Social Security Disability Benefits: Subject Matter Jurisdiction for Procedural Challenge

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I. Introduction

Hundreds of thousands of people have lost or been denied Social Security Disability Insurance and Supplemental Security Income disability benefits (SSDI) in the last few years, as the Reagan Administration has endeavored to clear the disability rolls of people who are not disabled. In response, tens of thousands of actions have been filed by individual SSD claimants, as well as hundreds of class actions, challenging the legality of the denial and termination procedures utilized by the Secretary of Health and Human Services.

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1. The definition of disability is similar for disability determinations under Social Security Disability Insurance, Title II of the Social Security Act, 42 U.S.C. § 416(i) (1982), and under Supplemental Security Income, Title XVI of the Social Security Act, 42 U.S.C. § 1382(c) (1982). This Comment will not distinguish between the two.


3. Procedural challenges to both termination decisions and denial of initial applications seek to invalidate the Social Security Administration's (SSA) methods of determining whether claimants' disabilities are covered by the Social Security Act. Plaintiffs in such challenges allege that the SSA has violated the Constitution, statutes or the SSA's regulations in reaching the unfavorable decision. See, e.g., Schisler v. Heckler, 107 F.R.D. 609 (W.D.N.Y. 1984), appeal docketed, No. 85-6092/6096 (2d Cir. Mar. 20, 1985) (Secretary's abandonment of standard of "medical improvement" before terminating benefits violates due process clause, Social Security Act and SSA regulations); Dixon v. Heckler, 589 F. Supp. 1494 (S.D.N.Y. 1984), appeal docketed, No. 84-6288 (2d Cir. Sept. 25, 1984) (Secretary's "severity" standard for determining disability violates Social Security Act).

These actions raise the crucial threshold question of whether federal courts have jurisdiction in the absence of timely exhaustion of administrative remedies. To resolve this issue, courts balance the claimant's need for judicial review against the Secretary's interest in completing administrative review. In balancing these interests, courts address the separation of powers between the judiciary and the Social Security Administration.5

The Social Security Act, § 405(g)6, provides federal courts with subject matter jurisdiction, permitting SSD claimants to challenge "final" decisions of the Secretary regarding entitlement to benefits.7 The Secretary's regulations establish four stages of administrative review for reaching a "final" decision8 and require the claimant to

This legislation was designed to resolve the "chaos" plaguing the administration of SSD, as courts consistently held that the Secretary's procedures violated the Social Security Act. See comments of Representatives and Senators in support of the bill, 130 CONG. REC. H9834-37, S11453-64 (daily ed. Sept. 19, 1984).

5. The separation of powers principle posits that separate branches of government, i.e. the legislature, executive and judiciary, should perform the distinct tasks of legislation, administration and adjudication, respectively. This approach recognizes that these tasks overlap and therefore permits the delegation of powers among the branches. See, e.g., Aranson, Gellhorn and Robinson, A Theory of Legislative Delegation, 68 CORNELL L. REV. 1, 3-4 (1982). Under a separation of powers approach, administrative agencies of the executive branch are authorized to implement and interpret the laws, while the complementary, distinct role of the courts is to resolve disputes by stating what the law is, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and by ensuring that administrative agencies obey constitutional and statutory mandates. See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.09, at 68-69 (1958); Note, Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers, 97 HARV. L. REV. 778 (1984). But cf., J. MASHAW, BUREAUCRATIC JUSTICE 193 (1983) (courts unsuited to administrative adjudication).

6. Section 205(g) of the Social Security Act, Title 42 U.S.C. § 405(g) (1982) reads in pertinent part: Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Section 2(d) of the Reform Act exempts from the requirement of timely exhaustion those class actions initiated before passage of the bill in which claimants alleged that the Secretary did not consider medical improvement in terminating disability. Section 2(d) of the Reform Act explicitly left to district courts the task of defining the scope of class actions in medical improvement cases for claimants whose benefits were terminated. This provision therefore immunizes these lawsuits from the jurisdictional bars contained in § 405(g), specifically exhaustion of administrative remedies within sixty days of the mailing of notice. See Kuehner v. Heckler, No. 85-1227, slip. op. at 15, 21 (3d Cir. Dec. 9, 1985); Avery v. Heckler, 762 F.2d 158, 163 (1st Cir. 1985). See also H.R. REP. No. 1039, 98th Cong., 2d Sess. 27 (1984); 130 CONG. REC. S11454 (daily ed. Sept. 19, 1984) (remarks of Senator Dole). However, other claims raised within the same class actions, e.g. allegations of improper determinations of disability for initial applications for benefits, are not so exempted. See Hyatt v. Heckler, 757 F.2d 1455, 1460 (4th Cir. 1985), petition for cert. filed, 54 U.S.L.W. 3229 (U.S. Sept. 19, 1985) (No. 85-474).

7. Section 405(g) of the Social Security Act is the basis for the judicial holding that timely exhaustion of administrative remedies is a prerequisite for subject matter jurisdiction. Mathews v. Eldridge, 424 U.S. 319, 327 (1976). Section 2(d) of the Reform Act exempts from the requirement of timely exhaustion those class actions initiated before passage of the bill in which claimants alleged that the Secretary did not consider medical improvement in terminating disability. Section 2(d) of the Reform Act explicitly left to district courts the task of defining the scope of class actions in medical improvement cases for claimants whose benefits were terminated. This provision therefore immunizes these lawsuits from the jurisdictional bars contained in § 405(g), specifically exhaustion of administrative remedies within sixty days of the mailing of notice. See Kuehner v. Heckler, No. 85-1227, slip. op. at 15, 21 (3d Cir. Dec. 9, 1985); Avery v. Heckler, 762 F.2d 158, 163 (1st Cir. 1985). See also H.R. REP. No. 1039, 98th Cong., 2d Sess. 27 (1984); 130 CONG. REC. S11454 (daily ed. Sept. 19, 1984) (remarks of Senator Dole). However, other claims raised within the same class actions, e.g. allegations of improper determinations of disability for initial applications for benefits, are not so exempted. See Hyatt v. Heckler, 757 F.2d 1455, 1460 (4th Cir. 1985), petition for cert. filed, 54 U.S.L.W. 3229 (U.S. Sept. 19, 1985) (No. 85-474).

8. First, an individual applies to begin or continue receiving benefits. If the individ-
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appeal each unfavorable administrative decision within sixty days of the mailing of notice to the claimant.9

Many claimants who are denied benefits due to the Secretary's utilization of allegedly illegal procedures do not pursue the available administrative appeals.10 Some file challenges in district court instead of exhausting administrative remedies. Others drop out of the appeals process, failing to challenge the Secretary's decision, but may be drawn into litigation as unnamed plaintiffs. Claimants who do not exhaust administrative remedies and/or are time-barred from pursuing administrative appeals cannot obtain judicial review under § 405(g), unless courts waive the exhaustion and/or sixty-day requirements.11

The Supreme Court is currently reviewing waiver of administrative exhaustion and the sixty-day rule by lower courts in *Heckler v. City of New York*,12 a case challenging the Secretary's determinations of the ability of mentally impaired claimants to perform basic work activities. In *City of New York*, the Secretary had circulated memos throughout the agency which required administrators at the first two stages of administrative review to follow an unpublished procedure for determining claimants' ability to work. The district court held that the unpublished procedure constituted a "covert policy" which violated both the Social Security Act and the agency

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regulations by denying claimants an individualized assessment of their capacity to work.\textsuperscript{13} The court waived both exhaustion and the sixty-day rule in certifying a plaintiff class of more than 50,000 claimants suffering from severe mental illnesses. The court awarded interim benefits to plaintiffs whose benefits had been terminated, the interim benefits to be paid until the Secretary issued procedurally correct decisions. While the Secretary did not appeal the district court's ruling on the merits,\textsuperscript{14} she contested the district court's jurisdiction over most members of the class. The Second Circuit affirmed jurisdiction under § 405(g), waiving the exhaustion and sixty-day requirements.\textsuperscript{15} The Supreme Court has granted certiorari to evaluate the grant of subject matter jurisdiction.\textsuperscript{16}

This Comment examines the validity of waiving exhaustion of administrative remedies and the sixty-day rule in City of New York, summarizing prior case law with a view toward resolving inconsistencies and ambiguities. Part I contrasts the establishment of prerequisites for waiver of exhaustion in Mathews v. Eldridge\textsuperscript{17} with the denial of waiver in the recent Supreme Court case, Heckler v. Ringer.\textsuperscript{18} A critique of Ringer is offered along with the suggestion that courts adhere to the analysis set forth in Eldridge.\textsuperscript{19} Part II discusses waiver of

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\item[13] Regulations require administrators to assess the ability of mentally impaired claimants to handle the stresses of the workplace, to understand instructions, and to respond appropriately to supervisors and co-workers. 20 C.F.R. §§ 404.1545(c), 416.945(c) (1985). See Rubenstein, SSA Issues New Rules Governing Mental Impairment Claims, 19 CLEARINGHOUSE REV. 715, 722 (1985); Weinstein, supra note 2, at 919.
\item[14] The Secretary abandoned the unpublished policy after suit was filed in the district court. The discontinuation of this policy also followed the issuance of a preliminary injunction in Mental Health Ass'n of Minnesota v. Schweiker, 554 F. Supp. 157 (D. Minn. 1982), aff'd, 720 F.2d 965 (8th Cir. 1983), which declared the challenged policy illegal.
\item[15] 742 F.2d at 736-38. The Second Circuit found mandamus jurisdiction under 28 U.S.C. § 1361 as an alternate source of jurisdiction. \textit{Id.} at 739. The Second Circuit also affirmed the award of interim benefits. \textit{Id.} at 740. The Secretary's appeal to the Supreme Court, does not challenge the remedial decree.
\item[16] The appeal to the Supreme Court also challenges the award of mandamus jurisdiction as an alternative source of jurisdiction. 54 U.S.L.W. 3193 (U.S. Oct. 8, 1985) (No. 84-1923). Many courts have granted mandamus jurisdiction when the Secretary's procedures violated a nondiscretionary duty owed to claimants and no other remedy was available. \textit{See, e.g.,} Ganem v. Heckler, 746 F.2d 844 (D.C. Cir. 1984); Kuehner v. Schweiker, 717 F.2d 813, 819 (3d Cir. 1983), \textit{remanded on other grounds}, 105 S. Ct. 376 (1984); Dietsch v. Schweiker, 700 F.2d 865 (2d Cir. 1983); Belles v. Schweiker, 720 F.2d 509 (8th Cir. 1983); Ellis v. Blum, 643 F.2d 68 (2d Cir. 1981); Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973). \textit{ Cf.} Hyatt v. Heckler, 757 F.2d 1455, 1461 (4th Cir. 1985) (mandamus jurisdiction denied because criteria not met).
\item[17] 424 U.S. 310, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).
\item[19] Circuit courts have split in their application of Ringer to SSD cases. The Fourth Circuit held that Ringer limits the availability of waiver of exhaustion for procedural challenges, compelling the denial of waiver in the case at bar. \textit{Hyatt}, 757 F.2d at 1460; \textit{accord}
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the sixty-day limitation in the context of equitable tolling of other statutory limitations on the filing of claims. This Comment argues that equitable tolling should be applied to the sixty-day rule when the Secretary’s secretive policies violate the Constitution, statutes or regulations.

I. Waiver of Exhaustion of Administrative Remedies

A. The Prerequisites for Waiver: The Eldridge Test

Mathews v. Eldridge held that courts may waive the exhaustion requirement of §405(g), against the Secretary’s wishes, “where

Johnson v. Heckler, 776 F.2d 166, 167-68 (7th Cir. 1985) (Easterbrook, J., dissenting from denial of rehearing en banc.) The Second, Seventh, Eighth and Tenth Circuits distinguished Ringer, finding that it did not preclude waiver in the cases they reviewed. Johnson v. Heckler, 769 F.2d 1202, 1208 (7th Cir. 1985); Reed v. Heckler, 756 F.2d 779, 785 (10th Cir. 1985); Polaski v. Heckler, 751 F.2d 943, 951 (8th Cir. 1984); City of New York, 742 F.2d at 737-38.

20. This Comment does not address the issue of whether the Secretary is exempt from waiver of the statute of limitations due to the government’s sovereign immunity from suit.

21. Circuit courts have disagreed in their decisions regarding whether the 60-day rule may be waived, and if so, the circumstances under which waiver is permitted. The Fourth and Sixth Circuits held that the 60-day requirement is jurisdictional and cannot be waived. Hunt v. Schweiker, 685 F.2d 121, 122 (4th Cir. 1982); Biron v. Harris, 668 F.2d 259, 261 (6th Cir. 1982); Whipp v. Weinberger, 505 F.2d 800, 801 (6th Cir. 1974). The Second, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits held that the 60-day rule may be waived. The Fifth, Seventh, Eighth and Eleventh Circuits have permitted waiver when the defense of the 60-day rule was not timely raised. Johnson, 769 F.2d at 1209; Mental Health Ass’n of Minnesota v. Heckler, 720 F.2d 965, 973 n.19 (8th Cir. 1983); Hatchell v. Heckler, 708 F.2d 578, 580 n.1 (11th Cir. 1983); Rowland v. Califano, 588 F.2d 449, 450 n.2 (5th Cir. 1979). The Ninth Circuit permitted waiver of the 60-day rule for an “extraordinary [case] involving bad faith on the part of the Secretary,” Lopez v. Heckler, 725 F.2d 1489, 1506-07 (9th Cir. 1984), remanded on other grounds, 105 S. Ct. 584 (1985). The Second Circuit held in City of New York that the secretive conduct of the Secretary warranted tolling the 60-day rule. 742 F.2d at 739; accord Borzeka v. Heckler, 739 F.2d 444, 448 n.3 (9th Cir. 1984).

22. Eldridge alleged that he was entitled, under the due process clause, U.S. Const. amend. XIV §1, to an evidentiary hearing prior to the termination of disability benefits. Eldridge did not appeal the termination decision he received to the reconsideration stage. Instead, he filed suit in federal court. Eldridge, 424 U.S. at 325.

23. Eldridge held that §405(g) jurisdiction also requires that the recipient of disability benefits present a claim when the Secretary conducts a Continuing Disability Investigation to determine whether the claimant’s disability has ceased. The Eldridge Court ruled that the presentment requirement for jurisdiction, i.e. the requirement that the claimant first present a claim to the Secretary, is not waivable. Eldridge satisfied the presentment requirement by answering the state agency questionnaire and by writing a letter prior to the termination of his benefits in response to the tentative determination that his disability had ceased. 424 U.S. at 328-30. See also, Ringer, 104 S. Ct. at 2023, 2025; Califano v. Yamasaki, 442 U.S. 682, 703 & n.15 (1979); Mathews v. Diaz, 426 U.S. 67, 75 (1976); City of New York, 742 F.2d at 733-36.

24. Prior to the ruling in Eldridge, the Supreme Court allowed §405(g) jurisdiction in the absence of exhaustion only when the courts construed the Secretary’s actions as waiving this requirement. See Weinberger v. Salfi, 422 U.S. 749, 765-67 (1975); Wein-
a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate.”

Eldridge established three criteria for determining whether the claimant's need for judicial review overrides the agency's interest in completing administrative review. These prerequisites require courts to assess the separation of powers between the judiciary and the administrative agency. Eldridge compels waiver where (1) exhaustion is futile and will not eliminate the need for judicial intervention, (2) the issue at bar is entirely collateral to the claim for benefits, and (3) irreparable harm will befall the claimant if exhaustion is not waived.

First, exhaustion is considered futile when pursuit of administrative remedies will not resolve the procedural issues. The futility prerequisite to waiver requires courts to determine whether the question at bar is best addressed by the courts or the administrative agency. Courts must distinguish between cases in which judicial review is required to vindicate legal rights and those in which ad-

25. 424 U.S. at 330.
26. See supra note 5 and accompanying text.
27. Eldridge, 424 U.S. at 330-32. The Eldridge Court stated that it was adopting a “practical” approach to jurisdiction. 424 U.S. at 331 n.11. Cf. Reed v. Heckler, 756 F.2d 779, 785 (10th Cir.) (exhaustion would impose “an unfair result”); Polaski v. Heckler, 751 F.2d 943, 951-52 (8th Cir. 1984) (“flexible, pragmatic approach”); City of New York, 742 F.2d at 736 (“no one factor is critical”). See also, Johnson v. Heckler, 769 F.2d 1202, 1207 (7th Cir. 1985); Mental Health Ass’n of Minnesota v. Schweiker, 720 F.2d 965, 969 (8th Cir. 1983); Jones v. Califano, 576 F.2d 12, 19-20 (2d Cir. 1978); Aldrich v. Schweiker, 555 F. Supp. 1080, 1088 (D. Vt. 1982).
28. The Secretary is not expected to change her nationwide policies in the context of the review of the individual applicant’s claim for benefits. Eldridge, 424 U.S. at 330. Many courts have held that once the Secretary finalizes her policies and procedures, it is futile for claimants to challenge her procedures in administrative hearings which are obliged to uphold these policies. Johnson, 769 F.2d at 1208; Livermore v. Heckler, 743 F.2d 1396, 1405 (9th Cir. 1984); Kuehner v. Schweiker, 717 F.2d 813, 818 (3d Cir. 1983), remanded on other grounds, 105 S. Ct. 376 (1984); Jones, 576 F.2d at 19; Liberty Alliance of the Blind v. Califano, 568 F.2d 333, 346 (3d Cir. 1977); Mayburg v. Heckler, 574 F. Supp. 922, 926 (D. Mass 1983); Tatum v. Mathews, 541 F.2d 161, 164 (6th Cir. 1976); Adams v. Califano, 474 F. Supp. 974, 984 (D. Md. 1979), aff’d sub nom., Adams v. Harris, 643 F.2d 995 (4th Cir. 1981). Cf. Polaski, 751 F.2d at 954 (Gibson, J., dissenting) (further evidence of improper procedure required to obtain waiver of exhaustion); Smith v. Schweiker, 709 F.2d 777, 781 (2d Cir. 1983) (further factual development needed at administrative level).
29. In Weinberger v. Salfi, the Court distinguished between the importance of purposive exhaustion in preventing “premature interference with agency processes” and the inappropriateness of futile exhaustion which merely wastes administrative resources. 422 U.S. at 765-66. Many courts have waived exhaustion in order to conserve administrative and judicial resources. Reed, 756 F.2d at 785; Livermore, 743 F.2d at 1405; Mental Health Ass’n, 720 F.2d at 970-71; Kuehner, 717 F.2d at 818; Caswell v. Califano, 583 F.2d 9, 14 n.12 (1st Cir. 1978); Liberty Alliance, 568 F.2d at 345; Adams, 474 F. Supp. at 982; Kennedy v. Harris, 87 F.R.D. 372, 375-376 (S.D. Cal. 1980).
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administrative review is essential to determine facts pertinent to an individual's claim for benefits.

The second requirement under *Eldridge* for waiver of exhaustion demands that the legal questions presented must be collateral to the claim for benefits. This requirement is also premised on concern for preserving the distinct roles of the judiciary and the administrative agency. A collateral challenge does not call for a determination of entitlement to benefits, but rather questions the criteria applied by the Secretary in deciding entitlements under the Social Security Act. Nevertheless, all procedural issues, including those raised in *Eldridge*, affect the likelihood that claimants will receive benefits. Therefore, the "entirely collateral" standard set forth in *Eldridge* could not have meant that the constitutional challenge was superfluous to a claim for benefits. This prerequisite should be viewed as a measure of degree, not as an absolute calculation.

Finally, because both the health and financial solvency of SSD claimants depend upon the uninterrupted receipt of benefits, retroactive payments may not remedy the harm suffered when judicial review is delayed during the completion of administrative review.

30. The collateral prerequisite signifies that the role of the administrative agency is to engage in the fact-finding necessary for a determination of entitlement. When entitlement is not at issue, judicial review will not interfere with the powers of the administrative agency.

31. In contrast, many SSD suits, particularly claims by a single plaintiff, raise issues of the application of the law to the facts of an individual's particular disabling medical condition. These cases require the court to determine whether the claimant is entitled to benefits.

32. Given the differences in the disabling medical conditions among members of the plaintiff class, not all will receive benefits upon resolution of a collateral challenge. *See Johnson*, 769 F.2d at 1208; *Caswell*, 583 F.2d at 14; *Mayburg*, 574 F. Supp. at 926; *Adams*, 474 F. Supp. at 981.

33. *See Reed*, 756 F.2d at 784 n.6.


35. The district court in *Polaski v. Heckler* stated, "Claimants who lose or are denied benefits face foreclosure proceedings on their homes, suffer utility cutoffs and find it difficult to purchase food. They go without medication and doctors' care; they lose their medical insurance. They become increasingly anxious, depressed, despairing—all of which aggravates their medical conditions." 585 F. Supp. 1004, 1013 (D. Minn. 1984). *Accord Eldridge*, 424 U.S. at 331; *Reed*, 756 F.2d at 783; *Lopez v. Heckler*, 725 F.2d 1489, 1497 (9th Cir. 1984), *remanded on other grounds*, 105 S. Ct. 584 (1985); *Mental Health Ass'n*, 720 F.2d at 970; *Bartlett v. Schweiker*, 719 F.2d 1059, 1061 (10th Cir. 1983); *Caswell*, 583 F.2d at 14; *Jones*, 576 F.2d at 20; *Schisler v. Schweiker*, No. 80-572E, slip. op. at 6 (W.D.N.Y. Aug. 11, 1981), *appeal docketed*, No. 85-6092/6096 (2d Cir. Mar. 20, 1985); *Holden v. Heckler*, 584 F. Supp. 463, 483 (N.D. Ohio 1984); *City of New York*, 578 F.
The claimant's interest in preventing irreparable harm may warrant waiver of exhaustion.

B. The Denial of Waiver of Exhaustion in Ringer

Heckler v. Ringer concerned the availability of jurisdiction for Medicare claims\(^{36}\) under § 405(g),\(^ {37}\) the same section of the Social Security Act which grants judicial review for SSD claims.\(^ {38}\) None of the named plaintiffs in Ringer had exhausted their administrative remedies at the time of filing suit;\(^ {39}\) instead, they requested waiver of exhaustion under the Eldridge analysis.

In Ringer, claimants challenged the policy of the Secretary, which was codified in two administrative instructions, prohibiting Medicare reimbursement for the surgical procedure of bilateral carotid body resection (BCBR).\(^ {40}\) Three of the named plaintiffs underwent BCBR prior to the effective date of the second administrative ruling.\(^ {41}\) The fourth, Ringer, never obtained the surgery, because he learned informally from the administrative agency that Medicare reimbursement would not be provided. He could not afford to pay for the procedure himself.\(^ {42}\)

The complaint in Ringer alleged that the Secretary's instructions exceeded the limits of her discretion, violating the Medicare Act, the Administrative Procedure Act, and the Due Process Clause of the Fifth Amendment.\(^ {43}\) The plaintiffs claimed the right to present to


36. Medicare is a federally subsidized health insurance program established by Title XVIII of the Social Security Act, 42 U.S.C. § 1395 (1982) [hereinafter cited as the Medicare Act].


38. See supra, notes 6, 8, 9 and accompanying text.

39. The first two stages of the four-level administrative review process are different for Medicare than for SSD. The application for Medicare payments is made to fiscal intermediaries, such as Blue Cross, and reconsideration is provided by the Health Care Financing Administration (HCFA). For SSD, the application and reconsideration procedures are handled in state Disability Determination Services. The final two stages of appeal, i.e. to the ALJs and Appeals Council, are procedurally identical for Medicare and SSD. See Ringer, 104 S. Ct. at 2017.

40. The first ruling was binding on the fiscal intermediaries and HCFA; the second applied to the ALJs and Appeals Council. 104 S. Ct. at 2017-18.

41. These claimants were not barred from receiving reimbursement from the ALJs or Appeals Council. Id. at 2021 & n.9.

42. Ringer 104 S. Ct. at 2019. Prior to the effective date of the Secretary's ruling, most surgeons did not require prepayment, instead relying on subsequent administrative review and the Secretary's policy of reimbursement. But once administrative hearings became preempted by the BCBR rule, surgeons could no longer depend upon after-the-fact reimbursements. Id. at 2036 n.33 (Stevens, J., dissenting).

43. Id. at 2019-20 & 2019 n.7.
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administrators, on a case-by-case basis, the medical justification for a surgery whose value was disputed by the medical profession. The Secretary's instructions categorically prohibited reimbursement.\textsuperscript{44} According to the plaintiffs, this policy interfered with the rights conferred on claimants by the Constitution and statutes.\textsuperscript{45}

The district court dismissed the complaint on the grounds that it did not have jurisdiction over the claims in the absence of exhaustion. The Court of Appeals for the Ninth Circuit reversed, holding that exhaustion would be futile\textsuperscript{46} and would impose irreparable harm.\textsuperscript{47}

The Supreme Court reversed the court of appeals, denying subject matter jurisdiction\textsuperscript{48} because the criteria for waiver of exhaustion under § 405(g) had not been met. Since claimant Ringer did not undergo the surgery and request reimbursement, the majority did not reach the question of whether he had satisfied the prerequisites for waiver.\textsuperscript{49} The Court held that the three claimants who had undergone BCBR\textsuperscript{50} had not met any of the three Eldridge criteria for waiver of exhaustion.\textsuperscript{51}

\textsuperscript{44} The Secretary relied on information from the Public Health Service and a special Task Force of the National Heart, Lung and Blood Institute of the National Institute of Health in reaching the conclusion that BCBR had not been proven effective, and therefore was "not 'reasonable and necessary' within the meaning of the Medicare Act." See Ringer, 104 S. Ct. at 2018; 42 U.S.C. §§ 1395y(a)(1) (1982).

\textsuperscript{45} Ringer, 104 S. Ct. at 2019.

\textsuperscript{46} The court of appeals found that the Secretary's instructions to ALJs and the Appeals Council made the results of that process "both pre-ordained and immutable." Ringer v. Schweiker, 697 F.2d 1291, 1295 (9th Cir. 1982).

\textsuperscript{47} The court of appeals combined the collateral and irreparable harm prerequisites from Eldridge. Procedural issues were distinguished from claims for benefits, because payment at the ALJ or Appeals Council level would not compensate irreparable harm. This harm stemmed from being forced to pursue appeals in order to obtain reimbursement. Ringer, 697 F.2d at 1296.

\textsuperscript{48} The Court also held that federal question jurisdiction was unavailable and that mandamus jurisdiction could not apply in this case. 104 S. Ct. at 2022-23. See supra, note 16.

\textsuperscript{49} The Court held that because Ringer did not present a claim to the Secretary as required by the "final decision" language of § 405(g), he failed to satisfy the nonwaivable presentment prerequisite. 104 S. Ct. at 2025. See supra, note 23. Justice Stevens, joined by Justices Brennan and Marshall, dissented with regard to the Court's handling of Ringer's claim. 104 S. Ct. at 2028. First, the dissent would have granted federal question jurisdiction. Id. at 2030-32. Second, the dissent believed that Ringer satisfied both the nonwaivable and waivable prerequisites of § 405(g) jurisdiction, and that subject matter jurisdiction was therefore available. Id. at 2034-35. The dissent concluded that the decision of the Secretary was final and satisfied presentment as well as the futility requirement. The dissent believed that Ringer was irreparably injured by his inability to obtain treatment for his illness and that this injury was collateral. Id. at 2034-36.

\textsuperscript{50} These claimants were found to have satisfied the nonwaivable presentment requirement. Id. at 2023.

\textsuperscript{51} Id. at 2023. Justice Stevens concurred with the Court's judgment as to these claimants. Id. at 2028-29.
While acknowledging that the complaint raised procedural issues, the majority nevertheless ruled that the challenge was not "wholly 'collateral'" to a claim for benefits. The Court explained its decision by noting that the relief claimants requested "to redress their supposed 'procedural' objections is . . . a 'substantive' declaration from [the Secretary] that the expenses of BCBR surgery are reimbursible under the Medicare Act." The Court believed that upon issuance of the requested declaration, "only essentially ministerial details will remain before [the claimants] would receive reimbursement."

The Court's determination that the challenge was not sufficiently collateral directed the holding with regard to the other two prerequisites. Since the majority viewed the procedural issues as intertwined with a claim for benefits, it held that payment through administrative channels would satisfy the claimants' procedural challenge. The majority concluded that exhaustion was not futile and would not impose irreparable harm, because administrative appeal could yield financial remuneration.

C. The Validity of Waiver of Exhaustion for Procedural Challenges

While the Ringer Court purported to apply the Eldridge test for waiver of exhaustion, a closer analysis reveals that Ringer and Eldridge differ fundamentally in their view of a collateral challenge and in their application of the separation of powers doctrine. City of New York highlights many of the reasons why the Eldridge approach is needed and provides an opportunity for the Court to resolve discrepancies between Ringer and Eldridge.

The Ringer majority justified its holding that the procedural issues were not collateral by characterizing the requested remedy as the functional equivalent of a determination of entitlement. The

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52. Id. at 2023.
53. Id. at 2021. "[T]he claims of those three respondents [are] . . . at bottom, a claim that they should be paid for their BCBR surgery. Arguably respondents do assert objections to the Secretary's 'procedure' for reaching her decision. . . . [H]owever, . . . those claims are 'inextricably intertwined' with respondents' claims for benefits." Id. The majority also characterized plaintiff Ringer's complaint as "essentially" a request for payment. Id. at 2024.
54. Id. at 2022.
55. The majority noted the high probability of receiving benefits at the ALJ stage for claimants who obtained BCBR prior to the effective date of the Secretary's administrative instruction to the ALJs. Id. at 2024. See infra note 60 and accompanying text.
56. 104 S. Ct. at 2024.
57. See supra notes 51 to 53 and accompanying text. If this characterization were correct, there would be no conflict with Eldridge, in which the desired remedy, i.e. a
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Court noted that prior to the Secretary's ruling, when BCBR was reimbursable, ALJs and the Appeals Council had consistently granted benefits. But, as the majority itself pointed out, the payment of benefits was due to the medical needs of the particular claimants involved. A declaration that BCBR surgery is "reimbursible" would not guarantee payment of Medicare benefits to all BCBR recipients, but rather would permit the administrative agency to deny benefits on a case-by-case basis to any claimants whose medical conditions did not warrant the surgery. The Court's characterization of administrative review as merely a "ministerial detail" conflicts with its own emphasis on the importance of exhaustion of administrative remedies.

The Court noted that, according to the plaintiffs' statistical accounting, reimbursement at the ALJ stage was very likely for the three named plaintiffs who had obtained BCBR. This probability was based on the claimants' receipt of BCBR prior to the effective date of the Secretary's administrative instruction to the ALJs. Such data is crucial for determining whether the claimants had standing to challenge this instruction, but irrelevant for deciding whether the claim was collateral. The distinctiveness of procedural and substantive issues does not hinge upon the probability of obtaining benefits for reasons unrelated to the procedural challenge.

The Ringer majority indicated that the courts should not address pretermination hearing, did not ensure that the claimant would be deemed entitled to benefits.

58. 104 S. Ct. at 2018. In granting benefits to one group of claimants, the Appeals Council explicitly stated that its decision applied only to these claimants and was not to be cited as precedent. Id.

59. The plaintiffs had requested class certification, but the district court dismissed the complaint before ruling on class certification. Id. at 2019 n.5. The class would have included claimants who did not even reach the second stage of the administrative appeals process, i.e. reconsideration.

60. The administrative agency determines whether the reimbursible item is medically necessary for each claimant, and if so, the rate of reimbursement. See 2 MEDICARE & MEDICAID GUIDE (CCH) ¶ 10,193, 10,217 (Mar. 1985) regarding surgical procedures and bill review and 1 MEDICARE & MEDICAID GUIDE (CCH) ¶ 3190.76 (Oct. 1985) regarding reasonable charge. Payment is not automatic. Many Medicare claims for reimbursable items are routinely denied. See Wilson, Benefit Cutbacks in the Medicare Program Through Administrative Agency Fiat Without Procedural Protections: Litigation Approaches on Behalf of Beneficiaries, 16 Gonz. L. Rev. 533, 535-36 (1981).

61. The Court held that these claimants had standing to challenge the ruling directed to the ALJs and Appeals Council, because the complaint had argued "that the existence of the formal rule creates a presumption against payment of their claims in the administrative process, even though the rule does not directly apply to bar their claims." 104 S. Ct. at 2021. Cf. Adams v. Califano, 474 F. Supp. 974, 983 (D. Md. 1979), aff'd sub nom., Adams v. Harris, 645 F.2d 995 (4th Cir. 1981) (plaintiffs have standing because of likelihood of adverse decision at ALJ hearing). The Ringer majority then proceeded to rebut this presumption by disallowing waiver. 104 S. Ct. at 2024.
procedural issues when benefits can be obtained on other grounds at a later stage in the administrative process. Until claimants exhaust administrative remedies, they do not know whether they are entitled to receive benefits regardless of the procedural illegality. The reasoning of the *Ringer* majority suggests that claimants must exhaust administrative remedies in order to challenge the initial levels of review. This suggestion is incompatible with *Eldridge*. The Court failed to recognize this incongruity and provided no justification, such as fairness or efficiency, for allowing allegedly illegal determinations at the earlier stages of review to remain uncorrected when claimants do not exhaust administrative remedies.

The majority position embodies a view of the role of the courts which differs from the separation of powers perspective articulated in *Eldridge*. In contrast, the *Ringer* dissent followed the *Eldridge* reasoning more closely, concluding that the proper role of the judiciary is to protect the interests of claimants by ensuring the legality of the Secretary’s procedures even when claimants do not exhaust administrative remedies. Both *Eldridge* and the *Ringer* dissent suggested that the proper function of the judiciary is to check the pow-

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62. *Id.* at 2024 n.12. See also, Johnson v. Heckler, 776 F.2d 166, 168 (7th Cir. 1985) (Easterbrook, J., dissenting from denial of rehearing en banc).

63. In *Eldridge*, the Court granted § 405(g) jurisdiction for the review of the allegation that the initial termination decision was illegal, even though the claimant never pursued the second stage of administrative review, i.e. reconsideration. 424 U.S. at 325, 332.

64. Given the Court’s prior decisions emphasizing the broad discretionary powers of the Secretary, it is likely that the *Ringer* plaintiffs would not have prevailed on the merits had they been reached. See, e.g., Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1980); *Note, Administrative Law — Jurisdiction, Class Action, Injunctive Relief and Nonacquiescence* — Lopez v. Heckler, 7 W. NEW ENG. L. REV. 277, 305-06 (1984). Most damaging to the plaintiffs’ chances of prevailing was the holding in *Heckler v. Campbell*, 461 U.S. 458 (1982), a case challenging the Secretary’s promulgation of medical-vocational guidelines, that the discretion of the agency included the power to “rely on its rulemaking authority to determine issues that do not require case-by-case consideration.” 461 U.S. at 467 (citations omitted). Nevertheless, the likelihood of defeat on the merits does not diminish the urgency of the claimant’s need for review of procedural issues. Indeed, Eldridge lost his case on the merits. *Eldridge*, 424 U.S. at 349.

65. See *supra* notes 5, 25, 26 and accompanying text.

66. Claimant Ringer’s inability to pay for the surgery prevented him from presenting a claim for reimbursement to the Secretary. His failure to exhaust administrative remedies then resulted in the majority’s ruling denying him access to the courts. The dissent noted that the majority provided Ringer with “the ‘right’ to judicial review only if he can pay for it—and he cannot.” The dissent characterized this holding as “ruthless” and contrary to congressional intent in enacting the Medicare program. *Id.* at 2038. See also, Mental Health Ass’n of Minnesota v. Schweiker, 720 F.2d 965, 971 (8th Cir. 1983). The dissent’s emphasis on providing claimant Ringer with an avenue of judicial review comports with the legislative history of the enactment of § 405(g). The Senate Committee on Finance explicitly stated that the purpose of this provision was to ensure that the Secretary’s “decisions on questions of law will be reviewable.” *S. REP. No. 794, 76th Cong. 1st Sess. 52 (1939)* (emphasis added).
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erers of the administrative agency, to delineate the limits of the Secretary's discretion, and to enforce the Constitution and statutes.

City of New York demonstrates the importance of reaffirming the principles embodied in Eldridge. In City of New York, as in many SSD class actions, at least one of the named plaintiffs had exhausted administrative remedies. This secures jurisdiction under § 405(g), requiring the court to review allegations of procedural violations affecting large numbers of claimants (the class in City of New York included 50,000 mentally ill claimants). In City of New York, the Eldridge waiver analysis determines not whether the merits will be heard but rather for whom they will be addressed. The Court's ruling on waiver will define the scope of the class membership.

Waiver of exhaustion of administrative remedies in City of New York serves many of the goals pursued by the separation of powers approach in Eldridge and does not conflict with Ringer. In City of New York, the exhaustion of administrative remedies by some of the named plaintiffs informs the court of the Secretary's methods of determining disability for the class. Since the Secretary's standards do not vary according to the facts of individual cases, the exhaustion

67. This analysis is equally valid for procedural challenges which do not involve claims of clandestine violations of the Secretary's published regulations.
70. Califano v. Yamasaki held that class relief under Fed. R. Civ. P. 23(b)(2) is permitted for claimants who meet the requirement of § 405(g). 442 U.S. 682, 700-01 (1979). Yamasaki did not address the appropriateness of waiver of exhaustion in class actions.
71. Since Ringer neither overruled nor suggested any reason for abandoning the Eldridge prerequisites for jurisdiction under § 405(g), but rather misapplied the Eldridge analysis, waiver for procedural challenges is consistent with Ringer.
72. When one or more claimants exhaust their administrative remedies, their claims exemplify the administrative response at each level of review. In City of New York, the court found that the presumption against disability recorded in forms filled out at the
of administrative remedies by 50,000 class members would not enhance the court's ability to evaluate the legality of the Secretary's procedures. Administrative exhaustion is futile for resolving the procedural challenge. Review of procedural questions is within the scope of judicial, not administrative, powers.

Second, resolution of the procedural issues in favor of the plaintiffs in City of New York would not automatically entitle claimants to backpayments. Instead, the Secretary would be required to issue new disability decisions, which would be reached after applying the correct procedures. Since judicial review does not determine awards of benefits, the procedural issue is collateral and may be addressed by the courts without interfering with the powers of the administrative agency.73

Third, waiver of exhaustion in City of New York decreases the risk that disabled individuals will be deprived of the benefits to which they are entitled, thereby minimizing the possibility of inflicting irreparable harm.74 If waiver is not permitted, interim benefits will be cut off for many claimants,75 with the likely result of inflicting financial troubles and aggravating medical disorders.76 Administrative processes will not protect these claimants; the responsibility for preventing irreparable harm falls upon the courts.

Claimants need judicial intervention to ensure that their claims are decided in conformity with the procedural protections guaran-

73. The impact of procedural questions on a claim for benefits in SSD cases is more subtle than in Ringer; the desired remedy does not include a declaration that payment is permissible. As a result, courts may be more convinced of the collateral nature of the claim. A number of courts have distinguished Ringer, in which procedural and substantive issues were found to be intertwined, from those SSD cases which challenge the Secretary's standards for determining disability, Johnson, 769 F.2d at 1208; Polaski, 751 F.2d at 952-53; City of New York, 742 F.2d at 1209; contra Hyatt, 757 F.2d at 1460; and the Secretary's notice procedures, Reed, 756 F.2d at 784. Courts have applied Ringer more stringently in Medicare cases. See, e.g., Hatcher v. Heckler, 772 F.2d 427, 430-31 (8th Cir. 1985); Miller v. Heckler, 601 F. Supp. 1471, 1483 (E.D. Tex. 1985).

74. The importance of lessening the risk of improper denials contributed to the court's decision to waive exhaustion in Reed, 756 F.2d at 785; Polaski, 751 F.2d at 952; Mental Health Ass'n, 720 F.2d at 971; and Liberty Alliance, 568 F.2d at 346.

The Ringer majority suggested that waiver should be denied in order to give the administrative agency an opportunity to find a reason for granting benefits which is exogenous to the procedural issue at bar. This approach increases the likelihood that irreparable harm will be inflicted. Ringer provides no remedy for claimants who fail to exhaust administrative remedies and delays judicial review for claimants who appeal the Secretary's unfavorable decisions.

75. If the court does not have jurisdiction over claimants who have not exhausted administrative remedies, it does not have the power to award them benefits.

76. See, supra, note 35.
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...ted in the Constitution, statutes and regulations. In *City of New York*, their interest in judicial relief far outweighs the Secretary's interest in completing administrative review. Waiver of exhaustion should be permitted in *City of New York* and in other procedural challenges which pursue the separation of powers objectives of *Eldridge*.77

II. Waiver of the Sixty-Day Limitation

A. The Availability of Waiver of the Sixty-Day Rule

*Eldridge* established both the permissibility of waiver of exhaustion of administrative remedies and the circumstances in which waiver is authorized. However, there is no equivalent precedent regarding waiver78 of the sixty-day limitation.79 The Supreme Court has stated in dicta that the sixty-day rule is a “statute of limitations” which is “waivable by the parties”80 but has never ruled directly on

77. While *Eldridge* involved a purely constitutional challenge, the claimants’ interest in obtaining judicial review of alleged violations of statutes may suffice to warrant waiver. Many courts have held that exhaustion may be waived for statutory procedural challenges. *Reed*, 756 F.2d at 785; *Lopez v. Heckler*, 725 F.2d 1489, 1503 (9th Cir. 1984), *remanded on other grounds*, 105 S. Ct. 584 (1985); *Mental Health Ass’n*, 720 F.2d at 971; *Kuehner*, 717 F.2d at 817-18; *Wright v. Califano*, 587 F.2d 345, 349 (7th Cir. 1978); *Caswell*, 583 F.2d at 14; *Jones*, 576 F.2d at 18; *Liberty Alliance*, 568 F.2d at 346; *Mayburg*, 574 F. Supp. at 925; *Fitzgerald*, 538 F. Supp. at 997-98. *See Goldstein*, supra note 68, at 743.

78. Referring to the sixty-day rule, courts use the terms “waivable” and “not jurisdictional” interchangeably. Both phrases indicate that the requirement of appeal within sixty days may be set aside by the courts, without abrogating the judicial right and power to adjudicate the subject matter of the case. However, the holding that a time bar is ordinarily jurisdictional does not preclude a finding that waiver is permitted under limited circumstances. *See City of New York*, 742 F.2d at 738 n.6. *Compare Hofer v. Campbell*, 581 F.2d 975 (D.C. Cir. 1978) (time bar jurisdictional) *with Coles v. Penny*, 531 F.2d 609 (D.C. Cir. 1976) (time bar waived). Courts may also describe the waiver of the sixty-day limitation as “tolling” the rule. When the sixty-day rule is “tolling”, it is not permanently barred but rather is temporarily suspended. *See, e.g.* *Smith v. American President Lines*, 571 F.2d 102, 109 (2d Cir. 1978).

79. The *Eldridge* prerequisites to waiver of exhaustion of administrative remedies do not provide a basis for waiving the sixty-day rule. *Eldridge* attempted to balance the utility of administrative remedies against the need for judicial review. Claimants who miss the deadline for filing administrative appeals are time barred from obtaining administrative review and therefore have no avenue of relief other than the courts.

80. *Eldridge*, 424 U.S. at 328 n.9; *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975). In *Salfi* and *Eldridge*, the defense of the statute of limitations was not “timely raised below” and therefore did not “need [to] be considered.” *Id.* A number of circuit courts have held that waiver is permitted when the Secretary fails to raise the defense of the 60-day rule in a timely manner. *Johnson*, 769 F.2d at 1209; *Mental Health Ass’n*, 720 F.2d at 973 n.19; *Hatchell v. Heckler*, 708 F.2d 578, 580 n.1 (11th Cir. 1983); *Rowland v. Califano*, 588 F.2d 449, 450 n.2 (5th Cir. 1979); *Wilson v. Edelman*, 542 F.2d 1260, 1274 (7th Cir. 1976).
Circuit courts have disagreed as to the weight that should be accorded to the dicta, and some have held that the sixty-day rule is jurisdictional and therefore not subject to waiver. City of New York provides an opportunity for the Court to resolve the conflicting interpretations of prior case law regarding whether the sixty-day limitation may be waived.

In City of New York, the Second Circuit espoused the view that the sixty-day limitation is not jurisdictional and held that the sixty-day period was "effectively tolled" during the time the Secretary's policy denying claimants an individualized assessment of their capacity to work was "operative but undisclosed". The court of appeals believed that the Secretary's secretive conduct prevented claimants from knowing that their rights had been violated. Finding that "the full extent of the Government's clandestine policy" was uncovered in the course of the litigation, the court tolled the sixty-day requirement until the lawsuit was underway.

The Second Circuit drew support for its holding from Barrett v. United States, a case involving a claim under the Federal Tort Claims Act. In Barrett, the statute of limitations was tolled because the government suppressed information regarding a tort injury. The City of New York court also cited Lopez v. Heckler, an SSD case in which the Ninth Circuit tolled the sixty-day rule. The Ninth Circuit stated in Lopez that the sixty-day rule is similar to the time limitation

81. Justice Stevens has discussed the sixty-day rule in a number of his dissents and concurrences. In his partial dissent in Lopez, 464 U.S. 879, 881 (1983), Justice Stevens stated that the court "had no jurisdiction to review the Secretary's refusal to reopen" cases whose time for appeal "had expired". However, in his partial dissent in Ringer, he quoted with favor Salfi's characterization of the sixty-day rule as a waivable statute of limitations. 104 S. Ct. at 2023 n.25. See also, Norton v. Mathews, 427 U.S. 524, 536 n.4 (1976) (Stevens, J., dissenting).

82. Biron v. Harris, 668 F.2d 259, 261 (6th Cir. 1982); Hunt v. Schweiker, 685 F.2d 121, 122 (4th Cir. 1982); accord Johnson, 776 F.2d at 168 (Easterbrook, J., dissenting from denial of rehearing en banc). However, the Fourth and Sixth Circuits have held that when the claimant's mental illness prevents her from understanding and pursuing her administrative remedies, the 60-day rule would deny her due process and therefore does not apply. Parker v. Califano, 644 F.2d 1199, 1203 (6th Cir. 1981) (citing Califano v. Sanders, 430 U.S. 99, 109 (1977)); Shrader v. Harris, 631 F.2d 297, 302-03 (4th Cir. 1980) (citing Sanders, 430 U.S. at 109).

83. The Second Circuit did not address the district court's finding that the Secretary had not asserted the defense of the 60-day limitation in a timely manner. The issue was first mentioned in the Secretary's post-trial brief. City of New York, 578 F. Supp. at 1124. The Second Circuit stated that even if this defense had been timely, it would not have prevailed. 742 F.2d at 738.

84. 742 F.2d at 738.


86. Lopez v. Heckler, 725 F.2d 1489 (9th Cir. 1984), remanded on other grounds, 105 S. Ct. 584 (1985).
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for initiating employment discrimination claims,\textsuperscript{87} since both are statutes of limitations subject to waiver and equitable tolling.\textsuperscript{88}

While the Supreme Court has not yet indicated whether such analogies are appropriate, its decisions in federal tort and employment discrimination cases bear some striking similarities to its opinions regarding SSD. In all three contexts the Court has stated that the purpose of time restrictions on the filing of law suits is to encourage the prompt presentation of claims and to preclude stale claims.\textsuperscript{89} The concern with staleness is "not so compelling" for SSD procedural challenges; these cases focus not upon individual fact questions but rather upon the standard by which the Secretary evaluates whatever information is available.\textsuperscript{90}

In both tort and employment discrimination cases, the Court has held that the time bar is a statute of limitations which is not jurisdictional.\textsuperscript{91} This position corresponds to the statement in SSD cases that the sixty-day rule is a statute of limitations which may be waived.\textsuperscript{92} The close resemblance of the Court's discussion of the sixty-day rule in § 405(g) to its holding that time limitations in tort and employment discrimination legislation may be waived leads to the conclusion that the sixty-day rule may also be waived.

B. The Proper Circumstances for Tolling Statutes of Limitations

The justifications for equitable tolling of statutes of limitations in tort and employment discrimination cases focus on the plaintiff's lack of knowledge that she has been injured by the defendant, the

\textsuperscript{87} These actions arise under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e [hereinafter cited as Title VII].

\textsuperscript{88} Lopes, 725 F.2d at 1505 (citing Zipes v. Trans World Airlines, 455 U.S. 385 (1982) and other cases). Accord Borzeka v. Heckler, 739 F.2d 444, 448 n.3 (9th Cir. 1984).


\textsuperscript{90} Kennedy v. Harris, 87 F.R.D. 372, 377 (S.D. Cal. 1980). Cf. Lopes, 725 F.2d at 1505 (60-day rule designed to promote administrative efficiency not always preclusive of stale claims litigation). In medical improvement cases, Congress has permitted the re determination of claims irrespective of their age. Reform Act § 2(d). See supra note 7. See also H.R. Rep. No. 1039, 98th Cong., 2d Sess. 28 (1984). Some of the claims to be determined anew are as many as ten years old. See Avery v. Secretary of Health and Human Services, 762 F.2d 158 (1st Cir. 1985); Kuehnert, No. 85-1227, slip op. (3d Cir. Dec. 9, 1985); Schisler, 107 F.R.D. 609.

\textsuperscript{91} Zipes, 455 U.S. at 393 (Title VII); Urie v. Thompson, 337 U.S. 163, 169-70 (1949) (tort claim under Federal Employers' Liability Act). Circuit courts have differed in their application of Zipes to cases involving charges filed against the federal government. See Stuckett v. United States Postal Services, 105 S. Ct. 274 (1984) (White, J., dissenting from denial of cert.).

\textsuperscript{92} See supra note 79 and accompanying text.
lack of knowledge of the medical or legal community, and the inadequacy of the defendant’s provision of notice to the plaintiff. In addition, time bars have been tolled when the defendant’s deceptive conduct induced the plaintiff to delay filing suit. This latter rationale supports waiver of the sixty-day rule in City of New York.93

In tort litigation, if the plaintiff does not know that she has been injured, due only to “blameless ignorance,”94 then the statute of limitations is tolled until the injury is apparent, e.g. when the disease manifests itself.95 When “facts about causation [are] in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain,” equitable tolling is warranted.96 However, ignorance of legal rights, resulting from the plaintiff’s failure to seek advice from the medical and legal community, does not suffice to toll the limitations period.97

The statute of limitations may be tolled until medical science uncovers the causal relationship between a disease and an injury, for example the debilitating effects of exposure to chemical substances.98 Prior to the medical discovery, the plaintiff can not know that a tort has been committed, and therefore is not at fault for failing to file suit within the prescribed period. Similarly, the time period for filing employment discrimination charges does not

93. An alternative approach to waiver of the 60-day limitation is to apply a separation of powers analysis, similar to the Eldridge reasoning for waiver of exhaustion of administrative remedies. See supra notes 5, 25, 26 and accompanying text. Insofar as the Secretary’s secretive procedures violate the Constitution, statutes and regulations, she has abused her delegated powers. Under this analysis, courts should therefore waive the 60-day rule in order to protect claimants who have suffered from the Secretary’s abuse of discretion.

94. Kubrick, 444 U.S. at 120 n.7 (quoting Urie, 337 U.S. at 169-70).

95. Id. See Smith v. American President Lines, 571 F.2d 102, 109 n.12 (2d Cir. 1978) (common law tolling principles). In most tort cases where the injury is obvious, the statute of limitations begins to run as soon as the tortious act is committed. See, e.g., RESTATEMENT (SECOND) OF TORTS § 899 comments c & e (1977).


98. Stoleson v. United States, 629 F.2d 1265, 1271 (7th Cir. 1980); DuBose, 729 F.2d at 1031. Cf. Barrett v. United States, 689 F.2d 324, 330 (2d Cir. 1982), cert. denied sub nom., Cattell v. Barrett, 461 U.S. 909 (1983) (“It is illogical to require a party to sue the Government for negligence at a time when the Government’s responsibility in the matter is suppressed in a manner designed to prevent the party, even with reasonable effort, from finding out about it.”).
commence until the facts that would support a charge, such as secret, illegal preferences in hiring, become apparent.99

This reasoning is applicable to SSD cases, such as City of New York, in which claimants allege that the Secretary violated her own regulations.100 The "injury" in procedural challenges is the absence of a fair, lawful administrative process for determining disability, e.g. in City of New York, claimants did not receive an individualized assessment of their ability to work. The "cause" of the injury is the Secretary's failure to adhere to the Constitution, statutes or regulations. When the Secretary does not publish the procedures she is actually employing and transgresses those regulations she has published, claimants are "blamelessly ignorant" of the illegality of the Secretary's procedures. Due diligence on the part of claimants, e.g. consulting a lawyer, does not expose the injury, because legal counsel would presumably be equally unaware of the Secretary's deviation from the regulations.

Ignorance of a procedural illegality is substantively different from ignorance of the legal right to sue. Claimants may learn of their legal right to sue by seeking legal advice. However, since counsel do not know of the procedural irregularity, they may incorrectly advise claimants regarding the merits of filing appeals. The Second Circuit correctly stated that claimants "were entitled to believe" that the Secretary obeyed the law.101

Identification of the procedural violation may not occur until after sixty days from the issuance of denial or termination decisions which are based upon the violation. Counsel may not even suspect that a procedural violation has occurred unless an unusually large number of claimants with similar circumstances seek legal assistance, and the accumulation of this critical mass of complainants may require a significant amount of time. Counsel may not recognize the


100. The 60-day rule has been waived, following the rationale in City of New York, in State of New York v. Heckler, 105 F.R.D. 118 (S.D.N.Y. 1985) (challenging the Secretary's unpublished rules regarding cardiovascular impairments); Dixon v. Heckler, 589 F. Supp. 1494 (S.D.N.Y. 1984), appeal docketed, No. 84-6288 (2d Cir. Sept. 25, 1984) (challenging the Secretary's abrogation of the "severity" regulations); Schisler, 107 F.R.D. 609 (challenging the Secretary's abandonment of medical improvement standard). Cf. Kuehnert, No. 85-1227, slip op. at 22 & n.13 (3d Cir. Dec. 9, 1985) (secrecy argument in Schisler does not apply to all class members and therefore is not relied upon).

101. City of New York, 742 F.2d at 738.
causal connection between denials and procedural improprieties unless the Secretary publishes the procedures she had actually employed, possibly years after she had adopted them in practice.\textsuperscript{102}

The provision of notice also affects claimants' understanding of the procedures to which they are entitled. Inadequacy of notice is a grounds for equitable tolling. In employment discrimination cases, the statute of limitations is tolled if the notice sent from the Equal Employment Opportunity Commission to the federal employee does not state clearly that the right to sue expires in thirty days.\textsuperscript{103} When the employing administrative agency fails to provide federal employees with any notice of the right to sue, the limitations period is tolled.\textsuperscript{104} Similarly, statutes of limitations in the Internal Revenue Code are tolled when the government's notice misleads plaintiffs regarding the time period for filing claims.\textsuperscript{105}

The issue of inadequate notice was raised in the complaint in \textit{City of New York} as an alternative theory for invalidating the Secretary's procedures but was not reached by the district court.\textsuperscript{106} Claimants alleged that the Secretary's failure to publish her procedures in the Federal Register violated the Administrative Procedure Act,\textsuperscript{107} the Freedom of Information Act,\textsuperscript{108} and the due process clause.\textsuperscript{109} The Secretary's arguments against tolling the sixty-day rule include the assertion that her policy was merely "an erroneous interpretation" of the regulations which did not trigger the publication requirement.\textsuperscript{110} However, because the Secretary's policy had a substantive impact on the determination of claims for benefits, the procedure significantly affected the rights of claimants and therefore required

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\textsuperscript{102} The alteration of the medical improvement standard provides an example of a lag in the publication of changes in the Secretary's procedures. On August 20, 1980, the Secretary revised her published rules to reflect her abandonment of the medical improvement standard and admitted that the policy was first altered on June 1, 1976. See \textit{Kuehner, No. 85-1227}, slip op. at 6-7, 22 (3d Cir. Dec. 9, 1985).
\textsuperscript{104} Williams v. Hidalgo, 663 F.2d 183, 188 (D.C. Cir. 1980); Allen v. United States, 542 F.2d 176, 180 (3d Cir. 1976); Coles v. Penny, 531 F.2d 609, 616-17 (D.C. Cir. 1976).
\textsuperscript{105} Miller v. United States, 500 F.2d 1007, 1010-11 (2d Cir. 1974); Heath v. United States, 219 Ct. Cl. 582, 583-84 (1979). Erroneous advice contained in notice does not necessarily toll the statute, however. See, e.g., Union Commerce Bank v. United States, 658 F.2d 962, 963 (6th Cir. 1981).
\textsuperscript{107} 5 U.S.C. § 553.
\textsuperscript{108} 5 U.S.C. § 552.
\textsuperscript{109} U.S. Const. amend. XIV § 1.
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publication.\textsuperscript{111} Inaccurate notice can have a devastating effect on claimants’ capacity to bring procedural challenges. Unless claimants (and their representatives) are informed of the procedures for determining disability, they cannot challenge these procedures.\textsuperscript{112} In these circumstances, claimants are forced to rely on the regulations, because they have no other means of ascertaining the Secretary’s procedures. When the Secretary finally makes known her procedures for determining disability, claimants should not be penalized for failing to challenge the process sooner, even if they could have challenged the denial or termination decisions.\textsuperscript{113} Therefore, the statute of limitations should be tolled, in City of New York and similar cases presenting procedural challenges, until the procedural violation is revealed.

III. Conclusion

The waiver of exhaustion analysis provided in Eldridge has enabled courts to prevent the Secretary from utilizing illegal procedures to deny and terminate the SSD benefits of thousands of claimants. This valuable mechanism for protecting the interests of claimants should not be eroded. Adherence to the objectives of the separation of powers approach in Eldridge should be continued in subse-


\textsuperscript{112} The Social Security Act requires the Secretary to provide individual notice informing each claimant of the reasons on which an unfavorable decision was based. Social Security Act, 42 U.S.C. § 405(b)(1) (1983 Amendments). By explaining in comprehensible language the legal basis for the decision, the notice is explicitly designed to influence the claimant’s decision whether to appeal the denial of benefits. See S. REP. NO. 408, 96th Cong., 2d Sess. 56-57, reprinted in 1980 U.S.CODE CONG. & AD. NEWS 1334-35.

\textsuperscript{113} The impact of secretive policies is greatest for claimants suffering from mental disorders. These individuals are least able to persevere through four levels of administrative appeals to preserve the right to challenge the Secretary’s procedures in court. They “are not capable of effectively utilizing available administrative procedures without the assistance of a representative,” Mental Health Ass’n of Minnesota v. Schweiker, 554 F. Supp. 157, 167 (D. Minn. 1982), aff’d, 720 F.2d 965 (8th Cir. 1983). See City of New York, 578 F. Supp. at 1115 (“The mentally ill are particularly vulnerable to bureaucratic errors”); Schisler, No. 80-572 E, slip op. at 6 (W.D.N.Y. Aug. 11, 1981). However, due to the cutbacks in Legal Services appropriations and the increasing number of SSD terminations, many of these claimants cannot procure legal assistance to help them challenge denial and termination decisions. See Yohalem, supra note 2, at 998-99.
quent procedural challenges. The rights of claimants should be further protected by tolling the sixty-day limitation for challenges of procedures which the Secretary has concealed. In this manner, courts will be able to ensure that SSD claimants receive the procedural protections mandated in the Constitution, statutes and regulations.

—Rochelle Bobroff