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**Intended Audience:** SSAARC in Region II—FYI  
SSAARCMOS/SSAARCPCO in New York State—ACTION  
New York State DDS—ACTION  
SSAODISP (SAWNY)—FYI  
SSAOHACO (SAWDY)—ACTION  
All SSAFOS/TSCS—ACTION  
All SSAPSCS/PSCDRS—ACTION  
ODIO—ACTION  
All SSAADS in New York State—FYI  
SSAORQA/SSADQBS in New York State—ACTION  
All SSAOQAS—ACTION  
SSAOHARO in Region II—FYI  
SSAOHARO/SSAOHAHO in Region III—FYI  
SSAOHABO in Hartford, Connecticut—ACTION  
SSAOHABO in Manchester, Connecticut—ACTION  
SSAOHABO in New Haven, Connecticut—ACTION  
All OHAHOS in New York State—ACTION  
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COS—FYI  
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**Title:** **Stieberger Settlement—Manual of Second Circuit Disability Decisions – Emergency DI/SSI Instructions**

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**Document:**

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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 August 14, 2003, the United States Court of Appeals for the Second Circuit issued a published decision in *Jasinski v. Barnhart*. 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 claims of New York residents. The volume in your office should now contain the full text of the Melville, Curry, Shaw, Schisler, Dixon, Diaz, Bush, Perez, Pratts, Beauvoir, Quinones, Schaal, DeChirico, Balsamo, Clark, Yancey, Tejada, Rosa, Brown, Snell, Williams, Draeger, Veino, Encarnacion, Green-Younger and Jasinski decisions.

#### EXPLANATION OF HOLDING:

Jasinski claimed disability due to neck and back injuries. An ALJ denied the claim at step four of the sequential evaluation process because the impairments did not prevent Jasinski from doing her past relevant work as a teacher's aide. The ALJ relied on evidence from five examining doctors and on vocational expert (VE) testimony. The VE testified teacher's aide work generally required light exertion according to the Dictionary of Occupational Titles (DOT) but that Jasinski's description of her past job indicated it had actually required sedentary to light exertion. When the Appeals Council denied a request for review, the ALJ decision became the final Agency decision. On appeal, a district court found the Agency decision was supported by substantial evidence. Jasinski appealed, arguing the VE testimony that her teacher's aide position actually required sedentary to light exertion, conflicted with the DOT. According to Jasinski, the ALJ should have inquired into the conflict, either relying on the DOT or explaining reliance on the VE testimony. The Second Circuit affirmed SSA, holding there was no conflict between the VE testimony and the DOT in this case.

The Second Circuit explained other circuit courts had not yet found a "conflict" based on such a discrepancy between the VE description of the actual job and the DOT general job description. Further, VE evidence about a particular job as it is actually performed does not necessarily "conflict" with the DOT, because many specific jobs differ slightly from jobs as they are generally performed. In this case, the VE cited the DOT description and specifically explained how Jasinski's description of the job differed from it. Moreover, when specifically asked if Jasinski could perform her past relevant work, the VE testified that she could, except for lifting children, activity that was within her discretion and not generally required for the job. Under these circumstances, there was no conflict between the VE testimony and the DOT evidence that required legal resolution. The Second Circuit noted that Jasinski's argument appeared to imply a per se rule requiring a finding that the VE testimony was not supported by substantial evidence. While the Second Circuit in a previous case had remanded an Agency denial when an unexplained and direct contradiction between VE testimony and the DOT reflected a careless mistake such that any decision based thereon would not be based on substantial evidence, this case did not involve such a conflict.

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, Center for Disability,  
New York Regional Office

All Other SSA Non-OHA Offices should contact their respective Regional Offices

OHA Offices:  
Stieberger Coordinator

**SUZANNE L. JASINSKI, Plaintiff-Appellant, v. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant-Appellee.**

**Docket No. 02-6268**

**UNITED STATES COURT OF APPEALS FOR THE SECOND  
CIRCUIT**

*2003 U.S. App. LEXIS 16788*

**May 6, 2003, Argued  
August 14, 2003, Decided**

**PRIOR HISTORY:** [\*1] Appeal from the judgment of the United States District Court for the Western District of New York (William M. Skretny, Judge) granting the appellee's motion for judgment on the pleadings, on the basis that substantial evidence supported the ALJ's decision that Jasinski retained the functional capacity to perform her past relevant work.

**DISPOSITION:** Affirmed.

**CORE TERMS:** claimant, aide, sedentary, impairment, exertion, vocational, disabled, substantial evidence, national economy, expert testified, actual conflict, discrepancy, functional, quotation, severe, categorizing, semi-skilled, conflicted, pick

**COUNSEL:** KENNETH R. HILLER, Amherst, NY, for Appellant.

SYBIL L. BURNETT, Assistant Regional Counsel (Lisa De Soto, General Counsel, Barbara L. Spivak, Chief Counsel, on the brief), Social Security Administration, New York, NY for Appellee.

**JUDGES:** Before: WALKER, Chief Judge, CARDAMONE and SOTOMAYOR, Circuit Judges.

**OPINIONBY:** JOHN M. WALKER, JR.

**OPINION:** JOHN M. WALKER, JR., Chief Judge:

Plaintiff-appellant Suzanne Jasinski brought this action seeking reversal of the final decision of the Commissioner of Social Security ("the Commissioner") denying her application for Social Security disability insurance benefits. Jasinski claims that in her administrative hearing, the administrative law judge ("ALJ") relied upon testimony by a vocational expert that conflicted with the Dictionary of Occupational Titles ("the Dictionary"), an official publication [\*2] of the Department of Labor. We write to clarify what constitutes a "conflict" and therefore requires legal resolution, and to explain that, in certain circumstances, an ALJ may rely on an expert's opinion, notwithstanding a conflict with the Dictionary, when the opinion is adequately supported by the evidence.

**I. BACKGROUND**

Jasinski claims that she became disabled due to an accident in 1999, which caused neck and back injuries and limited her ability to work. On October 19, 2000, the ALJ denied her benefits claim. To determine whether a

claimant is disabled, the Social Security Administration must undertake a five-step evaluation:

First, the Commissioner considers whether the claimant is currently engaged in substantial gainful activity. Where the claimant is not, the Commissioner next considers whether the claimant has a "severe impairment" that significantly limits her physical or mental ability to do basic work activities. If the claimant suffers such an impairment, the third inquiry is whether, based solely on medical evidence, the claimant has an impairment that is listed in *20 C.F.R. pt. 404, subpt. P, app. 1. . . .* Assuming the claimant does not have a listed [\*3] impairment, the fourth inquiry is whether, despite the claimant's severe impairment, she has the residual functional capacity to perform her past work. Finally, if the claimant is unable to perform her past work, the burden then shifts to the Commissioner to determine whether there is other work which the claimant could perform.

*Tejada v. Apfel*, 167 F.3d 770, 774 (2d Cir. 1999) (footnote omitted); see also *20 C.F.R. § 404.1520*. Applying the fourth inquiry of this test, the ALJ found that Jasinski was not disabled because her impairment did not prevent her from doing her past relevant work as a teacher's aide. The ALJ relied primarily on the examinations of five doctors and the testimony of Timothy Janikowski, an impartial vocational expert. The expert testified that the teacher's aide position was "light exertion" according to the Dictionary, but explained that "[Jasinski] described it being between

sedentary and light." He concluded that her work as a teacher's aide at Sacred Heart Catholic School was "between [] sedentary and light exertion."

The Appeals Council of the Social Security Administration denied Jasinski's [\*4] request for review on March 1, 2001, making the ALJ's decision final. Pursuant to *42 U.S.C. § 405(g)*, the district court reviewed the ALJ's order and granted the Commissioner's motion for judgment on the pleadings under *Fed. R. Civ. P. 12(c)*. The district court held that substantial evidence supported the ALJ's decision that Jasinski retained the functional capacity to perform her past relevant work as a teacher's aide, see *Jasinski v. Barnhart*, No. 01 Civ. 226S (W.D.N.Y. Aug. 27, 2002). Jasinski appeals from that decision.

## II. DISCUSSION

We review a district court's judgment on the pleadings de novo. *Williams v. Apfel*, 204 F.3d 48, 49 (2d Cir. 1999). When reviewing a disability benefits determination, "our focus is not so much on the district court's ruling as it is on the administrative ruling." *Id.* (internal quotation marks and citations omitted). We may reverse the administrative determination only if it is not supported by substantial evidence, based upon the entire administrative record. *Brown v. Apfel*, 174 F.3d 59, 62 (2d Cir. 1999) (per curiam). Substantial evidence is "more than a mere scintilla, [\*5]" and is "such relevant evidence as reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971) (internal citations and quotation marks omitted).

Jasinski argues that the testimony of Timothy Janikowski, the vocational expert, in categorizing the teacher's aide position as "between sedentary and light" exertion, conflicted with the Dictionary, which categorizes it as "light" exertion. Accordingly,

she contends that the ALJ should have inquired into the conflict and should have either deferred to the Dictionary or explained why she was adopting the expert's testimony over the Dictionary's definition.

We find that there was no actual conflict for the purposes of this legal question. Other circuits have found that the expert and the Dictionary conflict where they disagreed in categorizing or describing the requirements of a job as it is performed in the national economy. See, e.g., *Donahue v. Barnhart*, 279 F.3d 441, 445 (7th Cir. 2002); *Carey v. Apfel*, 230 F.3d 131, 145-46 (5th Cir. 2000); *Haddock v. Apfel*, 196 F.3d 1084, 1087, 1091 (10th Cir. 1999); [\*6] *Jones v. Apfel*, 190 F.3d 1224, 1229-30 (11th Cir. 1999); *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995); *Conn v. Sec'y of Health and Human Servs.*, 51 F.3d 607, 610 (6th Cir. 1995); *Smith v. Shalala*, 46 F.3d 45, 47 (8th Cir. 1995).

However, we know of no circuits that have found a "conflict" in a discrepancy between, on the one hand, the expert's description of the job that the claimant actually performed, and the Dictionary's description of the job as it is performed in the national economy. We have held that in the fourth stage of the SSI inquiry, the claimant has the burden to show an inability to return to her previous specific job and an inability to perform her past relevant work generally. See *Jock v. Harris*, 651 F.2d 133, 135 (2d Cir. 1981); see also *SSR 82-62*, 1982 WL 31386, at \*3 (Past relevant work in the fourth stage of the inquiry includes "the specific job a claimant performed or the same kind of work as it is customarily performed throughout the economy."). This inquiry requires separate evaluations of the previous specific job and the job as it is generally [\*7] performed. Whereas the Dictionary describes jobs as they are generally performed, an expert is often called upon to explain the requirements of particular jobs, and as such, his deviations from the Dictionary in such testimony do not

actually "conflict" with the Dictionary. Many specific jobs differ from those jobs as they are generally performed, and the expert may identify those unique aspects without contradicting the Dictionary.

In this case, the expert testified about Jasinski's past work as a teacher's aide at Sacred Heart Catholic School. The ALJ asked specifically about that job, and the expert responded: "Teacher's aide is DOT number 249.367-074, and that's light exertion, semi-skilled employment, and she described it being between sedentary to light. She indicated she may need to pick up a child, but that was on occasion. So I would . . . put it in between the sedentary and light exertion [categories]." The ALJ later asked whether Jasinski was able "to do any of her past relevant work," and the expert replied that "the teacher's aide work would . . . be allowed, with the exception that she would not be able to pick up a child. But that sounded like it was based on her [\*8] discretion, and it's not generally something that she was required to do." Again, the expert answered on the basis of Jasinski's description of her work as a Sacred Heart Catholic teacher's aide, and not on the basis of the job's requirements as it is performed nationally. Therefore, we find that the expert's testimony did not conflict with the Dictionary.

Furthermore, we have serious doubts about Jasinski's argument concerning the steps we should take upon review if there were an actual conflict between the Dictionary and the vocational expert. Jasinski cites *Mimms v. Heckler*, 750 F.2d 180, 186 (2d Cir. 1984), for the proposition that when the vocational expert's testimony conflicts with the Dictionary's description, the expert's testimony does not constitute substantial evidence to support a finding that jobs are available. Two other circuits have similarly construed *Mimms*. See *Burns v. Barnhart*, 312 F.3d 113, 127 n.8 (3d Cir. 2002); *Haddock*, 196 F.3d at 1091. However, *Mimms* did not create such a per se

rule. In *Mimms*, the "expert opined that . . . [the claimant] could transfer his existing skills to sedentary, [\*9] semi-skilled positions" and then proceeded to list, without explanation, four jobs that the claimant could perform, all of which the Dictionary classified as light work. *Mimms*, 750 F.2d at 186. The unexplained and direct contradiction of the Dictionary reflected a careless mistake, and thus, a remand was appropriate in *Mimms* not simply because there was a discrepancy, but because any decision based on assuming the four listed jobs were sedentary jobs was not based on substantial evidence.

We have reviewed Jasinski's remaining contentions and find them to be without merit.

### **III. CONCLUSION**

For the foregoing reasons, we AFFIRM the district court's granting of the Commissioner's motion for summary judgment.

