SOCIAL SECURITY DISABILITY DETERMINATIONS IN LITIGATION: UNRELIABLE OR UNDERUSED?

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INTRODUCTION

On May 12, 1998, Debbie Leiting pulled into the driveway of her daughter’s daycare center in Colorado Springs.1 While waiting in her minivan, the forty-three year old mother noticed a speeding car approaching.2 The driver, Vinay Mutha, suddenly veered and struck a parked pickup truck, slamming the vehicle into Debbie’s van.3 Still dazed by the collision, Debbie immediately started to feel pain in her arm and neck.4 Her injuries grew progressively worse over time and she experienced chronic pain on the left side of her body, slurred speech, loss of vision, and eventually developed paralysis in her left arm.5 As blood circulation to her hand diminished, Debbie’s skin also began to peel off.6 Unable to return to her place of employment where she had worked for over twenty years due to permanent nerve damage, she applied to the Social Security Administration (“SSA”) for disability benefits.7 After reviewing Debbie’s injuries, an Administrative Law Judge (“ALJ”) determined that she was permanently disabled and entitled to benefits from the executive agency.8

The next year, Debbie filed a personal injury suit against Mutha, seeking compensation for her lost wages and reduced capacity.9 Although Mutha admitted liability for the accident, he contested the extent of Debbie’s injuries.10 In order to demonstrate the severity of her damages, Debbie sought to introduce the SSA’s determination that she was permanently disabled.11 The Colorado trial court admitted the determination over Mutha’s

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2 Id.
3 Id.
4 Id.
5 Id.
6 Id.
7 Answer Brief of Debbie Leiting, supra note 1, at 3.
8 Id.
9 Id.
11 Id.
objections that the report constituted inadmissible hearsay. Although a jury returned a verdict in Debbie’s favor, her victory proved short-lived. Mutha appealed the introduction of the SSA determination to the Colorado Court of Appeals. After holding that the disability decision could not be admitted under any exception to hearsay, the court vacated the jury’s award to Debbie and remanded the case for a new trial. The appellate decision meant that, after three years of litigation, Debbie had to bring her claim anew, except this time without the agency’s finding of permanent disability. The conflicting holdings of the Colorado trial and appellate courts reflect the general difficulties courts encounter when parties attempt to introduce an executive agency’s evaluative determination as evidence in litigation. Because these evaluative reports provide findings and opinions not presented by the declarant at trial, they constitute hearsay evidence and cannot be admitted unless they fall under an established exception to the hearsay bar.

Although SSA disability determinations would provide valuable evidence to litigants like Debbie Leiting, courts have yet to establish a satisfactory approach to evaluating the admissibility of these and other similar agency determinations. Because the introduction of public records in litigation is most often subject to a judge’s discretion, the absence of a single approach results in remarkably varied results and dissimilar legal analyses. Parties seeking to admit disability determinations face a striking degree of uncertainty regarding how their respective forum will address the issue of admissibility. Such contradictory judicial holdings inevitably create

12 Id.
13 Id. at 1052, 1055.
14 Id. at 1052.
15 Id. at 1055.
16 Villanueva v. Zimmer, 69 A.3d 131, 138 (N.J. Super. Ct. App. Div. 2013) (finding that “[i]t is clear that the SSA determination is hearsay” because it “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”); MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE § 246 (Edward W. Cleary ed., 2d ed. 1972) (defining hearsay evidence as “testimony . . . or written evidence, of a statement made out of court . . . offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter”).
17 The introduction of evaluative reports creates evidentiary concerns regardless of which agency issued it. Courts’ treatment of reports issued by the National Transportation Safety Board (“NTSB”) is addressed in more detail in Part II of this Comment. Fed. R. Evid. 803(8) advisory committee’s note (“The disagreement among the [court] decisions has been due in part, no doubt, to the variety of situations encountered . . . .” (emphasis added)).
inefficiency in the legal system, resulting in more costly litigation.\textsuperscript{19} This result was clearly demonstrated in Debbie Leiting’s personal injury suit, which was remanded for new trial four years after the car accident took place because of the lower court’s admission of the SSA report.\textsuperscript{20}

While some diversity between the laws of different jurisdictions is expected on account of our federalist government, refusing to allow a trier of fact to consider any part of an SSA disability determination is unnecessary and inefficient. An outright ban on these reports denies parties a valuable source of evidence and overlooks an opportunity to mitigate the expenses and burdens of trial.\textsuperscript{21} The admission of SSA determinations in litigation allows low-income plaintiffs to demonstrate the extent of their injuries without relying on costly expert testimony to replicate the same findings.\textsuperscript{22} Because these reports provide substantial benefits when introduced as evidence at trial, courts should strive to ensure their admissibility.

Failing to consider the results of a disability application may also lead to indefensibly contradictory results. For example, a plaintiff who the SSA deems permanently disabled should surely receive more than a nominal award in a subsequent personal injury suit. Though Debbie’s injuries from the car accident were certainly serious, the SSA’s finding that she was permanently disabled provided a valuable measurement of the severity of her damages. On the other hand, should not a defendant in such a suit be permitted to demonstrate that a plaintiff could not qualify for disability insurance benefits from Social Security before a jury compels payment of exorbitant damages?

While the legal controversy surrounding the admissibility of these disability determinations creates uncertainty, it also presents an opportunity to examine the benefits and disadvantages of each approach. This diversity also draws attention to the need for an evidentiary paradigm that could increase efficiency in litigation without unduly prejudicing one party at the expense of the other. This Comment proposes that the most efficient ap-
proach to this issue involves differentiating the SSA’s interests in determining the presence of a disability from the causation of that injury. Though the introduction of a government report determining the causation of an injury may inflict prejudice on a party that wishes to contest liability, courts should view an indication as to the extent of these damages differently. Using this suggested approach, the Colorado appellate court in Leiting v. Mutha could have permitted Debbie’s introduction of valuable evidence to demonstrate the extent of her damages while preserving Mutha’s option to contest responsibility for the accident.

Absent clear direction from the Supreme Court or Congress addressing how courts should treat these evaluative reports in litigation, courts must develop a method to prevent these valuable evidentiary sources from being wasted while mitigating concerns of prejudice or unreliability. While a multitude of scholarly works examine the issues that arise when courts consider the admissibility of reports issued by agencies other than the SSA, contemporary scholarship offers little insight into the judicial treatment of disability determinations. This absence of available information is peculiar. Considering that there are an abundance of disability applications to the SSA and that personal injury suits are ubiquitous in American civil litigation, the evidentiary issues presented in Leiting are bound to persist.

This Comment examines the various approaches courts apply when determining the admissibility of evaluative determinations by the SSA regarding disability benefits, and recommends a paradigm with which parties could utilize these reports in litigation. Part I of this Comment provides a background of the process underlying the SSA’s evaluation of disability

23 E.g., Orber v. Jain, Civil No. 10-1674 (RMB/JS), 2012 WL 1565299, at *2 (D.N.J. May 2, 2012) ("The SSA does not have an institutional interest in determining the cause of Mrs. Orber’s disability. Rather, the SSA’s central inquiry is into whether the applicant is disabled as of the alleged onset date.”) (citing Lanscoli v. Astrue, Civil Action No. 10-12000, 2011 WL 4359978, at *2 (E.D. Pa. Aug. 25, 2011)).
claims and ensuing determination. The Part proceeds to discuss the development of evidentiary standards that govern the administrative proceedings underlying the determination. Part II then provides a foundational background regarding the evidentiary bar against hearsay and the established exceptions through which government evaluative reports may be admitted. Part III examines the notable conflicts in court rulings on the admissibility of SSA disability determinations and the various analyses employed in reaching these decisions. In Part IV, this Comment highlights inconsistencies between courts’ holdings regarding the admission of SSA reports and established evidentiary principles. The Part concludes by recommending an approach under which parties could derive probative value from these agency reports without jeopardizing fairness in litigation.

I. THE SOCIAL SECURITY ADMINISTRATION AND ADMINISTRATIVE EVIDENTIARY STANDARDS

The SSA is an independent federal agency created by Congress for the purpose of administering the Social Security Act of 1935.27 The Act constituted a significant piece of welfare legislation and reflected the increased involvement of the federal government in the wellbeing of the population that characterized the New Deal era.28 Though initially established as the Social Security Board, President Truman replaced the board with the SSA in 1946.29 Although the 1935 Act only provided for benefits to retired workers, a series of amendments enacted in the 1950s established a broad disability insurance program that provided cash benefits to disabled workers of all ages.30 The SSA disability program has become increasingly prominent during the contemporary era due to the growth in the country’s disabled population.31

30 Id. at 9.
Because executive agencies like the SSA issue millions of evaluative determinations in a given year, established processes govern consideration of each disability claim. Section A of this Part details the method by which the SSA evaluates claims for benefits. Section B discusses how claimants commence applications for benefits and the appellate process. Finally, Section C examines the evidentiary standards governing the administrative procedures of government agencies.

A. The Disability Determination Process

The statutory scheme governing the disability determination process is designed to accurately identify the presence of a serious impairment. To sufficiently demonstrate a disability to the SSA, an applicant must show: (1) an inability to engage in any “substantial gainful activity” (2) due to any “medically determinable physical or mental impairment” (3) which is “expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.”

When considering a disability application, the SSA employs a five-step “sequential evaluation process.” The process effectively consists of a series of questions, the findings of which may resolve the disability claim or lead to a subsequent inquiry. The first question asks whether an applicant is currently engaged in gainful employment. If the applicant is so engaged, the SSA will deny benefits without further inquiry. If the applicant is not gainfully employed, then the SSA will inquire whether the individual has an impairment that is sufficiently severe to significantly limit his or her ability to work, and is expected to cause death or last longer than twelve months. Should the SSA find that such an impairment is not present, the inquiry ends and it will deny the application.

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32 See OFFICE OF RET. & DISABILITY POLICY, supra note 26, at 2.73, 2.75, 7.1 (reporting that the SSA’s ALJs presided over approximately 800,000 hearings related to its disability benefit program).
34 20 C.F.R. § 404.1520 (2012); Frank S. Bloch et al., Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications, 25 CARDOZO L. REV. 1, 18-20 (2003) (describing the various steps and requirements to establish disability under the sequential evaluation process).
35 Bloch et al., supra note 34, at 18.
37 Id.
38 Id. §§ 404.1509, 404.1520 (defining the “duration requirement”).
39 Id. § 404.1520(a)(4)(ii) (“If you do not have a severe medically determinable physical or mental impairment . . . or a combination of impairments that is severe and meets the duration requirement, we will find that you are not disabled.”).
If the SSA determines the presence of a severe impairment, the third step asks whether the condition meets or equals a condition enumerated in the agency’s Listing of Impairments. If the condition meets such requirements, the agency will issue a finding of disability. Should the agency determine that the condition does not qualify under the Listing of Impairments, the process will proceed to the fourth inquiry which considers whether the applicant is prevented from performing past relevant work. The SSA will deny disability benefits if the claimant can engage in his or her past employment despite the presence of a disability. If the individual cannot perform his or her past occupation due to the injury, the process continues to the final inquiry: whether, in light of the claimant’s age, experience, and education, the condition prevents participation in other substantial employment that is available in the national economy. If the applicant cannot participate in his or her past employment or in other work in the national economy due to his or her condition, the agency will determine the presence of a disability.

In setting forth its disability determination process, the SSA did not specify which party carries the burden of proof at each stage of the evaluation. Established practice, however, indicates that the burden of proof generally rests with the claimant until the final inquiry, at which point the burden shifts to the agency. After a claimant demonstrates an inability to return to his or her previous employment, it is incumbent upon the agency to demonstrate that the individual may participate in other gainful work that is available in the national economy.

B. Applying for Benefits and Appealing Determinations

To be eligible for disability insurance benefits, a claimant generally must meet an earning requirement and have worked in the past because the

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40 These enumerated conditions vary widely and include certain types of cancer, persistent infections of the lung, and schizophrenia. Id. § 404.1520(a)(4)(iii). See generally id. § 404, subpt. P, app. 1.
41 20 C.F.R. § 404.1520(a)(4)(iii).
42 Id. § 404.1520(a)(4)(iv).
43 Id. § 404.1520(a)(4)(v).
44 Id.
45 Bloch et al., supra note 34, at 19.
46 Id. at 19-20; 20 C.F.R. § 404.1512(a) (“In general, you have to prove to us that you are blind or disabled.”).
47 See Owens v. Comm’r of Soc. Sec., 508 F. App’x 881, 883 (11th Cir. 2013) (per curiam); Hunter v. Sullivan, 993 F.2d 31, 35 (4th Cir. 1992) (per curiam); Bloch et al., supra note 34, at 19-20 (citing Bowen v. Yuckert, 482 U.S. 137, 146 (1987)).
48 Bloch et al., supra note 34, at 20.
program is funded by payroll contributions. A claimant begins the disability benefits process by filing an application with the local SSA office, usually by phone or through the internet. Application questions are designed to determine the medical basis for the condition, the effect of a claimed disability on the applicant’s employment, and discern sources for any necessary medical records. The SSA reviews the claimant’s application to determine what types of benefits would be available to the claimant should the petition be approved. If the local office can conclude from the application that the claimant is currently engaged in gainful employment, it will deny the application at this stage. Otherwise, the local office will forward the application to the Disability Determination Service (“DDS”), which begins compiling the claimant’s medical record.

Claimants have the burden to produce medical records that the agency will need to make a disability determination. After the claimant provides basic information, however, the SSA will participate in further developing the record. Regulations provide that the agency will “make every reasonable effort” to obtain necessary evidence from the applicant’s treating sources and to weigh the evidence appropriately. If sufficient evidence to make a decision is not available, the SSA may conduct a physical or mental examination of the claimant at the agency’s expense. The agency may also request information from nonmedical sources, including the claimant’s family members, social workers, and—in cases involving children—teachers and daycare workers. Using the accumulated evidence from the claimant and the SSA, the DDS renders a decision and returns a recommendation for approval or denial to the local SSA office.

A claimant who is denied benefits at this initial stage may request that the SSA reconsider his or her application. Reconsideration involves essentially the same procedure as the initial review except that new examiners and consultants oversee the claim. The claimant may also introduce fur-

50 Bloch et al., supra note 34, at 24.
51 Id. at 30.
52 Id.
53 Id.
54 Id.
55 20 C.F.R. § 404.704 (2014) (“When evidence is needed to prove your eligibility or your right to continue to receive benefit payments, you will be responsible for obtaining and giving the evidence to us.”).
56 Id. § 404.1512(d).
58 20 C.F.R. § 404.1517.
59 Id. § 404.1513(d).
60 Bloch et al., supra note 34, at 24.
61 20 C.F.R. § 416.1400.
62 Id. § 404.914.
ther evidence and request an in-person disability hearing. After reconsideration, a still-unsuccessful claimant may appeal the determination to an ALJ. The ALJ then reviews the accumulated evidence from the two earlier reviews, and may develop the record even further by requesting additional documentation or physical examinations. Once satisfied with the record as presented, the ALJ conducts an administrative hearing in which the claimant introduces additional evidence and testimony. If the ALJ denies the application, a claimant’s final means of recourse within the administration lies with a petition to the Appeals Council, which reviews the ALJ’s factual findings for errors. The Council’s determination constitutes a final decision by the SSA. However, this decision is subject to judicial review in a federal district court.

C. Evidentiary Standards in Administrative Hearings

Rules governing the admissibility of evidence into administrative procedures have historically been less stringent than those applied in civil litigation, and provide for the introduction of a broader range of evidence. The Supreme Court succinctly described this traditionally broad evidentiary practice in administrative proceedings in *Interstate Commerce Commission v. Baird*, 194 U.S. 25 (1905). The Court held that an executive agency performing a quasi-judicial function “should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered . . . by those

63 Id. § 416.1416.
64 Id. § 416.1400.
65 Id. § 404.916. Before the hearing, the ALJ reviews the evidentiary record to determine whether it is sufficiently complete and will decide if more evidence is necessary to issue a determination. The ALJ also decides whether a medical or other expert witness need be called to the hearing or if the claimant should undertake further examinations. Most administrative hearings are relatively brief—lasting between thirty minutes and an hour—and informal in nature. After the ALJ poses a series of questions to the claimant, the claimant may be further examined by representation, if the claimant chose to acquire such. Following the hearing, the ALJ issues a written determination including an overview of the evidentiary record, factual findings, and reasoning for the decision. Bloch et al., *supra* note 34, at 26.
66 20 C.F.R. § 404.914.
67 Id. § 404.970.
68 Bloch et al., *supra* note 34, at 28.
69 20 C.F.R. § 416.1400 (“If you are dissatisfied with our final decision, you may request judicial review by filing an action in a Federal district court.”).
71 194 U.S. 25 (1904).
narrow rules which prevail in trials at common law.”72 The Court included a limitation on this liberal standard in Consolidated Edison Co. v. N.L.R.B.,73 by insisting that agencies base determinations upon “substantial evidence” that has “rational probative force.”74 The Court described the “substantial evidence” standard as requiring “more than a mere scintilla,” but such relevant evidence that a reasonable mind would believe adequate to support a conclusion.75

The American Bar Association spearheaded the dissent against the Supreme Court’s endorsement of this broad standard, calling for the imposition of judicial evidentiary requirements into administrative evaluative proceedings.76 In 1946, Congress addressed the growing controversy by enacting the Administrative Procedure Act (“APA”), which balanced the demand for unrestricted admission of evidence and the concern that an excessively liberal standard would allow agencies to rest determinations on dubious evidence.77 The APA essentially bifurcated the evidentiary requirement and allowed the admission of all evidence except “useless or redundant information.”78 The APA restricted this standard by requiring agencies to consider the record in its entirety and only base determinations upon “reliable, probative and substantial evidence.”79

In Universal Camera Corp. v. N.L.R.B.,80 the Supreme Court interpreted the APA to demand closer judicial review of federal agency decisions, requiring courts to consider whether the whole record supported the determination and whether the holding was based upon “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”81 According to some scholarly interpretations, this standard of review effectively requires administrative decisions to rely on evidence that would be sufficiently compelling to sustain a jury verdict at trial.82

In the post-APA era, courts further expanded the evidentiary standard for administrative proceedings. In Richardson v. Perales,83 for example, a claimant for disability benefits objected to the introduction of a physician’s findings that the claimant was deliberately withholding his movement to

72 Id. at 44. See also Interstate Commerce Comm’n, 227 U.S. at 93 (“The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties.”).
73 305 U.S. 197 (1938).
74 Id. at 229-30.
75 Id. at 229.
76 Kuehnle, supra note 70, at 843.
77 Id. at 846-47.
78 Id. at 847.
81 Id. at 477; Kuehnle, supra note 70, at 853.
82 Kuehnle, supra note 70, at 887.
imitate a back injury. The Supreme Court not only held that the medical reports were admissible in the proceeding despite their hearsay nature, but also stated that such findings constituted substantial evidence on which agencies could permissibly base a decision. The Court pointed to several factors that assured the reliability and probative value of the contested medical reports, including the unbiased and routine nature of the reports, the lack of inconsistency in the proffered evidence, the frequent introduction of such reports into judicial litigation by means of an exception to hearsay, and the thoroughness of the examination on which the reports were based.

In 1991, the SSA standardized the degree of deference to be given to records provided by treating physicians, like those at stake in Perales. The agency ruled that evidence from treating sources have “special intrinsic value” which should only be excluded for “good reason.” As discussed in the next Part, the Supreme Court used substantially similar language when describing the optimal approach to the judicial treatment of public records as an exception to the hearsay rule.

II. HEARSAY EVIDENCE IN JUDICIAL TRIALS

Social Security disability determinations, like other administrative reports, constitute hearsay under federal and state evidentiary rules because they contain the opinions and conclusions of a public official not present at trial. Despite the evidentiary prohibition of hearsay, there are a number of exceptions to the rule, including an allowance under common law for public records. This allowance makes provision for the admission of investigatory reports prepared by public officials unless a judge deems them to be untrustworthy. The public record exception to hearsay existed at common law, and has since been codified in the Federal Rules of Evidence (“F.R.E.”) and its state equivalents. The exception assumes that public

84 Id. at 391-92, 395.
85 Id. at 402.
86 Id. at 402-06.
90 Id. at 976; McCORMICK ON EVIDENCE § 291 (Edward W. Cleary ed., 3d ed. 1984).
91 Fred Warren Bennett, Federal Rule of Evidence 803(8): The Use of Public Records in Civil and Criminal, 21 AM. J. TRIAL ADVOC. 229, 230 (1994) (“The common law recognized the written records and reports of public officials as an exception to the hearsay rule when there was a duty to make the report or record and the report or record was made upon firsthand knowledge.”).
officials will perform their statutorily authorized duties correctly and without bias, and that a written statement is likely more accurate than the official’s memory. Applying the public record exception, however, has created considerable disagreement among courts.

This Part explores the numerous hurdles that litigating parties face when introducing evaluative reports, as well as the established exceptions that may permit admissibility. Section A provides a background to the public records exception to the hearsay rule. Section B examines the trustworthiness requirement set forth in the F.R.E. and state rules of evidence. Finally, Section C discusses the implications of F.R.E. Rule 403 on the admissibility of evaluative determinations.

A. Interpreting the Public Records Exception

The F.R.E., enacted in 1975, codified the public records exception to hearsay in federal court. The rule provided for the admission of evidence constituting “[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate a lack of trustworthiness.” On its face, the rule is notably broad and provides for the admission of records in any form issued by any government office and agency. However, the federal codification of the public records exception was not without controversy.

The rule’s ambiguous language providing for admissibility of records setting forth “factual findings” only broadened the disagreement among courts. In a narrow application of the federal rule, the Fifth Circuit refused to admit a report by the Coast Guard indicating that a decedent had been exposed to dangerous levels of chemicals because, in addition to an objective background of the matter, the record contained the official’s conclusions, which the court determined were not factual findings, but opinionative in nature. The Tenth Circuit, on the other hand, employed a broad interpretation and upheld the admission of a law enforcement review board’s finding that the police acted within established department guidelines when shooting a suspect. This administrative report, containing both

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92 Id. at 231.
93 Musselman-Brown, supra note 89, at 977.
94 FED. R. EVID. 803(8).
95 Id.
96 Bennett, supra note 91, at 230-31.
97 Smith v. Ithaca Corp., 612 F.2d 215, 223 (5th Cir. 1980).
98 Perrin v. Anderson, 784 F.2d 1040, 1046-47 (10th Cir. 1986).
factual and opinionative evidence, would have been barred under the Fifth Circuit’s approach.

In *Beech Aircraft Corp. v. Rainey*, the Supreme Court finally addressed this “longstanding conflict among the Federal Courts of Appeals.” The spouses of two Navy pilots killed during a training mission appealed the Eleventh Circuit’s vacation of a verdict against the aircraft manufacturer due to the admission of a Navy investigative report at trial. Despite acknowledging the trustworthiness of the document, the Eleventh Circuit found that F.R.E. Rule 803(8)(c) was limited to purely factual findings and did not include the report’s evaluative conclusions and opinions. The Supreme Court disagreed with this narrow construction, finding that there was no basis in the rule’s text or legislative history to justify this distinction. Because the public records exception included a safeguard—the trustworthiness requirement—in addition to those pervasive throughout the F.R.E., the Court found that the language of the public records exception was not meant to be exclusionary. In embracing the broad interpretation of the public record exception, the Court held that opinions and conclusions are admissible provided they are based on factual investigations and satisfy the trustworthiness requirement.

Although *Beech Aircraft Corp.* established a broad understanding of the public records exception in the federal system, state rules of evidence not modeled after the F.R.E. sometimes yield alternative approaches to the admissibility. For example, when considering the admissibility of reports issued by the Office of Safety and Health Administration identifying causative factors in an accident, the Massachusetts Court of Appeals refused to adopt *Beech Aircraft Corp.*’s liberalized approach. Despite noting that the language of the state’s public records exception was identical to F.R.E. Rule 803(8)(c), the court distinguished the *Beech Aircraft Corp.* decision on state-law grounds. It instead adhered to the narrow construction of the

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100 Id. at 156.  
101 Id. at 156-57, 161.  
102 Because the Navy report provided findings of causation—“the ultimate issue the jury was to decide”—the court of appeals expressed concern the award in the lower court may have been influenced by the report’s admission and remanded for a new trial. Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1528 (11th Cir. 1986), rev’d, 488 U.S. 153, 175 (1988).  
103 *Beech Aircraft Corp.*, 488 U.S. at 163-65 (noting that a “conclusion by way of reasonable inference from the evidence” constituted a factual finding (quoting another source) (internal quotation marks omitted)).  
104 Id. at 167-68 (emphasizing that the opponent’s right to diminish the weight of the report through the provision of contrary evidence is the “ultimate safeguard”).  
105 Id. at 169-70.  
106 Musselman-Brown, supra note 89, at 990.  
108 Id.
rule denounced by the Supreme Court eight years earlier. The continued survival of the narrow approach to the public records exception in some state jurisdictions indicates that the uncertainty and controversy surrounding evaluative courts will persist in this arena, despite its resolution among the federal circuits.

B. *The Trustworthiness Inquiry*

Hearsay evidence passing under the public records exception may be excluded if a court determines that it is untrustworthy. However, because courts generally assume that agencies perform their functions impartially and diligently, there is an established presumption that public records are trustworthy. Therefore, the burden rests with the contesting party to demonstrate the untrustworthiness of the public record at issue. The Supreme Court in *Beech Aircraft Corp.* did not define trustworthiness, but rather endorsed the four factors promulgated by the Advisory Committee: (1) the timeliness of the investigation; (2) the investigator’s skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation.

Even in light of the test endorsed in *Beech Aircraft Corp.*, courts still routinely refuse to admit evaluative reports due to worries about trustworthiness. The lack of an adversarial process causes concern that public officials may base determinations on unsound or prejudicially one-sided

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109 *Id.* (citing Commonwealth v. Slavski, 245 Mass. 405, 417, 140 N.E. 465 (1923)) (noting that, under Massachusetts precedent, “records of investigations and inquiries conducted . . . by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible in evidence as public records” (emphasis added)).

110 See Gilbrook v. City of Westminster, 177 F.3d 839, 858-59 (9th Cir. 1999) (holding that a trial court could presume that a public record issued by the Financial Review Committee was “authentic and trustworthy”); Johnson v. City of Pleasanton, 982 F.2d 350, 352-53 (9th Cir. 1992) (noting the presumption of trustworthiness is “ premised on the assumption that public officials perform their duties properly without motive or interest other than to submit accurate and fair reports” (quoting another source) (internal quotation marks omitted)); Ellis v. Int’l Playtex, Inc., 745 F.2d 292, 304 (4th Cir. 1984) (noting that evidence presented by public agencies may be “presumed to reflect methodologies accepted by the scientific community”); United States v. Van Hook, 284 F.2d 489, 493 (7th Cir. 1960) (noting that the presumption that a public official properly performs his or her duty is a fundamental reason for the public records exception to hearsay), rev’d on other grounds, 365 U.S. 609 (1961)); Thomas J. McCarthy, *Two Decades After Beech: Confusion Over the Admissibility of Expert Opinions in Public Records*, 42 J. MARSHALL L. REV. 925, 927-30 (2009) (noting that public records issued by state agencies are generally considered reliable due to the administration’s presumed impartiality and special expertise).

111 See Ellis v. Int’l Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1984) (Because “[m]ost government sponsored investigations employ well accepted methodological means of gathering and analyzing data . . . it is far more equitable to place that burden on the party seeking to demonstrate why a time tested and carefully considered presumption is not appropriate.”).


113 *Id.* at 169 n.12.
facts, due to the absence of an opportunity for cross-examination.\textsuperscript{114} Another issue is the possibility that the public official who created the report will be biased when the agency has an interest in the outcome of a lawsuit.\textsuperscript{115} Lastly, the introduction of government records engenders the worry that such evidence will unduly prejudice a jury, which may give unjustified weight to a written report endorsed by the government.\textsuperscript{116}

On the other side of the debate, proponents of broad admissibility of public records insist that any evidentiary concerns can be mitigated by judicial discretion.\textsuperscript{117} Courts could exclude portions of a report for lack of trustworthiness or issue an appropriate limiting instruction to the jury to alleviate the likelihood of prejudice.\textsuperscript{118} The Maryland Court of Appeals in Ellsworth v. Sherne Lingerie, Inc.,\textsuperscript{119} for example, emphasized that relevant evidence should not be excluded for untrustworthiness if avoidable.\textsuperscript{120} It remanded the case with instructions to the trial court to consider redacting portions of the report that could not be admitted under the public records exception, instead of excluding the entire report.\textsuperscript{121}

C. Federal Rule of Evidence 403

Parties seeking to admit an agency’s evaluative report under the public records exception face an additional hurdle other than the trustworthiness inquiry.\textsuperscript{122} Even after deeming an evaluative report trustworthy under F.R.E. Rule 803(8), courts may still exclude the material due to concerns of creating prejudice to the other party.\textsuperscript{123} ‘The admission of all evidence in a judicial proceeding is subject to F.R.E. Rule 403, which provides that “[a]lthough relevant, evidence may be excluded if its probative value is

\textsuperscript{114} Id.
\textsuperscript{115} Musselman-Brown, supra note 89, at 978 (suggesting that an official may be reluctant to impose liability upon the government if he believes that the formulated conclusions may be used in subsequent litigation).
\textsuperscript{117} Musselman-Brown, supra note 89, at 978.
\textsuperscript{118} Id.
\textsuperscript{119} 495 A.2d 348 (Md. 1985).
\textsuperscript{120} Id. at 364.
\textsuperscript{121} Id.
\textsuperscript{122} Abbott, supra note 25, at 709 (“An evidentiary objection based on Rule 803(8)(C) is distinct from a Rule 403 objection.” (citing Ledford v. Rapid-American Corp., No. 86 Civ. 9116 (JFK), 1988 WL 3428, at *2 (S.D.N.Y. Jan. 8, 1988))).
\textsuperscript{123} Bright v. Firestone Tire & Rubber Co., 756 F.2d 19, 23 (6th Cir. 1984) (“Even if the requirements of Rule 803(8)(C) were met, the [court] would still have discretion to exclude the report under Rule 403 if its probative value was substantially outweighed by the danger of unfair prejudice.”).
substantially outweighed by the danger of unfair prejudice.”

The rule calls for a balancing test requiring the courts to weigh the evidence’s value against the risk of causing prejudice to a party, misleading the jury, and delaying trial. Although the rule invokes a court’s discretion in its application, the Senate Report accompanying the provision mandates that judges base exclusion under Rule 403 solely on these considerations. A court’s invocation of the rule is especially common in the context of admitting reports created by public agencies, due to the concern that a jury may be unduly influenced if confronted with the official findings of a government entity.

Although the text of Rule 403 seemingly poses a formidable obstacle to the introduction of evaluative reports, courts generally consider the exclusion of evidence under the provision as an extraordinary measure. Even when an enumerated consideration is evident, courts have exhibited a propensity to use the balancing test in favor of admitting trustworthy documents. This preference toward admissibility is reflected in the courts’ interpretations of Rule 403. “Unfair prejudice,” for instance, does not mean mere harm to a party’s cause, but “prejudice of the sort which clouds impartial scrutiny and reasoned evaluation of the facts, which inhibits neutral

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124 FED. R. EVID. 403.
125 Abbott, supra note 25, at 708-09.
126 S. REP. NO. 93-1277, at 24-25 (1974); see also Imwinkelried, supra note 22, at 351 (“Rule 403 cannot be treated as a source of judicial power to announce evidentiary rules of general applicability.”)
127 See City of New York v. Pullman, Inc., 662 F.2d 910, 915 (2d Cir. 1981) (excluding a report issued by the Urban Mass Transit Administration because it was incomplete and based on hearsay evidence. The circuit court worried that the jury would not recognize the report’s shortcomings due to the “aura of special reliability and trustworthiness” connected with findings of government agencies (quoting United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979)) (internal quotation marks omitted)).
128 Wheeler v. John Deere Co., 862 F.2d 1404, 1408 (10th Cir. 1998) (reiterating longstanding circuit precedent that “the exclusion of evidence under Rule 403 is an extraordinary remedy to be used sparingly” (quoting Romine v. Parman, 831 F.2d 944, 945 (10th Cir.1987)) (internal quotation marks omitted)); United States v. Anderson, 798 F.2d 919, 926 (7th Cir. 1986) (“[F]ederal rules and practice favor the admission of evidence rather than its exclusion if it has any probative value at all.” (quoting Young v. Ill. Cent. Gulf R.R. Co., 618 F.2d 332, 337 (5th Cir.1980)) (internal quotation marks omitted)); United States v. McDowell, 762 F.2d 1072, 1076 (D.C. Cir. 1985) (stating that the test underlying Rule 403 should weigh in favor of admissibility in close cases); Lies v. Farrell Lines, Inc., 641 F.2d 765, 773 (9th Cir. 1981) (holding that any doubt regarding the considerations set forth in Rule 403 should be resolved in favor of admissibility).
application of principles of law to the facts as found.” Proponents of broad admissibility standards encourage courts to exclude evidence under Rule 403 only when all three considerations are at stake and the judge has no means to reduce the risk of the report’s overvaluation by a jury.

Consideration of the numerous interpretations underlying the public record exception and Rule 403 indicates that these codified evidentiary rules favor admissibility, particularly when a trustworthy government source created the record at stake. As the ensuing Part of this Comment examines, however, courts’ frequent failures to apply these interpretations in the context of evaluative reports issued by the SSA often lead to inconsistent and improper holdings.

III. TREATMENT OF AGENCY REPORTS IN LITIGATION

Like evaluative reports issued by other agencies, courts approach the admissibility of SSA reports in a variety of ways. This Part analyzes the inconsistent manner in which courts treat disability determinations. Section A examines judicial decisions finding SSA disability determinations inadmissible, while Section B analyzes holdings of admissibility. These sections are further divided according to the judicial reasoning underlying the respective evidentiary decisions. Finally, Section C examines the judicial treatment of evaluative reports issued by the National Transportation Safety Board (“NTSB”) to provide a means of identifying common approaches and concerns expressed by courts in a different administrative context.

A. SSA Reports Found Inadmissible

Although many courts refuse to allow litigants to introduce SSA reports into litigation, the reasoning underlying these decisions varies widely, making it difficult to identify common concerns or approaches. Many of the reasons courts assert for excluding SSA reports are reminiscent of those asserted by courts during the development of the public records exception to the hearsay bar. Specifically, courts have justified excluding a disability determination on a narrow reading of the public record’s hearsay exception, a finding that the report is not trustworthy, or that its probative value is outweighed by the risk of creating prejudice.

131 Imwinkelried, supra note 22, at 341-42.
1. Textual Reading of Hearsay Exceptions

Recall Debbie Leiting’s ordeal involving the admissibility of her disability determination in the Colorado Court of Appeals. In reversing the trial court’s evidentiary ruling, the appellate court noted that “statements are not automatically admissible under [the state rule of evidence] 803(8) merely because they are contained in a public report.” The Colorado court found that the ALJ’s recitation of evidence presented at the administrative hearing was inadmissible under a textual reading of the public records exception, as set forth in Colorado Rules of Evidence (“C.R.E.”) Rule 803(8), because it did not contain factual findings of the SSA itself. Rather, the report merely contained an accumulation of evidence created by various medical sources and the agency’s determination based on this information. The Colorado court also refused to admit the SSA report under other C.R.E. exceptions to hearsay. While C.R.E. Rule 803(6) permits the admission of medical records kept in the regular course of business, the disability report only contained the ALJ’s summary and interpretation of the medical evidence, as opposed to the records themselves. The court also refused to apply C.R.E. Rule 803(4), which provides for the admission of statements made for the purposes of diagnosis and treatment. The court interpreted this hearsay exception to only include statements by the patient to a treating physician as opposed to the physician’s statements describing his or her diagnosis or treatment of the patient.

The Leiting decision is reminiscent of the debate between the federal circuits surrounding the scope of the public records exception’s provision for “factual findings.” Although the Beech Aircraft Corp. decision resolved this dispute in the federal arena and held that opinions and conclusions based on objective data constituted factual findings, some state courts still persist in using a narrow reading of this hearsay exception.

2. SSA Determinations Found Untrustworthy

In Villanueva v. Zimmer, a driver injured in an automobile accident appealed the trial court’s refusal to admit her Notice of Award issued by the

133 Id.
134 Id.
135 Id.
136 Id.
137 Id.
SSA, granting disability benefits. The driver argued that the government agency’s award created a rebuttable presumption that the plaintiff was permanently disabled and unable to work due to the injuries sustained in the accident. The appellate court noted that the only hearsay exception that could potentially apply to the SSA report was the public records exception under New Jersey Rules of Evidence (“N.J.R.E.”) Rule 803(8)(c). However, the court emphasized that trustworthiness “is the cornerstone of the public records exception to the hearsay rule,” and noted the need for judicial caution when deciding whether to admit an administrative determination “that may be predicated upon a different, more lenient, standard, or sets forth no factual findings.”

The New Jersey Appellate court employed a notably narrow interpretation of the state’s public records exception, holding that only statistical determinations could constitute “factual findings” as set out in the rule.

The Villanueva court also noted an absence of probative value that SSA disability determinations introduce in judicial proceedings, owing to the lack of an adversarial process employed during the administrative proceedings. The court evoked N.J.R.E. Rule 403, which states that even relevant evidence should not be admitted if the risk of unduly confusing or prejudicing a jury outweighs its probative value. Using this framework, the court indicated that reports detailing factual findings by public officials present a special problem because such a report “adds nothing to the jury’s deliberation, other than the conclusion of another fact finder arrived at through a process similar to the one that the trial is undergoing.”

In Orber v. Jain, a New Jersey federal district court focused its concerns upon the ALJ’s determinations regarding causation in deliberating over the admissibility of an SSA disability suit in a medical malpractice suit. The court noted that the SSA does not have an institutional interest in determining the causation of a disability but only the presence thereof.

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140 Id. at 133.
141 Id. at 135.
142 Id. at 139.
144 Id. at 142.
145 Villanueva, 69 A.3d at 142 (“The lack of a meaningful adversarial process with respect to the cause, existence and extent of a plaintiff’s alleged disability renders the SSA’s conclusions on that issue unreliable.”); see also Ianscoli v. Astrue, Civil Action No. 10-12000, 2011 WL 4359978, at *2 (E.D. Pa. Aug. 25, 2011) (“A hearing on an application for benefits is not adversarial in nature; rather the Social Security Administration assists an applicant in proving his claim.”).
146 Villanueva, 69 A.3d at 143.
147 Id. (quoting Grossman & Shapiro, supra note 116, at 777) (internal quotation marks omitted).
149 Id. at *2.
150 Id.
Similarly important to the court’s holding was the lack of a means to assess the ALJ’s qualifications to accurately formulate conclusions as to causation.\textsuperscript{151} Because it deemed the SSA report untrustworthy and prejudicial, the district court excluded the determination in its entirety under F.R.E Rule 403.\textsuperscript{152}

In contrast, the Arizona Court of Appeals in \textit{Larsen v. Decker}\textsuperscript{153} did not limit the state’s public records exception codified in A.R.S. Rules of Evid. Rule 803(8) to statistical findings like the New Jersey Court in \textit{Villaneuva}. In that case, Larsen appealed a jury award that was substantially less than she requested.\textsuperscript{154} Larsen claimed the lower court erroneously declined to admit certain medical records detailing the extent of her injuries, including an SSA disability determination, on the basis that the records were untrustworthy.\textsuperscript{155} Although the appellate court embraced the broader interpretation of the rule to admit conclusions, opinions, and facts as set forth by the Supreme Court in \textit{Rainey}, it nonetheless affirmed the trial court’s decision to exclude the SSA report.\textsuperscript{156} The court held that because of the ALJ’s lack of medical expertise, the absence of a contributing medical expert at trial that could be subject to cross-examination, and the essentially ex parte nature of the SSA proceedings (in which Larsen was the only source of the provided information), the lower court did not commit reversible error when deeming the report untrustworthy.\textsuperscript{157}

\section*{B. SSA Reports Deemed Admissible}

Courts that have permitted the introduction of SSA disability determinations generally base their evidentiary holdings upon findings that the reports are trustworthy or that the use of judicial discretionary tools minimized the risk of causing undue prejudice. Interestingly, these decisions for the most part do not refer to many of the evidentiary principles developed by the case law and the legislative history underpinning the public records exceptions.

\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.} at *2-3.
\textsuperscript{154} \textit{Id.} at 282.
\textsuperscript{155} \textit{Id.} at 282-83.
\textsuperscript{156} \textit{Id.} at 283.
\textsuperscript{157} \textit{Id.} But see \textit{Clark v. Clabaugh}, 20 F.3d 1290, 1294 (3d Cir. 1994) (finding the absence of an administrative procedure that provides for the cross-examination of evidence does not necessarily render the evidence untrustworthy when the agency prepared the report pursuant to a legal duty).
1. SSA Determinations Found Trustworthy Under the Public Records Exception

Contrary to the New Jersey appellate court’s severe language regarding SSA reports employed in Villanueva, the state’s courts have not consistently demonstrated such a strong aversion to admitting these determinations. In Golian v. Golian,158 the appellate court found that the SSA’s disability finding constituted a prima facie showing of disability and an inability to partake in gainful employment.159 The court described this approach as a “limited application of the doctrine of res judicata,” in which the court accepts conclusions reached in administrative proceedings as valid and the burden to show otherwise is imposed upon the party disputing the agency’s findings.160 In justifying this ruling, the court indicated that determinations of administrative agencies are presumptively correct.161 Because the trial court failed to provide an opportunity to offer evidence to detract from the presumptive “reasonableness”—or trustworthiness—of the SSA’s determination, the court remanded the matter.162

2. The Employment of Judicial Tools to Mitigate Concerns of Prejudice

In Goodman v. Boeing Co.,163 a corporation appealed the lower court’s decision to admit an SSA report that found a worker was completely disabled.164 The lower court determined that the ALJ’s decision was trustworthy and permitted the redaction of statements that may have otherwise warranted exclusion under the state’s equivalent of F.R.E. Rule 803.165 On appeal, however, the corporation contended that the evidence was one-sided and prejudicial to the jury.166 The Washington Court of Appeals refused to restrict its reading of the public records exception to allow only facts and not conclusions.167 Rather, due to the absence of prior case law on the admissibility of SSA reports, the court reviewed the evidentiary practices of the Ninth Circuit and held that administrative reports containing conclusions may be admitted provided these determinations are based in fact and suffi-

159 Id. at 1115.
161 Id.
162 Id. at 1115-16.
164 Id. at 714.
165 Id. at 715.
166 Id. at 714.
167 Id. at 715.
ciently trustworthy. The court emphasized that the lower court’s redaction of parts of the report related to causation mitigated the risk of prejudice.

In *Webster v. Oglebay Norton Co.*, the Ohio Court of Appeals affirmed a lower court’s admission of an SSA determination showing that a cargo ship captain was permanently disabled following a slip and fall. The court found that the report was both admissible and relevant to the captain’s allegations of disability and rejected the shipping company’s contentions that admitting the agency decision would unfairly prejudice the jury. In reaching this holding, the court approved of the lower court’s issuance of a well-crafted jury limitation to ensure the consideration of evidence in a context appropriate to the charges at hand. In affirming the admission of a disability report, it noted that the district court’s issuance of a limiting instruction to the jury, instructing that the public record was not determinative, effectively mitigated any prejudice that may have otherwise been introduced. The Tenth Circuit in *Perrin v. Anderson* similarly endorsed a trial court’s use of a limiting instruction to reduce the risk of causing prejudice when admitting a law enforcement report regarding a shooting by police.

C. *NTSB Reports*

In furtherance of this Comment’s proposal for a uniform approach aimed to mitigate uncertainty in litigation, the application of the public records exception to evaluative reports must be considered in other contexts. The NTSB is a federal agency charged with investigating incidents involving transit and pipelines. As in SSA disability proceedings, the NTSB renders determinations and reports its findings pursuant to administrative statutes. Although the use of these reports as evidence constitutes the

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168 Id.
169 Goodman, 877 P.2d at 715.
171 Id. at *1.
172 Id. at *4.
173 Id.
174 Id.
175 784 F.2d 1040 (10th Cir. 1986).
176 Id. at 1047.
179 Id.
“bedrock of third party liability litigation,” concerns of trustworthiness and overvaluation of the reports by a jury arise during their introduction.\textsuperscript{180}

In \textit{Zeus Enterprises, Inc., v. Alphin Aircraft, Inc.},\textsuperscript{181} an airplane repair company, Alphin, appealed a judgment for breach of contract on the basis that the district court improperly admitted an NTSB report into evidence.\textsuperscript{182} The report, issued by an ALJ for the NTSB, provided findings and conclusions indicating that Zeus’s aircraft was not airworthy following Alphin’s reconstruction work.\textsuperscript{183} The agency reached its determination after conducting an evidentiary hearing in which Alphin was permitted to submit evidence to assert the adequacy of its repair work.\textsuperscript{184} Alphin could not appeal the determination, however, because it was not a party in the original administrative proceedings, which stemmed from Zeus seeking an evaluative determination by the agency.\textsuperscript{185} During the ensuing litigation for breach of contract, the district court admitted the NTSB report into evidence under the public records exception.\textsuperscript{186}

On appeal, Alphin contended that the determination did not constitute a finding resulting from an investigation, but rather was the result of “an appellate quasi-judicial proceeding.”\textsuperscript{187} In dismissing this argument, the Fourth Circuit examined the ALJ’s role in the proceedings, which involved considering testimony from both the litigating parties and engineering experts.\textsuperscript{188} The Circuit court determined that the ALJ relied on “a preponderance of reliable, probative, and substantial evidence” in reaching his determination.\textsuperscript{189} The court also found that this proceeding constituted an “investigation” under the plain language of F.R.E. Rule 803(8)(c), thereby implicitly rejecting the narrow interpretation of the exception.\textsuperscript{190}


\textsuperscript{181} 190 F.3d 238 (4th Cir. 1999).

\textsuperscript{182} \textit{Id.} at 240.

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textit{Id.}

\textsuperscript{185} \textit{Id.}

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} \textit{Zeus Enters., Inc.}, 190 F.3d at 241. In making this argument, the aircraft repair company hoped to invoke Fourth Circuit precedent that “[a] judge in a civil trial is not an investigator, rather a judge.” \textit{Id.} at 242 (alteration in original) (quoting Nipper v. Snipes, 7 F.3d 415, 417 (4th Cir. 1993)) (internal quotation marks omitted). In rejecting the argument, the court noted that this precedent was relevant in judicial proceedings, not those conducted by executive agencies. \textit{Id.} at 241.

\textsuperscript{188} \textit{Id.}

\textsuperscript{189} \textit{Id.} (quoting 49 C.F.R. § 821.49(a)(1) (1998)) (internal quotation marks omitted).

\textsuperscript{190} The court also noted the Third and Sixth Circuits determined that proceedings of a similar nature were investigations for purposes of the public records exception. \textit{Id.} at 242-43.
The court then addressed Alphin’s alternative argument that the report was inadmissible under F.R.E. Rule 403 because the danger of unfair prejudice outweighed its probative value. Specifically, it claimed that because the ALJ was a “judge,” the jury would give undue weight to his conclusions. In applying the Rule 403 balancing test, the court found that, in light of the extensive proceedings underlying the determination, “the probative value of the ALJ’s decision is real and beyond dispute.”

The court also found that the risk of unfair prejudice was minimal because Alphin participated in the administrative hearings, attacked the credibility of the NTSB report at trial, and the district court issued a cautionary instruction to the jury.

Like the varied evidentiary approaches to SSA disability determinations, however, courts have not developed a common approach to the admissibility of NTSB reports. In Echevarria v. Caribbean Aviation Maintenance Corp., a district court excluded a Factual Accident Report issued by the agency on the grounds that it contained inadmissible hearsay and would unduly prejudice the aircraft repair company. The court expressed concern that the Factual Accident Report contained double hearsay, or hearsay within hearsay, because it included statements by witnesses and pilots, as opposed to just the official who compiled the report. The court interpreted the language of the public records exception to not extend to these statements and also noted that a judge may exclude the evidence at his or her discretion under F.R.E. Rule 403. Instead of using discretionary tools such as redaction to exclude only these vexing portions of the report, the court excluded the NTSB report in its entirety.

The First Circuit voiced similar concerns in John McShain, Inc. v. Cessna Aircraft Co. when excluding a NTSB report detailing the recurrent failure of an aircraft’s landing gear. Alongside concerns over double hearsay, the First Circuit also found that the lower court properly excluded

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191 Zeus Enters., Inc., 190 F.3d at 243.
192 Id. at 241.
193 Id. at 243.
194 The district court cautioned the jury that the “ALJ’s decision is not conclusive on the issue you have before you.” Id. (internal quotation marks omitted).
196 The district court explained that the report’s use of hearsay evidence made “it arduous to discern whether the statements are admissible or not.” It did not further specify how the evidence was prejudicial as to justify exclusion under F.R.E. 403. Id. at 467.
197 Id. at 466; but see D’Alessandro v. Pa. State Police, 937 A.2d 404, 417 (Pa. 2007) (Saylor, J., concurring) (agreeing with the admission of a police investigatory report including statements by witnesses and officers under the public records exception despite it constituting double hearsay).
198 Echevarria, 839 F. Supp. 2d at 466.
199 Id.
200 563 F.2d 632 (3d Cir. 1977).
201 Id. at 636.
the report under F.R.E. Rule 403 because it was not cumulative and its content could already be discerned from evidence already admitted.  

It is important to consider the contrary rulings regarding evaluative reports issued by agencies other than the SSA as part of developing a coherent approach to the admissibility disability determinations. The optimal paradigm would address the evaluative approaches employed in other contexts to ensure harmony with broader evidentiary principles.

IV. AN OPTIMAL APPROACH TO SSA REPORTS IN LITIGATION

Because most states have modeled their rules of evidence after the F.R.E., it stands to reason that the case law and the legislative history underlying the federal rules is relevant and should be influential in state jurisdictions. In refusing to admit SSA disability determinations, many courts subvert or even ignore evidentiary principles set forth in the common law underpinning the public records exception. For example, the presumption that a public record is valid and trustworthy is not just established precedent, but a central reason for having the public records exception in the first place. Second, intent to permit a broader range of evidence in litigation is incidental to the legislative enactment of a hearsay exception. Third, exclusion under F.R.E. Rule 403 and its state equivalents is an extraordinary measure, especially if the court determines that the record is trustworthy, because this would enhance the evidence’s probative value. Finally, a host of established subsidiary principles render these findings of inadmissibility even more dubious.

Section A of this Part proposes that the recurrent failures by courts to apply these assumptions in the context of SSA reports has led to improper evidentiary rulings. Section B establishes a paradigm with which courts

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202 Id.

203 See Margaret A. Berger, The Federal Rules of Evidence: Defining and Refining the Goals of Codification, 12 Hofstra L. Rev. 255, 256-57 (1984) (examining how the enactment of the F.R.E. spurred codification of evidentiary rules in state forums, many of which were based on the federal rules. The F.R.E. are highly influential even in jurisdictions not modeled after the federal paradigm); Charles J. Walsh & Beth S. Rose, Increasing the Useful Information Provided by Experts in the Courtroom: A Comparison of Federal Rules of Evidence 703 and 803(18) with the Evidence Rules in Illinois, Ohio, and New York, 26 Seton Hall L. Rev. 183, 199 (1995) (noting that the Wisconsin and New Mexico legislatures modeled their state’s hearsay rule on early drafts of the F.R.E.).

204 See supra note 110 and accompanying text.

205 See supra note 128 and accompanying text.

206 For example, the absence of an opportunity for cross-examination in an administrative hearing is not cause for a court to find the created report untrustworthy when that report was created pursuant to a legal duty. The same is true for administrative proceedings not characterized by an adversarial process. See supra Part III.
may allow the use of these determinations, while minimizing the risk of creating unfairness and prejudice.

A. Many Courts Understate the Trustworthiness of SSA Disability Reports While Exaggerating the Likelihood of Prejudicial Consequences

Many courts refuse to admit disability determinations by the SSA despite the valuable evidence these reports can provide to parties.\(^{207}\) However, many concerns on which judicial findings of untrustworthiness are predicated are overstated. Since agency reports are presumptively correct, courts should refrain from excluding such evidence unless blatantly untrustworthy—a principle not applied by many courts when considering SSA determinations.\(^{208}\)

In Villanueva, the New Jersey appellate court stated that the lack of an adversarial process in administrative hearings rendered the SSA report unreliable under the public records exception.\(^ {209}\) However, the Third Circuit in In re Japanese Electronic Products Antitrust Litigation\(^ {210}\) held that the absence of an administrative procedure that provides for the cross-examination of evidence by an adverse party does not necessarily render the evidence untrustworthy when the agency prepared the report pursuant to a legal duty.\(^ {211}\) The Supreme Court in Beech Aircraft Corp. noted that it is well established that cross-examination is not necessary to find that an official investigatory report is trustworthy.\(^ {212}\) The mere absence of a party’s ability to challenge evidence is therefore not a justifiable reason to exclude SSA reports.

This Comment does not suggest that SSA disability determinations should have a binding effect in litigation. Rather, these reports provide evidence with which an injured individual can more accurately convey the extent of his or her damages. Although the party contesting admission may not have been present during the SSA proceeding, it still has the opportunity to question and to discredit the determination at trial—a privilege the Supreme Court described as the “ultimate safeguard” against the introduction of untrustworthy evidence.\(^ {213}\)

\(^{207}\) See supra Part III.
\(^{208}\) Musselman-Brown, supra note 89, at 984.
\(^{211}\) Id. at 268.
\(^{213}\) Id. at 167-68. See also Zeus Enters., Inc. v. Alphin Aircraft, Inc., 190 F.3d 238, 243 (4th Cir. 1999) (noting that Alphin’s ability to challenge the NTSB’s findings in a subsequent trial for breach of contract further minimized the risk of the evidence causing prejudice).
The lack of medical expertise on the part of the ALJ who composed the final SSA determination also does not present a compelling reason to exclude the report.\footnote{214}{Larsen v. Decker, 995 P.2d 281, 285 (Ariz. Ct. App. 2000).} As noted by the Third Circuit, the public record exception to hearsay “does not on its face require that the one who undertakes the investigation and authors the report be qualified as an expert before the report becomes admissible.”\footnote{215}{Clark v. Clabaugh, 20 F.3d 1290, 1294 (3d Cir. 1994).} Because courts have interpreted the public records hearsay exception to favor admission of a broad range of evidence, courts should not imply a condition that effectively requires every ALJ who writes a disability report to have a medical degree.\footnote{216}{See Bennett, supra note 91, at 230-31.} After all, the same condition is not imposed on judges in state and federal courts.

When considering the probative value of SSA reports, courts should consider the standard of evidence that the Supreme Court’s ruling in Consolidated Edison Co. of New York imposed upon agencies.\footnote{217}{See supra notes 74-75 and accompanying text.} Though evidentiary practices under the APA may permit the introduction of all evidence that is not redundant or useless, agencies must base their determinations upon substantial evidence.\footnote{218}{See supra note 79 and accompanying text.} By requiring agencies to use sufficient evidence that a reasonable mind would accept as adequate to support the finding standard, the Supreme Court effectively equated this administrative standard to a preponderance of the evidence, as used in civil litigation.\footnote{219}{See supra note 82 and accompanying text; Zeus Enters., Inc. v. Alphin Aircraft, Inc., 190 F.3d 238, 241 (4th Cir. 1999) (finding that the ALJ relied upon “a preponderance of reliable, probative, and substantial evidence” in reaching a determination regarding the aircraft’s airworthiness (quoting 49 C.F.R. § 821.49(a)(1) (1998)) (internal quotation marks omitted)).} The use of a standard of proof in administrative proceedings that is similar to that necessary to support a judgment in judicial litigation bolsters the trustworthiness of such evidence. With this in mind, the Villanueva court appears to miss the mark by suggesting that caution is required when considering the admissibility of administrative reports that may be grounded “upon a different, more lenient, standard.”\footnote{220}{Villanueva v. Zimmer, 69 A.3d 131, 141 (N.J. Super. Ct. App. Div. 2013).}

The extensive administrative framework and entrenched procedures underlying the adjudication of disability claims also suggests that SSA determinations provide probative value.\footnote{221}{See supra Part I.} The SSA disability program has an institutional interest in preventing candidates who are merely unemployed from receiving benefits.\footnote{222}{See supra note 23 and accompanying text.} For that reason, Congress imposed a rigorous definition of “disability,” which indicates that determinations proceeding under this standard cannot be discarded as excessively lenient.\footnote{223}{See supra note 23 and accompanying text.} The ad-
administrative processing of a claim also resembles a judicial bench trial in many ways, including an initial consideration by an ALJ—a public official presumably possessing expertise in the matter—and a hierarchal appellate structure ending in judicial review. Given these established procedures, courts should refrain from excluding these reports as untrustworthy in the absence of strong evidence to the contrary.

Courts should also exercise restraint when considering the exclusion of SSA disability determinations under F.R.E. Rule 403 (or a state counterpart). Because evidentiary rules and practices generally favor admissibility of evidence, courts should not exclude otherwise trustworthy evidence for risk of prejudicial effect unless there is no alternative. It follows that a report found sufficiently trustworthy under the public record exception has probative value, which weighs strongly against a finding of inadmissibility. As courts established during the interpretation of the F.R.E. following its enactment, exclusion of evidence under Rule 403 is an extraordinary measure—especially in the context of a public record that has already passed the trustworthiness inquiry set forth in F.R.E. Rule 803(8)(c). Courts can alleviate concerns of prejudice, which may otherwise justify exclusion under Rule 403, by issuing a suitable cautionary instruction to the jury, as demonstrated by the Tenth Circuit’s approach in Perrin v. Anderson.

If the assertion that SSA reports are inherently trustworthy—like other public records created by government agencies—is accurate, then courts must develop a paradigm to ensure that these reports are used fairly and efficiently in litigation. The ensuing section sets forth a model with which courts could accomplish this goal.

B. A Proposed Paradigm

The inconsistent case law regarding SSA disability reports demonstrates that recipients of the disability program face uncertainty when attempting to introduce a determination regarding the extent of an injury into litigation. Despite concerns of unfairness and trustworthiness, a strict exclusionary approach toward admitting the reports in court is inefficient and perhaps unjustified in light of established hearsay exceptions. A better approach would entail courts considering the two findings usually conveyed in SSA disability decisions—causation and severity—as severable.

224 See supra Part I.B-C.
226 Schwartz, supra note 225, at 494 (“[T]he greater the trustworthiness of the report, the higher its probative value, and the less likely it will mislead or cause unfair prejudice.”).
227 Perrin v. Anderson, 784 F.2d 1040, 1047 (10th Cir. 1986).
1. Isolating Findings Related to Institutional Interests

In *Orber*, the New Jersey district court was skeptical about the trustworthiness of findings of causation in the report, but noted that the SSA *does* have an institutional interest in accurately determining the presence and severity of a disability.\(^{228}\) Unfortunately, despite noting that only “portions” of the report were more prejudicial than probative, the New Jersey court excluded the entire report.\(^{229}\) Had the district court utilized the approach used in *Goodman*, which involved redacting parts of the report before admitting it to trial, it could have allowed the plaintiff valuable evidence to demonstrate the severity of the injuries without influencing the jury in regards to causation.\(^{230}\)

When passing the APA, Congress bifurcated the administrative evidentiary rule by allowing the admission of all evidence but requiring agencies to rest their decisions only upon that which was determined to be “reliable, probative, and substantial.”\(^{231}\) This Comment’s recommended paradigm involves continuing this approach when introducing these determinations into litigation. By conceptually bifurcating an SSA disability report to determine which portions tend to establish causation and which demonstrate the extent of the injury, a court can take advantage of the agency’s institutional interests. Because administrative determinations are presumptively correct and the SSA has a compelling institutional interest to accurately determine the presence of a disability, these findings should generally be considered sufficiently trustworthy to pass under the public records exception to hearsay.\(^{232}\) Instead of excluding an SSA determination in its entirety because of findings of causation, courts should view causation and severity of injury as severable components of the report. If there is concern as to the trustworthiness of any findings related to causality—likely relating to whether the ALJ’s special expertise extends to questions of causation—under this approach, a judge could order the redaction of provisions accordingly.

By recognizing the SSA’s intrinsic institutional interest in determining the severity of an injury, courts should not hastily conclude that disability determinations are untrustworthy in this aspect. If a particular report contains findings related to causation that are untrustworthy or may cause unfair prejudice, a court can simply redact these to ensure the jury only considers holdings that the SSA had an institutional interest in accurately determining. This approach would be consistent with the methods courts em-

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\(^{228}\) See supra note 23 and accompanying text.


\(^{231}\) Kuehnle, supra note 70, at 833-34.

\(^{232}\) Musselman-Brown, supra note 89, at 984.
ploy when addressing the admissibility of evaluative determinations issued by other agencies.\textsuperscript{233}

2. Courts’ Use of Discretionary Tools

Even in jurisdictions that continue adhering to a narrow reading of the public records exception, courts should strive to allow SSA reports to the greatest extent possible. If a key justification for the public records exception is the special expertise, presumed impartiality, and diligence of the public official, it is inefficient to exclude such a valuable evidentiary source on an excessively narrow interpretation of the evidentiary rule. Rather, courts could use discretionary tools such as redaction or the issuance of a cautioning instruction to only present to the jury portions of the disability determination that was comprehended by that jurisdiction’s understanding of the public records exception. For example, a court located in a jurisdiction with a narrow understanding of what information constitutes a “factual finding”—such as the Colorado appellate court in \textit{Leiting}—could redact the opinions and conclusions of the ALJ. Using this approach, the party seeking admission of the report would still have access to statistical findings that would otherwise require expensive expert testimony to replicate. In the alternative, a court could issue a limiting instruction to the jury to prevent their consideration of problematic portions of the report.

By utilizing tools of judicial discretion to mitigate concerns of untrustworthiness and undue prejudice, such as limiting jury instructions and redaction, courts would rarely need to exclude SSA disability reports in their entirety. By sparing parties the expense of needing to use expert witnesses to demonstrate the extent of injuries while concurrently ensuring the ability to contest causation of the injury, this paradigm would achieve both economic efficiency and fairness in trial.

CONCLUSION

The current legal landscape concerning the admissibility of SSA disability determinations has created uncertainty and inconsistent results in litigation.\textsuperscript{234} Judicial reluctance to allow the introduction of these materials

\textsuperscript{233} Ellsworth v. Sherne Lingerie, Inc., 495 A.2d 348, 364 (Md. 1985) (reversing the exclusion of annual reports by the Secretary of Health, Education and Welfare and the Consumer Product Safety Commission to the President and remanding with instructions to redact any untrustworthy portions as opposed to excluding the reports in their entirety).

unduly deprives a party of evidence that would be invaluable in determining damages. In more unfortunate situations, epitomized by Debbie Leiting’s experience in the Colorado Court of Appeals, an injured party faces losing an award if an appellate court reverses a verdict on account of an admitted SSA determination. These types of results inject inefficiency into the legal system, as future litigants may be reluctant to introduce these types of reports on the grounds that a final judgment in their favor may later be vacated on account of the admission. Not only does this result cause economic waste by requiring the injured party to demonstrate findings already made available by the SSA, but it also deprives the jury of a means to calculate damages with more accuracy.

An evidentiary paradigm only restricting the use of SSA reports in trial to statements relating to the presence and extent of a disability will effectively mitigate concerns of prejudice while retaining a party’s right to demonstrate a government-endorsed determination of disability. By redacting or excluding portions of the report that implicate causation as opposed to just the extent of damages, a court can avoid the inefficient exclusion of the entire evidentiary source. This evidentiary model may have implications for the admissibility of records from agencies other than the SSA. The invoked discretionary tools are frequently employed by courts in other contexts to prevent the admission of untrustworthy or prejudicial material without excluding the entire report. If courts can determine the institutional interests underlying an agency’s activities and ensure that admitted statements directly relate to these interests, there seems to be little reason why this approach cannot be employed in other administrative contexts. By acknowledging the evidentiary principles established during the early interpretation of the F.R.E. and identifying the inherent institutional interests of a given agency, courts would be better prepared to render efficient evidentiary determinations.

untrustworthy due to the absence of adversarial process in the administrative proceedings and the residing ALJ’s lack of medical expertise).

235 See supra INTRODUCTION.