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Asking Too Much: The Ninth Circuit's Erroneous Review of Social Security Disability Determinations

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ASKING TOO MUCH: THE NINTH CIRCUIT'S ERRONEOUS REVIEW OF SOCIAL SECURITY DISABILITY DETERMINATIONS

by
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Disability determinations made by the Social Security Administration's administrative law judges are subject to judicial review by Article III courts. By statute, these courts apply the "substantial evidence" standard of review on appeal from the agency. The substantial evidence standard is a forgiving one that defers to the findings of the agency. But the Ninth Circuit Court of Appeals has modified this standard. It now reviews certain categories of SSA findings not only for substantial evidence, but for support by "clear and convincing reasons." This heightened standard of review is facially at odds with the statutorily mandated substantial evidence standard. It also undercuts the principle of deference given to the initial factfinder by the substantial evidence standard of review.

INTRODUCTION

The Ninth Circuit has created a standard of review for certain portions of Social Security Administration disability determinations that is at odds with both the applicable statute and principles of institutional deference. As an outlier among the circuits, it requires that Social Security Administration ("SSA") decision makers provide "clear and convincing reasons" for certain findings.[1] This is contrary to the

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[1] Garrison v. Colvin, 759 F.3d 995, 1015 (9th Cir. 2014). A Note written on this topic has asserted that "[a]t present, *the case law* has settled on the highest level of proof possible for the

lenient "substantial evidence" standard that is generally applied to administrative adjudications.[2]

Like so much of the law, standards of review—the tools appellate bodies apply to determine what degree of deference they should give to the lower court rulings being appealed—are expressed in imprecise phrases. We are familiar with legal tests that ask triers of fact to determine what a "reasonable person" would do or to make a distinction between "recklessness" and "knowledge." We may not be sure where lines are drawn, but we have a sense of how they should affect the work of the court.

The indistinct effect of verbal legal rules is especially pertinent to the application of appellate standards of review. How can we tell when a trial judge has committed an error that amounts to an "abuse of discretion"? When is a factual determination "clearly erroneous"? These are questions that seem to ask for measurements, but do not provide instruments to measure them.

Standards of judicial review of lower court and agency rulings come in many flavors.[3] They differ primarily in terms of the degree of deference the reviewing court is expected to accord the underlying decisionmaker's ruling.[4] Should the earlier ruling be given no weight, with the underlying material reviewed as if the earlier decision never happened? Such a standard is non-deferential de novo review.[5] Should the lower court's decision instead be considered more-or-less final as to the matter with review for only gross errors? This may arise under a deferential standard, like the clearly erroneous or abuse of discretion standards.[6] A deferential standard, *a fortiori*, should be less rigorous and lead to fewer reversals. A less deferential standard, on the other hand, should take a closer look at the underlying decision and lead to more reversals. The standard should have an effect on the process and the outcome. It should matter; it should be taken seriously.

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rejection of claimant testimony, 'clear and convincing' reasons." Nora Coon, *Honest or Histrionic? Credibility Evaluation in Judicial Review of Social Security Disability Decisions*, 23 GEO. J. ON POVERTY L. & POL'Y 161, 166–67 (2015) (emphasis added). But this case law is limited to the Ninth Circuit. *Id.* at 166. The Note's thesis is that the "clear and convincing reasons" standard is preferable as a matter of policy. *See id.* at 190. It does not address the tension between that standard and the "substantial evidence" standard.

[2] T-Mobile S., LLC v. City of Roswell, 574 U.S. 293, 301 (2015) ("The statutory phrase 'substantial evidence' is a 'term of art' in administrative law that describes how 'an administrative record is to be judged by a reviewing court.'" (quoting United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963))).

[3] *See, e.g.*, Arellano Hernandez v. Lynch, 831 F.3d 1127, 1130 (9th Cir. 2016), *cert. denied sub nom*, Hernandez v. Sessions, 137 S. Ct. 2180 (2017) (invoking, variously, de novo, clearly erroneous, and substantial evidence standards of review).

[4] *See, e.g.*, Morales v. Yeutter, 952 F.2d 954, 957 (7th Cir. 1991) (identifying a "deference spectrum" occupied by "the different verbal standards of review").

[5] *See infra* notes 53–54 and accompanying text.

[6] *See infra* note 56 and accompanying text.

Accordingly, the Ninth Circuit's addition of a demanding "clear and convincing reasons" component to the forgiving "substantial evidence" standard generally applicable to SSA determinations deserves scrutiny. This Essay will first describe the Ninth Circuit's approach to its review of SSA disability determinations. It will then explain how the Ninth Circuit's treatment of SSA administrative law judge ("ALJ") determinations of disability claimant credibility is at odds with the principles underlying the choice of a standard of review.

I. THE NINTH CIRCUIT'S REVIEW OF SOCIAL SECURITY DISABILITY DETERMINATIONS

It is unremarkable to note that judicial review of SSA disability determinations is performed under the "substantial evidence" standard.[7] More remarkable is the Ninth Circuit's gloss on this standard requiring the SSA to support certain findings with "clear and convincing reasons."[8] A universally-applied deferential standard has been altered in the Ninth Circuit to reduce deference to agency factfinders and to impose stringent demands upon them.[9] This is an unusual doctrinal development, at odds with both statute and the principles of judicial review.

The Social Security disability system has been called one of "the modern administrative state's two largest decision systems."[10] Appeals of Social Security disability cases take up a substantial part of the dockets of the United States District Courts.[11]

The SSA decides disability cases under its Supplemental Security Income ("SSI") and Social Security Disability Insurance ("SSDI") programs.[12] Under both

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[7] *E.g.*, Wellington v. Berryhill, 878 F.3d 867, 871 (9th Cir. 2017) ("We will affirm the Commissioner's decision unless it is not supported by substantial evidence or is based on a legal error.").

[8] *See, e.g.*, Garrison v. Colvin, 759 F.3d 995, 1014–15 (9th Cir. 2014).

[9] *See* Moore v. Comm'r of Soc. Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002) ("The clear and convincing standard is the most demanding required in Social Security cases.").

[10] Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 703 (2002). The other is "Freedom of Information (FOIA) requests certified by the Department of Justice (DOJ)." *Id.*

[11] *See, e.g.*, THE NINTH CIRCUIT, 2018 ANNUAL REPORT 54 (2018), https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2018.pdf ("Among matters involving the government, social security cases were most numerous, 4,055, or 51.2 percent of the total U.S. civil cases in [District Courts in] the Ninth Circuit.").

[12] *See, e.g.*, Santiago v. Massanari, No. 00 Civ.3847 GEL., 2001 WL 1946240, at *6 n.7 (S.D.N.Y. July 16, 2001) ("Regulations regarding SSDI and SSI benefits have been promulgated by the Commissioner under two distinct Parts of Title 20 of the Code of Federal Regulations. SSDI benefits are dealt with in 20 C.F.R. Part 404 (2001), and SSI benefits are dealt with in 20 C.F.R. Part 416 (2001). These two Parts are extremely similar. Both parties to this action, as well as Second Circuit Social Security case law, regularly treat the two sets of regulations as

titles, a determination is made that a claimant suffers from a disability.[13] SSA disability determinations under both titles are subject to judicial review, first in the United States District Courts, then in the Courts of Appeal.[14] By statute, Article III courts determine only whether SSA findings are supported by "substantial evidence."[15] The same standard applies to administrative agency determinations, generally, by the Administrative Procedure Act.[16] This standard of review places primary decisional responsibility not with a reviewing court, but with the agency.[17]

Substantial evidence means "more than a mere scintilla, but less than a preponderance, . . . that which 'a reasonable mind might accept as adequate to support a conclusion.'"[18] The substantial evidence standard is widely acknowledged to be a deferential one.[19] The Ninth Circuit itself has frequently acknowledged the deferential nature of substantial evidence review.[20] In explaining the effect of this standard, it has noted that "[i]f evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the agency."[21]

This deference extends to many factual determinations. In administrative adjudications, the ALJ is supposed to have the primary responsibility for determining

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interchangeable. For purposes of this opinion, this Court will also treat 20 C.F.R. Parts 404 and 416 (2001) as functionally identical, with occasional differences indicated as they arise.").

[13] *See* 20 C.F.R. § 404.315 (2019); *id.* § 416.202.

[14] 42 U.S.C. § 405(g) (district courts); 28 U.S.C. § 1291 (courts of appeal).

[15] 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive."); *see also* Connett v. Barnhart, 340 F.3d 871, 873 (9th Cir. 2003) (holding that the decision of the commissioner must be affirmed if it is supported by substantial evidence and if the commissioner applied the correct legal standards). The substantial evidence standard appears to have been adopted out of a fear that some agencies would arrive at decisions based on no evidence at all. Administrative Procedure Act, *Proceedings in the House of Representatives, May 24 and 25, 1946 and Proceedings in the Senate of the United States, March 12 and May 27, 1946*, at 365, https://www.justice.gov/sites/default/files/jmd/legacy/2013/11/19/proceedings-05-1946.pdf (contrasting decisions based on substantial evidence with those based on "surmise or suspicion or untenable inference").

[16] 5 U.S.C. § 706(2)(E) (2012); *see also* Kappos v. Hyatt, 566 U.S. 431, 435 (2012) (agency factual findings are reviewed under the substantial evidence standard).

[17] CHARLES H. KOCH, JR. & RICHARD MURPHY, 3 ADMINISTRATIVE LAW AND PRACTICE § 9:24 (3d ed. 2019) (noting that the substantial evidence standard "rests the power of decision in the agency").

[18] *See* NLRB v. Int'l Bhd. of Elec. Workers, Local 48, 345 F.3d 1049, 1053–54 (9th Cir. 2003) (internal citations and quotation marks omitted).

[19] *E.g.*, Johnson v. Comm'r of Soc. Sec., 652 F.3d 646, 648 (6th Cir. 2011); Rossello *ex rel.* Rossello v. Astrue, 529 F.3d 1181, 1185 (D.C. Cir. 2008).

[20] *See* Monjaraz-Munoz v. INS, 327 F.3d 892, 895 (9th Cir.), *amended by* 339 F.3d 1012 (9th Cir. 2003) (noting that the standard is "extremely deferential" and that a reviewing court must uphold the agency's findings "unless the evidence presented would compel a reasonable factfinder to reach a contrary result." (emphasis omitted)).

[21] Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207, 1212 (9th Cir. 2008).

credibility, for resolving conflicts in medical testimony, and for resolving ambiguities in the evidence.[22]

The Ninth Circuit has spoken from both sides of its mouth on the degree to which it will defer to agency credibility determinations. On one hand, it has acknowledged its duty to defer to credibility determinations made by agency hearing officers.[23] This deference has been described as requiring that credibility determinations must be upheld unless they are "inherently incredible or patently unreasonable."[24] On the other hand, it has said that the agency hearing officer must give a "specific, cogent reason" for adverse credibility findings.[25] This requirement of detail is, on its face, less deferential than a "patently unreasonable" standard would suggest.

The Ninth Circuit has gone even further towards non-deference in certain aspects of SSA disability determination. It has, in some instances, required "clear and convincing reasons" to support ALJ findings. It first required "clear and convincing reasons" to overcome uncontroverted opinions of treating physicians. The first use of this requirement appears in *Day v. Weinberger*.[26] *Day* cites two other cases for support of this requirement, one in the Ninth Circuit[27] and the other in the Seventh.[28] Neither of the cited cases include the phrase "clear and convincing" but instead use the "substantial evidence" language. Nonetheless, despite the lack of textual support, the new gloss on the standard took hold and remains in use in this context.[29]

Subsequently, in 1984, the Ninth Circuit applied this standard to claimant credibility findings.[30] Without supporting citation, in what seems to be an offhand remark in a case otherwise reviewing the matter for substantial evidence, the court wrote that "[n]o clear and convincing reasons were provided by the ALJ for his rejection of the testimony of Gallant regarding his constant and persistent back

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[22] Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001); *cf.* Glasser v. United States, 315 U.S. 60, 80 (1942) ("It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.").

[23] *See* Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 658 (9th Cir. 2003).

[24] Retlaw Broad. Co. v. NLRB, 53 F.3d 1002, 1006 (9th Cir. 1995) (quoting Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705, 712 (9th Cir. 1986)) (applying substantial evidence standard in National Labor Relations Act case).

[25] *E.g.*, *Mendoza Manimbao*, 329 F.3d at 658; Gui v. INS, 280 F.3d 1217, 1225 (9th Cir. 2002).

[26] Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir. 1975).

[27] White Glove Bldg. Maint., Inc. v. Brennan, 518 F.2d 1271, 1273 (9th Cir. 1975).

[28] Hassler v. Weinberger, 502 F.2d 172, 174 (7th Cir. 1974).

[29] *See* Matthews v. Shalala, 10 F.3d 678, 680 (9th Cir. 1993); Baxter v. Sullivan, 923 F.2d 1391, 1396 (9th Cir. 1991).

[30] Gallant v. Heckler, 753 F.2d 1450, 1455 (9th Cir. 1984).

pain."[31] The requirement of "clear and convincing reasons" to reject claimant testimony has subsequently extended beyond testimony regarding pain, applying as well to other medical symptoms.[32] The court has hewed to this standard ever since in cases involving claimant testimony.[33]

A Westlaw search of the terms "social security," "disability," and "clear and convincing" in its United States Courts of Appeals database turns up 898 entries.[34] Listed in terms of relevance, the first 100 results were cases issued by the Ninth Circuit.[35] This suggests that no other circuit applies a "clear and convincing" standard to any portion of its review of SSA findings. I take this as evidence of a *sub silentio* circuit split, despite no courts identifying such a split in their opinions.

It could be contended that because the requirement of "clear and convincing *reasons*" is different from the well-known and demanding standard of proof, "clear and convincing *evidence*,"[36] the phrase "clear and convincing reasons" should not be interpreted as adding to an SSA adjudicator's burden. But drawing this distinction here seems disingenuous. Though one word changes, the effect is identical: when it employs this standard, the Ninth Circuit is requiring a higher quantum of justification for the SSA's decision.

Nonetheless, an argument may be made that the "evidence" of "substantial evidence" and the "reasons" of "clear and convincing reasons" are ships passing in the night, dissimilar in kind.[37] Perhaps one is a standard of review and the other a burden of proof and thus should not be considered to be at odds. This argument is

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[31] *Id.*

[32] *See* Sprague v. Bowen, 812 F.2d 1226, 1231 (9th Cir. 1987) (applying standard to testimony regarding depression).

[33] *See* Garrison v. Colvin, 759 F.3d 995, 1015 (9th Cir. 2014); Johnson v. Shalala, 60 F.3d 1428, 1433 (9th Cir. 1996); Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989) ("The Secretary's reasons for rejecting excess symptom testimony must be clear and convincing if medical evidence establishes an objective basis for some degree of the symptom and no evidence affirmatively suggests that the claimant was malingering.").

[34] Search performed Dec. 30, 2019.

[35] *Id.*

[36] Clear and convincing *evidence*—as opposed to *reasons*—means "evidence that leaves you with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true. This is a higher standard of proof than proof by a preponderance of the evidence, but it does not require proof beyond a reasonable doubt." NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 1.7 (2017) (citing Colorado v. New Mexico, 467 U.S. 310, 316 (1984)).

[37] *See, e.g.*, Adefemi v. Ashcroft, 386 F.3d 1022, 1027 n.9 (11th Cir. 2004) ("Burden of proof and standard of review are not the same thing." (citing Woodby v. INS, 385 U.S. 276, 282 (1966))); Luul Yikalo Tikabo v. United States, No. H-16-2197, 2017 WL 4112306, at *2 (S.D. Tex. Sept. 18, 2017) (cautioning against "confus[ing] two different concepts: standards of review and burdens of proof").

easily rebutted.[38] Although the Ninth Circuit's wording is not "clear and convincing *evidence*," but "clear and convincing *reasons*," both words prompt an inquiry into the qualitative evaluation made by the agency, not a quantitative measuring. Moreover, "substantial evidence" itself is not about merely quantifying disembodied facts but evaluating the sufficiency of determinations drawn from them.

Evidence is defined as "[t]he available body of facts or information indicating whether a belief or proposition is true or valid."[39] An evidentiary fact is irrelevant without the ability to indicate and to support. A "reason" is a "cause, explanation, or justification for an action or event."[40] A reason can be every bit as fact-based as evidence. Both evidence and reasons have explanatory relationships to a proposition. Evidence is simply the raw material for a reason.

The indistinguishable nature of "evidence" and "reason" here is best clarified by example. In *Garrison v. Colvin*, the Ninth Circuit reversed the ALJ's no-disability determination with direction to enter an award of benefits.[41] It did so because "[t]he ALJ failed to offer specific, clear, and convincing reasons for discrediting Garrison's symptom testimony."[42]

In reviewing these "reasons," the court did nothing more than assess the evidence. The first reason the court attributed to the ALJ for discrediting the claimant's pain testimony was that "Garrison improved in 2007 and 2008 with the 'conservative' treatments of epidural injections and physical therapy."[43] In its rejection of that reason, the court pointed to evidence that there was "only partial and short-lived relief of her lower back pain, and no effective relief for her radiating neck pain."[44] As a result, the court concluded there was "no support in the record" for the ALJ's discrediting the claimant's complaints.[45] "Support in the record" is the language of evidence, and evidence, again, is the stuff of reason—at least in the material world.

Accordingly, the Ninth Circuit's "clear and convincing reasons" standard cannot be advocated as something analytically separable from the "substantial evidence" standard. Both purport to test the quality of the ALJ's reasoning, and one is facially more demanding than the other. The Ninth Circuit applies a test *intended* to be more stringent than "substantial evidence" to determinations of claimant credibility and determinations that reject uncontroverted opinions of treating physicians.[46]

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[38] In any event, if the standard were "clear and convincing evidence," that, too, places a burden on the decision-making process in excess of the statutorily required "substantial evidence."

[39] *Evidence*, LEXICO, https://www.lexico.com/definition/evidence (last visited Jan. 31, 2020).

[40] *Reason*, LEXICO, https://www.lexico.com/definition/reason (last visited Jan. 31, 2020).

[41] Garrison v. Colvin, 759 F.3d 995, 1013–14 (9th Cir. 2014).

[42] *Id.* at 1014.

[43] *Id.* at 1015.

[44] *Id.*

[45] *Id.*

[46] *See* Moore v. Comm'r of Soc. Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002).

II. STANDARDS OF REVIEW, INSTITUTIONAL COMPETENCE, AND JUDICIAL ECONOMY

Standards of review inform how appellate courts (including district courts reviewing SSA decisions) look at the decisions or rulings they are reviewing. "The standard of review focuses on the deference an appellate court affords to the decisions of a district court, jury or agency."[47]

The power of a standard of review to alter an outcome is unclear. Professor Jeffrey Dobbins writes that "the focus of courts, practitioners, and observers on the standard of review provides strong anecdotal evidence that they make a difference,"[48] but also reveals that a change in the standard of review applicable to a particular type of proceeding "does not drive substantially different outcomes with respect to reversal rates."[49] Ultimately, he concludes that "[t]he effect of a standard of review comes not from the mere power of its words, but from how it affects the way appellate courts think about their relationship with the entity whose decision is under review."[50]

But whether or not we can attach particular reversal rates to the words chosen to express *how* a reviewing court should look at the product of the court below, it would be cynical to claim that the choice of a standard—deferential or not—is irrelevant. The Supreme Court, in *Dickinson v. Zurko*, devoted pages of the United States Reports to determining whether the Federal Circuit should apply a "clearly erroneous" or "substantial evidence" standard to certain lower court findings.[51] If the Court believed these were all mere words rather than words manifesting some substantive difference, it would hardly have made the effort.[52]

At one end of the spectrum are standards of review that are not at all deferential. The well-known "de novo" standard is a non-deferential standard.[53] A court applying de novo review does not give weight to the decision below, but comes to its own, independent conclusions.[54]

At the other end of the spectrum are highly deferential standards, such as

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[47] FEDERAL APPELLATE PRACTICE: NINTH CIRCUIT § 18:1 (2018–2019 ed. 2018).

[48] Jeffrey C. Dobbins, *Changing Standards of Review*, 48 LOY. U. CHI. L.J. 205, 228 (2016).

[49] *Id.* at 212.

[50] *Id.*

[51] Dickinson v. Zurko, 527 U.S. 150, 162–63 (1999).

[52] *See* Paul R. Verkuil, *supra* note 10, at 695 (contending "that the Court takes review standards seriously").

[53] Lads Trucking Co. v. Bd. of Trustees, 777 F.2d 1371, 1373 (9th Cir. 1985) ("We review questions of fact under the deferential, clearly erroneous standard, and questions of law under the non-deferential, de novo standard.").

[54] United States v. First City Nat'l Bank of Houston, 386 U.S. 361, 368 (1967) (holding that "review *de novo*" requires "an independent determination of the issues").

"abuse of discretion" and "clear error."[55] A deferential standard requires a higher degree of confidence that the decision below was wrong before it should be overturned. "Discretion," for instance, implies a broad range of acceptable choices.[56] A decisionmaker only abuses its discretion when it acts outside that broad range. A deferential standard of review recognizes a range of decisional possibilities and does not require that a particular decision be obtained.

The choice of standard of review typically turns on the characterization of the issue under review as one resolving a question of law or a question of fact.[57] If a question of *law* is being reviewed, a non-deferential standard will be applied.[58] If, on the other hand, a question of *fact* is under review, a reviewing court will typically be more deferential to the decision below.[59] A lower court's determination of a question of fact, therefore, is less likely to be reversed.

The most common justification for this distinction is that different adjudicative bodies have different institutional competencies.[60] Courts of appeals are considered uniquely well-situated to decide legal issues.[61] The fact that they have "three heads" to address a question of logic and reason means they should be given the independent opportunity to decide what the law is.

Lower adjudicators—be they Article III district courts or administrative courts like the SSA's ALJs—are considered to be particularly competent at making factual determinations.[62]

The Supreme Court recently took up a case squarely addressing questions of institutional competence and the division of decisional labor underlying appellate standards of review.[63] In *Teva Pharmaceuticals v. Sandoz*, a patent case, the Court

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[55] *See, e.g.*, *Lads Trucking Co.*, 777 F.2d at 1373.

[56] Interpharm, Inc. v. Wells Fargo Bank, 655 F.3d 136, 146 (2d Cir. 2011) ("[D]iscretion is commonly understood to allow a decision maker to choose from a broad range of choices not conflicting with law or reason.").

[57] *See* Kelly Kunsch, *Standard of Review (State & Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 12 (1994).

[58] *Lads Trucking Co.*, 777 F.2d at 1373 ("We review questions of fact under the deferential, clearly erroneous standard, and questions of law under the non-deferential, de novo standard.").

[59] *Id.*

[60] *See* Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 435, 445 (2004) (explaining that "institutional competence is the dominant consideration" in assigning standards of review).

[61] *Id.* at 435.

[62] *See* Drejka v. Comm'r of Soc. Sec., 61 F. App'x 778, 781 (3d Cir. 2003) ("It is precisely because the ALJ is best situated to make credibility determinations that the findings of the ALJ are given deferential review."); Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 UTAH L. REV. 1, 44 (2012) (noting that "the idea that by their situation or their experience[,] the trial judges find facts better than appellate judges" is a reason for deferential review).

[63] Teva Pharm. USA, Inc. v. Sandoz, Inc., 574 U.S. 318 (2015).

was asked to determine the standard by which the Federal Circuit should review a district court's patent claim construction, including the district court's determination of subsidiary facts.[64] The Court held that when the Federal Circuit reviews a district court's resolution of subsidiary factual matters made while construing a patent claim, it must apply a "clear error" standard.[65] The "clear error" standard is similar to the "substantial evidence" standard in that (a) it is applied to a lower body's fact determinations, and (b) it is a deferential standard.[66]

In holding that the Federal Circuit must apply a deferential standard, the Court described some differences between appellate courts and triers of fact: "A district court judge who has presided over, and listened to, the entirety of a proceeding has a comparatively greater opportunity to gain that familiarity than an appeals court judge who must read a written transcript or perhaps just those portions to which the parties have referred."[67] It noted that the trier of fact "may have to make 'credibility judgments' about witnesses."[68]

In a parenthetical, the Court further emphasized the different institutional competencies of the trier of fact and the court of appeals.[69] It explained that "Federal Circuit judges 'lack the tools that district courts have available to resolve factual disputes fairly and accurately,' such as questioning the experts, examining the invention in operation, or appointing a court-appointed expert."[70] The Court concluded this topic with another parenthetical quotation clearly stating the trier of fact's primacy: "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."[71]

The classic example of this competence is determination of witness credibility.[72] Since testimony is taken before triers of fact—they are seeing it in the flesh—they can make determinations about whether or not to believe a witness that an

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[64] *Id.* at 321–22.

[65] *Id.* at 322.

[66] The judicial "clearly erroneous" and agency "substantial evidence" standards are similar, Dickinson v. Zurko, 527 U.S. 150, 162–63 (1999), though clear error is "somewhat stricter (i.e., allowing somewhat closer judicial review)." *Id.* at 153.

[67] *Teva Pharm.*, 574 U.S. at 838.

[68] *Id.*

[69] *Id.* at 838–39.

[70] *Id.* (quoting Lighting Ballast Control LLC v. Philips Elec. N. Am. Corp., 744 F.3d 1272, 1311 (Fed. Cir. 2014) (O'Malley, J., dissenting)).

[71] *Id.* at 839 (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985)).

[72] *See* Cooper Indus. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 440 (2001) (employing the term "institutional competence" in discussing standards of review and noting that when determining "degree or reprehensibility of the defendant's misconduct" for punitive damages purposes, "district courts have a somewhat superior vantage over courts of appeals, and even then the advantage exists primarily with respect to issues turning on witness credibility and demeanor").

appeals court, remote in time and place, cannot.[73]

But the idea of institutional competence should go beyond an obvious-enough acknowledgement that the factfinder looked into the eyes of the witness. An institutional trier of fact, such as an ALJ, is faced with voluminous evidentiary material all the time. The trier of fact weighs competing materials. Should sweat on the brow discredit the witness, or should documentary evidence overcome that? Is this treating doctor, with his valuable familiarity with a claimant-witness, as experienced as a consulting expert? There are calls to be made that go beyond how the judge "feels" about the witnesses before her.

The Supreme Court has explicitly asserted that deference to trier of fact determinations goes beyond deference to simple sight-and-sound assessments.[74] Deference must be afforded "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts."[75] In other words, the trier of fact is the trier of *all* facts. The reviewing court is not.

Beyond institutional competence lies another strong justification for deference to trial-level decisions on factual issues—finality.[76] An adjudicative act should not be in vain; something should be at stake at each level of a proceeding. If reviewing courts are going to get into the weeds of making first-cut factual determinations, there is no reason to have those determinations made by lower courts. Adjudication could begin and end at the appellate courts. Judicial economy requires that there be a division of labor between trial and appellate bodies. A non-deferential standard of review discards the work of lower bodies.

III. THE NINTH CIRCUIT SHOULD DISCARD ITS MODE OF CREDIBILITY REVIEW

In the SSA context, the Ninth Circuit's heightened standard is not only wasteful in its disregard of lower court decisionmaking, it is contrary to Congress's wishes. In both the Administrative Procedure Act and the Social Security Act, Congress was clear about the standard to be applied—the "substantial evidence" standard.[77]

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[73] *See id.*

[74] Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985).

[75] *Id.*; *see also* Dobbins, *supra* note 48, at 227 ("[S]ome view trial courts to be better than appellate courts at gathering, assessing, and evaluating facts, even if the trial court's evidence is purely documentary.").

[76] *See* Kunsch, *supra* note 57, at 19. A recent Supreme Court case suggests another value—speedy resolution of appeals. Monasky v. Taglieri, 140 S. Ct. 719, 730 (2020) ("As a deferential standard of review, clear-error review speeds up appeals . . . ."). Presumably, a less searching inquiry can be performed more quickly.

[77] *See supra* notes 15–16.

It is, again, difficult to determine the actual effects of standards of review.[78] They are verbal formulations subject to interpretation, manipulation, and the differing perspectives of different judges. But to the extent we agree that there is a reason for differing standards, and that they *should* lead to different results, it is not a sufficient response to the Ninth Circuit's standard to say, "well, that's just the way they phrase it."

The standard has substance. The Ninth Circuit itself has said that its "clear and convincing" standard "is not an easy requirement to meet: 'The clear and convincing standard is the most demanding required in Social Security cases.'"[79] Rhetorically, a greater demand is made on a court asked to apply a "clear and convincing" standard than on one asked to review only for "substantial evidence."

Ultimately, there is no reason to create a heightened standard of review for disregarding uncontroverted treating physician testimony. If it is uncontroverted, it is hard to imagine how its rejection would survive substantial evidence review. This seems to be an idle use of the language of a heightened standard of review.

There may be policy reasons for requiring heightened scrutiny of claimants' "excess symptom testimony."[80] It may be, as a policy matter, that the Ninth Circuit does not want a claimant's subjective complaints to be disregarded too easily. It may also believe that ALJs are insufficiently solicitous of claimant symptoms and assertions.

Nonetheless, these determinations are not the Ninth Circuit's to make. The standard of review in Social Security matters is provided by statute and requires only that "substantial evidence" support SSA findings, including credibility findings.[81] The Ninth Circuit rule provides a requirement contrary to Congress's mandate that is not commonplace judicial gloss. It is the only circuit to import a stricter standard of review into the Social Security realm, creating a split that should be resolved. This is made all the more important by the sheer number of SSA appeals heard in the district and circuit courts.

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[78] Kunsch, *supra* note 57, at 12 ("Some courts invoke it talismanically to authenticate the rest of their opinions. Once they state the standard, they then ignore it throughout their analysis of the issues. Other courts use standard of review to create an illusion of harmony between the appropriate result and the applicable law.").

[79] Garrison v. Colvin, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting Moore v. Comm'r of Soc. Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002)).

[80] *See* Coon, *supra* note 1, at 190 ("[C]ontinuing to apply the 'clear and convincing' standard will lead to a more efficient, and ultimately more accurate, disability evaluation system."); *see also id.* at 171 (quoting Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986)).

[81] 42 U.S.C. § 405(g) (2012).