

tion of the community. Because Dr. Silverman believed that Mr. Olhovsky's risk of harm to others was low and incarceration would cause him to regress, he wanted to advocate those findings. Not being allowed to testify about those factors caused undue harm and an unfair administration of justice to Mr. Olhovsky, which goes against the roles of the treatment provider and the court. As such, the appeals court noted that future courts should give greater consideration to the role of treating psychologists, specifically to their view on prognosis.

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## Treatment Noncompliance: Free Will or Symptom of Illness?

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### Controlling Weight Given to Treating Psychiatrist in Determination of Psychiatric Disability

In *Pate-Fires v. Astrue*, 564 F.3d 935 (8th Cir. 2009), the U.S. Court of Appeals for the Eighth Circuit considered an appeal by Donna Pate-Fires of her denial of Social Security Disability benefits by the U.S. District Court for the Eastern District of Arkansas. The district court had affirmed the decision of an administrative law judge (ALJ) to deny her application for disability insurance benefits and supplemental security income (SSI) on the basis of the determination that she had the residual functional capacity (RFC) to perform past work, despite her treating psychiatrist's report that she was incapable of working because of the chronicity of her disorder.

#### *Facts of the Case*

Ms. Pate-Fires applied for SSI benefits in 2004, stating that her disability due to various mental impairments extended back to January 1980. According to her psychiatric record, Ms. Pate-Fires was first

hospitalized in 1987, at the age of 23, when she began experiencing manic and psychotic symptoms. Since that time, she had been hospitalized many times, often involuntarily. The frequency and duration of episodes of illness increased, and she carried several diagnoses, including bipolar I disorder, severe, with psychotic features; schizoaffective disorder; personality disorder NOS; and cannabis, alcohol, and opiate abuse. On three occasions, Ms. Pate-Fires was arrested and hospitalized involuntarily; the alleged offenses included threatening, disorderly conduct, harassment, and stealing.

Since the emergence of her symptoms, Ms. Pate-Fires was treated primarily at Western Mental Health Institute; Arkansas State Hospital, Division of Mental Health Services; and Mid-South Health Systems, Inc. At the time of her disability application, she was being treated by Dr. David Erby of Mid-South. During her treatment episodes from 1999 to 2005, Ms. Pate-Fires' Global Assessment of Functioning (GAF) scores ranged from 10 ("persistent danger of severely hurting self or others") to 58 ("moderate symptoms or moderate difficulty in social, occupational, or school functioning") (American Psychiatric Association: DSM-IV-TR. American Psychiatric Association, 2000). At a 2002 involuntary commitment hearing, the court concluded that "she was in complete denial of illness and judgment was poor" with "a lengthy history of noncompliance with medication" (*Pate-Fires*, p 938). Even during two rare periods when her GAFs were 50 and 51, her treating doctor reported poor judgment and insight, inability to be gainfully employed, low tolerance for stress, and difficulty maintaining focus, even on minor tasks.

Ms. Pate-Fires had a high school education. She reported that she had worked as a stocker at Wal-Mart. According to her ex-husband, she had held several jobs, "none of which had lasted more than a couple of weeks" (*Pate-Fires*, p 937), because of her psychiatric illnesses.

The Social Security Administration denied Ms. Pate-Fires' first application and reconsideration. In 2006, her case was heard before an ALJ. Ms. Pate-Fires testified at her disability hearing and described herself as being easily stressed, noting that stress leads to manic episodes. She reported that she had difficulty concentrating; depended on her sister to manage her bills and scheduling; and, because of herniated discs in her back, found standing and walking to

be difficult. A vocational expert (VE) also testified at the hearing and opined that someone with Ms. Pate-Fires' history would have the RFC to perform work in which interpersonal contact is limited; tasks are of a rote nature; and supervision is simple, direct, and concrete. The expert believed that Ms. Pate-Fires' past work as a stocker fit this description.

Although Ms. Pate-Fires' treating physician's records reported her inability to maintain employment and her records showed 17 of 21 recorded GAF scores at or below 50, suggestive of severe impairment, the ALJ agreed with the VE and concurred with the original decisions. Social security regulations require an ALJ to give "controlling weight" to the opinion of the treating physician, as long as the opinion "is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the claimant's] case record" (20 C.F.R. § 404.1527(d)(2) (2004)). However, the ALJ asserted that "Dr. Erby's opinion was not entitled to any controlling weight because . . . it did not address Pate-Fires' long history of substance abuse and non-compliance with recommended medications and treatment" (*Pate-Fires*, p 943) and because his opinion allegedly contradicted some of his own treatment notes that cited some lessening of symptoms during brief periods when Ms. Pate-Fires was compliant with her treatment.

Ms. Pate-Fires appealed her denial of disability to the District Court of the Eastern District of Arkansas, because the ALJ did not give controlling weight to her physician's opinion and medical record and because the ALJ concluded incorrectly that she had the RFC to perform her previous work. On September 28, 2007, the district court heard the case and affirmed the ALJ's decision.

#### Ruling and Reasoning

The U.S. Court of Appeals for the Eight Circuit reversed the district court's judgment, remanding the matter to that court "with instructions to remand the case to the Social Security Commissioner for an award of benefits" (*Pate-Fires*, p 947).

With regard to Ms. Pate-Fires' claim that the ALJ did not give controlling weight to the opinion of her treating physician and medical record, the court agreed, deciding that the ALJ had improperly superseded the physician's opinion with his own "specu-

lative lay opinion" (*Robinson v. Barnhart*, 366 F.3d 1078 (10th Cir. 2004)).

Upon consideration of Ms. Pate-Fires' medical record, the court concluded that the "medical evidence uniformly indicates Pate-Fires suffers from a severe mental impairment and cannot be expected to engage in any gainful employment" (*Pate-Fires*, p 947). While the ALJ's decision to ignore the treating physician's opinion was based in part on the GAF scores given while Ms. Pate-Fires was compliant with treatment guidelines, the Eighth Circuit referenced *Colon v. Barnhart*, 424 F. Supp. 2d 805 (E.D. Pa. 2006), to conclude that the total history of GAF scores must be accounted for when determining disability.

The court also agreed with Ms. Pate-Fires' second claim that the determination that her self-report was not credible was not based on substantial evidence. The ALJ had cited evidence of her noncompliance with medication and treatment as a primary reason to conclude that she was not a credible source in the disability determination. The court concluded that the ALJ did not properly take into account her non-compliance as a symptom of her psychiatric illness (*Brashears v. Apfel*, 73 F. Supp.2d 648 (W.D. La. 1999)). In fact, the court concluded that the ALJ's decision that Ms. Pate-Fires' noncompliance was anything other than a symptom of her psychiatric illness despite overwhelming evidence in her medical record, was equivalent to the ALJ's "playing doctor," and cited *Rohan v. Chater*, 98 F.3d 966 (7th Cir. 1996), which warns against such judicial action.

#### Discussion

The Eighth Circuit's reversal of the ALJ's decision to deny Ms. Pate-Fires' disability raises questions for those involved in psychiatric evaluation for disability, including whether noncompliance is considered as free will or a symptom of disorder; how severity of a chronic, episodic disorder is determined; and whether controlling weight is given to the treating physician.

The ALJ determined that because of the likelihood that Ms. Pate-Fires' symptoms could be better controlled were she compliant with medication and treatment, her noncompliance precluded any potential disability determination. In a sense, the ALJ determined that noncompliance was a result of free will and concluded that with appropriate treatment, she may be capable of working. However, numerous

court cases have set the precedent that noncompliance in the treatment of psychiatric disorders should not be used to deny disability claims (*Brashears; Mendez v. Chater*, 943 F. Supp. 503 (E.D. Pa. 1996); *Sharp v. Bowen*, 705 F. Supp. 1111 (W.D. Pa. 1989)). In fact, her medical record consistently suggested that noncompliance was a result of poor insight and judgment because of her psychiatric disorder. Noncompliance with psychiatric medication for severe psychiatric disorders is high and can be attributed to the belief that one is not disordered, to unpleasant side effects, and to difficulty in achieving the degree of organization required to take medications and keep appointments.

The ALJ also viewed Ms. Pate-Fires' substance use as evidence of her lack of credibility. If the ALJ is unable to determine whether a substance use disorder contributed substantially to the psychiatric disorder, it cannot be used to deny disability (*Brueggemann v. Barnhart*, 348 F.3d 689 (8th Cir. 2003)). High comorbidity of substance use disorders and psychiatric disorders may lead to inappropriate denial of disability to those who would otherwise qualify.

Determination of a disability in cases in which the individual has an episodic, psychiatric condition must include consideration of the chronicity of the disorder and the full history of the individual's functioning. In Ms. Pate-Fires' case, the ALJ determined that she was not permanently disabled, because her medical record showed periods of improvement in which symptoms of paranoia and mania abated, and her global assessment of functioning increased. Given the episodic nature of her difficulties and the severity of impairment associated with her low GAF scores, the few reports of higher GAF scores are not suggestive of an ability to function in the workplace.

The ALJ used the evidence of Ms. Pate-Fires' noncompliance and her substance abuse history to discredit the treating physician's opinion, on the basis that these two concerns were not adequately addressed in the medical record. Previous disability determination cases have shown that an ALJ must give controlling weight to the treating physician and define the weight given (*Robinson*). The ALJ must not use speculation to make interpretations of disability or credibility from the client's medical record; these interpretations are reserved for mental health practitioners (*Rohan*). The decision that the treating physician's report has controlling weight brings to light

the importance of explicit documentation of a patient's ability for work and daily activities and also the factors contributing to noncompliance. The provider's controlling weight brings with it the challenge of maintaining a therapeutic alliance while trying to make impartial judgments of disability, judgments for which treatment providers have limited training.

In conclusion, mental health providers have a substantial role in the determination of disability for their clients, and in most circumstances, the treating provider's opinion is given weight over that of an independent psychiatric evaluator who has spent less time with the client. In addition, it is the role of mental health providers and not the ALJ to determine whether noncompliance with medication is a direct result of the psychiatric disorder and whether brief periods of lessened symptoms suggest an impermanence of the disorder and the disability.

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## The Burden of Proof on Psychiatric Experts With Regard to Imminent Injury in Civil Commitment Proceedings in Montana

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### Civil Commitment Criteria Clarified: Substance Abuse and Antisocial Personality Disorder Excluded

*In re D.M.S.*, 203 P.3d 776 (Mont. 2009), decided by the Montana Supreme Court on February 18, 2009, was an appeal from an order of the District Court of the Twenty-First Judicial District, Ravalli County, committing D.M.S. to the Montana State Hospital (MSH). The supreme court concluded that the evidence must clearly demonstrate a connection between imminent threat of injury and a recognized