Restoring Social Security Disability's Purpose

Does the decisionmaking process serve the purposes of the program?

BY JEFFREY S. WOLFE AND DAVID W. ENGEL

In the May 31, 2012 issue *Bloomberg BusinessWeek*, congressional reporter Brian Faler declared that "the pot of money the Social Security Administration is using to cover disability insurance is projected to run dry in 2016." In a prepared statement during hearings before the Permanent Subcommittee on Investigations last September 13th, Sen. Tom Coburn (R, Okla.) reminded the subcommittee—and the American people—that the purpose of the Social Security disability program is "to make sure that all Americans have a safety net if they become disabled and can no longer work." His remarks highlight a critical concern for the future of the program. "It should be remembered, though," said Coburn, "that, by law, being disabled means 'being unable to work any job in the national economy'. This is a high bar to meet." He continued: "The agency must make sure it is not awarding benefits to people who are not entitled to them. If something doesn't change and the programs continue to operate this way, there won't be a safety net left for those who have no other choice but to rely on it."

In making this cautionary observation, Senator Coburn draws us back to the roots of the disability program. Does today's pro-

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gram mirror the purposes originally contemplated by the framers of the Social Security Act? Does the process by which disability is determined, and particularly the jurisprudence underlying the decisionmaking process by administrative law judges, serve the purposes of the program?

Disability Compensation Programs: A Brief History

As early as 1939 the idea of a monetary benefit paid early to disabled workers was raised in a formal report to President Franklin D. Roosevelt. As described in an SSA history of the program, the 1939 Report to the President on National Health by the Interdepartmental Committee to Coordinate Health and Welfare Activities recommended "the development of social insurance to replace, in-part, wages lost during temporary or permanent disability. It suggested that insurance against permanent disability should be effected through a liberalization of the old-age insurance system, paying benefits at any time prior to age 65 to qualified workers who become permanently and totally disabled." However, what was proposed was, even then, a misnomer. It was not "insurance" as that product is traditionally known, but instead an early payout to beneficiaries who had paid into the Social Security Trust Fund.

The 1938 Annual Report of the Social Security Board to the President reflects consideration by the board to expand the fledgling program "to include provisions for benefits to workers who become permanently and totally disabled before reaching age 65, and to their dependents." Those entrusted with the successful implementation of the Social Security Act understood that such a system was potentially fraught with financial peril. Departure from the conceptual framework outlined above—such that a worker and his or her dependents could receive early monetary benefits (before attaining age 65)—depended for financial security on a number of variables. The board declined to make any such recommendation to Congress or the president. As recounted in the legislative history, the board stated:

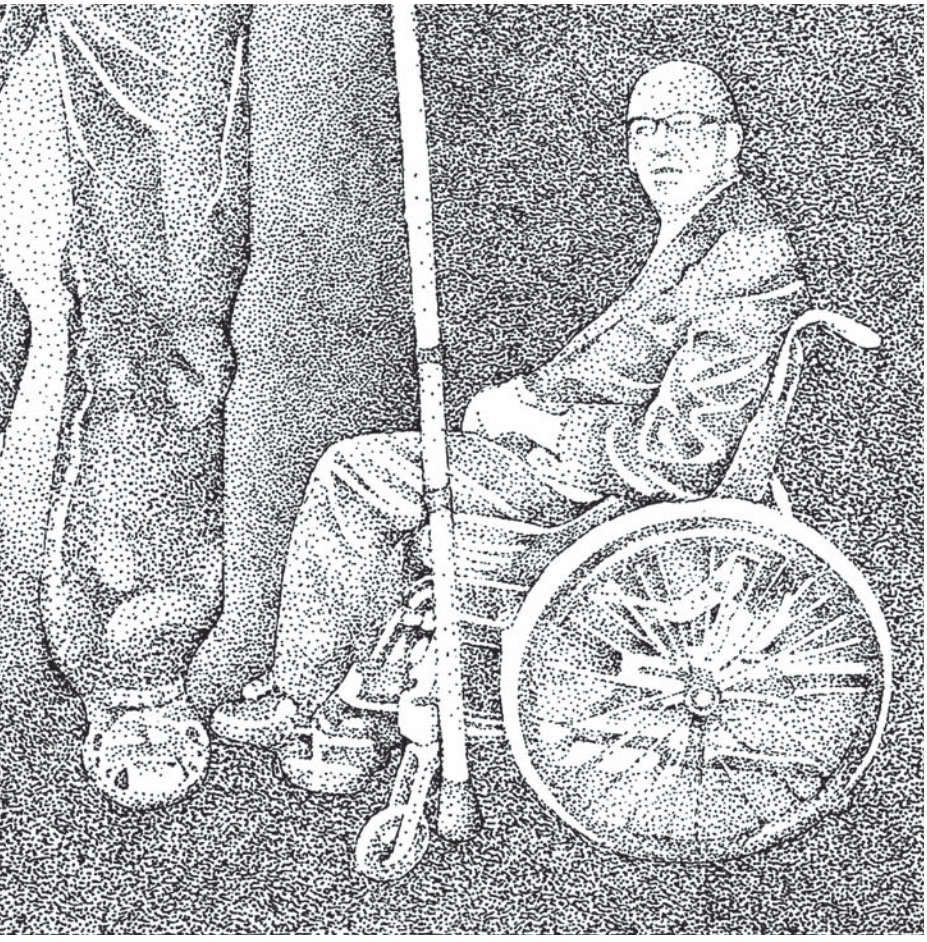
> [T]he extent of the increase in costs would depend upon the definition of disability, and that a strict definition at the beginning would keep costs within reasonable limits. Later, with experience, the definition could be made more liberal if this was considered socially desirable.

The Social Security Board in 1938 explicitly recognized the direct relationship between program costs and the definition of disability. The board understood that a narrow definition of disability sets a higher threshold than a definition that is, in the board's words, "more liberal."

While the original conception of "disability" required proof of a permanent disabling condition of "indefinite" duration, there is little question that the current disability standard for Social Security disability benefits has become "more liberal"—some would say dramatically so—over time. A disabling condition no longer need be permanent, but only has to last or be expected to last at least 12 months or result in death. Subjective decisional criteria are now integral elements of the disability formula. One need not even be unable to work in order to be declared "disabled." As a result, many Americans believe that too many now receive funds from the public disability coffers—monies the nation cannot afford.

Procedurally, to be declared disabled, a claimant asking for disability benefits must first apply, seeking benefits under one of two Social Security disability programs. Under Title II of the Social Security Act, *disability insurance benefits* are available to those who have worked and paid into the system the required amounts in at least 20 of the last 40 quarters as of the alleged date of disability. Alternately, Title XVI S*upplemental Security Income disability benefits* may be awarded to disabled individuals who have not worked or who do not have sufficient quarters of coverage, provided they meet a defined income and resources test.

A disability claim is initially made to the Social Security Administration, which then defers the initial determination to a state agency, generally termed the "Disability Determination Service" (DDS). If denied by the DDS, a claimant may ask for reconsideration. If denied on reconsideration, the claimant may, within 60 days, file a Request for Hearing before a federal



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administrative law judge (ALJ). The ALJ then typically holds a hearing; however, the government makes no appearance and the hearing process is described as "non-adversarial." The hearing may include witness testimony from a vocational and/or medical expert.

The current decisional paradigm requires the ALJ to engage in a five-step sequential analysis in deciding whether a claimant is entitled to an award of disability benefits. Benefits can be awarded at either of two "steps" in the analysis.

At Step 3, disability benefits can be awarded if the alleged disabling condition "meets" or is medically equivalent in severity to ("equals") a "Listing" within the *Listings of Impairments*, found at 20 C.F.R. Part 404, SubPart P, Appendix I. The Listings describe multiple bodily systems and various diagnoses, clinical signs, symptoms, and laboratory findings that, if shown by a preponderance of the evidence to exist for the required duration, are presumed to be of such severity as to be "disabling." This is a relatively narrow inquiry, examining the medical evidence of record. If disability cannot be shown at Step 3, the inquiry moves forward to Step 4 and if the claimant is found to be unable to perform his or her past relevant work, to Step 5.

At Step 5, the question of disability is more broadly considered. If, because of exertional or non-exertional limitations (or both) arising from one's physical and/or mental impairment(s), an individual can no longer function competitively such that there are not a "significant" number of jobs in the regional or national economies that such a person can perform, then one is found "disabled." In reaching this decision, the modern definition of disability at Step 5 looks to the Medical-Vocational Guidelines found at 20 C.F.R. Part 404, Subpart P, Appendix II, euphemistically termed "the Grids." The Grids comprise three tables containing multiple "rules" linked to the claimant's ability to engage in sedentary, light, and medium levels of exertion. Each rule incorporates age (18–62), education (illiterate, marginal, limited, high school, or greater), and past work experience (unskilled, semi-skilled, skilled), and directs a finding of either "disabled" or "not disabled" dependent upon the combination of factors presented.

Generally, the greater the individual's exertional capacity, the less likely he or she is to be found to be disabled. The converse is also true; the less a person can do, the more likely he or she is found to be disabled. The same is also the case when considering education and skill level.

However, the Grids do not account for so-called "non-exertional limitations" such as those arising from mental disorders. When present, non-exertional limitations require subjective consideration of the evidence as a whole. The Grids become a decisional framework that cannot, apart from other evidence, direct a finding of "not disabled." Thus, a Step-3 decision, which does not depend on the Grids, is generally regarded as embracing a more strict definition of disability as compared to a finding at Step 5, which must, of necessity, give greater consideration to subjective claims. The following example is illustrative.

In light of the current definition of disability at Step 5, consider a literate, English-speaking 50-year-old who is only able to do sit-down (that is, sedentary) unskilled work. Applying the Grid rules at Step 5, such a person is presumptively found "disabled" at Rule 201.12, even though he or she can, in fact, still perform sit-down-type jobs. A similarly situated non-English-speaking and/or English-illiterate individual will likewise be found "disabled" under Grid Rule 201.17 at age 45 (five years sooner). In both cases, the Grids direct a binding disability determination that the ALJ is powerless to set aside or ignore.

The rationale underlying this presumption is that there are too few such jobs available to someone over 45 or 50 years old. This result represents an agency policy position that assumes disability despite the fact that the claimant can still perform competitive sedentary work. As such, the Grids are fundamentally inconsistent with Senator Coburn's assessment of what the disability program should be. That is, disability benefits are awarded following the Grids, even though the claimant is still able to perform sedentary work. This is because "no longer able to work" is not interpreted as literally as Senator Coburn suggests that it should be, but is instead interpreted through the lens of public policy. If there are not a "significant number" of jobs available, then a claimant, such as the person described above, is deemed to be be "disabled" even though he or she is still capable of competitive work, albeit at a reduced level of performance.

Careful reading of the regulation indicates a disability standard different from that articulated in the underlying statute. The regulation at Title 20 C.F.R. §404.1520(a)(4)(v) provides in part that, "[i]f you cannot make an adjustment to other work, we will find that you are disabled." What the statute actually says at Title 42 U.S.C. §423(d) is that the "term 'disability' means—inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." We submit that the inability to engage in "any substantial gainful activity" is much different than the inability to "adjust" to other work.

Not only has the definition of what it means to be disabled been liberalized, so too has the scope of persons who qualify for disability been expanded. Congress has extended disability coverage to children, younger adults, and even older adults who have never worked.

The gradual nature of such expansions, added over the course of years, no doubt seemed appropriate at the time. The post-war U.S. economic boom created an environment wherein one could reasonably urge that an expansion of Social Security disability was "socially desirable." The current economic climate challenges this assumption, raising serious questions whether Social Security disability can or should continue on its present footing.

The Expansion of Disability Compensation

The 1946 Report to the Committee on Ways and Means by the committee's Social Security Technical Staff, otherwise known as the "Calhoun Report," recommended, in consideration of the "problems involved in long-term disability benefits," that benefits only be provided to persons above some

specified age, "such as 55 or 60."

In 1956 the first disability payment was authorized, for disabled workers between the ages of 50 and 65. Benefits were also authorized for disabled children (if they became disabled before age 18) of workers who were considered to be retired.

The shift to payment of disability benefits did not come without considerable discussion. The 1948 Report of the Advisory Council on Social Security to the Senate Finance Committee recommended payment of cash benefits to the permanently and totally disabled, regardless of age, as part of the social insurance system. "Two members of the Council disagreed with this recommendation," according to the SSA history. "They felt that protection against the risk of total disability should be provided by State assistance programs aided by Federal grants and should not be included in a Federal contributory system." In 1950 "the Senate Committee on Finance expressed the following views on the disability insurance program: We recognize that the problem of disabled workers is one which requires careful attention especially because of the increasing proportion of older workers and the rising rate of chronic invalidity in the population."

Despite those concerns, House Resolution 6000 in 1950 sought sweeping amendments to the disability program, including elimination of the requirement that a beneficiary be at least 50 years old. While maintaining that a disabling condition be permanent, the requirement that it be "medically determinable" was also proposed, as was the requirement that the applicant have at least 20 out of the last 40 quarters of coverage and "6 quarters of coverage in the 13-quarter period ending with such quarter." Notably, "[b]enefits were to be suspended where, among other things, an individual who was still disabled had earnings in excess of a permitted amount or where he failed, without good cause, to accept certain re-habilitation services or to undergo medical examinations."

H.R. 6000 was thus a mixed bag, eliminating "remote claims" with the requirement of six quarters of coverage in the 13-quarter period prior to the claim and requiring a medically determinable impairment, but expanding the program radically with the elimination of age 50 as a threshold requirement. H.R. 6000 was rejected by the Senate, but nevertheless laid the foundation for future expansion of the disability program.

As finally passed, the 1956 amendments to the Social Security Act included the payment of cash benefits for persons between ages 50 and 65. Other provisions included that "[t]he individual must have been a currently insured individual (a requirement similar to the one then existing under the 'freeze' of 6 quarters of coverage in the 13 quarters ending with the quarter of disablement) and he must have had 20 quarters of coverage out of the last 40 calendar quarters." Significantly, the definition of disability stated that, in order for a person to be considered disabled, he must be unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or which must be expected to result in death or to be of continued and indefinite duration," and "[t]here must have been 6 months of disability before benefits could be paid."

The passage of amendments to the Social Security Act in 1956 raised concerns about the program's expansion, as voiced in the Senate Finance Committee. The committee, in opposing a cash disability insurance benefit program, considered: "(1) The difficulty in making disability determinations, (2) the availability of assistance under the program of aid to the permanently disabled and the significant strides made in vocational rehabilitation, (3) the uncertainty as to the future costs of a cash disability insurance benefit program, and (4) the need for time to study and evaluate existing disability program."

Despite those concerns, the payment of cash benefits began, following the passage of the 1956 amendments. From there the expansion floodgates opened:

- In 1958 Congress allowed a 12-month retroactivity from the date of application for disability so that people who did not file timely were not penalized.
- The 1958 amendments also saw the "recency-of-work" test dropped, so that an individual no longer had to show coverage in six of the last 13 quarters.
- The 1960 amendments dropped the age requirement so that disability was no longer just for people ages 50–65.
- The 1965 amendments saw radical changes, eliminating the requirement of a permanent or indefinite disability, and providing only that the disabling condition be expected to last 12 months in duration. This was described as a "liberalizing" of the definition of disability.
- The 1965 amendments also saw the birth of Social Security "double-dipping." A retiree aged 62 or older could still apply for disability benefits, alleging disability before age 65. If successful, he would obtain the benefit of collecting a reduced retirement benefit at age 62 and still preserve the right to claim to be disabled.
- Following the 1967 amendments, the definition of disability changed yet again, effectively opening the doors wider: "An individual shall be determined to be under a disability if his physical or mental impairment or impairments are of such severity he is not unable to do his previous work but considering his age, education, and work experience, engage in substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for disability."

The 1967 amendments thus defined the ability to work not only based on the number of available jobs, but also on one's age, education, and work experience. Critically, both physical and mental impairments were identified as bases for disability, opening the door further to subjective evidence, necessarily a part of any claim based on a "mental impairment." Close reading of the legislative history indicates that job availability became not only a question of national numbers of available jobs, but also a question of regional availability—a seeming further, albeit subtle, expansion.

The 1967 House Committee on Ways and Means Report voiced cautious alarm over a growing number of awards, observing that, in the words of the SSA history, "over the prior 4 years

the number of disability allowances had been greater than estimated." The SSA attributed this "to greater knowledge of the availability of benefits and the better development of evidence of disability." Others, however, expressed concern that with the "growing body of court interpretation of the statute which, if followed in the administration of the disability provisions, could result in substantial further increases in costs in the future."

In fact, such was the case. According to a 1995 law review article by Erin Margaret Masson, "During the first two decades following the enactment of the Social Security Disability Act in 1956, [federal] courts liberally construed the definition of disability. Subjective complaints of pain were considered in addition to objectively determinable medical conditions, and, in some cases, subjective complaints alone were sufficient for courts to find the existence of a disability and grant benefits."

Changes have continued to be made to the definition of disability. In 1980, multiple changes were made, including Social Security's enactment of the Grids, incorporating presumptions of disability based on education, work history, age, and exertional capability. The 1980 changes also expanded trial work incentives and extended eligibility to claimants who had returned to work. While a continuing disability review was enacted requiring review of disability benefits every three years, so too was the ability to continue receiving benefits through the appeal to an ALJ—thus seemingly incentivizing such appeals.

The 1984 amendments to the Social Security Act permitted persons to apply for disability even though they did not have a "severe" impairment, but instead experienced a combination of impairments that would, if viewed individually, be considered non-severe. Codification of the requirements on how to evaluate pain—a subjective non-exertional limitation—also came as a part of these amendments.

The cumulative effect of these and subsequent changes has been to open the door ever wider, arguably extending the disability entitlement to a point beyond that which was intended by the original framers of the Social Security Act. As Senator Coburn stated in his prepared remarks last September 13th,

> The purpose of this program is to make sure that all Americans have a safety net if they become disabled and can no longer work. It should be remembered, though, that by law being disabled means "being unable to work any job in the national economy"—this is a high bar to meet.... If something doesn't change, and the programs continue to operate this way, there won't be a safety net left for those who have no other choice but to rely on it.

Restoring the Definition of Disability

Americans now face the prospect of potentially dramatic changes in the Social Security disability program. In a few years, the Social Security disability insurance fund will no longer be solvent, which could potentially result in cuts in Title II disability benefits—a measure that, if taken, will affect millions. Given that prospect, is a more "liberal" definition of disability still "socially desirable"?

To avoid such cuts, we suggest fundamental policy changes, hearkening back to the original foundations upon which the disability program was established. What follows are selected proposals, examining and suggesting revisions to current practices. As such, these proposals are not comprehensive, though we offer these ideas specifically to spark further discussion.

Re-define disability for SSI claimants | Significant questions have arisen regarding the breadth of the definition of disability under Social Security, with criticisms leveled against those who decide whether an applicant is disabled—both the DDSs and the ALJs. One policy response to the program's threatened insolvency is to adopt a definition of disability that is closer to the definition used in the program's early years.

A plain reading of the legislative history underlying the disability program shows that disability was intended for disabled workers and their dependents. With the advent of the Supplemental Security Income program in 1972, benefits became available to the blind and the aged, and was expanded further in 1974 to include disabled persons without regard to whether they had ever worked. No difference, however, was drawn in defining "disability" between those who had worked and acquired a sufficient number of quarters (at least 20 out of 40 quarters) and those who had not.

The distinction in the character of benefits received is made clear by the courts in the 1986 decision in *Salling v. Bowen*. "[T]he right to Social Security benefits is in one sense earned and that the extent to which procedural due process must be afforded to the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' Thus, the Court noted that there was a private interest involved which was affected by the governmental action and therefore the focus must be upon the private interest." The private interest exists because of monies paid into the Social Security program while working.

As a consequence, procedural due process in Social Security cases requires a much stricter standard than, for example, a U.S. Department of Veterans Affairs claim where there is no protected property interest. In VA claims a recipient of government benefits receives them, in a sense, by way of grace. Title XVI SSI benefits—there being no private interest, including in the award of disability—are similarly not "economically earned," and they too are by way of grace. SSI benefits, like VA compensation, VA pensions, and military retirement benefits, are thus all noncontributory in nature—i.e., monies were not "paid in" by any of the recipients, as is the case in an application for Title II Disability Insurance Benefits.

Any proposed reforms to VA benefits or military retirement benefits are outside the scope of this writing and we offer no proposals on that issue. However, in the context of Social Security's noncontributory SSI disability benefits, the test for receiving such benefits should arguably be more restrictive than for those who have worked and paid into the system. Thus, persons applying for SSI disability under Title XVI of the Social Security Act could be required to establish entitlement only at Step 3 of the current five-step sequential analysis. This requires a showing that their

impairment(s) are medically equivalent in severity to a specified impairment or combination of impairments within the Listings of Impairments. A Step-3 "meets or equals a Listing" disability standard is, as noted earlier, a more restrictive standard than a Step-5 analysis, which, unlike Step 3, examines functional capability, even of so-called "non-severe" impairments. Under current law, medical equivalency at Step 3 is only established in light of medical or psychological evidence and the opinion of a medical professional. The award of SSI disability would no longer be conditioned on a functional analysis at Step 5, given that the individual did not, in fact, work to attain sufficient quarters of coverage. Adoption of a more restrictive definition of disability for nonworkers is consistent with current agency policy regarding past work. Under standing rulings, "[a]ssessment of the credibility of an individual's statements about ... his or her ability to function must be based on a consideration of all of the evidence in the case record. This includes the ... prior work record and efforts to work." Further, according to the SSA, "[t]he lack of work experience is a vocationally adverse factor." Requiring that nonworkers establish entitlement to disability benefits under a Step-3 "meets-or-equals-a-Listing" standard recognizes the inherent difference between those who have paid into the disability system and those who have not.

Adjust the age break points | Senator Coburn argues that the Grids "relax the rules for claimants once they turn 50 and then again at 55, making it progressively easier" for applicants to obtain benefits. The Grids postulate the example of an individual defined in terms of his age, education, past work (skill level)—all in view of his or her exertional capability. Thus, on average, when considering two comparable individuals, the older, less educated, less skilled individual who is less exertionally capable is more likely to be found disabled. If we decide to maintain the Grids as a decisional tool, it is time they be amended.

Distinctive age-dependent "break points" exist in the present formulation of the Grids such that one is more likely to be found disabled having attained the indicated ages. For example, the "sedentary," and "light" exertion-level tables show break points at ages 50 and 55, while the "medium" table shows break points at ages 50, 55, and 60. These same age categories have remained unchanged as critical break points since the adoption of the Grids, despite the fact that people are living longer today than they did in 1954.

In 2006, the Congressional Research Service found that Americans are living fully 10 years longer now (78.7 years) than in 1951 (68.1 years.) Given this dramatic increase in life expectancy, readjustment of the Grids makes sense if we are to continue relying on this presumptive standard for determining disability. If these age-descriptive break points are raised in the sedentary and light tables by five years, the resulting break points would be at ages 55 and 60, while the medium table would reflect break points at ages 55, 60, and 62. Readjustment of the age categories consistent with the increase in life span would result in a more accurate assessment of whether an individual is disabled.

Curtail the fiction of "sedentary" and "light" disability | Senator Coburn and others have criticized the fact that without any change in medical condition, an individual, age 48, with no transferable skills, a high school education, and impairments that limit him to sedentary work activity, *is not* considered disabled, but the same person *is* considered disabled when he turns 50. Senator Coburn asks why is a 50-year-old who is able to perform sedentary work considered disabled? Should such a claimant not seek out sedentary work? Should such a claimant be found not disabled instead? Such is the issue with the current policy underlying the Grids.

An individual, age 48, with no transferable skills, a high school education, and impairments that limit him to sedentary work activity is not considered disabled, but the same person is considered disabled when he turns 50.

More to the point, if one of the purposes of the Social Security Act is to provide a retirement benefit, and if an individual who is not of retirement age is still able to work competitively (albeit at a reduced exertional level), how can he or she be disabled? Continued operation of such a legal fiction is not in keeping with the legislative history underlying the disability program as originally designed. Arguably, the nonrebuttable presumptions of disability now inherently a part of the Grids must be revised so as to delete those presumptions and align the outcomes with the original legislative intent of the framers of the disability program. The simplest way to do this is to replace the Grids.

Replace the Grids | One final alternative must be considered when examining the question of the definition of disability. Aging is a fact of life. It generally brings a reduction in one's capabilities and overall functioning. No citation is necessary to recognize the validity of this statement. The question then becomes whether age should not also occupy a different and more significant role in the disability assessment paradigm, especially since the question of age becomes predominant when considering eligibility for retirement.

While we earlier proposed fundamental policy changes that would affect the operation of the Grids, it will likely be difficult—if not impossible—to meaningfully revise the Grids in such a way as to remove the presumptions of disability and still maintain their viability as an outcome-determinative tool. A more direct, simple mechanism is adoption of a variable definition of disability predicated

on age, discarding the Grids altogether. The result: repealing the Medical-Vocational Guidelines effectively enables Senator Coburn's view of what Social Security should be, ending the legal presumptions of disability that are currently an integral part of the Grids.

A revision of the current disability assessment by age is relatively straightforward and can be accomplished within the existing infrastructure by simply limiting the disability determination paradigm to a Step-3 analysis for younger persons, much as discussed above for SSI claimants. Assuming an individual is "closely approaching advanced age" at age 55 (and not, as is now the case, age 50) a younger claimant, age 18–54, may only be adjudged to be disabled if his impairments, considered either singly or in combination, are medically equivalent in severity to a condition on the Listings of Impairments at Step 3. A Step 5 finding would be precluded given the individual's younger age. Claimants ages 55–61 may be found disabled at either Step 3 or in accordance with a revised Step-5 analysis.

Revising Step 5 is necessary under this proposal because the disability decision would no longer depend on the Grids. Thus, a decision at Step 5 must be predicated upon testimony by a vocational expert. Reliance on a vocational expert who is not employing or relying upon legal presumptions, but is instead testifying in light of the claimant's actual limitations, education, training, and work history, will produce a far more accurate decision than now occurs under the Grids.

Limiting disability decisions for persons under age 55 to a Step-3 analysis (a more stringent disability test) will, as a matter of course, limit the number of persons entitled to such awards. Similarly, employing either a Step-3 or Step-5 analysis for those ages 55–61 will provide essentially the same result for such persons, albeit a more accurate result given the absence of legal presumptions, as is now the case.

Two final points should be made. First, we suggest that persons electing to receive early retirement benefits at age 62 be thereafter precluded from seeking disability benefits. Under the current operation of the Grids, the legal presumptions plainly favor persons who, having attained age 62, are categorized as having reached retirement age and are thus far more likely to be found disabled under the Grids.

Second, although Social Security's Office of Policy has long understood that coordination of disability benefits such as worker's compensation is a desirable public policy to ensure that the total amount of disability benefits paid does not become a deterrent to work, no such offset yet exists for unemployment benefits. This creates a huge disincentive for the disabled to return to work, thus forcing up program costs, especially since 2008. We suggest that persons electing to receive unemployment compensation be precluded from seeking Social Security disability cash benefits for any period they were awarded unemployment benefits. The rationale is simple: The receipt of state unemployment benefits is generally conditioned on the recipient's promise to continue looking for work; and even, in some cases, maintain a log of submitted applications. To allow the current status to continue finds the applicant telling the federal government, "I cannot work," while at the same time representing to the state that he or she is ready, willing, and able to work. This becomes particularly ironic when one realizes that federal funds stand behind many state unemployment programs. See the Federal Unemployment Tax Act, 26 U.S.C. Chapter 23.

Change the jurisprudence | The jurisprudence upon which Social Security disability hearings are grounded is fundamentally flawed. Conceived as non-adversarial, and more specifically as an "inquisitorial" process, the present jurisprudence made sense when few persons were represented by duly appointed representatives—either lawyers or non-lawyer experts. In a system where few were represented and legal argument was the exception, not the rule, the role of the judge was intended to be one of gentle inquiry—his or her role infused and informed by the conception embodied in the Latin phrase *parens patriae*. In this role, judges are required to seek out the evidence favorable to the government, then turn around and seek out the evidence favorable to the claimant, and then return to the task of a neutral decisionmaker. Termed "three-hat-jurisprudence," the judge is at the center of the production of evidence and is subject to reversal should he or she not "properly" "develop the record." This jurisprudentially active role is contrary to the Anglo-American adversarial system, where the parties, not the judge, elicit and present evidence.

We suggest that persons electing to receive unemployment compensation be precluded from seeking Social Security disability cash benefits for any period they were awarded unemployment benefits.

The present jurisprudence gave rise to a system in which the government does not appear; does not question closely the claims made; provides little opportunity for early resolution of the appeal; and generally places the burden of inquiry on a neutral judge who, in the Anglo-American system of justice, is schooled in a fundamentally different judicial role than that of a judge in the European inquisitorial system. Adoption of an adversarial system in which a government attorney is present would return balance to the adjudicatory system, returning the ALJ to his or her traditional role as a neutral decisionmaker.

Under the current paradigm, there is no counterpart with whom a claimant's counsel may confer if she believes the claimant's claim can be resolved early on. Instead, the overwhelming majority of cases proceed through a set-piece case management

process where most proceed in lock-step and are only resolved following a hearing. As a result, each case must "stand in line" to be heard, with only a few being singled out by "senior attorneys" for early resolution. Again, this is because there is no effective avenue for the claimant's representative to communicate because there is essentially no one with whom she may speak. As a result, the claimant must wait in line regardless of the magnitude of his or her need.

The presence of a government attorney would provide an avenue for early communication between the claimant's representative and government counsel, encouraging early disposition of a claimant's appeal and leaving only the "hard" cases for hearing. Such an outcome mirrors the traditional federal court system where only 10–15 percent of cases are actually tried—most being resolved between the parties before trial. Adoption of such a system would far better serve the claimant than does the present lock-step, hear-every-case, delay-the-outcome process. Furthermore, as discussed below, fundamentally realigning the current fee structure would not penalize representatives from seeking early resolution of an appeal (i.e., by effectively reducing the fee), but can instead reward such outcomes.

The sunset of the "three-hat jurisprudence" would return the burden of production of evidence to the claimant, where—given that more than 85 percent of all claimants are now represented—it naturally belongs. In those few cases in which the claimant is not represented, the role of the judge—as with any judge in any court—is to ensure that justice is done and a fair hearing conducted. In those cases, the judge must assist the claimant in ensuring that the evidence is secured, testing done, etc. None of these proposed changes thus affect the overarching and unique philosophy upon which the disability determination process is founded—that the claimant is viewed as a potential beneficiary and the government as a supportive force.

The idea of a government representative is neither new nor novel. The SSA experimented with a Representation Project (SSARP) in the 1980s. The project was described by the SSA in 1982 as "a limited test using special SSA representatives in connection with disability hearings in selected hearing offices." The agency further explained:

> We wish to determine whether the participation of SSA representatives will sharpen factual issues, improve case record development, and contribute to improved quality, consistency, and timeliness of case dispositions at the hearing level. The implementing regulations were initially proposed on January 11, 1980 (45 Fed. Reg. 2345). That proposal was withdrawn after public hearings in a notice published on July 14, 1980.... On February 19, 1982, SSA published a notice reinstating the proposed rules.

In July 1986 the U.S. District Court for the Western District of Virginia, in *Salling v. Bowen*, found that "the SSARP does not meet the three-prong standard for procedural due process of *Eldridge,* nor does it meet the informal and fundamentally fair test of *Perales*." The court specifically found that "[t]he goal to build upon the record and to present a better record for review has had the opposite effect and has resulted in SSARs obtaining evidence for the government without regard to developing the cases for the claimants." The agency's conception of the government representative was that he or she would, in effect, be an extension of the judge, assisting both the government and the claimant in developing the record. The court found that this did not happen; the representative, it said, securing evidence primarily for the government. Unfortunately, no appeal of this decision was taken and the program was ended.

A proper concept of government counsel is not that he or she should seek to deny a claimant benefits, or—as suggested by the district court in *Salling*—seek out evidence only for the government. Rather, government counsel should ensure that a just result is reached and justice done. The Social Security Advisory Board has long supported the adoption of a government representative. The presence of a government lawyer is not for the purpose of opposing the award of benefits, but to stand for the people of the United States to ensure that justice is done in each claim, to advocate for the award of benefits where appropriate, to raise questions where there is a question, and to shoulder the burden of ensuring the record is fully developed before a decision is reached. All of that would be done under the eye of the judge to whom the case is assigned. This role is little different from the role of any government lawyer, who represents not simply an agency or other governmental entity, but the interests of the people of the United States, termed "the public interest serving" role.

It should be noted that some people have criticized the idea of including a government counsel, saying that it is cost-prohibitive. This ignores the fundamental change in potential outcomes represented by a shift in the burden of production to the claimant. Early resolution of claims, together with more accurate decisionmaking, would bring a natural balance to the system. Initial staffing may be supplied from existing attorneys from the Office of Disability Adjudication and Review now assigned to assist ALJs to fulfill the current duty of judicial inquiry.

Realign the current fee structure | Integral to the current jurisprudential process is the now-outmoded attorney-claimant fee structure. Revision of the current fee structure is critical to effective case management because representatives often set the pace and progress of the claim on appeal. The overwhelming presence of claimant's representatives, be they attorneys or certified non-attorney representatives, has worked a fundamental and oft-ignored change in the dynamics of the disability hearing.

The presence of representatives in more than 85 percent of all hearings—representatives who are only paid if they win, and whose pay is calculated as a function of past-due benefits—creates an essential imbalance in the jurisprudential paradigm of today's disability hearing. A contingent fee encourages increased filings for benefits as representatives advertise for clients and encourage pursuit of disability, which is in effect pursuit of a fee. A contingent fee based on past-due benefits encourages delay because the greater the delay, the larger the attorney fee. "Pay-for-delay" creates an inherent conflict between the representative, who benefits from delay, and his client, who seeks a speedy resolution of his claim for benefits.

There are a number of alternatives to the current pay-for-delay contingent fee. One example is a flat fee. Upon award, an attorney or representative would be entitled to an established fee, regardless of the amount of past-due benefits or the amount of time spent preparing the case. The amount of the fee would be governed by the complexity of the case, much as is the case now with a fee petition. Adopting the current maximum fee of $6,000, the ALJ would determine whether counsel would receive one-third of the maximum, two-thirds of the maximum, or the maximum fee, dependent upon the complexity of the case. No appeal could be had from this administrative judicial determination. Similarly, fee petitions would be precluded. The fee would be taken from a claimant's past-due benefits or, if this amount is insufficient, the balance would be paid by the government to counsel and the amount advanced by the government deducted from the claimant's monthly benefit in $100 increments until the government is repaid. No hardship rules would apply.

Alternately, attorney fees could be time-dependent. Resolution of the claim within six months of filing the Request for Hearing would result in payment of the maximum fee of $6,000. Hearing within 12 months would result in payment of $4,000, whereas any resolution after 12 months would result in a fee of $2,000. The same rules for payment would apply as outlined above. Time-dependent resolution encourages counsel to proceed with the case, which would benefit the claimant, who otherwise stands in need of a timely decision. It is even possible for the two scenarios to be combined such that the primary determining factor is time, and upon motion of counsel the ALJ may increase an otherwise lower fee based upon complexity of the case. Elimination of the current pay-for-delay contingent fee ends the incentive for delay by the representative and at the same time re-incentivizes counsel to proceed apace, all to the benefit of the claimant. Realignment of the fee structure accomplishes a positive realignment of both the claimant's and the representative's interests.

End government subsidy of private practice | The federal government currently pays travel fees to attorneys and non-attorney representatives who travel from one locale to represent a claimant in another. In an era when more than 85 percent of all claimants are represented, there would appear to be little or no justification for such payments. In the authors' Tulsa Hearing Office alone in 2010, those travel expenses amounted to $59,000. Multiply that amount by the more than 150 offices around the country, and the resulting savings potentially amounts to millions each year. So-called "national" law firms and nonlawyer disability advocates now advertise in most major U.S. media markets, seeking out-of-state claimants despite the often thriving practices of local counsel and nonlawyer representatives.

Ending subsidies for private firms to travel across the country would return the cost of such travel to the private sector, where it belongs. In an earlier era when few attorneys or nonlawyer representatives were available to represent claimants, there may have been some justification for reimbursing those travel expenses. But today, given the number of Social Security practitioners nationwide, expending public monies to support private practices simply makes no sense. The cost of travel should simply be, as with any other enterprise, a cost of doing business. It should not be, as it is now, an all-but-hidden public subsidy. This is not, however, simply a question of appropriate expenditures of ever-decreasing public monies; it also is a question of hearing efficiencies. Frequently, out-of-state lawyers never meet with their clients until the day of the hearing. This results in missing documents, failed communication, and hearing postponements.

The degree to which accruing these travel fees has become common practice is astounding. Today's representatives schedule travel so that they can be in one locale for a hearing Monday morning, board a plane for a neighboring state for a hearing the next day, and so on, generally meeting the claimants shortly before their hearings. It is not unusual in such cases to find two, three, and in some cases more than five different representatives who have at one time or another been designated by the claimant to represent his or her interests, only to be succeeded by a different member of the same firm because of varying travel schedules or postponements. Is there any valid reason why the federal government should incentivize hearing inefficiencies by paying for representatives' airfare and other travel, when local counsel are almost always available to handle such cases without the need for such subsidies?

Conclusion

President Bill Clinton once observed that "the price of doing the same old thing is far higher than the price of change." It is no less so in the present condition of the Social Security disability program. Recent hearings before the Permanent Subcommittee on Investigations and the House Subcommittee on Social Security portend deficit spending for disability benefits by 2016.

It is time for creative, meaningful change. It will take courage to make the needed legislative changes, and change will be politically difficult. But to do nothing—to continue sailing the current course—would mean an even greater hardship. R

READINGS

- "Introducing Nonadversarial Government Representatives to Improve the Record for Decision in Social Security Disability Adjudications," by Frank Bloch, Jeffrey Lubbers, and Paul Verkuil. Social Security Advisory Board, 2002.
- "Legislative History: The Development of the Disability Program under Old-Age Survivors Insurance, 1935–74." Social Security Administration.
- "Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?" by Steven K. Berenson. *Boston College Law Review*, Vol. 41 (2000).
- "Social Security Administration Nonacquiescence on the Standard for Evaluating Pain," by Erin Margaret Masson. *William and Mary Law Review*, Vol. 36 (1995).
- "The Times They Are a-Changin'—A New Jurisprudence for Social Security," by Jeffrey S. Wolfe. *Journal of the National Association of Administrative Law Judges*, Vol. 29 (Fall 2009).
- "What We Should Do about Social Security Disability," by Jeffrey S. Wolfe and Dale Glendenning. *Regulation*, Vol. 35, No. 1 (2012).