

## Weight Afforded Opinions of Treating Psychiatrists in Disability Evaluations

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### The Treating Provider's Opinion Carries Significant Weight in Disability Evaluations, Absent Substantial Evidence to Disregard the Assessment

In *Ghanim v. Colvin*, 763 F.3d 1154 (9th Cir. 2014), a claimant appealed the judgment of the United States District Court for the Western District of Washington affirming denial of his application for disability insurance benefits and Supplemental Security Income (SSI). The Ninth Circuit Court of Appeals found that the Administrative Law Judge (ALJ) had erred in discounting the opinions of the claimant's treating providers that supported his disability claim. The district court's decision was reversed and remanded to the Commissioner of the Social Security Administration (SSA) for further proceedings, in line with its opinion.

#### Facts of the Case

The claimant-appellant, Mr. Ghanim, was an Iraqi refugee who immigrated to the United States in 1994. In Iraq, he had been imprisoned and tortured. From 1994 to 2009, he worked consistently in a variety of jobs. In 2009, his brother was killed in Iraq.

In June 2009, Mr. Ghanim was examined by an independent psychologist. The psychologist noted severe functional limitations, such as inability to relate appropriately to coworkers and supervisors or to respond appropriately to the expectations of a normal work setting. The psychologist diagnosed post-traumatic stress disorder (PTSD), personality disorder, major depressive disorder, and generalized anxiety disorder.

In July 2009, Mr. Ghanim began receiving psychiatric care from a team of providers. His providers documented ongoing impairment, including depression, insomnia, nightmares, nervousness, memory loss, and anger.

In December 2009, another independent psychologist examined Mr. Ghanim at the request of Washington State's Department of Disability Services. Besides noting that Mr. Ghanim endorsed symptoms of PTSD, the examiner reported that Mr. Ghanim performed poorly on the cognitive assessment. The psychologist, however, stated that Mr. Ghanim's "cognitive deficits may not be as severe as he claims" (*Ghanim*, p 1158). The psychologist suspected malingering of cognitive function but did not make a definitive diagnosis of malingering. He gave Mr. Ghanim the following diagnoses: depressive disorder not otherwise specified (NOS), PTSD, anxiety disorder NOS, and cognitive disorder NOS.

Also in December 2009, a consultant psychologist, at the request of the Department of Disability Services, performed a mental residual functional capacity assessment based on a records review. The psychologist determined that Mr. Ghanim's only psychologically based limitation was his moderate inability to complete a normal work day without interruption. Another state consultant reviewed the records and affirmed the prior reviewer's assessment.

In March 2010, two of the appellant's treating providers (a nurse practitioner and licensed social worker) submitted a psychological evaluation to the Washington State Department of Social and Health Services. In October 2010, Mr. Ghanim's psychiatrist and case manager sent a letter to his attorney, opining: "[d]ue to his mental illness, we feel it is highly unlikely [that he] would be able to engage in meaningful adult activities or employment in the near future" (*Ghanim*, p 1157). In support, they referred to his symptoms and diagnoses of PTSD and major depressive disorder, recurrent, with psychotic features.

Mr. Ghanim initially applied for disability benefits and SSI in October 2009, claiming disability since April 2009. His application and request for reconsideration were both denied. At his hearing before an ALJ in December 2010, Mr. Ghanim testified that, even with medication, he experienced nightmares, social anxiety, and depression and that he was afraid to cook because his memory was so poor. He said that he was dependent on a friend for

assistance with basic self-care and social interactions. Records indicated that Mr. Ghanim performed limited chores and only occasionally socialized.

The ALJ concluded that Mr. Ghanim was not disabled and denied his application. The judge found that Mr. Ghanim had PTSD and depression, but also concluded that he was relatively unimpaired. In doing so, he discounted the opinions of Mr. Ghanim's treating providers because they conflicted with treatment records. The ALJ rejected Mr. Ghanim's personal testimony as not credible because it conflicted with information in the treatment records and the independent psychological assessments.

The Appeals Council denied Mr. Ghanim's request for review, and the district court affirmed. Mr. Ghanim initiated an appeal to the Ninth Circuit. While the appeal was pending, the SSA, on reconsideration, determined in March 2012 that he was disabled. At issue before the Ninth Circuit was whether Mr. Ghanim was entitled to benefits from April 2009 to March 2012. On appeal, Mr. Ghanim argued that neither the ALJ's rejection of his treating providers' opinions nor the determination about Mr. Ghanim's credibility was supported by substantial evidence.

#### *Ruling and Reasoning*

The Ninth Circuit reversed the district court's dismissal of the claim and remanded the case for further proceedings. The court held that the ALJ's rejection of both the treating providers' opinions and Mr. Ghanim's credibility was not supported by substantial evidence.

Citing prior precedent (*Holohan v. Massanari*, 246 F.3d 1195 (9th Cir. 2001); *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194 (9th Cir. 2008)), the court stated that the treating physician's opinion must be given more weight than that of an examining physician, and an examining physician's opinion must be given more weight than a reviewing physician's opinion. "Even if a treating physician's opinion is contradicted, the ALJ may not simply disregard it" without specific and substantial evidence (*Ghanim*, p 1161).

Although a conflict between treatment notes and the treating providers' opinions may constitute a legitimate reason to discount the opinion of a treating provider, the court held that in this case there was no substantial evidence supporting the ALJ's conclusion that the treating providers' opinions were inconsistent with objective reports in the records.

The court further noted that the ALJ discounted the treatment providers' opinions because they were largely based on Mr. Ghanim's subjective reports; when an opinion is not more heavily based on self-report than clinical observation, the court stated, there is no evidentiary basis for rejection of the opinion. In this case, self-report was only part of the evidence provided by the treating providers in support of their opinions.

The ALJ had rejected Mr. Ghanim's personal testimony as not credible because of inconsistencies with the treatment records, prior testimony, and independent psychological evaluations. The Ninth Circuit stated that the materials must be considered as a whole, not "cherry-picked." When taken in totality, the other sources did not sufficiently undermine Mr. Ghanim's credibility.

#### **Dissent**

The dissenting opinion highlighted concern that psychological symptoms may easily be feigned and that deference should be given to the commissioner when the record is open to interpretation. Although they were absent in the majority opinion, the dissenting judge included specific inconsistencies noted in the record, such as Mr. Ghanim's claim of not knowing his date of birth during an independent psychological evaluation. The dissent stated that the ALJ's opinion was supported by the record.

#### *Discussion*

This case focuses attention on the level of weight afforded the opinion of treating providers in disability claims. The treating provider's opinion carries weight unless there is substantial evidence that the opinion should be disregarded, such as conflict between that opinion and treatment notes. Thus, this case also brings to bear the importance of the totality of the treatment record. The ALJ cited specific instances of inconsistency within the treatment record. However, the Ninth Circuit made clear that the ALJ may not cherry-pick and that "occasional indicia of improvement" are not sufficient evidence that the treating provider's opinion should be disregarded.

This case underscores the importance of accuracy in the treatment records. It is noteworthy that the term "better," commonly seen in treatment notes, is frequently used as a relative term and does not necessarily signify complete recovery. It is possible for a patient to make improvements while remaining, on the whole, severely symptomatic and unable to main-

tain employment. Well-documented clinical encounters will minimize the risk of confusing minor improvements with complete recovery.

The dissenting judge suggested that there is a distinction between claims of disability based on physical versus mental impairment, in that psychological disabilities are based mainly on claimant self-report. The dissent raises the concern of fraudulent claims based on self-report of feigned or exaggerated symptoms. Although malingering should be considered a possibility in the context of disability assessments, it should not be assumed that a claimant reporting a mental disorder is more likely to file a fraudulent claim than one alleging a physical disability. Furthermore, as in this case, it is important to review the record as a whole, rather than pointing to minor indicia of improvement, especially in the setting of persistent severe symptoms.

Disclosures of financial or other potential conflicts of interest: None.

## The Right of Individuals with Mental Illness to Keep and Bear Arms

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### Federal Gun Law Prohibition From Possessing Firearms for Persons Committed to a Mental Institution and Second Amendment Rights

In *Tyler v. Hillsdale County Sheriff's Department*, 775 F.3d 308 (6th Cir. 2014), the Sixth Circuit Court of Appeals reversed and remanded the United States District Court for the Western District of Michigan's decision to dismiss a claim by Clifford Charles Tyler, stating that the federal statute that prohibits individuals who have been committed to a mental institution from possessing firearms was unconstitutional as applied to him. Mr. Tyler resided in Michigan, where there is no relief-from-disabilities program that would give him the opportunity to

challenge prohibition of firearms for persons who have been adjudicated intellectually disabled or have been committed to a mental institution under 18 U.S.C. § 922(g)(4) (2012).

#### *Facts of the Case*

Under federal law, defined by 18 U.S.C. § 922(g)(4) (2012), "It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution" to possess a firearm. In accordance with federal law, an individual may be eligible for relief from this prohibition through a relief-from-disability program after an application to the Attorney General, who had delegated the authority of this program to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). The application requires medical records, a copy of the court order mandating commitment, and other documentation supporting restoration. In 1992, Congress defunded the federal relief-from-disabilities program, but after the Virginia Tech shooting in 2008 and the passage of the National Instant Criminal Background Check System (NICS) Improvement Act of 2007, (NIAA), Pub. L. No. 110-180 (2008), Congress authorized federal grants to states to assist them in complying with providing accurate information in databases that help identify prohibited purchasers of firearms. The federal grants required certification that the state had a relief-from-disabilities program in place.

Mr. Tyler, now 73 years old, had been involuntarily committed in 1986 after his daughter called the police while he was having a difficult time during his divorce. At the time, he was reportedly sobbing, depressed, and suicidal, with difficulty sleeping. His family called the police and he was ultimately involuntarily committed to the Ypsilanti Regional Center. Thirty-five years later, in February 2011, Mr. Tyler attempted to buy a firearm and was informed by the Hillsdale County Sheriff's Office that he was ineligible because of his previous commitment to a mental institution, in accordance with 18 U.S.C. § 922(g)(4) (2012). On August 2011, he appealed the denial. In January 2012, NICS informed Mr. Tyler that his appeal was denied with a letter that included a statement indicating that until his state had an ATF-approved relief-from-disabilities program his federal firearm rights would not be restored. In May 2012, Mr. Tyler filed a federal lawsuit alleging that enforcement of § 922(g)(4) violated his Constitutional