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Weight Given to Treating Physician Opinions in Social Security Disability Cases: The Fifth Circuit's Interpretation of Sections 20 C.F.R. 404.1527(d)(2) & 416.927(d)(2)

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WEIGHT GIVEN TO TREATING PHYSICIAN OPINIONS IN SOCIAL SECURITY DISABILITY CASES: THE FIFTH CIRCUIT'S INTERPRETATION OF SECTIONS 20 C.F.R. 404.1527(d)(2) & 416.927(d)(2)

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I. INTRODUCTION

"The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little."

—Franklin D. Roosevelt[1]

This Article examines the issues concerning the weight a Social Security administrative law judge ("ALJ") must give to a "medically acceptable treating source" as defined by 20 C.F.R. §§ 404.1527(d)(2) and 416.927(d)(2). The review includes an overview of the Social Security[2] disability hearing process in order to provide the reader with a context to the main discussion, an examination of the various issues pertaining to the weight given to treating physician, psychiatrist, or psychologist opinions as established by Congress in 20 C.F.R. §§ 404.1527(d)(2) and 416.927(d)(2), and the interpretations of those regulations by Fifth Circuit Court of Appeals judges and U.S. district court and magistrate judges in the Northern and Southern Districts of Mississippi. Included will be information relevant to ALJs, the attorney writers who assist ALJs in crafting their opinions, and lawyers and representatives of claimants appearing before ALJs in Social Security disability hearings brought under the auspices of Title II and Title XVI of the Social Security Act.

Not included in this Article is a thorough discussion of the myriad of other considerations allocated to ALJs and practicing attorneys in disability cases, such as claimant credibility,[3] the effect of obesity or pain[4] on

1. President Franklin D. Roosevelt, Second Inaugural Address (Jan. 20, 1937).

2. The Social Security Administration is now an independent agency as of March 31, 1995, pursuant to the Social Security Act, 42 U.S.C. §§ 901–914 (2006), as noted in greater detail at 1 HARVEY L. MCCORMICK, SOCIAL SECURITY CLAIMS AND PROCEDURES § 1:9 (6th ed. 2006).

3. 20 C.F.R. § 404.1529 (2012) and SSR 96–7p, 1996 WL 374186 (July 2, 1996), detail how an ALJ must consider the effect of pain in assessing RFC and whether objective evidence supports the claimant's subjective complaints of pain. An "ALJ must consider subjective evidence of pain" and make a finding on the claimant's credibility, "but it is within [the ALJ's] discretion to determine the pain's disabling nature." Wren v. Sullivan, 925 F.2d 123, 128 (5th Cir. 1991) (per curium). Although an ALJ is bound to explain his reasons for rejecting a claimant's complaints of pain, he is not required to follow "formalistic rules in his articulation." Falco v. Shalala, 27 F.3d 160, 164 (5th Cir. 1994). The ALJ's determination about credibility is entitled to great deference and will not be upset if supported by substantial evidence. Woodham v. Astrue, No. 1:10CV308-SA-DAS, 2012 U.S. Dist. LEXIS 19330, at *12–13 (N.D. Miss. January 31, 2012) (citing Newton v. Apfel, 209 F.3d 448, 459 (5th Cir. 2000)). The best discussion on these issues may be found in SSR 96–7p.

4. For a good discussion of the Fifth Circuit's analysis of pain symptoms, see Hollis v. Bowen, 837 F.2d 1378, 1384 (5th Cir. 1988) and Adams v. Bowen, 833 F.2d 509, 512 (5th Cir. 1987).

other impairments, and the relevance of alcohol and drug abuse to disability and approval of attorney fee petitions. Other issues, such as the relevance of substantial gainful activity ("SGA"), the application of Impairment Listings, and the formulation of Residual Functional Capacity ("RFC"), are considered only where applicable to the central issues under consideration herein.

II. SOCIAL SECURITY DISABILITY HEARINGS BEFORE THE ADMINISTRATIVE LAW JUDGE: A BRIEF OVERVIEW OF THE PROCESS

In Mississippi, Social Security Administration ALJs determine[5] whether claimants are disabled in three separate Offices of Disability, Adjudication, and Review ("ODAR") located in Tupelo, Jackson, and Hattiesburg.[6] ALJs handle appeals of denied claims from the components responsible[7] for initial determinations and reconsiderations of claims.[8] Decisions made by Mississippi ALJs are appealed to another Social Security Administration component, the Appeals Council ("AC"), and from there, to the appropriate U.S. District Court in the Northern or Southern District of Mississippi (often handled there by agreement of the parties by United States magistrate judges), and from there to the Fifth Circuit Court of Appeals.[9]

In this Article, we will consider the two major types of cases ordinarily associated with disability hearings: Title II Social Security Benefits and Title XVI Supplemental Security Income Benefits. Actions under these titles are governed by largely mirror regulations—Title II is governed by 20 C.F.R. Part 404, while Title XVI actions are governed by 20 C.F.R. Part 416.

Claimants eligible for Title II benefits include disabled workers who have not reached full retirement age; retired insured workers aged sixty-two and over and their spouses who are aged sixty-two or over or who are caring for children either under sixteen or over sixteen but are disabled

5. ALJs also decide other issues, such as overpayments (whether claimants must return funds overpaid them due to their return to work or recovery from disability), the paternity of children claiming benefits based upon a potential parent's disability, and several other issues with which we are not directly concerned here.

6. ALJs are sometimes called to handle cases in other offices in their own ODAR Region. In my case, this is Region 4—essentially, Florida to Mississippi. This occurs when other offices, for various reasons such as temporary attrition of judges, need visiting judges to help maintain ever-mounting caseloads. In such circumstances, I have held hearings by video or in person (when claimants refuse to waive in-person hearings) for offices in Covington and Augusta, Georgia, Panama City and Melbourne, Florida, and Lexington and Louisville, Kentucky.

7. This refers to the state agency Department of Disability Services ("DDS"), which makes initial and reconsideration determinations of disability, from which claimants appeal to ALJs, as noted in greater detail at RICHARD C. RUSKELL, SOCIAL SECURITY DISABILITY CLAIMS HANDBOOK, § 2:6 (2012). *See also* 20 C.F.R. §§ 404.1503, 416.903 (2012).

8. See 20 C.F.R. §§ 404.900–28, 416.1400–28 (2012) for a full discussion of the procedures concerning appeals to ALJs from initial determinations and reconsideration determinations and subsequent Appeals Council and federal court review of ALJ decisions.

9. *Id.*; 20 C.F.R. §§ 404.955, 416.1455 (2012).

(thus entitling them to benefits on the worker's Social Security record); certain divorced spouses of insured but retired, disabled, or deceased workers; and certain minor dependents of insured but retired, disabled, or deceased workers,[10] although questions of insured status and quarters of coverage are not the subject of this Article.[11] Essentially, Title II covers workers who have sufficient earnings during applicable quarters to qualify for benefits.

Those eligible for benefits under Title XVI include those with limited income and resources or those aged sixty-five or older who are either blind or disabled, including adults and children.[12] Essentially, Title XVI covers adults and children who lack insured status or are dependents of those who lack insured status but have very limited income and resources.

Claimants eligible for benefits under Titles II and XVI[13] who have been denied recovery through initial and reconsidered Department of Disability Services ("DDS") determinations appeal to ALJs for consideration of the merits of their claims in disability hearings under the auspices of the ODAR branch of the Social Security Administration.

A. What are Social Security Disability Hearings?

In Mississippi, Social Security disability hearings before ALJs are held in Jackson, Tupelo, and Hattiesburg. The ALJ is the decision maker, and the claimant may either appear with an attorney or qualified representative, or the claimant may represent himself. A hearing monitor (e.g., court reporter in all but name only) is always present, and the ALJ may have an expert vocational consultant present if desired. While the ALJ may call a medical expert to testify in person or by telephone or video ("VTC"), the claimant can testify and may call fact or expert witnesses in support of his or her claim. Evidence is ordinarily submitted by claimants[14] or obtained by the ALJ[15] prior to the hearing and is contained in an electronic record available to both the claimant and the ALJ prior to and during the hearing. The hearing is inquisitorial and not adversarial,[16] the ALJ and claimant's

10. See 20 C.F.R. §§ 404.301–84 (2012) for additional information concerning these matters.

11. See 20 C.F.R. §§ 404.110–46 (2012) for further discussion.

12. See 20 C.F.R. §§ 416.202–69 (2012) for a complete explanation of eligibility for these benefits.

13. The onset of disability is generally from the date alleged by the claimant in Title II cases or from the date the claimant filed his or her petition for disability in Title XVI cases, although this may sometimes become a controverted issue involving alleged onset date, work history, and medical evidence. For a full discussion of these issues, see SSR 83-20, 1983 WL 31249 (Jan. 1, 1983), Ivy v. Sullivan, 898 F.2d 1045, 1048 (5th Cir. 1990), and *Mosley v. Astrue*, 2010 U.S. Dist. LEXIS 169, at *9–10 (N.D. Miss. Jan. 1, 2010) (Magistrate Judge Allan Alexander finding that the ALJ correctly rejected the treating doctor's findings because they were rendered prior to the alleged onset date).

14. Often, this is in the form of medical evidence from treating and examining medical sources and statements by other witnesses such as employers, teachers, and family members.

15. Frequently, this is in the form of medical consultative examinations, answers to interrogatories by medical experts, and employers' statements of wages earned and/or the claimant's capacity for continued employment at that job.

16. *See* Bobo v. Astrue, No. 1:10CV00037-SAA, 2010 U.S. Dist. LEXIS 114939, at *15 (N.D. Miss. Oct. 27, 2010) (citing Sims v. Apfel, 530 U.S. 103, 111 (2000)).

attorney are charged with developing the evidence of record, and the ALJ may question the claimant before or after the claimant or his or her representative offers the claimant's direct testimony. Both the ALJ and claimant are allowed to examine experts.

The hearing is not a formal trial, but neither is it so informal that fairness and due process are not recognized. It is open to the parties and all persons the ALJ deems necessary and proper, though not to the general public. The ALJ will ordinarily render a decision subsequent to the hearing, although ALJs may make an on-the-record favorable decision after the introduction of the evidence and closing arguments by counsel. Hearings are held in person or via VTC technology. ALJs in national hearing centers located throughout the country hold hearings only by VTC, allowing them to reach claimants who would not otherwise be able to come to a distant hearing office for a determination of their cases.[17]

After collecting all relevant evidence and eliciting all relevant testimony, the ALJ must perform a five-step sequential evaluation to determine whether or not the claimant is disabled.

B. The Sequential Nature of the Disability Evaluation: The Five-Step Process

Social Security Administration regulations[18] define "disability" as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment[19] that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than twelve months.[20] The sequential examination (explained here only in summary form to aid in the reader's understanding of the issues presented) is a specific order of steps each ALJ must follow in evaluating a disability claim. It is composed of five steps, although the process may cease at any step when a finding of "disabled" or "not-disabled" status can be made.[21]

Step one of the sequential evaluation asks, "Is/was the claimant engaging in substantial gainful activity ("SGA")?[22] If the claimant has SGA,[23] then a finding of "not-disabled" may be made at step one.

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17. See RUSKELL, *supra* note 7, § 3.10(b) for a more complete discussion of these procedures.

18. These are promulgated under § 223(d)(1)(A) and § 1614(a)(3)(A) of the Social Security Act.

19. For an excellent discussion of the analysis an ALJ is required to use in determining the severity of a mental impairment (i.e., the "special technique" provided in the regulations), see 20 C.F.R. §§ 404.1520, 416.920 (2012), ably discussed by Magistrate Judge John Roper, Sr., in Myers v. Astrue, 5:09CV121-DCB-JMR, 2010 U.S. Dist. LEXIS 142434, at * 37–38 (S.D. Miss. Nov. 18, 2010).

20. 20 C.F.R. §§ 404.1505(a), 416.905(a) (2012); *see also* Bowen v. Yuckert, 482 U.S. 137, 155–156 (1987) (O'Connor, J., concurring) (giving an eloquent rendering of this definition and a warning against the use of the term "severity" to allow premature dismissal of claims for lack of severity despite the relatively expansive definition thereof).

21. 20 C.F.R. §§ 404.1520(a)–(g), 416.920(a)–(g) (2012) (a full discussion of the process); *see also* Newton v. Apfel, 209 F.3d 448 (5th Cir. 2000) (the Fifth Circuit's affirmation of the requirement that ALJs must abide by this evaluation process).

22. 20 C.F.R. §§ 404.1510(a)–(b), 416.910(a)–(b) (2012); *see also* RUSKELL, *supra* note 7, § 2:8(a) (thoroughly discussing SGA and its role in the sequential evaluation).

Step two (a step of more direct concern to this Article) asks, "Does the claimant have any severe medically determinable impairments?"[24] A severe impairment is defined[25] as that which causes limitations having more than a minimal effect on the claimant's capacity to perform basic work activities.[26] In other words, if an impairment such as degenerative disk disease limits a claimant's ability to stand, walk, bend, breathe, etc. in more than a minimal way, it is severe and the evaluation must proceed to step three.

Step three asks, "Does the claimant have any impairment(s) that meets or equals in medical severity a listing impairment(s)?"[27] In other words, if the medical evidence alone documents an impairment or combination of impairments so medically severe as to be presumed disabling (and more often than not, presumed permanently disabling or expected to result in death), the evaluation stops and the claimant is declared disabled without resort to a consideration of vocational factors. A listing of impairments is located at Appendix 1 of 20 C.F.R. Part 404, Subpart P, and these include impairments severe enough to prevent a person from doing any gainful activity and that affect one or more of the various body systems, such as the cardiovascular, mental, digestive, and musculoskeletal systems.[28] These regulations describe the severe impairments and extent of limitations caused by them that must exist, as well as the clinical findings and supporting tests required to demonstrate their existence in order to qualify a claimant for disability based on the listings of impairments. However, should no listing be met or equaled, the evaluation must proceed to step three-and-a-half.[29]

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23. Substantial gainful activity is defined in 20 C.F.R. §§ 404.1572, 416.972 (2012). Often, this would constitute gross wages above a certain dollar amount in certain years (e.g., $1,000 per month in 2010 and $700 per month in 2000), although there are other factors to be considered, including available work-related expenses and different standards for self-employment earnings, as noted in 20 C.F.R. § 404.1574(a), 404.1575, 404.1576 (2012), and other issues, none of which are directly relevant to this Article.

24. 20 C.F.R. §§ 404.1520(c), 404.1521, 404.1523, 416.920(c), 416.921, 416.923 (2012).

25. See the landmark decision of Stone v Heckler, 752 F.2d 1099, 1101 (5th Cir. 1985), which discusses and defines a severe impairment and which must always be cited in an ALJ opinion, rendered in the Fifth Circuit's jurisdiction, that finds impairments non-severe. The failure to cite *Stone* is grounds for reversal.

26. 20 C.F.R. §§ 404.1505, 404.1508, 416.905, 416.908 (2102); *see also* RUSKELL, *supra* note 7, § 2:15(a) (discussing severe impairments and the signs, symptoms, and medically acceptable clinical, diagnostic, and laboratory findings essential to their determination).

27. 20 C.F.R. §§ 404.1525, 416.925 (2012); *see also* Magee v. Astrue, 1:09CV620HSO-JMR, 2011 U.S. Dist. LEXIS 33949, at *8-9 n.1 (S.D. Miss. Mar. 29, 2011) (District Judge Halil Suleyman Ozerden's excellent statement of the analysis required to determine whether an impairment meets or equals a listing).

28. 20 C.F.R., pt. 404, subpt. P, app. 1; *see also* RUSKELL, *supra* note 7, § 2.17(a).

29. Relatively few cases are decided at steps one through four, and the vast majority are decided at step five. Major considerations at this final step often include the claimant's RFC, vocational considerations pertinent to the RFC, the claimant's credibility, and the weight given to applicable medical evidence, as noted below.

Step three-and-a-half requires an unofficial, though nevertheless essential determination; the ALJ must assess the claimant's residual functional capacity ("RFC").[30] RFC is the most that the claimant can do on a sustained basis despite the limitations caused by his or her medically determinable impairment(s).[31] This is not the same as determining if the claimant is disabled, but involves merely determining what types of work activity the claimant can perform despite limitations caused by medically determinable impairments.[32] Work activities to be considered are exertional (i.e., how much the claimant can lift, how long he can sit or stand, and how much he can push and pull) and non-exertional (i.e., the claimant's capacity to bend, climb, crouch, concentrate, interact with others, and understand and perform instructions of various degrees of difficulty).[33] The above list of activities is far from exhaustive but is sufficient to aid the understanding of the reader at this juncture.[34] Mental RFC includes an inquiry into the claimant's ability to understand, remember, carry out instructions, and respond adequately to supervisors, coworkers, the general public, and work changes and pressures (stress).[35] The RFC determined by the ALJ is utilized in steps four and five, known as the vocational steps.

Step four asks, "Does the claimant's medically determinable impairment(s) prevent the performance of past relevant work ("PRW")?"[36] PRW is work performed within fifteen years of the adjudication or the date last insured ("DLI")[37] for Title II cases when the DLI has expired at a level constituting SGA.[38] If the claimant has an RFC consistent with PRW, then the evaluation ceases and the claimant is declared "not-disabled." If the claimant establishes an impairment that precludes PRW, we proceed to the next step.

The claimant has the burden of proof to demonstrate that he or she is disabled at step four, but once the claimant has met the burden of showing an inability to perform PRW, the burden of proof shifts to the Commissioner, through the adjudicator, to prove that, despite the claimant's impairments and functional limitations, there exist jobs in the national economy that the claimant can perform.[39] After the Commissioner meets this burden, the burden of proof shifts again, back to the claimant to rebut this finding.[40]

30. 20 C.F.R. §§ 404.1545, 416.945 (2012); *see also* RUSKELL, *supra* note 7, § 2:29 (discussing in detail RFC and its relevancy to the hearing process including the sequential evaluation).

31. 20 C.F.R. §§ 404.1545, 416.945.

32. *Id.*

33. 20 C.F.R. 404.1567, 416.967.

34. *Id.*

35. 20 C.F.R. §§ 404.1545, 416.945; RUSKELL, *supra* note 7, § 2:29 (an additional discussion of these activities and their relevance to the sequential evaluation).

36. 20 C.F.R. §§ 404.1520(f), 416.920(f) (2012).

37. A claimant is "insured" through a certain time for Title II purposes if he or she has worked sufficient quarters within a certain period of time close enough to the date of adjudication.

38. *Id.*

39. *Id.*; *see also* RUSKELL, *supra* note 7, § 2:29; Chaparro v. Bowen, 850 F.2d 1008, 1010 (5th Cir. 1987).

40. RUSKELL, *supra* note 7, § 2:7.

Step five asks, "Does the claimant's impairment(s) prevent the performance of other work which exists in significant numbers in the national economy?"[41] In making this determination, the ALJ considers the individual's age, education, and work experience to decide if there are a sufficient number of jobs in the national economy the claimant can perform on a sustained basis.[42]

The ALJ may be aided in this step, as he was in step four, by a vocational expert[43] who testifies about the types and numbers of jobs available to the claimant in light of the RFC determined by the ALJ. The ALJ may give several RFC hypotheticals to the expert to determine which jobs are available, if any, in light of several RFCs. The claimant, through legal counsel or qualified representative,[44] may also propose questions about those jobs and their own RFC hypotheticals to the vocational expert. The vocational expert is aided in his determinations by referring to the *Dictionary of Occupational Titles*, and the ALJ is aided in his deliberations by referring to a medical vocational guideline, or the Grids, found in Appendix 2 to Subpart P in Regulations Number 4. The Grids consist of tables organized according to exertional levels of work (i.e., "Sedentary"—lift no more than ten pounds and stand no more than two hours in an eight-hour day[45]; "Light"—lift a maximum of twenty pounds and stand six hours a day; "Medium"—lift up to fifty pounds and stand six hours a day; "Heavy"—lift no more than a hundred pounds and stand six hours; and "Very Heavy"—lift over one hundred pounds and stand six hours in a day).[46]

For example, if the vocational expert testifies that the claimant can perform only sedentary jobs, if the claimant is fifty-five-years-old, uneducated, and has done only unskilled work,[47] and if the claimant has degenerative disk disease so severely that he cannot lift more than ten pounds and stand no more than two hours in an eight-hour day, then the ALJ is ordinarily required to find that the claimant is disabled due to the definitions set out in the Grid tables. But if the expert testifies that the claimant can do medium work, the Grids ordinarily require a finding of "not-disabled." There are exceptions to these rules, but those are not the subject of this Article.

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41. 20 C.F.R. §§ 404.1520(g), 416.920(g) (2012).

42. *Id.*

43. For a more complete discussion of the role of the vocational expert, the Grids, and other vocational aspects of the process, see RUSKELL, *supra* note 7, § 2:30 and 20 C.F.R. §§ 404.1561, 416.961 (2012).

44. Or a representative with experience in disability hearings and/or who understands basic aspects of the program, including the five-step evaluation. A representative's competence is determined by the ALJ, and this decision is also reviewable.

45. Sedentary is defined as sitting six hours in an eight-hour day and occasionally lifting objects no more than ten pounds. Ripley v. Chater, 67 F.3d 552, 557 n.25 (5th Cir. 1995).

46. *See* RUSKELL, *supra* note 7, § 2:30(e); 20 C.F.R. §§ 404.1567, 416.967 (2012).

47. For a full discussion of the vocational factors relevant to unskilled, semi-skilled, and skilled work, as well as transferability of skills, see RUSKELL, *supra* note 7, § 2:30(f) and 20 C.F.R. §§ 404.1568(a)–(c),416.968(a)–(c), 404.1568(d)(3), 416.968(d)(3) (2012) (transferability of skills).

However, the ALJ's art, skill, and judgment is largely demonstrated by his or her capacity to accurately determine the claimant's RFC in light of the medical evidence and other evidence in the (usually electronic) court file. Indeed, this very abstract determination, although well-guided by regulations, agency rulings,[48] and federal court decisions, is difficult enough to warrant a significant portion of the reversals of ALJs by the Appeals Council and federal courts. And this is where the thrust of this Article truly begins.

C. Defining the "Acceptable Medical Source" for Purposes of Determining Who is a Treating Physician, Psychiatrist, or Psychologist

The Social Security Administration pledges, through its regulations, that before it makes a disability determination, it will develop the claimant's complete medical history[49] for at least twelve months preceding the month the claimant files the application (or earlier in some cases), and that it will either make every reasonable effort to help the claimant obtain medical reports from his own medical sources or that it will take such other steps as become necessary, including holding consultative examinations, to thoroughly develop the medical record.[50] This involves obtaining evidence from various medical sources. Essentially, medical sources include both acceptable medical sources and any other health care providers who are not deemed acceptable medical sources in the regulations.[51] These may include nurse practitioners, licensed clinical social workers, chiropractors, therapists, and other similar sources.[52]

Acceptable medical sources include licensed physicians (M.D. or D.O.), licensed or certified psychologists, licensed optometrists, licensed podiatrists, and qualified speech-language pathologists.[53] Only these sources may establish the existence of a medically determinable physical or mental impairment, give medical opinions, and be considered a treating source whose medical opinion may be entitled to controlling weight.[54]

48. Relevant sources for agency rulings and policies include Social Security Rulings (SSR), a series of precedential decisions published under the authority of the SSA Commissioner; Acquiescence Rulings, which explain how the Agency will apply a holding by a U.S. Court of Appeals that varies with SSA policies; the Program Operations Manual System ("POMS"), for use in internal SSA guidance for employees; and HALLEX, the Commissioner's procedures for carrying out policies and for guidance in the processing and adjudication of claims within the Agency. These are not directly involved in the subject of this Article, although they occasionally come into play within the federal court decisions analyzed.

49. In addition to medical sources, other non-medical sources are considered by ALJs in determining disability, including teachers, counselors, social workers, spouses, parents, friends, relatives, employers, and coworkers. However, acceptable medical sources may carry the greatest weight in these hearings, a subject to be discussed at length later in this Article.

50. 20 C.F.R. §§ 404.1512(d), 416.912(d) (2012).

51. 20 C.F.R. §§ 404.1502, 416.902 (2012).

52. *Id.*

53. 20 C.F.R. §§ 404.1513(a), 416.914(a) (2012).

54. 20 C.F.R. §§ 404.1513(a), 1527(a)(2), 416.913(a), 927(a) (2012).

An ALJ is required to consider all medical sources in determining whether a claimant is disabled, but he or she may be required to give "controlling weight" to the treating source opinions on the nature and severity of the claimant's impairments,[55] though only if those opinions are both well-supported by medically accepted clinical and laboratory techniques[56] (e.g., mental status or physical exams, x-rays, or MRIs, respectively) and are not inconsistent with the other substantial evidence of record, such as other credible examining physician or state agency physician findings and opinions.[57] In other words, the treating source's opinion must be adopted by the ALJ in whole or in part where it is supported by the appropriate findings in the medical evidence record ("MER") and is not substantially inconsistent with other credible medical opinions.

When an ALJ declines to give a treating physician's opinion controlling weight, his or her other options are (1) to give the treating physician's opinion some weight, or (2) to reject it entirely in favor of another medical opinion. However, these options may not be exercised without undergoing a regulation-mandated analysis. This analysis, when it must be made, and how extensive it must be, is the crux of this Article.

III. 20 C.F.R. SECTIONS 404.1527(d)2 & 416.927(d)2: WEIGHING TREATING MEDICAL OPINIONS

Agency regulations are specific about how an ALJ must analyze medical source opinions and medical evidence in general. The factors in the analysis address how to weigh treating, examining, and non-examining physicians' opinions, as well as those of specialists versus non-specialists.[58] These factors are found at 20 C.F.R. §§ 404.1527(d)(3-6) and 416.927(d)(3-6). After promising to evaluate every medical opinion submitted in the record, the regulations describe how agency adjudicators will weigh such evidence by considering the following factors:

(1) Examining relationship;[59]

(2) Treatment relationship;[60]

55. 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2); SSR 96-2p, 1996 WL 374188 (July 2, 1996).

56. Supporting documentation is essential because a conclusory statement that a claimant is disabled is not considered to be a medical opinion as contemplated by the regulations, but is instead an opinion on the ultimate determination that is reserved to the Commissioner (through the ALJ). Frank v. Barnhart, 326 F.3d 618, 620 (5th Cir. 2003).

57. *Id.*; *see also* Martinez v. Chater, 64 F.3d 172, 176 (5th Cir. 1995) (citing 20 C.F.R. § 404.1527(d)(2) (2012)).

58. 20 C.F.R. §§ 404.1527(d)(3)–(6), 416.927(d)(3)–(6) (2012).

59. The agency promises to give more weight to an examining source's opinion than to a non-examining source's opinion, e.g., a state agency physician who has reviewed the claimant's MER.

60. The agency promises to give more weight to treating source opinions as long as they are well supported by medically acceptable evidence and are not inconsistent with other substantial evidence in the case, in which case they will be given controlling weight. If not, all of these factors will be applied to determine the weight given to that opinion. Good reasons will be given for the weight accorded to the treating physician's opinion, including a consideration of the nature and extent of treatment, the length of treatment, and the frequency of examination.

(3) Support-Ability;[61]

(4) Consistency;[62]

(5) Specialization;[63] and

(6) Other Factors.[64]

In *Newton v. Apfel*,[65] the Fifth Circuit cited the factors in the following manner:

(1) the physician's length of treatment of the claimant;

(2) the physician's frequency of examination;

(3) the nature and extent of the treatment relationship;

(4) the support of the physician's opinion afforded by the medical evidence in the record;

(5) the consistency of the opinion with the record as a whole; and

(6) the specialization of the treating physician.

The regulations themselves actually includes one more factor—"any factors . . . which tend to support or contradict the opinion."[66] As we shall see subsequently, these "other" factors include, but are not limited to, the claimant's testimony, statements by non-medical sources such as family members, statements by employers, evidence of pain or the lack thereof, medical side effects, and the like.

Thus, we have come to the *raison d'etre* of this Article: the sufficiency of an ALJ's determination of disability often hinges on the weight given to the treating source's opinion versus the weight given to other treating, examining, and non-examining physicians' opinions.[67] At the heart of this analysis lies an issue of whether or not the ALJ has given proper weight to these opinions.

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61. The more supportable the medical source's opinion, the more weight it will be given.

62. Consistency with the record as a whole is the gist of this factor.

63. The agency generally gives more weight to specialists in their fields than to those who are not.

64. These other factors are discussed later in this Article.

65. 209 F.3d 448, 456 (5th Cir. 2000).

66. 20 C.F.R § 404.1527(d)(6) (2012).

67. Non-medical sources are also considered, including (but not limited to) family members, employers, nurse practitioners, therapists, etc., as explained in detail in SSR 06-3p, 2006 WL 2329939 (Aug. 9, 2006).

This is because the Commissioner's (i.e., ALJ's and AC's) denial of Social Security benefits is reviewed to ascertain whether (1) the final decision is supported by substantial evidence, and (2) whether the Commissioner (ALJ) used the proper legal standards to evaluate the evidence.[68] If the Commissioner's (ALJ's) findings are indeed supported by substantial evidence, they must be affirmed. "Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion. It is more than a mere scintilla and less than a preponderance.[69] The appellate court may not reweigh the evidence of record, retry the case de novo, or substitute its judgment for the Commissioner's (i.e., ALJs or affirming AC's), even if the evidence weighs against the Commissioner's decision or the appellate court would have ruled differently.[70]

The Fifth Circuit's landmark decision discussing these issues was *Newton v. Apfel*, wherein the court specifically ruled that:

> . . . absent reliable medical evidence from a treating or examining physician controverting the claimant's treating specialist, an ALJ may reject the opinion of the treating physician *only* if the ALJ performs a detailed analysis of the treating physician's views under the criteria set forth in 20 C.F.R. Section 404.1527(d)(2).[71]

Prior to *Newton*, the Fifth Circuit had largely engaged in a common sense analysis[72] of "good cause" to reject a treating medical source's opinion, without specifically requiring the multi-factor analysis mandated by the regulations. *Newton* would require this analysis, thus earning its status as a landmark decision. In light of this ruling and applicable Social Security Administration regulations and rulings, we must examine the aforesaid analysis in hope of offering worthwhile guidance to both the ALJs making these decisions and to the attorneys, representatives, and claimants challenging those decisions.

68. *See Newton*, 209 F.3d at 452, Brown v. Apfel, 192 F.3d 492, 496 (5th Cir. 1999); Martinez v. Chater, 64 F.3d 172, 173 (5th Cir. 1995).

69. *Id.* (quoting Ripley v. Chater, 67 F.3d 552, 555 (5th Cir. 1995)).

70. *Id.* (citing *Brown*, 192 F.3d at 496).

71. *Id.* at 453. The *Newton* court cited only the Title II provision of the regulations because the case at bar was a Title II case. However, the ruling also applies equally to Title XVI cases as per the mirror provision of Title XVI, 20 C.F.R. § 927(d)(2) (2012).

72. *See* Scott v. Heckler, 770 F.2d 482, 485 (5th Cir. 1985) (the ALJ was reversed for rejecting the treating doctor's opinion for lack of supporting clinical and laboratory findings where such evidence did exist, including the doctor's notes of record, without resort to a full blown *Newton*-mandated analysis).

IV. INTERPRETATIONS BY THE FIFTH CIRCUIT AND ITS PROGENY

A. Weighing Treating Source Versus Non-Treating, Non-Examining Source Opinions

There are times when ALJs review treating source opinions that are uncontroverted by other treating and examining sources, but *are* controverted by non-treating and non-examining sources. These usually come in the form of opinions of medical experts ("ME") called by ALJs (and rarely by claimants) to testify at the hearing, by interrogatory, or by opinions from state agency physicians or psychologists, any of which have examined the claimant's entire medical record (or at least the relevant aspects of the record vis-à-vis the medical expert's specialty) and have offered opinions about the claimant's disability or lack thereof.[73] The question then arises, "What weight must the ALJ give to treating medical sources in these situations?"

B. Versus Testifying Medical Experts

The *Newton* case specifically considered this issue. The *Newton* claimant applied for Title II disability insurance benefits due to alleged disabling effects of her SLE (lupus) impairment.[74] This caused chest pain and swelling in her feet and knees, which made it difficult and painful for her to stand, thus preventing her from performing her past work.[75] The ALJ found that she could nevertheless perform sedentary work and denied her claim.[76] By doing so, the ALJ rejected the treating physician's opinion that the claimant could do less than sedentary work (and was thus fully disabled pursuant to vocational factors established by the vocational expert) and gave substantial weight to the testifying ME, who asserted that he did not find evidence in the MER that indicated that the claimant's SLE flare-ups would prevent her from sitting six to eight hours in a day (light work).[77] The Appeals Council affirmed the ALJ's decision, as did the district court, and the claimant appealed to the Fifth Circuit.[78]

The *Newton* court began by stating that the ALJ had the sole responsibility for determining whether the claimant was disabled, that ALJs are free to reject the opinion of any physician[79] where the evidence supports a

73. State agency medical sources review the entire record, although there may be additional MERs submitted by the claimant or obtained by the ALJ subsequent to that review. The ODAR offices generally request the state agencies to send the entire medical record to reviewing independent medical experts; however, due to cost factors, some state agencies will only forward a limited number of exhibits to the ME. In that case, the best practice for ODAR offices is to send the exhibits most relevant to the ME's specialty (i.e., the MER related to mental treatment to the psychiatrist ME). Some reviewing courts in certain locations are apparently unaware of these cost-related limitations in sending the MER to the ME.

74. *Newton*, 209 F.3d at 451.

75. *Id.* at 452.

76. *Id.* at 454–55.

77. *Id.* at 453–54.

78. *Id.* at 455.

79. The court noted that the treating physician was a rheumatologist, a specialist concerning the claimant's impairment and that the ME was not a specialist; as is the case with all MEs, he had not

contrary conclusion, and that ALJs are free to assign little or no weight to the treating physician's opinion for good cause shown.[80] "Good cause" was then defined as a showing that the treating physician's evidence was either (1) conclusory, (2) unsupported by medically acceptable clinical, laboratory or diagnostic techniques, or (3) was otherwise unsupported by the evidence.[81]

However, the court continued, the ALJ must give good reasons in support of the weight accorded to a treating source's opinion by listing and analyzing the factors contained in 20 C.F.R. § 404.1527(d)(2-6).[82] The court concluded that the ALJ "failed to perform this analysis, which should be conducted on remand."[83]

The court then addressed the issue of the weight accorded to the ME after observing that the "ALJ expressly relied for her findings on the testimony of the [ME], and her own disbelief of the claimant's testimony.[84] The court found that the ME's opinion failed to aver that the claimant's treating opinion was conclusory or otherwise contradicted by the MER.[85] The court further noted that the ME's opinion was itself conclusory and unsupported by his own testimony, that the ME did not consider the effects of the claimant's medication's side effects on the claimant's functioning, and that the ME did not review all relevant medical records before offering his opinion.[86] For these reasons, the court declared that the ME's testimony was insufficient to provide the substantial evidence necessary for the ALJ to discard the treating physician's opinion and substitute it with that of the ME.[87]

"This is not a case," the *Newton* court stated, "where there is competing first-hand medical evidence"[88] and the ALJ finds as fact that the other doctor's opinion is more well-founded than that of the treating physician.[89] Nor did that case involve an ALJ's weighing of the claimant's treating physician's opinion against those of other treating or examining physicians.[90] The court concluded that the ALJ rejected the treating source's opinion based only on that of a non-specialty, non-treating, non-examining ME,

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personally examined the claimant, but only the MER. *Id.* at 456. The court later declared that the opinion of a specialist is generally accorded greater weight than a non-specialist. *Id.* at 455 (citing Paul v. Shalala, 29 F.3d 208, 211 (5th Cir. 1994)). However, this factor was not decisive in and of itself as to the determination of the faulty analysis by the ALJ regarding the weight given to the treating physician. *Id.* at 457.

80. *Id.* at 455–56; *see, e.g.*, Greenspan v. Shalala, 38 F.3d 232, 237 (5th Cir. 1994).); *Paul*, 29 F.3d at 211.

81. *Newton*, 209 F.3d at 456 (citing *Greenspan*, 38 F.3d at 237; *Paul*, 29 F.3d at 211; Brown v. Apfel, 192 F.3d 492, 500 (5th Cir. 1999)).

82. *Id.* at 455–56.

83. *Id.*

84. *Id.*

85. *Id.* at 457.

86. *Id.*

87. *Id.*

88. Or competing opinions from other treating or examining physicians.

89. *Id.* at 458 (citing Spellman v. Shalala, 1 F.3d 357 (5th Cir. 1993)).

90. *Id.* (citing Prosch v. Apfel, 201 F.3d 1010 (8th Cir. 2000)).

and thus the case had to be remanded for proper analysis and determination.[91]

From this ruling, we may draw several conclusions. First, when there is a treating physician's opinion in the MER, the ALJ must consider it and must give it controlling weight if it is properly supported by medically acceptable clinical, diagnostic, and laboratory findings and if it is not inconsistent with other credible MERs. However, the ALJ may reject a treating physician's opinion if good cause exists in the form of (1) sufficient competing medical evidence or (2) a conclusory and unsupported treating source opinion. In addition, even assuming the possibility of good cause, where the only controverting evidence comes from a non-examining medical source, the ALJ is not free to reject a medically supported treating opinion without undergoing the six-factor analysis contained in 20 C.F.R. §§ 404.1527(d)(2)–(6) and 416.927(d)(2)–(6). Furthermore, if the non-treating source's opinion, upon which the ALJ relies, is itself unsupported and inconsistent with the credible medical evidence, good cause will not be found to exist. Finally, as will become clearer later, the ALJ should apply the multi-factor analysis to all medical source opinions because it is the best basis for determining how much weight to give each opinion.[92] This is especially true if the ALJ is considering rejecting a treating source opinion in favor of another opinion.

C. Versus Reports from State Agency Reviewing Physicians, Psychiatrists, and Psychologists

At times, ALJs will reject an alleged treating source's opinion in favor of a non-treating, non-examining, state agency reviewing physician's or psychologist's opinion. This may be upheld in two specific situations.[93]

The first is when the medical source alleged to be a claimant's treating source is not an acceptable medical source. In such a case, the ALJ may reject that opinion in favor of a non-treating, non-examining physician without strictly utilizing the six-factor analysis. This occurred in *Crisman v. Astrue*, where Magistrate Judge Allan Alexander considered a Title XVI case in which the claimant alleged disability due to dizziness, a chemical

91. *Id.* The court also considered another key issue: whether the ALJ should have re-contacted the claimant's treating physician for clarification or supplementation of his report. *Id.* at 457–458. In cases where the report contains conflicts or ambiguities, lacks essential information, or appears not to be based on medically acceptable clinical, laboratory, and diagnostic techniques, the ALJ has the responsibility of contacting the treating physician. *See* Schaal v. Apfel, 134 F.3d 496, 505 (2d Cir. 1998). However, this regulation has been modified to state that, in such situations, the ALJ need not always contact the treating source first if sufficient information may be gained otherwise. *See* 20 C.F.R. §§ 404.1512, 416.912 (2012).

92. As required by 20 C.F.R. §§ 404.1529(3)(f)); 416.927(3)(f) (2012).

93. Essentially, these two situations involve an appropriate denial of weight to the treating physician's opinion because little weight is ordinarily accorded a non-treating, non-examining opinion that contradicts a treating source opinion. *See* Lowery v. Astrue, No. 1:09cv427-LG-RHW, 2010 U.S. Dist. LEXIS 120596140596, at *15 (S.D. Miss. Dec. 21, 2010) (the magistrate judge remanded the case because the ALJ rejected the treating source's opinion in favor of a contradictory and unsupported non-examining DDS physician's opinion).

imbalance, anxiety, hearing loss, and depression.[94] The ALJ ruled against the claimant at step five, finding work the claimant could perform despite her combination of impairments.[95] In so doing, the ALJ rejected the alleged treating source opinion on grounds that a therapist was not an acceptable medical source and thus could not be a treating source who could offer a diagnosis or an opinion warranting controlling weight, per 20 C.F.R. § 416.913(a) and SSR 06-03p.[96] The ALJ further gave more weight to two reviewing state agency psychologists' opinions that the claimant was not disabled than to the therapist who had found her disabled, finding that the psychologists' opinions were more consistent with both the claimant's testimony and the treatment notes from the therapist's clinic, Communicare.[97] Because the ALJ considered all the evidence, properly refused to give controlling weight to the therapist's opinion in light of the acceptable medical source regulation, and gave sound reasons for giving greater weight to the state agency psychologists' opinions, Judge Alexander affirmed both the ALJ's decision and the subsequent affirmation by the Appeals Council.[98] Judge Alexander added that, where substantial evidence supports a decision that a claimant is not disabled, the court can only review whether the ALJ applied the proper legal standards and conducted the proceedings "in conformity with applicable statues and regulations.[99]

The Fifth Circuit has continuously allowed an ALJ to give greater weight to a non-treating, non-examining physician than to the claimant's alleged treating source.[100] The source in *Hernandez* was viewed based on Hernandez's testimony as a therapist and not as a medically accepted medical source and thus was not entitled to controlling weight.[101] In *Thibodeaux*, the alleged treating source was a psychiatrist who occasionally examined the claimant only for medication management; the ALJ held the psychiatrist to be merely an examining physician.[102] Notably, in both cases, the court only required the ALJ to give a reasonable explanation of why he chose the opinion of one non-treating physician over the other, and the court did not require the ALJ to specifically consider the six *Newton* factors set out in 20 C.F.R. §§ 404.1527(d)(2)–(6) and 416.927(d)(2)–(6), as

94. No. 2:09CV115-SAA, 2010 U.S. Dist. LEXIS 60888, at *2 (N.D. Miss. June 17, 2010); *see also* Oddo v. Astrue, No. 1:09CV323-LG-RHW, 2010 U.S. Dist. LEXIS 105978 at *8–10 (S.D. Miss. Oct. 4, 2010) (District Judge Louis Guirola held 1) that an alleged treating doctor was merely an examining physician who only examined the claimant once and 2) that the ALJ properly gave more weight to the opinion of a state agency physician because the latter opinion was based on the claimant's medical treatment records while the former was based merely upon the claimant's subjective complaints. The ALJ made a choice between conflicting opinions, neither being a treating source opinion, and gave a reasonable explanation as to why he gave more weight to one over the other. Accordingly, his findings were affirmed).

95. *Crisman*, 2010 U.S. Dist. LEXIS 60888, at *7.

96. *Id.* at *15.

97. *Id.* at *13.

98. *Id.* at *18.

99. *Id.* at *8–9 (citing Hernandez v. Heckler, 704 F.2d 857, 859 (5th Cir. 1983)).

100. *See, e.g.*, *id.* at 857; Thibodeaux v. Astrue, 324 F. App'x 440 (5th Cir. 2009) (an unpublished opinion citing *Newton* in support of its holding).

101. 704 F.2d at 860–61.

102. 324 F. App'x at 442–43.

there was no treating physician opinion of record, the rejection of which warranted the aforesaid analysis.[103]

A second situation when an ALJ may reject the alleged treating source's opinion in favor of a state agency reviewing physician's opinion is when the treating source's opinion does not warrant controlling weight and may be rejected in whole or in part on its own lack of merit. In *Reid v. Astrue*, Magistrate Judge Linda Anderson encountered a situation where the claimant alleged disability under Title II and Title XVI due to sacroiliac joint dysfunction and arthritis.[104] The ALJ had denied the claimant's claims and the Appeals Council affirmed the denial.[105] The claimant appealed to the U.S. district court, where the appeal was heard by Judge Anderson.[106]

The ALJ had determined that the claimant's two treating physicians' opinions were not entitled to controlling weight and accorded them less weight than the state agency reviewing physician's opinion.[107] Noting that if substantial evidence supports the ALJ's decision, the court "could not reweigh the evidence, try the case de novo, or substitute its judgment for that of the ALJ even if the court finds evidence that preponderates against the ALJ's decision,"[108] Judge Anderson affirmed the ALJ's decision and the subsequent Appeals Council affirmation, stating that the ALJ had good cause to assign reduced weight to the treating physicians' opinions.[109]

The ALJ properly gave one treating source opinion less weight (1) because the bald opinion that the claimant was "100% disabled" was an opinion on the ultimate issue in controversy, a determination reserved to the Commissioner (through the ALJ), and (2) because the opinion was based on the alleged fact that the claimant was accorded special accommodations at the workplace, a fact clearly false in light of the former employer's testimony.[110] The second treating physician's opinion was appropriately given less weight because it was conclusory and based upon subjective complaints and MRI studies, which, rather than demonstrating the existence of an impairment, resulted in normal findings.[111] Judge Anderson found these explanations to constitute the good cause necessary to affirm the ALJ's (and AC's) decision.[112]

However, ALJs and practitioners are cautioned that in circumstances where the opinions of state agencies are pitted against those of treating

103. *Id.*; *Hernandez*, 704 F.2d at 860–61.

104. No. 3:10CV237 WHB-LRA, 2011 U.S. Dist. LEXIS 102323, at *2 (S.D. Miss. Aug. 15, 2011).

105. *Id.* at *1–2.

106. *Id.* at *2.

107. *Id.* at *20–23.

108. *Id.* at *11 (citing Bowling v. Shalala, 36 F.3d 431, 434 (5th Cir. 1994)).

109. *Id.* at *23.

110. *Id.* at *20–21.

111. *Id.* at *22–23.

112. *Id.* at *23.

physicians, the latter should ordinarily be accorded greater weight. In *Patterson v. Commissioner of the Social Security Administration*, Judge Alexander considered a case where the claimant had alleged disability due to heart problems and the ALJ had rejected the treating source's opinion in favor of a non-examining state agency reviewing physician's opinion.[113] In a conclusory fashion, the ALJ opined that the treating physician's opinion did not warrant controlling or even considerable weight because it was not supported by his treatment and examining notes and was "simply too restrictive to be realistic."[114]

Noting that the ALJ failed to apply the *Newton* six-factor analysis required by SSA regulations before declining to give the treating physician's opinion controlling weight, Judge Alexander ruled that the ALJ's explanation did not suffice as good cause for rejecting the treating source's opinion.[115] Furthermore, the court found that the opinion of the non-examining state agency physician was not entitled to the same weight as that of the treating physician because it was rendered years earlier than that of the treating physician and because treating physicians have a "unique perspective regarding the [claimant's] . . . limitations"[116] that doctors who "merely review[ ] medical files and perform[ ] no examination" generally do not.[117] For those reasons, the court concluded, non-examining physician opinions should generally be accorded less weight.[118]

V. Treating Source Opinion Is the Only Opinion in the Record

As is apparent in the above Part, the opinions of treating physicians are generally accorded more weight than those of non-treating, non-examining physicians in SSA regulations and in federal courts. Treating source opinions are truly the Holy Grail of medical source opinions in the Social Security disability context. So, the question naturally arises, if non-treating, non-examining medical source opinions are usually insufficient to rebut or discard treating source opinions,[119] is the ALJ bound to accept a treating source's opinion when it is the only opinion found in the medical record?

The answer is "no," but in accord with matters discussed above, the ALJ is still required to undergo the analysis mandated in 20 C.F.R. §§ 404.1527 and 416.927 or risk almost certain reversal. The Fifth Circuit and Mississippi district courts have encountered this issue on a frequent basis since *Newton* was decided and have since offered many suggestions on what is and is not sufficient good cause for rejecting the treating source's opinion in whole or in part under this circumstance.

113. No. 2:10CV00042-SAA, 2010 U.S. Dist. LEXIS 134066, at *9–10 (N.D. Miss. Dec. 17, 2010).
114. *Id.* at *9.
115. *Id.* at *13–14.
116. *Id.* at *16.
117. *Id.* at *15–16 (quoting Filocomo v. Chater, 944 F. Supp. 165, 170 (E.D.N.Y. 1996)).
118. *Id.*
119. Except in the two rare examples given above.

Two relatively recent[120] Fifth Circuit cases clearly demonstrate the type of evidence that will not suffice as good cause to reject a treating source's opinion.

In *Loza v. Apfel*, a forty-three-year-old claimant with a GED and prior military service had been found disabled by the Veteran's Administration (VA) and had applied for Social Security disability benefits (Title II).[121] The ALJ denied the claim, rejecting the opinion of the VA doctor who had determined that the claimant was disabled due to severe impairments of trauma-induced chronic brain syndrome, depression, PTSD, and after-effects of gunshot wounds.[122] Another source, known only as "Johnson," related that the neurological exams did not support the claimant's allegations and that the claimant was likely motivated by secondary gain.[123] The VA records were unclear as to whether Johnson was a nurse, psychiatrist, or medical technician, and the court ruled that this source's "findings" were unsupported and contradictory to both the findings of all other treating doctors and the statements given by the claimant's family members, who were all in agreement that the claimant suffered disabling effects because of his impairments.[124]

Beginning by conceding that the VA's determination of 100% disability was not binding on the ALJ,[125] the court nevertheless declared that the ALJ was not at liberty to reject the VA treating doctor's opinion that the claimant's impairments were severe and disabling without a full explanation of the factors provided in 20 C.F.R. §§ 404.1527(d) and 416.927(d).[126] Having failed to do so, the court concluded, no good cause existed for rejecting the treating doctor's opinion, and the ALJ committed reversible error.[127]

While *Loza* involved severity of impairments issues, *Audler v. Astrue* examined listing of impairment issues. There, the ALJ rejected the treating

120. An older, pre-*Newton* case, Scott v. Heckler, 770 F.2d 482, 486 (5th Cir. 1985), held simply that, where the ALJ rejected the treating doctor's opinion because he found "no clinical or laboratory findings" to support that opinion, and where the medical record was brimming with such evidence and no other treating, examining or reviewing physician opinions of record contradicted that opinion, the ALJ lacked good cause to reject the treating opinion. Because this was a pre-*Newton* case, the court merely focused upon the good cause issue and did not address the multi-factor analysis later required in *Newton*.

121. 219 F.3d 378, 380 (5th Cir. 2000).

122. *Id.*

123. *Id.* at 383. "Secondary gain" factors were recognized by the court as those noted in *Stedman's Medical Dictionary* 698 (24th ed. 1982): "interpersonal or social advantages, such as attention, assistance or sympathy that a person gains directly from having an organic illness." *Id.* at n.8. Today, many psychologists performing SSA consultative examinations refer to "secondary gain" as fraudulent attempts to acquire Social Security benefits by malingering, exaggerating, or giving less than full efforts during consultative examinations.

124. *Id.* at 383–84.

125. *Id.* at 394–95. *See also* SSR 96-10p, 1996 WL 743753 (Dec. 30, 1996); Latham v. Shalala, 36 F.3d 482, 483 (5th Cir. 1994) (although not binding, VA opinions should be considered and not entirely disregarded by the ALJ, who should apply the multi-factored analysis mandated for consideration of all medical evidence in 20 C.F.R. §§ 404.1927(d) and 416.927(d) to these opinions).

126. *Id.* at 395 (citing Newton v. Apfel, 209 F.3d 448, 455–56 (5th Cir. 2000); Scott v. Heckler, 770 F.2d 482, 485 (5th Cir. 1985); Greenspan v. Shalala, 38 F.3d 232, 237 (5th Cir. 1994)).

127. *Loza*, 219 F.3d at 395.

physicians' opinions that the claimant met Listing 1.04—the musculoskeletal listing.[128] Where the treating orthopedic surgeon buttressed his "disabled" opinion with a clinical examination replete with symptoms of nerve root compression, including positive straight leg raising, limited spinal range of motion, and motor and sensory loss, the court explained that the ALJ was not free to reject that opinion without a sufficient explanation to the contrary, arrived at through the *Newton* factor analysis.[129]

Audler and *Loza* involved the ALJ's failure to offer any mandated analysis to support a rejection of the treating physicians' opinions. However, in two other cases where the ALJ did offer such an analysis, a court found those analyses sufficient to demonstrate good cause for the rejection of treating source opinions.

In *Moore v. Astrue*, Magistrate Judge Alexander affirmed an ALJ's rejection of a treating doctor's opinion where there were no other medical opinions of record because (1) the treating doctor only provided routine medical care on two occasions since the claimant's alleged onset; (2) the doctor's opinion was related to the claimant's depression, a matter outside his specialty; (3) the doctor provided no notes in support of his conclusory opinion; and (4) the doctor had previously penned a letter stating that the claimant's examinations "did not reveal any severe physical deficiencies."[130]

Judge Alexander declared that "[t]he ALJ is required by federal regulation to consider six factors when determining" whether to give the treating physician's opinion controlling weight.[131] The ALJ did consider these factors, the court noted, and despite the treating doctor's longitudinal care, good cause existed to reject the opinion, not the least of which was that the doctor failed to submit any notes supporting his conclusions.[132]

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128. 501 F.3d 446, 448–49 (5th Cir. 2007). Musculoskeletal impairments are some of the most frequently alleged impairments, as human spines have not evolved sufficiently to keep up with our sitting and standing activities since we first began to walk upright. This particular listing considers tests such as x-rays, MRIs, and physical examinations that demonstrate herniated disks, arthritis and other similar impairments that cause nerve root impingement, extremity sensory, motor, and reflex loss, and concordant disabling pain, loss of range of motion, and inhibited functions such as standing, walking, and sitting. For those who find the various musculoskeletal impairments difficult to distinguish, *see* Panel on Musculoskeletal Disorders & the Workplace, Nat'l Research Council & Inst. of Med., *Musculoskeletal Disorders and the Workplace: Low Back Pain and Upper Extremities* 19 (2001), which defines the impairments as: "Radiculopathy is a disease of the roots of the spinal nerves. Spondylosis is the slippage of a vertebra that lies behind the spinal cord. Spondylolisthesis is the slippage of a vertebra on the vertebra below. Spinal stenosis is a narrowing of the spinal canal, usually due to osteoarthritis and sometimes with pressure on the nerve root." *See also* Anthony M. Gawienowski & David, *Oh, My Aching Back: Establishing Presumptively Disabling Low Back Impairments in Social Security Determinations,* 59 J. Mo. B. 133 (2003) for a thorough explanation of the factors involved in offering proof sufficient to meet listing 1.04.

129. *Audler*, 501 F.3d at 448–49.

130. No. 1:09-CV-306-SA-SAA, 2010 U.S. Dist. LEXIS 72272, at *6–7 (S.D. Miss. July 1, 2010). The claimant was forty-six years old, had a college degree, and had past relevant work as a band director. Among his allegations were depression, obesity, diabetes, hypertension, and sleep apnea. *Id.* at *2.

131. *Id.* at *8–9.

132. *Id.* at *9.

In *Coleman v. Astrue*,[133] where a fifty-one-year-old high school graduate and former manager of a moving and storage company alleged disability for degenerative disk disease, humerus fracture, chronic pain[134] and depression, the ALJ denied the claim and rejected the treating physician's opinion that the claimant was disabled due to pain. Noting that "the ALJ did not specifically enumerate all the six factors followed by an explanation," Judge Alexander nevertheless found that there was "substantial evidence to support the ALJ's conclusion not to give controlling weight to [the claimant's] treating physician's opinions."[135] The court observed that the ALJ thoroughly discussed the doctor's lack of substantial longitudinal care of the claimant, the doctor's very limited examinations of the claimant, and the lack of objective findings in the doctor's notes on which the disabling opinion was based.[136] Judge Alexander also stated that the examinations discussed by the ALJ revealed that, despite allegations of severe pain, the claimant had a normal gait and no numbness, tingling, atrophy, swelling, weakness, or muscle loss.[137] In other words, despite a lack of specific and literal application of the six *Newton* factors, the court deemed the ALJ's analysis of those factors sufficient to demonstrate good cause in light of his thorough discussion of all the relevant factors included in the *Newton* analysis.

In conclusion, the post-*Newton* world of the Fifth Circuit shows that in order to reject a treating source's opinion where there are no other medical opinions of record, the ALJ must (1) offer a thorough and supportable analysis of the treating physician's opinion before rejecting it in whole or in part, and (2) in so doing, must utilize the six regulation-mandated and *Newton*-mandated factors (whether specifically listing them or not) in the analysis. Additionally, the extent to which the ALJ may offer a less than sparkling *Newton* analysis will likely depend upon how unsupported and conclusory the treating doctor's opinion may be. In other words, if the treating doctor's opinion is supported in the medical record and is not conclusory, a detailed analysis will likely be in order; if not, the ALJ's analysis may be more brief if it succinctly hits enough points to demonstrate good cause for rejecting the opinion.

However, it should be noted that as far as my research reveals, the Fifth Circuit has never directly addressed the issue of whether ALJs must strictly cite all six factors and individually address them where no other opinion exists or if they may substantially do so in order to properly reject the treating physician's opinion. Until that decision, Mississippi ALJs should substantially, if not strictly, resort to the six-factor *Newton* analysis

133. No. 1:08-CV-230-SAA, 2010 U.S. Dist. LEXIS 22899, at*10 (S.D. Miss. Mar. 11, 2010).

134. Pain is a significant issue in disability hearings. For a discussion of evaluations of subjective complaints of pain in those hearings, see 20.C.F.R. §§ 404.1529 and 416.929 (2012); Hollis v. Bowen, 857 F.2d 1378, 1384 (5th Cir. 1998); and Adams v. Bowen, 833 F.3d 509, 512 (5th Cir. 1987).

135. *Coleman*, 2010 U.S. Dist. LEXIS 22899, at *13.

136. *Id.* at *13–14.

137. *Id.* at *10.

to the extent that circumstances, reason, common sense, and limited time[138] allow.

VI. Treating Versus Other Treating and Examining Physicians' Opinions

While opinions of reviewing, non-treating, and non-examining physicians are generally not accorded as much weight as those of treating physicians, this is not always the case with those of other examining physicians (treating or consultative examining physicians) whose opinions differ from that of the primary treating physician. However, as the following cases demonstrate, ALJs must still defer to treating source opinions unless they can demonstrate good cause for not doing so, though a precise *Newton* factor analysis will not be required if there are no contradictory opinions of record offered by examining physicians.

A. Consultative Examining Physicians, Psychiatrists, and Psychologists

After a disability petition has been filed but before the disability hearing on the petition, state agencies may order consultative examinations of the claimant by physicians and psychologists who are specialists in the fields relevant to the claimant's alleged impairments (e.g., internal medicine for diabetics, orthopedic exams for back pain sufferers, pediatric exams for children, psychiatric exams for the depressed, etc.). After the state agency denies the claim and the case transfers to the ODAR office for a hearing, the ALJ assigned to the case may order additional initial consultative exams[139] where the medical record is insufficient for an appropriate decision.[140] Quite often, the consultative examining ("CE") doctor's appraisal of the claimant's RFC differs substantially from that of the treating physician's, just as RFC opinions differ from other treating doctors in the medical record. We will first examine the analysis of weight given to the treating doctor when pitted against a competing opinion from a consultative examining physician.

Unlike pre-*Newton* cases relevant to non-treating, non-examining physicians, cases concerning consultative examining physician opinions versus treating doctor opinions are relevant to post-*Newton* inquiries. This is because those older cases applied common sense rules, replete with phrases such as "substantial evidence," "good cause," and "reasonable minds" to the analysis of weight to be given to treating physicians in this context.

138. ALJs are expected to prepare for, hold, and write opinions for (with the help of attorney writers) between 500 and 700 cases a year, in which they must consider a myriad of issues in every case, including, but by no means limited to, medical opinions, claimant credibility, pain, vocational factors, and further development of the record, to say nothing of the hundreds or thousands of pages of medical records to be reviewed in each case. As time consuming as these activities are, it stands to reason that appellate courts have good reason not to burden ALJs with strict requirements of every kind of analysis so long as reasonable analysis is offered sufficient to meet the ends of justice.

139. Or, the ALJ may order initial exams if there are none of record and if they are required for proper adjudication of the claim.

140. *See* 20 C.F.R. §§ 404, 416 (2012).

And as will become clear below, where treating physician opinions are weighed against other examining physician or psychologist opinions, a full *Newton* six-factor analysis is not ordinarily required.

The first of these pre-*Newton* cases is *Bradley v. Bowen*, where the claimant, a former machine operator and assistant office manager, alleged Title II disability for a back injury sustained on the job that led to back surgery, post-surgery pain, and substantial functional limitations.[141] The treating physician offered an opinion that the claimant was temporarily disabled and unable to walk, sit, stand, or lift more than five pounds.[142] A consultative examining orthopedic surgeon examined the claimant and opined that he could perform sedentary work—sit for two hours in a day, occasionally bend, lift five pounds, and push and pull twenty pounds.[143] A neurologist who examined the claimant at the treating physician's request found that despite some pain, the claimant suffered no muscle spasms and retained 100% of his strength.[144]

The ALJ accepted the opinion of the consultative examining orthopedic surgeon over that of the treating physician, and the court affirmed that finding.[145] The court cited prevailing law that, although the treating physician's opinion was generally entitled to more weight than that of an examining physician, an ALJ was free to reject the opinion of any physician when substantial evidence supported that choice.[146]

The Fifth Circuit offered more medical source opinion analysis in the subsequent case of *Martinez v. Chater*.[147] The *Martinez* court considered a treating doctor's opinion that the claimant suffered from arthritis and diabetes—an opinion buttressed by an X-ray report and alluded to by the treating doctor but not submitted in the record by the claimant. A CE physician's report indicated that the claimant suffered arthritis but had no functional limitations apart from occasional postural limits, and that the claimant had a history of non-insulin diabetes but suffered no end organ damage as a result. A ME reviewed the record and agreed with the consultative examining doctor.[148]

After the ALJ rejected the treating doctor's opinion in favor of the consultative examining doctor's, the claimant appealed and the court engaged in a four-prong consideration of (1) the objective medical facts, (2) the opinions of treating and examining physicians, (3) the claimants subjective evidence of pain and disability, and (4) the claimant's age, education, and work history.[149] The court's opinion, hung primarily upon fathoming

141. 809 F.2d 1054, 1055 (5th Cir. 1987).

142. *Id.*

143. *Id.*

144. *Id.* at 1055–56.

145. *Id.* at 1057.

146. *Id.* The court did not comment on what evidence sufficed as substantial.

147. 64 F.3d 172 (5th Cir. 1995).

148. *Id.* at 175.

149. The claimant was fifty-two, semi-illiterate, and a former machine sander and fruit picker (medium work). *Id.* at 174.

the contrary opinions, affirmed the ALJ, noting that the treating physician's opinion was both unsupported by any objective evidence such as X-rays or laboratory data and was also inconsistent with the findings of the CE and ME, which were based upon objective clinical test results.[150] The four matters considered by the *Martinez* court were later subsumed but expanded upon by the six *Newton* factors drawn from 20 C.F.R. § 404.1527(d).

Finally, in *Greenspan v. Shalala*, the court offered even more analysis where the ALJ rejected two treating physicians' opinions in favor of the opinions of several consultative examining physicians.[151] The claimant, a fifty-two-year-old, high-school graduate and former clothing sales manager, offered reports from his treating physicians that he suffered from an ecological immune deficiency illnesses that affected every part of his body, an atypical somatoform disorder,[152] and a histrionic personality disorder.[153] Several CE physicians and psychologists countered those assertions with reports that questioned the validity of "ecological medicine" and declared that the claimant suffered no mental impairments.[154]

The court began its analysis by agreeing with the claimant that established precedent held that "ordinarily the opinions, diagnoses, and medical evidence of a treating physician who is familiar with the claimant's injuries, treatments, and responses should be accorded considerable weight in determining disability."[155] However, the court continued, those opinions were far from conclusive, as the ALJ had the sole responsibility for determining disability status and ascertaining the credibility of both medical experts and lay witnesses, weighing their opinions accordingly.[156] The court noted that the ALJ "carefully considered, but ultimately rejected, the treating physicians' opinions that the claimant was disabled," in accordance with the SSA's regulatory promise in 20 C.F.R. § 404.1527 to weigh all medical evidence when the treating medical opinion was internally or externally inconsistent.[157] The court concluded that substantial evidence supported the ALJ's decision because the treating physicians' opinions were based upon dubious medical techniques, were conclusory, and were contradicted by their own notes and outside medical evidence (the CE reports).[158]

The foregoing pre-*Newton* cases provided some common sense guidance to ALJs for analysis of how much weight to give treating source opinions *vis-à-vis* other contradictory examining medical source opinions. Subsequently, the *Newton* case brought the Fifth Circuit more in line with

150. *Id.* at 175.

151. 38 F.3d 232 (5th Cir. 1994).

152. Somatoform disorder may be distinguished from malingering in that the latter involves knowingly false statements for secondary gain, while the former involves a mental condition that convinces the patient he suffers from impairments for which there is no objective evidentiary support.

153. *Id.* at 234.

154. *Id.* at 235.

155. *Id.* at 237 (citing Scott v. Heckler, 770 F.2d 482, 485 (5th Cir. 1985)).

156. *Id.* (citing 20 C.F.R. § 404.1527(c)(2)).

157. *Id.*

158. *Id.*

the relevant Social Security regulations, which the Fifth Circuit was bound to interpret faithfully. The following cases are recent post-*Newton* cases that applied the regulatory analysis specifically mandated by 20 C.F.R. §§ 404.1527(d) and 416.927(d) to the issue of weighing treating source opinions versus examining source opinions.

In *Thibodeaux v. Astrue*, an unpublished decision cited for the court's reasoning and not for its holding, the court upheld an ALJ's rejection of a treating psychiatrist's and treating therapist's opinions in favor of a CE neurologist's opinion because (1) the psychiatrist's treatment was not at a level commensurate with the alleged severity of disability, (2) the psychiatrist recommended that the claimant seek employment, (3) the psychiatrist's conclusory opinion that the claimant was disabled was a determination reserved to the Commissioner (ALJ), (4) the treating therapist was not an acceptable medical source, and thus the ALJ was not required to give that opinion deference, and (5) the CE neurologist contradicted both of those opinions with a report supported by objective evidence.[159]

Noting that the ALJ might have given the treating psychiatrist's opinion some weight rather than rejecting it entirely, the court declared that because there were two opposing reports from treating or examining doctors, the ALJ was free to choose between them so long as substantial evidence supported his decision.[160] More significantly, the court ruled that prior to rejecting the treating psychiatrist's opinion, the ALJ was "not required to apply the criteria set forth in 20 C.F.R. § 404.1527(d)(2)."[161] This was so, the court concluded, because (1) the examining neurologist's opinion constituted reliable medical evidence contradicting the treating psychiatrist's opinion, and (2) substantial evidence, such as the treating doctor's determination that the claimant should seek employment, supported the ALJ's finding and gave the ALJ good cause to reject the treating doctor's opinion.[162]

In *Bean v. Astrue*, Magistrate Judge Alexander ruled that an ALJ was correct in not giving controlling weight to a treating physician's opinion and that the ALJ properly gave that opinion less weight than the CE physician's opinion.[163] The ALJ agreed with the treating physician's assessment of how long the claimant[164] could sit (six hours in a day) but rejected the rest of the treating physician's opinion, instead choosing to adopt the CE's opinion as to how long the claimant could stand (five hours in a day), lift

159. 324 F. App'x 440 444–45 (5th Cir. 2009).

160. *Id.* at 443–44.

161. *Id.* at 445 (citing Newton v. Apfel, 209 F.3d 448, 453, 456 (5th Cir. 2000)).

162. *Id.*

163. No. 3:08CV75-SAA, 2010 U.S. Dist. LEXIS 12715, at *24–25 (N.D. Miss. Feb. 2, 2010).

164. The claimant was a forty-six year-old former seamstress alleging hypertension, anemia, arthritis, and obesity. *Id.* at *2. For a detailed explanation of how an ALJ should properly apply SSR 02-01p (2002), the ruling pertaining to obesity, whenever obesity is found to be a severe impairment, *see* Judge Alexander's excellent discussion in *Bean*, 2010 U.S. Dist. LEXIS 12715, at *12–13.

(ten pounds occasionally), and climb, balance, stoop, and crawl (occasionally[165]).[166] Judge Alexander held that the ALJ did not commit reversible error by failing to "expressly delineate each individual factor" of 20 C.F.R. §§ 404.1527 and 416.927,[167] finding that *Newton* requires remand when an ALJ rejects a treating physician's opinion either (1) in favor of a non-treating, non-examining physician's opinion, or (2) where there is no other opinion of record in the case.[168] However, when the ALJ fails to give the treating physician's opinion controlling weight and chooses another *examining* doctor's opinion over that of the treating physician's, he or she must only discuss such relevant factors as are necessary to provide substantial evidence for the decision—substantial enough to constitute good cause for affording the treating physician's opinion lesser weight.[169]

In support of her decision, Judge Alexander cited *Newton* and two pre-*Newton* cases: *Bradley v. Bowen* and *Martinez v. Chater*.[170] This demonstrates how certain pre-*Newton* cases offer considerable insight into the inherent, commonsensical approach required when an ALJ refuses to give controlling weight to a treating physician and gives that opinion less weight than that of an examining physician.

Nevertheless, our courts apparently take two approaches to this less-detailed treating versus examining opinion analysis. The first I will call the "non-delineation approach"; the second, the "less detail" rule.

Judge Alexander has repeatedly ruled that though an express delineation of the six *Newton* factors is not required, enough factors must be addressed to provide good cause for giving the treating physician's opinion less weight than that of another examining physician's opinion. For example, in *Lewis v. Astrue*, Judge Alexander upheld an ALJ's rejection of two treating doctors' opinions that the claimant was disabled due to diabetes, obesity, and heart disease in favor of a CE physician's opinion that the claimant could still perform light work.[171] She did so because the treating doctor's opinion was inconsistent with his own notes, the doctor's notes contained no functional restrictions for the claimant, the doctor advised the claimant to diet and exercise, and the claimant testified that he could perform many activities of daily living.[172] Noting that the ALJ had not specifically delineated the six *Newton* factors in his analysis, Judge Alexander nevertheless found that the ALJ had "clearly reviewed and relied upon [the two doctors'] records in rejecting their opinions." It was these factors, the court declared, as well as the claimant's testimony, which constituted

165. In our program, we utilize certain words of art. For example, "occasionally" means up to 1/3 of an eight-hour day, while "frequently" means up to 2/3 of an eight-hour day.

166. *Id.* at *20.

167. *Id.* at *24.

168. *Id.* at *22.

169. *Id.* at *25.

170. *Id.* at *7.

171. No. 2:09CV26-SAA, 2010 U.S. Dist. LEXIS 54178, at *15 (N.D. Miss. June 1, 2010).

172. *Id.* at *1, 14–15.

substantial evidence and good cause to reject the treating physician's opinions.[173]

Similarly, in *Southard v. Astrue*, Judge Alexander noted that an ALJ failed to make a specific delineation of the six *Newton* factors; nevertheless, Judge Alexander affirmed the ALJ's granting of less weight to two treating physicians' opinions that the claimant was mentally disabled in favor of the opinions of two CEs, one a psychologist and one an internal medicine physician, who both opined that the claimant suffered no disabling impairments.[174] Judge Alexander found that good cause for affirmation existed because the ALJ thoroughly reviewed and discussed the treating doctors' records and the record as a whole, determining that the first treating doctor's opinion was inconsistent with his own notes, stated the ultimate opinion reserved to the ALJ's determination in a conclusory fashion, and was an opinion about the claimant's mental health when the doctor was not a mental health specialist.[175] Judge Alexander found that the second treating physician's opinion was properly rejected because that doctor saw the claimant only once, gave no functional restrictions but instead said the claimant was "likely disabled," and provided treatment notes that were inconsistent with the record as a whole.[176]

As for my "less detail" rule, in *Myers v. Astrue*, Magistrate Judge John Roper, Jr., clearly stated that the six *Newton* factor analysis gleaned from 20 C.F.R. § 404.1527(d)(2) was not required when an ALJ gave less weight to a treating physician's opinion than to that of a CE.[177] This was so, Judge Roper reasoned, because the three treating physicians' findings and opinions were inconsistent with the medical record as a whole, and reliable medical evidence from other examining sources controverted their opinions.[178] Rejecting the claimant's argument that the ALJ should have utilized the *Newton* six-factor test in his analysis before rejecting the treating physicians' opinions, the court distinguished the case from *Newton* on the grounds that *Newton* (and 20 C.F.R. §§ 404.1527(d)(2) and 416.927(d)(2)) stood for the proposition that such an analysis was required only when rejecting a treating opinion in favor of a non-treating, non-examining physician's opinion and not when 'competing first hand medical evidence' existed that contradicted the treating physicians' assessments.[179] However, Judge Roper noted that the ALJ made a thorough examination of the entire record and offered substantial reasons supported by the medical record (including the treating doctors' inconsistent findings and the CE's supported findings) that sufficed as good cause for the rejection.

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173. *Id.* at *19.

174. No. 1:09CV142-SAA, 2010 U.S. Dist. LEXIS 56507, at *14 (N.D. Miss. June 7, 2010).

175. *Id.* at *8–9.

176. *Id.*

177. No. 5:09cv121-DCB-JMR, 2010 U.S. Dist. LEXIS 142434, at *35 (S.D. Miss. Nov. 18, 2010).

178. *Id.*

179. *Id.* at *34.

These two seemingly divergent interpretations of *Newton* by our magistrate judges are easily reconcilable. Judge Alexander holds that a delineated analysis of all six *Newton* factors is not necessary to reject a treating source's opinion in favor of a contradictory and supportable CE opinion so long as relevant factors are discussed to provide good cause for doing so. Judge Roper rules that though a *Newton* analysis is not required at all in this circumstance, the ALJ must still engage in a thorough (albeit less detailed) analysis of the entire medical record to base his rejection upon substantial evidence constituting good cause to do so. In the latter case, the ALJ must still resort to the six factors contained in the regulations—and as mandated by *Newton*—because they are the only conceivable factors that can support a rejection of a treating physician's opinion. The practical difference between this shortened analysis and the full-bore *Newton* analysis is that the *Newton* analysis need not be as detailed and does not require a strict citation to all six factors as does the scenario where the ALJ rejects the treating opinion in favor of that of a non-treating, non-reviewing physician.

However, from the ALJ's perspective, it is hardly safe to assume that he or she may freely reject a treating source's opinion in favor of a CE's opinion with only a modicum of analysis. In two recent Northern District of Mississippi cases, Judge Alexander reversed ALJs for giving more weight to CE opinions than to the opinions of treating sources. In *Logan v. Astrue*, a claimant argued that the ALJ did not give due consideration to the treating psychiatrist's and internal medicine doctor's opinions that she was disabled due to depression and anxiety, which allegedly limited her capacity to concentrate and interact sufficiently with others in a work environment.[180] The ALJ "discounted" these doctors' opinions in favor of an examining psychologist's opinion that the claimant was not mentally disabled, despite similar limitations in opinions by the treating doctors.[181]

Judge Alexander declared that before rejecting the treating physicians' opinions, the ALJ was required to explain his rationale for doing so in accordance with the six factors. Consideration of those factors, she added, "would likely have led to a different result."[182] Both treating doctors had longitudinal care of the claimant (one was a psychiatric specialist), and both offered substantial evidence of disability in their treatment notes, including discussions that the claimant had repeated periods of regression, anxiety, lack of energy, hallucinations, and periods of inability to care for her children.[183] Because this constituted supporting medical evidence, the court concluded, and because the CE stated in his report that he had no

180. No. 3:09-CV-101-SAA, 2010 U.S. Dist. LEXIS 61497, at *6 (N.D. Miss. June 21, 2010).

181. *Id.* All medical sources determined that the claimant could not understand and carry out detailed instructions and would function best in a non-interpersonally intensive work environment. *Id.*

182. *Id.* at *8.

183. *Id.* at *8–9.

access to the medical history of the claimant or to documentation supporting the allegations of depression, the report failed to contradict the treating doctors' opinions, requiring remand of the decision.

Although seemingly at odds with the above decisions in this Part, this opinion is not inconsistent. Judge Alexander reversed the ALJ because (1) the two treating doctors' opinions were consistent, unlike those in the affirmed cases; (2) they offered medically supported rather than conclusory opinions, unlike many of the above-related affirmed opinions in this Section; and (3) although there was a contradictory CE report, the CE was entirely unfamiliar with the claimant's medical record and offered nothing to contradict the treating physicians' opinions.[184] In other words, the treating physicians' opinions were reasonably supported and were not contradicted by any medical evidence of record, including that of an examining physician. Consequently, the ALJ was required (per 20 C.F.R. §§ 404.1527 and 416.927 and *Newton*) to utilize the mandated six-factor analysis.

Again, in *Woodard v. Astrue*, a forty-five-year-old claimant with a high school degree and past jobs as a babysitter, sewing machine operator, and stocking clerk appealed an ALJ's ruling that gave less weight to the treating doctor's opinions that she was disabled due to degenerative disk disease than to the opinion of a CE that she was not disabled.[185] The ALJ gave limited weight to the treating opinions[186] because they were " 'inconsistent with the substantial evidence in the record and his own objective medical findings.'"[187] However, Judge Alexander found that the ALJ did not state how the opinions were inconsistent with the medical record or with the doctor's own findings, finding that the treating physician's opinion was in fact supported by objective tests such as X-rays, blood work, and CT scans.[188] And as for the CE's opinion, Judge Alexander noted that the CE "did not have any 'outside medical records, imaging procedures, test results or other information . . . for additional consideration, correlation or corroboration' to consider in formulating his opinion."[189] Further, the CE did not provide a medical opinion as to limitations that would contradict the opinions of the treating doctors, and his report neither substantiated nor disproved the claimant's complaints.[190] In such situations, the court

184. In fairness to the ALJ, state agencies often refuse to send all exhibits in the record to CEs because of expense, and ALJs feel they must go with what they have. However, this approach was held insufficient here, and this cautionary decision may mean that the ALJ cannot give as much weight to the CE in such circumstances, or must re-contact the CE and ask him to consider additional evidence and offer another opinion in order to sufficiently buttress his own opinion with substantial evidence. *Id.*

185. No. 3:10cv0101-SAA, 2011 U.S. Dist. LEXIS 58049, at *7–8 (N.D. Miss. May 31, 2011).

186. These opinions found that the claimant was limited to sedentary work, had severe limitation of range of motion of her neck, and would miss up to four days a month because of pain. *Id.* at *9.

187. *Id.*

188. *Id.*

189. *Id.* at *10 (citing Appeal R. at 216).

190. *Id.*

concluded, the ALJ was required to provide a *Newton* and regulation mandated six-factor analysis before giving less weight to the treating doctor's opinions and accepting the findings of the CE.[191]

In other words, the ALJ did not explain his reasons for giving less weight to the treating doctor's opinions, which were in fact supported by objective tests, and giving more weight to a CE's findings, which were not supported by longitudinal care or laboratory tests, where that CE had no outside medical records to consider and offered no contradictory opinions to those of the treating doctor's. Where a CE opinion does not actually contradict a treating opinion that is well-supported by objective medical evidence, *Newton* and the regulations clearly require that the six-factor analysis be performed before giving less or no weight to the treating source's opinions.

The reality is that having a CE opinion of record (or examination report *sans* opinion) that does not actually contradict the treating opinion is tantamount to having no examining physician opinion contradicting the treating physician's opinion at all. In either case, the regulations' six-factor analysis is required before giving less or no weight to the treating physician's opinion. And if the regulations were not clear enough on this point, the *Newton* decision makes it crystal clear within the Fifth Circuit's jurisdiction. Moreover, decisions by Mississippi's U.S. district court and magistrate judges have driven this point home with such clarity that it almost boggles the mind that practicing attorneys and ALJs in Mississippi sometimes act as if they have not heard of the analysis at all.[192]

B. Other Treating Physicians, Psychiatrists, and Psychologists

The same rules applicable to consultative examining physicians apply to other treating physicians. In light of the six-factor analysis, it should be noted that CEs are usually specialists in relevant fields and understand the SSA's evidentiary requirements for disability determinations, while other treating doctors usually offer longitudinal care to the claimants but frequently know little of the SSA's evidentiary requirements.[193] It should also be noted that if other so-called treating physicians have only seen the claimant once or twice in a lengthy period, then they are merely "other" examining doctors, who are lower on the weight-giving scale than treating doctors.

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191. *Id.* at *10–11.

192. I am pointing the finger at no one more than myself, as I failed to fully comprehend the finer points of this analysis well into my tenure as an ALJ, despite the excellent training afforded me by my agency. How I won fourteen social security disability cases in a row representing claimants in the 1990s remains as impenetrable a mystery as those conundrums Woody Allen failed to solve in *Hannah and Her Sisters*, such as why were there Nazis if God exists and how does the can-opener work?

193. At such times, it falls to the attorney to explain the regulations to the doctor. Failing to do so often results in an unsupported conclusory "disabled" opinion or one that is out of line with the MER as well as common sense. Both such opinions are easily dispatched by ALJs armed with the knowledge of the provisions in 20 C.F.R. §§ 404.1527 and 416.927.

In *Holifield v. Astrue*, an ALJ declined to give controlling weight to a treating doctor's opinion that the claimant was disabled due to back and leg impairments and gave greater weight to another treating physician's findings that indicated that the claimant was not disabled.[194] The court observed that the ALJ determined that the treating physician's opinion was "not only conclusory and unsubstantiated, but was actually contradicted by objective medical evidence in the record."[195] That objective evidence came in the form of another treating doctor's findings that the claimant had negative straight-leg raising and intact reflexes, contrary to the first treating doctor's findings, and that two MRIs "failed to disclose the presence of nerve root compression."[196] Noting that a treating physician's opinion should generally be given considerable or controlling weight in determining disability, the court nevertheless declared that when a treating opinion is not well supported by credible and objective medical evidence and is inconsistent with other substantial evidence, the ALJ is "free to assign little or no weight to the opinion of any physician for good cause."[197] Accordingly, because the treating doctor's opinion was unsupported and because the contradictory findings of the other treating physician were supported, the court ruled that the ALJ had no obligation to engage in the six-factor analysis set forth in 20 C.F.R. § 1527(d)(2) and the *Newton* case.[198]

Similarly, in *Magee v. Astrue*, District Court Judge Halil Ozerden affirmed the findings of an ALJ, the Appeals Council, and a magistrate judge that found that the ALJ's failure to address the factors in 20 C.F.R. § 416.927(d) was not reversible.[199] Judge Ozerden declared that the Magistrate Judge properly found that the ALJ "was not required to detail more exhaustively her reasons for not affording controlling weight to the [treating doctor's opinion]," because first-hand evidence from another treating doctor and other sources contradicted the primary treating doctor's assessments.[200] This evidence involved findings adduced from the other treating doctor's examination, MRI results, the claimant's own testimony regarding

194. 402 F. App'x 24, 27–28 (5th Cir. 2010).

195. *Id.* at 26.

196. *Id.* at 25.

197. *Id.* at 26 (citing *Newton*, 209 F.3d at 455–56).

198. *Id.* at 27. The court also rejected the claimant's contention that the ALJ should have further developed the record as sometimes required in 20 C.F.R. § 404.1545(a)(3) because the claimant had ample opportunity to supplement the record and did not, and also because the claimant could not show the prejudice necessary for reversal. *Id.* at 226-27. Additionally, the court rejected the claimant's argument that the ALJ should be reversed for not re-contacting the treating physician as is sometimes required by 20 C.F.R. § 404.1512(e)(1). *Id.* at 27. The court found that the treating physician's record was inconclusive or otherwise inadequate to receive controlling weight because the record contained contradictory evidence from another treating physician. *Id.*

Regarding the re-contact rule, ALJs and practitioners are cautioned that the regulations concerning re-contacting the treating physician were amended in March 2012 to provide that the treating physician need not be re-contacted in situations where other evidence in the MER can clear up the inconclusive aspects or where other doctors may be contacted to clear up any such concerns, and where contacting other doctors may be easier or more fruitful. If not, the treating physician must still be re-contacted to resolve the inconclusive or inadequate opinions.

199. No. 1:09cv620HSO-JMR, 2011 U.S. Dist. LEXIS 33949, at *20–22 (S.D. Miss. Mar. 29, 2011).

200. *Id.* at *18–19.

her activities of daily living, her mother's statement of her activities of daily living, and a report from one of the claimant's teachers that indicated good functioning.[201] The court stated that when a treating physician's opinion is unsupported by medically acceptable clinical, diagnostic, and laboratory techniques (or is otherwise unsupported by the evidence) and the record contains reliable medical evidence controverting a treating source's opinion, "the ALJ is under no obligation to perform a detailed analysis pursuant to 20 C.F.R. § 404.1527(d)(2) before rejecting those opinions."[202] Significantly, the court added that "the ALJ did consider [the regulation's six factors], though not explicitly or sequentially, with regard to both physicians."[203]

That case supports the proposition that an ALJ is not required to undergo a detailed six-factor analysis before rejecting a treating source's opinion where the treating source's opinion is conclusory and unsupported by objective medical evidence and where there exists of record a credible contradictory opinion or objective set of findings. Even so, a consideration of the six factors is the best proof that the ALJ thoroughly considered the record and found substantial evidence constituting good cause to reject the treating opinion.[204]

On the other hand, as Judge Alexander decided in *Chandler v. Astrue*, where an ALJ summarily rejected a treating neurologist's positive objective findings on EMG/NCS tests that demonstrated carpal tunnel syndrome (CTS) in favor of the findings of another treating physician's exam that indicated a lack of CTS, the rejection warrants remand.[205] The court noted that the ALJ failed to explain why he disregarded "a neurological study that is medically accepted as the method for diagnosing [CTS] and chose to 'give weight' to [the other treating doctor's opinion]," "thus resulting in his evaluation of the [claimant's] RFC being unsupported by substantial evidence."[206] The result, Judge Alexander declared, was that the ALJ's ultimate decision as to disability was also unsupported by substantial evidence, and remand was required.[207] Once more, this decision makes clear that where the treating physician's findings are supported by medically acceptable evidence, the ALJ may not be required to utilize the six-factor *Newton* analysis before giving less weight to the treating physician's findings, but no analysis whatsoever will surely lead to a remand.

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201. *Id.* at *19. The statements and reports of family members and teachers are evaluated under the auspices of SSR 06-3p. *See supra* note 67.

202. *Id.* at *18 (citing *Holifield*, 402 F. App'x 24, 27 (5th Cir. 2010)).

203. *Id.* at *21.

204. *See also* Gates v. Astrue, No. 3:10-cv-489-CWR-FKB, 2011 U.S. Dist. LEXIS 109324, at *12–15 (S.D. Miss. Aug. 31, 2011) (citing where U.S. Magistrate Judge Keith Ball affirmed an ALJ's grant of little weight to a treating source's opinion. Judge Ball held that where evidence in the form of notes, tests, exams, etc. contradicts the treating physician's opinion, the regulation's multi-factor analysis is not required so long as the ALJ offers explanations sufficient to establish good cause for the rejection.).

205. No. 1:10CV060-SAA, 2010 U.S. Dist. LEXIS 114768 (N.D. Miss. Oct. 27, 2010).

206. *Id.* at *9–10.

207. *Id.* at *15–16.

VII. CONCLUSION

Voltaire famously observed that doctors "prescribe medicine of which they know little, to cure diseases of which they know less, in human beings of which they know nothing." Eighteenth century doctors almost certainly bled George Washington to death, undoubtedly prompting Thomas Jefferson to declare that whenever he saw three physicians together he cast his eyes skyward to see whether a turkey buzzard was hovering nearby. In the guise of Poor Richard, Benjamin Franklin quipped, "there's more old drunkards than old doctors" and "he's a fool that makes his doctor his heir."

Good revolutionary-era humor aside, advances in medical science have so improved doctors' chances of adequately treating their patients that there is now much truth in the old Jewish proverb: "Don't live in a town where there are no doctors." Consequently, treating doctors are nowadays assumed by the Social Security Administration to be the best sources for information about their patients' medical impairments and how those impairments affect their patients' functional capacities.

Unfortunately, many treating doctors, even the most highly qualified specialists, know very little about the evidentiary requirements of the Social Security disability process, and those CEs and state agency reviewing physicians who do know a great deal about those requirements do not know as much about the claimants' medical histories as do the treating medical sources. It is up to the lawyers to educate treating doctors on SSA evidentiary requirements, and it falls upon ALJs to appreciate fully the treating doctor's greater understanding of their patients' conditions.

Happily for the disability adjudication process, Social Security regulations, particularly 20 C.F.R. §§ 404.1527 and 416.927, provide considerable guidance to lawyers, doctors, ALJs, and appellate judges regarding the level of weight to be given to the various doctors' opinions adduced for the medical record. Knowing this, there are several things ALJs and the attorneys practicing before them can do to better serve both the American public and their clients, respectively.

Attorneys should familiarize themselves with these regulations before undertaking to represent clients in disability hearings. Armed with the knowledge of what evidence does and does not support disability findings, lawyers may then take the time to explain the regulations to doctors treating their clients. In particular, they can explain to physicians that a doctor's bald and unsupported statement that a claimant is disabled is practically worthless, as such determinations are reserved to the Commissioner (ALJ), while a doctor's letter or medical source statement explaining the claimant's impairments and their severity (i.e., how they affect the claimant's functioning, the degree to which the impairments affect the claimant's functioning, and the supporting medically acceptable clinical, diagnostic, and laboratory findings that document the doctor's opinions) is the most helpful information doctors can provide to lawyers representing claimants in disability cases.

As a lawyer handling Social Security cases in the 1990s, I abjured purchasing witless statements from doctors who knew nothing of either their clients' functioning capacities or SSA evidentiary requirements, and I took the time to explain the regulations pertaining to medical evidence to my clients' medical providers. This approach is guaranteed to bring better results for clients than merely approaching Social Security disability cases as if they were just another kind of tort action in circuit court with doctors familiar with evidentiary requirements. Not only will attorneys schooled in the regulations, and the law interpreting those regulations, offer better representation to their clients during hearings, they will also be in a better position to recognize errors made by ALJs who failed to properly analyze the medical opinions admitted into evidence.

Suffice it to say, ALJs handling disability hearings should be as well versed in the regulations as priests and pastors are in the Bible. And while I learned the regulations back and forth during the excellent judge training afforded me by the agency, I never truly understood their practical application until I took the time to read Fifth Circuit decisions such as *Newton v. Apfel* and the decisions promulgated by Mississippi's magistrate judges that often address numerous key issues (such as medical evidence, credibility, vocational factors, etc.) in greater detail.

Regarding weight given to treating and other medical sources, the regulations and the Fifth Circuit decisions interpreting those regulations have convinced me of three things. First, when a treating source offers a well-supported opinion as to a claimant's disability and there is no contradictory medical evidence in the form of examining or other treating source opinions, I must either give that treating opinion controlling weight, or before I decline to do so, I must engage in the analysis mandated by 20 C.F.R. §§ 404.1527 and 416.927, with my best guide for that analysis being the interpretations of those regulations by the Fifth Circuit in *Newton* and its progeny.

Second, if medical evidence of record exists in the form of a contradictory opinion rendered by another treating or examining physician and if I choose not to give the treating physician controlling weight, I must still consider how much weight to give the treating physician's opinion. I may reject that opinion or choose to give the opinion of another treating or examining physician greater weight without fully engaging in the *Newton* analysis, so long as I provide a reasonably supportable explanation that suffices as good cause to reject the treating opinion.

Third, even though contradictory, well-supported treating or other examining medical source opinions may suffice to allow me to reject the treating source opinion without a lengthy *Newton* analysis, I may still risk reversal if I do not utilize the best available guide for analyzing medical source opinions, the aforesaid regulations, and the *Newton* six-factor test for determining the weight I should give the treating physician's or psychologist's opinion.