



RECENT 2d CIRCUIT DECISIONS

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Empire Justice Center

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***Nunez v. Commissioner of Social Security*, 164 F.4th 60 (2d Cir., 2025), (decided November 25, 2025, but a https://ww3.ca2.uscourts.gov/decisions/isysquery/54524a16-3eab-4ca9-9c20-2921eb3abbd6/3/doc/23-831_complete_and_opn.pdf remanded on December 29, 2025),**

The Second Circuit clarified that an ALJ’s residual functional capacity (RFC) assessment must meaningfully reflect a claimant’s documented functional limitations, particularly in areas like concentration, persistence, and attendance. The court held that limiting a claimant to “unskilled, goal-oriented work” is insufficient where the record—including consistent medical opinions and vocational expert testimony—shows moderate limitations in staying on task and maintaining regular attendance. Because the ALJ failed to incorporate or explain the omission of these limitations, despite testimony that such deficits would preclude employment, the court remanded the case for further proceedings. The decision underscores the need to tie medical evidence directly to specific, work-related restrictions and to ensure that RFC findings account for vocationally significant limitations.

***Flinton v. Commissioner of Social Security*, 143 F.4th 90 (2d Cir. July 2, 2025)**

The Second Circuit vacated the district court’s decision and remanded for a new hearing before a different, properly appointed ALJ. The court held that the plaintiff, whose 2018 hearing was conducted by an ALJ not constitutionally appointed under the Appointments Clause, had not received the remedy required by *Lucia v. SEC*, 585 U.S. 217 (2018). The Commissioner’s later ratification of that ALJ’s appointment did not cure the defect, as *Lucia* mandates reassignment to a different ALJ to preserve structural constitutional protections. The court emphasized that such reassignment is not a mere formality but a necessary remedy when a hearing is tainted by an unconstitutional appointment. The decision—referred to as the “*Flinton Rule*”—requires new hearings before different ALJs in similar cases involving pre-July 2018 appointments.

***Rubin v. Martin O'Malley*, 116 F.4th 145 (2d. Cir. 2024)**

The Court of Appeals remanded for consideration of the C criteria of Mental Impairment Listing 12.04, finding that the ALJ had failed to provide any rationale for why the plaintiff did not meet the criteria. The court also offered what could be helpful language on the limited value of Mental Status Exams (MSEs) that can often derail claims. And it acknowledged that a psychiatrist's opinion can be based on and supported by the totality of the medical evidence from the whole treatment team, not merely his own limited notes. It rejected, however, the plaintiff's argument that the ALJ erred in denying the claim without the support of a medical opinion that she could work. But because the ALJ had found the psychiatrist's opinion and those of the non-examining consultants only partially persuasive and because the claimant had failed to attend a consultative examination, the ALJ's decision was not supported by substantial evidence. The court remanded for a consultative examination and fuller consideration of the evidence of record.

***Rucker v. Kijakazi*, 48 F.4th 86, 2022 WL 4074410 (2d Cir. Sept. 6, 2022)**

The court remanded under the pre 2017 opinion evidence regulations that applied to this case, finding the ALJ had not identified substantial evidence to support her conclusion that the plaintiff could work alone except for normal supervision. She also failed to provide good reasons for rejecting the limitations identified by the treating psychiatrist, erroneously rejecting it because it was based on the plaintiff's own reports. Nor was the plaintiff's periodic lack of complaints of symptoms sufficient given her lack of insight. The ALJ should not have relied on the plaintiff's ability to attend therapy as an indication of ability to work. Nor did some positive progress notes and mental status exams justify rejecting the treating source. The ALJ also relied too heavily on a consultative exam.

***Schillo v. Kijakazi*, 31 F.4th 64 (2d Cir. Apr. 6, 2022)**

The court affirmed the District Court decision under the pre 2017 opinion evidence regulations that applied in this case. It found the ALJ properly accorded lesser weight to the opinions of two treating physicians because one was conclusory and vague and the other, rendered in check-box format, was not supported by the medical evidence. And according to the court, both opinions as to the plaintiff's tremors and sensory deficits were inconsistent with the medical evidence, which identified only mild tremors, and the plaintiff's testimony. The court also agreed with the ALJ's assessment that the opinion of the consultative examiner was entitled to even less weight. It rejected plaintiff's argument that the ALJ could not make an RFC finding because she had declined to accord controlling weight to any of the medical opinions; the ALJ is entitled to weigh all available evidence to make RFC findings and her conclusion need not perfectly correspond with opinions of record. Finally, the court found that the ALJ's failure to articulate the so-called *Burgess* factors for evaluating treating source opinions to be harmless error as it was evident she had applied the substance of the treating physician rule.

***Fields v. Kijakazi*, 24 F.4th 845 (2d Cir. 2022)**

The Court of Appeals held that the District Court erred in reducing attorney fees requested by plaintiff's attorney, Binder & Binder, under 42 U.S.C. § 406(b), as a windfall. The Second Circuit, relying on its decision in *Wells v. Sullivan* ("Wells II"), 907 F.2d 367, 372 (2d Cir. 1990), and the Supreme Court in *Gisbreath v. Barnhart*, 535 U.S. 789, 808 (2002), held that to reduce a contingency fee solely on the grounds that the amount requested is a windfall, the court must be clear the fee was not earned by counsel. Here, the appeals court found that the plaintiff's very experienced attorney represented him professionally, efficiently, and ultimately successfully in four ALJ hearings, several Appeals Council petitions, and two district court appeals. His request for a fee of \$40,170, which was 25% of the plaintiff's retroactive award, was not a windfall even though it constituted an hourly rate of \$1,556.98 based on the 25.8 hours expended on representation in the federal court phases of the claims.

***Colgan v. Kijakazi*, 22 F.4th 353 (2d Cir. 2022)**

The court remanded, finding the ALJ erred in failing to accord controlling weight to the opinion of the treating physician under the pre 2017 opinion evidence regulations that applied in this case. The court held the ALJ failed to find good reasons under the old regulations for discounting the opinion of a concussion specialist that the plaintiff would be off task 33% of the day and absent more than four days per month due to her headaches and other impairments. The ALJ also erred in discounting the opinion because it was presented in "check box" form; the opinion was supported by voluminous treatment notes. The court criticized the ALJ for "cherry-picking" particular instances of improvement to create inconsistencies with the treating source opinion. And it criticized the ALJ for relying too heavily on the opinions of consulting physicians, particularly where the consulting opinions did not address or dispute the crux of the treating source's opinion.

***Alexander v. Saul*, 5 F.4th 139 (2d Cir. 2021), cert. denied, 142 S.Ct. 1461 (2022)**

The Second Circuit upheld a district court's refusal to extend the time to appeal its decision affirming the Commissioner's denial of an SSI claim. Although the Circuit was "sympathetic" to the plaintiff, it concluded the district court had not abused its discretion – even though the plaintiff filed her appeal and request for an extension only two days after the 60-day deadline expired. The district court had reasonably applied the "excusable neglect" factors rather "good cause" standard under Fed. R. App. P. 4(a)(5) because the plaintiff's failure to appeal was at least partially due to her own inadvertence in failing to notify her attorney of her change of address rather than due to her alleged mental illness. The court refused to toll the Rule 4(a)(5) deadline as it is considered jurisdictional and less flexible than the statute of limitations governing the 60-day limit to seek judicial review under 42 U.S.C. § 405(g).

***Szczepanski v. Saul*, 946 F.3d 152 (2d Cir. 2020)**

The court held that ability to complete work during the probationary period is relevant to a disability claim. It remanded for further proceedings at Step five of the Sequential Evaluation to determine whether the claimant could perform work as required during the probationary period, including meeting the levels for absenteeism tolerated by the employer.

***Estrella v. Berryhill*, 925 F.3d 90 (2d Cir. 2019)**

The Second Circuit remanded, finding the ALJ committed procedural error in failing to “explicitly” apply the factors laid out in *Burgess v. Astrue*, 537 F.3d 117 (2d Cir. 2008), for evaluating treating source opinions. The court reiterated its mandate, rooted both in regulation and precedent, for ALJs to follow specific procedures and adequately explain their reasoning when assigning weight to opinions, citing *Selian v. Astrue*, 708 F.3d 409, 419-20 (2d Cir. 2013), *Halloran v. Barnhart*, 362 F.3d 28, 32-33 (2d Cir. 2004)(per curiam). It found the ALJ “cherry picked” the evidence, particularly mental status exam results, without attempting to reconcile longitudinal inconsistencies in this mental health claim. And it criticized the ALJ for relying too heavily on the opinion of the consultative examiner, citing *Selian*.

***Lockwood v. Comm’r of SSA*, 914 F.3d 87 (2d Cir. 2019)**

The Court of Appeals remanded because the ALJ had not met his affirmative obligation under SSR 00-4p to inquire about any possible or apparent conflicts between vocational testimony and the Dictionary of Occupational Titles (DOT). The court found the ALJ did not meet his burden simply by asking the vocational expert if her testimony was consistent, especially where the ALJ found the plaintiff could not reach overhead, but the three jobs to which the VE testified all required frequent or occasional reaching.

***Lesterhuis v. Colvin*, 805 F.3d 83 (2d Cir. 2015)**

The Court of Appeals remanded for consideration of a retrospective medical opinion from a treating physician submitted to the Appeals Council, citing *Perez v. Chater*, 77 F.3d 41, 54 (2d Cir. 1996). The ALJ’s decision was not supported by substantial evidence in light of the new and material medical opinion from the treating physician that the plaintiff would likely miss four days of work per month. Since the vocational expert had testified a claimant who would be absent that frequently would be unable to work, the physician’s opinion, if credited, would suffice to support a determination of disability. The court also faulted the district court for identifying gaps in the treating physician’s knowledge of the plaintiff’s condition. Citing *Burgess v. Astrue*, 537 F.3d 117, 128 (2d Cir. 2008), the court reiterated it may not “affirm an administrative action on grounds different from those considered by the agency.”

***Greek v. Colvin*, 802 F.3d 370 (2d Cir 2015)**

The court remanded for clarification of the treating source’s opinion, particularly as to the claimant’s ability to perform postural activities. The doctor had also opined that Mr. Greek would likely be absent from work more than four days a month as a result of his impairments. Since a vocational expert testified there were no jobs Mr. Greek could perform if he had to miss four or more days of work a month, the court found the ALJ’s error misapplication of the factors in the treating physician regulations was not harmless. “After all, SSA’s regulations provide a very specific process for evaluating a treating physician’s opinion and instruct ALJs to give such opinions ‘controlling weight’ *in all but a limited range of circumstances*. See 20 C.F.R. § 404.1527(c)(2); see also *Burgess*, 537 F.3d at 128.” (Emphasis supplied.)

***McIntyre v. Colvin*, 758 F.3d 146 (2d Cir. 2014)**

The Court of Appeals for the Second Circuit found the ALJ's failure to incorporate all of the plaintiff's non-exertional limitations explicitly into the residual functional capacity (RFC) formulation or the hypothetical question posed to the vocational expert (VE) was harmless error. The court ruled that "an ALJ's hypothetical should explicitly incorporate any limitations in concentration, persistence, and pace." 758 F.3d at 152. But in this case, the evidence demonstrated the plaintiff could engage in simple, routine tasks, low stress tasks despite limits in concentration, persistence, and pace; the hypothetical thus implicitly incorporated those limitations. The court also held that the ALJ's decision was not internally inconsistent simply because he concluded that the same impairments he had found severe at Step two were not ultimately disabling.

***Cichocki v. Astrue*, 729 F.3d 172 (2d Cir. 2013)**

The Court held the failure to conduct a function-by-function analysis at Step four of the Sequential Evaluation is not a *per se* ground for remand. In affirming the decision of the district court, the Court ruled that despite the requirement of Social Security Ruling (SSR) 96-8p, it was joining other circuits in declining to adopt a *per se* rule that the functions referred to in the SSR must be addressed explicitly.

***Selian v. Astrue*, 708 F.3d 409 (2d Cir. 2013)**

The Court held the ALJ improperly substituted her own lay opinion by rejecting the claimant's contention that he has fibromyalgia despite a diagnosis by his treating physician. It found the ALJ misconstrued the treating physician's treatment notes. It criticized the ALJ for relying too heavily on the findings of a consultative examiner based on a single examination. It also found the ALJ improperly substituted her own criteria for fibromyalgia. Citing the guidance from the American College of Rheumatology now made part of SSR 12-2p, the Court remanded for further proceedings, noting the required finding of tender points was not documented in the records. The Court also held the ALJ's RFC determination was not supported by substantial evidence. It found the opinion of the consultative examiner upon which the ALJ relied was "remarkably vague." Finally, the court agreed the ALJ had erred in relying on the Grids to deny the claim. Although it upheld the ALJ's determination that neither the claimant's pain nor depression was significant, it concluded the ALJ had not affirmatively determined whether the claimant's reaching limitations were negligible.