

FILE NO: EM-95-98

DATE: August 16, 1995

TO : SSARC in Region II--FYI
All SSAARCSFOS/SSAARCSPGS in New York State--

ACTION

New York State DDS--ACTION
SSAODCPLS (SAWNY)--FYI
SSAOHACO (SAWDY)--ACTION
All SSAPSCS/PSCDRS--ACTION
ODIO--ACTION
All SSAADS in New York State--FYI
ALL SSAROPIR/SSADQBS--ACTION
All SSAOPIRS--ACTION
SSAOHARO in Region II--FYI
All OHAHOS in New York State--ACTION
SSAOD--FYI
SSADCO--FYI
COS--FYI
Chief Counsel, Region II--FYI
(SSARO - Deliver)

FROM : SSA, OPPEC, Litigation Staff

Author : Marg Handel Phone: (410) 965-4639

SUBJECT: Stieberger Settlement - Emergency DI/SSI
Instructions

This E-Mail message does not affect current POMS instructions. This instruction is being transmitted pursuant to the Stieberger settlement. This settlement requires SSA to include in the "Manual of Second Circuit Disability Decisions" (yellow book), currently used by all decisionmakers and reviewers of decisions involving New York residents, any new Second Circuit decision which delineates a holding regarding the adjudication of title II and/or title XVI disability claims. The "Manual of Second Circuit Disability Decisions" must also be made available to the general public upon request.

On June 20, 1995, the United States Court of Appeals for the Second Circuit issued a decision in Diaz v. Shalala holding that a treating chiropractor is not an acceptable medical source under 20 C.F.R. § 404.1513(a), and, as such, a treating chiropractor's opinion is not a medical opinion entitled to controlling weight under 20 U.S.C. § 404.1527(d)(2).

Therefore, in keeping with the requirements of the Stieberger settlement, the following must be added to the "Manual of Second Circuit Disability Decisions" and applied by decisionmakers and reviewers when adjudicating title II and/or title XVI disability claims of New York residents.

The Second Circuit reversed a district court decision finding that the opinion of the plaintiff's chiropractor had "a binding effect under the treating physician rule in the absence of substantial evidence to the contrary" and held that Agency decisionmakers are not required to give controlling weight to a chiropractor's opinion because those opinions are not 'medical' opinions under the Agency's regulations. [20 C.F.R. 404.1527, 416.927]. Instead, chiropractors' opinions are sources of information that may help assess how an impairment affects the claimant's ability to work [20 C.F.R. § 404.1513(e), 416.931(e)] and decisionmakers have the discretion to weigh a chiropractor's opinion based on all of the evidence before the decisionmakers.

The claimant also argued that the ALJ failed to make sufficiently specific findings that she could do her past work (operating a sewing machine). Since the claimant had to show inability to do her past work and since none of her medical doctors found she had difficulties with prolonged sitting, - although the chiropractor did - the Second Circuit found the Agency properly relied on the absence of 'medical' findings showing limitations on prolonged sitting to decide, based on all of the evidence, that the claimant could do her past work.

The claimant also argued that SSA should have held another hearing so she could cross-examine a doctor who wrote an unfavorable report that was in the claimant's worker's compensation file which the ALJ asked to see after the ALJ hearing. The Second Circuit held that because the claimant and her attorneys had access to the report long before the ALJ hearing and could have subpoenaed the doctor who wrote the report, claimant was not improperly denied the right to cross-examine the doctor."

In addition, in accordance with paragraphs 5(a) and 5(b) of the Stieberger settlement, the full text of the Diaz decision will be issued, shortly, to each office of disability decisionmakers and reviewers of decisions involving New York residents. As soon as you receive it, you must:

- Add the Diaz decision to the "Volume of Second Circuit Decisions" maintained in your office. The "Volume of Second Circuit Decisions" (maintained by each office of disability decisionmakers/reviewers) will now contain the full text in the Schisler, Dixon and Diaz decisions.

If your office does not receive the Diaz decision by September 7, 1995, immediately contact your respective Stieberger Coordinator listed below:

SSA Offices, Excluding OHA:

Stieberger Coordinator, Disability Programs, New York
Regional Office, (212) 264-7282.

OHA Offices:

Stieberger Coordinator, Office of Policy, Planning and
Evaluation, (703) 305-0720.

These individuals should also be contacted if you have questions
regarding the content of this teletype.

Retention Date: 8/1/96



Refer to:

August 1995

Baltimore MD 21235

To All Offices of Decisionmakers and Reviewers of Decisions
Involving New York Residents

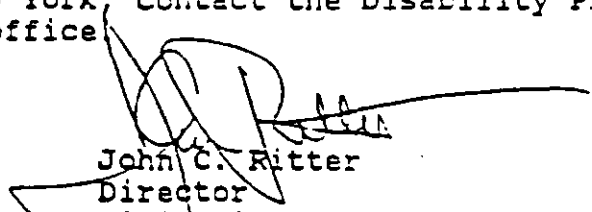
Re: Manual of Second Circuit Disability Decisions -
Diaz v. Shalala - ACTION

In accordance with paragraphs 5(a) and 5(b) of the Stieberger settlement, enclosed please find a copy of the full text of the Diaz decision. The settlement requires SSA to include in the "Manual of Second Circuit Disability Decisions" (yellow book), currently used by all decisionmakers and reviewers of decisions involving New York residents, any new Second Circuit decision which delineates a holding regarding the adjudication of title II and/or title XVI disability claims.

Also, please add the Diaz decision to the "Volume of Second Circuit Disability Decisions" maintained in your office. The "Volume of Second Circuit Disability Decisions" (maintained by each office of disability decisionmakers/reviewers) will now contain the full text in the Schisler, Dixon and Diaz decisions.

If you have any questions, in New York, contact the Stieberger Coordinator, Disability Programs, New York Regional Office, (212) 264-7282.

In offices outside of New York, contact the Disability Programs Branch of your regional office



John C. Ritter
Director
Litigation Staff
Office of Programs, Policy,
Evaluation and Communication

Enclosure

COPY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1263

August Term, 1994

(Argued: April 25, 1995

Decided: July 20 1995)

Docket No. 94-6213

JUANA DIAZ,
Plaintiff-Appellee,

v.

DONNA SHALALA, Secretary of the Department of Health & Human Services,
Defendant-Appellant,

Before: McLAUGHLIN, LEVAL and CABRANES, Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Eugene H. Nickerson, Judge), reversing a final determination by defendant Secretary of Health and Human Services that plaintiff was not disabled within the meaning of the Social Security Act. 855 F. Supp. 56 (E.D.N.Y. 1994). The Secretary argues that the district court applied an erroneous rule of law when it held that the opinion of plaintiff's treating chiropractor had "binding effect under the treating physician rule." 855 F. Supp. at 58.

Reversed.

MICHELLE T. WEINER, Assistant United States Attorney, Brooklyn, New York (Zachary W. Carter, United States Attorney, Eastern District of New York, Varuni Nelson, Bruce H. Nims, Assistant United States Attorneys, Brooklyn, New York, of counsel), for Defendant-Appellant.

see @ mad
6/21/95
cc: OD
OHA
6/21/95

1 JOHN E. ANTONOVICZ, Woodbury,
2 New York (Scheine, Fusco, Brandenstein &
3 Rada, P.C., Woodbury, New York), for
4 Plaintiff-Appellee.
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9 JOSÉ A. CABRANES, Circuit Judge.

10 We review a judgment of the United States District Court for the Eastern District of
11 New York (Eugene H. Nickerson, Judge), reversing a final decision by defendant Secretary of
12 Health and Human Services ("the Secretary"), who had found that plaintiff was not entitled
13 to disability benefits under the Social Security Act. 855 F. Supp. 56 (E.D.N.Y. 1994). This
14 appeal presents the question whether plaintiff's chiropractor qualified as a "treating
15 physician" whose opinion warranted "controlling weight" or "binding effect" in evaluating
16 plaintiff's claim for disability insurance benefits. Regulations issued by the Secretary and
17 upheld by our court in *Schuler v. Sellmer*, 3 F.3d 563 (2d Cir. 1993), provide that a "treating
18 source's opinion" will be accorded "controlling weight" when it is "well-supported by
19 medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent
20 with the other substantial evidence." 20 C.F.R. § 404.1527(d)(2) (1974). The regulations
21 make clear, however, that a chiropractor's opinion is not covered by this rule. Because the
22 district court upset the Secretary's adverse finding by giving the chiropractor's opinion
23 controlling weight and because substantial evidence supported the Secretary's finding, see 42
24 U.S.C. § 405(g), we reverse the judgment of the district court.
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1 FACTS

Plaintiff was born in the Dominican Republic in 1946. She has held several jobs both there and in the United States. In the United States she has worked as a sewing machine operator, an eyesight lens cutting machine operator, a sewing assistant for a dry clean and a census taker. Most recently, she held a job as an electric order assembler at the Eagle Electric Factory in New York. While on the job on September 24, 1970, plaintiff fell down an escalator, injuring her head, neck, and back.

After her fall, plaintiff sought workers' compensation and filed an application for disability insurance benefits on June 24, 1971, claiming that she was disabled due to LS radionuclide (a disease of the nerve roots) and lower back pain. Her application was denied initially and on reconsideration. Plaintiff then requested a hearing which was held before an administrative law judge (ALJ) on June 16, 1972.

The ALJ denied her application in an opinion dated October 23, 1972. Findings that the "clinical and laboratory findings, the opinion and assessment of examining physicians, the treatment she received and the claimant's activities" convinced the opinion of her chiropractor, Dr. Jacob K. Seelig, who had concluded that plaintiff was totally disabled before deciding whether plaintiff was disabled within the meaning of the Social Security Act.

42 U.S.C. § 423(d), the ALJ carefully considered the following evidence:

The record provides in relevant part as follows:

- (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 continuous 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 he is unable to

1 *Medical Tests*

2 An electromyogram taken at the direction of Dr. E. Wiseman on January 21, 1991,
3 was found to be positive for left lumbar radiculopathy involving the L5 nerve root. Nerve
4 stimulation studies, however, were within normal limits. Plaintiff received magnetic
5 resonance imaging (MRI) in March 1991, which, according to Dr. David P. Gertman,
6 revealed normal findings (i.e., the test was negative). There was no evidence of disc
7 degeneration, disc herniation or nerve root impingement. The test showed also that the
8 spinal cord ended normally and the spinal canal was of normal caliber.

9
10 *The Chiropractor's Findings*

11 Plaintiff began visiting Dr. Sadigh for treatment in October 1970. The frequency of
12 plaintiff's visits to Dr. Sadigh ranged from three times a week to twice a month. Dr. Sadigh
13 reported to the Workers' Compensation Board that plaintiff suffered from acute moderate
14 cervical and lumbar sprain, cervical disc syndrome, lumbar spondylitis and encephalgia
15 (migraine). He reported that plaintiff complained mostly of moderate headaches, moderate
16 lower back pain, restricted cervical mobility, difficulty sitting and doing any physical work,
17 and pain in the right arm, right hip, and thigh. In addition, the chiropractor found rigidity
18 in plaintiff's neck muscle, a diminished range of motion and span of the cervical spine,
19 nerve root damage, and reflex loss. He concluded that, as a result of her injuries, plaintiff
20 can perform "less than a full range of sedentary work."

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 normal impairment or impairment not of such severity that he is not only unable to do his
 previous work but cannot, considering his age, education, and work experience, engage in any
 other kind of substantial gainful work which exists in the national economy

1 *Dr. Wiseman's Findings*

2 Dr. Sedigh referred plaintiff to Dr. E. Wiseman, a specialist in physical medicine and
3 rehabilitation who saw plaintiff several times. Based on an examination of the plaintiff on
4 January 17, 1991, Dr. Wiseman reported a limited range of motion in the lumbosacral
5 region. He noted that "[d]eep tendon reflexes were present and symmetrical bilaterally."
6 On January 21, 1991, he administered an electromyogram and concluded it was positive for
7 left lumbar radiculopathy mostly involving the L5 root. He also conducted a nerve
8 stimulation study that was "within normal limits." Dr. Wiseman concluded that plaintiff
9 was "unable to perform all her usual duties because there is restricted range of motion, pain
10 and muscle spasticity." He recommended that plaintiff continue chiropractic treatment, but
11 the records do not indicate that he prescribed any pain medication. Dr. Wiseman completed
12 plaintiff's Workers' Compensation Board report forms and checked the box marked "total
13 disability."

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15 *Dr. Weis's Findings*

16 Dr. David Weis, an orthopedist, examined plaintiff on August 7, 1991, at the request
17 of the State Insurance Fund, the insurance carrier to the workers' compensation system. He
18 reported that plaintiff was taking Tylenol "as needed" for lower back and neck pain that also
19 affected her legs and right shoulder. He found that plaintiff was able to walk on her heels
20 and toes and that she could bend forward to her ankles; "back bending, however, reproduces
21 moderate discomfort." He found her "cervical spine flexion and extension . . . full" and her
22 rotation "mildly restricted." Based on his examination, Dr. Weis concluded that plaintiff

1 had a "mild partial orthopedic disability."
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3 *Dr. Seo's Findings.*

4 Dr. K. Seo, described by the ALJ as an "impartial consultant [for the Social Security
5 Administration],^o examined plaintiff on August 24, 1991. Plaintiff stated to him that she had
6 neck and lower back pain, for which she was reported to be taking Tylenol and Motrin as
7 needed. Dr. Seo's examinations indicated that plaintiff walked with a "normal gait," had "no
8 difficulty standing up from the sitting position" or in "getting on and off the examining
9 table." He reported that toe-heel walking and squatting were "possible." He also found the
10 following: "normal flexion and extension" of the cervical spine, "normal ROM [range of
11 motion]" of the lumbosacral spine, a normal range of motion of the hips, a normal range of
12 motion of the shoulders, elbows and wrist with pain in the right shoulder, some "diminished
13 sensation" of the right hand and the right leg, one inch muscle atrophy in the left thigh, and
14 a "mild spasm of the sternocleidomastoid muscles." He concluded that plaintiff had cervical
15 radiculopathy and lumbar radiculopathy. He concluded also that plaintiff "may be able to
16 stand and walk for over one hour and carry more than 10 lbs."
17

18 *Dr. Nirou's Findings*

19 Dr. Nirou examined plaintiff for the Workers' Compensation Board on October 29,
20 1991. He found "mild restriction in cervical motions in all planes," "mild internal rotation
21 defect of the right shoulder," mild restriction of "trunk motions" and straight leg raising,
22 some numbness of the left lower leg, and a half inch atrophy of the left quadriceps. He

1 reported also that "gross neurological examination are intact" and that her reflexes were
 2 "present bilaterally." Based on his examination, he concluded that plaintiff had a "partial
 3 disability."

4
 5 *Plaintiff's Testimony*

6 Plaintiff testified that she takes Tylenol, Advil, and Motrin four or five times a week
 7 for her pain and that she sometimes suffers from dizziness, which lasts two to three days.
 8 She testified that she takes Tylenol more often than Motrin. She also testified that she cooks,
 9 watches television, walks short distances and attends church. She stated she did not attend
 10 church often, however, because she cannot sit down for too long.

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 12 *Other Information*

13 Plaintiff underwent several evaluations at the New York Eye and Ear Infirmary in
 14 March and April 1992 for hearing loss. An audiologist reported that plaintiff had
 15 "moderately-severe to moderate" hearing loss in the right ear and "mild to slight to mild"
 16 hearing loss in the left ear. The audiologist reported also that plaintiff had excellent speech
 17 recognition at 10dB in the left ear and 50dB in the right ear.

18
 19 *The ALJ's Decision*

20 While finding that "[t]he medical evidence establishes that the claimant has cervical
 21 and lumbosacral strain and moderate to mild hearing loss," the ALJ concluded nevertheless
 22 that "[t]he claimant's impairments do not prevent [her] from performing her past relevant

work" as a sewing machine operator? The ALJ did not credit plaintiff's testimony about

dizziness, noting that neither the chiropractor nor the physicians reported that she

explained of dizziness. The ALJ also noted that plaintiff did not appear to take potent pain

medication and that Dr. Wiseman, who saw plaintiff on several occasions in her

chiropractor's request, did not indicate potent pain medication was prescribed. The ALJ

acknowledged that plaintiff's treating chiropractor and Dr. Wiseman had concluded that she

was totally disabled, but found that their opinions were not well supported by the clinical

or laboratory findings. The ALJ observed that the MRI was negative, nerve stimulation

studies were normal and the findings on the neurological examination were "mainly normal."

The ALJ also noted that the opinions of the chiropractor and Dr. Wiseman (both of whom

the ALJ characterized as "treating sources") were not consistent with other substantial

evidence including the findings and opinions of examining physicians. Finding that plaintiff

retains the ability to sit for prolonged periods, bend, push and pull and is able to perform

The ALJ followed a three-step process set out in the Secretary's regulation in order to determine whether plaintiff was entitled to disability benefits. 20 C.F.R. § 404.1520 (1994). We described these steps in *Berry v. Secretary*, 97 F.2d 441, 467 (9th Cir. 1972) (per curiam):

First, the Secretary considers whether the claimant is currently engaged in substantial gainful activity.

If he is not, the Secretary then considers whether the claimant has a "severe impairment" which significantly limits his physical or mental ability to do basic work activities. If the claimant meets this

an impairment, the third inquiry is whether, based solely on medical evidence, the claimant has an impairment which is listed in Appendix 1 of the regulation (or is equal to an impairment listed there).

If the claimant has such an impairment, the Secretary will consider his disability. According to the

claimant does not have a listed impairment, the fourth inquiry is whether, despite the claimant's efforts, he has the medical functional capacity to perform his past work. Finally, if the claimant

is unable to perform his past work, the Secretary then determines whether there is other work which the claimant could perform.

The ALJ in the case at bar found that plaintiff was not currently engaged in substantial gainful activity and

suffered from an impairment that limited her ability to perform work-related activity. But the ALJ found that

plaintiff did not have an impairment that is either listed in Appendix 1 to Subpart F, or 20 C.F.R. § 404.1520(a)(2), or that is of equal severity to an impairment listed there. Consequently, the

ALJ had to determine whether plaintiff has the medical functional capacity to perform work she had done in the past. 20 C.F.R. § 404.1520(a)(4). Berry, 97 F.2d at 467. Plaintiff bears the burden of proving that she

does not have the medical functional capacity to perform her past work. Id.

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1 some walking and standing," the ALJ concluded that plaintiff could return to her job as a
2 sewing machine operator and therefore was not disabled within the meaning of the Social
3 Security Act, 42 U.S.C. § 423(d)(1)(A).²

4 The Appeals Council denied plaintiff's request for review on May 28, 1993, thereby
5 rendering the ALJ's decision a final determination by the Secretary.

6
7 *The District Court's Decision*

8 Plaintiff brought an action in district court seeking review of the Secretary's decision.
9 Both parties moved for judgment on the pleadings. In a decision dated June 2, 1994, the
10 district court granted plaintiff's motion, thereby reversing the decision of the Secretary. In
11 doing so, the court held that the opinion of plaintiff's chiropractor had "a binding effect
12 under the treating physician rule in the absence of substantial evidence to the contrary." 855
13 F. Supp. at 58. Having announced this rule, the district court went on to find that the
14 chiropractor's opinion was indeed "entitled to controlling weight" because substantial
15 evidence did not contradict it.

16
17 **II. DISCUSSION**

18 The Findings of the Secretary are conclusive unless they are not supported by
19 substantial evidence. 42 U.S.C. § 405(g); *Jones v. Sullivan*, 949 F.2d 57, 59 (2d Cir. 1991).
20 The Secretary argues that the district court's holding that substantial evidence did not
21 support her finding was tainted by application of an erroneous legal standard—namely, that

22

23 ²See supra note 1.

the chiropractor's opinion was entitled to "binding effect under the treating physician rule in the absence of substantial evidence to the contrary." 855 F. Supp. at 53.

A. A Chiropractor's Opinion Is Not a Medical Opinion

We had previously left unresolved the question whether a chiropractor could qualify

as a "treating physician" or "treating source" whose opinion is entitled to controlling weight

under our Circuit's treating physician rule. See *Prode & Ralston v. Ralston*, 906 F.2d

654, 662 (2d Cir. 1992). Today we decide a slightly different question because the Secretary

issued regulations in August 1991 that we had explained the treating physician rule.

Schiller v. Sullivan, 9 F.3d 563 (2d Cir. 1993). We hold that it would be inconsistent with

those regulations to require the Secretary to give controlling weight to a chiropractor's

opinion.

The regulation does refer to our inquiry provides that the Secretary will give

controlling weight to a "treating source's" opinion on the issue(s) of the nature and severity

of your impairment(s) if it is "well-supported by medically acceptable clinical and

laboratory diagnostic techniques and is not inconsistent with the other substantial evidence."

20 C.F.R. § 404.1527(c)(2) (1994) (effective August 1991). This provision is part of a

"In *Prode*, we held the substantial evidence did not support the United States Railroad Retirement Board's finding that petitioner was not entitled to a total and permanent disability benefit. 844 F.2d at 1198. We reasoned that the opinion of petitioner's chiropractor carried "little weight." 844 F.2d at 1198. We based our decision on our interpretation of regulations promulgated after the decision in *Prode* that gave the Secretary from issuing a chiropractor's opinion equal weight in appropriate circumstances.

In *Schiller*, 9 F.3d at 564, we upheld the regulation after recognizing that it modified our treating physician rule. We noted that the August 1991 regulations differed from the earlier, physician rule in the following ways: the regulation (1) accorded less deference to treating physician whose opinions are not supported by other evidence; (2) considered the length of the relationship between the treating source and the claimant to be relevant; and (3) permitted the opinion of nonphysician sources to receive controlling weight.

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Accordingly, the district court erred when it held that the chiropractor's opinion had "binding effect . . . in the absence of substantial evidence to the contrary." Under the current regulations, the ALJ has the discretion to determine the appropriate weight to accord the chiropractor's opinion based on all the evidence before him; under no circumstances can the regulations be read to require the ALJ to give controlling weight to a chiropractor's opinion.⁸

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reasons. First, under basic canons of statutory construction, the definition of physician for the purpose of determining what services are reimbursable under Medicare does not govern how physicians should be defined for purposes of determining eligibility for disability benefits under Title II of the Social Security Act. Second, the definition itself is not helpful to plaintiff because it expressly states its limited purpose: "The term 'physician' . . . means . . . (5) a chiropractor who is licensed as such by the State . . . but only for the purpose of subsections (A)(1) and (1)(X)(A) of this section and only with respect to treatment by means of manual manipulation of the spine (to correct a subluxation demonstrated by X-ray to exist) . . ." 42 U.S.C. § 1395a(f) (emphasis added). The subsections this definition cross-references discuss reimbursement for a physician's services and supplies. Thus all this definition tells us is that chiropractors may be reimbursed under Medicare for services and supplies in connection with manual manipulation of the spine. Moreover, the requirement that a chiropractor's diagnosis—unlike that of a medical doctor—be corroborated by X-ray evidence further undercuts plaintiff's assertion that Congress meant to place chiropractors on a par with medical doctors. Accordingly, 42 U.S.C. § 1395a(f) is not the "governing statute" for purposes of determining who is an acceptable medical source in disability cases and, in any event, 20 C.F.R. § 1513(a) does not contradict it.

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Plaintiff's proposed standard—that "the opinion of a treating chiropractor should be given the same weight as the opinion of a treating medical doctor, when such opinion is rendered in relation to limitations remaining from a condition within that chiropractor's area of expertise," Appellee's Br. at 34—is not consistent with the regulations, which decline to impose any hard and fast rule on the weight to be given a chiropractor's opinion and which make clear that a chiropractor's opinion, regardless of whether it concerns an impairment within the realm of the chiropractor's expertise, is not considered an "acceptable medical source." 20 C.F.R. § 404.1513(a)(2)(c). Other circuits have also recognized the subordinate status the opinions of chiropractors occupy under the regulations. See, e.g., *Lee v. Sullivan*, 945 F.2d 687, 691 (4th Cir. 1991) (per curiam); *Griego v. Sullivan*, 940 F.2d 942, 945 (5th Cir. 1991) (per curiam); *Combs v. Sullivan*, 935 F.2d 137, 134 (8th Cir. 1991) (per curiam).

B. The Secretary's Finding Was Supported by Substantial Evidence

The district court found that substantial evidence did not support the Secretary's finding that plaintiff was not entitled to disability benefits. When analyzed under the proper legal standard, however, it is clear that substantial evidence supported the Secretary's finding. The Supreme Court has defined substantial evidence as "more than a mere scintilla . . . [what] a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

In this case, two examining physicians, Dr. Weiss' and Dr. Nirou, explicitly found the plaintiff was only partially disabled. A third physician, Dr. Seo, found normal range of motion of plaintiff's lumbosacral spine and normal flexion and extension of the cervical spine. None of these doctors indicated that plaintiff would be unable to perform a job that would require her mostly to sit and push or pull objects. Moreover, an MRI was negative, with no finding of disc degeneration, disc herniation, nerve root impingement or ligamentous damage, and nerve stimulation studies were within normal limits. And plaintiff testified that she primarily takes over-the-counter medicine to alleviate her pain.

Only plaintiff's chiropractor, Dr. Sedigh, explicitly found that plaintiff would be

The district court did not credit Dr. Weiss' findings because he examined plaintiff at the request of the State Insurance Fund: "[A] report submitted by a witness whose self-interest may well have dictated its content cannot and should not be permitted to constitute substantial evidence." 835 F. Supp. at 59 (quoting *Oderick v. Sullivan*, 841 F. Supp. 72, 73 (E.D.N.Y. 1993) and *Callahan v. Secretary of Dep't of Health & Human Servs.*, 723 F.2d 137, 139 (2d Cir. 1984)). Yet in *Callahan*, the case that announced this proposition, the likelihood of bias was far greater inasmuch as the plaintiff in that case had filed a malpractice suit against the doctor whose opinion was at issue. *Callahan*, 723 F.2d at 138-39. More significantly, under the district court's standard, virtually every opinion provided would be suspect to the extent it was requested by an interested party (including plaintiff), because it is always arguably in the "self-interest" of the doctor to help the party who requested that he give an opinion. In any event, in weighing all the evidence, the ALJ appears to have taken account of any possible bias by those who provided opinions, singling out Dr. Seo as an "impartial consultant."

unable to perform even sedentary work. Yet as we have observed, the Secretary had

discretion to decide what weight, if any, Dr. Sadigh's opinion deserved in the circumstances

presented. The ALJ ultimately accorded little weight to Dr. Sadigh's opinion because he

found it to be "not well supported" by the clinical or laboratory findings or by the other

substantial evidence. While Dr. Wiseman, a specialist in physical medicine and

rehabilitation—to whom plaintiff was referred by Dr. Sadigh, and whom the ALJ also

considered a "relying source"—found plaintiff to be totally disabled for purposes of

workers' compensation," he found many fewer problems with plaintiff's spine than did Dr.

Sadigh. And the ALJ found that Dr. Wiseman's opinion likewise was inconsistent with

other substantial evidence, such as the other physicians' reports and medical tests."

The opinions of three examining physicians, plaintiff's own testimony, and the

medical tests together constitute substantial evidence adequately supporting the Secretary's

conclusion that plaintiff's injuries did not prevent her from retaining her job as a sewing

machine operator." Accordingly, we must reverse the judgment of the district court.

"The Secretary argues that in checking off the 'total disability' box on the Workers' Compensation form

Dr. Wiseman indicates only that he found plaintiff unable to perform her job as an electrical worker

responsible for the job she held when she suffered her bad fall and for which she sought compensation. We said

but resolve this question because we find that, even assuming he had found plaintiff unable to perform any job,

substantial evidence would still constitute his findings.

"The Secretary, claiming Dr. Wiseman examined plaintiff enough times (five) to be considered a 'relying

source,' the ALJ justified his decision not to accord Dr. Wiseman's opinion controlling weight.

plaintiff argues that the evidence in this case cannot reasonably be distinguished from that in *Poole*,

where we found that the substantial evidence did not support the finding of the United States Railroad

Retirement Board that petitioner was not totally disabled. We disagreed. In *Poole*, all of (the) specimens held

ranked substantially the same condition than *Poole* (was) is not disabled. 925 F.2d at 612. There doctors in

that case agreed that *Poole* suffered due to her condition. All *Poole*, who had retained a condition to the right:

acromion and scapula "was unable to perform basic manual functions and required ... large doses of analgesic"

As in 1996, "We noted also that *Poole* was 'unable to sit or stand for more than a few minutes at a time ... to

bend or squat or lift objects weighing as much as a bottle of milk." At 614. The record in this case indicates

neither a substantial consensus among the examining physicians that plaintiff is totally disabled nor that her

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Plaintiff contends that we must remand the case because the ALJ failed to make sufficiently specific findings regarding her ability to perform her past work as a sewing machine operator. In fact, the ALJ explicitly found that "based on the record the claimant remains the ability to sit for prolonged period, bend, push and pull and is able to perform some walking and standing." (TR 20) In making this finding, the ALJ relied on the fact that no examining physician, including the "hospital consultant," Dr. Seo, had indicated that plaintiff had difficulty sitting for a prolonged period of time. See *Dumas v. Schweiker*, 712 F.2d 1545, 1553 (2d Cir. 1983) ("The Secretary is entitled to rely not only on what the record says, but also on what it does not say."). Only the chiropractor had made a finding that plaintiff could not sit for prolonged periods of time (one hour at most and no more than two hours in an eight-hour work day), which the ALJ had the discretion to discount. Because the burden was on plaintiff to prove that she could not resume her work as a sewing machine operator, see *Berry*, 675 F.2d at 467, it was proper for the ALJ to rely on the absence of findings by any physician concerning plaintiff's alleged inability to sit for prolonged periods in deciding that she could resume her work as a sewing machine operator.

C Other Cases

injury was of a severity equal to Postal's.

On Remand v. Hinkley, 722 F.2d 521, 526 (2d Cir. 1984), we found the ALJ's finding on the question of the disability claimant's residual functional capacity to engage in sedentary work to be "widely insufficient." The ALJ in that case found that the claimant could perform sedentary work in the box of continuing reports from several physicians about the length of time Petrus could sit. In light of the continuing reports, we found it incumbent upon the ALJ to make specific findings on Petrus's "ability to sit and for how long." At 527. We noted also that, in determining whether Petrus could perform sedentary work, the ALJ should consider the Secretary's suggestion in a finding, 522 F.2d at 527, that the sedentary work involves sitting for six hours out of an eight hour day. At 527 n.1.

In *Remond*, however, the burden was on the Secretary to show that the claimant could perform "some less demanding, but painful, employment," at 824, because the claimant had not the ultimate burden of proving that he could not return to his past work as a writer. By contrast, in the case at bar, not only was the

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1 Finally, plaintiff urges that we remand the case to the Secretary for a supplemental
2 hearing to allow plaintiff the opportunity to cross-examine Dr. Weiss, whose report was
3 included in the workers' compensation file and was submitted by plaintiff to the ALJ one
4 day after the hearing upon the ALJ's request. Plaintiff objected to its introduction into
5 evidence without being granted the concomitant opportunity to cross-examine the report's
6 author. The ALJ never ruled on plaintiff's objection, issuing a ruling without any additional
7 hearing. Plaintiff contends that the ALJ's failure to permit cross-examination of Dr. Weiss
8 violated her due process rights, citing *Townley v. Hechler*, 748 F.2d 109 (2d Cir. 1984)
9 (holding that disability claimant's due process rights were violated where ALJ relied on post-
10 hearing report of vocational expert), and *Gullo v. Califano*, 609 F.2d 649 (2d Cir. 1979)
11 (holding that disability claimant's due process rights were violated where ALJ relied on post-
12 hearing report). In *Gullo*, the ALJ ordered the claimant to submit to a post-hearing
13 examination and relied on the report of that examination, which was completed after the
14 hearing was held. *Id.* at 649-50. In *Townley*, the ALJ relied upon post-hearing
15 correspondence with a vocational expert before reaching a decision. *Townley*, 748 F.2d at
16 114. The ALJ informed Townley's attorney about his need for a vocational expert only after
17 receiving the vocational expert's post-hearing report, which the claimant never even had an
18 opportunity to examine. *Id.*

19 The Secretary argues that because plaintiff was represented by the same law firm in
20 her earlier workers' compensation case, plaintiff's counsel had "knowledge of and access to"

21 burden on plaintiff, but also no physician indicated any limitation on plaintiff's ability to sit. Accordingly, it
22 was reasonable for the ALJ to conclude from the absence of particular findings by "acceptable medical sources"
23 that plaintiff could sit for a "prolonged period" and that, based on plaintiff's testimony about what her past
24 work as a sewing machine operator entailed, she could resume that job.

1 Dr. Weiss's report long before the hearing was held. In the Secretary's view, the Supreme
2 Court's decision in *Richardson v. Perales* is therefore more apposite than *Gallo* or *Townley* to
3 the facts of this case. In *Perales*, the Court held that the claimant's failure to take advantage
4 of his opportunity to request subpoenas for the physicians whose reports were relied upon in
5 his Social Security disability claim hearing precluded claimant's contention that he was
6 denied the right of cross-examination. 402 U.S. at 404-07. Because Dr. Weiss's report was
7 completed and available to plaintiff and her attorneys well before the hearing was held, the
8 Secretary contends, plaintiff had an adequate opportunity to subpoena Dr. Weiss, unlike the
9 claimants in *Gallo* and *Townley*.

10 We agree with the Secretary. Plaintiff knew that she had been examined by Dr.
11 Weiss at the behest of the Workers' Compensation Board, and should have known that his
12 report would be included in the Board's file—portions of which her attorneys sought to
13 introduce at the disability benefit hearing. Furthermore, plaintiff was represented by the
14 same law firm before both the Workers' Compensation Board and the Social Security
15 Administration. Accordingly, "knowledge" of Dr. Weiss's report is imputable to both
16 plaintiff and her counsel. Because the medical report was available upon request from the
17 Workers' Compensation Board, plaintiff and her counsel also had "access" to the medical
18 report. We therefore reject her final challenge to the proceedings before the ALJ.
19

III. CONCLUSION

To summarize:

1. The regulation issued by the Secretary in August 1971, 20 C.F.R. § 404.1527(d), cannot be read to require the Secretary to accord controlling weight to the opinion of a chiropractor. Rather, the Secretary has the discretion to give a chiropractor's opinion the weight she believes it deserves based on the facts of the particular case.

2. Substantial evidence supported the Secretary's finding, on the record as it now stands, that plaintiff was not disabled within the meaning of the Social Security Act, 42 U.S.C. § 423(d)(1)(A).

3. The ALJ made the requisite specific findings regarding plaintiff's ability to perform her past work as a sewing machine operator.

Accordingly, the judgment of the district court is reversed.