Social Security Disability Update

Rules are a-Changin'!

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Social Security Disability Update

By Timothy N. Tripp[1]

Disability does not discriminate!

I. Introduction

A. Disability defined in the Social Security Act:

"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)

B. Procedure
1. application
2. initial determination
3. reconsideration
4. administrative hearing before administrative law judge ("ALJ")
5. review of decision from administrative hearing
6. 405(g) appeal/review in Federal District Court.
   a. whether the Commissioner's final decision is supported by substantial evidence, or
   b. whether the Commissioner committed an error of law.

42 U.S.C. § 405(g)

II. Miscellaneous

A. The Acting Commissioner Announced there will be a 2.0% cost-of-living increase for 2018. 82 Fed. Reg. 50209 (Oct. 30, 2017); www.ssa.gov/news/press/factsheets/colafacts2018.pdf

	2016	2017	2018
1. SSI	$ 733	$ 735	$750
2. SGA	$1,130	$1,170	$1,180
Blind	$1,820	$1,950	$1,970
3. TWP	$ 810	$ 840	$ 850
4. Quarter of Coverage	$1,260	$1,300	$1,320
5. User Fee	$ 91	$ 91	$ 93
6. Tax Max	$118.5K	$127.2K	$128.7K

B. Nancy A. Berryhill, Acting Commissioner of Social Security. Since January 23, 2017 she has served as Acting Commissioner, replacing Carolyn Colvin. A Commissioner is appointed for a term of 6 years. 42 U.S.C. § 902(a)(3). The Commissioner's position was designed to

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[1] **Disclaimer:** This outline is designed to address general issues about Social Security disability insurance benefit process and case law. This outline should not be substituted for legal advice. Social Security claims are almost always very fact specific and legal advice should be sought for any legal question presented.

span Administrations.

C. Notice of Proposed Rulemaking (NPRM) "Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process" 81 Fed. Reg. 45079 (July 12, 2016).

- would require all evidence, statements, and objections to be submitted 5 business days before hearing;
- would require subpoena requests at least 10 days before a hearing;
- would require SSA to mail notice of hearings at least 60 days before hearing date;
- AC will consider new and material evidence only if reasonably probable that it will change the outcome; and
- AC may hold hearings on some issues.

This was codified into the regulations. 20 C.F.R. § 404.935, 416.1435 (81 Fed. Reg. 90993 (Dec. 16, 2016)).

SSR 17-4p states:
"Our regulations require an individual to submit or inform us about all evidence known to him or her that relates to whether or not he or she is disabled or blind. This duty is ongoing and requires an individual to disclose any additional evidence about which he or she becomes aware. This duty applies at each level of the administrative review process, including the Appeals Council level if the evidence relates to the period on or before the date of the administrative law judge (ALJ) hearing decision. Generally, individuals must submit or inform us about any written evidence no later than 5 business days prior to the date of the scheduled hearing before an ALJ. The ALJ may decline to consider or obtain any evidence if disclosure takes place after this date, unless certain circumstances outlined in the regulations apply. We expect individuals to exercise their reasonable good faith judgment about what evidence "relates" to their disability claims. Evidence that may relate to whether or not a claimant is blind or disabled includes objective medical evidence, medical opinion evidence, other medical evidence, and evidence from nonmedical sources." SSR 17-4p goes on to articulate the representative's affirmative duty to assist in developing written evidence, and then reiterates a portion of the rules of conduct to which SSA holds representatives. SSR 17-4p then states: "Pursuant to the Ace, we may, after due notice and opportunity for hearing, suspend or prohibit from further practice before the Commissioner a representative who refuses to comply with our rules and regulations or who violates any provision for which a penalty is prescribed."

D. Notice of Proposed Rulemaking (NPRM) "Revisions to Rules Regarding the Evaluation of Medical Evidence" 81 Fed. Reg. 62559 (Sept. 9, 2016).

- would equally weigh treating doctors' medical opinions and the opinions of consulting or non-examining doctors;
- would eliminate requirement to consider disability findings of other governmental agencies; and
- would include more sources as "acceptable medical sources."

This was codified into regulations for cases filed on or after March 27, 2017. 20 C.F.R. §§ 404.1520c, 416.920c (82 Fed. Reg. 5844 et

seq. (Jan. 18, 2017)). "We will not defer or give any specific evidentiary weight, including controlling weight, to any medical opinion(s) or prior administrative medical finding(s), including those from your medical sources."

F. Step 3 - Medical Equivalence.
SSR 17-2p replaces SSR 96-6p and provides guidance to adjudicators in making findings of medical equivalence at Step 3. At the initial and reconsideration levels, the State agency medical consultants (MC) and/or psychological consultants (PC) make the determination on whether an impairments meets or equals a listed impairment. At the hearing level, the ALJ and some attorney advisors determine whether impairments meet or medical equal a listed impairment at Step 3. Adjudicators at this level *may* ask for and consider evidence from medical experts (ME), who review the file but do not examine the claimant, about the claimant's impairments such as the nature and severity of the impairments.

G. SSR 16-3p Evaluation of Symptoms in Disability Claims.
"We are rescinding SSR 96-7p: Policy Interpretation Ruling Titles II and XVI Evaluation of Symptoms in Disability Claims: Assessing the Credibility of an Individual's Statements and replacing it with this Ruling. We solicited a study and recommendations from the Administrative Conference of the United States (ACUS) on the topic of symptom evaluation. Based on ACUS's recommendations and our adjudicative experience, we are eliminating the use of the term "credibility" from our sub-regulatory policy, as our regulations do not use this term. In doing so, we clarify that subjective symptom evaluation is not an examination of an individual's character. Instead, we will more closely follow our regulatory language regarding symptom evaluation."

III. Selected 2017 Case law

A. Eighth Circuit Court of Appeals

November 13, 2016 - November 13, 2017		39 cases	
published	7		
unpublished	32		
Affirmed		36	92.3% (last year's 95%)
Reverse & Remand for Further Proceedings		3	

1. *Fentress v. Berryhill*, 854 F.3d 1016 (8th Cir. 2017)
04/25/17
Smith, Kelly, and Sippel
Affirm

The Appeals Council found that the claimant was not disabled from his initial alleged onset date of September 22, 2005 through August 23, 2012, but was disabled as of August 24, 2012. The claimant argues that the Commissioner improperly discounted the opinion of his treating physician when formulating the claimant's RFC.

The court holds that the ALJ properly discounted the opinion of Dr. Waters, general practitioner because at the time the opinion was rendered, he had only been treating the claimant for a few months. See 20 C.F.R. § 404.1545(c) (length of treatment relationship one factor to consider when weighing doctor's opinion). The court also holds that the Commissioner cited other substantial evidence in the record that was inconsistent with Dr. Waters' evaluation. While the claimant can point to some evidence in the record which detracts from the Commissioner's determination, the court notes that "If, after reviewing the record, the court finds it is possible to draw two inconsistent positions from the evidence and one of those positions represents the [Commissioner's] findings, the court must affirm the [Commissioner's] decision." Citing Pearsall v. Massanari, 274 F.3d 1211 (8th Cir. 2001).

2. *Scott v. Berryhill*, 855 F.3d 853 (8th Cir. 2017)
04/28/17
Colloton, Gruender, and Kelly
Affirm, Kelly dissenting (filed opinion)

The court holds that substantial evidence supports the ALJ's determination that the claimant did not meet or equal listing for manifest deficits in adaptive functioning prior to age twenty-two. The claimant's limitations, when considered together with his abilities, do not suggest that his condition meets or equals Listing 12.05C. See Ash v. Colvin, 812 F.3d 686, 692 (8th Cir. 2016). The court also holds that the ALJ adequately accounted for the claimant's limitations in concentration, persistence, or pace in the RFC hypothetical. The hypothetical adequately captured the "concrete consequences" of the claimants deficiencies. See Lacroix v. Barnhart, 465 F.3d 881, 889 (8th Cir. 2006); Porch v. Chater, 115 F.3d 567, 572 (8th Cir. 1997).

Judge Kelly dissents, arguing that the ALJ erred in relying on the claimant's diagnosis of "borderline intellectual functioning" as defined in DSM-IV. Judge Kelly notes that a claimant need not meet the DSM-IV definition of mental retardation to meet Listing 12.05C. Citing Maresh v. Barnhart, 438 F.3d 897, 899 (8th Cir. 2006). Judge Kelly maintains that the claimant presented ample evidence of deficits in adaptive functioning manifesting before age twenty-two, and that the ALJ's finding to the contrary was not supported by substantial evidence on the record as whole.

3. *Chesser v. Berryhill*, 858 F.3d 1161 (8th Cir. 2017)
06/09/17
Colloton, Gruender, and Kelly
Affirm

The ALJ properly discounted the caseworker's opinion because it was based on the subjective complaints of the claimant, whose testimony about the severity of her limitations was not fully credible in light of the RFC determination. The ALJ also properly discounted the opinion of treating psychiatrist and gave good reasons for doing so: that the opinion itself was internally inconsistent, and that the treating psychiatrist examined the claimant only once. See 20 C.F.R. § 404.1527(c)(2)(i) ("Generally, the longer a treating source has treated [a claimant] and the more times [a claimant] has been seen by a treating source, the more weight [the ALJ] will give to the source's medical opinion.") The limited treatment records from the emergency room and the claimant's primary care also support the ALJ's conclusion, and during one visit, the claimant denied depression – one of the bases on which she filed for benefits – during the period of time for which she sought benefits.

4. *Vance v. Berryhill*, 860 F.3d 1114 (8th Cir. 2017)
06/27/17
Colloton, Beam, and Gurender
Affirm

The ALJ adequately explained his decision that the claimant did not meet any of the Listing 11.00 impairments by addressing the Listing overall. Additionally, the ALJ reasonably found, based on the record as a whole, that the claimant does not currently exhibit the deficits in adaptive functioning needed to meet Listing 12.05C, despite exhibiting the requisite deficits in adaptive functioning prior to age twenty-two. The ALJ also properly discounted the treating physician's opinion to the extent that it relied on the claimant's subjective complaints because the claimant was found not credible.

5. *Bryant v. Colvin*, 861 F.3d 779 (8th Cir. 2017)
06/29/17
Smith, Shepherd, and Fenner
Affirm

The court holds that substantial evidence supported ALJ's determination that claimant's statements concerning the intensity, persistence and limiting effects of his symptoms were not entirely credible and the ALJ's determination that the claimant had residual functional capacity to perform medium work. The ALJ properly considered the doctor's findings that the claimant's left leg fracture was completely healed, the doctors' lack of restrictions placed on the claimant upon return to work, the claimant's ability to live independently and perform activities of daily living, the claimant's decision to retire without further medical advice, and the claimant's limitations or lack thereof.

6. *Gann v. Berryhill*, 864 F.3d 947 (8th Cir. 2017)
07/28/17
Smith, Benton, and Shepherd
Reversed and Remanded

The ALJ's RFC assessment and hypothetical question to the VE did not contain all impairments supported by substantial evidence in the record. The ALJ failed to include anything about adaptation restrictions in the RFC assessment in the hypothetical posed to the VE, and the VE cannot accurately assess the claimant's job prospects unless the hypothetical question comprehensively described the claimant's limitations. See Smith, 31 F.3d at 717.

7. *Combs v. Berryhill*. 868 F.3d 704 (8th Cir. 2017)
08/21/17
Smith, Kelly, and Sippel
Reversed and Remanded, Smith dissenting (filed opinion)

The ALJ improperly relied on his own inferences regarding what the claimant's medical providers meant when they noted in her medical records that she was in "no acute distress" and had "normal movement of all extremities" to determine her RFC. The court also holds that the ALJ failed to fully and fairly develop the record by neglecting to obtain a treating or consultative physician's opinion on the "crucial issue" of whether the claimant was limited to sedentary work or could perform light work. See Stormo v. Barnhart, 377 F.3d 801, 806 (8th Cir. 2004).

Judge Smith dissents, noting that at step four of disability analysis, the claimant has the burden to establish RFC. Judge Smith notes that an ALJ is not required to obtain a treating or consultative physician's opinion to determine RFC to perform past relevant work. Rather, an ALJ may rely "on a reviewing physician's report at step four when the burden is on the claimant to establish an inability to do past relevant work." Citing Casey v. Astrue, 503 F.3d 687, 697 (8th Cir. 2007); Echelberger, 390 F.3d at 591-92; Hensley, 829 F.3d at 932; Masterson v. Barnhart, 363 F.3d 731, 737-38 (8th Cir. 2004).