Every *Picture* Tells *a* Story:

A Visual Guide to Evaluating Opinion Evidence in Social Security Appeals

By Iain D. Johnston[*]

Introduction

Under the Social Security Act, an individual with a "disability" is generally entitled to benefits. 42 U.S.C. § 423(a)(1). But determining disability can be difficult. Social Security jurisprudence is Byzantine. Newcomers to the process of Social Security appeals might start their education by analyzing the underlying statutes. Unfortunately, like nearly all things related to Social Security, that common sense approach would result in almost instantaneous frustration. Other than providing the definition of "disability," the Social Security Act is barren of guidance, leaving the law and process to be fleshed out by the Social Security Administration's regulations. 42 U.S.C. §§ 405, 416(i)(1), 423(c)(4)(A). But even the Administration's regulations do not fully address all the basic issues. In addition to the regulations, the Hearings, Appeals and Litigation Law manual (HALLEX), Program Operations Manual System (POMS) and Social Security Rulings (SSR) fill in statutory blanks. Throw case law on top of the jurisprudential pile and the result is a puzzle that would make Erno Rubik proud.

This article attempts to distill these authorities into a visual guide (essentially a flow chart) for one of the most important aspects of Social Security appeals; namely, evaluating opinion evidence relating to a disability. When the Administration fails to properly determine the weight of opinions, on appeal, courts are likely to remand the case. Remand rates in Social Security appeals are extremely high. *See, e.g. Dettloff v. Colvin,* 2015 U.S. Dist. LEXIS 80285, *7 (N.D. Ill. June 22, 2015) (identifying a 70% reversal rate); *Freismuth v. Astrue,* 920 F. Supp. 2d 943, 945 (E.D. Wis. 2013) (identifying reversal rates in the Eastern District of Wisconsin ranging from 73% to 84%). A coin flip provides better odds of success.

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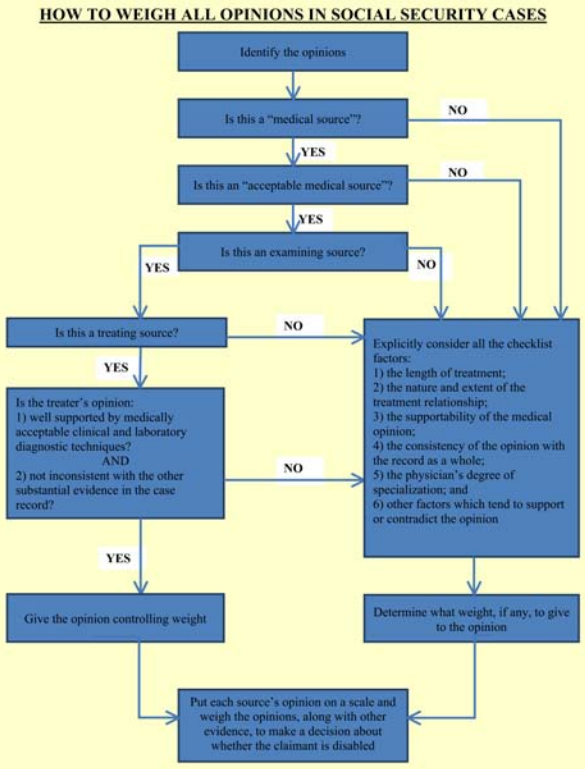
Many of those remands result from improperly weighing opinion evidence, particularly the opinions of treating sources. 78 Fed. Reg. 41352, 41353-54 (July 10, 2013). The following flow chart shows how the Administration should properly determine the weight of opinion evidence.



Weighing Process

The Administration is required to "consider" all opinions regarding a claimant's disability. *See* POMS DI 24515.002.4 ("Always consider opinion evidence when it is in the case file."); 20 C.F.R. § 404.1527(d); *Young v. Barnhart,* 362 F.3d 995, 1001 (7th Cir. 2004) ("Weighing conflicting evidence from medical experts . . . is exactly what the ALJ is required to do."). But not all opinions are equal. 20 C.F.R. § 404.1527(c). Some opinions are given more weight, usually based on the source of the opinion and the relationship between the claimant and the opinion's source. 20 C.F.R. § 404.1520b; 20 C.F.R. § 404.1527. Properly weighing the various opinions is critical to correctly determine whether a claimant is disabled. The following is a step-by-step explanation providing the legal authority to support the flow chart.

Step #1

The first step is to cull from all the evidence the various opinions. 20 C.F.R. § 404.1513(d); 20 C.F.R. § 404.1527(a)(2),(b),(c); SSR 06-03p. This step identifies the universe of all opinions in the record. With all the opinions identified, the sorting and resulting weighing process can start.

Step #2

The next steps focus on the source of the opinion. Initially, the Administration must determine whether the opinion is being offered by a "medical source." 20 C.F.R. § 404.1502; SSR 06-03p. A "medical source" includes licensed physicians, licensed or certified psychologists, licensed optometrists, licensed podiatrists, qualified speech-language pathologists, nurse practitioners, physicians' assistants, naturopaths, chiropractors, audiologists and therapists. *See* SSR 06-03p; 20 C.F.R. § 404.1502; 20 C.F.R. § 404.1513(a)(1)-(5), (d)(1). If the opinion is from a "medical source," the Administration must decide what type of medical source provided the opinion. SSR 06-03p. An opinion that is *not* offered by a "medical source" is an opinion from, not surprisingly, a "non-medical source." SSR 06-03p. Examples of a "non-medical source" include educational personnel, such as teachers, counselors, early intervention team members, developmental center workers, and daycare center workers; public and private social welfare agency personnel; and other non-medical sources, such as spouses, parents, caregivers, siblings, relatives, friends, neighbors, and clergy. 20 C.F.R. § 404.1513(d)(2)-(4); SSR 06-03p. An opinion from a "medical source" is generally, but not always, given more weight than an opinion from an "other source." *See* 06-03p (non-medical opinions cannot be used to establish existence of medical impairment); *Stetz v. Colvin,* 2013 U.S. Dist. LEXIS 120917, *34-37 (N.D. Ohio Aug. 26, 2013) (affirming despite non-medical opinion being given more weight than treating source opinion).

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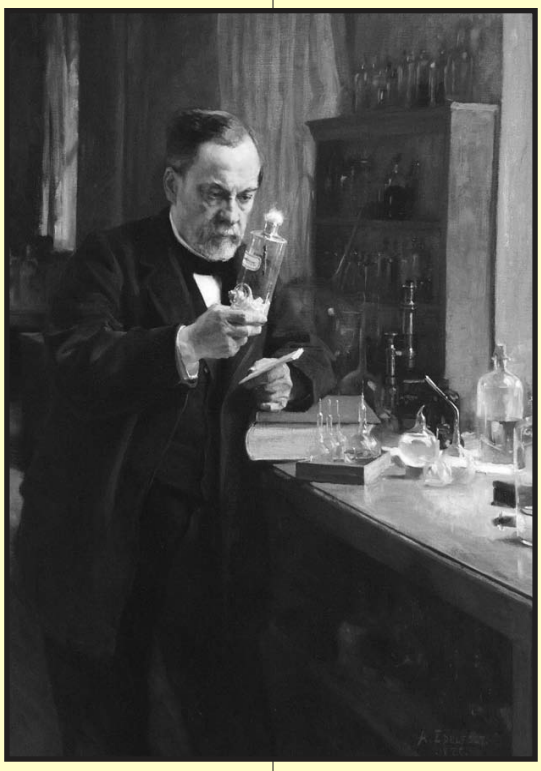
If the opinion is *not* from a "medical source" and is instead from a "non-medical source," then the opinion is weighed by considering the "checklist factors." 20 C.F.R. § 404.1527(c)(2)(i)-(ii),(c)(3)-(6); SSR 06-03p. These factors and how they are to be applied are discussed in detail at Step #7.



Step #3

Once an opinion has been identified as being offered by a "medical source," the Administration must determine if the "medical source" is an "acceptable medical source." An "acceptable medical source" is a licensed physician, licensed or certified psychologist, licensed optometrist, licensed podiatrist, and qualified speech-language pathologist. 20 C.F.R. § 404.1513(a)(1)-(5). Only an "acceptable medical source" can be considered a "treating source," "nontreating source," and "nonexamining source." 20 C.F.R. § 404.1502. Additionally, only an "acceptable medical source" can offer a "medical opinion." 20 C.F.R. § 404.1527(a)(2); SSR 06-03p. A "medical opinion" is a statement from an acceptable medical source that reflects judgments about the nature and severity of the claimant's impairments, including symptoms, diagnosis, prognosis, physical and mental restrictions, and activities the claimant can perform despite the impairment. 20 C.F.R. § 404.1527(a)(2). If the opinion is *not* from an acceptable medical source, then the opinion is characterized as coming from (again – not surprisingly) a "not acceptable medical source." SSR 06-03p. Examples of "not acceptable medical sources" include nurse-practitioners, physicians' assistants, naturopaths, chiropractors, audiologists, and therapists. 20 C.F. R. § 404.1513(d)(1). An opinion from an "acceptable medical source" is generally, but not always, given more weight than an opinion from a "not acceptable medical source." 20 C.F.R. § 404.1513(a); SSR 06-03p; *Garcia v. Astrue,* 2012 U.S. Dist. LEXIS 107576, *36 (N.D. Ind. Aug. 1, 2012). If the opinion is from a "not acceptable medical source," then, again, the opinion is weighed by considering the "checklist factors." SSR 06-03p ("Factors for Considering Opinion Evidence"); *see also* 20 C.F.R. § 404.1527(c)(2)(i)-(ii), (c)(3)-(6) (the checklist factors).

Step #4

Once it is determined that a "medical opinion" has been offered by an "acceptable medical source," the next step is to determine the relationship between the "acceptable medical source" and the claimant. The Administration must determine if the "acceptable medical source" examined the claimant. *See* 20 C.F.R. § 404.1527(c)(1). Strangely, although the regulations define "examining relationship," the regulations do *not* define "examining source." 20 C.F.R. §404.1527(c)(1). Instead, the regulations simply define "nonexamining source," which means "a physician, psychologist, or other acceptable medical source who has *not* examined [the claimant] but provides a medical or other opinion in [the claimant's] case." 20 C.F.R. § 404.1502 (emphasis added). Consequently, in a classic example of the reflexive property, an "examining source" examined the claimant. *See* 20 C.F.R. § 404.1527(c)(1). A doctor hired by a state to review a claimant's claim for disability (often referred to as a "state-agency physician") is an example of a "nonexamining source" that offers "medical opinions." SSR 96-6p. A medical expert is another common example of a "nonexamining source" that offers a "medical opinion." Medical experts are physicians, mental health professionals, and other medical professionals who provide impartial expert opinions at the hearing level. HALLEX I-2-5-32A. A medical expert is not allowed to exam the claimant. HALLEX I-2-5-36A. Indeed, a medical expert is disqualified if the expert has previously treated or examined the claimant. HALLEX I-2-5-32C. Medical experts review the claimant's medical record and listen to the hearing testimony. HALLEX I-2-5-36A. Medical experts are

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supposed to be selected based upon their expertise that is most appropriate to the claimant's diagnosed impairments. HALLEX I-2-5-36A. But experience shows that the Administration sometimes uses medical experts who have no expertise in the area of the claimed impairment. *See, e.g., Turkyilmaz v. Colvin,* 2014 U.S. Dist. LEXIS 94095, *10 (N.D. Ill. July 11, 2014) (medical expert was expert in internal and pulmonary medicine when claimant suffered from cervical radiculopathy and treated by a spine specialist). Importantly, "medical opinions" from "examining sources" generally, but not always, receive more weight than "medical opinions" from "nonexamining sources." 20 C.F.R. § 404.1527(c)(1). If the "medical opinion" is offered by a "nonexamining source," then, once again, the opinion is weighed by considering the "checklist factors." 20 C.F.R. § 404.1527(e); 20 C.F.R. § 404.1527(c)(2)(i)-(ii), (c)(3)-(6) (the checklist factors) (Are you noticing a pattern?).

Step #5

Once it has been determined that a "medical opinion" has been offered by an "examining source," the next step is to determine if the "examining source" treated the claimant, which would make the "examining source" a "treating source." 20 C.F.R. § 404.1502; 20 C.F.R. § 404.1527(c)(2). A "treating source" is the claimant's physician, psychologist, or other acceptable medical source that provides the claimant with medical treatment or evaluation and who has an ongoing treatment relationship with the claimant. 20 C.F.R. § 404.1502. A "treatment relationship" means the claimant is seeing or has seen the source "with a frequency consistent with acceptable medical practice for the type of treatment and/or evaluation required for [the claimant's] medical condition(s)." *Id.* An examining source that solely provides a report to support the claimant's disability claim is not a "treating source." *Id.* Critically, "medical opinions" offered by "treating sources" generally, but not always, receive greater weight than opinions from those with simply examining relationships. 20 C.F.R. § 404.1527(c)(2); *Clifford v. Apfel,* 227 F.3d 863, 870 (7th Cir. 2000). If the "examining source" does *not* have a treating relationship with the claimant, then – you guessed it – the opinion is weighed by considering the "checklist factors." 20 C.F.R. § 404.1527(c)(2)(i)-(ii), (c)(3)-(6) (the checklist factors). If the opinion is offered by a "treating source," then the Administration must determine if that opinion is given "controlling weight." 20 C.F.R. § 404.1527(c)(2).

Step #6

A "medical opinion" offered by a "treating source" can be given "controlling weight;" meaning the opinion outweighs all other opinions on the particular issue and, therefore, must be adopted. POMS DI 24515.004.B.1. But "controlling weight" does not mean that the claimant is necessarily disabled. That is a decision for the Administration's Commissioner. 20 C.F.R. § 404.1527(d)(1); *Johansen v. Barnhart,* 314 F.3d 283, 287-88 (7th Cir. 2002).

To be given "controlling weight," the "medical opinion" must be both (a) well-supported by medically acceptable clinical and laboratory diagnostic techniques and (b) not inconsistent with other substantial evidence in the record. 20 C.F.R. § 404.1527(c)(2). Both these requirements must be met for the "medical opinion" to be given "controlling weight." POMS DI 24515.004.B.1. The Administration has provided guidance on several aspects of this mandatory two-part test. For example, the opinion need only be "well-supported," not "fully supported." *Id.* Additionally, the opinion need only be "not inconsistent" with other substantial evidence, not that the opinion be "consistent." *Id.* Here's how the Administration tries to explain this apparent double negative: The opinion need not be supported by all other evidence; there only needs to be no substantial contradictory evidence. *Id.* Further, the quantum of "not inconsistent" evidence is low – just more than a scintilla. *Id.* A "scintilla" is a trace. *Black's Law Dictionary* 1464 (9th ed. 2009).

If the "medical opinion" from the "treating source" survives this two-part test, the Administration must adopt the opinion. POMS DI 24515.004.B.1. Courts rarely, if ever, hear appeals in which a treating source's medical opinion has been given controlling weight. If, on the other hand, the "medical opinion" fails the two-part test, then – and you know what's coming next – the opinion is weighed by considering the "checklist factors." 20 C.F.R. § 404.1527(c)(2)(i)-(ii), (c)(3)-(6) (the

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checklist factors); *Campbell v. Astrue,* 627 F.3d 299, 308 (7th Cir. 2010); *Bauer v. Astrue,* 532 F.3d 606, 608 (7th Cir. 2008). A "medical opinion" from a "treating source" that does not meet the two-part test cannot simply be rejected. *Walls v. Colvin,* 2015 U.S. Dist. LEXIS 154143, *8 (N.D. Ill. Nov. 13, 2015). Indeed, the opinion should still be given deference. *Bochat v. Colvin,* 2015 U.S. Dist. LEXIS 96227, *18 (E.D. Wis. July 23, 2015); *Macek v. Colvin,* 2013 U.S. Dist. LEXIS 139126, *48-49 (N.D. Ind. Sept. 27, 2013); *Pursell v. Colvin,* 2013 U.S. Dist. LEXIS 93775, *32 n.3 (N.D. Ill. July 3, 2013) (reinforcing that a non-controlling opinion is only discounted, not rejected).

Step #7

As shown by the flow chart, after distilling all the statutes, regulations, rulings, manuals and case law, determining the weight of any opinion can be simply capsulized: Unless the opinion is given controlling weight, the opinion is weighed by considering the "checklist factors."

The regulations enumerate six "checklist factors," but because the last enumerated factor is a catch-all, there are more. 20 C.F.R. § 404.1527(c)(2)(i)-(ii),(c)(3)-(6).

- **Length of the Treatment Relationship and the Frequency of Examination**
  A medical opinion by a "treating source" that has seen the claimant on many occasions for a long period of time is given more weight. 20 C.F.R. § 404.1527(c)(2)(i).

- **Nature and Extent of the Treatment Relationship**
  A medical opinion from a "treating source" that has more knowledge of the claimant's impairments is given more weight. 20 C.F.R. § 404.1527(c)(2)(ii).

- **Supportability**
  A medical opinion that is supported by medical signs and laboratory findings as well as more fulsome explanations for the opinion is given more weight. This factor is critical in determining the weight of opinions of "nonexamining sources." 20 C.F.R. § 404.1527(c)(3).

- **Consistency**
  A medical opinion that is consistent with the record as a whole is given more weight. 20 C.F.R. § 404.1527(c)(4). But this factor seems difficult to apply and is subject to "cherry picking." All cases are going to involve conflicting evidence (or as the Administration puts it, "inconsistent evidence"). Indeed, the very existence of the "inconsistent evidence" triggers the hearing and the weighing process. 20 C.F.R. § 404.1520b(b). Therefore, the Administration can always focus on those evidentiary materials that support a medical opinion over the conflicting or "inconsistent" evidence.

- **Specialization**
  A medical opinion from a source that has a specialty in the medical issues relating to the claimant is given more weight. 20 C.F.R. § 404.1527(c)(5). For example, the opinion of a psychiatrist should be given more weight than the opinion of a doctor of internal medicine in a case involving mental health. *See, e.g., Kelly v. Colvin,* 2015 U.S. Dist. LEXIS 104301, *16-17 (N.D. Ill. Aug. 10, 2015) (psychiatrist opinion discounted over doctor of internal medicine regarding mental health opinion).

- **Other Factors**
  The regulations provide a "catch all" factor. The regulations state that the Administration will consider "any factors" that "tend to support or contradict the opinion." 20 C.F.R. § 404.1527(c)(6). But the regulations only give two examples of "other factors." One example is "the extent to which an acceptable medical source is familiar with the other information in [the claimant's] case record." *Id.* This example is

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redundant with the "nature and extent" factor, at least when the opinion is of a "treating source." This "other factor" example makes sense. An opinion provided by a witness who has knowledge of the claimant's entire record should be given more weight. But the only other example of "other factors" the regulations provide – "the amount of understanding of [the Administration's] disability programs and their evidentiary requirements" – makes less sense. 20 C.F.R. § 404.1527(c)(6). The Administration does not explain why this particular "other factor" is important. Likewise, the case law addressing this "other factor" is almost nonexistent.

Moreover, the factor will almost always weigh in favor of the state-agency physicians and consultants. They are hired by the Administration, so they should have an "understanding of [the Administration's] disability programs." Additionally, a claimant is at a distinct disadvantage with regard to this factor. How would the claimant introduce evidence that the "treating source" is knowledgeable about the Social Security program? Treating physicians do not testify, and they certainly do not state in medical records their knowledge of disability programs and the basis for that knowledge. In theory, a claimant's attorney could obtain a statement from the treating source stating that the source is familiar with the Administration's programs.

Not all of the checklist factors will apply to every opinion. SSR 06-03p; POMS DI 24515.003.B.1.b. That is obvious. For example, the first two factors do not apply to "medical opinions" from a "nontreating source" or a "non-medical source," which is why the supportability, consistency and specialization factors are so important when considering opinions from these sources. *See, e.g. Brooks v. Astrue,* 2011 U.S. Dist. LEXIS 14574, *16 n.2 (E.D. Tenn. Jan. 26, 2011); *Johnson v. Astrue,* 2009 U.S. Dist. LEXIS 62524, *9 n.1 (E.D. Tenn. June 23, 2009). Moreover, "non-medical source" opinions do not exactly match with the "checklist factors." But they are a useful analog. SSR 06-03p.

This author has already argued that the administrative law judges must explicitly address the checklist factors. Johnston, *Understanding the Treating Physician Rule in the Seventh Circuit: Good Luck!,* The Circuit Rider 29, 36-37 (November 2015); *but see Oldham v. Astrue,* 509 F.3d 1254, 1258 (10th Cir. 2007) (explicit application unnecessary). District courts in this Circuit have routinely remanded cases when an administrative law judge fails to provide a clear explanation of the weight given to opinions. *See, e.g., Barnes v. Colvin,* 889 F. Supp. 3d 881, 889 (N.D. Ill. 2015) ("The ALJ must clearly state the weight he has given to the medical sources and the reasons that support the decision."); *Herrold v. Colvin,* 2015 U.S. Dist. LEXIS 33351, *22 (N.D. Ind. Mar. 17, 2015) (requiring a thorough explanation of the weight given to each medical source opinion). In fact, even the Administration's own rulings require that decisions denying benefits "must contain specific reasons for the weight given to a treating source's medical opinion and the reasons for that weight." SSR 96-2p. With luck, the Seventh Circuit will decisively resolve the issue of whether an explicit application of the "checklist factors" is required.

Conclusion

Hopefully, the flow chart will help in understanding the proper procedure in weighing opinion evidence in Social Security cases. A visual guide is often more comprehensible than stacks of regulations, rulings, and manuals.

HOW TO WEIGH ALL OPINIONS IN SOCIAL SECURITY CASES