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ADMINISTRATIVE LAW—Hearsay Evidence Held Admissible but Insubstantial in A Social Security Hearing

In April of 1966, Pedro Perales filed an application for disability benefits with the Secretary of Health, Education, and Welfare in accordance with the Social Security Act.¹ The claimant asserted that because of a back injury he had suffered, he was no longer able to engage in "any gainful activity" within the meaning of the Act.² An initial determination of no disability was made and reconsideration of his claim was requested.

Upon receipt of an unfavorable reconsideration determination, the claimant requested an administrative review of his claim before an administrative hearing examiner of the Bureau of Hearings and Appeals of the Social Security Administration.

Prior to this hearing Perales submitted to several medical examinations, including orthopedic and neurological examinations, authorized and arranged by the hearing examiner assigned to compile all the written evidence and conduct the oral hearing. The hearing was held in two sessions and, in addition to the examiner and the claimant, the participants in the hearing included a lawyer representing Mr. Perales, Dr. Morales testifying as claimant's witness, and Dr. Leavitt, "a medical expert."³

A number of unsworn medical reports written by "consultative physicians" who had examined the claimant but who were not present at the hearing were introduced into evidence. The presence of the medical expert was required to interpret these medical reports because of the absence of the examining physicians.

The claimant objected to the use of the written reports as a denial of his right to confront and cross-examine adverse witnesses and as hearsay evidence; and to the oral interpretation of these reports as "hearsay based upon hearsay."⁴ The examiner overruled the objections and re-

1. 42 U.S.C.A. 416(i)(1) and 423 (1964).

2. 42 U.S.C.A. 423 defines disability as:

"... 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." Establishing disability within this definition is a requisite for obtaining Social Security disability benefits.

3. The testifying medical expert is generally a preeminent physician who is present at the examiner's request and is paid by H.E.W. His purpose at the hearing is to interpret medical data found in written reports of examining doctors.

4. The claimant contended that the testimony of a doctor who had not examined

ceived the written reports and the testimony of the medical expert into evidence as tending to show that the claimant was not fully disabled.

Perales testified on his own behalf and called Dr. Morales, who had examined and treated him, to testify. The testimony of the claimant and his doctor was the only direct evidence submitted by either side as to physical condition of the claimant and supported the claimant's contention that he was totally disabled.

After the hearing, the examiner ruled that Perales was not entitled to disability benefits. The claimant then requested a review by the Appeals Council⁵ which affirmed the examiner's decision, and stated that its verdict was the final decision of the Secretary of Health, Education, and Welfare. The Social Security Act provides for judicial review of the Secretary's final determination.⁶ In accordance with the appropriate procedures, Perales appealed to the United States District Court for the Western District of Texas which reversed the decision of the Secretary and remanded the case to the Secretary for a new hearing before a different examiner. In the memorandum opinion the District Court said it was "Reluctant to accept as substantial evidence the opinions of medical experts submitted as original evidence in the form of unsworn written reports. . . ." unless "unusual circumstances" existed.⁷

The Secretary appealed the case to the United States Court of Appeals for the Fifth Circuit. At issue was the admissibility and substantiality of hearsay evidence in an administrative hearing.

HELD: The decision of the trial court to remand the case to the Secretary is affirmed. Hearsay evidence, such as unsworn medical reports of doctors who had examined the claimant but who were not present and did not testify at the hearing before the examiner, and the interpretation of those reports, by a medical expert who had never examined the claimant, is admissible in an administrative hearing. However, although the hearsay evidence is admissible over objection, such evidence, standing alone and without more, is not substantial evidence.

him was hearsay and since that testimony was based upon the hearsay evidence found in unsworn written reports the result was "hearsay based upon hearsay."

5. The final administrative reviewing board within the Social Security Administration.

6. 42 U.S.C.A. 405(g) (1964).

7. The decision of the trial court failed to elaborate upon what "unusual circumstances" might consist. However, the trial courts' use of the term might seem to indicate some consideration of the necessity or lack of it involved in allowing unsworn written reports rather than direct testimony of examining physicians. The Appellate Court did not provide for any flexibility due to necessity in its holding.

Judge Skelton of the Court of Claims, writing for a three-judge panel of the Fifth Circuit Court of Appeals, considered three basic questions in rendering his decision:

- (1) Was the decision of the trial court an appealable one?
- (2) Is hearsay evidence, when objected to, admissible in an administrative agency hearing such as the H.E.W. hearing in this case? and finally (3) If hearsay evidence is admissible over objection . . . , is such hearsay evidence, standing alone and without more substantial evidence?⁸

Noting that under the Social Security Act federal district courts are authorized to enter a judgment "affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing,"⁹ the court concluded that the decision of the Secretary denying benefits was final and appealable. The Act further provides that such a judgment, when rendered by a district court, is reviewable "in the same manner as a judgment in other civil actions."¹⁰ Since the trial court not only remanded the case for a new hearing, but also finally "established standards for the admission of hearsay evidence" the issue was "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."¹¹

The court then proceeded to the issue of whether hearsay evidence, namely written medical reports and oral interpretation of them by an expert witness, was admissible in a Social Security hearing. Under the Act, the Secretary is empowered to enact such rules and regulations as may be "necessary and appropriate" to carry out the provisions of the Act.¹² One such provision of the Act and an identical segment of a legislative rule allow that: "Evidence may be received at any hearing before the secretary even though inadmissible under rules of evidence applicable to court procedure."¹³ The Court regarded these identical provisions of the statute and regulation as clearly authorizing the admission of hearsay evidence in a Social Security hearing and so held.

Having decided the question of admissibility under the Social Security Act, the court next dealt with the claimant's assertion that he had been denied the right to cross-examine adverse witnesses, a right

8. *Perales v. Cohen*, 412 F.2d 44, 47 (1969).

9. *See* note 6, *supra*.

10. *Id.*

11. 412 F.2d at 489, citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

12. *See* note 6, *supra*.

13. 42 U.S.C.A. § 405(b) (1964) and 20 C.F.R. 404.928 (1969).

afforded him by the Administrative Procedure Act.¹⁴ The Claimant and the Bexar County (Texas) Legal Aid Society which appeared as an *amicus curiae*, argued that the issues of admissibility of hearsay and denial of the right to cross-examine were coextensive, and that therefore claimant's right to cross-examine controlled the question of admissibility. The court however held that while the A.P.A. does allow a party "to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts,"¹⁵ it specifically states that it does "not supercede the conduct of specified classes of proceedings . . . specifically provided for by or designated under statute."¹⁶ Thus the authorization for the admissibility of hearsay in the Social Security Act prevails over the right to cross-examine found in the Administrative Procedure Act.

The court then considered what it deemed a separate issue, the claimant's right to confront and cross-examine adverse witnesses. On this issue, the court held that the claimant failed to take advantage of the remedy available under the Social Security regulations and cannot now complain. Under the regulations issued by the Secretary, a hearing examiner has the authority to subpoena witnesses on his own motion or at the request of a party.¹⁷ Because the claimant failed to request that the examining physicians be subpoenaed to testify at the hearing, the claimant was precluded from urging the denial of a right to confront and cross-examine adverse witnesses.

However, the court does suggest that if the claimant had requested the issuance of subpoenas and this request was denied then "[H]e would have a valid objection that could be urged on appeal."¹⁸ The court's previous dismissal of the applicability of the A.P.A. leaves uncertain the origin of this "right." The possible interpretations are an absolute right of cross-examination founded on constitutional principles of due process, or a discretionary right provided by the Secretary which allows the examiner to issue subpoenas "when reasonably necessary for the full presentation of the case."¹⁹

The origin of this "right" to cross-examine is significant to future claimants, and the only indication of the *Perales* Court's viewpoint is its

14. 5 U.S.C.A. § 556(d) (1964): "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

15. *Id.*

16. 5 U.S.C.A. § 556(b) (1964).

17. 20 C.F.R. 404.926 (1969).

18. 412 F.2d at 51.

19. See note 17 *supra*.

statement that where the claimant is denied subpoenas, he "would have a *valid* objection that could be urged on appeal."²⁰ [emphasis added] A "valid" objection appears to be one which would be sustained if made; therefore, the court probably considers the "right" to cross-examine as absolute. This elevates the status of this "right" to cross-examine in an administrative hearing above the present state of the law.²¹

Assuming, arguendo, that the court views the claimant's "right" as founded in the Social Security Act and the regulations, such an interpretation would bring the decision on this point within the mainstream of the existing case law. The right to cross-examine would be based on its necessity to a true and full disclosure of the facts in the particular case, as viewed by the examiner.

In further support of its conclusion that hearsay is admissible in an administrative hearing, the court relied on *Morelli v. United States*.²² *Morelli* involved the admissibility of hearsay evidence in a suit brought by an employee of the Air Force for the recovery of back pay lost through an allegedly illegal dismissal. In holding that hearsay evidence was admissible in administrative hearings, the Court of Claims formulated the rule adopted by the *Perales* court:

The hearsay rule is not applicable to administrative hearings so long as the evidence upon which a decision is ultimately based is both substantial and has probative value.²³

Thus while the court allows the admission of hearsay in Social Security hearings, much of the adverse effects to the claimant of the hearsay may be ameliorated to the extent the examiner recognized a right of a claimant to subpoena the author of that hearsay and question him under oath. However, the allowance of the hearsay in the first instance is significant because the claimant may not, in the ordinary case, wish to cross-examine the author of an unfavorable report.

Finally, the court turned to what it considered the overriding issue—whether the medical reports and testimony of the medical expert re-

20. 412 F.2d at 51.

21. In the relatively few instances in which the Supreme Court has extended the right of cross-examination beyond criminal cases it has carefully limited its holding. Generally, the Court has only found a denial of a right of confrontation and cross-examination where there was no congressional authorization for the deprivation (unlike *Perales*) and the hearing adjudicated substantial rights such as the ability to carry on one's profession, *Green v. McElroy*, 360 U.S. 474 (1959); or where the administrative proceeding imposed criminal sanctions and where an "undue restriction" on the right to cross-examination was appealed. *Reilly v. Pinkus*, 338 U.S. 269 (1949).

22. *Morelli v. United States*, 177 Ct. Cl. 848 (1966).

23. *Id.* at 853-54.

ceived by the hearing examiner were substantial evidence upon which an administrative decision could be based.

In evaluating the proffered evidence, the court defined "substantial evidence" in the terms first used by the Supreme Court in *Consolidated Edison Co. v. N.L.R.B.* as "[S]uch relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²⁴ Equating this definition with the dictum found in *Consolidated Edison Co.* to the effect that "Mere uncorroborated hearsay or rumor does not constitute substantial evidence,"²⁵ the court concluded that the medical evidence presented by H.E.W. regarding claimant's disability was not substantial because it was based solely upon hearsay uncorroborated by any direct evidence.²⁶

The court found particularly objectionable the hearing examiner's dependence upon doctors who accompany the examiner or who are repeatedly asked to testify to their interpretation of the claimant's medical record without any examination of the claimant himself. The court termed this practice widespread. The General Counsel for H.E.W. has defended the H.E.W. practice of paying pre-eminent physicians to give expert medical testimony by pointing to the large number of cases before the Social Security Administration and the practical difficulty and expense of having the examining doctors testify. It was also suggested that written reports by reliable doctors submitted at the time of examination are more trustworthy than oral accounts given months later.²⁷

The decision of the Fifth Circuit Court of Appeals on the substantial evidence issue in *Perales* appears to be an extension of the "residuum rule" first elaborated by the New York Court of Appeals in *Carroll v. Knickerbocker Ice Co.*²⁸ The "residuum rule" requires that decisions in administrative hearings be based on evidence admissible in a jury trial. Since hearsay evidence is generally not admissible in a jury trial, hearsay can not be the sole basis of a decision in an administrative hearing. While not expressly applying the "residuum rule", the court relied upon several cases where the rule was applied.

24. *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

25. *Id.* at 230.

26. Finding that H.E.W.'s evidence was insubstantial was essential in order for the Court to remand the case. The Social Security Act allows a reviewing court to reverse a decision of the Secretary only if that decision is not supported by substantial evidence. 42 U.S.C. § 405(g) (1964) provides that: "the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

27. Memorandum from Robert C. Meridian to Assistant Attorney General William D. Ruckelshaus, May 28, 1969.

28. *Carroll v. Knickerbocker Ice Co.*, 218 N.Y. 435, 113 N.E. 507 (1916).

Although the Fifth Circuit relied on *Consolidated Edison Co. v. N.L.R.B.*²⁹ in support of its application of the "residuum rule," that case involved the National Labor Relations Act, a Congressional statute significantly different than the Social Security Act, and evidentiary problems quite unlike those raised in *Perales*. Proceedings before the National Labor Relations Board, quite unlike those before a hearing examiner of the Bureau of Hearings and Appeals, are truly adversary because the N.L.R.B. is looking for statutory violations and has the power to issue enforcement orders and assess severe penalties. Such large scale actions necessitate rules of evidence more restrictive than those required for a hearing designed to oversee the distribution of benefits provided by Congress. Furthermore, neither claimants nor apparently H.E.W., in the vast number of social security hearings, are financially able to carry on such large scale proceedings as are conducted in cases before the N.L.R.B.³⁰

Congress itself has displayed cognizance of the essential differences between hearings before the N.L.R.B. and those conducted by the Social Security Administration. The National Labor Relations Act was amended after the *Consolidated Edison* decision in order to bring proceedings before the N.L.R.B. into close conformity with the rules of evidence in jury trials.³¹ The *Perales* Court also distinguished the instant case from those cases which have reviewed administrative proceedings inherently different than Social Security hearings, stating:

Here the claimant is claiming disability benefits under a law of Congress. In such a case the Congress has the right to establish procedures and regulations the claimant must comply with before he is entitled to these benefits. So long as these procedures are not unfair, arbitrary, discriminatory, and do not deprive the claimant of the opportunity to present his claim in an adequate and comprehensive manner, he is required to comply with them.³²

It is the opinion of many respected legal scholars that the "residuum rule" should be abandoned in favor of a more flexible hearsay rule in administrative proceedings. Professor Wigmore has assailed the rule as resting on the false premise that evidence admissible in court is always more reliable than hearsay, whereas "[I]n ordinary experience, it is impossible to say that the one sort of evidence has any greater probability

29. 305 U.S. 197 (1938).

30. See note 27, *supra* at 11.

31. 29 U.S.C.A. § 160(b) (1964).

32. 412 F.2d at 50.

of truth than the other.”³³ Judge Learned Hand speaking for the majority of the court in *United States v. Costello* has said: “The resulting situation: that is, that hearsay will serve, only when supplemented by some modicum of first-hand evidence, has nothing to commend it.”³⁴ Professor Davis has been one of the most ardent opponents of the rule.

As soon as the residuum rule and the alternative to the rule are understood, the reasons against the rule become overwhelming—so overwhelming as to give rise to the question whether courts that have given lip service to the rule have done so on the basis of misunderstanding instead of through an exercise of informed judgment.³⁵

The exclusion of hearsay evidence in a court trial is a product of the jury system. The historical purpose for this exclusion is to protect the impressionable juror from contamination by untrustworthy evidence. However, the term “hearsay evidence” encompasses a wide spectrum of varying degrees of reliability, dependent upon the type of hearsay and the factual situation in which it is confronted. “The trustworthiness of hearsay ranges from the highest reliability to utter worthlessness.”³⁶ While the “residuum rule” does admit hearsay evidence, in practical effect, it is virtually the same as an exclusionary rule, for it relegates the rule of hearsay evidence to that of, at most, mere makeweight. The result is that much valuable, reliable, and crucial evidence is given virtually no weight in an administrative decision. This result is occasioned even though the danger of allowing hearsay evidence is decidedly lessened in administrative hearings before an examiner studied in law, capable of making sophisticated legal distinctions between various types of hearsay.

The rule the court sets down in *Perales* is unfortunate because it necessarily disregards much evidence that “a reasonable mind might accept as adequate to support a conclusion,” the basic test for substantial evidence enunciated by the Supreme Court.³⁷ The two Social Security cases which the *Perales* court cites as upholding the “residuum rule”, *Hill v. Fleming*³⁸ and *Mefford v. Gardner*,³⁹ support a much more flexible definition of substantial evidence.

33. 1 WIGMORE, EVIDENCE 41-42 (3rd ed. 1949). Professor McCormick in his treatise on evidence expresses a similar view. MCCORMICK, EVIDENCE 626 (1954).

34. *United States v. Costello*, 221 F.2d 668, 678 (2d Cir. 1955).

35. 2 DAVIS, ADMINISTRATIVE LAW TREATISE 293 (1958).

36. MCCORMICK, *supra* note 33, at 627.

37. 305 U.S. at 229.

38. *Hill v. Fleming*, 169 F. Supp. 240 (W.D. Pa. 1958).

39. *Mefford v. Gardner*, 383 F.2d 748 (6th Cir. 1967).

On review of the decision of the Secretary in *Hill v. Fleming*,⁴⁰ the court reversed the denial of a "period of disability" on the ground that the ultimate finding of fact was not based on substantial evidence. In *Hill*, the only evidence tending to show that the claimant was not disabled during the period alleged were the fragmentary statements contained in a report written by a clinical librarian. Contradicting this second hand hearsay evidence were the written medical reports of several doctors who had examined the claimant and were unanimously of the opinion that she was totally and permanently disabled. The court said that the hearsay evidence has "small probative value" but "in relation to the type of evidence reasonably anticipated in circumstances of the case, that very slight proof must be characterized as insubstantial."⁴¹

In contrast to the court in *Perales*, the *Hill* court was willing to afford the hearsay evidence some significance, and only after weighing it against the surrounding circumstances of the case did the court conclude that it was at most "hand-picked fragments of evidence merely enough to raise a suspicion."⁴²

Correspondingly, the Sixth Circuit Court of Appeals in *Mefford v. Gardner*,⁴³ also expressed considerable reluctance to apply hard and fast exclusionary rules of evidence in Social Security hearings. While the court rejected the testimony of a medical expert as insubstantial, it did so not because it failed to conform to the technical rules of evidence, but rather because ". . . in the light of the other medical evidence and other facts reflected in the transcript as a whole" it was entitled to very little weight.⁴⁴ In the words of the court: "Evidence which may be logically substantial in isolation may be deprived of much of its character or its claim to credibility when considered with other evidence."⁴⁵

The concern caused by the *Perales* decision does not result from its final assessment of the hearsay evidence, but rather the inflexible evidentiary rule it used in arriving at its conclusion and the consequent burden it places on the Administration and future claimants. A materially less burdensome and more flexible basis for determining the substantiality of evidence is Professor Davis' suggestion that all evidence, whether it be hearsay or direct, should be viewed in the light of several considerations. These considerations are: "a.) the alternative to re-

40. See note 38, *supra*.

41. *Id.* at 245.

42. *Id.*

43. See note 39, *supra*.

44. *Id.* at 760.

45. *Id.*

liance on the incompetent evidence; b.) the state of supporting and opposing evidence, if any; c.) the policy of the program being administered and the consequences of a decision either way; d.) importance or unimportance of the subject matter and consideration of economy of government; e.) the degree of efficacy or lack of efficacy of cross-examination with respect to particular hearsay declarations."⁴⁶

To summarize Professor Davis' criteria, the reliability of and the necessity for resorting to hearsay should be determined before automatically excluding it; particularly in view of the severity of the consequences to claimants. Where disregarding hearsay produces better evidence, such an approach is desirable; however, where disregarding hearsay leaves little or no evidence upon which to base a decision, it is undesirable.⁴⁷ Perhaps the most important function of a hearing examiner is to ascertain all relevant facts. A more flexible hearsay rule in administrative proceedings would permit the hearing examiner to utilize those facts and thereby enable him to make a more equitable determination of a claimant's rights. Again quoting Judge Hand, "If this be not evidence I can see no way of getting any better, and the fact cannot be established at all. Surely the law is not so unreasonable as that."⁴⁸

The Fifth Circuit Court of Appeals' opinion with respect to at least two key issues in the *Perales* case may have considerable impact in the field of administrative law.

First, the court held that hearsay evidence was admissible in a Social Security hearing. This conclusion was justified by the qualification that either party may request subpoenaing of the author of hearsay evidence to cross-examine him concerning his conclusions. However, the qualification is of questionable value to the claimant, for in the vast majority of cases he will not elect to have an unshakeable witness merely reiterate unfavorable evidence. Furthermore, the court has left unclear, when, and under what circumstances, the claimant enjoys an absolute right to have his subpoena request honored.

Secondly and more significantly, if hearsay is nevertheless admitted, *Perales* appears to have applied the "residuum rule" to Social Security hearings so as to establish that hearsay alone does not constitute substantial evidence. To the extent this latter aspect of the *Perales* decision is followed, hearsay may be of little future significance in Social Security

46. 2 DAVIS, *supra* note 35, at 296.

47. *Id.*

48. G. & C. Merriam Co. v. Syndicate Pub. Co., 207 F. 515, 518 (2d Cir. 1913).

hearings. This would have the result of preventing properly admitted evidence from being given any purposeful effect, thus making hearsay a mere makeweight; excluding much evidence that is reliable and necessary for a fair adjudication of the case; and increasing the backlog in administering to thousands of disability claims each year and adding immeasurably to the costs incurred in litigation by both the administration and the claimant. On this point, however, the interpretation of whether a claimant has a right to subpoena and cross-examine the author of the hearsay is relevant because the more safeguards provided the claimant when the hearsay is first introduced, the greater the justification for affording it substantial weight in the decision on the merits.

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