

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term 2002

5 (Argued October 8, 2002 Decided March 31, 2003)

6 Docket No. 01-6195

7 -----x
8 JEAN D. BYAM,
9 Plaintiff-Appellant,

10
11 -- v. --

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15 JO ANNE BARNHART, Commissioner,
16 Social Security Administration
17 Defendant-Appellee.

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19
20 -----x
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22 B e f o r e : WALKER, Chief Judge, CARDAMONE and STRAUB, Circuit
23 Judges.

24 Appeal from the judgment of the United States District Court
25 for the District of Vermont (Jerome J. Niedermeier, Magistrate
26 Judge) granting the appellee's motion for summary judgment, on
27 the basis that the administrative law judge did not
28 constructively reopen the appellant's previous applications for
29 disability benefits and that the administrative law judge's
30 decision not to reopen the appellant's previous applications did
31 not violate due process.

1 VACATED AND REMANDED.

2
3 RODNEY F. VIEUX, Johnson, VT,
4 for Plaintiff-Appellant.

5
6 MICHAEL P. DRESCHER, Assistant
7 United States Attorney, (Peter
8 W. Hall, United States
9 Attorney for the District of
10 Vermont, Carol L. Shea, Chief
11 of Civil Division, on the
12 brief), Burlington, VT, for
13 Defendant-Appellee.
14

15
16 JOHN M. WALKER, JR., Chief Judge:

17 Plaintiff-appellant Jean Byam appeals from the judgment of
18 the United States District Court for the District of Vermont
19 (Jerome J. Niedermeier, Magistrate Judge) granting the motion for
20 summary judgment by the defendant-appellee Commissioner of the
21 Social Security Administration ("the Commissioner") and denying
22 the cross-motion for summary judgment by the plaintiff-appellant
23 Byam. The administrative law judge ("ALJ") granted Supplemental
24 Security Income ("SSI") disability benefits dating back to June
25 1996, but refused to reopen three previous applications filed in
26 1993, 1994, and 1995 that had been denied and for which no
27 hearing had been requested. The district court ruled that it
28 lacked the jurisdiction to review the decision to deny Byam's
29 request to reopen her earlier applications for SSI disability
30 benefits, because neither did the ALJ constructively reopen the
31 appellant's previous applications nor did the ALJ's decision not

1 to reopen the appellant's previous applications violate due
2 process.

3 We conclude that the district court erred in certain
4 respects: 1) it failed to recognize and apply the burdens against
5 the moving party in summary judgment proceedings; 2) it
6 misapplied Stieberger v. Apfel, 134 F.3d 37 (2d Cir. 1997), by
7 focusing solely on whether Byam could "comprehend" notice of
8 denial of disability benefits, and not whether she could "act
9 upon notice," id. at 40; and 3) it misconstrued the
10 administrative law judge's findings of facts in ruling that there
11 was no violation of due process. Because there are material
12 issues of fact in dispute, we vacate the district court's grant
13 of summary judgment and remand for further proceedings on the
14 question of whether Byam was denied due process in her previous
15 applications for SSI benefits.

16 I. BACKGROUND

17 We first briefly describe the administrative scheme for SSI
18 applications, and then turn to Byam's medical and psychiatric
19 evaluations as they developed over the course of her four
20 applications.

21 A. Procedures for SSI Applications

22 The Social Security Act entitles disabled individuals to
23 receive SSI benefits. See 42 U.S.C. § 1381a. The Act defines
24 disability as an "inability to engage in any substantial gainful

1 activity by reason of any medically determinable physical or
2 mental impairment which can be expected to result in death or
3 which has lasted or can be expected to last for a continuous
4 period of not less than 12 months." 42 U.S.C. § 423(d)(1).

5 A claimant whose application has been denied may request
6 reconsideration within sixty days of receiving the denial. 20
7 C.F.R. § 416.1409(a). If the claim has been denied on
8 reconsideration, the claimant may request a hearing before an ALJ
9 within sixty days. § 416.1433(b). Following the ALJ's decision,
10 the claimant may request review by the Appeals Council within
11 sixty days. § 416.1468(a). The Appeals Council renders the
12 agency's determination final, and it is subject to judicial
13 review within sixty days. § 416.1481. The claimant may request
14 that her application be reopened within twelve months of notice
15 of the initial determination for any reason, and within two years
16 of the initial determination for good cause. § 416.1488(a)-(b).
17 An applicant establishes "good cause" by furnishing new and
18 material evidence; demonstrating a clerical error; or offering
19 evidence in the administrative record that "clearly shows on its
20 face that an error was made." § 416.1489(a). An application
21 can be reopened at any time if the determination was obtained by
22 "fraud or similar fault . . . tak[ing] into account any physical,
23 mental, educational, or linguistic limitations [which the
24 applicant] may have had at the time." § 416.1488(c). When a

1 claimant has failed to request reconsideration, an ALJ hearing,
2 Appeals Council Review, or review by a federal district court,
3 Social Security Ruling 91-5p requires the agency to extend the
4 deadlines for such requests if the claimant had good cause for
5 missing the deadline, such as if "he or she lacked the mental
6 capacity to understand the procedures for requesting review" or
7 had "any mental or physical condition which limit[ed] the
8 claimant's ability to do things for him/herself." Social
9 Security Ruling ("SSR") 91-5p, 1991 WL 208067, at *2 (S.S.A. July
10 1, 1991); see also Stieberger, 134 F.3d at 38.

11 **B. Byam's Psychiatric Background and Previous Applications**

12 Byam, who was born in 1950, has been unable to work since
13 June 1, 1969, which she attributes to depression, headaches, and
14 arthritis. According to her psychiatric records, Byam has been
15 hospitalized three times after suicide attempts in 1969, 1974,
16 and 1981.

17 Byam, unassisted by counsel, first applied for SSI benefits
18 on September 13, 1993. The application included a "Mental
19 Residual Functional Capacity Assessment" ("MRFCA") and a
20 "Psychiatric Review Technique" by Dr. Gayle Frommelt. The MRFCA
21 form begins by explaining, "Each mental activity is to be
22 evaluated within the context of the individual's capacity to
23 sustain that activity over a normal workday and workweek, on an
24 on going basis." Similarly, the Psychiatric Review Technique

1 uses categories established by 20 C.F.R. § 416.925 and 20 C.F.R.
2 § 404, Subpt. P, Appendix 1, which "are so constructed that an
3 individual with an impairment(s) that meets or is equivalent in
4 severity to the criteria of a listing could not reasonably be
5 expected to do any gainful activity." 20 C.F.R. § 404, Subpt. P,
6 Appendix 1, 12.00 Mental Disorders, Introduction. Thus, these
7 evaluations focus specifically on employment.

8 Dr. Frommelt noted that Byam had an affective disorder,
9 which the regulations characterize as "a disturbance of mood,
10 accompanied by a full or partial manic or depressive syndrome,"
11 and a personality disorder, defined as "typical of the
12 individual's long-term functioning." 20 C.F.R. § 404, Subpt. P,
13 Appendix 1, listings 12.04 and 12.08. Dr. Frommelt checked boxes
14 indicating that Byam had "[i]nflexible and maladaptive
15 personality traits which cause either significant impairment in
16 social or occupational functioning or subjective distress,"
17 including "[p]ersistent disturbances of mood or affect,"
18 "[p]athological dependence [and] aggressivity," and "[i]ntense
19 and unstable interpersonal relationships and impulsive and
20 damaging behavior." Dr. Frommelt also checked boxes indicating
21 that Byam was "moderately limited" in her ability to understand,
22 remember, and carry out detailed instructions, her ability to
23 maintain attention and concentration for extended periods, and
24 her ability to set realistic goals or make plans on her own, in

1 addition to other moderate work-related limitations. Dr.
2 Clifford Rivers, in a separate psychological assessment, also
3 noted that her mood disorder affects her concentration and
4 attention, that she "may be becoming more dependant and coping
5 increasingly poorly," and that she lacks judgment and "insight
6 into many of her problems." On November 19, 1993, the Social
7 Security Administration ("SSA") denied her 1993 application
8 initially and denied it again upon reconsideration on April 6,
9 1994.

10 Byam's denial notice informed her of a right to a hearing,
11 and explained that some benefits might be lost if, instead of
12 requesting a hearing, she filed a new application. Byam did not
13 request a hearing; and instead, again without counsel, she filed
14 a second claim for benefits on September 29, 1994. Five days
15 later, she reported to the Washington County Mental Health
16 Hospital, so that she would "not act on suicidal thoughts." Byam
17 began treatment there, although the record is unclear whether she
18 was ever hospitalized. The staff at the hospital noted "memory
19 loss and vagueness" and "dissociative presentation," which is a
20 disruption in "the usually integrated functions of consciousness,
21 memory, identity, or perception of the environment." Dr. Rafael
22 Garcia observed depression, suicidal ruminations, impaired
23 concentration, and social phobia. In November 1994, the hospital
24 staff noted the same disorders, and also "PTSD [post- traumatic

1 stress disorder] with suicidal ideation." Dr. Edward Hurley,
2 completing Byam's MRFCA for her 1994 application, found mental
3 conditions similar to the ones in Dr. Frommelt's 1993 evaluation:
4 She was "moderately limited" in her ability to understand and
5 carry out detailed instructions, but "not significantly limited"
6 in following simple instructions; and she had "slight"
7 restriction in daily living activities, "moderate" difficulty in
8 social functioning, and "often" had deficiencies in
9 concentration. The regional commissioner of the SSA denied her
10 1994 application on January 11, 1995, and she did not request
11 reconsideration or a hearing.

12 Byam, again unaided by counsel, filed a third application on
13 July 26, 1995. Her 1995 evaluations indicate that her depression
14 and poor concentration continued. Dr. Hurley completed her MRFCA
15 for the 1995 application and found some improvement over the past
16 year, but continued to observe moderate limitations in her
17 ability to carry out detailed instructions. The acting regional
18 commissioner denied her 1995 application initially on September
19 12, 1995 and on reconsideration on November 29, 1995. As with
20 her previous applications, she did not request a hearing. Even
21 though at any time within a year of the denials of her 1993,
22 1994, and 1995 applications she could have requested that her
23 applications be reopened, she never did so, despite the denial
24 notices' warnings that she may lose benefits by filing a new

1 application. 20 C.F.R. §§ 416.1487-88.

2 **C. Procedural History of Byam's 1996 Application**

3 On June 21, 1996, Byam filed her fourth application. Her
4 1996 evaluations for this application noted clarity, coherence,
5 and no delusions, but also suicidal ideation, depression,
6 auditory hallucinations, and social phobia. They also mention
7 that she suffered severe childhood physical and sexual abuse.
8 The acting regional commissioner of the Social Security
9 Administration again denied her application initially and on
10 reconsideration. This time, she requested a hearing, but she
11 submitted the request almost a month past the sixty-day request
12 period, which she attributed to illness. The ALJ found no good
13 cause for her untimeliness and dismissed the request.

14 In 1996, at about the time of her fourth application, Byam
15 began to see Dr. Judy Nepveu for evaluation and treatment. Based
16 upon previous evaluations and her own observations, Dr. Nepveu
17 found that Byam suffers from "lifelong dysfunction" and is of
18 "borderline retarded intellect," although Dr. Nepveu had not
19 measured her IQ. Dr. Nepveu concluded that Byam suffers from
20 PTSD probably as a result of "family violence." Two years later,
21 in 1998, Dr. Nepveu observed that Byam's coping style is "fixed
22 and dysfunctional--she stonewalls. When she doesn't understand
23 what to do, she does nothing. She'll have great difficulty
24 following . . . advice about paperwork and meetings." She also

1 commented, "She cannot advocate for herself, even when her own
2 survival is at stake."

3 On January 29, 1998, Byam's counsel wrote to the SSA Office
4 of Hearings and Appeals, enclosing a letter from Dr. Nepveu
5 stating that Byam has a "borderline retarded intellect" and that
6 she is "too disabled to do what it takes to get 'disability'"
7 benefits. After receiving this letter, the ALJ found good cause
8 for her untimely request for a hearing, and scheduled a hearing
9 for August 12, 1998. After missing this hearing, Byam appeared
10 with counsel and testified at a rescheduled hearing on March 18,
11 1999. Byam's counsel "requested reopening of previous
12 applications," because Byam's "mental impairments have prevented
13 her from following through."

14 On April 21, 1999, the ALJ granted Byam SSI disability
15 benefits dating back to June 21, 1996, the day she filed the
16 fourth application. He found that she had not engaged in
17 substantial gainful activity since 1969, that "her depression and
18 disorders of the back . . . cause significant vocationally
19 relevant limitations" and are "severe within the meaning of the
20 regulations [, imposing] significant restrictions in the ability
21 to perform basic work activities," and that her impairments fit
22 the criteria of an affective disorder under the federal
23 regulations. 20 C.F.R. § 404, Subpt. P, Appendix 1, Section
24 12.04. The ALJ described her psychiatric condition as follows:

1 The claimant suffers from depression. She has difficulty
2 keeping appointments and is lethargic. She is unable to
3 advocate for herself, even when her own survival is at
4 stake. She is upset, cries and is angry. She has hurt
5 herself in the past. She has no energy, sleeps poorly and
6 has nightmares. She has difficulty concentrating. She has
7 dysphoria [anxiety and depression], anhedonia [the inability
8 to experience pleasure], decreased appetite, hears voices
9 and has anxiety and feelings of rage. She also has feelings
10 of worthlessness and dissociative symptoms. She has suicidal
11 ideation and describes fearfulness.

12
13 She suffers from post traumatic stress disorder secondary to
14 abuse in her childhood. She is borderline retarded
15 intellectually. Her coping style is fixed and dysfunctional.
16 She stonewalls, when she doesn't understand what to do, she
17 does nothing. She is unable to follow instructions or
18 advice.
19

20 The ALJ recognized that "the claimant has suffered from
21 depression, post traumatic stress disorder, and borderline
22 retarded intellect," but found that her condition worsened after
23 June 1997, and that she was disabled "beginning [on] June 21,
24 1996 but not prior there to [sic]."

25 On the question of reopening her earlier applications, the
26 ALJ concluded that "[t]here is no medical evidence which can
27 establish disability prior to June 21, 1996. Therefore, I find
28 that there is no new and material evidence or error on the face
29 of the evidence that would establish good cause for reopening"
30 under 20 C.F.R. § 416.1488(b). However, the ALJ did not inquire
31 whether her applications were denied as the result of "fault"
32 (i.e., mental incapacity in Byam's case) under 20 C.F.R. §
33 416.1488(c), and he did not inquire whether she had any mental or

1 physical conditions that limited her "ability to do things for
2 [her]self," in accordance with SSR 91-5p, 1991 WL 208067, at *2.

3 Byam requested review of the ALJ's decision before the
4 Appeals Council, which summarily denied her request by a final
5 order on March 9, 2000, rendering the agency's decision final and
6 subject to judicial review. Within the sixty-day period for
7 filing a civil action, she then filed suit in the District of
8 Vermont, pursuant to 42 U.S.C. § 405(g), seeking to have the
9 earlier applications reopened. Byam claimed first that the ALJ
10 in 1999 constructively reopened the earlier applications by
11 reviewing their merits. She also argued that the ALJ's decision
12 not to reopen her previous applications denied her due process
13 because she had been incompetent to advocate for herself and had
14 been unrepresented by counsel, and thus, administrative notice
15 was constitutionally deficient.

16 Magistrate Judge Jerome Niedermeier, sitting as the district
17 court by consent of the parties pursuant to 28 U.S.C. § 636(c),
18 granted the Commissioner's motion for summary judgment against
19 Byam's claims. The district court ruled, first, that the ALJ had
20 not constructively reopened the applications, and, second, that
21 the denial notices were not constitutionally deficient. Despite
22 noting that Dr. Nepveu's evaluation makes a "strong case for
23 establishing that [Byam] was so severely disabled that she could
24 not comprehend the administrative process," he concluded that her

1 medical history before 1996 "falls short of establishing
2 'sufficient severity to impair comprehension' of the
3 administrative process." Byam v. Massanari, No. 2:00-CV-149, at
4 16 (D. Vt. July 5, 2001) (citing Stieberger, 134 F.3d at 40).
5 Byam appeals from the district court's grant of summary judgment
6 for the Commissioner.

7 **II. DISCUSSION**

8 **A. Standard of Review**

9 Summary judgment is appropriate only if there is no genuine
10 issue as to any material fact. Fed. R. Civ. P. 56(c). The
11 moving party bears the burden of demonstrating the absence of a
12 genuine issue of material fact. See Celotex Corp. v. Catrett,
13 477 U.S. 317, 323 (1986). When ruling on a summary judgment
14 motion, a court must construe the facts in the light most
15 favorable to the nonmovant and must resolve all ambiguities and
16 draw all reasonable inferences against the movant. See Anderson
17 v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Unfortunately,
18 in this case the magistrate judge did not discuss the standard of
19 review for summary judgment and did not consider the evidence in
20 the light most favorable to Byam.

21 **B. Jurisdiction**

22 As a general rule, federal courts lack jurisdiction to
23 review an administrative decision not to reopen a previous claim

1 for benefits. See Califano v. Sanders, 430 U.S. 99, 107-09
2 (1977). The Supreme Court explained the purpose underlying the
3 non-reviewability of decisions not to reopen:

4 [A]n interpretation that would allow a claimant
5 judicial review simply by filing--and being denied--a
6 petition to reopen his claim would frustrate the
7 congressional purpose, plainly evidenced in [42 U.S.C.
8 § 405(g)], to impose a 60-day limitation upon judicial
9 review of the Secretary's final decision on the initial
10 claim for benefits. Congress' determination so to
11 limit judicial review to the original decision denying
12 benefits is a policy choice obviously designed to
13 forestall repetitive or belated litigation of stale
14 eligibility claims. Our duty, of course, is to respect
15 that choice.
16

17 Id. at 108 (internal citations omitted). The Commissioner's
18 decision not to reopen a prior determination is not a final
19 decision for the purposes of § 405(g), and thus is generally
20 unreviewable even if there was a hearing in the case. See Latona
21 v. Schweiker, 707 F.2d 79, 81 (2d Cir. 1983). Nevertheless,
22 federal courts may review the Commissioner's decision not to
23 reopen a disability application in two circumstances: where the
24 Commissioner has constructively reopened the case and where the
25 claimant has been denied due process.

26 If the Commissioner "reviews the entire record and renders a
27 decision on the merits, the earlier decision will be deemed to
28 have been reopened, and any claim of administrative res judicata
29 to have been waived" and thus, "the claim is . . . subject to
30 judicial review." Malave v. Sullivan, 777 F. Supp. 247, 251-52

1 (S.D.N.Y. 1991) (citing Coup v. Heckler, 834 F.2d 313, 317 (3d
2 Cir. 1987) and McGowen v. Harris, 666 F.2d 60, 65-67 (4th Cir.
3 1981)); see also Kasey v. Sullivan, 3 F.3d 75, 77-78 (4th Cir.
4 1993); Brown v. Sullivan, 932 F.2d 1243, 1246-47 (8th Cir. 1991);
5 Cherry v. Heckler, 760 F.2d 1186, 1189 (11th Cir. 1985); Taylor
6 for Peck v. Heckler, 738 F.2d 1112, 1115 (10th Cir. 1984).

7 Judicial review is also permissible in "rare instances when the
8 Secretary's denial of a petition to reopen is challenged on
9 constitutional grounds." Califano, 430 U.S. at 109; cf. Able v.
10 United States, 88 F.3d 1280, 1288 (2d Cir. 1996) (discussing
11 Supreme Court precedent on judicial review of constitutional
12 claims). Thus, in the absence of either constructive reopening
13 or a constitutional claim, the district court lacks jurisdiction
14 to review a decision not to reopen. Latona, 707 F.2d at 81.

15 **C. Constructive Reopening**

16 First, Byam argues that the ALJ constructively reopened the
17 previous applications by reviewing the evidence provided in those
18 earlier applications and making a decision on the merits of that
19 evidence. However, the district court held that the ALJ had not
20 constructively reopened the previous applications, because he had
21 not ruled on their merits but had only assessed whether there was
22 new evidence to establish good cause to reopen them. We agree
23 with the district court.

24 Byam points to language that, when read in isolation,

1 suggests that the ALJ may have considered the merits of the
2 earlier applications. For example, the ALJ found that "[t]here
3 was no medical evidence which can establish Disability prior to
4 June 21, 1996," and that "[t]he medical evidence supports a
5 continued period of disability beginning June 21, 1996 but not
6 prior there to [sic]."

7 However, as the district court correctly pointed out, the
8 ALJ made these statements in the context of deciding whether Byam
9 had demonstrated good cause for reopening her earlier
10 applications. The ALJ followed those remarks by stating:

11 "Therefore, I find that there is no new and material evidence or
12 error on the face of the evidence that would establish good cause
13 for reopening the prior decision." Cf. 20 C.F.R. § 416.1489.

14 Byam makes no showing that the ALJ ruled on the merits of the
15 earlier evidence, and nothing in the record indicates that the
16 ALJ's disability determination was based on anything other than
17 evidence submitted as part of the 1996 application. His finding
18 that Byam was disabled "beginning June 21, 1996" resulted from
19 the fact that she filed the fourth application for SSI benefits
20 on that date, and not from any substantive review of evidence
21 submitted in previous applications. Of course, when presented
22 with a request to reopen earlier applications, the Secretary must
23 look into the facts of those applications to determine whether
24 there is cause to reopen them. A similar inquiry would

1 necessarily be triggered by an argument that the present claim is
2 barred by res judicata. But in either case, such a "threshold
3 inquiry into the nature of the evidence should not be read as a
4 reopening of this claim on the merits." McGowan, 666 F.2d at 68.
5 Otherwise these threshold inquiries would lead to frequent
6 unwarranted judicial review, defeating Congress's choice for
7 finality. Califano, 430 U.S. at 108. Here the district court
8 considered the earlier applications for the limited purpose of
9 deciding whether there was good cause to reopen them. This was
10 not the sort of merits review that amounts to a constructive
11 reopening, and we reject Byam's argument that it was.

12 **D. Due Process**

13 There is more substance to Byam's argument that the
14 Commissioner's refusal to reopen her claim violated due process.
15 Relying chiefly on Stieberger v. Apfel, 134 F.3d 37, she argues
16 that the notice she received of the administrative denials was
17 constitutionally deficient because her mental impairments
18 prevented her from pursuing her administrative remedies while she
19 was unrepresented by counsel. Byam argues that her impaired
20 mental state affected both her comprehension and her ability to
21 "follow through" on review procedures. The district court, in
22 granting summary judgment to the Commissioner, focused on
23 comprehension and not on ability to follow through. The error
24 was compounded, we think, by the district court's

1 misinterpretation of some of the evidence and its departure from
2 the requirement, in deciding this summary judgment motion, that
3 all evidence be interpreted and inferences be drawn in favor of
4 Byam. Because material questions of fact persist, the motion
5 should have been denied.

6 **1. The Legal Standard for Deficiency of Notice**

7 This appeal is similar in many respects to Stieberger.
8 Stieberger, suffering from depression with suicidal ideation,
9 schizophrenia, and anxiety, had failed to appeal the denial of
10 her 1974 SSI application. Id. at 38. Two decades later, an ALJ
11 rejected her argument that her mental impairments prevented her
12 from pursuing the appeal and found no good cause to reopen the
13 application. Id. at 38-39. She asserted a deprivation of her
14 right to due process in federal court, on the basis that notice
15 of the denial was constitutionally defective because of her
16 impaired mental state. Reversing the district court's 12(b)(6)
17 dismissal, we relied in part on our opinion in Canales v.
18 Sullivan, 936 F.2d 755, 758 (2d. Cir. 1991), where we explained:

19 [A] due process claim "seems peculiarly apropos in the
20 context of Social Security disability benefit proceedings in
21 which, as here, the very disability that forms all or part
22 of the basis for which the claimant seeks benefits may
23 deprive her of the ability to understand or *act upon* notice
24 of available administrative procedures."
25

26 Id. at 40 (quoting Canales v. Sullivan, 936 F.2d 755, 758 (2d
27 Cir. 1991) (quoting Elchediak v. Heckler, 750 F.2d 892, 894 (11th

1 Cir. 1985))) (emphasis added). In emphasizing a claimant's
2 "ability . . . to act upon notice of available administrative
3 procedures," we relied upon precedents from other circuits which
4 defined mental impairment broadly in evaluating the deficiency of
5 administrative notice. Id. at 40 (citing Elchediak, 750 F.2d at
6 894, and Parker v. Califano, 644 F.2d 1199, 1203 (6th Cir.
7 1981)). "[A] claimant suffering from mental illness raises a
8 colorable constitutional claim when he asserts that his mental
9 illness precluded him from litigating his claim because it
10 prevented him from proceeding from one administrative level to
11 another." Elchediak, 750 F.2d at 894; see also Evans v. Chater,
12 110 F.3d 1480, 1483 (9th Cir. 1997) (inquiring whether claimant's
13 "mental incapacity prevented the making of a timely request for
14 review"); Young v. Bowen, 858 F.2d 951, 955 (4th Cir. 1988)
15 (inquiring whether claimant had the "mental competency . . . to
16 contest" the denial of benefits); Parker, 644 F.2d at 1202-03
17 (relying on a precedent holding that administrative time limits
18 should be relaxed when a claimant's "mental condition prevented
19 timely pursuit of his administrative remedies"). Stieberger made
20 clear, however, that a claimant's argument that she was so
21 impaired as to be unable to pursue administrative remedies
22 requires more than a "generalized allegation" of confusion; it
23 requires a "particularized allegation of mental impairment
24 plausibly of sufficient severity to impair comprehension."

1 Stieberger, 134 F.3d at 40-41.

2 The district court in this case interpreted Stieberger to
3 hold that "notice of an adverse benefits determination to an
4 unrepresented claimant who is unable to comprehend it because of
5 mental impairments may be constitutionally deficient," and the
6 court concluded that Byam's claim "falls short of establishing
7 'sufficient severity to impair comprehension' of the
8 administrative process." Byam v. Massanari, No. 2:00-CV-149, at
9 13, 16 (quoting Stieberger, 134 F.3d at 41). However, the
10 district court failed to make the further inquiry under
11 Stieberger into whether the claimant could "act upon notice."
12 Stieberger, 134 F.3d at 40 (quoting Canales, 936 F.2d at 758).

13 **2. Interpreting the Evidence of Mental Impairment**

14 The district court properly recognized that Byam presented
15 evidence of personality and affective disorders, dissociative
16 presentation, and depression. However, in its due process
17 inquiry, the district court relied upon evaluations that assessed
18 Byam's mental state in the context of her employability, rather
19 than of her ability to act upon legal notice. The district court
20 cited Dr. Hurley's observation that Byam was "not significantly
21 limited" in understanding and carrying out simple instructions
22 and in similar areas, and that she was "moderately limited" in
23 her ability to understand, remember, and carry out detailed

1 instructions. Those observations were contained in Dr. Hurley's
2 MRFCA as a part of Byam's 1994 application. The MRFCA evaluates
3 mental health in the context of the "normal workday and
4 workweek," and the Psyschiatric Review Techniques completed by
5 Dr. Frommelt and Dr. Hurley also evaluate the individual in an
6 employment context.

7 The district court also cited the ALJ's "finding that the
8 claimant was disabled as of June 1996." But the ALJ's decision
9 not to reopen the earlier applications also was based on findings
10 that focused on employability within the framework of the SSI
11 regulations. Although the fault prong of 20 C.F.R. § 416.1488(c)
12 empowers an ALJ to consider reopening past applications by
13 evaluating whether a claimant was too impaired to comprehend
14 notice, the ALJ never engaged in any fact-finding or analysis in
15 this area. The ALJ's conclusion that Byam was disabled as of
16 June 21, 1996 reflected the date she filed her application, and
17 not a judgment about her mental state before 1996. Indeed, the
18 Commissioner, in arguing that the ALJ did not constructively
19 reopen the earlier applications, concedes that the ALJ did not
20 review the merits of Byam's pre-1996 evidence of disability.

21 We think that the district court's reliance on Dr. Hurley's
22 evaluation and on the ALJ's findings in rejecting Byam's due
23 process claims was misguided. The question was not whether Byam
24 could understand and act upon instructions in the context of

1 certain jobs, but whether she was impaired in her ability to
2 understand and pursue administrative and legal procedures.
3 "Moderate limitations" in an employment context may be severe
4 ones in understanding legal notice and filing requests for
5 administrative and judicial review. Depression and social phobia
6 might not prevent one from holding certain jobs, but they may
7 impede one's ability to act on notice or go to a hearing. We do
8 not think that employment assessments such as Dr. Hurley's are
9 irrelevant to this question; indeed, they may be helpful to a
10 fact-finder evaluating a due process claim, but they are neither
11 sufficient nor dispositive. Dr. Hurley's findings in 1994 of
12 moderate limitations in all four evaluation categories
13 ("understanding and memory," "sustained concentration and
14 persistence," "social interaction," and "adaptation") leave open
15 questions about Byam's ability to comprehend and act upon notice
16 in her earlier applications.

17 The district court noted that Dr. Nepveu's 1998 letter
18 "makes a strong case for establishing that the claimant was so
19 severely disabled that she could not comprehend the
20 administrative process," but concluded that Dr. Nepveu's
21 observations in 1998 had "no relevance to the claimant's state of
22 mind from 1993 to 1996." However, we have held that while a
23 treating physician's retrospective diagnosis is not conclusive,
24 it is entitled to controlling weight unless it is contradicted by

1 other medical evidence or "overwhelmingly compelling" non-medical
2 evidence. Rivera v. Sullivan, 923 F.2d 964, 968 (2d Cir. 1991);
3 see also Wagner v. Sec'y of Health and Human Servs., 906 F.2d
4 856, 862 (2d Cir. 1990). In determining the appropriateness of
5 summary judgment for the Commissioner, Dr. Nepveu's evaluation
6 should be viewed in the light most favorable to Byam. So
7 interpreted, Dr. Nepveu's diagnosis bears retrospectively on
8 Byam's condition at earlier times, particularly in her diagnosis
9 of "life[-]long dysfunction," "borderline mental retardation,"
10 PTSD, and personality disorders. The earlier contemporaneous
11 evaluations do not appear to contradict Dr. Nepveu's diagnoses,
12 and in fact, in some of their aspects, tend to support them. We
13 do not rule out the possibility that the plaintiff's condition
14 may have degenerated from 1993 to 1997-98, raising a concern
15 about the retrospective accuracy of Dr. Nepveu's evaluation.
16 However, in other cases of degenerative conditions and
17 speculative retrospective diagnoses, plaintiffs have won
18 reversals of adverse decisions. Rivera, 923 F.2d at 968 (citing
19 Wagner, 906 F.2d. at 861). We do not forecast the outcome here
20 in concluding that plaintiff has put forth sufficient evidence to
21 warrant consideration of her due process claim.

22 Finally, we turn to whether Byam has satisfied Stieberger's
23 requirement of a "particularized allegation of mental impairment
24 plausibly of sufficient severity to impair comprehension,"

1 Stieberger, 134 F.3d at 40-41, and easily find that she has.
2 There is record evidence of Byam's long history of depression,
3 suicidal ideation with specific suicide attempts, and numerous
4 evaluations around the dates of her SSI applications documenting
5 specific mental disorders and cognitive, social, and emotional
6 impairments. This evidence is sufficiently particularized and
7 severe to meet Stieberger's threshold allegation requirement and
8 to answer the Commissioner's motion for summary judgment.

9 **E. Remedy**

10 We faced a similar situation in Stieberger, where we
11 reviewed the district court's 12(b)(6) dismissal of the
12 claimant's complaint. Rather than remanding that case back to
13 the district court for discovery and trial on the merits of the
14 due process claim, we "conclude[d] that the expertise of the SSA
15 should be enlisted to make an initial determination, subject to
16 traditional judicial review to determine if an adverse decision
17 is supported by substantial evidence." Stieberger, 134 F.3d at
18 41. Our due process inquiry as to whether a claimant's mental
19 condition impaired comprehension of and the ability to act upon
20 notice is closely related to the agency's "fault" inquiry under
21 20 C.F.R. § 416.1488(c) and its "good cause" inquiry under SSR
22 91-5p. In Stieberger, the ALJ and the Appeals Council had
23 reviewed, under SSR 91-5p, whether the claimant had shown good
24 cause for missing a deadline, and so we remanded to the district

1 court for review of the SSA's determination under a substantial
2 evidence standard. Id. at 38-39, 41. Here, the ALJ had engaged
3 in no such inquiry under § 416.1488(c) or 91-5p, and thus, a
4 remand to the SSA for a hearing and fact-finding on these
5 questions of mental impairment is appropriate. Remanding for an
6 agency hearing would also streamline the proceedings, because if
7 the agency determines that it should reopen Byam's applications,
8 it could then rule on the merits of those applications and
9 calculate benefits, if necessary. A federal court might then be
10 able to review both the reopening issue and the substantive
11 merits in a single proceeding.

12 Both parties acknowledge that the appropriate relief
13 generally would be a remand to the agency for a hearing on
14 whether to reopen the past applications. However, Byam asks for
15 a reversal and a remand to calculate benefits, which would
16 effectively grant summary judgment in her favor that her right to
17 due process was violated and that she is entitled to the benefits
18 that she had applied for beginning in 1993. We decline this
19 invitation. Under Stieberger, the initial determination of
20 whether claimant's mental impairments prevented her from
21 receiving sufficient notice lies with the SSA, and the question
22 of her entitlement to benefits between 1993 and 1996 is not
23 properly before us. She cites a Fourth Circuit precedent, Young
24 v. Bowen, for reversing and remanding for a calculation of

1 benefits, but in that case, the Fourth Circuit found that the
2 Appeals Council, in reviewing the ALJ's decision, had evaluated
3 the merits of the claimant's application and found that the
4 claimant was entitled to benefits. 858 F.2d 951, 955-56 (4th
5 Cir. 1988). At this stage of Byam's case, the agency has
6 considered neither the merits of the earlier applications nor the
7 effect of mental impairments in preventing the claimant from
8 following the administrative procedures. From our perspective,
9 we simply are unable to conclude at this point that Byam is
10 entitled to benefits requested in her previous applications.

11 In accordance with Stieberger, we instruct the district
12 court to remand this case to the agency for a hearing on whether
13 to reopen Byam's previous applications under 20 C.F.R. § 416.1488
14 or extend their deadlines for review under SSR 91-5p; and if any
15 of the applications should be reopened or reviewed, the agency
16 should determine if she is entitled to benefits and should
17 calculate those benefits. The agency's decision whether to
18 reopen or not may then be reviewed, if necessary, by the district
19 court for substantial evidence. If that should occur, the agency
20 and the district court will have addressed the substance of her
21 due process claim, and further de novo review of Byam's due
22 process claim would not be necessary.

23 24 **III. CONCLUSION**

1 For the foregoing reasons, the district court's judgment is
2 VACATED, and we REMAND to the district court, with instructions
3 to remand to the agency for an initial determination on whether
4 to reopen Byam's 1993, 1994, and 1995 applications.