

INDIANA CONTINUING LEGAL EDUCATION FORUM

SOCIAL SECURITY LAW

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RECENT SEVENTH CIRCUIT CASE LAW

Eric Schnauffer

Attorney Eric Schnauffer is licensed in Illinois and Michigan. From 1990-95, he litigated Social Security cases for the Department of Health and Human Services. Since 1996, he has litigated Social Security and attorney-fee cases for plaintiffs and their attorneys. E.g., Gisbrecht v. Barnhart, 535 U.S. 789 (2002) (Schnauffer representing petitioners); Johnson v. Apfel, 189 F.3d 561 (7th Cir. 1999) (Schnauffer representing claimant-appellant); Hickman v. Apfel, 187 F.3d 683 (7th Cir. 1999) (same); Rohan v. Chater, 98 F.3d 966 (7th Cir. 1996). He tracks recent Social Security case law at www.schnauffer.com.

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I. Introduction to Recent Published Seventh Circuit Decisions

A. Disability Decisions Since January 2005

Sims v. Barnhart, 442 F.3d 536 (7th Cir. 2006) (Posner) (affirmed).
Hofslien v. Barnhart, 439 F.3d 375 (7th Cir. 2006) (Posner) (affirmed).
Mendez v. Barnhart, 439 F.3d 360 (7th Cir. 2006) (Posner) (remanded).
Gentle v. Barnhart, 430 F.3d 865 (7th Cir. 2005) (Posner) (remanded).
Briscoe ex rel. Taylor v. Barnhart, 425 F.3d 345 (7th Cir. 2005) (Wood) (remanded).
Haynes v. Barnhart, 416 F.3d 621 (7th Cir. 2005) (Kanne) (affirmed).
White v. Barnhart, 415 F.3d 654 (7th Cir. 2005) (Bauer) (affirmed).
Sienkiewicz v. Barnhart, 409 F.3d 798 (7th Cir. 2005) (per curiam) (affirmed).
Fast v. Barnhart, 397 F.3d 468 (7th Cir. 2005) (Wood) (affirmed).
Boiles v. Barnhart, 395 F.3d 421 (7th Cir. 2005) (Rovner) (remanded).
Schmidt v. Barnhart, 395 F.3d 737 (7th Cir. 2005) (Sykes) (affirmed).

B. Equal Access to Justice Act Decisions Since January 2005

Cunningham v. Barnhart, 440 F.3d 862 (7th Cir. 2006) (Kanne) (affirmed denial of EAJA).
Conrad v. Barnhart, 434 F.3d 987 (7th Cir. 2006) (Rovner) (affirmed denial of EAJA).

• This list was last updated April 27, 2006. All recent published appellate Seventh Circuit Social Security cases can be found on Lexis and Westlaw as well as at

<http://www.ca7.uscourts.gov/>
<http://www.findlaw.com/casecode/courts/7th.html>
<http://www.schnaufer.com/7th.htm>

• Litigants may cite relevant out-of-Circuit precedent. E.g., Hofslien v. Barnhart, 439 F.3d 375, 376 (7th Cir. 2006) (citing Second and Tenth Circuit law); Gentle v. Barnhart, 430 F.3d 865, 868 (7th Cir. 2005) (citing Second and Ninth Circuit law).

• For an overview of how to draft a merits brief in a Social Security case, see “Writing District Court Social Security Briefs in the Seventh Circuit” at www.schnaufer.com/7thBriefWriting.pdf.

II. Medical Opinions

A. Hofslien v. Barnhart, 439 F.3d 375 (7th Cir. 2006).

“This rule, now codified in social security regulations, 20 C.F.R. § 404.1527(d)(2), has been around a long time and is cited and discussed in innumerable cases. E.g., Black & Decker Disability Plan, 538 U.S. 822, 829 . . . (2003); White v. Barnhart, 415 F.3d 654, 658 (7th Cir. 2005); Hackett v. Barnhart, 395 F.3d 1168, 1173-74 (10th Cir. 2005); Halloran v. Barnhart, 362 F.3d 28, 32 (2d Cir. 2004) (per curiam). Its meaning and utility, however, are uncertain. It seems to take back with one hand what it gives with the other, and as a result to provide little in the way of guidance to either [ALJs] or counsel. It is time that the [SSA] reexamined the rule.” [at 376]

“The rule directs the [ALJ] to give controlling weight to the medical opinion of a treating physician if it is ‘well-supported by medically acceptable clinical and laboratory diagnostic techniques’ and ‘not inconsistent with the other substantial evidence.’ Obviously if it is well supported and there is no contradictory evidence, there is no basis on which the [ALJ], who is not a physician, could refuse to accept it. Equally obviously, once well-supported contradicting evidence is introduced, the treating physician’s evidence is no longer entitled to controlling weight.” [at 376]

“The advantage that a treating physician has over other physicians whose reports might figure in a disability case is that he has spent more time with the claimant. The other physicians whose reports or other evidence are presented to the [ALJ] might never even have examined the claimant (that was true here), but instead have based their evidence solely on a review of hospital or other medical records. But the fact that the claimant is the treating physician’s patient also detracts from the weight of that physician’s testimony, since, as is well known, many physicians

(including those most likely to attract patients who are thinking of seeking disability benefits) will often bend over backwards to assist a patient in obtaining benefits. [C]f. Seth A. Seabury, Robert T. Reville & Frank Neuhauser, “Physician Shopping in Workers’ Compensation: Evidence from California,” 3 Journal of Empirical Legal Studies 47 (2006). Black & Decker Disability Plan . . . Hawkins v. First Union Corp. Long-Term Disability Plan, 326 F.3d 914, 917 (7th Cir. 2003), and cases cited there. Moreover, though not in this case, the treating physician is often not a specialist in the patient’s ailments, as the other physicians who give evidence in a disability case usually are.” [at 377]

“So the weight properly to be given to testimony or other evidence of a treating physician depends on circumstances. As explained in the accompanying order, the [ALJ] was justified in giving greater weight to the medical evidence that contradicted the treating physician’s evidence than to his evidence.” [at 377]

- Is Hofslien law or just an editorial about treating-source law?
- Does Hofslien reduce to the general proposition that the weight given to a treating source’s opinion under 20 C.F.R. § 404.1527 (2006) depends on the facts? Is there anything for claimants to fear in a holding that the weight accorded a treating source’s opinion depends on the facts?
- Hofslien does not rely on Social Security law to conclude that treating sources “will often bend over backwards” for their patients. It relies instead on
 - an ERISA case holding that Social Security’s treating-source rule does not apply to ERISA proceedings,
 - a law review article, and
 - a long-term disability case.

- Hofslien may be distinguished or limited.

- Hofslien does not rely on Social Security law for its statement that a treating source will bend over backwards for his or her patient. An ERISA case holding that Social Security's treating-source rule does not apply to ERISA proceedings does not somehow limit Social Security's treating source rule.

- If the ALJ did not allege that the treating source did the claimant a favor, then the argument that the treating source did the claimant a favor is an improper post hoc rationalization under Chenery.

- If the ALJ asserts that the treating source did the claimant a favor, is the ALJ's assertion merely assumption, imputation, or speculation? Cf. White ex rel. Smith v. Apfel, 167 F.3d 369, 375 (7th Cir. 1999) ("Speculation is, of course, no substitute for evidence, and a decision based on speculation is not supported by substantial evidence.").

- If the ALJ relied on medical literature regarding treating sources, did the ALJ proffer that medical literature to the claimant prior to rendering a decision?

Procedural due process requires an ALJ to proffer to a claimant prior to rendering a decision any evidence upon which the ALJ will rely. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950); HALLEX, § I-2-7-1.

Further, the HALLEX prohibits reliance on a medical text to resolve a material issue. HALLEX, § I-2-8-25(D) ("The ALJ must not cite medical texts and medical publications as the authority for resolving any issue. If it is necessary to refer to a medical text or medical publication, the ALJ must submit the material to the

claimant or the representative for review and comment, and make the material a part of the record.”).

- There are favorable cases from other Circuits, including Reddick v. Chater, 157 F.3d 715, 726 (9th Cir. 1998) and Nguyen v. Chater, 100 F.3d 1462, 1465 (9th Cir. 1996).

B. Boiles v. Barnhart, 395 F.3d 421 (7th Cir. 2005).

“The opinion of a treating physician concerning a patient’s condition is ‘entitled to controlling weight if it is well supported by medical findings and not inconsistent with other substantial evidence in the record.’ Clifford [v. Apfel], 227 F.3d [863,] 870 [(7th Cir. 2000)]. Here, the ALJ did not explain how other evidence in the record contradicted Dr. Wallack’s opinion about the frequency of Boiles’s pseudoseizures. See Gudgel v. Barnhart, 345 F.3d 467, 470 (7th Cir. 2003). Aside from the puzzling statement that Dr. Wallack ‘failed to explain the type of seizure involved,’ the ALJ did not explain why Dr. Wallack’s opinion about the frequency of the seizures was not ‘well supported by medical findings.’ Dr. Stump, the non-treating medical expert, estimated that Boiles had seizures at least once per month. Although this more conservative estimate (which the ALJ did not mention) might be viewed as evidence that contradicts Dr. Wallack’s opinion, it still supports a level of frequency that is commensurate with Listing 11.02. At the very least, the ALJ was obligated to solicit more evidence if he believed that the frequency of the seizures, as reflected in the record, was unclear. See Smith v. Apfel, 231 F.3d 433, 437-38 (7th Cir. 2000).” [at 426]

- Boiles requires an ALJ to develop an adequate record even when the claimant has a representative. However, such authority is easily distinguished. In those cases where the claimant had a representative before the ALJ, the claimant should always try to find a stronger argument than that the ALJ failed to develop an adequate record. A court is likely to hold that the representative was required to fill any gap in the record instead of sitting on his or her hands, waiting for the ALJ to fill the gap.

- Boiles is a good example of a case in which the ALJ did not articulate adequately the weight accorded various medical opinions.

C. White v. Barnhart, 415 F.3d 654 (7th Cir. 2005).

“White invoked the ‘treating physician rule’ from the [SSA] Regulations to argue that Dr. Zondag’s opinion is entitled to controlling weight. The relevant regulation provides that the opinion of a treating source is entitled to controlling weight if the opinion ‘is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence’ 20 C.F.R. § 404.1527(d)(2); Black & Decker Disability Plan v. Nord, 538 U.S. 822, 825 . . . (2003). As the magistrate judge recognized, the problem with White’s argument is that Dr. Zondag was not a treating source as that term is defined by the regulations because he did not have an ongoing relationship with White. 20 C.F.R. § 404.1502. Rather, Dr. Zondag, who only examined White once, fits the definition of a nontreating source” [at 658]

“Indeed, it is difficult to think of more appropriate factors than a physician’s specialty and familiarity with the patient and his medical history when determining how much weight to assign to his opinions. The practice finds support in both Supreme Court case law and the

applicable regulations. Black & Decker, 538 U.S. at 832 . . . 20 C.F.R. §§ 404.1527(d)(2)(i) and (d)(5). The somewhat tentative nature of Dr. Steiner and Dr. Zondag’s diagnoses may also have influenced the ALJ’s finding. . . . At any rate, it was not irrational or unreasonable for the ALJ to discount a psychiatric diagnosis offered by two nontreating doctors who specialize in physical impairments.” [at 658-59 (citations to record omitted)]

“White next argues that the ALJ’s residual functional capacity evaluation has no credible foundation in the medical evidence. It bears noting that White does not contend that the ALJ’s conclusion about White’s functional capacity had no foundation in the medical evidence, only that it had no credible foundation in the evidence. This is a tough argument to make on a Social Security appeal because the reviewing court ‘is not allowed to substitute its judgment for the ALJ’s by reconsidering facts, reweighing evidence, resolving conflicts in evidence, or deciding questions of credibility.’ Jens v. Barnhart, 347 F.3d 209, 212 (7th Cir. 2003) (citations omitted).” [at 659 (emphasis in original)]

“The ALJ’s ultimate residual functional capacity finding tracked [medical expert] Dr. Steiner’s opinion almost exactly, and Dr. Steiner’s opinion, buttressed by the State Consultants’ opinions, was an adequate evidentiary foundation for the finding.” [at 659]

“White also claims that the ALJ violated the ‘treating physician rule’ when he declined to give controlling weight to Dr. Woldum’s opinion that he was unable to perform any type of substantial gainful activity. But the opinion of a treating physician is only entitled to controlling weight if it is ‘well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence’ 20 C.F.R. § 404.1527(d)(2). Dr. Woldum’s opinion did not meet either regulatory requirement. As explained

by the ALJ, Dr. Woldum's opinion was based on White's subjective complaints rather than accepted medical techniques, and White's complaints were not credible in light of the opinions of numerous physicians who examined him and found no objective evidence to support his claims of debilitating pain. Dr. Woldum's opinion was also inconsistent with the opinions of Dr. Steiner and the State Agency Medical Consultants, and at least partially inconsistent with the conclusions of several other physicians. Accordingly, we reject White's 'treating physician rule' argument with regard to Dr. Woldum's opinion." [at 659]

"Lastly, White criticizes the ALJ for crediting [medical expert] Dr. Steiner's opinion about White's residual functional capacity and then discounting his opinion that White suffered from a 'somatoform situation.' We do not view the ALJ's selective crediting of Dr. Steiner's opinions as problematic. Dr. Steiner is a physiatrist; physiatrists are experts in diagnosing and treating acute and chronic pain and musculoskeletal disorders. The ALJ credited Dr. Steiner's opinion to the extent that it related to his specialty — White's residual functional capacity in light of his physical ailments — and discounted Dr. Steiner's opinion when he strayed from his area of expertise and opined that White had a psychiatric disorder. This was a reasonable way to distinguish among Dr. Steiner's opinions." [at 659-60]

- White refers to and apparently relies on the ERISA case Black & Decker Disability Plan. A claimant should dispute the proposition that an ERISA case holding that Social Security's treating-source rule does not apply in the ERISA context somehow limits Social Security's treating-source rule.

- By raising the issue of credibility in the context of medical opinions, the claimant invoked the most deferential standard of judicial review. Whenever possible, a claimant should not

characterize an argument in terms of credibility or in terms of credibility alone.

- White is an ordinary example of an ALJ's proper weighing of a source's medical opinions. An ALJ may have a legitimate reason, e.g., the medical source's expertise, to accept one of the source's opinions yet reject others.

- A court may affirm an ALJ's finding based on opinions from non-examining sources, e.g., medical experts and non-examining state-agency sources. It is vital to review all of a non-examiner's opinions, trying to identify those opinions inconsistent with the ALJ's findings and consistent with the claimant's views. If possible, try to hoist the ALJ by his or her own petard. For example, did the non-examiner determine that the claimant had a manipulative limitation the ALJ did not recognize?

D. Haynes v. Barnhart, 416 F.3d 621 (7th Cir. 2005).

“Dr. Mulhausen was not one of Haynes's treating physicians, and the ALJ was entitled to reject Dr. Mulhausen's opinion in favor of other physicians' opinions and evidence in the record — particularly when Dr. Mulhausen's conclusion regarding the three-workday restriction was itself unsupported by any explanation or evidence.” [at 631 (citations omitted)]

- Haynes is an ordinary affirmance of an ALJ's weighing of the medical evidence.

III. Playing Doctor and Making Medical Judgments

A. Longstanding Seventh Circuit Law

- The Seventh Circuit prohibits an ALJ from playing doctor, i.e., making medical judgments beyond his or her ken. See Boiles v. Barnhart, 395 F.3d 421, 425 (7th Cir. 2005); Blakes ex rel. Wolfe v. Barnhart, 331 F.3d 565, 570 (7th Cir. 2003); Lopez ex rel. Lopez v. Barnhart, 336 F.3d

535, 540 (7th Cir. 2003); Clifford v. Apfel, 227 F.3d 863, 870 (7th Cir. 2000); Green v. Apfel, 204 F.3d 780, 781 (7th Cir. 2000); Rohan v. Chater, 98 F.3d 966, 970 (7th Cir. 1996); Wilder v. Chater, 64 F.3d 335, 337-38 (7th Cir. 1995); Herron v. Shalala, 19 F.3d 329, 334 n.10 (7th Cir. 1994); Scivally v. Sullivan, 966 F.2d 1070, 1076 (7th Cir. 1992); Schmidt v. Sullivan, 914 F.2d 117, 118 (7th Cir. 1990); Bauzo v. Bowen, 803 F.2d 917, 926 (7th Cir. 1986); Rousey v. Heckler, 771 F.2d 1065, 1069-70 (7th Cir. 1985).

• The Commissioner sometimes cites Dixon v. Massanari, 270 F.3d 1171 (7th Cir. 2001), for the proposition that an ALJ did not play doctor because the ALJ discussed the relevant evidence regardless of whether the ALJ’s discussion was reasonable. Id. at 1777 (“Here, ALJ Kelly thoroughly discussed the medical evidence in making her decision: she did not, as Dixon suggests, play doctor.”). Under Seventh Circuit law, it matters what the ALJ says when discussing the medical evidence. Dixon does not eviscerate the Seventh Circuit’s long-standing prohibition on playing doctor by excusing an ALJ for making an improper medical judgment so long as the ALJ discussed the relevant evidence. It matters very much what the ALJ said. The Seventh Circuit requires rational and reasoned evaluation of relevant evidence by an administrative agency. See, e.g., Wilder v. Chater, 64 F.3d 335, 336-38 (7th Cir. 1995). Addressing relevant evidence is a necessary but insufficient condition for approval of the ALJ’s decision. The ALJ must also provide a rational basis for his or her findings.

B. Boiles v. Barnhart, 395 F.3d 421 (7th Cir. 2005).

“An ALJ may not substitute his own judgment for a physician’s opinion without relying on other medical evidence or authority in the record.” [at 425]

“In this case, the testimony of Dr. Wallack and the two non-treating physicians did not support the reasons stated by the ALJ for finding that the pseudoseizures did not equal a listed impairment. First, the ALJ did not explain the relevance of the lack of EEG evidence for his finding that the pseudoseizures were not severe enough to equal a listing. The ALJ did not cite any evidence to contradict Dr. Stump’s opinion that a negative EEG: (1) was perfectly consistent with Boiles’s type of seizure disorder and (2) did not mean that her seizures were any less ‘real’ than those that could be measured by electric output; thus, it was improper for the ALJ to use the lack of EEG evidence as support for his decision.” [at 425]

- There must be a reasonable medical basis for an ALJ’s weighing of the evidence.

C. Haynes v. Barnhart, 416 F.3d 621 (7th Cir. 2005).

“Haynes next argues that the ALJ improperly disregarded [medical expert] Dr. Mulhausen’s testimony that Haynes would be required to miss up to three workdays per month due to his pulmonary condition and heel pain. This testimony is important to Haynes, because the vocational expert testified that if a claimant must miss more than two workdays a month, the claimant would be unemployable. Haynes claims there was no evidence in the record to contradict Dr. Mulhausen’s conclusion, and therefore the ALJ could not cast aside the physician’s opinion and substitute his own ‘layman’s’ opinion. [¶] Again we must disagree with Haynes. While it is true that the regulations require an ALJ to consider opinions offered by medical experts, an ALJ is not bound by those opinions and must evaluate them in the context of the expert’s medical specialty and expertise, supporting evidence in the record, and other explanations regarding the opinion. See 20 C.F.R. §§ 404.1527(f)(2); 416.927(f)(2). Likewise, the relevant policy statement reinforces the requirement that the ALJ consider the supportability

of the opinion, the consistency of the opinion with the record as a whole, including other medical opinions, and any explanation for the opinion provided by the state agency medical or psychological consultant or other program physician or psychologist. SSR 96-6p”

• A prohibition on playing doctor cannot be an absolute prohibition on weighing medical evidence. In many cases, an ALJ will need to weigh the medical evidence. To show that an ALJ made an improper medical judgment, consider:

- Is the underlying medical diagnosis simple or complex?
- Is the ALJ’s medical judgment reasonable?
- How do you know that the ALJ’s medical judgment is unreasonable?
- Is there an explicit or implicit countervailing medical opinion?
- Is there a legal basis, e.g., in the regulations, for the ALJ’s medical judgment?
- Can you tie the play-doctor argument to an argument that the ALJ failed either to address adequately specific important evidence or to develop an adequate record?

IV. Reliance on Reference Books and Medical Literature

A. Sims v. Barnhart, 442 F.3d 536 (7th Cir. 2006).

In Sims, the claimant alleged disability due to a somatoform disorder. The Seventh Circuit addressed what kind of medical proof a claimant needs to establish disability due to that disorder. When holding that the claimant did not present proof germane to a somatoform disorder, the Seventh Circuit cited ten medical articles or reference books, including:

- Deborah N. Black et al., “Conversion Hysteria: Lessons from Functional Imaging,” 16 J. Neuropsychiatry & Clinical Neurosciences 246 (2004).

- Jill Sardegna & T. Otis Paul, Encyclopedia of Blindness and Vision Impairment 241 (1991).

- Susan Dufel, “Conversion Disorder,” Apr. 15, 2005, <http://www.emedicine.com/emerg/topic112.htm>.

- Amer. Psych. Ass’n, Diagnostic and Statistical Manual of Mental Disorders (4th Text Rev. 2000).

• Did the ALJ cite any of these sources? If not, then are they extra-record evidence? If the ALJ cited any of these sources, did the ALJ proffer the sources to the claimant prior to rendering a decision?

• The Agency is responsible for establishing the standard of proof for benefit claims. 42 U.S.C. § 405(a) (“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.”).

Is the Seventh Circuit acting as though it were an administrative agency?

- If the Commissioner cited any of these sources in her brief when the ALJ did not cite any such source in his or her decision, would the Commissioner’s citation violate Chenery?

- A medical text can be cited for several different purposes — e.g., to define a technical medical term; to provide the diagnostic criteria for an impairment; and/or to describe the objective medical evidence associated with an impairment — and thus all citations to medical texts should not be treated the same.

B. Mendez v. Barnhart, 439 F.3d 360 (7th Cir. 2006).

When reviewing an ALJ's decision in which the claimant alleged disability due to mental retardation, the Seventh Circuit cited:

- Occupational Outlook Handbook (2004-05 ed.).
- Joseph D. Matarazzo, Wechler's Measurement and Appraisal of Adult Intelligence (5th ed.1972).
- Stedman's Medical Dictionary (27th ed. 2000).
- Medline Plus Medical Encyclopedia, <http://www.nlm.nih.gov/medlineplus/>.
- The Occupational Outlook Handbook has a special status in the regulations. See 20 C.F.R. § 404.1566(d)(5) (2006).
- Normally, it is permissible for the litigants and the reviewing court to cite a medical dictionary to define a medical term. However, if an ALJ cites a medical dictionary, consider carefully whether the ALJ is relying on extra-record evidence or making an improper lay medical judgment. Make sure that the claimant has a reasonable theory under which the citation of extra-record evidence is harmful error.

V. Articulation

A. General Articulation Framework

- The general rule is that an ALJ need not discuss every piece of evidence, but must discuss important evidence. Typically, a claimant's articulation argument has three parts:

- (1) Summarize articulation law.
 - (a) Administrative law generally
 - (b) Seventh Circuit articulation law
 - (i) Social Security
 - (ii) Other administrative agencies
 - (c) Regulations
 - (d) Social Security Rulings
- (2) Identify important evidence the ALJ neglected.
- (3) Explain why the failure to address important evidence is harmful error.

- Is every Seventh Circuit Social Security disability case an articulation case?

- What is the difference between “considering” and “evaluating” evidence? Just because an ALJ mentions evidence in a statement of the facts does not mean that the ALJ evaluated that evidence. If the ALJ did not provide a substantive analysis of specific evidence, argue that the ALJ did not “evaluate” that evidence. When an ALJ evaluates evidence, the ALJ states whether he or she accepts or rejects the evidence and/or specifies the weight accorded it. If an ALJ mentions evidence, including in a statement of the facts, it is very difficult to argue persuasively that the ALJ did not “consider” the evidence.

B. Hofslien v. Barnhart, 439 F.3d 375 (7th Cir. 2006).

“The rule [i.e., 20 C.F.R. § 404.1527] goes on to list various factors that the [ALJ] should consider, such as how often the treating physician has examined the claimant, whether the physician is a specialist in the condition claimed to be disabling, and so forth. The checklist is designed to help the [ALJ] decide how much weight to give the treating physician’s evidence.

When he has decided how much weight to give it, there seems no room for him to attach a presumptive weight to it.” [at 377]

- Hofslien does not state expressly that the ALJ must articulate his or her rationale with respect to the factors included in 20 C.F.R. § 404.1527(d) (2005). Cf. Newton v. Apfel, 209 F.3d 448, 456 (5th Cir. 2000) (“This court now similarly holds that an ALJ is required to consider each of the § 404.1527(d) factors before declining to give any weight to the opinions of the claimant’s treating specialist. The ALJ failed to perform this analysis, which should be conducted on remand.”).

C. Mendez v. Barnhart, 439 F.3d 360 (7th Cir. 2006).

“The [ALJ] failed to articulate a reasoned basis for the denial of benefits.” [at 363]

- There is an overlap between cases requiring adequate articulation of important evidence and those requiring adequate reasoning supporting any finding based on the evidence.

D. Briscoe ex rel. Taylor v. Barnhart, 425 F.3d 345 (7th Cir. 2005).

“In addition to relying on substantial evidence, the ALJ must also explain his analysis of the evidence with enough detail and clarity to permit meaningful appellate review.” [at 351]

“Contrary to SSR 96-8p, however, the ALJ did not explain how he arrived at these conclusions; this omission in itself is sufficient to warrant reversal of the ALJ’s decision. See SSR 96-8p . . . (‘RFC assessment must include a narrative discussion describing how the evidence supports each conclusion, citing specific medical facts.’)” [at 352]

- Briscoe is significant because it enforces an articulation standard in an SSR. Briscoe is thus similar to Prince, in which the Seventh Circuit enforced another SSR. See Prince v. Sullivan, 933 F.2d 598, 603 (7th Cir. 1991) (“Until the [SSA] revokes S.S.R. 82-62, we will hold ALJs to the requirements set out in that ruling by the Secretary.”).

- Look for articulation requirements in SSRs, such as SSR 96-8p’s requirement for a “thorough discussion and analysis of the objective medical and other evidence.” SSR 96-8p. Thus, SSR 96-8p requires more than the minimal articulation required by case law generally. See, e.g., Rice v. Barnhart, 384 F.3d 363, 371 (7th Cir. 2004) (“However, an ALJ need only ‘minimally articulate his or her justification for rejecting or accepting specific evidence of a disability.’”) (quoting Steward v. Bowen, 858 F.2d 1295, 1299 (7th Cir. 1988)).

E. Haynes v. Barnhart, 416 F.3d 621 (7th Cir. 2005).

“In rendering a decision, the ALJ must build a logical bridge from the evidence to his conclusion. See Steele v. Barnhart, 290 F.3d 936, 941 (7th Cir. 2002). The ALJ need not, however, provide a ‘complete written evaluation of every piece of testimony and evidence.’ Diaz v. Chater, 55 F.3d 300, 308 (7th Cir. 1995).” [at 626]

- A claimant may want to acknowledge, when challenging an ALJ decision on articulation grounds, that an ALJ need not evaluate expressly each item of evidence. A claimant needs to show that the ALJ did not adequately or reasonably evaluate significant evidence.

F. Boiles v. Barnhart, 395 F.3d 421 (7th Cir. 2005).

“Here, the ALJ did not explain how other evidence in the record contradicted [treating physician] Dr. Wallack’s opinion about the frequency of Boiles’s pseudoseizures. See Gudgel v. Barnhart, 345 F.3d 467, 470 (7th Cir. 2003). . . . [T]he ALJ did not explain why Dr. Wallack’s opinion about the frequency of the seizures was not ‘well supported by medical findings.’” [at 426]

- Whether the ALJ evaluated properly a treating source’s opinion is the same issue as whether the ALJ articulated an adequate basis for his or her conclusion regarding that opinion.

G. Schmidt v. Barnhart, 395 F.3d 737 (7th Cir. 2005).

“Finally, Schmidt contends that the ALJ improperly evaluated his testimony concerning subjective complaints of pain by failing to consider the relevant factors outlined in 20 C.F.R. § 404.1529, Social Security Ruling 96-7p, and our decisions including Knight v. Chater, 55 F.3d 309, 314 (7th Cir. 1995); Brindisi v. Barnhart, 315 F.3d 783, 787 (7th Cir. 2003); and Lopez v. Barnhart, 336 F.3d 535, 539-40 (7th Cir. 2003). These regulations and cases, taken together, require an ALJ to articulate specific reasons for discounting a claimant’s testimony as being less than credible, and preclude an ALJ from ‘merely ignoring’ the testimony or relying solely on a conflict between the objective medical evidence and the claimant’s testimony as a basis for a negative credibility finding. See Lopez, 336 F.3d at 539; Knight, 55 F.3d at 314.” [at 746-47]

- Contesting an ALJ’s adverse credibility finding is disputing whether the ALJ articulated an adequate basis for that finding.

VI. Chenery

A. SEC v. Chenery Corp., 318 U.S. 80 (1943) (Chenery I).

“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.” [at 87]

“If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.” [at 88]

B. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (Chenery II).

“When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency. [¶] We also emphasized in our prior decision an important corollary of the foregoing rule. If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency’s action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, ‘We must know what a decision means before the duty becomes ours to say whether it is right or wrong.’ United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499, 511, 467.” [at 196-97]

C. Mendez v. Barnhart, 439 F.3d 360 (7th Cir. 2006).

“In defending the [ALJ’s] decision on a ground that he himself did not mention, the government violates the Chenery principle. But it would not help the government if we overlooked the violation, because while the regulations do require the [ALJ] to determine that the claimant’s mental ‘deficits’ were manifested before the age of 22, there is no question that Mendez’s were manifested before then.” [at 362]

- A claimant should prove not only that the Commissioner violates Chenery by relying on a rationale not provided by the ALJ, but also that such rationale is unpersuasive on the merits. Although the general issue on judicial review is not whether substantial evidence supports the Commissioner’s brief, show that even if the Commissioner’s brief were the ALJ’s own rationale, substantial evidence would not support that rationale.
- When citing Chenery, consider explaining the rationale behind Chenery.
- Consider string citing in a footnote many of the Seventh Circuit’s Chenery cases in the Social Security context. See Mendez v. Barnhart, 439 F.3d 360, 362 (7th Cir. 2006); Golembiewski v. Barnhart, 322 F.3d 912, 916 (7th Cir. 2003); Steele v. Barnhart, 290 F.3d 936, 941 (7th Cir. 2002); O’Connor v. Sullivan, 938 F.2d 70, 73 (7th Cir. 1991).

VII. Credibility — Two Standards of Judicial Review

A. Herron v. Shalala, 19 F.3d 329 (7th Cir. 1994).

“Since the ALJ is in the best position to observe witnesses, we usually do not upset credibility determinations on appeal so long as they find some support in the record and are not patently wrong. Wolfe v. Shalala, 997 F.2d 321, 326 (7th Cir. 1993); Edwards v. Sullivan, 985 F.2d 334, 338 (7th Cir. 1993). Oftentimes, a credibility determination involves inarticulable elements that ‘leave no trace that can be discerned in this or any other transcript.’ Ehrhart v. Secretary of Health and Human Services, 969 F.2d 534, 541 (7th Cir. 1992) (quoting Imani v. Heckler, 797 F.2d 508, 512 (7th Cir. 1986)). However, when such determinations rest on objective factors or fundamental implausibilities rather than subjective considerations, appellate courts have greater freedom to review the ALJ’s decision. Anderson v. Bessemer City, 470 U.S.

564, 574 . . . (1985); Dray [v. Railroad Retirement Bd.], 10 F.3d [1306,] 1314 [(7th Cir. 1993)].”

- After Herron, under the general substantial-evidence standard of review there are two standards of review of ALJ credibility findings, one more deferential and one less so.

B. Briscoe ex rel. Taylor v. Barnhart, 425 F.3d 345 (7th Cir. 2005).

“Furthermore, the ALJ’s adverse credibility determination against Lawe-Taylor does not withstand closer analysis. See Jens v. Barnhart, 347 F.3d 209, 213 (7th Cir. 2003) (noting that a court will overturn credibility determinations if they are patently wrong). While credibility determinations are entitled to special deference because the ALJ is in a better position than the reviewing court to observe a witness, see Shramek v. Apfel, 226 F.3d 809, 811 (7th Cir. 2000), they are not immune from review. A court has greater freedom to review credibility determinations based on objective factors or fundamental implausibilities, rather than subjective considerations, see Clifford [v. Apfel], 227 F.3d [863,] 872 [(7th Cir. 2000)].” [at 354]

- Briscoe is authority that Herron’s bifurcated analysis is still good law.

C. Schmidt v. Barnhart, 395 F.3d 737 (7th Cir. 2005).

“In the end, we conclude that the ALJ’s credibility determination is not patently wrong, is supported by substantial evidence, and is sufficiently detailed that we are able to trace its path of reasoning.” [at 747]

- Sometimes a court will address whether a credibility finding is “patently wrong.” To set aside an ALJ’s adverse credibility finding, a claimant does not necessarily need to prove that it was “patently wrong.” A court will set aside an ALJ’s credibility finding under alternative theories, including that the finding

- is not supported by substantial evidence,
- is unreasonable,
- is based on factual error,
- does not comply with SSR 96-7p, and/or
- does not satisfy articulation law other than SSR 96-7p.

D. SSR 96-7p Cases

• The Seventh Circuit routinely enforces SSR 96-7p, the main SSR pertaining to credibility. Compare Indoranto v. Barnhart, 374 F.3d 470, 474-75 (7th Cir. 2004) (citing SSR 96-7p and setting aside ALJ’s credibility finding); Carradine v. Barnhart, 360 F.3d 751, 773-79 (7th Cir. 2004) (same); Lopez ex rel. Lopez v. Barnhart, 336 F.3d 535, 539-40 (7th Cir. 2003) (same); Golembiewski v. Barnhart, 322 F.3d 912, 915-16 (7th Cir. 2003) (same); Brindisi ex rel. Brindisi v. Barnhart, 315 F.3d 783, 787-88 (7th Cir. 2003) (same); Steele v. Barnhart, 290 F.3d 936, 941-42 (7th Cir. 2002) (same); Zurawski v. Halter, 245 F.3d 881, 887-88 (7th Cir. 2001) (same), with Sienkiewicz v. Barnhart, 409 F.3d 798 (7th Cir. 2005) (citing SSR 96-7p and affirming ALJ’s credibility finding); Schmidt v. Barnhart, 395 F.3d 737, 746-47 (7th Cir. 2005) (same); Scheck v. Barnhart, 357 F.3d 697, 701-03 (7th Cir. 2004) (same).

VIII. Credibility — Activities of Daily Living

A. Mendez v. Barnhart, 439 F.3d 360 (7th Cir. 2006).

“We have cautioned the [SSA] against placing undue weight on a claimant’s household activities in assessing the claimant’s ability to hold a job outside the home. Gentle v. Barnhart, 430 F.3d 865, 867 (7th Cir. 2005); Draper v. Barnhart, 425 F.3d 1127, 1131 (8th Cir. 2005);

Kelley v. Callahan, 133 F.3d 583, 588-89 (8th Cir. 1998); Smolen v. Chater, 80 F.3d 1273, 1284 n. 7 (9th Cir. 1996). (Some weight is appropriate. Warner v. Commissioner of Social Security, 375 F.3d 387, 392 (6th Cir. 2004).) The pressures, the nature of the work, flexibility in the use of time, and other aspects of the working environment as well, often differ dramatically between home and office or factory or other place of paid work. We do not know what Mendez’s ‘assist[ance]’ in performing household chores amounts to. We do know that she does not (as the [ALJ’s] opinion may imply) take care of her four children by herself, in part because she’s worried about choking the youngest child when she feeds him because she doesn’t know when to stop the feeding, an uncertainty that does not augur well for her ability to perform even the simplest tasks outside the home. You don’t want someone who doesn’t know when to stop watering your plants; she is likely to drown them.” [at 362-63]

• Mendez does not require a court to scrutinize an ALJ’s evaluation of a claimant’s minimal activities. Instead, it provides a roadmap for a claimant to show how a court may agree that under the facts of a particular case, the ALJ’s evaluation of the claimant’s activities is not supported by substantial evidence. The Seventh Circuit provides a checklist:

- Does the activity have the same stress as work?
- Is the nature of the activity analogous to work?
- Does the activity allow for a flexible schedule, unlike work?

B. Gentle v. Barnhart, 430 F.3d 865 (7th Cir. 2005).

“The [ALJ’s] casual equating of household work to work in the labor market cannot stand. Gentle must take care of her children, or else abandon them to foster care or perhaps her sister, and the choice may impel her to heroic efforts. A person can be totally disabled for

purposes of entitlement to social security benefits even if, because of an indulgent employer or circumstances of desperation, he is in fact working. Henderson v. Barnhart, 349 F.3d 434, 435 (7th Cir. 2003); Wilder v. Apfel, 153 F.3d 799, 801 (7th Cir. 1998); Weigel v. Target Stores, 122 F.3d 461, 467 (7th Cir. 1997); Kelley v. Callahan, 133 F.3d 583, 588 (8th Cir. 1998). [¶]

Granted, there is tension between these cases and a regulation (which the cases do not discuss) that states that ‘if you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.’ 20 C.F.R. §§ 404.1520(i)(5), 416.920(i)(5). The regulation is not strictly applicable here, because Gentle is no longer working; her work in the household is not ‘substantial gainful activity’ within the meaning of the regulation, in which ‘working’ signifies holding a job in the labor market. But the regulation implies that someone engaged in ‘substantial gainful activity,’ regardless of circumstances, is not disabled. In the case of the indulgent employer, the work may not be ‘substantial gainful activity’; but in the case of the desperate employee, it would be. The regulation may simply reflect a commonsense presumption that to work implies a capacity to continue working, and the presumption fails if the applicant is no longer working. [¶] A more important point is that taking care of an infant, although demanding, has a degree of flexibility that work in the workplace does not. You can park the infant in a playpen for much of the day, and anyway it will sleep much of the day (on average about 2 to 4 hours, Elizabeth Pantley, ‘Regular Naps Improve Nighttime Sleep,’ *Pediatrics for Parents*, Feb. 2004, http://findarticles.com/p/articles/mi_m0816/is_2_21/ai_n6182552; see also Suzanne Dixon, ‘Your Baby’s Sleep Patterns,’ http://us.pampers.com/en_US/content/type/101/contentId.2363.do), and so the caretaker will have numerous breaks in

which to rest.” [at 867-68]

- Gentle is an example of non-deferential review of an ALJ’s credibility finding. Gentle is an invitation for a claimant to provide a point-by-point critique of the ALJ’s reliance on specific activities to find the claimant not credible.

- Should a claimant him- or herself cite Internet sources such as the pampers.com web site?

Probably not to a court. Just because the Seventh Circuit cited such a site does not mean that a claimant should.

C. Schmidt v. Barnhart, 395 F.3d 737 (7th Cir. 2005).

“The ALJ’s assessment of Schmidt’s credibility did not run afoul of the applicable analytical framework. The decision notes not only the absence of objective medical evidence to support the severity of the pain to which Schmidt testified, but goes on to consider that Schmidt’s daily living activities were not significantly restricted Further, we find that the ALJ’s conclusions in this regard are supported by substantial record evidence. Schmidt’s contentions to the contrary are nothing more than a rehash of the medical records that do not point to any specific evidence contradicting the ALJ’s conclusions. In the end, we conclude that the ALJ’s credibility determination is not patently wrong, is supported by substantial evidence, and is sufficiently detailed that we are able to trace its path of reasoning.” [at 747]

- A court may ignore Mendez and Gentle and instead rely on Schmidt and similar cases to affirm an ALJ’s analysis of a claimant’s activities of daily living.

IX. Credibility — Unemployment Insurance Benefits

A. Schmidt v. Barnhart, 395 F.3d 737, 746 (7th Cir. 2005).

“Schmidt contends that the ALJ erred when he included Schmidt’s application for and receipt of unemployment compensation benefits among a long list of factors adversely affecting Schmidt’s credibility regarding his subjective complaints. Specifically, the ALJ’s credibility assessment includes the statement that ‘the claimant testified that he applied for and collected unemployment compensation . . . which required ready-to-work certification, and he also admitted that he has applied for a number of jobs since that time, but has not been hired for these jobs.’ Schmidt contends that his collection of unemployment should be irrelevant because ‘many people’ might actively seek work and yet wind up unable to physically perform the job once it is received. These hypothetical people, Schmidt opines, may be forced into applying for work due to desperate financial situations or do so out of a misconception regarding the extent of their own physical limitations. [¶] There may indeed be particular people to whom Schmidt’s analysis applies, but he fails to even suggest that he is among their number. He does not argue that he was forced into seeking employment by desperate financial straits, or that he did so out of a misapprehension of his own condition. Further, while we have previously held that ‘employment is not proof positive of ability to work,’ Wilder v. Apfel, 153 F.3d 799, 801 (7th Cir. 1998), we are not convinced that a Social Security claimant’s decision to apply for unemployment benefits and represent to state authorities and prospective employers that he is able and willing to work should play absolutely no role in assessing his subjective complaints of disability. To what extent such considerations may factor into the analysis is better left for another case, because here the ALJ regarded Schmidt’s unemployment experience as one of many factors adversely impacting

his credibility.”

- Schmidt holds that there is no legal prohibition on an ALJ finding a claimant not credible based in part on his or her receipt of unemployment benefits.

- Schmidt places on the claimant the burden to reconcile any arguable inconsistency between a claimant’s application for and/or receipt of unemployment benefits and his or her claim of disability. Schmidt is thus similar to the rationale in Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999), addressing the consistency of seeking relief under both the Americans With Disabilities Act and the Social Security Act’s disability programs.

X. Vocational-Expert Testimony/Hypothetical Question

A. Meredith v. Bowen, 833 F.2d 650 (7th Cir. 1987).

“All that is required is that the hypothetical question be supported by the medical evidence in the record.” [at 654]

- Meredith sets a very low bar for the accuracy of a hypothetical question.

B. Ehrhart v. Secretary of Health and Human Servs., 969 F.2d 534 (7th Cir. 1992).

“Moreover, even if the hypothetical question omitted any medical evidence that accurately reflected Ehrhart’s impairments, the vocational expert indicated that he had reviewed the documentary evidence prior to the hearing. When the record supports the conclusion that the vocational expert considered the medical reports and documents, his responses are probative of both residual functional capacity and which jobs a claimant reasonably can perform, even if the hypothetical question itself does not take into account every aspect of the claimant’s impairments.” [at 540 (internal citation omitted)]

- Ehrhart is a fudge. Under Ehrhart, a vocational expert is assumed to be a sponge, taking into account the entire record, not just the hypothetical question. After Ehrhart, an attorney must ask the vocational expert whether the vocational expert took anything into account other than the elements of the hypothetical question.

C. Ragsdale v. Shalala, 53 F.3d 816 (7th Cir. 1995).

“Because of the vocational expert’s review of the record, coupled with his presence during Ragsdale’s testimony, Ehrhart allows the reviewing courts to draw the conclusion that the vocational expert considered Ragsdale’s various impairments even though all of those impairments were not specifically included in the ALJ’s hypothetical question.” [at 820]

“Nevertheless, Ehrhart is certainly not an open invitation for the vocational expert to search the record and come up with his own independent decision on what a claimant is or is not able to do. In cases such as the one before us, when following our rule in Ehrhart, it would be most helpful if ALJs would make clear on the record any assumptions underlying the vocational expert’s conclusions regarding the claimant’s ability to work.” [at 821]

- Ask the vocational expert whether he or she took into account anything not included in the hypothetical question. Squeeze the sponge.

D. Donahue v. Barnhart, 279 F.3d 411 (7th Cir. 2002).

“Rule 702 of the Federal Rules of Evidence provides that ‘a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.’ This substantially codifies the holdings of Daubert

v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 . . . (1993), and its successors. Rule 702 does not apply to disability adjudications, a hybrid between the adversarial and the inquisitorial models. See Richardson v. Perales, 402 U.S. 389 . . . (1971). But the idea that experts should use reliable methods does not depend on Rule 702 alone, and it plays a role in the administrative process because every decision must be supported by substantial evidence. Evidence is not ‘substantial’ if vital testimony has been conjured out of whole cloth. See Peabody Coal Co. v. McCandless, 255 F.3d 465 (7th Cir. 2001); Elliott v. CFTC, 202 F.3d 926 (7th Cir. 2000). Even in court, however, an expert is free to give a bottom line, provided that the underlying data and reasoning are available on demand. Fed.R.Evid. 704(a). That’s what the vocational expert did here. Presented with a statement of Donahue’s abilities and limitations, the vocational expert produced some job titles and numbers. At this point the expert could have been cross-examined (Donahue was represented by counsel) about where these numbers came from, and why the expert's conclusion did not match the Dictionary’s. Holding out this opportunity is an approach deemed adequate in Richardson v. Perales. Yet counsel did not ask the vocational expert about the genesis of the numbers or the reason for the discrepancy.” [at 446]

“When no one questions the vocational expert’s foundation or reasoning, an ALJ is entitled to accept the vocational expert’s conclusion” [at 446]

- In Donahue, the representative did not cross-examine the vocational expert about the consistency of his testimony with the Dictionary of Occupational Titles (DOT). Donahue may be read as enunciating the principle that a claimant must cross-examine an Agency expert about any matter the claimant believes is important to his or her case, not as a narrow holding that a claimant must cross-examine a vocational expert about the DOT in order to preserve for later

judicial review DOT-related issues.

- Even after Donahue, a claimant may argue that an ALJ still has an “affirmative responsibility” under SSR 00-4p to ask a vocational expert whether his or her testimony conflicts with the DOT. Donahue does not eviscerate for claimants within the Seventh Circuit SSR 00-4p’s requirement that an ALJ, not a claimant, ask a vocational expert about the DOT.
- Uncontradicted nonsense is substantial evidence.

E. Steele v. Barnhart, 290 F.3d 936 (7th Cir. 2002).

“Moreover, Steele is also correct that the ALJ appears to have elicited incomplete testimony from the vocational expert. In her hypothetical questions to the vocational expert, the ALJ included many of Steele’s impairments. But she addressed neither how Steele’s depression restricted his daily activities and social functioning, nor how depression affected his ability to timely complete tasks by interfering with his concentration, persistence, and pace. Hypothetical questions posed to vocational experts ordinarily must include all limitations supported by medical evidence in the record. The reason for the rule is to ensure that the vocational expert does not refer to jobs that the applicant cannot work because the expert did not know the full range of the applicant’s limitations. An exception therefore exists for cases in which the vocational expert independently learned of the limitations (through other questioning at the hearing or outside review of the medical records, for example) and presumably accounted for them. See Ragsdale v. Shalala, 53 F.3d 816, 818-21 (7th Cir. 1995).” [at 942 (internal citation omitted)]

- Steele is another sponge case.

F. Kasarsky v. Barnhart, 335 F.3d 539 (7th Cir. 2003).

“We see nothing in this description, however, that takes into account the ALJ’s own earlier observation (both in his opinion and in the PRTF) that Kasarsky suffered from frequent deficiencies of concentration, persistence, or pace. It is possible, of course, that there is an explanation for this omission. Perhaps the ALJ thought that even with frequent deficiencies of this type, Kasarsky could still carry out detailed instructions in a way that would satisfy a potential employer. But we have no way of knowing that, and it is equally possible that [vocational expert] Verkins might have found that there were no jobs for someone with (a) limited exertional abilities, (b) borderline intelligence, and (c) frequent deficiencies of concentration, persistence or pace. Employers are entitled to demand that their employees stick with the job, once they have been trained to do it; the length of time it takes someone with borderline intelligence to learn a job is not the same as the ability of that person to perform consistently once trained. The ALJ’s failure to incorporate the latter kind of limitation, fully supported by this record, in the hypotheticals he posed to the vocational expert requires us to remand this case for further proceedings.” [at 544 (emphasis in original)]

- Kasarsky stands for the general principle that an ALJ’s step-three findings with respect to the B-criteria of Listing 12.00 must be consistent with the ALJ’s mental residual functional capacity finding and corresponding hypothetical question. SSR 96-8p is authority for the opposite principle.

- Avoid the easily-refuted argument that a hypothetical question must include precisely the B-criteria of Listing 12.00. Argue that the hypothetical question should include the relevant B-criteria findings or a reasonable proxy for limitations recognized in the B-criteria. For example, if

the ALJ finds a moderate limitation in social functioning, the residual functional capacity finding and hypothetical question should, for example, account for the claimant's difficulty getting along with the public, co-workers, and supervisors.

G. Barrett v. Barnhart, 355 F.3d 1065 (7th Cir.), reh'g denied, 368 F.3d 691 (2004).

“However, because Barrett’s lawyer did not question the basis for the vocational expert’s testimony, purely conclusional though that testimony was, any objection to it is forfeited. But the validity of the testimony still depends on whether the [ALJ] accurately described Barrett’s condition to him; for the testimony was perfunctory and ‘nothing in the record reflects that [he] independently knew of all the limitations related to’ Barrett’s condition. The [ALJ’s] analysis of Barrett’s condition was so flawed that the case must be returned to the [SSA] for a fresh analysis of the evidence.” [at 1067 (internal citations omitted)]

- Even if the claimant did not cross-examine the vocational expert, substantial evidence must nonetheless support the hypothetical question upon which the ALJ relied.

H. Young v. Barnhart, 362 F.3d 995 (7th Cir. 2004).

“In many cases, imputing knowledge to the vocational expert of everything in the exhibits and testimony from the hearing will be sufficient to allow an ALJ to assume that the vocational expert included all of these limitations in his assessment of the number of jobs that the applicant can perform, but this is not such a case. In this case, the ALJ took a different approach to the hypothetical question and decided to ask the vocational expert a series of hypothetical questions with increasingly debilitating limitations. For each question he circumscribed the exact limitations the vocational expert was to follow. . . . By the nature of the questioning, therefore, the vocational expert was prohibited from considering physical, psychological, or cognitive

limitations that he may have absorbed either through reviewing the evidence in the record or by listening to the hearing testimony. He was instructed to stick to the particular facts of the hypothetical along with the claimant's age, education, and work history." [at 1003 (internal citations omitted)]

"We make a special note that this situation differs from the one where a vocational expert independently learned of the other limitations through other questioning at the hearing or outside review of the record and there is evidence that he accounted for these limitations. We do not intend to overrule that line of cases which allows a reviewing court to impute to the expert knowledge of limitations that were not specifically included in the question but included elsewhere in the record or hearing testimony." [at 1003 n.2 (internal citations omitted)]

• Young provides a road map for distinguishing Ragsdale and other cases that excuse the incompleteness of a hypothetical question by assuming that the vocational expert answered that question making assumptions not included in it. If an ALJ asked a series of hypothetical questions, the ALJ implicitly asked the vocational expert to include only the assumptions assumed in each separate question. In Young, the ALJ himself squeezed the sponge.

I. McKinnie v. Barnhart, 368 F.3d 907 (7th Cir. 2003).

"McKinnie, however, also challenges the reliability of the expert testimony given at his hearing. He contends that the ALJ erred in relying on Bose's testimony without first ascertaining that she had an adequate foundation for her opinions. This argument has merit. [¶] We have recognized that the standards by which an expert's reliability is measured may be less stringent at an administrative hearing than under the Federal Rules of Evidence. Donahue v. Barnhart, 279 F.3d 441, 446 (7th Cir. 2002). Nevertheless, because an ALJ's findings must be supported by

substantial evidence, an ALJ may depend upon expert testimony only if the testimony is reliable. Id. (‘Evidence is not ‘substantial’ if vital testimony has been conjured out of whole cloth.’); see also Consol. Coal Co. v. Stein, 294 F.3d 885, 893 (7th Cir. 2002) (parties to an administrative proceeding must satisfy the ALJ that their experts are qualified). A vocational expert is ‘free to give a bottom line,’ but the data and reasoning underlying that bottom line must be ‘available on demand’ if the claimant challenges the foundation of the vocational expert’s opinions. Donahue, 279 F.3d at 446. ‘If the basis of the vocational expert’s conclusions is questioned at the hearing . . . then the ALJ should make an inquiry . . . to find out whether the purported expert’s conclusions are reliable.’ Id. [¶] At the hearing, McKinnie contested the reliability of Bose’s conclusions that an individual with McKinnie’s impairments could perform 1,000 to 1,200 telephone quotation clerk jobs, 6,000 to 6,500 telemarketing jobs, and 3,000 to 3,500 bench sorter jobs in the regional economy. Bose did not substantiate her findings with a written report or other documentation to substantiate her figures, and her vague responses to McKinnie’s questioning were insufficient to establish a foundation for her testimony. But the ALJ did not inquire into the reliability of her conclusions as he was required to do. Donahue, 279 F.3d at 446. Moreover, when McKinnie’s attorney requested that Bose supplement the record with documentation of her research, both the ALJ and Bose insisted that McKinnie pay for the preparation of these materials. [¶] It is the Commissioner’s burden at Step 5 to establish the existence of a significant number of jobs that the claimant can perform. See Knight v. Chater, 55 F.3d 309, 313 (7th Cir. 1995). The claimant should not have to pay to substantiate the expert testimony relied upon by the Commissioner in seeking to meet the Step 5 burden. Presumably a vocational expert establishes the foundation for her opinions before she expresses them at a

hearing. It is not apparent why a claimant should pay a vocational expert to do the preparatory research that she should have completed prior to testifying. The data and reasoning underlying a vocational expert's opinions are not 'available on demand' if the claimant must pay for them. See Donahue, 279 F.3d at 446. [¶] Without first inquiring into the reliability of Bose's opinions, the ALJ should not have so unquestioningly accepted her testimony that a significant number of jobs were available to McKinnie. For that reason, we vacate the ALJ's decision at Step 5 and remand so that he can undertake this inquiry." [at 910-11]

- McKinnie stands for the proposition that upon demand, an ALJ must obtain from a vocational expert the evidence, if any, underlying his or her testimony.

L. Indoranto v. Barnhart, 374 F.3d 470 (7th Cir. 2004).

"The ALJ also failed to include headaches or blurred vision in the list of work-related impairments submitted to the VE. If the ALJ relies on testimony from a vocational expert, the hypothetical question he poses to the VE must incorporate all of the claimant's limitations supported by medical evidence in the record. The Commissioner argues that although the ALJ did not mention headaches or blurred vision to the VE, he nonetheless incorporated these impairments into his questions by instructing the VE to include only those jobs that allowed for a low level of concentration. But concentration is not the same thing as vision, and one wonders how someone with daily episodes of blurred vision could perform the jobs suggested by the VE, such as a cashier or an assembler, which would require attention to visual detail. Further proceedings are necessary so that the ALJ can give full consideration to all of Indoranto's documented impairments in evaluating her claim." [at 474 (internal citations omitted)]

- Indoranto seems to provide authority that an ALJ must include in a hypothetical question not

just functional limitations attendant to a medical impairment (diagnosis), but the medical impairment itself: “The ALJ also failed to include headaches or blurred vision in the list of work-related impairments submitted to the VE.” As a general rule, a vocational expert does not need to know which impairments a claimant has. The vocational expert needs to know only the claimant’s functional limitations. Otherwise, the hypothetical question would implicitly require a vocational expert to determine the functional limitations attendant to an enumerated impairment. For example, the Sixth Circuit held that a diagnosis does not need to be included in a hypothetical question. See Webb v. Barnhart, 368 F.3d 629, 633 (6th Cir. 2004) (“Accordingly, in light of the facts present in Howard, this circuit’s prior case law, and the role of a vocational expert under the social security regulations, we do not read Howard to hold that hypothetical questions to vocational experts are required to include lists of claimants’ medical conditions.”).

XI. Appeals Council Evidence

A. Nelson v. Bowen, 855 F.2d 503 (7th Cir. 1988).

“The Appeals Council’s determination that the additional evidence submitted by Nelson is not material is a legal determination and therefore subject to de novo review. See Booz v. Secretary of Health and Human Services, 734 F.2d 1378, 1380 (9th Cir. 1984) (reviewing materiality of new evidence under § 405(g)). Our determination of the materiality of the evidence, as counsel for the Secretary suggested at oral argument, is informed by the materiality standard used in cases under § 405(g) of the Social Security Act New evidence is material for purposes of § 405(g) if there is a ‘reasonable possibility’ that it would change the outcome. Godsey v. Bowen, 832 F.2d 443, 444 (7th Cir. 1987).” [at 506]

- Nelson conflates sentence six of 42 U.S.C. § 405(g) with review of the Appeals Council’s denial of review under 20 C.F.R. § 404.970 (2006).

B. Damato v. Sullivan, 945 F.2d 982 (7th Cir. 1991).

“Since the Appeals Council’s denial of a request for review is not subject to judicial review and the applicable regulations do not require an explanation of the grounds for rejection, we hold that the Appeals Council may deny review without articulating its reasoning.” [at 989]

- Although Damato rules that the Appeals Council’s denial of review is unreviewable, Eads later clarifies that a denial of review is reviewable for legal error.

C. Eads v. Secretary of Dep’t of Health and Human Servs., 983 F.2d 815 (7th Cir. 1993).

“He stakes his all on persuading us to reverse the denial of disability benefits on the ground that the [ALJ’s] decision is erroneous when evaluated in light of all the evidence in the case, including evidence that the [ALJ] could not have considered because it was never submitted to him. It would change our role from that of a reviewing court to that of an [ALJ], required to sift and weigh evidence in the first instance, rather than limited as we are to reviewing evidentiary determinations made by the front-line factfinder.” [at 817-18]

“If the Council refuses to consider it, that refusal is not itself a final, appealable order — the [ALJ’s] decision is, having been made final and appealable by the refusal. But, as an interim order in the administrative proceeding, it is reviewable. Review is limited, because the decision to refuse to review the [ALJ’s] decision is discretionary. But if the refusal rests on a mistake of law, such as the determination in Nelson v. Bowen, 855 F.2d 503, 506-08 (7th Cir. 1988), that the evidence newly submitted to the Appeals Council was not material to the disability

determination, the court can reverse, as we did there. Eads does not, however, ask us to review the Appeals Council's refusal to review the [ALJ's] decision, and anyway that refusal was not based on any contestable legal determinations. And finally, 42 U.S.C. § 405(g) authorizes the court to remand the case to the [SSA] for consideration of newly discovered evidence. Eads could have submitted the doctor's letter to the district court as a basis for requesting such a remand. He did not do that either." [at 817 (internal citation omitted)]

- Evidence submitted to the Appeals Council cannot be used to show that substantial evidence does not support the ALJ's decision.
- Damato no longer means that the Appeals Council's denial of review is unreviewable. The Appeals Council's denial of review is reviewable for legal error. Yet even after Eads, the Commissioner argues that the Appeals Council's denial of review is unreviewable.
- There are two basic theories for reliance on Appeals Council evidence in the Seventh Circuit:
 - Prove that a remand under sentence six of 42 U.S.C. § 405(g) is warranted.
 - Prove that the Appeals Council made an Nelson- Eads legal error.
- Consider not relying on any Appeals Council evidence to avoid confusion and weak arguments.
- Always segregate Appeals Council evidence in the statement of the facts and argument sections of any brief.

D. Perkins v. Chater, 107 F.3d 1290 (7th Cir. 1997).

“Under the regulation, once the Council has assured itself that the proffered new material relates to the appropriate time period, the first step it must take is to decide whether the submission is really ‘new’ and ‘material.’ If it is, the Council must proceed under the second sentence to evaluate the entire record including that new and material evidence. If it concludes as

a result of that evaluation that the [ALJ's] action appears to be contrary to the weight of the evidence 'currently' of record — that is, the old evidence plus the new submissions — only then does it proceed to a full review of the case. Here, Perkins satisfied the first two steps: the evidence related to the proper time period and the Appeals Council treated it as new and material. He failed at step three: upon its consideration of the entire record, the Council concluded that there was nothing before it that undermined the ALJ's earlier decision. It accordingly denied review. We see no error as a matter of law in this method of proceeding, and thus, under Damato, we will not review the Council's discretionary decision. ” [at 1294]

- Perkins holds that the Appeals Council must follow the proper procedure when acting on a request for review.

E. Keys v. Barnhart, 347 F.3d 990 (7th Cir. 2003).

“The Council has discretion whether to hear an appeal from an [ALJ's] decision. Perkins v. Chater, 107 F.3d 1290, 1294 (7th Cir. 1997); Eads v. Secretary of HHS, 983 F.2d 815, 816 (7th Cir. 1993); see also Mills v. Apfel, 244 F.3d 1, 5 (1st Cir. 2001). It is like the discretion conferred by the certiorari jurisdiction of the Supreme Court, but unlike the Court the Appeals Council gives reasons when it denies review. . . . [¶] The government argues that the ‘final decision’ was that of the [ALJ], and hence the old regulations apply since the new ones had not taken effect until after his decision. We understand everything but ‘hence.’ The Appeals Council considered the new regulations — it had to, since obviously the [ALJ's] decision had not become final while the case was still before the Appeals Council. When the Council decided not to review the case, the [ALJ's] decision became final, but it became final then, not earlier, just as a decision becomes final when the Supreme Court denies certiorari. Clay v. United States, 537

U.S. 522 . . . (2003). It would be very odd if the [SSA] wanted the Appeals Council to consider the applicability of the new regulations but the court of appeals to consider only the applicability of the old ones. We have held, it is true, taking one side of a circuit split, see Mills v. Apfel, supra, 244 F.3d at 4 and n.2, that the court may not consider evidence first presented to the Appeals Council in deciding whether the [ALJ] made an error of fact, because he cannot err by failing to have considered evidence never tendered to him. Eads v. Secretary of HHS, supra, 983 F.2d at 817. But we made clear in that case, id., as did the First Circuit in Mills, 244 F.3d at 5, that we can review an erroneous refusal by the Council to take account of new evidence submitted to it, because that is a legal error. And similarly we can review an erroneous application of regulations by the Council. See Perkins v. Chater, supra, 107 F.3d at 1294.” [at 992-93]

- Keys is consistent with Eads: the Appeals Council’s denial of review is reviewable for legal error. The Commissioner argues contrary to Eads and Keys that the Appeals Council’s denial of review is unreviewable.