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AUTHOR : Clyde E. Andrews, Jr. Phone: (410)965-1597

SUBJECT : Stieberger Settlement--Manual of Second Circuit Disability Decisions - Emergency DI/SSI Instructions

This instruction is being transmitted pursuant to the Stieberger settlement. 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 published decision which delineates a holding regarding the adjudication of title II and/or title XVI disability claims.

On May 5, 1998, the United States of Appeals for the Second Circuit issues a published decision in Clark v. Apfel. Therefore, in keeping with the requirements of the Stieberger settlement, this instruction must be added to the "Manual of Second Circuit 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.

\*Clark alleged disability from February 1990 due to constant suffering after lower right leg surgery for a benign lesion. However, medical evidence showed no pain three months after surgery and full motor activity and sensation on termination of treatment two years later. Over three years after the operation and one month before applying for SSI disability, Clark began seeking treatment for right leg pain. Dr. Sookhu found pain, weakness, and decreased sensation but no limitation of motion, gait abnormality, or need of a cane. He opined that Clark could sit, stand, and walk eight hours a day; lift 25 pounds; and push and pull hand and foot controls. (Another doctor also found significant functional capacity.) Nine months later, Dr. Sookhu found pain on bending the right leg; ability to walk one block, stand one hour, and sit four hours; a need to lie down when tired; ability to lift 50 pounds; and ability to travel alone on public transportation.

Clark appealed pro se to the Second Circuit. It observed that Agency regulations afford special evidentiary weight to treating physician opinion. Also, subsequent

to the district court decision in *Clark*, the Second Circuit in *Schaal v. Apfel* had ruled that an ALJ may not fail to credit a treating physician opinion only because the doctor's report stated no specific clinical findings; rather the ALJ, pursuant to an affirmative obligation to develop the administrative record adequately, had to seek additional information under the circumstances presented in *Schaal*. [See Stieberger Manual instruction EM-98061 dated March 23, 1998]. Clark argued that the ALJ should have requested such information. The Second Circuit was unsure if the ALJ satisfied his duty to develop Clark's record. Accordingly, it vacated the district court decision and remanded for district court reconsideration under *Schaal*.

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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 holdings of how ALJs should handle cases may help illuminate a more general principle that also applies at the DDS level.

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

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.

Retention Date: December 2002  
Date Changed: February 20, 2002

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: April 23, 1998 Decided: May 5, 1998 )

Docket No. 97-6164

MAXINE CLARK,  
Plaintiff-Appellant,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Before: WALKER and CALABRESI, Circuit Judges, and RESTANI, Judge.(1)

Appeal from a judgment of the United States District Court for the Southern District of New York (Shira A. Scheindlin, Judge) affirming the Social Security Administration's ("SSA") denial of the plaintiff's application for Supplemental Security Income ("SSI") benefits and dismissing her complaint on the pleadings pursuant to Federal Rule of Civil Procedure 12(c).

Vacated and remanded.

MAXINE CLARK, pro se, New York, NY.

SUSAN D. BAIRD, Assistant United States Attorney, for Mary Jo White, United States Attorney for the Southern District of New York (Gideon A. Schor, Assistant United States Attorney, on the brief), for Defendant-Appellee.

CALABRESI, Circuit Judge:

Maxine Clark appeals from a judgment of the United States District Court for the Southern District of New York (Shira A. Scheindlin, Judge) affirming the Social Security Administration's ("SSA") denial of her application for Supplemental Security Income ("SSI") benefits and dismissing her complaint on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). We vacate and remand.

## A. Facts & Procedural History

### 1. Clark's Medical History

Clark claims that she is disabled as a result of having undergone surgery in February 1990 for a benign lesion on her right fibula, a bone in the lower leg. Although Clark testified that her suffering has been constant since the surgery, her medical records show that her complaints of pain have increased with the passage of time. Three months after the surgery, Clark told her doctor that she was not in pain and that she was able to walk, but that she had occasional swelling in her right ankle. And in February 1992, an examining physician found that Clark had recovered full motor activity and sensation in the leg, and that no follow-up treatment was necessary.

Clark next sought medical attention for her leg in June 1993, when she complained of pain to Dr. Lloyd Sookhu. Clark began seeing Dr. Sookhu on a regular basis. In July 1993, Clark applied for SSI benefits. In September 1993, Dr. Sookhu prepared a medical report indicating that Clark was experiencing pain, weakness, and decreased sensation in her right leg. He reported that there was no significant limit on her ability to flex or extend the leg, that there was no significant abnormality in her gait, and that she did not require an assistive device to walk. With respect to Clark's ability to hold a job, Dr. Sookhu indicated (a) that Clark could stand, sit or walk for a maximum of eight hours per day; (b) that she could occasionally lift and carry a maximum of twenty-five pounds; and (c) that she could push and pull hand and foot controls without limitation.

That same month, another physician, Dr. A. Kovary, also assessed Clark's residual functional capacity for work. He found (a) that Clark could lift and carry twenty pounds occasionally and ten pounds frequently; (b) that she could stand or walk about two hours in an eight-hour workday; (c) that she could sit about six hours in an eight-hour workday; and (d) that she could push and pull hand and foot controls without limitation.

Clark's treating physician, Dr. Sookhu, prepared a second assessment in July 1994. He stated that he had been seeing Clark approximately once every three months, and that she was still suffering from pain and numbness in the lower right leg. She had discontinued physical therapy, but had been taking 600 mg per day of Motrin. Dr. Sookhu's evaluation of Clark's functional capacity had changed. He indicated that she could only stand for one hour and sit for four hours out of an eight-hour workday, and that she needed to lie down during the day when tired. He reported that she could not bend her right knee without pain, but that she had no problems using her hands and could lift a maximum of twenty-one to

fifty pounds and carry eleven to twenty pounds. According to Dr. Sookhu, Clark could walk for only one block without

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stopping, but she was able to travel alone by bus and subway. Dr. Sookhu did not provide any additional information in the space designated for "clinical findings, laboratory and test results."

## 2. Clark's Application for SSI Benefits

Clark filed her application for SSI benefits in July 1993, shortly after she began seeing Dr. Sookhu on a regular basis. The application was denied, and Clark requested a hearing before an administrative law judge ("ALJ"). In January 1995, the ALJ found that Clark was not disabled. The ALJ stated that Clark's allegations of pain and physical limitations were inconsistent with the medical evidence. The ALJ also believed that Dr. Sookhu's second functional assessment was inconsistent with, and not supported by, the other medical evidence in the record -- in particular, Dr. Sookhu's and Dr. Kovary's September 1993 reports. In addition, the ALJ noted that Dr. Sookhu's second report failed to mention any clinical or objective findings to support his conclusion that Clark' functional capacity had decreased, and that Dr. Sookhu failed to explain why Clark's leg problem would preclude her from sitting for six hours a day. The ALJ concluded that Clark's impairments prevented her from lifting and carrying more than ten pounds and from standing and walking for long periods of time, but that Clark would be able to do sedentary work.

Clark filed objections, arguing that the ALJ "should have acted affirmatively to seek out clarifying information" concerning the discrepancies between Dr. Sookhu's inconsistent functional assessments. The Appeals Council denied Clark's request for review, and she filed her complaint in the district court. In March 1997, the Commissioner moved for judgment on the pleadings pursuant to Rule 12(c), and in June 1997, the court granted this motion. The district court found that the ALJ's decision was supported by substantial evidence and that the evidence that Clark had presented to the district court was not new or material.

## B. Discussion

In reviewing the denial of SSI benefits, we must determine whether the SSA's decision was supported by substantial evidence and based on the proper legal standard, keeping in mind that it is up to the agency, and not this court, to weigh the conflicting evidence in the record. See, e.g., *Beauvoir v. Chater*, 104 F.3d 1432, 1433 (2d Cir. 1997). We review de novo the district court's decision to grant judgment on the pleadings. See, e.g., *Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996).

The law gives special evidentiary weight to the opinion of the treating physician. Specifically, the regulations state that:

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Generally, we give more weight to opinions from your treating sources . . . . If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's opinion controlling weight, we apply [various factors] in determining the weight to give the opinion.

20 C.F.R. " 404.1527(d)(2), 416.927(d)(2). The factors that must be considered when the treating physician's opinion is not given controlling weight include: (i) the frequency of examination and the length, nature, and extent of the treatment relationship; (ii) the evidence in support of the opinion; (iii) the opinion's consistency with the record as a whole; and (iv) whether the opinion is from a specialist. *Id.* In addition, the regulations provide that the agency "will always give good reasons in [its] notice of determination or decision for the weight [it] gives [claimant's] treating source's opinion." *Id.*

The Second Circuit recently had occasion to explore the contours of the ALJ's obligations under these regulations in *Schaal v. Apfel*, 134 F.3d 496 (2d Cir. 1998). In that case, we held that the lack of specific clinical findings in the treating physician's report did not, standing by itself, justify the ALJ's failure to credit the physician's opinion. We stated that even if the clinical findings were inadequate, it was the ALJ's duty to seek additional information from [the treating physician] *sua sponte*. See *Perez v. Chater*, 77 F.3d 41, 47 (2d Cir. 1996) ("[T]he ALJ generally has an affirmative obligation to develop the administrative record. This duty exists even when the claimant is represented by counsel . . . .").

*Id.* at 505 (citation altered).

Clark has argued that the ALJ "should have acted affirmatively to seek out clarifying information" concerning the perceived inconsistencies between Dr. Sookhu's two reports. If asked, Dr. Sookhu might have been able to provide a medical explanation for why Clark's condition deteriorated over time. Likewise, the doctor might have been able to offer clinical findings in support of his

conclusion that Clark could not sit for most of the workday. Dr. Sookhu's failure to include this type of support for the findings in his report does not mean that such support does

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not exist; he might not have provided this information in the report because he did not know that the ALJ would consider it critical to the disposition of the case. There is, to say the least, a serious question as to whether the ALJ's duty to develop the administrative record was satisfied in this case.

Because the district court did not have the benefit of our opinion in *Schaal* when it evaluated Clark's claim, we vacate and remand so that the district court may reconsider Clark's claim in light of that opinion.<sup>(2)</sup> Given the complexity of the legal and factual issues in this case, we suggest that the district court might consider appointing counsel for Clark.

1. \*The Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

2. At oral argument, Clark asserted that a recent MRI (which was not available at the time the SSA made its decision and which was not presented to the district court) showed nerve damage, which might explain her ongoing pain. We express no opinion as to whether this evidence should be considered by the district court, but note that in deciding whether to remand a case to the agency, the court may consider new evidence that is material, provided that the claimant demonstrates good cause for failing to present the evidence earlier. See, e.g., *Lisa v. Secretary of Dep't of Health & Human Servs.*, 940 F.2d 40, 42-43 (2d Cir. 1991). Material evidence is evidence that is "relevant to the claimant's condition during the time period for which benefits were denied." *Id.* at 43. We have held that the results of medical tests completed after the SSA concluded its review were material where those test results allowed the treating physician "for the first time [to] diagnose[] a neurological cause of [the claimant's] serious condition." *Tolany v. Heckler*, 756 F.2d 268, 272 (2d Cir. 1985). In other words, the new test results were found to be material because they not only shed light on the claimant's current health, but also provided an explanation for her health problems in the time period for which benefits were denied. See generally *Missouri, Kan., & Tex. Ry. v. Williams*, 125 S.W. 881, 882-83 (Tex. 1910) (providing a classic statement of the evidentiary principle that "[w]hen the question is as to a condition existing at one time, evidence as to that at a different time" may or may not be probative, depending upon whether the condition is "ephemeral" or "permanent or lasting").