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SUBJECT : Stieberger Settlement--Manual of Second Circuit
Disability Decisions - Emergency DI/SSI
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 published decision which delineates a holding regarding the adjudication of title II and/or title XVI disability claims.

On May 22, 1998, the United States Court of Appeals for the Second Circuit issued a published decision in Yancey v. Apfel. 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.

***EXPLANATION OF HOLDING:**

Yancey worked as an aircraft parts inspector until 1989 when she claimed she became disabled beginning in January 1988 by inflammatory connective tissue disease. After the claim was denied, she reapplied in April 1992, alleging disability from April 1989. In a final Agency decision after an Appeals Council remand, an Administrative Law Judge (ALJ) denied Yancey's request for an administrative subpoena

directed to her treating physician and found her not disabled. The district court affirmed and Yancey appealed.

The Second Circuit found that the ALJ appropriately developed the record without issuing an administrative subpoena requiring Yancey's physician to testify. ALJs must provide claimants the opportunity to cross-examine reporting physicians when reasonably necessary for the full presentation of the case (20 C.F.R. 404.9650(d)(1)). However, due process does not require a reporting physician to be subpoenaed merely on the claimant's request. In this case, the ALJ properly exercised his discretion not to issue a subpoena. Yancey had a fair and meaningful opportunity to present her case and to submit medical evidence, and the ALJ had no indication that the treating or other physician's reports were inaccurate or biased or that subpoenaing the treating physician would have added anything of value to the proceedings.

Yancey also contended that the Appeals Council remand directing the ALJ to consider whether she had a medically determinable mental impairment required the ALJ to order a consultative mental examination. The Second Circuit held that the ALJ adequately developed the record without requesting such an examination. The court reasoned that 20 C.F.R. 404.1512 places the burden on the claimant to supply all relevant medical evidence, Yancey provided no mental impairment evidence, no physician recommended evaluation for mental illness, and Yancey furnished no legal basis of a requirement or necessity for a consultative examination. The appeals court concluded summarily that adequate record evidence supported the agency decision.

*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) 264-7317.

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

Central Office components should contact the Stieberger
Coordinator, Litigation Staff, Office of Program
Benefits (410) 965-4138.

OHA Offices:
Stieberger Coordinator, Office of Policy, Planning and
Evaluation, (703) 605-8277.

Retention Date: December 2002
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: November 7, 1997 Decided: May 22, 1998)

Docket No. 97-6103

BURNETTE YANCEY,
Plaintiff-Appellant,

- v. -

KENNETH S. APFEL, COMMISSIONER
OF SOCIAL SECURITY[1]
Defendant-Appellee.

Before: MINER and PARKER, Circuit Judges,
and DEARIE, District Judge.[2]

Appeal from a judgment and order of the United States
District
Court for the District of Connecticut (Dorsey, C.J.)
affirming
the decision of the Commissioner of Social Security[3]
that
plaintiff was not under a disability as defined in
the Social
Security Act, and denying plaintiff's motion for
rehearing, the
district court having determined that the decision
was supported
by substantial evidence and that the Administrative
Law Judge (1)
did not abuse his discretion by denying plaintiff's
request to
subpoena her treating physician to testify and (2)
did not err in
failing to refer plaintiff for either a psychiatric
or
psychological evaluation.

ROBERT S. REGER, Rolnick & Reger, Hamden, CT, for
Plaintiff-Appellant.

DEIRDRE A. MARTINI, Assistant United States Attorney,
District of

Connecticut, Bridgeport, CT, (Christopher F. Droney, United States Attorney, District of Connecticut, New Haven, CT, on the brief; Amy S. Knopf, Assistant Regional Counsel, Social Security Administration, Boston, MA, of counsel), for Defendant-Appellee.

OPINION BY: Miner, Circuit Judge

Plaintiff Burnette Yancey appeals from a judgment and order entered in the United States District Court for the District of Connecticut (Dorsey, C.J.). The order and judgment adopted the magistrate judge's recommended ruling affirming the decision of

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the Commissioner of Social Security that Yancey was not under a disability as defined in the Social Security Act, 42 U.S.C. § 301 et seq., as amended. The district court found that the decision of the Administrative Law Judge ("ALJ") was supported by substantial evidence and that (1) the ALJ did not abuse his discretion in refusing to subpoena Yancey's treating physician to testify at the administrative hearing and (2) the ALJ did not err in failing to refer Yancey for either a psychiatric or psychological evaluation.

For the reasons that follow, we affirm.

BACKGROUND

Plaintiff Burnette Yancey was born on July 19, 1950. Her formal education did not extend beyond the tenth grade. She has since worked as a machine operator, riveter, solderer, and machine inspector. She last worked in 1989 as an aircraft parts inspector for the Pratt & Whitney division of United Technologies Corporation. In early 1988, Yancey developed pain in her knees, wrists, hands and shoulders and experienced morning stiffness, fatigue and weight loss.

In a written opinion dated April 18, 1988, internist/rheumatologist, Dr. Robert Schoen, stated that it was his impression that Yancey was suffering from inflammatory arthritis, "possibly systemic lupus erythematosus" ("SLE" or "lupus").[4] On March 7, 1989, Dr. Schoen diagnosed Yancey with active SLE, and, among other treatments, prescribed prednisone, an anti-inflammatory. An anti-nuclear antibodies ("ANA") sample taken on March 7, 1989, was "not definitive" of an SLE diagnosis. On April 20, 1989, Dr. Schoen added corticosteroid therapy to Yancey's treatment regimen. In June of 1989, Dr. Schoen again reported that Yancey was manifesting symptoms of active SLE. On August 23, 1989, Yancey filed an application for disability benefits with the Social Security Administration

("SSA"),
alleging an inability to work since January of 1988
as a result
of rheumatoid arthritis and SLE. She thereafter was
referred for
a consultative examination, which was performed by Dr.
Joseph
Ayoub in October of 1989, at the request of the SSA.
Yancey again
reported pain and cramping in her extremities. Dr.

Ayoub noted evidence of swelling and tenderness in
Yancey's hands
and feet, with a decrease in motor power and a loss
of range of
motion of her hands. However, X-rays taken by Dr.
Ayoub revealed
no abnormalities. Dr. Ayoub diagnosed lupus "by
history" only,
and opined that Yancey should have restrictions in
carrying,
lifting, handling, holding, pushing, pulling with her
hands, as
well as walking, standing, climbing and balancing.
The SSA denied
Yancey's application for benefits on November 9, 1989,
based on

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its determination that the evidence of record did
"not show any
significant 100% disabling disease that would
interfere in
[Yancey's] ability to engage in all types of
employment."

In January of 1991, Yancey was examined at the Yale
University
School of Medicine's Rheumatology Clinic (the
"rheumatology

clinic"). Yancey showed no signs of rheumatoid arthritis or SLE, but exhibited minimal tenderness in her right wrist, biceps muscle and epigastric region. On March 13, 1991, Yancey began receiving treatment from Dr. Raymond Wong and the Hill Health Center ("HHC") staff in New Haven, Connecticut. At that time, Yancey complained that her joint pain had worsened. Dr. Wong noted Dr. Schoen's prior diagnosis of SLE, but only found evidence of tenderness in Yancey's left ankle and foot and in her right elbow. Dr. Wong prescribed prednisone and ibuprofen (Motrin).

Yancey filed a second application for disability benefits on April 15, 1992, alleging an inability to work since April 18, 1989. A report prepared for the State of Connecticut Disability Determination Services dated May 8, 1992, indicated that although Yancey had "some arthralgia,"[5] she did not fit the criteria for SLE. Notes from the HHC dated June 23, 1992, presumably Dr. Wong's, contain the following statement: "I am not convinced of SLE [diagnosis]." Because Yancey reported that the prednisone helped relieve her pain, its continued use was prescribed.

In June of 1992, internist Dr. Francisco Carbone performed a consultative examination of Yancey at the request of

the SSA. His examination found no evidence of wrist, digital or elbow tenderness, and no evidence of swelling. Dr. Carbone concluded that there was "no evidence of physical impairment which would restrict [Yancey] from any type of work related activities." On July 28, 1992, Yancey's second application was denied, the SSA having concluded from the evidence that Yancey was able to continue performing her work as a parts inspector. On September 10, 1992, Yancey filed a request for reconsideration.

Notes from the HHC dated September 21, 1992 indicate a history of SLE, but also indicate that Yancey manifested no symptoms of SLE other than arthralgia. On November 3, 1992, Dr. Wong completed a questionnaire for the State of Connecticut Disability Determination Services regarding Yancey's condition. He noted the presence of "multiple arthralgia" and indicated that Yancey had a history of SLE, "apparently diagnosed by Dr. Robert Schoen."

On December 23, 1992, the SSA again determined that Yancey was not disabled and was capable of returning to work. Yancey filed a request for an administrative hearing on March 3, 1993. R. 161-62. On July 16, 1993, a hearing was held before an ALJ. R. 254. The ALJ issued a written decision on October 26, 1993, in

which he denied Yancey's requests to subpoena Dr. Wong and to have a consultative examination of Yancey performed by another rheumatologist. The ALJ also made the following determination:

The medical evidence establishes the claimant has been diagnosed in the past as subject to [SLE] with arthralgia and arthritis. . . . However, other physicians have questioned this diagnosis. . . . Her impairments, individually or in combination, do not meet or equal the requirements of any impairment listed in Appendix 1, Subpart P, Regulations No. 4 [that would entitle her to disability benefits].

The ALJ determined that Yancey retained at least the capacity to perform sedentary work.[6] In so doing, the ALJ found Yancey's testimony of severe pain and concomitant functional limitations not to be fully credible in light of the contradictory information provided by Dr. Carbone and Dr. Wong. The ALJ then considered Yancey's vocational profile (age, education, past work experience and residual functional capacity) and determined that Yancey was not "disabled" as defined in the Social Security Act.[7] Yancey timely submitted an application requesting review of the decision by the SSA Appeals Council ("Appeals Council"). Attached to the application was a letter from Yancey's attorney

in which it was argued that because SLE is difficult to detect, Yancey was entitled to have the case remanded with an order for a subpoena either requiring a narrative report from Dr. Wong or requiring Dr. Wong to testify regarding his medical reports. Yancey's attorney also argued that Yancey was entitled to an additional consultative examination by a rheumatologist.

In January of 1994, Yancey again visited the rheumatology clinic, where it was determined that though there was evidence of some muscle tenderness, all joints showed full range of motion without inflammation. Radiological studies were normal. When Yancey was again examined at the rheumatology clinic in March of 1994, all of her joints were determined to be normal. At that time, Yancey was also tapering her use of prednisone successfully. Dr. Christina Brunet, of the rheumatology clinic explained that "[d]uring the time that [Yancey] has attended the Yale clinic she has not demonstrated any clinical signs of active arthritis or lupus."

In an order dated March 4, 1994, the Appeals Council remanded the case to "[f]urther evaluate the claimant's subjective complaints and provide rationale in accordance with the disability regulations pertaining to evaluation of symptoms (20

CFR

404.1529) and Social Security Ruling 88-13." [8]

In response to Yancey's attorney's requests, Dr. Wong forwarded to the attorney a letter dated June 2, 1994, in which he stated:

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Ms. Yancey as far as I know does not have active [SLE]. She has arthralgia which is joint pain but I have not documented any signs of arthritis or joint inflammation. Multiple [X-r]ay and scans have not confirmed the presence of arthritis. Because of the lack of objective findings she has been referred to the rheumatology clinic at Yale New Haven Hospital.

Unsatisfied with this letter, Yancey's attorney again requested that the ALJ issue a subpoena for Dr. Wong to appear at the second administrative hearing.

In accordance with the Appeals Council order, a second administrative hearing was held on May 23, 1994. After the hearing, the ALJ issued his written decision dated July 28, 1994. In the decision he denied the request to subpoena Dr. Wong. The ALJ reasoned that the letter from Dr. Wong, together with the other evidence, was "fully adequate to adjudicate [the] case." The ALJ went on to address Yancey's subjective

complaints as well
as the medical evidence and concluded:

Apparently in light of her ongoing complaints of pain,
treatment
was administered for [muscle and] low back pain, but
the medical
evidence does not show the existence of a medically
determinable
impairment that could reasonably be expected to
produce the
degree of pain alleged by the claimant.

The ALJ finally concluded that Yancey did not have an
impairment
or combination of impairments as listed in, or
medically
equivalent to one listed in, the SSA's Listing of
Impairments, 20
C.F.R. Part 404, Subpart P, Appendix 1, and was "not
entitled to
a period of disability or disability benefits under
Sections
216(i) and 223, respectively of the Social Security
Act."

On August 24, 1994, Yancey requested that the Appeals
Council
review the ALJ's second decision. In support of this
request,
Yancey's attorney again submitted a letter in which
he argued
that the ALJ did not satisfactorily inquire into
Yancey's
subjective complaints and that Yancey was denied her
"right to
subpoena [a] witness, even one who has submitted a
written
report" Yancey's attorney also argued that the
Appeals Council
order instructed the ALJ to explore, inter alia, the
possibility

of a medically determinable psychological impairment but that no examination by a clinical psychologist was conducted or ordered by the ALJ. Yancey's attorney requested that the matter again be remanded with an order to the ALJ to issue the subpoena and direct that Yancey be examined by a clinical psychologist. On October 12, 1994, the Appeals Council issued an order denying Yancey's request for review, concluding that there was no basis to grant review and that the ALJ's determination was supported by substantial evidence. The ALJ's decision thus became the final

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order of the Commissioner of Social Security. See 42 U.S.C. § 405(g).

Yancey timely filed suit in the United States District Court for the District of Connecticut on December 8, 1994, and subsequently sought to have the case remanded for rehearing pursuant to 42 U.S.C. § 405(g). In March of 1997, Magistrate Judge, Holly B. Fitzsimmons, recommended that the ALJ's decision be affirmed. The magistrate judge found that because the ALJ's decision was supported by substantial evidence, the ALJ did not abuse his discretion under 20 C.F.R. § 404.950(d)(1) when he

denied

Yancey's request to subpoena Dr. Wong. The magistrate judge also found that Yancey had waived any right to subpoena Dr. Wong

because she failed to file a written request for the subpoena

five days prior to the hearing date, as required by 20 C.F.R. §

404.950(d)(2). Finally, the magistrate judge noted that Yancey

bore the burden of demonstrating that she suffered from a mental

impairment and that Yancey's oral representation to the ALJ that

she was told by one physician that her problems were "in her

head" did not require the ALJ to solicit additional evidence of a

mental impairment.

The district court adopted the magistrate judge's recommendation,

but noted that Yancey may have satisfied the written request

requirement of § 404.950(d)(2).[9] The district court entered

judgment on April 2, 1997, dismissing Yancey's case and this

appeal followed.

DISCUSSION

I. Standard of Review

Appellate review of the Commissioner's decision is limited. "On

review, we may only set aside a determination which is based upon

legal error or not supported by substantial evidence." *Berry v.*

Schweiker, 675 F.2d 464, 467 (2d Cir. 1982).

Substantial evidence
"is more than a mere scintilla" and "means such
relevant evidence
as a reasonable mind might accept as adequate to
support a
conclusion." Richardson v. Perales, 402 U.S. 389, 401
(1971)
(quotation and citation omitted); see also Perez v.
Chater, 77
F.3d 41, 46 (2d Cir. 1996). Where an administrative
decision
rests on adequate findings sustained by evidence
having rational
probative force, the court should not substitute its
judgment for
that of the Commissioner. See Williams v. Bowen, 859
F.2d 255,
258 (2d Cir. 1988).

II. Right to Subpoena a Reporting Physician

Yancey argues that because diagnosing SLE is
difficult and there
is contradictory medical evidence in this case, "the
Fifth
Amendment of the Constitution and notions of
fundamental

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fairness" compel the issuance of a subpoena requiring
Dr. Wong to
testify so as to allow Yancey to cross-examine him
concerning his
medical findings. The specific issue of whether a
disability
claimant has an absolute right to have a reporting
physician
subpoenaed appears to be one of first impression in
this Circuit.
But see Townley v. Heckler, 748 F.2d 109, 114 (2d Cir.

1984) (ALJ violated claimant's right to due process by basing his decision on evidence that the claimant was not allowed to challenge or rebut); *Treadwell v. Schweiker*, 698 F.2d 137, 143-44 (2d Cir. 1983) (ALJ's reliance on uncorroborated hearsay testimony and failure to enforce subpoenas constituted a denial of due process); *Gullo v. Califano*, 609 F.2d 649, 650 (2d Cir. 1979) (ALJ's reliance on a post-hearing report without giving the claimant an opportunity to examine or challenge that report constituted a violation of due process).

For the following reasons, we hold that the right to due process in a social security disability hearing does not require that a reporting physician be subpoenaed any time a claimant makes such a request.

The issuance of subpoenas in social security administrative proceedings is governed primarily by 20 C.F.R. § 404.950(d)(1), which provides, in pertinent part, as follows:

"When it is reasonably necessary for the full presentation of a case, an administrative law judge or a member of the Appeals Council may, . . . at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other

documents
that are material to an issue at a hearing."

(emphasis added). The plain language of this section clearly places the decision to issue a subpoena within the sound discretion of the ALJ. See also *Wallace v. Bowen*, 869 F.2d 187, 194 (3d Cir. 1988) ("The question of whether to issue a subpoena to compel cross-examination of a reporting physician is a question entrusted to the ALJ who is obligated to develop the record fully." (quotation omitted)).

Yancey acknowledges that the ALJ generally has discretion in deciding whether to issue a subpoena, but contends that the claimant has an absolute due process right to subpoena a reporting physician whenever the claimant seeks to cross-examine that physician. Yancey relies on the Supreme Court case of *Richardson v. Perales*, 402 U.S. 389 (1971), and cases from other circuits that see *Perales* as supportive of such an absolute right. See *Lidy v. Sullivan*, 911 F.2d 1075 (5th Cir. 1990); *Coffin v. Sullivan*, 895 F.2d 1206 (8th Cir. 1990).

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The government counters by arguing that we should accept the reasoning of *Flatford v. Chater*, 93 F.3d 1296 (6th

Cir. 1996).

Citing certain pragmatic factors, the case of *Matthews v. Eldridge*, 424 U.S. 319 (1976), as well as the *Perales* case, the Flatford court held that due process does not require an ALJ to subpoena a reporting physician whenever a claimant so requests. The court reasoned that the issuance of subpoenas should be left to the sound discretion of the ALJ, who is charged with the obligation to develop the record fully. See *Flatford*, 93 F.3d at 1307.

In *Perales*, the Supreme Court addressed the question of what process was due with regard to the use of physician's reports in a social security disability hearing. See 402 U.S. at 389-408. Generally, due process requires that a social security disability hearing must be full and fair. See *id.* at 401-02. The *Perales* Court noted that, "in one sense," there is a property right to a claim to social security benefits and went on to state that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Id.* at 402-03 (citation and quotation omitted).

The Perales Court held that a written report prepared by a physician who had examined the claimant may be received as evidence in a disability hearing, and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination.

Id. at 402. Although the Court mentioned the "right to subpoena," it never specifically addressed whether this "right" was limited or absolute. The Perales Court indirectly acknowledged the ALJ's discretion in these matters by noting that the admission of consultative physicians' reports did not threaten the integrity or fairness of the administrative proceeding in light of the fact that such reports are subject to "cross-examination as may be required for a full and true disclosure of the facts." Id. at 410.

As noted above, some circuits have relied on Perales as a basis for holding that when a claimant requests that a

reporting physician be subpoenaed to testify, that claimant enjoys an absolute due process right to have the subpoena issued. See Lidy, 911 F.2d at 1077 (holding that a claimant requesting that a

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reporting physician be subpoenaed has an absolute due process right to cross-examine such physician); Coffin, 895 F.2d at 1212 (holding that "due process requires that a claimant be given the opportunity to cross-examine and subpoena the individuals who submit reports").

In contrast, after reviewing Perales and analyzing the requirements of procedural due process within the framework set forth in Eldridge, the Sixth Circuit recently held that due process does not require the Commissioner to issue a subpoena and allow a claimant to cross-examine a reporting physician upon request. See Flatford, 93 F.3d at 1305.

Flatford involved a disability claimant who was deemed to have retained the ability to perform sedentary work and therefore was denied disability benefits. See 93 F.3d at 1299. Prior to this determination, Flatford had submitted interrogatories to a reporting physician and, after receiving the

physician's answers,
requested that the physician be subpoenaed for cross-
examination.

The ALJ denied the request pursuant to 20 C.F.R. §
404.950(d)(1)

after finding that the record was fully developed.

See *id.*

Flatford appealed the denial of the subpoena to the
Sixth

Circuit, arguing that a claimant "has an absolute due
process

right to subpoena and cross-examine a medical
advisor." *Id.*

In resolving this question, the Sixth Circuit applied
the

analytical framework from *Eldridge*.^[10] The court
noted that the

private interests involved in a disability case are
the

claimant's interest in a meaningful opportunity to
present his

case and a fair determination of whether he was
qualified for

disability benefits. See *id.* at 1306. Citing the non-
adversarial

nature of administrative adjudications, the court
noted that the

need to allow for cross-examination of every
reporting physician

is less crucial to the fairness and accuracy of the
ALJ's

decision than it would be in an adversarial context.
See *id.* The

court also found that the danger of inaccurate
medical

information or biased opinions was not so great as to
cause

concern that the claimant might erroneously be denied
benefits if

not given the opportunity to cross-examine the
answering

physician. See *Id.* Finally, the court considered the burdensome effects of the costs of paying reporting physicians to testify in every case, as well as the likely decline in physicians willing to provide reports with the knowledge that a subpoena would follow virtually every report submitted. See *id.*

The Flatford court concluded that the requirements of due process are satisfied by providing a claimant with the opportunity to cross-examine a reporting physician "where reasonably necessary to a full development of the evidence in the case." *Id.* at 1307; see also *Wallace*, 869 F.2d at 191 (holding that an ALJ must afford a claimant an opportunity to cross-examine the authors of

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any post-hearing medical reports where such cross-examination is necessary to the full presentation of the case); 20 C.F.R. § 404.950(d)(1). Recognizing that the issuance of a subpoena was a matter committed to the discretion of the ALJ, the Sixth Circuit went on to examine whether the ALJ abused his discretion in Flatford's case, and concluded that he had not. *Flatford*, 93 F.3d at 1307.

We agree with the rule adopted by the Sixth Circuit. Applying

that rule to the case before us, we find no abuse of discretion by the ALJ. The ALJ (1) allowed Yancey a fair and meaningful opportunity to present her case and (2) had no indication that Dr. Wong's (or any physician's) reports were inaccurate or biased or that subpoenaing Dr. Wong would have added anything of value to the proceedings. Yancey was given ample opportunity to submit medical evidence to support her claim of disability. Indeed, Yancey submitted records from her first physician, Dr. Schoen, as well as from subsequent treating physicians, including Dr. Wong.

The ALJ provided an opportunity for Yancey to obtain and submit a final written report from Dr. Wong prior to the second administrative hearing. Dr. Wong replied to the request for this report and stated that, given the lack of objective symptoms, he did not believe Yancey suffered from SLE. The denial of Yancey's request to subpoena Dr. Wong did not threaten the fairness and accuracy of the ALJ's decision, which was expressly based on the entire record, including all of Dr. Wong's consistent reports. Significantly, Dr. Wong never diagnosed Yancey as having SLE and consistently found a lack of objective evidence to support such a finding. Dr. Wong's testimony therefore would have provided only redundant information and would not have aided the

ALJ in making
his determination.

Moreover, we agree that practical concerns strongly militate against adopting a rule establishing an absolute right to subpoena reporting physicians. We are particularly concerned that to accept, as a matter of law, that a disability claimant has an absolute right to subpoena a reporting physician would unnecessarily increase the financial and administrative burdens of processing disability claims while diluting the ALJ's discretion in how he develops the record.

In Yancey's case, the ALJ appropriately compiled the record, considered all the evidence and determined that the record was fully adequate to adjudicate the case and that there was no need to subpoena Dr. Wong. The ALJ had before him medical reports from numerous sources, including Dr. Schoen, who had first diagnosed SLE in 1989, as well as two physicians who, along with Dr. Wong, subsequently examined Yancey and opined that she did not suffer from disabling SLE or arthritis. After weighing the evidence, the ALJ found that although Yancey suffered from multiple pains and

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fatigue, she did not have an impairment or

combination of impairments listed in the pertinent regulations. Under these circumstances, we believe that there was no deprivation of due process as the ALJ acted well within his discretion by refusing to subpoena Dr. Wong.

III. Psychiatric Evaluation

Yancey contends that the decision of the Appeals Council to remand the ALJ's first decision with directions to consider the possibility that Yancey suffered from a medically determinable mental impairment required that the ALJ order a consultative psychiatric or psychological examination. Yancey argues that the ALJ neglected his duty to investigate and fully develop the record by failing to order a consultative examination in this circumstance. This argument is without merit.

20 C.F.R. § 404.1512 explicitly places the burden of supplying all relevant medical evidence on the claimant. Yancey provided no evidence of a psychiatric or psychological impairment, and offers no legal basis for her argument that such an examination was either required or necessary. In accordance with the Appeals Council's order, at the second hearing the ALJ questioned Yancey about the possibility of a mental impairment. The only indication of a "mental impairment" was Yancey's testimony that

one doctor allegedly informed her that her problems were "in her head."

Notably, the physicians of record neither suggested the existence of a mental impairment nor recommended that Yancey undergo a psychological or psychiatric evaluation.

Significantly, Dr. Ayoub described Yancey as being pleasant and coherent.

Likewise, Dr.

Carbone stated that Yancey appeared healthy, alert and oriented

at all times. We believe that after the remand order, the ALJ

properly and fully developed the record and in so doing,

sufficiently considered the possibility of Yancey's suffering

from a medically determinable mental impairment.

IV. Substantial Evidence

It is clear from the foregoing that the administrative decision

in this case rests on adequate findings clearly supported in the

record. The record reveals no basis for a determination that

substantial evidence is lacking.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

FOOTNOTES:

[1] Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. He is therefore substituted as defendant in this action pursuant to Federal Rule of Appellate Procedure 43(c)(1).

[2] The Honorable Raymond J. Dearie, of the United States District Court for the Eastern District of New York, sitting by designation.

[3] Effective March 31, 1995, the role of the Secretary of Health and Human Services with respect to social security cases was officially transferred to the Commissioner of Social Security. See 42 U.S.C. §§ 901-909. The administrative decision in this case became final before the transfer of authority to the Commissioner. Nonetheless, as the Commissioner is the defendant in this action, we refer to the Commissioner throughout this opinion.

[4] SLE is an inflammatory connective tissue disease with variable features that often include fever, weakness, fatigue, joint pains or arthritis resembling rheumatoid arthritis, and skin lesions on the face, neck or upper extremities. See Stedman's Medical Dictionary 1001 (26th ed. 1995).

[5] Arthralgia is generally defined as joint pain. Dorland's Medical Dictionary 140 (28th ed. 1994).

[6] According to 20 C.F.R. § 404.1567, sedentary work involves lifting no more than ten pounds at a time and occasionally lifting and carrying articles such as files, ledgers and small tools.

[7] "Disability" is defined as an "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).

[8] 20 C.F.R. § 404.1529 and Social Security Ruling 88-13 require an ALJ to consider a number of factors when evaluating subjective complaints such as pain. The Appeals Council ordered the ALJ specifically to address seven factors, including the possible existence of a medically determinable mental impairment.

[9] This issue was not raised on appeal.

[10] In Eldridge, the Supreme Court specifically dealt with due

process considerations in a benefit termination circumstance, but provided a general framework for analysis. The Supreme Court instructed that three factors need to be considered when determining whether an administrative procedure is constitutionally sufficient:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.