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**NOTE: CALVIN V. CHATER: THE RIGHT TO
SUBPOENA THE PHYSICIAN IN SSA CASES
CONFLICT IN THE CIRCUITS OVER THE
INTERPRETATION OF 20 C.F.R. 404.950(D)(1)**

Elliot B. Oppenheim, J.D., M.D.*

I. Introduction

The inconsistency between two decisions among the Fifth and Sixth Circuits has created a administrative law conundrum which could upset hearings procedures which affect over two million Social Security Administration claimants a year. This matter concerns whether a claimant has an automatic right to receive a subpoena under SSA regulations in order to cross-examine an examining physician at the Administrative Law Judge, or Appeals Council levels. It is startling that this matter remains unsettled at this time.

The United States Court of Appeals for the Sixth Circuit in the 1996 case of *Calvin v. Chater*¹ denied a claim for supplemental security income. The denial rejected Senior District Judge Odell Horton's holding that the claimant had an absolute right to a subpoena in order to conduct oral examination of the claimant's treating physician. The appellate court held the claimant's right to cross-examine adverse witness subject to the Social Security Administration's published rule which governed subpoenas and found the Agency's decision to deny the party's right to cross-examine the physician in live testimony did not constitute an abuse of discretion in the issuance of the subpoena.²

The Sixth Circuit decision in *Calvin* conflicts with a 1990 Fifth Circuit

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¹73 F.3d 87 (6th Cir. 1996).

²*Id.* at 87.

ruling in *Lidy v. Sullivan*,³ which came to an "opposite assumption."⁴ In *Lidy*, the lower court granted summary judgment and upheld denial of the applicant's claim. The Fifth Circuit held, however, that by merely requesting a subpoena the claimant had the automatic right to cross-examine an examining physician.⁵

In response to the *Lidy* decision, at the end of 1991, the Social Security Administration⁶ issued an Acquiescence Ruling⁷ in which the Agency referenced the Fifth Circuit decision. The AR stated that "The Fifth Circuit has held [that]...the right to a subpoena for the purposes of cross-examining an examining physician is absolute."⁸ The AR noted that Fifth Circuit rested its analysis on its interpretation of *Richardson v. Perales*,⁹ but SSA believed that the Agency was required to issue a subpoena "only when it is shown that the testimony sought is reasonably necessary for the full presentation of a case."¹⁰ SSA in the AR took the position that in view of the conflict between SSA instructions¹¹ and the *Lidy* holding, SSA's policy would be "that a claimant's right to a subpoena is qualified."¹²

In order to meet the *Lidy* court's requirement, SSA indicated that the holding applied "only to cases involving claimants for disability insurance benefits

³911 F.2d 1075, 1077 (5th Cir. 1990), *cert denied*, 500 U.S. 959 (1991).

⁴Calvin, 73 F.3d 87, 92.

⁵*Lidy*, 911 F.2d at 1075.

⁶Hereinafter, SSA.

⁷SOCIAL SEC. ADMIN.: RIGHT TO SUBPOENA AN EXAMINING PHYSICIAN FOR CROSS-EXAMINATION PURPOSES-TITLES II AND XVI OF THE SOCIAL SECURITY ACT: ACQUIESCENCE RULING 91-1(5)(I)(P) (12-31-91). Hereinafter, AR.

⁸*Id.*

⁹*Id.* citing *Richardson v. Perales*, 402 U.S. 389 (1971).

¹⁰*Id.*

¹¹*Id.* Stating that under current S.S.A. Regulations at 20 C.F.R. 404.950(d); 416.1450(d), that an ALJ may deny the claimant's request to subpoena an individual if the claimant fails to show that the evidence or testimony...is essential, or that the evidence or testimony cannot be obtained in any other way." However, there is an exception to the policy when "securing expert medical opinion after a hearing...." AR. 91-1(5)(i)(p). Then, if the claimant objects to the use of interrogatories and requests a supplemental hearing, the ALJ must grant the request.

¹²*Id.*

and/or supplemental insurance income payments..."who reside in Louisiana, Mississippi, or Texas at the time of the respective judicial hearings at the disability, ALJ, or Appeals Council levels. In contradistinction to the rest of the country, in those states "...when a claimant request...that a subpoena be issued for the purpose of cross-examining an examining physician, the adjudicator must issue the subpoena."¹³

Under current law, then, there exists an uneasy tension. Those persons bound by the Fifth Circuit, Louisiana, Mississippi, and Texas, follow the 1990 *Lidy* line of authority under AR 91-1(5(1)(p)), a mandatory issuance of subpoena jurisdiction, whereas the rest of the country, under federal law, will follow the *Calvin* Sixth Circuit interpretation of same issue, granting a subpoena only when it is "reasonably necessary for full presentation of a case." This Note will examine how this unusual legal conflict developed and propose a logical resolution since it is impossible to ignore the potential consequences if claimants were able to compel every examining physician to testify at every hearing.

II. Background

Judge Nelson framed the discussion for the following cases when he pinpointed the issue in *Calvin*:

Where a person asserting a claim...asks that a reporting physician be subpoenaed to testify on cross-examination at the claimant's hearing before an administrative law judge, must the request for a subpoena be honored even if the claimant has failed to justify the request in the manner prescribed by the applicable social security regulations?¹⁴

While the District Court would have permitted the subpoena and remanded the case back to the Agency in order to subpoena the physician for cross-examination, the

¹³*Id.*

¹⁴*Calvin*, 73 F.3d p. 88.

Appellate Court concluded that "a claimant is not entitled to ignore" SSA regulations.¹⁵

Mr. Calvin applied for Supplemental Security Income after he became disabled following a bout of acute renal failure.¹⁶ Calvin accepted his denial until he was notified three years later that he was entitled to review under the *Samuels v. Heckler*¹⁷ decision. As part of reopening his claim, Mr. Calvin underwent a consultative examination by Dr. Rawlinson and that physician prepared a report, including a two-page SSA medical assessment form. This report was consistent with another report prepared by Dr. Menees, a consultant retained by claimant.

Mr. Calvin's second claim was denied and prior to the hearing Calvin's attorney objected to both the Rawlinson report and the medical assessment form. At this time, it was Calvin's position that unless he was permitted the opportunity to cross-examine Dr. Rawlinson, the report and medical assessment should be entirely disallowed.¹⁸

The claimant cited as authority 20 C.F.R. § 416.1450(d), which authorizes an ALJ "to issue a subpoena... [w]hen it is reasonably necessary for the full presentation of a case..."¹⁹ However, the regulation requires that the party wishing a subpoena state, "the important facts that the witness or document is expected to prove; and indicate why these facts could not be proven without issuing a subpoena."²⁰

The court observed that in its subpoena request, the claimant did not suggest that Dr. Rawlinson was biased, that it did not refer to any "important facts" which it expected to be developed by the intended cross-examination, nor did the

¹⁵*Id.* at 88

¹⁶There were also some complications with the anti-coagulant Coumadin but these are unimportant to the legal issues.

¹⁷*Calvin*, 73 F.3d at p. 89.

¹⁸*Calvin* 73 F.3d at p. 89

¹⁹*Id.*

²⁰20 CFR § 416.1450(D)(2).

request state why these facts could not be proved through written interrogatories. The court denied the subpoena, the Rawlinson report was admitted²¹ and the claimant lost.²² The ALJ explained the denial as within the privilege of judicial discretion under the regulation²³ and furthermore, that to subpoena Dr. Rawlinson "would serve no useful purpose...since interrogatories" would suffice.²⁴

Calvin appealed to the United States District Court for the Western District of Tennessee, citing both *Lidy v. Sullivan* and *Richardson v. Perales*. The District Court held that Mr. Calvin did have "an absolute right, based upon due process considerations, to conduct live cross-examination..." and remanded to the Agency.²⁵ The Agency then appealed to the Sixth Circuit which reversed the district court.

Under the Social Security Act, the Secretary has "full" rule making power²⁶ and the Sixth Circuit presumed that the regulation was valid. ²⁷ Mr. Calvin "offered no explanation of how the regulation" fell short of the "statutorily prescribed reasonable and proper' standard."²⁸ Calvin argued that the Administrative Procedure Act,²⁹ permits administrative hearing officers the authority to issue subpoenas and that under 5 U.S.C. § 556(d) a party is permitted to conduct a cross-

²¹Calvin, 73 F.3d. at 89.

²²Mr. Calvin's attorney admitted that "the request for a subpoena did not meet the requirements of the regulation." *Id.* at 90, n.2.

²³*Id.* at 90, citing 20 CFR § 416.1450(d)(1)(2).

²⁴Calvin, 73 F.3d at 90. *Berger v. Secretary*, 835 F.2d 635 (6th Cir. 1987). "Denial of Mrs. Berger's subpoena request did not prevent her from receiving a fair and full hearing before the Administrative Law Judge."

²⁵*Id.* Calvin, 73 F.3d at 90-91.

²⁶*Id.* Citing the Congressional delegation of power codified in 42 U.S.C. § 405(a) which the court presumed valid. SSA may "regulate and provide for the nature and extent of proofs and evidence. . . [as well as] the 'method of taking and furnishing' evidence. § 405(a).

²⁷Calvin, 73 F.3d at 90-91, citing *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 721-22 (6th Cir. 1979), *aff'd*, 445 U.S. 1 (1980).

²⁸Calvin, 73 F.3d at 91. Mr. Calvin died while this case proceeded through the courts. *Id.* at 91, n. 3.

²⁹*Id.*, citing 5 U.S.C. § 556(c)(3). [hereinafter, APA]. APA § 556(c) states "Subject to published rules of the agency and within its powers, employees presiding at hearings may... issue subpoenas authorized by law...."

examination "as may be required for a full and true disclosure of the facts."³⁰ The court reasoned that under the *en banc* opinion of *Mullen v. Bowen*,³¹ the SSA must conform to the requirements of the APA and the Act "explicitly" states that the permission to issue such subpoenas rests with the published rules of the agency.³²

Calvin admitted that he did not comply with the Agency rule³³ and the court observed here, too, that this rule did not conflict with the APA, § 556(d), since the APA regulation "does not prevent a party who complies with its terms from putting himself in a position to conduct such cross-examination as may be required for a full and true disclosure of the facts."³⁴ The court explained that if the party complies with the rule and demonstrated that cross-examination is required, "the subpoena will presumably be issued."³⁵

Additionally, 42 U.S.C. § 405(b) permits that the Rawlinson report could be admitted even if it were hearsay, even if he were not present for cross-examination.³⁶ The court then considered the factual aspects of the Rawlinson report in terms of whether it would actually have made some sort of real-world difference. The court determined that the Menees' Report was more contemporaneous to the period of disability at issue, noting that the Rawlinson findings did not contradict other medical evidence, "and there had been no suggestion of bias..."³⁷

The Sixth Circuit distinguished *Calvin* from the 1983 Ninth Circuit decision of *Solis v. Schweiker*.³⁸ In *Solis* the claimant wanted to cross-examine a

³⁰*Calvin*, 73 F.3d at 91, citing 5 U.S.C. § 556(d).

³¹800 F.2d 535, 536 n. 1 (6th Cir. 1986) (*en banc*).

³²*Calvin*, 73 F.3d at 91. Under 5 U.S.C. § 556(c).

³³*Calvin*, 73 F.3d at 91.

³⁴*Id.*

³⁵*Id.*

³⁶42 U.S.C. § 405(b) provides that "[e]vidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure."

³⁷*Calvin*, 73 F.3d at 91.

³⁸*Id.*, citing, *Solis v. Schweiker*, 719 F.2d 301 (9th Cir. 1983).

medical witness "whose report was in substantial conflict with" reports from other doctors. The court found that the claimant had a due process right to the granting of the request for a subpoena. When the Ninth Circuit granted his request it affirmed that the ALJ "has discretion to decide when cross-examination is warranted."³⁹

In contrast to *Solis*, however, there was no conflict in *Calvin* between reports. The *Calvin* court also relied upon Judge Parker's ruling in *Long v. United States*⁴⁰ upon which the United States Supreme Court rested its important decision in *Richardson v. Perales*. In *Long*, the court held admissible reports such as the Rawlinson report in *Calvin* under a hearsay exception, in part because "their testimony 'is ordinarily a mere recital'"⁴¹ of what they wrote in their reports. Judge Parker reasoned that the physician would only refresh his recollection from his report, therefore, the report is more reliable than the physician's memory. Furthermore, Judge Parker continued, if a witness were to attempt to contradict the "statements contained in the reports, the reports would be accepted by any trier of facts in preference to oral testimony."⁴² Judge Parker stated that, "[t]he written record of an examination made at the time is undoubtedly more trustworthy than the treacherous memory of a busy man dealing with many cases having many points of similarity."⁴³ The reports were preferable to oral testimony since "they are more dependable...and are...the best evidence obtainable...."⁴⁴

In *Perales*, the Supreme Court relied upon Judge Parker's persuasive reasoning when it held that the "physician's written report 'may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the

³⁹*Calvin*, 73 F.3d at 92., citing *Solis*, 719 F.2d at 302.

⁴⁰*Calvin*, 73 F.3d at 92. *Long* involved reports from physician employees in the Veterans Bureau by physicians who were ordinarily not available at hearings. These physicians examined hundreds of disabled soldiers.

⁴¹*Calvin*, 73 F.3d at 92.

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.*, citing *Long*, 59 F.2d 602, 603-604.

claimant...."⁴⁵ The *Calvin* court differed with the *Perales* reasoning in that it did not find the right to subpoena "absolute" since the right is not automatic "whether or not [the claimant] has complied with the published rules...."⁴⁶ The *Perales* court also factored in the "substantial drain" on both the Agency and the involved physicians⁴⁷ such a rule would entail.

The *Calvin* court further distinguished *Lidy* from *Calvin* on its facts by noting that the Court of Appeals in the Fifth Circuit described Judge Parker's famous passage as less than "pellucid," and it reached the opposite assumption.⁴⁸ The *Lidy* court noted that subsequent to the passage from page 406 of *Perales*, the Supreme Court "refers to the 'use of the subpoena and consequent cross-examination'...suggesting that such cross-examination necessarily follows from the filing of a request for a subpoena."⁴⁹

The *Calvin* Court rejected this rationale for it "did not see why cross-examination should...follow from the filling of a subpoena request" when the request fails to comply with a regulation which requires a showing of some need for that cross-examination.⁵⁰ The *Calvin* court found the APA controlling; "[the APA] is the standard.... It is clear and workable and does not fall short of procedural due process."⁵¹ In conclusion, the *Calvin* opinion analyzed that if the party requesting the subpoena makes no attempt to justify his request, then he is not entitled to the subpoena. Further, as the court in *Lidy* observe, "when the *Perales* Court spoke of the claimant's non-exercise of 'his right to subpoena the reporting physician,' the Court did not speak of the 'right to request a subpoena."⁵²

⁴⁵*Calvin*, 73 F.3d at 92., citing *Perales*, 402 U.S. at 402.

⁴⁶*Id.*

⁴⁷*Id.*, citing *Perales* 406 U.S. at 406.

⁴⁸*Calvin*, 73 F.3d at 92.

⁴⁹*Id.*, citing *Lidy*, 911 F.2d at 1077.

⁵⁰*Calvin*, 73 F.3d at 92-93.

⁵¹*Calvin*, 73 F.3d at 93, citing *Perales*, 402 U.S. at 410.

⁵²*Calvin*, 73 F.3d at 93, citing *Lidy*, 911 F.2d at 1077.

In *Lidy* the physician answered interrogatories in a "vague and evasive"⁵³ manner. In *Calvin*, the Court concluded its analysis by denying is automaticity within the subpoena granting statute and explained its opinion by stating, "[i]f [d]ue process requires that a claimant be given an opportunity to cross-examine and subpoena the individuals who submit reports, it does not seem to us that the agency charged by statute with responsibility for issuing regulations telling claimants how to avail themselves of this opportunity is constitutionally precluded from prescribing reasonable and proper requirements of the sort found in" the [regulations.]. . . . Mr. Calvin's lawyer ignored those requirements at his peril...."⁵⁴

III. Analysis

May a claimant fully air his case without having access to an automatic subpoena which would subject his examining physician to cross-examination? Is it an unreasonable rule to require a threshold showing of need for subpoena in these cases? In most adversary situations parties are permitted to present all relevant evidence which would be probative.⁵⁵ The Federal Rules of Evidence "secure fairness in administration...to the end that the truth may be ascertained and proceedings justly determined."⁵⁶ In most situations before federal tribunals, then, relevant evidence may be excluded if, "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, ...or by considerations of undo delay or needless presentation of cumulative evidence."⁵⁷

Under SSA regulations, as above discussed, the Agency may determine to what extent and under what circumstances it will permit cross-examination of examining physicians. It does not seem unjust that claimants would be required to

⁵³*Calvin*, 73 F.3d at 93, citing *Lidy*, 911 F.2d at 1076.)

⁵⁴*Calvin*, 73 F.3d at 93. Citations to *Lidy*, 911 F.2d at 1076 and *Mathews v. Eldridge*, 424 U.S. 319 (1976) omitted.

⁵⁵FED. R. EVID. 401, 402.

⁵⁶FED. R. EVID. 102.

⁵⁷FED. R. EVID. 403.

present some evidence to satisfy a reasonableness standard prior to issuance of subpoenas. To make subpoena issuance automatic could place an excessive burden on already overburdened physicians, and cost the trust fund dearly.

The *Calvin* holding harmonizes with all of constitutional principles of due process, the Federal Rules of Evidence, the majority of case law, and a sense of "fair play." The alternative encourages the opposite and would tend to prolong the SSI process. To that end, SSA's position in the wake of the *Lidy* decision represents a well reasoned agency acquiescence in order to settle judicial discord⁵⁸ and is the better rule.

The Solicitor General of the United States sought the grant of a writ certiorari Fifth Circuit's decision in *Lidy*, stating that the court should grant the petition because of the conflict this decision created with other courts of appeals.⁵⁹ Additionally, "the holding that every applicant for federal disability benefits has an 'absolute right' to subpoena and orally examine every reporting physician threatens to impose enormous financial and procedural burdens under which [m]illions of claims are filed every year."⁶⁰ The Solicitor General also pointed out that "due process is flexible and calls for such procedural protections as the particular situation demands."⁶¹ It seems reasonable that all courts should adopt the *Calvin* rule. However, since the Supreme Court denied certiorari,⁶² the matter remains unresolved.

⁵⁸For a thorough discussion of this area of non-acquiescence, see, *Stieberger v. Heckler*, 615 F.Supp. 1315 (1985), vacated and remanded, 801 F.2d 29 (2d Cir. 1986). See also, generally, Robert J. Axelrod, *The Politics of Nonacquiescence: The Legacy of Stieberger v. Sullivan*, 60 BROOK.L.REV. 765 (1994); Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN.L.REV. 1339 (1991).

⁵⁹Petitioner's Petition for Certiorari at 7.

⁶⁰*Id.*, citing FED. R. EVID. 401, 402. *Schweiker v. Chilicky*, 487 U.S. 412, 424 (1988).

⁶¹*Id.* at 8, citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

⁶²*Cert. denied*, 500 U.S. 959 (1991).

Calvin should be the preferred interpretation of the subpoena issue, but a careful reading of *Calvin*⁶³ reveals that the court supported its holding with respect to APA § 205(g)⁶⁴ on a dictum; footnote one from *Mullen v. Bowen*.⁶⁵ Footnote one stated, in relevant part, "[h]earings under section 205(b), 42 U.S.C. § 405(b), must also conform to the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 556-557." No authority is cited for this statement, nor, does such authority exist as far as could be discovered. The proposition appears a mere assumption. The significance is that *Calvin*, the case litigants may look to for guidance, may perilously rest on this unsupported dictum from *Mullen v. Bowen*.

The Sixth Circuit in *Muller* decided what law should be applied to "resolve an inconsistency between two decisions by different panels...relating to the role of the Appeals Council in the scheme of review of disability determinations."⁶⁶ Then, the court moved on to a second issue, the applicable standard of review,⁶⁷ and as part of those issues, parenthetically placed footnote one as part of the court's "brief overview of the relationship between the Secretary and the Appeals Council under the Social Security Act and regulations promulgated thereunder."⁶⁸ The court then discussed § 205(b)(1) and the section authorizing the Secretary to conduct investigations and hearings "as he may deem necessary or proper." The court did not discuss section 205(g), however, relegating this important aspect, which strongly supports the *Calvin* opinion, to footnote status. Section 205(g) provides in part, "where a claim has been denied . . . because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity

⁶³The editors and author would like to acknowledge Chicago Attorney Eric Schnauffer who brought the footnote to the Journal's attention.

⁶⁴*Calvin*, 73 F.3d 87, 91.

⁶⁵800 F.2d 535, 536 n. 1 (6th Cir. 1986) (*en banc*).

⁶⁶*Mullen*, 800 F.2d 535, 536.

⁶⁷*Id.*

⁶⁸*Id.*

with such regulations and the validity of such regulations.” 42 U.S.C. § 405(g) (emphasis added).

A dictum can never be mandatory authority, however, and if the court which wrote the dictum can reverse the court in which the current matter resides, the dictum could become especially influential. That, however, is not the case where both *Calvin* and *Mullen* arose from the Sixth Circuit and that particular discord is intracircuit. Interestingly, Judge Nelson sat on both cases!

IV. Conclusion

The *Calvin/Lidy* problem requires Supreme Court resolution since this is a major national issue. This matter is no footnote in a cobwebbed archive. Whether the important *Calvin* decision rests uneasily on a dictum or firmly on statutory language will be a matter for the Supreme Court to consider. *Calvin* is the only tenable treatment of this problem. What is so astonishing is that this matter has remained unresolved for so long. Very few areas of evidence involve inflexible rules and most, especially where cost and human resources will be expended, interpose judicial discretion in the regulation of the expenditure.

It is untenable that there is one rule for Texas, Louisiana, and Mississippi, another rule for the Sixth Circuit, and confusion for the rest of the nation. the rule in *Calvin*, which requires that a subpoena may be issued when the testimony sought is reasonably necessary for the full presentation of the claimant's case, embraces all legal principles and is the rule the Supreme Court should recognize and adopt.

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