SUBSTANTIAL EVIDENCE REVIEW IN SOCIAL SECURITY CASES AS AN ISSUE OF FACT

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INTRODUCTION

Social security cases are a substantial presence in federal court. During the one-year period ending September 30, 2005, a total of 15,487 social security cases were filed in the United States district courts.[1] One-hundred forty-three were filed in the Northern District of Illinois,[2] which means a new social security case was filed more than every other business day. Other district courts had substantially more.[3]

By the time a social security case arrives on the desk of a district or magistrate judge in a federal district court, the claimant typically has been trying for years to obtain disability benefits. The case is of enormous financial and emotional importance to the claimant, and she may be quite desperate and down on her luck.[4]

The Social Security disability system impacts millions of people and involves enormous amounts of money. In December of 2005, 8.3 million people received disability benefits.[5] Total expenditures for the Social Security disability program in 2005 were 88 billion dollars, and administrative expenses for 2005 accounted for 2.6% of total expenditures.[6]

Given the profound importance of disability benefits to claimants and the tremendous amount of judicial and administrative resources required to process and distribute those claims, it is critically important that federal courts process social security appeals in a fair and efficient manner. Unfortunately, our current practices do not achieve these goals.

At the federal district court level, the Social Security Act permits claimants to argue that the factual determinations made by the Administrative Law Judge (ALJ) who decided the case are not supported by "substantial evidence."[7] This review requires the district court judge to review the entire administrative record, which generally consists of hundreds of pages, to determine whether there was a reasonable factual basis for the

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1 ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, Table 5-9 (Sept. 2005) *available at* http://www.uscourts.gov/judbus2005/tables/s9.pdf.

2 *Id.*

3 *Id.* One district had more than 1000 cases commence, one district more than 700, two districts more than 500, three districts more than 400, three districts more than 300, and seventeen other districts had more than 200 cases open. *Id.*

4 Linda Durston & Linda 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, 140 (1996). "Many, perhaps most, claimants seeking benefits with the Social Security disability system are disabled in part because they never found a voice within the larger and smaller communities in which they were raised and where they attempted to live and work as adults. Rather, many of these claimants have been the victims of childhood, domestic, and street violence that interfered with the development of an effective voice. It is impossible to overstate the importance of the hearing in the lives of such claimants." *Id.* (citations omitted).

5 BOARD OF TRUSTEES OF THE FEDERAL OLD AGE & SURVIVORS INSURANCE AND DISABILITY INSURANCE TRUST FUND, SUMMARY OF 2006 ANNUAL SOCIAL SECURITY AND MEDICARE TRUST FUND REPORTS, *available at* http://www.ssa.gov./OACT/TRSUM/tr06Summary.pdf.

6 *Id.*at 1, 3.

7 42 U.S.C. § 405(g) (2000).

denial of benefits.[8] Consequently, district and magistrate judges often write lengthy decisions after combing through the record in reaching their decisions,[9] a process that this article argues is factual in nature.

The losing party may then appeal the district court's substantial evidence determination.[10] It is taken as axiomatic by the courts of appeals that this second round of review is performed de novo, with no deference to the district court's findings, based on the premise that a district court's substantial evidence determination is a question of law.[11] In fact, many courts of appeals' decisions make no reference to the district court's opinion, but refer only to the ALJ's decision.[12]

Simply put, a fundamental problem with the way social security cases are processed is the treatment of a district court's substantial evidence determination as a question of law by the circuit courts of appeals. Indeed, this treatment of substantial evidence determinations as issues of law has also led to procedural anomalies in the district courts. Many courts decide social security appeals by means of summary judgment motions or motions for judgment on the pleadings,[13] devices that are inappropriate once substantial evidence review is properly characterized as an issue of fact, as well as for other reasons.

In many district courts, social security cases are referred to magistrate judges for report and recommendation.[14] Under this system, the magistrate judge undertakes the laborious process of digesting the administrative record and authoring a written opinion, which is then reviewed by the district court judge who decides whether to adopt the magistrate judge's opinion. This expends an additional layer of judicial resources and results in additional delay.

Judges and scholars alike have criticized this system of review as wildly inefficient and have proposed legislative change to modify the system.[15] This article echoes those concerns, but argues that Congressional intervention is unnecessary. Rather, the courts of appeals are the proper agents of change, and need only recognize

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8 *E.g.*, Young v. Barnhart, 362 F.3d 995, 1001 (7th Cir. 2004).

9 Montalvo v. Barnhart, 457 F. Supp. 2d 150 (W.D.N.Y. 2006); Ynocencio v. Barnhart, 300 F. Supp. 2d 646 (N.D. Ill. 2004).

10 42 U.S.C. § 405(g) (2000).

11 *E.g.*, Milton v. Harris, 616 F.2d 968 (7th Cir. 1980).

12 *E.g.*, Madrid v. Barnhart, 447 F.3d 788 (10th Cir. 2006).

13 *See*, *e.g.*, Jt. Ky. Loc. R. 83.11(C)(1)(A) (April 1, 2005) (summary judgment), *available at* http://www.kyed.uscourts.gov/rules/Civil_Rules-2.pdf; Dist. Me. Loc. R. 16.3(a)(2)(B) (July 24, 2007) (judgment on the pleadings), *available at* http://www.med.uscourts.gov/rules/localrules.pdf.

14 *See* Morton Denlow, Results of Survey of U.S. Magistrate Judges (2007) (copy on file with author) (hereinafter "Survey Results"). As part of the process of writing this article, I surveyed all of the magistrate judges in the federal court system on several issues related to social security cases. I received 234 responses, nearly half of all magistrate judges. A copy of the summary of the survey results is appended to this article. I thank my fellow magistrate judges for their participation in the survey.

15 *See* Groves v. Apfel, 148 F.3d 809, 811 (7th Cir. 1998); Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 Admin. L. Rev. 731 (2003); Report of the Federal Courts Study Committee–Part II (1990).

that a clearly erroneous standard should be applied to the district court's substantial evidence determination to achieve similar efficiency gains.

Part I of this article reviews the current social security disability determination system from the administrative level through the courts of appeals. Part II argues that district courts engage in fact finding when reviewing the record in a social security case, and that courts of appeals should therefore review the district court's substantial evidence determination for clear error. Part III engages in a review of Supreme Court and circuit court case law to determine the origins of de novo review of substantial evidence determinations, concludes that only minimal analysis of the issue has been conducted and only questionable justifications given, and refutes those articulated reasons. Part IV discusses practical considerations that favor deferential review of district court substantial evidence determinations in the courts of appeals. Part V deals briefly with the issues of the proper procedural devices to be used in the district courts and criticizes the use of the report and recommendation process.

I. THE SOCIAL SECURITY DETERMINATION AND REVIEW PROCESS

A. Administrative Process

A claimant is entitled to disability benefits if she can prove she is "under a disability," meaning she is "[unable] 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 that 12 months."[16] The impairment must be "demonstrable by medically acceptable clinical and laboratory diagnostic techniques," and without medical or similar evidence, the ALJ will not consider an individual to have a disability.[17]

The ALJ uses a five step sequential process to determine whether a person has a disability.[18] If the ALJ can make a conclusive finding at any step, it is unnecessary to proceed to the next step.[19] In the first step, the ALJ considers whether the claimant is engaging in substantial gainful activity, and if she is, the ALJ will decide that the claimant is not disabled.[20] Second, the ALJ considers the severity of the claimant's physical or mental impairment and whether it meets the duration requirement of at least one year.[21] Third, the ALJ considers the severity of the impairment and whether it meets or equals one of the impairments in the Social Security Administration "listings."[22]

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16 42 U.S.C. § 423(d)(1)(A) (2000).

17 42 U.S.C. §§ 423(d)(3), (5) (2000).

18 *See, e.g.*, Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 804 (1999).

19 20 C.F.R. § 404.1520(4) (2007).

20 20 C.F.R. § 404.1520(4)(I) (2007).

21 20 C.F.R. § 404.1520(4)(ii) (2007).

22 20 C.F.R. § 404.1520(4)(iii) (2007).

Fourth, the ALJ determines the claimant's residual functional capacity, i.e., what the claimant can do despite her limitations, and determines whether the claimant has the capacity to perform her relevant past work.[23] Fifth, the ALJ assesses the claimant's residual functional capacity, as well as her age, education, and work experience, to determine if the claimant can make an adjustment to other work.[24] The claimant bears the responsibility of proving the criteria in the first four steps; if she meets this burden, the Commissioner has the burden of proving the fifth step—i.e., that there is some other "substantial gainful employment" available to the claimant.[25]

If a claimant receives an unfavorable decision from the ALJ, she must then appeal to the Appeals Council if she wishes to continue the process.[26] The Appeals Council may grant, deny, or dismiss a request to review the ALJ's decision, and if review is granted may issue its own decision or remand to the ALJ.[27] Few claimants are granted review, but appeal to the Appeals Council is a prerequisite to judicial review.[28]

B. District Court Review

Title 42 U.S.C. § 405(g) states that

> [a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action . . . brought in the district court of the United States for the judicial district in which the plaintiff resides.[29]

This allows a claimant to appeal the Commissioner's decision denying her benefits in federal district court. As for the procedure when the claimant files her case in district court, § 405(g) states only that "[a]s part of the Commissioner's answer [to the claimant's complaint,] the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based."[30]

After the district court receives the transcript and administrative record, it "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security,

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23 20 C.F.R. § 404.1520(4)(iv) (2007).

24 20 C.F.R. § 404.1520(4)(v) (2007).

25 *E.g.*, Young v. Barnhart, 362 F.3d 995, 1000 (7th Cir. 2004).

26 20 C.F.R. § 404.967 (2007).

27 *Id.*

28 *See, e.g.*, CHARLES T. HALL, SOCIAL SECURITY DISABILITY PRACTICE § 4.4 (West 2005).

29 42 U.S.C. § 405(g) (2000).

30 *Id.*

with or without remanding the cause for a rehearing."[31] Section 405(g) sets forth the standard of review of the ALJ's decision by the district court:

> The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations.[32]

A district court can reverse the Commissioner's final determination only if the ALJ did not apply the proper legal standards or the record did not include substantial evidence to support the ALJ's decision.[33] A court reviews the clinical findings and diagnoses of both treating and examining physicians, the subjective evidence of pain and disability as testified by the claimant and by others, and the claimant's work history, education level, and age.[34] Using these evidentiary sources as guidelines, the district court must review the entire record to see if it contains substantial evidence supporting the agency's decision, but the court cannot decide facts anew, reweigh the evidence, or substitute its own judgment for that of the ALJ.[35] In his opinion, the ALJ must, at some minimal level, articulate his analysis of the presented evidence if the record contains evidence that conflicts with the ALJ's opinion.[36] The decision of the ALJ must be based on consideration of all relevant evidence, and the reasons for his conclusions must be stated in a manner sufficient to permit an informed review.[37]

The amount of evidence the courts require to support the ALJ's conclusion is "more than a mere scintilla" but less than the "preponderance of evidence."[38] Substantial evidence is evidence that "a reasonable mind might accept as adequate to support [the]

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31 *Id.*

32 *Id.*

33 *Id.*; *see* Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 368 (1946).

34 *E.g.*, Perez v. Barnhart, 415 F.3d 457, 462 (5th Cir. 2005).

35 *E.g.*, Young v. Barnhart, 362 F.3d 995, 1001 (7th Cir. 2004).

36 *E.g.*, Nelson v. Apfel, 131 F.3d 1228, 1237 (7th Cir. 1998).

37 *Id.*

38 Richardson v. Perales, 402 U.S. 389, 401 (1971).

conclusion."[39] Even if the reviewing court would reach an opposite conclusion in a de novo review of the case, the court cannot overturn the ALJ's decision if substantial evidence supports it.[40] The court must look at the entire record of proceedings and examine the evidence favoring the position of the claimant and the evidence rejecting that position.[41] The court's review of the record and its determination of the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight.[42] The only way the district court "can determine if the entire record was taken into consideration is for the district court to evaluate in detail the evidence it used in making its decision and how any contradictory evidence balances out."[43]

C. Procedures Used for District Court Review

District courts use a variety of procedural devices to review social security decisions. Summary judgment is the most common.[44] In one practitioner's guide, for example, the author states, "[a]fter the government files the administrative record of the case the burden is upon the claimant's attorney to file a motion for summary judgment."[45] Only the D.C. Circuit has expressly told lower courts not to use summary judgment in social security cases:

> This case is before us on an appeal of a summary judgment in favor of appellee, and we think it starkly illustrates the impropriety of using summary judgment in deciding a case under the Social Security Act. In almost every case brought in district court under the Act, the issue before the court is the substantiality of the evidence upon which the Secretary based his findings of fact. The Act directs the court to enter its judgment upon the pleadings and the transcript of the record. There is not room, as is normally the case in a motion for summary judgment, for consideration of depositions and

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39 *Id.*

40 *E.g.*, Johnson v. Barnhart, 390 F.3d 1067, 1070-71 (8th Cir. 2004).

41 *E.g.*, Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).

42 *E.g.*, McCrea v. Comm'r of Soc. Sec., 370 F.3d 357, 362 (3d Cir. 2004).

43 Wilcutts v. Apfel, 143 F.3d 1134, 1136 (8th Cir. 1998).

44 Hamilton v. Sec'y of Health & Human Serv. of U.S., 961 F.2d 1495, 1502 (10th Cir. 1992) (permitting use of summary judgment); Milton v. Harris, 616 F.2d 968, 975 (7th Cir. 1980) (summary judgment appropriate where plaintiff does not challenge the completeness of the record); Beane v. Richardson, 457 F.2d 758 (9th Cir. 1972); Johnson v. Califano, 434 F.Supp. 302, 310 (D. Md. 1977) (whether social security benefits claim is supported by substantial evidence is a legal question to "which summary judgment procedure is particularly applicable"); HARVEY L. MCCORMICK, SOCIAL SECURITY CLAIMS AND PROCEDURES, § 732 at 308 (4th ed. 1991) (stating majority rule).

45 CHARLES T. HALL, SOCIAL SECURITY DISABILITY PRACTICE § 4:14 (West 2005).

> interrogatories in order to determine whether any dispute of fact exists, and if so whether it is bona fide. If the case is one that involves the taking of additional evidence for any reason, the district court is obliged to obtain an enhancement or revision of the record by way of remand to the Secretary. Thus, the court should more correctly enter either a judgment on the pleadings, Fed.R.Civ.P. 12(c), or an order pursuant to a motion under Fed.R.Civ.P. 7(b)(1).[46]

The Fifth, Sixth, Seventh, and Ninth Circuits have all held that summary judgment is an acceptable procedure to decide the case without requiring its use.[47]

The remaining circuits use a variety of procedural devices to bring the case before the court for a final judgment. Besides summary judgment, the parties might file a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c),[48] a motion to affirm or reverse the administrative court's decision,[49] or a motion to remand to the ALJ.[50] Some courts simply require a complaint and answer with briefs in support and no motions.[51]

Some district courts have dealt with this lack of firm procedural direction by implementing local rules, such as requiring the plaintiff to move for summary judgment within thirty days of the Commissioner's answer;[52] permitting only initial pleadings and briefs;[53] entering judgment on the pleadings after oral argument;[54] requiring both parties to move for summary judgment;[55] or requiring the plaintiff to file a "Motion for Order Reversing Decision of the Commissioner or for Other Relief" within thirty days of the answer.[56]

D. Circuit Court Review

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46 Igonia v. Califano, 568 F.2d 1383, 1389 (D.C. Cir. 1977).

47 Pliley v. Sullivan, 892 F.2d 35, 37 (6th Cir. 1989); Lovett v. Schweiker, 667 F.2d 1, 2 (5th Cir. 1981); Milton v. Harris, 616 F.2d 968, 975 (7th Cir. 1980); Beane v. Richardson, 457 F.2d 758, 759 (9th Cir. 1972).

48 *E.g.*, Santiago v. Barnhart, 441 F. Supp. 2d 620, 624 (S.D.N.Y. 2006).

49 *E.g.*, Kratman v. Barnhart, 436 F. Supp. 2d 300, 302 (D.Mass. 2006).

50 *E.g.*, Justice v. Barnhart, 431 F. Supp. 2d 617, 618 (W.D.Va. 2006).

51 Survey Results, *supra* note 14.

52 E. DIST. KY. R. 83.11(c)(1)(A) (2006).

53 KAN. DIST. R. 83.7(d) (2006).

54 ME. DIST. R. 16.3(a)(2)(B) (2006).

55 N. DIST. TEX. R. 9.1(b) (2006); C.D. Ill. R. 8.1 (2006).

56 P.R. DIST. R. 9(b) (2006).

Either the Commissioner or the claimant may appeal an adverse judgment in the district court to the circuit court of appeals.[57] Most circuit courts explicitly state that the standard is a de novo review,[58] meaning that the court of appeals reviews de novo the question of whether the ALJ's opinion is supported by substantial evidence (and not meaning de novo review of whether the claimant is disabled). The remaining circuits, while not stating that review is de novo, apply an obviously de novo review in practice. They ignore the district court opinion, skip directly to the ALJ's opinion and the full administrative record, and decide anew whether the ALJ's opinion is supported by substantial evidence.[59] De novo review is applied regardless of the procedural device used in the district court.[60]

II. SUBSTANTIAL EVIDENCE REVIEW IS A FACT-FINDING PROCESS

A. Description of Substantial Evidence Review in Practice

A logical place to start the analysis is with a description of my own process for reviewing social security decisions. I am instructed by the Seventh Circuit to consider the entire record, not merely the evidence cited by the ALJ, when I make my decision. Therefore, after reading the briefs and the ALJ's decision, I begin by reading the

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[57] *E.g.*, Sanchez v. Barnhart, 467 F.3d 1081 (7th Cir. 2006).

[58] Pichette v. Barnhart, 2006 WL 1697524, at *2 (11th Cir. 2006) ("We review *de novo* the district court's determination on whether remand to the Commissioner is necessary based on new evidence."); Lounsburry v. Barnhart, 464 F.3d 944, 947 (9th Cir. 2006) ("We review *de novo* the decision of the district court affirming the decision of the ALJ."); Choate v. Barnhart, 457 F.3d 865, 869 (8th Cir. 2006) ("We review *de novo* the district court's decision upholding the denial of benefits, and affirm if substantial evidence on the record as a whole supports the outcome."); Nelson v. Comm'r of Soc. Sec., 2006 WL 2472910, at *6 (6th Cir. 2006) ("We review de novo the district court's grant of summary judgment."); Deleon v. Comm'r of Soc. Sec., 2006 WL 2351547, at *3 (3d Cir. 2006) ("We review the District Court's decision de novo."); Butts v. Barnhart, 388 F.3d 377, 384 (2d Cir. 2004) ("When reviewing the district court's determination as to the final decision of the Commissioner [w]e review the administrative record *de novo*, using the same standard applied by the district court." (internal quotation marks removed)); Seavey v. Barnhart, 276 F.3d 1, 9 (1st Cir. 2001) ("Our review of a district court's decision to affirm or reverse a final decision of the Commissioner is de novo and we use the same standard to review the correctness of the Commissioner's decision as does the district court.").

[59] Cain v. Barnhart, 2006 WL 2311114, at *1 (5th Cir. 2006) ("We review the Commissioner's decision to deny benefits for substantial evidence and application of the proper legal standards."); Prochaska v. Barnhart, 454 F.3d 731, 734 -35 (7th Cir. 2006) ("Although we perform a *de novo* review of the ALJ's conclusions of law, our review of the ALJ's factual determinations is deferential. We will affirm the ALJ's decision if it is supported by substantial evidence." (internal quotes and citations removed)); Madrid v. Barnhart, 447 F.3d 788, 790 (10th Cir. 2006) ("[W]e review the ALJ's decision only to determine whether the correct legal standards were applied and whether the factual findings are supported by substantial evidence in the record."); Johnson v. Barnhart, 434 F.3d 650, 653 (4th Cir. 2005) ("Under the Social Security Act, [a reviewing court] must uphold the factual findings of the [ALJ] if they are supported by substantial evidence and were reached through application of the correct legal standard."); Butler v. Barnhart, 353 F.3d 992, 999 (D.C. Cir. 2004) ("[W]e assess only whether the ALJ's finding that she is not is based on substantial evidence and a correct application of the law.").

[60] *See generally*, *Deleon*, 2006 WL 2351547; *Cain*, 2006 WL 2311114; *Prochaska*, 454 F.3d 731; *Nelson*, 2006 WL 2472910; *Choate*, 457 F.3d 865; *Lounsburry*, 464 F.3d 944; *Madrid*, 447 F.3d 788; *Pichette*, 2006 WL 1697524; *Johnson*, 434 F.3d 650; *Butler*, 353 F.3d 992; *Butts*, 388 F.3d 377; *Seavy*, 276 F.3d 1.

administrative record in its entirety. As I go, I flag any evidence that I believe to be relevant to the disability determination. I then process all of this evidence, consider how it all fits together and how some pieces support, contradict, or give context to other pieces. Finally, I write a statement of facts that reviews all of the evidence that may implicate the substantial evidence determination, pro or con. It is inevitably of much greater length and depth than what is found in the ALJ's opinion.[61]

There should be no question that what I have just described is fact-finding. Fact-finding is, at its heart, the process of focusing a mass of evidence into a coherent story by determining what is relevant and to what extent it is relevant. Certainly, the universe of facts in a social security appeal is closed by the administrative record, but this is no different than a bench trial, where the universe of facts is closed by what the parties have chosen to introduce into evidence. In both instances, a judge's critical eye and professional experience are used to sift and sort facts and to eventually make findings of fact.

As discussed below in Section III, current appellate court case law is uniformly rooted in a view of the substantial evidence review process in the district courts as one of reviewing the ALJ's decision to see if it measures up to a particular standard. The focus is on the ALJ's decision and its legal "status." A different, and I believe more realistic, view is that the district court is itself answering the same fact question as the ALJ but using a deferential evidentiary standard. Because the district court is deciding a question of fact, the courts of appeals should apply a clearly erroneous standard of review to the district court's decision.

Say, for example, the ALJ concluded the claimant could stand for seven of eight hours in a work-day. The ALJ cited the testimony of the medical expert but did not mention that five treating physicians restricted the claimant to standing no more than four hours per day, nor the definitive medical manual on treatment of the impairment that strongly recommends the same restriction. The district court is not reviewing the ALJ's conclusion for legal error so much as making an independent decision regarding the factual issue of whether substantial evidence supports the finding that the claimant can stand for seven of eight hours in a work-day. But, the district court does not make this factual determination as if the issue were before it on a bench trial. Rather, the district court asks whether there is a reasonable evidentiary basis for (as opposed to a preponderance of the evidence supporting) a conclusion that as a matter of fact the claimant does not need the restriction. The distinction is subtle, but at its core, what is at issue is a *fact* (can the claimant stand for more than an hour a day) and not a legal conclusion.

I recently surveyed all of the magistrate judges in the federal court system and asked whether they felt that they were deciding a question of fact when reviewing social

[61] *See, e.g.*, Ynocencio v. Barnhart, 300 F. Supp. 2d 646 (N.D. Ill. 2004). *See also e.g.*, Montalvo v. Barnhart, 457 F. Supp. 2d 150 (W.D.N.Y. 2006).

security records for substantial evidence. Nearly half of the approximately 500 magistrate judges responded. I asked:

> In reviewing the record in a social security case to determine whether substantial evidence supports the decision of the ALJ, do you believe you are deciding a question of fact? (I am interested in how you would characterize what you are doing based on your experience in reviewing the administrative record, not necessarily the way your court of appeals characterizes the issue.)[62]

Approximately 30% answered that they were deciding a question of fact, with 70% answering question of law.[63] While I was at first surprised to learn that more judges characterized the issue as a question of law, the fact that 30% described the process as a question of fact despite uniform appellate court description of the issue as one of law, demonstrates a clear disconnect between the district and circuit courts and reveals the need for deeper analysis.

B. Comparison to a Trial on the Papers

A Rule 52(a) trial on the papers is a bench trial conducted without live witnesses on the basis of a purely documentary record.[64] It resembles review of social security decisions in that the record before the district court consists only of written evidence. The two processes differ only in the evidentiary standard to be applied to the written record—preponderance of the evidence in a trial on the papers and substantial evidence in a social security case. The difference in standard does not change the underlying process or make substantial evidence review any less a question of fact.

Rule 52(a) states, "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge of the credibility of the witnesses."[65] Thus, even in a trial on the papers, which involves only documentary evidence, the courts of appeals review the district courts' factual findings for clear error, and not de novo.

While the plain text of Rule 52(a) mandates clearly erroneous review, some courts of appeals, for a time, subjected factual findings based solely on documentary evidence to

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[62] Survey Results, *supra* note 14.

[63] Survey Results, *supra* note 14. About a dozen judges added comments characterizing the process as a mixed question of law and fact. *Id.*

[64] *See* Anderson v. City of Bessemer City, 470 U.S. 564 (1985); Acuff-Rose Music, Inc. v. Jostens, Inc., 155 F.3d 140 (1998); MORTON DENLOW, *Trial on the Papers: An Alternative to Cross-Motions for Summary Judgment*, THE FEDERAL LAWYER, August 1999, at 30.

[65] FED. R. CIV. P. 52(a).

de novo review.[66] One commentator has described appellate court case law on the issue during that time as "indescribably confused," despite "the clear language of the rule, two Notes by the Advisory Committee, and pointed expressions from the Supreme Court."[67]

De novo review of Rule 52(a) findings of fact based on documentary evidence has long been rejected. The Advisory Committee Notes to the 1985 amendments to Rule 52(a) state:

> The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus eliminating the need for any special deference to the trial court's findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.[68]

Similar reasoning was used by the Supreme Court:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring

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66 *See* Anderson v. City of Bessemer, 470 U.S. 564, 574 (1985); FED. R. CIV. P. 52(a) advisory committee's notes (1985 Amendment).

67 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2587 (West 2007).

68 FED. R. CIV. P. 52(a) advisory committee's notes (1985 Amendment).

> too much. As the Court has stated in a different context, the trial on the merits should be the main event rather than a tryout on the road. For these reasons, review of factual findings under the clearly-erroneous standard-with its deference to the trier of fact-is the rule, not the exception.[69]

While section 405(g) lacks the same textual grounding for clearly erroneous review, the reasoning used by the Advisory Committee and the Supreme Court equally applies to substantial evidence review. Redundant review of substantial evidence decisions by the courts of appeals does not make for sound judicial economy and damages the legitimacy of the district courts. District courts have greater experience in reviewing social security decisions for substantial evidence, and another layer of identical judicial review adds little by way of accuracy and needlessly expends judicial resources.[70]

Finally, section 405(g) of the Social Security Act states: "The judgment of the [district] court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions."[71] Because the Act does not specify the procedural device to be used to review social security decisions in the district court, nor the standard of review on appeal in the circuit courts, what constitutes "the same manner as a judgment in other civil actions" must be determined by analogy. The proper analogy is to a Rule 52(a) trial on the papers.

It may be that district courts should make findings of fact and conclusions of law under Rule 52(a) when deciding social security cases. In this way, the court would make a finding as to whether substantial evidence exists to support the ALJ's finding and identify the factual basis. The court could then discuss the legal issues. As discussed below in Section III, appellate courts have first characterized substantial evidence review as an issue of law and then decided that summary judgment is an appropriate procedure, not the other way around. Therefore, it is unlikely that changing the procedure at the district court level will force a change in the standard of review at the courts of appeals level. Further, Rule 52(a) decisions involve both findings of fact and conclusions of law, and conclusions of law are subject to de novo review. Therefore, the legal issues raised in a social security appeal would still be subject to de novo review. Thus, change relies on recognition by courts of appeals of substantial evidence review as a factual issue, using Rule 52(a) as an analogy, and not on a change in district court procedures.

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[69] *Anderson*, 470 U.S. at 574-75 (internal quotation marks and citations omitted). *See also* Wright & Miller, *supra* note 67 at § 2587 ("This construction of the rule [clearly erroneous review of Rule 52(a) findings of fact based on documentary evidence] was required by the language of the rule itself, by the Advisory Committee Notes to the rule, and by the decisions of the Supreme Court. It was required even more clearly by the essential nature and function of trial courts as distinguished from appellate courts. Even in instances in which an appellate court is in as good a position to decide as the trial court, it should not disregard the trial court's finding, because to do so impairs confidence in the trial courts and multiplies appeals with attendant expense and delay.").

[70] *See* Section IV, *infra*, for discussion of judicial economy and trial vs. appellate court roles.

[71] 42 U.S.C. § 405(g) (2006).

C. Comparison to Other Administrative Law Contexts

In many administrative contexts, appeals are taken directly to the courts of appeals, with subsequent appeal taken to the Supreme Court.[72] Therefore, it is helpful to draw an analogy to the manner in which the Supreme Court reviews courts of appeals substantial evidence decisions in other administrative contexts. That review is, properly, deferential.

For example, National Labor Relations Board decisions are appealed directly to the courts of appeals under the Administrative Procedure Act (APA).[73] The APA authorizes the courts of appeals, among other things, to review administrative agency decisions for substantial evidence.[74] In this context, the Supreme Court gives deference to decisions made by the courts of appeals by seldom reviewing the application of the substantial evidence standard.[75] The Court has acknowledged that "Congress charged the courts of appeals, not this Court, with the normal and primary responsibility for reviewing the conclusions of the [administrative agency]."[76] Furthermore, the Supreme Court "is not the place to review a conflict of evidence nor to reverse a court of appeals because were [the Supreme Court] in its place we would find the record tilting one way rather than the other."[77] The Supreme Court will only intervene with the court of appeals' decision in the "rare instance when the standard appears to have been misapprehended or grossly misapplied."[78] If review by the courts of appeals in social security cases were properly analogized to Supreme Court review of courts of appeals decisions regarding substantial evidence, courts of appeals would apply a similarly deferential standard of review to district court substantial evidence conclusions.

III. COURTS OF APPEALS HAVE ERRONEOUSLY SUBJECTED DISTRICT COURT SUBSTANTIAL EVIDENCE DETERMINATIONS TO DE NOVO REVIEW

The appellate practice of reviewing a district court substantial evidence decision de novo on summary judgment initially motivated the writing of this article. Although it is common practice for an appellate court to review a summary judgment case de novo, [79]

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72 *See* KOCH, ADMINISTRATIVE LAW AND PRACTICE, § 8.13 (West 2d ed.) (2006).

73 *E.g.*, Nat'l Labor Relations Bd. v. Am. Nat'l Ins. Co., 343 U.S. 395, 409-10 (1952).

74 5 U.S.C. § 706 (2)(E) (2000).

75 Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 491 (1951).

76 *Nat'l Labor Relations Bd.*, 343 U.S. at 409-10.

77 *Id.* (internal quotations omitted) (citing Nat'l Labor Relations Bd. v. Pittsburg S.S. Co., 340 U.S. 498, 503 (1951)).

78 *Universal Camera*, 340 U.S. at 491.

79 *See, e.g.*, Tr. of S. Cal. Bakery Drivers Sec. Fund v. Middleton, 474 F.3d 642, 645(9th Cir. 2007).

perhaps a Rule 52 trial on the papers or another device would trigger a more deferential review. Unfortunately, this puts the cart before the horse: appellate courts addressing the issue have decided first that substantial evidence review is a legal issue, and therefore (in most circuits) that summary judgment is an appropriate procedural device. Further, as discussed in Section I, regardless of the procedural device used, circuit courts have uniformly applied a de novo review to substantial evidence determinations.

A. Reasons for Appellate Court Treatment of Substantial Evidence Decisions as a Matter of Law

As to the standard of review the appellate courts should apply to district court substantial evidence determinations, the Social Security Act simply states"[t]he judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions."[80] Given the uniform appellate treatment of the issue as one of law and the massive judicial effort required for de novo review on appeal, one would expect to find a Supreme Court decision holding that substantial evidence review is an issue of law. However, there is no such Supreme Court decision, and the courts of appeals that have addressed the issue with any depth have relied on unconvincing logic.

The Supreme Court has not provided clear guidance or analysis on the issue of whether substantial evidence review of a social security disability decision, or of an agency decision under the APA, is a question of law to be decided de novo on appeal or a question of fact to be reviewed under a deferential standard. Rather, the Court has offered conflicting treatment of the issue–at times implying that substantial evidence review is a question of fact subject to deferential review[81] and at times stating that the issue is one of law subject to de novo review.[82] None of these cases specifically addressed the issue in any detail.

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[80] 42 U.S.C. 405(g) (2006).

[81] *See* Nat'l Labor Relations Bd. v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 795 n.13 (1990) ("[Dissent's] argument is founded on the premise that the issue before us is the factual question whether substantial evidence supports the Board's finding . . . ."); Radio Corp. of America v. United States, 341 U.S. 412, 417-21 (1951) ("We sustain the Commissioner's power to reject this position and hold valid the challenged order, buttressed as it is by the District Court's approval. . . . We cannot say the District Court misapprehended or misapplied the proper judicial standard in holding that the Commission's order was not arbitrary or against the public interest as a matter of law. . . . We have considered other minor contentions made by RCA but are satisfied with the way the District Court disposed of them."); Universal Camera Corp. v. Nat'l Labor Relations Bd.., 340 U.S. 474, 491 (1951) ("Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.").

[82] *See* Reconstruction Finance Corp. v. Bankers Trust Co., 318 U.S. 163, 170 (1943) ("With respect to the amount set as a maximum [by the Interstate Commerce Commission] the only question of law which can arise is whether there is substantial evidence to support the Commission's finding."); Co. Nat'l Bank v. Comm'r of Internal Revenue, 305 U.S. 23, 25 (1938) ("[W]hether there is substantial evidence to support a finding [by the Commissioner] is a question of law.").

Circuit court case law, while often expressly holding that review is de novo, offers little analysis supporting that conclusion. In 1980, the Seventh Circuit in *Milton v. Harris* addressed the propriety of summary judgment as the device for deciding social security appeals.[83] In doing so, the court looked in part, to whether the substantial evidence question was one of law or fact, as summary judgment would not be appropriate if the district court was required to resolve an issue of fact.[84] While the courts of appeals universally treat substantial evidence review as an issue of law subject to de novo review, *Milton* is the only court of appeals case to discuss the issue with any level of depth, and is therefore an appropriate place to begin.

The Seventh Circuit acknowledged that the district court must "carefully peruse the proceedings below,"[85] but treated the record itself as uncontested, summarily rejecting as "mere sophistry" the argument that the existence of substantial evidence in the record is itself an issue of fact that would preclude summary judgment.[86] The remainder of the court's discussion on the summary judgment issue involved the depth of analysis required by the district court and whether that depth could be achieved through summary judgment, concluding that it could.[87] Yet, whether the appropriate depth of analysis could be achieved through summary judgment is unrelated to whether the issue before the court is one of law or fact or what standard of review applies on appeal.

In reaching its conclusion in *Milton*, the Seventh Circuit relied on *Beane v. Richardson*,[88] a Ninth Circuit case. While *Milton* provided at least its "mere sophistry" footnote in justifying the treatment of substantial evidence as a matter of law, *Beane* was even more cursory. The extent of *Beane*'s treatment of the issue is as follow:

> The judicial determination of this administrative finding [(the ALJ's findings of fact and whether they were supported by substantial evidence)] presents only an issue of law and not a question of fact. *Dredge Corporation v. Penny*, 338 F.2d 456, 462 (9th Cir. 1964). It is therefore a proper issue to raise by summary judgment.[89]

The search for a rigorous analysis of the issue turns therefore to *Dredge*. *Dredge* was a 1964 Ninth Circuit case involving judicial review of an administrative decision by the Bureau of Land Management pursuant to the APA.[90] The APA contains a substantial

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83 Milton v. Harris, 616 F.2d 968 (7th Cir. 1980).

84 *Id.* at 975.

85 *Id.* at 976 n.10.

86 *Id.* at 975, 976 n.10.

87 *Id.* at 975.

88 Beane v. Richardson, 457 F.2d 758.

89 *Id.* at 759.

90 Dredge v. Penny, 338 F.2d 456 (9th Cir. 1964).

evidence review provision very similar to the Social Security Act, and the plaintiffs in *Dredge* challenged the Bureau's decision on those grounds.[91] The court concluded that the presence of substantial evidence was a question of law, making summary judgment appropriate,[92] and cited *Marion County Co-op Ass'n v. Carnation Co.*[93]

Marion was an antitrust case that involved neither the substantial evidence standard nor judicial review of an administrative decision.[94] Rather, the relevant issues in *Marion* were the standards for summary judgment, and the court noted in its discussion that "the question of the sufficiency of the evidence raises an issue of law."[95] That phrase appears to be what *Dredge* relied upon for its conclusion that substantial evidence review is a question of law, and seems to be the genesis of the conclusion that substantial evidence review in social security cases is an issue of law that is reviewed de novo.

In addition to *Beane*, *Milton* cited Moore's Federal Practice as support for the conclusion that substantial evidence review is an issue of law.[96] The justification given in Moore's is as follows:

> In reviewing agency action [for substantial evidence] no *de novo* fact findings may be made by the district court. Thus, the court does not find facts, rather it examines the agency record to determine whether the state of facts meets the particular standard of review—a process that involves only a question of law, not fact.[97]

It seems, therefore, that only two explanations have been given as to why substantial evidence review is an issue of law, not fact: (1) the standard is analogous to determining the sufficiency of evidence as in a traditional motion for summary judgment, and (2) no de novo fact finding is performed by the trial court. As discussed below in Section III.C, those explanations are based on misunderstandings about the nature of substantial evidence review.

B. *Nickol* and the Short-Lived Tenth Circuit Deferential Review

At one point, it appeared that at least one circuit would treat substantial evidence review as an issue of fact. In 1974, the Tenth Circuit in *Nickol v. United States* addressed the propriety of summary judgment in an APA substantial evidence case arising from a

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91 *Id.*

92 *Id.* at 462.

93 Marion County Co-op Ass'n v. Carnation Co., 214 F.2d 557 (8th Cir. 1954).

94 *Id.* at 558.

95 *Id.* at 560.

96 Milton v. Harris, 616 F.2d 968 (7th Cir. 1980).

97 11 MOORE'S FEDERAL PRACTICE § 56App.200(6) n.25 (2005).

Department of the Interior, Board of Land Appeals decision.[98] The court noted the numerous cases interpreting the question as one of law, including *Beane* and *Dredge*, but reached the conclusion that the issue in the case was actually one of fact, precluding summary judgment:

> A judicial determination of whether 'substantial evidence' can be found in the record to support the administrative conclusion necessarily involves a fact finding which in turn determines whether the agency's action must be upheld. The issues in such a judicial review are, by definition and in substance, genuine issues as to material fact . . . .[99]

The court noted that the administrative record contained "detailed testimony as to a variety of particular facts, conditions, and events. . . . These are in great part divergent and conflicting."[100] This required the district court to

> examine [the] facts in the record, evaluate the conflicts, and to then make a determination therefrom whether the facts supported the several elements which made up the ultimate administrative decision . . . . For the district court to reach its conclusion requires [the] evaluation of testimony, resolution of conflicts, and a general examination of facts which would occur had the matter been 'tried' in that court. The statutory standards and presumptions are different in degree only because the case has already been 'tried' before someone else.[101]

Finally, the court turned to the review on appeal:

> For us to give it a meaningful review in accordance with the usual standards and practices applied by an appellate court, we must know how the trial court evaluated the conflicting facts and how it reached its determination as of the ultimate facts to which the law was applied. We again have to make a determination as to substantial evidence, but to do this and to give the proper consideration to the action of the district court, we must know how it reached its conclusions. We

98 Nickol v. United States, 501 F.2d 1389 (10th Cir. 1974).

99 *Id.* (emphasis in original).

100 *Id.*

101 *Id.* at 1391.

> could, of course, go through the record again and make a *de novo* determination. Thus the case would receive two separate and unrelated reviews. However, this is not in accord with proper appellate review. When the decision is based on conflicting facts, there need be some indication by the trial court as to how it arrived at its conclusions, and what in its opinion were the operative facts for which it found the substantial evidence.[102]

A year later, the Tenth Circuit applied the holding in *Nickol* to a Social Security case in *Mandrell v. Weinberger*.[103] The appellate court's review of the district court in *Mandrell* showed the sort of deference one would expect in reviewing findings of fact below. The appellate court's sole discussion of whether the ALJ's decision was supported by substantial evidence was this:

> Finally, it is alleged that the decision of the Secretary is not supported by substantial evidence in the administrative record. The district court carefully and thoroughly reviewed the disputed facts in the administrative record and found substantial evidence to support the Secretary's denial of benefits . . . . The operative facts which are supported in the administrative record by substantial evidence are summarized in the opinion of the district court, and this provides this court with a sufficient basis for review without a complete repetition of the trial court's action.[104]

The appellate court did not review the record evidence again de novo to determine whether substantial evidence existed.

Nonetheless, the Tenth Circuit eventually reverted to true de novo review of the substantial evidence issue. In 1992, Senior District Judge Kane, sitting by designation with the Tenth Circuit, noted the disintegration of *Nickol* in his concurring opinion in *Hamilton v. Secretary of Health & Human Services*.[105] Judge Kane's criticism was of the common practice among Tenth Circuit district courts to use summary judgment in social

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102 *Id.*

103 Mandrell v. Weinberger, 511 F.2d 1102 (10th Cir. 1975). Because the district court in *Mandrell* rendered its decision prior to *Nickol*, and because the district court's opinion made clear the facts relied upon by the district court in concluding that the ALJ's decision was supported by substantial evidence, the appellate court overlooked the use of summary judgment. *Id.* at 1103.

104 *Id.* at 1103.

105 Hamilton v. Sec'y of Health & Human Servs., 961 F.2d 1495 (10th Cir. 1992).

security review cases despite the guidance of *Nickol*.[106] Judge Kane's concern, however, related to the depth of treatment in the district court phase, and not the standard of review on appeal to the circuit courts.[107] Judge Kane preferred that the district courts use the *Federal Rules of Appellate Procedure*, and he signed on to a majority opinion that performed a clearly de novo review of the administrative record to re-decide the substantial evidence question.[108] Current practice in the Tenth Circuit is to review the district court's decision regarding substantial evidence de novo, ignoring the district court's decision altogether, and focusing solely on the administrative record.[109]

C. Refuting the Summary Judgment/Sufficiency of Evidence Comparison

The first argument for treating substantial evidence review as an issue of law is by analogy to whether there is sufficient evidence to deny summary judgment. However, this analogy overlooks a critical distinction. Federal Rule of Civil Procedure 56, the basis for summary judgment, states that summary judgment is required if the evidence shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[110] Thus, the plain text of Rule 56 dictates that whether there is sufficient evidence to withstand summary judgment is a question of law.

The same cannot be said of section 405(g), the statutory basis for substantial evidence review of social security decisions.[111] Section 405(g) is silent as to the standard of review of a district court's substantial evidence decision and does not discuss whether the issue is one of law or of fact, other than to say that the district court's judgment "shall be subject to review in the same manner as a judgment in other civil actions." Because of this important difference between the texts of Rule 56 and section 405(g), the analogy between them is inappropriate, and appellate court treatment of summary judgment should not dictate the standard of review in substantial evidence decisions.[112]

D. Refuting the "No De Novo Fact Finding" Argument

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106 *Id.* at 1500-04.

107 *Id.* at 1503-04.

108 *Id.* at 1497-1500, 1503-04.

109 *See, e.g.*, Martinez v. Barnhart, 444 F.3d 1201 (10th Cir. 2006); Madrid v. Barnhart, 447 F.3d 788 (10th Cir. 2006).

110 FED. R. CIV. P. 56(c).

111 42 U.S.C. § 405(g) (2000).

112 At first glance, it may appear analytically unsound to reject analogy to Rule 56 on the basis of its textual command that summary judgment be treated as an issue of law, yet accept analogy to Rule 52 despite its command that review be done for clear error, a command absent from section 405(g). The important difference, however, is that analogy to Rule 52 is grounded in the reasons *why* clear error applies. The courts relying on analogy to Rule 56 have not discussed the reasons why summary judgment is treated as an issue of law.

Appellate courts believe that district courts do not engage in de novo fact-finding when they review social security decisions. The origin of this belief is the passage in Moore's Federal Practice cited in *Milton*—an assertion made with no cites or critical analysis.[113] On a superficial level, this is an easy conclusion to reach, in that no new evidence is produced to the district court. Yet, as discussed above in Section II.B, substantial evidence review is a fact-finding process similar to a trial on the papers pursuant to Rule 52(a), and should be afforded the same deference on appellate review.[114]

IV. PRACTICAL REASONS FOR CLEARLY ERRONEOUS REVIEW

Substantial evidence review by district courts is a fact-finding process similar to a trial on the papers pursuant to Federal Rule of Civil Procedure 52(a), and should therefore be treated with the same deferential standard of review on appeal.[115] Further, the justifications given by the courts of appeals for treating substantial evidence review as an issue of law subject to de novo review rely on erroneous understandings about the work a trial court performs in undertaking substantial evidence review of the Commissioner's decisions. In addition, there are two important practical reasons for giving deference to the district court's determination: the proper roles of district and appellate courts, and judicial economy.

A. Trial Court vs. Appellate Court Roles

In counseling on the appropriate standard of review for appellate courts to apply to any given situation, the Supreme Court has offered guidance that should instruct the analysis of whether substantial evidence review is an issue of law or fact, and the appropriate standard of review of the district court's decision on appeal.[116] Consideration of these factors leads to the conclusion that district court substantial evidence decisions should be given greater deference.

The first factor is whether the relevant statute commands a particular standard of review.[117] There is no such command in the Social Security Act. The second factor is historical tradition.[118] There has been some disagreement among the circuits in the past as to whether substantial evidence review is a question of law or fact, but the circuits have for some time now universally treated the issue as one of law. As this article argues, however, to the extent courts have historically treated the question as one of law, that treatment has been erroneous.

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113 Milton v. Harris, 616 F.2d 968, 975 (7th Cir. 1980).

114 FED. R. CIV. P. 52(a).

115 *Id.*

116 Pierce v. Underwood, 487 U.S. 552 (1988).

117 *Id.* at 557-58.

118 *Id.* at 558.

Third, an appellate court should consider whether the decision is one that, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[119] De novo treatment of district court substantial evidence determinations fails to appreciate the proper roles of trial and appellate courts. As discussed above, the substantial evidence determination is one of fact, not law. Once that conclusion is reached, it should be self-evident that the district court, as a superior finder of fact, possesses greater institutional competence for making the substantial evidence determination, and its decision should be reviewed for clear error. Further, district courts have more experience reviewing social security decisions than the circuit courts.[120]

No one contends that the Supreme Court or circuit courts should not establish the broader legal principles governing the Social Security Act that affect all, or a majority of, the social security cases. What should be equally apparent, however, is that when it comes to the nitty-gritty dissection of any particular administrative record to determine whether substantial evidence supports a particular part of a particular ALJ's opinion, district courts simply have more experience, and this expertise should be respected by having appellate courts apply a deferential standard of review on appeal.

The final factor for deciding the appropriate standard of review is the practicability or impracticability of fashioning a rule of decision.[121] "Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist generalization . . . ."[122] In my experience, I have found that substantial evidence decisions resist generalization on the appellate level. The courts of appeals have developed some doctrines that are essential in reviewing social security denials for substantial evidence, such as the "treating physician rule," under which evidence from a treating physician is entitled to great weight.[123] But, in the vast majority of cases in which substantial evidence is an issue, a district court judge is faced with a unique combination of facts that can be resolved only through judicial experience and exercise of discretion. In these instances, there is little guidance that the courts of appeals can provide by way of a generalized rule.

Together, these factors suggest that substantial evidence determinations are more properly issues for the district courts to decide, with a deferential standard of review on appeal.

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[119] *Id.* at 559-60 (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)).

[120] A search of Westlaw in the all circuit courts of appeals database using the terms "social security" and "substantial evidence" in the year 2006 produces 411 results. The same search in the all district courts database yielded 853. *See also* Survey Results, *supra* note 14 at 9-10 (over 40% of respondents review greater than twenty Social Security decisions each per year, with many reviewing over fifty).

[121] *Pierce*, 487 U.S. at 561-62 (citing Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971)).

[122] *Id.* at 561-62 (quoting Rosenberg at 662).

[123] *See, e.g.*, Hofslien v. Barnhart, 439 F.3d 375, 376 (7th Cir. 2006). The treating physician rule has been codified into Social Security regulations. 20 C.F.R. § 404.1527(d)(2) (2007).

B. Judicial Efficiency

In 1990, the Federal Courts Study Committee, commissioned by the Chief Justice of the Supreme Court at the direction of Congress, completed a fifteen-month study on efficiency in the federal courts.[124] The report was prompted by "mounting public and professional concern with the federal courts' congestion, delay, expense, and expansion," and offered recommendations on a wide variety of issues.[125]

The report specifically addressed efficiency issues created by the two-tier system of review applied to social security disability claims.[126] It described the (still) current two-tiered review process as "cumbersome and duplicative," noting that the courts of appeals re-perform the same function performed by the district courts.[127]

The report called for creation of an Article I Court of Disability Claims to hear first-tier review of disability decisions, with subsequent review in the circuit courts "limited to pure issues of law."[128] The Committee recommended this change because it believed that the "principal issues in most Social Security disability cases are factual and technical," and that a new Article I court could "provide a more thorough and expert examination of the facts than federal district courts can provide."[129] The report also recommended that appeals to the circuit courts be limited to "constitutional claims and questions of law," which would not include "[d]ecisions about the sufficiency of evidence."[130]

The report recognized that the current system is grossly inefficient,[131] and acknowledged that factual issues predominate social security cases. The report may be correct that an "expert" Article I court might be superior to the district courts in evaluating administrative decisions for substantial evidence, but that should also mean that district courts, by virtue of their greater experience with fact issues, are superior to appellate courts in making these evaluations. Even in the absence of creation of a specialized court–a change that would require congressional action–efficiency gains could be had if appellate courts simply recognized that substantial evidence review is a

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[124] Report of the Federal Courts Study Committee, Part II (1990) [hereinafter Federal Courts Study].

[125] *Id.*

[126] Federal Courts Study, *supra* note 124, at 55-59. More detailed discussion is also found in Part III of the Report at 285-352.

[127] *Id.* at 55-56.

[128] *Id.*

[129] *Id.* at 56.

[130] *Id.*

[131] *See also* Groves v. Apfel, 148 F.3d 809, 811 (7th Cir. 1998) ("But the district judge's error is irrelevant because our review of his decision is de novo, which means that we review the decision by the administrative law judge without giving any deference to the district judge's review of that decision. This raises the question why there should be two tiers of review of identical scope of the administrative decision, but that is a question properly addressed to Congress rather than to the courts.") (internal citations omitted).

factual inquiry subject to a clearly erroneous standard of review. The more deferential standard would reduce the amount of appellate resources exhausted in substantial evidence review, and would likely discourage some appeals because the likelihood of success would be much lower.[132]

Several members of the Committee dissented from the social security recommendation. The dissent favored retention of district court review but would limit circuit court review to questions of law only, which would not include substantial evidence review.[133] In my opinion, the dissenting view is correct, but I believe reform would be unnecessary if courts of appeals simply reconsider whether substantial evidence review is really an issue of law. Given the potential efficiencies at stake, courts of appeals or the Supreme Court should have a compelling reason to give the issue further thought.

V. FINAL THOUGHTS ON PROCEDURES

A. The Report and Recommendation Process is Inefficient and Should be Avoided

Over 50% of the magistrate judges participating in the survey related to this article decide 75% or more of their social security cases on a report and recommendation basis, with nearly 40% of judges deciding over 90% of their cases in that way. This is not an efficient use of judicial resources because the work of the first judge in reviewing the administrative record for substantial evidence will be duplicated at least once, and twice if the district court's opinion is appealed to the circuit court.

Magistrate judges have played an important part in processing the enormous volume of social security cases brought to federal court. There is a more efficient way to contribute, however. If the parties agree to consent to the jurisdiction of a United States Magistrate Judge, the entire case is heard before the magistrate judge, whose orders are appealed directly to the circuit court.[134]

To the extent district judges wish to utilize the magistrate judges in their district for social security cases, they should more actively encourage claimants and the government to consent to the magistrate judge's jurisdiction or else keep the case for decision if the parties do not consent. Social Security litigants should seriously consider

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[132] In many districts, social security decisions are made by magistrate judges on a "Report and Recommendation" basis, which means that a federal magistrate judge writes an opinion that is reviewed by the district court judge, who either adopts the opinion or not. *See* Survey Results, *supra* note 15; 28 U.S.C. § 636(b)(1)(B) (2000); Montalvo v. Barnhart, 457 F. Supp. 2d 150 (W.D.N.Y. 2006) (adopting magistrate judge's report); Reece v. Barnhart, 414 F. Supp. 2d 555 (D.S.C. 2006) (rejecting magistrate judge's recommendation after conducting *de novo* review of the record). In these circumstances, judicial inefficiency is even greater, as an additional layer of judicial review is imposed.

[133] Federal Courts Study, *supra* note 124 at 58.

[134] *See* 28 U.S.C. § 636(c).

the two major benefits associated with consenting to magistrate judge jurisdiction.[135] First, the case will be decided more quickly because an additional layer of review will be eliminated. Second, in many districts, magistrate judges handle a great number of social security cases, with some individual magistrate judges handling fifty cases or more per year,[136] which allows for a greater degree of expertise.

B. Proper District Court Procedures

As discussed above in Section I, the following procedural devices are used to decide social security cases in federal court: (1) motions for summary judgment; (2) motions for judgment on the pleadings; (3) motions to affirm, reverse, or remand the Commissioner; and (4) briefs on each side with no motions. This article has also raised the possibility of a Rule 52(a) trial on the papers. While the actual review process does not seem to vary depending on the procedures used,[137] some procedures are a poor fit for the review process and contribute to needless confusion.

Summary judgment simply makes no sense in deciding social security cases. The usual summary judgment standards of absence of issues of material fact and entitlement to judgment as a matter of law do not apply because almost all social security disability decisions involve questions of fact before the administrative law judge. Further, Rule 56 permits the introduction of affidavits and other supplemental materials that are not permitted in social security cases. Summary judgment also permits a nondecision where a question of fact is found, whereas social security review requires a decision to either affirm, reverse, or remand. For these reasons and others, summary judgment has been widely criticized as a vehicle for deciding social security cases.[138]

Motions for judgment on the pleadings under Rule 12(c) are also improper. Rule 12(c) states that "if . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment."[139] Because the administrative record serves as the basis for deciding a social security case, matters outside the pleadings are considered and the court is simply left with summary judgment.

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[135] I was surprised to see many survey respondents' comments indicating that either the government or plaintiff's bar in their jurisdiction have a regular practice of not consenting. Survey Results, *supra* note 15.

[136] *See* Survey Results, *supra* note 14. Forty percent of magistrate judges who responded handled more than twenty Social Security cases per year. *Id.*

[137] *See* Section I. C.

[138] *See, e.g.*, Hamilton v. Sec'y of Health & Human Servs., 961 F.2d 1495, 1500-04 (10th Cir. 1992) (Kane, J., dissenting), and cases cited therein.

[139] FED. R. CIV. P. 12(c).

Motions to affirm, reverse, or remand appear appropriate because they capture the options contained in 42 U.S.C. section 405(g). Because these motions accurately describe the relief sought they do not generate any procedural confusion.

The practice of simply filing briefs in support of each side's position is the simplest. This practice is analogous to the process used by circuit courts under Federal Rule of Appellate Procedure 15 for review of agency decisions directly to the courts of appeals.[140]

Finally, a trial on the papers under Federal Rule of Civil Procedure 52(a) offers an interesting option. It has the advantage of recognizing the factual nature of the substantial evidence inquiry by permitting the trial court judge to make findings of fact based on the paper record. Because this procedure is not widely used, however, it might create confusion as administrative review has traditionally not required Rule 52(a) findings of fact and conclusions of law.

CONCLUSION

It has been taken for granted, with little critical analysis, that district court review of social security decisions is a legal issue subject to de novo review on appeal. This treatment comes at a great cost to the judicial system and is analytically wrong. The time has come to take a closer look at the issue and conclude that substantial evidence review in social security cases is a question of fact subject to clearly erroneous review by the courts of appeals. In addition, district courts should consider encouraging parties to consent to magistrate judges' jurisdiction rather than referring cases for reports and recommendations, and should adopt a simple and uniform local rule to bring about the efficient disposition of these important cases.

Appendix A - Results of Social Security Survey

1. In reviewing the record in a social security case to determine whether substantial evidence supports the decision of the ALJ, do you believe you are deciding a question of fact? (I am interested in how you would characterize what you are doing based on your experience in reviewing the administrative record, not necessarily the way your court of appeals characterizes the issue.)

Total Respondents	222
Yes, I am deciding a question of fact.	30.2% (67 responses)
No, I am deciding a question of law.	69.8% (155 responses)

[140] FED. R. APP. P. 15. *See, e.g.*, Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Comp. Programs, Dep't of Labor, 519 U.S. 248 (1997).

2. What procedural mechanism or mechanisms do the attorneys in your court use in presenting the Social Security Administration's decision to you for review? Please check all that apply.

Total Respondents 224	
Motions for summary judgment	42.9% (96 responses)
Motions for judgment on the pleadings	12.1% (27 responses)
Motions to affirm, reverse, or remand the decision of the Commissioner	35.7% (80 responses)
Other (please specify)	35.3% (79 responses)
*Briefs only/no motions	29.5% (66 responses)
*Joint stipulations	4% (9 responses)
*Misc.	2% (4 responses)

3. Approximately how many social security cases do you decide either on consent or by means of report and recommendation in a typical year?

Total Respondents 230	
Zero	3.9% (9 responses)
1-10	23.5% (54 responses)
11-20	31.7% (73 responses)
Over 20	40.8% (94 responses)

4. Approximately what percent of the social security cases you decide are on consent, and what percent are on report and recommendation?

Total Respondents 223	
90% or more consent	34.1% (76 responses)
75% consent/25% R&R	6.3% (14 responses)
50% each	8.1% (18 responses)
25% consent/75% R&R	12.6% (28 responses)
90% or more R&R	39% (87 responses)

5. Any comments are appreciated but not necessary. Please provide any comments below.

Total Respondents 74
Sample answers:

1. Although I answered #1 that whether there is substantial evidence is a question of law, it is resolved by an intensive review of the facts. In all civil litigation, I believe that a careful review of the facts can often eliminate difficult legal issues. In social security cases, the question is whether there are a cluster of fact-findings by the ALJ that find support in the record and which, following the regulations and statute, lead to the conclusion that the claimant is not disabled.

2. The [district name omitted] has had an explosion in the number of social security cases in the last few years, contributing to a large backlog of cases. The social security cases are being filed approximately one each business day, and the five Magistrate Judges in this district are getting approximately one new case per week. The court is attempting to address this backlog in various ways, including assigning extra law clerks to work on pending cases. Recently, the Clerk has sent consent forms in all pending social security cases. Thus, there may soon be a larger percentage of consent cases than we currently have. With respect to your question regarding whether the court is deciding questions of law or fact, we look at whether correct legal principles are applied then determine whether substantial evidence supports the Commissioner's conclusion. Although we are looking at questions of law, we are also looking at whether the facts support the conclusion and whether the facts are properly stated. We do not re-weigh the evidence, however.

3. This kind of case does not fit comfortably into the framework provided by the FRCP. Perhaps some amendments to FRCP would be useful.

4. No cases are decided by me through the consent process. No consents have been received in over 5 years. Plaintiff's want a chance at two bites out of the apple.

5. The Report &Recommendation process seems to encourage too much litigation and excessive appeals.

6. Social security cases take up much more time than the run-of-the-mill civil case for me. As a former colleague told me, "you need to remember that you are probably the last person who is REALLY going to look closely at the claim." With that advice in mind, I'm probably more attentive to them than I would be otherwise.

7. Since 2004, social security cases were placed "on the wheel" along with all other civil cases. The magistrate judges are randomly assigned social security cases and only retain them if both parties consent. If not, they are randomly reassigned to a district judge. The result is that 100% of our social security cases are on consent. Prior to 2004, we handled social security cases on both a report and recommendation or consent basis.

8. I think that I am deciding a mixed question of law and fact in Question number 1, i.e. applying the facts as decided by the ALJ to the law. I would be happy to see the creation of a specialized court for social security appeals, such as the Court of Appeals for Veteran's Claims, to get the social security appeals before a court devoted solely to these claims.

9. In answer to Question 1, my answer is that I am deciding a legal issue which has a factual basis. Similar to, if not like, a sufficiency of the evidence question.

10. As to question #1, of course we deal in factual questions, although not de novo. These cases are extremely fact-intensive, and I would call it more a mixed question of law and fact. While deference is given to an ALJ's factual determinations (e.g., credibility), and while the "substantial evidence" standard is purportedly not a high standard, "deferential review" is not the same as "no review."

11. With respect to the first question, in order to answer the legal question of whether there is substantial evidence, you have to find the facts in the record to support the ALJ's decision, therefore, it is fundamentally a factual rather than a legal question.

12. Summary judgment as a mechanism makes no sense. There are always triable issues of fact; we're not asked to decide whether a factual issue remains, but whether the ALJ got it right. It's really an appellate review.

13. Question No. 1 is a bit unfair -- you should also have "mixed question" as an option. In my view, determining what evidence is in the record is a factual question and determining whether the evidence in the record constitutes "substantial evidence" to support the ALJ's conclusions is a mixed question of law and fact (i.e. applying the legal standard to the evidence in the record).

14. I typically send out consent forms when a case is referred for Report & Recommendation. The government always consents. There are a few lawyers who represent claimants who never consent. Most others consent the outset of the case.

Appendix B - Suggested Standing Order in Social Security Cases

A. Motion and Briefing Guidelines.

(1) A Social Security appeal shall commence with the Complaint, filed by the Plaintiff. The Government shall respond with an Answer as in any other civil case. In addition to the Complaint and Answer, the following shall be filed: (i) Plaintiff's brief in support of reversing or remanding the decision of the Commissioner; (ii) Government's response brief in support of affirming the decision of the Commissioner; and (iii) Plaintiff's reply brief. No motions (e.g. motions for summary judgment; motions for judgment on the pleadings; or motions to affirm, reverse, or remand) shall be filed.

(2) In preparing a social security brief, the Plaintiff should do the following:

(i) Identify the specific grounds for reversal or remand early in the brief (e.g. the ALJ erred by failing to discuss the treating physician's recommendation that the Plaintiff is disabled, or the ALJ erred by failing to include the limitations with Plaintiff's right hand in the hypothetical to the vocational expert). Be as specific as possible.

(ii) State clearly the relief requested.

(iii) Include only those facts that relate to the issues presented. It is not necessary to include Plaintiff's entire medical history if it is not relevant to the issues raised.

(iv) It is not necessary to spend 3-4 pages repeating the well recognized standards for the five-part test. Cite a case that you believe accurately states the legal principles you wish the Court to apply. Make the Court aware of relevant contrary authority.

(v) Attach the ALJ's decision to the brief.

(3) In responding to Plaintiff's brief, the Commissioner should do the following:

(i) Consider whether a voluntary remand is appropriate.

(ii) Supplement the Plaintiff's facts where needed for the issues presented. Do not feel compelled to repeat the facts.

(iii) Cite to those portions of the record that constitute substantial evidence in support of the ALJ's decision.

[If this order is made part of a local rule, the following language promoting consents should be added:]

B. Encouraging consent to a Magistrate Judge's jurisdiction.

(1) The District Court Clerk shall distribute consent forms to the Plaintiff and the Government after the Answer has been filed.

(2) District Court Judges shall discuss consent with the parties during the initial appearance before the Court.

(3) If the parties do not consent, the District Court Judge should decide the case without referring the case to a Magistrate Judge for report and recommendation.