

**NONPRECEDENTIAL DISPOSITION**

To be cited only in accordance with FED. R. APP. P. 32.1

**United States Court of Appeals**

**For the Seventh Circuit  
Chicago, Illinois 60604**

Submitted November 28, 2023\*

Decided December 5, 2023

**Before**

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 23-1550

MARK S. BABIASH,  
*Plaintiff-Appellant,*

*v.*

KILOLO KIJAKAZI,  
Acting Commissioner of Social Security,  
*Defendant-Appellee.*

Appeal from the United States District  
Court for the Eastern District of  
Wisconsin.

No. 21-CV-1291-SCD

Stephen C. Dries,  
*Magistrate Judge.*

**ORDER**

Mark Babiash applied for Social Security disability insurance benefits. After initially obtaining a partially favorable decision, he received an unfavorable one. An administrative law judge ruled that her prior conclusion was erroneous: Babiash had never qualified for benefits and ordered repayment of the benefits he had received. The

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\* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

district court affirmed that decision, and because substantial evidence supports it, we do as well.

Babiash sought benefits in 2014, stating that his disability began in November 2013. He testified that he had recently begun working, receiving pay as a caregiver for his disabled adult daughter. The ALJ issued a partially favorable decision in 2015, determining that (1) Babiash's caregiving work did not disqualify him from benefits because the recent income was not enough to be substantial gainful activity and (2) he became disabled when he turned 55 in June 2014, not at the alleged onset date of November 2013. (Different rules apply to applicants who are at least 55 years old. *See* 20 C.F.R. § 404.1563(e).) The ALJ noted, however, that the agency could revise the disability decision depending on Babiash's future income:

The record indicates that the claimant is currently working. If ... the claimant's earnings level reaches substantial gainful activity, his disability benefits may stop or be adjusted, and he may be subject to an overpayment.

About two years later, after significant earnings on Babiash's record came to the agency's attention, the Commissioner reviewed his case. The case eventually returned to the ALJ after the Appeals Council determined that, in light of the evidence of Babiash's earnings since the original decision, the ALJ had erred in finding that his work was not substantial gainful activity. The ALJ then issued an unfavorable decision and explained why her earlier decision was wrong: To qualify for benefits, Babiash had to lack substantial gainful activity for 12 continuous months since the onset date of his disability. 20 C.F.R. §§ 404.1520(a)(4)(i), 404.1571–.1576. But his earnings showed that he experienced no such period. As a result, the ALJ ordered Babiash to repay about \$88,000 in unwarranted benefits. The Appeals Council denied Babiash's request for review.

Babiash responded in two ways. First, he asked the Commissioner to waive the overpayment recovery under 42 U.S.C. § 404(b). That application, Babiash tells us, remains pending at the agency. Second, Babiash sought judicial review in the district court, which affirmed the ALJ's decision. The court ruled that, because Babiash did not argue that the decision about his earnings lacked substantial evidence, he forfeited that contention; in any case, the court reasoned, substantial evidence supported the decision. It also ruled that, because he had not exhausted his administrative remedies, it lacked jurisdiction over Babiash's request to waive repaying benefits or his new claim that the agency stopped paying benefits to retaliate against him for filing this suit.

On appeal, Babiash urges that we overturn the ALJ's decision that he is obligated to repay his previously received benefits. We review the agency's factual findings for substantial evidence, *see* 42 U.S.C. § 405(g), and its legal conclusions de novo, *Poole v. Kijakazi*, 28 F.4th 792, 794 (7th Cir. 2022). But as in the district court, on appeal Babiash does not argue that the record lacks substantial evidence for the ALJ's finding that his substantial gainful activity since 2013 was never interrupted for 12 continuous months. The government correctly highlights here—as it did in the district court—that Babiash has thus forfeited any such argument. We construe pro se filings liberally, but we have recognized that pro se litigants, despite the challenges they face, still must comply with procedural rules. *Anderson v. Hardman*, 241 F.3d 544, 545–46 (7th Cir. 2001). The district court's clerk told Babiash about the requirements for his appellate brief and described how he could learn more about social security appeals. Under these circumstances, his failure to argue that the record lacks substantial evidence about his gainful activity means that he has forfeited the contention. *Id.*

Babiash raises two other arguments, but neither is persuasive. First, he contends that the ALJ's initial decision conclusively determined that his income rendered him eligible for benefits. But he misreads the record. The ALJ explained that she awarded benefits to Babiash because, once he turned 55 in 2014, his age combined with the other then-current aspects of his application rendered him eligible for benefits. But the ALJ ended the initial decision by telling Babiash that if his recently started work generated sufficient income, that income might both disqualify him from his awarded benefits and require repayment. Thus, the ALJ did not rule that Babiash was entitled to benefits in perpetuity.

Next, Babiash asks that we order the Commissioner to grant his application to waive recovery of the overpayment and argues that the Commissioner has stopped paying his benefits out to retaliate against him for bringing this suit. From the current record, it appears that Babiash is not at fault for the ALJ's initial, erroneous decision to grant him benefits. But, as the district court concluded, we cannot review these claims about waiver and retaliation because Babiash has not fully litigated them as he must before the Commissioner. Without exhausting these contentions before the Commissioner, we lack a “final decision” to review. 42 U.S.C. § 405(g); *see also Smith v. Berryhill*, 139 S. Ct. 1765, 1772 (2019) (explaining that claimants must exhaust remedies before the Commissioner before federal courts may review claim).

AFFIRMED