2024 Updates

for

SOCIAL SECURITY LAW, POLICY, AND PRACTICE

CASES AND MATERIALS

■ ■ ■

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2024 UPDATES

SOCIAL SECURITY LAW, POLICY, AND PRACTICE

Chapter 1, Section B (Major Amendments to the Social Security Act) at p. 39 (regarding discussion of the Social Security Independence and Program Improvement Act of 1994 at p. 38):

NOTE

Is the SSA currently unconstitutional after the Social Security Independence and Program Improvement Act of 1994 [discussed at p. 38], and if so, what is the implication of that conclusion? Should the Act's "for cause" protection provision for the SSA Commissioner simply be viewed as null and void in view of recent Supreme Court separation of powers precedent?

In 2020, the Supreme Court held in a case challenging the Consumer Financial Protection Bureau's (CFPB) enforcement authority that the CFPB's "leadership by a single individual, removable only for [cause,] violates separation of powers." Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183, 2197 (2020). In so doing, the majority expressly cited President Clinton's 1994 signing statement on the Social Security Independence and Program Improvement Act of 1994 but also distinguished the SSA from independent regulatory agencies like the CFPB as "lacking enforcement authority to bring actions against persons and limited only to adjudicating claims for social security benefits." *Id.* at 2202. The partial dissent derisively challenged the suggestion of lesser executive functioning and policy implications from the SSA, vis-à-vis the CFPB, stating: "Consider: would a President lose more votes from a nonfunctioning SSA or CFPB?" *Id.* at 2241 (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., concurring in the judgment with respect to severability and dissenting in part). Seven members of the Court concluded in *Seila Law*, however, that the CFPB's for-cause removal provision could be severed from the rest of the statute and, thus, did not require invalidation of the agency itself, *id. at 2209–11* (Roberts, C.J. joined by Alito and Kavanaugh, JJ, plurality opinion on severability); *id.* at 2245 (concurring opinion on the judgment with respect to severability and partial dissent). In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Supreme Court extended *Seila Law* and invalidated the similar structure of the Federal Housing Finance Agency ("FHFA"). In so doing the Court rejected, as unpersuasive, several proffered distinctions between the FHFA and CFPB because "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer." *Id.* at 1787 (quoting *Seila Law*, 140 S. Ct. at 2205).

In 2022, and in reliance on *Seila Law* and *Collins* and in response to an individual claimant's challenge to a benefits denial by an agency with an allegedly unconstitutional structure, the Ninth Circuit held that the SSA's structure, with a single Commissioner protected from removal except for cause and appointed for six years, violated separation of powers principles. *See* Kaufman v. Kijakazi, 32 F. 4th 843 (9th Cir. 2022). It further held, however, that the "for cause" removal restriction provision was severable from the rest of the Act, and that, pursuant to this body of law, "unless a claimant demonstrates actual harm, the unconstitutional provision has no effect on [a] claimant's case" or on the validity of the agency itself. *Id*. at 85.

The above two questions are not merely hypothetical. In the Summer of 2021, President Biden fired the President Trump-appointed SSA Commissioner, Andrew Saul, who had four years remaining on his six-year term, pointing to Saul's restrictive policy decisions on the disability benefits programs, alienation of the federal employee union and "other actions that run contrary to the mission of the agency and the President's policy agenda." *See* Lisa Rein, *President Biden fires head of the Social Security Administration, a Trump holdover who drew the ire of Democrats,* THE WASHINGTON POST, July 11, 2021. Although Saul and some Congressional Republicans have alleged that Saul's firing was illegal and vowed to fight the removal, *see id*, to date, Saul has not filed a lawsuit challenging his termination. Does Saul have a viable argument?

Chapter 1, Section E.1 (The Future of Social Security; The Viability of the Social Security Trust Funds) at p. 72:

The 2022 Annual Report of the Board of Trustees of the Federal Social Security Trusts Funds (Old-Age and Survivors' Insurance "OASI" and Disability Insurance "DI") projects that the combined funds will be solvent until 2035, for one year longer than projected in 2021. And for the first time since 1983, the DI Trust Fund will be solvent and able to pay full benefits through the 75-year long-range projection period (in 2021 the DI reserve was projected to be depleted in 2057). THE 2022 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE SURVIVORS AND FEDERAL DISABILITY INSURANCE TRUST FUNDS (JUNE 2, 2022). The same 75-year long range projection for full disability benefit payments was repeated in the 2023 Annual Report, although the solvency projection for the combined funds was moved back one year to 2034. THE 2023 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE SURVIVORS AND FEDERAL DISABILITY INSURANCE TRUST FUNDS (MARCH 31, 2023).

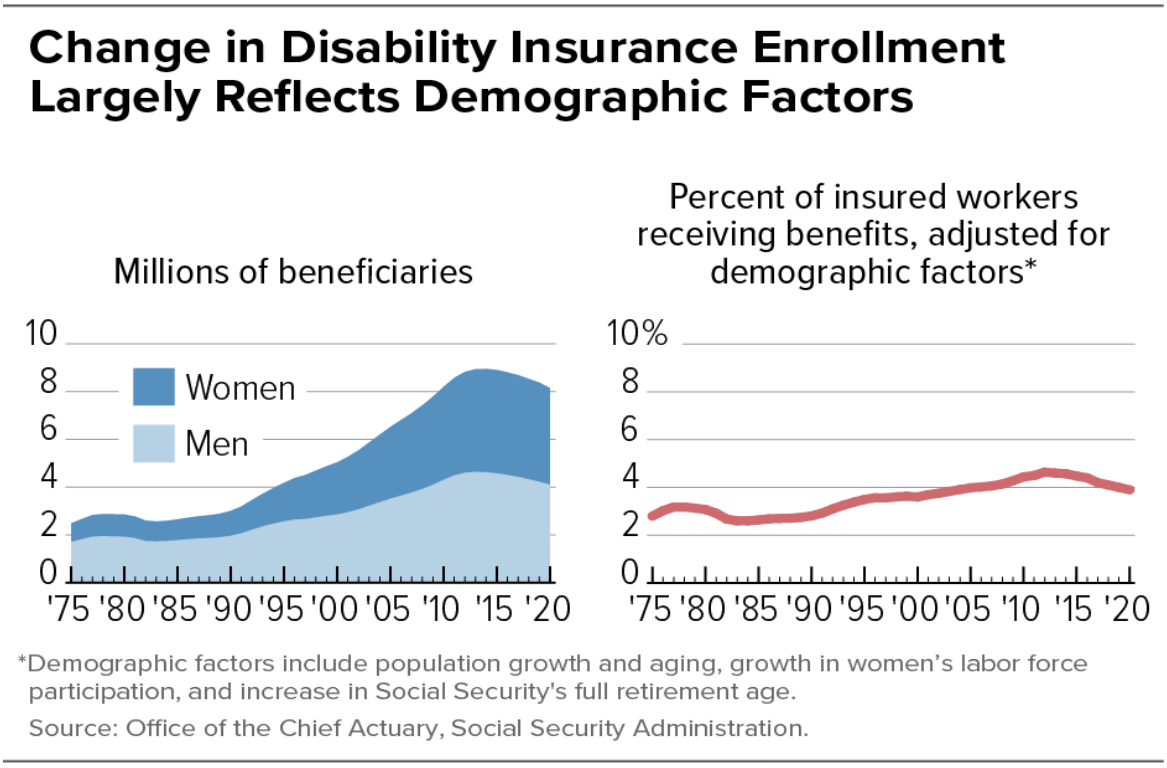
Chapter 1, Section E.2 (The Call for Social Security Disability Reform) at pp. 80-82:

As seen in the charts and material below compiled by the Center for Budget and Policy Priorities (updated March 17, 2022), the number of people receiving Social Security disability benefits peaked and then began to decrease in the past decade due to a variety of demographic factors:

Trends in SSDI Enrollment

The number of SSDI beneficiaries grew throughout most of the program's history, mainly reflecting demographic factors: the population increased; baby boomers aged into late middle age, when the odds of becoming disabled rise sharply; and more women joined the workforce, paid into Social Security, and earned coverage.

However, this trend has reversed in recent years as demographic factors have changed. SSDI applications and awards have fallen by over 35 percent since 2010, while the number of beneficiaries has dropped by nearly 1.8 million over the past eight years. Social Security's trustees project that the share of people in the U.S. receiving SSDI will rise somewhat over the next 20 years and then remain stable.



Chapter 2, Section A (Employment-based Eligibility (OASDI)) at p.97:

The QC amount for calendar year 2024 is $1730.

Chapter 2, Section A.1 (Special Insurer Status for Disability-Based Benefits) at p. 100:

Social Security Ruling SSR 18-1p (2018) provides that ALJs may, but are not required to, call a medical expert on the question of onset date: "The decision to call on the services of an ME is always at the ALJ's discretion. Neither the claimant nor his or her representative can require an ALJ to call on the services of an ME to assist in inferring the date that the claimant first met the statutory definition of disability."

Chapter 2, Section B.1 (Need-based Eligibility, Income Requirements) at p. 109:

The SSI benefit amounts effective in 2024 are $943 per month for an individual and $1415 per month for an eligible couple.

Chapter 2, Section D.1.b (Trial Work Period) at p. 131:

The trial work period earnings threshold for 2024 is $1110 per month.

Chapter 3, Section B.1.c (Proof of Marriage) at p. 150:

In light of the Supreme Court's decisions in United States v. Windsor, 133 S. Ct. 2675 (2013) and Obergefell v. Hodges, 135 S. Ct. 2584 (2015) holding the Defense of Marriage Act and state law bans on same-sex marriage unconstitutional, the Social Security Administration issued a Ruling that addressed how its reopening rules should operate when it applied a federal or state law in making a decision and the Supreme Court determined later that the law is unconstitutional. SSR 17-1p (2017); see also 82 Fed. Reg. 12270, 12271 (March 1, 2017). The Ruling clarifies the rules governing reopening based on a "change of legal interpretation or administrative ruling upon which the determination or decision was made" under 20 CFR §§ 404.989(b) and 416.1489(b). Ordinarily those rules effectively prevent reopening when a policy or legal precedent that SSA had applied in adjudicating cases is changed as a result of subsequent court decisions, so long as the law or policy was correct and reasonable when made. SSR 17-1p distinguishes the situation where SSA made a determination or decision by applying a federal or state law that the Supreme

Court subsequently determined to be unconstitutional. Then "the application of that law would not have been correct and reasonable when made."

In October 2021, the Biden Administration's Department of Justice (DOJ) changed its position and withdrew the Trump Administration DOJ"s Ninth Circuit appeals in two nationwide class action challenges where district courts had ruled that SSA's categorical denial of survivors' insurance benefits (SIB) to surviving partners of same sex couples who could not get married due to state law prohibitions, was unconstitutional. See Paula Spann, *Social Security Opens to Survivors of Same Sex Couples Who Could Not Marry,* N.Y. Times, January 22, 2022; *see also* SSA Notice of Class Action Order: *Thorton v. Commissioner of Social Security*, October 15, 2021, https://www.ssa.gov/thornton/ (nationwide class of persons never married to same sex partners and denied SIB); SSA Notice of Class Action Order: *Ely v. Saul*, October 15, 2021, https://www.ssa.gov/ely/ (nationwide class of persons not meeting the nine-month duration of marriage requirement of marriage to same sex partner and denied SIB). In rejecting SSA's arguments of substantial administrative burden and inefficiency from adjudicating the committed nature of same sex partnerships in a high volume of case-by-case determinations, the district court in *Ely*, (quoting the district court in *Thorton*) stated:

> [T]he Administration is clearly capable of making these case-by-case determinations and does so in every claim it processes. It already has regulations in place to make individualized determinations regarding benefits for people in common-law marriages. *See* 20 C.F.R. § 404.726. Indeed, the Administration is equipped with [a] myriad [of] internal policies for making the exact factual determinations required to determine whether [Plaintiff] and others similarly situated would have married their partner but for the unconstitutional state law. It recognizes exceptions to the nine-month marriage requirement under certain circumstances when the claimant had "a good faith belief" that the marriage was valid, but the wedding ceremony was flawed for some technical reason. *See* 42 U.S.C. § 416(h)(1)(B)(i). It also waives the nine-month marriage requirement when state law prevented a claimant from marrying the insured deceased spouse sooner because of a former spouse's institutionalization. *See* 42 U.S.C. § 416(c)(2), (g)(2).

Ely v. Saul, 2020 WL 2744138, at *9 (D. Ariz. May 17, 2020) (quoting *Thornton v. Comm'r of SSA*, Case No. CV-18-01409-JLR-JRC, Report and Recommendation at 18 (W.D. Wash. Jan. 31, 2020))

Chapter 4, Section C.1 (Special Disability Standard For Pre-1991 Spouses Benefits) at pp. 205-06:

Citing the fact that as of 2017 SSA had no pending applications that involve entitlement to spouses disability benefits from before 1991, SSA rescinded a 1991 Ruling clarifying the application of the pre-1991 regulations. 82 FR 24769 (May 30, 2017) (rescinding SSR 91-3p (1991)).

Chapter 4, Section C.3.b (The Effect of Disability Findings by Other Organizations and Agencies) at p. 221-223:

The Social Security Administration rescinded SSR 06-3p (2006) and issued new regulations in 2017 substantially modifying its prior rules for evaluating disability findings by other agencies and organizations. *See* "Revisions to Rules Regarding Medical Evidence," 82 Fed. Reg. 5844 (January 18, 2017); *see also id*.; 82 FR 15263 (March 27, 2017) (rescinding SSRs 96-2p, 96-5p and 06-3p). Under the new regulations, which became effective and apply to claims filed on or after March 27, 2017, other agencies' disability decisions are "not binding" on the SSA and SSA adjudicators "will not provide any analysis in their determination or decision about a decision made by any other governmental agency or a nongovernmental entity about whether [claimants] are disabled, blind, employable, or entitled to any benefits. However, [they] will consider all of the supporting evidence underlying the other governmental agency or nongovernmental entity's decision that [is] receive[d] as evidence in [the] claim." 20 C.F.R. §§ 404.1504; 416.904.

Chapter 5, Section B.1 (Step 3: Substantial Gainful Activity (SGA)) at p. 245:

The SGA trigger amount for 2024 is $1550 per month. For persons whose disability is based on blindness, the amount is $2590 per month.

Chapter 5, Section C.1 (Applying the Listing at Step 3) at pp 287-88:

The listings for mental disorders were revised substantially in 2016. As before, for most of the listings claimants must first show that they have a medically determinable mental impairment by documenting certain signs and symptoms enumerated in a Part A of the listing. Then they must demonstrate certain functional limitations outlined either in a Part B or, for some, they can demonstrate an alternative basis for establishing functional limitations set out in a Part C. Five of the eleven listings require claimants to meet the following Part B criteria: an "extreme" limitation of one, or "marked" limitation of two, of four areas of mental

functioning (understand, remember, or apply information; interact with others; concentrate, persist, or maintain pace; or adapt or manage oneself). Another five listings require meeting either the Part B criteria or those set out in a Part C: the relevant mental disorder is "serious and persistent" with a medically documented history of its existence over a period of at least 2 years, together with evidence of both "medical treatment, mental health therapy, psychosocial support(s), or a highly structured setting(s) that is ongoing and that diminishes the symptoms and signs of your mental disorder" and "marginal adjustment, that is, you have minimal capacity to adapt to changes in your environment or to demands that are not already part of your daily life." *See generally* 20 C.F.R. Part 404 Subpart P Appx 1 (Listings) § 12.00.

The listing for intellectual disability (formerly labeled "mental retardation") is structured separately. To qualify, a claimant must satisfy one of two sets of criteria in unique Parts A and B:

> A.
> 1. Significantly subaverage general intellectual functioning evident in your cognitive inability to function at a level required to participate in standardized testing of intellectual functioning; and
> 2. Significant deficits in adaptive functioning currently manifested by your dependence upon others for personal needs (for example, toileting, eating, dressing, or bathing); and
> 3. The evidence about your current intellectual and adaptive functioning and about the history of your disorder demonstrates or supports the conclusion that the disorder began prior to your attainment of age 22.
>
> OR
>
> B.
> 1. Significantly subaverage general intellectual functioning evidenced by a or b:
> a. A full scale (or comparable) IQ score of 70 or below on an individually administered standardized test of general intelligence; or
> b. A full scale (or comparable) IQ score of 71-75 accompanied by a verbal or performance IQ score (or comparable part score) of 70 or below on an individually administered standardized test of general intelligence; and
> 2. Significant deficits in adaptive functioning currently manifested by extreme limitation of one, or marked limitation of two, of the following areas of mental functioning:
> a. Understand, remember, or apply information (see 12.00E1); or
> b. Interact with others (see 12.00E2); or
> c. Concentrate, persist, or maintain pace (see 12.00E3); or

d. Adapt or manage oneself (see 12.00E4); and
3. The evidence about your current intellectual and adaptive functioning and about the history of your disorder demonstrates or supports the conclusion that the disorder began prior to your attainment of age 22.

See 20 C.F.R. Part 404 Subpart P Appx 1 (Listings) § 12.05. Among the ways that this new listing departs from its predecessor is the elimination of a much-litigated Part C option for meeting the listing with "a valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function." To some extent, borderline intellectual functioning covered by the former § 12.05(C) is now covered in the new § 12.11. *See* 20 C.F.R. Part 404 Subpart P Appx 1 (Listings) § 12.00.B.9.b.

Chapter 5, Section C.1.a (Overview of musculoskeletal listings) at p. 292 & C.1.b (Applying amputation listing) at p.296:

The Social Security Administration issued revised regulations for musculoskeletal impairments in late 2020, effective April 2022. 85 Fed. Reg. 78164 (December 3, 2020). The new listing for major dysfunction of a joint requires "gross anatomical deformity" and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint or joints. 20 C.F.R. Part 404 Subpart P Appx 1 § 1.02. Affected joints must be major peripheral weight bearing joints (hip, knee, or ankle) limiting the ability to ambulate effectively, or major peripheral joints in each upper extremity (shoulder, elbow, or wrist-hand) which limit the ability to perform fine and gross movements. 20 C.F.R. Part 404 Subpart P Appx 1 § 1.02A, B. The inability to ambulate effectively is defined as "an extreme limitation of the ability to walk; i.e., an impairment(s) that interferes very seriously with the individual's ability to independently initiate, sustain, or complete activities." 20 C.F.R. Part 404 Subpart P Appx 1 § 1.00B2b. The inability to perform fine and gross movements effectively is defined similarly as "an extreme loss of function of both upper extremities; i.e., an impairment(s) that interferes very seriously with the individual's ability to independently initiate, sustain, or complete activities." 20 C.F.R. Part 404 Subpart P Appx 1 § 1.00B2c.

Fractures are covered under two new listings: fractures of the femur, tibia, pelvis, or one or more tarsal bone, 20 C.F.R. Part 404 Subpart P Appx 1 § 1.06, and fracture of an upper extremity, 20 C.F.R. Part 404 Subpart P Appx 1 § 1.07. The listing for fractures of the femur, tibia, pelvis, or one or more tarsal bone requires an inability to ambulate effectively that does not or is not expected to improve within 12 months, as well as evidence that there is no solid union between bone fragments; the listing for fractures of an upper extremity requires nonunion of the shaft of the

humerus, radius, or ulna under continuing surgical management, directed toward restoring functional use where function was not restored, or expected to be restored, within 12 months.

Chapter 5, Section C.2 (Medical Equivalence to a Listed Impairment) at pp 307-08 and cases following:

SSR 17-2p (2017) replaced SSR 96-6p (1996). *See* "Evidence Needed by Adjudicators at the Hearings and Appeals Council Levels of the Administrative Review Process To Make Findings About Medical Equivalence," 82 Fed. Reg. 15,263 (March 27, 2017). The new Ruling, effective March 27, 2017, requires that a decision of medical equivalence at the administrative hearing (ALJ) level (and the Appeals Council level, when the AC makes the decision) include one of three specified types of expert opinion in the record: 1) a prior administrative medical finding from a Medical or Psychological Consultant from the initial or reconsideration adjudication levels supporting the medical equivalence finding; 2) Medical Expert evidence, which may include testimony or written responses to interrogatories, obtained at the hearings level supporting the medical equivalence finding; or 3) a report from the Appeals Council's medical support staff supporting the medical equivalence finding.

SSR 19-2p (2019) has replaced SSR 02-1p (2002). *See* SSR 19-2p: Title II and XVI: Evaluating Cases Involving Obesity, 2019 WL 2374244. The new ruling deletes some specific guidance for finding equivalence through the combined effects of obesity and a musculoskeletal impairment for listings 1.02(A) and 101.02A from former SSR 02-1p such as the requirement that "if the obesity is of such a level that it results in an inability to ambulate effectively, as defined in sections 1.00B2b or 101.00B2b of the listings, it may substitute for the major dysfunction of a joint(s) due to any cause (and its associated criteria), with the involvement of one major peripheral weight-bearing joint in listings 1.02A or 101.02A, and we will then make a finding of medical equivalence." The new SSR also deletes SSR 02-1p's passage declaring that the agency "will rarely use 'failure to follow prescribed treatment' for obesity to deny or cease benefits."

SSA has also issued a Ruling that discusses how chronic headaches can contribute to a finding of medical equivalence. SSR 19-4p (2019) (citing SSR 17-2p (2017). The Ruling, which deals mostly with issues of proof, confirms that "primary headache disorder" is a medically determinable impairment that, while not a listed impairment, can, either alone or in combination with other impairments, equal a listed impairment. Specifically, the Ruling identifies listing 11.02 (epilepsy) as "the most closely analogous listed impairment for [a medically determinable impairment] of a primary headache disorder" that can serve as the basis for a finding of medical equivalence.

Chapter 5, Section F.2 (Step 5 and the Medical-Vocational Guidelines ("Grids") after "Notes on Age Category and the Grids," at p. 408:

NOTES ON EDUCATION CATEGORY

1. Social Security Administration regulations divide claimants' educational levels for purposes of determining vocational capacity into four basic categories: (1) illiteracy, generally found in claimants with "little or no formal schooling"; (2) marginal education, generally considered as "6th grade level or less"; (3) limited education, generally 7th through 11th grades; and (4) high school education and above. 20 C.F.R. §§ 404.1564(b)(1)-(4), 416.964(b)(1)-(4). A 2020 Social Security Ruling provides further internal guidance on how those categories are to be applied. Thus, persons are considered to fall in the "illiteracy" category if they "cannot read or write a simple message such as instructions or inventory lists even though [they] can sign [their] name"; in the "marginal education" category if they have the "ability in reasoning, arithmetic, and language skills that are needed to do simple, unskilled types of jobs"; in the "limited education category" if they have "ability in reasoning, arithmetic, and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs"; and in the "high school or above" category if they have the "abilities in reasoning, arithmetic, and language skills acquired through formal schooling at a 12th grade level or above." SSR 20-1p (2020). The illiteracy category denotes inability to read or write a simple message" in any language." *Id*. SSA "will generally find that an individual who completed fourth grade [] is able to read or write a simple message and is therefore not illiterate" unless the individual can provide "relevant evidence" of illiteracy from various delineated categories, to counter this presumption. *Id*.

2. The rules set out in the Medical-Vocational Guidelines" grids include six variations on the four educational categories, not all of which are used on every grid table: high school graduate or more, which provides for direct entry into skilled work; high school graduate or more, which does not provide for direct entry into skilled work; limited education; limited education or less; marginal education or none; and illiterate. 20 C.F.R. Part 404 Subpart P, Appx 2 (Medical-Vocational Guidelines, Tables 1-3). Until early 2020, the category of "limited education" or less included a higher subcategory of persons who were "at least literate and able to communicate in English" and the category of "illiterate" included persons unable to communicate in English. Effective April 27, 2020, SSA eliminated the inability to communicate in English as a factor when evaluating disability claims. Noting that there have been changes in the national workforce since the inability to communicate in English was first included in the rules in 1978, SSA indicated that those changes, other data, and research "led us to conclude that this education category is no longer a useful indicator of an individual's educational attainment or of the vocational impact of an

individual's education for the purposes of our programs." The agency also indicated that Social Security programs have an increasingly "international reach" and that the elimination of inability to communicate in English as a vocational factor is an acknowledgment, because education in any language may provide vocational advantage, that it "is no longer a useful indicator of an individual's educational attainment or of the vocational impact of an individual's education because of changes in the national workforce." See 85 Fed. Reg. 10596 (February 25, 2020)

Do you agree with the SSA's reasoning? Consider the following:

> It is unclear what data supported the conclusion that lack of English-language communicative ability no longer affects ability to retain unskilled work in the increasing service sector of the economy or for some of the top-ten most commonly cited occupations [] by [vocational experts at ALJ hearings] in work adjustment assessments in SSA decisions denying benefits . . . Those occupations include: (#5) unskilled, sedentary, Surveillance System Monitor, DOT #379.367–010 ("notifies authorities by telephone of need for corrective action[;] . . . telephones police or other designated agency to notify authorities of location of disruptive activity") and (#10/tie) unskilled, sedentary, Call-Out Operator, DOT #237.367–014 ("fulfill subscribers' requests, using telephone[;] . . . [t]elephones subscriber to relay requested information"). . . Many jobs require basic language skills and communicative capacity with the ability to read and/[or] understand and speak and be understood. . .. Indeed, the SSA's 2020 position on the presumptive nonrelevance of ability to communicate in English for work adjustment assessments in the grid puts it at odds with 2018 regulations of another federal agency, the U.S. Department of Homeland Security (DHS). In listing lack of English-language facility as a factor to consider in determining whether an immigrant is likely to become a public charge—even without confining itself to the negatively synergistic work adjustment mix of a severe medical impairment combined with lack of English facility as in the SSA disability context—DHS represented that '[a]n inability to speak and understand English may adversely affect whether an [immigrant] can obtain employment.'[citing 83 Fed. Reg. 51114, 51195 (October 10, 2018)].It also found that '[p]eople with the lowest English speaking ability tend to have the lowest employment rate, lowest rate of full-time employment, and lowest median earnings.'[citing id.].

JON C. DUBIN, SOCIAL SECURITY DISABILITY LAW AND THE AMERICAN LABOR MARKET 67, 120-21 (2021)

Chapter 6, Section A.1 (1984 Amendments: Clarifying the Standard for Disability Based on Pain and other Subjective Symptoms) at "Note on Social Security Rulings on Pain," pp. 459-60:

For a recent case interpreting and applying SSR 16-3p (2016), see Cole v. Colvin, 831 F.3d 411, 414 (7th Cir. 2016) ("Recently the Social Security Administration announced that it would no longer assess the 'credibility' of an applicant's statements, but would instead focus on determining the 'intensity and persistence of [the applicant's] symptoms.' [citing SSR 16-3p (2016)]. The change in wording is meant to clarify that administrative law judges aren't in the business of impeaching claimants' character; obviously administrative law judges will continue to assess the credibility of pain assertions by applicants, especially as such assertions often cannot be either credited or rejected on the basis of medical evidence.").

In an even more recent case, the Eleventh Circuit rejected a claimant's argument that the ALJ violated SSR 16-3p in evaluating her subjective symptoms because he made the credibility-laden finding that "statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible for the reasons explained in this decision." See Hargess v. Social Security Commissioner, 883 F.3d 1302, 1308 (11th Cir. 2018). The Court explained "that SSR 16-3p became effective March 28, 2016, a year after the ALJ's hearing decision" and there is no authority for applying the rule retroactively which is disfavored. *Id*. (citing Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988)). The Court also found that "even if SSR 16-3p applied, the ALJ's use of the words 'not entirely credible' would not warrant a remand" since the ALJ's finding "did not assess [claimant's] overall character or truthfulness, but rather the ALJ, consistent with the ruling's two-step process for evaluating symptoms, assessed [claimant's] subjective complaints of disabling pain and fatigue and concluded that they were not consistent with the other evidence in the record. *Id*. at n.3 (citing SSR 16-3p and noting that it "explain[s] that the ALJ will consider whether the claimant's statements about the intensity, persistence, and limiting effects of symptoms "are consistent with" the record as a whole").

The SSA has republished and modified SSR 16-3p to change the term, "effective date" to "applicable date" and "to clarify that [its] adjudicators will apply SSR 16-3p when mak[ing] determinations and decisions on or after March 28, 2016." It also clarified its expectation that "when a Federal court reviews our final decision in a claim . . . the court [should] review the final decision using the **rules** that were in effect at the time we issued the decision under review. If a court remands a claim for further proceedings after the applicable date of the **ruling** (March 28, 2016), we will apply SSR 16-3p to the entire period in the decision we make after the court's remand." SSR 16-3p, as amended, 2017 WL 5180304 (Oct. 25, 2017).

Chapter 6, Section A.3 (Claims Based on Chronic Pain Conditions) add the following Note, at p. 485 (after *Green-Younger v. Barnhart*):

NOTE

Can lack of objective findings supporting fibromyalgia symptoms play any role, even as just one of many factors in the evaluation of fibromyalgia symptoms? Consider the following:

> A growing number of circuits have recognized fibromyalgia's unique nature and have accordingly held that ALJs may not discredit a claimant's subjective complaints regarding fibromyalgia symptoms based on a lack of objective evidence substantiating them. *See, e.g.*, *Johnson*, 597 F.3d at 412, 414 (1st Cir.); *Green-Younger*, 335 F.3d at 108 (2d Cir); *Rogers*, 486 F.3d at 248 (6th Cir.); *Sarchet*, 78 F.3d at 307 (7th Cir.); *Brosnahan*, 336 F.3d at 677–78 (8th Cir.); *Revels v.Berryhill,* 874 F.3d 648, 666 (9th Cir. 2017).
>
> Today, we join those circuits by holding that ALJs may not rely on objective medical evidence (or the lack thereof)—even as just one of multiple factors—to discount a claimant's subjective complaints regarding symptoms of fibromyalgia or some other disease that does not produce such evidence. Objective indicators such as normal clinical and laboratory results simply have no relevance to the severity, persistence, or limiting effects of a claimant's fibromyalgia, based on the current medical understanding of the disease. If considered at all, such evidence—along with consistent trigger-point findings—should be treated as evidence *substantiating* the claimant's impairment.

Arakas v. Comm'r of Soc. Sec., 983 F.3d 83, 97-98 (4th Cir. 2020) (emphasis in original).

Chapter 6, Section A.3 (Claims Based on Chronic Pain Conditions) add the following Note, at p. 493:

7. Chronic headaches is another example of a painful condition that can be difficult to prove in the context of establishing eligibility for benefits. The Social Security Administration issued a ruling in 2019 that defines "primary headache disorders" as "complex neurological disorders involving recurring pain in the head, scalp, or neck" and goes on to explain in some detail how it is diagnosed by the medical community. *See* SSR 19-4p (2019). It also explains how SSA will establish primary headache disorders as a "medically determinable impairment" with objective medical

evidence from approved medical sources, noting that, as with other pain-based claims, it will not do so on the basis of subjective symptoms alone. Finally, the Ruling confirms that a primary headache disorder, while not a listed impairment, can, either alone or in combination with other impairments, equal a listed impairment.

Chapter 6, Section B (Claims Based on Chronic Pain Conditions) add at the end of the note on p. 495:

Another aspect of the disability standard that requires special attention in mental impairment cases is the particular need and importance of the proper evaluation of psychiatric and psychological clinical methodology and subjective symptomology due to the nature of these conditions. As the District of Columbia and Sixth Circuits have explained:

> [A] psychiatric impairment is not as readily amenable to substantiation by objective laboratory testing as a medical impairment … consequently, the diagnostic techniques employed in the field of psychiatry may be somewhat less tangible than those in the field of medicine…. In general, mental disorders cannot be ascertained and verified as are most physical illnesses, for the mind cannot be probed by mechanical devices [] in order to obtain objective clinical manifestations of medical illness…. [W]hen mental illness is the basis of a disability claim, clinical and laboratory data may consist of the diagnosis and observations of professionals trained in the field of psychopathology. The report of a psychiatrist should not be rejected simply because of the relative imprecision of the psychiatric methodology or the absence of substantial documentation, unless there are other reasons to question the diagnostic techniques.

Blankenship v. Bowen, 874 F.2d 1116, 1121, (6th Cir. 1989) (*quoting* Poulin v. Bowen, 817 F.2d 865, 873–74 (D.C. Cir. 1987)). Accordingly, and as the Seventh Circuit has observed: "psychiatric assessments normally are based primarily on what the patient tells the psychiatrist, so that if the [ALJ] were correct [in discrediting the psychiatrist's assessment because it was based on what the claimant told him], most psychiatric evidence would be totally excluded from social security disability proceedings—a position we rejected." Price v. Colvin, 794 F.3d 836, 839–40 (7th Cir. 2015). That is because to discount a psychologist's evaluation "merely because it was 'based on the claimant's subjective report of symptoms' ignores that the subjective report is not simply transcribed: it is filtered through the psychologist's training and judgment." Thompson v. Berryhill, 722 Fed. Appx. 573, 581 (7th Cir. 2018).

More recently, the Fourth Circuit has analogized the evaluation of subjective symptomology in mental impairment cases, such as those involving depression, to cases involving special pain conditions such as fibromyalgia, noting:

> In *Arakas*, [see Ch. 6, A.3 update above at p.13] we held that ALJs could not rely upon the absence of objective medical evidence to discredit "a claimant's subjective complaints regarding symptoms of fibromyalgia *or some other disease that does not produce such evidence*." Today, we hold that depression—particularly chronic depression—is one of those other diseases. Characterized as a "mood disorder," MDD "causes a persistent feeling of sadness and loss of interest ... it affects how you feel, think and behave[.]" *Mayo Clinic, Depression (major depressive disorder) Symptoms & Causes* (Oct. 14 2022). Notably, the DSM-V declares that "no laboratory test has yielded results of sufficient sensitivity and specificity to be used as a diagnostic tool for [MDD.]" But most importantly, "[s]ymptoms caused by major depression can *vary from person to person*." *Mayo Clinic, Depression (major depressive disorder) Diagnosis & treatment*. Stated differently, symptoms of MDD, like those of fibromyalgia, are "*entirely subjective*," determined on a case-by-case basis. Ultimately, because of the unique and subjective nature of MDD, subjective statements from claimants "should be treated as evidence *substantiating* the claimant's impairment." Because the ALJ "improperly increased [the claimant's] burden of proof," in requiring that her subjective statements be validated by objective medical support, we must find error.

Shelley C. v. Comm'r of Soc. Sec. Admin., 61 F, 4th 341, 361-62 (4th Cir. 2023).

Chapter 6, Section B.2 (Psychiatric Review Technique Form) at Note, p. 510:

In a recent case, the Court of Appeals for the Fourth Circuit, citing *Kohler v. Astrue*, (pp. 501-09) noted that "the weight of authority suggests that failure to properly document application of the special technique will rarely, if ever, be harmless because such a failure prevents, or at least substantially hinders, judicial review." Patterson v. Commissioner, 846 F.3d 656, 662 (4th Cir. 2017). The court noted further that "[w]ithout documentation of the special technique, it is difficult to discern how the ALJ treated relevant and conflicting evidence," and that "[f]ailure to document application of the special-technique regulation constitutes error." *Id*. Moreover, the court came close to holding that such error cannot be harmless. *See id*. at 663 ("Put simply, '[t]he ALJ's lack of explanation requires remand.'") (quoting Mascio v. Colvin, 780 F.3d 632, 640 (4th Cir. 2015)).

Chapter 6, Section E.1 (Remediable Disability) at pp. 540-41:

The Social Security Administration clarified its procedure for determining a failure to follow prescribed treatment in a 2018 Ruling, SSR 18-3p (2018), which rescinded and replaced an earlier Ruling on the same topic (SSR 82-59 (1982). *See* 83 Fed. Reg. 49616 (October 2, 2018). The new Ruling provides that there must be evidence that the claimant's own medical source prescribed treatment for the "medically determinable impairment(s) upon which the disability finding is based." Therefore, SSA will not require claimants to follow treatment prescribed by a consultative examiner, medical or psychological consultant, medical expert, or by "a medical source during an evaluation conducted solely to determine eligibility to any State or Federal benefit." On the other hand, and consistent with the prior Ruling, the new Ruling provides that one cannot refuse surgery just because "success is not guaranteed or [the claimant] knows of someone else for whom the treatment was not successful."

The new Ruling also sets the process by which SSA determines whether an individual has failed to follow prescribed treatment. First, the treatment must, if followed, be expected to restore the person's ability to engage in substantial gainful activity (SGA). If so, the SSA will assess whether the person has "good cause" for not following that treatment. The Ruling then goes on to identify examples of good-cause reasons, including those based on religion, cost, prior history, and risk. Thus, if the reason is that the treatment goes against the tenets of the person's religion, she or he "must identify the religion, provide evidence of the individual's membership in or affiliation to his or her religion, and provide evidence that the religion's teachings do not permit the individual to follow the prescribed treatment"; if the person cannot afford the prescribed treatment, he or she "must demonstrate why he or she does not have health insurance that pays for the prescribed treatment or why he or she failed to obtain treatment at [an available] free or subsidized healthcare provider."

Chapter 7, Section B (SSI Standard of Need) at p. 568:

The 2022 SSI benefit amount for individuals is $841 per month; the amount for an eligible couple is $1261 per month.

Chapter 7, Section A.3 (Note on Payment of Benefits) at p. 567:

Congress eliminated the 5-month waiting period for persons with amyotrophic lateral sclerosis (ALS), or "Lou Gehrig's disease," who applied for disability benefits on or after December 23, 2020. ALS Disability Insurance Access Act of 2019, Public Law No: 116-250, 134 Stat. 1128 (December 22, 2020).

Chapter 7, Section F (Representative Payees) at p. 597:

Beginning in 2020, claimants are allowed to designate a preferred represented payee in advance. 20 C.F.R. §§ 404.2028, 416.918; *see also* 85 Fed. Reg. 7661 (Feb. 11, 2020). SSA will consider appointing such "advance designees" before considering any other potential representative payee. 20 C.F.R §§ 404.2021, 416.921.

The Social Security Administration issued regulations in 2019 requiring criminal background checks on potential representative payees every 5 years and prohibiting persons who have been convicted of certain crimes from serving as payees. 84 Fed. Reg. 4323 (February 15, 2019); 20 C.F.R §§ 404.2022, 2026, 416.622, 416.626. While the regulations identify specifically certain of those crimes, including human trafficking, false imprisonment, kidnapping, rape or sexual assault, fraud to obtain government benefits, theft of government funds or property, and abuse or neglect, *Id*. §§ 404.2022(f), 416.622(f), they also provide for an exception "if the nature of the conviction is such that selection of the applicant poses no risk to the beneficiary and the exception is in the beneficiary's best interest." *Id*. §§ 404.2022(b), 416.622(b).

Congress passed legislation in 2018 that gives state Protection and Advocacy systems added responsibility for monitoring Social Security representative payees and clarifies that the state, rather than the child, is liable for an overpayment when it served as representative payee. *See* Strengthening Protections for Social Security Beneficiaries Act of 2018, H.R. 4547, Pub. L. No. 115-165 (115th Cong, 2d Sess.) (2018).

Chapter 8, throughout:

SSA has split the former Office of Disability Adjudication and Review (ODAR) into the Office of Hearing Operations (OHO) and the Office of Appellate Operations (OAO).

Chapter 8, Section A (Administrative Decisionmaking Process) at "Note on Reopening" at pp. 605-06:

In light of the Supreme Court's decisions in United States v. Windsor, 133 S. Ct. 2675 (2013) and Obergefell v. Hodges, 135 S. Ct. 2584 (2015) holding the Defense of Marriage Act and state law bans on same-sex marriage unconstitutional, the Social Security Administration issued a Ruling that addressed how its reopening rules should be applied when it applied a federal or state law in making a decision and the Supreme Court determined later that the law is unconstitutional. SSR 17-1 (2017); see also 82 Fed. Reg. 12270, 12271 (March 1, 2017). The Ruling clarifies the rules governing reopening based on a "change of legal interpretation or administrative

ruling upon which the determination or decision was made" under 20 CFR §§ 404.989(b) and 416.1489(b). Ordinarily the rules effectively prevent reopening when a policy or legal precedent that SSA applied in adjudicating cases is changed as a result of subsequent court decisions, so long as the law or policy was correct and reasonable when made. SSR 17-1p distinguishes the situation where SSA made a determination or decision by applying a federal or state law that the Supreme Court subsequently determined to be unconstitutional. Then "the application of that law would not have been correct and reasonable when made."

Chapter 8, Section B (Application and Initial Decision) at p. 606:

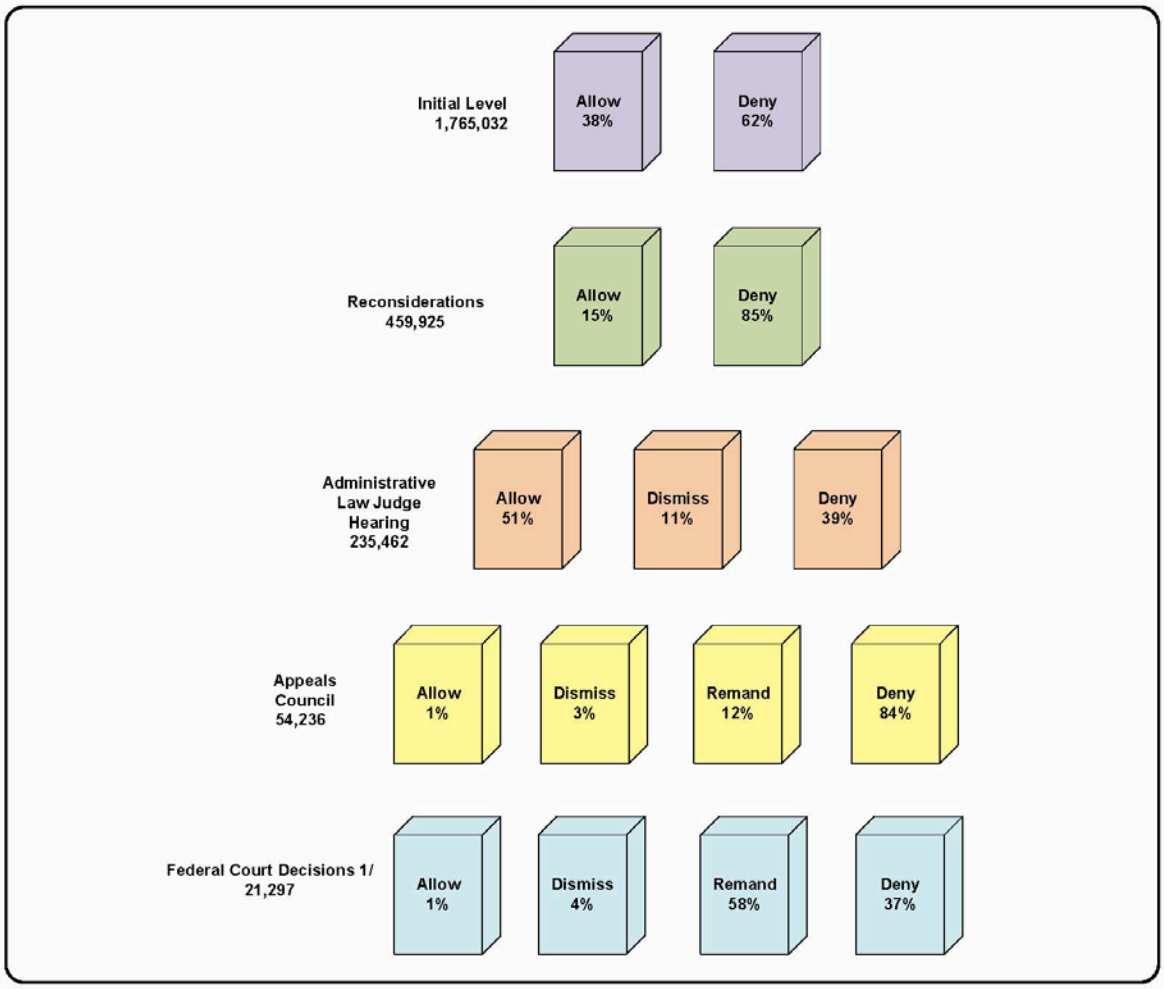
One can now apply for SSI online as well, but only if applying for both Disability Insurance Benefits and SSI at the same time (known as a "concurrent" application).

[Updates to Chapter 8, Section C begin on next page]

Chapter 8, Section C (Administrative Appeals) at p. 610:

FISCAL YEAR 2022 WORKLOAD DATA: DISABILITY DECISIONS*

Continuing Disability Redeterminations (CDRs) are not included except for Federal Court Level



*Includes Title II, Title XVI, and concurrent initial disability determinations and appeals decisions issued in FY 2022, regardless of the year in which the initial claim was filed, and regardless of whether the claimant ever received benefits (in a small number of cases with a favorable disability decision benefits are subsequently denied because the claimant does not meet other eligibility requirements.) Does not include claims where an eligibility determination was reached without a determination of disability. If a determination or appeals decision was made on Title II and Title XVI claims for the same person, the results are treated as one concurrent decision.
1/ Federal Court data includes appeals of Continuing Disability Reviews.

NOTE: Due to rounding, data may not always total 100%.

Prepared by: SSA, ODSSI (Office of Decision Support and Strategic Information)
Date Prepared: January 26, 2023
Data Sources:

1) Initial and Reconsideration Data: SSA State Agency Operations Report
2) Administrative Law Judge and Appeals Council data: SSA Office of Hearing Operations (OHO)
3) Federal Court data: SSA Office of General Counsel

Chapter 8, Section C.1 (Reconsideration) at Note 1, p. 613:

The Social Security Administration announced a final extension of its ten-state test elimination of reconsideration in 2016, to last "no later" than December 28, 2018. SSA then reinstated reconsideration in five of the 10 remaining states on January 1, 2019 (New Hampshire, New York, Louisiana, Colorado, Los Angeles North and West Branches in California), with reconsideration set to be reinstated in the last five states (Alabama, Alaska, Michigan, Missouri, Pennsylvania) by June, 2020. *See* 83 Fed. Reg. 63965 (December 12, 2018).

Chapter 8, Section C.2 (Administrative Hearing) at p. 614:

Hearing requests may be filed electronically. 20 C.F.R § 422.203(b). However, if an attorney requests direct payment of attorney's fees electronic filing is mandatory. 20 C.F.R. §§ 404.1713, 416.1513; SSR 19-3p (2019). SSA announced stricter enforcement of this requirement in 2020, noting that representatives are under an "affirmative duty" to comply and that failure to do so may lead to sanctions under the agency's Code of Conduct. 85 Fed. Reg. 62779 (October 5, 2020) (citing 20 C.F.R. §§ 404.1740(b)(4), 416.1530(b)(4)).

Chapter 8, Section C.2 (Administrative Hearing) at Note 5, p. 618:

The reinstated attorney advisors program, after being extended regularly, was made permanent in August, 2019. *See* 83 Fed. Reg. 40451 (Aug. 15, 2018).

Chapter 8, Section C.2 (Administrative Hearing), replace Note 6 at p. 619-20 as follows:

6. The Social Security Administration's Centralized Scheduling Unit (CSU) sets the date, time, and place for the hearing through Regional Centralized Scheduling Units (RCSU). Centralized control of the scheduling process, which had been run by local hearing offices, was reconfirmed and expanded in a new set of regulations effective in 2020. As explained by SSA when it published the final rules, the agency seeks "to maximize the case processing efficiencies and flexibility allowed by all appropriate manners of appearance at hearings" in order to "provide better customer service and most efficiently manage our workloads, while maintaining accuracy and fundamental fairness in our hearing process. *See generally* 84 Fed. Reg. 69298 (December 18, 2019).

Under the current regulations, SSA will schedule claimants to appear in person or by videoconference, or, in limited circumstances, by telephone. 20 C.F.R.

§§ 404.929, 416.1429. The decision as to whether the claimant will appear in person or by videoconference will take into consideration the relative efficiency of teleconferencing vs. an in-person appearance, as well as "any facts in [the claimant's] particular case that provide a good reason to schedule [the claimant's] appearance by video teleconferencing or in person." 20 C.F.R. §§ 404.936(c)(1), 416.1436(c)(1). Nonetheless, and contrary to the proposed version of the new rules, claimants can object to appearing by teleconference within 30 days after receipt of notice. 20 C.F.R. §§ 404.936(d), 416.1436(d). SSA also controls whether to schedule its witnesses by videoconference or telephone, including a medical or vocational expert. 20 C.F.R. §§ 404.936(c)(4), 416.1436(c)(4). SSA's criteria for deciding on witness appearance by videoconference or telephone are the same as for a party; however, the claimant does not have the right to object to the manner in which SSA witnesses appear.

Claimants can also object to the time and place of the hearing within 30 days, subject to a finding of good cause by the administrative law judge assigned to the claim. Among the good cause criteria are circumstances that make travel to the hearing site impossible, or other circumstances affecting the claimant's ability to present their claim such as the need for additional time to obtain representation or the unavailability to a witness with evidence that cannot be obtained otherwise. 20 C.F.R. §§ 404.936(f), (g), 416.1436(f), (g).

Although not authorized in the earlier regulations, in some cases SSA witnesses simply called in by telephone. Courts noted the problem and resolved it as follows:

> It appears that the use of telephonic testimony by medical experts is on the rise across the nation. Well over half of the instances in which a federal court notes that a medical expert testified by telephone in a Social Security benefits case have occurred in the last three years. Given the growing use of medical expert telephonic testimony in Social Security Administrative hearings—which likely serves efficiency purposes and may not often disadvantage claimants—this Court will not go so far as to rule that all medical expert testimony in such hearings must be either in person or by video teleconference. However, ALJs must provide claimants with notice that a witness will be testifying telephonically, and absent a new rule, medical experts should not be allowed to testify telephonically over a claimant's timely objection. If the Commissioner wishes to receive Chevron deference when it allows such telephonic testimony without notice or over claimants' objections, the Social Security Administration must create a rule through the approved notice-and-comment process.

Edwards v. Astrue, 2011 WL 3490024, *8, 168 Soc. Sec. Rep. Serv. 361 (D.Conn. 2011); *see also* Koutrakos v. Astrue, 906 F. Supp. 30, 35–36 (D.Conn. 2012) (going

further and noting that "cross examination is a vital part of a social security administrative hearing and . . . is not nearly as effective when the questioner cannot adjust his or her questions based on the appearance or the demeanor of the witness."). Would an ALJ's refusal to grant the claimant's request for face- to- face cross examination of an expert witness testifying telephonically under the new regulations raise due process/ fundamental fairness or Administrative Procedure Act issues? *See* Koutrakos v. Astrue, 906 F. Supp. 30, 35–36 (D.Conn. 2012)("Not only is face-to-face confrontation essential to fairness, it is essential to the appearance of fairness."); *but see* Hepp v. Astrue, 511 F.3d 798 (8th Cir. 2008) (rejecting due process challenge, reasoning that "[u]nder the [Mathews v.] Eldridge balancing test, we do not believe that, in a non-adversarial proceeding, an in-person cross-examination would significantly increase the accuracy of determining a witness's credibility over that of a telephone cross-examination."). [*See* Chapter 1 for a discussion of the Supreme Court's decision in Mathews v. Eldridge.]

Due to the COVID 19 pandemic-focused necessity and commencing in March 2020, SSA suspended in-person hearings and conducted all hearings by video-conferencing or telephone. *See* SSA Hearing options available during Covid-19, https://www.ssa.gov/appeals/hearing_options.html. SSA re-commenced limited in-person hearings in Spring 2021 and is still in the process of transitioning back to in-person hearings in 2023.

Chapter 8, Section C.3 (Appeals Council Review) at p. 621:

Currently, the Appeals Council is made up of approximately 58 Administrative Appeals Judges, 46 Appeals Officers, and several hundred support personnel.

Beginning in 2018, claimants and representatives can request Appeals Council review electronically and those requests will be routed automatically to the correct Appeals Council office. Requests for review can also still be filed by mail with hard-copy forms.

Chapter 8, Section C.3 (Appeals Council Review) at p. 621-22:

Current regulations provide that any new and material evidence presented to the Appeals Council must not only relate to the period on or before the date of the administrative hearing decision, but there must also be "a reasonable probability that the additional evidence would change the outcome of the decision." **20 C.F.R. §§ 404.970(a)(5), 416.1470(a)(5)**.

Chapter 8, Section D.1 (Jurisdiction) at p. 630

In Brown v. Kijakazi, 11 F.4th 1008 (9th Cir. 2021), the Ninth Circuit clarified that in an appeal from the unfavorable portion of a partially claimant-favorable administrative decision, the court lacks jurisdiction to entertain the Commissioner's request to set aside the favorable portion of its decision along with the unfavorable portion. It stated:

> By its terms, [the Social Security Act] only permits an "individual"—here, the claimant—to challenge a decision of the Commissioner, by filing a "civil action" in the district court. *See* 42 U.S.C. § 405(g). The Commissioner, of course, cannot sue himself, and so the statute does not provide him a cause of action to challenge the portions of his own decision that are favorable to the claimant. CAROLYN A. KUBITSCHEK & JON C. DUBIN, SOCIAL SECURITY DISABILITY LAW AND PROCEDURE IN FEDERAL COURT § 7:6 (2021) ("It should be noted that § 405(g), by its own terms, limits federal court jurisdiction to instances in which the claimant is the plaintiff. The Social Security Administration may not appeal [to a district court] from a decision in favor of the claimant."). . . . We therefore cannot enter an order, as the Government requests, directing that the entirety of the decision be redetermined. To do so would, in effect, assert and grant a form of counterclaim or cross-claim on the Government's behalf, and the Government has not identified any authority that would allow us to do that.

Id. at 1009-10.

Chapter 8, Section D.1.a (Exhaustion of Administrative Remedies) at the end of "Note on ALJ Issue Exhaustion and the Waiver Doctrine After Sims," at pp. 645-46:

CARR V. SAUL

___ U.S.___, 141 S.Ct. 1352 (2021)

Justice SOTOMAYOR delivered the opinion of the Court.

When the Social Security Administration (SSA) denies a claim for disability benefits, a claimant who wishes to contest that decision in federal court must first seek a hearing before an administrative law judge (ALJ). The petitioners here did just that: They each unsuccessfully challenged an adverse benefits determination in ALJ proceedings, and they now ask for judicial review. Specifically, petitioners argue that they are entitled to new hearings before different ALJs because the ALJs who

originally heard their cases were not properly appointed under the Appointments Clause of the U.S. Constitution. The question for the Court is whether petitioners forfeited their Appointments Clause challenges by failing to make them first to their respective ALJs. The Court holds that petitioners did not forfeit their claims.

I

The six petitioners in these consolidated cases each applied for disability benefits between 2013 and 2015. After their applications were denied, petitioners followed the prescribed steps for seeking administrative review. They sought reconsideration of the agency's initial determination, received a hearing before an ALJ, and requested review by the SSA's Appeals Council. See 20 CFR § 404.900(a). Petitioners were unsuccessful at every stage, concluding with the Appeals Council, which denied discretionary review.

This Court then held in Lucia v. SEC, 585 U.S. ——, 138 S.Ct. 2044, 201 L.Ed.2d 464 (2018), that ALJs within the Securities and Exchange Commission (SEC) had been unconstitutionally appointed. Under the Appointments Clause, only the President, "Courts of Law," or "Heads of Departments" may appoint "Officers of the United States." Art. II, § 2, cl. 2; see *Lucia*, 585 U.S., at ——, 138 S.Ct., at 2050. The *Lucia* Court determined that SEC ALJs were "Officers" rather than mere employees because they held "a continuing office established by law," exercised " 'significant discretion' when carrying out ... 'important functions,' " and often had the last word in SEC proceedings. *Id*., at —— – ——, 138 S.Ct., at 2052-2053. Consequently, the appointment of SEC ALJs by SEC staff violated the Constitution. *Id*., at ——, ——, 138 S.Ct., at 2047, 2055.

Like the SEC ALJs at issue in *Lucia*, SSA ALJs had been selected by lower level staff rather than appointed by the head of the agency. On July 16, 2018, a few weeks after *Lucia* was decided, the SSA's Acting Commissioner pre-emptively "address[ed] any Appointments Clause questions involving Social Security claims" by "ratif[ying] the appointments" of all SSA ALJs and "approv[ing] those appointments as her own." 84 Fed. Reg. 9583 (2019). The following year, the SSA issued a ruling stating that the Appeals Council should, in response to timely requests for Appeals Council review, vacate preratification ALJ decisions and provide fresh review by a properly appointed adjudicator. *Ibid*. That remedy was only available, however, to claimants who had raised an Appointments Clause challenge in either their ALJ or Appeals Council proceedings. Ibid. Claimants who had not objected to the ALJs' appointments in their administrative proceedings would receive no relief. See ibid.

Petitioners fell into this latter category. By the time the SSA issued its ruling, their administrative proceedings had concluded, and they were seeking review of the SSA's decisions in federal court. Following Lucia, each petitioner asked the Federal District Court (or, in some cases, the Federal Magistrate Judge) for a new hearing

before a constitutionally appointed ALJ. The Commissioner did not dispute that the ALJs who decided petitioners' cases were unconstitutionally appointed, but contended instead that petitioners had forfeited their Appointments Clause challenges by failing to raise them before the agency.

In three separate decisions (covering all six petitioners), the U.S. Courts of Appeals for the Eighth and Tenth Circuits adopted the Commissioner's forfeiture argument. In those Circuits' view, petitioners could not obtain judicial review of their Appointments Clause claims because they had not pressed those challenges in their administrative proceedings. 963 F.3d 790, 793 (C.A.8 2020); 964 F.3d 759, 763 (C.A.8 2020); Carr v. Commissioner, SSA, 961 F.3d 1267, 1268 (C.A.10 2020). The Third, Fourth, and Sixth Circuits have all held the opposite. In those Circuits, claimants may challenge the constitutionality of an SSA ALJ's appointment for the first time in federal court. *See* Cirko v. Commissioner of Social Security, 948 F.3d 148, 152 (C.A.3 2020); Probst v. Saul, 980 F.3d 1015, 1020 (C.A.4 2020); Ramsey v. Commissioner of Social Security, 973 F.3d 537, 546 (C.A.6 2020). The Court granted certiorari to resolve this conflict. 592 U.S. ——, 141 S.Ct. 813, 208 L.Ed.2d 397 (2020).

II

Administrative review schemes commonly require parties to give the agency an opportunity to address an issue before seeking judicial review of that question. The source of this requirement (known as issue exhaustion) varies by agency.[2] Typically, issue-exhaustion rules are creatures of statute or regulation. Sims v. Apfel, 530 U.S. 103, 107–108, 120 S.Ct. 2080, 147 L.Ed.2d 80 (2000); *see* United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 36, n. 6, 73 S.Ct. 67, 97 L.Ed. 54 (1952) (collecting statutes). Where statutes and regulations are silent, however, courts decide whether to require issue exhaustion based on "an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." Sims, 530 U.S. at 108–109, 120 S.Ct. 2080. The Commissioner concedes that no statute or regulation obligated petitioners to raise their Appointments Clause challenges in administrative proceedings. *See* Brief for Respondent 12, 35, n. 2; Tr. of Oral Arg. 39. Instead, the Commissioner asks this Court to impose a judicially created issue-exhaustion requirement in these cases.

A

"[T]he desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies

[2] Issue exhaustion should not be confused with exhaustion of administrative remedies. There is no dispute in these cases that petitioners exhausted their administrative remedies, meaning that they proceeded through each step of the SSA's administrative review scheme and received a "final decision" before seeking judicial review. See 42 U.S. C. § 405(g).

in a particular administrative proceeding." *Sims*, 530 U.S., at 109, 120 S.Ct. 2080. In conducting this inquiry, courts must take care not to "reflexively 'assimilat[e] the relation of ... administrative bodies and the courts to the relationship between lower and upper courts.' " *Id.*, at 110, 120 S.Ct. 2080 (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 144, 60 S.Ct. 437, 84 L.Ed. 656 (1940)). Instead, "[t]he inquiry requires careful examination of 'the characteristics of the particular administrative procedure provided.' " 530 U.S., at 113, 120 S.Ct. 2080 (O'Connor, J., concurring in part and concurring in judgment) (quoting McCarthy v. Madigan, 503 U.S. 140, 146, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992)). The critical feature that distinguishes adversarial proceedings from inquisitorial ones is whether claimants bear the responsibility to develop issues for adjudicators' consideration.[3]

With respect to the nature of the SSA proceedings at issue here, our inquiry starts from the baseline set by *Sims v. Apfel*. There, this Court held that issues not raised before the Appeals Council (the final stage of administrative review within the SSA) are nonetheless preserved for judicial review. In so holding, the Court explained that "the rationale for requiring issue exhaustion is at its greatest" when "the parties are expected to develop the issues in an adversarial administrative proceeding," but "the reasons for a court to require issue exhaustion are much weaker" when "an administrative proceeding is not adversarial." 530 U.S., at 110, 120 S.Ct. 2080.

The plurality went on to explain that "[t]he differences between courts and agencies are nowhere more pronounced than in Social Security proceedings," where administrative "proceedings are inquisitorial rather than adversarial." *Id.*, at 110–111, 120 S.Ct. 2080. Regulations governing SSA proceedings "expressly provide that the SSA 'conduct[s] the administrative review process in an informal, nonadversary manner' " and assures claimants that the SSA " 'will consider at each step of the review process any information you present as well as all the information in our records.' " *Id.*, at 111, 120 S.Ct. 2080 (quoting 20 CFR § 404.900(b) (1999)). At the Appeals Council level, "the Council's review is plenary unless it states otherwise." Sims, 530 U.S., at 111, 120 S.Ct. 2080 (plurality opinion). Rather than appear "as a

[3] The Commissioner invokes the "general rule," recognized in cases such as *L. A. Tucker Truck Lines*, that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S.Ct. 67, 97 L.Ed. 54 (1952); see also *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 85 L.Ed. 1037 (1941); *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 154–155, 67 S.Ct. 245, 91 L.Ed. 136 (1946). That general rule, however, originated in cases that "each involved an adversarial proceeding." *Sims v. Apfel*, 530 U.S. 103, 110, 120 S.Ct. 2080, 147 L.Ed.2d 80 (2000). Where claimants are not expected to develop certain issues in ALJ proceedings, it is generally inappropriate to treat those issues as forfeited. See *id.,* at 109, 120 S.Ct. 2080 ("[C]ourts require administrative issue exhaustion 'as a general rule' because it is usually 'appropriate under [an agency's] practice' for 'contestants in an adversary proceeding' before it to develop fully all issues there" (quoting *L.A. Tucker Truck Lines*, 344 U.S., at 36–37, 73 S.Ct. 67)).

litigant opposing the claimant," the Commissioner serves "just as an adviser to the Council." *Ibid*. Claimants are not required to file a brief; indeed, the SSA's standard form "provides only three lines for [a claimant's] request for review." *Id*., at 112, 120 S.Ct. 2080. A notice "accompanying the form estimates that it will take only 10 minutes to 'read the instructions, gather the necessary facts and fill out the form.' " Ibid. Thus, in the context of Appeals Council review, the plurality observed that the "adversarial development of issues by the parties ... on which [the judicial-proceedings] analogy depends simply does not exist." *Ibid*.

Justice O'Connor concurred in the judgment. In her view, "the agency's failure to notify claimants of an issue exhaustion requirement" provided a "sufficient basis" for refusing to impose one by judicial decree. *Id*., at 113, 120 S.Ct. 2080. "Requiring issue exhaustion is particularly inappropriate," she explained, "where the regulations and procedures of the [SSA] affirmatively suggest that specific issues need not be raised before the Appeals Council." *Ibid*.

Much of what the Sims opinions said about Appeals Council review applies equally to ALJ proceedings. The Sims plurality itself noted that "[i]t is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits" and that "[t]he Commissioner has no representative before the ALJ to oppose the claim for benefits." *Id*., at 111, 120 S.Ct. 2080. The SSA regulations that ensure informal, nonadversarial proceedings and plenary review apply as much to ALJs as to the Appeals Council. See 20 CFR § 404.900(b). Regulations also provide that ALJs will "loo[k] fully into the issues" themselves, § 404.944, and may "raise a new issue" at "any time ... before mailing notice of the hearing decision," § 404.946(b)(1). Like the form supplied by the SSA to request Appeals Council review, the form to request an ALJ hearing provides roughly three lines for claimants to explain their disagreement with the agency's determination, and the SSA "estimate[s]" that it will take just "10 minutes to read the instructions, gather the facts, and answer the questions" on that form. SSA, Request for Hearing by Administrative Law Judge, Form HA–501–U5. Last, as with the Appeals Council, SSA "regulations provide no notice that claimants must ... raise specific issues before" the ALJ "to preserve them for review in federal court." *Sims*, 530 U.S., at 113, 120 S.Ct. 2080 (opinion of O'Connor, J.).

B

The parallels between ALJ and Appeals Council proceedings are many, but the Commissioner correctly notes several differences that may make ALJ hearings relatively more adversarial. For one, ALJ hearings are typically available as a matter of right, while Appeals Council review is discretionary. Compare 20 CFR § 404.957 with § 404.967. Most claimants thus submit no more than a one-page request for review to the Appeals Council before having their request denied. Mandatory ALJ proceedings, by contrast, present far more opportunities for claimants to press issues,

and the SSA consequently relies more heavily on those proceedings to "conduc[t the agency's] principal and most thorough investigation of ... disability claim[s]." Brief for Respondent 35–36. Additionally, before every hearing, the SSA mails claimants a "notice of hearing" that includes logistical information and lists the "[t]he specific issues to be decided in [the] case." § 404.938(b)(1). Claimants must notify the ALJ in writing if they "object to the issues to be decided at the hearing."[4] § 404.939. Similarly, SSA conflict-of-interest regulations instruct claimants to "notify the [ALJ] at [the] earliest opportunity" if they "object to the [ALJ] who will conduct [their] hearing." § 404.940.

Even accepting that ALJ proceedings may be comparatively more adversarial than Appeals Council proceedings, the question nonetheless remains whether the ALJ proceedings at issue here were adversarial enough to support the "analogy to judicial proceedings" that undergirds judicially created issue-exhaustion requirements. *Sims*, 530 U.S., at 112, 120 S.Ct. 2080 (plurality opinion). In the specific context of petitioners' Appointments Clause challenges, two additional considerations tip the scales decidedly against imposing an issue-exhaustion requirement.[5]

First, this Court has often observed that agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise. *See, e.g.*, Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477, 491, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010); Califano v. Sanders, 430 U.S. 99, 109, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977); Weinberger v. Salfi, 422 U.S. 749, 765, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). As such, it is sometimes appropriate for courts to entertain constitutional challenges to statutes or other agency-wide policies even when those challenges were not raised in administrative proceedings.[6] *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 76–77, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976). Thus, this Court observed in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), that, so long as a Social Security claimant "had exhausted the full set of available administrative review procedures"

[4] As discussed above, see *supra,* at 1358, the Commissioner "do[es] not argue that these regulations themselves impose a forfeiture rule that applies here." Brief for Respondent 35, n. 2.

[5] Outside the context of Appointments Clause challenges, such as in the sphere of routine objections to individual benefits determinations, the scales might tip differently.

[6] Contrary to the Commissioner's assertion, *Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971), has no bearing on whether an issue-exhaustion requirement is appropriate in these cases. In *Perales*, the Court rejected a claimant's procedural due process challenge to the admissibility of an adverse medical report, explaining (among other reasons) that "[a]lthough the claimant complain[ed] of the lack of opportunity to cross-examine the reporting physicians, he did not take advantage of the opportunity" to subpoena the physicians. *Id.,* at 404, 91 S.Ct. 1420. *Perales* thus stands for the uncontroversial (and irrelevant) proposition that a claimant is not denied due process if he declines to take advantage of the adequate procedures available to him.

(as petitioners did here), "failure to have raised his constitutional claim would not bar him from asserting it later in a district court." *Id.*, at 329 n. 10, 96 S.Ct. 893.

Second, this Court has consistently recognized a futility exception to exhaustion requirements. *See, e.g.*, Bethesda Hospital Assn. v. Bowen, 485 U.S. 399, 405–406, 108 S.Ct. 1255, 99 L.Ed.2d 460 (1988); Montana Nat. Bank of Billings v. Yellowstone County, 276 U.S. 499, 505, 48 S.Ct. 331, 72 L.Ed. 673 (1928). It makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested. Such a vain exercise will rarely "protec[t] administrative agency authority" or "promot[e] judicial efficiency." *McCarthy*, 503 U.S., at 145, 112 S.Ct. 1081.

Both considerations apply fully here: Petitioners assert purely constitutional claims about which SSA ALJs have no special expertise and for which they can provide no relief. Relying on L. A. Tucker Truck Lines, the Commissioner argues that it nevertheless would have been fruitful for petitioners to raise Appointments Clause challenges in their ALJ hearings because " '[r]epetition of the objection' in multiple cases could have led 'to a change of policy.' " Brief for Respondent 45 (quoting L. A. Tucker Truck Lines, 344 U.S., at 37, 73 S.Ct. 67). But the Commissioner misses a key distinction: In L. A. Tucker Truck Lines, the aggrieved litigant had the opportunity to object to the relevant method of appointment before the full Interstate Commerce Commission itself. *Id.*, at 34, 73 S.Ct. 67. Repetition of such an objection in cases before the full Commission might have persuaded it to change its "predetermined policy on th[e] subject." *Id.*, at 37, 73 S.Ct. 67. Here, by contrast, the SSA's administrative review scheme at no point afforded petitioners access to the Commissioner, the one person who could remedy their Appointments Clause challenges. Nor were the ALJs capable of remedying any defects in their own appointments. After all, there were no Commissioner-appointed ALJs to whom objecting claimants' cases could be transferred, and the ALJs could not very well have reappointed themselves.

Internal SSA guidance confirms as much. On January 30, 2018, soon after this Court granted certiorari in Lucia, the agency issued an "emergency message" to ALJs advising them that "adjudicators may see challenges ... related to the constitutionality of the appointment of SSA's ALJs." SSA, EM–18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process, p. 2. The agency warned ALJs that, because the "SSA lacks the authority to finally decide constitutional issues such as these," they should "not discuss or make any findings related to the Appointments Clause issue on the record." Ibid. Instead, ALJs were directed to acknowledge any Appointments Clause objections with standardized language explaining that they " 'd[id] not have the authority to rule on that challenge.' " *Ibid.* The SSA reiterated these instructions in a second emergency message issued shortly after Lucia was decided. See SSA, EM–18003 REV: Important Information Regarding Possible

Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process—UPDATE, pp. 1–2 (June 25, 2018). It was not until March 2019 that the Acting Commissioner finally instructed the Appeals Council on how to handle preratification Appointments Clause challenges. *See* 84 Fed. Reg. 9582; *supra*, at 1357.

Taking a somewhat different tack, the Commissioner contends that petitioners are not entitled to new hearings before constitutionally appointed ALJs because they failed to make "timely challenge[s]" to their adjudicators' appointments. Ryder v. United States, 515 U.S. 177, 182, 115 S.Ct. 2031, 132 L.Ed.2d 136 (1995); *Lucia*, 585 U.S., at ——, 138 S.Ct., at 2055 (quoting Ryder). That argument, however, presumes what the Commissioner has failed to prove: that petitioners' challenges are, in fact, untimely. The Commissioner relies on Ryder and Lucia, but neither of those decisions had occasion to opine on what would constitute a "timely" objection in an administrative review scheme like the SSA's. Ryder involved an appeal from a Coast Guard court-martial, 515 U.S., at 179, 115 S.Ct. 2031, an adversarial proceeding in which traditional forfeiture rules apply, see United States v. Gladue, 67 M.J. 311, 313 (C. A. Armed Forces 2009). *Lucia*, meanwhile, arose from proceedings before the Securities and Exchange Commission, 585 U.S., at —— – ——, 138 S.Ct., at 2047, in which a statutory issue-exhaustion requirement applies, see 15 U.S. C. § 78y(c)(1). Where, as here, claimants are not required to exhaust certain issues in administrative proceedings to preserve them for judicial review, claimants who raise those issues for the first time in federal court are not untimely in doing so.

Taken together, the inquisitorial features of SSA ALJ proceedings, the constitutional character of petitioners' claims, and the unavailability of any remedy make clear that "adversarial development" of the Appointments Clause issue "simply [did] not exist" (and could not exist) in petitioners' ALJ proceedings. *Sims*, 530 U.S., at 112, 120 S.Ct. 2080 (plurality opinion). The Courts of Appeals therefore erred in imposing an issue-exhaustion requirement on petitioners' Appointments Clause claims. The judgments of the Eighth and Tenth Circuits are reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, with whom Justice GORSUCH and Justice BARRETT join, concurring in part and concurring in the judgment.

I join Parts I, II–A, and II–B–2 of the opinion of the Court, which correctly explain that the nonadversarial nature of an agency proceeding generally gives good reason to refrain from creating an issue-exhaustion requirement. *See* Sims v. Apfel, 530 U.S. 103, 109–110, 120 S.Ct. 2080, 147 L.Ed.2d 80 (2000). Proceedings before an administrative law judge (ALJ) of the Social Security Administration are plainly nonadversarial: The regulations assure claimants that the agency will "conduct the

administrative review process in an informal, non-adversarial manner." 20 CFR § 404.900(b) (2020). ALJs can raise new issues *sua sponte*. §§ 404.944, 404.946. Hearings are so informal that lawyers, briefs, and even attendance are often optional. §§ 404.948–404.950. And should an ALJ err, the Appeals Council may review cases to correct anything from "error[s] of law" to "broad policy or procedural issue[s] that may affect the general public interest." § 404.970(a). This decidedly pro-claimant, inquisitorial process is quite unlike an adversarial suit in which parties are expected to identify, argue, and preserve all issues.

To be sure, a few regulatory provisions direct claimants to advocate on their own behalf by objecting to problems, including if the agency misidentifies issues before the hearing or if the ALJ is "prejudiced or partial." §§ 404.938–404.940. But these unsurprising reminders that a claimant should not sit idly on the sidelines hardly demand that the penalty for overlooking an argument is forfeiture. On the contrary, such a permanent consequence would be surprising in light of the flexible, "informal" mechanisms that undergird the entire agency review process. § 404.900(b); see also Sims, 530 U.S., at 110, 120 S.Ct. 2080 (plurality opinion) ("The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings").

Because these proceedings bear little resemblance to adversarial litigation, I agree with the Court that there is no need for an exhaustion rule. I would end the analysis there.

Justice BREYER, concurring in part and concurring in the judgment.

I continue to believe that, "[u]nder ordinary principles of administrative law a reviewing court will not consider arguments that a party failed to raise in timely fashion before an administrative agency." Sims v. Apfel, 530 U.S. 103, 114, 120 S.Ct. 2080, 147 L.Ed.2d 80 (2000) (BREYER, J., dissenting). I also adhere to my prior view that, in the particular context of the Social Security Administration, a claimant "ordinarily must raise all relevant issues before the ALJ" and that the "nonadversarial nature" of the agency's procedures is generally irrelevant to whether the ordinary rule requiring issue exhaustion ought to apply. *Id.*, at 117, 120 S.Ct. 2080. Here, however, I agree with the Court that the Appointments Clause challenges at issue fall into the well-established exceptions for constitutional and futile claims. See *ante*, at 1360 – 1362; see also Sims, 530 U.S., at 115, 120 S.Ct. 2080 (BREYER, J., dissenting); Woodford v. Ngo, 548 U.S. 81, 103, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006) (BREYER, J., concurring in judgment); Ross v. Blake, 578 U.S. 632, 649, 136 S.Ct. 1850, 195 L.Ed.2d 117 (2016) (BREYER, J., concurring in part) (recognizing these traditional exceptions). I therefore join Parts I, II–B–1, and II–B–2 of the Court's opinion and concur in the Court's judgment.

NOTES

1. In Shaibi v. Berryhill, 883 F.3d 1102, 1108-1110 (9th Cir. 2018), the Ninth Circuit distinguished *Sims v. Apfel* and applied issue exhaustion to preclude judicial review of the reliability of vocational expert ("VE") testimony where a represented claimant failed to challenge the accuracy or reliability of that testimony on cross-examination or otherwise raise the issue before the ALJ. In so doing the Ninth Circuit narrowly construed the Supreme Court's holding in *Sims* as only rejecting the application of issue exhaustion in the context of failing to raise legal issues before the Appeals Council. *Id.* at 1109. Based on this narrow construction of *Sims*, the Court rejected plaintiff's argument that *Sims* had overruled an earlier Ninth Circuit decision, Meanel v. Apfel, 172 F.3d 1111 (9th Cir. 1999), which had applied ALJ issue exhaustion, at least in cases where claimants were represented by counsel at the hearing. *Id.* The Court further reasoned that Sentence Six of 42 U.S.C. § 405(g) also supported ALJ issue exhaustion since the plaintiff lacked "good cause" for failing to introduce this evidentiary challenge at the hearing and make the assertion that the VE's testimony was inconsistent with government labor market evidentiary sources such as the County Business Patterns ("CBP") published by the U.S. Census Bureau, and the Occupational Outlook Handbook ("OOH") published by the Bureau of Labor Statistics. *Id*.

Although SSA takes administrative notice of these government labor market data sources in 20 C.F.R. § 404.1566(d), it has not promulgated a regulation or ruling imposing an affirmative obligation on ALJs to reconcile discrepancies between those sources and a VE's testimony, unlike the affirmative obligation in SSR 00-4p to reconcile conflicts between VE testimony and the U.S. Dictionary of Occupational Titles ("DOT"). *Id*. In that respect, the Court observed that "unlike the DOT, which is comprised of self-contained descriptions of the requirements for performance of various jobs, using the job distribution information in the CBP and OOH requires information and inferences not contained in the documents themselves and so not amenable to an ALJ's *sua sponte* consideration." *Id*. at 1109, n.6. Finally, the Court clarified that it was not suggesting "that a claimant must, within minutes of a VE's initial testimony, cross-examine a VE with specific alternative job calculations based on the CBP, OOH, or other published sources." *Id*.at 1110. Rather, "it is enough to raise the job-numbers issue in a general sense before the ALJ [and] [a] claimant may do so by inquiring as to the evidentiary basis for a VE's estimated job numbers, or inquiring as to whether those numbers are consistent with [various listed governmental sources]." *Id*. at l.

2. Have *Shaibi* and other ALJ issue exhaustion circuit precedents on "routine" [non-structural constitutional] issues been decisively undercut by the Court's reasoning in *Carr v. Saul,* notwithstanding the Court's reservation in its footnote 5? Consider the following:

> The Court's recent decision in *Carr*, reaffirming the reasoning of *Sims*, should put to rest the debate over the propriety of judicially created issue exhaustion in any SSA adjudicative proceeding, including those at the ALJ hearing stage involving "routine" issues. The *Carr* and *Sims* decisions require express consideration of the non-adversarial and informal nature of the adjudication context in question and those considerations will decisively weigh against common law issue exhaustion's application to any of SSA's inquisitorial proceedings. The courts' extension of common law issue exhaustion into these proceedings was mistaken from the outset and heedlessly adapted from inapposite or questionably supported precedents from adversarial adjudicative systems. Its further application should be discontinued and the post-*Sims*, pre-*Carr* precedents, attempting to apply issue exhaustion at the ALJ hearing level should be viewed as no longer sound law.

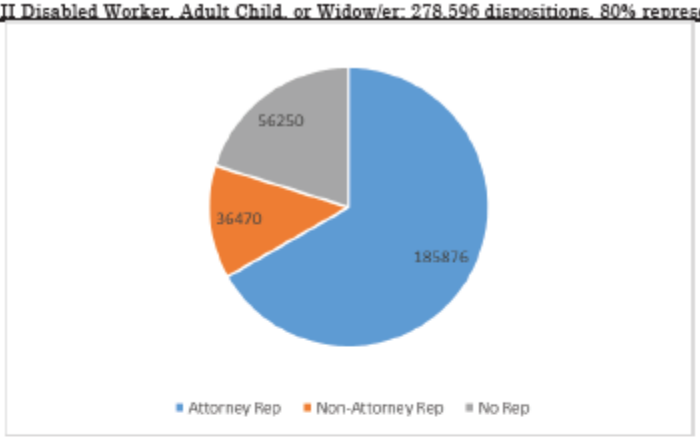
Jon C. Dubin, W*hy* Carr v. Saul *Should Signal the End of Common Law Issue Exhaustion in Inquisitorial Proceedings,* 29 GEO. MASON L. REV. 627, 673 (2022); *but cf.* Fetting v. Kijakazi, 62 F.4th 332, 337-38 (7th Cir. 2023) (applying ALJ issue exhaustion to routine vocational evidence issues , declining to identify or apply any of the considerations the Court articulated in *Carr* and *Sims* for determining the prudential propriety of common law issue exhaustion and pointing out simply that since the *Carr* Court reserved this question of the application of ALJ hearing-level issue exhaustion to "routine issues" in its footnote 5, its decision and analysis "does not help [the claimant]."); Leisgang v. Kijakazi, 72 F.4th 216, 219-20 (7th Cir. 2023) (following *Fetting* without mentioning *Carr*).

3. Even if ALJ issue exhaustion were otherwise deemed appropriate, should the doctrine ever be deemed potentially applicable on issues, such as the vocational issues in *Shaibi*, *Fetting*, and *Leisgang*, when a claimant is not represented by an attorney? Issue exhaustion, like all judicially created exhaustion doctrines, is a prudential, equitable doctrine. Is it ever prudent or equitable to expect a *pro se* disability claimant, or one represented only by a paralegal or other non-lawyer advocate, to cross-examine skilled vocational experts and medical experts at hearings? *See* Keifer v. Saul, 789 Fed. App'x. 581, 582 (9th Cir. Jan. 6, 2020) (applying *Shaibi*'s ALJ issue exhaustion holding to a case with a claimant represented by a non-attorney, "lay representative eligible for direct payment of fees under the Social Security Act."). In Fiscal Year 2018, more than 50% of SSI disability claimants lacked attorney representation and approximately 33% of disability insurance (DIB) claimants and claimants in concurrent DIB/SSID cases lacked attorney representation. *See* 41 SOCIAL SECURITY FORUM 17 (January 2019). In total, 295,916 disability claimants lacked attorney representation at their hearings in FY 2018. *Id.*

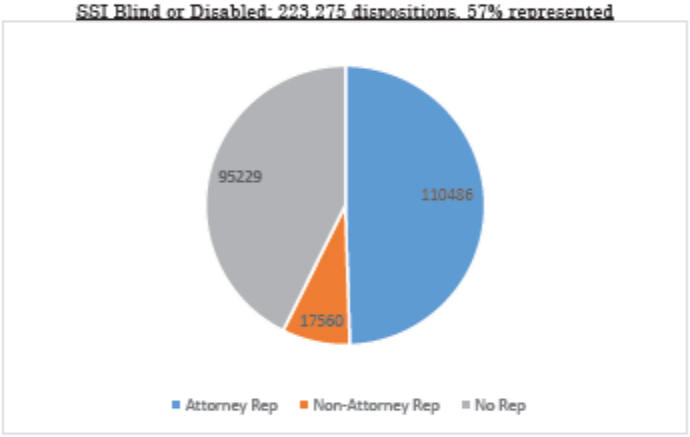
[Chart reproduced on next page]

What Percentage of ALJ Decisions and Dismissals Had Representation in Fiscal Year 2018?

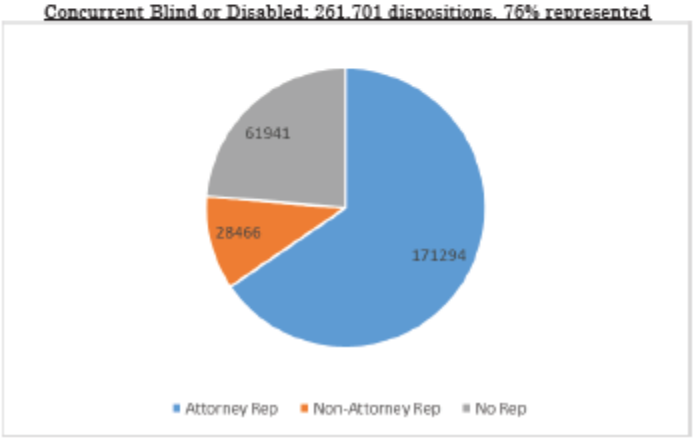
Title II Disabled Worker, Adult Child, or Widow/er: 278,596 dispositions, 80% represented



SSI Blind or Disabled: 223,275 dispositions, 57% represented



Concurrent Blind or Disabled: 261,701 dispositions, 76% represented



Chapter 8, Section D.1.b (Review of Decisions Made Without a Hearing) after Note, p. 649:

SMITH V. BERRYHILL

587 U.S. ___, 139 S.Ct. 1765 (2019)

JUSTICE SOTOMAYOR delivered the opinion of the Court.

The Social Security Act allows for judicial review of "any final decision ... made after a hearing" by the Social Security Administration (SSA). 42 U.S.C. § 405(g). Petitioner Ricky Lee Smith was denied Social Security benefits after a hearing by an administrative law judge (ALJ) and later had his appeal from that denial dismissed as untimely by the SSA's Appeals Council—the agency's final decisionmaker. This case asks whether the Appeals Council's dismissal of Smith's claim is a "final decision ... made after a hearing" so as to allow judicial review under § 405(g). We hold that it is.

I

A

Congress enacted the Social Security Act in 1935, responding to the crisis of the Great Depression. 49 Stat. 620; F. Bloch, Social Security Law and Practice 13 (2012). In its early days, the program was administered by a body called the Social Security Board; that role has since passed on to the Board's successor, the SSA. In 1939, Congress amended the Act, adding various provisions that—subject to changes not at issue here—continue to govern cases like this one. See Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360. First, Congress gave the agency "full power and authority to make rules and regulations and to establish procedures ... necessary or appropriate to carry out" the Act. § 405(a).

Second, Congress directed the agency "to make findings of fac[t] and decisions as to the rights of any individual applying for a payment" and to provide all eligible claimants—that is, people seeking benefits—with an "opportunity for a hearing with respect to such decision[s]." § 405(b)(1). Third, and most centrally, Congress provided for judicial review of "any final decision of the [agency] made after a hearing." § 405(g). At the same time, Congress made clear that review would be available only "as herein provided"—that is, only under the terms of § 405(g). § 405(h); see *Heckler v. Ringer*, 466 U.S. 602, 614–615, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984).

In 1940, the Social Security Board created the Appeals Council, giving it responsibility for overseeing and reviewing the decisions of the agency's hearing officers (who, today, are ALJs). Though the Appeals Council originally had just three

members, its ranks have since swelled to include over 100 individuals serving as either judges or officers. The Appeals Council remains a creature of regulatory rather than statutory creation. . . .

Modern-day claimants must generally proceed through a four-step process before they can obtain review from a federal court. First, the claimant must seek an initial determination as to his eligibility. Second, the claimant must seek reconsideration of the initial determination.

Third, the claimant must request a hearing, which is conducted by an ALJ. Fourth, the claimant must seek review of the ALJ's decision by the Appeals Council. See 20 CFR § 416.1400. If a claimant has proceeded through all four steps on the merits, all agree, § 405(g) entitles him to judicial review in federal district court. The tension in this case stems from the deadlines that SSA regulations impose for seeking each successive stage of review. A party who seeks Appeals Council review, as relevant here, must file his request within 60 days of receiving the ALJ's ruling, unless he can show "good cause for missing the deadline." § 416.1468.

The Appeals Council's review is discretionary: It may deny even a timely request without issuing a decision. See § 416.1481. If a claimant misses the deadline and cannot show good cause, however, the Appeals Council does not deny the request but rather dismisses it. § 416.1471. Dismissals are "binding and not subject to further review" by the SSA. § 416.1472. The question here is whether a dismissal for untimeliness, after the claimant has had an ALJ hearing, is a "final decision ... made after a hearing" for purposes of allowing judicial review under § 405(g).

B

Petitioner Ricky Lee Smith applied for disability benefits under Title XVI in 2012. Smith's claim was denied at the initial-determination stage and upon reconsideration. Smith then requested an ALJ hearing, which the ALJ held in February 2014 before issuing a decision denying Smith's claim on the merits in March 2014.

The parties dispute what happened next. Smith's attorney says that he sent a letter requesting Appeals Council review in April 2014, well within the 60-day deadline. The SSA says that it has no record of receiving any such letter. In late September 2014, Smith's attorney sent a copy of the letter that he assertedly had mailed in April. The SSA, noting that it had no record of prior receipt, counted the date of the request as the day that it received the copy. The Appeals Council accordingly determined that Smith's submission was untimely, concluded that Smith lacked good cause for missing the deadline, and dismissed Smith's request for review.

Smith sought judicial review of that dismissal in the U.S. District Court for the Eastern District of Kentucky. The District Court held that it lacked jurisdiction to

hear his suit. The U.S. Court of Appeals for the Sixth Circuit affirmed, maintaining that "an Appeals Council decision to refrain from considering an untimely petition for review is not a 'final decision' subject to judicial review in federal court." Smith petitioned this Court for certiorari. Responding to Smith's petition, the Government stated that while the Sixth Circuit's decision accorded with the SSA's longstanding position, the Government had "reexamined the question and concluded that its prior position was incorrect."

We granted certiorari to resolve a conflict among the Courts of Appeals. Because the Government agrees with Smith that the Appeals Council's dismissal meets § 405(g)'s terms, we appointed Deepak Gupta as *amicus curiae* to defend the judgment below. . . .

II

Section 405(g), as noted above, provides for judicial review of "any final decision ... made after a hearing." This provision, the Court has explained, contains two separate elements: first, a "jurisdictional" requirement that claims be presented to the agency, and second, a "waivable ... requirement that the administrative remedies prescribed by the Secretary be exhausted." *Mathews v. Eldridge*, 424 U.S. 319, 328, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). This case involves the latter, nonjurisdictional element of administrative exhaustion. While § 405(g) delegates to the SSA the authority to dictate which steps are generally required, see *Sims*, 530 U.S. at 106, 120 S.Ct. 2080, exhaustion of those steps may not only be waived by the agency, see *Weinberger v. Salfi*, 422 U.S. 749, 767, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), but also excused by the courts, see *Bowen v. City of New York*, 476 U.S. 467, 484, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986); *Eldridge*, 424 U.S. at 330, 96 S.Ct. 893.[7]

The question here is whether a dismissal by the Appeals Council on timeliness grounds after a claimant has received an ALJ hearing on the merits qualifies as a "final decision ... made after a hearing" for purposes of allowing judicial review under § 405(g). In light of the text, the context, and the presumption in favor of the reviewability of agency action, we conclude that it does.

[7] While *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977), can be read to cabin *Eldridge* and *Salfi* to only constitutional claims, the Court's subsequent decision in *City of New York* demonstrates that this understanding of § 405(g) can extend to cases lacking *Eldridge*'s and *Salfi*'s constitutional character. See *City of New York*, 476 U.S. at 474–475, and n. 5, 482–484, 106 S.Ct. 2022; see also *City of New York v. Heckler*, 578 F. Supp. 1109, 1124–1125 (EDNY 1984) (ruling that the agency's actions violated the Social Security Act and its own regulations and thus declining to reach the plaintiffs' constitutional argument).

A

We begin with the text. Taking the first clause ("any final decision") first, we note that the phrase "final decision" clearly denotes some kind of terminal event,[8] and Congress' use of the word "any" suggests an intent to use that term "expansive[ly]," see *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218–219, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008). The Appeals Council's dismissal of Smith's claim fits that language: Under the SSA's own regulations, it was the final stage of review. See 20 CFR § 416.1472.

Turning to the second clause ("made after a hearing"), we note that this phrase has been the subject of some confusion over the years. On the one hand, the statute elsewhere repeatedly uses the word "hearing" to signify an ALJ hearing,[9] which suggests that, in the ordinary case, the phrase here too denotes an ALJ hearing. See, *e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005) (noting "the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning"). On the other hand, the Court's precedents make clear that an ALJ hearing is not an ironclad prerequisite for judicial review. See, *e.g.*, *City of New York*, 476 U.S. at 484, 106 S.Ct. 2022 (emphasizing the Court's " 'intensely practical' " approach to the applicability of the exhaustion requirement and disapproving "mechanical application" of a set of factors).

There is no need today to give § 405(g) a definition for all seasons, because, in any event, this is a mine-run case and Smith obtained the kind of hearing that §

[8] See 5 Oxford English Dictionary 920 (2d ed. 1989) (Final: "Marking the last stage of a process; leaving nothing to be looked for or expected; ultimate"); 4 Oxford English Dictionary 222 (1933) (same); see also Webster's New World College Dictionary 542 (5th ed. 2016) (Final: "leaving no further chance for action, discussion, or change; deciding; conclusive"); Merriam-Webster's Collegiate Dictionary 469 (11th ed. 2011) (Final: "coming at the end: being the last in a series, process, or progress").

[9] See 42 U.S.C. § 405(b)(1) (entitling claimants to a hearing on the merits); § 405(b)(2) (discussing "reconsideration" of certain findings "before any hearing under paragraph (1) on the issue of such entitlement"); § 405(g) (discussing factual findings and evidence resulting from such a "hearing"); § 405(h) (discussing binding effect of decision "after a hearing"); see also §§ 1383(c)(1)(A), (3) (similar).

405(g) most naturally suggests: an ALJ hearing on the merits.[10] In other words, even giving § 405(g) a relatively strict reading, Smith appears to satisfy its terms.[11]

Smith cannot, however, satisfy § 405(g)'s "after a hearing" requirement as a matter of mere chronology.[12] In *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977), the Court considered whether the SSA's denial of a claimant's petition to reopen a prior denial of his claim for benefits qualified as a final decision under § 405(g). *Id.*, at 102–103, 107–109, 97 S.Ct. 980. The Court concluded that it did not, reasoning that a petition to reopen was a matter of agency grace that could be denied without a hearing altogether and that allowing judicial review would thwart Congress' own deadline for seeking such review. See *id.*, at 108–109, 97 S.Ct. 980. That the SSA's denial of the petition to reopen (1) was conclusive and (2) postdated an ALJ hearing did not, alone, bring it within the meaning of § 405(g).

Here, by contrast, the SSA's "final decision" is much more closely tethered to the relevant "hearing." Unlike a petition to reopen, a primary application for benefits may not be denied without an ALJ hearing (assuming the claimant timely requests one, as Smith did). § 405(b)(1). Moreover, the claimant's access to this first bite at the apple is indeed a matter of legislative right rather than agency grace. See *id.*, at 108, 97 S.Ct. 980. And, again unlike the situation in *Sanders*, there is no danger here of thwarting Congress' own deadline, given that the only potential untimeliness here concerns Smith's request for Appeals Council review—not his request for judicial review following the agency's ultimate determination.

B

The statutory context weighs in Smith's favor as well. Appeals from SSA determinations are, by their nature, appeals from the action of a federal agency, and

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[10] We note as well that the "hearing" referred to in § 405(g) cannot be a hearing before the Appeals Council. Congress provided for a hearing in § 405(b) and for judicial review "after a hearing" in § 405(g) before the Appeals Council even existed. Moreover, the Appeals Council makes many decisions without a hearing—*e.g.,* denying a petition for review without giving reasons—that are nevertheless plainly reviewable. See 20 CFR §§ 416.1400(a)(5), 416.1467, 416.1481. Accordingly, the fact that there was no Appeals Council hearing—much like the fact that there was no reasoned Appeals Council decision on the merits—does not bar review.

[11] We return below to the possibility, suggested by *amicus*, that "final decision ... made after a hearing" could signify a final decision "on a matter on which the Act requires a hearing." Here, we note only that while Congress certainly could have written something like "final decision on the merits ... made after a hearing," it did not.

[12] The alternative risks untenable breadth. The Battle of Yorktown predates our ruling today, but no one would describe today's opinion as a "decision made after the Battle of Yorktown." As we explain, however, the dismissal of Smith's claim is tethered to Smith's hearing in a way that more distant events are not.

in the separate administrative-law context of the Administrative Procedure Act (APA), an action is "final" if it both (1) "mark[s] the 'consummation' of the agency's decisionmaking process" and (2) is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' " *Bennett v. Spear*, 520 U.S. 154, 177–178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). Both conditions are satisfied when a Social Security claimant has reached the fourth and final step of the SSA's four-step process and has had his request for review dismissed as untimely. It is consistent to treat the Appeals Council's dismissal of Smith's claim as a final decision as well.

To be clear, "the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue," *Salfi*, 422 U.S. at 765, 95 S.Ct. 2457, and we leave this axiom undisturbed today. The Social Security Act and the APA are different statutes, and courts must remain sensitive to their differences. See, *e.g.*, *Sullivan v. Hudson*, 490 U.S. 877, 885, 109 S.Ct. 2248, 104 L.Ed.2d 941 (1989) (observing that "[a]s provisions for judicial review of agency action go, § 405(g) is somewhat unusual" in that its "detailed provisions ... suggest a degree of direct interaction between a federal court and an administrative agency alien to" APA review). But at least some of these differences suggest that Congress wanted more oversight by the courts in this context rather than less, see *ibid.*,[13] and the statute as a whole is one that "Congress designed to be 'unusually protective' of claimants," *City of New York*, 476 U.S. at 480, 106 S.Ct. 2022.

We note further that the SSA is a massive enterprise,[14] and mistakes will occur. See Brief for National Organization of Social Security Claimants' Representatives as *Amicus Curiae* 13 (collecting examples).[15] The four steps preceding judicial review, meanwhile, can drag on for years.[16] While mistakes by the agency may be admirably rare, we do not presume that Congress intended for this

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[13] The noteworthy counterpoint is § 405(h), which withdraws federal-court jurisdiction under 28 U.S.C. §§ 1331, 1346. While that provision clearly serves "to route review through" § 405(g), see *Sanders*, 430 U.S. at 103, n. 3, 97 S.Ct. 980; see also *Heckler v. Ringer*, 466 U.S. 602, 614–615, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984), that routing choice does not simultaneously constrict the route that Congress did provide.

[14] For example, the agency receives roughly 2.5 million new disability claims per year. See SSA, Annual Performance Report Fiscal Years 2017–2019, p. 32 (Feb. 12, 2018).

[15] See also [Koch & Koplow, The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council, 17 Fla. St. U. L. Rev. 199, 257 (1990)] (noting that each Appeals Council member "typically spends only ten to fifteen minutes reviewing an average case" given "the pressures of the caseload").

[16] See SSA, FY 2020 Congressional Justification 9 (Mar. 2019) (estimating 2019 average processing time for the first three steps at 113 days, 105 days, and 515 days, respectively).

claimant-protective statute, see *City of New York*, 476 U.S. at 480, 106 S.Ct. 2022, to leave a claimant without recourse to the courts when such a mistake does occur—least of all when the claimant may have already expended a significant amount of likely limited resources in a lengthy proceeding.

C

Smith's entitlement to judicial review is confirmed by "the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986). "That presumption," of course, "is rebuttable: It fails when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, ——— – ———, 135 S.Ct. 1645, 1651, 191 L.Ed.2d 607 (2015). But the burden for rebutting it is " 'heavy,' " *id.*, at ——, 135 S.Ct. at 1651, and that burden is not met here. While Congress left it to the SSA to define the procedures that claimants like Smith must first pass through, see *Sims*, 530 U.S. at 106, 120 S.Ct. 2080, Congress has not suggested that it intended for the SSA to be the unreviewable arbiter of whether claimants have complied with those procedures. Where, as here, a claimant has received a claim-ending timeliness determination from the agency's last-in-line decisionmaker after bringing his claim past the key procedural post (a hearing) mentioned in § 405(g), there has been a "final decision ... made after a hearing" under § 405(g).[17]

III

Amicus' arguments to the contrary have aided our consideration of this case, but they have not dissuaded us from concluding that the Appeals Council's dismissal of Smith's claim satisfied § 405(g). *Amicus* first argues that the phrase "final decision ... made after a hearing" refers to a conclusive disposition, after exhaustion, of a benefits claim on the merits—that is, on a basis for which the Social Security Act entitles a claimant to a hearing. This reading follows, *amicus* argues, from the Court's observations that § 405(g) generally requires exhaustion, and moreover from *Sanders*' suggestion, see 430 U.S. at 108, 97 S.Ct. 980, that review is not called for where a claimant loses on an agency-determined procedural ground that is divorced from the substantive matters for which a hearing is required. Even if Smith did receive a hearing on the merits, *amicus* argues, the conclusive determination was not on that basis, and "[i]t would be unnatural to read the statute as throwing open the gates to

[17] A different question would be presented by a claimant who assertedly faltered at an earlier step—*e.g.,* whose request for an ALJ hearing was dismissed as untimely and who then appealed that determination to the Appeals Council before seeking judicial review. While such a claimant would not have received a "hearing" at all, the Court's precedents also make clear that a hearing is not always required. Because such a situation is not before us, we do not address it.

judicial review of any final decision, no matter how collateral," just because such a hearing occurred.

We disagree. First, as noted above, the Court's precedents do not make exhaustion a pure necessity, indicating instead that while the SSA is empowered to define the steps claimants must generally take, the SSA is not also the unreviewable arbiter of whether a claimant has sufficiently complied with those steps. Second, the Appeals Council's dismissal is not merely collateral; such a dismissal calls an end to a proceeding in which a substantial factual record has already been developed and on which considerable resources have already been expended. Accepting *amicus*' argument would mean that a claimant could make it to the end of the SSA's process and then have judicial review precluded simply because the Appeals Council stamped "untimely" on the request, even if that designation were patently inaccurate. While there may be contexts in which the law is so unforgiving, this is not one.

Smith's case, as noted above, is also distinct from *Sanders*. *Sanders*, after all, involved the SSA's denial of a petition for reopening—a second look that the agency had made available to claimants as a matter of grace. See 430 U.S. at 101–102, 107–108, 97 S.Ct. 980. But Smith is not seeking a second look at an already-final denial; he argues that he was wrongly prevented from continuing to pursue his primary claim for benefits. That primary claim, meanwhile, is indeed a matter of statutory entitlement. See § 405(b).

Amicus also emphasizes that the SSA handles a large volume of claims, such that a decision providing for greater judicial review could risk a flood of litigation. That result seems unlikely for a few reasons. First, the number of Appeals Council untimeliness dismissals is comparatively small—something on the order of 2,500 dismissals out of 160,000 dispositions per year. Second, the interpretation that Smith and the Government urge has been the law since 1983 in the Eleventh Circuit, and the data there do not bear out *amicus*' warning. Third, while *amicus* flags related contexts that could be informed by today's ruling, those issues are not before us. We therefore do not address them other than to reinforce that such questions must be considered in the light of "the particular administrative scheme at issue." See *Salfi*, 422 U.S. at 765, 95 S.Ct. 2457. Today's decision, therefore, hardly knocks loose a line of dominoes.

Finally, *amicus* argues that the meaning of § 405(g) is ambiguous and that the SSA's longstanding interpretation of § 405(g)—prior to its changed position during the pendency of this case—is entitled to deference under *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Government and Smith maintain that the statute unambiguously supports the Government's new position, and Smith further asserts that deference is

inappropriate where the Government itself has rejected the interpretation in question in its filings.

We need not decide whether the statute is unambiguous or what to do with the curious situation of an *amicus curiae* seeking deference for an interpretation that the Government's briefing rejects. *Chevron* deference " 'is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.' " *King v. Burwell*, 576 U.S. ——, ——, 135 S.Ct. 2480, 2488, 192 L.Ed.2d 483 (2015). The scope of judicial review, meanwhile, is hardly the kind of question that the Court presumes that Congress implicitly delegated to an agency. . . . Rather, "[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.' "Here, too, while Congress has empowered the SSA to create a scheme of administrative exhaustion, see *Sims*, 530 U.S. at 106, 120 S.Ct. 2080, Congress did not delegate to the SSA the power to determine "the scope of the judicial power vested by" § 405(g) or to determine conclusively when its dictates are satisfied. *Adams Fruit Co.*, 494 U.S. at 650, 110 S.Ct. 1384. Consequently, having concluded that Smith and the Government have the better reading of § 405(g), we need go no further.

IV

Although they agree that § 405(g) permits judicial review of the Appeals Council's dismissal in this case, Smith and the Government disagree somewhat about the scope of review on remand.[19] Smith argues that if a reviewing court disagrees with the procedural ground for dismissal, it can then proceed directly to the merits, while the Government argues that the proper step in such a case would be to remand. We largely agree with the Government.

To be sure, there would be jurisdiction for a federal court to proceed to the merits in the way that Smith avers. For one, as noted above, exhaustion itself is not a jurisdictional prerequisite. Moreover, § 405(g) states that a reviewing "court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing"—a broad grant of authority that reflects the high "degree of direct interaction between a federal court and an administrative agency" envisioned by § 405(g). *Hudson*, 490 U.S. at 885, 109 S.Ct. 2248. In short, there is no jurisdictional bar to a court's reaching the merits.

[19] The parties agree, as do we, on the standard of review: abuse of discretion as to the overall conclusion, and "substantial evidence" "as to any fact." See § 405(g); cf. *Bowen v. City of New York*, 476 U.S. 467, 483, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986) ("Ordinarily, the Secretary has discretion to decide when to waive the exhaustion requirement").

Fundamental principles of administrative law, however, teach that a federal court generally goes astray if it decides a question that has been delegated to an agency if that agency has not first had a chance to address the question. See, *e.g.*, *INS v. Orlando Ventura*, 537 U.S. 12, 16, 18, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002) (*per curiam*); *ICC v. Locomotive Engineers*, 482 U.S. 270, 283, 107 S.Ct. 2360, 96 L.Ed.2d 222 (1987); cf. *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943) ("For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency"). The Court's cases discussing exhaustion in the Social Security context confirm the prudence of applying this general principle here, where the agency's final decisionmaker has not had a chance to address the merits at all.[20] See *City of New York*, 476 U.S. at 485, 106 S.Ct. 2022 ("Because of the agency's expertise in administering its own regulations, the agency ordinarily should be given the opportunity to review application of those regulations to a particular factual context"); *Salfi*, 422 U.S. at 765, 95 S.Ct. 2457 (explaining that exhaustion serves to "preven[t] premature interference with agency processes" and to give the agency "an opportunity to correct its own errors," "to afford the parties and the courts the benefit of its experience and expertise," and to produce "a record which is adequate for judicial review"). Accordingly, in an ordinary case, a court should restrict its review to the procedural ground that was the basis for the Appeals Council dismissal and (if necessary) allow the agency to address any residual substantive questions in the first instance.[21]

V

We hold that where the SSA's Appeals Council has dismissed a request for review as untimely after a claimant has obtained a hearing from an ALJ on the merits, that dismissal qualifies as a "final decision ... made after a hearing" within the meaning of § 405(g). The judgment of the United States Court of Appeals for the Sixth Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[20] We make no statement, by contrast, regarding the applicability of this line of cases to situations in which the Appeals Council has had a chance to address the merits. Cf. *Sims v. Apfel*, 530 U.S. 103, 110–112, 120 S.Ct. 2080, 147 L.Ed.2d 80 (2000) (plurality opinion) (discussing why the inquisitorial nature of SSA proceedings counsels against imposing an issue-exhaustion requirement).

[21] By the same token, remand may be forgone in rarer cases, such as where the Government joins the claimant in asking the court to reach the merits or where remand would serve no meaningful purpose.

NOTE

The Supreme Court determined that after the reviewing court disagrees with the procedural ground for dismissal by the Appeals Council, administrative exhaustion principles suggest the court should not decide the merits but rather should remand to provide opportunity to the agency to resolve the merits of the case in the first instance. It suggested two exceptions to this approach: 1) where the "government joins the claimant in asking the court to reach the merits;" and 2) where "remand would serve no meaningful purpose." In what circumstances would remand "serve no meaningful purpose" thereby justifying the reviewing court to reach the merits? If the reviewing court found error on the merits in such a case, would there be any limits on the court's authority to remand the case to the agency for further proceedings based on errors found on the merits review?

Chapter 8, Section D.3.b (Required Findings and Reasoning) at p. 665-66:

The Social Security Administration issued new regulations in 2017 purporting to alter articulation and reasoning requirements for evaluating medical evidence. *See* "Revisions to Rules Regarding Medical Evidence," 82 Fed. Reg. 5844 (January 18, 2017). These rules became effective and apply to claims filed on or after March 27, 2017. The new rules provide that adjudicators will evaluate all medical opinions and findings using the factors delineated in the regulations; supportability and consistency are the most important factors and their application must be explained; other factors which "will be considered" and about which adjudicators "may but are not required to explain" are the medical source's "treatment relationship" with the claimant, including the length, frequency, purpose and extent of the treating relationship, and whether the source has an examining (as opposed to a non-examining) relationship with the claimant; specialization; and "other factors" such as whether the source has familiarity with other evidence in the claim or understanding of the SSA disability program's policies and evidentiary requirements. 20 C.F.R. §§ 404.1520c(b),(c); 416.920c(b),(c). Adjudicators are also "not required to articulate how [they] considered evidence from nonmedical sources using [the above factors]." 20 C.F.R. §§ 404.1520c(d); 416.920c(d). Finally, SSA adjudicators "will not provide any analysis in their determination or decision about a decision made by any other governmental agency or a nongovernmental entity about whether [claimants] are disabled, blind, employable, or entitled to any benefits." 20 C.F.R. §§ 404.1504; 416.904.

The Court of Appeals for the Fifth Circuit has recently re-affirmed longstanding requirements for adequate ALJ reasoning and findings and the non-harmless nature of inadequate articulation. The court stated:

> Procedural perfection in administrative proceedings is not required as long as the substantial rights of a party have not been affected. The Commissioner avers that any error in not addressing Dr. Bernauer's statement was harmless. However, the Commissioner points to no cases in which an ALJ's failure to address an examining physician's medical opinion is deemed harmless. This is because, as explained above, such an error makes it impossible to know whether the ALJ properly considered and weighed an opinion, which directly affects the RFC determination. Here, if Dr. Bernauer's opinion was afforded some weight, the ALJ's RFC would surely have been different. This, in turn, would likely have affected the jobs available at step five of the sequential evaluation process, and Kneeland may have been found disabled. Of course it is possible the ALJ considered and rejected Dr. Bernauer's opinion, but without any explanation, we have no way of knowing.

Kneeland v. Berryhill, 850 F.3d 749, 761-62 (5th Cir. 2017).

Chapter 8, Section E.1 (Fee from the Claimant) at p. 678:

The percentage rate for the user fee remains at the original 6.3%; however, the cap has been increased to $117 for 2024.

Chapter 8, Section E.1. (Fee from the claimant) before discussion of Gisbrecht v. Barnhart, at p. 679:

The First Circuit has held that SSA's denial of fees to a law firm for an associate's work in situations when a salaried associate leaves a law firm, is unlawful and that "SSA must adjust its rules, . . ., to ensure that the law firms that employ salaried associates to represent SSA claimants may receive direct payment of the attorney's fees to which the firms' associates are entitled for representation performed while employed by those law firms." Marasco & Neselbush, LLP v. Collins, 6 F. 4th 150, 179 (1st Cir. 2021) (citing 42 U.S.C. § 406(a)(2), (4)). The court further held that "the SSA's rule barring payments to attorneys for work completed before they enter government service is both arbitrary and, in some circumstances, in conflict with the statutory mandate to pay 'a reasonable fee' for successful representation of SSA claimants. 42 U.S.C. § 406(a)(1). Hence, that rule must be eliminated." *Id.*

Chapter 8, Section E.1 (Fee from the Claimant) at the end of the Note after Gisbrecht, at p. 685:

The Second Circuit has rejected SSA claims of a windfall and excessive fee request and approved fees in excess of $1,550/hr. for counsel in Fields v. Kijakazi, 24 F.4th

845, 854-56 (2d Cir. 2022). In assessing the reasonableness of the fee request, the court found that "[a]mong the factors to be considered are the ability and expertise of the lawyers and whether they were particularly efficient, accomplishing in a relatively short amount of time what less specialized or less well-trained lawyers might take far longer to do," "the nature and length of the professional relationship with the claimant—including any representation at the agency level—when determining whether a requested fee can truly be deemed a windfall," "the satisfaction of the disabled claimant [including notice and consent or lack of objection to the requested fee]," and finally, "how uncertain it was that the case would result in an award of benefits and the effort it took to achieve that result [since] [l]awyers who operate on contingency—even the very best ones—lose a significant number of their cases and receive no compensation when they do." *Id.*

Chapter 8, Section E.1 (Fee from the Claimant) at p. 685:

In Culbertson v. Berryhill, 139 S.Ct. 517 (2019), a unanimous Supreme Court held that the 25% cap on fees from a claimant's retroactive benefits in 42 U.S.C. § 406(b)(1)(A), applies only to fees for representation in court and not to aggregate fees awarded under §§ 406(a) and 406 (b) for both court and agency representation. The practical impact of the decision is that lawyers in certain circumstances can receive up to a 50% contingency fee from past claimant benefits where the successful representation required work both in court and before the agency. However, SSA is only required to withhold the 25% of past benefits for direct payment to representatives from agency representation, thereby averting the sometime awkward fee collection process from clients on that amount, and only "may" withhold more for direct payment for representation before the courts. 139 S. Ct. at 523.

Chapters 9, throughout:

SSA has split the former Office of Disability Adjudication and Review (ODAR) into the Office of Hearing Operations (OHO) and the Office of Appellate Operations (OAO).

Chapter 9, Section A.1 (Standards of Conduct for Representatives) at pp. 705-706:

The Social Security Administration issued new regulations at the end of 2016, effective in 2017, entitled "Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process." 81 Fed. Reg. 90987 (December 16, 2016). Among other provisions, the new regulations set out a "5-day rule"

modifying the period when claimants (and their representatives) must submit or inform SSA about written evidence. 20 C.F.R. §§ 404.935(a), 416.1435(a). The new rule, which counts only business days, contains certain exceptions including: where SSA misled the claimant; if the claimant's failure to submit or inform SSA of the evidence was due to a physical, mental, educational, or linguistic limitation; or some "other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier." 20 C.F.R. §§ 404.935(b), 416.1435(b). The new regulations also lengthen the time frame for notifying claimants of a hearing date from at least 60 days to at least 75 days. 20 C.F.R. §§ 404.938(a), 416.1438(a).

In 2017, the agency issued a new Social Security Ruling, SSR 17-4p, "Title II and XVI: Responsibility for Developing Written Evidence," 82 Fed. Reg, 46339 (October 4, 2017), further defining the scope of the SSA's regulations, as amended by the 2015 and 2017 regulations, and imposing obligations on claimants and their representatives beyond the plain language requirements of the regulations. The new SSR provides, with respect to the requirement to "submit or inform [SSA adjudicators} about any written evidence no later than 5 business days prior to the date of the scheduled hearing before an ALJ," that:

> "To satisfy the claimant's obligation under the regulations to "inform" us about written evidence, he or she must provide information specific enough to identify the evidence (source, location, and dates of treatment) and show that the evidence relates to the individual's medical condition, work activity, job history, medical treatment, or other issues relevant to whether or not the individual is disabled or blind. If the individual does not provide us with information specific enough to allow us to identify the written evidence and understand how it relates to whether or not the individual is disabled or blind, the individual has not informed us about evidence within the meaning of [SSA regulations} and we will not request that evidence;"
>
> "[W]e expect representatives to submit or inform us about written evidence as soon as they obtain or become aware of it [and they] should not wait until 5 business days before the hearing to submit or inform us about written evidence unless they have compelling reasons for the delay (e.g., it was impractical to submit the evidence earlier because it was difficult to obtain or the representative was not aware of the evidence at an earlier date).
>
> "[I]t is only acceptable for a representative to inform us about evidence without submitting it if the representative shows that, despite good faith efforts, he or she could not obtain the evidence. Simply informing us of the existence of evidence without providing it or waiting until 5 days before a hearing to inform us about or provide evidence when it was otherwise

> available, . . . could be found to violate our rules of conduct and could lead to sanction proceedings against the representative."

SSR 17-4p also delineates new avenues for imposing discipline and sanctions against representatives for possible violation of SSA's standards of conduct for representatives, such as where:

> "A representative informs us about written evidence but refuses, without good cause, to make good faith efforts to obtain and timely submit the evidence;"
>
> "a representative informs us about evidence that relates to a claim instead of acting with reasonable promptness to help obtain and timely submit the evidence to us;"
>
> "the representative waits until 5 days before a hearing to provide or inform us of evidence when the evidence was known to the representative or available to provide to us at an earlier date;
>
> "the clients of a particular representative have a pattern of informing us about written evidence instead of making good-faith efforts to obtain and timely submit the evidence;" or
>
> "any other occasion when a representative's actions with regard to the submission of evidence may violate our rules for representatives."

Because of the vagueness and lack of clarity of terms such as "good faith" efforts, "timely" submission, or "compelling reasons," and due to the purported authority to sanction representatives who otherwise comply with the plain language in the regulations to submit or inform SSA adjudicators of written evidence "no later than 5 business days before the hearing," SSR 17-4p has created considerable uncertainty among social security administrative practitioners and ALJs alike. *See generally*, "*SSR 17-4p Addresses But Hardly Clarifies 5-Day Rule*," NOSSCR SOCIAL SECURITY FORUM, September 1, 2017.

SSA addressed the conduct of representatives again in 2018. Broadly speaking, current standards require representatives to "provide competent assistance to the claimant and recognize [the agency's] authority to lawfully administer the [claims] process." 20 C.F.R. §§ 404.1740(a)(1), 416.1540(a)(1). Representatives must also "be forthright in their dealings with [SSA] and with the claimant and must comport themselves with due regard for the nonadversarial nature of the proceedings." 20 C.F.R. §§ 404.1740(a)(2), 416.1540(a)(2). More specifically, representatives' obligations include an affirmative duty to "help obtain the information or evidence that the claimant must submit under [SSA] regulations" with "reasonable promptness" and to "forward the information or evidence to [SSA] for

consideration as soon as practicable." 20 C.F.R. §§ 404.1740(b)(1), 416.1540(b)(1). The 2018 revisions also prohibit "[c]ommunicating with agency staff or adjudicators outside the normal course of business or other prescribed procedures in an attempt to inappropriately influence the processing or outcome of a claim(s)." 20 C.F.R. §§ 404.1740(b)(3), 416.1540(c)(7)(ii)(C).

Chapter 9, Section B.1 (SSA Sub-Regulatory Guidance) at p. 713:

SSA issued new rules in 2020 on how "guidance documents" are to be treated. See 85 Fed. Reg. 51337 (August 20, 2020). These documents are described as "agency statements of general applicability, intended to have future effect on the behavior of regulated parties, that set forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation." 20 C.F.R. § 426.10(a). The new rules confirm that these documents "lack the force and effect of law" unless otherwise authorized by law or contract, and "are intended only to provide clarity to the public regarding existing requirements under the law or agency policies. When a guidance document is binding because the law authorizes binding guidance or because a contract incorporates the guidance, we will modify the disclaimer to reflect either of those facts." 20 C.F.R. § 426.15.

Chapter 9, Section D.4 (Administrative Hearing and the Role of the Administrative Law Judge: ALJ Decisional Independence) at 819-20:

In Lucia v. S.E.C., 138 S.Ct. 2044 (2018), the Supreme Court held that administrative law judges of the Securities and Exchange Commission (SEC) are "officers of the United States" and not mere employees for the purposes of the Appointments Clause of the Constitution, Article II, Section 2. Clause 2. Accordingly, they can only be lawfully appointed by the President, a Court of Law or a Department Head under Article II. Because, the SEC ALJs were appointed instead by agency staff pursuant to a civil service process and not by one of the three Appointment Clause options, the Court invalidated the appointment of SEC ALJs, and remanded Lucia's SEC case to a different ALJ for a new evaluation of the case with a properly appointed ALJ. The Court indicated that it would remand like SEC appeals where timely appointment clause challenges had been raised, and noted that Lucia had timely done so by raising his challenge to the ALJ's appointment to the commission on appeal and then to the courts (although not to the ALJ). *Id.* at 2055.

Although scholars had pointed to ways to distinguish SSA ALJs from SEC ALJs, as employees and not officers under the Appointments clause, see, e.g., Harold J. Krent, *Will the Supreme Court Review SEC's In-House SEC Judges?, in*, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES' NEWSLETTER, (Dec. 11, 2017) (noting

the SSA ALJs' unique, "3-hat," inquisitorial role and affirmative duties to investigate and develop the factual record on behalf of both the claimant and agency, and that SSA ALJs are unionized), the President issued an Executive Order on July 10, 2018, taking steps to apply *Lucia* to all ALJs, including those at SSA. *See* Executive Order (EO) 13843, 84 Fed. Reg. 32755 (July 10, 2018). Consistent with the EO and an undated, confidential guidance memorandum from the Solicitor General (SG) on *Lucia*, the Acting SSA Commissioner ratified the appointment of all ALJs and Appeals Council administrative appeal judges (AAJs) on July 16, 2018. *See* Social Security Emergency Message (EM) 18002 REV 2, §B (July 16, 2018).

The Administration's post-*Lucia* actions through the EO and as proposed in the SG's Guidance Memo, threaten to significantly diminish ALJ independence by eliminating previous merit-based and other restrictions on appointments, and reducing restrictions on removal, so that ALJs function more like at-will, political appointees. These changes were not mandated in the *Lucia* opinion. For example, the EO's removal of ALJs from competitive service means that ALJs will no longer be selected through a competitive exam and more robust minimum objective requirements. The only remaining qualification is a valid law license in good standing. EO at 32756-57. As such, new ALJ appointees can be selected with much greater emphasis on political considerations and personal connections. The SG's memo also signaled intent to reduce protection against removal of ALJs by interpreting 5 U.S.C. §7521's "good cause" protection provision as authorizing removal under a wider array of circumstances so as to ensure review is "suitably deferential" to the agency seeking removal. *See Solicitor General Issues Guidance on Administrative Judges After Lucia v. SEC (S.Ct.), July 2018,* 132 HARV. L. REV. 1120, 1126 (2019). This includes removal for failure to follow agency policies, procedures, and instructions which could justify "removing an adjudicator who consistently fails to comply with an agency's desired policy outcomes." *Id*.

SSA issued a Social Security Ruling, SSR 19-1p, 2019 WL 1324866 (March 15, 2019), with instructions on implementing *Lucia* at the Appeals Council. It provides that the Council "will process requests for review that include a timely administrative challenge to the ALJ's authority based on the Appointments Clause . . . where the claimant: (1) Timely requests Appeals Council review of an ALJ's decision or dismissal issued before July 16, 2018; and (2) raises before us (either at the Appeals Council level, or previously had raised at the ALJ level) a challenge under the Appointments Clause to the ALJ issuing the decision." *Id*. at *3. If the Appeals Council grants review, it will remand the case to a new ALJ (as in *Lucia*), or issue a new decision covering the period before the date of the ALJ decision, and "it will not presume that the prior hearing decision was correct." *Id*.

To date, most reported court decisions on SSA-program *Lucia* issues have centered on whether the Appointments Clause challenge was "timely raised" and the

applicability or inapplicability of the issue exhaustion doctrine and exhaustion principles to that determination. The Supreme Court unanimously resolved that issue against the agency in Carr v. Saul, 141 S.Ct. 1352 (2021) (rejecting SSA arguments that Appointments Clause challenges must be first exhausted administratively before the SSA in order to preserve such challenges for federal court judicial review) (discussed in Chapter 8, Section D.1.a, *supra).* Can an ALJ appointed in violation of the Appointments Clause when hearing and deciding a case, hear and decide that same case on remand after being properly appointed (after June 16, 2018), or would the remand decision be deemed tainted by the ALJ's unconstitutional actions at the previous hearing on the same case? Consider the following:

> Under *Lucia*, Cody is entitled to a new hearing before a different ALJ. At the time ALJ Mauer issued the 2017 decision, she was not a properly appointed "Officer[ ] of the United States" under the Appointments Clause. Rather than being appointed by a "Head of Department [ ]" as the Constitution requires, ALJ Mauer was instead appointed by lower-level SSA staff. Even though a district court vacated the 2017 decision, it was ALJ Mauer who again reheard and issued the 2019 decision on remand. True enough, at that point, the Acting Commissioner had properly ratified ALJ Mauer's appointment. But because the same ALJ issued both decisions, Cody did not receive what *Lucia* requires: an adjudication untainted by an Appointments Clause violation. *See Lucia*, 138 S. Ct. at 2055.Requiring a remand and hearing before a new ALJ here supports the two remedial aims identified by *Lucia.* First, a rehearing before a new ALJ promotes the "structural purposes" of the Appointments Clause by ensuring only a properly appointed Officer takes part in deciding Cody's case. *See id.* at 2055 n.5. By ordering a review untouched by ALJ Mauer, we guard against "the diffusion of the appointment power," [] by penalizing an agency's circumvention of the Appointments Clause. Second, a rehearing before a different ALJ would encourage claimants to raise Appointments Clause violations to the courts' attention. *See Lucia*, 138 S. Ct. at 2055 n.5. Without a remand to a new ALJ, claimants like Cody would see little benefit in defending the constitutional requirement. Indeed, in the post-ratification 2019 decision, the ALJ reached "all the same judgments," *id.*, as in the pre-ratification 2017 decision. Only with reassignment to a new, independent ALJ will Cody receive a fresh look and "the new hearing to which [he] is entitled." *Id.* at 2055. . . . And *Carr* confirms that Cody was not required to first raise the Appointments Clause claim before the SSA so long as he raised the constitutional challenge before the district court in the first instance. *See Carr*, 141 S. Ct. at 1362. Cody did just that when he pressed the Appointments Clause claim before the district court when appealing the tainted 2019 decision.

Cody v. Kijakazi, 48 F.4th 956, 961-63 (9th Cir. 2022); *see* Brooks v. Kijakazi, 60 F.4th 735 (4th Cir. 2023) (reaching same conclusion).

Further related issues which have arisen or may potentially arise include: 1) Whether SSR 19-1p's restriction of relief to cases where ALJs decided the case before July 16, 2018 (when the Acting Commissioner, Nancy Berryhill, ratified the appointments of then-current ALJs) but not cases heard and presided over by ALJs appointed before July 16, 2018 but not decided until after July 16, 2018, is justified. Is there any meaningful legal or constitutional rationale for excluding the latter cases presided over by a non-constitutionally appointed hearing official? Consider the following hypothetical: You are a student intern working for an SSA ALJ. The ALJ is out sick but asks you to preside over a hearing that day. You do so and then the ALJ listens to the recording of the hearing and writes and issues the decision weeks later. Is the decision constitutionally void or voidable?; 2) Another issue is whether appointments made or ratified by Acting Commissioner Nancy Berryhill in July 2018, under the circumstances of her unusually lengthy acting appointment, in excess of the Federal Vacancy Reform Act's [FVRA] 210-day limit, are legally or constitutionally valid. The first two courts of appeal to address this question have rejected this argument and construed the FVRA broadly to have authorized Berryhill's extended appointment and thus, her ALJ appointment-ratification actions in her Acting Commissioner role. *See* Dahle v. Kijakazi, 62 F.4th 424 (8th Cir. 2023); Rush v. Kijakazi, 65 F.4th 114 (4th Cir. 2023). *e*

Chapter 9, Section E (Weight and Sufficiency of Medical Evidence) at p. 840:

New regulations, 20 C.F.R. §§ 404.1503b, 416.903b, allow the Social Security Administration not to consider evidence from medical sources convicted of Social Security or federal healthcare program fraud, or who have been assessed a civil monetary penalty.

Chapter 9, Section E.1 (General Rules on Weight and Sufficiency) at p. 842-43:

In 2017, the Social Security Administration repealed SSR 06-3p (2016) and issued regulations expanding the category of "acceptable medical sources" to include licensed advanced practice nurses, licensed physician assistants, and licensed audiologists (for audiological impairments). These rules became effective and apply to claims filed on or after March 27, 2017. *See* "Revisions to Rules Regarding Medical Evidence," 82 Fed. Reg. 5844 (January 18, 2017); *see also* 82 FR 15263 (March 27, 2017) (rescinding SSRs 96-2p, 96-5p and 06-3p).

Chapter 9, Section E.3 (Treating Physician Rules in Practice) at p. 846-47:

The Social Security Administration issued new regulations in 2017 substantially modifying prior rules for evaluating treating physician and other medical evidence. *See* "Revisions to Rules Regarding Medical Evidence," 82 Fed. Reg. 5844 (January 18, 2017); *see also id*.; 82 FR 15263 (March 27, 2017) (rescinding SSRs 96-2p, 96-5p and 06-3p); SSR 17-2 (rescinding and replacing SSR 96-6p). New regulations, which became effective and apply to claims filed on or after March 27, 2017, provide that SSA "will not defer or give any specific evidentiary weight, including controlling weight, to any medical opinion(s) or prior administrative medical finding(s), including those from your medical sources." 20 C.F.R. §§ 404.1520c(a); 416.920c(a). More specifically, the new regulations provide that adjudicators will evaluate all medical opinions and findings using the factors delineated in the regulations; supportability and consistency are the most important factors and their application must be explained; other factors which "will be considered" and about which adjudicators "may but are not required to explain" are the medical source's "treatment relationship" with the claimant, including the length, frequency, purpose and extent of the treating relationship, and whether the source has an examining (as opposed to a non-examining) relationship with the claimant; specialization; and "other factors" such as whether the source has familiarity with other evidence in the claim or understanding of the Social Security disability program's policies and evidentiary requirements. 20 C.F.R. §§ 404.1520c(b),(c); 416.920c(b),(c).

The courts are just starting to grapple with interpretation of the 2017 regulations. How much will the 2017 regulations alter the evaluation of medical evidence and specifically, the opinions and assessments by treating physicians, in light of the well-developed body of case law interpreting the Social Security Act and harmonizing prior medical evidence regulations? Consider the following:

> Before the Social Security Administration adopted any regulations on the weight to be accorded to and the manner of evaluating medical evidence, several circuit courts of appeals interpreted the Social Security Act as extending great weight to treating physician assessments. *See, e.g.*, Gold v. Sec. H.E.W., 463 F.2d 38, 43 (2d Cir. 1972) ("The expert opinions of plaintiff's treating physicians as to plaintiff's disability . . . are binding upon the referee if not controverted by substantial evidence to the contrary."); Branham v. Gardner, 383 F.2d 614, 630 (6th Cir. 1967) (same). Those caselaw principles concerning the proper weight accorded opinions of treating physicians remained controversial until the early 1990s, when the SSA issued its first regulations establishing standards for evaluating medical opinions. Nevertheless, several circuits interpreted the agency's 1991 medical evidence regulations as consistent with or codifying pre-existing circuit caselaw interpreting the Act and extending greater deference to treating physician assessments. *See, e.g.*, Nelson v. Sullivan,

966 F.2d 363, 367-68, 37 Soc. Sec. Rep. Serv. 489 (8th Cir. 1992) (1991 medical evidence regulation "merely codifies this circuit's law regarding the opinions of treating physicians."). Only the Second Circuit expressly ruled that the regulations accorded less deference to the opinions of treating physicians than required by its pre-1991 decisions. *See* Schisler v. Sullivan, 3 F.3d 563, 567, 42 Soc. Sec. Rep. Serv. 184 (2d Cir. 1993)("by granting the treating physician's opinion 'controlling weight' only if it is 'well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence,' the regulations accord less deference to unsupported treating physician's opinions than do our decisions."). *Cf*. Castellano v. Sec. of Health & Human Services, 26 F.3d 1027, 1029, 44 Soc. Sec. Rep. Serv. 561 (10th Cir. 1994) ("In contrast to the situation in the Second Circuit, . . . in this circuit the regulations have merely codified existing law.").

It is not clear at present whether the courts' evaluation of treating physician and other medical evidence based on current medical evidence regulations will vary materially from their analysis under the 1991 regulations or pre-existing caselaw interpreting the Social Security Act. As largely occurred after 1991, many courts may attempt to harmonize present regulations with pre-existing case law interpreting the Act, rather than attempt to discern which body of law controls. Courts may also seek to reconcile provisions in the current regulations with those in prior regulations. *See, e.g.,* Cuevas v. Comm'r of Soc. Sec., No. 20-CV-0502 (AJN) (KHP), 2021 WL 363682, at *9 (S.D.N.Y. 2021) (collecting and surveying Second Circuit district court cases considering current regulations; concluding they show that "the essence" of the treating physician's rule remains the same and "the factors to be considered in weighing the various medical opinions in a given claimant's medical history are substantially similar," noting that this "is not surprising considering that, under the old rule, an ALJ had to determine whether a treating physician's opinion was supported by well-accepted medical evidence and not inconsistent with the rest of the record before controlling weight could be assigned.") (cases omitted).

FRANK S. BLOCH AND JON C. DUBIN, SOCIAL SECURITY LAW AND PRACTICE IN A NUTSHELL, 352-54 (2021).

The first early wave of court of appeals decisions interpreting or applying the 2017 medical evidence regulations has impliedly or expressly suggested that they validly displace the 1991 regulations and/or pre-existing caselaw. See, e.g., Bowers v. Kijakazi, 40 F.4th 872, 875 (8th Cir. 2022); Harner v. Comm'r of Soc. Sec., 38 F. 4th 892 (11th Cir. 2022); Albert v. Kijakazi, 34 F. 4th 611 (7th Cir. 2022); Woods v. Kijakazi, 32 F. 4th 785 (9th Cir. 2022); Webster v. Kijakazi, 19 F. 4th 715 (5th Cir.

2021). However, a few decisions have also pointed out the new regulations' emphasis on considering and evaluating the regulatory factors of "consistency" and "supportability" of medical evidence and have set aside agency decisions where ALJs devalued treating physician opinions without expressly or adequately evaluating one or both of these factors. *See, e.g.,* Loucks v. Kijakazi, No. 21-1749, 2022 WL 2189293 (2d Cir. June 17, 2022); Bonnett v. Kijakazi, 859 F. App'x 19 (8th Cir. 2021).

Chapter 9, Section E.4 (Other Rules for Weighing Medical Evidence) after NOTE, at p. 862:

Another issue for weighing medical evidence is the weight accorded medical reports prepared on checkbox forms designed to track the criteria of the listings and/or work-related functional restrictions that affect capacity for competitive work. Several courts have set aside decisions where ALJs categorically rejected treating physician assessments based on use of such forms in their evaluations. As the Second Circuit recently explained:

> The Commissioner reads those [prior] cases to hold that an ALJ may discount a treating physician's medical opinion in the determination of disability benefits if the opinion is provided in a check-box form. We are, however, unable to discern any such rule, either in our case law or in relevant federal regulations.. . . To endorse such a peculiar rule would, moreover, contravene our general approach to agency factfinding which, though deferential, as relevant federal regulations also make clear, is a functional and not a formalist one. *See, e.g.*, 20 C.F.R. § 404.1527(c) (setting forth various factors in the ALJ's consideration of medical evidence with respect to disability determinations); *cf. Biestek*, 139 S. Ct. at 1157 (rejecting disability applicant's argument calling for a "categorical rule" in assessing the substantial evidence standard and explaining that the relevant "inquiry, as is usually true in determining the substantiality of evidence, is case-by-case"); *id.* at 1162 (Gorsuch, J., dissenting) (discussing capacious categories of evidence that would not satisfy the substantial evidence standard). Accordingly, we take this occasion to reassert and clarify that the nature of an ALJ's inquiry in disability factfinding turns on the substance of the medical opinion at issue—not its form—and ultimately whether there is reasonable evidence in the record that supports the conclusions drawn by the medical expert.

Colgan v. Kijazaki, 22 F. 4th 353, 361 (2d Cir. 2022). The court also noted: "Troublingly, the ALJ did not seem to mind that a state agency psychologist's adverse opinion had been provided on a check-box form when assigning it 'significant weight.' [] Although we have no reason to doubt the impartiality of the ALJ in this case, we

find it appropriate to reiterate at this juncture that, 'the Commissioner is not a litigant and has no representative at the agency level .... Thus, it is the ALJ's duty to investigate and develop the facts and develop the arguments both for and against the granting of benefits.'" 22 F. 4th at 362 n.6 (citation omitted). *See also* Schink v. Comm'r of Soc. Sec., 935 F.3d 1245, 1262 (11th Cir. 2019) ("The most that can be said in criticism of the questionnaires' format is that they used a "check box" format with limited space for explanation of the assessments. But that is not a basis, in and of itself, to discount them as conclusory."); Trevizo v. Berryhill, 817 F.3d 664, 677 n.4 (9th Cir. 2017) ("[T]here is no authority that a "check-the-box" form is any less reliable than any other type of form; indeed, agency physicians routinely use these types of forms to assess the intensity, persistence, or limiting effects of impairments."); Reed v. Barnhart, 399 F.3d 917, 921 (8th Cir. 2005) ("An MSS [medical source statement] is a checklist evaluation in which the responding physician ranks the patient's abilities, and is considered a source of "'objective medical evidence' . . . . We have never upheld a decision to discount an MSS on the basis that the 'evaluation by box category' is deficient ipso facto.").

Chapter 9, Section F.1 (Vocational Experts and Hypothetical Questions) at Note 1, pp. 870-71:

The Court of Appeals for the Seventh Circuit elaborated further on its line of authority reflected in its holding in *Yurt v. Colvin* (pp. 865-70), by finding that an ALJ's hypothetical question to a vocational expert which included a restriction from jobs "with strict production quotas or a fast pace" did not impliedly account for or presumptively "serve as a proxy for" a claimant's moderate restrictions in concentration, persistence and pace ("CPP") in her mental residual functional capacity. O'Connor-Spinner v. Colvin, 832 F.3d 690, 698 (7th Cir. 2016). The court's conclusion was further buttressed by the fact that while SSA has not defined the term "moderate" in this context, the vocational expert found that a claimant would be unable to perform any of the identified jobs if "off task 15% or more" of the work day, and a "moderate" restriction in concentration, persistence and pace might amount to such a 15% off-task restriction. *Id*. at 698-99. In a later case, it found, that being off task as little as over 10% of the day due to moderate concentration, persistence, and pace can preclude a meaningful range of work and denote disability. *See* Lanigan v. Berryhill, 865 F.3d 558, 563 (7th Cir. 2017). Finally, in Winstead v. Berryhill, 923 F.3d 472, 477 (7th Cir. 2019), the court recently explained that there are two forms of work-related restrictions that can be used to capture moderate restrictions in concentration, persistence and pace and that can be included in hypothetical questions to the VE—time off task and absences from work per month:

> Notably, it appears the ALJ disregarded testimony from the VE about a person with limitations in concentration, persistence, and pace. The ALJ asked two additional hypothetical questions to the VE about an individual who would either be off task 20% of the workday or would have two

> unscheduled absences per month—seemingly having in mind someone with "moderate difficulties with concentration, persistence, and pace." The VE responded that neither individual could sustain employment. But these responses are not reflected in the ALJ's decision. Because the ALJ did not include Winsted's difficulties with concentration, persistence, and pace in the hypothetical he *did* consider, the decision cannot stand.

In Thomas v. Berryhill, 916 F.3d 307, 309-10 (4th Cir. 2019), the Fourth Circuit recently found that RFC findings in a hypothetical question to the VE that included restrictions to "simple, short routine tasks," with several additional interpersonal contact restrictions and limitations to work not requiring "production rate" or "demand pace," was still insufficient in accounting for the claimant's moderate restrictions in concentration, persistence and pace. *Id.* at 312-13. The court explained:

> Without further explanation, we simply cannot tell whether the RFC finding—particularly the portion restricting Thomas to jobs that do not require a 'production rate' or 'demand pace'—properly accounts for Thomas's moderate limitations in concentration, persistence, and pace. On remand, the ALJ will need to establish for how long, and under what conditions, Thomas is able 'to focus [her] attention on work activities and stay on task at a sustained rate.' 20 C.F.R. § Pt. 404, Subpt. P, App. 1 §12.00E(3). Only then will we or any court be able to meaningfully review the ALJ's RFC finding.

916 F.3d at 312 n.5.

Chapter 9, Section F.2 (Use of the Dictionary of Occupational Titles) at Note 1, p. 877:

The Court of Appeals for the Ninth Circuit elaborated on this issue in Gutierrez v. Colvin, 844 F.3d 804, 808 (9th Cir. 2016). While the Court reconfirmed that ALJs must require vocational experts to "reconcile" conflicts between their opinion that a claimant is able to work and the requirements listed in the Dictionary of Occupational Titles (Citing SSR 00-4p), it went on to state:

> For a difference between an expert's testimony and the Dictionary's listings to be fairly characterized as a conflict, it must be obvious or apparent. This means that the testimony must be at odds with the Dictionary's listing of job requirements that are essential, integral, or expected. This is not to say that ALJs are free to disregard the Dictionary's definitions or take them with a grain of salt—they aren't. But tasks that aren't essential, integral, or expected parts of a job are less likely to qualify as apparent conflicts that the

ALJ must ask about. Likewise, where the job itself is a familiar one—like cashiering—less scrutiny by the ALJ is required.

Taking the SSR 00-4p VE-DOT conflict analysis somewhat further than the Tenth Circuit in Hackett (pp. 874-77), the Fourth Circuit in Thomas v. Berryhill, 916 F.3d 307, 313 (4th Cir. 2019), recently explained:

> An ALJ cannot rely unquestioningly on a VE's testimony. Rather, an ALJ must ensure that any "apparent" conflicts between the Dictionary and the VE's testimony are reasonably resolved. SSR 00-4P, 2000 WL 1898704 at *2. To that end, the ALJ must ask the VE whether his or her testimony conflicts with the DOT. If the answer is "yes," the ALJ "must elicit a reasonable explanation for the conflict before relying on" the testimony. *Id.* But even if the VE answers "no," the ALJ has an affirmative "duty to make an independent identification of apparent conflicts." *Pearson v. Colvin*, 810 F.3d 204, 210 (4th Cir. 2015). This means that the ALJ must recognize and resolve ways in which a VE's testimony "seems to, but does not necessarily," conflict with the "express language" of the DOT—even if the conflict is not "obvious." *Id.* at 209.

Applying that reasoning, the court then found that "the ALJ should have identified and resolved a conflict between the DOT and the testimony of the VE" because there is an "'apparent conflict' between a limitation to 'short, simple instructions' (as found in Thomas's RFC) and a need to carry out 'detailed but uninvolved ... instructions' (as found in jobs requiring [DOT] Level 2 reasoning)." 916 F.3d at 313.

The Eleventh Circuit has explained how the SSA's inquisitorial adjudicative scheme also supports the ALJ's affirmative duties to investigate and resolve potential conflicts between the DOT and VE testimony in SSR 00-4p. It stated:

> Central to our holding is the recognition that in the context of a Social Security disability adjudication we are dealing with an inquisitorial proceeding. Few, if any, agency adjudications depart more markedly from the adversarial customs that define the American legal tradition than do SSA hearings. In processing disability claims, the ALJs do not simply act as umpires calling balls and strikes. They are by law investigators of the facts, and are tasked not only with the obligation to consider the reasons offered by both sides, but also with actively developing the record in the case. Accordingly, although independently identifying and resolving the points of apparent conflict between expert testimony and other evidence would be out of character for most judges, for a Social Security ALJ it can be fairly said to come with the territory.

Washington v. Comm's of Soc. Sec., 906 F.3d 1353, 1356 (11th Cir. 2018). Perhaps signaling its position on the issue, the Supreme Court recently granted *certiorari*, and vacated and remanded ("GVR'd") an earlier Eleventh Circuit decision "for further consideration in light of [the Eleventh Circuit's] opinion in *Washington.* " Baker v. Berryhill, 139 S. Ct. 1257, 1257-1258 (2019). For the impact of a Supreme Court "GVR" order *see generally* Lawrence by Lawrence v. Chater, 516 U.S. 163, 167 (1996) ("Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate."). The decision the Supreme Court vacated and remanded was decided before *Washington* and had relied on pre-SSR 00-4p Eleventh Circuit caselaw holding that "the VE's testimony 'trumps' the DOT 'whenever the two conflict.'" *See* Baker v. Comm'r of Soc. Sec., 729 Fed. Appx. 870, 872 (11th Cir. 2018) (quoting Jones v. Apfel, 190 F.3d 1224, 1229–30 (11th Cir. 1999)). In *Washington,* the Eleventh Circuit also found that its earlier, pre SSR 00-4p caselaw had merely "set a floor on SSA procedures" and "[t]hereafter, the SSA stepped in, explained and clarified the governing rules and exercised its prerogative to strengthen its own procedural requirements, and established an enhanced duty on the part of the ALJ to discern and resolve conflicts" through the enactment of SSR 00-4p. *Washington*, 906 F.3d at 1363. As such, the agency must enforce and respect its own procedural rules and regulations "where failure to enforce such regulations would adversely affect 'substantive rights of individuals.'" even where, "the internal procedures are more rigorous than otherwise would be required." *Id.* (citing Hall v. Schweiker, 660 F.2d 116, 119 (5th Cir. 1981) (per curiam)).

Chapter 9, Section F.2 (Use of the Dictionary of Occupational Titles) at Note 2, pp. 879-880:

The Court of Appeals for the Seventh Circuit recently endorsed use of O*NET in place of the DOT in Dimmett v. Colvin, 816 F.3d 486, 489 (7th Cir. 2016) ("And so we have in this case still another example of fatally weak testimony by a vocational expert. Compounding the weakness, both the administrative law judge * * * and the vocational expert * * * appear to have ignored the most current manual of job descriptions—the O*NET. It's true that the Social Security Administration, while aware of the obsolescence of the Dictionary of Occupational Titles, hasn't endorsed the O*NET and in fact is developing its own parallel classification system. But this system is not expected to be rolled out for at least three more years, leaving a vacuum that the O*NET may fill.") (citations omitted).

Further underscoring the problem of DOT methodological and evidentiary deficiencies, a recent study conducted on the evolution of the characteristics of surveillance system monitor ("SSM") jobs—one of the jobs identified by the vocational experts in *Hackett v. Barnhart* (pp. 874-77) and *Beltran v. Astrue* (pp. 380-86)—has documented the DOT's obsolescence in defining the current duties and requirements of this job. *See* Dan Wolstein, *Surveillance System Monitors in the Workforce*, 19 J. OF FORENSIC VOCATIONAL ANALYSIS 49 (Winter 2016). This conclusion is significant because the SSM job is the only sedentary unskilled job in the DOT requiring little to no handling of objects, and is "often cited as employment of last resort because it can be performed by a person who is almost completely physically incapacitated." Kevin Leibkemann, *Surveillance Monitor Job Subject to Scrutiny,* 39 SOC. SEC. FORUM 1 (May 2017) (case citation omitted). Among other conclusions, Dr. Wolstein's study found that SSM jobs have evolved in duties and responsibilities since the last DOT update in the 1990s and were no longer sedentary nor unskilled and the job's "essential functions . . . now require use of other skills, longer training, higher aptitudes and greater physical demands." *Id.* (quoting Wolfstein).

Chapter 9, Section F.2 (Use of the Dictionary of Occupational Titles) after *NOTES* at pp. 878-880:

BIESTEK V. BERRYHILL

587 U.S. ____, 139 S.Ct. 1148, 266 Soc. Sec. Rep. Serv. 23 (2019)

JUSTICE KAGAN delivered the opinion of the Court.

The Social Security Administration (SSA) provides benefits to individuals who cannot obtain work because of a physical or mental disability. To determine whether an applicant is entitled to benefits, the agency may hold an informal hearing examining (among other things) the kind and number of jobs available for someone with the applicant's disability and other characteristics. The agency's factual findings on that score are "conclusive" in judicial review of the benefits decision so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g).

This case arises from the SSA's reliance on an expert's testimony about the availability of certain jobs in the economy. The expert largely based her opinion on private market-survey data. The question presented is whether her refusal to provide that data upon the applicant's request categorically precludes her testimony from counting as "substantial evidence." We hold it does not.

I

Petitioner Michael Biestek once worked as a carpenter and general laborer on construction sites. But he stopped working after he developed degenerative disc disease, Hepatitis C, and depression. He then applied for social security disability benefits, claiming eligibility as of October 2009.2After some preliminary proceedings, the SSA assigned an Administrative Law Judge (ALJ) to hold a hearing on Biestek's application. Those hearings, as described in the Social Security Act, 42 U.S.C. § 301 *et seq.*, are recognizably adjudicative in nature. The ALJ may "receive evidence" and "examine witnesses" about the contested issues in a case. §§ 405(b)(1). But many of the rules governing such hearings are less rigid than those a court would follow. See *Richardson v. Perales*, 402 U.S. 389, 400–401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). An ALJ is to conduct a disability hearing in "an informal, non-adversarial manner." 20 CFR § 404.900(b) (2018); § 416.1400(b). Most notably, an ALJ may receive evidence in a disability hearing that "would not be admissible in court." §§ 404.950(c), 416.1450(c); see 42 U.S.C. §§ 405(b) (1), 1383(c)(1)(A).

To rule on Biestek's application, the ALJ had to determine whether the former construction laborer could successfully transition to less physically demanding work. That required exploring two issues. The ALJ needed to identify the types of jobs Biestek could perform notwithstanding his disabilities. And the ALJ needed to ascertain whether those kinds of jobs "exist[ed] in significant numbers in the national economy." §§ 404.1560(c)(1), 416.960(c)(1); see §§ 404.1566, 416.966.

For guidance on such questions, ALJs often seek the views of "vocational experts." Those experts are professionals under contract with SSA to provide impartial testimony in agency proceedings. They must have "expertise" and "current knowledge" of "[w]orking conditions and physical demands of various" jobs; "[k]nowledge of the existence and numbers of [those jobs] in the national economy"; and "[i]nvolvement in or knowledge of placing adult workers[ ] with disabilities[ ] into jobs." Many vocational experts simultaneously work in the private sector locating employment for persons with disabilities. See C. Kubitschek & J. Dubin, Social Security Disability Law & Procedure in Federal Court § 3:89 (2019). When offering testimony, the experts may invoke not only publicly available sources but also "information obtained directly from employers" and data otherwise developed from their own "experience in job placement or career counseling." Social Security Ruling, SSR 00–4p.

At Biestek's hearing, the ALJ asked a vocational expert named Erin O'Callaghan to identify a sampling of "sedentary" jobs that a person with Biestek's disabilities, education, and job history could perform. * * * In response to the ALJ's query, O'Callaghan listed sedentary jobs "such as a bench assembler [or] sorter" that

did not require many skills. And she further testified that 240,000 bench assembler jobs and 120,000 sorter jobs existed in the national economy.

On cross-examination, Biestek's attorney asked O'Callaghan "where [she was] getting those [numbers] from." O'Callaghan replied that they came from the Bureau of Labor Statistics and her "own individual labor market surveys." The lawyer then requested that O'Callaghan turn over the private surveys so he could review them. O'Callaghan responded that she wished to keep the surveys confidential because they were "part of [her] client files." The lawyer suggested that O'Callaghan could "take the clients' names out." But at that point the ALJ interjected that he "would not require" O'Callaghan to produce the files in any form. Biestek's counsel asked no further questions about the basis for O'Callaghan's assembler and sorter numbers.

After the hearing concluded, * * * the ALJ held, Biestek's disabilities should not have prevented a "successful adjustment to other work." The ALJ based that conclusion on O'Callaghan's testimony about the availability in the economy of "sedentary unskilled occupations such as bench assembler [or] sorter."

Biestek sought review in federal court of the ALJ's denial of benefits. On judicial review, an ALJ's factual findings—such as the determination that Biestek could have found sedentary work—"shall be conclusive" if supported by "substantial evidence." 42 U.S.C. § 405(g); Biestek contended that O'Callaghan's testimony could not possibly constitute such evidence because she had declined, upon request, to produce her supporting data. But the District Court rejected that argument. And the Court of Appeals for the Sixth Circuit affirmed. That court recognized that the Seventh Circuit had adopted the categorical rule Biestek proposed, precluding a vocational expert's testimony from qualifying as substantial if the expert had declined an applicant's request to provide supporting data. See *id.*, at 790 (citing *McKinnie v. Barnhart*, 368 F.3d 907, 910–911 (2004)). But that rule, the Sixth Circuit observed in joining the ranks of unconvinced courts, "ha[d] not been a popular export."

And no more is it so today.

II

The phrase "substantial evidence" is a "term of art" used throughout administrative law to describe how courts are to review agency factfinding. *T-Mobile South, LLC* v. *Roswell*, 574 U.S. ——, ——, 135 S.Ct. 808, 815, 190 L.Ed.2d 679 (2015). Under the substantial-evidence standard, a court looks to an existing administrative record and asks whether it contains "sufficien[t] evidence" to support the agency's factual determinations. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938) (emphasis deleted). And whatever the meaning of "substantial" in other contexts, the threshold for such evidentiary sufficiency is not high. Substantial evidence, this Court has said, is "more than a mere scintilla."

Ibid.;see, *e.g.*, *Perales*, 402 U.S. at 401, 91 S.Ct. 1420 (internal quotation marks omitted). It means—and means only—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison*, 305 U.S. at 229, 59 S.Ct. 206. See *Dickinson v. Zurko*, 527 U.S. 150, 153, 119 S.Ct. 1816, 144 L.Ed.2d 143 (1999) (comparing the substantial-evidence standard to the deferential clearly-erroneous standard).

Today, Biestek argues that the testimony of a vocational expert who (like O'Callaghan) refuses a request for supporting data about job availability can never clear the substantial-evidence bar. As that formulation makes clear, Biestek's proposed rule is categorical, rendering expert testimony insufficient to sustain an ALJ's factfinding whenever such a refusal has occurred.[1] But Biestek hastens to add two caveats. The first is to clarify what the rule is not, the second to stress where its limits lie.

Biestek initially takes pains—and understandably so—to distinguish his argument from a procedural claim. At no stage in this litigation, Biestek says, has he ever espoused "a free-standing procedural rule under which a vocational expert would always have to produce [her underlying data] upon request." That kind of rule exists in federal court: There, an expert witness must produce all data she has considered in reaching her conclusions. See Fed. Rule Civ. Proc. 26(a)(2)(B). But as Biestek appreciates, no similar requirement applies in SSA hearings. As explained above, Congress intended those proceedings to be "informal" and provided that the "strict rules of evidence, applicable in the courtroom, are not to" apply. *Perales*, 402 U.S. at 400, 91 S.Ct. 1420; see 42 U.S.C. § 405(b)(1). So Biestek does not press for a "procedural rule" governing "the means through which an evidentiary record [must be] created." Instead, he urges a "substantive rule" for "assess[ing] the quality and quantity of [record] evidence"—which would find testimony like O'Callaghan's inadequate, when taken alone, to support an ALJ's factfinding. And Biestek also emphasizes a limitation within that proposed rule. For the rule to kick in, the applicant must make a demand for the expert's supporting data.

Consider two cases in which vocational experts rely on, but do not produce, nonpublic information. In the first, the applicant asks for the data; in the second, not. According to Biestek, the expert's testimony in the first case cannot possibly clear the

[1] In contrast, the principal dissent cannot decide whether it favors such a categorical rule. At first, Justice GORSUCH endorses the rule Biestek and the Seventh Circuit have proposed. But in then addressing our opinion, he takes little or no issue with the reasoning we offer to show why that rule is too broad. So the dissent tries to narrow the scope of Biestek's categorical rule—to only cases that look just like his. And still more, it shelves all the "categorical" talk and concentrates on Biestek's case alone. There, Justice GORSUCH's dissent joins Justice SOTOMAYOR's in concluding that the expert evidence in this case was insubstantial. But as we later explain, Biestek did not petition us to resolve that factbound question; nor did his briefing and argument focus on anything other than the Seventh Circuit's categorical rule. We confine our opinion accordingly.

substantial-evidence bar; but in the second case, it may well do so, even though the administrative record is otherwise the same. And Biestek underscores that this difference in outcome has nothing to do with waiver or forfeiture: As he acknowledges, an applicant "cannot waive the substantial evidence standard." It is just that the evidentiary problem arises from the expert's refusal of a demand, not from the data's absence alone. In his words, the testimony "can constitute substantial evidence if unchallenged, but not if challenged."

To assess Biestek's proposal, we begin with the parties' common ground: Assuming no demand, a vocational expert's testimony may count as substantial evidence even when unaccompanied by supporting data. Take an example. Suppose an expert has top-of-the-line credentials, including professional qualifications and many years' experience; suppose, too, she has a history of giving sound testimony about job availability in similar cases (perhaps before the same ALJ). Now say that she testifies about the approximate number of various sedentary jobs an applicant for benefits could perform. She explains that she arrived at her figures by surveying a range of representative employers; amassing specific information about their labor needs and employment of people with disabilities; and extrapolating those findings to the national economy by means of a well-accepted methodology. She answers cogently and thoroughly all questions put to her by the ALJ and the applicant's lawyer. And nothing in the rest of the record conflicts with anything she says. But she never produces her survey data. Still, her testimony would be the kind of evidence—far "more than a mere scintilla"—that "a reasonable mind might accept as adequate to support" a finding about job availability. *Consolidated Edison*, 305 U.S. at 229, 59 S.Ct. 206. Of course, the testimony would be even better—more reliable and probative—if she had produced supporting data; that would be a best practice for the SSA and its experts.[2] And of course, a different (maybe less qualified) expert failing to produce such data might offer testimony that is so feeble, or contradicted, that it would fail to clear the substantial-evidence. The point is only—as, again, Biestek accepts—that expert testimony can sometimes surmount that bar absent underlying data.

But if that is true, why should one additional fact—a refusal to a request for that data—make a vocational expert's testimony categorically inadequate? Assume that an applicant challenges our hypothetical expert to turn over her supporting data; and assume the expert declines because the data reveals private information about her clients and making careful redactions will take a fair bit of time. Nothing in the

[2] The SSA itself appears to agree. In the handbook given to vocational experts, the agency states: "You should have available, at the hearing, any vocational resource materials that you are likely to rely upon" because "the ALJ may ask you to provide relevant portions of [those] materials." SSA, Vocational Expert Handbook 37 (Aug. 2017).

expert's refusal changes her testimony (as described above) about job availability. Nor does it alter any other material in the record. So if our expert's opinion was sufficient—*i.e.*, qualified as substantial evidence—before the refusal, it is hard to see why the opinion has to be insufficient afterward.

Biestek suggests two reasons for that non-obvious result. First, he contends that the expert's rejection of a request for backup data necessarily "cast[s her testimony] into doubt." And second, he avers that the refusal inevitably "deprives an applicant of the material necessary for an effective cross-examination." But Biestek states his arguments too broadly—and the nuggets of truth they contain cannot justify his proposed flat rule.

Consider Biestek's claim about how an expert's refusal undercuts her credibility. Biestek here invokes the established idea of an "adverse inference": If an expert declines to back up her testimony with information in her control, then the factfinder has a reason to think she is hiding something. We do not dispute that possibility—but the inference is far from always required. If an ALJ has no other reason to trust the expert, or finds her testimony iffy on its face, her refusal of the applicant's demand for supporting data may properly tip the scales against her opinion. (Indeed, more can be said: Even if the applicant makes no demand, such an expert's withholding of data may count against her.) But if (as in our prior hypothetical example, the ALJ views the expert and her testimony as otherwise trustworthy, and thinks she has good reason to keep her data private, her rejection of an applicant's demand need not make a difference. So too when a court reviews the ALJ's decision under the deferential substantial-evidence standard. In some cases, the refusal to disclose data, considered along with other shortcomings, will prevent a court from finding that "a reasonable mind" could accept the expert's testimony. *Consolidated Edison*, 305 U.S. at 229, 59 S.Ct. 206. But in other cases, that refusal will have no such consequence. Even taking it into account, the expert's opinion will qualify as "more than a mere scintilla" of evidence supporting the ALJ's conclusion. Which is to say it will count, contra Biestek, as substantial.

And much the same is true of Biestek's claim that an expert's refusal precludes meaningful cross-examination. We agree with Biestek that an ALJ and reviewing court may properly consider obstacles to such questioning when deciding how much to credit an expert's opinion. See *Perales*, 402 U.S. at 402–406, 91 S.Ct. 1420. But Biestek goes too far in suggesting that the refusal to provide supporting data always interferes with effective cross-examination, or that the absence of such testing always requires treating an opinion as unreliable. Even without specific data, an applicant may probe the strength of testimony by asking an expert about (for example) her sources and methods—where she got the information at issue and how she analyzed it and derived her conclusions. See, *e.g.*, *Chavez v. Berryhill*, 895 F.3d 962, 969–970 (CA7 2018). And even without significant testing, a factfinder may conclude that

testimony has sufficient indicia of reliability to support a conclusion about whether an applicant could find work. Indeed, Biestek effectively concedes both those points in cases where supporting data is missing, so long as an expert has not refused an applicant's demand. But once that much is acknowledged, Biestek's argument cannot hold. For with or without an express refusal, the absence of data places the selfsame limits on cross-examination.

Where Biestek goes wrong, at bottom, is in pressing for a categorical rule, applying to every case in which a vocational expert refuses a request for underlying data. Sometimes an expert's withholding of such data, when combined with other aspects of the record, will prevent her testimony from qualifying as substantial evidence. That would be so, for example, if the expert has no good reason to keep the data private and her testimony lacks other markers of reliability. But sometimes the reservation of data will have no such effect. Even though the applicant might wish for the data, the expert's testimony still will clear (even handily so) the more-than-a-mere-scintilla threshold. The inquiry, as is usually true in determining the substantiality of evidence, is case-by-case. See, *e.g.*, *Perales*, 402 U.S. at 399, 410, 91 S.Ct. 1420 (rejecting a categorical rule pertaining to the substantiality of medical reports in a disability hearing). It takes into account all features of the vocational expert's testimony, as well as the rest of the administrative record. And in so doing, it defers to the presiding ALJ, who has seen the hearing up close.

That much is sufficient to decide this case. Biestek petitioned us only to adopt the categorical rule we have now rejected. He did not ask us to decide whether, in the absence of that rule, substantial evidence supported the ALJ in denying him benefits. Accordingly, we affirm the Court of Appeals' judgment.

It is so ordered.

JUSTICE SOTOMAYOR, dissenting.

* * *

* * * [T]he expert offered no detail whatsoever on the basis for her testimony. She did not say whom she had surveyed, how many surveys she had conducted, or what information she had gathered, nor did she offer any other explanation of the data on which she relied. In conjunction with the failure to proffer the surveys themselves, the expert's conclusory testimony alone could not constitute substantial evidence to support the ALJ's factfinding.

I agree with much of Justice GORSUCH's reasoning. I emphasize that I do not foreclose the possibility that a more developed record could justify an ALJ's reliance on vocational-expert testimony in some circumstances even if the expert does not

produce records underlying that testimony on request. An expert may have legitimate reasons for not turning over data, such as the burden of gathering records or confidentiality concerns that redaction cannot address. In those circumstances, as the majority suggests, the agency may be able to support an expert's testimony in ways other than by providing underlying data, such as by offering a fulsome description of the data and methodology on which the expert relies. The agency simply did not do so here.

JUSTICE GORSUCH, with whom JUSTICE GINSBURG joins, dissenting.

Walk for a moment in Michael Biestek's shoes. As part of your application for disability benefits, you've proven that you suffer from serious health problems and can't return to your old construction job. Like many cases, yours turns on whether a significant number of other jobs remain that someone of your age, education, and experience, and with your physical limitations, could perform. When it comes to that question, the Social Security Administration bears the burden of proof. To meet its burden in your case, the agency chooses to rest on the testimony of a vocational expert the agency hired as an independent contractor. The expert asserts there are 120,000 "sorter" and 240,000 "bench assembler" jobs nationwide that you could perform even with your disabilities.

Where did these numbers come from? The expert says she relied on data from the Bureau of Labor Statistics and her own private surveys. But it turns out the Bureau can't be the source; its numbers aren't that specific. The source—if there is a source—must be the expert's private surveys. So you ask to see them. The expert refuses—she says they're part of confidential client files. You reply by pointing out that any confidential client information can be redacted. But rather than ordering the data produced, the hearing examiner, herself a Social Security Administration employee, jumps in to say that won't be necessary. Even without the data, the examiner states in her decision on your disability claim, the expert's say-so warrants "great weight" and is more than enough evidence to deny your application. Case closed.

Would you say this decision was based on "substantial evidence"? Count me with * * * the Seventh Circuit in thinking that an agency expert's bottom-line conclusion, supported only by a claim of readily available evidence that she refuses to produce on request, fails to satisfy the government's statutory burden of producing substantial evidence of available other work. See *Donahue v. Barnhart*, 279 F.3d 441, 446 (CA7 2002); *McKinnie v. Barnhart*, 368 F.3d 907, 910–911 (CA7 2004) (*per curiam*).

Start with the legal standard. The Social Security Act of 1935 requires the agency to support its conclusions about the number of available jobs with "substantial evidence." 42 U.S.C. § 405(g). Congress borrowed that standard from civil litigation practice, where reviewing courts may overturn a jury verdict when the record lacks "substantial evidence"—that is, evidence sufficient to permit a reasonable jury to reach the verdict it did. Much the same standard governs summary judgment and directed verdict practice today.

Next, consider what we know about this standard. Witness testimony that's clearly wrong as a matter of fact cannot be substantial evidence. See *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). Falsified evidence isn't substantial evidence. See, *e.g.*, *Firemen's and Policemen's Civil Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984). Speculation isn't substantial evidence. See, *e.g.*, *Cao He Lin v. Department of Justice*, 428 F.3d 391, 400 (CA2 2005); *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 250 (CA4 1997). And, maybe most pointedly for our purposes, courts have held that a party or expert who supplies only conclusory assertions fails this standard too. See, *e.g.*, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) ("The object of [summary-judgment practice] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit"); *Regents of Univ. of Minn. v. AGA Medical Corp.*, 717 F.3d 929, 941 (CA Fed. 2013) ("conclusory expert assertions cannot raise triable issues of material fact") (collecting cases); *Mid-State Fertilizer Co. v. Exchange Nat. Bank of Chicago*, 877 F.2d 1333, 1339 (CA7 1989) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process"); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 188 (CADC 1986) ("[I]nordinate faith in the conclusory assertions of an expert ... cannot satisfy the requirement [of] substantial evidence").

If clearly mistaken evidence, fake evidence, speculative evidence, and conclusory evidence aren't substantial evidence, the evidence here shouldn't be either. The case hinges on an expert who (a) claims to possess evidence on the dispositive legal question that can be found nowhere else in the record, but (b) offers only a conclusion about its contents, and (c) refuses to supply the evidence when requested without showing that it can't readily be made available. What reasonable factfinder would rely on evidence like that? It seems just the sort of conclusory evidence courts have long held insufficient to meet the substantial evidence standard. And thanks to its conclusory nature, for all anyone can tell it may have come out of a hat—and, thus, may wind up being clearly mistaken, fake, or speculative evidence too. Unsurprisingly given all this, the government fails to cite even a single authority blessing the sort of evidence here as substantial evidence, despite the standard's long history and widespread use.

Veteran Social Security practitioners must be feeling a sense of *déjà vu*. Half a century ago, Judge Henry Friendly encountered *Kerner v. Flemming*, 283 F.2d 916 (CA2 1960). There, the agency's hearing examiner offered "nothing save [his own] speculation" to support his holding that the claimant "could in fact obtain substantial gainful employment." The Second Circuit firmly explained that this kind of conclusory claim is insufficient to meet the substantial evidence standard. In response, the Social Security Administration began hiring vocational experts, like the one in this case, to document the number of jobs available to a given claimant. But if the government can do what it did in this case, it's hard to see what all the trouble was for. The agency might still rest decisions on a hunch—just so long as the hunch comes from an agency contractor rather than an agency examiner.

Instead of addressing the realities of this case, the government asks us to imagine a hypothetical one. Assume, it says, that no one had requested the underlying data. In those circumstances, the government points out, even Mr. Biestek appears to accept that the agency's decision could have stood. And if that's true, the government asks, why should it make a difference if we add only one additional fact—the expert's refusal to produce the data?

The answer is an old and familiar one. The refusal to supply readily available evidentiary support for a conclusion strongly suggests that the conclusion is, well, unsupported. See, *e.g.*, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226, 59 S.Ct. 467, 83 L.Ed. 610 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse"); *Clifton v. United States*, 4 How. 242, 248, 11 L.Ed. 957 (1846) (the withholding of "more direct" proof suggests that "if the more perfect exposition had been given it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal"); 31A C.J. S., Evidence § 156(2), p. 402 (1964) ("The unfavorable inference ... is especially applicable where the party withholding the evidence has had notice or has been ordered to produce it"). Meanwhile, a similar inference may not arise if no one's bothered to ask for the evidence, or if the evidence is shown to be unavailable for a good reason. In cases like those, there may be just too many other plausible and innocent excuses for the evidence's absence. Maybe, for example, nobody bothered to seek the underlying data because everyone knew what it would show.

Fine, the Court responds, all that's true enough. But even if we accept that an expert's failure to produce the evidence underlying her conclusion *may* support an inference that her conclusion is unsupported, that doesn't mean such an inference *must* follow. Whether an inference is appropriate depends on the facts of the particular case.

But what more do we need to know about the facts of *this* case? All of the relevant facts are undisputed, and it remains only to decide the legal question whether they meet the substantial evidence standard. We know that the expert offered a firm and exact conclusion about the number of available jobs. We know that the expert claimed to have private information to support her conclusion. We know Mr. Biestek requested that information and we have no reason to think any confidentiality concerns could not have been addressed. We know, too, that the hearing examiner had "no other reason to trust the expert['s]" numbers beyond her say-so. Finally, and looking to the law, we know that a witness's bare conclusion is regularly held insufficient to meet the substantial evidence threshold—and we know that the government hasn't cited a single case finding substantial evidence on so little. This is *exactly* the sort of case where an adverse inference should "tip the scales."

With so much now weighing against the government, everything seems to turn on a final hypothetical. Now we are asked to imagine that the expert had offered detailed oral testimony about the withheld data. Her testimony was so detailed, we are asked to suppose, that Mr. Biestek could have thoroughly tested the data's reliability through cross-examination. (You might wonder just how effective this cross-examination could be if Mr. Biestek didn't have access to the data. But overlook that.) Surely in *those* circumstances it wouldn't matter whether the expert failed to produce the data even in bad faith. Any failure to produce would be harmless as a matter of law because the expert's testimony, all by itself, would amount to substantial evidence on which a rational factfinder might rely.

The problem is that this imaginary case has nothing to teach us about our real one. In Mr. Biestek's case, it is undisputed that the expert offered only a bare conclusion about the number of available jobs. No other relevant testimony was offered or received: no testimony about the underlying data, no testimony about its specific sources, no testimony about its reliability. In our real case, there is simply no way to shrug off the failure to produce the data as harmless error. To the contrary, and as we have seen, cases like *this* routinely fail to satisfy the substantial evidence standard. And if the government has a "duty to fully develop the record," that conclusion should follow all the more strongly.

What leads the Court to a different conclusion? It says that it views Mr. Biestek's petition as raising only the "categorical" question whether an expert's failure to produce underlying data always and in "every case" precludes her testimony from qualifying as substantial evidence. And once the question is ratcheted up to that level of abstraction, of course it is easy enough to shoot it down: just point to a series of hypothetical cases where the record contains *additional* justification for the expert's failure to produce or *additional* evidence to support her opinion. In such counterfactual cases, the failure to produce either would not be enough to give rise to

an adverse inference under traditional legal principles or could be held harmless as a matter of law.

But as I understand Mr. Biestek's submission, it does not require an all-or-nothing approach that would cover "every case." As the Court acknowledges, Mr. Biestek has focused us "on the Seventh Circuit's categorical rule." And that "rule" targets the narrower "category" of circumstances we have here—where an expert "'give[s] a bottom line,' " fails to provide evidence "underlying that bottom line" when challenged, and fails to show the evidence is unavailable. *McKinnie*, 368 F.3d at 911 (quoting *Donahue*, 279 F.3d at 446). What to do about *that* category falls well within the question presented: "[w]hether a vocational expert's testimony can constitute substantial evidence of 'other work' ... when the expert fails upon the applicant's request to provide the underlying data on which that testimony is premised.". The answer to that question may be "always," "never," or—as the Court itself seems to acknowledge—"[s]ometimes." . And if the answer is "sometimes," the critical question becomes "in what circumstances"?

I suppose we could stop short and leave everyone guessing. But another option is to follow the Seventh Circuit's lead, resolve the smaller yet still significant "category" of cases like the one before us, and in that way begin to offer lower courts meaningful guidance in this important area. While I would not hesitate to take this course and make plain that cases like Mr. Biestek's fail the substantial evidence standard, I understand the Court today to choose the first option and leave these matters for another day.

There is good news and bad news in this. If my understanding of the Court's opinion is correct, the good news is that the Court remains open to the possibility that in real-world cases like Mr. Biestek's, lower courts may—and even should—find the substantial evidence test unmet. The bad news is that we must wait to find out, leaving many people and courts in limbo in the meantime. Cases with facts like Mr. Biestek's appear to be all too common. See, *e.g.*, Dubin, Overcoming Gridlock: *Campbell* After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs, 62 Admin. L. Rev. 937, 966 (2010). And many courts have erred in them by finding the substantial evidence test met, as the Sixth Circuit did in the case now before us. Some courts have even conflated the substantial evidence standard—a substantive standard governing what's needed to sustain a judgment as a matter of law—with procedural rules governing the admission of evidence. These courts have mistakenly suggested that, because the Federal Rules of Evidence don't apply in Social Security proceedings, anything an expert says will suffice to meet the agency's burden of proof. See, *e.g.*, *Welsh v. Commissioner of Social Security*, 662 Fed. Appx. 105, 109–110 (CA3 2016); *Bayliss v. Barnhart*, 427 F.3d 1211, 1218, and n. 4 (CA9 2005). Definitively resolving this case would have provided more useful guidance for

practitioners and lower courts that have struggled with a significant category of cases like Mr. Biestek's, all while affording him the relief the law promises in disputes like his.

The principle that the government must support its allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decisionmaking. See Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1313–1314 (1975). Without it, people like Mr. Biestek are left to the mercy of a bureaucrat's caprice. Over 100 years ago, in *ICC v. Louisville & Nashville R. Co.*, 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431 (1913), the government sought to justify an agency order binding private parties without producing the information on which the agency had relied. The government argued that its findings should be "presumed to have been supported." In essence, the government sought the right to "act upon any sort of secret evidence." Gellhorn, Official Notice in Administrative Adjudication, 20 Texas L. Rev. 131, 145 (1941). This Court did not approve of that practice then, and I would not have hesitated to make clear that we do not approve of it today.

I respectfully dissent.

NOTES

1. The Court emphasized that its opinion did not address the merits of Biestek's case and was strictly limited to addressing and rejecting a "categorical rule" that a vocational expert's refusal to supply private labor market data or studies upon which vocational testimony is purportedly based, does not automatically preclude the testimony from meeting the "substantial evidence standard" in social security disability cases. However, it pointed out that an "example" that would "prevent the [VE's] testimony from qualifying as substantial evidence" would be "if the expert has no good reason to keep the data private and her testimony lacks other markers of reliability." The dissenting opinions offer more detailed guidelines for proceeding to the merits and determining when such VE testimony coupled with denial of a request to permit examination of the underlying data or evidentiary materials supporting such testimony, does not amount to substantial evidence. Does the VE's testimony in *Biestek* satisfy the substantial evidence standard under these various considerations? Why, or why not?

2. Does or should the application of ALJ "issue exhaustion" preclude assertion of issues on judicial review based on the methodological or evidentiary inadequacy of vocational testimony, where those issues were not raised to the ALJ through cross-examination of the VE or otherwise? See this Update at Chapter 8, Section D.1.a, *supra*.

3. Can the Court's opinion be interpreted more broadly, to sanction the use of "junk vocational science" as "substantial evidence" to satisfy the agency's step-five "other work" burden in social security disability cases? Consider the following:

> In its famous opinion in *Daubert v. Merrell Dow Pharmaceuticals*, [509 U.S. 579 (1993)] the U.S. Supreme Court took a major step toward assuring that our legal system functions on the basis of sound scientific principles. The Court held that judges must apply criteria based on such principles when they decide whether to admit expert testimony. *Daubert* was a reaction to the well-documented problem of court decisions that are based on "junk science"—opinions offered in evidence by supposed experts but that are not supported by reliable data and analysis.* * *
>
> [In *Biestek*], [o]f course, we will never know whether the private surveys exist. If they exist, we will never know whether they support the witness's testimony. If they support the witness's testimony, we will never know whether they are based on reliable data. If they are supported by reliable data, we will never know whether the methodology the witness used to draw inferences from the data was reliable. * * *
>
> At the end of its opinion, the majority stated that it was only rejecting a "categorical rule" that the petitioner's lawyer had urged the Court to adopt. It went on to disavow any intent to decide in Biestek's case "whether, in the absence of that rule, substantial evidence supported the ALJ in denying him benefits." That is a strange statement that suggests that the majority did not do the one thing that every court is required to do—resolve the case before the court based on the facts of the case. I hope the optimism of the dissenting justices proves to be accurate, but it would be easy for lower courts to interpret the majority opinion as an invitation to allow agencies to rely on junk science in virtually all cases.

Richard J. Pierce, *Has the Supreme Court Endorsed the Use of Junk Science in the Administrative State?,* THE REGULATORY REVIEW (April 29, 2019).

4. The Court suggests that it is a "best practice" for vocational experts to supply their underlying supporting materials at the hearings and notes that SSA's own Vocational Expert Handbook instructs VEs that: "You should have available, at the hearing, any vocational resource materials that you are likely to rely upon." What is the legal significance of a VE's failure or refusal to follow this handbook and thereby deny claimants the opportunity to confront these materials in the hearing process? Would there be any additional legal significance if the materials had been requested in advance by subpoena pursuant to 20 C.F.R. § 404.950(d)(1) ("When it is reasonably necessary for the full presentation of a case, an administrative law judge or a member of the Appeals Council may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing.")? What if the subpoena were granted?

5. A growing body of post-*Biestek* precedential Court of Appeals decisions on VE evidence and its sufficiency under the substantial evidence standard, have scrutinized the VE's methodology in reaching job numbers conclusions and set aside decisions where that methodology is inadequate or simply not understandable. For example, in Goode v. Commissioner of Social Security, 966 F.3d 1277 (11th Cir. 2020), the Eleventh Circuit found the VE testimony deficient and insubstantial, requiring a remand of the agency's administrative decision. *Id.* at 1284-85. The court specifically cited and quoted the Gorsuch/Ginsburg *Biestek* dissent to reject the SSA's position that the absence of binding federal evidentiary rules on the foundation for expert testimony supported testimony lacking ascertainable methodology. *Id.* at 1283 (quoting *Biestek*, 139 S. Ct. at 1162, Gorsuch J., joined by Ginsburg, J., dissenting) ("Some courts have ... conflated the substantial evidence standard—a substantive standard governing what's needed to sustain a judgment as a matter of law—with procedural rules governing the admission of evidence. These courts have mistakenly suggested that, because the Federal Rules of Evidence don't apply in Social Security proceedings, anything an expert says will suffice to meet the agency's burden of proof."). It also reasoned while that the "case-by-case approach" to VE testimonial sufficiency mandated in *Biestek*, "takes into account all features of the vocational expert's testimony, as well as the rest of the administrative record," *Goode,* 966 F.3d at 1281 (quoting *Biestek*, 139 S. Ct. at 1157), "the fact that vocational expert testimony is admissible does not mean that it necessarily constitutes substantial evidence." *Goode,* 966 F.3d at 1283.

Next, the court explained that the VE must have a reliable methodology. *See id.* at 1282 (quoting CAROLYN KUBITSCHEK & JON DUBIN, SOCIAL SECURITY DISABILITY: LAW AND PROCEDURE IN FEDERAL COURT § 3:106 (2020 ed.)) ("One is hard-pressed to understand how vocational expert testimony lacking even minimal methodological support, when questioned, meets the 'substantiality' threshold, particularly at step five of the proceedings where the burden of demonstrating the claimant's ability to make a work adjustment to a significant number of jobs in the economy . . .has shifted from the claimant to the agency."). In particular, the VE must address the "matching problem" from "using one system to supply the job titles [the DOT] and another [the Standard Occupational Classification, or SOC] for the number of the jobs." *Id.* at 1281. This means after figuring out the total number of jobs in a broad SOC occupational group, the VE must take "an additional step in determining how many of those are the specific job or jobs that the claimant could perform." *Id.* at 1283. "In other words, the vocational expert 'must use some measure for associating SOC-based employment numbers to DOT-based job types.'" *Id.* (quoting Brault v. Soc. Sec. Admin., 683 F.3d 443 (2d Cir. 2012)). Because the VE "did not take any further steps, or use any other methodology" to demonstrate the number of the 43,000 national and 1,000 regional jobs identified for the "Food Processing Workers, All Others" broad SOC occupational grouping [SOC# 51-3099] containing 65 DOT codes that were properly and approximately attributable to the VE-identified single DOT occupational code of bakery worker [DOT # 524.687-022] in the VE's work-adjustment

assessment, the testimony was fatally deficient. *Goode,* 966 F.3d at 1282-84. It concluded that "a finding based on unreliable vocational expert testimony is 'equivalent to a finding that is not supported by substantial evidence and must be vacated.'" *Id.* at 1282 (quoting Britton v. Astrue, 521 F.3d 799, 803 (7th Cir. 2008)).

In addition, in Brace v. Saul, 970 F.3d 818, 822 (7th Cir. 2020), the Seventh Circuit held that a VE 's job numbers estimate "must be supported with evidence sufficient to provide some modicum of confidence in its reliability" and "the ALJ 'must require the VE to offer a reasoned and principled explanation of the method [the VE] used to produce it.'" (quoting Chavez v. Berryhill, 895 F.3d 962, 970 (7th Cir. 2018)) It also relied on its interpretation of the majority opinion in *Biestek* as holding that VE "job-number testimony will survive review under the substantial-evidence standard as long as it rests on a well-accepted methodology and the expert describes the methodology 'cogently and thoroughly.'" *Brace*, 970 F.3d at 822 (citing *Biestek*, 139 S. Ct. at 1155). The court then further held that VE attempts to explain job numbers methodology that are "unintelligible," "jargon"-laden, or "obscuring rather than elucidating" the process, reflect a "trust me" approach to the burden of proof by the agency and fail to satisfy the substantial evidence standard. *Brace*, 970 F.3d at 822-23.

To underscore its holding, the court quoted a section of the VE's explanation of his methodology for a job numbers estimate of 140,000 jobs in the occupations of call-out operator, semiconductor bonder, registration clerk and counter clerk, which it characterized as "entirely unilluminating," stating:

> Testimony that incants unelaborated words and phrases such as "weighting" and "allocation" and "my information that I have" cannot possibly satisfy the substantial-evidence standard. What allocations? How is the weighting and re-weighting performed? According to what criteria? And what is the unidentified "information" in the expert's possession? [The VE had stated: "Well, it's—it's that combination of, one, you are looking at the number of titles that are in that [OES] category[,] and then based upon the—my information that I have as far as how the frequency of those jobs are performed, then we do an allocation based upon weighting or re-weighting those allocations to get the estimates of the numbers."]

Id. at 822. Finally, in reaching its determination that the ALJ's decision needed to be vacated and remanded due to the lack of substantial evidence in support of the VE's job numbers and ALJ's work-adjustment conclusion, the court also rejected the ALJ's arguments that the claimant waived objection to the VE's methodology by not objecting or stipulating to the VE's qualifications, and that in light of the VE's large job numbers estimate any methodological issues reflect only harmless error. *Id.* at 823. It reasoned that "a claimant need not object to an expert's *qualifications* in order

to object to the expert's *methodology*," *id.* at 823 (emphasis in original), and "an unreliable job-number estimate cannot be considered reliable merely because it is large." *Id.*

6. In order for claimant representatives effectively to probe a VE's methodology as suggested in *Biestek*, are there steps the ALJs and agency should be taking to slow down the process and secure greater clarity from the VE in order to promote meaningful judicial review and avert the problems identified in *Goode* and *Brace supra* ? Consider the following:

> The ALJ must "hold the [vocational expert] to account for the reliability of [her] job-number estimates." But even after cross-examination raised doubts about the expert's methodology, the ALJ here did not ask the expert to clarify what she meant by "names of jobs," whether such names are different from SOC codes, or the reason she used the equal distribution method. Thus, nothing in the administrative record allows us to conclude that the vocational expert's estimates reasonably approximate the number of suitable jobs that exist for Ruenger. We are mindful of the time constraints and heavy caseloads faced by ALs. But when a claimant challenges a vocational expert's job-number estimates, the ALJ has a duty to spend time inquiring into the expert's methodology. This may require that ALJs ask more questions of vocational experts or slow down proceedings to give claimants a greater opportunity to pose their own questions. Otherwise, ALJs risk shifting the agency's evidentiary burden to the claimant.

Ruenger v. Kijakazi, 23 F.4th 760, 764 (7th Cir. 2022) (citations omitted).

7. To what extent is the issue of VE methodological incomprehension and inadequacy compounded by deficiencies and complexity in the multiple data sources and supporting materials needed to link job numbers to non-obsolete and granular occupational descriptions and job requirements? The concurring opinion in *Ruenger* described this problem as "systemic" and explained:

> No matter how many times we read this testimony, we cannot discern the VE's methodology. To be sure, we recognize many of the VE's references and much of the related administrative lingo. But recognizing dots does not tell us how, if at all, they connect. Faced with a transcript like this one, attempting to conduct judicial review is an exercise in futility. That is why we have concluded that substantial evidence did not support the ALJ's denial of benefits for Randall Ruenger. The concern underlying this evidentiary shortcoming extends beyond Mr. Ruenger's case. The issue is more systemic. Since 2008, the Social Security Administration has been promising courts and claimants alike that a new, unified jobs system—designed to simplify the process of compiling job-number estimates—will

> soon be available. More than a decade later, the Administration has not completed its work. So today's world is a distinct second best, with VEs made to cross-reference data points from multiple nonconversant data sets live on the witness stand at seemingly breakneck speed. There has to be a better way. At the very least, the record would benefit from everyone slowing down when VEs take the stand. A disability determination may well mark the difference between income and no income for the claimant. With so much at stake in these proceedings, it is essential that a reviewing court be able to decipher the evidentiary record. Tapping the brake pedal may go a long way toward making everything more transparent.

Id. at 765-66 (opinion by Scudder, concurring). For exploration of the deficiencies in available vocational data sources, examination of SSA's progress toward creating a newer and more accurate occupational taxonomy and corresponding job incidence data sources, and critique of policy recommendations to eliminate or minimize consideration of vocational factors and labor market evidence in SSA disability cases see JON C. DUBIN, SOCIAL SECURITY DISABILITY LAW AND THE AMERICAN LABOR MARKET (2021). As shown in some of the cases cited in the notes in this section, in the absence of a new accurate, non-obsolete occupational taxonomy and reliable methodologies for collecting corresponding jobs data linked to it, several vocational witnesses at ALJ hearings rely on a software program from the SkillTRAN company titled "JobBrowser Pro." The program utilizes a variety of methods including the somewhat discredited "equal distribution method" to extrapolate job incidence numbers by DOT titles from current Department of Labor data sources which only collect numbers by broad Standard Occupational Classification [SOC] categories and not be DOT definitions. *See* Job Numbers, SKILLTRAN (Feb. 8, 2021), https://skilltran.com/index.php/support-area/documentation/216-job-numbers; *see generally*, Holman v. Kijakazi, 72 F.4th 248, 254 (7th Cir, 2023) (expressing "many concerns about the ["Equal Distribution"] method's reliability," but concluding that "we have never categorically barred VEs from using that method in social security disability hearings . . . to make a step-five job-number determination."). Although ALJs and courts routinely rely on testimony from vocational witnesses utilizing the SkillTRAN software, the SSA has issued policy guidance through an Emergency Message (EM) specifically disclaiming validation, or acceptance of SkillTRAN's' methodology for identifying job numbers by DOT code. It states:

> Labor Market information.
>
> Federal agencies now publish labor market information by the Standard Occupational Classification (SOC) code. Those with vocational expertise use various approaches to arrive at informed estimates of numbers of jobs that exist within a DOT occupation. Results may differ given the method used for the estimate. We have not reviewed and do not specifically endorse the SkillTRAN proprietary algorithm. "

SSA Emergency Message 21065 REV (EM-21065 REV) (Dec. 5, 2023), https://secure.ssa.gov/apps10/reference.nsf/links/10292021113305AM.

8. Some post-*Biestek* Court of Appeals decisions have been less solicitous of challenges based on the ALJ's rejection of claimant efforts to obtain and effectively confront VE data and source materials supporting VE testimony and ALJ step-five conclusions, than to challenges predicated on VE methodological inadequacy. In Krell v. Saul, 931 F.3d 582, 586 (7th Cir. 2019), the Seventh Circuit, in reliance on *Biestek*, held that there is no categorical or "automatic" right to a pre-hearing subpoena for the vocational expert's supporting data. *Id.* at 586. The Court reasoned that "it is within an ALJ's discretion to issue a prehearing subpoena…when the subpoena is 'reasonably necessary for the full presentation of a case' and when certain 'facts could not be proven without issuing a subpoena.'" *Id.* (quoting 20 C.F.R. § 404.950(d)). It also observed that the ALJ had pointed out that claimant's counsel "had not in fact shown why it was necessary for the expert to produce his sources" pre-hearing as requested, as opposed to "just question[ing] the expert about his sources at the hearing" or "challenging the expert's reliance on those sources" post-hearing. *Id.* While affirming the decision and the denial of the subpoena—the only issue on appeal in *Krell*—the Seventh Circuit made "clear" that its holding "and that of *Biestek* do not give vocational experts carte blanche to testify without providing underlying sources" and "[i]t is certainly best practice for vocational experts to provide underlying sources at hearings, and we encourage them to do so." *Id.* at 587 (citing *Biestek*, 139 S. Ct. at 1155 (noting that a vocational expert's testimony would be "more reliable and probative" and "a best practice for the SSA and its experts" if the expert "produced supporting data") and Social Security Administration, *Vocational Expert Handbook*, 37 (Aug. 2017) ("You should have available, at the hearing, any vocational resource materials that you are likely to rely upon and should be able to thoroughly explain what resource materials you used and how you arrived at your opinions.")). The Court, following *Biestek*, declared it "will review on a case-by-case basis situations where a vocational expert does not produce his sources and the ALJ declines to require him to do so and in some cases, the vocational expert's testimony may prove to be unreliable without underlying sources, and in those cases the testimony may neither constitute substantial evidence nor be used as the basis for an ALJ's determination." *Id.* Finally, the court stated its strong, albeit non-mandatory, preference "that in cases where underlying data may not be available at the hearing, (say, for example, the vocational expert testified by phone, as was the case here), the claimant should have the opportunity to make additional argument about the data post-hearing." *Id.*

The Ninth Circuit has gone a step further and at least initially suggested that *Biestek* together with the regulatory 5-day rules for subpoena requests, support further limits on claimants' post-hearing efforts to subpoena or otherwise obtain and

challenge the sources, data and methodology supporting VE jobs testimony after such testimony is supplied for the first time at the hearing. In Ford v. Saul, 950 F.3d 1141 (9th Cir. 2020), it stated:

> Ford argues that the ALJ erred in failing to order the vocational expert to identify or provide his source material for his testimony on the number of jobs that exist in the national economy that Ford could perform. Ford first claims that she needed the underlying data to make a meaningful challenge to the vocational expert's testimony. According to Ford, the ALJ's failure to issue a subpoena requiring the vocational expert to produce the underlying data violated the applicable regulations and procedural rules, and violated her due process rights. Second, Ford argues that the vocational expert's failure to produce the data underlying his testimony undermined its reliability, and therefore the testimony did not constitute substantial evidence supporting the ALJ's determination at step five. We disagree on both points. First, the ALJ's decision not to issue a subpoena to the vocational expert did not violate the applicable regulations. . . . Here, Ford made her request for a subpoena a week after the hearing. Therefore, she did not meet the regulatory requirement that such requests be made "at least 5 days before the hearing date." Ford does not point to any authority entitling a claimant to make a post-hearing request or requiring an ALJ to consider issuing a post-hearing subpoena. Nor does she argue that an "unusual, unexpected, or unavoidable circumstance" prevented her from making her request at least 5 days before the hearing date. Accordingly, the ALJ did not violate the applicable regulations. Nor is there any "free-standing procedural rule under which a vocational expert would always have to produce [her underlying data] upon request." *Biestek*, 139 S. Ct. at 1154.
>
> Second, Ford argues that the vocational expert's failure to produce the data underlying her testimony undermined its reliability. Therefore, Ford contends, the expert's testimony did not constitute substantial evidence of the number of jobs that exist in the national economy. This argument also fails. Our review of an ALJ's fact-finding for substantial evidence is deferential, and "[t]he threshold for such evidentiary sufficiency is not high." *Biestek*, 139 S. Ct at 1154. . . . Given our deferential substantial evidence review, there is no "categorical rule, applying to every case in which a vocational expert refuses a request for underlying data," which would make an expert's testimony per se unreliable. *Id.* Rather, "the inquiry, as is usually true in determining the substantiality of evidence, is case-by-case," *id.*, and the court must consider the evidence in the record in each individual case. In some cases, the "expert's withholding of

> [underlying] data, when combined with other aspects of the record, will prevent [the expert's] testimony from qualifying as substantial evidence." *Id.* This could occur, for instance, if the expert's testimony lacks "markers of reliability," and "the expert has no good reason to keep the data private." *Id.* Likewise, the expert's "withholding of data may count against" the expert's opinion, such as where the expert lacked strong qualifications and offered only "testimony that is so feeble, or contradicted, that it would fail to clear the substantial-evidence bar." *Id.* at 1155–56. But in many of cases, where the expert is qualified and presents cogent testimony that does not conflict with other evidence in the record, "the expert's testimony still will clear (even handily so) the more-than-a-mere-scintilla threshold" even when the expert declines to provide the underlying data. *Id.* at 1157. Here, the expert's testimony cleared the low substantial evidence bar. Ford points to no indicia of unreliability in the expert's testimony—she does not argue that the expert lacked the necessary qualifications, that his testimony was untrustworthy, or that the testimony was contradicted by other evidence in the record. Moreover, unlike the expert in *Biestek*, the expert here did not decline to supply his underlying sources; rather, he merely stated that he did not have the information in his notes. Ford does not identify any evidence undermining the vocational expert's testimony. We have long held that "in the absence of any contrary evidence, a [vocational expert's] testimony is one type of job information that is regarded as inherently reliable; thus, there is no need for an ALJ to assess its reliability." *Buck v. Berryhill*, 869 F.3d 1040, 1051 (9th Cir. 2017). Given its inherent reliability, a qualified vocational expert's testimony as to the number of jobs existing in the national economy that a claimant can perform is ordinarily sufficient by itself to support an ALJ's step-five finding.

Id. at 1158-60.

Is the Ninth Circuit's decision in *Ford* consistent with SSA's evidence submission rules and 5-day regulations? [See Ch. 9, A.1 *supra* in this update on SSA's 5-day evidence submission rules]. Consider the following: 81 Fed. Reg. 90987, 90991 (Dec. 16, 2016) (" . . . if an ALJ introduces new evidence at or after a hearing, the claimant could use the exception in 20 CFR 404.935(b)(3) and 416.1435(b)(3) to submit rebuttal evidence. The claimant could also rebut evidence introduced at or after the hearing by submitting a written statement to the ALJ. As previously mentioned, we added language to 20 CFR 404.949 and 416.1449 to clarify that the 5-day requirement applies only to pre-hearing written statements, not to post-hearing written statements."). How can a claimant submit appropriate and salient post-hearing evidence and argument, as contemplated in SSA's regulations, to rebut VE

testimony presented the first time at the hearing, when lacking provision of or access to the data and source material upon which the VE testimony is based?

Since *Ford*, the Ninth Circuit has set aside several agency decisions based on unexplained or un-reconciled vocational evidence inconsistencies or evidentiary conflicts created by the claimants' submission of post-hearing counter-evidence to a VE's testimony. *See, e.g.,* White v. Kijakazi, 44 F.4th 828 (9th Cir. 2022) (decision remanded where post-hearing evidence submitted to appeals council and not reconciled and relying on screen shots of the same program (SkillTRAN Job Browser Pro) and the same DOT codes the VE had used. found that that there were only 2,957 table worker, 0 assembler, and 1,333 film touch-up inspector jobs in the national economy whereas the VE had testified that there were 72,000, 65,000, and 32,000 of such jobs, respectively); *see also* Erickson v. Saul, 840 Fed. Appx. 167, 168 (9th Cir. 2021) (decision remanded where post-hearing submission to the ALJ with credible or reliable contrary vocational evidence, showed only 19,000 jobs in the entire ophthalmic goods SOC occupational group and raised questions, unresolved by the ALJ, of the validity of VE testimony that a single DOT lens inserter occupation in that entire SOC group alone comprised 25,000 national jobs); Jaquez v. Saul, 840 Fed. Appx. 246, 247 (9th Cir. 2021) (remand where reliable post-hearing evidence submitted to Appeals Council and considered, but not reconciled, undermined reliability of VE testimony of 90,200 usher jobs since the post-hearing evidence showed that 90% of usher jobs are only part-time positions); *but cf*. Wischmann v. Kijakazi, 68 F. 4th 498, 501 (9th Cir. 2023) (non-reliable post-hearing submission and evidence rejected and does not change the result).

Appendix A, 20 C.F.R. §§ 404.1526(e), 416.926(e) (Who is responsible for determining medical equivalence?) at p. 939:

SSR 17-2 (2017) requires that a decision of medical equivalence at the ALJ level (and the Appeals Council level, when the AC makes the decision) include one of three specified types of expert opinion in the record: 1) a prior administrative medical finding from a Medical or Psychological Consultant from the initial or reconsideration adjudication levels supporting the medical equivalence finding, or 2) Medical Expert evidence, which may include testimony or written responses to interrogatories, obtained at the hearings level supporting the medical equivalence finding, or 3) a report from the Appeals Council's medical support staff supporting the medical equivalence finding.

Appendix A, §§404.970, 416.1570 (Cases the Appeals Council will review) at 914

(a) The Appeals Council will review a case if—

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence;

(4) There is a broad policy or procedural issue that may affect the general public interest; or

(5) Subject to paragraph (b) of this section, the Appeals Council receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.

(b) The Appeals Council will only consider additional evidence under paragraph (a)(5) of this section if you show good cause for not informing us about or submitting the evidence as described in §404.935 because:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about or submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. Examples include, but are not limited to:

(i) You were seriously ill, and your illness prevented you from contacting us in person, in writing, or through a friend, relative, or other person;

(ii) There was a death or serious illness in your immediate family;

(iii) Important records were destroyed or damaged by fire or other accidental cause;

(iv) You actively and diligently sought evidence from a source and the evidence was not received or was received less than 5 business days prior to the hearing; or

(v) You received a hearing level decision on the record and the Appeals Council reviewed your decision.

(c) If you submit additional evidence that does not relate to the period on or before the date of the administrative law judge hearing decision as required in paragraph (a)(5) of this section, or the Appeals Council does not find you had good cause for missing the deadline to submit the evidence in §404.935, the Appeals Council will send you a notice that explains why it did not accept the additional evidence and advises you of your right to file a new application. The notice will also advise you that if you file a new application within 6 months after the date of the Appeals Council's notice, your request for review will constitute a written statement indicating an intent to claim benefits under §404.630. If you file a new application within 6 months of the Appeals Council's notice, we will use the date you requested Appeals Council review as the filing date for your new application.

Appendix A, 20 C.F.R. Pt. 404, Subpt. P, App. 2: Medical-Vocational Guidelines, revise Rule 201.00(h) as follows at pp. 1014-15:

(h)(1)(iv) Are illiterate.

(h)(2) It is usually not a significant factor in limiting such individual's ability to make an adjustment to other work, including an adjustment to unskilled sedentary work, even when the individuals are illiterate.

(h)(4)(i) While illiteracy may significantly limit an individual's vocational scope, the primary work functions in most unskilled occupations involve working with things (rather than with data or people). In these work functions, education has the least significance. Similarly the lack of relevant work experience would have little significance since the bulk of unskilled jobs require no qualifying work experience. Thus, the functional capacity for a full range of sedentary work represents sufficient numbers of jobs to indicate substantial vocational scope for those individuals age 18–44, even if they are illiterate.

Appendix A, 20 C.F.R. Pt. 404, Subpt. P, App. 2: Medical-Vocational Guidelines, revise Table 1 Rules 201.17, 201.28, 201.23, and 201.24 as follows at pp. 1017:

Rule	Age	Education	Previous work experience	Decision
201.17	Younger individual age 45–49	Illiterate	Unskilled or none	Disabled
201.18	.....do	Limited or marginal, but not Illiterate	.....do	Not disabled
201.23	Younger individual age 18–44	Illiterate	Unskilled or none	Do.[4]
201.24	.....do	Limited or marginal, but not Illiterate	.....do	Do.[4]