

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARY BETH KAIS,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

1:18-cv-10686-NLH

**MEMORANDUM
OPINION & ORDER**

APPEARANCES :

ALAN H. POLONSKY
POLONSKY AND POLONSKY
512 S WHITE HORSE PIKE
AUDUBON, NJ 08106

On behalf of Plaintiff

EDA GIUSTI
SOCIAL SECURITY ADMINISTRATION
OFFICE OF THE GENERAL COUNSEL
300 SPRING GARDEN STREET
6TH FLOOR
PHILADELPHIA, PA 19123

On behalf of Defendant

HILLMAN, District Judge

WHEREAS, this matter comes before the Court pursuant to Section 205(g) of the Social Security Act, as amended, 42 U.S.C. § 405(g), regarding Defendant's denial of Plaintiff's application for Disability Insurance Benefits ("DIB") under Title II of the Social Security Act, 42 U.S.C. § 423, et seq.;

and

WHEREAS, on June 21, 2018, in Lucia v. SEC, 138 S. Ct. 2044 (2018), the U.S. Supreme Court held that Securities and Exchange Commission administrative law judges (ALJs) are inferior officers under the Constitution's Appointments Clause, and one of Plaintiff's bases for appeal is that the ALJ who heard his case before the Agency was not properly appointed under the Appointments Clause and that he is therefore entitled to remand to a properly appointed ALJ; and

WHEREAS, even though Plaintiff did not raise this challenge at the administrative level (hereinafter referred to as a "Lucia challenge"), on January 23, 2020, the Third Circuit Court of Appeals held in Cirko v. Commissioner of Social Security, 948 F.3d 148 (3d Cir. 2020) that a Social Security litigant need not administratively exhaust an Appointments Clause claim before raising it in federal court;¹ and

WHEREAS, after the Third Circuit issued its decision in Cirko,² Defendant represented in a "status update" the following:

¹ On March 26, 2020, the Third Circuit denied Defendant's petition for a rehearing *en banc*. As set forth below, Defendant did not seek further review of the Third Circuit's decision in Cirko.

² The Chief Judge for the District of New Jersey had entered a stay order in all pending social security appeal cases that asserted a Lucia challenge pending the Third Circuit's decision in Cirko. (Docket No. 13.) Once the Third Circuit issued its decision, the stay was lifted. (Docket No. 14.)

After conferring with the Department of Justice and the Solicitor General, the Commissioner has determined that it will not seek Supreme Court review of the Third Circuit's Cirko decision.

The Commissioner does not contend that Cirko does not apply to this case.

(Docket No. 16);

THEREFORE,

IT IS on this 15th day of December, 2020

ORDERED that within 15 days of today, Defendant shall show cause as to why pursuant to Cirko v. Commissioner of Social Security, 948 F.3d 148 (3d Cir. 2020) the ALJ's decision should not be reversed and the matter remanded for a new hearing before a properly appointed ALJ under the Appointments Clause.

At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.