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Administrative Deference and the Social Security Administration: Survey and Analysis

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ADMINISTRATIVE DEFERENCE AND THE SOCIAL SECURITY ADMINISTRATION: SURVEY AND ANALYSIS

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The purpose of this Article is to examine the role of administrative deference when decisions of the Social Security Administration are reviewed by federal courts. The concept of administrative deference to administrative agencies in federal courts goes back to the 1930's during the rise of the New Deal—with the high-water mark reached by the Supreme Court in Chevron v. National Resources Defense Council. Since this point, there has been a growing chorus calling to re-examine or outright roll back the deference owed to these agencies when their decisions are reviewed in federal court. Prior to rewriting the standards, this Article seeks to fill in the gaps and show where administrative deference matters when decisions of the Social Security Administration are reviewed and in what circumstances.

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INTRODUCTION

There has been increasing discussion within the federal judiciary and academic circles over the appropriate level of deference to afford the actions of administrative agencies. Much of the scholarship up to this point has focused on the merits of deference, its role in the separation of powers, the proper allocation of power between the three branches of government, and the practical effects of deference on administrative decision-making.[1] The Court's criticism of deference has turned upon the appropriate allocation of power between the executive, judicial, and legislative branches.[2] Before making changes, it is useful to understand the impact of the existing deference regime.

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[1] *See* Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 959 (2018); Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016). *See also* Charles J. Cooper, *The Flaws of Chevron Deference*, 21 TEX. REV. L. & POL'Y 307, 310–11 (2016); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative State*, 10 N.Y.U. J.L. & LIBERTY 475, 497–07 (2016).

[2] *See Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring); *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 315–28 (2013) (Roberts, C.J., dissenting); *Michigan v. E.P.A.*, 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–54 (10th Cir. 2016) (Gorsuch, J., concurring).

This Article will take measure of the successes and failures of administrative deference as applied to the Social Security Administration. Part I will examine the administrative structure erected by the Social Security Administration. Part II will introduce the major types of administrative deference. Part III will be an exhaustive examination of how administrative deference is applied to actions taken by the Social Security Administration. This Article adds to the existing scholarship concerning the impact of deference on various agencies such as the Environmental Protection Agency, the Securities and Exchange Commission, the Federal Trade Commission, and the like.[3]

In 2020, there were 23,830 civil actions filed seeking review of disability determinations reached by the Social Security Administration ("SSA"), accounting for five percent of the total caseload in the federal judiciary.[4] With an average monthly disability benefit of $1,277 a month,[5] the 2020 caseload should be appropriately valued at $365 million in benefits per year. The majority of the awards will be made to applicants aged fifty and older,[6] and $6.2 billion[7] in benefits will be paid until the applicants transition to the Social Security retirement system. Any actions taken by federal courts that increase or decrease the current

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[3] *See* Phillip Dane Warren, *The Impact of Weakening Chevron Deference on Environmental Deregulation*, 118 COLUM. L. REV. ONLINE 62, 63 (2018) (discussing the impact of changes to administrative deference with the Environmental Protection Agency); Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 248 (2014) (discussing *Chevron* deference and Federal Trade Commission); Steven J. Cleveland, *Resurrecting Court Deference to the Securities and Exchange Commission: Definition of "Security,"* 62 CATH. U. L. REV. 273, 300 (2013).

[4] *Table C-2. U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending December 31, 2019 and 2020*, https://www.uscourts.gov/sites/default/files/data_tables/jb_c2_0930.2020.pdf (last visited Apr. 5, 2022) [https://perma.cc/F4FB-4K2U].

[5] *Social Security Administration Fact Sheet*, SOC. SEC. ADMIN., https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf (last visited Feb. 21, 2022) [https://perma.cc/8K6K-5DHX].

[6] *Chartbook: Social Security Disability Insurance*, CTR. ON BUDGET AND POL'Y PRIORITIES (Feb. 12, 2021), https://www.cbpp.org/research/social-security/social-security-disability-insurance-0 [https://perma.cc/TB9M-4P5F].

[7] 17 years multiplied by 365,000,000.

allowance rate of approximately thirty-four percent[8] will have an enormous impact. Even this staggering figure leaves out the possibility of an increase in the number of cases being appealed to federal court if a more favorable standard of review is adopted by federal courts.

I. SOCIAL SECURITY DISABILITY ADJUDICATION PROCESS

A. Statutory Scheme

Disability benefits under the Social Security Act were not included in the initial program.[9] While this issue was debated at the time the Act was passed, Congress took a piecemeal approach and put off the enactment of a disability benefit.[10] It was not until the 1956 Amendments to the Social Security Act that a disability benefit was enacted.[11] Disability was defined in the 1956 Amendments as, "the 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 to be of long continued or indefinite duration."[12] Benefits were further limited to workers who had worked to earn twenty quarters of coverage in the previous forty quarters,[13] workers who were age fifty or older,[14] and workers with a six month waiting period before the beginning of benefits following the onset of disability.[15]

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[8] *See Chartbook*, *supra* note 6.

[9] *See* Social Security Act, ch. 531, 49 Stat. 620, 620–34 (1935) (codified as amended in scattered sections of 42 U.S.C. ch. 7).

[10] *See* John R. Kearney, *Social Security and the "D" in OASDI: The History of a Federal Program Insuring Earners Against Disability*, 66 SOC. SEC. BULL., Aug. 2006, at 1, 3; EDWARD D. BERKOWITZ, DISABLED POLICY: AMERICA'S PROGRAMS FOR THE HANDICAPPED 72 (Cambridge Univ. Press 1987).

[11] Social Security Amendments of 1956, ch. 836, § 101, 70 Stat. 807, 807 (1956) (current version at 42 U.S.C. §§ 401–422).

[12] *Id.* § 233, at 815.

[13] *Id.* The policy behind this requirement is to limit disability benefits to those people who were recently and substantially part of the workforce. *See Chartbook*, *supra* note 6.

[14] Social Security Amendments of 1956, § 223, at 815–16.

[15] *Id.*

Following on the heels of the 1956 creation of the Social Security Disability Insurance program, Congress continued to gradually expand the program over the next sixteen years. In 1958, Congress extended disability benefits to dependents, spouses and children of disabled workers and made disability benefits payable for up to a year prior to the filing for benefits.[16] In 1960, Congress acted to eliminate the age fifty requirement for the receipt of disability benefits and permitted disabled workers to attempt to work for a period of nine months without losing their benefits (also known as the Trial Work Program).[17] In 1965, Congress made a substantial change to the still fledgling program by better defining disability from a "long continued or indefinite duration" to lasting or being expected to last for at least twelve months.[18] This change expanded benefits to an additional 60,000 workers.[19] The 1967 Amendments passed by Congress provided disability benefits to disabled widowers over the age of fifty and clarified that in order to be disabled the worker must be unable to do their prior work and any other appropriate work in the national economy, regardless of whether they could or could not be hired to perform the job in question.[20] The 1972 Amendments reduced the waiting period for benefits from six to five months, extended Medicare after twenty-four months of disability, and, importantly, established the Supplemental Security Income ("SSI") program that was later implemented in 1974.[21]

The Supplemental Security Income program bears some similarities to the Social Security Disability Insurance ("SSDI")

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[16] Social Security Amendments of 1958, 72 Stat. 1013, 1013 (1958) (current version at 42 U.S.C. §§ 401–422).

[17] Social Security Amendments of 1960, § 403, 74 Stat. 924, 968–69 (1960) (current version at 42 U.S.C. § 423).

[18] Social Security Amendments of 1965, § 106, 79 Stat. 286, 337 (1965) (current version at 42 U.S.C. § 416).

[19] *See* Kearney, *supra* note 10, at 12.

[20] Social Security Amendments of 1967, § 158(d)(2), 81 Stat. 821, 867–68 (1968) (current version at 42 U.S.C. § 402).

[21] Robert M. Ball, *Social Security Amendments of 1972: Summary and Legislative History*, 36 SOC. SEC. BULL. 3, 3, 10, 13 (1973).

insofar as they both use the same definition of disability.[22] The major difference is that while SSDI pays benefits based upon the contributions paid by the worker into the Social Security Trust Fund towards retirement, SSI is a disability program for workers who are disabled and of very limited financial means.[23] It does not rely upon the wages earned by the worker and instead pays a set amount based on federal and state law.[24] As a practical matter, many workers who would qualify for SSDI would then receive a sufficient level of benefits that would disqualify them from SSI.[25] There are, however, workers with limited earnings who qualify for both SSDI and SSI.[26]

B. SSA Regulatory Structure

In furtherance of its responsibilities to provide benefits under the SSDI and SSI programs, the SSA is empowered to enact regulations in this regard.[27]

1. Notice and Comment Rules

The SSA has used its formal rulemaking authority to establish rules regarding the disability process.[28] In order to be eligible for

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[22] *Challenges Facing Social Security Disability Policy in the 21st Century: Hearing before the House Subcomm. on Soc. Sec. of the Comm. on Ways and Means*, 106th Cong. 32-44 (2000) (statement of Edward D. Berkowitz, Professor and Chair, Department of History at George Washington University).

[23] *Overview of Social Security Disability Programs: SSI and SSDI,* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://soarworks.samhsa.gov/article/overview-social-security-disability-programs-ssi-and-ssdi (last visited Feb. 21, 2022) [https://perma.cc/VV7U-FRCG].

[24] *Fact Sheet – Social Security and Supplemental Security Income (SSI): What's the Difference?*, SOC. SEC. ADMIN. (Nov. 2009), https://www.ssa.gov/sf/FactSheets/aianssavsssifinalrev.pdf [https://perma.cc/24SS-NM8B].

[25] *Example of Concurrent Benefits with Employment Supports*, SOC. SEC. ADMIN., https://ssa.gov/redbook/eng/supportsexample.htm (last visited Feb. 9, 2022) [https://perma.cc/PVH4-L9ZZ].

[26] *Id.*

[27] 42 U.S.C. §§ 405(a), 1383(d)(1), 902(a)(5).

SSDI, the applicant must have worked for a sufficient number of calendar quarters.[29] These quarters of coverage and the earnings paid into Social Security determine the benefit levels paid under SSDI.[30] As noted previously, there is no earnings requirement for SSI.[31] Having established eligibility for SSDI, the SSA then applies the same statutory definition of adult disability for both SSDI and SSI: "[t]he law defines disability as the inability to do 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."[32]

The SSA has translated this definition into a five step process for both SSDI and adult SSI.[33] At Step 1, the SSA looks at whether the applicant is engaged in substantially gainful activity.[34] Substantially gainful activity is a monthly earnings threshold that is adjusted for inflation.[35] The SSA will not find someone disabled who is engaged in substantially gainful activity.[36] At Step 2, the SSA looks at whether the applicant has a medically determinable severe impairment.[37] The SSA has limited the sources that are permitted to diagnose impairments.[38] The impairment must also last for at least a year or result in death.[39] If the claimant does not have a severe impairment, their claim is denied at Step 2.[40] At Step 3, the SSA will consider the severity of the medically determinable impairments found at Step 2.[41] If any of the impairments found at

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28 Federal Old-Age, Survivors and Disability Insurance, 20 C.F.R. § 404 (2022).

29 20 C.F.R. §§ 404.101–146, 404.301–392.

30 42 C.F.R. §§ 404.201–288.

31 *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS., *supra* note 23.

32 20 C.F.R. § 404.1505.

33 20 C.F.R. §§ 404.1520, 416.920.

34 *Id.*

35 20 C.F.R. §§ 404.1520, 404.272, 416.972, 416.974(b).

36 20 C.F.R. §§ 404.1520, 416.920.

37 *Id.*

38 20 C.F.R. §§ 404.1520, 416.902.

39 20 C.F.R. §§ 404.1509, 416.909.

40 20 C.F.R. §§ 404.1520, 416.920.

41 20 C.F.R. §§ 404.1520, 416.1902.

Step 2 meet a listing, the claimant is found disabled at Step 3.[42] The listings "describe . . . each of the major body systems impairments that [SSA] consider[s] to be severe enough to prevent an individual from doing any gainful activity, regardless of his or her age, education, or work experience."[43] If an applicant meets a listing, no further inquiry is necessary.[44] If an applicant does not meet a medical listing, a medical doctor or psychologist designated by the SSA can find that an impairment, or combination of impairments, equals a medical listing.[45] If the medical impairments do not meet or equal a listing, the SSA will determine the applicant's residual functional capacity by relying on medical and other evidence.[46] At Step 4, the SSA determines whether the applicant can perform their past relevant work in light of their residual functional capacity.[47] Past relevant work is defined by the SSA as work performed in the past fifteen years, at a substantially gainful level of activity, and performed for a sufficient period of time so as to be capable of fully performing the job.[48] If the applicant can perform their past relevant work, then the SSA will find them not disabled at this step.[49] At Step 5, the SSA will consider whether the applicant could perform any other work in the national economy that is available in substantial numbers, taking into consideration the residual functional capacity.[50] If the applicant is unable to perform a significant number of jobs in the national economy, they will be found disabled.[51] If the applicant is able to perform a significant number of jobs, they will not be found disabled and will be denied at this step.[52] At Steps 4 and 5, the SSA will often use expert witness testimony in the form of a vocational rehabilitation expert to determine whether an applicant

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42 *Id.*

43 20 C.F.R. §§ 404.1525, 416.925.

44 20 C.F.R. §§ 404.1520, 416.1902.

45 20 C.F.R. §§ 404.1526, 416.926.

46 20 C.F.R. §§ 404.1520, 404.1545, 416.920.

47 20 C.F.R. §§ 404.1520, 416.920.

48 20 C.F.R. §§ 404.1520, 416.960(b).

49 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

50 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

51 20 C.F.R. § 404.1560(c); 42 C.F.R. § 416.960(c).

52 20 C.F.R. § 404.1560(c); 42 C.F.R. § 416.960(c).

can perform their past relevant work at Step 4 or other work in the economy at Step 5.[53]

2. Internal Guidance

In addition to the formal notice and comment rulemaking discussed above, the SSA also makes use of internal operating instructions.[54] These internal operating instructions differ from notice and comment rulemaking because they do not have the force of law and are not required to be enacted through the notice and comment rulemaking process. These instructions primarily come in two forms with respect to disability applications.[55] The first is the Program Operations Manual System ("POMS") which guides employees of SSA in how to administer the laws, regulations, and rulings of the SSA.[56] The POMS provides guidance on how applications should be taken at Field Offices,[57] interview procedures,[58] and what evidence should be obtained.[59] It further provides guidance for when and how examinations should be ordered through the Disability Determination Service[60] and when

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[53] 20 C.F.R. § 404.1560(b); 42 C.F.R. § 416.960(b).

[54] *See Program Operations Manual System (POMS)*, SOC. SEC. ADMIN., https://secure.ssa.gov/poms.nsf/Home?readform (last visited Feb. 16, 2022) [https://perma.cc/GA99-PXU2].

[55] *Id.*

[56] *Id.*

[57] *See* Program Operations Manual System, DI 11010.000, Initial Disability Claims Processing, SOC. SEC. ADMIN., https://secure.ssa.gov/poms.nsf/lnx/0411010000 (last visited Feb. 19, 2022) [https://perma.cc/3N72-K4HG].

[58] *See* Program Operations Manual System, DI 11005.00, Disability Interviewing, SOC. SEC. ADMIN., https://secure.ssa.gov/poms.nsf/lnx/0411005000 (last visited Feb. 19, 2022) [https://perma.cc/Q274-8269].

[59] *See* Program Operations Manual System, DI 11010.485, FO Development of Medical Evidence, SOC. SEC. ADMIN., https://secure.ssa.gov/poms.nsf/lnx/0411010485 (last visited Feb. 19, 2022) [https://perma.cc/L6SN-BUAG].

[60] *See* Program Operations Manual System, DI 22510.000, Development of Consultative Examinations (CE), SOC. SEC. ADMIN., https://secure.ssa.gov/poms.nsf/lnx/0422510000 (last visited Feb. 19, 2022) [https://perma.cc/R4DQ-HPJX].

medical opinions should be sought.[61] Once an initial determination is reached, the POMS explains how the applicant should be notified and, if they are found disabled, how the disability benefits should be determined and implemented. The second set of instructions is the Hearings, Appeals, Litigation Law ("HALLEX") manual.[62] HALLEX provides "guiding principles, procedural guidance, and information to the Office of Hearing Operations ("OHO")."[63] The OHO is the component of the SSA that handles administrative appeals within the SSA.[64]

C. Application Process

1. SSA

a. District Office

An applicant for SSDI or SSI initiates a claim for disability benefits in person at a SSA Field Office, by mail, by phone, or online.[65] The Field Office will gather records to decide the non-disability aspects of the application(s), including earnings, assets

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[61] *See* Program Operations Manual System, DI 11010.210, Assembling and Transmitting the Official Folder to Disability Determination Services (DDS), SOC. SEC. ADMIN., https://secure.ssa.gov/poms.Nsf/lnx/0411010210 (last visited Feb. 19, 2022) [https://perma.cc/QJ6K-P6WN].

[62] Through HALLEX, the Associate Commissioner of Hearings and Appeals conveys guiding principles, procedural guidance and information to the Office of Hearings and Appeals ("OHA") staff. HALLEX includes policy statements resulting from an Appeals Council *en banc* meeting under the authority of the Appeals Council Chair. It also "defines procedures for carrying out policy and provides guidance for processing and adjudicating claims at the Hearing, Appeals Council, and Civil Action levels." *See* HALLEX I-1-0-1, Purpose, SOC. SEC. ADMIN., http://www.socialsecurity.gov/OP_Home/hallex/I-01/I-1-0-1.html (last visited Feb. 16, 2022) [https://perma.cc/5NN9-GHJH]. HALLEX provisions are available at http://www.ssa.gov/OP_Home/hallex/.

[63] HALLEX I-1-0-1.

[64] *See Information About Social Security's Hearings and Appeals Process*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/ (last visited Feb. 19, 2022) [https://perma.cc/45NN-SX43].

[65] *Disability Determination Process*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/determination.htm (last visited Feb. 13, 2022) [https://perma.cc/W8LE-FWJP].

and other non-disability requirements.[66] Assuming the preliminary non-disability requirements are met, the Field Office will first forward the application to the Disability Determination Service ("DDS"), which is normally operated by the state where the applicant files their application.[67] The DDS will then gather the applicant's medical records and, if necessary, order examinations by independent medical examiners provided by DDS.[68] The DDS will then proceed to evaluate the impairments in order to determine whether the applicant's impairments are severe, whether the impairments meet or equal a medical listing, and, if not, what the applicant's residual functional capacity is.[69] The case will then be sent back to the Field Office for effectuation if DDS finds that the applicant satisfied a medical listing or did not have a severe impairment.[70] If the DDS returns the application with a finding of one or more severe impairments, no listing met or equaled and, therefore, a residual functional capacity, the Field Office will apply the residual functional capacity to the non-medical finding of past relevant work and determine whether other work can be performed by the applicant in the national economy.[71] Depending on whether the Field Office finds the applicant able to perform their past relevant work or other work in the national economy, the Field Office will either deny the applicant or find them disabled.[72]

b. Office of Hearings Operations

After the Field Office notifies the applicant of their final decision, the applicant is entitled to file an appeal with the Office of Hearings Operations to seek a hearing in front of a United States Administrative Law Judge ("ALJ").[73] There are 1,230 Field

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66 *See id.*

67 *See id.*

68 *Id.*

69 *See* SOC. SEC. ADMIN., *supra* note 54.

70 *Id.*

71 *Id.*

72 *See id.*

73 20 C.F.R. §§ 404.929, 416.1429; HALLEX I-2-0-2.

Offices at the SSA.[74] District Office decisions are appealed to geographically organized OHO offices.[75] There are 163 hearing offices within OHO spread across the United States.[76] Upon receipt of the appeal from the Field Office determination, staff at the OHO will docket the appeal,[77] begin updating the medical and non-medical records in the file,[78] and, of course, schedule the case for a hearing before an ALJ.[79] The hearing before the ALJ is conducted ex parte; there is no representative of the SSA arguing against the applicant's disability claim.[80] The claimant is normally questioned under oath by the ALJ with the claimant's representative asking questions afterwards.[81] The ALJ will then question the expert witness(es) and then the representative will question the experts.[82] Following the hearing and any additional evidence or development, the ALJ will prepare a set of decision-writing instructions[83] and an attorney or paralegal for the SSA will draft a decision consistent with the instructions.[84] Finally, the ALJ reviews the draft and signs it, barring any revisions necessary.[85]

c. Appeals Council

If an applicant is unsatisfied with the decision from the ALJ, they can appeal to the Appeals Council, which is a component of

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[74] *Organizational Structure of the Social Security Administration*, SOC. SEC. ADMIN., https://www.ssa.gov/org/ (last visited Feb. 17, 2022) [https://perma.cc/EL4Q-4VCY].

[75] *See Hearing Office Locator*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/ho_locator.html (last visited Feb. 17, 2022) [https://perma.cc/6JK3-5QFC].

[76] *Information About SSA's Hearings and Appeals Operations*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/about_us.html (last visited Feb. 17, 2022) [https://perma.cc/46AE-UZXQ].

[77] *See* HALLEX I-2-1-10, I-2-1-20.

[78] *See* HALLEX I-2-1-5.

[79] *See* HALLEX I-2-3-10.

[80] 20 C.F.R. §§ 404.944, 416.1444; HALLEX I-2-6-1.

[81] *See* HALLEX I-2-6-60.

[82] *See* HALLEX I-2-6-70.

[83] *See* HALLEX I-2-8-20.

[84] *See* HALLEX I-2-8-25.

[85] *See* 20 C.F.R. §§ 404.953, 416.1453; HALLEX I-2-8-1.

the SSA.[86] The Appeals Council exercises review of ALJ decisions either upon request by the applicant[87] or on its own motion.[88] Upon review, the Appeals Council may reverse, affirm, or remand the decision of the ALJ.[89] The decision of the Appeals Council to affirm, reverse, or dismiss an appeal constitutes the final decision of the Commissioner.[90]

2. Federal Court Review

If an applicant disagrees with the final determination of the Commissioner of the Social Security Administration through the Appeals Council, an applicant can file a civil action in a United States District Court wherein the applicant resides or regularly transacts business.[91] The standard of review of decisions of the Commissioner is as follows:

> The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations.[92]

Social Security appeals in federal district court normally come before United States Magistrate Judge for a Report and Recommendation.[93] The Report and Recommendation can then be

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86 *See* HALLEX I-3-0-1.

87 *See* 20 C.F.R. §§ 404.967, 416.1467; HALLEX I-3-0-10.

88 *See* 20 C.F.R. §§ 404.969, 416.1469; HALLEX I-3-0-10.

89 *See* HALLEX I-3-8-12, I-3-7-14.

90 *See* 20 C.F.R. §§ 404.981, 416.1481; HALLEX I-3-8-1.

91 *See* 42 U.S.C. § 405(g).

92 *Id.*

93 28 U.S.C. § 636(b)(1)(B).

appealed on a de novo basis to the District Judge.[94] Decisions from the district court can then be appealed to the circuit court level and to the United States Supreme Court.[95]

II. ADMINISTRATIVE DEFERENCE

Having discussed the regulatory structure of the Social Security disability process and how cases proceed through the administrative process and federal courts, we now to turn how judicial deference to administrative decisions works.

A. Chevron

The seminal modern touchstone on judicial deference to administrative decisions is *Chevron v. Natural Resources Defense Council*.[96] When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is whether Congress has directly spoken to the precise question at issue.[97] If the intent of Congress is clear, that is the end of the matter and the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[98] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.[99] Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[100]

Arguably, the first step of the *Chevron* analysis lacks an independent meaning because, if Congress has spoken directly to the issue, then the agency is bound to adhere to the unambiguous

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94 *Id.*

95 42 U.S.C. § 405(g).

96 Chevron, U.S., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

97 *See id.* at 842–43.

98 *Id.*

99 *Id.* at 843.

100 *Id.*

will of Congress.[101] Accepting this admittedly reductionist analysis at face value, courts must only ask if the agency's interpretation of its statute is a permissible one.[102]

B. Skidmore

Skidmore v. Swift and Co. is the first pronouncement to come from the United States Supreme Court following the dramatic increase in regulatory enactments during the New Deal.[103] Swift challenged the interpretive rules enacted by the Wage and Hour Administrator for the United States Department of Labor pursuant to their authority under the Fair Labor Standards Act of 1938.[104] The Court in *Skidmore* adopted a test that considers several factors in determining whether to adopt the interpretive rules of the administrative agency.[105] Courts under *Skidmore* examine, "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[106]

Following the *Chevron* decision, there were some arguments that *Skidmore* deference was superseded.[107] These arguments were put to rest in *U.S. v. Mead Corp.*, where the Supreme Court rejected the application of *Chevron* deference to an agency interpretation, but instead found that *Skidmore* deference was applicable.[108] The Supreme Court clarified *Chevron* deference to

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[101] *See* Richard J. Pierce Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 78 (2011) [hereinafter Pierce Judicial Review]; *see also* Richard J. Pierce Jr., Matthew Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 599 (2009).

[102] *See* Pierce Judicial Review, *supra* note 101, at 599.

[103] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[104] *Id.* at 136.

[105] *See id.* at 140.

[106] *Id.*

[107] *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259 (1991) (Scalia, J., concurring); *see also* Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1105–10 (2001).

[108] *See* U.S. v. Mead Corp., 533 U.S. 218, 234 (2001).

only apply where "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[109]

After the *Mead* court decision, the *Chevron* test looks different.[110] Courts now have a "step zero" which asks if the agency has the authority to issue binding legal rules.[111] If the answer is "no," *Chevron* does not apply, but the agency may still receive some lesser degree of deference because of its expertise by virtue of *Skidmore*.[112] Assuming the "step zero" prong is answered in the affirmative, courts after *Mead* proceed with the remainder of their analysis under *Chevron*.[113]

C. Auer/Seminole Rock

Auer deference has its origins in the 1945 decision *Bowles v. Seminole Rock and Sand Co*.[114] The *Seminole Rock* decision stands for the proposition that courts should defer to agency interpretations of their regulations "unless it is plainly erroneous or inconsistent with the regulation."[115] The contemporary iteration of this case comes from *Auer v. Robbins*, where the Supreme Court deferred to a determination of the Wage and Hour Division of the United States Department of Labor regarding its interpretation of its overtime regulations.[116]

Auer/Seminole Rock deference has recently been pared back by the 2019 *Kisor v. Wilkie* decision from the Supreme Court.[117] The

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[109] *Id.* at 239.

[110] *See id.*; Dan Farber, *Everything You Always Wanted to Know About the Chevron Doctrine*, YALE J. ON REGUL. NOTICE & COMMENT (Oct. 17, 2013), https://www.yalejreg.com/nc/everything-you-always-wanted-to-know-about-the-chevron-doctrine-by-dan-farber/ [https://perma.cc/UWV2-H6N5].

[111] *See* Farber, *supra* note 110.

[112] *See id.*; *see also* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 189 (2006).

[113] *See* Sunstein, *supra* note 112, at 3–4.

[114] *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

[115] *Id.* at 413–14.

[116] *See* Auer v. Robbins, 519 U.S. 452, 458 (1997).

[117] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415–18 (2019).

Court opted to apply a *Chevron*-style review to *Auer* deference and the majority articulated the following framework:

1. The regulatory provision must be "genuinely ambiguous" after applying all of the traditional tools of interpretation (*Chevron* step one).

2. The agency's regulatory interpretation must be "reasonable," and "[t]hat is a requirement an agency can fail" (*Chevron* step two).

3. The agency's regulatory interpretation must be the agency's "authoritative" or "official position," which means it must "at the least emanate from [the agency head or equivalent final policymaking] actors, using those vehicles, understood to make authoritative policy in the relevant context" (some version of the *Mead* doctrine/*Chevron* step zero).

4. The agency's regulatory interpretation must implicate the agency's substantive expertise (some version of *Skidmore* deference, plus the *Gonzales v. Oregon* anti-parroting canon).

5. The agency's regulatory interpretation must reflect "fair and considered judgment" — not an *ad hoc* litigating position or otherwise an interpretation that causes regulated entities unfair surprise (existing *Christopher* exception to *Auer* deference).[118]

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[118] *See* Christopher J. Walker, *What Kisor Means for the Future of Auer Deference: The New Five-Step Kisor Deference Doctrine*, YALE J. ON REGUL. NOTICE & COMMENT (June 26, 2019), https://www.yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/ [https://perma.cc/Y2CF-5BYJ]; *see also* Gonzales v. Oregon 546 U.S.

D. State Farm and Substantial Evidence

The State Farm doctrine arises from the Supreme Court decision in *Motor Vehicle Manufacturers' Association v. State Farm Automobile Insurance Co.*[119] In *State Farm*, the Supreme Court held:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given." *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 1577, 91 L. Ed. 1995 (1947). We will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp. Inc. v. Arkansas-Best Freight System*, *supra*, 419 U.S., at 286, 95 S. Ct., at 442.[120]

The facts underlying the *State Farm* decision provide an excellent illustration of how this doctrine works in practice. State Farm and others challenged the rescission by the National Highway Traffic Safety Administration ("NHTSA") of its previous requirements for vehicles built after 1982 to be equipped with passive occupant safety restraints.[121] In finding that the NHTSA

243, 257 (2006)(rejecting administrative deference where the Agency enacts a regulation that only parrots the statutory language); Christopher v. SmithKline Beecham Corp., 567 U. S. 142, 155 (2012) (declining to grant administrative deference where the Agency is taking a convenient litigation position rather than applying its "fair and considered" judgment.) .

[119] *See* Motor Vehicle Mfr.'s Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983).

[120] *Id.* at 43.

[121] *Id.* at 39.

had not met the arbitrary and capricious standard, the Court noted there was insufficient evidence that the rescission was "the product of reasoned decision making."[122]

A cursory comparison between *State Farm* and step two of the *Chevron* shows a considerable overlap.[123] This is even more so if you consider the first step of *Chevron* to be superfluous.[124]

E. Substantial Evidence

The substantial evidence test is the standard of review for findings made by administrative agencies. This test is the traditional standard of review for review of determinations by administrative agencies.[125] The Supreme Court first explained the test in *Consolidated Edison v. National Labor Relations Board*, "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[126] The Court went on to qualify this definition further in *Universal Camera v. National Labor Relations Board*, by noting that, when evaluating substantial evidence, courts must take into account the evidence that detracts from the agency's determination and decide whether the evidence is sufficient to support the conclusions drawn.[127]

In the end, the "arbitrary and capricious" standard discussed in *State Farm* and the substantial evidence standard encompass much

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[122] *Id.* at 52, 57.

[123] *Compare id. with* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984). *See also* KRISTIN E. HICKMAN & RICHARD PIERCE, JR., ADMIN. LAW TREATISE § 11.7 (6th ed. 2010); Pierce Judicial Review, *supra* note 101, at 3.

[124] *See Chevron*, 467 U.S. at 842.

[125] *See, e.g.*, 29 U.S.C. § 160(e) (National Labor Relations Board); 15 U.S.C. § 45(c) (Federal Trade Commission); 42 U.S.C. § 405(g) (Social Security Administration).

[126] Consol. Edison Co. v. Nat'l Lab. Rel. Bd., 305 U.S. 197, 229 (1938) (citing Appalachian Elec. Power Co. v. Nat'l Lab. Rel. Bd., 93 F.3d 985, 989 (4th Cir. 1938); Nat'l Lab. Rel. Bd. v. Thompson Prods., Inc., 97 F.2d 13, 15 (6th Cir. 1938); Ballston-Stillwater Knitting Co. v. Nat'l Lab. Rel. Bd., 98 F.2d 758, 760 (2d Cir. 1938)).

[127] *See* Universal Camera Corp. v. Nat'l Lab. Rel. Bd., 340 U.S. 474, 488 (1951).

the same review and rarely yield differing results.[128] The *State Farm* decision in this context serves to inform the arbitrary and capricious/de novo standard by requiring the agency to supply an explanation for its decision and that the reviewing court cannot rely on a latter supplied explanation to justify the same.[129] As the District Court cogently explained in *Bowden v. Berryhill*:

> ”Even if an agency’s statutory or regulatory interpretation is permissible” under *Chevron*, *Skidmore*, or *Auer*, “the agency’s action may still be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Atrium Med. Ctr.*, 766 F.3d at 567 (quoting 5 U.S.C. § 706(2)(A)). “Not only must an agency’s decreed result be within the scope of its lawful authority but the process by which it reaches that result must be logical and rational.” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). Arbitrary and capricious review “ensur[es] that agencies have engaged in reasoned decision making.” *Judulang v. Holder*, 565 U.S. 42, 53 (2011). However, the scope of review is “narrow,” and the Court will “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Motor Vehicle Mfr. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).[130]

It is within this context that this Article will evaluate this standard.[131]

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[128] *See* Pierce Judicial Review, *supra* note 101, at 5.

[129] Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[130] Bowden v. Berryhill, No. CV 16-240-DLB, 2017 WL 2434536, at *12 (E.D. Ky. June 5, 2017).

[131] While an independent assessment of substantial evidence may be theoretically possible, it is too broad a subject for the confines of a law review article considering that the “substantial evidence” standard is the touchstone for all judicial review of SSA decisions. *See* 42 U.S.C. § 405(g).

F. De Novo

Each of the doctrines discussed above defers to an administrative determination at one level or another. De novo is the standard of review where the court does not defer to anyone; it gives the court the opportunity to decide for itself and to do so without consulting an agency's interpretation.[132]

III. DEFERENCE AS APPLIED

A. Chevron

1. Circuit Court

Chevron v. Natural Resources Defense Council has been cited and relied upon seventy-nine times by various circuit courts of appeal in connection with programs[133] administered by the Social Security Administration.[134] In forty-nine of those cases, the courts have deferred to the agency's interpretation of the laws the SSA is charged with enforcing.[135] In seven cases, the reviewing court

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[132] *See* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 688 (2002); *see also* Pierce Judicial Review, *supra* note 101, at 5.

[133] Cases where the Administration is a party to litigation outside of its programmatic responsibilities are excluded from the scope of this analysis. *Cf.* U.S. Dep't of Health & Hum. Servs. v. Fed. Lab. Rels. Auth., 833 F.2d 1129 (4th Cir. 1987) (SSA appealing an adverse decision of the Federal Labor Relations Authority); Tunik v. Merit Sys. Prot. Bd., 407 F.3d 1326 (Fed. Cir. 2005) (Administrative Law Judges challenging interference from Administration into matters of judicial independence).

[134] *See infra* notes 135–38.

[135] *See, e.g.*, Linza v. Saul 990 F.3d 243, 249–50 (2d Cir. 2021); Newton v. Comm'r of Soc. Sec. Admin., 983 F.3d 643, 649–50 (3d Cir. 2020); Lambert v. Saul 980 F.3d 1266, 1275 (9th Cir. 2020); Babcock v. Comm'r of Soc. Sec. Admin., 959 F.3d 210, 216 (6th Cir. 2020), *aff'd*, 142 S. Ct. 641 (2022); Valent v. Comm'r of Soc. Sec. Admin., 918 F.3d 516, 522–23 (6th Cir. 2019), *cert. dismissed*, 140 S. Ct. 450 (2019); MacNeil v. Berryhill, 869 F.3d 109, 113–14 (2d Cir. 2017); Parker v. Colvin, 640 F. App'x 726, 729–30 (10th Cir. 2016); Moriarty v. Colvin, 806 F.3d 664, 669–70 (1st Cir. 2015); Raniolo v. Comm'r of Soc. Sec., 464 F. App'x 836, 837 (11th Cir. 2012); Beeler v. Astrue, 651 F.3d 954, 961 (8th Cir. 2011), *cert. denied*, 566 U.S. 1030 (2012); Stanley v. Astrue,

found the statute in question ambiguous, but nonetheless disagreed with the Administration's interpretation.[136] In the remaining twenty-three cases, the courts found the statute in question to be unambiguous and decided interpretation at Step 1 of the *Chevron*

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298 F. App'x 537, 542 (8th Cir. 2008); U.S. Steel Corp. v. Astrue, 495 F.3d 1272, 1288 (11th Cir. 2007); Fernandez v. Barnhart, 200 F. App'x 325, 328 (5th Cir. 2006); Sidney Coal Co. v. Soc. Sec. Admin., 427 F.3d 336, 349 (6th Cir. 2005), *cert. denied*, 547 U.S. 1020 (2006); United Seniors Ass'n v. Sebelius, 423 F.3d 397, 403 (4th Cir. 2005); Fliegler v. Comm'r of Soc. Sec., 117 F. App'x 213, 215 (3d Cir. 2004); Stanford v. Barnhart, 68 F. App'x 758, 759 (8th Cir. 2003); Stroup v. Barnhart, 327 F.3d 1258, 1261 (11th Cir. 2003); Sanfilippo v. Barnhart, 325 F.3d 391, 394 (3d Cir. 2003); Sanfilippo v. Barnhart, 57 F. App'x 526, 529 (3d Cir. 2003); Newman v. Apfel, 223 F.3d 937, 957 (9th Cir. 2000); Dover v. Apfel, 203 F.3d 834, 2000 WL 135170, at *2 (10th Cir. 2000); Berger v. Apfel, 200 F.3d 1157, 1161 (8th Cir. 2000); Melville v. Apfel, 198 F.3d 45, 50 (2d Cir. 1999); Johnson v. Apfel, 191 F.3d 770, 775 (7th Cir. 1999); Williams v. Apfel, 179 F.3d 1066, 1070 (7th Cir. 1999); Campbell ex rel. Campbell v. Apfel, 177 F.3d 890, 893–94 (9th Cir. 1999); Olson ex rel. Est. of Olson v. Apfel, 170 F.3d 820, 825 (8th Cir. 1999); Splude v. Apfel, 165 F.3d 85, 90–91 (1st Cir. 1999); Florez on Behalf of Wallace v. Callahan, 156 F.3d 438, 447 (2d Cir. 1998); Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1251 (D.C. Cir. 1998); Holmes v. Comm'r of Soc. Sec., 1997 WL 570398, at *2 (6th Cir. 1997); Mikesell v. Chater, 1997 WL 10749, at *3 (4th Cir. 1997); Marshall v. Chater, 75 F.3d 1421, 1428 (10th Cir. 1996); Flaten v. Sec'y of Health & Hum. Servs., 44 F.3d 1453, 1460 (9th Cir. 1995); Wittler v. Chater, 59 F.3d 95, 98 (8th Cir. 1995); Gould v. Shalala, 30 F.3d 714, 720–21 (6th Cir. 1994); Mays v. Sec'y of Health & Hum. Servs., 1994 WL 283675, at *2 (9th Cir. 1994); Schisler v. Sullivan, 3 F.3d 563, 569 (2d Cir. 1993); Pope v. Shalala, 998 F.2d 473, 486 (7th Cir. 1993); Crane v. Sullivan, 993 F.2d 1335, 1336 (8th Cir. 1993); Briggs v. Sullivan, 954 F.2d 534, 538–39 (9th Cir. 1992); Moothart v. Bowen, 934 F.2d 114, 117 (7th Cir. 1991); Petition of Sullivan, 904 F.2d 826, 845 (3d Cir. 1990); Guadamuz v. Bowen, 859 F.2d 762, 770 (9th Cir. 1988); Ransom v. Bowen, 844 F.2d 1326, 1335 (7th Cir. 1988); Sciarotta v. Bowen, 837 F.2d 135, 140 (3d Cir. 1988); Howard v. Bowen, 823 F.2d 185, 187 (7th Cir. 1987); Lugo v. Schweiker, 776 F.2d 1143, 1147 (3d Cir. 1985).

[136] Jones v. Astrue, 650 F.3d 772, 775 (D.C. Cir. 2011); Keys v. Barnhart, 347 F.3d 990, 993–94 (7th Cir. 2003); Holland v. Nat'l Mining Ass'n, 309 F.3d 808, 810 (D.C. Cir. 2002); Thomas v. Comm'r of Soc. Sec., 294 F.3d 568, 574 (3d Cir. 2002), *rev'd sub nom.*, Barnhart v. Thomas, 540 U.S. 20, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003); Salamalekis v. Comm'r of Soc. Sec., 221 F.3d 828, 832 (6th Cir. 2000); Parisi by Cooney v. Chater, 69 F.3d 614, 618 (1st Cir. 1995); State of N.Y. v. Sullivan, 906 F.2d 910, 916 (2d Cir. 1990).

test without resorting to the Administration's interpretation.[137] Each of these outcomes will be explored in turn.

a. SSA Prevails at Step 2

As reflected in the statistics above, when the statute in question is ambiguous, the Social Security Administration generally prevails under *Chevron*.[138] The lessons are found in where the position of the SSA prevails, where it loses, and where the courts find the statutes in question are ambiguous and administrative deference is not required.[139] Of the aforementioned forty-nine cases where circuit courts deferred to the SSA interpretations under *Chevron*, eight of those cases[140] involved the Windfall

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[137] Beeler v. Saul, 977 F.3d 577, 584, n.3 (7th Cir. 2020); Cappetta v. Comm'r of Soc. Sec. Admin., 904 F.3d 158, 168 (2d Cir. 2018); Bowden v. Comm'r of Soc. Sec., 776 F. App'x 885, 889 (6th Cir. 2018); Parker v. Colvin, 640 F. App'x at 729–30; Petersen v. Astrue, 633 F.3d 633, 637–38 (8th Cir. 2011); Radford v. Colvin, 734 F.3d 288, 294 (4th Cir. 2013); Capato ex rel. B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 631 (3d Cir. 2011), *rev'd and remanded sub nom.*, Astrue v. Capato ex rel. B.N.C., 566 U.S. 541 (2012); Clark v. Astrue, 602 F.3d 140, 147 (2d Cir. 2010); Rudd v. Comm'r of Soc. Sec., 37 F. App'x 173, 175 (6th Cir. 2002); Lewis v. Barnhart, 285 F.3d 1329, 1333 (11th Cir. 2002); Walton v. Apfel, 235 F.3d 184, 188 (4th Cir. 2000), *rev'd sub nom.*, Barnhart v. Walton, 535 U.S. 212, 122 S. Ct. 1265, 152 L. Ed. 2d 330 (2002); Sigmon Coal Co. v. Apfel, 226 F.3d 291, 304 (4th Cir. 2000), *aff'd sub nom.*, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002); Vincent v. Apfel, 191 F.3d 1143, 1148 (9th Cir. 1999); R.G. Johnson Co. v. Apfel, 172 F.3d 890, 895 (D.C. Cir. 1999); Dixie Fuel Co. v. Comm'r of Soc. Sec., 171 F.3d 1052, 1063 (6th Cir. 1999); E. Enterprises v. Chater, 110 F.3d 150, 155 (1st Cir. 1997), *rev'd sub nom.*, E. Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998); Edelman v. Comm'r of Soc. Sec., 83 F.3d 68, 71–72 (3d Cir. 1996); Newman v. Chater, 87 F.3d 358, 361 (9th Cir. 1996); Nat'l Coal Ass'n v. Chater, 81 F.3d 1077, 1081 (11th Cir. 1996); Jones v. Shalala, 5 F.3d 447, 451 (9th Cir. 1993); Warren v. Sec'y of Health & Hum. Servs., 1992 WL 68305, at *4 (6th Cir. 1992); Zebley by Zebley v. Bowen, 855 F.2d 67, 73 (3d Cir. 1988), *aff'd sub nom.*, Sullivan v. Zebley, 493 U.S. 521, 110 S. Ct. 885, 107 L. Ed. 2d 967 (1990); Kuehner v. Heckler, 778 F.2d 152, 159 (3d Cir. 1985).

[138] *Compare supra* note 135, *with* note 136.

[139] *See supra* notes 135–37.

[140] *Linza*, 990 F.3d at 249–50; *Newton*, 983 F.3d at 649–50; *Babcock,* 959 F.3d at 216; *Fernandez*, 200 F. App'x at 328; *Stroup*, 327 F.3d at 1261; *Splude*,

Elimination Provision ("WEP"), enacted as part of the Social Security Amendments of 1983.[141] The WEP reduces the monthly Social Security payments for retirement or disability where the recipient is also receiving a pension from a job where the person did not pay into Social Security through the Old Age, Survivors, and Disability Insurance ("OASDI") payroll tax system.[142] The flashpoint for the WEP concerns the exceptions to the application of it and therefore who does not have their monthly retirement or disability payments reduced.[143] There is also some difference among the courts about whether the WEP is actually ambiguous and, therefore, whether resorting to SSA's interpretation is proper.[144] The next group of five cases involved the regulations interpreting the workers' compensation offset provisions of the Social Security Act.[145] The offset provision is designed to prevent someone who receives benefits from workers' compensation and Social Security benefits from receiving greater than eighty percent of their pre-injury wages.[146] The next group of circuit court cases involve SSA regulations that interpret different statutory provisions governing disability and retirement payments.[147]

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165 F.3d at 90–91; *Holmes,* 1997 WL 570398, at *2; *Mays*, 1994 WL 283675, at *2.

141 42 U.S.C. § 415(a)(7).

142 *Id.*; *Windfall Elimination Provision*, SOC. SEC. ADMIN. (Jan. 2022), https://www.ssa.gov/pubs/EN-05-10045.pdf [https://perma.cc/T5SP-ZRRT].

143 *Windfall Elimination Provision (WEP)*, SOC. SEC. ADMIN., https://www.ssa.gov/benefits/retirement/planner/wep.html (last visited Feb. 19, 2022) (chart showing monthly payment deduction from WEP as high as $498 per month) [https://perma.cc/96VD-JYB4]; *see also* Babcock v. Kijakazi, 141 S. Ct. 641 (2022).

144 *Compare supra* note 140 (courts finding WEP ambiguous), *with infra* note 156 (courts finding WEP unambiguous).

145 Sanfilippo v. Barnhart, 325 F.3d 391, 394 (3d Cir. 2003); Sanfilippo v. Barnhart, 57 F. App'x 526, 529 (3d Cir. 2003); Berger v. Apfel, 200 F.3d 1157, 1161 (8th Cir. 2000); Olson ex rel. Est. Of Olson v. Apfel, 170 F.3d 820, 825 (8th Cir. 1999); Sciarotta v. Bowen, 837 F.2d 135, 140 (3d Cir. 1988).

146 *See* 42 U.S.C. § 424(a).

147 *See* Newman v. Apfel, 223 F.3d 937, 947 (9th Cir. 2000) (method of computing benefit amounts); Florez on Behalf of Wallace v. Callahan, 156 F.3d 438, 447 (2d Cir. 1998) (benefit suspension while in detention facility); Mikesell v. Chater, 1997 WL 10749, at *3 (4th Cir. 1997) (defining the "period of disability" for receipt of benefits); Marshall v. Chater, 75 F.3d 1421, 1428 (10th

Beyond deciding issues of benefit calculations, many of the remaining cases involving *Chevron* deference pertain to SSA rules interpreting eligibility for retirement and disability under the Social Security Act.[148] The remaining cases involve regulation of third party benefit managers, attorney matters, and use of SSA insignia.[149] A solitary case is also implicated under the Coal Act at Step 2.[150]

Cir. 1996) (continuation of benefits while case being appealed); Wittler v. Chater, 59 F.3d 95, 98 (8th Cir. 1995) (eligibility while participating in vocational rehabilitation program); Gould v. Shalala, 30 F.3d 714, 720–21 (6th Cir. 1994) (change in accounting method for SSI eligibility); Ransom v. Bowen, 844 F.2d 1326, 1335 (7th Cir. 1988) (application of "disability freeze" provisions pertaining to disability benefit computation); Lugo v. Schweiker, 776 F.2d 1143, 1147 (3d Cir. 1985) (computation of overpayments and underpayments).

[148] *See* Lambert v. Saul 980 F.3d 1266, 1275 (9th Cir. 2020) (presumption of continued disability); Valent v. Comm'r of Soc. Sec. Admin., 918 F.3d 516, 522–23 (6th Cir. 2019) (failure to report employment as a material omission); MacNeil v. Berryhill, 869 F.3d 109, 113–14 (2d Cir. 2017) (state intestacy matters); Raniolo v. Comm'r of Soc. Sec., 464 F. App'x 836, 837 (11th Cir. 2012) (date of last insurance for Title 2 disability); Beeler v. Astrue, 651 F.3d 954, 961 (8th Cir. 2011) (definition of a child for benefit eligibility purposes); Fliegler v. Comm'r of Soc. Sec., 117 F. App'x 213, 215 (3d Cir. 2004) (definition of wages); Stanford v. Barnhart, 68 F. App'x 758, 759 (8th Cir. 2003) (non-deduction of medical insurance premiums from wage determinations); Melville v. Apfel, 198 F.3d 45, 50 (2d Cir. 1999) (finding workfare as countable for substantially gainful activity); Dover v. Apfel, 203 F.3d 834, 2000 WL 135170, at *2 (10th Cir. 2000) (margin of error for IQ testing); Johnson v. Apfel, 191 F.3d 770, 775 (7th Cir. 1999) (definition of a "current" application); Williams v. Apfel, 179 F.3d 1066, 1070 (7th Cir. 1999) (child disability framework for teenagers); Campbell ex rel. Campbell v. Apfel, 177 F.3d 890, 893–94 (9th Cir. 1999) (choice of laws for intestacy); Flaten v. Sec'y of Health & Hum. Servs., 44 F.3d 1453, 1460 (9th Cir. 1995) (period of disability needed when date of last insurance has expired); Schisler v. Sullivan, 3 F.3d 563, 569 (2d Cir. 1993) (change to way physician opinions are evaluated); Pope v. Shalala, 998 F.2d 473, 486 (7th Cir. 1993) (clarifying subjective pain rules); Crane v. Sullivan, 993 F.2d 1335, 1336 (8th Cir. 1993) (evaluating adult child disability eligibility); Moothart v. Bowen, 934 F.2d 114, 117 (7th Cir. 1991) (requiring objective and subjective to establish disability); Petition of Sullivan, 904 F.2d 826, 845 (3d Cir. 1990) (concerning drug and alcohol rules).

[149] *See* Moriarty v. Colvin, 806 F.3d 664, 669–70 (1st Cir. 2015); (considering attorney fees); United Seniors Ass'n v. Sebelius, 423 F.3d 397, 403

b. SSA Loses at Step 2

Losses for the SSA at Step 2 of *Chevron* are rare, with only seven occurring at the circuit court level.[151] Two of these cases involve issues that are outside the scope of deference under *Chevron*.[152] In two other cases, the courts in question hedged between saying the statute in question was unambiguous, causing the SSA to lose its argument at Step 1 of *Chevron*, and saying that the SSA rules interpreting the statutes in question were outside the range of reasonableness.[153] Even here, it is worth noting that in one of these two cases, the United States Supreme Court reversed the circuit court decision and found *Chevron* deference was appropriate.[154] In the remaining three cases, out of the seventy-nine cases utilizing *Chevron*, the courts in question elected to squarely hold that the interpretation of the statute by the SSA was entitled to deference and the SSA got its interpretation wrong.[155]

(4th Cir. 2005) (defining "other communications" for using the SSA insignia); Briggs v. Sullivan, 954 F.2d 534, 538–39 (9th Cir. 1992) (concerning third party benefit managers); Guadamuz v. Bowen, 859 F.2d 762, 770 (9th Cir. 1988) (concerning attorney fee computation); Howard v. Bowen, 823 F.2d 185, 187 (7th Cir. 1987) (same); Stanley v. Astrue, 298 F. App'x 537, 541 (8th Cir. 2008) (concerning attorney disbarment from practice before the SSA).

150 *See* Sidney Coal Co. v. Soc. Sec. Admin., 427 F.3d 336, 349 (6th Cir. 2005).

151 *See* Verkuil, *supra* note 132.

152 *See* Jones v. Astrue, 650 F.3d 772, 775 (D.C. Cir. 2011) (noting that SSA's regulations interpreting judicial review language at 42 U.S.C. § 405(g) are owed to deference under *Chevron*); Holland v. Nat'l Mining Ass'n, 309 F.3d 808, 810 (D.C. Cir. 2002) (finding no deference is owed because to do so would be acquiescing to a position compelled by a ruling in a different circuit, not a position adopted by the SSA).

153 *See* Salamalekis v. Comm'r of Soc. Sec., 221 F.3d 828, 832 (6th Cir. 2000) (finding SSR 82-52 contrary to statute); Thomas v. Comm'r of Soc. Sec., 294 F.3d 568, 572–73 (3d Cir. 2002) (finding the SSA interpretation of Step 4 of the sequential evaluation process to be "absurd" and contrary to the statute).

154 *See* Barnhart v. Thomas, 540 U.S. 20 (2003) *rev'g* Thomas v. Comm'r of Soc. Sec., 294 F.3d 568 (3d Cir. 2002).

155 *See* Keys v. Barnhart, 347 F.3d 990, 993–94 (finding the SSA position on whether current rules or rules in effect at the time the ALJ decided the case not to have been sufficiently articulated); Parisi by Cooney v. Chater, 69 F.3d 614, 618 (1st Cir. 1995) (finding the SSA rule applying the family maximum

c. Unambiguous and Decided at Step 1

Of the twenty-three circuit court cases where the court found the statute to be unambiguous and therefore resolvable at Step 1 of the *Chevron* test, the majority involved either the Windfall Elimination Provisions,[156] discussed previously,[157] or the Coal Industry Retiree Act of 1992[158] ("the Coal Act"), which set up a trust fund for the purpose of administering healthcare to retired coal miners.[159] The fund was supported by premiums paid by the various coal operators who were prior signatories to benefit fund agreements between the United Mine Workers Association and the various coal operators.[160] Much of the litigation pertinent to this Article under *Chevron* concerned the statutory responsibility for trust premiums when an employer of a former employee went out of business.[161] The courts have generally held that the statutory assignments for trust fund premiums are unambiguous and therefore not appropriate for administrative deference at the first step of the *Chevron* test and further found against the positions taken by the SSA.[162]

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payment to contravene the plain meaning the statute in question at Step 2 under *Chevron*); N.Y. v. Sullivan, 906 F.2d 910, 916 (2d Cir. 1990) (cardiac testing).

156 *See* Parker v. Colvin, 640 F. App'x 726, 729–30 (10th Cir. 2016); Petersen v. Astrue, 633 F.3d 633, 637–38 (8th Cir. 2011); Rudd v. Comm'r of Soc. Sec., 37 F. App'x 173, 175 (6th Cir. 2002); Vincent v. Apfel, 191 F.3d 1143, 1148 (9th Cir. 1999); Edelman v. Comm'r of Soc. Sec., 83 F.3d 68, 71–72 (3d Cir. 1996).

157 *See supra* notes 140–44 and accompanying text.

158 26 U.S.C. §§ 9701–08, 9711–12, 9721–22.

159 *See* 26 U.S.C. §§ 9701(b)(1), (3), § 9701(c)(1).

160 *Id.*

161 26 U.S.C. § 9706(a) (assignment for responsibility for premiums).

162 *See, e.g.*, Sigmon Coal Co. V. Apfel, 226 F.3d 291, 304 (4th Cir. 2000); R.G. Johnson Co. V. Apfel, 172 F.3d 890, 895 (D.C. Cir. 1999); Dixie Fuel Co. v. Comm'r of Soc. Sec., 171 F.3d 1052, 1063 (6th Cir. 1999); E. Enterprises v. Chater, 110 F.3d 150, 1551 (1st Cir. 1997); Nat'l Coal Ass'n v. Chater, 81 F.3d 1077, 1081 (11th Cir. 1996); *but see* U.S. Steel Corp. v. Astrue, 495 F.3d 1272, 1288 (11th Cir. 2007) (finding the construction of the Coal Act by the SSA to be permissible under Chevron at Step 2); Sidney Coal Co. v. Soc. Sec. Admin., 427 F.3d 336, 349 (6th Cir. 2005).

The remaining cases where circuit courts found deference inappropriate based upon on unambiguous statutory language are a mixture of situations involving eligibility for benefits[163] and benefit levels.[164]

Compared to how the SSA does at Step 2 under *Chevron*, the results at Step 1 are more of a mixed bag, with the SSA prevailing nine times[165] and losing eight times.[166] Of note, the SSA has

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[163] *See* Cappetta v. Comm'r of Soc. Sec. Admin., 904 F.3d 158, 168 (2d Cir. 2018) (penalty for failing to disclose work activity); Capato ex rel. B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 631 (3d Cir. 2011) (eligibility of a "dependent child" for survivor benefits where the child is born after the parent is deceased); Radford v. Colvin, 734 F.3d 288, 293–94 (4th Cir. 2013) (finding requirement of proximity of findings for medical listing 1.04 to be a post-hoc rationalization and further inconsistent with the unambiguous wording of the medical listing); Clark v. Astrue, 602 F.3d 140, 147 (2d Cir. 2010) (considering a suspension of benefits due to felony warrant); Lewis v. Barnhart, 285 F.3d 1329, 1333 (11th Cir. 2002) (computing length of marriage for spousal benefits eligibility); Walton v. Apfel, 235 F.3d 184, 188 (4th Cir. 2000) (applying "expected to last" provision and Trial Work Period provision to Substantially Gainful Activity rule); Kuehner v. Heckler, 778 F.2d 152, 159 (3d Cir. 1985) (construction of deadlines to appeal under Social Security Disability Benefits Reform Act of 1984); Zebley v. Bowen, 855 F.2d 67, 73 (3d Cir. 1988) (construction of child disability benefits statute).

[164] *See* Beeler v. Saul, 977 F.3d 577, 584, n.3 (7th Cir. 2020) (totalization of benefits for Social Security and Canadian pension); Bowden v. Comm'r of Soc. Sec., 776 F. App'x 885, 889 (6th Cir. 2018) (reduction in benefits based on failure to establish independent living arrangement); Newman v. Chater, 87 F.3d 358, 361 (9th Cir. 1996) (requirement to promulgate rule addressing "reliable information" exception to benefit level determinations for Supplemental Security Income); Jones v. Shalala, 5 F.3d 447, 451 (9th Cir. 1993) (calculation of non-recurring income for benefit level determinations); Warren v. Sec'y of Health & Hum. Servs., 1992 WL 68305, at *4 (6th Cir. 1992) (prohibition on collecting from two programs for war wage credits at once).

[165] *See* Parker v. Colvin, 640 F. App'x 726, 729–30 (10th Cir. 2016) (WEP); Vincent v. Apfel, 191 F.3d 1143, 1148 (9th Cir. 1999) (WEP); *E. Enterprises v. Chater*, 110 F.3d at 155 (Coal Act); *Cappetta*, 904 F.3d at 168 (penalty for failing to disclose work activity); *Capato ex rel. B.N.C.*, 631 F.3d at 631 (eligibility of a "dependent child" for survivor benefits where the child is born after the parent is deceased); Lewis v. Barnhart, 285 F.3d 1329, 1333 (11th Cir. 2002) (computation of length of marriage for spousal benefits eligibility); *Beeler*, 977 F.3d at 584, n.3 (totalization of benefits for Social Security and Canadian pension); *Bowden*, 776 F. App'x at 889 (reduction in benefits based on

prevailed in nearly all WEP cases either at Step 1 on the basis that the statute was unambiguous,[167] or if it was ambiguous, SSA's position was entitled to deference and was permissible.[168]

2. *Chevron* at District Court

There are seventy-eight cases where *Chevron* is applied[169] at the district court level where the position of the administration as expressed through a rule or regulation is adopted by the district court.[170] In only twelve cases where *Chevron* is found to apply, the district court refused to adopt the position articulated by the

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failure to establish independent living arrangement); *Jones*, 5 F.3d at 451 (calculation of non-recurring income for benefit level determinations).

[166] *See* Petersen v. Astrue, 633 F.3d 633, 637–38 (8th Cir. 2011) (Windfall Elimination Provision); *Sigmon Coal Co.*, 226 F.3d at 304 (Coal Act); *Dixie Fuel Co.*, 171 F.3d at 1063 (same); Nat'l Coal Ass'n v. Chater, 81 F.3d 1077, 1081 (11th Cir. 1996) (same); Clark v. Astrue, 602 F.3d 140, 141 (2d Cir. 2010) (suspension of benefits due to felony warrant); *Walton*, 235 F.3d at 188 (applying "expected to last" provision and Trial Work Period provision to Substantially Gainful Activity rule); *Kuehner*, 778 F.2d at 159 (construction of deadlines to appeal under Social Security Disability Benefits Reform Act of 1984); *Newman*, 87 F.3d at 361 (requirement to promulgate rule addressing "reliable information" exception to benefit level determinations for Supplemental Security Income).

[167] *See Parker*, 640 F. App'x at 729–30; *Vincent*, 191 F.3d at 1148; *but see Petersen*, 633 F.3d at 637–38.

[168] *See* sources cited *supra* note 135.

[169] Excluded from this total are instances where *Chevron* is cited for the general proposition of deference to SSA's interpretations of the Social Security Act without applying the actual *Chevron* analysis. The vast majority of cases in this category arise in the Southern District of Mississippi. *See, e.g.*, Ledet v. Comm'r of Soc. Sec., No. 2:19-CV70-KS-RPM, 2020 WL 6792673 (S.D. Miss. Aug. 10, 2020), *report and recommendation adopted*, No. 2:19-CV-70-KS-RPM, 2020 WL 5821967 (S.D. Miss. Sept. 30, 2020). For the sake of efficiency, this analysis also postpones a discussion of *Chevron* deference to Social Security Rulings until later in this article. Most of these cases arise out of the Western District of Washington. *See, e.g.*, Jay K. v. Comm'r of Soc. Sec., No. 3:18-CV-05258-TLF, 2019 WL 4024873 (W.D. Wash. Aug. 26, 2019); Denison v. Colvin, No. 2:16-CV-00021 JRC, 2016 WL 3610835 (W.D. Wash. July 6, 2016); Bartlett v. Astrue, No. 12-CV-5220-JRC, 2013 WL 593804 (W.D. Wash. Feb. 15, 2013); *see also infra* note 222.

[170] *See* sources cited *supra* note 169*; see also infra* notes 171–76.

SSA.[171] In nineteen cases, the district courts concluded that the portion of the statute in question is unambiguous at Step 1 of *Chevron* and found the interpretation by the SSA is of no moment.[172]

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[171] *See* Garnes v. Barnhart, 352 F. Supp. 2d 1059, 1067 (N.D. Cal. 2004) (finding unreasonable SSA's rule not requiring intent for a claimant "fleeing from justice" and therefore being ineligible for benefits); Melichar v. Astrue, No. 4:09-CV-244-HEA, 2009 WL 3461229, at *8 (E.D. Mo. Oct. 20, 2009) (finding SSA's definition of "against equity and good conscience" to be unreasonably narrow); Mitchell v. Barnhart, No. 2:01-CV-00081-DJS/MLM, 2003 WL 23413625, at *6 (E.D. Mo. Dec. 18, 2003) (same); Raymond v. Barnhart, 214 F. Supp. 2d 188, 193 (D.N.H. 2002) (finding the benefit computation method utilized by the SSA unreasonable); Vilante v. Sullivan, 862 F.Supp. 514, 520 (D.D.C. 1994) (finding SSA's definition of "against equity and good conscience" to be unreasonably narrow); Schisler v. Sullivan, No. 80-CV-572E, 1992 WL 170736, at *6 (W.D.N.Y. July 8, 1992), *aff'd in part, rev'd in part*, 3 F.3d 563 (2d Cir. 1993) (District Court rejected change to treating source rule under Chevron and reversed on appeal); White v. Sullivan, 813 F. Supp. 1059, 1064 (D. Vt. 1992), *rev'd sub nom.*, White v. Shalala, 7 F.3d 296 (2d Cir. 1993) (District Court rejected change in treatment for VA benefits for SSI and reversed on appeal); Abraham v. Sec'y. of Health & Hum. Servs., No. C83-4757, 1990 WL 275821, at *13 (N.D. Ohio Oct. 23, 1990); Robinson v. Sullivan, 733 F. Supp. 989, 995 (E.D. Pa. 1990); Lamkin v. Bowen, 721 F. Supp. 263, 269–70 (D. Colo. 1989); Lydon v. Sullivan, No. CIV S-88-1306-EM, 1989 WL 154818, at *3 (E.D. Cal. Aug. 17, 1989); Ruppert v. Sec'y of U.S. Dep't of Health & Hum. Servs., 671 F. Supp. 151, 169 (E.D.N.Y. 1987).

[172] *See* Perez v. Comm'r of Soc. Sec. Admin., No. CV-18-02737-PHX-MTL, 2020 WL 8991816, at *3 (D. Ariz. Mar. 26, 2020) (Windfall Elimination Provision); Owsley v. Saul, No. 4:18-CV-01328-SRC, 2020 WL 999203, at *5 (E.D. Mo. Mar. 2, 2020) (5-day rule for evidence submission); Viessman v. Saul, No. 4:19-CV-04063-VLD, 2020 WL 133431, at *28 (D.S.D. Jan. 13, 2020) (finding that Step 5 must include jobs that can be performed in the region); Flatequal v. Saul, No. 4:19-CV-04045-VLD, 2019 WL 4857584, at *27 (D.S.D. Oct. 2, 2019) (same); Springer v. Saul, No. 4:19-CV-04030-VLD, 2019 WL 4855186, at *34 (D.S.D. Oct. 1, 2019) (same); Berrios-Ortiz v. Comm'r of Soc. Sec. No. 18-1455 (BJM), 2019 WL 4599834, at *7 (D.P.R. Sept. 23, 2019) (fraud regulations contra statute); Beeler v. Berryhill, 381 F. Supp. 3d 991, 1005 (S.D. Ind. 2019) (Windfall Elimination Provision); Newton v. Comm'r of Soc. Sec., No. CV-18-751(RMB), 2019 WL 1417248, at *4 (D.N.J. Mar. 29, 2019) (same); Hephzibah G. v. Comm'r, Soc. Sec. Admin., No. CV-SAG-18-1186, 2019 WL 670017, at *2 (D. Md. Jan. 22, 2019) (same); Carl E. A. v. Comm'r, Soc. Sec., 427 F. Supp. 3d 620, 624–25 (D. Md. 2019) (same); Gorgol v. Berryhill, No. SA-17-CA-109-HJB, 2017 WL 8181018, at *3 (W.D. Tex. Oct. 18, 2017) (poverty line application for benefits); A.T. Massey Coal Co. v.

a. SSA Prevails at Step 2

Twenty-eight of these seventy-eight cases involve challenges to the SSA changes to rules governing how child disability cases are evaluated[173] and how medical opinions are evaluated,[174] and in

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Barnhart, 381 F. Supp. 2d 469, 482–83 (D. Md. 2005) (application of Coal Industry Retiree Health Benefit Act); Farinas v. Barnhart, 321 F. Supp. 2d 1311, 1316 (S.D. Fla. 2004) (applying the exception to five year bar on benefits to Cuban and Haitian immigrants); Sigmon Coal Co. V. Apfel, 33 F. Supp. 2d 505, 509 (W.D. Va. 1998) (application of Coal Industry Retiree Health Benefit Act); *see* Holland v. Apfel, 23 F. Supp. 2d 21, 28 (D.D.C. 1998) (same); R.G. Johnson Co. V. Apfel, 994 F. Supp. 10, 14 (D.D.C. 1998) (same); Miller v. Callahan, 964 F. Supp. 939, 948 (D. Md. 1997) (denying retroactive application of drug and alcohol rules); Farley v. Sullivan, 793 F. Supp. 1267, 1272–73 (D. Vt. 1992), *rev'd*, 983 F.2d 405 (2d Cir. 1993) (District Court rejected change to accounting method for SSI reversed on appeal); Cervantez v. Sullivan, 719 F. Supp. 899, 913 (E.D. Cal. 1989), *rev'd*, 963 F.2d 229 (9th Cir. 1992), *as amended on denial of reh'g* (June 10, 1992) (District Court rejected changed treatment for garnishments that was reversed on appeal).

[173] *See* Encarnacion ex rel. George v. Astrue, 491 F. Supp. 2d 453, 463–64 (S.D.N.Y. 2007); Marshall ex rel. Phillips v. Barnhart, No. 01 C 6962, 2003 WL 1720060, at *5 (N.D. Ill. Mar. 31, 2003); Encarnacion ex rel. George v. Barnhart, 191 F. Supp. 2d 463, 472 (S.D.N.Y. 2002); Colon v. Apfel, 133 F. Supp. 2d 330, 344 (S.D.N.Y. 2001); Bell ex rel. Wesley v. Apfel, No. 8982092-CIV-T17A, 2000 WL 1262862, at *5 (M.D. Fla. June 26, 2000); Smith ex rel. Smith v. Apfel, 87 F. Supp. 2d 621, 625 (W.D. La. 2000); Camacho v. Apfel, No. 97-11933-GAO, 1999 WL 191694, at *1 (D. Mass. Mar. 30, 1999); Anderson v. Apfel, No. CIV. A. 97-3447, 1999 WL 39518, at *3 (E.D. La. Jan. 29, 1999); DeFranza v. Apfel, No. CIV. A. 97-2784, 1998 WL 892611, at *3 (E.D. La. Dec. 21, 1998); Clennon v. Apfel, No. CIV.A. 97-3807, 1998 WL 883317, at *3 (E.D. La. Dec. 15, 1998); Jourdon on Behalf of Oliver v. Apfel, No. CIV.A. 97-2947, 1998 WL 888978, at *2 (E.D. La. Dec. 15, 1998); Hines v. Apfel, No. CIV. A. 97-3030, 1998 WL 404799, at *3 (E.D. La. July 17, 1998); Fuller v. Apfel, No. 96 CIV. 4475 (MBM), 1998 WL 9402, at *7 (S.D.N.Y. Jan. 13, 1998); Rogers v. Callahan, No. CIV. A. 96-3856, 1997 WL 680586, at *3 (E.D. La. Oct. 31, 1997).

[174] *See* Keener v. Saul, No. CIV-20-649-SM, 2021 WL 2460614, at *4 (W.D. Okla. June 16, 2021); Moore-Allen v. Saul, No. CV-20-2696, 2021 WL 2343012, at *7–8 (E.D. Pa. June 7, 2021); Douglas v. Saul, No. 4:20-CV-00822-CLM, 2021 WL 2188198, at *4 (N.D. Ala. May 28, 2021); Olson v. Saul, No. 20-CV-672-JDP, 2021 WL 1783136, at *4 (W.D. Wis. May 5, 2021); Carr v. Comm'r of Soc. Sec., No. 1:20-CV-00217-EPG, 2021 WL 1721692, at *4 (E.D. Cal. Apr. 30, 2021); Novak v. Saul, No. CIV-20-203-STE, 2021 WL 1646639,

these cases the courts find the new regulations to be permissible under Step 2 of *Chevron*.[175] Of the remaining fifty, twenty-nine involve determinations concerning eligibility for disability.[176]

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at *3 (W.D. Okla. Apr. 27, 2021); Agans v. Saul, No. 2:20-CV-00508 AC, 2021 WL 1388610, at *6 (E.D. Cal. Apr. 13, 2021); Dany Z. v. Saul, No. 2:19-CV-217, 2021 WL 1232641, at *10 (D. Vt. Mar. 31, 2021); Corpuz v. Saul, No. 2:19-CV-02401 AC, 2021 WL 795582, at *7 (E.D. Cal. Mar. 2, 2021); Jones v. Saul, No. 2:19-CV-01273 AC, 2021 WL 620475, at *7 (E.D. Cal. Feb. 17, 2021); George S. v. Saul, No. 19-CV-04252-JSC, 2020 WL 6149692, at *3 (N.D. Cal. Oct. 20, 2020); Patricia F. v. Saul, No. C19-5590-MAT, 2020 WL 1812233, at *3 (W.D. Wash. Apr. 9, 2020); Pearson v. Colvin, No. CV-14-4666, 2015 WL 9581749, at *6 (D.N.J. Dec. 30, 2015); Hodgson v. Barnhart, No. CIV.A.5:05-CV-14 (STA., 2006 WL 5527016, at *5 (N.D. W.Va. Mar. 27, 2006).

[175] *See supra* notes 173–74.

[176] *See* Taylor v. Berryhill, No. 5:17-CV-98, 2018 WL 2383086, at *2 (S.D. Ga. May 25, 2018) (sequential evaluation); Ragland v. Berryhill, No. 17-C-0730, 2018 WL 1757656, at *11 n.10 (E.D. Wis. Apr. 12, 2018) (reliable sources of jobs); DeCamp v. Berryhill, No. 15-C-1261, 2018 WL 1378758, at *12 (E.D. Wis. Mar. 19, 2018) (same); Townsend v. Berryhill, No. 2:16-CV-147, 2018 WL 1041563, at *2 n.3 (S.D. Ga. Feb. 23, 2018) (sequential evaluation); Taylor v. Berryhill, No. 1:16-CV-00044, 2018 WL 1003755, at *16 (W.D. Va. Feb. 21, 2018) (same); King v. Berryhill, No. CV-16-1147 KBM, 2018 WL 851358, at *11 (D.N.M. Feb. 12, 2018) (Dictionary of Occupational Titles); Boeck v. Berryhill, No. 16-C-1003, 2017 WL 4357444, at *20 (E.D. Wis. Sept. 30, 2017) (same); Radosevich v. Berryhill, No. 16-C-1119, 2017 WL 4119626, at *16 (E.D. Wis. Sept. 18, 2017) (same); Laster v. Berryhill, No. 5:16-CV-21, 2017 WL 3736612, at *2 (S.D. Ga. Aug. 30, 2017) (sequential evaluation); Milam v. Colvin, No. 16-CV-00824-CBS, 2017 WL 2438991, at *13 (D. Colo. June 6, 2017) (Dictionary of Occupational Titles); Jones v. Berryhill, No. 2:15-CV-167, 2017 WL 2362014, at *2 (S.D. Ga. May 31, 2017) (sequential evaluation); Lanier v. Colvin, No. 12-CV-3134-JPH, 2014 WL 62281, at *5 (E.D. Wash. Jan. 8, 2014) (period of disability); Souders v. Colvin, No. 4:12-CV-156-WGH-SEB, 2013 WL 6154570, at *2 (S.D. Ind. Nov. 20, 2013) (national economy at Step 5); Philbin v. Astrue, No. CIV.A. 11-4077-JWL, 2012 WL 2601958, at *9 (D. Kan. July 5, 2012) (consideration of part-time employment); Philpott v. Astrue, No. C11-367-MJP-JPD, 2011 WL 6210634, at *9 (W.D. Wash. Nov. 18, 2011) (sufficient jobs at Step 5); Simone v. Astrue, No. 3:10-CV-509-J-TEM, 2011 WL 4005902, at *5 (M.D. Fla. Sept. 9, 2011) (medical improvement standard for continuing disability reviews); Smalls v. Comm'r of Soc. Sec., No. CIV.A. 09-2048 JLL, 2010 WL 2925102, at *6 (D.N.J. July 19, 2010) (comparison point determination for continuing disability reviews); White v. Astrue, No. CIV. A. 07-1691, 2008 WL 4488922, at *11 (W.D. Pa. Oct. 2, 2008) (definition of disability); Kozlowicz v. Comm'r

There are five cases involving the previously discussed Windfall Elimination Provision,[177] four cases involving workers' compensation offsets,[178] and another sixteen addressing benefit levels.[179] The last group addresses attorney fee issues and a subpoena issue.[180]

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of Soc. Sec. Admin., No. 2:04-CV-01281-RCJ-LRL, 2006 WL 2668449, at *4 (D. Nev. Sept. 14, 2006) (insured status for disability insurance benefits); Young v. Barnhart, 415 F. Supp. 2d 823, 831–33 (M.D. Tenn. 2006) (definition of earnings); Nieves v. Barnhart, No. 02 CIV-9207(RWS), 2005 WL 668788, at *2 (S.D.N.Y. Mar. 23, 2005) (period of review for child continuing disability review); Peacock v. Barnhart, No. CIV 03-1407 LCS, 2004 WL 7337577, at *3 (D.N.M. Nov. 11, 2004) (construction of Trial Work Period); Colon v. Barnhart, No. 00 CIV. 5574 (RCC), 2004 WL 60292, at *2 (S.D.N.Y. Jan. 13, 2004) (sequential evaluation); Goode v. Barnhart, No. CIV.A. 02-0305, 2003 WL 22478190, at *1 (E.D. Pa. Aug. 29, 2003) (same); Stengel v. Callahan, 983 F. Supp. 1154, 1164 (N.D. Ill. 1997) (drug and alcohol rules); Lishman v. Chater, No. 96 C 1670, 1996 WL 650437, at *7 (N.D. Ill. Nov. 6, 1996) (age 18 redetermination rules); Sousa v. Chater, 945 F. Supp. 1312, 1329 (E.D. Cal. 1996) (drug and alcohol rules); Monahan v. Sec'y of Health & Hum. Servs., No. 91-CV-5565, 1993 WL 795258, at *12 (D.N.J. Aug. 9, 1993) (trial work period determination); Marsh v. Sullivan, No. C-89-3338-TEH, 1991 WL 154450, at *2 (N.D. Cal. May 1, 1991) (rules regarding subjective pain).

[177] Martin v. Berryhill, No. 5:15-CV-01677-VEH, 2017 WL 818849, at *8 (N.D. Ala. Mar. 2, 2017); Davenport v. Colvin, No. 1:12-CV-1315-LMB/JFA, 2013 WL 2182268, at *14 (E.D. Va. May 20, 2013); Biggs v. Astrue, No. 1:06-CV-0361-OWW/NEW/DLB, 2007 WL 9718714, at *4 (E.D. Cal. Apr. 11, 2007); Johnson v. Sullivan, 777 F. Supp. 741, 743 (W.D. Wis. 1991); Bailey v. Sullivan, 771 F. Supp. 215, 219 (S.D. Ohio 1991).

[178] Giattina v. Chater, 916 F. Supp. 555, 557 (E.D. Va. 1996); Howell v. Sullivan, 1992 WL 120395, at *4 (N.D. Ala. 1992); Rodlin v. Sec'y of Health & Hum. Servs., 750 F. Supp. 146, 150 (D.N.J. 1990); Corsi v. Sullivan, No. 89-3591, 1990 WL 251019, at *3 (D.N.J. June 29, 1990).

[179] Alford v. Comm'r of Soc. Sec., No. 3:17-CV-1200-J-PDB, 2019 WL 4727813, at *6 (M.D. Fla. Sept. 27, 2019) (overpayment waiver standards); MacNeil o/b/o A.T.M. v. Colvin, No. 1:14-CV-1398-GLS/CFH, 2016 WL 11476965, at *2 (N.D.N.Y. Feb. 8, 2016) (dependent child definition); Glosemeyer v. Colvin, No. 1:14-CV-00414, 2015 WL 5943664, at *8 (M.D.N.C. Oct. 13, 2015) (overpayment waiver standards); Hong Jun Xun v. Colvin, No. C-13-2041-YGR, 2014 WL 1477532, at *6 (N.D. Cal. Apr. 15, 2014) (resources definition for SSI); Anderson v. Colvin, No. 13-CV-34-BBC, 2014 WL 348161, at *3 (W.D. Wis. Jan. 31, 2014) (definition of confinement for denial of benefits); Bosco ex rel. B.B. v. Astrue, No. 10-CV-07544-LTS-MHD, 2013 WL 3358016, at *14 (S.D.N.Y. Feb. 19, 2013) (application of state

b. SSA Loses at Step 2

With only twelve losses at Step 2 under *Chevron* at the district court level compared to seven at the circuit court level, the district courts appear even more reluctant to reject the SSA regulations interpreting the Social Security Act.[181] There are some cases at issue where the district courts rejected SSA's interpretation of the Social Security Act only for the position to be vindicated upon direct appeal.[182]

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intestacy laws); Harper-Lee v. Astrue, No. 2:11-CV-571, 2012 WL 1229941, at *5 (S.D. Ohio Apr. 12, 2012) (definition of dependent for survivor benefits); Hunt v. Astrue, 581 F. Supp. 2d 238, 240-241 (D. Mass. 2008) (construction of trusts for SSI asset determinations); Williams v. Astrue, No. 07-CV-0667-H(NLS), 2007 WL 9717710, at *2 (S.D. Cal. Nov. 19, 2007) (construction of nine-month period for survivor benefits for widow); Bailey v. Apfel, 80 F. Supp. 2d 535, 539 (D. Md. 1999) (rules concerning PASS program); Georgiou v. Apfel, 50 F. Supp. 2d 913, 916 (E.D. Mo. 1999) (totalization agreement with Greece); Medina v. Sullivan, No. 90-6440-CIV-MORENO, 1991 WL 477706, at *3 (S.D. Fla. Dec. 26, 1991) (benefit computation for admitted alien); LaBeaux for LaBeaux v. Sullivan, 760 F. Supp. 761, 765 (N.D. Iowa 1991) (classification of tort damages as income for SSI); Giroux v. Sullivan, No. 89-1321-Y, 1990 WL 357277, at *3 (D. Mass. Jan. 30, 1990) (benefit adjustment due to institutional care); Albanese on Behalf of Albanese v. Sullivan, 724 F. Supp. 1083, 1088 (E.D.N.Y. 1989) (same); Szlosek v. Sec'y of Health & Hum. Servs., 674 F. Supp. 944, 949 (D. Mass. 1987), *aff'd*, 861 F.2d 13 (1st Cir. 1988) (permitting cross-program recovery for overpayments and underpayments).

[180] Marasco & Nesselbush, LLP v. Collins, 444 F. Supp. 3d 317, 326 (D.R.I. 2020) (law firm appearances); Robertson v. Berryhill, No. 3:16-3846, 2017 WL 1170873, at *12 (S.D.W. Va. Mar. 28, 2017) (fraud redetermination rules); Blair v. Colvin, No. C12-1118-BAT, 2015 WL 12977384, at *3 (W.D. Wash. Feb. 20, 2015) (attorney's fees rules under Equal Access to Justice Act); Moriarty v. Colvin, 76 F. Supp. 3d 261, 265 (D. Mass. 2014) (attorney fee rules); Feliciano v. Chater, 901 F. Supp. 50, 55 (D.P.R. 1995) (subpoenaing adverse expert witnesses).

[181] *Compare supra* note 151, *with supra* note 171.

[182] Schisler v. Sullivan, No. 80-CV-572E, 1992 WL 170736, at *6 (W.D.N.Y. July 8, 1992), *aff'd in part, rev'd in part*, 3 F.3d 563 (2d Cir. 1993) (rejecting a change to treating source rule under Chevron and reversed on appeal); White v. Sullivan, 813 F. Supp. 1059, 1064 (D. Vt. 1992), *rev'd sub nom.* White v. Shalala, 7 F.3d 296 (2d Cir. 1993) (Rejecting a change in treatment for VA benefits for SSI and reversed on appeal).

There are a series of cases where district courts rejected the regulatory scheme for widowers' disability as unduly narrow based upon the relevant statutory language because the SSA took the position that the determination of disability was to be made without consideration of age, education or past work.[183] While there were also cases ruling in the SSA's favor on this issue,[184] ultimately the SSA chose to revise its regulations in order to take into account the widowers' age, education and past work in determining disability on widowers' claims.[185]

There are also four cases arising from court decisions finding that SSA's construction of the "against equity and good conscience" rules for waiving benefit overpayments to be unduly narrow and contrary to the statute.[186] The position taken by the courts has been the subject of judicial criticism.[187]

The remaining cases present a series of isolated or unique situations. The first pertains to whether benefits can be suspended

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[183] Abraham v. Sec'y. of Health & Hum. Servs., No. C83-4757, 1990 WL 275821, at *13 (N.D. Ohio Oct. 23, 1990); Robinson v. Sullivan, 733 F. Supp. 989, 995 (E.D. Pa. 1990); *compare* 42 U.S.C. § 423(d)(2)(B) (explaining that the Secretary will find a widow to be "under a disability" for purposes of 42 U.S.C. § 402(e) if her "physical or mental impairment or impairments are of a level of severity which under the regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity"), *with* 20 C.F.R. § 404.1577 ("To determine whether you were disabled, we consider only your physical or mental impairment(s). We do not consider your age, education, and work experience.").

[184] Carty v. Sullivan, 736 F. Supp. 14114, 1418 (W.D. Va. 1990); Contreras v. Sullivan, 1990 WL 357098, at *3 (D. Ariz. Apr. 3, 1990).

[185] *See* 20 C.F.R. § 404.1505 (2021) (aligning the standard for disability for widowers to that of adult disability for benefits after December 1990).

[186] Melichar v. Astrue, No. 4:09-CV-244-HEA, 2009 WL 3461229, at *8 (E.D. Mo. Oct. 20, 2009); Mitchell v. Barnhart, No. 2:01-CV-00081-DJS/MLM 2003 WL 23413625, at *6 (E.D. Mo. Dec. 18, 2003); Vilante v. Sullivan, 862 F. Supp. 514, 520 (D.D.C. 1994); Groseclose v. Bowen, 809 F.2d 502, 506 (8th Cir. 1987).

[187] *See* Banuelos v. Apfel, 165 F.3d 1166, 1172–73 (7th Cir. 1999), *overruled on other grounds by* Johnson v. Apfel, 189 F.3d 561, 775 (7th Cir. 1999); Alford v. Comm'r of Soc. Sec., No. 3:17-CV-1200-J-PDB, 2019 WL 4727813, at *4–6 (M.D. Fla. Sept. 27, 2019); Bellm v. Astrue, No. 6:11-CV-301-ORL19-GJK, 2012 WL 13129966, at *8 (M.D. Fla. Sept. 30, 2012). *But see* Quinlivan v. Sullivan, 916 F.2d 524, 526–27 (9th Cir. 1990).

without a finding of intent to flee.[188] One of the proofs that the SSA relies upon is the existence of an arrest warrant or fugitive status to suspend payment of benefits, which requires a threshold determination by law enforcement and avoids an inquiry into matters for which the SSA is unsuited.[189] The problem that has been identified with this determination is that the threshold for a warrant (probable cause) is a lower threshold than the traditional preponderance of evidence utilized by the SSA.[190] There is also a case where the district court rejected the consideration of rehabilitation employment as substantially gainful activity.[191] The next two cases involve district courts rejecting as unduly narrow how the SSA treated in-kind support and loans for SSI.[192] The final case involves the method by which benefits are computed for someone who becomes disabled prior to age thirty-one, returns to work, and then becomes disabled again after age thirty-one.[193] The crux of the dispute is that because of the special alternative minimums for benefit calculations for persons becoming disabled prior to age thirty-one, the claimant was going to receive a lesser benefit during her second period of disability after age thirty-one than her earlier period of benefits prior to age thirty-one.[194] The court ultimately concluded that the savings clause of the Social Security Act prevented a reduction of benefits from her first period of disability to her second.[195] The nature of this inquiry is so esoteric that the court itself described it as requiring a "foray into the labyrinth of social security laws and regulations in which clarity is noticeably absent."[196] Put another way, this issue is extraordinarily isolated, rare, and unlikely to reoccur. It should be

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188 *See* Garnes v. Barnhart, 352 F. Supp. 2d 1059, 1067 (N.D. Cal. 2004).

189 20 C.F.R. § 416.1339.

190 *See* Clark v. Astrue, 602 F.3d 140, 151–52 (2d Cir. 2010).

191 Lamkin v. Bowen, 721 F. Supp. 263, 269–70 (D. Colo. 1989).

192 *See* Lydon v. Sullivan, No. CIV S-88-1306-EM, 1989 WL 154818, at *3 (E.D. Cal. Aug. 17, 1989); Ruppert v. Sec'y of U.S. Dep't of Health & Hum. Servs., 671 F. Supp. 151, 168–69 (E.D.N.Y. 1987).

193 *See* Raymond v. Barnhart, 214 F. Supp. 2d 188, 193 (D.N.H. 2002).

194 *See id.* at 190.

195 *See id.* at 193; *see also* 42 U.S.C. § 420; 20 C.F.R. § 404.130.

196 *Raymond*, 214 F. Supp. 2d at 190.

further noted this case sits as a virtual orphan with no citations to this analysis.

c. Unambiguous and Decided at Step 1

Similar to the situation with the unambiguous cases at the circuit court level, a majority of the unambiguous cases at the district court level[197] involve the Windfall Elimination Act[198] and Coal Industry Retiree Act of 1992.[199] Three district courts found the WEP unambiguous.[200] Another four district courts found the Coal Act unambiguous.[201] Of the remaining ten unambiguous cases, seven involved various issues concerning eligibility for disability benefits.[202] The last three cases involved benefit computations.[203]

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[197] *See supra* note 137.

[198] *See supra* notes 137, 140.

[199] *See supra* notes 150, 158–62 and accompanying text.

[200] *See* Perez v. Comm'r of Soc. Sec. Admin., No. CV-18-02737-PHX-MTL, 2020 WL 8991816, at *3 (D. Ariz. Mar. 26, 2020); Beeler v. Berryhill, 381 F.Supp.3d 991, 1005 (S.D. Ind. 2019); Newton v. Comm'r of Soc. Sec., Civ. No. 18-751, 2019 WL 1417248, at *2 (D.N.J. 2019).

[201] *See* A.T. Massey Coal Co., Inc. v. Barnhart, 381 F. Supp. 2d 469, 482–83 (D. Md. 2005); *see also* Sigmon Coal Co., Inc. v. Apfel, 33 F. Supp. 2d 505, 509 (W.D. Va. 1998); Holland v. Apfel, 23 F. Supp. 2d 21, 28 (D. D.C. 1998); R.G. Johnson Co., Inc. v. Apfel, 994 F. Supp. 10, 14 (D. D.C. 1998).

[202] *See* Owsley v. Saul, No. 18-CV-01328-SRC, 2020 WL 999203, at *6 (E.D. Mo. Mar. 2, 2020) (outlining the 5-day rule for evidence submission); Viessman v. Saul, No. 19-CV-04063-VLD, 2020 WL 133431, at *28 (D.S.D. Jan. 13, 2020) (emphasizing that Step 5 must include jobs that can be performed in the region); Flatequal v. Saul, No. 19-CV-04045-VLD, 2019 WL 4857584, at *27 (D.S.D. Oct. 2, 2019) (outlining that "national economy" means claimant's "region"); Springer v. Saul, No. 19-CV-04030-VLD, 2019 WL 4855186, at *34 (D.S.D. Oct. 10, 2019) (highlighting that "work which exists in the national economy" is a term of art in Social Security law); Berrios-Ortiz v. Comm'r Soc. Sec., No. 18–1455 (BJM), 2019 WL 4599834, at *7 (D.P.R. Sept. 23, 2019) (describing fraud regulations contra statute); Farinas v. Barnhart, 321 F.Supp.2d 1311, 1316 (S.D. Fla. 2004) (applying a "special status" exception to 5-year bar on benefits to Cuban and Haitian immigrants); Miller v. Callahan, 964 F. Supp. 939, 948 (1997) (denying retroactive application of drug and alcohol rules).

[203] *See* Gorgol v. Berryhill, No. SA–17–CA–109–HJB, 2017 WL 8181018, at *3 (W.D. Tex. Oct. 18, 2017) (using the poverty line is statutorily

Similar to the circuit court cases, the SSA experiences a lower affirmation rate where the district court concludes the statutory provision in question is unambiguous. Unlike the circuit court cases involving unambiguous statutes at Step 1 of *Chevron*, the SSA loses a majority of the cases in this posture. At the district court level, the SSA prevailed in five cases.[204] The SSA lost the remaining twelve cases at the district court level.[205] Even more striking is the only area where the SSA prevailed when the statutory provision was unambiguous at the district level has been for Windfall Elimination Provision cases.[206]

B. Skidmore

As discussed previously, *Skidmore* deference is a looser standard compared to *Chevron* deference, with *Skidmore* deference being dependent on how the reviewing court views such factors as the consideration given to the rule in question, the reasoning

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required for benefit applications); *see also* Farley v. Sullivan, 793 F. Supp. 1267, 1272–73 (D. Vt. 1992), *rev'd*, 983 F.2d 405 (2d Cir. 1993) (reversing District Court's denial to change to accounting method for SSI); Cervantez v. Sullivan, 719 F. Supp. 899 (E.D. Cal. 1989), *rev'd*, 963 F.2d 229 (9th Cir. 1992), *as amended on denial of reh'g* (June 10, 1992) (District Court rejected changed treatment for garnishments that was reversed on appeal).

[204] *See* Perez v. Comm'r Soc. Sec. Admin., No. CV-18-02737-PHX-MTL, 2020 WL 8991816, at *3 (D. Ariz. Mar. 26, 2020); Beeler v. Berryhill, 381 F. Supp. 3d 991, 1005 (S.D. Ind. 2019); Newton v. Comm'r Soc. Sec., No. 18–751(RMB), 2019 WL 1417248, at *4–5 (D. N.J. Mar. 29, 2019); Hephzibah G. v. Comm'r Soc. Sec. Admin., No. SAG-18-1186, 2019 WL 670017, at *2 (D. Md. Jan. 22, 2019); Carl E. A. v. Comm'r Soc. Sec., 427 F. Supp. 3d 620, 624–25 (D. Md. 2018).

[205] *See* A.T. Massey Coal Co. v. Barnhart, 381 F. Supp. 2d 469, 486 (D. Md. 2005); Sigmon Coal Co. V. Apfel, 33 F. Supp. 2d 505, 511 (W.D. Va. 1998); R.G. Johnson Co. V. Apfel, 994 F. Supp. 10, 18 (D.D.C. 1998); *Owsley*, 2020 WL 999203, at *9 (5-day rule for evidence submission); *Viessman*, 2020 WL 133431, at *29 (Step 5 must include jobs that can be performed in the region); *Flatequal*, 2019 WL 4857584, *30 (same); *Springer*, 2019 WL 4855186, at *39 (same); *Berrios-Ortiz*, 2019 WL 4599834, at *9 (fraud regulations contra statute); *Farinas*, 321 F. Supp.2d at 1317 (applying an exception to 5-year bar on benefits to Cuban and Haitian immigrants); *Miller*, 964 F. Supp. at 956 (denying retroactive application of drug and alcohol rules).

[206] *See* cases cited *supra* note 200.

underlying the rule, and consistency with earlier and later pronouncements.[207] Notwithstanding the considerable qualifications before satisfying the *Skidmore* test for deference, the deference itself is less than *Chevron*, it is only the "power to persuade."[208] With this reduced role to play and its subordination to *Chevron* after the *Mead* decision,[209] it is probably not surprising that courts are more willing to accede to *Skidmore* than to *Chevron*. A review of court decisions at the circuit and district court level bears this observation out, with courts deferring to the SSA under *Skidmore* in fifty-nine cases to various rules under POMS,[210]

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[207] *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[208] *Id.*

[209] *See supra* Part II, Section A.

[210] Martin v. Soc. Sec. Admin., Comm'r, 903 F.3d 1154, 1162 (11th Cir. 2018); Draper v. Colvin, 779 F.3d 556, 561 (8th Cir. 2015); Kelley v. Comm'r of Soc. Sec., 566 F.3d 347, 350 n.7 (3d Cir. 2009); Williams v. Astrue, 324 F. App'x 618, 619 (9th Cir. 2009); Encarnacion ex rel. George v. Astrue, 568 F.3d 72, 78 (2d Cir. 2009); McGraw v. Barnhart, 450 F.3d 493, 501 (10th Cir. 2006); Koziol v. Comm'r of Soc. Sec., No. 19-CV-4068-CJW-KEM, 2021 WL 930698, at *6 n.3 (N.D. Iowa Jan. 21, 2021); Jankowski v. Comm'r of Soc. Sec., No. 3:19-CV-16424 (BRM), 2020 WL 5810568, at *5 n.3 (D.N.J. Sept. 30, 2020); Jack E. v. Comm'r of Soc. Sec., No. 6:19-CV-872-JR, 2020 WL 6051601, at *3 (D. Or. May 20, 2020); Steven B. C. v. Comm'r, Soc. Sec. Admin., 452 F. Supp. 3d 957, 963 (D. Or. 2020); Bauer v. Comm'r of Soc. Sec., No. 2:15-CV-721-FTM-29-MRM, 2019 WL 12536550, at *4 (M.D. Fla. June 28, 2019); Johnny K. v. Berryhill, No. 6:17-CV-01087-JR, 2019 WL 430889, at *5 (D. Or. Feb. 4, 2019); Julie A. L. v. Comm'r of Soc. Sec., No. 3:18-CV-05419-DWC, 2019 WL 312275, at *2 n.2 (W.D. Wash. Jan. 24, 2019); Mix v. Berryhill, No. 3:17-CV-05739-JRC, 2018 WL 4409122, at *3–4 (W.D. Wash. Sept. 17, 2018); Wagner v. Berryhill, No. CV 17-5698-AS, 2018 WL 3956485, at *4 (C.D. Cal. Aug. 14, 2018); Lagois v. Berryhill, No. C17-310-MJP-JPD, 2017 WL 5713958, at *6 n.12 (W.D. Wash. Oct. 31, 2017); Wheeler v. Comm'r of Soc. Sec., No. 2:16-CV-00171-JTR, 2017 WL 3687658, at *5 n.3 (E.D. Wash. Aug. 25, 2017); Pyle v. Comm'r of Soc. Sec., No. 2:16-CV-00172-JTR, 2017 WL 3484195, at *5 n.1 (E.D. Wash. Aug. 14, 2017); Morgan v. Berryhill, No. 2:16-CV-01052-JRC, 2017 WL 2628094, at *3 (W.D. Wash. June 19, 2017); Daniel v. Berryhill, No. 2-14-CV-01728-JCM/PAL, 2017 WL 2292816, at *13 n.8 (D. Nev. May 25, 2017); Martin v. Berryhill, No. 5:15-CV-01677-VEH, 2017 WL 818849, at *11 (N.D. Ala. Mar. 2, 2017); Hansen v. Colvin, No. 1:15-CV-03131-JTR, 2016 WL 8232839, at *5 n.2 (E.D. Wash. Sept. 19, 2016); Olson v. Colvin, No. 1:15-CV-03152-JTR, 2016 WL 8234830, at *11 n.6 (E.D. Wash. Sept. 14, 2016); Rogers

HALLEX,[211] SSRs,[212] and other miscellaneous rules.[213] As was the case with *Chevron*, there are also instances when the

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v. Colvin, No. 3:15-5938-DWC, 2016 WL 3344573, at *4 (W.D. Wash. June 15, 2016); Dewitt v. Colvin, No. 1:15-CV-03171-JTR, 2016 WL 8232244, at *9 n.12 (E.D. Wash. June 6, 2016); Hernandez v. Colvin, No. 2:14-CV-2246-AC, 2016 WL 881118, at *12 (E.D. Cal. Mar. 8, 2016); Ney v. Colvin, No. 15-CV-00343-JCS, 2015 WL 8178652, at *5 n.4 (N.D. Cal. Dec. 8, 2015); Butts v. Colvin, No. 14-CV-01958-KLM, 2015 WL 5341784, at *6 n.4 (D. Colo. Sept. 15, 2015); Harvey v. Colvin, No. 1:13-CV-01957, 2015 WL 4078223, at *8 (D.D.C. July 1, 2015); Winston v. Colvin, No. 6:13-CV-1662-CL, 2015 WL 1549164, at *3 (D. Or. Apr. 7, 2015); Chin v. Colvin, No. CIV. 12-00508-JMS, 2015 WL 1525985, at *9 (D. Haw. Apr. 2, 2015); Duncan v. Colvin, No. 1:14-CV-01001-CBK, 2015 WL 1478019, at *3 (D.S.D. Mar. 31, 2015); Bouffiou v. Colvin, No. 14-CV-05435-JRC, 2015 WL 300626, at *3 (W.D. Wash. Jan. 22, 2015); Withrow v. Colvin, No. CV 13-1959-AS, 2015 WL 58727, at *9 (C.D. Cal. Jan. 5, 2015); Swarm v. Colvin, No. 1:13-CV-00183-CWD, 2014 WL 4656210, at *4 (D. Idaho Sept. 16, 2014); Udeochu v. Colvin, No. 1:12-CV-00540-CWD, 2014 WL 1017906, at *7 (D. Idaho Mar. 17, 2014); Smullin v. Colvin, No. 1:12-CV-00414-CWD, 2013 WL 5424009, at *5 (D. Idaho Sept. 26, 2013); Turner v. Colvin, 964 F. Supp. 2d 21, 33 (D.D.C. 2013); Lee v. Colvin, No. 3:12-CV-765-DW, 2013 WL 3786860, at *5 (W.D. Ky. July 18, 2013); Hardy v. Colvin, 930 F. Supp. 2d 1196, 1207 (C.D. Cal. 2013); Estrada v. Astrue, No. CV 09-3839-AGR, 2010 WL 3294400, at *3 (C.D. Cal. Aug. 20, 2010).

[211] Daneka M. v. Saul, No. C19-1560-MAT, 2020 WL 2199493, at *4 n.1 (W.D. Wash. May 6, 2020); Annalisa R. v. Saul, No. C19-1363-MAT, 2020 WL 1890612, at *2 n.2 (W.D. Wash. Apr. 16, 2020); Shawn D. v. Comm'r of Soc. Sec., No. C19-1466-BAT, 2020 WL 1673041, at *2 (W.D. Wash. Apr. 6, 2020); Kathleen S. v. Comm'r of Soc. Sec., No. C19-5167 RSL, 2019 WL 4855631, at *7 n.2 (W.D. Wash. Oct. 2, 2019); Michael R. v. Comm'r of Soc. Sec., No. 3:18-CV-05493-DWC, 2018 WL 6630096, at *2 n.2 (W.D. Wash. Dec. 19, 2018); Sharpes v. Berryhill, No. C17-1425-JLR, 2018 WL 2328558, at *5 n.6 (W.D. Wash. May 23, 2018); O'Neill v. Berryhill, No. C17-1700 BHS, 2018 WL 2316223, at *7 n.3 (W.D. Wash. May 22, 2018); Beamesderfer v. Berryhill, No. ED-CV-17-0868-SS, 2018 WL 2315956, at *6 (C.D. Cal. May 18, 2018); Johnson v. Berryhill, No. C17-0277-MAT, 2017 WL 2834286, at *4 n.1 (W.D. Wash. June 29, 2017); Dobson v. Comm'r of Soc. Sec., No. 2:09-CV-1460-KJN, 2013 WL 6198185, at *3 n.4 (E.D. Cal. Nov. 27, 2013); Scharlatt v. Astrue, No. C-04-4724-PJH, 2008 WL 5000531, at *2 n.2 (N.D. Cal. Nov. 21, 2008).

[212] Prince v. Sullivan, 933 F.2d 598, 602 (7th Cir. 1991); Lauer v. Bowen, 818 F.2d 636, 639–40 n.8 (7th Cir. 1987); Lester Z. v. Comm'r of Soc. Sec., No. 1:18-CV-3099-RMP, 2019 WL 7819479, at *6 n.3 (E.D. Wash. Apr. 22, 2019);

courts disagree with the rules put forth by SSA under *Skidmore* deference.[214]

1. SSA Prevails Under *Skidmore*

With a few exceptions that are discussed below,[215] nearly all of the cases where *Skidmore* deference is successfully applied by courts involve eligibility for disability, even more so than under *Chevron.*[216] Outside of eligibility issues, *Skidmore* deference has been applied to benefit level determinations[217] as well as miscellaneous attorney fee issues.[218] There are also situations

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Mettlen v. Comm'r of Soc. Sec. Admin., No. 9:01-CV-28, 2003 WL 1889011, at *7 (E.D. Tex. Apr. 10, 2003).

[213] Hagans v. Comm'r of Soc. Sec., 694 F.3d 287, 306 (3d Cir. 2012); Cage v. Comm'r of Soc. Sec., 692 F.3d 118, 125 (2d Cir. 2012); Lopez v. Comm'r of the Soc. Sec. Admin., No. 3:15-CV-00406-YY, 2016 WL 4107695, at *5 n.6 (D. Or. Aug. 1, 2016); Macias v. Colvin, No. 1:15-CV-00107-SKO, 2016 WL 1224067, at *8 (E.D. Cal. Mar. 29, 2016).

[214] Grunfeder v. Heckler, 748 F.2d 503, 508 (9th Cir. 1984); Shawn G. v. Berryhill, No. 1:18-CV-00570-JM-ST-AB, 2018 WL 3721393, at *6 (S.D. Ind. Aug. 6, 2018); Hicks v. Colvin, 214 F. Supp. 3d 627, 639–40 (E.D. Ky. 2016); Hofler v. Astrue, No. 4:11-CV-172, 2013 WL 442118, at *7 (E.D. Va. Jan. 9, 2013); Schwanz v. Astrue, No. 10-CV-795-HZ, 2011 WL 4501943, at *11 (D. Or. Sept. 28, 2011); Garnes v. Barnhart, 352 F. Supp. 2d 1059, 1063, 1067 (N.D. Cal. 2004); Nodarse v. Barnhart, 319 F. Supp. 2d 1333, 1340 (S.D. Fla. 2004).

[215] *See infra* notes 220–21.

[216] *See supra* notes 200–03.

[217] *See* Koziol v. Comm'r of Soc. Sec., No. 19-CV-4068-CJW-KEM, 2021 WL 930698, at *6, n.3 (N.D. Iowa Jan. 21, 2021) (benefit determinations for married couples); *see also* Martin v. Berryhill, No. 5:15-CV-01677-VEH, 2017 WL 818849, at *10 (N.D. Ala. Mar. 2, 2017) *aff'd sub nom Martin v. Soc. Sec. Admin., Comm'r*, 903 F.3d at 1162 (11th Cir. 2018) (Windfall Elimination Provisions); Draper v. Colvin, 779 F.3d 556, 561 (8th Cir. 2015) (determinations of when trusts are countable assets for SSI); Kelley v. Comm'r of Soc. Sec., 566 F.3d 347, 350 n.7 (3d Cir. 2009) (same); Williams v. Astrue, 324 F. App'x 618 (9th Cir. 2009) (month computation for benefit purposes); Bauer v. Comm'r of Soc. Sec., No. 2:15-cv-721-FtM-29MRM, 2019 WL 12536550, at *1 (M.D. Fla. June 28, 2019) (same); Chin v. Colvin, Civ. No. 12–00508 JMS–KSC, 2015 WL 1525985 (D. Haw. Apr. 2, 2015) (workers compensation offset).

[218] *See* McGraw v. Barnhart, 450 F.3d 493, 501 (10th Cir. 2006); *see also* Dobson v. Comm'r of Soc. Sec., No. 2:09-cv-1460-KJN, 2013 WL 6198185, at

where courts resort to the less deferential standard embodied in *Skidmore* in circumstances where the court cannot ascertain whether a higher level of deference is appropriate.[219]

2. SSA Loses Under *Skidmore*

In situations where the courts disagreed with the SSA under *Skidmore*, a similar pattern emerges to the cases where courts have adopted SSA's positions under *Chevron*, with five of the six cases involving eligibility for disability[220] and the last involving an asset computation for benefits under Title 16.[221]

There are also disagreements between different courts about how deference applies to different types of SSA rules. In particular, the Ninth Circuit concluded that Social Security Rulings ("SSR") receive deference under *Chevron.*[222] This view, however,

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*3, n.4 (E.D. Cal. Nov. 27, 2013); Scharlatt v. Astrue, No. C 04-4724 PJH, 2008 WL 5000531, at *2, n.2 (N.D. Cal. Nov. 21, 2008).

[219] Encarnacion ex rel. George v. Astrue, 568 F.3d 72, 78–79 (2d Cir. 2009).

[220] *See* Hicks v. Colvin, 214 F. Supp. 3d 627, 639–40 (E.D. Ken. 2016); *see also* Hofler v. Astrue, No. 4:11-cv-172, 2013 WL 442118, at *7 (E.D. Va. Jan. 9, 2013) (noting conflict between POMS and HALLEX regarding borderline age determination justifications); Schwanz v. Astrue, No. 10-CV-795-HZ, 2011 WL 4501943, at *11 (D. Ore. Sept. 28, 2011) (finding drug and alcohol emergency message in conflict with statute); Garnes v. Barnhart, 352 F. Supp. 2d 1059, 1067 (N.D. Ca. 2004) (finding POMS rules halting benefits under "fleeing felon" statute were contrary to statute and outside of SSA expertise); Nodarse v. Barnhart, 319 F. Supp. 2d 1333, 1340 (S.D. Fla. 2004) (finding POMS rules regarding eligibility of Cuban and Haitian immigrants to be contrary to statute).

[221] *See* Grunfeder v. Heckler, 748 F.2d at 508 (finding treatment of war reparations under POMS as assets contrary to statute).

[222] *See* Quang Van Han v. Bowen, 882 F.2d 1453, 1457 (9th Cir. 1989) (citing Paxton v. Sec. Health & Hum. Servs., 865 F.2d 1352, 1356 (9th Cir. 1988)); *see also* Paulson v. Bowen, 836 F.2d 1249, 1252 n.2 (9th Cir. 1988) (internal citation and footnote omitted); Jay K. v. Comm'r of Soc. Sec., No. 3:18-CV-05258-TLF, 2019 WL 4024873, at *4 (W.D. Wash. Aug. 26, 2019); Marvin L. v. Comm'r of Soc. Sec., No. C18-836 BAT, 2019 WL 2098820, at *5, n.4 (W.D. Wash. May 14, 2019); Taylor v. Saul, No. 1:16-CV-00044, 2019 WL 3837975, at *2–3 (W.D. Va. Aug. 15, 2019).

is not universally held.[223] There is also a dispute about the deference, if any, afforded to Acquiescence Rulings ("AR") issued by the SSA. ARs are rulings issued by the SSA similar in process to SSRs and instruct the SSA components on how to address certain circuit court decisions.[224] The Third Circuit has given these rulings *Skidmore* deference over *Chevron* deference after a detailed consideration of the factors governing both.[225] This view is also not universally held, with one court arguing there is no need to defer to an administrative ruling about interpreting a judicial opinion.[226]

C. Auer/Seminole Rock

Much has been the case with analyses of *Chevron* and *Skidmore*, the SSA has been largely successful in convincing courts to defer to its interpretations.[227] The SSA has been

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[223] Lester Z. v. Comm'r of Soc. Sec., No. 1:18-CV-3099-RMP, 2019 WL 7819479, at *6, n.3 (E.D. Wash. Apr. 22, 2019) (applying *Skidmore* deference to SSR 13-2p); Wilson v. Comm'r of Soc. Sec., 378 F.3d 541, 549 (6th Cir. 2004) (applying *Auer* deference to SSRs); Lauer v. Bowen, 818 F.2d 636, 639–40, n.8 (7th Cir. 1987) (applying *Skidmore* deference); Outley v. Colvin, 204 F. Supp. 3d 989, 1001–02 (N.D. Ill. 2016); Coskery v. Berryhill, 892 F.3d 1, 5 (1st Cir. 2018) (declining to resolve split in authority).

[224] *Acquiescence Ruling Definition*, SOC. SEC. ADMIN., https://www.ssa.gov/regulations/def-ar.htm (last visited Feb. 15, 2022) [https://perma.cc/V26T-2DBU]; *see also* 20 C.F.R. § 404.985(b) (stating that the SSA will issue an Acquiescence Ruling when it "determine[s] that a United States Court of Appeals holding conflicts with [the SSA's] interpretation of a provision of the Social Security Act or regulations . . . ."); *Social Security Disability Insurance Program: Hearing Before the S. Comm. on Fin.*, 98th Cong., 2d Sess. 115 (Jan. 25, 1984) (statement of SSA Commissioner Martha A. McSteen) (testifying that the SSA's "policy of non-acquiescence is essential to ensure that the agency follows its statutory mandate to administer [the Social Security] program in a uniform and consistent manner").

[225] Hagans v. Comm'r of Soc. Sec., 694 F.3d 287, 301–02 (3d Cir. 2012); Martin v. Berryhill, No. 5:15-CV-01677-VEH, 2017 WL 818849, at *10 (N.D. Ala. Mar. 2, 2017), *aff'd sub nom.* Martin v. Soc. Sec. Admin., Comm'r, 903 F.3d 1154 (11th Cir. 2018); Early v. Berryhill, No. 3:15-CV-00166, 2017 WL 6508174, at *2 n.3 (S.D. Ohio July 28, 2017).

[226] Melvin v. Astrue, 602 F. Supp. 2d 694, 703 (E.D.N.C. 2009).

[227] *See supra* notes 135–36, 171, 210–13.

successful on forty-seven occasions in convincing courts to adopt its interpretation of the SSA regulations under *Auer*,[228] contrasted

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[228] Hicks v. Comm'r of Soc. Sec., 909 F.3d 786, 809 (6th Cir. 2018); Rodysill v. Colvin, 745 F.3d 947, 950 (8th Cir. 2014); Raniolo v. Comm'r of Soc. Sec., 464 F. App'x 836, 837 (11th Cir. 2012); Barker v. Astrue, 459 F. App'x 732, 741 (10th Cir. 2012); Beeler v. Astrue, 651 F.3d 954, 961 (8th Cir. 2011); Ferriell v. Comm'r of Soc. Sec., 614 F.3d 611, 619 (6th Cir. 2010); Reutter ex rel. Reutter v. Barnhart, 372 F.3d 946, 951 (8th Cir. 2004); Wilson v. Comm'r of Soc. Sec., 378 F.3d 541, 549 (6th Cir. 2004); Encarnacion ex rel. George v. Barnhart, 331 F.3d 78, 87 (2d Cir. 2003); Pagter v. Massanari, 250 F.3d 1255, 1260 (9th Cir. 2001); Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1252 (D.C. Cir. 1998); Ian O. v. Commissioner, No. 1:20-CV-00599-EAW, 2021 WL 2133830, at *4 (W.D.N.Y. May 26, 2021); George S. v. Saul, No. 19-CV-04252-JSC, 2020 WL 6149692, at *3 (N.D. Cal. Oct. 20, 2020); Wahler v. Comm'r of Soc. Sec., No. 1:19-CV-00549-EAW, 2020 WL 3496300, at *4 (W.D.N.Y. June 29, 2020); Sewell v. Comm'r, Soc. Sec. Admin., No. 19-CV-00398-NYW, 2020 WL 1289554, at *15 (D. Colo. Mar. 18, 2020); Jean G. v. Saul, No. 8:19-CV-00521-KES, 2020 WL 584735, at *6 (C.D. Cal. Feb. 6, 2020); Mitzi D. v. Saul, No. SA CV-18-01065-DFM, 2019 WL 8112507, at *2 (C.D. Cal. Dec. 13, 2019); Thomas o/b/o C.T. v. Berryhill, No. 18-2467-TLP-TMP, 2019 WL 7580293, at *10 (W.D. Tenn. Nov. 7, 2019); Tyler J. v. Saul, No. 17-CV-50090, 2019 WL 3716817, at *12 (N.D. Ill. Aug. 7, 2019); Ramirez Morales v. Berryhill, No. 6:17-CV-06836-MAT, 2019 WL 1076088, at *3 (W.D.N.Y. Mar. 7, 2019); Bowden v. Berryhill, 2017 WL 2434536, at *12 *affirmed sub nom* Bowden v. Comm'r of Soc. Sec., 776 F. App'x 885, 890 (6th Cir. 2018); Siyah Monsoori v. Comm'r of Soc. Sec., No. 1:17-CV-01161-MAT, 2019 WL 2361486, at *4 (W.D.N.Y. June 4, 2019); Loffreda v. Colvin, No. 4:15-CV-00896-MWB/GBC, 2017 WL 2806819, at *7 (M.D. Pa. May 3, 2017); Dillow v. Berryhill, No. 3:17-CV-00353-DW, 2018 WL 1057025, at *8 (W.D. Ky. Feb. 26, 2018); Cowden v. Colvin, No. 1:16-CV-00168-YK-GBC, 2017 WL 1227454, at *7 (M.D. Pa. Mar. 17, 2017); Higgins v. Colvin, No. 1:15-CV-00594-YK-GBC, 2016 WL 5955762, at *7 (M.D. Pa. Sept. 21, 2016); Washburn v. Colvin, No. 1:15-CV-00674-CCC-GBC, 2016 WL 6136589, at *9 (M.D. Pa. Sept. 21, 2016); Carver v. Colvin, No. 1:15-CV-00634-SHR-GBC, 2016 WL 6601665, at *10 (M.D. Pa. Sept. 14, 2016); Brennan v. Colvin, No. 4:15-CV-01176-MWB-GBC, 2016 WL 7107235, at *9 (M.D. Pa. Sept. 14, 2016); Outley v. Colvin, 204 F. Supp. 3d 989, 1001 (N.D. Ill. 2016); Smith v. Colvin, No. 2:15-CV-00107-AA, 2016 WL 8711697, at *4 (D. Or. Feb. 5, 2016); Butts v. Colvin, No. 14-CV-01958-KLM, 2015 WL 5341784, at *7 (D. Colo. Sept. 15, 2015); Boulet v. Colvin, No. 6:13-CV-00188-JO, 2014 WL 3783963, at *2 (D. Or. July 30, 2014); Leach v. Colvin, No. 1:15-CV-01230-YK-GBC, 2016 WL 4010027, at *2 (M.D. Pa. June 20, 2016); Soles v. Colvin, No. 1:13-CV-491, 2015 WL 7454607, at *7 (M.D.N.C. Nov. 23, 2015) (requirements of listing 1.04); Hardy v. Colvin, 930 F. Supp. 2d 1196,

with only seven losses.[229] The SSA has been similarly successful under *Seminole Rock*, with SSA prevailing fifteen times[230] and again contrasted with only four losses.[231]

1206 (C.D. Cal. 2013); Gant v. Astrue, No. 12 C 4090, 2013 WL 4476219, at *7 (N.D. Ill. Aug. 20, 2013); McLaughlin v. Astrue, No. 10-CV-0506 NGG, 2012 WL 2449938, at *5 (E.D.N.Y. June 27, 2012); Reighard v. Astrue, No. 4:11-CV-1786, 2012 WL 1970122, at *5 (N.D. Ohio June 1, 2012); Perez v. Astrue, No. 1:10-CV-01471-SKO, 2012 WL 28639, at *6 (E.D. Cal. Jan. 5, 2012); Hardy v. Astrue, No. CV-07-1764-PLA, 2009 WL 700061, at *6 (C.D. Cal. Mar. 13, 2009); Moe v. Barnhart, No. CIV A 5:06-CV-00014, 2006 WL 2345867, at *7 (W.D. Va. Aug. 11, 2006); Bowles v. Barnhart, 392 F. Supp. 2d 738, 744 (W.D. Va. 2005); Sparwasser v. Astrue, No. CV-10-574-HU, 2011 WL 4435658, at *6 (D. Or. July 26, 2011); Oakes v. Barnhart, 400 F. Supp. 2d 766, 777 (E.D. Pa. 2005); Becker v. Astrue, No. CV-10-01469-SI, 2012 WL 707333, at *9 (D. Or. Mar. 5, 2012); McCall v. Astrue, No. 05 CIV. 2042(GEL), 2008 WL 5378121, at *10 (S.D.N.Y. Dec. 23, 2008).

[229] Barnes v. Berryhill, 895 F.3d 702, 705 (9th Cir. 2018) (post hoc rationalization of transferable skills position); Bray v. Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1225 (9th Cir. 2009) (unambiguous regulation requiring specific findings of transferable skills); Woodlee v. Barnhart, 147 F. App'x 787, 790 (10th Cir. 2005) (asset exclusions for SSI); Hulstine v. Colvin, No. 1:15-CV-00774-CCC-GBC, 2016 WL 4942039, at *13 (M.D. Pa. Aug. 25, 2016) (rejecting view on treating source opinions as a post hoc litigation position); Geertgens v. Colvin, No. 13 CIV. 5133 JCF, 2014 WL 4809944, at *3 (S.D.N.Y. Sept. 24, 2014) (untenable interpretation of survivor benefit eligibility); Halloran v. Colvin, 964 F. Supp. 2d 609, 614 (E.D. La. 2013) (finding that deference is not appropriate based on shifting position from POMS to brief to Court); Young v. Barnhart, 415 F. Supp. 2d 823, 835 (M.D. Tenn. 2006) (finding that an ALJ needs to articulate reasoning for deference to apply).

[230] Pope v. Shalala, 998 F.2d 473, 485–86 (7th Cir. 1993); Daubert v. Sullivan, 905 F.2d 266, 270 (9th Cir. 1990); Cieutat v. Bowen, 824 F.2d 348, 356–57 (5th Cir. 1987); Parker v. Bowen, 788 F.2d 1512, 1519–20 (11th Cir. 1986); Oldham v. Sec'y of Health & Hum. Servs., 718 F.2d 507, 510 (1st Cir. 1983); Stone v. Heckler, 715 F.2d 179, 183–84 (5th Cir. 1983); Beatty v. Schweiker, 678 F.2d 359, 362 (3d Cir. 1982); Adams v. Harris, 643 F.2d 995, 999 (4th Cir. 1981); United States v. LaLone, 152 F.2d 43, 45 (9th Cir. 1945); Gutierrez v. Bowen, 702 F. Supp. 1050, 1058 (S.D.N.Y. 1989); Irizarry v. Bowen, No. 87 C 10295, 1988 WL 84698, at *4 (N.D. Ill. Aug. 10, 1988); Adams v. Califano, 474 F. Supp. 974, 987 (D. Md. 1979); Stein v. Flemming, 187 F. Supp. 1, 3 (E.D. Mo. 1959); Dowell v. Folsom, 157 F. Supp. 46, 51 (D. Mont. 1957); Harris v. Ewing, 87 F. Supp. 151, 154 (N.D. Ala. 1949).

[231] Fabel v. Shalala, 891 F. Supp. 202, 207 (D.N.J. 1995) (finding SSR 82-52 governing duration requirements of impairments for disability inconsistent with statute); Grossman v. Bowen, 680 F. Supp. 570, 575 (S.D.N.Y. 1988)

1. SSA Prevails Under *Auer/Seminole Rock*

In the vast majority of decisions decided under *Auer*, the courts agreed with SSA's interpretation of its rules, which have centered upon eligibility for benefits either through interpretations of POMS[232] or HALLEX.[233] Eight of these cases, in turn, involve threshold eligibility determinations.[234] Of the cases involving disability determinations, it is interesting to note the contrast between circuits on the appropriate type of deference to SSRs[235] or

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(finding no special expertise in determining presumption of death); Fox v. Heckler, No. C83-4197Y, 1986 WL 82807, at *5 (N.D. Ohio Mar. 5, 1986) (finding basis for reopening decisions asserted by Secretary to be contra to the statute); Gomez v. Harris, 504 F. Supp. 1342, 1348 (D. Ala. 1981) (finding presumption of death interpretation contrary to regulation and case law).

[232] *Raniolo*, 464 F. App'x at 837 (eligibility for widower benefits); Beeler, 651 F.3d at 961 (finding that survivor benefits artificially conceived after death of parent); *Ferriell*, 614 F.3d at 619 (reopening rules); *Reutter ex rel. Reutter*, 372 F.3d at 951 (survivor benefits from stepparent); *Encarnacion ex rel. George*, 331 F.3d at 475 (child disability rules); *Ass'n of Bituminous Contractors, Inc.*, 156 F.3d at 1252 (Coal Act coverage); George S. v. Saul, 2020 WL 6149692, at *3 (N.D. Cal. Oct. 20, 2020) (PASS program); *Loffreda*, 2017 WL 2806819, at *7 (changes to treating source rule); *Cowden*, 2017 WL 1227454, at *7 (commentary to treating source regulations); *Butts*, 2015 WL 5341784, at *7 (social limitations); *Boulet*, 2014 WL 3783963, at *2 (continuing disability review standards); *Soles*, 2015 WL 7454607, at *7 (requirements of listing 1.04); *Hardy*, 930 F. Supp. 2d at 1206 (establishing paternity); *McLaughlin*, 2012 WL 2449938, at *5 (paternity); *Reighard*, 2012 WL 1970122, at *5 (reopening rules); *Hardy*, 2009 WL 700061, at *6 (child survivor benefits); *Sparwasser*, 2011 WL 4435658, at *6 (borderline age determinations); *Oakes*, 400 F. Supp. 2d at 777 (medical expert usage).

[233] *Gant v. Astrue*, 2013 WL 4476219, at *7 (HALLEX generally).

[234] *See Raniolo*, 464 F. App'x at 837 (eligibility for widower benefits); *Beeler*, 651 F.3d at 961 (survivor benefits artificially conceived after death of parent); *Reutter ex rel. Reutter*, 372 F.3d at 951 (survivor benefits from stepparent); *Ass'n of Bituminous Contractors, Inc.*, 156 F.3d at 1252 (Coal Act coverage); Monsoori v. Comm'r of Soc. Sec., No. 1:17-CV-01161-MAT, 2019 WL 2361486, at *4 (W.D.N.Y. June 4, 2019) (medical listing 1.04); *Hardy*, 930 F. Supp. 2d at 1206 (establishing paternity); *McLaughlin*, 2012 WL 2449938, at *5 (considering paternity); *Hardy*, 2009 WL 700061, at *6 (child survivor benefits).

[235] *See* Hicks v. Comm'r of Soc. Sec., 909 F.3d 786, 809 (6th Cir. 2018) (SSR 16-1—reopenings versus redeterminations); Barker v. Astrue, 459 F. App'x 732, 741 (10th Cir. 2012) (SSR 82-61—assessing subjective complaints);

ARs.[236] In particular, some courts have afforded SSRs and ARs a heightened level of deference under *Chevron* or *Auer*, while other courts have applied the less deferential standard under *Skidmore*.[237] The remaining cases where the courts have agreed

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Wilson v. Comm'r of Soc. Sec., 378 F.3d 541, 549 (6th Cir. 2004) (same); Sewell v. Comm'r, Soc. Sec. Admin., No. 19-CV-00398-NYW, 2020 WL 1289554, at *15 (D. Colo. Mar. 18, 2020) (SSR 00-4p—vocational expert testimony); Jean G. v. Saul, No. 8:19-CV-00521-KES, 2020 WL 584735, at *6 (C.D. Cal. Feb. 6, 2020) (SSR 83-10—definition of sedentary work); Mitzi D. v. Saul, No. SA CV-18-01065-DFM, 2019 WL 8112507, at *2 (C.D. Cal. Dec. 13, 2019) (SSR 83-10— definition of light work); Thomas o/b/o C.T. v. Berryhill, No. 18-2467-TLP-TMP, 2019 WL 7580293, at *10 (W.D. Tenn. Nov. 7, 2019) (SSR 17-2—need to obtain medical evidence concerning equivalency to medical listings); Tyler J. v. Saul, No. 17-CV-50090, 2019 WL 3716817, at *12 (N.D. Ill. Aug. 7, 2019) (SSR 16-1—differentiating reopening and redeterminations); Brennan v. Colvin, No. 4:15-CV-01176-MWB-GBC, 2016 WL 7107235, at *9 (M.D. Pa. Sept. 14, 2016) (SSR 96-6p); Outley v. Colvin, 204 F. Supp. 3d 989, 1001 (N.D. Ill. 2016) (SSR 16-3—evaluating evidence); Leach v. Colvin, No. 1:15-CV-01230-YK-GBC, 2016 WL 4010027, at *2 (M.D. Pa. June 20, 2016) (SSR 96-6—medical opinion evaluation); Becker v. Astrue, No. CV-10-01469-SI, 2012 WL 707333, at *9 (D. Or. Mar. 5, 2012) (SSR 06-03—evaluating non-medical opinions).

[236] *See* Ian O. v. Comm'r of Soc. Sec., No. 1:20-CV-00599 EAW, 2021 WL 2133830, at *4 (W.D.N.Y. May 26, 2021) (AR 15-1(4)—clarifying medical listing 1.04); Wahler v. Comm'r of Soc. Sec., No. 1:19-CV-00549 EAW, 2020 WL 3496300, at *4 (W.D.N.Y. June 29, 2020) (same); Morales v. Berryhill, No. 6:17-CV-06836-MAT, 2019 WL 1076088, at *4 (W.D.N.Y. Mar. 7, 2019) (same); Smith v. Colvin, No. 2:15-CV-00107-AA, 2016 WL 8711697, at *4 (D. Or. Feb. 5, 2016) (same).

[237] *See* Quang Van Han v. Bowen, 882 F.2d 1453, 1457 (9th Cir. 1989) (applying *Chevron* to SSR); Paxton v. Sec'y of Health & Hum. Servs., 856 F.2d 1352, 1356 (9th Cir. 1988) (same); Lopez Grajeda v. Berryhill, No. CV 17-6421-KK, 2018 WL 6843726, at *5 (C.D. Cal. Sept. 18, 2018) (same); White v. Shalala, 7 F.3d 296, 300 (2d Cir. 1993) (applying *Chevron*); *Wilson*, 378 F.3d at 549 (applying *Auer* deference to SSR); Hagans v. Comm'r of Soc. Sec., 694 F.3d 287, 303 (3d Cir. 2012) (applying *Skidmore* deference to Acquiescence Ruling); Lauer v. Bowen, 818 F.2d 636, 640 (7th Cir. 1987). *But see* Montalvo v. Astrue, 237 F. App'x 259, 262 (9th Cir. 2007) (applying *Skidmore* to SSR); *see also* Coskery v. Berryhill, 892 F.3d 1, 5 (1st Cir. 2018) (recognizing split in authorities).

involve benefit level determinations and overpayment procedures.[238]

The pattern for *Seminole Rock* deference where the SSA has prevailed differs significantly from *Auer*, with most of the decisions centered upon eligibility for benefits determinations where the court is asked to adopt an interpretation by the SSA involving regulations promulgated through notice and comment rulemaking[239] or, in one instance, an SSR.[240] The explanation for this divergence between *Auer* deference and *Seminole Rock* deference may be the time periods involved and how adverse decisions of the SSA were challenged, with older cases under *Seminole Rock* challenging SSA's interpretations of the regulations, while the more recent challenges were based on challenges to whether the SSA complied with its internal operating

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[238] *See* Rodysill v. Colvin, 745 F.3d 947, 950 (8th Cir. 2014) (overpayment rules); Pagter v. Massanari, 250 F.3d 1255, 1260 (9th Cir. 2001) (pension offset); Bowden v. Berryhill, No. CV 16-240-DLB, 2017 WL 2434536, at *12 (E.D. Ky. June 5, 2017), *aff'd sub nom* Bowden v. Comm'r of Soc. Sec., 776 F. App'x 885, 890 (6th Cir. 2018) (independent household agreements); Dillow v. Berryhill, No. 3:17-CV-00353-DW, 2018 WL 1057025, at *8 (W.D. Ky. Feb. 26, 2018) (asset determination for cohabiting individuals); McCall v. Astrue, No. 05 CIV. 2042(GEL), 2008 WL 5378121, at *10 (S.D.N.Y. Dec. 23, 2008) (quarters of coverage from private disability insurance payments).

[239] *See* Daubert v. Sullivan, 905 F.2d 266, 270 (9th Cir. 1990) (proof of death); Cieutat v. Bowen, 824 F.2d 348, 356–57 (5th Cir. 1987) (reopening); Parker v. Bowen, 788 F.2d 1512, 1519–20 (11th Cir. 1986) (Appeals Council review); Oldham v. Sec'y of Health & Hum. Servs., 718 F.2d 507, 510 (1st Cir. 1983) (interpreting Appeals Council review regulations); Stone v. Heckler, 715 F.2d 179, 183 (5th Cir. 1983) (accidental death); Adams v. Harris, 643 F.2d 995, 999 (4th Cir. 1981) (adequacy of notice of hearing); United States v. LaLone, 152 F.2d 43, 45 (9th Cir. 1945) (employee eligibility for survivor benefits); Gutierrez v. Bowen, 702 F. Supp. 1050, 1058 (S.D.N.Y. 1989) (reopening); Irizarry v. Bowen, No. 87 C 10295, 1988 WL 84698, at *4 (N.D. Ill. Aug. 10, 1988) (evaluating mental impairments); Adams v. Califano, 474 F. Supp. 974, 987 (D. Md. 1979) (sufficiency of denial notices); Stein v. Flemming, 187 F. Supp. 1, 3 (E.D. Mo. 1959) (lump sum death benefit eligibility); Dowell v. Folsom, 157 F. Supp. 46, 51 (D. Mont. 1957) (survivor benefit eligibility); Harris v. Ewing, 87 F. Supp. 151, 154 (N.D. Ala. 1949) (lump sum death benefit eligibility).

[240] Pope v. Shalala, 998 F.2d 473, 485 (7th Cir. 1993) (pain rules under SSR 88-13).

rules under HALLEX or POMS.[241] Another and perhaps more obvious reason lies with the fact that most of the challenges predate *Chevron*.[242] The remaining case where the SSA prevailed under *Seminole Rock* involves benefit determinations.[243]

2. SSA Loses Under *Auer/Seminole Rock*

Of the seven cases where the SSA did not prevail under *Auer* deference, a plurality of three involve rejections of the positions taken by the SSA as post hoc rationalizations or otherwise shifting reasoning.[244] Another two of these losses are attributable to the SSA taking positions incompatible with its own regulations.[245] Of the final two losses, the first occurred because the court could not find a position staked out by the SSA[246] and the second was because the court found SSA's own regulation to be unambiguous and, therefore, *Auer* deference was unnecessary.[247] This relative lack of unambiguous rules under *Auer* stands in contrast to *Chevron*.[248] The probable explanation is that SSA has far more control of the process under *Auer*, where SSA is seeking deference for its interpretations of regulations drafted by SSA, than under

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241 *Compare supra* notes 228–31, *with supra* notes 232–36.

242 *Id.*

243 Beatty v. Schweiker, 678 F.2d 359, 362 (3d Cir. 1982) (treatment of lump sum back benefits for asset purposes).

244 *See* Barnes v. Berryhill, 895 F.3d 702, 705 (9th Cir. 2018) (post hoc rationalization of transferable skills position); Hulstine v. Colvin, 2016 WL 4942039, at *13 (M.D. Pa. Aug. 25, 2016) (rejecting view on treating source opinions as a post hoc litigation position); *Halloran v. Colvin*, 964 F. Supp. 2d at 614 (explaining that deference is not appropriate based on shifting position from POMS to brief to Court).

245 Woodlee v. Barnhart, 147 F. App'x 787, 790 (10th Cir. 2005) (asset exclusions for SSI); Geertgens v. Colvin, No. CIV.5133 JCF, 2014 WL 4809944, at *3 (S.D.N.Y. Sept. 24, 2014) (untenable interpretation of survivor benefit eligibility).

246 Young v. Barnhart, 415 F. Supp. 2d 823, 835 (M.D. Tenn. 2006) (explaining that an ALJ needs to articulate reasoning for deference to apply).

247 Bray v. Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1225 (9th Cir. 2009) (explaining that unambiguous regulation requires specific findings of transferable skills).

248 *Compare id.*, *with supra* notes 132, *and* 136.

Chevron, where the SSA is seeking deference to its interpretations of laws written by Congress.

Of the four losses under *Seminole Rock,* two of the losses have been over the presumption of death for survivor benefits eligibility.[249] In both cases, the courts disputed the imputation of expertise to the SSA for making this type of determination.[250] The last two cases involve agency interpretations inconsistent with the underlying statutes.[251]

D. State Farm/Substantial Evidence

When compared to the other forms of deference previously discussed, *State Farm* stands apart from virtually every other standard when applied to SSA decisions. Of the 144 SSA cases where *State Farm* is cited, it is only cited for the arbitrary and capricious standard of review in six cases.[252] In the vast majority

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[249] *See* Grossman v. Bowen, 680 F. Supp. 570, 575 (S.D.N.Y. 1988) (finding no special expertise in determining presumption of death); Gomez v. Harris, 504 F. Supp. 1342, 1348 (D. Ala. 1981) (finding presumption of death interpretation is contra to regulation and case law).

[250] *See Grossman*, 680 F. Supp. at 575; *Gomez*, 504 F. Supp. at 1348.

[251] *See* Fabel v. Shalala, 891 F. Supp. 202, 206 (D.N.J. 1995) (finding SSR 82-52 governing duration requirements of impairments for disability inconsistent with statute); Fox v. Heckler, No. C83-4197Y, 1986 WL 82807, at *5 (N.D. Ohio Mar. 5, 1986) (finding basis for reopening decisions asserted by Secretary to be contra to the statute).

[252] *See* Drombetta v. Sec'y of Health & Hum. Servs., 845 F.2d 607, 610 (6th Cir. 1987) (upholding application of "pooled fund" method of evaluating survivor benefit offset); Jones v. Saul, No. 2:19-CV-01273-AC, 2021 WL 620475, at *7 (E.D. Cal. Feb. 17, 2021) (denying challenge to change in how medical opinions are evaluated); McCrea v. Soc. Sec. Comm'r, No. CV 17-2207-TJK/DAR, 2019 WL 5110547, at *3 (D.D.C. Aug. 16, 2019) (citing standard generally); Tyler J. v. Saul, No. 17-CV-50090, 2019 WL 3716817, at *12 (N.D. Ill. Aug. 7, 2019) (finding the two differing standards for fraud to be arbitrary and capricious); Bowden v. Berryhill, No. CV 16-240-DLB, 2017 WL 2434536, at *12 (E.D. Ky. June 5, 2017) (upholding application of "business arrangement" and rental subsidy"); Davis v. Callahan, No. 96 CIV. 9367 (SAS), 1997 WL 438772, at *9 (S.D.N.Y. Aug. 4, 1997) (considering the definition of asthma attack as found in Section 3.00C of the Listing).

of cases, *State Farm* is cited for one or two reflexive principles.[253] The first is that a court or appellate counsel "may not supply a reasoned basis for the agency's action that the agency itself has not given."[254] The second principle is that the court will uphold the decision of SSA "of less than ideal clarity if the agency's path may reasonably be discerned."[255]

The first principle is often cited as a response to an attorney for the SSA attempting to fill in the gaps left in a decision by an ALJ with the evaluation of medical opinions,[256] witness credibility,[257]

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[253] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[254] *Id.* (citing Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947)).

[255] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

[256] *See* McGaster v. Saul, No. CV 1:18-00321-N, 2019 WL 4544561, at *7 (S.D. Ala. Sept. 19, 2019*);* Russell v. Berryhill, No. CV 17-30045-MGM, 2019 WL 9244981, at *4 (D. Mass. Sept. 17, 2019); Williams v. Saul, No. 8:18-CV-1765-T-TGW, 2019 WL 4410323, at *3 (M.D. Fla. Sept. 13, 2019); Witz v. Soc. Sec. Admin., No. 2:18-CV-00035, 2019 WL 1450538, at *9 (M.D. Tenn. Mar. 12, 2019); Wilson v. Comm'r of Soc. Sec., No. 5:18-CV-335, 2019 WL 366692, at *10 (N.D. Ohio Jan. 30, 2019); Suzadail v. Berryhill, No. 3:18 -CV-0535, 2018 WL 4211737, at *10 (M.D. Pa. Sept. 4, 2018); Roberts v. Berryhill, No. 8:17-CV-1870-T-30TGW, 2018 WL 4403278, at *4 (M.D. Fla. Aug. 29, 2018); Lokey v. Comm'r, Soc. Sec. Admin., No. 3:17-1090, 2018 WL 2739371, at *5 (M.D. Tenn. June 7, 2018); Vitale v. Comm'r of Soc. Sec., No. 16-12654, 2017 WL 9470705, at *10 (E.D. Mich. Sept. 1, 2017); Atkinson v. Berryhill, No. 7:16-CV-333-FL, 2017 WL 4020433, at *5 (E.D.N.C. Aug. 28, 2017) (failure to consider Veterans Administration disability); Kelly v. Berryhill, No. 3:14-CV-00557, 2017 WL 3237792, at *6 (M.D. Tenn. July 31, 2017) (opinion evaluation); Woodard v. Berryhill, No. 8:16-CV-2412-T-27TGW, 2017 WL 3268473, at *4 (M.D. Fla. June 30, 2017); Born v. Berryhill, No. 3:14-CV-01946, 2017 WL 2376921, at *9 (M.D. Tenn. June 1, 2017); Jackson v. Colvin, No. 16-CV-00010, 2017 WL 1534327, at *4 (D.D.C. Apr. 27, 2017); Allen v. Berryhill, 273 F. Supp. 3d 763, 774 (M.D. Tenn. 2017); Cortes v. Comm'r of Soc. Sec., No. 15-14064, 2017 WL 941833, at *10 (E.D. Mich. Feb. 22, 2017); Wilkins v. Comm'r of Soc. Sec., No. 16-10134, 2017 WL 927621, at *12 (E.D. Mich. Feb. 16, 2017); Rounds v. Comm'r of Soc. Sec., No. 15-12440, 2016 WL 5661594, at *8 (E.D. Mich. Sept. 30, 2016); Dowdy v. Colvin, No. 4:15-CV-1120-VEH, 2016 WL 4479888, at *5 (N.D. Ala. Aug. 25, 2016); Purdy v. Comm'r of Soc. Sec., No. 15-10949, 2016 WL 4771393, at *9 (E.D. Mich. Aug. 19, 2016); Johnson v. Comm'r of Soc. Sec., 193 F. Supp. 3d 836, 847 (N.D. Ohio 2016); West v. Colvin, No. 8:14-CV-2659-T-TGW, 2016 WL 7508830, at

medical evidence,[258] medical listings,[259] the sequential evaluation process itself[260] or sometimes by a jurist.[261] Once this principle is

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*4 (M.D. Fla. Mar. 23, 2016); Ferraro v. Colvin, No. 1:14-CV-2413-VEH, 2016 WL 233102, at *4 (N.D. Ala. Jan. 20, 2016); Neff v. Colvin, No. 3:14-CV-2278, 2015 WL 4878720, at *14 (M.D. Pa. Aug. 14, 2015); Aldridge v. Colvin, No. 2:14-CV-24814, 2015 WL 4935117, at *5 (S.D.W. Va. July 16, 2015); Yoder v. Colvin, No. 8:14-CV-440-T-TGW, 2015 WL 769931, at *4 (M.D. Fla. Feb. 23, 2015); Mischka v. Colvin, No. 13-CV-1881, 2014 WL 7913045, at *13 (N.D. Ohio Sept. 29, 2014); Vock v. Comm'r of Soc. Sec., No. 13-12753, 2014 WL 4206885, at *19 (E.D. Mich. Aug. 22, 2014); Keith v. Comm'r of Soc. Sec., No. CIV.A. 12-4172 ES, 2013 WL 6904070, at *6 (D.N.J. Dec. 31, 2013); Bolen v. Colvin, No. 5:12 CV 3059, 2013 WL 6198289, at *18 (N.D. Ohio Nov. 27, 2013); Bubel v. Comm'r of Soc. Sec., No. 12-10616, 2013 WL 5231217, at *13 (E.D. Mich. Sept. 17, 2013); Gonz v. Comm'r of Soc. Sec., No. 6:12-CV-614-ORL-GJK, 2013 WL 4494313, at *4 (M.D. Fla. Aug. 20, 2013) (VA disability rating); Seaks v. Comm'r of Soc. Sec., No. 12-11783, 2013 WL 12122324, at *8 (E.D. Mich. Aug. 8, 2013); Punches v. Comm'r of Soc. Sec., No. 3:12-CV-974, 2013 WL 3992593, at *9 (N.D. Ohio Aug. 5, 2013); Boothe v. Colvin, No. 5:13-CV-21, 2013 WL 3779212, at *13 (N.D. Ohio July 18, 2013); Salamina v. Colvin, No. 8:12-CV-1985-T-23TGW, 2013 WL 2352204, at *4 (M.D. Fla. May 29, 2013) (VA disability rating); Varner v. Astrue, No. 1:12-CV-1857, 2013 WL 872402, at *8 (N.D. Ohio Mar. 8, 2013); Schroeder v. Comm'r of Soc. Sec., No. 11-14778, 2013 WL 1316748, at *13 (E.D. Mich. Mar. 1, 2013); Cejka v. Comm'r of Soc. Sec., No. 12-11102, 2013 WL 1317213, at *13 (E.D. Mich. Feb. 27, 2013); Jones v. Comm'r of Soc. Sec., No. 12-10502, 2013 WL 1189959, at *13 (E.D. Mich. Feb. 26, 2013); Fetters v. Astrue, No. 1:12-CV-1826, 2013 WL 474710, at *7 (N.D. Ohio Feb. 7, 2013); Richards v. Astrue, No. 1:12-CV-832, 2012 WL 7006345, at *10 (N.D. Ohio Dec. 17, 2012); Corona v. Astrue, no. 09-CV-02439-WJM-KMT, 2011 WL 4591958, at *3 (D. Colo. Oct. 4, 2011); Newsome v. Astrue, No. CIV.A. 9:09-2859-DCN, 2011 WL 902482, at *3 (D.S.C. Jan. 6, 2011).

[257] *See* Gross v. Comm'r Soc. Sec., 653 F. App'x 116, 121 (3d Cir. 2016) (pain complaints); Nichols v. Saul, No. 1:20-CV-00063-MOC, 2020 WL 5111211, at *4 (W.D.N.C. Aug. 31, 2020) (credibility resolution); Pariscoff v. Comm'r of Soc. Sec., No. 2:17-CV-798, 2018 WL 1224515, at *7 (S.D. Ohio Mar. 9, 2018) (credibility); Soltis v. Colvin, No. 8:14-CV-549-T-TGW, 2015 WL 631387, at *4 (M.D. Fla. Feb. 13, 2015) (same); Howell v. Astrue, No. 8:10-CV-2175-T-26TGW, 2011 WL 4002557, at *4 (M.D. Fla. Aug. 16, 2011) (same); McKinney v. Astrue, No. 8:08-CV-2318-T-TGW, 2010 WL 149826, at *3 (M.D. Fla. Jan. 15, 2010) (complaints about reaching limitations); Mai v. Astrue, No. 807-CV-288-T-TGW, 2008 WL 398985, at *3 (M.D. Fla. Feb. 11, 2008) (complaints of sleepiness associated with a medical condition).

[258] Huffman v. Saul, No. 5:19-CV-449-CHB, 2020 WL 6937441, at *10 (E.D. Ky. Nov. 24, 2020) (assessing impairment); Sallah v. Comm'r of Soc.

Sec., No. 16-14098, 2018 WL 1322064, at *10 (E.D. Mich. Feb. 23, 2018) (unaddressed evidence); Wilson v. Colvin, No. 5:14-CV-1784-VEH, 2016 WL 362407, at *5 (N.D. Ala. Jan. 29, 2016) (drugs and alcohol addiction); Walker v. Colvin, No. 1:15-CV-1234, 2015 WL 13217098, at *8 (N.D. Ohio Dec. 11, 2015) (fibromyalgia); Reeves v. Colvin, No. 3:15-CV-444, 2015 WL 4601199, at *13 (M.D. Pa. July 30, 2015) (migraines); Hardy v. Colvin, 2015 WL 4529950, at *11 (Global Assessment of Functioning ("GAF") scores); Lalonde v. Colvin, No. 8:14-CV-580-T-TGW, 2015 WL 628784, at *4 (M.D. Fla. Feb. 12, 2015) (finger pain and swelling); Gonzalez v. Colvin, No. 8:12-CV-674-T-TGW, 2013 WL 2285101, at *7 (M.D. Fla. May 23, 2013) (GAF scores); Faircloth v. Astrue, No. 8:12-CV-107-T-TGW, 2013 WL 461799, at *3 (M.D. Fla. Feb. 6, 2013) (medication side effects); Zupo v. Astrue, No. 8:11-CV-2857-T-TGW, 2013 WL 411398, at *4 (M.D. Fla. Feb. 1, 2013) (allergies); Tanner v. Astrue, No. CA 8:10-270-CMC-JDA, 2011 WL 2313042, at *2 (D.S.C. June 9, 2011) (medical records submitted to Appeals Council and not addressed); Luster v. Astrue, No. CA 9:10-1345-CMC, 2011 WL 2182719, at *2 (D.S.C. June 6, 2011) (same); Sligh v. Astrue, No. CIV.A. 9:10-0485-CMC, 2011 WL 2144601, at *5 (D.S.C. Apr. 22, 2011) (same); Carpenter v. Astrue, No. 8:10-CV-290-T-TGW, 2011 WL 767652, at *4 (M.D. Fla. Feb. 25, 2011) (back impairment evidence); Lowman v. Astrue, No. 8:08-CV-T-1214-TGW, 2009 WL 2134920, at *3 (M.D. Fla. July 13, 2009) (medication side effects); Imseis v. Astrue, No. 8:08-CV-172TTGW, 2009 WL 603769, at *3 (M.D. Fla. Mar. 9, 2009) (undiscussed orthopedic treatment).

[259] Idalski v. Comm'r of Soc. Sec., No. 16-11560, 2017 WL 4158793, at *9 (E.D. Mich. Aug. 24, 2017) (medical listing 2.07); Proctor v. Colvin, No. CV 2:15-16255, 2016 WL 11269930, at *11 (S.D.W. Va. Sept. 20, 2016) (consideration of listing 1.02); Ellsworth v. Comm'r of Soc. Sec., No. 3:15-CV-02173, 2016 WL 11260325, at *7 (N.D. Ohio Aug. 5, 2016) (medical listing 12.05); Taylor v. Colvin, No. 5:14-CV-2704, 2015 WL 5852932, at *7 (N.D. Ohio Oct. 6, 2015) (same); Teel v. Comm'r of Soc. Sec., No. 1:13CV755, 2013 WL 6180302, at *12 (N.D. Ohio Nov. 24, 2013) (medical listing 1.04C); McClellan v. Astrue, 804 F. Supp. 2d 678, 695 (E.D. Tenn. 2011) (medical listing 12.05).

[260] *See* Chacon v. Saul, No. 8:19-CV-2371-T-TGW, 2020 WL 6624927, at *4 (M.D. Fla. Nov. 12, 2020) (past relevant work determination); Wunker v. Saul, No. 19-CV-02137-REB, 2020 WL 1329699, at *3 (D. Colo. Mar. 23, 2020) (residual functional capacity assessment); Marrero o/b/o A.D.M. v. Saul, No. 8:20-CV-133-TGW, 2021 WL 1086154, at *6 (M.D. Fla. Mar. 22, 2021) (child functional domains); Williams v. Saul, No. CV 18-10547-MGM, 2019 WL 9244979, at *5 (D. Mass. Dec. 31, 2019) (Step 5 determination); Muniz v. Berryhill, No. CIV-17-433-G, 2018 WL 4635032, at *4 (W.D. Okla. Sept. 27, 2018) (ability to perform other work); Boyle v. Colvin, No. 1:14CV1294, 2015 WL 350383, at *15 (N.D. Ohio Jan. 23, 2015) (substantially gainful activity); Brabender v. Colvin, No. 8:13-CV-2315-T-TGW, 2014 WL 4627441, at *5

raised, it is normally fatal to SSA's case;[262] however, there are some exceptions.[263]

(M.D. Fla. Sept. 15, 2014) (independent work related expenses and substantially gainful activity); Mitchell v. Comm'r of Soc. Sec., No. 13-11138, 2014 WL 840086, at *15 (E.D. Mich. Mar. 4, 2014) (residual functional capacity assessment); Urban v. Comm'r of Soc. Sec., No. 1:13 CV 1136, 2014 WL 700041, at *8 (N.D. Ohio Feb. 21, 2014) (pulmonary irritants at Step 5 of the sequential evaluation); St. James v. Comm'r of Soc. Sec., No. 13-10574, 2014 WL 1305032, at *11 (E.D. Mich. Feb. 4, 2014) (residual functional capacity); Rodriguez v. Astrue, No. 8:10-CV-2192-T-TGW, 2011 WL 4028559, at *4 (M.D. Fla. Sept. 12, 2011) (past relevant work analysis); Williams v. Astrue, No. 8:09CV1519T-TGW, 2010 WL 2342426, at *3 (M.D. Fla. June 8, 2010) (unsuccessful work attempt).

[261] Burgess v. Comm'r of Soc. Sec., No. CV 19-13243, 2021 WL 1175193, at *5 (E.D. Mich. Mar. 29, 2021) (opinion evaluation); Thompson v. Berryhill, No. 4:18-CV-133 FL, 2019 WL 2980030, at *5 (E.D.N.C. Apr. 22, 2019) (same); Dunston v. Berryhill, No. 5:17-CV-380-FL, 2018 WL 4204639, at *3 (E.D.N.C. Sept. 4, 2018) (same).

[262] *See* Verkuil, *supra* note 132.

[263] Harris v. Comm'r of Soc. Sec., No. 1:18-CV-00007-TAV-SKL, 2018 WL 7019998, at *12 (E.D. Tenn. Dec. 7, 2018) (past relevant work but upholding ALJ position); Bowen v. Berryhill, No. 5:16-CV-65-FL, 2017 WL 1194462, at *4 (E.D.N.C. Mar. 31, 2017) (denying post hoc evaluation); Clark v. Colvin, No. CV 2:15-14654, 2016 WL 7366955, at *7 (S.D.W. Va. Nov. 22, 2016) (unsuccessful post hoc argument); Vanlue v. Colvin, No. CV 2:16-01499, 2016 WL 6883213, at *16 (S.D.W. Va. Oct. 6, 2016) (same); Brown v. Colvin, No. 4:15-CV-00992-MWB-GBC, 2016 WL 6661183, at *19 (M.D. Pa. Aug. 25, 2016) (same); Amr v. Comm'r of Soc. Sec., No. 17-10349, 2018 WL 1088030, at *11 (E.D. Mich. Feb. 26, 2018) (affirming ALJ decision and denying post hoc reasoning); Passaretti v. Colvin, No. 3:15-CV-520, 2015 WL 5697510, at *8 (M.D. Pa. Sept. 24, 2015) (same); Sherman v. Colvin, No. 3:15-CV-281, 2015 WL 4727298, at *17 (M.D. Pa. Aug. 10, 2015) (same); Wright v. Colvin, No. 3:15-CV-102, 2015 WL 4530384, at *13 (M.D. Pa. July 27, 2015) (same); McElhenny v. Colvin, No. 3:15-CV-103, 2015 WL 4066874 (M.D. Pa. July 2, 2015); Dyer v. Colvin, No. 3:14-CV-1962, 2015 WL 3953135, at *21 (M.D. Pa. June 29, 2015) (remanding but not based on post hoc reasoning issues); Bailey v. Colvin, No. 6:13-CV-31743, 2015 WL 1467053, at *4 (S.D.W. Va. Mar. 30, 2015) (rejecting post hoc argument and found ALJ argument to be discernible); Fultz v. Colvin, No. 13-2271-JWL, 2014 WL 4248238, at *3 (D. Kan. Aug. 27, 2014) (finding no post hoc because no evidence in the record); Clark v. Astrue, No. 5:12-CV-0046, 2012 WL 4023571, at *6 (N.D. Ohio Sept. 12, 2012) (not reaching SSA's ex post facto arguments because other evidence supported their position); Dorton v. Astrue, No. 1:11-CV-2790, 2012 WL 3853332, at *11 (N.D. Ohio Sept. 5, 2012) (same); Buchan v. Astrue, No. CIV.A. 10-4081-JWL,

If the first principle stands for the proposition that courts will only affirm actions by the SSA for the reasons set forth by the ALJ, the second principle is even more basic: courts will only uphold an action where they can identify the reasons for the action.[264] As with the first principle, once a court discusses this

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2011 WL 3714472, at *15 (D. Kan. Aug. 24, 2011) (affirming ALJ decision and denying post hoc reasoning); Bailey v. Comm'r of Soc. Sec., 623 F. Supp. 2d 889 (W.D. Mich. 2009) (same).

[264] Johnson v. Comm'r, No. 20-3111, 2021 WL 2661544, at *7 (E.D. Pa. June 29, 2021) (finding sufficient explanation); Huffman v. Saul, No. 5:19-CV-449-CHB, 2020 WL 6937441, at *10 (E.D. Ky. Nov. 24, 2020) (same); Hendrix v. Saul, No. 3:19-CV-00455-MOC, 2020 WL 2114382, at *4 (W.D.N.C. May 4, 2020) (finding that ALJ failed to explain concentration limitations); Dubose v. Saul, No. 19-CV-01973-REB, 2020 WL 1511175, at *3 (D. Colo. Mar. 30, 2020) (finding sufficient explanation); Webster v. Saul, No. 119CV-00080-MOC-WCM, 2020 WL 1481556, at *1 (W.D.N.C. Mar. 23, 2020) (finding that ALJ failed to explain concentration limitations); Wunker v. Saul, No. 19-CV-02137-REB, 2020 WL 1329699, at *3 (D. Colo. Mar. 23, 2020) (failing to discuss migraines); Sanchez v. Berryhill, No. 18-CV-00238-REB, 2019 WL 1254997, at *5 (D. Colo. Mar. 18, 2019) (failing to address opinion, but harmless error applied); Ladely v. Comm'r, Soc. Sec. Admin., No. 3:17-CV-00739-SU, 2018 WL 2336755, at *4 (D. Or. May 23, 2018) (failing to provide reasons for rejecting opinion); Stokes v. Berryhill, 294 F. Supp. 3d 460, 465 (E.D.N.C. 2018) (failing to consider back impairment evidence); Fennell v. Berryhill, No. 7:16-CV-312-FL, 2017 WL 4230557, at *6 (E.D.N.C. Aug. 31, 2017) (failing to consider medical evidence submitted to Appeals Council); Crawford v. Berryhill, No. 6:16-CV-748, 2017 WL 3332265, at *7 (D. Or. Aug. 4, 2017) (finding insufficient reasons for rejection of opinion); Dishong v. Berryhill, No. 8:15-CV-399, 2017 WL 1843068, at *12 (D. Neb. May 5, 2017) (failing to consider opinion); Pers. v. Berryhill, No. 5:15-CV-569-FL, 2017 WL 1030705, at *5 (E.D.N.C. Mar. 15, 2017) (failing to build bridge between evidence and decision); Woods v. Colvin, No. CV 2:15-15852, 2016 WL 6436656, at *10 (S.D.W. Va. Sept. 13, 2016) (concerning an unaddressed opinion); McCurdy v. Colvin, No. 3:15-CV-2436, 2016 WL 4077268, at *10 (M.D. Pa. Aug. 1, 2016) (failing to address evidence); Bailey v. Colvin, No. 6:13-CV-31743, 2015 WL 1467053, at *4 (S.D.W. Va. Mar. 30, 2015) (able to discern position on IQ scores); Sizemore v. Comm'r of Soc. Sec., No. 1:13-CV-521, 2014 WL 4549020, at *16 (S.D. Ohio Sept. 12, 2014) (failing to consider listing); Sanders v. Comm'r of Soc. Sec., No. 1:13-CV-481, 2014 WL 3899288, at *7 (S.D. Ohio Aug. 11, 2014) (same); Switzer v. Colvin, No. 1:13-CV-01919, 2014 WL 2611945, at *8 (N.D. Ohio June 11, 2014) (failing to discuss IQ scores); Williams v. Comm'r of Soc. Sec., No. 12-15156, 2014 WL 988911, at *12 (E.D. Mich. Mar. 13, 2014) (failing to consider opinions); Barr v. Colvin,

principle in the context of a SSA case, it is usually fatal to the SSA's position.[265]

1. SSA Prevails Under *State Farm*/Substantial Evidence

While there are only a limited number of instances where *State Farm* is applied as an arbitrary and capricious standard of review, the SSA prevailed in four of the five cases where the standard is applied, with two of these cases involving challenges to disability eligibility[266] and the other two cases involving benefit level determinations.[267]

2. SSA Loses Under *State Farm*/Substantial Evidence

As discussed previously, *State Farm* is generally not applied as a freestanding standard of review.[268] Rather, *State Farm* gets cited as a placeholder for substantial evidence review.[269] This explains why there are so few cases and why there is only one example of

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No. CIV.A. 12-2114-JWL, 2013 WL 1308641, at *11 (D. Kan. Mar. 29, 2013) (same); Hackle v. Comm'r of Soc. Sec., No. 1:12-CV-145, 2013 WL 618630, at *4 (S.D. Ohio Feb. 19, 2013) (able to discern basis for residual functional capacity); Musick v. Astrue, No. CIV.A. 12-2006-JWL, 2013 WL 441064, at *13 (D. Kan. Feb. 5, 2013) (able to discern evidence discussion); Keyes ex rel. C.A. v. Astrue, No. 1:12-CV-1309, 2013 WL 443849, at *13 (N.D. Ohio Feb. 4, 2013) (failing to connect evidence to conclusions); Nevels v. Astrue, No. 07 C 5492, 2011 WL 1362613, at *8 (N.D. Ill. Apr. 7, 2011) (failing to consider contrary evidence); Hart v. Astrue, No. 08-CV-07-BBC, 2008 WL 3456864, at *8 (W.D. Wis. Aug. 11, 2008) (inadequate discussion).

[265] *Id.*

[266] *Drombetta*, 845 F.2d at 610 (upholding application of "pooled fund" method of evaluating survivor benefit offset); *Bowden*, 2017 WL 2434536, at *12 (upholding application of "business arrangement" and rental subsidy").

[267] *Jones*, 2021 WL 620475, at *7 (denying challenge to change in how medical opinions are evaluated); *Davis*, 1997 WL 438772, at *9 (definition of asthma attack).

[268] *See supra* notes 253–55.

[269] *Id.*

the SSA failing *State Farm* as a standard of review.[270] As associated with substantial evidence for findings made by the SSA, there are far more instances where SSA does not prevail as compared to other standards of review.[271]

CONCLUSION

While the courts contemplate changes to how the judiciary will receive administrative interpretations of laws and regulations, SSA's interpretations generally prevail. With the exception of the discussion of *State Farm* above, SSA prevails under administrative deference at approximately the same rates, no matter whether *Chevron*, *Skidmore*, *Auer*/*Seminole Rock*, or *State Farm* deference applies.[272] Across all forms of deference, the SSA does its best when it is resolving issues of eligibility for disability and benefit determinations.[273] This is true despite differences between courts about what standard of deference applies in what situation.[274] These victories for the SSA are even more pronounced under the less deferential standard of *Skidmore*, where the SSA prevails at a comparable rate even under the more deferential standards for *Chevron* and *Auer*/*Seminole Rock*.[275]

The losses for the SSA have been scattered across different subject areas but are most pronounced outside of the disability

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[270] *Tyler J.*, 2019 WL 3716817, at *10 (finding the two differing standards for fraud to be arbitrary and capricious).

[271] *Compare supra* notes 266–67 (*State Farm* success compared to SSA), *with supra* notes 135–36 (*Chevron* success compared to SSA at the circuit court level), *and supra* notes 169–71 (*Chevron* success compared to SSA at the district court level); *supra* notes 210–14 (*Skidmore* success compared to SSA); *supra* notes 228–31 (*Auer*/*Seminole Rock* success compared to SSA).

[272] *Id.*

[273] *See supra* notes 148–50, 171, 173–76, 216–18, 220–21, 266–67.

[274] *See supra* notes 235–36.

[275] *Compare supra* notes 135–36 (forty-nine wins for the SSA under *Chevron* at the circuit court level compared to only seven losses), *and supra* notes 169-71 (seventy-eight wins for the SSA under *Chevron* at the district court level compared to only twelve losses), *and supra* notes 228–31 (forty-seven wins under *Auer* with seven losses and fifteen wins for *Seminole Rock* with four losses), *with supra* notes 210–14, 220–21 (fifty-nine wins for the SSA under *Skidmore* with six losses).

adjudication and benefit level determination areas.[276] Where the SSA does not tend to succeed is where the SSA is not doing what it traditionally is known for—making disability eligibility determinations and determining benefit levels.[277]

If there is a unifying element to the losses suffered by the SSA under the various forms of deference discussed in this Article, it is the lack of predictability. Given the size of the programs administered, a lack of predictability has drastic consequences.[278] Doing away with deference will do away with the predictability that SSA needs to successfully administer the Social Security disability program.

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[276] *See supra* notes 148–50, 171, 173–76, 216–18, 220–21, 266–67.

[277] *See, e.g.*, Jones v. Astrue, 650 F.3d 772, 775 (D.C. Cir. 2011) (refusing to defer to the SSA interpretation of judicial review standard under *Chevron*); Melvin v. Astrue, 602 F. Supp. 2d 694, 703 (E.D.N.C. 2009) (refusing to defer to the SSA interpretation of court decision under *Skidmore*); Holland v. Nat'l Mining Ass'n, 309 F.3d 808, 810 (D.C. Cir. 2002) (refusing to defer to position advanced by the SSA because the court was being asked to agree with another court not with SSA); Keys v. Barnhart, 347 F.3d 990, 993 (7th Cir. 2003) (determining effective date for new the SSA rule); Groseclose v. Bowen, 809 F.2d 502, 505 (8th Cir. 1987) (interpreting overpayment payment standard of "against equity and good conscience.").

[278] *See supra* text accompanying notes 4–8.