

presentation of expert testimony on the reliability of eyewitness identification (*Moreland*, pp 923–4). Further, the court noted that Dr. Williams was allowed to testify as to why Dayron’s version of events was problematic (e.g., the explanation that Dayron was a “parentified” child); he was only precluded from providing his opinion as to whether Dayron’s statements were “more likely the product of influence from his mother, detectives, prosecutors and social workers” (*Moreland*, p 924).

Discussion

The arguments set forth concern the impact of suggestibility on children’s credibility as witnesses in court. Child suggestibility refers to the likelihood that a child, because of a variety of biological and environmental factors, will be persuaded to believe that information provided to him is true, when it is not (Malloy LC, Quas JA: Children’s suggestibility: areas of consensus and controversy, in *The Evaluation of Child Sexual Abuse Allegations* . . . Edited by Kuehnle K, Connell M. Hoboken, N J: John Wiley & Sons, Inc, 2009, pp 267–97). Researchers have investigated this question extensively, and *amicus* briefs have been written on the subject (e.g., Bruck M, Ceci SJ: Amicus brief for the case of State of New Jersey v. Michaels . . . presented by committee of concerned social scientists. *Psychol Pub Pol’y & L* 1:272–322, 1995). Children are consistently found to be more suggestible to outside influences than are adults. Factors, including the use of suggestive questioning, the misuse of expert testimony, and allowing children to testify outside of the courtroom, thus not facing the accuser, all negatively affect the perception of children’s credibility and accuracy (Montoya J: Lessons from Akiki and Michaels . . . *Psychol Pub Pol’y & L* 1:340–69, 1995).

In this case, Mr. Moreland argued that Dayron’s testimony should be called into question, given his age and the repeated suggestive statements allegedly made to him by his relatives before trial. Although the court ruled that the techniques used by the trial court (e.g., questioning Dayron in judge’s chambers) were sufficient to establish the child’s competency to testify, the use of standardized, structured interviews would be an important consideration from a psycho-legal perspective, given that children are more susceptible to leading or suggestive questioning.

Further, the delineation of allowing Dr. Williams to provide expert testimony educating the court

about a diagnosis he gave Dayron, but not allowing him to testify about his opinion regarding the accuracy of Dayron’s statements is an important distinction. It is the role of an expert witness to educate the trier of fact about specialized knowledge, particularly knowledge that is generally accepted in the particular field of study. In this way, providing information about a diagnosis and its impact on functioning is quite different from testifying about subjective opinions of a child’s testimony. This case illustrates an important point about the limits of expert testimony. Expert witnesses may provide the court with the empirically supported knowledge about general questions regarding a child’s suggestibility and eyewitness testimony; however, they must stop short of providing an opinion about the accuracy of the actual eyewitness testimony in the particular case.

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The Weight of Treatment Team Opinion Regarding Mental Illness in Social Security Disability Claims

Jhilam Biswas, MD
Forensic Psychiatry Fellow

Kenneth L. Appelbaum, MD
Clinical Professor of Psychiatry

Law and Psychiatry Program
Department of Psychiatry
University of Massachusetts Medical School
Worcester, MA

The Opinion of a Treating Physician Does Not Have Controlling Weight in Determining Disability if the Record As a Whole Indicates Otherwise

In *Bernard v. Colvin*, 774 F.3d 482 (8th Cir. 2014), the Eighth Circuit Court of Appeals affirmed the decision of the U.S. District Court of Minnesota, Minneapolis, supporting the Social Security Commissioner’s denial of Social Security Disability Insurance (SSDI) benefits and Supplemental Security Income (SSI) to Todd Michael Bernard. Despite the opinion of three separate treating clinicians who determined that Mr. Bernard had mental impairments that warranted a disability claim, the appeals court agreed with the lower court’s ruling to not give con-

trolling weight to the treating physician's and therapist's opinions, because they were inconsistent with Mr. Bernard's record.

Facts of the Case

In April 2007, Todd Bernard, a 44-year-old laborer with a high school diploma claimed he could not work due to anxiety, cramping in his feet, and difficulty breathing. The record showed that he had worked a temporary job until April 2007 and that it had ended after completion of the project. Mr. Bernard sought mental health treatment in December of 2007 from a social worker for therapy and from a psychiatrist for psychopharmacology. During the next two years, multiple medical professionals treated Mr. Bernard for a variety of conditions, including major depressive disorder, alcohol dependence, generalized anxiety disorder, and emphysema until his death in July 2009 in the midst of the appeals process. There is no information in the opinion as to how he died.

An administrative law judge (ALJ) reviewed Mr. Bernard's claim and heard testimony from his father, medical professionals, a neighbor, and vocational experts. The ALJ determined that Mr. Bernard was still able to engage in light work, as he did when he was a laborer; that he was not disabled; and that he was not actively looking for gainful employment. Thus, in light of the finding, the ALJ determined that Mr. Bernard was not eligible for benefits.

The district court agreed with the ALJ's decision. They noted that, although the ALJ inappropriately weighed the medical professionals' opinions, it was a moot error because substantial evidence in Mr. Bernard's whole record indicated that his illnesses did not hinder his ability to work if he stopped using alcohol. After Mr. Bernard died, Ronald L. Bernard, his brother, filed an appeal.

Ruling and Reasoning

The Eight Circuit Court of Appeals agreed with the U.S. District Court's decision to deny benefits after reviewing the case using the *de novo* standard (i.e., the court reviewed the evidence as if the ALJ had not already made a finding of fact, essentially taking a fresh look at the case). The court wrote that it "must affirm the Commissioner's decision if it is supported by substantial evidence on the record as a whole" (quoting *Pelkey v. Barnhart*, 433 F.3d 575 (8th Cir. 2006), p 577). The court stated that for individuals

to receive Social Security benefits, they must be disabled.

Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment 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 12 months (*Halverson v. Astrue*, 600 F.3d 922 (8th Cir. 2010) p 929).

Disability, in the court of law, is determined by five considerations: the claimant was employed; he is severely impaired; his impairment is, or is comparable with, a listed impairment; he cannot perform past relevant work; and he cannot perform any other work.

Ronald Bernard contended that because the ALJ did not give appropriate weight to the opinions of the medical professionals, particularly his brother's psychiatrist and social worker who had treated him for an extended time, the ALJ's decision was not supported by substantial evidence in the record as a whole. From December 2007 through July 2009, Mr. Bernard had met with his social worker eight times and his psychiatrist four times. His treatment team had explained that he had "an anxiety related disorder and complete inability to function independently outside the area of [his] home" (*Bernard*, p 486). Regarding his alcohol use, they indicated that it was "impossible to separate out what attributes contribute to [Mr. Bernard's] dysfunction while he was drinking. He was equally disabled, however, when not drinking" (*Bernard*, p 486). Ronald Bernard also argued that the ALJ should have given greater weight to the doctor who evaluated his brother's hand tremors and had opined that his tremors were not derived from alcohol withdrawal and would prevent him from being effective at work.

The court determined that because the ALJ was tasked with evaluating the record as a whole, the treatment team's opinions did not automatically control the decision. The court cited the case of *Goff v. Barnhart*, 421 F.3d 785 (8th Cir. 2005): "An ALJ may discount or even disregard the opinion of a treating physician where other medical assessments are supported by better or more thorough medical evidence, or where a treating physician renders inconsistent opinions that undermine the credibility of such opinions" (*Goff*, p 790). The court determined that the evidence in the record was inconsistent with the opinions of the treatment team, because Mr. Bernard failed to follow the treatment recommendations

of the psychiatrist and social worker. As one example, Mr. Bernard did not see his psychiatrist for 15 months during his 2-year treatment because of his drinking. The court felt it was unjustified to give controlling weight to the opinions of the psychiatrist and social worker because of Mr. Bernard's gaps in appointments and because he was not seen during critical periods (including when he was drinking) or taking his medications regularly.

The court also agreed with the ALJ that Mr. Bernard seemed to stabilize when he was compliant with his medications and that he slept better, had less depressive symptoms, and experienced reduced tremors. In addition, the court opined that his participation in activities such as riding his bike to the library, playing games, handling finances, and performing maintenance work at his apartment building, was inconsistent with his subjective complaints, bringing his credibility into question. Because the treatment team relied only on Mr. Bernard's interpretation of his experience, they were likely relying on noncredible information.

The ALJ had also found that Mr. Bernard had a sparse work history and made no significant attempt to return to work. His making no effort to take vocational or rehabilitative training indicated his lack of motivation to return to work. Considering the lack of medical evidence indicating disability and Mr. Bernard's high activity level, sparse work history, and lack of motivation, the court found that the ALJ had properly denied giving controlling weight to the opinions of his doctors and social worker. The court also found the ALJ had substantial evidence to support denying benefits to Mr. Bernard.

Discussion

While breaking no new ground, this case serves as a reminder that the judge, not the clinician, makes the final decision on Social Security benefits awarded to a person because of mental illness. Although a clinical opinion is given substantial weight, factors that may detract from the clinician's affirming opinion include the patient's reliability in coming to appointments, medication compliance, and tendency to allow substance use to interfere with the medical treatment plan. Additional factors may include the credibility of the person and motivation to make improvements, despite disabilities.

This case highlights the need for treating clinicians to state the bases for their opinions and conclusions.

Without foundational reasoning for the opinion, the court may rightly give it less credence, if evidence in other parts of the record goes against the opinion. Clinicians can further bolster their credibility if they document findings that are inconsistent with their opinions and indicate how they have taken those findings into account.

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Competency to Waive Right to Counsel

Lia N. Rohlehr, PhD
Forensic Psychology Resident

Debra A. Pinals, MD
Associate Professor of Psychiatry

Law and Psychiatry Program
Department of Psychiatry
University of Massachusetts Medical School
Worcester, MA

Mental Condition Can Keep a Defendant from Making a Knowing and Voluntary Waiver of Counsel

In *Holland v. Florida*, 775 F.3d 1294 (11th Cir. 2014), a Florida court convicted Albert Holland of murder and sentenced him to death for the fatal shooting of police officer Scott Winters. The trial court denied Mr. Holland's repeated requests to represent himself. On appeal, the Florida Supreme Court determined that, because of his serious mental disabilities, Mr. Holland did not knowingly and voluntarily waive his right to counsel and thus upheld the trial court. Subsequently, the federal district court issued a writ of *habeas corpus* on the ground that Mr. Holland's right to represent himself was violated. The 11th Circuit agreed with the Florida Supreme Court and reversed the district court's grant of *habeas* relief.

Facts of Case

In October 1979, a fellow inmate in a federal prison knocked Albert Holland unconscious, leaving him with a serious brain injury. In the early 1980s, Mr. Holland was facing charges of robbery in Washington, D.C. His attorney described him as disheveled, incoherent, and unable to interact meaningfully with counsel. The court found him not guilty by