

RECENT NINTH CIRCUIT DECISIONS CONCERNING BIAS OF HEARING OFFICERS

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Although most attorneys who appear regularly at administrative hearings find the great majority of administrative law judges or hearing officers to be diligent, objective, and professional, every practitioner has a favorite war story or two about a presiding officer with a less judicious temperament. Four recent decisions of the 9th U.S. Circuit Court of Appeals address bias on the part of ALJs manifested in a variety of ways ranging from overly-rigid views about social mores and religious orthodoxy to downright inanity and rudeness.

A survey progressing from the serious to the ridiculous should begin with *Reyes-Melendez v. Immigration & Naturalization Service*, 342 F.3d 1001 (2003). Alejandro Reyes-Melendez is a Mexican citizen who appeared before an Immigration Judge on a petition for suspension of deportation. Among the issues at the hearing were whether he was of good moral character and whether his children, who are American citizens, would suffer hardship if he were deported.

Reyes-Melendez testified that he resides with his wife and two children and works as a nurse's assistant. In 1996, he had an affair with a co-worker and fathered a son by her. He maintains a platonic friendship with that woman, contributes to the child's support, and spends time with all three children each day. He attends church regularly, alternating between Catholic and Jehovah's Witnesses services because he and his wife are of those respective faiths.

Simply put, the IJ could not get past the fact that Reyes-Melendez had, as she put it, "committed adultery." Her interrogation of Reyes-Melendez on that point dominated the hearing, taking up seven of the eighteen pages of transcript. The court noted that the IJ was "aggressive and offered a stream of non-judicious and snide commentary, inquired into the sexual nature of his relationships with his wife and former paramour, and asked how many women with whom he had engaged in sexual intercourse." She "mentioned the fact that his children had two different mothers on at least six occasions, and she referred to [them] in a number of dismissive terms, including describing his son David as "the offspring of his lover."

She also addressed other aspects of his case with "sarcastic dismissiveness." For example, "his attendance of religious services received the commentary that 'he also notes he is a member of the Catholic Church and also says he is participating with the Jehovah's Witness church, and *is curiously a member of both.*'" (Emphasis added by the court.)

The IJ summarized her bizarre understanding of the petitioner's position: "Counsel, in effect, is arguing because he had this illicit relationship, he should be rewarded, he should be allowed to remain in the United States because he has to support his illegitimate child . . . while married and living with the present wife. On this theory, the more women he can have children

with, the better he is off under the Immigration laws, as counsel's interpretation apparently would lend me to find, and I should reward this illicit relationship."

The court concluded that "The record . . . indisputably demonstrates that the IJ was hostile towards Reyes-Melendez and judged his behavior as being morally bankrupt." Because she "behaved not as a neutral fact-finder interested in hearing the petitioner's evidence, but as a partisan adjudicator seeking to intimidate the alien and his counsel," the court granted Reyes-Melendez' petition and remanded the case for additional proceedings.

The other cases all involved social security disability claims. In *Wentworth v. Barnhart*, 71 Fe.Appx. (2003), the ALJ gave three reasons for refusing to give any weight to the report of the claimant's physician, with whom he was familiar on the basis of earlier cases. First, the doctor's diagnoses lacked support elsewhere in the record. Second, "as usual," the doctor only cited a few medical studies while omitting others the ALJ considered significant. Third, he "in short is a plaintiff's doctor who reports what he is paid to say, i.e., disability."

The court would have had no problem with the first ground, had it stood alone, because two other doctors had provided reports contradicting the account in question. However, the other two reasons "are both unsupported by the record and indicative of a bias against Dr. Brown, presumably based on past experience with the doctor. The ALJ should not have based his opinion on past activity by Dr. Brown that was not in the record." Accordingly, the court reversed the decision and ordered a new hearing before a different ALJ.

An ALJ's personal opinion of an individual was also at issue in *Lowry v. Barnhart*, 329 F.3d 1019 (2003). As Circuit Judge Alex Kozinski explained it, "In this case, social security lawyer David Lowry tries to live out what must be every lawyer's fantasy by suing the judge who ruled against him one time too many."

Lowry and ALJ Dan Hyatt apparently have a long-running feud, and Lowry sued for a writ of mandamus to have the ALJ, in Judge Kozinski's words, "investigated and kicked off his future cases." Lowry claims the ALJ criticizes him to clients and uses "intimidation and anger as a tactic to shorten [his] hearings." ALJ Hyatt in turn contends Lowry does a poor job and behaves in a "disrespectful and contemptuous" manner.

Lowry's frustration was compounded by the Social Security Administration's profound delay in establishing a permanent procedure for reviewing claims of bias. In 1992, the Administration declared it would formulate the procedure within six months, but it has never kept that promise. Meanwhile, interim procedures were in place, but an administrative complaint Lowry had filed about ALJ Hyatt had been languishing for over three years without a decision.

The court ruled that the interim procedures did not impose an enforceable duty upon the Administration to resolve Lowry's complaint. It also rejected Lowry's claim that ALJ Hyatt's treatment of him violated his due process rights. While litigants have a right to impartial decisionmakers, that right does not extend "vicariously" to their attorneys.

Finally *Bronson v. Barnhart*, 56 Fed.Appx. 793 (2003), was an appeal after a hearing at which the ALJ appears to have been quite out of control. According to the court, "throughout the

course of the hearing, the ALJ repeatedly insulted and belittled plaintiff's counsel with sarcastic and degrading remarks," including several accusations "of being from 'outer space' or having just returned from her 'spaceship.'"

The court noted the general principle that "expressions of impatience, dissatisfaction, annoyance, and even anger by themselves do not establish bias." However, in this instance, "the manner in which the ALJ conducted himself with Bronson's counsel -- constantly berating her and questioning her competence in front of her client -- constituted bias such that in this context Bronson had no chance for a full and fair hearing."

The conduct of the presiding officers was not the only disturbing feature of the *Reyes-Melendez*, *Wentworth*, and *Bronson* cases. It is also unfortunate that supervisory personnel in the government agencies affirmed the conduct of the ALJs, and that the United States Attorney defended it.

In *Reyes-Melendez*, the court criticized the government's characterization of the IJ's persistent questioning about the claimant's familial situation and religious practices as "benign, relevant inquiries," as well as its strange argument that "the presence of counsel is sufficient to ameliorate against an unfair hearing."

The brief, unpublished *Wentworth* opinion does not specify what arguments the Social Security Administration made on appeal, but the mere fact that the agency opposed a challenge to a decision based on an ALJ's preexisting opinion of a key witness speaks for itself.

The agency and United States Attorney also defended the choleric and abusive behavior of the ALJ in *Bronson*, insisting that while "the ALJ may have shown more irritation than was necessary, . . . he did not violate [the] claimant's right to a full and fair hearing."

In any vast administrative bureaucracy, there is bound to be an occasional prejudiced or intemperate hearing officer. It is also understandable that even the fairest and most professional adjudicator may have a bad day. It is far more difficult to explain without cynicism how decisions as obviously biased as the ones discussed here could survive multiple levels of review by administrative appeal boards and government counsel.