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Nonacquiescence by the Social Security Administration as a Matter of Law: Using *Stieberger v. Sullivan*¹ as a Model

I. INTRODUCTION

Intracircuit nonacquiescence by an administrative agency is the "deliberate refusal to implement holdings in binding [circuit] court [of appeals] decisions in cases adjudicated before it."² When a circuit court renders a decision that differs from the agency's schematic, the agency will either issue a formal declaration that it will not follow the circuit decision, or will silently disregard the decision and attempt to impress others that it is following the circuit's rule.³ The Social Security Administration's ("SSA") policy of intracircuit nonacquiescence in the Southern District of New York has been successfully challenged as being "inconsistent with the constitutionally required separation of powers."⁴ In addition to the Southern District's declaration, the Fourth, Sixth, Eighth, Ninth, and Tenth Circuits have also pronounced SSA's policy of intracircuit nonacquiescence as contrary to the Constitution.⁵ This Casenote will summarize the framework for finding nonacquiescence and the application of the *Stieberger v. Sullivan*⁶ framework to specific circuit rulings.

1. 738 F. Supp. 716 (S.D.N.Y. 1990).

2. *Id.* at 728. Intercircuit, as opposed to intracircuit nonacquiescence, is a refusal to implement decisions arising from the circuit courts outside the jurisdiction in which the agency is located.

3. Peter J. Rooney, Comment, *Nonacquiescence by the Securities and Exchange Commission: Its Relevance to the Nonacquiescence Debate*, 140 U. PA. L. REV. 1111, 1111-12 (1992). The comment recounts the controversy surrounding intracircuit nonacquiescence by the Social Security Administration ("SSA").

4. *Stieberger v. Heckler*, 615 F. Supp. 1315, 1367 (S.D.N.Y. 1985), *vacated sub nom. Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986). For the court's discussion of the legality of nonacquiescence, see 615 F. Supp. at 1350-67.

5. 615 F. Supp. at 1353.

6. 738 F. Supp. 716 (S.D.N.Y. 1990). The utility for intracircuit nonacquiescence by federal agencies has been the subject of a number of law review articles. For a particularly interesting discussion on the costs and benefits of intracircuit nonacquiescence, see Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801

II. PROCEDURAL HISTORY OF THE CASE

In 1985 the Southern District of New York certified a class of social security claimants contesting SSA's allegedly unconstitutional policy of nonacquiescence to rulings of the Second Circuit.⁷ In addition to certifying the class, the court granted plaintiffs preliminary injunctive relief.⁸ Both plaintiffs and defendants subsequently brought motions for summary judgment.⁹

On the issue of whether "SSA is affirmatively applying the Court's [U.S. Court of Appeals for the Second Circuit] holding and whether the consequence thereof is to deny claimants benefits to which they would otherwise be entitled,"¹⁰ Judge Sand granted plaintiffs' motion for summary judgment in part. Judge Sand found that SSA had not acquiesced to the Second Circuit's rulings regarding the weight accorded treating physician opinions,¹¹ the right to cross-examine the authors of post-hearing reports,¹² the Administrative Law Judge's ("ALJ") own observations,¹³ and the testimony of a claimant with a good work record.¹⁴ Although the court held that SSA had nonacquiesced to only certain holdings, it also found that plaintiffs "demonstrated a sufficient threat of continuing injury,"¹⁵ by SSA's policy of nonacquiescence. Thus the court awarded permanent injunctive relief to plaintiffs.¹⁶

III. THE COURT'S DECISION

Plaintiffs contended that SSA silently nonacquiesced to circuit holdings.¹⁷ Establishing agency nonacquiescence required plaintiffs to produce

(1990); Samuel Estreicher & Richard L. Revsz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831 (1990).

7. 615 F. Supp. at 1327-28.

8. *Id.* at 1399.

9. 738 F. Supp. at 721.

10. *Id.* at 729.

11. *Id.* at 732-38. See *Schisler v. Heckler*, 787 F.2d 76 (2d Cir. 1986).

12. 738 F. Supp. at 738-40. See *Townley v. Heckler*, 748 F.2d 109 (2d Cir. 1984).

13. 738 F. Supp. at 740-42. See *DeLeon v. Secretary Health & Human Servs.*, 734 F.2d 930 (2d Cir. 1984).

14. 738 F. Supp. at 742-43. See *Rivera v. Schweiker*, 717 F.2d 719 (2d Cir. 1983).

15. 738 F. Supp. at 759.

16. *Id.*

17. *Id.* at 728. "SSA admittedly non-acquiesced . . . 'more often' by ignoring the [court of appeals] decision and leaving the agency policy in tact." *Id.* at 747 (quoting Plaintiffs' Exhibit 23 at 1-2).

evidence that "SSA had deliberately failed to 'follow the law of the circuit whose courts have jurisdiction over the cause of action.'" ¹⁸

A. Framework for Finding Nonacquiescence

Plaintiffs began their claim of SSA silent nonacquiescence with a comparison of the agency policy and the circuit holding that revealed "substantial differences."¹⁹ Because SSA requires its adjudicators to strictly follow agency policy,²⁰ simply pointing to a difference in the language of the circuit holding and the agency policy is not sufficient to prove nonacquiescence.²¹ Plaintiffs must allege that those differences have in fact prejudiced the adjudication of individual claimants.²² Evidence of the disparate impact upon the adjudicatory process would include "a system-wide pattern of mistaken adjudication."²³ For example, when plaintiffs produce numerous cases that the courts have reversed for failing to apply a particular holding, the court could then state that the differences in agency policy and the circuit holding have "influenced" the adjudication of the claimant.²⁴ However, the court will not infer mistaken adjudication when plaintiffs produce only a relatively small number of cases in comparison to the length of time in which they selected those cases.²⁵ After demonstrating that the "substantial differences" in the agency policy and the circuit holdings have had an impact on the adjudication of individual claimants, plaintiffs concluded by contending that SSA knew that its application of agency policy was in error and thus, deliberately chose not to correct the differences.²⁶

Objecting to plaintiffs' inferential method of proving nonacquiescence, SSA argued that the court may charge the agency with nonacquiescence only when its policy expressly contradicts a circuit holding.²⁷ "[A]ny duty . . . to acquiesce does not extend beyond acquiescence in 'cases of square

18. *Id.* at 728 (quoting *Hyatt v. Heckler*, 807 F.2d 376, 739 (4th Cir. 1986), *cert. denied*, 484 U.S. 820 (1987)).

19. *Id.* See *Floyd v. Sullivan*, 833 F.2d 529 (5th Cir. 1987).

20. 738 F. Supp. at 728 (citing *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir.), *cert. denied sub nom.* *Nash v. Sullivan*, 493 U.S. 812 (1989)).

21. *Id.* See *Floyd v. Sullivan*, 833 F.2d 529, 532 (5th Cir. 1987).

22. 738 F. Supp. at 728.

23. *Id.* (quoting 833 F.2d at 532).

24. *Id.* at 728-29.

25. *Id.* at 729. The court stated that a reversal in those cases selected by plaintiff "would suggest either that the effects of the difference between agency policy and the holding cannot be detected in court opinions, that the differences have no effect, or that SSA actually applies the holding in the cases it adjudicates." *Id.*

26. *Id.*

27. *Id.*

conflict' between SSA policy and [a] court decision."²⁸ The court responded by acknowledging that SSA does not have a duty to incorporate court of appeals holdings when language from the court's decision is not necessary to its holding, in other words, "dicta",²⁹ and when the application of the decision is "beyond the scope indicated by the language of the decision itself."³⁰ SSA may also assert a factual distinction between the circuit decision and the case before the agency.³¹ These situations, however, do not support defendants' proposition that the agency must acquiesce only when the case decision and policy are in square conflict.³²

B. Application of Silent Nonacquiescence to Circuit Decisions

The Weight Accorded Treating Physician Opinions. The rule in the Second Circuit since 1981,³³ and subsequently affirmed in at least twenty-three circuit court decisions,³⁴ is that the treating physician's opinion on the issue of the claimant's medical disability "is binding . . . unless contradicted by substantial evidence" and is to be given extra weight in the disability determination.³⁵ Noting that SSA had neither formally acquiesced nor stated it would not acquiesce to this rule, the court found that in addition to substantial differences between the circuit rule and agency policy, the agency attempted to obscure the ruling.³⁶ The

28. *Id.* (quoting Defendants' Memorandum at 41-44).

29. *Id.* See *Sirbo Holdings, Inc. v. Commissioner*, 476 F.2d 981, 989 (2d Cir. 1973).

30. 738 F. Supp. at 729. See *Dixon v. United States*, 381 U.S. 68, 76-79 (1965).

31. 738 F. Supp. at 729. The court specifically stated that:

[I]f the agency could find a principled distinction between a particular set of factual circumstances and the case in which the Second Circuit articulated its holding which would indicate that the decision would not be controlling under those circumstances, and if SSA believed in good faith that the decision should not be applied in those circumstances, it would be entitled to set out as policy both the circumstances where the decision would be controlling and the circumstances where SSA had decided that it should not be applied.

Id.

32. *Id.* at 729-30.

33. *Id.* at 734 (citing *Schisler v. Heckler*, 787 F.2d 76, 81 (2d Cir. 1986)).

34. *Id.* at 736-37; see also *Hidalgo v. Bowen*, 822 F.2d 294, 296-97 (2d Cir. 1987).

35. 738 F. Supp. at 734 (quoting *Schisler v. Heckler*, 787 F.2d 76, 81 (2d Cir. 1986)).

Regarding the opinion of the treating physician in the United States Court of Appeals for the Eleventh Circuit, the court has declared the following rule: "Absent a good showing of cause to the contrary, the opinions of treating physicians must be accorded substantial or considerable weight by the Secretary." *Marbury v. Sullivan*, 957 F.2d 837, 840 (11th Cir. 1992) (Johnson, J., concurring) (quoting *Lamb v. Bowen*, 847 F.2d 698, 703 (11th Cir. 1988)).

36. 738 F. Supp. at 734. Examples of SSA's attempt to obscure the effect of the treating physician rule include the following: Social Security Rulings on circuit decisions that were inconsistent with the treating physician rule; no codification of the rule in the agency's Program Operations Manual System ("POMS"); implementation of POMS sections to override

"astonishing volume" of cases overturned evidenced the substantial differences between SSA policy and the circuit's rulings.³⁷ The court thus held that SSA nonacquiesced regarding the rule until the date on which it had complied with the *Stieberger* injunction.³⁸

The Right to Cross-Examine the Authors of Post-Hearing Reports. SSA may not "base a disability decision upon a report obtained after a hearing before an ALJ, unless the claimant against whom the report is introduced is given an opportunity to cross-examine the authors of the report."³⁹ The court examined agency policy and determined it was substantially different from this rule.⁴⁰ Agency policy indicates that the right to cross-examine witnesses at the hearing is discretionary, and after the hearing, the right to cross-examine may not even exist.⁴¹ Despite the limited cases in which the district courts in the circuit reversed for failure to apply the right to cross-examine post-hearing reports, the Second Circuit nevertheless found the following:

the uncontradicted conclusion of the Task Force [is] that SSA's general practice has been "to utilize post-hearing evidence quite frequently and to place upon the claimant the burden of asserting the right to cross-examine, presuming a waiver of that right whe[n] no such request is made."⁴²

the circuit rule; training materials for ALJs, which suggest to weigh the treating physician's opinion as equivalent to all other evidence; and rejection of the Agency's Acquiescence Task Force ("Task Force") recommendation to issue an Acquiescence Ruling. *Id.* at 734-36.

37. *Id.* at 736.

38. *Id.* at 738. See *supra* text accompanying note 6.

39. 738 F. Supp. at 738. See *Townley v. Heckler*, 748 F.2d 109, 114 (2d Cir. 1984); *Gullo v. Califano*, 609 F.2d 649, 650 (2d Cir. 1979); *Dorman v. Harns*, 633 F.2d 1035, 1039 (2d Cir. 1980).

The United States Court of Appeals for the Eleventh Circuit held that "the Secretary has no duty to inform a 'paralegal representative of her client's right to cross-examine' a doctor who submits a post-hearing report. A due process violation occurs only when a claimant is denied the opportunity to subpoena and cross-examine those who submit medical reports." *Jones v. Department of Health & Human Servs.* 941 F.2d 1529, 1534 (11th Cir. 1991) (quoting *Hudson v. Heckler*, 755 F.2d 781, 784-85 (11th Cir. 1985), *aff'd on other grounds sub nom. Sullivan v. Hudson*, 490 U.S. 877 (1989)).

40. 738 F. Supp. at 738-39.

41. *Id.* at 738-40. Examples of SSA policy conflicting with the circuit court holding that confers a right to confront the author of post-hearing reports include the following: SSA regulations, 20 C.F.R. §§ 404.950(d), 416.1450(d) (1989) requiring that the claimant request in writing a subpoena for the author in advance of the hearing and that the request will be granted if the agency finds it "reasonably necessary for the full presentation of the case"; and rejection by the Associate Commissioner of the Office of Hearing and Appeals ("OHA") of the Task Force's recommendation to change the OHA handbook to explicitly allow for post-hearing cross-examination. 738 F. Supp. at 738.

42. 738 F. Supp. at 740 (quoting Plaintiffs' Exhibit 65 at 1).

Upon finding the agency's policy had a deliberate impact on the claimant's adjudication, the court concluded nonacquiescence by SSA.⁴³

ALJ's Personal Observations. Second Circuit cases establish that an ALJ may accord "limited weight" to her observations of the claimant's physical and mental condition when determining the claimant's credibility on substantive issues.⁴⁴ Agency policy does not concur with the circuit's holdings and, in fact, is substantially different.⁴⁵ Citing twelve court cases in the Southern District of New York alone from 1986 to 1989, the court found a system-wide pattern of mistaken adjudication and, thus, concluded SSA nonacquiescence.⁴⁶

Standards for Evaluating Credibility, the Claimant with a Good Work Record. The Second Circuit established that "a claimant with a good work record is entitled to substantial credibility when claiming inability to work because of a disability."⁴⁷ Plaintiffs asserted and the

43. *Id.*

44. *Id.* at 741. The court rejected plaintiffs' contention that the Second Circuit had held that an ALJ may never assess the claimant's credibility in part by her observation. *Id.* at 740. Citing *Carroll v. Secretary of Health & Human Servs.*, 705 F.2d 638, 643 (2d Cir. 1983) and *DeLeon v. Secretary Health & Human Servs.*, 734 F.2d 930, 935 (2d Cir. 1984), the court categorized the ALJ's observation as lay opinion. 738 F. Supp. at 740-41.

The United States Court of Appeals for the Eleventh Circuit has a more general rule regarding the ALJ's personal observation of the claimant. "The ALJ is not prohibited 'from considering the claimant's appearance and demeanor during the hearing.'" *Macia v. Bowen*, 829 F.2d 1009, 1011 (11th Cir. 1987) (quoting *Norris v. Heckler*, 760 F.2d 1154, 1158 (11th Cir. 1985)).

45. 738 F. Supp. at 741. The court based its conclusion of significant differences on the following: SSA has not adopted an Social Security Ruling ("SSR") on point with the circuit holding—an SSR in 1988, effective only after plaintiffs' contested SSA's nonacquiescence from 1981 to 1988, failed to identify all situations in which the ALJ must limit the weight of her observations; rejection of the Task Force's recommendations that the agency compile the circuit's principles regarding this issue and distribute them to adjudicators; and recommendation by the Associate Commissioner of OHA that as long as the ALJ's "rationalized" the use of their observations in their findings, the guidelines suggested by the Associate Commissioner would have "a significant payoff." *Id.* at 741-42 (quoting Plaintiffs' Exhibit 51 at 1-3).

46. *Id.* at 742.

47. *Id.* (citing *Rivera v. Schweiker*, 717 F.2d 719, 725 (2d Cir. 1983)). If the claimant has a good work record, the court will presume as true the claimant's own testimony explaining the reasons for stopping work. *Singeletary v. Secretary of Health & Human Servs.*, 623 F.2d 217, 219 (2d Cir. 1980).

The United States Court of Appeals for the Eleventh Circuit has not been as generous in allowing a claimant with a good work record to testify as to the cause of the injury. In light of the provisions of SSA under which a claimant's complaints of pain may establish the existence of a disability (42 U.S.C. § 423(d)(5)(A) (1988)), the court has required the claimant to "produce 'evidence of an underlying medical condition and (1) objective medical evidence that confirms the severity of the alleged pain arising from that condition or (2) that

court agreed that no agency policy existed to give effect to the circuit rule.⁴⁸ Without guidance to the adjudicators on this rule, the court overturned a number of cases, illustrating a system-wide impact on decisions, and, therefore, nonacquiescence.⁴⁹

C. *Application of the Framework in Retrospect*

In demonstrating nonacquiescence by SSA to a particular circuit holding, plaintiffs must gather a number of cases that have been reversed because of the ALJ's failure to apply the circuit rule.⁵⁰ Although this task seems simple for plaintiffs' attorneys, it is most difficult considering the social security claimant must have gone through at least four previous hearings on the claim before reaching the federal appellate court. The costs of appealing decisions are enormous in comparison with the amount of money the claimant will receive.⁵¹

The court did not limit plaintiffs to showing nonacquiescence only in judicial decisions in which a number of cases had been overturned but also SSA's rulemaking bodies. For example, in determining whether SSA acquiesced to the Second Circuit's rule on the right to cross-examine the authors of post-hearing reports, the court rested its decision on SSA's Task Force's conclusion that the agency intentionally avoided the circuit rule.⁵² Only once in the examination of the four rules the court considered were plaintiffs able to show deliberate nonacquiescence.⁵³ In the typical case, plaintiffs have a difficult burden either finding an explicit statement from the agency or compiling a number of cases that have been overturned.

IV. CONCLUSION

In the enormous tasks of deciding whether SSA had deliberately nonacquiesced in certain applications of the law and whether its policy allowed for nonacquiescence, the court established a flexible framework for its determination, but a difficult one for the burdened plaintiffs.

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the objectively determined medical condition is of such a severity that it can be reasonably expected to give rise to the alleged pain.'" *Edwards v. Sullivan*, 937 F.2d 580, 584 (11th Cir. 1991) (quoting *Landry v. Heckler*, 782 F.2d 1551, 1553 (11th Cir. 1986)).

48. 738 F. Supp. at 742.

49. *Id.*

50. *Id.* at 728.

51. The costs are even greater for those claimant's attorneys who work on a contingency fee basis.

52. 738 F. Supp at 740.

53. *See supra* note 41 and accompanying text.

