FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN K. BROWN, *Plaintiff-Appellant*, v. KILOLO KIJAKAZI, Acting Commissioner of Social Security, *Defendant-Appellee.*	No. 20-35533 D.C. No. 3:19-cv-05613-MAT ORDER

Appeal from the United States District Court
for the Western District of Washington
Mary Alice Theiler, Magistrate Judge, Presiding

Submitted June 7, 2021[*]
Seattle, Washington

Filed August 30, 2021

Before: William A. Fletcher, Paul J. Watford, and Daniel P. Collins, Circuit Judges.

Order

[*] The panel unanimously concludes this case is suitable for decision without oral argument. *See* FED. R. APP. P. 34(a)(2)(C).

SUMMARY[**]

Social Security

The panel remanded this case to the district court with instructions to remand to the Social Security Administration with instructions to set aside the administrative law judge ("ALJ")'s determination that the claimant was not disabled before April 25, 2018, and to conduct a new disability hearing before a different, and properly appointed ALJ.

Claimant was awarded disability insurance benefits and supplemental security income benefits by an ALJ who concluded that, as of April 25, 2018, claimant was disabled under the Social Security Act. Claimant filed a civil action, pursuant to § 205(g) of the Act, challenging the ALJ's rejection of claimant's claim that he was disabled prior to April 25, 2018. The district court upheld the ALJ's decision.

Claimant contends that the ALJ who conducted his hearings had not been appointed in conformity with the Appointments Clause of the Constitution. The Commissioner of Social Security did not object to a remand for a new hearing before a different ALJ. The panel agreed that, under the circumstances of this case, a remand to the agency for a new hearing was warranted.

The panel rejected the Commissioner's assertion that this court should remand for a new decision on the entirety of claimant's claim, including the decision to award benefits as

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

of April 25, 2018. This proceeding did not arise from a direct appeal from a decision of one or more invalidly appointed officers, nor was it a direct petition for review that might similarly have brought the entirety of the administrative decision before the court. Rather, the statutory procedural vehicle for seeking judicial review of a social security decision is a civil complaint filed in the district court, asserting the statutory cause of action against the Commissioner that is provided in § 205(g) of the Act. The statute does not provide the Commissioner a cause of action to challenge the portions of his own decision that are favorable to the claimant. Given that only the claimant can file an action under § 205(g), the relief requested will necessarily be limited to only those aspects of the case that were unfavorable to the claimant. The complaint in this case asked for review of the ALJ's denial of benefits for the period from September 28, 2013, through April 24, 2018, and specifically added that the finding of disability since April 25, 2018, should not be disturbed. The panel held that it had no authority to set aside, or to disturb, the Commissioner's grant of benefits for the time period on or after April 25, 2018, because that was never placed at issue prior to the entry of judgment below.

COUNSEL

Eitan Kassel Yanich, Law Office of Eitan Kassel Yanich PLLC, Olympia, Washington, for Plaintiff-Appellant.

Brian T. Moran, United States Attorney; Kerry Jane Keefe, Assistant United States Attorney; Mathew W. Pile, Regional Chief Counsel, Seattle Region X; Sarah L. Martin, Assistant Regional Counsel; Office of the General Counsel, Social

Security Administration, Seattle, Washington; for Defendant-Appellee.

ORDER

After two administrative hearings, Appellant Brian Brown was awarded disability insurance benefits and supplemental security income ("SSI") benefits by an Administrative Law Judge ("ALJ"), who concluded that, as of April 25, 2018, Brown was "disabled" within the meaning of §§ 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act ("the Act"). *See* 42 U.S.C. §§ 416(i), 423(d), 1382c(a)(3)(A). But the ALJ rejected Brown's claim that he was disabled prior to April 25, 2018. Brown filed a civil action in the district court challenging the latter determination, pursuant to § 205(g) of the Act. *See* 42 U.S.C. § 405(g); *see also id*. § 1383(c)(3) (denial of SSI benefits is subject to judicial review under § 205(g)). The district court upheld the ALJ's decision, and Brown timely appealed to this court.

In addition to arguing that the ALJ erred in finding that Brown was not disabled before April 25, 2018, Brown has also argued that the ALJ who conducted his hearings had not been appointed in conformity with the Appointments Clause of the Constitution. *See* U.S. Const. art. II, § 2, cl. 2; *see also Carr v. Saul*, 141 S. Ct. 1352 (2021). Brown therefore argued that, as an alternative to granting him relief on the merits, the court should consider remanding the case to the agency "for a new hearing before a different ALJ" who has been appointed in conformity with the Appointments Clause. In response to this argument, the Commissioner has stated that, "[a]s a matter of agency discretion and in the interests of justice, the Commissioner does not object to a

remand of this case for a new hearing before a different ALJ." We agree that, under the circumstances of this case, a remand to the agency for a new hearing is warranted.

The Commissioner asserts, however, that in remanding the case, this court "should remand for a new decision on the entirety of Brown's claim," including the portion of the ALJ's decision that awarded Brown benefits as of April 25, 2018. We reject this suggestion in view of the procedural posture in which this dispute over benefits under the Act is presented to us.

This proceeding does not arise from a direct appeal from a decision of one or more invalidly appointed officers, *see Ryder v. United States*, 515 U.S. 177, 188 (1995), nor is it a direct petition for review that might similarly have brought the entirety of the administrative decision before us, *see Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018). Rather, the statutory procedural vehicle for seeking judicial review of a social security decision is a *civil complaint* filed in the district court, asserting the statutory cause of action against the Commissioner that is provided in § 205(g) of the Act. By its terms, that statute only permits an "individual"—here, the claimant—to challenge a decision of the Commissioner, by filing a "civil action" in the district court. *See* 42 U.S.C. § 405(g). The Commissioner, of course, cannot sue himself, and so the statute does not provide him a cause of action to challenge the portions of his own decision that are favorable to the claimant. Carolyn A. Kubitschek & Jon C. Dubin, Social Security Disability Law and Procedure in Federal Court § 7:6 (2021) ("It should be noted that § 405(g), by its own terms, limits federal court jurisdiction to instances in which the claimant is the plaintiff. The Social Security Administration may not appeal [to a district court] from a decision in favor of the claimant."). Moreover, like any

complaint in a civil action, a complaint filed by a social security claimant asserting a claim under § 205(g) must set forth the relief requested. *See* Fed. R. Civ. P. 8(a)(3); *see also* Fed. R. Civ. P. 1, 81; *cf.* W.D. Wash. Gen. Ord. 05-15 (June 1, 2015) (exempting Commissioner, in a proceeding brought "pursuant to 42 U.S.C. § 405(g)," from the need to file a separate "Answer" to a "complaint" beyond the filing of the certified administrative record). Given that only the claimant (or, perhaps, the claimant's representative) can file an action under § 205(g), the relief requested in any such complaint will necessarily be limited to only those aspects of the case that are unfavorable to the claimant. Thus, unsurprisingly, the complaint in this case asked the district court to "review[], reverse[], and set aside" the ALJ's denial of "disability benefits for the time period of September 28, 2013 through April 24, 2018," and the complaint specifically added that "the finding of disability since April 25, 2018 should not be disturbed."

As the appeal in this civil action comes to us, therefore, the *only* question is whether Brown should be granted the relief he requests, which is to set aside the determination that he was not disabled before April 25, 2018. We have no authority to set aside, or to disturb, the Commissioner's grant of benefits for the time period on or after April 25, 2018, because that was never placed at issue prior to the entry of judgment below. *Cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975) (relief outside the pleadings should not be granted where opposing party lacked notice and would be prejudiced). We therefore cannot enter an order, as the Government requests, directing that the entirety of the decision be redetermined. To do so would, in effect, assert and grant a form of counterclaim or cross-claim on the Government's behalf, and the Government has not identified any authority that would allow us to do that.

Accordingly, we remand this case to the district court with instructions to remand to the agency with instructions to set aside the ALJ's determination that Brown was not disabled before April 25, 2018, and to conduct a new hearing on that issue before a different, and properly appointed, ALJ.

REMANDED.