

Better Call Saul??

Social Security Disability Update

Drake University Law School
General Practice Review

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Disability does not discriminate!

I. Introduction

error of law.

A. Disability defined in the Social Security Act:

42 U.S.C. § 405(g)

“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.”

II. Miscellaneous

A. The Acting Commissioner Announced there will be a 1.3% cost-of-living increase for 2020 (last year it was 1.6%). 85 Fed. Reg. 67413 (Oct. 22, 2020) (copy attached); <https://www.ssa.gov/news/press/factsheets/colafacts2021.pdf>

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.

	<u>2019</u>	<u>2020</u>	<u>2021</u>
1. SSI	\$ 771	\$ 783	\$ 794
2. SGA	\$1,220	\$1,260	\$1,310
Blind	\$2,040	\$2,110	\$2,190
3. TWP	\$ 880	\$ 910	\$ 940
4. Quarter of Coverage	\$1,360	\$1,410	\$1,470
5. User Fee	\$ 95	\$ 97	\$ 98
6. Tax Max	\$132.9K	\$137.7K	\$142.8K

- a. whether the Commissioner’s final decision is supported by substantial evidence, or
- b. whether the Commissioner committed an

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.

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.

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:

Office	# of mo. '20	'19
West Des Moines	- 10mo	13
Omaha, NE	- 7	9.5
Peoria, IL	- 9	10
Fargo, ND	- 10	12

https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html (visited Nov. 3, 2020).

E. Regulations

- 20 C.F.R. §§ 404.1564; 416.964
- 20 C.F.R. Pt. 404, Subpt. P, App. 2 Medical Vocational Guidelines (the Grids)
- Inability to communicate in English was removed from the Grids. Amended Feb. 25, 2020, and effective April 27, 2020. 85 Fed.

Reg. 10602.

- 85 Fed. Reg. 73183 (November 16, 2020). Administrative Appeals Judges (AAJs) from the Appeals Council may hold hearings and issue decisions.

F. 1 New SSRs

SSR 20-1p Determining an Individual's Education Category

- Illiterate
- Limited or Marginal, but not illiterate
- High school graduate or more - does not provide for direct entry into skilled work
- High school graduate or more - provides for direct entry into skilled work

-this is important, because SSA did away with the "inability to communicate in English" category in the Medical Vocational Guidelines.

-"the lack of formal schooling does not necessarily mean that the individual is uneducated or does not have these abilities."
-"We consider someone illiterate if the person cannot read or write a simple message such as instructions or inventory lists even though the person can sign his or her name."

G. Misc.

US v. Vaello-Madero, 956 F.3d 12 (1st Cir. 2020) (April 10, 2020), cert. sought by SSA. The exclusion of Puerto Rico residents from eligibility for SSI, which are available to low-income, limited resourced, disabled and elderly persons residing in the 50 states, the District of Columbia, and the Northern Mariana Islands, violates the equal protections guaranty of the Fifth Amendment of the U.S. Constitution.

H. 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.

III. Selected 2020 Case law

Eighth Circuit Court of Appeals

December 1, 2019- October 30, 2020		24 cases
Published	7	
Unpublished	17	
Affirmed	22	(i.e., 92%)
Reverse & Remand for Further Proceedings	2	

1. *Cronin v. Saul*, 945 F.3d 1062 (8th Cir. 2019)

12/27/19

Smith, Beam, and Erickson (files a dissent)

Affirmed

Keith Cronin applied for SSI in October 2012 based on the following impairments: borderline intellectual functioning, learning delays, schizoaffective disorder, mood disorder, personality disorder, and an anxiety disorder. Mr. Cronin only completed elementary or possibly junior high course work, he received special education services, and failed to pass the GED several times. He was 39 years old when this case was filed in the Eight Circuit. The ALJ did not consider Listing 12.05 (intellectual disorder).

The court held that although Mr. Cronin has the requisite low IQ scores (i.e. here measured at 61 and 68), he “did not have the additional extreme or marked limitations in adaptive functioning required to meet that listing.” (Step 3). Mr. Cronin showed “inability to get along with certain people with altercations at work, in jail, and with police officers.” However, the court finds, “each time he successfully stayed with his medication and counseling regimen, he showed success in controlling outbursts and getting along with people.” The court also gives little weight to the treating therapist’s opinion of claimant’s severity of impairments, stating, “The opinion was contrary to some of therapist’s own treatment notes and those of other therapists at the facility.”

The court gives weight to the one-time consultative mental examiner, Dr. Hobby, stating that the doctor opined that Mr. Cronin could “learn simple, semi-skilled work tasks” based on various IQ test scores ranging from 66 to 84 (the 84 was in perceptual reasoning) and that Mr. Cronin was “appropriate” in the interview.

Judge Erickson dissented stating, “Keith Cronin cannot shop for groceries because he loses control and breaks items in the store. He cannot be in public for more than ten minutes at a time or drive more than two miles from home.” Mr. Cronin has “never lived without the daily support of others.” Judge Erickson goes on to say, “It is clear to me on this record that he is a person unable to work,” and, “The ALJ and the majority gloss over Cronin’s outbursts minimizing their severity, frequency, and, more importantly, Cronin’s inability to control them.” Judge Erickson felt that the B criteria of 12.08 or 12.11 was met; in that if Cronin has only a “marked” limitation in his ability to interact with others, it is clear that he also has a “marked” limitation in his ability to adapt or manage himself. Judge Erickson would reverse and remand with instructions to award benefits.

2. *Pemberton v. Saul*, 953 F.3d 514 (8th Cir. 2020)

3/9/20

Loken, Colloton, and Kobes

Affirmed

Angela Pemberton applied for DIB in June 2015 with impairments including spondylolisthesis, disc disease, sprains, and fractures.

The court holds that substantial evidence supports the ALJ’s RFC finding Ms. Pemberton can perform frequent but not constant grasping, handling, and fingering with her right arm. The case turns on this finding, and “Pemberton concedes that her right arm problems are not disabling on their own.” She argues, nevertheless, “that her manipulative abilities are more limited than the ALJ found.” The court finds that although Ms. Pemberton’s overall pain post-surgery is 6/10, because it was an improvement on her previous pain, she is not disabled. They also find her not-disabled based on Ms. Pemberton having “minimal complaints of pain and improvement in her range of motion.”

Dr. Allen, orthopedic surgeon who performed surgery on Ms. Pemberton’s right arm, concludes that “her arm had not responded to treatment and that she was not healing well,” however, the court gives little weight to his opinion because it conflicts with other evidence in the record that Ms. Pemberton was responding to treatment.

3. *Lucus v. Saul*, 960 F.3d 1066 (8th Cir. 2020)

6/3/20

Shepherd, Grasz, and Kobes

Reversed and Remanded

Eric Lucus applied for disability benefits in October 2015 based on his impairments of memory loss, depression, and anxiety. Mr. Lucus's treating psychiatrist, Dr. Monika Goyal, finds that "for 20% or more of the day, Lucus would be unable to remember 'very short and simple instructions, [m]aintain attention and concentration for extended period, [p]erform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances, or work with others without being distracted by them.'" In addition, he "would miss two or more days of work per month due to psychologically based symptoms."

The ALJ gives only partial weight to Dr. Goyal's opinion, finding that her opinion is "internally inconsistent and contradicted by the record and her own treatment notes." The district court upholds the ALJ's decision. The lower court decides that although the ALJ failed to adequately explain the "purported . . . inconsistenc[ies]" in Dr. Goyal's opinion, because Mr. Lucus could not identify "greater limitations [to his RFC] that could have been found had [Dr. Goyal's] opinion been given greater weight," the ALJ's error is harmless.

The Eighth Circuit court reviews the decision and finds errors in the ALJ's decision, given the ALJ "ignores or fails" to discuss facts highly relevant to the factors listed in 20 C.F.R. § 404.1527, such as Dr. Goyal treating Mr. Lucus for 18 months, meeting multiple times a week, and that Mr. Lucus regularly relies on his therapist to help him function in public. The court also finds that the vocational expert's testimony matches Dr. Goyal's assessment in most ways. The court reverses and remands the case based on the ALJ's "failure to comply with SSA regulations . . . in legal error." The court states, the "ALJ failed to give good reasons for giving limited weight to treating psychiatrist's opinion, and ALJ's error was not harmless," because, "we cannot determine whether the ALJ would have reached the same decision denying benefits even if [s]he had followed the proper procedure" for considering and explaining the value of Dr. Goyal's opinion.

(Caveat: this case involves 20 C.F.R. § 404.1527(c) and weighing of medical evidence. That rule applied to cases in which an application was filed prior to March 27, 2017. For claims filed on or after March 27, 2017 look to 20 C.F.R. § 404.1520c.)

4. *Davis v. Saul* 963 F.3d 790 (8th Cir. 2020)

6/26/20

Colloton, Wollman, and Benton

Affirmed

John Davis, Destiny Thurman, and Kimberly Iwan applied unsuccessfully for social security benefits in 2013 or 2014. Each asserts that the ALJ who denied their application for benefits "was not properly appointed in accordance with the Appointments Clause of the Constitution." The district court ruled in all three cases that "the claimant waived the argument by failing to

raise it before the agency,” because, in *Lucia v. SEC*, the Supreme Court ruled that “one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief.”

On August 6, the Office of Hearing Operations issued another revised version of their emergency measure (the first two warning ALJs that they might receive Appointments Clause challenges and instructing them not to discuss or make any findings related to the Appointments Clause issue because the SSA lacks the authority to finally decide constitutional issues such as these). This revised version announced that the agency’s Acting Commissioner recently ratified the appointment of all ALJs, thereby curing any defect related to the Appointments Clause. ALJs were instructed to continue to acknowledge and report any challenges raised before the ratification date.

The district court rules in each case that because “the claimant did not raise an Appointments Clause challenge before the ALJ or Appeals Council, the claimant had waived the issue.” Citing *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S. Ct. 719, 85 L. Ed. 1037 (1941), the court says, “[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction.” In most cases, “an issue not presented to an administrative decision maker cannot be argued for the first time in federal court.”

5. *Noerper v. Saul*, 964 F.3d 738 (8th Cir. 2020)

7/8/20

Kelly, Melloy, and Stras (files a dissent)

Reversed and Remanded

Angela Noerper, after working as a waitress, laborer at a tree nursery, and unskilled carnival worker, applied for DIB and SSI in February 2014 with impairments of degenerative joint disease in her knees, fibromyalgia, and arthritis. In 2009, at 44 years old, Ms. Noerper was in a car accident. She has not engaged in SGA since 2010.

With MRIs on her right knee showing deteriorated cartilage and fluid, the court focuses on her knee impairments. She has had injection in both knees, used a knee brace, uses a cane at home (although she does not have a prescription for a cane), was scheduled for arthroscopic surgery (cancelled due to insurance problems), and recommended to try physical therapy (unable to schedule due to insurance).

The ALJ and Commissioner afford great weight to the consulting physician’s, Dr. Jung, opinion, which said, “Claimant has no evidence of back . . . or knee problems or limitations . . . Exams have been [within normal limits] in these areas.” Dr. Jung does not reference more recent treatment records from Ms. Noerper’s physicians, Drs. Wilkerson and Jones, in regards specifically to her knees. The ALJ also “impermissibly relies on conclusions from Dr. Wilkerson,

a primary care physician, rather than conclusions from Dr. Jones, the orthopedist,” whose notes are “more detailed.” The agency should “place more weight on the opinions of specialists over generalists where opinions conflict and evidence does not otherwise provide reasons for rejecting the specialist’s opinion (20 C.F.R. § 404.1527(c)(5)).”

The Court of Appeals holds that the “ALJ fails to address or resolve the differences between medical opinions requiring remand.” Furthermore, the court finds no reliable evidence providing a basis for the conclusion that Ms. Noerper can stand or walk for 6 hours in an 8 hour workday.

In a two sentence dissent, Judge Stras says, “In my view, there was enough in the record for the ALJ to conclude that Angela Noerper can stand or walk for up to six hours in an ordinary workday.” He concludes the court has everything needed to affirm.

6. *Hilliard v. Saul*, 964 F.3d 759 (8th Cir. 2020)

7/9/20

Colloton, Wollman, and Benton

Affirmed

Thomas Hilliard applied for DIB and SSI in 2015. Mr. Hilliard’s reading comprehension is at the second-grade level.

The ALJ concludes Mr. Hilliard is not disabled because his RFC is for light, unskilled work, even with his limited reading comprehension level. The ALJ based this decision on the medical opinions of three consultative examiners, Mr. Hilliard’s daily activities, his statements to clinicians, and his past relevant work as a fast food worker. The ALJ provides partial weight to the opinion of Dr. Majed Barazanji, and little weight to the opinion of David Yurdin, a physician assistant.

The Court of Appeals asserts that “The interpretation of physicians’ findings is a factual matter left to the ALJ’s authority.” *Mabry v. Colvin*, 815 F.3d 386, 391 (8th Cir. 2016). In addition, the court affirms the ALJ’s decision to partially assign weight to Dr. Barazanji’s opinion as the doctor was a one time consultant, his opinions contradicted other consultive examiners, and his opinions were inconsistent with his medical observations. The court also affirms the ALJ’s decision to disregard the opinion of Mr. Yurdin, because “a physician assistant is not an acceptable medical source, but can provide information to help understand a claimant’s impairments.” *Sloan v. Astrue*, 499 F.3d 883, 888 (8th Cir. 2007). Additionally, the court affirms the ALJ giving little weight to Mr. Yurdin’s assessment since he only completed a checklist with brief commentary. The court observes that even a treating physician’s opinion “possess little evidentiary value” when they “consist of nothing more than vague, conclusory statements,” such as “checked boxes, circled answers, and brief fill-in-the-blank responses.” *Thomas v. Berryhill*, 881 F.3d 672, 675 (8th Cir. 2018).

According to the Court of Appeals, sufficient evidence exists in the record to support the ALJ's decision, including clinical notes that Mr. Hilliard lost weight from moving around so much, left a clinical appointment with a brisk walk and no cane, and stated he was doing well after a total hip replacement. The court also notes that although Mr. Hilliard raises an Appointments Clause challenge, because Mr. Hilliard did not raise the challenge to the ALJ, the court need not consider it. *Davis v. Saul*, 963 F.3d 790 (8th Cir. June 26, 2020).

7. *Lawrence v. Saul*, 970 F.3d 989 (8th Cir. 2020)

7/31/20

Kelly, Melloy, and Kobes

Affirmed

Jeanie Lawrence is a 34-year-old with neck, shoulder, and upper extremity pain who applied for DIB and SSI in April 2016. She also suffers from chest pain, migraines, and right foot tendonitis.

Ms. Lawrence's medical evidence shows an x-ray with "no cause for her shoulder pain" and MRIs with "some bone spur formation but without narrowing of the spinal canal or nerve passages [on cervical spine]", "mild partial tearing [of her right shoulder]", and "intact rotator cuff with minimal tendinopathy [shoulder]." Ms. Lawrence did receive right shoulder arthroscopy with bicep tenodesis in August 2016.

In July 2016, Ms. Lawrence met with treating physician Dr. John Ball. He stated she could not return to work, however, the ALJ assigned very little weight to Dr. Ball's opinion, stating Dr. Ball provided "very little explanation of the evidence relied on in forming" his opinion, and the ALJ notes, he does not have an extended treatment history with Ms. Lawrence.

Ms. Lawrence argues the ALJ fails to adequately develop the record, relying too strongly on evidence predating her surgery, and focusing too narrowly on her shoulder impairment instead of all impairments combined. She also argues the ALJ overly discounts her subjective statements concerning her limitations on ADL.

The ALJ's findings of not-disabled stems from the following evidence: MRI test indicating no nerve impingement in neck, orthopedic surgeon's note to substantial shoulder improvement five months after Ms. Lawrence's surgery, and treating physician's opinion that Ms. Lawrence frequently exhibited good ROM and had full strength in arm and shoulder. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3).

The Court of Appeals holds that substantial evidence supports ALJ's finding that Ms. Lawrence has RFC to perform sedentary work. The court further notes that although the present record certainly could have supported a different outcome, "[i]f substantial evidence supports the Commissioner's decision, we may not reverse even if we might have decided the case differently." *Strongson v. Barnhart*, 361 F.3d 1066, 1070 (8th Cir. 2004).



Fact Sheet

SOCIAL SECURITY

2021 SOCIAL SECURITY CHANGES

Cost-of-Living Adjustment (COLA):

Based on the increase in the Consumer Price Index (CPI-W) from the third quarter of 2019 through the third quarter of 2020, Social Security and Supplemental Security Income (SSI) beneficiaries will receive a 1.3 percent COLA for 2021. Other important 2021 Social Security information is as follows:

Tax Rate	2020	2021
Employee	7.65%	7.65%
Self-Employed	15.30%	15.30%

NOTE: The 7.65% tax rate is the combined rate for Social Security and Medicare. The Social Security portion (OASDI) is 6.20% on earnings up to the applicable taxable maximum amount (see below). The Medicare portion (HI) is 1.45% on all earnings. Also, as of January 2013, individuals with earned income of more than \$200,000 (\$250,000 for married couples filing jointly) pay an additional 0.9 percent in Medicare taxes. The tax rates shown above do not include the 0.9 percent.

	2020	2021
Maximum Taxable Earnings		
Social Security (OASDI only)	\$137,700	\$142,800
Medicare (HI only)	No Limit	
Quarter of Coverage		
	\$1,410	\$1,470
Retirement Earnings Test Exempt Amounts		
Under full retirement age	\$18,240/yr. (\$1,520/mo.)	\$18,960/yr. (\$1,580/mo.)
NOTE: One dollar in benefits will be withheld for every \$2 in earnings above the limit.		

The year an individual reaches full retirement age	\$48,600/yr. (\$4,050/mo.)	\$50,520/yr. (\$4,210/mo.)
NOTE: Applies only to earnings for months prior to attaining full retirement age. One dollar in benefits will be withheld for every \$3 in earnings above the limit.		
Beginning the month an individual attains full retirement age	None	

	2020	2021
Social Security Disability Thresholds		
Substantial Gainful Activity (SGA)		
Non-Blind	\$1,260/mo.	\$1,310/mo.
Blind	\$2,110/mo.	\$2,190/mo.
Trial Work Period (TWP)	\$ 910/mo.	\$ 940/mo.
Maximum Social Security Benefit: Worker Retiring at Full Retirement Age		
	\$3,011/mo.	\$3,148/mo.
SSI Federal Payment Standard		
Individual	\$ 783/mo.	\$ 794/mo.
Couple	\$1,175/mo.	\$1,191/mo.
SSI Resource Limits		
Individual	\$2,000	\$2,000
Couple	\$3,000	\$3,000
SSI Student Exclusion		
Monthly limit	\$1,900	\$1,930
Annual limit	\$7,670	\$7,770
Estimated Average Monthly Social Security Benefits Payable in January 2021		
	Before 1.3% COLA	After 1.3% COLA
All Retired Workers	\$1,523	\$1,543
Aged Couple, Both Receiving Benefits	\$2,563	\$2,596
Widowed Mother and Two Children	\$2,962	\$3,001
Aged Widow(er) Alone	\$1,434	\$1,453
Disabled Worker, Spouse and One or More Children	\$2,195	\$2,224
All Disabled Workers	\$1,261	\$1,277

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