2026 Edition Highlights

1. Decisions of the Ninth and Seventh Circuits and a new Social Security Ruling addressing the need to raise issues about and objections to vocational witness evidence and testimony at administrative hearings and potential application of the issue exhaustion doctrine and consistency with Supreme Court issue exhaustion principles in *Carr v, Saul* and *Sims v. Apfel* to wit: (a) The Ninth Circuit's decision limiting its prior application of issue exhaustion principles to preclude considering new issues on federal court appeal to situations where the represented claimant failed to "present new evidence" or the "new issues dependent on that evidence" to the ALJ at a hearing, such as new vocational evidence not presented by claimant's counsel to the ALJ as in the court's prior *Shaibi* and *Meanel* decisions, and after applying the Supreme Court's reasoning in *Carr* and *Sims*, in *O'Brien v. Bisignano*, 142 F.4th 687, 700-01 (9th Cir. 2025); (b) additional decisions of the Seventh Circuit, holding, without expressly applying the Supreme Court's factors and paradigm from *Carr* and *Sims* for determining the propriety of issue exhaustion in a particular context, that a claimant waives a federal court challenge to the accuracy of the testimony of a vocational expert where the claimant's attorney failed to challenge the testimony at the hearing level, in *Cain v. Bisignano*, 148 F.4th 490, 499-500 (7th Cir. 2025); *Thorpe v. Bisignano*, 148 F.4th 432, 436-37 (7th Cir. 2025); and *Schmitz v. Colvin*, 124 F.4th 1029, 1032-34 (7th Cir. 2024); and (c) the implications of Social Security Ruling (SSR) 24-3p, 89 Fed. Reg. 97158 (Dec. 6, 2024; eff. date Jan. 6, 2025), announcing expectation that representatives raise relevant questions or challenges about the Vocational Expert's (VE) testimony during the hearing stage, that VEs identify the sources of their data and methodology for estimating job numbers, and that ALJs develop the record on these matters when they have not been sufficiently developed by the VE in order to make a supported finding at step four or step five of the sequential evaluation process, and without mentioning application of issue exhaustion, waiver or forfeiture principles based on SSR 24-3p's varying expectations on ALJs, VEs and representatives.

2. The Second Circuit's decision holding that an ALJ who was not yet constitutionally appointed in a claimant's earlier hearing cannot properly hear and decide that same claimant's case on remand, without violating the Art II Appointments Clause per

the Supreme Court *Lucia* decision, even if the ALJ's appointment was properly ratified before the remand hearing in, *Flinton v. Commissioner of Social Security*, 143 F.4th 90, 92-99 (2d Cir. 2025) following decisions in the Fourth and Ninth Circuits in *Brooks v. Kijakazi*, 60 F.4th 735 (4th Cir. 2023) and *Cody v. Kijakazi*, 45 F. 4th 956 (9th Cir. 2022); and expressly contrary to a decision of the Eleventh Circuit, in *Raper v. Commissioner of Social Security*, 89 F.4th 1261 (11th Cir. 2024), cert. denied, 145 S. Ct. 984, 220 L. Ed. 2d 362 (2024).

3. The Eleventh Circuit's decision rejecting claims that the ratification of ALJ appointments in 2018 were invalid under Art II since the SSA Commissioner or Acting Commissioner is not a "head of a department" under the plain language of Article II but "head of an agency" and that the Appeals Council members who denied review in the case, served in violation of Article II, in *Rodriguez v. Social Security Administration*, 118 F.4th 1302, 1308-13 (11th Cir. 2024).

4. The Eleventh Circuit's further holding that the SSA's structure, with a single Commissioner protected from removal except for cause and appointed for 6 years, violated separation of powers principles pursuant to the Supreme Court's recent independent agency-head removal restriction separation of powers decisions, but the "for cause" removal restriction provision is severable from the rest of the Act, and that, pursuant to this body of\ law, "unless a claimant demonstrates actual harm, the unconstitutional provision has no effect on [a] claimant's case" and no harm had been demonstrated in claimant's case justifying relief, in *Rodriguez v. Social Security Administration*, 118 F.4th 1302, 1113-15 (11th Cir. 2024), following the Ninth Circuit's decision in *Kaufmann v. Kijakazi*, 32 F.4th 843, 849-50 Unempl. Ins. Rep. (CCH) &p;16118C, 112 Fed. R. Serv. 3d 1379 (9th Cir. 2022).

5. The Sixth Circuit's decision that a vocational expert's identification of 18,800 jobs in the national economy could satisfy the commissioner's burden of demonstrating jobs which exist in significant numbers in the economy, in *Norris v. Commissioner of Social Security*, 139 F.4th 541, 546 (6th Cir. 2025).

6. The Eleventh Circuit's decision holding that an ALJ who was not yet constitutionally appointed in a claimant's earlier hearing can properly hear and decide that same claimant's case on remand, without violating the Art II Appointments Clause, if the ALJ's appointment was properly ratified before the remand hearing in *Raper v. Commissioner of Social Security*, 89 F.4th 1261 (11th Cir. 2024) and expressly contrary to decisions of the Fourth and Ninth Circuits reaching the opposite conclusion in *Brooks v. Kijakazi*, 60 F.4th 735 (4th Cir. 2023) and *Cody v.*

Kijakazi, 48 F. 4th 956 (9th Cir. 2022);

7. The Fifth Circuit's holding that the applicable HALLEX (I-2-2-42 (B)(1) and POMS (DI 25015.006 (A) guidance establish that the borderline age regulations and criteria do not apply to claimants who are found eligible or would be found eligible for benefits under their chronological age under the medical-vocational guidelines but are seeking extra months of benefits based on an asserted borderline period before meeting their chronological age; rather the borderline criteria applies only in situations where the claimant would receive "zero benefits" without them such as where needed to meet a higher age category on the date of adjudication to or to establish eligibility on the date last insured for Title II purposes, in *Mitchell v. Dudek*, 130 F.4th 451, 454 (5th Cir. 2025).

8. The Ninth Circuit's determinations that: (a) the Supreme Court's holding in *Califano v. Saunders* denying federal court jurisdiction over agency discretionary denials of decisions to reopen social security claims does not apply to a case in which the agency has reopened and rendered a new decision on the merits since the agency's decision after a reopening is a new final decision on the merits from which an appeal can be taken under 42 U.S.C.A. § 405(g); and therefore (b) the courts have jurisdiction to review an ALJ's decision, on remand of the ALJ's prior denial of claimant's first benefits application, *to review that ALJ's discretionary determination* to reopen and reverse the claimant's favorable second benefits application, where claimant sought review within 60 days of that final decision, in *Nevin v. Colvin*, 125 F.4th 1297 (9th Cir. 2025).

9. The Ninth Circuit's holding that the court's failure to reach certain grounds asserted by the claimant on appeal in a social security disability case is not a sufficient reason for reducing a fee under the Equal Access to Justice Act, 28 U.S.C.A. § 2412(d), because when the court awards significant or complete relief on one claim, making it unnecessary to reach other claims, the claimant is entitled to a full fee, in *Nerio Mejia v. O'Malley*, 120 F.4th 1360, 1363-68 (9th Cir. 2024).

10. Decisions of the Sixth, Seventh and Eighth Circuits assessing the significance of counsel's effective hourly rate on an application for attorney's fees under the Social Security Act for federal court work in 42 U.S.C.A. § 406(b), after the Supreme Court decision in *Gisbrecht v. Barnhart*, leading to the Seventh Circuit's reversal of a fee reduction by the district court as an abuse of discretion and the Circuit's approval of the full requested fee award of $34,199.27 to counsel, reflecting an effective hourly

rate of $1,212.74 for 28.20 hours of work on the case, in *Arnold v. Bisignano*, 145 F.4th 768, 772-74 (7th Cir. 2025); the Eighth Circuit's affirmance of a reduction in fees from an effective hourly rate of $960 per hour for 25.1 hours of work for a total requested award of $24,087.25, to only $10,667.50 and an effective hourly rate of $425 per hour as within the court's discretion based on application of the *Gisbrecht* factors, in *Kertz v. Colvin*, 125 F.4th 1218, 1222-23 (8th Cir. 2025); and the Sixth Circuit's affirmance of a reduction in fees from an effective hourly rate of $897 per hour and a total fee of $31,205.43 for 34.8 hours of work in the district court, to only of $17,400 and an effective hourly rate of $500 per hour as within the court's discretion based on application of the *Gisbrecht* factors, in *Tucker v. Commissioner of Social Security*, 136 F.4th 639, 643-44 (6th Cir. 2025).