

THE WELFARE STATE AND MASS JUSTICE: A WARNING FROM THE SOCIAL SECURITY DISABILITY PROGRAM†

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Few domestic problems are more intractable, are growing at a more rapid rate,¹ and arouse more emotional concern and conflicts of principle than the welfare situation.² Much of the difficulty results because, unlike automatic age-retirement programs, welfare is a governmental program embracing few points of final decision. Once a welfare claim is initiated, an escalating series of decisions and reviews on eligibility, amounts, and changed conditions usually follows, continuing to the claimant's death—and beyond, where there are survi-

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1. Aggregate amounts of federal welfare assistance were 17.6 billion dollars in 1968 and 23.0 billion in 1970; the totals were expected to reach 31.1 billion in 1971. *AM. ENTERPRISE INST., WELFARE REFORM PROPOSALS 12* (Legislative Analysis No. 4, May 17, 1971).

THE FOLLOWING HEREINAFTER CITATION WILL BE USED IN THIS ARTICLE:

S. NAGI, *DISABILITY AND REHABILITATION: LEGAL, CLINICAL, AND SELF-CONCEPTS AND MEASUREMENT* (1969) [hereinafter cited as NAGI].

2. In this article, "welfare" is broadly defined to include discretionary "social insurance" such as disability awards. For an examination of the welfare controversy and an indication of the diverse opinions which it has aroused, see *COMMITTEE FOR ECONOMIC DEVELOPMENT, IMPROVING THE PUBLIC WELFARE SYSTEM* (1970); S. LEVITAN, *PROGRAMS IN AID OF THE POOR FOR THE 1970s* (1969); F. PIVEN & R. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (1971); B. STEIN, *ON RELIEF: THE ECONOMICS OF POVERTY AND PUBLIC WELFARE* (1971); G. STEINER, *THE STATE OF WELFARE* (1971).

vors. Our sense of fairness and our egalitarian desire for consistent decisions in similar cases call for safeguarding each repetitive decisional stage with procedural due process protections.³ At the same time, however, these full procedural formalities can produce administrative and judicial caseloads of near-astronomical proportions.

One of the less-studied developments of the continually growing problem of welfare-social insurance administration and litigation is the federally-administered program for disabled workers, dependents, and survivors. The program dates from 1956⁴ and is administered by the Department of Health, Education and Welfare's Social Security Administration (SSA) as an offshoot of the familiar Old Age and Survivor's Insurance (OASI) program, which provides eligibility for monthly payments upon retirement to workers in employments covered by the OASI program.⁵ Both programs are linked to payroll deductions and are popularly called "social security." In essence, the disability program simply advances the date of eligibility for payments if the worker can show total disability preventing any gainful employment, thus adding to the basic OASI program the concept of premature, involuntary retirement.⁶

Arising from concern over the compound problems caused by the large, steadily increasing volume of disability claims and the difficulty of disability determinations, this article empirically describes the existing disability program, critically examines the present determination process, and proposes alternatives designed to alleviate a number of the current problems.

SCOPE OF THE PROBLEM

By fiscal year 1970 the steadily rising intake of worker disability

3. See *Goldberg v. Kelly*, 397 U.S. 254, 260-66 (1970).

4. See Social Security Amendments of 1956, ch. 836, tit. I, § 103(a), 70 Stat. 815-17 (1956), as amended, 42 U.S.C. § 423 (1970).

5. 42 U.S.C. §§ 401-18 (1970) (originally enacted as Social Security Act of 1935, ch. 531, 49 Stat. 620). More than 92% of all workers in paid employment are covered. S. LEVITAN, *supra* note 2, at 20.

6. Both the regular retirement "insurance" (RSI) and the disability "insurance" (DI) programs are based on Title II of the Social Security Act. 42 U.S.C. §§ 401-29 (1970). Although the word "insurance" is a misnomer for both programs despite their semi-contributory nature, the use of the word does help separate these two wholly federal programs from certain forms of public assistance provided by the states pursuant to federal grants under other parts of the Social Security Act. See *id.* §§ 301-06 (old age assistance and medical assistance for the aged), §§ 1351-55 (aid to the permanently and totally disabled).

claims reached 779,926, and the total would have risen to 862,526 if widow and child claims had been added.⁷ The hearing examiner corps utilized to process these claims had grown to approximately 330 in 1971 and is currently the largest in the government.⁸ Moreover, challenges to SSA claim denials resulted in an input into the United States district courts of approximately 1,369 cases in calendar year 1970 and 1,537 in 1971.⁹ The rate at which claim denials have been reversed has also been high. By 1970 the reversal rate by hearing examiners of the 32,000 SSA denials appealed to them was nearly 45 percent.¹⁰ In turn, the reversal rate by federal district courts of hearing examiner denials approached 40 percent.¹¹

The total volume of work has been onerous and has tended to increase each year. For fiscal year 1970, as already noted, almost 800,000 worker disability claims were filed in district offices of the SSA across the nation; 1971 claims exceeded this total by over 150,000.¹² The filing of a claim, however, is only the beginning of the

7. Memorandum, "Selected Data on Claims of Disabled Persons," from Edward L. Binder, Technical Adviser, Bureau of Disability Insurance (BDI), Social Security Administration (SSA), to Robert G. Dixon, Jr., Sept. 1, 1971.

8. Tabulation, obtained from Charles Dullea, Director, Office of Hearing Examiners, Aug. 23, 1971 (copy on file with author). Indeed, the SSA examiners already comprised more than 50% of the total number of approximately 645 federal hearing examiners. *Id.* By September, 1972 the SSA Bureau of Hearing Examiners was expected to have 379 permanent hearing examiners and 43 temporary hearing examiners. Interview with Charles Dullea, August 21, 1972).

9. See note 2 *infra*.

10. See note 74 *infra*.

11. See note 92 *infra* and accompanying text. Reversal rates, which have some bearing on the question of accuracy and consistency in initial determinations, might be even higher but for the fact that only denials, not allowances, move up the ladder of reconsideration and review. Neither hearing examiners nor courts have any opportunity to review and correct errors in the more than one-half of the administrative level determinations which are allowances rather than denials.

12. The workload at the four basic administrative stages in fiscal year 1971 was reported as follows:

Initial Applications Filed	966,000
Initial Applications Processed	953,000
Allowances	395,000
Denials	
Substantive (denials based on finding that applicant not disabled)	364,000
Technical (denials based on failure to meet a technical requirement, e.g., insured status requirement not met)	194,000
Reconsideration Processed	128,000
Allowances	48,000
Denials	80,000
Hearings Processed	37,000
Allowances	16,000
Denials	21,000

administrative process—multiple stages of review significantly increase the agency's burden. Although there are four basic administrative decisional stages in this program—initial consideration, reconsideration, hearing examiner and Appeals Council—dualism between state and federal agencies at the first two stages produces six levels of administrative action, which, in addition, may be followed by court review.¹³

To the basic SSA workload must also be added the "temporary," but possibly permanent, program for "black lung" (pneumoconiosis) disability authorized by Congress at the end of 1969 for the occupational disease associated with coal mining.¹⁴ The initial congressional authorization of the black lung disability program contemplated that, beginning in 1973, the program would cease on a state-by-state basis as rapidly as states developed federally-approved additions to their workmen's compensation systems to handle black lung claims. However, the recent enactment of an 18 month extension of the federal black lung program, which also increases its scope and the subjectivity of its standard,¹⁵ seems to indicate that a major federal involve-

Memorandum, "Selected Data on Claims of Disabled Persons," from Edward L. Binder, Technical Adviser, BDI, SSA, to Robert G. Dixon, Jr., Aug. 16, 1971.

Court action is reported by SSA each calendar year. In 1971, 1,537 new disability cases were filed. At the end of 1971 the carryover backlog of cases was 2,260, a significant increase over the 2,001 backlog at the end of calendar year 1970. Figures are derived from 1970-71 Quarterly Reports on SSA Civil Litigation Activity (issued by the Bureau of Retirement and Survivors Insurance), incorporating data prepared by the Bureau of Disability Insurance.

13. The levels include: (1) initial determination by a state agency team; (2) review of this action by disability determiners in the Baltimore headquarters of SSA required to complete the initial determination stage; (3) reconsideration by a state agency team, if requested by a denied claimant; (4) review of this action by disability determiners in SSA-Baltimore to complete the reconsideration stage; (5) hearing examiner decision if requested by a denied claimant; (6) SSA Appeals Council discretionary review; (7) review of administrative action by a federal district court upon appeal by a denied claimant. See the discussion of the disability claims process, pp. 688-700 *infra*.

14. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, tit. IV, §§ 401-26, 83 Stat. 792-98 (codified at 30 U.S.C. §§ 901-36) (1970). See Knight, *Compensation for Black Lung at the Federal Level: A Precedent for Nationalized Workmen's Compensation*, 57 VA. L. REV. 97 (1971) for an overview of the new federal law and a comparison with West Virginia's workmen's compensation law. The initial figures on filings of black lung claims exceeded administrative expectations, as did the difficulty in handling the claims. New claims totalled 256,000 in fiscal year 1971 but were expected to decrease as the initial backlog was processed. Selected Data (Sept.), *supra* note 7.

15. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972). The Act adds strip miners, extends coverage to orphans of miners, expands the definition of disability to include other respiratory diseases of miners, and bars exclusive use of X-rays for diagnosis. See generally *Hearings on S. 2675, S. 2289, H.R. 9212 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st-2d Sess. (1972).

ment in black lung disability will continue. With the additional black lung cases, the SSA disability claims intake can be expected to rise above a million per year, and the number of hearing examiner cases may rise to 50,000 per year.

Although the number of disability claims subject to administrative adjudication and court litigation has been high, the current volume may prove to be only the warning tip of an iceberg. If, in addition to the black lung legislation,¹⁶ Congress enacts the extensive welfare reforms embodied in H.R. 1, the Social Security Amendments of 1972,¹⁷ the combined effect of these two plans, plus the natural growth rate in the original disability program, will yield further substantial increases in the number of disability claims filed with the SSA. Among H.R. 1's many proposed reforms is one which would end the system under the Social Security Act of 1935¹⁸ of state administration under federal grant-in-aid programs for the aged,¹⁹ the blind,²⁰ and the totally and permanently disabled.²¹ Under H.R. 1, the existing federal-state programs would be replaced with a wholly federal program²² administered by the SSA through its present administrative framework and hearing procedures. Through the proposed basic family assistance concept, eligible individuals would receive money payments when their monthly income fell below the statutory levels fixed by Congress.²³ Because the standard of eligibility for the

16. See notes 14-15 *supra* and accompanying text.

17. H.R. 1, 92d Cong., 2d Sess. (1972). See generally HOUSE COMM. ON WAYS AND MEANS, REPORT ON H.R. 1, H.R. REP. NO. 231, 92d Cong., 1st Sess. (1971); AM. ENTERPRISE INST., *supra* note 1.

18. 42 U.S.C. §§ 301-1396(g) (1970). See also COMPILATION OF THE SOCIAL SECURITY LAWS, H.R. Doc. No. 266, 90th Cong., 2d Sess. (2 vols. 1968).

19. 42 U.S.C. §§ 301-06 (1970). The old age assistance provisions should be distinguished from the wholly federal payroll deduction OASI program. *Id.* §§ 401-18.

20. *Id.* §§ 1201-06.

21. *Id.* §§ 1351-55. The programs for the aged, blind, and totally disabled, along with other welfare grant-in-aid programs such as aid to maternal and child health services, *id.* §§ 701-16, and aid to families with dependent children, *id.* §§ 601-42, have traditionally been referred to as categorical relief or public assistance. The federal government provides the money and some general guidelines, and the states administer the programs. See THE PRESIDENT'S COMMISSION ON INCOME MAINTENANCE PROGRAMS, REPORT 14-24 (Heineman Commission 1969).

22. See the welfare bill as passed by the House, H.R. 1, 92d Cong. 1st Sess., (Social Security Amendments of 1971), tit. XX (1971), reprinted in 117 CONG. REC. H5660, H5694 (daily ed. June 22, 1971); H. REP. NO. 231, *supra* note 17, at 25.

23. See H.R. 1, 92d Cong., 1st Sess., (Social Security Amendments of 1971), tit. XXI, §§ 2131-35 (1971) (House Version), reprinted in 117 CONG. REC. H5660, H5701-02 (daily ed. June 22, 1971); H.R. REP. NO. 231, *supra* note 17, at 30-34.

aged would be 65, and for the blind would be an objective physical measure,²⁴ neither standard would be expected to produce difficult administrative determinations or numerous appeals to the hearing examiner level, although the transfer would increase markedly the number of claims to be processed through the lower level SSA procedures.²⁵ On the other hand, the standard of eligibility for the transferred "totally and permanently disabled" program (APTD) would be the same vague, difficult-to-administer formula which has created difficulties for the existing SSA disability insurance program—that is, whether by virtue of a medically ascertainable impairment the person is unable to perform any type of gainful employment which exists in meaningful quantity in the region where the individual lives or in several regions of the national economy.²⁶ Given this standard, a significant increase in the number of claims which would be appealed to the SSA hearing examiner level and above might be expected.²⁷

As welfare caseloads rise, and as the number of administrative determinations and appeals thus soars, the natural instinct of administrators is to seek a simpler, more automatic method for delivering money to eligible welfare recipients. The idea of a guaranteed annual wage has had perennial appeal, both as a device to fill a gap in the coverage of existing categories of welfare and as a means of avoiding detailed, individualized eligibility determinations.²⁸ No such plan, however, can automatically solve the problems of administrative de-

24. See H.R. 1, 92d Cong., 1st Sess., (Social Security Amendments of 1971), tit. XX, § 2014(a)(1)(A), (a)(2) (1971) (House version), reprinted in 117 CONG. REC. H5660, H5696 (daily ed. June 22, 1971); H. REP. NO. 231, *supra* note 17, at 26.

25. In fiscal year 1970 there were 2,048,000 old age assistance recipients, and 80,000 blind recipients. Projected increases for 1971 and 1972 were: old age—2,098,000 and 2,169,000; blind—83,000 and 84,000. SPECIAL ANALYSES, BUDGET OF THE UNITED STATES, 1972 (Table L-14) (1971).

26. See H.R. 1, 92d Cong., 1st Sess., (Social Security Amendments of 1971), tit. XX, § 2014 (a)(3)(A)-(D) (1971) (House version), reprinted in 117 CONG. REC. H5660, H5696 (daily ed. June 22, 1971).

27. In fiscal year 1970 the existing federal-state aid to disabled program (APTD) had 798,000 recipients. Projected totals for 1971 and 1972 were 940,000 and 1,070,000. SPECIAL ANALYSES, *supra* note 25. Each of these figures is larger than the total number of disability insurance claims filed with SSA in 1970. See note 37 *infra*.

28. The "family assistance plan" concept, which is the informing principle of the Nixon Administration welfare reform embodied in H.R. 1, has distinct kinship to the concept of a guaranteed annual wage. It might be argued that expansion of such an assistance plan concept to the point of replacing the existing "social security" system (OASDI), especially the troublesome disability insurance program (DI), if not the basic retirement and survivors insurance program (RSI) as well, would be advantageous.

tail, adjudication and litigation which burden our present approach to welfare. These problems will persist whether welfare benefits are tied to personal need or to some theory of legal entitlement similar to the theories underlying the retirement and disability insurance programs. So long as persons are not free to help themselves from the "common warehouse," limited only by their own conscience and self-discipline, and instead, some limits of eligibility and amount are to be imposed upon them, time-consuming administrative problems will remain.²⁹

Adding eligibility criteria of need or ability to work, which are much less objective than the simpler standards of age, period of work or even capacity to perform one's last job, invites differences in perception and interpretation and provides the distinct possibility of varying decisions on similar facts. Thus, in the interest of fairness and equality, hearings and appeals are instituted, and the welfare recipient, in his economic life, almost unavoidably tends to become a "federal case." A level of fairness, equality of treatment, and "correctness" of decision which would be unmanageable in the private sphere³⁰ is sought—indeed, is constitutionally mandated because "state action" is involved. The long range question is at what point of volume and complexity a high level of decisional formality and review of each resource allocation determination becomes unworkable in the welfare system because decisions on claims cannot be produced with sufficient speed, fairness and consistency. The SSA disability insurance program is an interesting example of the way discretionary welfare programs posing difficult eligibility

29. The reason why, despite its large size, the original, wholly federal program (excluding the disability concept added in 1956) has not become an administrative monstrosity or a cause of burdensome litigation is because of its simplicity of concept and standards. Because there is neither a flexible eligibility standard nor an adjustment to need, no extraordinary difficulty in interpreting facts arises—payments fixed by statute are to be awarded to persons who have worked for the specified time period in an employment covered by the Act and have reached the statutory age. By contrast, in SSA's disability program the key concept is "workability"—that is, the claimant's theoretical capacity to perform any kind of gainful employment which exists in significant quantity in the national economy. This standard is far more elusive than the occupational disability concept common in private insurance. See pp. 700-09 *infra*.

30. Yet, viewed as an allocation of resources and rewards system, welfare systems do perform many of the same functions and make many of the same decisions which constantly recur in private employment—for example, in hiring, pay level, vocational training, work assignment, retention, promotion, transfer. For the employed, however, market forces with some contractual overlay make all of the key allocation decisions. The question of fair or equal treatment is seldom raised or made subject to formal protest and review.

determinations can acquire an escalating series of administrative and adjudicatory problems which have no ready solution so long as standards for deciding a large number of claims remain vague.

PROCESSING DISABILITY CLAIMS³¹

Claims Intake

Disability claims are filed by a claimant or his representative in one of the approximately 800 SSA district offices or sub-branches. The primary function of the district office—which has no decisional authority—is to perform an intake interview and to marshal the claimant's OASI earnings data to determine technical eligibility. Until 1971 the district office, in addition, obtained from the claimant and his physicians the relevant medical evidence of disability and job fitness.³² However, the establishment in 1971 of a new procedure termed "simultaneous development" has transferred the responsibility for compiling the medical data from the district office to the state agency. Now, after the district office has obtained the names of the claimant's physicians, and while it is completing the non-medical file, the state agency gathers the medical data from the identified sources. Through placing the state decisional body in control from the outset, the new procedure is designed to expedite the gathering of complete medical information and to avoid extensive contacts with physicians.³³

The determination of disability may actually begin at the district office level when the claims representative records his personal observations of the claimant on the intake interview form. These

31. Much of the factual material in this section concerning the processing up to the hearing examiner stage is derived from interviews in the summer of 1970 with Samuel E. Crouch, Deputy Director, Bureau of Disability Insurance; Carl Hall, Assistant Director, Division of Operations; and Edward J. O'Brien, Assistant Director, Division of Disability Policy and Procedure.

32. Providing medical data was (and still is) the responsibility of the claimant, but under the pre-1971 procedure he could receive considerable advice and assistance from the claim representative in the district office. The district office would hold the file until all medical reports were received and then forward the file to the state agency. The forms accumulated at this level included: (1) claimant's application; (2) report of disability interviews; (3) a medical development summary; (4) a summary of claimant's work activity; (5) release of hospital records; (6) requests for reports from attending physicians on the impairment.

33. Under the former procedure the decisional body—the state agency—might have sent the file back to the district office for further medical development if the initial medical reports were incomplete or unclear.

observations, which are not communicated to the claimant, may stand uncontradicted through the reconsideration stage.³⁴ Moreover, the intake interview may be the first and only face-to-face contact between the claimant and a representative of SSA.³⁵

Approximately 15-20 percent of the claims filed in district offices fail at the outset for nonsubstantive, technical reasons (for example, failure to meet insured status requirements)³⁶ and are sent directly to SSA-Baltimore headquarters for verification and official denial. Although included in the total denial figures for the initial determination stage, these cases are not referred to state agencies. State agency workloads at the initial determination stage, therefore, will normally be 15-20 percent smaller than the total claims intake.³⁷

After a case has left the district office, the file remains open for additional information concerning the initial disability date claimed. It also remains open under the continuing claim or "floating application" concept, whereby a valid claim may be filed if disability has occurred by the date of a given decisional stage, even though it did not exist at the earliest date claimed.³⁸ Therefore, the file may return to the district office several times for updating.

34. See I G. GOLDSBOROUGH, W. TINSLEY, A. STERNBERG, *THE SOCIAL SECURITY ADMINISTRATION: AN INTER-DISCIPLINARY STUDY OF DISABILITY EVALUATION* 170 (3 vols. 1963) (unpublished report contracted through Geo. Wash. Univ., on file with SSA-Baltimore). The two administrative stages after the district office—initial determination and reconsideration—are based on the record only, although pilot programs experimenting with state agency confrontation with the claimant at the initial consideration stage are now being conducted.

35. Early face-to-face contact at a decisional stage may be one way to reduce the volume of appeals and the rate of reversal at the hearing examiner stage. See text following note 124 *infra*. However, the district office activity is not a decisional stage, nor would it seem feasible to make it a decisional stage because of the intake volume, the number of offices to be supervised, and the recently reinforced tradition of state agency action.

36. 1970 Interviews, *supra* note 31.

37. Tabulations of total worker disability claims intake for fiscal years 1969-1972 are:

1969	716,215
1970	779,926
1971	966,000
1972 (est.)	1,175,000

Selected Data (Aug. & Sept.), *supra* notes 7, 12.

The disability intake figures reported in the United States Budget, which apparently include dependents' claims, are substantially higher:

1969	1,064,640
1970	1,152,125
1971	1,384,444
1972 (est.)	1,435,000

THE BUDGET OF THE UNITED STATES GOVERNMENT, 1971—APPENDIX 445; *id.* 1972—APPENDIX 473; *id.* 1973—APPENDIX 463.

Disability benefit payment outlays reported in the budget are:

Initial Determination—State Agency Role

When the district office file is complete, it is sent to the state agency in the claimant's home state, provided the claim has not been denied on technical grounds.³⁹ Under the "simultaneous development" procedure the state agency will already have been at work compiling the medical data. Usually, the "state agency" consists of a vocational rehabilitation agency with which the SSA has contracted for the performance of initial disability evaluations.⁴⁰ A two-man team, consisting of a physician and an official trained in disability evaluation, makes the disability determination⁴¹ and prepares a short, written decision which becomes part of the basic file; however, the result is not communicated to the claimant at this stage.⁴²

	<u>1970</u>	<u>1971</u>	<u>1972 (est.)</u>
Disability beneficiaries in current pay status (average for year)	2,495,000	2,666,000	2,922,000
Disability benefit payments (in millions)	\$ 2,778	\$3,381	\$3,961

THE BUDGET OF THE UNITED STATES GOVERNMENT, 1972—APPENDIX 473; *id.* 1973—APPENDIX 463.

38. 1970 Interviews, *supra* note 31.

39. See text accompanying note 36 *supra*. The propriety of referring every disability claim to a state agency may be questioned. Approximately half of the total claims can be disposed of on the basis of objective medical evidence furnished by the claimant's physician alone. 1970 Interviews, *supra* note 31. However, a 1965 proposal to eliminate state agency referrals in "obvious" cases was rejected, the states viewing it as a threat to their status. The 1971 "simultaneous development" policy takes the opposite stance, centering the initial medical "work-up" in the state agencies.

40. For this purpose the state agency is 100% federally funded and operates under SSA guidelines on disability determinations.

41. If additional evidence is deemed to be needed, there may be a consultative medical examination. The examination is performed, not by the physician member of the disability determination team, but by a private physician drawn from a federally-subsidized roster of physicians attached to the state agency. As a condition of maintaining his claim, the claimant must submit to a consultative examination if requested, 42 U.S.C. § 423(d)(5) (1970); 20 C.F.R. § 1527 (1971), and also must accept vocational rehabilitation efforts if offered, 42 U.S.C. § 422(b) (1970).

42. The statistics for state agency initial determination action in fiscal years 1969-70 are:

	<u>1969</u>	<u>1970</u>
Total referrals	642,057	603,329
Allowances	359,617	330,208
Denials	282,440	273,120

Selected Data (Sept.), *supra* note 7.

For discussion of the standards upon which the state agency's initial determination is based, see pp. 700-09 *infra*.

Initial Determination—SSA-Baltimore Role

The state agency decision and the claimant's file are sent to the Bureau of Disability Insurance (BDI) in the SSA-Baltimore headquarters for review by disability determiners⁴³ with the aid of medical specialists who are available for advice.⁴⁴ The degree of finality accorded the state agency decision depends on whether the state determiners have approved or denied the claim. A recommended approval of a disability claim can be rejected by BDI. On the other hand, a state agency's denial of a claim cannot be reversed directly,⁴⁵ although the denial may be remanded with a recommendation that the state agency change its decision.⁴⁶ Thus, on its own, BDI may not be more lenient than the state agency; however, it can be stricter, either by reversing an award or by limiting the period of eligibility through a finding that disability did not begin until later than the date fixed by the state agency or that disability ceased prior to an ending date determined by the agency.⁴⁷

43. There are approximately 700 disability determiners, about 10% having law degrees. As of 1970, nearly 500 were involved in review of state agency initial decisions. Another 200 were engaged in review of reconsideration actions. 1970 Interviews, *supra* note 31. Newly expanded sampling techniques, which provide for actual review of less than 10% of the state agency decisions, allow determiners more time for concentration on difficult cases and on reconsideration actions. Interviews with Samuel E. Crouch, Deputy Director, BDI, SSA, Dec. 2-3, 1971.

44. The standards for decision are the same at the state agency and the Baltimore levels. See notes 120-25 *infra* and accompanying text. Although training sessions are held, the volume of decisions and the rule of confidentiality have precluded recording and indexing of precedents at either level. For discussion of the level of consistency in the decision-making process, see pp. 709-22 *infra*.

45. See 42 U.S.C. § 421(c) (1970) (providing SSA "own motion" review only where the state agency determines that an individual is disabled).

46. *Id.*

47. The figures for BDI workload and dispositive action at the initial determination stage for fiscal year 1970 before initiation of the new sampling technique were:

Total initial applications processed	769,343
Technical denials without referral to state agency	158,000
State substantive denials changed to allowances after negotiation	5,422
Total substantive denials	273,120
State substantive allowances changed to denials by negotiation rather than outright reversal	6,204
Total allowances	330,208

Selected Data (Sept.), *supra* note 7. Several thousand claims, such as foreign and railroad claims, which are not processed by state agencies even if technical requirements are met, should be added to the above figures. It may be noted that the figures for initial applications filed in a

Although until recently all state agency decisions were reviewed,⁴⁸ by early 1972 BDI had reduced review by its disability determiners to a 5 percent sampling of the state agency determinations. In addition to this basic 5 percent sample, there is an independent 2 percent sample by the medical staff which is designed to provide a continuing review of the efficacy of the medical guidelines⁴⁹ and can also affect the decision in the cases reviewed. Finally, there is a 1 percent sample which monitors the whole program for administrative efficiency but does not affect the decision. The reduced number of claims now reviewed on their merits (BDI does control technical entitlement questions so that all state allowances do require a perfecting BDI decision) necessarily yields fewer occasions to return a state denial for negotiation or to reverse an allowance outright. Thus, the sampling practice makes the state agency decision the effective initial determination for most claims.

Allowances approved by BDI are final at this stage. Denials are recorded on a form showing the reasons for the decision, but an extensive rationale is not prepared; instead, a standard letter of denial is sent to the claimant.⁵⁰ The initial determination stage performs a valuable "flush" function in reducing the burdensome caseload to more manageable proportions through the expeditious rejection of meritless or technically defective claims⁵¹ and the ready allowance of "hardcore" disability claims.

Reconsideration Determination—State Agency and SSA-Baltimore

If the initial determination stage culminates in a denial,⁵² the

given year and initial applications processed in a given year will never be the same, because of necessary lag in processing time. For fiscal year 1970 the number of initial applications filed was 862,526. *Id.*

48. See 42 U.S.C. § 421(c) (1970) (which authorizes but does not require SSA review of state agency allowances, and implicitly withholds power to reverse a state agency denial).

49. Approximately half of the cases referred to state agencies and returned to BDI in the initial determination stage are disposed of under an objective medical-clinical approach. This wholly medical approach presumes disability if certain medically verifiable impairments are present. Cases in this category might be termed "hard-core disability" and seldom present decisional problems which require appeal. Selected Data (Sept.), *supra* note 7; 1970 Interviews, *supra* note 31. See notes 104-10 *infra* and accompanying text (describing the objective medical approach).

50. 20 C.F.R. § 404.907 (1971).

51. Examples of technically defective claims include those which are based on a work record insufficient to establish potential eligibility and those which are meritless in a *disability* sense because the claimant simply is unemployed and has the "miserics." 1970 Interviews, *supra* note 31.

52. Allowances at the initial consideration stage receive no further review, a factor which must be borne in mind in assessing reversal rates and measures of consistency.

claimant must request a reconsideration within six months or the denial becomes final.⁵³ A claimant's request initiates the reconsideration process, and the state agency-BDI determination procedure is repeated.⁵⁴ The second two-level examination of a claim is more deliberate—all cases are reprocessed by the state agencies, and all state agency redeterminations are substantively reviewed by BDI.⁵⁵

The first step in the reconsideration process is the updating of the file by the district office. At this point the claimant may have an interview⁵⁶ and submit additional medical evidence. Often, he will choose a new physician or consult specialists and thus present a stronger case than at the initial determination stage.⁵⁷ The second step is review of the file by the state agency, normally with a fresh team of determiners. After a decision by the state agency, the file is again forwarded to SSA-Baltimore for the third step in the reconsideration process. BDI may reverse a state agency decision to allow a formerly denied claim but can only send the claim back to the agency with a recommendation for an allowance if, upon reconsideration, the agency has upheld an initial determination of denial.⁵⁸

53. 20 C.F.R. §§ 404.908, .911 (1971).

54. *See, id.* § 404.914. The reconsideration stage is not specified by statute but is authorized by SSA regulations to give the claimant, the state agency and SSA a chance to correct erroneous denials at this level and thus to avoid the delay and expense of a hearing examiner proceeding.

55. There is no sampling technique at reconsideration (as of early 1972). The median time lapse from initial denial to request for reconsideration is 31 days. The claim is reviewed by fresh personnel in most instances. In terms of processing time, the median time from application to initial denial is 52 days, but from request for reconsideration to reconsideration decision, it is 62 days, despite the sharply reduced volume at the latter stage. Memorandum from Samuel E. Crouch, Deputy Director, BDI, SSA to Robert G. Dixon, Jr., Nov. 6, 1970.

56. Except for the district office interview, which is not a decisional stage, the regulations provide no face-to-face contact with the claimant at the reconsideration level.

57. For the mass of cases handled in the initial determination stage, time limitations inhibit the use of consultative physicians, especially specialists such as psychiatrists. However, upon reconsideration, in some cases the file built by the family physician will be augmented for the first time by an examination by a consultative physician. Hence, although in theory all of the cases in which allowances can rest solely on medical considerations should be eliminated during the initial determination stage (leaving for the reconsideration stage only those cases where the undecided factor is the subtle vocational element), many of the reversals at this stage (about one-third) rest more on medical factors than on vocational factors. 1970 Interviews, *supra* note 31.

58. The figures for BDI workloads and dispositive action at the reconsideration level for fiscal year 1970 are:

Total reconsiderations processed	109,453
Allowances	33,474
Denials	61,232

Selected Data (Sept.), *supra* note 7.

The open file-continuing claim concept complicates assessment of these figures. The allow-

Hearing Examiner Stage

Claimants who fail to receive a disability allowance at the reconsideration stage have six months from the date that notice of denial is mailed to file a request for a hearing before an examiner attached to SSA's Bureau of Hearings and Appeals.⁵⁹ When a request for a hearing is made, the claimant's files are transferred to the hearing examiner stationed in the area in which the claimant resides, and that examiner must schedule a hearing at a place as close as possible to the claimant's residence. In contrast with the two prior decisional stages, the claimant has a right to appear personally at the hearing.⁶⁰ In addition, he may be represented by retained counsel, although this right⁶¹ is infrequently exercised in practice.⁶² Unless the claimant authorizes a decision based solely on the written evidence,⁶³ the examiner holds a hearing at a location within 75 miles of the claimant's residence after a minimum of ten days notice.⁶⁴

Although the hearing is nonadversary, it is formal in the sense that a complete record is made⁶⁵ and both the hearing examiner and the claimant may subpoena and question witnesses under oath.⁶⁶ The hearing examiner has great latitude in the manner in which he conducts the hearing. New evidence is freely admitted under the open

ance of disability at the reconsideration stage may be based on new medical evidence or interpretations not available at the initial determination stage. Thus, because some second determinations, although technically classed as reversals, are really *de novo*, the open file-continuing claim concept operates to inflate the reversal rate. Moreover, this same factor inflates the reversal rate at all succeeding levels of review. It has been estimated that the reported reversal rates should be reduced by 10-15% to account for this inflationary factor. 1970 Interviews (Samuel E. Crouch), *supra* note 31.

59. 20 C.F.R. §§ 404.917-18 (1971). The Bureau, which also contains the Appeals Council, is located in Arlington, Virginia, thus necessitating transfer of files between Baltimore and the Washington area for cases which proceed above the reconsideration level.

60. *Id.* § 404.919.

61. *Id.* § 404.971.

62. In 1964-65, attorneys represented claimants in approximately 17-18% of the hearings. In the first six months of 1971, the number approached 21-23%. Figures obtained from Edward L. Binder, Technical Adviser, Bureau of Disability Insurance, SSA-Baltimore Headquarters, August 1971. The right to retained counsel is available at prior decisional stages, but cases in which it is exercised are rare. 1970 Interviews, *supra* note 31.

63. 20 C.F.R. § 404.934 (1971).

64. *Id.* § 404.923; SOCIAL SECURITY HANDBOOK § 2008, at 332 (4th ed. 1969).

65. 20 C.F.R. § 404.931 (1971).

66. *Id.* §§ 404.926, .929. Formal rules of evidence do not apply. *Id.* § 404.928. The conduct of the hearing is deemed to satisfy the Administrative Procedure Act as well as the Social Security Act. *Richardson v. Perales*, 402 U.S. 389, 408-10 (1971). See discussion at notes 244-56 *infra* and accompanying text.

file-continuing claim concept.⁶⁷ Moreover, at any time between the request for hearing and the mailing of the decision, the hearing examiner, on his own motion or by the request of a party, and subject to appropriate notice, may "consider any specified new issue . . . even though the Administration has not made an initial and reconsidered determination with respect to such new issue"⁶⁸ The typical hearing is quite informal with only the hearing examiner, the claimant, and a transcriber required to be present.⁶⁹ The hearing examiner may request a vocational specialist and a medical adviser to attend the hearing; after reviewing the file and observing the claimant's demeanor at the hearing, these experts may provide assistance in assessing the claimant's capacity for employment.⁷⁰

In keeping with the non-adversary nature of the proceeding, the role of the SSA hearing examiner is multi-faceted and dominant.⁷¹ In the usual case in which the claimant does not retain an attorney, the examiner functions as claimant's de facto counsel, striving to fully develop the case from the complainant's point of view. He is the first person with decisional authority to confront the claimant personally and elicit a connected account of his difficulties.⁷² Because there is no "defense counsel" to protect federal tax resources, the examiner also functions as government spokesman. His concern is to expose inconsistencies, gaps in the record, lack of claimant credibility, and to honor the statutory command that the claimant carry the burden of

67. See note 38 *supra* and accompanying text.

68. 20 C.F.R. § 404.924 (1971).

69. *See id.* §§ 404.919, .931.

70. *See id.* § 404.927. Each will have received relevant portions of the file, but neither will have examined the claimant prior to the hearing. A strong-willed medical adviser can support a conclusion of disability in such clear terms that a hearing examiner will have little choice but to concur or face an appeal. On the other hand, from the standpoint of avoiding reversal on appeal, the best ally that a hearing examiner can have is a forthright medical adviser who provides a clear statement supporting either a finding of disability or denial on which the examiner can base his own decision.

71. The non-adversary hearing is an atypical form of administrative adjudication. Moreover, many hearing examiners reversals of prior agency decisions represent a perfection of the administrative process rather than adjudication. Several contingencies may result in these overrulings: (1) the claimant's condition may degenerate (under the "open-file" rule, this decline is considered by the examiner); (2) new evidence concerning the initially claimed condition may become available; or (3) the examiner may reverse an erroneous state agency denial which BDI lacked power to overturn. See Comments of John Porterfield, President, Ass'n of Hearing Examiners, HEW, on SSA Disability Study at 12, 14, 16 (filed Nov. 23, 1971 with the Administrative Conference of the United States).

72. The claimant normally will not have exercised his right to file a written brief. 20 C.F.R. § 404.930 (1971). Moreover, although the record contains much discrete information, there is no written narrative account from the claimant's point of view.

proving disability.⁷³ Further, in his quasi-judicial role the hearing examiner has decisional authority under the law embodied in SSA regulations, rulings and current practice.⁷⁴ On the one hand, the

73. See 42 U.S.C. § 423(d)(5) (1970).

74. 20 C.F.R. §§ 404.939, .940 (1971). These aspects of the SSA policy-making process are discussed at notes 102-26 *infra* and accompanying text.

In fiscal year 1970, 32,000 hearings were processed, resulting in 14,000 allowances (reversals of administrative denials) and 18,000 denials (affirmances of administrative denials)—a reversal rate of 44%. Even more striking is the tabulation of reversals by hearing examiners from 1958-70 of disability appeals and total appeals, that is, disability plus retirement, and, since 1965, medicare claims. Disability claims, excluding "black lung," average approximately 85% of the total number of appeals. The figures are:

HEARING EXAMINER RATE OF REVERSALS OF SSA ADMINISTRATIVE
DETERMINATIONS

Fiscal Year	Reversals of Total Appealed to HE	Reversals of Disability Appealed to HE
1970	41.6%	44.4%
1969	38.2%	40.3%
1968	38.8%	40.4%
1967	39.5%	41.2%
1966	37.7%	38.7%
1965	28.9%	29.8%
1964	28.3%	29.0%
1963	21.1%	20.4%
1962	19.8%	19.0%
1961	22.8%	21.8%
1960	15.2%	13.9%
1959	11.0%	9.0%
1958	8.4%	4.1%

Tabulation furnished by Carlile Bolton-Smith, Assistant to the Bureau Director for Liaison, Bureau of Hearings and Appeals, SSA, Nov. 6, 1970 (copy on file with author).

Hearing examiner lag data for fiscal year 1970 show that the national median elapsed days from date hearing requested to disposition was 112 days. Management Effectiveness Report, furnished by office of Carlile Bolton-Smith, Assistant to the Bureau Director for Liaison, Bureau of Hearings and Appeals, SSA (Sept. 1, 1971) (copy on file with author).

Total hearing examiner workload and case disposition for recent fiscal years is:

	1960	1965	1969	1970	1971
All Requests for Hearing	13,778	23,323	34,244	42,573	50,101
Hearing Requests Processed	20,262	23,393	31,912	38,480	45,301
Affirmances (denial not changed)	12,788	14,578	16,789	18,542	N.A.
Reversals (allowances)	3,076	6,754	12,206	16,005	N.A.
Dismissals	4,398	2,061	2,917	3,933	N.A.
Disability Cases as % of All Requests for Hearing	71%	87%	82%	82%	81%

Briefing Pamphlet for Bureau of Hearings and Appeals (1970) (as updated) (unpublished, on file with SSA Bureau of Hearings and Appeals); supplementary material furnished by Roger Gentsch, Bureau of Hearings and Appeals.

quasi-judicial concept points in the direction of examiner independence from institutional pressures other than the formal appeal process itself. On the other hand, except in the "hardcore" disability cases which normally would not reach this stage, the multiplicity of factors and the subjectivity of the standard that are involved in a disability determination at this level may call for an institutional decision.⁷⁵

75. The question of hearing examiner independence was the subject of comment in the "Horsky Report" in 1961. C. Horsky & A. Mahin, *The Operation of the Social Security Administration, Hearing and Decisional Machinery* (1960) (unpublished and on file with the Administrative Conference of the United States). Although critical of some SSA practices—for example, *ex parte* communications between hearing examiners and medical advisors, *id.* at 410-19, a practice no longer followed—the Horsky Report was extremely sensitive to the need for frequent communications of many kinds to hearing examiners concerning agency policy. *Id.* at 382-83. Various memoranda, sent to the hearing examiners by the program division, which set forth legal or policy determinations were not seriously questioned. *Id.* at 394-95. The Horsky Report took a position more liberal in this area than did responsible officials inside SSA itself. Memorandum from Harold P. Packer, Assistant General Counsel, HEW, to Harold W. Horowitz, Associate General Counsel, HEW, August 7, 1971 (on file with the Administrative Conference of the United States). The House Subcommittee on the Administration of the Social Security Laws, in addition to questioning certain communications between SSA and the hearing examiners, objected to examiner "production quotas." SUBCOMM. ON ADMINISTRATION OF THE SOCIAL SECURITY LAWS, 86TH CONG., 2d SESS., PRELIMINARY REPORT ON ADMINISTRATION OF SSA DISABILITY INSURANCE PROGRAM 37 (Comm. Print 1960).

The matter of hearing examiner independence has recently been raised again in a report recommending that the Section on Administrative Law of the American Bar Association call upon the ABA to institute a thorough study of SSA hearing examiner independence. J. Gammon, *Hearing Examiners Subcommittee Report on Social Security Administration*, reprinted in 7 ABA ADMINISTRATIVE LAW SECTION 25 (1970). The report quotes a comment of Judge Thomas F. McAllister, Senior Judge, Sixth Circuit, complaining about hearing examiner disregard of disability rulings of that circuit. *Id.* at 26. A response to the Gammon Report in an SSA position paper notes the inappropriateness of the quotation from Judge McAllister which was made prior to the 1967 Amendments to the Social Security Act when SSA was resisting the tendency of many courts to apply a more liberal standard of disability than Congress had intended. Letter from Charles M. Erisman, Acting Director of Bureau of Hearings and Appeals, to Dan M. Byrd, Jr., Chairman, ABA Section of Administrative Law, April 6, 1970 (on file with Administrative Conference of the United States). For discussion of the 1967 Amendments and the conflict which led to their enactment, see notes 96-101 *infra* and accompanying text.

76. Appeals Council total workload figures for recent years (80-85% constituting disability cases) are:

	<u>1960</u>	<u>1965</u>	<u>1969</u>	<u>1970</u>
Total cases received	7,408	8,785	10,038	11,269
Total cases processed	8,386	8,320	10,104	11,094
Total affirmances	435	710	769	769
Total reversals	300	797	999	1,380
Total substantive decisions	735	1,507	1,768	2,149

Memorandum from Carlile Bolton-Smith, Assistant to the Bureau Director for Liason, Bureau of Hearings and Appeals, SSA to Robert G. Dixon, Jr., Sept. 1, 1971.

The projected total workload for fiscal year 1972 is 16,899 cases received. Briefing Pamphlet

Appeals Council Stage

The Appeals Council is the reviewing authority which stands at the apex of the administrative structure for processing disability claims.⁷⁶ A claim normally reaches the Appeals Council in one of three ways: (1) the Council may remove a hearing request which is pending before a hearing examiner and conduct the proceeding itself;⁷⁷ (2) a hearing examiner may decline to decide a case and certify it to the Council with a recommended decision;⁷⁸ or (3) a claimant may appeal a hearing examiner's denial of disability.⁷⁹ In addition, the Appeals Council monitors unappealed hearing examiner decisions and may recommend modification for "technical errors." The Appeals Council may deny a claimant's request for review⁸⁰ and does so in a large majority of cases.⁸¹

The Appeals Council usually operates in panels of two members and may utilize medical and vocational advisers. One of the two panelists writes an opinion, and if the second concurs, the opinion becomes an Appeals Council decision. If the second disagrees, another panelist is called in to break the deadlock.⁸²

In a removed case, a certified case, or an appeal which leads to an outright reversal of the examiner's decision, the Council's determi-

for Bureau of Hearings and Appeals (1970) (as updated) (unpublished, on file with SSA Bureau of Hearings and Appeals). Most of the gap between the large number of cases processed and the small number of substantive decisions is explained by the fact that review is discretionary and the Appeals Council frequently denies requests for review. Most of the hearing examiner decisions reviewed are denials because, normally, only denied claims move up the ladder. However, through exercise of its "own motion" review, the Appeals Council may reverse an allowance. See note 77 *infra* and accompanying text. BHA reports do not indicate the number of allowances reversed, but the figure is probably low (spokesmen say that the Appeals Council generally hesitates to reverse an allowance because of the adverse psychological effect of retracting a benefit already granted to needy persons).

77. 20 C.F.R. § 404.941 (1971). In such a case the hearing is governed by rules applicable to a hearing examiner hearing. *Id.*

78. *Id.* §§ 404.939, .942.

79. *Id.* § 404.945. Appeal must be made within 60 days. *Id.* § 404.946. In either a certified case or an appealed case, evidence in addition to that admitted by the hearing examiner may be received if the Appeals Council feels that such evidence may affect its decision, *id.* §§ 404.943, .949, and the claimant may file briefs and present oral argument, *id.* §§ 404.942, .948 (the regulations are unclear on the right to oral argument in an appealed case, but the right is accorded).

80. *Id.* §§ 404.947, .951.

81. See note 76 *supra*.

82. Moreover, when there is disagreement, either original panelist or tie breaker has the option of asking for an en banc consideration. Letter from Charles M. Erisman, Acting Director of Bureau of Hearings and Appeals, to Professor Roger Cramton, April 1, 1970 (on file at the Administrative Conference of the United States).

nation simply supersedes the examiner's. However, an appeal may result not in an affirmance, modification or formal reversal of the examiner's decision, but in a remand to the examiner with directions to rehear the case and to issue a decision or to take further testimony and return the record to the Appeals Council with a recommended decision.⁸³ Alternatively, without reversing, the Council may informally return a case to the examiner, suggesting that there are technical errors and that the examiner may wish to "correct" his decision.⁸⁴ Given these various alternatives of contact with the hearing examiners, the line often becomes blurred between formal appellate action which does not compromise the independence of the hearing examiner and corrective institutional contacts of an informal, revisory nature.⁸⁵

The decision of the Appeals Council, or the decision of the hearing examiner where the claimant's request for review is denied, is final unless a civil action is filed in a federal district court.⁸⁶ Appeals Council decisions, like the decisions of hearing examiners, are not published and do not have precedential value.⁸⁷ Occasionally, however, a particularly significant case may be elevated to the level of a Ruling, which does have precedential value.⁸⁸

Judicial Review

Within sixty days following a final administrative decision deny-

83. 20 C.F.R. § 404.950 (1971).

84. In practice, because the Appeals Council does not have a formal operating staff, analysts in the Bureau of Hearings and Appeals Division of Program Operations routinely review hearing examiner decisions and recommend to the Council whether its "own motion" review power should be exercised. Examples of situations where technical corrective action would be taken include a failure upon receipt of new evidence to reopen and modify a prior decision which had determined that the current claimant was not disabled, or a mistake in setting the eligibility date. Interviews with Bureau of Hearings and Appeals Staff, June 1971.

85. For discussion of the hearing examiner/Appeals Council relationship as it affects hearing examiner independence, see note 75 *supra* and accompanying text.

86. 20 C.F.R. § 404.951 (1971). However, any decision from the initial determination stage through the Appeals Council stage may be reopened for specified reasons during a period extending up to four years for "good cause" such as new evidence; moreover, the decision may be reopened at any time for reasons such as fraud. *Id.* § 404.957.

87. Primary reasons for not publishing the decisions are (1) the concern for maintaining confidentiality regarding the personal medical impairments of the claimant and other related personal matters and (2) the large volume of decisions, which, together with the factual stress and the brevity of the rationale, would make them of little use as precedents anyway. Most decisions, based upon a Council reaction to the totality of the often conflicting evidence in the record and its application of the uncertain congressional standards, are a borderline type not readily transferable to new fact situations. BHA Interviews, *supra* note 84.

88. See notes 128-30 *infra* and accompanying text.

ing his claim of disability, a claimant may file an appeal with the United States district court for the district in which he resides or has his place of business.⁸⁹ The answer, filed by the Secretary of HEW, must include the evidence upon which the SSA findings and decision are based. Factual findings of the Administration, if supported by substantial evidence,⁹⁰ are conclusive. The court may affirm, modify, reverse, or remand for a rehearing, and its decision may be appealed to the court of appeals in the same manner as judgments in other civil actions.⁹¹ A high rate of judicial reversal of SSA decisions has probably contributed to the heavy workload of both district courts⁹² and courts of appeal⁹³ by encouraging disability claimants to appeal.⁹⁴

DISABILITY STANDARDS: DEFICIENCIES IN CLARITY AND CONSISTENCY

The critical problem in the SSA disability program may center not in the several-tiered administrative determination process, but

89. 42 U.S.C. § 405(g) (1970). If he does not reside or have his principal place of business within such a judicial district, the claimant may bring an action in the United States District Court for the District of Columbia. *Id.*

90. *Id.* See notes 235-56 *infra* and accompanying text (discussing the substantial evidence rule and its application to SSA findings).

91. 42 U.S.C. § 405(g) (1970). For discussion of the disposition of many courts, particularly prior to the 1967 Amendments, to ignore the substantial evidence rule, to give trials de novo, and in effect, to convert the disability benefit program into a type of unemployment compensation system, see pp. 722-32 *infra*.

92. Statistics indicate the burdensome district court workload:

	<u>1968</u>	<u>1969</u>	<u>1970</u>	<u>1971</u>
New disability complaints	—	1392	1369	1537
Combined affirmance rate	—	60%	62%	62%
Cases awaiting disposition	1440	1772	2001	2260

(Allowances after remand are treated as reversals.) Figures are derived from 1968-72 Quarterly Reports on SSA Civil Litigation Activity (issued as memoranda by the Bureau of Retirement and Survivors Insurance).

93. Recent courts of appeal workload figures are:

	<u>1969</u>	<u>1970</u>	<u>1971</u>
Affirmed	25	47	65
Reversed	2	2	9
Remanded	10	4	12
Affirmance rate (counting remands as reversals)	70%	89%	76%
Pending cases	51	78	69

Id.

It must be noted that, while all district court "affirmances" support an SSA denial (because

rather in the inexactness of the statutory standards, the lack of clarity and precision in the rule-making procedures, and the interrelationship of the standards problem with the administrative process. No study of the existing administrative process for determining disability claims, with its high rate of reversals, can be meaningful or productive without emphasizing the problem of standards. Neither the initial congressional definition of disability nor the redefinition of 1967 seems to be administratively manageable, and the problem of refining the standard and applying it with clarity and consistency is aggravated when the courts ignore the substantial evidence rule.⁹⁵

The Statute

The basic standard has always been total disability—the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment”⁹⁶ Until 1965 this concept was qualified and limited by the requirement that the disability be one “which can be expected to result in death or to be of long-continued and indefinite duration.”⁹⁷ However, in 1965 the “duration” requirement was eased to include disability

only denials are appealed), court of appeal affirmances are uninformative unless one knows whether the district court ruled for or against the SSA denial.

From the inception of the disability program through calendar year 1970, the overall record for cases in the courts of appeal is: 232 decisions for SSA, 78 against; 84 remanded to SSA; 58 dismissed on technical grounds. Disregarding the dismissals, the combined affirmance ratio (adding remands to decisions against SSA) is 232 to 162. *Id.* For the period 1957-70 the combined federal court review record (district courts and courts of appeal) on the 9940 final actions (of 7939 complaints filed in the district courts) is: affirmed SSA decision—3724; reversed SSA decision—1594; Appeals Council decisions favorable to claimant on remand—1811. Adding remands to reversals, the combined affirmance ratio is 3724 to 3405—only slightly better than 50%. *Id.*

94. The problem of frequent court review and reversal of SSA hearing examiner decisions centers in the disability program rather than in the larger OASI retirement program. As summarized by one observer in 1968: “Prior to the availability of disability benefits, beginning in 1957 . . . relatively few cases arose from the anonymity of administrative decision. In the last ten years the volume of litigation has multiplied.” Viles, *The Social Security Administration Versus the Lawyers . . . And Poor People Too*, 39 *Miss. L.J.* 371, 390 (1968).

95. Regarding judicial action, the caveat must be added that the record of judicial review under the 1967 Amendments is insufficient to permit a conclusive evaluation. The recent Supreme Court case of *Richardson v. Perales*, 402 U.S. 389 (1971), may reflect a disposition to respect the relative informality of the SSA hearing procedures and to adhere more closely to the substantial evidence rule. See discussion at notes 244-56 *infra* and accompanying text.

96. See Social Security Amendments of 1956, ch. 836, tit. I, § 103(a), 70 Stat. 815 (1956) (codified at 42 U.S.C. § 423(c)(2) (1958)), *as amended*, 42 U.S.C. § 423(d) (1970).

97. *Id.*

“which has lasted or can be expected to last for a continuous period of not less than 12 months”⁹⁸

The administrative regulations defining the disability standard were intended to carry out the apparent congressional intent that this program constitute an extraordinary program for the disabled, involuntary, premature retiree, and *not* be merely another species of unemployment compensation.⁹⁹ Thus, SSA attempted to denote certain objective, hard-core disability areas in order to expedite claims handling at the initial determination stage and sought to introduce on a national basis some standardization, objectivity and uniformity in proceedings on borderline disability claims. The courts, however, showed a marked tendency in interpreting the statute to convert the program into a humanitarian unemployment program for any worker whose unemployment had some demonstrable basis in physical or mental trauma. The simple fact that there had been some disability and that the immediate claimant had lost his job or his zest for work created a near-presumption of a right to “get his tontine now.”¹⁰⁰

In 1967 Congress amended and clarified the statute in an attempt to force the courts to adhere to the basic, narrow, total disability concept:

98. Social Security Amendments of 1965, tit. III, § 303(a)(2), 79 Stat. 367 (1965), amending 42 U.S.C. § 423(c)(2) (1964) (presently codified at 42 U.S.C. § 423(d)(1)(A) (1970)). Legislative history indicates that the change from “indefinite duration” to “12 months” was made because experience showed that “in the great majority of cases in which total disability continues for at least a year the disability is essentially permanent.” 1 U.S. CODE CONG. & ADMIN. NEWS 2039 (1965). The change, which clarified and liberalized proof, but not the total disability concept, was expected to make 60,000 workers and dependents immediately eligible. *Id.* at 2040.

99. See HOUSE COMM. ON WAYS AND MEANS, SOCIAL SECURITY AMENDMENTS OF 1967, H.R. REP. NO. 544, 90th Cong., 1st Sess. 28-31 (1967); SENATE COMM. ON FINANCE, SOCIAL SECURITY AMENDMENTS OF 1967, S. REP. NO. 744, 90th Cong., 1st Sess. 46-50 (1967). The Senate report states that “[t]he original provision was designed to provide disability insurance benefits to workers who are so *severely disabled* that they are unable to engage in any substantial gainful activity.” *Id.* at 49 (emphasis added). However, the “definition of disability has eroded over a period of time,” resulting in a “significant increase in the proportion of the population becoming disabled within the definition,” although the actual proportion of disabled persons within the population has not increased. *Id.* at 47.

100. The report of the House Ways and Means Committee reviewing the problem which preceded the 1967 Amendments noted that one court had expressed with admirable frankness the degree of judicial rejection of congressional intent:

The standard which emerges from these decisions in our circuit and elsewhere is a practical one: whether there is a reasonably firm basis for thinking that this particular claimant [who has shown inability to perform his usual vocation] can obtain a job within a reasonably circumscribed labor market. H.R. REP. No. 544, *supra* note 99, at 29 (1967).

[A]n individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.¹⁰¹

However, the variables of age, education, and previous work experience, coupled with often conflicting medical data and uncertainty concerning claimant's theoretical capacity to adjust to a new, less demanding line of work, still leave much room for differences of opinion in similar cases arising under the "clarified" statute.

Regulations

The evaluation standards promulgated by SSA¹⁰² which are relevant to disability determination for the mass of general claimants (workers in fully insured status under the OASI retirement program) are contained in a single SSA regulation, section 1502.¹⁰³ The three tests of disability which seem to emerge from this regulation form a progression from "hard-core" to "borderline" disability, and a determiner cannot finally decide to deny a claim until he has considered all three tests.

Test I, derived from section 1502(a), might be termed an objective medical approach.¹⁰⁴ Section 1502(a) is supplemented by a long medical appendix listing various types of physical impairments—for example, loss of both hands, both feet, or one hand and one foot.¹⁰⁵

101. Social Security Amendments of 1967, tit. I, pt. 4, § 158(b), 81 Stat. 868, *amending* 42 U.S.C. § 423(c)(2) (1964) (presently codified at 42 U.S.C. § 423(d)(2)(A) (1970)). The statute adds further definitional detail:

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 in the country. *Id.*

. . . .

[A] "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. *Id.* § 423(d)(3) (1970).

102. The rulemaking power is specifically conferred upon SSA in *id.* § 405(a).

103. 20 C.F.R. § 404.1502 (1971). The other disability regulations, *id.* §§ 404.1501, .1503-39, deal with various matters of detail including the special rules applicable to the blind, widows and widowers.

104. *Id.* § 404.1502(a) (beginning at the fourth sentence).

105. *See id.* § 404.1506; Appendix following *id.* § 404.1539.

If a claimant's medical abnormalities fit a particular category in the schedule of impairments, his claim is approved without consideration of his residual work capacity and ability to overcome his impairment. Hence, section 1502(a) specifies that, on "medical considerations alone" (absent rebuttal evidence), a claimant can be deemed disabled "where his impairment is one that meets the duration requirement . . . [continuous 12 month period] and is listed in the appendix" ¹⁰⁶ Moreover, an applicant whose defect is not listed may still be deemed disabled on medical considerations alone if his impairment, or combined impairments, are "medically the equivalent of a listed impairment." ¹⁰⁷

Test I is designed to set up an objective category of hard-core disability analogous to the widespread, schedular approach employed in state workmen's compensation systems. ¹⁰⁸ Although the objective medical standard seemingly conflicts with the literal language of the statute, which calls for assessment of individual residual work capacity in all instances, ¹⁰⁹ Congress apparently approves of the approach. ¹¹⁰ Administratively, Test I supports a vital "flush" process. Under the test, a large number of the claims filed annually can be allowed without resort to a face-to-face hearing. To reject Test I and require further, subjective assessment of each claimant's capacity to overcome severe handicaps would tend to create added administrative problems for SSA and at the same time might be disadvantageous to claimants by increasing the number of imponderable cases and penalizing individuals possessing strong, work-oriented personalities.

Test II, created by section 1502(c), is a semi-objective standard which encompasses what may be characterized as the "worn-out" manual laborer syndrome. An "individual with a marginal education

106. *Id.* § 404.1502(a).

107. *Id.*

108. *See, e.g.*, ALA. CODE tit. 26, § 279 (Supp. 1969); IND. ANN. STAT. § 40-2208 (Supp. 1971); TENN. CODE ANN. § 50-1007 (Supp. 1971); VA. CODE ANN. § 65.1-56 (Supp. 1971).

109. *See* 42 U.S.C. § 423(d)(2)(A) (1970).

110. Congressional committee reports on the 1967 Amendments seem to endorse the objective medical approach of Test I. *See* H.R. REP. NO. 544, *supra* note 99, at 30-31 (1967), and the following language in the corresponding Senate report: "In most cases the decision that an individual is disabled can be made solely on the basis of an impairment, or impairments, which are of a level of severity presumed (*under administrative rules*) to be sufficient so that, in the absence of an actual demonstration of ability to engage in substantial gainful activity, it may be presumed that the person is unable to so engage . . ." S. REP. NO. 744, *supra* note 99, at 49 (emphasis added). The amendments were designed to clarify the standards for the more borderline claims where the impairments were insufficient to qualify for the presumption.

and long work experience . . . limited to the performance of arduous unskilled physical labor," who is unemployed and unable to perform his accustomed labor because of a significant impairment or impairments may fall within this classification if, considering his age, education and vocational background, he is unable to engage in lighter work.¹¹¹ The test has special relevance for aged, unemployed coal miners, but, of course, is not confined to that work category. In Test II, SSA has recognized that, as a practical matter, such workers are unwilling to go very far from their established homes or accept retraining for sedentary jobs, although theoretically they have sufficient residual capacity to perform some kind of gainful activity which exists to a significant degree in their home region or in several areas of the country. Like Test I this criterion conflicts with the literal language of the federal statute, but apparently has congressional acquiescence.

Test III, extracted from section 1502(b), may be characterized as the subjective medical-vocational approach. This test does little more than repeat the terms of the statute.¹¹² A person who has not qualified for an award under Test I or Test II may be determined to be disabled if the impairments he does possess, in light of his age, education and work experience, make him unable to engage in *any* kind of substantial, gainful work which exists to a significant degree in his geographical region or in several regions of the nation. Most of the cases which reach at least the hearing examiner level involve this broad test, because even a person with relatively severe impairments may have sufficient residual skill and physical capacity to perform a number of relatively simple occupations.

The "abstract capacity-for-gainful-activity" test is reached, however, only if the worker can first show by medical evidence that his impairments are the primary reason for the inability to do his previous work or work commensurate with his previous work. Mere failure to regain the old job or to obtain similar employment does not suffice. Thus, although approximately half of the substantive claims fail to qualify for an allowance under the objective and semi-objective disability criteria of Tests I and II, and thus must be evaluated under Test III, a majority of the persisting claims are denied at this point

111. 20 C.F.R. § 404.1502(c) (1971).

112. See note 101 *supra* and accompanying text.

because the "disabled" worker can still perform his last type of work.¹¹³

If the previous-work rule hurdle is surmounted by the claimant¹¹⁴—which is analogous to a determination of occupational disability—officials must determine if there are any jobs existing in "significant numbers," either in the claimant's home area or in two or more areas of the nation, which, theoretically, the claimant could perform.¹¹⁵ If the claimant has remained unemployed, not as a result of his physical or mental impairment, but because he is unsuccessful in obtaining work he could do or because work he could do does not exist in his local area, he is not deemed disabled.¹¹⁶ Even where his inability to find work is due to the hiring practices of employers, technological changes in the industry in which he has worked, or cyclical economic conditions, the claim of the worker who can perform some type of work will fail.¹¹⁷

Disability Insurance State Manual

For the guidance of the state agencies and BDI personnel at the initial determination and reconsideration stages, SSA has compiled the *Disability Insurance State Manual*. In addition to general guidelines for disability determinations, the *Manual* contains administrative interpretations of the law and regulations in the form of Disability Insurance Letters. Although theoretically the instructions or guidelines that may form the basis for a disability determination should be binding at all stages of the decisional process in order to avoid reversals which are based simply on different understandings

113. Letter from Arthur E. Hess, Deputy Commissioner of Social Security Administration to Professor Roger C. Cramton, Chairman, Administrative Conference of the United States, November 30, 1971 (commenting on disability program research); interviews with Bureau of Disability Insurance Staff, December, 1971.

114. In percentage terms the residuum of highly discretionary borderline claims under Test III is a small portion—15 to 20%—of the total intake but the residuum is large in absolute terms because of the high intake volume. *Id.* Also, as indicated in the next section, consistency problems, although most urgent for this residuum group, affect the processing of claims under the nominally more objective tests which are applied before reaching the abstract capacity-for-gainful-activity test, which is often called the "national economy" test by SSA officials.

115. 20 C.F.R. § 404.1502(b) (1971).

116. *Id.* However, "isolated jobs of a type that exist only in very limited number or in relatively few geographic locations shall not be considered to be 'work which exists in the national economy' for purposes of determining . . . disability; an individual is not denied benefits on the basis of the existence of such jobs." *Id.*

117. *Id.*

of basic policy, the *Manual* is not binding at the hearing examiner stage or above. However, the Disability Insurance Letters which comment on and seek to clarify the basic disability regulation¹¹⁸ do little more than paraphrase the statute or the regulation. Hence, a state agency or BDI determiner working with the *Manual* and a hearing examiner relying upon the regulations should not have markedly different perceptions of the same case.¹¹⁹

Yet, in clearer fashion than either the statute or the regulation, Disability Insurance Letter III-3 does create a presumption against a finding of disability throughout the borderline claims area of Test III.¹²⁰ The presumption seems consistent with the apparent congressional intent to create a premature involuntary retirement program rather than a general unemployment or welfare program.¹²¹ Claimants affected by the presumption have already been denied a disability allowance on the basis of Test I (the objective medical approach based on listing of impairments)¹²² and Test II (the "worn-out" manual laborer syndrome).¹²³ By definition, such claimants all retain some residual functional capacity for work.

However logical and correct this adverse presumption may be for the borderline cases under Test III, it has no binding effect above the reconsideration stage. The significant difference in the vigor of its application by hearing examiners and courts on the one hand, and by the initial disability determiners on the other, indicates another defect in the present system of disability standards. Even if the 1967 Amendments induce the courts to modify their pro-claimant disposition,¹²⁴ thus lessening the threat to hearing examiners of appellate reversal of decisions adverse to claimants, the examiners may continue to be more liberal than the state agency or BDI determiners. With the unemployed and at least partially disabled claimant before him, a hearing examiner may well be more reluctant to adhere to the adverse

118. *Id.* § 404.1502.

119. See OASI Disability Insurance Letters, Nos. III-1, III-2, III-3 (issued July 4, 1967) and III-8 (issued Jan. 8, 1968; supplemented May 10, 1968) (filed in Part III of DISABILITY INSURANCE STATE MANUAL), which attempt to provide guidance under the 1967 Amendments.

120. See *id.*, Letter III-3, at 3-4 (particularly the italicized portions). The Letter states that "[i]n a predominant number of cases adjudicated under § 404.1502(b), the applicant will be found to have the residual functional and vocational ability to meet job requirements" *Id.* at 3.

121. See note 99 *supra*.

122. See notes 104-10 *supra* and accompanying text.

123. See note 111 *supra* and accompanying text.

124. See notes 199-217 *infra* and accompanying text.

presumption than a determiner reacting only to the written record. Moreover, an additional psychological factor may operate to maintain a significant rate of reversals by hearing examiners. The state agency or BDI determiner receives a general mixture of cases, and his tendency to occasionally vote affirmatively can find an appropriate outlet in the Test I and Test II cases, while he still upholds a stringent policy in the Test,III borderline area. But, because the hearing examiner receives a virtually unrelieved stream of the closer Test III cases, his impulse to allow a certain number of claims and his interest in exercising hearing examiner independence can be fulfilled only by reversing Test III denials.

On the other hand, to the extent that they are based on an objective appraisal of the claimant's psychological condition manifested at the hearing, a substantial number of hearing examiner reversals of denial may be justified under the present standards. The claimant's attitude towards enduring pain, discomfort and restricted movement, his enthusiasm for trying to learn a new skill, his willingness to adjust his life style to the need for greater off-the-job rest, his residual vitality in general, and especially his pride, comprise his psychological "set" and are relevant decisional factors in the borderline Test III area. None of these combined fact-law considerations can be readily determined by a medical expert, although medical factors are relevant, nor can they be precisely decided by a vocational expert. Often, a solution does not spring from the formal record but requires the face-to-face contact of a hearing.

Thus, unintentionally, the SSA disability determination system may be structured to guarantee a significant reversal rate by hearing examiners. The "flush" system at the two lower determination levels is too thorough, and the first decisional authority to have face-to-face contact with claimants has its discretion warped by the unnaturally skewed case population it receives. Although this phenomenon may be a hazard in all appellate systems, it can be especially acute in the disability field, where the hearing examiners operate under a very subjective standard and, not being truly appellate,¹²⁵ cannot resort to the substantial evidence rule and simply sustain lower level denials on that ground.

125. Although appellate in an administrative hierarchy sense, the examiners are generically a trial body because they are the first SSA level empowered and obligated to build a formal record which will provide a basis for court review under the substantial evidence rule. *See* 20 C.F.R. §§ 404.917, .921, .931 (1971).

Rulings

The last category of formal standards in the disability determination process is made up of the Rulings which the Commissioner of Social Security promulgates intermittently, primarily in response to recommendations of the Appeals Council.¹²⁶ Normally, the Rulings are inspired by particular Appeals Council or judicial decisions and constitute an authoritative body of precedent binding on the entire SSA administrative decisional process below the Appeals Council level.¹²⁷ If an Appeals Council determination is selected for promulgation as a Ruling, the decision, in order to protect confidentiality, is first generalized by deleting the names of parties and specific facts which would indicate identities. The Rulings based on Appeals Council decisions, therefore, are more particularized than a regulation but more abstract than an actual case precedent. At present, the Rulings have not been issued in sufficient volume or with sufficient precision to alleviate the problem of excessive administrative discretion in the Test III borderline case area which is caused by the abstract capacity-for-gainful-activity test.¹²⁸

CONSISTENCY IN THE APPLICATION OF STANDARDS

Processing a large number of claims under imprecise standards makes it difficult to maintain consistency of treatment. With respect to the SSA disability claims process, this problem is intensified due to the numerous decision-making levels.¹²⁹ The actual, empirical dimensions of the general consistency question represent one of the

126. See *id.* § 422.408, which provides: "Social Security Rulings are published under the authority of the Commissioner of Social Security and are binding on all components of the Administration."

127. The regular Appeals Council and hearing examiner decisions are not published because of volume and in order to protect confidentiality and thus promote full disclosure of medical evidence. They do not have precedential authority, even if known. See note 87 *supra* and accompanying text.

128. In the period 1960-70, the Secretary issued 103 disability rulings, of which 59 were based on agency decisions and 44 on court decisions. Since the 1967 Amendments fewer Rulings have been issued. From 1968 through June 1971, 25 Rulings have been issued, of which 13 are based on agency decisions and 12 on court decisions. Statistics compiled from *Social Security Rulings* (1960-70). The Rulings deal not so much with questions of definition and discretion in Test III cases as with narrow issues such as refusal to undergo corrective surgery for religious reasons, refusal to submit to physical examination, effect of a prior disability determination by another agency, or effect of confinement under a defective delinquent statute. This type of Ruling is so specific that it would seldom be of help to a hearing examiner or administrative official dealing with borderline cases at the reconsideration and hearing stages.

129. See note 13 *supra* and accompanying text.

least studied aspects of administrative law. However, the consistency of disability determinations has been subjected to extensive study under contracts from HEW.¹³⁰ Although these studies would be more valuable if the research designs and analyses were more attuned to current administrative law and procedure, and were directed toward producing practical suggestions for administrative improvement, they do provide a partial basis for the following analysis of the consistency problem.

Consistency in Initial Determination and Reconsideration Stages

As the number of annual disability claims entering the system climbs above one million, the number of these claims which reach the hearing examiner stage is approaching forty thousand and may soon exceed fifty thousand. Between the district office stage, where a disability claim is initially filed, and the hearing examiner level, a major "flush" process occurs through the operation of BDI in the two administrative decisional stages at the SSA-Baltimore headquarters—the initial determination stage and the reconsideration stage.¹³¹ In each stage, there is joint federal-state agency action, except for nonsubstantive technical denials, actions on foreign claims, and other small special categories. Given the degree of discretion allowed by the standards¹³² and the large volume of claims, how consistent are these Baltimore determinations? The decisional process at the first two levels is documentary, with no face-to-face claimant contact, a factor which probably enhances consistency but may or may not promote correctness of decision.¹³³ The consistency problem is, of course, least troublesome regarding claims which can be disposed of under the objective medical approach of Test I¹³⁴ and most troublesome in the area of discretion created by Test III which entails the special abstract statutory concept of "workability."¹³⁵ However, in a particular case, officials considering a claim may disagree on a number of questions: Should an allowance be made under

130. E.g., GOLDSBOROUGH, *supra* note 34; NAGI; SMITH & LILIENFELD, *infra* note 158.

131. See note 51 *supra* and accompanying text.

132. See notes 96-101, 112-17 *supra* and accompanying text.

133. See text following note 124 *supra*; notes 262-63 *infra* and accompanying text.

134. See notes 104-10 *supra* and accompanying text. The phrase "Test I cases" conveys a misleading simplicity. The Baltimore scrutiny may find that the state agency determination was "correct" but may not agree with the category used.

135. See notes 112-17 *supra* and accompanying text. The Test II category for aged and exhausted manual laborers, notes 111 *supra* and accompanying text, apparently poses little problem.

part one of Test I, which is keyed to a single impairment in the authorized listing? Does the claimant's impairment correspond with the one listed? Under part two of Test I, do the claimant's combined impairments constitute the medical equivalent of a listed impairment? Is the combination observed correct? Under Test III (abstract capacity-for-gainful-activity test which adds to the medical factors the elusive personal equation of age, education and vocational ability), should the claim be allowed?

SSA does not publish percentile figures relating the substantive allowances and denials at the various decisional levels to these three tests. It is estimated, however, that at the initial and reconsideration stages approximately 45-50 percent of all cases (excluding technical denials) are allowed on the basis of Test I; 8-12 percent under Test II; and 8-10 percent under the more borderline Test III.¹³⁶ The remaining 35-40 percent are denials. If 10 percent of these denials are also hypothesized to have been made under Test III—a figure which may be too low because of the presumption in favor of denying a borderline case¹³⁷—then approximately 20 percent of the total number of dispositions could be within the borderline of Test III. Problems of consistency naturally would be expected in this area. However, the Nagi survey summarized below indicates that problems of consistency are not confined to Test III determinations.

The Nagi Survey. Constituting the most recent large-scale study relevant to the question of consistency in Baltimore determinations,¹³⁸ the Nagi survey was undertaken prior to adoption of the present sampling techniques¹³⁹ at a time when SSA-Baltimore reviewed all state agency initial determination actions. The Nagi study focused on the sociological concept of the relative need of the claimant for disability payments, rather than considering the legal question of whether a conscious and stringent congressional policy of limiting disability to unavoidable premature retirement was being followed. Special clinical panels were used to review a selected sample of actual SSA decisions, but the panels did not include anyone sensitive to the legal aspects of the narrow congressional purpose. Hence, one surprising result of the study is that, on an *overall* basis, the legally untrained teams were only slightly more favorable to the claimants

136. Selected Data (Sept.), *supra* note 7.

137. See notes 120-23 *supra* and accompanying text.

138. NAGI 26.

139. See text accompanying notes 48-49 *supra*.

than were the trained state agency teams and the BDI staff. In the sample used, the BDI allowance rate was 61.5 percent; the clinical team allowance rate was 68.1 percent.¹⁴⁰

The Nagi study was based upon four evaluations of disability: (1) the initial evaluation made by the state agency team under regular procedures; (2) a redetermination by the state agency team on the basis of new information accumulated by the clinical team; (3) the initial determination by BDI (reviewing the state agency and also considering the new information); (4) the disability determination by the clinical teams.¹⁴¹ The first three evaluations were dichotomous—that is, either an allowance or a denial of disability. In the fourth determination, however, the clinical teams evaluated the claimant's fitness for employment over a continuum which included eight classifications ranging from "fit for work under normal conditions" to "disabled."¹⁴²

The Nagi study showed that, with respect to the clinical teams' categories which would seem to be non-borderline, there was over a 30 percent margin of difference between the teams' and BDI's decisions.¹⁴³ For example, of those persons found by the clinical teams to be fit for specific jobs (excluding the claimant's former job), 36 percent nevertheless received an SSA allowance, and of those persons found by the clinical teams to be fit for work only at home, 30.5 percent were nevertheless denied disability by SSA.¹⁴⁴ The clinical teams found a large portion of the sample to be totally unfit for work,

140. NAGI 99. On a case-by-case basis, however, significant inconsistencies appear. See notes 143-45 *infra* and accompanying text.

141. NAGI 30-31.

142. The eight-point clinical continuum included the following classifications: fit for work under normal conditions; fit for specific jobs including former job, under normal conditions; fit for specific jobs excluding former job, under normal conditions; fit for work under special conditions; can work part-time under normal conditions; can work under sheltered conditions; can work at home only; not fit for work. *Id.* at 94.

In order to permit some comparison of the clinical teams' evaluations with the SSA evaluations, the eight point clinical continuum was made artificially dichotomous by treating the last three categories ("sheltered conditions" and below) as allowances, and the first five categories as denials. There are difficulties, however, with such a dichotomy for comparison purposes. It forces into the "allowances" category one continuum point, sheltered conditions, which, like the part-time and the special conditions continuum points, may yield an SSA denial if the work performed under sheltered conditions "provides evidences of skills and abilities that demonstrate an ability to engage in a substantial gainful activity, whether or not such work in itself constitutes substantial gainful activity," 20 C.F.R. § 404.1532(e) (1971), particularly if the earnings exceed a certain level. See *id.* §§ 404.1532(e), .1533, .1534(b)-(d) (1971).

143. NAGI 94.

144. *Id.*

but almost a quarter of that segment was denied disability by SSA.¹⁴⁵

Hence, the clinical teams' overall allowance rate of 68.1 percent probably coincides relatively well with the actual SSA allowance rate of 61.5 percent *not* because of any true consistency, but only because of a fortuitous cancelling-out process in which a large difference with BDI decisions at one end of the clinical teams' continuum is balanced by an equally large discrepancy at the other end. Moreover, two systems of evaluation which look similar in overall results but operate so differently in particular cases cannot both be right, although both could be wrong.

The Nagi study indicated that physical limitations have a closer association with allowance rates than do observed psychological limitations. For example, of those persons clinically determined to have a near total physical limitation, 88.9 percent received a BDI allowance; however, of those persons with near total psychological limitation, only 50.1 percent received an allowance.¹⁴⁶ The clinical teams and BDI reacted to aggravated psychological limitations quite differently—in the near-total-psychological-limitation category, the clinical teams' allowance rate would have been 76 percent.¹⁴⁷ These observations indicate a possible reason for the high rate of reversal of SSA denials by hearing examiners.¹⁴⁸ The psychological factors which are overridden by physical factors in BDI determinations may become dominant in the largely borderline cases which reach the hearing examiner level.¹⁴⁹

In the Nagi survey, the eight-point continuum of clinical team observations was also regrouped into a trichotomous employability breakdown—"fit," "unfit," and "borderline"—and then were compared with the dichotomous BDI allowance-denial decisions.¹⁵⁰ At the two extremes of fitness and unfitness there was a 26.9 percent

145. *Id.*

146. *Id.* at 99.

147. *Id.*

148. See note 74 *supra* and accompanying text.

149. As intimated earlier, the borderline cases often turn on an assessment of the claimant's residual vigor. See discussion in first paragraph following note 124 *supra*. This is a non-clinical matter related to work attitude in the face of physical adversity about which there can be little objective data in the claimant's file. The lack of agreed standards on how to react to psychiatric evaluations, when they exist, is also troublesome. Approximately 14.8% of the consultative examinations in 1970 were psychiatric, and psychiatric disorders ranked fourth in incidence of disability by diagnostic categories. Memorandum from BDI, SSA to Robert G. Dixon, Jr., Dec., 1971.

150. NAGI 115.

and 27.0 percent discrepancy respectively between the clinical teams' determinations and BDI determinations.¹⁵¹ In the group treated by the clinical teams as more borderline, the allowance-denial rates were equal.¹⁵² Although these cases were a relatively small portion of the total Nagi sample (14.2 percent), they could be expected to be a large percentage of the total claims which ultimately reach hearing examiners.

On the basis of this analysis, the Nagi study suggests some hypotheses relevant to the consistency problems: (1) the greatest difficulty in achieving consistency centers on the psychological factor;¹⁵³ (2) with respect to those borderline claimants unfit for many jobs but with considerable residual functional capacity, the consistency rate may be only 50 percent; (3) because the kinds of cases which raised the greatest problems of consistency at the Baltimore level of decision-making probably comprise the bulk of hearing examiner appeals,¹⁵⁴ and because the examiners have no more precise decisional guidelines than do the SSA-determiners, a corresponding consistency problem might be found to exist at the hearing examiner level if the matter were subjected to a similar study.¹⁵⁵

The figures of the Nagi study suggest that a goal of rapid and consistent determination of most claims with a minimal margin of error may be difficult to achieve and that this difficulty may center not so much in the procedures used to process disability claims as in the inexactness of the standards in the statute and implementing regulations.¹⁵⁶ If these indications are valid, repetitive reviews merely offer new opportunities for the further exercise of discretion. Although Nagi's teams were not using the legal tests of disability employed by BDI,¹⁵⁷ a distinction which dictates much caution in making comparisons and drawing conclusions, the approach which they utilized was not wholly dissimilar, given the intrinsic indefiniteness of the SSA standards themselves. Thus, the fact that the allowance determinations of SSA and the clinical teams fell outside a 10 percent

151. *Id.*

152. *Id.*

153. See text following note 124 *supra*.

154. See notes 112-17 *supra* and accompanying text (Test III/borderline cases).

155. Indeed, if there were any way to administer the study, a scrutiny of consistency in disability determinations among United States district courts is needed for a full understanding of the consistency issue.

156. See notes 96-101, 112-17 *supra* and accompanying text.

157. NAGI 23-27.

range of difference in so many instances may be a matter for concern.¹⁵⁸

The Reconsideration Stage. No current counterpart to the Nagi study of BDI initial determinations exists for the reconsideration stage. However, the SSA Operations Research Staff has produced a report dealing with the reconsideration stage which summarizes responses to a questionnaire sent to reconsideration determiners.¹⁵⁹

Most of the allowances at the reconsideration level—reversals of initial denials—were attributed to “additional evidence,”¹⁶⁰ but to an unmeasured extent the changes were actually due to the worsening of the claimant’s condition rather than to a better work-up of the report on the initial condition. The report observed that reconsideration determinations were likely to involve borderline cases and that fewer administrative presumptions were utilized at this level.¹⁶¹ The

158. For example, the divergence exceeded 10% for those persons in the physical category classified clinically as “near total,” and approached 10% for those classified as “severe.” *Id.* at 99. The overall differences in allowance rates—61.5% by the SSA and 68.1% by the clinical panels—is misleadingly small because it is the product of cancelling out the wider divergencies at opposite ends of the clinical evaluation continuum. See notes 150-51 *supra* and accompanying text.

A Johns Hopkins study of a sample of SSA disability applicants compared the post-decision experience of those claimants allowed benefits with those denied benefits. R. SMITH & A. LILIENTHAL, *THE OASDI DISABILITY PROGRAM: AN EVALUATION STUDY (1971)* (SSA contract study with Johns Hopkins University). The study included a BDI reevaluation (unofficial) based on a new file compiled by the study group. The time of compilation varied from one to four years after the initial allowance or denial of a benefit. The new file did not reveal the nature of the initial BDI decision, nor the subsequent official record of the applicant, if any. The results of the BDI unofficial reevaluation showed: (1) that 24% of the denied applicants were now assessed as eligible, and (2) that 20% of all claimants given allowances were now judged to be ineligible. *Id.* at 77. See also *id.* at 2-5, 76-78, 195. The study did not attempt to isolate or test hypotheses which could explain the differences—for example, possible bias in the initial sampling technique. However, one familiar with the Nagi study could hypothesize that, in addition to the obvious time factors, discrepancies of this order could be expected simply by the margin of error in the initial official decision process. The study made no attempt to determine how many of the initial decisions had been officially changed, either by withdrawing or granting an allowance. BDI estimates that about one-third of denied applicants submit second applications and about 25% of these reapplications are reclassified as allowances. No estimate is available regarding initial allowances later terminated. BDI Interviews, *supra* note 113.

159. M. Rock, *An Evaluation of the SSA Appeals Process: Progress Rep. No. Four (1967)* (prepared by SSA Operations Research Staff) (unpublished and on file with SSA).

This Progress Report and others cited *infra* are the result of internal administrative studies. Although they contain much valuable hard data, the SSA in releasing them cautions that they are not to be taken as definitive treatments of the topics studied.

160. *Id.* at 5.

161. *Id.* at 9, 12. See discussion of the SSA presumption in borderline cases at notes 120-23 *supra* and accompanying text.

report suggested that more thorough work in the district offices might be a solution to the problem of incomplete evidence.¹⁶²

The State Agency Operation. The analysis of the state agency operation is partially subsumed in the discussion of the Nagi survey and the reconsideration stage¹⁶³ because of the joint state-BDI agency operation at both initial and reconsideration determination stages. However, a report by the SSA Operations Research Staff noted the existence at the state agency level of a continuing standards problem and of inadequate factual work-up in the borderline cases.¹⁶⁴ The suggestion was made, for example, that improvement in the "quality and uniformity" of disability assessments might result if all claimants were processed through a "government-controlled, clinic-type evaluation center."¹⁶⁵ More frequent meetings of claims examiners were also suggested. Moreover, dissatisfaction was expressed over the "bounce" policy of BDI—returning a case to the state agency for better documentation or for a negotiated change of decision. The criticisms concerned the fluctuation in return rates due to policy changes in BDI and the lack of specification by BDI of other areas of the cases needing further development.¹⁶⁶

Consistency at the Hearing Examiner Level

No counterpart to the Nagi study of decision making in SSA-Baltimore determinations exists for the hearing examiner level. However, some pertinent facts can be derived from the hearing examiner production statistics maintained by the Bureau of Hearings and Appeals and from some reports by the SSA Operations Research Staff.

Hearings Examiner Variances in Reversal Rates. Production statistics reveal the existence of extreme disparities among an appreciable number of hearing examiners, not only on a national scale, but within the same region, regarding their rate of reversal of SSA deci-

162. Some reconsideration determiners were unhappy with the production requirements and felt that they adversely affected the quality of the work. Progress Rep. No. Four, *supra* note 159, at 28-29. One determiner, revealing the amount of personalization which can be attempted even without face-to-face contact with the claimant, said: "While medical findings are vital to our adjudication process, they must be related to the individual's level of functioning as well as to his education and work history." *Id.* at 34.

163. See pp. 711-15 *supra*.

164. M. Rock & R. Schumer, An Evaluation of the SSA Appeals Process: Progress Rep. No. Five (1968) (prepared by SSA Operations Research Staff) (unpublished and on file with SSA).

165. *Id.* at 22.

166. *Id.* at 17-18.

sions. Such data provide a further basis for questioning the certainty of the standards and the adequacy of present Appeals Council review as a centralizing, standardizing force.

On a national or regional basis, any disparities between individual hearing examiners are concealed by the averaging process. For example, in fiscal year 1971 the national mean reversal rate by SSA hearing examiners was approximately 46 percent.¹⁶⁷ The regional reversal rates ranged from a high of 51.2 percent in Region 9 (San Francisco) to 40.4 percent in Region 2 (New York).¹⁶⁸

However, with respect to individual hearing examiners, the differences in reversal rates are striking and disturbing.¹⁶⁹ An analysis of 252 hearing examiners showed that 153 had reversal rates ranging individually between 36 percent and 55 percent (of these 90 had rates between 41 percent and 50 percent). However, of the other 99 examiners falling outside this range, 19 had reversal rates as high as 66-80 percent, while 26 fell within a 21-30 percent zone. The remaining 54 examiners were grouped in two clusters with reversal rates of 56-65 percent (32) and 31-35 percent (22) respectively.¹⁷⁰ Although these figures compare hearing examiner reversal rate inconsistency on a national basis, similar disparities appear inside a given region and even within intraregional offices.¹⁷¹ Monthly production statistics of the Bureau of Hearings and Appeals support the additional hypothesis that the reversal rate of particular hearing examiners can be predicted with fair accuracy and that the stringency of the approach of a given examiner applies to each of the three types of disability

167. Statistics were furnished by Carlile Bolton-Smith, Liaison Officer, Bureau of Hearings and Appeals, Feb. 29, 1972 (on file with author).

168.

Region 9, San Francisco	51.2%	Region 4, Atlanta	43.9%
Region 7, Kansas City	50.3%	Region 8, Denver	43.8%
Region 10, Seattle	50.1%	Region 6, Dallas	43.2%
Region 5, Chicago	50.1%	Region 1, Boston	42.3%
Region 3, Philadelphia	47.7%	Region 2, New York	40.4%

Id. These differences do not appear large given the nature and volume of the program and possible inter-regional differences with respect to the climate of court review and the case mix. At this point, we are not concerned with the separate question of whether the average level of reversals is itself so high as to raise questions about the standards and the dichotomy between the reconsideration stage and the hearing examiner stage.

169. *Id.*

170. *Id.* Five hearing examiners ranged from 7% reversals up to 18%; another six ranged from 84 to 88%. Thus, 42% of the individual hearing examiner reversal rates fell outside a 20% spread centered on the national mean. *Id.*

171. These observations are based on production figures for the West Coast Region compiled by the author.

examiner's decisions: disability claims decided after a hearing; disability claims decided "on record;" and cessation actions (terminating a disability award).¹⁷²

The hearing examiner reversal rates in the "on record" cases are particularly instructive as to the clarity of standards question and the different policy perceptions of SSA-Baltimore and the hearing examiners. In these cases, the claimant has waived his right to appear personally and requests a decision on the basis of the evidence contained in the file.¹⁷³ Generally, the file contains the same evidence that was before the BDI disability determiner in the reconsideration stage. It would be reasonable to believe that only a small percentage of such cases would be reversed *if* hearing examiners apply the same standards as used by reconsideration determiners. However, the Bureau of Hearings and Appeals hearing examiner production figures for fiscal years 1960-70 indicate that examiners affirmed 2,272 "on record" cases and reversed 1,446, or 38 percent of these cases.¹⁷⁴ These figures raise questions not only with respect to the clarity of disability standards but also with respect to experience and training in the rapidly expanding SSA hearing examiner corps and the adequacy of examiner access to medical advice.

The foregoing figures on distribution of reversal rates among hearing examiners introduce a new uncertainty in the decision-making process for disability claims. When an evaluation system begins with an objective medical assessment, such extreme divergence in reversal rates among hearing examiners raises questions of equal dispensation of justice. If inexactness of standards is the crucial vice, the cure is not to be found in more formal hearings or more appellate review, for these devices will merely carry the discretionary inequality to ever higher levels.

1967 Questionnaire. A questionnaire sampling made in 1967¹⁷⁵ provides some additional insights (but no figures) into hearing examiner reversal rates. This study was made prior to the 1967 Amendments, when many courts were interpreting the congressional stand-

172. The hypothesis is supported by the observations of a hearing examiner who had studied consistency problems and is verified by independent examination of monthly BHA Hearing Examiner Case Docket and Disposition Data Sheets.

173. See note 63 *supra* and accompany text.

174. 1972 Statistics, *supra* note 167.

175. M. Rock & F. Ichinowski, An Evaluation of the SSA Appeals Process: Progress Rep. No. Three (1967) (prepared by SSA Operations Research Staff) (unpublished and on file with SSA).

ard very liberally to the advantage of claimants.¹⁷⁶ Accordingly, it is not surprising to find that many hearing examiners commented that “for whatever decision they wished to make, they could find a court opinion to back them up.”¹⁷⁷ Continued problems with standards, apart from the subjectivity of judicial policy, were indicated by the suggestion that there should be “more written opinions from the Appeals Council for their reversals in order to guide the hearing examiners and enable them to cite these as authority for hearing examiner decisions.”¹⁷⁸ It was suggested that more informative Appeals Council determinations would relieve the hearing examiners of the burden of searching for precedents.¹⁷⁹

The study considered inadequacy of evidence to be a continuing problem and suggested that a “good initial evaluation may save money in the long run.”¹⁸⁰ New evidence was given as the most frequent reason for reversals.¹⁸¹ The hearing examiners noted, however, that the claimant was the poorest source of evidence and that medical advisers, followed closely by vocational experts, were the best sources of evidence.¹⁸² This does not mean that the hearing could or should be discontinued. The medical advisers and vocational experts react, in part, to the demeanor of the claimant at the hearing. Also, their favorable standing with examiners may be based more on their “interpretative” aid to the examiner than the evidentiary value of their record testimony in the legal sense.

Reversal rates were also perceived to be related in a subtle way to prolonged unemployment and the probability of continued, indefinite, or permanent unemployment. Therefore, allowing an extended time limit for an appeal (up to 6 months to request a reconsideration,

176. See notes 199-217 *infra* and accompanying text.

177. Progress Rep. No. Three, *supra* note 175, at 7.

178. *Id.* at 13.

179. *Id.*

180. *Id.* at 18.

181. Reversals were especially high among claims involving strong multiple impairments, psychological impairments, and physical impairments with a strong psychological overlay. However, some degree of psychological complication appears in most cases. *Id.* at 19. The importance of the psychological factor poses a serious problem with respect to the correctness and consistency of decisions. The SSA system may not be geared to produce this evidence with sufficient regularity; moreover, standards for evaluating psychological evidence are always extremely subjective.

182. *Id.* at 12. In socio-economic terms, the average appellant-claimants were illiterate or semi-literate and usually non-skilled. They lacked complete medical histories because they did not have regular physicians. *Id.* at 22. For discussion of the potential impact of the claimant's appearance at the hearing examiner stage, see text following note 124 *supra*.

and if it is denied, another 6 months to request a hearing) increases the length of the established unemployment period and may itself contribute to the reversal rate.¹⁸³

Analytical Studies Concerning Hearing Participants and Non-Adversary System. Beginning in 1969, the SSA Operations Research Staff began a series of studies on administrative effectiveness based on case analysis, rather than questionnaires, with special attention to reversal rates. A report on hearing examiner decisions in fiscal years 1965-68 analyzed reversal rates in relation to the presence or absence at the hearing of various experts or representatives, such as vocational counsellors, non-attorney representatives, attorneys, or medical advisers.¹⁸⁴

The data indicated that the rate of reversals is substantially higher if the hearing is held with either an attorney or medical adviser present in addition to the claimant.¹⁸⁵ With one of these additional persons present the reversal rates were 54.8 percent and 51.4 percent respectively in fiscal year 1968.¹⁸⁶ On the other hand, there were reversal rates in that year of 39.8 percent when claimants appeared alone at a hearing and 36.4 percent for on-the-record decisions with claimant waiving his right of appearance.¹⁸⁷ The reversal rate was increased only slightly if, in addition to the claimant, a non-attorney representative was present (44.5 percent) or a vocational counsellor attended (39.3 percent).¹⁸⁸ These ratios indicate that a vocational

183. Progress Rep. No. Three, *supra* note 175, at 15. See also *id.* at 32-33.

184. M. Rock & R. Berwanger, *An Evaluation of the SSA Appeals Process*: Progress Rep. No. Six (1969) (prepared by SSA Operations Research Staff) (unpublished and on file with SSA).

185. *Id.* at 13. Various hypotheses may be offered, and rebutted, as possible explanations for the higher reversal rate in the claimant-with-attorney cases. *Id.* at 5-7. For example, claimants confident that they are disabled may approach attorneys more often, but the contrary could also be true—claimants with strong cases may avoid the expense of an attorney. Arguably, lawyers tend to reject those cases with a low likelihood of success, but non-attorney cases could be affected by this same screening process—assuming in each case that the screener knows enough about SSA to be able to identify a strong case. More plausible explanations for the higher reversal rates in attorney cases may be (1) the attorneys present the cases better; (2) a hearing examiner may anticipate that attorney-represented cases are more likely to be appealed and possibly reversed; and (3) some hearing examiners may be inclined to favor a fellow professional since the proceeding is non-adversary.

The high reversal rate when a medical adviser testifies may be explained by the tendency of the hearing examiner to call a medical adviser in close cases. But this fact alone would not produce a high reversal rate unless there were a pro-claimant bias among the medical advisers.

186. *Id.* at 13.

187. *Id.*

188. *Id.*

counsellor, by inducing fewer reversals than an attorney or a medical adviser, has a less disruptive effect on SSA policy manifested in pre-hearing level determinations.¹⁸⁹

A later report continues an analysis of reversal rates¹⁹⁰ and substantiates the earlier report by demonstrating that the presence of medical advisers, attorneys, and—to a slightly lesser extent—the non-attorney representatives produces the highest reversal rates.¹⁹¹ The

189. The frequency distribution for the various types of participants in hearings in fiscal years 1965-68 averaged approximately 49% with the claimant alone at the hearing, 36% with one additional participant (expert or personal representative), and 15% with more than one additional participant. *Id.* at 17. The more detailed breakdown of participants in fiscal year 1968 was:

Claimant alone at hearing	48.7% ^c
Vocational counsellor	28.5%
Non-attorney representative	7.9%
Attorney	22.8%
Medical adviser	10.4%

Id. at 18. The percentages add up to more than 100% because of the overlap in cases where more than one expert or representative was involved.

190. M. Rock, *An Evaluation of the SSA Appeals Process: Progress Rep. No. Seven (1970)* (prepared by SSA Operations Research Staff) (unpublished and on file with SSA).

191. Sixteen combinations are possible, ranging from a hearing with the claimant alone present, through hearings with the claimant plus various combinations of additional participants, to a hearing with the claimant and a full complement of additional participants—medical adviser, lawyer, non-attorney representative, and vocational adviser. The various reversal rates in the period 1965 to 1969 are summarized in the following table:

PARTICIPANT COMBINATIONS: THEIR FREQUENCY, RELATIVE FREQUENCY, NUMBER REVERSED, AND REVERSAL RATES

Participants	Frequency	Relative Frequency	Number Reversed	Reversal Rates (%)
NONE	37123	.4955	14393	38.8
M	1748	.0233	958	54.8
L	9413	.1256	5081	54.0
N	4692	.0626	2275	48.5
V	11070	.1477	4378	39.5
ML	734	.0098	477	65.0
MN	244	.0033	158	64.8
LN	203	.0027	128	63.1
MV	2220	.0296	1036	46.7
LV	4720	.0630	2699	57.2
NV	1214	.0162	625	51.5
LMN	25	.0003	19	76.0
MLV	1105	.0147	650	58.8
MNV	289	.0039	183	63.3
LNV	84	.0011	48	57.1
MLNV	42	.0006	31	73.8
TOTAL	74926	1.0000	33139	44.23

presence of one or more of the four possible participants at the hearing depends on choices made by the claimant regarding an attorney or a non-attorney representative and by the hearing examiner regarding a medical adviser or a vocational consultant. The SSA study showed that the choice made by one party often influences the other party's choice. When a claimant is represented by a lawyer, the examiner tends to request expert testimony,—hearing examiners selected experts in 41.1 percent of the cases in which the claimant had a lawyer, but in only 27.1 percent and 28.8 percent respectively of the cases where the claimant selected a non-attorney representative or had no representative.¹⁹²

JUDICIAL REVIEW OF SSA DISABILITY DETERMINATION STANDARD

The role of the courts in reviewing SSA disability determinations is the best known and probably the most widely studied aspect of the total disability claim structure.¹⁹³ The main areas of judicial concern, both before and after the 1967 Amendments, have been the interpretations of the statutory disability standards, the burden of proof, and the substantial evidence rule. Although there are some indications that the 1967 Amendments have had the effect of forcing the courts to adhere more closely to the congressional concept of total disabili-

Id. at Appendix I.

The reversal rate for hearings involving only lawyers (54.05%) was 15.2% higher than the reversal rates in cases without any participants (38.8%); the rate for medical advisers only (54.8%) was 16.0% higher. These effects are cumulative—the reversal rate in cases with both lawyers and medical advisers present but with no other participants (65.0%) was 26.2% higher. Vocational consultants, when operating alone, have little effect on the reversal rate (39.5%).

Because each participant can appear in, or be absent from, a number of different combinations, an averaging process can be used to determine the effect of individual participants on the reversal rates. The computations on average effect are as follows: lawyer, plus 12.1%; non-attorney representative, plus 10.4%; vocational and medical adviser, plus 11.7%; vocational consultant, minus 2.1%. *Id.* at 13.

192. *Id.* at 8. Hearing examiners may be induced to utilize experts in claimant-with-attorney cases in order to take some of the pressure off themselves and in order to build a more solid case for the appeal which the lawyer will probably take if he loses. From July 1, 1966 to December 31, 1967, 59% of the denials in hearing cases involving lawyers were appealed to the Appeals Council; this is in contrast to 47% of the denials in cases without lawyers. *Id.* at 9.

193. See 3 G. GOLDSBOROUGH, *supra* note 34; Rockman, *Judicial Review of Benefit Determinations in the Social Security and Veterans Administration* (Report to the Committee on Grants and Benefits, Administrative Conference of the United States, 1970); Rowland, *Judicial Review of Disability Determinations*, 52 GEO. L.J. 42, 76-85 (1963); Viles, *supra* note 94; Note, *Administrative Procedure and the Social Security Disability Program*, 2 IND. LEG. F. 295, 306-10 (1969); Note, *Social Security Disability Determinations: The Burden of Proof on Appeal*, 63 MICH. L. REV. 1465 (1965).

ity,¹⁹⁴ the number of appeals from the administrative decisional process to the district courts continues at a high rate—1,392, 1,369, and 1,537 in calendar years 1969, 1970 and 1971 respectively.¹⁹⁵ Most of the appealed cases are borderline determinations under Test III,¹⁹⁶ and the high rate of appeals can be expected to continue unless the basic standard for determining disability is radically overhauled. Given this reality, only a fairly rigid adherence to the substantial evidence rule¹⁹⁷ can minimize the reversal rate in district courts.¹⁹⁸ Ultimately, the courts' adherence to the substantial evidence rule and to the intent of the 1967 Amendments can be enforced only by the Supreme Court, which thus far has infrequently reviewed disability cases.

Pre-1968 Development

A study commissioned by the SSA in 1962 surveyed the administrative procedures and analyzed almost 2,000 court decisions in light of the elusive statutory concept of total disability.¹⁹⁹ The study does not contain percentage classifications of the character of decisions rendered, but it does attempt to group the decisions into meaningful substantive categories and identify problem areas. The chief source of difficulty perceived was the standard of disability itself, which, "in the absence of summary regulations," was often by default "consigned to the courts."²⁰⁰ Other problem areas, all derived from the imprecision of the legal standard, included the burden of proof, the courts' apparent distrust of the SSA administrative process, and the courts' lack of adherence to the substantial evidence rule.²⁰¹ Although the statutory standard has always been total incapacity for gainful employment in the national economy, rather than the more limited concept of occupational disability,²⁰² the inherent subjectivity of the disability concept permits either a strict or liberal approach toward total disability, individualization of the test, and burden of proof. On the whole, the SSA, bolstered by its perception of legislative history

194. See notes 96-101 *supra* and accompanying text.

195. See note 92 *supra*.

196. See notes 112-17 *supra* and accompanying text.

197. See notes 235-56 *infra* and accompanying text.

198. The reversal rate was 36% in calendar year 1970. See note 92 *supra*.

199. See 3 G. GOLDSBOROUGH, *supra* note 34.

200. *Id.* at I (Introduction).

201. *Id.*

202. See notes 96-101 *supra* and accompanying text.

and the statutory language, has espoused a strict interpretation²⁰³—a position towards which most courts were restive or flatly opposed prior to the 1967 Amendments.

Judicial opposition to a strict approach to the total disability concept culminated in an opinion by Judge Friendly in *Kerner v. Fleming*,²⁰⁴ which concerned a claimant who had worked as carpenter, salesman, mechanic and upholsterer, but who at the time of trial suffered from diabetes, a cardiac condition and anxiety neurosis. The court held that a disability determination must rest on the “resolution of two issues—*what* can applicant do, and *what* employment opportunities are there for a man who can do only what applicant can do?”²⁰⁵ This ruling, quickly dubbed the *Kerner* doctrine, in effect redefined “substantial gainful activity,” and its holding dominated the judicial approach toward review of SSA disability hearing examiner decisions at least until the enactment of the 1967 Amendments.²⁰⁶

The formulation of the first question of the *Kerner* doctrine is not a novel construction, inasmuch as it flows from the statute itself. But the second question, in turning on the phrase “employment opportunities,” rejected the SSA abstract-capacity approach, since the court added the explicit direction that “[m]ere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available.”²⁰⁷ Moreover, the court directed that the HEW Secretary “furnish information as to the employment opportunities . . . or the lack of them, for persons of plaintiff’s skills and limitations.”²⁰⁸ In short, the *Kerner* doctrine took a long step toward converting the disability concept into a limited unemployment compensation program and toward placing the burden of supplying the critical evidence of specific employment availabilities on the SSA if a denial of disability were to be sustained.²⁰⁹

After *Kerner*, another panel of the Second Circuit, with Judge Friendly not participating, rendered an opinion in *Rinaldi v.*

203. See note 120 *supra* and accompanying text.

204. 283 F.2d 916 (2d Cir. 1960).

205. *Id.* at 921 (emphasis added).

206. For a list of cases following the *Kerner* doctrine, see 22 A.L.R.3d 440, 446-49 (1968).

207. 283 F.2d at 921.

208. *Id.* at 922. The Administration necessarily acquiesced in the *Kerner* ruling and remand to the extent of producing additional information on employment opportunities. There followed another administrative rejection of *Kerner*’s claim, and the court upheld the denial. *Kerner v. Celebrezze*, 340 F.2d 736 (2d Cir. 1965).

209. 3 G. GOLDSBOROUGH, *supra* note 34, ch. I at 18.

*Ribicoff*²¹⁰ which seemed to offer a compromise between the initial rigidity of SSA and Judge Friendly's formulation of personalized actual employability. The case concerned a claimant whose injury precluded him from resuming truck driving or engaging in heavy manual labor. Although nominally purporting to follow *Kerner*, the court effectively rewrote the two key formulations, thereby facilitating the denial of claims: (1) if other individuals with similar impairments can do certain jobs, the plaintiff can as well, and (2) if others with similar impairments can *obtain* such jobs, so can the plaintiff.²¹¹ The *Rinaldi* approach would still impose on the SSA the burden of going forward with the evidence but would open the way to the use of a variety of empirical studies yielding detailed pattern evidence of employment for partially disabled workers in the national economy. The burden would then shift to the plaintiff, who retained the ultimate burden of proof, to show why he did not fall within the pattern.

As the case law developed prior to 1968, the *Kerner* doctrine, rather than the possibly workable *Rinaldi* approach, tended to dominate judicial review of SSA disability determinations. The SSA resisted and occasionally expressly declined to acquiesce in cases reversing its determinations.²¹² However, by 1967 the federal courts had delineated several procedural and substantive requirements which generally favored the claimant.²¹³ The courts shifted the burden of producing evidence on the question of the existence of some gainful activity in which claimant could engage from the claimant to SSA.²¹⁴ The courts allowed proof of disability to include personality disorders, pain and suffering, and lack of motivation.²¹⁵ The Administration was also required to prove the availability of employment within the claimant's capacity by specific reference to job positions located in the claimant's home area.²¹⁶

In requiring that the SSA prove, as a condition of a denial, that

210. 305 F.2d 548 (2d Cir. 1962).

211. *See id.* at 549-50. *See also* 3 G. GOLDSBOROUGH, *supra* note 34, ch. I at 74 for discussion of the standards-proof interface. A Department of Labor study listing 214 jobs which workers with back conditions like the claimant's could perform, and were performing, apparently was viewed as sufficient to resolve both questions against the instant plaintiff. 305 F.2d at 550.

212. *See, e.g.,* *Hodgson v. Celebrezze*, 357 F.2d 750 (3d Cir. 1966), *nonacquiesced in*, S.S.R. 67-14c (1967).

213. *See* Viles, *supra* note 94, at 397-98.

214. *May v. Gardner*, 362 F.2d 616, 618 (6th Cir. 1966).

215. *Carico v. Gardner*, 377 F.2d 259 (4th Cir. 1967).

216. *Boyd v. Gardner*, 377 F.2d 718, 723 (4th Cir. 1967).

there were jobs that claimant could do and that these were actually available in the area where he lived, the courts not only repealed the "national economy" concept of the statute and the regulations but also added employability as a factor which the agency must prove. The effect of this approach could operate to place the ultimate burden of proof on the SSA, contrary to the intent of the statute.²¹⁷

Judicial Reception of the 1967 Amendments

The 1967 Amendments of the statutory disability standard²¹⁸ were the culmination of extensive administrative and congressional consideration of the problem of court reversals.²¹⁹ The Amendments reflected the concern of Congress both over the lack of uniformity and consistency in the processing and review of disability cases²²⁰ and over the high reversal rate of SSA hearing examiners in district courts.²²¹ The legislation clarified two troublesome points. First, Congress made it clear that abstract capacity for work and not actual employability is the principle test, regardless of whether a "specific job vacancy exists" or whether a claimant would be "hired."²²² Second, the region to be considered for work availability consists not merely of the claimant's immediate dwelling area but rather the entire geographical area upon which the "national economy" is based.²²³

Despite early resistance, the present trend indicates that the circuit courts will follow the congressional intent as expressed in the 1967 Amendments. The Third Circuit, reversing a district court which had followed the old employability test,²²⁴ stated that, because of the explicit congressional command, the possible unwillingness of some employers to hire the handicapped should not be considered

217. See 42 U.S.C. § 423(d)(5) (1970).

218. See notes 96-101 *supra* and accompanying text.

219. See H.R. REP. NO. 544, *supra* note 99, at 28-31; S. REP. NO. 744, *supra* note 99, at 46-50.

220. See H.R. REP. NO. 544, *supra* note 99, at 29.

221. *Id.*

222. *Id.* at 30, 163.

223. *Id.* See note 101 *supra*. However, the 1967 Amendments initially seemed to have only a slight beneficial impact on district court reversal rates—there was only a 64% affirmance rate in 1970. See note 92 *supra* and accompanying text. Moreover, they seem to have had little effect on the high rate of reversals by hearing examiners of SSA-Baltimore determinations. See note 74 *supra*.

224. *Gentile v. Finch*, 298 F. Supp. 1401 (W.D. Pa. 1969), *rev'd*, 423 F.2d 244 (3d Cir. 1970).

in determining disability.²²⁵ In *Miller v. Finch*,²²⁶ the Eighth Circuit, noting that the claimant's brief indicated that SSA is required to show that jobs existed within a reasonable distance from the claimant's home, stated that a person is not disabled under the Act if "he can engage in any other kind of substantial gainful work which exists in the national economy."²²⁷ However, a few district courts have balked at the seemingly clear expression of congressional intent. In *Jones v. Cohen*,²²⁸ the district court stated that the requirement to show "employability" had not been changed by the statute.²²⁹ In *Taylor v. Gardner*,²³⁰ the district court drew a distinction between the "ability to perform the acts which constitute a certain job and the ability to hold down that job"²³¹ and held that the SSA must prove that "the claimant could successfully remain employed in a job."²³²

The *Kerner* allocation to SSA of the burden of going forward with the evidence on the details of the job market has survived the 1967 Amendments. In *Garrett v. Finch*,²³³ the Sixth Circuit announced its understanding of the rule:

Under a rule of this and other circuits, an applicant makes a prima facie case by showing that he is unable to work at his usual occupation. The burden then shifts to the secretary to produce evidence that will justify a finding that there is available some other kind of "substantial gainful employment" applicant is able to perform.²³⁴

Substantial Evidence Rule

A crucial factor in judicial review of disability determinations is

225. *Gentile v. Finch*, 423 F.2d 244, 246-47 (3d Cir. 1970). *Accord*, *Wright v. Gardner*, 403 F.2d 646, 647 (7th Cir. 1968) (per curiam). *See* *Martin v. Finch*, 415 F.2d 793, 794-95 (5th Cir. 1969); *Mullins v. Gardner*, 396 F.2d 139, 140 (6th Cir. 1968) (per curiam).

226. 430 F.2d 321 (8th Cir. 1970).

227. *Id.* at 324. *Accord*, *Martin v. Finch*, 415 F.2d 793, 794-95 (5th Cir. 1969); *Mullins v. Gardner*, 396 F.2d 139, 140 (6th Cir. 1968) (per curiam).

228. 295 F. Supp. 1302 (W.D. Pa. 1969).

229. *Id.* at 1307.

230. 297 F. Supp. 743 (N.D. Ill. 1969).

231. *Id.* at 747.

232. *Id.*

233. 436 F.2d 15 (6th Cir. 1970).

234. *Id.* at 18. *Accord*, *Meneses v. Sec. of HEW*, 442 F.2d 803, 806-07 (D.C. Cir. 1971); *Gray v. Finch*, 427 F.2d 336, 338 (6th Cir. 1971). *See* *Gray v. Sec. of HEW*, 421 F.2d 638, 639 (5th Cir. 1970). *But see* *Miller v. Finch*, 430 F.2d 321, 324 (8th Cir. 1970). Two circuits left the question open. *Gentile v. Finch*, 423 F.2d 244, 248 (3d Cir. 1970); *Flake v. Gardner*, 399 F.2d 532, 541 (9th Cir. 1968).

the courts' interpretation of the substantial evidence rule,²³⁵ inasmuch as liberal application of the rule may be used by the courts to circumvent the effectiveness of the 1967 Amendments. The Supreme Court has interpreted "substantial evidence" to mean "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²³⁶ Since the Supreme Court's definition of the rule is imprecise, courts can apply it broadly or narrowly.²³⁷ The substantial evidence rule was liberally applied by the Fourth Circuit in *Flack v. Cohen*,²³⁸ a disability determination, where the court relied upon the Supreme Court's opinion in *Universal Camera v. NLRB*.²³⁹ The Supreme Court had said in *Universal Camera* that a reviewing court may make a fair estimate of the worth of the testimony of witnesses and use its informed judgment on matters within its special competence.²⁴⁰ Drawing from this rationale a mandate not to rubberstamp administrative findings, the Fourth Circuit stated that a searching examination of the record must be made to ascertain whether the decision is supported by substantial evidence.²⁴¹ This approach, although purporting to follow the substantial evidence rule, seems to go even further and indicates that the reviewing court should reweigh the evidence as in a de novo hearing. On the other hand, the Fifth and Eighth Circuits apply the rule strictly.²⁴² The Fifth Circuit states that the court may neither reweigh the evidence nor substitute its judgment for that of the SSA; instead,

235. For a discussion of the rule, see 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29.02 (1958). See also Cooper, *Administrative Law: The "Substantial Evidence" Rule*, 44 A.B.A.J. 945 (1958); Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 22-26; Stason, "Substantial Evidence" in *Administrative Law*, 89 U. PA. L. REV. 1026 (1941); Comment, *Administrative Law: Substantial Evidence on the Record Considered As a Whole*, 12 LA. L. REV. 290 (1952).

236. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The Supreme Court further clarified the definition in *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939): "[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Id.* at 299-300.

237. See 4 K. DAVIS, *supra* note 235, § 29.02, at 130. "Verbal formulas do not control the intensity of judicial review. The scope of the court's inquiry may be broad or narrow, deep or shallow, and still comply with the substantial-evidence formula." *Id.* § 29.02, at 1000 (1970 Supp.).

238. 413 F.2d 278 (4th Cir. 1969).

239. 340 U.S. 474 (1951). The companion cases were *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951), and *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951).

240. 340 U.S. at 490.

241. 413 F.2d at 280.

242. See *Brown v. Finch*, 429 F.2d 80 (5th Cir. 1970); *Johnson v. Gardner*, 401 F.2d 518 (8th Cir. 1968).

the function of the trial and appellate courts is strictly limited to a determination of whether there is substantial evidence in the record to support the agency's decision.²⁴³ Since the strict approach is an important method of minimizing the reversal rate of disability determinations, the view of the Fifth Circuit should be uniformly adopted.

The recent Supreme Court decision in *Richardson v. Perales*,²⁴⁴ the Court's first review of a disability case in years, does little to clarify the substantial evidence rule because the question of its application was not directly presented. *Perales* involved the issue of whether written medical evidence, which was hearsay because not given orally or subjected to cross-examination, could constitute substantial evidence and support an SSA denial of a claim. The district court and the Fifth Circuit had found the evidence insufficient,²⁴⁵ the court of appeals noting (1) that the testimony of a medical adviser at an examiner hearing was not substantial evidence,²⁴⁶ and (2) that only limited evidentiary weight should be given to the testimony of any physician who has examined the claimant only once.²⁴⁷

The SSA naturally viewed these opinions as a basic attack on its entire system of processing disability claims through two non-testimonial decisional stages in the state agencies and Baltimore and through a predominantly non-testimonial examiner hearing in which the claimant, the medical adviser, and the vocational consultant comment on the prior non-testimonial record.²⁴⁸ Later the Fifth Circuit

243. *Williams v. Finch*, 440 F.2d 613, 615 (5th Cir. 1971).

244. 402 U.S. 389 (1971). For a discussion of *Perales*, see Project, *Federal Administrative Law Developments—1971*, 1972 DUKE L.J. 115, 174-82.

245. 412 F.2d 44 (5th Cir. 1969), *rev'g* 288 F. Supp. 313 (W.D. Tex. 1968).

246. 412 F.2d at 52-53.

247. *Id.* at 54-55.

248. That SSA's apprehensions were not unwarranted is indicated by the following quotation from the report to Congress by the Commissioner of Social Security on the situation: District courts have already cited the original *Perales* decision as authority to find that consultative medical reports, standing alone, do not constitute substantial evidence; oral testimony by consulting physicians does not constitute substantial evidence; oral testimony by a medical advisor is not substantial evidence; oral testimony by a vocational expert is not substantial evidence; unsigned hospital reports are hearsay and hence not substantial evidence; and a claimant's self-serving testimony (without any supporting live testimony) is sufficient to rebut written medical reports adverse to the claimant's claim. Letter and Attachment from Robert M. Ball, Commissioner of Social Security, to Wilbur D. Mills, Chairman, House Committee on Ways and Means, and Russell B. Long, Chairman, Senate Committee on Finance, April 7, 1970 (case citations omitted) (copy on file with author).

This is apparently the only report in which SSA honored the 1967 request of Congress to keep it informed on future trends of judicial interpretation. See H.R. Rep. No. 544, *supra* note 99, at 29-30.

modified its *Perales* opinion by imposing precise conditions for a claimant to successfully challenge the substantiality of such "reliable" hearsay evidence: (1) the claimant must object to the hearsay evidence, and (2) the claimant and a medical witness must appear and testify in direct contradiction to the hearsay evidence.²⁴⁹ From this modified ruling, which nonetheless would have entailed a major change in SSA procedures, an appeal was taken, and the Supreme Court reversed.²⁵⁰

The Supreme Court in *Perales* restored general record evidence to the level of potential substantial evidence, noting that under existing regulations there were ample devices for a complainant to protect himself by subpoenaing²⁵¹ and cross-examining the reporting physician (which *Perales* had not done).²⁵² In reaching this conclusion, the Court included in its supporting rationale the pragmatic factors that detailed medical reports based on accepted medical procedures are of value²⁵³ and that in a nonadversary system handling the claims volume that SSA processes, to require the presence of medical experts for testimony in each case would substantially raise costs and burden the medical profession without any likelihood of real benefit to the claimant.²⁵⁴ The Court briefly distinguished the *Perales*

249. 416 F.2d 1250 (5th Cir. 1970).

250. 402 U.S. 389 (1971).

251. The Secretary has the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. 42 U.S.C. § 405(d) (1970). The claimant himself may request the issuance of subpoenas. 20 C.F.R. § 404.926 (1971).

252. The Court held:

[A] written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by a hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician. 402 U.S. at 402.

253. *Id.* at 403.

254. *Id.* at 406. The Court was impressed by the care and thoroughness of the medical work-up. *See id.* at 403-04. Five specialists reported on *Perales* and agreed that this 34-year-old ex-truck driver with a back problem was exaggerating, malingering, steeped in hostility, and refusing to exercise or help himself. The five specialists, three of whom were government consulting physicians, were a neurosurgeon, neurologist, orthopedist, psychiatrist and physical medicine specialist. The medical adviser at the hearing supported these conclusions as did one physician on whom *Perales* had relied for a welfare claim, the latter recommending that he recondition himself and return to work. The only dissenting voice was the general practitioner who had seen *Perales* over thirty times. The Court, relying on professionalism, refused to find any bias on the part of the government-paid consulting physicians, *id.*, and apparently no one raised any question of bias on the part of the general practitioner.

disability claim from the situation in *Goldberg v. Kelly*,²⁵⁵ a dependent child welfare case which dealt with the termination of benefits prior to a hearing and in which the credibility and veracity of medical informants were in issue. The Court in *Goldberg* had held that before *termination* of benefits there must be notice and opportunity for a confrontation-type hearing. *Perales*, however, involved an initial grant situation rather than a change of status without prior notice. There was no problem of credibility and veracity of the physicians but only a professional disagreement on medical conclusions.

Perales is an important decision, because it indicates the Supreme Court's disposition, in light of the mass of cases to be processed, to find that the SSA's limited type of hearing is consistent with procedural due process if the claimant is given the opportunity to force cross-examination. However, the decision leaves open the future development of the substantial evidence rule. The Court expressly remanded the case for a substantial evidence determination by the district court, but its detailed discussion of the medical reports seems to leave little doubt as to the intended outcome. Was the Court's review an abrogation or an honoring of the substantial evidence rule—a *de novo* reweighing or simply an agreement with SSA that it had substantial evidence for its conclusion?²⁵⁶

Concluding Observation

The degree to which the substantial evidence rule will be followed by the courts may well be a function not of the rule itself but of the degree of (1) judicial acceptance of the goals of the political branches as embodied in the program; (2) the clarity of the statutory-administrative standards; and (3) the precision in administrative procedures and operational criteria for applying the standards. If so, despite the 1967 Amendments, the SSA disability program may fail to command judicial credibility on point (1); defies credibility on point (2); and may still be in trouble on point (3) because of its interrelationship with point (2). Hence, the present degree of judicial

255. 397 U.S. 254 (1970).

256. The short dissenting opinion by Justice Douglas, joined by Justices Black and Brennan, turns outwardly on a disposition to make cross-examination a rigid pre-condition of "substantial evidence," whatever the nature or volume of the governmental program. And yet, there are intimations that the dissenters might not feel bound by the substantial evidence rule. Even though the physicians' reports were forthright, uncompromising and unanimous, Justice Douglas refers to a "serious back injury," 402 U.S. at 411, as though it were a proven fact, and speaks of a "grave injustice." *Id.* at 413.

acceptance of the 1967 Amendments and the favorable *Perales* opinion may be only a lull induced more by the magnitude of the program and a sense of its administrative impossibilities than by an acceptance of the program in principle.

EVALUATION AND RECOMMENDATIONS

All studies of the administrative process tend to emphasize problem areas and to project a somewhat negatively distorted impression of any given program's fulfillment of its statutory mission. Thus, viewed from the perspective of a million-claim intake,²⁵⁷ the SSA disability system works. In fiscal year 1970, 6 percent (14,000) of the total number of potentially reviewable SSA actions (238,000 substantive denials) and 45 percent of the denials actually appealed were reversed by hearing examiners.²⁵⁸ It is a significant accomplishment that approximately 88 percent of all claims eventually allowed can be favorably disposed of at the initial determination-reconsideration levels, without hearing examiner or court action.

In spite of these indicia of success, fundamental weaknesses remain. Because appeals in only a fraction of a million claims may overload the system, some measure of finality at the earliest possible decisional stage of the SSA disability process is desirable. Furthermore, the high rates of reversal at the various review stages actively encourage claimants to appeal from denials of claims.

Proponents of extensive provisions for review typically argue that equity requires giving a claimant ample opportunity to appeal to a higher authority which can "correct" erroneous determinations made at a lower level of the decisional process. However, an examination of the extremely subjective disability standard and the equally subjective factors which are weighed when a disability determination is made indicates that review and reversals of disability decisions often produce merely different, rather than more accurate, results. In such a situation, high reversal rates are not likely to contribute to the basic "justice" of the system.²⁵⁹ Indeed, such rates may even imbalance the

257. See note 12 *supra*.

258. Bolton-Smith tabulation, *supra* note 74.

259. Reversals seem to be a complex of (1) the inherently amorphous nature of the abstract capacity-for-gainful-activity standard when applied to claimants with some quantum of residual work capacity; (2) the borderline fact situations in most of the cases which fall outside Test I and Test II; (3) the difficulty in assessing psychological overlay in the borderline cases; (4) the conclusory testimony of some medical advisers, which has telling effects; (5) the naturally

system in favor of persistent claimants who yield to traumas, thereby reinforcing the very kind of conduct society should seek to discourage.²⁶⁰

Perhaps the statutory abstract capacity-for-gainful-activity test²⁶¹ is the best legislative definition of total disability that can be drafted. However, the test gives no indication of the amount of employment-directed personal effort that society is to insist upon as a precondition of subsidized premature retirement for the borderline claimants who are only partially incapacitated. The problem is ultimately a public policy question for lay determination, rather than a medical or psychological/psychiatric issue. Nor is the problem readily susceptible to significant clarification by the traditional common-law process of reported, rationalized decisions and case-by-case construction of precedent (unless one small unit could make all of the decisions and thus institutionalize its own prejudices, following the model of a regulatory commission).

Hardcore disability cases are relatively easy. But the borderline cases which predominate at the appellate levels may involve informed guesswork on a record weakest in evidence on the most important factor—the spirit or motivation of the claimant. Moreover, psychological/psychiatric data, even if more assiduously garnered, might always be inconclusive, because any given set of data tends to support opposite conclusions. Thus, in a borderline case, the response of the

appealing nature of the face-to-face contact, which first occurs at the hearing examiner level; (6) the presence of an attorney who in any borderline case can always make a plausible argument, and by his mere presence threatens further appeal; (7) the natural desire of an appellate body to exercise its independence, which in the SSA context can only be accomplished through ruling in favor of the claimant; (8) at the court level, judicial ignorance or simply nonacceptance of the statutory standard of disability.

In defense of reversals, even at fairly high rates, the argument has been made that they are beneficial, evidencing correction of poor work at lower levels. This point is undoubtedly valid in part, and Justice Blackmun apparently took a similar view when he cited the 44.2% hearing examiner reversal rate as attesting to “the fairness of the system.” *Richardson v. Perales*, 402 U.S. 389, 410 (1971). But this hypothesis presents problems if it is extended too far. For example, see notes 169-72 *supra* and accompanying text (data showing personal inconsistencies among hearing examiners in their reversal rates).

260. This statement would not seem harsh to those who, like the author, have visited some “borderline” case hearings and have seen the effect of complainant demeanor. For example, in one case a disability allowance was denied to a claimant who, despite loss of one leg as a child, had worked all his life in heavy construction. In another case, a disability allowance was granted to an educated but ineffectual individual who had recovered from a physical illness and whose basic problem seemed to be personal failure rather than incapacity for gainful employment in the strict statutory sense.

261. See notes 96-101 *supra* and accompanying text.

first decisional body may be as accurate or reliable as the reaction of any appellate body, provided the first decisional level operates in the same fashion as the higher body—that is, in personal confrontation with the claimant. The lack of face-to-face contact with the claimant at the initial determination and reconsideration levels is a serious obstacle to attributing more finality to the two basic decisional stages and thus permitting reduction or elimination of much of the hearing examiner and appellate structure.

Because only a fraction of the total denials even reach the hearing examiner level, the question arises: Were the unreviewed decisions “correct,” or was there merely a differential in the vigor with which the individuals asserted their claims? More significantly, the data available on consistency among hearing examiners suggest that a reversal may depend as much upon the personality of the examiner as upon the actual record.²⁶² Such reversals do not so much attest to fairness as add a new element of inequity—the chance factor of case assignment to a particular examiner. And again, the crucial factor seems to be not bad faith but honest differences of opinion under the vagaries of the abstract capacity-for-gainful-activity standard.²⁶³

Historically, because standards are elusive and individual equity is difficult to accomplish, the most problematic decision for welfare or social insurance systems has been the disability determination. Regarding SSA itself, there is evidence of sophisticated concern, a spirit of self-study, a willingness to innovate, and a commendable disposition to cooperate with outside research. But a positive attitude seems to be of little avail if the SSA disability standards, due process-inspired appeals, and the sheer magnitude of the claims load combine to create administrative overburden and inherent problems of decisional inconsistency in the borderline cases.

At the same time, we resist the Cassandra-like suggestion that justice in the sense of consistency and correctness of decision is not

262. A significant cluster of examiners has reversed at the rate of 21-30%, while another substantial group has had reversal rates of 66-80%. See note 170 *supra* and accompanying text.

263. At the initial determination and reconsideration stages there are also indications that such borderline determinations are not uncommon. In evaluating the Nagi survey, see notes 138-58 *supra* and accompanying text, where the purpose was broader than a consistency check, there is the nice question of which set of evaluations to “trust”—the regular BDI-state agency determinations or the special clinical teams’ evaluations. The answer may be that both were partially “correct” (or “incorrect”), because of the intrinsic difficulty of the total disability concept, and that some variation both within and between the two sets of evaluating bodies was predictable. However, even in what would seem to be non-borderline cases, there was an observable divergence in the two sets of decisions. See note 151 *supra* and accompanying text.

achievable where goals are sophisticated, standards are necessarily vague, proof is difficult, and reasonable men may predictably differ in close cases at rates approaching 50 percent. Yet to recognize this conundrum is not to abandon the search for equity and efficiency in mass claims systems. Instead, such recognition points to an insistence that the best job possible be accomplished at the first stage where a record hearing is feasible or mandated, and compels a corollary insistence that appeals be rare and confined to correction of irrationality.

Policy Making and Standards

The SSA disability program needs a more vigorous, centralized policy-making machinery. Theoretically, the policy-making mechanisms center in the Commissioner of SSA who exercises power delegated by the Secretary of Health, Education and Welfare. In practice, SSA does not fit such a simple, centralized administrative model because the cases move from the "independent" hearing examiners and Appeals Council to court review without an intermediate, direct, unifying review power in the Commissioner. Therefore, SSA does not fit the quasi-judicial model of the regulatory commissions where the top level, which is directly responsible to Congress and the President, has power to review and modify individual case determinations and thus to centralize policy-making²⁶⁴ (although court review may follow). To be sure, the Appeals Council functions as the top SSA decisional level, but, except for the tie-breaking chairman, the Council is composed of tenured civil servants who are *not* politically accountable; moreover, its decisions are not reviewed by the Commissioner who *is* accountable.

A response to this phenomenon would be to say that the function of the Appeals Council is to apply the "law." But the question is, what is the "law" in a system with few regulations and an amorphous statutory standard which is to serve as the basis for all difficult determinations? An additional adverse impact on centralization of policy-making may flow from the geographic separation and the resultant conceptual bifurcation of the SSA effort between the two-level initial

264. See Jones, *The Role of Administrative Agencies as Instruments of Social Reform*, 19 AD. LAW REV. 279, 287-89 (1967). Cf. Loevinger, *The Administrative Agency As a Paradigm of Government—A Survey of the Administrative Process*, 40 IND. L.J. 287, 305-07 (1965). See also Comment, *Administrative Agencies, the Public Interest, and National Policy: Is a Marriage Possible?*, 59 GEO. L.J. 420 (1970).

determination-reconsideration process centralized in Baltimore and the hearing examiner process headquartered in Arlington, Virginia (with examiners themselves operating locally around the country). Some SSA-Baltimore guidelines, the most important being those relating to presumptions, are not honored in Arlington.²⁶⁵

Rulemaking is the normal process by which broad administrative discretion is clarified and channeled in the light of experience under statutes which may do little more than identify a goal.²⁶⁶ The problem of decisional inconsistencies in SSA could be eased if more detailed substantive regulations for disability determinations were issued by the Secretary of HEW, or the Commissioner of SSA as his delegate, for the uniform guidance of the state agencies, SSA-Baltimore determiners, hearing examiners and Appeals Council, and the courts. Although SSA has commendably formulated detailed guidelines which provide for allowance of many hardcore claims on objective medical grounds,²⁶⁷ very few standards for decision in the more difficult abstract capacity-for-gainful-activity cases have been articulated.²⁶⁸ One possibly promising approach, if Congress were to acquiesce, would be to experiment further with objective concepts of an age-occupational-disability nature.²⁶⁹ Another possibility would be to expand the concept of "medical equivalence" of a listed impairment under Test I.²⁷⁰

Although revision of the abstract statutory definition of disability would encounter resistance and should be a last recourse, difficulties caused by the statute cannot be ignored. Statutory revisions which might compel the creation of clearer standards include: (1) explicit statutory direction for SSA to make and enforce more detailed *per se* rules of disability; (2) clarification of the presumption to apply in close cases; (3) confinement of SSA disability to a wholly objective series of tightly drawn measures of physical incapacity and reliance on other federal programs to take care of needs in the present difficult border-line claims area; (4) removal of confidentiality

265. See notes 120-24 *supra* and accompanying text.

266. See generally 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 6.01-.12 (1958); *id.* §§ 6.01-.10 (Supp. 1970).

267. See notes 104-10 *supra* and accompanying text (Test I evaluations).

268. The present regulations do not insure that SSA determiners and hearing examiners will follow the same presumption in Test III cases. See notes 119-25 *supra* and accompanying text.

269. Test II, as applied to certain categories of manual laborers, exemplifies this approach. See notes 111-13 *supra* and accompanying text.

270. See notes 104-10 *supra* and accompanying text.

from SSA cases and publication of Appeals Council substantive decisions.

The SSA Administrative Process

Given the present claims volume, the SSA disability program requires an expeditious "flush" process which will insure the prompt denial of technically insufficient or frivolous applications and the ready allowance of obvious hardcore disability claims. The state agencies and SSA-Baltimore (BDI) perform this function relatively well in the initial determination and reconsideration stages without personally confronting the claimant. Face-to-face contact seems necessary, however, for a well-reasoned, equitable decision in the borderline cases. Lack of such contact at the first decisional levels may be one inducement to appeal to the hearing examiner level, and personal contact at that level seems to be an element in the high reversal rate.²⁷¹ Therefore, consideration should be given to providing personal confrontation prior to the hearing examiner level.

Using the state agency teams, SSA is now experimenting with face-to-face claimant contact at the reconsideration level. However, absent the grant of some measure of final decisional power to the state agencies, the state "hearing" would merely be an interview and would not accomplish the goals of direct personal impact by the claimant on the decisional process, increased "client" satisfaction, and decreased incentive to appeal. If a determinative state agency hearing were held, a continued Baltimore power to remand or reverse a decision without a hearing would be inappropriate from the standpoint of these goals. But if the Baltimore operation were thus displaced, major regional inconsistencies among state agencies might arise because of the vagueness of the disability standards.

Decentralization of the SSA-Baltimore reconsideration stage, although requiring a major structural and personnel upheaval, is a potentially promising alternative. A wholly federal reconsideration stage would increase the uniformity of decision, and a decentralized staff would provide the needed face-to-face claimant contact.²⁷² Staff decentralization could be accomplished by creating permanent local substations in each state or by using roving teams of reconsideration personnel rotating on a regular schedule (the latter being prefera-

271. See text following note 124 *supra*.

272. If the state agency role is to be preserved in deference to a corollary vocational rehabilitation purpose, a state role at the initial determination level should suffice.

ble in order to maintain uniformity and avoid regional differentials). Some replaced state expert personnel could be absorbed as part of the reconsideration staff expansion which might be needed. The federalized reconsideration panel could be composed of a physician and a vocational disability evaluator, who would supply technical expertise, and a lawyer, who would aid in structuring decisions and constructing a reviewable record. The increased initial workload resulting from personal hearings by a multi-member federal panel at the reconsideration level might be reduced by introducing a screening process whereby allowances could be made without a hearing.

If the suggestion to reconstitute the reconsideration stage as the basic personal hearing level has merit, retention of the hearing examiner stage, where personal confrontation first occurs under present procedures, would be redundant. The hearing examiner stage could be deleted entirely or, alternatively, could be fused with the proposed federalized reconsideration stage.²⁷³ The hearing examiner could serve as presiding and deciding officer, and other members of the multi-disciplinary panel might function as advisers. To go beyond this and incorporate the "independent" SSA hearing examiner as the presiding but co-equal member of multi-disciplinary reconsideration panels would require amendment of the Administrative Procedure Act.

Concededly, such a drastic reassessment of the SSA hearing examiner function gets into an area where there is a sharp clash of

273. The other extreme would be to completely divorce the decision-making process and the hearing examiner function, and to develop a "pure" administrative judge model. Logical corollary features of following the pure adjudicatory model would be:

- (a) use of an adversary process with an SSA spokesman present at the hearing to present the agency position;
- (b) termination of the "open file" concept and use of remands for the consideration of new evidence and the revision of the administrative position;
- (c) termination of the principle of confidentiality, because such a principle hinders the development of precedent in the process of adjudication.

Following the "administrative judge" model would force serious consideration of the issue of hearing examiner independence in relation to the Appeals Council and in relation to Bureau of Hearings and Appeals administrative control. The subject has already been the source of controversy. See note 75 *supra* and accompanying text.

As a third alternative, the system could remain substantially as it is at present, but with a concerted effort by SSA to clarify the law by issuing more detailed regulations and by publicizing more precedential decisions, "sanitized" by the Appeals Council to preserve confidentiality.

Fourth, there could be an attempt to work out a fresh accommodation between the position which indicates a more constricted hearing examiner role and the one which points toward increased examiner independence.

principles and deep disagreement. However, even under present procedures the SSA hearing examiner role is somewhat unusual. Formal rules of evidence are not used, and the proceeding is non-adversary. Furthermore, not all hearing examiner reversals of prior SSA administrative denials are substantive adjudications—some result from introduction of new evidence or from a change in the claimant's physical condition so that the hearing examiner is actually perfecting an incomplete administrative process.

Replacement of the hearing examiner level by a federal reconsideration hearing would pose questions concerning the minimum amount of formality which would be required for a proper hearing. Under present interpretations of the Social Security Act and the Administrative Procedure Act, disability hearings under the direction of a Civil Service Commission-certified hearing examiner are required to build a record for review.²⁷⁴ More critical is the question of the degree of formality constitutionally required.

Two recent decisions by the Supreme Court indicate that a cautious judicial reassessment of the due process-formality requirements in high volume benefit determinations may be underway. *Goldberg v. Kelly*²⁷⁵ involved a challenge to a state termination of an award under the federally-supported aid-to-dependent-children program which provided for a post-termination "fair hearing"—in other words, a formal, quasi-judicial trial. The Supreme Court held that while there must also be a pre-termination evidentiary hearing satisfying "minimum procedural safeguards," adapted to the "limited nature of the controversies to be resolved," the proceeding need not take the form of a "quasi-judicial trial" or the "statutory 'fair hearing.'"²⁷⁶ However, Justice Brennan, speaking for the Court, then proceeded to describe in quite formal terms the kind of pre-termination hearing contemplated.²⁷⁷

274. The Social Security Act provisions for a hearing and findings, 42 U.S.C. §§ 405(b), (g) (1970), read in combination with the Administrative Procedure Act provisions regarding who can hold such a hearing, 5 U.S.C. §§ 556-57, 3105 (1970), are deemed to require use of hearing examiners certified by the Civil Service Commission. See 20 C.F.R. § 404.921 (1971).

275. 397 U.S. 254 (1970).

276. *Id.* at 266-67.

277. Although a transcript and specific findings apparently are not required, there must be notice, personal appearance, right of counsel, and cross-examination. The decision maker must be impartial and his conclusions as to eligibility must rest on the legal rules and the evidence received at the hearing. He should relate the reasons for his decision to the evidence in the record. *Id.* at 267-71.

In *Richardson v. Wright*,²⁷⁸ the SSA had terminated, because of a subsequent work record, a disability award under procedures which allowed suspension of benefits before a full investigation and hearing were conducted. The claimants argued a right to a pre-termination hearing under *Goldberg* and won a partial victory in the district court,²⁷⁹ which apparently relied more on the Supreme Court's "minimum procedural safeguards" language than the surprisingly detailed description of that term. The court said that the claimant had a right to have timely notice, to examine the documentary evidence supporting termination, and to submit counter-evidence, but saw no necessity for a formal hearing where medical personnel or employers would be required to be present for cross-examination.²⁸⁰

The Supreme Court remanded the case for redetermination in the light of intervening, revised SSA provisions which govern disability benefit termination proceedings and follow the district court's limited reading of *Goldberg* in providing for written submissions rather than oral testimony or confrontation of witnesses.²⁸¹ The Court said that if the claimant won back his award under the new procedure there would be no need to consider his constitutional claim.²⁸² Thus, the Supreme Court's remand in *Wright*, despite the technical ground on which it was placed, raises the possibility that the Court may be moving toward an even more limited reading of *Goldberg* than was made in the district court. The Court's comment that "[i]n the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise"²⁸³ further indicates that at the proposed federalized reconsideration level,²⁸⁴ what is termed in *Goldberg* a detailed "evidentiary hearing," without formal rules of evidence, a transcript, or formal findings, might suffice as a basis for

278. 405 U.S. 208 (1972).

279. 321 F. Supp. 383 (D.D.C. 1971).

280. *Id.* at 387.

281. See DISABILITY INSURANCE STATE MANUAL § 265.1D.

282. 405 U.S. at 209. Justice Brennan in dissent noted that the new provisions do not expressly reflect the district court's additional comment that resolution of conflicting evidence furnished by the claimant should be by an impartial decision maker and that a hearing "could be" held on the conflict. *Id.* at 213-14.

283. *Id.* at 209.

284. See notes 272-74 *supra* and accompanying text.

both administrative and judicial review.²⁸⁵

CONCLUSION

The SSA experience strongly suggests the inadvisability of building high-level, Administrative Procedure Act-type hearing and appeal procedures into benefit or "social insurance" systems which yield a mass of claims to be disposed of under discretionary eligibility standards more subjective than such simple criteria as age, length of service, or strictly objective medical criteria. As we move further into the welfare state, defined broadly to include discretionary social insurance of the disability claim type, we may have to reevaluate at a very basic level the tensions caused by the interface of ever more absolute due process concepts and ever more mountainous claims loads under vague standards and intractable problems of proof.*

285. The questions remain, of course, as to whether the Court would require the same level of formality for initially processing claims as for terminating a benefit already awarded, and the extent to which the level of formality may vary with either the character of the administrative program or the degree of intrinsic objectivity and reliability in the relevant evidence.

* Editor's Note: At the time of publication, the Civil Service Commission had recently changed the title "hearing examiner" in all federal agencies, including SSA, to "administrative law judge." 37 Fed. Reg. 16787 (1972). However, the "traditional" term of "hearing examiner" has been used throughout this article.

