those on remand.

2. Procedural Delays -

(a) Delay in administrative proceedings through Appeals Council decision.

(b) 60 days after decision to commence action in District Court. 42 U.S.C. 405(g).

(c) Government has 60 days to answer Complaint. Fed. R. Civ. P. 12(a); it always moves ex parte for 60-90 days additional. Fed. R. Civ. P. 6(b). (Answer must include administrative record - 405(g) & Rule 12(c)).

(d) Delay in moving for judgment on pleadings.

(e) Reference to Magistrates in NDNY customary + 6 months delay.

(f) Report-Rec. of Magistrate to Court - 10 days to object. Review by District Court Judge. Another examination of entire record.

3. Inadequate Development of the Administrative Record -

(a) Very important matter, because Court review limited to Record.

(b) Factual gaps - medical evidence; employment history; present activities of claimant. Necessary to

RECONSTRUCT ADMINISTRATIVE RECORD IN PENDING CASE WHERE RECORD LOST.

4. Inadequate Presentation of Issues to the Court -

(A) Function of the attorneys. Supply briefs and memoranda.

(B) Obvious cause of additional delay. It also constitutes ineffective representation and may have disastrous results for the client.

II. What the Court Can Do to Remedy the Problems -

1. Attack Delay in Court Proceedings.

(A) Routinely deny the full extensions requested by the Gov't. Limit extensions.

(B) Review computer printout calendar regularly to see what cases pending for undue length of time after answer and record filed. Have Clerk notify attorneys of deadline for motions.

(C) Distribute cases among active Judges, Sr. Judges & Magistrates of the Court; recent tendency to refer all to Magistrates; rejected recent proposal for automatic referral to Magistrates.

(D) Shorten opinions - identify and resolve only salient factual and legal issues; note So. & Ea. District Judges who decide from Bench; recent Circuit opinion re Judge who decided case at conference between pro se claimant and Gov't attorney - one liner for Gov't - reversed. One District Court Judge reputed to remand all cases brought before him.

2. Impose Sanctions for Failure to File Memoranda Presenting the Issues to be Determined by the Court.

(A) Alameda v. Secretary, 622 F.2d 1044 (1st Cir. 1980) (brochure) - sanction of judgment for claimants available where Gov't failed to comply with local rule requiring timely submission of memoranda, provided there is compliance with Fed. R. Civ. P. 55(e) (no default judgment against U.S. unless claim established by satisfactory evidence.) - can rely on claimant's brief - record to be examined not for substantial evidence but only for lesser showing of compliance with Rule 55(e).

(B) ALAMEDA REFERS TO THE COURT'S "INHERENT POWER" TO REQUIRE THE SUBMISSION OF MEMORANDA. IT THEREFORE SHOULD BE OBVIOUS THAT IT IS WITHIN THE COURT'S AUTHORITY TO DISMISS THE COMPLAINT FOR THE CLAIMANT'S FAILURE TO FILE A MEMORANDUM.

3. COURT CAN DO NOTHING AS REGARDS THE VOLUME PROBLEM AS LONG AS CLAIMANTS CONSIDER THEMSELVES AGGRIEVED AND HAVE A CHANCE SUBSTANTIALLY IN EXCESS OF 50-50 TO PREVAIL IN COURT.

4. ALSO, AND UNFORTUNATELY, THE COURT CAN DO NOTHING ABOUT THE INADEQUACY OF THE ADMINISTRATIVE RECORD EXCEPT TO REMAND FOR FURTHER DEVELOPMENT IN A PROPER CASE.

III. WHAT THE BAR CAN DO TO REMEDY THE PROBLEMS.

1. AN ATTORNEY WHO REPRESENTS A CLAIMANT AT AN ADMINISTRATIVE HEARING SHOULD MAKE SURE THAT THE RECORD IS FULLY ADEQUATE TO SUPPORT THE CLAIM. MAKE AN OUTLINE OF WHAT YOU WISH TO PROVE AND FOLLOW IT. NOTE AN OBJECTION IF YOU ARE FORECLOSED FROM PURSUING A SPECIFIC LINE OF INQUIRY AT THE HEARING. MAKE SURE THAT YOU FOLLOW UP ON A FAVORABLE LINE OPENED BUT NOT PURSUED BY THE ALJ. UNFORTUNATELY, MANY CLAIMANTS ARE NOT REPRESENTED AT THE HEARING, AND THIS MAY CAUSE LATER PROBLEMS IN SPITE OF THE ALJ'S RESPONSIBILITY TO PRO SE CLAIMANTS.

2. AVOID DELAY BY MOVING ON THE PLEADINGS AS SOON AS THE ANSWER AND ADMINISTRATIVE RECORD ARE FILED.

3. PREPARE CAREFULLY THE NECESSARY MEMORANDA TO ADVANCE YOUR CLIENT'S POSITION. NARROW THE FACTUAL ISSUES AND BE PRECISE ON THE LAW. IN A CASE REFERRED TO A MAGISTRATE, TAKE THE OPPORTUNITY TO MAKE OBJECTIONS TO THE MAGISTRATE'S REPORT-RECOMMENDATION IF IT IS NOT FAVORABLE. I DO NOT HESITATE TO REJECT OR MODIFY A RECOMMENDATION THAT I CONSIDER TO BE IN ERROR. THE BRIEF TO THE DISTRICT COURT JUDGE SHOULD RAISE SPECIFIC OBJECTIONS, ON THE LAW OR THE FACTS, TO THE MAGISTRATE'S REPORT.

(A) IN PREPARING THE BRIEF, IT IS ESSENTIAL TO HAVE SOME BASIC PRINCIPLES IN MIND. THEY ARE AS FOLLOWS:

1) THE COURT'S FUNCTION IS TO DETERMINE WHETHER THE DECISION OF THE SECRETARY IS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE. SUBSTANTIAL EVIDENCE HAS BEEN DEFINED AS "SUCH RELEVANT EVIDENCE AS A REASONABLE MIND MIGHT ACCEPT AS ADEQUATE TO SUPPORT A CONCLUSION." IT, HOWEVER, "MUST DO MORE THAN CREATE A SUSPICION OF THE EXISTENCE OF THE FACT TO

BE ESTABLISHED." IT IS THE FUNCTION OF THE SECRETARY TO RESOLVE EVIDENTIARY CONFLICTS AND TO APPRAISE THE CREDIBILITY OF WITNESSES, INCLUDING THE CLAIMANT.

2) THE CLAIMANT HAS THE BURDEN OF ESTABLISHING DISABILITY WITHIN THE MEANING OF THE ACT.

3) TO BE ELIGIBLE FOR DISABILITY BENEFITS, A CLAIMANT MUST ESTABLISH (1) THE EXISTENCE OF A MEDICAL IMPAIRMENT, AND (2) AN INABILITY TO ENGAGE IN ANY SUBSTANTIAL GAINFUL EMPLOYMENT BECAUSE OF THIS IMPAIRMENT.

4) WHILE THE ULTIMATE BURDEN OF PERSUASION RESTS UPON THE CLAIMANT, ONCE IT IS ESTABLISHED THAT THE CLAIMANT IS UNABLE TO ENGAGE IN HIS CUSTOMARY OCCUPATION, THE BURDEN SHIFTS TO THE SECRETARY TO COME FORWARD WITH EVIDENCE THAT THE CLAIMANT IS CAPABLE OF PERFORMING OTHER SUBSTANTIAL GAINFUL ACTIVITY EXISTING IN THE NATIONAL ECONOMY. OF COURSE, THE SECRETARY MUST DEMONSTRATE THAT THE CLAIMANT IS <u>VOCATIONALLY</u> CAPABLE, AS WELL AS <u>PHYSICALLY</u> CAPABLE OF PERFORMING SUCH ACTIVITY.

5) SECTION 223 OF THE ACT PROVIDES FOR THE PAYMENT OF DISABILITY INSURANCE WHERE THE REQUIREMENTS STATED THEREIN ARE SATISFIED. SECTION 223(D)(1) DEFINES DISABILITY AS THE "INABILITY TO ENGAGE IN ANY SUBSTANTIAL GAINFUL ACTIVITY BY REASON OF ANY MEDICALLY DETERMINABLE PHYSICAL OR MENTAL IMPAIRMENT WHICH CAN BE EXPECTED TO RESULT IN DEATH OR WHICH HAS LASTED OR CAN BE EXPECTED TO LAST FOR A CONTINUOUS PERIOD OF NOT LESS THAN 12 MONTHS."

SECTION 223(D)(2)(A) OF THE ACT PROVIDES THAT AN INDIVIDUAL SHALL BE DETERMINED TO BE DISABLED IF HIS PHYSICAL OR MENTAL IMPAIRMENT IS "OF SUCH SEVERITY THAT HE IS NOT ONLY UNABLE TO DO HIS PREVIOUS WORK BUT CANNOT, CONSIDERING HIS AGE, EDUCATION, AND WORK EXPERIENCE, ENGAGE IN ANY OTHER KIND OF SUBSTANTIAL GAINFUL WORK WHICH EXISTS IN THE NATIONAL ECONOMY, REGARDLESS OF WHETHER SUCH WORK EXISTS IN THE IMMEDIATE AREA IN WHICH HE LIVES, OR WHETHER A SPECIFIC JOB VACANCY EXISTS FOR HIM OR WHETHER HE WOULD BE HIRED IF HE APPLIED FOR WORK." 42 U.S.C. § 423(D)(2)(A).

6) IN CONSIDERING AN INDIVIDUAL'S DISABILITY, THE SECRETARY MUST CONSIDER (1) THE OBJECTIVE MEDICAL FACTS, (2) THE MEDICAL OPINIONS OF THE EXAMINING OR TREATING PHYSICIANS, (3) THE CLAIMANT'S SUBJECTIVE SYMPTOMS AS TESTIFIED TO BY THE CLAIMANT OR OTHERS, AND (4) THE CLAIMANT'S AGE, EDUCATIONAL BACKGROUND, AND WORK EXPERIENCE.

(B) CITE IN THE BRIEF CASES DECIDED BY THE SECOND CIRCUIT COURT OF APPEALS. GENERAL REFERENCES TO NATIONAL TEXTBOOKS MAY BE INADEQUATE, AND CITATIONS TO OTHER CIRCUITS MAY NOT REFER TO THE LAW IN THIS CIRCUIT. SHEPARDIZE TO MAKE CERTAIN YOUR CITATIONS ARE CURRENT, AND BEAR IN MIND THAT THE SECOND CIRCUIT HAS DEVELOPED A SUBSTANTIAL BODY OF LAW ON SOCIAL SECURITY DISABILITY BENEFITS.

(C) 1) THE SECRETARY'S REGULATIONS GOVERNING DISABILITY DETERMINATIONS WITHIN THE MEANING OF THE ACT SET FORTH A SPECIFIC SEQUENTIAL PROCESS OF EVALUATION TO BE EMPLOYED IN ASSESSING DISABILITY CLAIMS. THE REGULATIONS PROVIDE THAT IF THE SECRETARY FINDS THAT THE CLAIMANT IS DISABLED OR NOT DISABLED AT ANY POINT IN THE REVIEW, THERE WILL BE NO FURTHER REVIEW. 20 C.F.R. § 404.1520(A) (1983).

2) THE REGULATIONS FURTHER PROVIDE THAT IN MAKING A DETERMINATION OF DISABILITY OR NO DISABILITY, THE FIRST INQUIRY SHALL BE WHETHER THE CLAIMANT IS CURRENTLY WORKING AND WHETHER THAT WORK IS SUBSTANTIAL GAINFUL ACTIVITY. 20 C.F.R. § 404.1520(B) (1983).

3) IF THE CLAIMANT IS NOT CURRENTLY ENGAGED IN SUBSTANTIAL GAINFUL ACTIVITY, THE INQUIRY THEN FOCUSES ON THE QUESTION OF WHETHER HE HAS A "SEVERE IMPAIRMENT," DEFINED AS "ANY IMPAIRMENT(S) WHICH SIGNIFICANTLY LIMITS [CLAIMANT'S] PHYSICAL OR MENTAL ABILITY TO DO BASIC WORK ACTIVITIES." 20 C.F.R. § 404.1520(C) (1983). IF IT IS DETERMINED THAT THE CLAIMANT DOES NOT HAVE ANY SEVERE IMPAIRMENTS, THE REGULATIONS DIRECT THAT THE SECRETARY WILL FIND THAT THE CLAIMANT IS NOT DISABLED. FURTHERMORE, THE SECRETARY WILL NOT CONSIDER THE CLAIMANT'S AGE, EDUCATION, AND WORK EXPERIENCE. 20 C.F.R. § 404.1520(C) (1983).

4) IF A DETERMINATION IS MADE THAT THE CLAIMANT DOES HAVE A SEVERE IMPAIRMENT, THE SECRETARY MUST MAKE THE THIRD INQUIRY WHICH IS WHETHER THE CLAIMANT HAS AN IMPAIRMENT EQUIVALENT TO A SPECIFIC LISTED IMPAIRMENT IN APPENDIX 1 OF THE REGULATIONS. 20 C.F.R. § 404.1520(D) (1983). IF THE CLAIMANT HAS SUCH AN IMPAIRMENT, HE IS AUTOMATICALLY FOUND TO BE DISABLED.

5) IF THE IMPAIRMENT IS SEVERE BUT NOT LISTED IN APPENDIX 1 OR IS NOT FOUND TO BE EQUAL TO AN APPENDIX 1 IMPAIRMENT, THE FOURTH QUESTION THE SECRETARY MUST ANSWER IS WHETHER THE CLAIMANT HAS THE RESIDUAL FUNCTIONAL CAPACITY TO PERFORM HIS PAST RELEVANT WORK. IF HE CAN STILL DO THIS KIND OF WORK, THE SECRETARY MUST FIND THAT THE CLAIMANT IS NOT DISABLED. 20 C.F.R. § 404.1520(E) (1983).

6) IF THE CLAIMANT IS UNABLE TO PERFORM HIS PAST WORK, THE SECRETARY IS REQUIRED TO MAKE THE FINAL INQUIRY WHICH IS WHETHER CLAIMANT'S SEVERE IMPAIRMENT(S) PREVENTS HIM FROM PERFORMING OTHER WORK EXISTING IN THE NATIONAL ECONOMY, GIVEN HIS AGE, EDUCATION, RESIDUAL FUNCTIONAL CAPACITY, AND RELEVANT WORK EXPERIENCE. 20 C.F.R. § 404.1520(F) (1983) (EMPHASIS ADDED).

(D) THE SEQUENTIAL PROCESS UTILIZED BY THE SECRETARY IS REFERRED TO IN RIVERA V. SCHWEIKER, DECIDED BY THE SECOND CIRCUIT COURT OF APPEALS ON SEPTEMBER 7, 1983 717 F.2D 719 (2D CIR. 1983). I BELIEVE THAT COUNSEL SHOULD USE IT AS THE FRAMEWORK FOR THEIR MEMORANDA. THE QUESTIONS SHOULD BE: WHERE DOES MY CASE FIT IN THIS ANALYSIS? REVIEW SEQUENTIAL PROCESS.

IV. SOME SPECIFIC SUGGESTIONS FOR THE EFFECTIVE REPRESENTATION OF DISABLED CLAIMANTS (10 RANDOM TIPS).

1. COMPLAINTS OF PAIN.

(A) A CLAIMANT'S COMPLAINTS OF PAIN SHOULD BE EXPLORED FULLY. IT HAS BEEN ESTABLISHED IN THIS CIRCUIT THAT SUBJECTIVE PAIN MAY SERVE TO ESTABLISH DISABILITY EVEN IF UNACCOMPANIED BY POSITIVE CLINICAL FINDINGS OR OTHER OBJECTIVE MEDICAL EVIDENCE, PROVIDED THAT AN UNDERLYING PHYSICAL OR MENTAL IMPAIRMENT CAN BE MEDICALLY ASCERTAINED. PAIN CAUSED BY THE IMPAIRMENT MAY BE FOUND DISABLING EVEN THOUGH THE IMPAIRMENT ORDINARILY DOES NOT CAUSE DISABLING PAIN.

(B) ONCE AN IMPAIRMENT HAS BEEN SHOWN, THE SECRETARY MUST EVALUATE THE CLAIMANT'S CREDIBILITY AND MOTIVATION WITH REGARD TO COMPLAINTS OF PAIN. AN ALJ MUST ARTICULATE SPECIFIC REASONS FOR FINDING THE COMPLAINTS INCREDIBLE, AND A FAILURE TO DO SO COMPELS REMAND OR REVERSAL. WE SOMETIMES FIND THAT THE ALJ FAILS TO REACH AN INDEPENDENT JUDGMENT CONCERNING THE TRUE EXTENT OF ALLEGED PAIN AND THE EXTENT TO WHICH IT HAMPERS ABILITY TO ENGAGE IN GAINFUL EMPLOYMENT. THE CIRCUIT HAS CRITICIZED THE USE OF OBSERVATIONS AT HEARINGS MADE BY THE ALJ RESPECTING PAIN, SAYING THAT THEY ARE OF LIMITED WEIGHT ("SIT & SQUIRM INDEX").

2. EXAMINE THE RECORD TO ASCERTAIN WHETHER THE ALJ PERFORMED HIS "HEIGHTENED DUTY" TO AFFIRMATIVELY DEVELOP THE RECORD WHERE THE CLAIMANT APPEARED AT THE ADMINISTRATIVE HEARING PRO SE.

OUR CIRCUIT HAS HELD THAT AN ALJ, UNLIKE A JUDGE AT TRIAL, MUST RECOGNIZE THE ESSENTIALLY NON-ADVERSARIAL NATURE OF A BENEFITS PROCEEDING AND THAT, IN THE CASE OF A PRO SE CLAIMANT, THE ALJ IS UNDER A HEIGHTENED DUTY "TO SCRUPULOUSLY AND

CONSCIENTIOUSLY PROBE INTO, INQUIRE OF, AND EXPLORE ALL THE RELEVANT FACTS." INDEED, THE CIRCUIT HAS HELD, IN A CASE WHERE A CLAIMANT WAS HANDICAPPED BY LACK OF COUNSEL, ILL HEALTH AND AN INABILITY TO SPEAK ENGLISH, THAT THE COURT ITSELF HAD A DUTY TO MAKE A "SEARCHING INVESTIGATION OF THE RECORD."

3. CHECK TO SEE IF THE MEDICAL-VOCATIONAL GUIDELINES, COMMONLY KNOWN AS THE "GRID" WERE APPLIED PROPERLY. GENERALLY, THE GRID CAN BE APPLIED ONLY TO FIND THAT SUBSTANTIAL GAINFUL ACTIVITY EXISTS IN THE NATIONAL ECONOMY FOR A CLAIMANT WHEN THE CLAIMANT'S ABILITY TO PERFORM A CERTAIN CATEGORY OF WORK IS VIRTUALLY UNRESTRICTED. WE HAD A CASE, FOR EXAMPLE, WHERE THERE WAS SUBSTANTIAL EVIDENCE OF MODERATE ENVIRONMENTAL RESTRICTIONS UPON A CLAIMANT SO THAT HE WAS UNABLE TO PERFORM A FULL RANGE OF SEDENTARY JOBS. THE GRID WAS FOUND TO BE INAPPLICABLE AND WE TURNED TO VOCATIONAL EXPERT TESTIMONY TO IDENTIFY SPECIFIC JOBS THE PLAINTIFF COULD PERFORM. IN THIS CASE, THE EXPERT IDENTIFIED THE JOB OF DESK GUARD, BUT A FINDING WAS MADE THAT THE NUMBERS OF JOBS IN THIS CATEGORY DID NOT CONSTITUTE THE "SIGNIFICANT NUMBER' OF JOBS REQUIRED BY THE STATUTE. IT IS ALSO NECESARY TO BE ALERT TO THE ALJ'S FINDINGS REGARDING TRANSFERABILITY OF SKILLS IN THE CONTEXT OF THE GRID.

4. BEAR IN MIND THAT THE EXPERT OPINION OF A TREATING PHYSICIAN ON THE SUBJECT OF DISABILITY IS BINDING ON THE SECRETARY IN THE ABSENCE OF EVIDENCE TO THE CONTRARY. THE PROPER APPLICATION OF THIS RULE MUST BE DISCERNIBLE FROM THE RECORD. THIS IS AN IMPORTANT POINT FOR CLAIMANTS' ATTORNEYS IN MAKING THEIR SUBMISSIONS TO THE COURT. WE FREQUENTLY FIND, HOWEVER, THAT TREATING PHYSICIANS OMIT THE RESIDUAL FUNCTIONAL CAPACITY EVALUATION, AND THOSE WHO REPRESENT CLAIMANTS SHOULD SEE THAT THE TREATING PHYSICIAN PRESENTS SUCH AN EVALUATION.

5. BE MINDFUL OF TIME CONSTRAINTS IN FILING APPLICATIONS FOR REVIEW WITH THE DISTRICT COURT. THE STATUTE PROVIDES THAT A CIVIL ACTION TO REVIEW THE SECRETARY'S DETERMINATION MUST BE COMMENCED WITHIN 60 DAYS AFTER THE MAILING OF THE DECISION OR WITHIN SUCH FURTHER TIME AS THE SECRETARY MAY ALLOW. THE SECRETARY HAS PROVIDED BY REGULATION THAT THE 60 DAY PERIOD SHALL RUN FROM THE TIME NOTICE IS RECEIVED, AND THE RECEIPT IS PRESUMED TO OCCUR 5 DAYS AFTER THE DATE OF NOTICE, "UNLESS THERE IS A REASONABLE SHOWING TO THE CONTRARY." ALSO, UPON A SHOWING OF GOOD CAUSE, THE APPEALS COUNCIL MAY EXTEND THE 60 DAY PERIOD TO FILE IN THE DISTRICT COURT. (NOTE NELLIS V. SCHWEIKER)

6. FINDINGS OF DISABILITY BY OTHER AGENCIES AND INSURANCE CARRIERS SHOULD BE MADE A PART OF THE RECORD. FINDINGS OF DISABILITY FOR PURPOSES OF WORKERS' COMPENSATION, STATE DISABILITY BENEFITS, UNEMPLOYMENT INSURANCE AND PERSONAL

DISABILITY INSURANCE POLICIES ARE NOT BINDING ON THE SECRETARY DUE TO DIFFERING STANDARDS, BUT THEY ARE ENTITLED TO SOME CONSIDERATION AND WEIGHT.

7. INQUIRE INTO THE CREDENTIALS OF PHYSICIANS AND EXPERTS RETAINED BY THE SECRETARY. OUR MAGISTRATE IN SYRACUSE FOUND A GROUP OF MEDICAL CONSULTANTS WHO WERE NOT LICENSED PHYSICIANS EXAMINING CLAIMANTS AND FURNISHING MEDICAL REPORTS TO THE SECRETARY. THESE PEOPLE WERE EITHER UNLICENSED RESIDENTS OR INTERNS ENGAGED IN "MOONLIGHTING." THE REGULATIONS REFER TO LICENSED PHYSICIANS AS ACCEPTABLE SOURCES OF MEDICAL EVIDENCE.

8. IT MUST BE ESTABLISHED THAT DISABILITY OCCURRED PRIOR TO THE EXPIRATION OF INSURED STATUS. AN IMPAIRMENT WHICH REACHED DISABLING SEVERITY AFTER THE EXPIRATION OF A CLAIMANT'S INSURED STATUS, OR WHICH WAS EXACERBATED AFTER SUCH EXPIRATION, CANNOT FORM THE BASIS FOR A PERIOD OF DISABILITY OR DISABILITY INSURANCE BENEFITS. THIS IS SO EVEN THOUGH THE IMPAIRMENT MAY HAVE EXISTED BEFORE THE INSURED STATUS EXPIRED.

9. BE AWARE OF THE DIFFERENT ANALYSIS APPLIED TO APPLICANTS FOR WIDOW'S DISABILITY BENEFITS AS COMPARED TO APPLICANTS FOR WAGE EARNER'S DISABILITY BENEFITS. THE WIDOW MUST SHOW 1) THE EXISTENCE OF A DETERMINABLE PHYSICAL OR MENTAL IMPAIRMENT AND 2) THAT THE IMPAIRMENT PRECLUDES ENGAGEMENT IN ANY GAINFUL ACTIVITY, NOT IN ANY SUBSTANTIAL GAINFUL ACTIVITY. THUS, ONE SEEKING BENEFITS AS A WIDOW MUST ESTABLISH DISABILITY ON THE BASIS OF MENTAL OR PHYSICAL IMPAIRMENTS ALONE AND MAY NOT RELY ON NON-MEDICAL FACTORS SUCH AS AGE, EDUCATION OR WORK EXPERIENCE.

10. REMAND

(A) THE STATUTE PERMITS THE SECRETARY TO MOVE FOR REMAND BEFORE THE FILING OF THE ANSWER, FOR GOOD CAUSE SHOWN. THE REASONS FOR SUCH A REQUEST SHOULD BE EXAMINED CAREFULLY, AND THE MOTIONS SHOULD BE OPPOSED IF WARRANTED. IN A RECENT CASE IN OUR COURT, A REMAND FOR THE TAKING OF CURRENT MEDICAL EVIDENCE BEFORE THE ANSWER WAS FILED WAS DENIED WHERE THERE WAS NO EXPLANATION OF WHY SUCH EVIDENCE WOULD BE NECESSARY.

(B) CASE LAW CONTINUES TO HOLD THAT THE DISTRICT COURT MAY REMAND FOR FURTHER DEVELOPMENT OF THE RECORD AFTER THE MOTION FOR JUDGMENT ON THE PLEADINGS, WHERE THE SECRETARY HAS MISAPPLIED THE LAW OR FAILED TO PROVIDE A FAIR HEARING. HOWEVER, THE COURT NOW MUST BE GUIDED BY THE 1981 AMENDMENT TO THE STATUTE, WHICH PERMITS A REMAND FOR ADDITIONAL EVIDENCE ONLY 1) UPON A SHOWING OF NEW MATERIAL EVIDENCE AND 2) THAT THERE IS GOOD CAUSE FOR THE FAILURE TO INCORPORATE SUCH EVIDENCE INTO THE RECORD IN THE PRIOR PROCEEDING. OTHERWISE, THE COURT MUST DIRECT

A REMAND ONLY FOR THE CALCULATION OF BENEFITS. CARROLL V. SECRETARY, 705 F.2D 638 (2D CIR. 1983); KING V. SCHWEIKER, NDNY.

V. SOME IMPORTANT ISSUES YET TO BE RESOLVED

1. BURDEN OF PROOF IN A TERMINATION CASE.

(A) THE QUESTION OF BURDEN OF PROOF IN A TERMINATION CASE HAS YET TO BE ANSWERED DIRECTLY BY OUR CIRCUIT COURT OF APPEALS. WHILE THE SUPREME COURT HAS REFERRED TO THE CONTINUING BURDEN OF DEMONSTRATING DISABILITY, IT DID SO IN THE CONTEXT OF A CASE INVOLVING THE PROPER TIMING OF A TERMINATION HEARING.

(B) IN A NON-TERMINATION CASE THE SECOND CIRCUIT TOOK NOTE OF THE SUPREME COURT'S DICTA BUT REFERRED TO THE FOLLOWING LANGUAGE IN THE SECRETARY'S BRIEF: "... IT IS ALTOGETHER PROPER TO REQUIRE THE SECRETARY TO PRODUCE SUBSTANTIAL EVIDENCE OF A CHANGE IN CLAIMANT'S CONDITION BEFORE THE COURTS ALLOW THE SECRETARY TO REVERSE HIS PRIOR FINDING OF DISABILITY CONTINUING FOR AN UNSPECIFIED TIME." SCHAUER V. SCHWEIKER. A DISTRICT COURT JUDGE IN THE WESTERN DISTRICT OF N.Y. HAS HELD THAT "THE SECRETARY HAS THE BURDEN OF COMING FORTH WITH RELEVANT EVIDENCE OF CHANGES IN THE CLAIMANT'S CONDITION - NOT MERELY THE RE-EVALUATION OF STALE EVIDENCE ALREADY IN THE CLAIMANT'S FILE." NORTHRUP V. SCHWEIKER.

2. CLASS ACTIONS.

(A) IN LOPEZ V. HECKLER, THE U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ENJOINED THE SECRETARY FROM FAILING TO FOLLOW TWO NINTH CIRCUIT DECISIONS REQUIRING EVIDENCE OF IMPROVEMENTS IN MEDICAL CONDITION BEFORE TERMINATION OF PAYMENTS. THE SECRETARY ARGUED THAT SHE CAN TERMINATE UPON EVIDENCE THAT A PRIOR RECIPIENT IS NOT PRESENTLY DISABLED AND THAT SHE NEED NOT PRODUCE SPECIFIC EVIDENCE OF IMPROVEMENT. THE CLASS ACTION IN THE DISTRICT COURT WAS STYLED AS A CONSTITUTIONAL CHALLENGE TO THE SECRETARY'S "NON-ACQUIESCENCE" WITH SETTLED LAW IN THE 9TH CIRCUIT. [SEE "DISABILITY BENEFIT CASES FLOOD COURTS" THE NATIONAL LAW JOURNAL, OCT. 17, 1983]. THE DISTRICT COURT INJUNCTION REQUIRED THAT MEMBERS OF THE CLASS BE NOTIFIED AND THAT THEIR BENEFITS BE REINSTATED IMMEDIATELY UPON APPLICATION. IT FURTHER PROVIDED THAT THE SECRETARY THEN MAY CONDUCT HEARINGS TO ESTABLISH DISABILITY IN ACCORDANCE WITH THE NINTH CIRCUIT STANDARDS. THE 9TH CIRCUIT REFUSED TO STAY THE INJUNCTION PENDING APPEAL TO THAT COURT. IN AN UNUSUAL STEP, JUSTICE REHNQUIST ORDERED A STAY OF THE PAYMENT OF BENEFITS DIRECTED BY THE INJUNCTION. HIS IN CHAMBERS OPINION IS FOUND IN THE SEPT. 20, 1983 ISSUE OF U.S. LAW WEEK. HIS REASONING IS INTERESTING, DEALING WITH THE SCOPE OF JUDICIAL POWER VIS-A-VIS AN

ADMINISTRATIVE AGENCY. THE APPEAL CONTINUES TO PEND IN THE 9TH CIRCUIT.

(B) IN HIS CHAMBERS OPINION, JUSTICE REHNQUIST REFERRED TO HECKLER V. DAY, A SECOND CIRCUIT CASE IN WHICH CERT. WAS GRANTED. THAT CASE ALSO INVOLVED A DIRECTION TO PAY INTERIM BENEFITS TO A CLASS, AND A CLAIM THAT SUCH AN ORDER WAS BEYOND DISTRICT COURT AUTHORITY. OUR CIRCUIT HERE WAS CONCERNED WITH THE LONG ADMINISTRATIVE DELAYS IN PROCESSING SSI CLAIMS AND APPROVED THE DISTRICT COURT'S ESTABLISHMENT OF A TIMETABLE FOR PROCESSING SUCH CLAIMS. THE SUPREME COURT HAS YET TO DECIDE THIS CASE.

(C) JUST LAST WEEK, THE NEWSPAPERS REPORTED THAT JUDGE ELFVIN OF THE WESTERN DIST. OF N.Y., IN A CLASS ACTION, REQUIRED THE SECRETARY TO REOPEN THE CLAIMS OF 160,000 MENTALLY IMPAIRED N.Y. RESIDENTS WHOSE DISABILITY BENEFITS WERE TERMINATED. APPARENTLY, THE GOV'T HAD BEEN IMPOSING CUT-OFFS OVER A SHORT PERIOD OF TIME WITHOUT DETERMINING WHETHER THE RECIPIENT WAS CAPABLE OF RESPONDING. VARIOUS FORMS OF PERSONAL CONTACT WERE DIRECTED.

(D) MOST RECENT DEVELOPMENT - N.Y. ATTY. GEN. BRINGS CLASS ACTION ON BEHALF OF HEART DISEASE RECIPIENTS WHO LOST BENEIFTS.

3. PRIORITIES IN FEDERAL COURT

(A) WHAT CASES SHOULD HAVE PRIORITY?

(B) VOLUME PROBLEMS; DIVERSITY; § 1983; HABEAS CORPUS; CRIMINAL; SOCIAL SECURITY.