

Hard to See From Here

Social Security Disability Update

Drake University Law School
General Practice Review

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By Timothy N. Tripp¹

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 3.2% cost-of-living increase for 2024 (last year it was 8.7%). 88 Fed. Reg. 72803 (Oct. 23, 2023) (copy attached); <https://www.ssa.gov/news/press/releases/2023/#10-2023-2>:

| | <u>2022</u> | <u>2023</u> | <u>2024</u> |
|------------------------|-------------|-------------|-------------|
| 1. SSI | \$ 841 | \$ 914 | \$ 943 |
| 2. SGA | \$1,350 | \$1,470 | \$1,550 |
| Blind | \$2,260 | \$2,460 | \$2,590 |
| 3. TWP | \$ 970 | \$1,050 | \$1,110 |
| 4. Quarter of Coverage | \$1,510 | \$1,640 | \$1,730 |
| 5. User Fee | \$ 104 | \$ 113 | \$ 117 |
| 6. Tax Max | \$147K | \$160.2K | \$168.6K |

B. President Biden, removed Commissioner Andrew Saul, and appointed, Dr. Kilolo Kijakazi as Acting Commissioner of Social Security. She assumed office as of July 9, 2021. Earlier this year, President Biden nominated former Maryland Governor, Martin O’Malley to be the next Commissioner of Social Security. The Senate Committee on Finance voted 17-10 on November 28, 2023 to advance his nomination.

¹**Disclaimer:** This outline is designed to address general issues about the 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.

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 (as of Oct. 2023):

| Office | # of mo. | ‘20 | ‘21 | ‘22 | ‘23 |
|-------------------|----------|-----|-----|-----|-----|
| (West) Des Moines | | 10 | 11 | 13 | 11 |
| Omaha, NE | | 7 | 7 | 13 | 10 |
| Peoria, IL | | 9 | 6 | 8 | 7 |
| Fargo, ND | | 10 | 9 | 9 | 10 |

https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html (visited Nov. 27, 2023)

E. Social Security Number Fraud Protection Act of 2017.

Starting in 2020 we began to notice that SSA was no longer using a claimant/beneficiary’s SSN on the notices. A 13-digit alphanumeric code called a Beneficiary Notice Control Number, or BNC#, replaces the SSN on notices sent by SSA. SSA also uses a “case number” on notices sent by the state agency, i.e.,

Disability Determination Services.

F. Misc.

More and more claimants are using their My Social Security account to access information about the status of their claims. As an appointed representative you have access to the claimant’s claims folder at all the administrative levels, although the information at the initial and reconsideration levels is still limited, i.e., can only review the medical records DDS has obtained, along with some administration correspondence.

G. Appointment of Representative.

In 2020 SSA changed the SSA-1696, the Claimant’s Appointment of Representative form. This form essentially went from a one page form to a six page form. The current version New 1696, and electronic version is from August 2020.

On this form the representative must

- include their Appointed Representative Rep ID number,
- Certify to 10 items,
- Identify the claim for which the person is being appointed, and
- Select fee arrangement option.

See <https://www.ssa.gov/forms/ssa-1696.html> for a link to the paper version and to the electronic version that can be completed online.

H. In-person hearings have returned

In 2020 in-person administrative hearings stopped being held due to COVID-19. This also included no video teleconference (VTC) hearings. In 2020, SSA pivoted quickly and went from in-person and VTC hearings to telephone hearings. In 2021, SSA introduced on-line video hearings (OVH) using Microsoft

Teams software. Telephone and OVH are but options, and claimants had the right to continue to request in-person hearings. In 2022 started holding n-person hearings, beginning in March 2022. In 2023 in person hearings have continued along with VTC, but telephone and OVH are still options.

I. Central Scheduling Unit

By the 1st of each month you must notify SSA of your availability 5 months from the current month. For example: Submit availability for May 2024 by December 1, 2023. This must be done for each Region in which you practice. SSA has a portal for attorneys (and non-attorney representatives) to use to report their availability for administrative hearings. You must register to use the portal. For more information please go to:
https://www.ssa.gov/appeals/scheduling_process.html

J. Office of Hearings Operations has Moved:

OHO for years was in West Des Moines. As of August 2023, OHO has a new home at

Social Security Administration
 Office of Hearings Operations
 Capitol Center 3, Suite 200
 400 East Court St.,
 Des Moines, Iowa. 50309-9821

K. The Appeals Council Moved.

The AC moved from their home in Falls Church, VA to Baltimore, MD. You can file your request for review of the ALJ's decision on-line. But if you are mailing it, use the AC's new address:

Social Security Administration
 Office of Appellate Operations
 6401 Security Blvd.
 Baltimore, MD 21235-6401

III. Selected 2023 Case law

| | |
|--|-----------------|
| Supreme Court | 0 cases |
| Eighth Circuit Court of Appeals | |
| November 20, 2022 - December 1, 2023 | 15 cases |
| Published | 2 |
| Unpublished | 13 |
| Affirmed* | 15 (i.e., 100%) |

* - the one "Reversal" was an appeal by SSA, and the 8th Circuit reversed a District Court decision giving the plaintiff a measure of relief.

Published

1. *Nolen v. Kijakazi*, 61 F.4th 575 (8th Cir. 2023)

3/2/23

Gruender, Benton and Shepherd

Affirmed

On appeal Nolen challenged the ALJ's consideration of her treating physician's opinion which was expressed on a checklist form. The ALJ found the opinion unpersuasive because "the level of limitation [was] unsupported and highly inconsistent with the examinations in the conservative treating record (including the doctor's own treatment notes) and claimant's activity level." The Court, held the checkbox opinion to be of little, if any, evidentiary value because it is vague and conclusory. The Court also agreed that the opinion was inconsistent with the physician's treatment records, as well as with other medical opinions and Nolen's own descriptions of her activities.

2. *Dahle v. Kijakazi*, 62 F.4th 424 (8th Cir. 2023)

3/7/23

Loken, Melloy, and Kobes

Reversed

In January 2017, Carolyn Colvin, who had been appointed and confirmed as the Deputy Commissioner for Social Security, resigned as Acting Commissioner. At that time, Deputy Commissioner for Operations Nancy Berryhill began serving as Acting Commissioner. She served until the Government Accountability Office indicated she was in violation of the Federal Vacancies Reform Act of 1998 time restrictions, at which time she ceased serving as Acting Commissioner. In April 2018, President Trump submitted a nomination for SSA Commissioner to the Senate. Berryhill resumed serving as Acting Commissioner after the nomination was sent to the Senate pursuant to 5 U.S.C. § 3346(a)(2). In July 2018, Acting Commissioner Berryhill issued an order ratifying the appointments of the agency's ALJs to ensure they were properly appointed pursuant to the recent Supreme Court case, *Lucia v. S.E.C.*, 585 U.S. —, 138 S. Ct. 2044, 2050–51, 201 L. Ed.2d 464 (2018).

When Brian Dahle sought judicial review of the denial of his claim for Social Security disability benefits in the United States District Court for the District of Minnesota (*Brian T.D. v. Kijakazi*, 580 F. Supp.3d 615, 635-36 (D. Minn. 2022)), he argued, among other things, that the ALJ who oversaw the case lacked authority because SSA Acting Commissioner Beryhill was not properly serving as Acting Commissioner when she ratified the ALJ's appointment. The District Court, United States Magistrate Judge, David T. Schultz, held:

As a matter of statutory interpretation, Berryhill's purported ratification is ineffective because under the [Federal Vacancies Reform Act], she was not properly acting as the Commissioner at that time. Since the ALJ was not properly appointed she lacked

the authority to hear and decide Claimant's case, thus the ALJ's decision is vacated. *See Carr*, 141 S. Ct. at 1357; *Lucia*, 138 S. Ct. at 2055. Claimant's disability claim is therefore remanded to the SSA for a new hearing before a properly appointed ALJ other than the one who presided over the first hearing. *Lucia*, 138 S. Ct. at 2055. Because the Court concludes Berryhill's purported ratification was ineffective, this Court need not address other issues raised by Claimant, including whether any part of Berryhill's service as Acting Commissioner violated the Appointments Clause.

The Commissioner appealed and the Circuit, held Berryhill was properly serving as Acting Commissioner when she ratified the appointment of the SSA ALJs. The Court noted that the FVRA authorizes succession memos such as the one President Obama issued in December 2016. "The succession memo directed the Deputy Commissioner for Operations to perform the functions of the Commissioner if the Commissioner and Deputy Commissioner positions were vacated." *Dahle v. Kijakazi*, 62 F.4th at 429.

Unpublished

In each case, the standard of review articulated was substantial evidence on the record as a whole. In one decision, *Bentley v. Kijakazi*, No: 22-2883, Slip Op. (8th Cir. June 7, 2023) the Court wrote: "This threshold is not high, and only requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citation omitted). We view the record in the light most favorable to the ALJ's determination, *Chismarich v. Berryhill*, 888 F.3d 978, 980 (8th Cir. 2018) (per curiam), and "defer heavily" to the Social Security Administration's findings and conclusions, *Hurd v. Astrue*, 621 F.3d 734, 738 (8th Cir. 2010). Nevertheless, Substantial Evidence on the Record as a whole appears to remain the standard of review in the 8th Circuit.

Another issue seen frequently in the unpublished case was the valuation of medical opinion evidence. 20 C.F.R. §§ 404.1527c and 416.920c regulate how opinion evidence is evaluated for claims filed after March 27, 2017. Under the new regulations, treating physician opinion is no longer entitled to controlling weight. Rather, all opinions are evaluated for persuasiveness using five factors: supportability, consistency, relationship with the claimant, specialization, and other factors such as familiarity with the other evidence in the file or understanding of the disability program's policies.

1. *Jarmon v. Kijakazi*, No. 22-2619, slip op. (8th Cir. March 1, 2023)
Loken, Kelly, and Kobes, Circuit Judges [Per Curiam]
Affirmed

Rita Jarmon argued that the ALJ erred in evaluating the opinion of her one-time treating source under 20 C.F.R. § 404.1520c. Here, the ALJ properly considered supportability and consistency of the opinion as articulated in the revised regulations.

2. *Jordan v. Kijakazi*, No: 22-2843, slip op. (8th Cir. March 31, 2023)
Gruender, Stras, and Kobes, Circuit Judges [Per Curiam]
Affirmed

Heather Jordan appealed the order of the Eastern District of Arkansas, affirming the denial of supplemental security income. The Court held: 1) the ALJ did not err in finding Jordan's mental impairments non-severe; 2) A statement from Jordan's neurologist did not assess her functional limitations, it was not an opinion under 20 C.F.R. § 416.913(a) (defining medical opinions and other medical evidence); 3) the ALJ was not required to evaluate it under 20 C.F.R. § 416.920c (ALJ must explain how supportability and consistency factors were considered in evaluating medical opinions); 4) the residual functional capacity determination was supported by substantial evidence, including the objective medical evidence, the state agency consultants' opinions, and, to some extent, Jordan's statements regarding her symptoms and daily activities, 5) the ALJ did not err by failing to order a consultative examination; 6) no merit to claim that the Social Security Administration's regulations and policies are unconstitutional.

3. *Wright v. Kijakazi*, No: 22-3124, slip op. (8th Cir. April 20, 2023)
Gruender, Shepherd, and Grasz, Circuit Judges [Per Curiam].
Affirmed

Vickie Wright appeal an order from the Eastern District of Missouri affirming the denial of disability insurance benefits and supplemental security income. The Court held: 1) the ALJ properly discounted Wright's subjective complaints; 2) substantial evidence supported the ALJ's residual functional capacity determination; 3) the ALJ did not err in proceeding with Wright's hearing despite her pro se status, because Wright received written notice of her right to representation and a list of organizations to contact regarding representation, and as she acknowledged and waived the right to representation at the hearing; 4) no merit to the argument that the district court was biased.

4. *Hart v. Kijakazi*, No: 22-3315, Slip op. (8th Cir. May 4, 2023)
Gruender, Grasz, and Kobes, Circuit Judges [Per Curiam]
Affirmed

Erica Hart appeal an order from the Western District of Missouri. The Court held; 1) The administrative law judge (ALJ) properly evaluated Hart's subjective complaints; 2) substantial evidence supported the ALJ's residual functional capacity determination; 2) no merit to the arguments that the ALJ was required to identify specific jobs claimant could obtain when finding that she could do other work; 3) no merit to the argument that the ALJ and the district court were biased against her.

5. *Halley v. Kijakazi*, No. 22-1934, Slip Op. (8th Cir. May 18, 2023)
Kelly, Erickson, and Stras, Circuit Judges [Per Curiam]
Affirmed

Scott Halley appealed an order from the Eastern District of Missouri. The Court held: 1) the ALJ made a proper credibility finding based on the entire record, including largely normal medical findings, and conservative treatment and activities such as caring for his disabled wife. The judgment is accordingly affirmed.

6. *Porter v. Kijakazi*, No: 22-3270, Slip Op. (8th Cir. May 25, 2023)
Colloton, Erickson, and Kobes, Circuit Judges [Per Curiam]
Affirmed

Jennifer Porter appeal an order from the Eastern District of Arkansas. The Court held: 1) While the ALJ erred in considering the statement of Porter's husband "inherently neither valuable nor persuasive," this error was harmless; 2) no reversible error in the ALJ's failure to include chronic pain syndrome among Porter's severe impairments, as this condition was closely related to the spinal and mental impairments the ALJ found severe; 3) the ALJ properly evaluated Porter's subjective complaints; 4) no merit to Porter's argument that the ALJ was required to defer to her treating physician's opinion in accordance with this court's prior precedent regarding the treating-source rule, despite the intervening rule change that abrogated such deference.

7. *Leiva v. Kijakazi*, No. 23-1240, Slip Op. (8th Cir. June 6, 2023)
Remand

SSA moved to have the case remand. In accordance with SSA's motion, the court reversed and remanded to the District Court with instructions to enter a final judgment reversing the decision of the ALJ and remanding the matter back to SSA for further administrative proceedings.

8. *Bentley v. Kijakazi* , No: 22-2883, Slip Op. (8th Cir. June 7, 2023)
Smith, Chief Judge, and Stras and Kobes, Circuit Judges [Per Curiam]
Affirmed

Gayle Bentley appealed an order from the Eastern District of Arkansas. The Court held: 1) Substantial evidence supported the ALJ's finding she could perform her past work; 2) When considering medical opinions and prior administrative medical findings, ALJs no longer defer or give any specific evidentiary weight to an applicant's medical sources, but instead evaluate their persuasiveness (20 C.F.R. § 404.1520c 2) An ALJ can discredit conclusory opinions; 3) the ALJ is not required to explicitly reconcile every conflicting shred of medical evidence, an ALJ's reasoning need only be clear enough to allow for appropriate judicial review.

9. *Smith v. Kijakazi* No: 22-3492, Slip Op. (8th Cir. Aug. 24, 2023).
Colloton, Erickson, and Kobes, Circuit Judges [Per Curiam]
Affirmed

LaDonna Smith appealed an order from the Eastern District of Arkansas. The Court held: 1) The ALJ adequately addressed the opinions of Smith's treating and examining providers; 2) no merit to the argument the ALJ was required to defer to her treatment providers' opinions; no merit to the argument that the ALJ should have included greater mental limitations in the residual functional capacity (RFC) assessment, as substantial evidence supports the ALJ's determination.

10. *Nicoski v. Kijakazi*, No: 23-1808, Slip Op. (8th Cir. Sept. 15, 2023)
Shepherd, Grasz, and Kobes, Circuit Judges [Per Curiam]
Affirmed

Steve Nicoski appealed the order of the District of Minnesota. The Court held: 1) the ALJ properly considered Nicoski's subjective complaints; 2) substantial evidence supports the ALJ's determination of Nicoski's residual functional capacity; 3) we find no abuse of discretion in declining to remand the case for consideration of the new evidence Nicoski submitted to the district court.

11. *Wyatt v. Kijakazi*, No. 23-1559, Slip Op. (8th Cir. Oct. 12, 2023)
Erickson, Grasz, Kobes, Circuit Judges. [Per Curiam]
Affirmed

John Wyatt appealed an order from the District of Minnesota. The Court held 1) the ALJ did not err in declining to include more restrictive limitations regarding interactions with coworkers and supervisors in the residual functional capacity determination; 2) the ALJ was not required to adopt the exact limitations set forth in the opinions she found persuasive, and substantial evidence supported the RFC findings regarding Wyatt's abilities to interact with others in the workplace.

12. *Hopkins v. Kijakazi*, 23-1921, Slip Op. (8th Cir. Oct. 18, 2023)
Erickson, Grasz, and Kobes, Circuit Judges [Per Curiam]
Affirmed

Peggy Hopkins appealed an order from the Eastern District of Arkansas. The Court held: 1) no merit to Hopkins's argument that the administrative law judge (ALJ) erred by failing to include any limitations related to her severe impairment of diverticulitis in the residual functional capacity finding, as the ALJ considered this impairment in determining that she was limited to performing medium work with additional restrictions; 2) the ALJ properly declined to include an RFC limitation requiring frequent bathroom breaks, as he found Hopkins's testimony on that point was unsupported by the medical evidence.

13. *D.S. v. Kijakazi*, 23-2287, Slip Op. (8th Cir. November 30, 2023)
Colloton, Shepherd, and Kobes [Per Curiam]
Affirmed

Child's claim. ALJ properly evaluated the opinion evidence and D.S.'s subjective complaints. Substantial evidence supports the ALJ's determination of residual functional capacity. We find no merit to contentions that the ALJ failed to fully develop the record, or failed to consider all of the medical evidence. Substantial evidence also supported the ALJ's conclusion, based on the vocational expert's testimony, that D.S. was not disabled. District court did not abuse its discretion in declining to remand the case for consideration of the new evidence that was not new and material. We also deny the motion to supplement the record on appeal.