

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Hart v. Berryhill Implementation (also known as *Hart v. Colvin*)

Focus on class members with open claims

Gerald McIntyre, Special Counsel

Trinh Phan, Senior Staff Attorney

August 10, 2017

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

Today's Agenda

1. Overview of *Hart v. Berryhill* class action
2. Brief review of settlement relief
3. Considerations for class members with open claims (C notices)

Overview of *Hart v. Berryhill*

Also known as *Hart v. Colvin*

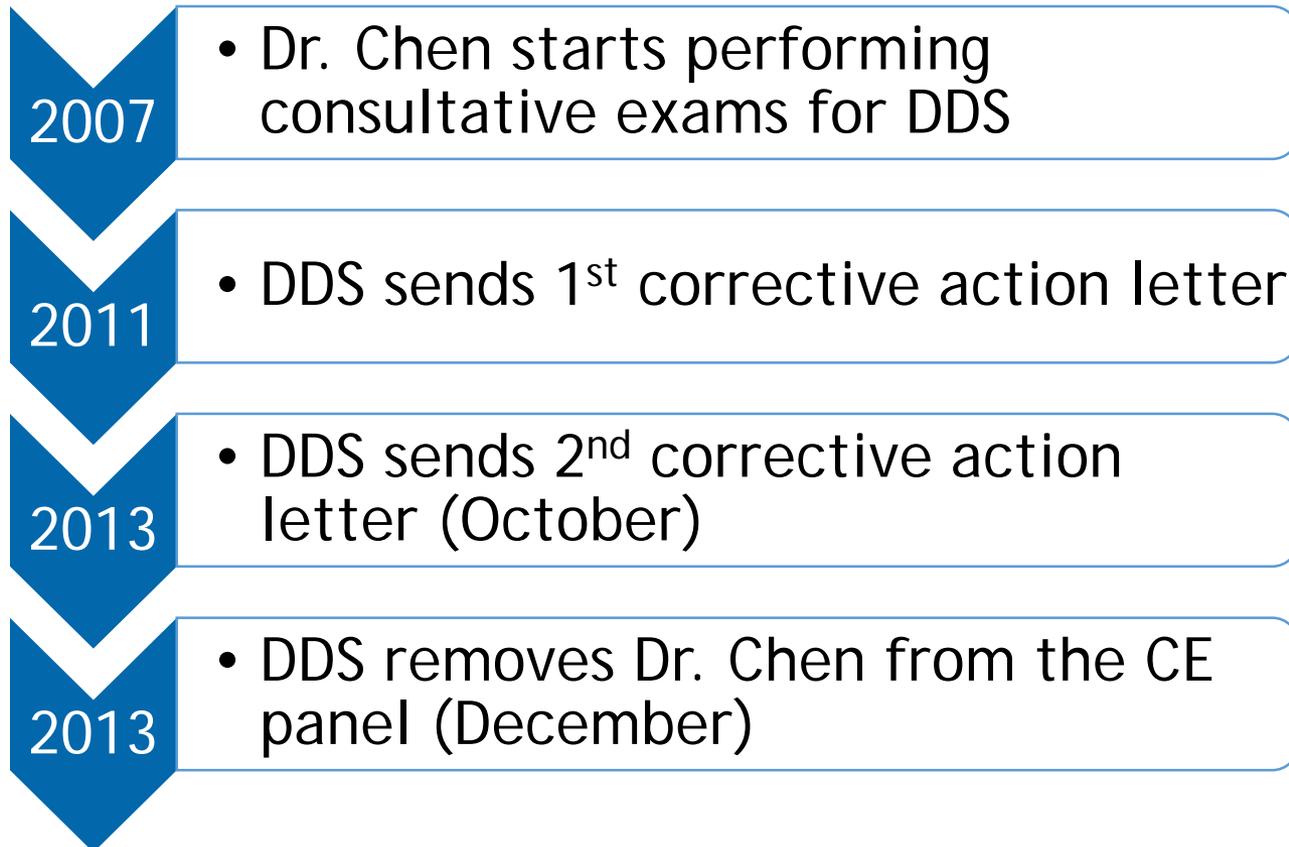
Background

- Social Security consultative examiner Dr. Frank Chen
- Performed consultative exams (CEs) in the Greater Bay Area, and as far south as San Luis Obispo
- Many complaints over a period of years

The Complaints

- Statements that he performed tests he did not in fact perform
- Conclusions that were inconsistent with medical evidence already in the record, with no explanation of the inconsistency
- Exams were very short
- Claimants reported instances of rudeness, bias and other inappropriate remarks

Sequence of Events



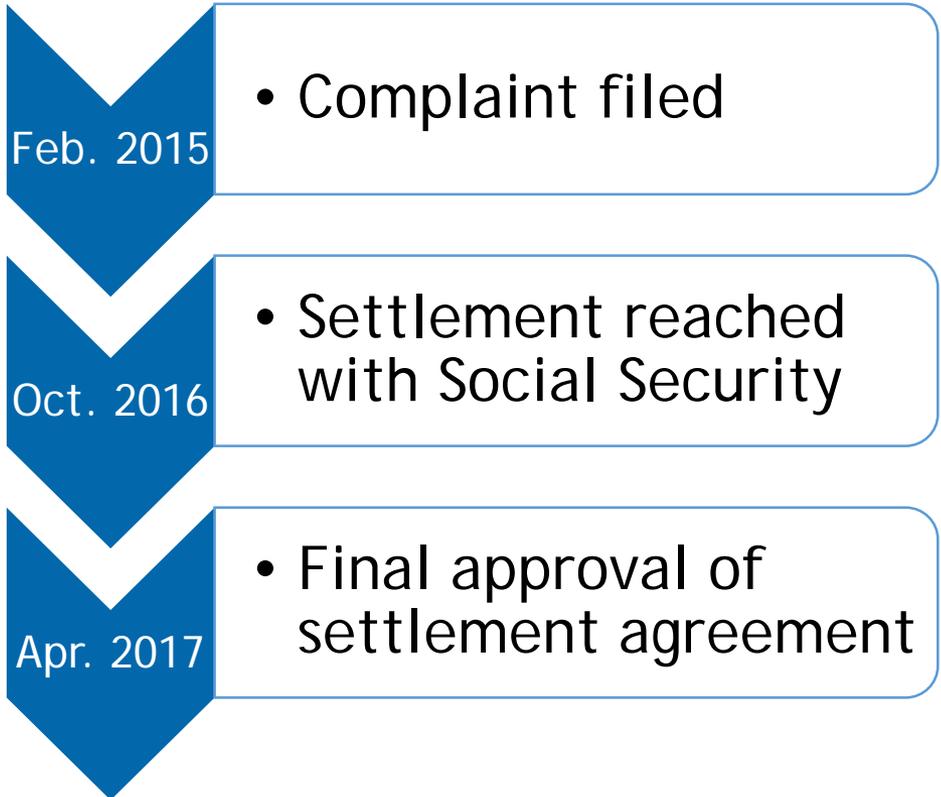
But continues to use his CE reports to deny and terminate SSI and SSDI benefits

The Case

Hart v. Berryhill, No. 3:15-cv-623-JST (N.D. Cal)

Also known as *Hart v. Colvin*

Case brought by Justice in Aging, the law firm of Morrison & Foerster LLP, and the Legal Aid Society of San Mateo County.



Settlement implementation:
July 2017 - March 2018

Brief review of settlement relief

Sub-topics

Class definition

- Exam by Dr. Chen, AND claim denied in part or in full
- Two exceptions

Categories of relief

- Open claim
- Closed claim, exam in 2011-2013
- Closed claim, exam 2007-2010

Relief

- New disability determinations for many class members. Details vary by category.

The Class

Examined by Dr. Chen from 2007 through 2013

- SSDI or SSI disability application
- Continuing Disability Review

AND claim denied in part (partially favorable decision) or in full (unfavorable decision)

The Class: Two Exceptions

1. In current pay status on October 14, 2015 =
Receiving SSDI, or SSDI that converted into Social Security retirement at full retirement age; or receiving SSI on the basis of disability, or SSI that converted into SSI on the basis of age at age 65
 - Not “current pay” if receiving Social Security retirement that was not converted from disability benefits, or if came into current pay status after 10/14/15.
 - Also not “current pay” if receiving SSI based on age that was not converted from SSI disability, or if came into current pay status after 10/14/15.
2. ALJ’s decision explicitly stated that Dr. Chen’s report was not given any weight.

Categories Eligible for Relief

Notice C

Claim is **open** at SSA on April 25, 2017.

- Saw Dr. Chen from **2007-2013**
- Group 3 in settlement agreement

Notice A and A2

Claim is closed as of April 25, 2017. More recent claims.

- Saw Dr. Chen from 2011-2013
- Group 1 in settlement agreement

Notice B and B2

Claim is closed as of April 25, 2017. Less recent claims.

- Saw Dr. Chen from 2007-2010
- Group 2 in settlement agreement

A2 and B2: Partially Favorable Decisions

A decision that was favorable in part, and unfavorable in part.

Examples:

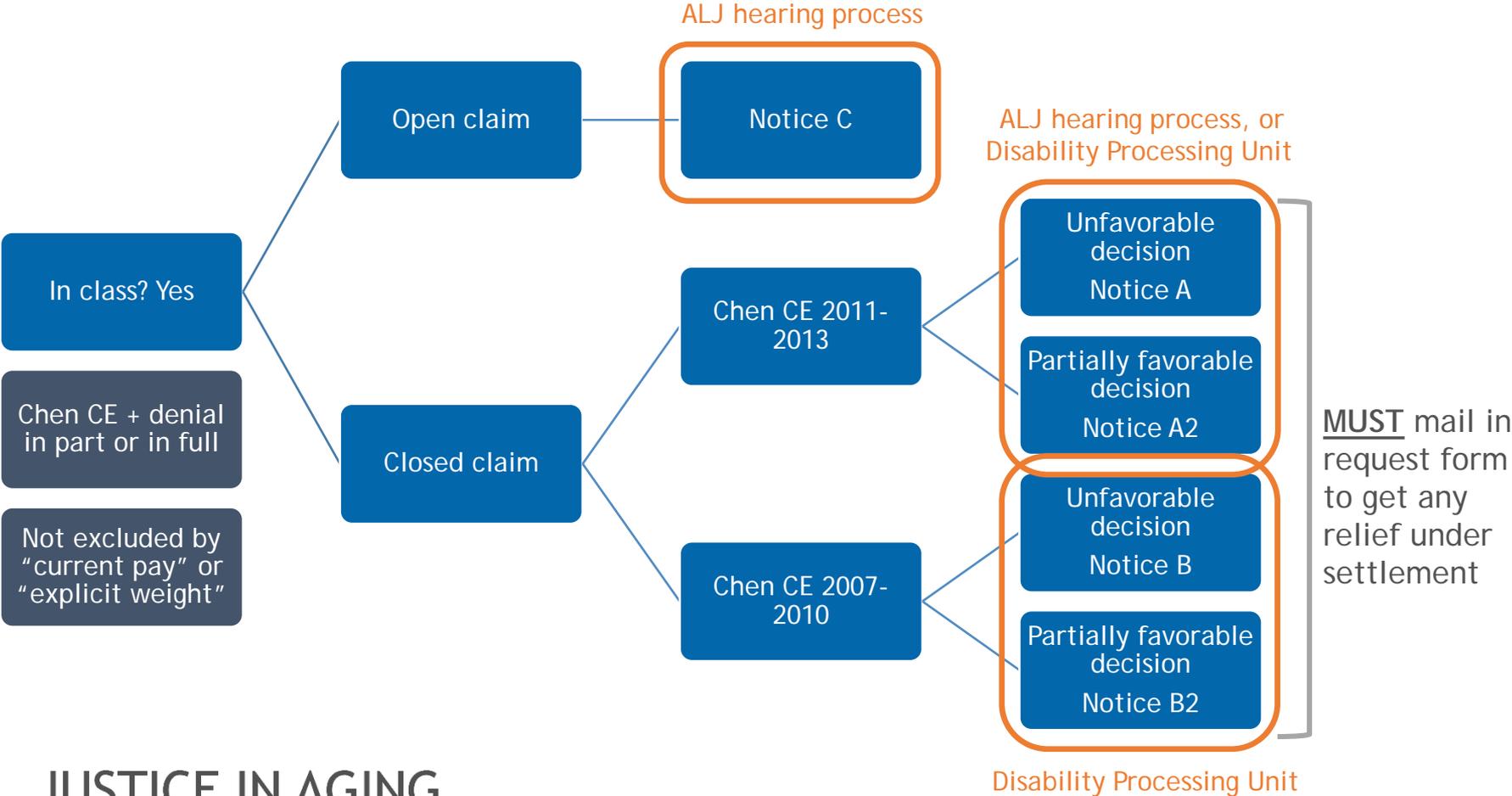
- Approved, but for a closed period of disability (no ongoing benefits)
- Approved, but with a later disability onset date

The Mechanisms for Relief

Notice C Open	Notice A and A2 Recent, closed	Notice B and B2 Less recent, closed
<ul style="list-style-type: none">• ALJ hearing process	<ul style="list-style-type: none">• If closed at initial or Reconsideration, → Disability Processing Unit• If closed at ALJ or higher, → ALJ hearing	<ul style="list-style-type: none">• Disability Processing Unit

For cases in district court: SSA will not contest an appropriate motion requesting that case be sent back to the agency to be considered for relief under the settlement.

Assisting Class Members



The Relief: Notice C

A class member can choose whether the Dr. Chen report is considered in adjudicating their claim

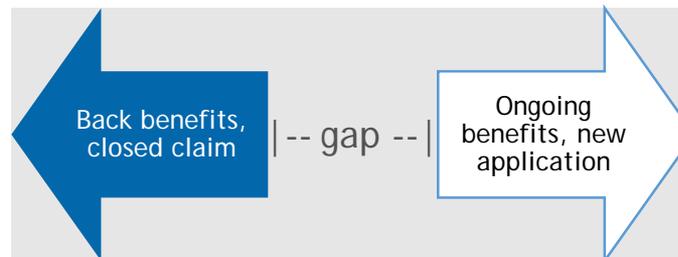
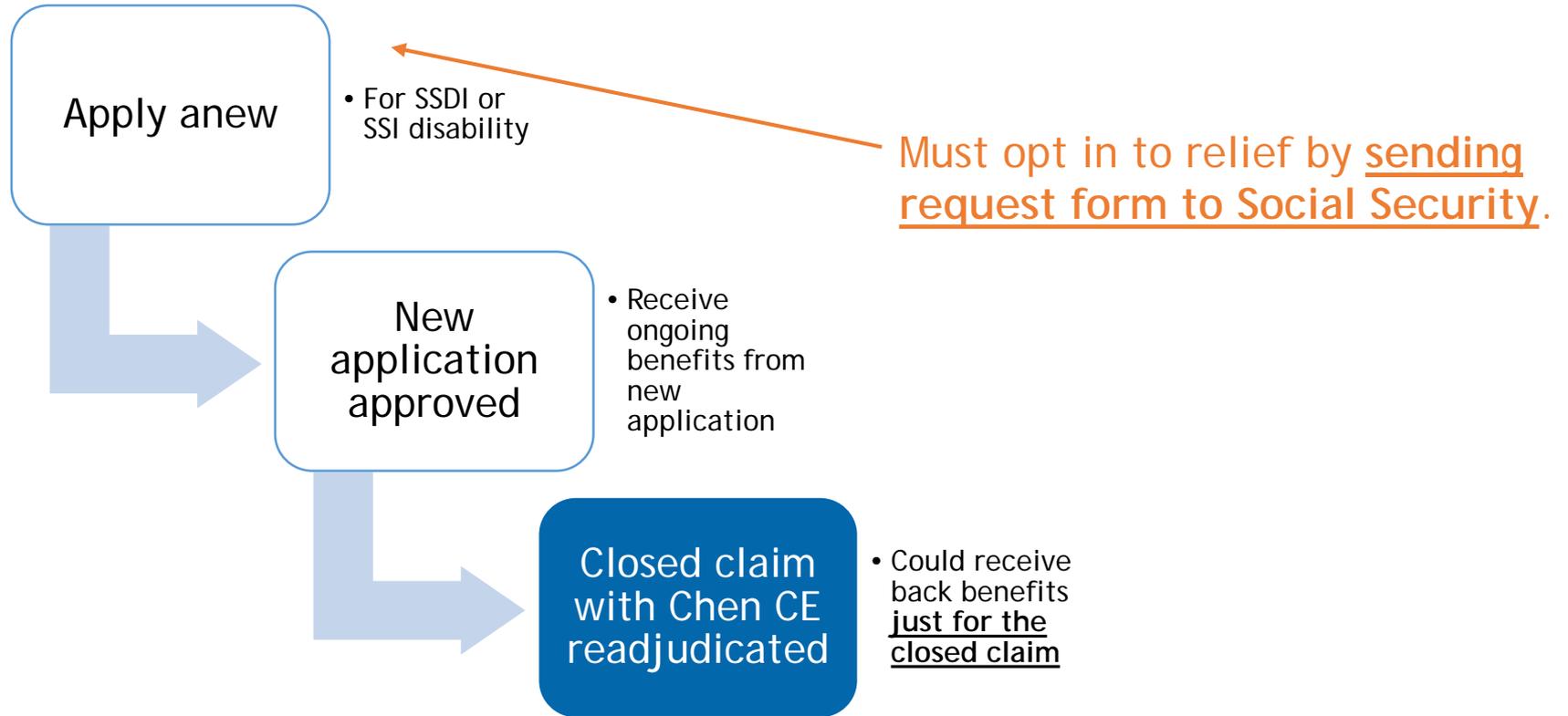
The Relief: Notice A and A2

Must opt in to relief by sending request form to Social Security.

Step 1: Can get back benefits for closed claim period, if can prove disability for closed claim

Step 2: If got back benefits through Step 1, then can also get benefits from closed period up to the present and ongoing, if can prove disability in that time period

The Relief: Notice B and B2



Treating Source Rule vs. New Medical Evidence Rule

Treating source rule applies for all but some B notice relief. (treating source can get controlling weight)

- Notice C (open claims) and Notice A and A2 (closed claims, more recent):
 - Because the critical date is the date of filing of the claim → treating source rule
- Notice B and B2 (closed claims, less recent):
 - Part 1 (new disability application) → new rule
 - Part 2 (readjudication of old claim) → treating source rule

New Rule Applies to New Disability Application (Part 1) of Notice B/B2 Relief

- Revised rule on the evaluation of medical evidence, published earlier this year.
 - Adjudicators will give no special weight to the medical opinions of a claimant's treating doctors. Instead, medical evidence will be evaluated for "persuasiveness," based most importantly on consistency and supportability.

New rule: 20 CFR §§ 404.1520c, 416.920c

Treating source rule: 20 CFR §§ 404.1527, 416.927

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Implementation: Notice C Class Members

Timeline for notices

July 10, 2017

C notices mailed to class members with open claims

August 2017

Deadline to return notice C request form is 30 days from date of receipt

- EXCEPTION: If ALJ hearing is already scheduled, then return request form no fewer than 5 days before the hearing date.
- Mailing deadline. (USPS Certificate of Mailing at \$1.35, Signature Confirmation at \$2.90/\$2.45, Certified Mail at \$3.35)

September 2017

Likely timeframe for mailing of A, A2, B and B2 notices

- Deadline to return A and B notice request form is 90 days from date of receipt.
- Deadline to return A2 and B2 notice request form is 180 days from date of receipt.
- Justice in Aging will have a training around the time the A, A2, B and B2 notices are mailed. Stay tuned.

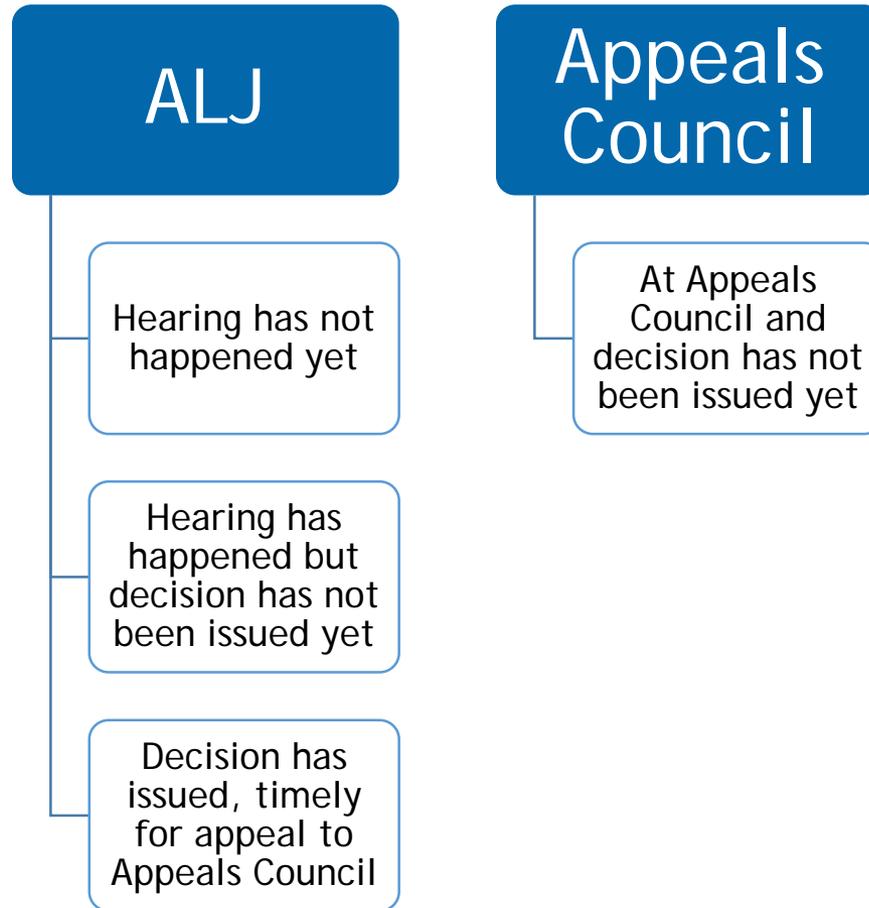
JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Who Will Receive Notice C?

- Individual examined by Dr. Chen between January 1, 2007 and December 31, 2013
- AND had open claim as of **April 25, 2017**, meaning claim was:
 - At ALJ (before hearing, after hearing but before decision)
 - Decided by ALJ, within time to appeal to Appeals Council
 - At Appeals Council and waiting for decision
- Not an open claim → claim pending in federal district court. “Open” = decision on claim has not yet become binding through (1) final decision of Commissioner or (2) individual’s failure to timely request the next level of admin review.

Procedural posture



What does notice C say?

- Informs class member about the settlement
- Request form: Does the class member want the ALJ to consider Dr. Chen's report when deciding the claim?
- Deadline to return request form:
 - 30 days from date of receipt, EXCEPT
 - If ALJ hearing has been scheduled, then no fewer than 5 days before hearing date



Social Security Administration
Important Information

SOCIAL SECURITY
[6401 SECURITY BLVD
BALTIMORE, MD 21235]
Date:
BNC:

John Doe
123 Main St
Anytown, MD 12345

NOTICE OF CLASS ACTION SETTLEMENT AND REQUEST FORM

Please Return The Enclosed Form Within 30 Days After You Get This Notice

You are receiving this notice and request form because of a class action settlement in a lawsuit. The lawsuit alleged the Social Security Administration should not have relied on examination reports from Dr. Frank Chen. Plaintiffs alleged that Dr. Chen's reports were flawed in important

John Doe
123 Main St
Anytown, MD 12345

Hart v. Colvin REQUEST FORM

IMPORTANT

Return This Form Using the Enclosed Envelope Within 30Days of Receiving It, Or No Fewer Than 5 Days Before A Scheduled Hearing

Please check below to indicate whether you want the ALJ to consider Dr. Chen's report when deciding your claim.

_____ Yes, I want the ALJ to consider Dr. Chen's report.

_____ No, I do not want the ALJ to consider Dr. Chen's report.

Date

Signature

Assisting Class Members

Returns Request Form



If select NO, then ALJ will not consider Chen CE.



If select YES, ALJ will consider Chen CE.
ALJ will still consider reasons he was removed from CE panel.

Does Not Return Request Form



If pre-hearing, ALJ will ask class member at hearing, and proceed accordingly.



If post-hearing, ALJ will consider Chen CE.
ALJ will still consider reasons he was removed from CE panel.

Regardless, ALJ has discretion to order a new consultative exam.

What Happens if You Return the Request Form?

- If NO, person does not want ALJ to consider Dr. Chen's report
 - ALJ will be instructed by SSA to honor that choice and to disregard Dr. Chen's report in evaluating the claim.
 - ALJ should make a clear statement to this effect on the record at the hearing (if the ALJ hearing has not happened yet) and in the written decision.
- If YES, person wants the ALJ to consider Dr. Chen's report
 - ALJ will be instructed by SSA to nonetheless consider the reasons Dr. Chen was removed from the CE panel, whether ordering an additional CE is appropriate, and to explain the weight, if any, he or she gives to Dr. Chen's CE report.
- Regardless, ALJ has discretion to order a new CE

What Happens if You Don't Return the Request Form?

- If post-hearing, ALJ will proceed as if claimant chose to include Dr. Chen's report. (YES in prior slide)
- If pre-hearing, the ALJ will be instructed by SSA to ask on the record whether claimant wants the ALJ to exclude Dr. Chen's report from consideration, and proceed accordingly.
- Regardless, ALJ has discretion to order a new CE.

Additional Considerations for C Notices

Depending on the Location of the Pending Appeal

If ALJ Hearing Has Not Happened Yet

- If claimant is pre-hearing, then the ALJ must advise the person during the hearing that he or she:
 - Received a CE from Dr. Chen, a provider who was later removed from the DDS panel for reasons that include uncorrected deficiencies regarding the quality of his exam reports and the thoroughness of his exams;
 - Has the option to have the report from Dr. Chen excluded from consideration in their case; and
 - That the ALJ has the discretion to consider whether ordering an additional CE is appropriate.
- Another chance to choose whether to consider Chen report

If ALJ Hearing Has Happened but Decision Not Issued Yet

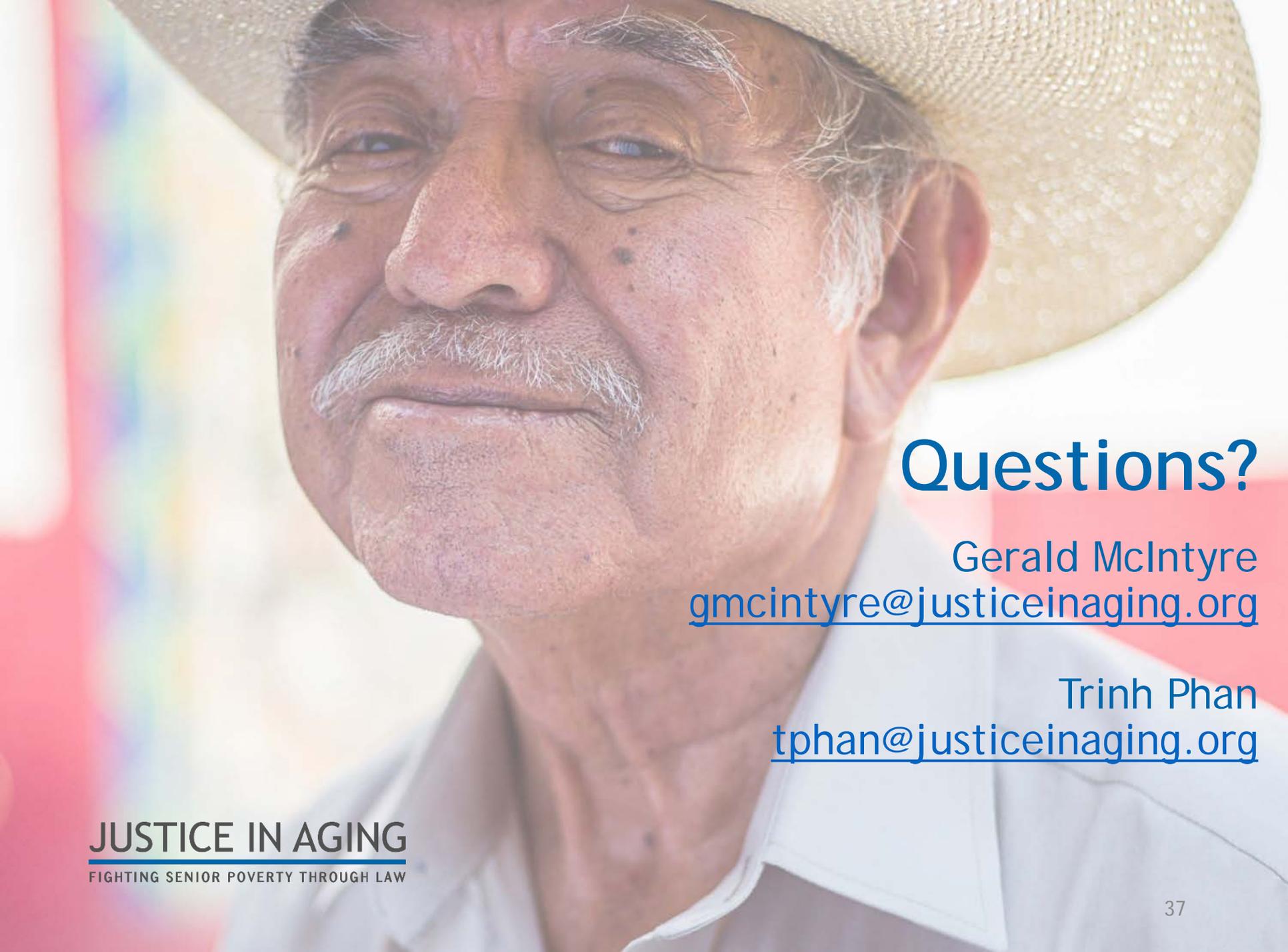
- Must return request form if they want the Dr. Chen CE excluded from consideration by the ALJ.
- If the class member does nothing, the ALJ will be instructed by SSA to consider the CE from Dr. Chen, along with the reasons Dr. Chen was removed from the consultative examination panel, whether ordering an additional consultative examination is appropriate, and how much weight the CE should receive under the circumstances.

If Claim is Pending at Appeals Council

- SSA will remand the case to re-schedule for a new ALJ hearing.
- The next steps in the process are the same as where the ALJ hearing has not happened yet.

Additional Resources

- Justice in Aging: <http://www.justiceinaging.org/our-work/litigation/hart-v-colvin-litigation/>
 - Includes case documents
 - Additional information: Trinh Phan, tphan@justiceinaging.org or 510-931-4203



Questions?

Gerald McIntyre
gmcintyre@justiceinaging.org

Trinh Phan
tphan@justiceinaging.org