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## Social Security

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# SOCIAL SECURITY

## INTRODUCTION

Disability benefits play an important role in the broader social safety net.<sup>1</sup> Individuals suffering from physical or mental disabilities may receive benefit payments under two major federal programs authorized by the Social Security Act.<sup>2</sup> The Old Age Survivors and Disability Insurance (OASDI) program provides workers with an insurance program designed to protect against unexpected loss of earnings due to injury, retirement, or death.<sup>3</sup> The Supplemental Security Income (SSI) program offers disability payments for individuals qualifying for the means based welfare program.<sup>4</sup> Both OASDI and SSI define disability as the inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."<sup>5</sup> Determining whether an individual qualifies as disabled is the most difficult and commonly litigated requirement of both OASDI and SSI.<sup>6</sup>

The Social Security Administration (SSA) administers the massive OASDI and SSI programs. One commentator appropriately labeled the SSA disability program as "the Mount Everest of bureaucratic structures."<sup>7</sup> The entire OASDI program provides benefits to 45 million individuals, including 5.9 million beneficiaries under disability status.<sup>8</sup> Almost 800,000 blind or disabled OASDI beneficiaries also receive SSI payments.<sup>9</sup> Another 2.4 million blind or disabled individuals receive only SSI benefits.<sup>10</sup>

Individuals denied benefits by the SSA may seek administrative review and subsequent judicial review in the federal courts.<sup>11</sup> In 1987, administrative law judges (ALJs) decided 320,000 appeals from SSA decisions.<sup>12</sup> Disability

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1. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 18-20 (1983); Jon C. Dubin, *Poverty Pain, and Precedent: The Fifth Circuit's Social Security Jurisprudence*, 25 ST. MARY'S L.J. 81, 88 (1993).

2. Social Security Act of 1935, ch. 531, 49 Stat. 620 (codified as amended in scattered sections of 26 and 42 U.S.C.).

3. See 42 U.S.C. §§ 401-422 (1994).

4. See 42 U.S.C. §§ 1381-1383.

5. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1994).

6. Jon C. Dubin, *Social Security Law*, 26 TEX. TECH L. REV. 763, 763-64 (1995); Larry M. Gropman, *Social Security*, 1995 DET. C.L. REV. 773, 774 (1995).

7. Paul R. Verkuil, *The Self-Legitimizing Bureaucracy*, 93 YALE L.J. 780, 781 (1984) (book review).

8. Social Sec. Admin., U.S. Dept. of Health & Human Servs., 59 SOC. SEC. BULL. 96 (1996) (listing current SSA operating statistics).

9. *Id.*

10. *Id.* at 97.

11. 42 U.S.C. § 405(g); see generally ARTHUR ABRAHAM & DAVID L. KOPELMAN, *FEDERAL SOCIAL SECURITY* 115-26 (1979) (explaining the steps and issues of the appeal procedure).

12. KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 6 (3d ed. 1994).

cases amount to a significant component of the total federal court caseload. The average circuit court must decide 382 disability cases each year.<sup>13</sup> Overall, appeals from denials of Social Security disability benefits were 5.3% of all new district court filings and 3.2% of the caseload in the courts of appeals.<sup>14</sup>

The role of judicial oversight is particularly important for the administration of Social Security disability benefits.<sup>15</sup> Historically, the SSA has been vulnerable to external pressures and exercised its own bureaucratic power to influence the overall case load and the level of rejections.<sup>16</sup> For this reason, judicial review provides an important check to ensure that the administrative agency makes informed and rational decisions, acts within its statutory authority, and adheres to fundamental constitutional protection.<sup>17</sup>

The Tenth Circuit addressed the role of this important judicial check on the SSA during the survey period from September 1995 through August 1996. Section I examines three cases involving enhanced judicial review of SSA decisions. Section II considers pain and drug addiction, their relation to disability benefits, and the Tenth Circuit's interpretation of recent congressional pronouncements against drug addiction. Finally, Section III addresses the issue of reopening a disability case due to fraud, as well as constitutional requirements for notice before the SSA terminates benefits.

### I. DUTY OF THE ALJ

The Commissioner of Social Security has statutory authority to establish rules and regulations to carry out the provisions of the Social Security Act<sup>18</sup> and to make determinations about the eligibility of individual disability claimants.<sup>19</sup> The first level of review for an individual pursuing a disability claim occurs at the state agency level.<sup>20</sup> If dissatisfied by the initial decision, the claimant may appeal by seeking administrative review at the federal level.<sup>21</sup> A federal administrative law judge (ALJ) reviews the application, holds hearings, consults medical and vocational experts, and makes detailed findings to

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13. *Id.* at 7.

14. Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 B.Y.U. L. REV. 461, 477 n.88 (referencing statistics from the 1987 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS).

15. See JERRY L. MASHAW ET AL., *SOCIAL SECURITY HEARINGS AND APPEALS* 136-46 (1978).

16. Levy, *supra* note 14, at 484-507. During the 1980's, the Reagan administration sought to reduce the number of disability beneficiaries by 891,000 through aggressive enforcement and heightened substantive standards for disability. *Id.* at 484. The SSA also instituted practices that pressured ALJs to process claims faster and increase the rate of denials. *Id.* at 494. Furthermore, the SSA pursued an explicit policy of nonacquiescence to federal court decisions when it disagreed with lower court decisions. *Id.* at 503-07. See also DONNA PRICE COFER, *JUDGES BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE* 66-152 (1985) (presenting a detailed review of the Trachtenberg era, 1975-79, when new management controls were instituted by the Bureau of Hearings and Appeals, a 1979 suit filed by ALJs, and congressional amendments in 1980).

17. See DAVIS & PIERCE, *supra* note 12, at 173-210.

18. 42 U.S.C. § 405(a).

19. 42 U.S.C. § 405(b).

20. Levy, *supra* note 14, at 465-66; SOCIAL SECURITY ADMINISTRATION, *SOCIAL SECURITY HANDBOOK* 15-16 (12th ed. 1995) [hereinafter *SSA HANDBOOK*].

21. *Id.* at 471.

either accept or reject disability claims.<sup>22</sup>

The ALJ's determination of disability status must follow a standardized five step evaluation process.<sup>23</sup> Step one asks whether the claimant currently performs work defined in terms of substantial gainful activity.<sup>24</sup> If the answer is yes, the ALJ denies disability benefits.<sup>25</sup> If the answer is no, the ALJ moves to step two.<sup>26</sup>

Step two requires the claimant to show that he suffers from a medically severe impairment, or combination of impairments, that limits his ability to perform work.<sup>27</sup> If the claimant cannot demonstrate a medical impairment, the ALJ denies disability benefits.<sup>28</sup> If the claimant shows the impairments have a threshold impact on his ability to do work activity, the analysis proceeds to step three.<sup>29</sup>

Step three inquires whether the claimant's impairment is equivalent to a recognized impairment that precludes substantial gainful activity.<sup>30</sup> If the claimant's impairment is one of the recognized impairments, the ALJ awards disability benefits to the claimant.<sup>31</sup> If the claimant does not have a recognized impairment, the analysis moves to step four.<sup>32</sup>

Step four examines whether the impairment prevents the claimant from performing his previous work.<sup>33</sup> If the claimant can perform past work, the ALJ denies disability status.<sup>34</sup> If past work is no longer possible, the analysis moves to step five.<sup>35</sup>

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22. See 20 C.F.R. §§ 404.929 (OASDI), 416.1429 (SSI) (1996).

23. See 20 C.F.R. § 404.1520; *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988); Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 806-11 (1992); SSA HANDBOOK, *supra* note 20, at 137-49.

24. *Williams*, 844 F.2d at 750. Regulations define "substantial gainful activity" as "work that (a) [i]nvolves doing significant and productive physical or mental duties; and (b) [i]s done (or intended) for pay or profit." 20 C.F.R. § 416.910. The Tenth Circuit elaborated on the meaning of this term in a 1979 case. *Markham v. Califano*, 601 F.2d 533, 534 (10th Cir. 1979). The court stated that substantial gainful activity was work performed on a regular basis. *Id.* Intermittent work does not necessarily constitute substantial gainful activity, and the SSA should review medical testimony to determine if such an intermittent worker qualifies for disability benefits. *Id.*

25. *Williams*, 844 F.2d at 750.

26. *Id.*

27. *Id.* (citing *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987) (stating that a claimant must have a severe impairment or combination of impairments, otherwise a claim is denied)). Regulations contain detailed guidelines for listing medically severe impairments that significantly limit the ability for a person to perform "basic work activities." 20 C.F.R. §§ 404.1520, .1525. Basic work activities include: "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; . . . [c]apacities for seeing, hearing, and speaking; . . . [u]nderstanding, carrying out, and remembering simple instructions; . . . [u]se of judgment; . . . [r]esponding appropriately to supervision, co-workers and usual work situations; and . . . [d]ealing with changes in a routine work setting." 20 C.F.R. § 404.1521.

28. *Williams*, 844 F.2d at 751.

29. *Id.* at 750-51.

30. *Id.* If a claimant has an impairment either listed by the SSA or equivalent to a listed impairment, the SSA must find that the claimant is disabled without regard to the claimant's age, education, and work experience. 20 C.F.R. § 404.1520(d).

31. *Williams*, 844 F.2d at 750-51.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

Step five explores whether the claimant has the residual functional capacity to perform other work in the economy given the claimant's age, education, and work experience.<sup>36</sup> If the Secretary can show that alternative employment opportunities exist in the economy, the ALJ denies disability benefits.<sup>37</sup> If not, the claimant can be awarded disability benefits.<sup>38</sup>

After ALJ review, a denied claim may be appealed to the Appeals Council.<sup>39</sup> The Appeals Council may deny the request to review, affirm, or reverse the ALJ.<sup>40</sup> The determination by the Appeals Council represents a final decision by the Commissioner.<sup>41</sup> The claimant may seek judicial review in the federal courts.<sup>42</sup> The federal and appellate courts review the record to see if an ALJ decision was supported by substantial evidence and if the ALJ followed the required regulations.<sup>43</sup> The following cases illustrate the standards that the Tenth Circuit applies to ALJ decisions on Social Security disability decisions.

A. *Developing the Record: Carter v. Chater*<sup>44</sup>

1. Facts

Nelda Carter filed for disability insurance benefits claiming disability for paroxysmal atrial tachycardia, a chronic peptic ulcer, gastrointestinal pain, and weakness of her upper arm.<sup>45</sup> The ALJ conducted the five-step evaluation process and denied the claim at step five.<sup>46</sup> The ALJ determined that Carter retained residual functional capacity (RFC) to perform sedentary and light work in the economy.<sup>47</sup> He then considered Carter's RFC in relation to her age, education, and work experience by applying the Medical-Vocational Guidelines.<sup>48</sup> After analyzing these factors and hearing testimony from a vocational expert, the ALJ ruled that Carter did not meet the disabled requirements.<sup>49</sup> The Appeals Council denied her request for review and the district court affirmed the ALJ's ruling.<sup>50</sup> Carter appealed on grounds that the ALJ did not develop the record concerning her mental ailments.<sup>51</sup> Although a

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36. *Id.*

37. *Id.*

38. *Id.*

39. *Levy, supra* note 14, at 472. The Appeals Council is within the SSA. *Id.*

40. *See* 20 C.F.R. §§ 404.967-.981 (OASDI), 416.1467-.1481 (SSI).

41. 20 C.F.R. § 404.981. The claimant may file an action in federal district court 60 days after receipt of notice of the council's decision. *Id.*

42. 42 U.S.C. § 405(g).

43. *Id.*

44. 73 F.3d 1019 (10th Cir. 1996).

45. *Id.* at 1021.

46. *Id.*

47. *Id.*

48. 20 C.F.R. pt. 404, subpt. P, app. 2. The Medical-Vocational Guidelines, commonly known as "grids," provide a framework to evaluate the residual functional capacity based upon the claimant's characteristics (age, education, and work experience) and vocational factors describing the type of work (sedentary, light, medium, heavy, and very heavy). *Williams*, 844 F.2d at 751-52.

49. *Carter*, 73 F.3d at 1021.

50. *Id.*

51. *Id.*

physician's report diagnosed Carter as suffering from depression and associated neuropsychiatric symptoms, the ALJ rejected the report because he deemed it unsupported by any testing or clinical interview.<sup>52</sup>

## 2. Holding

The Tenth Circuit agreed with Carter's claim that the ALJ failed to develop the record.<sup>53</sup> As a general rule, the ALJ has a "duty of inquiry to fully and fairly develop the record as to material issues."<sup>54</sup> Courts impose a heightened duty to develop the record when the claimant is not represented by counsel.<sup>55</sup> The Tenth Circuit determined that the ALJ in Carter's case should have developed the record concerning the physician's diagnosis of depression.<sup>56</sup> The court noted that the ALJ failed to sufficiently inquire about Carter's mental state in the hearings, and he discounted the medical diagnosis of mental depression without seeking further tests or medical consultations.<sup>57</sup>

## 3. Analysis

The Social Security Act does not envision an adversarial review process between the claimant and the SSA.<sup>58</sup> Rather, the ALJ has the responsibility to elicit all information relevant to the claimant's case, decide whether the individual has a valid claim, and document the evidence and reasoning of the decision.<sup>59</sup> Based on *Carter*, the Tenth Circuit will hold ALJs responsible for a serious examination of the medical evidence for mental illness claims, even if the claimant has not raised that claim herself.

## 4. Other Circuits

Other courts have also required ALJ's to take an active role in developing the record. The Second Circuit reversed an ALJ who failed to record the testimony of a medical expert and ignored other medical records in denying benefits to an HIV positive claimant.<sup>60</sup> The Fifth Circuit remanded an ALJ's denial of benefits for failing to include a report from the treating physician about the claimant's ability to work.<sup>61</sup> The Ninth Circuit reversed an ALJ who rejected a disability claim based on fatigue and pain because the medical records were sparse and inadequately documented.<sup>62</sup> The same court noted the height-

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52. *Id.* at 1021-22.

53. *Id.* at 1021.

54. *Id.* (citing *Baca v. Department of Health & Human Servs.*, 5 F.3d 476, 479-80 (10th Cir. 1993)).

55. *Carter*, 73 F.3d at 1021 (citing *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992)).

56. *Id.*

57. *Id.*

58. *Levy*, *supra* note 14, at 472; see 20 C.F.R. §§ 404.944, .950, .1450, 416.144.

59. 20 C.F.R. § 404.944; *Baker v. Bowen* 886 F.2d 289, 291-92 (10th Cir. 1989).

60. *Pratts v. Chater*, 94 F.3d 34, 34 (2d Cir. 1996).

61. *Ripley v. Chater*, 67 F.3d 552, 552 (5th Cir. 1995). *But see Brock v. Chater*, 84 F.3d 726 (5th Cir. 1991) (upholding an ALJ's refusal to order a consultive examination of a claimant who wrote a letter after the hearing that raised claims of depression and past drug abuse).

62. *Smolen v. Chater*, 80 F.3d 1273 (9th Cir. 1996).

ened duty of the ALJ to develop the record of a claimant who is not represented by counsel.<sup>63</sup>

## B. *Explaining the Finding: Clifton v. Chater*<sup>64</sup>

### 1. Facts

Danny Clifton filed for disability benefits on grounds of a back injury.<sup>65</sup> The ALJ applied the five-step analysis and denied his disability claim because he could still perform sedentary work.<sup>66</sup> The Appeals Council denied review and the district court affirmed.<sup>67</sup> Clifton appealed on grounds that his impairment met the listed requirements and that he did not retain the ability to perform sedentary work in the economy.<sup>68</sup>

### 2. Holding

The Tenth Circuit rejected the ALJ's findings because he merely stated summary conclusions without discussing the evidence at step three, the recognized impairment step.<sup>69</sup> The Social Security Act specifically requires that the ALJ shall write a "statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based."<sup>70</sup> In *Clifton*, the court determined that the ALJ did not discuss the evidence nor explain why he rejected Clifton's claim at step three.<sup>71</sup>

### 3. Analysis

Under the Social Security Act, courts do not make factual findings in social security cases.<sup>72</sup> The court may not reweigh the evidence nor substitute its discretion for that of the ALJ.<sup>73</sup> The court's role is to review the record to ensure that substantial evidence supports the ALJ's conclusion and that the ALJ applied correct legal standards.<sup>74</sup> Federal courts require ALJs to present a detailed explanation of their findings to ensure that reviewing courts can perform their oversight role.<sup>75</sup> As the Tenth Circuit noted, without a detailed account of the ALJ's findings linked to the evidence, the reviewing court cannot carry out its proper role of judicial review.<sup>76</sup>

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63. *Id.* at 1288.

64. 79 F.3d 1007 (10th Cir. 1996).

65. *Id.* at 1008.

66. *Id.*

67. *Id.*

68. *Id.* at 1009.

69. *Id.*

70. 42 U.S.C. § 405(b)(1).

71. *Clifton*, 79 F.3d at 1009.

72. *Id.* (citing 42 U.S.C. § 405(g)).

73. *Musgrave*, 966 F.2d at 1374.

74. *Clifton*, 79 F.3d at 1009.

75. *Id.*; *Cook v. Heckler*, 783 F.2d 1168, 1172-73 (4th Cir. 1986); *Brown v. Bowen*, 794 F.2d 703, 708 (D.C. Cir. 1986).

76. *Clifton*, 79 F.3d at 1009.

The Tenth Circuit reached a similar result in the recent case of *Kepler v. Chater*.<sup>77</sup> The court remanded the ALJ's decision because the finding addressed the complaints about pain in a conclusory fashion.<sup>78</sup> The court found that the ALJ should have considered the claimant's assertions of pain and explain the specific evidence relevant for rejecting the complaints.<sup>79</sup> Without knowing the specific evidence or logic that led the ALJ to reject the disability claim, the appellate court cannot determine whether the conclusion is supported by the evidence.<sup>80</sup> The Tenth Circuit ordered a limited remand with instructions for express findings linked to the relevant evidence.<sup>81</sup>

#### 4. Other Circuits

Two other circuits have reversed ALJ findings for failure to explain their decisions. The Eighth Circuit overturned an ALJ's denial of disability benefits to an individual who claimed he had been suffering from post-traumatic stress disorder since 1975.<sup>82</sup> The Eighth Circuit found that the ALJ failed to include retrospective medical opinions or evidence of personality change observed by family members.<sup>83</sup> In a similar fashion, the Ninth Circuit rejected an ALJ's limited reasons for turning down an individual's claim for back pain.<sup>84</sup>

### C. *Substantial Evidence and Bias: Winfrey v. Chater*<sup>85</sup>

#### 1. Facts

William Winfrey filed a disability claim alleging pain in his neck, shoulder, back, right leg, and additional problems arising from headaches, asthma, liver disfunction, hypoglycemia, hiatal hernia, depression, general anxiety disorder, and somatoform disorder.<sup>86</sup> Winfrey worked as a truck driver for 21 years in a position that required him to load and unload cargo.<sup>87</sup> In 1988, Winfrey injured his neck and shoulder while working and subsequently obtained worker's compensation.<sup>88</sup> He quit his position in 1991 because he could no longer perform his job in face of growing medical complications.<sup>89</sup> The ALJ initially applied the five-step analysis and denied disability based on the Medical-Vocational Guidelines.<sup>90</sup> The Appeals Council reversed and re-

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77. 68 F.3d 387 (10th Cir. 1995).

78. *Id.* at 390.

79. *Id.* at 391.

80. *Id.*

81. *Id.*

82. *Jones v. Chater*, 65 F.3d 102 (8th Cir. 1995).

83. *Id.* at 104.

84. *Lester v. Chater*, 81 F.3d 821, 829 (9th Cir. 1995) (stating that the ALJ must provide specific, cogent reasons for disbelief, and the reasons for rejecting the claimant's testimony must be clear and convincing).

85. 92 F.3d 1017 (10th Cir. 1996).

86. *Id.* at 1019.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

manded with orders to obtain further evidence about Winfrey's physical and mental factors and to reevaluate under proper legal principles.<sup>91</sup> In the second round, the ALJ concluded that Winfrey could perform medium work and return to his past work as a truck driver, but excluded the task of loading or unloading materials from his truck driving duties.<sup>92</sup> Winfrey appealed on grounds that the ALJ erred in the evaluation of (1) subjective complaints; (2) mental impairments; (3) RFC; (4) ability to return to work; and (5) vocational expert testimony.<sup>93</sup>

## 2. Holding

The Tenth Circuit reversed because (1) the ALJ's evaluation of subjective complaints relied on factors not supported by substantial evidence;<sup>94</sup> (2) the ALJ improperly substituted his own medical judgment contrary to the advice of a medical expert;<sup>95</sup> and (3) the ALJ committed numerous errors at step four of the five part sequential analysis.<sup>96</sup>

## 3. Analysis

The standard of review in Social Security disability claims is whether the Secretary's decision "is supported by substantial evidence and whether the Secretary applied the correct legal standards."<sup>97</sup> In *Winfrey*, the ALJ determined that the claimant had an incentive not to work, based solely on the ALJ's speculation that the claimant's pension might prohibit him from working.<sup>98</sup> Additionally, the ALJ disregarded the medical diagnosis that Winfrey suffered from a psychological problem combined with a physical disorder.<sup>99</sup> The ALJ discounted these claims based on his assessment that the "claimant is bored and whiny and has [an] incentive not to work and to complain about problems."<sup>100</sup> The Tenth Circuit expressed concern about the overall tone and manner with which the ALJ evaluated the evidence.<sup>101</sup> The court inferred from the record that the ALJ may have exhibited some bias in evaluating Winfrey's case.<sup>102</sup> In an unusual step, the Tenth Circuit recommended that the Secretary assign Winfrey's case to a different ALJ in order to ensure a fair hearing.<sup>103</sup>

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91. *Id.*

92. *Id.*

93. *Id.* at 1020.

94. *Id.*

95. *Id.* at 1022-23.

96. *Id.* at 1023-25.

97. *Washington v. Shalala*, 37 F.3d 1437, 1439 (10th Cir. 1994) (stating that the court must "meticulously examine the record" to determine whether the evidence is substantial and must "take into account whatever in the record fairly detracts from its weight").

98. *Winfrey*, 92 F.3d at 1020-21.

99. *Id.* at 1020.

100. *Id.*

101. *Id.* at 1026.

102. *Id.*

103. *Id.*

#### 4. Other Circuits

The Eleventh Circuit confronted a similar matter concerning ALJ bias in 1996.<sup>104</sup> The court reversed an ALJ who dismissed the credibility of the claimant's medical experts because they always side in favor of the claimant.<sup>105</sup> The district court deduced that the ALJ's past experience or mere gossip formed the basis for the ALJ's dismissal of the medical experts.<sup>106</sup> Under regulations governing the review process, the "administrative law judge shall not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision."<sup>107</sup> The Eleventh Circuit noted the unique role of the ALJ in the disability review process and that impartiality is essential to the integrity of the system.<sup>108</sup> The court remanded the case with instructions to order a new hearing before another ALJ.<sup>109</sup>

## II. DRUG ADDICTION

Although drug addiction does not necessarily affect a person's ability to engage in physical activity, courts recognize drug addiction as an impairment that qualifies for disability benefits.<sup>110</sup> Claimants can establish drug addiction as a disability in a two part test: (1) the individual must prove that he has lost the ability to control his use of the drug; and (2) the addiction, alone or in combination with other impairments, prevents the individual from performing substantial gainful activity.<sup>111</sup> The Tenth Circuit addressed this issue most recently in the following case.

### A. *Drug Addiction and Pain Evaluation: Saleem v. Chater*<sup>112</sup>

#### 1. Facts

Suhiyr Saleem filed for SSI benefits alleging a disability due to arthritis, headaches, back problems, and nerves.<sup>113</sup> The ALJ initially rejected Saleem's disability claim but the Appeals Council reversed and remanded with instruc-

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104. *Miles v. Chater*, 84 F.3d 1397 (11th Cir. 1996) (noting that the district court confronted conflicting physician opinions about whether the claimant retained the residual functional capacity to perform sedentary tasks).

105. *Id.* at 1400.

106. *Id.*

107. *Id.* (citing 20 C.F.R. § 404.940).

108. *Id.* at 1401.

109. *Id.*

110. *Channel v. Heckler*, 747 F.2d 577, 580 (10th Cir. 1984) (citing *Odle v. Heckler*, 707 F.2d 439, 440 (9th Cir. 1983) and *McCoy v. Schweiker*, 683 F.2d 1138, 1148 (8th Cir. 1982)). The SSA's Medical-Vocational Guideline used to evaluate physical and mental impairments is based on physical abilities, such as the ability to lift or walk; but SSA regulations do recognize that certain nonexertional impairments may also qualify for benefits. *Id.* These other impairments include drug addiction, mental impairments, pain, alcoholism, dizziness and psychiatric disorders. *Id.*

111. *Coleman v. Chater*, 58 F.3d 577, 579 (10th Cir. 1995) (stating the two part test when the plaintiff suffered from alcoholism).

112. 86 F.3d 176 (10th Cir. 1996).

113. *Id.* at 178.

tions to consider Saleem's substance abuse problem.<sup>114</sup> In a second hearing, the ALJ again denied disability status after conducting the five step evaluation.<sup>115</sup> The ALJ asserted that Saleem could control her pain by taking prescription drugs and thereby retained the capacity to perform work.<sup>116</sup> The Appeals Council denied review and the district court affirmed.<sup>117</sup>

## 2. Holding

The Tenth Circuit determined that the ALJ did not properly consider Saleem's pain disability in light of her addiction to prescription drugs. The court declared that "the ALJ cannot discredit a claimant's assertions of disabling pain by relying on her use of medicines to which the medical evidence clearly indicates she is addicted, and which she should have long ago stopped taking, but which presently provide adequate pain relief."<sup>118</sup>

## 3. Analysis

The ALJ rejected Saleem's allegation of disabling pain based in part on a statement by her physician that her pain can be controlled by medication.<sup>119</sup> The Tenth Circuit found that the ALJ did not give adequate consideration to the negative side effects of the medication, despite statements by the physician that Saleem's medication served her more harm than good.<sup>120</sup> According to the court, the ALJ's decision would force Saleem back to work, addicted, but free from severe pain.<sup>121</sup> The Tenth Circuit reasoned that such a result would violate congressional policy statements declaring that Social Security laws should not be applied to perpetuate drug addiction.<sup>122</sup> The court remanded the case with instructions for an ALJ to reconsider Saleem's claims of disabling pain and provide legitimate reasons for accepting or denying her credibility.<sup>123</sup>

The significance of *Saleem* and the future role of substance abuse in Social Security disability may be altered by recent congressional action. Amendments to the Social Security Act signed into law on March 29, 1996, deny disability benefits if drug addiction or alcoholism forms the basis for the disability determination.<sup>124</sup> Individuals who obtained disability status based solely on an existing substance abuse problem may have future benefits denied upon subsequent review.<sup>125</sup>

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114. *Id.*

115. *Id.*

116. *Id.* at 178-79.

117. *Id.* at 178.

118. *Id.* at 179-80.

119. *Id.* at 180.

120. *Id.* at 179.

121. *Id.*

122. *Id.*

123. *Id.* at 180.

124. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 105(c), 110 Stat. 847 (amending 42 U.S.C. § 1382c(a)(3)).

125. Senator McCain, one of the amendment's sponsors, described the amendment as denying SSI benefits to those whose sole disability is drug addiction or alcoholism. 142 CONG. REC.

Based upon the amendment and its intent, courts will likely distinguish between claimants in the position of Saleem and others who purposely consume addictive substances. The Saleem-type claimant seeks to obtain disability status on a basis independent of the addiction and should remain eligible for benefits if the SSA carefully administers the amendment.

#### 4. Other Circuits

The Tenth Circuit took recognized that other circuits had addressed this issue.<sup>126</sup> The Seventh Circuit permitted a claimant to avoid pain relief medication that would otherwise allow him to work if he had a reasonable fear of becoming addicted.<sup>127</sup> The Eighth Circuit considered a case where the claimant alleged disabling back pain and the treating physician discontinued prescription medication, fearing that the claimant was becoming addicted. The Eighth Circuit remanded with instructions to hear vocational expert testimony and determine whether the Secretary can demonstrate that the claimant could perform jobs available in the economy.<sup>128</sup> This past year, the Eighth Circuit upheld an ALJ who determined that a claimant's alcoholism problem was sufficiently controlled to justify omitting that factor when conducting an analysis of functional limitations.<sup>129</sup>

### III. OVERPAYMENT AND NOTICE

An individual receiving disability benefits may perform some work so long as the work level and earnings do not exceed guidelines known as substantial gainful activity (SGA).<sup>130</sup> SSA regulations establish standards for determining the SGA threshold.<sup>131</sup> A second set of SGA regulations applies to those who are statutorily blind.<sup>132</sup> The SSA may examine a claimant's past earnings to determine if the claimant performed SGA.<sup>133</sup> If the SSA discovers that the claimant's application involved fraud or fault,<sup>134</sup> the SSA can reopen the individual's case and recover for overpayment.<sup>135</sup> This issue arose in the following case.

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S3114-02, S3117 (daily ed. March 28, 1996) (statement of Sen. McCain). Several senators voiced their concern that drug addicts and alcoholics used their benefits to finance their addictions. *Id.* Senator McCain noted that the amendment would save approximately \$3.5 billion over two years. *Id.*

126. Saleem v. Chater, 86 F.3d 176, 179 (10th Cir. 1996) (citing Seventh and Eighth Circuit decisions).

127. Dray v. Railroad Retirement Bd., 10 F.3d 1306, 1313 (7th Cir. 1993).

128. Dover v. Bowen, 784 F.2d 335 (8th Cir. 1986).

129. Mapes v. Chater, 82 F.3d 259 (8th Cir. 1996).

130. 42 U.S.C. § 423(d)(4); Jozefowicz v. Heckler, 811 F.2d 1352, 1356 (10th Cir. 1987) (applying § 423(d)(4)); see generally Daniel M. Taubman, *Tenth Circuit Update of Social Security Cases*, 43 SOC. SEC. REP. SER. 817, 825-26 (1994).

131. 20 C.F.R. §§ 404.1571-.1576 (1996).

132. 20 C.F.R. § 404.1584.

133. 20 C.F.R. § 404.1574(1).

134. See generally SSA HANDBOOK, *supra* note 20, at 31-32.

135. Fowler v. Bowen, 876 F.2d 1451, 1453-54 (10th Cir. 1989); see generally Michael R. Schuster et al., *Social Security Advocacy After Your Client's Application for Benefits Has Been Granted*, 29 CLEARINGHOUSE REV. 605, 613-15 (1995) (explaining what an attorney should do if the SSA has made an overpayment).

A. *Fraud, Overpayment and Notice: Marshall v. Chater*<sup>136</sup>

1. Facts

Ray Marshall initially received Social Security disability benefits for blindness in 1974.<sup>137</sup> Marshall started working at the University of New Mexico in 1979 and earned a salary below the SGA limits.<sup>138</sup> Over the next ten years, Marshall received pay increases that put him over the SGA limits.<sup>139</sup> In 1987 and 1988, he submitted reports to the SSA understating his actual earnings.<sup>140</sup> The SSA discovered evidence of these discrepancies and started an investigation in 1990.<sup>141</sup>

In September 1991, the SSA contends that it sent Marshall a notice about the alleged SGA violations. Marshall asserted that he never received the notice.<sup>142</sup> While there is a dispute over the initial notice, the SSA notified Marshall in October 1991 of its determination that he engaged in SGA back in 1984, and sent him a notice on December 20 regarding its impending reconsidered decision.<sup>143</sup> In a series of procedural moves, the SSA terminated Marshall's benefits and Marshall sought to reverse the SSA action in federal court.<sup>144</sup> In February 1992, the district court concluded the benefits were not available and dismissed Marshall's complaint for failure to exhaust administrative remedies.<sup>145</sup> Marshall requested a new administrative hearing and the ALJ remanded to the SSA for reconsideration.<sup>146</sup> The SSA reopened Marshall's case based on new and material evidence and determined that he had performed SGA in 1986. Upon review of the SSA decision, the ALJ concluded: (1) Marshall received proper notice either by the September 1991 notice, oral contacts with SSA, or the December 20, 1991, letter; (2) the SSA had authority to reopen the case based on new and material evidence; (3) Marshall performed SGA since February 1986 and was not entitled to benefits after April 1986; and (4) the SSA could recover an overpayment equal to \$82,349 from Marshall.<sup>147</sup> The Appeals Council denied review and the district court affirmed.<sup>148</sup>

2. Holding

The Tenth Circuit upheld the ALJ's findings that (1) the SSA had the authority to reopen the case and terminate benefits;<sup>149</sup> (2) the SSA satisfied its constitutional due process requirements of notice by sending a letter and

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136. 75 F.3d 1421 (10th Cir. 1996).

137. *Id.* at 1424.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1425.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1426.

providing an opportunity to respond;<sup>150</sup> and (3) the claimant was not entitled to benefits during the appeals process.<sup>151</sup>

### 3. Analysis

The Tenth Circuit ruled that the SSA has authority to reopen a case and terminate benefits of one who had previously participated in SGA.<sup>152</sup> Under SSA regulations, a blind person's entitlement to benefits ends the very month that person engages in SGA.<sup>153</sup> The Tenth Circuit rejected Marshall's argument that the SSA improperly reopened the case because there was no "new" evidence since the reopening occurred four years after the prior determination.<sup>154</sup> The court interpreted "new evidence" to include information not before the decisionmaker who made the prior determination.<sup>155</sup> In Marshall's case, his true earnings were not before the SSA decisionmaker in 1988. The SSA effectively reopened the 1988 determination when it concluded in October 1991 that Marshall had previously performed SGA in 1984.<sup>156</sup>

In terms of the constitutional issue, the Tenth Circuit ruled that the SSA did not violate Marshall's due process rights. Under *Mathews v. Eldridge*,<sup>157</sup> a claimant must be given notice before the agency terminates disability benefits.<sup>158</sup> After *Mathews*, courts evaluating challenges to procedural due process must consider the following three factors: (1) the private interest affected by the agency action; (2) the risk of error in the procedure; and (3) balancing the government's interest in maintaining the existing procedure with the burdens of instituting new procedures.<sup>159</sup> In Marshall's case, the court said it was unclear whether the September 1991 predetermination letter was ever sent.<sup>160</sup> Even if it was not sent, the letter of December 20, 1991, cured the possible error to provide adequate notice.<sup>161</sup> The Tenth Circuit effectively determined there was no risk of error associated with the second factor since the claimant received notice through the December 20, 1991, letter.<sup>162</sup>

On the third issue, the Tenth Circuit ruled that Marshall was not entitled to benefits while his appeal was pending before the ALJ.<sup>163</sup> Under the statute, a claimant has the right to receive benefits during an administrative appeal when "the physical or mental impairment on the basis of which such benefits are payable is found to have ceased, not to have existed, or to no longer be disabling."<sup>164</sup> The SSA interpreted the statute narrowly to apply only to cases

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150. *Id.* at 1427-28.

151. *Id.* at 1428.

152. *Id.* at 1426-28.

153. 20 C.F.R. § 404.1586(a)(3) (1996).

154. *Marshall*, 75 F.3d at 1426.

155. *Id.* (citing *Dugan v. Sullivan*, 957 F.2d 1384, 1390 (7th Cir. 1992)).

156. *Id.* (citing *Taylor ex rel. Peck v. Heckler*, 783 F.2d 1112, 1115 (10th Cir. 1984)).

157. 424 U.S. 319 (1976).

158. *Mathews*, 424 U.S. at 332-33, 348-49.

159. WILLIAM J. FOX, UNDERSTANDING ADMINISTRATIVE LAW 112 (2d ed. 1992).

160. *Marshall*, 75 F.3d at 1427.

161. *Id.* at 1427-28.

162. *Id.* at 1427.

163. *Id.* at 1428.

164. 42 U.S.C. § 423(g)(1)(B) (1994).

of cessation of medical disability benefits, and not to cases of excessive earnings.<sup>165</sup> The Tenth Circuit upheld the agency's interpretation under the *Chevron* analysis regarding court deference paid to an agency's permissible construction of a statute.<sup>166</sup> In *Marshall*, the court determined the statute and legislative history were ambiguous, and upheld the agency's interpretation under a deferential standard.<sup>167</sup> On all three issues addressed in *Marshall*, the Tenth Circuit showed deference to the SSA in its efforts to discover fraud and take steps to terminate benefits to a claimant that is not eligible for disability benefits.<sup>168</sup>

#### IV. CONCLUSION

The Tenth Circuit's decisions involving Social Security disability benefits reflect a continuing effort to ensure administrative justice to claimants and promote efficient administration of the massive disability program. The Tenth Circuit will not tolerate ALJ decisions that do not fully develop the record,<sup>169</sup> explain the rationale behind a conclusion,<sup>170</sup> or exhibit the appearance of bias.<sup>171</sup> The court interpreted congressional concern over drug addiction to impose safeguards that restrict the disability program's encouragement of addiction by individuals suffering from pain.<sup>172</sup> Finally, it allowed discretion to the SSA when the agency seeks to curtail fraud and abuse by approving reasonable procedural notice requirements and granting deferential interpretation of the Social Security Act.<sup>173</sup>

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165. *Marshall*, 75 F.3d at 1428.

166. *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If . . . the statute is ambiguous or silent on the issue in question, we must determine whether the agency's determination is based on a permissible construction of the statute. If so, we will defer to the agency's interpretation.")).

167. *Marshall*, 75 F.3d at 1428.

168. *See generally* *Marshall v. Chater*, 75 F.3d 1421 (10th Cir. 1996).

169. *Carter v. Chater*, 73 F.3d 1019, 1021 (10th Cir. 1996).

170. *Clifton v. Chater*, 79 F.3d 1007, 1009 (10th Cir. 1996).

171. *Winfrey v. Chater*, 92 F.3d 1017, 1020, 1022-25 (10th Cir. 1996).

172. *Saleem v. Chater*, 86 F.3d 176, 179-80 (10th Cir. 1996).

173. *Marshall v. Chater*, 75 F.3d 1421, 1426-28 (10th Cir. 1996).