

BREYER, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 98–9537

JUATASSA SIMS, PETITIONER v. KENNETH
S. APFEL, COMMISSIONER OF
SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June 5, 2000]

JUSTICE BREYER, with whom THE CHIEF JUSTICE,
JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

Under ordinary principles of administrative law a reviewing court will not consider arguments that a party failed to raise in timely fashion before an administrative agency. See *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 36–37 (1952); *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U. S. 143, 155 (1946); *Hormel v. Helvering*, 312 U. S. 552, 556–557 (1941); see also 2 K. Davis & R. Pierce, *Administrative Law Treatise* §15.8, pp. 341–344 (3d ed. 1994). As this Court explained long ago:

“[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. . . . [C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *L. A. Tucker Truck Lines, supra*, at 37.

Although the rule has exceptions, it applies with particular force where resolution of the claim significantly

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depends upon specialized agency knowledge or practice. In this case, petitioner asked the reviewing court to consider arguments of the kind that clearly fall within the general rule, namely, whether an administrative law judge should have ordered a further medical examination or asked different questions of a vocational expert. No one claims that any established exception to this ordinary “exhaustion” or “waiver” rule applies. See, e.g., *Bethesda Hospital Assn. v. Bowen*, 485 U. S. 399, 406–407 (1988) (futility); *Mathews v. Eldridge*, 424 U. S. 319, 329, n. 10 (1976) (constitutional claims).

The Court nonetheless concludes that the law requires a new exception. It points out that the ordinary waiver rule as applied to administrative agencies “is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts.” *Ante*, at 5. And the plurality argues that the agency proceedings here at issue, unlike those before trial courts, are not adversarial proceedings. *Ante*, at 7–9. Although I agree with both propositions, I do not see how they lead to the plurality’s conclusion.

There are, of course, important differences between a court and an administrative agency, but those differences argue *in favor of*, not against, applying the waiver principle here. Cf. *SEC v. Chenery Corp.*, 318 U. S. 80, 88–95 (1943). As this Court has explained, the law ordinarily insists that a party invoke administrative processes before coming to court in order to avoid premature interruption of the administrative process and to enable the expert agency to develop the necessary facts. *McKart v. United States*, 395 U. S. 185, 193–194 (1969). In addition, exhaustion is required because a

“complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of

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administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.” *Id.*, at 195.

Certain of these reasons apply with equal force to courts and to administrative agencies. Others, such as the notion of “administrative autonomy,” apply with special force to agencies. None of them applies *only* to courts. Practical considerations arising out of the agency’s familiarity with the subject matter as well as institutional considerations caution strongly against courts’ deciding ordinary, circumstance-specific matters that the parties have not raised before the agency— at least where there is no good reason excusing that failure. These considerations apply where a party fails to give an agency an opportunity to correct its own mistake, *i.e.*, to a failure to raise a matter on an internal agency appeal, just as they apply to a failure ever to raise the matter at all. See *id.*, at 194 (exhaustion principles apply equally where “administrative process is at an end and a party seeks judicial review of a decision that was not appealed through the administrative process”).

I would add that these ordinary “exhaustion of remedies” rules are particularly important in Social Security cases, where the Appeals Council is asked to process over 100,000 claims each year, Social Security Administration Office of Hearings and Appeals, Key Workload Indicators— Fiscal Year 1999, p. 21 (115,151 requests for Appeals Council review), where many of those cases ultimately find their way to federal court, Administrative Office of the United States Courts, L. Mecham, Judicial Business of the United States Courts: 1998 Report of the Director 144 (Table C–2) (over 14,000 cases in fiscal year

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1998), and where the Social Security Act itself stresses their applicability. 42 U. S. C. §§405(g), (h); see generally *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U. S. 1, ___ (2000) (slip op., at 9); *Weinberger v. Salfi*, 422 U. S. 749, 765–766 (1975).

Nor, with one exception, do I see why the nonadversarial nature of the Social Security Administration internal appellate process makes a difference. An initial ALJ proceeding is, after all, itself nonadversarial. *Ante*, at 7 (although claimant may be represented by counsel, the agency itself has no representative present and relies upon the ALJ to “investigate the facts and develop the arguments both for and against granting benefits”). Yet I assume the plurality would not forgive the requirement that a party ordinarily must raise all relevant issues before the ALJ. Cf. *Shalala, supra*, at ___ (slip op., at 11–12) (noting statute’s “nonwaivable and nonexcusable requirement that an individual present a claim to the agency before raising it in court”).

Neither does the law in this area disfavor informal proceedings. See *Hormel*, 312 U. S., at 556 (“And the basic reasons which support th[e] general principle [of waiver] applicable to trial courts *make it equally desirable* that parties should have an opportunity to offer evidence on the general issues involved *in the less formal proceedings* before administrative agencies entrusted with the responsibility of fact finding” (emphasis added)). Considerations of time and expense can favor such proceedings. And, since a Social Security claimant is permitted his own counsel or other representative if he wishes, the informality does not necessarily work to his disadvantage. Indeed, the plurality’s rule, by interfering with the ordinary ALJ/Appeals Council/District Court order for presenting agency-specific arguments, threatens to complicate judicial review, thereby producing increased delay without any benefit to the agency or to the claimants themselves.

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There is, however, one exception, *i.e.*, one way in which the informality of the proceedings may matter. Administrative lawyers are normally aware of the basic “exhaustion of remedies” rules, including the specific waiver principle here at issue. But the internal appellate review proceeding’s informality; the absence of a clear statement in the rules or on the Appeals Council instructional form insisting upon the raising of all, not just some, issues; the presence on the instructional form of just a few lines for the listing of issues; and an attached estimate that on average an appellant can “read the instructions, gather the necessary facts and fill out the form” in 10 minutes, see Form HA–520– taken together– might mislead the Social Security claimant. That is, it might make the claimant believe he need not raise every issue before the Appeals Council. *Ante*, at 1–3 (O’CONNOR, J., concurring in part and concurring in judgment).

But the Social Security Administration says that it does not apply its waiver rule where the claimant is not represented. Brief for Respondent 41–42. And I cannot say it is “arbitrary, capricious, [or] an abuse of discretion,” 5 U. S. C. §706(2)(A), to apply the waiver rule when a claimant was represented before the Appeals Council, as was petitioner, by an *attorney*. Petitioner’s lawyer should have known the basic legal principle: namely, that, with important exceptions, a claimant must raise his objections in an internal agency appellate proceeding or forgo the opportunity later to raise them in court. The Fifth Circuit, moreover, had precedent applying the general rule in this specific context. *Paul v. Shalala*, 29 F. 3d 208, 210–211 (1994). And far from being misled by the agency’s form, petitioner’s lawyer followed an alternative procedure, see 20 CFR §§422.205(a), 404.968(a) (1999), and filed 19 pages of detailed legal and factual arguments challenging the ALJ’s decision. App. 51–69. In these circumstances, petitioner is accountable for her lawyer’s decision– whether neglectful

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or by design— to reserve some of her objections for federal court.

For these reasons, I would affirm the judgment of the Court of Appeals.