

Developments in Social Security Law

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I. INTRODUCTION

During the survey period, the Seventh Circuit Court of Appeals decided three cases involving the standard for the evaluation of subjective claims of pain as a factor in the determination of social security disability cases. Whether these cases, *Meredith v. Bowen*,¹ *Veal v. Bowen*,² and *Walker v. Bowen*,³ help to clarify this complex legal and social issue is questionable, for they stop short of the thorough analysis of the standard contained in *Luna v. Bowen*,⁴ decided during the survey period by the Tenth Circuit. All four decisions demonstrate that the most notable development concerning this frequently litigated subject is the failure of the Social Security Disability Benefits Reform Act of 1984 (DRA)⁵ to resolve the recurring conflict between the Social Security Administration ("Administration") of the Department of Health and Human Services and the various circuit courts of appeals concerning evaluation of claims of disabling pain.

The confusion in this area of the law poses significant problems for as many as one-half of all applicants for social security disability benefits,⁶ their attorneys, the Administration's decisionmakers who adjudicate applications for disability benefits, and the federal courts which review the final decisions of the Secretary. This Article will review the legislation, regulations and case law pertaining to the issue, as well as selected findings contained in the *Report of the Commission on the Evaluation of Pain*,⁷ prior to analyzing the *Meredith*, *Veal*, *Walker*, and *Luna* decisions. Suggestions derived from the analysis of the foregoing will be made by the author to assist the practitioner in his or her proof of disabling pain in the representation of social security disability claimants.

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1. 833 F.2d 650 (7th Cir. 1987).

2. 833 F.2d 693 (7th Cir. 1987).

3. 834 F.2d 635 (7th Cir. 1987).

4. 834 F.2d 161 (10th Cir. 1987).

5. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 3, 98 Stat. 1794, 1799 (current version at 42 U.S.C. § 423 (Supp. IV 1986)).

6. R. GILBERT & J.D. TEETERS, SOCIAL SECURITY DISABILITY CLAIMS § 2:8A (1988).

7. COMMISSION ON THE EVALUATION OF PAIN, U.S. DEP'T OF HEALTH & HUMAN SERVICES, REPORT OF THE COMMISSION ON THE EVALUATION OF PAIN 121 (1986) [hereinafter REPORT OF THE COMMISSION ON THE EVALUATION OF PAIN].

II. STATUTORY AND REGULATORY FRAMEWORK

For many years, the Social Security Act⁸ and the regulations promulgated pursuant to the Act failed to provide any guidance regarding a claim that a disability applicant was functionally disabled due to pain. "Disability" was defined simply 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"⁹ Since the Act requires a claimant to prove that his physical or mental impairment "results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques,"¹⁰ claimants alleging disabling pain were often denied benefits because of a lack of objective medical evidence substantiating their subjective symptoms.¹¹

By 1980, some federal courts had clearly established that "subjective *pain* may serve as the basis for establishing disability, even if such pain

8. Social Security Act, ch. 531, tit. I, § 1, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. § 401 (1982 & Supp. IV 1986)).

9. 42 U.S.C. § 423(d)(1)(A) (1982). As summarized by the court in *Veal v. Bowen*, the Social Security Administration's regulations required a fact-finder to consider a claim for disability benefits in the following sequence:

1. Is the claimant presently unemployed?
2. Is the claimant's impairment "severe"?
3. Does the impairment meet or exceed one of a list of specific impairments?
4. Is the claimant unable to perform his or her former occupation?
5. Is the claimant unable to perform any other work within the economy?

An affirmative answer leads either to the next step or, on steps 3 and 5, to a finding that the claimant is disabled. A negative answer at any point, other than step 3, stops the inquiry and leads to a determination that the claimant is not disabled.

Veal v. Bowen, 833 F.2d 693, 695 n.1 (7th Cir. 1987) (citations omitted). Because no specific listed impairment exists as yet for claims of severe pain, the evaluation of whether pain associated with a particular impairment is severe enough to result in disability necessarily occurs at step 4 and/or 5.

10. 42 U.S.C. § 423(d)(3) (1982). The relevant regulation within the subpart on disability determination, states that symptoms, signs, and laboratory findings all constitute medical findings. Symptoms are descriptions of the claimant's subjective physical or mental impairments such as pain, dizziness, shortness of breath and inability to concentrate. Signs are anatomical, physiological or psychological abnormalities observable by medical personnel using medically acceptable clinical diagnostic techniques. Laboratory findings include anatomical, physiological or psychological phenomena evidenced through the use of medically acceptable laboratory diagnostic techniques such as chemical tests, electrocardiograms, x-rays and psychological tests. 20 C.F.R. § 404.1528(c) (1988).

11. See Poskus, *Analyzing and Proving Subjective Pain for Social Security Disability Purposes*, 17 COLO. LAW. 475, 478 n.5 (1988).

is unaccompanied by positive clinical findings or other 'objective' medical evidence."¹² These cases typically involved either medical evidence of a persistent painful condition of an unknown etiology or a known medical condition which could reasonably be expected to produce some pain but not to the degree alleged by the claimant and his physician.¹³

As the case authority on the issue grew, the Administration promulgated a regulation in 1980 for the evaluation of subjective complaints, including pain.¹⁴ Although the regulation required medical evidence of a condition which could reasonably be expected to produce the symptoms, it also required evaluation of the alleged disabling effect in light of the extent the symptom was confirmed by signs (abnormalities observable by physicians using standard diagnostic techniques) and laboratory findings (such as chemical tests, X-ray studies, etc.). In response to public concern that it was requiring objective measurement of pain, the Administration acknowledged for the first time that proof of a medical condition that can be expected to cause pain is all that is required.¹⁵

Unfortunately, the regulation failed to elucidate the extent to which signs and laboratory findings were necessary to substantiate allegations of disabling symptoms. By 1982 it became clear, however, that the Administration's emphasis in pain evaluation was not on the credibility of the claimant's testimony or his doctor's opinion about the functional limitations resulting from pain; rather, the regulation, as interpreted by Social Security Ruling 82-58,¹⁶ placed the greatest weight on the re-

12. *Marcus v. Califano*, 615 F.2d 23, 27 (2d Cir. 1979) (emphasis in original) (citations and footnotes omitted); see also *Celebrezze v. Warren*, 339 F.2d 833, 838 (10th Cir. 1964).

13. *Aubeuf v. Schweiker*, 649 F.2d 107, 113 (2d Cir. 1981) (error to require claimant to produce objective medical evidence of condition inevitably causing disabling pain); *Bartell v. Cohen*, 445 F.2d 80, 83 (7th Cir. 1971) (absence of hospitalization for degenerative arthritis not substantial evidence of ability to work); *Celebrezze v. Warren*, 339 F.2d at 838 (inability to determine etiology of well-documented severe pain does not constitute substantial evidence necessary to support denial of benefits).

14. 20 C.F.R. § 404.1529 (1988). "How we evaluate symptoms, including pain," provides as follows:

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.

Id.

15. 45 Fed. Reg. 55,576-77 (1980).

16. Unempl. Ins. Rep. (CCH) Soc. Sec., § 14,358 (October, 1982).

quirement of a medical basis to substantiate the claimed level of severity. Consequently, federal appellate review of the Administration's denial of benefits in cases involving pain continued as before with claimants contending that the Administration improperly required objective proof substantiating the severity of the pain alleged.¹⁷ As before, claimants in other cases contended that their testimony or the opinions of their treating physicians with respect to the severity of their pain was rejected without substantial evidence to support the rejection.¹⁸ The common thread throughout these cases is the determination that the level of pain claimed was not credible when viewed in light of the clinical signs and laboratory findings, *i.e.*, the "objective" medical evidence was insufficient, sometimes even if the severity was supported by opinion. The Act and regulations simply did not answer questions such as whether a paucity of medical signs and laboratory findings could be bolstered by strong, favorable medical opinion or credible testimony or whether the inability of the claimant to articulate the limitations caused by his symptoms would undermine the credibility of favorable medical opinions or strong medical evidence. Answers to these questions were not supplied by the DRA.

III. THE "PAIN" STATUTE AND COMMISSION

In response to both the continuing appellate challenges contending that the Administration was denying benefits by improperly requiring objective evidence of the severity of pain and the fear of some congressmen that the court decisions were giving too much weight to subjective complaints,¹⁹ the Ninety-eighth Congress enacted Section 3 of the Social Security Disability Benefits Reform Act of 1984. The Act amended 42 U.S.C. section 423(d)(5)(A) by codifying the standard for the evaluation of claims of disabling pain already found in the Administration's regulations and rulings.²⁰ The true promise of the legislation, however,

17. *Avery v. Secretary of Health & Human Serv.*, 797 F.2d 19 (1st Cir. 1986); *Turner v. Heckler*, 754 F.2d 326 (10th Cir. 1985); *Nieto v. Heckler*, 750 F.2d 59 (10th Cir. 1984); *Hillhouse v. Harris*, 715 F.2d 428 (8th Cir. 1983).

18. *Look v. Heckler*, 775 F.2d 192 (7th Cir. 1985); *Broadbent v. Harris*, 698 F.2d 407 (10th Cir. 1983).

19. REPORT OF THE COMMISSION ON THE EVALUATION OF PAIN, *supra* note 7, at xi.

20. 42 U.S.C. § 423(d)(5)(A) (Supp. IV 1986), as amended, states as follows: An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require. An individual's statement 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

came in its requirement that the Secretary of Health and Human Services appoint a commission to study and evaluate pain, in consultation with the National Academy of Sciences, for the purpose of formulating recommendations on how subjective pain should be considered in the adjudication of disability benefits. Thus, the codified standard was given an expiration date of December 31, 1986, in anticipation of revisions based upon the Commission's recommendations.

On April 1, 1985, the Commission on the Evaluation of Pain ("Commission") was appointed. The Commission sent its report to the Secretary of Health and Human Services on June 29, 1986.

Unfortunately, the Commission's central conclusion was that further study was necessary. Accordingly, it proposed retention of the standard contained in 42 U.S.C. section 423(d)(5)(A) and requested a special study by the National Academy of Sciences.²¹

Despite the Commission's failure to formulate recommendations for revision of the Act or regulations, its findings validated the complexity of this legal-medical issue. The Commission noted that pain can be categorized as acute and chronic and stated further that "[t]he distinctions between the two are important for proper assessment of disability."²² Acute pain is pain which is of a recent onset and will be of limited duration. The Commission found that pain of this nature "is dealt with relatively well under current law."²³ Chronic pain, on the other hand, is either constant, or intermittent over a long period of time, and persists after healing. The category of chronic pain also includes chronic pain syndrome. One of the initial findings of the Commission was that chronic pain and chronic pain syndrome, as opposed to acute pain, are inadequately understood by patients, professionals, and the Administration.²⁴

The complex experience of chronic pain involves physical and mental processes which are necessarily affected by personal response and ad-

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 the 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.

21. REPORT OF THE COMMISSION ON THE EVALUATION OF PAIN, *supra* note 7, at xix, xx.

22. *Id.* at xvii.

23. *Id.*

24. *Id.*

aptation. Thus, the degree of identifiable body damage and an individual's ability to deal effectively with pain are the chief predictors of the individual's potential for functioning and possible return to work. Chronic pain syndrome, as differentiated from chronic pain, additionally involves recognizable psychological and socio-economic components. Because of these characteristic psychological and sociological behavior patterns, trained clinicians can distinguish chronic pain syndrome from malingering and serious emotional disorders.²⁵ The importance of this finding is that it gives validity to the common sense notion that no two individuals will experience pain in the same way.

The second general finding of the Commission is that malingering is not a significant problem. Furthermore, it can be diagnosed by trained professionals, both medical and otherwise. The importance of this finding, as noted by the Commission, is that the Administration can give increased attention to subjective evidence of disabling pain without a significant concern that by doing so unworthy applicants will be awarded benefits.²⁶

Among the more dubious findings of the Commission was that the statutory standard for the consideration of pain "promoted a uniformity of adjudication at all levels within the Social Security Administration and in the courts which did not previously exist."²⁷ Thus, it recommended retention of the standard past the "sunset" date in order that further evaluation of the standard could be made.²⁸

As can be seen in the following discussion of the Tenth Circuit's decision in *Luna v. Bowen* and the Seventh Circuit's decisions in *Meredith v. Bowen*, *Veal v. Bowen*, and *Walker v. Bowen*, it appears that the Commission was overly optimistic in finding that uniformity now exists between the circuit courts of appeals since the codification of the Administration's standard for evaluation of pain.

IV. *LUNA V. BOWEN*: THE TENTH CIRCUIT'S THREE-STEP ANALYSIS

At the time of the enactment of DRA, *Luna v. Bowen*, a class action, was pending in the District Court of Colorado.²⁹ The plaintiffs, all claimants for disability benefits under the Act, alleged that their claims had been improperly adjudicated due to vague policies of the Secretary regarding the evaluation of pain which were inconsistent with the DRA.³⁰ The district court, finding that the Secretary wrongly required

25. *Id.*

26. *Id.* at xviii.

27. *Id.* at xix.

28. *Id.*

29. 641 F. Supp. 1109 (D. Colo. 1986).

30. *Id.* at 1113.

primarily objective medical evidence to substantiate allegations of the severity of pain, granted summary judgment to the plaintiffs, and the Secretary appealed.

On appeal to the Tenth Circuit, the court reversed the district court's decision because of its flawed analysis of "objective" medical evidence. The district court made two findings based upon this analysis.³¹ First, it held that "the Secretary's regulations [were] facially invalid because they require a claimant to show objective medical evidence of a pain-producing impairment."³² However, the Tenth Circuit determined that this finding was based on the erroneous premise that "objective evidence is limited to concrete physiological data,"³³ and, further, that purely psychological impairments were incapable of being proven by objective medical evidence. On appeal, the court relied on language in a case previously decided by the Tenth Circuit³⁴ to conclude that "objective medical evidence can be both physiological, psychological, or both."³⁵ Accordingly, this portion of the district court's holding was reversed outright.³⁶ The second part of the district court's decision presented a greater problem for the court of appeals. The district court's second holding was that the Secretary, after finding the pain-producing impairment, improperly relied primarily on objective medical evidence to determine the disabling effect of pain, *i.e.*, to determine the severity of pain.³⁷ Although the Tenth Circuit was unable to determine the extent to which the district court's holding was affected by its flawed analysis of what constitutes objective medical evidence, it considered the issue in order to provide a proper framework for the case on remand.³⁸

Finding that neither the Act, as amended, the regulations, or other agency rulings and instructions clearly described how much weight a decisionmaker must give to subjective allegations of pain, the court noted:

We have recognized the statute requires that a pain-producing impairment, whether psychological or physiological in origin, must be proven by objective medical evidence before an agency decision maker can find a claimant disabled by pain. . . . The issue in this case, however, is what the decision maker must do after finding that a pain-producing impairment exists.³⁹

31. *Luna v. Bowen*, 834 F.2d 161, 163 (10th Cir. 1987).

32. *Id.* at 162.

33. *Id.*

34. *Teter v. Heckler*, 775 F.2d 1104 (10th Cir. 1985).

35. *Luna*, 834 F.2d at 162.

36. *Id.*

37. *Id.*

38. *Id.* at 163-66.

39. *Id.* at 163 (citations omitted).

To answer this issue, the court adopted the Secretary's description of the three-step analysis to be employed by the decisionmaker after finding the existence of a pain-producing impairment. First, the claimant must demonstrate by objective medical evidence that a pain-producing impairment exists before the decisionmaker may consider the relationship between the impairment and the pain alleged.⁴⁰ Thus, the second step requires that the decisionmaker take "the [claimant's] subjective allegations of pain as true in determining whether they are *reasonably* related to the proven impairment."⁴¹

It is at this second stage that the problem arises and presents itself for resolution by the court: what nexus between the established impairment and alleged pain is required? The court noted that both parties failed to address what "standard of reasonableness . . . the Secretary must use to determine whether the impairment is one that could 'reasonably' be expected to produce the alleged disabling pain."⁴² Finding that sufficient evidence of congressional intent existed to convince the court that the statute required only a loose connection between the proven impairment and the alleged pain, it held that, "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."⁴³ In other words, proof of an impairment that could be expected to cause pain in the lower extremities would not reasonably be expected to produce disabling pain in the upper body. However, an impairment likely to produce *some* pain in a particular area of the body may be reasonably expected to produce disabling pain in a particular claimant because, according to the court, Congress recognized that two patients with the same impairment may be affected with radically different pain.⁴⁴ Thus, once the nexus is established,

40. *Id.* "The term 'objective' in this context refers . . . to any evidence that an examining doctor can discover and substantiate." *Id.* at 162.

41. *Id.* at 163 (emphasis added). The Secretary also stated that the role of the decisionmaker was not to evaluate the claimant's credibility. *Id.*

42. *Id.*

43. *Id.* at 164 (emphasis in original).

44. *Id.* at 164-65. In this regard, the court noted that:

In amending section 423 and codifying an objective evidence requirement, Congress certainly intended to help alleviate the tremendous administrative burden borne by the social security system in determining who is in fact disabled by pain. Because one cannot conclusively prove the severity of an individual's pain through medical test results, however, Congress stopped short of requiring medical evidence of severity. Rather, the decision maker must consider all the evidence presented that could reasonably produce the pain alleged once a claimant demonstrates a pain-causing impairment. Clearly, Congress believed that this scheme would reduce the administrative burden without permitting the Secretary to deny

“the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant’s subjective allegations of pain, but a lack of objective corroboration of the pain’s severity cannot justify disregarding those allegations.”⁴⁵

The court defended its analysis by reasoning that, if objective medical evidence was required to establish the severity of pain, subjective testimony would serve no purpose at all. Such a construction would be contrary to the statute’s mandate requiring consideration of all evidence of pain, including statements of the individual or his physician about the intensity and persistence of pain.⁴⁶

Once the first two steps are established, namely objective evidence of an abnormality that could reasonably be expected to cause some of the pain complained of, then the decisionmaker is required to consider all evidence of pain to determine its disabling effect. It is at this third step that subjective statements of the claimant, or other witnesses, and opinions of his physician regarding the intensity, persistence and disabling effects of the pain are to be considered.⁴⁷

The court anticipated criticism that its approach would force decisionmakers to decide cases based solely upon their evaluation of the credibility of subjective statements of the claimant or the opinions of his physicians. The court noted that, although it is impossible to know how pain affects any particular individual, a variety of indicators exist that provide insight into how much pain a person is experiencing and assist in determining whether descriptions of the claimant’s pain were consistent with known pain-related behaviors. The court cited, for example, that persistent attempts to find relief for pain, which would be reflected in medical records; willingness to try any prescribed treatment, also reflected in the medical records; regular use of crutches or a cane, which is observable; regular contact with a doctor, which, again, is verifiable by medical records; limitation of daily activities; and, frequent use of pain medications, are all behaviors that the decisionmaker can consider, among many others, in evaluating a claimant’s allegations of disabling pain.⁴⁸

benefits automatically to those with objectively proven impairments that usually (but not invariably) cause only non-disabling pain.

Id. at 165.

45. *Id.* (emphasis omitted) (quoting *Polaski v. Heckler*, 751 F.2d 943, 948 (8th Cir. 1984)).

46. *Luna*, 834 F.2d at 165.

47. *Id.*

48. *Id.* at 165-66.

V. THE SEVENTH CIRCUIT'S APPROACH TO PAIN EVALUATION

The Tenth Circuit's decision in *Luna v. Bowen* contrasts markedly with the Seventh Circuit's approach to pain evaluation as demonstrated by its decisions in *Meredith v. Bowen*, *Veal v. Bowen*, and *Walker v. Bowen*. Whereas *Luna* required only a "loose nexus" between the pain-causing impairment and the alleged pain before requiring the decision-maker to proceed to consider subjective evidence and opinion regarding pain, the Seventh Circuit's opinions can be read to permit the Secretary to emphasize corroboration of the alleged severity of pain by objective medical evidence.

A. *Meredith v. Bowen*

Meredith v. Bowen,⁴⁹ decided December 9, 1987, involved the Secretary's appeal of a decision from the Southern District of Indiana reversing the decision of an administrative law judge ("ALJ") and awarding disability benefits to the claimant.

The evidence revealed that Sue Meredith's legs and pelvis were fractured, and her spine was injured in an automobile accident in 1967. She was hospitalized at the time of the injury for seven weeks and again about one year later when she required a spinal fusion. Two years after the accident, Meredith applied for and was awarded a "closed" period of disability from the date of her accident until February, 1970. She did not pursue an appeal of the determination not to award her continuing benefits.⁵⁰

From 1970 until 1973, Meredith was treated by several physicians for neck and shoulder pain in addition to other maladies. From examinations of Meredith during this period, physicians noted that she had a reduced range of motion in her neck. One physician believed that X-rays of the spinal fusion showed "evidence of a compression fracture of the fused vertebrae and possible motion between the fused vertebrae."⁵¹ A neurosurgeon noted Meredith's complaints of pain and dizziness and found that she had severe congenital or post-traumatic changes in the cervical spine which he believed accounted for her symptoms. Meredith was hospitalized one time during this period and was diagnosed as having minimal osteoarthritis in her spine. Meredith made a second disability benefits application in November, 1973. This application was denied in January, 1974 because she had failed to prove that she was disabled on or before December 31, 1972, which was the date her insured status

49. 833 F.2d 650 (7th Cir. 1987).

50. *Id.* at 651.

51. *Id.*

expired. This failure of proof was compounded by the fact that "Meredith had worked eight to nine hours a day as a tomato peeler during the harvest season of 1973."⁵² Meredith did not request a reconsideration of this decision.

In January, 1984, Meredith filed her third disability benefits application. At that time she indicated she had been unable to work since February, 1970. In considering this third application, the ALJ "discovered that the SSA had miscalculated the expiration of Meredith's insured status . . . [which] actually expired on March 31, 1973."⁵³ Her second application was reopened for a determination of disability during the last quarter of her insured status. Her eligibility for disability benefits expired on March 31, 1973, and she did not work between then and her last application for disability benefits in January, 1984.

Prior to the hearing on her application for disability benefits, she was examined by two physicians who concluded that she was totally disabled as of that time. The issue, however, before the ALJ was whether Meredith was disabled on or before March 31, 1973. At the hearing before the ALJ, "Meredith testified that she suffered from pain, dizziness and problems with the strength of her grip since 1972 due to numbness in her arms and hands and that her problems had gotten progressively worse."⁵⁴ Standing was a problem for her because of her knees, and sitting was a problem because she experienced severe headaches if she sat too long.⁵⁵

Even though the ALJ found that Meredith had a severe impairment, that her testimony regarding pain was credible and that she could not perform her past work, he found that she could have done other jobs during the relevant period on the basis of testimony by a vocational expert. Thus, he denied her application for disability benefits.⁵⁶ The district court found that the ALJ effectively ignored the objective medical evidence of Meredith's pain, failed to give the proper consideration to Meredith's complaints of pain and failed to have the vocational expert consider the effect of Meredith's alleged pain on her ability to do the other jobs he identified.⁵⁷ The district court found that, since Meredith's statements regarding pain were credible and supported by objective medical evidence, the pain statute (42 U.S.C. section 423(d)(5)(A)) required a finding of disability.⁵⁸ The Seventh Circuit reversed holding that the

52. *Id.* at 652.

53. *Id.*

54. *Id.* at 653.

55. *Id.*

56. *Id.*

57. *Id.* at 653.

58. *Id.* at 654.

district court's finding amounted to nothing more than substituting its judgment for that of the ALJ.⁵⁹

From the Seventh Circuit's decision, it appears that the district court used an approach similar to the three-step test in *Luna*. Having found, in effect, that all three parts of the test had been met, the district court's decision necessarily required reversal of the Secretary's determination. In reversing the district court's decision, the court stated that it was not necessary to look beyond the words of the pain statute because it was clear and unambiguous. It then engaged in a curious analysis of that statute: "objective medical evidence of pain must be considered by an ALJ in determining whether an individual is disabled. Such evidence does not, however, mandate a finding of disability."⁶⁰

Up to that point, the court's analysis would have been consistent with *Luna* (and the district court) because the objective medical evidence clearly established that Meredith had an impairment and there was some medical evidence to substantiate Meredith's claim that the particular impairment caused pain. Thus, under *Luna*, the ALJ would have had to consider all other evidence of pain including Meredith's testimony of her symptoms. Because the ALJ found Meredith's symptoms credible, it appears that the *Luna* analysis, like that of the district court, would have mandated a finding of disability. But the Seventh Circuit intercepted the progression of the analysis from the second step to the third.

What the Seventh Circuit did was find that some medical records, those closest in time to Meredith's last date of entitlement, did not support her claim of disabling pain.⁶¹ In other words, the court found that there was insufficient objective medical evidence to support Meredith's claims of disabling pain even though the ALJ found Meredith's testimony to be credible.

If it is not clear from *Meredith* that the Seventh Circuit will allow the Secretary to emphasize the need for objective medical evidence to corroborate the severity of pain, it is clear from the Seventh Circuit's other decisions in *Veal v. Bowen*⁶² and *Walker v. Bowen*⁶³.

B. *Veal v. Bowen*

Veal involved an appeal from the district court which affirmed the Secretary's decision denying Lillie Veal's application for disability benefits. The Seventh Circuit Court of Appeals affirmed.⁶⁴

59. *Id.*

60. *Id.*

61. *Id.* at 655.

62. 833 F.2d 693 (7th Cir. 1987).

63. 834 F.2d 635 (7th Cir. 1987).

64. 833 F.2d at 694.

Veal complained that she was disabled by a number of ailments including high blood pressure, arthritis in her right hand, headaches, dizziness, back pain and others. To substantiate her ailments, Veal relied upon the reports of her treating physician. Comparing Veal's subjective complaints with the medical evidence provided by a consulting physician and Veal's treating physician the ALJ determined that "the diagnoses of [Veal's treating physician] was inconsistent with other objective medical findings and . . . in light of the contrary medical evidence, the subjective symptoms of Ms. Veal were not credible."⁶⁵ The ALJ relied upon the consulting physician's examination and report to conclude that Ms. Veal's physical impairments did not preclude her from returning to her past occupation.⁶⁶

In its review of the record, the court found substantial evidence to support the ALJ's findings, specifically that "objective medical evidence did not corroborate Ms. Veal's contentions that she was unable to perform her past work."⁶⁷ Indeed, it appears from the court's decision that the reports of Veal's treating physician did not specify any of the bases upon which he rendered his diagnosis of Veal's complaints.⁶⁸

What is important, however, about the court's decision in *Veal* is its attempt to formulate an approach to the evaluation of subjective complaints:

Despite a paucity of objective medical evidence directly supporting a disability, the claimant may prove that she is "disabled" within the SSA by subjective complaints if she shows: 1) evidence of an objectively adduced abnormality *and, either* 2) objective medical evidence supporting the subjective complaints issuing from that abnormality, *or* 3) that the abnormality is of a nature in which it is reasonable to conclude that the subjective complaints are a result of that condition.⁶⁹

This two-step approach appears to allow the analysis of a subjective complaint such as pain to stop at step two if objective medical evidence supports the subjective complaints issuing from that abnormality. If this is so, it appears to contradict the court's decision rendered five days

65. *Id.* at 695-96.

66. *Id.* at 694-96. Ms. Veal's most recent employment was in the capacity of a home health care worker in which she assisted homebound individuals with meal preparation, bathing, laundry, cleaning, etc. *Id.* at 694.

67. *Id.* at 698.

68. *Id.* at 695-96.

69. *Id.* at 698 (emphasis in original) (citing *Sparks v. Bowen*, 807 F.2d 616, 618 (7th Cir. 1986)).

earlier in *Meredith* in which the Seventh Circuit held: “[Objective medical evidence of pain] does not, however, mandate a finding of disability.”⁷⁰ If it was not the court’s intent to permit the inquiry to end with objective medical evidence supporting a subjective complaint, why would it offer the alternative step three, permitting an inquiry into whether the abnormality is of a nature in which it is reasonable to conclude that the subjective complaints are a result of the condition?

The approach in *Veal* leaves important questions unanswered. For example, if equally weighted objective medical evidence regarding the subjective complaints was conflicting, could the conflict form the basis for rejecting otherwise credible testimony of the claimant? In other words, if *Veal*’s treating physician had been a specialist and had identified the bases of his diagnosis in order to substantiate his opinion, could credible testimony by *Veal* of subjective complaints be rejected on the basis that another specialist’s opinion contradicted that of her treating specialist? Under a *Luna* analysis, it would appear incorrect to disregard credible testimony and opinions regarding the existence of disabling pain because a connection existed between the objectively proven impairment and some pain which can be reasonably expected to result from it. Had the facts in *Veal* been like those in the foregoing hypothetical question, would the result suggested by *Luna* be possible in light of the court’s earlier decision in *Meredith*? It appears that the answer would be negative.

C. Walker v. Bowen

The court’s final decision during the survey period in *Walker v. Bowen*⁷¹ would seem to close the door on the *Luna* result. In *Walker v. Bowen*, the claimant, Benny Walker, injured his back in October 1980. He went to a neurosurgeon who diagnosed Walker as suffering from a left lumbar disc protrusion. Walker’s injury did not improve with conservative treatment, so the neurosurgeon performed a discectomy in March 1981, approximately six months after the injury. Three months later, a second discectomy was performed. As Walker recuperated, the back condition began to improve. Six months later, the neurosurgeon informed the Disability Determination Division of his opinion that Walker would be able to return to work in February 1982 and further that Walker was medically unfit for work from the time of the injury in October 1980 through February 1982.⁷²

Walker was awarded a closed period of disability from October 1980 through December 1981, based upon a medical examination in December

70. *Meredith v. Bowen*, 833 F.2d 650, 654 (7th Cir. 1987).

71. 834 F.2d 635 (7th Cir. 1987).

72. *Id.* at 636-37.

1981 concluding that he was fit. Walker did not seek review of the denial of continuing benefits.⁷³

Unfortunately for Walker, however, he began to experience back problems again in January 1982. At that time, he was admitted to the hospital where no new damage to the back was discovered. He was released but readmitted again in March 1982. He made some improvement and his neurosurgeon rendered an opinion that he would be able to return to work in June 1982. In May 1982, another doctor examined Walker at the request of the Secretary. Like Walker's treating physician, the consulting doctor found Walker to be partially impaired and noted that he was taking pain medication containing a narcotic. Walker did not return to work. For the next five months, Walker received physical therapy. The therapist's notes indicated that Walker experienced some pain during therapy. When Walker failed to improve with physical therapy, his neurosurgeon operated on him in January 1983, the third time in less than two years. By July 1983, Walker's back condition apparently stabilized. In July and August, consulting physicians concluded that Walker could do sedentary work.⁷⁴

In November 1983, a hearing was held to review Walker's disability claim.⁷⁵ At that time, Walker testified that he took considerable amounts of pain medication and wore an electronic nerve stimulator to control his pain. He introduced evidenced that he attended a vocational evaluation program and that a vocational rehabilitation worker had concluded that he was physically unfit to undergo training even for sedentary work because of severe pain.⁷⁶

Although the ALJ found that Walker suffered from a severe back impairment, he found that Walker had not proven he was totally disabled for a continuous 12-month period and that Walker had the physical ability to pursue sedentary work.⁷⁷ Relying on the Medical Vocational Guidelines which considered factors such as Walker's relatively young age and prior work experience, the ALJ found that Walker was not disabled.⁷⁸

Walker appealed this decision to the district court. That court reversed the Secretary's decision with respect to the first part of the period in dispute and awarded Walker disability benefits for the period from

73. *Id.* at 637.

74. *Id.* at 636-38.

75. *Id.* at 639. Walker had previously filed applications for disability benefits (for the post-December 1981 period) in January and February 1983, and both the original application and reconsideration had been denied. *Id.*

76. *Id.* at 638.

77. *Id.* at 639.

78. *Id.*

December 1981 through July 1983. In the second part of its decision, the district court upheld the denial of benefits for the period of time after July 1983.⁷⁹

Walker appealed the district court's decision to the Seventh Circuit and the Secretary cross-appealed. The Seventh Circuit reversed that portion of the judgment which granted Walker benefits and affirmed that part of the district court's judgment which approved the denial of benefits to Walker for the period after July 1983.⁸⁰

On appeal, Walker alleged a number of errors, including a contention that "the ALJ applied the wrong legal standard by discounting his testimony regarding pain solely because it was not totally supported by objective medical evidence."⁸¹ The court, however, concluded that the ALJ discounted Walker's complaints on a finding that Walker's account of his pain was not credible because his descriptions of the pain during his testimony were inconsistent. Because credibility determinations are traditionally reserved for the trier of fact, the court declined to substitute its opinion for the credibility determination made by the ALJ.⁸²

The court reiterated the congressional determination found in the pain statute that an individual's statement as to pain or other symptoms alone is not conclusive evidence of disability and that medical signs and findings which could reasonably be expected to produce the pain must be shown. Following this statement, the court noted: "Furthermore, we concluded in *Nelson*,⁸³ 770 F.2d [682,] 685, that a claim of pain may be discounted if it is not borne out by objective medical evidence."⁸⁴

This statement seems to put the Seventh Circuit squarely at odds with the Tenth Circuit. Under *Luna*, some objective evidence of pain caused by the proven impairment would seem to require basing the ultimate determination on the credibility of the claimant's statements and the opinions of his physicians regarding pain. The foregoing quote from *Walker*, on the other hand, seems to imply that regardless of the credibility of the claimant's testimony and his physician's opinion, they can be rejected if the objective medical evidence isn't sufficient in the eyes of the decisionmaker.

Based on the foregoing analysis of *Luna*, *Meredith*, *Veal* and *Walker*, it appears that there will continue to be a considerable difference in approach between at least two circuits in the evaluation of pain. It is

79. *Id.*

80. *Id.* at 644-45.

81. *Id.* at 641.

82. *Id.*

83. *Nelson v. Secretary of Health & Human Serv.*, 770 F.2d 682, 685 (7th Cir. 1985).

84. *Id.*

not unreasonable to conclude that a claimant's statements and his physician's opinions will be given more weight in the Tenth Circuit whereas the Seventh Circuit will permit the Secretary to emphasize the need for corroboration of subjective complaints of pain by objective medical evidence.

VI. CONCLUSION

Until further study of pain results in a more definitive approach to its evaluation in disability cases, it appears that the social security disability practitioner residing in the Seventh Circuit must carefully evaluate a claimant's allegations of disabling pain and meticulously gather objective medical evidence establishing abnormalities; then, with the aid of medical treatises and opinions, draw a connection between the abnormality and the pain alleged. The presentation of considerable testimony from the claimant and others who know him, as well as the opinions of his physicians concerning pain, should be used to bolster conflicting or scant medical findings. With regard to the latter, it is important for the practitioner to accumulate as much evidence as possible of behavioral manifestations of pain. In addition to those suggested by *Luna*, it would be advisable to obtain and present evidence demonstrating consistent audible and/or body language displays of pain during activity such as groaning, grimacing, bracing, guarded movements or disturbances of posture or gait. These observations can come from physicians or their reports, family members or neighbors. In addition, testimony concerning the avoidance of activities that are normally pleasurable such as socializing and sexual relationships, can demonstrate the claimant's desire to protect himself from pain aggravating activity. The practitioner can also find assistance in the development of pain fact proofs by reviewing the sample pain questions for physicians, claimants and the claimant's relatives or friends found in Appendix E of the *Report of the Commission on the Evaluation of Pain*.⁸⁵

Until a truly uniform approach to evaluation of pain in Social Security disability cases is made part of the law, the Administration and some courts will remain apprehensive about granting appropriate emphasis to subjective accounts of disability symptomology, even though malin-gering is not a substantial problem.

85. REPORT OF THE COMMISSION ON THE EVALUATION OF PAIN, *supra* note 7, at 169-72.

