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Social Security Disability Update

Drake University Law School
General Practice Review

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By Timothy N. Tripp[1]

Disability does not discriminate!

I. Introduction

A. Disability defined in the Social Security Act:

"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."

42 U.S.C. § 423(d)(1)

B. Procedure
1. application
2. initial determination
3. reconsideration
4. administrative hearing before administrative law judge ("ALJ")
5. review of decision from administrative hearing
6. 405(g) appeal/review in Federal District Court.
   a. whether the Commissioner's final decision is supported by substantial evidence, or
   b. whether the Commissioner committed an error of law.

42 U.S.C. § 405(g)

II. Miscellaneous

A. The Acting Commissioner Announced there will be a 1.6% cost-of-living increase for 2020 (last year it was 2.8%). 84 Fed. Reg. 56515 (Oct. 22, 2019); www.ssa.gov/news/press/factsheets/colafacts2020.pdf

	2018	2019	2020
1. SSI	$ 750	$ 771	$ 783
2. SGA	$1,180	$1,220	$1,260
Blind	$1,970	$2,040	$2,110
3. TWP	$ 850	$ 880	$ 910
4. Quarter of Coverage	$1,320	$1,360	$1,410
5. User Fee	$ 93	$ 95	$ 97
6. Tax Max	$128.4K	$132.9K	$137.7K

[1]**Disclaimer:** This outline is designed to address general issues about Social Security disability insurance benefit process and case law. This outline should not be substituted for legal advice. Social Security claims are almost always very fact specific and legal advice should be sought for any legal question presented.

B. Andrew Saul, Commissioner of Social Security. He assumed office as of June 17, 2019. His six-year term, 42 U.S.C. § 902(a)(3), expires on January 19, 2025. SSA had been lead by "acting" commissioners since Michael Astrue left office on January 19, 2013.

The Commissioner's position was designed to span Administrations.

C. Rules of Conduct
20 C.F.R. § 404.1740(b)(5)(i); 416.1540(b)(5)(i)

5) Disclose in writing, at the time a medical or vocational opinion is submitted to us or as soon as the representative is aware of the submission to us, if:

> (i) The representative's employee or any individual contracting with the representative drafted, prepared, or issued the medical or vocational opinion; or
> (ii) The representative referred or suggested that the claimant seek an examination from, treatment by, or the assistance of, the individual providing opinion evidence.

D. Average Wait time from the date the request for hearing was filed until a hearing was held:

West Des Moines	-	13 months
Omaha, NE	-	9.5 months
Peoria, IL	-	10 months
Fargo, ND	-	12 months

https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html (visited Dec. 5, 2019).

E. Three New SSR's
On Oct. 2, 2018, SSA issues 3 new Social Security Rulings (SSRs). See 83 Fed. Reg. 49616; 83 F.3d Reg. 49621.

SSR 19-1p Effect of the Decision in Lucia v. Securities and Exchange Commission (SEC) on Cases Pending at the Appeals Council

SSR 19-2p Evaluating Cases Involving Obesity
- -Rescinds and replaces SSR 02-1p
- -no specific weight or BMI establishes obesity as a severe impairment.
- -Signs and laboratory findings from an acceptable medical source that may establish an medically determinable impairment of obesity include measured height and weight, measured waist size, and BMI measurements over time.
- -consider the functional limitations the person's ability to do basic work activities resulting from obesity and from any other physical or mental impairments.

This SSR hits the highlights of SSR 02-1p, but eliminates the meat and potatoes of SSR 02-1p.

SSR 19-3p Requesting Reconsideration or Hearing by an Administrative Law Judge

SSR 19-4p Evaluating Cases Involving Primary Headache Disorders

Reiterates that primary headache disorder is not a listed impairment (i.e., Step 3), but that SSA may find that the primary headache disorder, alone or in combination with another impairment may medically equal a listing. The SSR expressly notes that Epilepsy (Listing 11.02) "is the most closely analogous listed impairment for a medically determinable impairment of a primary headache disorder.

Listing 11.02 , paragraph B requires dyscognitive seizures occurring at least once a week for at least 3 consecutive months despite adherence to prescribed treatment. For headache disorder to equal Listing 11.02B, SSA considers: a) detailed description from an acceptable medical source of a typical headache event, including all associated phenomena; the frequency of headache events; adherence to prescribed treatment; side effects of treatment (e.g., drowsiness, confusion, or inattention); the limitations in functioning that may be associated with the primary headache disorder (e.g., need for darkened and quite room, having to lie down without moving, a sleep disturbance that affects daytime activities...)

SSR 18-3p rescinds and replaces SSR 82-59 "Failure to Follow Prescribed Treatment"

F. Central Scheduling Unit

By the 15th of each month you must notify SSA of your unavailability 5 months from the current month. For example: Submit unavailability for May 2019 by December 15, 2018.

G. Withdrawal of representation
NOT allowed once the hearing has been scheduled except under "extraordinary circumstances."
83 Fed. Reg. 30849 at 30850 (July 2, 2018) (effective Aug. 1, 2018)

III. Selected 2019 Case law

B. U.S. Supreme Court

1. *Culbertson v. Berryhill*, 139 S. Ct. 517 (2019).
1/8/19
Thomas
Reversed and Remanded
This is an attorney fee case. The Court held that the 25% cap in the Social Security Act limiting attorney fees for representations in federal court applies only to fees for representation before the court, not to the total fees awarded to the attorney for court time and administrative time.

2. *Biestek v. Berryhill*, 139 S. Ct. 1148 (2019).
4/1/19
Kagan
Affirmed
This is a vocational expert (VE) case. The Court held that the VE refusal to prove the private market survey data which provided the basis for her opinion about job availability, upon the applicant's request, does not "categorically preclude" the VE's testimony from counting as "substantial evidence". It is a case-by-case analysis.

A. Eighth Circuit Court of Appeals

November 1, 2018- November 30, 2019 — 31 cases

Published	10
Unpublished	21

Affirmed	30
Reverse & Remand for Further Proceedings	0
Dismissed for failure to prosecute	1

1. *Nash v. Comm'r, SSA*, 907 F.3d 1086
11/2/18
Loken, Benton, and Shepherd
Affirmed

Jessie Mae Nash applied for DIB and SSI, alleging she was disabled since January 2012, the day she was laid off of from her job as a recruiter. She said she was not able to work due to her back, right knee, and right thumb problems, along with bladder problems. She is now 68 years old and has a sixth-grade education with a general equivalency diploma. Her PRW including telemarketing, recruiter, salesperson, medical assistant and a nursing-home aide. The court noted "It is "the ALJ's responsibility to determine [the claimant's] RFC based on all the relevant evidence, including medical records, observations of treating physicians and others, and [claimant's] own description of her limitations." *Anderson v. Shalala*, 51 F.3d 777, 779 (8th Cir. 1995); 20 C.F.R. §§ 404.1545-46, 416.945-46. But in this case Ms. Nash's alleged limitations - needing to lie down and prop up her feet and always going back and forth to the bathroom - are supported ONLY by her own testimony. The record contains no directions from her medical sources instructing her to "lie down and prop up her feet." An ALJ is not obligated to adopt a claimant's "unsupported subjective complaints and self-imposed limitations," nor is an ALJ required to ask a VE about those unsupported limitations. The court held that the substantial evidence supports the ALJ's RFC assessment, and affirmed the denial of benefits.

2. *Adkins v. Comm'r Soc. Sec. Admin.*, 911 F.3d 547
12/19/18
Loken, Benton, and Shepherd
Affirmed

Jennie Adkins stopped working as a hospice volunteer coordinator in September 2013. She was 54 years old at the time. Adkins had the following impairments which were found to be severe: degenerative disc disease, spondylosis, arthritis, chronic obstructive pulmonary disease (COPD)/asthma, obesity, and type II diabetes. The ALJ, following the administrative hearing, found she had the residual functional capacity (RFC) to perform sedentary work, except she can only occasionally stoop, kneel, crouch, bend, crawl, and balance, and she cannot have excessive

exposure to dust, smoke, fumes, and other pulmonary irritants. The ALJ found she could not perform her past relevant work (PRW), but she had acquired work skills from her PRW which were transferable to other work, i.e., a Step 5 decision. The court held that the ALJ's decision was supported by substantial evidence on the record as a whole. The court sites to a an MRI showing only "mild" degenerative changes, a reported measure of relief in her pain, and her being dismissed from her treating pain specialist because she missed too many appointments. The court also relied on a report from a treating source recounting that Adkins was "able to do all her activities of daily living including work," even though this predated her alleged onset date (AOD). Her treating physician provided an "eleventh hour" check-off, pre-printed form opinion, which the ALJ gave "little weight." The court held that an ALJ "may discount a treating physician's opinion when 'other medical assessments are supported by better or more thorough medical evidence." *Medhaug v. Astrue*, 578 F.3d 805, 815 (8th Cir. 2009), *Turpin v. Colvin*, 750 F.3d 989, 991, 993-94 (8th Cir. 2014).

3. *Bagwell v. Comm'r Soc. Sec. Admin.*, 916 F.3d 117
02/28/19
Loken, Grasz, and Stras
Affirmed

At the end of 2014 Dwain Bagwell applied for DIB alleging "mild intellectual disparity, low education, slow learning abilities, and memory problems." The ALJ found Bagwell had three severe impairments: arthropathies, obesity, and depressive disorder. The ALJ found an RFC for light unskilled work with some additional restrictions. SSA's CE opined that Bagwell was "moderately depressed but was not functioning in the intellectual disability range." Bagwell also had an evaluation with an examiner of his own choice. The court also identified another examiner from a prior filing that was referenced by the ALJ, but which supporting records were not in the current application. The court finds that the ALJ's decision finding Bagwell not disabled is supported by substantial evidence, and then goes through nice, albeit brief, discussion of Listing 12.05C (note: this Listing has been updated since Bagwell applied; see current Listing 12.05B) and explains that even if Bagwell could have proven the A portion of Listing 12.05C he "cannot meet the other criteria for deficits in adaptive functioning or significant work related limitations in light of the ALJ's findings about his intellectual capacity." The court essentially says there is no error for not considering Listing 12.05C since it was unsupported by the record.

4. *Thompson v. Comm'r Soc. Sec. Admin.*, 919 F.3d 1033
3/22/19
Wollman, Colloton, and Benton
Affirmed

Dennis Thompson was diagnosed with a neurological disorder called transverse myelitis in 2005. He applies for DIB in 2013. The ALJ denies his claim, and the Appeals Council denies Thompson's request for review in a letter dated July 27, 2015. Thompson apparently requested an extension in which to file a civil action in federal court, and the AC granted him a thirty-day

extension of time on November 13, 2015, giving Thompson until December 18, 2015 to file a civil action. Thompson's wife sent two letters on Thompson's behalf before the deadline to the AC, but asking for review, and not asking for additional time. On January 6, 2016 the AC acknowledging receiving Mrs. Thompson's "second request for review" of the ALJ's decision. Mrs. Thompson then realizes her mistake, and tried to request another extension in which to file the civil action. Mrs. Thompson finally filed a *pro se* complaint on her husband's behalf in federal district court on April 18, 2016. The district court dismissed the action as untimely pursuant to 42 U.S.C. § 405(g) because it was filed after the extended deadline, and "equitable tolling was inappropriate." Thompson appealed, and the court appointed counsel for Thompson and ordered briefing on "whether he was entitled to equitable tolling." Equitable tolling has two elements: a) the litigant has been pursuing his/her rights diligently, and b) some extraordinary circumstances stood in his/her way. *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005). The court finds that there were no"extra ordinary" circumstances standing in the way of Thompson filing the civil action timely. The court held that Thompson's delay "was not beyond his control." The court affirms the district court's dismissal of Thompson's untimely action.

5. *Despain v. Berryhill*, 926 F.3d 1024
6/14/19
Loken, Grasz, and Stras
Affirmed

Sherry Despain is a 52 year old individual you previously worked at Frito-Lay as a packaging machine operator. Despain has chronic pain and obesity. In June 2015 she applies for DIB. The ALJ found she had the RFC for light unskilled work, along with some further restrictions, and found that Despain could perform some other work, i.e., Step 5. Her treating physician completed a check-off form, and left blank the part that asked for medical findings which supporting his assessed limitations. The court held that since the treating doctor's opinion was "conclusory" the ALJ properly examined the underlying medical record to determine whether it supported the doctor's assessment. "A conclusory report from a treating physician may still be entitled to controlling weight if it is accurate when viewed in the context of the medical record." *See Cox v. Barnhart*, 345 F.3d 606, 609 (8th Cir. 2003). The court concludes, however, that the medical records do not "adequately support the limitations" the treating physician found in 2016, and affirms ALJ's ultimate conclusion denying benefits.

6. *Schwandt v. Berryhill*, 926 F.3d 1004
6/14/19
Colloton, Shepherd, and Stras
Affirmed

Cheryl Schwandt says she is disabled due to avascular necrosis of the knees, a full knee replacement, and chromic pain syndrome since January 1, 2012. She applies for DIB the following month, in February 2012. Schwandt had worked as a dental hygienist.

As it happened, however, the Administration mistakenly recorded an onset date of January 1, 2001. Under the correct onset date of January 1, 2012, benefit payments should have started in June 2012, because a claimant generally must be disabled for a full five months before benefits can be paid. See 42 U.S.C. § 423(a)(1), (c)(2). The erroneous onset date resulted in benefit payments dating back to February 2011, twelve months before the application date. See id. § 423(b). The agency's error thus resulted in Schwandt receiving undeserved payments for the months from February 2011 to May 2012. When the agency discovered the mistake, it sought to recover the overpayments, and declined to grant Schwandt a waiver that would allow her to keep the money.

Around this time, an agency employee learned that Schwandt's earnings had been "subsidized" since 2010, meaning that Schwandt was paid more than the reasonable value of the actual services she performed. See 20 C.F.R. § 404.1574(a)(2). As a result, the employee thought that Schwandt had not engaged in substantial gainful activity after 2009, and recommended using an amended disability onset date of December 31, 2009, to calculate Schwandt's benefits. The earlier onset date would have allowed Schwandt to keep the overpayments that she received from the government. Acting on this recommendation, an agency disability examiner reopened Schwandt's claim in September 2013 to investigate the matter. After conducting a full review, however, the agency concluded that Schwandt's impairments had not been disabling before 2012, and that the correct onset date was still January 1, 2012.

In an effort to establish an earlier onset date of December 31, 2009, Schwandt requested a hearing before an administrative law judge. The ALJ informed Schwandt before the hearing that she would evaluate Schwandt's disability status from "December 31, 2009 through the present." Schwandt responded with a letter objecting to any reconsideration of her disability status from 2012 onward, but she did not attempt to withdraw her request for a hearing.

The ALJ began the hearing by overruling Schwandt's objection to the scope of the hearing. Applying the familiar sequential process, the ALJ then concluded that Schwandt had not been disabled since December 31, 2009. *See Bowen v. Yuckert*, 482 U.S. 137, 140, 107 S. Ct. 2287, 96 L. Ed.2d 119 (1987); 20 C.F.R. § 404.1520(a)(4). The ALJ determined at step one that Schwandt had been engaged in substantial gainful activity from December 31, 2009, to December 31, 2011, so she was not disabled during that period. Schwandt had not been engaged in substantial gainful activity since January 1, 2012, but the ALJ concluded that Schwandt could perform past relevant work and therefore was not disabled from 2012 onward. As a result, Schwandt was not entitled to any disability insurance benefits. See 42 U.S.C. § 423(a)(1)(E), (d).

Schwandt, 926 F.3d at 1007-08.

Schwandt makes a number of arguments as to why the ALJ couldn't do what the ALJ did. After discussing a number of principles including; *res judicata*, the "clean hands" doctrine, and "bad faith," the court concludes the ALJ could do what was done, and found that the decision that Schwandt was never disabled is supported by substantial evidence.

7. *Twyford v. Comm'r Soc. Sec. Admin.*, 929 F.3d 512
7/3/19
Colloton, Gruender, and Erickson
Affirmed

This is a concurrent claim. Melvin Russell Twyford, Jr. applies for DIB and SSI in late 2012, alleging he is disabled since September 10, 2011 due to degenerative disc disease, major depressive disorder, and chronic anxiety. A Few months after applying Twyford undergoes a cervical laminoplasty. Twyford argues that the ALJ's Step 3 determination as to Listings 1.04 and 12.04, and 12.06 is not supported by substantial evidence on the record as a whole. The court holds that substantial evidence supports the ALJ's finding that Twyford did not meet all the criteria. The court goes on to find that the RFC determination was supported by substantial evidence. The court observers that "We do not require that every aspect of an RFC finding 'be supported by some medical evidence of the claimant's ability to function in the workplace."

8. *Swink v. Saul*, 931 F.3d 765
7/29/19
Shepherd, Melloy, and Grasz
Affirmed

Jonathan Swink is a 41 year old who battles a seizure disorder, anxiety, and back pain. On February 21, 2014 he files a DIB application. The ALJ felt that Swink had the RFC for light, unskilled work. A nurse practitioner who treats Swink had assessed, among other limitations, that Swink would "sometimes need to take unscheduled breaks" and "likely miss more than four work days per month." Swink argues that the ALJ should have "at least comment[ed] on and assign[ed] weight to" these limitations. The court reiterates well established case law and notes that the "mere fact that some evidence may support a conclusion opposite to that reached by the Commissioner," does not allow the court to reverse the decision of the ALJ. The court then concludes "even though we agree with Swink to some extent, we must affirm the ALJ's RFC finding." The court also held that the ALJ's credibility finding is supported by substantial evidence on the record as a whole."

9. *Dols v. Saul*, 931 F.3d 741
7/26/19
Colloton, Gruender, and Erickson (files a dissent)
Affirmed

This is a SSI case, where the court affirms the ALJ's decision denying benefits. Dols raises a number of issues, but the court concludes that "while the ALJ could have weighed the evidence differently, substantial evidence supports the ALJ's determination that Dr. Lace's review of all the evidence should be credited over Kaley's observations as a non-medical, other source."

In his dissent, Judge Erickson states:

> In closing, I fear the majority's decision reflects an increasing tendency to "rubber stamp" an ALJ's action in contravention of the "scrutinizing analysis" our precedent requires. *See Cline v. Colvin*, 771 F.3d 1098, 1106 (8th Cir. 2014) (Bright, J., dissenting); *Cooper v. Sec'y of Health & Human Servs.*, 919 F.2d 1317, 1320 (8th Cir. 1990). The ALJ's rejection of Kaley's testimony was error when viewed in light of the record as a whole. I believe the ALJ failed to provide "good reasons" for rejecting Kaley's testimony, and that error is not harmless. I would reverse and remand to the district court with instructions to remand to the ALJ for reconsideration of Robert's claim after giving Kaley's opinion proper weight.

10. *Sloan v. Saul*, 933 F.3d 946
8/12/19
Colloton, Gruender, and Erickson
Affirmed

Tammy Sloan applied for DIB and SSI benefits, alleging she was disabled since March 28, 2014 due to migraines, degenerative disc disease of the lumbar and cervical spine, degenerative joint disease of the knees, obesity, diabetes mellitus, bilateral carpal tunnel syndrome, and vertigo.

The issue is whether substantial evidence supported the ALJ's conclusion that the claimant's past relevant work as a receptionist was performed at substantial gainful activity level and whether or not the claimant could perform her past relevant work as a receptionist.

The court found that substantial evidence supported the ALJ's decision that the claimant could perform her past relevant work as a receptionist, despite the VE's testimony that the claimant's past employment looked "like a composite job" as a receptionist, order filler, and stores laborer. The court noted that although Sloan did have additional responsibilities (of a stores laborer), "these tasks were not the focus of her job," and "she still performed all duties of a receptionist, so this is not a case of a "composite job" with no counterpart in the DOT." Additionally, "Sloan performed activities beyond her core duties as a receptionist only occasionally, and her

responsibilities as a receptionist alone constituted substantial gainful activity."

Although Sloan contended that the ALJ also did not provide a sufficient explanation for his decision, the Court noted that "a deficiency in opinion-writing is not a sufficient reason for setting aside an administration finding where the deficiency had no practical effect on the outcome of the case." *Senne v. Apfel*, 198 F.3d 1065, 1067 (8th Circ. 1999).

The court held that substantial evidence supported the ALJs conclusion that Ms. Sloan was able to perform her past relevant work as a receptionist and that substantial evidence supported the ALJ's conclusion that the claimant's past relevant work as a receptionist was substantial gainful activity, and the ALJ provided sufficient explanation for his decision, and the court affirmed the denial of benefits.