Social Security Caselaw Update/Review February 2022 through November 2023

Prepared by Sarah Moum and Amy Gilbrough

Social Security Disability CLE
U.S. District Court for the Western District of Washington, Seattle Courthouse
December 7, 2023

A. Step Five Issues

- *Kilpatrick v. Kijakazi*, 35 F. 4th 1187 (9th Cir. 2022) (number of jobs).
- *White v. Kijakazi*, 44 F.4th 828 (9th Cir. 2022) (number of jobs).
- *Wischmann v. Kijakazi*, 68 F. 4th 498 (9th Cir. 2023) (number of jobs).
- *Leach v. Kijakazi*,70 F.4th 1251 (9th Cir. 2023) (material difference in hypothetical and residual functional capacity).

B. Subjective Symptoms/Medical Evidence

- *Smartt v. Kijakazi*, 53 F.4th 489 (9th Cir. 2022) (subjective symptoms, medical opinion).
- *Farlow v. Kijakazi*, 53 F. 4th 485 (9th Cir. 2022) (state agency medical consultant).
- *Woods v. Kijakazi*, 32 F.4th 785 (9th Cir. 2022) (new medical evidence rules).
- *Kitchen v. Kijakazi*, 82 F.4th 732 (9th Cir. 2023) (VA rating decisions, new medical evidence rules, subjective symptoms, paragraph C criteria).
- *Glanden v. Kijakazi,* No. 22-35632, -- F.4th -- (9th Cir. November 16, 2023) (step two, subjective symptoms).

C. Other issues

- *Cody v. Kijakazi*, 48 F.4th 956 (9th Cir. 2022) (longer term implications of *Lucia).*
- *Washington v. Kijakazi*, 72 F.4th 1029 (9th Cir. 2023) (jurisdiction of Magistrate Judge, remedy).
- *Allen v. Kijakazi*, 35 F. 4th 752 (9th Cir. 2022) (suspension of Title II benefits for sexually violent predator).
- *Kaufman v. Kijakazi*, 32 F.4th 843 (9th Cir. 2022) (Seila Law).
- *Miskey v. Kijakazi*, 33 F.4th 565 (9th Cir. 2022) (government pension offset, remedy).

A. Step Five Issues.

- *Kilpatrick v. Kijakazi*, 35 F. 4th 1187 (9th Cir. 2022) (number of jobs).
- *White v. Kijakazi*, 44 F.4th 828 (9th Cir. 2022) (number of jobs).
- *Wischmann v. Kijakazi*, 68 F. 4th 498 (9th Cir. 2023) (number of jobs).
- *Leach v. Kijakazi*,70 F.4th 1251 (9th Cir. 2023) (material difference in hypothetical and residual functional capacity).

***Kilpatrick v. Kijakazi*, 35 F. 4th 1187 (9th Cir. 2022).**

Filed: May 27, 2022.
AFFIRMED

VE Testimony: Kilpatrick could perform work as an usher (64,00 jobs), children's attendant (50,000 jobs), and sandwich board carrier (9,500 jobs). He stated his testimony was consistent with the DOT. He explained his methodologies including use of a software program (which is not otherwise identified in the decision). *Kilpatrick*, at 1190.

Representative response: The ALJ allowed Kilpatrick to submit a post-hearing brief. He submitted a letter which represented that the numbers of jobs were much lower with numbers relying on data published by the Department of Labor Occupational Employment Statistics (OES). To reach his numbers, he used a "straight-line method" also known as an "equal distribution method": he started with the number of jobs in the OES group for each job, divided it by the DOT occupations in that group, and then multiplied it by the percentage of full-time jobs for the larger OES group.

Agency Action: The ALJ noted he had received the post hearing submission but did not comment on the submission further. The Appeals Council affirmed.

Discussion

The Court affirmed. The Court found the "significant and probative" evidence standard applied to the evidence submitted by Kilpatrick:

> "This standard appropriately captures the competing interests at stake. To engage in meaningful review of a disability claim, an ALJ may not ignore significant probative evidence that bears on the disability analysis. But at the same time, a rule requiring ALJs to address every argument or piece of evidence, however meritless or immaterial, would unduly detain ALJs in their orderly consideration of Social Security disability benefits claims.

Id. at 1193.

Court held that, unlike *Buck v. Berryhill*¸ 869 F.3d 1040, 1051 (9th Cir. 2017), where the competing evidence was "too striking to be ignored", the evidence Kilpatrick submitted was not significant and probative. The attorney did not replicate the VE's methodology, the attorney had no expertise in calculating job figures in the national economy, his information was from 2011, and there were obvious reasons to question his methodology. *Id.* at 1194.

///

***White v. Kijakazi*, 44 F.4th 828 (9th Cir. 2022).**

Filed: August 8, 2022.
REVERSED AND REMANDED.

VE testimony: In response to a hypothetical which found White could perform a limited range of sedentary work, the VE testified White could perform the following sedentary jobs: table worker (72,000 jobs), assembler (65,000 jobs), and touch up inspector (32,000 jobs). *White* at 830-31.

Representative response: On questioning from White's rep, the VE testified the numbers came indirectly from the Bureau of Labor Statistics (BLS), and that she used SkillTRAN to get the actual numbers. She testified that SkillTRAN is widely used and very reliable. White's representative did not offer any evidence contradicting the VE's estimated job numbers at the hearing level. At the Appeals Council, his attorney submitted job numbers generated using SkillTRAN's "flagship program" Job Browser Pro, which showed there were 2,957 table worker jobs; 0 assembler jobs; and 1,333 film touch up inspector jobs. *Id.* at 832-33.

Discussion.
Uncontradicted VE job numbers are inherently reliable and ordinarily sufficient by themselves to support an ALJ's step five finding. *Id.* at 835.

Waiver
Claimant must raise challenges at some point during the administrative proceedings to preserve the challenge on appeal in district court. The Court recognized a claimant will rarely if ever be in a position to anticipate the occupations a VE might list or to know the corresponding job numbers. The Court did not however, categorically find a claimant would have good cause for submitting VE rebuttal evidence to the AC, without submitting it to the ALJ. Instead, the Court considered White's evidence on appeal because it found the Appeals Council had found the claimant had "good cause" when it said it had considered White's reasons and made them part of the record. *Id.* at 836.

Evidence submitted was significant and probative.
Court found White's evidence was significant and probative because it was produced using a data source and methodology frequently relied on by the SSA and which, according to White, was the same methodology the vocational expert had used. *Id.* at 836.

Not harmless error
Had the AC credited White's job numbers, there is a reasonable possibility that the outcome may have been different. *Id. at* 837, *citing Guitierrez v. Commissioner,* 740 F.3d 519, 518-29 (9th Cir. 2014), *Beltran v. Astrue*, 700 F.3d 386, 390 (9th Cir. 2012).

Remand was the appropriate remedy.
Relying on *Buck*, the Court found it was appropriate to allow the ALJ to address the evidence and to resolve the inconsistency between the job-number estimates provided by White and the VE. *White* at 837.

***Wischmann v. Kijakazi*, 68 F. 4th 498 (9th Cir. 2023).**

Filed: May 17, 2023.
AFFIRMED

VE testimony: VE identified jobs as a bakery helper (59,000 positions nationwide), counter clerk (25,000 positions nationwide), and agricultural sorter (10,600 positions nationwide). The VE testified he relied on Skill TRAN/Job Browser Pro in estimating the number of jobs. *Wischmann* at 501.

Representative Response: Wischmann submitted computer printouts to the Appeals Council, but the pages did not themselves indicate their source and Wischmann's letter to the Appeals Council did not reference those pages. The pages did not indicate the process by which the data were generated. Also, the letter, which recited job numbers purportedly obtained from Job Browser Pro, did not completely correspond with the numbers in the printouts. *Id.* at 503-04.

Waiver.
A claimant must preserve his challenge to vocational expert job numbers testimony by raising it at the administrative level. Wischmann did so by asking the VE how he calculated the estimates for the jobs he cited and which date source he used and by submitting contrary job-number estimates to the Appeals Council which the Appeals Council considered and made a part of the record. *Id.* at 506.

Discussion.
Applying the significant and probative standard and comparing this case to *Buck, Kilpatrick, and White*, the Court found the evidence Wischmann submitted was not probative based on several factors: (1) the letter provided no information about how the job numbers were produced, other than the name of the software program used; (2) the letter did not state who produced the Job Browser Pro outputs, *i.e.*, whether it was a VE with expertise or the attorney himself, who had no identified expertise; (3) the letter did not establish that the attorney replicated a methodology that was set forth by the VE at the hearing; (4) the letter did not explain what queries were entered into the computer program, what variables were changed, or what filters were applied to the data; (5) the letter did not state which version of the program was used to determine whether the program was current or out of date; (6) neither the letter nor the printout pages themselves directly stated that the printout data was produced with Job Browser Pro; (7) the raw data on the computer printout was not comprehensible to a lay person; and (8) there were reasons to question the reliability of the computer printout, such as that the

numbers showing on the printout did not match the numbers presented in the attorney's cover letter. *Id*. at 506-07.

***Leach v. Kijakazi*, 70 F.4th 1251 (9th Cir. 2023).**
Filed: June 15, 2023
REVERSED AND REMANDED

Summary: Leach's attorney compared the hearing hypothetical and the residual functional capacity assessment, which differed in three respects. While the ALJ does not need to use identical wording in the hypothetical and the RFC assessment, the Court found the language in the hypothetical and the RFC assessment materially differed such that the ALJ did not meet the burden of producing evidence of jobs Leach could perform. *Leach* at 1257.

Hypothetical for simple instructions materially differed from RFC assessment to short, simple instructions based on DOT reasoning level 1 and 2 definitions.
The ALJ did not meet burden of showing a claimant with an RFC for "short simple" instructions could perform jobs requiring a reasoning level of two, where the hypothetical question only limited the claimant to "simple" instructions, omitting the word "short." *Id.* at 1256-57.

In the DOT, reasoning level one jobs require simple one or two step instructions, while level two jobs require detailed but uninvolved instructions. A level two job *could* require an individual to follow more than two steps. The court stressed it was not finding a limitation to short simple instructions was a limitation to reasoning level one jobs. Some level two jobs could have short simple instructions, but where the hypothetical omitted the word "short" such that the VE did not testify about this limitation, the Court could not conclude that the reasoning level two jobs cited required only short, simple instructions. *Id.* at 1257.

Hypothetical limiting the individual to work environments with occasional changes, differed materially from residual functional capacity for a work environment that was predictable with few work setting changes.
The court noted that occasional, a term of art in the context of physical exertion meaning from very little up to 1/3 of the time, could be more than few, since "a few" suggests a small, absolute number while "occasional" suggests from time to time without an absolute numerical limit. *Id.* at 1257-58.

Hypothetical for jobs with no more than minimal judgment did not differ materially from residual functional capacity for work requiring little or no judgment where unskilled jobs were identified.
The VE expert identified unskilled work which is defined as work that needs little or no judgment. This error was harmless. *Id.* at 1256.

B. Subjective symptoms/medical evidence.

- *Smartt v. Kijakazi*, 53 F.4th 489 (9th Cir. 2022) (subjective symptoms, medical opinion).
- *Farlow v. Kijakazi*, 53 F. 4th 485 (9th Cir. 2022) (state agency medical consultant opinion).
- *Woods v. Kijakazi*, 32 F.4th 785 (9th Cir. 2022) (new rules for evaluating medical evidence).
- *Kitchen v. Kijakazi*, 82 F.4th 732 (9th Cir. 2023) (VA rating decisions, new rules, subjective symptoms, paragraph C criteria).
- *Glanden v. Kijakazi,* No. 22-35632, -- F.4th -- (9th Cir. November 16, 2023) (step two, subjective symptoms)

***Smartt v. Kijakazi*, 53 F.4th 489 (9th Cir. 2022).**

Filed: November 17, 2022.
AFFIRMED

Medical Evidence – Old Rules - Treating physician was more like a consultative examiner.

The Court noted the treating physician whose opinion was at issue was not "really her treating physician as that title would normally be understood." He saw her three times in three years solely to complete medical source statements and only because her nurse practitioner told her he was not qualified to sign her disability paperwork. When Smartt saw this doctor, she declined a standard vitals check stating she was just there to have him sign papers. *Smartt* at 495.

Medical Evidence – Old Rules - Conflicts between the physician's opinion and the medical evidence justified rejection.

The ALJ properly found the opinion which found Smartt could not sit more than 2 hours, stand more than 2 hours, or lift more than 10 pounds, and would need to alternate between sitting and standing every 20 minutes, conflicted with contemporaneous medical records which showed she had "normal range of motion" and use of her extremities, was "neurologically intact", "could ambulate without an assistive device", and that her condition improved after surgery. The ALJ "permissibly concluded" the treating physician's opinions were "overly restrictive" when "most" of the medical records documented improvement in strength, walking, and daily activities *Id.* at 495-97.

Medical Evidence – Old Rules – ALJ reasonably resolved a conflict in an opinion regarding the need for an assistive device.

A consultative examiner's report contained three statements regarding an assistive device. First, in the History and Physical Section of the report, he wrote, "the claimant's walker is medically necessary all the time." Second, he checked "yes" in response to the assessment's boilerplate question, "Does this individual require the use of a cane to ambulate?" Third, in the "Medical Source Statement" which asked whether Smartt could

ambulate independently without using a wheelchair, walker or [two] canes or [two] crutches, he checked “yes.” The ALJ found Smartt was limited to light work and found that Smartt would need assistance when ambulating any distance over fifty feet.” *Id.* at 496.

Smartt argued the examiner found she needed to use a cane all the time and that the ALJ did not properly address this limitation. The Court looked at all the statements in the report concerning Smartt’s need for a cane and determined they were “at best, not internally inconsistent and, at worst, ambiguous.” The court found the ALJ resolved any discrepancies in the report to mean that Smartt needed assistance when ambulating any distance over 50 feet. *Id.*

Subjective symptoms.

1. **ALJ properly rejected testimony based on contradictions between testimony and other evidence concerning activities.**
   ALJ identified a direct contradiction regarding Smartt’s ability to drive. At hearings in 2018 and 2019, she testified she had not driven since 2015, but in a 2016 daily activities questionnaire, Smartt reported she routinely drove a car and her daily activities included driving her daughter to school. *Id*. at 497.

   In 2016, Smartt reported that since 2009 she had been unable to walk without the assistance of a walker, and she testified that she used a cane, crutch, or wheelchair for assistance, but the ALJ identified medical records which did not document the use of an assistive device, contrary to her testimony. *Id*. at 479-98.

2. **Reliance on daily activities as not unreasonable.**
   Where Smartt reported constant 10/10 pain, the ALJ properly rejected this testimony based on chores she performed in an average day including cooking, cleaning, caring for her daughter, doing laundry, grocery shopping, playing board games and doing crafts. *Id.* at 499-500. In a footnote, the Court suggested this alone might not be a sufficient reason for rejecting her testimony. (“But having properly discounted Smartt's subjective testimony elsewhere in his decision, the ALJ did not need to include in his list of Smartt's daily activities all of her caveats accompanying her description of those activities.”). *Id.* at 500, n. 3.

3. **Conservative treatment.**
   Although Smartt had cervical spine surgery, the Court found that other than the initial repair, Smartt received routine and conservative treatment which included physical therapy, temporary use of a neck brace and wheelchair, and ongoing opioid pain medication. *Id.* at 500.

Use of objective medical evidence in the subjective symptom finding.

When objective medical evidence in the record is inconsistent with the claimant’s subjective testimony the ALJ may find it undercuts such testimony. *Smartt* at 498. An

ALJ cannot, however, render a claimant's subjective symptom testimony superfluous by demanding positive objective medical evidence fully corroborating every allegation within the testimony. *Id.* In *Smartt* the "objective medical evidence" was explicitly contradictory – such as Smartt's statement that she always used an assistive device despite medical evidence showing she was not using an assistive device. *Id.* at 497-98.

Clear and convincing standard.
The Court clarified that the clear and convincing standard is not whether the Court itself is convinced, but rather whether the ALJ's rational is clear enough that it has the power to convince. Further, it requires the ALJ show his or her work. *Id*. at 499.

***Farlow v. Kijakazi*, 53 F.4th 485 (9th Cir. 2022).**
Filed: November 16, 2022.
AFFIRMED.

Medical Evidence – old rules – standard applied to state agency medical consultants.
Clear and convincing standard applies to uncontradicted treating and examining physicians, not to uncontradicted opinions of the state agency medical consultants. The Court found the rule that an ALJ gave more weight to treating and examining sources stemmed from regulations and nothing in the regulations required the ALJ to defer to an opinion of a non-treating, non-examining medical source. *Farlow* at 488.

The ALJ properly rejected the state agency medical consultant's opinion when finding that the medical consultant did not examine Farlow, did not provide a persuasive basis for his opinion, and because his opinion was not consistent with the record. *Farlow* at 488-89.

ALJ's can independently review and form conclusions about medical evidence when assessing residual functional capacity.
The Court wrote, "In evaluating the weight given to a non-examining, non-treating doctor's opinion, we have held that an ALJ "may reject the opinion of a non-examining physician by reference to specific evidence in the medical record." Inherent in this standard is a presumption that ALJs are, at some level, capable of independently reviewing and forming conclusions about medical evidence to discharge their statutory duty to determine whether a claimant is disabled and cannot work." *Id.* at 488. The Court affirmed the ALJ's assessment of a medium RFC, notwithstanding the fact that the only medical opinion evidence identified a light RFC.

***Woods v. Kijakazi*, 32 F.4th 785 (9th Cir. 2022).**
Filed: April 22, 2022.
AFFIRMED

Medical Opinion – New Rules.
Former circuit rules for weighing medical evidence based on the extent of the doctor's relationships with the claimant no longer apply and the "specific and legitimate standard" is clearly irreconcilable with the new regulations.

The ALJ cannot reject an examining or treating doctor's opinion as unsupported or inconsistent without providing an explanation supported by substantial evidence. *Woods* at 792. The ALJ should endeavor to use the terms "consistent" and "supported" with precision. *Id.* at n. 4.

Substantial evidence supported the ALJ's inconsistency finding, and overall finding that the opinion was unpersuasive, in this case. *Id.* at 793.

Inconsistent evidence
ALJ reasonably found opinion of marked and extreme limitations in various cognitive areas, including memory and concentration, was inconsistent with mental status exams showing normal cognition and memory as well as evidence that the claimant's income had not significantly decreased notwithstanding additional caring duties. *Id*. at 792-93.

Checkbox opinion
ALJ properly found unpersuasive a counselor's letter containing a checked box agreeing with another medical source opinion where the counselor's concurring opinion was wholly unexplained and thus unsupported. *Id*. at 793.

***Kitchen v. Kijakazi*, 82 F.4th 732 (9th Cir. 2023)**
Filed: September 14, 2023
AFFIRMED

Summary: Kitchen was a 100% disabled veteran with admittedly marked limitations in social function. Applying the new rules for evaluating medical evidence, the ALJ was not required to discuss the VA rating decision, properly rejected the opinions of his examining physician, made a residual functional capacity assessment that was consistent with marked limits in social function, and did not err when he found the claimant did not satisfy the paragraph C criteria.

In cases filed after March 27, 2017, the ALJ is not required to address VA Rating Decisions.
McCartey v. Massanari, 298 F.3d 1072 (9th Cir. 2002), is no longer good law for cases filed after the March 27, 2017, the effective date of the revised regulations regarding evaluation of medical evidence. Those regulations state that decisions by other governmental agencies, including the VA are "inherently neither valuable nor persuasive." Under the new regulations the ALJ is not required to include any analysis of a decision made by any other governmental agency. *Kitchen* at 738.

Subjective symptoms – improvement.
The ALJ properly rejected Kitchen's testimony where the record showed he experienced a gradual improvement in his functioning with medication and psychotherapy. *Id.* at 739.

Subjective symptoms – mild/moderate inconsistent with disability.
The ALJ properly rejected Kitchen's testimony as inconsistent with the medical evidence and other evidence in the record because "most of Kitchen's physicians opined that his mental impairments were "mild" or "moderate" rather than disabling. *Id.*

Medical Opinions – new rules - marked limitations in social function consistent with RFC assessment with some social limitations.
The RFC, which limited Kitchen to working in an environment that did not require close cooperation with coworkers and supervisors and which required that he work away from the public, was consistent with the examining physician's opinion that Kitchen would have "marked interpersonal problems in an employment situation." *Id.* at 740.

Medical Opinions – new rules - not supported by treatment notes, checkbox form.
At issue was the opinion of a treating source, who found Kitchen was markedly, severely, or extremely limited in almost all functions included in the typical Social Security mental residual functional capacity assessment including understanding, remembering, and carrying out very short and simple instructions and making simple work-related decisions. There was an examining source who found he was only mildly impaired in cognitive function and mildly to markedly impaired in his ability to interact with others. A medical expert testified Kitchen would be markedly limited in interacting with others but was doing very well or above average in terms of concentration, persistence, and pace. *Id.* at 736-37.

The Court found substantial evidence supported the ALJ's finding that the treating doctor's opinion was inconsistent with the medical records and the treating doctor's own unremarkable mental status examinations which stated Kitchen was engaged, alert and oriented, and only "slightly anxious." The Court also found the ALJ properly rejected the treating source opinion based on the medical expert testimony, because it was unsupported by Dr. Adams's observations, and was set forth in a check box form. *Id.* at 740-41.

Paragraph C criteria.
The ALJ properly found Kitchen did not satisfy the paragraph C criteria, as described in Listing 12.00A(2)(c), where the ALJ found the record did not support a finding he had marginal adjustment, where Kitchen had responded well to medication, where Kitchen did not have regular treatment, and where Kitchen's reports were contradicted by objective evidence. *Id.* at 741.

***Glanden v. Kijakazi,* No. 22-35632, -- F.4th -- (9th Cir. November 16, 2023).**
Filed November 16, 2023.
REMANDED

Step Two.
The step two analysis is a threshold showing. "[C]laimants need only make a de minimis showing for the analysis to proceed past this step." *Glanden*, slip op. at 10. "Properly denying a claim at step two requires an unambiguous record showing only minimal limitations." *Id.* at 10. "Once a claimant presents evidence of a severe impairment, an ALJ may find an impairment or combination of impairments "not severe" at step two "*only if* the evidence establishes a slight abnormality that has no more than a minimal effect on an individual's ability to work." *Id.* at 11. If an ALJ "is unable to determine clearly the effect of an impairment . . . on the individual's ability to do basic work activities, the sequential evaluation should not end with the not severe evaluation step. Rather it should be continued. *Id.* at 11, citing SSR 85-28.

Glanden met the step two bar by submitting evidence that he had multiple chronic medical conditions, even though there was no treatment for these conditions during the relevant period because, as he alleged, he was not able to pay for treatment, and in addition a medical expert testified that based on Glanden's records, his symptoms were serious enough to require treatment. *Id.* at 12. Court distinguished this case from *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005). *Id.* at 14.

Failure to seek treatment – inability to pay.
ALJ erred when he rejected Glanden's statement that he was not able to pay for treatment, finding that he had access to free clinics, when Glanden testified such clinics would not treat his condition. *Id.* at 12-13.

Failure to seek treatment – modification of activities.
ALJ erred when he rejected Glanden's statements based on failure to seek treatment, when he ignored Glanden's testimony that in the absence of treatment Glanden managed his pain by modifying his activities on some days to cope with his symptoms including spending time lying down for hours every day, avoiding people, and staying home and doing very little. *Id.* at 14, citing SSR 16-3p.

Timeframe is important.
ALJ erred when he rejected Glanden's testimony about limitations based on his ability to perform yard work after the period at issue. *Id.* at 16. Likewise, evidence of improvement after surgery in 2019 was not a clear and convincing reason for rejecting his statements concerning symptoms from December 2017 to June 2018. *Id.* at 18.

Objective Evidence in subjective symptoms finding.

"[S]ubjective pain is not always verifiable through a physical examination." *Id.* at 17. The ALJ erred when he rejected Glanden's testimony because the results of exams or imaging did not fully substantiate Glanden's pain reports.

Drug-seeking Behavior.
In the absence of evidence that the claimant exaggerated his pain, evidence of drug seeking behavior alone was not a clear and convincing reason for rejecting Glanden's testimony, particularly where such behavior occurred years before the relevant period.

Dissent.

C. Other issues.

- *Cody v. Kijakazi*, 48 F.4th 956 (9th Cir. 2022) (Longer term implications of *Lucia).*
- *Washington v. Kijakazi*, 72 F.4th 1029 (9th Cir. 2023) (Jurisdiction of Magistrate Judge, remedy).
- *Allen v. Kijakazi*, 35 F. 4th 752 (9th Cir. 2022) (Suspension of Title II benefits for sexually violent predator).
- *Kaufman v. Kijakazi*, 32 F.4th 843 (9th Cir. 2022) (Seila Law).
- *Miskey v. Kijakazi*, 33 F.4th 565 (9th Cir. 2022) (government pension offset, remedy).

***Cody v. Kijakazi*, 48 F.4th 956 (9th Cir. 2022).**

Filed: September 8, 2022.
REMANDED.

Summary: In June 2018, the Supreme Court decided *Lucia v. SEC*, 138 S.Ct. 2044, 585 U.S. __, 201 L.Ed. 2d 464 (2018), which in simplest terms, found Securities and Exchange Commissioner ALJs were not duly appointed under the Constitution's Appointment Clause. On July 16, 2018, the Commissioner responded to *Lucia*, ratifying any appointments of Social Security ALJs. Then, in March 2019, the Commissioner stated that in response to timely raised Appointment Clause challenges, the Appeals Council would vacate pre-ratification ALJ decisions and assign cases to a new properly appointed ALJ.

In September 2017, ALJ Mauer issued a decision finding Cody not disabled. Cody filed a district court appeal of the September 2017 decision but did not raise *Lucia* even though *Lucia* had been decided about three months before Cody's appeal was filed. The case was remanded on the merits. On remand, the case was once again considered by ALJ Mauer, now ratified by the Commissioner, and she issued a second denial decision. Cody once again filed a district court appeal, this time arguing remand was appropriate because ALJ Mauer was not properly assigned to the case under *Lucia*.

The Court stressed that an Appointments Clause violation is not a mere technicality or a quaint formality – such a violation weakens our constitutional design. *Cody* at 960.

Under *Lucia*, where a hearing has occurred with a judge who is not duly appointed, the new hearing cannot be conducted by the same ALJ even if that ALJ received a constitutional appointment after the first hearing.

Waiver.

Appointments Clause challenges with a *Cody* fact pattern are not waived even though it could have been raised in the first Court proceeding.

***Washington v. Kijakazi*, 72 F.4th 1029 (9th Cir. 2023).**
Filed: July 3, 2023
AFFIRMED

Summary: Washington, a pro se claimant, appealed a decision remanding his case for further proceedings, arguing that the Magistrate Judge did not have the authority to issue a final judgment and that the proper remedy was remand for calculation of benefits.

The Court held the Magistrate Judge had authority to issue final judgment where pro se claimant was fully informed of the consequences of consent and did not decline consent.

The Court rejected the claimant's argument that he was entitled to remand for calculation of benefits. First, because the ALJ decision stopped at step two, outstanding issues—that is, findings at each subsequent step—required resolution before a determination of disability could be made. Second, inconsistencies between the medical opinion evidence, including Washington's treating doctor and the consulting medical expert, warranted remand.

***Allen v. Kijakazi*, 35 F. 4th 752 (9th Cir. 2022).**
Filed: May 23, 2022.
AFFIRMED
This case dealt with 42 U.S.C. 402(x), which is the part of the statute that suspends disability insurance benefit payments to prisoners, certain other inmates of publicly funded institutions, and fleeing felons. Allen applied for and began receiving benefits while he was detained at a State Hospital pending jury trial under the SVPA (Sexually Violent Predator Act). Ultimately, SSA determined they should not have paid Allen benefits because he was confined and maintained at public expense. They stopped his benefits and charged him with an overpayment.

Allen argued he had not yet been found to be a sexually violent predator and therefore he did not meet the criteria of 41 U.S.C. 402(x). The Court held that the probable cause hearing that preceded his jury trial was sufficient to meet the criteria for 402(x).

***Kaufman v. Kijakazi*, 32 F.4th 843 (9th Cir. 2022) (constitutional violation was harmless, ruling on 59(e) motion not an abuse of discretion).**
Filed: April 27, 2022.
AFFIRMED

While removal provision violated the constitution, it was harmless in this case.
The Court concluded the Social Security Act violated the Constitution because it provided that the Commissioner could only be removed during their six-year term for

“neglect of duty or malfeasance in office.” But the removal provision was severable from the remainder of the statute. The unconstitutional removal provision did not affect the authority of underlying officials to act and therefore actions taken by the agency were not void. Because the claimant could not demonstrate actual harm, the unconstitutional provision had no effect on his case.

59(e) Motion.
District’s court ruling on 59(e) motion was reviewed for abuse of discretion and District Court did not abuse its considerable discretion in its ruling on the motion.

***Miskey v. Kijakazi*, 33 F.4th 565 (9th Cir. 2022) (government pension offset, remedy).**
Filed: May 3, 2022.
AFFIRMED.

Government pension offset applied to spousal benefits where the claimant had both covered and non-covered employment.

The district court did not abuse its discretion by applying the default rule and remanding for further proceedings. As the Court held, remand is “required” to allow the agency to consider in the first instance an issue that it has not previously addressed. *Miskey*, at 575.