



# *Proving Harm at the Appeals Council and on Judicial Review*

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# Any Error is Harmless Unless Proven Otherwise

- Almost every unfavorable ALJ decision includes many errors
- Only 20% relief at the Appeals Council
- Only 45% relief in federal court
- Appellate tribunals — Appeals Council and courts — thus apply a harmless-error test
- Identifying an error is not enough
- Every error is harmless in theory
- Any error may be harmless in fact
- Assume that the appellate tribunal presumes that any error is harmless

# Test for Harm: Appeals Council

- No formal legal test for harmless error
- No statutory test
- No regulatory test
- No sub-regulatory test (HALLEX)
- Appeals Council mostly requires harm
- Exceptions
  - Some improper dismissals
  - Some proffer violations
    - Post-hearing report of Agency CE
    - Post-hearing report of ME or VE

# Test for Harm: Court (I)

- 42 U.S.C. § 405(g) is itself a harmless-error standard
  - Substantial evidence vs. preponderance of the evidence
  - Deferential means ignoring some errors
- § 405(g) includes implicit harmless-error test
  - Ordinary administrative law
  - Since 1939 subject to harmless-error test
  - Every Circuit applies harmless-error test

# Test for Harm: Court (II)

- Plaintiff has the burden of persuasion to prove that an error is harmful – Shinseki v. Sanders, 556 U.S. 396 (2009)
- Assume that a court will presume that any error is harmless
- Address harm expressly in court — an argument not raised expressly may be waived – “harm” as a mantra
- Proving harm is just as important as proving that substantial evidence does not support

# Test for Harm: Court (III)

- Choice whether to embrace Sanders
- Citing Sanders
  - Shows knowledge of the law
  - Provides evidence that the plaintiff proved harm
  - Steals the Commissioner's thunder
  - Look to Circuit law and the relevant district court for Sanders cites
- Not citing Sanders
  - Avoids focusing court on plaintiff's burden
  - Avoids prompting the Commissioner to cite Sanders
  - May interrupt your argument

# Test for Harm: Court (IV)

- Four main approaches:
- (1) Does substantial evidence otherwise support the ALJ's decision?
  - Ignore the error
  - Look for other substantial evidence
- (2) Was the error material or central to the ALJ's decision?
- (3) Would the ALJ have rendered a different decision if the ALJ had not made the error?
- (4) Could a reasonable ALJ who did not make the same error have found the claimant disabled?

# Test for Harm: Court (V)

- Allord (7th Cir.): “The only situations in which an error in the factors considered by the trier of fact in making a credibility determination can confidently be thought harmless are when a contrary determination would have to be set aside as incredible or when the trier of fact says that he would have made the same determination even if the questioned circumstances had been different from what he thought them to be and he gives an adequate reason for that back-up position.”
- See also Stout (9th Cir.) (similar); but see Molina (9th Cir.) (criticizing Stout).

# Test for Harm: Court (VI)

- Chenery: “The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”
- Chenery used to rebut harmless-error post hoc rationalizations
- Always attack post hoc rationalization on the merits too
- Sanders did not overrule Chenery

# Test for Harm: Court (VII)

- Spiva (7th Cir.): “The government implies that if the [ALJ]’s opinion consisted of two words — ‘benefits denied’ — a persuasive brief could substitute for the missing opinion. That is incorrect. It would displace the responsibility that Congress has delegated to the Social Security Administration — the responsibility not merely to gesture thumbs up or thumbs down but to articulate reasoned grounds of decision based on legislative policy and administrative regulation — into the Justice Department, which represents the agency in the courts.”

# Duty to Develop: Appeals Council

- Submit the missing evidence to the Appeals Council — develop the record
- Explain why claimant could not submit missing evidence
  - Evidence in possession of Agency, e.g., prior claim file
  - Claimant cannot afford to obtain evidence, e.g., CE
  - Evidence is ME or VE testimony
- Explain why missing evidence matters
- Cite multiple legal authorities, e.g., regulations, SSRs, and HALLEX

# Duty to Develop: Court

- Relief under sentence four of 42 U.S.C. § 405(g) based on a duty-to-develop error
- Relief under sentence six of § 405(g) based on “new” and “material” evidence omitted for “good cause”
- Follow Circuit law with respect to Appeals Council evidence
- Carefully distinguish between sentence four and six
- Explain why the missing evidence matters
- Cite multiple legal authorities, e.g., regulations, SSRs, and cases

# Due Process: Appeals Council

- ALJ procedural-due-process errors
  - Failure to proffer post-hearing evidence
  - Interference with cross-examination
- HALLEX is the main authority
- Appeals Council may presume harm
- Do not assume presumption of harm
- Explain why violation mattered in terms due process and disability
- Make procedural requests
- Submit additional evidence

# Due Process: Court (I)

- HALLEX is not the main authority
- HALLEX is the Agency's implementation of procedural due process
- Commissioner will attack the HALLEX as unenforceable
- Cite Constitution, APA, the Social Security Act, regulations and case law
- Main cases are Mullane (S. Ct.) (notice) and Perales (S. Ct.) (cross-examination)

# Due Process: Court (II)

- Allege property interest in benefits
- Harm sometimes presumed — Miles (11th Cir.) — substantial evidence never even addressed
- Harm ordinarily must be shown
- Commissioner ordinarily argues no error or harmless error
- Commissioner may misstate the law
- Explain why the error mattered in terms of due process and disability

# Medical Opinion: Appeals Council

- The Appeals Council presumes any legal or factual medical-opinion error is harmless
- Even egregious factual misstatements are presumed harmless
- Prove that the opinion at issue undermines a material finding, e.g., the ALJ's RFC
- Mantra: "The ALJ's error was harmful because..."
- Show harm in multiple ways

# Medical Opinion: Court

- Harm must be proven
- Mantra: “The ALJ’s error was harmful because...”
- Connect all the dots plural
  - Step-two finding
  - Step-three finding
  - Residual functional capacity assessment
  - Related adverse credibility finding
  - Step-four AAP & AGP
  - Step-five (need for VE & specific jobs)

# Step Two: Appeals Council

- Step-two decision vs. finding
- Step-two decision for remote date last insured presumed harmless
- Submit evidence to disprove lack-of-evidence step-two decision
- No requirement to inventory step-two impairments except mental impairment
- Prove harm in terms of residual functional capacity assessment, step three, step four, and step five

# Step Two: Court

- Step-two decision
  - Assume that a court will consider ultimate disability — explain ultimate disability
  - Commissioner will likely address ultimate disability
- Step-two finding
  - Harm must be proven at a later step of the sequential evaluation
  - Step-two error is a building block to show harm in terms of residual functional capacity assessment, credibility, and steps three, four, and five

## Step Three: Appeals Council

- Must actually prove Listing-level impairment — very heavy burden
- Not enough to submit a check-box form from a medical source, even a treating specialist
- All step-three articulation errors are harmless unless the claimant actually meets or clearly equals a Listing
- SSR 96-6p may require medical-expert testimony
- Rare request for Medical Support Staff

## Step Three: Court

- Must actually prove Listing-level impairment — normally heavy burden
- Except for Listing 12.05, medical opinion usually required to prove harm
- Articulation error normally requires good-faith showing that claimant may meet or equal Listing
- Request for medical-expert testimony normally requires good-faith showing of equivalence to Listing

# RFC: Appeals Council & Court

- Harm must be shown at step four in terms of past relevant work AAP and AGP as appropriate
- Harm must be shown at step five in terms of
  - relevant SSRs, e.g., SSR 96-9p, SSR 83-14
  - need for vocational-expert testimony
  - specific step-five jobs the vocational expert identified
  - specific DOT jobs identified

# Credibility: Appeals Council

- Unless the ALJ said nothing about any evidence, the Appeals Council will likely find the credibility error harmless
- To show harm, focus on the aspects of credibility that are the most medical
- To show harm, focus on the most important factual mistakes
- Explain how the credibility errors impacted the ALJ's other findings
- Look for non-credibility errors

# Credibility: Court

- Prove that the credibility errors undermine and are intertwined with the ALJ's other findings, e.g.,
  - functional capacity assessment
  - weighing of medical opinions
- The Commissioner ordinarily argues harmless error based on other substantial evidence, relying on one test for harmless error and ignoring others
- Mantra: "The ALJ's errors were harmful because..."

## Step Four: Appeals Council & Court

- Defeat all express AAP and AGP bases for the ALJ's step-four decision
- Defeat any non-explicit bases
- Submit additional evidence, e.g., DOT and SCO
- Prove that substantial evidence does not support any alternative step-five decision
- If the ALJ did not reach step five, present a theory of step five

# Step Five: Appeals Council

- The Appeals Council applies a no-jobs standard; defeat every job identified
- Any violation of SSR 00-4p's "affirmative responsibility" requirement is presumed harmless
- Submit DOT and SCO data
- Submit rebuttal vocational evidence
- Uncontradicted nonsense VE-testimony is substantial evidence
- Rely on the Agency's burden of production

## Step Five: Court

- Assume that a court applies a no-jobs standard; defeat every job identified
- When the numbers are large, only a drastic reduction in numbers is harmful
- Use Chenery to rebut a post hoc defense based on reduced numbers
- Any violation of SSR 00-4p's "affirmative responsibility" requirement is presumed harmless technicality
- Rely on the Agency's burden

# Citations

Shinseki v. Sanders, 556 U.S. 396 (2009);  
Richardson v. Perales, 402 U.S. 389 (1971);  
Mullane v. Central Hanover Bank & Trust Co.,  
339 U.S. 306 (1950); SEC v. Chenery Corp., 332  
U.S. 194 (1947); Molina v. Astrue, – F.3d –, No.  
10-16578 (9th Cir. Apr. 2, 2012); Spiva v. Astrue,  
628 F.3d 346 (7th Cir. 2010); Allord v. Barnhart,  
455 F.3d 818 (7th Cir. 2006); Stout v. Comm'r,  
Soc. Sec. Admin., 454 F.3d 1050 (9th Cir. 2006);  
Miles v. Chater, 84 F.3d 1397 (11th Cir. 1996).