

10-15-1996

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### Recommended Citation

James L. Hoyle, *Note: Flatford v. Chater: No Absolute Due Process Right to Subpoena a Physician Providing Post-Hearing Evidence at a Social Security Disability Hearing*, 16 J. Nat'l Ass'n Admin. L. Judges. (1996)  
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**NOTE: FLATFORD V. CHATER:  
NO ABSOLUTE DUE PROCESS RIGHT TO SUBPOENA A  
PHYSICIAN PROVIDING POST-HEARING EVIDENCE AT  
A SOCIAL SECURITY DISABILITY HEARING**

**James L. Hoyle\***

**I. Introduction**

This decision of the United States Court of Appeals for the Sixth Circuit concerns the discretion to deny a due process entitlement to a disability claimant seeking a subpoena for a physician providing post-hearing evidence expands upon its previous decision in *Calvin v. Chater*<sup>1</sup> where the court determined an absolute right did not exist to a subpoena in order to conduct an oral examination of the claimant's treating physician at the hearing.<sup>2</sup> This line of decisions continues to conflict with other circuits,<sup>3</sup> and the Supreme Court needs to resolve this issue.

The United States Court of Appeals, Sixth Circuit, in *Flatford v. Chater*<sup>4</sup> affirmed the district court's decision to dismiss the case based upon the magistrate's recommendation, and concluded that the administrative law judge had not abused his discretion in refusing to issue a subpoena of a physician. The Sixth Circuit held: (1) the Commissioner of Social Security can base his decision on the evidence in the record and is not limited to the evidence obtained in the hearing, and, (2) the administrative law judge did not abuse his discretion by

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<sup>1</sup>73 F.3d 87 (6th Cir. 1996). See, Oppenheim, Note, *Calvin v. Chater*, 15 J.N.A.A.L.J. 143 (1996).

<sup>2</sup>Id. at 93.

<sup>3</sup>The Circuits in the following cases have relied upon *Richardson v. Perales* and concluded that social security claimants have an absolute right to subpoena persons providing evidence: *Lidy v. Sullivan*, 911 F.2d 1075, 1077 (5th Cir. Tex. 1990), *Coffin v. Sullivan*, 895 F.2d 1206 (8th Cir. Iowa 1990), *Townsley v. Heckler*, 748 F.2d 109 (2d Cir. N.Y. 1984), *Demenech v. Secretary of HHS*, 913 F.2d 882,884 (11th Cir. 1990), *Wallace v. Bowen*, 869 F.2d 187, 193 (3rd Cir. 1988) and *Lonzollo v. Weinberger*, 534 F.2d 712 (7th Cir. 1976).

<sup>4</sup>93 F.3d 1296 (6th Cir. 1996).

denying the claimant's request to subpoena and cross-examine a reporting physician questioned by the judge after the hearing.<sup>5</sup> This Note examines this second holding.<sup>6</sup>

## II. Background

Mr. Flatford, who suffered from coronary artery disease, applied for Social Security disability benefits and supplemental income benefits on March 7, 1983.<sup>7</sup> Flatford's claim was denied and he reapplied on October 2, 1987.<sup>8</sup> In a decision issued July 24 1989, Flatford was determined to be disabled as of December 1, 1987.<sup>9</sup>

On September 1, 1990, the Social Security Administration reopened Flatford's 1983 application pursuant to his request following the decision in *Samuels v. Heckler*.<sup>10</sup> Prior to reopening the Hearing, the ALJ submitted interrogatories to a cardiologist and offered Flatford's attorney the opportunity to submit his own interrogatories.<sup>11</sup> Flatford's attorney did not submit any questions at that time, but he requested a copy of the responses and reserved the right to cross-examine the physician after obtaining the responses.<sup>12</sup>

A hearing was held on May 6, 1991, and the ALJ submitted as an exhibit the responses made by the physician.<sup>13</sup> Flatford's attorney

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<sup>5</sup>*Flatford*, 93 F.3d at 1307.

<sup>6</sup>*Id.* at 1302, citing *Lawson v. Secretary of HHS*, 688 F.2d 436 (6th cir.1982). The court held that post hearing evidence was permitted under the Secretary's statutory authority to conduct additional proceedings under 42 U.S.C. § 405(a) and (b).

<sup>7</sup>*Id.* at 1297.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>668 F.Supp. 656 (W.D.Tenn.1986). In *Samuels*, a class of claimants excluded from disability and supplemental security income benefits on a basis of an unlawful policy statement and ruling, were entitled to a redetermination of their cases under new standards requiring consideration of the degree that their impairment interfered with ability to work. These claimants received notification by certified mail that they had a right to a redetermination and the instructions on the procedures to be used.

<sup>11</sup>*Flatford*, 93 F.3d at 1298.

<sup>12</sup>*Id.* at 1298.

<sup>13</sup>*Id.* at 1298. Pursuant to the open file policy of Social Security these should have been available earlier to the attorney.

had not received a copy of the responses prior to the hearing so the ALJ agreed to submit further interrogatories to the physician subsequent to the hearing.<sup>14</sup>

Flatford's attorney submitted two requests for a supplemental hearing to cross-examine the physician. The ALJ denied the requested hearings but permitted Flatford to submit additional interrogatories.<sup>15</sup> The ALJ based his denial upon his interpretation of Social Security Regulation 20 C.F.R. § 404.950(d)(1) and (d)(2) which provides the ALJ with the discretion to issue a subpoena where reasonably necessary for the full presentation of a case and upon a showing by the claimant that the specified facts could not be proven without issuing a subpoena.<sup>16</sup> The ALJ determined that Flatford's attorney failed to make a showing as to why the facts regarding Flatford's health could not be obtained through interrogatories.<sup>17</sup>

Flatford submitted additional interrogatories on September 17, 1991, however, he again requested cross-examination because the ALJ edited and deleted some of the questions submitted and some answers were unresponsive.<sup>18</sup>

The ALJ did not respond to the renewed request for a subpoena, but he denied Flatford's claim<sup>19</sup> on December 21, 1991. Flatford appealed the denial and the Appeals Council remanded the case because the ALJ failed to respond to Flatford's renewed request for a subpoena.<sup>20</sup> The Appeals Council instructed the ALJ to permit additional interrogatories or to explain why they were not warranted.<sup>21</sup> Flatford submitted additional interrogatories and again renewed his request for cross-examination. The ALJ submitted the interrogatories

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<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>*Id.* Flatford's attorney indicated his reasons for needing cross-examination were that the answers provided by the doctor during direct cross examination would direct his next question and that he was not furnished with Dr. Saunders' responses until the day of the May 6 hearing despite his efforts to contact the Office of Health Administration to see if the responses had been received.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 1299.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

but instructed the physician to disregard two questions.<sup>22</sup>

On February 1, 1993, after receiving the physician's latest response, Flatford once again requested a supplemental hearing and an opportunity to cross-examine the reporting physician.<sup>23</sup> The ALJ denied Flatford's request because he believed the renewed request did not seek material facts which have not already been proved in previous interrogatories.<sup>24</sup>

On June 22, 1993, The ALJ once again denied the claim after finding that Flatford had the capacity to perform sedentary work and that he was not disabled. The Appeals Council denied review on October 26, 1993, and the decision became final.<sup>25</sup>

Flatford filed suit in federal court on December 27, 1993. On February 2, 1995, a magistrate recommended that the Commissioner's decision be affirmed because of the discretion granted to the ALJ under 20 C.F.R. § 404.950(d)(1).<sup>26</sup> The district court accepted the recommendation of the Magistrate and determined the ALJ had not abused his discretion.<sup>27</sup> Flatford appealed.

### III. Discussion and Analysis

#### A. Issue Raised on Appeal

The issue raised on appeal was whether a social security disability claimant has an absolute right under due process to subpoena and cross-examine a medical advisor who provides a post-hearing report.<sup>28</sup> Impliedly raised, as well, was the scope of discretion to refuse issuance of a subpoena.

Flatford argued that the discretion granted to the ALJ pursuant

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<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

<sup>26</sup>*Id.* The district court's decision is unpublished.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

to 20 C.F.R. § 404.950(d) violated his right to procedural due process, because there is an absolute right to cross-examination in a social security hearing. To support his contention Flatford cited *Richardson v. Perales*<sup>29</sup> and decisions of six other Circuits of the United States Court of Appeals.<sup>30</sup>

The Commissioner argued that the appellate court should follow its decision in *Calvin v. Chater*,<sup>31</sup> where the court determined that an ALJ's discretion to issue subpoenas under 20 C.F.R. § 416.1450(d)(1)<sup>32</sup> did not violate the procedural due process rights of a claimant of supplemental security income seeking a subpoena for a physician who submitted a prehearing report.<sup>33</sup>

## **B. The Appellate Court's Decision on Due Process.<sup>34</sup>**

### **I. Due Process Requirements Met When Cross-Examination Available Where Reasonably Necessary.**

The Sixth Circuit relied on *Richardson v. Perales*<sup>35</sup> and assumed that Flatford has a property interest in the benefits he claims.<sup>36</sup>

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<sup>29</sup>402 U.S. 389, 410, 91 S.Ct. 1420, 1431-32, 28 L.Ed.2d 842 (1971).

<sup>30</sup>*Supra* Note 3.

<sup>31</sup>73 F.3d 87 (6th Cir. 1996.)

<sup>32</sup>This regulation involves the procedures for obtaining a subpoena by a claimant seeking supplemental security income and is identical to the procedures for issuing subpoenas under 20 C.F.R. § 404.950(d)(1) to claimants seeking disability benefits. It states in relevant part: "When reasonably necessary for the full presentation of a case, an administrative law judge...may, on his or her own initiative or at the request of a party, issue subpoenas."

<sup>33</sup>Flatford, 93 F.3d at 1301, citing *Calvin*, 73 F.3d at 92-93.

<sup>34</sup>Before addressing the due process issue, the appellate court addressed whether the Commissioner can make a decision based upon the evidence in the record, rather than only on the evidence "adduced at the hearing" under 42 U.S.C. § 405(b)(1). The appellate court determined the Commissioner's broad interpretation of 42 U.S.C. § 405(b) was not arbitrary and capricious because the commissioner was also given broad regulatory authority and the authority to conduct other hearings and investigation under 42 U.S.C. § 405(a) and (b).

<sup>35</sup>*Perales*, 402 U.S. 389, 91 S.Ct. 1420.

<sup>36</sup>*Flatford*, 93 F.3d at 1305.

Furthermore, the court agreed with *Perales* that "due process requires that a social security hearing be 'full and fair.'"<sup>37</sup>

The Sixth Circuit considered several factors related to having an absolute right to subpoena and cross-examine every witness. The court weighed the burdens an absolute right to subpoena and cross-examine would have on the witnesses and the administrative system against the unlikely danger of inaccurate medical information and biased opinions that would result in a claimant being wrongly denied benefits.<sup>38</sup> The court reasoned that the nonadversarial nature of social security adjudications makes the need to cross-examine every reporting physician unnecessary and that the use of interrogatories provided a meaningful opportunity to Flatford to present all of his evidence and to confront any contrary evidence.<sup>39</sup> The court concluded that by having cross-examination available where reasonably necessary to the full development of the case, the due process requirements are met.<sup>40</sup>

## II. Discretion: A Close Call!

While the Sixth Circuit concluded the ALJ had not abused his discretion by denying the subpoena to Flatford, it noted that its conclusion was a close call.<sup>41</sup> The court acknowledged that there is a

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<sup>37</sup> *Id.*, citing *Perales*, 402 U.S. at 401-02, 91 S.Ct. at 1427. While the Sixth Circuit agreed with *Perales* that the hearing must be "full and fair," the Sixth Circuit believed that *Perales* failed to provide the complete answer regarding whether the claimant must have cross-examination in order for the hearing to be "full and fair."

<sup>38</sup> *Id.* at 1306.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1307.

<sup>41</sup> The Sixth Circuit made its conclusion despite contrary case law. William Allen, Flatford's attorney, provided various examples of cases concluding that an ALJ abused his discretion by denying a subpoena. Those cases are: *Cowart v. Schweiker*, 662 F.2d 731 (11th Cir. 1981)(ALJ's decision based upon post-hearing reports invalidated where claimant not afforded an opportunity to cross-examine.), *Demenech v. Sec. of the Dept. of Health and Human Services*, 913 F.2d 882 (11th Cir. 1990)(cross-examination is of extraordinary utility where the ALJ substantially relies upon post-hearing medical report.), *Solis v. Schweiker*, 719 F.2d 301 (9th Cir. 1983)(to show bias, interrogatories are an inadequate substitute for cross-examination.) *Souch v. Califano*, 599 F.2d 577 (4th Cir. 1979)(denial of request for subpoena for reporting physicians violates due process when

danger that the claimant may not have the opportunity to cross-examine a physician when the ALJ obtains post-hearing evidence.<sup>42</sup> The court considered three factors that may prevent the claimant from having the opportunity to cross-examine. The first factor was whether the claimant may be discouraged from seeking a supplemental hearing because of the additional expense, inconvenience and delayed decision.<sup>43</sup> Secondly, the court considered the number of questions not answered by the physician combined with the interrogatories that were withheld by the ALJ.<sup>44</sup> The final factor was whether the ALJ abandoned his role as an impartial decision maker or failed to aid the claimant in the full development of the record.<sup>45</sup>

Upon considering these factors, the Sixth Circuit concluded that Flatford's attorney was very successful in gathering information from the physician with the interrogatories and that more precisely drafted interrogatories may have solved the problem.<sup>46</sup> Finally, the court concluded that the record did not reflect that the ALJ had abandoned his role as an impartial decision maker or failed in his duty to aid the

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ALJ substantially relies on those physicians' reports.). Telephone interview with William Allen, Rural Legal Services of Tennessee. (November 6, 1996.) (hereafter "**Allen Interview**").

<sup>42</sup>*Id.*

<sup>43</sup>*Id.* It should be noted the claimant was being represented by William Allen, Rural Legal Services of Tennessee.

<sup>44</sup>*Id.* The majority of the questions originally excluded by the ALJ were subsequently sent to the physician. Some of these questions related to the instructions provided by Social Security to the physician explaining how to answer the interrogatories. Furthermore, the issue remains regarding the non-responsive answers by the physician to interrogatories. For example, the physician responded initially that he had reviewed the whole record. However, when responding to subsequent questions relating to reports on claimants with similar symptomatology, he indicated he could not answer these questions because the reports were not in the record, when in fact they were. Cross-examination may have proved very helpful under such circumstances to discredit the physician or demonstrate bias. Indeed, the substance of the unanswered questions should have been given more consideration by the Sixth Circuit rather than the number left unanswered. **Allen Interview**, supra note 41.

<sup>45</sup>*Id.*

<sup>46</sup>*Id.* at 1307. While the court noted that more precisely drafted interrogatories may have solved the problem, Mr. Allen advises that an opportunity to provide additional interrogatories has not been provided. **Allen Interview**, supra note 41.



claimant in the full development of the record.<sup>47</sup>

#### IV. Conclusion

While the conclusion made by the Sixth Circuit is the minority opinion, it is a sound solution to this issue and a logical extension to the decision rendered by the Sixth Circuit in *Calvin v. Chater*. As decided in *Flatford v. Chater*, there is no absolute right to subpoena a physician providing post-hearing evidence, whereas in *Calvin* there is no absolute right to subpoena in order to conduct an oral examination of the treating physician at the hearing. Both decisions affirm an ALJ's discretion under similar regulations to issue subpoenas when it is reasonably necessary for the full presentation of a case.

However, as noted by the Sixth Circuit in the instant case, it was a close call whether the ALJ abused his discretion in the case at bar. While the Sixth Circuit's conclusion that an ALJ has the discretion to issue subpoenas where reasonable, its conclusion regarding abuse of discretion in the instant case is far less supportable. An opportunity to cross-examine the reporting physician should have been granted considering the significance of the interrogatories left unanswered and because the reporting physician's credibility was seriously at issue. Indeed, the most serious credibility problem for an expert witness who gives an opinion regarding a set of documents, concerns that expert's familiarity with important information in the documents. Since the physician demonstrated a lack of knowledge of contents of the file, cross examination to determine the impact, or not, of the overlooked data on his conclusions appears critical. Anything less appears a denial of due process.

Many questions remain, not only because there exists a split among the circuits, but also because it remains unclear how much discretion an ALJ should be allowed. The Supreme Court should affirm the ALJ's discretion to issue subpoenas where reasonably necessary, however, while considering this close call on discretion, it

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<sup>47</sup>Id.

should establish the standards for the ALJ's discretion, particularly when guidance exists to impeach the reliability of expert medical opinion.