Proving Disabling Pain in Social Security Disability Proceedings: The Social Security Administration and The Third Circuit Court of Appeals*

I. INTRODUCTION

Social Security disability benefits provided under Titles II and XVI of the Social Security Act¹ have been described by the Special Committee on Aging of the United States Senate as an important part of the "safety net" protecting citizens who are unable to support themselves.² These benefits are designed to protect disabled workers who are insured within the requirements of the Act and who have not yet reached the age of 65³ if these workers are under disabilities which render them unable to engage in any "kind of substantial gainful work which exists in the national economy."⁴

In contrast to the old age and survivors insurance trust fund, the disability insurance trust fund is considered to be financially sound.⁵ However, this program currently faces its own intractable problems. There has been a widespread perception that, in the past, lax administration of the program has allowed large numbers of persons who did not meet the statutory definition of "disability"⁶ to receive disability insurance benefits, and has allowed persons to continue receiving benefits after their disabilities have

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2. STAFF OF SENATE SPECIAL COMM. ON AGING, 97TH CONG., 2D SESS., SOCIAL SECURITY DISABILITY: PAST, PRESENT, AND FUTURE iii (Comm. Print 1982) [hereinafter cited as SPECIAL COMM. ON AGING].


5. SPECIAL COMM. ON AGING, supra note 2, at iii.

ceased. The Social Security Administration has also come under attack for failing to adequately serve disabled claimants and beneficiaries, for providing an inadequate adjudicatory process by which claimants may assert and defend their rights to benefits, and for failing to manage the adjudication of claims so as to produce predictable and consistent results. As a result of congressional concerns about a large backlog of cases awaiting review and the resulting poor administration of the disability insurance programs, the 1980 amendments to the Social Security Act were enacted. As thus amended, the Social Security Act contemplates a greatly strengthened federal management of the disability program, as opposed to the role of the state agencies, with a view towards increasing the uniformity of decisions.

7. Special Comm. on Aging, supra note 2, at iii.
11. At the inception of the disability program, Congress decided that initial disability determinations should be made by state vocational rehabilitation agencies, and applications are still normally referred to these agencies after they are filed at a district office of the Social Security Administration. See Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in Matheus v. Eldridge: Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28, 32-33 n.17 (1976). However, under certain circumstances, initial disability determinations will be made by the Secretary of Health and Human Services, rather than the state agency. 42 U.S.C. § 421(a), (b) (Supp. V 1981).

If the claim is denied by the state agency, the claimant is entitled first to a reconsideration by the state agency, and then to a de novo hearing before an administrative law judge appointed under the federal Administrative Procedure Act. If the claimant is still unsuccessful, he may request review by the Appeals Council of the Social Security Administration. Finally, he may seek judicial review under 42 U.S.C. § 405(g) (Supp V 1981). These procedures are outlined in Mashaw, supra, at 32-33. See also 20 C.F.R. §§ 404.900-404.995 (1983).

12. For example, under the Social Security Act as amended, the Secretary of Health and Human Services (hereinafter the Secretary) is required to promulgate regulations specifying performance standards and administrative requirements and procedures to be followed by the states in performing the disability determination function. 42 U.S.C. § 421(a)(2) (Supp V 1981). The Secretary is also authorized to review state agency determinations and administrative law judges' decisions on his own motion, 42 U.S.C. § 421(c)(1) (Supp V 1981), and is required to review specified percentages of all determinations made by state agencies before any action is taken to implement the determination; that is, before any benefits are paid. 42 U.S.C. § 421(c)(3) (Supp V 1981). In addition, the Secretary is required to review the status of persons already receiving benefits whose status had not been determined to be permanent at least once every three years, for the purpose of determining continuing eligibility. 42 U.S.C. § 421(h)(1) (Supp V 1981). However, because of the pressures imposed on the state agencies by the vastly increased number of reviews under this latter requirement, the Social Security Act was again amended in 1982 to permit the Secretary to waive it, and reduce the number of cases sent to the state agencies for re-
The result of the 1980 amendments has been, and will apparently continue to be, to make it more difficult for persons alleging that they suffer from some disabling impairment to obtain disability insurance benefits. The Social Security Administration's efforts to tighten up the management of the program have reached the point where seventy percent of the initial applications are denied at the state agency level. Furthermore, about forty-five percent of those beneficiaries whose cases are reviewed for continuing eligibility are currently having their benefits terminated. Although many disabled persons who have received denials or terminations have, on appeal, had benefits awarded to them by the administrative law judges, successful appeals are becoming rarer. In addition to demanding that its administrative law judges adhere to a policy of "non-acquiescence" in court decisions which contradict its policies as to what constitutes a "disability" within the meaning of the Social Security Act, the Social Security Administration has attempted to improve the judges' performance by instituting production standards, a peer review system, and a quality assurance program. These efforts have been seen by administrative law judges as threatening their judicial independence, and consequently, the right of disability claimants to a fair hearing.

The controversy presently surrounding the disability insurance program is bound to affect the administration of the program, es-

13. SPECIAL COMM. ON AGING, supra note 2, at iii-iv.
14. Id. at iv.
15. See supra note 11 as to the role of administrative law judges in the disability determination process. It should be noted here that disability benefit recipients have no constitutional right to an evidentiary hearing prior to the termination of their benefits under Mathews v. Eldridge, 424 U.S. 319 (1976). Furthermore, on an appeal by the terminated claimant, the Secretary may reweigh the evidence considered at the earlier proceeding, and reach a different determination on the basis of evidence that the impairment was less serious than originally thought, or that there had been a medical improvement. Weber v. Harris, 640 F.2d 176 (8th Cir. 1981). But cf. Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982); Simpson v. Schweiker, 691 F.2d 966 (11th Cir. 1982); Rivas v. Weinberger, 475 F.2d 255 (5th Cir. 1973) (a prior ruling of disability can give rise to a presumption that the disability still exists, absent proof to the contrary).
16. See infra notes 166-180 and accompanying text.
18. See, e.g., Nash v. Califano, 613 F.2d 10 (2d Cir. 1980), where the court held that the plaintiff, an administrative law judge in the Social Security Administration's Bureau of Hearings and Appeals, presented a justiciable controversy and had standing to bring suit alleging an invasion of his statutory right of decisional independence by Social Security Administration management policies.
pecially since proving the existence of a "disability" within the statutory definition is such an inherently subjective, individualized procedure. This is, of course, especially true when the impairment alleged is a disabling degree of subjectively felt pain. In fact, the Social Security Administration's ability to accurately adjudicate this issue has already been severely affected, mostly at the expense of large numbers of truly disabled persons whose applications for disability benefits have been denied in recent years, or whose benefits have been terminated. Many of these persons, whose disability benefits were often their sole source of income, have lost their homes and cars, deteriorated physically due to lack of medical attention, or even committed suicide. Some have died as a result of the very illnesses which had been determined to be not disabling, sometimes shortly after the determination was made. The disability program has been thrown into chaos, as Senator Levin recently indicated in introducing reform legislation which would, among other things, require a showing of medical improvement before a claimant's benefits are terminated and amend the Social Security Act by including a definition of "pain."

This comment will explore the conflict between the policies of the Social Security Administration and the decisions of the United States Court of Appeals for the Third Circuit regarding determinations as to the issue of when subjectively-felt pain experienced by a particular disability benefits claimant is disabling within the meaning of the Social Security Act. Although references will be made to decisions of other federal courts, it is submitted that the decisions of the Third Circuit are representative, and may be taken as a

21. Id. at S1145.
25. Id. See infra note 180.
26. For example, it is well-settled in a majority of the courts of appeals that, as a general proposition, a claimant's testimony concerning subjective pain may serve as the basis for establishing disability even in the absence of supporting clinical or objective medical findings, since such pain may still be so real and intense to the claimant as to be disabling. See, e.g., Simpson v. Schweiker, 691 F.2d 966 (11th Cir. 1982); Benson v. Schweiker, 652 F.2d 406 (5th Cir. 1981); Myers v. Califano, 611 F.2d 980 (4th Cir. 1980); Marcus v. Califano, 615 F.2d 23 (2d Cir. 1979); Northcutt v. Califano, 581 F.2d 164 (8th Cir. 1978); Stark v. Weinberger, 497 F.2d 1092 (7th Cir. 1974); Bittel v. Richardson, 441 F.2d 1193 (3d Cir. 1971); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967); Mark v. Celebrezze, 348 F.2d 289 (9th Cir. 1965).
starting point. The general issue discussed will be the legitimacy of
the Social Security Administration's application of the statutory
definition of disability, particularly by its promulgation and appli-
cation of regulations, to cases in which an impairment is alleged
due to subjectively-felt disabling pain. The Administration's per-
formance will be measured against judicial interpretations of the
Social Security Act's definition of "disability," with a due regard
for the fact that much of the difference between the two is proba-

bly inevitable, as a result of the difference in institutional perspec-
tives. That is, the Administration, which is responsible for running
a large program, will necessarily favor an approach to disability is-

sues which emphasizes the need for consistent adjudications and
makes it difficult to qualify for benefits on such a subjective basis
as disabling pain. The courts, on the other hand, frequently faced
with sympathy-arousing individual claimants, are much more
likely to grant benefits on the basis of subjectively-felt pain despite
the dangers to uniform decision-making.27

II. THE SOCIAL SECURITY ACT'S DEFINITION OF DISABILITY

The Social Security Act's definition of what constitutes a "disa-

bility" for which disability insurance benefits may be paid28 lacks

27. See Liebman, The Definition of Disability in Social Security and Supplemen-
(1976). Though recognizing the inevitability of this difference in institutional perspectives,
this author confesses to an opinion that the Social Security Administration too often forgets
that the beneficient purposes of the Social Security Act require that a liberal, tolerant stan-
dard be applied in disability proceedings. Hess v. Secretary of HEW, 497 F.2d 837, 840 (3d
Cir. 1974).

28. 42 U.S.C. § 423(d)(1)-(3) (1976) provides in relevant part that:
(d)(1) The term "disability" means—
(A) 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 continu-
ous period of not less than 12 months . . . .

(2) For purposes of paragraph (1)(A)—
(A) an individual . . . shall be determined to be under a disability only if his
physical or mental impairment or impairments are of such severity that he is
not only unable to do his previous work but cannot, considering his age, educa-
tion, and work experience, engage in any other kind of substantial gainful work
which exists in the national economy . . . .

(3) For purposes of this subsection, a "physical or mental impairment" is an impair-
ment which results from anatomical, physiological, or psychological abnormalities
which are demonstrable by medically acceptable clinical and laboratory diagnostic


specificity and is of little help in determining when, or even whether, subjective complaints of pain may serve as the basis for determining that a claimant is disabled. The statutory language tends to focus on the effects of a medical condition concerning a claimant’s ability to perform work activity, rather than on the medical condition itself. For example, the Social Security Act’s basic definition of “disability,” found in 42 U.S.C. § 423(d)(1), simply provides that a disability exists when a claimant cannot perform “any substantial gainful activity” as a result of “any medically determinable physical or mental impairment.” Likewise, in 42 U.S.C. § 423(d)(2)(A), the Act refers to the “severity” of a physical or medical impairment, but measures such severity in terms of the claimant’s ability to perform either his previous work or other work existing in the national economy, rather than in medical terminology. It should also be noted that nothing in the language of 42 U.S.C. § 423(d)(3) requires a different analysis. Although this part of the statutory definition of disability requires that the demonstration of the medical condition causing the impairment be “by medically acceptable clinical and laboratory diagnostic techniques,” the existence of the impairment itself need not be so proven. That is, although the existence of the medical condition must be proven by medical evidence, the statutory language does not impose a requirement that the resulting impairment also be proven by such evidence.

In short, the statutory language defines disability as a “functional” rather than a “medical or physical concept.” That is, disability determinations in particular cases are to be made not merely with reference to the medical diagnosis of the claimant’s condition, but rather with reference to the effects of the medical condition on the claimant’s ability to work. This emphasis is apparent in, for example, the section of the Social Security Regulation which provides that the presumption of disability which arises from a normally disabling medical condition may be rebutted by a showing that the claimant in fact has earnings from work activity

32. See supra note 28.
33. Id. See infra note 78 and accompanying text.
in excess of a certain sum.35 At such a level, earnings are consid-
ered by the Secretary to represent an ability to perform "substan-
tial gainful activity"36 within the meaning of the Act, unless the
work was performed in a sheltered or special environment,37 or was
otherwise not truly earned by the claimant.38

However, most claimants filing for disability benefits are not em-
ployed, and therefore, no question exists as to whether their earn-
ings actually represent an ability to perform work activity. For this
reason, most disability determinations involve the consideration of
medical evidence, which will necessarily vary greatly from case to
case. The Social Security Act authorizes the Secretary of Health
and Human Services to promulgate regulations to implement the
general requirements of the Act and determine what evidence is
admissible in making disability determinations.39 However, these
regulations must be “reasonable” and “not inconsistent with” the
provisions of the Act.40 An additional restraint is placed on the
Secretary’s discretion by section 205(g) of the Act,41 which requires
that his findings of fact be “supported by substantial evidence”42

35. 20 C.F.R. § 404.1574 (1983). See also McCormick, supra note 34, at § 392.
generally at 20 C.F.R. § 404.1572 (1983). To be considered “substantial,” the work activity
must involve “doing significant physical or mental activities.” Id. (a). To be “gainful,” it
must be for “pay or profit,” or be “the kind of work usually done for pay or profit, whether
or not a profit is realized.” 20 C.F.R. § 404.1572(b) (1983).
40. Id. Since the statute expressly delegates to the Secretary of Health and Human
Services the power to promulgate regulations as to what constitutes a “disability,” the stan-
dard for judicial review of the Regulations thus promulgated is that applied in Batterton v.
Francis, 432 U.S. 416 (1976). In Batterton, ruling upon a similar express delegation of power
by Congress, the Court held that Congress had thereby entrusted “to the Secretary rather
than the courts the primary responsibility for interpreting the statutory term.” Id. at 425.
Therefore, a court could not set aside a Regulation merely because it would have interpreted
the statute differently. Id.
41. Codified at 42 U.S.C. § 405(g) (Supp. V 1981). This section of the Act also provides
for judicial review of the final decision of the Secretary of Health and Human Services on an
application for disability insurance benefits by the filing of an action in the federal district
court within sixty days of such final decision. Id.
42. Id. “Substantial evidence” has been defined by the Supreme Court, in one of its
rare reviews of a Social Security disability case, as “more than a mere scintilla. It means
such relevant evidence as a reasonable mind might accept as adequate to support a conclu-
NLRB, 305 U.S. 197, 229 (1938)). The substantial evidence standard has been elaborated
upon occasionally by some of the district courts within the Third Circuit and it has been
held that it imposes an obligation on the reviewing courts to review the record as a whole to
determine whether a decision of the Secretary was supported by substantial evidence. Bur-
and provides that if they are so supported, the Secretary’s findings are conclusive as to any reviewing court. The substantial evidence rule constitutes, however, a separate and distinct basis for judicial review of the Secretary’s final decision. The effect of an incorrect application of the law by the Secretary is to take the case out of the substantial evidence standard.

Both of these bases for judicial review may come into play in cases in which disability is alleged on the basis of subjectively-felt pain. It is in such cases that the ability of the Social Security Administration to promulgate and apply fair regulations which are consistent with the statutory mandate, and to reach decisions supported by substantial evidence, is most severely tested. The difficulties inherent in performing the individualized adjudications required in disability cases are greatly compounded when complaints of chronic, disabling pain must be evaluated, since such complaints are subjective by nature, and such pain is viewed as unquantifiable and unmeasurable. Pain has been described as “the great unknown factor” in disability determinations, and as such creates some of the most intractable issues found in judicial review of such determinations.

As the party seeking an award of disability insurance benefits, the claimant bears the initial burden, or risk of non-persuasion, in proving his disability. Although the Social Security Act does not

(E.D. Pa. 1974). However, if there is “only a slight preponderance of evidence on one side or another” the Secretary’s decision must be affirmed. Szumowski v. Weinberger, 401 F. Supp. 1015 (E.D. Pa. 1975); Wilson v. Weinberger, 398 F. Supp. 1071 (E.D. Pa. 1975).


44. McCORMICK, supra note 34, at §§ 392, 730. The improper promulgation or application of a Social Security Regulation which is inconsistent with the Act would, of course, amount to such an error of law. The relationship between the two types of judicial review is recognized in 42 U.S.C. § 405(g) (Supp. V 1981), which states in part that:

The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of the failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations . . . .

Id.


46. Id. Bolan recognized that “[a]dministrative law judges are uneasy with pain complaints because pain is subjective, often advanced with weak objective findings, and subject to exaggeration or abuse.” Id. at 5. These are also, of course, the factors which make it difficult as a matter of policy for the Social Security Administration to make accurate disability determinations in this area; it may perhaps fairly be said that the Administration itself is “uneasy with pain complaints.”
specifically require that the claimant be made responsible for introducing evidence of his disability, 47 the Regulations 48 indicate that he must prove to the Social Security Administration or the state agency that he is disabled 49 by providing medical evidence showing the existence of an impairment and its severity. 50

The decisions of the Third Circuit Court of Appeals and other courts also place the burden of proving the existence of a disabling impairment resulting in an inability to return to his or her previous or customary occupation on the claimant. 51 This showing must

47. 42 U.S.C. § 405(a) (1976) merely provides that the Secretary’s Regulations are “to regulate and provide for the nature and extent of the proof and evidence and the method of taking and furnishing the same . . . .” Id.

48. Whether a claimant has a “medically determinable physical or mental impairment” within the Social Security Act’s definition of a “disability” is determined according to a five-step evaluation process provided for in the Regulations. This process requires that each case be evaluated according to a set order of considerations, and if a claimant is found to be disabled at any point, the case is not reviewed further. 20 C.F.R. § 404.1520(a) (1983). The questions to be considered under the Regulations are, first, whether the claimant is presently working. 20 C.F.R. § 404.1520(b) (1983). Next, it must be determined whether he has a “severe” impairment. 20 C.F.R. § 404.1520(c) (1983). A “severe” impairment is defined as one which “significantly limits . . . ability to do basic work activities . . . .” Id. It must then be determined whether the impairment meets or equals a listed impairment in Appendix 1 of the Regulations, 20 C.F.R. §§ 404.1501-404.1599 App. 1 (1983), which lists impairments for each of the major body systems which are considered severe enough to prevent a person from performing any type of work. See 20 C.F.R. § 404.1525(a) (1983). The listings include medical findings for each listed impairment, and these findings must be present before an impairment will be considered to “meet” the listing; a diagnosis of the impairment is insufficient. 20 C.F.R. § 404.1525(c), (d) (1983). If the medical findings required to support a diagnosis are not included in a particular listing, “the diagnosis must still be established on the basis of medically acceptable clinical and laboratory diagnostic techniques.” Id. at (c). “Medical equivalence” to a listed impairment requires a consideration of “symptoms, signs, and laboratory findings,” and must be based on “medically acceptable clinical and laboratory diagnostic techniques.” 20 C.F.R. § 404.1526 (1983). If a claimant is found disabled under either step (2) or step (3), his age, education, and work experience are not considered. 20 C.F.R. § 404.1520(c), (d) (1983). Findings are then made as to whether the impairment prevents the claimant from doing his past relevant work. 20 C.F.R. § 404.1520(e) (1983). Finally, a determination is made as to whether the claimant can do any other work. 20 C.F.R. § 404.1520(f) (1983). This stage is reached if the claimant has met his burden of proving an inability to return to his past work. See infra notes 51-55 and accompanying text. It involves consideration of the claimant’s age, education and work experience in light of his remaining residual functional capacity under Appendix 2 of the Regulations, 20 C.F.R. §§ 404.1501-404.1599 App. 2 (1983).


50. 20 C.F.R. §§ 404.1512(b), 404.1514 (1983). Note, however, that the Administration may pay physicians not employed by it to provide existing medical evidence. 20 C.F.R. § 404.1514 (1983). Also, if necessary to obtain more detailed or specialized medical evidence, or to resolve conflicts in the medical evidence already available, the Administration may have a consultative examination performed at no expense to the claimant. 20 C.F.R. § 404.1517 (1983).

51. The Regulations provide that only work experience from within the last 15 years
ordinarily be made by medical evidence, rather than subjective testimony of an inability to work, for a prima facie case of disability to have been made out.\(^5\) Recognizing the special significance of the opinion of the claimant’s regular treating physician,\(^6\) the court in *Rossi v. Califano*\(^6^4\) indicated that a claimant could satisfy this initial burden of showing an inability to return to customary work by having her doctor substantiate her subjective claim.\(^6^5\)

Provided that the claimant meets the initial burden of proving an inability to return to his or her past relevant work, the Third Circuit has held that the burden then shifts to the Secretary to demonstrate that the claimant is capable of performing some other type of substantial gainful activity.\(^6^6\) This holding raises several questions, including whether the burden which devolves on the Secretary upon the claimant’s introduction of a prima facie case of disability may properly even be described as a burden of proof, and whether this burden, if it exists, actually does shift.\(^6^7\) In *Dobrowolsky v. Califano*,\(^6^8\) it was seemingly recognized that to so formulate the issue failed to adequately and clearly define the re-

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52. *See, e.g.*, Cotter v. Harris, 642 F.2d 700, 708 (3d Cir. 1981); Livingston v. Califano, 614 F.2d 342, 345 (3d Cir. 1980); Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979); Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979).

53. *See infra* notes 153-65 and accompanying text.

54. 602 F.2d 55 (3d Cir. 1979).

55. 602 F.2d at 57 (citing Lewis v. Weinberger, 544 F.2d 417 (4th Cir. 1976); Capaldi v. Weinberger, 391 F. Supp. 502 (W.D. Pa. 1975)). The court noted that there was no evidence contradicting the claimant’s testimony that she was disabled by fever, nausea, and swelling of her arm resulting from surgery and radiation therapy for a carcinoma of the breast, and that her complaints were confirmed by her treating physician, who reported that she was disabled and that he had advised her not to return to work. 602 F.2d at 56-58.


57. *See Dobrowolsky v. Califano*, 606 F.2d 403 (3d Cir. 1979). In *Dobrowolsky*, the court noted that the burden devolving on the Secretary “has been variously described as a burden of proof, a burden to go forward and produce substantial evidence,” a burden “to show,” or simply a burden of production, with no ultimate shifting of the burden of proof. *Id.* at 406 (citations omitted). The court ended up “eschew[ing] such discussion as less than enlightening,” since the responsibilities of the parties “resist translation into absolutes, especially because social security proceedings are not strictly adversarial.” *Id.* (citing Miranda v. Secretary of HEW, 514 F.2d 996, 998 (1st Cir. 1975)).

58. 606 F.2d 403 (3d Cir. 1979).
sponsibility of the Secretary in disability adjudications: to reach a
decision based on substantial evidence as to whether the particular
claimant can perform any type of substantial gainful activity. A
similar recognition is seen in Livingston v. Califano, where the
court required the Secretary, once the claimant's initial burden
was met, to establish that there exists alternative substantial gain-
ful employment which is within his ability.

The Secretary is not, however, required to identify specific jobs
capable of being performed by the disability claimant, as had been
previously indicated in Rossi. Rather, in Santise v. Schweiker, the
Third Circuit Court of Appeals upheld the use of the medical-
vocational regulations (commonly referred to as the "grid") promulgated
by the Secretary in 1978 as an acceptable means of
discharging the Secretary's burden of proof. The medical-voca-
tional regulations take administrative notice of the general availa-
bility of jobs which could be performed by a person of the particu-
lar claimant's age, education, work experience, and "residual
functional capacity." This holding had the effect of overruling
Rossi as to the "specific job" requirement. The approach of the
court in Santise has since been adopted by the United States Su-
preme Court in Heckler v. Campbell.

59. Id. at 406.
60. 614 F.2d 342 (3d Cir. 1980).
61. Id. at 345.
62. 602 F.2d at 57. The Rossi rule was discussed with approval and reaffirmed as late
as 1982 in Torres v. Schweiker, 682 F.2d 109 (3d Cir. 1982). In Torres, the court conceded
that the statutory language appeared to be neutral as to the burden of proof question, but
the rule was approved as consistent with the recognition that sophisticated information as
to the availability of jobs in the national economy was available to the Secretary, but not to
most claimants. Id. at 111-12. Oddly enough, in discussing the Rossi rule the court failed to
mention its recent decision in Santise v. Schweiker, 676 F.2d 925 (3d Cir. 1982), which had
effectively laid to rest the requirement that the availability of specific alternative jobs be
shown. See infra notes 63-70 and accompanying text.
63. 676 F.2d 925 (3d Cir. 1982).
65. See, e.g., 676 F.2d at 927.
(1983)).
67. 676 F.2d at 938.
68. "Residual functional capacity" is defined by the Regulations as "what you can still
69. 676 F.2d at 938. The court considered this requirement to be no longer necessary
in light of the new regulations. Id.
III. PROOF OF DISABLING PAIN IN THE THIRD CIRCUIT AND THE SOCIAL SECURITY ADMINISTRATION

Although allegations of subjectively-felt disabling pain may not fit comfortably within the Secretary's regulatory scheme, they still must be dealt with in a large number of cases. In an attempt to deal with such allegations within the broad requirement of the Social Security Act that disability benefits be granted only to claimants suffering from a "medically determinable physical or mental impairment," the Secretary has promulgated several Regulations. Generally speaking, these Regulations impose what has been described as the "'clinical' or 'laboratory' demonstration requirement," which tends to exclude unmeasured, subjectively-felt pain as a medically determinable impairment.

This requirement can be found in several sections of the Social Security Regulations. For example, after reciting the statutory definition of a "disability" as an inability to work as the result of a medically determinable physical or mental impairment, the Regulations add the requirement that the impairment result from "abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques." This language is taken, of course, from another subsection of the statutory definition of disability, namely 42 U.S.C. § 432(d)(3). It means, according to the Social Security Administration, that although "symptoms" can be considered, the existence of an impairment as well as of the "abnormality" causing it must be proven by "medical evidence consisting of symptoms, signs, and laboratory findings, not only by your [the claimant's] statement of symptoms."

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72. See infra notes 74-86 and accompanying text.
73. See McCormick, supra note 34, at § 412.
75. 20 C.F.R. § 404.1508 (1983).
76. See supra note 28.
77. 20 C.F.R. § 404.1508 (1983) provides:
What is needed to show an impairment.
If you are not doing substantial gainful activity, we always look first at your physical or mental impairment(s) to determine whether you are disabled or blind. Your impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by your statement of symptoms. (See § 404.1528 for further information about what we mean by symptoms, signs, and laboratory findings).
The difficulty with this Regulation, in terms of its quotation of this statutory language, is that when a careful comparison with the Regulation is made, it becomes apparent that it imposes an additional requirement for a proof of a disability, beyond that contemplated in the statute. That is, when read carefully, it is clear that 42 U.S.C. § 423(d)(3) does not require that the impairment itself be demonstrated with "clinical" and "laboratory" findings. Rather, such findings are only required to demonstrate the existence of a medical "abnormality" causing the impairment. From its second to its third sentence, however, the Regulation leaps from the clinical and laboratory demonstration requirement which is justified under the Act to one which is not, and requires a claimant to produce such evidence in the form of "signs, symptoms, and laboratory findings" as to the impairment as well as its medical cause.

The above-quoted Regulation, 20 C.F.R. § 404.1508, then refers the reader to 20 C.F.R. § 404.1528 for a further definition of signs, symptoms, and laboratory findings. This Regulation illustrates

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78. See supra text accompanying notes 32-34. Nor, it should be noted, does the language of 42 U.S.C. § 423(d)(1) provide support for the additional clinical and laboratory demonstration requirement, by requiring proof of the existence of a "medically determinable . . . impairment." Id. See supra note 28. Although to this writer's knowledge, the relationship between § 423(d)(1) and § 423(d)(3) has never been analyzed by any court, an assumption that "medically determinable" is the equivalent of "by medically acceptable clinical and laboratory diagnostic techniques" would seem to be unwarranted absent a plain indication of legislative intent that the statute should be so construed. The "medically determinable" language would seem to contemplate an acceptance of a wider range of evidence, including, for example, a physician's report based on a familiarity with the claimant's condition, but not supported by more precise medical evidence such as X-rays or laboratory tests.

79. See supra note 77.

80. 20 C.F.R. § 404.1528 (1983) provides:

Medical findings consist of symptoms, signs, and laboratory findings:

(a) Symptoms are your own descriptions of your physical or mental impairment. Your statements alone are not enough to establish that there is a physical or mental impairment.

(b) Signs are anatomical, physiological, or psychological abnormalities which can be observed, apart from your statements (symptoms). Signs must be shown by medically acceptable clinical diagnostic techniques. Psychiatric signs are medically demonstrable phenomena which indicate specific abnormalities of behavior, effect, thought, memory, orientation and contact with reality. They must also be shown by observable facts that can be medically described and evaluated.

(c) Laboratory findings are anatomical, physiological or psychological phenomena which can be shown by the use of medically acceptable laboratory diagnostic techniques. Some of these diagnostic techniques include chemical tests,
the extent to which the Social Security Administration has cut back on the consideration of evidence which might otherwise be found probative. All three types of acceptable medical evidence are included within the caption of "medical findings" which, according to the preceding Regulation, will be reviewed to determine if there is support for a physician's conclusion that the claimant is disabled. However, it is clear that "symptoms" (the definition of which includes pain), will not be considered sufficient to establish disability, no matter how severe, unless the existence of the medical condition causing the symptoms is also demonstrated by a review of that medical evidence which is provided through "medically acceptable clinical diagnostic techniques" and "medically acceptable laboratory diagnostic techniques."

The extent to which the Secretary has sought to exclude subjectively-felt pain from the disability equation is further illustrated by 20 C.F.R. § 404.1529. This Regulation indicates that such pain can serve as the basis of a finding of disability only to the extent that there is proof of a medical condition "that could be reasonably expected to produce" the pain. On its face, this seems a reasonable requirement, because it would appear from the language of this Regulation that the proof required could include a physician's report which includes a professional opinion that the claimant is disabled. That is, since under the Regulations the complaint may be confirmed by "medical signs" which are defined as "abnormal-

electrophysiological studies (electrocardiogram, electroencephalogram, etc.),
roentgenological studies (x-rays), and psychological tests.

Id.
84. 20 C.F.R. § 404.1528(b) (1983). See supra note 80.
85. 20 C.F.R. § 404.1528(c) (1983). See supra note 80.
86. 20 C.F.R. § 404.1529 (1983) provides:
How we evaluate symptoms, including pain.
If you have a physical or mental impairment, you may have symptoms (like pain, shortness of breath, weakness or nervousness). We consider all your symptoms, including pain, and the extent to which signs and laboratory findings confirm these symptoms. The effects of all symptoms, including severe and prolonged pain, must be evaluated on the basis of a medically determinable impairment which can be shown to be the cause of the symptom. We will never find that you are disabled based on your symptoms, including pain, unless medical signs or findings show that there is a medical condition that could reasonably be expected to produce those symptoms.

Id.
87. Id.
ities which can be observed, apart from your statements, one might imagine that it is medical professionals who are to do the observing. The definition of "medical findings" would presumably include professional medical opinions. However, the Secretary has also promulgated a regulation which seeks to preclude such professional judgment as the basis for establishing a disability, absent a review of supporting "medical findings" by the Secretary. Since medical findings are defined to include "signs" which "can be observed," the Secretary's reasoning in promulgating these regulations seems confusing and circular. Surely, the process by which an independent professional judgment as to what constitutes a medically determinable impairment in a particular case is rendered ought not to be unnecessarily restricted, unless bias on the part of a particular physician is suspected.

What emerges from an overview of the disability regulations on pain, therefore, is the realization that the Secretary has sought so far as possible to exclude the more subjective types of professional medical evidence from consideration. The effects of this approach are aggravated by the fact that the regulations also require that the etiology of a claimant's complaints be definitely established, despite the intensity of any symptoms as confirmed by a doctor's professional observations. In other words, the Secretary requires

89. 20 C.F.R. § 404.1527 (1983).
90. 20 C.F.R. § 404.1528(b) (1983). See supra note 80.
91. See 20 C.F.R. § 404.1513(b)-(d) (1983), which defines what medical reports should include and imposes a requirement of "completeness" which includes "clinical and laboratory findings." Id. § 404.1513(d). If enforced in cases involving subjective pain as a disability, where such findings are likely to be absent at least as far as the intensity of the pain is concerned, this requirement would have the effect of confining even further the Secretary's definition of "medically determinable."
92. Such bias, either for or against a claimant, should not be presumed; the United States Supreme Court in Richardson v. Perales, 402 U.S. 389 (1971), noted that "[w]e cannot, and do not, ascribe bias to the work of these independent physicians, or any interest on their part in the outcome of the administrative proceeding beyond the professional curiosity a dedicated medical man possesses." Id. at 403.
93. 20 C.F.R. § 404.1529 (1983). See supra note 86. This policy was made more explicit in a recent Social Security Ruling, intended to state the policy of the Social Security Administration on the consideration to be given to symptoms, particularly pain, in the evaluation of disability:

If no medically determinable physical impairment is found, yet the person alleges work-related limitations due to a symptom normally attributable to a physical impairment, the possibility of a medically determinable severe mental impairment must be considered. When a medically determinable severe impairment cannot be established on either a physical or mental basis, the claim must be denied, regardless of the intensity of the symptom, related limitations alleged, or any judgments by exam-
"objective" proof not just of the cause of subjectively-felt pain, but also of its intensity, though the latter will be inherently difficult to produce due to the nature of the impairment. Such an approach to disability claims will clearly fall most harshly on those claimants whose subjective complaints are not easily confirmed by the types of objective evidence demanded by the Secretary.

A. Reports of Physicians as Proof of a "Medically Determinable Impairment"

The Third Circuit Court of Appeals has responded to the Secretary's policy on proof of disabling pain by holding, along with other circuits, that a disability claimant's symptomatology, as evidenced either by his doctor's reports or by his subjective complaints, must be considered even if not accompanied by objective medical data. This rule is consistent with the court's holding in other cases that pain itself can be a disabling condition. These holdings must, however, be read in conjunction with the understanding that subjective testimony of disabling pain standing alone, will be insufficient to meet a claimant's initial burden of proving an inability to return to his past relevant employment.

It is thus clear that the courts will require the serious consideration of all relevant medical evidence at all stages of disability determination proceedings, despite the restrictions of the Social Security Regulations. The decisions demonstrate that this includes professional medical opinions based on examinations and familiarity with a claimant's condition, even if no "clinical" or "laboratory" findings are provided with the physician's report. The cases also indicate that when an administrative law judge arrives at a finding of "not disabled" by excluding evidence to the contrary which did not include such findings, the decision will not be considered to have met the substantial evidence test. In such cases,
the courts have not hesitated to remand the case for a reconsideration of the evidence by the Secretary.

As an example of the requirement that all types of relevant evidence be considered, the Federal District Court for the Eastern District of Pennsylvania has long characterized the resolution of the disability issue as dependent on the results of a two-pronged test: (1) a determination of the extent of physical or mental disabilities, and (2) a determination as to whether they result in an inability to perform substantial gainful activity. In making such determinations, four elements of proof must be considered: (1) medical data and findings, (2) expert medical opinions, (3) subjective complaints and (4) the claimant’s age, education and work experience.99 The requirement that elements (2) and (3) be considered, if not met at the first part of the two-pronged test, would at least have to be met when the determination of whether an impairment has resulted from the medical condition is made.100 In other words, the Secretary may not resolve the disability issue by considering only the “objective” evidence in a given case and ignoring other professional medical evidence. This approach to the disability issue was illustrated by the Third Circuit’s discussions of the evidence in Rossi v. Califano101 and Fowler v. Califano.102 In both of these cases, denials of disability benefits were reversed by the Court after a discussion of reports of treating physicians that contained professional opinions, unsupported by “objective findings,” that the claimants were disabled. In both cases, these reports had been slighted by the administrative law judges.103


100. If one of the elements of proof is slighted, the resulting determination cannot be said to be supported by substantial evidence, since “[i]f reliance has been placed upon one portion of the record to the disregard of overwhelming evidence to the contrary, the reviewing court must decide against the Secretary.” Szumowski v. Weinberger, 401 F. Supp. 1015, 1016 (E.D. Pa. 1975) (citing Thomas v. Celebrezze, 331 F.2d 541 (4th Cir. 1964)).

101. 602 F.2d 55 (3d Cir. 1979).

102. 596 F.2d 600 (3d Cir. 1979).

103. In Rossi, the court quoted the report of Dr. Rice, the claimant’s treating physician, who recounted the history of her illness and opined that following her course of radiation treatment for her cancer “she was totally disabled . . . [and] is still disabled.” 602 F.2d at 56-57. The court then noted that “disability may be ‘medically determined’ . . . even when a doctor’s opinion is not supported by objective clinical findings.” Id. at 58 (citing Stark v. Weinberger, 497 F.2d 1092 (7th Cir. 1974); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967)). In any event, the court concluded that the opinion relied upon by the Secretary was not “a professional opinion that the applicant ‘is capable of working and as to what she can do.’” 602 F.2d at 58 (citing Whitson v. Finch, 437 F.2d 728, 732 (6th Cir. 1971)).
Despite such holdings, however, the extent to which professional medical opinions are determinative of the disability issue should not be overstated. To say that this type of evidence must be considered for the determination of the Secretary to be supported by substantial evidence is not to say that it is dispositive of the cases.\textsuperscript{104} Even if the existence of a disease capable of causing the disabilities at issue is clearly established, this will not end the inquiry; the claimant must also establish that the disease renders him unable to engage in substantial employment.\textsuperscript{105} Therefore, although professional opinions of disability must be considered, their rejection because of a lack of supporting objective medical data has been upheld in cases in which the reports were characterized as unsubstantiated, contradictory, and/or conclusory.\textsuperscript{106}

Within these limitations, however, the status of what has been termed "subjective medical evidence"\textsuperscript{107} is now securely established, as far as the reviewing courts are concerned. Although the Social Security Act requires proof of a medically determinable impairment, this does not mean that symptoms or subjective complaints associated with such an impairment may be ignored when not substantiated by objective medical evidence.\textsuperscript{108} As one district court has suggested, to the extent the Social Security Regulations enact such rules, they are "of dubious legality."\textsuperscript{109} It is submitted

\textsuperscript{104} Fowler the court noted that the opinions of the claimant's treating physician and of her employer (also a physician), that because of the progress of her multiple sclerosis she had become disabled were ignored by the administrative law judge, who reached a conclusory finding that she was not disabled. 596 F.2d at 602. The court found that this result was "not supported by any medical opinion in this case." Id. at 603.

\textsuperscript{105} Beasley v. Califano, 608 F.2d 1162 (8th Cir. 1979).


\textsuperscript{107} See, e.g., Oldham v. Schweiker, 660 F.2d 1078 (5th Cir. 1981) (opinion that the claimant was disabled was conclusory and devoid of any support in the way of clinical or laboratory findings); Kirkland v. Weinberger, 480 F.2d 46 (5th Cir. 1973) (a physician's unsubstantiated, contradictory, and totally conclusory statement was insufficient to establish an impairment); Gianella v. Califano, 477 F. Supp. 7 (E.D. Mo. 1979) (claimant's medical examiners agreed on a diagnosis of coccydynia and low back pain, but there were no objective findings and two of them commented on the claimant's dexterity of motion and lack of distress).

\textsuperscript{108} See Simpson v. Schweiker, 691 F.2d 966 (11th Cir. 1982); Wiggins v. Schweiker, 679 F.2d 1387 (11th Cir. 1982); Marcus v. Califano, 615 F.2d 23 (2d Cir. 1979); Northcutt v. Califano, 581 F.2d 164 (8th Cir. 1978); Bittel v. Richardson, 441 F.2d 1193 (3d Cir. 1971).

\textsuperscript{109} Abel v. Secretary of HEW, 384 F. Supp. 1212, 1215 (W.D. Tex. 1974).

\textsuperscript{107} See, e.g., Oldham v. Schweiker, 660 F.2d 1078 (5th Cir. 1981) (opinion that the claimant was disabled was conclusory and devoid of any support in the way of clinical or laboratory findings); Kirkland v. Weinberger, 480 F.2d 46 (5th Cir. 1973) (a physician's unsubstantiated, contradictory, and totally conclusory statement was insufficient to establish an impairment); Gianella v. Califano, 477 F. Supp. 7 (E.D. Mo. 1979) (claimant's medical examiners agreed on a diagnosis of coccydynia and low back pain, but there were no objective findings and two of them commented on the claimant's dexterity of motion and lack of distress).

\textsuperscript{108} See Simpson v. Schweiker, 691 F.2d 966 (11th Cir. 1982); Wiggins v. Schweiker, 679 F.2d 1387 (11th Cir. 1982); Marcus v. Califano, 615 F.2d 23 (2d Cir. 1979); Northcutt v. Califano, 581 F.2d 164 (8th Cir. 1978); Bittel v. Richardson, 441 F.2d 1193 (3d Cir. 1971).

\textsuperscript{109} Rosario v. Secretary of Health and Human Serv., 512 F. Supp. 874, 876 n.2 (S.D.N.Y. 1981) (discussion of 20 C.F.R. § 404.1529 (1980)). The court stated that "[t]he promulgation of a regulation does not vest with legitimacy a practice that the reviewing courts have explicitly rejected." 512 F. Supp. at 876 n.2. See supra note 86 for the text of 20 C.F.R. § 404.1529 (1983), which is unchanged from the 1980 version despite the admonition
that, in addition, such a rule would also be inconsistent with the practicalities of proving a disabling impairment. Not only is "subjective medical evidence" likely to be highly reliable and probative,¹¹⁰ but to exclude it would make the rejection of meritorious disability claims simply too easy, and too likely.¹¹¹ For these reasons, the judicially imposed rule which admits such evidence is not only consistent with the Social Security Act's definition of "disability," it is also absolutely necessary to the fair administration of the Act.

B. Evaluating the Claimant's Subjective Complaints

In addition to requiring at least a consideration of "subjective medical evidence" provided by physicians, the Third Circuit has held that the Secretary must also consider the credibility of a claimant's complaints of subjective pain and inability to work.¹¹² This is consistent with the court's realization that pain itself can be a disabling condition,¹¹³ and that often the exact extent of the effects of a particular claimant's pain on his ability to work will not ordinarily be measurable by medical science, even if the medical condition causing the pain is definitely ascertainable.¹¹⁴ The rule is thus consistent with the necessity or proving that a claimant's im-

of the court in Rosario.

¹¹⁰. As the court noted in Karp v. Schweiker, 539 F. Supp. 217, 220 (N.D. Cal. 1982) (citing Flake v. Gardner, 399 F.2d 532, 540-41 (9th Cir. 1968)):

Not all subjective complaints of a patient are accepted by a doctor. But one skilled in the art may well be able, by medically acceptable clinical techniques, to sort them out, to decide which to believe and to make a diagnosis accordingly. In this case, several doctors, in spite of a lack of objective symptoms, believed [the claimant's] complaints and came to a diagnosis on that basis. Id.

¹¹¹. This occurred in Timblin v. Harris, 498 F. Supp. 1107 (W.D. Pa. 1980), where the court noted that although two physicians had confirmed that the claimant was disabled and there was no contrary evidence, "the Secretary classifies medical facts as subjective complaints . . . which the fact-finder may reject." Id. at 1108. The court reversed, and awarded benefits to the claimant. Id. at 1109.


¹¹⁴. For example, citing the rule that pain itself can be a disabling condition, the court in one case noted that "[c]omplaints of disabling back pain are among the most difficult types of claims to resolve with any degree of certainty." Taybron v. Harris, 667 F.2d 412, 415 (3d Cir. 1981).
pairment is "severe" and that it is not remediable. It embraces the common-sense realization that a person with a long employment history is not likely to suddenly start faking a disability.

For these reasons, the Third Circuit Court of Appeals has recognized that an administrative law judge deciding a disability case must make specific findings on the credibility of a claimant’s subjective complaints. Of course, such complaints may still be rejected by the trier of fact, but only if properly weighed. It has been held that a proper weighing of a claimant’s complaints of disabling pain entails making an “express finding” as to his credibility. That is, the administrative law judge must “affirmatively address the issue in his decision.” If the claimant’s testimony is rejected, it must be for “reasons consonant with the substantial evidence test.” A claimant’s testimony may not be dismissed as wholly

116. 20 C.F.R. § 404.1530 (1983). See also Coleman v. Califano, 462 F. Supp. 77 (N.D.N.Y. 1978) (the court held that the refusal to undergo hernia surgery and attempt weight reduction meant that the claimant suffered only remediable impairments that could not serve as the basis for a finding of disability); Locklear v. Mathews, 424 F. Supp. 639 (D. Md. 1976) (affirming the finding of the administrative law judge that the claimant’s obesity was remediable, the court denied benefits to the claimant). Compare with Lewis v. Califano, 616 F.2d 73 (3d Cir. 1980) (claimant who refused to undergo surgery to remove tumor because of religious belief in faith healing was entitled to benefits if found disabled).

117. E.g., Vitek v. Finch, 438 F.2d 1157 (4th Cir. 1971); Duncan v. Harris, 518 F. Supp. 751 (E.D. Ark. 1980); Nanny v. Mathews, 423 F. Supp. 548 (E.D. Va. 1976). The Third Circuit has recognized that a degree of pain which does not completely incapacitate a person may still be sufficient to prevent him from meeting the demands of a regular work schedule. Therefore, the testimony of a claimant with a long work history as to his abilities is entitled to great weight. Dobrowolsky v. Califano, 606 F.2d 403 (3d Cir. 1979). In such cases, it has been held to be error to infer a lack of disabling pain from the claimant’s “sporadic activities.” Smith v. Califano, 637 F.2d 968, 972 (3d Cir. 1981); Tunstall v. Schweiker, 511 F. Supp. 470, 474 (E.D. Pa. 1981).


119. See, e.g., Greth v. Califano, 438 F. Supp. 1270, 1272 (E.D. Pa. 1977), where the court noted that “[o]nly a single opaque paragraph in the ALJ’s decision adverts to plaintiff’s credibility.” Id. at 1271. Furthermore, this paragraph referred as much to the Secretary’s requirement that subjective pain be proven by “clinical” and “laboratory” findings as to the claimant’s complaints. Therefore, in the absence of any express finding on the credibility of the claimant’s complaints, the court was reluctant to address the merits of the case, and remanded it instead for appropriate findings of fact. Id. at 1272.


121. Rusnak v. Matthews, 415 F. Supp. 822, 824 (D. Del. 1976). Note that if the Social Security Administration Appeals Council rejects the credibility findings of an administrative law judge and overturns his decision granting benefits, it is under the same obligation to
self-serving simply because it is subjective,122 although it has also been stated that the testimony must be evaluated with due consideration for the claimant’s motivation.123 In fact, the administrative law judge may be said to be under a duty to evaluate the claimant’s subjective complaints in light of the objective medical evidence and other evidence which is available,124 and may reject complaints which are “grossly disproportionate” to such evidence.125 However, if there is no medical evidence in the record to support a finding that claimant’s subjective complaints are not credible, reversal or remand is required.126

In addition to the Social Security Regulations which require that subjective complaints be supported by “clinical” or “laboratory” findings,127 the decisions of the Third Circuit and other courts have had to deal with several other rationales purporting to justify refusals to properly weigh such evidence. One such rationale for the discounting of both the medical evidence presented by a claimant and his subjective complaints is that the claimant’s appearance does not conform to the administrative law judge’s idea of what a person suffering from the particular medical conditions alleged should look like. This approach to the disability issue was firmly rejected by the Third Circuit Court of Appeals in Kelly v. Railroad Retirement Board.128 In that case, in regard to professional psychiatric evidence submitted by a claimant seeking a disabled child’s annuity under the Railroad Retirement Act, the court stated that such evidence could not be rejected merely upon an administrative law judge’s lay observation that the claimant appeared to be an ordinary, normal individual.129 This holding was consistent with

make express findings. Beavers v. Secretary of HEW, 577 F.2d 383, 387 (6th Cir. 1978). However, if the Appeals Council only summarily affirms the administrative law judge’s decision, the reviewing court will assume that all matters of record were fully considered. Carlin v. Secretary of HEW, 448 F. Supp. 34 (D. Kan. 1978).

128. 625 F.2d 486 (3d Cir. 1980).
129. 625 F.2d at 494 (3d Cir. 1980) (citing Lewis v. Califano, 616 F.2d 73, 76 (3d Cir. 1980); Gober v. Mathews, 574 F.2d 772, 777 (3d Cir. 1978)). The court noted that five psychiatrists had classified the claimant as having depressive neurosis and one psychologist had diagnosed her as having a “hysterical personality.” 625 F.2d at 494. Of course, when a psychological disability is alleged, the observation of an administrative law judge that the
the fact that the administrative law judge, though entitled and indeed required to assess credibility,\footnote{See supra notes 118-126 and accompanying text.} is outside his realm of expertise when he attempts to make a medical judgment based on the physical appearance of a claimant. For this reason, the Third Circuit has held on numerous occasions that he may not “set his own expertise against that of a physician who testified before him,”\footnote{Gober v. Matthews, 574 F.2d 772, 777 (3d Cir. 1978).} or who otherwise presents competent medical evidence.\footnote{Lewis v. Califano, 616 F.2d 73, 76-77 (3d Cir. 1979); Golofsky v. Califano, 607 F.2d 1063, 1068 (3d Cir. 1979); Fowler v. Califano, 596 F.2d 600, 603 (3d Cir. 1979). In Lewis, for example, the court held that the administrative law judge could not determine from the claimant’s appearance alone, in light of the medical evidence to the contrary, that she was not disabled by a uterine tumor which one physician described as larger than a full-term fetus. 616 F.2d at 76-77.}

Other courts have confirmed and followed these holdings. Although the administrative law judge may rely on demeanor evidence and his own impressions and observations derived therefrom,\footnote{See supra notes 118-126 and accompanying text.} he may not discard the other evidence presented on the basis that the claimant’s appearance did not present “observable phenomena” thought to be associated with complaints of disabling pain, such as significant muscle atrophy or weight loss.\footnote{King v. Secretary of HEW, 481 F. Supp. 947, 948-49 (E.D. Pa. 1979).} Such assessments of a claimant’s pain have been rejected on the basis that the proposition that such “observable phenomena” should exist is not self-evident for all pain in every organ, and was not established on the record by expert testimony.\footnote{Id. at 949.} Such “sit and squirm” jurisprudence\footnote{E.g., Freeman v. Schweiker, 681 F.2d 727 (11th Cir. 1982) (the administrative law judge subjectively arrived at an index of traits which he expected a claimant alleging constant pain to exhibit, and then denied the claim when he failed to observe them in the claimant).} has even been carried to the point that an administrative law judge has improperly conducted an amateur vision test of an allegedly vision-impaired claimant by having her read a photostatic copy, resulting in the remand of the case.\footnote{Gudlis v. Califano, 452 F. Supp. 401 (N.D. Ill. 1978).}

C. Obligations of the Administrative Law Judge

In addition to failures to properly consider the credibility of a
claimant's subjective complaints, and properly weigh the medical evidence, administrative law judges have sometimes failed to meet other judicially imposed requirements in rendering their decisions. For example, decisions of administrative law judges have had to be reversed in literally hundreds of cases due to gross misinterpretations of medical reports, reliance on isolated statements taken out of context, failure to state explicit reasons for disregarding the claimant's medical evidence or testimony, or reaching a finding of non-disability in the face of unrebutted evidence to the contrary. A particular issue as to which there has been considerable controversy is the relative weight to be given the opinion of a regular treating physician, as opposed to one who performs a single consultative exam, or who does not examine the claimant at all.

Based on its review of disability cases where an administrative law judge's opinion exhibited some or all of these vices, the Third Circuit has in several cases discussed the standards expected of disability decisions on judicial review. The court has held that decisions of administrative law judges must be as "comprehensive and analytical" as feasible, revealing what evidence was accepted and what was rejected. In **Baerga v. Richardson**, for example, although the court of appeals affirmed a denial of benefits on other grounds, it expressed concern over the manner in which the administrative law judge set forth his decision. In his decision, the judge merely summarized the evidence, and then set forth an "evaluation of the evidence" in which the claimant's complaints were rejected in a conclusory manner without reference to his


139. Cotter v. Harris, 642 F.2d 700 (3d Cir. 1981); Baerga v. Richardson, 500 F.2d 309 (3d Cir. 1974), cert. denied, 420 U.S. 931 (1975). The court in **Baerga** noted that although the administrative law judge as fact-finder may reject evidence as not credible, "failure to indicate rejection could lead to a conclusion that he neglected to consider it at all." 500 F.2d at 312. See also Goodley v. Harris, 608 F.2d 234, 236 (5th Cir. 1979); Belmen v. Califano, 588 F.2d 252, 254 (8th Cir. 1978) (administrative law judge may not "arbitrarily choose to ignore an uncontroverted medical diagnosis").


141. Id. at 312. The court noted that: "The examiner merely extracted portions of the medical reports which he stated '... are of interest.' Consequently, the summary serves no purpose except for identifying portions of the evidence; there is absolutely no attempt to analyze or evaluate those items referred to in the summary." Id. at 312 n.3.

142. Id. at 312. The substitution of "conclusory" statements and assertions for a reasoned analysis was the basis for reversal of a finding of non-disability in Fowler v. Califano, 596 F.2d 600, 602 (3d Cir. 1979); Milazza v. Schweiker, 528 F. Supp. 1099, 1102 (E.D. Pa. 1981).
subjective complaints or to some of the medical reports which strongly supported the claim. This supporting evidence included x-ray studies revealing degenerative joint disease and reports of treating physicians confirming functional losses in the claimant’s spine and some of his joints.\textsuperscript{143}

The obvious reason for the requirement that disability determinations include full and explicit findings is so that a reviewing court will be able to discern the basis of the decision.\textsuperscript{144} The court will not speculate as to an administrative law judge’s reasoning process.\textsuperscript{145} It is only when the reasoning behind a disability decision is revealed that the court can determine whether the decision was supported by substantial evidence. Within that standard, reversals of decisions denying benefits have been required for various other reasons.

As might be expected, one of the most common causes for such reversals is a failure by the administrative law judge to adequately consider and discuss the subjective complaints of the claimant, and the testimony relating thereto. In this regard, the decision must include findings on the credibility of the claimant’s testimony,\textsuperscript{146} and benefits must be granted if there is no basis in the record for a finding on this issue.\textsuperscript{147} The administrative law judge must state reasons for the credibility choices made; he must explicitly state whether he believed or disbelieved the claimant.\textsuperscript{148} Various courts have also found fault with certain practices of administrative law judges in weighing medical reports. There have been reversals of decisions denying benefits for reliance on a portion of a report when a fair reading of the entire report did not support the decision,\textsuperscript{149} for excessive reliance on a “rather cursory” report in the

\textsuperscript{143} 500 F.2d at 312 n.4.

\textsuperscript{144} Dobrowolsky v. Califano, 606 F.2d 403 (3d Cir. 1979); Hargenrader v. Califano, 575 F.2d 434 (3d Cir. 1978); Baerga v. Richardson, 500 F.2d 309 (3d Cir. 1974), cert. denied, 420 U.S. 931 (1975); Burton v. Schweiker, 512 F. Supp. 913 (W.D. Pa. 1981). As was stated in Cotter v. Harris, 642 F.2d 700 (3d Cir. 1981): “Since it is apparent that the ALJ cannot reject evidence for no reason or for the wrong reason . . . an explanation from the ALJ of the reason why probative evidence has been rejected is required so that a reviewing court can determine whether the reasons for rejection were improper.” Id. at 706-07 (citation omitted).

\textsuperscript{145} Schaaf v. Matthews, 574 F.2d 157 (3d Cir. 1978).

\textsuperscript{146} Dobrowolsky v. Califano, 606 F.2d 403, 409 (3d Cir. 1979); Kephart v. Richardson, 505 F.2d 1085, 1089 (3d Cir. 1974).


\textsuperscript{149} Hassler v. Weinberger, 502 F.2d 172 (7th Cir. 1974).
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face of contrary evidence,\textsuperscript{150} and for basing a decision on a single report in the face of several others indicating that the claimant was disabled.\textsuperscript{151} One district court has provided a laundry list of reasons for remand in a disability case. These include reliance on equivocal or contradictory evidence not sufficient to meet the substantial evidence test, the absence of specific testimony from the record, a failure to make findings of fact reflecting a proper allocation of the burden of proof, and basing findings on medical records which defy comprehension because of illegibility.\textsuperscript{152}

Perhaps the most common failure of administrative law judges in weighing medical evidence is an excessive reliance on the reports of physicians who have performed a single consultative examination of the claimant for the Social Security Administration,\textsuperscript{153} or who have not examined him at all.\textsuperscript{154} The Third Circuit Court of Appeals has held, in \textit{Cotter v. Harris},\textsuperscript{155} that in comparison to such sources, the opinion of a claimant's regular treating physician is entitled to "substantial weight."\textsuperscript{156} This holding has also been reached by a large number of other courts.\textsuperscript{157} It has even been held

\begin{itemize}
  \item \textsuperscript{151} Kelly v. Railroad Retirement Bd., 625 F.2d 486 (3d Cir. 1980). See also Kent v. Schweiker, 710 F.2d 110 (3d Cir. 1983), where the court, after reciting the substantial evidence test as found in \textit{Cotter v. Harris}, 642 F.2d 700, 704 (3d Cir. 1981), pointed out that:
  \begin{quote}
    This oft-cited language is not, however, a talismanic or self-executing formula for adjudication; rather, our decisions make clear that determination of the existence \textit{vel non} of substantial evidence is \textit{not} merely a quantitative exercise. A single piece of evidence will not satisfy the substantiality test if the Secretary ignores, or fails to resolve a conflict created by countervailing evidence. Nor is evidence substantial if it is overwhelmed by other evidence—particularly certain types of evidence (e.g., that offered by treating physicians)—or if it really constitutes not evidence but merely conclusion. . . . The search for substantial evidence is thus a qualitative exercise without which our review of social security disability cases ceases to be merely differential and becomes instead a sham.
  \end{quote}
  \item \textsuperscript{152} Fields v. Harris, 498 F. Supp. 478 (N.D. Ga. 1980).
  \item \textsuperscript{153} The use of written reports from physicians who have performed consultative examinations was approved in Richardson v. Perales, 402 U.S. 389, 402 (1971), and is provided for at 20 C.F.R. §§ 404.1517-404.1518 (1983).
  \item \textsuperscript{154} 20 C.F.R. § 404.1546 provides for the use of state agency staff physicians or other physicians designated by the Secretary to provide assessments of a claimant's residual functional capacity, based on the reports of "treating or examining physicians, consultative physicians, or any other physician designated by the Secretary." \textit{Id}.
  \item \textsuperscript{155} 642 F.2d 700, 704 (3d Cir. 1981).
  \item \textsuperscript{156} 642 F.2d at 704 (citing Bastien v. Califano, 572 F.2d 908, 912 (2d Cir. 1978)). The court noted that the administrative law judge did not even mention the report of Dr. Corcino, the claimant's treating physician, or his opinion that that claimant could not return to work. Instead, he preferred to rely on the contrary opinion of Dr. Trinidad, who had performed only a single consultative examination. 642 F.2d at 704.
  \item \textsuperscript{157} \textit{E.g.}, Wiggins v. Schweiker, 679 F.2d 1387 (11th Cir. 1982); Carver v. Harris, 634
that this rule applies notwithstanding that the treating physician did not treat the claimant until after the relevant determination date. In the Second Circuit Court of Appeals, the rule prevails that when no contrary evidence is presented, the treating physician’s expert opinion is binding as to whether a disabling impairment exists. A few courts have held that when the only evidence presenting an opinion contrary to those that the claimant is disabled is presented by a non-examining physician, such evidence cannot even constitute “substantial evidence.” Although the rules of these latter cases represent an extreme position, it is clear that the rule that the opinion of a treating physician is entitled to the greatest weight has been largely accepted. Certainly, a consultant’s advisory report is not conclusive, simply because it was ordered by a state agency or by the Secretary.

The Social Security Administration, however, continues to downplay the importance of the opinions of treating physicians, as evidenced by the promulgation of 20 C.F.R. § 404.1527, which attempts to minimize the effect to be given a statement by such a physician that a claimant is “disabled” or “unable to work.” This policy was recently reaffirmed in a memorandum to all administrative law judges from the Administration’s Office of Hearings and Appeals. This memorandum reviewed “problems” revealed by the ongoing “Bellmon Review” program provided for in the 1980 amendments to the Social Security Act. It indicated

F.2d 363 (7th Cir. 1980); Oppenheim v. Finch, 495 F.2d 396 (4th Cir. 1974); Jones v. Harris, 497 F. Supp. 161 (E.D. Pa. 1980); McDaniel v. Califano, 446 F. Supp. 1080 (W.D.N.C. 1978). Contra Sitar v. Schweiker, 671 F.2d 19 (1st Cir. 1982) (a treating physician’s opinion is not necessarily entitled to greater weight than that of a physician who examines the claimant only once).

158. Boyd v. Heckler, 704 F.2d 1207 (11th Cir. 1983); Dousewicz v. Harris, 646 F.2d 771 (2d Cir. 1981); Stark v. Weinberger, 497 F.2d 1092 (7th Cir. 1974).

159. See, e.g., Eiden v. Secretary of HEW, 616 F.2d 63 (2d Cir. 1980); Alvarado v. Califano, 605 F.2d 34 (2d Cir. 1979).


161. Smith v. Schweiker, 671 F.2d 789 (3d Cir. 1982). See also Woodard v. Schweiker, 668 F.2d 370 (8th Cir. 1981), where it was held to be improper for an administrative law judge to agree to be “bound” by a non-examining medical advisor’s opinion as to whether the claimant was “impaired,” and to reject her claim upon the response that she was not. Id. at 373.


164. In addition to the other changes in the management of the disability program
that in claimant-favorable disability determinations, there "appears to be a tendency to accord undue weight" to the opinions of treating physicians, as well as to the testimony of the claimant’s themselves. The memorandum clearly reveals that although the Administration is aware of the judicial holdings on these issues, it intends not to follow them, and to limit their effects as much as possible.

IV. THE "POLICY OF NON-ACQUIESCENCE"

A case may be made out for the proposition that much of the tension between the policies of the Social Security Administration and the decisions of the Third Circuit Court of Appeals and other courts is inevitable, as the natural result of the difference in institutional perspectives. However, of late this difference has been unnecessarily aggravated by the Secretary’s refusal to attempt to accommodate the judicial interpretations of the Social Security Act within the disability adjudication process. Instead, the Secretary has embarked on a “policy of non-acquiescence” as to court decisions which are inconsistent with the Social Security Regulations and other expressions of policy, refusing to give these decisions any effect in disability determinations. This policy of non-acquiescence has especially affected claimants who have alleged a disabling degree of subjectively-felt pain.

The policy of non-acquiescence is not merely some vaguely discernible trend; rather, it is an announced policy which the Social Security Administration expects its personnel to consistently apply. It is defined in the OHA Handbook, which is made available to personnel of the Administration’s Office of Hearings and Appeals who are responsible for conducting hearings and reviews of disability claims. Under the non-acquiescence policy, administrative law judges and other personnel are informed that the Secretary is bound only by the decisions of the United States Supreme

discussed supra note 12 § 304(g) of Pub. L. No. 96-265 provided that: “[t]he Secretary of Health and Human Services shall implement a program of reviewing, on his own motion, decisions rendered by administrative law judges as a result of hearing under section 221(d) of the Social Security Act, and shall report to the Congress by January 1, 1982, on his progress.” Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 304(g), 94 Stat. 456 (appears in notes following 42 U.S.C. § 421 (Supp. V 1981)).

165. Results of Bellmon Review, supra note 163, at 15.

166. See supra note 27 and accompanying text.


Court, and not by the decisions of federal district and appeals courts. When a decision of a lower federal court is inconsistent with the Secretary's interpretation of the Social Security Act or Regulations, such a decision is not to be considered binding in other than the particular case it decides. This applies even as to decisions which are not appealed by the Secretary.

This policy of non-acquiescence greatly complicates the task of securing disability benefits for claimants who are lawfully entitled to them, especially when benefits are sought on the basis of subjectively-felt disabling pain, since there is such a disparity between the Secretary's policy and the judicial decisions on that issue. The result is the creation of dual standards for the determination of disability issues: one standard for claimants who appeal denials or terminations of benefits to the courts, where the judicially evolved standards apply, and another, more restrictive, standard for those who give up at the administrative level. In addition, administrative law judges charged with rendering disability determinations are placed, unnecessarily, in a crossfire between the inconsistent standards of adjudication imposed by their superiors and by the courts. The final result of the non-acquiescence policy is that more applications are wrongfully denied than would otherwise be the case, and it is more often necessary to seek judicial review of the Secretary's determinations. More benefit dollars end up in the hands of attorneys, as contingent fees. Nonetheless, the policy continues to be defended by the Secretary, who has contended that the "case law" supports it.

169. OHA Handbook, supra note 167, at § 1-161 (T.S. No. 1-9, issued 12/79). The Social Security Administration may decide to acquiesce in a particular district or circuit court decision however, and issue an appropriate regulation or ruling. Id. This writer knows of no instance in which it has done so concerning the issues discussed in this comment.

170. Id. The OHA Handbook indicates that "[i]n certain cases SSA will not appeal a court decision it disagrees with, in view of special circumstances of the particular case (e.g., the limited effect of the decision)." Id.

171. Policy of Acquiescence Bombarded, SOCIAL SECURITY FORUM, July 1983, at 1, where the progress of two current attacks on the non-acquiescence policy is reported. These are: Lopez v. Heckler, No. 83-0697-WPG(T) (C.D. Cal. June 16, 1983) (preliminary injunction issued preventing the application of the non-acquiescence policy to cessation cases within the Ninth Circuit); See Morrison v. Heckler, No. C83-888V (W.D. Wash. May 7, 1983) (preliminary injunction issued requiring that all disability decisions concerning a previously certified class of disability benefits claimants who are Washington residents be made in accordance with four Ninth Circuit Court of Appeals decisions). SOCIAL SECURITY FORUM, supra, at 3-4.

172. These invasions of the independent decision-making powers of administrative law judges have also been the subject of litigation. See supra note 18.

173. The Secretary has instructed administrative law judges that:
This argument is, however, a distortion of the truth. In several cases involving the National Labor Relations Board, it has been held that the Board was not free to pursue its own policy of non-acquiescence and refuse to follow prior decisions of courts of appeals. The more persuasive approach is that such decisions, if not overruled by the United States Supreme Court, are binding on inferior courts, litigants, and administrative agencies. The same result was reached in a recent case involving the reversal by the Appeals Council of a claimant-favorable decision of an administrative law judge in a Social Security proceeding. In his decision, the administrative law judge had noted that under the relevant case law, subjective complaints had to be considered even if unsupported by objective findings. This reference was the basis of the reversal by the Appeals Council. Although it determined that the Appeals Council's decision was supported by substantial evidence, the court noted that the Social Security Administration was bound to follow decisions of the court of appeals unless or until they were reversed by the Supreme Court. Despite such statements, however, it seems unlikely that the non-acquiescence policy will be abandoned unless reform legislation is enacted.

I would like to remind you that the Secretary's regulations are legislative rules and have the full force and affect of the law. Accordingly, you are bound by the Secretary's regulations and the agency's interpretation of the same. It is well established by case law that an agency's interpretations of its own regulations are controlling on the agency's adjudicators and the courts...

Results of Bellmon Review, supra note 163, at 16.

174. NLRB v. Blackstone Co., 685 F.2d 102 (3d Cir. 1982); Ithaca College v. NLRB, 623 F.2d 224 (2d Cir.), cert. denied, 449 U.S. 975 (1980); Allegheny General Hospital v. NLRB, 608 F.2d 965 (3d Cir. 1979). In the Blackstone case, the court responded to a contrary argument that it regarded the Board's instructions to its administrative law judges on non-acquiescence "to be completely improper and reflective of a bureaucratic arrogance which will not be tolerated." 685 F.2d at 106 n.5.


176. Brand v. Secretary of HEW, 623 F.2d 523 (8th Cir. 1980).

177. 547 F. Supp. at 89-90.

178. Id. at 90. In regard to the reversal of an administrative law judge's decision as to credibility by the Appeals Council, it should be noted that the administrative law judge is not only required by the case law to make findings on this issue, but he is also in a much better position to do so than the Appeals Council, since he is the one to actually observe the claimant.

179. 547 F. Supp. at 92. The court quoted the Ithaca College case: "The Board cites no contrary authority [to the relevant case law] except its own consistent practice of refusing to follow the law of the circuit unless it coincides with the Board's views. This is intolerable if the rule of law is to prevail." Id. (quoting Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir.), cert. denied, 449 U.S. 975 (1980)).

180. Such legislation is pending; see S. 476, 98th Cong., 1st Sess., 129 Cong. Rec. S1146-52. The bill would require that the Secretary of Health and Human Services appeal
V. Conclusion

Even without difficulties such as those imposed by the Secretary's policy of non-acquiescence, the resolution of such an individualized issue of whether a particular person is disabled by subjectively-felt pain is likely to create tension in a mass-adjudication system like that run by the Social Security Administration, and make fair and uniform determinations difficult to achieve.\textsuperscript{181} Legislation which imposes specific requirements that subjective testimony of a claimant in regard to his allegedly disabling pain be considered\textsuperscript{182} may be helpful. However, in light of the highly individualized determinations inherently required in a process by which a broad and general legislative standard is supposed to be applied in widely differing fact situations, it seems clear that legislation is only part of the answer. What is also required is a willingness on the part of the Secretary of Health and Human Services, which is to say the Social Security Administration, to submit to the rule of law and be governed by the relevant case law like any other litigant. The Secretary might even consider trying to conform the Social Security Regulations to developments in the case law, instead of attempting to nullify unwelcome judicial decisions by the promulgation of Regulations\textsuperscript{183} or other means. Unfortunately, however, such a change of policy presently seems unlikely. The Administration's policy of non-acquiescence, and its refusal to even attempt to accommodate judicial holdings through the promulgation of new regulations not inconsistent with them, further complicates the disability adjudication process. The final result is the frustration of the purpose of the disability program: to provide for the disabled worker.

\textit{George R. Zaiser}

\textsuperscript{181} See supra note 27 and accompanying text.
\textsuperscript{182} See supra note 180.
\textsuperscript{183} See supra note 109 and accompanying text, for an example of how one court dealt with such an attempt.