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Subjective Pain Testimony in Disability Determination Proceedings: Can Pain Alone be Disabling?

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INTRODUCTION

Everyone has suffered pain.¹ Yet, not everyone appears to suffer the same degree or severity of pain.² What one person considers unbearable, another may find tolerable.³ This occurs because each person has an individual pain threshold. As a result, pain cannot be objectively measured; it is purely subjective in nature.⁴

Because pain affects everyone, it is not surprising that physicians consider it to be the complaint they hear most often. Disability insurers, both private and public, view it as an enormous problem.⁵ One public insurer, the Social Security Administration (Administration), currently finds its disability insurance program in a state of flux⁶ over its attempt to answer the following question: "Because the experience of pain is different for each person, how is it possible to assess pain and determine a severity beyond which one

1. INSTITUTE OF MEDICINE, PAIN AND DISABILITY 2 (1987) [hereinafter INST. OF MED.].

2. COMMISSION ON THE EVALUATION OF PAIN, U.S. DEPT. OF HEALTH & HUMAN SERVICES, REPORT OF THE COMMISSION ON THE EVALUATION OF PAIN 54 (1986) [hereinafter REPORT ON THE EVALUATION OF PAIN] ("The Commission wishes to emphasize the fact that no one can know the pain of another person."). See also Report of the Commission on the Evaluation of Pain, 50 SOC. SEC. BULL. 13 (Jan. 1987) [hereinafter Report] (for an abridged version of the Commission's report).

3. *Ber v. Celebrezze*, 332 F.2d 293, 299 (2d Cir. 1964). The *Ber* case is seen by many as the most profound judicial opinion written on the subject of subjective pain testimony. The court stated:

It is common knowledge that physical phenomena of a debilitating nature may work differing degrees of hardship on different persons; and, too that even where the amount of hardship experienced is roughly the same, persons subjected to it will bear up under it differently because they possess relatively higher or lower thresholds of resistance to the pain the debilitation generates. What one human being may be able to tolerate as an uncomfortable but bearable burden may constitute for another human being a degree of pain so unbearable as to subject him to unrelenting misery of the worst sort.

Id. See Goldhammer & Bloom, *Recent Changes in the Assessment of Pain in Disability Claims Before the Social Security Administration*, 3 SOC. SEC. REP. SER. 1119 (1984); Fried, *A Disability Appeal Primer: Appeals to Federal Court in Social Security and Supplemental Security Income Disability Cases*, 9 SOC. SEC. REP. SER. 971 n.62 (1985).

4. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 54. The Commission reports that the only way for someone to measure the pain of another person is to note the suffering person's outward manifestations of "pain behaviors," i.e., verbal and nonverbal expressions or physical acts such as extensive reliance on pain medication. *Id.*

5. INST. OF MED., *supra* note 1, at 12, 14. See Goldhammer & Bloom, *supra* note 3 (noting that subjective symptoms, such as pain, have created more controversy within the disability determination process than any other issue).

6. INST. OF MED., *supra* note 1, at 15.

should not be expected to work?"⁷

This Comment will define and explain the confusion surrounding subjective pain testimony in disability determination proceedings, primarily focusing on the problems caused by Congress' approach to such testimony. Accordingly, Section I provides background into the present problem. Section II follows with a discussion of the disability determination process that claimants must follow when seeking disability benefits. Section III outlines the Administration's policy on pain evaluation and its contribution to the present problem. Section IV explores the fundamental objectives and the end result of legislation passed by Congress in an effort to remedy the problem.

Finally, Section V makes a two-part recommendation to correct this problem. The first part proposes legislation to address the importance of pain testimony in the disability determination process. This legislation emphasizes the relationship between a medically established impairment and the degree of subjective pain alleged. The second part suggests regulations which would require the Administration to consider the impact a claimant's pain may have on his or her ability to function in everyday life before denying benefits. The Comment's overall objective is to examine the struggle of those parties participating in the disability determination process and to highlight the need for Congressional action.

I. BACKGROUND

A. *Overview of the Problem*

In 1956, Congress passed the Social Security Disability Insurance Act (SSDI),⁸ the first of two federally funded programs enacted under the Social Security Act.⁹ The second program, Supplemental Security Income (SSI), was passed in 1972.¹⁰ The requirements for disability are the same under both programs;¹¹ each program, however, has separate objectives.¹² As

7. *Id.*

8. Social Security Amendments of 1956, Pub. L. No. 84-880, § 103, 73 Stat. 807, 815-24 (codified as amended at 42 U.S.C. (1991)). This program is referred to as Title II—Old-Age, Survivors, and Disability Insurance Benefits, of the Social Security Acts.

9. The current Social Security Act is codified at 42 U.S.C. §§ 301-1379 (1988).

10. Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1329, 1465-78 (codified as amended in scattered sections of 42 U.S.C. (1991)). This program is referred to as Title XVI—Supplemental Security Income for the Aged, Blind, and Disabled, of the Social Security Act.

11. Compare 20 C.F.R. §§ 404.1501-1599 (1989) (SSDI) with 20 C.F.R. §§ 416.90-998 (1989) (SSI).

12. While SSDI was enacted to provide assistance to those who had previously paid into the social security system as employees participating through the Federal Insurance Contribution Act (FICA), SSI was designed to aid aged, blind, or disabled indigent claimants. Eligibility under SSI was based solely on financial need. See Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 B.Y.U. L. REV. 461, 464-65; Rubinson, *Government Benefits: Social Security Disability*, 1987 Ann. Sur. Amer. L. 195, 196 (June 1988). Further citations in this Comment will refer to SSDI claims.

with most social legislation, rising costs began to overwhelm sound objectives, and reform quickly followed.

Reacting to a sharp cost increase after the passage of SSI,¹³ Congress enacted the Social Security Amendments of 1980 as a way of containing both SSI and SSDI.¹⁴ The main thrust of the 1980 legislation was a requirement that the Administration conduct eligibility reviews every three years.¹⁵ Although the new eligibility review process was originally seen as a promising way to protect taxpayers by "weeding out" those claimants no longer legally disabled, the harsh reality of implementing the process soon became clear: deserving claimants were having their benefits terminated.¹⁶

In response to the escalating problem, Congress enacted the Social Security Disability Benefits Reform Act of 1984 (Reform Act).¹⁷ The primary motivation behind this legislation was the need for new standards to determine the eligibility of both existing claimants and new applicants.¹⁸ The basic purpose was to ensure uniformity among all the participants in the disability benefits determination process by clarifying statutory guidelines.¹⁹ Congress hoped to provide a clear federal mandate to assist the Administration in its policy-making role.²⁰ Other strong considerations included the need for a more sympathetic and understanding appeal process and more efficient administrative procedures.²¹

In particular, Section 3 of the Reform Act²² (Section 3) was designed to set forth a consistent and uniform framework for evaluating pain and other

13. Between 1957 and 1982, the Social Security Program's costs increased from \$59 million to \$18.5 billion, and the number of eligible insurance recipients rose from 149,850 to 4,374,000. See Rubinson, *supra* note 12, at 197 n.14.

14. See Social Security Amendments of 1980, Pub. L. No. 96-265, § 311(a), 94 Stat. 441 (codified as amended at 42 U.S.C. § 421(h)(1) (1988)). After passage of the Social Security Amendments of 1980, the Administration began periodic eligibility reviews of then current disability income beneficiaries. This legislation was received as a surprise to many because it was seen as a way to cut-back on the number of eligible recipients, a goal uncommon to the Carter administration. Today many blame the Reagan administration for the harsh results which occurred under the Act. Yet, as noted, the Act was proposed by the Carter administration. The difficult task of conducting the eligibility reviews, however, fell on the Reagan administration. See 130 CONG. REC. 25975, 25976 (1984) (statement of Sen. Dole).

15. 130 CONG. REC. 25975 (1984) (statement of Sen Dole).

16. *Id.* The Act created a great deal of confusion and ended up causing more harm than good because it lacked a concrete and uniform process for conducting the reviews. Within just three years, this confusion resulted in the termination of approximately 500,000 recipients at the state level. Of those who could afford an appeal to an administrative law judge, roughly 60% had their benefits reinstated. Obviously, many benefits were wrongfully terminated.

17. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (codified at scattered sections of 42 U.S.C.) [hereinafter Reform Act].

18. H.R. Rep. No. 618, 98th Cong., 2d Sess. 13, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3039 [hereinafter 1984 House Report].

19. *Id.* Congress was referring to the Administration's policies, those outlined in various regulations and rulings, when it spoke of existing statutory guidelines.

20. *Id.*

21. *Id.*

22. Reform Act, *supra* note 17, § 3 (codified as amended at 42 U.S.C. § 423(d)(5)(A) (1988)).

symptoms in disability determination proceedings by codifying the Administration's existing policy on pain.²³ For individuals involved in these determination proceedings, Section 3 was the legislation's most promising feature because it provided disability decision-makers with the first statutory definition for pain evaluation,²⁴ and addressed the need for a comprehensive study on the evaluation of pain.²⁵

B. Illustrations of the Problem

1. Administrative Review

To appreciate Congress' concern over subjective pain and the Administration's difficulty in handling claims of pain, consider the hypothetical case of Joe Parker.²⁶ Mr. Parker worked on the docks as a longshoreman for fifteen years but was forced to quit after he injured his back while hauling sacks of grain.²⁷ On the advice of his doctors, Mr. Parker underwent disc surgery. Though he recuperated nicely, his doctors prescribed only light manual work in the future. Fifteen months later, Mr. Parker found work as a cook and counter person, but had to give up that job as well after falling and breaking his hip. Mr. Parker claimed the fall aggravated the earlier back injury. As a result, Mr. Parker has not worked for the past three years, claiming that pain prevents him from performing even light work. Despite his claims of debilitating pain, medical evidence indicates that both of Mr. Parker's injuries have healed, at least to the point of permitting light to medium work.²⁸

Mr. Parker was denied state disability insurance benefits because he could not show the existence of a medical impairment that could reasonably cause the amount of pain he alleged.²⁹ He appealed the decision to an Administrative Law Judge (ALJ) only to have it affirmed despite corroborating testimony from family, friends, and co-workers as to the existence of his pain. Mr. Parker next pursued relief through the Appeals Council, but the Council declined to review his claim. Distressed by the less than favorable administrative outcome, Mr. Parker then brought an action in federal district court. The district court accepted the ALJ's findings and affirmed the denial

23. 130 CONG. REC. 13214-15 (1984) (statement of Sen. Long).

24. INST. OF MED., *supra* note 1, at v.

25. *Id.* at v-vi, 1. See *infra* Section IV.B for a discussion of the study.

26. The name and facts given here are purely hypothetical and are intended only to illustrate the situation many claimants face.

27. Lower back pain and other musculoskeletal conditions are the leading causes of disability for people in their working years. See INST. OF MED., *supra* note 1, at 12.

28. See 20 C.F.R. § 404.1567 (1989) (classifying and describing work in the national economy as either "sedentary," "light," "medium," "heavy," or "very heavy."); See also *infra* text accompanying note 118.

29. See *infra* text accompanying notes 84-106.

of benefits. Desperate, Mr. Parker appealed to the federal circuit court of appeals.³⁰ The circuit court expressed dissatisfaction with the ALJ's handling of Mr. Parker's subjective complaints of pain. The court determined that there was sufficient objective evidence supporting a medical impairment which would reasonably cause some amount of pain.³¹ The court then reversed the ALJ's ruling and granted Mr. Parker disability benefits, concluding that the ALJ is not permitted to disregard subjective complaints of pain solely because objective medical evidence fails to confirm the severity of such pain.³²

Mr. Parker's difficulties in receiving benefits are not atypical. In fact, the determination process is more complex and the issues often more troubling in an actual case. For years, inconsistent standards have been applied in disability determination proceedings in which claimants complain of severe or prolonged pain.³³ State administrators working under the auspices of the Secretary of Health and Human Services (the Secretary), ALJs, and federal courts all share in the confusion over what standard to apply when claimants allege severe or enduring pain for which there is no objectively identifiable source.³⁴

This confusion and inconsistency results from the lack of a uniform standard for evaluating pain among the various reviewing bodies. While the Administration follows its own promulgations and rulings,³⁵ federal courts adhere to the doctrine of *stare decisis* and follow judicial precedent.³⁶ Although the regulations recognize subjective pain, it is only to the extent the pain is fully supported by objective evidence of an underlying medical condition.³⁷ Many federal courts, on the other hand, interpret the Administration's policy differently, recognizing subjective pain testimony

30. See generally O'Byrne, *How To Prepare the Social Security Disability Case*, 35 PRAC. LAW. 61 (Apr. 1986) (listing procedural steps claimants must follow in a disability determination case).

31. See *infra* Section I.B.2.

32. The effects of this sort of a disparity in the review process can be personally devastating to a claimant. Most claimants have little or no income, and for those who do, the appeals process can be financially crippling. For those unable to pursue an appeal, their pain goes unrecognized, and their lives often end in shambles. See 130 CONG. REC. 25979 (1984) (statement of Sen. Levin) (The effect of having benefits wrongfully terminated and having to then go through an exhaustive appeals process creates substantial personal grief and expense on many claimants. For instance, many lose their homes or automobiles, some suffer worsened medical conditions because of a lack of insurance, and a few go so far as to commit suicide.). *Id.*

33. 1984 House Report, *supra* note 18, at 3050-55.

34. See *id.* at 3050-51.

35. See *infra* Section III.A.

36. This situation has created a problem all its own. See *infra* Section III.B.

37. See *infra* text accompanying note 160. Note that the Administration's policy, therefore, falls short of helping Mr. Parker and others like him.

despite the absence of supporting medical evidence.³⁸ However, the court decisions themselves often conflict.³⁹ In addition, Congress' lack of guidance in this area before 1984 compounded the problem.⁴⁰

2. Judicial Review

Judicial interpretation of pain, both before and after the enactment of Section 3, has magnified the problem. For example, over the last twenty-five years the Ninth Circuit alone has gone from not requiring objective medical evidence to support a claim of pain in full to requiring fully supportive objective medical evidence of pain, back to not requiring it,

38. *Page v. Celebrezze*, 311 F.2d 757, 762-63 (5th Cir. 1963) (if pain resulting from any medically determinable impairment is real to claimant and precludes his working in a substantially gainful occupation, claimant is entitled to benefits despite fact that the pain is unsupported by objective medical evidence); *Ber*, 332 F.2d at 299 ("Even pain unaccompanied by any objectively observable symptoms which is nevertheless real to the sufferer and so intense as to be disabling will support a claim for disability benefits."); *Aubeuf v. Schweiker*, 649 F.2d 107, 111-12 (2d Cir. 1981) (subjective pain may support a finding of disability despite fact that the pain is not corroborated by objective medical proof); *Mark v. Celebrezze*, 348 F.2d 289, 292 (9th Cir. 1965) ("[s]ubjective symptoms of pain are a significant factor to be weighed when determining 'disability' . . ."); *Miranda v. Secretary of Health, Education and Welfare*, 514 F.2d 996, 1000 (1st Cir. 1975) (pain may be disabling); *Beavers v. Secretary of Health, Education, and Welfare*, 577 F.2d 383, 386 (6th Cir. 1978) (there is no requirement that an underlying medical condition make the alleged pain inevitable); *Northcutt v. Califano*, 581 F.2d 164, 166 (8th Cir. 1978) (subjective pain allegations cannot be disregarded solely on the ground that they are unaccompanied by objective medical evidence); *Baerga v. Richardson*, 500 F.2d 309, 312 (3d Cir. 1974), *cert. denied*, 420 U.S. 931 (1975) ("Pain, in itself, may be a disabling condition. . . ."); *Smith v. Califano*, 637 F.2d 968, 972 (3d Cir. 1981) (pain may be disabling and need not be fully supported by objective medical evidence); *Myers v. Califano*, 611 F.2d 980, 983 (4th Cir. 1980) (ALJ should have evaluated impact of pain on disability claimant even though its intensity was shown only by subjective evidence); *Walden v. Schweiker*, 672 F.2d 835, 840 (11th Cir. 1982) (pain alone can be disabling, even when its existence is unsupported by objective evidence).

39. *Compare Stark v. Weinberger*, 497 F.2d 1092, 1096 (7th Cir. 1974) (subjective pain testimony is insufficient to establish disability) and *Gonzalez v. Harris*, 631 F.2d 143, 145 (9th Cir. 1980) (allegations of pain must be supported by medical evidence) *with Wiggins v. Schweiker*, 679 F.2d 1387, 1390-91 (11th Cir. 1982) (pain need not be supported by objective evidence and can support a finding of disability). *See Goldhammer & Bloom, supra* note 3 ("Many decisions written on [subjective pain testimony] . . ., even in the same circuit, seem to reach different results despite extremely similar factual situations. It seems as though one can find at least one case for almost any proposition one proposes with respect to disability claims.").

40. Prior to 1984, Title II of the Social Security Act made no mention of pain. Disability was defined as "the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A) (1988). The impairment could be demonstrated only by showing that it "result[ed] from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3) (1988). *See infra* note 83. The statute read further that "an individual shall not be considered to be under a disability unless he furnishes such medical and other evidence as the Secretary may require." 42 U.S.C. § 423(d)(5) (1988).

then to requiring it again, and finally to not requiring it.⁴¹ This vacillation reflects the confusion and inconsistency inherent in the Ninth Circuit's approach to pain, and serves as a general illustration of the widespread and continuing conflict over pain.

In 1985, the court decided the first Ninth Circuit case to interpret Section 3, *Nyman v. Heckler*.⁴² *Nyman* concluded that earlier circuit precedent was consistent with Section 3's requirement of objective proof to support pain testimony⁴³ and rejected the claimant's suggestion that the court adopt the Eighth Circuit's pain standard, which recognized subjective pain testimony even in the absence of medical evidence to support the claim in full.⁴⁴ However, the Eighth Circuit standard rejected in *Nyman* was the same standard adopted by the court only six months later in *Cotton v. Bowen*.⁴⁵ Not only did *Cotton* fail to follow *Nyman*, it completely rejected the *Nyman* interpretation of Section 3:

This court has rejected that interpretation of . . . 423(d)(5)(A) [Section 3]. 'We have never required that the medical evidence identify an impairment that would make the pain inevitable.' Requiring firm objective confirmation of pain complaints before believing them 'would overlook the fact that pain is a highly idiosyncratic phenomenon, varying according to the pain threshold and stamina of the victim,' and it would trivialize the importance that we have consistently ascribed to pain testimony, rendering it, in the final analysis, almost superfluous. In enacting the Social Security Disability Benefits Reform Act, Congress did not intend to render the claimant's pain testimony irrelevant. 'Instead, Congress clearly meant that so long as the pain is *associated* with a clinically demonstrated impairment, credible pain testimony

41. See *Mark*, 348 F.2d at 292; *Gonzalez*, 631 F.2d at 145-46; *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986); *Bates*, 894 F.2d 1059, 1065-66 (9th Cir. 1990), *overruled*, *Bunnell v. Sullivan*, 1191 WL 191634, at *5-6 (9th Cir. 1991).

42. 779 F.2d 528 (9th Cir. 1985).

43. See *Gonzalez*, 631 F.2d at 145 (claimant's pain allegations must be supported by objective medical evidence). *But see Mark*, 348 F.2d at 292 (While claimant must show the existence of a medical condition, the Secretary is not permitted, "under the guise of 'medically determinable impairment,' to approach the determination of 'disability'. . . from an exclusively technical viewpoint, thereby sacrificing realities of the individual case to [a] rigid requirement of a preponderance of objective clinical findings.").

44. See *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984) ("While the claimant has the burden of proving that the disability results from a medically determinable physical or mental impairment, direct medical evidence of the cause and effect relationship between the impairment and the degree of claimant's subjective complaints need not be produced. The adjudicator may not disregard a claimant's subjective complaints solely because the objective medical evidence does not fully support them.").

45. 799 F.2d 1403 (9th Cir. 1986).

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 should contribute to a determination of disability.

Cotton recognized what the Ninth Circuit refers to as “excess pain.”⁴⁷ This term of art aptly describes situations in which disability claimants can objectively establish the existence of a physical or mental impairment, but not one which could reasonably be expected to produce the amount of pain claimed.⁴⁸ Instead of following *Nyman*, the *Cotton* opinion confirmed the Ninth Circuit’s earlier position which considered claimants’ subjective allegations of pain despite the absence of supporting objective proof.⁴⁹ The court reasoned that pain may be so severe as to be disabling, and therefore, it would be unjust to discard claimants’ complaints when determining disability simply because the etiology of the pain is not completely substantiated by objective evidence.⁵⁰ There is no clear explanation for the sharp contrast between *Nyman* and *Cotton*.⁵¹ Both cases interpreted Section 3 in light of pain testimony and reached different conclusions.

In 1990, the Ninth Circuit decided *Bates v. Sullivan*.⁵² *Bates* rejected excess pain testimony and *Cotton*’s interpretation of Section 3.⁵³ In *Bates*, the concurrence⁵⁴ opined that Section 3 cannot be read to permit the court’s adoption and acceptance of excess pain testimony in disability insurance benefits cases:

46. *Cotton*, 799 F.2d at 1407 (quoting *Howard*, 782 F.2d at 1488). Most of the Ninth Circuit cases refer to the codified version of Section 3, 42 U.S.C. § 423(d)(5)(A). See also *Bunnell*, 1991 WL 191634, at * 5-6 (explaining the *Nyman/Cotton* inconsistency).

47. See *Cotton*, 799 F.2d at 1407.

48. *Id.*

49. See *Howard*, 782 F.2d at 1488 (describing excess pain but not yet giving it that name) This is basically the Eighth Circuit’s standard.

50. *Cotton*, 799 F.2d at 1407 (“If the claimant submits objective medical findings establishing a medical impairment that would normally produce a certain amount of pain, but testifies that she experiences pain at a higher level (hereinafter referred to as the claimant’s ‘excess pain’), the Secretary is free to disbelieve that testimony, but must make specific findings justifying that decision. ‘Excess pain’ is, by definition, pain that is unsupported by objective medical findings. If the Secretary were free to disbelieve excess-pain testimony solely on the ground that it was not supported by objective medical findings, then the Secretary would be free to reject all excess pain testimony.”).

The court’s decision in *Cotton* appears well-reasoned; however, one Ninth Circuit judge has declared the decision a marked departure from circuit precedent. See *infra* note 57. Furthermore, just one year earlier, the court had expressed an opposite view. See *Swanson v. Secretary of Health and Human Services*, 763 F.2d 1061, 1064 (9th Cir. 1985) (In determining whether claimant has suffered a ‘disability’ within the meaning of the Social Security Act, Secretary need not accept claimant’s subjective allegations of pain if they are unsupported by objective findings.).

51. In fact, *Howard*, decided between *Nyman* and *Cotton* and setting the stage for *Cotton*, was decided less than two months after *Nyman* and ten days before *Nyman* was amended.

52. 894 F.2d 1059. The majority opinion was authored by Judge David Thompson; however, it was the majority in result only. On the issue of what standard to apply to a claimant’s subjective pain testimony, the majority consisted of Judges Wright and Wallace. Their concurring opinion is actually the majority decision on this issue. See *Rice v. Sullivan*, 912 F.2d 1076, 1083, n.4 (9th Cir. 1990), *vacated and remanded*, *Bunnell*, 1991 WL 191634, at *6.

53. *Bates*, 894 F.2d at 1066-72 (concurrence).

54. See generally *supra* note 52.

Significantly, the language of the statute uses a definite article, referring to *'the pain'* alleged. It does not refer to 'some of the pain' alleged by the claimant, nor does it refer to medical impairments expected to produce 'a certain amount of pain,' nor to 'excess pain.' Thus, read in its most direct and plain sense, section . . . 423(d)(5)(A) requires evidence of a medical condition which 'could reasonably be expected to produce' the actual pain, in amount and degree, alleged by the claimant. Unless a claimant can produce 'objective medical evidence of' such a medical impairment, he or she is not disabled under the statute.⁵⁵

In support of their conclusion, the concurring judges embarked on an extensive analysis of Section 3's legislative history.⁵⁶ They claimed the "excess pain" approach adopted by the court in *Cotton* was exactly the approach rejected by Congress during the debates surrounding Section 3's passage.⁵⁷

The judges blamed the inconsistent holdings of the circuit's pain cases on a failure to follow binding authority.⁵⁸ They explicitly stated that the *Cotton* line of cases⁵⁹ created a conflict within the circuit.⁶⁰ However, rather than commanding an *en banc* rehearing, the concurrence found that the *Cotton* line of cases could remain good law.⁶¹ They determined a rehearing *en banc* was unnecessary because the cases could be distinguished on the basis of their date of decision.⁶² An outright reversal, therefore, was unnecessary.

The concurring judges cleverly distinguished the *Cotton* line of cases by noting that section 3's sunset provision⁶³ made it applicable only to cases decided on or before December 31, 1986.⁶⁴ They argued that those cases

55. *Bates*, 894 F.2d at 1066 (concurrence).

56. *Id.* at 1072 (concurrence). Much of the legislative history cited in the *Bates* concurrence is discussed *infra* in Section IV.A.

57. *Id.* at 1070-71 (concurrence) ("As the legislative history makes clear, section 423(d)(5)(A) [Section 3] was drafted in an attempt to avoid the result advocated by *Cotton* rather than command it. . . . In sum, *Cotton* is a complete departure from both the plain language of section 423(d)(5)(A) and its legislative history.").

58. *See id.* at 1069. ("[Judge Thompson's] disagreement with our reasoning, we believe, stems from his failure to follow the binding authority cited earlier. . . . The first case to depart from our circuit precedent was *Howard v. Heckler*.").

59. *See Cotton; Howard; Varney v. Secretary of Health and Human Services*, 846 F.2d 581 (9th Cir. 1988); *Stewart v. Sullivan*, 881 F.2d 740 (9th Cir. 1989); *Fair v. Bowen*, 885 F.2d 597 (9th Cir. 1989).

60. *Bates*, 894 F.2d at 1071 (concurrence) ("Under section 423(d)(5)(A), we are unable to devise a way to distinguish this case from our circuit's controlling authority—*Nyman, Taylor, and Miller*. We therefore conclude that *Cotton* and its progeny . . . create a clear circuit conflict.").

61. *Id.* ("Unless there is some way to distinguish *Cotton*, we would be obliged to request a rehearing *en banc*. But we believe there is a way.").

62. *Id.*

63. *See Reform Act, supra* note 19, § 3(a)(3).

64. *Bates*, 894 F.2d at 1071.

were in line with the requirements of the now defunct Section 3.⁶⁵ The judges, therefore, reasoned that *Bates* should be decided in light of the Secretary's regulations and rulings rather than prior case law.⁶⁶ After concluding that the regulations⁶⁷ do not permit a finding of disability based on anything other than medical evidence supporting the claim in full, they rejected *Bates*' claim and affirmed the Secretary's ruling.⁶⁸

In a recent *rehearing en banc*, however, the Ninth Circuit recently overruled *Bates* and reaffirmed *Cotton* in *Bunnell v. Sullivan*.⁶⁹ In doing so, the court held that the appropriate standard for evaluating subjective pain testimony requires claimants to produce objective medical evidence of an underlying impairment which is reasonably likely to cause their pain.⁷⁰ Once such evidence is produced, an ALJ is not permitted to then disregard their subjective complaints solely because the medical evidence fails to corroborate the full extent of the pain alleged.⁷¹ The court reaffirmed the familiar *Cotton* standard after concluding that it was, and always had been, consistent with both Congress' and the Administration's approach to pain.⁷²

65. *Bates*, 894 F.2d at 1071 (conurrence) ("Thus, we may distinguish *Cotton* and its progeny on the ground that they were based upon a statute that does not apply to the determination rendered in this case."). The sunset provision made Section 3 inapplicable to *Bates* because the Appeals Council's decision denying the claimant's benefits was rendered on May 31, 1987. *Id.* For similar arguments see *Hollis v. Bowen*, 837 F.2d 1378 (5th Cir. 1988) and *McCormick v. Secretary of Health & Human Services*, 861 F.2d 998 (6th Cir. 1988).

66. *Bates*, 894 F.2d at 1071 ("The fact that the expiration of section 423(d)(5)(A) does not change the law concerning subjective pain testimony does not, of course, suggest that *Cotton*'s standard can somehow be read into the Secretary's regulation. Rather, we must examine the language of the Secretary's regulations independent of the case law interpreting section 423(d)(5)(A).").

67. See 20 C.F.R. § 404.1529 (1989).

68. *Id.* at 1072 ("The statute and regulations determine what disability is for purposes of the statutory and regulatory schemes. Our responsibility is to follow the statute and determine whether there is substantial evidence in the record as a whole to affirm the Secretary's decision. We hold that there is."). The concurrence was agreeing with the result of the case but not with the reasoning.

69. *Bunnell*, 1991 WL 191634, at *2 ("We conclude the concurring opinion in *Bates* misconstrued the relevant law, and thus erroneously rejected the standard for evaluating pain as adopted by this circuit in *Cotton*.")

70. *Id.* at *2.

71. *Id.* The court outright rejected the earlier standard requiring objective medical evidence of an underlying impairment as well as objective medical evidence to corroborate the severity of the pain alleged.

72. *Id.* at *6. It is submitted that although the standard adopted by the court in *Bunnell* is the more reasonable standard and the one preferred by this comment, it is nevertheless inconsistent with Congress' past intentions and the Administration's current mandates. For in-depth analyses of why the *Cotton* standard is inconsistent with Section 3 and the current regulations and rulings, see *Bates*, 894 F.2d at 1064-68 and *Bunnell*, 1991 WL 191634, at *10 (conurrence) ("Hard as it may be for my colleagues to believe, Congress actually made a hard policy judgment and directed the SSA to deny disability benefits in dubious cases. It may not be the policy judgment that makes sense to us, but we are not empowered to second-guess this judgment simply because we are incredulous that Congress chose the path it did."). In an effort to remedy the inconsistency, this comment proposes to Congress and the Administration that they both adopt standards which will effectively permit the federal courts to apply the more reasonable *Cotton* standard. See *infra* text accompanying notes 223-36.

3. Malingering

The confusion of those persons charged with the responsibility for determining disability based on pain is not surprising.⁷³ Pain has been referred to as “the great unknown factor” of the disability determination process.⁷⁴ And, because there is no objective measuring stick available to measure the degree of pain felt by a particular individual, there is also no way to be objectively certain the individual indeed is suffering.⁷⁵ Medical experts have termed those persons who attempt to defraud the Administration by deliberately faking their disability, “malingerers.”⁷⁶ Malingering may be the Administration’s greatest fear in relation to its disability program because the government can not financially afford to promote, even indirectly, such a practice by granting benefits to those persons not truly disabled.⁷⁷ Medical experts, however, have concluded that malingering is not a serious threat to the disability determination process because trained health care professionals can identify malingerers early in the disability determination process with medical and psychological tests.⁷⁸

II. DISABILITY DETERMINATION PROCESS

Claimants seeking disability insurance benefits must be prepared to deal with bureaucratic red-tape.⁷⁹ The disability determination process begins at a state administrative agency and could conceivably end before the United

73. Goldhammer & Bloom, *supra* note 3. In defense of the Administration’s policy, the authors state:

Considering then, that expressions of ‘subjective pain’ may well not reflect the individual’s true state of capacity, there is much to say for an approach which largely ignores subjective expressions of pain and dysfunction and relies primarily upon that medical evidence which can be independently verified and assessed as producing a medically legitimate state of incapacity.

Id. at 19.

74. Comment, *Proving Disabling Pain in Social Security Disability Proceedings: The Social Security Administration and the Third Circuit Court of Appeals*, 22 DUQ. L. REV. 491, 498 (1984) [hereinafter *Proving Disabling Pain*].

75. Goldhammer and Bloom, *supra* note 3. “[I]t is extremely difficult to distinguish that degree of ache and pain which the individual really could tolerate, if he had to do so, from that degree of pain which is truly tolerable.”). The author points out that “[a]fter a serious injury, because human vulnerability is discovered, there is a natural tendency to magnify every twitch and ache and pain without knowing whether these sensations prevent activity. . . . [S]ome degree of pain may well evaporate when the individual is actually faced with concerted activity.” *Id.* at 18.

76. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 59.

77. See generally Goldhammer & Bloom, *supra* note 3.

78. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 59-60.

79. See Levy, *supra* note 12, at 467-68.

States Supreme Court.⁸⁰ For this reason, not only must claimants make a mental commitment toward fighting “the bureaucrats” for their benefits, but also they must make a financial sacrifice if they wish to appeal should they initially be denied benefits. The complexity and extent of the determination process, particularly the numerous levels of review, provide ample opportunity for the confusion over subjective pain testimony to manifest itself in inconsistent and contradictory decisions.

A. Administrative Process

The Social Security Act⁸¹ defines disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”⁸² The Social Security Act’s definition of a “physical or mental impairment” requires claimants to show proof of “an impairment which results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.”⁸³

The difficult and frustrating situation many claimants face becomes clear upon close examination of the Administration’s disability determination process. Further use of the hypothetical case of Joe Parker⁸⁴ illustrates this detailed procedural maze. For Mr. Parker, the administrative process began when he filed his disability claim at one of the Administration’s many district or branch offices.⁸⁵ After gathering information relevant to Mr. Parker’s claim,⁸⁶ the state branch office transferred the claim to a state Disability

80. O’Byrne, *supra* note 30, at 64. The U.S. Supreme Court, however, rarely grants certiorari in disability determination cases. See Levy, *supra* note 12, at 475 n. 78.

81. See INST. OF MED., *supra* note 1, at 38.

82. 42 U.S.C. § 423(d)(1) (1988). One article suggests that much of the controversy between the Administration and the federal judiciary results from differing interpretations of this statute; e.g., while the Administration focuses on the terms “by reason of any medically determinable physical or mental impairment”, the courts appear more concerned with the words “inability to engage in any substantial gainful activity.” See Goldhammer & Bloom, *supra* note 3, at 19. The authors note that “[f]rom the court’s perspective, a worker who can’t use his legs because he is in too much pain to walk is just as disabled as the individual who is missing both of his legs, even though the former lacks the objective evidence to justify his inability to walk.” *Id.*

83. 42 U.S.C. § 423(d)(3) (1988).

84. See *supra* Section I.B.1.

85. INST. OF MED., *supra* note 1, at 42. According to the Institute’s report, in 1987, there were about 1.5 million claimants who filed claims with one of the more than 1,300 branch offices. These offices are designed to handle initial application procedures only. Office employees assist claimants in filling out forms as well as by determining claimants’ work history and medical background, and advising them of their rights and responsibilities throughout the process. *Id.* at 42-43.

86. Relevant information includes past work experience and the names of any treating physicians. *Id.*

Determination Service agency (DDS).⁸⁷

The DDS is responsible for making the first disability determination.⁸⁸ This initial procedure is conducted by an "evaluation team"⁸⁹ within the DDS.⁹⁰ In Mr. Parker's case, the evaluation team first developed his disability file, composed of the information forwarded from the district or branch office together with any information deemed pertinent by the DDS.⁹¹ This process and the initial application procedure at the branch offices, primarily consist of the compilation of paperwork and are purposefully devoid of subjectivity⁹² because the ultimate purpose is to determine whether Mr. Parker is objectively disabled within the meaning of the law.⁹³ Next, the evaluation team considered Mr. Parker's condition to determine if he was disabled using a detailed, five-step process entitled the "sequential evaluation process."⁹⁴ This process⁹⁵ is required by law,⁹⁶ and is applicable to all initial determination decisions.⁹⁷

The first step required the evaluation team to determine Mr. Parker's present occupational status.⁹⁸ The evaluation team then considered whether

87. *Id.* at 43. See also Levy, *supra* note 12, at 468.

88. See *id.*

89. INST. OF MED., *supra* note 1, at 43. The evaluation team consists of two persons; one is an administrator, referred to as the "disability examiner," and the other is a doctor. While the disability examiner is present to ensure conformity with the legal and administrative requirements for disability, the doctor's primary duty is to make a determination as to whether the claimant is in fact medically disabled. The doctor is a licensed physician who is usually either a general practitioner and/or an internist. Note that neither a general practitioner nor an internist is trained in the intricacies of pain evaluation. *Id.*

90. *Id.*

91. It is not uncommon for the DDS to order the claimant to undergo a medical examination conducted by a physician paid for by the Administration. *Id.* See also Levy, *supra* note 12, at 468. The Administration is permitted by law to require this of a claimant. See 20 C.F.R. § 404.1517 (1989). It must be noted that although the Administration can require a consultative examination and is not bound by conclusions reached by a claimant's treating physician, federal courts accord a great deal of deference to a treating physician's testimony. See Fair, 885 F.2d at 604 (holding that a treating physician's opinion is entitled to "special weight"); Cotton, 799 F.2d at 1408 (concluding that although an ALJ is not bound by a treating physician's determinations as to the claimant's disability, the ALJ is required to "provide a reasoned rationale for disregarding a particular treating physician's findings").

92. See 1984 House Report, *supra* note 18, at 3043 ("The initial decision is made according to the submitted clinical findings, a deliberate paper decision that avoids as much as possible the personal influence of either the claimant or his physician.").

93. *Id.* at 3043-44.

94. INST. OF MED., *supra* note 1, at 43. See generally 20 C.F.R. § 404.1520 (1989).

95. Each step asks the evaluation team a question. Depending on whether the answer is yes or no, the team moves on to the next question. Failure to satisfy a particular question results in an automatic denial of benefits without consideration of any of the remaining questions or any of the claimant's subjective complaints, including pain. See REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 13.

96. See 20 C.F.R. § 404.1520 (1989).

97. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 13.

98. INST. OF MED., *supra* note 1, at 45.

Mr. Parker was “currently engaging in substantial gainful activity?”⁹⁹ Once the evaluation team was satisfied that Mr. Parker was not presently gainfully employed, the process moved on to step two.¹⁰⁰

Step two asks whether Mr. Parker’s impairment or combination of impairments¹⁰¹ was severe.¹⁰² Under the evaluation process Mr. Parker’s condition would be considered severe if his back and hip injuries had “more than a minimal effect on [his] ability to perform basic work activities,”¹⁰³ including “sitting, standing, walking, lifting, pushing, pulling, handling, seeing, hearing, communicating, and understanding and following simple instructions”¹⁰⁴ and if Mr. Parker was able to show that these impairments were reasonably capable of producing his pain.¹⁰⁵ However, because the objective findings failed to show that his injuries were reasonably capable of causing the severity of pain he alleged, the evaluation team concluded that

99. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 13. Substantial gainful activity is defined as “work that involves doing significant and productive physical or mental duties and is done for pay or profit.” INST. OF MED., *supra* note 1, at 45. The Commission On the Evaluation of Pain reports that generally, claimants claiming in excess of \$300 per month are considered “substantially” employed. See REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 13. See generally 20 C.F.R. §§ 404.1510, 404.1571-75 (1989).

100. If the evaluation team finds that the claimant is presently gainfully employed, the process halts and benefits are automatically denied.

101. See Reform Act, *supra* note 17, § 4(c) (amending § 223(d)(2) of the Social Security Act):

In determining whether an individual’s physical or mental impairment or impairments are of a sufficient medical severity that such an impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all the individual’s impairments without regard to whether any such impairment, if considered separately, would be of such a severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

102. INST. OF MED., *supra* note 1, at 45.

103. See 20 C.F.R. § 404.1521(b) (1989).

104. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 13. See generally 20 C.F.R. § 404.1520 (1989).

105. *Id.* It is submitted that this is the point at which the evaluation process places an overly harsh burden on claimants. By focusing solely on objective proof of a claimant’s pain, the Administration effectively denies benefits without considering the pain itself and its subjective effect upon a particular claimant. Others have agreed with this assessment of the process:

Under the sequential evaluation of disability, one cannot reach the question of effect on functioning; *i.e.*, can the individual sit, stand, walk, etc., until one first decides there are appropriate signs and findings, as opposed to symptoms, showing a ‘severe’ impairment.

[B]ecause of the order in which the regulations must be applied, they operate to prevent a finding of disability based primarily on subjective reasons, such as pain.

Goldhammer and Bloom, *supra* note 3, at 3-4. See *infra* text accompanying notes 227-36 for a discussion of how the Administration can remedy this problem.

his impairment was not "severe" and denied him benefits.¹⁰⁶

To gain an understanding of the entire process, consider at this point that Mr. Parker's impairment was, in fact, determined severe by the evaluation team. In such a case, the evaluation team would begin Step 3. This would require an elaborate analysis of Mr. Parker's disability file, comparing the information it contained to the Administration's "Listing of Impairments" (Listing).¹⁰⁷ The Listing provides a detailed compilation of medical conditions¹⁰⁸ that the Administration considers severe,¹⁰⁹ and which, in the absence of substantial gainful activity, allow for a presumption of disability.¹¹⁰ If any of the objective findings contained in Mr. Parker's medical file matched with a condition's listed symptoms, signs, or laboratory findings,¹¹¹ then he would be presumed disabled based on the medical evidence alone.¹¹² Mr. Parker also may be considered disabled, however, if his alleged impairment is of equal severity or duration as that of one of the listed conditions.¹¹³

At this point, if Mr. Parker's impairment is considered severe, but does not match one of the conditions in the Listing, the evaluation team would

106. Under step 2, when the objective findings fail to substantiate an underlying physical impairment reasonably capable of producing the pain alleged, a determination on the possibility for an underlying mental impairment causing the pain is required. See generally 20 C.F.R. § 404.1520(a)(1989) for evaluation of mental impairments.

107. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 14. The Listing can be found at 20 C.F.R. Appendix I to Subpart P (1989).

108. INST. OF MED., *supra* note 1, at 39. The Administration has listed over 100 medical conditions and arranged them according to 13 major body systems. *Id.*

109. REPORT OF THE COMMISSION ON THE EVALUATION OF PAIN, *supra* note 2, at 14. The level of severity required for each condition considered a severe impairment is determined by signs, symptoms, and laboratory findings. *Id.* See *infra* note 111 for a definition of these terms.

110. INST. OF MED., *supra* note 1, at 39.

111. 20 C.F.R. § 404.1528 (1989) defines *symptoms* as "your own description of your physical or mental impairment. Your statements alone are not enough to establish that there is a physical or mental impairment." *Signs* are defined as "anatomical, physiological, or psychological abnormalities which can be observed, apart from your statements (symptoms). Signs must be shown by medically acceptable clinical diagnostic techniques. Psychiatric signs are medically demonstrable phenomena which indicate specific abnormalities of behavior, affect thought, memory, orientation and contact with reality. They must also be shown by observable facts that can be medically described and evaluated." *Id.* And, *laboratory findings* are defined as "anatomical, physiological, or psychological phenomena which can be shown by the use of medically acceptable laboratory diagnostic techniques. Some of these diagnostic techniques include chemical tests, electrophysiological studies (electrocardiogram, electroencephalogram, etc.), roentgenological studies (x-rays), and psychological tests." *Id.*

112. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 14; INST. OF MED., *supra* note 1, at 45.

113. *Id.* note 1, at 45. The Listing lists a few conditions which require the team to consider pain at this point in the sequential evaluation process. In other words, to establish a severe impairment on the basis of one of these conditions, the claimant must allege pain as a disabling factor. See 20 C.F.R. Part 404, Subpart P, app. 1 § 1.05 (1989). Note that the type of pain referred to in the Listing is "acute," rather than "chronic" pain. See *infra* text accompanying note 206.

proceed to the fourth and fifth steps.¹¹⁴ These steps would require consideration of the impact of various vocational factors on Mr. Parker's ability to perform basic work activities, despite the limitations caused by the severe impairment.¹¹⁵ This remaining ability has been termed the claimant's "residual functional capacity."¹¹⁶

When determining Mr. Parker's residual functional capacity,¹¹⁷ the evaluation team would first consider his ability to perform basic exertional activities, those requiring some degree of physical strength.¹¹⁸ The evaluation team would then attempt to determine whether Mr. Parker was capable of performing his previous job, considering his residual functional capacity and the requirements of his past work environment.¹¹⁹ If the evaluation team determined that Mr. Parker was unable to return to his past occupation, then the team would proceed to step five.¹²⁰

114. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 14-15; *see also* INST. OF MED., *supra* note 1, at 45. Question 4 asks, "Does the Individual Have the Residual Functional Capacity to Perform Past Relevant Work?" and question 5 asks, "Does the Individual Have the Residual Functional Capacity to Perform Other Work?" REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 15-16.

115. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 15-16.

116. *Id.* at 16. Residual functional capacity is measured by the claimant's ability to perform the basic work activities listed in step two despite the restrictions imposed by the severe impairment.

117. Evaluation of the claimant's residual functional capacity is based on medical signs and laboratory findings but includes the claimant's own symptoms as well. If the claimant alleges dysfunctioning pain beyond that medically substantiated, the team may make "reasonable conclusions" about the effect the pain may have on the claimant's basic work activities. This would entail consideration of the claimant's own description of the pain and its severity and the limitations imposed on the claimant, the medication taken by the claimant, including the type and dosage, and the claimant's current daily activities. *See id.*

118. 20 C.F.R. § 404.1567 (1989) classifies jobs in the national economy based on the jobs' physical work requirements. The classifications range from "sedentary" to "very heavy" work. If the evaluation team had determined that Mr. Parker's impairment was severe but did not affect his ability to perform exertional activities, it would have then considered any nonexertional limitations resulting from the impairment, such as Mr. Parker's ability to apply cognitive thought in a routine work setting. *Id.* at 15. 20 C.F.R. Part 404, Subpart P, app. 2, § 200.00(e) (1989), explains that those impairments which might not cause any exertional limitations include certain mental, sensory, or skin impairments.

119. When the claimant alleges functional limitations, the evaluation team will rely on Medical-Vocational Guidelines ("grids") in making the disability determination. The grids contain objective guidelines for determining the claimant's exertional limitations by classifying various jobs found in the national economy based on the amount of physical strength required to perform such jobs. The grids also classify jobs according to the skill required for performance. In determining the claimant's nonexertional limitations, the grids provide a standard framework. *See* INST. OF MED, *supra* note 1, at 46. *See generally* 20 C.F.R. Part 404, Subpart P, app. 2 (1989).

120. The process never reaches step five if the claimant is found capable of performing his past work; however, an opposite finding does not halt the process in favor of the claimant. The evaluation team must then proceed to step five. If a claimant were appealing an adverse ruling, it is at this point that the burden of proof would shift to the Secretary. In all disability determination proceedings, the claimant bears the ultimate burden of proving his disability; however, once the claimant satisfies step four by proving his inability to perform past work, the burden then shifts to the Secretary to prove the claimant is capable of performing other work. *See* *Rivera v. Schweiker*, 717 F.2d 719, 722-23 (2d Cir. 1983); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1202 (9th Cir. 1990); *see also* Heaney, *Why the High Rate of Reversals in Social Security*

Step five would require the evaluation team to consider Mr. Parker's residual functional capacity to determine whether he was capable of performing other work.¹²¹ In addition to exertional and nonexertional capability, under step five, the evaluation team would consider Mr. Parker's age, education, and prior work experience.¹²² If the evaluation team did not consider Mr. Parker disabled by the time it reached the end of step five, then Mr. Parker would be denied benefits.¹²³ The state agency would then send Mr. Parker an "initial denial determination" letter which would inform him of his right to seek review of his claim by the agency.¹²⁴ This review procedure is entitled "reconsideration"¹²⁵ and would represent Mr. Parker's first attempt to challenge the initial state agency decision.¹²⁶

The reconsideration procedure is conducted by a new team of evaluators who repeat the five-step sequential evaluation process.¹²⁷ Mr. Parker would be permitted to introduce additional evidence and could claim that his condition had worsened since the initial determination.¹²⁸ If Mr. Parker was determined not disabled once again by the state agency,¹²⁹ he would be sent a "reconsideration denial" letter which would advise him of his right to request a hearing before an ALJ.¹³⁰

B. Appeals Process

There are several levels of review available to Mr. Parker. The first, reconsideration, is discussed above. After reconsideration, Mr. Parker, and other claimant's who have been denied disability benefits, may proceed through administrative and judicial review.

Disability Cases?, 1 SOC. SEC. REP. SER. 1133 (1983).

121. 20 C.F.R. § 404.1566 (1989) defines *other work* as any job existing in the national economy which is currently available in significant numbers in either the region where the claimant lives or in many regions of the country. For a discussion of how courts should evaluate the terms *significant numbers*, see *Barker v. Secretary of Health & Human Services*, 882 F.2d 1474, 1478 (9th Cir. 1989).

122. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 17. Age is the most predominate consideration at this point, and the Administration automatically considers those claimants "55 and over" unable to begin a new job requiring skills different than those required by the claimant's previous job. See INST. OF MED., *supra* note 1, at 46. See generally 20 C.F.R. §§ 404.1520(f), 404.1563(d) (1989).

123. The Institute of Medicine reports that of the 1.5 million claimants receiving an initial determination each year, 60% are denied benefits. See INST. OF MED., *supra* note 1, at 46-47.

124. O'Byrne, *supra* note 30, at 62.

125. Roughly half of those claimants initially denied benefits will seek reconsideration of their claims. See INST. OF MED., *supra* note 1, at 47.

126. Levy, *supra* note 12, at 470.

127. INST. OF MED., *supra* note 1, at 47.

128. *Id.*

129. Eighty-percent of the claimants seeking reconsideration will be denied benefits for the second time. Roughly 70% of those denied will request a hearing before an ALJ. *Id.*

130. See O'Byrne, *supra* note 30, at 62.

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1. *Administrative review.* A hearing before one of the Administration's many ALJs offers Mr. Parker another chance to receive benefits. Fortunately, he has many advantages on his side during the hearing. First, although the ALJ is bound to follow the law according to the Social Security Act, and the Administration's regulations and rulings,¹³¹ the ALJ conducts a *de novo* review of the case¹³² and will admit new evidence offered by the claimant, including, but not limited to, the presentation of witnesses in his favor.¹³³ Second, in making a decision,¹³⁴ the ALJ conducts its own sequential evaluation process based on the record and any new evidence submitted by the claimant.¹³⁵ Finally, the hearing is informal, and although Mr. Parker has the right to be represented by counsel at all times, the Administration is not so represented.¹³⁶ If the ALJ concludes that Mr. Parker is disabled,¹³⁷ then benefits will be awarded. If, however, the ruling is adverse, Mr. Parker may seek review before the Administration's Appeals Council.

The Appeals Council is Mr. Parker's last opportunity for administrative relief.¹³⁸ If the Appeals Council chooses to hear a case,¹³⁹ its review will ordinarily be limited to the record developed by the ALJ and the claimant's disability file.¹⁴⁰ The Appeals Council may permit Mr. Parker to submit further additional evidence; this occurs, however, only in exceptional cases.¹⁴¹ If the Appeals Council affirms the ALJ's decision, then Mr. Parker's next hope for an award of benefits lies with the federal judiciary.¹⁴²

2. *Judicial Review.* For Mr. Parker, the federal process begins in district court. The district court, however, acts as an appellate, rather than as a trial

131. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 25.

132. Levy, *supra* note 12, at 471.

133. INST. OF MED., *supra* note 1, at 47.

134. It must be kept in mind that this is probably the first time the claimant appears in person during the disability determination process. See Levy, *supra* note 12, at 471. For this reason, the ALJ is confronted not only with the objective evidence and findings, but also with his own subjective observations of the claimant credibility, therefore, becomes a key factor at this stage of the process. *But see, supra* note 92.

135. INST. OF MED., *supra* note 1, at 47.

136. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 25.

137. The Institute of Medicine reports that the ALJ overturns agency decisions and awards benefits in about half of all disability cases. See INST. OF MED., *supra* note 1, at 47.

138. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 26.

139. Review by the Appeals Council is discretionary. The Appeals Council may deny a claimant's request for review or it might possibly hear the case on its own motion. See INST. OF MED., *supra* note 1, at 47.

140. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 26.

141. *Id.* In extremely rare cases, the Appeals Council may allow the claimant to be present.

142. *Id.* This right is recognized by 42 U.S.C. § 205(g) (1988). The Social Security Act provides that appeals from administrative decisions are procedurally no different than ordinary civil appeals. See 42 U.S.C. § 405(g) (1988); see also Levy, *supra* note 12, at 475 n.78.

court during the review.¹⁴³ Thus, the district court conducts a “paper review”¹⁴⁴ of the Administration’s findings and makes its final decision based on whether the ALJ’s decision was supported by substantial evidence and was free from legal error.¹⁴⁵ If the district court affirms the ALJ’s decision, Mr. Parker may appeal to a circuit court of appeals.¹⁴⁶ Like the district court, the circuit court determines whether the ALJ’s decision was based on substantial evidence.¹⁴⁷ When confronted with a case involving pain testimony in which the claimant alleges pain beyond that which is medically documented, circuit courts look to see whether the ALJ “convincingly justifi[ed] his rejection” of the claimant’s testimony.”¹⁴⁸ A rejection based solely on the absence of objective evidence to support the degree of pain alleged is not sufficient to satisfy this standard.¹⁴⁹ However, if the ALJ makes specific findings for rejecting a claim, and those findings are

143. INST. OF MED., *supra* note 1, at 76. For additional insight into the review process, see, Comment, *Judicial Review of Social Security Disability Decisions: A Proposal for Change*, 11 Tex. Tech. L. Rev. 215, 227 (1980).

144. INST. OF MED., *supra* note 1, at 76.

145. *Id.* at 77.

146. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 26.

147. *Elam v. Railroad Retirement Bd.*, 921 F.2d 1210, 1213 (11th Cir. 1991) (“Substantial evidence is more than a mere scintilla, but less than a preponderance.”).

148. *Stewart*, 881 F.2d at 743; see also *Fair*, 885 F.2d at 602 (concluding that before an ALJ can reject a claimant’s excess pain claim, not only must he make specific findings justifying his decision, but also the findings must “convincingly justify his rejection” of the claim.). Excess pain is pain the claimant alleges beyond that which is identifiable by objective medical evidence. See *supra* note 46 for a more precise definition.

In a proceeding before an ALJ in which the claimant alleges excess pain, the ALJ’s assessment of the claimant’s credibility is extremely important because excess pain, by definition, invites falsehood. As noted by the *Fair* court:

excess pain cases often hinge entirely on whether or not the claimant’s description of what he is feeling is believed. In making this determination, the ALJ must walk a narrow path, as serious harm can flow from error in either direction. On one side, incorrect denials of benefits can leave deserving claimants, who are often in precarious financial conditions, without a crucial source of income. On the other, erroneous grants of benefits reward liars at public expense, waste resources that could be put to any number of more productive uses, and may ultimately reduce the level of funding available for people who are legitimately disabled. The public interest is ill-served by either type of mistake.

Fair, 885 F.2d at 602. Although credibility determinations are indeed important, many courts will not permit an ALJ to find a claimant not credible simply because medical evidence does not fully support the degree of pain alleged. See *supra* note 38. This, however, is not to say that circuit courts act as triers of fact; to the contrary, “[c]redibility determinations are within the province of the ALJ.” *Fair*, 885 F.2d. at 604. As the *Fair* court explains, it is not sufficient for an ALJ to find a claimant not credible merely because of a lack of objective medical evidence; however, this fact, when coupled with contradicting testimony to the effect that the claimant has been functioning quite well in his everyday life and has made no attempt to alleviate his pain through treatment or medication, will justify the ALJ’s decision denying benefits. *Id.* at 603-04.

149. *Id.* at 602. (“And, as we have repeatedly stated, the ALJ may not discredit pain testimony merely because a claimant’s reported degree of pain is unsupported by objective medical findings.”).

supported by substantial evidence in the record, the circuit court will affirm the denial of benefits.¹⁵⁰ As noted above, it is at this point that Mr. Parker may appeal to the U.S. Supreme Court.¹⁵¹

III. THE ADMINISTRATION'S PAIN POLICY

The Administration's specific policy on pain is outlined in various regulations and "in-house" rulings,¹⁵² which are binding on all Administration employees, including ALJs.¹⁵³ These rulings are designed to assist employees in administering programs and in implementing policy. While federal courts are not required to follow the Administration's rulings, the regulations are accorded judicial notice.¹⁵⁴ This, however, does not require judicial recognition of the agency's interpretation of the regulations.¹⁵⁵

A. Regulations and Rulings

During the 1980s, the Administration revised some of its regulations and made changes to some of its internal policies to better clarify its pain policy.¹⁵⁶ Its efforts were intended to end the conflict over subjective pain testimony between the Administration and the federal judiciary.¹⁵⁷ These clarifications solidified the Administration's commitment to a disability policy based primarily on objective medical evidence.¹⁵⁸ Thus, the Administr-

150. *Id.* at 604.

151. *See supra* note 80. Claimants should be aware that the Supreme Court affords great deference to an administrative agency's construction of a statute which the particular agency is empowered to enforce. *See United States v. Hammers*, 221 U.S. 220 (1911). Note that this rule would hold true for an ALJ's interpretation of Congress' pain statute.

152. *See* 20 C.F.R. § 404.1508 (1989); 20 C.F.R. § 404.1528 (1989); 20 C.F.R. § 404.1529 (1989); Social Security Ruling 82-58 (1982) [hereinafter SSR 82-58] (superseded by Social Security Ruling 88-131); Program Operations Manual System (POMS) DI T00401.570. POMS provide detailed administrative instructions for the Administration's employees to follow in making disability determinations; however, ALJs are not bound by them. *See Goldhammer & Bloom, supra* note 3. For a well-written discussion on SSR 82-58 and POMS DI T00401.570, *see Avery v. Secretary of Health & Human Services*, 797 F.2d 19 (1st Cir. 1986).

153. 20 C.F.R. § 422.408 (1989).

154. 44 U.S.C. § 1507 (1988).

155. *See Rosofsky v. Schweiker*, 523 F. Supp. 1180, 1188 (E.D.N.Y. 1981).

156. INST. OF MED., *supra* note 1, at 51. Part of the reason for the changes was likely due to the significant number of disability cases in which pain was a major factor.

157. *See Pryor, Compensation and the Eradicable Problems of Pain*, 50 GEO. WASH. L. REV. 239, 261-62 (1991). The conflict of course, surrounded the appropriate standard to apply when a claimant alleged severe pain. Although the regulations appeared clear to the Administration, federal courts continued to consider medically unsubstantiated pain testimony in disability determination proceedings. *Id.* at 261.

158. *See* 20 C.F.R. § 404.1508 (1989) ("Your impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only

ation's policy does not permit a finding of disability based solely on the claimant's subjective allegations of pain.¹⁵⁹ Instead, the regulations and internal policies limit consideration of subjective pain testimony to situations in which claimants can show a medical condition reasonably capable of producing their pain:

If you have a physical or mental impairment, you may have symptoms (like pain, shortness of breath, weakness or nervousness). We consider all your symptoms, including pain, and the extent to which signs and laboratory findings confirm these symptoms. The effects of all symptoms, including severe and prolonged pain, must be evaluated on the basis of a medically determinable impairment which can be shown to be the cause of the symptom. We will never find that you are disabled based on your symptoms, including pain, unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce those symptoms.¹⁶⁰

In 1982, the Administration adopted an "in-house" ruling, Social Security Ruling 82-58 (SSR 82-58), on the evaluation of pain and other symptoms.¹⁶¹ Similar to 20 C.F.R. section 404.1529, SSR 82-58¹⁶² instructed Administration employees to credit only medically substantiated pain allegations.¹⁶³ SSR 82-58 states in part:

Symptoms such as pain, shortness of breath, weakness, or nervousness are the individual's own perceptions of the effects of a physical or mental impairment(s). Because of their subjective characteristics and the absence of any reliable techniques for measurement, symptoms (especially pain) are difficult to prove, disprove, or quantify. . . . [This policy statement] emphasizes the need for a sound medical basis to support the overall evaluation of impairment severity and underscores the importance of detailed

by your statement of symptoms."); 20 C.F.R. § 404.1528 (1989) defines symptoms as "[y]our own description of your physical or mental impairment." The regulation goes on to state that "[y]our statements alone are not enough to establish that there is a physical or mental impairment."

159. 20 C.F.R. § 404.1528 (1989).

160. 20 C.F.R. § 404.1529 (1989).

161. See SSR 82-58, *supra* note 152. Note the similarities between SSR 82-58 and 20 C.F.R. § 404.1529 (1989).

162. Although SSR 82-58 was superseded in 1988 by SSR 88-13, it is still relevant because it provides background into the Administration's pain standard and was in effect at the time Congress passed the Reform Act. For a discussion of SSR 88-13, see *infra* Section V.B.2. It should be noted that Social Security Rulings are issued by the Secretary and represent binding authority upon all components of the Administration, including ALJs. See 20 C.F.R. § 422.408 (1989).

163. See Pryor, *supra* note 157, at 262.

findings. . . . Symptoms will not have a significant effect on a disability determination or decision unless medical signs or findings show that a medical condition is present that could reasonably be expected to produce the symptoms which are alleged or reported. However, once such a medical condition (e.g., disc disease) is objectively established, the symptoms are still not controlling for purposes of evaluating disability. Clinical and laboratory data and a well-documented medical history must establish findings which may reasonably account for the symptom in a particular impairment. . . . There must be an objective basis to support the overall evaluation of impairment severity. It is not sufficient to merely establish a diagnosis or a source for the symptom.¹⁶⁴

SSR 82-58 was an important component of the Administration's overall pain policy because it recognized the Administration's firm commitment to requiring objective evidence: the evaluation team was required to reject a claim for benefits if the alleged medical impairment was not reasonably likely to produce the amount of pain alleged, despite complaints of severe and debilitating pain.¹⁶⁵

Although the policy appeared clear enough, many federal courts continued to find claimants' pain allegations credible, even in the absence of medical evidence to support the claim in full.¹⁶⁶ Instead of following the Administration's policy, these courts created their own guidelines for handling subjective pain complaints.¹⁶⁷ Thus, rather than resolving the earlier conflict between the Administration and the federal judiciary as the Administration had hoped, the revised regulations and new rulings only exacerbated the problem.

164. SSR 82-58 (1982).

165. Levy, *supra* note 12, at 493; *see also* Social Security Ruling 82-58 ("When a medically determinable severe impairment cannot be established on either a physical or a mental basis, the claim must be denied, regardless of the intensity of the symptom, related limitations alleged, or any judgments by examining medical sources about the effects of the symptom.").

166. *Myers*, 611 F.2d, at 983 (finding that the ALJ should have considered the claimant's subjective pain allegations even though the claimant alleged greater intensity of the pain than was objectively supported); *Wiggins*, 679 F.2d at 1390 (concluding that both the Fifth and Eleventh Circuit precedent rejects the requirement that pain must be medically substantiated); *Rivera*, 717 F.2d at 724 (maintaining that pain by itself may be so severe as to warrant a finding of disability where a medically ascertained impairment is found, despite the fact that the pain is not substantiated by objective medical findings). *See also*, Poskus, *Analyzing and Proving Subjective Pain For Social Security Disability Purposes*, 17 COLO. LAW. 475 (1988) ("The federal courts have disagreed with this [SSR 82-58] analysis, and reversals of [Social Security Administration] decisions based on the agency improperly requiring objective evidence of pain have been commonplace.").

167. Budeit-Blondin, *Pain-Can It Be a Permanent Disability?*, 57 CONN. B.J. 341, 342 (1983) ("For the most part, it has been left up to the courts to lay down the guidelines necessary for the consideration of pain within a disability claim and as a separate disability itself.").

B. Nonacquiescence

Although it is a broad concept affecting the disability process on a large scale, the Administration's policy of nonacquiescence is a major force contributing to the problem of subjective pain evaluation.¹⁶⁸ Nonacquiescence refers to "the administration's refusal to follow rules determined by the Federal Courts to govern the disability determination process."¹⁶⁹ This policy allows the Administration to ignore federal court decisions interpreting a particular statute when the courts' and the Administration's interpretations conflict.¹⁷⁰ This disregard for certain federal court decisions fosters discord among the reviewing bodies and creates problems for all those involved in disability determination proceedings where subjective pain is at issue because it eliminates any hope for a uniform standard for evaluating pain.

IV. SECTION 3 OF THE REFORM ACT

Motivated by concern over the federal courts' apparent ignorance of the Administration's policy on pain,¹⁷¹ and the general conflict over the issue

168. *Proving Disabling Pain, supra* note 74, at 517 (noting that the Administration's policy of nonacquiescence "has especially affected claimants who have alleged a disabling degree of subjectively-felt pain").

169. Fried, *supra* note 3.

170. Note, *Administrative Nonacquiescence in Judicial Decisions*, 53 GEO. WASH. L. REV. 147 (1984-85). The Administration, however, is bound by the decision as it relates to the particular parties in the suit that created the conflicting ruling. The policy applies only to subsequent proceedings.

The Administration justifies nonacquiescence by claiming that its policy promotes uniformity in the disability determination process. See Levy, *supra* note 12, at 504. However, as long as both the Administration and the federal courts are players within the process and as long as the Administration insists on practicing this policy, uniformity will be virtually impossible because although the Administration's program is nationally administered, circuit court decisions are binding only within the particular circuit generating a ruling. For example, a claimant who is denied benefits from the Administration will appeal to a federal court, and, if subjective pain is in issue, the claimant will likely be awarded benefits. In this case, the Administration cannot disregard the court's ruling. Another claimant, however, with similar facts and in the same circuit will then initiate proceedings for benefits. This claimant will be denied benefits because of the Administration's policy of nonacquiescence. Only if the claimant is both mentally and financially stable enough to pursue an appeal will he be awarded benefits. See Note, *supra* note 170, at 152-58 (for a discussion on the possibility for equal protection challenges under such circumstances).

171. The Pain Commission reported that,

[d]uring the Congressional deliberations on Public Law (P.L.) 98-460 [specifically Section 3] several Members noted the influence the federal courts were exercising in defining various pain standards in the disability program. The decisions regarding pain varied considerably from Circuit to Circuit, and primarily addressed how a claimant's allegation of pain was to be assessed and evaluated in deciding whether a claimant was under a disability. Some members were concerned that the court opinions had gone beyond what the Congress had intended by giving too much weight to allegations, thereby redefining the concept of disability. These Members believed that the court pain standards were improper and beyond the

California Western Law Review, Vol. 28 [1991], No. 1, Art. 12 of pain evaluation in disability determination proceedings,¹⁷² Congress enacted Section 3. It was passed as an interim standard effective through December 31, 1986.¹⁷³ A sunset provision was included in the statute because Congress intended to either amend or extend Section 3 before the sunset date, depending on the results of a report from a commission established to help Congress deal with the issue.¹⁷⁴

As noted earlier, Section 3 represented the first statutory standard for the evaluation of pain. It was designed to end the confusion over pain testimony in disability benefits cases by codifying the Administration's existing policy on pain.¹⁷⁵ Section 3 states in part:

An individual's statements as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability.¹⁷⁶

In essence, the language mirrored the Administration's policy,¹⁷⁷ thus reaffirming the requirement of objective medical evidence to substantiate pain

intent of Congress. Other Members were concerned that SSA (Administration) had been too restrictive in its interpretation of how to evaluate pain, thereby wrongfully denying benefits.

REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at xi. See also 1984 House Report, *supra* note 18, at 3050. ("Almost every circuit court of appeals has ruled at some point over the last ten years that eligibility should be based on subjective evidence of pain, at least in cases where it [sic] corroborated by testimony of other witnesses.").

172. See Pryor, *supra* note 157, at 263.

173. 1984 House Report, *supra* note 18, at 3086-87. See *supra* text accompanying notes 63-68.

174. *Id.* at 3040-46.

175. See *supra* text accompanying notes 22-25.

176. Reform Act, *supra* note 17.

177. See *supra* text accompanying notes 160 and 164.

allegations in full.¹⁷⁸

Not surprisingly, many federal courts have interpreted Section 3's language to require medical evidence of a pain-producing impairment only, rather than medical evidence supporting the full extent of the pain alleged.¹⁷⁹ These courts justify their actions by arguing that Congress intended for subjective pain testimony to play an important role in the disability determination process.¹⁸⁰

A. Legislative History

Section 3's legislative history, however, seems to reveal a contrary intent.¹⁸¹ The debate surrounding passage of Section 3, nevertheless, provides insight into many of the courts' decisions. The arguments primarily center on whether Congress should have adopted the Administration's current standard for evaluating disability claimants' pain or a completely new standard. Ultimately, the Administration's standard prevailed.¹⁸²

Senators Carl Levin (D-MI) and William S. Cohen (R-ME) proposed the Levin-Cohen amendment, legislation which would have included a statutory definition of pain and required medical proof of the existence of pain but not objective evidence of a medical condition causing the pain.¹⁸³ The late

178. See *Hand v. Heckler*, 761 F.2d 1545, 1548 (11th Cir. 1985) ("Congress' purpose in implementing this standard was to codify the regulations and policies currently followed by the Administration in order to promote national uniformity in the application of the social security disability laws and insure that disability decisions are based on verifiable evidence.").

179. See *id.* See also *Polaski v. Heckler*, 751 F.2d 943 (8th Cir. 1984), *amend. denied*, 804 F.2d 456 (1986), *cert. denied*, 482 U.S. 927 (1987); *Cotton*, 799 F.2d 1403; *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987); *Avery*, 797 F.2d at 21; *Hyatt v. Heckler*, 711 F. Supp. 837, 840 (W.D. N.C. 1989), *aff'd in part, amended in part on other grds., vacated in part on other grds.*, 899 F.2d 329 (4th Cir. 1990); *Jenkins v. Sullivan*, 906 F.2d 107, 108 (4th Cir. 1990).

180. See *Cotton*, 799 F.2d at 1407 (quoting *Howard*, 782 F.2d at 1488 n.4 ("Congress clearly meant that so long as the pain is associated with a clinically demonstrable impairment, credible pain testimony should contribute to a determination of disability.")); *Luna*, 834 F.2d at 163; *Bunnell*, 1991 WL 191634, at *4.

181. See *Hand*, 761 F.2d at 1548 n.3 ("The legislative history of Section 3 notes with concern that, despite the federal regulations, ALJs and federal courts have continued to give heavy weight to subjective evidence of pain even without objective evidence of the type required by regulation.").

182. Reports from both the House and Senate suggest Congress did not intend to create a new standard for determining disability based on pain. Instead, Congress was satisfied that codification of existing policy would eliminate the confusion and disparity. "While it may be the case that pain, in and of itself, regardless of its cause, can result in inability to work, there is apparently still no way to verify the existence of such pain through objective medical testing. The committee is therefore reluctant at this time to allow determinations of disability to be based on such subjective criteria. . . . It is not appropriate for the Federal courts to establish policy on such an issue simply because the statute is insufficiently specific." 1984 House Report, *supra* note 17, at 3051. See generally S. 476, 98th Cong., 2d Sess. (1984); H.R. 3755, 98th Cong., 2d Sess. (1984).

183. 129 CONG. REC. 2205 (1983) (statement of Sen. Cohen); 130 CONG. REC. 13219 (1984) (statement of Sen. Cohen).

Senator John Heinz (R-PA) also endorsed this proposal.¹⁸⁴ Heinz explained his opposition to requiring objective evidence of pain and his opposition to the Committee on Finance's bill as it pertained to Section 3:

In this bill, we limit the Secretary to only considering pain that has a medically identifiable source of underlying impairment. Objective medical evidence of pain in which an underlying cause cannot be found is deemed irrelevant for the purposes of establishing disability. Subjective evidence of pain is also excluded. It seems to me that this standard does not conform to the state of the art in medical and scientific knowledge, and sets an overly narrow and unrealistic standard. Pain is an extraordinarily complicated medical phenomenon, and it is frequently the case that pain that can be objectively identified cannot be linked to an underlying impairment. To deny the existence of this phenomenon in this program seems to be a serious mistake, one we will have to correct in the future.¹⁸⁵

On the other hand, Senator Russell B. Long (D-LA) strongly favored enacting the Administration's existing policy on pain evaluation.¹⁸⁶ Senator Long felt his proposal reflected Congress' intent to restrict the granting of benefits to only those who established disability by objective medical evidence.¹⁸⁷ Additionally, he believed it would ensure uniformity among the adjudicating bodies and lead to more efficient administration and review.¹⁸⁸ Although Senator Long and Senators Levin and Cohen had differing perspectives on the role pain should play in disability determination proceedings, Senator Long joined the others by expressing his distaste with the fragmented standard currently being applied:

Courts do, of course, have the responsibility to carry out the law and to resolve questions of interpretation. In so doing, however, they should be guided by the statute and its legislative history, not by abstract theories found in law review articles. . . . But circuit courts are not regional legislatures. . . . If the regional courts are going to persist in ignoring the policy objectives expressed by Congress and persist in refusing to grant appropriate deference to the duly promulgated regulations of the Secretary, the Congress

184. 130 CONG. REC. 13222 (1984) (statement of Sen. Heinz).

185. *Id.*

186. 130 CONG. REC. 13214-17 (1984) (statement of Sen. Long).

187. *Id.* at 13215.

188. *Id.*

may be forced to find ways of dealing with this situation.¹⁸⁹

Senator Long's basic argument was that the taxpayers were not likely to stand for a law which greatly expanded the existing program. Instead, he argued that both taxpayers and claimants would best be served by a statute which gave existing policy legislative credibility with the courts. He was certain this could be accomplished by codifying the Administration's policy on pain.¹⁹⁰ In the end, the Committee on Finance adopted Section 3 as it was proposed by Senator Long. Senators Levin and Cohen, like Senator Heinz, felt that the Administration's policy placed too heavy a burden on claimants and would assuredly need correcting in the future.¹⁹¹

The only House member to speak on Section 3 was House Representative J.J. Pickle (D-TX):

With reference to pain, the conference agreement puts present regulatory policy into statute until January 1, 1987, and mandates that in the meantime, a study be conducted so that we might better deal with this very difficult issue. I know that many Members in both bodies are concerned about the fairness of our present policies and I would expect that as we continue to benefit from the progress of medical science, we will improve our laws in this regard.¹⁹²

The legislative history of Section 3 clearly indicates Congress' intent to support and affirm the Administration's policy on pain. The primary concern of both Houses was not to modify or change, but rather to add clarity and consistency where they were greatly needed.¹⁹³

189. *Id.* at 13216. Senator Long's comments were aimed at a district court judge who discarded the Secretary's rulings and regulations in favor of what the judge referred to as, "Eighth Circuit Law," and held that a claimant's subjective pain complaints need not be fully substantiated by objective medical proof. *See Polaski v. Heckler*, 585 F. Supp. 1004, 1008-09 (D. Minn.), *aff'd* 739 F.2d 1320 (8th Cir.), *remanded on other grounds*, 751 F.2d 943 (8th Cir. 1984), *vacated*, 476 U.S. 1167 (1986). On appeal, the Eighth Circuit held that disability determinations dealing with pain were to be based on Section 3, SSR 82-58, and 20 C.F.R. § 404.529. *Polaski*, 751 F.2d at 950.

190. 130 CONG. REC. at 13215, 13216, 13238, 13239 (1984).

191. *Id.* at 13219, 13237-38. *See also id.* at 13226. (The committee amendment reads in part: ". . . eligibility for benefits may not be based solely on subjective allegations of pain (or other symptoms). There must be evidence of an underlying medical condition and (1) there must be objective medical evidence to conform the severity of the alleged pain arising from that condition or (2) the objectively determined medical condition must be of a severity which can reasonably be expected to give rise to the alleged pain."). *See generally* S. 476, 98th Cong., 2d Sess. (1984).

192. 130 CONG. REC. at 26142 (1984) (statement of Rep. Pickle).

193. Depending on whether the Secretary, an ALJ, or a federal court heard a claimant's case, the claimant might or might not have been awarded benefits based on disability. This fragmented application of existing policy caused congressional concern. *See* 1984 House Report, *supra* note 18, at 3051.

B. Objectives

Realizing the complex nature of pain evaluation, Congress included in Section 3 a requirement that the Secretary appoint a National Commission on the Evaluation of Pain (Commission).¹⁹⁴ Both Houses agreed on the need for the Commission and its assistance in clarifying the proper standard for pain evaluation.¹⁹⁵ The Commission, working closely with the Institute of Medicine of the National Academy of Sciences (Institute), was to conduct a study on pain,¹⁹⁶ assess its impact on disability determination proceedings, and report to Congress on its findings before December 31, 1986.¹⁹⁷

The Commission was appointed on April 1, 1985¹⁹⁸ and consisted of 20 members, all of whom were chosen on the basis of their knowledge of pain and related issues.¹⁹⁹ Although the Commission forwarded its findings to the Secretary before the sunset date, it did not accomplish the objectives within the time-frame Congress had allotted.²⁰⁰ The Commission's overall opinion was that Section 3's language should not be changed or modified at that time because the extremely complex nature of the issue called for more extensive evaluation.²⁰¹ The Commission's report ultimately sent a message to the Secretary and Congress calling for a resolution of this "legal-medical issue,"²⁰² however, it did little to inspire new legislation. The essence of the message sent was that difficult issues and sparse data precluded the

194. See Reform Act, *supra* note 17, at 1799.

195. See generally S. 476, 98th Cong., 2d Sess. (1984); H.R. 3755, 98th Cong., 2d Sess. (1984); see also 130 CONG. REC. at 13235 (1984) (statement of Sen. Moynihan).

This legislation contains an important proposal requiring the Secretary of Health and Human Services to appoint a commission of experts to conduct a study concerning the evaluation of pain in determining eligibility for disability benefits. Quite often, an individual may suffer from excruciating, debilitating pain that is impossible to measure objectively. As yet, the SSA has no guidelines for the evaluation of subjective evidence of pain, in determining disability. It is my hope that, upon review of the commission's report, we can decide whether such guidelines are feasible.

196. This was mandated by the Reform Act. See Reform Act, *supra* note 17, at § 3(b).

197. *Id.*

198. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at xi.

199. The expertise of the Commission's members included medicine, law, insurance, and disability program administration. See *id.* at xii.

200. Congress had expected the Commission to perform the following tasks prior to December 31, 1986: "(1) complete its mandated study of the issues; (2) evaluate the appropriateness of the standard [Section 3]; and (3) recommend extension, modification, or termination of the statutory language." Report, *supra* note 2, at 27. The first task could not be completed because of the complex nature of the issues coupled with the time constraint. The Commission, however, felt the issues were important enough to require further consideration. *Id.*

201. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at xii, 74. See *infra* text accompanying note 204.

202. Ruppert, *Developments in Social Security Law*, 22 IND. L. REV. 401, 405 (1988).

Commission from recommending additional legislation at that time.²⁰³ The Commission's overall recommendation reads:

The current statutory standard for the evaluation of pain should be extended without modification for the duration of the experiment(s) being recommended by this Commission and for one year thereafter. Any modification in the statutory language should only be made after additional data are acquired as a result of the study being conducted by the Institute of Medicine of the National Academy of Sciences and through the experimental process.²⁰⁴

In its report, the Commission recognized two broad categories of pain: acute and chronic. The Commission noted that chronic pain is often more difficult to recognize because of the frequent absence of an objectively identifiable underlying medical condition.²⁰⁵ As the report makes clear, the Commission was deeply concerned over pain for which there was no objectively identifiable source.²⁰⁶ In fact, the Commission considered recommending to the Administration that it include a special category on pain impairment within the Listing;²⁰⁷ however, Commission members failed to reach a consensus on this issue.²⁰⁸ While a minority of the members dissented by drafting a proposed category for the Listing,²⁰⁹ the majority

203. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at xv.

204. *Id.* at xxiv. Specifically, the Commission recommended to the Administration that it reassess its policies and procedures and make the necessary changes to insure that pain receives adequate consideration in the disability determination process. *See id.* at xiv-v. This recommendation, however, was merely superficial and neglected to suggest the fundamental changes necessary to insure that subjective pain testimony would not be disregarded solely on the basis that the complaints were not medically substantiated in full.

205. *See id.* at 54-55. Usually, acute pain is the effect of a recent injury or illness and ordinarily subsides as the medical condition improves, typically within one month. Chronic pain, on the other hand, often has no identifiable medical source which could be expected to produce the pain alleged. It is longer in duration than acute pain, often lasting as long as six months or more.

The Commission devoted a substantial portion of its report to discussing what it refers to as chronic pain syndrome (CPS). Individuals suffering from CPS experience a great deal of pain all of the time; pain is a factor of daily living. They develop negative behaviors to deal with their pain such as drug use, and often seek extensive, and sometimes drastic, medical solutions. However, nothing works because there is no evidence of an underlying condition causing the pain. So, the pain continues, and the sufferers find no relief in either drugs, medical procedures, or through disability insurance benefits. *Id.* The Commission emphasizes the fact that CPS sufferers do not simply imagine their pain, although they may experience psychological setbacks as a result. (CPS, as opposed to ordinary chronic pain, has severe sociological and psychological characteristics.) CPS is real; however, at this time it is almost impossible to fully medically substantiate. *Id.* at 56-57.

206. *See id.* at xv. Ordinary chronic pain, like CPS, is extremely difficult to medically substantiate.

207. *See supra* text accompanying notes 107-10. Currently, the Listing only recognizes some forms of acute pain. *See* REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 54.

208. *See id.*

209. REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 125-27. Of the twenty-one Commission members, four dissented. *Id.*

concluded that such a proposal was premature given the lack of data, and instead, called for an experiment or set of experiments to determine the sociological and economical feasibility of a special category for pain impairment.²¹⁰ The minority, on the other hand, insisted the experiment was overly cautious and urged immediate substantive action.²¹¹ The majority view prevailed, and the experiment became part of the Commission's broad recommendation to Congress.²¹²

As noted above, the Commission's overall recommendation called for an additional study by the Institute. This study began where the Commission's report ended, utilizing much of the data collected by the Commission through experimentation.²¹³ In line with the Commission's report, the Institute's study primarily concerned chronic pain, and whether it could be adequately assessed for disability purposes.²¹⁴ The study concluded that it could be assessed properly by evaluating how a claimant's pain affects his or her ability to function.²¹⁵ The Institute recommended a change in the current sequential evaluation process which called for this type of a functional assessment before a pain claimant's claim for benefits could be rejected.²¹⁶

V. RECOMMENDATIONS

It has been over four years since the sun set on Section 3. Congress had intended to amend the legislation before it expired;²¹⁷ its failure to do so has wreaked havoc on the entire disability determination process. The Ninth Circuit conflict previously discussed is a prime example of how federal courts, in the absence of legislative guidance, have employed various

210. See *id.* at xv-vi. The "reactivation/vocational rehabilitation experiment" consisted of two phases: Phase I called for a basic paper study of disability rolls to identify whether, demographically, there was a need for a special category on pain impairment; Phase II, relying on the criteria established by Phase I, was to predict whether the identified group would benefit from a special category. See *id.* at 104-116 for an outline of the proposed experiment.

211. *Id.* at 121.

212. See *id.* at 104-16.

213. See INST. OF MED., *supra* note 1, at 263.

214. See *id.* at 2.

215. *Id.* at 268.

216. *Id.* ("[T]he kinds of acceptable evaluation and corroboration should not be limited to medical evidence of an underlying disease process. With or without such findings, consideration should also be given to serious functional limitations and serious problems on measures of integrated behavior."). The Institute ultimately made six recommendations; for purposes of this Comment, the third is most significant. See *infra* text accompanying notes 224-37 for a discussion of the practical application of such a functional assessment procedure.

217. See 1984 House Report, *supra* note 18, at 3046 ("With respect to the area that is not so clarified, i.e., the use of subjective evidence of pain in disability determinations, the intent of Congress is clear: upon receipt of information adequate to form a reasonable basis for legislating, Congress will enact a specific policy concerning pain; until that time, no change in policy by the Social Security Administration is mandated by this bill.").

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 measures for handling subjective pain testimony.²¹⁸ The Administration has responded to the lack of legislative direction by passing an "in-house" ruling to supersede former SSR 82-58.²¹⁹ Although the Administration's measure may be helpful to individual Administration employees, it does little to promote uniformity, one of Congress' primary concerns in passing the Reform Act.²²⁰

In the final analysis, it appears the core of the problem is centered on the issue of whether a claimant should be required to substantiate, by objective medical evidence, the full extent of his or her alleged disability. Indeed, the elusive relationship between a medically documented impairment and the degree of pain alleged has sparked great concern.²²¹ It is submitted that much of the problem with subjective pain allegations in disability determination proceedings could be eliminated by a concerted effort on the part of both Congress and the Administration to define the role of pain in disability determination proceedings explicitly setting forth the weight to be afforded to subjective pain testimony. Congress, in accordance with action taken by the Administration, should amend the Social Security Act to include consideration of the effect a claimant's pain may have on his or her ability to function in both the home and work environment.²²² Similarly, the Administration should add a special category on pain impairment to the current sequential evaluation process which would allow the evaluation team to make a functional assessment when confronted with an excess pain claim. The following discussion will explain the practical application of such a proposition, as well as offer support for the argument.

218. See generally *Bunnell*, 912 F.2d 1149 (9th Cir. 1990) (relying on the Secretary's regulations); *vacated*, *Bunnell*, 1991 WL 191634; *Luna*, 834 F.2d 161 (relying on prior judicial interpretations of Section 3); *Hollis*, 837 F.2d 1378 (relying on circuit precedent).

219. Social Security Ruling 88-13 (1988) [hereinafter SSR 88-13]. This ruling basically reiterates the policy statement contained in SSR 82-58; however, SSR 88-13 clarifies the Administration's apparent willingness to consider pain at each stage of the sequential evaluation process once an impairment is medically documented. In other words, a claimant's subjective pain testimony will be considered in determining the severity of the impairment but not the existence of the impairment.

220. 130 CONG. REC. 13206 (1984).

221. See *Luna*, 834 F.2d at 163-64 ("The issue is clearly one of degree."). INST. OF MED., *supra* note 1, at 8 ("There is an imperfect correspondence between severity of pain and dysfunction. People can have severe pain with minimal functional limitations or minimal pain with severe limitations.").

222. The current regulations require medical evidence of a severe physical or mental impairment. If none exists, the claimant is automatically denied benefits. The evaluation team does not conduct further study into a claimant's functional capacity. See *supra* note 105 and accompanying text.

A. *The Proposal*²²³

This proposal provides for a pain-oriented assessment early in the sequential evaluation process. This early assessment will preclude the evaluation team from rejecting pain claimants' claim for benefits before considering the impact of the pain on the claimants' ability to function.

1. *Congressional Action.* As noted, Section 3's language is inappropriate because it requires claimants to provide medical proof of a condition which could reasonably produce the full extent of their alleged pain.²²⁴ In many instances, this is simply not possible.²²⁵ Therefore, Congress should eliminate this requirement in favor of permitting "excess pain" claimants to prove disability by establishing dysfunction based on their pain. Such legislation could modify Section 3 and should prompt the Administration to take concurrent measures. Based on the dissenting Commission members' proposal and the Institute's recommendations, the statute should read:

An individual's statements as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged. *When medical evidence is present which could reasonably be expected to produce the pain or other symptoms alleged, the individual will be considered disabled. If, however, medical documentation fails to support the full extent of the alleged pain, an individual may establish a medical impairment either by showing objective evidence of physical damage such as tissue damage or bone deterioration or by alleging pain disproportionate in intensity, location, or duration to the physical damage, and by manifesting through behavior a preoccupation with pain, an overutilization of the healthcare system, excessive reliance on pain medication, audible signs and body language consistent with the degree of pain alleged, and/or other objectively observable behaviors such as sleeping or eating disorders and sexual dysfunction. Once the individual establishes a medical impairment through one of the procedures outlined above, a functional*

223. This proposal is largely based on the dissenting Commission members' proposal and the Institute's third recommendation. See REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 125-27; INST. OF MED., *supra* note 1, at 268-70.

224. See *supra* text accompanying note 105.

225. See *supra* text accompanying note 4. See also *infra* note 231 and accompanying text.

*assessment will be conducted for the purpose of determining whether such pain is in fact disabling. This assessment involves the consideration of all evidence relevant to such a determination including, but not limited to, statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms, and statements of the individual's family, friends, or coworkers indicating dysfunction due to pain in one or more of the following areas: activities of daily living; social functioning; ability to complete tasks; functional capacity to perform basic work activities. The assessment broadly includes a consideration of the individual's inability to feed or dress him or herself, to sit or pay attention for extended periods of time, and/or a persistent inability to effectively interact and communicate with others on a personal level.*²²⁶

This language effectively eliminates the unfairness which currently exists in Congress' approach to pain.

2. *Administrative Action.* To complement this proposed legislative action, changes must also be made in the Administration's handling of subjective pain testimony. As noted, the current sequential evaluation process²²⁷ establishes a procedure for determining disability based on a "question and answer-type" process.²²⁸ Under this process, a claimant who alleges debilitating pain with no documented, objective support for the pain is denied disability benefits because he has not satisfied step two, the existence of a severe physical or mental impairment.²²⁹ As previously submitted, the process requires the claimant to produce objective medical evidence of the full extent of his pain,²³⁰ a virtually impossible requirement.²³¹ Thus, the Administration's as well as the Congress' need to require the existence of a relationship between an impairment and the full degree of pain alleged imposes an unrealistic and unjust burden on many pain claimants.²³² The following proposal suggests an alternative to the Administration's current

226. The nonitalicized portions of the proposed statute are taken directly from the language of Section 3. The italicized portions, on the other hand, are drawn almost exclusively from the dissenting Commission members' proposal. See REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 125-27.

227. See *supra* note 94.

228. See *supra* note 95.

229. In this type of situation, the evaluation ends at step two. See *supra* notes 105-06 and accompanying text. See also *supra* text accompanying note 105.

230. See 20 C.F.R. § 404.1529 (1989) requiring medical evidence of a "medical condition that could reasonably be expected to produce [the claimant's] symptoms."

231. INST. OF MED., *supra* note 1, at 3 ("There is no, direct objective way to measure pain.").

232. *Id.* at 2 ("Much research and clinical experience with pain have demonstrated that there is no clear relation between the amount of tissue damage and the degree of discomfort or functional disability.").

policy on pain and proposes an additional listing to the current sequential evaluation process.

Under this proposal, a claimant is required to first objectively establish the existence of a physical or mental impairment which could reasonably be expected to produce "some" amount of pain.²³³ A claimant could satisfy this requirement by showing either physical evidence specifically related to the alleged pain such as tissue damage or bone deterioration. Alternatively, the claimant could allege pain which is disproportionate to or uncharacteristic of the physical evidence shown. After satisfying either requirement, the claimant must then show behavioral manifestations ordinarily thought to be associated with severe or prolonged pain: a preoccupation with his pain apparent through repeated complaints; a desire and willingness to undergo painful procedures as a way of alleviating the pain; overutilization of the healthcare system in search of a cure; overreliance on or excessive use of pain medication; audible signs or body language consistent with his complaints such as moaning, limping, bracing himself, grimacing, etc.; and/or other pain-related behaviors which are objectively identifiable such as sleep or eating disorders or sexual dysfunction.

Once the claimant establishes that he suffers from a pain-producing impairment, a functional assessment of the claimant's pain is triggered.²³⁴ This assessment requires the evaluation team to specifically assess the claimant's ability to respond to stimuli present in four categories essential to work productivity: 1) activities of daily living, 2) social functioning, 3) ability to complete tasks, and 4) functional capacity to perform basic work activities.²³⁵ The burden is on claimants to provide the evaluation team with information relevant to this assessment. Such information can come in the form of statements by family, friends, co-workers, employers, and by the claimants themselves.

1) Activities of Daily Living. The first category requires consideration of the claimant's ability to effectively deal with life's everyday demands. These demands include ordinary activities such as maintaining personal hygiene,

233. This proposal in no way suggests that benefits should be awarded on the basis of subjective complaints alone. The objection arises from the requirement that claimants produce medical evidence supporting the full extent of their pain before assessing basic functional ability.

234. This step is the equivalent of step four of the current sequential evaluation process. Procedurally, steps four and five would remain unchanged; the claimant would still carry the burden of proving his inability to perform his past work, and the Secretary would still be required to show that there was other work available to the claimant. Basically, the only change made by the proposal is that the evaluation team could no longer reject a claim on the basis of a lack of medical evidence before considering the claimants' functional limitations. This is currently what happens at step two when a claimant alleges severe pain with no medically identifiable source. See *supra* note 105 and accompanying text.

235. In conducting this assessment it is important for the evaluation team to obtain any and all evidence available from the claimant's family, friends, coworkers, etc. . . . which tends to corroborate the claimant's subjective pain complaints and/or his or her inability to cope in one of the four categories. Along these same lines, the ALJ should permit the same type of testimony during the claimant's hearing.

dress and feeding oneself, as well as other demanding but necessary activities such as paying bills, taking public transportation, visiting the post office, or using the telephone.²³⁶

2) *Social Functioning*. The listing's second category requires the evaluation team to assess the claimant's communication and interaction skills in order to determine the claimant's ability to function in a social setting. Assessment of these skills focuses on the claimant's ability to get along with not only his family and friends, but also his landlord, his physician, the grocery store clerk, and the bus driver. For example, persistent social isolation or a history of fighting may demonstrate impaired social functioning due to pain. On the other hand, a desire and willingness to interact with others through participation in group activities likely indicates healthy social skills.

3) *Ability to Complete Tasks*. The third category focuses on the claimant's ability to undertake and complete self-initiated or assigned tasks in a timely manner. Here, the evaluation team is concerned with such work-related skills as concentration, persistence, and pace. These skills may be properly measured by assessing the length of time it takes the claimant to complete a work-related task or perform a routine household chore.

4) *Functional Capacity to Perform Basic Work Activities*. The fourth and final category requires consideration of basic work activities. It is important for the evaluation team to consider such exertional activities as sitting, standing, walking, lifting, pulling, pushing, and carrying as well as those nonexertional requirements demanded by the work-place such as the ability to concentrate, follow directions, report in a timely manner, and get along with both superiors and coworkers.

B. Support

Not only is this proposal supported by the Commission's dissenting members' proposal and the Institute's study, but also it finds support in case law, and surprisingly enough, in the Administration's own regulations and rulings. Although supportive, the current caselaw and administrative regulations and rulings do not go far enough to remedy the existing problem.

236. The activities listed in this category, as well as in the other three, are not meant to be put through a balancing test for the purpose of determining the exact number of activities which are restricted; rather, they are to be separated individually to determine the degree of restriction present within each activity. For example, a claimant may be perfectly capable of feeding and caring for him or herself, however, his or her inability to sit or stand or to pay attention for prolonged periods may indicate disabling pain. This is what the dissenters refer to in their proposal as "marked" restriction. See REPORT ON THE EVALUATION OF PAIN, *supra* note 2, at 125-27.

1. *Caselaw.* As noted, the Ninth Circuit's recent decision in *Bunnell* reaffirmed the earlier pain standard enunciated in *Cotton*.²³⁷ This standard, which precludes an ALJ from discrediting subjective pain testimony solely because such testimony is not fully supported by objective medical evidence, is characteristic of many circuit court decisions in this area.²³⁸

For example, the Tenth Circuit, in *Luna v. Bowen*,²³⁹ drew attention to the issue of subjective pain testimony by addressing the relationship between the medical impairment and the degree of pain alleged.²⁴⁰ The court explained that by allowing the ALJ to rely primarily on objective medical evidence to determine whether the claimant's impairment is "reasonably" likely to cause his or her pain, courts place too heavy a burden on claimants to establish a sufficiently tight nexus between the impairment and the severity of the pain alleged.²⁴¹ Relying on *Cotton*, the court concluded that after demonstrating the existence of a medical impairment through objective evidence, the claimant is only required to establish a loose relationship between the impairment and his or her pain.²⁴²

Although facially helpful to claimants,²⁴³ the pain standards articulated in *Bunnell*, *Luna*, and other decisions²⁴⁴ are, by themselves, insufficient to

237. See *supra* note 69.

238. See *Polaski*, 751 F.2d 943; *Luna*, 834 F.2d 161; *Elam*, 921 F.2d 1210.

239. 834 F.2d 161 (10th Cir. 1987).

240. *Luna*, 834 F.2d at 163. Under both Section 3 and the Administration's regulations, the impairment must be one which could "reasonably" be expected to cause the claimant's pain. See *supra* note 22; 20 C.F.R. § 404.1529 (1989).

241. *Luna*, 834 F.2d at 164.

242. *Id.* The court explained that,

[u]nder this standard, a claimant certainly must demonstrate more than a *potentially* pain-causing impairment before the decision maker must weigh all other evidence. . . . The more difficult issue is how tight a relation the statute requires between the impairment and the allegation. Sufficient evidence of congressional intent exists to convince us that the statute requires only a loose nexus between the proven impairment and the pain alleged. Accordingly, if an impairment is reasonably expected to produce *some* pain, allegations of *disabling* pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id.

243. The decisions themselves are merely facially helpful because the remedy afforded by these courts is available only after the claimant labors through the entire administrative process first. See *supra* note 32.

244. In *Polaski*, the court articulated the following standard:

While the claimant has the burden of proving that the disability results from a medically determinable physical or mental impairment, direct medical evidence of the cause and effect relationship between the impairment and the degree of the claimant's subjective complaints need not be produced. The adjudication may not disregard a claimant's subjective complaints solely because the objective medical evidence does not fully support them.

Polaski, 751 F.2d at 948. Other courts have expressed similar standards. See *Jenkins*, 906 F.2d at 108 ("A claimant [is required] to show objective medical evidence of some condition that could reasonably be expected to produce the pain alleged, not objective evidence of the pain

correct the unfairness which currently exists within the disability determination process and are inconsistent with congressional intent.²⁴⁵ These opinions do, however, illustrate both the strong desire and willingness of the federal courts to recognize subjective pain testimony and their recent commitment to doing so. It is now up to Congress and the Administration to provide the courts with the means to effectuate this end.

2. *Administrative Regulations and Rulings.* Additionally, the proposal is supported by the Administration's current approach to the evaluation of mental impairments.²⁴⁶ When evaluating a mental impairment as a basis for disability, the Administration's regulations require the evaluation team to conduct a functional assessment of the alleged impairment.²⁴⁷ SSR 88-13 also lends support to the proposal.²⁴⁸

In determining whether an impairment(s) is severe, full consideration is to be given to all material evidence, including signs, symptoms (such as pain), and laboratory findings. Objective findings may confirm that the individual has a severe impairment. If they do not, the degree of pain must be considered. . . . [W]here the degree of pain alleged is significantly greater than that which can be reasonably anticipated based on the objective physical findings, the adjudicator must carefully explore any additional limitation(s) imposed by the pain on the individual's functional ability beyond those limitations indicated by the

itself."); *Hyatt*, 711 F. Supp. at 846 ("The absence of objective medical evidence of the pain itself, its intensity or degree, is not grounds for concluding that the pain is either inconsistent with or not reasonably related to the underlying impairment."). In *Hyatt*, the court went so far as to rescind the Administration's rulings and implement its own ruling for use in North Carolina: ". . . the Secretary must abandon, and does hereby abandon for North Carolina, the pain evaluation policy previously applied by his decision-makers." *Hyatt*, 711 F. Supp. at 845. The policy mandated by the court stated, in part:

Once an underlying physical or mental impairment that could reasonably be expected to cause pain is shown by medically acceptable objective evidence, such as clinical or laboratory diagnostic techniques, the adjudicator must evaluate the disabling effects of a claimant's pain, even though its intensity or severity is shown only by subjective evidence.

Id.

245. See *supra* notes 57 and 72 and accompanying text. See also *Hyatt*, 711 F. Supp. at 843 (maintaining that Section 3 "does not provide any directions concerning the evaluation of subjective evidence of the degree or intensity of pain, should objective medical evidence of the degree or intensity of the pain not be available.") However, of course, both the Ninth and Eleventh Circuits claim their pain standard is fully consistent with both congressional and administrative intent. See *Bunnell*, 1991 WL 191634, at *6; *Elam*, 921 F.2d at 1214-15.

246. See 20 C.F.R. § 404.1520(a) (1989).

247. See 20 C.F.R. § 404.1520(b)(3) (1989).

248. The SSR is not completely supportive because it still contains the initial requirement of objective medical evidence of an impairment which could possibly produce the degree of pain alleged.

objective medical evidence before any conclusions about severity can be reached.²⁴⁹

SSR 88-13 provides further that:

There are situations in which an individual's alleged or reported symptoms, such as pain, suggest the possibility of a greater restriction of the individual's ability to function than can be demonstrated by objective medical evidence alone. In such cases, reasonable conclusions as to any limitations on the individual's ability to do basic work activities can be derived from the consideration of other information in conjunction with medical evidence. This is consistent with court decisions which require that statements of the claimant or his/her physician as to the intensity and persistence of pain or other symptoms which may reasonably be accepted as consistent with the medical signs and laboratory findings are to be included in the evidence to be considered in making a disability determination.²⁵⁰

This concern over functional limitation is precisely the idea the proposal is premised upon; therefore, it appears that the Administration at least recognizes that functional assessment is an important component of any disability determination proceeding. The Administration's actions to date, however, do nothing to remedy the problem. The regulations, as well as the SSRs, should provide for functional assessment early in the sequential evaluation process, as early as the claimant's first complaint of severe or prolonged pain.²⁵¹

CONCLUSION

It seems ironic that two of Congress' greatest concerns in enacting the Reform Act, uniformity and fairness,²⁵² continue to haunt all those involved in the disability determination process. Congress' attempt to placate those concerned over subjective pain testimony by including Section 3 in the statute accomplished little. It is no surprise, therefore, that federal courts, unskilled in the complexities surrounding claimants' subjective complaints of pain, loosely interpreted Section 3 by requiring only a relaxed nexus between an underlying medical condition and the degree of pain alleged. This type of pain policy is in line with the purpose for which the Social Security Act was enacted and should be adopted by Congress in place of the Administra-

249. SSR 88-13.

250. *Id.*

251. See INST. OF MED., *supra* note 1, at 9 ("The committee's recommendation is that a primary complaint of pain allow an early assessment of the claimant's functional capacity for work.").

252. See 1984 House Report, *supra* note 18, at 3039.

tion's present policy.²⁵³

There is no way of knowing the exact number of claimants who have been wrongly denied benefits because of the overly harsh pain policy currently in place.²⁵⁴ However, continuing to require claimants to provide medically documented proof of the degree of their pain will most assuredly result in many more legitimately disabled claimants being denied the benefits they deserve.²⁵⁵ Congress should pass legislation which adopts *Cotton* and *Luna* and which is modeled after the Commission's dissenting members' proposal and the Institute's recommendation. New legislation and administrative regulations should (1) eliminate the need for a "reasonable" nexus between the medically substantiated impairment and the degree of pain alleged and (2) include a functional pain-assessment category in the Listing. This will go a long way toward remedying many of the existing problems in the Social Security disability determination process. Without such change, however, problems like those in the Ninth Circuit will continue to plague the overall process. In the long run, claimants will suffer most.

*Margaret C. Rodgers**

253. *Keef v. Weinberger*, 404 F. Supp. 1193, 1195-6 (D. Kan. 1975) ("The purpose of the Social Security Act is to ameliorate some of the rigors of life for those who are disabled or impoverished. To accomplish this goal, the Act must be construed liberally."). See also *Goldhammer & Bloom*, *supra* note 3 ("The Social Security Administration's rules and regulations then operate to exclude classes of disability applicants, out-of-keeping with the purpose of the Social Security Act."); *Fair*, 885 F.2d at 603 ("The Social Security Act does not require that claimants be utterly incapacitated to be eligible for benefits.").

254. *Id.* (finding the Administration responsible for exercising "callous disregard" for those persons functionally incapacitated because of pain).

255. *Bunnell*, 912 F.2d at 1158 (dissent).

* This comment is dedicated with love to the memory of my grandmother, Kay Van Riper. Her enthusiasm for the law will continue to inspire me always. Special thanks to Victor Cosentino for his hard work and sound guidance during the editing process.

