

Details of *Hart v. Berryhill (Colvin)* Relief

Hart v. Berryhill (Colvin) is a Social Security and SSI disability class action that challenged the Social Security Administration's continued use of medical reports from Dr. Frank Chen even after he had been disqualified from performing medical examinations for Social Security because of serious deficiencies in his reports.

Dr. Frank Chen performed consultative examinations in the Bay Area and the Central Coast as far south as San Luis Obispo. After many complaints over a period of years, he was disqualified from serving on the Social Security consultative examiner panel in December, 2013. Problems with his exam reports include statements that he performed tests he did not in fact perform and conclusions that were inconsistent with medical evidence already in the record, with no explanation or acknowledgement of the inconsistency. The examinations were very short, and there were allegations that he was rude to people.

Even after the disqualification of Dr. Chen in 2013, Social Security continued to rely on his reports in denying or terminating disability benefits.

The *Hart v. Berryhill (Colvin)* class action sought to require the Social Security Administration to reopen all prior determinations that terminated or denied SSI and/or SSDI benefits and that relied on a report from Dr. Chen. The settlement, which was approved on April 25, 2017, provides an opportunity for new disability determinations for many class members.

Who is eligible for relief?

The class includes individuals who were examined by Dr. Chen from 2007 through 2013. Individuals may have seen Dr. Chen either as part of their application for SSDI or SSI disability benefits, or as part of a continuing disability review.

With two exceptions, some form of relief would be provided to any individual who:

- Had an exam by Dr. Chen between 2007 and 2013, AND
- Had their claim denied in part (partially favorable decision) or in full (unfavorable decision).

Who is not eligible for relief?

The biggest exclusion is that individuals who were in current pay status on October 14, 2015 (the date the class was certified) are not eligible for relief. "Current pay" means that the individual was receiving SSDI, SSI disability, or SSDI that automatically converted into Social Security retirement at full retirement age. However, if someone was receiving Social Security Retirement benefits on October 14, 2015 that was not converted from disability benefits, they are not excluded and are still eligible for relief. If someone came into current pay status after October 14, 2015, that person also is eligible for relief.

The only other exclusion is an extremely limited one. This is where the individual had an Administrative Law Judge (ALJ) decision affirming a denial or termination and the ALJ's decision explicitly stated that Dr. Chen's report was not given any weight. Note that this should be a very narrow exception. If the report was given any kind of weight, then the claim remains eligible for relief. For example, if the decision gave the Dr. Chen report "little to no weight", or if the Dr. Chen report was not mentioned at all, then the claim remains eligible for relief, as it is not explicit that the Dr. Chen report was given no weight.

What is the relief?

The relief provided in the settlement varies depending on the status of the class member's claim and the amount of time since their examination by Dr. Chen. Class members are divided into three groups:

- a. An individual who saw Dr. Chen from 2011–2013, and whose claim is closed.
- b. An individual who saw Dr. Chen from 2007–2010, and whose claim is closed.
- c. An individual who saw Dr. Chen from 2007–2013, and whose claim is open.

Individuals can be eligible whether they have a closed claim or an open claim. A closed claim means that there was no active administrative appeal in process on the claim involving the Dr. Chen report, as of April 25, 2017. An open claim means that there was an active administrative appeal in process on the claim involving the Dr. Chen report, as of April 25, 2017.

Note: People who were examined by Dr. Frank Chen should make sure that Social Security has their correct current mailing address. This is especially important for people who were denied SSI. Social Security will mail out notices to all class members who are eligible for relief, using the mailing address that is in Social Security's system. To update their address, people should contact their local Social Security office and provide their current mailing address.

Examined by Dr. Chen from 2011–2013, closed claims

Individuals in this group were examined by Dr. Chen on or after January 1, 2011, and have closed claims. If a class member in this group elects relief, then they will be able to get a new decision on their case.

If the individual never appealed the denial or termination of disability benefits or if the final decision was made on reconsideration (the first stage of the appeal process), then a special "Disability Processing Unit" (DPU) of the Social Security Administration will decide the case for the period covered by the earlier denial, without considering the report of Dr. Chen. A class member will be able to submit supplemental evidence to the DPU. If the DPU determines that the individual was disabled for the period covered by the earlier denial, then the DPU will determine whether the disability continues to the present, and in doing so may order a new medical exam. All denials by the DPU may be appealed directly to an ALJ. At the ALJ level, a class member will be able to submit supplemental evidence, and the ALJ may order a new medical exam.

If an ALJ made the final decision on the closed claim, then a new ALJ hearing will be scheduled, without considering Dr. Chen's report. If the Appeals Council made the final decision on the closed claim, then the claim will be remanded for a new ALJ hearing, without considering Dr. Chen's report. A class member will be able to submit supplemental evidence, and the ALJ may order a new medical exam.

In all cases, if the individual is found disabled for the closed claim, then the individual will also have the opportunity to present evidence that the disability extends beyond the closed period, and up until the present. The individual will receive benefits for whatever period of disability that they are able to prove, including both back benefits and ongoing benefits.

A class member in this group has the option to appeal the readjudication decision. The normal appeal rights and process apply, except that, in the case of a determination by the Disability Processing Unit, the class member can appeal directly to the Administrative Law Judge without the necessity of reconsideration.

Note: For those who had claims in district court on or before April 25, 2017, the Social Security Administration will not contest an appropriate motion requesting that the case be sent back to the agency to be considered for relief under the settlement.

Examined by Dr. Chen from 2007–2010, closed claims

Individuals in this group were examined by Dr. Chen between January 1, 2007 and December 31, 2010, and have closed claims. For a class member in this group to obtain relief they must not only return the claim form, but they must also file a new application for SSDI or SSI disability and be approved. If they are found currently disabled, only then will their closed claim involving the Dr. Chen report be readjudicated by the “Disability Processing Unit” described above, without considering the report of Dr. Chen. The individual will then also be able to submit supplemental evidence relating to the closed claim, but no new medical exam will be ordered. The DPU would perform a lookback assessment to readjudicate only the prior closed period (from application to final decision). If found disabled in that prior period, the individual would receive back benefits for that prior period.

A class member in this group does not have the option to appeal the readjudication decision. A class member in this group also does not have the option to try to show disability extending between the prior closed period and the new current period of disability.

Note: For those whose new disability applications have been approved and who had claims in district court on or before April 25, 2017, the Social Security Administration will not contest an appropriate motion requesting that the case be sent back to the agency to be considered for relief under the settlement.

Examined by Dr. Chen from 2007–2013, open claims

Individuals in this group were examined by Dr. Chen between January 1, 2007 and December 31, 2013, and have open claims. An open claim means that the individual’s appeal was still active in the Social Security administrative appeal process on April 25, 2017 (the date of final approval of the settlement). All class members with open claims are at the ALJ level and beyond, and relief will be offered through the ALJ hearing process.

A class member in this group can choose whether the Dr. Chen report is considered in adjudicating their claim. If the class member wants to have the ALJ consider Dr. Chen’s report, then the ALJ will consider it. In that case, the ALJ will also consider the reasons Dr. Chen was removed from the consultative examination panel, should also consider whether ordering an additional consultative examination is appropriate, and should explain the weight, if any, he or she gives to Dr. Chen’s report.

Prospective relief

The settlement also requires Social Security to do a study of the processes through which Social Security monitors the California Disability Determination Service Division’s consultative examiner process, under which Dr. Chen performed examinations. After the conclusion of that study, Social Security must issue a document identifying processes for notifying adjudicators when an individual consultative examiner has been disqualified for conduct determined to undermine the reliability of that provider’s reports.

Additional questions?

The attorneys representing plaintiffs are Justice in Aging, the law firm of Morrison & Foerster LLP, and the Legal Aid Society of San Mateo County.

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