FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN J. CODY, *Plaintiff-Appellant*, v. KILOLO KIJAKAZI, Acting Commissioner of Social Security, *Defendant-Appellee.*	No. 21-35553 D.C. No. 3:20-cv-05390-JRC OPINION

Appeal from the United States District Court
for the Western District of Washington
J. Richard Creatura, Magistrate Judge, Presiding

Argued and Submitted July 8, 2022
Seattle, Washington

Filed September 8, 2022

Before: Michael Daly Hawkins and Patrick J. Bumatay, Circuit Judges, and Barry Ted Moskowitz,[*] District Judge.

Opinion by Judge Bumatay

[*] The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

SUMMARY[**]

Appointments Clause / Social Security

Because the administrative law judge's decision was tainted by a prior Appointments Clause violation, the panel vacated the district court's decision affirming the Commissioner of Social Security's denial of claimant's application for benefits under the Social Security Act, and remanded with instructions to the Commissioner to assign the case to a different, validly appointed ALJ to rehear and adjudicate claimant's case de novo.

A Social Security Administration ALJ, appointed by agency staff rather than by the Commissioner as required, reviewed and denied claimant's initial claims. Without challenging the ALJ's appointment, the claimant appealed to the district court and prevailed in part. The district court vacated the 2017 ALJ decision and ordered a new hearing because the ALJ failed to properly consider certain evidence. The case returned to the same ALJ, who by then had been properly ratified by the Acting Commissioner. In a 2019 decision, the ALJ again denied benefits, and claimant appealed to the district court, raising the issue of an Appointments Clause violation. The district court affirmed the ALJ decision and denied the Appointments Clause claim because the 2017 decision had been vacated and the ALJ was properly appointed when she issued the 2019 decision.

In *Lucia v. SEC*, 138 S. Ct. 2044, 2049, 2052–55 (2018), the Supreme Court held that Securities & Exchange

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

Commission ALJs were not mere government employees, but rather "Officers" of the United States, and as a result, their appointments must follow the Appointments Clause.

The panel held that under *Lucia*, the claimant was entitled to a new hearing before a different ALJ. At the time the ALJ issued the 2017 decision, she was not a properly appointed Officer of the United States under the Appointments Clause. By the time the same ALJ reheard and issued the 2019 decision, the Acting Commissioner had ratified the ALJ's appointment. The panel held that because the same ALJ issued both decisions, the claimant did not receive what *Lucia* required: an adjudication untainted by an Appointments Clause violation. The panel rejected SSA's argument that no new ALJ decision was required because the claimant failed to timely raise a challenge to the pre-ratification 2017 decision. Claimant's challenge was not to the 2017 decision, but to the 2019 decision, which was tainted by the 2017 decision. The panel concluded that claimants are entitled to an independent decision issued by a different ALJ if a timely challenged ALJ decision is tainted by a pre-ratification ALJ decision.

COUNSEL

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OPINION

BUMATAY, Circuit Judge:

We face the novel question of whether an administrative law judge ("ALJ") appointed in violation of the Appointments Clause can continue to decide a case after being ratified by a constitutionally authorized official. Here, a Social Security Administration ("SSA") ALJ was appointed by agency staff rather than by the Commissioner as required by the Appointments Clause. That ALJ reviewed and denied Brian Cody's disability claims. Without challenging the ALJ's appointment, Cody appealed his case to federal district court and prevailed in part. The district court vacated the ALJ decision and ordered a new hearing because the ALJ failed to properly consider certain evidence.

Cody's case then went back to the same ALJ, who by then had been properly ratified by the SSA Acting Commissioner. Unsurprisingly, the ALJ reached the same conclusion—no benefits. She addressed the evidence mandated by the district court, but still ruled against Cody. Cody again appealed to federal court, this time raising the Appointments Clause violation.

Must the second decision stand since the ALJ was properly appointed at the time? Or is Cody entitled to relief for the pre-ratification constitutional violation? Based on recent Appointments Clause precedents, we conclude the second decision was tainted by the first, and Cody must receive a new decision from a different ALJ. We thus vacate

the district court decision and remand the case to the Commissioner for a hearing before a new ALJ.[1]

I.

In 2014, Brian Cody applied for Social Security disability insurance and supplemental security income benefits. Cody claimed a disability based on his mental and physical limitations. After his applications were initially denied, the SSA assigned ALJ Marilyn Mauer to his case. ALJ Mauer held a hearing on Cody's matter in December 2016 and another in July 2017. In a September 2017 decision, ALJ Mauer found Cody not disabled and denied his applications for benefits. At the time of the hearings and the September 2017 decision, it is undisputed that ALJ Mauer was appointed by lower-level SSA staff and not by the SSA Commissioner.

In her decision, ALJ Mauer determined that Cody had major depressive disorder and social anxiety disorder but retained the ability to perform a full range of work with limitations. In reaching her decision, ALJ Mauer discounted Cody's testimony on his subjective symptoms as inconsistent with the overall record, and only partially relied on the opinions of several mental health professionals. For example, she gave "limited weight" to the opinions of Tasmyn Bowes, Terilee Wingate, and Kristyn Abbott. She also summarized the evidence from nurse practitioner Nancy Armstrong but did not assign a weight to it. Cody appealed

[1] Because we vacate and remand for a new hearing based on an Appointments Clause violation, we do not address Cody's challenge to the merits of the ALJ decision.

the ALJ decision to the SSA Appeals Council, which denied the appeal in July 2018.

Meanwhile, in June 2018, the Supreme Court decided *Lucia v. SEC*, 138 S. Ct. 2044 (2018). In that case, the Court ruled that Securities & Exchange Commission ALJs are "Officers of the United States," whose appointments must comply with the requirements of the Appointments Clause. *Id.* at 2049, 2051. Since the ALJ at issue ruled "without the kind of appointment the Clause requires," the Court said that Lucia was entitled to a new hearing before a different ALJ. *Id.* at 2055.

Weeks later, on July 16, 2018, the Acting Commissioner responded to *Lucia* by "preemptively" addressing any Appointments Clause questions involving Social Security claims. She ratified the appointments of all SSA ALJs and "approved those appointments as her own." 84 Fed. Reg. 9582-02, 9583 (2019). Then in March 2019, the SSA announced that, in response to timely raised Appointments Clause challenges, the Appeals Council would vacate pre-ratification ALJ decisions and assign a different, properly appointed adjudicator to conduct a fresh review of each case. *See id.* (explaining that the SSA will assign "an ALJ other than the ALJ who issued the decision under review").

Shortly after *Lucia*, back in September 2018, Cody appealed the 2017 ALJ decision to federal district court. Cody did not raise an Appointments Clause claim; he argued only that ALJ Mauer erred by discounting certain mental health evidence as well as his own testimony. The district court affirmed ALJ Mauer's weighing of the evidence from Bowes, Wingate, Abbott, and Cody himself. But it reversed on the limited ground that ALJ Mauer failed to properly address and assign a weight to the Armstrong evidence. The district court then remanded the case to the SSA for it to

reconsider the Armstrong evidence, develop the record, and proceed as necessary. On remand, in June 2019, the Appeals Council vacated the 2017 decision and directed that Cody receive a new hearing before ALJ Mauer.

ALJ Mauer—now ratified by the Acting Commissioner—held a hearing in October 2019 and again ruled Cody not disabled in a December 2019 decision. This time, besides the other impairments, ALJ Mauer determined that Cody had lumbar degenerative disc disease, but remained able to perform a reduced range of light work with limitations like those in the 2017 decision. She also addressed Armstrong's opinion, giving it "no weight," and largely reiterated her earlier findings. She continued to give limited weight to the opinions of Bowes, Wingate, and Abbott, and again discounted Cody's testimony about his subjective symptoms.

In April 2020, Cody appealed the 2019 decision to federal court, raising both merits and Appointments Clause challenges. The district court affirmed the ALJ decision on all grounds. It denied the Appointments Clause claim because the 2017 decision had been vacated and ALJ Mauer was properly appointed when she issued the 2019 decision.

Cody now appeals from that ruling. We review the district court's decision de novo. *Lambert v. Saul*, 980 F.3d 1266, 1270 (9th Cir. 2020).

II.

A.

The Appointments Clause specifies the exclusive ways of appointing "Officers of the United States." The President "shall nominate, and by and with the Advice and Consent of

the Senate, shall appoint . . . Officers of the United States." U.S. Const. art. II, § 2, cl. 2. But the Clause also provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* So as a straightforward textual matter, only the "President," "Courts of Law," or "Heads of Departments" may appoint "inferior Officers."

The Appointments Clause is a key component of the Constitution's structural design. It acts not only as a "bulwark against one branch aggrandizing its power at the expense of another branch" but also "preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Ryder v. United States*, 515 U.S. 177, 182 (1995) (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991)). It operates as a check on the legislative branch, by "prevent[ing] Congress from dispensing [the] power [to appoint] too freely." *Freytag*, 501 U.S. at 880. The Clause also provides a "limiting principle" on executive appointments and so does not always "serve the Executive's interest." *Id.* In other words, "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Id.*

An Appointments Clause violation is thus no mere technicality or quaint formality—it weakens our constitutional design. An appointment too far removed from the President or the head of an executive agency may, for example, erode political accountability. For it is the President who alone answers to the entire nation for his actions and for the actions of his agency heads. *See Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020) ("[T]he Framers made the President the most

democratic and politically accountable official in Government."). And if the appointment power were handed-out to unelected and insulated lower-level officials, accountability would be lost in the nameless bureaucracy.

Given its importance within our Constitution's structure, the Supreme Court has established remedies with bite for Appointments Clause violations. *See Lucia*, 138 S. Ct. at 2055. In *Lucia*, the Court ruled that Securities & Exchange Commission ALJs were not mere government employees, but rather "Officers" of the United States. *Id.* at 2049, 2055. That's because ALJs exercise "significant discretion" in carrying out "important functions" and often serve as the "last[] word" for the agency. *Id.* at 2052–55 (simplified). As a result, their appointments must follow the Appointments Clause. And since the ALJ at issue was appointed by SEC staff rather than the SEC Commissioner, he was not properly appointed. *Id.* at 2051, 2055.

The Court then turned to the "relief [that] follows" from a timely raised Appointments Clause violation. *Id.* at 2055. In its view, "the appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed official." *Id.* (simplified). The Court then went a step further, specifying that the new hearing *cannot* be conducted by the same ALJ who decided the prior matter—"even if he has by now received (or receives sometime in the future) a constitutional appointment." *Id.* That's because an ALJ who has already heard a case and issued a decision on the merits "cannot be expected to consider the matter as though he had not adjudicated it before." *Id.* So "[t]o cure the constitutional error," the Court concluded that a different ALJ must hold a new hearing. *Id.*

Lucia observed that this remedy advances two purposes. Not only does the remand before a new ALJ reinforce the "structural purposes" of the Appointments Clause directly, it also seeks to "create incentives to raise Appointments Clause challenges." *Id.* at 2055 n.5 (simplified). And that goal of encouraging Appointments Clauses challenges is "best accomplish[ed] . . . by providing a successful litigant with a hearing before a new judge." *Id.* That's because "the old judge would have no reason to think he did anything wrong on the merits," and so on reassignment, the judge would likely "reach all the same judgments." *Id.*

Lucia was a watershed decision that created new issues and questions for federal agencies. Shortly after the decision, the SSA recognized that the appointments of its ALJs were constitutionally suspect under the Appointments Clause, and so the Acting Commissioner ratified their appointments and "approved those appointments as her own." *See* 84 Fed. Reg. at 9583. The SSA also acknowledged that "[c]hallenges to an ALJ's authority to decide a claim may raise a broadly applicable procedural issue independent of the merits of the individual claim for benefits." *Id.* It then issued a ruling directing the Appeals Council, upon timely challenge, to vacate any pre-ratification ALJ decision and remand the case to a different ALJ for a "new, independent decision." *Id.* at 9584. The SSA only offered that relief to claimants who exhausted the claim administratively. *Id.* at 9583.

The SSA's administrative exhaustion requirement prompted the Court to take up another Appointments Clause case. *See Carr v. Saul*, 141 S. Ct. 1352 (2021). In *Carr*, the Court addressed whether claimants needed to raise their Appointments Clause challenge before the SSA to avoid forfeiture. There, the SSA essentially conceded that its ALJs

were improperly appointed, but it argued that claimants had to first raise the Appointments Clause issue before the ALJ to receive any relief. *Id.* at 1357. The Court disagreed. It first concluded that agency adjudications are "generally ill suited to address structural constitutional challenges," like an Appointments Clause claim. *Id.* at 1360. And to the Court, it "ma[de] little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested." *Id.* at 1361. Indeed, "ALJs [are not] capable of remedying any defects in their own appointments," and so it's unnecessary to bring Appointments Clause claims before ALJs. *Id.* Thus, the Court held, for an Appointments Clause challenge to be "timely," claimants need only raise the issue "for the first time in federal court." *Id.* at 1362.

B.

Under *Lucia*, Cody is entitled to a new hearing before a different ALJ. At the time ALJ Mauer issued the 2017 decision, she was not a properly appointed "Officer[] of the United States" under the Appointments Clause. Rather than being appointed by a "Head of Department[]" as the Constitution requires, ALJ Mauer was instead appointed by lower-level SSA staff. Even though a district court vacated the 2017 decision, it was ALJ Mauer who again reheard and issued the 2019 decision on remand. True enough, at that point, the Acting Commissioner had properly ratified ALJ Mauer's appointment. But because the same ALJ issued both decisions, Cody did not receive what *Lucia* requires: an adjudication untainted by an Appointments Clause violation. *See Lucia*, 138 S. Ct. at 2055.

Requiring a remand and hearing before a new ALJ here supports the two remedial aims identified by *Lucia*. First, a rehearing before a new ALJ promotes the "structural purposes" of the Appointments Clause by ensuring only a

properly appointed Officer takes part in deciding Cody's case. *See id.* at 2055 n.5. By ordering a review untouched by ALJ Mauer, we guard against "the diffusion of the appointment power," *Freytag*, 501 U.S. at 878, by penalizing an agency's circumvention of the Appointments Clause.

Second, a rehearing before a different ALJ would encourage claimants to raise Appointments Clause violations to the courts' attention. *See Lucia*, 138 S. Ct. at 2055 n.5. Without a remand to a new ALJ, claimants like Cody would see little benefit in defending the constitutional requirement. Indeed, in the post-ratification 2019 decision, the ALJ reached "all the same judgments," *id.*, as in the pre-ratification 2017 decision. Only with reassignment to a new, independent ALJ will Cody receive a fresh look and "the new hearing to which [he] is entitled." *Id.* at 2055.

Despite the Clause's violation, the SSA argues that no new ALJ decision is required because Cody failed to timely raise a challenge to the pre-ratification 2017 decision. But the SSA misunderstands Cody's claim. He challenges—not the now-vacated 2017 decision—but the ALJ's post-ratification 2019 decision. As *Lucia* makes clear, claimants are entitled to relief from any "adjudication *tainted* with an appointments violation." *Id.* at 2055 (emphasis added).

Here, it's obvious that the 2017 decision tainted the post-ratification 2019 decision. In both decisions, ALJ Mauer denied Cody benefits because he retained the ability to perform a range of work with some limitations. In both decisions, ALJ Mauer discounted Cody's testimony about his subjective symptoms. And in both decisions, ALJ Mauer gave limited weight to the opinions of several mental health professionals, including Bowes, Wingate, and Abbott. Of course, there were some differences between the decisions.

In the 2019 decision, ALJ Mauer gave a more thorough explanation of her analysis of Armstrong's opinion, as required by court order. ALJ Mauer also credited Cody's back impairment as being severe in 2019 when she did not do so in 2017.

But ALJ Mauer copied verbatim parts of the 2017 decision into her 2019 decision. For example, in her 2017 decision, ALJ Mauer wrote that Cody's testimony on his physical limitations were not supported by the evidence because he "underwent minimal conservative treatment for his back pain;" "reported improvement with zero pain after only three sessions of physical therapy and elected not to complete the recommended course of physical therapy thereafter;" and "although he ambulated with a slightly antalgic gait during a consultative examination, other clinicians observed that the claimant had no difficulties ambulating normally." Then in the 2019 decision, ALJ Mauer reached the same conclusion and lifted those exact sentences—word for word—into the 2019 decision. ALJ Mauer also copied parts of her 2017 analysis of the various mental health opinions and pasted them in the 2019 decision. So it's clear ALJ Mauer didn't take a fresh look at the case in 2019—one that was independent of her 2017 decision.

And *Carr* confirms that Cody was not required to first raise the Appointments Clause claim before the SSA so long as he raised the constitutional challenge before the district court in the first instance. *See Carr*, 141 S. Ct. at 1362. Cody did just that when he pressed the Appointments Clause claim before the district court when appealing the tainted 2019 decision.

We thus hold that claimants are entitled to an independent decision issued by a different ALJ if a timely challenged ALJ decision is "tainted" by a pre-ratification

ALJ decision. In this case, that means that Cody must receive a new decision by a different ALJ because ALJ Mauer issued both the 2017 and 2019 decisions.

III.

For these reasons, we vacate the district court decision and remand with instructions to return the case to the Commissioner. The Commissioner should then assign a *different*, validly appointed ALJ to rehear and adjudicate Cody's case de novo.

VACATED AND REMANDED.