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## **An Attempt to Bring Modern Workplace Realities to the Social Security Disability Adjudication System**

Robert E. Rains  
*Penn State Dickinson Law*

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# An Attempt to Bring Modern Workplace Realities to the Social Security Disability Adjudication System

Robert E. Rains\*

In *Social Security Disability Law and the American Labor Market*,<sup>1</sup> Jon C. Dubin<sup>2</sup> has made a significant contribution to the field of disability law. The book provides a detailed account of the long-standing and ongoing disputes among Congress, the Social Security Administration, and the courts on the fundamental question of who should be excused from working because of disability and granted economic and health care support by the government. Dubin explores the obvious flaws in the current adjudicative system, including reliance on outdated labor market data, demonstrates the fallacious assumptions of those who would make the system even harsher than it is today, and suggests sensible improvements.

When the Social Security Act was originally enacted in 1935, it contained no provisions for the benefit of persons with disabilities. Two decades later, in 1954, Congress took the first small step to protect disabled workers by creating the “disability freeze program.” This program provided neither cash benefits nor health insurance, but only a “freeze” on the disabled worker’s earnings record. If the worker lived into retirement age, the worker’s monthly retirement benefit amount would not be adversely affected by nonpayment of FICA taxes during a period of disability. Then, in 1956, Congress finally added Social Security Disability Insurance (SSDI) cash benefits for disabled workers. Through a series of amendments, Congress later added Medicare coverage for disabled workers, subject to various limitations, and created the Supplemental Security Income (SSI) program for indigent, disabled individuals who lack insurance coverage. In most states, individuals on SSI also

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\* Professor emeritus and founding director, the Disability Law Clinic (now part of the Community Law Clinic), Penn State Dickinson Law.

1. JON C. DUBIN, *SOCIAL SECURITY DISABILITY LAW AND THE AMERICAN LABOR MARKET* 115 (2021).

2. Professor Jon Dubin is the Board of Governors Distinguished Service Professor of Law and Associate Dean for Clinical Education at Rutgers Law School.

become eligible for Medical Assistance (Medicaid). The statutory and regulatory tests for being disabled are the same for Disability Insurance (DI) benefits and adult SSI disability benefits. (The complex rules for disabled children seeking SSI are beyond the scope of Dubin's book and this review.)

One of the reasons why Congress initially provided no benefits for disabled workers under the Social Security Act was the perceived difficulty of crafting a workable and fair definition of disability. That problem, as illustrated in *Social Security Disability Law*, has persisted to the present day and will likely never be finally resolved. The current statutory language defining disability reads:

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he 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, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence . . . "work which exists in the national economy" means work which exists in significant numbers either in the region where the individual lives or in several regions of the country.<sup>3</sup>

Although this appears to be a quite detailed definition, Professor Dubin cogently notes, "the statutory definition does not create a precise, objective, or scientifically determined standard but one that is socially constructed."<sup>4</sup>

Under current regulations, the Social Security Administration (the SSA) utilizes a five-step "sequential evaluation of disability."<sup>5</sup> At step one, the SSA asks whether the claimant is engaging in "substantial gainful activity" (SGA).<sup>6</sup> If so, she is not disabled (no matter how disabled she is), and the evaluation ends. If not, the SSA proceeds to step two: does the claimant have a severe impairment or combination of impairments?<sup>7</sup> If not, she is not disabled, and the evaluation stops. If so, the SSA proceeds to step three: does the claimant have an impairment that meets or equals in severity any of the impairments in the "Listing of Impairments"?<sup>8</sup> If so, the claim-

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3. 42 U.S.C. § 423(d)(2)(A) (2006); 42 U.S.C. § 1382c(a)(3)(B) (2018).

4. DUBIN, *supra* note 1, at 115 (2021).

5. 20 C.F.R. § 404.1520 (2020).

6. *Id.*

7. *Id.*

8. *Id.*; 20 C.F.R. pt. 404, subpart P, app. 1 (2020).

ant is disabled, and the evaluation stops. If not, the SSA proceeds to step four: can the claimant, given her “residual functional capacity” (RFC), return to her past relevant work, i.e., work performed in the last 15 years?<sup>9</sup> If so, she is not disabled, and the evaluation stops. If not, the SSA proceeds to the final step: can the claimant, given her RFC, age, education, and work experience, perform other jobs that exist in significant numbers in the national economy?<sup>10</sup> If so, she is not disabled. If not, she is disabled.

In *Social Security Disability Law*, Professor Dubin analyzes many deficiencies in the current system. For instance, in order to make the vocational assessments at steps four and five, it is necessary to categorize jobs in the labor market, both as to their exertional requirements (sedentary, light, medium, heavy, very heavy) and non-exertional requirements (mental, sensory, postural, manipulative, etc.). Unfortunately, the primary source administratively noticed by the SSA to make these determinations is the Department of Labor’s *Dictionary of Occupational Titles* (the DOT), which has not been updated in three decades!<sup>11</sup>

Even the Department of Labor itself considers the DOT to be obsolete.<sup>12</sup> The DOT was last updated before near-universal computerization and the digital revolution, the age of robotics, and widespread outsourcing. Although the SSA continues to rely on the existence of 200 unskilled sedentary occupations, by 1977 the revised DOT had already recognized that only 137 such occupations remained.<sup>13</sup> And some of those remaining unskilled sedentary occupations which theoretically exist in significant numbers, such as “dowel inspector” and “vamp strap ironer,” are highly questionable at best.<sup>14</sup>

The theoretical job most frequently cited in SSA decisions denying benefits is “addresser,” which has been used to deny benefits in 9.5 percent of such cases.<sup>15</sup> According to the DOT, this job involves “addressing envelopes, cards and packages by hand and typewriters.”<sup>16</sup> (Query: when was the last time that you received mail from an office with a handwritten address? And when was the last time that you saw a typewriter actually in use in any office?)

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9. 20 C.F.R. §§ 404.1520, 416.920.

10. *Id.*

11. DUBIN, *supra* note 1, at 35, 45–46.

12. *Id.* at 45–46, 46 n.38.

13. *Id.* at 103.

14. *Id.* at 103 n.5.

15. *Id.* at 48–49, 48 n.53.

16. *Id.* at 49.

Dubin points out the irony of the SSA's continuing reliance on the 30+-year-old DOT to adjudicate cases since the agency does not consider work performed more than 15 years ago to constitute "past relevant work." The SSA's regulations explain, "A gradual change occurs in most jobs so that after 15 years it is no longer realistic to expect that skills and abilities acquired in a job done then continue to apply."<sup>17</sup>

In an attempt to bring some semblance of uniformity to the decision-making process, in 1978 the SSA promulgated the Medical-Vocational Guidelines (commonly referred to as the "grids"), consisting of three charts purporting to direct decisional outcomes for individuals based on their exertional RFC, age, education, and previous work experience.<sup>18</sup> Significantly, the grids do not dictate the result where an individual has solely nonexertional impairments, and they "may not be fully applicable" where an individual has both exertional and nonexertional impairments. This has led to complex and largely unresolved issues of "grid exception cases," including "cases where the administratively noticed grid occupational and job bases are eroded by the presence of nonexertional limitations, falling between two exertional RFC categories or lacking the exertional RFC for even the full range of sedentary work."<sup>19</sup>

The vocational experts (VEs) who testify at many hearings, not only still rely on the DOT, but are not subject to any rigorous quality control to become VEs. Unlike lay representatives seeking direct payment of fees, VEs are not required to pass any examination.<sup>20</sup> And they often fail to provide any meaningful basis for their conclusions.<sup>21</sup>

Dubin notes that there are enormous inconsistencies among administrative law judges (ALJs), VEs, and the courts in determining what constitutes a "significant number of jobs" that a person with disabilities could theoretically perform and thus be ruled ineligible for benefits.<sup>22</sup> "Courts have found as few as 174 regional jobs and 25,000 national jobs sufficient while finding as many as 1,800 regional jobs and 120,350 national jobs insufficient."<sup>23</sup>

Although there are many fine and honest Social Security ALJs, there have been individual instances of corruption, as well as a 1992

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17. 20 C.F.R. §§ 404.1565(a), 416.965(a).

18. *Id.* pt. 404, subpart P, app. 2 § 200.00.

19. *Id.* pt. 404, subpart P, app. 2 § 200.00(e); DUBIN, *supra* note 1, at 72.

20. DUBIN, *supra* note 1, at 43.

21. *Id.*

22. *Id.* at 42.

23. *Id.*

finding by the Government Accounting Office (GAO) of “unexplained differences in approval rates by race, with lower approval rates for African American claimants at the ALJ level.”<sup>24</sup> Despite an effort by the SSA to address this problem, in 2002 the GAO reported a lack of progress in correcting it.<sup>25</sup>

Against this background, there have unsurprisingly been calls to change the system for determining eligibility benefits. Unfortunately, some of these proposals would make the system even more claimant unfriendly than it is today. For example, former SSA Deputy Commissioner Mark J. Warshawsky, who is now at the American Enterprise Institute, and Ross A. Marchand, who is now the director of policy for the Taxpayer Protection Alliance, have proposed generally eliminating consideration of a claimant’s age, education, work experience and work skills.<sup>26</sup> Dubin easily demonstrates how these and other restrictive proposals are utterly inconsistent with the realities of today’s labor market. (Consider: if someone had the late Stephen Hawking’s physical infirmities but instead of being a genius had only a third-grade education, would that person be reasonably capable of employment? Doing what?)

Professors David Autor and David Dorn, labor economists, have argued that there has been substantial growth in the “lower tail” skills quartile job market, hence more opportunities for physically impaired workers with limited job skills.<sup>27</sup> The problem with their analysis is that it is incomplete and at odds with the realities of today’s labor market. As Dubin explains, the bulk of the jobs in this category have heavy physical demands. For example, in the food service industry where most of the growth has occurred, standing is generally required 97.4 percent of the workday.<sup>28</sup> These are not realistic jobs for the older, unskilled former workers with back or leg impairments, who constitute a significant proportion of claimants.

The reality, as Dubin documents, is that the American system of disability adjudication and benefits is one of the harshest in the developed world. In 2013, all then-existing former SSA Commissioners, who had been appointed by presidents of both parties, signed an open letter attesting to the strictness of our standards for benefits.<sup>29</sup> We spend substantially less on disability benefits as a

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24. *Id.* at 146.

25. *Id.*

26. *Id.* at 111.

27. *Id.* at 125.

28. *Id.* at 126.

29. *Id.* at 133–34.

percent of GDP than most developed nations.<sup>30</sup> And we have the highest rejection rate of any country studied by the Organization for Economic Cooperation and Development (OECD).<sup>31</sup>

Prof. Dubin's bottom line is that our disability system should be reformed in a "mend it, don't end it approach."<sup>32</sup> Dubin adds:

The system created by the Congress and the SSA, as interpreted by the courts, for making the work adjustment assessments in disability benefits cases is large, complex, and in urgent need of updating and some repair. Many thousands of work adjustment assessments and resulting SSA decisions are made every year that are currently unsupportable.<sup>33</sup>

Dubin concludes with several positive proposals for Congress and the SSA to consider in order to bring our disability policies and procedures in line with 21st century American labor market realities. "First, a new, realistic, comprehensive, and temporally accurate taxonomy linked to regularly collected occupational statistics must be completed."<sup>34</sup> Second, the "SSA should adopt some type of certification process for VEs to demonstrate sufficient background and experience to offer informed expert opinions on the job market and relevant work adjustment and vocational facts."<sup>35</sup> Third, the SSA should require that "VEs must not only be prepared to explain cogently the methodology behind their work adjustments assessments and job incidence numbers but also make the underlying source material on which their assessments rest available at the hearing or through the hearing process."<sup>36</sup> Additionally, "the grid and its adjudicative framework should be updated."<sup>37</sup>

*Social Security Disability Law and the American Labor Market* is meticulously researched and documented; there are almost 90 pages of endnotes. It is not a practice manual, nor is it always an "easy read," but it is a "must read" book for disability policy wonks, serious Social Security practitioners, and any sophisticated person who cares about fair treatment for individuals struggling with impairments in today's job market.

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30. DUBIN, *supra* note 1, at 142.

31. *Id.* at 143.

32. *Id.* at 162.

33. *Id.* at 161.

34. *Id.* at 162.

35. *Id.* at 163.

36. *Id.*

37. *Id.* at 164.