

that the evidence did not indicate significant limitations of adaptive functioning, according to the *Briseno* criteria, nor was there evidence of the manifestation of intellectual disability before the age of 18. Thus, the appeals court concluded that although there were some factual questions about whether he was intellectually disabled, the state court had properly evaluated the conflicting evidence, and there was no error in its conclusion that he did not meet criteria for intellectual disability.

Discussion

Following the Supreme Court's decision in *Atkins* that execution of intellectually disabled individuals is unconstitutional, many thorny questions have arisen concerning the determination of intellectual disability. Some of the concerns have included the definitions of intellectual disability adopted by states, the accuracy of IQ scores, and whether there should be rigid cutoff scores (as in the recently heard arguments before the Supreme Court, in Transcript of Oral Argument, *Hall v. Florida*, No. 1210882. Available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-10882_7758.pdf. Accessed March 3, 2014). *Hernandez* did not involve questions about the appropriateness of Texas' standards for intellectual disability, but rather whether the standards were properly applied. Of particular interest to mental health professionals are the questions raised in this case of administration and scoring errors, cultural differences (Mr. Hernandez was a Mexican national, and there are hints that there may have been a language problem, as most of the tests administered were nonverbal), and assessment of effort and feigning. Given the very high stakes in *Atkins* cases, this case serves as a reminder of the need for properly trained evaluators who are familiar with the relevant tests and can inform the court of the limitations of many tests standardized in the United States when applied to individuals from different cultures. Furthermore, it is concerning in this case that assessment of feigning was seemingly based at least in part on idiosyncratic clinical judgment (*e.g.*, that the defendant volunteered that he was a member of a prison gang), rather than on validated instruments designed specifically to address feigning and proper effort.

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Denial of Social Security Benefits In Contrast to the Treating Doctor's Opinion

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Denial of Social Security Benefits Were Upheld (Despite the Controlling Decision of a Prior Administrative Law Judge) Due to Evidence of Improvement (Despite the Treating Physician's Opinion)

In *Rudd v. Comm'r of Social Security*, 531 F. App'x 719 (6th Cir. 2013), Jerry Rudd contended that the Social Security Administrative Law Judge (ALJ) erred in failing to apply the prior ALJ's residual functional capacity (RFC) finding, as required by *Drummond v. Comm'r of Soc. Sec.*, 126 F.3d 837 (6th Cir. 1997), that subsequent ALJ findings are bound by previous ALJ findings unless evidence of improvement in the claimant is presented. Mr. Rudd also contended that his new mental evaluation established that he had greater mental impairment and limitations and that the ALJ erred in not giving controlling weight to the opinions of his treating physician. Mr. Rudd appealed the denial of his disability claims in the United States Court of Appeals for the Sixth Circuit after an ALJ found that he had an RFC for reduced range of sedentary work with some mental limitations and that he was not disabled, in that he could perform other work.

Facts of the Case

Mr. Rudd had suffered various injuries from an April 2002 motor vehicle accident, had had surgery on his right knee in 2005, and had had treatment for depression. He filed applications for a period of disability, disability insurance benefits, and Supplemental Security Income. The ALJ denied these claims, finding him not disabled from June 1, 2003 through June 25, 2007. The ALJ found that he had severe impairments of cognitive and adjustment disorders and was unable to carry out detailed instruc-

tions, make complex decisions, and work in the general public. The ALJ found that he had RFC for sedentary work, and recommend that he avoid fast-paced work and be limited to simple, repetitive, non-quota tasks.

Mr. Rudd received mental health treatment from Four Rivers Behavioral Health from February 2007 through March 2008 and had a diagnosis of depressive disorder, with Global Assessment Functioning (GAF) scores between 55 and 60. At subsequent visits, he was not depressed and was seeking employment. At his final visit, he was doing well on medications with normal mood and affect, and he had improved sleep and energy. Due to pain in his back, legs, and hands, he visited the office of Danny Butler, MD, in 2007–2008 on at least three occasions. Dr. Butler would later provide an assessment that if accepted would have required a finding of a disability due to Mr. Rudd's inability to work any full-time, eight-hour job.

Dan Vandivier, PhD, a state agency psychologist, opined that Mr. Rudd could understand simple instructions; could sustain concentration, effort, and pace for simple tasks and interact with supervisors and peers, but not with the public; and could adequately adapt to situational conditions and changes. At his attorney's request, Bruce Amble, PhD, examined Mr. Rudd and opined that he would have generally serious limitations with work activities.

Tom Wagner, PhD, testified, based on a review of the records, that Mr. Rudd had mild limitations of activities of daily living, moderate limitations of social functioning and concentration, persistence and pace, and no episodes of decompensating. Dr. Wagner opined that Mr. Rudd needed verbal instructions and had slight limitations in his ability to carrying out simple work-related adjustments; deal with co-workers; and understand, remember, and carry out simple work instructions. Dr. Wagner opined that Mr. Rudd's GAF of 55 to 60 was inconsistent with the level of limitations noted by Dr. Amble, acknowledging that the inconsistency could be explained by the time gap between Dr. Amble's evaluation and Mr. Rudd's last mental health treatment. Dr. Wagner opined that Mr. Rudd's treatment was successful. During this hearing, an impartial vocational expert testified that Mr. Rudd could perform light work with the mental restrictions indicated by Dr. Wagner and a variety of unskilled jobs.

The ALJ determined that Mr. Rudd had not engaged in gainful employment since his alleged onset date and that he had numerous, severe impairments; however, these impairments from injuries sustained in the 2002 motor vehicle accident, a 2005 knee injury, borderline intellectual functioning, dysthymia, personality disorder, and a history of substance abuse, neither alone or in combination met criteria of impairments in accordance with the Listings of Impairments. The ALJ recognized that the previous ALJ had found that Mr. Rudd could perform unskilled, sedentary jobs; however, since the prior final decision, the current ALJ found that Mr. Rudd had regained a higher level of physical functioning, that he could perform light work, and that his mental state had improved according to his treatment records. In an alternative finding, the ALJ found that, even if limited to unskilled, sedentary jobs, Mr. Rudd could still perform a significant number of jobs. The ALJ concluded that Mr. Rudd was not disabled. The Social Security Appeals Council denied Mr. Rudd's request for a review of the decision. He appealed to the district court.

The district court held that the AJL had a "substantial basis" for concluding that improvement had occurred; therefore, the AJL was entitled to reevaluate his RFC. The magistrate judge found that the ALJ did not err in relying on Dr. Wagner's testimony over that of Dr. Amble's, since Dr. Amble had examined Mr. Rudd only once, Dr. Wagner had access to the entire medical record, and Dr. Wagner had explained the basis of his disagreement with Dr. Amble's diagnosis. The magistrate judge found that the ALJ had appropriately updated Mr. Rudd's RFC, noting that Mr. Rudd had not received much mental health treatment since the prior decision, his symptoms were manageable with medications, and Dr. Wagner had found that Mr. Rudd had moderate limitations in dealing with work pressures. The district court affirmed the final decision of the Commissioner and dismissed the complaint.

Ruling and Reasoning

The appellate court affirmed the judgment of the district court.

Mr. Rudd contended that the ALJ erred in failing to apply the prior ALJ's RFC finding per *Drummond v. Comm'r of Soc. Sec.*, 126 F.3d 837 (6th Cir. 1997). The appellate court held that substantial evidence supported the finding that Mr. Rudd's physical con-

dition had improved since the prior decision based on the facts that he received minimal, conservative treatment; had normal diagnostic test results; and had recovered from his injuries. The court also held that his mental condition had improved, as evidenced by treatment notes reflecting an improvement in mental status, less depression, and anxiety; no depressive symptoms; and an improved GAF score of 60. Thus, the prior RFC was not binding.

Mr. Rudd contended that his new mental evaluation established greater mental impairment and limitations and that the ALJ's reliance on Dr. Wagner's testimony was improper, since Dr. Wagner never examined him. The court held that substantial evidence supported the opposite conclusion that his condition had improved, including treatment records reflecting moderate mental limitations; opinions of two state agency physicians that Mr. Rudd could perform simple work, interact with superiors and peers, and adapt to work changes based on their reviews of the evidence; and Dr. Wagner's review of the entire mental health evidence before his testimony. Since the evidence supported his testimony, the court held that the ALJ was not precluded from relying on the opinion of a nonexamining physician.

The court held that the ALJ did not err in failing to give Dr. Butler's opinion controlling weight, recognizing that the nature and extent of a treatment relationship is relevant to the weight given to a physician's opinion. The court found Mr. Rudd's treatment sparse, not well supported by medically acceptable clinical and laboratory diagnostic techniques, and inconsistent with the other substantial evidence.

Discussion

Traditionally in disability law, the treating physician's opinion holds the controlling weight for the determination of symptoms in the adjudication of claims for disability benefits. In this case, however, the judge gave more weight to a nonexamining physician than to the treating physician because of the limited treatment provided by the treating physician, the inconsistency between his opinion and those of other experts, the lack of basis for his opinion, and the power of a nonexamining physician who reviewed the entire record and supported his opinion with evidence. This physician's report was more persuasive to the court because of its thoroughness and well-documented substantiation of opinions, as is

desired in forensic practice. Moreover, the latter very likely improved the court's awareness of the dual role of the treating physician and a reminder of the required sensitivity to the differences between clinical and legal obligations of those who find themselves in a dual-agency situation, such as in disability evaluations, guardianships, civil commitments, and Workers' Compensation hearings.

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The Diagnosis of Mental Illness and the Determination of a Sex Offender's Eligibility for Civil Commitment

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Fourth Circuit Court Affirms Ruling That Repeat Sex Offender Does Not Suffer From a Serious Mental Illness and Is Not Eligible for Civil Commitment

In January 2012, Frederick Springer, who had already been incarcerated for failing to comply with the federal Sex Offender Registration and Notification Act, was certified as "sexually dangerous" in seeking to have him civilly committed under the Adam Walsh Child Protection and Safety Act of July 27, 2006 (Pub. L. No. 109-248, 120 Stat. 587 (2006)) (the Walsh Act). In *United States v. Springer*, 715 F.3d 535 (4th Cir. 2013), the Fourth Circuit Court of Appeals affirmed the decision of the U.S. District Court of the Eastern District of North Carolina, finding that it is within the court's discretion not to rely on the Diagnostic and Statistical Manual