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Retention Date: December 1, 2002

Date Changed: March 20, 2002

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 published decision which delineates a holding regarding the adjudication of title II and/or title XVI disability claims.

On January 21, 1997, the United States Court of Appeals for the Second Circuit issued a published decision in Beauvoir v. Chater. Therefore, in keeping with the requirements of the Stieberger

settlement, this instruction must be added to the "Manual of Second Circuit Disability Decisions" and the following holding must be applied by decisionmakers and reviewers of decisions when adjudicating title II and/or title XVI disability claims of New York residents.

\*Beauvoir applied for disability benefits in 1991, claiming he was disabled in 1986, after a car accident, by ankle and hip fractures and damage to his trachea. After a 1993 hearing at which Beauvoir, represented by his attorney, testified in a soft whisper, the Administrative Law Judge (ALJ) found a period of disability from 1986 until 1990. Relying on evidence that vocal cord surgery and speech therapy improved Beauvoir's speaking ability, on the ALJ's own assessment of Beauvoir's ability to speak during the hearing, and on evidence including Beauvoir's testimony that the hip and ankle had healed by 1990, the ALJ concluded that Beauvoir was able to return to his past work as a liquor store manager in 1990. The Appeals Council declined to review the ALJ's decision. The district court reviewed the record, including the hearing tape, and affirmed the Agency decision.

On appeal, the Second Circuit described the sole question before it as whether Beauvoir's limited ability to speak was a "listed" impairment. The appellate court found the case "somewhat unusual" in that the ALJ relied on personal observation and hearing of Beauvoir's testimony and that the magistrate and district court judges listened to the hearing tape.

At issue was Listing 2.09, "Organic loss of speech due to any cause with inability to produce by any means speech which can be heard, understood, and sustained", 20 C.F.R. Sec. 404, Subpart P, Appendix 1, Listing 2.09. Further, Social Security Ruling (SSR) 82-57 states:

Three attributes of speech pertinent to the evaluation of speech proficiency [under Listing 2.09] are: (1) audibility -- the ability to speak at a level sufficient to be heard; (2) intelligibility -- the ability to articulate and to link the phonetic units of speech with sufficient accuracy to be understood; and (3) functional efficiency -- the ability to produce and sustain a serviceably fast rate of speech output over a useful period of time. When at least one of these

attributes is missing, overall speech function is not considered effective.

The Second Circuit reasoned that medical reports, the administrative, magistrate and district court judges, and even Beauvoir's own counsel characterized Beauvoir as able to speak in an understandable whisper. The magistrate judge was able to understand Beauvoir's testimony on the hearing tape, including portions that the Agency designated as inaudible in the administrative transcript. The district court judge agreed after listening to the hearing tape that

Beauvoir could be heard and understood over a sustained period. On hearing the tape, the appellate court concluded that these factual findings about Beauvoir's ability to speak were not clearly erroneous.

The Second Circuit further considered whether the ALJ's decision met the requirements of Listing 2.09 and SSR 82-57 regarding audibility, intelligibility, and functional efficiency. Given the medical evidence that Beauvoir was able to communicate orally in a whisper at a level sufficient to be heard and the fact that his speech was successfully recorded, Beauvoir's ability to be heard and understood satisfied the audibility and intelligibility prongs of SSR 82-57. His stage whisper during an hour-long ALJ hearing showed an ability to sustain speech, satisfying the functional efficiency prong of SSR 82-57, "the ability to produce and sustain a serviceably fast rate of speech output over a useful period of time". Thus, the ALJ's decision contained no legal error in this regard.

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\* The Manual Preface states in pertinent part:

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

ALJ's should handle cases may help illuminate a more general principle that also applies at the DDS level.

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

The following individuals should be contacted if you have questions regarding the content of this teletype or if your office did not receive it.

SSA Offices Other Than OHA in New York:  
Stieberger Coordinator, Disability Center, New York  
Regional Office, (212) 264-7282.

All other SSA non-OHA offices should contact their respective Regional Offices.

Central Office components should contact the Stieberger Coordinator, Litigation Staff, Office of Programs and Policy, (410) 965-4138.

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

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
No. 342 August Term, 1996  
(Argued: October 24, 1996 Decided: January 21, 1997)  
Docket No. 96-6082

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GARY BEAUVOIR,  
Plaintiff-Appellant,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL  
SECURITY ADMINISTRATION,  
Defendant-Appellee.

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B e f o r e: OAKES, VAN GRAAFEILAND, and WINTER, Circuit  
Judges.

Appeal from a judgment in the United States District Court for the Eastern District of New York (Reena Raggi, Judge) upholding the denial of disability benefits for speech impairment beyond September 30, 1990. We affirm. STANLEY F. MELTZER, Meltzer, Fishman, Madigan & Campbell, New York, New York, for Plaintiff-Appellant.

GWEN POLLAK, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York, (Zachary W. Carter, United States Attorney, Varuni Nelson, Bruce H. Nims, Assistant United States Attorneys, of counsel), for Defendant-Appellee.

WINTER, Circuit Judge:

Gary Beauvoir appeals from Judge Raggi's decision upholding the Social Security Administration's denial of disability insurance benefits to Beauvoir beyond September 30, 1990. Beauvoir asserts that he continues to suffer from an inability to speak that constitutes a listed impairment under 20 C.F.R. ' 404, Subpart P, App. 1, Listing 2.09 ("Listing 2.09"). We hold that Beauvoir's ability to speak in a sustained whisper is not within Listing 2.09's description of an "[o]rganic loss of speech." Beauvoir applied for disability benefits under the Social Security Act, 42 U.S.C. ' 423, on March 31, 1991, claiming that he had been unable to work since a car accident on October 26, 1986, due to fractures of his ankle and hip and damage to his trachea that caused a significant impairment of his ability to speak. After a hearing on June 14, 1993, at which Beauvoir appeared with his attorney and testified in a soft whisper, Administrative Law Judge Harold Rosenbaum ("ALJ") determined that the relevant period of disability was from the date of the accident to September 30, 1990. In rendering his decision, the ALJ relied on medical reports and other evidence that surgery on Beauvoir's vocal cord in 1987 followed by speech therapy had improved his ability to speak. The ALJ also relied on his own assessment of Beauvoir's ability to speak as demonstrated during the hearing. With regard to Beauvoir's other injuries, the ALJ relied on reports and testimony by Beauvoir that the injuries to his hip and ankle had

healed by March 1990. The ALJ concluded that by the end of September 1990, Beauvoir was physically able to return to his prior work as a liquor store manager -- although by this time appellant had become a full-time accounting student -- and that Beauvoir was therefore not entitled to further disability payments.

Appellant's request for review by the Social Security Administration's Appeals Council was rejected in June 1994. Beauvoir then filed the instant action seeking review of the Social Security Administration's decision under 42 U.S.C. ' 405(g). After examining the record and listening to a recording of the hearing before the ALJ, Magistrate Judge Mann recommended that the ALJ's decision be affirmed. *Beauvoir v. Shalala*, 94-CV-3757 (RR) (E.D.N.Y. Sept. 1, 1995). District Court Judge Raggi, after considering the record and also listening to the recording of the hearing, adopted Magistrate Mann's report and recommendation.

The Social Security Act defines "disability" in relevant part as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. ' 423(d)(1)(A). Administrative regulations prescribe the analytic framework for evaluating claims of disability. The Social Security Administration ("SSA") first considers whether the claimant is currently engaged in substantial gainful employment. If not, the SSA next considers whether the claimant has a "severe impairment" that significantly limits the ability to do basic work activities. If the claimant does suffer such an impairment, then the SSA determines whether the claimant has an impairment listed in Appendix 1 of the regulations, 20 C.F.R. ' 404, Subpart P (such as Listing 2.09). If the claimant meets the descriptions of one of the listed impairments, then the SSA presumes the claimant to be disabled without considering the claimant's actual ability to perform substantial gainful activity. 20 C.F.R. " 404.1520(d), 416.920(d); see also *Berry v. Schweiker*, 675 F.2d 464, 467 (1982). The sole question before us is whether Beauvoir's limited ability to speak is a "listed" impairment.

Our review of the Social Security Administration's "final decision denying a SSI disability benefits claim is not de novo; it is limited to inquiring into whether the Secretary's conclusions are supported by substantial evidence in the record as a whole or are based on an erroneous legal standard." *Cruz v. Sullivan*, 912 F.2d 8, 11 (2d Cir. 1990) (citation omitted). The question here is somewhat unusual in that the ALJ

based his decision in part on his personal observation and hearing of Beauvoir's testimony, and the magistrate and district judges listened to the tape of that hearing. We also have the tape before us.

The issue in the instant matter concerns Listing 2.09. Listing 2.09 states the qualifying disability condition as: Organic loss of speech due to any cause with inability to produce by any means speech which can be heard, understood, and sustained.

20 C.F.R. ' 404, Subpart P, App. 1, Listing 2.09. Social Security Ruling 82-57 ("Ruling 82-57") further defines the disability condition of Listing 2.09:

Three attributes of speech pertinent to the evaluation of speech proficiency [under Listing 2.09] are: (1) audibility -- the ability to speak at a level sufficient to be heard; (2) intelligibility -- the ability to articulate and to link the phonetic units of speech with sufficient accuracy to be understood; and (3) functional efficiency -- the ability to produce and sustain a serviceably fast rate of speech output over a useful period of time. When at least one of these attributes is missing, overall speech function is not considered effective.

Medical reports, the ALJ, Judge Mann, Judge Raggi, and even on occasion Beauvoir's own counsel have characterized appellant as being able to speak in an understandable whisper. Dr. J.B. Jasmin, a medical consultant who evaluated Beauvoir in 1992 on behalf of the SSA, stated in his report: "Speaks in a whisper, but can be heard and understood." The ALJ who conducted an hour-long hearing consisting of appellant's testimony, observed in his opinion that Beauvoir was able to communicate by speaking "very low, as in a whisper." The ALJ commented to Beauvoir's counsel, "You and I have learned at this hearing he can be understood, right?" Beauvoir's counsel responded, "Yes." Magistrate Judge Mann listened to a tape recording of the hearing and reached the same conclusion as the ALJ. She was "able to understand nearly all of plaintiff's [Beauvoir's] testimony, including the portions designated as inaudible on the transcript." Beauvoir, 94-CV-3757, at 11. Judge Raggi, adopting Judge Mann's report "in all respects," wrote: "The Court has also

listened to the tape recording of the ALJ hearing in this case . . .  
. . . [Beauvoir] is able to make himself heard and understood over a sustained period. The tape recording demonstrates this." Although appellant asserts on appeal that his speech at the ALJ hearing constituted "scant intermittent monosyllabic grunts," Appellant's Br. at 18, another section of his brief concedes that his condition allows him to speak in a "stage whisper." Id. at 21. Moreover, as noted above, Beauvoir's attorney acknowledged during the ALJ hearing that his client was able to be understood by the judge during that hearing.

Finally, we agree that the recording of the hearing before the ALJ supports the conclusion of the three other judges, namely, that while Beauvoir's speaking ability is impaired, he is able to speak in a soft, yet sustainable and understandable whisper. We therefore conclude that their factual findings are not clearly erroneous.

We now turn to whether the ALJ's decision was based on an "erroneous legal standard," Cruz, 912 F.2d at 11, that is, whether appellant's inability to converse in more than a stage whisper meets the requirements of Listing 2.09 and Ruling 82-57 regarding audibility, intelligibility, and functional efficiency. Appellant relies on Gresh v. Shalala, No. 93-129J, 1994 WL 465828 (W.D. Pa. June 16, 1994) (memorandum order), in which the court reversed an ALJ's denial of benefits under Listing 2.09 where the record "clearly documents that plaintiff's speech is nothing more than a whisper." Id. at \*3. However, in Gresh the claimant had problems both in sustaining speech and in making herself understood. She would speak an occasional word in a normal tone and then become inaudible afterwards. Her ability to speak was thus "variable." Id. at \*2. Most significantly, Gresh was unable "to testify in a manner which was capable of being recorded." Id. at \*3. At Gresh's administrative hearing, Gresh's sister attempted to relay answers to the ALJ, but at one point there was a break in the testimony due to a communication problem. Id.

In the instant case, there was medical evidence that Beauvoir was able to communicate orally, albeit in a whisper. He was able "to speak at a level sufficient to be heard," Ruling 82-57, by the ALJ, and his speech at the hearing was successfully recorded. He was, therefore, heard and understood, fulfilling the audibility and intelligibility prongs of Ruling 82-57. Moreover, Beauvoir maintained his stage whisper throughout the hour-long ALJ hearing. He was thus able to sustain speech. This ability satisfies the functional efficiency prong, "the ability to produce and sustain a serviceably fast rate of speech output over a useful period of time." Ruling 82-57.

We therefore affirm.

ATTACHMENT 2

WILLIAM O'CONNOR, Plaintiff-Appellant, v. DONNA E. SHALALA, as Secretary of Health & Human Services, Defendant-Appellee.

96-6215

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

1997 U.S. App. LEXIS 6097

March 31, 1997, Decided

NOTICE: [\*1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of New York. (Loretta A. Preska, Judge). This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

DISPOSITION: AFFIRMED.

COUNSEL: APPEARING FOR APPELLANT: Michael Joseph J. Barnas, New York, N.Y.

APPEARING FOR APPELLEE: Linda A. Riffkin, Asst. U.S. Atty., New York, N.Y.

JUDGES: PRESENT: HONORABLE JON O. NEWMAN, Chief Judge. HONORABLE GUIDO CALABRESI, Circuit Judge. HONORABLE DENIS R. HURLEY, \* District Judge.

\* Of the United States District Court for the Eastern District of New York, sitting by designation.

OPINION: SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

William O'Connor appeals from the June 12, 1996, judgment of the District Court which affirmed the decision of the Commissioner of Social Security denying O'Connor's claim for disability [\*2] benefits, granted the Commissioner's motion for judgment on the pleadings, and dismissed O'Connor's complaint. O'Connor's main contention is that the opinion of his treating psychiatrist, retrospectively diagnosing him with a mental impairment, was entitled to added, if not controlling, weight in the determination of his disability status, and that the Commissioner's decision, by failing to accord such additional weight, was based on legal error and not supported by substantial evidence.

While working as a police officer in 1975, O'Connor sustained a gunshot wound to his dominant hand. The injury caused him to lose part of his index finger to gangrene. He has not worked as a police officer since that time. In 1992, O'Connor was examined by Dr. Conciatori, a psychiatrist, who diagnosed him with post-traumatic stress disorder with an onset date of 1975. There was no evidence that prior to 1992, O'Connor had complained to any doctor about any symptoms of a mental impairment or depression.

In evaluating a claim for disability benefits, the Commissioner will accord less than controlling weight to the opinion of a treating physician when, for example, the opinion is inconsistent with [\*3] the record as a whole, 20 C.F.R. @ 404.1527(d)(4) (1996), or when other factors tend to contradict the opinion, id. @ 404.1527(d)(5). However, if the treating physician's opinion is well-supported and is not inconsistent with other substantial evidence in the record, the opinion is entitled to controlling weight. *Schisler v. Sullivan*, 3 F.3d 563, 567 (2d Cir. 1993) (discussing @ 404.1527).

The Commissioner and the District Court were entitled to accord little or no added weight to the opinion of Dr. Conciatori, who indicated that O'Connor's mental impairment began some ten years before Dr. Conciatori first examined him. Rather than being "well-supported by medically-acceptable clinical and laboratory diagnostic techniques," id. @ 404.1527(d)(2), Dr. Conciatori's opinion was speculative, and was contradicted by substantial other evidence, including contradictory evidence of O'Connor's social interactions during the relevant period, and the absence of any

contemporaneous evidence of the existence of a psychiatric impairment. In determining the existence of a disability, the Commissioner is also entitled to rely on the absence of contemporaneous evidence of the disability. [\*4] See *Dumas v. Schweiker*, 712 F.2d 1545, 1553 (2d Cir. 1983). The Commissioner's conclusion that O'Connor was not suffering from a mental impairment prior to September 30, 1992, was not based on legal error and was supported by substantial evidence. E.g., *Mongeur v. Heckler*, 722 F.2d 1033, 1038 (2d Cir. 1983).

We have considered O'Connor's remaining arguments and find them to be without merit.