

REDEFINING DISABILITY: INCREASING EFFICIENCY AND FAIRNESS IN SSDI

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Social Security Disability Insurance (SSDI) struggles to remain solvent in an era where beneficiaries continue to enter the program faster than they are exiting. This relative increase in beneficiaries can be attributed to several factors, including the aging U.S. population and recent irregularities in benefit determinations. Despite these modern challenges, the definition of disability under the insurance program has remained unchanged for over fifty years. To address these issues and SSDI's potential insolvency, Ms. Weinberger-Divack explores in her Note the possibility of reworking the definition of "disability" used to determine SSDI benefits. Ms. Weinberger-Divack begins by examining SSDI eligibility requirements, the history of the Social Security Administration's (SSA) disability definition, and the overall benefits-determination process. The Note then analyzes how federal courts have interpreted the SSA disability definition, and investigates alternative approaches undertaken by the U.S. Department of Veterans Affairs, the Americans with Disabilities Act, and the disability benefits system in the Netherlands. Combining characteristics of these three approaches, Ms. Weinberger-Divack ultimately recommends SSDI adopt a three-step disability definition that considers whether an applicant is earning above SSA's substantial gainful activity threshold, the applicant's major life activity impairments, and whether the applicant is entitled to full or partial benefits.

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I. Introduction

Social Security Disability Insurance (SSDI) is in danger of disappearing. The Eisenhower-era program designed to “help workers who are ‘permanently and totally disabled,’”¹ is anticipated to be the first large federal benefit program to run out of funds.² It is estimated that Medicare and Social Security will remain solvent without adjustments through 2029 and 2040 respectively, but the SSDI Trust Fund may run out of money in as few as four years.³ The financial strain on the Trust Fund is caused by a simple phenomenon: SSDI beneficiaries are entering the program faster than they are leaving.⁴ Many beneficiaries would prefer to work rather than collect benefits, but barriers caused by employers and fears of losing medical benefits prevent individuals from regaining employment.

The stories of two SSDI beneficiaries highlight the plight of individuals who want to return to work. Consider the case of Ruth Bates.⁵ Ms. Bates was almost sixty years old when she took a medical leave from a large grocery store chain, but she was not ready to stop working permanently.⁶ Ms. Bates has multiple sclerosis (MS) and bipolar disorder, and for several years she was able to complete her job with only minor accommodations.⁷ Born in 1948, Ms. Bates planned to work at the camera counter until she retired, but her plans were derailed when a new supervisor took over.⁸ Past supervisors exempted Ms. Bates from the task of stocking shelves because her MS made it difficult.⁹ The new supervisor, however, insisted that she stock the shelves in addition to her other duties, and as a result she had to take medical leave and rely on SSDI for financial support.¹⁰ She aspired to return to her job at the camera counter; unfortunately, the store had a

1. Motoko Rich, *Disabled, but Looking for Work*, N.Y. TIMES, Apr. 6, 2011, at B1.

2. Damian Paletta, *Insolvency Looms as States Drain U.S. Disability Fund*, WALL ST. J., Mar. 22, 2011, at A1 [hereinafter Paletta, *Insolvency Looms*].

3. *Id.* According to government auditors, the disability fund is scheduled to run dry in four to seven years absent federal intervention. *Id.*

4. *Id.*

5. Ruth Bates is a pseudonym.

6. Interview with Alan Goldstein, Senior Attorney, Equip for Equality (Mar. 4, 2012). Mr. Goldstein represented Ms. Bates when she filed suit against Jewel-Osco under the Americans with Disabilities Act. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

practice of refusing to reinstate employees who had taken leave.¹¹ Ms. Bates is an example of an older SSDI recipient who wants to return to work but is unable due to her disability and her employer's failure to accommodate.

Like Ms. Bates, Christopher Howard is an SSDI recipient who would like to leave the benefits program. Mr. Howard is a former construction worker who herniated several discs in his back when he fell from a cell phone tower.¹² At age thirty-six, a \$574 monthly check from SSDI is Mr. Howard's only source of income.¹³ Although he could continue to receive benefits until he reaches retirement age, he "desperately wants to work," and like many who are unemployed he desires the feeling of independence and self-sufficiency that employment provides.¹⁴ Additionally, Mr. Howard has a more beneficent motive: to make sure that SSDI remains available for individuals who have more severe disabilities than his own.¹⁵ Like many SSDI beneficiaries, he is tempered by fears of returning to work and losing the cash and medical benefits associated with SSDI.¹⁶

Mr. Howard's impulse to preserve SSDI for future generations is especially timely given the financial difficulties facing the Trust Fund.¹⁷ Looming insolvency is driven in large part by the influx of beneficiaries who have joined the program: SSDI dramatically increased from 6.6 million in 2000 to 10.2 million in 2010.¹⁸ This increase in beneficiaries can be attributed to several factors, including the lagging economy, aging U.S. population, irregularities in benefits deter-

11. *Id.* Settling the dispute took approximately five years, and Ms. Bates was no longer interested in returning to work at the end of the ordeal. *Id.*

12. Rich, *supra* note 1, at B1.

13. *Id.*

14. *Id.*

15. *Id.* Mr. Howard comments, "I would feel better if I worked and made my own money . . . [b]ecause that way when somebody who needs it even more than I do, the Social Security would be there for them." *Id.*

16. *Id.* Mr. Howard discarded information about services to help him return to work due to the "bureaucratic language" and "fearing the loss of medical coverage." *Id.* In general, SSDI beneficiaries qualify for Medicare after two years of participation in the program. *Id.*

17. SSDI is funded through a flat rate 1.8% payroll tax that is used to support payments to SSDI beneficiaries. RICHARD V. BURKHAUSER & MARY C. DALY, *THE DECLINING WORK AND WELFARE OF PEOPLE WITH DISABILITIES: WHAT WENT WRONG AND A STRATEGY FOR CHANGE* 56 (2011). After benefit payments are made, any amount left over is applied to the Social Security Trust Fund. *Id.*

18. Paletta, *Insolvency Looms*, *supra* note 2, at A1.

minations, as well as workplace stereotypes and prejudices.¹⁹ The inconsistencies that plague the benefits-determination process are well documented. For instance, *The Wall Street Journal* recently exposed the severity of benefits irregularities and increases in new recipients concentrated in specific geographic areas, including Texas, New Hampshire, and Puerto Rico.²⁰ In May 2011, an administrative law judge (ALJ) in West Virginia stepped down after reports surfaced that he approved SSDI benefits in 99.7 percent of his decisions.²¹ The West Virginia ALJ is just one extreme example of a widespread problem. Disability allowance rates—SSDI awards as a percentage of applications—vary significantly across states, and between Disability Determination Service decision makers and ALJs.²²

Despite the changing economy, increasing population, and difficulty of maintaining consistency in determination decisions, the current definition of disability has remained essentially unchanged for over fifty years.²³ As a result, the definition is not well suited for the challenges facing today's disability insurance program. Impending insolvency, beneficiaries who want to return to work but who are discouraged by their employers, or who are afraid of losing Medicare coverage, and uneven benefits determinations across geographic regions all point to the need for structural change in SSDI.

This Note will explore one possible avenue for reform: reworking the definition of disability that the Social Security Administration (SSA) uses to determine SSDI benefits.²⁴ First, the Note explains the

19. *Id.*; Rich, *supra* note 1, at B1. Puerto Rico boasts one of the highest acceptance rates in the country, approving 63.0% of SSDI applicants, while West Virginia has one of the lowest acceptance rates in the country, with just 36.7% of applicants entering the program. Paletta, *Insolvency Looms*, *supra* note 2, at A1.

20. Damian Paletta, *Disability Judge Spurs Benefits Investigation*, WALL ST. J., May 20, 2011, at A3 [hereinafter Paletta, *Benefits Investigation*].

21. *Id.*

22. NAT'L RESEARCH COUNCIL, THE DYNAMICS OF DISABILITY: MEASURING AND MONITORING DISABILITY FOR SOCIAL SECURITY PROGRAMS 10 (Gooloo S. Wunderlich et al. eds., 2002).

23. Frank S. Bloch, *Medical Proof, Social Policy, and Social Security's Medically Centered Definition of Disability*, 92 CORNELL L. REV. 189, 197 (2007). SSA currently defines disability for purposes of SSDI as the "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." 42 U.S.C. § 423(d) (2006).

24. SSA uses the same definition of disability to determine benefits for both SSDI and Supplemental Security Income (SSI) applicants. BURKHAUSER & DALY, *supra* note 17. SSI is a benefits program for people with disabilities who have lim-

advantages and disadvantages of reworking the SSDI disability determination process. Part II details SSDI eligibility requirements, the history of the SSA disability definition, the five-step determination process, and the factors behind the enrollment influx. Part III analyzes how federal courts have interpreted the SSA definition of disability and the attendant five-step determination process. Part III further examines three alternatives to the SSA disability definition by exploring the determination mechanisms used by the U.S. Department of Veterans Affairs, the Americans with Disabilities Act, and the disability benefits system in the Netherlands. Part IV recommends a new approach that combines aspects of all three alternatives to promote the goals of SSDI while increasing the financial stability of the Trust Fund.

II. Background

A. Eligibility for SSDI

Although SSDI serves as an essential safety net for millions of Americans with disabilities each year, not every individual with disabilities is eligible for benefits. SSDI provides financial benefits only for working-age individuals who are no longer able to earn at the level of Substantial Gainful Activity (SGA) as a result of their disabilities.²⁵ SSDI provides cash benefits to individuals who cannot work because they have a medical condition that is expected to last at least one year or result in death.²⁶ In 2012, the average SSDI benefit was \$1,130 for a worker with a disability.²⁷ Indirectly, SSDI provides access to medical insurance for most beneficiaries, and after two years of receiving disability benefits, an individual automatically qualifies for Medicare coverage.²⁸ For many individuals, access to Medicare is

ited work histories, and provides significantly more modest benefits relative to SSDI. *Id.* at 62–63.

25. 42 U.S.C. § 423(a).

26. *Id.* at § 423(d)(1)(A); SOC. SEC. ADMIN., PUB. NO. 05-10029, SOCIAL SECURITY DISABILITY BENEFITS 4 (2011), available at <http://www.ssa.gov/pubs/10029.pdf>. Additionally, a qualifying individual's spouse and children may also be entitled to receive SSDI payments under certain conditions. *Id.* at 12–13.

27. *Monthly Statistical Snapshot, Jan. 2013*, SOC. SECURITY ONLINE, http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/ (last visited Mar. 9, 2013). Spouses and children who were eligible for SSDI benefits received an average of \$303.45 and \$336.51 respectively. *Id.*

28. SOC. SEC. ADMIN., *supra* note 26, at 14.

even more important than the cash benefits that SSDI provides.²⁹

The rules governing SSDI qualification are complex and vary depending on the age of the applicant.³⁰ Even before an applicant is required to prove the existence of a disability,³¹ she or he must also meet an earnings requirement.³² Because SSDI is funded through payroll taxes, SSDI is generally only available to individuals who have worked prior to the onset of disability.³³ The earnings requirement has two prongs: (1) recent work, and (2) duration of work. The specific demands of each prong depend on the age of the applicant.³⁴ For example, an individual over age thirty-one must have worked a total of five out of the ten years prior to the onset of the disability to satisfy the “recent work” prong.³⁵ A fifty-year-old worker who develops a disability that makes it impossible for her to work generally needs a total of seven years of past work history in order to meet the “duration of work” test.³⁶ Thus, the “recent work” and “duration of work” requirements will serve to exclude workers with sparse work histories even before the issue of disability arises in the benefits determination.

B. History of the SSA Disability Definition

The Social Security program was initially conceived as a safety net for retired workers; as such, it did not originally include disability as a basis for eligibility.³⁷ The first time that Congress defined disability for the purposes of Social Security was in 1954 when it enacted a “disability freeze” that allowed wage earners to remain eligible for retirement benefits after developing a disability that caused them to stop working.³⁸ The definition of disability for purposes of the “disability freeze” was the “inability to engage in any substantial gainful

29. See, e.g., Ticket to Work and Self-Sufficiency Program, 42 U.S.C. § 1320b-19 (2000).

30. SOC. SEC. ADMIN., *supra* note 26, at 6.

31. See *infra* Section II.C.

32. 42 U.S.C. § 423(c)(1) (2006); SOC. SEC. ADMIN., *supra* note 26, at 5.

33. BURKHAUSER & DALY, *supra* note 17; see also Bloch, *supra* note 23, at 195 (discussing the creation of disability insurance based on the social insurance program model that preceded it). Some individuals who do not have disabilities qualify for SSDI benefits through their parents. *Benefits for Children*, SOC. SEC. ADMIN., <http://www.ssa.gov/pubs/10085.html#90=-1> (last visited Mar. 9, 2013).

34. SOC. SEC. ADMIN., *supra* note 26, at 5-6.

35. *Id.* at 5.

36. *Id.*

37. Bloch, *supra* note 23, at 193.

38. *Id.* at 197.

activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration”³⁹ In 1956, Congress incorporated this standard, essentially unchanged, into the Social Security Act when it added disability insurance benefits to the social insurance program.⁴⁰

Crafting the definition of disability for the purpose of SSDI engendered lively discussion.⁴¹ The debates surrounding the enactment of disability insurance pitted those who wanted to protect workers from the financial strain of disability against those who feared disability insurance would be misused as a free ticket out of the workforce.⁴² For instance, President Franklin D. Roosevelt felt a social program was necessary to provide economic security against “the hazards and vicissitudes of life.”⁴³ Roosevelt, and other proponents of disability insurance as a social safety net, viewed SSDI as a humane response to an inevitable economic reality.⁴⁴ Proponents argued the social insurance model would force people to save money who otherwise would not have sufficient resources to cope with disability.⁴⁵ Furthermore, social insurance would assist workers at the onset of disability, a critical moment when an individual’s situation could significantly worsen due to financial hardship.⁴⁶ Opponents of social insurance worried that such a program would only work if the premiums were high, the benefits low, and the claimants closely scrutinized.⁴⁷ This skepticism was rooted in the experience of commercial insurance companies, which incurred massive losses in the Great Depression only a few decades earlier.⁴⁸ Ultimately, those who felt disability insurance was a necessary protection for workers prevailed; however, concerns about the perverse incentives that SSDI creates continue through the present

39. Social Security Amendments of 1954, Pub. L. No. 83-761, § 216, 68 Stat. 1052, 1080 (1954).

40. See Social Security Amendments of 1956, Pub. L. No. 84-880, § 223(c)(2), 70 Stat. 807, 815 (1956) (codified as amended at 42 U.S.C. § 423(d)(1)(A) (2006)).

41. Bloch, *supra* note 23, at 195–96.

42. *Id.*

43. *Id.* at 195 n.38.

44. Jacobus tenBroek & Richard B. Wilson, *Public Assistance and Social Insurance—A Normative Evaluation*, 1 UCLA L. REV. 237, 240–42 (1954).

45. *Id.* at 240–41.

46. *Id.* at 241.

47. *Id.* at 242.

48. *Id.*

day.⁴⁹

Between 1954 and 2012, the basic statutory definition of disability for purposes of SSDI went through several amendments. One significant change was that the requirement of permanent disability—“long-continued and indefinite duration”—was altered to include disability lasting or expected to last for as little as one year.⁵⁰ Congress also specified that SSA must take into consideration the combined effects of a claimant’s impairments, having the positive effect of making the definition more closely connected with the way individuals experience disability.⁵¹ The elimination of alcohol and drug addiction as a basis for disability insurance benefits represented a significant policy shift but did not fundamentally alter the disability definition.⁵² Finally, Congress adopted amendments regarding the role of vocational factors⁵³ and determinations based on pain in order to clarify the definition.⁵⁴ Ultimately, after almost sixty years of existence, the SSA definition of disability has remained largely intact.⁵⁵

Although the basic statutory definition has scarcely changed, the economic climate for workers with disabilities has experienced a major shift. When Congress created the disability definition for SSDI the manufacturing industry made up a greater proportion of the job market.⁵⁶ Because manufacturing jobs generally require considerable physical labor, this definition was a response to the expectation that a

49. Congress acknowledged that when returning to work, SSDI beneficiaries risk losing Medicare or Medicaid coverage that has been linked to their cash benefits. Significantly, Congress recognized that this risk could be an overwhelming work disincentive, often an even greater disincentive than the loss of cash benefits. Ticket to Work and Work Incentives Improvement Act of 1999 § (a)(6), Pub. L. No. 106-170, 113 Stat. 1860 (codified at 42 U.S.C. § 1320b-19 (2010)).

50. *Id.* at § 423(d).

51. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 4(a)(1), 98 Stat. 1794, 1800 (1984) (codified as amended at 42 U.S.C. § 423(d)(2)(B) (2006)).

52. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 105, 110 Stat. 847, 852-55 (codified in scattered sections of 42 U.S.C. (2006)). In 1989, Congress recognized alcohol and drug addiction as independently qualifying impairments for purposes of the SSA definition of disability. Dru Stevenson, *Should Addicts Get Welfare? Addiction and SSI/SSDI*, 68 BROOK. L. REV. 185, 188-89 (2002). Less than a decade later, Congressional amendments excluded individuals whose drug or alcohol addiction was a “contributing factor material to their disability.” *Id.* at 192.

53. Vocational factors include age, level of education, and work history. 20 C.F.R. § 404.1520(g) (2012).

54. Bloch, *supra* note 23, at 202.

55. *Id.* at 201.

56. NAT’L RESEARCH COUNCIL, *supra* note 22, at 4.

worker who developed a significant impairment would not be able to work again.⁵⁷ Since the 1950s, however, the economy has moved away from manufacturing toward service industries, making the workplace in general less physically demanding and potentially more accommodating for individuals with physical disabilities.⁵⁸ Furthermore, advances in medicine, technology, and the law (specifically the Americans with Disabilities Act) have made employment possible for more individuals with significant disabilities.⁵⁹ The economic conditions surrounding the creation of the SSA definition of disability explain why the “substantial gainful activity” language was adopted and point to the need for reform.

Currently, SSA defines disability for purposes of SSDI as the “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.”⁶⁰ This definition consists of three basic components:

- (1) the severity requirement,
- (2) the medical causation requirement, and
- (3) the duration requirement.⁶¹

In order to meet the severity requirement an individual must be unable to perform any “substantial gainful activity.”⁶² In other words, the individual must be incapable of earning at SGA through either self-employment or holding any form of employment that exists in the national economy, given the applicant’s age, level of education, and work experience.⁶³ To satisfy the medical causation requirement, the inability to work must be the result of a “medically determinable physical or mental impairment.”⁶⁴ Impairments that meet the medical causation requirement include such diverse disabilities as: limitations in the ability to walk, visual and other sensory disorders, chronic

57. *Id.*

58. *Id.*

59. *Id.*

60. 42 U.S.C. § 423(d)(1)(A) (2006).

61. Bloch, *supra* note 23, at 201.

62. 20 C.F.R. § 404.1572 (2012); 20 C.F.R. § 404.1505 (2012) (“[Y]ou must have a severe impairment(s) that makes you unable to do . . . substantial gainful work that exists in the national economy.”).

63. Bloch, *supra* note 23, at 201.

64. 42 U.S.C. § 423(d)(1)(A).

heart failure, and intellectual disabilities such as Down syndrome.⁶⁵ The most extreme manifestations of disability generally are not litigated in regards to the medical causation requirement.⁶⁶ Disabilities such as depression,⁶⁷ mood disorder,⁶⁸ degenerative disc disease, and chronic pain syndrome⁶⁹ are more likely to be on the cusp of the causation requirement but may nevertheless meet the standard. Finally, the duration requirement limits eligibility to those individuals whose disability has lasted, or is expected to last, for a minimum of twelve months, or is expected to result in death.⁷⁰ In order to satisfy the duration requirement, the applicant must submit evidence from “accepted medical sources”—typically licensed physicians or psychologists—that is complete and detailed enough for an ALJ to determine that the disability has lasted or is expected to last for a sufficient period of time.⁷¹

When SSA first adopted its disability definition, the scope of the severity requirement was ambiguous. It was unclear whether the inability to perform any “substantial gainful activity” limited disability benefits to individuals who could not perform any work because of their disability, or if the requirement took into account the availability of positions in the then-existing job market.⁷² In order to clarify the role of labor market conditions in determining disability, Congress amended the definition of disability for purposes of SSDI to provide an explanation:

[A]n 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.⁷³

65. 20 C.F.R. § 404app. 1 (2012).

66. Bloch, *supra* note 23, at 203.

67. Lederman v. Astrue, 829 F. Supp. 2d 531, 538 (N.D. Tex. 2011).

68. Cole v. Astrue, 661 F.3d 931, 934 (6th Cir. 2011).

69. Bjornson v. Astrue, 671 F.3d 640, 641 (7th Cir. 2012).

70. 20 C.F.R. § 404.1509 (2012).

71. *Id.* Treating doctors’ records are often used. Interview with Alan Goldstein, Senior Attorney, Equip for Equality (May 6, 2012).

72. Bloch, *supra* note 23, at 203.

73. Social Security Amendments of 1967, Pub. L. No. 90-248, § 158(d)(2)(A), 81 Stat. 821, 868 (codified as amended at 42 U.S.C. § 423(d)(2)(A) (2006)).

This amendment served two purposes. First, it affirmed that vocational qualifications (i.e., age, education, and work experience) should be taken into account when making a disability determination.⁷⁴ For example, an individual who has recently become a wheelchair user and who has not completed any post-secondary education would not be considered capable of taking a high-level executive position. Therefore, the existence of executive positions in the national economy that an individual is physically capable of filling would not affect whether she or he is considered able to perform substantial gainful work.⁷⁵ In this example, the mobility impairment is not the reason that the position is not available to the individual, rather she or he will not be able to work in that field because of a vocational factor—lack of education. Second, the definition prevented local labor market conditions from being taken into consideration.⁷⁶ If an applicant is found capable of performing work available anywhere in the country, it is immaterial whether such a position exists in the region where the applicant currently lives.⁷⁷

C. Disability Determination Process

The disability determination process takes the statutory definition of disability and implements it in the real world. The SSA disability claims process proceeds in four stages.⁷⁸ First, SSA district offices complete a preliminary screening of benefits applications.⁷⁹ Second, state Disability Determination Service (DDS) agencies make disability determinations using federal regulations and SSA guidelines.⁸⁰ Third, applicants who are denied may have their claims reconsidered by the DDS agencies.⁸¹ Finally, claimants who are denied after the DDS reconsideration can request a hearing before an ALJ.⁸² After the hearing, an unsuccessful applicant may request review first by the SSA Ap-

74. *Id.*

75. *See* 42 U.S.C. § 423(d)(2)(A) (2006).

76. *Id.*

77. *See id.* (“[A disabled person is unable to engage in work] regardless of whether such work exists in the immediate area in which he lives . . .”).

78. NAT’L RESEARCH COUNCIL, *supra* note 22, at 21.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

peals Council and next by the federal courts.⁸³

SSDI applications are processed through state disability determination offices, each of which follows a five-step procedure in order to make an initial determination.⁸⁴ First, applicants must pass an earnings test. If an applicant is found to be currently working and earning more than the substantial gainful activity (SGA) threshold, then SSA will deny the benefits application.⁸⁵ SGA is defined as “work that (a) [i]nvolves doing significant and productive physical or mental duties; and (b) [i]s done (or intended) for pay or profit.”⁸⁶ Work may be considered “substantial” even if it is completed on a part-time basis, and may be considered “gainful” so long as it is the type of work done for profit, regardless of whether profit is realized.⁸⁷ In order to facilitate the determination, SSA sets a monthly SGA threshold above which an applicant generally will be considered to be engaging in SGA.⁸⁸ In 2013, the SGA for blind individuals is \$1,740, and for all other individuals with disabilities it is \$1,040.⁸⁹ Despite the ambiguous regulatory standard, because SGA is defined as a monetary amount the requirement is actually straightforward and relatively easy to apply, and as a result, very few cases are rejected at this level.⁹⁰

Second, applicants must demonstrate that they have a severe impairment that has lasted or is expected to last for at least twelve months or result in death.⁹¹ Nearly one-tenth of all applicants are denied at this step.⁹² Third, the disability determination office will check the applicant’s stated impairment against the SSA medical listings.⁹³ If the impairment is listed or judged to be equivalent to one of the medi-

83. *Id.*

84. *Coggon v. Barnhart*, 354 F. Supp. 2d 40, 49–50 (D. Mass. 2005); BURKHAUSER & DALY, *supra* note 17, at 49.

85. BURKHAUSER & DALY, *supra* note 17, at 46–47. In 2013 an individual with a disability who is not blind can earn up to \$1,040 per month, and an individual who is blind can earn up to \$1,740 per month and still qualify for SSDI benefits. *Substantial Gainful Activity*, SOC. SECURITY ONLINE, <http://www.ssa.gov/oact/cola/sga.html> (last visited Mar. 9, 2013).

86. 20 C.F.R. § 404.1510 (2012).

87. *Id.* at § 404.1572.

88. *Substantial Gainful Activity*, *supra* note 85.

89. *Id.*

90. BURKHAUSER & DALY, *supra* note 17, at 49.

91. 42 U.S.C. § 423(d)(1)(A) (2006); 20 C.F.R. § 404.1505 (2012).

92. BURKHAUSER & DALY, *supra* note 17, at 49. Nine percent of applicants were denied at the second step in 2000. *Id.*

93. 20 C.F.R. § 404app. 1 (2012).

cal listings, the application will be approved.⁹⁴ Nearly twenty percent of all applicants are approved at this step, and the remaining eighty percent simply move to the next step.⁹⁵ Fourth, if the office cannot make a determination based on the medical listing, it will evaluate the applicant in terms of “residual functional capacity.”⁹⁶ At this step, DDS will take into account past relevant work and, if necessary, vocational factors.⁹⁷ Twelve percent of all applicants are denied after the residual functional capacity evaluation.⁹⁸ Applicants who are denied benefits after the first four steps can ask for reconsideration by a second team of examiners.⁹⁹ If an applicant is rejected again after reconsideration, the fifth and final step is to submit an appeal to an ALJ.¹⁰⁰

This five-step process is onerous for many applicants. Moving through the application and decision process with the disability determination office takes one to two years on average, and those who appeal to an ALJ can expect further years of waiting before receiving a decision.¹⁰¹ In addition to long waiting times, the large percentage of applications denied every year indicates that it is difficult for applicants to accurately calculate whether their application is likely to be approved. The data demonstrates that the SGA earnings threshold is clear to SSDI applicants because so few individuals are rejected at that step.¹⁰² The severe impairment requirement and residual functional capacity assessment, however, seem less predictable to applicants because approximately one in ten applicants are ultimately rejected at each of these two steps.¹⁰³ The complexity and lack of predictability suggest that the five-step process could benefit from simplification.

94. BURKHAUSER & DALY, *supra* note 17, at 49.

95. *Id.*

96. 20 C.F.R. § 404.1505 (2012).

97. *Id.*; BURKHAUSER & DALY, *supra* note 17, at 49–50. “If, for example, applicants’ maximum sustained work capacity is limited to sedentary work and they are at least age fifty to fifty-four with less than a high school education and no skilled work experience, then they would be considered disabled In contrast, if applicants’ previous employment experience includes skilled work, then they would not receive benefits.” *Id.* at 50.

98. BURKHAUSER & DALY, *supra* note 17, at 50.

99. *Id.*

100. *Id.*

101. Interview with Alan Goldstein, *supra* note 71.

102. BURKHAUSER & DALY, *supra* note 17, at 49.

103. *Id.*

D. Recent SSDI Enrollment Influx

SSDI has become increasingly important in securing the financial stability of people with disabilities who are unable to work. Over the past three decades the number of SSDI beneficiaries has ballooned from 2.8 million in 1980 to nearly 8.0 million in 2010.¹⁰⁴ This increase can be attributed to at least four factors:

- (1) the increasing population of older Americans,¹⁰⁵
- (2) continually high unemployment rates for people with disabilities,¹⁰⁶
- (3) evidence that application rates are strongly correlated with the business cycle,¹⁰⁷ and
- (4) changes in SSDI that have made it easier for people to collect or retain benefits.¹⁰⁸

The first three factors are beyond the control of SSA; however, they are realities the administration must address in order to stabilize the Trust Fund. The fourth factor—administrative changes in the determination process that SSA can make in order to affect the number and amount of benefits dispersed—is the focus of this Note.

Since the inception of SSDI, there have been numerous efforts to contain costs and forestall insolvency.¹⁰⁹ These efforts have focused on three main tactics:

- (1) narrowing eligibility requirements,

104. DAVID STAPLETON & DAVID WITTENBURG, CTR. FOR STUDYING DISABILITY POL'Y & MATHEMATICA, THE SSDI TRUST FUND: NEW SOLUTIONS TO AN OLD PROBLEM 2 (2011), available at http://www.mathematica-mpr.com/publications/PDFs/disability/SSDITrustFund_IB.pdf.

105. Rich, *supra* note 1 ("Baby boomers are hitting the age when health starts to deteriorate.").

106. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-812SP, HIGHLIGHTS OF A FORUM: ACTIONS THAT COULD INCREASE WORK PARTICIPATION FOR ADULTS WITH DISABILITIES 4 (2010). Working-age individuals with disabilities experience disturbingly high unemployment rates compared with those without disabilities. Merely forty percent of working-age people with disabilities were employed in 2008. *Id.* Significantly, forty percent of working-age SSDI recipients reported having the goal of working in the future, whereas the nation's jobless rate continues to hover around nine percent. *Id.*; Oct. Payroll Employment Continues to Trend Up (+80,000); Jobless Rate (9.0%) Changes Little, News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, The Employment Situation—October 2011 (Nov. 4, 2011), http://www.bls.gov/news.release/archives/empsit_11042011.pdf.

107. BURKHAUSER & DALY, *supra* note 17, at 44.

108. *Id.* at 44–45 (detailing the administrative changes that made it easier for people with mental illness to collect benefits).

109. E.g., STAPLETON & WITTENBURG, *supra* note 104, at 1–2.

- (2) increasing SSDI Trust Fund revenues, and
- (3) encouraging beneficiaries to leave the program and return to work.¹¹⁰

Thus far, the cost controls have been largely unsuccessful. First, the tightening of eligibility requirements is difficult to implement because it is politically unpopular. Congress tightened eligibility criteria with the 1980 Amendments to the Social Security Act;¹¹¹ however, public outcry led Congress to repeal the changes four years later.¹¹² Second, finding ways to increase Trust Fund revenues is another approach that Congress has used to forestall insolvency, but it is also an unpopular solution. In the past, Congress has used two methods to raise revenues: increasing payroll taxes and transferring funds from Old-Age and Survivors Insurance (OASI) to SSDI.¹¹³ In the current political climate, however, a revenue increase is unlikely to gain any traction. First, Americans have enjoyed a payroll-tax decrease since the end of 2010, meaning Congress would have to reinstate the full tax before any increase can be contemplated.¹¹⁴ Second, anti-tax sentiment in the Republican Party is at record-high levels, making any revenue increase unlikely to gain sufficient Congressional support to reach the President's desk.¹¹⁵ Specifically, ninety-eight percent of House Republicans have signed a pledge to "oppose and vote against tax increases."¹¹⁶ As a result, any proposed increase in payroll taxes likely would need to be offset by difficult-to-find tax cuts of an equal or greater size.

Third, encouraging beneficiaries to return to work is a popular solution, but current efforts to implement such a program have been

110. *Id.*

111. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 (codified as amended in scattered sections of 42 U.S.C. and 45 U.S.C. (2006)).

112. Social Security Disability Benefits Reform Act of 1984, Pub. L. 98-460, 98 Stat. 1794 (codified as amended in scattered sections of 42 U.S.C. (2000)); STAPLETON & WITTENBURG, *supra* note 104, at 2.

113. STAPLETON & WITTENBURG, *supra* note 104, at 2.

114. Ron Lieber, *Putting that Tax Holiday to Work*, N.Y. TIMES, Dec. 25, 2010, at B1.

115. See, e.g. *Fresh Air: Did U.S. Tax Policies Increase Economic Inequality?*, WHYY (Nov. 16, 2011) (downloaded using iTunes) ("[T]hroughout Reagan and the George H.W. Bush presidency, there was a commitment to fiscal balance . . . and that required raising revenues. There wasn't this allergy to revenue that the current GOP displays.").

116. *Id.*; *What is the Taxpayer Protection Pledge?*, AMS. FOR TAX REFORM, <http://www.atr.org/taxpayer-protection-pledge> (last visited Mar. 9, 2013).

ineffective. SSA spearheaded several initiatives to encourage beneficiaries to return to work, most notably the Ticket to Work Program.¹¹⁷ The program was created to alleviate SSDI's perverse incentives: because disability insurance benefits qualify individuals for Medicare or Medicaid, beneficiaries are often reluctant to return to work for fear of losing valuable medical benefits.¹¹⁸ The Ticket to Work Program attempts to solve this problem by creating financial incentives for beneficiaries to reenter the workforce and allowing former beneficiaries to maintain medical coverage while working.¹¹⁹ Unfortunately, Ticket to Work has been largely ineffective, failing to substantially increase the number of people with disabilities who are employed, and as a result there has not been a significant decrease in the SSDI caseload.¹²⁰ The very existence of the Ticket to Work Program suggests, however, that Congress would be supportive of a benefits model that encourages individuals with disabilities to return to work, and policymakers may therefore be in favor of a new disability definition that facilitates employment.¹²¹

Whichever initiative or combination of initiatives Congress decides to enact to shore up the Trust Fund, it will have a disproportionate impact on older Americans. In part, this is because the fast-paced increase in the number of SSDI beneficiaries is driven by demographic changes and economic circumstances.¹²² The aging of the baby-boom generation is a key factor driving up the total number of people who receive SSDI benefits.¹²³ Because people are increasingly likely to develop disabilities as they age,¹²⁴ older workers are more likely to file SSDI applications than their younger counterparts.¹²⁵ SSA has recently launched an initiative that will further increase the number of SSDI

117. Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860 (codified as amended in scattered sections of 42 U.S.C. (2000)); 20 C.F.R. § 411.105 (2012) (setting forth the purpose of the Ticket to Work Program: to expand the universe of service providers available to SSDI and SSI beneficiaries in order to find, enter, and retain employment, and to increase the likelihood that these individuals will reduce their dependence on benefits).

118. Ticket to Work and Work Incentives Improvement Act of 1999, *supra* note 49, at § (a)(5)–(6).

119. *Id.* at § (a)–(b).

120. STAPLETON & WITTENBURG, *supra* note 104, at 2.

121. NAT'L RESEARCH COUNCIL, *supra* note 22, at 10.

122. See STAPLETON & WITTENBURG, *supra* note 104, at 2.

123. *Id.*

124. Marti G. Parker & Mats Thorslund, *Health Trends in the Elderly Population: Getting Better and Getting Worse*, 47 GERONTOLOGIST 150, 151 (2007).

125. STAPLETON & WITTENBURG, *supra* note 104, at 2.

beneficiaries who are over age fifty: a fast-track evaluation process for individuals with early-onset Alzheimer's disease.¹²⁶ The effect of the aging U.S. population on SSDI enrollment has been exacerbated by the financial downturn. In 2010, unemployed workers aged fifty-five to sixty-four experienced a more difficult time finding a new position on average than any other age group.¹²⁷ In other words, when older workers lose their jobs they are less likely than their younger counterparts to find new employment and leave SSDI. Moreover, SSDI eligibility may affect individuals even after they age out of the program at sixty-five. For instance, when an individual is denied disability insurance she will then have less money available to save or invest for retirement. In sum, the definition of disability that SSDI chooses to use will disproportionately affect individuals with disabilities who are over age fifty-five.

III. Analysis

Scholars, policy makers, and lay people have defined disability using a multitude of different approaches to solve the problem of capturing a concept that has no readily discernable outer limit.¹²⁸ Although the general concept of disability remains strongly contested,¹²⁹ in order to create a more functional and equitable disability insurance program there is no need to arrive at a consensus on the general concept of disability.¹³⁰ The SSA disability definition is rooted in the concept of "work disability" because of the nature of disability insurance.¹³¹ Workers pay into the trust fund to be protected in the event

126. Press Release, Alzheimer's Ass'n, Alzheimer's Association Applauds Social Security Administration for Adding Early-Onset Alzheimer's to Its Compassionate Allowances Initiative (Feb. 11, 2010), available at http://www.alz.org/documents/national/ssdi_statement.pdf.

127. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-172T, THE EFFECT OF THE 2007-2009 RECESSION ON OLDER ADULTS 4 (2011).

128. See NAT'L RESEARCH COUNCIL, *supra* note 22, at 53–64.

129. *Id.* at 55.

130. This is because, in order to function, SSDI needs a definition of disability that separates those who can work from those who cannot. Such a definition, by its very nature, will not be useful in all contexts. For instance, a definition of disability that focuses on work capacity will be inadequate to determine whether very young children have disabilities. Therefore, this Note will not attempt to arrive at a universally applicable disability definition. See *id.*

131. See NAT'L RESEARCH COUNCIL, *supra* note 22, at 55–64 (explaining the conceptual issues in defining work disability as opposed to theoretical disability frameworks unconnected to income maintenance programs).

that they are no longer able to work because of the onset of disability.¹³² Differences between work disability and scholarly theoretical definitions illuminate the dilemma that Congress faces in creating an equitable and economical definition.¹³³

There is growing scholarly recognition that disability is more accurately represented as the interplay of a physical or mental limitation and an individual's social and physical environment.¹³⁴ Older definitions of disability tend to focus on the physical or mental manifestations of impairment. In 1951, three years before Congress defined disability for the first time, Talcott Parsons defined illness as: "a state of disturbance in the normal functioning of the total human individual including both the state of the organism as a biological system, and of his personal and social adjustments."¹³⁵ This definition is grounded in the functional capacity of the individual, greatly minimizing or excluding altogether the environmental factors that affect physical and mental ability.¹³⁶ Advances in assistive technology in the last half-century (e.g. speech recognition software, battery powered wheelchairs, and refreshable Braille displays) have contributed to the emergence of a new disability framework linking limitation and environment.¹³⁷ The environmental context that affects disability can be as varied as the existence (or absence) of curb cuts and ramps for wheelchairs, medicine to control seizures, or service animals to assist soldiers with post-traumatic stress disorder.¹³⁸ For instance, two individuals with the same level of visual impairment would have the same disability according to Parsons' functionalist analysis. If, however, one individual has a type of impairment that cannot be corrected with eyeglasses or contacts lenses and the other individual's visual impairment *can* be corrected, the two people will be analyzed differently under a definition that takes into account environmental factors. Sim-

132. See *supra* notes 25–36 and accompanying text.

133. For a discussion of the conflicting statutory scheme involving the SSA and ADA definitions of disability see Lauren Lowe, *What Employees Say, or What Employers Do: How Post-Cleveland Decisions Continue to Obscure Discrimination*, 62 VAND. L. REV. 1245 (2009).

134. NAT'L RESEARCH COUNCIL, *supra* note 22, at 57.

135. TALCOTT PARSONS, THE SOCIAL SYSTEM 431 (1951), in NAT'L RESEARCH COUNCIL, THE DYNAMICS OF DISABILITY: MEASURING AND MONITORING DISABILITY FOR SOCIAL SECURITY PROGRAMS 54 (Gooloo S. Wunderlich et al. eds., 2002).

136. NAT'L RESEARCH COUNCIL, *supra* note 22, at 54.

137. *Id.*

138. *Id.*

ilarly, a social condition such as discrimination can affect the prospects of two individuals with otherwise similar disabilities. For example, if all airlines were to make a rule that pilots must have uncorrected vision of 20/100 in order to be eligible for employment, any applicant with a more severe visual impairment would have substantially diminished opportunities for working in the airline industry. This would be the case even if the individual's corrected vision fell within the acceptable range for operating aircraft.¹³⁹ Thus, any accurate definition of disability must take into account physical and mental limitations together with environmental and social factors.

Incorporating social and environmental conditions into a disability definition is merely the first step; any viable definition must also take the goals of a disability insurance program into account. A program that determines who will be entitled to passes for accessible parking spaces will, by design, be more lenient than a program that provides cash and medical benefits.¹⁴⁰ Because medical and monetary benefits are more valuable than accessible parking spaces, programs such as SSDI must enact limits on the number of people who qualify for the program while balancing the overall objectives of the program. Any viable definition of work disability that SSA uses will be shaped in part by the goals of the program and the need to ration the valuable benefits SSDI provides.

A. Federal Courts' Interpretation of SSDI Definition of Disability

The SSDI disability definition has been shaped and refined by the judicial branch. Specifically, the Circuit Courts have interpreted the "severity requirement" and the concept of "residual functional capacity" in order to clarify the determination process.¹⁴¹ SSDI disability determination issues reach the federal courts after applicants have received a final decision from the Social Security Commissioner (Commissioner); all SSDI applicants are entitled to judicial review in federal district court.¹⁴² The district court will review the Commissioner's ex-

139. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475–76 (1999). Twin sisters with severe myopia applied to be commercial airline pilots. *Id.* The airline terminated their interviews when it discovered that their uncorrected visual acuity was worse than 20/100, despite the fact that their impairment could be fully corrected by eyeglasses. *Id.*

140. NAT'L RESEARCH COUNCIL, *supra* note 22, at 55.

141. *Id.*

142. 42 U.S.C. § 405(g) (2006). The applicant is entitled to bring the claim into

ecution of the five-step process¹⁴³ to determine whether substantial evidence exists to support the determination.¹⁴⁴ It is possible for the district court to find error at any step in the process; however, the court generally will not reverse the Commissioner at the first step because it is relatively simple to determine whether or not the applicant is currently working and earning more than the SGA threshold. The second step, however, has been the subject of numerous opinions.

1. THE SEVERITY REQUIREMENT

The second step is determining whether the applicant has a “severe” impairment, which courts have interpreted as a continuous disability that is more than a groundless claim.¹⁴⁵ In determining the second step, there is no bright-line rule to apply, so the severity requirement is more likely to be challenged in court than the first step.¹⁴⁶ At step two of the evaluation process, the SSDI applicant has the burden of proving that she has a “medically severe impairment or combination of impairments.”¹⁴⁷ The impairment or combination of impairments must significantly limit an applicant’s physical or mental ability to do basic work activities in order to qualify as “severe.”¹⁴⁸ SSA may deny a claim “for lack of a severe impairment only where medical evidence establishes only a *slight abnormality* . . . which would have no more than a *minimal effect* on an individual’s ability to work even if the individual’s age, education, or work experience were specifically considered”¹⁴⁹ In other words, step two authorizes SSA to deny claims when an applicant has only a slight abnormality, and it is not meant to be a difficult standard for applicants to meet.

Despite SSA’s use of the word “severe,” courts recognize that the standard is meant to do no more than screen out groundless claims.¹⁵⁰

federal court irrespective of the amount in controversy. *Id.*

143. See *supra* notes 83–99 and accompanying text.

144. See *Coggon v. Barnhart*, 354 F. Supp. 2d 40, 48–49 (D. Mass. 2005) (“Substantial evidence exists when a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support the Commissioner’s conclusion.”).

145. See, e.g., *Ramos v. Barnhart*, 60 Fed. App’x 334, 335 (1st Cir. 2003).

146. *Id.*

147. *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987).

148. 20 C.F.R. § 404.1520(c) (2012).

149. *Ramos*, 60 Fed. App’x at 335 (emphasis added) (quoting *Barrientos v. Sec’y of Health and Human Servs.*, 820 F.2d 1, 2 (1st Cir. 1987)).

150. E.g., *McCrea v. Comm’r of Soc. Sec.*, 370 F.3d 357, 360 (3d Cir. 2004) (“Although the regulatory language speaks in terms of ‘severity,’ the Commissioner has

Furthermore, it is well established that a claimant with multiple impairments need not have any individual impairment that is severe. Rather, the cumulative effects of the claimant's impairments must be considered in determining step two.¹⁵¹ Applicants are responsible for providing evidence to support their claims, and SSA will consider a wide range of evidence in making a determination.¹⁵² For instance, statements by medical personnel need not be based on formal medical examinations.¹⁵³ Moreover, SSA will consider descriptions and observations from the applicant herself as well as family and friends.¹⁵⁴ Unsupported assertions made by the claimant, however, will not suffice to prove the existence of severe impairments for purposes of step two.¹⁵⁵ The Seventh Circuit affirmed an ALJ decision where the applicant submitted a nurse practitioner's report and VA rating decision, both of which failed to establish that plaintiff's severe impairments existed prior to his last insured date.¹⁵⁶ In sum, evidence does not have to be offered by a medical professional in order to be deemed supported, but it must at the very least bear upon the existence of a disability during the relevant time period.

District courts have interpreted "severe impairment" as having a continuity element. For example, the Western District of North Carolina upheld an ALJ's denial of benefits when an applicant's disability was periodic in nature.¹⁵⁷ The ALJ agreed with the applicant that her

clarified that an applicant need only demonstrate something beyond 'a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work.');" *Ramos*, 60 Fed. App'x at 335 (citing *McDonald v. Sec'y of Health and Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986)); *Anthony v. Sullivan*, 954 F.2d 289, 294 (5th Cir. 1992); *Casey v. Secretary of HHS*, No. 86-3267, 1987 U.S. App. LEXIS 3112, at *14 (6th Cir. Mar. 6, 1987); *Watson v. Astrue*, No. 08-6006-CV-SJ-NKL-SSA, 2009 U.S. Dist. LEXIS 113304, at *8-9 (W.D. Mo. Dec. 4, 2009).

151. 20 C.F.R. § 404.1545(a)(2) (2012) ("If you have more than one impairment. We will consider all of your medically determinable impairments of which we are aware, including your medically determinable impairments that are not 'severe.'"); *see also* *Dixon v. Shalala*, 54 F.3d 1019, 1031 (2d Cir. 1995) (recognizing that the combined effect of a claimant's impairments must be considered in determining disability); *Cornell v. Astrue*, 764 F. Supp. 2d 381, 405 (N.D.N.Y. 2010) (directing the ALJ to consider the effect of plaintiff's obesity in combination with her other impairments).

152. 20 C.F.R. § 404.1545(a)(3) (2012).

153. *Id.*

154. *Id.*

155. *See* *Wolms v. Barnhart*, 71 F. App'x 579, 581 (7th Cir. 2003).

156. *Id.*

157. *Adams v. Barnhart*, No. 1:05cv 291, 2006 U.S. Dist. LEXIS 96822, at *18-19 (W.D.N.C. Aug. 21, 2006).

anxious depression was a severe impairment, however, the ALJ stated that the impairment was not active for the requisite amount of time because “the impairment was not ‘severe’ for a sustained twelve-month period and therefore did not impose disabling limitations.”¹⁵⁸ The interpretation that an impairment must last continuously for twelve months does not accommodate individuals with mental illness or other disabilities that are periodic in nature. For instance, bipolar disorder is characterized by pronounced fluctuations: a manic period of high productivity and creativity is generally followed by a depressive period of low functioning.¹⁵⁹ People with bipolar disorder often have relatively little difficulty obtaining employment; however, the cyclical nature of the disability makes job retention a major issue.¹⁶⁰ The fluctuating nature of disability is not limited to bipolar disorder. Other disabilities that are periodic in nature include epilepsy, cancer, HIV/AIDS, and diabetes.¹⁶¹

Consider the case of Dennis Gribbins.¹⁶² Mr. Gribbins applied for SSDI and SSI benefits, claiming his bipolar disorder made it impossible for him to work.¹⁶³ He was unable to cooperate with groups of people or work well with his supervisors as a result of his mental illness.¹⁶⁴ One treating physician determined that he suffered “only moderate difficulty with social and occupational functioning.”¹⁶⁵ The District Court upheld the ALJ’s determination that Mr. Gribbins did not meet the severity requirement and was thus ineligible for SSDI or SSI benefits, and the Sixth Circuit affirmed.¹⁶⁶ The current definition is not well suited to address the population of individuals with periodic disabilities because applicants are forced to argue that their disabilities will prevent them from working for a year or more, although there may be short periods of time within the year that they are willing and able to work. Most adults with severe mental illness want to work; however, the fear of losing benefits such as SSDI significantly

158. *Id.* at *19.

159. Geoff Waghorn & Chris Lloyd, *The Employment of People with Mental Illness*, AUSTL. E-JOURNAL FOR THE ADVANCEMENT OF MENTAL HEALTH, Sept. 2005, at 1, 8.

160. *Id.*

161. Interview with Alan Goldstein, *supra* note 71.

162. *Gribbins v. Comm’r Soc. Sec. Admin.*, 37 F. App’x 777, 778 (6th Cir. 2002).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 778–79.

interferes with employment prospects.¹⁶⁷ This suggests that a new definition is needed that is more accommodating of people with fluctuating disabilities.

2. RESIDUAL FUNCTIONAL CAPACITY

The SSDI determination process does not end when an applicant meets the severe impairment threshold. As discussed *supra* at Section II.C, after the severe impairment step is satisfied, the disability determination office will check the applicant's stated impairment against the SSA medical listings. An application can be approved at the medical listing step; however, if a determination cannot be made based on the listing, the office will evaluate the applicant in terms of residual functional capacity (RFC).¹⁶⁸ An RFC is an assessment of the extent to which an individual's medically determinable impairments, and related symptoms, such as pain, may restrict the individual's capacity to complete work-related physical or mental activities.¹⁶⁹ Basic work-related physical activities include, among other things, physical functions such as walking, standing, sitting, lifting, carrying, or handling.¹⁷⁰ Additionally, the ALJ will consider an impairment's effects on basic mental activities including, "understanding, carrying out, and remembering simple instructions; use of judgment; responding appropriately to supervision, co-workers and usual work situations; and dealing with changes in a routine work setting."¹⁷¹ An applicant's RFC will be compared with his or her past work experience, and if the judge finds the applicant capable of performing the past work, the judge will deny the application.¹⁷² If the applicant cannot perform past work due to disability, the judge will consider RFC together with vocational factors, including age, education, and work experience, to determine whether the applicant can find alternative employment that is

167. Kim T. Mueser et al., *The Hartford Study of Supported Employment for Persons with Severe Mental Illness*, 72 J. CONSULTING & CLINICAL PSYCHOL. 479, 479 (2004).

168. *Hicks v. Astrue*, 718 F. Supp. 2d 1, 14 (D.D.C. 2010) ("To make an . . . inquiry into the claimant's ability to return to past work and a determination of whether future employment of any variety is possible, the ALJ must engage in a residual functional capacity ("RFC") analysis." (citation omitted)).

169. 20 C.F.R. §§ 404.1520, 404.1545 (2012).

170. *McCrea v. Comm'r of Soc. Sec.*, 370 F.3d 357, 360 (3d Cir. 2004).

171. *Baroni v. Astrue*, No. CV 10-5169 RNB, 2011 U.S. Dist. LEXIS 79631, at *18 (C.D. Cal. July 18, 2011).

172. 20 C.F.R. § 404.1520 (2012).

compatible with his or her skills, education, experience, and disability.¹⁷³

The current formulation of the RFC determination is outdated and should be revised. In particular, the vocational factors (age, education, and work experience) are based on research last updated in 1978.¹⁷⁴ Researchers now know more about the relative importance of each of these factors on an individual's employment prospects. Under the current regime, *age* is given strong weight as a vocational factor.¹⁷⁵ The thinking goes: the older the applicant is, the less likely that individual is to be hired.¹⁷⁶ Current studies, however, suggest that age may have little independent influence on an individual's ability to work.¹⁷⁷ The vocational factor of education-level is also improperly weighted in the current process. *Education* is undoubtedly an important factor in employability; however, the most significant impact is felt at the upper and lower levels, suggesting that it should not be considered as heavily in the middle ranges.¹⁷⁸ Finally, like *age*, the factor of work *experience* is difficult to weight properly. Scholars agree that *experience* is an important factor in evaluating whether an individual will be able to return to work after the onset of disability; however, it is less clear how *experience* affects a worker's capacity to attain a new type of employment.¹⁷⁹ This is a significant flaw, considering that, the majority of the time, vocational factors are used to evaluate capacity for alternative forms of employment.¹⁸⁰ The outmoded use of vocational factors suggests that the RFC analysis is not well-suited to provide consistent and fair disability determinations and is in need of revision.

173. *Id.* at § 404.1520(g).

174. NAT'L RESEARCH COUNCIL, *supra* note 22, at 135. "SSA has not updated the research base on the effect of age, education, and work experience on work disability that had been used in developing the medical-vocational guidelines of 1978 Since then, much has changed with regard to the relative importance of each of these factors." *Id.*

175. *Id.*

176. *See id.*

177. *Id.* Chronological age may still have a significant influence on whether an individual is hired or retained by an employer. *Id.*

178. *Id.*

179. *Id.* at 136.

180. *Id.*

B. The Definition of Disability Used in Other Systems

SSA's definition of disability is merely one possible formulation, and the definition of disability used by other government agencies, statutes, and foreign governments can provide insight into the possibilities for SSDI reform. This Section probes the pros and cons of definitions used by the U.S. Department of Veterans Affairs (VA), the Americans with Disabilities Act (ADA), and the Dutch disability insurance system. Each program differs from SSDI in significant respects, and these three formulations were chosen for their diversity of approach and potential applicability to SSDI. The VA does not conduct individualized assessments; it allows applicants to collect partial benefits if the disability diminishes, but does not completely extinguish, earning capacity.¹⁸¹ The ADA uses a broad definition that more closely correlates with the existence of disability in an individual.¹⁸² Finally, the Dutch system offers lessons on cost control using tightened eligibility criteria and incentive-shifting mechanisms.¹⁸³

1. DEPARTMENT OF VETERANS AFFAIRS: PARTIAL BENEFITS FOR SERVICE-RELATED IMPAIRMENTS

Like SSDI benefits, VA disability compensation is provided for individuals who have physical or mental impairments that prevent them from working.¹⁸⁴ Unlike SSDI, which is an all-or-nothing benefits program, VA will allocate partial disability benefits based on the severity of the disability determination.¹⁸⁵ VA calculates benefits by using the average reduction in earning capacity across a group of individuals with a similar condition rather than the actual reduction for an individual veteran.¹⁸⁶ The *Schedule for Rating Disabilities* assigns each diagnosis a percentage decrease in earning capacity from zero to one hundred percent,¹⁸⁷ and Congress assigns a benefit amount for

181. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-597, SSA AND VA DISABILITY PROGRAMS: RE-EXAMINATION OF DISABILITY CRITERIA NEEDED TO HELP ENSURE PROGRAM INTEGRITY 11-12 (2002).

182. See 42 U.S.C. § 12102(1) (2012).

183. See BURKHAUSER & DALY, *supra* note 17, at 73-75.

184. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 181, at 11. The VA provides compensation for veterans with service-connected disabilities. DEP'T OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS DEPENDENTS & SURVIVORS 25 (2011 ed. 2011) available at http://www.va.gov/opa/publications/benefits_book/federal_benefits.pdf.

185. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 181.

186. *Id.*

187. *Id.* at 12.

each disability rating, which is typically adjusted every year.¹⁸⁸ For example, the *Schedule* presumes that the loss of a foot results in a forty percent decrease in earning capacity, on average.¹⁸⁹ As a result, veterans who lose a foot through military service will receive a forty percent disability rating.¹⁹⁰ In 2011, the compensation rate for a veteran with a forty percent rating was \$541 per month.¹⁹¹ SSDI beneficiaries, in contrast, cannot receive forty percent payments if they have a less than severe disability.¹⁹²

The administration of VA disability benefits differs from SSDI in several major respects. The most significant difference is that the VA disability rating allows veterans to collect benefits if their earnings capacity is partially diminished.¹⁹³ Second, instead of making an individualized assessment of each veteran's earning capacity, the VA assigns a percentage reduction in earnings capacity based on the average effects of a specific diagnosis.¹⁹⁴ As a result, a veteran with a disability may collect cash benefits regardless of her employment status or the amount of her earnings.¹⁹⁵ In addition, unlike SSDI, the VA must determine that a disability was incurred or aggravated during active military service before benefits will be dispersed.¹⁹⁶ Furthermore, unlike SSDI, the VA is not required to administer ongoing disability reviews to determine whether a veteran continues to meet the statutory requirements.¹⁹⁷

The VA disability determination process has several drawbacks as compared with SSA. Because the VA does not conduct an individualized assessment of earning capacity, the benefit amounts could be considered unfair for some beneficiaries. Those individuals whose actual diminished earning capacity is less than the average reduction in wages will experience a disproportionate benefit. In other words, an individual whose disability is determined to result in a thirty percent

188. *Id.* at 12 n.12.

189. *Id.* at 12.

190. *Id.*

191. DEP'T OF VETERANS AFFAIRS, *supra* note 184, at 26. The 2011 monthly compensation rates range from \$130 for a veteran with a ten percent rating, up to \$2,673 for a veteran with a one hundred percent disability rating. *Id.*

192. *See supra* Part III.A.1.

193. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 184, at 10.

194. *Id.* at 10–11.

195. *Id.*

196. *Id.* While this is a significant difference, it has no implications for civilian benefits such as SSDI that do not tie benefits to the cause of a disability.

197. *Id.* at 12.

decrease, but who actually experiences diminished earnings of only ten percent, will receive a windfall from the program relative to the average recipient. Because SSDI is facing imminent financial instability,¹⁹⁸ it is a significant drawback to SSA as compared to VA that the VA definition gives some recipients a larger benefit than they “deserve” (i.e., more money than they would receive using an individually tailored assessment). Even more troubling, an individual who experiences a greater-than-average drop in real earnings will bear a financial hardship as compared with the average recipient. The over and under payments on the margins may be justified, however, by the efficiency realized by considering specific impairments in the aggregate rather than on a case-by-case basis.

The VA disability determination process also has several advantages. First, because it does not require an applicant to prove that she is unable to complete any substantial gainful activity, the process provides a more accurate reflection of disability. Specifically, the VA disability rating treats disability as a continuum that can be fluctuating in nature.¹⁹⁹ Because of the sliding scale between zero and one hundred percent, the VA process takes away the incentive for individuals to prove that they are unable to engage in any substantial gainful activity. For example, an individual with mental illness may be able to work only part time, or only for part of the year, thus experiencing diminished earnings capacity. The VA sliding scale allows applicants to receive some benefits to counter the percentage decrease in earnings capacity that they are experiencing.

Second, the program may be less costly to administer because the VA does not conduct an individualized assessment of earning capacity. The current definition SSA uses has a high administrative cost.²⁰⁰ In fact, the bulk of SSA’s administrative resources are used to determine whether applicants for disability benefits have a disability sufficient to meet the definition requirements.²⁰¹ The more complex the program becomes, the more costly it will be to administer.²⁰² The

198. See *supra* notes 2–3 and accompanying text.

199. See, e.g., Alan Walker, *Assessing the Severity of Disability for the Allocation of Benefits and Services*, 34 INT’L SOC. SECURITY REV. 274, 288–89 (1981).

200. Bloch, *supra* note 23, at 191.

201. *Id.* In 2005, of the nearly 650,000 administrative hearing requests that SSA’s Office of Hearings and Appeals received, almost 600,000 involved disability benefits—over ninety percent of the total requests. *Id.* at 192.

202. Melinda F. Podgor, Note, *The Inability of World War II Atomic Veterans to*

Schedule for Rating Disabilities reduces program complexity as compared with SSA, because the system does not have to expend resources in determining whether, given an individual's specific disability combined with his or her vocational factors, employment in the national economy is possible. This potential cost saving must, however, be balanced with the reduction in accuracy that is inherent in doing away with the individualized assessment.

2. AMERICANS WITH DISABILITIES ACT: SUBSTANTIAL LIMITATION IN ONE OR MORE MAJOR LIFE ACTIVITY

In contrast to the SSA disability definition, Congress formulated a very broad definition of disability under Americans with Disabilities Act (ADA). Although the purposes of the ADA,²⁰³ a civil rights provision, and SSDI, an insurance benefits program, are markedly different, ADA's relatively broader definition is helpful in considering a new definition for SSDI.

An individual is considered to have a disability under the ADA if she or he has a physical or mental impairment that substantially limits one or more major life activity, has a history or record of such an impairment, or is perceived by others as having such an impairment.²⁰⁴ Because the ADA is a statute primarily created to address discrimination against people with disabilities, it uses a broader definition of disability than would be appropriate for SSDI. SSDI was created as a safety net for workers who develop a disability during the course of their employment and have significantly decreased earning capacity as a result.²⁰⁵ Therefore, it would not be appropriate for SSDI to grant disability benefits to an applicant who is "regarded as" having an impairment. Similarly, when determining whether an impairment substantially limits one or more major life activity, the ADA does not take into account any mitigating measures.²⁰⁶ Mitigating measures include products such as medication, prosthetics, hearing

Obtain Disability Benefits: Time Is Running Out on Our Chance to Fix the System, 13 ELDER L.J. 519, 545 (2005).

203. 42 U.S.C. § 12101(b) (2006). The stated purpose of the ADA is, among other things, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.* at § 12101(b)(1).

204. *Id.* at § 12102(2).

205. See *supra* notes 36–49 and accompanying text.

206. 42 U.S.C. § 12102(4)(E)(i) (2010).

aids, or mobility devices, as well as services such as personal attendants.²⁰⁷ Such a provision would have to be removed in order to make the ADA definition of disability potentially suitable for SSDI.

Despite these differences, the ADA definition—“a physical or mental impairment that substantially limits one or more major life activities”²⁰⁸—is applicable to an insurance benefits scheme such as SSDI. Specifically, the ADA includes “working” as a major life activity.²⁰⁹ Instead of adopting a definition of disability that is identical to the ADA, SSDI could revise the ADA definition to include any individual with an impairment that substantially limits the major life activity of working.

When interpreting the requirement that an impairment substantially limit the major life activity of working, courts have found that the impairment must substantially limit the plaintiff from performing a “broad class of jobs” as compared with an average individual in the general population.²¹⁰ Prior to the ADA Amendments Act, EEOC regulations specified that a person substantially limited in the major life activity of working must be restricted in the ability to perform a class or broad range of jobs.²¹¹ Despite the fact that the relevant regulatory language was eliminated by the EEOC in May 2011, courts continue to insist that individuals be unable to perform a broad class of jobs if they are to meet the definition.²¹²

Additionally, courts have interpreted the ADA’s substantial limitation in the major life activity of working to disfavor plaintiffs who remain employed during the time of their alleged disability, or who find subsequent employment. For example, in *Ramos-Echevarría v. Pichis*, the First Circuit held that a plaintiff with epilepsy was not substantially limited in the major life activity of working.²¹³ The evidence showed that Plaintiff experienced such severe seizures that he was forced to leave work several times per year.²¹⁴ Nevertheless, the court

207. *Id.*

208. *Id.* at § 12102(1)(A).

209. *Id.* at § 12102(2)(A).

210. See, e.g., *Ramos-Echevarría v. Pichis, Inc.*, 659 F.3d 182, 189 (1st Cir. 2011); *Carroll v. Xerox Corp.*, 294 F.3d 231, 239 (1st Cir. 2002); *Allen v. SouthCrest Hosp.*, 455 Fed. App’x 827, 835 (10th Cir. 2011).

211. 29 C.F.R. § 1630.2(j)(3)(i) (2012).

212. *Powers v. U.S.F. Holland, Inc.*, 667 F.3d 815, 820 (7th Cir. 2011); *SouthCrest Hosp.*, 455 Fed. App’x at 835.

213. *Ramos-Echevarría*, 659 F.3d at 190.

214. *Id.* at 188.

found there was insufficient evidence to show substantial limitation because Plaintiff held two jobs for a number of years during the time of his alleged disability, and there was no expert testimony or labor market statistics in the record to show that he was restricted in performing a broad range of jobs.²¹⁵ Similarly, in *Cassimy v. Board of Education*, Plaintiff brought a claim against his employer for failing to accommodate his severe depression.²¹⁶ Although Plaintiff was unable to work as a school principal in the Rockford school system due to his anxiety and depression, the Seventh Circuit found it dispositive that he subsequently was employed in teaching and administrative positions in other equally demanding school districts.²¹⁷ As a result, he was not substantially limited in the major life activity of working.²¹⁸ These cases demonstrate that the ADA definition of disability could be adapted to conform to the policy goals and strict eligibility requirements of a disability insurance program.

An adapted ADA approach has various drawbacks and benefits. One drawback is that courts continue to exclude individuals using the broad class of jobs standard even though the standard has been eliminated from the regulations. If the adapted ADA approach is adopted, the legislature or EEOC must clarify that a type-of-work standard is more appropriate than the broad language currently in place or SSDI will be overly exclusive. One benefit is that an ADA-based definition may be more likely to include individuals with periodic disabilities. Because the ADA uses a more “accurate” definition of disability—formulating disability as an interaction between health conditions and an individual’s social and physical environment rather than an immutable, health-based condition—an ADA-based definition has the benefit of including individuals with periodic disabilities.²¹⁹ The statutory language of the ADA as amended covers disabilities that are episodic in nature, so long as the disability is found to substantially limit a major life activity when the impairment is active.²²⁰ An ADA-based definition may not guarantee that individuals with episodic disabilities

215. *Id.* at 189–91.

216. *Cassimy v. Bd. of Educ. of the Rockford Pub. Schs.*, 461 F.3d 932, 933 (7th Cir. 2006). Additionally, Plaintiff claimed that the Board of Education engaged in retaliation by reclassifying him from administrator to teacher. *Id.*

217. *Id.* at 936–37.

218. *Id.*

219. See BURKHAUSER & DALY *supra* note 17, at 39.

220. 42 U.S.C. § 12102(4)(D) (2010).

are covered, because courts have given the ADA a narrower interpretation than the statutory language would suggest. For instance, the Seventh Circuit held that “[i]solated bouts of depression . . . do not qualify as disabilities under the ADA.”²²¹ Therefore, simply appropriating the statutory language of the ADA for use in SSDI runs some risk of excluding individuals with cyclical disabilities.

Another benefit is that under the ADA, determining whether an impairment substantially limits a major life activity must be conducted using an individualized assessment.²²² The individualized assessment more closely resembles the process currently used by SSA than the procedure the VA has in place. However, unlike SSA, the ADA does not require an individual to submit “scientific, medical, or statistical evidence” in order to prove the existence of a substantial limitation.²²³ Although it is not a requirement, courts routinely deny benefits to plaintiffs who fail to provide expert testimony or statistical support to show that they are unable to work in a broad range of jobs.²²⁴ As previously discussed, an individualized assessment has the drawback of being somewhat more costly, but the benefit of being significantly fairer.

An advantage of the ADA-based approach is that the definition could utilize the time-limit specified under the “regarded as” prong for all applicants. Under the ADA, an individual who is “regarded as” having a disability, but whose impairment has an actual or expected duration of six months or less will not be considered an individual with a disability for purposes of the statute.²²⁵ This is a more generous definition than currently used by SSA, which requires the impairment to last for at least one year.²²⁶ The disadvantage, of course, is that any definition that expands the number of qualified applicants will necessarily be more expensive to administer.

221. *Cassimy*, 461 F.3d at 937.

222. 29 C.F.R. § 1630.2(j)(1)(iv) (2012) (“[I]n making this [individualized] assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for “substantially limits” applied prior to the [Americans with Disabilities Amendments Act].”). *Id.*

223. 29 C.F.R. § 1630.2(j)(1)(v) (2012).

224. *See, e.g., Ramos-Echevarría v. Pichis, Inc.*, 659 F.3d 182, 190 (1st Cir. 2011) (“The record contains no expert vocational testimony or labor market statistics supporting Ramos-Echevarría’s contention that his epilepsy substantially limits him from performing jobs other than his own.”).

225. 42 U.S.C. § 12102(3)(B) (2010).

226. SOC. SEC. ADMIN., *supra* note 26, at 9.

3. THE NETHERLANDS: LOWERED BENEFITS, STRICT ELIGIBILITY CRITERIA, AND EMPLOYER COST-SHARING

The Netherlands is a fascinating example of a country that has—by most measures—completely and successfully reformed their government-provided disability insurance program. The Dutch disability policy reforms are informative for the United States because the Netherlands has a disability system that is similar to the United States; there is a social insurance program that, like SSDI, protects workers from lost earnings, and a safety net for people with disabilities with scant work history.²²⁷ Moreover, the disability insurance programs in both countries have faced similar challenges: continual caseload growth coupled with unsustainable cost increases.²²⁸ In the 1980s, the Netherlands had nearly three times as many beneficiaries per thousand workers as the United States; after decades of declining caseload in the Netherlands and increasing caseload in the United States, the Netherlands finally dipped below the United States in 2009.²²⁹ The Dutch disability reform was accomplished through three major initiatives:

- (1) reducing benefits,
- (2) tightening eligibility criteria, and
- (3) shifting the responsibility for disability benefits to employers for the first two years after the onset of disability.²³⁰

Combining a retooled disability definition with realigned incentives, the government significantly lowered the number of beneficiaries per worker.²³¹

The Netherlands implemented its disability insurance reforms over several decades. The first wave of reforms between 1982 and 1987 significantly reduced benefits.²³² Before the reforms, beneficiaries could expect to receive payments equal to eighty percent of before-tax income.²³³ After the reforms, payments declined to seventy percent of

227. BURKHAUSER & DALY, *supra* note 17, at 70.

228. *Id.* at 68.

229. *Id.* at 69 fig.5-1.

230. *Id.* at 73–75.

231. *Id.* at 68–69.

232. *Id.* at 73. For those who can read Dutch, the statute setting forth the Dutch disability insurance scheme is called *Wet Werk en Inkomen naar Arbeidsvermogen*. Stb. 2005, 572, <https://zoek.officielebekendmakingen.nl/stb-2005-572.html> (last visited Mar. 6, 2013).

233. *Id.*

after-tax income.²³⁴ The lower benefit rates affected both new applicants and current beneficiaries.²³⁵ The second wave of reforms occurred in the mid-1990s and brought tightened eligibility criteria.²³⁶ Previously, an individual's residual earning capacity was established by determining which jobs, if any, she or he could perform that were commensurate with current health-impaired job skills.²³⁷ In 1994, the concept of "commensurate" employment was expanded to include all jobs compatible with residual capacity, *without* considering work history and education.²³⁸ The SSDI disability definition, in contrast, takes into account an individual's vocational qualifications when making a determination.²³⁹ This distinction has a significant effect on applicants: for instance, an individual in the Netherlands who does not have the work history or education to qualify for an executive position will nevertheless be found capable of working in that position if she or he is physically and mentally able to perform executive job duties. In the U.S., if an individual is not qualified for an executive position, for example, then the existence of executive positions in the national economy will not be considered in the substantial gainful activity analysis.²⁴⁰ As a result, the Dutch system excludes some applicants who would be eligible for SSDI benefits in the U.S.

Implementing SSDI reforms similar to the Dutch first wave has both advantages and disadvantages. First, lowering payments to beneficiaries will lead directly to cost savings for the program. Furthermore, if the Trust Fund distributes less money to beneficiaries, the need for an SSDI bailout will also decrease.²⁴¹ A wholesale decrease in benefits, however, will be politically difficult to implement.²⁴² Second, disregarding vocational qualifications, as the Dutch system has decided to do, significantly hinders the ability of SSDI to provide for the

234. *Id.*

235. *Id.*

236. *Id.* at 74.

237. *Id.* at 71–72.

238. *Id.* at 74.

239. Bloch, *supra* note 23, at 202.

240. *See supra* note 73 and accompanying text.

241. *See Paletta, Insolvency Looms, supra* note 2.

242. *See* Angela Cunningham & Sarah Sell, *Social Security Workers Protest Proposed Cuts*, WZZM (Apr. 6, 2011, 3:41 PM), <http://www.wzzm13.com/news/article/161218/14/Workers-protest-proposed-cuts>; *cf. Spending and Transparency*, AMERICANS FOR TAX REFORM (Feb. 4, 2012, 4:13 PM), <http://www.atr.org/spending-and-transparency> (advocating across-the-board spending restraint in the federal budget).

most vulnerable workers. One goal of the disability insurance system is to protect workers against the financial strain of disability,²⁴³ and disregarding vocational qualifications will punish workers with the lowest level of education and job skills—a troubling result for a program that is meant to act as a safety net for those who cannot support themselves.

The most significant change occurred in the third wave of reforms when employers became responsible for paying employees' disability insurance benefits.²⁴⁴ For the first two years following a health shock, employers are responsible for providing eighty-five percent of their employee's wages.²⁴⁵ In the U.S., in contrast, employers are not responsible for any part of the disability insurance benefits when an individual successfully applies for SSDI; instead, the U.S. government is responsible for the payments. Furthermore, during this two-year period, employers must provide a work-resumption plan to any employee who is forced to leave work as the result of an illness or disability.²⁴⁶ Private occupational health agencies contracted by the employers implement the work-resumption plans in order to retain employees with disabilities or to find alternative employment.²⁴⁷ During that two-year period, employers are prohibited from dismissing employees who are collecting wages following their health shock.²⁴⁸ After the two-year period ends, the responsibility for disability payments shifts from the employer to the Dutch government.²⁴⁹ In sum, the Dutch system provides a mechanism for signaling the cost of disability insurance to employers—a feature completely absent from the U.S. system.

The third wave of reforms has a clear benefit as compared with SSDI: such reforms could significantly reduce the strain on the dwindling Trust Fund. Because employers are responsible for paying near-

243. See Bloch, *supra* note 23, at 195–96.

244. BURKHAUSER & DALY, *supra* note 17, at 75. Under this system, the employers are providing “sick pay” to their employees, making them ineligible for government-provided disability benefits. *Id.*

245. *Id.* “[D]uring the first two years following a health shock, workers [are] the responsibility of the firm and not eligible for long-term government-provided benefits.” *Id.*

246. *Id.*

247. *Id.*

248. There is one exception: an employee can be fired if he or she refuses to cooperate with the work-resumption plan. *Id.*

249. *Id.* at 75–76.

ly the full salary of employees with disabilities who are unable to work for two years after the onset of disability, Dutch employers have a financial incentive to accommodate and retain employees or, alternatively, to help the employees with disabilities find other, more suitable, employment. If an employee is retained, the employer will no longer have to pay a salary without receiving work product. Similarly, if the employee finds alternative employment, the employer will no longer be responsible for paying an employee who is not contributing to company productivity. Thus, employers have an incentive to help their employees with disabilities continue working. This, in turn, eases the financial burden on the Dutch government—a clear benefit if applied to the financially troubled Trust Fund. The U.S. system, on the other hand, provides no financial incentives for employers who encourage workers with disabilities to continue employment rather than collect SSDI benefits. Instead, if employees are collecting benefits from long-term disability insurance, they will be pushed to move onto SSDI.²⁵⁰ Direct economic disincentives could encourage employers to accommodate and retain employees, or help employees find a new workplace.²⁵¹

The third wave reforms also present a significant drawback. Any efforts to implement SSDI reforms that impose significant costs on businesses—particularly mid-size and small businesses—will likely be met with strong resistance.²⁵² This suggests that any implementation of third wave reforms in the U.S. will have to provide financial incentives to employers to lower the number of SSDI beneficiaries without greatly increasing employers' costs.

IV. Recommendation

SSA should retool its disability determination process by utilizing aspects of the VA, ADA, and Dutch definitions and simplifying the process from five steps to three. SSA wants a decision process that

250. Interview with Alan Goldstein, *supra* note 71.

251. Employers do, however, have some economic incentives to accommodate their employees with disabilities. Interview with Alan Goldstein, *supra* note 6. When workers with disabilities are not accommodated, their performance tends to slip, and if they no longer are able to maintain employment, employers incur costs incident to hiring new talent. *Id.* Moreover, there is a tax credit for businesses who qualify for vocational rehabilitation services. *Id.*

252. Lisa Mascaró, *Small-Business Bill Gets Broad House Support*, L.A. TIMES, Mar. 9, 2012, at B2.

is simple, consistent, accurate, timely, and fair.²⁵³ This proposal will satisfy those goals while reducing SSDI expenditures and providing a better safety net for individuals with periodic disabilities.

A. Step One: Substantial Gainful Activity

Like the current definition, the first step in the proposed definition is to determine whether applicants are earning above the SGA threshold.²⁵⁴ Currently, an individual with a disability other than blindness can earn up to up to \$1,040 per month, and a beneficiary who is blind can earn significantly more—up to \$1,740 per month—and still qualify for SSDI benefits.²⁵⁵ By determining SGA on a monthly basis, SSA excludes individuals with disabilities who make consistent employment difficult.²⁵⁶ For instance, an individual with MS may have difficulty obtaining an affirmative disability determination due to the fluctuating nature of the disability.²⁵⁷ In order to remedy this issue, individuals should have the option of determining SGA over the course of six months, rather than a single month. In other words, the economic value of the threshold remains unchanged, but individuals who earn under \$6,240 in six months²⁵⁸ could continue in the SSDI determination process.

Altering the SGA threshold to take into account earning capacity over the course of six months meets SSA's stated goals.²⁵⁹ Analyzing earnings over a six-month period is only marginally more complex than making the calculation over a one-month span: the six-month period will yield consistent results, just as the one-month test does; it will yield accurate and timely determinations; and, because it is more inclusive of people with periodic disabilities, it is more likely that the public will perceive the system as fair. In sum, applicants will have

253. NAT'L RESEARCH COUNCIL, *supra* note 22, at 116. SSA has stated that a re-designed decision process should, "be simple to administer; facilitate consistent application of rules at each decision level; provide accurate and timely decisions; and be perceived by the public as straightforward, understandable, and fair." *Id.*

254. 20 C.F.R. 416.972 (2002); BURKHAUSER & DALY, *supra* note 17, at 46–47.

255. *Substantial Gainful Activity*, *supra* note 85.

256. *E.g.* Gribbins v. Comm'r Soc. Sec. Admin., 37 F. App'x 777, 778 (6th Cir. 2002); Waghorn & Lloyd, *supra* note 159, at 8.

257. *See* Johnson v. Astrue, No. 10-30169-KPN, 2011 WL 5520379, at *3 (D. Mass. Nov. 9, 2011).

258. This is the current SGA multiplied by six. For individuals who are blind, the new SGA would be \$10,440, which is \$1,740 multiplied by six.

259. NAT'L RESEARCH COUNCIL, *supra* note 22, at 116.

two options: for those who have had a sudden onset of disability, they need only show that they are under SGA for one month's time, and for those with periodic disabilities who have difficulty working consistently, they must show that they are under SGA for six months. Applicants who earn salaries below the new SGA will next have to meet disability-specific requirements.

B. Step Two: Major Life Activity of Working

After applicants demonstrate that they are earning under SGA, using either the one-month or six-month earnings test, they will then move to the second step: the impairments assessment. Under the current SSA definition, an individual must demonstrate that she or he has a severe impairment that has lasted or is expected to last for at least twelve months or result in death.²⁶⁰ This step should be revised with the ADA definition of disability as a model: a physical or mental impairment that substantially limits the major life activity of working.²⁶¹ "Working" should then be defined as earning or expected to earn above the SGA threshold for a period of six months or more. This language would replace the current definition: an impairment expected to last for twelve or more months or result in death.²⁶² The adapted-ADA approach has the benefit of simplifying the determination process. Instead of mandating that the impairment be continuous over a twelve-month period, the inquiry will be whether the impairment has caused or is expected to cause a substantial limitation in working for a period of twelve months or more. This shifts the focus away from the mere existence of the impairment to the more important question—the effect the impairment will have on the applicant's employability.

The adapted-ADA approach replaces steps two²⁶³ and three²⁶⁴ of the current determination process. This does away with the unneces-

260. 42 U.S.C. § 423(d)(1)(A) (2006); 20 C.F.R. § 404.1505 (2012).

261. An individual has a disability under the ADA if he or she has a physical or mental impairment that substantially limits one or more major life activity, has a history or record of an impairment, or is perceived by others as having an impairment. 42 U.S.C. § 12102(1) (2006).

262. See *supra* note 260.

263. Whether the applicant has a severe physical or mental impairment. NAT'L RESEARCH COUNCIL, *supra* note 22, at 115.

264. Whether the severity of the impairment equals or exceeds that specified in the SSA's Listing of Impairments. *Id.*

sary, low-threshold “severity requirement,” and requires an individualized assessment of each applicant that takes into account the interaction between health conditions and an individual’s social and physical environment.²⁶⁵ If an applicant is found to have no impairment, or an impairment that does not substantially limit working, he or she will be denied at this step. On the other hand, if an applicant meets the “substantial limitation” requirement, then the application will move to step three.

C. Step Three: Capacity for Other Work

The final proposed step is to evaluate the capacity for other work, including self-employment, work with a different employer, or a significant reduction in work with the applicant’s current employer. This step draws in part on the VA disability insurance model. A major benefit of the VA system is that disability decisions are made on a sliding scale, rather than an all-or-nothing determination. In other words, the VA allows veterans to collect disability benefits when earning capacity is only partially diminished.²⁶⁶ The VA does not complete an individualized assessment of each applicant; instead, benefits are calculated based on the average reduction in earning capacity, and without regard to the actual employment status or salary of each veteran.²⁶⁷ Disregarding the current employment status or earnings of an applicant would not be appropriate in the context of SSDI because the very goal of the program is to provide for individuals who have suffered an economic setback as a result of disability.²⁶⁸ Moreover, providing disability insurance benefits to individuals who have completely maintained their ability to work while having a disability would go against SSA’s fairness goal.²⁶⁹

Providing partial benefits for individuals who have experienced a significant (but not complete) reduction in earning capacity would, however, increase both accuracy and fairness. When work disability

265. At this step, the individualized assessment should focus on the applicant’s ability to work at his or her most recent place of employment. The applicant’s capacity for alternative employment will be analyzed at step three. This parallels the current decision process that first examines the capacity for “past work” and next the capacity for “other work.” *Id.* at 118.

266. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 184, at 10.

267. See *id.*

268. tenBroek & Wilson, *supra* note 44, at 240–42.

269. NAT’L RESEARCH COUNCIL, *supra* note 22, at 116.

is an all-or-nothing determination, it provides an incentive for applicants to argue that they are completely precluded from earning SGA. In contrast, when applicants are permitted to make a more accurate representation of their capacity for employment and still remain eligible for some benefits, there will be less incentive to argue that they are experiencing complete work incapacity.

A partial-benefits determination could be implemented by splitting cash benefits into two different levels. The upper level will include individuals found to have a loss in earnings of at least eighty percent and who are not likely to recover earning capacity. At this level, individuals receive full SSDI benefits. The lower level, however, would include those with a loss in earnings capacity between thirty and eighty percent. Individuals at the lower level will receive only partial SSDI benefits, corresponding with the determined disability percentage. Individuals at both levels will remain eligible for medical benefits indefinitely, alleviating a strong disincentive to working.²⁷⁰ Making it easier for applicants to maintain medical benefits is especially important, given that forty percent of SSDI recipients reported having the goal of working in the future.²⁷¹ Having the flexibility to shift from full to partial disability status while maintaining eligibility for partial cash and full medical benefits will make it much easier for individuals who have experienced the onset of disability to return to full-time employment in the event that the effects of the disability sufficiently diminish over time. Finally, this approach should be adopted because offering partial disability benefits has a disproportionately positive effect on older workers.²⁷²

270. See *supra* note 15 and accompanying text (describing feared loss of medical coverage as a deterrent to returning to work). The Ticket to Work program currently allows SSDI beneficiaries to maintain Medicare Parts A, B, and D coverage for at least ninety-three months. SOC. SEC. ADMIN., 2013 RED BOOK 29 (2013), available at <http://www.ssa.gov/redbook/eng/TheRedBook2013.pdf>.

271. Gina A. Livermore, Earnings and Work Expectations of Social Security Disability Beneficiaries, CTR. FOR STUDYING DISABILITY POLICY 2 (Aug. 2008), available at http://www.mathematica-mpr.com/publications/PDFs/earnings_disbrief1.pdf.

272. Philip R. de Jong, *Recent Changes in Dutch Disability Policy* 20–21 (APE Working Paper 2008). In the Netherlands, partial beneficiaries tend to be older and economically better off. *Id.* Partial benefits offer older employees easier work conditions and may serve as a partial early retirement plan. *Id.*

D. Experience Rating for Employers

One final recommendation that falls outside of the disability determination process draws on lessons from the Dutch disability insurance model. As in the Dutch system, employers should be encouraged to provide accommodations for their employees or help employees find suitable alternative work. In the Netherlands, forcing employers to choose between the costs of disability benefits and workplace accommodation and/or rehabilitation has led directly to a decline in the number of disability insurance claims per worker.²⁷³ Employers in the U.S. do have financial incentives to accommodate their employees with disabilities, but they often are not fully aware of the incentives.²⁷⁴ Therefore, stronger measures are needed to encourage employers to help employees stay off the SSDI rolls.

Realigned incentives can be accomplished through the mechanism of experience rating: financial penalties for businesses that have a higher-than-average number of employees who move from employment to SSDI.²⁷⁵ Experience rating could be a disincentive to hiring workers with disabilities or older workers who are statistically more likely to develop disabilities in the future, but such discrimination would violate the ADA and Age Discrimination in Employment Act.²⁷⁶ Experience rating has been used with success in the Workers' Compensation program because there is a direct relationship between the benefits paid to employees and the premiums paid by the employer.²⁷⁷ Employers are generally unaware of the costs associated with SSDI, and the financial penalties produced by experience rating can provide an efficient way to convey cost information.²⁷⁸ This in turn would decrease the number of SSDI beneficiaries by making it easier for workers who experience the onset of disability to receive the necessary accommodations to remain in their current workplace or find alternative employment.

273. BURKHAUSER & DALY, *supra* note 17, at 77.

274. Interview with Alan Goldstein, *supra* note 6. For instance, many employers do not realize that employees with disabilities tend to have higher-than-average company loyalty. *Id.* There are also tax credits available for employing people with disabilities who meet certain qualifications. *Id.*

275. BURKHAUSER & DALY, *supra* note 17, at 83.

276. Americans with Disabilities Act of 1990 § 102, 42 U.S.C. § 12112 (2006); Age Discrimination in Employment Act of 1967 § 2, 29 U.S.C. § 623(a)(1) (2006).

277. BURKHAUSER & DALY, *supra* note 17, at 111.

278. John F. Burton & Monroe Burkowitz, *Objectives Other Than Income Maintenance for Workmen's Compensation*, 38 J. RISK & INS. 343, 351 (1971).

V. Conclusion

SSDI is an essential safety net for millions of workers with disabilities, and lawmakers must take swift action to address threats to the program's solvency. Over the years, Congress has attempted to narrow eligibility requirements, increase revenues, and encourage beneficiaries to return to work; yet, efforts to decrease the SSDI caseload have failed. While the Trust Fund dwindles, many disability insurance beneficiaries are stuck in the program either because their employers fail to make necessary accommodations or because they fear losing valuable medical benefits. Conversely, deserving applicants are locked out of the program due to the periodic nature of their disabilities. SSDI can be improved by adopting a three-step disability definition that determines: (1) whether the applicant is earning a salary below the SGA threshold, (2) whether the impairment substantially impacts the major life activity of working, and (3) whether the applicant is entitled to full or partial benefits. Additionally, realigning financial incentives through experience rating has the potential to improve employment prospects for those who want to continue working rather than collect benefits. While looming Trust Fund insolvency is a grave problem, it is also an opportunity for bold policymakers to create a fair and sustainable disability insurance program for all workers.

