the nursing home. I am just grateful my mother had the level of care she needed when my sister and I could not take care of her.

My father is 83 years old and lives 45 minutes away from me in Rockville, Maryland. Although it is scary and nerve racking to drive with him, he also came up to take me to Johns Hopkins for testing twice and took care of me the week following my most recent surgery. He's not the greatest nurse but he has been as supportive as any good father could be in all other ways. His financial generosity has saved me and he has been the one to come up and take care of my car so it wouldn't rot in the driveway. My father also came up to take me to the MVA to get my license renewed when I couldn't drive there or stand in line. I know my serious and prolonged illness has been very hard on him and causes him great concern.

There is no way to measure the amount of stress and strain my illness has cost my loved ones. I wish with all my heart that I could say it's all over now and we can all relax, but I can't. More is yet to come.

IV. Conclusion

In sum, my life is dominated by pain, fatigue and feces. I cannot be around a lot of germs with a compromised immune system, less than optimal nutrition and the ulcerated skin around my stoma. I cannot expect an employer to put up with fecal matter leaking into the workplace because I often have sudden colostomy bag leaks, accidents when emptying the bag, and I have to empty it many times a day. If I had to suddenly change the bag, lying down in a private room to do so poses another impossibility in the workplace. Even if I found an employer who would accept all of this, my cognitive abilities are not what they were. I am unable to concentrate for sustained periods of time. I am thoroughly exhausted, often spending more hours resting during the day in between struggling to get simple chores done. In short, I am not competent to perform a job that requires high cognitive ability, memory, and stamina. I also am not competent to perform work that requires sitting up for hours at a time, bending, reaching or lifting – I don't have the energy to stand for very long, and bending and lifting are compromised by the painful ostomy site. My restrictive joint and muscle pains make moving around very slow.

I am an independent person. I had my own business and was proud to be able to maintain it. I would rather work than spend the last several weeks writing this. If I could work, I certainly would. I cannot.

For all of the reasons set forth above, I respectfully request that you reconsider your initial determination and find me to be disabled as defined by the SSA. Thank you.

Sincerely,
Mary Virginia White

Appendix I: Social Security in the Courts

This Appendix will provide summaries of selected court decisions relating to SSI or SSDI that are important for patients with chronic diseases.[104] Primarily, I will be showing how different jurisdictions follow slightly different rules of law. Again, a large number of the cases I summarize involve inflammatory bowel disease (IBD), although many relate to other illnesses, or IBD in conjunction with other illnesses. Substitute the disease mentioned in the case summary with your disease – the law is the same regardless of diagnosis.

The following cases demonstrate how the courts around the country have treated SSDI and SSI cases. In particular, I have tried to provide examples of how the rules differ from one jurisdiction to the next. Some cases that involved a number of issues are cited more than once, for the various points the case illustrates.

1. Chronic Diseases that Remit and Relapse

In *Barnhart v. Walton*, 535 U.S. 212 (2002), the United States Supreme Court considered a claim for SSI. The claimant suffered from schizophrenia and depression. Due to his illness, he lost his job, but had begun to work again (in a different, far less well-paying job) within 12 months of his job loss. The SSA interpreted its definition of "impairment" to require that the impairment "has lasted or can be expected to last for a continuous period of not less than 12 months." The Court explained that the 12-month phrase relates to the impairment, not to the incapacity to work, although the impairment must be sufficiently severe so as to prevent the claimant from engaging in substantial gainful work. Although one might have a chronic illness like high blood pressure for at least 12 months, it might not render the claimant incapable of gainful employment during that time. Thus, the Court found that the 12-month duration applies both to the impairment and to the inability to work.

Interpreted literally, *Walton* could have harsh results for patients with chronic illnesses. If we cannot qualify for benefits unless we are totally disabled for every day of a 12-month period, most of us will be ineligible for benefits.

Despite *Walton*, courts – especially the Eighth Circuit – seem to understand that chronic diseases are disabling even if they are not acute and active all of the time:

Forehand v. Barnhart, 364 F.3d 984 (8th Cir. 2004) – a claimant with fibromyalgia appealed a denial of benefits. Without discussing or distinguishing *Walton*, the court said that, in deciding whether a person has residual functional capacity sufficient to be able to work, the courts look to whether the claimant has the ability to perform the requisite physical acts day in and day out, in competitive and stressful environments "in which real people work in the real world." This language would seem to allow for the possibility of providing benefits when the claimant is not disabled for a

[104] The cases discussed here are selected illustrations and are not intended to be exhaustive.

continuous 12 month period as long as there is substantial evidence to show the likelihood that remissions are likely to be brief and temporary.

There are cases in other jurisdictions, although not all favorable:

Louis v. Astrue, 2011 WESTLAW 3568822 (E.D. Cal. Aug. 12, 2011) – ALJ was wrong to dismiss a claim of disability due to chronic mental illness simply because there were days on which he was not psychotic. "Chronic mental illnesses may include periods between bouts of acute symptoms in which the claimant's symptoms, while sufficiently controlled to permit the claimant to live independently, still prevent the claimant from pursuing normal employment."

Wiederholt v. Barnhart, 2005 WESTLAW 290082 (10th Cir. Feb. 8, 2005) – claimant with carpal tunnel syndrome, fibromyalgia and depression appealed from the denial of both SSDI and SSI benefits. The ALJ had ruled that her depression did not qualify as a disability because it was not expected to last at a disabling level for 12 months. The court held that, even though she was depressed for more than 12 months, the relevant test is whether the depression was disabling for 12 months. Since the record did not include any evidence of a long-standing severe disability that would render the claimant incapable of working for 12 months, the court upheld the denial of benefits.

Watson v. Barnhart, 288 F.3d 212 (5th Cir. 2002) – claimant who suffered back injury at work, resulting in permanent degenerative disc and hip problems acknowledged that, at times, he could stand for only a few minutes without pain, whereas at other times, he could stand for hours. The court explained that the ability to engage in substantial gainful activity requires more than a finding that the claimant could find a job; it requires a finding that he could hold the job for a significant period of time. The test is not whether the claimant could get hired; the test is whether he could keep the job.

Finally, some courts construe the holding in *Walton* narrowly:

Nelson v. Barnhart, 2002 WESTLAW 31599018 (D. Me. 2002) – claimant with multiple sclerosis appealed a finding that she was ineligible for benefits retroactive to the onset of her disease because her illness was non-severe in the twelve months prior to it becoming totally disabling. The court explained that *Walton* does not require that a condition must be severe day in and day out for twelve straight months. The court acknowledged that *Walton* says that the impairment must have lasted or be expected to last twelve months, and that the impairment must be or have been sufficiently severe as to prevent him from engaging in substantial gainful activity for at least twelve months. However, the court stated that this should not be construed to deny benefits to a claimant "simply because he had a condition that tended to wax and wane." The court noted that "many chronically ill people experience 'good days and bad days,' and a vocational expert quite properly could be asked whether intermittent incapacitation – say, one day a week or six days a month – would preclude the performance of substantial gainful activity."

2. Treating Physician Rule Cases

A number of jurisdictions differ in how much weight to give the treating physician's opinion.[105]

For example, some courts give the treating physician's opinion special weight:

Eaton v. Astrue, 2011 WESTLAW 3704246 (D. Or. August 22, 2011) - the opinion of a treating physician deserves more weight than that of an examining physician, and a non-examining physician's opinion receives the least weight.

Ostalaza v. Astrue, 2009 WESTLAW 3170089 (C.D.Cal. Sept. 30, 2009) – The governing regulations provide that the Agency must recontact an applicant's treating physician where the evidence is inadequate to make a disability determination or is ambiguous (citing 20 C.F.R. §§ 404.1512(e), 416.912(e), 416.927(c)(3)). Further, if the ALJ rejects the treating physician's opinion, he or she must provide "specific and legitimate" reasons for doing so. When evaluating a disability like fibromyalgia, which is proven primarily by subjective complaints of pain rather than objective evidence, a treating physician's opinion may be based purely on a patient's subjective complaints.

Borden v. Astrue, 494 F.Supp.2d 1278 (N.D.Ala. 2007) – The medical opinion of a treating physician must be given greater weight than that of other physicians. Claimant had degenerative disc disease, peripheral neuropathy, irritable bowel syndrome, fibromyalgia, dyslipidemia, hypertension, and other ailments. Treating physician stated that claimant cannot retain long-term and gainful employment with these chronic illnesses and SSA physician agreed, but ALJ rejected this opinion. Where the ALJ fails to credit the treating physician, the treating physician's statement shall be taken as true.

Holmes v. Barnhart, 2006 WESTLAW 3165695 (E.D.Pa. 2006) – ALJ must afford the treating physician's opinion great weight, especially when their opinions reflect expert judgment based on a continuing observation of a patient over a long period of time. If a treating physician's opinion conflicts with that of a non-treating physician, the ALF may choose who to credit, but the ALJ has to have a good reason to reject the view of the treating physician. A treating physician's opinion can be rejected only on the basis of conflicting medical evidence, not based on credibility judgments, speculation, or lay opinion.

Center v. Barnhart, 2005 WESTLAW 752226 (9th Cir. April 4, 2005) (unpublished opinion, not binding authority) – claimant with severe major depressive disorder appealed denial of benefits. To justify disregarding an uncontradicted treating physician's opinion, an Administrative Law Judge ("ALJ") must provide clear and convincing reasons. If the treating physician's opinion is contradicted by another

[105] As set forth in Section V.B.ii, the "treating physician rule" that applies in the context of Social Security does not apply in the context of ERISA-governed disability insurance benefits.

physician, the ALJ must accept the treating physician's opinion unless there are specific and legitimate reasons for doing so, supported by substantial evidence in the record.

Lackey v. Barnhart, 2005 WESTLAW 758797 (10th Cir. April 5, 2005) (unpublished opinion, not binding authority) – claimant with degenerative disc disease and bipolar disorder appealed the denial of benefits. The court reversed the ALJ's decision because the ALJ failed even to mention the opinion of one of an examining physician, which was consistent with that of the primary treating physician. If an ALJ rejects a medical opinion, he or she must give reasons.

Robbins v. Barnhart, 205 F.Supp.2d 1189 (D. Kan. 2002) – SSDI appeal by female claimant with Crohn's disease. SSA terminated benefits, and claimant contested, arguing that there was no improvement in her condition. The court found that a treating physician's opinion as to the nature and severity of a claimant's impairments is to be given controlling weight when it is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the substantial evidence in the record. The ALJ must give specific, legitimate reasons for rejecting the treating physician's opinion. The evidence showed that, due to the fact that claimant would miss work for several days per month, she remained unable to work.

Henriquez v. Chater, 1996 WESTLAW 103828 (S.D.N.Y. 1996) – SSDI appeal by 45 year old man with ulcerative colitis. The court found that the failure of the Administrative Law Judge to mention the treating physician rule (the report of the treating physician is binding unless contradicted by substantial evidence) was reversible error. The court pointed to evidence that supported the treating physician's statement that the claimant was disabled, including testimony of the claimant that he takes public transportation to doctor appointments only with great difficulty, often needing to go outside of the subway to find a restaurant bathroom to use.

Fitchet v. Chater, 89 F.3d 833 (6th Cir. 1996) (unpublished decision, not binding authority) – SSDI appeal by a female claimant with Crohn's disease. The court explained that a treating physician's opinion is afforded more weight than the opinion of a physician who is employed by the government, although the final decision rests with the Administrative Law Judge.

Fandino v. Secretary of HHS, 1987 WESTLAW 16150 (S.D.N.Y. 1987) - SSDI appeal by a claimant with ulcerative colitis. Treating physician reports have special evidentiary value, according to this court. It is binding on the SSA unless there is substantial evidence to contradict it.

Bulpett v. Heckler, 617 F.Supp. 850 (D. Mass. 1985) – SSDI appeal of 51 year old woman with ulcerative colitis, regional enteritis (Crohn's) and erythema nodosum. The court found that the Administrative Law Judge did not carefully analyze the report of the claimant's treating physician, which documented two disabling impairments, Crohn's disease and arthritis of the spine.

Most courts give the treating physician's opinion great weight unless that opinion is contrary to, or unsupported by, the evidence:

Feskens v. Astrue, 2011 WESTLAW 1344060 (D. Or. April 8, 2011) – Although an ALJ can decline to follow a treating physician's opinion if there is substantial evidence in the record that calls that opinion into question, the opinion of a non-treating physician cannot by itself constitute that substantial evidence.

Andrews v. Astrue, 2011 WESTLAW 3296393 (N.D. Ill. July 29, 2011) – If the ALJ chooses to follow a non-treating physician's opinion over a treating physician's opinion, she must provide reasons for doing so.

Perkins v. Astrue, 2011 WESTLAW 3477199 (8th Cir. August 10, 2011) – Although the treating physician's opinion generally is given weight, it is not controlling "where other medical assessments are supported by better or more thorough medical evidence, or where a treating physician renders inconsistent opinions that undermine the credibility of such opinions."

Kent v. Astrue, 2009 WESTLAW 1497323 (9th Cir. May 29, 2009) – When there is no substantial inconsistency between the treating physician's statements and the treatment notes and other evidence in the records, the treating physician's conclusion should be upheld. Here, where treatment notes establish that the Claimant's Crohn's disease manifests itself in recurring flare-ups and responds to a heavy dose of medication, the treating physician's opinion should not be disregarded.

Wools v. Astrue, 2009 WESTLAW 1148219 (S.D.Ind. April 28, 2009) – controlling weight may be given only in appropriate circumstances to medical opinions by a treating physician on the issues of the nature and severity of an impairment. Controlling weight may not be given to a treating physician's medical opinion unless it is well supported by medically acceptable clinical and laboratory diagnostic techniques, and as long as it is not inconsistent with the other substantial evidence in the record. A finding that the treating physician's opinion is not controlling doesn't mean it is rejected; it may still be entitled to deference and be adopted by the adjudicator. The ALJ's decision must contain specific reasons for the weight given to the treating physician's medical opinion and the reasons for that weight. Thus, doctor who diagnosed fibromyalgia, chronic fatigue syndrome, and multiple chemical sensitivity may not have been given controlling weight, but still might be entitled to deference. If rejected or not given deference, the ALJ had to explain the reason for the weight given (or not given) to the treating physician's opinion.

Pletsch v. Astrue, 2009 WESTLAW 511409 (D.N.D. Feb. 27, 2009) – an ALJ is required to give controlling weight to the opinion of a treating physician's medical opinion that is well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record. When evaluating a case of chronic fatigue syndrome, opinions from treating physicians concerning the effects of the illness on the individual's ability to function in a sustained

manner in performing work activities or in performing activities of daily living are important in enabling adjudicators to draw conclusions about the severity of the impairment and the individual's residual functional capacity.

Cabaniss v. McMahon, 2007 WESTLAW 2405731 (W.D.Va. Aug. 15, 2007) – Absent persuasive contradictory evidence, the treating physician rule requires that the court give "greater deference to the expert judgment of a physician who has observed the patient's medical condition over a prolonged period of time." Where ALJ disregards treating physician's opinion that claimant would miss at least 3 days per month without explanation or evidence in the record.

Collins v. Astrue, 493 F.Supp.2d 858 (S.D.Tex. 2007) – Ordinarily, treating physician's opinion is given considerable weight; however, a treating physician's opinion may be given no weight if they are conclusory and there is no good cause shown. Where the treating physician's opinion contradicts objective evidence in the medical record, the ALJ may deviate from the treating physician's opinion.

Stemple v. Astrue, 475 F.Supp.2d 527 (D. Md. 2007) – ALJ erred in giving great weight to physician who treated claimant for only 4 months, contrary to the opinions of other treating physicians.

Dye v. Barnhart, 180 Fed. Appx. 27 (10th Cir. 2006) – ALJ must decide whether the treating physician's opinion qualifies for controlling weight, which means it is well supported by medically acceptable diagnostic techniques. If so, then ALJ must determine whether the opinion is consistent with substantial evidence in the record. If so, the opinion is entitled to controlling weight. Even if it is not entitled to controlling weight, though, the opinion of the treating physician should be evaluated and, if the ALJ decides to reject the opinion, he must give specific, legitimate reasons.

Cain v. Barnhart, 197 Fed. Appx. 531 (8th Cir. 2006) – ALJ properly discounted treating physician's opinion when the physician did not explain his assessment, the assessment is contrary to the opinions of other physicians, the physician is not a specialist in the particular type of impairment, and the physician's assessment were inconsistent with the claimant's own testimony.

Dhanrah v. Barnhart, 2006 WESTLAW 1148105 (S.D.N.Y. 2006) – Claimant with colostomy due to rectal cancer, a stent in his heart due to coronary artery disease, severe back and leg pain due to spinal stenosis, diabetes, hearing loss, blurred vision, and high blood pressure was denied benefits before the date when he was seen by a physician other than a neighborhood clinic that did not keep good records. He did not have health insurance until this date, so he had no medical records dating before this date, but his doctors argued that, since his illnesses were progressive, they clearly had been substantial impairments for a considerable period of time before claimant got medical attention. The ALJ felt that he could rely only on the neighborhood clinic's records because none of the other records explicitly referred to a prior time period. The court held that the ALJ had to affirmatively develop the record and infer a disability onset date, and that the ALJ had

failed to ignore the opinion of the treating physician that the claimant was disabled for a significant period of time before the physician first saw the claimant. A finding of disability onset date need not be based on contemporaneous medical records, but can be inferred from the record as a whole. The lack of disability cannot be inferred from the failure to seek treatment when the claimant was uninsured at the time. Finally, the opinion of the treating physician was binding unless contradicted by substantial evidence, so here, the treating physician's opinion that the claimant had progressive diseases and had to have been disabled for some time prior to obtaining treatment was binding on the ALJ. Even if the treating physician is deemed not controlling, an ALJ should give weight to that opinion based on the length, nature, and extent of the treating relationship, the supportability of the medical findings, whether the physician is a specialist, and the opinion's consistency with the records.

Vandenboom v. Barnhart, 2005 WESTLAW 1421695 (8th Cir. June 20, 2005) – claimant with headaches, fatigue, neck pain, forgetfulness, and emotional frustration appealed the denial of benefits. The court found that the ALJ gave good reasons for rejecting the treating physician's opinion when other medical assessments are supported by more thorough medical evidence or where the treating physician renders inconsistent opinions that undermine the credibility of those opinions.

Wind v. Barnhart, 2005 WESTLAW 1317040 (11th Cir. June 2, 2005) – testimony of a treating physician must be given substantial weight unless "good cause" for disregarding the opinion is provided. A treating physician's opinion may be disregarded when the doctor's opinion is unsupported by the evidence, inconsistent with the doctor's own records, or is merely conclusory.

Jaramillo v. Commissioner, 2005 WESTLAW 1099880 (3d Cir. May 10, 2005) – claimant with Guillan-Barrre syndrome, hand tremors, nocturnal enuresis, attention deficit and hyperactivity disorder, and a learning disability appealed the denial of SSI benefits. The court said that, when the opinions of the treating physician and the State Agency Psychological Consultant differ, the ALJ can reject the conclusions of the treating physician if he or she weighs all the evidence and explains why the treating physician's opinion is rejected.

Wise v. Barnhart, 2005 WESTLAW 941669 (10th Cir. April 25, 2005) (unpublished opinion, not binding authority) – Claimant with physical injuries from a car accident, asthma, and a number of psychological impairments appealed the denial of benefits. The court explained that the treating physician's statement should be given controlling weight only if it is supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other evidence in the record. Where the ALJ rejected both the treating physician's opinion and that of the treating psychiatrist together, the court said that the ALJ should have considered them separately and should have concluded that, while the medical doctor's opinion was not supported by the record, the psychiatric doctor's opinion was supported by the record and should have been given great weight.

Anderson v. Commissioner, 2005 WESTLAW 768712 (4th Cir. April 6, 2005) – treating physician's opinion must be given weight, but not necessarily controlling weight. If not supported by clinical evidence or inconsistent with other substantial evidence, then the treating physician's opinion should be given less weight.

Rice v. Barnhart, 2005 WESTLAW 743068 (2d Cir. March 31, 2005) – Claimant appealed the denial of SSDI benefits for a disability related to an accident from which the claimant did not completely recover. The court said that the treating physician's opinion is entitled to controlling weight if supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence in the record.

Barrow v. Massanari, 2001 WESTLAW 741718 (D. Kan. 2001) – SSDI appeal by female claimant with colitis, migraine headaches, mild mitro valve prolapse, and possible connective tissue disease. All clinical tests were normal except for a biopsy taken during a colonoscopy, which showed colitis. A later biopsy was normal. She developed daily migraines that were alleviated with medication, and eventually was diagnosed with fibromyalgia, and complained of fatigue. The court said that an ALJ must give substantial weight to the opinion of a treating physician unless good cause is shown to disregard it, considering factors such as the length of the treatment relationship, the frequency of examination, the nature and extent of the treatment relationship, the degree to which the physician's opinion is supported by relevant evidence, the consistency between the opinion and the record as a whole, whether or not the physician is a specialist in the ears, and other factors brought to the ALJ's attention which tend to support or contradict the opinion.

Denson v. Apfel, 2000 WESTLAW 1848077 (S.D.Ala. 2000) – SSDI and SSI appeal by female claimant with Crohn's disease and other impairments. A treating physician's opinion is entitled to considerable weight unless there is good cause to the contrary, i.e., unless it is not accompanied by objective medical evidence or it is wholly conclusory, or when the evidence supports a contrary conclusion. The need to use a bathroom frequently would constitute a significant non-exertional limitation that should be considered by a vocational expert when determining if work exists in the national economy.

Harris v. Chater, 998 F.Supp. 223 (E.D.N.Y. 1998) – Claimant with Crohn's disease was found to be capable of light duty sedentary work. Court stated the rule that if the ALJ fails to give a treating physician's opinion sufficient weight, the ALJ must give good reasons for failing to do so. Very interesting opinion in which judge talks at length about the need for society to find ways to allow the chronically ill to work from home.

McCoy v. Apfel, 1998 WESTLAW 213701 (W.D.Va. 1998) – SSDI appeal by a female claimant with Crohn's disease. The Administrative Law Judge found that found that the claimant was capable of performing sedentary work. The court said a treating physician's statement is accorded great weight, but not controlling weight if it is not supported by substantial evidence or if it is inconsistent with substantial evidence. The

court said that the treating physician's opinion can be called into question if it "overly derives from a claimant's subjective reports of pain."

Phillips v. Chater, 1996 WESTLAW 457183 (D.N.J. 1996) – SSDI appeal by male with diverticulosis and osteoarthritis. The court said that the treating physician's opinion will be given controlling weight if it is well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record.

Lang v. Shalala, 1995 WESTLAW 358642 (N.D.Ill. 1995) – SSI appeal by male claimant with Crohn's disease, and burns from a work-related accident, accompanied by some neurological deficits as a result. A treating physician's opinion is entitled to controlling weight only if supported by medically acceptable clinical and laboratory diagnostic evidence.

Roberts v. Shalala, 1994 WESTLAW 285039 (E.D.Pa. 1994) – SSI appeal by man with Crohn's disease. Administrative Law Judge found that he was capable of light work. The court found that treating physicians' opinions should be given great weight unless a history of conservative treatment is inconsistent with the opinion that the claimant is totally disabled or when the opinion is conclusory.

Cornblath v. Shalala. 39 F.3d 1186 (9th Cir. 1994) (unpublished decision, not binding) – SSDI appeal by male with Crohn's disease. The court said opinions of treating physicians are given greater weight, but those opinions are not conclusive. The Administrative Law Judge must carefully explain the reasons for rejecting a treating physician's opinion. Where the ALJ noted that the opinion was cryptic and the clinical notes were no help, that was sufficient.

Abrar v. Secretary, 1992 WESTLAW 389004 (C.D.Cal. 1992) – SSI appeal by female with Crohn's disease, and no other impairments, physical or mental. The decision of the treating physician is entitled to special weight, although it can be rejected based on specific legitimate reasons, based on substantial evidence.

Brown v. Sullivan, 927 F.2d 595 (4th Cir. 1991) – SSDI and SSI appeal by male with ulcerative colitis and other impairments. The court stated that the treating physician rule in the Fourth Circuit is that the treating physician's opinion is given great weight and may be disregarded only if there is persuasive contradictory evidence, as there was in this case. Finally, the ALJ properly considered the combined effects of the claimant's impairments.

Sheets v. Bowen, 875 F.2d 867 (6th Cir. 1989) – SSDI appeal of female claimant with Crohn's disease. The treating physician's opinion must be supported by objective evidence to be entitled to deference.

3. Subjective Complaints of Pain and Other Symptoms

This section will show the weight various courts give to subjective complaints of pain – and should show you how important it is to confirm as much as possible through "objective" evidence, i.e., test results, results of physical examination, etc. As these cases show, subjective complaints of pain without come "objective" medical evidence is not enough to prove a disability.

Most courts consider subjective complaints of pain when confirmed by objective medical evidence:

Coleman v. Astrue, 2011 WESTLAW 3924187 (S.D. W. Va. Sept. 7, 2011) – when evaluating subjective complaints of pain, the judge should evaluate the intensity, persistence, and severity of the symptoms based on all available evidence including medical history, medical signs, laboratory findings, any objective evidence of pain, and any other evidence relevant to the severity of the impairment, including the claimant's daily activities, specific description of the pain, location, duration, frequency and intensity of symptoms, precipitation and aggravating factors, treatment, and other factors related to functional impairment.

Kent v. Astrue, 2009 WESTLAW 1497323 (9th Cir. May 29, 2009) – Claimant's complaints that she had diarrhea five days per week, spending four to six hours per day in the restroom, and that precludes her from standing or carrying anything in order to avoid an accidental bowel movement was corroborated by objective evidence, including colonoscopy, which could reasonably be expected to produce the symptoms that the claimant alleged.

Collins v. Astrue, 493 F.Supp.2d 858 (S.D.Tex. 2007) – The mere fact that working may cause pain, or the mere existence of pain itself, does not mean the claimant is disabled. Finding that pain that is controlled with medication, and that it otherwise is not disabling, supports conclusion that pain is not as constant and unremitting as claimant testified, and ALJ was permitted to question claimant's credibility.

VanLaningham v. Astrue, 2007 WESTLAW 2119499 (S.D. Iowa 2007) – fact that claimant is not using prescription pain medication is relevant to determining claimant's credibility with respect to subjective complaints of pain, although it is not dispositive if prescription pain medication could not be expected to restore claimant's ability to work.

Jolly v. Barnhart, 465 F.Supp.2d 498 (D.S.C. 2006) – claimant with arthritis, chronic back pain, depression, irritable bowel syndrome, and GERD claimed that the ALJ failed to credit her subjective complaints of pain. The court stated the rule that a subjective complaint of pain must be supported by objective medical evidence of some condition that could reasonably be expected to produce the alleged pain, although subjective complaints of pain need not be credited if they are inconsistent with the medical and nonmedical evidence.

Cain v. Barnhart, 197 Fed. Appx. 531 (8th Cir. 2006) – when the medical or other objective evidence of disabling symptoms does not support the claimant's statement that he suffers from disabling pain, fatigue and mental impairments associated with Crohn's disease, hepatitis C, neck and back pain, degenerative bone disease, chronic fatigue, migraine headaches, depression, anxiety, and impaired memory, the ALJ was free to discount the subjective complaints of pain.

Wilson v Barnhart, 2005 WESTLAW 1098130 (5th Cir. May 10, 2005) – claimant appealed the termination of her SSDI benefits based on the ALJ's finding of substantial evidence of medical improvement. Claimant suffered from obesity, headaches, lumbar strain and a history of anxiety and depression. The court found that the ALJ's determination as to the claimant's credibility was supported by adequate reasons, after weighing all of the medical evidence.

McCann v. Barnhart, 2005 WESTLAW 696917 (8th Cir. March 28, 2005) (unpublished opinion, not binding authority) – claimant with "various conditions that cause her pain" appealed the finding that her complaints were not credible. The court found that the ALJ's credibility determination was based on the lack of medical evidence supporting her claims, and her unwillingness to undergo pain management.

Thomas v. Barnhart, 2004 WESTLAW 3244315 (8th Cir. March 18, 2005) (unpublished decision, not binding authority) – claimant with back and knee injuries appealed the denial of benefits. The court found that the ALJ's finding that the complaints of pain were not supported by the objective medical evidence was correct. The lack of medical evidence, medications taken, the lack of more aggressive treatment, poor work record, and functional capacities supported the ALJ's credibility determination.

Lucido v. Barnhart, 2005 WESTLAW 221528 (6th Cir. 2003) – injured employee who had difficulty concentrating, remembering, or interacting with others was found to be exaggerating about the extent of his pain because his complaints were disproportionate to the medical evidence. Since credibility determinations are made by the ALJ, and not the courts, a finding that the claimant was not credible would not be overturned by the court.

Williamson v. Barnhart, 2002 WESTLAW 165105 (W.D.N.C. 2002) – SSDI appeal by a female claimant with fibromyalgia, arthritis, TMJ, migraines, and "possible" Crohn's disease or irritable bowel syndrome. The ALJ questioned the claimant's credibility. The court found that the credibility determination was supported by substantial evidence, and that the ALJ was correct in finding that there was objective medical evidence to indicate that subjective claims of pain were not determinative in the absence of objective medical evidence.

Neely v. Apfel, 2000 WESTLAW 1285427 (N.D.Ill. 2000) – SSI appeal by female with Crohn's disease and asthma. Claimant testified that her condition came and went, and that she experienced pain. There was no medical evidence to support complaints of

pain, weakness, shortness of breath, and the ALJ properly discounted claimant's testimony accordingly.

Harris v. Apfel, 198 F.3d 250 (8th Cir. 1999) (unpublished decision, not binding authority) – SSDI appeal by male claimant with back problems and ulcerative colitis. The Administrative Law Judge discounted the subjective complaints of pain based on inconsistencies in the record, including the fact that medical treatment was sought only intermittently, and that his conditions had been managed with medication over the years. He also reported daily activities like making breakfast, washing dishes, driving, socializing without physical restrictions. The court found that the ALJ had properly applied the legal tests and that substantial evidence supported his conclusion.

Phillips v. Chater, 1996 WESTLAW 457183 (D.N.J. 1996) – SSDI appeal by male with diverticulosis and osteoarthritis. The court said that subjective claims of pain are considered when the pain stems from a medically determinable impairment which can reasonably be expected to produce the pain complained of.

Fitchet v. Chater, 89 F.3d 833 (6th Cir. 1996) (unpublished decision, not binding authority) – SSDI appeal by a female claimant with Crohn's disease. Objective evidence did not confirm that the claimant was disabled by pain.

Eaves v. Secretary of HHS, 877 F.Supp. 334 (E.D.Tex. 1995) – SSDI appeal by patient with Crohn's disease and other impairments. The court explained that its role is to decide if substantial evidence supports the SSA's determination. In answering that question, the court should look to objective medical facts, diagnoses and opinions of treating physicians, claimant's subjective evidence of pain, and claimant's educational and employment history. The court said that pain itself is considered disabling "only when it is constant, unremitting, and wholly unresponsive to therapeutic treatment." Where there is no objective confirmation of subjective complaints of pain, the subjective complaints can be discounted.

Roberts v. Shalala, 1994 WESTLAW 285039 (E.D.Pa. 1994) – SSI appeal by man with Crohn's disease. The court said that subjective complaints of pain are to be considered to the extent they are not inconsistent with medical or other evidence.

Soth v. Shalala, 827 F.Supp. 1415 (S.D.Iowa 1993) – SSDI appeal by male claimant with ulcerative colitis, with pain, bleeding, and diarrhea. He also had gout, dementia, and anxiety disorder. The Administrative Law Judge found that his subjective complaints of pain were not fully credible because they were not supported by medical evidence.

Miller v. Bowen, 1990 WESTLAW 10054 (E.D.Pa. 1990) – SSDI and SSI appeal by woman with Crohn's disease. Pain must be considered in making a disability determination when confirmed by medical evidence establishing the cause of the pain. The evidence was not sufficient to find that the claimant's impairments were disabling.

Sheets v. Bowen, 875 F.2d 867 (6th Cir. 1989) – SSDI appeal of female claimant with Crohn's disease. Subjective complaints of pain also must be supported by objective medical evidence that could be expected to cause disabling pain.

Bulpett v. Heckler, 617 F.Supp. 850 (D. Mass. 1985) – SSDI appeal of 51 year old woman with ulcerative colitis, regional enteritis (Crohn's) and erythema nodosum. The court found that the ALJ had not properly considered the claimant's assertion of pain, as confirmed by objective medical evidence.

Dix v. Sullivan, 900 F.2d 135 (8th Cir. 1990) – SSI appeal by female with Crohn's disease whose flare-ups lasted from a day to several weeks. She had an ileostomy. She was able to work for a nine-year period when her disease was in remission, but when it became more active, she applied for SSI benefits. At that time, the longest she had gone without a flare-up was a month. During flare-ups, she suffered severe abdominal pain, cramps, nausea, diarrhea, and difficulty sleeping. She also had developed 4 fistulas. The Administrative Law Judge found that she was not disabled, finding that his subjective complaints were not credible. The court said that, when faced with a complaint of pain, the ALJ should consider the claimant's daily activities; the duration, frequency and intensity of the pain; precipitating and aggravating factors; dosage, effectiveness and side effects of medication; and functional restrictions. "Subjective complaints may be discounted if there are inconsistencies in the evidence as a whole."

However, some courts have said that it is error to fail to consider subjective complaints of pain:

Schmidt v. Barnhart, 395 F.3d 737, (7th Cir. 2005) – Subjective complaints of pain may be rejected if the ALJ gives reasons for discounting subjective complaints based on a lack of the claimant's credibility. However, an ALJ cannot ignore subjective complaints of pain; he or she must explain how these complaints are contradicted in the record, so that it is clear that the subjective complaints were rejected due to a lack of credibility.

McGee v. Barnhart, 2003 WESTLAW 22888843 (N.D. Iowa Dec. 8, 2003) – Despite opinions of doctors, based on a huge file establishing a medical history, the ALJ did not find the claimant to be credible, and the claimant appealed. An ALJ may not discredit complaints of pain simply because there is a lack of objective evidence; an ALJ may discredit subjective complaints only if they are inconsistent with the record.

Cornblath v. Shalala. 39 F.3d 1186 (9th Cir. 1994) (unpublished decision, not binding) – SSDI appeal by male with Crohn's disease. The ALJ had to consider subjective evidence of pain, but subjective evidence can be rejected if the ALJ gives good reasons, and he failed to do so in this case.

Abrar v. Secretary, 1992 WESTLAW 389004 (C.D.Cal. 1992) – SSI appeal by female with Crohn's disease, and no other impairments, physical or mental. The ALJ did not find the subjective complaints of pain to be credible because her testimony was

inconsistent, and her medications were more effective than she allowed. The court said that if the ALJ's decision is based on a credibility assessment, there has to be an explicit finding as to whether the plaintiff's testimony was believed or not, and the testimony cannot be discounted simply because it is not confirmed by objective evidence.

Scharlow v. Schweiker, 655 F.2d 645 (5th Cir. 1981) – SSI disability appeal by a 56-year old woman with anxiety and an unspecified gastrointestinal problem, variously diagnosed as ulcerative colitis or regional ileitis. The claimant argued that her subjective symptoms were not given adequate consideration. The court said that pain itself can be disabling, even when its existence is unsupported by objective medical evidence if linked to a medically determinable impairment. In this particular case, the court found that the claimant's subjective evidence of pain was not adequately considered.

Some courts have developed a test for determining whether complaints of pain are credible:

Ledbetter v. Astrue, 2011 WL 1335840 (D.S.C. April 7, 2011) – In the Fourth Circuit, once an underlying physical or [m]ental impairment that could reasonably be expected to cause pain is shown by medically acceptable objective evidence, such as clinical or laboratory diagnostic techniques, the adjudicator must evaluate the disabling effects of a disability claimant's pain, even though its intensity or severity is shown only by subjective evidence. If an underlying impairment capable of causing pain is shown, subjective evidence of the pain, its intensity or degree can, by itself, support a finding of disability. Objective medical evidence of pain, its intensity or degree (i.e., manifestations of the functional effects of pain such as deteriorating nerve or muscle tissue, muscle spasm, or sensory or motor disruption), if available, should be obtained and considered. Because pain is not readily susceptible of objective proof, however, the absence of objective medical evidence of the intensity, severity, degree or functional effect of pain is not determinative.

Duncan v. Astrue, 2011 WL 1748549 (E.D.N.Y. May 6, 2011) - When evaluating a subjective complaint of pain, first, the ALJ must determine if a claimant has a "medically determinable impairment that could reasonably be expected to produce the symptoms alleged." If an impairment of that nature is present, the ALJ must then determine " 'the extent to which [the claimant's] symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence' " in the administrative record. If plaintiff offers "statements about her symptoms that are not substantiated by objective medical evidence, the ALJ must make a finding as to the [plaintiff's] credibility." Because an ALJ has "the benefit of directly observing a claimant's demeanor and other indicia of credibility," his decision to discredit subjective testimony may not be disturbed on review if his disability determination is supported by substantial evidence.

Hennes v. Commissioner, 2005 WESTLAW 1027242 (11th Cir. May 3, 2005) (unpublished decision, not binding authority) – to establish a disability based on testimony regarding pain or other subjective symptoms, the claimant must show evidence

of an underlying medical condition and either objective medical evidence that confirms the severity of the pain or that the objectively verifiable medical condition is of such severity that it reasonably can be expected to give rise to the pain complained of.

Lewis v. Astrue, 2009 WESTLAW 3256018 (N.D. Florida Oct. 6, 2009) – To establish a disability based on pain, the claimant must satisfy two parts of a three-part test shoing: (1) evidence of an underlying medical condition; (2) either (a) objective medical evidence confirming the severity of the alleged pain; or (b) that the objectively determined medical condition can reasonably be expected to give rise to the claimed pain.

Pletsch v. Astrue, 2009 WESTLAW 511409 (D.N.D. Feb. 27, 2009) – In evaluating a claimant's subjective complaints of pain, the ALJ is required to assess the claimant's credibility in light of the objective medical evidence and any evidence related to a claimant's daily activities; duration, frequency and intensity of pain; dosage and effectiveness of medication; precipitating and aggravating factors and functional restrictions. The ALJ just give full consideration to all of the evidence presented relating to subjective complaints including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to these matters.

Barrow v. Massanari, 2001 WESTLAW 741718 (D.Kan. 2001) – SSDI appeal by female claimant with colitis, migraine headaches, mild mitro valve prolapse, and possible connective tissue disease. All clinical tests were normal except for a biopsy taken during a colonoscopy, which showed colitis. A later biopsy was normal. She also had a mildly elevated sedimentation rate (blood test that is a marker for inflammation). She developed daily migraines that were alleviated with medication, and eventually was diagnosed with fibromyalgia, and complained of fatigue. Subjective complaints of pain are evaluated according the following test: (1) whether claimant proves with objective evidence an impairment that causes the subjective condition; (2) whether a loose nexus exists between the impairment and the subjective condition; and (3) whether the subjective condition is disabling based on all of the evidence. In assessing credibility, an Administrative Law Judge should consider the level of medication, the extensiveness of the attempts to obtain relief, the frequency of medical contacts, the nature of daily activities, the consistency of nonmedical testimony with objective medical evidence, and subjective measures of credibility within the judgment of the ALJ. An ALJ has to explain why specific evidence supports a conclusion that a claimant's subjective complaints are not credible.

Denson v. Apfel, 2000 WESTLAW 1848077 (S.D.Ala. 2000) – SSDI and SSI appeal by female claimant with Crohn's disease and other impairments. The ALJ found that claimant's subjective complaints of pain were inconsistent and disproportionate to the medical evidence. Subjective complaints of pain are evaluated to determine whether there is evidence of an underlying medical condition and either (1) objective medical evidence confirming severity of the pain; or (2) that the objectively determined medical condition is of such a severity that it can be reasonably expected to give rise to the alleged pain. In assessing credibility, the ALJ should consider the claimant's daily activities; the location, duration, frequency and intensity of the pain; factors that precipitate and aggravate the symptoms; the type, dosage, effectiveness and side effects

of medication; treatment other than medication; and any measures other than treatment the individual uses or has used to relieve pain.

Rohrberg v. Apfel, 26 F.Supp.2d 303 (D. Mass. 1998) – SSDI appeal by patient with Crohn's disease and depression. The court stated a detailed test for consideration of pain, looking at (1) nature, location, onset, duration, frequency, radiation, and intensity of pain; (2) precipitating or aggravating factors; (3) type, dosage, effectiveness, and adverse side effects of pain medication; (4) treatment other than medication; (5) functional restrictions; and (6) the claimant's daily activities. The ALJ failed to apply this test and, thus, failed to adequately examine the claimant's subjective claim of pain. The court found that the unpredictability of the claimant's condition on any given day made it difficult to commit to even part-time work. Further, the court stated that sporadic or transitory activity does not disprove disability. "Disability does not mean that a claimant must vegetate in a dark room excluded from all other forms of human and social activity." The fact that the claimant might be able to work on some days, with frequent bathroom breaks, did not determine a residual functional capacity.

However, in all jurisdictions, subjective complaints of pain are not enough to find someone disabled:

Jaramillo v. Commissioner, 2005 WESTLAW 1099880 (3d Cir. May 10, 2005) – claimant with Guillan-Barrre syndrome, hand tremors, nocturnal enuresis, attention deficit and hyperactivity disorder, and a learning disability appealed denial of SSI benefits. Court found that it was appropriate to disregard the subjective complaints of pain since pain alone is not disabling.

4. Combination of Impairments

These cases illustrate the ways in which multiple impairments are or should be considered by the courts.

Courts have found that the failure to consider the cumulative effect of multiple impairments is error:

Money v. Astrue, 2011 WESTLAW 3841972 (M.D. N.C. Aug. 26, 2011) – ALJ must consider all impairments in combination, without regard to whether any one impairment, if considered separately, would meet a listing. The rule "compels the ALJ to consider the cumulative, compounding, or synergistic effect of the claimant's individual impairments instead of 'fragmentiz[ing]' them or evaluating them in isolation." The ALJ must make particularized findings regarding the effects of a combination of impairments.

West v. Astrue, 2009 WESTLAW 4348976 (C.D.Ill. Nov. 24, 2009) – ALJ's failure to consider whether claimant has an impairment or combination of impairments that meets or equals a listing is error. Although the ALJ correctly stated that there was no listing for pancreatitis, the ALJ erred in failing to consider whether pancreatitis and diabetes in combination meet or equal a listing.

Stemple v. Astrue, 475 F.Supp.2d 527 (D. Md. 2007) – ALJ's failure to consider claimant's impairments in combination with her obesity is reversible error.

Eacret v. Barnhart, 1005 WESTLAW 40061 (10th Cir. Jan. 10, 2005) – claimant with both physical and mental health impairments claimed that the ALJ had failed to consider her impairments in combination. The court found that there was no indication that the ALJ had failed to consider the impairments in combination. Since the ALJ found that her high blood pressure was not disabling, it was irrelevant that her high blood pressure may have been caused or exacerbated by her anxiety and depression.

Duff v. Barnhart, 2005 WESTLAW 176251 (9th Cir. Jan. 27, 2005) – Claimant appealed the denial of benefits, claiming that she suffers from scoliosis, an affective disorder, and somatization disorder. The court found that failing to consider all disorders, both separately and in combination, was error.

Raney v. Barnhart, 396 F.3d 1007 (8th Cir. 2005) – claimant with degenerative disc disease, back pain, diabetes with peripheral neuropathy, carpal tunnel syndrome, steatohepatitis, morbid obesity, hypertension, irregular heartbeat, angina, rheumatoid arthritis, peripheral vascular disease, chronic obstructive pulmonary disease, and asthma, as well as anxiety and depression, claimed that the ALJ did not consider the effects of her impairments in combination. An ALJ is required to consider whether the combination of impairments is medically equal to any listed impairment. The ALJ's opinion clearly referenced all of her impairments, and stated that they were considered both individually and in combination. Thus, the court found no error by the ALJ.

McCarty v. Barnhart, 2005 WESTLAW 5108536 (N.D. Cal. 2005) – court found error in failure to consider the combined effects of all impairments, both severe and non-severe. The claimant had degenerative disc disease, hepatitis B, rheumatoid arthritis, GERD, Raynaud's Syndrome, and depression. The court stated that, on remand, the SSA had to consider the disability onset date for each of the impairments in order to determine when the combination of impairments rendered the claimant disabled.

Segal v. Barnhart, 342 F.Supp.2d 338 (E.D.Pa. 2004) – here, a court reversed a denial of SSDI benefits. The claimant suffered from high blood pressure and cholesterol, ulcerative colitis, gallstones, obesity, and a bulging disc at the base of her lumbar. She also has migraine headaches. All of these physical problems led to anxiety and depression. The ALJ found that her physical impairments were severe, but her mental health impairments were not. The ALJ then found that, although her physical impairments were severe, they did not meet any of the listings. The court found that the ALJ committed error in coming to this conclusion. The court found that the impairments had to be taken in combination.

Cummings v. Apfel, 2000 WESTLAW 343357 (E.D.La. 2000) – SSI appeal by female claimant with non-specific gastrointestinal complaints and other impairments, including back pain and depression. The court explained that an individual's combined

impairments may constitute a disability, even when each individual impairment alone does not. Because the claimant's impairments were "fragmented" and viewed in isolation by the Administrative Law Judge, the court rejected the ALJ's conclusions.

Bulpett v. Heckler, 617 F.Supp. 850 (D. Mass. 1985) – The court found that the ALJ erred in failing to consider "the cumulative effect of [the claimant's] impairments." "It is inappropriate to view several disabilities as isolated from one another." The need to frequently use the bathroom would interfere the claimant's performance and, thus, it, too, is relevant.

Wilson v. Schweiker, 553 F.Supp. 728 (E.D.Wash. 1982) – SSDI appeal by male claimant with ulcerative colitis, arthritis, aortic aneurysm, emphysema and heart problems. The court found that the claimant's impairments *in combination* are severe enough to preclude him from engaging in substantial gainful activity. If a number of impairments in combination equal a listed impairment, the claimant is disabled.

5. Residual Functional Capacity, the Grids, and Reliance on Vocational Experts

As set forth in the text, the Social Security Administration has grids that measure disability when the impairments are exertional, i.e., they affect physical strength and endurance. However, the grids are not to be used if there is a non-exertional impairment such as pain, dehydration, cognitive problems, etc.

Where there is a non-exertional impairment, the grids cannot be used, and the testimony of vocational experts is required:

Sarabia v. Barnhart, 2005 WESTLAW 1317062 (5th Cir. June 2, 2005) – if a claimant suffers from a non-exertional impairment, or a combination of exertional and non-exertional impairments, the ALJ must obtain and rely on the opinion of a vocational expert in order to establish that there are no jobs in the economy the claimant could perform based on her residual functional capacity.

Houston v. Chater, 56 F.3d 77 (10th Cir. 1995) (unpublished decision, not binding authority) – SSDI appeal by male claimant with Crohn's disease and back problems. Claimant had lost 60 pounds in 10 months, and x-rays confirmed back problems. After a lengthy period on SSDI, claimant's condition improved, and an Administrative Law Judge found that he no longer was disabled because he had regained residual functional capacity sufficient to perform substantial gainful activity. The record supported these conclusions. The grids cannot be used when a claimant's exertional capacity is further restricted by non-exertional limitations, as is the case with Crohn's disease, according to the court.

Kinney v. Secretary, 953 F.2d 644 (6th Cir. 1992) (unpublished decision, not binding authority) – SSDI appeal by a male with Crohn's disease and back pain. The Administrative Law Judge found that the claimant retained the ability to perform

sedentary work. The claimant argued that testimony of a vocational expert was necessary to evaluate the effects of Crohn's disease, a non-exertional impairment. The court said the claimant had the burden of showing he could not perform sedentary work due to his non-exertional impairment.

Mackinaw v. Bowen, 866 F.2d 1023 (8th Cir. 1989) – SSDI and SSI appeal by male with ulcerative colitis, for which he had a colectomy and an ileostomy. Because he was unable to perform all of the elements of sedentary work, including sitting for long times, lifting more than 10 pounds, standing for more than ½ hour, or sitting more than an hour, the impairment had characteristics that differ in a material respect from the guidelines (the grid), so testimony of a vocational expert is required.

However, even when there are non-exertional impairments, some courts allow the grids to serve as guidelines:

Guillory v. Barnhart, 2005 WESTLAW 616011 (5th Cir. March 17, 2005) (unpublished, not binding authority), the court found that the presence of a non-exertional impairment does not preclude the use of the grids because the ALJ found that the non-exertional impairment did not significantly affect her ability to perform the base of jobs for which she was qualified.

Lang v. Shalala, 1995 WESTLAW 358642 (N.D.Ill. 1995) – SSI appeal by male claimant with Crohn's disease, and burns from a work-related accident, accompanied by some neurological deficits as a result. A vocational expert testified that, even with the limits the claimant suffered, he could perform a number of jobs. The main issue was the effects of memory loss, frustration and temper, all resulting from the work accident. Although direct application of the SSA grid was inappropriate here, it could be used as a framework.

Findings regarding residual functional capacity must be based on the medical evidence, and the SSA has to prove that there are jobs in the economy that claimant can perform with residual functional capacity:

Collins v. Astrue, 493 F.Supp.2d 858 (S.D.Tex. 2007) – Residual functional capacity combines a medical assessment with the descriptions by physicians, the claimant, and other witnesses. If claimant's residual functional capacity is not sufficient to permit him to continue his former work, then his age, education and work experience must be considered in evaluating whether he is capable of performing other work.

VanLaningham v. Astrue, 2007 WESTLAW 2119499 (S.D. Iowa 2007) – the ability to perform light housework does not, in itself, prove that the claimant can perform a full-time job. A determination that a claimant's testimony is not credible because he can perform light housework is not tantamount to proving that claimant has residual functional capacity.

Holmes v. Barnhart, 2006 WESTLAW 3165695 (E.D.Pa. 2006) – ALJ erred when relying on testimony of a medical examiner that patient would do better if she worked through her pain in finding residual functional capacity. Further, claimant's obesity was improperly considered a severe impairment, but obesity can be considered as a factor in determining residual functional capacity.

Jolly v. Barnhart, 465 F.Supp.2d 498 (D.S.C. 2006) – Although ALJ was correct to discredit subjective complaints that claimant was virtually helpless due to her arthritis, the ALJ erred in discounting the medical evidence that claimant's ability to grip and grasp is compromised by her impairments. The vocational expert testified that the only jobs claimant was able to perform were jobs that require the ability to use one's hands on a continuous, or at least frequent, basis. If the ALJ was going to find residual functional capacity, he had to explain how he reached this conclusion based on the medical evidence.

Soth v. Shalala, 827 F.Supp. 1415 (S.D.Iowa 1993) – SSDI appeal by male claimant with ulcerative colitis, with pain, bleeding, and diarrhea. He also had gout, dementia, and anxiety disorder. The court stated the rule that, once a claimant shows he cannot perform his past job, the SSA must show that the claimant has residual functional capacity *and* that there are jobs available in the economy that the claimant can perform. The court found that there was no medical evidence confirming the finding of residual functional capacity, and remanded the case for further medical examinations of claimant. In March 1996, the case again came to the court, 937 F.Supp. 840 (S.D. Iowa 1996), after the ALJ again decided against the claimant. The court said that since the SSA was unable to prove on remand that the plaintiff was able to perform medium-level work, the ALJ could not deny benefits.

6. Special Standard for Assessment of Mental Impairments

McCarty v. Barnhart, 2005 WESTLAW 5108536 (N.D. Cal. 2005) – the court stated that, if a claimant has a medically determinable mental impairment, the SSA must rate the degree of functional limitation in four areas: activities of daily living; social functioning; concentration, persistence or pace; and episodes of decompensation. If the mental impairment is severe based on these ratings, SSA then must go on to see if the impairment meets or is equivalent to a listed disorder, or, if not, whether there is residual functional capacity.

Lewis v. Astrue, 2009 WESTLAW 3256018 (N.D. Florida Oct. 6, 2009) – In applying the above test, the ALJ must consider not only all of the medical evidence, but also must consider the lay evidence as to the claimant's ability to perform the activities of daily living. The ALJ must directly evaluate the mental health evidence as bearing up on the issue of the claimant's residual functional capacity.

Appendix J: ADA Rules Relating to Job Interviews

I am grateful to Alisa Arnoff, Esq. at Scalambrino & Arnoff in Chicago, IL for allowing me to include the following materials relating to what an employer can and cannot ask/do/say during a job interview.

I. The Interview

A. An Employer cannot directly ask about existence, or severity of a disability. This ensures an applicant's disability is not considered prior to assessment of applicant's non-medical qualifications.

*An Employer CANNOT ask:

- Are you and alcoholic?
- Do you have HIV/AIDS?
- Do you have a disability that would prevent you from performing the essential functions of this job with or without reasonable accommodation?

*An Employer CAN ask:

- Do you have 20/20 vision?
- How do you handle stress?
- Do you work better or worse under pressure?
- Can you perform: [Insert particular job function]?

*There are certain situations in which you cannot ask even if the disability would allow the employer to legitimately exclude the applicant because of the disability:

> Example: Federal law prohibits epileptics from working as interstate trust drivers. However, a trucking company cannot ask an applicant if they have epilepsy.

B. An employer cannot inquire whether an applicant "needs" reasonable accommodation for the job unless it is open and obvious – then the employer can ask:

- "Would you need reasonable accommodation in this job?"
- "Would you need reasonable accommodation to perform this specific function?"
- A phone company can ask a one-legged applicant applying for a telephone line repair person to describe or demonstrate how they would perform the duties of the position.

C. An employer cannot ask questions that are "likely" to elicit information about a disability.