Understanding the Treating Physician Rule in the Seventh Circuit: Good Luck!

*By Iain D. Johnston**

I. Introduction

As shown below, to paraphrase Captain Hector Barbossa in The Pirates of the Caribbean, the treating physician rule seems to be more of a guideline than an actual rule.

Social Security appeals are now a major component of the district courts' docket, particularly for magistrate judges. In the last decade, the number of appeals filed in the U.S. District Court for the Northern District of Illinois has risen from a manageable 160 cases in 2005 to an overwhelming 411 cases in 2014. A recurring issue in many of these cases is the treating physician rule. This article focuses on two distinct, divergent lines of cases regarding two important aspects of the treating physician rule. The first divergent line of cases relates to whether an administrative law judge (ALJ) can refuse to give a treating physician's opinion "controlling weight" by relying solely upon a consulting physician's contrary opinion. The second divergent line of cases concerns whether an ALJ may impliedly apply "the checklist" to a treating physician's opinion. Clear direction from the Seventh Circuit on these aspects of the treating physician rule would be very valuable to the district courts, the Social Security bar and ALJs.

II. The Role Medical Opinions Play in Disability Determinations

To be entitled to Social Security disability benefits, a claimant must be unable to work because of any physical or mental impairment that can be expected to last for a year or more. 42 U.S.C. §423(d)(1)(A). Accordingly, medical opinions play a fundamental role in making that determination.

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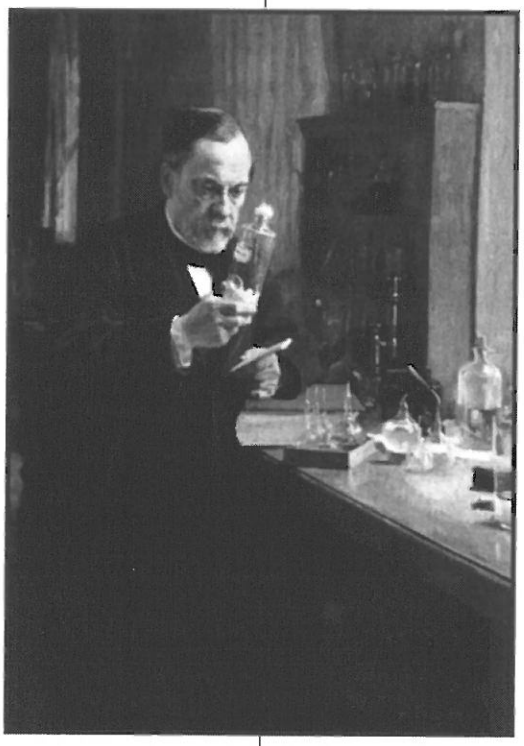
The treating physician rule is based upon the Social Security Administration's (SSA) regulations. 20 C.F.R. §404.1527(c). These regulations create a hierarchy of medical opinion testimony. 20 C.F.R. §1527(c)(2); 20 C.F.R. §404.1513. The key concept under this hierarchy is the "weight" an ALJ is to give the opinion. 20 C.F.R. §404.1527(c) ("How we weigh medical opinions."). The weight given to an opinion depends, in large part, on the source of the opinion. At the top of the opinion testimony hierarchy are medical opinions from "acceptable medical sources". 20 C.F.R. §404.1513(a); 20 C.F.R. §404.1502. "Acceptable medical sources" are the following types of medical providers: physicians, psychologists, optometrists and podiatrists. 20 C.F.R. §404.1513(a)(1) – (4); 20 C.F.R. §404.1502.[1] Other sources of medical opinions that are not acceptable medical sources include the following types of medical providers: nurse-practitioners, physicians' assistants, therapists, counselors and chiropractors. 20 C.F.R. §404.1513(d). Opinions from these sources are considered but *might* not be given as much weight under the circumstances. SSR No. 06-03p; *Fiori v. Colvin,* 2014 U.S. Dist. LEXIS 129112, *33-35 (N.D. Ill. 2014). According to the SSA, the distinction between these different types of sources "facilitates the application of [the SSA's] rules on establishing the existence of an impairment, evaluating medical opinions, and who can be considered a treating source." SSR 06-03p. This bureaucratic jargon is perplexing. Perhaps this jargon means that having different rules for different sources makes it easier for the SSA to determine if a claimant is impaired. To an outsider, the promulgated pecking order appears to be based upon the length and type of education each of these professions requires.



Under the regulations, in addition to the source of the opinion, the hierarchy also considers the relationship between that source and the claimant. The regulations differentiate between three types of sources and relationships: (1) treating sources and relationships; (2) examining sources and relationships; and (3) nonexamining sources. 20 C.F.R. §404.1527(c)(1) – (2), (e); 20 C.F.R. §404.1502. A treating source is the claimant's own "acceptable medical source" who provides medical treatment or evaluation and who has a treating relationship with the claimant. 20 C.F.R. §404.1502. An examining source is an acceptable medical source who examined the claimant but who does not have a treating relationship with the claimant; nontreating sources include, but are not limited to, SSA "consultative examiners." *Id.* A nonexamining source is an acceptable medical source who has not examined the claimant, but who provides opinions in the claimant's case; nonexamining sources include, but are not limited to, State agency consultants. *Id.* Nonexamining sources form their opinions based upon reviews of the claimants' medical files. *Traywick v. Astrue,* 2012 U.S. Dist. LEXIS 9947, *11 (D. Kan. 2012). A common nonexamining source is a "medical expert". *Hill v. Astrue,* 2010 U.S. Dist. LEXIS 128174, *40 (N.D. Ill. 2010). Medical experts are used by ALJs to help the ALJs evaluate the medical evidence in a case. HALLEX I-2-5-32B. Medical experts are prohibited from examining claimants, however. *Jensen v. Colvin,* 2013 U.S. Dist. LEXIS 135452, *34 (N.D. Ill. 2013). Medical experts form their opinions based upon a review of the medical records and hearing testimony. HALLEX I-2-5-38C. Generally, but not always, medical opinions from treating sources with treating relationships are given the most weight. 20 C.F.R. §404.1527(c)(2). Likewise, generally, but not always, medical opinions from examining sources are given more weight than medical opinions from nonexamining sources.

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20 C.F.R. §404.1527(c)(1), (e). Medical opinions from nonexamining sources must be considered, but are afforded their weight after having been analyzed under "the checklist." 20 C.F.R. §404.1527(e).

The checklist is comprised of the following factors: (a) the length of the treatment relationship and frequency of examinations, (b) the nature and extent of the treatment relationship, (c) the supportability of the opinion; meaning that more weight will be afforded to opinions that are supported by medical signs, laboratory findings and fulsome explanations; (d) the consistency of the opinion compared to the whole record; (e) the specialization of the source of the opinion, and (f) "other factors," such as the source's understanding of disability programs and the claimant's case file. 20 C.F.R. §404.1527(c)(2)(i)-(ii), (c)(3)-(c)(6). The Seventh Circuit refers to these factors as "the checklist." *See, e.g., Larson v. Astrue,* 615 F.3d, 744, 751 (7th Cir. 2010) (referring to the checklist); *Bauer v. Astrue,* 532 F.3d 606, 608 (7th Cir. 2008) (same). Applying the first two factors to nonexamining sources seems counterintuitive because these factors relate to the treating relationship. For nontreating and nonexamining sources, the most important checklist factors should be supportability, consistency and specialization. *See, e.g., Brooks v. Astrue,* 2011 U.S. Dist. LEXIS 14574, *16 n.2 (E.D. Tenn. 2011); *Johnson v. Astrue,* 2009 U.S. Dist. LEXIS 62524, *9 n.1 (E.D. Tenn. 2009). As discussed below, the checklist often comes into play later in the analysis of a treating physician's opinion.

III. Weight Given to Medical Opinions by Treating Physicians: The Treating Physician Rule.

The treating physician rule provided by the regulations involves a two-step process. *Krauser v. Astrue,* 638 F.3d 1324, 1330 (10th Cir. 2011) ("Our case law, the applicable regulations, and the Commissioner's pertinent Social Security Ruling (SSR), all make clear that in evaluating medical opinions of a claimant's treating physician, the ALJ must complete a sequential two-step inquiry, each step of which is analytically distinct."); *Smith v. Colvin,* 2015 U.S. Dist. LEXIS 41101, *27 (S.D. Ind. 2015) (referring to the process as "a bifurcated analysis"). First, the ALJ must determine whether to give the treating physician's opinion "controlling weight," by evaluating the opinion in light of its supportability as shown by medical tests and consistency with other evidence in the record. 20 C.F.R. § 404.1527(c)(2). Second, if the ALJ finds that the treating physician's opinion is not entitled to controlling weight, then the ALJ must apply the checklist factors to determine what, if any, weight to give to the opinion. 20 C.F.R. § 404.1527(c)(2)(1) – (6).

These two steps should not be conflated. *Duran v. Colvin,* 2015 U.S. Dist. LEXIS 101352, *27-28 (N.D. Ill. 2015). They are analytically distinct. *Taylor v. Colvin,* 2015 U.S. Dist. LEXIS 111300, *16 (N.D. Ill. 2015). Unfortunately, ALJs often mix these analyses into a single, messy, amalgamated decisional stew. *Id.* This type of lazy analysis routinely leads to unnecessary problems, which are left for the courts to resolve on appeal.

A. Step One: Does the Treating Physician Opinion Receive Controlling Weight?

Based on the hierarchal structure the regulations give various opinions, not surprisingly, opinions of treating physicians are at the top of the heap. 20 C.F.R. §1527(c)(2) ("Generally, we give more weight to opinions from your treating sources. . ."). Indeed, these opinions can be given "controlling weight."[2] The regulation states the treating physician rule as follows: "If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight." 20 C.F.R. §404.1527(c)(2). This sentence is not the model of clarity. For example, the term "well-supported" can easily be interpreted either conservatively or liberally, and the phrase "not inconsistent" is a double negative.[3] In fact, the regulation is so convoluted that the SSA issued a multi-page ruling addressing how the regulation should be interpreted. SSR No. 96-2p. Accordingly, the treating

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physician rule could be stated differently: A claimant's treating doctor's opinion will be accepted over other, different medical opinions if the treating doctor's opinion is (1) backed up by the kinds of tests doctors do to determine the nature and extent of the claimant's medical problem and (2) consistent with other non-trivial evidence[4] in the case file. Essentially, the treating physician opinion controls when these two components exist. When the ALJ determines the treating physician's opinion controls, the opinion trumps all the other contrary medical opinions in the record.

But regardless of any amount of word smithing, the rule itself is contradictory. As the Seventh Circuit noted, as promulgated, the rule "seems to take back with one hand what it gives with the other." *Hofslien v. Barnhart,* 439 F.3d 375, 376 (7th Cir. 2006). The rule provides vague guidance to the claimants, attorneys, ALJs and district courts. *See id.*

B. Step Two: If the Treating Physician Opinion Does Not Receive Controlling Weight, Based on the Checklist, What Weight Should It Receive?

If the treating physician opinion is not given controlling weight, the ALJ cannot simply disregard the opinion without further consideration and analysis. *Campbell v. Astrue,* 627 F.3d 299, 308 (7th Cir. 2010) ("Even if an ALJ gives good reasons for not giving controlling weight to a treating physician's opinion, she has to decide what weight to give that opinion."). Instead, the ALJ must determine what, if any, weight the treating physician's opinion is to be given. *Moss v. Astrue,* 555 F.3d 556, 561 (7th Cir. 2009); 20 C.F.R. §404.1527(c)(2). To make this determination, the ALJ must apply the checklist factors to the now non-controlling treating physician's opinion. *Bauer v. Astrue,* 532 F.3d 606, 608 (7th Cir. 2008); 20 C.F.R. §404.1527(c)(2).

Once the ALJ shows it considered the checklist factors in determining what weight to give to the treating physician's opinion, courts will give that determination great deference. *Elder,* 529 F.3d at 415 ("If the ALJ discounts the physician's opinion after considering these factors, we must allow that decision to stand so long as the ALJ '"minimally articulated"' his reasons – a very deferential standard that we have, in fact, deemed 'lax'."). This deference is given only after the reviewing court is satisfied that the ALJ properly considered these factors.

* * *

The Seventh Circuit's conflicting interpretations of the treating physician rule make the rule even more difficult to understand and apply. As mentioned at the outset, this article focuses on two aspects of the rule: first, whether a non-examining consultant's opinion, alone, is "substantial evidence," thereby allowing ALJs the freedom to not give the treating physician's opinion controlling weight; and second, whether ALJs may impliedly, rather than explicitly, apply the checklist once they determine not to give the treating physician's opinion controlling weight.[5]

IV. Can an ALJ Rely Solely Upon a Non-Examining Consultant's Opinion as a Basis to Not Give the Treating Physician's Opinion Controlling Weight?

In *Gudgel v. Barnhart,* 345 F.3d 467, 470 (7th Cir. 2003), the Seventh Circuit, per curiam, articulated the general treating physician rule, but, importantly and boldly, added the following gloss: "An ALJ can reject an examining physician's opinion only for reasons supported by substantial evidence in the record; a contradictory opinion of a non-examining physician does not, by itself, suffice."[6] The Seventh Circuit did not reconcile previous decisions that at least seemed contrary to this statement, to the extent that a "consultant" is often a "non-examining physician." *See, e.g., Dixon v. Massanari,* 270 F.3d 1171, 1178 (7th Cir. 2001) ("When treating and consulting physicians present conflicting evidence, the ALJ may decide whom to believe, so long as substantial evidence supports that decision."); *Books v. Chater,* 91 F.3d 972, 979 (7th Cir. 1996) ("Nothing in *Micus* mandates that the opinion of a treating physician always be accepted over that of a consulting physician, only that the relative merits of both be duly considered.").[7]

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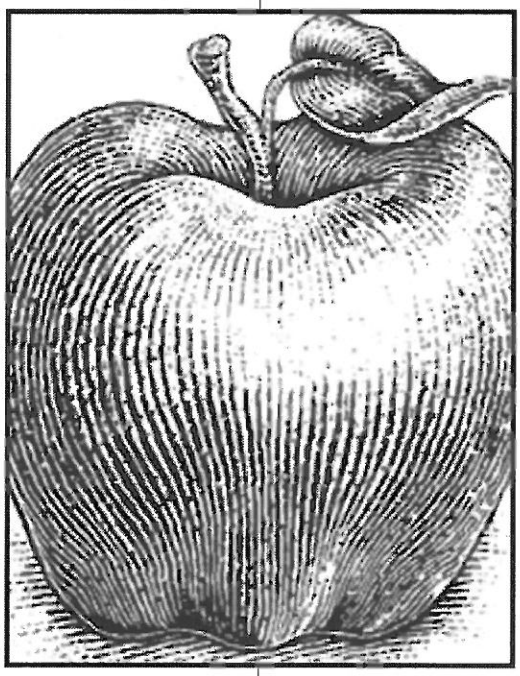
Three years after *Gudgel,* the Seventh Circuit, in *Hofslien v. Barnhart,* 439 F.3d 375 (7th Cir. 2006), questioned the validity and usefulness of the treating physician rule. In doing so, the Seventh Circuit affirmed, even though "[t]he administrative law judge . . . refused to give [the treating physicians' opinions] controlling weight because they were inconsistent with other medical evidence, albeit from physicians who had not treated or even examined [the claimant]." *Id.* at 376. The Seventh Circuit did not cite or address its decision in *Gudgel.*



Two years later, in *Bauer v. Astrue,* 532 F.3d 606, 608 (7th Cir. 2008), after discussing its decision in *Hofslien* at length, the Seventh Circuit, refused to give a treating physician's opinion controlling weight because "[t]here was evidence – the report of the nonexamining consultant – that contradicted the reports of the treating physicians." Again, the Seventh Circuit did not address its previous decision in *Gudgel.*

At least two district courts have identified these conflicting decisions. *See, RJM v. Astrue,* 2008 U.S. Dist. LEXIS 24784, *17 (S.D. Ind. 2008) ("These two cases are at odds and have not been directly reconciled."); *Patterson v. Barnhart,* 428 F. Supp. 2d 869, 885 n. 19 (E.D. Wis. 2006) ("This holding is at odds with *Gudgel,* which the *Hofslien* court did not cite . . . Thus, the status of the treating source rule in this circuit is uncertain."). But at least one district court disagrees with these courts' view that a conflict exists. *See Lipke v. Astrue,* 575 F. Supp. 2d 970, 979 (W.D. Wisc. 2007). Consequently, there is a conflict as to whether there is a conflict.

At least two other district courts have attempted to reconcile these conflicting decisions. In *Baumgartner v. Colvin,* 2013 U.S. Dist. LEXIS 156487, *13-14 (W.D. Wisc. 2013), the court focused on the Seventh Circuit's use of the word "reject" in *Gudgel.* The *Baumgartner* court concluded by stating, "Thus, while it is true that a contradictory opinion by a non-examining physician is not, by itself, a sufficient basis for completely rejecting a treating source opinion, it is a sufficient basis to deny the treating source opinion conclusive weight." *Id.* Although this statement of the law appears accurate, the *Baumgartner* court's focus on the word "reject" does not reconcile the *Gudgel* opinion and the *Hofslien* opinion. Instead, the Seventh Circuit's imprecise use of the word "reject" appears to mean "not give controlling weight" in the same way that the Seventh Circuit used the term "discount" in the *Skarbek* opinion. *See, e.g., Latkowski v. Barnhart,* 93 Fed. Appx. 963, 969-70 (7th Cir. 2004) (citing *Gudgel's* "reject" language despite recognizing that ALJ simply gave less than controlling weight).[8] Indeed, if "reject" means to give zero weight to a treating physician opinion, then that scenario should be a rare occurrence. As the SSA's own interpretative ruling states, even if a treating physician opinion is not given controlling weight, the opinion is still entitled to deference. SSR 96-2p.

In *Henriksen v. Astrue,* 2008 U.S. Dist. LEXIS 84698, *24 (N.D. Ill. 2008), the court took a different approach to reconciling *Gudgel* and *Hofslien.* But this time, the court focused on the *Gudgel* court's use of the term "by itself." The *Henriksen* decision shifted the focus back to whether there was other evidence inconsistent with the treating physician's opinion. If there were other conflicting evidence, then the non-examining opinion could be used in conjunction with this other evidence, so that the treating physician's opinion would not be given controlling weight. Again, this proposition of law is sound, but does not necessarily resolve the conflict. In fact, the Seventh Circuit has found that "the report of a nonexamining consultant," alone,

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was a sufficient basis not to give a treating physician's opinion controlling weight, so that "the checklist [came] into play." *Bauer,* 532 F.3d at 608.[9] Accordingly, focusing on the phrase "by itself" does not reconcile these divergent lines of cases.

Hopefully, the Seventh Circuit will first recognize and then resolve this conflict at the next opportunity. The announcement in *Gudgel* was created by case law. No statutory or regulatory provision required the *Gudgel* court's assertion that a non-examining consultant's opinion alone is insufficient to allow an ALJ to not give a treating physician's opinion controlling weight. Instead, *Gudgel* relied on a Ninth Circuit decision, without considering contrary Seventh Circuit decisions. Consequently, assuming compliance with Circuit Rule 40 of the United States Court of Appeals for the Seventh Circuit, the Seventh Circuit is free to overrule *Gudgel* in this regard, particularly in light of the other line of cases. Alternatively, the Seventh Circuit might be able to harmonize these lines of cases in some fashion. Frankly, although the Social Security bar certainly cares which way the Seventh Circuit resolves this issue, the district courts only seek clear guidance.

V. Can An ALJ Impliedly Apply the Checklist Once it Decides Not to Give Controlling Weight to the Treating Physician's Opinion

As previously stated, if either qualification to the treating physician's opinion exists (*i.e.,* (1) the opinion is not backed up by relevant tests to determine the nature and extent of the problem or (2) the opinion is inconsistent with substantial evidence), then the treating physician's opinion is not given controlling weight. The amount of weight to afford the treating physician opinion is now determined by applying the checklist. *Bauer v. Astrue,* 532 F.3d 606, 608 (7th Cir. 2008). ALJs commit reversible error by simply determining not to give the treating physician's opinion controlling weight, without then considering the checklist factors to determine what weight, if any, to give to the opinion. *Larson,* 615 F.3d at 751 (ALJ disregarded checklist); *Moss,* 555 F.3d at 561 ("the choice to accept one physician's opinions but not the other's was made by the ALJ without any consideration of the factors outlined in the regulations").

Not only do ALJs fail to properly use the required two-step sequential analysis, but they also fail to properly apply the checklist after they have apparently decided not to give a treating physician's opinion controlling weight. Instead of simply setting forth the checklist factors, ALJs conduct a "breezy" or "drive-by" analysis of the checklist factors. *See Duran v. Colvin,* 2015 U.S. Dist. LEXIS 101352, *32 (N.D. Ill. 2015); *Shaevitz v. Colvin,* 2015 U.S. Dist. LEXIS 103480, *8 (N.D. Ill. 2015).

A. Two Conflicting Lines of Cases Exist

The failure to apply the checklist factors in a clear manner has resulted in two different and very difficult to reconcile lines of cases in the Seventh Circuit. One line of cases is far more forgiving of ALJs' failure to properly apply the checklist. This line of cases allows ALJs to impliedly consider the checklist factors. *See, e.g., Schreiber v. Colvin,* 519 Fed. Appx. 951 (7th Cir. 2013); *Henke v. Astrue,* 498 Fed. Appx. 636 (7th Cir. 2012); *Elder v. Astrue,* 529 F.3d 408 (7th Cir. 2008). In contrast, the other line of cases requires ALJs to explicitly apply the checklist factors. *See, e.g., Yurt v. Colvin,* 758 F.3d 850 (7th Cir. 2014); *Campbell v. Astrue,* 627 F.3d 299 (7th Cir. 2010); *see also Larson v. Astrue,* 615 F.3d 744 (7th 2010); *Moss v. Astrue,* 555 F.3d 556 (7th Cir. 2009). Unfortunately, the Seventh Circuit has not recognized, let alone harmonized, these distinct lines of cases.

The starting point for the more forgiving line of cases is found in *Elder v. Astrue,* 529 F.3d 408 (7th Cir. 2008). In *Elder,* the claimant waived the issue that her treating physicians' opinions were entitled to controlling weight; however, the Seventh Circuit conducted the analysis and found that the opinions were not entitled to controlling weight. *Elder,* 529 F.3d at 415. More importantly for purposes of this article, the Seventh Circuit found that the ALJ did not err in failing to give "substantial

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weight" to the treating physicians' opinions. *Id.* at 416. In doing so, the Seventh Circuit noted that the ALJ found that the treating physicians (a) were not specialist in the relevant field, and (b) failed to support their opinions with a medical exam. *Id.* These are only two of the six checklist factors, but the Seventh Circuit still affirmed. *Id.*

Building on *Elder,* the Seventh Circuit, in *Henke v. Astrue,* again found that the ALJ did not err in failing to give "substantial weight" to a treating physician's opinion. In doing so, the Seventh Circuit stated the following:

> The ALJ did not *explicitly* weigh *every* factor while discussing her decision to reject [the treating physician's] reports, but she did note the lack of medical evidence supporting [the doctor's] opinion, *see* 20 C.F.R. § 404.1527(d)(3) (2009), and its inconsistency with the rest of the record, *see id.* § 4041527(d)(4). This is enough. *See Elder,* 529 F.3d at 415-16 (affirming denial of benefits where ALJ discussed only two of the relevant factors laid out in § 404.1527(d)).

Henke, 498 Fed. Appx. at 640 n.3. (emphasis added).

Thus, in *Henke,* the Seventh Circuit added the important point that the ALJ need not explicitly weigh every factor.

Most recently, in *Schreiber v. Colvin,* 519 Fed. Appx. 951 (7th Cir. 2013), the Court expanded the holdings of *Elder* and *Henke.* In both of those cases, the specific issue before the court was whether the ALJ erred in not giving "substantial weight" to the treating physicians' opinions. The *Schreiber* court went further. In *Schreiber,* the claimant argued "that the ALJ failed to properly analyze [the treating physician's] opinion because he did not specifically address each factor set forth in 20 C.F.R. § 404.1527." 519 Fed. Appx. at 959. The Seventh Circuit rejected that argument:

> Here, while the ALJ did not explicitly weigh each factor in discussing [the treating physician's] opinion, his decision makes clear that he was aware of and considered many of the factors, including [the treating physician's] treatment relationship with [the claimant], the consistency of her opinion with the record as a whole, and the supportability of her opinion. See 20 C.F.R. § 404.1527(c). While we may not agree with the weight the ALJ ultimately gave [the treating physician's] opinions, our inquiry is limited to whether the ALJ sufficiently accounted for the factors in 20 C.F.R. § 404.1527, *see Elder v. Astrue,* 529 F.3d 408, 415-16 (7th Cir. 2008) (affirming denial of benefits where ALJ discussed only two of the relevant factors laid out in 20 C.F.R. § 404.1527). . . We find that deferential standard is met here.

Schreiber, 519 Fed. Appx. at 959.

Accordingly, under the forgiving line of cases, the ALJ need not explicitly weigh each factor, but instead need only "sufficiently account for the factors."

Many district courts have relied on this forgiving line of cases in finding that an ALJ's application of the checklist was sufficient. *See, e.g. Smith v. Colvin,* 2015 U.S. Dist. LEXIS 41101, *27 (S.D. Ind. 2015) (relying, in part, on *Henke* to affirm ALJ's decision that "was not a model of thoroughness"); *Crumpler v. Colvin,* 2014 U.S. Dist. LEXIS 82555, *43 (C.D. Ill. 2014). In contrast, other district court decisions have recognized the forgiving line of cases, but, nevertheless, remanded because of the ALJ's failure to properly apply the checklist to the treating physician's opinion. *See, e.g., Cagle v. Colvin,* 2015 U.S. Dist. LEXIS 10948, *21-22 (N.D. Ind. 2015) (remanding because ALJ paid "too little attention to the factors"); *Ledbetter v. Colvin,* 2014 U.S. Dist. LEXIS 137648, *14 (S.D. Ind. 2014); *Cherry v. Colvin,* 2014 U.S. Dist. LEXIS 100390, *6-7 (C.D. Ill. 2014).

The more restrictive line of cases stakes out some easy ground. If "the ALJ [says] nothing of the required checklist of factors," then remand is necessary. *Larson,* 615 F.3d at 751. Similarly, if the ALJ made its decision as to the weight of the treating physician's opinion "without any consideration of the factors outlined in the regulations," then the case will be remanded. *Moss,* 555 F.3d at 561. Thus, a clear failure to apply the checklist results in reversal. *Collins,* 324 Fed. Appx. at 521 ("The ALJ did not apply these regulations."). But this restrictive line of cases goes further, requiring the ALJ to *explicitly* address the checklist factors. *See Yurt,* 758 F.3d at 860 (on remand, "the ALJ should

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explicitly consider the details of the treatment relationship and provide reasons for the weight given to [the treating physicians'] opinions," citing 20 C.F.R. § 404.1527(c)(2) (emphasis added)). The restrictive line of cases is best exemplified by *Campbell v. Astrue,* 627 F.3d 299 (7th Cir. 2010). In *Campbell,* the ALJ's decision stated that 'she considered opinion evidence in accordance with . . . § 404.1527." *Campbell,* 627 F.3d at 308. This assertion is standard boilerplate in ALJ decisions, regardless of whether there are any indicia that the ALJ truly considered the factors. The ALJ's asserted consideration was insufficient for the Seventh Circuit. According to the *Campbell* court, "the decision [did] not *explicitly* address the checklist of factors as applied to the medical opinion evidence." *Id.* (Emphasis added.) Consequently, this restrictive line of cases requires the ALJ to explicitly consider the checklist factors.

B. Courts Should Require Explicit Consideration of the Checklist

Without doubt, numerous district courts have held that an ALJ need only impliedly apply the checklist.[10] In fact, it would be fair to say that this appears to be the prevailing view among the district courts in the Seventh Circuit. Indeed, this author may be standing alone in siding with the more restrictive line of cases. *Taylor,* 2015 U.S. Dist. LEXIS 111300 at *17 n. 5. However, most of the cases allowing ALJs to impliedly apply the checklist do not address the existence of an entire line of seemingly contrary Seventh Circuit authority, just as the Seventh Circuit has not recognized its own conflicting cases.

Requiring ALJs to explicitly apply the checklist is the better approach for four reasons. First, requiring ALJs to explicitly apply the checklist is more consistent with the SSA regulations. The regulations state the following about determining the weight to give to treating physicians' opinions: "[W]e will evaluate every medical opinion we receive. . . [W]e consider all of the following factors in deciding the weight to give to any medical opinion." The language of the regulations is mandatory. *Duran,* 2015 U.S. Dist. LEXIS 101352 at *25. And the SSA is required to follow its own regulations. *See Wilson v. Comm'n of Social Security,* 378 F.3d 541, 545 (6th Cir. 2004). Second, requiring an explicit analysis of the checklist allows for meaningful review. *Id.* at 544. The Seventh Circuit has been careful to emphasize that review is not merely a rubber stamp. *Scott v. Barnhart,* 297 F.3d 589, 593 (7th Cir. 2002). Instead, a reviewing court must conduct a critical review of the evidence before affirming the Commissioner's decision. *Eichstadt v. Astrue,* 534 F.3d 663, 665 (7th Cir. 2008). That process is furthered when ALJs explicitly address the checklist factors, and should dissuade ALJs from cavalierly or blithely discounting a treating physician opinion. Third, the initial case that allowed courts to use the implied consideration analysis – *Elder* – focused on whether the ALJ erred in not giving "substantial weight" to the treating physician's opinion. That issue is very different than the issue of whether an ALJ complied with the SSA regulations. Fourth, the two cases upon which the numerous district courts rely – *Schreiber and Henke* – are both unpublished, non-precedential opinions. Accordingly, under Circuit Rule 32.1(b) of the United States Court of Appeals for the Seventh Circuit, they need not be followed, unlike the reported decisions that require explicit consideration of the checklist factors.

When confronted on appeal with the fact that the ALJ failed to properly apply the checklist, the Commissioner routinely makes two arguments to support the decision. First, the Commissioner will assert that all checklist factors may not be applicable to

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every treating physician opinion. *See* SSR 06-03p ("Not every factor for weighing opinion evidence will apply in every case.") Second, the Commissioner will assert that there is a difference between "explaining" and "considering," and that the regulations only require that the ALJ "consider" the factors. *Korzeniewski,* 2014 U.S. Dist. LEXIS 51004 at *25.[11]

Although these assertions may be technically true, they do not support the position that ALJ's should only be required to impliedly apply the checklist. Indeed, these assertions *support* the argument that the ALJ should explicitly apply the checklist factors. First, in those circumstances in which a factor is not applicable in a given case, explicitly applying the checklist makes the ALJ's job easier. All the ALJ needs to do is say that the factor does not apply and why, requiring only a sentence or two. This would show the reviewing court that the ALJ, in fact, "considered" the factor, rather than ignored it. Second, for the same reasons, explicitly applying the checklist factors establishes that the ALJ truly considered the checklist factors. How does a reviewing court know the ALJ "considered" the relevant factors if the ALJ does not show its work? A reviewing court cannot just assume that an ALJ considered all the relevant factors because ALJs routinely do not properly apply the treating physician rule. *See, e.g., Collens v. Astrue,* 324 Fed. Appx. 516, 522 (7th Cir. 2009) ("As [the claimant] points out, hers is not the first case in which this particular ALJ has misstated the treating-physician rule."). A reviewing court should not be required to speculate that the ALJ considered all relevant checklist factors, particularly when a sentence or two by the ALJ will remove all doubt.

Therefore, for both legal and practical reasons, requiring explicit consideration is the better approach. ALJs could easily establish that they considered the checklist factors by simply listing them and giving a concise analysis how each factor applies or does not apply – a seemingly nominal task. (The author assumes those decisions exists, although it has yet to see one, in the same way the author assumes the existence of coelacanths.) Using a simple checklist analysis would be not only more consistent with the requirements of the regulations, but easier for the ALJs.

Of course, the Seventh Circuit might disagree. But to do so, the Seventh Circuit will need to, first, recognize the conflict and, then, hold that ALJs may impliedly apply the checklist. Again, the district courts would appreciate clear guidance on this issue.

VI. Conclusion

The treating physician rule is a major issue in many disability appeals. Consequently, it is extremely important that the rule is clearly and consistently applied. Unfortunately, the treating physician rule is articulated in a bureaucratic regulation. Moreover, the Seventh Circuit has inconsistently interpreted that bureaucratic regulation in two major ways. To make matters worse, the Seventh Circuit has not even recognized that it has done so. Clear guidance on the rule is much needed and would be greatly appreciated.

Notes:

[1] The term "treating *physician* rule" is a misnomer. The rule would be more accurately called the "treating *source* rule." For example, a psychologist who treated a claimant for mental illness would be an acceptable medical source, whose opinion may be controlling.

[2] The concept of "controlling weight" is also a bit of a misnomer. The opinion does not "control" the ultimate decision as to whether a claimant is disabled. 20 C.F.R. §404.1527(d)(1) ("A statement by a medical source that you are 'disabled' or 'unable to work' does not mean that we will determine that you are disabled."). That decision is left to the Commissioner. *Vossen v. Astrue,* 612 F.3d 1011, 1015 (7th Cir. 2010) (opinions that a claimant is "disabled" or "unable to work" are reserved for the Commissioner and do not receive controlling weight); 20 C.F.R. §404.1527(d)(2) (final responsibility for determining disability is reserved to the Commissioner). The opinion of a treating source "controls" in the sense that this opinion trumps other opinions so long as two other qualifications of the regulations exist.

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Good Luck!

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[3] There is a debate as to whether "not inconsistent" is different than "consistent". *Compare Ross v. Colvin*, 2014 U.S. Dist. LEXIS 152027, *12 n.4 (S.D. Ind. 2014) (no meaningful difference) with *Lopez-Navarro v. Barnhart*, 207 F. Supp. 2d 870, 885 (E.D. Wis. 2002) ("not inconsistent" and "consistent" are different analytically). Because the Seventh Circuit has used the "*consistent* with substantial evidence in the record" standard, this article assumes there is no meaningful difference. *See, e.g., Bates v. Colvin*, 736 F.3d 1093, 1097 (7th Cir. 2013) (Emphasis added.); *Elder*, 529 F.3d at 415 (same). For a lengthy discussion regarding "not inconsistent," *see* SSR 96-2p.

[4] The regulations repeatedly use the term "substantial" in a variety of contexts. The treating physician rule is one example. Another example exists in the context of reviewing the Commissioner's disability determination. In that situation "substantial" can mean less than a preponderance of evidence (i.e., less than 51%). *See Schmidt v. Astrue*, 496 F.3d 833, 842 (7th Cir. 2007). Similarly, the Commissioner's disability decision will not be affirmed if supported by only a "scintilla" of evidence. *Scott*, 297 F.3d at 593. The term "non-trivial" is somewhere between these guide posts. *See Wood v. Thompson*, 246 F.3d 1026, 1029 (7th Cir. 2001) (substantial evidence is more than a scintilla and less than a preponderance).

[5] This article addresses the issue of whether a contradictory nonexamining consultant's opinion, alone, constitutes substantial evidence allowing an ALJ to not give a treating physician's opinion controlling weight. Other examples of substantial inconsistent evidence include when the treating physician's opinion is internally inconsistent and when the claimant's own testimony contradicts the treating physician's opinion. *Schmidt v. Astrue*, 496 F.3d 833, 842 (7th Cir. 2007); *Latkowski v. Barnhart*, 93 Fed. Appx. 963, 970 (7th Cir. 2004); *Rosell v. Colvin*, 2014 U.S. Dist. LEXIS 88533, *28 (N.D. Ill. 2014); *Johnson v. Barnhart*, 2005 U.S. Dist. LEXIS 30087, *32 (W.D. Wisc. 2005); *Seban v. Massanari*, 2001 U.S. Dist. LEXIS 21463, *32-33 (N.D. Ill. 2001).

[6] The Seventh Circuit relied upon Ninth Circuit's decision in *Moore v. Barnhart*, 278 F.3d 920, 924 (9th Cir. 2002) for this proposition. In *Moore*, the Ninth Circuit stated, "The ALJ could reject the opinion of Moore's examining physicians, contradicted by a nonexamining physician, only for 'specific and legitimate reasons that are supported by substantial evidence in the record.'" *Id.*

This article assumes the Seventh Circuit used the word "reject" to mean "not giving the treating physician's opinions 'controlling weight'."

[7] Following *Gudgel*, citing *Dixon*, in *Skarbek v. Barnhart*, 390 F.3d 500, 503 (7th Cir. 2004), the Seventh Circuit stated "An ALJ may discount a treating physician's medical opinion if it is inconsistent with the opinion of a consulting physician." *See also Schmidt*, 496 F.3d at 842 (asserting that an ALJ may discount a treating physician's opinion because it is inconsistent with a consultant's opinion); *see also Ketelboeter v. Astrue*, 550 F.3d 620, 625 (7th Cir. 2008) (if treating physician opinion is inconsistent with the consulting physician opinion, then ALJ may discount it).

Again, this article assumes that the Seventh Circuit used the word "discount" to mean "not giving the treating physician's opinion 'controlling weight'."

[8] Several district court opinions likewise cite *Gudgel* even though the ALJ did not completely reject the treating physician's opinion, but instead, merely gave the opinion "little weight." *See, e.g., Cunningham v. Colvin*, 2014 U.S. Dist. LEXIS 164005, *29 (E.D. Wisc. 2014); *Townsend v. Colvin*, 2014 U.S. Dist. LEXIS 47801, *41-42 (N.D. Ind. 2014); *Feyen v. Colvin*, 2014 U.S. Dist. LEXIS 127403, *30-32 (E.D. Wisc. 2014).

[9] *See also Samuel v. Barnhart*, 295 F. Supp. 2d 926, 952 (E.D. Wisc. 2003) (in reversing, court cited Gudgel's holding that non-examining consultant's opinion by itself ws insufficient even though ALJ relied on more than this evidence).

[10] *See, e.g., Ross v. Colvin*, 2014 U.S. Dist. LEXIS 152027, *15 (S.D. Ind. 2014); *Kirby v. Colvin*, 2014 U.S. Dist. LEXIS 138163, *12 (S.D. Ind. 2014) ("However, the ALJ does not have to explicitly discuss and analyze the entire checklist of factors in the opinion."); *Korzeniewski v. Colvin*, 2014 U.S. Dist. LEXIS 51004, *25-27 (N.D. Ill. 2014) (collecting cases affirming ALJ decisions in which the checklist factors were not discussed but showed that the factors were considered); *Busking v. Colvin*, 2013 U.S. Dist. LEXIS 114575, *41 (N.D. Ill. 2013) ("an ALJ is not required to undertake an in-depth analysis of each and every one of the factors set out in §404.1527(c)(2)"); *King v. Colvin*, 2013 U.S. Dist. LEXIS 106944, *32 (N.D. Ill. 2013); *McCormick v. Astrue*, 2012 U.S. Dist. LEXIS 71754, *40-41 (N.D. Ind. 2012).

[11] The application of the harmless error doctrine to any alleged error occurring in this process is outside the scope of this article.

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