07-0922-cv

To Be Argued By:
ANN M. NEVINS

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-0922-cv

PATRICIA A. KREIDLER
Plaintiff-Appellant,

-vs-

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

==========

BRIEF FOR THE UNITED STATES OF AMERICA

==========

KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

ANN M. NEVINS
SANDRA S. GLOVER
Assistant United States Attorneys

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

OTHER AUTHORITIES

Statement of Jurisdiction

The United States District Court for the District of Connecticut (Peter C. Dorsey, J.) had subject matter jurisdiction over Patricia A. Kreidler's appeal from a decision of the Social Security Administration (SSA). 42 U.S.C. § 405(g). The final agency decision was dated October 18, 1997, and Kreidler filed suit in district court on November 25, 1997. (AR 5; JA 3).[1]

On June 23, 1998, the district court ordered the case remanded to SSA pursuant to sentence six, 42 U.S.C. § 405(g), and the case was closed. (JA 4). After remand, the district court case was reopened so that Kreidler could seek review of SSA's decision denying her request to reopen a 1982 denial of disability insurance benefits. (JA 4). On June 19, 2006, the district court (Joan Glazer Margolis, M.J.) entered a recommended ruling in favor of SSA to which Kreidler objected. (JA 6). Kreidler's objection challenged whether SSA had deprived Kreidler of her right to due process of law under the Constitution in making its decision. (JA 52-53). On January 9, 2007, the district court approved and adopted the recommended ruling after conducting a *de novo* review of the record, and

---

[1] Appellant filed the record in this case in two volumes. The first volume, captioned "Administrative Record of Social Security Decision," is referenced herein as "(AR [page number])." The second volume, captioned "Joint Appendix," is referenced herein as "(JA [page number])".

overruled Kreidler's objection. (JA 6; 42-65). Judgment entered January 10, 2007. (JA 6).

On March 6, 2007, Kreidler filed a notice of appeal with respect to the district court's January 9, 2007 ruling within the 60 days permitted by Fed. R. App. P. 4(a). (JA 7). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291, and *Califano v. Sanders,* 430 U.S. 99 (1977).[2]

Simultaneously, however, Kreidler filed a motion for reconsideration and a motion to vacate judgment. (JA 7). In her motion for reconsideration Kreidler raised for the first time the argument that SSA had constructively re-opened the 1982 denial of disability insurance benefits. (JA 179-80).

In light of the pending motion in the district court, and in light of the possibility of settlement, the parties agreed to withdraw the appeal from active consideration and an order to that effect entered dated April 25, 2007. When settlement discussions failed to result in a resolution, the appeal was reinstated on September 10, 2007.

---

[2] The Administrative Procedure Act generally does not permit district court review of an appeal from an agency decision denying a request to open an earlier denial of relief. However, in two circumstances such review is permitted: (1) when there is an allegation of a denial of due process of law under the Constitution, *Sanders*, 430 U.S. at 107-109; and (2) when the agency has constructively reopened the denial, *Byam v. Barnhart*, 336 F.3d 172, 180 (2d Cir. 2003).

In the interim, on May 8, 2007, the district court entered a ruling denying Kreidler's motion for reconsideration and motion to vacate the district court's January 9, 2007 ruling. (JA 7; 174-81). No notice of appeal was filed as to the May 8, 2007 ruling and no amendment to the notice of appeal filed with respect to the January 2007 judgment was filed. Pursuant to Fed. R. App. P. 4(a)(1), this Court has no jurisdiction to review the May 8, 2007 decision.

Statement of Issues Presented for Review

I. Was the administrative law judge's determination – that Kreidler failed to establish that the reason she did not file an appeal of the Social Security Administration's 1982 denial of her application for disability insurance benefits was due to mental retardation or mental incapacity – based on substantial evidence and based on application of the correct legal standards?

II. Does Kreidler's failure to file a notice of appeal or amended notice of appeal after the district court entered its May 2007 ruling denying the post-judgment motions to vacate and for reconsideration deprive this Court of jurisdiction to review that ruling?

III. Assuming *arguendo* this Court has jurisdiction to review the district court's May 2007 ruling denying the post-judgment motions to vacate and for reconsideration, or, otherwise has jurisdiction to hear Kreidler's argument that the ALJ constructively reopened Kreidler's 1982 disability insurance benefits application, should this Court affirm the district court's discretionary decision to reject that argument as untimely?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-0922-cv

PATRICIA A. KREIDLER,
Plaintiff- Appellant,

-vs-

MICHAEL J. ASTRUE,
COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Through this appeal Patricia A. Kreidler seeks allowance of social security disability insurance benefits (DIB) for the period from approximately 1981 through approximately 1993. Kreidler has already been awarded DIB for the period from approximately 1993 through the present.

To support her contention that the Social Security Administration (SSA, or the Commissioner) improperly declined to reopen a 1982 denial of DIB, Kreidler advanced two theories: (1) SSA deprived her of due process of law because SSA failed to properly apply its ruling, SSR 91-5p, to the facts and circumstances of this case; and (2) SSA improperly weighed evidence of her alleged mental retardation. The district court rejected both arguments. After judgment entered, Kreidler sought reconsideration – which was denied – based on a third theory, namely that SSA constructively reopened its 1982 denial of DIB and should be required to reopen the denial as a substantive matter to grant benefits to Kreidler back to 1981.

With respect to the issues properly raised in the district court case, Kreidler received all the process due to her under the particular facts and procedural posture of her case, and the administrative law judge (ALJ) properly weighed the evidence of record in determining that Kreidler had the mental capacity to understand and to perform the steps required to seek review of the 1982 denial of her DIB application (1982 Denial).

Kreidler raised the constructive reopening argument for the first time during the nine year history of the district court litigation after the district court's judgment had entered. For this reason, and because no notice of appeal was filed after the district court's ruling denying consideration of that new claim, the Court should decline to consider this argument. Assuming *arguendo* the Court considers the constructive reopening argument

notwithstanding that it was raised for the first time after judgment and was not considered substantively by the district court, relief should be denied because the argument is devoid of merit.

Statement of the Case

Kreidler initially applied to SSA for DIB in 1982, alleging disability since 1975; this application was denied on July 7, 1982 . (AR 634-36). Two years later, in 1984, Congress enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (the "Disability Reform Act"), which required the Secretary of Health and Human Services to revise the mental-impairment criteria for disability benefits. The Disability Reform Act further permitted claimants who were denied claims for social security benefits based on alleged mental impairments during the period from approximately 1981 through 1985 to reapply for benefits but only if they re-applied before October 9, 1985; in such cases, applicants could only be found disabled on the basis of their new applications. 98 Stat. 1794, § 5.

In other words, the 1984 Disability Reform Act permitted claimants who alleged mental impairment and received a denial between 1981 to 1985 to reapply for benefits before October 9, 1985, but limited the relief available so that the original denial of claim would not be reopened. 98 Stat. 1794, § 5.

Kreidler did not re-apply for DIB until December 13, 1994, when she again alleged disability since 1975. (AR

36-39). This application was denied initially and Kreidler, proceeding at that time as a *pro se* claimant, timely filed the paperwork necessary to seek reconsideration. (AR 45). The application was denied on reconsideration and Kreidler, with the assistance of counsel for the first time, sought a hearing before an administrative law judge (the first ALJ). (AR 47-50; 51). At the time of this hearing, counsel requested reopening of the 1982 application in addition to the grant of benefits in connection with her 1994 application. (*See* AR 32).

On January 21, 1997, the first ALJ found Kreidler disabled with regard to her 1994 application, but failed to address her request for reopening of her 1982 application. (AR 13-16). On October 18, 1997, the Appeals Council denied review, stating that Kreidler had failed to demonstrate entitlement to reopening. (AR 5-7). Kreidler then filed a timely suit for judicial review in the district court on November 25, 1997. (JA 3).

In June 1998, the district court granted the Commissioner's motion for a voluntary remand for the purpose of obtaining an express ruling as to whether Kreidler was entitled to reopening on the ground that she lacked the mental capacity to appeal her 1982 claim in a timely fashion. (AR 628-30; JA 4). In January 1999, a second ALJ (the second ALJ) held a hearing on Kreidler's request for reopening. (AR 612-27). On March 23, 1999, the second ALJ denied her request for reopening. (AR 599-608). On October 2003, the Appeals Council declined

review, stating that the second ALJ had provided adequate reasons for declining reopening. (AR 585-86).

On January 16, 2004, the district court granted Kreidler's request to reopen the district court case and on June 19, 2006, Magistrate Judge Joan Glazer Margolis entered a Recommended Ruling granting the Government's motion to dismiss the action. (JA 4; 6;13-41). Kreidler objected to the Recommended Ruling on the ground that "she is mentally retarded and has a personality disorder, and thus lacked the mental capacity to comprehend the notice of denial of her application for DIB and to act on the notice and file an appeal without assistance." (JA 53) (describing Kreidler's arguments). Kreidler did not object to the Recommended Ruling on the ground that SSA had constructively reopened the 1982 Denial of the DIB application. (JA 53).

District Judge Peter C. Dorsey conducted a *de novo* review of the record and entered a ruling approving and adopting the Recommended Ruling on January 9, 2007. (JA 42-65). Judgment entered January 10, 2007. (JA 6). On March 6, 2007, Kreidler moved to vacate the judgment and for reconsideration of the objection to the recommended ruling, arguing for the first time that the agency had constructively reopened the 1982 Denial of Kreidler's DIB application. (JA 7; 163-70).

Kreidler also filed a Notice of Appeal on March 6, 2007. (JA 1; 7). By stipulation of the parties, on April 25, 2007, the resulting appeal pending with this Court was

withdrawn without prejudice to reinstatement. (JA 1; 7).

On May 8, 2007, the district court denied Kreidler's motion for reconsideration and motion to vacate the district court's January 9, 2007 ruling. (JA 7; 174-81). Kreidler did not file an amended notice of appeal, nor did she file a notice of appeal after the May 8, 2007 ruling. (JA 7).

The appeal was reinstated to this Court's docket on September 10, 2007.

Statement of Facts and Proceedings Relevant to this Appeal

A. The claimant's medical history

Kreidler was 31 years old on June 30, 1976 (the month her insured status expired) and 37 years old when her first application was denied in July 1982. (AR 36; 56; 634). She graduated from high school and worked as a nurse's aide, housekeeper and inspector. (AR 68). She reported that she last worked in August 1975. (AR 64). In 1981, Kreidler described herself as a "fulltime housewife" and said she had quit working after she got married for the second time (on June 28, 1975). (AR 250; 37).

In June 1976, Kreidler was seen by neurologist Dr. Bobowick due to a possible seizure immediately after her second child was born. (AR 286). At this point, she reported a remote history of psychiatric treatment, which she attributed to "a very bad marriage" to an "alcoholic,

drug abusing husband" (who she divorced in 1973). (AR 37; 286). No current psychological problems were described by her at that time – and Dr. Bobowick noted no mental abnormalities beyond grogginess (possibly due to medication). (AR 286). In August, Kreidler told Dr. Bobowick that phenobarbital was causing drowsiness and confusion, so he adjusted her medication accordingly. (AR 285).

In December 1981, Kreidler was hospitalized following an overdose of her anti-seizure medications. (AR 250). On mental status examination, she appeared tired but calm; her mood was anxious and depressed but her affect was generally appropriate. (AR 251). She was fully oriented, but displayed some anxiety when asked questions. (AR 251). Her intelligence appeared to be in the low average range. (AR 251).[3] The source of her distress appeared to be marital and family difficulties. (AR 253). Her condition on discharge was "improved" and her prognosis was described as "fair" on medications. (AR 254).

In early 1982, Kreidler received chiropractic treatments for aches and pains in her joints. (AR 255-58). Later that year, her chiropractor said she had also been seen for complaints of memory lapses and general disorientation, which he attributed to possible metabolic imbalances. (AR

---

[3] IQ testing in 1967 showed an overall score of 66, which was described as within the mildly retarded range. (AR 108; 112). Other than references to the 1967 IQ test, which is not itself of record, the record does not contain any other report of Kreidler's IQ.

474-75). In December 1984, Kreidler returned to Dr. Bobowick for the first time since 1976. (AR 285). She reported experiencing occasional "spells" that caused a "swimming sensation in her head" and a sense of euphoria, followed by sleepiness. (AR 285). No current mental complaints were described by Kreidler at this time – other than a sense that going out into crowds might trigger her spells. (AR 285).

In August 1985, Kreidler was hospitalized for complaints of severe knee pain; no mental complaints were voiced at this time. (AR 288). In March 1986, Dr. Eisen reported that he could find no neurological basis for Kreidler's complaints of low back and right leg pain. (AR 369-71). In August 1986, Kreidler told Dr. Sterling that she had admitted herself to Merriman Hall three or four years previously due to "unusual phenomena with memory loss and other abnormal behavior." (AR 453).[4]

In September 1992, Kreidler was seen by Dr. Eisen for complaints of visual problems that she said began around nine years previously, following an auto accident. (AR 365). Dr. Eisen could find no neurological explanation for her symptoms. (AR 366).

In June 1994, Kreidler was involved in an automobile accident, and after that point she supposedly began experiencing forgetfulness and recent memory loss. (AR

---

[4] Earlier that year, when Dr. Eisen asked Kreidler about her treatment at Merriman Hall, she and her husband were "quite offensive" and provided no information. (AR 369).

319-20). In December 1994, Dr. Kenneth Kaplove noted both memory problems and newly-developed psychomotor retardation. (AR 382-84).

A state agency physician who reviewed Kreidler's medical records in May 1996 concluded that, as of her date last insured (the end of June 1976), she did not meet or equal any listed impairment and should have been able to do simple work not involving much public contact. (AR 83-94). The reviewing psychologist noted that the 1967 IQ score did not correlate with Kreidler's educational background or her social-occupational history. (AR 84, 87).

B. The applications for disability benefits in 1982 and 1994

Kreidler initially applied for benefits in 1982, alleging disability since 1975; this application was denied on July 7, 1982. (AR 634-36). Subsequently, Congress enacted the Disability Reform Act, which created new standards for evaluation of disability due to mental impairment. 42 U.S.C. § 423(f); 98 Stat. 1794, § 5(a). These standards were made retroactively applicable to persons in Kreidler's situation, but only if they re-applied before October 9, 1985; in such cases, applicants could only be found disabled on the basis of their new applications. *See* 98 Stat. 1794, § 5(c)(3).

Kreidler did not re-apply for disability insurance benefits until December 13, 1994, when she again alleged

disability since 1975. (AR 36-39).[5] This application was denied initially and Kreidler, proceeding at that time as a *pro se* claimant, timely filed the paperwork necessary to seek review. (AR 45). The application was declined on reconsideration and Kreidler, with the assistance of counsel for the first time, sought a hearing before an administrative law judge (the first ALJ). (AR 41-44; 47-50; 51). At the time of this hearing, counsel requested reopening of the 1982 application in addition to grant of benefits in connection with her 1994 application. (AR 32).

On January 21, 1997, the ALJ found Kreidler disabled with regard to her 1994 application, but failed to address her request for reopening of her 1982 application. (AR 13-16). The Appeals Council denied review, stating that Kreidler had failed to demonstrate entitlement to reopening. (AR 5-7). Kreidler then filed a timely suit for judicial review in the district court. (JA 3).

C. The district court decision

Kreidler sought review of the Agency's decision claiming that SSA had deprived her of her constitutional right to due process when it rejected her request to reopen the 1982 Denial. (JA 3). On May 21, 1998, the Commissioner moved to voluntarily remand the case to SSA for the purpose of having an ALJ articulate the basis for the denial of Kreidler's request that the 1982 Denial be

---

[5] In December 1994, Kreidler reported that she did not file an appeal of her 1982 denial decision "because my 2nd husband would not let me appeal." (AR 64).

reopened, and to consider Kreidler's mental capacity to understand and act upon her right to seek review of the 1982 Denial in a timely fashion. (JA 3; 9-11).

In June 1998, the district court granted the Commissioner's motion for a voluntary remand. (AR 628-30; JA 4).

D. The agency decision on remand

In January 1999, a second ALJ held a hearing on Kreidler's request for reopening the 1982 application. (AR 612-27). On March 23, 1999, the second ALJ denied her request for reopening. (AR 599-608).

The second ALJ articulated the legal standard applicable to Kreidler's request for reopening of the 1982 Denial. In particular, he noted the four year period after a decision during which a claimant may seek reopening for good cause, pursuant to 20 C.F.R. § 404.988(b). (JA 601). He also noted the discretionary criteria for extending a deadline to appeal a denial after the four year period, as provided in SSR 91-5p. (JA 601).

The second ALJ gave specific reasons for declining to reopen the 1982 Denial. (AR 602-605). The second ALJ held that there was "no evidence that mental incompetence or an inability to understand the appeal requirements prevented the claimant from filing a timely appeal, continuously, from 1982 through 1994. Rather, other factors materially contributed to the lengthy delay until she made an **implied** request to reopen by filing her second

claim in December 1994, over ten years later." (JA 601) (emphasis in original).

In reaching this conclusion, the second ALJ noted that the Appeals Council did not comment adversely on the findings of disability by the first ALJ. (JA 601). He also determined that *res judicata* principles would not be applied in the case because the claimant had not received a hearing before the 1982 Denial and therefore SSA would not preclude a finding of disability as of her date last insured (1975) due to *res judicata*. (JA 602).

The second ALJ found it significant that Kreidler filed her Disability Report dated December 12, 1994, having filled it out by hand. (JA 602). "She gave detailed answers about her medical, educational and job background which clearly contradict counsel's argument that due to IQ, memory and emotional difficulties, she [had] been unable to understand or pursue an appeal." (JA 602; 64-71). The second ALJ found that Kreidler and not SSA staff had completed much if not all of the Disability Report. (JA 602).

It was also significant to the second ALJ that Kreidler expressly stated in her handwritten report that her long delay in renewing her disability claim was because her second husband "would not let" her appeal the 1982 Denial. (JA 602; 64). The second ALJ also noted that Kreidler's counsel had "not offered any recent treating source opinion to confirm his argument that mentally and emotionally, the claimant could not understand or pursue an appeal for over ten years – continuously." (JA 602).

The second ALJ weighed the fact that Kreidler testified that she did not recall the events of the 1982 timeframe, and not that she did not understand the denial notice. (JA 603). However, Kreidler kept the initial denial notice and made it available to her counsel. (JA 603). Importantly, two months before Kreidler retained her counsel, in March 1995, Kreidler filed her request for reconsideration on her own. (JA 603; 45).

With regard to the application of the regulations for extending the time to reopen a denial of a claim, the second ALJ stated,

> [i]t is not sufficient to show that an individual has been treated for a mental condition or alleges memory difficulties. What must also be established is that the individual's mental incompetence "prevented" her from either (1) pursuing an appeal or (2) understanding the need to file a timely appeal. Counsel has not submitted any testimony or specific medical opinion to show either of these two key facts. Rather, he has presented testimony that in general, she does not **currently** recall her 1982 application.

(JA 603).

In evaluating the medical evidence presented by Kreidler, the second ALJ noted the following:

- William Matchett, M.D., claimant's treating psychiatrist from 1967 through 1968, diagnosed

Kreidler with a hysterical personality disorder, with below average but not retarded intellectual level. He described her limitations as between none and moderate in two extensive checklists with no large or extreme limitations. He noted her psychological testing showed an IQ of 66 but "No evidence of organicity," nor of schizophrenia; and "many somatic concerns and fear of emotions." (JA 603-604).

- Dr. Matchett's treatment records showed that "treatment was needed for [Kreidler's] emotional and marital difficulties, and that her emotional disorders may have impacted upon her [IQ] test score." (JA 604).

- Tim Schumacher, Ph.D., a state agency disability consultant, opined in 1996 that Kreidler's IQ score of 66 probably was a "significant underestimate of her potential." (JA 604). Dr. Schumacher "cited multiple details of her social, educational and treatment background inconsistent with that single score." (JA 604). The second ALJ also noted that the record did not contain the full psychologist's report with that score, making the testing psychologist's own assessment of the IQ score's validity unavailable. (JA 604).

- K. David Schultz, Ph.D., and Soledad Araya, M.D., reported in 1981 that Kreidler was observed for possible suicidal ideation after an overdose of prescribed medication. Her prior hospitalization was

fifteen years earlier. They estimated her intelligence was in the low average range. (JA 604).

- In June 1976, Kreidler was examined by A. Bobowick, M.D., a neurologist who diagnosed a possible idiopathic seizure disorder and possible hysterical disorder, but not material retardation or memory impairments. (JA 604).

- Records of John Salerno, M.D., an internist, reflect a 1993 diagnosis of seizure disorder, arthritis and other physical problems but not retardation or any organic mental disorder. (JA 604-605).

In October 2003, the Appeals Council declined review of the second ALJ's 1999 decision, stating that the second ALJ had considered the record carefully and provided supporting rationale for denying the reopening of the 1982 Denial. (AR 585-86).

E. The district court decision after remand

On December 1, 2003, Kreidler filed a motion to reopen the district court case, which had been closed after the order of voluntary remand. (JA 4). The case was reopened by order of the district court on January 16, 2004. (JA 4). On June 19, 2006, Magistrate Judge Margolis issued a Recommended Ruling in favor of the Commissioner. (JA 6; 13-41). Kreidler objected to the Recommended Ruling on June 29, 2006. (JA 6). After conducting a *de novo* review of the case, the district court (Peter C. Dorsey, Sr. J.) entered a Ruling approving and

adopting the Recommended Ruling on January 9, 2007. (JA 6; 42-65). On January 10, 2007, the district court entered judgment. (JA 6).

In her argument to the district court, Kreidler asked the district court,

> to reopen the denial of her 1982 application and to extend the time for filing an appeal of that denial on grounds that defendant's failure to reopen the denial of the 1982 application and the failure to permit her to pursue and appeal that decision denies her of her constitutional right to due process of law.

(JA 30; *see also* 52-53).[6]

The district court's decision made several findings in overruling Kreidler's objection and denying her motion. First, the district court found that the second ALJ applied the correct legal standards and made detailed factual findings in denying the request to reopen. (JA 59).

---

[6] Kreidler did not argue at any time prior to judgment that the second ALJ had constructively reopened the 1982 application for disability benefits, and neither the magistrate judge's opinion nor the district court's opinion address a constructive reopening argument. (JA 13-41; 42-65).

Specifically, the court found that, "[a]lthough the record is replete with references to Plaintiff's personality disorder and various psychological problems, there is not sufficient evidence to conclude that Plaintiff is mentally retarded or that her mental incapacity 'prevented [her] from understanding the review process,' so as to support a finding that good cause exists to reopen her 1982 application." (JA 64).

The district court rejected Kreidler's argument that her alleged extreme dependence on others was probative or controlling, because "the evidence supplied was not sufficient to conclude that this 'prevented [Kreidler] from filing a timely request or from understanding or knowing about the need to file a timely request for review' of her 1982 application." (JA 64-65).

The district court concluded, after reviewing the second ALJ's determination and the record, that the second ALJ had applied correct legal principles and that the determination was supported by substantial evidence. (JA 65). Accordingly, the district court dismissed Kreidler's complaint. (JA 65).

F. The post-judgment motions

The clerk entered judgment in favor of SSA on January 10, 2007. (JA 6). On March 6, 2007, Kreidler filed a notice of appeal, a motion for reconsideration and a motion to vacate. (JA 7). For the first time, Kreidler advanced the argument that the second ALJ had constructively reopened the 1982 application. (JA 13-41; 42-65; 163-170; 180).

On May 8, 2007, the district court rejected this argument as untimely under both Fed. R. Civ. P. 59 and 60(b). (JA 174-81). In doing so, the district court noted that motions under Fed. R. Civ. P. 59 must be filed within ten days from the date of the entry of judgment, ruling or order at issue, and this was not done. (JA 6-7; 178). Accordingly, the district court considered the motion filed pursuant to Fed. R. Civ. P. 60(b)(1) or (6). (JA 178).

Noting that Rule 60(b) motions are "addressed to the sound discretion of the district judge and are generally granted only upon a showing of exceptional circumstances," the district court denied the motion. (JA 178). The district court found that Kreidler presented no justification or extraordinary circumstances "explaining her failure to raise the constructive reopening issue earlier in the litigation, completely evading the issue" in her briefs to the district court. (JA 180-81). The district court thus concluded that Kreidler had failed to meet her burden to show that relief from the judgment was appropriate and denied the motion. (JA 181).

Kreidler filed a timely notice of appeal with respect to the judgment within the 60 days permitted by Fed. R. App. P. 4(a), on March 6, 2007. (JA 7). However, Kreidler failed to file a notice of appeal or an amended notice of appeal as to the district court's May 2007 denial of her post-judgment motions. (JA 7).

Summary of Argument

I. There is no dispute that Kreidler was disabled as of June 30, 1976, when her insured status expired, due (in part) to mental problems prior to that date. Rather, the sole issue before this Court is whether SSA deprived Kreidler of her constitutional right to due process when it denied her request to reopen the 1982 Denial.[7]

After a voluntary remand to the Agency, the SSA properly denied Kreidler's request to reopen the 1982 Denial. The second ALJ appropriately reviewed and weighed the evidence of record and determined that Kreidler had failed to establish by substantial evidence that at the time of the 1982 Denial she suffered from a mental impairment or combination of impairments which prevented her from understanding the steps required to seek review of the denial, or which prevented her from taking such steps. This is so because Kreidler admitted that the reason she did not seek review of the 1982 Denial was because her husband would not let her do so, and because other substantial evidence of record indicates she was capable of understanding the steps required to seek review of the denial, and was capable of taking such steps.

---

[7] Because Kreidler was granted DIB based on her 1994 application (and thus has received DIB since one year before that application), the practical effect of a reopening of the 1982 DIB application would be to permit Kreidler to collect benefits for the period from one year prior to her 1982 application (1981) through the commencement date of DIB based on her 1994 application (1993).

Moreover, Kreidler, as a *pro se* claimant twelve years later, was able to seek review of her 1994 DIB application without assistance.

II. Throughout the district court litigation, Kreidler failed to raise the issue of whether the ALJ constructively reopened the 1982 Denial. More than ten (10) days after judgment entered, Kreidler filed a motion for reconsideration of the district court's dismissal of the case, raising the constructive reopening issue for the first time. On May 8, 2007, the district court entered a ruling denying the motion to reconsider, but Kreidler failed to file a notice of appeal or to amend her March 6, 2007 notice of appeal. Pursuant to Fed. R. App. P. 4(a)(1)(B), this Court has no jurisdiction to review the district court's May 8, 2007 ruling.

Furthermore, this Court should decline to consider Kreidler's constructive reopening claim as a matter of the Court's discretion to consider issues raised for the first time on appeal. Although this Court will consider issues raised for the first time on appeal, that discretion should not be exercised here, where the issue in question is not a purely legal question.

III. In the event the Court determines that there is no jurisdictional bar to its review of Kreidler's constructive reopening claim, the Court should nonetheless deny relief since it has no merit. The district court acted well within its broad discretion to reject Kreidler's constructive reopening claim, raised for the first time in a nine-year old case after judgment was entered, because she offered no

explanation to justify her delay in raising that claim. In any event, Kreidler's constructive reopening argument is meritless. The ALJ properly considered the record to evaluate Kreidler's 1994 application for benefits. Although the evidence for this claim overlapped with the evidence relevant for her 1982 application, the ALJ did not constructively reopen the prior claim.

Argument

I. The ALJ's decision denying Kreidler's request to reopen the 1982 Denial was reached using the correct legal standards and is supported by substantial evidence.

A. Relevant facts

All facts relevant to the argument can be found in the Statement of Facts, above.

B. Standard of review and governing law

1. Standard of review

A federal court's review of the Commissioner's denial of disability benefits is limited to determining whether the denial was premised on an error of law or is otherwise not supported by substantial evidence. *See* 42 U.S.C. § 405(g); *Byam v. Barnhart*, 336 F.3d 172, 179 (2d Cir. 2003); *Veino v. Barnhart*, 312 F.3d 578, 586 (2d Cir. 2002); *Yancey v. Apfel*, 145 F.3d 106, 111 (2d Cir. 1998). "Where the Commissioner's decision rests on adequate findings supported by evidence having rational probative

force, we will not substitute our judgment for that of the Commissioner." *Veino*, 312 F.3d at 586; *Yancey*, 145 F.3d at 111. However, "[t]he deferential standard of review for substantial evidence does not apply to the Commissioner's conclusions of law." *Byam*, 336 F.3d at 179 (citing *Townley v. Heckler*, 748 F.2d 109, 112 (2d Cir. 1984)). This Court reviews the district court's decision *de novo*, applying the same standard of review of the agency's decision as the district court. *Veino*, 312 F.3d at 586; *Brown v. Apfel*, 174 F.3d 59, 61-62 (2d Cir. 1999) (per curiam).

Judicial review of SSA's decisions is limited by statute; a court may only set aside a determination which is based upon legal error or not supported by substantial evidence. 42 U.S.C. § 405(g); *accord Yancey*, 145 F.3d at 111. "Substantial evidence 'is more than a mere scintilla' and 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *accord Perez v. Chafer*, 77 F.3d 41, 46 (2d Cir. 1996). The "substantial evidence" standard also applies to judicial review of agency determinations as to whether an applicant's mental condition raises a due process violation. *Stieberger v. Apfel*, 134 F.3d 37, 41 (2d Cir. 1997).

Review is limited to the Commissioner's final decision and the evidence and findings on which that decision is based. 42 U.S.C. § 405(g). Where an administrative decision rests on adequate findings sustained by evidence having rational probative force, the court should not substitute its judgment for that of the agency. *See Veino*,

312 F.3d at 586. The findings of the Commissioner, if supported by substantial evidence, should be upheld even in those cases in which the reviewing court, had it heard the same evidence *de novo*, might have found otherwise. *Rutherford v. Schweiker*, 685 F.2d 60, 62 (2d Cir. 1982).

2. Governing law

a. Finality of agency decisions and agency review process

In order to prevail on an application for DIB, a claimant bears the burden of establishing that her impairments reached disabling proportions on or before the date when her insured status expired. *Wagner v. Secretary of Health and Human Services*, 906 F.2d 856, 860 (2d Cir. 1990); *Arnone v. Bowen*, 882 F.2d 34, 37-38 (2d Cir. 1989).

42 U.S.C. § 405(g) permits judicial review of final SSA decisions. The Supreme Court has recognized that "[t]his provision clearly limits judicial review to a particular type of agency action, a 'final decision . . . .'" *Sanders*, 430 U.S. at 108 (quoting statute). Although the term "final decision" remains undefined in the Social Security Act, "its meaning is left to the [Commissioner] to flesh out by regulation." *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975). The regulations, in turn, provide that a claimant must complete a four-step administrative review process in order to obtain a judicially reviewable final decision. 20 C.F.R. §§ 404.900(a); *see also Sanders*, 430 U.S. at 102 ("[t]he Act and regulations thus create an orderly

administrative mechanism, with district court review of the final decision of the [Commissioner]."). If the claimant does not pursue administrative appeal rights, the administrative determination or decision becomes binding. 20 C.F.R. §§ 404.905, 404.921, 404.955, 404.981.

Under the Commissioner's regulations, an individual claiming entitlement to benefits first receives an initial determination. 20 C.F.R. § 404.902. If dissatisfied with this determination, the claimant may request reconsideration. 20 C.F.R. § 404.907. If the claimant is dissatisfied with the reconsidered determination, he or she may request a hearing before an ALJ. 20 C.F.R. §§ 404.929, 422.203. If the ALJ's hearing decision is unsatisfactory to the claimant, she may request a review of the decision by the Appeals Council. 20 C.F.R. §§ 404.967, 422.205. The Appeals Council may dismiss a request for review, deny the request for review and allow the ALJ's decision to stand as the final decision of the Commissioner, grant the request for review and remand the claim to an ALJ, or grant the request for review and issue its own decision. 20 C.F.R. §§ 404.971, 404.977, 404.981. When the Appeals Council dismisses a request for review, the dismissal is binding and not subject to further review. 20 C.F.R. § 404.972. When the Appeals Council denies a request for review or grants the request and remands the case for a new ALJ decision or issues its own decision, the claimant may *then* seek judicial review of the Commissioner's final decision by filing an action in federal district court within sixty (60) days after receiving notice of the Appeals Council's action. 20 C.F.R. § 404.981; *see also* 20 C.F.R. § 422.210.

When a claimant fails to timely request further review during the administrative process, SSA's regulations set forth the circumstances under which such failure may be excused:

> In determining whether you have shown that you had good cause for missing a deadline to request review we consider–
>
> (1) What circumstances kept you from making the request on time;
> (2) Whether our action misled you;
> (3) Whether you did not understand the requirements of the Act resulting from amendments to the Act, other legislation, or court decisions; and
> (4) Whether you had any physical, mental, educational, or linguistic limitations . . . which prevented you from filing a timely request or from understanding or knowing about the need to file a timely request for review.

20 C.F.R. § 404.911(a).

The rules on administrative finality provide that a final determination or decision cannot be reopened more than four years from the date of the notice of the initial determination on a claim. 20 C.F.R. §§ 404.987, 404.988, 404.989. However, where a claimant establishes good cause for missing a deadline to request further review, the

prior administrative action is treated as not final or binding for purposes of applying the rules on either *res judicata* or administrative finality. *See* Social Security Ruling 91-5p.

As a matter of SSA policy, under appropriate circumstances, evidence that mental incapacity may have prevented a claimant from understanding the review process may be used to excuse non-compliance with filing deadlines. When a claimant presents evidence that mental incapacity prevented her from timely requesting further required review, and the claimant had no one legally responsible for prosecuting the claim at the time of the prior administrative action, SSA determines whether or not there is good cause that warrants extending the time to request review. Social Security Ruling 91-5p provides, in relevant part:

> The claimant will have established mental incapacity for the purpose of establishing good cause when the evidence establishes that he or she lacked the mental capacity to understand the procedures for requesting review.
>
> In determining whether a claimant lacked the mental capacity to understand the procedures for requesting review, the adjudicator must consider the following factors as they existed at the time of the prior administrative action:
> – inability to read or write;
> – lack of facility with the English language;
> – limited education;

> – any mental or physical condition which limits the claimant's ability to do things for him/herself.
>
> If the claimant is unrepresented and has one of the factors listed above, the adjudicator will assist the claimant in obtaining any relevant evidence. The decision as to what constitutes mental incapacity must be based on all the pertinent facts in a particular case. The adjudicator will resolve any reasonable doubt in favor of the claimant.

SSR 91-5p.

"[A] claimant's argument that she was so impaired as to be unable to pursue administrative remedies requires more than a 'generalized allegation' of confusion; it requires a 'particularized allegation of mental impairment plausibly of sufficient severity to impair comprehension.'" *Byam*, 336 F.3d at 182 (quoting *Stieberger*, 134 F.3d at 40-41).

The determination of whether a claimant's failure to pursue her administrative remedies was due to mental incapacity involves different considerations from the determination of disability. *Id.* at 183. The question becomes not whether a claimant could understand and act upon instructions in the context of certain jobs, but "whether she was impaired in her ability to understand and pursue administrative and legal procedures." *Id.*

b. SSA's evaluation of mental disorders

In October 1984, Congress passed the Disability Reform Act, which required the Secretary of Health and Human Services to revise the mental-impairment criteria for disability benefits. 98 Stat. 1794, § 5(a). The legislation further provided that individuals who had applied for disability based on mental impairments at certain times, and were denied, were able to reapply for benefits within specified time periods in light of the modified criteria. Specifically, Section 5(c)(3) of the Disability Reform Act provided:

> Any individual with a mental impairment who was found to be not disabled pursuant to an initial disability determination or continuing eligibility review between March 1, 1981, and the date of the enactment of this Act,[8] and who reapplies for benefits . . . may be determined to be under a disability during the period considered in the most recent prior determination. Any reapplication under this paragraph must be filed within one year after the date of the enactment of this Act, and benefits payable as a result of the preceding sentence shall be paid only on the basis of the reapplication.

98 Stat. 1794, § 5(c)(3).

---

[8] The 1982 Denial falls within these dates.

Thus, when mandating new mental impairment standards, Congress allowed for *de novo* readjudication of whether or not a claimant was disabled during the period March 1981 through October 1984, but specifically limited benefits available on such readjudication to those that could be awarded on the basis of the claimant's new application. In other words, this exception to the finality rules (20 C.F.R. § § 404.987, 404.988, 404.989) did not provide for an automatic reopening of the prior, denied application. Rather, the criteria for considering a request to reopen a denied claim after more than four years has passed is governed by SSR 91-5p.

Although Congress addressed only reapplications during the one year period from October 1984 through October 1985, SSA has expanded the time frame under which 1981-1985 decisions involving mental impairment claims can be reevaluated, without invocation of administrative *res judicata*, through SSR 91-5p.

Although the Disability Reform Act allowed for reapplications by certain claimants, it did not modify the effect of 42 U.S.C. § 405(h)'s limitation on the authority of federal courts to review decisions by SSA. Thus, while the Disability Reform Act allowed Kreidler to reapply for disability benefits notwithstanding the 1982 Denial, which became a final, nonappealable decision, 405(h)'s limitation on the district court's authority to review the reapplication is unchanged. *See* 42 U.S.C. § 405(h); 98 Stat. 1794, § (5)(c)(3). Furthermore, the Disability Reform Act specifically limited benefits available on such readjudication to those that could be awarded on the basis

of the claimant's new application. 98 Stat. 1794, § (5)(c)(3). Put another way, any action by SSA on a new application (here the 1994 application) could only award benefits on the basis of the 1994 application even though the 1994 application here, by definition, sought a conclusion that Kreidler was disabled prior to her date last insured in 1976.

With regard to SSA's consideration of personality disorders, at the time the second ALJ entered his decision, persons claiming disability due to personality disorders had to exhibit marked limitations in three areas of function. (*See* AR 611); Listing 12.08, 20 C.F.R. Part 404, Subpart P, Appendix 1 (1999).

With respect to an ALJ's consideration of a claimant's IQ scores, an ALJ is not required to accept IQ scores as valid, especially when faced with contradictory evidence in the record. *Lax v. Astrue*, 489 F.3d 1080, 1087 (10th Cir. 2007) (citing *Markle v. Barnhart*, 324 F.3d 182, 186 (3rd Cir. 2003) (noting that the Commissioner is not required to accept a claimant's IQ scores and may reject scores that are inconsistent with the record); *Muse v. Sullivan*, 925 F.2d 785, 790 (5th Cir. 1991) (noting that an ALJ may make factual determinations on the validity of IQ scores); *Popp v. Heckler*, 779 F.2d 1497 (11th Cir. 1986) (noting that Commissioner is not required to make finding of mental retardation based on the results of an IQ test alone)). In other words, "[t]he Commissioner is not required to accept a claimant's I.Q. scores, . . ., and may reject scores that are inconsistent with the record." *Clark v. Apfel*, 141 F.3d 1253, 1255 (8th Cir. 1998). *Contrast*

Brown v. Secretary of Health and Human Services, 948 F.2d 268, 270 (6th Cir. 1991) (substantial evidence did not support SSA's rejection of IQ scores), with *Nieves v. Secretary of Health and Human Services*, 775 F.2d 12 (1st Cir. 1985) (in the context of determining disability, low IQ score was the only evidence before the ALJ on this point and ALJ should have accepted the score).

C. Discussion

There is no dispute that Kreidler was disabled as of June 30, 1976, when her insured status expired. The second ALJ declined to disturb the first ALJ's conclusion on this point, although the second ALJ did not agree that Kreidler met the criteria of Listing 12.08.[9] (AR 15-16; 606-608). The dispute in this case therefore relates solely

---

[9] Kreidler argues that the second ALJ erred when he found her disabled on a different basis than the first ALJ. Appellant's Brief, pp. 13-15; 23-24. In particular, Kreidler argues that the second ALJ should have found her disabled pursuant to a mental impairment listing set forth in SSA's regulations, Listing 12.08. *See* 20 C.F.R. § 404, subpt. p, Appendix 1, Listing 12.08. This argument ignores the fact that the district court entered a sentence six remand which authorizes the agency on remand to reconsider, vacate or modify its own earlier determination. 20 C.F.R. § 404.983. Moreover, at the Commissioner's request the Appeals Council expressly vacated the first ALJ's decision, consistent with the district court's order. (AR 628; 629-30). As a result, the first ALJ's ruling is a nullity and not subject to review by this Court.

to the second ALJ's decision to not reopen the 1982 Denial.

Kreidler's deadline to seek to reopen the 1982 Denial passed in 1986. 20 C.F.R. §§ 404.987; 404.988; 404.989. Because Kreidler failed to timely request further review, her untimely request for reopening is governed in part by SSA's regulations which address the circumstances under which such failure may be excused. 20 C.F.R. § 404.911(a) provides:

> In determining whether you have shown that you had good cause for missing a deadline to request review we consider–
>
> (1) What circumstances kept you from making the request on time;
> (2) Whether our action misled you;
> (3) Whether you did not understand the requirements of the Act resulting from amendments to the Act, other legislation, or court decisions; and
> (4) Whether you had any physical, mental, educational, or linguistic limitations . . . which prevented you from filing a timely request or from understanding or knowing about the need to file a timely request for review.

20 C.F.R. § 404.911(a).

Here, the second ALJ did not enforce *res judicata* or administrative finality, and instead considered Kreidler's request by applying the criteria set forth in SSR 91-5p. Social Security Ruling 91-5p provides, in relevant part:

> The claimant will have established mental incapacity for the purpose of establishing good cause when the evidence establishes that he or she lacked the mental capacity to understand the procedures for requesting review.
>
> In determining whether a claimant lacked the mental capacity to understand the procedures for requesting review, the adjudicator must consider the following factors as they existed at the time of the prior administrative action:
> – inability to read or write;
> – lack of facility with the English language;
> – limited education;
> – any mental or physical condition which limits the claimant's ability to do things for him/herself.
>
> If the claimant is unrepresented and has one of the factors listed above, the adjudicator will assist the claimant in obtaining any relevant evidence. The decision as to what constitutes mental incapacity must be based on all the pertinent facts in a particular case. The adjudicator will resolve any reasonable doubt in favor of the claimant.

SSR 91-5p.

The second ALJ here properly applied these criteria to find Kreidler had not established good cause and, thus, was not entitled to reopening of the 1982 Denial. In doing so, the second ALJ provided a quite detailed discussion of the evidence as the basis of his rejection of that claim. (AR 602-605). For example, he cited evidence that she completed her 1994 application with detailed answers, that she had a graduated from high school and held several jobs, and that she had failed to submit any recent medical evidence to support the argument that she could not understand or pursue an appeal. (AR 602). The ALJ noted that in 1994, Kreidler had not claimed that she lacked the mental or emotional capacity to understand or pursue an appeal of the earlier decision; instead she had reported that she did not appeal because her husband would not let her. (AR 602).

The ALJ continued by observing that while Kreidler testified she could not recall the events surrounding her failure to appeal, she did not testify that she had any difficulty understanding the process or the 1982 Denial. (AR 603). Further, the ALJ noted that Kreidler *had* appealed a decision on her 1994 application in March 1995, while still proceeding *pro se*. (AR 603).

Finally, the ALJ provided a detailed review of the medical evidence in the record, concluding that this evidence did not support Kreidler's claim that she was mentally retarded or mentally unable to understand and pursue an appeal. (AR 603-605) (describing medical evidence); *see also* Statement of Facts, Part D, *supra* (describing ALJ's decision). As the second ALJ noted, the

reviewing psychologist expressly rejected the diagnosis of mental retardation as inconsistent with the rest of the record. (AR 604; 84). Such an expert opinion may constitute substantial evidence where, as here, it provides a reasonable assessment of the other medical evidence in the record. 20 C.F.R. § 404.1527(f).

Although Kreidler did receive an IQ score of 66 during testing in 1967 (AR 108; 112), when Kreidler was being treated for various emotional problems, other evidence showed she was not, in fact, mentally retarded. A treating psychiatrist from that period did not think she was retarded and doctors who saw her in late 1981 also felt she functioned within the "low average" range. (AR 200; 228; 251). Dr. Bobowick, who saw Kreidler in June 1976 (the month her insured status expired) made no observation indicating that she was retarded. (AR 286-87). Only a chiropractor who saw Kreidler in 1982 mentions possibly significant mental problems at that point in time. (AR 257). As the second ALJ correctly observed, assessment of mental disorders fell outside this individual's area of expertise. (AR 604).[10]

Furthermore, the second ALJ was not required to accept the only report of Kreidler's IQ – a secondary report of the resulting score without the actual report by the person who administered the test – in a vacuum. *See Lax*,

---

[10] Moreover, chiropractors do not constitute an acceptable source of medical evidence of disability (though their reports can be considered as "other evidence" as to the impact of medically-established impairments). 20 C.F.R. § 404.1513(d).

489 F.3d at 1087; *Markle*, 324 F.3d at 186 (noting that the Commissioner is not required to accept a claimant's IQ scores and may reject scores that are inconsistent with the record); *Muse*, 925 F.2d at 790 (noting that an ALJ may make factual determinations on the validity of IQ scores); *Popp*, 779 F.2d 1497 (noting that Commissioner is not required to make finding of mental retardation based on the results of an IQ test alone); *Clark*, 141 F.3d at 1255 ("The Commissioner is not required to accept a claimant's I.Q. scores, . . ., and may reject scores that are inconsistent with the record."). Instead, the second ALJ properly considered the evidence in the record as a whole and evaluated the IQ score as part of his overall consideration of whether, in 1982 and later, Kreidler was able to understand what needed to be done, and to take action, to seek review of the 1982 Denial. Moreover, the ALJ was not required, as part of his consideration of the reopening issue, to determine whether Kreidler met the listing regarding mental retardation, and that he did not do so is not error. (AR 600-605).

Although much of Kreidler's argument to this Court is premised upon her IQ score, Kreidler also argues that she was incapable of understanding the need to pursue her administrative remedies back in 1982 due to a personality disorder. Appellant's Brief, p. 9. Virtually all of the evidence in the record regarding a personality disorder relates to periods quite remote from the month at issue (July 1982). Most of the evidence dates from the late 1960s, when Kreidler was involved in an abusive relationship with her first husband. (*See* AR 286; 106-249). There is nothing in the record that suggests that the

mental disarray Kreidler experienced in the late 1960s continued unabated throughout the 1970s and early 1980s. Rather, the record suggests that her mental condition began to worsen again around June 1994, when she was involved in an automobile accident. (AR 319-20). The 1996 neurological examination Kreidler relies on reveals nothing about her condition in 1982. (AR 496-99).

The evidence closest in time to the date her first application was denied, while somewhat sparse, simply does not show an individual lacking basic mental competence – despite the fact that she had some situational emotional difficulties in late 1981. (AR 251-54). Given the fact that Kreidler's mental condition during the late 1970s and early 1980s seems to have been basically fairly stable, the reviewing psychologist's assessment that she remained competent to do basic mental activities supported the second ALJ's finding that Kreidler was not unable to understand the need to appeal in 1982 or to pursue such appeal. (AR 84; 95; 605).[11]

Kreidler argues, in addition, that the second ALJ erred by finding that she did not meet Listing 12.08, because he found that she had marked limitations in two broad areas of mental functioning. Appellant's Brief, pp.23-24. This argument ignores the fact that persons claiming disability due to personality disorders had to exhibit marked

---

[11] As the second ALJ noted, Kreidler was able to initiate her 1994 claim and pursue it through the reconsideration stage in 1994, prior to obtaining representation. (AR 602). There is no real evidence suggesting she was *less* capable in 1982.

limitations in three (not two) areas of function in 1999 when the second ALJ entered his decision. (*See* AR 611). Listing 12.08, 20 C.F.R. Part 404, Subpart P, Appendix 1 (1999). Moreover, since the second ALJ found that Kreidler was disabled during the entire period she claimed in both of her disability applications, it is unclear how Kreidler's argument on this point is probative vis-a-vis the 1982 Denial.

At its core, Kreidler's argument in this Court is this: because the second ALJ found Kreidler was disabled (in part) due to mental problems prior to such date, the second ALJ should also have found that she failed to pursue her administrative remedies because she was incapable of understanding and challenging the 1982 Denial.

This argument is flatly contradicted by two powerful admissions in the record: (1) Kreidler acknowledged that she did not seek further review of the 1982 Denial because her (now former) husband would not let her appeal that denial (AR 64); and (2) Kreidler, acting on her own behalf and without the assistance of legal counsel, was able to understand and follow through on the procedural step to seek review of the initial denial of her 1994 application. (AR 45).

Moreover, Kreidler ignores the important distinction between a review of a record for purposes of determining disability, or the inability to perform work, and a review of a record for purposes of determining a mental impairment which prevents a claimant from seeking review of a denial of benefits. The distinction is important and was

appropriately articulated and observed by the second ALJ in this case. (AR 601; 602-606). *See Byam*, 336 F.3d at 182.

Kreidler's failure to appreciate this distinction is seen in her argument about her IQ scores. Kreidler argues that her 1967 IQ score should be probative – or even determinative – of the second ALJ's decision denying reopening the 1982 Denial. The question actually before the second ALJ, however, was not whether Kreidler was mentally retarded during that time period, but rather whether Kreidler's mental status in 1982 through 1986 – whatever one calls it – prevented her from understanding and challenging the 1982 Denial. 20 C.F.R. §§ 404.987; 404.988; 404.989; *Byam*, 336 F.3d at 182.

Similarly, regardless of whether Kreidler met the listing criteria for a personality disorder or not, the issue of whether Kreidler's failure to pursue her administrative remedies in 1982 was due to mental incapacity involves different considerations from the determination of disability. *Byam*, 336 F.3d at 182. Kreidler's acknowledgment in 1994 that she did not proceed further in 1982 due to the fact that her husband "would not let" her do so indicates that she understood the need for further appeal then, but chose not to seek further administrative review. (AR 64). The fact that she understood such duty is confirmed by her ability to re-file in 1994 and take all necessary steps for further review following the initial denial of her 1994 claim. (AR 45; 74-79).

The second ALJ appropriately reviewed the record before him for the purpose of considering the request to reopen the 1982 Denial. He clearly understood that he was evaluating medical evidence for the purpose of determining whether Kreidler's mental condition prevented her from understanding what needed to be done to seek review of the 1982 Denial, and to then take action. He articulated as much by concluding that "[t]he treatment records contradict counsel's arguments that she was mentally unable to understand and pursue an appeal – continuously – from 1982 until late 1994." (JA 605).

The second ALJ's decision applied the correct legal standard and it is supported by substantial evidence. Where, as here, an administrative decision rests on adequate findings sustained by evidence having rational probative force, this Court should not substitute its judgment for that of the agency. *See Veino*, 312 F.3d at 586. Because the record supports the second ALJ's conclusion on this point, the Court should affirm the district court's judgment of dismissal.

II. Pursuant to Fed. R. App. P. 4(a)(1)(B), this Court has no jurisdiction to review the district court's May 2007 ruling as to which no notice of appeal was filed.

A. Relevant facts

The relevant facts are stated above in the Statement of Facts.

B. Governing law

A court always has jurisdiction to consider its jurisdiction. *See United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79 (1988); *Hertzner v. Henderson*, 292 F.3d 302, 304 (2d Cir. 2002).

To appeal from a district court judgment or order, a party must file a notice of appeal must be filed within sixty (60) days after the judgment or ruling appealed from is entered, when the United States is a party. Fed. R. App. P. 4(a)(1)(B). Judgment is entered for purposes of these rules "when it is entered in the civil docket . . . ." Fed. R. Civ. P. 58(b).

"[T]he time limits for filing a notice of appeal are jurisdictional in nature." *Bowles v. Russell*, 127 S. Ct. 2360, 2362 (2007). Although recent decisions by the Supreme Court have addressed and clarified the distinction between claims-processing rules and jurisdictional rules, "none of them calls into question [the Supreme Court's] longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 2364 (referencing, *inter alia*, *Kontrick v. Ryan,* 540 U.S. 443 (2004) and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam)).

C. Discussion

Kreidler failed to file a notice of appeal or an amended notice of appeal as to the May 8, 2007 ruling denying her motions to vacate and for reconsideration. (JA 7). The basis for Kreidler's motion for reconsideration was to seek

district court review of her untimely claim that the second ALJ had constructively reopened the 1982 Denial. (JA 174-81).

Because statutory time limits for taking an appeal are jurisdictional, this Court has no jurisdiction to review the May 8, 2007 decision rejecting Kreidler's constructive reopening claim. *Bowles*, 127 S. Ct. at 2364.

Furthermore, the Court should not exercise its discretion to consider Kreidler's constructive reopening claim. This Court has held that it has "discretion to decide what issues may be addressed for the first time on appeal because 'there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt.'" *J.C. v. Regional School District 10, Board of Education*, 278 F.3d 119, 125 (2d Cir. 2002) (quoting *Singleton v. Wulff,* 428 U.S. 106, 121 (1976)). As explained in *J.C.*, this Court has "chosen to exercise such discretion in cases where the issues not addressed below involved purely legal questions." *Id.*; *see also Pichardo v. Ashcroft*, 374 F.3d 46, 54 (2d Cir. 2004) (court of appeals will consider issue raised on appeal for the first time when it involves purely issue of law).

This Court's decision in *Beason v. United Technologies Corp.*, 337 F.3d 271 (2d Cir. 2003), while procedurally analogous, is distinguishable. In *Beason*, this Court considered arguments made to the district court in a motion for reconsideration which was denied by the district court, but for which no timely notice of appeal or

amended notice of appeal was filed. *Id.* at 274-75. There, however, the district court had ruled on the substance of the arguments raised in the motion for reconsideration and those arguments were purely legal. *Id.* Here, by contrast, the district court denied Kreidler's motion for reconsideration as untimely; the court did not address the substance of her claims. (JA 174-81). The district court engaged in no fact finding, and no consideration of the substance of the Commissioner's ruling, when it denied the untimely Rule 60(b) motion. In other words, neither the Government, nor the Magistrate Judge, nor the District Judge have considered the substance of the factual and legal argument in support of the constructive reopening theory advanced by Kreidler before this Court.

Furthermore, Kreidler's constructive reopening claim presents at best mixed questions of law and fact, and is therefore not amenable to the discretionary review contemplated in *Beason*. In particular, consideration of Kreidler's claim of constructive reopening would require this Court to completely review and weigh the factual record on which Kreidler bases her constructive reopening argument. Consideration of the argument and claim at this late date would require a full examination of the administrative record again, and would require the parties and any fact finder to weigh evidence and its import in relation to the constructive reopening claim. *See, e.g.*, Part III, *infra*. Because such review and weighing of facts would be an indispensable part of any consideration of the claim, it is not a purely legal issue and this Court should therefore decline review.

III. Even assuming for purposes of review that Kreidler's constructive reopening claim were properly before this Court, the claim is without merit.

A. Relevant facts

All facts relevant to the argument can be found in the Statement of Facts.

B. Standard of review and governing law

1. Standard of review

This Court reviews a district court's denial of a motion for reconsideration, whether construed as a motion under Fed. R. Civ. P. 59 or 60(b), for abuse of discretion. *See In re Lynch*, 430 F.3d 600, 603 (2d Cir. 2005); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2d Cir.1998).

2. Governing law

a. Motions Under Rule 59 or Rule 60

A motion to alter or amend a judgment under Fed. R. Civ. P. 59 must be filed within 10 days of the entry of the judgment in question. Fed. R. Civ. P. 59(e).

The district court outlined the standards governing motions under the relevant portions of Rule 60(b) as follows:

Rule 60(b) motions are "addressed to the sound discretion of the district court and are generally granted only upon a showing of exceptional circumstances." *Mendell ex rel. Viacom, Inc. v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990). The party seeking relief from judgment has the burden of showing that such is appropriate. *United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 391 (2d Cir. 2001) (internal citations omitted). In order to grant relief pursuant to Rule 60(b), "the Court must find that (1) the circumstances of the case present grounds justifying relief and (2) the movant possesses a meritorious claim in the first instance." *Flaherty v. Hackeling*, 221 F.R.D. 383, 386 (E.D.N.Y. 2004).

In discussing Rule 60(b)(1)'s "excusable neglect" standard, the Supreme Court has stated that the issue is "an equitable one," and that the Court should consider "all relevant circumstances surrounding the party's omission." *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, [507 U.S. 380, 395] (1993). The relevant factors to consider include (1) the danger of prejudice to the non-moving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including consideration of whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. *Id.* The Second Circuit has made clear that "a party claiming excusable neglect will, in the ordinary course, lose

> under the *Pioneer* test." *Canfield v. Van Atta Buick/GMC Truck*, 127 F.3d 248, 251 (2d Cir. 1997).
>
> Rule 60(b)(6) grants federal courts broad authority to provide relief from a final judgment "upon such terms as are just," so long as the motion for relief is made "within a reasonable time" and does not rely on the grounds for relief provided for in clauses (b)(1) through (b)(5). *Liljeberg v. Health Services Acquisition Corp.*, [486 U.S. 847, 863] 1988. In *Liljeberg*, the Supreme Court noted that Rule 60(b)(6) can be used to vacate judgments "whenever such action is appropriate to accomplish justice," but cautioned that it should only be used in "extraordinary circumstances." *Id.* at 864 (citations omitted).

(JA 178-79).

b. Constructive reopening

The Administrative Procedure Act generally does not permit district court review of an appeal from an agency decision denying a request to open an earlier denial of relief. However, in two circumstances such review is permitted: (1) when there is an allegation of a denial of due process of law under the Constitution, *Sanders*, 430 U.S. at 107-109; and (2) when the agency has constructively reopened the denial. *Byam*, 336 F.3d at 180.

As this Court explained in *Byam*, if the Commissioner, "'reviews the entire record and renders a decision on the merits, the earlier decision will be deemed to have been reopened, and any claim of administrative res judicata to have been waived' and thus, 'the claim is subject to judicial review.'" *Byam*, 336 F.3d at 180 (citations omitted). Similarly, the United States Court of Appeals for the Third Circuit has held that a constructive "reopening will be found when there is an administrative review of the entire record and a decision is reached on the merits of the claim." *Tobak v. Apfel*, 195 F.3d 183, 186 (3d Cir. 1999).

C. Discussion

The district court acted well within its broad discretion to deny Kreidler's motion for reconsideration. First, the motion was not timely filed under Rule 59 because it was not filed within 10 days of the entry of judgment. (JA 6-7; 178). Second, the district court properly denied the motion when construed as a motion under Rule 60 because Kreidler's motion raised an issue for the first time in a nine-year old case with no explanation – much less a showing of extraordinary circumstances – to justify the delay in raising the issue. (JA 180-81). Although Kreidler could have raised her constructive reopening argument at the very beginning, she waited to raise the argument until *after* judgment was entered nine years later. The district court did not abuse its discretion to deny Kreidler's motion as untimely.

In any event, Kreidler's constructive reopening argument is without merit. It is hard to imagine how an

ALJ would consider Kreidler's 1994 claim that she was disabled from her date last insured (1976) and remained disabled continuously through the hearing before the second ALJ in 1999 without considering the record. Under Kreidler's view, the ALJ would have to make the determination on the 1994 claim without considering any evidence between 1976 and 1982, or suffer the consequence of having substantively reopened a twelve year old denial of benefits.

Kreidler simply cannot have it both ways. She cannot on the one hand seek a waiver of administrative finality and *res judicata,* by making her application for benefits as of 1976 in 1994, even though the same claim had been denied more than twelve years earlier, and on the other hand claim that the very review that led to an award of benefits for the 1994 application caused a reopening of the 1982 Denial. If that were the case, every denial of benefits fitting the special circumstances of Kreidler's case – with a claimant alleging a mental impairment, and alleging that impairment affected a denial from 1981 to 1985 – could automatically reopen the prior denial by simply filing a new disability claim decades later.

This result is clearly not intended by the Disability Reform Act or the Commissioner's regulations. As discussed at length in Section I of this brief, to get the benefit of being able to refile her claim for DIB in 1994 without being bound by *res judicata*, Kreidler must also be bound by the balance of the statute which specifically limited benefits available on such readjudications to those that could be awarded on the basis of the claimant's new

application. 98 Stat. 1794, § (5)(c)(3). Put another way, any action by SSA on a new application (here the 1994 application) could only award benefits on the basis of the 1994 application even though the 1994 application here, by definition, sought a conclusion that Kreidler was disabled prior to her date last insured in 1976.

As the Court found was the case in *Byam*, the ALJ here reviewed the record and evaluated evidence in the context of determining if she demonstrated entitlement to reopen a prior denial. *See Byam*, 336 F.3d at 180. This review required the ALJ to review the medical records and other materials before the agency. However, such review of the record did not rise to the level required to establish a reopening of the prior denial.

As discussed in Section I of this Brief, the second ALJ appreciated and articulated the scope of the review required, and appropriately considered and weighed the evidence such as it is as it bears on the question of whether in 1982 Kreidler could have understood the steps she needed to take to seek review and could have acted upon that understanding. The second ALJ understood and articulated that this analysis is different from the analysis of whether Kreidler could perform work.

The Court should therefore affirm the district court's dismissal of the complaint.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: March 14, 2008

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

ANN M. NEVINS
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,013 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

ANN M. NEVINS
ASSISTANT U.S. ATTORNEY

ADDENDUM

42 U.S.C. § 405. Evidence, procedure, and certification for payments

. . .

(g) Judicial review

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of

Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, 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; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person

occupying the office of Commissioner of Social Security or any vacancy in such office.

(h) Finality of Commissioner's decision

The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

Fed. R. App. P. 4

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;
(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
(iv) to alter or amend the judgment under Rule 59;
(v) for a new trial under Rule 59; or
(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment-but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.
(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.
(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal

Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

Fed. R. Civ. P. 59. New Trial; Altering or Amending a Judgment

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues--and to any party--as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 10 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after being served to file opposing affidavits; but that period may be extended for up to 20 days, either by the court for good cause or by

the parties' stipulation. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

Fed. R. Civ. P. 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or
(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

20 C.F.R. § 404.1513 Medical and other evidence of your impairment(s).

(a) Sources who can provide evidence to establish an impairment. We need evidence from acceptable medical sources to establish whether you have a medically determinable impairment(s). See § 404.1508. Acceptable medical sources are--

(1) Licensed physicians (medical or osteopathic doctors);

(2) Licensed or certified psychologists. Included are school psychologists, or other licensed or certified individuals with other titles who perform the same function as a school psychologist in a school setting, for purposes of establishing mental retardation, learning disabilities, and borderline intellectual functioning only;

(3) Licensed optometrists, for purposes of establishing visual disorders only (except, in the U.S. Virgin Islands, licensed optometrists, for the measurement of visual acuity and visual fields only);

(4) Licensed podiatrists, for purposes of establishing impairments of the foot, or foot and ankle only, depending on whether the State in which the podiatrist practices permits the practice of podiatry on the foot only, or the foot and ankle; and

(5) Qualified speech-language pathologists, for purposes of establishing speech or language impairments only. For this source, "qualified" means that the speech-language pathologist must be licensed by the State professional licensing agency, or be fully certified by the State education agency in the State in which he or she practices, or hold a Certificate of

Clinical Competence from the American Speech-Language-Hearing Association.

(b) Medical reports. Medical reports should include--

(1) Medical history;

(2) Clinical findings (such as the results of physical or mental status examinations);

(3) Laboratory findings (such as blood pressure, x-rays);

(4) Diagnosis (statement of disease or injury based on its signs and symptoms);

(5) Treatment prescribed with response, and prognosis; and

(6) A statement about what you can still do despite your impairment(s) based on the acceptable medical source's findings on the factors under paragraphs (b)(1) through (b)(5) of this section (except in statutory blindness claims). Although we will request a medical source statement about what you can still do despite your impairment(s), the lack of the medical source statement will not make the report incomplete. See § 404.1527.

(c) Statements about what you can still do. At the administrative law judge and Appeals Council levels, and at the reviewing official, administrative law judge, and Decision Review Board levels in claims adjudicated under the procedures in part 405 of this chapter, we will consider residual functional capacity assessments made by State agency medical and psychological consultants, medical and psychological experts (as defined in § 405.5 of this chapter), and other program physicians and psychologists to be "statements about what you can still do" made by nonexamining physicians and psychologists based on their review of the evidence in the case record. Statements about

what you can still do (based on the acceptable medical source's findings on the factors under paragraphs (b)(1) through (b)(5) of this section) should describe, but are not limited to, the kinds of physical and mental capabilities listed as follows (See §§ 404.1527 and 404.1545(c)):

(1) The acceptable medical source's opinion about your ability, despite your impairment(s), to do work-related activities such as sitting, standing, walking, lifting, carrying, handling objects, hearing, speaking, and traveling; and

(2) In cases of mental impairment(s), the acceptable medical source's opinion about your ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, coworkers, and work pressures in a work setting.

(d) Other sources. In addition to evidence from the acceptable medical sources listed in paragraph (a) of this section, we may also use evidence from other sources to show the severity of your impairment(s) and how it affects your ability to work. Other sources include, but are not limited to--

(1) Medical sources not listed in paragraph (a) of this section (for example, nurse-practitioners, physicians' assistants, naturopaths, chiropractors, audiologists, and therapists);

(2) Educational personnel (for example, school teachers, counselors, early intervention team members, developmental center workers, and daycare center workers);

(3) Public and private social welfare agency personnel; and

(4) Other non-medical sources (for example, spouses, parents and other caregivers, siblings, other relatives, friends, neighbors, and clergy).

(e) Completeness. The evidence in your case record, including the medical evidence from acceptable medical sources (containing the clinical and laboratory findings) and other medical sources not listed in paragraph (a) of this section, information you give us about your medical condition(s) and how it affects you, and other evidence from other sources, must be complete and detailed enough to allow us to make a determination or decision about whether you are disabled or blind. It must allow us to determine--

(1) The nature and severity of your impairment(s) for any period in question;

(2) Whether the duration requirement described in § 404.1509 is met; and

(3) Your residual functional capacity to do work-related physical and mental activities, when the evaluation steps described in § 404.1520(e) or (f)(1) apply.

20 C.F.R. § 404.1527 Evaluating opinion evidence.

(a) General.

(1) You can only be found disabled if you are unable to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. See § 404.1505. Your impairment must result from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. See § 404.1508.

(2) Evidence that you submit or that we obtain may contain medical opinions. Medical opinions are statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of your impairment(s), including your symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and your physical or mental restrictions.

(b) How we consider medical opinions. In deciding whether you are disabled, we will always consider the medical opinions in your case record together with the rest of the relevant evidence we receive.

(c) Making disability determinations. After we review all of the evidence relevant to your claim, including medical opinions, we make findings about what the evidence shows.

(1) If all of the evidence we receive, including all medical opinion(s), is consistent, and there is sufficient evidence for us to decide whether you are disabled, we will make our determination or decision based on that evidence.

(2) If any of the evidence in your case record, including any medical opinion(s), is inconsistent with other evidence or is internally inconsistent, we will weigh all of the evidence and see whether we can decide whether you are disabled based on the evidence we have.

(3) If the evidence is consistent but we do not have sufficient evidence to decide whether you are disabled, or if after weighing the evidence we decide we cannot reach a conclusion about whether you are disabled, we will try to obtain additional evidence under the provisions of §§ 404.1512 and 404.1519 through 404.1519h. We will request additional existing records, recontact your treating sources or any other examining sources, ask you to undergo a consultative examination at our expense, or ask you or others for more information. We will consider any additional evidence we receive together with the evidence we already have.

(4) When there are inconsistencies in the evidence that cannot be resolved, or when despite efforts to obtain additional evidence the evidence is not complete, we will make a determination or decision based on the evidence we have.

(d) How we weigh medical opinions. Regardless of its source, we will evaluate every medical opinion we receive. Unless we give a treating source's opinion controlling weight under paragraph (d)(2) of this section, we consider all of the following factors in deciding the weight we give to any medical opinion.

(1) Examining relationship. Generally, we give more weight to the opinion of a source who has examined you than to the opinion of a source who has not examined you.

(2) Treatment relationship. Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's opinion controlling weight, we apply the factors listed in paragraphs (d)(2)(i) and (d)(2)(ii) of this section, as well as the factors in paragraphs (d)(3) through (d)(6) of this section in determining the weight to give the opinion. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion.

(i) Length of the treatment relationship and the frequency of examination. Generally, the longer a treating source has treated you and the more times you have been seen by a treating source, the more weight we will give to the source's medical opinion. When the treating source has seen you a number of times and long enough to have obtained a longitudinal picture of your impairment, we will give the source's opinion more weight than we would give it if it were from a nontreating source.

(ii) Nature and extent of the treatment relationship. Generally, the more knowledge a treating source has about your impairment(s) the more weight we will give to the source's medical opinion. We will look at the treatment the source has provided and at the kinds and extent of examinations and testing the source has performed or ordered from specialists and independent laboratories. For example, if your ophthalmologist notices that you have complained of neck pain during your eye examinations, we will consider his or her opinion with respect to your neck pain, but we will give it less weight than that of another physician who has treated you for the neck pain. When the treating source has reasonable knowledge of your impairment(s), we will give the source's opinion more weight than we would give it if it were from a nontreating source.

(3) Supportability. The more a medical source presents relevant evidence to support an opinion, particularly medical signs and laboratory findings, the more weight we will give that opinion. The better an explanation a source provides for an opinion, the more weight we will give that opinion. Furthermore, because nonexamining sources have no examining or treating relationship with you, the weight we will give their opinions will depend on the degree to which they provide supporting explanations for their opinions. We will evaluate the degree to which these opinions consider all of the pertinent evidence in your claim, including opinions of treating and other examining sources.

(4) Consistency. Generally, the more consistent an opinion is with the record as a whole, the more weight we will give to that opinion.

(5) Specialization. We generally give more weight to the opinion of a specialist about medical issues related to his or her area of specialty than to the opinion of a source who is not a specialist.

(6) Other factors. When we consider how much weight to give to a medical opinion, we will also consider any factors you or others bring to our attention, or of which we are aware, which tend to support or contradict the opinion. For example, the amount of understanding of our disability programs and their evidentiary requirements that an acceptable medical source has, regardless of the source of that understanding, and the extent to which an acceptable medical source is familiar with the other information in your case record are relevant factors that we will consider in deciding the weight to give to a medical opinion.

(e) Medical source opinions on issues reserved to the Commissioner. Opinions on some issues, such as the examples that follow, are not medical opinions, as described in paragraph (a)(2) of this section, but are, instead, opinions on issues reserved to the Commissioner because they are administrative findings that are dispositive of a case; i.e., that would direct the determination or decision of disability.

(1) Opinions that you are disabled. We are responsible for making the determination or decision about whether you meet the statutory definition of disability. In so doing, we review all of the medical findings and other evidence that support a medical source's statement that you are disabled. A statement by a medical source that

you are "disabled" or "unable to work" does not mean that we will determine that you are disabled.

(2) Other opinions on issues reserved to the Commissioner. We use medical sources, including your treating source, to provide evidence, including opinions, on the nature and severity of your impairment(s). Although we consider opinions from medical sources on issues such as whether your impairment(s) meets or equals the requirements of any impairment(s) in the Listing of Impairments in appendix 1 to this subpart, your residual functional capacity (see §§ 404.1545 and 404.1546), or the application of vocational factors, the final responsibility for deciding these issues is reserved to the Commissioner.

(3) We will not give any special significance to the source of an opinion on issues reserved to the Commissioner described in paragraphs (e)(1) and (e)(2) of this section.

(f) Opinions of nonexamining sources. We consider all evidence from nonexamining sources to be opinion evidence. When we consider the opinions of nonexamining sources, we apply the rules in paragraphs (a) through (e) of this section. In addition, the following rules apply to State agency medical and psychological consultants, other program physicians and psychologists, and medical experts we consult in connection with administrative law judge hearings and Appeals Council review:

(1) In claims adjudicated by the State agency, a State agency medical or psychological consultant (or a medical or psychological expert (as defined in § 405.5 of this chapter) in claims adjudicated under the procedures in part 405 of this chapter) will consider the

evidence in your case record and make findings of fact about the medical issues, including, but not limited to, the existence and severity of your impairment(s), the existence and severity of your symptoms, whether your impairment(s) meets or equals the requirements for any impairment listed in appendix 1 to this subpart, and your residual functional capacity. These administrative findings of fact are based on the evidence in your case record but are not themselves evidence at these steps.

(2) Administrative law judges are responsible for reviewing the evidence and making findings of fact and conclusions of law. They will consider opinions of State agency medical or psychological consultants, other program physicians and psychologists, and medical experts as follows:

(i) Administrative law judges are not bound by any findings made by State agency medical or psychological consultants, or other program physicians or psychologists. However, State agency medical and psychological consultants and other program physicians and psychologists are highly qualified physicians and psychologists who are also experts in Social Security disability evaluation. Therefore, administrative law judges must consider findings of State agency medical and psychological consultants or other program physicians or psychologists as opinion evidence, except for the ultimate determination about whether you are disabled. See § 404.1512(b)(6).

(ii) When an administrative law judge considers findings of a State agency medical or psychological consultant or other program physician or psychologist, the administrative law judge will

evaluate the findings using relevant factors in paragraphs (a) through (e) of this section, such as the physician's or psychologist's medical specialty and expertise in our rules, the supporting evidence in the case record, supporting explanations provided by the physician or psychologist, and any other factors relevant to the weighing of the opinions. Unless the treating source's opinion is given controlling weight, the administrative law judge must explain in the decision the weight given to the opinions of a State agency medical or psychological consultant or other program physician or psychologist, as the administrative law judge must do for any opinions from treating sources, nontreating sources, and other nonexamining sources who do not work for us.

(iii) Administrative law judges may also ask for and consider opinions from medical experts on the nature and severity of your impairment(s) and on whether your impairment(s) equals the requirements of any impairment listed in appendix 1 to this subpart. When administrative law judges consider these opinions, they will evaluate them using the rules in paragraphs (a) through (e) of this section.

(3) When the Appeals Council makes a decision, it will follow the same rules for considering opinion evidence as administrative law judges follow.

(4) In claims adjudicated under the procedures in part 405 of this chapter at the Federal reviewing official, administrative law judge, and the Decision Review Board levels of the administrative review process, we will follow the same rules for considering opinion

evidence that administrative law judges follow under this section.

20 C.F.R. § 404.900 Introduction.

(a) Explanation of the administrative review process. This subpart explains the procedures we follow in determining your rights under title II of the Social Security Act. The regulations describe the process of administrative review and explain your right to judicial review after you have taken all the necessary administrative steps. These procedures apply also to persons claiming certain benefits under title XVIII of the Act (Medicare); see 42 CFR 405.701(c). The administrative review process consists of several steps, which usually must be requested within certain time periods and in the following order:

(1) Initial determination. This is a determination we make about your entitlement or your continuing entitlement to benefits or about any other matter, as discussed in § 404.902, that gives you a right to further review.

(2) Reconsideration. If you are dissatisfied with an initial determination, you may ask us to reconsider it.

(3) Hearing before an administrative law judge. If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge.

(4) Appeals Council review. If you are dissatisfied with the decision of the administrative law judge, you may request that the Appeals Council review the decision.

(5) Federal court review. When you have completed the steps of the administrative review process listed in paragraphs (a)(1) through (a)(4) of this section, we will

have made our final decision. If you are dissatisfied with our final decision, you may request judicial review by filing an action in a Federal district court.

(6) Expedited appeals process. At some time after your initial determination has been reviewed, if you have no dispute with our findings of fact and our application and interpretation of the controlling laws, but you believe that a part of the law is unconstitutional, you may use the expedited appeals process. This process permits you to go directly to a Federal district court so that the constitutional issue may be resolved.

. . . .

20 C.F.R. § 404.902 Administrative actions that are initial determinations.

Initial determinations are the determinations we make that are subject to administrative and judicial review. The initial determination will state the important facts and give the reasons for our conclusions. In the old age, survivors' and disability insurance programs, initial determinations include, but are not limited to, determinations about--

(a) Your entitlement or your continuing entitlement to benefits;

(b) Your reentitlement to benefits;

(c) The amount of your benefit;

(d) A recomputation of your benefit;

(e) A reduction in your disability benefits because you also receive benefits under a workmen's compensation law;

(f) A deduction from your benefits on account of work;

(g) [Reserved]

(h) Termination of your benefits;

(i) Penalty deductions imposed because you failed to report certain events;

(j) Any overpayment or underpayment of your benefits;

(k) Whether an overpayment of benefits must be repaid to us;

(l) How an underpayment of benefits due a deceased person will be paid;

(m) The establishment or termination of a period of disability;

(n) A revision of your earnings record;

(o) Whether the payment of your benefits will be made, on your behalf, to a representative payee;

(p) Your drug addiction or alcoholism;

(q) Who will act as your payee if we determine that representative payment will be made;
(r) An offset of your benefits under § 404.408b because you previously received supplemental security income payments for the same period;
(s) Whether your completion of, or continuation for a specified period of time in, an appropriate program of vocational rehabilitation services, employment services, or other support services will increase the likelihood that you will not have to return to the disability benefit rolls, and thus, whether your benefits may be continued even though you are not disabled;
(t) Nonpayment of your benefits under § 404.468 because of your confinement in a jail, prison, or other penal institution or correctional facility for conviction of a felony;
(u) Whether or not you have a disabling impairment(s) as defined in § 404.1511;
(v) Nonpayment of your benefits under § 404.469 because you have not furnished us satisfactory proof of your Social Security number, or, if a Social Security number has not been assigned to you, you have not filed a proper application for one;
(w) A claim for benefits under § 404.633 based on alleged misinformation; and
(x) Whether we were negligent in investigating or monitoring or failing to investigate or monitor your representative payee, which resulted in the misuse of benefits by your representative payee.

20 C.F.R. § 404.905 Effect of an initial determination.

An initial determination is binding unless you request a reconsideration within the stated time period, or we revise the initial determination.

20 C.F.R. § 404.907 Reconsideration--general.

If you are dissatisfied with the initial determination, reconsideration is the first step in the administrative review process that we provide, except that we provide the opportunity for a hearing before an administrative law judge as the first step for those situations described in § 404.930(a)(6) and (a)(7), where you appeal an initial determination denying your request for waiver of adjustment or recovery of an overpayment (see § 404.506). If you are dissatisfied with our reconsidered determination, you may request a hearing before an administrative law judge.

20 C.F.R. § 404.911 Good cause for missing the deadline to request review.

(a) In determining whether you have shown that you had good cause for missing a deadline to request review we consider--

(1) What circumstances kept you from making the request on time;

(2) Whether our action misled you;

(3) Whether you did not understand the requirements of the Act resulting from amendments to the Act, other legislation, or court decisions; and

(4) Whether you had any physical, mental, educational, or linguistic limitations (including any lack of facility

with the English language) which prevented you from filing a timely request or from understanding or knowing about the need to file a timely request for review.

(b) Examples of circumstances where good cause may exist include, but are not limited to, the following situations:

(1) You were seriously ill and were prevented from contacting us in person, in writing, or through a friend, relative, or other person.

(2) There was a death or serious illness in your immediate family.

(3) Important records were destroyed or damaged by fire or other accidental cause.

(4) You were trying very hard to find necessary information to support your claim but did not find the information within the stated time periods.

(5) You asked us for additional information explaining our action within the time limit, and within 60 days of receiving the explanation you requested reconsideration or a hearing, or within 30 days of receiving the explanation you requested Appeal Council review or filed a civil suit.

(6) We gave you incorrect or incomplete information about when and how to request administrative review or to file a civil suit.

(7) You did not receive notice of the determination or decision.

(8) You sent the request to another Government agency in good faith within the time limit and the request did not reach us until after the time period had expired.

(9) Unusual or unavoidable circumstances exist, including the circumstances described in paragraph

(a)(4) of this section, which show that you could not have known of the need to file timely, or which prevented you from filing timely.

20 C.F.R. § 404.921 Effect of a reconsidered determination.

The reconsidered determination is binding unless--
(a) You or any other party to the reconsideration requests a hearing before an administrative law judge within the stated time period and a decision is made;
(b) The expedited appeals process is used; or
(c) The reconsidered determination is revised.

20 C.F.R. § 404.929 Hearing before an administrative law judge--general.

If you are dissatisfied with one of the determinations or decisions listed in § 404.930 you may request a hearing. The Associate Commissioner for Hearings and Appeals, or his or her delegate, shall appoint an administrative law judge to conduct the hearing. If circumstances warrant, the Associate Commissioner, or his or her delegate, may assign your case to another administrative law judge. At the hearing you may appear in person or by video teleconferencing, submit new evidence, examine the evidence used in making the determination or decision under review, and present and question witnesses. The administrative law judge who conducts the hearing may ask you questions. He or she shall issue a decision based on the hearing record. If you waive your right to appear at the hearing, either in person or by video teleconferencing, the administrative law judge will make a decision based on

the evidence that is in the file and any new evidence that may have been submitted for consideration.

20 C.F.R. § 404.955 The effect of an administrative law judge's decision.

The decision of the administrative law judge is binding on all parties to the hearing unless--

(a) You or another party request a review of the decision by the Appeals Council within the stated time period, and the Appeals Council reviews your case;

(b) You or another party requests a review of the decision by the Appeals Council within the stated time period, the Appeals Council denies your request for review, and you seek judicial review of your case by filing an action in a Federal district court;

(c) The decision is revised by an administrative law judge or the Appeals Council under the procedures explained in § 404.987;

(d) The expedited appeals process is used;

(e) The decision is a recommended decision directed to the Appeals Council; or

(f) In a case remanded by a Federal court, the Appeals Council assumes jurisdiction under the procedures in § 404.984.

20 C.F.R.§ 404.967 Appeals Council review--general.

If you or any other party is dissatisfied with the hearing decision or with the dismissal of a hearing request, you may request that the Appeals Council review that action. The Appeals Council may deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case to an administrative law judge. The Appeals Council shall notify the parties at their last known address of the action it takes.

20 C.F.R. § 404.971 Dismissal by Appeals Council.

The Appeals Council will dismiss your request for review if you did not file your request within the stated period of time and the time for filing has not been extended. The Appeals Council may also dismiss any proceedings before it if--

(a) You and any other party to the proceedings files a written request for dismissal; or

(b) You or any other party to the proceedings dies and the record clearly shows that dismissal will not adversely affect any other person who wishes to continue the action.

20 C.F.R. § 404.972 Effect of dismissal of request for Appeals Council review.

The dismissal of a request for Appeals Council review is binding and not subject to further review.

20 C.F.R. § 404.977 Case remanded by Appeals Council.

(a) When the Appeals Council may remand a case. The Appeals Council may remand a case to an administrative law judge so that he or she may hold a hearing and issue a decision or a recommended decision. The Appeals Council may also remand a case in which additional evidence is needed or additional action by the administrative law judge is required.

(b) Action by administrative law judge on remand. The administrative law judge shall take any action that is ordered by the Appeals Council and may take any additional action that is not inconsistent with the Appeals Council's remand order.

(c) Notice when case is returned with a recommended decision. When the administrative law judge sends a case to the Appeals Council with a recommended decision, a notice is mailed to the parties at their last known address. The notice tells them that the case has been sent to the Appeals Council, explains the rules for filing briefs or other written statements with the Appeals Council, and includes a copy of the recommended decision.

(d) Filing briefs with and obtaining evidence from the Appeals Council.

(1) You may file briefs or other written statements about the facts and law relevant to your case with the Appeals Council within 20 days of the date that the recommended decision is mailed to you. Any party may ask the Appeals Council for additional time to file briefs or statements. The Appeals Council will extend this period, as appropriate, if you show that you had good cause for missing the deadline.

(2) All other rules for filing briefs with and obtaining evidence from the Appeals Council follow the procedures explained in this subpart.

(e) Procedures before the Appeals Council.

(1) The Appeals Council, after receiving a recommended decision, will conduct its proceedings and issue its decision according to the procedures explain in this subpart.

(2) If the Appeals Council believes that more evidence is required, it may again remand the case to an administrative law judge for further inquiry into the issues, rehearing, receipt of evidence, and another decision or recommended decision. However, if the Appeals Council decides that it can get the additional evidence more quickly, it will take appropriate action.

20 C.F.R. § 404.981 Effect of Appeals Council's decision or denial of review.

The Appeals Council may deny a party's request for review or it may decide to review a case and make a decision. The Appeals Council's decision, or the decision of the administrative law judge if the request for review is denied, is binding unless you or another party file an action in Federal district court, or the decision is revised. You may file an action in a Federal district court within 60 days after the date you receive notice of the Appeals Council's action.

20 C.F.R. § 404.987 Reopening and revising determinations and decisions.

(a) General. Generally, if you are dissatisfied with a determination or decision made in the administrative review process, but do not request further review within the stated time period, you lose your right to further review and that determination or decision becomes final. However, a determination or a decision made in your case which is otherwise final and binding may be reopened and revised by us.
(b) Procedure for reopening and revision. We may reopen a final determination or decision on our own initiative, or you may ask that a final determination or a decision to which you were a party be reopened. In either instance, if we reopen the determination or decision, we may revise that determination or decision. The conditions under which we may reopen a previous determination or decision, either on our own initiative or at your request, are explained in § 404.988.

20 C.F.R. § 404.988 Conditions for reopening.

A determination, revised determination, decision, or revised decision may be reopened--
(a) Within 12 months of the date of the notice of the initial determination, for any reason;
(b) Within four years of the date of the notice of the initial determination if we find good cause, as defined in § 404.989, to reopen the case; or
(c) At any time if--

(1) It was obtained by fraud or similar fault (see § 416.1488(c) of this chapter for factors which we take into account in determining fraud or similar fault);
(2) Another person files a claim on the same earnings record and allowance of the claim adversely affects your claim;
(3) A person previously determined to be dead, and on whose earnings record your entitlement is based, is later found to be alive;
(4) Your claim was denied because you did not prove that a person died, and the death is later established--

(i) By a presumption of death under § 404.721(b); or

(ii) By location or identification of his or her body;

(5) The Railroad Retirement Board has awarded duplicate benefits on the same earnings record;
(6) It either--

(i) Denies the person on whose earnings record your claim is based gratuitous wage credits for military or naval service because another Federal agency (other than the Veterans Administration) has erroneously certified that it has awarded benefits based on the service; or

(ii) Credits the earnings record of the person on which your claim is based with gratuitous wage credits and another Federal agency (other than the Veterans Administration) certifies that it has awarded a benefit based on the period of service for which the wage credits were granted;

(7) It finds that the claimant did not have insured status, but earnings were later credited to his or her earnings record to correct errors apparent on the face of the earnings record (section 205(c)(5)(C) of the Act),

to enter items transferred by the Railroad Retirement Board, which were credited under the Railroad Retirement Act when they should have been credited to the claimant's Social Security earnings record (section 205(c)(5)(D) of the Act), or to correct errors made in the allocation of wages or self-employment income to individuals or periods (section 205(c)(5)(G) of the Act), which would have given him or her insured status at the time of the determination or decision if the earnings had been credited to his or her earnings record at that time, and the evidence of these earnings was in our possession or the possession of the Railroad Retirement Board at the time of the determination or decision;

(8) It is wholly or partially unfavorable to a party, but only to correct clerical error or an error that appears on the face of the evidence that was considered when the determination or decision was made;

(9) It finds that you are entitled to monthly benefits or to a lump sum death payment based on the earnings of a deceased person, and it is later established that:

(i) You were convicted of a felony or an act in the nature of a felony for intentionally causing that person's death; or

(ii) If you were subject to the juvenile justice system, you were found by a court of competent jurisdiction to have intentionally caused that person's death by committing an act which, if committed by an adult, would have been considered a felony or an act in the nature of a felony;

(10) It either--

(i) Denies the person on whose earnings record your claim is based deemed wages for

internment during World War II because of an erroneous finding that a benefit based upon the internment has been determined by an agency of the United States to be payable under another Federal law or under a system established by that agency; or

(ii) Awards the person on whose earnings record your claim is based deemed wages for internment during World War II and a benefit based upon the internment is determined by an agency of the United States to be payable under another Federal law or under a system established by that agency; or

(11) It is incorrect because--

(i) You were convicted of a crime that affected your right to receive benefits or your entitlement to a period of disability; or

(ii) Your conviction of a crime that affected your right to receive benefits or your entitlement to a period of disability is overturned.

20 C.F.R. § 404.989 Good cause for reopening.

(a) We will find that there is good cause to reopen a determination or decision if--

(1) New and material evidence is furnished;

(2) A clerical error in the computation or recomputation of benefits was made; or

(3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made.

(b) We will not find good cause to reopen your case if the only reason for reopening is a change of legal interpretation or administrative ruling upon which the determination or decision was made.

20 C.F.R. § 422.203 Hearings.

(a) Right to request a hearing.

(1) After a reconsidered or a revised determination (i) of a claim for benefits or any other right under title II of the Social Security Act; or (ii) of eligibility or amount of benefits or any other matter under title XVI of the Act, except where an initial or reconsidered determination involving an adverse action is revised, after such revised determination has been reconsidered; or (iii) As to entitlement under part A or part B of title XVIII of the Act, or as to the amount of benefits under part A of such title XVIII (where the amount in controversy is $100 or more); or of health services to be provided by a health maintenance organization without additional costs (where the amount in controversy is $100 or more); or as to the amount of benefits under part B of title XVIII (where the amount in controversy is $500 or more); or as to a determination by a peer review organization (PRO) under title XI (where the amount in controversy is $200 or more); or as to certain determinations made under section 1154, 1842(1), 1866(f)(2), or 1879 of the Act; any party to such a determination may, pursuant to the applicable section of the Act, file a written request for a hearing on the determination. After a reconsidered determination of a claim for benefits under part B of title IV (Black Lung benefits) of the Federal Mine

Safety and Health Act of 1977 (30 U.S.C. 921 through 925), a party to the determination may file a written request for hearing on the determination.

(2) After (i) a reconsidered or revised determination that an institution, facility, agency, or clinic does not qualify as a provider of services, or (ii) a determination terminating an agreement with a provider of services, such institution, facility, agency, or clinic may, pursuant to section 1866 of the Act, file a written request for a hearing on the determination.

(3) After (i) a reconsidered or revised determination that an independent laboratory, supplier of portable X-ray services, or end-stage renal disease treatment facility or other person does not meet the conditions for coverage of its services or (ii) a determination that it no longer meets such conditions has been made, such laboratory, supplier, treatment facility may, under 42 CFR 498.40 of this chapter, file a written request for a hearing on the determination. (For hearing rights of independent laboratories, suppliers of portable X-ray services, and end-stage renal disease treatment facilities and other person see 42 CFR 498.5.)

(b) Request for hearing.

(1) A request for a hearing under paragraph (a) of this section may be made on Form HA-501, "Request for Hearing," or Form HA-501.1, "Request for Hearing, part A Hospital Insurance Benefits," or by any other writing requesting a hearing. The request shall be filed at an office of the Social Security Administration, usually a district office or a branch office, or at the Veterans' Administration Regional Office in the Philippines (except in title XVI cases), or at a hearing office of the Office of Hearings and Appeals, or with

the Appeals Council. A qualified railroad retirement beneficiary may, if he prefers, file a request for a hearing under part A of title XVIII with the Railroad Retirement Board. Form HA-501 may be obtained from any social security district office or branch office, from the Office of Hearings and Appeals, Social Security Administration, P.O. Box 3200, Arlington, VA 22203, or from any other office where a request for a hearing may be filed.

(2) Unless for good cause shown an extension of time has been granted, a request for hearing must be filed within 60 days after the receipt of the notice of the reconsidered or revised determination, or after an initial determination described in 42 CFR 498.3(b) and (c) (see §§ 405.933, 410.631, and 416.1433 of this chapter and 42 CFR 405.722, 498.40, and 417.260.)

(c) Hearing decision or other action. Generally, the administrative law judge will either decide the case after hearing (unless hearing is waived) or, if appropriate, dismiss the request for hearing. With respect to a hearing on a determination under paragraph (a)(1) of this section, the administrative law judge may certify the case with a recommended decision to the Appeals Council for decision. If the determination on which the hearing request is based relates to the amount of benefits under part A or B of title XVIII of the Act, to health services to be provided by a health maintenance organization without additional costs, or to PRO determinations, the administrative law judge shall dismiss the request for hearing if he or she finds that the amount in controversy is less than $100 for appeals arising under part A or concerning health maintenance organization benefits; less than $200 for appeals arising from PRO determinations;

and less than $500 for appeals arising under part B. Hearing decisions must be based on the evidence of record, under applicable provisions of the law and regulations and appropriate precedents.

20 C.F.R. § 422.205 Review by Appeals Council.

(a) Any party to a hearing decision or dismissal may request a review of such action by the Appeals Council. The Health Care Financing Administration or, as appropriate, the Office of the Inspector General is a party to a hearing on a determination under § 422.203 (a)(2) and (a)(3) and to administrative appeals involving matters under section 1128(b)(6) of the Act (see 42 CFR 498.42). This request may be made on Form HA-520, "Request for Review of Hearing Decision/Order," or by any other writing specifically requesting review. Form HA-520 may be obtained from any social security district office or branch office, from the Office of Hearings and Appeals Social Security Administration, P.O. Box 3200, Arlington, VA 22203, or at any other office where a request for a hearing may be filed. (For time and place of filing, see §§ 404.968, 410.661, and 416.1468 of this chapter, and 42 CFR 405.724, 498.82 and 417.261.)

(b) Whenever the Appeals Council reviews a hearing decision under §§ 404.967 or 404.969, 410.662, 416.1467, or 416.1469 of this chapter, or 42 CFR 405.724 or 417.261 or 473.46 and the claimant does not appear personally or through representation before the Council to present oral argument, such review will be conducted by a panel of not less than two members of the Council designated in the manner prescribed by the Chairman or Deputy Chairman

of the Council. In the event of disagreement between a panel composed of only two members, the Chairman or Deputy Chairman, or his delegate, who must be a member of the Council, shall participate as a third member of the panel. When the claimant appears in person or through representation before the Council in the location designated by the Council, the review will be conducted by a panel of not less than three members of the Council designated in the manner prescribed by the Chairman or Deputy Chairman. Concurrence of a majority of a panel shall constitute the decision of the Appeals Council unless the case is considered as provided under paragraph (e) of this section.

(c) The denial of a request for review of a hearing decision concerning a determination under § 422.203(a)(1) shall be by such appeals officer or appeals officers or by such member or members of the Appeals Council as may be designated in the manner prescribed by the Chair or Deputy Chair. The denial of a request for review of a hearing dismissal, the dismissal of a request for review, the denial of a request for review of a hearing decision whenever such hearing decision after such denial would not be subject to judicial review as explained in § 422.210(a), or the refusal of a request to reopen a hearing or Appeals Council decision concerning a determination under § 422.203(a)(1) shall be by such member or members of the Appeals Council as may be designated in the manner prescribed by the Chair or Deputy Chair.

(d) A review or a denial of review of a hearing decision or a dismissal of a request for review with respect to requests by parties under 42 CFR 498.82 or 1001.128 in accordance

with § 498.83 will be conducted by a panel of at least two members of the Appeals Council designated by the Chairman or Deputy Chairman and one person from the U.S. Public Health Service designated by the Surgeon General, Public Health Service, Department of Health and Human Services, or his delegate. This person shall serve on an ad hoc basis and shall be considered for this purpose as a member of the Appeals Council. Concurrence of a majority of the panel shall constitute the decision of the Appeals Council unless the case is considered as provided under paragraph (e) of this section.

(e) On call of the Chairman, the Appeals Council may meet en banc or a representative body of Appeals Council members may be convened to consider any case arising under paragraph (b), (c), or (d) of this section. Such representative body shall be comprised of a panel of not less than five members designated by the Chairman as deemed appropriate for the matter to be considered, including a person from the U.S. Public Health Service in a matter under paragraph (d) of this section. The Chairman or Deputy Chairman shall preside, or in his absence, the Chairman shall designate a member of the Appeals Council to preside. A majority vote of the designated panel, or of the members present and voting shall constitute the decision of the Appeals Council.

(f) The Chairman may designate an administrative law judge to serve as a member of the Appeals Council for temporary assignments. An administrative law judge shall not be designated to serve as a member on any panel where such panel is conducting review on a case in which such individual has been previously involved.

Social Security Disability Benefits Reform Act of 1984, Pub.L. No. 98-460 , 98 Stat. 1794, Section 5(a)

. . .

MORATORIUM ON MENTAL IMPAIRMENT REVIEWS

Sec. 5.
(a) The Secretary of Health and Human Services "42 USC 421 note" hereafter in this section referred to as the "Secretary") shall revise the criteria embodied under the category "Mental Disorders" in the "Listing of Impairments" in effect on the date of the enactment of this Act under appendix 1 to subpart P of part 404 of title 20 of the Code of Federal Regulations. The revised criteria and listings, alone and in combination with assessments of the residual functional capacity of the individuals involved, shall be designed to realistically evaluate the ability of a mentally impaired individual to engage in substantial gainful activity in a competitive workplace environment. Regulations establishing such revised criteria and listings shall be published no later than 120 days after the date of the enactment of this Act.
(b)(1) Until such time as revised criteria have been established by regulation in accordance with subsection (a), no continuing eligibility review shall be carried out under section 221(i) of the Social Security Act, "42 USC 421 or under the corresponding requirements established for disability determinations and reviews under title XVI of such Act, "42 USC 1381" with respect to any individual previously determined to be under a disability by reason of a mental impairment, if --

(A) no initial decision on such review has been rendered with respect to such individual prior to the date of the enactment of this Act, or

(B) an initial decision on such review was rendered with respect to such individual prior to the date of the enactment of this Act but a timely appeal from such decision was filed or was pending on or after June 7, 1983.

For purposes of this paragraph and subsection (c)(1) term "continuing eligibility review", when used to refer to a review of a previous determination of disability, includes any reconsideration of or hearing on the initial decision rendered in such review as well as such initial decision itself, and any review by the Appeals Council of the hearing decision.

(2) Paragraph (1) shall not apply in any case where the Secretary determines that fraud was involved in the prior determination, or where an individual (other than an individual eligible to receive benefits under section 1619 of the Social Security Act "42 USC 1382h" is determined by the Secretary to be engaged in substantial gainful activity (or gainful activity, in the case of a widow, surviving divorced wife, widower, or surviving divorced husband for purposes of section 202(e) and (f) of such Act). "42 USC 402"

(c)(1) Any initial determination that an individual is not under a disability by reason of a mental impairment and any determination that an individual is not under a disability by reason of a mental impairment in a reconsideration of or hearing on an initial disability determination, made or held under title II or XVI of the Social Security Act after the date of the enactment of this Act "42 USC 401, 1381" and prior to the date on which

revised criteria are established by regulation in accordance with subsection (a), and any determination that an individual is not under a disability by reason of a mental impairment made under or in accordance with title II or XVI of such Act in a reconsideration of, hearing on, review by the Appeals Council of, or judicial review of a decision rendered in any continuing eligibility review to which subsection (b)(1) applies, shall be redetermined by the Secretary as soon as feasible after the date on which such criteria are so established, applying such revised criteria.

(2) In the case of a redetermination under paragraph (1) of a prior action which found that an individual was not under a disability, if such individual is found on redetermination to be under a disability, such redetermination shall be applied as though it had been made at the time of such prior action.

(3) Any individual with a mental impairment who was found to be not disabled pursuant to an initial disability determination or a continuing eligibility review between March 1, 1981, and the date of the enactment of this Act, and who reapplies for benefits under title II or XVI of the Social Security Act, "42 USC 401, 1381" may be determined to be under a disability during the period considered in the most recent prior determination. Any reapplication under this paragraph must be filed within one year after the date of the enactment of this Act, and benefits payable as a result of the preceding sentence shall be paid only on the basis of the reapplication.

Listing 12.08, 20 C.F.R. Part 404, Subpart P, Appendix 1 (1999)

12.08 Personality Disorders: A personality disorder exists when personality traits are inflexible and maladaptive and cause either significant impairment in social or occupational functioning or subjective distress. Characteristic features are typical of the individual's long-term functioning and are not limited to discrete episodes of illness.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied.

A. Deeply ingrained, maladaptive patterns of behavior associated with one of the following:

1. Seclusiveness or autistic thinking; or

2. Pathologically inappropriate suspiciousness or hostility; or

3. Oddities of thought, perception, speech and behavior; or

4. Persistent disturbances of mood or affect; or

5. Pathological dependence, passivity, or aggressivity; or

6. Intense and unstable interpersonal relationships and impulsive and damaging behavior;

AND

B. Resulting in three of the following:

1. Marked restriction of activities of daily living; or

2. Marked difficulties in maintaining social functioning; or

3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or

4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).