

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

<p>CARYN JANECKY MONTGOMERY) Plaintiff,))) v.) CIVIL ACTION NO. 18-00013-N)) NANCY A. BERRYHILL,) ACTING COMMISSIONER OF) SOCIAL SECURITY,) Defendant.)</p>		
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ORDER

This action is before the Court on the Motion for Order of Remand (Doc. 18) filed by Plaintiff Caryn Janecky Montgomery. The Defendant Commissioner of Social Security (“the Commissioner”) has timely filed a response (Doc. 24-1 at 12 – 19) in opposition to the motion, and Montgomery has timely filed a reply (Doc. 26) to the response. The motion is now under submission.

Montgomery’s present motion asserts that her case must be remanded to the Commissioner for a new hearing because the Administrative Law Judge who issued an unfavorable decision on her application for Social Security benefits should be considered an “Officer of the United States” who was not properly appointed in accordance with the Appointments Clause of Article II, Section 2 of the United States constitution, based on the reasoning in the United States Supreme Court’s recent decision *Lucia v. SEC*, 138 S. Ct. 2044 (2018). In response, the Commissioner argues that Montgomery forfeited this claim by failing to raise it at

the administrative level.¹ In reply, Montgomery, while conceding that she did not raise her Appointments Clause challenge at the administrative level, argues that she was not required to do so in order to preserve that claim for judicial review, and alternatively that the Court should exercise its discretion to excuse any forfeiture of the claim.

For the reasons stated in *Abbington v. Berryhill*, No. CV 1:17-00552-N, 2018 WL 6571208 (S.D. Ala. Dec. 13, 2018), the Court finds that Montgomery has forfeited her Appointments Clause challenge by failing to first raise it before the Social Security Administration, and Montgomery has not shown sufficient cause to excuse the forfeiture. Accordingly, Montgomery's Motion for Order of Remand (Doc. 18) is **DENIED**.²

DONE and ORDERED this the 14th day of December 2018.

/s/ Katherine P. Nelson
KATHERINE P. NELSON
UNITED STATES MAGISTRATE JUDGE

¹ The Commissioner expressly declines to argue whether Social Security ALJs are "Officers of the United States" subject to the Appointments Clause (*see* Doc. 24-1 at 12 n.2), and the Court expresses no opinion on that issue.

² With the consent of the parties, the Court has designated the undersigned Magistrate Judge to conduct all proceedings in this civil action, in accordance with 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and S.D. Ala. GenLR 73. (*See* Docs. 19, 20).