Journal of the National Association of Administrative Law Judiciary

Volume 36 | Issue 1 Article 4

5-15-2016

Save the Social Security Disability Trust Fund! and Reduce SSI Exposure to the General Fund

Daniel F. Solomon

SAVE THE SOCIAL SECURITY DISABILITY TRUST FUND!
AND REDUCE SSI EXPOSURE TO THE GENERAL FUND

DANIEL F. SOLOMON*

Last November, this country was saved from an impending disaster, when the President signed the Bipartisan Budget Act of 2015 into law on November 2, 2015.[1] Before that, it looked like the Social Security Disability Trust Fund would default. Default could have been disastrous, not only for beneficiaries, but for our entire economy.

Although most Americans consider Social Security as a unitary program, two separate trust funds are involved:

1.the Old-Age and Survivors' Insurance (OASI) program and

2.the Social Security Disability (DI) program.[2]

Old-age benefits were enacted in 1935 and have been paid monthly since 1940.[3] Benefits for disabled workers were established in 1956 and a separate trust fund has been maintained since then.[4] This paper concentrates on the DI Fund.

The 2014 Trustees' Annual Report projected that the DI Trust Fund reserves would have been depleted in the fourth quarter of 2016, and the combined OASI and DI Trust Funds would have been depleted in 2033.[5]

---

* Administrative law judge, United States Department of Labor; past Federal Administrative Law Judges' Conference (FALJC) president and FALJC liaison member of the Administrative Conference of the United States (ACUS); past chair, National Conference of the Administrative Judiciary, Judicial Division, American Bar Association (ABA); and former long-time member of the ABA House of Delegates. Author, *Breaking Up With Cuba: The Dissolution of Friendly Relations between Washington and Havana, 1956-1961*, 4 INT'L J. CUBAN STUD. 109 (2012). The views expressed in this report are those of the author and do not necessarily reflect the official policy or position of the Department of Labor or any other organization.

1 *Congress Passes H.R. 1314, the Bipartisan Budget Act of 2015*, SOC. SEC. LEGISLATIVE BULLETIN, 114-18 (November 3, 2015).

2 DI refers to Disability Insurance Benefits (DIB) also known as Title II benefits, named for the chapter title of the governing section of the Social Security Act.

3 Robert J. Myers, *Old-Age, Survivors, and Disability Insurance Provisions: Summary of Legislation, 1935-58*, 22 SOC. SEC. BULLETIN 15, (1959).

4 *Id.* at 20.

5 *Informational Report: Disability Insurance Trust Fund*, A-15-15-15024, OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., 3 (Dec. 1, 2014),

Until that time, given Congressional inaction, it appeared that default was inevitable.[6]

---

http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-15-15-15024.pdf [hereinafter *Informational Report*]:

> DI Trust Fund reserves expressed as a percent of annual cost (the trust fund ratio) declined to 40 percent at the beginning of 2015, and the Trustees project trust fund depletion late in 2016, the same year projected in the last Trustees Report. DI costs have exceeded non-interest income since 2005, and the trust fund ratio has declined in every year since peaking in 2003. While legislation is needed to address all of Social Security's financial imbalances, the need has become urgent with respect to the program's disability insurance component. Lawmakers need to act soon to avoid automatic reductions in payments to DI beneficiaries in late 2016.

Jacob J. Lew et al., *A Summary of the 2015 Annual Reports*, SOC. SEC. ADMIN. (2015), http://www.ssa.gov/oact/trsum/. This had been known for many years. *See*, *Policy Options for the Social Security Disability Insurance Program*, *Publ'n No.* 4207, CONG. BUDGET OFF. (2012), https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/43421-DisabilityInsurance_print.pdf. [hereinafter *Publ'n No. 4207*] CBO projected that DI outlays would peak in 2016 and taper off beginning in FY 2017. *Id.* at 1.

[6] *See* Harold A. Pollack, *Saving SSDI: As the disability-insurance program's trust fund runs out of cash, there are new signs of internal reform—but more changes are needed.* THE ATLANTIC (August 31, 2015) http://www.theatlantic.com/politics/archive/2015/08/ssdi-social-security-disability-insurance/402475; Max Ehrenfreund, *Social Security Disability Payments Will be Cut by a Fifth if Congress Doesn't Act*, WASH. POST: WONKBLOG (January 7, 2015), http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/07/social-security-disability-payments-would-be-cut-by-a-fifth-without-new-action/. For the rationale in forcing DI Trust Fund default see Nicholas Ballasy, *Greenspan: US 'Way Underestimating' the National Debt*, PJ MEDIA (May 30, 2015), http://pjmedia.com/blog/greenspan-u-s-way-underestimating-the-national-debt/ fund/2015/06/07/id/649228/. Al Greenspan, former Chairman of the Federal reserve stated:

> The notion that we have a trust fund is nonsense – that trust fund has no meaning whatsoever except for the fact as an all private fund to benefit programs, if it runs out of money, you can only pay out in cash flows that come in but the probability that will happen is not particularly high.

Dartagnan, *Diary Entry Republicans Move To Gut Social Security Benefits on Their First Day in Power*, THE DAILY KOS (Jan. 07, 2015), http://www.dailykos.com/story/2015/01/07/1356086/-Republicans-Move-To-Gut-Social-Security-Benefits-on-Their-First-Day-in-Power#.

The President requested Congress to reallocate the Social Security payroll tax rate to avoid default in fiscal year (FY) 2016. Trust funds had been transferred between the two funds eleven times, most recently in 1994.[7] In the proposed 2016 budget, President Obama proposed increasing the portion of the payroll tax going to the disability fund by 0.9 percentage point, redirecting $330 billion from the retirement fund over five years.[8]

Employees and employers now each pay a 6.2% payroll tax that funds both the disability insurance trust fund and the much larger retirement-benefits fund, which is currently expected to be depleted in 2034.[9]

---

7 Kristina Peterson, *Parties Clash Over Social Security Disability Trust Fund*, WALL ST. J. (Feb. 11, 2015), http://www.wsj.com/articles/parties-clash-over-social-security-disability-trust-fund-1423696405.

8 *Id.*

9 *Id.* According to Ms. Peterson and the Wall Street Journal, the proposed administration budget proposal reallocation "would mean that both the [OASI and the DI] trust funds would be depleted in 2033, a year earlier than otherwise projected for the retirement fund." *Id.; see also Informational Report*, *supra* note 5, at 3. However, in response, House Republicans passed a rule prohibiting it unless steps were also taken to shore up Social Security's overall finances. *See* Kathy Ruffing & Paul N. Van de Water, *Congress Needs to Boost Disability Insurance Share of Payroll Tax by 2016*, CTR. ON BUDGET & POLICY PRIORITIES (July 31, 2014), http://www.cbpp.org/sites/default/files/atoms/files/7-16-14socsec.pdf; Kathy Ruffing & Paul N. Van de Water, *Boosting Disability Insurance Share of Social Security Payroll Tax Would Not Harm Retirees*, CTR. ON BUDGET & POLICY PRIORITIES (Dec. 2, 2014), http://www.cbpp.org/sites/default/files/atoms/files/12-2-14ss.pdf. William R. Morton, *Social Security Disability Insurance (SSDI) Reform: An Overview of Proposals to Reduce the Growth in SSDI Rolls*, CONG. RESEARCH SERVS.,10 (2013), https://www.fas.org/sgp/crs/misc/R43054.pdf, outlines an increase in the number of insured workers due to population growth and a rise in the percentage of the working-age population insured for disability resulted in an expansion in the size of the insured-worker population as factors for insolvency. He documents that "growth in the size of the female insured-worker population coincided with a rapid rise in the incidence rate of women in the [DI] program." *Id.* at 11. However, he also notes "SSA's Chief Actuary projects that both male and female age-adjusted incidence rates should stabilize between five and six awards per 1,000 disability-exposed workers in the future." *Id.* He also documents that "[b]eginning in 1996, working-age baby boomers increasingly entered their most disability prone years (aged 50 to full retirement age [FRA]), thereby shifting the age distribution of the insured-worker population from younger workers (aged 25 to 44) to older workers (aged 45 to FRA)." *Id.* He also documents that a "decreased likelihood of dying in a given year helped to increase the chance of an individual surviving to his or her

This paper may provide some solutions to forego disaster.

There is often confusion about DI and Supplemental Security Income (SSI). DI benefits are based on Old-Age and Survivors Insurance and Disability Insurance (OASDI),[10] Federal Insurance Contributions Act (FICA), taxes collected from wage earners.[11] At present, the maximum amount of earnings subject to the Social Security tax (the "taxable maximum") is $118,500 for 2015.[12] Employers and employees each contribute 6.2 % to the taxable minimum to OASDI.[13] Self-employed individuals pay the full 12.4% personally.[14] "Of an estimated 168 million workers who will pay FICA taxes in 2015, about 10 million will pay higher taxes because of an annual increase in the taxable maximum."[15] In essence, the DI program is an "early retirement" policy for workers who meet the terms of a policy of "social insurance."[16] In order to qualify, as a predicate, workers must have paid enough OASDI taxes to be fully or currently insured[17] and meet "disability" requirements. The definition of disability contains a duration test; if the impairment (1) is not expected to result in death, and (2) has neither lasted twelve months nor is expected to last for a continuous period of twelve months, the claimant is "not disabled."[18] In 2014, Social Security paid 141 billion to almost 11 million disability beneficiaries and their family

---

most disability-prone years (aged 50 to FRA)." *Id.*at 12. He also notes that dips in the economy, especially unemployment rates, is proportionate to increases in DI applications and awards. *Id.* at 13-14; *see also Publ'n No. 4207,* supra note 5, at 4 (Congressional Budget Office "(CBO) in conjunction with the staff of the Joint Committee on Taxation (JCT) estimated the budgetary effects of a variety of potential modifications to the DI program."). This paper also addresses several budgetary effects of DI program modifications.

10 Lew, *supra* note 5.

11 Imposed on both employees and employers to fund Social Security and Medicare. *Id.*

12 *Id.*

13 Including Medicare, each contributes a total of 7.65% for a total of 15.3%. *Id.* Also, as of January 2013, individuals with earned income of more than $200,000 ($250,000 for married couples filing jointly) pay an additional 0.9 percent in Medicare taxes. *Id.*

14 *Id.*

15 *Id.*

16 Morton, *supra* note 9, at 2.

17 42 U.S.C. § 414(a)-(b) (2012).

18 *See* 42 USC § 423(d)(1)(A) (2012).

members.[19] When recipients become eligible for DI, they also become eligible for Medicare.[20] Disabled workers are paid from the DI fund at the same rate as retired workers until the full retirement age is met, when they are converted to OASI beneficiaries.[21] SSA annually adjusts benefit levels to account for inflation through Cost-of-Living Adjustments (COLA), as measured by the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W).[22] At one time retirement age was 65; now it is 66 and will eventually increase.[23] More than 450,000 people between ages 65 and 66, who under former law would have achieved full retirement, currently receive DI benefits.[24]

"Eligibility for [DI does not take accumulated wealth or passive income, such as the benefits paid by a long-term disability (LTD)

---

19 Peterson, *supra* note 7 (paraphrasing Acting Social Security Commissioner Carolyn Colvin).

20 Twenty-nine months from the date of onset. Morton, *supra* note 9, at 3. Also eligible are disabled widow(er)s and disabled adult children (grown children of a retired, disabled, or retired worker who suffered onset of a disabling impairment before age 22), two smaller categories who also qualify under Title II of the Social Security Act. *See id.* at 7.

21 Kathy Ruffing, *Social Security Disability Insurance is Vital to Workers with Severe Impairments*, CTR. ON BUDGET & POLICY PRIORITIES, 3 (Aug. 9, 2012), http://www.cbpp.org/sites/default/files/atoms/files/8-9-12ss.pdf.

22 20 C.F.R. § 404.272(a)(1).

23 In a legislative fix in 1983, Congress incrementally increased the full retirement age (FRA) from 65 to 67, thereby expanding the maximum penalty for taking early retirement at age 62 from a 20% to a 30% reduction in cash benefits (based on year of birth). Morton, *supra* note 9, at 21.

24 Statistics should become available to show whether many recipients enrolled in DI primarily because they did not have medical insurance prior to Obamacare and needed Medicare. Nearly five percent of all DI beneficiaries are between the age of sixty-five and sixty-six. Ruffing, *supra* note 21 at 3. After Congress increased the age requirement for OASDI from sixty-five to sixty-six, "under the rules in place a decade ago," the six-five year olds "would have been receiving retirement benefits instead." *Id.* The author argues that although the administration did not concentrate on resolving the impending default, demographics explain most of the growth. *Id.* at 2 "Baby boomers into their high-disability years." *Id.* She notes that more women are now qualified for disability benefits, and that "this has been a large factor behind the increase in the number of DI beneficiaries." *Id.* at 3. It is also reasonable that poor labor market prospects due to changes in the nature of work and the 2008 recession contributed. *Id.* at 4.

insurance policy, into account when determining eligibility."[25] Some private disability insurance policies require that the insured apply for DI benefits and, if received, LTD benefits will be offset by the amount of DI.[26] Some LTD policies permit collection of benefits after a recipient is qualified for DI, but many others do not.[27] In many cases, LTD policies cut the DI benefits once a recipient is approved. LTD benefits are not governmental benefits subject to offset.[28]

Supplemental Security Income (SSI) is a welfare type program, a federal income supplement program funded by general tax revenues not Social Security taxes.[29] SSI is designed to help aged, blind, and disabled people, who have little or no income; and provides cash to meet basic needs for food, clothing, and shelter.[30] The Social Security Administration (SSA) considers an applicant's income and resources to establish eligibility for SSI.[31] Payments to SSI recipients do not affect the DI trust fund in any manner because they are funded separately.[32] When a recipient is eligible for SSI, they are also usually automatically eligible for state Medicaid.[33] However, SSA offsets SSI benefits based on receipt of other public benefits, including DI cash benefits.[34]

Some recipients are entitled to both DI and SSI. This is because although the recipient is currently and fully insured, the OASDI

---

25 Dell Markey, *Can You Combine Social Security Benefits and Long-Term Disability Policy?*, ZACKS, http://finance.zacks.com/can-combine-social-security-benefits-longterm-disability-policy-7804.html.

26 *See also Disability Insurance*, CANCER LEGAL RESEARCH CENTER (2008), https://disabilityrightslegalcenter.org/sites/disabilityrightslegalcenter.org/files/about/documents/DisabilityInsuranceNational.pdf.

27 *See also* Markey, *supra* note 25.

28 *DI 52125.005 Benefits Not Considered a Public Disability Benefit (PDB)*, SOC. SEC. ADMIN. (May 28, 2009), http://policy.ssa.gov/poms.nsf/lnx/0452125005.

29 William R. Morton, *Primer on Disability Benefits: Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI)*, CONG. RESEARCH SERVS. (Aug. 1, 2014), https://www.fas.org/sgp/crs/misc/RL32279.pdf.

30 *Id.* at 5.

31 *Id.* at 6-7.

32 *Id.*

33 *Understanding Supplemental Security Income SSI And Other Government Programs*, SOC. SEC. ADMIN. (2015), https://www.ssa.gov/ssi/text-other-ussi.htm.

34 Rene Parent, *Profile of Social Security Disabled Workers and Dependents Who Have a Connection to Workers' Compensation or Public Disability Benefits, Research and Statistics Note No. 2012-03*, SOC. SEC. ADMIN. (Sept. 2012), https://www.ssa.gov/policy/docs/rsnotes/rsn2012-03.html.

contribution did not generate a significant DI benefit because the amount of DI benefits depends on the amount of contribution.[35]

On the other hand, benefits paid to disabled workers and their families may be reduced for receipt of certain public disability benefits such as Workers' Compensation.[36] Benefits to family members may be limited by a family maximum benefit.[37]

If the DI Trust Fund defaults, current and prospective recipients would receive only about 80% of their current income.[38] The DI Trust Fund was a year away from default in . . . 1994, when Congress reallocated the Social Security 12.4% payroll tax rate, providing a little more for DI, but no change in the total tax rate.[39] The 1995 Trustees Report projected that DI Trust Fund reserves would remain adequate until 2016.[40] The number of DI recipients tripled since 1980, and doubled since 1995.[41]

The Disability Insurance Trust Fund finished the first quarter of 2015 with $54.3 billion in U.S. government bonds. This was down $5.9 billion from the end of 2014.[42] The Disability Insurance Trust Fund had lost $6.4 billion in the first quarter of 2014.[43]

Internal SSA documents disclosed:

[a]bsent another act of Congress, the Social Security Act does not permit further inter-Fund borrowing. The Social Security Act also specifies that benefit payments shall be made only from the Trust

---

35 *Id.* at 3.

36 *Id.* at 6-7.

37 20 C.F.R. § 404.403

38 *Informational Report*, *supra* note 5 at 7. The author is skeptical of the Inspector General's assessment that the quick fix would be used.

39 Ruffing & Van de Water, *supra* note 9, at 1-2. Trust funds have been transferred between the two funds eleven times, most recently in 1994. *Id.* at 2.

40 *The Financing Challenges Facing the Social Security Disability Insurance Program Before the Ways and Means Subcomm. on Soc. Sec.*, 113 Cong. 1 (2013) (statement by Stephen C. Goss, Chief Actuary, Soc. Sec. Admin.), http://www.socialsecurity.gov/oact/testimony/HouseWM_20130314.pdf.

41 Ruffing, *supra* note 21 at 2 (figure 1 illustrates this).

42 *Trust Fund Data First Calendar Quarter of 2015*, SOC. SEC. ONLINE., http://www.socialsecurity.gov/cgi-bin/ops_series.cgi (follow "Single time period" hyperlink; then search year field for "2015" and select calendar quarter 1) [hereinafter *Trust Fund Data*].

43 Charles T. Hall, *Updated Disability Insurance Trust Numbers*, SOC. SEC. NEWS (Apr. 28, 2015), http://socsecnews.blogspot.com/2015/04/updated-disability-insurance-trust-fund.html.

Funds (that is, accumulated Trust Fund assets and current tax income). Consequently, if the Social Security Trust Funds become depleted—that is, if current tax income and accumulated assets are not sufficient to pay the benefits to which people are entitled—current law would effectively prohibit full Social Security benefits from being paid on time. The Agency would then have to decide whether to pay disabled beneficiaries 81 percent of their scheduled benefits on time, delay benefit payments until enough funds are available, or determine another alternative.[44]

In 2001, President G.W. Bush appointed a Commission on Social Security to focus on Social Security privatization.[45] In 2005, at the start of his second term, President Bush formally proposed Social Security privatization as a cure for expected shortfalls.[46] Michael J. Astrue was confirmed by the Senate as Commissioner on February 2, 2007. [47] Andrew G. Biggs, former assistant director of the CATO Project on Social Security Privatization and who had written favorably about privatization of the DI program, was appointed Principal Deputy Commissioner to Mr. Astrue in 2007.[48]

During this time, and most especially after 2008, more attention was paid to backlogs in the disability system than in impending default of the DI trust fund.[49] Actually, DI trust funds were in

---

44 *Informational Report*, *supra* note 5 at 7.

45*The 2001 President's Reform Commission*, SOC. SEC. ADMIN., (2001), https://www.ssa.gov/history/reports/pcsss/pcsss.html.

46 *State of the Union*, WHITEHOUSE.GOV (2005), http://georgewbush-hitehouse.archives.gov/stateoftheunion/2005/.

47 Mr. Astrue previously served SSA as Counselor to the Commissioner, served in the U.S. Department of Health and Human Services as General Counsel and as Acting Deputy Assistant Secretary for Legislation, was former Associate Counsel to the President of the United States at the White House in the Reagan and George H. W. Bush administrations. In the private sector, He practiced law and was as a senior executive at several biotechnology companies and also had been a member of ACUS. Michael J. Astrue, *Social Security*, SOC. SEC. ONLINE PRESS OFFICE. https://www.ssa.gov/news/press/factsheets/astrue.htm (last visited Apr. 7, 2016).

48 In 2005, Mr. Biggs was Associate Director of the National Economic Council; he worked on Social Security "reform" for the White House and, in 2001, had been on the staff of the President's Commission to Strengthen Social Security, a euphemism for privatization. Andrew G. Biggs, AMERICAN ENTERPRISE INSTITUTE (2016), https://www.aei.org/scholar/andrew-g-biggs/.

49 *Improving Social Security Disability Insurance Claim Processing in Ohio Before S. Homeland Sec. & Gov. Affairs Subcomm. on Oversight of Gov. Mgmt.*,

surplus until the economic downturn in 2008.[50] In the preceding fourteen years the system was entirely self- supporting.[51] When the program runs a surplus, excess funding is available that year.[52] The excess funds are diverted to the trust funds, in the form of treasury bonds.[53]

Federal law requires that all excess funds be invested in interest-bearing securities backed by the full faith and credit of the United States. The Department of the Treasury currently invests all program revenues in special non-marketable securities of the U.S. Government which earn a market rate of interest. The balances in the trust funds, which represent the accumulated value, including interest, of all prior program annual surpluses and deficits, provide automatic authority to pay benefits.[54]

The trust funds do not represent a legal obligation to individual program recipients, and Congress could cut or raise taxes on such benefits if it chooses.[55] Trust funds are considered "intra-governmental" debt, a component of the "public" or "national" debt.[56]

---

the Fed. Workforce, and the District of Columbia, 111th Cong. 1 (2010) (statement of Michael J. Astrue, Comm'r of Soc. Sec.), https://www.gpo.gov/fdsys/pkg/CHRG-111shrg63865/pdf/CHRG-111shrg63865.pdf. *See also* Hearings Backlog Reduction Update, SOC. SEC. ADMIN. (2009), www.socialsecurity.gov/appeals/congressional-booklets.html

50 Table 1.

51 *See Trust Fund Data*, *supra* note 42.

52 *Social Security Trust Fund*, WIKIPEDIA (2016), https://en.wikipedia.org/wiki/Social_Security_Trust_Fund.

53 *See* Lew, *supra* note 5.

54 *Id.*

55 *Social Security Trust Fund*, WORLDLIBRARY.ORG, http://www.worldlibrary.org/Article.aspx?Title=Social_Security_Trust_Fund (last visited Apr. 7, 2016).

56 *See* David Pattison, *Social Security Trust Fund Cash Flows and Reserves*, 75 SOC. SEC. BULLETIN 1, 1 (2015).

> The Social Security trust funds date back to the "Old-Age Reserve Account," established under the 1935 Social Security Act. The act authorized Congress to appropriate funds to the reserve account and separately established a new payroll tax sufficient to provide those funds. However, because a recent Supreme Court decision (unrelated to Social Security) had raised questions about the constitutionality of appropriating the tax revenues directly to the reserve account, the act did not explicitly earmark those revenues to the account. Nevertheless, it was understood that Congress would simply appropriate the tax

In 2010, President Obama empaneled a Commission to study Social Security, but it did not make specific recommendations to reform the DI or SSI programs.[57] However:

The Commission recommends a comprehensive redesign of the DI program to modernize both the program objectives and the eligibility criteria to better provide adequate and appropriate support to the disabled community without putting in place barriers to work and full community participation.[58]

"The Moment of Truth: Report of the National Commission on Fiscal Responsibility and Reform," December, 2010.[59]

In 2011 and 2012, as part of an economic stimulus package, the federal government temporarily reduced employees' share of payroll taxes from 6.2% to 4.2% of compensation.[60] A resulting shortfall was appropriated from the general Government funds. This increased public debt, but did not advance the year of depletion of the Trust Fund.[61]

> revenues for that purpose even without a statutory requirement to do so. By the time the act was first amended in 1939, the constitutional questions had been resolved, and the 1939 amendments provided for automatic appropriation of the payroll taxes to the reserve account. Under both the 1935 act and the 1939 amendments, the accumulated reserves were invested in interest-bearing Treasury securities, with the interest accruing to the reserves.

Id.

57 *Obama Fiscal Social Security Proposals*, SOC. SEC. ADMIN., https://www.ssa.gov/history/reports/ObamaFiscal/SocialSecurityProposals.pdf (last visited Apr. 7, 2016).

58 *Id.*

59 The Co-Chairmen were former Clinton Administration Chief of Staff Erskine Bowles and former Republican Senator Alan Simpson. Many, if not most of the members disagreed with major aspects of the report, and although they issued separate statements, none specifically addressed the DI program. *See generally Member Statements*, FISCAL COMM'N (2010), http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/MemberStatements.pdf.

60 *Microhistory of Employee Benefits and Compensation*, AON (Jul. 2013), http://www.aon.com/attachments/human-capital-consulting/LR-F-July-13_Microhistory_of_Employee_Benefits_and_Compensation.pdf.

61 *See Social Security Trust Fund supra* note 55 (citing *Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010*, sec. 601(e), (Jan. 5, 2010). *See also A Summary of the 2014 Annual Reports*, SOC. SEC.

An increase in claims had long been predicted, but SSA failed to plan ahead and if anything was guilty in mismanagement of the entire disability trust fund.[62] Even after the initiation of the Obama administration's Presidential Commission, SSA's pending hearing backlog grew from about 694,000 cases at the end of June 2010 to approximately 955,000 at the end of June 2014.[63] Average processing

---

AND MEDICARE BDS OF TRS,(2014), https://www.ssa.gov/oact/TRSUM/tr14summary.pdf..

62 Most of the increase comes from the aging of the "baby boomer," post-World War II, generation. CBO, Policy Options 2012. Also approximately 37% of those eligible retire at age 62. *See* Rodney Brooks, *What age is the best age to start drawing Social Security benefits. The truth is, it depends*. WASH. POST (Jun. 28, 2014), http://www.washingtonpost.com/business/what-age-is-best-to-start-drawing-social-security-benefits-truth-is-it-depends/2015/06/25/42d2aca2-1923-11e5-93b7-5eddc056ad8a_story.html?tid=hpModule_79c38dfc-8691-11e2-9d71-f0feafdd1394. A high percentage of that number immediately applies for DI. See Appendix 1. 18 % take benefits at full retirement age (66 for most baby boomers), and only 3 % at age 70. Brooks, *supra* note 62.

63 In his Congressional testimony in 2013, Mr. Goss related that the number of disabled worker beneficiaries increased from 2.86 million in 1980 to 8.20 million in 2010, an increase of 187 percent (while the number of workers rose by just 39 percent). Several main "drivers" have caused this disproportionate increase in the number of beneficiaries:

> •The first driver is the 41-percent increase in the total population at ages 20 through 64 between 1980 and 2010, which roughly matches the increase in workers.
>
> •The second driver is the changing age distribution described above, which resulted in a 38-percent increase in "prevalence" of disability. (The gross disability prevalence rate grew 38 percent more than the age-sex-adjusted prevalence rate between 1980 and 2010.)
>
> •The third driver is the percent of the population at ages 20 through 64 that is disability insured. Since 1970, the disability insured population grew substantially as increasing numbers of women worked consistently and stayed insured. Between 1980 and 2010, the percent of the "disability-age" population that was insured rose from about 50 to 68 percent for women, but declined from about 77 to 74 percent for men. Overall, there was a net 8-percent increase in the number of disabled worker beneficiaries. This increase is relatively small because the proportion of the population that is undocumented (and far less likely to become disability insured) rose substantially between 1980 and 2010.

Soc. Sec. Admin. before the H Comm. on Ways and Means, Subcomm. on Soc. Sec. (2013) (statement of Stephen C. Goss, Chief Actuary, Soc. Sec. Admin.). https://www.ssa.gov/legislation/testimony_031413a.html.

time on hearings also increased from 415 days in June 2010 to 437 days in June 2014.[64] SSA managers are accused of awarding benefits to reduce case backlogs.[65] The pressure to reduce backlogs may have had a direct effect on outcomes.[66] However, Mr. Astrue, the former Commissioner, and Carolyn W. Colvin, the current Commissioner, have each testified that 99% of Social Security disability payments are accurate.[67]

The Social Security Act defines disability as the inability to perform "substantial gainful activity" (SGA) due to a medically determinable impairment that has lasted or is expected to last at least one year or to result in death.[68] SGA refers to the performance of significant physical or mental activities in work for pay or profit or in work of a type generally performed for pay or profit.[69] SGA is a test for determining both initial and continuing eligibility for Social Security Disability Insurance (SSDI).[70] In initial claims situations, if a claimant's work is at SGA, then the claimant generally does not meet the definition of disability and does not receive benefits.[71]

---

64 *Improve the Responsiveness and Oversight of the Hearings Process*, SOC. SEC. ADMIN., http://oig.ssa.gov/audits-and-investigations/top-ssa-management-issues/social-security-disability-hearings-backlog.

65 *Clearing the Disability Backlog: SSA's Administrative Law Judge and Hearing Office Performance*, SOC. SEC, ADMIN.,(Sept. 16, 2008), http://oig.ssa.gov/newsroom/congressional-testimony/clearing-disability-backog-ssas-administrative-law-judge-and.

66 *See* Morton, *supra* note 9 especially, *A Lack of Consistency in the Initial Determination Process*, at 17-18.

67 *Soc. Sec. Testimony before the S. Homeland Sec. and Gov. Affairs Comm.* (2010) (statement of Michael J. Astrue, Comm'r Soc. Sec.) SOC. SEC. ADMIN., https://www.socialsecurity.gov/legislation/testimony_080410.html.

68 Sections 223(d) and 1614(a) of the Social Security Act, 42 U.S.C. §423(d)(1)(A) and 42 U.S.C. §1623(d)(1)(A). *See also* 20 CFR Regulations No. 4, part P, §§ 404.1513, 404.1520, 404.1520a, 404.1545, 404.1546, 404.1560, 404.1561, 404.1569a, and appendix 2; 20 C.F.R. No. 16, part I, §§ 416.913, 416.920, 416.920a, 416.945, 416.946, 416.960, 416.961, and 416.969a.

69 *See Substantially Gainful Activity*, SOC. SEC. ADMIN., https://www.socialsecurity.gov/oact/cola/sga.html (last accessed Apr. 7, 2016).

70 *Soc. Sec. Testimony before the Office of Research Demonstration, and Employment Support*, (2015) (statement of the Hon. David Weave Assoc. Comm'r), SOC. SEC. ADMIN. https://www.ssa.gov/legislation/testimony_061615.html. [hereinafter Statement of Hon. David Weave].

71 *Id.*

Countable earnings averaging over $1,090 a month (in 2015) demonstrate the ability to perform SGA in most cases.[72] For claimants who are blind, countable earnings averaging over $1,820 a month (in 2015) usually demonstrate SGA for SSDI.[73]

SSA uses a process called the sequential evaluation that will be discussed below. If a claimant is engaged at SGA, then the claim is denied.[74] The claims are initially evaluated by the district office (DO) in conjunction with state agencies, known as Disability Determination Services or "DDS."[75] Claims of claimants in SGA should not be forwarded for further review, per step 1 of the sequential evaluation.[76]

Based on a longitudinal tracking of 2.6 million disability claims filed in calendar year 2008, approximately 76% of all allowances occurred at the initial or reconsideration levels.[77] SSA authorizes each DDS to purchase medical examinations, X-rays, and laboratory tests on a consultative basis to supplement evidence obtained from the claimants' physicians or other treating sources when medical and nonmedical evidence is insufficient to make a disability determination.[78] SSA reimburses the DDS for 100% of allowable expenditures up to its approved funding authorization for costs.[79] DDS withdraws federal funds through the Department of the Treasury's Automated Standard Application for Payments system to pay for program expenditures.[80]

Statistics show that the initial DI allowance rate is very high for younger individuals, ranging from 60% to 70% at ages 18 – 23.[81] As stated earlier, more than 450,000 people between ages 65 and 66,

---

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *See* Statement of Hon. David Weave, *supra* note 70.

77 *See* Carolyn W. Colvin, *Statement for the Record* ,H. COMM. ON OVERSIGHT AND GOV. REFORM (Jun. 11, 2014), http://oversight.house.gov/wp-content/uploads/2014/06/Colvin-Statement-SSA-Disability-Appeals.pdf

78 *Audit Report: Administrative Costs Claimed by the Tennessee Disability Determination*, OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN. (2013), http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-04-12-11298.pdf.

79 *Id.*

80 *Id.*

81 Meseguer, *infra* note 102.

who under former law would have achieved full retirement, currently receive DI benefits.[82] The increase in retirement age has probably been a significant factor in the increase in DI claims.

A RAND study estimated that up to 60% of applicants "could have received a different initial determination from at least one other examiner in the DDS office."[83] Although the appeals process mitigated some of this variation, the study concluded that up to 23% of claimants could have ultimately received a different outcome had another examiner in the DDS office performed the determination.[84]

The RAND Corporation study found that of the denied claimants who contested their initial determination, 75% had their denial overturned eventually on appeal.[85] Although DDS examiners base

---

82 Statistics should become available to show whether many recipients enrolled in DI primarily because they did not have medical insurance prior to Obamacare and needed Medicare. Ms. Ruffing points out that nearly five percent of all DI beneficiaries – are in DI status. After Congress increased the age requirement for OASDI from 65 to 66, under the rules in place a decade ago, the 65 year olds would have been receiving retirement benefits instead. Ruffing, *Social Security Disability Insurance Is Vital to Workers With Severe Impairments*, *supra* note 21. She argues that although the administration did not concentrate on resolving the impending default, demographics explain most of the growth. Baby boomers have aged into their high-disability years. She notes that more women are now qualified for disability benefits, and that this has been a large factor behind the increase in the number of DI beneficiaries. *Id.* It is also reasonable that poor labor market prospects due to changes in the nature of work and the 2008 recession contributed.

83 *U.S. Congress, House Ways and Means, Social Security, Third in a Hearing Series on Securing the Future of the*

Social Security Disability Insurance Program, 112th Cong., 2nd sess. 112-SS14, (Mar. 20, 2012), (testimony of Nicole Maestas) p. 3, http://waysandmeans.house.gov/uploadedfiles/nicolemaestas_ss_3_20_12s.pdf. *See also* Nicole Maestas, Kathleen J. Mullen, & Alexander Strand, *Does Disability Insurance Receipt Discourage Work?*

Using Examiner Assignment to Estimate Causal Effects of SSDI Receipt, Working Paper WR-

853.3, RAND CORP., 11 (2012), http://www.rand.org/pubs/working_papers/WR853-3.html [hereinafter Maestas et al.].

84 Note that although the RAND study found that 23% of applicants could have received a different outcome, there is no guarantee that the applicants would have received a different decision had their cases been assigned to a different DDS examiner.

85 Maestas et al., *supra* note 83, at. 22. They also found that the employment of marginal program entrants would have been on average twenty-eight percentage points higher two years after the initial determination had they not received SSDI.

their initial determinations on uniform guidelines established by SSA, regional differences in demographic, health, and employment characteristics may produce variation in initial allowance rates between DDS offices.[86] The RAND study found variation in determination outcomes across examiners within the same DDS office.[87]

None of these studies established the effect of representation in the eventual outcome of a case. The percentage of DI and SSI claimants represented by attorneys at hearings has doubled since 1977, while the use of non-attorney representatives has stayed in the 10-20 percent range, although it has seen a steady increase since 2007.[88] The figures for attorney and non-attorney representatives are

---

This figure drops to 16 percentage points four years after the initial determination. However, these estimations reflect economic and labor market conditions between 2005 and 2006, and therefore may relate to the December 2007 to June 2009 recession. *Id.*

86 SSA has identified several variables that affect differences geographically. For example, the age of the population; it is logical to expect higher allowance rates with an older population. "The only variable used in the analysis that could be considered partially internal to the program is the percentage of applications based on physical (as opposed to mental) impairments. It is internal in the sense that it refers to a characteristic of the claimant rather than of the population. Although this variable is largely independent of the claims process, an element of subjective judgment exists in the classifying of disability cases. The analysis nevertheless uses this variable because there is no corresponding characteristic that can be measured in the state population." Alexander Strand, *Social Security Disability Programs: Assessing the Variation in Allowance Rates*, *ORES Working Paper no. 98*, SOC. SEC. ADMIN., (Aug. 2002), http://www.ssa.gov/policy/docs/workingpapers/wp98.html. *See also* Norma B. Coe et al., *What Explains Variation in SSDI Application Rates?*, CTR. FOR RETIREMENT RESEARCH AT BOSTON COLL., WP#2011-23, http://crr.bc.edu/working-papers/whatexplains- state-variation-in-ssdi-application-rates/. Historically, the lowest participation in SSDI has been in Utah. The states with the highest percentage of applications per population are West Virginia, Mississippi and Arkansas. Five states enacted employer temporary disability insurance (TDI) mandates prior to the first year of data included in this analysis: California (1946), Hawaii (1969), New Jersey (1948), New York (1949), and Rhode Island (1942). According to Coe, et al, holding all else constant, the five states that mandate employer TDI should have lower SSDI application rates. *Id.*

87 Maestas et al., *supra* note 83, at 23.

88 *Aspects of Disability*

Decision Making: Data and Materials, SOC. SEC. ADVISORY BD., (Feb. 2012), http://www.lb7.uscourts.gov/documents/1-11-CV-00224.pdf. [hereinafter *Aspects of Disability Decision Making*].

not additive since some claimants may have both.[89] At the hearing level and in the court appeals, effective representation may actually be the most important outcome variable.[90]

Another outcome variable is state policy. There is wide variation in SSD entry across states, with some states having entry percentages twice as high as others.[91] At present claimants who file in some states

---

89 *Filing for Social Security Disability Benefits: What Impact Does Professional*

Representation Have on the Process at the Initial Level, SOC. SEC. ADVISORY BD., 60 (2012), http://www.ssab.gov/

Reports/Third-Party-2012-Full.pdf.

90 By the time a case gets to hearing, a good lawyer can create an overwhelming record. Even in an imperfect record, after the fact, good claimant lawyers may be able to overcome any agency decision in the current posture. Under the law, even if claims are appealed and lost at every level, including the United States Supreme Court, the decision may very well be reopened through modification. As people get older, it is expected that the human body will deteriorate. 20 C.F.R. § 404.988 provides that a claim may be opened within a year of filing the initial claim for any reason, or within 4 years for good cause. 20 C.F.R. § 404.989. Good cause for reopening:

(a) We will find that there is good cause to reopen a determination or decision if -

(1) New and material evidence is furnished;

New evidence very well may be supportive narrative reports or statements from physicians whose opinions were discounted in the case decision.

91 David Stapleton & Frank Martin, *Vocational Rehabilitation on the Road to Social Security Disability: Longitudinal Statistics from Matched Administrative Data*, *WP 2012-269*, UNIV. OF MICHIGAN RETIREMENT RESEARCH CTR. (2012), http://www.mrrc.isr.umich.edu/publications/papers/pdf/wp269.pdf. For an earlier study see Alexander Strand, *Social Security Disability Programs: Assessing the Variation in Allowance Rates ORES Working Paper No. 98*, SSA DIV. OF POLICY EVALUATION, OFFICE OF RESEARCH, EVALUATION, AND STATISTICS, OFFICE. OF POLICY, SOC. SEC. ADMIN.(Aug. 2002). The major findings include the following:

- In 1997–1999, states with the highest and lowest allowance rates for DI, SSI, and concurrent applications differed by about thirty percentage points.
- States that have the highest and lowest allowance rates for DI or SSI tend to retain that status over time, although some changes in ranking do occur.
- States with high filing rates tend to have low allowance rates, and vice versa.
- Adjusting for economic, demographic, and health factors cuts the variation in allowance rates among states in half.
- The variation in the prevalence of disability beneficiaries in the population has only a minimal ability to explain allowance rates.

have a 70% chance of receiving an award, considering all levels, initial, recon, ALJ, USDC and US Cir.[92] In other states, claimants have a 70% chance of losing at all levels.[93]

For example, in 2010 the percentage of cases decided favorably for DI-only applicants ranged from a high of 59% in New Jersey to a low of 34% in Tennessee.[94] For SSI-only disability claims in 2010, allowance rates ranged from 56% in Alaska to 24% in Mississippi.[95] For concurrent DI-SSI claims, allowance rates ranged from 40% in New Hampshire to 16% in West Virginia.[96] The variation in allowance rates may reflect different characteristics of claimants or in the nature of industry in a particular area (e.g. mining, manufacturing, farming, etc.)[97] SSA should investigate the allegation that many states merely pass on determinations in many claims that should be awarded below.

The Social Security Advisory Board (SSAB or Board) has been tracking the variation in allowance rates by state and adjudicative stage, and suggested changes.[98] As stated earlier, claimants who file in some states have a 70% chance of receiving an award, considering all levels, initial, recon, ALJ, USDC and US Cir.[99] In other states,

---

•The allowance rates in most states are relatively close to the rates predicted by demographic and socioeconomic factors.

•States that deviate from their predicted rates tend not to do so consistently.

Id.. [Note that I have asked many times for updated information, without success.]

92 *Id.*

93 Many courts reject the entire process. See Freismuth v. Astrue, 920 F. Supp. 2d 943 (E.D. Wis. 2013) judicial rejection for the process may be the administrative law equivalent to jury nullification.

94 *Annual Statistical Report on the Social Security Disability Insurance Program*, SOC. SEC. ADMIN. (2010), https://www.ssa.gov/policy/docs/statcomps/di_asr/2010/di_asr10.pdf [hereinafter *Annual Statistical Report on SSDI*].

95 *Id.*

96 *Id.*

97 *See Aspects of Disability Decision Making*, *supra* note 88, at 43-44. *See also* Stapleton & Martin, *supra* note 91.

98 *See Outcome Variation in the Social Security Disability Insurance Program: The Role of Primary Diagnoses*, SOC. SEC. BULLETIN, VOL. 73, NO. 2 (2013), https://www.ssa.gov/policy/docs/ssb/v73n2/v73n2p39.html

99 *See Annual Statistical Report on SSDI*, *supra* note 94.

claimants have a 70% chance of losing at all levels.[100] There is no way to justify the statistics.[101]

The Board advocates strengthening the federal or state arrangement to decrease the large disparities that exist between different states regarding staff salaries, educational requirements, training, and attrition rates. The Board also recommends reforming the hearing process by establishing uniform procedures for claimant representatives; having the government represented at the hearing level or above; and closing the record after the decision, so that cases do not change substantially at each level of appeal.[102]

Mr. Morton, for the Congressional Research Service, and Ms. Ruffing, formerly of the Congressional Budget Office, have provided the most thorough research on potential outcomes for the DI program to date.[103] Most of the growth in the program over the past twenty years has stemmed from increases in disabled worker beneficiaries, from around 2.9 million to almost 8.6 million—an increase of 196.6%.[104] Conversely, the number of spouses of disabled workers on DI decreased 64.5% during this period (from almost 461,900 to more than 164,000).[105] The number of children of disabled workers receiving benefits expanded rather modestly compared with disabled workers, increasing 35.7% (from nearly 1.4 million in 1980 to roughly 1.9 million in 2011).[106] There is no doubt that there are more DI applicants and recipients.[107] However, a close reading of DI Trust Fund sources shows that any increases were predictable and, if

---

100 *Id*.

101 *See* Freismuth v. Astrue, 920 F. Supp. 2d 943 (E.D. Wis. 2013).

102 Javier Meseguer, *Outcome Variation in the Social Security Disability Insurance Program: The Role of Primary Diagnoses*, SOC. SEC. BULLETIN, VOL. 73, NO. 2 (2013), https://www.ssa.gov/policy/docs/ssb/v73n2/v73n2p39.html. According to the literature, state allowance rates depend on the economic, demographic, and health characteristics of the applicants, which vary among the states. For instance, states with older populations are anticipated to have higher disability allowance rates on average. Older applicants are more likely to qualify because of the higher prevalence of age-related disabilities and the fact that they face less stringent program standards than do younger individuals. From my experience, some states simply do not want to develop the record.

103 *See* Morton, *supra* note 9.

104 *Id.*

105 *Id*.

106 *Id.* at 8.

107 *See* Morton, *supra* note 9.

anything, SSA policy in the period from 2002 to 2013 accelerated the problem.

The following are suggestions to help resolve the impending default:

I. RECOMMENDATION ONE: SSA AS A CHARITY.

This proposal does not require any legislation or rulemaking. Although the trust funds provide retirement income, they also support needed resources to widows, orphans and the disabled among us.[108] Donations to the trust funds are tax deductible.

Donations have been possible since a legislative fix in 1972.[109] The managing trustee of the OASI and DI funds may accept money gifts or bequests for deposit. Section 170(c)(l) of the Internal Revenue Code lists the U.S. government among the educational or charitable organizations to which donations are acceptable to receive a tax deduction.[110] Gifts must be unconditional, except that the donor may designate the DI Trust Fund. If the donor does not designate the DI Fund, SSA will credit it to the OASDI Trust Fund.

Donations may not make the fund solvent, but they can slow down the rate of decline. SSA should include donation information in their literature.[111] The costs that would be involved to fully implement this proposal should be negligible.

II. RECOMMENDATION TWO: INCREASE THE NUMBER OF CONTINUING DISABILITY REVIEWS (CDRS) PERFORMED BY SSA.

Had Congress appropriated sufficient DI CDR funds and had SSA properly administered them since 2004, there would, in essence, have been no threatening DI Trust Fund default. Every Congress has discussed the issue of funding CDRs since 1994, when the DI fund was restored to solvency, but little has been done. Congress has been

---

[108] *See Donations to the Social Security Trust Funds*, SOC. SEC. ADMIN., http://www.ssa.gov/agency/donations.html#a0=2 (last visited Apr. 7, 2016).

[109] Before 1972, bequests naming Social Security or a trust fund as a beneficiary could not be accepted, which caused problems in administration of some estates.

[110] 26 U.S.C. § 170 (2015).

[111] *See* Daniel F. Solomon, *Social Security: Maybe Charity Should Begin at Home?* 22 VOICE OF EXPERIENCE no. 4, 6-7 (2008). The paper was written for lawyers, especially those who are involved with wills and trusts.

"penny wise and pound-foolish." Expansion of CDRs can remedy the situation.

By the end of FY 2013, SSA had a CDR backlog of 1.3 million claims.[112] Apparently, the backlog has continued at the same pace heading into FY 2016. DI recipients are to be re-evaluated every three to seven years to determine whether their medical condition has improved enough that they should no longer receive benefits.[113] SSA estimates that for every $1 spent on medical CDRs, the yield is about $9 in savings to SSA programs as well as Medicare and Medicaid over 10 years.[114] In FY 2013, 428,658 medical CDRs were completed; more than 115,000 of these, or about 27%, resulted in an initial cessation of benefits.[115]

If the 27% denial rate holds, the existing CDR law and regulations should be, standing alone, ultimately be sufficient to bring the DI Trust Fund into solvency.[116] However, Congress has

---

112 *Examining the Ways the Soc. Sec. Admin. Can Improve the Disability Review Process Before the H. Comm. on Oversight and Gov. Reform, H. Subcomm. on Energy Policy, Health Care and Entitlements* (April 9, 2014) (statement of Inspector Gen. Patrick P. O'Carroll, Jr., Soc. Sec. Admin.) http://oig.ssa.gov/sites/default/files/testimony/O'Carroll%209%20Apr%202014%20Written%20Statement%20Final.pdf [hereinafter Statement of Inspector Gen. O'Carroll Jr.]. Projected savings reflect the present value of future benefits for OASDI, Supplemental Security Income (SSI), Medicare, and Medicaid as of September 30, 2010. Projected savings do not take into account the lifetime benefits of terminated beneficiaries processed outside SSA's central release system. The $9.3 to $1.0 savings-to-cost ratio is calculated by dividing OC Act's projected future savings of more than $3.5 billion by the $381 million spent on periodic CDRs in FY2010. However, see the discussion *infra*, suggesting that the MIRS medical improvement requirement be scrapped. Letter from Michael Astrue, Comm'r Soc. Sec., to Hon. Joseph R. Biden Jr., President of the S. (May 1, 2012), http://ssa.gov/legislation/FY%202010%20CDR%20Report.pdf. *See also Annual Report of Continuing Disability Reviews*, SOC. SEC. ADMIN. (2012), http://ssa.gov/legislation/FY%202010%20CDR%20Report.pdf. [hereinafter *Annual Report of Continuing Disability Reviews*].

113 *Reviewing Your Disability*, SOC. SEC. ADMIN. (2015), https://www.ssa.gov/pubs/EN-05-10068.pdf.

114 *Id.* In 2012, the estimate was about $10 for each $1. 24 *Annual Report of Continuing Disability Reviews*, *supra* note 112.

115 *Id.*

116 *The Future Financial Status of the Social Security Program*, SOC. SEC.BULLETIN, VOL. 70, NO. 3 (2010), https://www.ssa.gov/policy/docs/ssb/v70n3/v70n3p111.html.

underfunded CDRs, especially since 2004, and should appropriate enough funding to maximize savings.

In Budget Justifications to Congress, SSA asserts that it:

- Completed 429,000 full medical CDRs in 2013;[117] and
- Completed over three million overpayment actions[118] and
- Planned for 888,000 full medical CDRs in 2015.[119]
- Planned to increase to 908,000 in FY 2016.[120]

However, under the Budget Control Act of 2011 (BCA), which was to provide SSA's integrity funding through FY2021, funding is limited.[121] The base SSA program integrity funding ($273 million) and the SSA cap adjustment ($1,166 million) were proposed to be

---

117 Carolyn Colvin, *Justification of Estimates for Appropriations Committees Fiscal Year 2015: Fulfilling Our Commitments to the American People,* SOC. SEC. ADMIN. (2014), http://www.ssa.gov/budget/FY15Files/2015FCJ.pdf.

118 *Id*.

119 *Id*.

120 Carolyn Colvin, *FY 2016 Budget Overview*, SOC. SEC. ADMIN., http://www.ssa.gov/budget/FY16Files/2016BO.pdf (last visited Apr. 7, 2016).

121 Please see research from Kathy Ruffing, who has concentrated in this area for the Center on Budget and Policy Priorities after twenty-five years at the Congressional Budget Office, where she analyzed a wide range of topics including interest costs and federal debt, federal pay, immigration, and Social Security. She advises that an adjustment must be made because the Budget Control Act included a special "cap adjustment" for such activities. These cap adjustments set aside a limited amount of money that Congress can use solely to increase SSA funding for program integrity purposes, which include CDRs and SSI redeterminations of financial eligibility. These limited funding increases do not require offsetting reductions in other non-defense appropriations; in effect, such increases are outside the statutory caps on annual non-defense appropriations that the Budget Control Act established. . *See* Ruffing, *Social Security Disability Insurance Is Vital to Workers With Severe Impairments*, *supra* note 21. Subsequent papers cover that demographic changes account for the bulk of the program's growth, while some other analyses appear to tell a different story. These differences largely reflect variations in the measure of DI growth that the studies use, the factors considered, and the time period analyzed. Thus, there is no single correct answer to "how much of DI's growth stems from demographic factors?" Kathy Ruffing, *How Much of the Growth in Disability Insurance Stems from Demographic Changes?* CTR. ON BUDGET AND POLICY PRIORITIES (Jan. 27, 2014), http://www.cbpp.org/cms/index.cfm?fa=view&id=4080.

funded through discretionary appropriations in 2016 because the cap adjustment was fully funded for 2015.[122]

Many impairments are progressive and, as people age, the probability for improvement lessens. For most claims, SSA uses a Medical Improvement Review Standard (MIRS), which requires that the agency must show medical improvement before benefits can be terminated.[123]

SSA shall terminate disability benefits "only if such finding is supported by:

(1)Substantial evidence which demonstrates that—

(A)There has been any medical improvement in the individual's impairment or combination of impairments (other than medical improvement which is not related to the individual's ability to work), and

(B)The individual is now able to engage in substantial gainful activity.

Among the issues for evaluation at the time a claim is filed are the nature of the alleged impairment and the age and occupational experience of the claimant.[124] Some impairments can be controlled or even cured. However, to any reasonable degree of probability, CDRs are more effective for younger claimants than older.[125] People are

---

122 In a joint resolution, S. Con 11, setting forth the congressional budget for the United States Government for FY2016 and setting forth the appropriate budgetary levels for FY2017 through 2025. *See* Table 2.

123 Congress passed the standard as part of the Social Security Disability Benefits Reform Act of 1984 (DBRA 1984; Pub. L. No. 98-460) – legislation passed by a unanimous, bipartisan vote in both the House of Representatives (402-0) and the Senate (99-0) in September 1984, and was enacted when signed by President Reagan on October 9, 1984. *See also*, Soc. Sec. Act §§ 223(f), 1614(a)(4); 42 U.S.C. §§ 423(f), 1382c(a)(4). A number of exceptions to application of the MIRS were provided in the legislation, including cases where the prior decision was "in error." If fraud was involved, benefits can be terminated retroactively and the individual may be referred for further sanctions.

124 *Standards for Consultative Examinations and Existing Medical Evidence, Final Rules; 56 FR 36932*, SOC. SEC. ADMIN. (Aug. 1, 1991), https://www.ssa.gov/OP_Home/hallex/II-04/II-4-1-2.html.

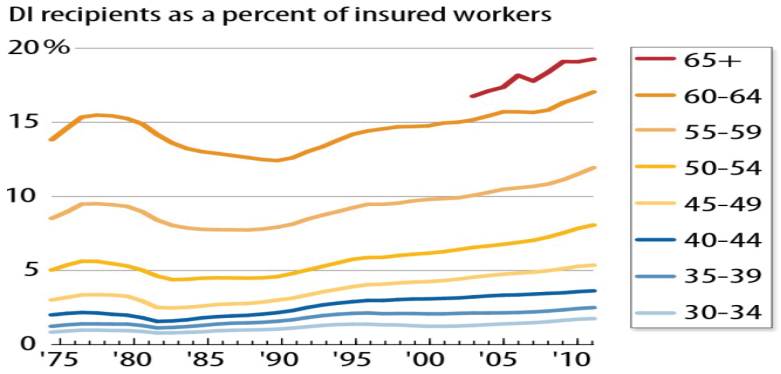
125 The typical DI beneficiary is in his or her late fifties (0% are over age fifty, and 30% are sixty or older) and suffers from a severe mental, musculoskeletal, or other debilitating impairment. Age data for December 2011, from the *Social*

roughly twice as likely to be disabled at age fifty as at age forty, and twice as likely to be disabled at age sixty as at age fifty.[126] MIRS does not apply to SSA Age-eighteen Redetermination cases.[127]

After a recipient qualifies as disabled, SSA is required to conduct periodic CDRs to determine whether the individual continues to be disabled. However, SSA generally cannot find an individual's disability has ended without finding medical improvement has occurred. As such, diaries are set for six to eighteen months when improvement is expected, up to three years when improvement is possible, and five to seven years when improvement is not expected.[128]

Security Beneficiary Data, SOC. SEC. ADMIN., http://www.ssa.gov/OACT/ProgData/beniesQuery.html (last visited Apr. 7, 2016); diagnostic data from *Annual Statistical Report on the Social Security Disability Insurance Program*, SOC. SEC. ADMIN. (2011), http://www.ssa.gov/policy/docs/statcomps/di_asr/2011/sect01c.pdf. Nearly one-quarter of beneficiaries lack a high school diploma, and only ten percent have a four-year college degree and labor-market prospects for such applicants are poor. *See* Ruffing, *Social Security Disability Insurance is Vital to Workers with Severe Impairments*, *supra* note 21, at 4. "Program's Growth Largely Due to Demographic Factors; Financing Should Be Addressed as Part of Overall Solvency".

126 See Chart below. Source: CBPP based on data from the Social Security Administration, Office of the Chief Actuary.



127 *DI 33025.075 Age 18 Redetermination Cases Under P.L. 104-193*, SOC. SEC. ADMIN. (Feb. 22, 2013), https://secure.ssa.gov/apps10/poms.nsf/lnx/0433025075.

128 *Examining Ways Social Security Can Improve the Disability Review Process*, SOC. SEC. ADMIN. (Apr. 9, 2014), http://oig.ssa.gov/newsroom/congressional-testimony/april9.

If the recipient's medical condition has improved and the recipient is no longer disabled according to its guidelines, SSA ceases benefits.[129] There are several exceptions, including:

- Advances in medical or vocational therapy or technology,[130]
- Vocational therapy (any additional education or training that improves the individual's ability to meet the vocational requirements of more jobs),[131]
- New or improved diagnostic or evaluative techniques, and[132]
- Substantial evidence demonstrates that any prior disability decision was made in error.[133]

Procedural exceptions also include:

- Fraud or similar fault,[134]
- Failure to cooperate or whereabouts unknown,[135] and

---

129 *Id*.

130 *DI 28020.100 Advances in Medical or Vocational Therapy or Technology*, SOC. SEC. ADMIN. (Sep. 4, 2015), https://secure.ssa.gov/poms.nsf/lnx/0428020100.

131 *28020.150 Vocational Therapy*, SOC. SEC. ADMIN. (Sep. 4, 2015), https://secure.ssa.gov/poms.nsf/lnx/0428020150.

132 *DI 28020.250 New or Improved Diagnostic or Evaluative Techniques*, SOC. SEC. ADMIN. (Sep. 4, 2015), https://secure.ssa.gov/poms.nsf/lnx/0428020250.

133 20 C.F.R. § 404.1594.

134 Fraud exists when a claimant (or any other person acting on the claimant's behalf) with intent to defraud either makes or causes to be made a false statement or a misrepresentation of a material fact for use in determining rights to Title II or XVI benefits; or conceals or fails to disclose a material fact for use in determining rights to Title II or XVI benefits. Similar fault does not require fraudulent intent. It exists when a claimant or any other person either knowingly makes an incorrect or incomplete statement that is material to the determination or knowingly conceals information that is material to the determination. 20 C.F.R. §§ 404.1594(e)(1), 416.994(b)(4)(i). SSA maintains a Cooperative Disability Investigations (CDI) Program, to investigate DI and SSI claims that state disability examiners believe are suspicious. The CDI program's primary mission is to obtain evidence that can resolve questions of fraud before benefits are ever paid. CDI Units also provide reports to DDS examiners during CDRs that can be used to cease benefits of in-payment beneficiaries.

135 A failure to cooperate or whereabouts unknown issue may arise at any point during a CDR when a disabled individual does not furnish medical or other evidence, fails to attend a consultative examination by a certain date, or cannot be located. 20 C.F.R. §§ 404.1594(e)(2)-(3), 416.994(b)(4)(ii)-(iii).

•Failure to follow prescribed treatment.[136]

Medical CDRs declined by 65% from FY2004 to 2008, resulting in a significant backlog.[137] According to Inspector General (IG) reports, SSA would have saved at least $556 million during calendar year 2011 had SSA had conducted the medical CDRs in the backlog when they were due.[138] Had CDRs been initiated in 2004, when the appropriations and the concentration on CDRs diminished, it is reasonable that the solvency of the DI fund would have been extended beyond the expected 2016 drop-dead date.[139]

It is reasonable that the five to seven years evaluation for those whose improvement is not expected means that most claimants near "advanced age" should not be re-evaluated. However, for those who became disabled when they were younger, evaluation should yield a huge return on the investment, i.e. appropriations targeted to this group.

For FY2014, under the Consolidated Appropriations Act of 2014, SSA received about $1.2 billion in dedicated program integrity funding, and recent information received from the Agency suggests that it planned to complete 510,000 medical CDRs.[140]

SSA has preliminarily reported it would need $11.8 billion in funding over the next ten years to eliminate the medical CDR backlog by FY2018 and prevent its recurrence through FY2023.[141]

---

136 If treatment can restore the ability to work, an individual must follow prescribed treatment to receive benefits. If prescribed treatment is not followed without good cause, SSA should cease benefits when performing a CDR. 20 C.F.R. §§ 404.1594(e)(4), 416.994(b)(4)(iv).

137 Statement of Inspector Gen. O'Carroll Jr., *supra*, note 112.

138 *Id.*

139 The Contract with America Advancement Act of 1996 authorized additional funds for CDRs but only for fiscal year (FY) 1996 through FY2002. In FY2003, the additional funding for CDRs lapsed and SSA shifted its focus away from CDRs toward processing the growing number of initial disability claims. As a result, the number of

medical CDRs performed by SSA dropped from an all-time high of 876,802 in FY2000 to 207,637 in FY2007, before climbing back up to 443,233 in FY2012. Morton, *supra* note 9 at 6 (citing *Social Security Administration, Performance and Accountability Report, Fiscal Year 2003*, SOC. SEC. ADMIN. (Nov. 10, 2003), http://www.ssa.gov/finance/.

140 *Id.*

141 *Examining Ways Social Security Can Improve the Disability Review Process*, *supra* note 128.

Under this scenario, the DI fund can be salvaged.[142] In order to expedite savings to the DI Trust Fund, resources should initially be directed only to those younger individuals who received an award at "Step 5" of the sequential evaluation, those who do not have a condition that meets or equals a listed impairment.[143] The CDR program should also be integrated with certain return to work initiatives discussed more fully below that could target those who can easily be returned to work while increasing the efficiency of

---

142 *Id.*

143 *See* Bernard Wixon & Alexander Strand, *Identifying SSA's Sequential Disability Determination Steps Using Administrative Data*, SOC. SEC. ADMIN. (Jun. 2013), http://www.socialsecurity.gov/policy/docs/rsnotes/rsn2013-01.html.

From Table 1, the following process is extracted:

Step 3: Meets or equals the Listings?			330,383	13.6
A1	Allow	Impairment meets the Listings	271,278	11.1
B1	Allow	Impairment equals the Listings	59,105	2.4
Step 4: Capacity for past work?			499,238	20.5
H1	Deny	Capacity for SGA, past relevant work—ER/PP met	448,993	18.4
H2	Deny	Capacity for SGA, past relevant work—ER/PP not met	50,245	2.1
Step 5: Capacity for any work?			1,042,622	42.8
C1	Allow	Medical vocational considerations	408,301	16.8
D1	Allow	Medical vocational considerations—arduous unskilled work	310	0.0
G1	Deny	Capacity for SGA, vocational considerations—reentitlement period met	34,131	1.4
G2	Deny	Capacity for SGA, vocational considerations—reentitlement period not met	1,225	0.1
J1	Deny	Capacity for SGA, other work—ER/PP met	529,680	21.7
J2	Deny	Capacity for SGA, other work—ER/PP not met	68,975	2.8

ER = expedited reinstatement;

PP = provisional period.

"If an adult is not actually working and his impairment matches or is equivalent to a listed impairment, he is presumed unable to work and is awarded benefits without a determination whether he actually can perform his own prior work or other work." Sullivan v. Zebley, 493 U.S. 521, 532 (1990). "If the claimant wins at the third step (a listed impairment), she must be held disabled, and the case is over." Jones v. Barnhart, 335 F.3d 697, 699 (8th Cir. 2003); *See* 20 C.F.R. § 404.1520(d) ("If you have an impairment(s) which meets the duration requirement and is listed in appendix 1 or is equal to a listed impairment(s), we will find you disabled *without* considering your age, education, and work experience." *Id.* (emphasis added).

adjudication. E.g., fewer resources would be needed to effectuate the adjudication process for those who do not qualify for vocational rehabilitation (VR) programs.

However, added funding for the CDR program is a low risk investment that should be pursued vigorously.

III. RECOMMENDATION 3: TAKE ADVANTAGE OF RETURN-TO-WORK INCENTIVES.

SSA should proactively offer rehabilitation services to every applicant and beneficiary for DI.

Legislation recently offered would amend the Act to authorize the Commissioner to give individuals denied OASDI and SSI benefits based on an adverse determination of disability any information on appropriate public or private entities that provide employment services, vocational rehabilitation services, or other support services.[144] In some states, this is already standard operating procedure.[145]

Another bill would mandate that SSA develop public online tools to assist beneficiaries.[146] These tools would permit individuals eligible for disability benefits to assess the impact of earnings on the individual's eligibility for, and amount of, benefits received through Federal and State benefit programs.

I would support both. However, more importantly, agency rulemaking to address current law is required that would be more effective. For example, although 20 C.F.R. Section 416.1710 referral

---

144 Promoting Opportunity for Disability Benefit Applicants Act, H.R.2135, 114th Cong. (2015-2016).

145 *See* discussion of the Wagner-Peyser Act of 1933, as amended, *infra*, 29 U.S.C. 943, et seq. Every American is entitled to use employment services. The Act is implemented through DOL, Employment and Training Administration regulations, 20 C.F.R. Part 652 and Parts 660 through 671. *See also* Stapleton and Martin, Table B.1., in Appendix B Percentage of the 2002 New VR Applicant Cohort Ever Awarded SSD at Application, from Application to Closure, and from Closure to 60 Months After Application, by State of Application. See also, the Workforce Innovation and Opportunity Act (WIOA) (discussed in more detail, infra.) effective July 1, 2015, requires Temporary Assistance for Needy Families (TANF) and programs under the Second Chance Act to be mandatory partners in a mandatory "One-Stop" VR system. This would include SSI applicants but may not include many DI applicants.

146 Promoting Opportunity Through Informed Choice Act, H.R. 1795, 114th Cong. (2015).

for state vocational rehabilitation services (VR) exists "on the books," it is not enforced and there is no equivalent in the DI regulations:[147]

Whom we refer and when:

(a) Whom we refer: If you are 16 years of age or older and under 65 years old, and receiving SSI benefits, we will refer you to the State agency providing vocational rehabilitation services. If you are under age 16, we will refer you to an agency administering services under the Maternal and Child Health Services (Title V) Block Grant Act.[148]

(b) When we refer: We will make this referral when we find you eligible for benefits or at any other time that we find you might be helped by vocational rehabilitation services.[149]

SSA should expand it for Title II claims and enforce this provision for certain younger individuals.[150] This is especially true because the percentage of DI allowances based on vocational, educational, and age-specific factors increased from 28 percent to 47 percent in the ten years prior to 2009.[151] It is reasonable that the mathematical progression for current claims has held and there is increased need to evaluate vocational factors.

Please note that although a claimant may not be able to return to past relevant work at Step 4 of the sequential evaluation and at Step 5 vocational evidence shows that there are no "other" jobs a claimant can perform under current guidelines, SSA does not apply the Americans with Disabilities Act (ADA) principles in rendering a determination.[152] Because some of the claimants cannot return to

---

147 20 C.F.R. § 416.1110.

148 20 C.F.R. 416.1710(a).

149 20 C.F.R. 416.1710(b).

150 According to recent statistics, of the nearly 9 million disabled workers receiving benefits in 2012, the most recent year for which data is available, 193,042 recipients tried working, according to SSA, to be taken off. Joseph Lawler, *GOP plans overhaul for Social Security disability*, WASH. EXAMINER (Feb. 23, 2015), http://www.washingtonexaminer.com/gop-plans-overhaul-for-social-security-disability/article/2560440.

151 Wixon & Strand, *supra* 143.

152 *SSR 83046c: Sections 216(i) and 224(d) (42 U.S.C. 416(i) and 423(d)) Disability Insurance Benefits – Inability to Perform Previous Work – Administrative Notice Under the Medial-Vocational Guidelines of the Existence of Other Work*, SOC. SEC. ADMIN.,

work, they may be entitled to an accommodation under the ADA.[153] According to the DOL Bureau of Labor Statistics (BLS) in 2013, 17.6 percent of persons with a disability were employed.[154] In contrast, the employment-population ratio for those without a disability was 64.0 percent.[155] The employment-population ratio was little changed from 2012 to 2013 for both groups.[156] The unemployment rate for those with a disability was 13.2 percent in

---

https://www.socialsecurity.gov/OP_Home/rulings/di/02/SSR83-46-di-02.html (last visited Apr. 7, 2016).

153 The ADA prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities. The ADA also establishes requirements for telecommunications relay services.

DOL's Office of Disability Employment Policy (ODEP) provides publications and other technical assistance on the basic requirements of the ADA. It does not enforce any part of the law.

In addition to the Department of Labor, four federal agencies enforce the ADA:

> The Equal Employment Opportunity Commission (EEOC) enforces regulations covering employment.
>
> The Department of Transportation enforces regulations governing transit.
>
> The Federal Communications Commission (FCC) enforces regulations covering telecommunication services.
>
> The Department of Justice enforces regulations governing public accommodations and state and local government services.
>
> Another federal agency, the Architectural and Transportation Barriers Compliance Board (ATBCB), also known as the Access Board, issues guidelines to ensure that buildings, facilities, and transit vehicles are accessible and usable by people with disabilities.

Two agencies within the Department of Labor enforce portions of the ADA.

> •The Office of Federal Contract Compliance Programs (OFCCP) has coordinating authority under the employment-related provisions of the ADA.
>
> •The Civil Rights Center is responsible for enforcing Title II of the ADA as it applies to the labor- and workforce-related practices of state and local governments and other public entities. See the Laws & Regulations subtopic for specific information on these provisions.

Americans with Disabilities Act, DEPT. OF LABOR, http://www.dol.gov/dol/topic/disability/ada.htm (last visited Apr. 7, 2016).

154 News Release, Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics - 2013 (Jun. 11, 2014), http://www.bls.gov/news.release/archives/disabl_06112014.pdf.

155 *Id.*

156 *Id*.

2013, higher than the rate for persons with no disability (7.1 percent).[157] The jobless rate for persons with a disability was little changed from 2012 to 2013, while the rate for those without a disability declined.[158]

Although the BLS statistics do not consider those eligible for DI, and does not show whether employers of the disabled need to accommodate an impairment, for many disabled people, an accommodation could return them to the current job and potentially provide a more lucrative occupational setting than in former work.[159]

Please consider the following:

A.The Public Vocational Rehabilitation (VR) program funded under Title I of the Rehabilitation Act of 1973 is the primary Federal program assisting individuals with disabilities in securing competitive employment.[160] This program is not the exclusive domain of the DI and SSI systems, although beneficiaries may take advantage of them.

B.In 1992, Congress mandated a longitudinal study of VR.[161] The results demonstrated that:

•69% of VR consumers achieved employment as a result of VR services and 75% of those were working at jobs in the competitive labor market.

---

157 *Id*.

158 Economic News Release, Bureau of Labor and Statistics, Persons with a Disability: Labor Force Characteristics Summary- 2014,(Jun. 16, 2015), http://www.bls.gov/news.release/disabl.nr0.htm. The data on persons with a disability are collected as part of the Current Population Survey (CPS), a monthly sample survey of about 60,000 households that provides information on employment and unemployment in the United States. The Department of Labor's Office of Disability Employment Policy sponsors the collection of data on persons with a disability.

159 *Id*.

160 *See also Public Vocational Rehabilitation Before the H. Comm. on Edu. And Labor, Subcomm. on Higher Edu., Life Long Learning and Competativeness* (2009) (statement of Steve Wooderson, Admn'r. Iowa Vocational Rehab Servs.), http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/111/pdf/testimony/20090212StephenWoodersonTestimony.pdf.

161 REHABILITATION SERVICES ADMINISTRATION (RSA), U.S. DEPARTMENT OF EDUCATION UNDER CONTRACT NO. HR92022001(1992).

•20.7% of VR consumers utilized assistive technology (specialized computerized devices, portable speech synthesizers, special software, etc.) in helping to enter the workforce.

•Three years after job placement, 76% continued to be employed and received increases in salary and benefits.

•Consumers earned an average of $7.33/hour; rate increased to $9.62/hour after three years (minimum wage is $5.15/hour)

•Among individuals who completed VR services, 44% no longer needed public assistance.[162]

C.Applicants are supposed to be told that they may contact the rehabilitation agency in their state directly at any time:

a.The literature states: Your Social Security office will be glad to provide the location and phone number of the nearest office of the state vocational rehabilitation agency. Individuals then can let the agency know of their interest in receiving rehabilitation services to help them return to work. The address and phone number of the state vocational rehabilitation agency also can be found in the phone book.[163]

b.However, this is not performed in many states.

c.It is usually directed to recipients rather than applicants.[164]

D.In order to expedite large numbers of cases, the sequential evaluation, for DI claims involving adult claimants is:

Step 1. An individual who is working and engaging in substantial gainful activity will not be found to be disabled regardless of medical findings.[165]

---

162 *Id.*

163 *See Working While Disabled—How We Can HELP*, SOC. SEC. ADMIN. (2015), http://www.ssa.gov/pubs/EN-05-10095.pdf.

164*See What You Need To Know When You Get Social Security Disability Benefits*, SOC. SEC. ADMIN. (2011), http://www.socialsecurity.gov/pubs/EN-05-10153.pdf. *See also Working While Disabled*, SOC. SEC. ADMIN., http://www.socialsecurity.gov/pubs/EN-05-10095.pdf (last visited Apr. 7, 2016); *SSA 2015 Red Book*, SOC. SEC. ADMIN. (2015), http://www.socialsecurity.gov/redbook/documents/TheRedBook2015.pdf.

165 20 C.F.R. § 404.1520(b) (2012).

Step 2. An individual who does not have a "severe impairment" will not be found disabled.[166]

Step 3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and which "meets or equals" a listed impairment in "Appendix 1" of Subpart P of Regulations No. 4, a finding of disabled will be made without consideration of vocational factors.[167]

•Appendix 1 contains a listing of impairments.

Step 4. If an individual is capable of performing work he or she has done in the past, a finding of "not disabled" must be made.[168]

Step 5. If an individual's impairment is so severe as to preclude the performance of past work, other factors including age, education, past work experience and residual functional capacity must be considered to determine if other work can be performed:[169]

a.The "grid" rules set out in Appendix 2 of the Regulations are considered in determining whether a claimant with exertional impairments[170] is or is not disabled.[171] The regulations also provide

---

166 20 C.F.R. § 404.1520(a)(4)(ii) (2012).

167 20 C.F.R. § 404.1520(a)(4)(iii) (2012).

168 20 C.F.R. § 404.1520(a)(4)(iv) (2012).

169 20 C.F.R. § 404.1520(a)(4)(v) (2012).

170 Exertional. i.e. strength, categories:

•Sedentary work involves lifting no more than ten pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. *See* 20 C.F.R. § 404.1567(a).

•Light work involves lifting no more than twenty pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. *See Id*. at § 404.1567(b).

•Medium work involves lifting no more than fifty pounds at a time with frequent lifting or carrying of objects weighing up to twenty-five pounds. *See Id.* at § 404.1567(c).

•Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to fifty pounds. *See Id.* at § 404.1567(d).

•Very heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing fifty pounds or more. *See* Id. § 404.1567(e).

171 The Medical-Vocational Guidelines are a matrix system for handling claims that involve substantially uniform levels of impairment. *See* 20 C.F.R. § Part 404, Subpt. P, App. 2. These guidelines are commonly known as the grids or tables that give a finding of disabled or not disabled for various combinations of age, education, and work experience. The grids provide a uniform conclusion about

that if an individual suffers from a non-exertional impairment as well as an exertional impairment, both are considered in determining residual functional capacity.[172] Residual functional capacity is the most a claimant can still do despite limitations.[173]

b.The grids categorize jobs by their physical-exertional requirements and consist of three separate tables, one table for each category (sedentary work, light work, and medium work).[174] If a claimant is found able to work the full range of heavy work this "generally is sufficient for a finding of not disabled."[175] Each grid presents various combinations of factors relevant to a claimant's ability to find work. The factors in the grids are the claimant's age,[176] education, and work experience.[177] For each combination of these factors, e.g., fifty years old, limited education, and unskilled work experience, the grids direct a finding of either disabled or not disabled based on the number of jobs in the national economy in that category of physical-exertional requirements.[178] This approach allows the Commissioner to streamline the administrative process and encourages uniform treatment of claims.[179]

c.If a finding of disabled cannot be made based on strength limitations alone, the rules established in Appendix 2 are used as a framework in evaluating disability.[180] In cases where the individual has solely a non-exertional impairment, a determination as to whether disability exists shall be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in Appendix 2.[181]

---

the availability of jobs for all persons whose medical condition is categorized in the same way.

172 20 C.F.R. § 404, Subpart P, Appendix 2.

173 *Id.*

174 *See* Exertional categories, *supra* note 170.

175 20 C.F.R. § 404, Subpart P, Appendix 2.

176 The grids consider three age categories: younger person (under age fifty), person closely approaching advanced age (age 50-54), and eighteen person of advanced age (age fifty-five or older).

177 20 C.F.R. § 404, Subpart P, Appendix 2.

178 *Id.*

179 *Id.*

180 *Id*.

181 *See* Daniel F. Solomon, *Vocational Testimony in Social Security Hearings*, 18 J. NAT'L ASS'N ADMIN. L. JUDGES (1998) http://digitalcommons.pepperdine.edu/naalj/vol18/iss2/2.

d.If claimant's limitations are only non-exertional, the grids are inappropriate, and determination must rely on other evidence.[182] If claimant's limitations are both exertional and non-exertional, the determination is supposed to consult the grids first.[183] If the claimant is disabled under the grids, there is no need to examine the effect of the non-exertional limitations.[184] But if the same claimant may be not disabled under the grids, the non-exertional limitations must be examined separately.[185]

E.A claimant can be determined to be disabled at steps 3 or 5.[186] At step 5 in the adult sequential evaluation the burden shifts from the claimant to SSA to show that considering age, education, past work experience and residual functional capacity other work can be performed that is substantial gainful employment, which exists in the regional or national economy.[187] Under 20 C.F.R. § 404.1566, work that exists in the national economy is defined:

---

182 20 C.F.R. § 404, Subpart P, Appendix 2.

183 *Id.*

184 *Id.*

185 *Id.*

186 Wixon & Strand, *supra* 143

187 *See*, *e.g.*, Cannon v. Bowen, 858 F.2d 1541, 1544 (11th Cir. 1988). At the hearing level, an administrative law judge *must* articulate specific jobs that the claimant is able to perform, and this finding must be supported by substantial evidence. (emphasis added.) Although rarely used at the DDS level, Vocational Experts (VEs) are used by administrative law judges at the hearing level to help determine step five of the sequential evaluation to in help determine the ability to perform other appropriate work in the labor market. VEs respond to hypothetical questions proposed by the judges and claimants' representatives based on a hypothetical individual's: age, education, work experience, skills and their residual functional capacity; *See also* Vocational and Medical Experts (Vocational Expert and Medical Expert Fees for Services, Office of the Inspector General of the Social Security Administration (A-06-99-51005) (2001). In FY1999 the SSA Office of Hearing and Appeals (currently the SSA Office of Disability Adjudication and Review, ODAR) had Blanket Purchase Agreements with 1,337 Vocational Experts and had made $21.6 million dollars in payments to Vocational Experts. These payments represented 3.1% of the $687 million operating budget in 1999. *See also* Solomon, *Vocational Testimony in Social Security Hearings*, *supra* note 181. SSA has signed an interagency agreement with the U.S. Department of Labor's Bureau of Labor Statistics (BLS). More detailed information about the agreement see *Occupational Information System Project*, SOC. SEC. ADMIN., http://www.ssa.gov/disabilityresearch/occupational_info_systems.html (last visited Apr. 7, 2016). Hypothetically, a new Occupational Information System (OIS) to update and/or replace the DOT is being developed.

(a)General. We consider that work exists in the national economy when it exists in significant numbers either in the region where you live or in several other regions of the country. It does not matter whether—

(1) Work exists in the immediate area in which you live;
(2) A specific job vacancy exists for you; or
(3) You would be hired if you applied for work.

(b) How we determine the existence of work. Work exists in the national economy when there is a significant number of jobs (in one or more occupations) having requirements which you are able to meet with your physical or mental abilities and vocational qualifications. Isolated jobs that exist only in very limited numbers in relatively few locations outside of the region where you live are not considered "work which exists in the national economy." We will not deny you disability benefits on the basis of the existence of these kinds of jobs. If work that you can do does not exist in the national economy, we will determine that you are disabled. However, if work that you can do does exist in the national economy, we will determine that you are not disabled.

(c) Inability to obtain work. We will determine that you are not disabled if your residual functional capacity and vocational abilities make it possible for you to do work which exists in the national economy, but you remain unemployed because of:

(1) Your inability to get work;
(2) Lack of work in your local area;
(3) The hiring practices of employers;
(4) Technological changes in the industry in which you have worked;
(5) Cyclical economic conditions;
(6) No job openings for you;
(7) You would not actually be hired to do work you could otherwise do; or
(8) You do not wish to do a particular type of work.

(d) Administrative notice of job data. When we determine that unskilled, sedentary, light, and medium jobs exist in the national economy (in significant numbers either in the region where you live or in several regions of the country), we will take administrative notice of reliable job information available from various governmental and other publications. For example, we will take notice of:

(1) ***Dictionary of Occupational Titles***, published by the Department of Labor;
(2) ***County Business Patterns***, published by the Bureau of the Census;
(3) ***Census Reports***, also published by the Bureau of the Census;
(4) ***Occupational Analyses***, prepared for the Social Security Administration by various State employment agencies; and
(5) ***Occupational Outlook Handbook***, published by the Bureau of Labor Statistics.

(e) Use of vocational experts and other specialists. If the issue in determining whether you are disabled is whether your work skills can be used in other work and the specific occupations in which they can be used, or there is a similarly complex issue, we may use the services of a vocational expert or other specialist. We will decide whether to use a vocational expert or other specialist.[188]

When issued in 1980, the Medical-Vocational Guidelines were largely supported by the DOT.[189] The DOT is supposed to identify jobs that claimants might be able to perform in light of their functional limitations and vocational characteristics. Unfortunately, it was last updated in 1991 and is most probably flawed.[190]

If there are a significant number of jobs either in the region where the claimant lives or in several other regions of the country that match the claimant's medical and vocational profile, then the claimant is "not disabled." However, it is inappropriate to conclude that an older (typically age 50 and above) claimant can transfer to a

---

188 20 C.F.R. § 404.1566.

189 20 C.F.R. § 404(P)(2).

190 Although the Department of Labor replaced DOT with the Occupational Information Network (O*NET)—SSA determined O*Net does not contain definitive job information. Also, by all accounts, vocational profiles of claimants at the DDS level are often inaccurate.

different job in a wholly different industry that requires more than a minimal adjustment. If there are no jobs that claimant could perform at step 5 of the sequential evaluation, or if such jobs do not exist in sufficient numbers, then SSA has not met the shifting burden and claimant is "disabled."[191]

F.Trial work period. After a person becomes eligible for disability benefits, the person may attempt to return to the work force.[192] As an incentive, SSA provides a trial work period in which a beneficiary may have earnings and still collect benefits.[193] During a trial work period, a recipient may test an ability to work and still be considered disabled.[194] Services performed during the trial work period that would normally show the disability has ended are not considered until services have been performed for at least 9 months (not necessarily consecutive) in a rolling 60-month period.[195] In 2015, any month in which earnings exceed $780 is considered a month of services for an individual's trial work period.[196]

G.Ticket to Work. SSA administers a voluntary VR program for persons aged 18 through 64 who already are in payment status.[197] The program permits recipients to keep benefits while they explore employment, receive vocational rehabilitation services, and gain work experience. Cash benefits and Medicaid or Medicare often continue throughout a transition to work, and there are protections in place to help regain benefits if the recipient is unable to continue

---

191 Tom Johns, *SSA's Sequential Evaluation Process for Assessing Disability*, SOC. SEC. ADMIN., https://www.ssa.gov/oidap/Documents/Social%20Security%20Administration.%20%20SSAs%20Sequential%20Evaluation.pdf (last visited Apr. 7, 2016).

192 *Substantial Gainful Activity*, SOC. SEC. ADMIN., (2016), https://www.socialsecurity.gov/oact/cola/sga.html.

193 *Id.*

194 *Trial Work Period*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/cola/twp.html. (last visited Apr. 7, 2016).

195 *SSA 2016 Red Book*, SOC. SEC. ADMIN. (2016), https://www.ssa.gov/redbook/eng/ssdi-only-employment-supports.htm.

196 *Trial Work Period, supra* note 194.

197 The SSA Ticket Act created two other programs, the Work Incentives Planning and Assistance (WIPA) program and the Protection and Advocacy for Beneficiaries of Social Security (PABSS) program, to supplement the assistance available at our field offices. The two programs authorize grants to organizations with ties to the disability community at the local level. 20 C.F.R. § 411.

working due to disability.[198] SSA maintains an Office of Research, Demonstration, and Employment Support, which conducts research and analysis, administers employment support programs, and develops agency policies on work incentives.[199] Unfortunately, this Office is underfunded and did not provide much support until recently.[200]

H.Meanwhile, SSA is supposed to determine whether VR will aid a willing recipient.

I.SSA states that for every dollar spent on VR, it receives $7 in return. According to the Council of State Administrators of Vocational Rehabilitation, the individuals who completed their VR service plans in 2012 and went to work earned approximately $3.5 billion in wages during their first year of work.[201] During that year, these new wage earners paid approximately $320 million in federal taxes; $95 million in state income taxes; and $520 million in Social Security and Medicare taxes (self and employer). These individuals will be able to pay back the cost of their rehabilitation services, through taxes, in just two to four years. In addition, many of these individuals will generate projected savings to the Federal Treasury and the Social Security Trust Fund of a projected $470.3 million in savings for one fiscal year.[202]

J.However, the SSA statistics are based on only those already awarded benefits whereas the most effective time to address work is at the time of application, before an applicant is in payment status.

---

198 *See* Scott D. Szymendera & William R. Morton, *About Ticket to Work*, CONG. RESEARCH SERV. RL33585 (2014), http://www.chooseworkttw.net/about/index.html.

199 *Organization Chart & Structure*, SOC. SEC. ADMIN., https://www.ssa.gov/disabilityresearch/organization.htm (last visited Apr. 7, 2016).

200 *See Accelerated Benefits Demonstration*, SOC. SEC. ADMIN., http://www.ssa.gov/disabilityresearch/accelerated.htm (last visited Apr. 7, 2016). *See also SSA 2016 Red Book supra* note 194 (providing more information on SSA's demonstration projects).

201 *See Public Vocational Rehabilitation: An Investment In America*, COUNCIL OF STATE ADM'R OF VOCATIONAL REHAB. (Jul. 9, 2013), http://www.rehabnetwork.org/?s=an+investment+in+America&submit=. *See also Investing in America: 2013-2014*,, COUNCIL OF STATE ADM'R OF VOCATIONAL REHAB., http://www.rehabnetwork.org/wp-content/uploads/Investing-in-America-brochure-2013-2014.pdf (last visited Apr. 7, 2016).

202 *Id.*

SSA once developed a plan to conduct a test of early intervention services provided by state VR agencies to applicants as part of a broader early intervention test, but that plan was not pursued.[203] For every dollar spent, SSA would get thousands back. Some researchers believe that savings could be in the billions of dollars. This, standing alone, could make the DI system solvent.[204]

K.Moreover, there are no statistics to show the effect of the application of VR principles on CDR claimants. It could be that VR is being applied, but there is no evidence to substantiate it.

L.Social Security administers a Vocational Rehabilitation (VR) Reimbursement Program.[205] The following is a summary of the reimbursements Social Security made to State VR agencies by fiscal year.[206]

---

203 In fact, SSA ran a study in 2001-2003 with the Disability Research Institute, a research consortium. "Early intervention" was offered to a sample of applicants with "impairments that may reasonably be presumed to be disabling (i.e., they have a good chance at being approved Social Security Disability Insurance (SSDI) benefits) and who are likely to engage in Substantial Gainful Activity (SGA) as a result of the features of early intervention." *See* DEBRA BRUCKER, EARLY INTERVENTION PROJECT: YEAR TWO REPORT, PROGRAM FOR DISABILITY RESEARCH, RUTGERS UNIV. (2002). A review of the report shows that it took Rutgers two years to discover that the Department of Labor (DOL) offered a "one-stop" or career center offices that could perform the entire function.

204 David C. Stapleton & Frank Martin, *Vocational Rehabilitation on the Road to Social Security Disability: Longitudinal Statistics from Matched Administrative Data Vocational Rehabilitation on the Road to Social Security Disability: Longitudinal Statistics from Matched Administrative Data*, *in* MICHIGAN RETIREMENT RESEARCH CENTER RESEARCH PAPER 2012-269 (2012).

205 *Vocational Rehabilitation Cost Reimbursement Program*, SOC. SEC. ADMIN., https://www.ssa.gov/work/vocational_rehab.html (last visited Apr. 7, 2016).

206 *See State Vocational Rehabilitation Agency Reimbursements*, SOC. SEC. ADMIN, http://www.ssa.gov/work/claimsprocessing.html (last visited Apr. 7, 2016).

Fiscal Year*	Claims Allowed	Dollars Allowed	Average Cost Per Claim
FY 14	9,451	$141,449,760.46	$14,966.64
FY 13	9,645	$138,260,580.10	$14,334.95
FY 12	5,343	$78,768,058.10	$14,742.29
FY 11	4,679	$72,991,906.25	$15,599.89
FY 10	7,768	$105,964,398.60	$13,641.14
FY 09	8,712	$122,268,833.39	$14,035
FY 08	9,325	$124,238,549.09	$13,323
FY 07	6,871	$90,263,129.56	$13,137
FY 06	8,387	$105,049,203.20	$12,525
FY 05	6,095	$75,635,939.94	$12,410
FY 04	6,811	$85,172,425.42	$12,505
FY 03	6,760	$84,599,189.87	$12,514
FY 02	10,527	$131,062,205.10	$12,450
FY 01	8,208	$103,892,717.86	$12,657
FY 00	10,220	$117,024,222.20	$11,451
FY 99	11,126	$119,934,831.23	$10,780
FY 98	9,950	$103,037,127.54	$10,355

These figures show that more emphasis on VR was attributed for years prior to the Bush administration (when there were proportionally fewer DI beneficiaries) and prior to declines in the DI Trust Fund. It is reasonable that the emphasis on VR contributed to surpluses in the DI Trust Fund for those periods. It is also reasonable that the decreased emphasis from 2004 onward contributed to the decline in the DI Fund.

M.Meanwhile, in addition to the SSA VR system, every state has a mandated multi-funded VR program.[207] The 1998 Workforce

---

[207] A federal–state VR program partnership, administered by the federal U.S. Department of Education Rehabilitation Services Administration (RSA), currently gives approximately $3 billion annually to state agencies to provide a wide variety of vocational rehabilitation services to individuals with a broad spectrum of disabling conditions. These funds are not specifically dedicated for SSID and SSI applicants. *E.g.*, David Dean, John V. Pepper, Robert M. Schmidt, & Steven Stern, *State Vocational Rehabilitation Programs and Federal Disability Insurance: An Analysis of Virginia's Vocational Rehabilitation Program*, IZA J. LAB. POL'Y (2014). The researchers concluded, first, VR services are associated with lower rates of participation in disability insurance programs - a nearly two point drop in SSDI receipt and one point drop in SSI receipt. Second, VR service receipt is associated with lower take-up rates of SSDI/SSI. Finally, among VR applicants on SSDI/SSI, those who receive substantive VR services are more likely to be employed.

Investment Act (WIA) was intended to incorporate a myriad of federal job training programs into a coordinated, comprehensive system.[208] States were required to develop statewide and local plans that included the VR system in the planning process.[209] Although Congress contemplated merging the VR system into the WIA, VR is maintained as a separate program by several agencies to meet the vocational training needs of people with disabilities.[210] But, the vocational training opportunities of the state workforce investment system are clearly intended to be available to individuals with disabilities.[211] The Workforce Investment Act of 1998 was reauthorized July 14, 2014 as P.L. 113-128, the Workforce Innovation and Opportunity Act (WIOA).[212] Any service an individual receives from the VR system must be connected to an ultimate employment goal.[213] People must show a mental, physical or learning disability that interferes with the ability to work.[214] The disability need not qualify the person for DI or SSI benefits, but it must be a substantial impediment to employment.[215]

N.Among the programs involved under WIOA are: Title I of the Act, Adult, Dislocated Worker and Youth programs[216]; Adult

---

208 *The Workforce Investment Act of 1998: A Primer for People with Disabilities Development,* JOHN J. HELDRICH CTR. FOR WORKFORCE (1999), https://labor.ny.gov/workforcenypartners/PDFs/WIA-Primer-Disabilities.pdf.

209 *Id*.

210 *Id*.

211 *See* 29 U.S.C. § 701(b)(1)(A).

212 H.R. 803, 113th Cong. (2013).

213 *See* 29 U.S.C. § 722(a)(1) (2014).

214 29 U.S.C § 705(20)(a) (2014).

215 29 C.F.R. § 722(a)(3). Although VR services may be denied if a person cannot benefit from them, a person is presumed capable of employment, despite the severity of a disability, unless the VR agency shows by clear and convincing evidence that he or she cannot benefit from services. *Id.*; *see also* 34 C.F.R. § 361.42(a)(2).

216 According to this provision, priority access to higher-intensity career services and training

must be given to public assistance recipients, other low-income individuals, and individuals who are basic skills

deficient. Previously, under WIA, local policies on priority of service varied widely.

Education and Literacy programs; the Wagner-Peyser Employment Service; and VR: Title I of the Rehabilitation Act programs.[217]

O.In addition to SSA and Department of Education (DOE) involvement, DOL provides grants for re-entry into the job market.[218] Because some of the claimants cannot return to past relevant work, they may be entitled to an accommodation under the American Disabilities Act (ADA).[219] DOL maintains a Job Accommodation

---

217 *WIOA Overview*, U.S. DEPT. OF LABOR, https://www.doleta.gov/wioa/Overview.cfm (last visited Apr. 7, 2016).

218 See JAN'S SOAR INFORMATION SYSTEM, http://askjan.org/cgi-win/typequery.exe?902 (last visited Apr. 7, 2016) (for a list of Vocational Rehabilitation Agencies).

219 The Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities. The ADA also establishes requirements for telecommunications relay services.

DOL's Office of Disability Employment Policy (ODEP) provides publications and other technical assistance on the basic requirements of the ADA. It does not enforce any part of the law.

In addition to the Department of Labor, four federal agencies enforce the ADA:

- The Equal Employment Opportunity Commission (EEOC) enforces regulations covering employment.
- The Department of Transportation enforces regulations governing transit.
- The Federal Communications Commission (FCC) enforces regulations covering telecommunication services.
- The Department of Justice enforces regulations governing public accommodations and state and local government services.

Another federal agency, the Architectural and Transportation Barriers Compliance Board (ATBCB), also known as the Access Board, issues guidelines to ensure that buildings, facilities, and transit vehicles are accessible and usable by people with disabilities.

Two agencies within the Department of Labor enforce portions of the ADA.

- The Office of Federal Contract Compliance Programs (OFCCP) has coordinating authority under the employment-related provisions of the ADA.
- The Civil Rights Center is responsible for enforcing Title II of the ADA as it applies to the labor- and workforce-related practices of state and local governments and other public entities. See the Laws & Regulations subtopic for specific information on these provisions.

Americans with Disabilities Act, *supra* note 153.

Network (JAN) through the Office of Disability Employment Policy.[220]

P.In 2014, DOL provided funding for the following:[221]

1.The "Add Us In" initiative received a total of $2,774,116.[222] Each of the recipients led a consortium working to identify and develop strategies to increase the capacity of small businesses, including those in underrepresented and historically excluded communities, to employ youth and young adults with disabilities.[223]

2.The West Virginia University Research Corp. in Morgantown, W.Va., received $2,499,901 to operate the JAN.[224] JAN is a free and confidential consulting service that provides individualized worksite accommodation solutions and technical assistance spanning the complete range of disabilities and job functions to ensure compliance with the Americans with Disabilities Act and other disability-related legislation.[225] It also provides information about self-employment and small business ownership opportunities for individuals with disabilities.[226]

3.The Institute for Educational Leadership in the District of Columbia received $1,099,984 to operate the National Collaborative

---

220 *The Job Accommodation Process: Steps to Collaborative Solutions*, U.S. DEPT. OF LABOR (Feb. 2009), http://www.dol.gov/odep/pubs/misc/job.htm.

221 News Release, U.S. Dept. of Labor, $8.4M in Continued Funding to Improve Employment Opportunities for People with Disabilities Announced by U.S. Labor Dept. (Sept. 11, 2014), , http://www.dol.gov/newsroom/releases/odep/odep20141699 [hereinafter News Release U.S. Dept. of Labor]

222 *Id*.

223 The eight recipients who are participating in this initiative are: 1) the National Organization on Disability in New York; 2) The WorkPlace Inc. in Bridgeport, Connecticut; 3) the TransCen Inc. in Rockville, Maryland; 4) the University of Illinois at Chicago in Chicago; 5) the University of Missouri — Kansas City in Kansas City, Missouri; 6) The University of Oklahoma in Norman, Oklahoma; 7) the Integrated Recovery Network in Los Angeles and 8) the World Institute on Disability in Berkeley, California.

224 News Release U.S. Dept. of Labor, *supra* note 222.

225 News Release, U.S. Dept. of Labor, U.S. Dept. of Labor Announces $2.5 million Grant Opportunity to Manage, Operate Job Accommodation Network (Jul. 19, 2012), http://www.dol.gov/opa/media/press/odep/ODEP20121220.htm.

226 *Id.*

on Workforce and Disability for Youth.[227] These funds will be used to continue the center's work building capacity within and across youth service delivery systems to improve employment and postsecondary education outcomes for youth with disabilities.[228] The center will have three areas of focus going forward: 1) career exploration, management and planning; 2) youth development and leadership; and 3) professional development.[229]

4.The National Disability Institute in the District of Columbia received $1,098,573 to operate the National Center on Leadership for Employment and Advancement of Citizens with Disabilities (LEAD).[230] These funds support the LEAD Center's ongoing efforts to conduct policy and research initiatives focused on improving employment outcomes and economic advancement for individuals with disabilities.[231] Additionally, these resources enable the LEAD Center to continue developing policies and guidance on best practices in retention and return-to work, customizing employment, and conducting policy analysis to ensure that American Job Centers nationwide are able to effectively serve job seekers with disabilities.[232]

5.The Rehabilitation Engineering and Assistive Technology Society of North America in Arlington, Virginia, received $950,000 to operate ODEP's Partnership on Employment and Accessible Technology (PEAT). PEAT is a multifaceted initiative working to advance the employment, retention and career advancement of people with disabilities through the development, adoption and promotion of accessible technology.[233]

Q.Whereas SSA currently merely evaluates claimants for eligibility for DI or SSI, once VR eligibility (not necessarily DI eligibility) is established, the contracting VR agency supposedly develops a written plan establishing the individual's employment goal and the specific services to be provided to assist the individual to

---

227 News Release U.S. Dept. of Labor, *supra* note 222.

228 *Id.*

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*

233 News Release U.S. Dept. of Labor, *supra* note 222

reach that goal.[234] An individualized plan for employment (IPE) must be established.[235] This plan, developed by the claimant with assistance from the VR counselor, is reduced to writing.[236] The assessment evaluates the unique strengths, resources, priorities, abilities and interests of the individual.[237] The assessment can cover educational, psychological, psychiatric, vocational, personal, social and medical factors that affect the employment and rehabilitation needs of the individual.[238] It may also include a referral for the provision of rehabilitation technology services, "to assess and develop the capacities of the individual to perform in a work environment."[239] By law, the IPE is supposed be reviewed at least annually and amended if there are substantive changes in the employment outcome, the VR services to be provided, or the service providers.[240] Any changes will not take effect until agreed to by the individual and the VR counselor.[241]

R.Each IPE must indicate the expected need for post-employment services.[242] Prior to a decision that an individual has achieved an employment outcome, there must be a reassessment of the need for post-employment services.[243] If so, they are to be provided under an

---

234 *See Vocational Rehabilitation Services*, SOUTH DAKOTA DEPT. OF HUMAN SERVS., https://dhs.sd.gov/drs/vocrehab/vr.aspx (last visited Apr. 7, 2016).

235 34 C.F.R. § 361.45 (2016).

236 34 C.F.R. § 361.46 (2001).

237 *Id.*

238 *Id.*

239 34 C.F.R. § 361.5 (2016).

240 *Id.*

241 *Id.*

242Ronald M. Hager, *Policy and Practice Brief: Order of Selection for Vocational Rehabilitation Services*, CORNELL WORK INCENTIVE SUPPORT CTR., http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1058&context=edicollect (last visited Apr. 7, 2016).

243 Post-employment services are defined as services provided after the person has achieved an employment outcome, which are necessary for the individual "to maintain, regain or advance in employment." 34 C.F.R. § 361.5(b)(37) A note to the regulation indicates some possible circumstances in which post-employment services may be appropriate:

> Post-employment services are available to assist an individual to maintain employment, e.g., the individual's employment is jeopardized because of conflicts with supervisors or co-workers and the individual needs mental health services and counseling to maintain the employment; to regain employment, e.g., the individual's job is eliminated through

amended IPE.[244] Therefore, there is no need for a re-determination of eligibility.[245] A note indicates that post-employment services are not intended to be complex or comprehensive and should be limited in scope and duration.[246] If more comprehensive services are required, a new rehabilitation effort should be considered.

S.Special "work incentive" rules are supposed to make it possible for DI recipients to work and still receive monthly payments and Medicare or Medicaid similar to the Rehabilitation Act and WIOA.[247] Section 505(a) of the Social Security Disability Amendments of 1980, Pub. L. 96-265, directed the Commissioner to develop and conduct experiments and demonstration projects designed to provide more cost-effective ways of encouraging disabled beneficiaries to return to work and leave benefit rolls.[248] These experiments and demonstration projects were supposed to test the advantages and disadvantages of altering certain limitations and conditions that apply to title II disabled beneficiaries.[249]

T.In these "experimental" programs, the Commissioner may waive compliance with the entitlement and payment requirements for disabled beneficiaries to carry out experiments and demonstration projects in the title II disability program.[250]

U.The GAO has repeatedly determined that SSA had failed to develop and conduct experiments and demonstration projects in accordance with the regulations.[251]

> reorganization and new placement services are needed; and to advance in employment, e.g., the employment is no longer consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, and interests.

244 *Id*.

245 *See Id.*

246 *State Vocational Rehabilitation Agencies and Their Obligation to Maximize Employment*, NEIGHBORHOOD LEGAL SERVS. INC., (1999), http://nls.org/Disability/VocationalRehabilitation/StateVocationalRehabilitationAgenciesMaximizeEmployment [hereinafter NEIGHBORHOOD LEGAL SERVS. INC.].

247 20 C.F.R. § 404.1599.

248 *Id.*

249 *Id.*

250 *Id.*

251 *See Full Medical Continuing Disability Reviews, A-07-09-29147*, OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., (Mar. 2010) http://oig.ssa.gov/sites/default/files/audit/full/html/A-07-09-29147_7.html

V.At present, SSA has two demonstration projects: Benefit Offset National Demonstration (BOND) and Youth Transition Demonstration (YTD).[252]

1.BOND tests a $1 reduction in benefits for every $2 in earnings over substantial gainful activity (SGA) levels, in combination with benefits counseling, with the goal of helping beneficiaries with disabilities return-to-work.[253] The demonstration allows beneficiaries to face this gradual reduction in their benefits, eliminating the abrupt loss of cash benefits. BOND was initiated in January, 2011 and full implementation began in late April. 2011. A final report is due in 2017.[254]

2.YTD focuses on youths ages 14-25 who receive Supplemental Security Income, SSDI, or childhood disability benefits, or who are at heightened risk of becoming eligible for such benefits.[255] YTD sites develop service delivery systems and partnerships with federal, state, and local entities to assist youth with disabilities to successfully transition from school, which may include post-secondary education, to employment and economic self-sufficiency.[256] All six of the random assignment sites have completed YTD services.[257]

W.“Subsidies" and "Special Conditions" refer to support on the job that could result in receipt of more pay than the actual value of the services performed.[258] The value of subsidies and special conditions are deducted from earnings when SSA determines whether the work is at the SGA level.[259] Following are examples of subsidies and special conditions:

1. The recipient receives more supervision than other workers doing a similar job for the same pay.[260]

---

252 *SSA 2015 Red Book, supra* note 164.

253 *Id.*

254 *Id.*

255 *See SSA 2015 Red Book, supra* note 164.

256 *Id.*

257 *See Youth Transition Demonstration*, SOC. SEC. ADMIN., www.socialsecurity.gov/disabilityresearch/youth.htm (last visited Apr. 7, 2016) (showing the 12-month and 24-month impact reports, as well as the final report, for all of the sites).

258 *Subsidy & Special Conditions*, SOC. SEC. ADMIN., http://www.socialsecurity.gov/disabilityresearch/wi/subsidies.htm (last visited Apr. 7, 2016).

259 *Id.*

260 *See SSA 2015 Red Book, supra* note 164.

2. The recipient has fewer or simpler tasks to complete than other workers who are doing the same job for the same pay.[261]

3. The recipient has a job coach or mentor who helps perform some of the work.[262]

X.All job applicants and employers are eligible for employment services funded through Wagner-Peyser allotments.[263] Funding comes from the DOL Budget and the program is administered by the DOL Employment and Training Administration.[264] Unemployment Insurance (UI) claimants are the largest customer component and have an opportunity to receive work skills assessments, counseling, and job and training referrals.[265] Veterans and eligible spouses receive priority referral to jobs and training, as well as special employment services and assistance coordinated with the Veterans Administration.[266] Special programs are also available that offer extra assistance to people who have the hardest time finding employment, such as the long-term unemployed, individuals with disabilities, at-

---

261 *Id.*

262 *Id.*

263 *Wagner-Peyser Act of 1933, as amended by the Workforce Investment Act of 1998*, U.S. DEPT. OF LABOR EMPLOYMENT AND TRAINING ADMIN., http://www.doleta.gov/programs/w-pact_amended98.cfm (last visited Apr. 7, 2016). As stated above, the program is administered through the WIA and the WOIA.

264 *See Id*. The statute states in part:

> b) It shall be the duty of the Secretary [of DOL, not SSA] to assure that unemployment insurance and employment service offices in each State, as appropriate, upon request of a public agency administering or supervising the administration of a State plan approved under part A of title IV of the Social Security Act, …
>
> (c) The Secretary shall--
>
> (1) assist in the coordination and development of a nationwide system of public labor exchange services, provided as part of the one-stop customer service systems of the States;
>
> (2) assist in the development of continuous improvement models for such nationwide system that ensure private sector satisfaction with the system and meet the demands of jobseekers relating to the system; and
>
> (3) ensure, for individuals otherwise eligible to receive unemployment compensation, the provision of reemployment services and other activities in which the individuals are required to participate to receive the compensation.

265 *Id.*

266 *Id.*

risk youth, parents receiving Temporary Assistance for Needy Family support, and dislocated workers:[267]

1.Claimants for employment are supposed to receive individual treatment. Data elements are collected from claimants during the initial claims and/or work registration process and entered into a computer database that will be used to profile claimants. Necessary labor market information data would also be entered.[268]

2.Claimants who have been issued a first unemployment payment are then profiled using a two-step approach. First, claimants who are on recall or who use a union hiring hall are excluded. Then, the remaining claimants are either identified or assigned a probability of dislocation through a statistical model process or additional characteristic screens.[269]

3. A list of claimants who are potentially eligible for referral to Service Providers is then created by the State's computer system. If a statistical model is used, claimants are ranked, highest to lowest, in order of their probability of exhaustion of benefits. If characteristic screens are used, the result is simply a list of claimants considered likely to exhaust benefits.[270]

4.The UI component and Service Provider jointly determine the number of profiled UI claimants to be selected and referred. This referral agreement establishes the number of claimants that can be referred and provided with reemployment services.[271]

5.In order to create incentives to hire DI recipients and other priority claimants, the Work Opportunity Tax Credit (WOTC), a federal tax credit, is available to employers hiring individuals from certain target groups who have consistently faced significant barriers to employment. The maximum tax credit ranges from $1,200 to $9,600, depending on the employee hired.[272]

---

267 *Id.*

268 *Worker Profiling and Reemployment Services*, U.S. DEPT. OF LABOR EMPLOYMENT AND TRAINING ADMIN., https://www.doleta.gov/programs/wprs.cfm (last visited Apr. 7, 2016).

269 *Id.*

270 *Id.*

271 *Id.*

272 *Work Opportunity Tax Credit*, U.S. DEPT. OF LABOR EMPLOYMENT AND TRAINING ADMIN., http://www.doleta.gov/business/incentives/opptax (last visited Apr. 7, 2016).

Y.Extrapolating the statistics, assuming that VR would be applied at time of application, reduced to present value, for the work life expectancy of an average successful beneficiary, the return on investment is probably more than $100 for each VR dollar spent and "takers" become "makers." Most recipients of VR will not draw from the fund, and will eventually pay into it. The recipients will also pay income taxes and increase personal consumption, allowing the process to ripple into other revenue streams.

Z.VR agencies are considered the payer of last resort for many services. They will not pay for a service if a similar benefit is available through some other agency or program.[273] If another agency refuses to provide a service that is within its area of responsibility, the claimant should not have to wait until that dispute is resolved before obtaining the service. In the above example, the IPE would list an item or service to be to be provided and indicate that it would be provided by SSA as a comparable benefit. If Medicaid then refused to provide it, the VR agency would be responsible for obtaining the device, pending resolution with SSA. This can easily be established as a contract item between SSA, the VR provider and the medical supplier.

AA.Partial disability. DI is an “all or nothing” concept. From the beginning of DI, Congress has discussed “partial” disability.

1.A worker can choose to retire as early as age 62, but doing so may result in a benefit reduction of as much as 30 percent.[274] Many recipients receive a discounted retirement benefit at age 62, and at the time of application simultaneously file a DI application. If the 62-65 year old claimant is approved for DI, the benefit amount for DI is awarded as if “full” retirement age, currently age 66, has been met. For a 62 year old, that amount is usually about 20% higher than the amount based on date of actual retirement.[275]

a.One reason for the claim is, of course, the higher payment amount.

---

273 *See* NEIGHBORHOOD LEGAL SERVS. INC., *supra* note 247.

274 The benefit is reduced 5/9 of one percent for each month before normal retirement age, up to 36 months. If the number of months exceeds 36, then the benefit is further reduced 5/12 of one percent per month. *See Early or Late Retirement?*, SOC. SEC. ONLINE (2008), http://www.ssa.gov/oact/quickcalc/early_late.html.

275 *Id.*

b.Another reason may or may not be that as a DI recipient, the claimant will be eligible for Medicare (usually after 25 months from date of onset).[276]

c.These claims, which many are questionable and difficult to adjudicate, clog the system.

d.New developments such as Obamacare could reduce the number of claimants who are uninsured between ages 62-65, many of whom are in high risk insurance underwriter categories.

e.Congress could easily prorate the amounts from age 62 to full retirement date.

In its 2012 Policy Report, CBO estimated great savings by preventing workers from applying for DI benefits after their 62nd birthday or from receiving awards if the date they become eligible for benefits after that birthday.[277]

I find that this would be extremely harsh for those who become disabled at that age.

SSA could establish an election whereby at ages 62-65 a claimant would elect either early retirement or DI at the prorated amount at retirement, but not both. Of course, this would not be applied retroactively. Because legislation and rulemaking is necessary, it will take many years to impact the DI Trust Fund.

2.CATO proposes a program that would combine benefit offsets with variable wage subsidies.[278] Under a "generalized benefit offset" (GBO), beneficiaries would choose when and how much to work according to their health conditions, labor market opportunities, and work abilities.[279]

a.If a beneficiary has sufficiently high earnings in any period, he or she would receive a smaller benefit out of DI's trust fund but would also receive a wage subsidy (from a different federal funding

---

[276] If the eligibility for Medicare were lowered to age 62 from the current 65, I suspect that DI claims would drop precipitously.

[277] CBO estimated that this would affect about 500,000 people in 2022 and would reduce DI outlays by

about $12 billion in 2022 and by about 6 percent in 2037. However, most of those budgetary savings would

be offset by larger outlays for retirement benefits.

[278] Jagadeesh Gokhale, *SSDI Reform: Promoting Gainful Employment while Preserving Economic Security*, 762 POLICY ANALYSIS, CATO INSTITUTE (October 22, 2014), http://object.cato.org/sites/cato.org/files/pubs/pdf/pa762_1.pdf

[279] *Id.*

source) that increases with earnings up to a certain level well beyond SGA.[280] Over that range, the earnings subsidy would increase the beneficiary's income faster than the increase in earnings. Such a subsidy would provide a more robust work incentive. That payment structure should induce labor force reentry by beneficiaries who retain work abilities. However, it is likely to be effective only if SSDI benefits are restored when earnings decline, for whatever reason. Essentially, GBO would provide a flexible, prowork system of payments to those on SSDI.[281]

b.CATO argues that a key advantage of GBO's benefit structure is that it would incentivize recipients who can work to "self-select" into working rather than remaining out of the labor force, thereby inducing voluntary labor market choices that would better reveal beneficiaries' work capabilities and are better suited to their economic preferences and opportunities.[282]

c.From the literature, this suggestion is similar to using ADA principles in evaluation of claims and using the same methods currently employed by the Department of Labor Employment and Training Administration in evaluating and placing disabled applicants. The mechanism required by the CATO proposal to adjust benefit amounts based on income and other factors is employed at SSA in part when calculating SSI benefits. SSI recipients live "in a fishbowl" because they have a continuing duty to provide financial data as SSA calculates and recalculates benefit amounts based on the amounts of income and resources available to the recipient.[283] This creates millions of cases of underpayment and overpayment that may or may not be appealed through the same system used to adjudicate DI.

d.If the CATO system were applied, recipients would need to produce financial record and employers would have to continually report. From my perspective, the current SSI system is de-

---

280 *Id.*

281 *Id.*

282 *Id.*

283 Richard Balkus, James Sears, Susan Wilschke, & Bernard Wixon, *Simplifying the Supplemental Security Income Program: Options for Eliminating the Counting of In-kind Support and Maintenance*, 68, SOC. SEC. BULLETIN 15 (2008), http://www.ssa.gov/policy/docs/ssb/v22n1/v22n1p15.pdf.

humanizing, because of the inference that recipients need constant monitoring and supervision.[284]

e.From the literature, CATO has not scored the proposal.[285]

f.Because of the need to adjust amounts of benefits and wage subsidies, given an added expense of SSA labor and without showing it is cost productive, it is difficult to see how this would benefit the Trust Fund. The proposal is also limited to recipients, those already adjudicated as disabled.

a.Also, this is analogous to a workers' compensation concept known in most states and under some Federal Statutes as "wage loss," used to evaluate "permanent partial" disability (PPD).[286] Although there are many variations on the theme under state law, when a claimant has a compensable injury and has reached maximum medical improvement,[287] an evaluation is made on how to return claimant to work. If the amount of future wages is the same as former work, there is no additional payment. However, when there is a differential, workers' compensation coverage pays the difference.[288]

Application of an individualized system would better serve claimants than the current system. Please note that I differentiate among claimants and recipients or beneficiaries. I think that if the ADA/IPE evaluation were performed for appropriate DI applicants (mostly age 50 and younger), more valid claims would be paid at an early stage, relieving more claimants of high anxiety and financial stress.

---

284 It is interesting that CATO proposes increased government intrusion. All DI recipients are recovering FICA taxes, are currently and fully insured, and arguably are merely collecting under a policy similar to LTD policies.

285 Gokhale, *supra* note 280.

286 *Id.*

287 Maximum medical improvement (MMI) occurs when an injured employee reaches a state where his or her condition cannot be improved any further or when a treatment plateau in a person's healing process is reached.

288 *See, e.g.,* 33 U.S.C.§ 908(c). (This section also addresses "scheduled injuries," payments for loss of use of certain parts of the anatomy. At the state level, there is no majority rule, as they vary. In some states, there is a cap in terms of months of payment. In others, once a claimant is entitled to WC they are also entitled to SSA retirement benefits. *See also PPD Benefits by State*, MICH. STATE UNIV. (2008), http://hrlr.msu.edu/hr_executive_education/documents/State20PPD20Laws2008-02.pdf (providing a summary of state laws).

If the same process were applied to the CDR process, it is reasonable that it would increase the 27% denial rate.[289]

The IPE would more accurately define the medical (i.e. RFC) and vocational profiles, so once cases are appealed a superior record would be developed. Under current practice only a few claimants are receiving the VR services that many more are entitled to receive.

Development by SSA of the IPE/VR evaluation at the application stage has the potential, standing alone, to completely resolve the DI Trust Fund dilemma. However, extensive rulemaking is needed to restructure the existing system and it is expected that it will take several years to yield results.

BB.Experience Rating. Experience rating is a process for determining insurance premiums based on the cost of an insurance pool's past claims.[290] An insurer calculates a firm's insurance premium based on the likelihood, or risk, of the firm submitting a future claim, given its previous behavior.[291] Many types of employer-

---

289 *Id.*

290 David C. Stapleton, *Bending the Employment, Income, and Cost Curves for People with Disabilities* 2 MATHEMATICA POLICY RESEARCH, INC., No. 11- 01, (2011).

291 *See Id*. at 38-40. *See, e.g.*, 33 U.S.C.§ 908(c) This section also addresses "scheduled injuries," payments for loss of use of certain parts of the anatomy. At the state level, there is no majority rule, as they vary. In some states, there is a cap in terms of months of payment. In others, once a claimant is entitled to WC they are also entitled to SSA retirement benefits. *See also PPD Benefits by State*, *supra* note 290. The International Organization for Standardization (ISO) identifies the following principles of risk management. Risk management should:

- create value – resources expended to mitigate risk should be less than the consequence of inaction, or (as in value engineering), the gain should exceed the pain;
- be an integral part of organizational processes;
- be part of decision making process;
- explicitly address uncertainty and assumptions;
- be systematic and structured process;
- be based on the best available information;
- be tailorable;
- take human factors into account;
- be transparent and inclusive;
- be dynamic, iterative and responsive to change;
- be capable of continual improvement and enhancement; and
- be continually or periodically re-assessed.

Committee Draft of ISO 31000 Risk Management, http://www.nsai.ie/uploads/file/N047_Committee_Draft_of_ISO_31000.pdf

sponsored insurance use experience ratings to determine premiums, including state workers' compensation ("WC"), unemployment insurance ("UI"), and private long-term disability insurance ("LTD").[292]

1.Mr. Stapleton and researchers Richard V. Burkhauser, Mary C. Daly, and Philip R. de Jong address whether it is feasible to treat DI in the same manner as insurance companies rate employers in underwriting. [293] Mr. Morton does a thorough job of highlighting arguments for and against this proposal, and much of the discussion *infra*, comes from his paper.[294]

2.Employers pay the same payroll tax rate on their employees' earnings for DI, regardless of the rate at which their employees enroll in the program.[295] According to the researchers, especially Mr. Stapleton, under the current system, employers have little incentive to make robust investments in preventative, accommodative, or rehabilitative services, because employees with disabilities can transition to DI without any additional cost to the employer.[296] However, under an experience rated system, employers whose employees enroll in DI at rates above the national average would pay a higher payroll tax rate, whereas firms whose employees enter the program at below average rates would pay a lower payroll tax rate.[297]

3.According to the researchers and Mr. Morton, in theory, the experienced-rated payroll tax should incentivize employers to provide supported-work services, in order to reduce their employees' enrollment rate in SSDI and subsequently lower their labor costs.[298]

---

[292] Stapleton, *supra* note 292.

[293] *Id.* Insurance premium determination systems and methodologies vary by state. Workers' compensation provides medical benefits and a partial wage replacement to insured workers whose impairment or condition stems from their employment. Unemployment insurance provides a partial wage replacement to insured workers who become involuntarily unemployed. *See also* Richard V. Burkhauser, Mary C. Daly & Philip R. de Jong, *Curing the Dutch Disease: Lessons for United States Disability Policy* (Univ. of Mich. Retirement Research Ctr., Working Paper 2008- 188, 2008), http://www.mrrc.isr.umich.edu/publications/Papers/pdf/wp188.pdf.

[294] Morton, *supra* note 9.

[295] Burkhauser, *surpa* note 295.

[296] Stapleton, *supra* note 292.

[297] *Id.*

[298] *Id.*

4.Mr. Stapleton states that another potential advantage of the experience rating option is its relative simplicity.[299] Employers already report payroll tax data to the Internal Revenue Service ("IRS"), which the agency shares with SSA. Moreover, most employers are accustomed to the concept of experience rating stemming from their experience paying state WC and UI premiums.[300] By compiling both payroll tax and beneficiary award data, SSA could conceivably initiate an experience rating system to the DI payroll tax "without imposing substantial new reporting requirements or administrative burdens on employers."[301]

5.The researchers admit that notwithstanding the potential for reduced enrollment in DI, implementing an experience rating system to the employer's portion of the payroll tax may adversely affect some workers.[302] For example, experience-rated payroll taxes could make employers hesitant to hire or retain workers 'perceived to be a[] high risk for disability.'[303] Employers may discriminate against older workers, people with chronic conditions such as diabetes, or individuals prone to at-risk behaviors (e.g., alcohol or substance abuse) in order to avoid paying a higher payroll tax rate on their employees' earnings.[304] To address this possibility, supporters of experience rating suggest implementing risk adjustments specific to factors such as age, occupation, and health status, as well as enforcing existing anti-discrimination laws.[305]

6.In addition, experience rating could conceivably reduce the compensation or employment opportunities of low-wage workers. Some employers, subject to higher payroll tax rates, could shift the additional cost onto workers in the form of reduced take-home pay and benefits.

7.Alternatively, employers, unable to shift additional labor costs onto their employees, may instead offset the higher payroll tax rate

---

299 *Id.*

300 *Id.*

301 David H. Autor, *The Unsustainable Rise of the Disability Rolls in the United States: Causes, Consequences, and Policy Options* 15 (Nat'l Bureau of Economic Research, Working Paper No. 17697, 2011), http://www.nber.org/papers/w17697.

302 Stapleton, *supra* note 292, at 3.

303 Morton, *supra* note 9, at 40.

304 *Id.*

305 *Id.*

by hiring fewer workers in the future. Mr. Morton aptly notes that employers may be unable to shift increased labor costs onto employees due to a lower bound restraint such as the minimum wage.[306] Since many low-wage individuals typically work in professions with high rates of disability, they may be disproportionately affected by employer cost avoidance and therefore more likely to suffer financially as a result.[307] Mr. Stapleton would offset the reduced compensation with an expansion of the Earned Income Tax Credit ("EITC") in order to bolster the after-tax income of low-wage workers.[308]

8.Opponents of experience rating argue that workers adversely affected by employer cost avoidance could turn to []DI as a last resort, thereby increasing worker enrollment. . . .[309]

9.Some critics of experience rating have expressed concern that while the system changes the incentives of employers with respect to program enrollment, it fails to address the incentives of workers to apply for DI.[310] Some workers may apply for DI because of economic circumstances such as unemployment or low wages.[311] The CBO notes that "[a]lthough the initial determination process screens out most non-meritorious claimants, SSA may grant awards to some claimants on the margin of program entry who could potentially work but choose not to due to economic circumstances."[312] Under an experience rating system, the former employers of these new beneficiaries could have their payroll tax rate increased, even though the beneficiaries based their decision to apply for DI primarily on factors unrelated to health status or disability. As a result, these employers would be penalized twice for terminating a worker, insofar as their UI rate would increase, as well as their payroll tax rate for DI and Medicare. Given this scenario, opponents contend that experience rating the employer's portion of the payroll tax does little

---

306 *Id.*

307 *Id.*

308 Stapleton, *supra* note 292.

309 Morton, *supra* note 9, at 40.

310 *Id*.

311 *Id.* at 40-41. Moral hazard refers to the tendency for individuals to engage in risky behavior when they are not fully exposed to the consequences of their actions.

312 *Id.* at 40.

to address the moral hazard of workers applying to the program for reasons unrelated to health status or disability.[313]

As described, there is no basis to actually determine whether the Trust Funds would be affected by experience rating employers. It probably will cost time, effort and expensive start-up funding to initiate. I also find that the "cons" expressed by the CBO, whether predominant or not, make the proposal risky.[314]

Moreover, I find that risk management and experience rating is not "science." I note the analogies to WC and LTD. I address LTD in more detail later, but the history of WC includes a litany of failure and all fifty states and the District of Columbia are served by guaranty funds to cover bankrupt WC insurers.[315] For example, the Florida Workers' Compensation Insurance Guaranty Association, Inc. (FWCIGA) provides a mechanism for the payment of covered claims, in the event of the insolvency of a member insurer.[316] Dozens of carriers have become bankrupt. In fact the Florida Workers' Compensation Find, itself became insolvent in 1999.[317] Whether these failures were actually due to improvident underwriting or whether fraud or indolence was involved, Workers compensation is a bad analogy.[318]

In most states, employers are required to provide WC insurance coverage for their employees or post a bond.[319] Some employers have to be sued for failure to obtain coverage. Although it is not a valid defense, many are unable to bear the increased costs, including the administrative expense and time involved.

This proposal would add another layer of bureaucracy. As many potential DI claimants are self-insured, the proposal does not include them. Even if a person who is self-insured may have a geographical or demographic advantage based on risk assessment factors, there is no way (or reason) to adjust for experience rating.[320]

---

313 *Id.* at 38.

314 *Publ'n No. 4207*, *supra* note 5.

315 *See* FLORIDA WORKERS' COMPENSATION INS. GUARANTY ASSOC., http://fwciga.org/ (last visited Apr. 7, 2016).

316 *Id.*

317 *Id.*

318 *Id.*

319 *Id.*

320 For example, someone living in Greenwich Connecticut has a better geographic risk factor than someone living in Appalachia. According to recent

Given that legislation and rulemaking is required for this proposal, and given the controversy, to any degree of probability, it cannot be effectuated.

IV. RECOMMENDATION 4: ADDRESS ELIGIBILITY CRITERIA.

A. "Severe"

At step 2 of the sequential evaluation in an initial claim, a claimant must show a "medically determinable impairment" to be evaluated at the remaining steps.[321] At present, almost any bald *allegation* of disability constitutes a "severe" impairment at step 2 of the sequential evaluation. This starts a costly and time consuming process that may include sending the claimant to a medical expert (ME) for a consultative examination (CE) and having that report examined by another ME.[322] Even if the allegation of a severe impairment cannot be substantiated at the DDS level, the case may enter the appeals process where hundreds of hours of work may be entailed.

In *Bowen v. Yuckert*, 482 U.S. 137 (1987), the Supreme Court found that if a claimant is unable to prove a medically severe impairment, then the claimant is not eligible for disability benefits.[323] At Step Two of the sequential evaluation, as the claimant is "not disabled," there is no reason to spend taxpayer and DI Fund money

---

statistics, claimants in certain counties in Appalachia and in the Delta regions of Mississippi, Arkansas and Louisiana have about 100 times higher incidences of disability. *See* Allen Flippen, *Where Are the Hardest Places to Live in the U.S.?* NEW YORK TIMES, http://www.nytimes.com/2014/06/26/upshot/where-are-the-hardest-places-to-live-in-the-us.html?module=Search&mabReward=relbias%3Aw%2C%7B%221%22%3A%22RI%3A11%22%7D&_r=0&abt=0002&abg=1 (last visited June 26, 2014), Please note that the incidence is ten times greater in Appalachia than in Oklahoma City or Philadelphia. The 10 lowest counties in the country, by this ranking, include a cluster of six in the Appalachian Mountains of eastern Kentucky (Breathitt, Clay, Jackson, Lee, Leslie and Magoffin), along with four others in various parts of the rural South: Humphreys County, Miss.; East Carroll Parish, La.; Jefferson County, Ga.; and Lee County, Ark. Moreover life expectancies in most of Appalachia are ten years less than in most of the rest of the U.S.

321 *See* Johns, *supra* note 161.

322 *Id.*

323 Bowen v. Yuckert, 482 U.S. 137, 180 (1987).

for a consultative evaluation or consider the claimant's vocational factors.[324] The burden of proof is supposed to be on the claimant.[325] A claimant must produce medical evidence that shows that an inability to perform basic work activities, as required in most jobs. i.e. impediments to walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling; seeing, hearing, and speaking; understanding, carrying out, and remembering simple instructions; use of judgment, responding appropriately to supervision, coworkers, and usual work situations; and dealing with changes in a routine work setting.[326] If medical evidence does not support allegations about the medical profile, the file should be closed.[327]

It should be easy to profile which claims will fail to meet the "severe" standard. Statistics show that over eighty percent of genitourinary and neoplastic impairments prevail at the initial stage, while the rate drops to 26.3 percent for skin disorders and to about thirty percent for musculoskeletal diagnoses.[328] Therefore, the range of variation in initial allowances among the body systems is roughly fifty-five percentage points.[329] In general, the genitourinary and neoplastic body systems have the highest initial award rates, more than any other group by at least 20 percentage points.[330] As a result, those two groups also have the lowest proportions of initial denials not appealed, final allowances, and final denials.[331] Applicants with injuries and skin impairments appear most likely not to appeal an initial denial, with about thirty-one percent of the outcomes.[332] Musculoskeletal diagnoses have the highest proportion of final

---

324 *Id. See also* SSR 88-3c and SSR 85-28.

325 5 U.S.C. § 556(d). The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. Director, OWCP, Department of Labor v. Greenwich Collieries, 512 U.S. 267 (1994).

326 See 20 C.F.R. 404.1569(a), Exertional and nonexertional limitations. *See also* SSR 96-8p, *Titles II and XVI: Assessing Residual Functional Capacity in Initial Claims*.

327 *Appendix C: Components of the Definition Trailer*, DICTIONARY OF OCCUPATIONAL TITLES (2010), http://www.lb7.uscourts.gov/documents/INSD/08-1621.pdf.

329 *Id*.

330 *Id*.

331 *Id.*

332 *Id.*

allowances, with about 34 percent of the outcomes, followed by skin disorders.[333] In addition to injuries, however, musculoskeletal and skin impairments also exhibit the highest rates of final denials.[334]

In internal SSA rulings and instructions to staff, if the evidence "is not clearly established" by medical evidence, adjudication must continue through the sequential evaluation process.[335]

I argue that as practiced by the agency, the severity standard is too relaxed. If a claimant is able to work the full range of heavy work, this generally is sufficient for a finding of "not disabled."[336] As a matter of convenience at step two at the initial level, almost every claim is reviewed for matters that are irrelevant at that level, and can be appealed to the hearings level, and under the current law has to be heard.[337] This is a waste of energy and resources. In FY2011, the unit cost of adjudicating a disability hearing was $2,752.00, whereas the unit cost of processing an initial disability claim was $1,058.44.[338] The burden of proof is supposed to be on the claimant, and if heavy work can be performed, and there is no non-exertional overlay, it is reasonable to stop the process at Step Two in the sequential evaluation and place the obligation of going forward on the claimant.[339]

Statistics will show that misapplication of *Bowen v. Yuckert* unnecessarily bogs the adjudication system. In some states anyone

---

333 *Id*. This probably a function of the duration requirement as the conditions could be "severe" if they were to last 12 consecutive months to meet the durational aspect.

334 *Appendix C: Components of the Definition Trailer, supra* note 329.

335 *Id*.

An applicant is denied at step 2 if his or her impairment(s) is considered not severe. *DI 24505.001 Individual Must Have a Medically Determinable Severe Impairment*, SOC. SEC. ADMIN. (2012), https://secure.ssa.gov/apps10/poms.nsf/lnx/0424505001. Applicants are also denied if their impairments fail the duration test; that is, if the impairment (1) is not expected to result in death, and (2) has neither lasted 12 months nor is expected to last for a continuous period of 12 months. The duration test is typically invoked at step 2, but may also be invoked at step 3, 4, or 5.

336 42 U.S.C. § 423(d)(1)(A) (2015).

337 *Id.*

338 *Aspects of Disability*

Decision Making: Data and Materials, SOC. SEC. ADVISORY BD. (Feb. 2012), http://www.lb7.uscourts.gov/documents/1-11-CV-00224.pdf.

339 42 USC § 423(d)(1)(A) (2015).

who receives state benefits, i.e. public assistance or unemployment, even if not related to disability, *must* apply to SSA to receive the state benefits.[340] An applicant should be able to prove at least a medically determinable impairment as a condition precedent to proceed to a hearing. There is no reason the DDS cannot be provided a clear indication through a neutral interrogatory from the claimant's treating sources soon after the claim is filed.[341]

At the time of application, claimants should be informed that their chances of success improve with representation, and that they may use services under the WIOA and the Wagner-Peyser Act. It may be that after an IPE is developed a claimant is rejected for VR, that fact will presume that the claimant is "disabled."

In the current setting, to promote judicial economy, absent further legislation or rulemaking, if a case has a questionable medically determinable impairment, at the hearings level, before unnecessary

---

340 This is why there are a disproportionate number of claims in states that force SSI claims and explains why the probability for awards in these states should be less likely. For states, it is generally financially advantageous for adults and children with disabilities to transfer from such programs as Temporary Assistance for Needy Families (TANF) to SSI. States gain because the federal government pays for the SSI benefit, and states can then use the TANF savings for other purposes. The families gain because the SSI benefits they acquire are greater than the TANF benefits they lose. The payoff to states from transferring welfare recipients to SSI was substantially increased when Congress replaced AFDC with TANF in 1996. States retained less than half of any savings achieved through such transfers under AFDC, but they retain all of the savings under TANF. Also, the work participation requirements under TANF have obligated states to address the work support needs of adults with disabilities who remain in TANF, and states can avoid these costs if adults have disabilities that satisfy SSI eligibility requirements. The incentive for TANF recipients to apply for SSI has increased over time as inflation has caused real TANF benefits to fall relative to payments received by SSI recipients. Steve Wamhoff and Michael Wiseman, *The TANF/SSI Connection*, U.S. SOCIAL SECURITY ADMINISTRATION OFFICE OF POLICY, http://www.ssa.gov/policy/docs/ssb/v66n4/v66n4p21.html. In addition, five states enacted employer temporary disability insurance ("TDI") mandates prior to the first year of data included in this analysis: California (1946), Hawaii (1969), New Jersey (1948), New York (1949), and Rhode Island (1942). Norma B. Coe et al. *supra*. According to Coe, et al, holding all else constant, the five states that mandate employer TDI should have lower application rates.

341 SSA can use a "report of contact" with the treating sources through telephone and even social media within the first 10 days. Claimants should be given the opportunity to get statements from their treating sources and should be provided SSA DI forms appropriate to their alleged impairments.

development work is committed to the claim, an administrative law judge should be able to issue an order to show cause whether one exists.

B.Medical Vocational Guidelines

As stated above, the DOT was last updated in 1991.[342] Since the grids are based on them, they are most probably flawed. Bills in both the House and Senate would require the Commissioner to proscribe rules and regulations to update the medical-vocational guidelines, appendix 2 to the Regulations.[343] This has been discussed for years. In July 2012, the DOL Bureau of Labor Statistics (BLS) contracted with SSA to test the viability of using the DOL BLS' National Compensation Survey (NCS) to collect updated occupational data.[344] According to SSA, the agency plans to conduct ongoing testing and analysis of its data collection process in FY2013 and FY2014, with the expectation of implementing the new OIS starting in FY2016.[345]

In November 2005, SSA issued a Notice of Proposed Rulemaking (NPRM) that proposed to increase the age categories for older insured workers by two years.[346] However, after receiving adverse comments, SSA withdrew the NPRM in May, 2009.[347]

The Congressional Budget Office (CBO) examined the effects of increasing the 45-49 and 50-54 age ranges by two years to 47-51 and 52-56 and making 57 to FRA the new maximum range, thereby eliminating the 45, 46, and 60 and older categories.[348] According to CBO, implementing this policy option in 2013 would have decreased the number of SSDI beneficiaries by 50,000 or 0.5% in 2022, as well as reduced program expenditures by $1.0 billion in that year.[349] Adjusting the age categories for vocational factors would likely encourage older insured workers to seek out other potential income supports. According to the CBO, whereas workers aged 62 to FRA

---

342 See *supra* note 190.

343 The GRIDD Act of 2015, S.1194, 114th Cong. (2015-2016).

344 *Occupational Information System Project*, SOC. SEC. ADMIN.., http://www.ssa.gov/disabilityresearch/occupational_info_systems.html.

345 *Id.*

346 *Age as a Factor in Evaluating Disability*, 70 Federal Reg. 67104 (2005).

347 74 Federal Reg. 21563 (2009).

348 *Publ'n No. 4207, supra* note 5. *See also* Morton, *supra*, note 9, at 23-24.

349 *Publ'n No. 4207, supra* note, at 18.

could apply for early retirement benefits, workers with a recent attachment to the labor force may choose to apply for other work-related supports such as state workers' compensation, private disability insurance, or unemployment insurance.[350]

Apparently, SSA does not have studies that support a need to increase the age by two years. Critics note that although the worklife and life expectancies of all workers are on the rise, those in the lower income occupations have actually decreased worklife and life expectancies.[351]

I argue that the grids should not be applied to younger individuals. The regulations recognize that age is a positive factor for claimants who are under age 45 and is usually not a significant factor in limiting an individual's ability to make a vocational adjustment, even an adjustment to unskilled sedentary work, and even where the individual is illiterate or unable to communicate in English.[352] A younger individual who meets "disabled" criteria would have met or equaled a listed impairment at step 3 of the sequential evaluation, before application of the grids.[353] Some Circuit Courts provide a

---

350 Mr. Morton points out that low-income claimants would most likely apply for SSI and Medicaid in response to the adjustment in the age categories. Morton, *supra* note 9, at 24.

351 *See* E.G., Paul Krugman, *Expanding Social Security*, NEW YORK TIMES, http://www.nytimes.com/2013/11/22/opinion/krugman-expanding-social-security.html (last visited Nov. 21, 2013). ("Those with lower incomes and less education have, at best, seen hardly any rise in life expectancy at age 65; in fact, those with less education have seen their life expectancy decline."). *See also The Life Expectancy Zombie*, NEW YORK TIMES http://krugman.blogs.nytimes.com/2013/03/05/the-life-expectancy-zombie/?_r=0 (last visited Mar. 5, 2013).

352 *See* Appendix 2 to the Regulations.

353 20 C.F.R. 404.1545(5). How we will use our residual functional capacity assessment. (i) We will first use our residual functional capacity assessment at step four of the sequential evaluation process to decide if you can do your past relevant work. *See* §§ 404.1520(f) and 404.1560(b))

(ii) If we find that you cannot do your past relevant work, you do not have any past relevant work, or if we use the procedures in § 404.1520(h) and § 404.1562 does not apply, we will use the same assessment of your residual functional capacity at step five of the sequential evaluation process to decide if you can adjust to any other work that exists in the national economy. *See* §§ 404.1520(g) and 404.1566. At this step, we will not use our assessment of your residual functional capacity alone to decide if you are disabled. We will use the guidelines in §§ 404.1560 through 404.1569a, and consider our residual functional capacity

defacto basis for equaling the record.[354] Although some believe that a claimant is "disabled" if (s)he cannot perform a full range of sedentary work. Actually, if a claimant does not, in fact, have the residual functional capacity for a full range of sedentary work, the case must be evaluated within the framework of the vocational rules.[355] "The functional restrictions which limit the claimant to less than the full range of sedentary work must be specified.[356] It must then be determined whether, considering all of the functional limitations, a "significant number" of sedentary jobs which the claimant can perform exists in the national economy.[357] Evaluation using the grids, whether or not as a "framework" for decision making, is a mere formality for younger individuals.

Moreover, the evaluation should be more individualized. Although there is no DI equivalent, for example, SSA administers a Plan to Achieve Self-Support (PASS), which lets a recipient pay for items or services needed to achieve a specific work goal.[358] This is similar to the WIOA VR process when an equivalent to an IPE is developed.[359] Again, it may be that after an IPE is developed a claimant is rejected for VR, that fact will force the adjudicator to presume that the claimant is "disabled."[360]

---

assessment together with the information about your vocational background to make our disability determination or decision.

354 *See, e.g., Carradine v. Barnhart*, 360 F.3d 751 (7th Cir. 2004) (observing that it was improbable that claimant's physicians would have prescribed drugs and other treatment for her if they had believed that she was faking her pain and noting that "[s]uch an inference would amount to an accusation that the medical workers who treated [the claimant] were behaving unprofessionally"). More recently, in *Goins v. Colvin*, 764 F. 3d 677 (7th Cir.2014), he again attacked the decision for undermining subjective complains of several impairments competent to produce disability. *See* Debra Cassens Weiss, *Posner opinion takes aim at denial of disability benefits; is it a 7th Circuit trend?*, ABA JOURNAL (Aug. 21, 2014), http://www.abajournal.com/news/article/posner_opinion_takes_aim_at_denial_of_disability_benefits_is_it_a_7th_circu.

355 *SSR 86-8: Titles II and XVI: The Sequential Evaluation Process*, SOC. SEC. ADMIN., https://www.socialsecurity.gov/op_home/rulings/di/01/ssr86-08-di-01.html.

356 *Id.*

357 *Id.*

358 *Plan to Achieve Self-Support (PASS)*, SOC. SEC. ADMIN.,, http://www.socialsecurity.gov/disabilityresearch/wi/pass.htm.

359 *See WIOA Overview*, *supra*, note 218.

360 *Id.*

On the other hand, development of the IPE is more defined that the current "vocational profile" needed to establish past relevant work and other job duty evidence at step 5 of the adult listing.[361] This would eliminate the need to use the grid as a framework for decision making.

At present, at hearing, if a claimant has a non-exertional impairment, a vocational expert is required in most circuits.

As to those closely approaching advanced age and older, the issue is usually transferability. Perhaps the ADA should be incorporated into decision making. If an IPE were developed, educational, psychological, psychiatric, vocational, personal, social and medical factors that affect the employment and rehabilitation needs would be individualized.

C."Double Dip"

Bills in both the House and Senate would have substantial gainful activity within a month after an individual is paid, or determined to be eligible for, unemployment compensation.[362]

A claimant for unemployment must swear under oath that (s)he is ready willing and able to work, and work search is required. A claimant for DI must swear that (s)he is unable to perform any gainful activities.[363] These concepts are conflicted.

D.MIRS

SSA has investigated whether the MIRS standard used in CDRs, which requires that SSA show medical improvement before benefits can be terminated, should be retained.[364] The IG determined that if SSA used the Initial Disability Standard, rather than MIRS during a

---

361 *Id.*

362 Social Security Disability Insurance and Unemployment Benefits Double Dip Elimination Act, S. 499, 114th Cong. (2015-2016); Social Security Disability Insurance and Unemployment Benefits Double Dip Elimination Act, H.R. 918, 114th Cong. (2015-2016).

363 *Id.*

364 20 C.F.R. 404.1594. *See* Statement of Inspector Gen. O'Carroll Jr., *supra* note 112. *See also The Medical Improvement Review Standard During Continuing Disability Reviews*, OFFICE OF THE INSPECTOR GEN. SOC. SEC. ADMIN. (May 2014), http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-13-23065.pdf. The investigation found numerous coding mistakes that also should be resolved. *Id.*

CDR, about $269 million less in benefits would be due until the next CDR due date to about 4,000 adult beneficiaries who would not be disabled.[365]

A major problem with this suggestion is that it has been tried unsuccessfully. At the onset of the Reagan Administration, about one million beneficiaries were subject to a three-year CDR review, and between March 1981 and early 1984, federal-funded state Disability Determination Services agencies terminated the benefits of almost 500,000 disabled Americans, including tens of thousands of beneficiaries with severe mental impairments. Twenty-nine states refused to follow SSA's instructions for termination of benefits; federal courts were clogged with appeals; 200 federal courts across the country threatened the government with contempt of court citations for refusing to pay benefits when ordered.

Litigation challenging the CDR policy was instituted across the county, including more than 12,000 individual appeals of terminations and forty class actions. Many courts ordered SSA to apply a medical improvement standard before terminating disability benefits and one-half of the states refused to follow SSA's new procedures and criteria. By April 1984, the Administration finally announced a nationwide moratorium on CDRs. Ultimately Congress enacted the Disability Benefits Reform Act of 1984 (DBRA) to clarify eligibility and to limit terminations to cases where the agency could show that the beneficiary's medical condition had improved.[366]

E.Increase of the Currently Insured Requirement

A recency-of-work test is satisfied if the worker has earned at least twenty credits during a 40-quarter period that ends with the quarter in which the waiting period begins.[367]

A special test for younger workers provides an alternative. A worker who is under a disability which began before the quarter of attainment of age thirty-one satisfies the "current" requirement if

---

365 *Id.*

366 Katharine P. Collins and Anne Erfle, *Social Security Disability Benefits Reform Act of 1984: Legislative History and Summary of Provisions*, 48 SOC. SEC. BULLETIN 4 (1985), http://www.ssa.gov/policy/docs/ssb/v48n4/v48n4p5.pdf.

367 Tim Zayatz, *Social Security Disability Insurance Program Worker Experience, Actuarial Study No. 118*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/NOTES/as118/DI-WrkerExper_Body.html#wp1237389.

credits were earned for at least one-half of the quarters during the period beginning with the quarter after the quarter the worker attained age twenty-one, and ending with the quarter in which the disability began.[368] If this period contains twelve or fewer quarters—that is, if the disability begins in the quarter the worker attains age twenty-four or earlier—then a minimum of six credits must be earned in the twelve-quarter period ending with the quarter in which the disability began.[369]

CBO recently estimated the impact of increasing the recency-of-work requirement on beneficiary enrollment.[370] The agency projected that requiring disability claimants to have worked four of the past six years (instead of five of the past ten) starting in 2013 would have reduced the number of SSDI beneficiaries by 4% in 2022, as well as decreased program outlays by $8.0 billion in that year.[371]

According to Mr. Morton, the stricter recency-of-work requirement would likely affect individuals with intermittent work histories, specifically workers with prolonged and sustained bouts of absence from covered employment due to unemployment or withdrawal from the labor force.[372] A recent study found that while men report leaving the labor force primarily because of disability, women typically report leaving the labor force to care for someone in their household.[373] Consequently, the more stringent recency-of-work requirement may disproportionately affect women who drop out of the labor force to act as caregivers.

I find that any gains to the DI Fund because of a failure to meet the currently insured requirement will most probably be lost to SSI

---

368 *Id.*

369 *Id.*

370 *Options For Reducing the Deficit: 2014-2013, Mandatory Spending, Function 650- Social Security*, CONG. BUDGET OFFICE (2013), https://www.cbo.gov/budget-options/2013/44755.

371 *Publ'n No. 4207*, *supra* note 5, at 18; Morton, *supra* note 9, at 23.

372 Morton, *supra* note 9.

373 Julie L. Hotchkiss, M. Melinda Pitts & Fernando Rios-Avila, *A Closer Look at Nonparticipants During and After the Great Recession* 6 (Fed. Reserve Bank, Working Paper 2012-10, 2012), http://www.frbatlanta.org/pubs/wp/12_10.cfm.

and the general funds. Moreover, public policy should not discriminate against caregivers.[374]

V.RECOMMENDATION FIVE: REDUCE FRAUD

A.In General

Although accusations of widespread fraud are grossly exaggerated, Congress should eliminate the taint. Recently, the SSA IG reported that over a ten-year period, SSA overpaid recipients of about seventeen billion dollars.[375] The IG bases this estimate on a sampling of both DI and SSI claims, so the amount is substantially less for the DI program.[376] SSA recovered about $8.1 billion of the $16.8 billion in overpayments it assessed and prevented about $8 billion in overpayments.[377] Considering in the amounts paid into the system, the differences are not as large as depicted in the headlines.

Some of the reasons the IG found are:

a.Work activity or income: Cessation if the work activity constitutes SGA.[378]

b.Payment issued after death: An individual's benefits stop with death.[379]

c. Imprisonment or fugitive status: The Social Security Act prohibits the payment of DI to recipients convicted and incarcerated

---

374 *See* Sarah E. Hoffman, *Falling Through the Cracks: How the 20/40 Rule Discriminates Against Women Seeking Social Security Disability Insurance Benefits and What Congress Can Do About It*, 113 PENN ST. L. REV. 621, (2009).

375 *Overpayments in the Social Security Administration's Disability Program – a Ten Year Study*, OFFICE OF THE INSPECTOR GEN. SOC. SEC. ADMIN. (Jun. 2015)[hereinafter *Overpayments*], http://oig.ssa.gov/audits-and-investigations/audit-reports/A-01-14-24114; *See also Report: Social Security Overpaid Disability Benefits by $17B*, NEW YORK TIMES (Jun. 5, 2015), http://www.nytimes.com/aponline/2015/06/05/us/politics/ap-us-social-security-overpayments.html.

376 *Id.*

377 *Id.*

378 *Id.*

379 *Id.*

for a period of more than 30 days in a jail, prison, or other penal or correctional facility; (2) DI benefits to beneficiaries having certain unsatisfied warrants.[380]

d. Medical improvement: Through CDR: if the individual is no longer disabled, he/she may appeal and continue to receive benefits during the appeal process. If the appeal affirms the disability ceased, SSA assesses an overpayment for the amount of benefits paid during the appeal process.[381]

e. Duplicate benefit payment: Payment issued more than once for the same month. For example, an individual receiving a replacement check after reporting not receiving the original check and then cashing both checks.[382]

f. Incorrect payment computations: The payment amount was based on incorrect information.[383]

g. Improperly entitled to benefits: Under certain circumstances, SSA may reopen a prior allowance decision and change it to a denial, such as when a disability beneficiary returns to work and performs SGA within a few months from the date the disability began.[384]

h. Not cooperative: SSA may suspend an individual's payment for failure to provide the Agency pertinent information.[385]

i. Married: Entitlement to certain DI benefits (i.e. widow or widower) depend on the beneficiary being unmarried.[386]

---

380 *Id.* Social Security Act, §§ 202(x)(1)(A)(i), (iv)-(v) & (B)(iii)-(iv); Social Security Act1611(e)(1)(A) & 1611(e)(4); 42 U.S.C. §§ 402(x)(1)(A)(i), (iv)-(v) & (B)(iii)-(iv); 1382(e)(1)(A) & 1382(e)(4). *See Social Security Inspector General Report: Implementation of Phase I of the Martinez Settlement Agreement*, OFFICE OF THE INSPECTOR GEN. SOC. SEC. ADMIN. (Feb. 2011), http://oig.ssa.gov/newsroom/news-releases/social-security-inspector-general-report-implementation-phase-i-martinez.

381 *Overpayments*, *supra* note 379.

382 *Id.*

383 *Id.*

384 *Id.*

385 *Id.*

j. Receiving Multiple Benefits: Dual entitlement exists when a beneficiary is entitled to more than one benefit at the same time. For example, a beneficiary may be entitled to retirement benefits on his or her own earnings record and to spouse's benefits on another person's earnings record. Although a beneficiary may be simultaneously entitled to more than one benefit, the total benefit may not be greater than the highest single benefit amount to which he or she is entitled. Generally, SSA calculates the amounts due and combines the benefits into one monthly payment.[387]

k. Needed a representative payee: SSA assigns a representative payee to an individual when the Agency determines the individual is incapable of handling his/her own benefits. SSA may suspend payment while establishing or changing a representative payee, and an overpayment may occur to beneficiaries for the same month.[388]

Meanwhile, whereas the SSA database includes approximately 6.5 million individuals who would be age 112 or older, other sources list only 35 people aged 112 or older in the world as of October. 2013.[389] Of course, none of these discrepancies has anything to do with disability fraud, but there is some question whether this is fraud or error and if it is error it is by the same organization administering DI.

The IG has performed a valuable service,[390] but I find that the emphasis does not account for many DI recipients who work at SGA

---

386 *Id.*

387 *Overpayments, supra* note 379.

388 *Id.*

389 Sean Williams, *Social Security Fraud: The Mind-Numbing Reason the SSA Is Being Cheated Out of Billions*, THE MOTLEY FOOL (Jun.13, 2015), http://www.fool.com/retirement/general/2015/06/13/social-security-fraud-the-mind-numbing-reason-the.aspx. ("Per the OIG, some 1.4 million beneficiaries had death notes input into their records, but an official date of death had not been recorded, thus signaling, … that these individuals were still alive. Another 410,000 individuals had their payments terminated and death dates added, but the official death date information was not passed on . . . .").

390 Most of these examples are probably not fraud in the criminal sense, but are errors. Most of the "mistakes" would probably be covered in private industry by "error and omission" insurance coverage.

but fail to report. An underground economy is comprised of people who do not report income to SSA let alone to IRS. Some sources allege that the "shadow economy" in this country yields as much as 10% of Gross Domestic Product (GDP).[391] The same sources allege that the shadow economy doubled from 4 % of GDP in 1970 to 9 % in 2000.[392]

Other sources think the "tax gap" is much higher.[393] Forensic economists estimated that 18%- 19 % of income nationwide is not reported to the IRS.[394] "The estimated $2 trillion of unreported income gives rise to an annual tax gap of $450-500 billion."[395]

A "new" underground economy may entail:

> …a lot of people doing honest work, such as freelancers and consultants who used to be full-time professionals, computer-repair people laid off from corporate IT departments, home remodelers benefiting from a revived housing sector, people running eBay business, and retirees earning a few extra bucks by running errands for busy parents.[396]

---

391 Friedrich Schneider & Dominik Enste, FUND, http://www.imf.org/external/pubs/ft/issues/issues30/;\ *See also* Joshua Zumbrun, *More Americans Work in the Underground Economy*, BlOOMBERG NEWS, (Mar. 28, 2013, http://www.bloomberg.com/bw/articles/2013-03-28/more-americans-work-in-the-underground-economy).

392 *Id.*

393 Richard Cebula and Edgar Feige, *America's unreported economy: measuring the size, growth and determinants of income tax evasion in the U.S.,* 57 CRIME, LAW AND SOCIAL CHANGE 265-85 (2012), http://www.ssc.wisc.edu/econ/archive/wp2011-1.pdf.

394 *Id.*

395 *Id.*

396 Rick Newman, *The New Underground Economy: More people than ever may be working off-the-books--and spending freely*, U.S. NEWS AND WORLD REPORT (Mar. 18, 2013), http://www.usnews.com/news/blogs/rick-newman/2013/03/18/the-new-underground-economy.According to Newman, economists estimate the size of the underground economy at somewhere between 8%-14% of total GDP, "which could amount to as much as $2 trillion worth of economic activity. Authorities in California say off-the-books transactions cost the state $6.5 billion in lost tax revenue every year." "If the trend is similar throughout the U.S. economy, that would amount to roughly $50 billion in lost tax revenue for all 50 states combined, plus an even bigger chunk that Washington fails to collect."

If the estimates are correct and FICA taxes were received, and if all recipients currently working off the books were accountable, there would be no threat to default of the DI Trust Fund.

Congress has noted that SSA bars adjudicators from researching whether some claimants have opened themselves for investigation by postings in social media.[397] Most of the complaints come from administrative law judges, and some have been discussed at Congressional hearings.[398]

I take the position that the agency has a *duty* to perform an investigation, "scouting,"[399] where there is good cause to do so. When the DO collects medical and vocational information to create a claim file, it should ask questions about daily activities and social media is prevalent. If there is probable cause to investigate further, referrals should be made to the IG. Perhaps the DDS should also perform this function. However, I also take the position that this function should be performed by investigators and not administrative law judges. The Administrative Procedure Act (APA) states that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision."[400]

I also recommend that Congress expand *qui tam* to permit suits to collect unpaid FICA taxes (as well as income taxes) and benefit the SSA Trust Funds against employers who knowingly pay workers "under the table." Many unsuspecting workers discover when they become injured that they have no DI benefits.

These suggestions will not immediately restore the DI Trust Fund to solvency, but may mitigate significant losses.

---

397 *See, e. g.*, Congress, Serial No. 113-72 (Nov. 19, 2013) http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg86479/html/CHRG-113hhrg86479.htm.

398 *Id.*

399 SSA DO employees investigate. At one time SSA early retirement placed restrictions on working and employees would report after an investigation. The underlying law has changed and scouting is no longer performed.

400 5 U.S.C. § 554(d). Administrative Procedure Act of 1946, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 500 et. seq.). 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 6362, 7562.

B.Bar LTD Carriers from Laying Off Exposure to the DI Trust Fund

As I have stated, some LTD carriers attempt to offset their exposure by requiring insureds to apply for DI. In 2009 the *New York Times* reported that disability insurers were compelling claimants to apply for Social Security even when they did not qualify, and were cutting off insurance checks if the claimants failed to do so.[401] In response to a "*qui tam*" (whistleblower) lawsuit, Unum, one of the largest disability insurers, and Cigna stated in court filings that insurers may send ineligible persons to SSA to file claims, noting the agency "has an open-door policy.[402] All comers are welcome."[403] This bogs the system, and according to the *qui tam* complaints, leads to claimants wrongfully losing their LTD.[404]

The reason claimants are jeopardized is because the LTD standard in the *qui tam* cases requires the insured to prove an inability to work in one's "own occupation," not an SSA/DI inability to perform SGA, which is a far more restrictive test.[405] Most DI claimants who receive LTD are in better financial status than most other beneficiaries.[406] Processing these claims affects claims of others, mostly without income while waiting for "months and years, who in many cases are much worse off." [407]After an investigation, Senator Charles Grassley (R. IA.) wrote a letter to SSA recommending the following:

---

401 Collette Mattzie, *The Disability Mess,* THE NEW YORK TIMES (May 2009), http://roomfordebate.blogs.nytimes.com/2009/05/07/the-disability-mess/comment-page-4/?_r=0.

402 Although a jury returned a verdict against the LTD companies, it was remanded on appeal by the 1st Circuit Court of Appeals. United States ex rel. Loughren v. Unum Group, 613 F.3d 300 (1st Cir. 2010).

403 Mattzie, *supra* note 405.

404 *See also* Mary Williams Walsh, *Insurers Faulted as Overloading Social Security*, THE NEW YORK TIMES, (April 1, 2008), http://www.nytimes.com/2008/04/01/business/01disabled.html.

405 Press Release, Grassley works to strengthen Social Security disability program: Senator seeks agency response to backlog caused by insurance community (May 27, 2009), http://www.grassley.senate.gov/news/news-releases/grassley-works-strengthen-social-security-disability-program.

406 *Id.*

407 Quoted from Ken Nabali, former SSA Associate Commissioner, *Id*.

(1)Require that individuals applying for SSA benefits disclose whether or not they have private or other non-SSA disability coverage or benefits at the time they file their SSDI or Supplemental Security Income (SSI) application;[408]

(2)Require SSDI and SSI applicants and claimant representatives to attest to the accuracy and truthfulness of SSDI or SSI claim information; and[409]

(3)Implement information sharing arrangements with private insurers and other non-SSA disability programs to exchange information regarding the status or disposition of disability claims.[410]

He also asked the Social Security Administration and the Federal Trade Commission for status reports on their evaluation of private insurance practices in this area.[411] A diligent search yields no response.

Mr. Morton notes that as of March 2012, 39% of all workers in private industry had access to short-term disability insurance, whereas 33% had access to long-term LTD.[412] Short-term private disability insurance (PDI) typically lasts a fixed number of weeks or months, whereas LTD insurance can last anywhere from a year to FRA.[413] Compared with other forms of employer-care, PDI is relatively inexpensive.[414] In addition, employers can partially offset the cost of PDI by requiring employees to contribute to the plan.[415]

---

408 Letter from Charles E. Grassley, U.S. Senator for Iowa, to Hon. Michel Astrue, Commn'r Soc. Sec. Admin. (Mar. 24, 2008), http://www.grassley.senate.gov/news/news-releases/grassley-works-strengthen-social-security-disability-program.

409 *Id.*

410 *Id.*

411 *Id.*

412 Morton, *supra* note 9.

413 In March 2012, the median duration of benefit receipt on short-term PDI for all workers in private industry was *Employee Benefits Survey, Short-Term Disability Plans: Duration of Benefits*, U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, Table 25 (Mar. 2012), http://www.bls.gov/ncs/ebs/benefits/2012/ownership/private/table35a.htm.

414 In December 2012, employee health insurance cost employers in private industry $2.23 per-hour worked, whereas employee short-term disability insurance cost $0.05 and long-term disability insurance cost $0.04 per-hour worked. *See*

Although the future is uncertain, the current trend appears away from traditional employer-employee relationships to self-employment and use of independent contractors, and these plans do not include them.

The insurance industry has advocated that Congress should promote employer sponsored PDI "to reduce the growth in DI rolls."[416] Employer-sponsored PDI plans have the potential to reduce the incidence of DI benefit receipt, inasmuch as they provide employment support services soon after the onset of disability when the likelihood of recovery is highest. Proponents argue that by intervening with robust supported-work services early in the disability process, PDI and LTD may keep disabled workers attached to the labor force and therefore less likely to apply for DI.[417]

Mr. Morton reports that the promotion of employer-sponsored PDI could come about in either one of two ways: (1) encouragement through incentives or (2) a government mandate."[418] Under the former option, the federal government would offer employers financial incentives to provide PDI for their employees. For example, if the federal government adopted an experience rating system to the employer's portion of the DI and Medicare payroll tax, SSA could further lower the payroll tax rate of employers who purchase PDI and LTD and whose insurance agents coordinate with SSA officials (gatekeepers) to manage disability cases in a cost-effective manner.

Economic News Release, U.S. Dept. of Labor, Bureau of Labor Statistics, Table 5: Private Industry, by Major Occupational Group and Bargaining Status (Dec. 2012), http://www.bls.gov/news.release/ecec.t05.htm.

415 In March 2012, 19% of short-term PDI plans sponsored by employers in private industry required employee

contributions, whereas 8% of long-term PDI plans had such a requirement. *See Employee Benefits Survey: Nat'l Compensation Survey, Employee Benefits in the U.S.*, U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, Tables Organized by Benefit (Mar. 2012), http://www.bls.gov/ncs/ebs/benefits/ 2012/benefits.htm#life.

416 David H. Autor & Mark Duggan, *Supporting Work: A Proposal for Modernizing the U.S. Disability Insurance System*, THE CTR. FOR AMERICAN PROGRESS and THE HAMILTON PROJECT (2012), http://www.brookings.edu/research/papers/2010/12/disability-insurance-autor

417 *See* Coe et al., *supra* note 86. The authors found that state-mandated temporary disability insurance (TDI) has a small negative effect on overall SDI applications.

418 Morton, *supra* note 9.

[419]Alternatively, the federal government could award subsidies or tax credits to firms that provide PDI and LTD.[420]

Under the latter option, the federal government would require all employers to provide PDI for their employees. To enforce the mandate, employers who fail to provide PDI would likely face financial penalties for their non-compliance. In 2010, only New Jersey, New York, Hawaii, and Puerto Rico required employers to provide some form of short-term PDI—known as temporary disability insurance (TDI)—or contribute to a state-operated fund.[421] Employer-mandated PDI, however, has become an increasingly popular approach to finance disability insurance in many European countries.

Mr. Morton reports that researchers David H. Autor and Mark Duggan have proposed requiring all employers to provide medium-term PDI, through which workers with disabilities would receive rehabilitation services, workplace accommodation, and a partial wage replacement for two years.[422] Plans under this proposal would be purchased on the existing PDI market, and employers would be permitted to require employees to contribute up to 40% of the cost of their coverage.[423] Following the exhaustion of employer-sponsored PDI, SSA would transition beneficiaries who still lack the ability to engage in SGA onto SSDI.[424] Workers with extremely severe or terminal disabilities would be exempt from the two-year PDI requirement and would instead be immediately fast-tracked onto DI.[425]

---

419 Autor, *supra* note 420 at, 39 n.228 (c).

420 *Id.* at 42, n.249 (c).

421 *Id.* at n.250 ("TDI typically provides partial compensation due to non-occupational disability for approximately 26 to 52 weeks. For more information, *see Social Security Administration, No. 13-11758*, SOC. SEC. ADMIN. 46 (Jul. 1997), http://www.SSA.gov/policy/docs/progdesc/sspus/).

422 *Id.* at n.252 (citing Autor, *supra* note 420).

423 *Id.*, n.253 ("rated for firms with 50 or more full-time equivalent employees, whereas smaller firms would have their premiums determined based on differentiated rates by industry.")

424 Morton, *supra* note 9.

425Autor,*supra* note 420, at n.254 "protect employers from the so-called "double indemnity" of paying higher experienced-rated premiums for both UI and PDI, unemployed workers would be unable to claim both UI and PDI benefits simultaneously.")

These are interesting proposals, but as with many of the others, it will take years for Congressional action, regulation, and implementation, and therefore they are not an immediate resolution to DI Trust Fund default. Several LTD carries and their lobbyists have been arguing for privatization of the entire system, and/or contracting evaluation from DDS to private companies.[426]

In looking at whether state mandated LTD (or PDI) in New Jersey, New York, Hawaii, and Puerto Rico have reduced rates for applications and awards in those states, I find no valid studies to substantiate the claim that private insurance generates savings. As a matter of fact, the SSA OIG has identified three of the four as states where systematic fraud on the DI system has occurred.[427]

---

426 *Id* at 16.

427 *See, e.g.*, Damian Paletta, *Disability-Fraud Probe Leads to Arrests in Puerto Rico: Social Security Benefits May Have Been Improperly Obtained*, THE WALL STREET JOURNAL (Aug.21, 2013), http://www.wsj.com/articles/SB10001424127887323665504579026583651700434 ;

William K. Rashbaum & Jamed C. McKinley Jr., *Charges for 106 in Huge Fraud Over Disability*, THE NEW YORK TIMES (Aug. 1, 2014), http://www.nytimes.com/2014/01/08/nyregion/retired-new-york-officers-and-firefighters-charged-in-social-security-scheme.html?hpw&rref=nyregion&_r=1.

> Scores of former police officers and firefighters were arrested on Tuesday and brought in handcuffs to State Supreme Court in Manhattan, where they were arraigned before Acting Justice Daniel Fitzgerald on charges of grand larceny. They are accused of collecting between $30,000 and $50,000 a year.
>
> Many of the 72 city police officers and eight firefighters named in the 205-count indictment had blamed the Sept. 11 attacks for what they described as mental problems: post-traumatic stress disorder, anxiety and severe depression.

See also Shayna Jacobs, *More than 50 people plead guilty in massive Social Security disability scam*, NEW YORK DAILY NEWS (Jun. 4, 2014), http://www.nydailynews.com/new-york/nyc-crime/50-admit-participating-disability-scam-article-1.1820605 (Apparently, the recipients also had taken disability pensions, and had received awards from the September 11 Victim Compensation Fund (VCF)); Message from Special Master Sheila Birnbaum

(Apr. 8, 2015), http://www.vcf.gov/blogprogstatsapr2015.html ("VCF has made loss determinations of more than $1 billion. As of March 31, 2015, the VCF has approved 10,549 eligibility claims and rendered 4,415 loss decisions, totaling $1,058,398,144."); Wendy Floering, *The September 11th Victim Compensation Fund of 2001: A Better Alternative to Litigation?* 22 J. NAT'L ASS'N ADMIN. L.JUDGES (2002) http://digitalcommons.pepperdine.edu/naalj/vol22/iss1/6. Please note that my office, DOL OALJ, heard some of these cases.

Moreover, if the allegations regarding LTD carriers in the *qui tam* actions are correct, the DI trust Fund has been losing far more than the fraud from Puerto Rico and the post 9/11 DI fraud. The LTD losses as alleged may be continually perpetrated unless action is taken to mitigate them.

I recommend that to protect claimants from potential fraud, to avoid the appearance of impropriety, and to promote integrity, DI benefits should not be offset against LTD policies. Similarly, the Federal Employee Retirement System (FERS) requires all claimants to apply for SSDI benefits. This requirement can lead to abuse and should be eliminated. [428]

C.Privacy Act

Our government is supposed to be open. SSA, however, has closed DI hearings and exhibit files are not public because the agency is overly concerned with the Privacy Act of 1974.[429] SSA does not consider its appeals process to be "legal" proceedings.[430] Most of the files contain medical records. Many claimants have companion claims, i.e. workers' compensation, personal injury, etc., where the same records are available to the public.[431] On appeal, at the court level these claims are open. Even when the claimant waives privacy, it does not permit the public, and especially the press, to view the hearings.[432]

A review of the Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-579): Source Book on Privacy, Ninety-Fourth Congress, 2nd Session (September, 1976) shows that although Social Security Numbers were considered when the Act was drafted, there was no discussion about applying the Privacy Act to administrative hearings and administrative records.[433] The Privacy Act applies only

---

428 For the record, I am a FERS employee who would because of my age, get no disability benefit if and when I am disabled.

429 5 U.S.C. 552(a).

430 *See Legislative History of the Privacy Act of 1974, S. 3418* (*Pub. L. No. 93-579): Source Book on Privacy*, THE LIBRARY OF CONG., MILITARY LEGAL RESOURCES (Sept. 1976), http://www.loc.gov/rr/frd/Military_Law/LH_privacy_act-1974.html.

431 *Id.*

432 *Id.*

433 *Id.*

to "systems of records," [434] and most adjudicatory and rulemaking documents are outside the scope of that term.

SSA is more protective of privacy than any other agency, but from outside, it appears that it is the agency, rather than the parties that craves privacy.[435] Decisions by administrative law judges and the SSA Appeals Council are rarely published; when so, mostly by claimant representatives' organization.[436]

Because SSA hearings are closed, an aura of mystery surrounds the process. Claimants before an agency have a right to know whether similar issues have been adjudicated to determine how to proceed. They also have a right to know how a judge has handled similar cases and for that matter attempt to see whether there is a record of decisions that have been remanded or overturned.

Other agencies have no problem with the Privacy Act.[437] At DOL, in the adjudication process, the burden as to privacy is with the parties.[438]

Numerous Congressional inquiries regarding "fraud" investigate the process.[439] "Sunlight" may be the best disinfectant. SSA should

---

434 *See* 5 U.S.C. § 552a(b) (2012) (limiting non-disclosure duty to record contained in system of records).

435 *See e.g.*, Thomas C. Mans, *Selecting the 'Hidden Judiciary': How the Merit Process Works in Choosing Administrative Law Judges* (Part 1), 63 JUDICATURE 60 (1979) (coining the term "hidden judiciary"); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477-1530 (2009), http://scholarship.law.duke.edu/dlj/vol58/iss7/8.

436 Anecdotally, I am told that even when the claimant may be represented and clearly waives the Privacy Act, news media and other members of the public are barred from observing hearings by SSA policy.

437 An exception is Medicare appeals.

438 From DOL OALJ website: It is the responsibility of counsel and the parties to take appropriate action to seek legal protection of information from public disclosure to the extent that such protection is available under applicable rules. *See, e.g.*, 29 C.F.R. § 18.15 (protective orders); § 18.43(a) (closing of hearing to public); § 18.46 (in camera and protective orders); § 18.56 (restricted access order); 29 C.F.R. § 70.26 (designation of confidential commercial information under FOIA). *See also* FOIA Update, Vol. XIII, No. 3.

439Steve Kroft, *Disability, USA*, CBS SIXTY MINUTES (Oct. 10, 2013), http://www.cbsnews.com/news/disability-usa/ (citing to Senator Tom Coburn: 25% of recipients are gaming the system). Although the accusations should include DDS, where 75% of the awards are rendered. Citing to the union for administrative law judges: lawyers are gaming the system. Congress concentrates on administrative law judges. *See Lawmakers urge broad snooping powers for Social*

publish all administrative law judge and appeals council decisions. These can be "sanitized" to conform to the Privacy Act.[440] Names and SSNs can be redacted. Under FCRP Rule 5.2 (a), unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only: (1) the last four digits of the social-security number and taxpayer-identification number; (2) the year of the individual's birth; (3) the minor's initials; and (4) the last four digits of the financial-account number.[441]

Decisions should be available to the public and especially the parties as a matter of right. Almost all other "final" decisions are published. A party appearing before an agency has a right to be able to determine whether there is a track record of bias or whether there is a track record of reversal at a higher level of review regarding disputed issues.[442] SSA applies the Privacy Act to its own employees.

Security Administration, THE WASHINGTON TIMES (April 8, 2014); Representative Darrell Issa, Reps. James Lankford (R., Okla.), and Jim Jordan (R., Ohio) letter to then Acting Commissioner Colvin, July 1, 2014: "We are concerned that your testimony indicated a lack of appreciation of the substantial problem created when ALJs essentially approve every claimant before them, regardless of whether they are disabled or unable to work, and that you lack the commitment to fundamental program reform." Historically, only a few administrative law judges have been charged criminally, but none who were topics of recent Congressional hearings. Elizabeth Price was sentenced to eight months in prison for lying to obtain SSA benefits for her daughter. *Judge Gets Prison Term For Social Security Fraud*, SFGATE, (Mar. 10, 2000), http://www.sfgate.com/news/article/SAN-FRANCISCO-Judge-Gets-Prison-Term-For-Social-2797034.php. Thomas Ploss was sentenced to a year in prison for disclosing confidential records to an Evanston lawyer who used the information to solicit clients. *Judge sentenced for role in Social Security scam*, CHICAGO TRIBUNE (Aug. 12, 2003), http://articles.chicagotribune.com/2003-08-12/news/0308120113_1_administrative-law-judge-district-court-sentenced.

440 *Recordings of Service Observations*, SOC. SEC. ADMIN., https://www.ssa.gov/foia/bluebook/60-0362.htm (last visited Apr. 7, 2016).

441 Fed. R. Civ. P. 5.2.

442 ODAR's Division of Quality Service (DQS) reviews these complaints with the assistance of ODAR's regional office (RO) staff, as appropriate. § 404.940 and § 416.1440, Disqualification of the administrative law judge, sets forth:

> An administrative law judge shall not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision. If you object to the

Administrative law judge and Appeals Council opinions should be public. Other agencies do not have a system of acquiescence so even when our decisions do not have precedence, or be subject to issue preclusion, they may be persuasive as to argument.

Again, this proposal will not prevent default of the DI Trust Fund, and is not as crucial as the CDR and VR proposals as to viability, but as the agency becomes more open, it becomes more accountable. If this proposal is combined with expansion of *qui tam*, it may cause more scrutiny and provide a greater reason for the public and especially the legal community to support the Trust Funds.

VI.Recommendation Six: Consider Adversarial Hearings

At the administrative law judge level, hearings are procedurally "non-adversarial." Almost all other "formal" adjudications in this country are "adversarial" stemming from common law procedures. SSA has been using this system from the first hearings in 1940 and continued to use them even after passage of the APA in 1946. The Social Security Act is a humanitarian statute and is weighted in favor of claimants.[443]

The DI cases that judges hear involve substantial amounts of money. I estimate that the exposure to the DI Trust Fund in payouts

---

> administrative law judge who will conduct the hearing, you must notify the administrative law judge at your earliest opportunity. The administrative law judge shall consider your objections and shall decide whether to proceed with the hearing or withdraw. If he or she withdraws, the Associate Commissioner for Hearings and Appeals, or his or her delegate, will appoint another administrative law judge to conduct the hearing. If the administrative law judge does not withdraw, you may, after the hearing, present your objections to the Appeals Council as reasons why the hearing decision should be revised or a new hearing held before another administrative law judge.

443 The Social Security Act is a remedial statute that must be liberally construed in favor of disability if a disability is proven. Social Security Ruling (SSR) 71-30 ("[S]ince the Act is remedial in nature, it should be given a liberal construction in order to effectuate its purpose."). *See also* Combs v. Gardner, 382 F.2d 949, 956 (6th Cir.1967); Polly v. Gardner, 364 F.2d 969 (6th Cir.1966); Morell E. Mullins, Sr. *Coming to Terms with Strict and Liberal Construction*, 64 ALB. L. REV.9 (2000). Professor Mullins is also author of the *Manual for Administrative Law Judges*, UNIV. OF ARK., http://ualr.edu/malj/malj.pdf.

of an average case involving a younger individual with a family is about $2 million.[444]

In 1982, SSA initiated a Social Security Administration Representation Project (SSARP).[445] However in *Salling v. Bowen*, 641 F. Supp. 1046 (W.D. Va. 1986),[446] SSARP was issued a permanent injunction because the program was improperly implemented, as SSA did not initiate the program through APA rulemaking. It also:

1.violated SSA regulations, in that it was advertised to be non-adversarial but was adversarial from the beginning;

2.did not achieve a stated goal of aiding in the development of cases but has, at best, maintained the present system or, at worst, tended to cause the ALJs to rely upon the SSARs to the detriment of claimants;

3.did not achieve its goal of improving quality of decisions or expediting cases;

4.did not achieve its goal of increasing productivity;

5.did not achieve its goal of uniformity;

6.was in violation of the intention of the Social Security Act.[447]

---

[444]I realize that this is a disputed figure, but value includes family derivative benefits. The value of Social Security Disability Insurance benefits for an average hypothetical worker with median earnings, who becomes disabled at age 30 includes $405,000 in Disability Insurance payments and $178,000 in OASI payments once the worker converts to retirement benefits. Some claimants with higher earnings will obtain double than the average. As stated, this does not include benefits for dependents and for survivors. *See The Insurance Value of Potential Survivor and Disability Benefits for an Illustrative Worker*, SOC. SEC. ADMIN. (Sept. 27, 2012).

Many experts estimate that the insurance value is greater than the actuarial value because Social Security benefits are adjusted for inflation and cost-of-living, unlike the benefits paid out by most private plans. *See* Martin R. Holmer, *The Value of Social Security Disability Insurance*, AARP (2001), http://assets.aarp.org/rgcenter/econ/2001_09_ssdi. *The Full Returns from Social Security* WASHINGTON: ECONOMIC POLICY INSTITUTE, http://72.32.39.237:8080/Plone/publications/pdfs/pb50/ Baker-FullReturns.pdf.

[445]*The Social Security Administration and Information Technology, Special Report*, SOC. SEC. ADMIN. (1986), https://www.ssa.gov/history/pdf/ota86.pdf

[446] *See* 42 U.S.C. § 434.

[447] *Id.*

I have been arguing that the program should be re-instituted, after agency rulemaking. [448],

Public perception is that the inquisitional model is unfair.[449] Meanwhile, SSA evokes "inconsistency in outcomes" as a rationalization to blame judges for failures in delivery and quality of disability determinations.[450] However, as stated, according to agency statistics 75% of awards are paid at lower levels.[451] Members of Congress have concentrated on attacking the hearing process, rather than concentrating on other factors leading to Trust Fund deficits.[452]

---

448 This subject has been discussed in Frank Bloch, Jeffrey Lubbers, & Paul Verkuil, Int*roducing Nonadversarial Government Representatives to Improve the Record of Decision in Social Security Disability Adjudications*, SOC. SEC. ADVISORY BD. (2003), http://www.ssab.gov/documents/Bloch-Lubbers-Verkuil.pdf., and more recently by Mr. Morton, see Morton, *supra* note 9.

449 *Id.*

450 *See* Harold Krent & Scott Morris, *Achieving Greater Consistency in Social Security Disability Adjudication: An Empirical Study and Suggested Reforms*, ACUS (2013), http://www.acus.gov/sites/default/files/documents/Achieving_Greater_Consistency_Final_Report_4-3-2013_clean.pdf. ACUS identified "outlier" administrative law judges, defined as two standard deviations above or below the mean, in the low range of allowance rates.

Please note that The Social Security Administration (SSA) has engaged the Office of the Chairman of ACUS to:

> •Review and analyze the Social Security Act, as well as SSA's implementing regulations, policies, and practices for adjudicating claims under titles II and XVI.
>
> •Evaluate federal court interpretations and applications of SSA's rules and regulations, noting patterns that show consistencies or inconsistencies among appellate and district courts.
>
> •Examine SSA's acquiescence rulings and how the agency applies decisions of federal appellate courts that are at variance with SSA's national policies.
>
> •Survey federal court practices and procedures for handling social security cases to identify varying approaches and differential impacts, if any.

SSA Federal Courts Analysis, ADMIN. CONFERENCE OF THE U.S,, https://www.acus.gov/research-projects/ssa-federal-courts-analysis (last visited Sept 17, 2015). Consultants are Professors Jonah Gelbach and David Marcus.

451 *Id.*

452 Although some of the allegations about some the judges who have been "paying down the backlog" may be true, they are statistical "outliers," and all judges are now suspects. For example, in hearings reminiscent of show trials of

The ALJ pretext has even been accepted in academia, where one noted law professor suggests that to resolve deficits in the disability trust fund, the appeals system and the administrative law judge position should be abolished.[453]

In "Thinking Outside The APA Box: A New Social Security Tribunal," Professor

---

1930s Soviet Union, judges have been (as I used to tell juries) inspected, dissected and rejected by several Congressional committees. SSA knew deficits would occur and that economics could help to restore the funds:

> Economic conditions influence the number and timing of disabled worker claims and awards under the DI program. This is true in spite of the fact that the DI program's definition of disability is based on a medical determination of the inability to engage in any substantial gainful activity without regard to the current state of the economy. Because disability claims have historically increased in response to periods of high unemployment, it is reasonable to expect that the percentage of claims that are allowed would drop under conditions of high unemployment. Evidence presented in this note supports that expectation.
>
> The inverse relationship between the allowance rate for disabled worker claims filed in a year and the unemployment rate in the second prior year is evident in Figure 1. The most recent recession which started in 2008 is no exception. The unemployment rate rose from 4.6 percent for 2007 to 5.8 percent for 2008, and allowance rates for claims filed in 2010 are lower than rates for claims filed in 2009. The more dramatic further increase in the unemployment rate to 9.3 percent for 2009 suggests a further drop in allowance rates for claims filed in 2011. Preliminary data for claims filed in 2011 suggest that allowance rates will be lower than in 2010 as expected.

Stephen C. Goss, Anthony W. Cheng, Michael L. Miller, & Sven H. Sinclair, *Disabled Worker Allowance Rates: Variation under Changing Economic Conditions*, *Actuarial Note*, SOC. SEC. ADMIN. 153 (2013).

[453] Richard J. Pierce, *What Should We Do About Social Security Disability Appeals?*, REGULATION, 41 (2011), http://www.cato.org/sites/cato.org/files/serials/files/regulation/2011/9/regv34n3-3.pdf. *But see Scapegoating Social Security Disability Claimants (and the Judges Who Evaluate Them*), AMERICAN CONSTITUTION SOCIETY (2012), https://www.acslaw.org/sites/default/files/Dubin__Rains_-_Scapegoating_Social_Security_Disability_Claimants.pdf.

Professor Pierce testified similarly before Congress.

Michael Asimow and Judge Jeffrey S. Wolfe creation of a separate tribunal to handle the adjudication of disability appeals.[454] The tribunal, headed by a Social Security Chief Judge (SSCJ) would be independent of SSA and able to appoint new non-APA "Social Security Judges" (SSJs). They state that a number of approaches deserve consideration, including:

(4) introducing government attorneys and adversarial hearings in a limited number of case categories;

"But one additional possibility is to consider whether SSA ALJs should become a special "breed" - especially since they make up approximately 85% of all ALJs."

Although they list (4) above, Asimow and Wolfe assume that the non-adversarial system would be perpetuated.[455]

As currently practiced, by the time a claim reaches the hearing level, claimants can address the basis of denial by DDS.[456] At DDS, speed is usually more important than accuracy. When SSA obtains medical records, they do not pay the treating source to write a narrative report, which is the gold standard to determine credibility of the treating physician. DDS examiners usually do not send the physicians appropriate follow-up questions. In some cases, the rules elevate the status of the treating physician who may render an opinion entitled to controlling weight.

---

454 *Should Congress Create a Special Category of SSA ALJs?* 38 ADMIN. & REG. LAW NEWS, ABA SECTION OF ADMIN. LAW & REG. PRACTICE http://www.americanbar.org/content/dam/aba/images/administrative_law/winter_2013.pdf.

In the same publication as Asimow and Wolfe, Professor Jeffrey Lubbers published *Should Congress Create a Special Category of SSA ALJs?* would also support tailoring a special selection process for SSA ALJs. This could be done in two ways—either by a mandate to OPM to provide for specialized hiring of SSA ALJs, or by legislatively designating them as "Social Security Judges" and allowing SSA to fashion its own hiring process that uses the OPM process as a model. *See id.* at 6, 15.

455 "In conclusion, [w]e think that the SSA adjudication program's size, backlog, and perhaps the character of its cases, requires some special treatment, and, given the informality and non-adversarial nature of the cases, there is ample reason to rethink the role and attributes of the adjudicators— at least going forward."

456 *Id.*

Further production of evidence is usually entirely one sided.[457] A claimant can develop tailored evidence to overcome objections at the lower level. Besides more recent test results and treatment notes, the claimant can provide narrative medical reports and answers to tailored interrogatories.[458] The lawyer is free to attack the credibility of the medical evidence and also the credibility of the individuals rendering a negative opinion.

If a VE is needed, effective cross-examination can nullify the vocational testimony. Claimants are free to call their own medical and vocational witnesses.

SSA does not develop rebuttal evidence.

By the time a case gets to hearing, a good lawyer can create an overwhelming record. Even in an imperfect record, after the fact, good claimant lawyers may be able to overcome any agency decision in the current posture. Under the law, even if claims are appealed and lost at every level, including the United States Supreme Court, the decision may very well be reopened through modification.[459] As people get older, it is expected that the human body will deteriorate. 20 CFR § 404.988 provides that a claim may be opened within a year of filing the initial claim for any reason, or within four years for good cause.[460] Good cause for reopening:

(a) We will find that there is good cause to reopen a determination or decision if -

(1) New and material evidence is furnished;[461]

---

457 I find that most private lawyers will not waste time and money on cases they know will be losers. This may be the principal reason that many claimants are pro se. I also recommend that pro se claimants should be sent to representatives. At one time, legal services filled this duty; more recently they cannot due to a lack of funding.

458 Some of the lawyers who used to appear before me, presented a "sworn statement" which is actually a one-sided deposition of the treating physician. The questioning would usually track the sequential evaluation. In most cases, if the claimant presented a combination of severe impairments, the physician was questioned whether or not a listed impairment was equaled.

459 20 C.F.R. § 404.989.

460 *Id.*

461 *Id.*

New evidence very well may contain supportive narrative reports or statements from physicians whose opinions were discounted in the case decision.

The percentage of claimants, who are represented, has skyrocketed at the same time that receipts have increased due to the 2008 recession.[462] SSA permits withholding of past due benefits to pay representatives fees if a standard form attorney's fee contract is filed.[463] At the same time that SSA became less concerned with accuracy and more concerned with backlogs, in 2004, the agency and Congress relaxed rules governing representation, making it easier for non-lawyer advocates to get paid.[464] Some large firms hired brigades of non-lawyers, and advertised nationally.[465] See Table 3 for "Top Reps" in 2010. All made in excess of $1.5 million in FY 2010.[466] In 2010, administrative law judges complained to Congress; they accused some firms of doctoring records and withholding unsupportive medical evidence as a matter of course.[467] After it was bought by a hedge fund, in December, 2014, the top ranked firm, with about 57,000 clients and approximately 900 employees in 13 states declared bankruptcy.[468]

---

462 *Compilation Of The Social Security Laws, Part B- Procedural and General Provisions*, SOC. SEC. ADMIN. https://www.ssa.gov/OP_Home/ssact/title16b/1631.htm.

463 *Id.*

464 Damian Paletta & Dionne Searcey, *Two Lawyers Strike Gold In U.S. Disability System*, WALL STREET JOURNAL **(**Dec. 11, 2011) http://www.wsj.com/articles/SB10001424052970203518404577096632862007046.

465 Oversight of Rising Social Security Disability Claims and The Role of Administrative Law Judges: Hearing Before the Subcomm. on Energy Policy, Health Care and Entitlements of the Comm. on Oversight and Gov't H.R., 113th Cong. 75-77 (2013) http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg82276/html/CHRG-113hhrg82276.htm (statement of Hon. J.E. Sullivan, A.L.J., Office of Hearings, U.S. Dep't of Transp.). *See also*, Paletta and Searcey, , *supra* note 469.

466 See Table 3 for "Top Reps" in 2010.

467 *Id.*

468 Jonathan LaMantia, *Binder & Binder files for bankruptcy: One of the nation's largest Social Security disability firms had to reduce institutional debt after payments from the federal government slowed*, CRAIN'S NEW YORK BUSINESS (Dec. 19, 2014), http://www.crainsnewyork.com/article/20141219/PROFESSIONAL_SERVICES/141219807/binder-binder-files-for-bankruptcy.

It is reasonable to expect that many of the representation abuses will abate if representatives are required to justify their fees.

I also think that good prosecutors may be able to guide settlements. As started earlier, SSA DI is an all or nothing proposition. But it may be feasible in some cases, to work out a VR plan through the principles in Recommendation Number Three that will satisfy the claimant. Administrative law judges should be given authority to approve such plans.[469]

Prosecutors may also be able to perform further discovery. As stated, at present SSA does not obtain rebuttal evidence. [470]Newer evidence may be needed. It may be that new evidence will substantiate the claimant's position and there may not be a need for a hearing. The parties may agree to further testing or another form of evaluation.

Further the parties can reduce the degree of difficulty in rendering a decision and reducing it to writing by presenting binding stipulations.[471] A summary decision rule would permit easy cases to be awarded as soon as the evidence is collected. Also, a judge should be able to require an Order to Show cause regarding whether there is evidence to substantiate a "severe" impairment. See Recommendation Four A regarding step 2 of the sequential evaluation.[472]

I do not think that conversion to an adversarial process will affect the DI Trust Fund immediately, but it will bring some stability to the system. The CBO in 2012 Policy Options stated that in the short term it would add certain costs for hiring and training but, might, over the long run result in lower spending for the program because fewer

---

469 *See also supra* Recommendation Three in text.

470 *Rebuttal Procedures and Presumed Maximum Value (PMW) Rule*, SOC. SEC. ADMIN., https://secure.ssa.gov/poms.nsf/lnx/0203910040 (last revised Aug. 18, 2015).

471 Under current practice the records often contain hundreds, if not thousands of pages of raw hospital and other treatment records that may/ may not been culled for duplicates and other procedural flaws. In an adversarial setting, the parties can be required to present medical and other evidence summaries, and the parties can be required to comment on the accuracy. I argue that most of the employee time spent currently on developing records is completely unnecessary. Administrative law judges should be given authority to rely on medical summaries and stipulated evidence.

472 *See supra* Recommendation Four in text.

people would be admitted.[473] "However, the effects that any of those modifications would have on the disability determination process are uncertain, and CBO did not estimate the budgetary impact."[474]

As I envision it, administrative law judges will be able to devote their time and energy on hearing and deciding cases more expeditiously.[475] I do not think the CBO took procedural reforms into effect. Both speed and accuracy will increase so if SSA remains devoted to judicial "production," this recommendation will yield it. If opened to public scrutiny, this recommendation will improve public confidence that the system is not rife with fraud and ripe for failure. At this time, because there is no basis for comparison, I recommend, as stated earlier, that Congress reinstate and improve on SSARP rather than immediately adopt the adversary process without testing it.[476] I think that Recommendations One and Two are as close to sure things as simple mathematics in this dimension can offer.[477] I think that Recommendation can completely change how claims are decided at Step 5 of the sequential evaluation.[478]

However, if an adversarial outcome yields one (1) less affirmed case per year per judge @ $2,000,000 x 1400 judges = $280,000,000 in future savings.[479] I argue that the costs for a demonstration project will yield far greater savings than expenditures. This can be another boon to future DI Trust Fund prospects.

Anticipating objections that imposition of the Equal Access to Justice Act (EAJA), when successful claimants are entitled to fees for prosecution of the claim in an adversarial system, will require greater

---

473 Similar to Professor Lubbers, they suggest modifying the selection criteria for administrative law judges, increasing the length of their training, and improving the consistency of training among localities. Another example of a possible change in the program's administrative procedures involves altering the hearing process. Professor Lubbers would add a new classification of administrative judges rather than administrative law judges.

474 *Testimony: The Social Security Disability Insurance Program*, CONG. BUDGET OFFICE (2013), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/43995_DI-testimony_one-column.pdf.

475 I suspect that far fewer hearings will need to be held. Although prosecutors need to be hired, fewer administrative law judges will eventually be needed.

payouts, any exposure for EAJA fees will pale compared to the projected savings.[480] Under EAJA, the statutory cap is $125 per hour.[481] Moreover, any recovery would be offset by the amount awarded in back benefits under an approved fee agreement, which are, on average, about 20% of recovery.[482]

VII. CONCLUSION

Although recipients and applicants for DI may be relieved by passage of the savings bill, however that does not mean that the Fund will be safe. For a 2-year period (FY 2016 and FY 2017), the legislation increases discretionary spending by $80 billion, split evenly between defense and nondefense programs, above the Budget Control Act (BCA) (P.L. 112‑25) sequester-level spending caps. Sequester relief of $50 billion will be applied to FY 2016 and $30 billion to FY 2017.[483] What will happen after that is speculative. The vote was not unanimous. The House voted 266 to 167. The Senate vote was 64 to 35. [484] Many "nay" members of Congress wanted default.

There are few investments that can yield $9 for every $1 spent. VR analysis at time of DI application holds this promise. See Recommendations Two and Three. Congress has, on the taxpayers' behalf, rejected the investment. Instead, in the name of austerity, some members intend to cut current investments. Utilizing some of the recommendations, especially Recommendation Three, could possibly yield over $100 for each dollar spent. Recommendations One to Three could actually serve to stimulate the economy.

If the DI Trust Fund defaults, current and prospective recipients would receive only about 80% of their current income.[485] As I stated

---

480 I-1-2-91, Equal Access to Justice Act, Social Security, https://www.ssa.gov/OP_Home/hallex/I-01/I-1-2-91.html.

481 Meanwhile, I hear cases involving some lawyers in fee shifting cases who can justify a fee based on more than $400 per hour. A couple of lawyers who have appeared before me, bill their defense clients in excess of $1000 per hour. I don't think that these lawyers will take an EAJA case.

482 28 U.S.C.A. § 2412 d(2)(A) (2015).

483 Congress Passes H.R. 1314, the Bipartisan Budget Act of 2015, *supra* note 1.

484 *Id*.

485 Ehrenfreund, *supra* note 6. *See also* Statement of Inspector Gen. O'Carroll Jr., *supra* note 112.

previously, most Americans, even those who pay FICA taxes do not understand the difference between DI and SSI. They are often depicted in Congress and by the media as unworthy.[486] There is a tendency in some quarters to label them as "takers."[487] Actually, those DI recipients who worked and paid are currently and fully insured.[488] Their benefits are based on an earnings record and on meeting strict conditions of a social insurance policy. Although most of them justifiably relied on promises that the Trust fund would be protected, DI recipients will suffer most if a default occurs.

When SSI was created in 1973 by the Nixon Administration, a vocal minority expressed displeasure with "Federalism," and wanted

---

486 *See* Jonathan P. Baird, *My Turn: The art of hating the poor*, CONCORD MONITOR (Jun. 2, 2015), http://www.concordmonitor.com/home/17046621-95/my-turn-the-art-of-hating-the-poor. "Being hostile to poor people is a long American tradition. Historically, the American people have fluctuated between a desire to help the deserving needy and an alternating desire to castigate and punish the undeserving poor. The tension between these conflicting desires lies behind public policy disputes about poverty and what to do about it." Baird is an administrative law judge, assigned to SSA. "The view is not one that sees poverty as a result of misfortune or social class. It is about bad persons. Poverty is seen as a willful result of personal deficiencies, laziness and vice."

On the Investment Watch blog, this comment is typical:

> Darkwing: "Most of the people on SS disability, never put a dime in the fund. I know dozens of people over the years, that are getting disibility [sic] pay check and never worked in their lives. Total scum."

Social Security Disability Payments to be Cut?, INVESTMENT WATCH (2015), http://investmentwatchblog.com/social-security-disability-payments-to-be-cut/

487 See John Attarian, *Essays In Political Economy The Roots of The Social Security Myth*, LUDWIG VON MISES INSTITUTE 1, 53 (2001), https://mises.org/sites/default/files/Roots%20of%20the%20Social%20Security%20Myth_2.pdf. –"Social Security has had a very corrosive and degrading effect on our national character. Instead of fostering fortitude and self-reliance, it has encouraged whiny dependence. It has made Americans first servile and then petulant in their relations with their government: tamely submitting to crushing tax burdens in their productive years under the deliberately-cultivated delusion that they were buying something for themselves, and in their retirement years, railing at any attempt, however innocuous, to trim benefits. Its zero-sum finance, whereby the beneficiary's gain is inescapably the taxpayer's loss, has made the old callous toward the program's burdens on the young, and the young resentful of the old. It is telling that the sour epithet 'greedy geezer' was unknown in America until the elderly mobilized in the 1970s and 1980s to protect Social Security." *Id.* at 53.

488 *Id.*

to retain independent state disability systems.[489] In compromise, funds for the development of claims mostly are spent at the DDS, state agency level. In the main, most SSI claimants benefitted from federalizing the state claims. I do not address SSI viability, longstanding arguments that the DDS system should be nationalized, or whether SSI adjudication should be returned to the states.

More recently, antagonism over federalization has risen and is the basis for much of the exaggerations and distortions about SSA.[490] Many pundits had predicted that the Trust Funds would have dried up by now.[491] Some Administrations, like proverbial foxes in charge, added to the folklore. Inaction between 2001 – 2009, combined with a "pay down the backlog" attitude, and a swelling of the rolls, is sometimes confabulated by agency incompetence and outright fraud. To a reasonable degree of certainty, "indolence" regarding the impending DI Trust Fund default appears to have been planned as part of the privatization effort. Likewise, the Budget Control Act of 2011 (BCA), especially cutting CDR funding, was penny wise and pound foolish and accelerated entropy.[492]

From the onset of the Fund, generations of Americans were told that there would be nothing left for them when they needed it. Many baby boomers who paid their FICA and are now vested had believed

---

489 *Id.*

490 Some argue that FICA is not insurance but coercive redistribution of wealth. See Attarian *supra* note 492, "Abolition of this tax is essential for exploding the false consciousness. [Under Attarian's plan] [t]hose born after 1945 would lose their Social Security benefits and would have to recognize the OASDI taxes they have already paid for what they are—redistributive transfers. On the other hand, they would be free to make their own arrangements for old age with the money they now pay in Social Security taxes. A less severe option would be to permit people after 1945 to make a free choice between receiving their benefits or receiving tax lifetime exemptions equal to or greater than accumulated benefits." Pp. 52-53. *See also* Greenspan, *supra* note 6. Ironically, Greenspan, a philosophical opponent to the concept, was Chair of the National Commission on Social Security Reform, which "fixed" the trust funds in 1983. *Greenspan Commission: Report of the Nat'l Commission on Social Security Reform*,

SOC. SEC. ADMIN. (1983), http://www.ssa.gov/history/reports/gspan.html.

491 *Id.*

492 Kathy Ruffing, *Failure to Fund Disability Reviews Is Penny Wise and Pound Foolish*, CTR. ON BUDGET & POLICY PRIORITIES (Mar. 11, 2013), http://www.cbpp.org/blog/failure-to-fund-disability-reviews-is-penny-wise-and-pound-foolish.

these tales of woe. They never expected to be entitled to anything. They voted for candidates who also believed in doom. But they now must be pleasantly surprised that their FICA payments have turned out to have been a sound investment, and they can now receive DI (or retirement) benefits.

However, due to exigent circumstances, pain may well be imminent. The vast majority of DI recipients are innocent. Congress needs to protect their investments.

Millions of recipients may fall from DI to SSDC, partly within the SSI category, due to declining income and resources. This could put further pressure on the general funds of the United States. In some states DI receipts constitute a large part of the local economy. DI default will add pressure to have local entities pick up the tab. Because there will be less money in circulation, unemployment will occur. It is also reasonable to expect that the current adjudication system will need to be revamped.

Table 4.A2 Disability Insurance, 1957–2013 (in millions of dollars)

	Receipts [a]					Expenditures				Assets	
Year	Total	Net payroll tax contributions [b]	Income from taxation of benefits	Transfers from the general fund of the Treasury [c]	Net interest [d]	Total	Benefit payments [e]	Administrative expenses	Transfers to Railroad Retirement program	Net increase during year	Amount at end of year
1957	709	702	. . .	. . .	7	59	57	3	. . .	649	649
1958	991	966	. . .	. . .	25	261	249	12	. . .	729	1,379
1959	931	891	. . .	. . .	40	485	457	50	-22	447	1,825
1960	1,063	1,010	. . .	. . .	53	600	568	36	-5	464	2,289
1961	1,104	1,038	. . .	. . .	66	956	887	64	5	148	2,437
1962	1,114	1,046	. . .	. . .	68	1,183	1,105	66	11	-69	2,368
1963	1,165	1,099	. . .	. . .	66	1,297	1,210	68	20	-133	2,235
1964	1,218	1,154	. . .	. . .	64	1,407	1,309	79	19	-188	2,047
1965	1,247	1,188	. . .	. . .	59	1,687	1,573	90	24	-440	1,606
1966	2,079	2,006	. . .	16	58	1,947	1,784	137	25	133	1,739
1967	2,379	2,286	. . .	16	78	2,089	1,950	109	31	290	2,029
1968	3,454	3,316	. . .	32	106	2,458	2,311	127	20	996	3,025
1969	3,792	3,599	. . .	16	177	2,716	2,557	138	21	1,075	4,100
1970	4,774	4,481	. . .	16	277	3,259	3,085	164	10	1,514	5,614
1971	5,031	4,620	. . .	50	361	4,000	3,783	205	13	1,031	6,645
1972	5,572	5,107	. . .	51	414	4,759	4,502	233	24	813	7,457
1973	6,443	5,932	. . .	52	458	5,973	5,764	190	20	470	7,927
1974	7,378	6,826	. . .	52	500	7,196	6,957	217	22	182	8,109
1975	8,035	7,444	. . .	90	502	8,790	8,505	256	29	-754	7,354
1976	8,757	8,233	. . .	103	422	10,366	10,055	285	26	-1,609	5,745
1977	9,570	9,138	. . .	128	304	11,945	11,547	399	-1	-2,375	3,370
1978	13,810	13,413	. . .	142	256	12,954	12,599	325	30	856	4,226
1979	15,590	15,114	. . .	118	358	14,186	13,786	371	30	1,404	5,630
1980	13,871	13,255	. . .	130	485	15,872	15,515	368	-12	-2,001	3,629
1981	17,078	16,738	. . .	168	172	17,658	17,192	436	29	-580	3,049
1982	22,715	21,995	. . .	174	546	17,992	17,376	590	26	[f] -358	2,691
1983	20,682	17,991	. . .	1,121	1,569	18,177	17,524	625	28	2,505	5,195
1984	17,309	15,503	190	441	1,174	18,546	17,898	626	22	-1,237	3,959
1985	19,301	17,014	222	1,195	870	19,478	18,827	608	43	[f] 2,363	6,321
1986	19,439	18,247	238	152	803	20,522	19,853	600	68	[f] 1,459	7,780
1987	20,303	19,538	-36	153	648	21,425	20,519	849	57	-1,122	6,658
1988	22,699	21,837	61	202	600	22,494	21,695	737	61	206	6,864
1989	24,795	23,797	95	196	707	23,753	22,911	754	88	1,041	7,905
1990	28,791	28,403	144	-639	883	25,616	24,829	707	80	3,174	11,079
1991	30,390	29,128	190	9	1,063	28,571	27,695	794	82	1,819	12,898
1992	31,430	30,148	232	-12	1,062	32,004	31,112	834	58	-574	12,324
1993	32,301	31,182	281	4	835	35,662	34,613	966	83	-3,361	8,963
1994	52,841	51,372	311	1	1,157	38,879	37,744	1,029	106	13,962	22,925
1995	56,696	54,404	341	-207	2,158	42,055	40,923	1,064	68	14,641	37,566

Table 4.A2 Disability Insurance, 1957–2013 (in millions of dollars)

	Receipts [a]					Expenditures				Assets	
Year	Total	Net payroll tax contributions [b]	Income from taxation of benefits	Transfers from the general fund of the Treasury [c]	Net interest [d]	Total	Benefit payments [e]	Administrative expenses	Transfers to Railroad Retirement program	Net increase during year	Amount at end of year
1996	60,710	57,325	373	g	3,012	45,351	44,189	1,160	2	15,359	52,924
1997	60,499	56,037	470	g	3,992	47,034	45,695	1,280	59	13,465	66,389
1998	64,357	58,966	558	g	4,832	49,931	48,207	1,567	157	14,425	80,815
1999	69,541	63,203	661	g	5,677	53,035	51,381	1,519	135	16,507	97,321
2000	77,920	71,093	721	-836	6,942	56,782	54,983	1,639	159	21,138	118,459
2001	83,903	74,933	811	g	8,158	61,369	59,618	1,741	10	22,534	140,993
2002	87,379	77,272	930	g	9,178	67,905	65,702	2,049	154	19,475	160,468
2003	88,074	77,442	944	g	9,689	73,108	70,933	2,008	167	14,966	175,434
2004	91,380	80,281	1,111	g	9,988	80,597	78,229	2,152	215	10,783	186,217
2005	97,423	86,077	1,073	g	10,273	88,018	85,365	2,315	338	9,405	195,623
2006	102,641	90,808	1,230	g	10,603	94,456	91,741	2,326	388	8,185	203,808
2007	109,854	95,243	1,393	8	13,210	98,778	95,865	2,468	445	11,076	214,884
2008	109,840	97,566	1,313	g	10,961	108,951	106,007	2,526	418	889	215,773
2009	109,283	96,865	1,955	g	10,463	121,506	118,315	2,743	448	-12,223	203,550
2010	104,017	92,511	1,852	363	9,292	127,660	124,216	2,982	462	-23,643	179,907
2011	106,276	81,881	1,581	14,927	7,887	132,332	128,948	2,920	465	-26,056	153,850
2012	109,115	85,615	583	16,546	6,371	140,299	136,897	2,890	512	-31,184	122,666
2013	111,228	105,402	391	729	4,706	143,450	140,130	2,769	551	-32,221	90,445

SOURCE: Department of the Treasury.

a. The definitions of the categories "net payroll tax contributions" and "reimbursements from the general fund of the Treasury" were revised in 2011. Data in these two columns for 1984 and later may vary from those in prior editions, but total receipts are unchanged. b. Beginning in 1983, includes transfers from the general fund of the Treasury representing contributions that would have been paid on deemed wage credits for military service in 1957–2001, if such credits were considered to be covered wages. c. Includes payments (1) in 1966 and later, for costs of noncontributory wage credits for military service performed before 1957; (2) in 1971–1982, for costs of deemed wage credits for military service performed after 1956; (3) in 1968 and later, for costs of benefits to certain uninsured persons who attained age 72 before 1968; (4) in 1984 for employees, and in 1984–1989 for self-employed persons, for payroll tax credits provided under Public Law 98-21; and (5) in 2010–2012, for payroll tax revenue forgone under the provisions of Public Laws 111-147, 111-312, 112-78, and 112-96. d. Includes net profits or losses on marketable securities; interest adjustments on amounts reimbursed from, or paid to, other trust funds or the general fund of the Treasury; and relatively small amounts of gifts to the fund. e. Beginning in 1966, includes payments for vocational rehabilitation services furnished to disabled persons receiving benefits because of their disabilities. Beginning in 1983, amounts are reduced by amount of reimbursement for unnegotiated benefit checks. f. The Old-Age and Survivors Insurance Trust Fund borrowed from the Disability Insurance and Hospital Insurance Trust Funds in 1982, and repaid the borrowed amounts in 1985 and 1986. Amounts for these years are equal to total receipts less total expenditures, plus amounts borrowed or less amounts repaid. g. Between -$500,000 and $500,000.[493]

SEC. 102. SOCIAL SECURITY .

(a) Social Security Revenues- For purposes of Senate enforcement under sections 302 and 311 of the Congressional Budget Act of 1974, the amounts of revenues of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund are as follows:

Fiscal year 2016:	Fiscal year 2021:
$792,776,000,000.	$962,188,000,000.
Fiscal year 2017:	Fiscal year 2022:
$824,342,000,000.	$1,000,637,000,000.
Fiscal year 2018:	Fiscal year 2023:
$857,154,000,000.	$1,040,394,000,000.
Fiscal year 2019:	Fiscal year 2024:
$890,609,000,000.	$1,081,476,000,000.
Fiscal year 2020:	Fiscal year 2025:
$925,760,000,000.	$1,123,748,000,000.

(b) Social Security Outlays- For purposes of Senate enforcement under sections 302 and 311 of the Congressional Budget Act of 1974, the amounts of outlays of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund are as follows:

Fiscal year 2016:	Fiscal year 2021:
$778,032,000,000.	$1,073,227,000,000.
Fiscal year 2017:	Fiscal year 2022:
$825,829,000,000.	$1,145,188,000,000.
Fiscal year 2018:	Fiscal year 2023:
$882,521,000,000.	$1,222,754,000,000.
Fiscal year 2019:	Fiscal year 2024:
$941,034,000,000.	$1,305,622,000,000.
Fiscal year 2020:	Fiscal year 2025:
$1,005,632,000,000.	$1,394,327,000,000.

(c) Social Security Administrative Expenses- In the Senate, the amounts of new budget authority and budget outlays of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund for administrative expenses are as follows:

Fiscal year 2016:

(A) New budget authority,	
$5,026,000,000.	(B) Outlays,
	$5,089,000,000.

Fiscal year 2017:
(A) New budget authority, $5,175,000,000.
(B) Outlays, $5,190,000,000.
Fiscal year 2018:
(A) New budget authority, $5,345,000,000.
(B) Outlays, $5,316,000,000.
Fiscal year 2019:
(A) New budget authority, $5,518,000,000.
(B) Outlays, $5,487,000,000.
Fiscal year 2020:
(A) New budget authority, $5,699,000,000.
B) Outlays, $5,668,000,000.
Fiscal year 2021:
(A) New budget authority, $5,881,000,000.
(B) Outlays, $5,849,000,000.
Fiscal year 2022:
(A) New budget authority, $6,072,000,000.
(B) Outlays, $6,039,000,000.
Fiscal year 2023:
(A) New budget authority, $6,266,000,000.
(B) Outlays, $6,232,000,000.
Fiscal year 2024:
(A) New budget authority, $6,462,000,000.
(B) Outlays, $6,428,000,000.
Fiscal year 2025:
(A) New budget authority, $6,665,000,000.
(B) Outlays, $6,630,000,000.[493]

[493] S. Con. Res. 11, 114th Cong. § 102 (2015), https://www.congress.gov/114/bills/sconres11/BILLS-114sconres11es.pdf.

TOP REPS

The Social Security Administration pays legal firms directly for successfully winning disability benefits for their clients. Here are the top 10 individuals collecting fees from 2010.

Name	2010 payments	Based	Comment?
Charles Binder	$22,817,430.62	Hauppauge, N.Y.	Declined to comment
Thomas Nash	$6,292,296.41	Chicago	Didn't respond to request for comment
Eric Conn	$3,815,512.96	Stanville, Ky.	Didn't respond to request for comment
Michael Sullivan	$3,614,429.13	Lousiville, Ky.	Didn't respond to request for comment
Frank Latour	$3,464,262.24	Colton, Calif.	Didn't respond to request for comment
Ronald Miller	$3,241,150.42	Santa Monica, Calif.	A spokesman for Disability Group, the firm run by Mr. Miller, said, 'Statistically, claimants who employ an attorney to represent them are much more likely to win than those who go unrepresented. We are proud of the results we have achieved for our clients, helping them obtain justly deserved benefits. The $3.2 million is for the work performed by our national firm to help clients achieve their deserved benefits.'
Juan Hernandez Rivera	$2,816,311.80	Bayamon, Puerto Rico	Didn't respond to request for comment
Robert Friedman	$2,531,046.93	Seattle	Didn't respond to request for comment

Matthew Greenbaum	$2,004,375.65	New Orleans	Didn't respond to request for comment
Thomas Bothwell	$1,668,758.92	Yakima, Wash.	Declined to comment

Source: Social Security Administration. [494]

[494] Damian Paletta & Dionne Searcey, *Two Lawyers Strike Gold In U.S. Disability System*, WALL ST. J. (Dec. 11, 2011), http://www.wsj.com/articles/SB10001424052970203518404577096632862007046.