

Treating Physician Rule Eliminated in Social Security Regulations

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U.S. district courts throughout the country routinely handle a number of Social Security disability appeals each year. For instance, in Dayton, Ohio, 130 Social Security disability appeals were filed in 2016 alone.

A significant number of Social Security disability appeals in district courts raise issues concerning the assessment of “acceptable medical source” opinions by an administrative law judge (ALJ) when determining disability under the Social Security Act. Most frequently, such issues concern the ALJ’s weighing of opinions offered by a claimant’s treating doctors and, specifically, the ALJ’s compliance with the “treating physician rule.”¹¹ Effective March 27, 2017, the Social Security Administration’s (SSA) new regulations alter the law in this area in a number of ways, some of which are discussed briefly herein.

Claims Filed Before March 27, 2017

With regard to SSA claims filed before March 27, 2017, an individual’s disability status is determined by considering, among other evidence, the opinions of “acceptable medical sources.”¹² “Acceptable medical sources” include licensed physicians, psychologists, optometrists, and podiatrists.³ Other medical sources such as “nurse-practitioners, physicians’ assistants, naturopaths, chiropractors, audiologists, and therapists” are not “acceptable medical sources,”¹⁴ although their opinions must be considered by the SSA and ALJs in determining a claimant’s ability to perform work-related activities.⁵

Under the previous regulatory scheme, acceptable medical sources are categorized as one of the following: (1) treating physicians who have typically treated the claimant multiple times over a period of years; (2) examining physicians who generally met the claimant on a single occasion and prepared a report at the request of the SSA; and (3) non-examining physicians who, at the request of the SSA, offered opinions of a claimant’s ability to perform work-related activities based upon a review of the claimant’s medical records.⁶

The regulations in effect before March 27, 2017, generally provide for the giving of greater weight to the opinion of a treating physician over the opinion

of a one-time examining physician.⁷ Further, the one-time examining physician’s opinion is generally entitled to more weight than that of a non-examining physician.⁸ In essence, “the regulations provide [for] progressively more rigorous tests for weighing opinions as the ties between the source of the opinion and the individual become weaker.”⁹ Courts have interpreted the regulations as setting forth a general hierarchy of acceptable medical source opinions.¹⁰

The treating physician rule is a key component of the rigorous testing procedure under the previous regulatory scheme.¹¹ Notably, “the treating physician rule ... was originally developed by Courts of Appeals as a means to control disability determinations by administrative law judges under the Social Security Act[.]”¹² Subsequently, the SSA formally incorporated the rule in its regulations in 1991.¹³

Under those regulations, the treating physician rule provides an extra level of deference to opinions from treating physicians by requiring that an ALJ give such opinions “controlling weight” (i.e., such opinion is more or less dispositive of a claimant’s ability to perform certain work-related activities¹⁴) if that opinion is “well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record.”¹⁵ The controlling weight analysis applies only to the weighing of treating physician opinions and never applies when weighing the opinions of examining or record-reviewing sources.¹⁶

For claims filed before March 27, 2017, even where a treating physician’s opinion is not entitled to controlling weight, “there remains a presumption, albeit a rebuttable one, that the opinion ... is entitled to great deference.”¹⁷ The presumption for deferential weight can be rebutted by considering a number of factors including, “the length, frequency, nature, and extent of the treatment relationship ... as well as the treating source’s area of specialty and the degree to which the opinion is consistent with the record as a whole and is supported by relevant evidence[.]”¹⁸

The rationale behind the treating physician rule was clear, and was specifically set forth in the SSA’s

regulations: “these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of [a claimant’s] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations.”¹⁹

In applying the treating physician rule, the previous regulatory scheme also imposed specific requirements upon ALJs for explaining why medical source opinions were credited or discredited. Specifically, in weighing treating physician opinions, ALJs were required to articulate “good reasons” for the weight given,²⁰ and those reasons were required to be “sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave ... and the reasons for that weight.”²¹ Failure to give “good reasons” or sufficiently explain such reasons could lead to a reversal of an ALJ’s non-disability finding regardless of whether the ALJ’s ultimate conclusion was otherwise supported by substantial evidence.²²

Regulations Applicable to Claims Filed After March 27, 2017

The new SSA regulations, effective March 27, 2017, make a number of changes, including: (1) eliminating the treating physician rule; (2) expanding the definition of “acceptable medical sources”; and (3) reducing the articulation standards required of ALJs in assessing medical source opinions.

These changes, in large part, arise from the SSA’s conclusion that people today receive health care services in a different manner, and from different providers, than they did when the regulations were first enacted.²³ According to the SSA, claimants today do not “develop a sustained relationship with one treating physician” and, instead, “typically visit multiple medical professionals ... in a variety of medical settings ... for their health care needs[.]”²⁴ In addition, the SSA concludes that claimants not only frequently change medical providers based upon changes in insurance coverage, but they also typically receive care from specialists who have little familiarity with all of a claimant’s medical conditions.²⁵

The amendments also seek to address the SSA’s concern that the previous regulations overburdened ALJs by requiring that they “make a large number of findings ... in their determinations and decisions.”²⁶ As a result, the SSA believed that some “reviewing courts ... focused more on whether [ALJs] sufficiently articulated the weight [given to] treating source opinions rather than on whether substantial evidence supports the commissioner’s final decision.”

To address these concerns, the SSA’s most significant amendment to the regulations involves eliminating the treating physician rule for disability claims filed on or after March 27, 2017. While under the SSA’s new regulatory scheme, a medical source’s “treatment relationship” with a claimant remains a factor considered when assessing the persuasiveness of medical source opinions,²⁷ no controlling weight analysis or deferential weight presumption attaches to any opinion.

Instead, the persuasiveness of any medical source’s opinion—whether that source is a treating, examining, or record-reviewing source—depends significantly upon whether such opinion: (1) is supported by objective medical evidence and the source’s own explanation of the opinion, and (2) is consistent with other evidence provided by medical sources of record.²⁸ Under this new regulatory scheme, consistency and supportability are “the most important factors” considered.²⁹ In addition to a medical source’s treating relationship, other lesser factors considered include a medical source’s specialty, “familiarity with the other evidence in the claim” record,

and “understanding of [the SSA’s] disability program’s policies and evidentiary requirements.”³⁰

In addition to eliminating the treating physician rule, the SSA’s new regulations broaden the definition of “acceptable medical sources” to include a number of health care providers who were previously omitted from such definition.³¹ As stated by the SSA, “to reflect changes in the national health care workforce and the manner that many people now receive primary medical care[.]” particularly low income individuals or individuals in rural areas, the definition of “acceptable medical source” now includes advanced practice registered nurses—such as certified nurse midwives, nurse practitioners, certified registered nurse anesthetists, and clinical nurse specialists³²—audiologists, and licensed physician assistants.³³

Finally, the new regulatory scheme alters the SSA’s requirement that ALJs explain the reasons for favoring one medical source opinion over another. While ALJs must “articulate how they consider[ed] medical opinions from all medical sources, regardless of [acceptable medical source] status,”³⁴ such articulation need only explain how the supportability and consistency factors were considered. ALJs now have discretion to choose whether they specifically discuss how any other factor—whether it be the significance of a treating relationship or a source’s specialty in a particular area of medicine—impacted the persuasiveness of any medical source’s opinion.³⁵

The Impact

Absence of the treating physician rule will potentially result in fewer reversals of ALJ decisions on appeal to federal courts. It remains to be seen, however, if the reduction of reversals will be dramatic, especially since certain articulation requirements remain, notably, the requirement that an ALJ “explain how [she or he] considered the supportability and consistency factors for a medical source’s medical opinions[.]”³⁶ As noted by courts, “although substantial evidence otherwise supports [a] decision of the commissioner[.]” reversal may, nevertheless, be warranted if an ALJ fails “to follow its own procedural regulation” (i.e., giving a sufficient explanation).³⁷ Going forward, there may be an issue regarding the specificity with which courts require an ALJ to articulate the supportability and consistency factors.

Interestingly, some commentators suggest that the treating physician rule could potentially survive the SSA amendments “because the treating-physician rule and articulation burdens arose originally from case law and it is not certain that Social Security is correct that they can be removed by regulation.”³⁸ Court consideration and interpretation of the new regulations, however, may not be known for some time. It will take many months before a disability application filed after March 27, 2017, is appealed to a district court and many more months after a district court appeal before a federal circuit court has the opportunity to address application of the new regulations in any particular case. ☉

Endnotes

¹20 C.F.R. §§ 404.1527, 416.927 (2016).

²20 C.F.R. §§ 404.1512, 404.1513, 416.912, 416.913 (2016). Notably, under previous regulations, “medical opinions” were defined as “statements from acceptable medical sources that reflect judgments about the nature and severity of [a claimant’s] impairment(s), including ... symptoms, diagnosis and prognosis, what [the claimant] can still do despite impairment(s), and [the claimant’s] physical or mental restrictions.” 20 C.F.R. §§ 404.1527(a)(1), 416.927(a)

(1) (2016). The new regulations define a medical opinion as “a statement from a medical source about what you can still do despite your impairment(s) and whether you have one or more impairment-related limitations or restrictions in the following abilities[.]” 20 C.F.R. §§ 404.1513(a)(2), 416.913(a)(2) (2017).

³²⁰C.F.R. §§ 404.1513(a), 416.913(a) (2016).

⁴²⁰C.F.R. §§ 1513(d)(1), 416.913(d)(1) (2016).

⁵See *Cole v. Astrue*, 661 F.3d 931, 939 (6th Cir. 2011); see also Soc. Sec. Ruling (SSR) 06-03p, 2006 WL 2329939, at *6 (Aug. 9, 2006).

⁶See 20 C.F.R. §§ 404.1527(c)(1)-(2), 416.927(c)(1)-(2) (2016).

⁷See 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2) (2016).

⁸See 20 C.F.R. §§ 404.1527(c)(1), 416.927(c)(1) (2016).

⁹SSR 96-6p, 1996 WL 374180, at *2 (July 2, 1996).

¹⁰*Snell v. Comm’r of Soc. Sec.*, No. 3:12-CV-119, 2013 WL 372032, at *9 (S.D. Ohio Jan. 30, 2013); *Godin v. Astrue*, No. 3:11-CV-881 SRU, 2013 WL 1246791, at *2 (D. Conn. Mar. 27, 2013); *LoPresto v. Colvin*, No. CV-12-00739-PHX-GMS, 2013 WL 1628727, at *2 (D. Ariz. Apr. 16, 2013).

¹¹See *Gayheart v. Comm’r of Soc. Sec.*, 710 F.3d 365, 377 (6th Cir. 2013).

¹²*Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 829 (2003).

¹³*Id.* (citing 56 FR 36961, 36968).

¹⁴*Cf. Arzuaga v. Bowen*, 833 F.2d 424, 426 (2d Cir. 1987) (stating that the treating physician rule generally provides that “the claimant’s treating physician’s diagnoses and findings regarding the degree of claimant’s impairment are binding on the ALJ unless there is substantial evidence to the contrary”).

¹⁵20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2) (2016).

¹⁶*Gayheart*, 710 F.3d at 376.

¹⁷*Hensley v. Astrue*, 573 F.3d 263, 266 (6th Cir. 2009) (citing *Rogers v. Comm’r of Soc. Sec.*, 486 F.3d 234, 242 (6th Cir. 2007)).

¹⁸*Gayheart*, 710 F.3d at 376 (internal citations omitted).

¹⁹20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2).

²⁰20 C.F.R. § 404.1527(c)(2) (2016).

²¹SSR 96-2p, 1996 WL 374188, at *5 (July 2, 1996).

²²See *Blakley v. Comm’r of Soc. Sec.*, 581 F.3d 399, 409 (6th Cir. 2009) (stating that, “where the ALJ fails to give good reasons on the record for according less than controlling weight to treating sources, we reverse and remand unless the error is a harmless de minimis procedural violation”); see also *Gayheart*, 710 F.3d at 377.

²³Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844-01, 5853 (Jan. 18, 2017).

²⁴Revisions to Rules Regarding the Evaluation of Medical Evidence, 81 Fed. Reg. 62560-01, 62573 (Sept. 9, 2016).

²⁵*Id.*

²⁶*Id.*

²⁷20 C.F.R. §§ 404.1520c(c)(3) and 416.920c(c)(3) (2017).

²⁸20 C.F.R. §§ 404.1520c(c) and 416.920c(c) (2017).

²⁹20 C.F.R. §§ 404.1520c(b)(2) and 416.920c(b)(2) (2017).

³⁰20 C.F.R. §§ 404.1520c(c)(4)-(5) and 416.920c(c)(4)-(5) (2017).

³¹81 Fed. Reg. 62560-01, 62567-68 (Sept. 9, 2016).

³²81 Fed. Reg. 62560-01, 62569 (Sept. 9, 2016).

³³20 C.F.R. §§ 404.1502(a) and 416.912(a); see also 81 FR 62560-01 and 82 FR 5844.01.

³⁴82 Fed. Reg. 5844-01, 5858 (Jan. 18, 2017).

³⁵20 C.F.R. §§ 404.1520c(b)(2) and 416.920c(b)(2).

³⁶*Id.*

³⁷*Wilson v. Comm’r of Soc. Sec.*, 378 F.3d 541, 544 (6th Cir. 2004).

³⁸David D. Camp, *Final Rules on the Evaluation of Medical Evidence—Elimination of the Treating-Physician Rule*, CURRENT SOC. SEC. NEWS, Apr. 2017.

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