# Social Security Administration

# Eliminate the Vocational Grids from the Disability Insurance Determination Process

## RECOMMENDATION

The Secretary of Health and Human Services (HHS) should eliminate the non-medical vocational grids, as well as a person's ability to *adjust* to work, from Social Security Disability Insurance (SSDI) determinations.

Using his authority to determine what constitutes "disability" and to promulgate regulations, the Secretary should eliminate the non-medical grid factors from the disability determination process, and instead base determinations exclusively on physical and mental conditions that prevent workers from performing any job in the national economy (which is the Social Security Administration's definition of disability).[1] Moreover, because being *capable of adjusting to a job* is a precondition of *being able to perform that job,* the Secretary should eliminate consideration of the ability to adjust to work in the determination process.

## RATIONALE

SSDI benefits are supposed to be for people who have physical or mental conditions that prevent them from working. Nevertheless, 40 percent of all SSDI benefit awards rely on non-medical vocational grids in the disability determination process.[2]

Under regulatory authority to consider the relevant disability factors,[3] the Secretary of HHS promulgated medical-vocational guidelines in 1978 that establish disability status on the basis of non-medical vocational (so-called "grid") factors including age, eligibility, and work experience.[4] Consequently, individuals can qualify for SSDI benefits based on factors that may have no role whatsoever in their disability claims. For example, individuals who are limited to sedentary work can be determined disabled if they are ages 45 or older and say they cannot speak English, or if they are 50 or older and lack transferable skills.

While age and disability are correlated, age itself does not cause disability any more than do grey hairs or extra pounds. Education and work experience, or lack thereof, cannot cause disability. Qualification for SSDI benefits based on a lack of education or skills discourages individuals from gaining education, skills, and literacy that would improve their job prospects and overall well-being.

The HHS Secretary should eliminate the broad-sweeping and discriminatory vocational standards from the disability determination process and base disability determinations exclusively on physical and mental factors that directly affect work capabilities.

## ADDITIONAL READING


- Rachel Greszler, "Comments to SSA on Grid 2015," submission for comments on the Social Security Administration (SSA) Proposed Rule: Vocational Factors of Age, Education and Work Experience in the Adult Disability Determination Process, November 9, 2015.

# Establish a Needs-Based Period for Disability Benefits

## RECOMMENDATION

Congress should revise disability classifications and establish a needs-based period of disability benefit for newly eligible SSDI beneficiaries who qualify with conditions that are expected to improve.

## RATIONALE

The current SSDI program sets no clear expectation that individuals with marginal and temporary disabilities should return to work with improvement and given applicable accommodations. The program makes no provisions for individual conditions and fails to acknowledge potential future work capacity.

The continuing disability review (CDR) process, responsible for reviewing whether disability insurance beneficiaries continue to be eligible, suffers from several flaws which undermine its effectiveness. One example is the medical review improvement standard. The Social Security Administration (SSA) must first find "substantial evidence of improvement in the individual's impairment(s) enabling [the individual] to engage in substantial employment." For individuals who initially qualified with marginal conditions or conditions that were insufficiently documented or inadequately supported by the evidence on file, demonstrating such substantial improvement can be an impossible task. The purpose of this standard is to make it more difficult for the SSA to terminate benefits than to continue them.

Congress should revise current disability classifications and period of disability to establish a needs-based period of disability benefit that aligns individual needs and abilities with benefit provisions to help reintegrate individuals with disabilities into labor markets upon the improvement of their condition and in considering applicable accommodations. Such a benefit would be time-limited based on the disability classification granted. Individuals could requalify prior to benefit cessation via an expedited determination process. Individuals whose conditions worsened after exiting the program could reapply using the current expedited reinstatement process that exists under the Ticket to Work and Work Incentives Improvement Act of 1999.

## ADDITIONAL READING


- Romina Boccia, "A Pathway to Work for Social Security Disability Beneficiaries," Heritage Foundation *Commentary*, March 27, 2017.
- Jason Fichtner and Jason Seligman, "Beyond All or Nothing: Reforming Social Security Disability Insurance to Encourage Work and Wealth," in Jim McCrery and Early Pomery, eds., *SSDI Solutions: Ideas to Strengthen the Social Security Disability Insurance Program* (Infinity Publishing, 2016).

# Strengthen and Enforce the Five-Day Rule to Close the Evidentiary Record for SSDI

## RECOMMENDATION

The Commissioner of Social Security should chiefly communicate agency commitment to the five-day rule for closing the evidentiary record for the Social Security adjudication process, including through consistent messaging and enforcement of the rule among Administrative Law Judges (ALJs) and the Appeals Councils nationwide. Furthermore, the current regulation should be strengthened to allow evidence to be submitted within five days of the hearing *only* if Social Security's action demonstrably misled the applicant or severe, unexpected, and unavoidable circumstances beyond the applicant's control prevented timely submission. No more evidence shall be submitted after the hearing begins.

## RATIONALE

The Commissioner of Social Security has broad discretion to issue regulations establishing the processes by which evidence is submitted and hearings are conducted. A key component of a well-functioning SSDI hearing process is the timely and complete submission of evidence that is to be considered by the ALJ in deciding the claimant's case. Evidence that is submitted late, especially if such evidence is voluminous, as is often the case, makes it impossible for the ALJ to fully consider it for the hearing. Allowing evidence to be submitted too close to, during, and even after the hearing, can unnecessarily delay hearing decisions, further contributing to unfair and inconsistent decision making and case backlogs.

Section 405.331 of the Code of Federal Regulations specifies that any written evidence must be submitted no later than five business days before the date of the scheduled hearing. Yet this rule is not enforced consistently. Moreover, current regulation is too loose, allowing applicants with a physical, mental, educational, or linguistic limitation(s) to submit evidence within five days of the hearing. Arguably, all eligible Social Security applicants have some physical, mental, educational, or linguistic limitation(s), rendering the current rule virtually unenforceable.

Furthermore, the Commissioner should *close* the record at the very latest at the moment at which the hearing begins. No more evidence should be accepted that is submitted during or after the hearing.

## ADDITIONAL READING


- Office of the Chairman of the Administrative Conference of the United States, "SSA Disability Benefits Adjudication Process: Assessing the Impact of the Region I Pilot Program," December 23, 2013.
- Romina Boccia, "What Is Social Security Disability Insurance? An SSDI Primer," Heritage Foundation *Backgrounder* No. 2994, February 19, 2015.

# Test an Optional Private Disability Insurance Component within the SSDI Program

## RECOMMENDATION

The Social Security Administration should implement a demonstration project to test the viability of providing an optional, private disability insurance component within the current SSDI program.

## RATIONALE

Aside from inefficiencies in the Social Security Administration's operations, SSDI's problems and unchecked growth boil down to two factors: Too many people get on the rolls and too few ever leave them. The private sector offers solutions to both of those problems. Private disability insurance (DI) does a significantly better job than SSDI of weeding out truly disabled individuals from those who have non-disabling conditions and would simply like to retire early. Private DI also helps about four times as many people return to work, it provides a more efficient and timely determination process (taking no more than 45 days for a determination, compared to more than a year for most SSDI applicants), and it provides about 33 percent more in benefits for about half the cost of SSDI.[5]

The Heritage Foundation has a proposal that would provide private companies and self-employed individuals with the option of receiving a reduction in their portion of the SSDI payroll tax in exchange for providing their employees (or purchasing, if self-employed) qualified, private long-term private DI that would cover at least the first three years of disability benefits.[6]

The SSA should use its authority under Section 234[7] to implement a demonstration program that would test the viability—including the budgetary impact for the SSDI system and the economic and physical well-being of potential SSDI beneficiaries—of an optional, private DI component by allowing a limited number of companies and workers to participate in an optional private DI system for their first three years of benefits.[8] If mutually beneficial to SSDI's finances and to individuals' well-being, Congress should make optional private DI available to all companies and workers.

## ADDITIONAL READING


- Rachel Greszler, "Private Disability Insurance Option Could Help Save SSDI and Improve Individual Well-Being," Heritage Foundation *Backgrounder* No. 3037, July 20, 2015.

# Eliminate the SSA as Middleman in Disability Insurance Representatives' Payments

## RECOMMENDATION

Congress should eliminate the SSA's role in the payment of SSDI representatives, and replace the current mandatory criteria and fee structure for SSDI representatives with an optional certification for SSDI representatives who choose to follow the SSA's requirements.

## RATIONALE

Currently, more than 90 percent of SSDI claimants are represented at hearings before ALJs.[9] Instead of contracting with representatives and paying them after the case is settled, the SSA withholds money from the claimants' benefits and pays SSDI representatives directly. By acting as representatives' bill collectors, the SSA's direct payment raises representatives' payments, which increases their supply and can lead some representatives to seek out and encourage potential SSDI beneficiaries to apply for benefits.

Direct payment also diminishes disability applicants' control over representatives' services and fees because representatives bill the SSA directly, and the SSA takes the money out of the claimants' benefit checks. Consequently, many SSDI representatives receive significant payments without providing much value to claimants. A 2014 report by the Office of the Inspector General (OIG) examined representation of SSDI claimants at the initial Disability Determination Service (DDS) level. Of the cases the OIG examined, only 37 percent of representatives assisted their clients throughout the claim process, 41 percent assisted only with filing the claim, and 22 percent appeared to have not assisted their clients at all.[10]

Direct payment for SSDI representatives also establishes a dangerous precedent for the government stepping in as bill collector if it determines there is a need to increase access to certain services. This precedent could be used to require all tax preparers to follow government standards and fee schedules, and to have the government take money out of individuals' tax returns to directly pay their tax preparers.

SSDI representatives provide services to individuals—not to the federal government—and it is an individual's right and responsibility to pay for the services that he contracts to receive. Claimants should be free to choose the types of services they want to purchase and should be in control of their own money so that they can ensure that they obtain what they contract to receive. If the SSA wants to establish a certain standard of services and schedule of allowable fees, it can provide SSDI representatives the option of receiving an SSA certification if they choose to abide by those standards.

## ADDITIONAL READING

- Rachel Greszler, "Time to Cut out the SSA as Middleman in SSDI Representation," Heritage Foundation *Issue Brief* No. 4489, November 24, 2015.

# Improve the SSDI Program's Continuing Disability Review Process

## RECOMMENDATION

The SSA should enact a meaningful and timely continuing disability review (CDR) process that requires more than returning a check-the-box postcard to the SSA.

## RATIONALE

Virtually all individuals who receive SSDI benefits are required to undergo a CDR process every three or seven years, depending on their disability. However, most of those (73 percent) CDRs involve nothing more than sending current SSDI beneficiaries a postcard in the mail that asks them to check a box if they are still disabled.[11] While 19 percent of full medical CDRs result in a cessation of benefits, only 5 percent of mailed CDRs result in cessation of benefits (and much of that appears to come from mailed CDRs that are followed up by full in-person medical CDRs).[12] As a whole, only about 0.5 percent of all SSDI beneficiaries return to work in any given year.[13]

Despite its statutory requirement to perform CDRs at least every three years except for individuals with permanent disabilities, the SSA has a backlog of more than 1 million CDRs, meaning many beneficiaries escape the CDRs or receive only a mailed CDR. This creates the impression—and, predominantly, the reality—that a positive SSDI determination equates to disability benefits for life.

While the SSA is required by law to prioritize certain CDRs, such as those for low-birth-weight children upon their first birthday, and it is supposed to conduct them for all non-permanent disabilities within three years, the SSA has wide discretion in how it prioritizes the CDRs it is able to conduct given limited resources. A 2016 GAO report found that the SSA could realize significant savings by prioritizing CDRs more efficiently.[14]

The SSA Commissioner should work with the Deputy Commissioner of Operations and the Deputy Commissioner of Budget, Finance, Quality, and Management to optimize the prioritization of CDRs and should establish a timeline and adequate resources to eliminate the current CDR backlog and ensure that all SSDI beneficiaries with non-permanent disability determinations receive a CDR within the statutorily required three-year period. Furthermore, the SSA should add a medical verification component to the mailed CDR process. This could be as simple as having the beneficiaries' medical providers confirm or deny continued disability status through a check-the-box online portal. If the provider indicates that the individual is no longer disabled (at least not to the same extent), this should trigger a prompt and full CDR.

## ADDITIONAL READING


- Government Accountability Office, "Social Security Disability: SSA Could Increase Savings by Refining Its Selection of Cases for Disability Review," GAO-16-250, March 14, 2016.

## ENDNOTES

1. Disability Insurance Benefits–Vocational Factors Regulations–Constitutionality, SSR 83-47C (S.S.A. 1983).
2. David R. Mann, David C. Stapleton, and Jeanette de Richemond, "Vocational Factors in the Social Security Disability Determination Process: A Literature Review," Mathematica Center for Studying Disability Policy *Working Paper* No. 2014-07, July 21, 2014, http://www.disabilitypolicyresearch.org/~/media/publications/pdfs/disability/drc_wp_2014-07_voc_factors_determinations.pdf (accessed June 5, 2017).
3. 461 42 U.S. Code § 423(d)(2)(A); 20 C.F.R. § 404.1520(f).
4. See 20 C.F.R. § Pt. 404, Subpt. P, App. 2 (1982). See also *Heckler v. Campbell*, 461 U.S. 458 (1983). Ibid.
5. Rachel Greszler, "Private Disability Insurance Option Could Help Save SSDI and Improve Individual Well-Being," Heritage Foundation *Backgrounder* No. 3037, July 20, 2015, http://www.heritage.org/research/reports/2015/07/private-disability-insurance-option-could-help-save-ssdi-and-improve-individual-well-being.
6. Ibid.
7. 42 U.S. Code 434 (a).
8. Social Security Administration, "Compilation of the Social Security Laws: Demonstration Project Authority," https://www.ssa.gov/OP_Home/ssact/title02/0234.htm (accessed May 20, 2017). Bipartisan Budget Act of 2015 extended the SSDI demonstration authority through 2021 (Section 281 of the act).
9. Government Accountability Office, "SSA Disability Representatives: Fee Payment Changes Show Promise, But Eligibility Criteria and Representative Overpayments Require Further Monitoring," *Report to Congressional Committees*, October 2007, p. 9, Figure 2: Percentage of Claimants with Representation at Their Hearing, Fiscal Years 2000–2006, http://www.gao.gov/new.items/d085.pdf (accessed September 30, 2015).
10. Office of the Inspector General, Social Security Administration, *Audit Report: Claimant Representatives at the Disability Determination Services Level*, February 2014.
11. Government Accountability Office, "Social Security Disability: SSA Could Increase Savings by Refining Its Selection of Cases for Disability Review," GAO-16-250, March 14, 2016, http://www.gao.gov/assets/680/675168.pdf (accessed May 23, 2017).
12. Ibid.
13. Greszler, "Private Disability Insurance Option Could Help Save SSDI and Improve Individual Well-Being."
14. Government Accountability Office, "Social Security Disability: SSA Could Increase Savings by Refining Its Selection of Cases for Disability Review."