Social Security Claimants with Developmental Disabilities: Problems of Policy and Practice

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Eddie W. Abbott suffered from the following impairments: He had a severely damaged knee and a back condition that limited him to performing "sedentary" work; he had been diagnosed as having significant personality disorders; he could read at only a third grade level; and he had an IQ of fifty-six on the Stanford-Binet Intelligence scale.1 Despite these impairments, the Appeals Council of the Social Security Administration (SSA) determined that Mr. Abbott was not disabled and denied him Social Security benefits.2

While Mr. Abbott ultimately succeeded in having the decision of the Appeals Council reversed,3 his case is but one example of a disturbing phenomenon in the administrative adjudication of eligibility for disability benefits. Although individuals suffering from "mental impairments" in general, and developmental disabilities in particular, may be eligible for Social Security benefits, they are frequently denied benefits on grounds that are at best questionable and often plainly improper. Indeed, in 1984 a federal district court found that the SSA had followed an illegal and clandestine policy that denied benefits to claimants with mental disabilities.4 While some of the most obvious abuses have been curtailed, the Abbott case illustrates that the developmentally

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2. Id. at 924. Specifically, the Appeals Council concluded that Mr. Abbott's mental impairments did not impose significant nonexertional limitations on his capacity to work. The Council therefore applied the "grids," see infra note 75 and accompanying text, to conclude that there was sufficient work available in the national economy for one with Mr. Abbott's residual capacity to perform sedentary work and his age, education, and prior work experience.
3. The Sixth Circuit Court of Appeals reversed the district court's decision affirming the Appeals Council finding that he was not disabled. Abbott, 905 F.2d at 928.
disabled Social Security claimant may have difficulty convincing the SSA that he or she is “disabled” within the meaning of statutory eligibility requirements.

This Article concludes that broad policy changes within the SSA have exacerbated the inherent practical difficulties faced by claimants with developmental disabilities when confronting the Social Security bureaucracy. In particular, the SSA has come increasingly to emphasize its limited resources and the prevention of improper benefit awards. The result of this emphasis has been a tightening of standards, insistence on objective proof of disability, and pressure on disability decisionmakers to deny benefits in doubtful cases. While the SSA’s policy orientation has adversely affected claimants in general, claimants with developmental disabilities are especially vulnerable. Given this situation, the purposes of this Article are twofold. First, by describing many of the substantive and systemic obstacles faced by claimants with developmental disabilities, it may enable practitioners representing disability claimants to avoid some of the pitfalls that await them. Second, and more broadly, the Article argues that while very real resource limitations plague the disability programs, a bureaucratically imposed policy that falls most heavily on those least able to protect themselves is not an appropriate way of addressing these limitations.

Part I of the Article examines the political and institutional pressures that caused the SSA in the 1980s to de-emphasize its mission as a “helping” agency and focus its efforts on increasing the productivity of disability decisionmakers, securing adjudicatory consistency, and reducing the rate of erroneous awards of disability benefits. This shift in focus led to the adoption of various restrictive policies and practices whose adverse consequences fell with particular force on claimants with mental impairments. Part II of the Article examines the substantive standards for determining disability which, as part of the shift in perspective described in Part I, were made more formal and increasingly emphasized objectively provable symptoms. Part II describes a variety of substantive policies and problems that may lead to the denial or termination of benefits for claimants with developmental disabilities. Part III of the Article considers the procedural apparatus for making disability determinations. Part III argues that this procedural apparatus is vulnerable to a systemic anti-claimant bias and that various procedural obstacles may be particularly difficult for claimants with developmental disabilities to overcome. Finally, Part IV considers the broader policy implications of the substantive and systemic problems described in Parts II and III.
I. HELPING HAND OR GUARDIAN OF THE PURSE?

The SSA has long had the difficult task of adjudicating a vast number of disability claims accurately, efficiently, and fairly. Indeed, there is an inherent tension in a system designed to help those in need, but whose resources are limited. Beginning in the late 1970s and accelerating in the 1980s, the SSA came increasingly to emphasize the limited nature of resources and therefore to restrict the availability of disability benefits. While this change in attitude was prompted initially by congressional action reflecting concern over the fiscal integrity of the Social Security disability system, the SSA under the Reagan Administration pursued this policy perspective with great vigor even after Congress began to express a countervailing concern over the erroneous denial of benefits. Part I describes the historical development of the SSA's restrictive policy perspective, examines its effects on disability claimants, and considers some of the reasons that claimants with mental impairments, including developmental disabilities, are particularly at risk.

A. The Changing Policy Perspective

Social Security includes two distinct disability programs. The Old Age Survivors and Disability Insurance (OASDI), established in 1956 by the Old Age, Survivors, and Disability Insurance Benefits Amendments, is essentially a form of federally sponsored insurance in which financial eligibility is purchased through employee contributions. The second disability program, Supplemental Security Income (SSI), is a need based disability program that was added in 1974 when Congress placed a variety of state welfare programs under the auspices of the SSA. Under both programs, disability determinations are made initially at the state level on the basis of a paper record, followed by de novo hearings before federal Administrative Law Judges (ALJs).


8. ALJ decisions are subject to administrative review within the SSA by the Appeals Council and to judicial review by federal district courts, circuit courts of appeals, and the Supreme Court. The procedural apparatus for determining disability is described in greater detail infra at Part III of the Article.
From the inception of federal disability programs, there has been concern over the quality of adjudications in which disability is determined. However, this concern came to the fore in the 1970s, when the infusion of new claims, particularly as a result of the SSI program, placed severe pressures on the disability determination process. Critics of the process focused on three problems. First, a serious backlog in disability claims caused great delay in the adjudication of claims and award of benefits. Second, because the substantive standards for determining disability were relatively undeveloped and individual adjudicators were left largely to their subjective judgment of a claimant's disability, there was considerable inconsistency in the decisions awarding or denying benefits. Third, the accuracy of disability determinations was questioned, perhaps as a result of the first two problems. The concern over the quality of disability determinations was accompanied by increasing concerns over the fiscal integrity of disability programs.

In the latter half of the 1970s the SSA undertook several internal institutional reforms to address these problems. To improve productivity, the SSA reorganized hearing offices and began to distribute bureaucratic rewards to productive ALJs while threatening to punish unproductive ones. To increase accuracy and consistency, the SSA established a Quality Assurance Program in which ALJ decisions were reviewed for "quality." Finally, the SSA

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13. See, e.g., Benefits Terminations, supra note 10, at 6-7.


15. Id. at 93-98.

16. Id. at 84-88; S. Mezey, supra note 11, at 50.
sought to address productivity, consistency, and accuracy problems by implementing a detailed, standardized set of disability criteria.\textsuperscript{17} While the goals of these reforms may have been laudable, in practice they caused considerable tension between the SSA and the ALJs responsible for determining disability, who felt that their independence was threatened by the reforms.\textsuperscript{18}

Ironically, the rate at which ALJs allowed benefits (reversing state agency denials) continued to rise in the face of these reforms.\textsuperscript{19} Thus, throughout the latter half of the 1970s, congressional concerns mounted, particularly in light of the well-known financial difficulties faced by the Social Security system. Prompted by reports that a large number of undeserving claimants were receiving benefits, Congress sought to tighten the disability determination process, adopting the Social Security Disability Amendments of 1980,\textsuperscript{20} which contained three basic reforms. First, the statute required federal review of state decisions allowing benefits before the state decision took effect (pre-effectuation or quality assurance review).\textsuperscript{21} Second, it directed the SSA to develop a program of periodic Continuing Disability Reviews (CDR) to verify the eligibility of recipients with nonpermanent disabilities.\textsuperscript{22} Third, the

\textsuperscript{17} See D. Cofer, supra note 10, at 89-93; J. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims 109-23 (1983); S. Mezey, supra note 11, at 40-41. For further discussion of the criteria, see infra notes 67-80 and accompanying text.


\textsuperscript{19} D. Cofer, supra note 10, at 122.


Bellmon Amendment to the statute required pre-effectuation review of ALJ decisions allowing benefits (Bellmon Review).23

Under the Reagan Administration, the SSA took the congressional message to heart, increasingly focusing its efforts on reducing the disability roles to preserve the resources of the program. The SSA implemented the pre-effectuation review, CDR, and Bellmon Review programs aggressively.24 In addition, the SSA adopted detailed substantive rules that further restricted the availability of disability benefits by tightening standards for disability.25 Moreover, SSA regulations and internal rules directed decision-makers to disregard the subjective complaints of claimants unless they were supported by specific medical evidence.26 Equally important, decision-makers throughout the system sensed a policy of denying benefits whenever possible.27 For example, the Bellmon Review program “targeted” ALJs with high allowance rates for review, based on the SSA’s view that high allowance rates indicated high rates of error.28

These restrictive policies caused considerable controversy. Many of them were overturned by the courts, but the SSA resisted these judicial efforts through a policy of “nonacquiescence” in judicial decisions.29 The controversy also received considerable congres-

24. See, e.g., Levy, supra note 5, at 479.
25. See, e.g., id. at 487-89.
26. See, e.g., id. at 486.
27. "'[T]he message perceived by the State agencies, swamped with cases, was to deny, deny, deny, . . . . In the name of efficiency, we have scanned our computer terminals, rounded up the disabled workers in the country, pushed the discharge button, and let them go toward a free [f]all toward economic chaos.'" Schweiker v. Chilicky, 487 U.S. 412, 416 (1988) (quoting Sen. Cohen, cosponsor of the Social Security Disability Benefits Reform Act of 1984); see id. at 415-17 (citing additional legislative comments); J. MASLAW, supra note 17, at 174; ALJ Role, supra note 18, at 269-83 (statement of position of Federal Administrative Law Judge’s Conference). See generally Levy, supra note 5, at 494-502 (describing impact of SSA oversight of state DDS’s and federal ALJs).
29. Under the SSA’s nonacquiescence policy, it would treat a judicial decision as binding only with respect to the parties to the case, but "would refuse to treat the decision as binding precedent even within the circuit in which the decision was handed down." Levy, supra note 5, at 503. The SSA refused, for example, to acquiesce in federal court decisions imposing a medical improvement standard in CDR cases, see S.S.R. 82-10c (Cum. Ed. 1982) (nonacquiescing in Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1982)); S.S.R. 82-49c (Cum. Ed. 1982) (nonacquiescing in Patti v. Schweiker, 669 F.2d 582 (9th Cir.
sional attention, leading to numerous congressional hearings in which various SSA policies were denounced. Legislative reform designed to alleviate the most egregious policies followed. By the mid 1980s, many of the specific policies and programs adopted by the SSA had been overturned judicially, reversed by statute, or modified or withdrawn by the SSA, but to this day many advocates of the disabled doubt the sincerity of the SSA's commitment to the broad purposes of the disability benefit system.

This concern is not surprising, because the restrictive policies of the early 1980s seem to reflect a fundamental change in the SSA's policy perspective. Thus, while Professor Jerry Mashaw reported in his exhaustive study of the system that the "SSA has succeeded remarkably well in embracing both the neutrality, expertise, and efficiency that are the promise of bureaucracy and the concern for individual circumstances and well-being that is promised by systems oriented towards moral entitlements and professional treatment," he went on to warn that "external pressures from the Congress have begun to move the system toward new goals, such as fiscal restraint, consistency, and manageability, that may undermine—at

1982)), and in decisions requiring the SSA to consider the combined effects of impairments in assessing their severity. See, e.g., McDonald v. Secretary of Health and Human Servs., 795 F.2d 1118 (1st Cir. 1986). For a general discussion of the SSA's nonacquiescence policy, see Levy, supra note 5, at 503-07; Note, Administrative Agency Intracircuit Nonacquiescence, 85 COLUM. L. REV. 582, 585-87 (1985).

30. See, e.g., Levy, supra note 5, at 485 n.127 (listing congressional hearings).


32. See, e.g., D. COFER, supra note 10, at 181-83; S. MEZER, supra note 11, at 166, 168.

33. See, e.g., Pierce, Political Control Versus Impermissible Agency Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta, 57 U. CHI. L. REV. 481, 502 (1990). This change of perspective appears to be part of a broader change in perspective with regard to social welfare programs. For example, Professor William Simon described a similar change in the AFDC program as follows: "In the early 1960's, the dominant vision was principally associated with liberals concerned with the interests of the poor; more recently it has been co-opted by conservatives concerned with cost-cutting and disciplining the public work force." Simon, Legality, Bureaucracy, and Class in the Welfare System, 92 YALE L.J. 1198, 1223 (1983). Professor Simon identifies, among others, four developments in the administration of the AFDC program: (1) the reformulation of substantive norms away from open ended standards toward specific rules; (2) the reconception of proof towards extensive documentation of eligibility; (3) the advent of quality control that emphasized avoiding erroneous awards of benefits and de-emphasized erroneous denials; and (4) productivity enforcement. See id at 1201-19. These developments correspond to analogous developments described above with respect to the Social Security program.

34. J. MASHAW, supra note 17, at 214.
least distort—the accuracy, efficiency, and fairness norms that the system tended to pursue.”

Professor Mashaw’s insight proved to be prescient. While in the past the SSA appeared to have attempted to balance the goals of efficiency, consistency, and accuracy with a broad sense of its mission as a humane, "helping" agency, the 1980s saw the emergence of efficiency and fiscal restraint as the dominant policies. Although some of the most extreme policies reflecting this change in attitude are gone, many recent examples, such as the Abbott case described above, suggest that the SSA continues to take a restrictive attitude toward disability benefits.

B. The Impact of Restrictive Policies

The restrictive polices and practices of the 1980s had a dramatic impact. Increased scrutiny of decisions allowing benefits, the CDR program, and restrictive substantive policies enabled the Reagan Administration to claim in its 1985 fiscal year budget justification to Congress that there would be 891,000 fewer disability beneficiaries in 1984 than in 1981. The CDR program was particularly significant, resulting in the termination of benefits to nearly 500,000 beneficiaries. Moreover, it soon became clear that in a large number of cases benefits were denied or terminated erroneously. For example, the SSA itself conceded that under the CDR program at least 200,000 claimants had their benefits wrongfully terminated.

The overall impact of the policies and practices of the 1980s is documented in Tables 1 and 2, below. Table 1 depicts the substantial decline in OASDI disability beneficiaries that occurred in the early and mid 1980s, and a corresponding "plateau" in the growth of SSI disability recipients.

35. \textit{Id.} See also \textit{id.} at 174: “There is currently much evidence, for example, that SSA, responding to congressional concern, is constraining the supply of disability benefits. The new stringency is reflected both in SSA’s normative prescriptions and in its operational and management activities.”

36. See, e.g., S. Mezey, \textit{supra} note 11, at 41: “Thus, about twenty years after the disability insurance program was begun, it appeared that the Social Security Administration’s enthusiasm for growth faded and was replaced by an increasingly restrictive attitude toward disability entitlement.” Cf. Simon, \textit{supra} note 33, at 1223 (noting the recent attempt to cut costs by eliminating discretion).

37. For a defense of many SSA policies and a criticism of judicial decisions invalidating them, see Pierce, \textit{supra} note 33, at 501-15.


### TABLE 1: Disability Recipients

<table>
<thead>
<tr>
<th>Year</th>
<th>OASDI</th>
<th>SSI</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>4,352,200</td>
<td>1,950,625</td>
</tr>
<tr>
<td>1976</td>
<td>4,623,757</td>
<td>— —</td>
</tr>
<tr>
<td>1977</td>
<td>4,860,431</td>
<td>— —</td>
</tr>
<tr>
<td>1978</td>
<td>4,868,490</td>
<td>2,191,145</td>
</tr>
<tr>
<td>1979</td>
<td>4,777,412</td>
<td>2,220,827</td>
</tr>
<tr>
<td>1980</td>
<td>4,678,444</td>
<td>2,276,130</td>
</tr>
<tr>
<td>1981</td>
<td>4,456,274</td>
<td>2,280,525</td>
</tr>
<tr>
<td>1982</td>
<td>3,973,261</td>
<td>2,251,013</td>
</tr>
<tr>
<td>1983</td>
<td>3,812,991</td>
<td>2,329,596</td>
</tr>
<tr>
<td>1984</td>
<td>3,821,781</td>
<td>2,449,947</td>
</tr>
<tr>
<td>1985</td>
<td>3,907,374</td>
<td>2,586,741</td>
</tr>
<tr>
<td>1986</td>
<td>3,995,873</td>
<td>2,755,401</td>
</tr>
<tr>
<td>1987</td>
<td>4,044,675</td>
<td>2,888,852</td>
</tr>
<tr>
<td>1988</td>
<td>4,074,300</td>
<td>2,992,606</td>
</tr>
</tbody>
</table>

Table 2 focuses on the allowance rates for OASDI disability claims. (Similar data was not available for SSI.) It demonstrates that while the number of applications for disability benefits remained relatively constant, the number of allowances declined dramatically in the early and mid 1980s. Indeed, the rate of allowances dropped from nearly 45% in the mid 1970s to a low of 26.5% in 1982.

### TABLE 2: OASDI Allowances

<table>
<thead>
<tr>
<th>Year</th>
<th>Applications (in thousands)</th>
<th>Allowances (in thousands)</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>1,284.3</td>
<td>592.0</td>
<td>46.1%</td>
</tr>
<tr>
<td>1976</td>
<td>1,228.8</td>
<td>551.5</td>
<td>44.9%</td>
</tr>
<tr>
<td>1977</td>
<td>1,236.0</td>
<td>568.9</td>
<td>46.0%</td>
</tr>
<tr>
<td>1978</td>
<td>1,185.9</td>
<td>464.4</td>
<td>39.2%</td>
</tr>
<tr>
<td>1979</td>
<td>1,188.6</td>
<td>416.7</td>
<td>35.1%</td>
</tr>
<tr>
<td>1980</td>
<td>1,263.5</td>
<td>396.6</td>
<td>31.4%</td>
</tr>
<tr>
<td>1981</td>
<td>1,135.6</td>
<td>345.4</td>
<td>30.4%</td>
</tr>
<tr>
<td>1982</td>
<td>1,127.3</td>
<td>298.5</td>
<td>26.5%</td>
</tr>
<tr>
<td>1983</td>
<td>1,127.2</td>
<td>311.5</td>
<td>27.6%</td>
</tr>
<tr>
<td>1984</td>
<td>1,147.8</td>
<td>357.1</td>
<td>31.1%</td>
</tr>
<tr>
<td>1985</td>
<td>1,137.3</td>
<td>377.4</td>
<td>33.2%</td>
</tr>
<tr>
<td>1986</td>
<td>1,240.5</td>
<td>416.9</td>
<td>33.6%</td>
</tr>
<tr>
<td>1987</td>
<td>1,198.0</td>
<td>415.8</td>
<td>34.7%</td>
</tr>
<tr>
<td>1988</td>
<td>922.0</td>
<td>409.4</td>
<td>44.4%</td>
</tr>
</tbody>
</table>


42. Figures taken from id. at 262 (Table 6.C7).
While many of the SSA’s restrictive policies affected all disability claimants, those with mental disabilities appeared to be singled out for especially adverse treatment. In 1982 and again in 1984, federal district courts found that the SSA had engaged in a clandestine policy that illegally denied or terminated benefits to large numbers of claimants with mental disabilities. Under this policy, when a mental impairment was not sufficiently severe to be considered per se disabling, the SSA refused to engage in an individualized consideration of the claimant’s vocational abilities, instead conclusively presuming that the claimant had the capability to engage in unskilled work. The impact of this policy, and its subsequent reversal by the courts, is illustrated in Table 3.

TABLE 3: OASDI ALLOWANCES FOR MENTAL DISABILITIES

<table>
<thead>
<tr>
<th>Year</th>
<th>Allowances for Mental Disabilities</th>
<th>Percent of Total Allowances</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>67,213</td>
<td>11.4%</td>
</tr>
<tr>
<td>1976</td>
<td>63,667</td>
<td>11.5%</td>
</tr>
<tr>
<td>1977</td>
<td>70,825</td>
<td>12.5%</td>
</tr>
<tr>
<td>1978</td>
<td>54,329</td>
<td>11.7%</td>
</tr>
<tr>
<td>1979</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1980</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1981</td>
<td>36,318</td>
<td>10.5%</td>
</tr>
<tr>
<td>1982</td>
<td>31,531</td>
<td>10.6%</td>
</tr>
<tr>
<td>1983</td>
<td>50,633</td>
<td>16.3%</td>
</tr>
<tr>
<td>1984</td>
<td>64,078</td>
<td>17.9%</td>
</tr>
<tr>
<td>1985</td>
<td>68,610</td>
<td>18.2%</td>
</tr>
<tr>
<td>1986</td>
<td>123,983</td>
<td>29.7%</td>
</tr>
<tr>
<td>1987</td>
<td>81,241</td>
<td>19.5%</td>
</tr>
</tbody>
</table>


46. Id. For further discussion of this policy, see infra notes 156-62 and accompanying text.

47. Statistics taken from 1989 SSB, supra note 41, at 259 (1989) (Table 6.C3); id. at 257 (1988) (Table 6.C3); id. at 133 (1987) (Table 57); id. at 120 (1986) (Table 52); id. at 112, 113 (1984-1985) (Table 48); id. at 111 (1983) (Table 50); id. at 106 (1982) (Table 46); id. at 203 (1981) (Table 131); id. at 192 (1980) (Table 129); id. at 198 (1977-1979) (Table 130); and id. at 172 (1976) (Table 129).
As Table 3 demonstrates, by 1982 the policy had cut the number of allowances for mental disabilities in OASDI cases to less than half the rate that prevailed in the mid 1970s. Mental disability allowances as a percent of total allowances remained relatively constant despite this decline, probably because the overall number of allowances was significantly reduced as well. When the SSA abandoned the policy in 1983 as a result of the adverse ruling in the 1982 litigation and the filing of an additional lawsuit,48 however, the allowances for mental disabilities returned to their previous levels and constituted a much higher proportion of the overall allowances. The 1986 and, to a lesser extent, the 1987 figures are especially high as a result of the re-evaluation of claims ordered by the district court under new standards promulgated for mental disabilities.49

It is somewhat problematic to generalize from the above figures to reach specific conclusions regarding claimants with developmental disabilities. Separate figures for these claimants are unavailable prior to 1986 with respect to either recipients or allowances in either the OASDI or SSI programs. Moreover, the figures in Table 3 pertain only to OASDI, in which developmental disabilities comprise only a small proportion of total claims and less than one-fifth of claims based on mental disabilities.50 While individuals with developmental disabilities make up a far larger number and proportion of SSI recipients,51 analogous figures for SSI awards are unavailable. Nonetheless, there is considerable anecdotal evidence to suggest that at least some claimants with developmental disabilities had significant difficulty receiving benefits to which

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48. See supra notes 44-45 and accompanying text.
49. These regulations did not enter into force until 1985. For further discussion of the new regulations for evaluating claims of mental disability, see infra notes 76-80 and accompanying text.
51. 395,600 individuals, or 27.1% of total recipients, received SSI benefits on the basis of mental retardation in 1986; 428,400, or 26.9%, in 1987; and 454,800, or 27.1% in 1988. 1987 SSB, supra note 50, at 290 (Table 212); 1988 SSB, supra note 50, at 330 (Table 9.F1); 1989 SSB, supra note 41, at 336 (Table 9.F2). These figures may underestimate the number of recipients to some degree, because the diagnosis of recipients was unavailable for a substantial number of claimants in each of the years in question.
they were entitled. Numerous cases reversing SSA denials of benefits to claimants with developmental disabilities can be found at both the circuit and district court level.\footnote{See the discussion of cases in Part II, infra.}

C. \textit{Mental Disabilities and the Politics of Scarcity}

In short, the Social Security Administration underwent during the late 1970s and early 1980s a "sea change" in attitude, in which it came to emphasize fiscal austerity in the determination of eligibility for disability benefits and efficiency and consistency in the disability determination process. This emphasis produced substantive and systemic policies that led to the denial or termination of benefits for hundreds of thousands of disability claimants. For various reasons, this sea change in attitude and the resulting substantive and systemic policies fell with particular harshness on claimants with mental disabilities.

Substantively, SSA policies emphasized objective proof of disability and made disability standards more formal and specific.\footnote{These policies are discussed in greater detail in Part II, infra.} These policy changes tended to restrict the availability of benefits across the range of disabilities,\footnote{While emphasis on objective proof may be justified generally by reference to the goal of accurate adjudications of disability, it should be clear that it also reflects skepticism about the subjective claims of disability made by claimants and, to some extent, the subjective judgments of their physicians. This skepticism often led to the denial or termination of benefits. Thus, for example, the SSA refused to recognize subjective complaints of pain, see infra note 104 and accompanying text, and tended to weigh the evidence of their own consulting physicians over the opinions of the claimant’s treating physician, even though the treating physician was more familiar with the case. See infra notes 220-21 and accompanying text. Likewise, specific and formal standards were designed to increase consistency in disability determinations, a cause for great concern during the late 1970s and early 1980s. See supra notes 9-28 and accompanying text. However, many of these "specific" standards were also much more stringent. See infra notes 102-10 and accompanying text (discussing the severity regulation).} but claimants with mental disabilities were especially vulnerable. Claimants with mental disabilities had difficulty satisfying requirements of objective proof because the existence and severity of a mental disability is typically based upon subjective symptoms and their subjective evaluation by medical (or other) personnel.\footnote{See, e.g., \textit{Social Security Reviews of the Mentally Disabled: Hearings Before the Senate Special Subcomm. on Aging}, 98th Cong., 1st Sess. 72 (1983) (prepared statement of Stephen H. Sachs, Attorney General of the State of Maryland): “Unlike cases dealing with physical disabilities such as cardiac or pulmonary impairments, mental disabilities rarely have the clear ‘objective’ signs and symptoms which disability examiners favor. They are inherently more subjective and require different methods of analysis.”} Similarly, the effect of a mental disa-
bility on an individual’s ability to work is not always readily apparent. Because of the lack of objectively manifest symptoms, those with mental disabilities are often skeptically viewed as “shirkers” who are not truly disabled. Finally, the emphasis on objectively manifest symptoms and limitations found its way into the more formal and specific standards for disability promulgated by the SSA. As a result, these standards were ill suited to evaluation of claimants with mental disabilities.

Likewise, a variety of systemic factors caused claimants with mental disabilities to be adversely affected by the change in the SSA’s perspective. The bureaucratic pressures to deny benefits have been well documented. Given the lack of objective evidence of mental disabilities and the poor “fit” of mental disabilities into the formal and specific standards promulgated by the SSA, claimants with mental disabilities are logical targets for benefit denials. To some extent, the propensity to deny claims based on mental disabilities may have been reinforced by the fact that those with mental disabilities generally lack political influence. In addition,

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56. For example, individuals who function well in controlled or familiar settings may be unable to function effectively under the stress of the work environment. Current regulations take this factor into account. See infra notes 80-121 and accompanying text.

57. Indeed, there is some evidence that the SSA was particularly suspicious of claimants with mental disabilities and singled them out for special scrutiny. See supra note 43 and accompanying text. For example, claimants with mental impairments were disproportionately subject to CDR. While mental impairments accounted for approximately 11% of OASDI recipients and 18% of SSI recipients, over 27% of all CDRs involved mental impairments. See Social Security Reviews of the Mentally Disabled: Hearings Before the Senate Special Comm. on Aging, 98th Cong., 1st Sess. 164-65 (1983) (appendix).

58. See Part II, infra.


60. It is, of course, difficult if not impossible to prove directly the impact of bureaucratic pressures on individualized decisions; decisionmakers do not openly acknowledge the impact of such pressures on their decisions. Nonetheless, some evidence for this explanation is present in the form of the district court findings in the two class action suits challenging the SSA’s denial of benefits to claimants with mental disabilities. See supra notes 44-48 and accompanying text. Moreover, numerous court decisions have recognized the tendency of bureaucratic pressures to influence individual benefit decisions, striking down the Bellmon Review program on the grounds that it infringed the independence of the ALJ’s and threatened claimants’ due process rights to an unbiased decisionmaker. See infra note 227 and accompanying text. This general pressure to deny benefits would tend to be particularly troublesome in mental disability cases because the difficulty of objective proof and the inapplicability of specific standards described above would increase the subjectivity of disability determinations.

61. Of course, various advocacy groups represent the interests of individuals with developmental disabilities, and legislative successes suggest that they are not totally powerless within the political system. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 443-45 (1985). On the other hand, individuals with developmental disabilities are
the nature of mental disabilities makes it more difficult for claimants to respond to the denial of benefits because they have great difficulty negotiating the complex procedural apparatus for appeals. In some instances, the denial of benefits may itself worsen a claimant's condition and prevent effective pursuit of opportunities for review.

The following sections consider in greater detail the impact of the policy shift described above. Part II examines the substantive standards for determining disability, explaining how various features of these standards present special difficulty for claimants with mental disabilities. Part III describes systemic features of the disability determination process that operate to the detriment of claimants with mental disabilities. The discussion in Parts II and III provides considerable anecdotal evidence of the significant practical consequences of the SSA's policy shift for claimants with developmental disabilities.

II. Substantive Issues

Disability is a vague and open-ended concept, which in the early years of the disability program was determined largely on a subjective basis by individual disability decisionmakers. One of the most significant developments over the past two decades was the SSA's adoption of an elaborate regulatory framework to guide and control disability determinations. Two key features of this regulatory framework are the establishment of a sequential evaluation process and the use of standardized categories at several stages of the process to limit the decisionmaker's discretion. In the process of increasing the specificity and formality of the determination process, the SSA in the 1980s also made various

probably not as powerful as other groups competing for slices of the Social Security pie, such as the elderly. Indeed, individuals with developmental disabilities have suffered a history of discrimination of which many vestiges remain. See id. at 461-64 (Marshall, J., dissenting). Ultimately, one cannot state with certainty what effect the relative lack of power may have on SSA policy, but given the generally accepted research regarding bureaucratic response to interest group politics, see, e.g., Shapiro & Levy, Heightened Scrutiny of the Fourth Branch: Separation of Powers and The Requirement of Adequate Reasons for Agency Decisions, 1987 Duke L.J. 387, 394-95, the possibility cannot be ruled out.

62. See Part III, infra.
63. See, e.g., Weinstein, supra note 43, at 922.
64. While the SSA used systematized medical criteria to decide cases of severe disability from the inception of the program, the formalization and objectification of vocational criteria did not occur until more recently in response to congressional pressure. See, e.g., J. Mashaw, supra note 17, at 108-09.
65. See, e.g., S. Mezey, supra note 11, at 40-41.
requirements for proving disability more difficult to meet. As will be discussed more fully below, these developments present a number of troublesome hurdles for claimants with developmental disabilities.

A. The Sequential Evaluation Process

Although they have differing financial eligibility requirements, both OASDI and SSI define disability as 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." Thus, the statutory provisions specifically contemplate that mental impairments, including developmental disabilities, may qualify as disabilities for which benefits should be awarded. In addition to the general definition of disability, both OASDI and SSI further require that the impairment or impairments be "of such severity that [a claimant] is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . ." This requirement combines the consideration of medical evidence regarding the effects of an impairment with a consideration of vocational factors affecting a claimant's ability to engage in gainful activity in light of the impairment.

To implement these requirements, the SSA has developed a five-step "sequential evaluation process" for determining disability. Under step one, if the claimant is currently engaged in substantial gainful activity, the claimant is not disabled. If the claimant is not engaged in substantial gainful activity, under step two the SSA makes a threshold determination of whether the claimant's impairment or combination of impairments is severe. An impairment is not severe if it does not significantly impair a claimant's ability

66. See, e.g., Levy, supra note 5, at 489-94.
67. See supra notes 6-7 and accompanying text.
69. Id. § 423(d)(2)(A) (OASDI); id. § 1382c(a)(3)(B) (SSI).
71. Substantial gainful activity is defined at 20 C.F.R. § 404.1572 (1990) (OASDI); id. § 416.972 (SSI). For further discussion of what constitutes substantial gainful activity, see infra notes 81-101 and accompanying text.
72. The severity requirement is explained at 20 C.F.R. § 404.1521 (1990) (OASDI); id. § 416.921 (SSI). For further discussion, see infra notes 102-18 and accompanying text.
to perform work related activities. If the claimant does not have a severe impairment, the claimant is not disabled. If the claimant’s impairment is severe, the SSA determines under step three whether the impairment or impairments meets or equals the listing of impairments contained in the social security regulations.\(^{73}\) If so, then the claimant is disabled.

If the impairment does not meet or equal the listings, the SSA considers vocational factors to determine disability. These vocational considerations require an assessment of “residual functional capacity,” which is the claimant’s ability, in light of his or her impairments, to perform work related activities. The assessment involves evaluation of physical abilities, such as capacity to walk, stand, sit, bend, and lift, as well as mental abilities, such as the ability to understand, remember and carry out instructions, and to adjust psychologically to the work setting.\(^{74}\) Under step four, if the claimant’s residual functional capacity allows the claimant to return to his or her previous work, the claimant is not disabled. If the claimant cannot return to his or her previous work, under step five the SSA considers whether the claimant’s residual functional capacity allows him or her to perform any other work available in the national economy. This determination is usually made according to tables (known as the “grids”) which have been established by the SSA and which dictate results on the basis of a claimant’s physical exertional limits, age, education, and prior work experience.\(^{75}\)

The sequential evaluation process was designed to evaluate physical impairments and is not well adapted to the evaluation of mental impairments. Indeed, in the early years of the sequential evaluation process, the SSA simply refused to make an individualized assessment of the residual functional capacity of claimants with mental disabilities, conclusively presuming that claimants whose impairments did not meet or equal the listing of impairments at

\(^{73}\) The listings are contained at 20 C.F.R. Pt. 404, Subpt. P, app. 1 (1990). For discussion of the listings affecting those with developmental disabilities, see infra notes 119-51 and accompanying text.

\(^{74}\) See 20 C.F.R. § 404.1545 (1990) (OASDI); id. § 416.945 (SSI). For further discussion of residual functional capacity, see infra notes 152-55; 175-86 and accompanying text.

\(^{75}\) The grids are located at 20 C.F.R. Pt. 404, Subpt. P, app. 2 (1990). See Heckler v. Campbell, 461 U.S. 458, 465-70 (1983) (upholding use of grids in general). The grids are binding when a claimant’s exertional and nonexertional impairments match precisely with a category in the grids; when they do not, the grids may be used only as guidelines. See, e.g., Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 404.1569 (1990) (OASDI); id. § 416.969 (SSI). For further discussion of step five and the use of the grids, see infra notes 187-204 and accompanying text.
step three of the process retained the capacity to perform unskilled work.\textsuperscript{76} In 1984, following the SSA’s suspension of continuing disability reviews\textsuperscript{77} of claimants with mental disabilities, Congress directed the SSA to develop new regulations for determining mental disability.\textsuperscript{78} These regulations, adopted in 1985, include a revised system for evaluating mental disabilities and revisions of the listings for mental disabilities at step three of the sequential evaluation process.\textsuperscript{79}

The cornerstone of the regulations is a new methodology for evaluating mental disabilities.\textsuperscript{80} The regulations provide that the SSA will rate the degree of functional loss resulting from mental impairments in four categories: (1) activities of daily living; (2) social functioning; (3) concentration, persistence, or pace; and (4) deterioration or decompensation in work or work-like settings. Functional loss in activities of daily living and social functioning is measured on a five point scale: none, slight, moderate, marked, and extreme. A different five point scale is used to rate concentration, persistence, and pace: never, seldom, often, frequent, and constant. Finally, deterioration and decompensation is rated on a four point scale: never, once or twice, repeated, and continual. These ratings form the basis for evaluating the severity of an impairment at step two of the sequential evaluation process, determining whether an impairment meets or equals the listings at step three of the process, and determining residual functional capacity. Despite the new methodology, problems arise for claimants with developmental disabilities at various steps of the sequential evaluation process.

\textbf{B. Substantial Gainful Activity}

The premise of step one in the sequential evaluation process is simple—if a claimant is currently employed and earning significant income, then the claimant is not “disabled.” This simple premise, however, has come into tension with the broad movement pro-


\textsuperscript{77} See Levy, supra note 5, at 489 & n.151.


\textsuperscript{79} See 20 C.F.R. § 404.1520a (1990) (OASDI); id. § 416.920a (SSI); id. Pt. 404, Subpt. P, app. 1, § 12.00.

\textsuperscript{80} The methodology is described at 20 C.F.R. § 404.1520a (1990) (OASDI); id. § 416.920a (SSI).
moting self-sufficiency and autonomy for individuals with disabilities.\textsuperscript{81} Increasingly, self-sufficiency and autonomy have been sought through training and employment programs for adults with developmental disabilities.\textsuperscript{82} By pursuing these options, however, claimants with developmental disabilities may become ineligible for benefits if the SSA determines that they are engaged in substantial gainful activity. Though Congress and the SSA have attempted to accommodate employment, claimants nonetheless run the risk that they may lose their benefits if they work.

The SSA has attempted to accommodate structured or assisted employment in its definition of substantial gainful activity. Normally, whether a disability claimant is engaged in substantial gainful activity is determined by the earnings of the claimant, in accordance with guidelines establishing income levels that indicate whether a claimant presumptively is or is not engaged in substantial gainful activity.\textsuperscript{83} The SSA recognizes, however, that in some instances of sheltered or subsidized employment, claimants may not actually "earn" the full amount that they are paid. Thus, the regulations provide that the SSA must determine which portions of a claimant's income are earned, disregarding "subsidized" income and considering whether work is done under close and continuous supervision or in a sheltered workshop.\textsuperscript{84} Likewise, income guidelines set higher income levels for claimants working in sheltered workshops than for those working in a competitive environment.\textsuperscript{85}

Despite these regulatory provisions, employees with a disability who engage in assisted work may be denied benefits at step one of the sequential evaluation process. The determination of whether a claimant actually earns income from assisted employment depends on the development of the record of employment and may ultimately be quite subjective. For example, in \textit{Thompson v.}

\textsuperscript{81} For extensive discussion of varying views of the appropriate tactics of "advocates" on behalf of individuals with developmental disabilities, see \textit{The Legal Rights of Citizens With Mental Retardation} (1988).

\textsuperscript{82} A number of programs exist in which adults with developmental disabilities are placed, under the supervision of job coaches, with private sector employers who receive tax benefits as incentives. These programs have generally been received favorably by all those involved. See, e.g., Suo, \textit{Firms Find Disabled Can Prove Good Employees}, Boston Globe, July 5, 1989, at 24; Shaheen, \textit{Program Helps the Disabled to Join the Work Force}, N.Y. Times, May 24, 1987, \textsection A1, at 24, col. 1 (Section 11 N.J. ed.).

\textsuperscript{83} See 20 C.F.R. \textsection 404.1574(b) (1990) (OASDI); \textit{id.} \textsection 416.974(b) (SSI); see also \textit{id.} \textsection 404.1574(a)(1) (OASDI); \textit{id.} \textsection 416.974(a)(1) (SSI) ("Generally, if you worked for substantial earnings, this will show that you are able to do substantial gainful activity.").

\textsuperscript{84} \textit{id.} \textsection 404.1574(a)(2)-(3) (1990) (OASDI); \textit{id.} \textsection 416.974(a)(2)-(3) (SSI).

\textsuperscript{85} \textit{id.} \textsection 404.1574(b) (1990) (OASDI); \textit{id.} \textsection 416.974(b) (SSI).
the court reversed and remanded the SSA’s denial of benefits on the ground that the ALJ “failed to develop the record fully with regard to the conditions of employment” in light of evidence in the record showing that the claimant’s family members helped her with one job and that another job was performed under special circumstances. Thompson is perhaps an unusual case because of the informal nature of the assistance Ms. Thompson received, but problems may also arise in the context of more formally structured settings. Thus, in Fogarty v. Secretary of Health and Human Services, the district court reversed and remanded an ALJ decision denying benefits to a mentally retarded woman with cerebral palsy and a seizure disorder. Although Ms. Fogarty's income from the sheltered workshop in which she was employed was of itself clearly inadequate to constitute “substantial gainful activity” under SSA guidelines, the ALJ concluded that she was engaged in substantial gainful activity because “other criteria regarding comparability and value of services” indicated that the claimant was “working at a level of productivity which is comparable to that of unimpaired people in the community . . . .” While such an inquiry is appropriate under the regula-

86. 878 F.2d 1108 (8th Cir. 1989). The claimant alleged disability on the basis of heart trouble, diabetes, and the effects of polio, id. at 1109, and after the initial denial of benefits requested that the Appeals Council reconsider the case in light of a vocational evaluation finding that she was profoundly mentally retarded. Id. at 1110. Because the decision turned on the step one determination of substantial gainful activity, the severity of both her physical and mental impairments was not relevant to the SSA’s initial determination. However, the court of appeals directed the ALJ on remand to inquire into the degree of her impairments, including the issue of mental retardation, if the presumption of substantial gainful activity was inapplicable. Id. at 1110-11.

87. Id. at 1110. The claimant worked as a maid approximately 20 hours per week at minimum wage. Id. at 1109. One of her jobs was at a bank where she had worked for about 20 years and the other was in a private home. Id. Although the SSA representative noted that the claimant’s work was “not comparable to other maids in the neighborhood,” there was no indication of special conditions of employment in the representative’s report. Id. The claimant testified that her son and granddaughter had to help her “off and on” at the bank cleaning job, that sometimes she had to lie on the floor and let them do the work, and that the job she had at the private home was possible only because the owner did not care if she arrived on time and allowed her to leave to go back home to bed when her pain became too bad. Id. at 1109-10.


89. The guidelines establish income levels at which a claimant is presumptively not engaged in substantial gainful activity, 20 C.F.R. § 404.1574(a)(3) (1990) (OASDI); id. § 416.974(a)(3) (SSI), and Ms. Fogarty’s monthly earnings, which ranged from $265.00 to $282.00 per month, 690 F. Supp. at 168, fell below those levels.

tions, the court held that the ALJ’s conclusion was not supported by substantial evidence.

Moreover, even if a claimant’s work does not itself constitute substantial gainful activity, it may be used to support the conclusion that the claimant is capable of engaging in substantial gainful activity. In Zenker v. Bowen, for example, the court of appeals upheld the SSA’s denial of benefits to a speech and learning impaired claimant who suffered from chronic bronchitis, a seizure disorder, hypertension, alcoholism, and Klinefelter’s syndrome. Mr. Zenker worked approximately twenty hours per week as a dishwasher for the Elk’s lodge, but his earnings did not establish that he was engaged in substantial gainful activity. Nonetheless, the ALJ found that Mr. Zenker was capable of working on a full time basis and denied benefits. Although Mr. Zenker’s wife, employer, rehabilitation counselor, and treating physician all indicated that he could not work on a full time basis, the court of appeals concluded that there was substantial evidence to support the ALJ’s finding because Mr. Zenker himself stated that he would work more hours if they were available and because an initial letter from the treating physician indicated that Mr. Zenker could work longer hours.

91. See 20 C.F.R. § 404.1574(b)(5)-(6) (1990) (OASDI); id. § 416.974(b)(5)-(6) (SSI).
92. Fogarty, 690 F. Supp. at 169. Specifically, the court concluded that the ALJ relied too heavily on evaluation letters from the claimant’s counselors stating that she was working at a 73% work productivity rate and on one counselor’s statement that she was ready for placement in the competitive workplace. Id. In so doing, the ALJ failed to consider specific limitations that the claimant’s disabilities placed on “the complexity and duration of the work tasks [she] can undertake, and the independence with which she can undertake them.” Id. Moreover, the ALJ failed to adequately develop the record with respect to the “precise nature of the plaintiff’s work and the conditions under which she performed it.” Id. For further discussion of the problems of developing an evidentiary record and the ALJ’s duty to develop the record, see infra notes 216-21 & 234-36 and accompanying text.
93. 872 F.2d 268 (8th Cir. 1989); see also Sessler v. Secretary of Health and Human Servs., No. 86-CV-1105 (N.D.N.Y. Apr. 20, 1990) (unpublished district court decision available on Westlaw, 1990 WL 52970) (reversing ALJ decision because ALJ improperly relied on claimant’s employment in a sheltered workshop to conclude she could find competitive work).
94. Zenker, 872 F.2d at 270.
95. Id. It is unclear what step of the sequential evaluation process this conclusion reflects. The ALJ concluded that Mr. Zenker was not engaged in substantial gainful activity (step one), was suffering from severe impairments (step two), and was not suffering from impairments that met or equaled the listing of impairments (step three). Id. Because the case did not present the possibility of returning to past work (step four), the finding presumably reflects the conclusion that Mr. Zenker was capable of performing work in the national economy (step five), but the ALJ’s opinion does not so indicate. Id.
96. Id. at 271-72. As pointed out effectively by a dissenting judge, however, Mr.
These examples suggest that there are difficulties in evaluating when a claimant's sheltered or assisted work constitutes substantial gainful activity. Claimants may not be in a position to fully document the degree to which a particular work situation is assisted and cannot always rely on the SSA or ALJs to investigate their situation. Moreover, whether a particular work situation constitutes substantial gainful activity requires, to some degree at least, a subjective evaluation, and this subjective evaluation may be influenced by general attitudes regarding the availability of benefits. Finally, even with objective and accurate application of the SSA's definition of substantial gainful activity, claimants run the risk that their efforts at self-sufficiency may be too successful, causing the termination or denial of benefits.

For SSI claimants, Congress addressed some of these problems. When claimants are denied benefits on the grounds that they are engaged in substantial gainful activity, the statute provides that SSI benefits and Medicaid eligibility may continue. Although this provision alleviates the step one eligibility problem, it applies only if the claimant remains financially eligible for benefits. The risk that employment will cause the claimant to lose financial eligibility is lessened by provisions excluding from the computation of income those work-related expenses caused by the claimant's disability as well as half of a claimant's remaining earned income. Nonethe-

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Zenker did not testify that he could work a 40 hour week, but rather merely stated that he would work more hours if they were given. Id. at 272-73 (Heaney, J., dissenting). Moreover, the treating physician flatly stated in later correspondence that the claimant was incapable of performing his current job on a full time basis. Id. at 273. While the SSA Appeals Council rejected this opinion on the basis of the physician's initial letter, the dissenting judge argued that the first letter did not unequivocally state that Mr. Zenker could work full time, and therefore should be discounted in favor of the later, unequivocal statement to the contrary. Id.


98. Income levels for eligibility are set under 42 U.S.C. §§ 1382(a)(1)(A) or 1382(a)(2)(A) (1988), and are adjusted for cost of living increases under § 1382f. Special eligibility for SSI benefits despite substantial gainful activity incorporate the requirements of § 1382. See id. § 1382h(a)(1)(B). Medicaid eligibility, which is normally conditioned on eligibility for SSI benefits, may continue even though the claimant's earned income would render him or her ineligible for SSI, so long as the claimant's earnings are insufficient to replace the benefits that would otherwise be lost. See id. § 1382h(b)(1)(D).

99. To be eligible financially for SSI, a claimant must also meet a "resources" test. See 42 U.S.C. § 1382b (1988). This requirement can also create problems for persons with disabilities seeking to live independently. See, e.g., New Ways to Aid the Disabled, Chicago Tribune, Sept. 24, 1985, at 17 (proposing that parents of children with developmental disabilities be encouraged to provide for their future needs, but noting that such efforts may render them ineligible for SSI benefits).

100. Determination of income is made pursuant to § 1382a, which provides in part:
less, the potential loss of eligibility for benefits operates as a disincentive to work, and rests on the potentially erroneous premise that the working disabled no longer need financial assistance.

Despite the regulatory and statutory provisions, then, adults with developmental disabilities who seek greater independence and dignity through work run the risk of losing their eligibility. In some instances this may be through erroneous application of step one of the sequential evaluation process, but it may also be that the very success of claimants’ work efforts means that they no longer meet the definition of “disabled” and/or the financial eligibility requirements for SSI (and Medicaid) benefits. The claimants’ loss of benefits often will mean that they are not much better off financially for having worked. Considering that work involves various expenses not accounted for in the computation of income under SSI, such as clothing for work, claimants may actually be worse off. In any event, neither the maximum income limits for SSI benefits nor the benefits themselves are particularly generous, so that the claimant may need both to achieve a decent standard of living.

This situation has both practical and policy implications for those who advocate on behalf of persons with disabilities. From the practical perspective of those who represent claimants before the SSA and the courts, attention must be paid to the regulations defining substantial gainful activity and the specifics of any work performed by the claimant. From the policy perspective, the statutes and regulations should be changed to better accommodate claimants’ efforts to work. As it now stands, the Social Security system clearly does not operate to further, and in fact may deter, important efforts to improve the situation of individuals with developmental disabilities. Ironically, these efforts to lead independent and productive lives could, if encouraged, contribute significant long-term financial benefits to the system.101

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(b) In determining the income of an individual (and his eligible spouse) there shall be excluded —
(4)(B) if such individual (or such spouse) is disabled but not blind (and has not attained age 65 . . . ) . . . (ii) such additional amounts of earned income of such individual . . . , if such individual’s disability is sufficiently severe to result in a functional limitation requiring assistance in order for him to work, as may be necessary to pay the costs (to such individual) of attendant care services, medical devices, equipment, prostheses, and similar items and services . . . which are necessary . . . for that purpose [and] (iii) one-half the amount of earned income not excluded after the application of the preceding provisions of this subparagraph . . . .


101. By encouraging initial efforts to move into the workplace, the system would foster
C. Severity

Under step two of the sequential evaluation process, a claimant who does not have a "severe" impairment is denied benefits. One of the most significant substantive policies leading to the denial of benefits during the first half of the 1980s was the SSA's determination of severity at this stage of the process. In determining severity, the SSA expanded the number of impairments regarded as per se nonsevere, refused to consider the combined effects of multiple impairments, disregarded the relationship between an impairment and a claimant's prior work, and considered subjective symptoms such as pain to be irrelevant in determining severity.

The severity requirement of step two was used to deny benefits to claimants with developmental disabilities. In a Social Security Ruling that listed impairments regarded as not severe, the SSA indicated that an "IQ of 80 or greater in all major areas of intellectual functioning" constitutes a nonsevere impairment. While these sorts of IQ scores may not of themselves be indicative of developmental disabilities, benefits were often denied at step two despite significantly lower IQ scores. Moreover, the SSA disregarded the interaction of a claimant's "nonsevere" developmental disability with other impairments regarded as not severe, and also discounted the effect that a particular impairment would have on a claimant's ability to work. For example, in Estran v.

long term independence for at least some individuals with developmental disabilities. Over time, work related income would increase to the point that disability benefits could be reduced.

102. 20 C.F.R. § 404.1520(c) (1990) (OASDI); id. § 416.920(c) (SSI) provides: "If you do not have any impairment . . . which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled." See also id. § 404.1521(a) (OASDI); id. § 416.921(a) (SSI) (defining a nonsevere impairment as one that "does not significantly limit your physical or mental ability to do basic work activities").

103. While the SSA had long had a threshold severity requirement, denials based on the absence of severe impairment rose from approximately 8% in 1975 to 40% in 1982. See Bowen v. Yuckert, 482 U.S. 137, 157 (1987) (O'Connor, J., concurring).

104. These policies are discussed in greater detail in Levy, supra note 5, at 489-94.

105. S.S.R. 82-55 at 106 (Cum. Ed. 1982). Social Security Rulings are SSA decisions intended to have precedential effect. The SSA's use and the binding effect of Social Security Rulings has been the subject of some controversy. See Levy, supra note 5, at 495 n.186.


Heckler, the SSA found nonsevere the impairments of a fifty-eight year old illiterate woman with an IQ of sixty-nine, who "suffer[ed] from depressive neurosis, a somatization disorder, hypertrophic arthritis, and some angina."

The most restrictive aspects of the SSA's application of the severity requirement were reversed by congressional action or modified by the SSA. Under current law, the determination of severity in the case of mental impairments should be made according to the functional limitations (restriction of activities of daily living; difficulties in maintaining social functioning; deficiencies in concentration, persistence, or pace; and episodes of deterioration or decompensation in work or work-like settings) identified in the special procedures for evaluating mental impairments. Under the regulations, ratings of "none" or "slight" in the first two categories, "never" or "seldom" in the third, and "never" in the fourth area generally indicate a nonsevere impairment. Some cases suggest that while the reliance on functional limitation is intended to produce objective results, in assessing the degree of limitation the SSA may evaluate the evidence adversely to the claimant.

108. 745 F.2d at 340. The court of appeals, on rehearing from a previously unpublished opinion, concluded that the ALJ had improperly interpreted the severity requirement, and remanded the case to the SSA for reconsideration.


110. In Social Security Ruling 85-28, the SSA provided that when the effect of an impairment or combination of impairments on a claimant's ability to perform basic work activities is unclear, the adjudicator must "evaluate the individual's ability to do past work, or to do other work based on the consideration of age, education, and prior work experience." S.S.R. 85-28 at 23. See also S.S.R. 85-III-II (obsoleting the listing of per se nonsevere impairments contained in S.S.R. 82-55); S.S.R. 86-8 (Cum. Ed. 1988) (replacing S.S.R. 82-56, which provided that an impairment may not be severe even if it prevents a claimant from performing his or her past work). The change in policy these rulings reflect was perhaps prompted by concern expressed in the legislative history accompanying the Social Security Disability Benefits Reform Act of 1984, see Levy, supra note 5, at 491-92. The Supreme Court upheld the severity regulation as interpreted by Social Security Ruling 85-28 in Bowen v. Yuckert, 482 U.S. 137, 145 (1987).

111. See supra notes 79-80 and accompanying text.


113. Although not a developmental disability case, Figueroa-Rodriguez v. Secretary of Health and Human Servs., 845 F.2d 370 (1st Cir. 1988) is illustrative. In Figueroa-Rodriguez, the claimant suffered from back problems and a dysthemic disorder, but the Appeals Council found that the dysthemic disorder was not severe and, therefore, applied the grids
In addition, the ALJ may fail to apply the functional limitations and instead engage in a more subjective evaluation of severity.\textsuperscript{114} In \textit{Santiago v. Sullivan},\textsuperscript{115} for example, the district court reversed an ALJ decision denying benefits at step two of the sequential evaluation process. While the court upheld the ALJ’s finding that the claimant’s alleged physical impairments were not severe, the court concluded that the ALJ’s rejection of the claimant’s alleged mental retardation and anxiety disorder was not supported by substantial evidence. The ALJ rejected the claimant’s verbal IQ score of sixty-nine on the basis of the treating psychologist’s statement that the score may have been understated,\textsuperscript{116} despite the fact that the psychologist had diagnosed her as mildly mentally retarded.\textsuperscript{117} Likewise, the ALJ rejected the diagnosis of an anxiety disorder without sufficient basis, and had erroneously refused to consider the combined effects of these impairments.\textsuperscript{118}

Despite uncertainties about the effectiveness of the SSA’s functional limitation approach to assessing mental impairments, there are relatively few recent cases in which the SSA’s denial of benefits at step two of the process has been reversed by the courts. This

to determine that the claimant’s back problems did not prevent him from performing work available in the national economy. \textit{Id.} at 371. Based on the testimony of the SSA’s own examining psychiatrist, the ALJ rated the degree of limitations as moderate, slight, seldom, and insufficient evidence, respectively. These ratings would take the dysthmic disorder out of the nonevere category. \textit{Id.} at 373 \& n.1. But the ALJ nonetheless found the impairment to be nonevere. \textit{Id.} at 374. Perhaps to correct this oversight, the Appeals Council, without explanation, “simply filled out a form checking slight, slight, never, never, so that the ratings would correspond with § 404.1520a(o)(1).” \textit{Id.} Accordingly, the court of appeals remanded the case to the SSA for further proceedings.

The assessment of functional limitation also presents problems in applying the listings of impairments at step three of the process, \textit{see infra} notes 145-51 and accompanying text, and in determining residual functional capacity for steps four and five of the process. \textit{See infra} notes 175-204 and accompanying text.

\textsuperscript{114} The failure to apply the functional limitation framework also appears to be a problem in applying the listings at step three of the process. \textit{See infra} notes 145-51 and accompanying text.


\textsuperscript{116} The claimant’s performance score was 94 and her full scale score was 80. \textit{Id.} at 2.

\textsuperscript{117} The psychologist had also concluded that “the possibility that her current level of functioning is a reasonable estimate of her potential cannot be ruled out.” \textit{Id.} at 4.

\textsuperscript{118} The ALJ stated merely that “[n]either Dr. Bird or Dr. Jablon [sic] has come forward to explain their diagnosis [of generalized anxiety disorder] or to certify disability in terms acceptable to the Social Security Administration.” \textit{Id.} at 4. The court emphasized that these diagnoses had been confirmed on three separate occasions by others and that the ALJ could only reject a treating physician’s medical opinion on the basis of other medical evidence. \textit{Id.}
suggests that the severity regulation no longer presents the same barrier it once did to disability claimants.

D. Disability Under the Listings

Under step three of the sequential evaluation process, claimants are disabled if their impairments meet or equal the SSA’s listing of impairments. The listings for “Mental Retardation and Autism,” found at section 12.05, define mental retardation as “a significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22).” The listings then set forth four sets of requirements under any one of which a claimant may be found disabled at step three of the process:

A. Mental incapacity evidenced by dependence upon others for personal needs (e.g., toileting, eating, dressing, or bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded; OR

B. A valid verbal, performance, or full scale IQ of 59 or less; OR

C. A valid verbal, performance, or full scale IQ of 60 to 69 inclusive and a physical or other mental impairment imposing additional and significant work-related limitation of function; OR

D. A valid verbal, performance, or full scale IQ of 60 to 69 inclusive or in the case of autism gross deficits in social and communicative skills with two of the following:
   1. Marked restriction of activities of daily living; or
   2. Marked difficulties in maintaining social functioning; or
   3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner . . . ; or
   4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms . . . .

Two aspects of these provisions create significant problems for claimants with developmental disabilities: the reliance on IQ scores as objective measures of impairment and the interaction between IQ scores and other physical or mental impairments or significant

119. See supra note 73 and accompanying text.

120. See 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05 (1990). Autism is defined as “a pervasive developmental disorder characterized by social and significant communication deficits originating in the developmental period.” Id. Because disability claimants with autism do not appear to have faced significant difficulties demonstrating their disability to SSA’s satisfaction (as evidenced by the scarcity of the autism cases reaching the federal district and circuit courts), this Article does not specifically address the application of the listing to claimants with autism.

121. See also id. § 112.05 (adapted provisions for young children). These listings are applied pursuant to the special provisions governing the sequential evaluation process for mental disabilities. See supra notes 76-80 and accompanying text.
functional restrictions under paragraphs "C" and "D" of the listings.

1. IQ Scores

The listings reflect the broad trend, discussed previously, towards reliance on specific, across-the-board standards and objective evidence in determining disability. In the context of developmental disabilities, these trends lead to a heavy reliance on IQ scores as a measure of impairment. Despite the apparent objectivity of IQ scores, however, their use by the SSA may lead to inaccurate and inconsistent results.

First, the SSA does not always accept IQ scores, but may on various grounds reject scores that are favorable to a claimant and then deny benefits. For example, claimants who have not taken IQ tests until later in life may be treated by the SSA as not disabled on the ground that there is no evidence that the impairment manifested itself before age twenty-two.\(^{122}\) Courts have been generally unreceptive to such conclusions, however, reasoning that "in the absence of any evidence of a change in a claimant's intelligence functioning, it must be assumed that the claimant's IQ has remained relatively constant."\(^{123}\) In addition, the SSA may determine that IQ scores are not truly representative of a claimant's capabilities. While such conclusions may sometimes benefit a claimant,\(^ {124}\) low IQ scores are often rejected as invalid, resulting in a failure to meet the listings.\(^ {125}\) In addition, when IQ tests are taken

\(^{122}\) See, e.g., Lucky v. United States Dept't of Health and Human Servs., 890 F.2d 666 (4th Cir. 1989); Turner v. Bowen, 856 F.2d 695 (4th Cir. 1988).

\(^{123}\) Lucky, 890 F.2d at 668 (citing Branhm v. Heckler, 775 F.2d 1271, 1274 (4th Cir. 1983)). The court in Lucky also rejected the argument that the claimant's prior work experience was evidence that his IQ had changed, emphasizing instead evidence that the claimant could barely read or write as constituting a manifestaton of mental retardation prior to age 22. Id. at 668-69 (citing Turner, 856 F.2d at 699).

\(^{124}\) Cf. Salmi v. Secretary of Health and Human Servs., 774 F.2d 685, 686 (6th Cir. 1985) (examiner indicated claimant's high performance score might not be valid because she had taken the test more than once). It is difficult to know how frequently high scores are rejected by the SSA as invalid, because in such a case the claimant would most likely be awarded benefits and, therefore, would not appeal the administrative resolution of his or her claim.

several times, the question arises as to which scores to use.\footnote{126}
Second, the listing is structured so that a single "point" on an IQ score can determine the outcome.\footnote{127} This was the case, for example, in \textit{Selders v. Sullivan},\footnote{128} in which the court of appeals affirmed the denial of benefits to a claimant whose verbal IQ score was seventy. The ALJ found that Mr. Selders was unable to perform his past work as a construction laborer and carpenter because of a back injury that limited him to sedentary and light work, but then determined that he did not meet the listings and applied the grids to conclude that he was not disabled.\footnote{129} The court of appeals rejected Mr. Selders's argument that because his score of seventy was "close to the 60-69 range" the ALJ should have found him to be disabled under the listings.\footnote{130}

\footnote{126} This was a factor in the \textit{Gibson} and \textit{Brown} cases, cited \textit{supra} note 125, in which the ALJs rejected the lowest scores and credited the higher scores. \textit{See Gibson}, 882 F.2d at 330; \textit{Brown}, 845 F.2d at 1212 n.1. One problem for repeat test takers is that experience in taking the exam may increase their performance score. \textit{See}, e.g., \textit{Salmi}, 774 F.2d at 686. Another interesting but relatively unusual problem was presented in \textit{Sanchez v. Secretary of Health and Human Servs.}, 717 F. Supp. 7 (D. Mass. 1988). In that case, the claimant was a Puerto Rican who had taken the Spanish version of the WAIS. His score was "normed" against the Puerto Rican population as well as the United States population. The SSA applied the Puerto Rican norm, which led to a much higher IQ than the application of the U.S. norm. The district court reversed, reasoning that the United States norm was a more accurate reflection of the claimant's abilities because he had been living in the United States for over twelve years. \textit{Id.} at 9.

\footnote{127} Under the listings, reproduced \textit{supra} note 121 and accompanying text, the following results would obtain: For a claimant without any additional mental or physical impairments or significant functional limitations, a verbal, performance, or full scale score of 59 would dictate disability, while a score of 60 would mean that vocational factors must be considered at steps four and five. Likewise, a claimant with a score of 70 on all three measures could not meet the listings for mental retardation, while a score of 69 on any measure would suffice if there were additional mental or physical impairments or significant functional limitations.

\footnote{128} 914 F.2d 614 (5th Cir. 1990). \textit{See also} \textit{Romero v. Secretary of Health and Human Servs.}, 707 F. Supp. 249 (W.D. La. 1989) (ALJ found claimant with IQ scores of 60, 61, and 62 failed to meet listing, but district court reversed because ALJ failed to consider an additional mental impairment under 12.05C).

\footnote{129} \textit{Selders}, 914 F.2d at 617.

\footnote{130} \textit{Id.} at 619. The court emphasized that Mr. Selders's other scores were 72 (full scale) and 76 (performance), \textit{id.}, but this reasoning is questionable in light of the provision in the listings that when a single test produces more than one score, the \textit{lowest} score should be used. \textit{See 20 C.F.R. Pt. 404, Subpt. P, App. 1., § 12.00.} The court went on to state that Mr. Selders had "not shown the requisite additional physical or other mental impairment imposing additional and significant work-related limitations of function," required by 12.05C. \textit{Selders}, 914 F.2d at 620. This statement is hard to square with the ALJ's conclusions that Mr. Selders could not perform his past work and that his exertional limitations restricted him to sedentary and light work, \textit{id.} at 617, particularly because all the courts to consider the question have concluded that an impairment that is "severe" under step two of the process meets the requirement of 12.05C. \textit{See infra} note 139.
The reliance on precise IQ scores is further complicated by the problem of determining which IQ test to use. The scores used in the listings are based on the Wechsler Adult Intelligence Scale (WAIS), and scores from other tests must be "translated" to fit the listings. This translation may create some uncertainty as to a precise IQ score, which in turn could determine the outcome of the step three evaluation.

These problems suggest a third, and more fundamental objection to the heavy reliance on IQ scores. It is doubtful that reliance on precise IQ scores produces an accurate measure of impairment. Considerable psychiatric and psychological opinion suggests that IQ is at best an imperfect measure of ability. Aside from the well-known cultural and educational factors affecting scores, the broader validity and reliability of the tests can be questioned, particularly at the extremes of the scale. Thus, while IQ tests may be helpful in providing a general indicator of intellectual functioning, the effort to employ them as a precise determinant of disability is misconceived. Such objective measures cannot substitute for an individualized evaluation of a claimant's abilities.

2. The 12.05C and 12.05D Listings

Aside from the difficulties associated with heavy reliance on IQ scores, problems arise in the application of the 12.05C and 12.05D listings. Pursuant to those listings, if a claimant's IQ falls between

132. See Abbott v. Sullivan, 905 F.2d 918, 925 (6th Cir. 1990).
133. See, e.g., Carviglia, Lane & Gay, Longitudinal Comparisons of Wechsler Scales in Educable Mentally Handicapped Children and Adults, 21 Psychology In The Schools 137 (1984); Webster, Statistical and Individual Temporal Stability of the WISC-R for Cognitively Disabled Adolescents, 25 Psychology In The Schools 365 (1988). See also Parents in Action on Special Education v. Hannon, 506 F. Supp. 831, 835-78 (N.D. Ill. 1980) (discussing various criticisms of IQ tests and concluding that low test scores by black children reflect socio-economic factors which interfere with the development of intellectual skills rather than cultural or racial bias); Larry P. v. Riles, 495 F. Supp. 926, 952-60 (N.D. Cal. 1979) (discussing problems with IQ testing and concluding that tests do reflect cultural bias).
134. See materials cited supra note 133.
135. Given the institutional pressures on state DDSs and ALJs, see infra notes 208-13 & 223-27 and accompanying text, the effect of the current system seems to be a kind of one-way ratchet. If a claimant's scores are too high, there is little chance for an administrative determination of disability; but low scores may not guarantee an award of benefits because they may be discounted or rejected by the SSA. This kind of effect is certainly suggested by the cases discussed supra notes 122-26 and accompanying text, but one must be hesitant to draw too many conclusions from judicial opinions, because cases resolved favorably to claimants are not appealed to the courts.
sixty and sixty-nine inclusive, a finding of disability is required under 12.05C if the claimant has an additional physical or other mental disability that imposes "additional and significant work related limitation of function." A finding of disability is required under 12.05D if the claimant's IQ is within this range and the claimant meets certain minimum functional loss criteria. Despite these provisions, the SSA often ignores or discounts a claimant's additional impairments under 12.05C. Moreover, it is unclear whether the 12.05D listing is applied at all in practice.

One area of uncertainty is the meaning of "significant work related limitation of function" under 12.05C. While the courts are generally in agreement that "an impairment imposes significant limitations when its effect on a claimant's ability to perform basic work activities is more than slight or minimal," there is some uncertainty as to whether this standard is equivalent to or less demanding than the severity standard under step two of the process.

More significant than the general uncertainty regarding the standard is the apparent tendency of ALJs to disregard or ignore additional impairments, particularly if they are mental impairments. For example, in *Romero v. Secretary of Health and Human Services*, 775 F.2d 12, 14 (1st Cir. 1985); *Fanning v. Bowen*, 827 F.2d 631, 633 (9th Cir. 1987); *Pullen v. Bowen*, 820 F.2d 105, 109 (4th Cir. 1987); *Cook v. Bowen*, 797 F.2d 687, 690 (8th Cir. 1986). *Nieves* states that if an impairment is found to be severe, "a fortiori it satisfies the significant limitations standard." 775 F.2d at 14 (citing *Edwards v. Heckler*, 736 F.2d 625, 630 (11th Cir. 1984)). Some courts seem to regard *Nieves* as creating a test that equates the two standards, see, e.g., *Cook*, 797 F.2d at 690-91, but others emphasize that an impairment need not satisfy the severity requirement to satisfy the "more than slight or minimal" standard. See, e.g., *Fanning*, 827 F.2d at 633 n.3; *Edwards ex rel Edwards v. Heckler*, 755 F.2d 1513, 1515 (11th Cir. 1985). Equating the two standards would seem to be more consistent with language of the regulations. Compare *20 C.F.R. § 404.1521(a) (1990) (OASDI); id. § 416.921(a) (SSI) ("An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.") (emphasis added) with id. at Pt. 4, Subpt. P, App. 1, § 12.05C (requiring "a physical or other mental impairment imposing additional and significant work-related limitations of function") (emphasis added). In practice, it may not matter that much which test is used. See, e.g., *Cook*, 797 F.2d at 690-91 (claimant satisfied either test); *Romero v. Secretary of Health and Human Servs.*, 707 F. Supp. 249, 253-54 (W.D. La. 1989) (same). But see *Fanning*, 827 F.2d at 633-64 (remanding to ALJ for consideration of whether a knee injury imposed more than slight or minimal limitations when ALJ had apparently determined that injury did not meet the severity requirement).

There are numerous examples of cases in which the SSA has denied benefits despite
Human Services, the district court (adopting a magistrate's recommendation) awarded benefits to a claimant under 12.05C. The claimant had IQ scores of sixty-one (verbal), sixty-two (performance), and sixty (full scale); was also diagnosed as having organic brain syndrome; and in addition suffered back pain associated with an injury sustained from slipping while working on a boat. The ALJ treated the claimant's mental retardation and his organic brain syndrome as a single impairment, and thus found that he failed to meet the listing under 12.05C. The district court concluded that this was error, because the "objective medical evidence of brain abnormalities" established the organic brain syndrome as a separate mental impairment.

Equally troubling is the apparent irrelevance of the 12.05D listing. Research disclosed no court cases in which 12.05D was the subject of any significant discussion. In many of the cases in which 12.05C denials were involved, 12.05D was simply not mentioned. This seems odd because the IQ prerequisites for the

some evidence of an additional impairment. See Brown v. Bowen, 864 F.2d 336, 339 (5th Cir. 1988) (affirming ALJ's conclusion that claimant did not suffer from a somatoform disorder); Johnson v. Bowen, 864 F.2d 340, 348 (5th Cir. 1988) (affirming ALJ's conclusion that claimant's depression did not constitute a significant impairment); Fanning, 827 F.2d at 633-34 (remanding for consideration of alleged additional impairments when ALJ had made no explicit findings as to their significance); Pullen, 820 F.2d at 109-10 (denying attorneys fees when district court had awarded benefits after concluding that ALJ's finding of no significant additional impairment from anxiety attacks was unsupported by substantial evidence); Cook, 797 F.2d at 690-91 (awarding benefits when ALJ had found claimant's additional impairments to be severe under step two, but concluded that the claimant did not meet the 12.05C listing); Romero v. Secretary of Health and Human Servs., 707 F. Supp. 249, 254 (W.D. La. 1989) (awarding benefits when ALJ ignored evidence of organic brain syndrome); Kelley v. Bowen, 687 F. Supp. 704, 708 (D. Mass. 1988) (awarding benefits when ALJ ignored evidence of anxiety and depression); see also Luckey v. Department of Health & Human Servs., 890 F.2d 666, 669 (4th Cir. 1989) (rejecting the SSA's argument that claimant's physical disabilities failed to satisfy the requirements of 12.05C after finding that the SSA improperly rejected claimant's IQ scores).

142. See id. at 251.
143. Id. at 253 (ALJ stated that "[m]edical evidence of record establishes that the claimant suffers from mental retardation caused by organic brain syndrome" ). The ALJ also found that the claimant's back strain "has long since been resolved," id. at 253, despite considerable record evidence to the contrary. See id. at 251-52.
144. Id. at 254.
145. The absence of court cases on the subject does not necessarily mean that claimants are unable to qualify for benefits under 12.05D at the administrative level, because successful claimants do not appeal. Nonetheless, given the sheer number of claimants and the frequency with which denials are appealed, one would expect that in at least some instances claimants would appeal findings that they failed to meet the 12.05D listing.
12.05C and D listings are the same. Thus, any claimant who qualified for consideration under the C listing should, if no additional impairment is found, also be considered under the D listing. Even in those few cases in which the D listing was mentioned, there was nothing more than a conclusory statement that the claimants’ functional restrictions did not meet those required by the listing. 147

The non-use of the 12.05D listing may reflect various factors. In some instances, it may simply be that a claimant’s counsel failed or declined to argue the issue on appeal. 148 But at the administrative level, it is incumbent upon the ALJ to assist the claimant, 149 and that would include applying the 12.05D listing even if the claimant or the claimant’s counsel neglects to request it. Thus, the dearth of 12.05D cases may reflect an administrative reluctance to apply the functional limitations. 150 Another possible factor suggested by the cases conclusorily rejecting 12.05D arguments is that the 12.05D listing is illusory, because its strict functional limitation requirements are seldom, if ever, met by claimants with IQs in the sixty to sixty-nine range. 151

E. Vocational Factors

If a claimant does not meet or equal the listings, the disability determination depends upon vocational considerations; that is, whether a claimant can be expected to work given his or her impairments. In order to resolve this question, the SSA first determines the claimant’s residual functional capacity, defined in the regulations as a “medical assessment” of “what you can still do despite your limitations.” 152 Determination of residual functional capacity requires consideration of a claimant’s physical abilities, such as the ability to stand, lift, carry, push, pull, reach,

147. See Johnson v. Bowen, 864 F.2d 340, 347 (5th Cir. 1988) (conclusory statement that substantial evidence supported ALJ determination that claimant’s functional limitations did not meet the 12.05D requirements); Romero v. Secretary of Health & Human Servs., 707 F. Supp. 249, 252 (W.D. La. 1989) (ALJ rated severity of impairment under 12.05D as “‘none’”).
148. See Fanning, 827 F.2d at 633 (claimant argued he met the 12.05C listing).
149. See Levy, supra note 5, at 472.
150. Difficulties in evaluating the functional limitation approach are suggested by cases involving both the severity requirement at step two of the process, see supra notes 114-18 and accompanying text, and the determination of residual functional capacity at steps four and five of the process. See infra notes 175-204 and accompanying text.
151. Such IQ scores are generally consistent with “mild mental retardation.” See Romero, 707 F. Supp. at 251 (claimant with IQ scores ranging from 60 to 62 diagnosed as “‘functioning in a mild mental retardation range’”).
152. 20 C.F.R. § 404.1545(a) (1990) (OASDI); id. § 416.945(a) (SSI).
and handle; mental impairments affecting the claimant’s ability to understand, remember and carry out instructions, or respond appropriately to supervisors, co-workers, and work pressures; and other impairments imposing physical limitations that are not exertional.\footnote{153} Residual functional capacity is used at step four to determine whether a claimant can return to his or her past work, and is used at step five, together with other vocational factors such as age, education, and prior work experience, to determine whether the claimant can perform other work.\footnote{154}

Historically, the subjective nature of vocational determinations led to inconsistent results, and the SSA responded by introducing the “grids” to be applied at step five.\footnote{155} This measure, however, could not and did not completely avoid subjectivity and inconsistency in vocational determinations. The subjectivity and inconsistency of vocational determinations have, in various ways, operated to the particular disadvantage of those with mental impairments, including those with developmental disabilities. First, the SSA has shown a desire to avoid individualized vocational assessments. Second, when the SSA does engage in a vocational assessment, problems arise in the determination of residual functional capacity, in the erroneous application of the grids, and in the failure to fully account for mental impairments when making individualized vocational assessments.

1. Avoiding Vocational Assessment

Because the SSA cannot completely eliminate subjectivity and potential inconsistency from vocational assessments, particularly with respect to those with mental impairments, it has attempted to avoid individualized vocational assessments altogether. As noted previously, in the early 1980s two separate district courts found that the SSA had adopted an illegal and clandestine policy with respect to claimants with mental impairments.\footnote{156} In \textit{Mental Health Association v. Schweiker}\footnote{157} and \textit{City of New York v. Heckler},\footnote{158} the district courts found that under the SSA’s policy, claimants whose mental impairments did not meet or equal the listings were

\footnote{153}{\textit{Id.} § 404.1545 (b)-(d) (OASDI); \textit{Id.} § 416.945(b)-(d) (SSI).}
\footnote{154}{See supra notes 74-75 and accompanying text.}
\footnote{155}{See supra note 17 and accompanying text.}
\footnote{156}{See supra notes 44-46 and accompanying text.}
\footnote{157}{554 F. Supp. 157 (D. Minn. 1982), aff’d in relevant part sub nom. Mental Health Ass’n v. Heckler, 720 F.2d 965 (8th Cir. 1983).}
\footnote{158}{578 F. Supp. 1109 (E.D.N.Y.), aff’d, 742 F.2d 729 (2d Cir. 1984), aff’d sub nom. Bowen v. City of New York, 476 U.S. 467 (1985).}
conclusively presumed to have the capacity to engage in unskilled work.\textsuperscript{159} This policy plainly contradicts both the statute and the administrative regulations.\textsuperscript{160} While this policy may have avoided problems of subjectivity and inconsistency,\textsuperscript{161} it led to the erroneous denial of benefits to thousands of claimants, and its effects linger to this day.\textsuperscript{162}

More recently, the United States Supreme Court overturned different SSA policy that avoided vocational assessment. In \textit{Sullivan v. Zebley},\textsuperscript{163} the Court struck down regulations under which children seeking SSI benefits could qualify only by establishing that their impairments met or equaled the listings at step three.\textsuperscript{164} According to the Court, the SSA's failure to move beyond step three adversely affected claimants in three ways. First, the listings do not cover all impairments, including such developmental impairments as Downs Syndrome, and claimants with such impairments must fulfill the criteria for whatever listing most closely resembles their impairment.\textsuperscript{165} Second, the listings are purposefully set higher than the statutory standard, "so they exclude claimants who have listed impairments in a form severe enough to preclude substantial gainful activity, but not quite severe enough to meet the listings level . . . ."\textsuperscript{166} Finally, they "also exclude any claimant

\textsuperscript{159} \textit{City of New York}, 578 F. Supp. at 1124; \textit{Mental Health Ass'n}, 554 F. Supp. at 160; see generally Weinstein, supra note 43. The policy was not contained in any official agency regulations or statements of policy for public consumption, but instead was implemented through personnel manuals and quality assurance review "returns" to state agencies. See id. at 920. For further discussion of such informal controls on state agencies, see infra notes 208-13 and accompanying text.

\textsuperscript{160} \textit{City of New York}, 578 F. Supp. at 1124-25; \textit{Mental Health Ass'n}, 554 F. Supp. at 166; Weinstein, supra note 43, at 922-23.

\textsuperscript{161} This motivation for the policy puts the "best face" on the policy. Another, far more troublesome, possibility is that the SSA, in seeking to reduce costs, simply singled out a vulnerable segment of the beneficiary population for wholesale disenrollment on the assumption that those affected would be unable to assert their rights either through the appeals process or the political system. See infra note 232 and accompanying text.

\textsuperscript{162} According to a UPI release, available on Nexis, from January 10, 1988, the New York State Human Resources Administration was still searching for thousands of mentally impaired social security beneficiaries whose benefits were illegally terminated from 1980-1983.

\textsuperscript{163} \textit{N.Y. City}, 110 S. Ct. 885 (1990).


\textsuperscript{165} Zebley, 110 S. Ct. at 891 & n. 10, 893 & n.13.

\textsuperscript{166} Id. at 893.
whose impairment would not prevent any and all persons from doing any kind of work, but which actually precludes the particular claimant from working, given its actual effects on him . . . and . . . [his] age, education, and work experience." [167] Because steps four and five of the process, which normally alleviate these problems, did not apply to children, the Court concluded that the regulations were inconsistent with the clear statutory directive to provide benefits to children with impairments "of comparable severity" to those which qualify disabled adults for benefits. [168]

The dramatic effect of the regulations has not yet been alleviated. About twenty-five percent of adult recipients qualify for benefits on the basis of vocational considerations, [169] and according to some estimates between 400,000 and 600,000 children were adversely affected by the SSA's refusal to go beyond the listings. [170] Assuming that these estimates are accurate and that about twenty-five percent of all child claimants have developmental disabilities, then about 100,000 children with developmental disabilities were affected. [171] The number could be even higher because the assessment of functional limitations is particularly important in the case of mental impairments. [172] It is particularly distressing to note that although Zebley was decided on February 20, 1990, the SSA had, at the time of this writing, done little or nothing to comply with the

167. Id.

168. 42 U.S.C. § 1382c(a)(3)(A) (1988); Zebley, 110 S. Ct. at 894 ("The child-disability regulations are simply inconsistent with the statutory standard of 'comparable severity.'"). The Court rejected the SSA's argument that engaging in a vocational assessment for children was not feasible because there is no measure of a child's functional abilities analogous to an adult's ability to work, concluding that the SSA should measure the effects of an impairment on a child's ability to engage in the normal daily activities of a child.

169. Id. at 894 n.15.


171. See supra note 51 (about 27% of all SSI recipients receive benefits on the basis of mental retardation).

172. The methodology for evaluating mental impairments reflects this conclusion by incorporating functional assessments throughout the process. See supra notes 79-80 and accompanying text. Indeed, the SSA's pre-Zebley proposals for reforming the listings of impairments for children also recognized this fact, but nonetheless did not go beyond step three of the process. See Jameson & King, supra note 164, at 330-31.
Supreme Court's order. As one Senator has noted, "[t]he harsh fact is that 500,000 children are no closer to justice in November than they were in February. Not one denial has been reversed, not one check mailed, not one child helped." While interim standards have been established for pending and future cases, these standards contain a questionable provision that prevents children who are denied benefits from exercising their right to appeal the denial.

2. Problems with Vocational Assessment

When the SSA does engage in a vocational assessment, various problems arise. First, the determination of residual functional capacity is inherently subjective and often appears to be slanted against claimants, especially those with mental impairments. Second, the SSA often relies on the grids to determine that a claimant is not disabled, even though the grids do not incorporate mental impairments and thus do not adequately reflect the claimant's true ability to engage in substantial gainful activity. Third, when the SSA moves off the grids and relies on testimony of vocational experts to determine the claimant's ability to work, the determination often ignores or minimizes the impact of mental impairments.

The determination of residual functional capacity is the cornerstone of vocational assessments; it applies at both steps four and five. If this determination is adverse to a claimant, it will usually result in the denial of benefits. In making such determinations, however, there is ample opportunity to "slant" the result against (or in favor of) a claimant. Although it does not involve a

173. Pear, supra note 170, at B10, col. 3 (quoting Senator John Heinz, "a Pennsylvania Republican who has monitored Social Security disability programs for 10 years"). The SSA and the Bush Administration have explained that concerns over the costs of reprocessing the claims and the desire to ensure that back payments go to those who need it most are the cause for the delay. See id. at B10, col. 6.

174. Id. at B10, col. 6. This restriction would generally be troublesome insofar as it requires a claimant to relinquish a legal right in order to obtain a right to which the claimant is already entitled, but it is all the more cause for concern given the SSA's history of disregard for judicial precedent, see supra note 29 and accompanying text, and proclivity for erroneous denials.

175. Thus the SSA's presumption that a claimant with a mental impairment could perform unskilled work, overturned in the early 1980s and discussed supra notes 156-62 and accompanying text, was particularly significant.

176. Only cases involving determinations slanted against claimants make it to the courts. Thus, it is difficult to know whether the examples below are counterbalanced by erroneous grants of benefits based upon residual functional capacity assessments that were slanted in the claimant's favor or whether the examples reflect a systemic bias against claimants. Given the SSA's history of denying benefits to claimants with mental disabilities on the
claimant with a developmental disability, *Campbell v. Bowen*¹⁷⁷ is a stark example of the possibility of manipulating residual functional capacity assessments. In *Campbell*, the ALJ originally found that a claimant suffering from osteoarthritis and bi-polar syndrome could perform only “sedentary” work and was not disabled.¹⁷⁸ After the Appeals Council remanded the case because the ALJ had improperly concluded that the claimant’s education qualified him for skilled work, the ALJ re-evaluated the claimant’s exertional limitations and determined that he was capable of performing more strenuous work in the “light” work category, again concluding that he was not disabled.¹⁷⁹ Such a re-evaluation seems to be an obvious case of result-oriented decisionmaking, with the desired result being a finding of no disability. Nonetheless, the re-evaluation of exertional limits was upheld, although the court of appeals reversed the finding of no disability on other grounds.¹⁸⁰

*Miller v. Bowen,*¹⁸¹ a relatively recent case from the Kansas federal district court, illustrates the problem in the context of a claimant with a developmental disability.¹⁸² *Miller* involved a claimant with mental retardation and a personality disorder who had also suffered a hearing loss.¹⁸³ Because the impairments did not meet or equal the listings,¹⁸⁴ the ALJ conducted a residual functional capacity assessment and determined at step four of the sequential evaluation process that the claimant maintained the capacity to perform past work.¹⁸⁵ The district court reversed, concluding that the ALJ had “ignored the evidence as a whole and, instead, ha[d] selectively abstracted pieces of evidence favorable to his position.”¹⁸⁶ While the *Miller* court reversed the denial of benefits, SSA determinations are entitled to deferential review

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¹⁷⁷. 822 F.2d 1518 (10th Cir. 1987).
¹⁷⁸. Id. at 1520.
¹⁷⁹. Id. at 1521.
¹⁸⁰. Id. at 1521-22.
¹⁸². For other illustrations, see Gibson v. Secretary of Health & Human Servs., 882 F.2d 329 (8th Cir. 1989); Thomas v. Sullivan, 876 F.2d 666 (8th Cir. 1989).
¹⁸³. Miller, 703 F. Supp. at 887 (hearing loss), 888 (ALJ’s finding of mental retardation and personality disorder).
¹⁸⁴. The impairments did not meet the 12.00C listings because the claimant’s IQ scores were in the 75-76 range. See id. at 886.
¹⁸⁵. Id. at 888-89.
¹⁸⁶. Id. at 889. In particular, the ALJ had failed to consider the claimant’s ability to understand, to carry out and remember instructions, and to respond appropriately to
under the substantial evidence standard, and claimants may not always be successful in challenging residual functional capacity assessments. 187

A second problem with vocational assessments is the SSA's tendency to rely on the grids to deny benefits despite the presence of developmental disabilities.188 The grids reflect only a claimant's exertional limitations (ability to perform sedentary, light, medium, heavy, or very heavy work),189 as well as age, education, and work experience. Thus, reliance on the grids is inappropriate when developmental disabilities present significant nonexertional limitations. As explained by the court in Welchance v. Bowen:

[The grids are simply statistically based generalizations that significant jobs are available in the national economy for those who are accurately described by a rule which directs a conclusion of "not disabled." Logically then, the rule cannot be presumed to show that significant jobs are available within the national economy for a person who cannot perform a wide range of work at the level assumed by the rule.190

Typically, the SSA explains the reliance on the grids by asserting that nonexertional limitations do not prevent the claimant from performing the full range of work encompassed in the grid category.191 The success of this argument depends upon the significance of the nonexertional impairment. In Johnson v. Sullivan,192 for example, the court of appeals cursorily dismissed the claimant's argument that the SSA erroneously applied the grids despite evidence of his low intelligence. The court stated that "below-average intelligence alone does not constitute a nonexertional impairment," and noted that "a clinical psychologist who examined Johnson concluded that he is not mentally retarded."193 On the other hand,

supervision, co-workers and work pressures; improperly disregarded the diagnoses of two psychologists; erroneously relied on the claimant's past work to establish his ability to work without considering the testimony of family members that his personality disorder had worsened; and unreasonably discounted the opinions of the psychologist supporting the conclusion that the claimant's disorder had worsened. Id.


188. See, e.g., Abbott v. Sullivan, 905 F.2d 918 (6th Cir. 1990); Allen v. Sullivan, 880 F.2d 1200, 1201 (11th Cir. 1989) (per curiam); Williams v. Bowen, 862 F.2d 875 (9th Cir. 1988) (unreported opinion available on Westlaw); Sullivan v. Secretary of Health and Human Servs., 833 F.2d 1013 (6th Cir. 1987) (unreported opinion available on Westlaw); Welchance v. Bowen, 731 F. Supp. 806, 819 (M.D. Tenn. 1989).

189. 20 C.F.R. § 404.1567 (1990) (OASDI); id. § 416.967 (SSI).


191. See, e.g., Allen, 880 F.2d at 1201.

192. 894 F.2d 683 (5th Cir. 1990).

193. Id. at 686.
IQs of seventy or above that would not qualify for consideration under the listings are normally sufficient to prevent application of the grids.194

The SSA successfully advanced a different sort of argument for applying the grids in Ortiz v. Secretary of Health & Human Services.195 Ortiz suffered from a severe back injury that limited him to light work and from dysthemia, a depressive neurosis. The ALJ applied the grids to find that Ortiz could perform work available in the national economy. Despite finding that the dysthemia constituted a nonexertional limitation preventing Ortiz from performing the full range of light work, "the ALJ managed to finesse the [normal rule against applying the grids] by concluding that claimant's mental disorder affected only the occupational skill level at which he could operate."196 The ALJ concluded that, as a consequence, Ortiz retained the residual functional capacity to perform the full range of light work, and hence applied the grids.197 The court of appeals accepted this "shorthand" approach with the proviso that the factual predicate of the claimant's ability to perform unskilled work must be present in the record.198 Although Ortiz does not involve a claimant with a developmental disability, its implications for claimants with developmental disabilities are both apparent and far reaching. If the Ortiz approach is widely adopted, the SSA may apply the grids despite the presence of developmental disabilities so long as the record supports a finding that a claimant can perform the full range of unskilled work.199

If the SSA moves off the grids, as it should when a claimant suffers from nonexertional impairments, "a final determination of 'not disabled' may only be entered if supported by 'expert vocational testimony or other similar evidence to establish that there

194. See Williams v. Bowen, 862 F.2d 875 (9th Cir. 1988) (unreported opinion available on Westlaw) (IQ scores of 78 verbal, 72 performance, and 74 full scale); Sullivan v. Secretary of Health & Human Servs., 833 F.2d 1012, 1013 (6th Cir. 1987) (unreported opinion available on Westlaw) (IQ of 74); Wellchance, 731 F. Supp. at 827 (IQ scores of 70 verbal, 76 performance, and 72 full scale); see also Allen, 880 F.2d at 1201 (borderline intellectual functioning). But cf. Brown v. Bowen, 845 F.2d 1211, 1215 (3d Cir. 1988) (upholding application of regulations to deny benefits to claimant with creditable IQ scores in the 70s and suffering from epileptic seizure disorder).
195. 890 F.2d 520 (1st Cir. 1989).
196. Id. at 526.
197. Id.
198. Id.
199. Such a finding would presumably be possible—although not necessarily sustainable—in cases when the claimant's mental retardation is mild or the claimant has borderline intellectual functioning; or when the claimant has prior work experience in a competitive work environment.
are jobs available in the national economy for a person with the claimant's characteristics. Typically, the vocational expert will be asked to identify jobs that can be performed by a hypothetical person with certain impairments, age, education, and vocational background. The use of vocational experts creates a final problem area for claimants with developmental disabilities: the expert may not be fully informed of the claimant's mental impairments. In Cintron v. Bowen, for example, the district court reversed an SSA determination that a forty year old claimant with a history of alcohol abuse, organic brain syndrome, a schizotypal personality disorder, and a full scale IQ of seventy-three was not disabled. The determination was based on the testimony of a vocational expert who had not been fully informed of the claimant's mental impairments. Given the defects in the vocational testimony, the district court concluded that there was insufficient evidence that the claimant could perform work available in the national economy.

F. Conclusion

The foregoing discussion of substantive difficulties faced by claimants with developmental disabilities is intended to accomplish two objectives. First, at a practical level, it should assist attorneys or others who represent claimants in the disability determination process. It appears that the best way to avoid problems is to anticipate potential pitfalls and address them early in the process by gathering the necessary evidence or making appropriate arguments in accordance with the substantive framework that will be applied. Second, at a deeper level, the discussion is intended to provide evidence of the pervasiveness of the broad-ranging shift in policy perspective that the SSA has undergone and to demonstrate its significance for claimants with developmental disabilities. In particular, the reluctance to grant benefits and the related insistence on objective proof and specific standards to increase the speed, accuracy, and consistency of benefit determinations have redounded to the detriment of claimants with developmental dis-

202. This was the basis for reversal in Campbell v. Bowen, discussed supra notes 177-80 and accompanying text.
204. Id. at 525.
205. Id.
abilities, who do not fit neatly into the standards developed by the SSA and who have difficulty mustering the objective evidence (other than IQ scores) to prove the extent of their disability. To some degree, the problems faced by claimants with developmental disabilities are inherent in any effort to rely on specific standards and objective proof. But, as reflected in many of the cases discussed above, the system itself seems to work against claimants with developmental disabilities. These systemic difficulties are discussed in greater detail in Part III of this Article.

III. Systemic Concerns

Disability claims are processed through an elaborate procedural apparatus. Initial determinations are made and may be reconsidered at the state level by state agencies. Dissatisfied claimants may appeal benefit denials to federal administrative law judges, whose decisions may be reviewed at the administrative level by the SSA’s Appeals Council. Finally, SSA decisions may be appealed to the federal district courts, and from there to the courts of appeals and potentially to the United States Supreme Court. This process, as it is currently structured, exacerbates the substantive difficulties faced by claimants with developmental disabilities. First, the complexity of the process makes it inherently difficult for claimants to negotiate. Second, at all levels of the process, the SSA’s restrictive policies have created an increasingly adversarial posture that claimants must overcome to receive benefits. These systemic obstacles are particularly burdensome for claimants with developmental disabilities.

A. State Disability Determination Services

After a claimant applies for benefits and a preliminary determination of financial eligibility is made, the initial determination of whether a claimant is disabled is made by a federally funded state Disability Determination Service (DDS).206 The state DDS decisions are typically made on the basis of a paper record without

any face to face hearing at which the claimant may appear. The record includes a medical file, consisting of information provided by the claimant, medical records obtained by the DDS at its own expense, and, if necessary, the results of a consulting examination by a physician under contract with the DDS.

The SSA oversees the operation of state DDSs in various ways. First, SSA regulations are applicable to DDSs. Second, the SSA imposes binding written guidelines on DDSs in the Program Operating Manual System (POMS). The POMS guidelines, which are not subject to public comment prior to adoption and are not published in the federal register, often contain provisions that are more restrictive than statutory provisions or regulations. Third, the SSA conducts pre-effectuation "Quality Assurance Reviews" of state DDS decisions. These reviews have a kind of precedential effect for state DDSs and state officials have obvious incentives to comply with SSA policy expressed through the reviews. By and large, the state DDSs perceive the SSA policy, as implemented through the POMS and pre-effectuation review, as one of encouraging benefit denial whenever possible, and at least in doubtful cases. Although the most restrictive features of the SSA's policy have been overturned, altered, or abandoned, there is little evidence that the SSA's overall policy perspective—or the states' perception of it—has changed.

Claimants with developmental disabilities confront a variety of difficulties at the state DDS stage. These difficulties begin with the application process itself. Many claimants are either unaware that they qualify or are discouraged by complicated application
forms.\textsuperscript{215} Likewise, difficulties arise for recipients whose benefits may be terminated for failure to cooperate or comply with the SSA's efforts to monitor continuing eligibility. A recent SSA study found that many recipients who could not understand what was required of them or could not act to fulfill the requirements had their benefits erroneously terminated.\textsuperscript{216}

Claimants, who are typically not represented at this stage of the process,\textsuperscript{217} may also have difficulty obtaining the necessary medical evidence to substantiate their claims. For example, claims may be denied when the claimant fails to obtain necessary psychological tests.\textsuperscript{218} While the state DDS is supposed to assist the claimant in compiling the necessary evidence, less than vigorous efforts on the claimant's behalf often adversely affect claims.\textsuperscript{219} Given the strained resources of state DDSs, overwhelming caseloads, and the pressures to deny benefits, the threat of inadequate compilation of medical records is a very real one.\textsuperscript{220} One manifestation of this threat is the increased reliance on consultative examinations rather than the records of treating physicians.\textsuperscript{221} It is often faster, cheaper, and


\textsuperscript{216} See \textit{Social Security Ers in Cuts: Many Regain Benefits That Were Unfairly Suspended}, Chicago Tribune, Dec. 9, 1989, § C, at 1, col. 2. According to the study, 80,000 recipients were cut off in 1987 and 105,000 in 1988 for failure to cooperate with the agency, but an internal review of 1,293 sample suspensions showed that the cut-offs were incorrect in 54% of the cases.

\textsuperscript{217} See \textit{Appeals Council Report, supra} note 206, at 668 (ALJ hearing is "typically the first stage at which the claimant obtains legal or other representation").

\textsuperscript{218} See, e.g., Albritton v. Sullivan, 889 F.2d 640, 643 (5th Cir. 1989) (affirming the district court's refusal to remand a case for consideration of a psychological evaluation finding mild mental retardation, but holding that the SSA had improperly applied grid reflecting "marginal education" to claimant who was functionally illiterate); Pierre v. Sullivan, 884 F.2d 799, 803-04 (5th Cir. 1989) (refusing to remand for consideration of IQ test showing claimant had IQ of 57 when test was not taken until after SSA denial had become final and no good cause was shown for failure to obtain test earlier); see also Turner v. Bowen, 856 F.2d 695, 696-98 (4th Cir. 1988) (claimant who initially filed for benefits in 1979, and whose claim was rejected by the SSA several times only to be remanded by the courts, finally had a consultative psychological evaluation in 1987 showing IQ scores in the 60-69 range).

\textsuperscript{219} See \textit{Appeals Council Report, supra} note 206, at 661 n.106 (citing Letter from Reps. Rostenkowski, Pickle, and Jacobs to SSA Commissioner Hardy, Feb. 3, 1987).


easier to order a consultative examination by a physician under contract with the state DDS than to obtain the medical records of treating physicians, but the reliability of such examinations has been drawn into serious question.\textsuperscript{222}

Thus, claimants with developmental disabilities are not generally represented by counsel and may need the assistance of the state DDS or SSA personnel in discovering their eligibility for benefits, filling out forms, and compiling the evidence necessary to establish their disability. State agencies, strapped for resources and under pressure from the SSA to deny benefits in doubtful cases, are often unable or unwilling to provide that assistance. Moreover, state DDS personnel do not generally see claimants and therefore have no opportunity to observe the claimant’s disability first-hand. In many cases, then, the result is an erroneous denial of benefits.

B. The ALJs and the Appeals Council

Disappointed claimants may seek administrative review of the denial or termination of benefits.\textsuperscript{223} First, there is a de novo hearing before an ALJ, which is normally the claimant’s first opportunity to appear and present witnesses. The hearing is nonadversarial and the ALJ has the duty to assist claimants in developing their cases, but claimants at this stage are normally assisted by counsel. Second, the ALJ decision may be reviewed by the SSA Appeals Council, either at the request of the claimant or on the Council’s own motion. This review, which consists of an evaluation of the record by up to three members of the Council, is apparently de novo. If the Appeals Council refuses to review an ALJ decision or affirms it, the decision of the ALJ is final; otherwise, the decision of the Council becomes the final decision of the SSA.

There is considerable tension between the ALJs’ decisional independence under the Administrative Procedure Act\textsuperscript{224} and the SSA’s efforts to promote the goals of efficiency, consistency, and restrictive interpretation of benefit eligibility.\textsuperscript{225} During the 1980s,

\textsuperscript{222} See id. at 3-4, 10-15 (consultative examinations often conducted on a volume basis in a deceptive and fraudulent manner).

\textsuperscript{223} The description that follows summarizes information presented in Levy, supra note 5, at 471-75. See generally 20 C.F.R. §§ 404.929-981 (1990) (OASDI); id. §§ 416.1429-1481 (SSI); Appeals Council Report, supra note 206, at 667-74, 687-744.

\textsuperscript{224} While the SSA “employs” the approximately 700 ALJs who hear disability claims, various statutory provisions are designed to preserve their decisional independence. See 5 U.S.C. §§ 554(d), 3105, 5362, 7521 (1988).

SSA efforts to set productivity goals or quotas, distribute bureaucratic perks accordingly, and discipline or remove unproductive ALJs were broadly resented and perceived by ALJs as threatening the quality of their decisions and their decisional independence.226 Moreover, the ALJs perceived considerable pressure from the SSA to deny benefits.227 Most significantly, the SSA’s practice of “targeting” ALJs with high benefit allowance rates for review under the Bellmon Review Program was widely perceived as creating impermissible pressure to deny benefits.228

The decisional independence of ALJs is further compromised by the fact that their decisions are reviewable by the Appeals Council, whose members do not enjoy Administrative Procedure Act safeguards.229 While the Council may enjoy a certain “de facto” independence from the Secretary of Health and Human Services and SSA policymakers, it nonetheless is closely associated with the Office of Hearings and Appeals (which oversees the ALJs) and is viewed in some quarters as a partisan device for implementing SSA policy.230

The discussion of substantive issues in Part II of this Article suggests that the pressures to deny benefits to claimants have had a significant impact on SSA decisions involving claimants with a developmental disability. Indeed, claimants with mental impairments may be particularly vulnerable to the effects of these pressures for several reasons. First, the effects of mental impairments are less objectively demonstrable, leaving more room for ALJ discretion than in the case of physical impairments with measurable consequences.231 Second, because the grids do not reflect mental impairments, claimants with a mental impairment do not get the

226. See Levy, supra note 5, at 497, 499-501.
227. This pressure began with the training given to new ALJs by the SSA. See ALJ Role, supra note 206, at 295 (statement of Joyce Krutick Barlow).
228. See W.C. v. Bowen, 807 F.2d 1502 (9th Cir.), modified, 819 F.2d 237 (9th Cir. 1987) (targeting high allowance ALJs is a substantive rule that must comply with Administrative Procedure Act notice and comment procedures because it was intended to and did influence substantive outcomes); Barry v. Heckler, 620 F. Supp. 779, 782 (N.D. Cal. 1985) (Bellmon Review affects impartiality of ALJs); Stieberger v. Heckler, 615 F. Supp. 1315, 1398 (S.D.N.Y. 1985), vacated, 801 F.2d 29 (2d Cir. 1986) (finding that implementation of Bellmon Review compromised decisional independence but declining injunctive relief because SSA had curtailed practice of targeting high-allowance ALJs); Association of Admin. Law Judges v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984) (same).
230. Id.
231. This factor is particularly relevant for ALJ application of the 12.05D listings, see supra notes 145-51 and accompanying text, and for determinations of Residual Functional Capacity. See supra notes 175-87 and accompanying text.
benefit of grid provisions that mandate a finding of benefits, and may be adversely affected by the erroneous application of the grids or the reliance on the testimony of vocational experts.\textsuperscript{232} Finally, as noted earlier, there is some evidence that individuals with a mental disability have been singled out for particularly adverse treatment,\textsuperscript{233} either because the SSA is particularly suspicious of mental disability claims or because claimants with mental disabilities lack political clout in comparison with other social security beneficiaries.

In addition, as is the case at the state DDS level, claimants with developmental disabilities may face particular problems coping with the administrative process. They may not be aware of or fail to pursue their administrative remedies.\textsuperscript{234} Moreover, claimants with mental disabilities are particularly dependent upon ALJs or legal counsel to marshal the evidence of their disability. While ALJs have a duty to develop the facts, a claimant cannot necessarily count on the ALJ to order psychological testing. In \textit{Pierre v. Sullivan},\textsuperscript{235} for example, the circuit court concluded that an ALJ's failure to order testing was not error because there were only a few isolated comments about the claimant's intellectual functioning in the record.\textsuperscript{236} This was true despite the fact that later tests showed the claimant's IQ to be fifty-seven.\textsuperscript{237} These later tests were held to be inadmissible because there was no good cause for failing to obtain them earlier.\textsuperscript{238}

While claimants are normally represented by counsel at this stage of the process, counsel may not always have the time, energy, or incentive to be zealous. Representing social security disability claimants is not particularly lucrative, and collecting fee awards is problematic. Statutory provisions allow payment of fee awards by the SSA directly to counsel out of any past due benefits, but these payments are limited to a maximum of 25% of the past due benefits.

\textsuperscript{232} See supra notes 188-205 and accompanying text.
\textsuperscript{233} See supra notes 156-62 and accompanying text (discussing the clandestine policy against individualized vocational assessment); supra note 57 (mentally impaired recipients subject to disproportionate continuing disability reviews); supra note 43 (citing sources).\textsuperscript{234} See Young v. Bowen, 858 F.2d 951, 952 (4th Cir. 1988), discussed infra notes 247-50 and accompanying text. A special example of this problem is presented when the benefits of a recipient whose developmental disabilities are associated with other mental impairments are terminated. In such cases, the effect of termination may be to worsen the claimant's condition and prevent pursuit of appellate remedies. See Weinstein, supra note 43, at 922.
\textsuperscript{235} 884 F.2d 799 (5th Cir. 1989).
\textsuperscript{236} Id. at 802-03.
\textsuperscript{237} Id. at 801.
\textsuperscript{238} Id. at 803-04.
amount. Until recently, the SSA had unreviewable discretion to determine what constitutes a reasonable fee, and its attorney fee policies became controversial. Advocacy groups for claimants asserted that policies limiting the amount of awards and delaying payment made representing claimants so unprofitable that private attorneys were being forced to abandon social security practice, while the SSA asserted that private fees had become so high that they unfairly infringed upon claimants’ benefits. For example, the SSA limited the attorney fees approvable by individual ALJs to $1500, a policy that was suspended by statute pending investigation of and report to Congress on the problem of attorney fees in OASDI cases. This report produced legislative action in the Omnibus Budget Reconciliation Act of 1990, which requires that the SSA approve, at the time of a favorable determination, any attorney fee agreement submitted in writing prior to the decision, provided that the agreement does not exceed 25% of past due benefits or $4000, whichever is less.

This legislation does not completely eliminate attorney fee problems at the administrative level, however, because such problems

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239. See 42 U.S.C. § 406 (1988) (OASDI). In the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 5106(a)(2), 104 Stat. 1388 (1990), to be codified at 42 U.S.C. § 1383(d)(2)(A), Congress made OASDI attorney fees provisions applicable in SSI cases. Prior to this Act, withholding provisions did not exist respecting SSI, and the Supreme Court held that this omission reflected a conscious congressional decision to preclude the award of fees from benefits in SSI cases, thus depriving the courts of any inherent authority to require payment of fees. See Bowen v. Galbraith, 485 U.S. 74, 76-78 (1988). Under this regime, when a claimant was eligible under both OASDI and SSI, the SSA reduced the amount of the award of past due benefits by the amount of SSI benefits before computing the attorney fees to be withheld. See Detson v. Schweiker, 788 F.2d 372, 374-76 (6th Cir. 1986) (upholding policy); Wheeler v. Heckler, 787 F.2d 101, 107-08 (3d Cir. 1986) (same). In both OASDI and SSI cases, a claimant who successfully appeals an SSA determination to the federal courts may be entitled to fees under the Equal Access to Justice Act. See Levy, supra note 5, at 527 n.366. For further discussion of attorney fees awardable by the courts, see infra notes 267-73 and accompanying text.

240. See, e.g., Pittman v. Sullivan, 911 F.2d 42, 46 (8th Cir. 1990).


244. Id. § 5106(a)(1)(C) (to be codified at 42 U.S.C. § 406(a)(2)(A)). This requirement is not absolute, however. The Secretary of Health and Human Services is directed to provide by regulation for review of the fee amount whenever the claimant or ALJ submits a written request for reduction of fees within 15 days of the favorable disposition or the attorney or other representative submits a request to increase the fee amount. Id.
are by no means limited to controversial SSA policies. As is often the case with contingency fee arrangements, there are many potential conflicts of interest.\textsuperscript{245} Another potential problem arises when the SSA erroneously pays benefits to claimants without first deducting attorney fees, because neither the SSA nor the attorney may be able to recover the overpayment from the claimant.\textsuperscript{246} Some collection problems may be ameliorated through the use of an attorney fee escrow account.\textsuperscript{247} It is difficult, of course, to measure the impact of attorney fee difficulties on the quality of representation for claimants, but it does seem clear that disability cases are not always the highest priority for the attorneys involved.\textsuperscript{248}

The problems faced by claimants with developmental disabilities are well illustrated by the case of \textit{Young v. Bowen}.\textsuperscript{249} Ms. Young filed claims based on mental impairments in 1979 and 1980, which

\textsuperscript{245} For example, because the fund on which contingency fees are based is the claimant's past due benefits, there are incentives for the attorney to delay hearings to increase the size of the fund. \textit{See Rodriguez v. Bowen}, 865 F.2d 739, 746-47 (6th Cir. 1989); Notice of Study, 53 Fed. Reg. 9818 (1988). A similar conflict arises with respect to receipt of interim benefits pending review of an SSA decision terminating benefits. SSA regulations provide that if the claimant is successful, the interim benefits will not be treated as past due benefits in computing the 25\% attorney fee limit. \textit{See Rodriguez v. Secretary of Health & Human Servs.}, 856 F.2d 338 (1st Cir. 1988) (upholding regulation). Such treatment of interim benefits provides a disincentive for attorneys to recommend that their client elect to receive such benefits. Thus, some courts rejected the SSA's regulation, in part on this ground. \textit{See Gowan v. Bowen}, 855 F.2d 613, 618-19 (8th Cir. 1988); \textit{Condon v. Bowen}, 853 F.2d 66, 72 (2d Cir. 1988); \textit{see also Pittman v. Sullivan}, 911 F.2d 42, 47-48 (8th Cir. 1990) (extending scope of \textit{Gowan} holding). In the Omnibus Budget Reconciliation Act of 1990, however, Congress confirmed the SSA interpretation, providing that interim payments \textit{not} be treated as past due benefits for attorney fee purposes. \textit{See Pub. L. No. 101-508}, § 5106(a)(1)(C), 104 Stat. 1388 (1990) (to be codified at 42 U.S.C. § 406(a)(2)(D)).

\textsuperscript{246} The SSA is required to attempt to recoup overpayments, 42 U.S.C. § 404(a)(1)(A) (1988); \textit{Sullivan v. Everhart}, 110 S. Ct. 960 (1990), but it is also directed to waive recoupment if the claimant is without fault and recoupment would defeat the purposes of the Social Security Act or be against equity and good conscience. \textit{See 42 U.S.C. § 404(b)} (1988); \textit{Califano v. Yamasaki}, 442 U.S. 682 (1979). Interestingly, the POMS provides that if the SSA erroneously fails to withhold fees, then the SSA will pay the attorney directly and seek recoupment from the claimant. This provision, however, appears to be unenforceable at the behest of an attorney who has not received fees. \textit{See Pittman v. Sullivan}, 911 F.2d 42, 46 (8th Cir. 1990) (administrative regulation cannot waive sovereign immunity).


\textsuperscript{248} \textit{See, e.g., Johnson v. Sullivan}, 894 F.2d 683, 686 (5th Cir. 1990) (rejecting claimant's argument that he was denied effective assistance of counsel by ALJ's refusal to grant claimant's attorney second continuance for "'business of a personal nature' ").

\textsuperscript{249} 858 F.2d 951 (4th Cir. 1988). The factual summary of this case is taken from pages 952-54.
were denied at the state level. She was unrepresented by counsel and did not appeal these claims. Ms. Young again filed for benefits in 1983 and was denied, but this time she was represented by counsel and appealed the denial to an ALJ. The ALJ denied the claim and this decision was affirmed by the Appeals Council. After judicial decisions invalidated the SSA’s policy regarding mental impairments, the case was remanded to the SSA for further consideration under the Social Security Disability Benefits Reform Act of 1984. A new hearing was held in 1986, at which time medical evidence was introduced showing chronic psychoneurosis, mixed anxiety-depression, and inadequate personality, as well as IQ scores of sixty-seven (verbal), sixty-seven (performance), and sixty-six (full scale). On the basis of this evidence, the ALJ granted benefits and the Appeals Council affirmed. Both the ALJ and the Appeals Council, however, refused to reopen the prior claims and grant benefits retroactively. Finally, in 1988, the court of appeals in Young held that this refusal denied Ms. Young due process, because her mental disabilities and pro se status made her incapable of pursuing the appeals process with respect to the earlier denials.

C. Judicial Review

Claimants may seek judicial review of decisions denying or terminating benefits. Review is available initially in the federal district courts. District court decisions may be appealed to the circuit courts of appeals, and disappointed litigants at the circuit court level may petition the Supreme Court for writs of certiorari. Given the SSA’s restrictive policy perspective and the relative lack of independence of state DDSs and the federal administrative process, review by Article III judges comprises an important safeguard for disability claimants. The ability of courts to correct

250. See supra notes 156-62 and accompanying text.
251. See supra notes 77-78 and accompanying text.
252. Young, 858 F.2d at 954-55. The court went on to conclude that the evidence of disability at the time of the 1980 application was clear, and directed the SSA to award benefits from that time. See id. at 955-56. For another example of a torturous road to disability benefits, see Turner v. Bowen, 856 F.2d 695, 696-98 (4th Cir. 1988), discussed infra note 264.
255. Courts played an important role in curbing the most extreme anti-claimant SSA policies of the first half of the 1980s, striking down a number of them and serving as a
erroneous denials of benefits, however, is limited in two important respects. First, courts are generally required to defer to administrative disability decisions and the policies that underlie them. Second, many claimants, particularly those with mental impairments, may be discouraged from seeking review by the lengthy, cumbersome, and expensive process that must be negotiated in order to succeed at the judicial level.

General principles of administrative law, applicable to the SSA, require that courts be deferential to the SSA’s decisions. In particular, courts review the SSA’s factual decisions under the relatively deferential substantial evidence standard of review, and must defer to the SSA’s interpretation of ambiguous statutory

catalyst for legislative or administrative modification of others. See generally S. Mezey, supra note 11, at 95-179 (describing the judicial role and concluding that congressional intervention ultimately was required to resolve the impasse between the judiciary and the SSA); Levy, supra note 5, at 484-507. For a negative view of the judicial role as improperly infringing upon the legitimate realm of executive branch policymaking, see Pierce, supra note 33, at 501-15.

256. An underlying obstacle to using judicial review to correct “errors” is the difficulty of determining what the “correct” decision is in disability cases. Given the nature of disability decisions, reasonable minds may differ in many cases, and the courts are in no better position—and in fact are poorly situated—to second guess the decisions of administrative decisionmakers who have greater expertise and who are closer to the case. In assessing the proper role for judicial review, it is helpful to differentiate between erroneous denials that are the product of systemic bias and those that will inevitably occur as a result of inherent difficulties in determining disability. Judicial review is unlikely to be of much value in correcting the latter, inherent errors that creep into the system; but it has proven to be an important, albeit imperfect check against systemic bias. See Levy, supra note 5, at 508-09. But see Pierce, supra note 33, at 513-15 (arguing that a reduction of the rates at which ALJs grant benefits is a permissible policy objective with which courts should not interfere).

257. It is unnecessary for purposes of this Article to explore the reasons for deference in any great detail. Broadly speaking they can be grouped into three general categories. First, structurally, agencies have been delegated authority and discretion from Congress and are politically accountable through presidential oversight. Thus, it is improper from a separation of powers perspective for courts to substitute their judgments for those of the agency. Second, agencies have substantive and technical expertise that results from specialization and greater familiarity with the evidence produced in a particular case (including the opportunity to observe witnesses’ demeanor). Thus, they are more likely to make accurate decisions. Third, it is inefficient for courts to consider and decide anew issues that have already been decided by agencies, and courts in any event lack the resources to do so. Against all these reasons for deference can be interposed the court’s traditional responsibility for enforcing the rule of law, which in the context of administrative decisions requires oversight of agency compliance with substantive and procedural statutory requirements and ensuring that factual determinations are reasonably supported by competent evidence in the record.

provisions so long as that interpretation is reasonable. Despite these limitations, courts have frequently overturned SSA decisions as unsupported by substantial evidence or based upon statutory interpretations that are inconsistent with statutory language or congressional intent. Nonetheless, on numerous occasions, courts have and will invoke the substantial evidence standard in refusing to overturn individual agency decisions denying benefits, and they may also defer to the statutory interpretations underlying SSA regulations.

In addition, the practical barriers preventing claimants from successfully negotiating the system at the state and federal administrative level are all the more significant in seeking judicial review. Claimants must press their claim through the lengthy and cumbersome administrative process before availing themselves of judicial review, and many claims are lost to attrition. Even if a claimant is successful before the courts, the normal remedy is for the court to remand the case to the SSA for further consideration.


260. See Levy, supra note 5, at 476 & n.81. Indeed, SSA officials have complained at times that courts have not been according SSA decisions the deference due under this standard. See id. at 507; Kubitschek, A Re-Evaluation of Matthews v. Eldridge in Light of Administrative Shortcomings and Social Security Nonacquiescence, 31 Ariz. L. Rev. 53, 75-76 (1989).

261. In Zebley, for example, the Court concluded that the SSA's regulations were inconsistent with the plain statutory command to use comparable standards in evaluating adult and child disabilities. See Zebley, 110 S. Ct. at 891-97. Indeed, courts have been criticized for failing to accord proper deference under Chevron to SSA policies. See Pierce, supra note 33, at 514-15.

262. A number of examples are cited in Part II of this Article. See, e.g., supra notes 93-96, 125, 128-30, 140, 186, 191.


264. See Levy, supra note 5, at 480-82 (Tables 1, 2, and 3). In 1988, 15,412 social security cases were reviewed in the district courts. While this number may seem rather large, it reflects a relatively small proportion of initial determinations each year. New applications in OASDI cases alone have consistently exceeded one million per year since 1974, and should account for over 600,000 denials each year (denial rates at the initial application stage exceed 60%). Over 290,000 cases were appealed to the ALJ level in 1988 of which 43% were denied — about 120,000. About half of these claimants (64,861) sought Appeals Council review. The Council decided 69% of these cases adversely to the claimants, leaving about 40,000 cases which could be appealed to the district courts. It is, of course, difficult to assess what proportion of those claims not appealed at each level of the process are meritorious.
which may lead to a renewed denial of benefits.\textsuperscript{265} Thus, in many cases, claimants must be extraordinarily persistent in order to secure benefits.\textsuperscript{266}

Attorney fees are also a factor affecting the ability to pursue, and the likely success of, judicial review. As the process draws out, a larger amount of the claimant’s benefits may ultimately be paid to the attorney rather than to the claimant.\textsuperscript{267} Conversely, judicial review may greatly expand the number of hours an attorney must devote to a Social Security claim (for preparation of court papers, review of the record, etc.) in the face of decreased chances of recovery without proportionally expanding the potential fee that may ultimately be paid.\textsuperscript{268}

\textsuperscript{265} The general rule in administrative law requires that courts remand cases to agencies whenever a final disposition of the case requires the exercise of the agency’s discretion, such as the re-evaluation of facts under appropriate legal standards. \textit{See}, \textit{e.g.}, Fanning v. Bowen, 827 F.2d 631, 634 (9th Cir. 1987). This rule, which rests on legislative delegation of discretion to the agency and the relative expertise of agencies in resolving matters within their field of specialization, dates at least from \textit{SEC v. Cheney Corp.}, 318 U.S. 80 (1943). \textit{But cf.} Sullivan v. Hudson, 490 U.S. 877, 889-92 (1989) (discussing the more significant role of courts in the Social Security context). In some instances, courts will determine that a claimant is clearly entitled to benefits, and enter an order accordingly. \textit{See}, \textit{e.g.}, Young v. Bowen, 858 F.2d 951, 955-56 (4th Cir. 1988).

\textsuperscript{266} An excellent example of this is Turner v. Bowen, 856 F.2d 695 (4th Cir. 1988). In \textit{Turner}, the claimant had various physical problems and applied for benefits in 1979. This application was denied at the administrative level, but the case was remanded by a district court for consideration of claimant’s statements of pain, and re-evaluation of residual functional capacity in light of the combined effects of his impairments. On remand, the ALJ followed this directive and considered the claimant’s emerging psychological problems as well, granting benefits. The Appeals Council reversed (in 1983) and the district court affirmed the Appeals Council. The district court, however, was reversed by the court of appeals. On remand, the Appeals Council again denied benefits (in 1985) and again the district court affirmed, only to be reversed by the court of appeals, which remanded the case to the SSA for reconsideration in light of the new regulations regarding mental impairments. A new ALJ hearing was held in 1986, and the ALJ awarded benefits only to be reversed by the Appeals Council, which remanded the case to the ALJ for further consideration. Finally, in 1987, a full consultative psychological evaluation was performed which produced IQ scores of 67 (verbal), 68 (performance), and 67 (full scale). The ALJ again found the claimant disabled, but was limited by the terms of the remand to considering disability after January 1, 1984. The ALJ recommended reconsidering disability prior to that date. The Appeals Council affirmed the disability finding but declined to reconsider disability prior to 1984, and the district court affirmed. The Court of Appeals reversed in 1988, this time directing an award of benefits dating from the initial application for benefits. \textit{Id.} at 696-98, 699.

\textsuperscript{267} \textit{See supra} notes 239-48 and accompanying text (discussing contingency fees and withholding benefits at the administrative level). Any fee for successful attorneys at the judicial level must be approved by the court rather than the agency. \textit{See} 42 U.S.C. § 406(b)(1) (1988); \textit{see also} Rodríguez v. Bowen, 865 F.2d 739 (6th Cir. 1989) (discussing factors to be considered by district courts in determining the reasonableness of fees).

\textsuperscript{268} This is particularly true if the claimant receives interim benefits pending review,
To some degree, these problems are counterbalanced by an important additional source of fees for claims that succeed at the judicial level: the Equal Access to Justice Act (EAJA).\textsuperscript{269} The EAJA allows a claimant who successfully challenges the denial or termination of benefits to recover attorney fees \textit{from the government} "unless the court finds that the position of the United States was substantially justified or that special circumstances make the award unjust."\textsuperscript{270} The EAJA is not a perfect solution to problems with fee awards under the Social Security Act. First, recovery of EAJA fees is by no means certain, depending upon, among other things, a finding that the government's litigating position was not substantially justified. This requirement has generally been interpreted to mean that the government's position must be justified in fact and law to a degree that would satisfy a reasonable person.\textsuperscript{271} Second, the statute requires that the claimant be reimbursed for attorney costs from any EAJA fees awarded.\textsuperscript{272} While this requirement relieves the claimant of the hardship caused by deducting fees from past due benefits, it also means that attorneys may have little to gain by seeking EAJA fees.\textsuperscript{273}

A final limitation on the courts' ability to check the SSA's substantive policies is the SSA's policy of nonacquiescence. Under this policy, which flourished in the early 1980s, the SSA would treat the decisions of lower federal courts as binding with respect to the parties to that decision, but refuse to treat the decision as

because these benefits are not included in the computation of the fee award. \textit{See supra} note 245.


binding precedent even within the district or circuit in which the decision was handed down.\textsuperscript{274} Nonacquiescence forced many claimants to relitigate legal issues that had already been resolved adversely to the SSA.\textsuperscript{275} Responding to pressure from various sources, in January of 1990 the SSA issued new regulations governing acquiescence in decisions of circuit courts of appeals.\textsuperscript{276} Under these regulations, the SSA will issue formal rulings acquiescing in circuit court decisions within the relevant circuit unless the SSA decides to seek review in the Supreme Court or one of four "activating events" justifies relitigating an issue.\textsuperscript{277}

IV. CONCLUSION

The foregoing discussion leaves little doubt that the policy perspective of the Social Security Administration now emphasizes the limited resources available for disability benefits and the need to efficiently, consistently, and accurately process the myriad dis-

\textsuperscript{274} See supra note 29 and accompanying text. The SSA followed this policy with respect to many of the most controversial policies used to deny benefits during the 1980s. See Levy, supra note 5, at 503-07. In defense of the policy, the SSA argued that it had the duty and authority to develop and apply uniform national law on disability, and thus could refuse to apply lower court decisions at odds with its policies. Id. at 504-05. Most commentators and many courts rejected these arguments, instead viewing the nonacquiescence policy as incompatible with the rule of law. Id. at 505-06.

\textsuperscript{275} For this reason, some critics of the SSA contended that the nonacquiescence policy reflected a war of attrition waged by the SSA against claimants. See Judicial Review of Agency Action: Health and Human Services Policy of Nonacquiescence: Oversight Hearing Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 107 (remarks of Rep. Frank).

\textsuperscript{276} 20 CFR § 404.985 (1990) (OASDI); id. § 416.1485 (SSI). The SSA had already modified its policy in 1985, but this modification did not fully satisfy critics of the policy. Levy, supra note 5, at 506.

\textsuperscript{277} These activating events include congressional action indicating that the circuit court decision in question was inconsistent with congressional intent, a statement in a majority opinion within the circuit indicating that the circuit may no longer follow the previous decision, subsequent conflicting circuit court precedent in another circuit, or a subsequent Supreme Court decision providing a reasonable basis for questioning the circuit court decision. Id. § 404.985(c)(1). While the regulations appear to abandon the policy of nonacquiescence, it is not clear how effective they will be. The SSA continues to defend the policy of nonacquiescence, despite the new regulations. See 55 Fed. Reg. 1014. Moreover, there are potential loopholes in the regulations. Although the regulations abandon the language of nonacquiescence, "relitigation" within a circuit may amount to more or less the same thing. In addition, the regulations do not really require one of these activating events to be present. They provide: "We will re litigate only when [the General Counsel of the Department of Health and Human Services concurs and notice is published in the Federal Register] and, in general one of the events specified in paragraph (c)(1) of this section [listing activating events] occurs." 20 C.F.R. § 404.985(c) (1990) (emphasis added) (OASDI); id. § 416.1485(c) (SSI).
ability claims that must be resolved by the SSA. While this policy emphasis reflects important concerns that must be addressed by an agency responsible for administering a massive disability program, it has led in many cases to erroneous denials of benefits for claimants in general and for claimants with developmental disabilities in particular. Thus, if individuals with developmental disabilities are to claim benefits successfully, it is essential that they have informed representation, whether by legal counsel or otherwise, that can assist them in negotiating the system. Further, these representatives must plan carefully to limit the impact of the substantive difficulties described in Part II of this Article, and they must be persistent and dedicated advocates to overcome the systemic hurdles described in Part III.

Despite the legitimate concerns motivating the SSA's restrictive policy perspective, it can be questioned on various grounds. First, it is unclear whether the restrictive policies actually preserve resources. Many disability claimants who are denied benefits end up receiving aid from other programs.\(^{278}\) In addition, many decisions denying or terminating benefits are ultimately reversed, imposing substantial administrative and judicial costs without preserving disability program resources.\(^{279}\) Moreover, the system often operates to discourage self-sufficiency by denying benefits to claimants who participate in structured programs or seek to work despite their disabilities.\(^{280}\)

Second, the restrictive policies do not appear to effectively target claimants who are not truly disabled. Claimants who, like those with developmental disabilities, suffer from impairments that are difficult to prove objectively and that inherently require subjective judgments by disability decisionmakers, seem to have an especially difficult time establishing disability.\(^{281}\) Moreover, the system seems to reward those who are persistent and have high quality representation, while denying benefits to those, such as claimants with developmental disabilities, who are least able to negotiate the system.\(^{282}\) This is particularly troublesome because the social costs

\(^{278}\) See Levy, supra note 5, at 486 n.128. This shifting of programs may be desirable from the bureaucratic perspective, because these other programs may be operated under a different budget line, and in many cases with state rather than federal funds. This bureaucratic rationality, however, is inefficient from a societal perspective, because there is no net savings and considerable costs are imposed on individuals.

\(^{279}\) Id. Whether a net savings results would depend on the proportion of erroneous denials generated and the number of erroneous grants corrected.

\(^{280}\) See supra notes 81-101 and accompanying text.

\(^{281}\) See Part II, supra.

\(^{282}\) See Part III, supra.
of erroneous denials of benefits are arguably greater than the costs of erroneous benefit allowances. 283

Third, and perhaps most importantly, regardless of its ultimate wisdom, the SSA's policy perspective has been broadly implemented without much public attention, exposure, or debate. It is true that some features of SSA policy were prompted by legislative action or subsequently approved by statute, and some policies were implemented by regulations subject to public comment. On the other hand, the most telling features of the restrictive attitude occur in the day-to-day individualized judgments that must be made in order to determine disability. These judgments range from providing assistance in filling out disability forms to evaluating the vocational capabilities of claimants with developmental disabilities. The restrictive attitude currently reflected in these judgments may or may not be consistent with the wishes of the general public.

One thing is clear, however. The issue is too important to be resolved incrementally through the bureaucracy; it should be brought out into the open and resolved through the political process. Meanwhile, until the SSA's broad policy is changed through that process, or until a "kinder, gentler" bureaucracy emerges, the Social Security disability determination process will continue to present a variety of pitfalls for claimants with developmental disabilities.

283. See Appeals Council Report, supra note 206, at 765. But see J. Mashaw, supra note 17, at 83.