From the Editor

Ipse Dixit Alone Qualifies as Substantial Evidence in Agency Proceedings

By Patrick J. Kenny

The rules governing expert testimony in federal judicial proceedings do not apply with the same force in administrative proceedings. That is relatively unremarkable. After all, administrative proceedings typically do not involve juries and ordinarily are not subject to the same rules of evidence applicable in federal courts. In some respects, disputes concerning expert testimony in administrative proceedings are comparable to similar disputes in bench tried cases. A recent 6–3 decision from the Supreme Court, in *Biestek v. Berryhill*, 139 S. Ct. 1148 (2019), demonstrates one significant difference.

The circumstances leading to the decision in *Biestek* were straightforward. Mr. Biestek had stopped working because of an array of medical problems and applied for social security disability benefits. That led to administrative proceedings before an Administrative Law Judge ("ALJ"). Proceedings before ALJs are recognized as "adjudicative," but the "rules governing such hearings are less rigid than those a court would follow." *Id.*

Ultimately, the merits of Mr. Biestek's claim depended on findings as to (a) "the types of jobs Biestek could perform notwithstanding his disabilities[,]" and (b) "whether those kinds of jobs 'exist[ed] in significant numbers in the national economy.'" *Id.* at 1152 (further citation omitted). To help with those questions the ALJ sought the opinions of a vocational expert. *Id.* at 1153. The expert testified that a person with Mr. Biestek's disabilities, education and job history could perform sedentary jobs, such as a bench assembler or sorter, and that "240,000 bench assembler jobs and 120,000 sorter jobs existed in the national economy." *Id.* at 1153 (further citation omitted).

On cross-examination the expert offered two sources for those figures: (1) the Bureau of Labor Statistics; and (2) her "own individual labor market surveys." *Id.* Though not noted in the majority opinion, Justice Gorsuch later observed in his dissent that "it turns out the Bureau can't be the source; its numbers aren't that specific." *Id.* at 1159 (Gorsuch, J., dissenting). The sole source for the expert's testimony regarding the 240,000 assembler jobs and the 120,000 sorter jobs had to be her "own individual labor market surveys."

Thus, as it turns out, the cross-examination of the expert was the key to Mr. Biestek's disability claim. Mr. Biestek's attorney asked the expert for those surveys. The expert refused, citing confidentiality concerns. Mr. Biestek's attorney suggested the expert redact the confidential information so he could review the surveys. The ALJ then "interjected that he 'would not require' [the expert] to produce the files in any form." *Id.*

Thereafter, the ALJ explicitly relied on the expert's unsupported testimony in ruling on Mr. Biestek's application. Although he granted Mr. Biestek some relief, he denied disability benefits for the period before Mr. Biestek reached the age of 50. Mr. Biestek sought review in federal court.

In federal court, factual determinations by ALJ's are deemed to be "conclusive" if they are supported by "substantial evidence." *Id.* at 1153. In Mr. Biestek's case, relying solely on the expert's testimony above, the ALJ had found that before Mr. Biestek reached the age of 50 his "disabilities should not have prevented a 'successful adjustment to other work.'" *Id.* Under the rules governing such judicial review, that factual finding by the ALJ would be deemed "conclusive" if it was supported by substantial evidence. The only evidence supporting that finding was the expert's unsupported opinion.

Thus, Mr. Biestek argued that the expert's testimony "could not possibly constitute [substantial] evidence because she had declined, upon request, to produce her supporting data." *Id.*

The Supreme Court majority rejected that argument. They viewed Mr. Biestek's argument as one urging a "categorical rule" that would "preclude a vocational expert's testimony from qualifying as substantial if the expert had declined an applicant's request to provide supporting data." *Id.* at 1153–54. They also observed that, although experts in a federal court proceeding are required to produce all data considered in forming their opinions, the rule is different in the administrative proceedings before the Social Security Administration. *Id.* at 1154.

The majority then rejected Mr. Biestek's proposition, reasoning that if the expert's testimony would be deemed sufficient to support the ALJ determination had no request for the supporting data had been made, then:

> why should one additional fact—a refusal to a request for that data—make a vocational expert's testimony categorically inadequate?

Id. at 1156.

In the end, the majority rejected Mr. Biestek's argument, holding that "[t]he inquiry, as is usually true in determining the substantiality of evidence, is case-by-case[,]" *id.*, explaining that:

> Where Biestek goes wrong, at bottom, is in pressing for a categorical rule, applying to every case in which a vocational expert refuses a request for underlying data.

Id. at 1157.

The three dissenting Justices viewed the case quite differently. They faulted the majority for:

> Focus[ing] on the propriety of a categorical rule that precludes private data that a vocational expert refuses viewed the circumstances differently.

Id. at 1157.

In their view:

> the question presented by this case encompasses an inquiry not just into the propriety of a categorical rule in such circumstances but also into whether the substantial-evidence standard was met in the narrower circumstances of Michael Biestek's case.

Id.

On that second point, Judge Gorsuch believed that Mr. Biestek's individual case required reversal:

> Count me with Judge Easterbrook and the Seventh Circuit in thinking that an agency expert's bottom-line conclusion, supported only by a claim of readily available evidence that she refuses to produce on request, fails to satisfy the government's statutory burden of producing substantial evidence of available other work.

Id. at 1159 (Gorsuch, J., dissenting).

As to the majority's view of Mr. Biestek's "categorical" proposition, Justice Gorsuch stated that he did not view Mr. Biestek's submission as requiring an "all-or-nothing approach that would cover 'every case.'" *Id.* at 1162. Noting that an expert's opinion might be supported in ways other than through production of the expert's data, the dissenting Justices nevertheless observed that no such alternative method was used in Mr. Biestek's case. *See id.*

Although *Biestek* suggests that it was decided on an abstract ground, concerning a categorical question, in practice the effect of *Biestek* could be profound. The "substantial evidence" test is a ubiquitous legal standard. The substantial evidence supporting the adverse portion of Mr. Biestek's disability ruling was solely the *ipse dixit* of the government's expert. The district court affirmed that ruling. The Sixth Circuit affirmed that ruling. The Supreme Court affirmed that ruling. Regardless of whether *Biestek* was meant to be decided on a narrow basis, its effect in the arena of adjudicative agency processes potentially will be much broader.

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