Balancing Fundamental Disability Policies:
The Relationship Between the Americans with Disabilities Act and Social Security Disability

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Disability law is becoming an increasingly diverse field due to the passage of new legislation, and the amendment of existing legislation. The Americans with Disabilities Act of 1990 (ADA) and the 1992 amendments to the Rehabilitation Act of 1973 have greatly expanded the rights of disabled individuals. However, the relationship of these new laws to existing disability benefits legislation, particularly the Social Security Disability Insurance Program (SSDI) and the Supplemental Security Income program (SSI), is unclear.

Exploring this relationship is vital because millions of Americans have one or more disabilities, and disability law has a substantial impact on a large sector of the population—particularly older individuals and impoverished individuals. Knowing whether the new disability discrimination laws impact the rights provided by existing disability benefits legislation would enable individuals with disabilities to better assess their rights and possibly prevent expensive litigation.

This article explores the effect of the ADA on the social security disability programs. Part I provides an overview of those programs. Part II explains the employment provisions of the ADA, as disability benefits laws focus on the ability to engage in employment.

Part III discusses the relationship between the ADA and SSDI/SSI. The most obvious way in which the ADA may potentially impact SSDI/SSI benefits determinations is through application of the concept of reasonable accommodation to evaluations of an individual’s ability to participate in substantial gainful activity. The relationship between these concepts and the policies underlying the ADA and SSDI/SSI is explored, and it is suggested that the duty to reasonably accommodate should not provide the Social Security Administration (SSA) with an additional basis for denying benefits or expanding the list of jobs that can be performed by individuals with given disabilities.

Engaging in a dialogue on this topic is essential, because the SSA has historically demonstrated a willingness to stretch legislation beyond its underlying purpose and the intent of Congress in order to create addi-
tional bases for denying benefits. Thus, the SSA might conceivably use the duty of employers' to reasonably accommodate disabled employees under the ADA as a basis for denying benefits to individuals who would otherwise be eligible for them. For the reasons set forth below, such an attempt would be inconsistent with the purpose of the ADA and SSDI/SSI, and would not likely survive judicial scrutiny.

I. OVERVIEW OF SOCIAL SECURITY DISABILITY

A. Brief History

As noted earlier, social security legislation has created two disability benefits programs, SSDI and SSI. Both programs are administered by the SSA. SSDI provides benefits to disabled workers and widows if the worker is insured under the provisions of the program. SSI provides benefits to disabled individuals whose incomes and assets fall below a specified level. The statutory provisions governing these programs are similar, and have been amended numerous times. In addition, the regulations promulgated by the Secretary of Health and Human Services (HHS) to implement the Social Security Act have been amended several times, and have been the subject of major litigation. Significantly, the SSA is often accused of misapplying the statute and regulations to facilitate the denial of benefits.

Notwithstanding concerns about the frequency with which the applicable law is changed, and the SSA's application of that law, SSDI and SSI function on a massive scale. Between 1974 and 1991, these programs generated an average of 1,250,000 claims annually, and paid approximately twenty-one billion dollars a year in benefits. The SSA employs thousands of people and thousands more work for the SSA under contract.

B. How the Social Security Disability Programs Function

To receive disability benefits, an individual must be disabled as defined under SSDI or SSI. The definitions of disability under the two programs are similar in pertinent part. The portions of the definition most relevant to this paper are as follows:

(1) The term "disability" means-
(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

(2) For purposes of paragraph (1)(A)-
(A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

The HHS regulations have created a complex system for evaluating disability claims in light of these definitions. Following this regulatory scheme, the SSA uses a five-step process to determine whether a person is disabled. First, the SSA determines whether the claimant is presently engaged in any substantial gainful activity. Second, it asks whether the impairment is severe by inquiring whether it significantly limits the claimant's ability to work. Third, the SSA determines whether the impairment is equivalent to any impairment the SSA has listed as so severe that it automatically precludes substantial gainful activity. Fourth, it determines...
whether the claimant has the residual functional capacity to perform his or her past work. Finally, it asks whether the claimant is able to perform any substantial gainful activity in the national economy. The claimant has the burden of proof for the first four steps, while the SSA has the burden of proof for step five if the claim proceeds that far.

The disability determination process is applied to SSDI/SSI claims in the following manner. If a claimant is otherwise eligible and has an impairment which is expected to end in death, or has lasted or can be expected to last for at least twelve months, the claim proceeds to step one. If the claimant is engaged in substantial gainful activity the claim is denied. If he or she is not, step two is followed. If the impairment significantly limits the claimant's ability to work — that is, it is severe — the claim continues to step three. Otherwise, it is denied. If the SSA determines that the impairment is equivalent to a listed impairment, it grants benefits; otherwise the claim proceeds to step four. Pursuant to step four, if the claimant does not have the residual functional capacity to perform his or her past work the burden shifts to the government and step five is followed. If the claimant is unable to perform any substantial gainful activity in the national economy considering his or her age, education, and past work experience benefits will be granted.

To demonstrate that a claimant can perform some work in the national economy given his or her age, education, and past work experience, the SSA applies "grid regulations." The grids are applied to claims involving impairments that are primarily exertional in nature. The essential function of the grids is to determine whether an individual is disabled, as per step five above, considering the claimant's age, education, and past work experience.

This is done through a system of tables based on residual functional capacity. These tables are broken down into rules which apply to the various possible combinations of factors relating to age, education, and past work experience. The charts contain headings for age, education, and previous work experience, as well as a heading for the decision as to whether a claimant is disabled based on those factors. Under every heading there is a classification for each factor as applied to each rule. For example, in the age column classifications range from "younger individual" to "advanced age," while under past work experience they range from "none" to "skilled." Based on these factors a determination of disabled, or not disabled, is listed.

C. Substantial Gainful Activity

The SSDI/SSI concept that is most relevant to an analysis of the relationship of the ADA to those programs is "substantial gainful activity." As discussed in Part III, the SSA might argue that ADA concepts such as "reasonable accommodation" should impact the determination of a claimant's ability to perform substantial gainful activity as defined in the statutes and regulations. Thus, a detailed understanding of substantial gainful activity is essential to any analysis of the relationship between SSDI/SSI and the ADA.

Substantial gainful activity refers to work activity that is both substantial and gainful. A substantial work activity requires performance of significant physical or mental activities. Part-time work may be substantial, as may work performed for a lower rate of pay with more limited duties and responsibilities than a claimant's prior work. A gainful work activity is one engaged in for profit. Activity is gainful if it is a type of work usually performed for profit, regardless of whether the claimant actually realizes a profit from that work.

In determining whether work actually performed is substantial gainful activity the SSA considers factors such as the nature of the work performed, how well the claimant performs that work, whether the work is performed under special conditions, and the amount of time spent working. In addition to these factors, the SSA utilizes evaluation guides. These guides evaluate actual earnings from work activity to determine whether it is substantial and gainful. There are separate guides for employees and for self-
employed individuals. The fact that an employee has not earned sufficient income to classify his or her work as substantial and gainful under the guides will not demonstrate that the claimant is incapable of performing substantial gainful activity.

If a claimant performed any substantial gainful activity during an alleged period of disability, the SSA will find that the claimant is not disabled, unless the claimant was forced to stop working after a short period because of his or her impairment or impairments. However, the fact that a claimant has not performed substantial gainful activity during that period does not preclude a finding that he or she could perform such activity.

The concept of substantial gainful activity is used not only to assess a claimant's actual work activity but also to assess his or her potential to perform work. Steps four and five of the procedure used by the SSA to make disability determinations demonstrate that the SSA may find a claimant not disabled even when the claimant is not engaged in substantial gainful activity, and has not engaged in it during his or her period of disability. It will do so if the claimant has the residual functional capacity to perform past relevant work or, in light of his or her age, education and past experience, to perform any work in the national economy.

II. OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT

A. Brief History

The ADA was passed in 1990. The employment provisions of the ADA, contained in Title I, went into effect for employers with twenty-five or more employees on July 26, 1992, and will go into effect for employers with fifteen or more employees on July 26, 1994.Prior to the passage of the ADA, the only major federal law which prohibited disability-based employment discrimination and required reasonable accommodation of disabled employees, was the Rehabilitation Act of 1973. However, the employment provisions of that statute apply only to the federal government, federal contractors, and entities that receive federal funds.

Congress passed the ADA in response to a public outcry over the widespread discrimination against, and lack of legal protection for, disabled Americans. Particularly significant was the fact that disabled individuals had no legal redress for discrimination unless they were protected by the Rehabilitation Act, and that they were not protected under the Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion, national origin, and sex. The primary policies underlying the ADA are the elimination of barriers that prevent disabled Americans from participating in mainstream American society, and the provision of equal employment and other opportunities for those citizens.

B. The ADA Employment Provisions and the Concept of Reasonable Accommodation

This article is primarily concerned with Title I of the ADA, which covers employment, as SSDI and SSI benefits are directly tied to the ability to engage in employment. Title I of the ADA prohibits discriminatory employment practices against qualified individuals with disabilities, and requires covered employers to reasonably accommodate such individuals unless such accommodation would impose an undue hardship on the employer. Discriminatory employment practices include any discriminatory practice that affects job application procedures, hiring, advancement, discharge, compensation, training, or any other term, condition, or privilege of employment. In this respect the ADA is similar to Title VII of the Age Discrimination in Employment Act. However, the concept of reasonable accommodation as applied to individuals with disabilities is unique to the ADA and the Rehabilitation Act, and it is that concept which is most relevant to SSDI/SSI.

In order to be protected under Title I, and thus entitled to reasonable accommodation, an employee or job applicant must be a qualified individual with a disability. A qualified individual with a disability means:
An individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this Title, consideration shall be given to the employer's judgment as to what functions of a job are essential. 

Disability, with respect to an individual, is defined as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such impairment; or

(C) being regarded as having such an impairment.

If an employee or applicant is a qualified individual with a disability, he or she is protected from discriminatory employment practices, and may request an employer to reasonably accommodate his or her disability or disabilities. The purpose of providing such accommodation is to enable the employee to perform the essential functions of his or her job, and enjoy the benefits and privileges related to that job, regardless of any disability or disabilities. Unless accommodation would result in undue hardship to the employer, the employer must provide such accommodation; however, the employer need not provide the exact accommodation requested by the employee or the "best" accommodation possible, but may provide any accommodation that enables the employee to perform the essential functions of his or her job.

For purposes of this analysis, undue hardship means "an action requiring significant difficulty or expense, when considered in light of" factors specified in the statute such as the cost of the accommodation, the financial resources of the employer, and the nature of the employer's operations. The statute provides examples of reasonable accommodations, including modification of existing facilities so that disabled individuals can access and use them, job restructuring, modification of work schedules, reassignment, acquisition or modification of work-related equipment or devices, provision of qualified readers and interpreters, and modification of examinations and other materials and policies. If an employer fails to provide reasonable accommodation to a qualified individual with a disability, or subjects such an individual to a discriminatory employment practice, the disabled individual may file a complaint pursuant to the powers, remedies, and procedures set forth under Title VII. In such a suit a court will consider case law interpreting the Rehabilitation Act. There are a substantial number of cases under the Rehabilitation Act which will provide guidance in determining what accommodations are reasonable.

An employee who wishes to be accommodated has the burden to allege a disability and request accommodation. Once the employee does this, an employer not wishing to grant the requested accommodation has the burden to show why it would pose an undue hardship, and to work in good faith with the employee to come up with alternative accommodations. If the employer presents credible evidence that the employee cannot be accommodated without imposing undue hardship, the employee may demonstrate that there are indeed alternative accommodations that might be provided without undue hardship to the employer.

With reasonable accommodation, disabled individuals can perform jobs from that they were often excluded from prior to the passage of the ADA. Thus, if employers bring themselves into compliance with the ADA, employment possibilities for disabled Americans will vastly increase. Interestingly, it is precisely this point which could cause confusion as to whether the ADA should impact the SSA's determinations of whether an individual can perform substantial gainful activity.

III. THE RELATIONSHIP BETWEEN THE ADA AND SOCIAL SECURITY DISABILITY

A. Legislative History and Policy Considerations

There is little legislative history addressing the relationship between the ADA and
the social security disability programs. However, the relevant legislative history that does exist expresses a perceived tension between the policies underlying the ADA and SSDI/SSI. For example, a House Report on the 1991 Comprehensive Oversight Initiative of the Committee on Ways And Means contains a section on Structural Disability Reform, summarizing the testimony of the Director of the National Rehabilitation Hospital Research Center as follows:

Policy assumptions that drive the eligibility criteria for disability income assistance programs are not consistent with the policy assumptions that led to the passage of the Americans with Disabilities Act. According to the Director, [the] ADA is based on the assumption that people with disabilities want to be independent and productive citizens and that society should help eliminate the barriers that preclude their full participation in society. Further, he testified that the disability program is predicated on the assumption that an individual is either disabled or not disabled, and that the conditions of individuals who are disabled are so hopeless that future prospects for work are virtually nil.

The Director made six recommendations: (1) focus less on medical condition or impairment and more on function and disability in determining eligibility for the disability program; (2) eliminate the notion that a disability has to be long-lasting or end in death in order for an individual to qualify for disability benefits; (3) consider providing income benefits for those who have a partial, as opposed to total, work disability but enact the program cautiously; (4) decouple eligibility for in-kind benefits, i.e., health care, from eligibility for disability income benefits; (5) use disability funds to pay for in-kind benefits that will enable a person with an impairment to work regardless of whether he or she is receiving a cash benefit; and (6) consider splitting the disability program in two parts, first, a de facto early retirement program for disabled persons 55 years and older, and second, a more independent living and work-oriented program for younger disabled persons.

Significantly, the Director did not suggest expanding the determination criteria relating to the ability to perform gainful activity to include those jobs conceivably amenable to reasonable accommodation under the ADA. Most of the director’s suggestions would encourage those individuals with disabilities who are capable of working to do so, but would not preclude granting benefits to those determined to be incapable of working. However, the director’s first suggestion, which implies that the SSA does not look at the level of impairment in making disability determinations, but should, ignores the fact that the SSA does consider impairment and function in making disability determinations.

Senator Donald Riegle also discussed a perceived tension between the ADA and SSDI/SSI in a 1989 statement related to the ADA:

One of the prime goals of legislation affecting disabled Americans has been the effort to incorporate them into the mainstream. While the Americans with Disabilities Act would remove the barriers to participation in the workforce, efforts must also be made to ensure that participation is possible. The present system of disability insurance encourages retirement from the workforce. That approach is wrong. Americans with disabilities should have every encouragement to take advantage of the options opened up by the Americans with Disabilities Act... The tension noted by the Director and Senator Riegle between the ADA and the social security disability programs comes from a perceived conflict in the policies underlying these statutes. The findings and purpose of Congress included in the ADA demonstrate that the act’s purpose is to enable individuals with disabilities to participate in employment, and the other emoluments of society, without the barriers to such participation that presently exist. The SSDI/SSI legislation, on the other hand, provides benefits to disabled individuals.
The primary focus of any dialogue regarding the relationship between the ADA and SSDI/SSI will likely be on the duty to reasonably accommodate on determinations of an SSDI/SSI claimant's ability to perform substantial gainful activity.

Removing barriers so that individuals with disabilities can participate in employment will not mean that all disabled individuals will be able to participate in gainful employment. In fact, as discussed in Part III.C., not all disabled individuals can, or will, be accommodated. Thus the two statutory schemes may be seen as complementary, the ADA encouraging disabled individuals to participate in employment, and SSDI/SSI providing benefits to those who cannot do so. Absent a determination by an appropriate body that an employer must accommodate a disability and proof that such accommodation actually enables the employee to perform the essential functions of his or her job, applying reasonable accommodation principles to reduce the number of disability benefits recipients would harm many disabled individuals, and would violate the policies underlying both the ADA and the social security disability programs.

The concern that the SSDI/SSI scheme will encourage disabled individuals to stay at home rather than participate in gainful employment reflects an assumption that such individuals do not wish to work and will not seek accommodation as long as benefits are available. That assumption ignores the reality that the ADA was enacted in response to the will of disabled individuals to work and participate in society, and the fact that these opportunities were being discriminatorily denied them.

Significantly, SSDI/SSI disability determination procedures do not require the SSA to hand out benefits simply because an individual is disabled. In fact, the SSA denies many claims, and some have suggested that it uses the determination procedures to facilitate such denials. Even claims by individuals considered disabled under the ADA may be appropriately denied under SSDI/SSI. Thus, even in practice the policies do not necessarily conflict. One guarantees the right to equal opportunity for all disabled individuals provided they are qualified to perform the jobs they seek or hold, while the other guarantees benefits to those whose disabilities are determined to preclude gainful employment.

B. Conflict in the Definition of “Disability”

The primary focus of any dialogue regarding the relationship between the ADA and SSDI/SSI will likely be on the impact of the duty to reasonably accommodate on determinations of a SSDI/SSI claimant's ability to perform substantial gainful activity. However, in order to better analyze that relationship, it is necessary to understand the conflict in the definitions of “disability” under the ADA and SSDI/SSI.

There are substantial differences in how the statutes interpret the term “disability.” The definition of “disability” set out in the ADA focuses on whether the individual has an impairment that substantially limits one or more major life functions. The definition of “disability” under SSDI/SSI, which is set forth above, focuses on whether an individual can participate in any substantial gainful activity in which he or she participated in the past or that exists in the national economy, in light of an impairment which is terminal or which has lasted, or is expected to last, for at least twelve months. Because of these definitional differences, an individual may be considered disabled for purposes of the ADA but not for SSDI/SSI, or vice versa. An individual might have a disability such as a respiratory disorder that inhibits one or more major life functions — breathing, for example — but still be capable of performing substantial gainful activity that he or she performed in the past, or that exists in the national economy, such as sedentary work. Similarly, an individual might have an impairment that lasts for over twelve months and precludes that individual from performing substantial gainful activity, but that does not substantially limit one or more major life functions, as non-chronic impairments with little or no long-term impact are not ordinarily considered disabilities under the ADA.

This dichotomy makes sense considering the policies underlying the ADA and SSDI/SSI. The ADA is meant to enable individuals with disabilities to participate fully in...
society by removing barriers and providing redress for discrimination that prevents such participation. Thus, the ADA's purpose supports a broader definition of "disability" focusing on the impact of an impairment on the individual's life functions, because it is the impairment of those functions that has caused the individual to be subjected to discrimination and barriers. Likewise, the underlying purpose of SSDI/SSI supports the definition of "disability" under those programs. That definition focuses on the ability to perform substantial gainful activity in light of an impairment or impairments. This is consistent with SSDI/SSI's purpose of providing benefits to those who are unable to work due to disabilities. An attempt to converge the two definitions would make little sense, because it would frustrate the purposes of both the ADA and SSDI/SSI.

C. Reasonable Accommodation and SSDI/SSI

Under the ADA, covered employers have a duty to reasonably accommodate the disabilities of employees and job applicants. Thus, the number and types of jobs available to individuals with disabilities should increase. However, reasonable accommodation is an individualized concept that will not uniformly expand opportunities.

First, the duty to accommodate is not absolute. If providing an accommodation would impose undue hardship on an employer, the employer need not make that accommodation. Whether or not providing an accommodation constitutes an undue hardship in a specific case is based on several subjective factors, including the nature of the accommodation needed, the resources of the employer, and the nature of the employer's operation. Furthermore, employees working for employers with fewer than fifteen employees are not protected under Title I of the ADA, and those working for employers with fewer than twenty-five employees will only be protected until July 26, 1994.

Additionally, the duty to accommodate only applies to individuals who are qualified — that is, who can perform the essential functions of the job, with or without reasonable accommodation. Logic dictates, and the statute provides, that an employer may adopt a qualification standard requiring that employees and applicants be able to perform the essential functions of the job in question without posing a direct threat to the health or safety of others in the workplace. The ADA defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." The Equal Employment Opportunity Commission (EEOC) regulations provide that the direct threat concept includes direct threats to the disabled individual's own health or safety.

Moreover, disabled employees and job applicants who are entitled to accommodations may be unable to obtain them. The ADA was passed because of myths and stereotypes that create barriers to equal opportunity for disabled individuals. Those beliefs did not magically disappear with the passage of the ADA, and many employers may not comply, either intentionally, due to ignorance of the ADA's mandates, or as a result of sincere but erroneous attempts to interpret the law. Thus, in order to obtain reasonable accommodation employees and job applicants may often have to resort to litigation.

SSDI/SSI determinations about whether an individual can perform substantial gainful activity are based on general presumptions about the availability of work for an individual with the claimant's impairment or impairments. Whether the individual would actually be hired and whether a specific job vacancy exists are factors irrelevant to the SSA's disability determination. Thus, if the availability of gainful activity in the national economy were augmented by jobs in which the SSA determined that disabled individuals with given accommodations could function, many disabled individuals presently eligible to receive disability benefits, and those with the same disabilities applying in the future, would be denied benefits regardless of whether accommodation is really possible. A detailed explanation of why this would be unworkable and contrary to the purposes of the ADA and SSDI/SSI is set forth below.

Significantly, if a disabled employee is actually accommodated in a job that consti-
Assumptions by a vocational expert or a grid regulation that all individuals with a particular disability can perform a particular job with reasonable accommodation... would ignore the facts that many of those individuals will be unable to obtain the accommodation without costly litigation, and still others will not be entitled to it at all.

1. Accommodation is an Individualized Concept, Not Available to All Disabled Individuals in Like Situations

As noted above, reasonable accommodation is an individualized concept which will be applied differently in each case. An engineer who works for a large computer company and becomes paraplegic after an accident might be entitled to special computer equipment costing thousands of dollars, while another engineer who likewise became paraplegic, but who works for a small struggling computer company might only be entitled only to less expensive accommodations or no accommodation at all. Under present SSDI/SSI procedures both engineers would be evaluated using the same criteria, and would likely be entitled to benefits.

If the SSA decided to consider the possibility of reasonable accommodation in determining whether individuals can participate in past relevant gainful employment or any work in the national economy, it might argue that individuals with specific disabilities are capable of performing a vastly expanded number of jobs. The increased assessments of the availability of jobs for individuals with given disabilities based on the possibility of reasonable accommodation would alter the grid and enable the SSA to vastly reduce the number of jobs disabled individuals are assumed not to be able to perform in the national economy. Millions of disabled individuals would be denied benefits based on the blanket assumption that they can perform jobs with reasonable accommodation, and that employers will immediately provide such accommodation.

While the assumptions underlying the above scenario are consistent with the class-based determinations regarding disability made under SSDI/SSI, they are wholly inconsistent with the individualized application of reasonable accommodation under the ADA. SSA makes determinations about an individual's ability to engage in gainful activity in substantial part based on the "grids," assessments by vocational experts of the number and type of jobs appropriate for an individual with a particular impairment or impairments, and reliable published information. Whether an individual will actually be hired or a job is actually available is irrelevant.

It would be impractical for vocational experts and grid regulations to assess the availability of reasonable accommodation considering the procedures used by the SSA, because under the ADA, determinations regarding accommodation will be made on an individual basis, and litigation may be necessary to force employers to provide appropriate accommodations. Assumptions by a vocational expert or a grid regulation that all individuals with a particular disability can perform a particular job with reasonable accommodation, and that due to such accommodation a particular number of such jobs exists in the national or local economy, would ignore the facts that many of those individuals will be unable to obtain the accommodation without costly litigation, and still others will not be entitled to it at all.

In fact, the need for the ADA and the related damage provisions provided by the Civil Rights Act of 1991, demonstrates that many employers are not likely to voluntarily provide accommodations absent litigation. Additionally, employers who attempt to voluntarily comply with the ADA may not provide appropriate accommodations in all cases; some may misapply the subjective factors that determine whether an accommodation would pose an undue hardship. Thus, the individualized basis on which reasonable accommodation determinations are made militates against the application of that concept to SSA disability determina-
tions. Additional factors also militate against such application.

2. Exceptions and Defenses to Reasonable Accommodation Prevent Uniform Application of that Concept

There are several broad exceptions to the duty to reasonably accommodate. First, presently no employer with less than twenty-five employees must provide such accommodation. After July 26, 1994, no employer with less than fifteen employees will have a duty to reasonably accommodate. Thus, if the SSA determined that certain disabilities can be accommodated, and found that individuals with those disabilities were able to perform jobs that they could not previously perform, all SSA assessments of the number of such jobs existing in the national economy would have to be revised and continually updated to factor out employers that have fewer than fifteen employees in any given year. This is because the SSA has a statutory duty to consider only work that exists in significant numbers in the national economy.

Second, as discussed in Parts II.B. and III.C., if providing an accommodation would pose an undue hardship on an employer, that employer need not accommodate. The application of the undue hardship defense will be unpredictable, and the defense will likely be asserted by employers in many situations.

Finally, the requirement that employers reasonably accommodate disabled employees and applicants does not guarantee compliance with that duty. It is not difficult to imagine situations in which employees and applicants will be denied requested accommodations, either because of an employer's deliberate refusal to comply with the ADA or because of a sincere disagreement about what accommodations, if any, must be provided. Many employees and applicants in these situations will be unwilling or unable to undertake the litigation necessary to vindicate their rights. Were the SSA to consider the possibility of reasonable accommodation, it would deny benefits to claimants if work were deemed available in the national economy, regardless of whether those claimants would actually be hired in light of an employer's hiring practices. Thus, those claimants would be forced to seek employment from which they have traditionally been excluded due to barriers and discrimination. However, such employment will be unavailable to many because of the same discrimination and barriers that prompted the passage of the ADA. Under such a system, the SSA would be denying benefits based on the perceived availability of reasonable accommodation for particular jobs, despite the reality that many claimants will be unable to obtain accommodation and even claimants with the resources to litigate may have to wait years to obtain accommodation.

This scenario is contrary to the purposes of the ADA and SSDI/SSI. As noted above, the ADA seeks to provide opportunities that have traditionally been denied to disabled individuals. Inherent in its existence is the fact that such opportunities are being denied. Denying disability benefits based on abstract rights available under the ADA, which will usually be enforced on an individualized basis, would take subsistence funds away from disabled individuals who need those funds until they are accommodated and from others who can be accommodated in theory, but in actuality cannot perform their jobs once accommodation is provided. This would be inconsistent with the ADA's focus on expanding the rights of disabled individuals.

The purpose of SSDI/SSI is to provide benefits to individuals who cannot perform substantial gainful activity due to an impairment or impairments. Admittedly, in assessing benefit eligibility, the focus is whether work is available and not whether an individual would actually be hired. However, the application of reasonable accommodation to disability determinations affects the assessment of job availability because it would expand the number and type of jobs deemed available for individuals with a given disability. Unfortunately, since such accommodation will not actually be available in many cases where it is presumed to be, the objective assessments of the number of jobs such individuals could perform in light of reasonable accommodation would automati-
cally be flawed. Thus, the purpose of SSDI/SSI would not be served, because many individuals who cannot perform any available work due to an impairment or impairments would be denied benefits.

3. Reasonable Accommodation May Apply Differently at Different Stages of a Progressive Disability

Individuals with disabilities which become progressively worse over time, such as muscular dystrophy and cancer, may be capable of performing the essential functions of their jobs at various times with or without accommodation. For example, an individual may be able to perform without accommodations for two years, need minor accommodations for the following year, and need increasingly expensive accommodations after that. Eventually the individual may not be able to perform the essential functions of his or her job with any accommodation. Significantly, some of these individuals may be able to work longer because they work for, or can get a job with, employers who can provide broader accommodations without undue hardship; others will be forced to stop working sooner.

If the SSA made initial determinations that such disabilities can be permanently accommodated for certain jobs based on the fact that they can be initially accommodated, or that they can be accommodated for a certain period of time based on the ability of an average company to provide accommodation, many individuals whose disability progresses faster than usual, or who work for smaller or less solvent employers, would be unjustly denied benefits. This concern would be compounded by the fact that the SSA does not consider employer hiring practices or whether individual claimants will actually be hired in making disability determinations.

Accordingly, the SSA would not be able to apply the concept of reasonable accommodation to such disability determinations for individuals with progressive disabilities without denying benefits to many individuals who would otherwise be entitled to them.

4. The Availability of Reasonable Accommodation is Not an Appropriate Subject for the SSA to Consider

The SSA administers the social security programs created by Congress. The EEOC is the administrative body primarily responsible for the employment provisions of the ADA. The EEOC is the logical agency to have such authority, because it has had similar authority over claims filed in the context of disability-based employment discrimination under the Rehabilitation Act, and thus has experience dealing with concepts such as reasonable accommodation. Additionally the EEOC is the agency with primary authority over other employment discrimination statutes such as Title VII and the ADEA.

The SSA does not have sufficient experience to understand or predict the practical effects of applying ADA concepts such as reasonable accommodation to disability benefit determinations. Additionally, the SSA is not authorized to do so by Congress. Only the EEOC, the Attorney General, and private citizens protected under the ADA may enforce the rights provided thereunder. If Congress meant for the SSA to utilize reasonable accommodation in making disability determinations it could have done so by including appropriate language in the ADA or amending the social security disability legislation. It did not. Thus, the SSA cannot appropriately apply reasonable accommodation to expand the bases for denying disability benefit claims.

Likewise, the Secretary of HHS cannot expressly incorporate the concept of reasonable accommodation into the SSDI/SSI regulations. The ADA gives the EEOC enforcement authority regarding employment issues under the ADA. It says nothing about the Secretary of HHS or the SSA. Furthermore, the Supreme Court stated in *Heckler v. Campbell* that the Secretary of HHS “may rely on [her] rulemaking authority to determine issues that do not require case by case consideration.” The Court held that the medical-vocational guidelines promulgated by the Secretary for determining social security disability benefits eligib-
ity constituted a valid exercise of authority. However, as explained in Part III.C.1, determinations regarding reasonable accommodation must by their nature be made on a case by case basis, and thus are not an appropriate subject for rulemaking. The availability of jobs based on the provision of accommodations cannot be calculated on a broad scale; facts particular to each case are needed to determine the number of jobs available in light of reasonable accommodation. Thus, the SSA cannot be authorized by regulation to apply reasonable accommodation to expand the bases for denying disability benefits.

D. The Limited Circumstances in which Reasonable Accommodation May be Relevant to Disability Benefit Determinations

While the SSA should not import ADA concepts into its disability determination procedures, the concept of reasonable accommodation may be relevant in individual cases. If a disability benefits claimant has successfully obtained a reasonable accommodation, and if substantial evidence indicates that the claimant will be able to perform the essential functions of his or her job during the time for which the claimant seeks benefits, and that such job is substantial gainful activity as defined in the SSDI/SSI regulations, the claim may be appropriately denied. However, the basis for the denial would not be the application of reasonable accommodation in the disability determination, but rather the fact that the claimant is currently engaged in substantial gainful activity, automatically precluding an award of benefits. Thus, reasonable accommodation would be relevant to the SSA's analysis only to the extent that the claimant is actually working as a result of such accommodation.

IV. CONCLUSION

The SSDI and SSI programs provide benefits to millions of disabled individuals, many of whom are older or impoverished. The Americans with Disabilities Act creates previously unavailable opportunities for many disabled individuals. These two statutory schemes complement one another, the ADA encouraging disabled individuals to work and encouraging employers to hire them, and SSDI/SSI providing benefits to those who cannot work due to disability. As each scheme operates to serve a different purpose, the standards used in one scheme may not simply be incorporated into the other.

The availability of reasonable accommodation under the ADA has expanded the number of jobs available for many disabled individuals. However, that concept should not be used as a means of expanding the bases for denying disability benefits. If an individual does receive reasonable accommodation that enables him or her to work, that individual will be denied SSDI/SSI benefits, provided his or her job constitutes substantial gainful activity. However, individuals who are unable to obtain accommodation will not reap the benefits of expanded job opportunities created by the ADA, and may also face complex litigation to vindicate rights guaranteed under that statute.

An attempt by the SSA to limit the availability of SSDI/SSI benefits by importing ADA concepts into the disability benefits determination procedures would undermine the purposes of both the ADA and SSDI/SSI. Given the SSA's skill in finding new and creative ways to deny benefits, it is essential to clarify now why the concept of reasonable accommodation should not be used in this manner. Otherwise, SSA experimentation with the idea might result in the denial of benefits to thousands of deserving disabled individuals, and the waste of taxpayer dollars on litigation over an issue on which the SSA would not likely prevail.

NOTES

1. The views set forth in this article are solely those of the author, and do not necessarily represent the views of any of the author's past or present employers. The author would like to thank Charles Sabatino, Adjunct Professor of Law at the Georgetown University Law Center, for helpful advice on this article.


4. For example, the ADA provides broad rights to disabled employees of both public and private employers. See 42 U.S.C. §§ 12111-12117. Likewise the Rehabilitation Act provides the same rights to federal employees and employees of entities with specified

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5 Id. §§ 1381-1383c (West 1992 & Supp. 1993). Herein­after the Supplemental Security Income program will be referred to as “SSI,” and, along with “SSDI,” will be included in the phrase “social security disability” as used herein.

6 42 U.S.C. § 12101(a)(1), a subpart of the section of the ADA which sets forth the findings of Congress in relation to that act as follows:

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population is growing older.

7 Id. (noting that the number of Americans with disabilities is increasing with the age of the population).

8 SSI benefits are paid only to disabled individuals whose income and assets are below a specified level. 42 U.S.C.A. § 1382(d).

9 For purposes of this paper references to the ADA will also refer to the Rehabilitation Act. However, where there is a specific reference to the Rehabilitation Act, or a difference between the two acts, the appropriate act is cited.

10 For purposes of this paper SSDI and SSI will be treated identically except where their provisions differ. The provisions of the two laws that are most relevant to this paper, and the related regulations, are virtually identical. Compare 42 U.S.C.A. §§ 422-425 (SSDI) with id. §§ 1382c-1382h (SSI); compare 20 C.F.R. §§ 404.1520-.1575 (1993) (SSDI) with id. §§ 416.920-975 (1993) (SSI).

11 Reasonable accommodation is a core principle of Title I of the ADA. Employers are required to provide reasonable accommodations to disabled employees who request them, unless such accommodation would impose an undue hardship on the employer. 42 U.S.C. §§ 12111(9), (10); id. § 12112(b)(5).

12 The determination as to whether an individual can participate in substantial gainful activity is central to the denial or award of benefits under SSDI/SSI. 42 U.S.C.A. § 423(d)-(e) (SSDI); id. §§ 1382c(a), 1382h (SSI).


The [disability] system itself seems to me to be a bureaucratic endurance test designed to discourage people who are mentally or physically disabled from lasting through the process.


14 The SSA might attempt to fit the concept of reasonable accommodation within existing regulations to expand the bases on which it can deny benefits. This concern is compounded by the possibility that the plethora of local offices which make the initial disability assessments might also do this, and that the Secretary of HHS might promulgate regulations expressly permitting this practice. However, for the reasons set forth in Part III.C.3, the Secretary of HHS is unlikely to do this.

15 See New York v. Sullivan, 906 F.2d at 913.

16 For purposes of this paper the term “widow” also applies to widowers.

17 42 U.S.C.A. § 423 (disability insurance benefit payments); id. §§ 402(e)(1)(C)-(D) and (f)(1)(C)-(D) (widows and widowers).

18 Id. §§ 1381(a), 1382(d).


22 See supra note 13. Significantly, Congress has recently begun looking into some of the problems associated with the way SSDI/SSI are administered. See Problems with the Accuracy and Timeliness of the Social Security Administration’s Handling of Disability Application, Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means, 102d Cong., 1st Sess. (1991); Social Security Administration’s Disability Determination and Appeals Process, Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means, 102d Cong., 1st Sess. (1991); Judicial Independence of Administrative Law Judges at the Social Security Administration, Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means,


24 Id.

25 Id. at 258 n.91.


29 This process was categorized as a five-step process in Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987). This categorization was based on the structure of the applicable regulations, 20 C.F.R. § 404.1520 and § 404.920 (1993). However, it has also been labelled as a six-step process. See Brown, supra note 13, at 96-100 (categorizing the SSA's evaluation of disability as a six-step process by dividing step two as labelled in Bowen into two separate steps).

30 20 C.F.R. §§ 404.1520(b), 416.920(b) (1993); Bowen, 482 U.S. at 140.

31 20 C.F.R. §§ 404.1520(c), 416.920(c) (1993); Bowen, 482 U.S. at 140-41.

32 20 C.F.R. §§ 404.1520(d), 416.920(d) (1993); id. at 404, subpt. P app. 1; Bowen, 482 U.S. at 141.

33 20 C.F.R. §§ 404.1520(e), 416.920(e) (1993); Bowen, 482 U.S. at 141-42. “Residual functional capacity” is “a medical assessment of what an individual can do in a work setting in spite of the functional limitations and environmental restrictions imposed by all of his or her medically determinable impairments.” Muir, supra note 13, at 520 n.23.

34 20 C.F.R. §§ 404.1520(f), 416.920(f) (1993); Bowen, 482 U.S. at 142.

35 Bowen, 482 U.S. at 146 n.5.

36 See supra note 26.


40 20 C.F.R. §§ 404.1520(d), 416.920(d); id. at 404, subpt. P app. 1 (1993). However, disabled widows and divorced spouses may not proceed to step four whether or not they meet a listing in step three. Id.

41 20 C.F.R. §§ 404.1520(e), 416.920(e) (1993); see also supra note 33 (regarding meaning of “residual functional capacity”).

42 42 U.S.C. §§ 423(d)(2)(A), 1320c(a)(3)(B); 20 C.F.R. §§ 404.1520(f), 416.920(f) (1993). Additionally, if a claimant has a marginal education and 35 or more years work experience performing arduous unskilled physical labor, and can no longer perform such work, § 404.1562 (SSDI) or § 416.962 (SSI) is applied, and benefits will be granted pursuant to that rule.

43 For an in-depth discussion of the “grid regulations,” hereinafter referred to as the “grids,” see Brown, supra note 13, at 100-04.

44 Id. at 100.

45 Id.

46 These charts, the grids, can be found at 20 C.F.R. pt. 404, subpt. P app. 2 (1993).

47 See Brown, supra note 13, at 102-03. Residual functional capacity for a given claimant will be classified as either sedentary, light, or medium, and there is a corresponding table or “grid” for each classification. Id.

48 See Brown, supra note 13, at 103.

49 See supra note 46.

50 Id.


53 See supra note 11.

54 See supra Part I.B. For the reasons set forth in Part III, any attempt by the SSA to apply the concept of reasonable accommodation to the basis for denying benefits would result in expensive litigation in which the SSA would likely lose. However, given the SSA’s propensity for finding ways to deny benefits, see Brown, supra note 13, New York v. Sullivan, 906 F.2d 910 (2d Cir. 1990), it is possible the SSA would attempt to do so in the absence of a clearly delineated basis not to do so. It is hoped the rationale set forth in this article will provide such a basis.
57 Id.
59 Id.
60 20 C.F.R. §§ 404.1573, 416.973 (1993) provides explanation of how each of these factors are considered.
62 For employees, only earnings are considered in the guides, 20 C.F.R. §§ 404.1574, 416.974 (1993), but for those who are self-employed the value of the claimant’s services to his or her business is considered in addition to income from that business. Id. §§ 404.1575, 416.975. How the SSA evaluates such services is set forth at id. §§ 404.975(a)-(b), 416.975(a)-(b). The SSA’s method for evaluating income for self-employed individuals uses the earnings guides from id. §§ 404.1574 and 416.975, and is set forth at id. §§ 404.1575(c), 416.975(c). If an employee’s earnings fall somewhere between the guides showing that work activity is, or is not, substantial and gainful, the SSA applies id. § 404.1574(b)(6).
64 However, the self-employed guides do reference the employee guides. 20 C.F.R. §§ 404.1574, 416.974 (1993).
67 This will usually be considered an unsuccessful work attempt, and not probative of an ability to participate in substantial gainful activity. 20 C.F.R. §§ 404.1574(a)(1), 416.974(a)(1) (1993).
71 The U.S. Senate passed S. 933, the Senate adaptation of the ADA, on September 7, 1989. 135 CONG. REC. 11467. The final draft of the ADA was signed in both the Senate and the House on July 17, 1990, and President Bush signed it into law on July 26, 1990. 1 BUREAU OF NATIONAL AFFAIRS, AMERICANS WITH DISABILITIES ACT MANUAL 70:0083 (Jan. 1992) [hereinafter ADA MANUAL].
73 Id. § 12111(5)(A).
75 Id. §§ 791-794. While the Rehabilitation Act applies to state and local government employees in programs receiving federal funding, all other employees of state and local government entities are protected in their employment under Title II of the ADA. 1 ADA MANUAL, supra note 71, at 25:0001-0003 (Apr. 1992); see also supra note 80 (discussing application of Title II to public employees).
76 These factors can be seen from Congress’ Findings and Purposes in regard to the ADA, codified at 42 U.S.C. § 12101.
77 See 42 U.S.C. § 12101(a)(4) (noting lack of legal recourse available to disabled individuals to redress discrimination, and availability of such recourse for other protected classes).
78 Id. §§ 2000e-2000e-17 (1988). Hereinafter the Civil Rights Act of 1964 will be referred to as “Title VII.”
79 See Comments of Senator Riegle, 135 CONG. REC. S519 (“One of the prime goals of legislation affecting disabled Americans has been the effort to incorporate them into the mainstream. While the Americans with Disabilities Act would remove the barriers to participation in the workforce, efforts must also be made to ensure that participation is possible.”).
80 In addition, to the extent it is relevant, the article concerns 42 U.S.C. § 12102, which is applicable to the entire act. Significantly, for state and local government employees not working in programs receiving federal funding, Title II of the ADA is applicable, and employment claims under that title are analyzed like those under Title I. 1 ADA MANUAL, supra note 71, at 25:0002-0003 (Apr. 1992).
82 Id. § 12112(b)(5)(A).
83 Id. § 12112(a).
84 Id. § 2000e-2(a).
86 The duty to reasonably accommodate is mandated under the ADA at 42 U.S.C.A. § 12112(5), and under the Rehabilitation Act at 29 U.S.C.A. § 794(d)(utilizing the standards for employment discrimination set forth in Title I of the ADA). However, it should be noted that while the concept of reasonable accommodation as applied under these statutes is unique, the term “reasonable accommodation” is applicable in contexts outside of disability discrimination law. For example employers have a duty to reasonably accommodate the religious practices of employees under Title VII. See Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) (discussing the requirement of 42 U.S.C. § 701(6) regarding an employer’s duty to accommodate the religious observances of employees, unless such accommodation would result in undue hardship). The uniqueness of the duty to reasonably accommodate disabled employees is that such accommodation is required to enable the employee to perform his or her job. The accommodation of religious observances does not so enable the employee to perform his or her job. It
simply acknowledges that employees have a right to observe their religious beliefs without being discriminated against in employment to the extent that such observance does not impose an undue hardship on the employer. Id. at 68-69.


42 U.S.C. § 12111(9).

42 U.S.C. § 12111(10).

42 U.S.C. § 12111(9). Additionally, the EEOC has issued regulations which provide guidance regarding Title I of the ADA, including what is a reasonable accommodation, 29 C.F.R. §§ 1630-1630.2 (1993), and there is substantial interpretive material dealing with the ADA which also addresses the concept of reasonable accommodation. See e.g., ADA MANUAL, supra note 71.


See 29 C.F.R. pt. 1630 app., § 1630.2(g) (1993) (noting that Congress intended relevant case law developed under the Rehabilitation Act to be generally applicable to the term “disability” under the ADA); id. § 1630(c) (1993) (the ADA will not apply lesser standards than those applied under the Rehabilitation Act).

See annotations to 29 U.S.C.A. § 794.

See supra note 92 and accompanying text. When litigation is initiated the plaintiff bears the initial burden to allege a disability, and suggest plausible reasons why such disability can be accommodated. Prewitt v. United States Postal Service, 662 F.2d 292, 309-10 (5th Cir. 1981).

Prewitt, 662 F.2d at 307-10. The burden of persuasion in proving the employer’s inability to accommodate is always on the employer, but the burden of production may shift as described supra at note 103 and accompanying text.

The employer’s duty in this regard is inferred from the EEOC regulations, which envision appropriate reasonable accommodations being determined through a flexible, interactive process that involves both the employer and employee, 29 C.F.R. pt. 1630 app., §1630.9 (1993), and the fact that a good faith attempt to provide reasonable accommodation in consultation with the complaining employee is a defense to an award of damages when failure to reasonably accommodate is proven. 42 U.S.C.A. § 1981a(a)(3) (West Supp. 1993).
Vocational experts are utilized to determine which jobs an individual with particular skills can perform in light of an impairment or impairments if he or she cannot perform past work, and whether such alternative jobs are available. 20 C.F.R. §§ 404.1566(e), 416.966(e) (1991). Additionally, such experts are used to assist on other complex vocational issues. Id.

The SSA will take administrative notice of such information as it relates to the number of available jobs in a specific locality or nationally. 20 C.F.R. §§ 404.1566(d), 416.966(d) (1993).


The individualized basis on which reasonable accommodations is determined would also preclude the use of statistics to substantiate a finding that a particular number of jobs in the national or local economy are available for individuals with a given disability due to employer compliance with the ADA, because the availability of accommodations for some individuals is not probative of the availability of an appropriate accommodation for another individual with the same disability, as the individualized factors that go into that determination are different in each case. See supra Part III.C. Thus, no set of national or local statistics would be a viable basis to make determinations about the numerous individualized determinations being made.

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161 See supra Parts II.B (discussing undue hardship) and III.C.

162 See supra Part III.C.1 (discussing how the ADA concept of undue hardship may apply differently to small and large corporations).

163 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (SSA does not have to consider whether a claimant will actually be hired); 20 C.F.R. §§ 404.1566(c)(3), 416.966(c)(3) (1993) (SSA does not consider employer hiring practices).

164 Brown, supra note 13, at 94.

165 42 U.S.C. §§ 12116-12117, and id. § 12111(1) (defining the term “Commission” as used in Title I of the ADA as the EEOC). Additionally, the Attorney General has enforcement powers under the ADA in the same way she does under Title VII. 42 U.S.C. § 12117.

166 29 U.S.C. § 794(a) (noting application of procedures under Title VII, including those under 42 U.S.C. § 2000e-5(f), dealing with the EEOC, to the Rehabilitation Act).


169 Id. § 12117(b).


171 Id. at 467.

172 Id. at 467-70.

173 Id. at 467 (noting that agencies may rely on rulemaking authority for issues not requiring case by case consideration).

174 It cannot be assumed that an employer will actually accommodate, or that an accommodation will work in a particular case. Additionally, accommodation is not required if the employer is unable to provide it without undue hardship — a determination that must be made on a case by case basis. See supra Part III.C.


177 This analysis might become muddied in a case where an individual prevails in obtaining accommodation but then decides not to take advantage of it, and applies for disability benefits. This would be so because under the analysis contained in this article, the SSA cannot consider the availability of reasonable accommodation in making its disability determination. However, it is unlikely that an individual would seek accommodation, obtain an effective accommodation (possibly through protracted litigation), and then simply ignore its availability. These rare situations could be dealt with in two ways. First, the application of the normal SSA procedures might preclude an award of benefits. Second, the SSA might formulate a rule enabling it to consider the availability of reasonable accommodation in individual cases if there is substantial evidence that such accommodation was sought, granted or ordered and that the accommodation so ordered or granted would enable the individual to perform substantial gainful activity during the period for which disability benefits are sought.