
**BETWEEN EMPATHY AND ECONOMY:
THE STRUGGLE OVER THE SUBSTANTIAL
EVIDENCE STANDARD IN SOCIAL SECURITY
DISABILITY DETERMINATIONS**

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I. INTRODUCTION

A denial of Social Security Disability Insurance Benefits (DIB) will be upheld if it the decision of the Administrative Law Judge (ALJ) is supported by "substantial evidence." In practice, the application of the substantial evidence standard has varied as the Seventh Circuit has struggled over the degree of deference that should be accorded to the ALJ's findings. This is particularly true in cases that require the administrative law judge to evaluate impairments with highly subjective effects, as well impairments that must be considered in combination to determine disability.¹ The Seventh Circuit's recent decision in *Gentle v. Barnhart* advances a vision of the substantial evidence standard informed by the broad objectives of the Social Security's disability program, an approach that emphasizes the

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¹ See e.g., *Carradine v. Barnhart*, 360 F.3d 751 (7th Cir. 2004) (subjective experience of pain); *Sims v. Barnhart*, 309 F.3d 424 (7th Cir. 2002) (combined effect of multiple impairments, none of which rise individually to the level of disability).

investigatory burden on the ALJ over deference to the ALJ in her adjudicatory role.²

First this note will provide an overview of how the Social Security Administration evaluates disability claims and how claimants can appeal an adverse decision. Next this note will survey the debate within the Seventh Circuit over the application of the substantial evidence standard in social security disability law and the level of deference accorded to factual findings by the ALJ.³ This will be followed by a discussion of how the Seventh Circuit's most recent decision in *Gentle v. Barnhart* extends the line of reasoning that more vigorously questions whether an adverse decision is supported by substantial evidence. In this decision, the Seventh Circuit placed a heavy emphasis on the investigatory responsibilities of the administrative law judge. This approach gives slightly less deference to factual findings by the ALJ where coming to those conclusions requires a subjective evaluation, for example, evaluating the credibility of the witness. Finally, this note will conclude that although this approach slightly weakens deference to the adjudicatory role of the ALJ in favor of a somewhat heavier burden the ALJs in her investigatory role, this approach is consistent with the language and the goals of the Social Security Act.

II. BACKGROUND

Applying for Social Security Disability benefits can be a complex process, particularly if the applicant's claim is rejected initially. A person insured by Social Security who becomes disabled may apply for disability insurance benefits (DIB) after a waiting period of five months following the onset of the disability.⁴ The prospective applicant then has a one year window in which to file a claim with the

² 430 F.3d 865 (7th Cir. 2005).

³ The cases selected for discussion have been chosen because they illustrate the debate through the contrasting reasoning offered in the majority and dissenting opinions. This is not intended as an exhaustive survey of cases in which the Seventh Circuit has applied the substantial evidence standard.

⁴ 42 U.S.C. § 423(c)(2) (2004).

Social Security Administration (SSA).⁵ To be considered disabled, a person must be unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . ." ⁶ The applicant must be unable to continue their "previous work" or "engage in any other kind of substantial gainful work which exists in the national economy" where jobs that the claimant can perform exist in significant numbers in the regional economy.⁷ The disability must be "medically determinable."⁸ It also must be relatively permanent: to qualify as a disability, it must be expected either to result in death or to last for a continuous period of at least one year.⁹

Disability is evaluated using a five-step evaluation process.¹⁰ If a claimant is found to be disabled or not to be disabled at any step, the analysis ends.¹¹ First, the SSA examiner or ALJ asks whether an applicant is involved in substantial gainful activity; if so, that person will not be considered disabled.¹² There are exceptions to the rule. Make-work provided by an indulgent employer is not considered gainful activity because such employment is not proof of employability.¹³ Neither is employment taken out of desperation.¹⁴

The second step is to consider whether any medically determinable physical or mental impairments, individually or in combination, meet the duration requirement for severity.¹⁵ To be considered disabled, the disability must be expected to persist for at

⁵ 42 U.S.C. § 423(b) (2004).

⁶ 42 U.S.C. § 423(d)(1)(A) (2004).

⁷ 42 U.S.C. § 423(d)(2)(A) (2004).

⁸ 42 U.S.C. § 423(d)(1)(A) (2004).

⁹ 42 U.S.C. § 423(d)(1)(A) (2004).

¹⁰ 20 C.F.R. § 404.1520 (2006) (explaining five-step sequential evaluation process).

¹¹ 20 C.F.R. § 404.1520(a)(4) (2006).

¹² 20 C.F.R. § 404.1520(a)(4)(i). (2006)

¹³ *Wilder v. Apfel*, 153 F.3d 799, 801 (7th Cir. 1998).

¹⁴ *Id.*

¹⁵ 20 C.F.R. § 404.1520(a)(4)(ii) (2006).

least one year.¹⁶ Qualitative severity is evaluated in the third step.¹⁷ If any impairment meets or equals the severity of one of the impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1, the claimant will be considered disabled.¹⁸

If the claimant is not considered disabled at step three, the SSA will make a determination of the claimant's residual functional capacity for use in steps four and five.¹⁹ Residual functional capacity is the most work a claimant can do within the claimant's limitations.²⁰ It is determined through an assessment of the claimant's physical abilities, mental abilities, environmental restrictions and the total limiting effect of all impairments and symptoms.²¹ The fourth step considers whether the claimant can perform her past relevant work given her residual functional capacity.²² If the claimant can perform her past relevant work despite her limitations, she will not be considered disabled.²³

Finally, in the fifth step, the examiner or ALJ determines whether the claimant is able to make an adjustment to other work²⁴ based on residual functional capacity, age, education, and work experience.²⁵ 20 C.F.R. Pt. 404, Subpt. P, App. 1 lists medical-vocational guidelines ("grids") that may be used to assess whether a claimant should be considered capable of substantial gainful employment for purposes of social security disability benefits based on physical abilities, age and education. For example, under Table No. 1, illiteracy, advanced age, and a work history of unskilled work would together direct a finding

¹⁶ 20 C.F.R. § 404.1520(a)(4)(ii) (2006) (incorporating by reference duration requirements in 20 C.F.R. § 404.1509) (2006).

¹⁷ 20 C.F.R. § 404.1520(a)(4)(iii) (2006).

¹⁸ *Id.*

¹⁹ 20 C.F.R. § 404.1520(a)(4) (2006).

²⁰ 20 C.F.R. § 404.1545(a)(1) (2006).

²¹ *Id.*

²² 20 C.F.R. § 404.1520(a)(4)(iv) (2006).

²³ *Id.*

²⁴ 20 C.F.R. § 404.1520(a)(4)(v) (2006).

²⁵ 20 C.F.R. § 404.1520(g)(1) (2006).

of disability, presuming the claimant's limitations prevent her from performing her past relevant work.²⁶ Alternatively, or where the grids do not apply because a *mental* residual functional capacity must be considered, a vocational expert may be called to testify to how many jobs are available in the regional economy that can be performed by the claimant, taking the claimant's limitations into account.²⁷

A. Review of the Initial Determination

If the Social Security Administration determines that a claimant is not disabled, the claimant may challenge that determination through an administrative review process.²⁸ First, the claimant may ask for reconsideration.²⁹ If the claim is denied upon reconsideration, the claimant has the right to a hearing before an ALJ.³⁰ The ALJ is responsible for a unique type of administrative review. The administrative review hearing is a non-adversarial process.³¹ Although the claimant has a right to be represented by counsel,³² the Commissioner of Social Security is unrepresented at the hearing.³³

The ALJ has an investigatory role as well as a quasi-judicial role. While the claimant has the opportunity to offer evidence of disability by submitting medical records and testimony,³⁴ the ALJ has a duty to investigate facts and develop the issues through the course of the hearing.³⁵ The ALJ has multiple tools for developing the record. The ALJ reviews records and hears testimony from witnesses, including

²⁶ 20 C.F.R. Pt. 404, Subpt. P, App. 1(2006).

²⁷ 69 Am. Jur. Proof of Facts 3d 1 § 66 (2005).

²⁸ 20 C.F.R. § 404.900(a) (2006).

²⁹ 20 C.F.R. § 404.900(b)(2) (2006).

³⁰ 20 C.F.R. § 404.900(b)(3) (2006).

³¹ 20 C.F.R. § 404.900(b) (2006).

³² See 42 U.S.C. § 406(a)(1) (2000).

³³ *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000).

³⁴ 20 C.F.R. §§ 404.935, 404.949, 404.950 (2006).

³⁵ *Sims*, 530 U.S. at 111 (citing *Richardson v. Perales*, 402 U.S. 389, 400-401 (1971)).

medical experts, friends and family of the claimant, and the claimant himself.³⁶ The examiner has great latitude to conduct the hearing in a relatively informal manner, considering even evidence that might be excluded as hearsay in a more formal judicial proceeding.³⁷ Where additional evidence is required, the ALJ has the discretion to order additional medical and psychiatric examinations.³⁸ A medical advisor may be called upon to review the medical records and offer her professional opinion.³⁹

If the ALJ denies the applicant's claim, the applicant may appeal to the Social Security Appeals Council.⁴⁰ If the claimant is not satisfied with the Council's decision, the claimant may seek administrative review in federal court.⁴¹

The ALJ's determination of whether a claimant is disabled, and ultimately the decision of the Commissioner of Social Security, must be supported by "substantial evidence."⁴² Reviewing courts are to give the findings of the Commissioner, and in effect the ALJ, conclusive weight in questions of fact where those factual findings are supported by substantial evidence.⁴³ That the record contains enough information to support an ALJ's decision is not sufficient: the ALJ has an obligation to write a detailed explanation the decision, one that "build[s] an accurate and logical bridge from the evidence to [the]

³⁶ See *Richardson*, 402 U.S. at 400 (quoting 20 C.F.R. § 404.927 ("The hearing examiner shall inquire fully into the matters at issue and shall receive into evidence the testimony of witnesses and any documents which are relevant and material to such matters . . .")); 20 C.F.R. § 404.944 (2006).

³⁷ *Id.* (quoting 20 C.F.R. § 404.927 ("The . . . procedure at the hearing generally . . . shall be in the discretion of the hearing examiner and of such nature as to afford the parties a reasonable opportunity for a fair hearing."))

³⁸ 20 C.F.R. §§ 404.1519, 404.1519a (2006).

³⁹ *Richardson*, 402 U.S. at 408.

⁴⁰ 20 C.F.R. § 404.900(4) (2006).

⁴¹ 20 C.F.R. § 404.900(5) (2006).

⁴² See 42 U.S.C. § 405(g) (2000).

⁴³ *Id.* ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive . . .") (emphasis added).

conclusion."⁴⁴ Courts are authorized "to enter ... a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."⁴⁵ However, a reviewing court may award benefits only where "all factual issues have been resolved and the record supports a finding of disability."⁴⁶

B. Construing "Substantial Evidence"

Seventh Circuit Court of Appeals Judge Richard A. Posner has noted a tension in the interpretation of social security disability law between empathy and economy, an ideological split between "those who empathize with the humane objectives of the law and those who worry about fostering dependence and depleting the federal budget."⁴⁷ He observes that these perspectives in the field are divided by fundamental questions of value, questions not easily resolved by appeals to a neutral observer.⁴⁸ While Judge Posner noted this in the context of discussion of the wisdom of reforming the review process

⁴⁴ *Steele v. Barnhart*, 290 F.3d 936, 941 (7th Cir. 2002) (quoting *Dixon v. Massanari*, 270 F.3d 1171, 1176 (7th Cir. 2001) (rejecting reasons for a decision supplied by the Commissioner's lawyers rather than by the ALJ in her report).

⁴⁵ 42 U.S.C. § 405(g) (2000).

⁴⁶ *Briscoe v. Barnhart*, 425 F.3d 345, 356 (7th Cir. 2005). In *Briscoe*, The Seventh Circuit clarified the circumstances under which a reviewing court may award benefits rather than reversing and remanding for proceedings consistent with the court's decision. The confusion among the district courts arose from the Seventh Circuit's decision in *Wilder v. Apfel*. *Briscoe*, 425 F.3d at 356 (citing *Wilder v. Apfel*, 153 F.3d 799, 801 (7th Cir. 1998)). In *Wilder*, the Seventh Circuit awarded benefits where the agency failed to bring forth contradictory medical evidence despite a second hearing following remand from the district court. The Court of Appeals "found it necessary to 'bring the charade to an end'" and awarded benefits to the claimant. *Id.* However, in *Briscoe*, the Court of Appeals emphasized that "obduracy" on the part of the ALJ is not in itself sufficient grounds for an award of benefits by a reviewing court. *Id.*

⁴⁷ RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 253 (1996).

⁴⁸ *Id.*

by establishing specialized courts,⁴⁹ a similar division comes into play in the interpretation of the substantial evidence standard. The following cases illustrate the tension between an ideal of economic and judicial economy, which tends to afford maximum deference to the factual findings of ALJs, and an empathetic desire for meaningful review under the substantial evidence standard.

This tension between economy and empathy in interpreting the "substantial evidence standard" is not new. It is evident in the Supreme Court of the United State's 1971 decision in *Richardson v. Perales*, in which the Court considered whether medical reports by physicians who have not been cross-examined, presenting evidence that contradicts live testimony favorable to the claimant, constitute substantial evidence supporting a finding adverse to the claimant.⁵⁰ Richard Perales challenged whether the unsworn, hearsay reports were constitutionally sufficient evidence.⁵¹ He claimed that because he had not had the opportunity to cross-examine the authors of these medical reports, these reports should not have been admitted as evidence.⁵²

Mr. Perales' presented evidence of his impairments in the form of testimony by one of his treating physicians and reports created by two others physicians who had personally examined him.⁵³ Initially, Mr. Perales presented somewhat weak medical evidence that he was disabled due to a back injury.⁵⁴ Mr. Perales had undergone back

⁴⁹ For further critiques of the current system of review and a survey of proposed solutions, see Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731 (2003).

⁵⁰ *Richardson*, 402 at 390.

⁵¹ *Richardson*, 402 U.S. at 395, 398. Initially, Richardson challenged the use of unsworn reports as a violation of the Confrontation clause. The Court eventually addressed his claim as a procedural due process issue: "The question, then, is as to what procedural due process requires with respect to examining physician's reports in a social security disability claim hearing." *Id.* at 402.

⁵² *Id.* at 395, 398.

⁵³ *Id.* at 395-96.

⁵⁴ See *id.* at 390-92.

surgery in an attempt to relieve his back pain.⁵⁵ However, his surgeon, Dr. Munslow, was not able to definitively identify the source of his pain at surgery.⁵⁶ Following the surgery, he diagnosed Perales' condition a "nerve root compression syndrome, left."⁵⁷ His final diagnosis before discharging Perales was "neruitis, lumbar, mild."⁵⁸ Similarly, Dr. Lampert, a neurologist was unable to identify a neurological explanation for his pain.⁵⁹ Following Dr. Lampert's diagnosis, Dr. Munslow recommended that Perales return to work.⁶⁰ Perales visited a third physician, a general practitioner named Dr. Morales.⁶¹ Dr. Morales hospitalized Perales for his back pain.⁶² He eventually diagnosed Mr. Perales with a moderately severe lumbosacral back sprain and with a possible ruptured disc.⁶³

After Mr. Perales applied for Social Security disability benefits, the agency ordered an additional medical examination by an orthopedic surgeon.⁶⁴ The results undermined Mr. Perales' claim.⁶⁵ The examiner concluded that although Mr. Perales did indeed have a back sprain, he was exaggerating his symptoms.⁶⁶ The surgeon suggested that Mr. Perales had exacerbated his problems by failing to exercise.⁶⁷ He also suggested that there might be a psychological component to Mr. Perales' illness.⁶⁸

⁵⁵ *Id.* at 390-91.

⁵⁶ *Id.* at 391.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 392.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 393 n.3.

⁶⁷ *Id.* at 392.

⁶⁸ *Id.* at 393 n.3.

Mr. Perales' claim was denied and he requested reconsideration.⁶⁹ Dr. Morales submitted a report stating that Mr. Perales had never fully recovered from his prior back surgery, and that he was as badly off physically as he had been before the surgery.⁷⁰ He believed that Mr. Perales was not malingering.⁷¹ He concluded that the injury was permanent and that Mr. Perales would not be able to continue working in his past line of work as a laborer.⁷² The state agency administering the DIB program also arranged for a psychiatric evaluation of Mr. Perales.⁷³ Dr. James Bailey reported personality difficulties, but no separate psychiatric illness.⁷⁴ After the agency denied Mr. Perales' claim a second time, he requesting a hearing before a hearing examiner.⁷⁵

Mr. Perales presented direct evidence of disability at his hearing: Dr. Morales testified as to the seriousness of Mr. Perales' condition, and Mr. Perales himself testified.⁷⁶ The ALJ also admitted reports from Drs. Langton, Bailey, Mattson, Lampert, as well as the hospital records, over objections from Mr. Perales attorney, who objected to the hearsay nature of the evidence.⁷⁷

Dr. Morales' conclusions were contradicted by Dr. Lewis A. Leavitt, an independent "medical advisor" called by the hearing examiner.⁷⁸ Based on his review of the medical reports, Dr. Leavitt testified that Mr. Perales' back problems were mild and were of musculo-ligamentous origin rather than the result a disc injury.⁷⁹ He also testified that Mr. Perales' problems might in part be only

⁶⁹ *Id.*

⁷⁰ *Id.* at 393.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 394.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 395.

⁷⁷ *Id.*

⁷⁸ *Id.* at 396.

⁷⁹ *Id.*

minimally psychological.⁸⁰ Faced with conflicting evidence, the hearing examiner accepted the medical advisor's conclusions and denied Mr. Perales' claim based on that testimony.⁸¹

Mr. Perales appealed to the Appeals Council.⁸² At this time he submitted an additional medical report which had been prepared to support a welfare claim.⁸³ Although the examining physician, Dr. Williams, was unable to definitively identify the source of the pain, he concluded that Mr. Perales was 15% disabled at that time and could probably be reconditioned to return to work.⁸⁴ The Appeals Council also denied Mr. Perales claim.⁸⁵ Mr. Perales appealed in federal court, arguing that he had been denied procedural due process because the physician's reports on which the medical advisor relied were uncorroborated hearsay.⁸⁶ He also argued that he had not had the opportunity to cross-examine the doctors who wrote the reports.⁸⁷

A Supreme Court majority upheld the use of medical reports without cross-examination over the protest of the dissent. These differing views regarding the constitutional adequacy of disability hearing procedures illustrate a subtle but persistent rift over what constitutes a fair determination by an ALJ in a Social Security disability hearing. The Court acknowledged that an ALJ's decision must be supported by "substantial evidence."⁸⁸ The majority was satisfied with the probative value of the hearsay reports.⁸⁹ The Court recognized several indicators reliability. First, the non adversarial nature of proceedings themselves give rise to a presumption of

⁸⁰ *Id.*

⁸¹ *Id.* at 396-97.

⁸² *Id.* at 397.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 397-98.

⁸⁷ *Id.* at 398.

⁸⁸ *Id.* at 401.

⁸⁹ *Id.* at 402.

impartiality.⁹⁰ The agency is intended to act as an adjudicator of claims, not as an advocate or an adversary.⁹¹ Second, the majority saw no evidence of bias in the extensive medical reports.⁹² It believed the reports to be consistent.⁹³ Further, the Court recognized a general societal acceptance of the probative nature of physicians' reports.⁹⁴ Third, with respect to cross-examination, the Court noted that Mr. Perales had not entirely availed himself of his statutory rights.⁹⁵ Mr. Perales had failed to take advantage of a five-day period in which he could have requested subpoenas of the authors of those medical reports.⁹⁶ Finally, the Court addressed an "additional and pragmatic factor which, although not controlling, deserves mention."⁹⁷ The Court concluded that live testimony would be too great a drain on financial resources of the system, particularly where subpoenas had not been requested.⁹⁸ Accordingly, the court held that Mr. Perales had not been denied the rights of confrontation and cross-examination.⁹⁹

Taking all considerations into account, the Court was satisfied with the fundamental fairness of the system.¹⁰⁰ The hearing process was consistent with due process rights for several reasons. First, the hearing did not concern a termination of benefits.¹⁰¹ Second, the majority did not believe that reliance on those reports had any adverse impact on the system's fundamental integrity and fairness because the

⁹⁰ *Id.* at 403.

⁹¹ *Id.*

⁹² *Id.* at 404.

⁹³ *Id.*

⁹⁴ *Id.* at 405.

⁹⁵ *See id.* at 406-07.

⁹⁶ *Id.*

⁹⁷ *Id.* at 406.

⁹⁸ *Id.*

⁹⁹ *Id.* at 407-08.

¹⁰⁰ *Id.* at 410.

¹⁰¹ *Id.* at 406-07. The court contrasted the application for disability benefits with the termination of AFDC benefits at issue in *Goldberg v. Kelly*, 397 U.S. 254, 254 (1970).

medical reports had probative value.¹⁰² Finally, the Court rejected the contention that the examiner had a dual role as a judge and an advocate, despite his obligation to develop the facts.¹⁰³ According to the Court, requiring additional examination would harm a complex system that was working well.¹⁰⁴ Despite the Court's assertion that cost was merely a pragmatic matter, and not controlling, the Court's concerns over the workability of a large and complex system loom large in the decision.

The dissenting justices vehemently disputed whether medical reports as interpreted by a medical advisor should be considered "substantial evidence" sufficient to contradict live testimony from the claimant and from an examining physician.¹⁰⁵ The dissent noted that one doctor, the "medical advisor," had never seen the patient.¹⁰⁶ Additionally, doctors in this case had serious conflicts of interest—some had been hired by the insurance company seeking to defeat Mr. Perales' workmen's compensation claims.¹⁰⁷ The dissent also questioned whether a "circuit-riding doctor[]" hired by the agency itself to interpret medical records could be impartial.¹⁰⁸ It blasted the majority decision as an injustice wreaked on an individual by a powerful bureaucracy.¹⁰⁹ It characterized the "cutting of corners" as contrary to the spirit of the law and beneath the dignity of a great nation.¹¹⁰ Although the dissent lost on the issue of the admissibility of unsworn medical reports, this strong empathy for claimants entangled in administrative procedures survives as a major concern in the analysis of the substantial evidence standard.

¹⁰² *Id.* at 407-08.

¹⁰³ *Id.* at 410.

¹⁰⁴ *Id.*

¹⁰⁵ *See id.* at 411-12 (Douglas, J. dissenting).

¹⁰⁶ *Id.* at 413.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 414.

¹¹⁰ *Id.*

C. Substantial Evidence in the Seventh Circuit

1. *Smith v. Apfel*

In the Court of Appeals for the Seventh Circuit the tension between efficiency and empathy played out in a struggle over the degree of deference accorded to the ALJ when reviewing adverse decisions under the substantive evidence standard. In *Smith v. Apfel*, Mr. Smith had been receiving Social Security disability payments for disability due to alcoholism.¹¹¹ In 1997 the Social Security Administration changed the rules so that alcoholism was no longer a disability.¹¹² The SSA informed Mr. Smith that unless he could show that alcoholism was not a contributing factor to his disability, his benefits would cease.¹¹³ Mr. Smith requested a review, claiming that he was unable to work because of arthritis, back pain, an ulcer, and cirrhosis of the liver.¹¹⁴ Records from Mr. Smith's treating physician of 21 years confirmed some degenerative disease in his left knee and right ankle in X-rays taken in 1987.¹¹⁵ In 1996 a diagnosis of osteoarthritis was also recorded. Mr. Smith also was taking medication for hypertension.¹¹⁶

Shortly after requesting review, Mr. Smith was examined by a consultative physician, Dr. Bharti.¹¹⁷ Dr. Bharti confirmed degenerative changes in Mr. Smith's right ankle but found no other problems.¹¹⁸ Although Mr. Smith claimed back pain when lifting anything over 50 pounds, Dr. Bharti noted that he had a full range of motion in his back.¹¹⁹ Based on Dr. Bharti's report, state agency

¹¹¹ 231 F.3d 433, 434 (7th Cir. 2000)

¹¹² *Id.* at 435.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

physician Dr. Dow determined that Mr. Smith had mild osteoarthritis and was probably suffering from degenerative joint disease in the lumbar area as well.¹²⁰ She determined that Mr. Smith was able to work in a job that required lifting or carrying up to 50 pounds occasionally and 25 pounds frequently.¹²¹ A third physician, Dr. Baraglia, also assessed Mr. Smith's records.¹²² He concluded that Mr. Smith could lift no more than 20 pounds occasionally.¹²³ He also determined that Mr. Smith could not stand or walk for an eight-hour work day, and could only occasionally climb, balance or stoop because of arthritis in his knees.¹²⁴ Two months later, Dr. Baraglia amended his opinion, stating that Mr. Smith could not walk a block without severe pain and could lift no more than 10 pounds occasionally.¹²⁵ He also stated that Mr. Smith had a limited range of motion in his back.¹²⁶

At his hearing, Mr. Smith testified to his limited ability to sit in one place or to stand for long periods of time.¹²⁷ He also told the hearing administrator that he suffered from spells of dizziness due to his hypertension.¹²⁸ He said that he could regularly lift 25 to 30 pounds but that he had trouble with anything weighing more than 50 pounds.¹²⁹ In this respect, his testimony corresponded much more closely with the evaluation done by Dr. Bharti than with the report from Dr. Baraglia.

Mr. Smith's case presents a combination of impairments with subjective elements, such as pain, and varying medical testimony. The ALJ in this case took issue with Mr. Smith's credibility, and

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 436.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

determined that Mr. Smith did not have pain related to arthritis.¹³⁰ He faulted Dr. Bharti for failing to order X-rays that might support his medical opinion. He also did not consider Mr. Smith's claim of dizziness due to hypertension.¹³¹ After hearing the medical evidence and testimony from a vocational expert, the ALJ concluded that Mr. Smith's skills were transferable to the position of forklift operator.¹³² Mr. Smith appealed the decision as not being based on substantial evidence.¹³³

In her opinion for the majority, Judge Ilana Diamond Rovner, joined by Judge Ann Claire Williams, held that the ALJ's decision was not based on substantial evidence.¹³⁴ The court concluded that it was impossible for the ALJ to evaluate Mr. Smith's arthritis without updated X-rays, despite the vocational expert's information that operating a forklift required frequent use of the right foot.¹³⁵ The court also faulted the ALJ for failing to take Mr. Smith's spells of dizziness into account when determining that he was capable of operating a fork lift.¹³⁶ The court reversed and remanded with instructions, emphasizing the ALJ's duty to develop a "full and fair record," and admonishing the ALJ not to simply select and discuss the evidence favorable to his position.¹³⁷

In his dissent, Judge Kenneth F. Ripple disagreed with the lack of deference given to the ALJ's findings, particularly to the ALJ's credibility determination.¹³⁸ He emphasized that the ALJ is in the best position to make a credibility determination and to evaluate various discrepancies.¹³⁹ According to the dissent, to overturn the credibility

¹³⁰ *Id.* at 437.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 438.

¹³⁵ *Id.* at 437-38.

¹³⁶ *Id.* at 438.

¹³⁷ *Id.* at 437-38.

¹³⁸ *Id.* at 438-45 (Ripple, J. dissenting).

¹³⁹ *Id.* at 439.

determination, and all that followed, the claimant would have to show that the ALJ was "patently wrong" in his credibility determination.¹⁴⁰ With respect to the lack of recent X-rays, rather than taking the omission to indicate that the ALJ had failed to develop the record fully, the dissenter would have taken the absence of evidence as probative of the claimant's lack of credibility.¹⁴¹ In short, the dissent would have placed a higher burden on the claimant and a lesser burden on the ALJ and deferred almost entirely to the ALJ in credibility determinations. In a case where the ALJ considered multiple impairments, including a subjective evaluation of pain, the majority and the dissent emphasize distinct aspects of the ALJ's role, the investigative and the adjudicatory, as they massage the burden of the claimant and the level of deference to the ALJ under the substantial evidence standard.

2. *Sims v. Barnhart*

Social Security disability cases are highly fact-intensive, which can make comparisons difficult. Nevertheless, whether the court chooses to construe the responsibilities of claimants and administrative law judge more narrowly or more broadly depends on both the circumstances of the case and the sympathies of the panel hearing the appeal. In *Sims v. Barnhart*, a majority consisting of Judge Daniel A. Manion and Judge Frank H. Easterbrook held that a denial of benefits was based on substantial evidence despite the claimant's constellation of ailments and a vocational expert's opinion based on some highly questionable assumptions.¹⁴² The majority rejected *Sims'* claims that the ALJ had not taken into account each condition, considering the effect in combination, because the ALJ had mentioned each of these factors in the opinion.¹⁴³

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 443.

¹⁴² 309 F.3d 424, 432 (7th Cir. 2002).

¹⁴³ *Id.* at 432.

The ALJ acknowledged that Ms. Sims had severely impaired renal function and hypertension.¹⁴⁴ She had also been to the emergency room three times for fainting spells.¹⁴⁵ A computed tomography ("CT") scan revealed "generalized atrophy" and "focal areas of decreased attenuation" consistent with a history of lunar infarcts, small lesions on the brain caused by a lack of blood flow to the affected area.¹⁴⁶ Ms. Sims also complained of headaches.¹⁴⁷ She had a history of recurrent depression, panic disorder, and agoraphobia.¹⁴⁸ Three Global Assessment of Functioning tests were performed; one showed that she would have "moderate difficulty in social, occupational, or school functioning," while two later showed "some difficulty."¹⁴⁹ She also had a borderline IQ score.¹⁵⁰ However, she was able to drive to do errands, care for herself at home and to attend church.¹⁵¹ The ALJ concluded that none of these impairments alone were of sufficient severity to meet the listed requirements.¹⁵² The ALJ questioned the credibility of Ms. Sims' allegations concerning the "intensity, persistence, and limiting effects of her symptoms," finding the allegations inconsistent with the record as a whole.¹⁵³ As a result, the ALJ concluded that the combined effect of her impairments was also not severe enough to rise to the level of a disability.¹⁵⁴ After hearing the advice of a vocational expert who concluded that sufficient jobs were available in the economy that she was capable of performing, the ALJ found her not to be disabled.¹⁵⁵

¹⁴⁴ *Id.* at 428.

¹⁴⁵ *Id.* at 426.

¹⁴⁶ *Id.* at 426 n.1.

¹⁴⁷ *Id.* at 427.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 427 at n.5

¹⁵⁰ *Id.* at 427.

¹⁵¹ *Id.* at 428.

¹⁵² *Id.*

¹⁵³ *Id.* at 431.

¹⁵⁴ *Id.* at 431.

¹⁵⁵ *Id.* at 428.

The majority of the Seventh Circuit panel agreed, and held that Ms. Sims failed to show that the decision was not supported by substantial evidence.¹⁵⁶ The decision hinges on deference. The majority did not discuss the ALJ's credibility determination except to note that it would not disturb a credibility finding unless it was patently wrong.¹⁵⁷ Rather than reweighing the combined effect of Sims' impairments the majority noted that the ALJ had recognized her various complaints.¹⁵⁸ The majority also considered itself persuaded that the decision was supported by substantial evidence because the ALJ had ensured that the vocational expert took the impairments into account when determining whether jobs existed in the economy that Sims could perform.¹⁵⁹ Yet the majority concluded with a statement that casts doubt on its satisfaction with the ALJ's decision, "urg[ing] the SSA in the future to carefully examine the issue of disability in light of a claimant's total impairments."¹⁶⁰

In a strong dissent, Judge Richard Posner objected to how the ALJ had assessed Ms. Sims' various conditions.¹⁶¹ On the basis of her fainting fits alone, he argued, no employer would dare to hire her.¹⁶² He ascribed Ms. Sims' failure to control her blood pressure with medication to her low intelligence rather than to willful noncompliance.¹⁶³ Further, he heavily questioned the vocational expert's determination in several respects. The ALJ had failed to mention Ms. Sims' hypertension and fainting fits in his instructions to the vocational expert.¹⁶⁴ The ALJ also told the expert to take into account her high-school education.¹⁶⁵ However, Ms. Sims

¹⁵⁶ *Id.* at 431.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 432.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (Posner, J. dissenting).

¹⁶² *Id.*

¹⁶³ *Id.* at 433.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

had left school after the 8th grade and later earned a GED.¹⁶⁶ The record contained no evidence of whether her series of strokes had impaired her mental abilities since.¹⁶⁷ As to her ability to work, the dissenter considered her employment too sporadic to be considered substantial gainful employment.¹⁶⁸ The resulting opinion from the vocational expert, Judge Posner argued, "rests on air."¹⁶⁹ He concluded that the claimant was entitled to a competent examination of her disabilities but that she had not received it.¹⁷⁰ Judge Posner scathingly highlights the injustice resulting from a position of extreme deference to the adjudicatory role of the ALJ.

3. Carradine v. Barnhart

In *Carradine v. Barnhart*, Judge Richard Posner, from a position in the majority, considered whether substantial evidence supported a denial of a disability claim where the claimant subjectively experienced severe pain but could offer no objective medical findings demonstrating the severity of the pain.¹⁷¹ Patty Carradine was injured in 1994 when she suffered a back injury as a result of a fall.¹⁷² The back injury caused severe pain and numbness in her right hand.¹⁷³ In the course of her search for treatment with many doctors, she received a variety of diagnoses, including "degenerative disk disease, scoliosis, depression, fibromyalgia, and 'somatization disorder.'"¹⁷⁴ "Somatization disorder" refers to physical distress with a psychological origin.¹⁷⁵

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 432.

¹⁶⁹ *Id.* at 433.

¹⁷⁰ *Id.*

¹⁷¹ 360 F.3d 751 753 (7th Cir. 2004).

¹⁷² *Id.* at 754.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

Although Ms. Carradine presented medical evidence of her underlying physical disorders, she could offer only testimonial evidence concerning the severity of her pain.¹⁷⁶ She testified to pain so disabling that she could not work, and her husband corroborated her distress.¹⁷⁷ The administrative law judge acknowledged that severe pain can be totally disabling but declined to find Ms. Carradine disabled.¹⁷⁸ He did not believe that her pain was as severe as she had testified for several reasons.

Two members of the three-person panel, Judge Posner and Judge Kenneth Ripple, agreed that the ALJ's decision was not supported by substantial evidence. This majority was willing to question the ALJ's credibility determination, ultimately holding that the ALJ's credibility determination was based on serious errors in reasoning rather than on Ms. Carradine's demeanor.¹⁷⁹ Citing law from the Court of Appeals for the Fifth Circuit and the Court of Appeals for the Eighth Circuit, Judge Posner emphasized the difference between genuine pain with a psychological origin and exaggerated claims of pain.¹⁸⁰ Where the existence of an underlying impairment is supported by objective medical evidence, an ALJ cannot dismiss claims of pain merely because the witness testifies to subjective symptoms.¹⁸¹ Pain with a psychological origin, according to Posner, is no less real because it can

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 753-54.

¹⁸⁰ *Id.* at 754-55 (citing *Metz v. Shalala*, 49 F.3d 374, 377 (8th Cir. 1995); *Latham v. Shalala*, 36 F.3d 482, 484 (5th Cir. 1994); *Easter v. Bowen*, 867 F.2d 1128, 1129 (8th Cir. 1989)). Indeed, the single Seventh Circuit decision cited by the majority that considered a somatic pain disorder, *Cass v. Shalala*, displays reasoning seemingly contrary to the majority's reasoning in *Carradine*. See *Cass v. Shalala*, 8 F.3d 552, 554-55 (7th Cir. 1993). The *Cass* panel, consisting of Judges Flaum, Easterbrook and Kanne, unanimously affirmed a denial of benefits based in part on deference to the ALJ's finding that the applicant's claim of disabling pain was not credible. See *Cass*, 8 F.3d at 554-55.

¹⁸¹ *Carradine*, 360 F.3d at 753.

be evaluated only subjectively.¹⁸² Judge Posner stated, "If pain is disabling, the fact that its source is purely psychological does not disentitle the applicant to benefits."¹⁸³ Judge Posner carefully distinguishes between psychosomatic pain and exaggerated or fabricated claims of pain, the second set of which do not qualify an applicant for benefits.¹⁸⁴ The majority accuses the ALJ of entirely misunderstanding this distinction.¹⁸⁵ Somatoform disorders are indeed mentioned as disabling disorders in the Social Security regulations.¹⁸⁶ However, this appears to be the first time this distinction has been made in the Seventh Circuit. The majority voted to reverse and remand for further findings over the strong objections of Judge John Coffey, who argued in his dissent that the majority had run roughshod over longstanding principles of deference.¹⁸⁷

II. GENTLE V. BARNHART

In *Gentle v. Barnhart*,¹⁸⁸ the Seventh Circuit steers away from the harsh stance of the majority in *Sims* and the dissent in *Carradine*. The unanimous opinion, authored by Judge Posner, emphasizes the burden ALJs bear to thoroughly investigate the combined effect of various conditions which may not individually rise to the level of a disability, including conditions that can be evaluated only subjectively. Nicole Gentle suffered from spinal disk disease, but her impairment was pain.¹⁸⁹ The pain was so severe it made it difficult for her to walk, sit, stand, bend or turn, or to lift more than 20 pounds.¹⁹⁰ In addition, she

¹⁸² *Id.* at 754.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 753.

¹⁸⁵ *Id.* at 754.

¹⁸⁶ 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.07 (2006) (criteria for somatoform disorders, i.e., "Physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms.")

¹⁸⁷ *Carradine*, 360 F.3d at 756-58 (Coffey, J. dissenting).

¹⁸⁸ 430 F.3d 865 (7th Cir. 2005).

¹⁸⁹ *Id.* at 866-67.

¹⁹⁰ *Id.*

suffered from a number of other conditions that, while not individually rising to the level of a disability under Social Security regulations, combined to aggravate her pain. She suffered from serious allergies.¹⁹¹ She was a "slow learner" who had difficulty concentrating on complex tasks.¹⁹² She also suffered from depression and anxiety.¹⁹³ Finally, she was obese, standing 5 feet 11 inches and weighing 275 pounds.¹⁹⁴

She had formerly worked as a supermarket delicatessen worker and a school lunchroom attendant.¹⁹⁵ In 2001, she stopped working upon the birth of her second child.¹⁹⁶ At the time of the hearing, she was a single mother, taking care of her eleven-month child at home and sending her four-year-old child to preschool.¹⁹⁷ Yet the administrative law judge who heard her case found that she was capable of substantial gainful employment, in part because she was able to care for her children.¹⁹⁸

The Seventh Circuit Court of Appeals took the ALJ to task for failing to consider the combined effect of Ms. Gentle's various conditions, noting that the effects of conditions must be considered even where the underlying condition is not severe enough to be considered a disability.¹⁹⁹ According to Judge Posner, the social security disability program is not concerned with health per se, but with whether a person is capable of working.²⁰⁰ The court stressed that conditions must not be confused with disabilities, and that any aggravating health factor must be considered for its incremental effect on disability.²⁰¹ According to the court, the ALJ failed to account for

¹⁹¹ *Id.* at 867.

¹⁹² *Id.*

¹⁹³ *Id.* at 868.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 866.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 867.

¹⁹⁹ *Id.* at 868.

²⁰⁰ *Id.*

²⁰¹ *Id.*

how Ms. Gentle's obesity might interact with her spinal disc disease.²⁰² Similarly, the ALJ also failed to account for how her psychiatric problems could affect her ability to work, particularly in combination with her disc disease and her obesity.²⁰³

The Seventh Circuit also strongly disagreed with how the ALJ had evaluated Ms. Gentle's work capabilities. The ALJ had overlooked her uncontroverted testimony that she performed her household tasks with difficulty.²⁰⁴ The opinion emphasized that the relevant question was not whether she could care for herself, but whether she could perform "full-time gainful employment."²⁰⁵ It emphasized that a finding of disability has more to do with the ability to obtain substantial gainful employment than with actual health and pointed out the great differences between the home environment and the labor market.²⁰⁶ Even caring for an infant, a disabled person could find times to sit down and rest.²⁰⁷ However, a delicatessen worker could not miss a couple of days a week or take a two hour break every day and remain employed.²⁰⁸

The court reversed unanimously and remanded for further proceedings consistent with the opinion.²⁰⁹ Although the court did not instruct the ALJ to gather additional medical opinions to develop the record, the lack of information concerning the interaction of Ms. Gentle's various conditions would seem to mandate further development, particularly if the ALJ is inclined to deny benefits again after further consideration.

The decision sends several signals to courts reviewing adverse decisions in Social Security Disability cases. First, the court is unlikely to be satisfied that a decision is supported by substantial evidence

²⁰² *Id.*

²⁰³ *Id.* at 868-69.

²⁰⁴ *Id.* at 868.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 867-68.

²⁰⁸ *Id.* at 867.

²⁰⁹ *Id.* at 869.

simply because an ALJ has listed all the factors she considered when making her decision, as in *Sims v. Barnhart*. Merely following the five-step process and writing up the results will not ensure that a decision will be upheld. The courts will question more closely whether the bridge between the evidence and the conclusion is a *logical* bridge, making level of deference afforded to the ALJ in *Sims* less and less common.

Second, the court will review decisions including an element of subjective evaluation on the part of the ALJ, such as credibility determination, or findings on the combined effects of impairments, against the objective reality of a claimant's likely employability. The analysis will consider not only whether a person is physically and mentally capable of performing some low level of work, and whether there are jobs in the economy fitting that description, but also whether an employer would be likely to hire a person with the claimant's specific impairments.

Finally, when an ALJ's otherwise well-supported opinion collides with the objective reality of employability, courts will continue to ask the ALJ to investigate further rather than deferring to the ALJ in his adjudicatory role. The investigation cannot be screened off from scrutiny by a simple application of procedure.

These trends are a subtle and appropriate adjustment to the application of the substantial evidence standard. Because disability is defined by employability rather than health, it is appropriate for reviewing courts to make these inquiries. The somewhat more empathetic analysis does not end deference. Extreme deference undermines the fairness of the system as a whole. Rather, the approach taken by the Seventh Circuit in *Smith*, *Carradine* and *Gentle* balances deference to the ALJ in her adjudicatory capacity with the need for oversight of the investigatory process.

CONCLUSION

Inquiries into whether a determination of non-eligibility for Social Security Disability Insurance benefits is supported by substantial evidence are fact-intensive. Because these complex factual patterns

provide ample grounds for distinguishing between cases on the basis of the facts, they tend to obscure the divide over the interpretation of the substantial evidence standard in the Seventh Circuit. However, the contrast in the outcomes in cases such as *Sims v. Barnhart* and *Smith v. Apfel* and the vociferous dissents in both cases illuminate the struggle. This divide is particularly striking where evaluation of the claim requires a subjective evaluation of ills suffered by the claimant, or where physicians have difficulty pinpointing the sources of those ailments. In these close cases, the degree of deference accorded to the administrative law judge's decision appears to vary with the guiding philosophy of the panelists.

In *Gentle v. Barnhart*, the Seventh Circuit extended the empathetic strain of interpretation which closely examines the investigation done by the ALJ, rather than taking a position of extreme deference toward the ALJ in her adjudicatory role. This is not a radical departure from existing law, but a shift consistent with the language and purposes of the Social Security Act. This decision signals that while the court will not usurp the role of the administrative law judge, neither will it dilute the substantial evidence standard for the sake of economy or expediency.