

GROUP 3 GUIDANCE

On December 30, 2013, after finding uncorrected deficiencies regarding the quality of his reports and the thoroughness of his examinations, the Disability Determination Service (DDS) for the State of California removed Dr. Frank Chen from its DDS consultative examination (CE) panel. In February 2015, a class action lawsuit captioned *Hart, et al. v. Colvin* lawsuit, No. 3:15-cv-623-JST (N.D. Cal.), was filed in federal court alleging, among other things, that Social Security Administration adjudicators improperly considered reports from Dr. Chen in deciding disability claims. The agency has since entered into a class action settlement agreement providing for readjudication of most unfavorable closed claims involving a Dr. Chen report generated on or after January 1, 2011, as well as offering certain opportunities for possible readjudication of unfavorable closed claims involving an earlier Dr. Chen report. As part of the settlement, the agency is also promulgating this guidance for adjudicators handling pending claims containing reports from Dr. Chen.

Within 20 days of the date the settlement becomes effective, the agency will mail a special form to eligible claimants, and exhibit it. The mailing will advise such claimants of the key features of the settlement and ask them to promptly return a form making an election as to whether or not they wish to have Dr. Chen's report excluded from consideration in their case. This form, if returned, shall be added to the claim folder and exhibited.

INSTRUCTIONS FOR CLAIMANTS WHO HAVE PROCEEDED TO ALJ HEARING BUT HAVE NOT YET RECEIVED A DECISION WHEN THEY RETURN THE ELECTION FORM

It is possible that some claimants who return the form will have already had a hearing but are still awaiting a decision. The claimant's election will be honored in this circumstance, regardless of whether the hearing has already occurred. Should the ALJ find a supplemental hearing, or a supplemental consultative examination, is warranted, the ALJ may use his or her usual discretion to schedule same before issuing a decision.

If the claimant's election asks the ALJ not to consider Dr. Chen's report, the ALJ will honor that election and shall disregard Dr. Chen's report in evaluating the claim. The ALJ should make a clear statement to this effect in the written decision.

If the claimant's election asks the ALJ not to disregard Dr. Chen's report, then the ALJ will be guided by the following:

In accordance with the regulations at 20 C.F.R. §§ 404.1527 and 416.927, when evaluating a report from Dr. Chen and determining the weight, if any, to afford it, the adjudicator should consider that Dr. Chen was removed from the California DDS CE panel for reasons that included uncorrected deficiencies regarding the quality of his reports and the thoroughness of his examinations. Furthermore, in accordance with those regulations, the ALJ should explain in his or her decision the weight, if any, afforded to Dr. Chen's report. The adjudicator should also consider whether ordering an additional CE is appropriate.

INSTRUCTIONS FOR CLAIMANTS WHO HAVE NOT YET PROCEEDED TO ALJ HEARING WHEN THEY RECEIVE OR RETURN THE ELECTION FORM

For claimants who have not yet had a hearing, the ALJ will explain at the hearing that due to the *Hart v. Colvin* settlement, the claimant was sent a special election form allowing the claimant to elect whether or not the ALJ should consider the consultative examination report from Dr. Chen. The ALJ will further note, on the record, whether or not the claimant returned the form and, if so, the election the claimant made.

If the election form was returned by the claimant before (or during) the hearing, the ALJ will ask the claimant and his or her representative to confirm, on the record, that the information on the form regarding the claimant's election is correct. For claimants who did not return the form either before or during the hearing, the ALJ will ask the claimant and his or her representative on the record whether they want the ALJ to exclude Dr. Chen's report from consideration. The ALJ will also explain that if he or she were to exclude consideration of the report, it would result in excluding consideration of any medical findings and other information contained therein.

If the claimant elects for the ALJ not to consider Dr. Chen's report, the ALJ will honor that election and shall disregard Dr. Chen's report in evaluating the claim. The ALJ should make a statement to this effect on the record at the hearing and in the written decision. If the claimant's election asks the ALJ not to disregard Dr. Chen's report, then the ALJ shall be guided by the following:

In accordance with the regulations at 20 C.F.R. §§ 404.1527 and 416.927, when evaluating a report from Dr. Chen and determining the weight, if any, to afford it, the adjudicator should consider that Dr. Chen was removed from the California DDS panel for reasons that included uncorrected deficiencies regarding the quality of his reports and the thoroughness of his examinations. Furthermore, in accordance with those regulations, the ALJ should explain in his or her decision the weight, if any, afforded to Dr. Chen's report. The adjudicator should also consider whether ordering an additional CE is appropriate.

As in all cases, the ALJ has discretion to order a new consultative examination for the claimant if warranted.