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Res Judicata and Multiple Disability Applications: Fulfilling the Praiseworthy Intentions of the Fourth and Sixth Courts

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NOTES

Res Judicata and Multiple Disability Applications: Fulfilling the Praiseworthy Intentions of the Fourth and Sixth Circuits

In the United States, the application process to receive disability benefits through the Social Security Administration is often a tedious, multistep procedure. The process becomes even more complex if a claimant has filed multiple disability applications covering different time periods. In that circumstance, the question arises as to whether an administrative law judge hearing a claimant's second application must make the same findings as the administrative law judge who heard the first application. In other words, how should res judicata function in the administrative law context when a claimant has filed for disability multiple times? Currently, circuits differ on this question. This Note proposes a solution aimed at providing uniformity and ensuring disabled people receive the benefits they need. It proposes that res judicata should not bind findings that would harm a claimant on a future application, while res judicata should bind findings that would aid a claimant on a future application unless new clear-and-convincing evidence indicates the claimant's condition has improved. The Note then details how such a proposal is within the Social Security Administration's authority and is consistent with Supreme Court jurisprudence on the matter.

INTRODUCTION

The Centers for Disease Control and Prevention ("CDC") estimates that twenty-seven percent of adults in the United States are disabled.[1] Disabled adults are often subject to substantial economic risks, with research estimating that disability onset causes a fifty to eighty percent decrease in income.[2] Further, disabled adults in the United States face significant barriers to necessary medical care and employment.[3] Even when disabled adults are able to secure employment, the jobs are often low paying; twenty-two percent of disabled adults have an income of less than $15,000,[4] and the median income of disabled adults is $28,438.[5]

Federal disability benefits aim to bridge the economic inequalities between disabled and nondisabled adults—and the attendant disparities in quality of life—by improving disabled claimants' access to medical care. To that end, this program can claim considerable success, with research indicating that low-income individuals who are able to qualify for disability benefits experience a reduction in mortality.[6] Yet, only a "small subset" of disabled adults in the United States are able to qualify for benefits under the current imperfect system,[7] meaning many disabled adults still face substantial barriers to necessary medical care due to the high cost of healthcare.[8] Specifically, one in four disabled adults under the age of forty-five currently live with an unfulfilled health-related need.[9]

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1. *Disability Impacts All of Us,* CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html (last reviewed May 15, 2023) [https://perma.cc/W4BH-UAPB] [hereinafter *Disability Impacts*].

2. Norma B. Coe, Stephan Lindner, Kendrew Wong & April Yanyuan Wu, *How Do People with Disabilities Cope While Waiting for Disability Insurance Benefits?*, 3 IZA J. LAB. POL'Y 1, 9–11, 23 (2014) ("The direct financial consequences of a disability onset are dramatic – previous estimates suggest a 50 to 80 percent drop in earnings.").

3. *Id.*; *Common Barriers to Participation Experienced by People with Disabilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/disability-barriers.html (last reviewed Sept. 16, 2020) [https://perma.cc/3TU3-XURB] [hereinafter *Common Barriers*].

4. *Common Barriers*, supra note 3.

5. Rebecca Leppert & Katherine Schaeffer, *8 Facts About Americans with Disabilities*, PEW RSCH. CTR. (July 24, 2023), https://www.pewresearch.org/short-reads/2023/07/24/8-facts-about-americans-with-disabilities/ [https://perma.cc/87KG-5EWN]. For reference, in 2021, the median income for nondisabled people in the United States was $40,948. *Id.*

6. Alexander Gelber, Timothy Moore, Zhuan Pei & Alexander Strand, *Disability Insurance Income Saves Lives*, 131 J. POL. ECON. 3156, 3175, 3179 (2023).

7. *Facts*, SOC. SEC. ADMIN., https://www.ssa.gov/disabilityfacts/facts.html (last visited Feb. 6, 2024) [https://perma.cc/3ACE-X6PP].

8. *Disability Impacts*, *supra* note 1.

9. *Id.*

Presently, the Social Security Administration ("SSA") provides disability benefits under two major programs: the Social Security Disability Insurance ("SSDI") program and the Supplemental Security Income ("SSI") program.[10] The key differences between these programs relate to the nonmedical eligibility requirements.[11] When it comes to the medical eligibility requirements, however, the claimant must satisfy the SSA's strict disability criteria under either program.[12] Both programs provide recipients with monthly payments and sometimes allow claimants to qualify for health insurance coverage through Medicare or Medicaid.[13]

Frequently, an administrative law judge ("ALJ") decides whether a claimant meets the SSA's disability criteria and thus qualifies for disability benefits.[14] As this Note addresses throughout, the system for receiving disability benefits is long, tedious, and unpredictable.[15] While the process is already complex and requires ALJs to make difficult determinations, these determinations become even more complicated when the claimant has filed multiple disability applications covering different time periods.[16] Multiple applications are particularly challenging for ALJs to adjudicate, as they arguably run afoul of a principle central to the American legal system: res judicata,

10. *Red Book: Overview of Our Disability Programs*, SOC. SEC. ADMIN., https://www.ssa.gov/redbook/eng/overview-disability.htm (last visited Feb. 6, 2024) [https://perma.cc/5TXM-HLRR].

11. Generally, to be eligible for SSDI, a claimant must have worked for the requisite number of years. *Disability Benefits | How You Qualify*, SOC. SEC. ADMIN., https://www.ssa.gov/benefits/disability/qualify.html (last visited Feb. 6, 2024) [https://perma.cc/FZY3-S8T3]. To qualify for SSI, a claimant must show the requisite financial need. SOC. SEC. ADMIN., *supra* note 10.

12. SOC. SEC. ADMIN., *supra* note 10.

13. *SSI v. SSDI: The Differences, Benefits, and How to Apply*, NAT'L COUNCIL ON AGING (Mar. 16, 2022), https://ncoa.org/article/ssi-vs-ssdi-what-are-these-benefits-how-they-differ [https://perma.cc/6S53-MFF2] ("A person with SSDI will automatically qualify for Medicare after 24 months of receiving disability payments . . . ."); *Understanding Supplemental Security Income SSI and Other Government Programs – 2023 Edition*, SOC. SEC. ADMIN., https://www.ssa.gov/ssi/text-other-ussi.htm (last visited Feb. 6, 2024) [https://perma.cc/5FCK-W2RY] ("In most States, if you are an SSI recipient, you may be automatically eligible for Medicaid; an SSI application is also an application for Medicaid.").

14. OFF. OF RET. & DISABILITY POL'Y, SOC. SEC. ADMIN. PUB. NO. 13-11700, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2.72 tbl. 2.F8 (Dec. 2022).

15. *See Disability Benefits*, SOC. SEC. ADMIN. 4 (2022), https://www.ssa.gov/pubs/EN-05-10029.pdf [https://perma.cc/5XSC-XRLR] [hereinafter *Disability Benefits*] ("Processing an application for disability benefits can take on average three to six months."); *id.* at 1 ("Federal law requires this very strict definition of disability."); *Your Right to Question the Decision Made on Your Claim*, SOC. SEC. ADMIN. 1 (2022), https://www.ssa.gov/pubs/EN-05-10058.pdf [https://perma.cc/R5NJ-6CL7] [hereinafter *Your Right to Question*] ("There are four levels of appeal when you disagree with a determination you have received from us . . . .").

16. *See, e.g.*, Earley v. Comm'r of Soc. Sec., 893 F.3d 929, 934 (6th Cir. 2018).

the common-law doctrine that prevents claims resulting in a final judgment from being relitigated.[17]

Precisely stated, if an ALJ makes findings and a final determination regarding a claimant's condition, and then the claimant reapplies, does res judicata mandate that the ALJ who hears the second application adopt the prior ALJ's findings?[18] Many people may reflexively respond "no," likely assuming that the claimant is reapplying because they were initially denied benefits. After reviewing the situations that cause claimants to reapply for benefits, however, this Note argues that the appropriate answer to this question should be "sometimes."

Claimants file multiple disability applications under a variety of circumstances. Perhaps the most straightforward instance is when a claimant applies for disability and is denied, only for the claimant's condition to persist or worsen. The claimant then reapplies, hoping the second determination will be more favorable.[19] Another scenario leading to reapplication is when a claimant applies for disability and is denied and then a few weeks, months, or years go by and the claimant is now in an older age category;[20] as a claimant ages, the SSA makes it easier to receive disability benefits.[21] Thus, some of these repeat claimants, even if initially denied, may benefit from prior findings binding future ALJs, as the prior findings combined with the new age category may render them qualified to receive benefits.[22] A third scenario involves when a claimant who receives SSI becomes incarcerated.[23] When incarcerated, SSI claimants stop receiving benefits after one month, and the SSA terminates their benefits completely after twelve months, requiring them to reapply at that point.[24] When reapplying, these claimants will almost surely desire for their past findings to be binding, considering the past findings already rendered them disabled for purposes of receiving benefits.

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17. Allen v. McCurry, 449 U.S. 90, 94 (1980).

18. For an example of this dilemma, see *Earley*, 893 F.3d at 934. This, however, will be thoroughly explained throughout the Note.

19. *See id.* ("Most applicants reapply only because the Administration found them not to be disabled.").

20. *See, e.g.*, Lively v. Sec'y of Health & Hum. Servs., 820 F.2d 1391, 1392 (4th Cir. 1987) ("Because the appellant was limited to light work when he attained 55 years of age, he was entitled to benefits on his second application therefor.").

21. *See* 20 C.F.R. pt. 404, subpart. P, app. 2 (2020) (presenting tables that demonstrate that it is easier to qualify for disability benefits if the claimant is older).

22. *See Lively*, 820 F.2d at 1392.

23. *Re-entering the Community After Incarceration—How We Can Help*, SOC. SEC. ADMIN. 1–2 (June 2021), https://www.ssa.gov/pubs/EN-05-10504.pdf [https://perma.cc/J7T4-XWGK].

24. *See id.*

Whether res judicata requires that these past findings bind future ALJs' assessments of disability—a question that can singularly determine a claimant's receipt of benefits—has proven challenging for Article III courts to resolve. In fact, circuits are split as to how ALJs should assess multiple applications for disability benefits,[25] with certain circuits responding to this issue inconsistently over time.[26] In response to this irregularity, this Note proposes a solution geared towards promoting efficiency, providing nationwide uniformity in the disability-benefits allocation process, and ensuring that disabled people receive the healthcare benefits they need. Furthermore, the solution seeks to use res judicata to the benefit of disability claimants and avoids using the doctrine to their detriment. This selective usage of the doctrine is defensible, as courts, both generally and in the disability-benefits context, apply res judicata in the administrative context more loosely.[27]

Accordingly, the solution advocates that the SSA promulgate a regulation outlining the way in which an ALJ must use a prior ALJ's findings from a previous disability application. The proposed regulation dictates that prior findings are not binding if they would harm the claimant's new application for disability. On the other hand, if prior findings would aid a claimant, then subsequent ALJs must use the findings unless there is new clear-and-convincing evidence that the claimant's condition has improved.

This Note proceeds in three parts. Part I explains the current state and process of disability determinations, explores the history of res judicata, and concludes by outlining how res judicata applies to the allocation of disability benefits. Part II analyzes the benefits and detriments of current judicial approaches governing the application of res judicata to disability claimants. As the solution, Part III proposes a federal regulation providing instructions for res judicata's application to disability applications that will benefit the largest number of claimants. Part III also explains the legality, policy rationale, and practicality of the proposed regulation. A brief conclusion follows.

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25. *Compare* Chavez v. Bowen, 844 F.2d 691, 694 (9th Cir. 1988) (binding prior findings), *with* Earley v. Comm'r of Soc. Sec., 893 F.3d 929, 933 (6th Cir. 2018) ("[E]ach application is entitled to review.").

26. *See infra* Section I.D.

27. Christine M. Mullen, Note, *Preclusion of Exclusion: How Many Bites Does DHS Get at the Deportation Apple?*, 70 DUKE L.J. 217, 230 (2020); Alvear-Velez v. Mukasey, 540 F.3d 672, 677 (7th Cir. 2008) ("Notably, however, we have applied res judicata much more flexibly in the administrative context."). See discussion *infra* Section I.D for how various circuits currently treat res judicata in the disability administrative context.

I. BACKGROUND

This Part begins by discussing current statistics concerning disabilities in the United States. Then, it provides information on the SSA and the process of applying for disability benefits, followed by a discussion about judicial review of the SSA's decisions. The Part concludes by explaining the history of res judicata and how various federal circuits have applied the doctrine of res judicata to disability applications.

A. Disability in the United States

According to the CDC, sixty-one million adults (twenty-seven percent of adults) in the United States are disabled.[28] Yet, just a fraction of these adults receive disability benefits.[29] The SSA reports that only "9 million or so people" receive disability benefits, which "represent[s] just a small subset of Americans living with disabilities."[30] This gap is especially problematic considering the barriers to medical care that disabled adults face. One in four disabled adults lack a "usual healthcare provider," and one in five disabled adults did not receive "a routine check-up in the past year."[31]

Other statistics are likewise concerning and indicate a need to increase support for disabled adults and children. Disabled adults are approximately half as likely to have a job compared to nondisabled adults and are around half as likely to finish high school.[32] Furthermore, twenty-two percent of disabled adults have an income below $15,000.[33] Disability disproportionality affects certain marginalized groups; one in four Black adults and three in ten American Indian/Alaska Native adults are disabled, compared to only

28. *Disability Impacts*, *supra* note 3; *Disability Inclusion*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/disability-inclusion.html (last reviewed Sept. 16, 2020) [https://perma.cc/92YY-3LN4]. The CDC defines a disability as "any condition of the body or mind (impairment) that makes it more difficult for the person with the condition to do certain activities (activity limitation) and interact with the world around them (participation restrictions)." *Disability and Health Overview*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/disability.html (last reviewed Sept. 16, 2020) [https://perma.cc/9YTL-BD9S].

29. SOC. SEC. ADMIN., *supra* note 7.

30. *Id.*

31. *Disability Impacts*, *supra* note 1.

32. *Common Barriers*, *supra* note 3. In the United States, 35.5 percent of disabled adults are employed as compared to the 76.5 percent of nondisabled adults who are employed. *Id.* Furthermore, 22.3 percent of disabled people fail to finish high school as compared to the 10.1 percent of nondisabled people who fail to finish high school. *Id.*

33. *Id.*

one in five white adults.[34] In addition, disabilities are more prevalent among adults living below the poverty line and among women.[35]

B. The Current State of the Social Security Administration and Disability Applications

Given the barriers to healthcare, employment, and education that disabled people face,[36] society should expect federal intervention to enhance and provide consistency to the social-welfare program. Yet, as will be described in this Section, the process by which the SSA and Article III judges evaluate disability-benefit applications and decisions is a tedious process that often produces idiosyncratic and even paradoxical results.

In the words of Justice Elena Kagan, the SSA heads "the Nation's largest government program—among other things, deciding all claims brought by its 64 million beneficiaries."[37] The SSA oversees several social-welfare programs, including disability and retirement benefits.[38] Regarding SSDI benefits specifically, the SSA received 1.8 million applications in 2021 alone,[39] which highlights the need for a uniform, consistent, and efficient system to assess these disability applications. As it stands today, such a system does not exist. Instead, claimants face a complicated, multistep process involving state agencies, the federal bureaucracy, and federal courts.

Under the current system, after a claimant applies for disability benefits, the SSA makes an initial determination of whether the claimant meets the non-health-related prerequisites for disability-benefit eligibility (for example, whether the claimant worked the required number of years).[40] If so, the application is forwarded to the

34. *Adults with Disabilities: Ethnicity and Race*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/materials/infographic-disabilities-ethnicity-race.html (last reviewed Sept. 16, 2020) [https://perma.cc/7ENF-KLRE].

35. *Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults — United States, 2016*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/features/kf-adult-prevalence-disabilities.html (last reviewed Sept. 16, 2020) [https://perma.cc/UF8P-CZZ5].

36. *See supra* Section I.A.

37. Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2241 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

38. *About Us*, SOC. SEC. ADMIN., https://www.ssa.gov/agency/ (last visited Feb. 6, 2024) [https://perma.cc/U66A-KJ6Y].

39. *Selected Data from Social Security's Disability Program*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/STATS/dibStat.html (last visited Feb. 19, 2024) [https://perma.cc/49ZF-NUJT]. This number does not include applications for "disabled child's and disabled widow(er)'s benefits." *Id.*

40. *Disability Benefits*, *supra* note 15, at 5.

relevant state agency, also known as the Disability Determination Services ("DDS"), for evaluation of whether the claimant's medical condition(s) constitutes a disability.[41] To qualify for disability benefits, the claimant must meet the SSA's definition of having a disability, which is to be unable "to engage in any substantial gainful activity (SGA) by reason of any medically determinable physical or mental impairment(s) which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[42]

When deciding if the claimant meets this definition, and is thus disabled for purposes of the Social Security Act, the SSA and the DDS conduct a five-step sequential evaluation process.[43] During the first step, the SSA determines if the claimant is currently engaging in "substantial gainful activity."[44] If so, the application is denied, but, if not, application moves to the second step, where the DDS takes over.[45] For the second step, the DDS determines if the claimant has an impairment (or combination of impairments) that is "a severe medically determinable physical or mental impairment" and is (1) is expected to result in death, (2) has lasted for twelve continuous months, or (3) is expected to last for at least twelve continuous months.[46] If the claimant fails this step, the application is denied, but if the claimant passes this step, the DDS moves to step three.[47] At step three, the DDS decides if the claimant's impairment meets (or is equivalent to) specifically enumerated criteria that qualify the claimant for disability regardless of the claimant's other characteristics.[48] If so, the claimant qualifies for disability and the inquiry is over.[49] But, if not, the DDS determines the claimant's Residual Functional Capacity ("RFC") and then continues to step four.[50]

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41. *Id.* at 5–6.

42. *Disability Evaluation Under Social Security*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/professionals/bluebook/general-info.htm (last visited Feb. 4, 2024) [https://perma.cc/22HZ-BHA3].

43. 20 C.F.R. § 404.1520(a) (2024). In the first instance, the SSA completes the first step in the sequential evaluation and the DDS completes steps two through five. *Understanding Supplemental Security Income if You Have a Disability or Are Blind -- 2023 Edition*, SOC. SEC. ADMIN., https://www.ssa.gov/ssi/text-disable-ussi.htm (last visited Feb. 6, 2024) [https://perma.cc/K478-A2BL].

44. 20 C.F.R. § 404.1520(a)(4)(i) (2024); SOC. SEC. ADMIN., *supra* note 43.

45. 20 C.F.R. § 404.1520(a)(4)(i) (2024).

46. *Id.* § 404.1520(a)(4)(ii); *id.* § 404.1509.

47. *Id.* § 404.1520(a)(4)(ii).

48. *Id.* § 404.1520(a)(4)(iii).

49. *Id.*

50. *Id.* § 404.1520(a)(4).

A claimant's RFC is "the most [she] can still do despite [her] limitations."[51] Using the RFC for step four, the DDS determines whether the claimant can complete her past relevant work.[52] If the claimant has this capacity, she will be deemed not disabled.[53] If not, the DDS will continue to step five of the sequence.[54] Almost all of the individual cases analyzed in Part II of this Note focus on claimants whose applications proceeded to step five.[55]

At the fifth step, the DDS determines whether the claimant "can make an adjustment to other work."[56] At this step, the claimant's RFC must be articulated in terms of exertional categories, meaning the reviewer must state if the claimant can perform "sedentary," "light," "medium," "heavy," or "very heavy" work.[57] Then, using the RFC, in combination with the claimant's vocational factors (meaning her age, education, and work experience), the DDS determines if the claimant can adjust to other work.[58] For this inquiry, the DDS uses the Medical-Vocational Guidelines—which contain many different rules, each describing a different possible combination of an RFC with the various vocational factors.[59] The combinations in each rule "reflect the analysis" of whether a claimant would be able transition into other work.[60] If the rule indicates the claimant, based on her RFC and vocational factors, cannot adjust to other work, the claimant is considered disabled.[61] As the Medical-Vocational Guidelines state, "Where the findings of fact made with respect to a particular individual's vocational factors and residual functional capacity coincide with all of the criteria of a particular rule, the rule directs a conclusion as to whether the individual is or is not disabled."[62] If no rule addresses the claimant's exact situation (such as when a claimant's RFC is between exertional categories), the DDS then takes a more individualized approach.[63] At

51. *Id.* § 404.1545(a).
52. *Id.* § 404.1520(a)(4)(iv).
53. *Id.*
54. *Id.* § 404.1520(a)(4).
55. *See infra* Part II.
56. 20 C.F.R. § 404.1520(a)(4)(v) (2024).
57. *DI 24510.006 Assessing Residual Functional Capacity (RFC) in Initial Claims*, SOC. SEC. ADMIN., https://secure.ssa.gov/poms.nsf/lnx/0424510006 (last visited Feb. 6, 2024) [https://perma.cc/LX3N-52QP].
58. 20 C.F.R. § 404.1520(a)(4)(v) (2024).
59. 20 C.F.R. pt. 404, subpart P., app. 2 (2020).
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*

the end of step five, if the claimant is deemed not disabled, she has the right to appeal.[64]

If a claimant decides to appeal, a lengthy, four-stage process lies ahead.[65] First, during the reconsideration stage, a claimant requests that the state agency reconsider its initial decision,[66] and a new reviewer assesses the application.[67] If denied at the reconsideration phase, a claimant can proceed to the second stage of the appeals process and request a hearing in front of an ALJ.[68] The ALJ reconsiders any issues not resolved in the claimant's favor.[69] Notably, these ALJ hearings are a frequent occurrence. From 2019 to 2021, there were 1.8 million hearing-level dispositions (with 451,046 of these in 2021 alone),[70] resulting in a significant workload for each ALJ[71] and a protracted process for hundreds of thousands of disabled people.[72] In 2021, 1,235 ALJs worked for the SSA, each hearing thirty disability claims per month and averaging 273 pending hearings.[73] This prolonged process has significant real-life consequences.[74] While waiting for disability determinations, claimants do not receive any benefits, and many of them must resort to measures such as changing their living arrangements, relying on a supplemental nutrition assistance program, or even liquidating their homes.[75]

If unsatisfied with the hearing's outcome, the claimant would then need to proceed to the third stage and appeal the ALJ's determination to the SSA's Appeals Council, which possesses the authority to grant or deny the review request.[76] If granted, the council may reach its own determination concerning the application or remand

64. *Disability Benefits*, *supra* note 15, at 8.

65. *Your Right to Question*, *supra* note 15, at 1–3.

66. *Id.* at 1.

67. *Id.*

68. *Id.* at 2.

69. *SI 04030.010 Administrative Law Judge Hearings for Supplemental Security Income Cases*, SOC. SEC. ADMIN., https://secure.ssa.gov/poms.nsf/lnx/0504030010 (last visited Feb. 6, 2024) [https://perma.cc/A6Y9-C5ZY].

70. OFF. OF RET. & DISABILITY POL'Y, *supra* note 14, at 2.73 tbl. 2.F9.

71. *See id.* at 2.72 tbl. 2.F8.

72. *Wait Times for Social Security Disability Benefit Decisions Reach New High*, USAFACTS, https://usafacts.org/data-projects/disability-benefit-wait-time (last updated Dec. 12, 2023) [https://perma.cc/Q5DP-97ES] ("Even so, the backlog of cases pending a review and decision continued to grow, reaching a new high of 1.15 million initial applications in November 2023.").

73. OFF. OF RET. & DISABILITY POL'Y, *supra* note 14, at 2.72 tbl. 2.F8.

74. Coe et al., *supra* note 2, at 23 ("The direct financial consequences of a disability onset are dramatic – previous estimates suggest a 50 to 80 percent drop in earnings.").

75. *Id.* at 1, 9–11.

76. *Your Right to Question*, *supra* note 15, at 2; *see also* Jonah J. Horwitz, *Social Insecurity: A Modest Proposal for Remedying Federal District Court Inconsistency in Social Security Cases*, 34 PACE L. REV. 30, 35 (2014) (providing a similar description of the Appeals Council's process).

the case back to an ALJ.[77] For reference, in 2021, the Appeals Council issued 118,415 dispositions.[78] Once the SSA reaches a final decision (meaning once the council makes its own determination or denies the request for review), the claimant can seek judicial review in federal district court, which is the fourth and final stage.[79]

In judicial review, questions of disability law are reviewed by district courts de novo.[80] Regarding factual matters, the district court must affirm the determination of the commissioner so long as "substantial evidence" supports the decision.[81] Importantly, after being denied benefits (by either an Article III judge or by the SSA), claimants are permitted to file another disability application covering a new time period.[82] This will be explored further in Section I.D.

C. Judicial Review of Disability Decisions

When performing judicial review of disability-benefits determinations, circuit and district courts often produce drastically different results from one another.[83] Even judges within the same district generate contradictory outcomes.[84] Comparing affirmance and reversal rates of disability determinations, Professor Jonah Horwitz

77. *Your Right to Question*, *supra* note 15, at 2.

78. OFF. OF RET. & DISABILITY POL'Y, *supra* note 14, at 2.74 tbl. 2.F11. Dispositions include the Appeals Council's own determinations (including new decisions or dismissals), denials to review, and remands back to the ALJ. *Appeals Council Requests for Review FY 2021*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/DataSets/archive/07_FY2021/07_September_AC_Requests_For_Review.html (last visited Feb. 6, 2024) [https://perma.cc/8V6Y-HLQF].

79. *Your Right to Question*, *supra* note 15, at 3; *see also* 42 U.S.C. § 405(g) ("Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action . . . ."); Horwitz, *supra* note 76, at 35 ("If the Appeals Council either declines to hear the claim or affirms the ALJ's denial of benefits, the claimant has the right to appeal to a federal district court." (footnote omitted)).

80. *See* McClanahan v. Comm'r of Soc. Sec., 474 F.3d 830, 833 (6th Cir. 2006); Pupo v. Comm'r, Soc. Sec. Admin., 17 F.4th 1054, 1060 (11th Cir. 2021) ("We review de novo the legal principles applied by the Commissioner in social security appeals.").

81. 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive . . . ."); *see, e.g.*, Counts v. Comm'r of Soc. Sec., No. 22-3271, 2022 WL 17853572, at *2 (6th Cir. Dec. 22, 2022) ("Where the Commissioner's decision applied the proper legal standards and followed the relevant regulations, we, like the district court did here, will affirm the decision if it is supported by substantial evidence.").

82. Earley v. Comm'r of Soc. Sec., 893 F.3d 929, 932 (6th Cir. 2018).

83. Susan Haire & Stefanie Lindquist, *An Agency and 12 Courts: Social Security Disability Cases in the U.S. Courts of Appeals*, 80 JUDICATURE 230, 233 (1997) ("Overall, disability case outcomes in published decisions of the First, Fifth, and Sixth Circuits are more likely to favor the SSA. In contrast, judges in the Second, Third, Fourth, and Eleventh Circuits are quite receptive to disability claimants."); Horwitz, *supra* note 76, at 40–42.

84. *See* Horwitz, *supra* note 76, at 40–42 (showing significant discrepancies among district judges in the same districts in affirmation and reversal rates of disability decisions).

points to a striking example of two divergent judges in the District of Colorado.[85] Between 2008 and 2012, Judge Wiley Daniel remanded one hundred percent of his fifty-eight social security cases back to the SSA for further consideration, while Judge Christine Arguello, who sits in the very same district, affirmed seventy-two percent of her social security cases—meaning she effectively denied disability benefits to seventy-two percent of plaintiffs.[86] These significant discrepancies are concerning because two equally deserving plaintiffs may receive different results depending on which district court judge presides over their cases.[87]

One explanation for why judges reach inconsistent results when addressing disability benefits cases is that appellate courts around the country have provided little guidance on questions of law surrounding disability benefits.[88] Furthermore, to the extent there is guidance, the doctrine varies between circuits, which can cause judges in different circuits to reach competing conclusions.[89] In addition, the cultures of the various circuits may play a role in the disparate outcomes, with district and magistrate judges remanding more frequently when their reviewing circuit courts tend to be more hostile towards the SSA's decisions.[90] Finally, the Supreme Court rarely grants certiorari to address questions of law surrounding disability benefits, [91] despite the significant number of people who rely on them.[92]

85. *Id.* at 40.

86. *Id.* Professor Horwitz provides multiple examples, similar to the one described above, of disturbing differences between affirmance and reversal rates across judges in the same geographic locations. *Id.* at 40–41.

87. *Id.* at 51–52.

88. *See id.* at 48 ("An examination of the cases under consideration here discloses the miniscule percentage of appeals from around the country, regardless of the outcome in district court.").

89. Harold J. Krent & Scott Morris, *Inconsistency and Angst in District Court Resolution of Social Security Disability Appeals*, 67 HASTINGS L.J. 367, 396–97 (2016) ("First, to some extent, doctrine matters, and we suggest below one doctrinal split in particular that likely is correlated with higher remand rates.").

90. *Id.* at 397.

91. *See* Horwitz, *supra* note 76, at 48; Frederick Schauer, *The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 32 (2006) (explaining that in 2005, the Supreme Court did not address any questions regarding Social Security, despite this being a pressing concern for the population).

92. SOC. SEC. ADMIN., *supra* note 39 (showing that 571,952 disability awards were provided in 2021).

D. Res Judicata and Disability Benefits Across Time, Circuits, and Districts

This Section begins by explaining the doctrine of res judicata and its place in the administrative law context. Next, it discusses how the Fourth and Sixth Circuits apply res judicata to disability application determinations when a claimant has filed for disability multiple times. It describes both how these circuits previously handled the issue and their current approaches, tracking shifts across time. Finally, the Section details how other circuits address this issue.

1. The History of Res Judicata

Courts have long abided by the doctrine of res judicata when adjudicating claims.[93] As the Supreme Court explains the doctrine, res judicata prevents parties from raising issues previously decided by a "final judgment" predicated "on the merits" of a case.[94] Res judicata serves vital functions for courts, parties, and society, including shielding plaintiffs from unnecessary "cost and vexation of multiple lawsuits," promoting "reliance on adjudication," and conserving "judicial resources."[95]

Res judicata extends beyond what one might consider a typical case or controversy brought in court. In 1966, the Supreme Court explicitly recognized that principles of res judicata should apply, in some shape or form, to administrative law proceedings featuring trial-like components.[96] Although the Restatement (Second) of Judgments favors a strict application of res judicata to administrative law

93. *See* Cromwell v. County of Sac, 94 U.S. 351, 353 (1876) ("The language . . . that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy."); *see also* S. Pac. R.R. Co. v. United States, 168 U.S. 1, 48 (1897) ("[A] right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies . . . .").

94. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 94 (1980).

95. *Id.*; *see also S. Pac. R.R. Co.*, 168 U.S. at 49 ("[Res judicata] is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.").

96. *See* United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421–22 (1966) ("Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad." (footnote omitted)).

adjudications,[97] courts, in practice, are flexible in their application of res judicata in the administrative law context.[98]

Regarding disability benefits, a federal regulation provides that an ALJ "may dismiss" a claimant's "request for a hearing" if res judicata applies, meaning that a final determination has previously been made regarding the same issue on the same set of facts.[99] While this regulation appears to have a clear meaning, federal appellate courts differ significantly on the question of when res judicata applies and renders disability determinations binding. For example, the Sixth Circuit has determined that when a claimant files multiple applications for disability covering different time periods, an ALJ may not refuse to hear the subsequent cases on res judicata grounds; instead, "each application is entitled to review."[100] Yet, in the Ninth Circuit, if multiple applications are filed, res judicata strictly applies to new applications (even if for a new period of time) unless the claimant proves changed circumstances.[101] These differences are more thoroughly explored in the following Subsections.

2. Res Judicata Applied to Disability Benefits: The *Drummond*/*Lively* Approach

This Subsection explores the *Drummond*/*Lively* approach, which is how the Fourth and Sixth Circuits previously applied res judicata to disability-benefit determinations.[102] In 1987, the Fourth Circuit decided *Lively v. Secretary of Health and Human Services*.[103] Then, in 1997, the

97. RESTATEMENT (SECOND) OF JUDGMENTS § 83(1) (AM. L. INST. 1982) ("[A] valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.").

98. Mullen, *supra* note 27, at 230 (noting various court decisions indicating that res judicata is more flexible in the administrative law context); Joel deJesus, Comment, *Interagency Privity and Claim Preclusion*, 57 U. CHI. L. REV. 195, 204 (1990) ("The consensus seems to be that claim preclusion applies much less rigidly to administrative decisions than to court decisions.").

99. 20 C.F.R. § 404.957(c)(1) (2023); *id.* § 416.1457.

100. Earley v. Comm'r of Soc. Sec., 893 F.3d 929, 933 (6th Cir. 2018) ("When an individual seeks disability benefits for a distinct period of time, each application is entitled to review.").

101. Chavez v. Bowen, 844 F.2d 691, 693–94 (9th Cir. 1988); *see* Dalka v. Kijakazi, No. 20-36043, 2021 WL 5768463, at *1 (9th Cir. Dec. 6, 2021) (applying the *Chavez* standard even when the applications covered two different time periods).

102. *See* Lively v. Sec'y of Health & Hum. Servs., 820 F.2d 1391 (4th Cir. 1987); Drummond v. Comm'r of Soc. Sec., 126 F.3d 837 (6th Cir. 1997).

103. 820 F.2d at 1391. This Note refers to the prior approach of the Fourth and Sixth Circuits regarding the application of res judicata to the determination of disability benefits as the *Drummond*/*Lively* approach.

Sixth Circuit decided *Drummond v. Commissioner of Social Security*, where it explicitly adopted the Fourth Circuit's approach in *Lively*.[104]

Under the *Drummond*/*Lively* approach, if a claimant applied for benefits multiple times, then—barring a material change in the claimant's health—principles of res judicata required subsequent ALJs to adopt the findings of prior ALJs.[105] In *Lively*, Mr. Lively applied for disability-insurance benefits two times.[106] Age played a critical role in Mr. Lively's case.[107] To illustrate Mr. Lively's situation: assume a claimant is fifty-five years old or older, can perform only light work, has received "limited" education, and does not have transferrable skills from prior work.[108] Per the Medical-Vocational Guidelines, this claimant would qualify for benefits.[109] If, however, a claimant had all these same characteristics but was instead under fifty-five, this claimant would not qualify for benefits.[110]

At the time of Mr. Lively's first application, he was *under* fifty-five, and the ALJ determined that he could perform light work.[111] Thus, he was denied benefits.[112] A few weeks later, he turned fifty-five and reapplied for benefits.[113] This timing is crucial because fifty-five is the earliest age at which a claimant is considered of "advanced age."[114] Because Mr. Lively was now fifty-five and the previous ALJ determined he could perform only light work, he presumably thought the new ALJ assessing his second application would quickly award him benefits. Yet, the ALJ who heard the second application denied Mr. Lively benefits, finding that he could actually perform work at "any exertional level" and was therefore not limited to light work.[115]

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104. 126 F.3d at 842 ("We find the reasoning of the *Lively* court persuasive. Absent evidence of an improvement in a claimant's condition, a subsequent ALJ is bound by the findings of a previous ALJ.").

105. *Lively*, 820 F.2d at 1392; *Drummond*, 126 F.3d at 842.

106. *Lively*, 820 F.2d at 1391–92.

107. *Id.* at 1392.

108. *Id.* (explaining Grid Rule 202.02 applied to Mr. Lively's second application, which indicates these were Mr. Lively's characteristics); 20 C.F.R. pt. 404, subpart P, app. 2 (2020) (detailing Grid Rule 202.02).

109. *Lively*, 820 F.2d at 1392; 20 C.F.R. pt. 404, subpart P, app. 2 (2020).

110. 20 C.F.R. pt. 404, subpart P, app. 2 (2020) (outlining Grid Rule 202.10).

111. *Lively*, 820 F.2d at 1391–92.

112. *Id.* at 1392. In social security law, generally, if a claimant is under fifty-five and can perform light work, the claimant is considered not disabled. 20 C.F.R. pt. 404, subpart P, app. 2 (2020).

113. *Lively*, 820 F.2d at 1392.

114. *Id.*

115. *Id.*

Mr. Lively first appealed to the district court and then to the Fourth Circuit, which held that Mr. Lively was entitled to benefits.[116] Ultimately, the Fourth Circuit reasoned that res judicata prohibited the second ALJ from deviating from the first ALJ's determination that Mr. Lively was limited to light work.[117] The court explained that "[i]t is utterly inconceivable that his condition had so improved in two weeks as to enable him to perform medium work" and that there was no evidence of a "miraculous improvement" of Mr. Lively's condition.[118]

Drummond presented a very similar set of facts, and the Sixth Circuit ultimately came to the same conclusion as the Fourth Circuit in *Lively*.[119] Ms. Drummond applied for disability insurance benefits and was denied.[120] She was forty-nine at the time, and the ALJ determined that she could perform sedentary work and was therefore not disabled.[121] Approximately two years later, Ms. Drummond filed another disability application.[122] When Ms. Drummond filed this second disability application she was no longer a "younger individual" and was now a "person approaching advanced age."[123] This is a crucial difference. Per the Medical-Vocational Guidelines, if Ms. Drummond was a "person approaching advanced age" and restricted to sedentary work, she would be considered disabled.[124]

At the time of the second application, new evidence indicated Ms. Drummond's condition had worsened.[125] Despite this, the ALJ hearing the new application changed course, determining that Ms. Drummond could now perform medium work and was not in fact limited to sedentary work as the prior ALJ had determined.[126] Thus, the second ALJ denied Ms. Drummond benefits.[127] Ms. Drummond then appealed this decision up to the Sixth Circuit.[128]

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*; Drummond v. Comm'r of Soc. Sec., 126 F.3d 837, 842 (6th Cir. 1997).

120. *Drummond*, 126 F.3d at 838.

121. *Id.* In social security law, generally, if a claimant is under fifty and can perform sedentary work, the claimant is considered not disabled. 20 C.F.R. pt. 404, subpart P, app. 2 (2020).

122. *Drummond*, 126 F.3d at 838.

123. *Id.* at 839.

124. *Id.* Furthermore, in social security law, if a claimant is fifty or older and is limited to sedentary work, the claimant will frequently be considered disabled. 20 C.F.R. pt. 404, subpart P, app. 2 (2020). This depends to some extent on the claimant's education level and prior work experience. *Id.*

125. *Drummond*, 126 F.3d at 843.

126. *Id.* at 839.

127. *Id.*

128. *Id.* at 838.

As the Sixth Circuit explained, if the second ALJ had adopted the first ALJ's determination that Ms. Drummond had the RFC to complete only sedentary work, then, due to Ms. Drummond's increase in age between the applications, she would have automatically qualified for benefits.[129] Fortunately for Ms. Drummond, the Sixth Circuit, while considering the necessity of providing a sense of finality and fairness to disability claimants, determined that the subsequent ALJ was required to adopt the first ALJ's determination that Ms. Drummond was limited to sedentary work.[130] The limit of sedentary work, combined with Ms. Drummond's new age category, rendered her disabled, and she was awarded benefits.[131] As for the applicable rule, the Sixth Circuit followed the Fourth Circuit's approach in *Lively* and stated, "Absent evidence of an improvement in a claimant's condition, a subsequent ALJ is bound by the findings of a previous ALJ."[132] Furthermore, the Sixth Circuit placed the burden on the commissioner "to prove changed circumstances and therefore escape the principles of res judicata."[133]

In both *Drummond* and *Lively*, the claimants benefited from res judicata barring the subsequent ALJs from reconsidering the exertional level of work the claimants could perform.[134] In both cases the courts were disturbed that the ALJs markedly deviated in their assessments of the work the claimants could perform.[135] Due to both claimants' increase in age between the applications, they would have automatically been considered disabled if the subsequent ALJs used the findings of the prior ALJs, and, for this reason, the circuit courts were ready to grant these claimants benefits.[136] Yet, as the next Subsection demonstrates, this is not always the case.[137] Sometimes, a claimant is in a better position if the subsequent ALJs are *not* strictly bound by res judicata but rather are permitted to reassess the claimants' disabilities.[138]

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129. *Id.* at 839; *see* Lively v. Sec'y of Health & Hum. Servs., 820 F.2d 1391, 1391–92 (4th Cir. 1987) (presenting the same issue as in *Drummond*).

130. *Drummond*, 126 F.3d at 842.

131. *Id.* at 843.

132. *Id.* at 842.

133. *Id.* at 843.

134. *Id.*; *Lively*, 820 F.2d at 1392.

135. *See* Earley v. Comm'r of Soc. Sec., 893 F.3d 929, 932 (6th Cir. 2018) (explaining that the second ALJ in Ms. Drummond's case "switch[ing] gears" on her "was too much for our court to accept"); *Lively*, 820 F.2d at 1392.

136. *Drummond*, 126 F.3d at 843; *Lively*, 820 F.2d at 1392; *Earley*, 893 F.3d at 932.

137. *See infra* Subsection I.D.3.

138. *E.g.*, *Earley*, 893 F.3d at 934.

3. Res Judicata Applied to Disability Benefits: The *Earley/Albright* Approach

Although they did so at different paces, both the Fourth and Sixth Circuits have scaled back the *Drummond/Lively* approach.[139] In 1999, the Fourth Circuit in *Albright v. Commissioner of the Social Security Administration* pivoted away from the *Drummond/Lively* approach.[140] In 2018, the Sixth Circuit followed suit in *Earley v. Commissioner of Social Security*, declaring that *Drummond* was an "overstatement" of the law and explicitly changing its rule to mimic the Fourth Circuit's more recent *Albright* approach.[141]

In *Albright*, Mr. Albright was denied disability benefits after the ALJ determined that his injury qualified as a disability for only nine months, thus falling short of the requisite twelve-month minimum.[142] Mr. Albright then reapplied for benefits.[143] Notably, unlike in *Lively* and *Drummond*, any increase in age between the first and second applications would not have helped Mr. Albright because the twelve-month requirement would still stand, regardless of his age.[144] Applying *Lively*, the second ALJ again denied Mr. Albright, reasoning that he was bound by the first ALJ's determination absent "new and material evidence."[145]

Yet, the Fourth Circuit disagreed. It scaled back the *Lively* decision, explaining that res judicata does not bind subsequent ALJs and that "the prior adjudication in *Lively*—though highly probative—was not conclusive."[146] Instead of reading *Lively* as a per se rule, the *Albright* court treated *Lively* as an application of the substantial-evidence rule, reasoning that the prior finding that Lively could perform only light work "was such an important and probative fact as to render the subsequent finding to the contrary unsupported by substantial

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139. *Id.*; Albright v. Comm'r of the Soc. Sec. Admin., 174 F.3d 473, 477 (4th Cir. 1999).

140. 174 F.3d at 477.

141. 893 F.3d at 933–34. Throughout this Note, this current approach of the Fourth and Sixth Circuits regarding res judicata and disability determinations will be referred to as the "*Earley/Albright* approach."

142. *Albright*, 174 F.3d at 474; 42 U.S.C. § 423(d)(1).

143. *Albright*, 174 F.3d at 474.

144. *See* Evans v. Heckler, 734 F.2d 1012, 1014 (4th Cir. 1984) ("[A]n impairment can be considered as 'not severe' only if it is a *slight abnormality* which has such a *minimal effect* on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience." (alteration in original) (quoting Brady v. Heckler, 724 F.2d 914, 920 (11th Cir. 1984))).

145. *Albright*, 174 F.3d at 475.

146. *Id.* at 477.

evidence."[147] The court explained that in *Lively*, the time between applications was only two weeks; here, by, contrast, there was more time between applications, meaning the ALJs' differing conclusions concerning a claimant's ability to work were more acceptable.[148] Thus, the court in *Albright* held that the second ALJ was not bound by the first ALJ's findings regarding the severity of Mr. Albright's disability.[149]

In *Albright*, *not* applying res judicata benefited the claimant,[150] while in *Lively*, the opposite was true: *strictly* applying res judicata benefited the claimant.[151] In both cases, the claimants received their desired results.[152] Ultimately, the Fourth Circuit severely limited the *Lively* decision[153] and thus abandoned a strict application of res judicata to disability determinations. As for its reasoning, the court emphasized helping as many claimants as possible, stating, "We expect that few prospective claimants will one day find themselves in Lively's shoes, but many may hazard the treacherous path now trod by Albright."[154]

In *Earley*, the Sixth Circuit made a similar move regarding its prior *Drummond* decision.[155] Ms. Earley applied for disability benefits and was denied.[156] She then reapplied, and she was denied again.[157] The second ALJ did not reassess her condition; instead, this ALJ mechanically applied *Drummond* to her detriment, reasoning she had not presented "new and material evidence."[158] Ms. Earley appealed the decision to a district court.[159] The magistrate judge (on consent) reversed the decision, concluding that *Drummond* and res judicata applied only when they favored the applicant; the Sixth Circuit, however, rejected this approach.[160] Instead, the Sixth Circuit

147. *Id.* As the Fourth Circuit explained, "[W]e determined that the finding of a qualified and disinterested tribunal that Lively was capable of performing only light work as of a certain date was such an important and probative fact as to render the subsequent finding to the contrary unsupported by substantial evidence." *Id.* at 477–78. Whether or not there is substantial evidence to support a finding of fact is crucial as "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive . . . ." 42 U.S.C. § 405(g).

148. *Albright*, 174 F.3d at 477.

149. *Id.* at 478.

150. *Id.*

151. Lively v. Sec'y of Health & Hum. Servs., 820 F.2d 1391, 1392 (4th Cir. 1987).

152. *Id.*; *Albright*, 174 F.3d at 478.

153. The court did note that the court reached the correct outcome in *Lively*. *Albright*, 174 F.3d at 478.

154. *Id.*

155. Earley v. Comm'r of Soc. Sec., 893 F.3d 929, 933–34 (6th Cir. 2018).

156. *Id.* at 931.

157. *Id.*

158. *Id.*

159. *See id.*

160. *Id.* at 930–31.

announced that res judicata simply does not have a binding effect when two disability applications cover different time periods.[161] As the Sixth Circuit explained, "When an individual seeks disability benefits for a distinct period of time, each application is entitled to review."[162] The Sixth Circuit now holds that an ALJ "honors" the principles of res judicata by taking a prior ALJ's findings into consideration; even so, in the absence of new and material evidence, these findings are *not* binding and the ALJ is not required to follow them.[163]

The Sixth Circuit's rationale for rolling back *Drummond* mirrored the Fourth Circuit's rationale for rolling back *Lively*.[164] In adjusting the standard, the Sixth Circuit in *Earley* explained that Ms. Drummond was a "black swan."[165] In other words, Ms. Drummond wanted the same finding regarding her capacity to work because her increase in age between the applications, combined with the previous findings that she could perform only sedentary work, would have necessarily rendered her disabled.[166] According to the court, Ms. Drummond's position was "unusual" because most applicants "want the next administrative law judge to examine the new record and make a new, more favorable finding."[167] In proving its point that most applicants desire new findings, "Just ask Sharon Earley," the court rhetorically remarked.[168] In qualifying *Drummond*, the Sixth Circuit explained that *Drummond* "would do far more harm than good for social security applicants."[169]

4. Other Circuits: Some *Earley*, One *Drummond*, and Many Lacking Guidance

Like the Sixth and Fourth Circuits in *Earley* and *Albright*, the Eleventh and Seventh Circuits have expressed a preference for not strictly applying res judicata to disability determinations.[170] As stated

161. *Id.* at 933.

162. *Id.*

163. *Id.* ("[A]bsent new and additional evidence, the first administrative law judge's findings are a legitimate, albeit not binding, consideration in reviewing a second application.").

164. *See id.* at 934 (highlighting the similarity to *Albright* in "need[ing] to correct an overreading of a prior decision with respect to this precise issue"); Albright v. Comm'r of the Soc. Sec. Admin., 174 F.3d 473, 478 (4th Cir. 1999) ("[T]his dispute illustrates the pitfalls of extrapolating a legal rule of broad applicability from the result in a heavily fact-dependent case.").

165. 893 F.3d at 934.

166. *Id.* at 932, 934.

167. *Id.* at 934.

168. *Id.*

169. *Id.*

170. *See* Groves v. Apfel, 148 F.3d 809, 810 (7th Cir. 1998); Torres v. Comm'r of Soc. Sec., 819 F. App'x 886, 888 (11th Cir. 2020).

by Judge Posner, "Res judicata bars attempts to relitigate the same claim, but a claim that one became disabled in 1990 is not the same as a claim that one became disabled in 1994."[171] On the other hand, the Ninth Circuit currently aligns more closely with the *Drummond*/*Lively* approach, even as the Sixth and Fourth Circuits have moved away from that standard. In the Ninth Circuit, an ALJ's prior findings are binding on subsequent ALJs unless the claimant shows changed circumstances.[172] This is true even when the findings' binding nature harms the claimant.[173]

Many circuits have not directly considered whether an ALJ's findings should be binding, which is unsurprising given Professor Horwitz's analysis showing the lack of appellate guidance on questions of disability benefits.[174] For example, the Fifth Circuit does not have any binding precedent on this issue, with one lower court within the Circuit recently refusing to decide the question.[175] Likewise, the Tenth Circuit "has not . . . squarely" considered this res judicata question, yet some lower courts' holdings from the Circuit suggest they shy away from the *Drummond*/*Lively* approach and towards the *Albright*/*Earley* approach.[176] Similarly, the First Circuit has not provided a reasoned decision on this question; on the issue, the Circuit has issued only one per curiam decision in 2005, which lacked reasoning and simply affirmed a lower court's decision that had used a version of the *Albright*/*Earley* approach.[177] Generally speaking, lower courts in the First Circuit have rejected the *Drummond*/*Lively* approach and employ *Albright*/*Earley*.[178]

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171. *Groves*, 148 F.3d at 810.

172. Chavez v. Bowen, 844 F.2d 691 (9th Cir. 1988).

173. Carter v. Kijakazi, No. 21-55043, 2022 WL 193203, at *1 (9th Cir. Jan. 21, 2022) (affirming the holding in *Chavez* and strictly applying res judicata to subsequent applications even when it harmed the claimant).

174. Horwitz, *supra* note 76, at 48.

175. Brewer v. Soc. Sec. Admin., No. 20-3226, 2022 WL 3586753, at *1 (E.D. La. Aug. 22, 2022) ("Although the Report correctly notes the lack of binding Fifth Circuit precedent on the issue, this Court finds it unnecessary at this time to answer whether a past disability finding is binding or not.").

176. *See* Zelenak v. Saul, No. 20-cv-02045, 2021 WL 973390, at *2 (D. Colo. Mar. 16, 2021) ("[T]he Tenth Circuit has been unwilling to apply the holding of *Lively* where the second ALJ . . . independently considered the claimant's eligibility at the time of the second application, which involved a different, unadjudicated time period as to which new evidence had been presented.").

177. Cameron v. Berryhill, 356 F. Supp. 3d 186, 196–97 (D. Mass. 2019); Frost v. Barnhart, 121 F. App'x 399 (1st Cir. 2005).

178. *See, e.g.*, Frost v. Barnhart, No. 03-215-P-H, 2004 WL 1529286, at *4 (D. Me. May 7, 2004) ("I find the Fourth Circuit's reasoning in *Albright* persuasive."); *Cameron*, 356 F. Supp. 3d at 197 (following *Albright*).

II. ANALYSIS

Part I introduced courts of appeals' decisions developing the doctrine of res judicata in the context of disability benefits and explained the disagreement over time and between various circuits.[179] This Part, by evaluating lower court decisions, analyzes if the *Earley*/*Albright* approach provides the advantage to disability claimants that the Fourth and Sixth Circuits claim that it does.[180] Ultimately, this Part demonstrates that the *Earley*/*Albright* approach fails to live up to its aspiration of helping the largest number of social security applicants.[181] This is not to say that the *Drummond*/*Lively* approach is better, however. As Part III will present, the ideal solution is a combination of the two approaches.[182]

A. The Earley/Albright *Approach Fails Many Disability Claimants*

When the Sixth Circuit in *Earley* walked back its *Drummond* holding, the court explained that *Drummond* would harm disability claimants more than the decision would help them, as most disability claimants do not want previous findings to be binding.[183] Thus, in its decision, the Sixth Circuit sought to apply res judicata in a way that would benefit the largest number of claimants.[184] The Fourth Circuit articulated the same rationale when walking back its *Lively* decision.[185] Further, the fact that both circuit courts applied res judicata when it helped the particular Plaintiffs,[186] yet deemed it inapplicable when res judicata hurt the particular Plaintiffs,[187] highlights the courts'

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179. *See infra* Part III.

180. *See* Earley v. Comm'r of Soc. Sec., 893 F.3d 929, 934 (6th Cir. 2018); Albright v. Comm'r of the Soc. Sec. Admin., 174 F.3d 473, 474–76 (4th Cir. 1999).

181. *See infra* Section II.A.

182. *See infra* Part III.

183. *Earley*, 893 F.3d at 934.

184. *See id.* Lower court decisions have also noted this aspect of the *Earley* decision. For one example, see Hunter v. Comm'r of Soc. Sec., No. 20-11388, 2022 WL 988366, at *7 (E.D. Mich. Mar. 31, 2022):

> Plaintiff is correct that *Earley* explicitly recognized that overstatement of *Drummond*'s principles of res judicata in situations outside of the black swan scenario would operate to the detriment of "most applicants" who generally reapply in the hopes of obtaining "a new, more favorable finding." Plaintiff is also correct that this appeared to be a consideration in the Sixth Circuit's decision to clarify *Drummond*.

(internal citation omitted).

185. *Albright*, 174 F.3d at 478 ("We expect that few prospective claimants will one day find themselves in Lively's shoes, but many may hazard the treacherous path now trod by Albright.").

186. Lively v. Sec'y of Health & Hum. Servs., 820 F.2d 1391, 1392 (4th Cir. 1987); Drummond v. Comm'r of Soc. Sec., 126 F.3d 837, 843 (6th Cir. 1997).

187. *Earley*, 893 F.3d at 933–34; *Albright*, 174 F.3d at 478.

underlying motivation: benefiting the largest number of claimants possible.

As *Wilson v. Kijazki* demonstrates, the *Earley*/*Albright* approach does in fact help some disability claimants receive benefits.[188] In *Wilson*, Ms. Wilson filed for disability benefits and was denied; the ALJ determined that she was able to complete medium work (with some limitations) and enough jobs existed "in the economy that she could perform."[189] She then refiled, claiming her condition had worsened.[190] Despite this, the subsequent ALJ denied her again, holding that the first ALJ's findings were binding under *Drummond*.[191]

Even though Ms. Wilson's reapplication covered a new time period, the *Drummond* approach meant that res judicata would have barred her from receiving benefits.[192] *Drummond* would have bound the initial finding that Ms. Wilson could perform medium work, which is almost surely detrimental to a disability claimant regardless of age.[193] Yet, fortunately for Ms. Wilson, because the ALJ should have applied the new *Earley* approach (instead of *Drummond*) and given the second application a "fresh look," the reviewing judge remanded the case back to the SSA.[194] As *Earley* requires an ALJ to give the second application this "fresh look," the *Earley* approach presented Ms. Wilson with another chance to receive benefits that *Drummond* foreclosed.[195]

Under the *Earley*/*Albright* approach, however, some disability applicants still slip through the cracks. Plaintiffs who desire prior findings to be binding are the ones likely to be harmed by the *Earley*/*Albright* approach.[196] The *Earley* court asserted that this position is a rare occurrence;[197] in reality, however, these plaintiffs may be more common than the *Earley* court suggests.[198]

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188. Wilson v. Kijakazi, No. 6:21-CV-168, 2022 WL 17070516, at *4 (E.D. Ky. Nov. 17, 2022).

189. *Id.* at *1.

190. *Id.* at *2, *4.

191. *See id.* at *2–3 ("ALJ Mangus determined that ALJ Leiner's prior decision was 'final' and 'binding' and had a 'res judicata' effect.").

192. *Id.*

193. Drummond v. Comm'r of Soc. Sec., 126 F.3d 837, 842 (6th Cir. 1997); *see* 20 C.F.R. pt. 404, subpart P, app. 2 (2020) (providing very limited circumstances where a claimant who can perform medium work could qualify for benefits).

194. *Wilson*, 2022 WL 17070516, at *4.

195. *Id.* at *2, *4.

196. *See* Snow v. Saul, No. 5:20-cv-00388, 2022 WL 813603 (E.D. Ky. Mar. 16, 2022) (presenting a plaintiff who wanted the ALJ's previous finding regarding her RFC to be binding and lost her appeal under *Earley*).

197. Earley v. Comm'r of Soc. Sec., 893 F.3d 929, 934 (6th Cir. 2018).

198. *See, e.g.*, *Snow*, 2022 WL 813603; *infra* Section II.B.

The lower-court decision *Snow v. Saul* exemplifies this reality.[199] In this case, Ms. Snow filed a disability application, and, although the ALJ determined she could perform only sedentary work, the ALJ rejected her application for benefits.[200] She then reapplied for benefits, and the subsequent ALJ determined that she could actually perform light work, thus increasing her working capabilities (and therefore decreasing her chance of receiving benefits).[201] Ms. Snow argued that *Drummond* required the subsequent ALJ to find that she could perform only sedentary work, as new and material evidence did not suggest an improvement to her condition—thus contesting the ALJ's conclusion to the contrary.[202] In fact, she asserted that new evidence indicated that she could perform only sedentary work.[203] The reviewing judge did not resolve this dispute or determine if Ms. Snow would have prevailed under the old *Drummond* approach because, unfortunately for Ms. Snow, her case review occurred after *Earley*.[204] Thus, the reviewing judge applied *Earley* to Ms. Snow's case.[205] As the court explained, since the applications covered two distinct time periods, *Earley* permitted the subsequent ALJ to give the second application a "fresh look," and the ALJ was not bound by the prior ALJ's finding.[206] Because substantial evidence (a *very* deferential standard of review)[207] supported the subsequent ALJ's determination that Ms. Snow could perform light work, the reviewing judge denied her appeal under *Earley*.[208]

For Ms. Snow, the *Earley* decision did not help her; rather, it took away her opportunity to prevail under *Drummond* as it was previously understood.[209] Despite the Sixth and Fourth Circuits' intention to help the largest number of disability applicants possible,

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199. *Snow*, 2022 WL 813603.

200. *Id.* at *2.

201. *Id.* at *1; *see* 20 C.F.R. pt. 404, subpart P, app. 2 (presenting Table 1 and Table 2, which exemplify that it is more difficult to receive benefits when an ALJ determines that a claimant can perform light work as compared to sedentary work).

202. *Snow*, 2022 WL 813603, at *2.

203. *Id.*

204. *Id.* at *3–4 ("Plaintiff fails to explain how her case distinguishes itself from the circumscription of *Drummond* by the *Earley* court.").

205. *Id.*

206. *Id.*

207. *See, e.g.*, Longworth v. Comm'r Soc. Sec. Admin., 402 F.3d 591, 595 (6th Cir. 2005) ("The substantial evidence standard is met if a reasonable mind might accept the relevant evidence as adequate to support a conclusion." (internal quotation marks omitted) (quoting Warner v. Comm'r of Soc. Sec., 375 F.3d 387, 390 (6th Cir. 2004))).

208. *Snow*, 2022 WL 813603, at *4–5.

209. *See id.* at *4 ("As these decisions were based on separate time period[s], ALJ Wright was entitled to give the evidence a 'fresh look' and was not bound by the *res judicata* principles found in *Drummond*.").

their rolling back of the *Drummond* and *Lively* decisions[210] hurt the very disability applicants that *Drummond* and *Lively*[211] were initially implemented to support.

B. Lower Courts' Attempts to Resolve the Earley/Albright *Holes*

1. One Recent Attempt by a Lower Court in the Sixth Circuit

At least one magistrate judge within the Sixth Circuit has recognized the plight of plaintiffs in Ms. Snow's position and has attempted to rectify the circuit's extensive oversight.[212] In *Anissa E. v. Kijakazi*,[213] the Plaintiff "would have benefited" from a prior ALJ's findings regarding her RFC.[214] To the Plaintiff's detriment, the subsequent ALJ did not use the prior findings; instead, this ALJ gave the second application a "fresh look," ultimately denying the Plaintiff benefits.[215] In defending the ALJ's actions, the SSA contended on appeal that this was proper under *Earley*.[216]

Yet, for the magistrate judge who heard this case on consent and issued an order, the SSA's interpretation took *Earley* too far.[217] As the judge explained, "Where (as here) a claimant would benefit by acceptance of the prior RFC finding, no amount of 'fresh looking' at the new evidence will excuse departure from the prior RFC unless the evidence reflects medical improvement."[218] Essentially, if a plaintiff has filed multiple applications and the plaintiff would be aided by prior findings extending to their subsequent applications, then "new evidence" must show "medical improvement" between applications in order for the subsequent ALJ to disregard the prior findings.[219] In other

210. Earley v. Comm'r of Soc. Sec., 893 F.3d 929, 934 (6th Cir. 2018); Albright v. Comm'r of the Soc. Sec. Admin., 174 F.3d 473, 478 (4th Cir. 1999).

211. *See* Lively v. Sec'y of Health & Hum. Servs., 820 F.2d 1391, 1392 (4th Cir. 1987) (explaining that res judicata places a burden on the government to demonstrate that a claimant is capable of performing the intensity of work purported by the government when the claimant prevailed in the first administrative proceeding); Drummond v. Comm'r of Soc. Sec., 126 F.3d 837, 843 (6th Cir. 1997) (finding that res judicata applies to the Commissioner of Social Security in instances where the claimant prevailed in the first administrative proceeding); *Snow*, 2022 WL 813603, at *4 (holding that an ALJ is not bound by res judicata principles in a second administrative proceeding when their decision is based on a separate time period under *Earley*).

212. Anissa E. v. Kijakazi, No. 5:22-cv-00003, 2022 WL 3654863, at *3 (W.D. Ky. Aug. 23, 2022); *supra* Section II.A.

213. *Anissa E.*, 2022 WL 3654863, at *3.

214. *Id.*

215. *Id.* at *2–3.

216. *Id.* at *3.

217. *Id.*

218. *Id.*

219. *Id.*

words, when *Earley* hurts a plaintiff, this magistrate judge desires to instead apply *Drummond*.[220] In some respects, this decision is similar to the proposed solution below.[221]

While *Annissa E.* aligns with the Sixth and Fourth Circuits' desire to aid the largest number of social security applicants possible,[222] *Earley* asserted that "*each* application" receives a fresh review, not only when a fresh review will aid a claimant.[223] On the other hand, some language in *Earley* does support the *Annissa E.* position. In *Earley*, the Sixth Circuit suggests that even where a "fresh look" would harm a claimant, the substantial-evidence standard will likely save the claimant (meaning substantial evidence will not support the new RFC).[224] This is a questionable fallback, however, considering the substantial-evidence standard gives significant deference to ALJ decisions.[225] Moreover, *Earley*'s ambiguous fallback standard likely leaves plaintiffs wondering how subsequent ALJs and reviewing judges will treat prior findings, serving only to increase confusion in an already-byzantine process.

Notably, many other lower courts within the Sixth Circuit have come to the opposite conclusion as *Annissa E.*, pitting *Earley* against plaintiffs. For example, in both *Mounts v. Berryhill* and *Hunter v. Commissioner of Social Security*, the reviewing judges applied *Earley* despite the Plaintiffs' desire for *Drummond* to apply.[226] The judge in *Hunter* acknowledged *Early*'s aspirational rationale—aiding the largest number of disability claimants possible—but explained that this underlying rationale does not create a "separate standard to be applied to situations when the claimant wants a new ALJ to make the same determination as made previously by a prior ALJ."[227] Ultimately, the Plaintiff was denied benefits.[228] Likewise, in *Snow*, the reviewing judge applied the "fresh look" *Earley* standard even though the previous

220. *See id.* Under *Drummond*, prior findings are binding unless new evidence suggests otherwise. Drummond v. Comm'r of Soc. Sec., 126 F.3d 837, 842 (6th Cir. 1997) ("Absent evidence of an improvement in a claimant's condition, a subsequent ALJ is bound by the findings of a previous ALJ.").

221. *See infra* Section III.

222. *See, e.g.*, Earley v. Comm'r of Soc. Sec., 893 F.3d 929, 934 (6th Cir. 2018) (desiring to help the largest number of disability claimants with its decision).

223. *Id.* at 933 (emphasis added); *see also, e.g.*, Hunter v. Comm'r of Soc. Sec., No. 20-11388, 2022 WL 988366, at *7 (E.D. Mich. Mar. 31, 2022) (explaining that "each application is entitled to review" even if the case is "factually similar" to *Drummond* (quoting *Earley*, 893 F.3d at 933)).

224. *Earley*, 893 F.3d at 934.

225. *See* Longworth v. Comm'r Soc. Sec. Admin., 402 F.3d 591, 595 (6th Cir. 2005).

226. Mounts v. Berryhill, No. 6:18-CV-261, 2020 WL 34407, at *5 (E.D. Ky. Jan. 2, 2020); *Hunter*, 2022 WL 988366, at *7.

227. *Hunter*, 2022 WL 988366, at *7.

228. *Id.* at *8, *11.

articulation of *Drummond* would have been more favorable.[229] Accordingly, the *Snow* Plaintiff lost and the substantial-evidence standard did not save her second application—it actually worked against her.[230] Altogether, these cases followed *Earley*'s procedure while reaching conclusions that actually contravene the decision's core logic.

Thus, district-level decisions within the Sixth Circuit appear to clash on the question of to what extent *Earley* applies when the standard harms a plaintiff. This outcome conforms to the findings of Professor Horwitz's study: judges sitting in the same circuit often treat disability claimants in drastically different ways.[231]

2. One Recent Attempt by a Lower Court in the Fifth Circuit

A district court within the Fifth Circuit recently refused to decide if the *Drummond*/*Lively* approach or the *Earley*/*Albright* standard applies.[232] The district judge in *Brewer v. Social Security Administration* was deciding whether to adopt a magistrate judge's report and recommendation.[233] In *Brewer*, the magistrate judge desired to adopt the *Drummond* standard.[234] The Plaintiff had previously received benefits but lost those benefits while he was incarcerated.[235] Once released, Mr. Brewer reapplied for benefits.[236] The ALJ did not apply res judicata and denied the benefits, concluding that Mr. Brewer's schizophrenia had "disappeared."[237] The Plaintiff appealed and argued that the court should adopt the *Drummond*/*Lively* approach for his case, which the magistrate judge ultimately found persuasive, recommending a remand back to the SSA.[238] Like many of the plaintiffs discussed above, Mr. Brewer would have benefitted from a stringent res

229. Snow v. Saul, No. 5:20-cv-00388, 2022 WL 813603, at *3–4 (E.D. Ky. Mar. 16, 2022).

230. *Id.*

231. Horwitz, *supra* note 76, at 40–41.

232. *See* Brewer v. Soc. Sec. Admin., No. 20-3226, 2022 WL 3586753, at *1 (E.D. La. Aug. 22, 2022) ("Although the Report correctly notes the lack of binding Fifth Circuit precedent on the issue, this Court finds it unnecessary at this time to answer whether a past disability finding is binding or not.").

233. *Id.*

234. Brewer v. Kijakazi, No. 20-3226, 2022 WL 3591072, at *7 (E.D. La. July 7, 2022), *Rep. & Recommendation adopted in part by Brewer*, 2022 WL 3586753.

235. *See Brewer*, 2022 WL 3591072, at *1.

236. *See id.*

237. *Id.* at *4. The Plaintiff asserted that the ALJ concluded that his schizophrenia disappeared, and the ALJ did not find that the Plaintiff suffered from schizophrenia, despite a prior ALJ's finding to the contrary. *Id.* at *4, *7.

238. *Id.* at *7, *11.

judicata application, and the magistrate judge was ready to utilize the *Drummond*/*Lively* approach to help him receive benefits.[239]

In contrast, the district judge reviewing the recommendation was not willing to adopt the *Drummond*/*Lively* approach.[240] Still, the district judge also did not go so far as to adopt the *Earley*/*Albright* approach,[241] perhaps recognizing the downfalls of both. In any event, the district judge recognized that the prior decision awarding Mr. Brewer benefits should have "*at least*" been considered under either approach and, thus, the judge remanded the case and gave Mr. Brewer an opportunity to receive benefits.[242] The judge did not require either that the prior findings be binding or even that medical evidence show his condition had improved if he is ultimately denied benefits.[243] The judge required only that the prior findings be considered and that the ALJ provide an explanation if denying benefits.[244] Thus, when Mr. Brewer's case left the district court his future receipt of benefits remained uncertain.

Ultimately, the district judge stopped short of fully embracing the *Earley* position, and Mr. Brewer could still receive benefits.[245] At the same time, he also did not adopt the *Drummond*/*Lively* approach,[246] which would have harmed future applicants who do not wish for prior findings to be binding.[247] Therefore, the district judge appears to have walked a narrow path between the *Earley*/*Albright* approach and the *Drummond*/*Lively* approach, allowing Mr. Brewer's case to move forward, while not harming future claimants.[248]

III. SOLUTION

This Part provides a solution to the issue of multiple disability applications and res judicata. It begins by proposing that the SSA adopt

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239. *See id.* at *7.

240. *See* Brewer v. Soc. Sec. Admin., No. 20-3226, 2022 WL 3586753, at *1 (E.D. La. Aug. 22, 2022) ("[T]his Court finds it unnecessary at this time to answer whether a past disability finding is binding or not. After all, regardless of which circuit's approach applies, it is clear that the ALJ must *at least* consider the 2014 disability finding.").

241. *See id.*

242. *Id.*

243. *Id.* at *1–2.

244. *Id.*

245. *Id.*

246. *Id.*

247. *See, e.g.*, Earley v. Comm'r of Soc. Sec., 893 F.3d 929, 934 (6th Cir. 2018) ("Most applicants reapply only because the [Social Security] Administration found them not to be disabled . . . [and] want the next administrative law judge to examine the new record and make a new, more favorable finding.").

248. *See Brewer*, 2022 WL 3586753, at *1–2.

a federal regulation. Under the proposed regulation, if a claimant has filed multiple disability applications covering different time periods, past findings that are harmful to a claimant's new application are not binding, while past findings that are beneficial to a claimant's new application are binding (unless *new* clear-and-convincing evidence indicates the finding should not be binding). This Part then argues that the regulation is within the SSA's power to adopt. Next, this Part explains a policy rationale behind the proposed regulation and finishes by describing how this regulation is practical.

A. The Proposed Regulation

This Note proposes that the SSA adopt a federal regulation clarifying res judicata's role in the disability-determination process. This proposed regulation combines the advantages of the *Drummond*/*Lively* approach with the aspirations of the *Earley*/*Albright* approach. Furthermore, the regulation seeks to create uniformity in the SSA's allocation of benefits, ensuring that every person is subject to the same rules when the case involves multiple disability applications.[249]

Under the proposed regulation, if res judicata would bind a prior finding that harms a claimant's application for disability benefits, then res judicata has no place.[250] For cases that reach step five in the sequential evaluation process, the ALJ would use the Medical-Vocational Guidelines[251] to guide the determination of what constitutes a "harmful finding." The ALJ would decide if the prior finding, combined with the claimant's other pertinent characteristics (i.e., age and education level), would render her disabled or not. The prior finding would be considered harmful if the finding would result in the claimant not receiving benefits.

For example, if a claimant who is "closely approaching advanced age" is found to be able to perform medium work, the current Medical-

249. In general, clashing circuit decisions on questions of disability benefits and these decisions' concerning effects on uniformity of the federal program have previously been considered an issue. *See* Haire & Lindquist, *supra* note 83, at 230 ("Different circuits have reached different conclusions on issues relating to Social Security Administration disability claims, possibly undermining the agency's efforts to implement a nationally uniform program.").

250. This brings in the main positive attribute of the *Earley*/*Albright* approach. A claimant should not be punished on a second application covering a new time period just because findings on a prior application were unfavorable. *See Earley*, 893 F.3d at 934.

251. The Medical-Vocational Guidelines function as follows: "Where the findings of fact made with respect to a particular individual's vocational factors and residual functional capacity coincide with all of the criteria of a particular rule, the rule directs a conclusion as to whether the individual is or is not disabled." 20 C.F.R. pt. 404, subpart P, app. 2 (2020).

Vocational Guidelines direct a denial of benefits.[252] Under the proposed regulation, if this claimant later reapplies while still "closely approaching advanced age," then res judicata would not apply to the prior finding that the claimant can perform medium work. Instead, the ALJ would be required to reevaluate the RFC. This is because the medium-work RFC finding would be considered "harmful" under the proposed regulation; if res judicata bound the medium-work RFC finding, then this claimant's second application would necessarily be denied per the Medical-Vocational Guidelines.[253]

If, however, a claimant is aided by res judicata binding any particular finding, the regulation ensures that the prior finding applies to the subsequent application unless the commissioner can prove by a clear-and-convincing-evidence standard that the circumstances have changed, using only new evidence.[254] Given the flexibility of the usual substantial-evidence standard, using a clear-and-convincing-evidence standard ensures that there would be no "bait and switch" on claimants, a concern the *Albright* court shared when rolling back the *Lively* decision.[255]

For example, if the finding in question concerns a claimant's RFC, the second ALJ could not increase the exertional level of the work the claimant can perform unless the commissioner shows by new clear-and-convincing evidence that the claimant's condition has improved. Assume an ALJ determined that a claimant was able to perform light work, denying her benefits. The claimant reapplies for benefits when she is older and that RFC of light work would then qualify this claimant for benefits. In this situation, under the proposed regulation, the second ALJ would be limited to finding that the claimant can perform light work or less. The subsequent ALJ could not increase the claimant's exertional level to medium work or take away any of her limitations unless new clear-and-convincing evidence showed the claimant could perform medium work.

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252. *Id.* (providing on Table 3, specifically through Grid Rules 203.18–203.24, that if a claimant can perform medium work and is closely approaching advanced age, they will not be considered disabled).

253. *Id.* This hypothetical assumes the Medical-Vocational Guidelines can entirely direct a conclusion of nondisability for this claimant, meaning the claimant's nonexertional limits do not require the SSA to take a more individualized approach.

254. *Cf.* Anissa E. v. Kijakazi, No. 5:22-cv-00003, 2022 WL 3654863, at *3 (W.D. Ky. Aug. 23, 2022) (holding that if prior findings would help the plaintiff, new evidence must show medical improvement when an ALJ rejects these prior findings).

255. *See* Albright v. Comm'r of the Soc. Sec. Admin., 174 F.3d 473, 478 (4th Cir. 1999) ("Even more importantly, judicial ratification of the SSA's 'bait-and-switch' approach to resolving Lively's claim would have produced a result reasonably perceived as unjust and fundamentally unfair.").

B. The Social Security Administration's Authority to Promulgate the Proposed Regulation

The SSA possesses the legal authority to implement this type of regulation. As the Supreme Court explained in the disability-benefits case *Heckler v. Campbell*, when the "statute expressly entrusts the Secretary with the responsibility for implementing a provision by regulation," then the regulation is valid unless it "exceed[s] the Secretary's statutory authority" or is arbitrary and capricious.[256]

The relevant statute expressly authorizes the Secretary to promulgate this regulation.[257] As the Supreme Court has explained, the Social Security Act grants the Secretary "exceptionally broad authority" to promulgate certain rules and regulations.[258] Furthermore, the Social Security Secretary has previously promulgated regulations regarding res judicata and the disability-determination process,[259] indicating the Secretary possesses express authority to implement the proposed regulation.[260]

Furthermore, *Heckler* indicates that the regulation does not exceed the Secretary's statutory authority.[261] In *Heckler*, the Supreme Court approved the SSA's usage of rulemaking to determine factual issues,[262] and this proposed regulation is rulemaking that determines factual issues. Thus, under *Heckler*, it does not exceed the SSA's statutory authority.[263] In this instance, the regulation would, to some extent, predetermine whether prior findings will be binding. The

256. 461 U.S. 458, 466 (1983).

257. 42 U.S.C. § 405(a).

258. *Id.* ("The Commissioner of Social Security . . . shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder."); *see also Heckler*, 461 U.S. at 466 ("As we previously have recognized, Congress has 'conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the [Social Security] Act.' "); Jon C. Dubin, *Overcoming Gridlock:* Campbell *After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs*, 62 ADMIN. L. REV. 937, 972 (2010) ("Thus, emboldened by Congress's 'exceptionally broad' delegation of rulemaking authority, the agency promulgated the medical-vocational guidelines or 'grid' regulations to accomplish this task." (footnote omitted)).

259. *See* 20 C.F.R. § 404.957 (1994).

260. *Cf.* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 119–20 (2022) (explaining that when there is a lack of historical precedent for the implementation of a regulation, the agency is likely beyond its powers).

261. *See Heckler*, 461 U.S. at 467.

262. *Id.*; Dubin, *supra* note 258, at 941 ("[T]he Supreme Court held that properly empowered agencies, such as the SSA, may promulgate rules to resolve a class of general factual issues across the board in advance of individual adjudications.").

263. *See* 461 U.S. at 467.

Supreme Court recognizes that this is acceptable, considering that otherwise the agency would need to continually "relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding."[264]

Relitigating at the price of efficiency and fairness is a consistent feature of the current landscape. ALJs must frequently decide how res judicata applies to various claimants,[265] and the reviewing courts are prone to changing their minds on the matter, waffling as to which standard ALJs must apply.[266] Thus, the regulation would prevent considerable litigation both at the agency level and before Article III courts by establishing a uniform standard for how res judicata applies—the type of justification that the Supreme Court explicitly endorsed in *Heckler*.[267]

In addition, the proposed regulation is unlikely to be deemed arbitrary and capricious. As the famous *Motor Vehicle Manufacturers Ass'ns of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.* case exemplifies, consideration of alternatives is a focal point of the arbitrary and capricious analysis.[268] In this instance, alternative solutions have already proven inefficient and unjust in practice, as evidenced by courts and ALJs (1) allocating disability benefits differently from one another,[269] (2) using past findings from prior applications as strong presumptions against plaintiffs,[270] and (3) not giving appropriate weight to prior beneficial findings that plaintiffs likely relied on.[271] The regulation finds an optimal solution that resolves the weaknesses of the current approaches, while ultimately giving disability applicants the benefit of the doubt on close-call cases and

264. *Id.*; Dubin, *supra* note 258, at 941.

265. *See supra* Part II (presenting several cases in which ALJs differed in their application of res judicata).

266. *See supra* Part II (presenting circuit courts limiting prior decisions and district courts applying appellate court decisions in different ways). As one example, *Earley* limited *Drummond*'s application. Earley v. Comm'r of Soc. Sec., 893 F.3d 929, 934 (6th Cir. 2018).

267. *See* 461 U.S. at 467 ("A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.").

268. 463 U.S. 29, 46, 51 (1983). In *State Farm*, the Court held that an agency's regulation was arbitrary and capricious as the agency failed to consider technological alternatives. *Id.*

269. *See supra* Part II.

270. *See, e.g.*, Dalka v. Kijakazi, No. 20-36043, 2021 WL 5768463, at *1 (9th Cir. Dec. 6, 2021) (showing how ALJs will sometimes use past harmful findings, stating, "As no other changed circumstances existed, the ALJ adopted the remainder of the first ALJ's findings and found Dalka not disabled").

271. *See* Brewer v. Soc. Sec. Admin., No. 20-3226, 2022 WL 3586753, at *1–2 (E.D. La. Aug. 22, 2022) (requiring only that the subsequent ALJ "consider" the prior claimant's friendly findings and "explain" any departure from them, even in the absence of medical improvement).

providing support to the greatest number of claimants possible—the Sixth and Fourth Circuits' articulated goal.[272]

C. A Policy Rationale Supporting the Proposed Regulation

This solution seeks to expand disability benefits to ensure that every disabled person entitled to benefits receives them. The solution pushes for the outcome that multiple courts currently desire.[273] Furthermore, even with the more claimant-friendly regulation proposed above, the SSA's very strict definition of a disability for benefit purposes[274] renders it unlikely that a completely nondisabled claimant will receive benefits. Likewise, the relatively small amount of money the benefits provide,[275] in combination with the tediousness of the process,[276] makes it more probable that only people who truly need the benefits will apply multiple times and trigger the proposed regulation. Nevertheless, even if a few nondisabled claimants improperly receive benefits, the regulation embraces the policy rationale grounded in Blackstone's philosophy; namely, that a society should think "it is better that ten undeserving claimants receive unwarranted benefits, than that one truly disabled individual be denied them."[277] At the same time, the proposal fosters consistency in allocating disability benefits, thus alleviating current concerns regarding the arbitrary inconsistency of the current system.[278]

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272. *See* Albright v. Comm'r of the Soc. Sec. Admin., 174 F.3d 473, 478 (4th Cir. 1999); *Earley*, 893 F.3d at 934.

273. *See supra* Section II.A.

274. SOC. SEC. ADMIN., *supra* note 11.

275. The monthly average disabled worker benefit in 2021 was $1,568.89. *Old-Age, Survivors, and Disability Insurance*, SOC. SEC. ADMIN., https://www.ssa.gov/policy/docs/statcomps/supplement/2022/6c.html (last visited Feb. 6, 2024) [https://perma.cc/P6EZ-5CXR]. There are strict rules, however, on working while receiving disability; thus, this likely represents the person's only income each month. *Red Book: SSDI Only Employment Supports*, SOC. SEC. ADMIN., https://www.ssa.gov/redbook/eng/ssdi-only-employment-supports.htm?tl=5 (last visited Feb. 6, 2024) [https://perma.cc/KW6N-RAEB]; *see also* SOC. SEC. ADMIN., *supra* note 7 ("At the beginning of 2019, Social Security paid an average monthly disability benefit of about $1,234 to all disabled workers. That is barely enough to keep a beneficiary above the 2018 poverty level ($12,140 annually). For many beneficiaries, their monthly disability payment represents most of their income.").

276. *See supra* Section I.B.

277. Horwitz, *supra* note 76, at 36–37.

278. *Id.*

D. The Regulation's Practicality

Considering Congress grants the SSA great deference,[279] and the Supreme Court rarely considers disability-benefit cases,[280] a federal regulation is the most workable solution. Furthermore, in 2022 alone, the SSA promulgated four final rules, two of which concerned disability benefits,[281] indicating the agency actively engages in rulemaking.

Finally, there is a concern that this solution will incentivize more claimants to reapply for benefits after being denied, thus increasing the burden on the SSA, which is already handling over one million cases per year.[282] The first response to this concern is that these incentives already exist to some extent, meaning the increase in applications may not be as significant as one would expect. In the Ninth Circuit, for example, claimants previously denied disability who now desire specific prior findings to be binding already have great incentive to reapply.[283] The same is true of claimants in the Sixth and Fourth Circuits who do not want prior findings to be binding.[284] Admittedly, this regulation may incentivize more reapplications, but any attendant losses in judicial efficiency are outweighed by the regulation's principal benefit: ensuring truly disabled individuals who were improperly denied benefits can successfully reapply.

In addition, any potential increase in applications will likely not be as dramatic as one may expect. This is in part because an applicant who fully pursues a claim and exhausts appellate remedies has spent years awaiting the final outcome.[285] One organization, while using data from the SSA, estimates that the average wait time for a claimant who takes a claim all the way to a federal district court is three years and eight months.[286] Thus, claimants lack the ability to flood the system with continuous applications, considering the true resolution of a singular claim may take over three years.[287] Furthermore, setting out a

279. 42 U.S.C. § 405(a).

280. *See, e.g.*, Schauer, *supra* note 91, at 32.

281. *Recent Regulatory Actions*, SOC. SEC. ADMIN., https://www.ssa.gov/regulations/recentregulatory.html (last visited Feb. 6, 2024) [https://perma.cc/UVQ2-MMUR].

282. SOC. SEC. ADMIN., *supra* note 39.

283. *See* Chavez v. Bowen, 844 F.2d 691, 694 (9th Cir. 1988) (rendering past findings binding absent changed circumstances); Drake v. Saul, 805 F. App'x 467, 469 (9th Cir. 2020) ("Because we cannot determine, based on the existing record, whether the ALJ would still have found Drake 'not disabled' if the RFC findings in the 2011 Decision had been incorporated, we reverse the 2015 Decision and remand the case to the agency for further proceedings.").

284. *See supra* Section II.A.

285. USAFACTS, *supra* note 72.

286. *Id.*

287. *Id.*

clear regulation may decrease the need for appeals to the judicial branch, which often result in a remand back to, and therefore more work for, the SSA.[288] An easily administrable regulation, such as the one proposed, could help curb this burden.

Furthermore, the regulation will actually alleviate some of the SSA's burden because, through a single rulemaking process, the regulation establishes an easy guideline to decide the cases of anyone who reapplies (including claimants who would have reapplied regardless of the new regulation).[289] For example, for cases reaching step five of the sequential evaluation process, favorable findings would not need to be relitigated so long as: (1) a claimant has increased in age category, (2) the past findings would render the claimant disabled under the new age category, and (3) there is not new clear-and-convincing evidence that the disability has improved. Under the current framework, most circuits relitigate both favorable and unfavorable findings when claimants have filed multiple applications covering different time periods.[290] Thus, the regulation actually frees up ALJs' time and resources as compared to the current framework in which res judicata applies less frequently.[291] In summary, the regulation prevents the need to relitigate facts in certain circumstances, thus decreasing the time necessary to assess many applications.[292]

CONCLUSION

While the SSA provides benefits to many disabled adults and children, many other disabled claimants fail to receive the benefits necessary for basic livelihood and healthcare costs.[293] Furthermore, the process to receive benefits is unpredictable, difficult, and lengthy.[294] Adding to the injustice, when claimants have filed multiple applications, their receipt of benefits may depend solely on the U.S. region they live in, as the law varies between—and within—circuits.[295] Moreover, these claimants are subject to frequent changes in the law at

288. Lisa Rein, *Judges Rebuke Social Security for Errors as Disability Denials Stack Up*, WASH. POST (May 25, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/05/25/social-security-disability-denials-court-remands/ [https://perma.cc/53JN-WB2C] ("For the last decade, roughly half of all cases that made it to federal courts have been sent back.").

289. As previously addressed, the Supreme Court supports these types of measures. *See* Heckler v. Campbell, 461 U.S. 458, 466 (1983).

290. *See supra* Subsection I.D.4.

291. *See supra* Subsection I.D.4.

292. *See Heckler*, 461 U.S. at 466.

293. *See supra* Section I.A.

294. *See supra* Section I.A.

295. *See supra* Section I.D.

the circuit and district court levels.[296] These are also the claimants who feel the burdens of the application process the most, considering they have had to navigate it multiple times.

Some courts attempt to use the doctrine of res judicata to provide these claimants benefits, yet under current approaches, only some claimants benefit from the doctrine.[297] Thus, the SSA needs to step in and promulgate a federal regulation that provides uniformity in the application of res judicata to these claimants. The regulation should prohibit res judicata's application to claimants when doing so will harm their chance at benefits, while requiring res judicata's application when doing so will aid the claimants in their pursuit for benefits. Underpinning this solution is the belief that it is better to provide too many benefits rather than too few, as one disabled person without benefits and insurance is one too many.[298]

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296. *See supra* Part II.

297. *See supra* Part II.

298. *See supra* Section III.C.

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