

PREVENTING SOCIAL SECURITY OVERPAYMENTS TO OLDER CLAIMANTS

Deborah I. Ginsberg

Although a social security overpayment might initially seem like a welcome windfall, the reality is much the opposite. Claimants who receive overpayments eventually face a Social Security Administration (SSA) eager for repayment and persistent about collection. In this note, Ms. Ginsberg discusses the SSA's recollection practices and procedures, and how the elderly are unfairly affected by inconsistent application of the SSA's policies. First Ms. Ginsberg explains how excessive distribution of social security benefits to the elderly might arise. For example, elder individuals may suffer from a physiological condition that prevents them from giving accurate information on their application for benefits. Alternatively, elder persons may not comprehend English well enough to heed warnings for reporting overpayments. Such factors become "pertinent circumstances" when the SSA reviews applications to waive the requirement to repay excess benefits. According to Ms. Ginsberg's analysis, this waiver process is plagued with inconsistency: neither regulations governing SSA review, decisions made by administrative law judges, nor federal district courts have clearly established a method of considering whether these pertinent circumstances should relieve recipients from repayment. Next, Ms. Ginsberg considers how administrative changes might prevent overpayments. She suggests that the SSA provide the elderly with more assistance in the application stage of the process. Further, the SSA should clarify when elders may rely upon the representative payee system, a process by which the SSA designates a person to carry out the claimant's responsibility when the claimant is unable. Finally, Ms. Ginsberg concludes by exploring several measures which would prevent unfair repayments such as the consistent application of pertinent circumstances when determining if repayment waivers are appropriate.

An elderly blind woman lived alone in an apartment in East Boston. Every month, she received \$210 in Disability Insurance and \$245.70 in Supplemental Security Income. In March 1986, the Social Security Administration formally notified her that because she neglected to report a certain bank account in her name, the amount of Supplemental Security Income benefits the Administration paid her was too great. From that day forward, the Social Security Administration decreed, it would withhold fifty dollars of her

monthly benefits until the government fully recovered the amount overpaid.¹

A seventy-two-year-old Vietnamese woman who had difficulty with English provided erroneous information to the Social Security Administration about her living arrangements. Consequently, Social Security overpaid her. When the Administration discovered the overpayment, it elected to decrease her benefits by \$37.92 a month until it recovered the excess amount.²

A sixty-five-year-old man with an eighth-grade education appealed a Social Security Administration decision not to waive recoupment of an overpayment. The claimant had no prior experience with Social Security, and his wife had handled the family's finances before her death. When he was forced to deal with Social Security on his own, the man became confused. His misunderstanding of Social Security regulations caused an overpayment of \$21,209.20.³

A sixty-seven-year-old woman found herself expected to repay \$3,049.60 to the Social Security Administration. The woman had only a ninth-grade education and was unable to comprehend that she had a duty to report to the Administration earnings from her employment. Because the absence of such earnings greatly increases an individual's benefit entitlement, the Administration overpaid her.⁴

I. Overpayments to Older Claimants

The idea of a government agency handing out excess benefits to individual claimants may seem bizarre, yet the Social Security Administration often mistakenly overpays its claimants. These overpayments, however, do not result in a windfall for the "fortunate" recipient. If the Administration discovers its error, it will make every effort to recover excess benefits. In the Administration's pursuit of recovery, the responsibility lies with the claimant to show whether and why repayment would be inequitable.

For the older claimant, overpayments can become a particularly cumbersome problem. Physical and social problems inherent within

1. *Cotter v. Secretary of Health & Human Servs.*, [1990 Jan.-June Transfer Binder] 35 Unempl. Ins. Rep. (CCH) ¶ 15,231A (D. Mass. July 10, 1989).

2. *Nguyen v. Sullivan*, [1991 Jan.-June Transfer Binder] 37 Unempl. Ins. Rep. (CCH) ¶ 15,968A (D. Mass. Feb. 27, 1991).

3. *Torre v. Bowen*, 673 F. Supp. 1180 (E.D.N.Y. 1987).

4. *Arik v. Bowen*, No. CIV.A.88-3708(JCL), 1990 WL 118751 (D.N.J. July 27, 1990).

the older population (such as dementia and illiteracy) often lead to situations that result in overpayment. In addition, older people may find themselves repaying excess benefits from what may be a low income and asset base. But while reducing the impact of overpayments can be a difficult task, both the older claimant and the Social Security Administration can take measures to prevent many overpayments.

II. Effect of Overpayments on the Older Population

A. Problem of Overpayment Increasing

Overpayments result when the Social Security Administration (SSA) grants claimants excess benefits.⁵ This problem costs the SSA millions of dollars every year.⁶ After attempting to curb these costs, the SSA managed to reduce the rate of loss in the mid-1980s—from a \$2.04 billion loss in 1984 down to a \$1.0 billion loss in 1986⁷—but since 1986, the rate has increased to a \$1.55 billion loss in 1990.⁸

In 1990, the United States Accounting Office commissioned a study to determine the causes of this increase.⁹ The study found three sources of this problem.¹⁰ First, the 1986 statistic (showing the large drop in overpayments) had been underreported by \$300 million.¹¹ Second, the SSA had improved its ability to detect overpayments.¹² Finally, the Social Security program had gained 1.8 million additional claimants between 1986 and 1989.¹³

In addition to investigating causes of the immediate increase, the study probed the general causes of overpayments.¹⁴ The government found that beneficiary error caused most overpayments.¹⁵ Beneficiaries caused overpayments nearly seventy-nine percent of the time, by reporting vital information late, providing inaccurate information, or failing entirely to report necessary information.¹⁶ The study found that seventeen percent of the time, the SSA itself caused the errors,

5. 42 U.S.C. § 404 (1994); 20 C.F.R. § 404.501 (1995).

6. U.S. GEN. ACCOUNTING OFFICE, SOCIAL SECURITY: CAUSES OF INCREASED OVERPAYMENTS, 1986 TO 1989, at 3 (1992) [hereinafter GAO STUDY].

7. *Id.*

8. *Id.*

9. *Id.* at 1.

10. *Id.* at 4.

11. *Id.*

12. *Id.*

13. *Id.* at 5.

14. *Id.*

15. *Id.* at 15.

16. *Id.*

generally through inaccurate earnings' posting, processing delays, and general administrative errors.¹⁷ Four percent of the errors resulting in overpayments were inexplicable.¹⁸

B. Overpayments to the Older Population

A significant part of the overpayment problem involves older Social Security claimants.¹⁹ In 1990, the average age of claimants receiving overpayments from Retirement, Survivors, and Disability Insurance was fifty-two.²⁰ The average age of those receiving overpayments from Supplemental Security Income that year was fifty.²¹ These statistics suggest that the older population (fifty years or older) receives a large portion of all Social Security overpayments.

The cause of overpayments is often related to communication or comprehension difficulties that characterize many older people. These difficulties, in turn, contribute to reporting errors, which then result in overpayments. Older claimants often cannot understand that they need to account for certain information when they apply for benefits or cannot remember conditions that they agreed to when they signed a particular form.²² Yet, the SSA commonly holds claimants accountable for overpayments arising from these difficulties.²³

1. SOURCE OF PROBLEMS

That overpayments occur is not surprising. The SSA is a large, complex organization, and its statutes and regulations are similarly complicated and hard to assimilate.²⁴ Receiving and processing claims involves a large number of rules and procedures. The entire process provides ample opportunity for error.

17. *Id.*

18. *Id.*

19. *Id.* at 17.

20. *Id.*

21. *Id.*

22. *See, e.g.,* Arik v. Bowen, No. CIV.A.88-3708(JCL), 1990 WL 118751 (D.N.J. July 27, 1990) (67-year-old woman was unable to comprehend her duty to report her outside earnings to the SSA, at least partly as a result of having only a ninth-grade education).

23. *See, e.g., id.* (SSA originally wished to reclaim the overpayment—later the district court reversed this decision).

24. *See* Orsini v. Sullivan, No. CIV. 88-1891AET, 1990 WL 56412 (D.N.J. Apr. 30, 1990). "The Social Security Act is an exceedingly complex and detailed law, and the Secretary cannot arbitrarily assume that a claimant understood its application to his particular situation." *Id.* at *4 (citing Kendrick v. Califano, 460 F. Supp. 561, 572 (E.D. Va. 1978)).

Claims for retirement benefits are particularly susceptible to error because the application is very long—six pages—and fairly complex,²⁵ presenting a number of opportunities for claimants completing the form to make mistakes.²⁶ To simplify the process, SSA employees often fill out the forms, while claimants sign in the required areas.²⁷ Errors at this stage can arise not only from claimants' inaccurate information, but also from employees' misinterpreting or incorrectly transcribing claimants' answers.²⁸ Applicants are advised to read the completed application and look for errors, but many applicants either fail to check the information or give the forms only a cursory reading.²⁹

Moreover, aspects of the application process may lead to later difficulties even if claimants accurately complete the forms. The SSA application requests that claimants report certain changes when they occur.³⁰ Claimants either become confused about which changes to report or forget to report changes entirely, causing the SSA to overpay

25. Telephone Interview with Ms. Higgins, Representative, SSA Teleservice Center, Chicago (Jan. 15, 1994). The Application for Retirement Insurance Benefits asks for detailed information concerning a claimant's family, business dealings, wages, and biographical history. Claimants can also complete the application by phone. *Id.*

26. *See, e.g.,* Giordono v. Bowen, No. 87 C 4080, 1989 WL 32810 (E.D.N.Y. Mar. 28, 1989) (claimant did not indicate that he would become eligible for a federal pension when he applied for retirement benefits (the Application for Retirement Insurance Benefits requests this information in question 6c). This error resulted in an overpayment of \$9,819.30).

27. Telephone Interview with Ms. Higgins, *supra* note 25.

28. *See, e.g.,* Austin v. Sullivan, 830 F. Supp. 329 (N.D. Tex. 1992) (older claimant for widow's benefits claiming that the overpayment resulted from the SSA employee's incorrect notation of her current marital status; claimant was planning to divorce, and the SSA employee noted on the application that the claimant had already divorced).

29. *Id.* (claimant's cursory reading missed the error the employee had made on the application).

30. NATIONAL ORG. OF SOCIAL SEC. CLAIMANT'S REPRESENTATIVES, SOCIAL SECURITY PRACTICE GUIDE § 4A (Michael L. Glancy ed., 1995) (reprinting form entitled Application for Retirement Insurance Benefits). Specifically, the form requests claimants report changes in their mailing addresses, if they leave the United States, their deaths or incapacitation, work changes, imprisonment, receipt of a pension or annuity, any change in custody, and any change in marital status. *Id.* § 4A, at 5. Also, the SSA requests that claimants submit annual earnings reports if they earn more than the yearly limit and the applicant is younger than 70 years old. *Id.* § 4A, at 3.

benefits based on outdated information.³¹ Still other errors may arise from internal miscommunications within the SSA itself.³²

2. COMMUNICATION AND COMPREHENSION PROBLEMS

Although the SSA causes many of the errors that result in overpayment, most can be traced to the claimants themselves.³³ In dealing with the SSA, many of the problems the older population confronts arise from communication or cognitive difficulties, which in turn may be caused by social, physiological, or psychological factors.

Most of the common communication or cognitive problems resulting in overpayment stem from social problems. Often, claimants make errors when they have not achieved a high level of formal schooling, they are illiterate, or they do not speak or read English well.³⁴ Any one of these difficulties can cause claimants to misunderstand their duties as Social Security beneficiaries, leading to overpayment.

Education is an important tool in building the skills needed to deal with Social Security. Older generations, however, are likely not to have attained the same level of formal education as younger generations. In 1990, 75% of the American adult population (twenty-five or older) had at least a high school diploma.³⁵ But among older Americans, a high school education was much less common.³⁶ For example, among Americans aged twenty-five to thirty-four, 84.1% had at least a high school education as of 1990.³⁷ For the thirty-five to fifty-four group, this number was 82.6%.³⁸ Within the oldest age groups, the number of people with a high school diploma drops radically.³⁹ In 1990, Americans fifty-five to sixty-four years old were only 67.6% likely to have attained an educational level of high school or greater.⁴⁰ Those sixty-five to seventy-four years old have a 59.2% likelihood of

31. See *Tannehill v. Bowen*, 687 F. Supp. 555 (N.D. Ala. 1987) (claimant initially agreed to file earnings reports when needed, but forgot to do so, resulting in overpayment).

32. See GAO STUDY, *supra* note 6.

33. See *supra* text accompanying note 16.

34. See, e.g., *Jefferson v. Bowen*, 794 F.2d 631 (11th Cir. 1986) (woman with only a fourth-grade education failed to understand Social Security duties and caused an overpayment).

35. U.S. DEP'T OF COMMERCE, *WE THE AMERICANS: OUR EDUCATION* 3 (1993).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

having received at least a high school diploma.⁴¹ And among those Americans over seventy-four, the number drops to 44.8%.⁴²

Examining the national average of educational achievement levels yields similar results.⁴³ For Americans over twenty-five, the average level of educational attainment in 1991 was 12.7 years of schooling.⁴⁴ Americans fifty-five to sixty-four years old attended on the average only 11.8 years of school, while those sixty-five and over had an average of only 10.7 years.⁴⁵ This lack of formal schooling can lead to problems later when encountering the SSA.⁴⁶

The lack of educational foundation among the elderly population may account partly for the low degree of literacy found within this population by the National Adult Literacy Survey.⁴⁷ The survey consisted of a three-part test designed to evaluate English-reading skills among Americans.⁴⁸ First, the prose literacy test evaluated the ability to understand and use information found within textual material.⁴⁹ Next, the document literacy test covered the ability to use documents such as tables, schedules, charts, graphs, maps, and forms.⁵⁰ Finally, the quantitative literacy test examined the quantitative ability to perform numerical operations found in everyday life.⁵¹

41. *Id.*

42. *Id.*

43. *Id.*

44. CENSUS BUREAU, *Table 17. Years of School Completed by Persons 25 Years Old and Over, by Age and Sex: Selected Years 1940 to 1991*, CENSUS TABLE RN 16 10 02 110 SECTION: 16 (1993) [hereinafter CENSUS BUREAU].

45. IRWIN S. KIRSCH ET AL., *ADULT LITERACY IN AMERICA* 32 (1993).

46. Among the older minority population, the problem is even more severe. See, e.g., *Planning for an Aging America: The Void in Reliable Data: Hearing Before the House Select Committee on Aging*, 100th Cong., 1st Sess. 2 (1987) (statement of Emily M. Agee, Research Associate, Kennedy Institute of Ethics, Georgetown University). Among African American elderly, although only 6% have no formal education at all (as opposed to 1.6% for whites), only 17% have completed high school. *Id.* at 107. Thirteen percent of older Asian Americans are likely not to have had any formal education (*id.* at 100), and 26% are likely to have finished high school. EMILY M. AGEE, *AMERICAN ASS'N OF RETIRED PERSONS, A PORTRAIT OF OLDER MINORITIES* 13 (1992). Sixteen percent of Hispanic elderly are likely to have no formal education, with 19% having high school diplomas. *Planning for an Aging America: The Void in Reliable Data: Hearing Before the House Select Committee on Aging*, 100th Cong., 1st Sess. 92 (1987). Finally, one-eighth of the Native American elderly have had no formal education, with only 23% completing high school. *Id.* at 84.

47. KIRSCH ET AL., *supra* note 45, at 30. "Thus, it appears that some of the decrease in literacy skills across the age cohorts can be attributed to fewer years of schooling." *Id.*

48. *Id.* at 70-73.

49. *Id.* at 73.

50. *Id.* at 74.

51. *Id.* at 71.

The average national score (for people sixteen and over) on the prose test was 272 (out of a possible 500, high scores were around 375),⁵² the average on the document test was 267,⁵³ and the average on the quantitative proficiency test was 271.⁵⁴ For Americans fifty-five to sixty-four years old, however, these scores were 260, 245, and 261, and for Americans sixty-five and older the scores dropped to 230, 217, and 237.⁵⁵

52. *Id.* at 113.

53. *Id.* at 114.

54. *Id.* at 115. The higher the number, the better the score. *Id.*

55. *Id.* at 31. To get an idea of what these numbers mean, it is helpful to examine what the scoring looks like by degree of education:

TABLE 1

| LEVEL OF EDUCATION | PROSE SCORE | DOCUMENT SCORE | QUANTITATIVE SCORE |
|-------------------------|-------------|----------------|--------------------|
| Still in high school | 271 | 274 | 269 |
| 0 to 8 years | 177 | 170 | 169 |
| 9 to 12 years | 231 | 227 | 227 |
| GED | 268 | 264 | 268 |
| High school | 270 | 264 | 270 |
| Some college—no degree | 294 | 290 | 295 |
| 2 year college degree | 308 | 299 | 307 |
| 4 year college degree | 322 | 314 | 322 |
| Graduate studies/degree | 336 | 326 | 334 |

Id. at 116-18. This test was scored in five levels.

TABLE 2

| PROSE AGE | PERCENT SCORING | LEVEL 2 226 TO 275 | LEVEL 3 276 TO 335 | LEVEL 4 326 TO 375 | LEVEL 5 376 OR MORE |
|-------------------|------------------------|-----------------------|-----------------------|-----------------------|------------------------|
| | LEVEL 1 225 OR LESS | | | | |
| Total population | 21% | 27% | 32% | 17% | 3% |
| 55-64 years | 26% | 31% | 30% | 12% | 1% |
| 65 years and over | 44% | 32% | 19% | 5% | 1% |

Id. at 113, 116.

TABLE 3

| DOCUMENT AGE | PERCENT SCORING | LEVEL 2 226 TO 275 | LEVEL 3 276 TO 335 | LEVEL 4 326 TO 375 | LEVEL 5 376 OR MORE |
|--------------------|------------------------|-----------------------|-----------------------|-----------------------|------------------------|
| | LEVEL 1 225 OR LESS | | | | |
| Total population | 23% | 28% | 31% | 15% | 3% |
| 55-64 years | 30% | 34% | 26% | 8% | 1% |
| 65 years and older | 53% | 32% | 13% | 2% | 0 (less than 5%) |

Id. at 114, 117.

Of these three categories, document literacy is the most important skill for dealing with Social Security. Although the survey did not test SSA documents, someone with a higher score in document literacy presumably would find using the SSA forms and documents easier and would be less likely to make mistakes than someone with a lower score. It is troublesome, then, that Americans fifty-five to sixty-four scored twenty-two points below the national average, while those sixty-five and over scored a full fifty points below average.⁵⁶ These results indicate that the elder population is probably at a considerable disadvantage when dealing with the SSA and its many documents.⁵⁷

In addition to a lack of education and problems with literacy, the claimants' inability to speak English well also can interfere with an older claimant's ability to deal with the SSA.⁵⁸ No study has yet been done to determine the number of non-English speaking ("linguistically isolated") people among the elder population. Because linguistic isolation is prevalent within the general population (six percent of the American population does not speak any English),⁵⁹ the problem probably has a strong presence within the elder population.

TABLE 4

| QUANTITATIVE AGE | PERCENT SCORING LEVEL 1 | LEVEL 2 | LEVEL 3 | LEVEL 4 | LEVEL 5 |
|---------------------|-------------------------------|------------|------------|------------|-------------|
| | 225 OR LESS | 226 TO 275 | 276 TO 335 | 326 TO 375 | 376 OR MORE |
| Total population | 22% | 25% | 31% | 17% | 4% |
| 55-64 years | 25% | 30% | 30% | 13% | 2% |
| 65 years and older | 45% | 26% | 20% | 7% | 2% |

Id. at 115, 118.

56. See *supra* text accompanying note 55.

57. The National Adult Literacy survey found that older minority adults are at an additional disadvantage. African American adults between 55 and 65 years of age scored 212 on the prose test, 201 on the document test, and 203 on the quantitative test. *Id.* at 120. Hispanic Americans of this age scored 192 on the prose test, 187 on the document test, and 195 on the quantitative test. *Id.* Similarly aged whites, in contrast scored 273, 262, and 275 respectively. *Id.* For those 65 and older, African Americans scored 187 on the prose, 173 on the document, and 163 on the quantitative tests. *Id.* Hispanic Americans the same age scored 170, 151, and 144 respectively on these tests, while white Americans scored 240, 266, and 240. *Id.* The test did not accumulate sufficient data on older Asian Americans, Native Americans, and Americans of other heritages to include in the study. *Id.*

58. See *Matthanasak v. Sullivan*, 769 F. Supp. 103 (W.D.N.Y. 1991) (inability to speak English resulted in claimant not reporting needed information and caused an overpayment).

59. CENSUS BUREAU, *Americans Speaking Language Other than English*, CENSUS USER NEWS RN 05 99 02 120, SECTION: 05, 1 (1993).

Physiological problems also can play a large role in impeding claimants' communication with the SSA. The older population is particularly vulnerable to physical problems that affect communication and cognition.⁶⁰ Although communicative- or cognitive-impairing health problems affect only some older people,⁶¹ many of the conditions, such as strokes, cardiovascular disease, and Alzheimer's Disease, can severely impair mental functions.⁶²

Moreover, any one of these problems can lead to impaired mental abilities or dementia.⁶³ Even in its earliest stages, dementia can affect communication.⁶⁴ As the condition progresses, communication and cognition become increasingly impaired, until it is impossible for the victim to interact with his or her surroundings.⁶⁵ Furthermore, strokes sometimes cause aphasia.⁶⁶ Aphasia specifically interferes with the affected person's ability to use language, usually by eliminating significant portions of the stroke victim's grammar or vocabulary.⁶⁷

In addition to specific debilitating conditions, the aging process itself often impairs older peoples' ability to think and communicate. Among other changes, sight and hearing may wane, cognitive skills may decrease, and comprehension may become impaired.⁶⁸

60. ROSEMARY GRAVELL, COMMUNICATION PROBLEMS IN ELDERLY PEOPLE—PRACTICAL APPROACHES TO MANAGEMENT 3-28 (1988) (describing these conditions).

61. *Id.* at 2. Although the older population consumes a significant portion of medical resources, partly because of those conditions that affect communication, the statistics can be misleading. Admittedly, one study found that those over 65, who represent 10% of the population, use "30 percent of annual health care costs, 30 percent of acute beds, and 25 percent of prescription drugs." *Id.* At the same time, 42% of the older population is never admitted into a hospital in a given year, and 20% of all days spent in hospitals by the older population are used by only 2% of that group. *Id.* Particular conditions that may affect an older person's ability to communicate are not overly common. Strokes affect 9 out of 1000 people between the ages of 65 and 74, 20 per 1000 in the 75 to 84 group, and 40 per 1000 to those over 85. *Id.* at 17. Parkinson's Disease affects 1% of the population over fifty. *Id.* Finally, Alzheimer's Disease affects 1 person in 5 over the age of 80. *Id.* at 54.

62. *Id.* at 53. Other causes of severe communications impairment include strokes, Pick's Disease, Parkinson's Disease, infections, metabolic disorders, tumors, and depression. *Id.*

63. Dementia is defined as "a 'chronic, progressive brain disease, characterized by intellectual deterioration, impaired memory, and disorientation—all occurring without drowsiness and persisting.'" *Id.* at 52 (citing BRICE PITT, PSYCHOGERIATRICS (1982)).

64. *Id.* at 52-65.

65. *Id.*

66. Aphasia is defined as "a disruption of language as a result of brain damage." *Id.* at 21.

67. *Id.* at 21-24.

68. *Id.* at 3-28.

While older people generally retain previously learned knowledge and skills, they may find new information harder to assimilate.⁶⁹

Finally, physical conditions may impair a claimant's ability to deal with the SSA. The National Adult Literacy Survey noted that people with certain physiological difficulties scored lower on all three parts of the literacy test.⁷⁰ In fact, the average scores for those suffering any physical or mental health condition were forty-five points lower than the general average.⁷¹

Problems stemming from either social or physiological sources can cause older claimants to misunderstand their duties as Social Security claimants. They may not learn of or comprehend a particular rule, regulation, or form. Errors that arise from such misunderstanding can easily lead to situations in which claimants find that the SSA expects them to repay a substantial sum.

III. The Administration of Overpayment Cases Involving Older Claimants

A. The Social Security Overpayment System

Overpayments are governed by Title 42 ("The Public Health and Welfare"), Subchapter II ("Social Security"), Section 404 ("Overpayments and Underpayments") of the Code of the Laws of the United States of America.⁷² For retirement, survivors, and disability benefits, this statute is in turn regulated by Title 20 ("Employee's Benefits"), Chapter III ("Social Security Administration, Department of Health

69. *Id.* at 7-11.

70. KIRSCH ET AL., *supra* note 45, at 135-37.

71. *Id.*

TABLE 5
Average Scores by Type of Physical, Mental, or Health Condition

| DISABILITY | PROSE SCORE | DOCUMENT SCORE | QUANTITATIVE SCORE |
|---|-------------|----------------|--------------------|
| None | 272 | 267 | 271 |
| Any Physical or Mental Health Condition | 227 | 222 | 224 |
| Visual Difficulty | 217 | 215 | 214 |
| Hearing Difficulty | 243 | 239 | 247 |
| Physical Disability | 231 | 226 | 228 |
| Long-term Illness, 6 mo. or more | 236 | 230 | 233 |
| Any other health impairment | 237 | 231 | 239 |

Id.

72. 42 U.S.C. § 404 (Supp. 1991).

and Human Services”), Part 404 (“Federal Old-age, Survivors and Disability Insurance (1950-)”), Subpart F (“Overpayments, and Liability of a Certifying Officer”) of the Federal Code of Regulations.⁷³ Parts of the Program Operating Manual System (POMS), Section 02245, also govern benefit overpayments.⁷⁴

Under the statute and regulations, the Secretary of Health and Human Services is empowered to recover overpayments from all claimants except those who are “without fault if such . . . recovery would defeat the purpose of this [statute] or would be against equity and good conscience.”⁷⁵

The waiver process itself is fairly straightforward. When the Social Security Administration attempts to collect an overpayment, it notifies the claimant.⁷⁶ This notice must be constitutionally adequate, and must explain the amount overpaid, the time period for which overpayment is alleged, the reason for the overpayment, and the claimant’s rights to appeal the overpayment.⁷⁷ The SSA must include with its payment demand a notice of the claimant’s right to request a waiver.⁷⁸

Once charged with an overpayment, a claimant may take one of three actions.⁷⁹ First, the claimant may repay the excess benefits, and not challenge the SSA’s determination.⁸⁰ Alternatively, the claimant

73. 20 C.F.R. §§ 404.501-522 (1995).

74. The Program Operating Manual System is a multivolume social security handbook that sets forth procedures necessary to implement the statutory and regulatory provisions of this Act. The United States Supreme Court has acknowledged the appropriateness of handbooks and claims manual provisions. *Gilbert v. Sullivan*, No. 89 C 20378, 1990 WL 304307 (N.D. Ill. Dec. 28, 1990) (referring to *Sullivan v. Everhart*, 494 U.S. 83 (1990)).

75. 42 U.S.C. § 404(b) (1994).

76. 59 Fed. Reg. 35,378 (1994) (in accordance with 25 C.F.R. § 422.406(b)(1)). “The Ruling states the Social Security Administration’s longstanding policy of giving adequate written notice of a determination of overpayment and the right to contest recovery with an opportunity for a face-to-face oral hearing before we deny that person’s request for waiver of recovery of the overpayment.” *Id.*

77. According to one Social Security lawyer, however, these notices are often unclear and do not adequately explain the overpayment situation to the claimant. She notes, “The claimant usually receives a series of notices entitled ‘Notice of Planned Action,’ ‘Notice of Change in Payments,’ ‘Notice of Overpayment’ and/or ‘Important Information.’ These notices usually contain different, often inconsistent, advice and ‘information’ and may arrive as often as every other day for a month or more.” Jill A. Boskey, *Elder Law Institute 1994: Supplemental Security Income*, in *PLI NEW YORK ELDER LAW HANDBOOK* 51, 132 (Annette L. Kasle ed., 1994); see also Charles T. Hall, *SOCIAL SECURITY DISABILITY PRACTICE*, Part I, Ch. 5, § 5.20, *1, available in WESTLAW, Texts and Periodicals Database, SSDISP File.

78. 20 C.F.R. § 404.502a (1995).

79. Boskey, *supra* note 77, at 131.

80. *Id.*

may request that the SSA reconsider the overpayment charge and reevaluate the facts upon which the charge is based.⁸¹ Finally, the claimant may apply for a waiver of overpayment.⁸²

Claimants who wish to request a waiver must first complete a Request for Waiver of Overpayment Recovery or Change in Repayment Due form, available at Social Security offices.⁸³ The form is long and complex.⁸⁴ In completing the form, the claimant will need to explain the circumstances of the overpayment, the reasons he or she cannot pay, the reasons why the overpayment occurred, and, if the claimant is not receiving supplemental financial assistance, detailed financial information. The SSA will use the information on this form to decide whether to grant the waiver.⁸⁵

Unfortunately, the SSA often does not grant many claimants this initial request for a waiver. Upon request, the SSA will review a negative determination along with any evidence the claimant submits, and, if the claimant wishes, the SSA will hold an oral hearing.⁸⁶ If the SSA continues to deny the claimant's waiver, the claimant next may request a hearing before an Administrative Law Judge (ALJ).⁸⁷ The ALJ is not bound by the factual evidence and issues presented in the initial determinations, but may examine the case anew.⁸⁸ If a claimant disagrees with the ALJ's decision, he or she may ask for reexamination by the SSA's Appeals Council.⁸⁹ If the Appeals Council also rejects the claimant's waiver request, the claimant may seek review in a federal district court.⁹⁰ Once the case has reached this level, the federal district court is bound by the factual determinations of the ALJ or the Appeals Council as long as they are supported by substantial evi-

81. *Id.*

82. *Id.*

83. *Id.*

84. The form is a total of eight pages. It asks 23 questions (not all need to be answered in every situation). Some questions have subparts, up to 17 in the question concerning the claimant's expenses. The form states that it will take 25 minutes to complete the entire written process.

85. Request for Waiver of Overpayment Recovery or Change in Repayment Rate, Social Security Administration Form 632-BK (on file with *The Elder Law Journal*).

86. 20 C.F.R. § 404.522 (1995); see *Califano v. Yamasaki*, 442 U.S. 682 (1979). "[A]n opportunity for a pre-recoupment oral hearing is required where a recipient requests a waiver under [the statute]." *Id.* at 697.

87. 20 C.F.R. §§ 404.929, 404.930 (1995).

88. *Id.* § 404.946.

89. *Id.* § 404.967.

90. *Id.* § 404.981.

dence.⁹¹ In addition, courts will accord significant weight to agency interpretations of related statutes and regulations.⁹²

Deciding the initial factor in a test for waiver—whether a particular claimant is at fault—is not so straightforward. The regulations have provided a few guidelines, stating that a claimant will be found to be at fault if the overpayment resulted from:

- (a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or
- (b) Failure to furnish information which he knew or should have known to be material; or
- (c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.⁹³

In addition, the claimant can be at fault even if the SSA is also at fault.⁹⁴ Further, federal law provides that “any determination of whether any individual is without fault [requires that] the Secretary shall specifically take into account any physical, mental, educational, or linguistic limitation such individual may have (including lack of facility with the English language).”⁹⁵

Additional “without fault” standards will apply depending on the type of aid involved.⁹⁶ If the problem concerns excess entitlement benefits,⁹⁷ the claimant will be without fault if he or she acted in reasonable reliance on information from an official source or if certain changes in the law cause specific errors.⁹⁸ More likely, the SSA will overpay a claimant because he or she has continued working while

91. *Richardson v. Perales*, 402 U.S. 389 (1971).

92. *See Whiteside v. Secretary*, 834 F.2d 1289 (6th Cir. 1987).

The scope of this court’s review is not . . . *de novo*, [the application of] legal principals, legal conclusions arrived at by agency interpreting its organic statute are not without weight. As the Supreme Court explained: “The interpretation put on the statute by the agency charged with administering it is entitled to deference . . . but the courts are the final authority on issues of statutory interpretation [and may change the interpretation if the agency’s construction is manifestly incorrect].”

Id. at 1295 (quoting *Federal Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981)).

93. 20 C.F.R. § 404.507 (1995).

94. *Boskey*, *supra* note 77, at 136.

95. 42 U.S.C. § 404 (1994). In addition, this language has recently been added to a number of regulations. *See* 20 C.F.R. §§ 404.507, .510-.511, 416.552 (1995).

96. *See* 20 C.F.R. §§ 404.510-.510a (1995).

97. Errors in determining entitlement affect whether the claimant has a general right to benefits.

98. 20 C.F.R. § 404.510a (1995).

receiving retirement benefits.⁹⁹ Errors in such situations result in deduction overpayments.¹⁰⁰ If deduction overpayments are at issue, a large but specific array of circumstances will determine whether a claimant is not without fault. The claimant will be held responsible if he or she facilitates¹⁰¹ “[r]eliance upon erroneous information from an official source within the [SSA] (or other governmental agency which the individual had reasonable cause to believe was connected with the administration of benefits).”¹⁰² Additionally, the claimant is responsible for “[f]ailure to understand the deduction provisions of the Act or the occurrences of unusual or unavoidable circumstances the nature of which clearly shows the individual was unaware of a violation of such deduction provisions.”¹⁰³ At the same time, the regulations require that those individuals who have received deduction overpayments to have exercised a high degree of care to avoid overpayment.¹⁰⁴

Even if claimants can convince the SSA, the ALJs, or the courts that they are without fault in receiving the overpayment, they may still be required to repay.¹⁰⁵ Regardless of fault, in order to waive overpayment, claimants must also establish either that (1) repayment would defeat the purpose of the Social Security Act or that (2) repayment would be inequitable.¹⁰⁶ Although what is inequitable is ambiguous,¹⁰⁷ often claimants do not have much difficulty meeting the first

99. See, e.g., *Ballard v. Sullivan*, 905 F.2d 257 (9th Cir. 1990); *Davis v. Bowen*, 840 F.2d 822 (11th Cir. 1988); *Morris v. Harris*, 663 F.2d 1014 (10th Cir. 1981); *Jefferson v. Bowen*, 794 F.2d 631 (11th Cir. 1986); *Alser v. Secretary*, [1988 Jan.-June Transfer Binder] 31 Unempl. Ins. Rep. (CCH) ¶ 17,988.1 (N.D. Ill. Mar. 11, 1987); *Orling v. Secretary*, No. CV-86-3428, 1987 WL 14132 (E.D.N.Y. July 14, 1987). All of the foregoing cases are examples of claimants receiving overpayments due to errors involving earnings after retirement.

100. Deduction overpayments are overpayments of retirement insurance caused by the claimant continuing to work without the full knowledge of the Administration. Had the SSA been aware of the claimant's employment, it would have been entitled to take deductions from the original payment of retirement benefits. 42 U.S.C. § 403 (1994) (provides an overall description of conditions that will result in a deduction of Social Security benefits).

101. 20 C.F.R. § 404.510 (1995).

102. *Id.* § 404.510(b).

103. *Id.* § 404.510(n).

104. *Id.* § 404.511.

105. 42 U.S.C. § 404 (1988 & Supp. 1993).

106. 20 C.F.R. § 404.508 (1995) (defeats the purposes of the act); *id.* § 404.509 (against equity and good conscience).

107. It is clear that claimants will meet this test if they can establish that they changed some position for the worse or gave up a valuable right to receive benefits. *Boskey*, *supra* note 77, at 137.

part.¹⁰⁸ The purpose of the Social Security Act is to provide financial means to meet basic needs, and many claimants would be unable to fulfill those needs should they lose even a small portion of their Social Security benefits.¹⁰⁹

If a claimant is found to be either “not without fault” or without fault in a situation where repayment would not defeat the purpose of the Act or be inequitable, the SSA may not require full repayment immediately. The SSA recognizes that many claimants would never be able to afford to repay what can become a very large liability (sometimes into the tens of thousands of dollars)¹¹⁰ in one payment. Therefore, instead of requiring claimants to repay overpayments in a lump sum, the SSA commonly withholds a small amount from the claimant’s check each month until the overpayment is fully recovered.¹¹¹

B. Judicial Reflection of Communication/Cognitive Problems of the Older Population in Overpayment Cases

Because courts are the final adjudicators of SSA overpayment cases, the case record contains many examples of communication and cognitive problems causing overpayments. As noted above, these communication and cognitive difficulties can arise from social causes (e.g., illiteracy), psychological causes (e.g., implicit trust in the government), or physiological causes (e.g., injury). As a result, claimants may become confused and misunderstand their duties as Social Security beneficiaries. These misunderstandings, in turn, can lead to overpayments.

Social factors contribute to many SSA overpayments. Often, these factors cause overpayments because, although claimants are able to understand some of what they were required to do to receive benefits, they may miss important rules (such as having to report all sav-

108. See *Wallin v. Bowen*, No. CV 87-L-326, 1990 WL 159928 (D. Neb. July 12, 1990); *Myers v. Bowen*, 704 F. Supp. 45 (S.D.N.Y. 1989) (meets the requirements of the second part of the test due to lack of adequate resources). *But see Farnham v. Secretary*, No. 85-5123, 1985 WL 14144 (6th Cir. Dec. 27, 1985) (claimant has not shown lack of resources and income and must repay the overpayment).

109. Cf. 42 U.S.C. § 404 (1988 & Supp. 1993) (listing factors considered in determining whether repayment is inequitable).

110. See, e.g., *Anderson v. Sullivan*, 914 F.2d 1121 (9th Cir. 1990) (SSA overpaid claimant \$19,057.20 in retirement benefits).

111. 20 C.F.R. § 404.502 (1995). In most circumstances, unless the overpayment was caused by some fraudulent act, the SSA will only withhold up to 10% of the claimant’s check. *Boskey*, *supra* note 77, at 132.

ings accounts) that affect the permitted amount of retirement benefits.¹¹²

Social factors include low literacy rates and lack of facility with English. For example, older claimants who comprehend little or no English can easily find themselves in situations lending to payment error. This note began with the example of a seventy-two-year-old Vietnamese woman who had difficulty with English incorrectly reporting her lodging status to the SSA.¹¹³ In a second case, a sixty-four-year-old claimant with only an eighth-grade education was unable to understand the benefits she was entitled to, leading to overpayment.¹¹⁴ As a large number of court cases reflect, these factors have a significant impact on the problem of overpayments.¹¹⁵

Frequently, social factors cause claimants to become confused about their ability to continue earning money from employment after applying for retirement benefits.¹¹⁶ Depending on the claimant's age, the SSA guidelines limit the amount a claimant can earn and still collect full benefits: when claimants' earnings are greater than the SSA cap, claimants will be entitled to benefits only if they are older than seventy.¹¹⁷ Should claimants under seventy continue to work, they will lose benefits.¹¹⁸ Claimants, however, may lose track of how much they can earn and still retain benefits, or may be entirely unaware that by continuing to work, they are not entitled to full benefits. Their confusion often results in overpayments.

One striking example of this problem can be seen in an Eleventh Circuit case, *Jefferson v. Bowen*.¹¹⁹ In 1972, Lois Jefferson's husband

112. See, e.g., *Torre v. Bowen*, 673 F. Supp. 1180 (E.D.N.Y. 1987) (neglected to report a savings account and caused overpayment).

113. *Nguyen v. Sullivan*, [1990 Jan.-June Transfer Binder] 35 Unempl. Ins. Rep. (CCH) ¶ 15,231A (D. Mass. Feb. 27, 1991).

114. *Kincaid v. Sullivan*, CV 88-1444-PA, 1989 WL 281959 (D. Or. Sept. 22, 1989).

115. Some of the examples cited in the following discussion do not directly involve older claimants, but do involve situations which are analogous to those encountered by older claimants.

116. See *Jefferson v. Bowen*, 794 F.2d 631 (11th Cir. 1986).

117. Richard B. Toolson, *Should a Worker Who Continues to Work Beyond Normal Retirement Age Immediately Draw Social Security Benefits?*, TAX NOTES, Oct. 26, 1992, at 539. In 1992, this limit was \$7,440 for claimants between 62 and 64 years of age, and \$10,200 for claimants between 65 and 70 years. *Id.* at 541. The limits are indexed by year. *Id.*

118. *Id.* Claimants will lose \$1 of their benefits for every \$2 earned if they are between 62 and 64, and \$1 for every \$3 earned if they are between 65 and 70. *Id.*

119. 794 F.2d 631 (11th Cir. 1986).

applied for retirement and disability benefits,¹²⁰ and Jefferson herself applied for wife's benefits (benefits to which she was entitled as another claimant's spouse).¹²¹ When her husband died, Jefferson reported his death to the SSA.¹²² At that time, the SSA told her that her benefits would continue.¹²³ The application she initially completed in 1972, however, had informed her that she would only receive benefits if she earned less than a set yearly minimum.¹²⁴ Because Jefferson had only a fourth-grade education, she was unable to understand this system.¹²⁵ Once Jefferson earned more than the SSA income cap after her husband's death, the benefits that the SSA sent her were too great.¹²⁶

Claimants' confusion from misunderstandings caused by social factors often lead them to overly trust the SSA. "They know what they are doing," was the sentiment expressed by one sixty-nine-year-old woman who continued to receive children's benefits even after her children had reached majority age.¹²⁷ Similar problems can arise when SSA employees complete application forms for claimants. Believing that SSA employees know the application process, claimants may allow SSA employees to complete the application forms. The claimants will often sign the employee-completed forms without reading their contents.¹²⁸ Despite claimants' trust in SSA employees' knowledge and competence, the forms often contain incorrect information. These inaccuracies can have serious consequences. For example, a district court recently affirmed an SSA determination that one claimant was at fault for causing an overpayment when she did not thoroughly inspect the employee's work before signing.¹²⁹ The claimant had failed to notice that the clerk had incorrectly described the claimant's current marital status on the application form.¹³⁰

In addition to social and psychological factors, physiological problems often cause claimants to become confused about or forget the procedures the SSA explained to them when they first applied.

120. *Id.* at 632.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 633.

126. *Id.*

127. *Archuleta v. Bowen*, 655 F. Supp. 1196 (D. Wyo. 1987).

128. *See, e.g., Austin v. Sullivan*, 830 F. Supp. 329 (N.D. Tex. 1992) (claimant did not read form after SSA employee completed it. Error on the form later resulted in an overpayment).

129. *Id.*

130. *Id.*

Even problems like minor memory loss, prevalent within the older population, may cause overpayments, as the SSA may expect a claimant to remember and be responsible for one check mark in a multiple-page application form years after completing the form.¹³¹ Sometimes the SSA will remind claimants of their duties,¹³² but confusion, dementia, or mental illness may cause claimants to forget or interpret these procedures in an irrational manner, leading to overpayment.

C. Taking Pertinent Circumstances into Account

The statutes and regulations controlling SSA overpayments clearly require that evaluators examining overpayment cases consider all of the factors discussed above—social, psychological, and physical—when determining fault. To underscore the importance of these pertinent circumstances, the SSA has recently added specific language to its regulations.¹³³ According to current statutes and regulations, evaluators must consider circumstances such as a claimant’s “age, intelligence, education, and physical and mental condition” and “linguistic limitation[s] such individual may have (including any lack of facility with the English language).”¹³⁴

Unfortunately, those evaluating overpayments will seldom take into account specific “pertinent circumstances.” For example, a number of cases describe how often administrative law judges (ALJs) do not take into account social factors—such as the claimant’s inability to speak English or the claimant’s low level of education—when determining that an overpaid claimant is at fault.¹³⁵ Other cases indicate that ALJs often do not consider relevant mental or physical factors such as mental illness, mental impairment, or debilitating

131. For example, in *Tannehill v. Bowen*, a recent federal district court case, the SSA determined that the claimant was liable for an overpayment for not filing annual reports. Evidently, the claimant had checked on the application that she agreed to file the reports some years before the overpayment occurred. *Tannehill v. Bowen*, 687 F. Supp. 555 (N.D. Ala. 1987).

132. The SSA periodically sends notices to claimants to avoid anticipated problems (e.g., the SSA periodically sends recipients of retirement benefits notices concerning earnings reports). Telephone Interview with Ms. Higgins, *supra* note 27.

133. See 20 C.F.R. §§ 404.507, .510-.511, 416.552 (1995).

134. 42 U.S.C. § 404(b) (1994).

135. See, e.g., *Jefferson v. Bowen*, 794 F.2d 631 (11th Cir. 1986) (ALJ did not fully consider that claimant’s lack of education contributed to overpayment). *But see Eder v. Sullivan*, No. 91-C-0638, 1991 WL 212175 (N.D. Ill. Oct. 4, 1991) (ALJ rightfully concluded that claimant was well educated and should have understood SSA requirements).

physical impairments.¹³⁶ Failure to consider these circumstances can be especially hard on older people, because many of them are affected by at least one of these impairments.

The case of Ermano Valente is a well-known example of how ALJs can fail to take relevant circumstances into account.¹³⁷ In 1975, the SSA began paying claimant Valente Disability Insurance Benefits when a heart condition rendered him unable to work.¹³⁸ In April 1976, Valente notified the SSA that he had resumed employment.¹³⁹ In July 1976, the SSA sent Valente a letter explaining that it would continue to pay him during a nine-month "trial-work" period.¹⁴⁰ Although the letter promised that the SSA would contact Valente in September, he never heard from the agency.¹⁴¹ Instead, he continued to receive and cash benefit checks.¹⁴²

Valente again became ill and unable to work in mid-1977, and did not return to his job until October 1978.¹⁴³ Valente's wife claimed that she visited the SSA office on a number of occasions in 1978 to notify the agency that Valente had resumed working.¹⁴⁴ She testified that she believed that because her husband had returned to work, he was no longer entitled to SSA checks.¹⁴⁵

Eventually, in October 1979, the SSA reviewed Valente's case.¹⁴⁶ As a result of this review, the SSA found that it had overpaid him \$19,859.60.¹⁴⁷ Citing that it had explained the workings of a trial-work period to Valente in 1977, the SSA determined that he was not without

136. See, e.g., *Wimbish v. Sullivan*, [1990 July-Dec. Transfer Binder] 36 Unempl. Ins. Rep. (CCH) ¶ 15,677A (D.D.C. July 24, 1990) (ALJ did not properly consider how claimant's injury affected overpayment). But see *Anderson v. Sullivan*, 914 F.2d 1121 (9th Cir. 1990) (ALJ correctly concluded that claimant's blindness, minimal education, and present confusion were not relevant in causing overpayment).

137. Although the case does not specifically mention Valente's age, the disabilities for which he received Disability Insurance Benefits are common among the older population.

138. *Valente v. Secretary of Health & Human Servs.*, 733 F.2d 1037, 1038 (2d Cir. 1984).

139. *Id.* at 1039.

140. The SSA uses trial work periods to determine whether a worker who has been disabled is ready to return to employment. After nine months, the SSA reviews the claimant's condition. If the claimant is found to be no longer disabled "within the meaning of the law," the SSA will grant no further benefits. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

fault in causing the overpayment.¹⁴⁸ The ALJ hearing Valente's request for a waiver agreed with this argument.¹⁴⁹

Valente then appealed this decision to the federal district court.¹⁵⁰ The court found that the ALJ failed to consider many important aspects of his case, including the fact that the SSA had failed to contact Valente for several years after it had promised to do so, the fact that Valente's wife "barely understands English," and the fact that both of the Valentés were "barely literate."¹⁵¹ The Second Circuit, on appeal, did not agree with some of the specific circumstances that the district court had admonished the ALJ for overlooking,¹⁵² but agreed with the lower court's general finding that the ALJ had, in fact, failed to consider the claimant's pertinent circumstances as required by the statute. The court noted, "[a]lthough the ALJ recited these criteria at the beginning of his opinion, he did not indicate how, or whether, he applied them."¹⁵³ The circuit court was especially concerned that the ALJ had failed to take into account Valente's physical condition.¹⁵⁴

Remanding a case back to the ALJ for further consideration does not mean that the ALJ will amend his or her failure to review pertinent circumstances. The Second Circuit made very clear to the ALJ what aspects of the case the ALJ needed to consider in order to find Valente "not without fault."¹⁵⁵ Yet, six years later, Valente once again appeared before the Second Circuit, asking the court to examine the ALJ's most recent determination against him.¹⁵⁶ The court found that on remand, the ALJ "refused to determine Valente's physical condition" during the time in question; if he was disabled at any point, he was entitled to the benefits.¹⁵⁷ Despite the fact that federal judges are not to second guess the judgment of the Secretary of Health and Human Services,¹⁵⁸ the Second Circuit determined that remanding the case would be a further waste of time and resources.¹⁵⁹ The court held

148. *Id.*

149. *Id.*

150. *Id.* at 1040.

151. *Id.*

152. *Id.* at 1042 n.4.

153. *Id.* at 1043.

154. *Id.*

155. *Id.*

156. *Valente v. Sullivan*, 897 F.2d 54 (2d Cir. 1990).

157. *Id.* at 56.

158. *Valente v. Secretary of Health & Human Servs.*, 733 F.2d 1037, 1041 (2d Cir. 1984) (citing *Bastien v. Califano*, 572 F.2d 908, 912 (2d Cir. 1978)).

159. *Valente*, 733 F.2d at 1041.

that there was only enough evidence to support the Secretary's contention that Valente was "not without fault" for causing three months (out of thirty-five total in question) of the overpayment.¹⁶⁰

Even after the Valente and Jefferson decisions, ALJs continue to evaluate pertinent circumstances improperly.¹⁶¹ For example, in March 1988, a diabetic condition prevented Joyce Lieberman from working.¹⁶² In response, Lieberman sought and collected disability insurance.¹⁶³ In March 1989, she found employment, and notified SSA of this change in May.¹⁶⁴ The SSA told her that it would continue to pay benefits throughout a nine-month trial period.¹⁶⁵ At the end of the trial period, the SSA told her it would reevaluate her claim.¹⁶⁶

Over a year after her trial period expired, the SSA discovered Lieberman was still employed.¹⁶⁷ The SSA also discovered that it had paid her benefits for several months after the trial period had expired.¹⁶⁸ The SSA subsequently demanded repayment.¹⁶⁹

Lieberman requested a waiver, which the SSA denied.¹⁷⁰ When she eventually came before an ALJ, he, too, denied her waiver.¹⁷¹ His decision was affirmed by the Appeals Council.¹⁷² Lieberman then requested that the federal court review her situation.¹⁷³

The district court found many faults in the ALJ's evaluation of her "pertinent circumstances."¹⁷⁴ The court found that the ALJ failed to make explicit findings of Lieberman's credibility (or lack thereof).¹⁷⁵ In addition, the ALJ made no specific findings on whether any pertinent circumstances caused the overpayment.¹⁷⁶ For example, the ALJ did not determine Lieberman's level of education or intelligence.¹⁷⁷ Also, the ALJ did not determine whether the claimant suffered side

160. *Valente v. Sullivan*, 897 F.2d 54, 58 (2d Cir. 1990).

161. *Lieberman v. Shalala*, 878 F. Supp. 678, 681 (S.D.N.Y. 1995).

162. *Id.* at 679.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 680-82.

175. *Id.* at 681.

176. *Id.*

177. *Id.*

effects from the many medications she took, and how the side effects, if any, might have influenced the overpayment.¹⁷⁸ Finally, the ALJ failed to determine whether Lieberman reasonably relied on information given by the SSA when she accepted the additional benefits, noting that while she had been told that she would receive benefits during a nine-month trial period, the SSA did not indicate that subsequently, those payments would automatically stop.¹⁷⁹

Although in some circumstances claimants are expected to exercise a high degree of care to avoid overpayment,¹⁸⁰ this additional duty does not excuse the ALJ from taking pertinent circumstances into account.¹⁸¹ For example, in *Albalos v. Sullivan*,¹⁸² a 1990 Ninth Circuit case, the ALJ below had found Albalos to be not without fault in causing an overpayment of \$868.60 in retirement benefits because he failed to file earnings reports.¹⁸³ The Second Circuit, however, noted that the ALJ had failed to take a number of important circumstances into account in making this decision, including that Albalos spoke English as a second language and had completed only a sixth-grade education.¹⁸⁴ Admittedly, the SSA had required that Albalos exercise a high degree of care in avoiding errors, but “[b]ecause the ALJ did not make findings regarding those [statutory] circumstances,” the court reversed.¹⁸⁵

As seen in *Valente* and *Albalos*, if courts determine that the ALJ did not properly take relevant circumstances into account, they can remand the trial for another hearing. At the same time, the courts do not review all cases that come before a particular ALJ. There are probably many cases where the ALJ’s failure to consider relevant circumstances has forced claimants to repay the SSA unfairly. Worse, if the ALJs are obstinate (as in the case of *Valente*), older people can find themselves trying for many years to have an overpayment waived.

Even when the ALJ takes the statutory “pertinent circumstances” into account, the ALJ presiding over the case often does not know how to properly evaluate these circumstances.¹⁸⁶ This tendency to un-

178. *Id.*

179. *Id.* at 681-82.

180. 20 C.F.R. § 404.510 (1994) (to prevent deduction overpayments).

181. 42 U.S.C. § 404(b) (1994).

182. 907 F.2d 871 (9th Cir. 1990).

183. *Id.* at 873.

184. *Id.* at 872-73.

185. *Id.* at 873.

186. See *Wimbish v. Sullivan*, No. 89-1293-OG, 1990 WL 180704, at *7-8 (D.D.C. July 24, 1990) (ALJ incorrectly evaluated impact of claimant’s injury on causing overpayment).

derconsider relevant circumstances can potentially cause unfair results if the circumstances are of a physical nature and must be evaluated by experts.

One example well illustrates this problem.¹⁸⁷ The District Court for the District of Columbia noted after Cecillia Wimbish's car accident, "[her] skull was fractured, one eye became totally blind, both legs require[d] braces, and she use[d] two canes. She [had] frequent headaches, dizzy spells, loss of concentration, and memory lapses. She also suffered from depression and feelings of helplessness."¹⁸⁸ Because she worked while receiving benefits, the SSA determined that she had been overpaid by more than \$66,000 (this later was reduced to \$31,750).¹⁸⁹ Wimbish claimed that she was without fault in receiving the overpayments for a number of reasons, including that "her severe memory lapses made her unaware of any such reporting requirement."¹⁹⁰ With regard to this claim, the Secretary and Wimbish submitted conflicting reports from expert witnesses.¹⁹¹ Despite a detailed report supporting Wimbish's contention that her physical problems led to the overpayment, the ALJ elected to accept the Secretary's more perfunctory evaluation and determined that she "was not without fault."¹⁹² The district court found the ALJ's rejection of the more detailed report unacceptable.¹⁹³ "[T]he fact of plaintiff Wimbish's impaired memory lies at the heart of this case," the court stated.¹⁹⁴ The court continued:

In deciding whether plaintiff should have known to report her employment to the SSA, the ALJ was bound by regulation to consider 'all pertinent circumstances' By rejecting [the more thorough] report, the ALJ failed to consider all pertinent circumstances, and the agency's resulting decision holding plaintiff accountable for her failure to report her employment to the SSA is unsupported by the record.¹⁹⁵

187. Although the claimant was only 39 at the time of the case, the issues are analogous to those facing older claimants. The issues in this case are much clearer than any on record involving older claimants. This does not mean, however, that because no strong case has been made with an older claimant, ALJs will effectively consider those claimants' relevant circumstances.

188. *Wimbish v. Sullivan*, No. 89-1293-OG, 1990 WL 180704, at *1 (D.D.C. July 24, 1990).

189. *Id.* at *2.

190. *Id.*

191. *Id.* at *5.

192. *Id.*

193. *Id.*

194. *Id.* at *6.

195. *Id.* at *7.

Although Wimbish was not an older claimant, analogizing her situation to that of an older claimant is not difficult. A comparable situation would be a case involving older claimants receiving an overpayment because they did not report their employment after commencing Social Security retirement benefits. Claimants may fail to report because their lack of education made them confused about their responsibilities (as seen in *Jefferson*)¹⁹⁶ or because memory lapses caused them to forget the requirement to report employment.¹⁹⁷ Older claimants would be in a more precarious position than Wimbish because the resulting overpayment would likely be a deduction overpayment, which, as noted above, claimants must exercise a high degree of care to avoid.¹⁹⁸ An ALJ may be tempted to use this standard to dismiss many relevant circumstances as not controlling, and the claimant would not even have had the chance for her particular circumstance to render her “without fault” in causing the overpayment.

In addition to either refusing to evaluate circumstances or evaluating circumstances incorrectly, ALJs sometimes improperly use their personal opinions to evaluate a claimant’s situation; ALJs may attempt to use their own “personal awareness” as a basis for evaluating the claimant’s circumstances.¹⁹⁹ For example, in *Fremont v. Sullivan*, a recent Ninth Circuit case, the court discovered that, “[i]n his decision to deny Fremont’s request for a waiver, the ALJ appeared to base his finding on the ALJ’s personal awareness that federal employees received notice of pension offset provisions on many occasions.”²⁰⁰ This “personal awareness” led the ALJ to conclude that the claimant was not without fault in causing the overpayment because the claimant should have been aware of the provisions.²⁰¹ The Ninth Circuit found the ALJ’s action entirely “improper,” and reversed the ALJ’s decision.²⁰²

196. *Jefferson v. Bowen*, 794 F.2d 631 (11th Cir. 1986).

197. *See id.* (In addition to not understanding the SSA requirements, Jefferson probably had forgotten any initial explanation received when she first applied in 1972).

198. *See supra* note 104.

199. *See Fremont v. Sullivan*, No. 90-56076, 1992 WL 68263 (9th Cir. Apr. 7, 1992) (ALJ improperly uses “personal awareness” to evaluate case).

200. *Id.*

201. *Id.*

202. *Id.* In a more recent example, a federal district court held that ALJs could not overly read into the facts and interpret them in light of their own ideas concerning the causes of an overpayment without providing evidentiary support for those ideas. *Valente v. Sullivan*, 862 F. Supp. 514 (D.D.C. 1994).

Moreover, even if claimants can establish that they suffer from some impairment that would reasonably affect their ability to interact with the SSA, evaluators commonly assume that claimants will have support (such as translators) available to aid them with Social Security.²⁰³ In one example, the Ninth Circuit expected a blind claimant to have someone help him read correspondence from the SSA, even though nothing indicated that such support was available.²⁰⁴

D. Inconsistencies Within the Overpayment System

Because the SSA and courts have no established measures for handling claimants with certain problems, areas of inconsistency have arisen, at least two of which affect older claimants. First, no general consensus exists on claimants' accountability to signed forms and applications.²⁰⁵ Second, judges disagree as to whether older claimants who do not have strong English skills are responsible for securing interpreters for their dealings with the SSA.²⁰⁶

Much disagreement exists over claimants' responsibilities for signed applications. The general application to receive retirement benefits is six pages long.²⁰⁷ The form asks claimants to provide a great deal of information, some of which they must update if circumstances change.²⁰⁸ Claimants do not always remember the information they provided to the SSA when they signed the form or do not remember to provide updates when the original information changes.²⁰⁹

Some courts prefer the SSA and ALJs to take into account the fact that claimants, especially if they are older, will not always remember what they wrote on the forms or the precise procedures the claim-

203. See *Anderson v. Sullivan*, 914 F.2d 1121 (9th Cir. 1990).

204. *Id.* It is unclear whether this inconsistency will disappear under the new regulations that stress lack of facility with the English language as an important pertinent circumstance.

205. See, e.g., *Tannehill v. Bowen*, 687 F. Supp. 555, 556 (N.D. Ala. 1987) (claimant was not expected to remember every condition agreed to at the time of application); *Clifford v. Sullivan*, No. 92-2029, 1993 WL 118836 (10th Cir. Apr. 15, 1993) (claimant responsible for all conditions agreed to at time of application).

206. See, e.g., *Matthanasak v. Sullivan*, 769 F. Supp. 103 (W.D.N.Y. 1991) (claimant knew he could not speak English well and was therefore responsible for getting his own aid to deal with the SSA); *Valle v. Secretary*, No. 84 Civ. 2885 (WCC), 1985 WL 1993 (S.D.N.Y. June 28, 1985) (SSA (here, through the ALJ) expected to use additional care with claimant who did not speak English well).

207. See *supra* note 25.

208. *Id.*

209. See also *Jefferson v. Bowen*, 794 F.2d 631 (11th Cir. 1986) (claimant did not remember to report changes in earnings).

ants agreed to by signing the application.²¹⁰ A 1987 district court case, *Tannehill v. Bowen*, provides a good example of this view.²¹¹ When applying for benefits for her dependent children in 1977, claimant Tannehill marked the box on the form that indicated that she agreed to file annual earnings reports.²¹² When she subsequently failed to file those forms, the SSA overpaid her.²¹³ The court noted that “[t]he fact that she checked the box on the application is . . . not persuasive” to establish fault.²¹⁴ The court found, “[i]t is simply unreasonable, therefore, that Mrs. Tannehill ‘would recall a checkmark in a box from a form filled out’ in 1977.”²¹⁵

Other courts insist that claimants adhere to all information and conditions they had agreed to when they signed the application forms.²¹⁶ These courts fear that to hold otherwise would allow claimants to lie and claim forgetfulness.²¹⁷ For example, in *Clifford v. Sullivan*,²¹⁸ a recent Tenth Circuit case, the court expected the claimant to remember that he had agreed to report any pension changes when he first applied for retirement benefits.²¹⁹ The court concluded that, in signing the form, Clifford showed his consent to comply with SSA duties, and therefore he was not without fault in causing the overpayment that resulted when he neglected to inform the SSA of federal pension changes several years after applying.²²⁰

Just as no set policy dictates what claimants are expected to remember when they sign their application, no set policy establishes what responsibilities those claimants unable to speak English have when dealing with the SSA. Certain courts have considered poor English to be a relevant circumstance which prevents claimants from effectively communicating with the SSA.²²¹ These courts are willing to waive repayment when the claimant’s inability to communicate in

210. See, e.g., *Tannehill v. Bowen*, 687 F. Supp. 555, 558 (N.D. Ala. 1987) (claimant did not remember all conditions agreed to when signed form around 10 years before).

211. *Id.*

212. *Id.* at 556.

213. *Id.*

214. *Id.* at 558.

215. *Id.* (citing *Jefferson v. Bowen*, 794 F.2d 631 (11th Cir. 1986)).

216. *Clifford v. Sullivan*, No. 92-2029, 1993 WL 118836 (10th Cir. Apr. 15, 1993).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. See *Valente v. Sullivan*, 773 F.2d 1037 (2d Cir. 1984).

English caused the initial difficulty.²²² For example, in *Valle v. Secretary*,²²³ the District Court of the Southern District of New York remanded the case because the ALJ did not take into account all of the circumstances of the claimant's inability to speak English. The record showed that the claimant did not understand the events surrounding the hearing in front of the ALJ.²²⁴ In fact, statutes and regulations mandate that the SSA, the ALJs, and the courts consider lack of strong English skills a pertinent circumstance.²²⁵

At the same time, a number of courts have held that claimants who do not speak English are responsible for their problem.²²⁶ Such claimants should get translators to ensure that no errors arise due to miscommunication.²²⁷ Consequently, a New York district court found one claimant, Syno Matthanasak, to be not without fault in an overpayment that stemmed from his poor ability to communicate in English.²²⁸ The court stated, "[t]he record is replete with numerous instances in which plaintiff was placed on notice regarding his obligation to have SSA forms and communications translated and explained for his understanding."²²⁹ Therefore, the court concluded, the claimant knew or should have known to get the assistance that would have allowed him to understand his responsibilities and prevented the overpayment.²³⁰

Cases concerning those claimants who do not speak English well do not clarify whether the SSA itself must aid these claimants or whether these claimants are on their own. The courts have not set a concrete policy. Currently, the SSA provides many services and translators to non-English-speaking claimants, including telephone applications and help services in Spanish.²³¹ At the same time, the SSA maintains that it is under no duty to provide translators.²³²

222. *Id.*

223. No. 84 Civ. 2885 (WCC), 1985 WL 1993 (S.D.N.Y. June 28, 1985).

224. *Id.*

225. See *supra* text accompanying note 94.

226. *Matthanasak v. Sullivan*, 769 F. Supp. 103 (W.D.N.Y. 1991).

227. *Id.* at 106.

228. *Id.*

229. *Id.*

230. *Id.* at 107.

231. Telephone Interview with Ms. Higgins, *supra* note 25.

232. See *Tomic v. Sullivan*, No. 89-C-2054, 1992 WL 43241 (N.D. Ill. Mar. 2, 1992).

IV. Alleviating the Problem of Overpayments

Obviously, within an organization as large as the Social Security Administration, which deals with nearly the entire population of the United States, large numbers of errors are inevitable. At the same time, both the SSA and its claimants can take steps to alleviate the problem of overpayments through preventative measures. In addition, the SSA, the ALJs, and the courts can take measures to ensure that recoupment of overpayments is handled as equitably as possible.

A. Stopping Overpayments at the Administrative Level

The SSA already has taken a number of steps to alleviate problems caused by errors at the administrative level. For example, the SSA has had for a long time one program specifically designed to address the problem of those claimants who are unable to manage their own affairs—the representative payee system. This system allows the SSA to designate another person to carry out the claimant’s responsibilities when the claimant is unable to do so.²³³ The process of selecting the payee and delineating that person’s responsibilities is relatively thorough.²³⁴ Yet, the regulations provide only a general definition of when a representative payee will be used for an older claimant.²³⁵ For such claimants, a representative payee will be used if the claimant is “[l]egally incompetent or mentally incapable of managing benefit payments” or “[p]hysically incapable of managing or directing the management of his or her benefit payments.”²³⁶ The regulation does not detail what situations are included by these conditions. This system, however, is designed to prevent the errors that arise when an incapable person attempts to handle SSA benefits alone.

At the same time, many errors continue to arise when older claimants attempt to deal with the SSA. For example, many of the errors that result in overpayments stem from situations that occur when the claimant completes the application. The claimant may provide incorrect information, fail to provide information, or fail to read the application filled out by an SSA employee. In order to avoid inaccurate applications, both claimants and SSA employees need to be more diligent. The application process has become hurried—the claimant either fills out the application without knowing the process

233. 20 C.F.R. § 404.2001 (1995).

234. *See id.* §§ 404.2001-.2021.

235. *Id.* § 404.2010.

236. *Id.* § 404.2010(a).

or signs the form without double-checking the information written down by the employee. As the cases above demonstrate, this process often leads to errors or misunderstandings that cause overpayments.

Furthermore, problems arise when the SSA office does not assist those claimants who are unable to complete the forms alone. For example, non-English-speaking claimants often cannot get translators to help explain forms and regulations. Yet these claimants are unaware that they will be held accountable for all misunderstandings. Either proper resources need to be available to claimants with special needs, or the SSA needs to inform those in need of extra help that, as Social Security claimants, they have a responsibility to secure aid in getting the right benefits.

B. Preventing Unfair Repayments

In addition to preventing overpayments, preventing unfair repayments is important. Congress and the SSA have gone to great lengths to ensure that only those claimants who are not without fault repay overpayments. Those evaluating overpayment cases, however, do not always seem to be pursuing this goal.

That ALJs continue to ignore the “pertinent circumstances” requirement of evaluating fault is incongruous. Understandably, ALJs wish to reach the correct result. Claimants were never entitled to excess benefits in the first place and would have had to go without the extra resources had they received their correct allotment. If the legislature and the SSA had wished to be that strict, they would not have provided for the large number of circumstances in which the SSA can waive the requirement to repay. The ALJs should not try to thwart legislative efforts by denying waivers altogether.

Moreover, both the SSA as well as the courts need to be better aware of what problems give rise to “pertinent circumstances.” This awareness is especially important for older claimants whose difficulties might not be obvious. Many younger claimants who receive aid from Social Security are getting disability insurance; their physical or mental conditions which might lead to an overpayment will most likely be obvious. Older claimants, however, often receive overpayments of retirement benefits; their conditions which cause overpayment initially might not be as obvious. The SSA and courts need to be aware of those conditions affecting the older population that cause overpayment. Most importantly, they need to be aware of those con-

ditions that affect the older population in general—such as changes in comprehension and memory.

C. Changing the System

In its most simple form, the older population's interaction with the overpayment system shows that more needs to be done to prevent overpayments and the unfair denial of waivers. As this note has discussed, many overpayments are caused through miscommunication or confusion. Any solution aimed at reducing the amount the SSA overpays older claimants will have to include ways to facilitate communication between the agency and its claimants and ways to facilitate claimants' understanding of their responsibilities as recipients of SSA benefits.

A number of possible changes could be made to alleviate the overpayment problem. First, the required paperwork should be simplified. Currently, the application form for retirement benefits tries to encompass every contingency, which makes the form long and hard to read. Perhaps making applications streamlined, with different versions targeted toward specific groups, might stop common errors before they occur. The SSA could provide, for example, one version for federal employees which emphasizes that pensions count against Social Security, and one version for those claimants between the ages of sixty-two and seventy who wish to continue to work, which makes any deductions known from the beginning.

Second, the SSA should forbid its employees from filling out application forms for claimants without reviewing the information thoroughly with the claimant before the claimant signs the form. In addition, although telephone applications may be convenient for routine claimants, they should be done with the utmost care and avoided in cases where the claimant's situation is complex.

Third, the SSA should keep track of its claimants' current status. As providing follow-up for all SSA claimants is unfeasible, the SSA may wish to limit this inquiry to only those claimants with potential communication problems (e.g., the claimant has little schooling or little facility with English), or to claimants who are known to be or may still be working (especially if the claimant is under seventy). Although the SSA sends periodic reminders with benefit checks alerting its claimants of potential problems, claimants are not always aware that the information applies to them. More personal communi-

cation is needed, such as individualized letters or phone calls, to overcome this problem.

Furthermore, SSA employees, ALJs, and courts must be more aware of the specific problems that should be included among the statutory "pertinent circumstances." They need to know which social and physiological problems to expect, and what resources the Administration provides to deal with claimants who cannot easily communicate with or understand the SSA and its employees.

Finally, claimants themselves are not powerless to prevent unfair overpayments. At the outset, claimants should endeavor to learn as much as possible about their duties and rights as SSA beneficiaries. Should claimants find themselves charged with overpayment, they can ensure that their request for a waiver is handled expediently and arrives at the correct result by keeping thorough and accurate records of the circumstances of the alleged overpayment. In addition to providing good evidence for their case, complete records also enhance claimant credibility, increasing their chances for a waiver.²³⁷

V. Conclusion: Will the Problem Fix Itself?

Even if the Social Security Administration improves its system to curb overpayments, this problem can never be eliminated entirely. A system as large as Social Security is bound to make some errors in distributing its benefits: paying some greater benefits than entitled, paying some less, not paying some applicants entitled to benefits, and paying benefits to a few applicants who are not entitled. With \$1.5 billion a year lost due to overpayments, however, any improvement would be of great value.

Part of this problem may solve itself in the future. As noted early in this note, poor education and illiteracy were two problems found associated with the elder population that lead to overpayments. At the same time, the National Adult Literacy Survey and the 1990 census noted a trend towards a higher level of literacy and educational attainment within the American population.²³⁸ Currently, the median educational level for the United States population over twenty-five is 12.7 years of school, with those twenty-five to thirty-four averaging 12.9 years, and those thirty-four to fifty-five averaging

237. See Boskey, *supra* note 77, at 138. "Documentation and credibility are the two crucial elements in any appeal of an overpayment." *Id.*

238. See KIRSCH ET AL., *supra* note 45; CENSUS BUREAU, *supra* note 44.

13.0 years.²³⁹ Moreover, those in the twenty-five to fifty-four category scored around 20 to 25 points higher on the literacy test than those in the fifty-five to sixty-four group, and around 35 to 60 or more points higher than those in the sixty-five and over group (taking into account all three tests).²⁴⁰ Those in the younger group, who have a higher literacy and educational level should be able to deal with the SSA better, thus causing fewer errors. Fewer errors, meanwhile, should lead to fewer overpayments—and a proportional decline in headaches for both the SSA and its constituents.

At the same time, waiting for the problem to fix itself will not help reclaim the billions currently lost to overpayments. Although an increase in literacy rates would reduce overpayments, this increase would fail to alleviate those overpayments caused by other social and physiological situations. To curb this loss, measures need to be taken now to reduce the loss in overpayments caused by both lack of literacy as well as other physiological and social circumstances.

239. See KIRSCH ET AL., *supra* note 45.

240. *Id.* In the document category, the numbers are 27 to 37 points higher than the 55 to 64 group, and a full 56 to 66 higher than the 65 and over group. *Id.*