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**NOTE: BUSH V. SHALALA AND PRATTS V. CHATER:
SOCIAL SECURITY DISABILITY PING PONG AND
CONTRASTING APPROACHES IN THE SECOND CIRCUIT:
THE CENTRAL ROLE OF AN ACTIVE ALJ**

Jorge J. Vera, Jr.*

I. Introduction

These two cases which reach contrary conclusions on entitlement to disability conclusions demonstrate the importance of the active role of an ALJ. in a social security case. In one case, ten years of delay resulted from inadequate investigation. In the second case inadequate understanding of the contents of the administrative record delay granting a claim for years and resulted in remand.

On the surface, there is apparent inconsistency between two decisions of different panels of the United States Court of Appeals for the Second Circuit. In the first case, the United States Court of Appeals for the Second Circuit in the 1996 case of *Bush v. Shalala*¹ reversed the district court's decision and remanded the case back to the district court for reinstatement of the Secretary's determination and dismissal of the claim for social security disability insurance. The denial rejected District Judge C. J. Sifton's holding that the court had not been provided with findings of facts and conclusions of law of some complexity and that a ten-year delay alone was sufficient basis to remand benefits. The appellate court held that substantial evidence² existed to support a finding against the claimant, although a ten-year delay had occurred. In the second case, *Pratts v. Chater*³ a different panel of the United States Court of Appeals for the Second Circuit vacated the district court's denial of a claim for social security

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¹ "Substantial evidence," in the social security disability insurance context, means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971) (citation and internal quotation marks omitted). *Pratts v. Chater* 94 F.3d 34 (2d Cir. 1996)

² 94 F.3d 40 (2d Cir. 1996)

³ 94 F.3d 34

disability insurance and remanded the matter to the Commissioner for further development of substantial evidence. The denial rejected District Court's finding that substantial evidence supported the denial of benefits. The appellate court held that the denial of benefits was not supported by substantial evidence and was based upon legal error.

II. Background

A. Bush v. Shalala

Eleven years ago, Florence Bush, filed an application for disability insurance benefits under Title II of the Social Security Act. Her application stated that, due to a chronic cough, she was unable to work.⁴ Ms. Bush had worked as a file clerk/typist and as a bank teller.

This is an ordinary social security disability claim which has been in the administrative and judicial systems for over ten years with five hearings before Administrative Law Judges⁵, five denials by the Appeals Council of the Social Security Administration,⁶ and three hearings before District Judge Sifton.

The first ALJ hearing took place in March of 1986 before ALJ Sidney Fenster. Ms. Bush, appeared pro se, testified that she was unable to work due to her cough. ALJ Fenster denied the plaintiff's claim, finding that Ms. Bush was able to return to her past relevant work and was not "disabled" as defined by the Social Security Act. Ms. Bush then sought her first review by the Appeals Council. In July 1986, the Appeals Council denied her appeal. Ms. Bush then sought judicial review in the Eastern District of New York. The district court remanded the case to the SSA for further investigation of the plaintiff's medical situation.⁷

⁴ However, ALJ Nisnewitz went on to find that the Ms. Bush's "impairment did not prevent [her] from performing her past relevant work as a bank teller from her alleged onset of disability on May 24, 1985 through her date last insured on December 31, 1989."p.8

⁵Hereinafter, ALJ

⁶Hereinafter, the Appeals Council

⁷ Judge Sifton held that ALJ Fenster ignored a residual functional capacity assessment showed that the Ms. Bush suffered from allergies and needed to avoid certain work environments. The residual functional capacity evaluation contained in the record

Upon remand, in September of 1987, Dr. James Vevaina,⁸ examined Ms. Bush.⁹ The second hearing before ALJ Fenster was held in January of 1988. Ms. Bush argued through counsel that Dr. Vevaina's examination was deficient. However, ALJ Fenster again found that Ms. Bush was not disabled and denied benefits. The Appeals Council refused once again to hear her claim. Upon returning to the district court, Judge Sifton remanded the case for yet further inquiry.¹⁰

Ms. Bush's entitlement to social security disability insurance ended on December 31, 1989.¹¹ Pursuant to the district court's remand, plaintiff saw Dr. Vevaina again in May of 1990. Dr. Vevaina reported that the plaintiff had symptoms of cough and sinusitis, that there was no evidence of asthma or emphysema, and that she was not disabled.

Judge Sifton remanded to a third hearing was held in August of 1990. Ms. Bush submitted, as evidence, the letters from Drs. Weinstock and Schmitt¹² as well as Medicare billing statements and bills. Based

"recognized that this woman suffered from allergies, asthma, should avoid work environments including dust, humidity, temperature extremes, et cetera."

⁸ The Secretary at oral argument described Dr. Vevaina as a Social Security doctor.

⁹ Dr. Vevaina noted that Ms. Bush's symptoms were coughing, sputum production, wheezing, and shortness of breath. Dr. Vevaina's diagnosis stated that Ms. Bush suffered from chronic bronchitis and a post-nasal drip. He found no limitation with respect to Ms. Bush's ability to lift and carry, stand, or walk. The only work limitations he noted were that she was to avoid temperature extremes, chemicals, dust, and fumes.

¹⁰ "In August 1989, the district court...remanded the case. The court found that ALJ Fenster had erred by relying on Dr. Vevaina's report without more testing. It also found that the ALJ had misapplied the burdens of proof in requiring the plaintiff, on her own, to pursue additional testing to support her claims." "[T]he court ordered further inquiry regarding any environmental restrictions on the plaintiff's ability to perform her past relevant work."

¹¹ Because her entitlement to disability insurance benefits expired on December 31, 1989, Ms. Bush had to show that she was disabled before that date in order to be eligible for disability benefits.

¹² Dr. Weinstock, in a July 1990 letter to Ms. Bush's attorney, wrote that he continued to treat the plaintiff for allergic rhinitis and asthma. Dr. Gary Weinstock reported that Ms. Bush still required medication for her allergies and that she had severe symptom exacerbations with exposure to dust, damp weather, or flowers. She also had developed food allergies that increased her rhinitis. He stated that Ms. Bush should avoid work environments with cigarette smoke, dust, mold spores, or flowers. Dr. Laura Schmitt, Ms.

on the testimony,¹³ ALJ Fenster issued his third consistent decision finding that the plaintiff was not disabled¹⁴ Ms. Bush asked for review for the third time. The Appeals Council in May of 1991 remanded the case for further administrative inquiry into plaintiff's symptoms.¹⁵

The fourth hearing was held before ALJ Richard Karpe.¹⁶ After the hearing, ALJ Karpe denied Ms. Bush's application, concluding that she was not disabled because she was capable of returning to her past relevant work. Ms. Bush asked the Appeals Council to review the decision for the fourth time. In December of 1992, the Council remanded for an additional evaluation of plaintiff's subjective complaints of pain.¹⁷

A fifth administrative hearing was held in May 1993 before ALJ David Nisnewitz. Judge Nisnewitz, after reviewing the medical evidence¹⁸, again denied Ms. Bush's application for benefits.

Bush's dentist, also submitted a note to Ms. Bush's attorney in July of 1990. Dr. Schmitt reported that her dental work on Ms. Bush often had to be interrupted to permit her to cough, that she gasped for breath at times, and that she had to sit with her head raised during dental procedures due to a large quantity of mucus.

¹³Dr. Morton Rosen a vocational expert apparently called by the government, testified that a person with a moderate asthmatic condition who requires an allergen-free environment is nonetheless able to function in an air-conditioned environment such as a bank.

¹⁴ He stated that Ms. Bush's allergies did not prevent her from functioning in her past relevant work.

¹⁵It requested that an ALJ "make specific findings as to the credibility of the claimant's complaints and their effect on her ability to function."

¹⁶At that hearing, Dr. Richard Wagner was called by the government as a medical advisor. He testified that Ms. Bush's bronchoscopy and chest x-ray results were normal and that she suffered only from allergies. He testified that Ms. Bush should avoid temperature extremes, dust, and fumes, and that she should not lift heavy objects.

¹⁷ It ordered the ALJ to: address the issue of the claimant's subjective complaints during the period at issue within the guidelines set forth in 20 CFR 404.1529. The rationale includes such factors as the claimant's daily activities, the kinds, amounts, and frequency of any medications taken during the period at issue, pertinent medical findings and opinions, and observations of the claimant.

¹⁸ Judge Nisnewitz found that while she suffers from a severe respiratory impairment, that impairment failed to meet or equal the level of severity of any disabling condition contained in Appendix 1, Subpart P of Social Security Regulations No. 4. Her ability to sit, stand, walk and lift was unlimited. His conclusion corresponded with that of Ms. Bush's treating physician, Dr. Weinstock, who recommended, in July 1990, that Ms. Bush avoid exposure to cigarette smoke and increased amounts of dust, mold and flowers.

On physical examinations, the claimant has displayed normal breath sounds, with

The Appeals Council turned down the Ms. Bush's request for review in June of 1994.

In August of 1994, Ms. Bush petitioned the district court for the third time challenging the denial of benefits. In May of 1996, Judge Sifton granted Ms. Bush's motion and entered judgment in her favor. Judge Sifton "stated that ALJ Nisnewitz had failed to conduct a hearing over 'a number of days' and that he had not provided the reviewing court with 'findings of fact and conclusions of law of some complexity.'"¹⁹ Accordingly, Ms. Bush was awarded disability insurance benefits retroactive to 1985 through December 31, 1989.

B. Pratts v. Chater

Pratts applied for disability benefits with the Social Security Administration²⁰ in November 1992. He claimed he was disabled due to the manifestations of an HIV infection. Pratts, who was in his

no evidence of wheezing, rales or rhonchi. Dr. Weinstock, reports that the Ms. Bush's symptoms had improved and that she experienced a marked response to bronchodilation therapy.

"The claimant alleges that her daily activities are extremely constricted due to persistent coughing spells. . . . However, the claimant noted that, between 1985 and 1989, she was able to shop for clothing and shoes, wore perfume and lipstick and attended church on a weekly basis. She further testified that she taught Sunday School. Her housekeeping chores were limited to making beds, doing laundry, cleaning the bathroom and cooking. Her husband reportedly performs chores such as vacuuming and grocery shopping. The claimant also acknowledges that she has a driver's license and continued to drive through 1989."

"At hearing, the claimant testified that she traveled to the Middle East in 1989 . . . for a period of two weeks. The claimant also travels to South Carolina annually for a two-week trip during the summer months. Presumably, if temperature extremes did, indeed, exacerbate the claimant's symptoms, she would travel to South Carolina during a more temperate time of the year. Despite the claimant's allegations that her coughing and breathing difficulties are disabling, the Administrative Law Judge finds no diagnostic studies of record which can reasonably support the claimant's allegations."

The claimant continued to attend church, perform limited housekeeping and travels without limitation. Her activities, in conjunction with medical findings, lead the ALJ to conclude that the claimant's symptoms were not as severe as "to render her incapable of performing substantial gainful activity on a sustained basis."

¹⁹ He stated that "the Secretary has had more than enough time and opportunity to pursue those inquiries and make those detailed findings of fact permitting me to review the determination, so in these circumstances the remedy for the failure to explore these matters in the past can only be reversal and a remand for an award."

²⁰ Hereinafter, SSA.

mid-forties at the time, alleged in his application that he had not been able to work since April 1987 as a result of his impairments.²¹

The SSA denied Pratts's November 1992 application for benefits in March 1993, and also denied his request for reconsideration in August 1993. An ALJ hearing was held in February 1994. Pratts and Dr. Edgar Bonilla, a medical expert called by the SSA who based his opinions on his review of Pratts's records from the VA, testified. The hearing tape, however, was mistakenly turned off for a portion of Dr. Bonilla's testimony, which left a significant gap in the administrative record. The ALJ concluded that Pratts was not disabled as defined in the Social Security Act on or before December 31, 1990. The ALJ issued her decision in March 1994 and became the final decision of the Commissioner when the Appeals Council denied review on May 17, 1994. Pratts sought review of the Commissioner's decision in district court. The district court granted the Commissioner's motion with "substantial evidence" as the basis.

III. Discussion and Analysis

The standard of review on appeal was well settled as the substantial evidence test.²² "We therefore focus our attention on the

²¹ He had worked for roughly fifteen years as an industrial engineer and mechanic, a job requiring significant strength and exertion. Because of his employment history, Pratts met the SSA's disability insured status requirements through December 31, 1990.

Pratts had been treated on an outpatient basis at the Veterans' Administration Hospital (the "VA") in San Juan, Puerto Rico, starting in August 1987. Pratts did not have one treating physician, but was seen primarily by doctors in the VA's Infectious Disease Clinic. The inadequacies of his medical records are immediately evident: no record of his second visit for gastroenteritis; no explanation provided for the diagnosis of AIDS made at his third visit; no blood test results appear in the records even though they were order; and the physician's findings are almost completely illegible. "...Pratts continued to suffer from a variety of maladies connected to his HIV infection and that his medical records continued to display an unfortunate degree of inexactitude regarding test results, medications, weight loss or gain, symptoms, and follow-up treatment.

²² *Havas v. Bowen*, 804 F.2d 783, 785 (2d Cir. 1986); see also *Vargas v. Sullivan*, 898 F.2d 293, 296 (2d Cir. 1990); *Parker v. Harris*, 626 F.2d 225, 231 (2d Cir. 1980).

administrative ruling rather than on the decision of the district court."²³ It was not the function of the appellate court to determine de novo whether either Ms. Bush or Mr. Pratts was disabled.²⁴ "We [appellate court] may only set aside a determination which is... not supported by substantial evidence."²⁵

In evaluating disability claims, the Secretary is required to use a five-step sequence.²⁶ In of Ms. Bush's, case the appellate court found she did not have a "listed" impairment. The court concluded that "she had the burden of proving that her impairment interfered with her capacity to perform her relevant past work." The Secretary, ALJ Nisnewitz, and the Second Circuit all concluded that Ms. Bush had not shown that she was unable to perform her past relevant work. The ALJ concluded that there was substantial evidence" to support the Secretary's findings. The Second Circuit panel found such findings "conclusive" and may not be questioned by the district court.

The court determined that Ms. Bush had repeated chances to present such evidence. However, "she had never come close to meeting

²³ *Rivera v. Sullivan*, 923 F.2d 964, 967 (2d Cir. 1991); *Wagner v. Secretary of HHS*, 906 F.2d 856, 860 (2d Cir. 1990).

²⁴ *Mimms v. Heckler*, 750 F.2d 180, 185 (2d Cir. 1984).

²⁵ *Berry v. Schweiker*, 675 F.2d 464, 467 (2d Cir. 1982) (per curiam).

²⁶ Promulgated in 20 C.F.R. @@ 404.1520, 416.920 (1981):

"First, the Secretary considers whether the claimant is currently engaged in substantial gainful activity. If he is not, the Secretary next considers whether the claimant has a "severe impairment" which significantly limits his physical or mental ability to do basic work activities. If the claimant suffers such an impairment, the third inquiry is whether, based solely on medical evidence, the claimant has an impairment which is listed in Appendix 1 of the regulations. If the claimant has such an impairment, the Secretary will consider him disabled without considering vocational factors such as age, education, and work experience; the Secretary presumes that a claimant who is afflicted with a "listed" impairment is unable to perform substantial gainful activity. Assuming the claimant does not have a listed impairment, the fourth inquiry is whether, despite the claimant's severe impairment, he has the residual functional capacity to perform his past work. Finally, if the claimant is unable to perform his past work, the Secretary then determines whether there is other work which the claimant could perform." The burden of proving disability, encompassing the first four of these steps, is on the claimant. The burden of proving the fifth step is on the Secretary. *Rivera v. Schweiker*, 717 F.2d 719, 722-23 (2d Cir. 1983) (emphases added) (citations omitted).

that burden."²⁷ The district court failed to focus on her past relevant work requirement, which remained critical in her case. The appellate court concluded that there was no substantive evidence, and "absent a finding that the claimant was actually disabled, delay alone is an insufficient basis on which to remand for benefits."²⁸

"[T]he ALJ, unlike a judge in a trial, must herself affirmatively develop the record in light of 'the essentially non-adversarial nature of a benefits proceeding.'"²⁹ The duty to affirmatively develop arises from "the Commissioner's regulatory obligations to develop a complete medical record before making a disability determination"³⁰ In *Pratts*, the administrative record was inadequately developed by the ALJ. Therefore, the decision to deny *Pratts*' benefits was unsupported by substantial evidence as evidenced by the missing tape. However, in *Bush*, the administrative record was adequately developed by the ALJ. Therefore, the decision to deny *Bush*'s benefits was supported by substantial evidence as evidenced by the three government physicians she saw.

In a cases such as these, where the assessment of disability involves careful consideration of medical evidence, the testimony of medical experts figures prominently in the ALJ's decision making.³¹

²⁷ Not one doctor ever testified to this effect. The best she had done was to quote (twice) her treating physician, that she continued to have relatively severe symptom exacerbations with exposure to dust, damp weather, or flowers. She had developed food allergies, which have also increased her allergic rhinitis symptoms. Another new problem had been severe reflux esophagitis with episodes or aspiration of gastric secretions and due to her allergic rhinitis and asthma, she should avoid work environments with cigarette smoke, increased amounts of dust or molds spores or flowers.

²⁸ See *Gilliland v. Heckler*, 786 F.2d 178, 184 (3d Cir. 1986) (a decision to reverse and direct an award for benefits "should be made only when . . . substantial evidence on the record as a whole indicates that the Claimant is disabled and entitled to benefits").

²⁹ *Echevarria v. Secretary of HHS*, 685 F.2d 751, 755 (2d Cir. 1982).

³⁰ 20 C.F.R. 404.1512(d)-(f) (1995). The duty exists even when, as here, the claimant is represented by counsel. *Perez v. Chater*, 77 F.3d 41, 47 (2d Cir. 1996).

³¹ The "hearing record upon which the ALJ relied was significantly compromised by the failure to transcribe a portion of Dr. Bonilla's testimony." *Williams ex rel. Williams v. Bowen*, 859 F.2d 255, 261 (2d Cir. 1988) (findings of ALJ must be consistent with medical evidence); *Bell v. Secretary of HHS*, 732 F.2d 308, 310-12 (2d Cir. 1984) (ALJ must carefully examine medical evidence, taking into account the entire record).

In *Pratts*, "[t]he sole evidence before the ALJ refuting Pratts's claims of disabling pain and illness...was an incomplete medical history and an expert opinion rendered from it."³² Finally in *Pratts*, "the ALJ made several errors in assessing the evidence which may have influenced her ultimate finding that Pratts was not disabled."³³

The ALJ in *Pratts* "...committed several factual errors in evaluating the medical evidence of Pratts's allegedly disabling condition." For example, the ALJ stated there was no evidence of marked weight loss or anemia, yet Pratts' medical records indicate an almost twenty pound weight loss by December 1989, as well as anemia in April and May 1990. The appellate court held her decision to deny Pratts disability benefits as unsupported by substantial evidence.³⁴

³²The appellate court concluded that much of Pratts' medical history is missing. The only expert medical testimony was that of Dr. Bonilla, who relied exclusively on the materials in this record to form his opinion that Pratts was capable of light work. Such a record offers us no basis to find the substantial evidence necessary to uphold the ALJ's decision. See *Vargas*, 898 F.2d at 295-96 (stating that a doctor's assessment of other doctor's findings merits "little weight" in a disability determination); *Hidalgo v. Bowen*, 822 F.2d 294, 298 (2d Cir. 1987) (testimony of physician who had never examined claimant and relied on incomplete medical records did not constitute substantial evidence).

³³The ALJ also noted that Pratts' HIV infection was not corroborated by an ELISA test despite a treatment note that Pratts was "ELISA positive since 4/24/88." Additionally, the ALJ found no persistent sinusitis even though the medical records show treatment for sinusitis in 1988, 1989, and 1990. The ALJ wrote that Pratts's "HIV positive is controlled with vitamins and proteins," a statement that is directly contradicted by Pratts' AZT prescription and perhaps indicates a failure to comprehend fully the nature of HIV and AIDS. These errors further winnowed the amount of substantial evidence underlying the ALJ's decision to deny Pratts disability benefits. See, e.g., *Decker v. Harris*, 647 F.2d 291, 295 (2d Cir. 1981) (finding ALJ's conclusion erroneous when contradicted by direct evidence in the record).

³⁴The appellate court also found that the ALJ erred in her application of the Medical-Vocational Guidelines (the "grids"), 20 C.F.R. Pt. 404, Subpt. P, App. 2 (1995), to Pratts's case. Under the Social Security Act, the Commissioner bears the burden of proof for the final determination of disability. Generally speaking, if a claimant suffers only from exertional impairments, e.g., strength limitations, then the Commissioner may satisfy her burden by resorting to the applicable grids. For a claimant whose characteristics match the criteria of a particular grid rule, the rule directs a conclusion as to whether he is disabled. In this case, if Pratts suffered only from exertional impairments, there is no dispute that the grids would require a determination that he was not disabled based upon his age, education, and prior work experience. If, however, Pratts "suffered from additional 'nonexertional' impairments, the grid rules may not be controlling" and "the guidelines could not provide

“When there are gaps in the administrative record or the ALJ has applied an improper legal standard, we have, on numerous occasions, remanded to the [Commissioner] for further development of the evidence.”³⁵

IV. Conclusion

The reversal and remand, in the case of Mr. Pratts, was appropriate because the appellate court was “unable to fathom the ALJ’s rationale in relation to the evidence in the record’ without ‘further findings or clearer explanation for the decision.’” Mr. Pratts’ opportunity to have a ALJ’s rationale be based on developed substantive evidence in the record is an understandable outcome because the Commisioner had not undertaken a diligent search. The judgment to vaticate and remand in the case of Ms. Bush, was appropriate because Ms. Bush had done nothing to satisfy her burden, while the Secretary had gone to great lengths to satisfy its burden. The two decisions while appearing on their face to be contradictory, do infact satisfy one issue and that substaantial evidence developed by any interested party is key to the finding of disability.

the exclusive framework for making a disability determination.” Bapp v. Bowen, 802 F.2d 601, 604-05 (2d Cir. 1986).

³⁵Parker, 626 F.2d at 235; see also Hankerson v. Harris, 636 F.2d 893, 896 (2d Cir. 1980).