

State University of New York at Buffalo

From the Selected Works of Chris E Pashler

2013

Mirror, Mirror on the Wall: Stigma and Denial in Social Security Disability Hearings

Chris E Pashler



Available at: https://works.bepress.com/chris_pashler/2/

MIRROR, MIRROR ON THE WALL: STIGMA AND DENIAL IN SOCIAL SECURITY DISABILITY HEARINGS

*Christopher E. Pashler**

ABSTRACT

Commentators have recently suggested that the Social Security Administration (SSA) abandon its non-adversarial model of adjudication utilized in the disability hearings process in favor of an adversarial system, where the United States would be represented by an attorney. This Article will argue that such measures are not necessary to provide the claimant with a full and fair hearing, and will not lead to more consistent or accurate outcomes. Rather, this Article will argue that adoption of an adversarial model of adjudication will radically transform the nature of the disability adjudication process. This potential shift in the character of the hearings process is problematic given claimants may experience shame and embarrassment about the nature of their impairments. Individuals with stigmatized disorders such as obesity may be reluctant to discuss their obesity with either physicians or the Administrative Law Judge (ALJ). A shift to the adversarial model may only serve to intensify barriers to open communication about stigmatized disorders.

This Article will argue that while conversion to an adversarial system is not necessary, some reform of the inquisitorial model is needed as evidenced by the SSA's inability to consistently decide claims filed by similarly situated obese individuals. This conclusion is necessitated by research concerning the impact of negative halos on decision making. In other words, decision makers may make choices and judgments based initial impressions of claimants.

However, positive reform of the inquisitorial model can be achieved by further definition of the contours of the ALJ's duty to develop the record. The first point will consider coping mechanisms utilized by individuals with stigmatized impairments, such as obesity, in applications for benefits. The Article's second major point will explore how these coping mechanisms effectively limit a claimant's ability to communicate about the limiting

* Assistant Professor of Legal Skills, SUNY Buffalo, The State University of New York. B.A., J.D., The University of Iowa. The author can be reached at chrispas@buffalo.edu. Portions of this Article were presented on May 2, 2012 in Philadelphia, Pennsylvania at a conference for the National Organization of Social Security Claimants' Representatives (NOSSCR). Appreciation goes to Professors Rick Su, Mark Bartholomew, and Christine Pedigo for their thoughtful feedback and thoughts about this research project. SUNY at Buffalo law students Kim Rowles and Chelsea Heinz provided invaluable assistance in the preparation of this article.

nature of her obesity. The inability to communicate about weight will, in turn, have a profound impact on her chances of being successful in the disability adjudication process because the testimony and records may not adequately document the claimant's weight as a limiting factor. Thus, there is a need for standardized protocols to be developed to ensure that the ALJ properly considers stigmatized disorders such as obesity, even in instances where the claimant does not allege her obesity as a disabling factor. This reform will improve ALJ decision making in the context of a non-adversarial hearings process.

INTRODUCTION

Once upon a time, lived a King, whose daughter was white as snow, with lips as red as blood and hair as black as ebony.¹ She was known as Snow White. Snow White's step-mother, the Queen, could not bear the thought that another could possess her beauty and used a magic mirror to provide reassurance. When the Queen stood in front of the mirror, she asked, "Mirror, mirror on the wall/Who is the fairest of us all?" To which the mirror would respond, "Queen, thou art the fairest of us all!" This was a perfectly acceptable answer to the Queen. After all, the mirror told the truth. But with the passage of time, Snow White grew into a beautiful young woman, perhaps even more beautiful than the Queen herself. But this could not be. Would the mirror lead the Queen astray? So, the Queen asked, "Mirror, mirror on the wall/Who is the fairest of us all." But this time, the mirror gave the news she did not want to hear: "Queen, thou art the fairest in this hall/But Snow-White's fairer than us all."

The Brothers Grimm fable can be viewed as an illustration of how we may perceive our body image and the coping methods we utilize when our perceptions of our bodies are incongruous with the normative understanding of physical form.² Applicants for benefits under the two disability programs administered by the Social Security Administration (SSA)³ are likely to utilize such coping mechanisms during the adjudication process because impairments can be of such a sensitive nature that the individual can feel intense feelings of shame and humiliation.⁴ These negative

¹ JACOB GRIMM & WILHELM K. GRIMM, *SNOW WHITE AND THE SEVEN DWARFS* (Randall Jarrell trans., 1972).

² See generally, ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 51-62 (1974). In many respects the Queen's relationship with the mirror represents a form of basic stigma management, whereby the individual seeks to construct beliefs about her identity in order to establish her place in the larger group of what sociologist Erving Goffman refers to as the "normals." *Id.*, at 3.

³ See 42 U.S.C §§ 201-233 (2010); 42 U.S.C. §§ 1381-1383(d) (2011).

⁴ JERRY MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 91 (1983) (hereinafter *BUREAUCRATIC JUSTICE*). The problem of embarrassment and shame can intensify when the individual is coping with the presence of a highly stigmatized disorder, such as obesity. See also Rebecca Puhl, *Ways of Coping with Obesity Stigma: Review and Conceptual analysis*, 4 *EATING BEHAVIORS* 53, 62 (2003) (discussing ways that individuals cope with stigma through the negotiation of social identity, whereby the individual adjusts one's self-image to satisfy the requirements of social interactions); Gina Cordell & Carol Rambo Ronai, *Identity Management Among Overweight Women: Narrative Resistance to Stigma*, in *INTERPRETING WEIGHT: THE SOCIAL MANAGEMENT OF OBESITY* 37 (Jeffrey Sobal & Donna Mauerer eds., 1999) (describing how obese individuals construct continuums to help establish that their problem with obesity is not as

feelings can, in turn, limit an individual's ability to openly communicate with an Administrative Law Judge (ALJ) about her impairments. These barriers in communication are problematic because although disability hearings are non-adversarial, the ALJ has a basic obligation to help the claimant develop the record. This obligation is undermined when an ALJ either fails to assist the claimant in proper development of the record, or chooses to ignore potentially relevant issues or obvious facts.

Recently, there has been a resurgence in calls for the SSA to abandon the inquisitorial model of adjudication utilized in the disability hearings process in favor of an adversarial system, where the United States would be represented by an attorney.⁵ This Article will argue that such measures are not necessary to provide the claimant with a full and fair hearing and will not lead to more consistent or accurate outcomes. Rather, this Article will argue that an ALJ can properly fulfill her duty to the claimant in the current inquisitorial model. However, some changes are necessary, particularly with the evaluation of stigmatized disorders such as obesity⁶ that individuals may be reluctant to discuss with either their treating physician or the ALJ. This Article will argue conversion to an adversarial system is not necessary because better protocols should be developed to standardize the hearings process to ensure that the ALJ properly considers stigmatized disorders such as obesity.

This Article's first major point will consider coping mechanisms utilized by individuals with stigmatized impairments, such as obesity, in applications for benefits under either Title II or Title XVI of the Social Security Act. These coping mechanisms are the result of society's historically uneasy relationship with the disabled, particularly when the disabled are visible in the public square.⁷ Stigma is a concept that not only

severe as it is for other individuals).

⁵ See generally, CONGRESSIONAL BUDGET OFFICE, POLICY OPTIONS FOR THE SOC. SEC. DISABILITY INSURANCE PROGRAM, at 18 (July 2012), http://www.cbo.gov/sites/default/files/cbofiles/attachments/43421DisabilityInsurance_screen.pdf; *Social Security Finance: Hearing Before the Subcomm. on Social Sec. of the H. Comm. on Ways & Means*, 112th Cong. (2012) (statement of D. Randall Frye, President, Assoc. of Admin. L. Judges); Jeffrey S. Wolfe, *The Times they are a Changin'*, 29 J. Nat'l L. Jud. 515 (2009)

⁶ Although this Article is going to focus primarily on the stigmatized impairment of obesity, almost all the points would be just as relevant to the Agency's evaluation of mental illness.

⁷ SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL DISCUSSIONS OF DISABILITY* 40 (1996). Disability scholar Susan Wendell has argued that the non-disabled male paradigm has created a world of public and private spheres, where physical structures and social organizations are created for the benefit of the able-bodied. *Id.* at 39-40. Wendell suggests that a tension exists between two spheres when the disabled individual emerges from her private space to enter the public sphere because of the lack of means to

describes attributes but also defines relationships between individuals, for what is a point of shame for one individual might be a source of pride for another.⁸ In the context of disability applications, claimants may recognize potential adversity and employ coping mechanisms to manage the stress associated with the perceived deviant identity.

This Article's second major point will be to consider how an individual's inability to fully communicate about the limiting nature of her obesity will have a profound impact on her chances of being successful in the disability adjudication process. There are two reasons for this. First, a claimant's ability to be successful in her application for disability benefits may depend, in part, on the quality of the record development, particularly the medical records.⁹ Put another way, if a claimant is unable to communicate with her treating physician, her medical records may not accurately reflect a complete narrative of the claimant's illness. The second reason is the critical role that ALJs for the SSA's Office of Disability Adjudication and Review (ODAR)¹⁰ serve in the hearing process.¹¹ In other words, because of the

publicly express the experience of disability and illness. *Id.* Wendell's work has two points of relevance to this Article. First, stigma can guide explicit choices to classify individuals based on perceptions of difference. For example, so-called beggars laws — otherwise known as “ugly laws” — serve as a reminder that even in the not-so-distant past, municipalities throughout the country enacted ordinances that made it illegal for individuals with unsightly physical disabilities to appear in public. *See, e.g.,* Mark Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 132 (1998)(discussing the 1973 repeal of a City of Chicago ordinance prohibiting persons who were “deformed” and “unsightly” from being in the public view). Second, while such extreme examples of overt invidious conduct by decision makers are becoming rarer, stereotypes and myths about the disabled continue to persist, and these beliefs likely will affect the attitudes of decision makers towards certain types of individuals. *See* Linda G. Mills, *A Calculus for Bias: How Malingered Females and Dependent Housewives Fare in the Social Security Disability System*, 16 HARV. WOMEN'S L.J. 211, 212 (1993).

⁸ *Id.*

⁹ *See* 20 C.F.R. § 404.704 (1978) (“When evidence is needed to prove your eligibility or right to continue to receive benefit payments, you will be responsible for obtaining and giving evidence to us.”). However, there is substantial criticism among scholars across a number of disciplines regarding the SSA's overreliance on medical evidence. *See* Hugo Benitez-Silva et al., *How Large are the Classification Errors in the Social Security Disability Award Process?* (NBER Working Paper No. 10219), available at <http://www.nber.org/papers/w1021> (finding individuals may be erroneously classified as not disabled due to unclear definitions utilized in the Agency's protocols or incomplete development of the medical records).

¹⁰ 20 C.F.R. §§ 404.929 (2003); 404.932 (2010). *See also* Heckler v. Campbell, 461 U.S. 458, 471 n.1 (1983)(Brennan, J., concurring) (“[T]here is a “basic obligation” on the ALJ in these non-adversarial proceedings to develop a full and fair record...The ‘duty of inquiry’ derives from claimants’ basic statutory and constitutional right to due process in the adjudication of their claims...” (citations omitted) (quoting Broz v. Schweiker, 677 F.

inquisitorial model utilized in the disability adjudication process, the ALJ can essentially control the inputs into the hearing and define the boundaries of the claimant's testimony.

The third major point of this Article will consider whether the ALJ's role in the disability adjudication process as inquisitor (and decision maker) contributes to inconsistency in the evaluation of claims filed by obese individuals.¹² Recently, an idea that was explored by Professor Frank Bloch in 1981 has reemerged: switching from the inquisitorial model to a system where the United States would be represented at the disability hearing by an attorney.¹³ Yet, these recent commentators have suggested that the process

2d 1351, 1364 (11th Cir. 1982)).

¹¹ See 20 C.F.R. § 404.944 (1986) ("The administrative law judge may decide when the evidence will be presented and when the issues will be discussed."); § 404.953 (1986) ("The administrative law judge must base the decision on the preponderance of the evidence offered at the hearing or otherwise included in the record."); § 404.705 (1986) ("Generally, you will be asked to give us by a certain date specific kinds of evidence or information to prove you are eligible for benefits. If we do not receive the evidence or information by that date, we may decide you are not eligible for benefits."); see also Robert Rains, *Professional Responsibility and Social Security Representation: The Myth of the State-Bar to Compliance with Federal Rules on Production of Adverse Evidence*, 92 CORNELL L. REV. 363, 367 (2007) ("...the record created at the ALJ hearing is critical."); Frank Bloch, et al., *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 28 (2004).

In the context of a highly stigmatized disorder such as obesity there are numerous examples where claimants fail to properly develop supply sufficient evidence to establish that their obesity could be a disabling impairment. See, e.g., *Cheeks v. Comm. of Soc. Sec.*, No. 10-CV-12047, 2011 WL 589283, (Jan. 18, 2011) (finding the determination of the ALJ was supported by substantial evidence). In *Cheeks*, the claimant testified she was 5'5" tall and weighed approximately 384 pounds. *Id.* at * 5. The administrative record contained evidence the claimant was treated for obesity for a period of one year, but it is not apparent from the reported decision whether the claimant testified about the limiting effects of her obesity or offered other testimony in support of her obesity being a disabling condition. *Id.* at *4. Despite the claimant's obesity (and other impairments) the ALJ determined the claimant could perform the full range of light work. *Id.* at *6. While it is possible that the claimant could perform the full range of light work, this case serves as an example that the record concerning a claimant's obesity needs to be developed, even in instances where the claimant's extreme obesity would be readily apparent to the ALJ.

¹² *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (acknowledging the "multiple hat" model utilized in the ALJ decision-making process).

¹³ Frank S. Bloch, *Representation and Advocacy at Non-Adversary Hearings: The Need for Non-Adversary Representatives at Social Security Disability Hearings*, 59 WASH. U. L. Q 349 (1981); SOC. SEC. ADMIN. ADVISORY BOARD, CHARTING THE FUTURE OF SOCIAL SECURITY'S DISABILITY PROGRAMS: THE NEED FOR FUNDAMENTAL CHANGE 19-20 (2001) ("We think that having an individual present at the hearing to defend the agency's position would help to clarify the issues and introduce greater consistency and accountability into the adjudicative system."). Professor Bloch's prior work, however, has

should actually be characterized as adversarial.¹⁴ At first blush, this proposal seems attractive, especially in light of this Article's first two major points. This proposal sounds intriguing as the supremacy of the idea of the adversarial system as utilized in the Anglo-American system of jurisprudence is engrained in the American consciousness.¹⁵ It is possible a government representative would improve the quality of the hearings process for individuals with highly stigmatized disorders such as obesity, but it is unclear that the benefit of government representation would outweigh the enormous costs of transforming the disability hearings stage from an inquisitorial model to an adversarial system.¹⁶ Further, it is not obvious why this proposal is necessary to achieve greater accuracy and consistency in decision making given that ALJs have sufficient power and the necessary tools to fulfill their obligations as inquisitor.

Thus, this Article will consider whether inconsistent results in the evaluation of obesity are the result of the Ruling's failure to specify the role of the ALJ in performing an active investigatory role, especially when handling cases involving highly stigmatized disorders such as obesity. This Article comes at a time when commentators have recently argued for the ALJ corps to have expanded judicial independence under the Administrative Procedures Act.¹⁷ While this is an interesting academic issue, the question of whether the APA's formal adjudication measures apply to disability hearings is ultimately a matter for Congress to decide.¹⁸ Putting aside these questions, it is unclear how an adversarial system will solve the problem of incomplete record development.¹⁹ In fact, as will be

suggested that while a government representative is necessary, steps should be taken to preserve the non-adversarial nature of the hearings process.

¹⁴ *see also*, Frye, *supra* note x. at 4; Wolfe, *supra* note x, at 540. Wolfe actually characterizes the claimant's position as being adverse to the position of the United States because a claimant appeals to the ALJ only after her claim has been denied.

¹⁵ Jeffrey S. Wolfe & Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L.J. 293, 300 (1997).

¹⁶ *Social Security Finance: Hearing Before the Subcomm. on Social Sec. of the H. Comm. on Ways & Means*, 112th Cong. (2012) (statement of Professor Richard Lubbers)(noting in 2004 he previously estimated the cost of implementing government representation could exceed \$100 million); Richard J. Pierce, Jr., *Reply to Jeffrey Woolfe and Dale Glending*, 35 REGULATION 22, 23 (2012) (estimating conversion to an adversarial system would require the Agency to hire an additional 3,000 ALJs and 4,500 staff attorneys to avoid adding more delay to the decision-making process).

¹⁷ 5 U.S.C. §§ 556-557 (2006); *see also* Jeffrey Wolfe, *Civil Justice Reform in Social Security Adjudications*, 64 ADMIN. L. REV. 379, 407-412 (2012) (discussing tension that exists between Agency and ALJ corps over the limits of judicial independence).

¹⁸ Lubbers, *supra* note x, at 3.

¹⁹ *See* Frank Bloch et al; INTRODUCING GOVERNMENT REPRESENTATIVES TO IMPROVE THE RECORD FOR DECISIONS IN SOCIAL SECURITY ADJUDICATIONS 69 (2003), *available at*

discussed in this Article, adoption of adversarial model may hinder the disability adjudication process.

Nonetheless, the contours of an ALJ's obligation to conduct a full and fair hearing should be better defined, particularly when deciding matters involving highly stigmatized disorders such as obesity. This Article will argue that the Agency's adoption of an adversarial system will not necessarily improve consistency in decision making. The evaluation of morbid obesity, particularly where the claimant does not allege obesity as a disabling impairment, is problematic because of the inconsistency in the assessment of obesity. Adjudicators may be unaware of the difficulties extremely obese claimants may have in communicating about their fatness.²⁰ Reform targeted at encouraging decision makers to acknowledge these difficulties associated with the stigma of obesity may lead to a more equitable disability determination process that acknowledges that obesity can be the sole cause of disability or, at least, a contributing factor that needs to be explicitly considered.²¹ Reform may promote consistency and will perhaps prove to be more cost effective than switching to the adversarial system. First, reform should seek to clarify and expand upon the ALJ's duty to develop the record.²² In the context of a stigmatized impairment such as obesity, the Agency should require adjudicators to more explicitly explore how the claimant's obesity impacts her health and functional ability.²³

I. THE PROBLEM WHEN CLAIMANTS DO NOT ALLEGE OBESITY AS A SEVERE IMPAIRMENT

[http:// www.ssab.gov/documents/Bloch-Lubbers-Verkuil.pdf](http://www.ssab.gov/documents/Bloch-Lubbers-Verkuil.pdf). This study conducted by Professors Bloch, Lubbers and Verkuil suggests that government representation may be necessary to assist the ALJ in record development and issue identification. But this study does not go as far as advocating adoption of an adversarial model of adjudication. *See also*, Lubbers, *supra* note x, at 6.

²⁰ *See* Dara Purvis, *A Female Disease: The Unintentional Gendering of Fibromyalgia Social Security Claims*, 21 TX. J. WOMEN & L. 85, 115 (2011) (noting that adjudicators are unaware of gender differentials in pain management and coping with fibromyalgia).

²¹ *See Id.*, at 115 ("A better awareness of the existence of gendered medical issues could arguably begin to equalize the path faced by male and female claimants with excess pain claims).

²² *See generally*, JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS 67-74 (1978).

²³ *See* Purvis, *supra* note X, at 116 (suggesting SSA should direct adjudicators to inquire whether or how the claimant deals with pain). Commentators such as ALJ Jeffrey Wolfe have previously suggested that many adjudicators worry that more rigorous cross examination of claimants might lead to charges of bias. *See also*, Jeffrey S. Wolfe, *The Times they are a Changin'*, 29 J. Nat'l L. Jud. 515, 5XX (2009). ALJs have made this argument for many years; however, Professor Mashaw's study directly disputes that charge. MASHAW ET AL., *supra* note x, at 98.

Focus on the role of the ALJ in the development of the record is necessary because in fact a low percentage of obese claimants may actually allege obesity as a severe impairment on either the initial application for disability benefits or at the administrative hearing.²⁴ The low percentage of individuals alleging disability as a result of their obesity suggests these individuals may possibly be utilizing coping mechanisms. These coping mechanisms, in turn, make development of a complete record more difficult. Reform should seek to clarify and standardize the ALJ duty to develop the record to ensure that stigmatized individuals have a full and fair opportunity to discuss their impairments.

Prior research has shown that decision-making patterns concerning similarly situated obese individuals can be described as inconsistent.²⁵ For example, 25% of the cases reviewed involved individuals with a BMI greater than 48. Of these decisions, the ALJs were affirmed in 54% of the cases reviewed and reversed in 46%. This finding was somewhat surprising because of my initial hypothesis that there would be greater consistency in results (i.e., remands), especially with individuals who could be classified as morbidly obese.²⁶ These findings suggest the Ruling's guidance

²⁴ This Article is part of an ongoing project exploring the problems with the disability adjudication process by looking at the SSA's evaluation of a very contemporary problem: obesity. I chose to look at the evaluation for obesity for two reasons. First, obese individuals are vulnerable to bias in a number of contexts because excess weight can invoke strong negative reactions among reasonable individuals: slothfulness, gluttony, and pitiful are all adjectives associated with high body weight. See Puhl, *supra* note x, at X. But these opinions hardly represent consensus. In spite of the stigma associated with obesity, other reasonable individuals might decry the moral panic associated with obesity. Second, I thought identifying similarly situated claimants would be possible by looking at the claimant's Body Mass Index (BMI). There are three categories of obesity. Level I includes BMIs of 30.0 – 34.9; Level II includes BMIs of 35.0-39.9; Level III, which the Agency terms "extreme obesity," represents the greatest risk for developing obesity-related impairments and includes BMIs greater than or equal to 40.

²⁵ Chris E. Pashler, *Smithers What's the Name of this Gastropod? King-size Homer and the Social Security Administration's Subjective Evaluation of Fatness*, 29 GA. ST. L. REV. ____ (2013) (forthcoming). Last year I began to review all district and circuit court decisions following the repeal of Medical Listing 9.09, which provided guidelines to evaluate obesity at Step 3 in the sequential evaluation process. In total this review looked at 1,623 decisions. Out of these cases involving obese claimants, I only reviewed cases where the claimant's BMI could be ascertained. These cases were coded for a number of factors: age, gender, BMI, whether the application was for Title II and/or Title XVI benefits, and what additional impairments the ALJ determined to be a severe impairment. Upon completion of the first review, it became apparent that my search had also included cases where the claimant did not identify obesity as a severe impairment. Thus, I added a category to consider whether the claimant alleged obesity as a severe impairment or whether the ALJ determined that the claimant's obesity was a severe impairment.

²⁶ There are three categories of obesity. Level I includes BMIs of 30.0 – 34.9; Level II

provided to decision makers is sufficiently vague²⁷ as to permit adjudicators to engage in a form of intuitive²⁸ decision making because the Ruling fails to specify the point at which a claimant's obesity is severe enough to warrant substantial discussion in the decision.²⁹

A possible explanation of these inconsistencies involving similarly situated obese individuals is attributable to ALJ bias. But perhaps it is an over simplification to point the figure at the biased ALJ. Another explanation is that unsuccessful claimants failed to properly allege their obesity on the initial application or develop the record concerning their obesity, either through the use of medical records or testimony, at the ALJ hearing level. Thus, there is a point of intersection between bias and development of the record because of the critical role the ALJ serves in the informal, non-adversarial model of adjudication.³⁰ Put another way, in cases where the claimant does not properly document the impact of her obesity on her health and functional limitation, the ALJ may make the choice to ignore the claimant's obesity, even where the claimant's size should put the ALJ on notice that obesity could potentially be relevant to the disability determination.³¹ This is particularly true where claimants

includes BMIs of 35.0-39.9; Level III, which the Agency terms "extreme obesity," represents the greatest risk for developing obesity-related impairments, and includes BMIs greater than or equal to 40.

²⁷ See, e.g., *Norman v. Astrue*, 694 F. Supp. 2d 738, 748 (N.D. Ohio 2010) ("This Court concedes that SSR 02-01p does not identify a specific level of analysis.").

²⁸ BUREAUCRATIC JUSTICE, *supra* note x, at 75-76 ("By intuitive rationality I mean an exercise of judgment that is not explained, or perhaps explainable, through reasoned connection of value premises and factual findings. These sorts of intuitive judgments are particularly common in personal relationships...but they are also fairly widespread in political and legal systems.").

²⁹ See, e.g., *Sotack v. Astrue*, No. 07-CV-0382, 2009 WL 3734869 (Nov. 4, 2009) (observing district courts vary in their interpretation of the extent and explicitness of the ALJ's explanation of how the ALJ considered the claimant's obesity at Steps 4 and 5).

³⁰ *Sims v. Apfel*, 530 U.S. 103, 111 (2000) (noting SSA has replaced traditional judicial model utilized in the adversarial system and replaced it with an inquisitorial proceeding, where the ALJ is charged with the duty to investigate the facts and develop arguments for and against granting disability benefits).

³¹ Whether the full impact of the claimant's obesity is explored in the hearing can make a difference in the outcome of the case. See, e.g., *Trent v. Astrue*, No. 3:09CV00453, 2011 WL 463371 (S.D. Ohio Jan. 14, 2011) (holding the ALJ's conclusions regarding the claimant's obesity were not supported by substantial evidence). In *Trent*, the claimant was 5'4" with weight between 247.5 and 262 pounds, which would put her BMI at between 40 and 42.29. *Id.* at *2. The claimant's treating physicians did not opine as to the impact of the claimant's obesity on her ability to work. See *id.* Although the ALJ determined the claimant's obesity was a severe impairment, the ALJ relied on the testimony of an independent medical expert who testified about the claimant's obesity. *Id.* at *10. The exchange, which was described by the reviewing court as "confusing" and somewhat limited: "And let's see, she's, she's 5'8" and 242. Does that present any significant [sic] as

suffer from highly stigmatized disorders, such as obesity because they may be reluctant to discuss their obesity with their treating physicians, their counsel, and the ALJ.³²

Two trends from the review of case law³³ support this theory and will be the focus of this article. First, in my review, only 17% of claimants actually alleged obesity as a severe impairment, either at the initial application for benefits or at the hearing stage.³⁴ In these cases, the decisions of the ALJs were affirmed in approximately 63% of the cases surveyed. This failure to properly allege obesity as a disabling impairment can potentially have negative consequences to a claimant's disability application, even in instances where the claimant's obesity³⁵ or the impact of the obesity on other impairments should be obvious to the decision maker because of the

far as impairment to you, Doctor?" *Id.* To which the medical expert answered, "No." *Id.* The reviewing court described this testimony as "conclusory" and suggested the doctor failed to consider the impact of the claimant's obesity with her fibromyalgia and degenerative disc disease on her work abilities. *Id.* This exchange illustrates how an ALJ may choose to ignore obesity where references to obesity in the record and the claimant's testimony are scarce. *Cf. Cruz v. Barnhart*, No. 04 CV-9011, 2006 WL 1228581 (S.D.N.Y. Mar. 7, 2006)(claimant did not claim obesity as a severe impairment, but remand was not needed as ALJ's acknowledgment of the claimant's obesity in the statement of facts was sufficient consideration of the impairment).

³² *See Edwards v. Astrue*, No. 10-1088, 2011 WL 1430324 (E.D. Penn. April 6, 2011) (noting the Third Circuit has not specifically addressed whether a remand is necessary when the claimant does not assert obesity but the ALJ determines the claimant's obesity is a severe impairment, and the ALJ subsequently fails to analyze the impact of the claimant's obesity on her other impairments). *Cf. Briggs v. Astrue*, 221 Fed. Appx 767, 771 (10th Cir. 2007) (ALJ correctly determined obesity was not a severe impairment where the claimant did not allege it).

³³ Pashler, *supra* note x, at x (describing review of appeals of adverse ALJ determinations following the repeal of Medical Listing 9.09).

³⁴ Pashler, *supra* note x, at x. Disability applications will be potentially reviewed at four different stages. The initial application begins at the claimant's local SSA office. The Commissioner of Social Security has authorized State agencies, known as the Disability Determination Service ("DDS"), and the Social Security Administration to make decisions concerning disability applications. 20 C.F.R. § 404.1503 (2007). The Agency relies on 54 DDS offices to review and make a decision on a claimant's file. If the application is denied, the claimant can file request with the DDS for reconsideration. If this request is denied, the claimant can appeal an adverse decision for a de novo hearing before an ALJ. 20 C.F.R. § 404.900 (2011). Adverse decisions can be appealed to the Appeals Council. 20 C.F.R. § 404.970, 20 C.F.R. § 416.1470 (2003).

³⁵ *See, e.g., Rockwood v. Astrue*, 614 F. Supp. 2d 252 (N.D. N.Y. 2009)(remanding for consideration of claimant's obesity on the claimant's residual functional capacity). In *Rockwood*, a female claimant did not allege obesity as a severe impairment even though she had a BMI of 38.8. Nonetheless, the ALJ did not mention the claimant's obesity anywhere in his decision. On appeal, the Agency, despite the fact the claimant's treating physician had diagnosed her as being obese, argued the claimant's weight was "in the range of her normal weight."

claimant's size.³⁶ The second theme that became apparent is the majority of cases that were denied, the ALJs declined to consider the claimant's obesity, in part, because the claimant's medical records did not contain discussion of the impact of the claimant's obesity on either health or functional ability.³⁷

These points are closely related and raise a similar question: why are claimants reticent to discuss the potential impact of their weight on health or functional ability? The answer may be the result of obesity as a stigmatized condition, which, in turn forces the stigmatized individual to employ coping mechanisms.³⁸ These coping mechanisms may ultimately discourage the claimant from engaging in a full and open discussion of her obesity with the decision maker. For example, assume a morbidly obese individual has a treating physician who is skeptical that obesity can be a disability.³⁹ The claimant assumes the treating physician will be hostile about her weight. This skepticism may eventually create friction in the doctor-patient relationship and reduces the likelihood that the treating physician will discuss the impact of the claimant's obesity on health and functional ability. The claimant, as part of her coping mechanism, refuses to acknowledge to herself that her weight could contribute to the overall decline in her health and does not discuss her weight at the disability

³⁶ See, e.g., *Barr v. Astrue*, No. CIV S-07-0284, 2008 WL 3200863 (Aug. 7, 2008). In *Barr*, the reviewing court remanded the decision where the claimant did have a BMI of 40.6, and the ALJ only mentioned in passing that the claimant's obesity "probably exacerbated" the claimant's sleep apnea and back pain. *Id.*, at 6.

³⁷ See, e.g., *Warner v. Astrue*, No. 1:09-CV-01112, 2011 WL 1135810 (Mar. 25, 2011) (claimant's BMI was greater than 40, but the ALJ declined to find obesity was a severe impairment because medical records did not indicate claimant's obesity caused functional limitations); *Norton v. Astrue*, No. 4:09-CV-3100, 2010 WL 4273108 (Oct. 21, 2010) (despite BMI of 43.3, the claimant's obesity was not determined to be a severe impairment); cf. *Rockwood*, 614 F. Supp. 2d. at 278 (remand appropriate despite "scant" references to obesity); *Deaver v. Astrue*, No. 7:07-CV-158, 2008 WL 4619823 (Oct. 20, 2008) (ALJ did not find that obesity was a severe impairment despite multiple references in the medical records to the claimant's morbid obesity and her BMI of 51.6)

³⁸ Puhl, *supra* note x, at x.

³⁹ This illustration is based on the Ninth Circuit's decision in *Celaya v. Hunter*, 332 F.3d 1177 (9th Cir. 2003), which shows how an ALJ may choose to ignore a claimant's obvious high BMI, especially when the claimant does not allege obesity as a severe impairment. The record did contain some inconsistencies as to Celaya's height, ranging from 4'9" to 5'7". Additionally, during the period Celaya asserted she was eligible for benefits, Celaya's weight fluctuated between 205 and 213 pounds. Depending on the estimate of height and weight used, Celaya's BMI would have ranged from either the lowest classification of BMI, Level 1, to the highest classification, Level III. The majority held the ALJ had an obligation to consider visually obvious impairments where viewing the claimant in-person should have alerted the ALJ that he needed to facilitate a multi-impairment analysis, even though the non-asserted condition (obesity) was not noted in the record. Cf. *Burch v. Barnhart*, 400 F.3d 676 (9th Cir. 2005).

hearing. Thus, because the medical records do not address the claimant's obesity, and because the claimant has failed to address her obesity during the hearing, the ALJ is not required by the Ruling or other regulation to find that the claimant's obesity is a severe impairment and address the obesity in his decision. Before this Article considers ways the ALJ's duty to develop the record can be enhanced, a basic understanding of how individuals cope with a stigmatized condition such as obesity is necessary.

II. OBESITY, STIGMA, AND THE PARADOX OF DISABILITY

Stigma is an important concept to understand in the context of SSI/DI disability hearings because of the important role the ALJ⁴⁰ and the treating physician⁴¹ serve in the disability certification process. The treating physician plays a critical role in identifying and treating illness, but the ALJ will play a significant part in defining the legal contours of the claimant's disease.⁴² To establish the legal significance of an impairment, the statutory definition of disability relies heavily on the objective, clinically verifiable assessment of the medical profession.⁴³ But this reliance on clinical judgment of doctors and objectively verifiable assessment is problematic for vulnerable communities, such as the obese.⁴⁴ Obese individuals may experience both explicit and implicit bias, especially in the context of the physician-patient relationship.⁴⁵ For example, in 2009, the American Medical Association passed a resolution that rejected the classification of obesity as a disability.⁴⁶ If a physician is skeptical of whether obesity by

⁴⁰ See 20 C.F.R. § 404.1512(d) & 20 C.F.R. § 416.912(d).

⁴¹ See 20 C.F.R. § 404.1520 (d)(2) (2000) ("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.").

⁴² See Lars Noah, *Pidgeonholing Illness: Medical Diagnosis as a Legal Construct*, 50 HASTINGS L.J. 241, 246 & 252 (1999).

⁴³ 42 U.S.C. § 423(d) (1) (A) (1994) (requiring a medically determinable physical or psychological impairment); see also § 423 (d) (3) (a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.").

⁴⁴ See 42 U.S.C. § 423(d)(5)(A).

⁴⁵ Leanne Joannise & Anthony Synnott, *Fighting Back: Reactions and Resistance to the Stigma of Obesity*, in INTERPRETING WEIGHT: THE SOCIAL MANAGEMENT OF FATNESS AND THINNESS 49 (Jeffrey Sobal & Donna Mauerer eds., 1999) (noting the obese have reported in prior surveys of fat bias by health professionals, including the dismissal of all ailments, as originating from the patient's obesity).

⁴⁶ Despite the AMA's skepticism about whether obesity can constitute a disability,

itself can be disability, this skepticism may, in turn, be reflected in any discussion of obesity in the medical records.⁴⁷

For the purposes of this Article, a basic understanding of stigma is necessary to understand why obese individuals may employ a number of coping mechanisms in a variety of settings, including employment situations, relationships with doctors, social workers, and others. These coping mechanisms may serve as an effective barrier to communication about obesity and may affect the outcome of a disability application. Specifically, these coping mechanisms may serve to limit the claimant's discussion of information necessary to determine whether a claimant is statutorily eligible for benefits.

Stigma can assume many forms and can affect many different types of people. In his seminal work, Goffman noted there are three types of stigma, two of which are applicable to obese⁴⁸ individuals:

Three grossly different types of stigma may be mentioned. First there are abominations of the body — the various physical deformities. Next there are blemishes of individual characters perceived as weak will, domineering or unnatural passions, treacherous and rigid beliefs, and dishonesty, these being inferred from a known record of, for example, mental disorder, imprisonment, addiction, alcoholism, homosexuality, unemployment, suicidal attempts, and radical political behavior. Finally, there are the tribal stigma of race, nation, and religion, these being stigma that can be transmitted through lineages and these equally contaminate all members of a family.⁴⁹

Goffman's work recognizes that stigma is a socially constructed problem, influenced by a series of factors that may shift periodically as societal views evolve and change.⁵⁰ In Goffman's typology, he distinguishes between stigma related to differences in the physical form (the discredited) and those related to behavior (the discreditable), which can be hidden from public

individuals are still eligible for disability as a result of their obesity following the repeal of Medical Listing 9.09. Pashler, *supra* note x, at x.

⁴⁷ The Social Security Act's definition of disability requires a multiple factor analysis that not only considers the individual's physical or mental impairments, but also the result of those impairments on the individual's ability to perform the functional requirements of work. See Bloch, *supra* note x, at 202-04.

⁴⁸ Goffman, however, failed to identify obesity as a stigmatized disorder. See William DeJong, *The Stigma of Obesity: The Consequences of Naïve Assumptions Concerning the Causes of Physical Deviance*, 21 J. OF HEALTH AND SOCIAL BEHAVIOR 75 (1980).

⁴⁹ GOFFMAN, *supra* note X, at 4.

⁵⁰ See Puhl, *supra* note X, at 54. Consider, for example, how attitudes towards homosexuality since the first edition of Goffman's book appeared in 1963 and today when over 50% of Americans believe that gay and lesbian individuals should be allowed to marry.

view.⁵¹

For the obese, their differences in the physical form are readily apparent. Fat⁵² bodies will always be seen as physically different, especially in a country obsessed with thinness and reality shows that emphasize make-overs.⁵³ In part, obese individuals, unlike others, cannot hide their difference for fatness is impossible to hide. These physical differences between fat and thin have practical impact on the individual's ability to function in a variety of settings. For one, the bodies are larger than what society is prepared to accommodate. There are numerous examples of large individuals being disabled by their environment — seats that are too small, doors that are too narrow, chairs that are too low and cannot be adjusted.⁵⁴

While the obese may experience stigma because of society's difficulty in accommodating their size difference, the size differential serves as a constant reminder of deviance and provides very public evidence for those inclined to believe obesity is the result of overeating and laziness.⁵⁵ These attributions of responsibility are embedded in our culture and fuel anti-fat attitudes.⁵⁶ As a result, the obese can experience prejudice in a number of major life areas, including employment, health care, and education.⁵⁷ These negative stereotypes have undercut efforts to include obese individuals under the protection of anti-discrimination statutes.⁵⁸ In part, beliefs that obesity is a problem that could be remedied through individual choice distinguish obesity from other classes that are protected by Title VII of the Civil Rights Act of 1964.⁵⁹ Perhaps these beliefs concerning the etiology of

⁵¹ GOFFMAN, *supra* note x, at 4.

⁵² I will use the words fat and obesity throughout this article because the word fat has been reclaimed by fat activists and is widely used by scholars in this area. For example, one scholar has argued that the use of obesity is harmful because it “medicalizes” the diversity of the human body size and leads to the false belief that obesity can be cured, which, in turn fuels anti-fat prejudice as people who need to be cured. Marilyn Wann, *Foreward: Fat Studies: An Invitation to Revolution*, THE FAT STUDIES READER xiii (Esther Rothblum & Sandra Solovay, eds. 2009); *see also* Abigail C. Saguy & Kevin W. Reiley, *Weighing Both Sides: Morality, Mortality, and Framing Contests Over Obesity*, 30 J. OF HEALTH POL., POL'Y & L. 869, 870 (2006).

⁵³ *See* Puhl, *supra* note x, at 54.

⁵⁴ *See* WENDELL, *supra* note x, at 46.

⁵⁵ Anna Kirkland, *Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance Movement*, 42 LAW & SOC'Y REV. 397,401 (2009). The association of obesity with a litany of negative adjectives is not surprising because, as Goffman argues, that “we tend to impute a wide range of imperfections on the basis of an original one.” Goffman, *supra* note x, at 15-16.

⁵⁶ Christian S. Crandall & April Hortsman Reser, *Attributions and Weight-Based Prejudice*, in WEIGHT BIAS 89 (Kelly Brownell, et al., eds. 2006).

⁵⁷ Puhl, *supra* note x, at 53.

⁵⁸ Kirkland, *supra* note x, at 401.

⁵⁹ *See* Jane Byeff Korn, *Fat*, 77 B.U.L.REV. 25, 39 (2007).

obesity and the potentially transitory nature of fatness explain why the obese can have a negative perception of self. This “spoiled identity”⁶⁰ serves as a possible explanation as to why obese claimants have difficulty discussing their fatness in the context of applications for SSI/DI benefits.⁶¹

Thus, obese claimants are vulnerable to bias in the disability adjudication process because of two forms of stigma: (1) their physical difference marks obese individuals as different; and (2) the reality that stigma is a socially created construct that will (negatively) impact the relationship between patient and doctor.⁶² Both of these forms of stigma will be discussed in this section.

A. *Ways of Coping with the Stigma of Obesity*

Methods of coping with stigma are directly relevant to the SSA’s evaluation of obesity because how a claimant communicates about her obesity may directly impact the adjudicator’s response. Coping mechanisms may, in fact, be necessary for an individual’s survival. But understanding these coping mechanisms is essential for adjudicators to understand why obese individuals may be vulnerable to consequences of stigma.⁶³ In part, stigmatized persons learn to identify individuals who may pose potential threats and how to limit their interactions with those groups.⁶⁴ This is problematic in the context of the disability adjudication process because health stigmas develop as the result of poor communications communication.⁶⁵ Forms of “discursive constraint” may serve to explicitly identify the individual as deviant and alter the way the individual perceives herself.⁶⁶

⁶⁰ GOFFMAN, *supra* note x, at x (noting individuals can suffer because of external discrimination and internal sense of diminished self-perception).

⁶¹ A possible explanation as to why such a low percentage of claimants actually alleged obesity is that claimants do not perceive themselves as being obese. In part, the recognition of self as obese and the construction of a fat identity is a multi-step process. Douglas Degher & Gerald Hughes, *The Adoption of a “Fat” Identity*, in WEIGHT BIAS 13-18 (Kelly Brownell, et al., eds. 2006).

⁶² See Lawrence Hsin Young et al., *Culture and stigma: Adding Moral Experience to Stigma Theory*, 64 SOC. SCI. & MED. 1524, 1531-33 (2006).

⁶³ Puhl, *supra* note x, at 54.

⁶⁴ Rachel A. Smith, *Stigma, Communication, and Health*, in THE ROUTLEDGE HANDBOOK OF HEALTH COMMUNICATION, 456 (Teresa L. Thompson, Roxanne Parrott, & Jon F. Nussbaum, eds., 2011)

⁶⁵ Smith, *supra* note x, at 459.

⁶⁶ Carol R. Ronai & Rebecca Cross, *Dancing with Identity: Narrative Resistance Strategies of Male and Female Stripdancers*, 19 DEVIANT BEHAVIOR 99, 117 (1997)(“All of these forms of discursive constraint are attempts at domination and control, either as an effort to constrain how a person chooses to self identify or as an effort to change her or his

In light of living with external and internal indicators of otherness,⁶⁷ obese individuals turn to coping mechanisms to handle the consequences of living in a society unable to accommodate their deviance.⁶⁸ Prior research suggests that obese individuals may employ a number of coping mechanisms designed to either confront or avoid stigma.⁶⁹ A number of these coping mechanisms are relevant in the context of disability applications. While these coping mechanisms can be designed to protect the individual's identity through promotion of positive self-esteem, they also can directly impact an individual's ability to communicate about her obesity.⁷⁰ For example, researchers have found that obese individuals may employ two different types of attributional strategies to account for their obesity.⁷¹ This framework is relevant to the disability adjudication process because adjudicators may struggle to contextualize origin stories of obesity.⁷²

In many ways, this theory of narrative resistance serves as a possible explanation for why so few claimants actually allege obesity as a severe impairment. Obese individuals know fatness is associated with the negative, and perhaps distinguishable from other lamentable causes of disability. Thus, the discussion of the impact of obesity is limited as the claimant seeks to avoid association with a taboo form of existence.

A question becomes why, then, wouldn't individuals squarely address these issues during the course of a hearing. In fact, this inability to communicate may not represent an unconscious choice, but rather a conscious decision. This choice, known as narrative resistance, is in many

behavior....").

⁶⁷ WENDELL, *supra* note x, at 39 ("Societies that are physically constructed and socially organized with the unacknowledged assumption that everyone is healthy, non-disabled, young but adult, shaped according to cultural ideas, and, often male, create a great deal of disability through sheer neglect of what most people need in order to participate fully in them.").

⁶⁸ Degher & Hughes, *supra* note x, at 18.

⁶⁹ Puhl & Brownell, *supra* note x, at 56. Puhl and Brownell identify ten coping mechanisms that are utilized by obese individuals, including: (1) confirmation and self-acceptance of stereotypes; (2) self-protection; (3) compensation; (4) personal attribution; (5) negotiation of identity; (6) confrontation; (7) social activism; (8) avoidance and psychological disengagement; (9) communal coping; and (10) losing weight.

⁷⁰ *Id.*, at 58.

⁷¹ *Id.*, at 61 (one strategy focuses blame for being overweight on others, while the other strategy focuses on providing socially acceptable reasons for being obese).

⁷² See, e.g., *Stone v. Harris*, 657 F. 2d 210, 212 (8th Cir. 1981) ("The psychological reports submitted to the Appeals Council depict a person whose physical condition, employment frustration, and social and financial situations combined to make it difficult if not impossible for her to sustain the effort needed to lose the two hundred pounds she must shed to reach her supposed "ideal" weight."). Issues of credibility and the rule regarding failure to follow prescribed treatment will be discussed further in *infra* § 4.

ways a coping mechanism. Professor Carol Ronai writes:

Narrative resistance is a response to discursive constraint which dialectically emerges from and constitutes an alternative stock of knowledge within a stigmatized group. Narrative resistance is an active speech behavior which serves to decenter the authority of specific individuals or society to dictate identity. The narrative resistance strategies presented here are forms of biographical work which cast self in frameworks which make use of the language of deviance, but reshape it in such a way as to resist taking on the negative identity for oneself. In reshaping the resources that the mainstream stocks of knowledge offer a stigmatized group, the group in question is remapping both their individual identities and their collective place in the terrain of social space.⁷³

Narrative resistance is a mechanism that is utilized by a variety of stigmatized individuals, including the obese. In many ways the relationship between an obese individual and society is, at best, uneasy, and at worst, hostile.⁷⁴ Whatever the reaction, the lives of the obese have been at least partially defined by society, and obese individuals will employ coping mechanisms necessary for the construction of a positive sense of self.⁷⁵

In light of these coping mechanisms, reform should take advantage of the role the ALJ can play in the development of the record through thorough examination of claimant that is designed to elicit information the claimant may not provide being willing to provide because of a coping mechanism.

B. *Bias in the doctor-patient relationship*

Siddhartha Mukherjee, in his biography of cancer, eloquently captured the difficulty in the communication between a treating physician and her patient: “[a] patient, long before he becomes the subject of medical scrutiny is, at first, simply a storyteller, a narrator of suffering — a traveler who has visited the kingdom of the ill. To relieve an illness, one must begin, then, by unburdening its story.”⁷⁶ Unfortunately, for many obese individuals, the negative perception of obesity may serve as a barrier in proper communication between doctor and patient and will invariably impact the quality of discussion about the claimant’s obesity in her medical records.⁷⁷

⁷³ Ronai, *supra* note x, at 106 (italics from quotation removed).

⁷⁴ Ronai & Cross, *supra* note x, at 43 (noting that the relationship between obese individuals, particularly obese women, and society at large can be characterized as domination and resistance).

⁷⁵ Ronai & Cross, *supra* note x, at 43.

⁷⁶ SIDDHARTHA MUKHERJEE, *THE EMPEROR OF ALL MALADIES: A BIOGRAPHY OF CANCER* 46 (2010).

⁷⁷ See FREDA MOLD & ANGUS FORBES, *HEALTH EXPECTATIONS* (2011); M. Elizabeth

In the context of the application for disability benefits, this can have a profoundly negative impact on the claimant's chances of being awarded benefits.⁷⁸ Bias in the treatment of obese patients is relevant to the disability adjudication process in two ways.

First, patient perceptions of physician hostility to obesity may be inimical to the development of an appropriate physician-patient relationship, and physician attitudes concerning weight can affect clinical judgment.⁷⁹ This inability to establish a proper working relationship between doctor and patient can have a profound impact on the outcome of the hearings process as these clinical judgments, especially because those judgments concerning a treating physician's⁸⁰ diagnosis and opinion about how the claimant's impairment(s) affect functional ability should be afforded controlling weight.⁸¹ Thus, it is problematic for the SSA that studies indicate that physicians struggle with how to counsel patients on weight management and the great variance in how obesity is treated.⁸² Two studies underscore this point. The first study found that physicians recognized problems with obesity but determined only 18% discussed weight management techniques with the patient; the number increased to 42% for mildly obese patients, while in another study, 23% percent of physicians did not recommend any treatment to their obese patients, and 47% felt discussion of counseling was inconvenient.⁸³

The development of a claimant's medical record may further be

Teixeira & Geraldine M. Budd, *Obesity Stigma: A Newly Recognized Barrier to Comprehensive and Effective Type 2 Diabetes Management*, 22 J. OF AM. ACAD. OF NURSE PRAC. 527 (2010); Deborah Carr & Michael Friedman, *Is Obesity Stigmatizing? Body Weight, Perceived Discrimination and Psychological Well-Being in the United States* 46 J. OF HEALTH AND SOC. BEHAVIOR 244 (2005); Rebecca Puhl & Kelly Brownell, *Bias, Obesity & Discrimination*, 9 OBESITY RESEARCH 788 (2001).

⁷⁸ See *infra* § III (describing the importance of medical records in the disability adjudication process).

⁷⁹ Professors Puhl and Brownell found that prior studies suggest that physicians, like other members of the general public, hold negative opinions of obese individuals. For example, one study asked physicians to identify five diagnostic categories to which they responded negatively; obesity ranked fourth, behind drug addiction, alcoholism, and mental illness. Puhl & Brownell, *supra* note x, at 792. In this study, physicians associated obese individuals with poor hygiene, non-compliance, dishonesty, and hostility. *Id.* Bethany Teachman & Kelly Brownell, *Implicit Anti-Fat Bias Among Health Professionals: Is Anyone Immune*, 25 J. OF INT'L OBESITY 1521, 1529 (2001) (finding health professionals who specialize in obesity treatment evidence of strong implicit anti-fat bias in evaluations of overweight persons as bad and beliefs that obese persons are lazy).

⁸⁰ For further discussion of the role of the treating physician in the disability adjudication process, see *infra* Part III.

⁸¹ See *supra* note x.

⁸² Puhl & Brownell, *supra* note x, at 793.

⁸³ *Id.*

complicated because many physicians have reported a sense of skepticism towards obesity as a disabling condition.⁸⁴ For example, one study of treating physicians found that only 33% of physicians believed they bore the primary responsibility for the treatment of obesity, while 39% believed responsibility for care lay elsewhere.⁸⁵ This indifference can have a profound impact on the extent to which the medical records address obesity as patient-centered communication is widely accepted as a conceptual indicator of quality care.⁸⁶ The communication barrier is further complicated by the fact physicians may spend less time with obese patients;⁸⁷ another study found obese patients generally believe their treating physician devotes less time to their weight-related concerns.⁸⁸ To some degree, the doctor-patient interview is a process that is reflective of underlying tension between the participants.⁸⁹ Further complicating the disability adjudicator's task in the examination and evaluation of the claimant's medical records is that interaction between doctors and patients is a specialized rhetorical form in which the communication assumes a question and answer format.⁹⁰ Both participants possess important and relevant forms of information that are necessary to enable the successful provision of treatment services; the doctor about diagnosis and the patient about self.⁹¹ Despite this, evaluation of a claimant's medical records is complicated where a claimant does not pass along relevant information to a treating physician, which, in turn limits the ability of the physician to provide a full and accurate assessment of the claimant's impairments. This task of information gathering and classification may be made more difficult because the treatment of obese individuals can be more demanding because of a number of factors which make clinical judgments complex because while physicians are trained to recognize differences between patients, they also have to weigh how to achieve best outcomes in treatment against the

⁸⁴ Brown *et al.*, *supra* note x, at 668-69.

⁸⁵ Puhl, *supra* note x, at 793.

⁸⁶ See Debra L. Roter & Judith A. Hall, *How Medical Interaction Shapes and Reflects the Physician-Patient Relationship*, in THE ROUTLEDGE HANDBOOK OF HEALTH COMMUNICATION, Teresa L. Thompson, et al. eds., 55, 57 (2011).

⁸⁷ Michele Hebl & Jinchao Xu, *Weighing the Care Physicians' Reactions to the Size of a Patient*, 25 INT'L J. OF OBESITY 1246 (2001) (survey of 122 physicians finding that doctors were more likely to order objective tests for obese patients but likely to spend less time with this patient group).

⁸⁸ Emily Merrill & Jane Grassley, *Women's Stories of Their Experiences as Overweight Patients*, 64 J. OF ADVANCED NURSING 139, x (2009).

⁸⁹ Barbara F. Sharf, *Physician-Patient Communication as Interpersonal Rhetoric: A Narrative Approach*, 2 J. OF HEALTH COMM. 217, 219 (1990).

⁹⁰ *Id.*, at 219.

⁹¹ *Id.*

reality of scarce resources.⁹²

The second point of relevancy to the disability application process is that empirical studies have consistently found that obese claimants may in fact be avoiding seeking medical care. While good relationships between doctor and patient only partly ameliorate the stigma of being obese, a strong sense of personal responsibility may serve as a deterrent to seeking out care.⁹³ Prior studies have indicated that obese individuals suffering from stigma were more likely to avoid interactions with their primary care physicians. For instance, one study found 55% of women surveyed with a BMI greater than 35 delayed or cancelled doctors' appointments because they knew they would be weighed.⁹⁴ Furthermore, these individuals indicated they delayed seeking care because of embarrassment of their weight or because they wanted to avoid a lecture from the treating physician.⁹⁵ Prior research also indicates that obese individuals have sought to delay preventative examinations because of weight.⁹⁶ For example, in one study BMI was directly correlated to whether women sought out a pap-smear, gynecological examination, or clinical breast examination during a three year period.⁹⁷ This reticence to seek care can have a negative impact on an individual's health, and can also limit an adjudicator's understanding of the complex interaction of obesity on other impairments. In other words, a claimant's medical records may provide an incomplete view that will negatively impact the decision maker's ability to determine whether the claimant meets the statutory definition of disability, given the SSA's medically centered definition of disability.

C. Impact of Narrative Resistance Strategies in Disability Hearings

Communication is critical in the context of the disability application process, particularly in a hearing before an ALJ.⁹⁸ The Ninth Circuit's decision in *Burch v. Barnhart*, in which the court backtracked from its prior decision in *Celaya v. Hunter*, illustrates the importance of record

⁹² Mold & Forbes, *supra* note x, at 11, 15.

⁹³ Ian Brown, et al., "Primary care for Tackling Obesity: A Qualitative Study of the Perceptions of Obese Patients," BRITISH J. OF GEN. PRACTICE 666, 668-72 (2006)

⁹⁴ Cheri Wilson, et al., "Overweight Women Delay Medical Care," 3 Archives of Family Medicine 888, x (1994).

⁹⁵ *Id.*

⁹⁶ See generally, Kevin R. Fontaine, et al., "Body Weight and Health Care Among Women in the General Population," 7 ARCHIVE OF FAM. MED. 381 (1998)

⁹⁷ See generally, N.K. Amy, et al., "Barriers to Routine Gynecological Screening for White and African-American Obese Women," 30 J. OF INT'L OBESITY 147 (2006)

⁹⁸ See *infra* § II (A) (describing the claimant's burden of proof).

development through testimony.⁹⁹ Specifically, the court noted Burch was unable to develop through testimony any evidence that her obesity caused any functional limitation.¹⁰⁰ *Burch* suggested that while *Celaya* held that the ALJ has a duty to develop the record and the ALJ should have made greater inquiry into her obesity, *Celaya* had not defined the contours of that burden.¹⁰¹ In fact, my review of the case law suggests this observation is correct, and the exact extent of this obligation is not clear.¹⁰² ALJs need to recognize that there could be potential deficiencies in the administrative record, especially with claimants who have highly stigmatized disorders, and the ALJs obligation to develop these points needs to be clarified.

In many ways, disability hearings are about the past. The statutory definition of disability excludes transitory impairments and illnesses, and so the decision maker is reaching into the claimant's past to explore the origin of her impairments.¹⁰³ In the administrative context, this inquiry may require a claimant to explain her past choices; to explain how she became sick and the decisions she made concerning her medical treatment.¹⁰⁴ As a result, tension between the ALJ and claimant may develop when the individual has to testify about deeply personal issues to an ALJ.¹⁰⁵ This tension can be exacerbated as many SSDI applicants are lower income and less educated.¹⁰⁶ Disability claimants exist and function in a system governed by a complex set of rules that seek to process both objective medical records and subjective allegations. Thus, a claimant's inability to communicate about her illnesses may result in a poorly constructed administrative record which leaves the decision maker unable to issue a favorable decision, even if the claim is completely warranted.

Hence the problem becomes clear. In the context of adversarial

⁹⁹ *Burch v. Barnhart*, 400 F.3d 676 (9th Cir. 2005). *Burch* distinguished *Celaya* on three grounds: (1) *Celaya*'s medical records at least implicitly recognized the limiting result of her obesity; (2) *Celaya*'s obesity was at points close to satisfying the Listing criteria for the former Medical Listing 9.09; and (3) *Celaya*'s *pro se* status. *Id.* at 682.

¹⁰⁰ *Id.*, at 682-683.

¹⁰¹ *Id.*

¹⁰² See *infra* § IV.

¹⁰³ See Cade, *supra* note x, at 16 ("administrative proceedings involve evaluation of a claimant's past actions: the claimant is called upon to describe, explain and defend what he or she did, or did not do, or should have done.").

¹⁰⁴ *Id.*

¹⁰⁵ Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 772 (1992) ("More broadly case the judicial role conflict is associated with the institutional organization of the state apparatus in administering and adjudicating disability, particularly conflict arising out of the incompatible role functions of administrators, adjudicators, lawyers and clients.").

¹⁰⁶ Peter V. Lee, et al., *Engendering Social Security Disability Determinations: The Path of a Woman Claimant*, 68 TUL L. REV. 1477 (1994). .

proceedings, some advocates and scholars distinguish between narrative-based testimony, through which a party is permitted to tell his or her story with minimal interruption, and the testimony that is gathered through the process of structured questioning by an attorney or judge.¹⁰⁷ In the inquisitorial model of adjudication,¹⁰⁸ both forms of testimony will be received. The problem is conceptions and preferences of narrative style may differ between the ALJ and the claimant.¹⁰⁹ While storytelling may have certain virtues, a limitation is that it may not matter in the context of administrative decision making.¹¹⁰ The disability determination process is focused on ascertaining what, despite all the claimant has been through, functional ability does she retain.¹¹¹ To reach this determination, specific pieces of information must be considered.¹¹² In other words, the ALJ may be looking for specific testimony; in the absence of such testimony, approval of the disability application may not be possible.

This section discussed reasons why a claimant may not discuss their obesity with their treating physician(s) or in the context of the disability

¹⁰⁷ Jason Cade, *Narrative Preferences and Administrative Due Process*, 14 HARV. LATINO L. REV. 155, 162 (2011).

¹⁰⁸ The inquisitorial model, where the ALJ serves both as decision maker and fact gatherer, will be discussed further in § 4.

¹⁰⁹ Cade, *supra* note x, at 165 (noting that adjudicators may be more comfortable with rule based narratives).

¹¹⁰ Linda S. Durston & Linda G. Mills, *Toward a New Dynamic in Poverty Client Empowerment: The Rhetoric, Politics, and Therapeutics of Opening Statements in Social Security Disability Hearings*, 8 YALE J. L. & FEMINISM 119, 122 (1996).

¹¹¹ C.F.R. § 404.1545(a) (2003) (“Your residual functional capacity is the most you can still do despite your limitations. We will assess your residual functional capacity based on all the relevant evidence in your case record.”).

¹¹² See C.F.R. § 404.1545(b), (c) (2003). The regulation provides some indication as to what points from a client’s testimony might be relevant:

(b) *Physical abilities*. When we assess your physical abilities, we first assess the nature and extent of your physical limitations and then determine your residual functional capacity for work activity on a regular and continuing basis. A limited ability to perform certain physical demands of work activity, such as sitting, standing, walking, lifting, carrying, pushing, pulling, or other physical functions (including manipulative or postural functions, such as reaching, handling, stooping or crouching), may reduce your ability to do past work and other work.

(c) *Mental abilities*. When we assess your mental abilities, we first assess the nature and extent of your mental limitations and restrictions and then determine your residual functional capacity for work activity on a regular and continuing basis. A limited ability to carry out certain mental activities, such as limitations in understanding, remembering, and carrying out instructions, and in responding appropriately to supervision, co-workers, and work pressures in a work setting, may reduce your ability to do past work and other work.

hearings process. The next question is whether in light of the ALJ's duty to develop the record, does the ALJ have an expanded duty where the claimant may not have alleged the impairment but it becomes obvious that the impairment could affect functional ability. The next section will begin to consider this question by looking at how information is received in the administrative process.

III. THE DISABILITY APPLICATION PROCESS AND DEVELOPMENT OF THE RECORD

The purpose of Part III is to discuss the important role of the development of the record in the disability application process.¹¹³ The prior section reviewed literature from other disciplines that suggests that obese individuals may in fact receive lower quality health care because they either avoid establishing a relationship with their treating physician or fail to properly communicate with their doctor about their obesity. This relationship is complicated further by biased reactions by health care providers that may limit their ability to analyze how a claimant's obesity impacts ability to work. These points are directly relevant to the first major point of this section: the disability evaluation process relies very heavily on the judgment of doctors and other objective medical evidence.¹¹⁴ The second point of this section is that deficiencies in the quality of medical records are especially problematic given the discretion of the ALJ to determine the inputs into the record. Particular consideration must then be given to whether relevant information and testimony can be established at other points in the disability application process.

This section begins by looking at how the failure to properly document how obesity impacts the ability to work can have negative consequences for claimants. For instance, in *Cranfield v. Comm'r of Soc. Sec.*,¹¹⁵ the Sixth

¹¹³ See 20 C.F.R. § 404.1512(a) (2010) ("In general, you have to prove to us that you are ...disabled. Therefore, you must bring to our attention everything that shows that you are blind or disabled. This means that you must furnish medical and other evidence that we can use to reach conclusions about your medical impairment(s) and, if material to the determination of whether you are...disabled, its effect on your ability to work on a sustained basis."). There are numerous examples of cases where the claimant did not properly develop the record and the ALJ did not address the claimant's obesity. See, e.g., *Bush v. Astrue*, No. 3:10-cv-01128, 2011 WL 3444072 (M.D. Tenn. Aug. 8, 2011). *Bush* illustrates how vulnerable obese claimants are when they do not allege obesity as a severe impairment, even where they have been diagnosed with obesity. In affirming the decision of the ALJ, the court specifically noted that the claimant did not allege obesity on any of the forms filed with his initial application, nor did he discuss his obesity at the hearing. *Id.* at X. Thus, it was proper for the ALJ to conclude that the claimant did not have any work related limitations as a result of his obesity. *Id.*

¹¹⁴ Noah, *supra* note x., at 245.

¹¹⁵ *Cranfield v. Commissioner*, 79 Fed.Appx. 852 (6th Cir. 2003), cf. *Young v. Astrue*,

Circuit rejected the claimant's argument that the ALJ was obligated to consider her obesity because of references to her obesity in the medical records. The claimant argued language in Section 404.1512(a) that directs the SSA to consider impairments "you have or about which we receive evidence" and required the ALJ to consider reports from her treating physician that indicated she was obese.¹¹⁶ The court rejected this argument and noted that despite her obligation to furnish medical and other evidence that her medical impairments limited her ability to work on a sustained basis, the claimant provided no such evidence.¹¹⁷ *Cranfield* illustrates a fundamental challenge that obese claimants have. It is possible *Cranfield* submitted all her medical records, yet for reasons articulated in the prior section, did not ever adequately discuss the impact of her obesity with her treating physician or during the disability adjudication process.¹¹⁸ As the issue wasn't raised in either the medical records or the hearing, the Ruling allowed the decision maker to properly choose not to further probe the issue. In order to understand the importance of the record in the disability adjudication process, a basic understanding of both the statutory definition of disability and the disability application process is necessary.

A. *The Statutory Standard for Disability and Proving Disability*

The definition of disability is a complex interaction of both legal and medical concepts.¹¹⁹ An understanding of the role of objective medical evidence, diagnosis, and opinion underscores how vulnerable obese individuals or would be if the medical records only offer a diagnosis of obesity but do not provide any further analysis of the impairment. Central to the disability determination process is the role the treating physician serves in identifying and classifying illness.¹²⁰ These judgments can affect eligibility decisions. But there are limitations to the meaning and

No. 3:09-CV-01894, 2010 WL 6764156 (N.D. Ohio Oct. 15, 2010) (holding ALJ's duty to consider this issue was not excused by the failure of Plaintiff and his treating physicians to raise his obesity as an impairment).

¹¹⁶ *Id.*, at 857.

¹¹⁷ *Id.*

¹¹⁸ Diagnosis is process fraught with uncertainty and the presence of an impairment may not be sufficient to establish statutory eligibility for disability. DEBORAH STONE, *THE DISABLED STATE* 129 (1979) ("The evaluation of impairment rests on physicians' observations and interpretations of basic clinical findings....These building blocks of clinical practice are as much an art as science, and numerous studies have demonstrated significant variations among physicians and laboratory technicians in interpreting them.").

¹¹⁹ Bloch, *supra* note x, at 221 (noting the gatekeeping role of the medical profession in the disability determination process); Noah, *supra* note x, at 252 (noting that lawyers have played a critical, if understated role in framing disease).

¹²⁰ Noah, *supra* note x, at 244.

significance of the process of diagnosis. The treating physician may or may not be trained in vocational medicine and understand the complexities of the statutory definition of disability.¹²¹ As Professor Mashaw noted, “[d]octors diagnose illness from the point of view of prescribing treatment. They have no particular training or experience in relating symptoms of disease to vocationally relevant functions.”¹²² On the other hand, an ALJ is a lawyer who must inquire into the interaction between the claimant’s medical impairments and the relevant vocational considerations. As used in both the SSI and DI programs, the definition of disability means an “[i]nability to engage in 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.”¹²³

The standard has three components.¹²⁴ The severity requirement requires that the claimant’s “physical or mental impairments”¹²⁵ are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy....¹²⁶ The medical causation requires the impairment be “medically determinable.”¹²⁷ The definition of disability also has a duration

¹²¹ MASHAW, *supra* note x, at 54-60.

¹²² *Id.*, at 69.

¹²³ 42 U.S.C.A. § 423(d)(1), (2) (2004). For SSI, the standard is phrased slightly differently. 42 U.S.C.A. § 1382(c)(a)(3)(A) (“unable to engage in substantial gainful activity.”). Despite the minor difference, both titles interpret the standard for disability consistently with one another. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987).

¹²⁴ Bloch, *supra* note X, at 201 (suggesting definition of disability consists of three components: (1) a severity requirement that defines disability as an inability to engage in past relevant experience and any work that exists in the national economy; (2) a medical causation requirement that limits eligibility to individuals whose impairments can be verified by the presence of objective medical evidence; and (3) a duration requirement.

¹²⁵ 20 C.F.R. 404 § 1508 (1991) (“Your impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by your statement of symptoms.”). Additionally, a combination of impairments can be used to meet the severity requirement. 20 C.F.R. §§ 404.1523, 416.923.

¹²⁶ Professor Liebman characterized the statutory definition of disability as narrow in the sense that eligibility is not open to every individual with an impairment. *See Lance Liebman, The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of the Social Welfare State*, 90 HARV. L. REV. 833, 840-55 (1976)(noting the boundaries of disability are restrictive because of three factors: (1) the requirement of prior work; (2) the total disability requirement; and (3) the requirement of a medically established impairment).

¹²⁷ 42 U.S.C.A § 423(d)(1)(2).

requirement that mandates that the disability has lasted, or can be expected to last at least twelve months, or can be expected to result in death.¹²⁸

In the disability determination process, the claimant bears the burden of showing she is disabled and has to produce evidence to this effect.¹²⁹ Once the claimant has established that she is unable to perform her past relevant work, the burden shifts to the Commissioner of the SSA to establish the existence of alternative substantial gainful activity that exists in the national economy.¹³⁰ Despite the claimant's obligation to establish eligibility for disability, the Regulations establish obligations for both the claimant and the Agency in terms of the record development. The claimant is responsible for providing evidence she had an impairment during the relevant period and provide evidence that shows that the impairment affected functioning.¹³¹ But the Agency is responsible for developing the claimant's medical history for the 12 month period prior to the application for benefits.¹³²

There are several key differences in how evidence is defined and used in the disability application process and other types of litigation. Just as in civil litigation, applications for SSDI benefits are adjudicated using a "preponderance of the evidence standard."¹³³ But proof of disability is handled very differently in the administrative context, as the Federal Rules of Evidence do not apply to any stage¹³⁴ in the disability application process.¹³⁵ Further, evidence is defined broadly: "anything you or anyone else submits to us or that we obtain that relates to your claim."¹³⁶ In fact, there are no formal requirements for the admission of written evidence as written reports from physicians or other experts are accepted.¹³⁷ These more informal protocols seemingly mask the claimant's "heavy burden"¹³⁸ in the administrative process, and appear to downplay the role of the ALJ in

¹²⁸ *Id.*

¹²⁹ The Act establishes this burden as the claimant "shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the [Social Security Administration] may require. 42 U.S.C.A § 423 (d)(5); *see also* 20 C.F.R. § 404.1512 (2010).

¹³⁰ *Mongeur v. Heckler*, 722 F. 2d 1033, 1037 (2nd Cir. 1983).

¹³¹ 20 C.F.R. § 404.1512(c).

¹³² 20 C.F.R. § 404.1512(d).

¹³³ 20 C.F.R. §§ 404.901; 416.1401 ("Preponderance of the evidence means such relevant evidence that as a whole shows that the existence of the fact to be proven is more likely than not.")

¹³⁴ The stages of the disability application process will be discussed in Part B of this Section.

¹³⁵ 42 U.S.C.A § 405(b)(1); *see also Richardson*, 402 U.S. at 402.

¹³⁶ 20 C.F.R. §§ 404.1512(b); 416.912(b).

¹³⁷ *Richardson*, 402 U.S. at 400-402.

¹³⁸ *See, e.g., Mandziej v. Chater*, 944 F. Supp. 121, 125 (D.N.H. 1996).

record development.¹³⁹ Yet, this Article will argue in Sections IV and V that the ALJ's role as inquisitor is essential to the full and fair development of the administrative record.

Courts have noted there are generally four types of evidence that can be received in an application for benefits: objective medical facts; diagnoses or medical opinion evidence; the claimant's subjective testimony about pain or other considerations; and evidence related to vocational factors.¹⁴⁰ First, evidence of disability can be established through the objective medical evidence, including medical signs and laboratory testing.¹⁴¹ Second, other acceptable sources of evidence of opinion include medical source providers,¹⁴² such as: licensed physicians and psychologists, licensed optometrists, podiatrists, and qualified speech pathologists.¹⁴³ Third, others familiar with the individual's allegations may offer testimony only about severity and functional limitation.¹⁴⁴ Fourth, a claimant may establish disability through subjective allegations of pain, but there must be some objective basis that could be reasonably expected to produce the pain.¹⁴⁵ In

¹³⁹ See, e.g., *Seavey v. Barnhart*, 276 F. 3d 1, 8 (1st Cir. 2001) ("It is the ALJ's duty to investigate and develop the facts and develop the arguments both for and against the granting of benefits. At the ALJ level, the applicant is the only *litigant* presenting evidence."); cf. *Easjey v. Finch*, 413 F. 2d 1351 (4th Cir. 1970) ("A hearing on an application for benefits is not an adversary proceeding. The applicant is confronted with no adversary in the usual sense of that term. The Social Security Administration provides an applicant with assistance to prove his claim.").

¹⁴⁰ *Mongeur*, 722 F. 2d at 1037.

¹⁴¹ 20 C.F.R. § 404.1512(b)(1). Signs are "anatomical, physiological, or psychological abnormalities which can be observed, apart from your statements (symptoms). Signs must be shown by medically acceptable clinical diagnostic techniques. Psychiatric signs are medically demonstrable phenomena that indicate specific psychological abnormalities..." 20 C.F.R. § 404.1528(b) (2006). Laboratory findings include: "anatomical, physiological, or psychological phenomena which can be shown by the use of medically acceptable laboratory diagnostic techniques. Some of these diagnostic techniques include chemical tests, electrophysiological studies (electrocardiogram, electroencephalogram, etc.), roentgenological studies (X-rays), and psychological tests." 20 C.F.R. § 404.1528 (c). Speech therapists can only offer testimony about speech related impairments.

¹⁴² 20 C.F.R. § 404.1512(b)(2).

¹⁴³ 20 C.F.R. § 404.1512(c)(1).

¹⁴⁴ 20 C.F.R. § 404.1512(b)(4). These sources can include certain types of medical treatment providers (e.g., nurses), educational personnel, social workers, or others (e.g., friends or family). 20 C.F.R. § 404.1513(d) (2007).

¹⁴⁵ See Social Security Disability Benefits Reform Act of 1984, P.K. 98-460 § 98-460 § 3, 98 Stat. 1794 (1984) ("An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability ...; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or

considering the claimant's allegations of pain, there are five factors the Agency will consider: (1) the claimant's daily activities; (2) the duration, frequency and intensity of the pain; (3) precipitating and aggravating factors; (4) dosage, effectiveness and side effects of medication; and (5) functional restrictions.¹⁴⁶ What type of evidence (medical or vocational) is needed may depend on what point in the five-step sequential evaluation process the decision maker decides the claim.¹⁴⁷

The regulations also indicate how important physicians are in the disability application process. For example, the adjudicator will consider the claimant's medical history, clinical findings, laboratory results, diagnosis, and statements about what the claimant can still do.¹⁴⁸ Additionally, the decision maker will consider the opinion of an acceptable medical source's opinion about the claimant's ability to do work-related activities such as sitting, standing, walking, lifting, carrying, handling objects, hearing, speaking, and traveling.¹⁴⁹ In the context of the evaluation of obesity, these points are critical because while there may be objective evidence (BMI) that could put an ALJ on notice of the limiting effects of obesity, the medical records, for the reasons discussed in Part I may not contain fully developed opinion evidence.

These concerns are especially critical in light of the weight the SSA affords treating doctors.¹⁵⁰ The ALJ will consider the medical opinion of any sources from which she receives evidence, but generally the adjudicator will afford more weight to the opinion of treating physician so long as that opinion is consistent with the record as a whole.¹⁵¹

other symptoms alleged and which, when considered with all evidence required to be furnished ... (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability.”); *see also*, 20 C.F.R. §§ 404.1529, 416.929 (1981).

¹⁴⁶ *See, e.g.*, *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984).

¹⁴⁷ The five-step sequential evaluation process will be described further in Part B of this Section. *See, e.g.*, *Nguyen v. Chater*, 75 F. 3d 429 (8th Cir. 1996)(holding that vocational factors — age, work history, and educational level — are not relevant at Step 2).

¹⁴⁸ 20 C.F.R. § 404.1513(b).

¹⁴⁹ 20 C.F.R. § 404.1513(c)(1).

¹⁵⁰ There are three potential sources of medical testimony during the disability application process. First, are the claimant's treating sources. Second, the SSA may retain the services of a consulting examiner. 20 C.F.R. §§ 404.1519, 416.919 (2012). A consultative examination is “a physical or mental examination or test purchased ... at [the SSA's] request and expense from a treating physician or psychologist, another source of record, or an independent source, including a pediatrician when appropriate.” *Id.* Third, the ALJ may retain an independent medical examiner to testify at the hearing. This individual does not examine the claimant.

¹⁵¹ 20 C.F.R. § 404.1527(e)(ii).

B. *The Disability Application Process*

There are several points in the SSA's disability evaluation process where a claimant could discuss the impact of their obesity on health or functional limitation. The disability application process involves decision makers at both the state and federal levels. Decision makers follow the standardized five-step sequential evaluation process, which requires decision makers to evaluate the claim in a particular order. The five steps, which will be discussed further, include: Step 1 determines whether an individual is performing substantial gainful activity; Step 2 looks at whether the individual has a severe impairment; Step 3 evaluates whether the claimant's impairments meet or medically equal a Medical Listing; Step 4 considers whether the claimant can perform his past relevant work; and Step 5 looks at whether there are jobs in the national economy the claimant can perform.¹⁵²

The disability application process begins when a claimant applies for either Title II or Title XVI benefits, or both.¹⁵³ The evaluation process begins when the claimant properly completes an application for benefits.¹⁵⁴ Applications can be filed in-person, over the phone, or on the internet.¹⁵⁵ Although the claim will be processed by the state Disability Determination Service ("DDS"),¹⁵⁶ the claimant will initially meet with an Agency employee to begin the interview process.¹⁵⁷ The interview is the first opportunity the claimant has to describe her disabling condition and how

¹⁵² 20 C.F.R. §494.1520(a)(4)(describing the five-step sequential evaluation process). The five-step sequential evaluation process is designed, in part, to promote objectivity and lead to uniform outcomes as it requires that decision makers to consider the claimant's application in a particular order). Mills, *supra* note x, at 215.

¹⁵³ 20 C.F.R. § 404.610 (1981), § 416.305 (1999). There are some important differences between the Title II and Title XVI programs. But both employ the same definition of disability. The statutory disability standard requires decision makers to consider both medical and vocational criteria.

¹⁵⁴ See 20 C.F.R. §§ 404.610, 416.310 (20XX).

¹⁵⁵ 20 C.F.R. §§ 422.505(a) (2005).

¹⁵⁶ The Commissioner of Social Security has authorized State agencies, known as the Disability Determination Service ("DDS"), and the Social Security Administration to make decisions concerning disability applications. 20 C.F.R § 404.1503 (2007). The DDS evaluates the application at the first two stages of the process, known as the initial stage and reconsideration. 20 C.F.R. § 404.900 (a)(1)(2). The Agency relies on 54 DDS offices to review and make a decision on a claimant's file. If the application is denied, the claimant can file request with the DDS for reconsideration. If this request is denied, the claimant can appeal an adverse decision for a *de novo* hearing before an ALJ. 20 C.F.R. § 404.900 (2011). Both the DDS and the ALJs use the five-step sequential evaluation process. 20 C.F.R. § 404.1520 (2003).

¹⁵⁷ U.S. SOC. SEC. ADMIN. PROGRAM OPERATIONS MANUAL (POMS) DI 11005.001; SI 00601.060.

her condition precludes her capacity to work.¹⁵⁸

The claimant will then complete a number of forms that will serve an important role in the disability evaluation process, including the Function Report, the Work History Report, and the Disability Report.¹⁵⁹ These forms will serve as a foundation for the claimant's development of the record and, as will be discussed in Part V, could be utilized in the development of a more guided inquiry designed to elicit particular pieces of information about a claimant's obesity. The Disability Report — Adult Form SSA 3368 — is used to develop medical and other evidence and is used to assess disability in conjunction with nonmedical factors, such as education and work history.¹⁶⁰ Section 3 of the form asks the claimant to list "all of the physical or mental conditions...that limit your ability to work."¹⁶¹ This section further asks the claimant to indicate height without shoes and weight without shoes.¹⁶² Section 4 asks the claimant to identify the reason she stopped working.¹⁶³ The Work History Report — Form SSA 3369 — is used to gather information about jobs the claimant has performed and the physical and mental requirements needed to complete the identified jobs.¹⁶⁴ The Adult Function Report — Form SSA 3373 — is not mandatory in all cases, but is used to gather information about the claimant's ability to perform functional requirements associated with activities of daily living.¹⁶⁵ These forms may be problematic for individuals with certain stigmatized disorders, as they may not perceive certain impairments as necessarily being disabling conditions, or even as contributing to diminished functional capacity.¹⁶⁶ Thus, because of the coping mechanisms discussed in Part II of this Article, claimants may not be willing to discuss their weight or even fully perceive their obesity as a factor relevant to their disability application.

If the individual is dissatisfied with the initial determination, she may request a reconsideration of that decision.¹⁶⁷ The reconsideration consists of a review of the case file.¹⁶⁸ After the request for reconsideration at the state DDS level is denied, the claimant may request a hearing before an ALJ

¹⁵⁸ *Id.*

¹⁵⁹ POMS 11005.016.

¹⁶⁰ POMS DI 11005.023.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ POMS DI 11005.025.

¹⁶⁵ POMS 11005.016.

¹⁶⁶ *See infra* note x.

¹⁶⁷ 20 C.F.R. § 404.907 (1996).

¹⁶⁸ 20 C.F.R. § 404.913 (1986).

with the Office of Disability Adjudication.¹⁶⁹ The ALJ hearing will be the first time in the decision making process that the claimant will be able to speak to the decision maker who will decide whether she is disabled.¹⁷⁰

A basic understanding of the hearing rules and protocols is necessary because they illustrate conversion to an adversarial system is not necessary. because the rules and regulations already give the ALJ all the tools necessary to properly develop the record. Although the hearing process is informal, the Hearings, Appeal, Law and Litigation Manual (HALLEX) prescribes a course of conduct that gives the hearing a decidedly formal feel that may seem comparable to the trial process utilized in the adversarial model of adjudication. For instance, although not required by the Program Operations Manual (POMS) or HALLEX, some ALJs choose to wear traditional black judicial robes. Additionally, an ALJ hearing should include an opening statement by the ALJ, oaths or affirmations, inquiry into the relevant evidence, receipt of oral testimony, presentation of oral argument, and a closing statement.¹⁷¹ Yet, despite the pomp and circumstance of the formality¹⁷² of the hearing, ALJs have discretion in controlling both the structure and format of a hearing that can give the process a decidedly informal feel. In terms of structure, the average hearing will be about an hour, but hearing time can run from thirty minutes to two hours.¹⁷³ The ALJ is free to choose how to question the claimant or other witnesses, whether by using a traditional question-and-answer format associated with adversarial litigation or by more informal methods that

¹⁶⁹ 42 U.S.C § 405(b)(1)

[T]he Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision....The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this title. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure.

¹⁷⁰ ALJ Wolfe argues that the state DDS denial of the application characterizes the process as adversarial. Wolfe, *supra* note x, at 549. While it is true that the claimant would like to receive benefits, the goal of the process is to afford the claimant a full and fair opportunity to have her case heard.

¹⁷¹ HALLEX 1-2-6-56.

¹⁷² Professor Linda Mills has referred to the requirements for an ALJ as "empty formalities", as many ALJs do not follow these guidelines. LINDA MILLS, *PENCHANT FOR PREJUDICE X* (1996).

¹⁷³ Lee et al., *supra* note x, at x.

would allow the claimant an opportunity to construct her own narrative.¹⁷⁴

ALJs have a duty to make sure the record is “fully and fairly” developed.¹⁷⁵ The ALJ has great discretion in determining the order in which the evidence can be presented.¹⁷⁶ As part of this duty the ALJ could decide that additional evidence is necessary and is authorized to order further medical examination or testing.¹⁷⁷ Further, the ALJ has great discretion in determining the order in which the evidence can be presented.¹⁷⁸ Thus, the ALJs have enormous power to control the inputs into the administrative record, and many of these choices will be outcome determinative. For example, the ALJ can call an independent medical examiner and/or vocational expert to testify and offer opinion testimony at the hearing.¹⁷⁹

Both of these types of witnesses may offer testimony that could potentially affect the outcome of a hearing. The medical examiner does not examine the claimant but serves an influential role in the hearing because the medical examiner can provide guidance concerning conclusions that can reasonably be drawn from the claimant’s medical records. For instance, a medical examiner may help the ALJ reconcile conflicting medical evidence between a claimant’s treating physician and the consultative examiner.¹⁸⁰ In the case of vocational experts, these witnesses may offer opinion testimony concerning whether an individual can perform jobs within the national economy based on their medical and vocational profile.

¹⁷⁴ HALLEX 1-2-6-60 (“The ALJ determines the subject and scope of claimants’ and witnesses’ testimony, and how and when they will testify at the hearing [e.g., the ALJ may decide to use the question and answer method or allow the claimant or witness to testify in his or her own way.]”).

¹⁷⁵ 20 C.F.R. § 404.944 (1986)(ALJ should look fully into the issues); HALLEX 1-2-6-56, 1-2-1-61 (“ALJ must fully inquire into all matters at issue and conduct the hearing in a fair and impartial way.”). Even though HALLEX prescribes conduct for the ALJ to follow, there is some question as to whether HALLEX is actually binding on the ALJs as the issue has not been conclusively resolved. *Compare* Moore v. Apfel, 216 F.3d 864, 868–69 (9th Cir. 2000) (noting the HALLEX is a purely internal manual without legal influence) *with* Newton v. Apfel, 209 F.3d 449, 459–60 (5th Cir. 2000) (acknowledged HALLEX is not legally binding, but held the SSA’s failure to follow its own protocols constituted a legal error). Some courts have held that the Code of Federal Regulations control over HALLEX. *See, e.g.,* Blevins- Moore v. Barnhart, No. 1:03-CV-13, 2003 WL 21919191, at *3 (N.D. Ind. July 30, 2003) (finding that Federal Regulations control over the HALLEX).

¹⁷⁶ 20 C.F.R. § 404.320(b).

¹⁷⁷ *See supra* note x. An ALJ on her own initiative or at the request of the claimant may issue subpoena requests for the appearance of witnesses or the production of evidence at a hearing. 20 C.F.R. § 405.332.

¹⁷⁸ 20 C.F.R. § 404.320(b).

¹⁷⁹ 20 C.F.R. § 404.1514 (1981).

¹⁸⁰ Lee, *supra* note x, at 1510.

The ALJ will decide the case decided on evidence presented at the hearing and will issue a written decision.¹⁸¹ The written decision should be based on the administrative record, and contain an explanation of the ALJ's findings of fact and grounds for the decision.¹⁸²

If a claimant is dissatisfied with an adverse determination made by an ALJ follow the hearing, the claimant may seek review of the decision at the SSA's Appeals Council.¹⁸³ The Appeals Council can grant or deny a claimant's request for review. If the Appeals Council considers the review, the Council will either issue a decision or remand the case back to the ALJ for a decision. There are four grounds for review: (1) abuse of ALJ discretion; (2) an error of law; (3) a decision is not supported by substantial evidence; and (4) the impact of ALJ's decision impact on a broad policy issue that may affect the general public interest.

This section has explored two major points that are relevant to proceedings involving claimants with stigmatized disorders. First, the statutory definition of disability relies heavily on the production of medical evidence. However, certain classes and types of individuals may be at a severe disadvantage in the disability application process because they lack the resources necessary to have the type of established and consistent relationship with a treating physician that was envisioned by the SSA.¹⁸⁴ As the medical records may not be as well-developed because of inadequate medical care, the ALJ can more easily choose to find the testimony of the treating physician to be not credible.¹⁸⁵ These points concerning the adequacy of the record may be just as applicable to individuals with stigmatized disorders.¹⁸⁶

The second major point of this section is ALJs have enormous power to control the inputs into the administrative record, and many of these choices will be outcome determinative. The difficulty for claimants, especially

¹⁸¹ 20 C.F.R. § 404.370 (2010) ("We need specific medical evidence to determine whether you are disabled or blind. You are responsible for providing that evidence. However, we will pay physicians not employed by the Federal government and other non-Federal providers of medical services for the reasonable cost of providing us with existing medical evidence that we need..."); 20 C.F.R. § 1517 (1991) ("If your medical sources cannot or will not give us sufficient medical evidence about your impairment for us to determine whether you are disabled or blind, we may ask you to have one or more physical or mental examinations or tests.")

¹⁸² 20 C.F.R. § 404.953(a) (2010).

¹⁸³ 20 C.F.R. §§ 404.968; 416.1468. Additionally, the SSA may on its own initiative seek to review random and selectively identified decisions to check for error. 20 C.F.R. §§ 404.969, 416.1469 (2003).

¹⁸⁴ Lee, *supra* note x, at 1521 (noting poor and working class claimants are not likely to have these resources).

¹⁸⁵ Lee, *supra* note x., at 1521.

¹⁸⁶ See *infra* § I.

claimants with stigmatized disorders, such as obesity or mental illness, is that disability determination may ultimately be subjective.¹⁸⁷ Given the potentially subjective nature of the decision, particular attention should be given to the choices that can be exercised by decision makers. The question then becomes whether the ALJ has a unique obligation to develop and explore evidentiary gaps in light of her obligations under the inquisitorial system.

IV. THE ADMINISTRATIVE LAW JUDGE AND THE INQUISITORIAL SYSTEM

Consider the following example as an illustration of why the ALJ's duty to develop the record should be better defined. A claimant, with a BMI of 48, applies for disability but does not allege disability as a result of his obesity on his initial application for benefits nor does he discuss his obesity at the hearing before an ALJ. Because of the claimant's obvious obesity, perhaps an ALJ should be put on notice to inquire about the impact of the claimant's obesity on health and functional limitation. The idea that an ALJ has virtually no obligation to further develop generalized points of evidence or testimony is at odds with other regulations and Social Security Ruling 02-01p. Specifically, the Regulations provide that before making a determination that the claimant is not disabled, the ALJ has an obligation to assist the claimant in developing the record.¹⁸⁸ Additionally, the Ruling suggests that the ALJ has the power to seek additional guidance from a medical source to clarify whether the individual has obesity in situations where the clinical records only contain references to the claimant's high body weight.¹⁸⁹ The dissent in *Celaya v. Hunter* disagreed:

This approach would transform Social Security administrative hearings into seance-like proceedings where the ALJ must divine implicit impairments, diagnose disabilities lying close to the listing criterion and detect any aura compelling further development of the record. Nothing in our precedent condones such wholesale disregard of the ALJ's adjudicatory role.

Yet, this position seems inconsistent with the widely-recognized obligations of a decision maker in an inquisitorial system.

A hearing before an ALJ is an important stage in the disability application process as the hearing affords the claimant an opportunity to relate her experience of being disabled to an impartial decision maker.¹⁹⁰ A

¹⁸⁷ See Bloch, *supra* note x, at 28.

¹⁸⁸ 20 C.F.R. § 404.1545(a)(3).

¹⁸⁹ SSR 02-1p at ¶ 5.

¹⁹⁰ Lee et al., *supra* note x, at 1504. Several scholars have explored the supposedly therapeutic nature of the hearings process for lower income claimants and other

claimant's right to a "full and fair hearing" is protected by the Act¹⁹¹ and the Due Process Clause of the 5th Amendment.¹⁹² This obligation to provide a "full and fair" hearing requires the ALJ to both gather evidence and develop the administrative record and then issue a decision that articulates the grounds for the determination.¹⁹³ This obligation exists where both the claimant appears *pro se*¹⁹⁴ or is represented by either an attorney¹⁹⁵ or non-attorney representative.¹⁹⁶ The ALJ's obligation is further heightened where the claimant is disadvantaged in some way.

Several notable scholars¹⁹⁷ and ALJs¹⁹⁸ have argued in support of the

marginalized individuals. *See, e.g.,* Durston, *supra* note x, at x; Cade, *supra* note x, at x (unemployment hearings).

¹⁹¹ *See, e.g.,* Northcutt v. Califano, 581 F. 2d 164, 167 (8th Cir. 1978).

¹⁹² *Richardson*, 402 U.S. at 401-402. In *Richardson*, the United States Supreme Court noted the heightened duty the ALJ serves in development of the record, even with the claimant's burden of proof, to establish the claimant's eligibility for disability benefits: "[w]ell-settled precedent confirms that the ALJ bears a responsibility to develop the record fairly and fully, independent of the claimant's burden to press his case."; *see also, Heckler*, 461 U.S. at 471.

¹⁹³ *See, e.g.,* Brown v. Astrue, No. 2:09-cv-1011, 2010 WL 3069350 at *2 (S.D. Ohio Aug. 4, 2010) (remand appropriate where claimant was 5'10", 360 pounds but ALJ failed to provide particularized articulation of how the claimant's obesity impacted his ability to work); *cf.,* Nejat v. Comm'r of Soc. Sec., 359 Fed.Appx. 574, 577 (6th Cir. 2009) (ALJ did not have to consider claimant's obesity where the claimant was diagnosed with Class 1 obesity but did not allege the condition as a disabling impairment).

¹⁹⁴ The circuit courts appear to be in agreement that an ALJ has a heightened duty to "scrupulously and conscientiously probe" into all the relevant facts at the hearing where the claimant appears *pro se*. *See, e.g.,* Reefer v. Barnhart, 326 F.3d 380 (3d Cir. 2003); Melville v. Apfel, 198 F.3d 45 (2d Cir. 1999); Nelson v. Apfel, 131 F.3d 1228 (7th Cir. 1997); Brock v. Chater, 84 F.3d 726 (5th Cir. 1996); Welch v. Bowen, 854 F.2d 436 (11th Cir. 1988); Gold v. Sec'y of Health, Educ. and Welfare, 463 F.2d 38, 43 (2d Cir. 1972). Other circuit courts have used similar language. *See also Celaya*, 332 F.3d at 118 (defining the duty as special); Younger v. Shalala, 30 F.3d 1265, 1267 (10th Cir. 1994) (noting ALJ's duty is heightened); Mitchell v. Shalala, 25 F.3d 712, 714 (8th Cir. 1994) (defining ALJ's duty as enhanced).

¹⁹⁵ There does appear to be some disagreement about the extent of this duty where the claimant is represented by an attorney. For example, in the Second Circuit the ALJ has an affirmative duty to develop the record, even if the claimant is represented by counsel, if the medical record is ambiguous or incomplete. *See e.g.,* Tejada v. Apfel, 167 F.3d 770, 774 (2d Cir.1999); Rosa v. Callahan, 168 F.3d 72, 79 (2d Cir.1999). This reasoning has been applied in a recent decision involving underdevelopment of a claimant's obesity. *Rockwood v. Astrue*, 614 F.Supp.2d 252, 279 (N.D.N.Y. 2009) (remanding claim for further development where ALJ did not consider obesity).

¹⁹⁶ The SSA allows non-attorney representatives to appear on behalf of claimants in proceedings before ODAR. 20 C.F.R. § 1505(b)(2011). *See, e.g.,* Rosa v. Callahan, 168 F. 3d 72, 79 (2d. Cir. 1999) (ALJ under obligation to develop claimant's medical records even where the representative is an attorney or paralegal).

¹⁹⁷ The arguments for adoption of an adversarial system seem to go back at least 30 plus years. *See, e.g.,* Bloch, *supra* note x, at 349 ("The dual realities that administrative

SSA's adoption of an adversarial system. ALJ Jeffrey Wolfe argues that an axiom of American culture is our collective desire to have the opportunity to have our disputes heard before an impartial, neutral decision maker.¹⁹⁹ ALJ Wolfe's point is noted, but a reasonable question is whether adoption of an adversarial system as part of a separate adjudicative agency, or even to an Article 1 court,²⁰⁰ would improve either the perception of fairness or actually enhance the quality of the decision-making process. To understand the wisdom of such reforms, a basic understanding of the differences between the adversarial system of justice utilized in the Anglo-American tradition and the inquisitorial model is necessary.

ALJs are similar to Article III (and comparable appointed state trial court) judges in the sense they are impartial adjudicators who apply facts to law.²⁰¹ While there are some aspects of the disability hearing that are similar to adversarial proceedings, there are significant differences between ALJs and Article III judges as the ALJ conducts a *de novo* review²⁰² in an informal, non-adversarial process.²⁰³ The government is not represented; instead, some commentators have suggested the ALJ wears three hats²⁰⁴

during the disability adjudication process.²⁰⁵ There are significant differences between the adversarial process and the inquisitorial model

law judges often do not advocate effectively for claimants and cannot advocate fully on behalf the Social Security Administration....Indeed, a move to an adversary system has been suggested as a means of resolving [these] difficulties...."). However, there appears to have been a resurgence in calls for adoption of an adversarial system. See Wolfe, *supra* note x.

¹⁹⁸ See *supra* note X.

¹⁹⁹ Wolfe, *supra* note x, at 418 (arguing that bureaucratic efforts to control case management activities threaten the perception of an independent ALJ corps).

²⁰⁰ *Id.*

²⁰¹ James E. Moliterno, 41 WAKE FOREST L. REV. 1191, 1197-98 (2006) ("Administrative Judges are true judges on this basis because they are impartial decision makers who adjudicate disputes between parties.").

²⁰² 20 C.F.R. §§ 404.953(a), 416.1453(a). These distinctions between ALJs and trial courts have been specifically noted by courts reviewing ALJ determinations. See *Echevarria v. Secretary of Health and Human Services*, 685 F.2d 751, 755 (2d Cir. 1982) ("the ALJ, unlike a judge in a trial, must himself affirmatively develop the record").

²⁰³ 20 C.F.R. §§ 404.900(b), 416.4000(b); *Richardson*, 402 U.S. at 403 ("We bear in mind that the agency operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary."). See also, *Sims v. Apfel*, 530 U.S. 103,104 (2000) ("the [SSA] conducts the administrative review process in an informal, nonadversary manner."); see generally, CAROLYN A. KUBITSCHK & JON C. DUBIN, SOCIAL SECURITY DISABILITY: LAW AND PROCEDURE IN FEDERAL COURT § 6.1.

²⁰⁴ The three hats the ALJ wears are: neutral decision maker, government representative, and claimant representative.

²⁰⁵ See generally, Jeffrey S. Wolfe & Lisa Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L.J. 293 (1998).

utilized by the SSA.²⁰⁶ This inquisitorial model requires the ALJ to assume a more active role than is usually assumed in the adversarial setting, where the adjudicator is deeply involved in case management.²⁰⁷ For instance, at the hearing the ALJ is statutorily required²⁰⁸ to look into all the issues.²⁰⁹ Additionally, the ALJ may take the lead in questioning witnesses.²¹⁰ Despite these differences between the role of the ALJ and an Article III judge, Professor Moliterno suggested that: "...administrative law judges, while more active than their Article III counterparts, are certainly judges in the broad sense, even if they often resemble their civil, more than their common law, counterparts. In the end, they are impartial adjudicators of disputes."²¹¹

Yet there are some legitimate reasons to question whether ALJs can serve as impartial decision makers given the multiple roles they serve in the disability adjudication process. The results of a system unable to properly develop the administrative record²¹² become apparent during federal district court review of cases.²¹³ Thus, some commentators suggest greater consistency and accuracy could be achieved by looking at whether a

²⁰⁶ STEPHEN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 2 (1984) ("The adversary process should not be viewed as a single technique or collection of techniques....The central precept of the adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute...."). *see also*, Dubin, *supra* note x, at 1300 ("The primary distinction between the traditional Anglo-American adversarial system and the European-style inquisitorial system is the relative degree of control the decision maker and the parties have over the process of identifying issues and gathering and presenting evidence.").

²⁰⁷ LANDSMAN, *supra* note x, at 3. *See also*, Bloch, *supra* note x, at 365. Professor Bloch noted the ALJ has two obligations: one, to develop and complete written record; and, two, to explore all relevant arguments, facts, and issues through the use of proper questioning and cross examination of the claimant. *Id.*

²⁰⁸ The Act requires that the ALJ "make every reasonable effort to obtain from the individual's treating physician ... all medical evidence, including diagnostic tests, necessary in order to properly make [a disability] determination, prior to evaluating medical evidence obtained from any other source on a consultative basis." Social Security Disability Benefits Reform Act of 1984, Pub L No. 98-460, § 9(a) (1984), (codified as amended at 42 U.S.C.A. §§ 423(d)(2)(B), 1382(c)(a)(3)(G)

²⁰⁹ 20 C.F.R. §§ 404.944, 404.1444 ("At the hearing, the administrative law judge looks fully into the issues, questions you and the other witnesses, and accepts as evidence any documents that are material to the issues.).

²¹⁰ 20 C.F.R. §§ 404.950(e), 416.1450(e).

²¹¹ Moliterno, *supra* note x, at 1198.

²¹² KUBITSCHKE & DUBIN, *supra* note x, § 6.1 ("Unfortunately, in far too many cases, counsel who begins representing a claimant at the federal court level will discover that the administrative record is woefully inadequate. Typical gaps in the record are amazingly brief hearings, lack of counsel, and lack of medical and testimonial evidence.").

²¹³ *See* 42 U.S.C. § 405(g).

government representative could help narrow the administrative record in a manner that would achieve more consistent results.²¹⁴ In part, these commentators suggest that more effective cross examination could be possible in an adversarial proceeding because the ALJ would be able to operate free from the specter of a potential bias claim that could potentially emerge from a thorough cross examination of the claimant.²¹⁵ Thus, proponents of greater ALJ autonomy in the adjudicatory process argue:

The overriding purpose of the hearing is "fact-finding." The [Association of Administrative Law Judges] believes that the model used by SSA to conduct hearings is a relatively poor fact-finding model as compared to the adversarial model. We believe that the center of any change at SSA should include, at a minimum, conversion from the inquisitorial model to the adversarial model. The adversarial system of adjudication is fundamental to our American judicial system. The AALJ knows of no state or Federal court that uses the inquisitorial model to adjudicate issues. SSA uses a model unheard of throughout our land to find facts in a judicial-type setting.²¹⁶

Heightened rhetoric about the independence of the ALJ corps²¹⁷ aside, it is not clear if the benefits of adopting an adversarial model for disability hearings will outweigh the potential costs.²¹⁸ In fact, the inherent qualities

²¹⁴ Soc. Sec. Advisory Bd. 2001 (“[T]he fact that most claimants are now represented by an attorney reinforces the proposition, which has been made several times in the past, that the agency should be represented as well. Unlike a traditional court setting, only one side is now represented at Social Security’s ALJ hearings. We think that having an individual present at the hearing to defend the agency’s position would help to clarify the issues and introduce greater consistency and accountability into the adjudicative system.”)

²¹⁵ SOC. SEC. ADVISORY BD. 2001, *supra* note x at x; *see also* Frye, *supra* note x at 5. (“Oftentimes vigorous examination of the claimant by the judge leads to allegations against the judge of bias and prejudice. Some judges have even been subjected to discipline by the Agency because of aggressive examination of the claimant, done in pursuit of truth and justice.”).

²¹⁶ Frye, *supra* note x at 5.

²¹⁷ *See, e.g.,* Wolfe, *supra* note x, at 390-91 (“Bureaucrats attempt to manage and control performance and outcomes to achieve politically designated goals. This concept is inherently anathema to the American ideal of a “fair” hearing that affords an individual fundamental due process rights before an independent decisionmaker who is to render an impartial decision and who is not bound a predetermined political agenda in which value is placed on consistency and predictability.”) (tracing the history of tension between the ALJ corps and the management of the SSA). Yet, it is not clear that the need to better define the ALJ’s duty to conduct a full and fair hearing would impact the decisional independence of the ALJ. Rather, such measures would be designed to further the ALJ’s statutory obligations.

²¹⁸ *See* Lubbers, *supra* note x, at 16. LANDSMAN, *supra* note x, at 52 (“It is also sensible to utilize nonadversarial proceedings when all the parties strongly desire speed,

of disability application process call into question whether the adversarial system would be feasible,²¹⁹ or even desirable, as it is not clear the presence of the a government representative would assist the SSA in reaching accurate determinations.²²⁰ Adoption of an adversarial system will fundamentally alter the nature of the hearings process.²²¹ As discussed previously, claimants may already feel some level of trepidation when discussing very personal matters. Many claimants may perceive a government attorney as prosecutor, whose role is to question and second-guess choices. For individuals with stigmatized disorders such as obesity this may have catastrophic consequences.

Professor Mashaw has observed that “virtually all mass justice systems have decided that they are unable to function effectively without the active-adjudicator investigation, informal rules of evidence and procedure, and presiding office control of issue definition and development that characterize an inquisitorial or examinational approach.”²²² In fact, what is striking about ALJ Frye’s testimony before the United States House of Representatives Subcommittee on Social Security for the Committee on Ways and Means is the lack of concern for the claimant’s right to a full and fair hearing. Rather, his focus seems on his perception of the ALJ’s burden under the inquisitorial model. Thus, a more appropriate question is whether the ALJs obligations and duties should be better defined to enable fuller development of the administrative record.²²³

In fact, courts may already be requiring the ALJ to be more involved in record development in cases involving another stigmatized impairment: mental illness. In cases where claimants may be reluctant (for whatever reason) to discuss their impairment, a more engaged ALJ may, in fact, be

simplicity, and economy in adjudication. In such settings the adversary process will tend to intrude undesired deliberation and expense.”).

²¹⁹ Pierce, *supra* note x, at 23.

²²⁰ Professor Bloch’s study notes that his interviews found ALJs and other Agency employees described the hearing process as one-sided because many claimants are represented. See Bloch, *supra* note x, at 69. Yet, as previously discussed, stigmatized impairments like obesity present a unique challenge because stigmatized individuals may not be willing to discuss these issues with their representative.

²²¹ ALJ Wolfe argues the opposite and actually suggests an ALJ would be more intimidating than a government lawyer. Wolfe, *supra* note x, at 567

²²² Dubin, *supra* note x, at 1301.

²²³ MASHAW, *supra* note x, at 71 (“Two things seem to be required in order that the record be fully developed. The first is that all the bases really be touched with respect to the functional limitations inquiry. A few perfunctory questions about how the claimant spends his day will not suffice. Second, with respect to each inquiry that is made, the judge must be prepared to follow up, to develop factual issues as he goes along, and to press the questioning.”).

necessary for the adjudicator to reach a decision.²²⁴ This is particularly true when the adjudicator is involved in a case where the claimant has based her claim on particular impairments but may in fact have additional impairments.²²⁵ This frequently occurs with mental-illness which, like obesity, may be underreported.²²⁶ With mental illness, just as with obesity, claimants may not recognize that the impairment can be potentially disabling.²²⁷ Thus, it is not unreasonable to expect that an ALJ's role in the hearing process be better defined because the Commissioner and the claimant both share the goal that "deserving benefit claimants who apply for benefits receive justice."²²⁸

While courts seem to widely acknowledge the ALJ's duty to conduct a full and fair inquiry into all potentially relevant facts, several courts of appeal seem to echo the concerns echoed by the dissent in *Celaya v. Hunter* about whether the obligations of the ALJ also extend to implicit impairments.²²⁹ The courts, however, seem to require more where the claimant is either unrepresented or has limitation that would limit her ability to testify.²³⁰

Yet these decisions that do hold an ALJ has an enhanced duty to assist the claimant in the development of the record in cases involving mental illness illustrate the need for the SSA to develop a more standardized form of inquiry. Such reform would work towards the obligation to provide the claimant with a full and fair hearing.²³¹ In fact, prior commentary has argued that hearings should move toward the more intensive questioning

²²⁴ MASHAW, *supra* note x, at 74 ("There seems to be no way around the necessity for persistent and extensive ALJ questioning of the claimant. Without it the basic evidence upon which a judgment should be based is unavailable.").

²²⁵ KUBITSCHKEK & DUBIN, *supra* note x, at §6:10.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Cunningham v. Apfel*, 222 F.3d 496, x (8th Cir. 2000) ("...the ALJ did not pursue any questioning that could have revealed Cunningham's mental disabilities. Such '[s]uperficial questioning of inarticulate claimants or claimants with limited education is likely to elicit responses which fail to portray accurately the extent of their limitations.'").

²²⁹ *See, e.g., Halverson v. Astrue*, 600 F. 3d 922, 933-34 (8th Cir. 2010) (ALJ not obligated to consider claims not alleged at the time of the application for benefits or raised at the hearing); *Leggett v. Chater*, 67 F. 3d 558 (5th Cir. 1995); *Mayes v. Massanari*, 276 F.3d 453 (9th Cir. 2001).

²³⁰ *See, e.g., Harris v. Secretary of Dept. of Health and Human Services*, 959 F.2d 723 (8th Cir. 1992); *Thompson v. Sullivan*, 933 F.2d 581 (7th Cir. 1991).

²³¹ *See, e.g., Bloch, supra* note x, at 28 ("Specifically, if a full and complete record is the key to fair and accurate disability decisions, agency procedures should facilitate the development of all relevant evidence and continue to do so until a final decision is reached.").

end of the spectrum of ALJ practice.²³² A disability case is by its nature a more generalized inquiry about the claimant's medical impairments, as well as interaction of medical condition with her prior training, education, and skill level.²³³ But an ALJ's first impression — one that may be negative — may guide the ALJ's later choices to ignore potential areas of inquiry into highly stigmatized impairments. In fact, our first impressions may influence later judgments. Psychologists refer to this as the halo theory.²³⁴

This Article so far has suggested that certain disorders — obesity and mental illness — are highly stigmatized conditions that claimants may not even recognize themselves as being potentially disabling. Decision makers may respond negatively to these impairments. As a result of these impressions, adjudicators may not fill in the gaps in the administrative record by either ordering subsequent medical testing that might shed further light on the impact of the claimant's obesity on her health or by directed inquiry designed to establish the limiting effects of obesity. These choices are outcome determinative because the record may not support a finding of disability. But this seems almost contrary to the ALJ's obligations to conduct a full and fair hearing. If the inquisitorial decision maker is to be an active participant in the process, it seems reasonable that the obligations of the ALJ to develop the record be better defined. The next section will explore how this can be accomplished.

V. THE ALJ'S DUTY TO CONDUCT A FAIR AND IMPARTIAL HEARING AND THE HALO EFFECT

Daniel Kahneman provides an example that illustrates why an ALJ's role in the development of the record needs to be better defined, particularly when considering potentially stigmatizing disorders because a first impression of an individual may guide future judgments about that individual and values associated with her. Kahneman writes:²³⁵

You meet a woman named Joan at a party and find her personable and easy to talk to. Now her name comes up as someone who could be asked to contribute to a charity. What do you know about Joan's generosity? The correct answer is that you know virtually nothing, because there is little reason to believe that people who are agreeable in social situations are also generous contributors to charities. But you like Joan and you will retrieve the feeling of

²³² MASHAW, *supra* note x, at 69.

²³³ *Id.*, at 71.

²³⁴ DANIEL KAHNEMAN, THINKING, FAST AND SLOW 231 (2011). *See also* Goffman's point about we impute beliefs based on our original judgment in *supra* note x.

²³⁵ KAHNEMAN, *supra* note x, at 82

liking her when you think of her. You also like generosity and generous people. By association, you are now predisposed to believe that Joan is generous.

Unfortunately for claimants in the context of disability adjudication, halos can also be negative.²³⁶ Think back to the Part II's discussion of the negative stereotypes associated with obesity. These stereotypes may be directly relevant to how we evaluate other areas of the obese individual's life beyond her relationship with food.

Empirical evidence also suggests individuals employ negative halos when evaluating an obese individual's choices and decisions. For example, a recent study found that fat phobic attitudes among diet and food nutrition students also influenced value judgments about whether an obese individual was likely to comply with treatment instructions.²³⁷ In this study, researchers found that registered dietician students made assumptions that obese patients had poor diets and overall poor health, despite being provided with evidence that suggested these individuals had a relatively healthy diet and overall decent health.²³⁸

These findings serve as a cautionary tale that initial judgments should not serve as a foundation for a conclusion because in fact the reality of a claimant's situation may guide the decision maker to a conclusion that differs from the initial assessment of the situation. But given the likelihood that some morbidly obese individuals are not adequately prepared to discuss the limiting effects of their weight, the question turns to whether enhanced protocols can be developed to ensure that the ALJ considers the impact of the stigmatized disorder. This is not to say that these protocols should be so rigid as to lead the decision maker to the conclusion that all morbidly obese individuals are disabled. Simply put, that is not likely the case. After all, the facts are what the facts are, and the disability adjudication process is ultimately a case-by-case assessment. But the objective of defining the scope of the ALJ's duties and obligations is simple: ensuring that ALJs fulfill their obligations as inquisitors through proper development of the record.

In fact, literature from other disciplines provides a model for how a more standardized question-and-answer process could be developed. Daniel Kahneman in his recent book, *Thinking, Fast and Slow*, recounts his experience designing and implementing an interview procedure for the Israeli Defense Forces that has some relevance to how the ALJ's duty to develop the record could be structured as a more standardized process

²³⁶ *Id.*, at 199.

²³⁷ Rebecca Puhl, et al., *Weight Bias among Dietetics Students:*

Implications for Treatment Practices, J. OF AM. DIETETIC ASSOC. 438 (2009).

²³⁸ *Id.*, at 442.

designed to focus on factual questions that could combat any negative halo effect.²³⁹ Kahneman developed a procedure where interviewers evaluated several personality traits that appeared relevant to performance in combat and assigned individual scores to each trait.²⁴⁰ For each personality trait, Kahneman developed a series of questions about the individual's life that were designed to elicit objective information about how well an individual had performed in these areas.²⁴¹ Interviewers were instructed to strictly adhere to this script.²⁴² Despite resistance among the interviewers, Kahneman found soldiers selected through this method received higher evaluations from their commanding officers.²⁴³

A similar system could be developed by the SSA for use in hearings to help ensure proper development of the record, particularly in cases involving stigmatized disorders.²⁴⁴ For example, protocols could be developed to guide ALJ questioning in cases where the claimant has a BMI that exceeds 40, which is the highest level of obesity, regardless of whether the claimant alleged obesity as a disabling condition or not. Questions could even be developed from the forms the claimant completes in the initial application for benefits. Objective questions could be developed designed to elicit and evaluate how the obesity impacts the medical, functional, and vocational considerations relevant to whether an individual is eligible for benefits. Facts supporting a conclusion of disability may be present. They may not be. But the point is when dealing with individuals with stigmatized disorders the record is at risk of not being properly developed. The goal should be to take steps necessary to ensure the ALJ fulfills her obligations of properly gathering facts so a decision can be reached.

Reform is necessary because of the manner in which obesity is identified and treated by the medical profession. These treatment records and medical opinion evidence form the backbone of the medical record. Yet, this reliance on medical evidence can have the unintended consequence of

²³⁹ KAHNEMAN, *supra* note x, at 229.

²⁴⁰ *Id.*, at 230.

²⁴¹ *Id.*

²⁴² *Id.* There is also interest in checklists in other professions. For instance, Dr. Atul Gawande has written about the success of using checklists to promote standardized and structured decision making in the medical context. ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2010)(noting that studies conducted in I.C.U. units in multiple hospital found that checklists led to a dramatic decrease in infections and deaths).

²⁴³ KAHNEMAN, *supra* note x at 230.

²⁴⁴ ALJ Wolfe argues that switching to an adversarial model is also necessitated because negative first impressions may prejudice a decision maker. Wolfe, *supra* note x, at 567. However, in light of this point, Kahneman's work has even greater relevance as means to combat potential bias in administrative decision making.

excluding from coverage individuals whose disabilities render them eligible for benefits.²⁴⁵ Reform needs to begin by acknowledging that differences in the quality of treatment have led to different outcomes between similarly situated obese individuals. In light of the research concerning how obese individuals may receive lower quality health care and may be reluctant to openly discuss their obesity, reform needs to squarely address these two concerns.

The first reform²⁴⁶ should identify a trigger point — perhaps with BMI of 40, which is the highest level of obesity — at which the ALJ should be on alert that the claimant's obesity should constitute a severe impairment, regardless of whether the claimant alleged obesity on the initial application. This reform acknowledges that a claimant's medical records concerning her obesity may be woefully inadequate. Yet, research shows that obesity at these extreme levels does impact health and functional ability.²⁴⁷ Thus, this reform will serve as a starting point to put the ALJ on notice that enhanced discussion concerning the claimant's obesity will be required.²⁴⁸

The second reform is the development of protocol questions that would be utilized by the ALJ every time she encounters obesity at levels higher than a 40 BMI.²⁴⁹ This directed inquiry will be designed to elicit specific pieces of information that a claimant may not be willing to provide as part of an unstructured narrative about her impairments. The answers provided should be designed to help the ALJ gather sufficient evidence to make a determination concerning the limitations caused by the claimant's obesity. For example, adjudicators could be specifically directed to ask specific questions designed to gather information about how the claimant's obesity impacts her ability to perform her activities of daily living or functional abilities. These questions could be developed, in part, by members of the ALJ corps themselves and utilize the form and structure of forms used by SSA in the initial application for benefits.

At the end of the day, the answers to the questions might lead the decision maker to the conclusion the claimant is not disabled because of her obesity. The point of this reform is not to give benefits to all obese individuals.

²⁴⁵ See Purvis, *supra* note x, at 117.

²⁴⁶ While outside of the scope of this Article, I would argue this reform could also apply to mental illness.

²⁴⁷ See Pashler, *supra* note x, x.

²⁴⁸ At the NOSSCR conference on May 2, 2012, a practitioner asked me a question about how to respond to clients who denied that their obesity could be a disabling condition. According to this practitioner, she worked with individuals whose obesity was obviously a limiting factor, but the client did not want to discuss the issue further. In many ways, this question underscores the need for the Agency to direct the ALJ to engage seek answers about the claimant's obesity through a highly structure series of questions.

²⁴⁹ See Purvis, *supra* note x, at 116.

Rather, the point is to acknowledge that medical records for some individuals may be inadequate because they have a stigmatized disorder. The SSA should seek reform to better define the boundaries of the ALJs obligations to conduct a full and fair hearing.

CONCLUSION

This Article has discussed three points. The first point is that individuals with stigmatized disorders, such as obesity or mental illness, may employ certain coping mechanisms. These coping mechanisms, in turn, limit the individual's ability to openly communicate about their impairments with their treating physician, their attorney, and an adjudicator. The second point is that these barriers to effective communication are significant in the context of disability adjudications because of the importance of medication determinations and evidence in the evaluation process. This is problematic and may cause unintended results, even in instances where a claimant's obesity likely would have relevance to the disability determination. The third point of this Article is that, despite potential problems in terms of record development in cases involving stigmatized disorders, the inquisitorial model should not be abandoned in favor of the adversarial model. Advocates of this switch have argued that such a change is necessary because the "overriding purpose of the hearing is fact finding."²⁵⁰ This is true. But it is unclear why these commentators believe an adversarial model would guarantee the record will be fully developed. Rather, a switch to the adversarial model will fundamentally alter the nature of the hearings in a way that will perhaps have unintended consequences. Further, this switch could potentially impact indigent claimants who appear *pro se*. Better protocols that provide for structured and guided questioning will produce more consistent results in an efficient and less costly manner.

²⁵⁰ Frye, *supra* note x, at 4.