

10-15-2002

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### Recommended Citation

Victor G. Rosenblum, *Was the Third Circuit Off Base in Failing to Accord Chevron Deference to Social Security Administration's Interpretation of the Statute's Definition of Disability?*, 22 J. Nat'l Ass'n Admin. L. Judges. (2002)  
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# Was the Third Circuit Off Base in Failing to Accord Chevron Deference to Social Security Administration's Interpretation of the Statute's Definition of Disability?

Victor G. Rosenblum\*

Invoking the principle that “[o]ther things being equal, a statute should be read to avoid absurd results,” the en banc Third Circuit U.S. Court of Appeals, divided 6-3, refused to defer to the Social Security Administration’s (“SSA”) construction of the definition of “disability” in its enabling statute and reversed the Agency’s denial of disability benefits in *Thomas v. Commissioner of Social Security* on June 21, 2002.<sup>1</sup> The Third Circuit’s ruling that “disability” must be evaluated in relation to existence of “substantial gainful activity” was not only at odds with the SSA’s but with precedents from the Fourth,<sup>2</sup> Sixth,<sup>3</sup> Eighth,<sup>4</sup> and Ninth Circuits.<sup>5</sup> Only the Seventh Circuit had expressed an interpretive view of the SSA statute similar to the Third Circuit’s, and that was in dicta.<sup>6</sup> This article addresses

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1. 294 F.3d 568, 572 (3d Cir. 2002), *cert. granted*, *Barnhart v. Thomas*, 71 U.S.L.W. 3390 (U.S. Feb. 24, 2003) (No. 02-763).

2. *See Pass v. Chater*, 65 F.3d 1200 (4th Cir. 1995).

3. *See Garcia v. Sec’y of Health and Human Serv.*, 46 F.3d 552 (6th Cir. 1995).

4. *See Rater v. Chater*, 73 F.3d 796 (8th Cir. 1996).

5. *See Quang Van Han v. Bowen*, 882 F.2d 1453 (9th Cir. 1989).

6. *See Kolman v. Sullivan*, 925 F.2d 212 (7th Cir. 1991), *aff’d* *Kolman v. Shalala*, 39 F.3d 173 (7th Cir. 1994). The ruling reversing SSA was premised on the fact, not present in the *Thomas* case, that claimant’s past job was a temporary training position. *Id.* at 214. The panel went on to say, in dictum, that it would not be “a rational ground for denying benefits” to rule that a claimant could perform a past job that no longer exists. *Id.* at 213.

The failure of the regulations to require that the job constituting the applicant’s past work exist in significant numbers probably just reflects an assumption that jobs that

whether the Third Circuit's decision violated the Supreme Court's requirements for judicial deference to agency interpretations and should be repudiated.

A. *The SSA Statute's Text on "Disability" and the Agency's Implementing Regulations*

Central to the dichotomy between SSA supporters and the majority of the Third Circuit was construction of the language of the Social Security statute defining "disability" and setting forth explicit criteria for determining when an individual is disabled.<sup>7</sup>

Section 423(d) of 42 U.S.C. provides:

(1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . .<sup>8</sup>

After defining disability, the statute sets forth particular criteria to govern determinations that an individual is under a disability:

(2) For purposes of paragraph (1)(A) –

(A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of

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existed five or ten or even fifteen years ago still exist. But if the assumption is dramatically falsified in a particular case, the administrative law judge is required to move on to the next stage and inquire whether some other job that the applicant can perform exists in significant numbers today somewhere in the national economy.

*Id.* at 213-14.

7. *Thomas v. Comm'r of Soc. Sec.*, 294 F.3d 568, 572-74 (3d Cir. 2002).

8. 42 U.S.C. § 423(d)(1)-(1)(A) (1994).

substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.<sup>9</sup>

Having worked as a housekeeper until a heart attack imposed limitations on her physical activity, Pauline Thomas then worked as an elevator operator until she was laid off in 1995 when her position was eliminated.<sup>10</sup> Claiming disability related to cardiac problems and maintaining that the position of elevator operator was no longer available in significant numbers in the national economy, Thomas applied for Disability Insurance and Supplemental Security Income Benefits.<sup>11</sup>

SSA regulations for applying the statute's criteria to determine disability in individual cases provide for a five step sequential evaluation process. Whether the claimant was "currently engaging in a substantial gainful activity" is the subject of step one;<sup>12</sup> it was clear that Thomas was not so engaged.<sup>13</sup> At step two, the Commissioner must determine "whether the claimant has a severe impairment;"<sup>14</sup> Thomas was found to have an impairment whose degree was still in question.<sup>15</sup> At step three, it must be determined whether the claimant's impairment was severe enough to preclude gainful work;<sup>16</sup> an agency ALJ found that Thomas' impairment was not severe

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9. 42 U.S.C. § 423(d)(2)-(2)(A) (1994).

10. *Thomas*, 294 F.3d at 570.

11. *Id.*

12. 20 C.F.R. § 404.1520(b) (2002).

13. *Thomas*, 294 F.3d at 570.

14. 20 C.F.R. § 404.1520(c) (2002).

15. *Thomas*, 294 F.3d at 570.

16. 20 C.F.R. § 404.1520(d) (2002).

enough to preclude any gainful work.<sup>17</sup> If, at step three, a claimant is not found to suffer from an impairment on the list of impairments presumed to be severe enough to preclude gainful work, the inquiry proceeds to step four.<sup>18</sup>

Step four – the key step at issue in this case – focused on the duty of the Commissioner to determine whether the claimant retained residual functional capacity to perform past relevant work.<sup>19</sup> The burden is on the claimant to demonstrate his or her inability to return to past relevant work.<sup>20</sup> Thomas argued that she could not return to her past relevant work because jobs as elevator operators were no longer available in the national economy to offer substantial gainful activity.<sup>21</sup> Finding, under step four, that Thomas could perform her previous job as an elevator operator, the ALJ ruled that she was not under a disability.<sup>22</sup> The evaluation ended without any inquiry into whether the past work Thomas could do actually existed in the present and without proceeding to step five. Had step five been pursued, the Commissioner would have had to show that Thomas was capable of performing other jobs existing in significant numbers in the national economy, and if not, to find her disabled.<sup>23</sup>

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17. *Thomas*, 294 F.3d at 570.

18. *Id.* at 571.

19. *Id.*

20. *Id.*

21. *Id.* at 570.

22. *Id.* The SSA regulations describe step four in this way:

Your impairment(s) must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

20 C.F.R. § 404.1520(e) (2002).

23. The SSA regulations describe step five in this way:

Your impairment(s) must prevent you from doing any other work. (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

After SSA's Appeals Council denied Thomas' request for review of the ALJ's decision, and her challenge to SSA's ruling failed in Federal District Court for the District of New Jersey, Thomas sought redress in the Court of Appeals for the Third Circuit.<sup>24</sup>

The majority and the dissent in the Court of Appeals divided sharply over whether sections of the Social Security Act at issue were clear and consistent with the Agency's regulations, were clear and inconsistent with the regulations, or were ambiguous and therefore entitled the Agency to deference.<sup>25</sup>

### *B. Views of the Third Circuit's Majority*

To the majority, the district court's affirmation of the Agency's denial that the existence of "substantial gainful work" was an integral component of any evaluation of "disability" was "inconsistent with both a careful reading of the particular provision at issue and the obvious statutory scheme."<sup>26</sup> The Agency's cramped reading of its regulation regarding step four set up "an artificial roadblock to an accurate determination of whether Thomas can 'engage in any . . . kind of substantial gainful work which exists in the national economy.'"<sup>27</sup> The majority proclaimed: "[W]e cannot lose sight of the fact that the touchstone of 'disability' is the inability to engage in any substantial gainful activity that exists in the national economy."<sup>28</sup> The SSA's "rigid application of Step Four . . . could defeat Congress's unambiguous intent."<sup>29</sup> Citing *United States v. Mead Corp.*<sup>30</sup> and *Chevron v. Natural Resources Defense Council*<sup>31</sup> for the

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20 C.F.R. § 404.1520(f) (2002).

24. *Thomas*, 294 F.3d at 568.

25. *Id.* at 575-79.

26. *Id.* at 569.

27. *Id.* at 574 (quoting 42 U.S.C § 423(d)(2)(A) (1994)).

28. *Id.* at 574.

29. *Id.*

30. *United States v. Mead Corp.*, 553 U.S. 218, 226 (2001).

31. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984). The pertinent *Chevron* language was: "Such legislative regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute." *Id.* To the same effect, Judge Alito could also have invoked *Chevron's* text and footnote nine at pages 842-43. *Id.* at 843 & n.9. The widely quoted text provides:

proposition that "a court should not follow a regulation that is manifestly contrary to the statute," the majority concluded "we must reject such an approach."<sup>32</sup>

The Third Circuit majority found "unconvincing" the Commissioner's argument that permitting a claimant at step four to

show that her past job does not exist in significant numbers in the national economy would convert disability benefits into unemployment benefits. Awarding disability benefits to a claimant who, as a result of a qualifying impairment, cannot perform any job that actually exists is hardly the equivalent of providing unemployment compensation. By contrast, denying benefits because a claimant could perform a type of job that does not exist seems nonsensical.<sup>33</sup>

Judge Alito's majority recognized that the Ninth and the Sixth Circuit Courts found the SSA statute's language in 42 U.S.C. § 423(a)(2) to be "ambiguous" and entitled to deference, but he insisted that their readings were not consistent with "standard usage."<sup>34</sup> He was also aware that the Fourth and Eighth Circuit Courts agreed explicitly with SSA's interpretation of disability,<sup>35</sup> but he argued "neither opinion [wa]s persuasive."<sup>36</sup>

Judge Alito emphasized the significance of Congress's use of the term "any other" in making evaluations of disability under 42 U.S.C.

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"If the intent of Congress is clear, that is the end of the matter, for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. Footnote nine iterates that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843, n.9.

32. *Thomas*, 294 F.3d at 574.

33. *Id.* (citation omitted).

34. *Id.* at 572. In *Bowen*, the Ninth Circuit maintained that SSA's interpretation "is a reasonable interpretation of the statute, but not the only one. It is also reasonable to construe 'previous work' and 'other' work as separate categories, neither a subset of the other." *Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989). The Sixth Circuit echoed this view in *Garcia*. *Garcia v. Sec'y of Health and Human Serv.*, 46 F.3d 552, 558 (6th Cir. 1995).

35. *Pass v. Chater*, 65 F.3d 1200, 1204 (4th Cir. 1995); *Rater v. Chater*, 73 F.3d 796 (8th Cir. 1996).

36. *Thomas*, 294 F.3d at 575.

§ 423(d)(2)(A).<sup>37</sup> Use of the phrase “any other” in this provision, he maintained, “makes clear that an individual’s ‘previous work’ was regarded as a type of ‘substantial gainful work which exists in the national economy.’”<sup>38</sup> Judge Alito proceeded to enlarge on what standard usage of “any other” mandates:

When a sentence sets out one or more specific items followed by “any other” and a description, the specific items must fall within the description. For example, it makes sense to say: “I have not seen a tiger or any other large cat” or “I have not read *Oliver Twist* or any other novel which Charles Dickens wrote.” But it would make no sense to say, “I have not seen a tiger or any other bird” or “I have not read *Oliver Twist* or any other novel which Leo Tolstoy wrote.” Therefore, if we presume that the statutory provisions at issue here are written in accordance with correct usage, a claimant’s ability to perform “previous work” is not disqualifying if that work no longer “exists in the national economy.” This feature of the statutory language is unambiguous.<sup>39</sup>

As to why the Fourth and Eighth Circuit decisions in *Pass v. Chater* and *Rater v. Chater* adopting SSA’s interpretation of “disability” were not persuasive, Judge Alito said that “[b]oth decisions rely primarily on the Social Security regulations and on Social Security rulings. Neither opinion, in our judgment, devotes

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37. *Id.* at 572.

38. *Id.*

39. *Id.* (citation omitted). Even if 42 U.S.C. § 423(a)(2) were ambiguous, Judge Alito went on:

[O]ur interpretation would not change. Other things being equal, a statute should be read to avoid absurd results. Here, there is no plausible reason why Congress might have wanted to deny benefits to an otherwise qualified person simply because that person, although unable to perform any job that actually exists in the national economy, could perform a previous job that no longer exists.

*Id.* at 572-73 (citation omitted).



sufficient attention to the language of the statute or the statutory scheme.”<sup>40</sup>

Judge Alito did not elaborate on what he meant by “sufficient attention” to the statute’s language. Although the *Pass* and *Rater* decisions did emphasize Social Security regulations and rulings,<sup>41</sup> they did not bypass analysis of the statute’s text. In *Pass*, for example, the Fourth Circuit panel relied on the SSA statute’s requirement that inability to perform substantial gainful activity be “by reason of any medically determinable physical or mental impairment” and inferentially, not by reason of marketplace conditions.<sup>42</sup>

In other words, a finding of disability under the statute must be based upon a lack of physical or mental capabilities on the part of the claimant, not upon other factors which prevent the claimant from obtaining work. The Social Security regulations addressing past relevant work reflect the statute’s focus on the functional capacity retained by the claimant.<sup>43</sup>

Furthermore, at the end of its opinion in *Pass*, the Fourth Circuit quoted approvingly from the Sixth Circuit’s statutory interpretation in *Garcia*: “Congress intended to distinguish sharply between unemployment compensation and the disability benefits provided by the Act. Congress manifested this intention by defining ‘disability’ under the Act as a predominantly medical determination as opposed to a vocational one.”<sup>44</sup>

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40. *Id.* at 575 (citing *Pass v. Chater*, 65 F.3d 1200, 1204 (4th Cir. 1995); *Rater v. Chater*, 73 F.3d 796 (8th Cir. 1996)).

41. *See Pass*, 65 F.3d at 1204-05 (invoking Social Security Rulings 82-61 and 82-40); *see Rater* 73 F.3d at 798-99 (relying on Social Security Ruling 82-61).

42. *Pass*, 65 F.3d at 1203 (quoting 42 U.S.C. § 423(d)(1)(A) (1994) (defining the word “disability”)).

43. *Id.* at 1204.

44. *Id.* at 1207 (quoting *Garcia v. Sec’y of Health and Human Serv.*, 46 F.3d 552, 559 (6th Cir. 1995) (citations omitted)). Given its endorsement of SSA’s reading of the statute, the *Pass* panel’s admonition to courts toward the end of its opinion was no surprise: “If the analysis of disability under the Social Security Act is to be changed, it is for Congress or the Social Security Administration, not the courts, to do so.” *Id.*

The Eighth Circuit endorsed SSA's interpretation of "disability" in *Rater*, explicitly rejecting claimant's argument that the statute requires past relevant work to exist in significant numbers within the national economy.<sup>45</sup> The unanimous panel added: "The statute does not require a particular job to exist in significant numbers in the national economy in order to constitute past relevant work."<sup>46</sup>

The Third Circuit majority's reading of the SSA statute in *Thomas* clearly and emphatically opposed that of the Fourth Circuit's in *Pass* and the Eighth Circuit's in *Rater*.<sup>47</sup> The underlying dispute in the disagreement was not so much over sufficiency of attention to the SSA statute's text as over the bearing of the statute's terms "substantial gainful activity" and "substantial gainful work which exists in the national economy" on the determination of "disability."<sup>48</sup> The Fourth and Eighth Circuits subordinated those terms of the text to the primacy in their view of the statute's requirement that inability be "by reason of" the claimant's "physical or mental impairment . . . of such severity" as to be unable to do previous or any other work. On the other hand, the focus of the statute's language to the Third Circuit majority was on the juxtaposition of "disability" and "inability" with "substantial gainful work" and the use of "any other" to confirm Congress's concern that "substantial gainful work" must exist in order to validate denial of "disability" to an impaired claimant.<sup>49</sup>

### C. Views of the Third Circuit Minority

The three judge minority in *Thomas*, led by Judge Rendell, charged that the majority's rejection of the Agency's regulatory scheme in steps four and five was "unprecedented" and that its interpretation of the SSA statute, tantamount to a "rewriting," will "wreak havoc with the evidentiary aspects of the administrative

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45. *Rater*, 73 F.3d at 799.

46. *Id.* (citing Social Security Ruling 82-61).

47. *Thomas*, 294 F.3d at 570-72. *But see Pass*, 65 F.3d at 1203-04; *Rater*, 73 F.3d at 799.

48. *Thomas*, 294 F.3d at 570-72.

49. *Id.* at 578.

process.”<sup>50</sup> As to why Congress might have wanted to deny benefits to someone in Pauline Thomas’s position, it is “quite plausible that Congress decided that if a claimant still retained the physical and mental capacity to do whatever work she previously did, the inquiry should end there with a finding that claimant is not disabled.”<sup>51</sup> The dissenting opinion went on to state that:

[Congress’s use of] [p]revious work [as a governing standard] essentially serves as a proxy for the ability to perform work, not as proof that the claimant can be employed in that particular job. Congress may not, in fact, have considered the problem of job obsolescence, but . . . it is not up to the courts to fill that alleged legislative void.<sup>52</sup>

Even if the SSA statute cannot be read to explicitly equate with the Agency’s regulations, Judge Rendell maintained, one can only conclude that “the statute is at best ambiguous. Accordingly, the Agency’s interpretation should be accorded great weight.”<sup>53</sup> The minority relied at this juncture on the Supreme Court’s 2002 decision in *Barnhart v. Walton*, which reendorsed *Chevron’s* formulaic language:

[I]f the statute speaks clearly “to the precise question at issue,” we “must give effect to the unambiguously expressed intent of Congress.” If, however, the statute “is silent or ambiguous with respect to the specific issue,” we must sustain the Agency’s interpretation if it is “based on a permissible construction” of the Act.<sup>54</sup>

Examining the *Walton* case, which Judge Alito bypassed, Judge Rendell charged that the majority acted contrary to *Walton’s* requirements by virtue of its “unwillingness to defer to the Agency’s authority to regulate.”<sup>55</sup> Judge Rendell quoted *Walton’s* explicit

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50. *Id.* at 577.

51. *Id.*

52. *Id.* (citation omitted).

53. *Id.* at 578.

54. *Barnhart v. Walton*, 122 S. Ct. 1265, 1269 (2002) (citations omitted).

55. *Thomas*, 294 F.3d at 578. *But see Walton*, 122 S. Ct. at 1269.

endorsement of SSA discretion: “The [Social Security Act’s] complexity, the vast number of claims that it engenders, and the consequent need for agency expertise and administrative experience lead us to read the statute as delegating to the Agency considerable authority to fill in, through interpretation, matters of detail related to its administration.”<sup>56</sup>

*Walton* ruled explicitly that Chevron deference was due the Social Security Administration’s interpretation of “impairment . . . for a continuous period of not less than 12 months” in its evaluations of “disability” pursuant to 42 U.S.C. § 423(d)(1)(A).<sup>57</sup> Given the unanimity of the Supreme Court’s judgment prescribing Chevron deference for SSA’s interpretation of this facet of the definition of “disability,” can the Third Circuit’s ruling in *Thomas* survive Supreme Court scrutiny?

#### D. Possible Scenarios in the Supreme Court for Disposition of *Thomas*

The possibility cannot be easily dismissed that the Supreme Court would, citing *Walton*, summarily reverse the Third Circuit’s decision in *Thomas* without more. After all, Justice Breyer was eloquent, emphatic and unconditional in concluding that Chevron deference was mandatory for SSA’s interpretation in *Walton*.<sup>58</sup>

In the rare situation in which the Supreme Court has reversed an SSA ruling, it has required unauthorized and misleading action on the

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56. *Thomas*, 294 F.3d at 578 (quoting *Walton*, 122 S. Ct. at 1273) (alteration in original). Unquoted by Judge Rendell, Justice Breyer, earlier in his opinion in *Walton*, used even stronger language that could be construed as endorsing the dissenting position in *Thomas*:

In this case, the interstitial nature of the legal question . . . the importance of the question to administration of the statute, the complexity of that administration and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.

*Walton*, 122 S. Ct. at 1272.

57. *Walton*, 122 S. Ct. at 1272.

58. *Id.*

Agency's part to convince the Justices to blow the whistle.<sup>59</sup> Even then, as in *Sims v. Apfel* where the Court reversed SSA's requirement of issue exhaustion in Agency proceedings as a condition of obtaining judicial review of such issues by SSA claimants, only a bare majority could be mustered to counter the Agency.<sup>60</sup> The dissenters in *Sims* – Justices Breyer, Scalia, Rehnquist, and Kennedy – continued to urge judicial acceptance of the Agency's position, pointing out that “[p]ractical considerations arising out of the agency's familiarity with the subject matter as well as institutional considerations caution strongly against courts' deciding ordinary, circumstance-specific matters that the parties have not raised before the agency.”<sup>61</sup>

Although the Supreme Court's unanimous call for deference to SSA in *Walton* might control a future ruling in *Thomas*, the issues raised by the Justices and their resolution in *Walton* do not compel rejection of the Third Circuit majority's approach in *Thomas*.

Judge Alito emphasized in the Third Circuit's ruling that the SSA statute integrally ties “disability” to “inability to engage in any substantial gainful activity.”<sup>62</sup> Ability so to engage is a function of

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59. *Sims v. Apfel*, 530 U.S. 103 (2000).

60. *Id.*

61. *Id.* at 116 (Breyer, J., dissenting). Justice Thomas, for the plurality, objected to SSA's imposition of the issue exhaustion requirement in order to prevent judicial review of such issues because the SSA statute said nothing of issue exhaustion and the Agency itself had failed to adopt regulations requiring issue exhaustion. *Id.* at 107-10. To the contrary, the Agency had encouraged claimants to believe that the administrative review process would be conducted by the Agency “in an informal, nonadversary manner.” 20 C.F.R. § 404.900 (b) (2002). Justice Thomas noted that the Agency's form given to claimants seeking Appeals Council review provided only three lines for the request for review and its notice accompanying the form told claimants “it will take only 10 minutes to ‘read the instructions, gather the necessary facts and fill out the form’ . . . [Issue exhaustion] ‘makes little sense in this particular context.’” *Id.* at 112 (quoting *Hardwood v. Apfel*, 186 F.3d 1039, 1042 (1999)). Justice O'Connor concurred in the judgment, maintaining that “the agency's failure to notify claimants of an issue exhaustion requirement in this context is a sufficient basis for our decision. Requiring issue exhaustion is particularly inappropriate here, where [SSA] regulation[s] and procedures . . . affirmatively suggest that specific issues need not be raised before the Appeals Council.” *Id.* at 113 (O'Connor, J., concurring).

62. *Thomas v. Comm'r of Soc. Sec.*, 294 F.3d 568, 574 (3d Cir. 2002).

the state of the marketplace as well as of the physical and mental capacity of the claimant. This emphasis on the joint relevance to disability of marketplace and personal capacity by the Third Circuit majority was in no way refuted or even considered by the Justices in *Walton*.

Central to the Supreme Court's ruling was whether the claimant had violated the SSA statute's requirements by having engaged in substantial gainful activity within less than twelve months of suffering physical or mental impairment. The Justices ruled unanimously that the SSA statute was ambiguous on that point because "[i]t says nothing about how the Agency, when it adjudicates a matter after Year One, is to treat an earlier return to work."<sup>63</sup>

The Agency's interpretation of this ambiguous provision, finding that claimant's return to gainful employment prior to the lapse of a twelve month period after the onset of impairment precluded a determination of disability, was found to be reasonable.<sup>64</sup> But the facts, analysis and conclusion of the Justices in *Walton* do not require findings that the provision of the SSA statute at issue in *Thomas* was ambiguous or that the Agency's interpretation of the provision's text to avoid consideration in its step four of the existence of gainful employment was reasonable. The question whether Chevron deference has to be applied to SSA's truncation of the statute's "substantial gainful activity" component of the definition of disability thus remains open.<sup>65</sup>

One of the points emphasized by Justice Breyer in according Chevron deference to SSA in *Walton* was that the Agency's interpretation of the statute's "not less than 12 months" requirement made "considerable sense in terms of the statute's basic objectives."<sup>66</sup>  
The SSA statute

demands some duration requirement. No one claims that the statute would permit an individual with a chronic illness – say high blood pressure – to qualify for benefits if that illness, while itself lasting for a

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63. *Id.* at 1273.

64. *Id.*

65. *Walton*, 122 S. Ct. at 1270.

66. *Id.* (quoting 42 U.S.C. § 423(d)(1)(A) (1994)).

year, were to permit a claimant to return to work after only a week, or perhaps even a day, away from the job. The Agency's interpretation supplies a duration requirement, which the statute demands, while doing so in a way that consistently reconciles the statutory "impairment" and "inability" language.<sup>67</sup>

Quite to the contrary of SSA's interpretation in *Walton* reconciling statutory terms, its interpretation in *Thomas* not only made no effort to reconcile the statute's requirements of "inability" and "physical or mental impairment" with the existence of "substantial gainful activity," but the Agency purged the term "substantial gainful activity" from any consideration at the crucial decisional stage.<sup>68</sup> Far from making "considerable sense in terms of the statute's basic objective,"<sup>69</sup> that interpretation by SSA in *Thomas* was arguably arbitrary and warranted correction.

That the Third Circuit majority was right in proclaiming "the touchstone of 'disability' is the inability to engage in any substantial gainful activity that exists in the national economy"<sup>70</sup> was supported implicitly by Congress's meticulous explanation of what it meant by "work which exists in the national economy."<sup>71</sup> Why would legislators proceed to enlarge on that term as "work which exists in significant numbers either in the region where such individual lives or in several regions of the country"<sup>72</sup> in the key paragraph of the statute defining disability, if they intended, as SSA alleges, to authorize the Agency to exclude from consideration in determining "disability" whether work the claimant can perform "exists in the national economy?"<sup>73</sup>

Congress' juxtaposition of "disability" and "inability" with engagement in "substantial gainful activity" also contributes semantic support to the Third Circuit majority position. A Congress

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67. *Id.*

68. *Thomas*, 294 F.3d at 572. *But see Walton*, 122 S. Ct. at 1270.

69. *Walton*, 122 S. Ct. at 1270.

70. *Thomas*, 294 F.3d at 573.

71. 42 U.S.C. § 423(d)(2)(A) (1994).

72. *Id.*

73. *Id.*

indifferent to the bearing of the marketplace on disability could have defined "disability" as "inability to engage in any activity," but the legislators chose explicitly to modify the noun "activity" with two significant marketplace adjectives. The "activity" claimant was unable to perform had to be "gainful," and had to exist in the marketplace to a particular degree: "substantiality". The marketplace factor of "substantial gainful activity" was thus made an integral, required component of determinations of "disability." While in no way at issue in *Walton*, this "touchstone of disability" lies at the core of the dispute in *Thomas*.

The Third Circuit majority's reasoning and conclusion in *Thomas* honors the plain meaning of "substantial gainful activity" as a defining statutory component of "disability" and, in addition, makes "considerable sense in terms of the statute's basic objective."



