

Attachment C - Manual of Second Circuit Disability Decisions

11/11/11

**MANUAL
OF SECOND CIRCUIT
DISABILITY DECISIONS**



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TABLE OF CONTENTS

Preface	ii
Instruction	iii
Credibility	1
Credibility -- Demeanor; ALJ Observations	3
Cross Examination and Testimony of Witnesses and Authors of Adverse Reports	4
Duration of Impairments	6
Duty to Develop Record	7
Findings Requirement -- What Must be in a Disability Decision	10
Impairments -- Particular Impairments	12
Medical Evidence	15
Onset of Disability	19
Pain	21
Post Hearing Development	25
Residual Functional Capacity Assessment	26
Sedentary Work	28
Severe / Non-Severe Impairments	30
Shifting Burden of Proof	31
Vocational Considerations -- Medical-Vocational Guidelines (Grid)	32
Vocational Considerations -- Expert Testimony	35
Vocational Considerations -- Employability	37
Weight to be Accorded Other Agency Findings on Disability	38

PREFACE

This Manual is being **issued as** part of the settlement agreement in Stieberser v. Sullivan. It excerpts principal holdings of the Second Circuit Court of Appeals as of June 18, 1992 concerning standards and procedures for determining disability issued by the Court. The Manual does **.not** contain all holdings of the Second Circuit. Following this preface the Manual includes an instruction issued as part of the Stieberaer settlement that explains how holdings are to be applied and describes the ways in which SSA will inform personnel of Second Circuit decisions **issued** after June 18, 1992. A copy of the full settlement in Stieberaer has been distributed to all offices that adjudicate or review the adjudication of claims filed by New York State residents.

Many of the quotations excerpted in this Manual discuss how claims should be handled at the Administrative Law Judge (**ALJ**) or Appeals Council level and thus may not have direct applicability to prior decisionmaking levels (**e.g.**, cases dealing with **cross-examination**). Those quotations are nevertheless available in this Manual for decisionmakers at prior levels both to provide information on how claims are developed and decided in the Office of Hearings and Appeals and because, in some instances, the specific holdings of how **ALJs** should handle cases may help illuminate a more general principle that also applies at the DDS level.

Accordingly, cases or sections of this Manual which have more impact on decisionmaking at the Office of Hearings and Appeals level as opposed to the Office of Disability Determinations **level** have been asterisked.

APPLICATION OF SECOND CIRCUIT DECISIONS TO **SOCIAL SECURITY**
ACT DISABILITY BENEFIT CLAIMS OF **NEW YORK RESIDENTS**

A. General Rule

Effective immediately, all persons who decide Social Security Act disability benefit claims of New York State residents or who review such decisions shall follow and apply the holdings of the United States Court of Appeals for the Second Circuit, except when written instructions to the contrary are issued pursuant to paragraphs D and E. This instruction applies to all Second Circuit disability decisions except those that are expressly designated not for publication.

B. How to Apply Holdings

Holdings of the Second Circuit Court of Appeals must be applied at all levels of administrative review to all claims for title II and title XVI disability benefits filed by New York State residents, unless written instructions to the contrary are issued pursuant to paragraphs D and E. You must apply those holdings in good faith and to the best of your ability and understanding whether or not you view them as correct or sound.

In general, a holding in a decision is a legal principle that is the basis of the court's decision on any issue in the case. There may be more than one holding in a decision. A holding must be applied whenever the legal principle is relevant.

Not all of the discussion in a decision is a holding. For example, the factual discussion in a decision is not a holding although it can help you understand the holding by placing it in context. Also, in their decisions courts may make observations or other remarks that are helpful in understanding the court's reasoning. You are required to apply the holdings, not those observations or other comments of the court.

Of course, you should continue to make sure that the decision whether a claimant is disabled is an individualized decision based on the evidence regarding that claimant.

C. Availability of Decisions and Instructions

To help ensure that decisionmakers and reviewers of decisions apply Second Circuit holdings, SSA will do the following:

1. SSA will provide each office of decisionmakers and reviewers of decisions with a copy of the settlement approved by the Court in Stieberger v. Sullivan.

2. **SSA** will provide all decisionmakers and reviewers of decisions with a Manual of Second Circuit disability decisions ("**Manual**") containing excerpts of the principal holdings of the Second Circuit issued before June 18, 1992, the date that the settlement in Stieberger was approved by the Court.

3. **SSA** will provide each office of decisionmakers and reviewers of decisions with a copy of each Second Circuit disability decision issued after June 17, 1992 promptly after the decision is issued by the Court. Each such office shall maintain a volume containing copies of these decisions. This volume shall be readily accessible to decisionmakers and reviewers of decisions.

4. SSA will issue instructions to ODD decisionmakers and reviewers of decisions about applying Second Circuit decisions rendered after June 17, 1992. These instructions must be added to the Manual as supplements. SSA may issue instructions to **OHA** adjudicators.

You should familiarize yourself with the Manual, with **SSA's** instructions on Second Circuit holdings, and with Second Circuit decisions as they are issued.

While SSA will take the steps described above to help you apply Second Circuit holdings, you must apply the holdings even in the absence of an instruction, and even if they are not included in the Manual.

Example: You have become aware of a Second Circuit disability decision (for example, a claimant draws it to your attention or you receive notification of it from **SSA**), but you have not yet received an instruction from SSA on how to apply the decision and it is not in the Manual. You must apply the holding(s) of that decision to all claims where it is relevant.

D. Instructions Regarding When Decisions Become Effective

1. You must apply the holdings in a decision once the decision becomes effective. A decision of the Second Circuit generally becomes effective 20 days after the decision is issued by the Court, unless a specific written instruction is issued that requires the decision to be applied earlier or later. If you have not received instructions about a particular Second Circuit decision issued after the date of this instruction, consult with your supervisor for further guidance about whether the decision has become effective. (If you are an administrative law judge, **you** may

inquire with the Regional **Office** concerning the status of the **decision.**)

2. As long as a Second Circuit decision is pending further court review, **SSA may** instruct decisionmakers and reviewers of decisions not to apply some or all holdings stated in that Second Circuit decision. In such instances SSA will issue specific instructions explaining which holdings are not to be applied and identifying the issues addressed by those holdings. When such instructions are issued, decisionmaking and reviewing offices will maintain a list of disability claims decisions that may be affected because the Second Circuit holding is not being applied. Any notice sent to claimants on the list, denying benefits in whole or in part, will include the following language:

If you do **not** agree with this decision, you can appeal. You must ask for an appeal within **60 days**.

You should know that we decided your claim without applying all of what the court said about the law in is a recent court ruling that we do **not** consider final because it may be reviewed further by the courts. If it becomes final, we may contact you again.

If you disagree with our decision in your case, do not wait for us to contact you. You should appeal within 60 days of the date you receive this notice. If you do not appeal within 60 days, you may lose benefits.

3. When no further judicial review of a Second Circuit decision will occur, SSA will promptly rescind any instructions issued under this paragraph D, and will advise decisionmakers and reviewers of decisions about the final decision in the case. SSA will also explain what action is to be taken, including any reopenings, with respect to claimants whose cases may have been affected by the instruction not to apply the Second Circuit decision pending further court review.

E. Issuance and Rescission of Acquiescence Rulings

This instruction on application of Second Circuit decisions to disability benefit claims does not prevent SSA from issuing or rescinding acquiescence rulings, or relitigating issues under 20 C.F.R. 404.985 and 416.1485.

F. Questions Concerning this Instruction and Second Circuit Decisions

This instruction is issued pursuant to the settlement agreement in Stieberger v. Sullivan, 84 Civ. 1302 (S.D.N.Y.). A copy of the

complete agreement is available in your office. Any questions about applying Second Circuit decisions that you cannot resolve yourself may be directed to your **supervisors and**, if more guidance is needed, through supervisory channels to the Litigation Staff in SSA Central **Office** in Baltimore, Maryland. In addition, a team of SSA personnel will visit the New York ODD one month after you receive this instruction and quarterly thereafter for 3 years to discuss any questions decisionmakers and reviewers of decisions have about applying Second Circuit disability decisions,

g. Binding Effect of This Instruction

This instruction is binding on all personnel, including state employees, **ALJs**, Appeals Council Administrative Appeals Judges, **quality** assurance staff, **and all other personnel** who process, render decisions on, or review claims of New York residents for disability benefits under the Social Security Act.

Because this instruction arises out of a lawsuit, it **does** not apply to claims of any persons who do not reside in the State of New York. However, this limitation does not lessen the extent to which court decisions are to be applied to claims of persons who reside in any other state. This limitation also should not be deemed to suggest that such decisions are not given or should not be given proper consideration in any other state.

CREDIBILITY

1. Evaluation of credibility in general

Marcus v. Califano, 615 F.2d 23, 27 (2d Cir. 1979), CCH 16,657

"The Secretary is not obliged to accept without question the credibility of such subjective evidence . . . the Administrative Law Judge has discretion to evaluate the credibility of a claimant and to arrive at an independent judgment, in light of medical findings and other evidence, regarding the true extent of pain alleged by the claimant."

2. Specific findings on credibility required

* Williams on behalf of Williams v. Bowen, 859 F.2d 255 (2d Cir. 1988).

* "As a fact finder the ALJ is free to accept or reject testimony like that given by Joyce and Loretta Williams. A finding that the witness is not credible must nevertheless be set forth with sufficient specificity to permit intelligible plenary review of the record. Carroll v. Secretary of Health and Human Servs., 705 F.2d 638 (2d Cir. 1983). The failure to make credibility findings regarding the Williams' critical testimony fatally undermines the Secretary's argument that there is substantial evidence adequate to support his conclusion that claimant is not under a disability. See Ferraris v. Heckler, 728 F.2d 582, 587 (2d Cir. 1984).

Dumas v. Schweiker, 712 F.2d 1545 (2d Cir. 1983), 2 S.S.R.S. 362, CCH 14,650

"The Secretary is entitled to rely not only on what the record says, but also on what it does not say. Rutherford v. Schweiker, 685 F.2d at 63; Berry v. Schweiker, 675 F.2d 464, 468 (2d Cir. 1982) (per curiam). The Secretary is entitled to rely on the medical record and his evaluation of claimant's credibility in determining whether the claimant suffers from disabling pain. Rutherford v. Schweiker, 685 F.2d at 63; Marcus v. Califano, 615 F.2d 23, 27 (2d Cir. 1979). . . . Miles v. Harris, 645 F.2d at 124."

3. Assessing credibility of claimant with a good work record

* Rivera v. Schweiker, 717 F.2d 719 (2d Cir. 1983), 3 S.S.R.S. 21, CCH 14,771

* "Second, any evidence of a desire by Rivera to work would merely emphasize the positive value of his 32-year employment history. A claimant with a good work record is entitled to substantial credibility when claiming an inability to work because of a disability. Sinsletary v. Secretary of Health, Education and Welfare, 623 F.2d 217, 219 (2d Cir. 1980)."

4. Duty of **ALJ** to consider possible bias of evidence source

Cullinane v. Sec. of Health and Human Services, 728 **F.2d** 137 (2d Cir. 1984), 4 S.S.R.S. 164, CCH 15,137

"It can hardly be questioned that a report submitted by a witness whose self-interest may well have dictated its contents cannot and should not be permitted to constitute substantial evidence. Echevarria v. Secretary of Health and Human Services, *supra.*" [Claimant was suing treating physician for malpractice].

References:

Social Security Rulings: SSR 88-13, Evaluation Of Pain and Other Symptoms

Social Security Regulations: 20 CFR §§ 404.1529 and 416.929

* CREDIBILITY -- Demeanor; ALJ Observations

1. Observations of claimant's demeanor entitled to limited weight

De Leon v. Sec. of Health and Human Services, 734 F.2d 930, (2d Cir. 1984), 5 S.S.R.S. 232, CCH 15,100

"Finally, insofar as the ALJ relied on factors such as De Leon's demeanor or appearance, such factors really do not contribute toward meeting the substantial evidence burden in cases of this nature. See Aubeuf v. Schweiker, 649 F.2d 107, 113 (2d Cir. 1981). As we said in Gold v. Secretary of Health, Education and Welfare, 463 F.2d 38, 41 n. 6 (2d Cir. 1972), '[t]o receive benefits . . . one need not be completely helpless or unable to function....' The applicant for disability need not be 'a total 'basket case,' Timmerman v. Weinberoer, 510 F.2d 439, 442 (8th Cir. 1975). However De Leon may have appeared at his hearing, we cannot ignore the overwhelming evidence that he has severe, disabling psychological and other problems."

Varela v. Sec. of Health and Human Services, 711 F.2d 482 (2d Cir. 1983), 2 S.S.R.S. 289, CCH 14,649

"The ALJ's finding that appellant is not disabled by her psychiatric condition was based on her demeanor at the hearing and her failure to testify as to any continuing psychiatric problem. Evidently, the ALJ disregarded the medical report of Dr. Garcia, and the concern of Dr. Braaf, in favor of his own observations during the hearing.... Although we do not reject the possibility that on the basis of his own direct observations an ALJ may disregard an examining psychiatrist's diagnosis, nevertheless, before doing so the ALJ should make a more complete and revealing record than has been established here."

Carroll v. Sec. of Health and Human Services, 705 F.2d 638 (2d Cir. 1983), 2 S.S.R.S. 10, CCH 14,549

"The ALJ's observation that Carroll sat through the hearing without apparent pain, being that of a lay person, is entitled to but limited weight, see Freeman v. Schweiker, 681 F.2d 727, 731 (11th Cir. 1982), and since only a 40-minute period was involved it is not inconsistent with the medical evidence and Carroll's own testimony."

Rivera v. Schweiker, 717 F.2d 719 (2d Cir. 1983)

"In assessing Rivera's allegations of pain, the ALJ placed principal, if not sole, reliance upon his observations at the hearing. The ALJ's observations, under these circumstances, are entitled to limited weight. See Carroll v. Secretary of Health and Human Services, 705 F.2d 638, 643 (2d Cir. 1983)."

* CROSS-EXAMINATION AND TESTIMONY
OF WITNESSES AND AUTHORS OF ADVERSE REPORTS

1. Cross examination of medical advisor [medical expert]

McLaughlin v. Sec. of the HEW, 612 F.2d 701 (2d Cir. 1980)

"While we agree with this conclusion [that the agency decision is supported by substantial evidence] we reverse because the ALJ imposed undue limitations on cross-examination of the 'medical advisor' with respect to a highly material point."

2. Cross **examination** of author of adverse report and presentation of rebuttal evidence

Townley v. Heckler, 748 F.2d 109, 113 (2d Cir. 1984), 7 S.S.R.S. 236, 240, CCH 15,662

"A disability benefits claimant has a right to cross examine the author of an adverse report and to present rebuttal evidence. Treadwell v. Schweiker, 698 F.2d 137, 143 (2d Cir. 1983); Allison v. Heckler, 711 F.2d 145, 147 (10th Cir. 1983); Gullo v. Califano, 609 F.2d 649 (2d Cir. 1979); Lonzollo v. Weinberser, 534 F.2d 712, 714 (7th Cir. 1976). Appellant's attorney, however, was not informed of the need for expert vocational evidence until after the report was filed with the AW. Further, appellant was denied an opportunity to examine that vocational report, and, despite claimant's request, no additional hearing was held. Although the ALJ asked appellant's attorney to submit objections and additions to the interrogatories posed to the vocational expert, there is no evidence that the attorney's suggestions were ever forwarded. Moreover, appellant was denied his due process rights to cross-examine the expert and to present rebuttal evidence."

3. Testimony from lay witness on **claimant's** pain and inability to function

Lopez v. Secretary of HHS, 728 F.2d 148, 150 (2d Cir. 1984)

"Moreover, it was simply unfair to preclude the testimony of a sole corroborative witness as cumulative by assuring appellant that her testimony would be accepted and then rejecting it as incredible. . . [T]he [lay] witness was competent to testify as to her observations of the claimant's evident pain, . . . and her hearing of the claimant's contemporaneous state of mind declarations concerning pain. . . . The ALJ should therefore have allowed appellant's witness to testify. Appellant was unrepresented and speaks little English. The prospective witness, a young woman, apparently has regular contact with appellant, probably speaks English, and could have provided effective testimony about appellant's inability to function on a daily basis."

4. Duty to **instruct pro se** claimant of **right to subpoena** and **cross-examine** a treating physician

Cullinane v. Secretary of HHS, 728 F.2d 137 (2d Cir. 1984)

"[The ALJ] failed, however, to pursue [the pro se claimant's] assertion that [the treating physician's] report was unreliable or to question [the treating physician] concerning the contradiction between the November 6th [1980] prognosis and the two reports filed in October, 1980. In addition the ALJ neglected to instruct the pro se claimant that she had the right to subpoena and cross-examine a treating physician whose documentary evidence had been called into question. (Claimant was suing the treating physician for malpractice.) As a result, the evidence concerning the 'quality and trustworthiness' of the challenged oral surgeon was never sufficiently developed. Fernandez v. Schweiker, 650 F.2d 5, 8 (2d Cir. 1981)."

References:

Richardson v. Perales, 402 U.S. 389 (1971) SSR 71-53c.

DURATION OF IMPAIRMENTS

Moore v. Sec. of the United States Department of Health and Human Services, 778 F.2d 127 (2d Cir. 1985), 12 S.S.R.S. 4, 7, CCH 16,516

"The thrust of the Secretary's position on appeal is simply that Moore has failed to show that his condition in the twelve months prior to April of 1982 continuously precluded him from engaging in his past relevant work as a porter The fact that Moore responded at least somewhat to treatment simply is not persuasive evidence to the contrary: following closely on the heels of each advance was a relapse into a worsening condition. Although Moore's various discharge summaries noted improvement in his condition, none offered cause for vocational optimism. Cf. Morrone v. Secretary of Health, Education and Welfare, 372 F.Supp. 794, 800 (E.D.Pa. 1974)."

DUTY TO DEVELOP RECORD

1. Affirmative duty to assist pro se claimant

- * Cullinane v. Sec. of Health and Human Services, 728 F.2d 137 (2d Cir. 1984), 4 S.S.R.S. 164, CCH 15,137

"An ALJ has an affirmative duty to **assist** a pro se claimant and 'to scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts.' Echevarria v. Secretary of Health and Human Services, 685 F.2d 751, 755 (2d Cir. 1982), citing Hankerson v. Harris, 636 F.2d 893, 895 (2d Cir. 1980). A reviewing court is charged with the responsibility of ensuring the evidence is both 'developed and considered.'"

2. Lay representation

- * Echevarria v. Secretary, 685 F.2d 751 (2d Cir. 1982)

"[A lay person's] nominal representation . . . did not suspend the ALJ's special duty to pro se claimants, [lay person] only intended to testify and not act as a representative. . . . Notwithstanding [a lay person's] nominal representation, the ALJ was under a special duty to protect Echevarria's rights by ensuring that the hearing be 'fair and adequate.'"

3. Right to counsel

- Robinson v. Secretary, 733 F.2d 255 (2d Cir. 1984), 5 S.S.R.S. 96.

"The claimant is entitled to be represented by counsel at the hearing and the ALJ must ensure that the claimant is aware of this right. See Cutler v. Weinbercer, 516 F.2d 1282, 1286 (2d Cir. 1975).

4. Failure to develop the record fully results in lack of fair hearing

- * Robinson v. Secretary, 733 F.2d 255 (2d Cir. 1984), 5 S.S.R.S. 96.

"In sum, the failure of the ALJ to develop the record fully and to afford [the claimant] . . . who was unrepresented by counsel, an adequate opportunity to do so, denied [the claimant] . . . a fair hearing. Accordingly, we reverse the order of the district court with directions to remand the case to the Secretary for further proceedings consistent with this **opinion.**"

5. Duty to probe frequency and severity of episodic impairments (e.g., asthma) for pro se claimant

- Cruz v. Sullivan, 912 F.2d 8, 11-12 (2d Cir. 1990)

"The ALJ failed to probe into the frequency and severity of [Cruz's] attacks. . . . The ALJ did not explore what circumstances had triggered Cruz's attacks, how often he had been treated or when he had last visited the emergency room. Instead, the ALJ only asked at which hospital Cruz had been treated, and yet did not seek to obtain those hospital records. Further the ALJ never inquired as to whether the nature of Cruz's asthma had changed over the years. Although we do not at all suggest that the ALJ was indifferent to Cruz's

condition, it is our view that he did not adequately fulfill his 'affirmative obligation to assist this pro se claimant in developing [his] case."

6. ALJ duty to notify pro se claimant of opportunity to contact treating physician for a "more detailed statement"

* Hankerson v. Harris, 635 F.2d 893 (2d Cir. 1980)

"The ALJ also erred in failing to advise plaintiff that he should obtain a more detailed statement from his treating physician. ...

Before the ALJ can reject an opinion of a pro se claimant's treating physician because it is conclusory, basic principles of fairness require that he inform the claimant of his proposed action and give him an opportunity to obtain a more detailed statement"

* Cruz v. Sullivan, 912 F.2d 8, 12 (2d Cir. 1990)

"Although the ALJ sent a letter to one of several treating physicians four days after the hearing, requesting a more detailed explanation of the causes of Cruz's inability to work, he clearly failed to advise Cruz, a pro se claimant, that he should obtain a more detailed statement from [the treating physician]. Had Cruz been apprised of the ALJ's skepticism, he, unlike the ALJ, may have been persistent about obtaining his medical records and a detailed statement from [the treating physician],

7. Duty to inquire about a prior period of disability

Mimms v. Heckler, 750 F.2d 180, 185 (2d Cir. 1984)

"[W]e find that [the ALJ] failed to adequately develop the record so as to provide Mimms with a full and fair hearing. Specifically, despite the fact that the claimant testified that he had been determined disabled in June of 1977 and had received disability benefits until October 1980, when he voluntarily attempted to resume gainful employment, the ALJ failed to ask one question of the claimant about his prior disability and its relationship to the disability claim he was now pursuing before the ALJ. The existence of a prior established disability is highly relevant when the nature of that disability appears to be the very same cause of the alleged disability then under examination.

8. Duty to obtain documents identified by pro se claimant

Robinson v. Secretary, 733 F.2d 255 (2d Cir. 1984)

"[W]e conclude that Robinson was not afforded a fair hearing by reason of the ALJ's failure to develop the record. The record is replete with instances where the claimant referred to missing documents and the ALJ failed to follow up the claimant's inquiries."

9. Duty to pro se claimant to inquire about symptoms

Echevarria v. Secretary, 685 F.2d 751 (2d Cir. 1982)

"The ALJ failed adequately to explore the nature and extent of Echevarria's subjective symptoms. A claimant's testimony about pain and suffering 'is not only probative on the issue of disability, but

"may serve as the basis for establishing disability, even when such pain is unaccompanied by positive clinical findings or other 'objective' medical evidence. Hankerson, supra 636 F.2d at 895."

10. Duty to inquire about requirements and nature of pro se claimant's past relevant work

Donato v. Secretary of HHS, 721 F.2d 414, 419 (2d Cir. 1983)

"[B]efore deciding whether Mrs. Donato was physically capable of resuming her factory work, the ALJ, in fulfillment of his 'heightened duty' to explore for all relevant facts, Echevarria v. Secretary of HHS, 685 F.2d 751, 755 (2d Cir. 1982), should have inquired further into the nature and extent of the physical exertion required of her by her former job, the number of hours she worked each day, the length of time she stood for any one period, the distance she would be required to walk in commuting to work, and the like."

Echevarria v. Secretary, 685 F.2d 751, 756 (2d Cir. 1982)

"An inquiry also should have been conducted in to whether Echevarria's former employment was made possible only by special accommodation on the part of his employer that would not be matched by potential future employers. The record fails to disclose the reasons for Echevarria's increasingly frequent absences and his having been given easier tasks as his ailments became more serious."

11. Duty to claimant to seek clarification where medical document is illegible

Cutler v. Weinberser, 516 F.2d 1282 (2d Cir. 1975)

"Many of the medical records included in the case are illegible, either because of the poor quality of the reproduction, the handwriting of the physician, or both. Under the circumstances this court has no way to determine whether the Secretary fully understood some of the medical reports before him. Where the medical records are crucial to the plaintiff's claim, illegibility of important evidentiary material has been held to warrant a remand for clarification and supplementation"

References:

Social Security Regulations: 20 CFR §§ 404.944, 416.1444, 404.950, 404.951, 416.1450, and 416.1451

Social Security Act: Sections 205(b) and 1631(c)(1)

FINDINGS REQUIREMENT --
WHAT MUST BE IN A DISABILITY DECISION

1. Specific findings on credibility required

- * Williams on behalf of Williams v. Bowen, 859 F.2d 255 (2d Cir. 1988).

"[A]n ALJ is free to accept or reject testimony like that given by Joyce and Loretta Williams. A finding that the witness is not credible must nevertheless be set forth with sufficient specificity to permit intelligible plenary review of the record. Carroll v. Secretary of Health and Human Sews., 705 F.2d 638 (2d Cir. 1983). The failure to make credibility findings regarding the Williams' critical testimony fatally undermines the **Secretary's** argument that there is substantial evidence adequate to support his conclusion that claimant is not under a disability. See Ferraris v. Heckler, 728 F.2d 582, 587 (2d Cir. 1984).

2. Specific findings regarding testimony of pain required

Carroll v. Secretary of HHS, 705 F.2d 638 (2d Cir. 1983).

"His testimony regarding pain was also corroborated to some extent by the doctors who examined him, none of whom indicated any doubts about his credibility. Although the ALJ was not required to credit Carroll's testimony, he would normally be expected to note his rejection of it in whole or part. Yet he failed to indicate any such disbelief, resting his finding of capability of sedentary work on 'the medical evidence.'"

Donato v. Secretary of HHS, 721 F.2d 414 (2d Cir. 1983)

"[T]he ALJ must make credibility findings when there is conflicting evidence with respect to a material issue such as pain or other disability. If the claimant is found credible, his or her subjective pain may not be disregarded."

3. Specific findings on claimant's RFC required

Ferraris v. Secretary of Health and Human Services, 728 F.2d 582 (2d Cir. 1984), 4 S.S.R.S. 192, CCH 15,169

"[I]n making any determination as to a claimant's disability, the Secretary must explain what physical functions the claimant is capable of performing. . . [T]he crucial factors in any determination must be set forth with sufficient specificity to enable us to decide whether the determination is supported by substantial evidence."

White v. Sullivan, 910 F.2d 64 (2d Cir. 1990)

"Failure to specify the basis for a conclusion as to residual functional capacity is reason enough to vacate a decision of the Secretary."

4. specific findings required with respect to each impairment **alleged**

* Aponte v. Secretary of HHS, 728 F.2d 588, 593 (2d Cir. 1984)

"[W]here the ALJ has stated no findings or conclusions with respect to a claim of disabling impairment, especially one as to which the claimant arguably has demonstrated the symptoms described in the Secretary's regulations, we cannot determine whether the **ALJ's** conclusion was based on a correct application of the law and whether there is substantial evidence in the record to support.

5. Rationale regarding **listed** impairment required

Berry v. Schweiker, 675 F.2d 464, 469 (2d Cir. 1982)

"[I]n future cases in which the disability claim is premised upon one or more listed impairments of Appendix 1, the Secretary should set forth a sufficient rationale in support of his decision to find **or** not to find a listed **impairment.**"

6. Specific findings on transferability of skills required

Ferraris v. Heckler, 728 F.2d 582 (2d Cir. 1984)

"[P]ast experience as a supervisor may not necessarily indicate the possession of skills, or that they are transferrable. Specific findings on these issues are required."

7. Specific findings regarding whether claimant is literate and **able to communicate in English required**

Veaa v. Harris, 636 F.2d 900, 903-04 (2d Cir. 1981)

"Under the (Medical Vocational guidelines) the **ALJ's** findings of fact in this case are inadequate with respect to Vega's education. The **ALJ** did not determine, as required under the circumstances whether Vega was literate and whether she was able to communicate in English. See 20 C.F.R. §§404.1507(f), 416.907(f)(1980) [now 20 C.F.R. §§ 404.1564(b)(5); 416.964(b)(5)]. The circumstances are that appellant's less than four years of formal education took place in Puerto Rico and that, although she has lived in this country some thirty years, the hearing had to be conducted with a Spanish-English interpreter. . . . [A] brief exchange [in English, between claimant and **ALJ**], of course, is not a substitute for a determination on the question of ability to communicate in **English.**"

IMPAIRMENTS -- PARTICULAR IMPAIRMENTS

1. Listing of Impairments, in general

Williams on behalf of Williams v. Bowen, 859 **F.2d** 255, 260 (2d Cir. 1988)

"[T]he Secretary must be mindful that 'the Social Security Act is a remedial statute, to be broadly construed and liberally applied.'" Gold v. Secretary of Health, Educ. and Welfare, 463 **F.2d** 38, 41 (2d Cir. 1972). Moreover, "a claimant need not be an invalid to be found disabled under Title XVI of the Social Security Act." Murdaugh v. Secretary of Health and Human Servs., 837 **F.2d** 99, 102 (2d Cir. 1988) (citation omitted). The Secretary read the requirements in the Listing of Impairments in a constricted and crabbed manner, forgetting in this case that this remedial statute is to be broadly construed.

2. Visual Impairment

McBrayer v. Secretary of HHS, 711 **F.2d** 795, 798 (2d Cir. 1983)

"The statements by **McBrayer** in previous applications for disability are not substantial evidence that he did not qualify for benefits. The forms were filled out by representatives of the Social Security Administration --**McBrayer** could not even read the answers he was signing--and, even if they accurately reflect the answers he gave to SSA questions, they are explicable in light of his psychological unwillingness to admit disability or his confusion, shared with the Secretary as to the distinction between legal blindness and inability to perform a sufficient quantity of tasks as to be **unemployable**."

3. Asthma

See Cruz v. Sullivan, 912 **F.2d** 8, 11-12 (2d Cir. 1990), *supra*, at page 7 (describing duty to probe into frequency and severity of asthma attacks).

4. Cardiovascular System

State of New York v. Sullivan, 906 **F.2d** 910, 919 (2d Cir. 1990)

"[T]he Secretary should consider all available relevant evidence when evaluating claims of ischemic heart disease."

"Since Congress left no doubt that individualized treatment of disability claims is the rule, sole reliance on the treadmill test results to the exclusion of other available relevant evidence clearly violates Congress's requirement of particularized treatment and significant input from treating physicians."

See also District Court Order in State of New York v. Sullivan; HALLEX Temporary Instruction 5-____; POMS DI 32594.000 ff.

5. Epilepsy

De Leon v. Secretary of HHS, 732 F.2d 930, 935 (2d Cir. 1984)

"The ALJ found that De Leon did not have a severe neurological impairment because he had only one seizure in the last year and thus did not satisfy the **numerical** frequency test for neurological impairment relative to epilepsy under the regulations. Ignoring De Leon's testimony that he had a seizure only two months before the hearing while taking Tegretol, the ALJ concluded that De Leon's epilepsy 'is under total control with medication.' The ALJ also made no mention of the testimony that De Leon was experiencing significant side effects from using Tegretol. There is no substantial evidence on the record to support the ALJ's finding that De Leon's epilepsy is 'under total control.'"

6. Mental Disorders

De Leon v. Secretary of HHS, 734 F.2d 930, 934 (2d Cir. 1984)

"The appellant at least facially meets the listings in the regulations for chronic brain syndrome' and functional psychotic disorders, and the record does not contain substantial evidence to support the Secretary's contrary conclusion.

"A claimant's denial of psychiatric disability or the refusal to obtain treatment for it is not necessarily probative. See Cullison v. Califano, 613 F.2d 55, 58 (4th Cir. 1980).

7. Alcohol and other drug abuse

Rutherford v. Schweiker, 685 F.2d 60, 62 (2d Cir. 1983)

"If there is a continuing relationship between excess consumption of alcohol and the disability, such that termination of the former will end the latter, the issue for the Secretary is whether the claimant has lost the voluntary ability to control this drinking."

Singletary v. Sec. of HEW, 623 F.2d 217 (2d Cir. 1980)

"The claimant's son attempted to testify concerning claimant's alcoholism and inability to work: however, the ALJ rejected his testimony because he is not a doctor and he is the claimant's son. While possible bias is undoubtedly a factor which would go to the weight of the son's testimony, the son had first hand knowledge of claimant's alcohol intake and life style. The testimony of lay witnesses has always been admissible with regard to **drunkenness.**" 623 F.2d at 219 (citing Rule 701, F.R. Evid.; People v. Eastwood, 14 N.Y. 562, 566 (1856)).

References:

Program Circular: SSA Disability Program Circular 04-91-OD, SSA Pub. No. 64-044 (April 8, 1991) ("Evaluation of Substance Addiction Disorder Cases Reiteration of **Current Policy**")

Social Security Rulings: SSR 82-60, Evaluation Of Drug Addiction And Alcoholism

1
Social security Regulations: 20 CFR 404, Subpart P, Appendix 1,
Section 12.09; 20 CFR §§ 404.1525(e) and 416.925(e).

MEDICAL EVIDENCE

1. substitution of medical judgment by lay decisionmaker

* McBrayer v. Sec. of Health and Human Services, 712 F.2d 795, 799 (2d Cir. 1983), 2 S.S.R.S. 343, 347

"But the ALJ cannot arbitrarily substitute his own judgment for competent medical opinion. Grable v. Secretary of HEW, 442 F.Supp. 465, 470 (W.D.N.Y. 1977). As stated by the Third Circuit, '[w]hile an administrative law judge is free to resolve issues of credibility as to lay testimony or to choose between properly submitted medical opinions, he is not free to set his own expertise against that of a physician who testified before him.' Gober v. Matthews, 574 F.2d 772, 777 (3d Cir. 1978); see also, Dousewicz v. Harris, 646 F.2d at 774."

2. Cannot reject medical evidence without explanation

Fiorello v. Heckler, 725 F.2d 174, 176 (2d Cir. 1983), 4 S.S.R.S. 22, 24, CCH 15,021

"Although we do not require that, in rejecting a claim of disability, an ALJ must reconcile explicitly every conflicting shred of medical testimony, Miles v. Harris, 645 F.2d 122, 124 (2d Cir. 1981), we cannot accept an unreasoned rejection of all the medical evidence in a claimant's favor, see SEC v. Chenerv Corp., 318 U.S. 80, 94, 63 S.Ct. 454, 462, 87 L.Ed. 626 (1943)."

3. Weight to be accorded opinion of consultative examining physician

Cruz v. Sullivan, 912 F.2d 8, 13 (2d Cir. 1990)

"[I]n evaluating a claimant's disability, a consulting physician's opinions or report should be given limited weight. Cf. Bluvband, 730 F.2d at 894 (ALJ should not baldly accept consulting physician's evaluations which are disputed and formulated after they had examined claimant only once). This is justified because 'consultative exams are often brief, are generally performed without benefit or review of claimant's medical history and, at best, only give a glimpse of the claimant on a single day. Often, consultative reports ignore or give only passing consideration to subjective symptoms without stated reasons.'" (citing Torres v. Bowen, 700 F.Supp. 1306, 1312 (S.D.N.Y. 1988)) .

Ed. Note: Cruz was decided before the issuance of regulations regarding consultative examinations and medical evidence of record, 20 C.F.R. §§ 404.1519-1519t; 416.919-919t, which require that consultative examinations be complete, include a medical history, and address claimants' subjective symptoms.

4. Physician's failure to use the conclusory term "disabled"

Gold v. Sec. of HEW, 463 F.2d 38, 42 n.7 (2d Cir. 1972)

"Nor is the absence of the conclusory term 'disabled' from some of the reports as crucial as the government would have us believe, for a physician might not consider that essential in a contemporaneous record of symptoms."

5. Full text of the basic standard of the Second Circuit (Schisler II)

Schisler v. Bowen, 851 F.2d 43, 47 (2d Cir. 1988), 22 S.S.R.S. 304, 308, CCH 16,706

"Having taken the position that he has adopted the treating physician rule of this circuit, the Secretary is thereby bound to offer a formulation of the rule based on our caselaw.... The version of the SSR we approve is printed in full in Appendix A."

Appendix A

Titles II and XVI: Consideration of the Opinions of Treating Sources

Purpose

"To clarify the Social Security Administrations's (SSA) policy on developing medical evidence from treating sources and describe how SSA evaluates such evidence, including any opinion about disability, in determining whether an individual is disabled in accordance with the provisions of the Social Security Act. Particularly, this Ruling clarifies when a medical opinion by a treating source will be conclusive as to the medical issues of the nature and severity of an impairment(s) individually or collectively bearing on the claimant's ability to engage in substantial gainful activity, and indicates how the determination or decision rationale is to reflect the evaluation of evidence from a treating source.

"The preferred source of medical evidence is the claimant's treating source(s). Medical evidence from a treating source is important because it will often provide a medical history of the claimant's impairment based on the ongoing treatment and physician-patient relationship with the claimant.

"In addition to providing medical history, a treating source often provides an opinion about disability, i.e., diagnosis and nature and degree of impairment. Such opinions are carefully considered in evaluating disability. Although the decision as to whether an individual is disabled under the Act is made by the Secretary, medical opinions will be considered in the context of all the medical and other evidence in making that decision.

"Section 223(d)(5) of the Act, as amended by the Social Security Disability Benefits Reform Act of 1984, requires the Secretary to make every reasonable effort to obtain from the individual's treating source all medical evidence, including diagnostic tests, needed to make properly a determination regarding disability, prior to evaluating medical evidence obtained from any other source on a consultative basis.

"A claimant's treating source is his or her own physician osteopath or psychologist (including an outpatient clinic or health maintenance organization) who has provided the individual with medical treatment or evaluation and who has or had an ongoing treatment and physician-patient relationship with the individual. The nature of the physician's relationship with the patient, rather

than its duration or its coincidence with a claim for benefits, is determinative."

"Medical evidence and opinion from claimant's treating source is important because the treating source, on the basis of the ongoing physician-patient relationship, is most able to give a detailed history and a reliable prognosis. Therefore, treating source evidence should always be requested and every reasonable effort should be made to obtain it. Treating sources should be requested to provide complete medical reports consisting of a medical history, clinical findings, laboratory findings, diagnosis, treatment prescribed and response to any treatment, prognosis, and a medical assessment: i.e., a statement of the individual's ability to do work-related activities. If the treating source provides an incomplete medical report, the adjudicator will request the necessary additional information from the treating source. Where SSA finds that the opinion of a treating source regarding medical issues is inconsistent with other evidence in file, including opinions of other sources, the adjudicator must **resolve** the inconsistency, according to the principles set forth **below**. If necessary to resolve the inconsistency, the adjudicator will secure additional evidence and interpretation or explanation from the treating source(s) and/or consulting source(s).

"Once the adjudicator has made every reasonable effort to obtain the medical evidence and to resolve all conflicts the adjudicator must evaluate all of the evidence in file in arriving at a determination. Initially, the adjudicator must review the record to determine what is the treating source's opinion on the subject of medical disability, i.e., diagnosis and nature and degree of impairment. The adjudicator should then examine the record for conflicting evidence. Upon finding conflicting evidence, the adjudicator should compare the probative value of the treating source's opinion with the probative value of the conflicting evidence.

"**The** treating source's opinion on the subject of medical disability--i.e., diagnosis and nature and degree of impairment--is (1) binding on the fact-finder unless contradicted by substantial evidence and (2) entitled to some extra weight, even if contradicted by substantial evidence, because the treating source is inherently more familiar with a claimant's medical condition than are other sources. Resolution of genuine conflicts between the opinion of the treating source, with its extra weight, and any substantial evidence to the contrary remains the responsibility of the fact-finder.

"Substantial evidence is such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. Opinions of nonexamining medical personnel **cannot**, in themselves and in most situations, constitute substantial **evidence** to override the opinion of a treating source.

"**Where** the opinion of a treating source is being rejected or overridden, there must be a discussion documented in the file of the opinion(s) and medical findings provided by the medical sources, an explanation of how SSA evaluates the report, a description of any unsuccessful efforts to obtain information from a source(s), the pertinent nonmedical findings, and an explanation

as to why the substantial medical evidence of record contradicts the opinion(s) of a treating source(s). This discussion must be set out in a determination or decision rationale.18

References:

HALLEX Temporary Instructions: 5-423 (OHA Interim Circular No. 167:
Schisler, et al. v. Heckler)

MANUAL at page 19: **"Onset** of Disability"

Social Security Regulations: 20 CFR §§ 404.1527 and 416.927

ONSET OF DISABILITY

1. Retrospective opinion of physician

Dousewicz v. Harris, 646 F.2d 771, 774 (2d Cir. 1981)

"While Dr. Sanfacon did not treat the appellant during the relevant period, before September 30, 1971, his opinion is entitled to significant weight. '[A] diagnosis of a claimant's condition may properly be made even several years after the actual onset of the impairment' Such a diagnosis must be evaluated in terms of whether it is predicated upon a medically accepted clinical **diagnostic** technique and whether considered in light of the entire record, it establishes the existence of a physical impairment prior to [the date last insured]."

"[T]he fact that a condition is more disabling today than it was yesterday does not mean that the condition was not disabling yesterday."

Waaner v. Secretary, 906 F.2d 856, 861 (2d Cir. 1990)

"With regard to the requirement stated in Dousewicz of a clinically acceptable diagnostic technique, we believe that Dr. **Naumann's** diagnosis of hemiplegic migraine, adopted by the Secretary as the basis for post-1983 disability, is sufficient. The Secretary may be doubtful of the connection between Wagner's present condition and her pre-1983 symptomatology, but, if so, he should have offered medical testimony specifically addressed to that nexus or lack thereof. Except for Dr. **Blatchley's** [treating physician] opinion, none of the medical evidence in the record confronts the question of whether the 1983 trauma explains the preceding three **years'** ailments.

* * *

"We do offer these facts to demonstrate that a circumstantial critique by nonphysicians, however thorough or responsible, must be overwhelmingly compelling in order to overcome a medical opinion."

Isabel Rivera v. Sullivan, 923 F.2d 964, 968-69 (2d Cir. 1991)

"The absence of an opinion expressed by [a previous treating physician] regarding disability does not contradict [the subsequent treating **physician's**] explicit statement that **Rivera** did suffer from a disability in 1978."

"[T]he opinions of this Court hold that the mere fact that a condition is degenerative does not establish that it may not have been disabling at an earlier **time**."

2. contemporaneous medical records not required

Arnone v. Bowen, 882 F.2d 34, 39 (2d Cir. 1989)

"Although his (the claimant's) task would be easier if he produced medical evidence from that period, it is conceivable that he could demonstrate such a disability without contemporaneous evidence."

Eiden v. Sec. of HHS, 616 F.2d 63, 65 (2d Cir. 1980)

"[E]vidence bearing upon an applicant's condition subsequent to the date [of eligibility] is pertinent evidence in that it may disclose the severity and continuity of impairments existing before,"

3. Evidence relied on in finding disability cannot be disregarded in determining onset date

Bell v. Secretary of HHS, 732 F.2d 308, 311 (2d Cir. 1984)

"The ALJ, of course was not required to credit the information contained in these letters [letters written approximately contemporaneously with the date of the hearing by a mental health "case manager" and a "psychiatric Social Worker"], but it is quite apparent that he did so since he expressly relied on them in finding that Bell was disabled. Having done so, he was not free to disregard them in determining the onset date of that same disability."

4. Onset date cannot be determined arbitrarily but must be based on examination of the record

Bell v. Secretary of HHS, 732 F.2d 308, 311 (2d Cir. 1984)

"The ALJ is not entitled to assume that Ms. Bell suddenly became schizophrenic on the day of her hearing absent evidence to support such a view. Even giving Dr. Alper's report the interpretation adopted by the ALJ, he was required to examine the record further to determine the onset date."

5. Evidence regarding current condition may be relevant to severity of earlier condition

Gold v. Sec. of HEW, 463 F.2d 38, 42 (2d Cir. 1972)

"[E]vidence bearing upon an applicant's condition subsequent to the date upon which the earning requirement was last met is pertinent evidence in that it may disclose the severity and continuity of impairments existing before the earning requirements date or may identify additional impairments which could reasonably be presumed to have been present and to have imposed limitations as of the earning requirement data.

References:

Social Security Rulings: SSR 83-20, Onset of Disability

PAIN

1. Consideration of pain, in general;

Mimms v. Heckler, 750 **F.2d** 180, 185-86 (2d Cir. 1984), 8 S.S.R.S. 123, 128-29, CCH 15,667

"This Circuit has long held that the subjective element of pain is an important factor to be considered in determining disability. Ber v. Celebrezze, 332 **F.2d** 293, 298, 300 (2d Cir. 1964)."

2. **Decisionmaker** can review credibility and arrive at independent evaluation of pain

Mimms v. Heckler, 750 **F.2d** 180, 185-86 (2d Cir. 1984), 8 S.S.R.S. 123, 128-29, CCH 15,667

"While an **ALJ** 'has the discretion to evaluate the credibility of a claimant and to arrive at an independent judgment [regarding that pain, he must do so] in light of medical findings and other evidence, regarding the true extent of the pain alleged by the claimant.' McLaughlin v. Secretary of Health, Education and Welfare, 612 **F.2d** 701, 705 (2d Cir. 1980), quoting Marcus v. Califano, 615 **F.2d** 23, 27 (2d Cir. 1979)."

3. Cannot assume treating physician's **estimate** of **claimant's** RFC considered **pain**

Mimms v. Heckler, 750 **F.2d** 180, 186 (2d Cir. 1984), 8 S.S.R.S. 123, 129, CCH 15,667

"It is clear that the **ALJ's** decision to disregard . . . testimony concerning disabling pain was based on his blind **assumption** that appellant's treating physician considered such pain in determining his residual functional capacity. Especially, given the claimant's pro se status, we hold that the claimant's assertions of disabling pain cannot be rejected solely on the unfounded assumption that the treating physicians considered them. An **ALJ** is not free to assume that a factor, such as pain, was considered in formulating a medical opinion when there is no evidence that such was the case."

4. Need medical impairment; but not objective findings of pain itself

Gallasher on behalf of Gallasher v. Schweiker, 697 **F.2d** 82, 84 (2d Cir. 1983), 1 S.S.R.S. 21, 23, CCH 14,414

"On appeal, the claimant contends that this conclusion is in conflict with our prior decisions in Aubeuf v. Schweiker, 649 **F.2d** 107 (2d Cir. 1981), and Marcus v. Califano, 615 **F.2d** 23 (2d Cir. 1979). Specifically relied upon is the observation in Marcus that 'subjective pain may serve as the basis for establishing disability, even if such pain is unaccompanied by positive clinical findings or other 'objective' medical evidence.' . . . These cases did not signal any departure from the statutory **requirement** that a disability claimant must prove physical or mental impairment resulting from abnormalities demonstrable by 'medically acceptable clinical and laboratory techniques.' What these cases properly recognized is that once such an impairment has been diagnosed, pain caused by the

impairment may be found to be disabling even though the impairment 'ordinarily does not cause severe, disabling pain.' Marcus, **supra**, 615 **F.2d** at 28. The pain need not be corroborated by objective medical findings, but some impairment must be medically ascertained, as it was not only in Marcus and Aubeuf, but also in Hankerson v. Harris, 636 **F.2d** 893 (2d Cir. 1980) (heart disease); McLaughlin v. Secretary of Health, Education and Welfare, 612 **F.2d** 701 (2d Cir. 1980) (discogenic problem); and Ber v. Celebrezze, 332 **F.2d** 293 (2d Cir. 1964) (arthritis of cervical spine)."

"[T]he impairment must be attributable to abnormalities demonstrable by medically acceptable techniques. In drawing the line at this point, Congress authorized the Secretary to deny benefits to claimants like Mrs. Gallagher, who though suffering from severe pain, has not produced any medical evidence identifying the underlying impairment."

Marcus v. Califano, 615 **F.2d** 23 (1980)

"We therefore reverse and remand this case so that the **Secretary** may reconsider appellant's application for disability benefits under the standard that a medical impairment which results in severe, disabling pain may give rise to a grant of disability benefits even if 'objective' clinical findings do not provide proof of an affliction ordinarily causing such **pain.**"

Ber v. Celebrezze, 332 **F.2d** 293, at 299 (2d Cir. 1964)

"**What** one human being may be able to tolerate as an uncomfortable but bearable burden may constitute for another human being a degree of pain so unbearable as to subject him to unrelenting misery of the worst sort... ."

Franklin v. Secretary of Health, Education, and Welfare, 393 **F.2d** 640 (2d Cir. 1968)

"**In** the present case the hearing examiner's conclusion, as paraphrased by the district court, was that the medical evidence reflected 'an undramatically mild underlying pathology wholly disproportionate to the massive **disability** plaintiff imposes upon it.' It is no doubt true, as appellant contends, that this court has rejected the view that a claimant will be said to be so disabled as to qualify for benefits only if an 'average **man,**' suffering from the same objective symptoms as the claimant, would be disabled under the statute, for we have earlier indicated that the subjective element of pain is an important factor in determining disability. Ber v. Celebrezze, 332 **F.2d** 293, 298, 300 (2d Cir. 1964). However, assuming arauendo [that a medically determinable impairment was present], we nevertheless believe that there was substantial evidence that appellant's assumed impairment had not produced 'inability to engage in any substantial gainful **employment.**'"

"**Conceding**, also, that appellant might not be able to return to her former employment as an 'executive secretary' because such a job would require her to keep her neck in a fixed position for prolonged periods of time (e.g., while typing) and hence cause her to have periods of intense pain, there was ample evidence to support a conclusion that appellant could engage in other related forms of

employment in which she would not be required to keep her neck in a fixed position,

5. Work without pain

Dumas v. Schweiker, 712 F.2d 1545, 1552 (2d Cir. 1983), 2 S.S.R.S. 362, 369, CCH 14,650

"But, disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment. The severity of pain is a subjective measure - difficult to prove, yet equally difficult to disprove. We must not constrain the Secretary's ability to evaluate the credibility of subjective complaints of pain, particularly where, as here, those complaints were not part of claimant's prima facie **case.**"

6. Subjective complaints, when accompanied by objective medical findings, entitled to great weight

Rivera v. Schweiker, 717 F.2d 719, 725 (2d Cir. 1983), 3 S.S.R.S. 21, 27, CCH 14,771

"In view of the rule that a claimant's subjective evidence of pain, when accompanied by objective medical evidence, as exists here, is entitled to great weight, see, e.g., Dobrowolski v. Califano, 606 F.2d 403, 409 (3d Cir. 1979), we determine that the record supports **Rivera.**"

7. Pain endurance as a factor in determining disability

Nelson v. Bowen, 882 F.2d 45, 49 (2d Cir. 1989)

"When a disabled person gamely chooses to endure pain in order to pursue important goals, it would be a shame to hold this endurance against him in determining benefits unless his conduct truly showed that he is capable of **working.**"

8. ALJ's observation of pain

* Aubeuf v. Schweiker, 649 F.2d 107, 113 (2d Cir. 1984)

* "This finding (that the claimant exhibited 'no outward signs that could be related to a severe pain complex') raises serious questions with respect to the propriety of subjecting claimants to a '**sit and squirm index**' and with respect to rendition by the ALJ of an expert medical opinion which is beyond his competence. Thus, [it] does not constitute substantial evidence sufficient to rebut the physicians' findings of pain resulting from Mr. Aubeuf's back injury."

Rivera v. Schweiker, 717 F.2d 719 (2d Cir. 1983)

"[A]lthough it is clearly permissible for an administrative law judge to evaluate the credibility of an individual's allegations of pain, this independent judgment should be arrived at in light of **all** the evidence regarding the extent of the pain. See McLaughlin, 612 F.2d at 705. It is clear to us that the ALJ herein did not follow this standard.

References:

Social Security Ruling: SSR 88-13, Evaluation' Of Pain And Other Symptoms

Social Security Regulations: 20 CFR §§ 404.1529 and 416.929

Social Security Act: Section 223(d)(5)(A) (1984) (sunset date December 31, 1986)

* Townlev v. Heckler, 748 **F.2d** 109, 113 (2d Cir. 1984), 7 **S.S.R.S.** 236, 240, CCH 15,662

"The interest of an individual in continue@ receipt of [Social Security disability benefits] is a statutorily created 'property' interest protected by the Fifth Amendment. Matthews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 **L.Ed.** 2d 18 (1975). Thus, a disability benefits claimant has a right to cross examine the author of an adverse report and to present rebuttal evidence. Treadwell v. Schweiker, 698 **F.2d** 137, 143 (2d Cir. 1983); Allison v. Heckler, 711 **F.2d** 145, 147 (10th Cir. 1983); Gullo v. Califano, 609 **F.2d** 649 (2d Cir. 1979); Lonzollo v. Weinberaer, 534 **F.2d** 712, 714 (7th Cir. 1976). Appellant's attorney, however, was not informed of the need for expert vocational evidence until after the report was filed with the **ALJ**. Further, appellant was denied an opportunity to examine that vocational report, and, despite claimant's request, no additional hearing was held. Although the **ALJ** asked appellant's attorney to submit objections and additions to the interrogatories posed to the vocational expert, there is no evidence that the attorney's suggestions were ever forwarded. Moreover, appellant was denied his due process rights to cross-examine the expert and to present rebuttal evidence."

RESIDUAL FUNCTIONAL CAPACITY ASSESSMENT

1. RFC assessment requires consideration of ability to engage in sustained activities

Carroll v. Sec. of Health and Human Services, 705 F.2d 638, 643 (2d Cir. 1983), 2 S.S.R.S. 10, 15, CCH 14,549

"Nor has the Secretary sustained his burden on the basis of (1) Carroll's testimony that he sometimes reads, watches television, listens to the radio, rides buses and subways, and (2) the ALJ's notation that Carroll 'sat still for the duration of the hearing and was in no evident pain or distress.' There was no proof that Carroll engaged in any of these activities for sustained periods comparable to those required to hold a sedentary job."

2. Specific findings on claimant's RFC required

Ferraris v. Secretary of Health and Human Services, 728 F.2d 582 (2d Cir. 1984), 4 S.S.R.S. 192, CCH 15,169 [from CCCG section on duty to develop]

"[I]n making any determination as to a claimant's disability, the Secretary must explain what physical functions the claimant is capable of performing. * * * * . . . the crucial factors in any determination must be set forth with sufficient specificity to enable us to decide whether the determination is supported by substantial evidence."

White v. Secretary of Health and Human Services, 910 F.2d 64, 65 (2d Cir. 1990), 30 S.S.R.S. 669, 671, CCH 15,663A

"Failure to specify the basis for a conclusion as to residual functional capacity is reason enough to vacate a decision of the Secretary."

3. Evaluation of physician's estimates of time that a claimant can walk and stand

Varsas v. Sullivan, 898 F.2d 293, 295 (2d Cir. 1990), 29 S.S.R.S. 123, 125, CCH 15,310A

"Despite Dr. Pajela's uncontradicted residual functional capacity assessment, the A.L.J. erroneously concluded that Mrs. Vargas could 'stand and walk at least six hours in an eight-hour day. . . . ' To arrive at this conclusion, the A.L.J. had to interpret Dr. Pajela's report to mean that, after Mrs. Vargas completed the four hours of standing permitted by Dr. Pajela, she could undertake an additional two hours of walking. . . . This was a distortion of the attending physician's report. . . . [In construing this physician's report] the two hours of walking must be included in the four hours of standing, not added to it."

4. significance of borderline I.Q. test results

De Leon v. Secretary of HHS, 732 F.2d 930, 935-36 (2d Cir. 1984)

"Surely a borderline IQ has a bearing on employability, even as a moppusher, porter, or maintenance man."

References:

Social Security Rulings: SSR 83-10, Determining Capability To Do Other Work--The Medical-Vocational Rules of Appendix 2

Social Security Regulations: 20 CFR §§ 404.1567(a) and 416.967(a)

SEDENTARY WORK

1. Sedentary work requires the ability to sit for long periods of **time**
Carroll v. Sec. of Health and Human Services, 705 **F.2d** 638, 643 --
(2d Cir. 1983) 2 S.S.R.S. 10, 15, CCH 14,549

"By its very nature 'sedentary' work requires a person to sit for long periods of time even though standing and walking are occasionally required. Three of the four doctors who examined Carroll were never asked what work or activity, such as sedentary employment, Carroll could perform and hence expressed no opinion on that subject. However, the treating physician who examined Carroll many times over a period of more than a year, expressed the opinion that Carroll had a limited ability to stand for any period of time, to sit for any period, to lift **or** to bend, and that he could sit, walk, or stand for only 'short periods.'"

2. Alternating sitting **and** standing not within concept **of** sedentary work
Nelson v. Bowen, 882 **F.2d** 45, 48-49 (2d Cir. 1989)

"The magistrate also pointed out that the Secretary cannot sustain his burden [of proving there was 'other **work**' that Nelson could perform] without a showing that the claimant engages in activity for sustained periods of time comparable to those required to maintain a sedentary job, citing Carroll v. Secretary of Health & Human Services, 705 **F.2d** 638 (2d Cir. 1983), especially in light of the Secretary's own ruling explaining that sedentary work requires '**that** a worker be in a certain place or posture for at least a certain length of time to accomplish a certain task. Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at **will**,' citing West's **Soc. Sec. Rep. Serv.** SSR 83-12 at 62 (Supp. 1986)."

Ferraris v. Heckler, 728 **F.2d** 582, 587 (2d Cir. 1984), 4 S.S.R.S. 192, 197, CCH 15,169

"We have held that the concept of sedentary work contemplates substantial sitting. Carroll, supra, 705 **F.2d** at 643. Moreover, alternating between sitting and standing may not be within the concept of sedentary work. Deutsch, supra, 511 **F.Supp.** at 249. On the basis of the **ALJ's** insufficient findings here, we cannot determine whether his conclusory statement that Ferraris could carry out sedentary work is supported by substantial evidence. We of course do **not** suggest that **every** conflict in a record be reconciled by the ALJ or the Secretary, Miles v. Harris, 645 **F.2d** 122, 124 (2d Cir. 1981), but we do believe that the crucial factors in any determination must be set forth with sufficient specificity to enable us' to decide whether the determination is supported by substantial evidence. Treadwell v. Schweiker, 698 **F.2d** 137, 142 (2d Cir. 1983)."

3. Performance of some limited daily activities and conservative treatment do not by themselves establish ability to do a full range of sedentary work

Murdauah v. Bowen, 837 F.2d 99 (2d Cir. 1988)

"Moreover, that appellant receives conservative treatment, waters his landlady's garden, occasionally visits friends and is able to get on and off an examination table can scarcely be said to controvert the medical evidence. In short, a claimant need not be an invalid to be found disabled under Title XVI of the Social Security Act, 42 U.S.C. § 1382c(a)(3)(A)."

References:

Social Security Rulings: SSR 83-12, Capability To Do Other Work--The Medical-Vocational Rules As A Framework For Evaluating Exertional Limitations Within A Range Of Work Or Between Ranges Of Work

SEVERE / NONSEVERE IMPAIRMENTS

Step 2 of sequential evaluation upheld by Supreme Court

Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287 (1987), 17 S.S.R.S. 661, CCH 17,348

References:

HALLEX Temporary Instructions: 5-406 (OHA Interim Circular No. 168: Dixon, et al. v. Heckler)

HALLEX Temporary Instructions: 5-416 (OHA Interim Circular No. 195: Wilson, et al. v. Heckler)

Social Security Rulings: SSR 85-28, Medical Impairments That Are Not Severe

SHIFTING BURDEN OF PROOF

Mimms v. Heckler, 750 F.2d 180, 185 (2 Cir. 1984), 8 S.S.R.S.123 ,
128, CCH 15,667

"The burden of proving disability is on the claimant. Gold v. Secretary of HEW, 463 F.2d 38, 41 (2d Cir. 1972), 42 U.S.C. § 423(d)(5). However, once the claimant has established a prima facie case by proving that his impairment prevents his return to his prior employment, it then becomes incumbent upon the Secretary to show that there exists alternative substantial gainful work in the national economy which the claimant could perform, considering his physical capability, age, education, experience and training. Parker v. Harris, 626 F.2d 225, 231 (2d Cir. 1980)."

References:

HALLEX Temporary Instructions: 5-307 ("Specific written acknowledgment of the shifting burden at the last step of the sequential evaluation process in unfavorable **decisions**")

Social Security Regulations: 20 CFR §§ 404.1520 and 416.920

1. In general, use upheld

Heckler v. Campbell, 461 U.S. 458, 103 S.Ct. 1952 (1983), CCH 14,585

2. Vocational evidence required when nonexertional impairment significantly diminishes the ability to perform a full range of work

Bapp v. Bowen, 802 F.2d 601, 605-06 (2d Cir. 1986), 15 S.S.R.S. 169, 173-74, CCH 17,066

"Application of the Grid guidelines and the necessity for expert testimony must be determined on a case by case basis. If the guidelines adequately reflect a claimant's condition, then their use to determine disability status is appropriate. But if a claimant's nonexertional impairments 'significantly limit the range of work permitted by his exertional limitations*' then the grids obviously will not accurately determine disability status because they fail to take into account claimant's nonexertional impairments. Blacknall, 721 F.2d at 1181. Accordingly, where the claimant's work capacity is significantly diminished beyond that caused by his exertional impairment the application of the grids is inappropriate. By the use of the phrase 'significantly diminish' we mean the additional loss of work capacity beyond a negligible one or, in other words, one that so narrows a claimant's possible range of work as to deprive him of a meaningful employment opportunity."

[Ed. Note: This preceding sentence appears in the official text of the court's decision but not in S.S.R.S.]

3. In order for Medical-Vocational Guidelines ("Grid") to be applied, Secretary must show that non-exertional limitations do not significantly diminish full range of work noticed by the Grids

Bapp v. Bowen, 802 F.2d at 605-06.

- * "Upon remand the ALJ must reevaluate whether the Secretary has shown that plaintiff's capability to perform the full range of light work was not significantly diminished by his coughing and blackout spells. That initial determination can be made without resort to a vocational expert. If nonexertional limitations significantly diminish Bapp's ability to perform the full range of 'light work,' then the ALJ should require the Secretary to present either the testimony of avocational expert or other similar evidence regarding the existence of jobs in the national economy for an individual with claimant's limitations."

[Ed. Note: Portions of the preceding quotation appear in the official text of the court's decision but not in S.S.R.S.]

- * Nelson v. Bowen, 882 F.2d 45, 49 (2d Cir. 1989).

'In an individualized evaluation the Secretary's burden can be met only by calling a vocational expert to testify as to the plaintiff's ability to perform some particular job and, of course, Nelson will have the opportunity either through medical or vocational or other

testimony to rebut the evidence of the Secretary ~~to prove~~ further his inability to **perform sedentary work.**"

4. Ability to communicate in English

Vega v. Harris, 636 F.2d 900, 903-04 (2d Cir. 1981)

"Under the [Medical Vocational guidelines] the **ALJ's** findings of fact in this case are inadequate with respect to Vega's education. The ALJ did not determine, as required under the circumstances, whether Vega was literate and whether she was able to communicate in English. **See 20 C.F.R. §§404-1507(f), 416 907(f)(1980)** [now 20 C.F.R. §§ 404.1564 (b)(5); 416.964(b)(5)]. The circumstances are that appellant's less than four years of formal education took place in Puerto Rico and that, although she has lived in this country some thirty years, the hearing had to be conducted with a Spanish-English interpreter. . . . [A] brief exchange (in English, between **claimant and ALJ**), of course, is not a substitute for a determination on the question of ability to communicate in English."

5. specific findings required on the issue of transferability of skills

Ferraris v. Heckler, 728 F.2d 582, 587 and 588 n.4 (2d Cir. 1984)

"[P]ast experience as a supervisor may not necessarily indicate the possession of skills, or that they are transferrable. Specific findings on these issues are required."

"A certain degree of explicitness is suggested by SSR 82-41 . . . , which we assume the **ALJ** will bear in mind on remand."

6. Borderline I.Q. may have a bearing on employability

* DeLeon v. Secretary of HHS, 734 F.2d 930, 935-936 (2d Cir. 1984)

"Although he summarized the **psychologist's** report in his decision, the **ALJ** did not test the report's conclusions by presenting them in hypothetical questions to the vocational expert Surely a borderline I.Q. has a bearing on employability, even as a moppusher, porter or maintenance **man.**"

References:

Social Security Rulings: SSR 85-15, Capability To Do Other Work--The Medical--Vocational Rules As A Framework For Evaluating Solely Nonexertional Impairments; SSR 83-10, Determining Capability To Do Other Work--The Medical-Vocational Rules of Appendix 2; SSR 83-11, Capability to Do Other Work--The Exertionally Based Medical-Vocational Rules Met; SSR 83-12, Capability to Do other Work--The Medical-Vocational Rules As A Framework For Evaluating Exertional Limitations Within A Range of Work or Between Ranges Of Work; SSR 83-14, Capability To Do Other Work--The Medical-Vocational Rules As A Framework For Evaluating A Combination of Exertional and Nonexertional Impairments; SSR 82-41, Work Skills And Their Transferability As Intended By The Expanded Vocational Factors

Social Security Regulations: 20 CFR §§ 404.1545 and 416.945

* VOCATIONAL CONSIDERATIONS -- EXPERT TESTIMONY

1. Vocational **testimony** about medical **condition is not, by itself, substantial evidence**

De Leon v. Sec. of Health and Human Services, 734 F.2d 930, 934-35 (2d Cir. 1984), 5 S.S.R.S. 232, 236-37, CCH 15,100

"The consultant's [vocational expert's] evaluation of De Leon's [medical] condition thus directly contradicted that of the claimant's consulting and treating physicians, and of the vocational rehabilitation counselor with whom he had worked closely for nine months. Vocational expert testimony alone does not provide the necessary substantial evidence from which to deduce a capacity to engage in substantial gainful activity when there is overwhelming evidence to the contrary in the record. See Yawitz v. Weinberaer, 498 F.2d 956, 961 (8th Cir. 1974)."

2. Hypothetical **questions; proper standard**

De Leon v. Sec. of Health and Human Services, 734 F.2d 930, 936 (2d Cir. 1984), 5 S.S.R.S. 232, 238, CCH 15,100

"In positing hypothetical questions to the vocational consultant, the ALJ did not even present the full extent of De Leon's physical disabilities. He made no mention, for example, of De Leon's shoulder or leg problems, or the full implications of his epilepsy. As a result, the record provides no basis for drawing conclusions about whether De Leon's physical impairments or low intelligence render him disabled."

Aubeuf v. Schweiker, 649 F.2d 107, 114 (2d Cir. 1984)

"[A] vocational expert's testimony is only useful if it addresses whether the particular claimant, with his limitations and capabilities, can realistically perform a particular job."

Dumas v. Schweiker, 712 F.2d 1545, 1553 (2d Cir. 1983), 2 S.S.R.S. 362, 370, CCH 14,650

"Dumas attacks the hypothetical posed by the ALJ because the vocational expert was asked to assume that Dumas was capable of sedentary work. He relies on Aubeuf v. Schweiker, 649 F.2d 107 (2d Cir. 1981), to support his argument that a 'vocational expert's testimony is only useful if it addresses whether the particular claimant, with his limitations and capabilities, can realistically perform a particular job.' Id at 114. His reliance is misplaced. Aubeuf and other decisions critical of **hypotheticals** that ask a vocational expert to assume a particular physical capability on the part of the claimant all address situations where there was no evidence to support the assumption underlying the hypothetical.... See Brittingham v. Weinberger, 408 F.Supp. 606, 614 (E.D. Pa. 1976) (vocational expert's opinion **meaningless '[u]nless** there is record evidence to adequately support . . . assumption' in hypothetical question)."

3. ALJ, not vocational expert, is required to determine claimant's RFC
Townley v. Heckler, 748 F.2d 109 (2d Cir. 1984)

"Herein, the ALJ did not make the requisite determination which would have enabled him to apply the [Grid] regulations. The ALJ relied on the vocational expert and made no express finding himself of appellant's residual functional capacity. Thus the ALJ violated 20 C.F.R. § 404.1546, which specifically states that in cases at the hearing level, "the responsibility for deciding [a claimant's] residual functional capacity rests with the administrative law judge."

VOCATIONAL CONSIDERATIONS -- EMPLOYABILITY

Keith v. Heckler, 732 **F.2d** 1089, 1095 (2d Cir. **1984**), 5 **S.S.R.S.** 72, 78, CCH 15,283

"The ALJ was well justified in having the impression that the trouble was not. . . **inability** to work but inability to find work that he can do. However unfortunate this may be, the Ninetieth **Congress** specifically ruled this out as a ground for disability benefits when it enacted in 1967 what is now 42 U.S.C. § 423(d)(2)(A), see Chico, supra, 710 **F.2d** at **948-49.**"

References:

Social Security Rulings: SSR **83-46c**, Inability To Perform Previous **Work--Administrative** Notice Under the Medical-Vocational Guidelines Of The Existence Of Other Work

Social Security Regulations: 20 CFR §§ 404.1566(c) and 416.966(c)

WEIGHT TO BE ACCORDED
OTHER AGENCY FINDINGS ON **DISABILITY**

1. General rule - other agency findings on disability **are** entitled to **some** weight and must be considered

cutler v. Weinberaer, 516 **F.2d** 1282 (2d Cir. 1975)

"While the determination of another governmental ~~agency~~ ^{that} **social** Security disability benefits claimant is disabled is not binding on the Secretary, it is entitled to some weight and should be considered."

See Havas v. Bowen, 804 **F.2d** 783 (2d Cir. 1986) (State of New York disability and Workers Compensation benefits determination); Cutler v. Weinberger, 516 **F.2d** 1282, 1286 (2d Cir. 1975) (Department of social Services, New York City, determination); Hankerson v. Harris, 636 **F.2d** 893, 896-97 (2d **cir.** 1980) (**Veterans** Administration [now Department of Veterans Affairs] determination).

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