2002

To Review or Not To Review - That Is the Question: Interpreting New Evidence in Social Security Disability Claims in the Third Circuit

Kelly Huntley

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Issues in the Third Circuit

"TO REVIEW OR NOT TO REVIEW?"—THAT IS THE QUESTION: INTERPRETING NEW EVIDENCE IN SOCIAL SECURITY DISABILITY CLAIMS IN THE THIRD CIRCUIT

I. INTRODUCTION

Since its creation in 1935, the Social Security Administration (SSA) has been described as the "Mount Everest of Bureaucratic Structures."¹ Due to this massive system of adjudicating disability claims, the SSA and the federal courts often differ regarding the disability review process.² Because of the enormous number of claims filed each year and the difficulty in determining a claimant's disability status, the SSA's need for a synchronized review process between the two associations remains a primary objective.³ To comply with Congress' initial goal to provide disability benefits in the most efficient and effective manner, federal jurists are left to promulgate the correct procedures during different levels of review in disability determinations.⁴

Currently, a claimant who alleges physical or mental disability can file for Social Security disability insurance benefits (DIB) under Title II of the Social Security Act (the Act) or for supplemental security income (SSI) under Title XVI of the Act. The disability standards for the two programs are the same. A claimant must be under a medically determinable, severe impairment that prevents them from engaging in any substantial gainful activity. Proving disability is difficult, and claimants are often not able to satisfy the stringent requirements for eligibility. The SSA places the burden of proof on a claimant to prove that they are disabled, and claimants often do not have the resources to pursue their claim effectively.


2. See Dickinson, supra note 1, at 957 (discussing difficulty of balancing administrative agency with judicial system).

3. See Gropman, supra note 1, at 755-56 (noting difficulty of determination process due to problems in providing individual attention to claimants and backlog of cases that places heavy burden on judiciary); Barbara A. Sheehy, An Analysis of the Honorable Richard A. Posner’s Social Security Law, 7 CONN. INS. L.J. 103, 104-05 (2000-2001) (finding that because review process and procedures are difficult to understand and implement, federal courts’ roles are important because they have final say in claimant’s case).

4. See Sheehy, supra note 3, at 105 (emphasizing important role that circuit courts play in disability review process).
under Title XVI of the Act. The exact roles of the Appeals Council during the administrative review process and the district court during the judicial review process are highly litigated topics. Recently, the Third Circuit joined the debate among circuits over whether the claimant must prove good cause to the district court to obtain review of new evidence previously submitted to the Appeals Council, which subsequently denied review. In short, the Third Circuit concluded that district courts should review the claimant’s evidence if, under section 405(g) of the Act: (1) the evidence is new; (2) the evidence is material; and (3) the claimant proves good cause for failure to present the evidence earlier.

This Casebrief explains the Third Circuit’s approach to a claimant’s right to review of new evidence in light of its decision in Matthews v. Apfel, in which the court found that the claimant must show good cause in order to obtain review. Part II discusses the procedures a claimant must follow in order to bring a disability claim. This section concludes with a discussion of the circuits’ differing requirements for review of new evidence. Part III examines the Third Circuit’s recent decision that claimants must

5. See 42 U.S.C. § 423 (1994) (explaining process for bringing claims). Because SSI and DIB claims are subject to essentially the same analysis, this Casebrief will only specifically address DIB. Compare 20 C.F.R. § 404.900 (2001) (explaining DIB review process), with § 416.1400(a), (b) (explaining SSI review process). Under the Act, the amount of claimants that file for some type of disability insurance is overwhelming. See Hearings, supra note 1, at 35 (statement of Stanford G. Ross, Chairman, Social Security Advisory Board) (noting that more than 154 million Americans currently receive and rely on disability insurance); Sheehy, supra note 3, at 104 (“The social security disability system annually affects more than seven million people and provides more than sixty billion dollars in cash benefits per year.”); Social Security Administration, Social Security Bulletin: Annual Statistical Supplement 2000, at 141 (2000), available at http://www.ssa.gov/statistics/Supplement/2000/supp2000.pdf (last modified Feb. 27, 2001) (stating that Social Security Administration receives over three million disability benefits applications every year). Consequently, the need for a coherent and consistent disability program is more imperative than most Americans realize:

As the baby boomers reach the age of increased likelihood of disability the growth in these programs will accelerate. The Social Security Administration’s actuaries project that between 2001 and 2011 the number of DI worker beneficiaries will increase by 47 percent, and the number of SSI disability beneficiaries will increase by 15 percent. In the coming fiscal year, Social Security’s disability programs are projected to cost about $96 billion, or 5 percent of the Federal budget.

Hearings, supra note 1, at 35 (statement of Stanford G. Ross).


8. See id. at 592-93 (applying Sentence Six review).

9. 231 F.3d 589 (3d Cir. 2001).

10. For a discussion of the Matthews decision, see infra notes 98-132 and accompanying text.

11. For a discussion of the disability review process, see infra notes 16-39 and accompanying text.

12. For a discussion of the courts of appeals’ differing views, see infra notes 40-74 and accompanying text.
meet the provisions of section 405(g) of the Act to obtain review of new evidence. Additionally, this section offers advice for practitioners representing disability claimants in the Third Circuit. Finally, Part IV highlights the significance of Matthews and reiterates the Third Circuit’s goals outlined in its decision.

II. BACKGROUND

A. Disability Programs Under the Social Security Act

In an effort to harmonize the disorganized state of the disability insurance program, Congress passed the Social Security Amendments of 1980. Through this revision, Congress sought not only to strengthen work incentives, but also to strengthen federal management of the state disability determination and review processes. In order to guide states in disability review determinations, Congress enacted regulations to specify performance standards and devised administrative requirements and procedures for use in disability claims.


B. Advancing Disability Programs


C. Advancing Disability Programs

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cial Security Disability Benefits Reform Act of 1984 (the Reform Act) to reaffirm its initial goal of establishing national uniformity in the disability programs. Under the Reform Act, Congress established major provi-

trative review. See id. (discussing reform measures); see also Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983) (stating measures of reform); S. Rep. No. 899, at 6 (discussing concerns addressed in 1980 legislation). Some concerns addressed in the 1980 Amendments were problems of "consistency of decision-making throughout the country," and the adequacy of administrative review. See S. Rep. No. 899, at 6 (noting concerns are still valid today). Many supporters of disability reform regarded the current social security disability program as one of "total chaos." See 130 CONG. REC. 12,981, 13,243 (statement of Mr. Domenici) (arguing that 1984 amendment is necessary to correct problems in disability review process and to restore balance).

Commentators viewed the 1984 disability amendments as the next step towards stabilizing a disability insurance program that was chaotic and problematic in its current state. Compare 130 CONG. REC. 5,827, 6,583 (statement of Mr. Conable) (urging acceptance of bill as necessary to alleviate problems after Public Law 96-265 was enacted), with Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 201, 94 Stat. 441, 442 (1980) (providing certain amendments to disability reform under Social Security Act, such as review for disability status every three years). Although drafters of the prior 1980 amendments sought changes that would strengthen disability review, the results were not optimal. See 130 CONC. REC. 5,827, 6,583 (statement of Mr. Conable) (noting many benefits were terminated for eligible claimants who then suffered economic hardship). Although supporters did not see the 1984 amendments as the final step in reform, they did see the amendments as a step toward order and consistency in the disability review process. See id. at 13,235 (statement of Mr. Levin) (proposing 1984 amendments offer uniformity, fairness and justice for disability benefits review process); id. at 6,584 (statement of Mr. Conable) (suggesting system may have to be federalized in future); id. at 6,586 (statement of Mr. Shannon) (proposing passage of bill to "[put] an end to the abuse and the indignity that is now being inflicted on disabled Americans across the country").

Consequently, proponents are still concerned over consistency and fairness in the evaluation and review of disability claims today. See Hearings, supra note 1, at 36-37 (testimony of Stanford G. Ross) (noting goal of Board remains consistent and fair treatment of people through objective measures). In turn, there are many factors that contribute to inconsistent outcomes in review proceedings, such as regional and economic differences, health status, court decisions and differences in evidence at different levels of adjudication. See id. (suggesting policy, structure and procedures also contribute to varying outcomes).
sions and statutory standards that continue to serve as the foundation for evaluating and reviewing disability claims today. 21

B. Procedures for Bringing a Disability Claim

Under the Social Security Act, the claimant submits an application for DIB, and the SSA finds the claimant disabled if the claimant is unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to . . . last for a continuous period of not less than 12 months." 22 If the SSA initially denies the claimant’s application, the claimant may request reconsideration followed by several stages of review. 23 This reconsideration process is often two-fold, in that a claimant who is unsuccessful in the administrative process may then seek judicial review once there is a final decision by the Commissioner of Social Security. 24 Because the administrative and judi-

21. See Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 2, 98 Stat. 1794 (1984) (codified as amended at 42 U.S.C. § 423 (1984)) (explaining standard of review for terminating disability benefits). There were four important changes that were proposed and passed in the 1984 amendments: (1) a medical improvement standard for terminating benefits; (2) a face-to-face evidentiary hearing at the initial review level; (3) the payment of benefits through appeal; and (4) the application of uniform standards for disability determinations. See 130 Cong. Rec. 5,827, 6,584 (statement of Mr. Pickle) (arguing bill’s purpose is to "restore order and humanity to the disability review process").

22. 42 U.S.C. § 423(d) (1)(A) (1994); see 20 C.F.R. § 404.1505(a) (2001) (defining disability); see also Lori Oosterbaan, From Misapplication to No Application of the Issue Exhaustion Doctrine in Social Security Cases: Sims v. Apfel, 32 Loy. U. Chi. L.J. 693, 697-98 (2001) (noting to qualify for disability benefits, applicants must meet Congress’ definition of disability). The claimant bears the burden of proving the existence of a disability. See 42 U.S.C. § 423(d) (5) (providing standard). If the claimant shows an inability to return to former work, then the burden of proof shifts to the Commissioner to show the claimant has the ability to perform specific jobs in the economy. See Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979) (setting forth requirements). Therefore, a claimant is disabled "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . ." 42 U.S.C. § 423(d) (2)(A). Also, for disability purposes, a "physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." See Sheehy, supra note 3, at 108 (defining terms from statute). Finally, "substantial gainful activity is defined as activity that involves doing significant physical or mental activities . . . even if it is done on a part-time basis . . . work activity you do for gain or profit." See id. (providing explanations).

23. See Sheehy, supra note 3, at 113-14 (noting process consists of application, review, request for de novo review from ALJ, appeal of ALJ’s decision to Appeals Council and finally appeal to district court).

cial review processes involve many steps, the language of the regulations and the Act has led the courts of appeals to interpret the procedures for review of new evidence differently. 25

1. The Administrative Review Process Governed by Regulation

A claimant seeking administrative review must follow the SSA's regulations. 26 After application and an initial determination, the claimant may pursue four additional avenues of claim review under the regulations. 27 First, if a claimant is dissatisfied with his or her initial determination, the claimant may ask for reconsideration. 28 Second, if still dissatisfied, the claimant may seek de novo review from an Administrative Law Judge (ALJ). 29 Third, if the claimant is still displeased after the ALJ hearing, the

25. See Sheehy, supra note 3, at 116 (suggesting social security disability cases are unattractive because they are "overly technical or unduly complex and involve an unbelievable bureaucratic maze"). Consequently, the appeals process is often difficult to understand and implement because of the heavy caseloads and lack of resources. See Hearings, supra note 1, at 36 (testimony of Stanford G. Ross) (noting stress in appeals process due to backlogs, inadequate resources and complex procedures). As a result, circuit courts are split over the appropriate treatment of evidence, on judicial review, that was not presented to the Administrative Law Judge (ALJ) at the administrative level. Compare Perez v. Chater, 77 F.3d 41, 45 (2d Cir. 1996) (holding evidence should be considered by district court judge on judicial review), O'Dell v. Shalala, 44 F.3d 855, 859 (10th Cir. 1994) (same), Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th Cir. 1993) (same), Nelson v. Sullivan, 966 F.2d 363, 366 (8th Cir. 1992) (same), and Wilkins v. Secretary of HHS, 953 F.2d 93, 96 (4th Cir. 1991) (en banc) (same), with Matthews v. Apfel, 239 F.3d 589, 593 (3d Cir. 2001) (holding evidence not presented to ALJ should not be considered on judicial review nor be basis of remand unless it is new, material and good cause exists for not presenting it earlier), Falge v. Apfel, 150 F.3d 1320, 1322-23 (11th Cir. 1998), cert. denied, 525 U.S. 1124 (1999) (same), Cotton v. Sullivan, 2 F.3d 692, 695-96 (6th Cir. 1993) (same), and Eads v. Sec'y of HHS, 983 F.2d 815, 817-18 (7th Cir. 1993) (same).


27. See 20 C.F.R. § 404.900(a)(2)-(5) (stating procedures); see also Dickinson, supra note 1, at 968 (noting claimants usually wait about 155 days to hear whether or not his/her initial application has been granted or denied).

28. See 20 C.F.R. § 404.900(a)(2) (listing process); see also Dickinson, supra note 1, at 968 (stating claimant has sixty days from denial to request reconsideration). On average, by the end of this second step, the claimant has been in the disability benefits appeals process for about eight months. See id. (noting reconsideration from initial denial usually takes around fifty days to complete).

29. See 20 C.F.R. § 404.900(a)(3) (following steps). The ALJ determines whether or not the plaintiff can engage in substantial gainful employment by using the following five-factor evaluation process: (1) if the claimant is currently engaged in substantial gainful employment, the claimant will be found not disabled; (2) if the claimant does not suffer from a "severe impairment," the claimant will be found not disabled; (3) if a severe impairment meets or equals a listed impairment in 20 C.F.R. Part 404, Subpart P, Appendix 1 and has lasted or is expected to last
claimant may request review from the Appeals Council. As a result, the Council may or may not grant review, and if it denies review, the ALJ’s decision becomes the final decision of the Commissioner. Finally, after the claimant has exhausted all of these steps, the Commissioner’s decision is final, and the claimant may request judicial review by filing an action in federal district court.

2. The Judicial Review Process Governed by the Act

Once the Commissioner orders a final decision, the claimant may seek judicial review by a United States district court as governed by the

continually for at least twelve months, then the claimant will be found disabled; (4) if the severe impairment does not meet prong (3), the Commissioner considers the claimant’s residual functional capacity (RFC) to determine whether the claimant can perform work the claimant has done in the past despite the severe impairment—if the claimant can, the claimant will be found not disabled; and (5) if the claimant cannot perform past her/his past work, the Commissioner will consider the claimant’s RFC, age, education and past work experience to determine whether the claimant can perform other work which exists in the national economy. See id. at § 404.1520(b)-(f) (providing steps for evaluating disability); Schaudeck v. Comm’r of Soc. Sec., 181 F.3d 429, 431-32 (3d Cir. 1999) (noting evaluation process).

At this stage in the disability claims process, the ALJ takes around 265 days to review and determine the claimant’s status. See Dickinson, supra note 1, at 963 (discussing lengthy process). It follows that by the time the claimant obtains the ALJ’s decision, the claimant has already been dealing with the Social Security Administration’s disability review process for over a year and a half. See id. (stating this is first level claimant is able to plead disability case in person).

30. See 20 C.F.R. § 404.900(a)(4) (noting availability of request). The Appeals Council, however, is not required to grant review. See id. at § 404.970(a)(1)-(4) (directing situations where review is warranted); see also Oosterbaan, supra note 22, at 700 (noting procedures claimant must take through administrative review with opportunity to request judicial review at fifth step). Review by the Appeals Council is discretionary, and the Council serves as final agency review in order to maintain consistent agency policy among ALJ decisions. See Sheehy, supra note 3, at 114 (suggesting Social Security Administration’s intent when it created Appeals Council).

31. See Sims v. Apfel, 530 U.S. 103, 106-07 (2000) (explaining finality of decisions); Oosterbaan, supra note 22, at 701-02 (stating Act permits review of administrative decisions once claimant receives a “final decision” from administrative agency). For purposes of review, a “final decision” occurs when a claimant “complete[s] the steps of the administrative review process,” including initial determination, reconsideration, ALJ hearing and Appeals Council review. See 20 C.F.R. § 404.900(a)(5) (stating how claimant obtains federal court review); see also Magaldi, supra note 26, at 1071 (specifying terms of regulations). Furthermore, a decision becomes “final” when the Appeals Council makes a decision on the merits or declines review, thereby making the ALJ’s decision the Commissioner’s final decision. See 20 C.F.R. § 404.981 (stating effect of Appeals Council’s decision or denial of review).

32. See 20 C.F.R. § 404.900(a)(5) (discussing federal court review); see also Skutt, supra note 24, at 203 (stating 42 U.S.C. § 405(g) is “sole statutory basis” for review of unfavorable administrative decision); cf. Sheehy, supra note 3, at 105 (suggesting judicial system’s role is crucial in distribution of benefits because unhappy claimants can appeal administrative decisions and challenge regulations in district court).
Social Security Act. At this level, there are certain options available to
the district court. Based on the record before the ALJ (assuming the
Appeals Council denies review), the district court may affirm, modify or
reverse the Commissioner’s decision, with or without remand. The
district court’s review of the Commissioner’s decision, however, is very limited in scope. Under the Act, the district court may only determine
whether or not the Commissioner’s decision is supported by substantial
evidence and whether the agency applied the correct legal standards to
reach that decision. As a result, if a claimant submits evidence in the

33. See 42 U.S.C. § 405(g) (1994) (stating procedures for judicial review); see also Matthews v. Eldridge, 424 U.S. 319, 328 (1976) (discussing procedure for obtaining judicial review); Skutt, supra note 24, at 203 (finding final decision of Secretary is prerequisite to judicial review). The Act states that “[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). Therefore, as long as the decision at the administrative level is supported by “substantial evidence,” the district court upholds the decision. See Matthews v. Apfel, 229 F.3d 589, 592 (3d Cir. 2001) (interpreting statute). Substantial evidence “does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Pierce v. Underwood, 487 U.S. 552, 565 (1988).

This right to judicial review is grounded in our history. See Toni M. Fine, Agency Requests for “Voluntary” Remand: A Proposal for the Development of Judicial Standards, 28 Ariz. St. L.J. 1079, 1094 (1996) (recognizing right to judicial review at common law and through statute). One commentator suggests that judicial review is vital to maintaining a system of “checks and balances,” and to providing claimants with the fairest system available. See id. (noting “reviewability” is component of federalism). The importance of judicial review has not changed, and if anything, its importance has increased. See id. at 1095-96 (stating right to review “continues to be a pillar of our system of federalism”).

Consequently, the judicial review stage plays an indispensable role in the adjudication process. See Gropman, supra note 1, at 755 (discussing backlog and delay of cases). The judiciary bears a heavy burden because of the difficulty in reviewing disability determinations and ensuring adequate attention to individual situations. See id. at 756 (suggesting public and Congress want judiciary to keep administrative agency in check, making sure claimants are treated fairly). Furthermore, due to the thousands of disability cases appealed to the federal district courts each year, questions arise as to the exact responsibilities and roles of district courts on judicial review for disability claims. See id. (arguing judicial review has imposed “acute responsibilities” on federal district courts).

34. See 42 U.S.C. § 405(g) (noting court’s powers).

35. See id. (explaining Sentence Four review); see also Matthews, 229 F.3d at 593 (explaining district court’s options on review). At this stage, the district court acts as a reviewer of the Commissioner’s final decision, not as a fact-finder. See Sheehy, supra note 3, at 115 (suggesting that “if the findings and conclusions drawn by the Secretary are reasonable under the circumstances, the court is not free to review the record and draw its own inferences and conclusions from it”). Consequently, it is the Commissioner’s role, not the district court’s role, to decide conflicting evidence. See id. (noting court is not bound by Commissioner’s decision but should give decision great weight).

36. See 42 U.S.C. § 405(g) (stating court may review Commissioner’s findings).

37. See id. (noting Commissioner’s decision is final as long as supported by substantial evidence). For purposes of judicial review, substantial evidence is rele-
district court that was not previously presented to the ALJ, the court may remand and allow the additional evidence to be presented to the Commissioner, "but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." Consequently, this "good cause" requirement for review generates much debate among the courts of appeals.38

C. The Submission of Additional Evidence: The Courts of Appeals' Interpretations

The United States Supreme Court has not decided the district court's role (on judicial review) concerning the appropriate treatment of evidence submitted to the Appeals Council but not previously reviewed by the ALJ when the ALJ's decision serves as the Commissioner's final decision.40 Without Supreme Court guidance, appellate courts have followed

vant evidence viewed objectively as adequate to support a decision. See Richardson v. Perales, 402 U.S. 389, 401 (1971) (following past Supreme Court findings that substantial evidence is more than "a mere scintilla") (citing Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); Doak v. Heckler, 790 F.2d 26, 28 (3d Cir. 1986) (providing standard for burden to prove claim); see also Dubin, supra note 1, at 102 (noting district court's review "does not sanction a de novo search for the ideal findings"). Despite the district court's deference to the Commissioner's final decision, the court does not give deference when it reviews the agency's application of the law. See Dubin, supra note 1, at 103-04 (finding that when agency bases its decision on improper legal standards, decision must be overturned).

38. 42 U.S.C. § 405(g); see, e.g., Cline v. Comm'r of Soc. Sec., 96 F.3d 146, 149 (6th Cir. 1996) (holding no remand permitted where claimant did not prove good cause); Newhouse v. Heckler, 753 F.2d 283, 286 (3d Cir. 1985) (stating remand is considered where good cause requirement is met); Szubak v. Secretary of HHS, 745 F.2d 831, 834 (3d Cir. 1984) (same); see also David Hill et al., Disability Under the Social Security Act, 31 SOC. SEC. REP. SERV. 589, 607 (1990) (stating remand for "noncumulative" evidence is appropriate where it may change decision and there is good cause for not submitting it earlier); Andrew M. Campbell, Annotation, Order, Based on New Evidence Provision of 42 U.S.C.A. § 405(G), That Additional Evidence Be Taken in Administrative Proceeding to Establish Eligibility For Benefits Under Social Security Act, 152 A.L.R. Fed. 123, 134 (1999) (noting that under Act federal district courts may remand upon showing of new and material evidence if good cause exists for not having submitted it at prior proceedings).

39. Compare Matthews, 299 F.3d at 594 (holding new evidence can only be reviewed upon showing of good cause), with Perez v. Chater, 77 F.3d 41, 45 (2d Cir. 1996) (following regulations to find no good cause requirement necessary to review new evidence).

40. See generally U.S. Supreme Court: Summary of Term's Significant Opinions on Employment Law and Federal Procedure, U.S. LAW Wk.—DAILY Ed., Aug. 19, 1993, at 1 ("Employment-related cases accounted for less than 10 percent of the U.S. Supreme Court's decisional output in the 1992-93 term, about the same as last term but far less than in the recent past."). One commentator argues that because it is highly unlikely that the Supreme Court will choose to hear a disability claimant's appeal, the circuit courts play vital roles as the final word in disputes. See Sheehy, supra note 3, at 105 (noting statistical likelihood that Supreme Court will not hear this type of case). Furthermore, a recent Federal Courts Study Committee Report suggests that federal judges view social security appeals as insignificant or unde-
different lines of reasoning. Thus, each court of appeals follows one of two paths. Some courts hold that all evidence should be considered by the district court in its review of the final decision of the Commissioner. Alternatively, other courts hold that evidence not presented to the ALJ should not be reviewed by the district court and should not be the basis of remand to the Commissioner unless the evidence is new, material and there is good cause for not having submitted the evidence earlier. Accordingly, because the courts of appeals follow two different lines of reasoning, a claimant’s right to review differs by circuit.

1. The District Court Should Consider Additional Evidence


41. Compare Perez, 77 F.3d at 45 (holding that new evidence becomes part of administrative record to be considered by district court), O’Dell v. Shalala, 44 F.3d 855, 859 (10th Cir. 1994) (same), Ramirez v. Shalala, 8 F.3d 1449, 1455 (9th Cir. 1993) (same), Nelson v. Sullivan, 966 F.2d 363, 366 (8th Cir. 1992) (explaining that if Appeals Council does not consider new evidence, reviewing court may remand if that evidence is new and material; if Appeals Council considers new evidence but declines to review case, that evidence becomes part of administrative record for review by district court), and Wilkins v. Sec’y of HHS, 953 F.2d 93, 95-96 (4th Cir. 1991) (explaining that new and material evidence which relates back to period on or before date of ALJ’s decision must be considered by Appeals Council), with Falge v. Apfel, 150 F.3d 1320, 1323 (11th Cir. 1998), cert. denied, 525 U.S. 1124 (1999) (adopting Seventh Circuit’s approach in Eads v. Sec’y of HHS, 983 F.2d 815 (7th Cir. 1993), and articulating rule that when Appeals Council denies review, only evidence actually presented to ALJ will be considered in determining whether ALJ’s decision is supported by substantial evidence), Cotton v. Sullivan, 2 F.3d 692, 695-96 (6th Cir. 1993) (same), and Eads v. Sec’y of HHS, 983 F.2d 815, 817-18 (7th Cir. 1993) (articulating same principle).

42. See, e.g., Matthews, 239 F.3d at 592-94 (comparing circuits that require good cause for review with those that allow review of all evidence without good cause).

43. For a discussion of circuits that allow review of all evidence, see infra notes 45-59 and accompanying text.

44. For a discussion of circuits that require good cause for review, see infra notes 60-74 and accompanying text.

45. See, e.g., Perez, 77 F.3d at 45 (holding that district court should consider additional evidence); O’Dell, 44 F.3d at 859 (holding that new evidence is considered because whole record is reviewed); Ramirez, 8 F.3d at 1452 (holding that even when Appeals Council denies review, this decision is based on merits, so district court must review entire record); Nelson, 966 F.2d at 366 (holding that because new evidence becomes part of record, whole record is reviewed by district court); Wilkins, 953 F.2d at 96 (holding that new evidence is reviewed by district court because no good cause requirement exists in regulations); see also Entitlements/Public Benefits: Federal and State, 25 Mental & Physical Disability L. Rep. 256, 259 (2001) (discussing holdings of Second and Tenth Circuits, which relied on Social Security regulation).
have reasoned that the new evidence submitted to the Appeals Council becomes part of the administrative record used for purposes of judicial review. As part of their analyses, these circuits relied on the regulations that allow the Appeals Council to accept new evidence as long as it is new and material. Even if the Appeals Council denies review, these circuits stated that the evidence nonetheless becomes part of the record for evaluation by the district court.

For instance, in Perez v. Chater, the claimant alleged that the district court erred in holding that the evidence submitted to the Appeals Council, following the ALJ’s decision, did not become part of the record for judicial review. In Perez, the Second Circuit stated that the purpose of the regulations is to provide claimants with ample opportunity to submit additional evidence before the Commissioner’s decision becomes final. Thus, the Second Circuit held that the claimant must only show the evidence is new and material—a claimant does not have to prove “good cause.”

Similarly, other circuits have held that even when the Appeals Council denies review, the district court must evaluate all evidence submitted, even if the ALJ did not initially review the evidence. These circuits proposed that as long as the claimant properly submits the evidence to the Appeals Council (i.e., shows it is “new and material”), the administrative

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46. See Perez, 77 F.3d at 45 (stating that because “regulations appear to treat the new evidence as part of the administrative record” district court must review entire record); O’Dell, 44 F.3d at 859 (interpreting regulations as requiring review of record as whole); Ramirez, 8 F.3d at 1451-52 (finding district court must review entire record on judicial review); Nelson, 966 F.2d at 366 (holding that even though ALJ did not have chance to review new evidence, it still becomes part of record for review); Wilkins, 953 F.2d at 96 (holding that because doctor’s letter was incorporated into record, district court must review record as whole).

47. See 20 C.F.R. § 404.970(b) (2001) (discussing submission of new and material evidence that relates to period on or before date of ALJ hearing decision).

48. For examples of circuits that find the record becomes part of the district court’s review proceedings, see supra note 45 and accompanying text.

49. 77 F.3d 41 (2d Cir. 1996).

50. See id. at 43 (noting facts).

51. See id. at 45 (interpreting Commissioner’s intentions when formulating regulations).

52. See id. (stating limitations that court relied upon). The Second Circuit recognized the “good cause” requirement in the Act but relied on the regulations for its holding. See id. (comparing federal regulations and Social Security Act).

53. See, e.g., Nelson v. Sullivan, 966 F.2d 363, 366 n.5 (8th Cir. 1992) (noting that even though ALJ did not have opportunity to base his or her decision on new evidence, it becomes part of record for district court review because “it would not make sense to require . . . good cause for failing to make it part of a prior proceeding’s record”).
record becomes a reviewable package deal. In other words, all evidence is lumped together for the district court to review.

For example, in Nelson v. Sullivan, the claimant sought to have evidence of his sleep apnea reviewed by the district court, even though the Appeals Council denied review and the ALJ did not base his decision on that evidence. In turn, the Eighth Circuit held that "[t]he newly submitted evidence is to become part of what we will loosely describe here as the 'administrative record,' even though the evidence was not originally included in the ALJ's record." As a result, these circuits have held that all evidence should be included in the administrative record, and the district court's role, on judicial review, is to review the entire administrative record.

2. The District Court Should Not Consider Additional Evidence

In contrast, the Third, Sixth, Seventh and Eleventh Circuits have held that a district court should not review new evidence presented to the Appeals Council, which subsequently denied review. These circuits con-
curred with the Second, Fourth, Eighth, Ninth and Tenth Circuits that a claimant is permitted to submit new evidence to the Appeals Council following the regulation’s requirement that the evidence be “new and material.” In addition, these circuits also found that the district court incorporates this evidence into the administrative record. These circuits differ in their conclusion, however, because they do not hold that the district court reviews the entire administrative record. Instead, the Third, Sixth, Seventh and Eleventh Circuits have reasoned that the Act, not the regulations, provides guidance for the district court’s role on judicial review.

Specifically, under the Act, the district court reviews the “final decision” of the Commissioner. The final decision is either the Appeals Council’s or the ALJ’s decision. For instance, in *Eads v. Secretary of HHS*, the Seventh Circuit reiterated which decision in the administrative process becomes the Commissioner’s final decision.

61. See 20 C.F.R. § 404.970(b) (2001) (explaining when Appeals Council review is warranted).

62. See *Matthews*, 239 F.3d at 591 (finding vocational report went into record); *Falge*, 150 F.3d at 1323 (adopting *Eads*’ reasoning that new evidence becomes part of administrative record); *Cotton*, 2 F.3d at 695-96 (same); *Eads*, 983 F.2d at 817 (“Since the submission of the evidence precedes the Appeals Council’s decision, and that decision, even when it denies review, is a precondition to judicial review, the new evidence is a part of the administrative record that goes to the district court in the judicial review proceeding . . . .”).

63. See *Matthews*, 239 F.3d at 593 (holding that only time district court reviews entire record is when Appeals Council accepts review, not declines review); *Falge*, 150 F.3d at 1323 (same); *Cotton*, 2 F.3d at 696 (same); *Eads*, 983 F.2d at 817 (same). *But cf.* *Riley v. Shalala*, 18 F.3d 619, 622 (8th Cir. 1994) (stating that court should decide if ALJ’s determination was supported by substantial evidence by considering whole record, even new evidence submitted after ALJ’s determination was made); *Stevens v. Heckler*, 766 F.2d 284, 288 (7th Cir. 1985) (finding that court should examine entire record of disability proceedings to determine whether Secretary’s decision was supported by substantial evidence); *Mongeur v. Heckler*, 722 F.2d 1033, 1038 (2d Cir. 1983) (holding that court must examine entire record); *Brinker v. Weinberger*, 522 F.2d 13, 16 (8th Cir. 1975) (stating that court must examine entire record to determine if ALJ’s decision was supported by substantial evidence); *Oppenheim v. Finch*, 495 F.2d 396, 397 (4th Cir. 1974) (noting that court does not review case *de novo*, rather court must examine whole record); *Vitek v. Finch*, 438 F.2d 1157, 1157-58 (4th Cir. 1971) (noting that court must uphold responsibility to examine whole record); *Gardner v. Bishop*, 362 F.2d 917, 920 (10th Cir. 1966) (explaining that court must review all evidence in record to determine whether Secretary’s decision was supported by substantial evidence).

64. See *Matthews*, 239 F.3d at 594 (distinguishing opposing circuits’ rationale by stating that Act, not regulations, governs standards for judicial review).

65. See 42 U.S.C. § 405(g) (1994) (providing individuals with right to request judicial review after Commissioner makes final decision).

66. See 20 C.F.R. § 404.981 (“The Appeals Council’s decision, or the decision of the administrative law judge if the request for review is denied, is binding . . . .”).

67. 983 F.2d 815 (7th Cir. 1993).

68. See *id.* at 817 (discussing review process).
The Seventh Circuit stated that the district court only reviews the Commissioner’s final decision. That is, if the Appeals Council grants review and makes a decision on the merits, that decision is the Commissioner’s final decision. Alternatively, if the Appeals Council denies review, the ALJ’s decision is the Commissioner’s final decision; hence, the district court could only consider the ALJ’s report.

Following the language of the Act, these circuits reasoned that the Commissioner’s final decision stands unless the district court finds the decision is not supported by “substantial evidence.” Therefore, these circuits argued that the district court only bases its “substantiality” review on the evidence before the ALJ and not on evidence never presented to the ALJ. Consequently, these circuits have held that if a claimant wants review of evidence submitted to the Appeals Council that denied review, under section 405(g) the evidence must be: (1) new; (2) material; and (3) the claimant must prove good cause for failure to present the evidence earlier.

D. Third Circuit Precedent Sets the Stage

In 1984, the Third Circuit, in Szubak v. Secretary of HHS, articulated guidelines to evaluate a remand for new evidence under section 405(g). The evidence must first be “new” and not merely cumulative of what is already in the record. Second, the evidence must be “material;” it must be relevant and probative. Beyond that, the materiality standard requires that there be a reasonable possibility that the new evidence would have changed the outcome of the Secretary’s determination. An implicit mate-
In *Szubak*, the disability claimant argued in the alternative that the five medical reports gathered after the Commissioner's final decision permitted a remand for reconsideration.77 Although the Third Circuit granted the claimant's request for remand, the Third Circuit only permitted the remand because the claimant met all three requirements for review under section 405(g).78

Following *Szubak*, in *Jones v. Sullivan*,79 the Third Circuit expanded upon its reasoning in *Szubak* and held that evidence not presented to the ALJ cannot be used to allege that the ALJ's decision was not based upon substantial evidence.80 In *Jones*, the claimant requested remand for consideration of new evidence pertaining to a specific period of hospitalization.81 As a result, the Third Circuit found that the Commissioner's decision was supported by substantial evidence and that the claimant did not justify his or her need for remand.82

III. *MATTHEWS v. APFEL: THE THIRD CIRCUIT DEFINES THE DISTRICT COURT'S ROLE FOR JUDICIAL REVIEW OF NEW EVIDENCE WHEN THE APPEALS COUNCIL DENIES REVIEW*

A. Facts and Procedural Background of Matthews

Recently, relying on *Szubak* and *Jones* for support, the Third Circuit set forth its standard for reviewing new evidence in disability claims.83

rality requirement is that the new evidence relate to the time period for which benefits were denied . . . . Finally the claimant must demonstrate good cause for not having incorporated the new evidence into the administrative record.

Id. (citations omitted).

77. See id. at 832 (stating plaintiff's alternative argument on appeal).
78. See id. at 833-34 (holding claimant met all three requirements for remand). In *Szubak*, the Third Circuit also noted that the particular facts of the case contributed to its decision to grant a remand. See id. at 834 (discussing necessity for justification for failure to present evidence to ALJ). In particular, the court stated that the claimant did not obtain counsel until after the ALJ's decision was rendered, and that the administrative record was unclear due to a vague doctor's report. See id. (finding no danger of claimant abusing system).
79. 954 F.2d 125 (3d Cir. 1991).
80. See id. at 128 (discussing claimant's attempt to introduce new evidence regarding disability).
81. See id. (providing claimant's argument).
82. See id. (noting that claimant's attorney did not provide any explanation as to why report was not submitted earlier). Practitioners should note that in *Jones*, the new evidence was not incorporated into the administrative record because the Appeals Council denied review first and then the claimant attempted to reopen the case by submitting new evidence for review. Compare Matthews v. Apfel, 239 F.3d 589, 591 (3d Cir. 2001) (finding claimant submitted additional evidence first and then Appeals Council denied review), with *Jones*, 954 F.2d at 127 (noting Appeals Council denied review and then claimant submitted additional evidence).
83. For a discussion of the Third Circuit's guidelines for submission of new evidence, see infra notes 101-32 and accompanying text.
On October 15, 1992, Sharon Matthews applied for disability benefits, alleging that her arthritis, hearing loss and right foot drop (stemming from an old Achilles tendon rupture) rendered her disabled. Thereafter, the council denied Matthews’ disability claim. On September 21, 1994, an ALJ heard Matthews’ case and ruled that Matthews was not disabled. Following the ALJ’s hearing, the Appeals Council granted Matthews’ request for review, and it vacated the ALJ’s decision, remanding for a new trial.

Subsequently, on July 11, 1996, a second ALJ heard Matthews’ claim. At this hearing, Matthews submitted medical reports in connection with her impairments, and a vocational expert testified that there were a significant number of sedentary and unskilled jobs, such as cashier, that Matthews could perform. Specifically, the ALJ held the record open for Matthews to submit her treating physician’s final report before issuing his decision. On April 21, 1997, the ALJ agreed with the vocational expert that Matthews was not disabled due to the significant number of sedentary jobs available to a claimant in Matthews’ condition.

Afterwards, on June 23, 1997, Matthews filed a request for review to the Appeals Council. Eventually, on December 8, 1997, more than seven months after the ALJ’s decision, Matthews submitted her treating physician’s final report before issuing his decision.

84. See Matthews, 239 F.3d at 590 (claiming disability since Dec. 9, 1991). Matthews also applied for SSI but because SSI and DIB follow the same evaluation process, the court focused on DIB. See id. (discussing Matthews’ claims).

85. See id. (noting that claim was denied initially and again on reconsideration).

86. See id. (discussing initial ALJ hearing).

87. See id. (noting that Appeals Council directed ALJ to give further consideration to Matthews’ residual functional capacity and to obtain additional evidence from vocational expert, clarifying effect of Matthews’ limitations on her “occupational base”).

88. See id. (discussing second ALJ proceedings).

89. See id. (noting that vocational expert accounted for Matthews’ impairments, age, educational background and employment history in making determination).

90. See id. (implying Matthews had ample opportunity to respond to vocational expert’s testimony with countervailing evidence indicating her inability to perform suggested jobs). Specifically, the ALJ must “fully and fairly” develop the record so that his determination is the most fair and objective to the claimant. See Gropman, supra note 1, at 759 (discussing ALJ’s role). In Matthews, however, the ALJ fulfilled his or her duty by leaving the record open for Matthews to obtain any and all additional material evidence helpful to her claim. See Matthews, 239 F.3d at 595 (finding Matthews did not submit her additional evidence until seven months after ALJ’s decision).

91. See Matthews, 239 F.3d at 590-91 (noting that Matthews’ treating physicians did not offer evidence that she could not perform sedentary work). The ALJ found that Matthews’ impairments did not meet or equal the criteria of the listed impairments. See id. at 590 (discussing decision). Furthermore, the ALJ asserted that although Matthews was unable to perform any of her past work as a teacher’s aide or hospital worker, there remained a large number of jobs in the national economy that she could perform. See id. at 590-91 (suggesting jobs Matthews could perform in a low-noise environment such as cashier).

92. See id. at 591 (discussing review process).
seven months after the ALJ’s decision, Matthews submitted additional documents to the Appeals Council from a vocational expert that stated Matthews lacked the reading and arithmetic skills to work as a cashier. Nevertheless, the Appeals Council denied Matthews’ request for review, and incorporated the new evidence into the administrative record.

As a result, Matthews filed suit in the United States District Court for the Eastern District of Pennsylvania requesting judicial review of the Commissioner’s final decision. Thereafter, the Magistrate Judge found the ALJ’s decision was supported by substantial evidence. Specifically, the Magistrate Judge noted that the additional vocational evidence was new and material. The judge, however, did not evaluate the evidence on judicial review because Matthews had failed to demonstrate good cause for not submitting the evidence to the ALJ.

B. The Third Circuit’s Decision

Judge Sloviter, writing for the Third Circuit, recognized the importance of clarifying the review proceedings for district courts faced with new evidence initially submitted to the Appeals Council, which thereafter denied review. As a matter of first impression, the Third Circuit held that a claimant must demonstrate good cause for failure to submit the evidence earlier. The Third Circuit reasoned that: (1) the district court’s duties arise from a strict interpretation of section 405(g) of the Act.

93. See id. (noting that vocational expert also stated that “Matthews’ exertional and nonexertional impairments would preclude her from performing any other gainful work activities in the national economy”).

94. See id. (explaining that, in doing so, Appeals Council followed regulations to review evidence). In Matthews, the Appeals Council noted that when new evidence is submitted, it only has to grant review if “[it] finds that the Administrative Law Judge’s actions, findings, or conclusion [are] contrary to the weight of the evidence currently of record.” Id. (citing 20 C.F.R. § 404.970(b) (2001)). Furthermore, the court noted that the Council’s action meant that the ALJ’s decision became the final decision of the Commissioner. See id. at 591 (discussing process for incorporating new evidence into proceedings).

95. See id. (noting parties filed cross-motions for summary judgment).

96. See id. (recommending Commissioner’s motion for summary judgment be granted); see also 42 U.S.C. § 405(g) (1994) (stating that district court shall accept Commissioner’s final decision as long as it is supported by substantial evidence).

97. See Matthews, 239 F.3d at 591 (noting that district court adopted Magistrate Judge’s recommendation and granted summary judgment for Commissioner). On appeal, Matthews argued that the district court erred in failing to review the evidence that was made part of the administrative record and that there is no “good cause” requirement in the regulations. See id. (noting procedural posture).

98. See id. at 589-90 (“This case raises the important issue of the treatment to be given by the district court of evidence submitted by the claimant for the first time to the Appeals Council, which has then denied review.”); see also Leah M. Perkins, Claimant Must Demonstrate Good Cause For Not Presenting Evidence to ALJ, Law. J., Apr. 6, 2001, at 3 (noting case raises noteworthy issue).

99. See Matthews, 239 F.3d at 594 (relying on language of § 405(g) of Act).
Social Security Act, not from the regulations; and (2) strong public policy encourages timely presentation of all evidence.\textsuperscript{100}

1. The Act Governs

In order to contrast the Third Circuit's view with opposing circuits, the Third Circuit began its analysis by distinguishing the administrative review process from the judicial review process.\textsuperscript{101} The Third Circuit laid this foundation because it recognized that opposing circuits based much of their analyses on the wording in the regulations.\textsuperscript{102} For instance, the Second Circuit in\textit{Perez} stated that the regulations allow submission of new evidence to the Appeals Council as long as it is new and material.\textsuperscript{103} Consistent with the Second Circuit's view, the Third Circuit agreed with this practice, but explained that this procedure is only proper when claimants are in the administrative review process.\textsuperscript{104} Because this evidence precedes the Appeals Council's decision to grant or deny review, the new evidence does in fact become part of the record.\textsuperscript{105}

Despite these findings,\textit{Perez} attempted to distinguish its fellow circuits from circuits that follow the same reasoning as the Third Circuit by specifically stating that "[t]he Sixth and Seventh Circuits have held that, when the Appeals Council denies review, the administrative record does not include new evidence first submitted to the Appeals Council."\textsuperscript{106} Contrary

\begin{itemize}
  \item \textsuperscript{100} See id. at 595 (analyzing holding).
  \item \textsuperscript{101} See Molly J. Liskow, \textit{Third Circuit: Social Security Issue of First Impression}, 10 N.J. LAW.: WKLY. NEWSPAPER 337 (Feb. 19, 2001) (observing that court distinguished between Social Security Administration regulations and Social Security Act). The distinction between the administrative review process and the judicial review process is often difficult to discern, and the attempt to create a dividing line between the two adds to the dichotomy of interpretations by the courts. See Dickinson, supra note 1, at 957 ("[T]he harmonization of federal court and administrative process appears to be the equivalent of fitting square pegs into round holes."). As a result, some Social Security advocates contend that Congress should devise a Social Security Court or a Social Security Court of Appeals to homogenize decision-making. See Hearings, supra note 1, at 39 (testimony of Stanford G. Ross) (proposing changes for judicial review process).
  \item \textsuperscript{102} See Matthews, 239 F.3d at 593 (noting Tenth and Second Circuits based their contrary holdings on requirements in regulations, rather than on requirements found in Social Security Act).
  \item \textsuperscript{103} See Perez v. Chater, 77 F.3d 41, 44 (2d Cir. 1996) (stating regulations "expressly authorize" claimant to submit new and material evidence to Appeals Council).
  \item \textsuperscript{104} See Matthews, 239 F.3d at 594 (agreeing that evidence can be submitted, but only for consideration by Appeals Council in deciding whether or not to review ALJ's decision).
  \item \textsuperscript{105} See Eads v. Sec'y of HHS, 983 F.2d 815, 817 (7th Cir. 1993) (noting that Appeals Council's decision, whether affirmation or denial, is "a precondition to judicial review").
  \item \textsuperscript{106} Perez, 77 F.3d at 44. Contra Cotton v. Sullivan, 2 F.3d 692, 695 (6th Cir. 1993) (finding that new evidence is part of entire record); Eads, 983 F.2d at 817 (holding that new evidence, which becomes part of proceedings, follows claimant throughout appeals process).
\end{itemize}
to the Second Circuit's explicit allegations, however, the Third Circuit held that even when the Appeals Council denies review, "the new evidence is a part of the administrative record that goes to the district court in the judicial proceeding . . . ." Similar to all the other circuits that have ruled on this issue, the Third Circuit found that the additional evidence is in fact part of the administrative record—it is what is done with this record that is the center of disagreement among the circuits. Up to this step, the Third Circuit and opposing circuits followed the same analyses.

At the next step, however, the Third Circuit inferred that once the Appeals Council makes the decision to accept or deny review, the Commissioner's decision becomes final, and the proceedings are subject to an entirely different set of standards—judicial review under section 405(g).

Under this section, the Third Circuit explained that the district court's role on judicial review is to determine whether the Commissioner's final

107. *Eads*, 983 F.2d at 817; see *Matthews*, 239 F.3d at 591 (incorporating evidence into record); *Cotton*, 2 F.3d at 695 (finding that new evidence is part of record for review). In fact, the Eleventh Circuit stated, "[a] close reading of *Eads* shows that the Seventh Circuit includes the new evidence in the administrative record going to reviewing courts, but the Seventh Circuit does not consider that new evidence presented only to the AC when reviewing the ALJ's decision." Falge v. Apfel, 150 F.3d 1320, 1323 n.6 (11th Cir. 1998), cert. denied, 525 U.S. 1124 (1999).

108. Compare *Matthews*, 239 F.3d at 594 ("The new and material evidence is transmitted with the record so that the district court will have before it the evidence that will be the subject of remand if the claimant can show good cause why new and material evidence was not submitted to the ALJ."). *Eads*, 983 F.2d at 817 (providing for review of evidence on record before ALJ), with *Perez*, 77 F.3d at 44-45 (finding good cause requirement is unnecessary for district court to review record as whole), and *O'Dell* v. Shalala, 44 F.3d 855, 859 (10th Cir. 1994) (holding entire record is reviewed by district court on judicial review). The record that follows the claimant to the judicial proceedings is highly controversial. See *Hearings*, supra note 1, at 39 (testimony of Stanford G. Ross) (suggesting different determination as to record proceedings). Specifically, one commentator argues that the Social Security Administration and Congress should reconsider the issue of whether the record should be fully closed after the ALJ's decision. See id. (arguing that open record allows case to change at different levels of appeals process, causing inconsistency in decision-making). Moreover, this argument for a closed record is in harmony with the Third Circuit's rationale that only the evidence before the final decision-maker should be reviewed. See id. (proposing that new evidence would only be considered on new application because record would be final).

109. See *Matthews*, 239 F.3d at 594 (distinguishing opposing circuits by stating that, at this point in claimants' case, review process is governed by Act, not by regulations).

110. See id. (noting regulations only govern administrative review procedures, not judicial review procedures). The Third Circuit's reasoning is consistent with the language of the regulation and Act that explicitly states that once a claimant receives the Commissioner's final decision under the regulation, the claimant may request judicial review under the Act. See 42 U.S.C. § 405(g) (1994) (stating claimant may obtain judicial review, governed by Act, once Commissioner makes final decision); 20 C.F.R. § 404.900(a)(5) (2001) (stating when claimant completes administrative review steps, Commissioner's decision is final and claimant may request judicial review).
decision is supported by substantial evidence. As a result, if the district court finds the decision is supported by substantial evidence, then the district court accepts this decision as "conclusive." Following Eads, the Third Circuit reasoned that because the Appeals Council is the last step in exhausting administrative review, if the Appeals Council grants review, its decision (on the merits) becomes the Commissioner's final decision. If, however, the Appeals Council denies review, as in Matthews, the ALJ's decision becomes the Commissioner's final decision. Based upon this reasoning, the Third Circuit held that because the Commissioner's final decision is subject to judicial review, then the decision that the district court reviews is the ALJ's decision. Consequently, "[t]he correctness of that decision depends on the evidence that was before him . . . ."

Building upon this foundation, the Third Circuit concluded that even though the new evidence is submitted with the record on judicial review, the district court is restricted to reviewing only the ALJ's decision, using only the evidence that was before the ALJ. Following logic, the Third

111. See 42 U.S.C. § 405(g) (stating Commissioner's decision is final as long as supported by substantial evidence); see also Richardson v. Perales, 402 U.S. 389, 401-02 (1971) (finding that district court reviews Secretary's final decision only to determine if based on substantial evidence); Doak v. Heckler, 790 F.2d 26, 28 (3d Cir. 1986) (same); Newhouse v. Heckler, 753 F.2d 283, 285 (3d Cir. 1985) ("In reviewing final determinations by the Secretary after an administrative hearing, courts are bound by the Secretary's findings of fact if they are supported by substantial evidence.").

112. See 42 U.S.C. § 405(g) ("The findings of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive . . . .").

113. See Liskow, supra note 101 (noting Matthews court relies on Szubak and Eads for support).

114. See 20 C.F.R. § 404.981 (providing effect of Appeals Council's decision to grant or deny review).

115. See Matthews, 299 F.3d at 593 (reasoning district court only considers new evidence when Appeals Council grants review, but when it denies review, district court reviews ALJ's decision); see also Eads v. Sec'y of HHS, 983 F.2d 815, 817 (7th Cir. 1993) (finding when Appeals Council denies review, district court reviews ALJ's decision).

116. Eads, 983 F.2d at 817; see Falge v. Apfel, 150 F.3d 1320, 1323 (11th Cir. 1998), cert. denied, 525 U.S. 1124 (1999) (following reasoning in Eads); Jones v. Sullivan, 954 F.2d 125, 128 (3d Cir. 1991) (holding evidence not presented to ALJ cannot be used to assert his decision was not supported by substantial evidence). Specifically, the Eleventh Circuit noted that the opposing circuits do not realize the problems associated with reviewing evidence that the ALJ never had the opportunity to consider. See Falge, 150 F.3d at 1323 (discussing difficulties with reviewing record as whole). In particular, "that means . . . [courts] must speculate to some extent on how the administrative law judge would have weighed the newly submitted reports if they had been available for the original hearing . . . . [T]his is a peculiar task for a reviewing court." Riley v. Shalala, 18 F.3d 619, 622 (8th Cir. 1994).

117. See Perkins, supra note 98, at 4 (noting under § 405(g) for judicial review purposes, "record" is "the evidence upon which the findings and decision complained of are based"); see also Gropman, supra note 1, at 761 (stating judicial review is limited to whether Commissioner's findings are supported by substantial evidence). Moreover, federal district courts, on judicial review, do not have the
Circuit rationalized that the ALJ cannot be faulted for having failed to weigh evidence never presented to it. Particularly, the Third Circuit asserted that there is no language in the Act that grants the district court the authority to review the Appeals Council's decision to deny review. Additionally, there is no language in the Act that authorizes the district court to make a decision on the "substantial evidence standard" based on new and material evidence never presented to the ALJ. Instead, the Third Circuit proposed that the Act only gives the district court authority to remand to the Commissioner if the claimant proves good cause for failure to present the evidence earlier. Although the opposing circuits argued that the district court has an obligation to review all the evidence on the record, the Third Circuit reasoned that the purpose of transmitting the evidence with the record is for the district court's review if the claimant shows good cause for remand.

Consistent with its rationale, the Third Circuit found that this process was not unfair to Matthews or unfair to future claimants because under section 405(g), claimants still have the opportunity to have additional evidence reviewed if the evidence is new, material and there is good cause for not having offered the evidence earlier. Moreover, the Third Circuit noted that this reasoning is consistent with its prior opinions that require meeting the requirements in section 405(g). Rejecting Matthews' argument that there is no good cause requirement in the regulations, the power to try cases de novo, "resolve conflicts in the evidence, nor decide questions of credibility." See id. (suggesting federal district courts have authority to review decisions, not act as fact-finders).

118. See Matthews, 239 F.3d at 593 (noting district court cannot find against substantial evidence if ALJ did not have opportunity to weigh evidence in making his decision); Eads, 983 F.2d at 817 (finding ALJ cannot be faulted for not having taken into consideration doctor's letter that he never had chance to review).

119. See Perkins, supra note 98, at 4 (noting that court found no authorization in statutory provisions).

120. See id. (continuing discussion of holding).

121. See Matthews, 239 F.3d at 594 (suggesting if court interpreted statute any other way regulations and Act would be in conflict over good cause requirement); see also Cotton v. Sullivan, 2 F.3d 692, 695-96 (6th Cir. 1993) (reasoning in cases where Appeals Council has declined review, district courts may remand for consideration of new evidence only if it is material and claimant shows good cause); Gropman, supra note 1, at 762-63 (noting Sixth Circuit's rule that where Appeals Council denies review, district court cannot consider new evidence).

122. See Matthews, 239 F.3d at 594 (suggesting that evidence is not useless, but rather preserved for chance that claimant meets requirements in Act for review).

123. See Liskow, supra note 101, at 2 (indicating that Third Circuit believes if courts do not interpret section 405(g) in this manner, conflict will result between regulations and Act as to good cause requirement).

124. See Jones v. Sullivan, 954 F.2d 125, 128 (3d Cir. 1991) (finding on judicial review that claimant is not entitled to review of evidence not previously submitted to ALJ unless the claimant meets requirements in Act); Szubak v. Sec'y of HHS, 745 F.2d 831, 833 (3d Cir. 1984) (holding that claimant entitled to remand to consider additional evidence where claimant met good cause requirement in § 405(g)).
Third Circuit stated that the regulations are only used in administrative decision-making; judicial review is an entirely different process. Finally, the Third Circuit concluded that Matthews did not attempt to establish good cause for not having submitted the evidence to the ALJ; thus, she was not entitled to review of the medical evidence.

2. Policy Considerations

In Matthews, the Third Circuit made considerable mention that its decision is consistent with public policy. The Third Circuit rationalized that if disability claimants are not encouraged to submit all material evidence in advance, the courts will have to remand for each new item of additional evidence submitted. This practice, the Third Circuit explained, would “open the door for claimants to withhold evidence from the ALJ in order to preserve a reason for remand.”

125. See Matthews, 239 F.3d at 594 (rejecting Matthews’ claim because regulation only guides administrative decisions, whereas Act governs what evidence on record is reviewed for judicial review purposes).

126. See John W. Parry, Highlights, 25 MENTAL & PHYSICAL DISABILITY L. REP. 150, 153 (2001) (noting that Matthews’ argument that she did not realize the importance of obtaining evidence from vocational expert earlier was not sufficient good cause).

127. See Liskow, supra note 101 (discussing Third Circuit’s public policy arguments). The Third Circuit’s policy considerations seem appropriate considering the current state of disarray in disability proceedings. See Hearings, supra note 1, at 36 (testimony of Stanford G. Ross) (arguing regulations and rulings need to be reconsidered using “sound policy and administrative feasibility”). But cf. Magaldi, supra note 26, at 1083 (suggesting that claimants’ rights to due process require policy favoring their rights under system). One commentator argues that claimants’ rights to dignity should be afforded more weight in the adjudicative process:

An essential element of due process is respect for the dignity of the individual claimant. It is not enough that a process is available to adjudicate a claimant’s eligibility for benefits; the procedures should be crafted in such a way that the claimant, regardless of the outcome of the decision, has confidence and trust in the adjudication.

128. Id. Cf. Fine, supra note 33, at 1114 (arguing that depending upon circumstances, requests for remand may cause “unnecessary and wasteful expenditure of time and resources” on part of courts and claimants). In order to adjudicate claims more effectively, Congress could reconsider whether or not the record should officially be closed after the ALJ’s decision. See Hearings, supra note 1, at 39 (testimony of Stanford G. Ross) (arguing Congress and Administration should order record to close to eliminate changes in cases at every level of appeal). Particularly, disability claimants should submit all necessary evidence in advance, thereby removing the need to remand and expend valuable time:

Closing the record would heighten the need to develop the record as fully as possible before the decision is made in order to ensure that claimants are treated fairly. If new evidence emerges after the decision, a claimant would be able to make a new application, but finality would be achieved on the record presented before the hearing decision is made.

Id.

129. See Szubak, 745 F.2d at 834 (suggesting claimant might be tempted to withhold evidence to get another “bite at the apple” if claimant’s disability is denied); see also Wilkins v. Sec’y of HHS, 953 F.2d 93, 97 (4th Cir. 1991) (Chapman, J., dissenting) (“By allowing the proceedings to be reopened and remanded for
ing in *Matthews*, the Third Circuit recognized the need to encourage "speedy and orderly disposition" of Social Security claims. Consequently, the Third Circuit stated that sound policy encourages disability claimants to submit all relevant evidence to the ALJ unless there is good cause for not having done so. In effect, the Third Circuit inferred that this procedure contributes to a more efficient adjudication process.

Additional evidence, which is not really new, the majority is encouraging attorneys to hold back evidence and then seek remand for consideration of evidence that was available at the time of the ALJ hearing.

130. *See Matthews*, 239 F.3d at 595 (proposing policy necessitates its holding in order to contribute to more efficient Social Security system); *see also Hearings*, supra note 1, at 87 (testimony of Stanford G. Ross) (suggesting change is needed in disability review process because it is "slow and cumbersome").

In order to implement speed and efficiency in disability review, Congress could devise new reform measures to change parts of the system. *See Hearings*, supra note 1, at 81 (testimony of Ronald G. Bernoski) (arguing for Congress to reform Social Security Act). Specifically, instead of the ALJ and Appeals Council making the final administrative decisions, a new independent adjudication agency could provide claimants with timely, high quality and unbiased decisions. *See id.* (suggesting backlog of cases results in longer processing time for claims). Although independent, this agency would still function within the Social Security Administration, but judicial review would be of the final decision of this new agency, not the current administration in place. *See id.* at 86 ("SSA has a long history of trying to use the adjudicatory function to implement policy, rather than just to decide cases on their merits, which undermines the ALJ's ability to provide the claimants with timely, impartial, high quality and fair adjudications of their claims.").

131. *See Matthews*, 239 F.3d at 594-95 (implying claimants not only have burden to show good cause for remand, but also to consider foreseeable consequences of their claims). One speaker argues that Congress should adopt uniform procedures for claimants to follow, "such as requiring them (absent good cause) to submit all evidence within a specified number of days prior to the hearing and certify that the case is fully developed and ready for a hearing." *Hearings*, supra note 1, at 39 (testimony of Stanford G. Ross); *cf. Perkins*, supra note 98, at 5 (proposing that members of Allegheny Bar Association’s Social Security Practitioner’s Committee feel it is "better practice to present all material evidence to ALJ").

132. *See 130 CONG. REC. 12,981, 13,243 (1984) (statement of Mr. Domenici)* (suggesting Social Security Administration has duty to improve review process to protect claimants’ rights to disability insurance); *Gropman*, supra note 1, at 767 (arguing circuits must make efforts to "streamline and eliminate the perplexity" that exists with disability review procedures in order to allow program to help people in fair, timely and consistent manner); *Perkins*, supra note 98, at 5 (noting opinion of member of Allegheny County Bar Association’s Social Security Practitioner’s Committee that more efficient practice is necessary). Commenting on *Matthews*, Karl Osterhout, vice-chair of the Social Security Practitioner’s Committee said, "*[Matthews]* is very appropriate as the claimant’s case should be made to the ALJ and not the Appeals Council. If you have issues that you know about, they should be raised with the ALJ. If you don’t, you are taking a risk." *See id.* (commenting on case). Thus, the Third Circuit’s efforts to contribute to a more efficient system seem imperative because, "[d]espite efforts to establish a relatively straightforward, non-adversarial system, where the average applicant easily understands the process and procedures, [the social security system]... has become one of the least user-friendly bureaucracies known to the administrative state." *Sheehy*, supra note 3, at 104.
C. Advice for Practitioners Representing Disability Claimants in the Third Circuit

Although *Matthews* is a case of first impression in the Third Circuit, the Third Circuit is very straightforward in its interpretation of administrative review versus judicial review. It is imperative, therefore, that a practitioner representing a disability claimant is aware of and understands all of the steps available to the claimant. Through *Matthews*, the Third Circuit has expressed its intolerance toward claimants and claimants’ practitioners that do not take active participation in their cases. In order for disability claimants to ensure that all relevant medical evidence is reviewed, practitioners should follow these guidelines.

1. Administrative Review Level: Be on Alert

The Third Circuit has proposed that the ALJ review step is critical to a claimant’s appeal. At this stage, the Third Circuit suggests that the claimant is put on notice as to what types of jobs the Administration thinks the claimant is capable of performing, given the claimant’s abilities. For example, in *Matthews*, an impartial vocational expert testified, as required, that there were a considerable number of jobs Matthews could still perform, such as cashier. Moreover, the ALJ left the record open for Matthews to submit further medical evidence before the ALJ issued a decision. Matthews, however, did not submit any additional medical evidence until over seven months after the ALJ issued a final decision. Consequently, the Third Circuit was adamant that Matthews should have known, due to the vocational expert’s testimony at the ALJ hearing, that her ability to perform this type of sedentary work was at issue in the case. Because Matthews did not take this opportunity to gather any and

133. See *Matthews*, 239 F.3d at 592 (dividing line between application of administrative review procedures and judicial review procedures).

134. See *id.* at 594 (suggesting consequences of not following proper procedures).

135. See *id.* at 595 (stating that testimony at hearing was sufficient enough that claimant should have known what skills were at issue in case).

136. See *id.* (suggesting that by encouraging disability claimants to submit all necessary evidence to ALJ, system will not be abused and claimant will have material evidence considered).

137. See *id.* (arguing that vocational expert’s testimony at ALJ hearing indicated what skills were at issue to disability claim from that point forward).

138. See *id.* at 590-91 (discussing determination).

139. See *id.* at 590 (noting that after vocational expert testified, ALJ left record open for claimant to submit any additional evidence before rendering decision).

140. See *id.* at 591 (stating claimant submitted two-page letter and other documents from vocational expert over seven months after ALJ’s decision).

141. See *id.* at 595 (finding that it should have been clear to claimant after vocational expert rendered opinion that her arithmetic and reading skills were relevant to disability).
all evidence that might help prove her case, the Third Circuit concluded Matthews did not provide the requisite justification for remand.\textsuperscript{142}

In short, the Third Circuit commands that practitioners and claimants who do not take notice of foreseeable issues that develop in their claims will not be afforded the opportunity to present new evidence to the district court.\textsuperscript{143} Following this reasoning, practitioners should be on alert for any issues that may arise at the ALJ level, requiring submission of additional medical evidence for review. Furthermore, if the ALJ leaves the record open for the submission of additional evidence, practitioners should take this time to submit any and all pertinent medical evidence possibly helpful to the claimant's case.\textsuperscript{144} In light of this opportunity, if practitioners fail to submit the new evidence to the ALJ, practitioners should be aware that the Third Circuit requires that the claimant will then be subject to the stringent requirements of section 405(g) on appeal.\textsuperscript{145}

2. \textit{Judicial Review Level: Section 405(g) Takes Over}

Practitioners that fail to submit the additional evidence to the ALJ face a tough burden in the Third Circuit.\textsuperscript{146} As soon as the practitioner exhausts all administrative levels of adjudication, including the Appeals Council's decision to grant or deny review, the practitioner must direct the claimant's case toward meeting the requirements of section 405(g) of the Act, not the regulations.\textsuperscript{147} The Third Circuit does not stray from its conclusion that the Act, not the regulations, governs all judicial review determinations.\textsuperscript{148} It follows that a practitioner in the Third Circuit must be aware that the district court, under the Act, will only review the Commissioner's final decision to see if it is supported by substantial evidence.\textsuperscript{149} Specifically, the Third Circuit has stated that the district court

\begin{itemize}
\item \textsuperscript{142} See id. (deducing that claimant did not meet good cause requirement and district court decision stands).
\item \textsuperscript{143} See id. (implying claimants and practitioners have duty to follow up on testimony submitted at ALJ level with any necessary additional evidence that might have bearing on claimant's case).
\item \textsuperscript{144} See id. (insisting claimant even had further opportunity to submit evidence when ALJ left record open).
\item \textsuperscript{145} See id. at 592 (stating that claimant who is unsuccessful in administrative procedures may seek judicial review subject to requirements of \$ 405(g) of Act).
\item \textsuperscript{146} Compare id. at 593 (finding evidence not presented to ALJ cannot be reviewed by district court when determining if Commissioner's decision is supported by substantial evidence), with O'Dell v. Shalala, 44 F.3d 855, 858-60 (10th Cir. 1994) (holding all evidence will be reviewed by district court, even if not previously reviewed by ALJ).
\item \textsuperscript{147} See Matthews, 239 F.3d at 592 (finding that claimant may seek judicial review under \$ 405(g) once claimant receives final decision from Commissioner in administrative proceedings).
\item \textsuperscript{148} See id. at 594 (stating Social Security Act governs procedures for judicial review and district court should not follow regulations at this point).
\item \textsuperscript{149} See, e.g., Jones v. Sullivan, 954 F.2d 125, 127-28. (3d Cir. 1991) (stating that standard of review is whether there is substantial evidence to uphold Secretary's decision).
\end{itemize}
will only review evidence that was before the final decision-making body (i.e., ALJ when the Appeals Council denies review).\textsuperscript{150} Under the Third Circuit's decision, in order for the practitioner to obtain review of the claimant's new evidence, the practitioner must allege and prove that the evidence is new, material and that good cause exists for not presenting it earlier.\textsuperscript{151} As a result, if the practitioner does not strictly adhere to meeting the requirements of the Act, the district court will not review the claimant's additional evidence, despite its substantive value.\textsuperscript{152}

3. Policy Arguments: Not a Winner for the Practitioner

Finally, in Matthews, the Third Circuit, strongly stated its policy reasons for allowing a remand only for good cause.\textsuperscript{153} Therefore, a practitioner should not argue that public policy calls for giving the claimant another opportunity to submit evidence material to the outcome of the claimant's case.\textsuperscript{154} Although the evidence may in fact be material to the claimant's appeal, the Third Circuit explicitly stated that it believes its reasoning helps further the more important policy of adjudicating claims in the most efficient way possible.\textsuperscript{155} Under this rationale, a practitioner who focuses need for review of the claimant's evidence on policy grounds will waste his and the claimant's time. That is, the Third Circuit holds that the claimant is already afforded a sufficient number of occasions to submit additional evidence; as a last resort, the practitioner and claimant still have the chance to prove good cause to obtain review under section 405(g).\textsuperscript{156}

IV. Conclusion

The United States Court of Appeals for the Third Circuit's decision in Matthews indicates its objective to uphold Congress' goal of speedy, uni-

\textsuperscript{150} See Matthews, 239 F.3d at 593 (reasoning that although evidence becomes part of record, it is not reviewed by district court because ALJ cannot be faulted for not having weighed evidence he did not receive).

\textsuperscript{151} See id. at 592-93 (noting new evidence must meet three requirements of § 405(g) to be considered); Szubak v. Sec'y of HHS, 745 F.2d 831, 833 (3d Cir. 1984) (stating claimant must also show good cause for not having submitted evidence earlier). For instance, in Matthews, the claimant's problem was that she relied on the wording of the regulations and did not attempt to establish good cause for her failure to present the evidence earlier. See Matthews, 239 F.3d at 595 (alleging claimant failed to meet her burden of proving good cause).

\textsuperscript{152} See Matthews, 239 F.3d at 595 (noting that although district court felt evidence was material, it was not reviewed because claimant did not justify her failure to present it to ALJ).

\textsuperscript{153} For a discussion of the Third Circuit's policy considerations in Matthews, see supra notes 127-32 and accompanying text.

\textsuperscript{154} But cf. Magaldi, supra note 26, at 1083 (arguing claimants have right to "dignity" and opportunity for fairness in disability review procedures).

\textsuperscript{155} See Matthews, 239 F.3d at 595 (proposing it is "sounder policy" to impose obligation on claimants to submit all evidence to ALJ).

\textsuperscript{156} See id. at 591-93 (noting options open to claimant at administrative and judicial levels).
form and efficient adjudication of Social Security disability claims.\textsuperscript{157} Moreover, the Third Circuit's decision exemplifies the circuit's adherence to a strict interpretation of the requirements for review under the Social Security Act.\textsuperscript{158} After \textit{Matthews}, lower courts have followed the logic and reasoning set forth by the Third Circuit Court of Appeals.\textsuperscript{159} Although other circuits have defined the requirements for review more broadly, the Third Circuit warns practitioners and claimants that it will not simply allow remand every time the claimant wishes to submit new evidence.\textsuperscript{160} Through its holding, the Third Circuit reinforces a national aim for a system where claimants, practitioners, administrators and courts work together to develop a consistent and successful Social Security disability claims review process.

\textit{Kelly Huntley}

\textsuperscript{157} For a discussion of Congress' goals for Social Security disability insurance, see \textit{supra} notes 16-21 and accompanying text.

\textsuperscript{158} For a discussion of the Third Circuit's interpretation of judicial review requirements, see \textit{supra} notes 101-26 and accompanying text.


\textsuperscript{160} See \textit{Matthews}, 239 F.3d at 595 (suggesting court does not want to encourage practitioners and claimants to withhold evidence in order to obtain remand at later time).