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## Debating Disability Design: A Response

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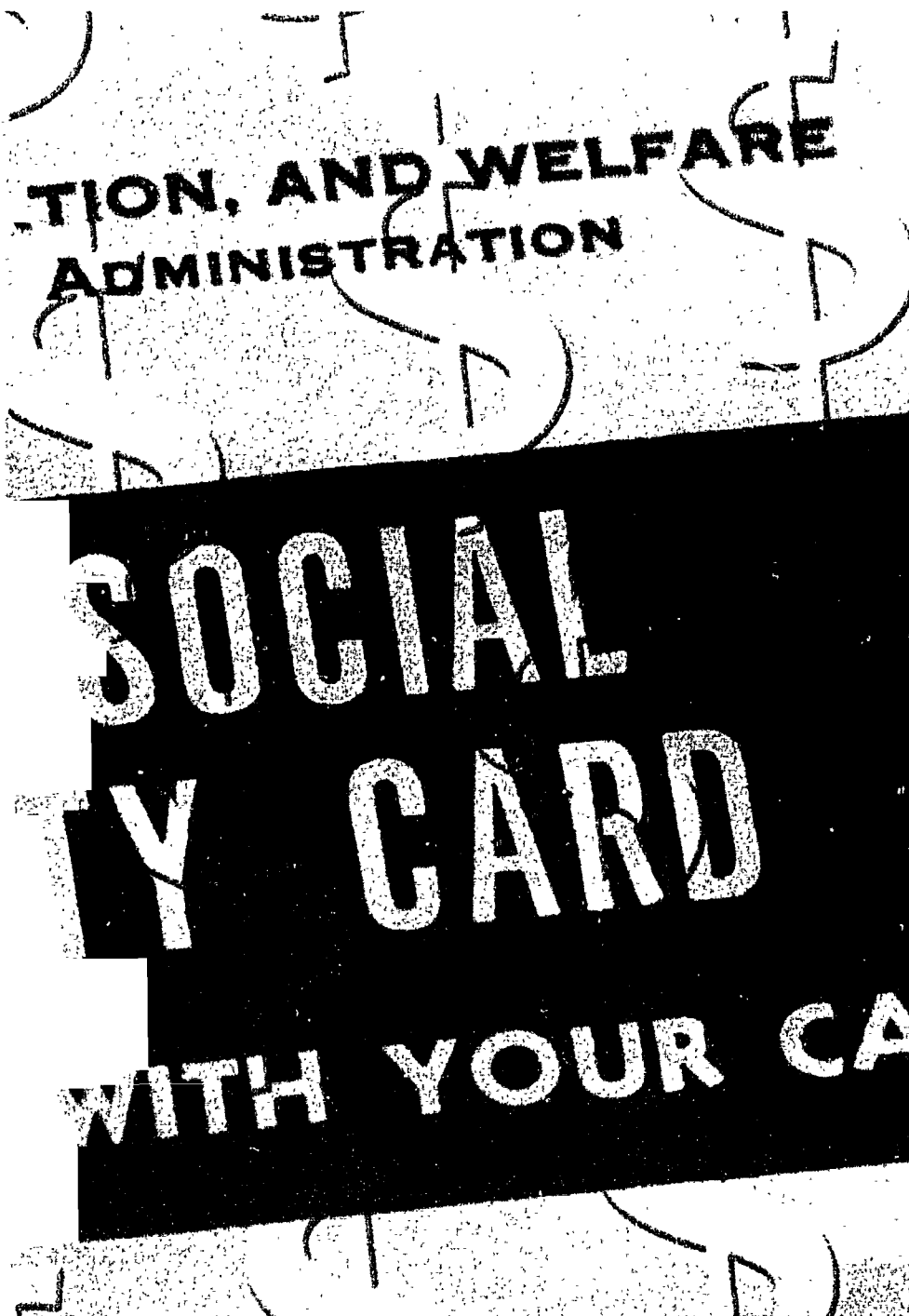
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# Counter Point

## *Debating Disability Design: A Response*

By Robert E. Rains

There is certainly room for disagreement about our country's legal policies toward persons with disabilities. However, Judge Meisburg's proposals would hardly be the panacea he envisions. While some of them may merit consideration, others mischaracterize the law, and many are based on questionable assumptions and caricatures of disabled Americans.



In "Ten Ways to Improve the SSA Disability Program and Save Billions of Dollars in the Process," Judge John M. Meisburg Jr. raises a number of provocative issues regarding how a compassionate society should design its policies toward those with disabilities. Unfortunately, the judge does so in a way that sometimes creates heat rather than light. He also ignores the fact that many of his proposals have been the subject of recent debates within Congress which have sometimes resulted in substantive changes to the disability program and sometimes have not.

There are two main tensions relating to disability programs in this country, which will never be resolved to the satisfaction of all. The first tension involves deciding which individuals we deem to be too disabled to reasonably believe that they can engage in substantial gainful employment and further be worthy of public income maintenance either through the Social Security trust fund or through general revenues, and which are not. The second tension is between providing income maintenance and encouraging individuals with disabilities to work. As one who has represented many claimants for more than two decades both in private practice and while supervising law students in a disability law clinic, I am particularly frustrated by the failure of the government until now to come up with >>> 41

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Security Administration (SSA) trust fund or the treasury about \$250,000 over the life of the claimant, my calculations reveal that I have potentially approved the expenditure of over \$300 million — more than a quarter of a billion dollars — which is more than the national budget of the United States in 1890.<sup>1</sup> The SSA has about 1,000 ALJs, and the national approval rate for claims is about 65 percent at the ALJ hearing level. This means billions of dollars per year are being approved for expenditure in the SSA disability program. The latest estimate is \$77 billion per year! As Sen. Everett Dirksen once said: “A billion here and a billion there, and sooner or later it adds up to real money.” Reasonable, “tough love” substantive revisions in disability law would save the nation billions of dollars and should be enacted by the Congress and the Social Security Administration. These changes will actually benefit many claimants by motivating them to return to work.

In the past, changes proposed in disability law have been primarily procedural, administrative, and cosmetic. The changes I propose are mostly substantive and relate to the eligibility for disability benefits and the rules, regulations, and policies that govern ALJs in the adjudication of actual cases.

## **Update the Medical-Vocational Guidelines (so-called “Grid Rules”) to define “Advanced Age” to be 60 and not 55, and entitled to more liberal treatment; make the Grids advisory, not mandatory.**

At present, under the Grid Rules, if a claimant is 55 years old (called “Advanced Age”), has a limited education, an unskilled work background, and is limited to sedentary work, he or she is deemed to be disabled, and the ALJ is *required* to render that decision.<sup>2</sup> But, if a person in the age group 55–60 can do sedentary work, he or she should not be deemed to be disabled. Indeed, this is a *non sequitur* — if a person can do sedentary work, he can work! In our new age of technology and computers, a person age 55–60 can, with a minimum of training and skill, perform all sorts of useful work, and should not be found disabled. The Dictionary of Occupational Titles contains the listings of numerous jobs that persons age 55–60 can do if they are limited to sedentary work and have a limited education and unskilled work background,<sup>3</sup> and these jobs exist in significant numbers. The grids could also provide that persons age 50–60 would be “approaching advanced age” and persons under age 50 would be called “younger individuals.” This change in the Grid Rules would dovetail with proposals to raise the Social Security retirement age to 70, also reflecting a trend of modern society that people are living longer and working longer. The Grid Rules should also be made advisory and not mandatory — which would give more flexibility and quasi-judicial discretion to the ALJs to

determine if disability is really warranted in a particular case.

## **Deny disability to claimants who fail to follow their doctor’s orders to take medication, lose weight, have surgery, stop smoking, drinking, or stop using drugs, resulting in self-induced disability.**

Such a rule would greatly encourage personal responsibility and would save billions of dollars annually. Presently, an SSA regulation provides that claimants must follow prescribed medical treatment if following said treatment can restore the claimant to substantial gainful activity.<sup>4</sup> But agency policy statements make it very difficult for ALJs to enforce this rule by creating a very high burden of proof as to whether the treatment would “clearly” restore the claimant to substantial gainful employment (SGA). Social Security Ruling 82-59 (1982). What is needed is a clear-cut statutory mandate.

My experience has been that as much as 50 percent of all disability is smoking/nicotine related, 75 percent of all disability claimants are smokers, and many of the smoking claimants smoke 2–3 packs per day (40–60 cigarettes per day), against the strong advice and urging of their treating physicians. Most of these claimants are still smoking at the time of the disability hearing. The statute should provide that ALJs can deny benefits due to the failure of a claimant to follow prescribed treatment, *e.g.*, smoking cessation, if medical evidence in the record, such as testimony from a medical expert or treating physician, states that following such treatment would result in a significant improvement in the health of the claimant and enable the claimant to return to SGA.<sup>5</sup> This is especially true in borderline cases (about 25 percent of all claims) where a significant improvement in the claimant’s health would clearly “tip the scales” of justice against disability and in favor of the ability of the claimant to return to work and SGA.

Congress should also make clear that nicotine addiction is a drug addiction; if nicotine addiction is material to the claimant’s disability, benefits should be denied under the new Drug Addiction and Alcoholism law,<sup>6</sup> as in cases of alcohol and cocaine addiction. This change would dovetail with President Clinton’s campaign against nicotine.<sup>7</sup> Otherwise, many claimants will use their disability money to fund their nicotine habit, much like their alcohol, marijuana, or cocaine habits. The federal government should not be in the business of funding bad habits and lifestyles that cause the disability on which the payments are based.

Obesity is another serious problem that affects a clear majority of the disability claimants I have seen and is often combined with smoking. Frequently, obesity is a medical condition beyond the control of the claimant. But, if there is no medical reason for the obesity, the claimant should have the duty to exercise, diet, and lose weight, if urged to do so by the treating doctor. Failure to do so

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clear and workable rules that would provide meaningful work incentives (including health insurance) to encourage people to leave the disability rolls.<sup>1</sup>

It is unfortunate that Judge Meisburg's article is written in such a way as to demonize Social Security recipients. In addition, he draws analogies that are — for lack of a kinder word — far-fetched. For example, he tries to equate the benefits that he has approved for disabled persons in the latter half of the 1990s with the national budget of the United States in 1890. The implied suggestion, of course, is that 1990s dollars are somehow the equivalent of 1890s dollars, which obviously defies history and economic reality.

In order to understand Judge Meisburg's specific suggestions, one must be familiar with the analysis used in the Social Security regulations to determine whether an individual is disabled. The Social Security Administration (SSA) has adopted what is known as the sequential evaluation of disability.<sup>2</sup> In greatly simplified overview, the process asks, first, whether the claimant is working (engaging in substantial gainful activity, or SGA). If so, the evaluation stops and the applicant is ruled not disabled. If not, the process proceeds to step two: does the claimant have a severe impairment? If not, the process stops — the claimant is not disabled. If so, the evaluation moves to step three: does the claimant have a condition which meets the 12-month durational requirement and meets or equals in severity a listed impairment (a "listing") as set forth in an appendix to the regulations divided into fourteen areas or body systems? If so, the person is disabled. If not, a child claimant is ruled not disabled, but for an adult claimant there are two more steps. At step four, the issue is whether the adult claimant has the residual functional capacity to perform past relevant work. If so, the adult claimant is not disabled. If not, the process moves on to the fifth and final step: given residual functional capacity, age, education, and past work experience, can the claimant perform other work? SSA has adopted a series of charts, named the Medical-Vocational Guidelines, but known in the trade as the grids, to aid in making this final assessment.<sup>3</sup>

Undoubtedly, there are assumptions at every step of the evaluation which are value-laden both in theory and in practice. For example, while it might seem obvious at step one that a person who is currently working is not disabled, yet it is not uncommon for an older worker with seriously progressive deteriorating health to continue working against medical advice because of the "Catch 22" step one creates. Such a person, in need of steady income, cannot "test the waters;" that is, she cannot continue working and apply for benefits, find out if she meets the standards, and then quit or retire. She

must quit or retire first, then apply, then wait it out, sometimes for years. This simply may not be a realistic option for an ill worker who lives paycheck to paycheck.

Another judgment is necessarily contained in step one: how much income demonstrates the ability to work? Restated, how little income will our society let a person with disabilities attempt to survive on without public assistance? Through most of the 1990s, this level was set at \$500 per month for most disabled persons. Effective July 1, 1999, SSA raised this amount to \$700 per month "to encourage individuals with disabilities to attempt to work, and to provide an updated indicator of when earnings demonstrate the ability to engage in SGA."<sup>4</sup> This change may also have the effect of more persons receiving more benefits, at a cost to the government, based on policy judgments that few commentators to the proposed change challenged.

An interesting aspect of the SGA level, arguably based more on history and politics than reason, is the continuing and significant discrepancy between the level of income that blind persons can earn while receiving income support and the SGA level for all other persons with disabilities. For 1999, SGA for persons who are blind is set at \$1,110 per month, almost 50 percent greater than the new SGA level for all other disabled people and more than 100 percent greater than the general SGA level prior to July 1999. On what basis do we make a societal judgment that blind persons either can earn so much more money than persons with AIDS, cancer, etc., while still being disabled, or that all other disabled people can "get by" on so much less money? The only response by SSA is that Congress sets the SGA level for blind persons.<sup>5</sup> This obviously begs the question of how other disabled people are supposed to subsist at income levels far below that set for blind people.<sup>6</sup>

Even step two — the seemingly obvious requirement of a severe impairment — has hardly been free from controversy. The severity regulation barely survived a facial challenge in the Supreme Court.<sup>7</sup> While the Court voted 6-3 to uphold the regulation, Justice Sandra Day O'Connor authored a concurring opinion joined by Justice John Paul Stevens, addressing "the contention of respondent and various *amici* (including 29 states and five major cities) that this facially valid regulation has been applied systematically to deny benefits to claimants who *do* meet the statutory definition of disability." Justice O'Connor noted that:

Empirical evidence cited by respondent and the *amici* further support the inference that the regulation has been used in a manner inconsistent with the statutory definition of disability. Before the step two regulations were promulgated approximately 8 percent of all claimants were denied benefits at the "not severe" stage of the administrative

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should be treated like other failures to follow prescribed treatment. SSA recently abolished the listing for obesity, which had previously automatically granted disability to persons who were morbidly obese according to a height and weight chart. This was prompted by a congressional outcry from a spoof on the TV show "The Simpsons" which portrayed Homer Simpson deciding to eat himself into disability payments by eating all the pies and cakes he could find so he would not have to work. Prior to this change, America was probably the only nation in the world that paid its citizens to be overweight. Obesity is now recognized as a serious national health problem that affects more than 50 percent of the American people according to American Medical Association standards, and often is the result of our self-indulgent, sedentary culture and lifestyle.

## **Abolish disability for children.**

The concept of disability for children is a *non sequitur* because children do not work in the first instance. Moreover, this program is known to be ripe for waste and fraud because the parents who are given the benefits may spend the payments on other things such as beer and cigarettes rather than on medical care for their children. Instead, Congress should ensure that *poor children* are provided with free medical care under Medicare or some other program (perhaps called "Kiddicare"). This change alone would probably save hundreds of millions of dollars per year from the trust fund and treasury.

parents to act unruly secondary to financial gain motivation. Such a process also teaches children to lie and to fabricate a medical condition in order to obtain government benefits — a terrible lesson for young people to learn. America is probably the only nation in the world that has rewarded bad behavior in children with disability payments for such new psychological disorders as Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). Numerous medical journal articles have recently spoken to the epidemic of misdiagnosis of ADHD and the overuse of the drug Ritalin on the children of America. Recently, the Listing for ADHD was abolished, partly as a result of the abuses mentioned above. There was a realization, I believe, that this disease alone should not justify disability payments. Branding a child as "disabled" can also have a deleterious psychological impact on the child who then sees himself, perhaps forever, as a misfit, which becomes a "self-fulfilling prophecy." While I certainly believe that ADHD and ODD are real mental impairments, I also believe that the answer in many borderline cases is not medical treatment and medication and disability payments, but love and discipline. Isn't it strange that such problems with children hardly existed in the 1950s when biblical values of the sanctity of marriage (not divorce), extended families, submission to authority, proper care for and discipline of children, respect for parental and teacher authority, and the Ten Commandments were held sacrosanct?

## **Abolish disability for persons who cannot speak English.**

Under current regulations, an ALJ must consider a claimant's inability to speak English as one disabling fac-

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***America is probably the only nation in the world that has rewarded bad behavior in children with disability payments for such new psychological disorders as Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD).***

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Moreover, disability has often been awarded to children who are simply disobedient and unruly and need parental and school love and discipline, not federal money. In some cases, the consultative examinations reveal that the claimant/child is actually being coached by the

tor (*i.e.*, the inability to properly communicate).<sup>8</sup> Under this regulation, more than half of the city of Miami and much of the state of California could potentially be found to be disabled! As a former resident of Miami, I know that

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process; afterwards approximately 40 percent of all claims were denied at this stage.

She concluded that, in her view, "step two may not be used to disqualify those who meet the statutory definition of disability."<sup>8</sup> This two-justice concurrence, coupled with the three-justice dissent, sent a strong message to SSA to reconsider how it was evaluating whether claimants have a severe impairment.

Another value judgment implicit in the severity step is whether SSA should consider or ignore an individual's impairments, each of which in isolation is nonsevere, but in combination severely restrict the ability to work. Prior to 1984, SSA adopted the policy of ignoring such impairments. That policy was invalidated by various court decisions and ultimately by Congress in the Social Security Benefits Reform Act of 1984.<sup>9</sup>

Step three — the listings — is based on a presumption that a person with the listed condition at the listing level of severity cannot be expected to work. But that same person, if working, would normally have been disqualified at step one. In the government's brief to the Supreme Court in a significant disability case last term, co-authored by SSA's general counsel, this point was expressly acknowledged:

Because of the use by the SSA of generalized presumptions, a finding that a person is disabled for purposes of Social Security benefits does not mean that there is no job that he can perform. For example, at step three of the Social Security determination process, an individual with an impairment listed in the regulations (such as blindness) is conclusively presumed to be "disabled" and "unable to work" without any inquiry into his ability to do his past work or other work that exists in the national economy (and even though many people with that impairment may in fact be working).<sup>10</sup>

Step 4 — the ability to return to past relevant work — likewise contains policy judgments both in theory and practice. SSA defines past relevant work "usually" as work the individual performed within the past 15 years.<sup>11</sup> But it is common sense that some jobs — and particularly the more skilled jobs — evolve much faster than others. Moreover, in practicality, the major guide that SSA has been using to assess jobs, the Department of Labor's *Dictionary of Occupational Titles* is hopelessly out of date, with large numbers of entries not updated in 20 years. Although a new vocational guide, the "O\*NET" is being developed by the Department of Labor to replace the *Dictionary of Occupational Titles*, it is far from complete and usable at this point; and despite early enthusiasm by SSA, it is unclear whether SSA will be

willing or able to adapt the O\*NET to use in disability determinations.

Step 5 — the ability to engage in other work — also involves policy judgments as to which reasonable minds might differ. The regulations explicitly provided that:

- (a) It does not matter whether —
  - (1) Work exists in the immediate area in which you live;
  - (2) A specific job vacancy exists for you; or
  - (3) You would be hired if you applied for work.

....

- (c) Inability to obtain work. We will determine that you are not disabled if your residual functional capacity and vocational abilities make it possible for you to do work which exists in the national economy, but you remain unemployed because of —
  - (1) Your inability to get work ...
  - (3) The hiring practices of employers;
  - (4) Technological changes in the industry in which you have worked;
  - (6) No job openings for you;
  - (7) You would not actually be hired to do work you could otherwise do; or ...<sup>12</sup>

Does it make sound policy to say to such a person, in effect, "you can work?"

Turning to Judge Meisburg's specific suggestions, several may be worthy of debate, and, although not noted by Judge Meisburg, some have been recently debated and indeed acted upon by the United States Congress or SSA itself.

**Update the Medical-Vocational Guidelines (so-called "Grid Rules") to define "Advanced Age" to be 60 and not 55, and entitled to more liberal treatment; make the Grids advisory, not mandatory.**

It may be true, as Judge Meisburg believes, that a particular individual age 55-59 with limited education, and an unskilled work background who is limited to sedentary work, can perform all sorts of useful work. Certainly some do. On the other hand, as should now be clear, the entire structure of the Social Security regulations is premised on making generalizations about individuals. These generalizations reflect, to the best of the administration's judgment, that it is not reasonable to believe that most individuals in the situations described would be able with reasonable effort to engage in substantial gainful activity. [Also, although the administration does not like to say so, the regulations also reflect, to some extent, hiring realities.]

Judge Meisburg suggests that the *Dictionary of Occupational Titles* contains listings of numerous jobs that persons age 55-60 can do if they are limited to seden-

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the inability to speak English has little or no effect on workers in that city. More than half of the city speaks Spanish, and it is often the “Anglos” who only speak English who are at a disadvantage. The inability to speak *Spanish* (not English) is often a very “disabling” factor in this city, especially in areas such as Little Havana. Persons who only speak Spanish have little or no trouble earning a living in this city because they work in Spanish speaking areas and businesses. Persons who come to America have the obligation to learn the native language of English; we should not discourage them by paying disability benefits to those who fail to learn the language. This change would dovetail with the recent vote in California to abolish bilingual education as a failed policy that prevents children from learning English and being able to function in an English-speaking nation. Even more anomalous is that this regulation also applies in Puerto Rico, where residents can apply for disability benefits based in part on their inability to speak English, despite the fact that the island is mostly Spanish-speaking.

## **Prohibit “Re-opening” of old claims; limit Title II “back benefits” to one year prior to the application date.**

At present, “back benefits” are not permitted in Title XVI/Supplemental Security Income claims, but are allowed in Title II/insurance claims, dating back to the alleged onset date, which could be as much as 10 years prior to the application date. Reopening of old claims is also allowed (on “good cause”) if the new claim is within two years of the initial denial of a prior Title XVI/SSI claim, and within four years of the initial denial of a prior Title II/insurance claim. Thus, it is possible for a claimant to seek reopening of an old claim that was filed four years earlier, with an alleged onset date of 10 years in the distant past. This creates a very difficult inquiry for the ALJ who must sift through medical records that are 10 years old and must question the claimant about his condition a decade in the past. Many claimants cannot remember what they did last week, much less 10 years ago. In my view, this procedure is unrealistic and unworkable. I propose that “reopening” of old claims denied in the past not be permitted (since the claimant failed to appeal the denial to an ALJ) and that Title II back benefits be limited to one year prior to the application date regardless of the alleged onset date. The ban on all back benefits in Title XVI/SSI claims should remain. These changes would save hundreds of millions if not billions of dollars, and would make disability hearings infinitely more straightforward and practical.

## **Create “Temporary Total Disability” and give the ALJs Continuing Disability Review (CDR) continuing jurisdiction.**

At present, when claimants are put on the disability rolls, they often stay there forever, regardless of whether

their medical condition improves or their disability ceases. This is so because “temporary total disability” does not exist under SSA law (as in workers’ compensation law), only “permanent, total disability.” In other words, it is all or nothing. Once a claimant is pronounced “disabled,” the benefits last forever unless a “continuing disability review” is conducted, which is supposed to take place within three years of all cases decided but often does not occur due to a lack of resources.

Continuing disability reviews are extremely cost-effective and critical for the quality assurance of the disability program and to prevent waste and fraud. Congress has often urged the SSA to make continuing disability reviews a top priority and has appropriated millions for this purpose, often to no avail.

One alternative would be to give ALJs “continuing jurisdiction” in cases where the ALJ determines that medical improvement is likely, much like U.S. district judges have “continuing jurisdiction” over issues in litigated cases (such as the remedy stage, which continues for many years and needs court supervision, *e.g.*, school busing to achieve racial integration). Where the case for disability is borderline and medical improvement due to planned surgery, physical therapy, or rehabilitation is likely, or the ALJ has directed the claimant to vocational rehabilitation, it is quite possible that the claimant can return to the workforce. In such cases, ALJs could have the authority to order claimants to submit proof within one or two years that they are still disabled, and the ALJs who find disability could hold the CDR hearings due to their familiarity with the facts.

## **Prohibit “reapplication” for disability based on the same impairments within one year of an unfavorable ALJ decision.**

At present, claimants can file a new claim based on the same impairments one day after an unfavorable ALJ or Appeals Council decision; this is irrational because it has just been adjudicated that they are not disabled. The 12-month durational requirement states a claimant must be disabled for 12 months, or expect to be so, to obtain benefits. The change would be a modification of this rule. The rule could also provide that if the medical condition worsens during the 12-month period, a new claim could be filed if the claimant obtains a statement from his or her physician stating that the condition had worsened during that period.

## **Close the evidentiary record after the ALJ decision; require the Appeals Council to abide by and use federal court precedent in their decision making.**

At present, claimants can submit new medical evidence on appeal to the Appeals Council if it is “new and material.” This is not allowed in federal court or in any other judicial system. The Appeals Council review should not be a *de novo* review, like the ALJ hearing, but should be

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tary work and have a limited education and unskilled work background. But for obvious reasons, the *Dictionary of Occupational Titles* does not consider the age of an employee or applicant for employment. Judge Meisburg asserts that it is a *non sequitur* for the regulations to provide that someone who can perform sedentary work is disabled, and, on its face, there is some force to that remark. On the other hand, what is the reasonable likelihood that a person aged 55-59, with a severe impairment or combination of impairments, who cannot lift more than 10 pounds at a time, nor frequently lift 10 pounds, nor engage in significant standing or walking during an eight-hour day,<sup>13</sup> who has less than a high school education, and either has not worked during the last 15 years or lacks the capacity to return to any job he has held in the last 15 years, would be considered a reasonable candidate for employment? How many employers would seriously consider hiring such an individual (notwithstanding the Age Discrimination in Employment Act)?<sup>14</sup> I submit that, in the main, such individuals do not have much by way of realistic job prospects.

If it could be demonstrated that in the real world such persons would not face enormous difficulties in obtaining (and keeping) employment, then the generalization currently in the Grid Rules may be unfounded. Judge Meisburg points to no such data or study and, frankly, it seems doubtful that many employers, with or without the blessings of their insurance carriers, would want to hire such individuals. Finally, notwithstanding SSA's stated policy that it doesn't matter if any individual is hireable, is it good public policy to deny such persons subsistence income?

**Deny disability to claimants who fail to follow their doctor's orders to take medication, lose weight, have surgery, stop smoking, drinking, or stop using drugs, resulting in self-induced disability.**

**Medication and Surgery.** As Judge Meisburg concedes, SSA regulations already provide that claimants must follow prescribed treatment.<sup>15</sup> He argues, however, that Social Security Ruling (SSR) 82-59 makes it too difficult to deny benefits to claimants who fail to follow prescribed treatment by requiring that the treatment would clearly restore the claimant to the ability to engage in substantial gainful activity. He fails to add that this ruling goes on to state that if "the treating source states that prescribed treatment will restore the ability to work, consideration should be given to that opinion." Surely the prescribing physician is in a better position to assess the possible beneficial effects of a treatment he has prescribed than even the smartest ALJ.

**Obesity.** This appears to be a moot issue. On Aug. 24, 1999, SSA eliminated the obesity listing.<sup>16</sup> In both the

Notice of Proposed Rule Making<sup>17</sup> and final Rule Making, SSA referred to unidentified "current medical and vocational research" in support of this change. In response to a FOIA request to identify the medical literature search that led to the proposal to delete the obesity listing, SSA replied:

We do not have any documents to provide. Our literature search was done by a medical consultant and the medical librarian of the now-defunct Office of Medical Evaluation's medical library. The purpose of the search was to determine whether there existed any current medical research findings that would indicate a correlation between obesity per se (as opposed to obesity in combination with various other impairments associated with obesity) and loss of function. The search for articles was conducted via computer (e.g., Medline). Foreign language articles and some articles in obscure journals were not obtained.

We found no information linking obesity directly to loss of function. Obesity was cited as a risk factor for mortality and associated with other impairments, primarily cardiovascular and musculoskeletal impairments, although there were other types of impairments too. As you know, our policy has long recognized this connection and would continue to recognize it if we promulgate the proposed rules. Since there was no specific information found on the topic, we did not prepare a written report of our findings. We no longer have copies of the articles we retrieved or records of those articles.<sup>18</sup>

With the unwillingness of SSA to identify the sources underlying this change, it is impossible to determine whether they are any more scientific or reliable than the source cited by Judge Meisburg, "The Simpsons."

Both advocates and SSA might ponder whether, under these circumstances, SSA has met the standard enunciated by the Supreme Court that, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis beyond that which may be required when an agency does not act in the first place."<sup>19</sup>

**Smoking, drinking, using drugs.** By virtue of two congressional enactments in the 1990s, persons disabled by current use of drugs or alcohol are denied benefits.<sup>20</sup> Judge Meisburg is certainly correct that our policies in this country toward tobacco are inconsistent. If his proposal to deny benefits where tobacco use is "material" to disability is intended to be consistent with the current drug and alcohol abuse policy, it may well merit consideration. Materiality in this context would mean that benefits would be denied only if the person would not be disabled in the near future if he abandoned his habit.

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based upon the evidence in the record. If the ALJ decision is supported by “substantial evidence” and conforms to the law and the regulations, it should be affirmed. If new and material evidence affecting the claim becomes available after the decision, the claimant should be required to ask the ALJ to reopen the case for a new hearing, or file a new claim, with a request to reopen the prior claim based on new evidence.

At present, the Appeals Council does not utilize federal court case law precedent in its decision making, while ALJs do this routinely. The Appeals Council should be required to do so.

This relates to the policy of the agency to not “acquiesce” to federal court decisions with which they disagree, which is now the subject of congressional hearings and proposed legislation requiring SSA to abide by federal court precedent in the judicial circuit where the decision is rendered.<sup>9</sup> There have been proposals to abolish the Appeals Council, but this might put an undue burden on the federal courts (which could be remedied by hiring more federal magistrates or creating one federal appellate court for disability appeals). It is an anomaly that we have the only system of justice wherein lower-graded Appeals Council judges who often do not have trial experience and do not use federal court precedent in their decision making can overrule the decisions of higher graded ALJs with extensive trial experience. One solution would be to make Appeals Council judges ALJs chosen from the Office of Personnel Management register.

## **Give SSA ALJ's the power to issue and enforce orders, subpoenas and contempt citations.**

At present, SSA ALJs have little real power to control the proceedings before them. Unlike state and federal judges (who often decide cases that involve claims worth much less from a monetary viewpoint) SSA ALJs have no contempt power, no real authority to enforce subpoenas, and even no real authority to issue orders related to the cases they are adjudicating. I was informed recently that an SSA ALJ had no authority to issue an order requiring an attorney to submit a post-hearing brief discussing certain key issues of fact and law relating to his client's case, although ALJs in other agencies issue such orders routinely. The Social Security Act (§ 423 (d)(5)(A)) provides that “an individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Commissioner or Social Security may require.” I propose that the SSA adopt regulations pursuant to this statutory provision which gives ALJs the authority to issue orders requiring the production of evidence, and to issue orders requiring a claimant's representative to file a brief or position statement on factual and legal issues in the case if the ALJ deems this to be appropriate or helpful to the adjudica-

tion. This seems elementary. The proposed regulation could also give the ALJ the authority to issue contempt citations and enforce subpoenas by the use of civil fines. ALJs should also be given the authority to reduce fees of representatives who disobey orders or who are found in contempt. These changes would produce a more efficient and productive adjudication process that would help to ensure that only truly meritorious claims are paid.

## **Make the Office of Hearings and Appeals (OHA) an independent agency of the federal government, much like the Office of Special Counsel is independent of the Merit Systems Protection Board.**

This move would underline the independence of OHA from SSA and ensure the independence of OHA ALJs in their decision making. During the Reagan years, there was pressure on ALJs to deny disability claims. Now, under President Clinton, ALJs complain about pressure to grant claims. ALJs should be under no political pressure one way or the other, but should be totally independent in their decision making and in the manner in which they develop the evidence in a particular case. OHA could still receive policy updates and rulings from SSA, as well as other regulatory information, but could be run as a separate, independent agency. This would be a step toward an independent ALJ corps which has been proposed in Congress for several years. ALJs should not be employed by the agency for which they are deciding cases — this is an inherent conflict of interest.

There is no doubt that millions of Americans are truly disabled due to accidents, chronic pain and other disabling conditions. For those who are truly suffering, we should make the process as painless and as efficient as possible, especially since most claimants have paid into the Title II insurance system during their working years and are entitled to disability payments if they truly are unable to work. ALJs are now correctly paying about 65 percent of all claims. But there are also millions of “borderline” cases that should be scrutinized very closely: this is the mission of the ALJ. Today, so many people are on disability that a shortage of workers actually exists in some areas of the country. Moreover, it is a known fact that work is very therapeutic, and may be “just what the doctor ordered,” for those suffering from borderline physical or mental conditions that heal over time. But, it is a “no-brainer” that a person who “gives up” and sits at home, watching TV, gaining weight, smoking 60 cigarettes per day, drinking a case a beer every day, smoking marijuana and using other illegal drugs, is likely to get worse rather than better and may always be disabled and a ward of the state. Activity and work are often far better physically and mentally than disability payments. To take an extreme case to prove a point, a claimant who can smoke 60 cigarettes per day and drink 24 beers per day has excellent concentration, hand-eye coordination, and manual dexter-

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## Abolish disability for children.

Of course, we all wish we could abolish disability for children. Nevertheless, there are many children with serious disabilities in this country even though, as Judge Meisburg notes, we do not normally expect children to work in the sense of full-time employment. Although not noted by Judge Meisburg, the wisdom of retaining cash benefits for disabled children in poor families was fully debated by Congress during the legislative process

fied few cases of suspected coaching and very few of the children involved received SSI benefits.”<sup>23</sup> If there are, in fact, isolated cases of “coaching,” it is appropriate to deny benefits and possibly even seek — in extreme cases — criminal sanctions. But the fact that a few people may try to “work the system,” is no more a basis to eliminate this program than it would be to eliminate federal income taxes.

## Abolish disability for persons who cannot speak English.

Judge Meisburg asserts that the effect of considering the inability of a claimant to speak English means that

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***But the fact that a few people may try to “work the system,” is no more a basis to eliminate this program than it would be to eliminate federal income taxes.***

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leading to enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (more commonly known as the Welfare Reform Act.)<sup>21</sup>

If Judge Meisburg’s proposed “Kiddicare” program would really cover all additional costs incurred by an indigent family trying to do a good job of raising a child with significant disabilities, and if such a program could be administered without great expense by appropriate governmental units, then it would certainly deserve consideration. One would assume, of course, that it would include the cost of tutoring, making a home wheelchair-accessible, purchasing a wheelchair-accessible van, transportation to such things as therapy sessions and medical visits, reimbursement for work opportunities the parent(s) had to forgo to care for the child, etc.<sup>22</sup> The point is that many of the costs in such situations hardly fall into what is traditionally covered by public or private medical insurance plans.

It is unfortunate that Judge Meisburg has revived the seemingly dead issue of parents coaching children to misbehave so they can get Supplemental Security Income (SSI) benefits. As part of the legislative process for the Welfare Reform Act of 1996, the House of Representatives requested the General Accounting Office to study this repeated allegation. The GAO, reviewing SSA’s own efforts to determine whether this problem is real and significant, concluded, “Both of these initiatives identi-

“more than half the city of Miami and much of the state of California could potentially be found to be disabled!”

It may be, as Judge Meisburg suggests, that more than half the population of Miami and much of the population of California are “illiterate or unable to communicate in English,”<sup>24</sup> but frankly I doubt it, and Judge Meisburg cites no authority (not even “The Simpsons”) for this novel proposition. Even if true, it would hardly equate to half of those populations receiving disability benefits for the simple reason that such an inability to communicate in English *only* becomes a vocational factor at step 5. Thus, it is only relevant to disabled persons who have already been found to be not working, severely impaired and unable to return to any work they have performed in the past 15 years. Unless large parts of the population of Miami and California (and Puerto Rico) are so afflicted, something is wrong with Judge Meisburg’s math.

Carping aside, this may be a situation, at least in some parts of the country, where, occasionally, vocational expert testimony will be at variance with the result mandated by the Medical Vocational Guidelines (the grids). If, in an individual case, it could be demonstrated through valid testimony that the occupational base was not significantly eroded for a claimant, then that might result in vocational testimony trumping the grids.<sup>25</sup> I

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ity and can almost certainly do some type of unskilled work!

The Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) were passed by Congress in 1968 to prevent discrimination against older workers and job applicants, assist disabled persons to return to work, and make employers sensitive to disabilities and accommodate special needs. The federal government should strive to fully enforce these laws, and SSA disability law should not work at cross purposes with the ADEA and the ADA.<sup>10</sup> SSA disability should pay only those persons clearly unable to work, and should encourage as many claimants as possible to return to work when able, utilizing disability payments for support in the interim period of rest, recuperation, treatment, and rehabilitation.

President Dwight D. Eisenhower warned the nation in 1956 about the staggering potential costs of a federal disability program, and the tendency of such a program to make citizens overly dependent upon federal benefits, destroying their will and incentive to return to the workforce as productive citizens. As baby boomers reach age 50 and a new wave of disability claims approaches, the changes proposed here will go a long way toward addressing President Eisenhower's two concerns. **TFL**

*Judge Meisburg is U.S. administrative law judge assigned to the Office of Hearings and Appeals, Social Security Administration, Jacksonville, Fla. He has served as an ALJ with OHA for six years, and has 28 years of federal legal service in seven agencies: OHA (Louisville and Jacksonville); Equal Employment Opportunity Commission (Atlanta and Miami); Department of Justice (Washington, D.C.); U.S. District Court/Louisville, Ky.; U.S. House of*



*Representatives (Washington, D.C.); Office of Special Counsel/MSPB (Washington, D.C.); and Federal Deposit Insurance Corporation (Orlando, Fla).*

## Endnotes

<sup>1</sup>*The World Almanac and Book of Facts*, 1999.

<sup>2</sup>This Grid Rule is found at 20 C.F.R. Part 404, Subpart P, Appendix 2, Rule 201.01.

<sup>3</sup>Such jobs include (1) electronic surveillance systems monitor, Dictionary of Occupational Titles (DOT) #379.367-010, Unskilled/sedentary, 131,000 jobs in the national economy; (2) Information Clerk, DOT #237.367-022, unskilled/sedentary, 6,569 jobs in national economy; (3) Stuffer/toys, DOT #731-685-014, Unskilled/Sedentary, 297,582 jobs in national economy, (4) Tube Operator, DOT #239.687-014, Unskilled/sedentary, 18,898 jobs in national economy.

<sup>4</sup>This regulation is found at 20 CFR 404.1530 (Title II claims) and 416.930 (Title 16/SSI claims).

<sup>5</sup>See Hon. John M. Meisburg Jr., *Smoking, Disability and Saving America from Bankruptcy*, *THE FEDERAL LAWYER* (March/April 1998).

<sup>6</sup>42 U.S.C. 423 (d)(2)(c) and 1382c (a)(3)(j) (Contract with America Advancement Act, 1996).

<sup>7</sup>SSA apparently has recently adopted this view, according to statements made in the recent DA&A training given all ALJs nationwide; but no formal policy guidance has been issued.

<sup>8</sup>This regulation is found at 20 CFR Part 404, Subpart P, Appendix 2.

<sup>9</sup>The Federal Agency Compliance Bill (H.R. 1924) has been assigned to the House Judiciary Subcommittee on Commercial and Administrative Law; this bill would require all federal agencies to abide by the federal court decisions at least in the judicial circuits in which the decisions are rendered.

<sup>10</sup>See Matthew Diller, *Dissonant Disability Policies: The Tension between the ADA and the Federal Disability Benefit Program*, 76 *TEXAS LAW REVIEW* 5 (April 1998).

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doubt, however, that in drafting rules for a national program, SSA will or should conclude that unemployed persons with severe impairments who cannot return to past relevant work are not also, in the main, vocationally disadvantaged by an inability to communicate in English.

## **Prohibit "Re-opening" of old claims; limit Title II "back benefits" to one year prior to the Application date.**

*Reopening.* Currently there are strict time limits and conditions on reopening claims, except for extreme circumstances such as later-acquired evidence that a wage-earner was, in fact, dead.<sup>26</sup> Reopening is only allowed after 12 months for "good cause" which is principally based on "new and material evidence" being furnished. In my practice experience over two decades, this typically arises in situations where mentally ill or mentally retarded persons previously filed claims asserting only physical disabilities. They were either unaware or ashamed of their mental disabilities, or simply did not understand the vocational relevance of those disabilities. Thus, for example, my client who had abandoned a claim for disability based on having "arthritis in every joint of his body" never bothered to inform SSA of his ongoing schizophrenia and his years as an inpatient in mental hospitals. Yes, SSA could have saved money by refusing to open his prior claim and that refusal would not have been reviewable by a court,<sup>27</sup> but surely it was appropriate not to financially punish such a person for the effects of the very disease process which in fact rendered him totally disabled.

*Limit Title II "Back Benefits" to one year prior to the application date.* Judge Meisburg is simply mistaken in his belief that "back benefits" ... are allowed in Title II insurance claims, dating back to the alleged onset date, which could be as much as 10 years prior to the application date." This assertion is incorrect in two ways. First, Title II benefits *never* date back to the alleged onset date. Rather, "benefits do not begin until you have been disabled for a full five months."<sup>28</sup> Second, it is impossible for benefits to date back 10 years prior to the claimant's initial application. This is because the five month "waiting period can begin no earlier than the 17th month before the month you apply — no matter how long you were disabled before then."<sup>29</sup> Inasmuch as 17-5=12, Title II back benefits already *are* limited to 12 months (1 year) prior to initial application. In other words, Judge Meisburg's proposal merely restates the current law and thus could hardly "save hundreds of millions if not billions of dollars."

## **Create "Temporary Total Disability" and give the ALJs Continuing Disability Review (CDR) continuing jurisdiction.**

Why? A continuing disability review will, in effect, lead to a new *initial* determination. That is not what ALJs do; it is the province of the state agencies. An ALJ can already note in a favorable decision that a case should be "diaried" for an early CDR. The CDR should then be performed by the state agency which has in place the machinery for obtaining updated records. Would, under Judge Meisburg's proposal, the Office of Hearings and Appeals undertake to contact all treatment sources and obtain such records? What would that do to the efficiency of OHA? And should recipients, in the first instance, be forced to a hearing — and often attorneys' fees — for a first level CDR?

## **Prohibit "reapplication" for disability based on the same impairments within one year of an unfavorable ALJ decision.**

Is this change meant for administrative efficiency and economy at the expense of denying legitimate claims? Would Judge Meisburg impose such a limitation even in the case of an intervening event involving the same impairment such as a second heart attack? He proposes an exception "if the claimant obtains a statement from his or her physician stating that the condition had worsened. ..." Given that most claimants are older individuals, often with progressive conditions involving the musculo-skeletal, cardiovascular, or other major systems, I suspect that this (humane) exception would eventually swallow the new rule.

## **Close the evidentiary record after the ALJ decision; require the Appeals Council to abide by and use federal court precedent in their decision making.**

*Closing the record after the ALJ decision.* Especially where, as frequently happens, a claimant was unrepresented before the ALJ, it makes perfect sense to allow such new and material evidence if SSA's primary goal is truth-seeking rather than administrative efficiency. Instead, Judge Meisburg recommends that "the claimant should be required to ask the ALJ to reopen the case for a new hearing, or a new claim filed, with a request to reopen the prior claim based on new evidence." The first alternative is an interesting one, which would require regulatory clarification with regard to such matters as time limitations, justification for prior failure to submit, etc. Judge Meisburg's second alternative — a new claim filed with a request to reopen the prior claim — flatly contradicts his earlier proposal to "Prohibit 're-opening' of old claims." It is difficult to see how both

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proposals could be effected.

*Require the Appeals Council to Abide by Federal Court Precedent.* In more than 20 years of representing Social Security claimants, I have not known ALJs to "utilize federal court caselaw precedent in their decisionmaking ... routinely." Such practice would appear to contravene both SSA regulations<sup>30</sup> and a 1997 directive from SSA's general counsel to all ALJs that they are "bound to follow agency policy even if, in the ALJ's opinion, the policy is contrary to law."<sup>31</sup>

Nevertheless I wholeheartedly agree with Judge Meisburg and many ALJs, federal judges, and other commentators, that SSA's current policy of acquiescence/non-acquiescence, is simply wrong. It constitutes an insult to both administrative law judges and administrative appeals judges, and a disservice to deserving claimants and reviewing courts.

## **Give SSA ALJs the power to issue and enforce orders, subpoenas and contempt citations.**

The frustration of some ALJs with some representatives (and vice versa) is certainly understandable. However, this is an area which, although not mentioned by Judge Meisburg, has been the subject of recent review and action by SSA. In August 1998, the agency adopted new Standards of Conduct for Claimant Representatives.<sup>32</sup> SSA considered and rejected some of Judge Meisburg's specific proposals. As one who is on record as advocating the submission of all evidence, favorable and unfavorable alike,<sup>33</sup> I concur that the bottom line must always be the truth-seeking function. Where a representative or claimant purposely seeks to thwart that function, I would be the last person to object to the use of the mechanisms, both civil and criminal, that are already in place to address such misconduct, including the Fraud and Abuse provisions of the Social Security Independence and Program Improvements Act of 1994.<sup>34</sup>

## **Make the Office of Hearings and Appeals (OHA) an independent agency of the federal government.**

Hear, hear! I don't know whether such a change will save or cost the government money in the long run; there are simply too many variables. But surely Judge Meisburg is correct that having ALJs employed by the agency for which they are deciding cases, and which must necessarily be concerned with how many claims are paid, creates an inherent conflict of interest.

....

Perhaps the most troubling aspect of Judge Meisburg's article is the final portrait he paints of a disability recipient. He writes:

But, it is a "no brainer" that if a person "gives up" and sits at home, watching TV, gaining weight, smoking 60 cigarettes per day, drinking a case of beer every day, smoking marijuana and using other illegal drugs, he or she is likely to get worse rather than better and may always be disabled and a ward of the state.

Yes, if this is really a typical recipient of benefits, then something is drastically wrong with our policies. But if, as I believe after having sat with, interviewed, evaluated, and represented disabled human beings for over two decades, this is a hideous caricature, then the fault lies elsewhere.

Judge Meisburg ends by citing the Age Discrimination in Employment Act and the Americans with Disabilities Act (ADA).<sup>35</sup> Surely the ADA is a great step forward for disabled persons; and, as an advocate, I would far prefer to represent persons with disabilities seeking, or seeking to maintain, employment, than seeking SSDIB or SSI. The good news is that the Supreme Court has recently given the ADA a construction that allows it to work in tandem with the Social Security Act. In *Cleveland v. Policy Management Systems Inc.*,<sup>36</sup> the Court unanimously ruled that application for, or receipt of, Social Security benefits will not automatically bar an individual with disabilities from pursuing an employment discrimination claim under the ADA. The bad news is that the Court subsequently decided three cases at the end of the last term, reading the employment discrimination provisions of the ADA very narrowly.<sup>37</sup>

If we are to have sound policies which encourage people to overcome their disabilities and maintain employment, a good first step would be for Congress to revisit the ADA and amend it so that courts view disabled people as employers do in the real world. This necessary re-examination of disability policy under the ADA, and ongoing reassessment of Social Security policies, will best be served by treating Americans with disabilities fairly, recognizing that they, like the rest of us, are affected by economic forces, and, most importantly, by refraining from stigmatizing or demonizing this portion of our population. **TFL**

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## Endnotes

<sup>1</sup>Congress may have finally come to grips with this issue in a meaningful way. On Dec. 17, 1999, Pres. Clinton signed into law the "Ticket to Work and Work Incentives Improvement Act of 1999." Pub. L. 106-170. This act contains provisions which hold out the promise — if properly implemented — of encouraging disability benefits recipients to work, rather than punishing them.

<sup>2</sup>The rules for adults are found at 20 CFR § 404.1520 *et seq.* for Title II, Social Security Disability Insurance benefits, and § 416.920 *et seq.* for Title XVI, Supplemental Security Income (SSI) benefits. The modified sequential evaluation for children seeking SSI is found at § 416.924 *et seq.*

<sup>3</sup>20 CFR Part 404, Subpart P, App. 2. See *Heckler v. Campbell*, 461 U.S. 458 (1983).

<sup>4</sup>64 F.R. 18566, 18567, April 15, 1999.

<sup>5</sup>*Id.* at 18568.

<sup>6</sup>Challenges to the preferential treatment of persons disabled by blindness have been summarily dismissed. See *Spragens v. Shalala*, 36 F.3d 947 (10th Cir. 1994) — the disparity must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." See also *Vaughn v. Sullivan*, 83 F.3d 907 (7th Cir. 1996) — upholding preferential treatment of blind persons under the Medicaid program.

<sup>7</sup>*Bowen v. Yuckert*, 482 U.S. 137 (1987).

<sup>8</sup>*Id.* at 158-9.

<sup>9</sup>See *Bailey v. Sullivan*, 885 F.2d 52, 59-61 (3rd Cir. 1987).

<sup>10</sup>Brief of the United States and EEOC as Amici Curiae, *Cleveland v. Policy Management Systems Corp.*, No. 97-1008.

<sup>11</sup>20 CFR §§ 404.1565, 416.965

<sup>12</sup>20 CFR §§ 404.1566, 416.966 N.B. The problems with the hopelessly outdated *Dictionary of Occupational Titles* apply at step 5 as well as at step 4.

<sup>13</sup>See CFR §§ 404.1567, 416.967.

<sup>14</sup>29 USC § 621 *et seq.*

<sup>15</sup>20 CFR §§ 404.1530, 416.930.

<sup>16</sup>64 F.R. 46122-46129 (Aug. 24, 1999), effective Oct. 25, 1999.

<sup>17</sup>63 F.R. 11854 (March 11, 1998).

<sup>18</sup>Letter of July 9, 1998, from SSA Freedom of Information Officer Darnell Blevins to Nancy G. Shor, executive director, National Organization of Social Security Claimants' Representatives.

<sup>19</sup>*Motor Vehicles Mfrs. Ass'n. v. State Farm*, 463 U.S. 29, 42 (1983).

<sup>20</sup>The Social Security Independence and Program Improvements Act of 1994, P.L. 103-296, and the Contract with America Advancement Act of 1996, P.L. 104-121.

<sup>21</sup>P.L. 104-193. See *United States Code Congressional and Administrative News*, 104th Congress — Second Session, 1996, Vol. 5.

<sup>22</sup>The extra costs (including lost income) to poor families with disabled children was recently documented in

a report of the General Accounting Office entitled *SSI Children — Multiple Factors Affect Families' Costs for Disability-Related Services*, GAO/HEHS-99-99, June 1999.

<sup>23</sup>SSA Initiatives to Identify Coaching, GAO/HEHS — 96-96R, March 1996.

<sup>24</sup>20 CFR Part 404, Subpt. P, App. 2.

<sup>25</sup>Compare *Cooper v. Sullivan*, 880 F.2d 1152 (9th Cir. 1989) and *Lawson v. Apfel*, 46 F. Supp. 2d 941 (W.D. Mo. 1998).

<sup>26</sup>20 CFR §§ 404.988-9, 416.1488-9.

<sup>27</sup>*Califano v. Sanders*, 430 U.S. 99 (1977).

<sup>28</sup>20 CFR § 404.315(a)(4).

<sup>29</sup>*Ibid.*

<sup>30</sup>20 CFR §§ 404.985, 416.1485.

<sup>31</sup>Memorandum from Social Security Administration Office of the General Counsel, Legal Foundations of the Duty of Impartiality in the Hearing Process and its Applicability to Administrative Law Judges 5-6 (Jan. 28, 1997).

<sup>32</sup>63 FR 41404-41418 (Aug. 4, 1998).

<sup>33</sup>Robert E. Rains, *The Advocate's Conflicting Obligations Vis-a-Vis Adverse Medical Evidence in Social Security Proceedings*, BRIGHAM YOUNG U.L. REV. 99 (1995).

<sup>34</sup>Implementing regulations are found at 20 CFR Part 498. See also SSR 00-2p, 65 FR 13140-2 (Feb. 25, 2000).

<sup>35</sup>Judge Meisburg is mistaken in his assertion that these acts "were passed by Congress in 1968." As their full names imply, the "Age Discrimination in Employment Act of 1967," P.L. 90-202, was enacted in 1967, and the "Americans with Disabilities Act of 1990," P.L. 101-336, was enacted in 1990.

<sup>36</sup>119 S.Ct. 1597 (1999).

<sup>37</sup>*Sutton v. United Air Lines*, 119 S.Ct. 2139 (1999) — although employer denied employment based on applicants' conditions *without* mitigating devices (eyeglasses), Court deems them not disabled because of their conditions *with* mitigating devices. *Murphy v. United Parcel Service*, 119 S.Ct. 2133 (1999) — same, also person not covered by ADA where employer regarded him perhaps erroneously as unable to perform his job, because employer didn't believe he was unable to perform all jobs in the field. *Albertson's v. Kirkingburg*, 119 S.Ct. 2162 (1999) — no violation of ADA to refuse to hire applicant on grounds that he didn't meet federal safety regulations where administering federal agency had granted him a waiver.