

# 11-3134

*To Be Argued By:*  
BRENDA M. GREEN

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 11-3134**

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ZEWEE DAKAR IMPALA,

*Plaintiff-Appellant,*

v.

MICHAEL ASTRUE  
COMMISSIONER OF SOCIAL SECURITY,  
*Defendant-Appellee.*

—  
ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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DAVID B. FEIN  
*United States Attorney  
District of Connecticut*

BRENDA M. GREEN  
*Assistant United States Attorney*  
ROBERT M. SPECTOR  
*Assistant United States Attorney (of counsel)*

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## Statement of Jurisdiction

The district court (Vanessa L. Bryant, J.) had subject matter jurisdiction over this social security case under 42 U.S.C. § 405(g). Judgment entered on June 15, 2011. A12.<sup>1</sup> On August 2, 2011, Zeewe Dakar Impala (“Impala”) filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). PA 348. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

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<sup>1</sup> Impala filed the record in this case which is referred to as the “Plaintiff-Appellant’s Appendix.” Citations to the appendix will be noted as “PA” with the page number. Impala also submitted, as part of his opening brief, Exhibits A (the district court’s decision), B (the ALJ’s decision), and C (the Decision Review Board’s decision), which will each be referred to as “A,” “B”, and “C” along with the page number.

**Statement of Issues  
Presented for Review**

I. Whether the Administrative Law Judge (“ALJ”) failed to develop fully Impala’s medical record in determining that there was insufficient evidence to substantiate the existence of a medically determinable impairment, pursuant to 20 C.F.R. § 416.920(c).

II. Whether the ALJ’s finding that Impala had no severe medically determinable impairment was supported by substantial evidence.

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

Docket No. 11-3134

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*Plaintiff-Appellant,*

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ON APPEAL FROM THE UNITED STATES DISTRICT  
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**BRIEF FOR THE UNITED STATES OF AMERICA**

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### **Preliminary Statement**

On March 3, 2008, Impala sought Supplemental Security Income payments (“SSI”) from the Social Security Administration (“SSA”), alleging that he had been disabled since January 1, 1988, due to a blood disease known as leukopenia, an enlarged prostate, and a back injury. After conducting a hearing at which Impala testified, and considering medical evidence provided by Impala and his attorney, the ALJ denied Impala’s claim, finding that he was not entitled to SSI because the evidence did not establish that

he had a severe medically determinable impairment. The Decision Review Board selected Impala's claim for review, but it did not complete its review of Impala's claim during the time allowed, rendering the ALJ's decision as the final decision subject to judicial review. Impala filed a motion to reverse the ALJ's decision with the district court, and the district court denied that motion.

In this appeal, Impala advances two theories in support of his contention that substantial evidence does not support the ALJ's decision. He argues first that the ALJ failed to develop properly Impala's medical record and second that the ALJ improperly determined that there were no medical signs or laboratory findings to substantiate the existence of a medically determinable impairment, pursuant to 20 CFR § 416.920.

For the reasons set forth below, these arguments lack merit. The ALJ properly concluded, based on substantial evidence and a sufficiently developed record, that Impala had not met his burden of demonstrating that he was disabled. The district court's judgment should be affirmed.

## Statement of the Case

Impala filed an application for SSI on March 3, 2008. PA 103, 108, 135, 164. Impala's application was denied initially and on reconsideration. PA 45-51. Impala requested a hearing before an ALJ, which was held on May 11, 2009. PA 12-42, 52. Impala, who was represented by an attorney, appeared and testified at the hearing. PA 12-42. Upon reviewing all of the evidence of record, the ALJ issued a decision on September 2, 2009, in which he found that Impala was not entitled to SSI because the evidence did not establish that Impala had a severe medically determinable impairment. PA 7-11.

The Decision Review Board selected Impala's claim for review, but it did not complete its review of Impala's claim during the time allowed. PA 1-4. This rendered the ALJ's decision the final decision of the Commissioner subject to judicial review. PA 1-3.

On April 4, 2010, Impala filed a complaint for judicial review with the district court as provided in Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g). On June 15, 2011, the district court (Vanessa L. Bryant, J.) issued a decision granting the government's motion to affirm the ALJ's decision and denying Impala's motion to reverse and remand the ALJ's decision. A1-A12. Judgment entered on June 16, 2011. Impa-

la filed a timely notice of appeal from the district court's ruling on August 2, 2011.

**Statement of Facts and Proceedings  
Relevant to this Appeal**

Impala was 55 years old at the time of the ALJ's decision. PA 141. He graduated from high school in 1972. PA 103. From 1973 to 1975, Impala worked as a dishwasher, but this work was performed more than fifteen years prior to his application date. PA 19, 136. Impala was incarcerated in federal prison from March 1997 to February 2008. PA 155. He had been receiving disability benefits as of June 1991, but his benefits were terminated in April 1997 when it was learned that he was incarcerated. PA 132. Impala reapplied for benefits on March 3, 2008.<sup>2</sup>

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<sup>2</sup> Impala had filed a supplemental security application associated with a back injury in approximately 1991. PA 155. Impala received benefits from June 1991 through March 1997. PA 155, 336. Those benefits were discontinued due to his federal conviction. PA 155, 335-336. When Impala filed his application for supplemental security income on March 3, 2008, it was noted that a previous application had been allowed in June, 1991 and the location of the prior folder was "L47." PA 132. According to Social Security Program Operations Manual Systems, Section D1 20505.005, the location code "L47" signifies that the folder has been destroyed. As the district court

## **I. Medical evidence that was presented to the ALJ**

### **A. Medical treatment while incarcerated**

According to Impala's records of the medical treatment he received while incarcerated, in July 1999, Impala reported a past history of a blood disease known as leucopenia, asthma, and a "prostate problem" since 1994. PA 243, 269, 317. He denied taking any medications. PA 243, 269. Impala underwent eye examinations in 1999, 2002, and 2003, and received prescription glasses. PA 254-268. At a physical examination in June 2001, it was noted that Impala's prostate was mildly enlarged, there was mild swelling of the right foot, and a callous was noted in the plantar area. PA 313, 411. Impala complained of back pain in September 2005 after engaging in strenuous exercises. PA 232. Tenderness of the right sub-scapula was noted on palpation. Impala was diagnosed with muscle strain and prescribed ibuprofen. PA 232.

In February 2000, Impala asked for orthopedic shoes, stating that he did not have foot pain

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found, "Regardless of its availability, it does not appear to be relevant because it concerned a back injury while the plaintiff's current application did not allege a back injury." A9-A10.

when he wore sneakers, but he experienced pain when wearing the State-issued boots. PA 279. He was advised that he had no deformities that warranted special shoes. PA 279. When he complained of foot pain again in November 2000, Impala was approved for soft shoes for thirty days. PA 314. Soft shoes were authorized, again, in June 2001 for thirty days. PA 398. Impala complained of foot pain in January 2004 and again requested special shoes, but examination of the feet was unremarkable. PA 300. Impala reported calluses on his right foot in late 2005 and early 2006, and asked permission to wear soft shoes. PA 231, 233. Impala was informed that he did not meet the guidelines for approval of soft shoes. PA 233.

### **B. Competency evaluation while incarcerated**

In conjunction with his criminal prosecution, Impala underwent a mental health evaluation at the Federal Correction Institution in Butner, North Carolina in November 1998 by William Grant, M.D., a psychiatrist, and Angela Coleman, M.A., a psychology intern. PA 334-342. The purpose of the evaluation was to determine if Impala was competent to be sentenced. PA 332. Dr. Grant and Ms. Coleman issued a report on January 14, 1999 which indicated that, in their view, Impala was competent to go forward

with sentencing and that his refusal to work with his attorneys was not due to any mental disease or defect. PA 332, 341.

In preparation for that report, they took a history from Impala in which he provided the following information: Impala was first arrested at the age of eighteen, and he was in and out of jail since that time. PA 335, 368. His most recent conviction occurred in July 1998 on charges of bank robbery and unlawful possession of a firearm by a convicted felon. PA 334. Dr. Grant remarked that, upon admission to the facility, Impala underwent a routine physical examination. PA 337. His medical history was described as unremarkable except for a history of a dislocated right shoulder ten years prior, asthma, peptic ulcer disease, and leukopenia. PA 337. He was taking no medications. PA 337. Impala's white blood cell count was low. PA 337, 383.

Mental status examination upon admission showed Impala as highly verbal and articulate. PA 337. The study found that there was no evidence of depression, hallucinations, or delusions. Impala's attitude was characterized as not of paranoid suspiciousness, but rather, narcissistic assertiveness. PA 337. His thought processes were clear, logical, and goal-directed, and he was not mentally confused. PA 337. Dr. Grant noted that Impala did not participate in the usual

structured activities at the prison, but spent most of his free time in the law library working on his case. PA 339. Impala was not disruptive, nor was he a problem for prison management. PA 339.

Dr. Grant administered the Wechsler Adult Intelligence Scale -2 to Impala. PA 339. Impala earned a verbal I.Q. score of 91, a performance I.Q. of 86, and a full scale I.Q. of 89. PA 340. Dr. Grant remarked that these test results did not suggest the presence of any severe cognitive impairment, and he added that the scores likely underestimated Impala's intellectual ability given Impala's negative attitude toward the testing. PA 340. On the Minnesota Multiphasic Personality Inventory - Second Edition, Impala's scores were representative of persons who are grouchy, dissatisfied, and pessimistic in their outlook. PA 340. Such persons are passive-dependent who make excessive demands on others for attention and sympathy, but are resentful of the mildest demands on them. PA 340. Impala's profile also suggested that he was immature, narcissistic, and self-indulgent. Dr. Grant added that there was no indication of a formalized thought disorder. PA 340.

Dr. Grant diagnosed Impala with polysubstance dependence, in remission in a controlled setting; personality disorder, not otherwise spe-

cified, with narcissistic and anti-social features; and leukopenia. PA 340. Dr. Grant explained that the polysubstance dependence diagnosis stemmed from Impala's self-report of drug use in his teens. PA 341.

Dr. Grant opined that Impala's polysubstance dependence and personality disorder did not have a significant impact on Impala's mental or emotional condition at the time he committed the criminal offense or during the evaluation. PA 341. Dr. Grant noted that Impala had refused to work with his attorneys, but he did not relate that behavior to a mental disease or defect. Impala was competent to be sentenced. PA 341. Dr. Grant added that Impala's mental and emotional condition were relevant in terms of Impala's release from prison only to the extent that he would warrant close supervision due to his history of substance and alcohol abuse. PA 341. No medications were prescribed. PA 341.

### **C. Treatment at Hill Health Center**

Upon release from prison in February 2008, Impala established treatment at Hill Health Center. PA 542. On March 8, 2008, Impala reported a history of leukopenia, teeth removal, cataracts, and bladder incontinence due to an enlarged prostate. He reported no psychiatric illnesses. PA 195. Physical examination revealed

Impala in no acute distress, and his heart demonstrated regular rate and rhythm. PA 198.

Approximately two weeks later, Impala complained of difficulty urinating. PA 211. Physical examination was within normal limits with the exception of an enlarged prostate, and he was prescribed Flomax. PA 211.

On May 8, 2008, Impala complained of generalized itching on the trunk and upper extremities and generalized fatigue. PA 195. Impala was diagnosed with enlarged prostate and dyspepsia. PA 196. He was prescribed Mylanta and Flomax. PA 195.

In January 2009, Impala presented to Hill Health Center complaining of prostate pain. PA 212. The prostate was tender on examination. Impala was diagnosed with enlarged prostate and gastroesophageal reflux disease. PA 212.

**D. Treatment by Sidney Bogardus, M.D., gastroenterologist**

Impala presented to Sidney Bogardus, M.D., of Connecticut Gastroenterology Consultants, P.C., on March 6, 2009. PA 540. Impala stated that he was there for treatment of Hepatitis C. According to Dr. Bogardus's treatment notes, the examination was "within normal limits." PA 540-542.

During a follow-up visit on March 27, 2009, Impala reported that he was feeling okay. PA 537. An ultrasound performed on April 3, 2009, showed hepatic cysts and gallbladder polyps, but was otherwise negative. PA 535.<sup>3</sup> An ultrasound follow-up was recommended to confirm the stability of the gall bladder polyps. PA 535.

### **E. Review by Dr. Arthur Waldman**

Impala was asked to attend a consultative examination because of the lack of a recent medical evidence, but Impala refused to attend. PA 186. Indeed, on June 29, 2009, Impala completed a form stating that he refused to keep the appointment because “the court has enough medical evidence . . . .” PA 184.

On April 25, 2009 and April 29, 2009, a State Agency medical consultant, Dr. Arthur Waldman, reviewed Impala’s medical records, includ-

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<sup>3</sup> Impala, through his counsel, provided the ALJ only with Dr. Bogardus’s treatment notes. PA 540-552. On February 9, 2010, after the ALJ had reached his decision, Dr. Bogardus prepared a report as part of Impala’s application for benefits with the Connecticut Department of Social Services. Although Impala did not provide the ALJ with the February 9, 2010 report, he did present it to the district court, which concluded that it was not probative and would not have altered the ALJ’s decision. A9-A10.

ing those from the Hill Health Center. PA 185-186. Dr. Waldman noted that because Impala was unwilling to undergo the consultative medical examination, there was insufficient evidence upon which to decide his claim and to establish a disability. PA 185-186.

#### **F. Impala's testimony**

The ALJ held a hearing on May 11, 2009, at which Impala appeared with an attorney and testified under oath. PA 12-42. At the start of the hearing, the ALJ indicated that he had postponed the hearing to the present date to allow Impala and his counsel to obtain additional medical records. PA 15. He asked Impala's counsel, "[W]ere you able to obtain any additional records?" PA 15. Counsel replied, "Yes, Your Honor. We submitted records from Dr. Bogardus. Those records cover the time period from May 8th of 08 through April 27th of 09. That's a recent addition into the file. And that will cover the information regarding the hepatitis and the interferon treatment." PA 15. Impala's attorney later clarified that the documents he submitted were Dr. Bogardus's "notes from May of 08 through the present." PA 17.

At that point, the ALJ reviewed all of the documents he had in the file and confirmed that Impala and his counsel had no objection to any of them. PA 15. The ALJ also clarified that "the

time frame that we're concentrating on" was "from March 08 to the present" because Impala had originally been granted benefits in 1991, but, due to his incarceration, "had not been getting benefits for a number of years." PA 17-18. At that point, the ALJ asked, "And so do we have complete records from March of 08 to the present?" PA 18. Impala's attorney replied, "Yes." PA 18. The ALJ also asked Impala's attorney if there were treatment records to "substantiate" his impairments claims, and the attorney replied that, although there were no mental health records at the Hill Health Center, where Impala was currently receiving treatment, Impala's prison records documented sufficiently his "physical and/or mental issues." PA 20-21.

At that point, both his own attorney and the ALJ asked Impala questions about his work experience, his daily activities and his health issues. PA 22-42. Impala testified that he had not worked in the past 15 years. PA 24. Impala stated that he suffered from leukopenia, which he described as "the opposite of leukemia" involving "a shortage of white blood cells." PA 24. He said that it caused him to "feel tired" and to "catch colds and things very easily." PA 24. He also said that he was being treated for Hepatitis with "interferon treatments," a drug treatment that was to last between six months to one year.

PA 25. This treatment, which involved weekly injections, also left him feeling tired. PA 25-26.

Impala further testified that he is an active member of the Society of Friends.<sup>4</sup> PA 30. He went to them, and they have been ministering to him. PA 32.

When questioned by his attorney as well as the ALJ, Impala testified that his normal day consisted of going to the soup kitchen, picking up his soup and going to the New Haven green to eat his soup alone. PA 35-37. Then, he claimed he regularly went to the library when it opened, until noon when he went back to the soup kitchen for his next meal. PA 35. After lunch, Impala

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<sup>4</sup> In a letter dated May 14, 2009, Patricia Wallace, a clerk at the New Haven Friends Meeting of the Religious Society of Friends, advised that Impala was an active participant at New Haven Friends Meeting. PA 496. Ms. Wallace stated that, since his release from prison one year prior, Impala was present every week for worship, and that he enriched the organization with his knowledge of and research into local Quaker history. PA 496. Impala participated in programs and activities during the week, and he contributed to the weekly meetings with clean-up. PA 496. Ms. Wallace informed that Impala recently led a well-attended program on how meditation was used in prisons to help inmates and staff live at a deeper level. PA 496.

returned to the library or the green. PA 36. At the library, Impala sometimes used the computers. PA 36. Impala also testified that he received state assistance and food stamps and had a medical card. PA 37-38

At the conclusion of the hearing, the ALJ requested additional documentation from Impala's attorney. Specifically, he asked for a letter from Patricia Wallace, who knew Impala through their church, regarding her impression of Impala's physical and mental "disability issues." PA 38-39. He also asked for any medical report that may have been submitted in conjunction with Impala's separate application for state assistance. PA 41.

## II. The ALJ's decision

On September 2, 2009, ALJ Robert A. DiBiccaro found that, although Impala “has not engaged in substantial gainful activity since March 3, 2008,” “[t]here are no medical signs or laboratory findings to substantiate the existence of a medically determinable impairment.” B9. According to the ALJ, Impala “is alleging disability as of March 3, 2008 for leucopenia, enlarged prostate with bladder incontinence and cataract.” B10. The ALJ chronicled the medical evidence of record when he explained his finding that Impala did not have a severe impairment. B10.

First, the ALJ noted that “the prison record” did not “support the finding of a severe impairment” because, in prison, Impala was “treated for complaints of ear ache, right shoulder pain and right toe nail discoloration.” B10. Also, the results of a physical examination “was within normal limits.” B10.

Second, the ALJ reviewed the Hill Health Center records. According to these records, as of March 8, 2008, Impala had been released from prison after serving an eleven-year sentence. B10. He was not taking any medications, but was complaining of groin itch. B10. He “denied having any shortness of breath, chest pain, headaches and dizziness.” B10. This examina-

tion “was within normal limits.” B10. At a follow-up visit on March 27, 2008, Impala complained that he was having difficulty urinating, was “assessed with an enlarged prostate,” and was “prescribed medication.” B10. At a follow-up visit on May 8, 2008, Impala complained of “generalized prutitis” in the “trunk and upper extremity” and “generalized fatigue.” B10. The physical examination “was within normal limits,” but “lab test[s] were requested,” and Impala “was instructed to return in two months.” B10. Then, at his initial visit with Dr. Bogardus on March 6, 2009, the examination “was within normal limits.” B10. At a follow-up visit with Dr. Bogardus on March 27, 2009, Impala “reported felling okay.” B10. Finally, an April 3, 2009 ultrasound of his abdomen “revealed hepatic cysts and gall bladder polyps, but [was] otherwise [a] negative abdominal ultrasound examination.” B10.

Third, the ALJ addressed Impala’s mental health claims. Noting that he was “also alleging personality disorder and schizophrenia,” the ALJ indicated that “there are no mental treatment records.” B10. “The claimant has not been hospitalized or treated by a psychiatrist or psychologist either in prison or at the Hill Health Center after his release.”<sup>5</sup> B10. Moreover, “the clerk

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<sup>5</sup> Although Impala’s prison records contained a men-

of the claimant's church submitted a letter praising his attendance and work at the church, including leading a discussion about the use of meditation by prisoners and prison staff." B10.

Thus, "[h]aving reviewed all pertinent medical evidence of record," the ALJ found that "the claimant has no severe impairment." B10. According to the ALJ, "There is no significant objective medical evidence in the record of a disabling physical or mental condition." B10. The ALJ noted that, according to Impala's testimony, he had begun interferon treatment for his hepatitis, but there were no medical records from the Hill Health Center to corroborate this testimony. B10. Moreover, despite the fact that the ALJ had ordered Impala to participate in a psychological examination, he had refused to do so, as he had refused "during the state review of his application." B10. The ALJ found that Impala's testimony regarding his impairment was not "fully credible as his claim of inability to do all work activity is not supported by the medical evidence of record." B11.

The ALJ "reviewed the opinions of the state agency medical physicians in the initial and re-

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tal health evaluation, that evaluation was directed solely at determining Impala's competence to go forward with sentencing.

consideration determinations” and gave them “significant weight as they [were] consistent with the medical evidence of record.” B11. “Accordingly, the [ALJ] [found] that the objective medical evidence contained in the record does not establish the existence of a medically determinable impairment that could reasonably be expected to produce the claimant’s symptoms.” B11.

The Commissioner’s Review Board selected the Impala’s claim for review but then notified him on January 28, 2010 that it had failed to complete its review of the ALJ’s decision within the required ninety days. PA at 52-54. Therefore, the decision of the ALJ became final, and the Impala filed his case in the district court.

### **III. The district court's decision**

On June 15, 2011, the district court issued a memorandum of decision upholding the ALJ's conclusion that, although Impala was not performing substantial gainful activity, he did not have any severe medically determinable impairments based on the objective medical evidence in the record. A3. The court laid out the five step sequential evaluation process to an application for SSI. A2.

First, the ALJ must determine whether the claimant is performing substantial gainful work activity. *See* 20 C.F.R. § 416.920 (a) (4) (i). A2.

If the claimant is not performing substantial gainful work activity, the ALJ must proceed to the second step to determine whether the claimant has a severe medically determinable physical or mental impairment or combination of impairments. *See* 20 C.F.R. § 416.920 (a)(4)(ii). A2. The impairment must be expected to result in death or must last or be expected to last for a continuous period of at least twelve months. *See* 20 C.F. R. § 416.909. A2.

If the claimant has a severe impairment, the ALJ must proceed to the third step to determine whether the impairment meets or equals an impairment listed in appendix 1 of the regulations. *See* 20 C.F. R. § 416.920(a)(4)(iii). A2. If the

claimant's impairment meets or equals a listed impairment, the claimant is disabled. A2.

If the claimant does not have a listed impairment, the ALJ must proceed to the fourth step to determine whether the claimant has the residual functional capacity ("RFC") to perform his past relevant work. *See* 20 C.F.R. § 416.920(a)(4)(iv). RFC is defined as the most that a claimant can do despite the physical and mental limitations that affect what he can do in a work setting. *See* 20 C.F.R. § 416.945(a)(1).

If the claimant's RFC indicated that he cannot perform his past relevant work, the ALJ must proceed to the fifth step to determine whether the claimant can perform any other work available in the national economy in light of his RFC, age, education, and work experience. *See* 20 C.F.R. § 416.920(a)(4)(v). The claimant is entitled to SSI if he is unable to perform other such work.

The claimant bears the burden of proof as to the first four steps, while the Commissioner bears the burden of proof as to the fifth step. *Kohler v. Astrue*, 546 F.3d 260, 265 (2d Cir. 2008). A3.

The district court found that the ALJ properly ended his analysis at step 2 of the sequential evaluation process and concluded that Impala

was not disabled. A12. The court found that the ALJ had properly developed the record, A9-A10, had properly assessed Impala's credibility, A11-A12, and had correctly determined that Impala had no severe impairments, A10-A11.

Before the district court, Impala offered, for the first time, a report written by Dr. Bogardus on February 9, 2010. A5. Dr. Bogardus's report constituted "extra-record evidence" which had not been presented either to the ALJ or to the Decision Review Board. The court found that Dr. Bogardus's report met the first prong of *Tirado v. Bowen*, 842F.2d 595, 597 (2d Cir. 1988), because Dr. Bogardus had opined on Impala's ability to work and on the relationship of his various alleged impairments. A8. The court categorized this conclusion as a "close call," however, due to the report's incompleteness and lack of detail.

The district rejected Impala's argument that this report was "new evidence" that was material and relevant to the claimant's condition during the time period for which benefits were denied. A6-A7. The court found that Dr. Bogardus's report was not relevant and probative because it failed to identify physical or mental limitations bearing on Impala's ability to work. A7. Moreover, Dr. Bogardus identified the duration of Impala's conditions as six months or more, while the minimum duration of twelve

months is required by 20 C.F.R. § 416.909. A7. The court also agreed that Impala had failed to meet his burden of showing a reasonable possibility that the report would have caused the ALJ to render a different decision. A7.

The district court found that Dr. Bogardus report established a good prognosis for Impala's hepatitis C, but was unclear as to the leukopenia. A7. Dr. Bogardus stated that Impala's treatment would "likely" worsen his "psychiatric issues" and impact his ability to work, but he did not explain how Impala's work ability would be affected. A7. Dr. Bogardus was similarly imprecise when he noted that Impala "appears to suffer" from depression, anxiety and "possibly other issues" which "may" be worsened by his hepatitis C treatment. A8. The court further emphasized that Dr. Bogardus was a gastroenterologist and not a psychiatrist, so it was reasonable for the ALJ not to accept uncertain opinion regarding Impala's mental condition. A8-A9. Further the court found that Dr. Bogardus failed to evaluate Impala's physical capacity and assigned a "less than minimum required duration to Impala's possible conditions."<sup>6</sup> Moreover, Dr. Bogardus

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<sup>6</sup> The equivocal nature of Dr. Bogardus's report is further illustrated by its statements that the Impala's medications "could cause" side effects and "can affect ability to work." He did not state that the Im-

did not state that Impala would suffer symptoms preventing him from working twelve or more months. In light of all the weaknesses in Dr. Bogardus's report, the district court found that it was not reasonably possible that the ALJ would have concluded that Impala had a severe impairment even if the ALJ had been able to review Dr. Bogardus's report. A8. Thus, the report did not satisfy the materiality requirement of *Tirado*. A8.

The district court also found that Impala failed to show good cause under the third prong of *Tirado*. A8. Dr. Bogardus began treated Impala on March 6, 2009, the ALJ hearing occurred on May 11, 2009, and the ALJ rendered his opinion on September 2, 2009. A8. Dr. Bogardus did not complete his report until February 9, 2010, approximately one week after Impala was notified by the Decision Review Board that it had failed to complete its review of the case and apparently in conjunction with Impala's application for benefits with the Connecticut Department of Social Service. A8-A9. The district court found that nothing in the report suggested that it could have not been completed within the first few months of treatment, thereby failing to meet the second and third prongs of *Tirado* and

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pala actually experienced the specific side effects or that they actually affected his ability to work. A8.

establishing good cause as to why Dr. Bogardus's report was not prepared earlier. A8-A9. The district court thereby held that the case could not be remanded to the Commissioner based on Dr. Bogardus's report. A8-A9.

The district court also found that the ALJ did not commit error by failing to consider Impala's SSI application associated with his back injury in approximately 1991 because those records had been destroyed and were unavailable. A9-A10. Moreover, the district court held that "[r]egardless of its availability, it does not appear to be relevant because it concerned a back injury while Impala's current application did not allege a back injury." A9-A10.

In the same vein, the court rejected Impala's claim that the ALJ had not developed adequately the medical record. The court determined that, even had the ALJ sought an opinion from Impala's treating physician, it would not have mattered since it was not reasonably possible that Dr. Bogardus's report would have changed the ALJ's decision. A10. In making this point, the court pointed out that Impala had refused to augment the record by submitting to a consultative examination, that the ALJ had Dr. Bogardus's treatment notes, and that Impala was represented by counsel at the ALJ hearing. A10. Therefore, the district court found that the ALJ

had satisfied his obligation to develop the record. A10.

The court further found that the ALJ properly determined that Impala did not suffer from a severe impairment. A10. Dr. Bogardus' s report did not establish that Impala's hepatitis C and leukopenia were severe. A10. Dr. Grant's psychiatric report likewise failed to meet the burden of establishing that Impala had a severe impairment. A10. Although Impala was diagnosed with polysubstance dependence and personality disorder with narcissistic and antisocial features, the prison psychiatrist determined that they "did not have a significant impact on [the Impala's] mental or emotional condition . . . during the current evaluation. A10-A11. The district court found that, with regard to Impala's enlarged prostate with bladder incontinence, Impala only cited to two complaints of incontinence in prison in 2005, including a request for diapers, and a treatment note from March 6, 2009 indicating that he had to urinate "more than twice a night." A11. The district court found that the ALJ properly reviewed the records and determined that Impala's symptoms were not severe and did not show a significant impact on his ability to work. A11.

According to the district court, because the ALJ determined that Impala did not have a

medically determinable impairment, he was not required to proceed with a credibility assessment pursuant to 20 C.F.R. § 416.929. Still, the ALJ found that Impala was “not fully credible” because the medical evidence did not support his claim that he was unable to work. A12. The district court concluded that the credibility finding, although not required, was proper due to the inconsistency between Impala’s subjective symptoms and the objective medical evidence. A12. “Moreover, to the extent a credibility assessment was improper, it was harmless because it did not affect the outcome.”<sup>7</sup> A12.

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<sup>7</sup> Impala’s case did not proceed past Step Two, therefore the ALJ was not required to assess Impala’s credibility. Here, however, the ALJ, in granting Impala the benefit of the doubt, considered Impala’s subjective complaints. B11. While evidence of pain and other symptoms is an element to be considered in the adjudication of disability claims, this consideration occurs at Step Four of the sequential evaluation process when an individual’s residual functional capacity is assessed. *See Meadors v. Astrue*, 370 Fed.Appx. 179, 183 (2d Cir. March 23, 2010) (unpublished decision) (citation omitted). In the instant case, the ALJ determined that the record evidence “does not establish the existence of a medically determinable impairment that could reasonably be expected to produce the claimant’s symptoms.” B11. In light of this evidence, the ALJ correctly determined

## Summary of Argument

The ALJ's determination that Impala had failed to meet his burden to establish that he was disabled under the Act and that he suffered a severe medically determinable impairment was supported by substantial evidence in the record, and the district court properly affirmed this determination. This Court should decline any invitation to substitute its judgment for that of the ALJ.

Impala's first argument, that the ALJ failed to develop the record, is without merit. It was Impala's burden to prove that he was disabled within the meaning of the Social Security Act, 20 C.F.R. § 416.912 (a). Although both the ALJ and Impala had obligations in assembling the records, the claimant had the burden of producing evidence to be used to support conclusions about his medical impairments, 20 CFR § 416.912(a). Moreover, the ALJ properly collected the medical evidence, confirmed with Impala and his counsel that they had given him all relevant medical records, and even left the hearing open to allow Impala's counsel to submit additional medical documentation. The ALJ also

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that the record did not establish the existence of a medically determinable impairment that could reasonably be expected to produce Impala's symptoms.

ordered Impala to undergo a psychological examination, but Impala refused to attend the examination or earlier examinations that had been scheduled during the state review of his application.

Impala's second argument, that the ALJ erred by failing to reasonably evaluate the substantial evidence of Impala's medical impairment, is also without merit. To receive SSI, a claimant must establish a severe impairment that significantly limits his ability to do basic work activities. 20 C.F.R. § 416.920(c). The ALJ correctly determined that the objective medical evidence in the record did not establish that Impala had a severe medically determinable impairment. He reviewed carefully all of the medical records and treatment notes that he had, as well as Impala's own testimony, and properly concluded that Impala's claims of physical and mental disabilities were simply not borne out in the objective medical evidence.

The judgment of the district court affirming the ALJ's decision should therefore be affirmed.

## Argument

- I. **The ALJ properly developed the record as to Impala’s claimed disability and correctly concluded that Impala had presented insufficient evidence of a severe medically determinable impairment.**

### **A. Governing law and standard of review**

The Social Security Act creates an entitlement program for qualifying persons who are “disabled” within the meaning of the Act. *See* 42 U.S.C. § 423. “To show ‘disabled’ status a claimant must establish ‘inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . which has lasted or can be expected to last for a continuous period of not less than 12 months.’” *Shaw v. Chater*, 221 F.3d 126, 131 (2d Cir. 2000) (*quoting* 42 U.S.C. § 423(d)(1)(A)). “The impairment must be of ‘such severity that [the claimant] is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.’” *Id.* at 131-32 (*quoting* 42 U.S.C. § 423(d)(2)(A)). *See also* *Draegert v. Barnhart*, 311 F.3d 468, 472 (2d Cir. 2002) (same).

In light of the foregoing standard, the Commissioner has issued regulations prescribing a five-step analysis for the consideration of disability claims. See 20 C.F.R. § 404.1520. “In essence, if the Commissioner determines (1) that the claimant is not working, (2) that he has a ‘severe impairment,’ (3) that the impairment is not one that conclusively requires a determination of disability, and (4) that the claimant is not capable of continuing in his prior type of work, the Commissioner must find him disabled if (5) there is not another type of work the claimant can do.” *Draeger*, 311 F.3d at 472; see also *Shaw*, 221 F.3d at 132 (outlining 5-step analysis); *Curry v. Apfel*, 209 F.3d 117, 122 (2d Cir. 2000) (same). “The Commissioner bears the burden of proof on th[e] last step, while the claimant has the burden on the first four steps.” *Shaw*, 221 F.3d at 132; see *Butts v. Barnhart*, 388 F.3d 377, 381 (2d Cir. 2004); *Curry*, 209 F.3d at 122.

This Court reviews the Commissioner’s denial of disability benefits using the same standard as that applied by the district court: it is limited to determining whether the denial was premised on an error of law or is otherwise not supported by substantial evidence. See 42 U.S.C. § 405(g); *Veino v. Barnhart*, 312 F.3d 578, 586 (2d Cir. 2002); *Yancey v. Apfel*, 145 F.3d 106, 111 (2d Cir. 1998). “Where there is a reasonable basis for doubt whether the ALJ applied correct legal

principles, application of the substantial evidence standard to uphold a finding of no disability creates an unacceptable risk that a claimant will be deprived of the right to have her disability determination made according to the correct legal principles.” *Schaal v. Apfel*, 134 F.3d 496, 504 (2d Cir. 1987) (quoting *Johnson v. Bowen*, 817 F.2d 983, 986 (2d Cir. 1987)). Where, however, “the Commissioner’s decision rests on adequate findings supported by evidence having rational probative force, [this Court] will not substitute [its] judgment for that of the Commissioner.” *Veino* 312 F.3d at 586; *see also Yancey*, 145 F.3d at 111.

To enable a reviewing court to decide whether the determination is supported by substantial evidence, the ALJ must set forth the crucial factors in any determination with specificity. *Ferraris v. Heckler*, 728 F.2d 582, 587 (2d Cir. 1984). Thus, although the ALJ is free to accept or reject the testimony of any witness, a finding that the witness is not credible must nevertheless be set forth with sufficient specificity to permit intelligible review of the record. *Williams ex rel. Williams v. Bowen*, 859 F.2d 255, 260-61 (2d Cir. 1988). Moreover, when a finding is potentially dispositive on the issue of disability, there must be enough discussion to enable a reviewing court to determine whether substantial evidence exists

to support that finding. *See generally Ferraris*, 728 F.2d at 587.

The Social Security Act provides that “[t]he findings of the Commissioner . . . as to any fact, if supported by substantial evidence, shall be conclusive . . . .” 42 U.S.C. § 405(g). *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Veino*, 312 F.3d at 586. A court does not “determine de novo whether [a claimant] is disabled; [instead, the court] ascertain[s] whether the decision was supported by substantial evidence.” *Halloran v. Barnhart*, 362 F.3d 28, 31 (2d Cir. 2004) (per curiam) (internal citations and quotation marks omitted). Where the Commissioner’s determination is supported by substantial evidence, the decision must be upheld. *See Alston v. Sullivan*, 904 F.2d 122, 126 (2d Cir. 1990).

In considering opinions by a claimant’s treating physician on the issue of disability, the SSA will afford controlling weight if the opinion is supported by medical tests and clinical evidence found to be consistent with other substantial evidence in the record. *Schisler v. Sullivan*, 3 F.3d 563, 567 (2d Cir. 1993); *see also Shaw*, 221 F.3d at 134; *see* 20 C.F.R. § 404.1527(d). “[S]ome kinds of findings,” however, “including the ultimate finding of whether a claimant is disabled and cannot work – are reserved to the Commissioner . . . .” *Snell v. Apfel*, 177 F.3d 128, 133 (2d

Cir. 1999) (internal citations and quotations omitted); see 20 C.F.R. § 404.1527(e). Accordingly, “[a] treating physician’s statement that the claimant is disabled cannot itself be determinative.” *Snell*, 177 F.3d at 133.

The term “substantial” does not require that the evidence be overwhelming, but it must be “more than a mere scintilla.” *Richardson*, 402 U.S. at 401 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence need not compel the Commissioner’s decision; rather substantial evidence need only be evidence that “a reasonable mind might accept as adequate to support [the] conclusion.” *Id.* (quoting *Consol. Edison*, 305 U.S. at 229); *Veino*, 312 F.3d at 586.

The ALJ must affirmatively develop the record even if the claimant is represented by counsel, in light of the non-adversarial nature of a benefits proceeding.” *Moran v. Astrue*, 569 F.3d 108, 112 (2d Cir 2009). The regulations state that the Commissioner “will develop [an individual’s] complete medical history” and the Commissioner “will make every reasonable effort to help [the individual] get medical reports from [his] own medical sources when [the individual] gives [the Commissioner] permission to do so.” 20 C.F.R. § 416.912(d). The regulations further provide that when the evidence received from a

treating physician or other source is inadequate for purposes of making a disability determination, the Commissioner will re-contact the treating physician or other source to determine whether additional information is available. 20 C.F.R. § 416.912(e). Additional evidence or clarification is sought when the report from the physician or other source contains a conflict or ambiguity that must be resolved, does not contain necessary information, or does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 416.912(e)(1).

## **B. Discussion**

### **1. The ALJ properly developed the record**

It is Impala's burden to prove that he is disabled within the meaning of the Social Security Act. *See* 20 C.F.R. § 416.912 (a). This includes the burden of establishing the existence of a medically determinable impairment. *See Bowen v. Yuckert*, 482 U.S. 137, 146 (1987). The ALJ's duty to develop the record does not excuse Impala's burden of producing evidence to establish disability. 20 C.F.R. §§ 404.1512(a), (c). In this case, Impala was represented by counsel, and the ALJ conferred with counsel throughout the proceeding to make sure that he had all the necessary medical records and documentation to

allow him to decide whether there was any “significant objective medical evidence in the record of a disabling physical or mental condition.” PA 10. Specifically, the ALJ asked Impala’s counsel if the file contained the complete medical records from March 3, 2008 through the hearing date, and Impala’s counsel confirmed that it did. PA 18. The ALJ also asked Impala’s counsel whether the prison records were sufficient documentation of Impala’s medical impairments, and counsel advised that “the records definitely document any physical and/or mental issues.” PA 20-21.

Impala never sought assistance from the ALJ in obtaining any medical records. In fact, when the ALJ learned that Impala was receiving state aid, he noted that an application typically contained a functional capacity form prepared by a physician and left the record open for an additional four days after the administrative hearing so that Impala’s counsel could obtain it. Impala’s counsel only submitted additional medical records from the Hill Health Center. The ALJ also ordered Impala to undergo a consultative examination, but Impala refused to cooperate.<sup>8</sup>

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<sup>8</sup> The SSA also attempted to assist Impala in securing medical evidence of his alleged impairments, but he refused to cooperate. At the initial administrative level, the SSA attempted to arrange for Impala to undergo a consultative medical examination. PA

Impala argues that the ALJ failed to meet his duty to develop the record when he failed to request medical records and opinions from Impala's current treating sources and instead "relied upon gaps in the medical records and relied upon the absence of treating physician opinion to find Impala was not disabled." *See* Appellant's Br. at 10. Impala asserts that the ALJ's failure to develop the record adequately is an independent ground for vacating the ALJ's decision and remanding the case. *See id.* at 11. Impala further asserts that the record was devoid of opinion evidence from Impala's treating source, that the ALJ found no significant medical evidence of a disabling physical or mental condition and that the ALJ failed to request opinion evidence regarding the severity of Impala's alleged impairments and functional limitations. *Id.*

Impala's contention fails, as it is no more than an attempt to absolve himself of his responsibility to produce evidence of his disability. While the regulations require the Commissioner to assist a claimant in obtaining "medical re-

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143, 145. Impala refused to attend any consultative examination that was not held at Hill Health Center. PA 143. An attempt was then made to arrange for another consultative examination, PA157, but Impala again refused to attend, claiming that "you have enough of my information." PA 160.

ports” in order to develop the claimant’s “medical history,” *i.e.*, medical treatment “records,” there is no requirement that the Commissioner seek out functional capacity assessments from a claimant’s treating sources. 20 C.F.R. § 416.912(d). The claimant has the burden of producing evidence that can be used to reach conclusions about the claimant’s medical impairments, 20 CFR § 416.912(a).

Moreover, Impala never sought assistance from the ALJ in obtaining any medical records, nor did Impala ever indicate that he needed assistance in gaining access to his medical records. In fact, the ALJ specifically addressed Impala and his counsel on this issue and confirmed with them that he had all the medical records he needed to make his decision. The ALJ then went out of his way to request additional documentation which could have helped Impala’s application. After learning that Impala was receiving state assistance, the ALJ asked him to obtain a copy of the supporting functional capacity assessment, if one existed, because “the doctors check[] boxes and indicate[] either mental or physical functional capacity.” PA 38, 41. The ALJ also sought documents from a clerk at Impala’s church to support his testimony that he regularly attended counseling at the church. PA 32-34. In addition, the ALJ left the record open for the submission of additional evidence and

stated that he would wait for the two additional submissions before making any decision. PA 41.

Four days after the administrative hearing, Impala's counsel submitted medical evidence from Hill Health Center. PA 41, 497-531. The ALJ also received a letter from Pat Wallace. Although it did not state that Impala was receiving any counseling at the church, it did praise his attendance and work at the church, including his role as a discussion leader. PA10. The ALJ left the record open so that additional documents could be provided by Impala's counsel. After additional documents were provided to the ALJ, the ALJ properly determined there were no medical records to establish that Impala had a medical disability impairment.

Under such circumstances, and given counsel's duty under 20 C.F.R. § 416.1540(b)(1) to present relevant evidence, the ALJ was entitled to presume that Impala had made his best case. Impala failed to meet his burden of production; the ALJ did not fail in his duty to adequately develop the record. Impala cannot fault the ALJ for his own failure to support his claim of disability and, thus, his argument lacks merit. Moreover, the SSA attempted to assist Impala in securing medical evidence of his alleged impairments, but Impala refused to cooperate. At the initial administrative level, the SSA attempted

to arrange for Impala to undergo a consultative medical examination, and he refused to do so. PA 143, 145; 20 C.F.R. § 416.918 (stating that, if a claimant refuses to attend a consultative examination without a good reason, his application for disability benefits may be denied on that basis).

Impala further argues that, to the extent that the ALJ “identified a gap in the record,” he should have sought out treatment records. See Appellant’s Br. at 12. In making this argument, he relies on *Corcoran v. Astrue*, No. 3:04CV946 (SRU), 2009 U.S. Dist. LEXIS 5563 (D. Conn. Jan. 26, 2009). His reliance on *Corcoran*, however, is wholly misplaced. In *Corcoran*, when the plaintiff argued that the ALJ failed to develop the record to ensure he had a full and fair hearing, the court held that the ALJ owed no special duty to the plaintiff, that the ALJ did not mislead the plaintiff and that the record had been sufficiently developed. *Corcoran*, 2009 U.S. Dist. LEXIS 5563, at \* 6. More specifically, the court in *Corcoran* held that:

The ALJ’s duty to further investigate the facts is not absolute and depends on the record before the ALJ. See [*Schaal*, 134 F.3d at 505] (finding that an ALJ had no obligation to develop the record concerning possible mental disability when treatment

notes from a medical provider indicated that the plaintiff's symptoms were under 'adequate control' and that medication produced 'good results'). Where the plaintiff's treating physician submits information to the ALJ indicating the plaintiff is not under an alleged disability, the ALJ may not need to further develop the record on that issue".

*Corcoran* 2009 U.S. Dist. LEXIS 5563, at \*7-8.

The facts in *Corcoran* are similar to the facts here. The treatment notes from Dr. Bogardus and Impala's prison mental health notes all establish that Impala's condition was under control and that he was not suffering from an alleged disability. Thus, the ALJ did not need to further develop the record on those issues.

Additionally in *Corcoran*, as in the present matter, *Corcoran* was represented by counsel at his hearing, and the ALJ owed *Corcoran* only a general duty to develop the record. *Corcoran* 2009 U.S. Dist. LEXIS 5563, at \* 8 (stating that "the transcript of the hearing showed the ALJ did not discourage the plaintiff's attorney presenting *Corcoran*'s case . . ."). Here, the ALJ asked Impala's counsel whether he had complete medical records and whether there were any additional records available that were prepared in support of Impala's application for state aid and

left the record open so that Impala's counsel could supplement it additional supportive documentation. Impala's counsel represented to the ALJ that he thought they had submitted all the records and "I think that's sufficient." PA 20. The ALJ also asked Impala detailed questions about his daily living, physical conditions and limitations. PA 21-29, 33-34, 35-42. As such, the ALJ properly developed the record and found that the objective medical evidence contained in the record did not establish the existence of a medically determinable impairment that could reasonably be expected to produce the claimant's symptoms. PA 11.

Further, it is Impala's burden to prove that he is disabled within the meaning of the Social Security Act. 20 C.F.R. § 416.912(a); *Bowen*, 482 U.S. at 146. This includes the burden of establishing the existence of a medically determinable impairment. *Id.* at 146. It is not unreasonable to require Impala, who is in a better position to provide information about his own medical condition, to do so. *Id.* at 146 n.5. The ALJ's duty to develop the record does not excuse Impala from his burden of producing evidence to establish disability. 20 C.F.R. §§ 404.1512(a),(c).

**2. The ALJ properly determined that Impala did not have a severe medical impairment.**

The ALJ properly found that Impala did not have a severe impairment, which is one that significantly limits an individual's ability to do basic work activities. 20 C.F.R. §416.920 (c). Impala failed to bear his burden of producing evidence of a severe medically determinable impairment, as is mandated by 20 C.F.R. §§ 416.908 and 416.912.

First, the submitted medical evidence, and, in particular, Dr. Bogardus's treatment notes, did not establish that Impala's hepatitis C and leukopenia were severe. Indeed, there was scant information in the medical records about these conditions and certainly not enough information to allow for the ALJ to reach the conclusion that they qualified as severe impairments. The record evidence, including that cited by Impala, does not demonstrate the presence of an impairment that would have more than a minimal effect on Impala's ability to perform basic work activities. The ALJ, for instance, noted that despite his reports, Impala's physical examinations were consistently within normal limits. PA 10, 196-198, 537, 542.

As to Impala's claims of bladder incontinence and an enlarged prostate, the records were like-

wise devoid of evidence of a severe impairment. Impala only cited to two complaints of incontinence in prison in 2005, including a request for diapers, and made only one recent complaint, during a March 6, 2009 appointment, when he complained that he had to urinate “more than twice a night.” A11. The mere fact that Impala was diagnosed with an enlarged prostate and was prescribed pharmacological treatment does not equate to a finding that the condition is severe. *See William*, 859 F.2d at 259.

Second, there was very little information submitted to substantiate any kind of severe mental health impairment. According to Dr. Grant’s competency report, although Impala was diagnosed with polysubstance dependence and personality disorder with narcissistic and anti-social features, these conditions “did not have a significant impact on [Impala’s] mental or emotional condition . . . during the current evaluation.” A10-A11. Indeed, Dr. Grant’s report depicts Impala as someone who was clear-headed, logical, and goal-directed, not someone who was mentally confused. PA 337. It also labeled him as a narcissistic and “passive-dependent” person who makes demands on others for attention and sympathy, but is resentful when others put demands on him. PA 337, 340.

Third, Impala provided testimony that the ALJ found to be incredible and inconsistent with the medical record. Impala was discussing subjective symptoms that were inconsistent with the objective medical records. The ALJ is not obliged to accept as true Impala's self-serving, subjective statements. *See Marcus v. Califano*, 615 F.2d 23, 27 (2d Cir. 1979). Moreover, when given the opportunity to supplement the record by submitting to an additional consultative examination, Impala refused to do so.

Impala contends that there is "substantial medical evidence consisting of signs symptoms, and clinical and laboratory findings showing medically determinable impairments of personality disorder, leukopenia, bladder incontinence, and Hepatitis B and C,"<sup>9</sup> Appellant's Br. at 12-13, and that "there is substantial evidence that the Appellant's medically determinable impairments . . . are severe." *Id.* In support of this argument, Impala provides a detailed recitation of his medical records pertaining to Impala's

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<sup>9</sup> With regard to his Hepatitis C and leukopenia, Impala cites only to his own report in 1998 that he had a history of leukopenia, his hearing testimony that he was taking Interferon and Ribavirin, and the lab results that showed a low neutrophil count and Hepatitis B and C. He cites to no medical evidence showing that these impairments are severe.

treatment for personality disorder, Appellant's Br. at 14-19, leukopenia, Appellant's Br. at 19-20, enlarged prostate with bladder incontinence, Appellant's Br. at 20-21 and Hepatitis C, Appellant's Br. at 21-22. Impala's assessment of the record evidence is inaccurate.

The mere fact that Impala was diagnosed with these impairments and was receiving treatment for the same is insufficient to prove disability pursuant to 20 C.F.R. § 416.920(c). *Williams*, 859 F.2d at 259. Nothing in the record evidence indicates that these impairments resulted in more than a minimal effect on Impala's abilities to perform basic work activities.

Impala also contends that “[b]oth the ALJ and District Court failed to assess the medical records while Impala was incarcerated.” Appellant's Br. at 18. The prison records that were contained in the administrative record before the ALJ and the district court, however, did not establish that Impala suffered from a medically determinable impairment, let alone a severe impairment. As discussed above, the evidence in the prison records of any physical impairment suffered by Impala is dated, and there is no recent indication in those records of any medical condition relevant to the March 2008 time-frame. As the ALJ explained, and Impala's attorney agreed, the relevant time period for Impala-

la's application was from the application date through the hearing date, since Impala had spent the previous eleven years in prison. Moreover, although Impala was diagnosed with polysubstance dependence and a personality disorder as part of his 1999 competency examination, Dr. Grant determined that they "did not have a significant impact on [Impala's] mental or emotional condition . . . ." PA 341.

Impala also attacks the ALJ for stating that there were "no mental treatment records," B10, when, in fact, the prison competency report constituted such records. According to Impala, the prison records show that there was psychiatric treatment identifying signs, symptoms and clinical findings supporting a diagnosis of a medically determinable impairment, and the ALJ failed to assess the relevant signs, symptoms or laboratory findings presented in these records. See Appellant's Br. at 18 (citing *Gonzalez v. Astrue*, No. 1:07CV487, 2009 WL 4724716 (N.D.N.Y. Dec. 2, 2009)).

Impala's reliance on *Gonzalez* is misplaced. The *Gonzalez* Court found that "the regulations do not empower the ALJ to require a preferred but absent sign, symptom, or laboratory finding . . . [instead] the ALJ must assess the relevant signs, symptoms or laboratory findings presented in the record, *seek any necessary addi-*

*tional evidence from claimant's doctors, or request consultative examinations if the available evidence is insufficient."* Gonzalez, 2009 U.S. Dist. LEXIS 111765, at \* 14. (emphasis added, citations omitted).

Here, the ALJ did just that. He reviewed the prison records and found absolutely no evidence of a severe mental or physical impairment and even ordered Impala to undergo a consultative examination to enhance the record. Even after Impala's incarceration, he received no mental health treatment, and, when he first reported to the Hill Health Center after his incarceration, he reported that he suffered from no psychiatric issues. PA 196. Indeed, since his release, Impala stated that he spends his days at the library reading whatever is available and using the computers, activities that undermine any claim of memory or concentration problems. PA 36.

The ALJ properly found that, because there was no medical evidence to establish a severe physical or medical impairment, Impala cannot be found to be disabled under Step Two of the sequential evaluation. At the administrative hearing, the ALJ questioned Impala and his counsel extensively to make sure that the record was complete and that Impala had submitted all available and relevant medical records to support his claim. He provided Impala with addi-

tional time to submit additional reports and even ordered Impala to participate in a consultative examination to enhance the record. The ALJ reviewed the evidence that was presented at the administrative hearing, and the ALJ questioned Impala and his counsel to determine whether there was any possible additional evidence. The ALJ then properly considered all the medical records and other supporting documentation that was submitted to him for review and correctly determined that the record did not establish the existence of a medically determinable impairment that could reasonably be expected to produce Impala's symptoms. Further, the ALJ compared a broad reading of the record with the opinions of disability and found it was inadequate to support a finding of severe impairment in accordance with 20 C.F.R. § 416.920(c). The ALJ's decision was well-supported by the record evidence and should be affirmed.

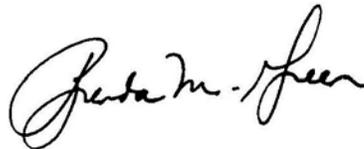
**Conclusion**

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: February 17, 2012

Respectfully submitted,

DAVID B. FEIN  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

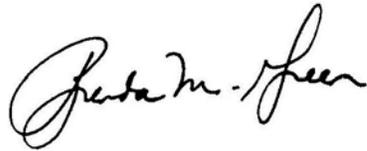
A handwritten signature in black ink, appearing to read "Brenda M. Green". The signature is written in a cursive, flowing style.

BRENDA M. GREEN  
ASSISTANT U.S. ATTORNEY

Robert M. Spector  
Assistant United States Attorney (of counsel)

**Federal Rule of Appellate Procedure  
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 10,025 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in cursive script, appearing to read "Brenda M. Green".

BRENDA M. GREEN  
ASSISTANT U.S. ATTORNEY

## **Addendum**

**20 C.F.R. § 404.1520. Evaluation of disability in general.**

(a) General--

(1) Purpose of this section. This section explains the five-step sequential evaluation process we use to decide whether you are disabled, as defined in § 404.1505.

(2) Applicability of these rules. These rules apply to you if you file an application for a period of disability or disability insurance benefits (or both) or for child's insurance benefits based on disability. They also apply if you file an application for widow's or widower's benefits based on disability for months after December 1990. (See § 404.1505(a).)

(3) Evidence considered. We will consider all evidence in your case record when we make a determination or decision whether you are disabled.

(4) The five-step sequential evaluation process. The sequential evaluation process is a series of five "steps" that we follow in a set order. If we can find that you are disabled or not disabled at a step, we make our determination or decision and we do not go on to the next step. If we cannot find that you are disabled or not disabled at a step, we go on to the next step. Before we go from step three to step four, we assess your residual functional capacity. (See paragraph (e) of this section.) We use this residual functional capacity assessment at both step four and step five

when we evaluate your claim at these steps. These are the five steps we follow:

(i) At the first step, we consider your work activity, if any. If you are doing substantial gainful activity, we will find that you are not disabled. (See paragraph (b) of this section.)

(ii) At the second step, we consider the medical severity of your impairment(s). If you do not have a severe medically determinable physical or mental impairment that meets the duration requirement in § 404.1509, or a combination of impairments that is severe and meets the duration requirement, we will find that you are not disabled. (See paragraph (c) of this section.)

(iii) At the third step, we also consider the medical severity of your impairment(s). If you have an impairment(s) that meets or equals one of our listings in appendix 1 of this subpart and meets the duration requirement, we will find that you are disabled. (See paragraph (d) of this section.)

(iv) At the fourth step, we consider our assessment of your residual functional capacity and your past relevant work. If you can still do your past relevant work, we will find that you are not disabled. (See paragraph (f) of this section and § 404.1560(b).)

(v) At the fifth and last step, we consider our assessment of your residual functional capacity

and your age, education, and work experience to see if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled. (See paragraph (g) of this section and § 404.1560(c).)

(5) When you are already receiving disability benefits. If you are already receiving disability benefits, we will use a different sequential evaluation process to decide whether you continue to be disabled. We explain this process in § 404.1594(f).

...

(c) You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.

...

(e) When your impairment(s) does not meet or equal a listed impairment. If your impairment(s)

does not meet or equal a listed impairment, we will assess and make a finding about your residual functional capacity based on all the relevant medical and other evidence in your case record, as explained in § 404.1545. (See paragraph (g)(2) of this section and § 404.1562 for an exception to this rule.) We use our residual functional capacity assessment at the fourth step of the sequential evaluation process to determine if you can do your past relevant work (paragraph (f) of this section) and at the fifth step of the sequential evaluation process (if the evaluation proceeds to this step) to determine if you can adjust to other work (paragraph (g) of this section).

...

(g) Your impairment(s) must prevent you from making an adjustment to any other work.

(1) If we find that you cannot do your past relevant work because you have a severe impairment(s) (or you do not have any past relevant work), we will consider the same residual functional capacity assessment we made under paragraph (e) of this section, together with your vocational factors (your age, education, and work experience) to determine if you can make an adjustment to other work. (See § 404.1560(c).) If you can make an adjustment to other work, we will find you not disabled. If you cannot, we will find you disabled.

(2) We use different rules if you meet one of the two special medical-vocational profiles described in § 404.1562. If you meet one of those profiles, we will find that you cannot make an adjustment to other work, and that you are disabled.