AMERICAN UNIVERSITY | WASHINGTON COLLEGE OF LAW

# HEALTH LAW & POLICY BRIEF

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**ARTICLE**

*Acknowledgements:*
We would like to thank our advisor, Lewis Grossman, for his support. We are also grateful to the American University Washington College of Law for providing a legal education that empowers us to champion what matters.

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## ARTICLE

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# LETTER FROM THE EDITORS

Dear Reader:

On behalf of the Editorial Board and Staff, we proudly present Volume 20, Issue 1 of the *Health Law & Policy Brief*. Since its formation in 2007, the *Brief* has published articles on an array of topics in health law, food and drug law, and emerging health technologies. Consistent with this mission, Volume 20.1 engages with persistent and evolving challenges at the intersection of healthcare access, administrative law, and patient advocacy. In this issue, our author discusses facets of disability adjudication and administrative decision-making in the United States. Volume 20.1 features an article written by American University Washington College of Law student Nicholas Menacho-Foronda.

Mr. Menacho-Foronda's article, *Navigating the Labyrinth of the Social Security Administration: Legal and Procedural Barriers for Fibromyalgia Disability Claims*, examines the unique difficulties faced by claimants seeking disability benefits for conditions that lack objective diagnostic markers and argues that existing legal and procedural frameworks insufficiently account for the realities of chronic pain disorders such as fibromyalgia. Through doctrinal analysis and policy critique, the article highlights gaps in adjudicatory standards and offers insight into potential reforms.

We would like to thank Mr. Menacho-Foronda for his insight, creativity, and cooperation in producing this piece. We would also like to thank the *Health Law & Policy Brief*'s article editors and staff members who worked so diligently on this issue.

To all our readers, we hope that you enjoy this issue, that the never-ending complexities of this area of law inspire your own scholarship, and that you continue to anticipate and scrutinize the challenges that our healthcare system continues to withstand.

Sincerely,

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|---|---|
| Tyanna Robinson | Elizabeth McHugh |
| *Editor-in-Chief* | *Executive Editor* |

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HEALTH LAW & POLICY BRIEF
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# NAVIGATING THE LABYRINTH OF THE SOCIAL SECURITY ADMINISTRATION: LEGAL AND PROCEDURAL BARRIERS FOR FIBROMYALGIA DISABILITY CLAIMS

*Nicholas Menacho-Foronda**

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* *Nicholas Menacho-Foronda is a third-year J.D. candidate at American University Washington College of Law, expected to graduate in May 2026. He would like to thank the staff of the Health Law & Policy Brief for their time, dedication, and support in editing and publishing this Article.*

## INTRODUCTION

"Fibromyalgia is a chronic (long-lasting) disorder that causes pain and tenderness throughout the body, as well as fatigue and trouble sleeping."[1] This disorder has prompted a classification war within the medical community due to its unclear origin and lack of objective criteria for its diagnosis.[2] Medical opinion remains split, with one group of physicians conceptualizing fibromyalgia as a neurophysiological disease and another viewing it as a primarily psychological

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[1] *Fibromyalgia*, NAT'L INST. OF ARTHRITIS AND MUSCULOSKELETAL AND SKIN DISEASES, https://www.niams.nih.gov/health-topics/fibromyalgia (last visited June 3, 2025); *see also Gebauer v. Saul*, 801 Fed. Appx. 404, 405 (7th Cir. 2020) (noting the severity of fibromyalgia symptoms forced a 42-year-old former dispatcher and retail manager to stop working due to pain, fatigue, and muscle cramps).

[2] *See* Winfried Häuser & Mary-Ann Fitzcharles, *Facts and Myths Pertaining to Fibromyalgia*, 20 DIALOGUES IN CLINICAL NEUROSCIENCE 53, 54-55 (2018), https://pmc.ncbi.nlm.nih.gov/articles/PMC6016048/pdf/DialoguesClinNeurosci-20-53.pdf. (characterizing fibromyalgia as a "bitterly controversial condition.").

illness.[3] A third faction of physicians, however, contends that the disorder does not exist, as fibromyalgia cannot be confirmed through objective medical evidence (OME) such as radiographic imaging or laboratory testing.[4] The unresolved medical debate over fibromyalgia has seeped into the legal landscape, influencing how disability claims are evaluated.

In response to the growing acceptance of fibromyalgia as a legitimate disorder, the Social Security Administration (SSA) brought a "sea-change" in 2012, by issuing a rule recognizing fibromyalgia as a "basis for a finding of

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[3] *See* Samuel D. Hodge, Jr. & Jack E. Hubbard, *Fibromyalgia due to Physical Trauma: Fact or Fiction*, 13 J. HEALTH & BIOMED. L. 185, 187 (2018) ("[T]hought to be a psychological condition without any medical or organic basis."); *see also* Joel Everest, *Fibromyalgia and Workers' Compensation: Controversy, Problems, and Injustice,* 60 ALA. L. REV., 1031, 1033 (explaining that fibromyalgia patients experienced gray matter loss in their brains at an accelerated rate).

[4] *See* Joseph Bernstein, *Not the Last Word: Fibromyalgia is Real*, 474 CLINICAL ORTHOPAEDICS AND RELATED RSCH. 304 (2016), https://pmc.ncbi.nlm.nih.gov/articles/PMC4709307/pdf/11999_2015_Article_4670.pdf.

disability."[5] While fibromyalgia is not included in the SSA's official listings of disabilities, claimants may instead argue that their symptoms prevent them from engaging in substantial gainful activity, entitling them to disability benefits.[6] When fibromyalgia claimants file for benefits without the support of an official listing, they face a significant evidentiary burden: proving their symptoms with OME, even though they typically must rely on and only have access to subjective complaints of pain.[7] Consequently, a fibromyalgia claimant must then rely on

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[5] *Revels v. Berryhill*, 874 F.3d 648, 656 (9th Cir. 2017); *see also* SSR 12-2p, 77 Fed. Reg. 43640, 43640 (July 25, 2012) ("This . . . SSR provides guidance on how [the SSA] develop[s] evidence to establish that a person has a medically determinable impairment of fibromyalgia . . . and how we evaluate [fibromyalgia] in disability claims . . .").

[6] *See generally Listing of Impairments – Adult Listings (Part A)*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm (last visited June 3, 2025); s*ee also* SSR 16-3p, 82 Fed. Reg. 49462, 49467 (Oct. 25, 2017) ("If the individual is performing substantial gainful activity, we find him or her not disabled.").

[7] *See generally* Debra Fulghum Bruce, *Fibromyalgia: Work and Disability*, WEBMD, https://www.webmd.com/fibromyalgia/fibromyalgia-work-and-

subjective complaints of pain with little or no OME, only for an SSA Administrative Law Judge (ALJ) to deny the claim based on the perceived lack of evidence.[8] The resulting conflict emerges on appeal, when a federal district court overturns the ALJs decision after finding that the ALJ misunderstood the nature of fibromyalgia, an error the court is better positioned to recognize and correct.[9] Federal courts have frequently recognized that requiring OME to prove the severity of fibromyalgia symptoms is too demanding because fibromyalgia

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disability (July 25, 2025) (explaining that a claimant cannot rely solely on descriptions of pain but must also present specific signs and physical findings demonstrating how the pain limits their ability to work).

[8] *See, e.g., Smith v. Saul*, 820 F. App'x. 582, 584 (9th Cir. 2020) (demonstrating an ALJ improperly discrediting a fibromyalgia claimant's symptom testimony due to a fundamental misunderstanding of the disease, such as relying on normal findings of "full range of motion" and "muscle tone.").

[9] *See Revels*, 874 F.3d at 662 (explaining that a recurring problem ALJs face is failing to analyze a claimant's fibromyalgia-related symptoms pursuant to SSR 12-2p).

symptoms can elude those same objective reporting metrics.[10] This evidentiary hurdle is just one of many obstacles confronting fibromyalgia claimants during the application process. One other concern claimants face, regardless of disability, is that the average initial determination process time is approximately seven months.[11] The SSA is unable to expedite the processing of disability benefits due to widespread understaffing at both the state and federal levels, compounded by a backlog of over one million applicants awaiting initial determinations.[12] Another concern is that when claimants are denied benefits at

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[10] *See Arakas v. Comm'r, Soc. Sec. Admin.,* 983 F.3d 83, 97 (4th Cir. 2020) ("A growing number of circuits have recognized fibromyalgia's unique nature and have accordingly held that ALJs may not discredit a claimant's subjective complaints regarding fibromyalgia symptoms based on a lack of objective evidence substantiating them.").

[11] *See Disability Determination Processing Time*, SOC. SEC. ADMIN., https://www.ssa.gov/securitystat/disability-processing-time (last visited June 4, 2025).

[12] *See* Mark Miller, *When You Call Social Security, Expect to Wait Even Longer*, N.Y. TIMES (Dec. 2, 2023), https://www.nytimes.com/2023/12/02/business/social-security-phone-line-budget-cuts.html; *see also* Lorie Konish, *Democratic*

the initial determination stage, they are forced to navigate the SSA's rigorous and multi-stage appeals process.[13] The appeals process may take several months, or even years, which is time that many claimants simply do not have.[14] In fact, an estimated "10,000 people die each year" while waiting for approval for disability benefits.[15] Finally, in 2017, the SSA eliminated the treating source rule, a regulation that had given controlling weight to a primary physician's opinion

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*Senators Press Social Security Administration on Reports of Dangerous Employee Cuts*, NBC SAN DIEGO (Apr. 14, 2025, at 11:43 ET), https://www.nbcsandiego.com/news/business/money-report/democratic-senators-press-social-security-administration-on-reports-of-dangerous-employee-cuts/ ( "the agency has announced plans to cut its force by more than 12%.").

[13] *See generally Understanding Supplemental Security Income Appeals Process*, SOC. SEC. ADMIN., https://www.ssa.gov/ssi/text-appeals-ussi.htm (last visited June 4, 2025).

[14] *See, e.g., Lauren S. v. O'Malley*, No. 2:23cv60, 2024 U.S. Dist. LEXIS 139520, at *1-2 (E.D. Va. Mar. 29, 2024) (noting that the claimant filed for benefits on October 5, 2017 and appealed for judicial review on February 20, 2023).

[15] Joseph Shapiro, *These Disabled People Tried to Play by the Rules. It Cost Them Their Federal Benefits*, NPR (Jun. 8, 2024, at 05:01 ET), https://www.npr.org/2024/06/08/g-s1-3475/social-security-ssi-asset-limits.

based on the sustained treatment relationship between physician and patient.[16] The SSA justified the rule's removal by noting that patients no longer consistently see a single primary care physician but instead receive treatment across a fragmented and increasingly decentralized healthcare system.[17] The opinions of primary care physicians are especially critical in fibromyalgia claims, as these physicians are often best positioned to document and observe the claimant's longitudinal history of chronic pain and fatigue.[18] With the removal of the treating source rule, an ALJ now evaluates a primary physician's opinion as just one factor among many, weighed alongside other supporting or conflicting

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[16] *See generally* 20 C.F.R. §§ 404.1527, 416.927 (2017).

[17] *See* Revisions to Rules Regarding the Evaluation of Medical Evidence, 81 Fed. Reg. 62560, 62573 (Sep. 9, 2016) (to be codified at 20 C.F.R. pts. 404, 416) ("Claimants typically visit multiple medical professionals . . . in a variety of medical settings . . . for their healthcare needs, and less frequently develop a sustained relationship with one treating physician.").

[18] *See generally* SSR 12-2p, *supra* note 5 at 43642 ("When a person alleges [fibromyalgia], longitudinal records reflecting ongoing medical evaluation and treatment from acceptable medical sources are especially helpful in establishing both the existence and severity of the impairment.").

medical opinions.[19] Together, these procedural, evidentiary, and structural barriers converge to create a system in which fibromyalgia claimants are uniquely disadvantaged: by facing delays, heightened proof burdens, and diminished deference to the medical professionals most familiar with their condition.

This Article examines how the SSA evaluates fibromyalgia claims and how its administrative regulations—particularly the removal of the treating source rule—create substantial barriers for claimants. By tracing the SSA's evolving approach to fibromyalgia, including its regulatory history and shifting evidentiary standards, this analysis sheds light on the structural obstacles embedded in the disability adjudication process. Part I provides background on the SSA's administrative framework, including the appeals process and the inherent difficulties of assessing fibromyalgia. Part II explores the evolving legal landscape by analyzing the tension between SSA ALJs and federal courts in three phases: before fibromyalgia was recognized as a medically determinable impairment (MDI), during the creation of SSR 12-2p and the treating source rule, and after the rule's elimination. Part III offers two policy recommendations aimed at reducing the systematic disadvantages fibromyalgia claimants face: (1) adding fibromyalgia to the SSA's Listings to allow for independent claims, and

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[19] *See* 20 C.F.R. §§ 404.1520c(a), 416.920c(a) (2024).

(2) revising the HALLEX manual to limit the extent to which ALJs may discredit subjective symptom testimony in the absence of OME.

## I. BACKGROUND

### *A. The Social Security Administration*

The SSA's mission is to "ensure equity and accessibility in delivering Social Security services by improving the customer experience and addressing systemic barriers to participation in [its] programs."[20] To understand how this mission developed, it is important to examine the SSA's origins. The effects of the Great Depression revealed that certain groups of Americans were particularly vulnerable to economic insecurity.[21] This widespread instability prompted a fundamental shift in how the federal government approached economic welfare and social protection. In response, President Franklin D. Roosevelt signed the

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[20] SOC. SEC. ADMIN., AGENCY STRATEGIC PLAN FISCAL YEARS 2022–2026 5 (2022).

[21] *See Social Security Fundamentals: A Fact-Based Foundation: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means, 118 Cong. 130.* (2023) (statement of Barry F. Huston, Analyst in Soc. Pol'y) (stating that the act aimed to provide economic stability to older adults, unemployed workers, and dependent children).

Social Security Act of 1935, establishing the SSA as a cornerstone of the federal welfare system.[22] President Roosevelt understood that implementing a benefits system would safeguard Americans from economic insecurity in a rapidly industrializing nation.[23] Today, the SSA continues to play a vital role in supporting vulnerable Americans, including older adults, individuals with debilitating disabilities, and those who have lost a spouse or parent.[24] In August 2025, approximately one million disabled individuals under age 65 received both Social Security Disability Insurance (SSDI) under Title II of the Act and Supplemental Security Income (SSI) under Title XVI of the Act.[25] SSDI

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[22] *See* Pub. L. No. 74-271, 49 Stat. 620, 620 (1935).

[23] *See Presidential Statement Signing the Social Security Act*, SOC. SEC. ADMIN.: SOC. SEC. HIST. (Aug. 14, 1935), https://www.ssa.gov/history/fdrstmts.html#signing ("[W]e have tried to frame a law which will give some measure of protection to the average citizen and to his family against the loss of a job and against poverty-ridden old age.").

[24] *See Understanding the Benefits*, SOC. SEC. ADMIN., https://www.ssa.gov/pubs/EN-05-10024.pdf. (last visited June 8, 2025).

[25] *See Monthly Statistical Snapshot*, SOC. SEC. ADMIN., https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/ (last visited June 4,

"provides benefits for workers who become disabled and for their families," while SSI "provides financial support to aged, blind, and disabled adults and children who have limited income and resources."[26] Between April 2023 and March 2024, more than 14,000 Americans whose applications for benefits were denied by the SSA have appealed to a United States Federal District Court.[27] The volume of appeals reflects the broader strain on the SSA, which must keep pace with a growing applicant pool and a widening gap between staffing levels and service

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2025); *see also Disability Evaluation Under Social Security*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/professionals/bluebook/general-info.htm (last visited June 8, 2025).

[26] SOC. SEC. ADMIN., AGENCY STRATEGIC PLAN FISCAL YEARS 2022-2026 7 (2022), https://www.ssa.gov/agency/asp/materials/pdfs/SSA_Agency_Strategic_Plan_Fiscal_Years_2022-2026.pdf.

[27] Table C-2. U.S. District Courts Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2023 and 2024, https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2024/03/31 (last visited June 4, 2025).

demand.[28] Given this pressure, it is unsurprising that SSA employees spend less time on individual cases and often expedite the process by using denials, practices that have led the agency to be characterized as operating within a culture of mistrust.[29] For example, ALJs frequently rely on "boilerplate phrases" in their decisions to summarily reject claimants' appeals, reflecting a preference for

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[28] *See Disability Determination Processing Time*, *supra* note 11; *see also* Ashley Lopez & Jenna McLaughlin, *The Social Security Administration Says its Plans to Cut Some 7,000 Jobs*, NPR (Feb. 28, 2025), https://www.npr.org/2025/02/28/nx-s1-5296986/ ("current staffing is already at about a 50-year low.").

[29] *See* Jack Smalligan, *The SSA Says It's Reduced the Disability Claims Backlog*, URBAN INSTITUE: URBAN WIRE (Sep. 25, 2025), https://www.urban.org/urban-wire/ssa-says-its-reduced-disability-claims-backlog-fewer-new-claims-and-higher-denial-rate; Jonah Gelbach & David Marcus, *A Study of Social Security Litigation in the Federal Courts*, ADMIN. CONF. OF THE U.S. 4, 123 (July 28, 2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2669&context=faculty_scholarship.

administrative efficiency over individualized assessment.[30] This culture of mistrust is perhaps best illustrated by comparative remand rates: while the SSA Appeals Council remands only 13% of cases, federal courts remand 61% —a striking disparity that suggests the judiciary is far more likely to find in favor of claimants.[31] The SSA finds itself in a difficult position: it defends its practices as necessary to expedite claims and ensure national uniformity.[32] Yet these objectives are undermined when federal courts overturn its decisions. From the SSA's perspective, such reversals occur because courts "interpret[] the statute to

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[30] *See, e.g.*, *Langley v. Barnhart*, 373 F.3d 1116, 1122 (10th Cir. 2004) ("Repeating the same boilerplate phrase he used to reject [the claimant's physician's] opinion, the ALJ stated, 'all in all, I find [Dr. Williams'] account of the claimant's limitations to be more an act of courtesy to a patient, rather than a genuine medical assessment of discrete functional limitations based upon clinically established pathologies.'").

[31] *See* SOC. SEC. ADMIN., FISCAL YEAR 2023 WORKLOAD DATA: DISABILITY DECISIONS (Jan. 29, 2024), https://www.ssa.gov/foia/resources/proactivedisclosure/2024/FY23%20Workload%20Data-Total.pdf.

[32] *See* Robert G. Dixon, Jr., *The Welfare State and Mass Justice: A Warning from The Social Security Program*, 1972 DUKE L. J. 681, 702 (1972).

convert the program into a humanitarian unemployment program for any worker whose unemployment had some demonstrable basis in physical or mental trauma."[33] Understanding the SSA's institutional pressures and procedural priorities sets the stage for examining how its disability framework struggles to accommodate conditions like fibromyalgia, which challenge conventional evidentiary standards.

### *B. What is Fibromyalgia?*

Fibromyalgia is a complex and chronic disorder characterized by widespread musculoskeletal pain, often accompanied by fatigue, cognitive disturbances, psychiatric symptoms, and other somatic complaints.[34] While the disorder is not life-threatening, its symptoms are persistent and debilitating, significantly impairing a patient's ability to carry out daily activities.[35] Management typically involves a combination of pharmacological treatment and

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[33] *See id.*

[34] *See* Juhi Bhargava & Jennifer Goldin, *Fibromyalgia*, NAT'L LIBR. OF MED. (Jan. 31, 2025), https://www.ncbi.nlm.nih.gov/books/NBK540974/.

[35] *See Swiecichowski v. Dudek*, 133 F.4th 751, 754 (7th Cir. 2025) (noting that the claimant left her job due to debilitating pain and did not try to find new employment "because she could not sit or stand for long periods of time.").

exercise-based therapy, but there is no known cure.[36] A central challenge in evaluating fibromyalgia lies in its diagnostic framework. A symptom is defined by the SSA as an "individual's own description or statement of [their] physical or mental impairment(s)."[37] In contrast, OME, like laboratory tests, imaging, or physical examinations, is generally used by physicians to confirm and quantify impairments.[38] However, fibromyalgia's hallmark symptoms, including pain, fatigue, and cognitive dysfunction, are inherently subjective and typically do not manifest in measurable objective indicators.[39] As a result, claimants rely heavily on their own testimony, as well as corroborating accounts from medical professionals, family members, and others familiar with their functional limitations.[40] The medical community's approach to diagnosing fibromyalgia has

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[36] *See* Bhargava & Goldin, *supra* note 34; *see, e.g.*, *Denton v. Astrue*, 596 F.3d 419, 421 (7th Cir. 2010).

[37] SSR 16-3p, 81 Fed. Reg. 14166, 14167 (Mar. 16, 2016)

[38] *See* Hodge & Hubbard, *supra* note 3, at 187.

[39] *See id.*

[40] *See id.*; *see*, *e.g.*, Dutkewych v. Std. Ins. Co., 781 F.3d 623, 630 (1st Cir. 2015) ("attach[ing] letters from his wife, his in-laws, two of his brothers, and two of his treating physicians.").

evolved significantly over the past three decades.[41] In 1990, the American College of Rheumatology (ACR) published its first diagnostic criteria, requiring a history of generalized pain for at least three months and tenderness in at least 11 of 19 specific bilateral "tender points."[42] However, the 1990 criteria faced significant criticism for their limited predictive validity, reliance on tender-point examinations that were difficult to standardize in primary care, and failure to account for symptoms like sleep disturbances and fatigue.[43] In 2010, the ACR issued updated criteria that broadened the scope of evaluation.[44] The revised approach focuses on the Widespread Pain Index (WPI), which scores pain in 19

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[41] *See generally* Frederick Wolfe, Daniel J. Clauw, Mary-Ann Fitzcharles, Don L. Goldenberg, Robert S. Katz, Philip Mease, et. al., *The American College of Rheumatology Preliminary Diagnostic Criteria for Fibromyalgia and Measurement of Symptom Severity*, 62 AM. COLLEGE OF RHEUMATOL. 600, 601 (2010), https://acrjournals.onlinelibrary.wiley.com/doi/epdf/10.1002/acr.20140.

[42] *See* Carmen M. Galvez-Sanchez & Gustavo A. Reyes del Paso, *Diagnostic Criteria for Fibromyalgia: Critical Review and Future Perspectives*, J. CLIN. MED. 1, 4 (Apr. 23, 2020), https://pmc.ncbi.nlm.nih.gov/articles/PMC7230253/pdf/jcm-09-01219.pdf.

[43] *See id.*

[44] *See id.*

regions of the body, and the Symptom Severity Scale (SSS), which measures the intensity and number of additional symptoms such as fatigue, sleep disturbances, and cognitive issues.[45] Patients must report widespread pain in designated body regions and self-assess the severity and number of symptoms listed on the ACR's checklist, which are then scored to reflect total symptom burden.[46] The 2010 criteria require both a high WPI and symptom severity score, offering a more comprehensive and functional assessment of the disorder.[47]

In 2012, SSA formally recognized fibromyalgia as an MDI through Social Security Ruling (SSR) 12-2p, which incorporates both the 1990 and 2010 ACR

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[45] *See id.* (distinguishing two categories of symptoms: category one evaluates the "severity of fatigue, waking unrefreshed, and cognitive symptoms," category two "consists of a checklist of 41 symptoms (irritable bowel syndrome, fatigue/tiredness, muscle weakness, Raynaud's, ringing in ears, etc.)").

[46] *See id.* at 4–5 (describing the SSS, in which patients are evaluated based on the number of symptoms reported: "0 symptoms (score of 0), 1 to 10 symptoms (score of 1), 11 to 24 symptoms (score of 2), and 25 of more symptoms (score of 3).").

[47] *See id.* at 5.

diagnostic criteria.[48] Despite this recognition, fibromyalgia remains the "most controversial condition in the history of medicine," largely due to its reliance on subjective symptom reporting and absence of OME.[49] Courts have acknowledged its "elusive and mysterious" nature, noting that fibromyalgia cannot be confirmed through laboratory tests or imaging studies.[50] This diagnostic ambiguity contributes to a persistent skepticism among ALJs, who may fear that claimants are exaggerating symptoms to obtain monetary benefits.[51] One example appears

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[48] *See* SSR 12-2p, *supra* note 5 at 43641–42 (July 25, 2012) (describing the criteria that can establish whether a person has an MDI of fibromyalgia, such as "history of widespread pain," "11 positive tender points on physicial examination," and "repeated manifestations" of symptoms).

[49] *See* Hodge & Hubbard, *supra* note 3 at 186 (quoting Monique Leahy, *Proof of Chronic Fatigue Syndrome and Fibromyalgia*, 99 AM. JUR. PROOF OF FACTS 1, 6 (3d. ed. 2008).

[50] *See Sarchet v. Charter*, 78 F.3d 305, 306 (7th Cir. 1996) (recognizing that the causes fibromyalgia were largely unknown and that its symptoms were subjective).

[51] *See, eg.*, *Jordan v. Comm'r of Soc. Sec.*, 548 F.3d 417, 420 (6th Cir. 2008) (explaining how a patient exhibited "exaggerated pain responses" to examinations involving little movement to receive workers' compensation benefits).

in *Jordan v. Commissioner of Social Security*,[52] where the claimant exhibited extreme pain behaviors—such as grimacing and withdrawal—when pressure was applied during examination.[53] However, the ALJ affirmed the denial of benefits after reviewing surveillance footage showing the claimant shopping and exercising at a gym without discomfort.[54] Such cases underscore the hesitation ALJs default to when confronted with fibromyalgia claims.

Even with the SSA's recognition of fibromyalgia under 12-2p, claimants face a significant hurdle: fibromyalgia is not included in the SSA's Listings of Disabilities, known as the "Blue Book."[55] The Blue Book sets out medical conditions and criteria that, if satisfied, establish a presumption of disability for

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[52] *Id.* at 420.

[53] *Id.*

[54] *See id.* at 420–21 (noting that the claimant's physician reviewed surveillance footage showing the claimant carrying tree limbs, lifting merchandise without difficulty, entering her car with ease, and exiting a gym without any visible signs of back pain).

[55] *See Fibromyalgia and Social Security Disability*, DISABILITY BENEFITS HELP, https://www.disability-benefits-help.org/disabling-conditions/fibromyalgia-and-social-security-disability (last visited June 5, 2025); *see generally Disability Evaluation Under Social Security*, *supra* note 25.

purposes of receiving SSDI or SSI.[56] Because fibromyalgia is absent from this list, claimants often must file under another recognized condition—such as degenerative disc disease or rheumatoid arthritis—and cite fibromyalgia as a secondary impairment.[57] SSR 12-2p does offer a procedural advantage by allowing claimants to identify fibromyalgia as an MDI that contributes to their inability to work.[58] While this rule may help a claimant "get in the door," it does not reduce the evidentiary burden at the hearing stage. In practice, the subjective nature of fibromyalgia symptoms, combined with its exclusion from the listings, means that ALJs remain hesitant to credit such claims absent OME.[59]

When a claimant appeals a denial of benefits to an ALJ, the judge applies a five-step sequential evaluation process to determine whether the claimant is disabled.[60] If the ALJ finds the claimant not disabled at any step, the inquiry

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[56] *See SSA's Blue Book in 2024*, DISABILITY BENEFITS HELP, https://www.disability-benefits-help.org/glossary/social-security-blue-book/more-information (last visited June 5, 2025).

[57] *See Fibromyalgia and Social Security Disability*, *supra* note 25.

[58] *See* SSR 12–2p, 77 Fed. Reg. 4364 (Jul. 25, 2012).

[59] *See generally infra* Part II.

[60] *See* 20 C.F.R. §§ 404.1520(a), 416.920(a) (2025); *see*, *e.g.*, *Thomas v. Colvin*, 745 F.3d 802, 807 (7th Cir. 2014).

ends.[61] If the claimant is found disabled at a given step, the ALJ may either conclude the evaluation or proceed to the next step if necessary.[62]

At step one, the ALJ considers whether the claimant is engaged in substantial gainful activity (SGA); if they are, the claimant is not disabled.[63] Gainful activity is described as work performed and intended for pay or profit.[64] At step two, the ALJ evaluates whether the claimant's impairment is medically

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[61] *See supra* note 60; *Moore v. Barnhart*, 405 F.3d 1208, 1212-13 (11th Cir. 2005) (finding the claimant not disabled at step four of the sequential analysis due to inconsistencies in the claimant's descriptions of daily activities).

[62] *See supra* note 60.

[63] *See* 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i); *see also What is Substantial Gainful Activity,* SOC. SEC. ADMIN., https://www.ssa.gov/faqs/en/questions/KA-01843.html (last modified Oct. 7, 2022) ("(SGA) is used to describe a level of work activity and earnings. Work is 'substantial' if it involves doing significant physical or mental activities or a combination of both.").

[64] *See generally What is Substantial Gainful Activity,* SOC. SEC. ADMIN., https://www.ssa.gov/faqs/en/questions/KA-01843.html (last updated Oct. 7, 2022).

severe and meets the SSA's duration requirement.[65] Step three involves determining whether the impairment matches one of the listed impairments in the SSA's Blue Book.[66] Claimants whose conditions meet or equal a listed impairment are deemed disabled at this step, without consideration of "age, education, or work experience."[67] Because fibromyalgia is not included in the official listings, claimants often file under analogous conditions—such as degenerative disc disease—that share features like chronic pain.[68] If no listing applies, an ALJ must then conduct a Residual Functional Capacity (RFC)

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[65] *See* 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii); *see also* 20 C.F.R. §§ 404.1509, 416.909 ("[The impairment] . . . must have lasted or must be expected to last for a continuous period of at least 12 months. We call this the duration requirement.").

[66] *See* 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

[67] 20 C.F.R. §§ 404.1520(d), 416.920(d).

[68] *See 1.00 Musculoskeletal Disorders – Adult*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/professionals/bluebook/1.00-Musculoskeletal-Adult.htm (last visited June 6, 2025); *see generally Spine Care Fibromyalgia*, UCLA HEALTH, https://www.uclahealth.org/medical-services/spine/conditions/fibromyalgia (last visited June 6, 2025).

assessment.[69] An RFC assessment requires the ALJ to evaluate all relevant evidence in the record to determine the most work the claimant can still perform despite their limitations under a standard work schedule of "8 hours a day, for 5 days a week."[70] The RFC assessment may include testimony from medical professionals, friends, or family to support the claimant's functional limitations.[71] At Step Four, the ALJ considers whether the claimant can return to their past work despite the limitations identified in the RFC.[72] At Step Five, the ALJ assesses whether the claimant, based on their RFC, age, education, and work experience, can adjust to other work available in the national economy.[73] If they can, the claimant is found not disabled; if they cannot, they are deemed disabled.[74] The SSA's five-step evaluation process, particularly the absence of a fibromyalgia

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[69] *See* 20 C.F.R. §§ 404.1520(e), 416.920(e).

[70] *See* 20 C.F.R. §§ 404.1545(a), 416.945(a); see also SSR 96-8p, 61 Fed. Reg. 34474, 34475 (July 2, 1996) (explaining that an RFC "is an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis.").

[71] *See* 20 C.F.R. §§ 404.1545(a)(3), 416.945(a)(3).

[72] *See* 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

[73] *See* 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

[74] *See supra* note 73.

listing and evidentiary demands embedded in the RFC assessment, places fibromyalgia claimants at a distinct disadvantage within a system designed to favor objectively verifiable impairments.

### *C. Understanding the Social Security Appeals Process*

Understanding the SSAs appeals process is essential to grasping the procedural challenges disability claimants face, especially those whose impairments do not easily lend themselves to objective verification, such as fibromyalgia. After an initial application is denied, claimants must navigate a complex, multi-tiered appeals process.[75] This process involves four stages: reconsideration, a hearing before an ALJ, review by the Appeals Council, and finally, appeal to a federal district court.[76] At the start of every application for benefits, a claimant must first submit an application through their local SSA field officer either in person, by telephone, or online.[77] Field officers verify non-

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[75] *See generally Understanding Supplemental Security Income Appeals Process*, SOC. SEC. ADMIN., https://www.ssa.gov/ssi/text-appeals-ussi.htm (last visited June 5, 2025).

[76] *See id.*

[77] *See Disability Determination Process*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/determination.htm (last visited June 5, 2025).

medical eligibility requirements, such as the claimant's age and employment history, before transferring the application to Disability Determination Services (DDS).[78] DDS uses its internally trained staff to evaluate the claimant's medical evidence and issue an initial disability determination.[79] At this stage, the SSA relies on the Program Operations Manual System (POMS), its "primary source of information…to process claims for Social Security benefits."[80] If DDS concludes that the claimant is disabled, the SSA computes and disburses benefits.[81] If not, the claimant may request a reconsideration: an appeal in which DDS re-reviews the application for possible error.[82]

Significant delays plague this early phase of review. As of 2024, the average processing time for an initial determination is approximately seven

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[78] *See id.*

[79] *See id.*

[80] *POMS Home*, SOC. SEC. ADMIN., https://secure.ssa.gov/apps10/poms.nsf/Home?readform (last visited Oct. 29, 2025).

[81] *See Disability Determination Process*, *supra* note 77.

[82] *See Understanding Supplemental Security Income Appeals Process*, *supra* note 13.

months, due in part to a backlog of over one million pending applications.[83] If DDS denies the application again at reconsideration, the claimant may request a hearing before an ALJ.[84] At this hearing, the ALJ evaluates the claimant's medical condition based on the administrative record and any new evidence submitted.[85] If the ALJ upholds the denial, the claimant may appeal to the SSA Appeals Council, which primarily "involves error correction" by reviewing the reasoning and legal adequacy of the ALJs decision.[86] Both ALJs and the Appeals Council rely on the Hearings, Appeals, and Litigation Law Manual (HALLEX),

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[83] *See* Mark Miller, *supra* note 12; *see also Disability Determination Processing Time*, *supra* note 11.

[84] *See Understanding Supplemental Security Income Appeals Process*, *supra* note 13.

[85] *See id.*; *see also Disability Benefit Decision Appeals Time*, SOC. SEC. ADMIN., https://www.ssa.gov/securitystat/disability-appeals-time (last visited June 5, 2025) (noting that the current average processing time for hearings can take up to 280 days); *see generally* Gelbach & Marcus, *supra* note 29 (describing that ALJs routinely "do not address the weight they assign to treating physicians" and "omit basic findings, such as whether the claimant has a severe impairment.").

[86] *See Understanding Supplemental Security Income Appeals Process*, *supra* note 13; *see also* Gelbach & Marcus, *supra* note 29 at 29.

which "conveys guiding principles, procedural guidance, and information to hearing level and Appeals Council staff."[87] Should the Appeals Council affirm the denial, the claimant may then seek judicial review in a United States Federal District Court.[88] There, a federal judge reviews the administrative record and assesses whether the ALJs decision was supported by substantial evidence.[89] While no uniform definition of substantial evidence governs all federal circuits, the Supreme Court has articulated that it means "more than a mere scintilla" and must reflect sufficient support in the record to justify the agency's factual determination.[90] If a federal court's ruling conflicts with existing SSA

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[87] *I-1-0-1 Purpose*, SOC. SEC. ADMIN., https://www.ssa.gov/OP_Home/hallex/I-01/I-1-0-1.html (last visited June 5, 2025).

[88] *See Understanding Supplemental Security Income Appeals Process*, *supra* note 13.

[89] *See id.*; *see generally* Gelbach & Marcus, *supra* note 29 at 10 n.21 (noting that federal judges often view benefit appeals as burdensome due to complex disability evaluations and voluminous administrative records, and that such cases are a "horribly ill fit for the skill set of Article III judges and clerks.").

[90] *See Biestek v. Berryhill*, 587 U.S. 97, 102–03 (2019) (noting that the meaning of substantial in court decisions should describe that the threshold for evidentiary sufficiency is not high).

regulations, the agency may respond by issuing an “acquiescence ruling,” binding its adjudicators to follow that court’s holding within the relevant federal circuit.[91] In sum, the SSA appeals process is an extended and often arduous progression that can take years to navigate, from initial determination to final judicial review.[92]

This Article focuses on the second stage of the appeals process, the ALJ hearings, where fibromyalgia claimants face a particularly difficult evidentiary burden. ALJs require OME to establish fibromyalgia as an MDI, even though claimants can typically offer only a documented history of subjective complaints.[93] To understand this evidentiary conflict, it is necessary to examine

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[91] *See* 20 C.F.R. § 416.1485(a); *see also* Drew A. Swank*, An Argument Against Administrative Acquiescence*, 88 N.D. L. REV. 1, 12 (2012) (explaining that the SSA avoids binding Supreme Court decisions to "deny more claimants their properly deserved disability benefits.").

[92] *Arakas v. Comm’r*, 983 F.3d 83, 89 (4th Cir. 2020) (noting that the claimant filed their initial application for SSDI on April 23, 2010 and reached review before a federal district court on September 23, 2015).

[93] *See, e.g., Harper v. Sullivan*, 887 F.2d 92, 94-95 (5th Cir. 1989) (describing claimant’s repeated medical visits due to his fibromyalgia symptoms and complaints).

the legal history and evolving relationship between SSA adjudicators and the federal courts.[94]

## II. THE EVOLVING LEGAL LANDSCAPE

### *A. Before the Creation of SSR 12-2p*

The relationship between SSA ALJs and federal courts reflects the complexity of disability appeal adjudication and the regulatory burden imposed by SSA's evidentiary framework. Understanding how fibromyalgia claims were treated before the enactment of SSR 12-2p offers critical insight into the skepticism ALJs continue to display when evaluating conditions rooted in subjective symptomology.

A recurring theme in early fibromyalgia appeals was the heightened improper evidentiary burden placed on claimants to prove the severity of their symptoms, despite the condition's resistance to objective medical

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[94] *See Infra* Part II.

documentation.[95] In *Harper v. Sullivan*,[96] one of the earliest circuit court decisions involving a fibromyalgia appeal, the claimant—a logger—suffered from persistent elbow and neck pain linked to physically demanding work.[97] Although he reported chronic pain and weakness, his treating physician opined that his prognosis was "very good," creating a counterweight to the claimant's subjective complaints.[98] The ALJ ultimately denied benefits, concluding that the claimant's reports of pain and functional limitations were not supported by "credible medical findings of record."[99] On appeal, the Fifth Circuit affirmed the denial, citing the Social Security Disability Benefits Reform Act of 1984, which requires that "an individual's statement as to pain or other symptoms shall not alone be conclusive

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[95] *See Arakas v. Comm'r*, 983 F.3d 83, 96 (4th Cir. 2020) (noting that by requiring a claimant to present objective medical evidence with her subjective description of her symptoms, the ALJ improperly increased the burden of proof).

[96] 887 F.2d 92 (5th Cir. 1989).

[97] *See id.* at 94 (describing that the pain and grip problems were linked by having to carry tools that weighed twenty to one hundred-fifty pounds).

[98] *See id.* (describing the physician's opinion: "The knees were stable and had a full range of motion. His left elbow lacked 20 degrees of full extension, but there was no swelling or tenderness. Motor and sensory functions were intact.").

[99] *Id.* at 95.

evidence of disability . . . objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques must be considered."[100] *Harper* underscores the rigidity of SSA's pre-SSR 12-2p approach: ALJs were unwilling to credit pain-related impairments without corresponding OME, even when the claimant presented a consistent, documented history of chronic symptoms.[101] However, not all courts accept this strict interpretation. In *Sarchet v. Chater*,[102] the Seventh Circuit reversed an ALJs denial of benefits, criticizing the decision as containing a "substantial number of illogical or erroneous statements."[103] There, the ALJ discredited the claimant's testimony based in part on her poor work history, failing to consider that her

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[100] *See id.* at 96; *see also* Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794.

[101] *See* 887 F.2d at 96; *see also Langley v. Barnhart*, 373 F.3d 1116, 1120 (10th Cir. 2004) (recognizing that while ALJs may assign less than controlling weight to a treating physician's opinion, they may not summarily reject the opinion in its entirety without adequate explanation or consideration of the record as a whole).

[102] 78 F.3d 305 (7th Cir. 1996).

[103] *Id.* at 307 (explaining that the ALJ misunderstood the fundamental nature of fibromyalgia and incorrectly described the claimant's testimony in her decision opinion).

sporadic employment was itself the result of disabling fibromyalgia symptoms.[104] Together, *Harper* and *Sarchet* illustrate the legal tension surrounding fibromyalgia claims before 12-2p: while SSA policy emphasized objective verification, federal courts began to recognize that such standards were poorly suited for conditions defined by chronic, subjective symptoms.[105] The skepticism of ALJs towards pain-based claims, particularly in the absence of laboratory

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[104] *See id.* at 308 (stating that the ALJ made "unfounded sociological speculations" about individuals who apply for social security disability benefits and described the claimant's testimony as "melodramatic").

[105] *See id.* at 309 (noting that the 7th Circuit urged the claim to be remanded to a different ALJ because the current ALJ had an "unshakeable commitment to the denial of the applicant's claim."); *see generally* Hodge & Hubbard, *supra* note 3, at 206 (observing that one criticism of the fibromyalgia diagnosis is its susceptibility to "legitimize vague and difficult or distressing symptoms" which would affirm a disability determination and lead to "monetary benefits based upon self-reported symptoms when the disorder may not [actually] be present.").

findings, remained a significant barrier for fibromyalgia claimants during this period.[106]

### *B. The Creation of SSR 12-2p*

Although fibromyalgia remains absent from the SSA's Listings, the agency created a procedural middle ground in 2012 with the issuance of SSR 12-2p.[107] This ruling formally recognized fibromyalgia as an MDI and adopted both the 1990 and 2010 diagnostic criteria developed by the ACR.[108] The 1990 criteria required a history of widespread pain and at least 11 positive tender points out of 18, while the 2010 revision offered a more flexible standard, requiring "repeated manifestation of six or more fibromyalgia symptoms, signs, or co-occurring conditions."[109] SSR 12-2p acknowledges that while SSA typically requires OME

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[106] *See Langley*, 373 F.3d at 1120, 1122 (describing that the ALJ failed to understand the nature of fibromyalgia when he refused to give controlling weight to the claimant's treating physician and called it "ridiculous.").

[107] *See generally Listing of Impairments – Adult Listings (Part A)*, *supra* note 6; *see also* SSR 12-2p, *supra* note 5.

[108] *Id.* at 43641-42.

[109] SSR 12-2p, 77 Fed. Reg. 43640, 43642; *see* Galvez-Sanchez & Reyes del Paso, *supra* note 42, at 4 (explaining the diagnostic criteria for fibromyalgia in

to establish a disability, fibromyalgia may be substantiated through longitudinal treatment records, clinical documentation, and a physician's diagnosis, if the diagnosis is not inconsistent with the broader medical record.[110] Federal courts understand the difficulty that ALJs face when having to evaluate fibromyalgia, a disease whose "symptoms are entirely subjective and [for which] there are no laboratory tests for [its] presence or severity."[111]

Several cases illustrate this enduring skepticism. In *Carradine v. Barnhart,*[112] Judge Posner of the Seventh Circuit emphasized that even in the absence of OME, and despite the possibility of symptom exaggeration, ALJs must

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1990, which required a painful response in 11 of 18 body bilateral points in the body).

[110] *See* SSR 12-2p, 77 Fed. Reg. 43640, 43641 (describing that a medically determinable impairment of fibromyalgia requires evidence from a medical source, which documents the person's medical history and the physician's assessments of the person over time).

[111] *Sarchet v. Chater*, 78 F.3d 305, 306 (7th Cir. 1996).

[112] 360 F.3d 751 (7th Cir. 2004).

engage, in good faith, with medical opinions and relevant medical literature.[113] He cautioned that "an administrative agency's decision cannot be upheld when the reasoning process employed by the decision maker exhibits deep logical flaws."[114] But even within the good faith framework, the dissent in *Carradine* argued that Judge Posner had been misled by the claimant's "thespian capabilities," asserting that the ALJ properly relied on expert medical opinions to discredit inconsistent testimony.[115]

While *Carradine* urged the need for ALJs to approach fibromyalgia claims without bias, subsequent cases revealed that this standard was often unmet in

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[113] *See id.* at 756 ("Maybe [the claimant] is exaggerating her pain. Maybe we are naive in doubting [the claimant's] thespian capabilities or the willingness of physicians to perform intrusive, even dangerous, therapies on patients whom they believe to be fakers.").

[114] *Id.*

[115] *See id.* at 757. (Coffey, J., dissenting) (noting that the claimant's testimony was "significantly inconsistent," her credibility was further diminished because the results of her physical capacity test indicated she was exerting "minimal efforts" during the exam, and her somatization disorder inclined her to "exaggerate the severity of the symptoms she reported.").

practice. For example, in *Gerstner v. Berryhill*,[116] the ALJ selectively relied on isolated negative remarks from the claimant's treating physician, Dr. Callaghan, to assign the opinion "little weight" and ultimately discredit the claimant's reported symptoms of pain, even considering the claimant's consistent documentation of their struggle with fibromyalgia.[117] *Gerstner* highlights a broader concern: ALJs may undermine treating physician opinions not through outright rejection, but by strategically emphasizing portions of the record that support denial while disregarding the longitudinal context of the physician's findings.[118] This tactic directly contradicts the intent of the treating source rule, which was designed to prioritize the insights of medical professionals most familiar with the claimant's condition.[119]

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[116] 879 F.3d 257 (7th Cir. 2018).

[117] *See id.* at 261–63 ("We agree with [the claimant] that the ALJ fixated on select portions of Dr. Callaghan's treatment notes and inadequately analyzed his opinions.").

[118] *See, e.g., id.* ("Although the ALJ discussed the weight to afford these physicians' opinions, he did not specify how or to what extent he considered these opinions when deciding to assign little weight to Dr. Callaghan's opinions.").

[119] *See* 20 CFR § 416.927(c)(2) (2017).

Before March 27, 2017, SSA regulations required ALJs to apply the treating source rule, which gave controlling weight to the opinions of a claimant's treating physician if the opinion was "well-supported by medically acceptable clinical techniques" and not inconsistent with the record.[120] The rationale behind the rule was that treating physicians are best positioned to provide a "detailed, longitudinal picture" of a claimant's impairments, rather than standalone examinations.[121] The Supreme Court described the rule as a judicially developed doctrine intended to bring consistency and to control the adjudication of disability determinations made by ALJs.[122] In practice, however, ALJs often circumvented the treating source rule by finding inconsistency with OME or by elevating the

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[120] *Id.*

[121] *Id.*

[122] *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 829 (2003); *see also* ADMIN. CONF. OF THE U. S., SSA DISABILITY BENEFITS PROGRAMS: ASSESSING THE EFFICACY OF THE TREATING PHYSICIAN RULE 12 (2013) (assessing the effectiveness of the treating physician rule in Social Security disability determinations and confirming that the rule was produced with the intent of increasing consistency among ALJ adjudications ).

views of non-examining physicians.[123] In *Johnson v. Astrue*, the ALJ gave greater weight to two non-examining physicians over the treating physician, citing infrequent consultations and an alleged inconsistency between the prescribed treatment plan and the physician's assessment of disability.[124]

ALJ reliance on non-examining physicians over treating sources has drawn sharp scrutiny in fibromyalgia cases. Non-examining physicians typically assess claimants' impairments by reviewing the medical record alone, without conducting a physical examination or developing a longitudinal understanding of the claimant's condition.[125] This method is particularly problematic in cases involving fibromyalgia, where subjective symptom reporting is central to

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[123] *See*, *e.g., Johnson v. Astrue*, 597 F.3d 409, 411–12 (1st Cir. 2009) (holding that the ALJ erred in denying benefits to the claimant where they gave greater weight to the opinions of two non-treating physicians).

[124] *Id.*

[125] *See generally Consultative Examinations: A Guide for Health Professionals*, SOC. SEC. ADMIN., (directing medical reports to be sufficiently thorough so as to permit an independent examiner to understand the claimant's history and condition without having to conduct a physical examination) https://www.ssa.gov/disability/professionals/greenbook/ce-guidelines.htm (last visited June 8, 2025).

diagnosis and treatment.[126] Despite this, ALJs often give greater weight to non-examining consultants who dismiss treating physicians' opinions due to the absence of OME.[127] However, an ALJ cannot reject a treating physician's opinion, especially one based on consistent clinical observations and subjective complaints, without identifying contrary objective evidence.[128] To do so effectively penalizes claimants for having a condition that defies conventional diagnostic tools and ignores the SSA's own recognition of subjective symptoms as medically relevant under SSR 12-2p.

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[126] *Rose v. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994) ("We have held that the amount of weight that can properly be given the conclusions of non-testifying, non-examining physicians 'will vary with the circumstances, including the nature of the illness and the information provided the expert'").

[127] *See Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234, 245 (6th Cir. 2007) ("[I]t is clear that the opinions offered by Drs. Leeb and Rath were concerned solely with objective medical evidence…the foundation for the opinions offered by Drs. Leeb and Rath was the lack of objective findings.").

[128] *See Johnson*, 597 F.3d at 412 (reversing the ALJ denial for improperly disregarding the treating physician's opinion based on the claimant's consistent subjective reports of pain, as well as failing to consider trigger point findings under ACR criteria—the closest available objective evidence for fibromyalgia).

Other circuits have expressed concern with prioritizing non-treating source physicians. In *Green-Younger v. Barnhart*,[129] the Second Circuit reversed an ALJs denial of benefits for rejecting a treating physician's diagnosis, which met the ACR's 1990 criteria, in favor of a one-time evaluation by a physical therapist.[130] The court emphasized that fibromyalgia claims cannot be adjudicated using traditional assumptions about OME, and that subjective complaints are an "essential diagnostic tool" for the condition.[131] Fibromyalgia claimants often find themselves in a battle of the experts, relying on treating physicians to substantiate their longitudinal history of symptoms, while SSA ALJs turn to non-examining consultants as a counterweight.[132] This conflict was on full display in *Rogers v. Commissioner of Social Security*, where the claimant presented three medical experts: Dr. Evans, who had treated her for five years and

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[129] 335 F.3d 99 (2d Cir. 2003).

[130] *See id.* at 103 (noting that an initial evaluation by a physical therapist found the claimant capable of sedentary work, but a prior assessment showed the claimant could tolerate seated activity for only 30 minutes at a time).

[131] *See id.* at 107–08 (quoting *Flanery v. Chater*, 112 F.3d 346, 350 (8th cir. 1997)).

[132] *See Rogers*, 486 F.3d at 245 (noting that the ALJ prescribed more weight to the medical opinions of the non-examining experts).

documented a "long history of pain"; Dr. Stein, who identified tender points consistent with "classic fibromyalgia"; and Dr. Waldbaum, who acknowledged the claimant's normal reflexes and range of motion but concluded that she could not maintain full-time employment.[133] Despite this detailed clinical record, the ALJ gave little weight to these treating opinions and instead relied on three non-examining physicians, each of whom discredited the claimant based solely on the absence of OME.[134] At the time, a now-rescinded SSA ruling permitted greater weight to be given to non-examining physicians under the rationale that they had a complete snapshot of the claimant's medical history.[135] But in *Rogers*, the Sixth

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[133] *See id.* at 237–39 (demonstrating the claimant had prepared a longitudinal history of her medical evaluations and multiple treating sources who had recognized her symptoms of chronic pain and difficulty in physical movement).

[134] *See id.* at 237–40 (noting that one non-examining physician believed that the claimant's limitations were related to her subjective complaints of pain and that there was no objective medical evidence to support those complaints).

[135] *See* SSR 96-6p, 61 Fed. Reg. 34466, 34467 (July 2, 1996) ("Findings of fact made by State agency medical and psychological consultants and other program physicians and psychologists regarding the nature and severity of an individual's impairment(s) must be treated as expert opinion evidence of nonexamining

Circuit found this reasoning deficient, emphasizing that the non-examining consultants were ill-suited to evaluate fibromyalgia and that the ALJ had failed to consider the record as a whole.[136]

Despite these judicial corrections, the SSA eliminated the treating source rule in 2017, further complicating fibromyalgia claims and weakening one of the few procedural safeguards available to claimants with medically elusive conditions.[137]

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sources at the administrative law judge and Appeals Council levels of administrative review.”).

[136] *See Rogers,* 486 F.3d at 245–46 (“[T]he ALJ failed to explain in any illuminating way why he elected to elevate the opinion of a single non-treating non-examining orthopedic surgeon over four conflicting opinions . . . one of whom is a rheumatologist.”).

[137] *See generally* Michael N. Rhinehart, *Treating Physician Rule Eliminated in Social Security Regulations*, THE FED. LAW., Oct.–Nov. 2017, at 5 (noting that the previous treating physician rule effectively deferred to the opinions of physicians who most intimately were familiar with a claimant’s condition).

### *C. The Removal of the Treating Source Rule*

Proponents of the treating source rule point to substantial changes in the American healthcare system, noting that patients today are less likely to maintain long-term relationships with a single physician.[138] In response to this trend, the SSA repealed the rule with the enactment of 20 C.F.R. § 416.920c, which governs all claims filed on or after March 27, 2017.[139] Under this revised framework, the SSA no longer defers to or assigns controlling weight to any medical opinion, regardless of whether it originates from a treating source.[140] Instead, all medical opinions and prior administrative findings are evaluated collectively based on five regulatory factors: supportability, consistency, relationship with the claimant,

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[138] *See* Charles Terranova, *Somebody Call My Doctor: Repeal of the Treating Physician Rule in Social Security Disability Adjudication*, 68 BUFF. L. REV. 931, 956 (2020) ("Instead of developing a close relationship with one primary doctor, claimants now treat with 'coordinated and managed care organizations.'").

[139] *See* 20 C.F.R. § 416.920c (2024).

[140] *See* 20 C.F.R. § 416.920c(a) (2024).

specialization, and other considerations.[141] Among these, supportability and consistency are the most critical.[142]

The supportability factor focuses on how well a medical opinion is explained and supported by relevant objective evidence; the consistency factor evaluates how closely the opinion aligns with other evidence in the record.[143] While this framework aims to simplify adjudication and enhance uniformity, it has important consequences for fibromyalgia claims. SSR 12-2p previously emphasized the importance of a treating physician's longitudinal observations, particularly in conditions like fibromyalgia, where diagnoses often rest on subjective reports of pain and fatigue.[144] Under the new rule, a treating

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[141] *See id; see also* 20 C.F.R. § 416.920c(c) (2024) (enumerating factors).

[142] 20 C.F.R. § 416.920c(b)(2) (2024).

[143] *See* 20 C.F.R. § 416.920c(c)(1) (2024) ("the more relevant the [OME] and supporting explanations presented by a medical source are…the more persuasive the medical opinion(s)…."); 20 C.F.R. § 416.920c(c)(2) (2024) ("the more consistent a medical opinion…is with evidence from other medical sources and nonmedical sources…the more persuasive the medical opinion(s)….").

[144] *See* SSR 12-2p, 77 Fed. Reg. 43640, 43643 (July 25, 2012) ("Because the symptoms and signs of [fibromyalgia] may vary in severity over time and may

physician's opinion is simply one of several factors and may be discounted if found inconsistent with other medical opinions, including those from non-examining physicians.[145]

At first glance, this change appears to trade administrative simplicity for adjudicatory flexibility, particularly in cases like fibromyalgia, where medical records can span hundreds of pages.[146] To alleviate this burden, the new SSA rule permits ALJs to issue a single, consolidated analysis of medical source opinions,

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even be absent on some days, it is important that the medical source who conducts the [examination] has access to longitudinal information about the person.").

[145] 20 C.F.R. § 416.920c(c) (2024); *see*, *e.g.*, *Green-Younger*, 335 F.3d at 106 (2d Cir. 2003) ("'a treating source's opinion on the issue(s) of the nature and severity of your impairment(s)' will be given 'controlling weight' if the opinion is 'well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record.'") (quoting 20 C.F.R. § 404.1527(d)(2)).

[146] *See Revels v. Berryhill*, 874 F.3d 648, 670 (9th Cir. 2017) (finding that the administrative record spanned a thousand pages which all described multiple doctors treating the claimant); *Rogers*, 486 F.3d at 244 (finding that the evaluations of three physicians who reviewed the claimant's history of pain were five-hundred pages long).

focusing solely on supportability and consistency, rather than fully addressing all five factors.[147] This streamlining reflects the agency's broader adaptation to a fragmented healthcare landscape, shaped by an increasing reliance on telehealth, urgent care clinics, and short-term medical relationships exacerbated by the COVID-19 pandemic.[148] Courts have echoed SSA's rationale. The Eleventh

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[147] *See* 20 C.F.R. § 416.920c(b)(1) (2024) ("Because many claims have voluminous case records containing many types of evidence from different sources, it is not administratively feasible for us to articulate in each determination or decision how we considered all of the factors for all of the medical opinions and prior administrative medical findings in your case record."); *see also* Rhinehart, *supra* note 137, at 6 (explaining how ALJs are required to explain how they considered medical opinions from all sources, but only in terms of the supportability and consistency factors).

[148] YALDA JABBARPOUR, ANURADHA JETTY, HOON BYUN, ANAM SIDDIQI, STEPHEN PETTERSON, & JEONGYOUNG PARK, NO ONE CAN SEE YOU NOW: FIVE REASONS WHY ACCESS TO PRIMARY CARE IS GETTING WORSE (AND WHAT NEEDS TO CHANGE) 8 (2024) ("The explosion of delivery models such as telehealth-only primary care, retail clinics, and urgent care has fragmented the primary care workforce…"); Lindsay Allen, Janet R. Cummings, Jason M. Hockenberry, *The*

Circuit, for instance, has observed that the repeal "eliminated confusion about the hierarchy of medical sources and focused on the persuasiveness of the content of the evidence."[149] Still, ALJs remain hesitant to credit treating physicians who diagnose fibromyalgia, often viewing them as overly sympathetic to claimants or prone to overstating limitations.[150] This skepticism persists despite growing judicial recognition of fibromyalgia's unique evidentiary challenges. In 2020, the Fourth Circuit offered a critical corrective—one that echoed a broader shift

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*Impact of Urgent Care Centers on Nonemergency Emergency Department Visits*, 56 HEALTH SERVS. RES. 721, 727–728 (2021) (finding that "retail clinics have a small but statistically significant impact on reducing [emergency department] use and suggest that the walk-in clinic industry (comprising both urgent care centers and retail clinics) may in turn reduce health care expenditures.").

[149] *Harner v. Soc. Sec. Admin.*, 38 F.4th 892, 897 (11th Cir. 2022).

[150] *See Schillo v. Kijakazi*, 31 F.4th 64, 72 (2d Cir. 2022) ("The ALJ further pointed to the [claimant's] own testimony establishing her ability to engage in 'several activities that require fine manipulation, including driving a vehicle, dressing, bathing, preparing meals, doing chores, and using a cellphone'" when denying the benefits claim.).

among federal courts—by articulating a necessary protection for fibromyalgia claimants under the new regulatory framework.[151]

In *Arakas v. Commissioner*, the Fourth Circuit addressed the persistent problems of relying on OME to discredit the subjective symptoms of fibromyalgia claimants.[152] There, the ALJ adopted the findings of non-examining state agency consultants who stated that the claimant had met the diagnostic criteria for fibromyalgia but nonetheless concluded that she could lift 20 pounds occasionally, sit or stand for six hours in a workday, and push or pull without limitation.[153] In contrast, the claimant's treating physician opined that she could not sustain full-time employment due to the severity of her symptoms because her pain would wax and wane, a hallmark of fibromyalgia.[154] Despite this evidence,

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[151] *See Arakas v. Comm'r*, 983 F.3d 83, 97–98 (4th Cir. 2020) ("[W]e have previously held that ALJs apply an incorrect legal standard by requiring objective evidence of symptoms even when they also consider other evidence in the record.").

[152] *See id*. at 112 (holding that, in the case of a claimant suffering from fibromyalgia, "the ALJ erred in discrediting [claimant's] subjective complaints and in according little weight to her treating physician's opinion.").

[153] *Id.* at 92.

[154] *Id*. at 91.

the ALJ discounted the claimant's statements and imposed a heightened evidentiary burden of proof by requiring a corroborating OME to establish the severity of her condition when the claimant was "entitled to rely exclusively on subjective evidence to prove" that her symptoms were so severe they prevented her from working.[155]

The Fourth Circuit held that this was legal error.[156] Crucially, the court ruled that claimants with fibromyalgia "are entitled to rely exclusively on subjective evidence to prove the severity, persistence, and limiting effects of their symptoms."[157] Going further, the Fourth Circuit articulated a categorial limitation on ALJ discretion: "ALJs may not rely on objective medical evidence (or the lack thereof)—even as just one of multiple factors—to discount a claimant's subjective complaints regarding symptoms of fibromyalgia or some other disease that does

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[155] *Id.* at 96.

[156] *See id*. at 112 ("Given our finding of Arakas's disability, remanding the case for yet another ALJ hearing would be not only pointless, but also unjust…Therefore, we reverse and remand the case to the Commissioner for a calculation of disability benefits.").

[157] *Arakas*, 983 F.3d at 98.

not produce such evidence."[158] The holding represents a significant doctrinal development. The court emphasized that "[o]bjective indicators such as normal clinical and laboratory results simply have no relevance to the severity, persistence, or limiting effects of a claimant's fibromyalgia."[159] ALJs should look to the consistency of symptom reports and clinical markers such as trigger point findings.[160] In doing so, *Arakas* joins a growing body of case law that seeks to impose meaningful constraints on ALJ skepticism, offering a compelling framework for rebalancing the evidentiary burdens that have long disadvantaged fibromyalgia claimants.

## III. RECOMMENDATION

As demonstrated throughout this Article, fibromyalgia claimants continue to encounter substantial administrative and evidentiary hurdles, notwithstanding increasing legal acknowledgement of the condition's legitimacy. The Fourth

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[158] *Id.* at 97; *See also Shelley C. v. Comm'r*, 61 F.4th 341, 361 (4th Cir. 2023) (noting that the *Arakas* rule has extended to subjective symptoms of major depressive disorder).

[159] *Id.* at 97.

[160] *See id.* at 97–98 (holding that consistent symptom reports and trigger point findings should only serve to substantiate a claim of impairment).

Circuit's decision in *Arakas* represents a critical inflection point in this trajectory, reaffirming that ALJs may not discount claimants' subjective reports of pain solely due to a lack of OME, particularly in cases involving conditions like fibromyalgia, where such evidence is inherently limited.[161] Despite the significance of *Arakas*, the SSA has failed to issue an acquiescence ruling to reconcile the inconsistency between ALJ practice and the Fourth Circuit's interpretation of the standards applicable to fibromyalgia claims.[162] While such a ruling could resolve regional circuit conflicts, its limited geographic scope renders it an inadequate solution to a nationwide issue.[163] The remedy that the SSA must enact should alleviate the systemic roadblocks against fibromyalgia claimants

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[161] *See generally supra* Part II.; *see also Arakas v. Comm'r*, 983 F.3d at 97 ("[T]he ALJ 'effectively required' objective evidence by placing undue emphasis on [the claimant's] normal clinical and laboratory results.") (quoting *Green-Younger*, 335 F.3d at 108.).

[162] *See generally* 20 C.F.R. §§ 404.985, 416.1485 (describing the appeals processes of the Social Security Administration concerning acquiescence rulings).

[163] *GN 03501.001 Acquiescence Rulings (AR) – Background and General Policy*, SOC. SEC. ADMIN. (describing how acquiescence rulings are limited in application to the relevant circuit), https://secure.ssa.gov/poms.nsf/lnx/0203501001 (last visited June 8, 2025).

across the country. Moreover, the SSA's decision not to promulgate such a ruling may be partly motivated by a desire to curtail the favorable precedential impact of federal court decisions on future fibromyalgia claimants within each circuit.[164] The SSA's longstanding concern about deterring fraudulent claims has also contributed to its reticence in expanding procedural protections for this category of claimants.[165]

Although the repeal of the treating source rule has presented new challenges, its reinstatement would not be a panacea for fibromyalgia claimants. The SSA's rationale for its removal rightly reflects the modern realities of healthcare delivery, where claimants often lack "sustained relationships" with a single primary care provider.[166] The agency has simultaneously broadened the

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[164] *See* Swank, *supra* note 91, at 12 ("Merely ignoring the circuit court decision . . . is much easier and safer from the Agency perspective so as to deny more claimants their properly deserved disability benefits.").

[165] *See Carradine v. Barnhart*, 360 F.3d at 756 (identifying the dueling interests of providing those in need with benefits versus uncovering and denying fraudulent claims).

[166] *See* Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844, 5853 (Jan. 18, 2017) (to be codified at 20 C.F.R. pts. 404, 416)

definition of an acceptable medical source to include a wider array of practitioners, thereby affording claimants additional avenues for sustaining their conditions.[167] This Article therefore proposes two structural reforms to ensure fairer adjudication of fibromyalgia claims: (1) the inclusion of fibromyalgia as an impairment in the SSA's Listings of impairments; and (2) the creation of procedural guidelines within the SSA's HALLEX Manual that would codify protections against improper ALJ discounting of subjective symptom testimony in fibromyalgia cases.

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("Many individuals receive health care from multiple medical sources, such as from coordinated and managed care organizations…"); *See also* OFF. OF THE NAT'L COORDINATOR FOR HEALTH INFO. TECH., NO. 65, USE OF TELEMEDICINE AMONG OFFICE-BASED PHYSICIANS 1 (2023) (describing how the use of telehealth proliferated rapidly due to the Covid-19 Pandemic).

[167] *See* 82 Fed. Reg. at 5846 (including certified midwives, anesthetists, and clinical nurse specialists); *see also* Michael N. Rhinehart, *supra* note 137, at 5–6 ("In addition, the SSA concludes that claimants not only frequently change medical providers based upon changes in insurance coverage, but they also typically receive care from specialists who have little familiarity with all of a claimant's medical conditions."); *see generally* 20 C.F.R. §§ 404.1502(a), 416.902(a) (defining an expanded list of acceptable medical sources).

### *A. Adding Fibromyalgia into the SSA's Official Listing*

A principal challenge faced by fibromyalgia claimants is that the condition is not currently recognized within the SSA's Listings of impairments.[168] In the absence of a listing, claimants must proceed through an RFC analysis, which involves examining the claimant's ability to do work regularly while considering the limitations of the impairment.[169] While SSR 12-2p provides a framework for assessing fibromyalgia as an MDI impairment, it does not offer the streamlined path to benefits that a formal listing would confer.[170] Inclusion in the SSA's Blue Book would allow ALJs to conclude claims at step three of the five-step sequential evaluation, avoiding prolonged RFC evaluations and the frequent conflicts that arise between non-examining agency physicians and treating medical providers.[171] Importantly, several federal courts have identified the RFC

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[168] *Listing of Impairments – Adult Listings (Part A)*, *supra* note 6.

[169] *See* 20 C.F.R. §§ 404.1545, 416.945; *see also* SSR 96-8p, 61 Fed. Reg. 34474, 34474–75 (July 2, 1996) (defining and providing the processes for assessing residual functional capacity).

[170] *See* SSR 12-2p, 77 Fed. Reg. at 43641 (describing the heighted burden on the claimant in proving an MDI claim for fibromyalgia).

[171] *See* 20 C.F.R. §§ 404.1520(d), 416.920(d) (2024) (demonstrating how inclusion in the Blue Book makes it easier for a claimant to acquire benefits).

determination as the procedural stage most prone to error in fibromyalgia adjudications.[172]

If the SSA were to list fibromyalgia officially, it would need to determine the appropriate section under which the condition should fall. Contemporary medical literature increasingly describes fibromyalgia as a "neurosensory disorder," characterized by altered central nervous system pain processing.[173] This understanding supports the inclusion of fibromyalgia in the neurological disorders section, rather than the musculoskeletal disorders section, which

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[172] *See Arakas v. Comm'r*, 983 F.3d at 94; *see also Rogers v. Comm'r*, 486 F.3d at 237–40; *see generally supra* Part. II (examples of such cases).

[173] See Bhargava & Goldin, *supra* note 34 ("Fibromyalgia is considered a disorder of pain regulation and is classified as a condition of central sensitization. Patients with central sensitization experience hypersensitivity to pain due to amplified neural signaling in the [central nervous system]."); *see also Fibromyalgia Brain vs Normal Brain: Neurological Differences Explained*, NEUROLAUNCH (Sep. 30, 2024), https://neurolaunch.com/fibromyalgia-brain-vs-normal-brain/ ("The way the brain functions in fibromyalgia is fundamentally altered…One of the hallmark features of fibromyalgia is central sensitization. This is like the brain's pain alarm system becoming overly sensitive, going off at the slightest touch.").

generally requires physical examination findings inconsistent with the diagnostic nature of fibromyalgia.[174]

Notably, claimants currently filing under musculoskeletal impairments, such as degenerative disc disease, are often denied based on the lack of OME, a standard incompatible with fibromyalgia diagnosis.[175]

Claimants who suffer from fibromyalgia typically file under degenerative disc disease, a disability that is also located in the musculoskeletal disorders section.[176] But if a claimant files under a musculoskeletal disorder, SSA "will not

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[174] *See generally 11.00 Neurological – Adult*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/professionals/bluebook/11.00-Neurological-Adult.htm (last visited June 8, 2025).

[175] *See generally 1.00 Musculoskeletal Disorders – Adult*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/professionals/bluebook/1.00-Musculoskeletal-Adult.htm (last visited June 8, 2025) (noting that the musculoskeletal listing requires a physical examination report which would not detect fibromyalgia).

[176] *See id.*; *see also Fibromyalgia and Social Security Disability*, DISABILITY BENEFITS HELP, https://www.disability-benefits-help.org/disabling-conditions/fibromyalgia-and-social-security-disability (last visited Nov. 9, 2024) ("If possible, it is in a claimant's best interest to apply for disability benefits on

accept a report of [the claimant's] statements about [their] symptoms and limitations in place of the medical source's report of objective clinical findings."[177] This requirement is fundamentally at odds with the evaluation process of fibromyalgia, which uses a claimant's subjective complaints as a necessary diagnostic tool.[178] All sections within the SSA's Listing of Impairments are governed by sunset provisions, which set an expiration date for

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the basis of Fibromyalgia in conjunction with other disabling conditions such as Degenerative Disc Disease or Rheumatoid Arthritis, mainly due to the fact that diagnoses of [Fibromyalgia] are quite difficult to make accurately").

[177] *1.00 Musculoskeletal Disorders – Adult*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/professionals/bluebook/1.00-Musculoskeletal-Adult.htm (last visited Nov. 10, 2024).

[178] *See Johnson v. Astrue*, 597 F.3d at 412 ("'a patient's report of complaints, or history, is an essential diagnostic tool' in fibromyalgia cases, and a treating physician's reliance on such complaints 'hardly undermines his opinion as to [the patient's] functional limitations.'") (quoting *Green-Younger*, 335 F.3d at 107.).

each listing, absent formal renewal or revision.[179] These provisions serve as a critical regulatory function: they ensure that the criteria used to adjudicate disability claims remain current with evolving medical standards and diagnostic practices.[180] Upon expiration, a listing may be revised or extended by the Commissioner of Social Security pursuant to their authority under 42 U.S.C. § 902(a)(5), which empowers the Commissioner to "prescribe such rules and regulations as the [they] determine[] necessary or appropriate to carry out the functions of the Administration."[181]

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[179] *See* 20 C.F.R. § 404, App. 1 (2024), https://www.ecfr.gov/current/title-20/chapter-III/part-404/subpart-P/appendix-Appendix%201%20to%20Subpart%20P%20of%20Part%20404 (demonstrating the existence of the sunset provisions); *see generally* GovFacts, *Decoding the Law: Understanding Sunset Provisions vs. Permanent Legislation*, GOVFACTS (May 18, 2025), https://govfacts.org/explainer/decoding-the-law-understanding-sunset-provisions-vs-permanent-legislation/.

[180] *See generally Decoding the Law: Understanding Sunset Provisions vs. Permanent Legislation*, *supra* note 179 ("[Sunset provisions] allow laws to be more easily updated, modified, or removed if they become outdated, ineffective, or if societal circumstances change significantly.").

[181] 42 U.S.C. § 902(a)(5) (2025).

The neurological disorders section of the Listing—under which fibromyalgia could appropriately be categorized—is currently scheduled to sunset on September 29, 2025.[182] This presents a timely and administratively efficient opportunity for the Commissioner to incorporate fibromyalgia as a recognized impairment within that section. The Commissioner can consider emerging medical research that increasingly classifies fibromyalgia as a neurosensory disorder involving dysfunction in central pain processing.[183] Its placement in the neurological section is consistent with both scientific consensus and judicial interpretations of the condition.[184] In light of these developments, the

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[182] 20 C.F.R. § 404, App. 1 (2024), https://www.ecfr.gov/current/title-20/chapter-III/part-404/subpart-P/appendix-Appendix%201%20to%20Subpart%20P%20of%20Part%20404.

[183] *See* David Williams & Richard Gracely*, Functional Magnetic Resonance Imaging Findings in Fibromyalgia*, 8 ARTHRITIS RSCH. & THERAPY 224 (2007) (finding that patients with fibromyalgia noted unpleasant sensations at stimuli "significantly lower than those observed in healthy controls."), https://pmc.ncbi.nlm.nih.gov/articles/PMC1794529/pdf.

[184] *See, e.g.*, Revised Medical Criteria for Evaluating Hearing Loss, 75 Fed. Reg. 30,693 (June 2, 2010) (to be codified at 20 C.F.R. pt. 404) (noting that the criteria

Commissioner would be acting squarely within their statutory authority to revise the Listing to include fibromyalgia. Such a revision would not only reflect advancements in medical understanding but also address systemic administrative barriers faced by claimants. Including fibromyalgia in the Listing would eliminate the need for a RFC analysis, thereby streamlining adjudication and aligning SSA procedures with the realities of diagnosing and treating the condition. It would also fulfill the statutory mandate to enact rules that are "necessary or appropriate," as doing so would remove a significant evidentiary roadblock for claimants and enhance uniformity in the evaluation of fibromyalgia across jurisdictions.[185]

Should the Commissioner elect to revise the Listing of Impairments to include fibromyalgia under the neurological disorders section, the change would be subject to the notice-and-comment rulemaking procedures required by the Administrative Procedure Act (APA).[186] Specifically, SSA would need to publish a Notice of Proposed Rulemaking (NPRM) in the Federal Register, providing both a rationale for the proposed revision and an opportunity for the public to

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for evaluating claims of hearing loss is being revised because of "advances in medical knowledge, treatment, and methods of evaluating hearing loss . . .").

[185] 42 U.S.C. § 902(a)(5).

[186] *See id.*; *see generally* Administrative Procedure Act, 5 U.S.C. §§ 551–559.

comment.[187] The SSA's authority to initiate such rulemaking is firmly grounded in its statutory mandate under Titles II and XVI of the Social Security Act, which authorizes the agency to determine eligibility for disability benefits and to promulgate rules necessary to fulfill the function.[188] Adding fibromyalgia to the Listings would be a legitimate exercise of this authority, especially given the growing body of scientific and judicial support for recognizing fibromyalgia as a disabling neurological impairment.[189]

In preparation for this revision, the SSA should take a proactive, research-based approach by conducting informal stakeholder engagement. This could include outreach to individuals living with fibromyalgia, patient advocacy organizations, and medical professionals who specialize in chronic pain and neurological disorders. Such consultation would help the agency develop a more

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[187] *See* OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS (2011) ("The [Notice] is a formal invitation to participate in shaping the proposed rule and starts the notice-and-comment process in motion.").

[188] *See* 42 U.S.C. §§ 401(b), 1381–85; *see also Welcome to Social Security*, SOC. SEC. ADMIN., https://www.ssa.gov/about-ssa (last visited June 8, 2025).

[189] *See supra* Part II.C; *Spine Care Fibromyalgia*, *supra* note 68 (describing the characteristics of fibromyalgia that make it a neurological impairment).

accurate and nuanced understanding of the condition, particularly given the evolving and, at times, contested medical consensus surrounding its etiology and diagnosis.[190] The SSA's justification for the proposed rule should emphasize two key developments. First, advances in neuroscientific research increasingly characterize fibromyalgia as a central nervous system disorder involving altered pain processing, thereby supporting its inclusion under the neurological disorders section.[191] Second, a series of federal appellate decisions, notably outlined in *Arakas*, have reversed ALJ denials of fibromyalgia claims based on improper evidentiary standards, highlighting the need for more consistent, scientifically informed administrative guidance.[192]

The public comment period that follows the issuance of an NPRM will serve as a critical component of the rulemaking process. This phase provides a formal avenue for stakeholders—including medical professionals, disability

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[190] *See, e.g.*, A GUIDE TO THE RULEMAKING PROCESS, *supra* note 187 (describing how conversations by those potentially affected by proposed rules helps to foster the rulemaking process).

[191] *Spine Care Fibromyalgia*, *supra* note 68.

[192] *See generally Arakas*, 983 F.3d at 97 (holding that ALJs may not rely on objective medical evidence to discount a claimant's subjective complaints of symptoms of fibromyalgia).

advocates, researchers, and the public—to offer feedback on the proposed inclusion of fibromyalgia in the neurological disorders section of the SSA's Listings of Impairments. Given the historically polarized medical discourse surrounding fibromyalgia, this stage will likely draw commentary from both proponents who support its classification as a legitimate neurological disorder and skeptics who continue to challenge its pathophysiological basis.[193]

Nevertheless, recent trends suggest increasing alignment in the medical community, especially with the proliferation of advanced diagnostic technologies such as functional magnetic resonance imaging (fMRI) and positron emission tomography (PET) scans, which have begun to identify neuropsychological markers consistent with central nervous system dysregulation.[194] These findings support a growing consensus that fibromyalgia has a demonstrable neurological component, thus making its classification under the neurological disorders section not only reasonable but scientifically justified. Public comments reflecting this

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[193] *See, e.g.*, Bernstein, *supra* note 4, at 304 ("The root cause of the fibromyalgia controversy is that reasonable people can argue that fibromyalgia is more a mind/brain disease than a musculoskeletal disease.").

[194] *See* Williams & Gracely*, supra* note 183, at 224 (describing how advances on brain imaging have begun to uncover the neurological markets associated with fibromyalgia).

emergency understanding will be instrumental in bolstering the evidentiary foundation for the final rule and may reflect a significant shift toward legitimization of fibromyalgia as a disabling condition under the SSA framework.[195] Moreover, public comments can enhance administrative legitimacy by highlighting how the proposed revision would address persistent adjudicative inconsistencies. Courts have repeatedly reversed ALJ decisions denying fibromyalgia claims, often citing the SSA's failure to properly evaluate subjective symptoms or to recognize the unique clinical criteria of the condition.[196] These judicial interventions underscore the urgency of a regulatory update and may be echoed in the public commentary by legal scholars, practitioners, and advocacy organizations.

After the close of the comment period, the SSA's proposed rule will be subject to executive branch review, most notably by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB),

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[195] *See generally* Fitzcharles et al., *supra* note 41 (discussing the increasing shift towards fibromyalgia's acceptance as a neurological disorder since the 1990s).

[196] *See Selian v. Astrue*, 708 F.3d 409, 420 (2d Cir. 2013) (explaining that SSA fibromyalgia guidelines are "binding upon SSA's corps of ALJs" to restrict ALJs from going rogue and implementing their own criteria).

and ultimately by the President of the United States.[197] While the SSA functions as an independent agency, its rules are nonetheless reviewed by the executive branch if they are considered “significant” under Executive Order 12866—either because of their economic impact or their implications for public policy.[198] The inclusion of fibromyalgia, with potential effects on disability benefit eligibility and claims volume, would likely meet this threshold.

In the current political climate, such executive review takes on added complexity. President Donald Trump has expressed conflicting priorities: pledging both to protect Social Security benefits and to implement tax cuts, a combination that the Washington Post has noted could “deplete Social Security’s funds sooner than expected, in just six years.”[199] This fiscal tension may influence the pace or scope of SSA rulemaking, particularly where expansions in disability coverage are viewed as imposing new financial pressures on already strained trust

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[197] A GUIDE TO THE RULEMAKING PROCESS, *supra* note 187.

[198] Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,737–38 (Oct. 4, 1993).

[199] Alison Durkee, How Trump Could Affect Social Security and Medicare, FORBES (Nov. 6, 2024), https://www.forbes.com/sites/alisondurkee/2024/11/06/how-trump-could-affect-social-security-and-medicare-group-warns-funds-could-run-out-in-6-years-under-his-plans/.

funds.[200] Consequently, OIRA may scrutinize the economic analysis accompanying the rule, and the SSA must be prepared to defend the long-term cost-effectiveness of addressing fibromyalgia through clearer listings—potentially reducing the need for repeated appeals and judicial review.

In addition to internal executive review, interagency consultation may also be warranted. The Department of Health and Human Services (HHS), whose mission includes supporting medical research and improving public health outcomes, could offer technical expertise regarding the neuroscientific evidence surrounding fibromyalgia.[201] The collaboration would reflect a whole-of-

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[200] *See Office of the Chief Actuary's Estimates of Proposals to Change the Social Security Program or the SSI Program*, SOC. SEC. ADMIN., https://www.ssa.gov/OACT/solvency/ (last visited June 8, 2025) ("Trust Fund reserves would become depleted between 2033 and 2035 under the intermediate set of assumptions….").

[201] *See About HHS*, U.S. DEP'T OF HEALTH & HUM. SERV., https://www.hhs.gov/about/index.html (last visited June 8, 2025) (noting that DHS provides "effective health and human services and by fostering sound, sustained advances in the sciences underlying medicine, public health, and social services.").

government approach to integrating modern medical understanding into federal disability policy.

Following these reviews, the SSA would publish the final rule in the Federal Register.[202] Ideally, the agency would clearly state that the revision is being promulgated under its authority pursuant to 42 U.S.C. § 902(a)(5) and is justified by both emerging scientific consensus and judicial recognition of the administrative challenges posed by fibromyalgia-related claims.[203] Notably, this revision would also remain consistent with the SSA's statutory mandate, even in the wake of *Loper Bright Enterprises v. Raimondo*.[204] While that decision reexamined judicial deference to agency interpretations, it left intact congressionally delegated powers, such as SSA's express authority to define and update the criteria used to determine disability.[205] In sum, the inclusion of fibromyalgia in the SSA's Listing of Impairments would represent not only a legally sound exercise of regulatory authority, but also a medically informed and procedurally efficient response to evolving clinical standards and legal precedent.

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[202] A GUIDE TO THE RULEMAKING PROCESS, *supra* note 187.

[203] *See id.* (describing the requirement to provide justifications for proposed rules).

[204] 144 S.Ct. 2244 (U.S. 2024).

[205] *See generally id.*; *see also* 42 U.S.C. §§ 423(d)(1), 1382c(a).

The proposed rule, if finalized, would enhance predictability for claimants, reduce the burden on courts, and affirm the SSA's commitment to aligning its policies with modern scientific understanding.

### *B. Providing Protection to Fibromyalgia Claims through HALLEX*

A second remedy to address systemic challenges facing fibromyalgia claimants is a revision to the SSA's HALLEX manual.[206] HALLEX is the agency's internal guidance manual that governs procedural guidelines at the appeals level for ALJs, Appeals Council members, and other SSA staff involved in adjudicating claims.[207] While it does not carry the force of law, it is binding on SSA employees and frequently cited in internal decisions and litigation contexts. This remedy would reflect the reasoning adopted in *Arakas*, which held that it is inappropriate for ALJs to discredit subjective symptom testimony solely due to the absence of OME.[208]

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[206] *Procedures for New HALLEX Sections or Updates*, SOC. SEC. ADMIN. (Aug. 5, 2025), https://www.ssa.gov/OP_Home/hallex/I-01/I-1-0-7.html.

[207] *See HA 01105.001 Purpose*, SOC. SEC. ADMIN. (Aug. 5, 2025), https://www.ssa.gov/OP_Home/hallex/I-01/I-1-0-1.html (last visited June 8, 2025).

[208] *Arakas*, 983 F.3d at 97.

To address this issue, the Commissioner could initiate an agency-wide procedural directive clarifying that ALJs may not reject a claimant's symptom testimony solely because it is unsupported by objective evidence, particularly in fibromyalgia cases.[209] Such a revision would not require formal notice-and-comment rulemaking. Instead, it would proceed through internal administrative channels and could be implemented swiftly.[210] The revised provision could be added to HALLEX I-2-8-25, which currently outlines instructions on writing decisions."[211] The added language might read: "When adjudicating cases involving fibromyalgia or similar disorders where objective medical evidence may be limited, ALJs may not discount the claimant's subjective symptom testimony due to the lack of objective medical findings. Instead, adjudicators must evaluate the consistency and credibility of the claimant's reports, considering

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[209] *See, e.g.*, AGENCY STRATEGIC PLAN FISCAL YEARS 2022–2026 (2022), *supra* note 20, at 6 (outlining the SSA's directives to address inequities and increase support for claimants over a four year period).

[210] *See* A GUIDE TO THE RULEMAKING PROCESS (2011), *supra* note 187 (describing how procedural directives are not bound to procedure in the same way that traditional rulemaking is).

[211] *See generally HA 01280.025 Writing the Decision*, SOC. SEC. ADMIN. (May 1, 2017), https://www.ssa.gov/OP_Home/hallex/I-02/I-2-8-25.html.

longitudinal medical history, treatment records, and other probative evidence."[212] This language aligns with SSA's own ruling, SSR 12-2p, which recognizes that objective findings are not required to establish the severity of fibromyalgia symptoms, and it supplements existing HALLEX guidance that ALJs must not rely on personal opinions or unsubstantiated judgments when issuing decisions.[213]

To revise HALLEX, the Commissioner, typically working through the Office of Appellate Operations (OAO), initiates an internal action plan. This plan outlines the basis for the procedural change, explains how it aligns with SSA rulings and federal court precedent, and highlights the operational need to clarify standards and reduce inconsistencies in adjudication.[214] After internal review, the OAO drafts a proposed HALLEX entry and circulates it for feedback from other SSA components, such as the Office of Disability Adjudication and Review (ODAR) and Office of the General Counsel (OGC).[215] Once comments are

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[212] *See id.*

[213] *See id.*; *see also* SSR 12-2p, 77 Fed. Reg. at 43641 (highlighting consistency as an essential factor in evaluating fibromyalgia claims).

[214] *See HA 01105.007 Procedures for New HALLEX Sections or Updates*, SOC. SEC. ADMIN. (Aug. 5, 2025), https://www.ssa.gov/OP_Home/hallex/I-01/I-1-0-7.html.

[215] *See id.*

addressed and revisions are finalized, the proposal is submitted to the Executive Director of OAO or a designated high-level official for final approval.[216] Upon approval, the change is issued in the next HALLEX transmittal and becomes binding on ALJs.[217]

Some critics may argue that such a procedural revision could restrict ALJ discretion and open the door to fraudulent or unsupported claims. However, the proposed HALLEX change does not prevent ALJs from denying claims; it merely ensures they do not rely exclusively on the absence of objective evidence to discount legitimate symptom reports. ALJs would still retain discretion to consider other factors like a claimant's longitudinal medical history, inconsistencies in reported symptoms, and opinions from treating sources that are not well-supported by the record.[218] Updating HALLEX represents a low-cost, high-impact intervention that does not require legislative action or protracted rulemaking. It would promote consistency and fairness in fibromyalgia adjudications, reduce unnecessary appeals, and signal that SSA takes seriously the unique challenges posed by medically contested conditions. Moreover,

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[216] *See* id.

[217] *See id.*

[218] *See* SSR 12-2p, 77 Fed. Reg. at 43641; 20 C.F.R. § 416.920c (highlighting longitudinal medical history as a factor to consider).

implementing this remedy would demonstrate the Commissioner’s willingness to modernize SSA procedure in line with evolving medical consensus and federal court rulings, ensuring that adjudicative standards reflect the realities of invisible and complex chronic illnesses.

## CONCLUSION

Fibromyalgia claimants must navigate one of the most procedurally and evidentially complex paths within the Social Security disability system. Despite increasing medical consensus and federal judicial recognition of fibromyalgia’s legitimacy, the Social Security Administration continues to rely on outdated assumptions that disproportionately disadvantage these claimants. From the persistent reliance on (OME) in conditions that inherently lack such markers, to the structural inefficiencies of the administrative appeals process, fibromyalgia claimants face both systemic disbelief and procedural inertia. This Article has demonstrated that the SSA’s current regulatory and adjudicative framework is ill-equipped to fairly evaluate fibromyalgia claims. While the agency’s 2012 issuance of SSR 12-2p was an important milestone, it remains insufficient without complementary structural reforms.

To rectify these entrenched barriers, this Article proposes two institutional remedies. First, the SSA should revise its Listing of Impairments to include fibromyalgia, categorizing it under the neurological disorders section. This change would reflect the growing body of medical research classifying fibromyalgia as a neurosensory disorder, reduce the need for residual functional capacity assessments, and enhance uniformity in ALJ adjudication. Second, the SSA should revise its HALLEX manual to codify protections against ALJs discrediting subjective symptom testimony in fibromyalgia cases, thereby reinforcing the principles articulated in *Arakas* and promoting consistency across adjudications. These reforms are not merely technical—they carry deep legal and ethical significance. Recognizing fibromyalgia more fully within the SSA's disability determination process would align the agency's practices with evolving clinical science, judicial oversight, and its own regulatory mission. More fundamentally, it would offer procedural dignity and substantive fairness to thousands of Americans whose suffering has too often been met with skepticism instead of support.

In a moment of growing pressure on the Social Security system: fiscally, politically, and administratively, the agency must resist the temptation to sacrifice equity for expediency. Meaningful reform requires not only the updating of listings and internal manuals, but also a broader institutional commitment to recognizing invisible and contested illnesses. The SSA's ability to meet this challenge will signal whether its disability adjudication process remains a living system, capable of adaptation, fairness, and humanity in the face of complexity.