RECENT DEVELOPMENTS

ADJUDICATING ADDICTS: SOCIAL SECURITY DISABILITY, THE FAILURE TO ADEQUATELY ADDRESS SUBSTANCE ABUSE, AND PROPOSALS FOR CHANGE

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* The views expressed in this paper do not represent the views of the Social Security Administration (SSA) or the United States Government. They are solely the views of the authors, Warnecke Miller and Rebecca Griffin, in their personal capacity. The authors are not acting as agents or representatives of the SSA or the United States Government in this activity. There is no expressed or implied endorsement of views by either the SSA or the United States Government. Warnecke Miller graduated from the University of Kentucky College of Law in 1999 and has worked as a law clerk for Judge Joseph M. Hood on the Eastern District of Kentucky; as an Honors Attorney for the Department of the Treasury; as a litigation attorney for several offices in the Department of Defense; as an Administrative Law Judge (ALJ) for SSA; and currently as an attorney-advisor for the National Aeronautics and Space Administration at Johnson Space Center. Rebecca Griffin holds a Master of Arts from the University of Kentucky, Patterson School of Diplomacy and International Commerce, and a *Juris Doctor* from the University of Kentucky College of Law (2012), where she served as Note Editor for the *Kentucky Journal of Equine, Agriculture, and Natural Resource Law*.

OVERVIEW

Drug and alcohol abuse are major public health problems in this country, causing over forty million injuries and illnesses each year.[1] Alcohol misuse alone results in seventy-five thousand deaths annually and is associated with serious medical conditions such as "liver disease, cancer, cardiovascular disease, and neurological damage," as well as "depression, anxiety, and antisocial personality disorder."[2] Drug and alcohol abuse's connection to severe medical conditions makes it an important issue for the Social Security Administration (SSA) to consider because persons afflicted with these conditions often apply for disability benefits.

Currently, the federal benefits system does not properly address the drug and alcohol abuse plaguing U.S. society. The current system does not provide addicts or alcoholics with any disability benefits, thus allowing persons with a substance abuse problem to potentially develop even more serious, sometimes irreversible, health problems. While the disability adjudication process identifies individuals who have "material" drug or alcohol abuse problems, after affixing this label, it fails to address their problems' underlying cause. This lack of substance abuse treatment increases the likelihood that addicts become claimants who file multiple subsequent applications. In turn, these chronic filers drive up program administration costs. Further, failing to treat addicts requesting disability benefits often prevents them from being rehabilitated and returning to productive work.[3] This approach to drug and alcohol abuse only further deteriorates the mental and physical conditions of addicts and ultimately costs taxpayers more in benefit payouts and program administration costs.

Second, the current benefit system is not clear and predictable, which is why "errors in the adjudication of drug addiction and alcoholism continued to be noted by peer review study, appeals counsel, and the federal courts."[4]

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1. *Drug Abuse*, MEDLINEPLUS, http://www.nlm.nih.gov/medlineplus/drugabuse.html (last updated Nov. 30, 2012).

2. *Alcohol*, CAPITAL AREA SUBSTANCE ABUSE COUNCIL, http://casac.org/alcohol/ (last visited Nov. 30, 2012).

3. *Principles of Drug Abuse Treatment for Criminal Justice Populations—A Research-Based Guide*, NAT'L INST. ON DRUG ABUSE, http://www.drugabuse.gov/publications/principles-drug-abuse-treatment-criminal-justice-populations/why-should-drug-abuse-treatment-be-provided-to-offe (last updated Jan. 2012) [hereinafter *Principles*] (indicating that drug abuse treatment "may improve prospects for employment").

4. DVD: OHA Hour: Drug Addiction & Alcoholism (SSA 2004) (on file with the Social Security Administration (SSA)) [hereinafter DVD: OHA Hour]. The training videos produced by the SSA, and referred to in this paper, were obtained though SSA FOIA Request AH5574, dated December 3, 2011, at 10:35:53 AM. SSA provided full, un-redacted versions of both referenced videos.

The 1996 Welfare Reform Act eliminated an applicant's ability to use a substance abuse disorder as an independent basis for receiving benefits; however, the preexisting § 404.1536 of the Code of Federal Regulations (C.F.R.) mandates that applicants suffering from a substance abuse disorder avail themselves of treatment.[5] Since § 404.1536 has not been repealed, there is substantial confusion in the adjudication of cases involving drug and alcohol addiction.

As the federal government has an administrative system that officially recognizes when a person has a drug or alcohol addiction or both, this system should be required to address the problem and direct the person to resources for recovery, even if disability benefits are not paid. The current system identifies when a claimant is a substance abuser, and yet adjudicators are removed from the responsibility of addressing the issue once that determination has been made. The most efficient and responsible time to address that issue is when the Administrative Law Judge (ALJ), as required by the Social Security disability adjudication process, legally establishes that a person struggles with substance abuse. Political leaders are recognizing the need to take action and address the deteriorating situation caused by the current system. For example, Newt Gingrich and Senator Ron Paul have suggested developing "a more logical long term policy."[6] Gingrich expressed a desire for a system able "to sanction [addicts] . . . give them medical help and . . . get them to detox."[7] Restructuring federal aid programs is one way of achieving that end.

To rectify the current situation, the federal government must amend the current benefits system so that it is capable of promptly and effectively addressing drug and alcohol abuse. First, this Article discusses the government interest in discouraging drug and alcohol abuse. Then, it delves into the SSA's different approaches to drug abuse and alcoholism in regulations and benefit adjudications. The third Part presents an overview of the current SSA' disability adjudication process in cases involving substance abuse. The fourth Part details how to adjust the disability benefits system to more appropriately address drug abuse and alcoholism. Refining and adopting a § 404.1536-style regulation would address the substance abuse plaguing the nation and promote a healthy workforce.

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5. Employees' Benefits, 20 C.F.R. § 404.1536 (2012) *see also* 20 C.F.R. §§ 404.1536–.1541, §§ 416.936–.941. These provisions of the Code are no longer in effect, but linger on the books as echoes of the haphazard solutions given to this pervasive problem.

6. Chris Moody, *Newt Gingrich on Drug Laws, Entitlements and Campaigning: The Yahoo News Interview*, YAHOO! NEWS: DESTINATION 2012: TICKET BLOG (Nov. 28, 2011), http://news.yahoo.com/blogs/ticket/newt-gingrich-drug-laws-entitlements-campaigning-yahoo-news-152936251.html.

7. *Id.*

Doing so would also allow the SSA to avoid burdening taxpayers with paying lifetime benefits to claimants for the irreversible physical results of chronic drug and alcohol abuse.

I. GOVERNMENT'S INTEREST IN DISCOURAGING DRUG AND ALCOHOL ABUSE

The U.S. government has a legitimate state interest in discouraging substance abuse.[8] The Social Security disability adjudication process is an administrative system that officially recognizes when a person has a drug or alcohol abuse problem and requires a legal finding that the substance abuse impacts the individual's functionality. However, there is no mechanism in place to effectively address this legally recognized problem.

There is a significant economic interest in treating substance abuse. Estimates suggest that "substance abuse costs our nation more than $484 billion per year."[9] The magnitude of the problem becomes more obvious in light of the fact that the costs of substance abuse are as high as, or exceed, the costs of other long-term, debilitating diseases; as a comparison, diabetes and cancer amass annual costs of approximately $131.7 billion and $171.6 billion, respectively.[10] A substantial part of the cost of substance abuse to the nation includes the loss of productivity and the incapacitation of potential members of the labor force. Some estimates calculate the loss in productivity alone to be over $120 billion annually.[11]

In addition to its national economic impact, substance abuse has a tremendous impact on the health care system and the health of the American people. In 2009, approximately two million visits to the emergency room in the United States were the result of drug abuse or misuse, which led to $161 million in health care costs.[12] In addition to these health problems, substance abuse has been scientifically proven to lead to other serious illnesses. For example, "Researchers have found a connection between the abuse of tobacco, cocaine, MDMA (ecstasy), amphetamines, and steroids and the development of cardiovascular diseases."[13] "Approximately one-third of AIDS cases reported in 2000 (11,635) and most cases of hepatitis C (approximately 25,000 in 2001) in

8. Mitchell v. Comm'r of the SSA, 182 F.3d 272, 275 (4th Cir. 1999).

9. *Magnitude*, NAT'L INST. ON DRUG ABUSE, http://archives.drugabuse.gov/about/welcome/aboutdrugabuse/magnitude/ (last visited Nov. 30, 2012).

10. *Id.*

11. U.S. DEP'T OF JUSTICE, NAT'L DRUG INTEL. CTR., No. 2011-Q0317-001, NATIONAL DRUG THREAT ASSESSMENT 2011 1, 4 (2011).

12. *Id.* at 5.

13. *Magnitude*, *supra* note 9.

the United States are associated with injection drug use."[14]

Moreover, the failure to address drug and alcohol abuse leads to other social problems. Substance abuse increases crime, incites violence, "undermines family cohesion, [and] reduces workplace productivity."[15] Additionally, "The National Highway Traffic Safety Administration estimates that drugs are used by approximately 10 to 22 percent of drivers involved in crashes, often in combination with alcohol."[16] Substance abuse also plays a catalytic role in more serious, violent crimes. The Institute for Health Policy indicates: "At least half of the individuals arrested for major crimes including homicide, theft, and assault were under the influence of illicit drugs around the time of their arrest."[17] A study by the Arrestee Drug Abuse Monitoring Program found that "60 percent or more of arrestees tested positive" for some illicit drug at the time of their arrest, which "shows a strong correlation between drug abuse and criminal activity."[18]

Substance abuse not only plays an important role in individual criminal acts but also in organized crime and terrorist organizations.[19] Often, revenue generated from drug trafficking and consumption funnels directly back to illegal and terrorist organizations. "Drug trafficking [has been] the most widespread and lucrative organized crime operation in the United States, accounting for nearly 40 percent of this country's organized crime activity and generating an annual income estimated to be as high as $110 billion."[20] Without question, "terrorism is a significant threat to American lives and property, at home and abroad."

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14. *Id.*

15. Jim Kouri, *The Global Underworld: Terrorists, Drug Traffickers, and Organized Crime*, COMPUTER CRIME RESEARCH CTR. (Nov. 1, 2004), http://www.crime-research.org/analytics/759/.

16. *Magnitude*, *supra* note 9.

17. *Id.*

18. NATIONAL DRUG THREAT ASSESSMENT, *supra* note 11, at 4.

19. *Id.* at 40.

20. PRESIDENT'S COMM'N ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, & ORGANIZED CRIME (1986), *available at* http://www.druglibrary.org/schaffer/govpubs/amhab/amhabc3.htm; *see also* Ryan Byrnes, *Mexican Drug Trafficking Now "Greatest Organized Crime Threat" to U.S.*, CNSNEWS.COM, Jan. 21, 2009, http://cnsnews.com/news/article/mexican-drug-traffickers-now-greatest-organized-crime-threat-us.

> As evidenced by the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland, the 1993 World Trade Center bombing in New York City, the 1995 Riyadh and the 1996 Khobar Towers bombings in Saudi Arabia, and the 1995 assassination of two U.S. nationals in Karachi, Pakistan, . . . [a]nd the most devastating terrorist attack . . . in 2001 in New York and Washington, DC.[21]

Drug consumption and trafficking often finance such attacks.[22]

For these reasons, administrative action must be taken to modify the current benefits system. Treating individuals for substance addiction will undoubtedly reduce the possibility that benefit recipients develop more serious, debilitating illnesses in the future; it will also decrease the number of future disability claimants and suppress demand for illegal drugs.

Congress and the courts believe that the current system discourages alcohol and substance abuse "in that it withholds social security benefits from those who likely would use the funds to purchase alcohol or drugs."[23] However, there is no evidence to support the assertion that withholding benefits from substance abusers actually addresses the problem. In fact, "The abuse of several major illicit drugs, including heroin, marijuana, and methamphetamine, appears to be increasing, especially among the young."[24]

The current approach of denying benefits to addicts is a prudent one, but does not fully address the consequences that drug abuse inflicts on the American population. Under the current system, disabled persons[25] with addictions are not mandated to receive treatment and their demand for drugs is left unchecked. Without being obligated to address their substance abuse or having access to a treatment program for their addiction, addicts use illegal methods of generating income to fund their substance abuse problem. To properly quell demand for harmful or illegal substances, addicts must be treated. While not every addict can be reformed to the point of returning to productive employment, studies show that access to treatment increases the likelihood of improvement.[26]

No one disputes that the government has an interest in addressing the

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21. Kouri, *supra* note 15.

22. *Id.*

23. Mitchell v. Comm'r of the SSA, 182 F.3d 272, 275 (4th Cir. 1999).

24. NATIONAL DRUG THREAT ASSESSMENT, *supra* note 11, at 1.

25. The term "disabled" refers to a determination thorough the Social Security adjudication process that the individual is unable to work. Under the current system, those who are found disabled, but experience drug or alcohol abuse that is material, are denied all benefits. Those who are found disabled, and are not identified as having material drug or alcohol abuse, receive financial benefits.

26. *Principles*, *supra* note 3 (indicating that drug abuse treatment "may improve prospects for employment").

multi-faceted substance abuse problem plaguing the nation.[27] Yet, the current system does not provide an adequate solution to those with an identified substance abuse issue. Current regulations deny benefits while acknowledging addicts' inability to engage in gainful employment. As mentioned previously, politicians—and the general public—recognize the impact that drug and alcohol abuse has on our society. Surveys demonstrate that people rank substance abuse among the top ten most serious health problems plaguing our society, with 82% of those polled classifying substance abuse as a "very serious problem."[28]

It is time to reexamine how Social Security disability benefits programs operate. Reform is necessary to effectively address the very serious issue of substance abuse disorders. The system must be modified to identify and treat persons disabled by addiction. As this Part demonstrated, treating current addicts is essential to decreasing substance abuse and the grave problems associated with it. Treating drug and alcohol addicts is also a more effective way to address America's current substance-related problems, considering that other government prevention methods are being thwarted: "Traffickers are responding to government counterdrug efforts by modifying their interrelationships, altering drug production levels, and adjusting their trafficking routes and methods."[29] To uncover the most effective way to use the SSA's benefits system to treat addicts, one must examine the evolution of this system and its fluctuating position on drug and alcohol abuse.

II. HISTORY OF THE SSA APPROACH TO DRUG AND ALCOHOL ABUSE

In the 1950s, the federal government began to offer disability benefits to persons unable to maintain gainful employment.[30] However, several years passed before the SSA began to consider drug and alcohol abuse within the disability system.[31] Originally, the SSA refused to recognize drug addiction

27. *Mitchell*, 182 F.3d at 275.

28. *Magnitude*, *supra* note 9.

29. NATIONAL DRUG THREAT ASSESSMENT, *supra* note 11, at 1.

30. *See generally* SOC. SEC. ADMIN., HISTORY: CHRONOLOGY 1950S, http://www.ssa.gov/history/1950.html (last visited Nov. 30, 2012); *see also* SOC. SEC. ADMIN., A HISTORY OF THE SOCIAL SECURITY DISABILITY PROGRAMS, http://www.ssa.gov/history/1986dibhistory.html (Jan. 1986) (noting that, as defined by the 1954 Amendments, disability meant, "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 to be of long-continued and indefinite duration.").

31. *See* George Farris, *An Evaluation of Alcoholism as a Disabling Impairment*, OHA L.J., Summer 1992, at 38, 38–39; *see also* Andrea Callow, Social Security Disability for the Chronically Homeless 18 (2012) (unpublished submission to the 2012 University of Connecticut School of Law Student Legal Writing Competition), *available at*

and alcoholism as causes of disability, instead seeing "chronic alcoholism, sexual deviation and drug addiction to be medically determinable impairments . . . [but] not disabling."[32] Later, the general perception about substance abuse shifted away from the "formerly prevailing social and legal view that an alcoholic is simply an individual who lacks the will or moral fiber to curb his self-indulgence."[33] Consequently, during this period, an applicant suffering from multiple impairments, including addiction, was still entitled to receive benefits.[34] The SSA considered the change in social views, and in 1968 adopted a "Listing of Impairments" that allowed applicants to receive benefits if they suffered from an "addictive dependence on alcohol or drugs, with evidence of irreversible organ damage."[35]

Despite this change in position, neither substance abuse nor addiction was considered an independent basis for disability benefits until a decade later.[36] In 1975, the SSA stopped requiring applicants to prove end organ damage.[37] Under the revised rules and regulations, an addiction *could* be an independent basis for awarding disability benefits,[38] meaning a substance addiction disorder, in and of itself, was considered a disabling medical impairment if it met the requirements defined by the SSA. "*No additional physical or mental impairment* . . . [would be] *required* for a finding of disability."[39]

Administrative case law attempted to clarify when an addict could take advantage of disability benefits during this time. An Eighth Circuit case, *Adams v. Weinberger*, explained that the key fact in determining whether or not an addict was eligible for benefits was whether "the claimant [had] the

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http://www.law.uconn.edu/files/UCONN%20Law%20Student%20legal%20Writing%20Competition_2012%20Third%20Place%20Paper_Andrea%20Callow.pdf.

32. David J. Agastein, *Social Security Disability Benefits and the Control Theory of Alcoholism: Is It Time to Rethink an Old Problem?*, 50 SOC. SEC. REPORTING SERV. (West) 893, 893 (1996) (internal quotation marks omitted).

33. Farris, *supra* note 31, at 39 (quoting *In re* Sullivan, 904 F.2d 826, 835 (3d Cir. 1990)).

34. Weaver v. Finch, 306 F. Supp. 1185, 1194 (W.D. Mo. 1969) ("The existence of alcoholism with other medically determinable impairments does not vitiate recovery on account of disability where the plaintiff is otherwise disabled.").

35. Agastein, *supra* note 32, at 893 (internal quotation marks omitted).

36. *See* Dru Stevenson, *Should Addicts Get Welfare? Addiction & SSI/SSDI*, 68 BROOK. L. REV. 185, 188 (2002) (discussing the SSA's historical treatment of applicants with substance abuse conditions).

37. *See id.*; *see also* Adams v. Weinberger, 548 F.2d 239, 242–43 (8th Cir. 1977).

38. *See* Cannon v. Harris, 651 F.2d 513, 518 (7th Cir. 1981) ("By itself, the mere finding that an individual suffers from alcoholism is insufficient to support a finding of disability.").

39. Farris, *supra* note 31, at 40 (internal quotation marks omitted).

power to control his alcoholism."[40] Under *Adams*, an applicant who has lost control over the consumption of alcohol or drugs would be entitled to disability benefits.[41] Other circuits adopted similar positions on the subject and handed down decisions requiring applicants to demonstrate a loss of control over their drug or alcohol usage.[42] The SSA later incorporated this case law into 20 C.F.R. §§ 404.1525(e) and 416.925(e).[43] Under this regime, "[I]ndividuals whose sole severe disabling condition [was] drug addiction or alcoholism [were] eligible to receive monthly cash . . . if they [were] unable to work because of their addictions."[44] The system also required participation in a rehabilitation program,[45] and the assumption can be made that the recipient, at the completion of the program, would no longer be disabled and that benefits would cease.

This addiction impact analysis required consideration of whether the addict's usage was voluntary or involuntary.[46] However, when reviewing the many dimensions of addiction, the voluntariness classification is irrelevant, as the impact on society and the addict remains the same. It is important to address any addictive behavior that prevents an individual from fully participating in the activities of daily life,[47] contributes to the individual's mental and physical ailments, or renders the individual incapable of participating in the workforce. This is true regardless of the individual's ability to control her consumption. Whether by choice or by compulsion,[48] the destructive behavior that accompanies an addiction

40. *Adams*, 548 F.2d at 245.

41. *Id.*

42. *See* Farris, *supra* note 31, at 39 (citing Purter v. Heckler, 771 F.2d 682, 689 (3d Cir. 1985); Gerst v. Sec'y of HHS, 709 F.2d 1075, 1078 (6th Cir. 1983); Rutherford v. Schweiker, 685 F.2d 60, 62 (2d Cir. 1982); *Cannon*, 651 F.2d at 519; Ferguson v. Schweiker, 641 F.2d 243, 248–49 (5th Cir. 1981); Swaim v. Califano, 599 F.2d 1309, 1312 (4th Cir. 1979)).

43. 20 C.F.R. §§ 404.1525(e), 416.925(e) (2010).

44. H.R. REP. NO. 104-379, at 17 (1995). While the commentary may be somewhat harsh, it nonetheless reflects the status of the law at that time.

45. *See* 20 C.F.R. §§ 404.1536, 416.936.

46. *Cf.* Farris, *supra* note 31, at 43. The author notes that a review of case law indicates that some courts hold that there is "no disability from alcohol-related impairments when there is no absence of control." *Id.*

47. *See* 20 C.F.R. § 404.1520a(c)(3) (rating the degree of an applicant's functional limitation by requiring that "four broad functional areas" be considered: "[a]ctivities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation").

48. The existence of this distinction is difficult to empirically prove as,

> [E]conomists contradict the disease model by showing that consumption patterns, even among addicts, often respond to market forces such as price increases, criminalization and taxes on the products. Addicts who are given money vouchers in

indicates that an individual is not engaging in rational behavior and therefore needs treatment for addiction issues. When establishing government policy on the award of benefits, the voluntary or involuntary nature of an addiction should be irrelevant. The arguments supporting such a distinction are red herrings that lack tangible impact on the practicalities of substance abuse's impact on society and the individual.

The relationship between federal disability benefits and drug and alcohol addiction transitioned again in the mid-1990s with the government taking a more punitive approach towards addicts.[49] Congress passed the Social Security Independence and Programs Improvements Act in 1994, which "altered and restricted the receipt of SSI [Social Security Income] and SSDI [Social Security Disability Insurance] benefits by persons who are disabled wholly or partially as a result of drug or alcohol addiction."[50] For "the first time in the history of these programs . . . benefits [were] time-restricted";[51] benefit applicants with a drug or alcohol problem had to contend with a thirty-six month limitation on Title II and Title XVI benefits.[52] The 1994 modifications put greater emphasis on treatment and rehabilitation.[53] During this period, the system mandated that "drug addicts or alcoholics . . . receive payments through a representative payee and participate in a treatment program."[54] There were also consequences for non-compliance with the requirements, such as a suspension of benefits and retroactive payment for benefits in lieu of a lump-sum check.[55] These restrictions on applicants with drug or alcohol addiction in the mid-1990s paved the way for even more stringent reforms years later.

Until 1996, the regulations of the SSA reflected the belief that substance abuse could constitute a disability, but the regulations became increasingly

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exchange for "clean" urine tests each week respond well, and more so as the monetary amounts increase.

Stevenson, *supra* note 36, at 204–05. (footnote omitted).

49. *See* Dean Spade, *Undeserving Addicts: SSI/SSD and the Penalties of Poverty*, 5 HOW. SCROLL: SOC. JUST. L. REV. 89, 94 (2002).

50. *Id.*

51. *Id.* at 95.

52. *See id.*

53. *See* 42 U.S.C. § 423(d)(1)(A) (1994); *see also* GEOFFREY KOLLMANN, CONG. RESEARCH SERV., RL 30565, SOCIAL SECURITY: SUMMARY OF MAJOR CHANGES IN THE CASH BENEFIT PROGRAM 19 (2000), *available at* http://www.ssa.gov/history/reports/crsleghist2.html (stating that the 1994 bill "restricted DI and SSI benefits payable to drug addicts and alcoholics by creating sanctions for failing to get treatment, limiting their enrollment to 3 years, and requiring that those receiving DI benefits have a representative payee (formerly required only of SSI recipients)").

54. Paul Davies et al., *The Effect of Welfare Reform on SSA's Disability Programs: Design of Policy Evaluation and Early Evidence*, 63 SOC. SECURITY BULL., 2000, at 3, 4.

55. DVD: OHA Hour, *supra* note 4.

punitive toward the recipients. The 1996 Congress, despite the earlier reforms, still did not believe that the current system adequately deterred substance abuse. At that time, Congress believed that the pre-1996 system provided "a perverse incentive that affront[ed] working taxpayers and fail[ed] to serve the interests of addicts and alcoholics, many of whom use[d] their disability checks to purchase drugs and alcohol, thereby maintaining their addictions."[56] One commentator summarized Congress's belief: "[It is] counterintuitive to give a financial award to individuals for their self-destructive behavior, much less illegal activities such as the habitual consumption of contraband."[57] So, the 1996 Congress and President Clinton passed legislation that ended disability payments for drug and alcohol addiction, indicating that "[t]he proposal would convert part of the savings to taxpayers into additional Federal funding to States for drug and alcohol treatment, providing an incentive for States to provide treatment to former recipients."[58] This legislation only provided additional funding for treatment programs for fiscal years 1997 and 1998 and did not purport to permanently establish or fund such treatment goals.[59] The purpose of this legislation was:

> [T]o eliminate payment of cash Social Security and SSI disability benefits to drug addicts and alcoholics, to ensure that beneficiaries with other severe disabilities who are also addicts or alcoholics are paid benefits through a representative payee and referred for treatment, and to provide additional funding to States to enable recipients to continue to be referred to treatment sources.[60]

Inherent in this legislation was a desire "to discourage alcohol and drug abuse, or at least not encourage abuse through the provision of a permanent government subsidy."[61]

To accomplish these goals, the 1996 Congress "passed the Contract with America Advancement Act (Contract with America), which excluded from the category of disabled individuals under SSI and SSDI persons whose alcoholism or drug addiction would . . . be a contributing factor material to

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56. H.R. REP. NO. 104-379, at 17 (1995).

57. Stevenson, *supra* note 36, at 202 (summarizing the rationale that paying benefits to addicts creates a moral hazard while ultimately criticizing such a rationale).

58. H.R. Rep. No. 104-379, at 17.

59. *Id.*

60. *Id.* (purporting to allow substance abusers to be "referred for treatment," but failing to codify the method for an ALJ to execute such a referral and not providing an affirmative responsibility to make such a referral).

61. CAROLYN A. KUBITSCHEK & JON C. DUBIN, SOCIAL SECURITY DISABILITY LAW AND PROCEDURE IN FEDERAL COURT § 5:52 (2011).

the determination that they are disabled."[62] Effectively, the reform prevented an applicant from using a drug or alcohol dependency to qualify for disability benefits.[63] This change in the system prevented applicants disabled by substance addiction from receiving benefits, regardless of how much those impairments interfered with their ability to function.

> In 1996, more than 200,000 individuals received [SSI] or [SSDI] payments based on diagnoses of "drug and alcohol addiction." This classification was abolished and individuals for whom drug or alcohol addiction was the primary reason for their disability had their benefits terminated. Many individuals with terminated benefits could re-qualify for disability assistance based upon other conditions. However, existing studies indicate that many terminated beneficiaries did not return to the roll.[64]

The 1996 reform and its "wholesale exclusion of persons disabled by drug and alcohol addiction from SSI eligibility [was] the first time in the history of the program that Congress [had] eliminated entire categories of disease or diagnosis as a basis for eligibility."[65] The reforms had a substantial impact on the benefits system, but did not necessarily achieve their goals. After the implementation of the 1996 legislation, one study found that the "proportion [of Drug Addiction & Alcoholism (DAA) recipients] who were payment eligible [prior to the 1996 legislation] dropped dramatically from 77.3 percent to 24.9 percent—by 52.4 percentage points."[66] That same study also determined that "almost half . . . of all targeted beneficiaries . . . lost their eligibility (and did not have it reinstated) as a result of the policy change."[67] That being said, the impact on the overall number of beneficiaries on the welfare rolls did not dramatically change. The legal reform "had only a very small effect on the size of the SSA's disability programs as a whole, reflecting the fact that the targeted recipients accounted for only 2.6 percent of beneficiaries receiving [SS]DI and disabled adults receiving SSI at the time."[68]

To summarize, the current benefit system under the 1996 reforms has not succeeded in its endeavor to substantially decrease the number of

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62. Spade, *supra* note 49, at 96 (alteration in original) (footnote omitted) (internal quotation marks omitted).

63. Davies et al, *supra* note 54, at 4.

64. Rukmalie Jayakody et al., *Substance Abuse and Welfare Reform*, NAT'L POVERTY CENTER POL'Y BRIEF, Apr. 2004, at 1, 1–2, *available at* http://www.npc.umich.edu/publications/policy_briefs/brief02/.

65. Spade, *supra* note 49, at 97–98.

66. Davies, *supra* note 54, at 5.

67. *Id.* at 6.

68. *Id.*

claimants on welfare rolls.[69] In fact, the more punitive approach toward drug and alcohol addicts "undermine[s] the rehabilitative thrust of the SSI and SSDI programs"[70] and will cause even greater administrative costs when addicts develop serious medical conditions and become chronic filers in the future. Moreover, the failure to revoke or adapt existing regulations has generated confusion and "errors in the adjudication of drug addiction and alcoholism."[71] To rectify these problems, steps must be taken to make our nation's benefits systems both effective and understandable.

III. CURRENT SSA APPROACH TO DRUG AND ALCOHOL ABUSE

Under the current system, the federal government provides Social Security benefits "to people who cannot work because they have a medical condition that is expected to last at least one year or result in death."[72] Citizens who wish to receive benefits submit their applications to their local SSA office, which then forwards the application to the Disability Determination Services office in the applicant's state.[73] To decipher who will receive benefits among the applicants, the state agency's staff reviews the application and applies a five-step process to determine whether the applicant is disabled, pursuant to 20 C.F.R. § 416.920.[74] If any of the steps in this sequential evaluation process result in a determination that benefits may or may not be paid, then the analysis does not proceed any further.[75]

The sequential evaluation begins when the agency determines whether the applicant is working and the amount the applicant earns from her employment.[76] If the applicant's income exceeds a certain published figure,

69. *See id.* at 6.

70. *See* Spade, *supra* note 49, at 98 (internal citation omitted) (describing the view of critics of the reforms). From its inception, the Social Security benefits system was intended to promote rehabilitation. In fact, "When Congress enacted the disability program in 1956, it intended that an effort would be made to rehabilitate as many disabled beneficiaries as possible so that they could return to work." *See* John R. Kearney, *Social Security and the "D" in OASDI: The History of a Federal Program Insuring Earners Against Disability*, 66 SOC. SEC. BULL., 2005/2006 at 1, 20, *available at* http://www.ssa.gov/policy/docs/ssb/v66n3/v66n3p1.html.

71. DVD: OHA Hour, *supra* note 4.

72. SOC. SEC. ADMIN., SSA PUB. NO. 05-10029, SOCIAL SECURITY: DISABILITY BENEFITS 4 (2012), *available at* www.socialsecurity.gov/pubs/10029.pdf.

73. *Id.* at 8.

74. *See* 20 C.F.R. § 416.920(a)(4) (2012) (addressing the steps for a Title XVI claim). The mirror section addressing Title II claims can be found at 20 C.F.R. § 404.1520(a)(4) (2012); SOC. SEC. ADMIN., *supra* note 72, at 9–10. *But see* 20 C.F.R. § 416.935 (providing for a different process when there is evidence of a drug addiction or alcoholism).

75. *See* SOC. SEC. ADMIN., *supra* note 72, at 9–10.

76. *See id.*

the agency will no longer consider the application.[77] If the applicant's income falls below the published threshold, the agency moves to the second step and considers the severity of the applicant's medical condition.[78] Not only must an applicant prove that he has an existing medical condition as determined by "acceptable medical sources,"[79] but the "medical condition must significantly limit [the applicant's] ability to do basic work activities—such as walking, sitting[, or] remembering—for at least one year."[80] An applicant whose medical condition does not limit "basic work activities" is not disabled.[81] The third step of the process considers whether the applicant's medical condition appears on the "List of Impairments," which details medical conditions that are "so severe that they automatically mean that [an applicant is] disabled as defined by law."[82]

The last two steps in the five-step process involve the agency basically evaluating the applicant's ability to work.[83] This adjudicative process establishes the applicant's residual functional capacity—a description of what the individual is still able to do—despite medically-proven impairments and limitations.[84] The state agency will examine whether or not the asserted medical conditions prevent the applicant from doing work he previously had done.[85] Then, taking into consideration factors like "age, education, and work experience," as well as medical conditions, the agency determines whether an applicant can work in any capacity.[86] If the claimant could do any other work that exists in significant numbers in the national economy, the state agency will determine that the individual is not disabled and not eligible to receive benefits.[87]

Even if an applicant satisfies all five steps, she may still be denied disability benefits if she is a drug abuser or alcoholic. A substance abuse disorder, drug addiction, or alcoholism, as defined by the SSA, is "when a maladapted person's pattern of substance abuse leads to clinically significant impairment or distress."[88] When a person suffering from this type of condition applies for benefits, the SSA first determines whether or

77. *Id.*
78. *Id.*
79. *See* 20 C.F.R. § 404.1513(a) (2012).
80. SOC. SEC. ADMIN., *supra* note 72, at 9.
81. *Id.*
82. *Id.* at 10.
83. *See* 20 C.F.R. § 404.1520a(c)(4) (2012).
84. *See* 20 C.F.R. § 404.1545(a)(4) (2012).
85. *Id.* § 404.1545(a)(5)(ii).
86. *See id.* § 404.1520(a)(4)(v).
87. *See* 20 C.F.R. §§ 404.1520(g), 404.1566(a), 416.920(g), 416.966(a).
88. DVD: OHA Hour, *supra* note 4.

not the applicant is disabled, given the totality of the circumstances.[89] After the agency determines the applicant to be disabled, it may deny disability benefits to an applicant whose "drug addiction or alcoholism is a contributing factor material to the determination of disability."[90]

Whether the presiding ALJ grants benefits will depend on whether the applicant's substance abuse disorder is "material."[91] Once the applicant is already determined to be disabled, the ALJ "will evaluate which of [the applicant's] current physical and mental limitations, upon which [the ALJ] based [the] disability determination, would remain if [the applicant] stopped using drugs or alcohol and then determine whether any or all of [the] remaining limitations would be disabling."[92] Specifically, the agency examines whether it would still find an applicant disabled if he stopped using drugs or alcohol.[93] If the agency decides an applicant would not be disabled after drug or alcohol usage ceased, then the agency will find that the drug use or alcoholism is a "material contributing factor."[94] When substance abuse is a material contributing factor, then the agency will deny benefits to an applicant despite the fact that he may not be able to properly function and maintain gainful employment. The only way that an addict or alcoholic may keep her benefits is "if the claimant would remain disabled if she stopped using alcohol or drugs."[95]

This process must be followed even if the claimant fails to mention, or outright denies, his substance abuse problem. A presiding ALJ must investigate and determine whether there is an existing abuse condition.[96] Using available evidence such as medical records, physician notes, and evidence like repeated visits to the emergency room for intoxication, if an ALJ finds any indication that a substance abuse disorder exists, the ALJ must analyze and process the benefits adjudication under the contributing factor analysis.[97] Under the current system, an applicant is legally deemed to have a substance abuse problem but is not offered any means to treat the problem, depriving the applicant, who may be seriously disabled by his

89. *Id.*

90. *See* 20 C.F.R. §§ 416.935(a), 404.1535(a).

91. *See id.*

92. *Id.* § 404.1535(b)(2).

93. *See id.* §§ 416.935(b)(1), 404.1535(b)(1)–(2).

94. KUBITSCHEK & DUBIN, *supra* note 61, § 5:52.

95. *Id.* at 565.

96. DVD: Office of Disability Adjudication and Review Training Video: Drug Addiction and Alcoholism [DAA] (SSA 2009) [hereinafter DVD: ODAR]. The training videos produced by the SSA, and referred to in this paper, were obtained though SSA FOIA Request AH5574, dated December 3, 2011, at 10:35:53 AM. SSA provided full, un-redacted versions of both referenced videos.

97. *Id.*

condition, of the opportunity to return to the workforce.

To better illustrate, consider the following: an applicant who suffers from seizures and substance addiction "must first be found disabled considering all impairments, including DAA."[98] Once an ALJ determines that the applicant is in fact disabled, the ALJ must then apply the contributing factor analysis to the case.[99] If an applicant experienced seizures while using drugs, a judge could deem the applicant disabled. If those seizures would stop if the claimant stopped using drugs, the drugs would be found material to the seizures and the applicant would be found ineligible for benefits. If, however, the applicant's seizures continued regardless of whether or not he was using drugs, his seizures would be an independent basis for conferring social security benefits.

To conclude our discussion of the present system, the 1996 reforms currently in place prevent applicants with DAA from receiving treatment. Failing to meaningfully address drug and alcohol addiction will only further exacerbate mental and physical problems for the applicant. Additionally, this failure will encourage chronic filings with the SSA in the future and burden taxpayers with the cost of providing long-term benefits to the applicant who develops a more serious, perhaps irreversible, condition.[100] Moreover, continued DAA will prevent any medical improvement that might enable the claimant to return to productive work.

In addition, current adjudication of cases involving drug and alcohol abuse is complicated by the fact that inconsistent, pre-1996 regulations still exist.[101] Provisions within the current code were not removed to reflect the change in policy. The legal reforms state: "An individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled."[102] Provisions enacted before the newer reforms, namely § 404.1536, still remain in title twenty of the C.F.R. and suggest that substance abusers may receive benefits in the form of treatment.[103] These conflicting provisions not only confuse those participating in the adjudication of these claims, but also confuse the general public, which

98. DVD: OHA Hour, *supra* note 4.

99. *See* Stevenson, *supra* 36 at 192.

100. Medicaid benefits may also be implicated. Before age sixty-five, an individual is eligible for free Medicare hospital insurance if he has been entitled to Social Security disability benefits for twenty-four months. SOC. SEC. ADMIN, SSA PUB NO. 05-10043, SOCIAL SECURITY: MEDICARE, at 6 (2012) *available at* http://www.ssa.gov/pubs/10043.pdf.

101. *E.g.*, 20 C.F.R. § 404.1536–.1541; § 416.936–.941 (2012).

102. 42 U.S.C. § 423(d)(2)(C) (2006); *see* DVD, OHA Hour, *supra* note 4.

103. 20 C.F.R. § 404.1536.

relies on the C.F.R. to make regulations "accessible, consistent, written in plain language, and easy to understand."[104]

The C.F.R. was written for the general public to understand the benefits process, and the inclusion of inaccurate or outdated information misleads the public. In fact, it appears that even the SSA is confused about the applicability of 20 C.F.R. § 404.1563. In a training video produced to educate Social Security employees about the proper way to process applications containing substance abuse issues, viewers are told that "if a claimant is determined to be disabled and also found to have a [DAA] condition they must have a representative payee and the claimant must also receive appropriate [DAA] treatment."[105]

In summary, the SSA awards benefits to individuals with administratively determined substance abuse and addiction issues, but there is no requirement to address and rectify those issues for continuation of benefits. At the same time, other applicants who are administratively labeled as substance abusers and addicts are dismissed from the system without being provided access to services that could be used to restore their productivity as employees. While the reforms proposed in the following section could allow some claimants to use their benefits awards to subsidize DAA behavior,[106] they are preferable to the current system that conveniently ignores the substance abuse problems plaguing the nation. In the current system, if an addict suffers from an additional impairment that prevents employment, benefits are awarded without requiring the claimant to mitigate further mental and physical damage through a substance abuse program. If a claimant is an addict without other significant ailments, the individual is labeled as such, and is promptly turned out to fend for himself until the chronic addiction produces irreversible mental and physical damage that will qualify for the receipt of disability benefits. The economic efficiency, if not the sanity, of this approach must be questioned.

IV. SUGGESTIONS FOR REFORM

As is evident, the current disability system does not address the needs of

104. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (explaining the general goals of regulations); *see also Plain Language: It's the Law*, PLAINLANGUAGE.GOV, http://www.plainlanguage.gov/plLaw/index.cfm (last visited Nov. 30, 2012).

105. DVD: ODAR, *supra* note 96.

106. The approach recommended in this paper will not fully prevent disability payments from being utilized to purchase drugs or alcohol. The system reforms in the 1990s were subject to extensive legislative debate. *See* Stevenson, *supra* note 36, at 212 ("The legislative history is replete with anecdotes of purported system abuses, including 'junkies' who designate their suppliers as their 'representative payees,' and alcoholics who designate their local watering hole as the mailing address for their benefits checks.").

a certain population of disabled persons. The system simply fails to respond to the treatment needs of individuals who are administratively labeled as addicts and substance abusers and, by doing so, generates economic inefficiency. Without assistance, these potential workers will probably not reintegrate into the labor force.[107] Moreover, ignoring this disability now will deplete government revenues in the future because addicts will develop more serious health issues that require more benefits and medical care. To rehabilitate these persons and avoid this economic drain, the current Social Security disability benefits system must be altered.

The issue now becomes how the current system may be modified so as to better serve those labeled as substance abusers and addicts. Two possible approaches[108] address the current situation. Restituting 20 C.F.R. § 404.1536 is one possible method. If this former regulation was revived and accompanied by the appropriate procedures, the disability system

107. *See* Dieter Henkel, *Unemployment and Substance Use: A Review of the Literature* (1990–2010), 4 CURRENT DRUG ABUSE REVS. 4, 4 (2011), *available at* http://www.ncbi.nlm.nih.gov/pubmed/21466502 ("Problematic substance use increases the likelihood of unemployment and decreases the chance of finding and holding down a job.").

108. Obviously, the potential list of solutions is expansive. However, this paper will focus on reforms related to the implementation or modification of 20 C.F.R. § 404.1536. While other solutions have been suggested, many are impractical. For example, the suggestion that the SSA add DAA as part of the grid analysis at 20 C.F.R. § 404.1569 and provide addicts with financial benefits is ineffective. *See* Stevenson, *supra* note 36, at 235. Using the grid analysis results in an automatic determination of benefit availability based on the categorization of an individual's standing. For instance, if a person is over a certain age, has limited education, and is found unable to engage in work that would require lifting more than ten pounds, the person automatically qualifies for benefits. If DAA is added as a factor that would automatically allow an individual to qualify for benefits, there will be several undesirable results. First, the grid prevents the adjudicator from looking at the person as an individual, but instead removes discretion from the adjudicator and forces her to classify that person under a pre-determined standard. This is incompatible with the complex nature of a DAA analysis where classification is not objectively quantified or precisely measured. Successful classification and treatment of DAA requires an individualized approach that considers the person holistically. Second, this system would encourage addictive behaviors and would prevent individuals from seeking treatment for rehabilitation and recovery. Often, individuals wait over a year from their state agency denial of benefits until their in-person hearing before an ALJ. The motivation to obtain financial Social Security disability benefits is influential. During this time, applicants are often wary of seeking employment opportunities or engaging in behaviors that would jeopardize their appeal. Adding DAA to the grid would cause those who are aware of their need for substance abuse treatment to avoid engaging in treatment until after their scheduled hearing. While it may be possible to develop another grid for the determination that a person is "DAA Relevant Despite Being Otherwise Disabled" and thus qualifies for addiction treatment, this approach would still oversimplify the subtlety of the determination that an individual is a substance abuser. Therefore, the holistic evidentiary approach proffered in this paper is superior to the development of such a grid analysis.

could more effectively address drug addiction and abuse. In such a system, agency procedures would instruct SSA ALJs to cease to distribute benefits when the recipient fails to comply with a designated rehabilitation or treatment program. These procedures would not only promote rehabilitation but would also avoid squandering government funds on a non-compliant recipient. However, as addressed below, this approach has significant shortcomings.

Alternatively, SSA could adopt a § 404.1536-type system that does not award benefits but provides the claimant with resources for drug and alcohol rehabilitation and job training. To be eligible for this federally established program, the claimant would go through the established application process for disability benefits and be classified as "DAA Material." Such an individual would not be considered disabled *but for* their addiction. This addiction would prevent the individual from being employed, and the claimant would therefore be considered a "DAA Material" claimant. The § 404.1536-type reform would also address individuals who were awarded benefits based on other ailments, despite evidence of substance abuse. These individuals would be required to participate in a substance abuse treatment program to continue receipt of financial disability benefits.

It is essential to understand how the system worked under 20 C.F.R. § 404.1536 before addressing the respective benefits and drawbacks of each of the aforementioned options. Section 404.1536, originally promulgated in 1995, provided that if the SSA determined that an applicant's addiction was "material to the determination of disability," the applicant was required to "avail [herself] of appropriate treatment . . . at an institution or facility approved by" the agency.[109] Revocation of benefits occurred when an applicant "did not comply with the terms, conditions and requirements of the treatment which has been made available," or when the applicant failed to avail himself of treatment after he had been notified that such treatment was available.[110]

The wholesale reimplementation of 20 C.F.R. § 404.1536 is not a sensible approach to today's problem. It is difficult to persuade the political electorate that providing a stream of income to an acknowledged substance abuse addict is sound public policy. Taxpayers will find the premise distasteful and support for such a policy is likely to serve as fodder for negative political ad campaigns. In addition, suggesting a return to past precedent is "unlikely to be popular politically, as this will intuitively strike voters as regressive. From a purely pragmatic standpoint, advocates will be

109. *See* 20 C.F.R. § 404.1536(a) (2012).
110. *See id.* § 404.1536(a)(1)–(2).

more effective originating something 'new' to achieve the same purpose."[111]

The administrative cost of monitoring rehabilitation compliance and terminating benefits would be burdensome and expensive. This termination procedure may become so cumbersome to execute that the SSA may essentially just overlook and underutilize it. In the best case scenario, it would still take a significant amount of time to determine if a claimant has not complied with treatment and to process the appropriate paperwork to discontinue benefits. This would allow individuals classified as substance abusers to continue to receive benefits without engaging in substance abuse treatment.

Furthermore, providing financial disability benefits to claimants while requiring participation in substance abuse treatment would likely flood rehabilitation programs with individuals who are not fully committed to successfully treating their addictions. These individuals would attend only as necessary to continue receiving disability payments. As successful program completion would result in elimination of benefits, the individual is motivated to attend and participate only enough to avoid benefits termination. A claimant would be financially incentivized to extend the treatment as long as possible by intentionally relapsing into substance use or by showcasing an inability to maintain sobriety in the absence of continued treatment. For these reasons, it is unwise and unwarranted to return wholesale to the historic use of 20 C.F.R. § 404.1536.

However, a modified version of this system could potentially stem the rising number of substance abusers and efficiently preserve limited government resources. Therefore, 20 C.F.R. § 404.1536 should be reexamined and adopted, but with the accompanying provisions.

First, the modified regulation must provide an ALJ with the authority to both provide a claimant identified as "DAA Material" with access to a federally funded drug and alcohol treatment program and prevent the award of accompanying financial benefits. This access to treatment would provide an opportunity for the claimant to obtain services but would not mandate that the claimant participate in a substance abuse program. By eliminating the financial payment incentive for those classified as DAA Material, only the individuals committed to recovery will choose to utilize the rehabilitation benefits they have been awarded. This will direct federal funding only to individuals who are motivated to cease substance abuse.

The program would primarily address the medical and psychological needs of an individual seeking to cease the use of drugs, alcohol, or both. The program's goal will be to provide the individual with the skills necessary to maintain a lifestyle of complete abstinence from these

111. Stevenson, *supra* note 36, at 232–33.

substances. Once the initial phase of the program is complete and abstinence is obtained, it would also be appropriate to introduce job or vocational training as part of this rehabilitation process during the second phase of the treatment, in which the abstinent lifestyle is stabilized and the individual receives appropriate counseling and training. The specific requirements or attributes of this rehabilitation program are beyond the scope of this paper, but it is sufficient to state that the rehabilitation goals for this program include abstinence from substance abuse and stabilization of the newly sober lifestyle, including appropriate vocational training.

Next, ALJs should be provided with a new regulatory category: "DAA Relevant Despite Being Otherwise Disabled." Based on the individual situation, an ALJ should be vested with the authority to require addiction treatment services for individuals receiving disability benefits when evidence establishes an active addiction. New regulations should require rehabilitation as a prerequisite to continuation of disability benefits. Requiring rehabilitation would decrease the costs associated with additional medical issues related to ongoing abuse. Additionally, it could potentially enable a benefit recipient to return to the workforce if other medical issues improve as a result of treatment. Lastly, this system would further provide some accountability for payment of disability benefits.

The requirement of rehabilitation would differ in philosophy from the offer of substance abuse treatment provided to individuals classified as DAA Material. While the DAA Material claimant is denied financial disability benefits, he is offered the opportunity to access substance abuse rehabilitation services on a voluntary basis. As articulated earlier, this will funnel services to individuals who are motivated to cease substance abuse and will not waste resources on individuals disinterested in this type of lifestyle change. This approach preserves government resources and also coincides with an individual's desire to choose if and when to pursue substance abuse treatment.

However, when a claimant receives the requested financial benefits from a disability determination, the government has a vested interest in ensuring that the benefits will be well-managed, that the individual is not engaging in illegal behavior, and that the individual now designated as a substance abuser is responsibly addressing the issue. It may be argued that mandated treatment will not be as effective as voluntary treatment. However, by analogy, the criminal justice system has shown that mandated treatment can be beneficial:

> Often, the criminal justice system can apply legal pressure to encourage offenders to participate in drug abuse treatment; or treatment can be mandated through a drug court or as a condition of pretrial release, probation, or parole. A large percentage of those admitted to drug abuse

> treatment cite legal pressure as an important reason for seeking treatment. Most studies suggest that outcomes for those who are legally pressured to enter treatment are as good as or better than outcomes for those who entered treatment without legal pressure. Individuals under legal pressure also tend to have higher attendance rates and remain in treatment for longer periods, which can also have a positive impact on treatment outcomes.[112]

There will be a discrepancy in treating addicts: DAA Material addicts will be offered substance abuse treatment, and DAA Relevant Despite Being Otherwise Disabled claimants will be mandated to participate in such treatment. However, the distinction is rationally based on the government's interests in a claimant's sobriety as benefits are paid from public funds.[113] Discussed above, these interests support the need for mandated treatment, even if success rates are higher among the voluntary DAA Material participants.

If the SSA adopted such a system, there would need to be some guidance concerning requirements for finding a claimant DAA Relevant Despite Being Otherwise Disabled. A myriad of issues could be considered when establishing a standard for determining that a claimant falls into this category. However, the threshold determination must be clear and easy to establish.

A number of relevant factors were considered in the early 1990s to establish if alcoholism or addiction was voluntary or involuntary. While a similar approach would not be appropriate in this case, as the voluntary or involuntary nature of a person's consumption should be irrelevant in the determination of public policy, the types of evidence under review would be similar. The standards proffered in the voluntary/involuntary analysis provide a starting point for determining if a person should be classified as DAA Relevant Despite Being Otherwise Disabled. The adjudicator should be able to consider job-attendance issues, alcohol-related arrests, patterns of attempted treatment, continued drinking while on disulfiram[114], parole violations, frequency of intoxication, withdrawal symptoms, increased

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112. *Principles*, *supra* note 3.

113. *See* United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 203 (2003) (citing South Dakota v. Dole, 483 U.S. 203, 206 (1987)) ("Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.")).

114. Disulfiram, also known as Antabuse, is used to treat chronic alcoholism. The drug:

> [C]auses unpleasant effects when even small amounts of alcohol are consumed. These effects include flushing of the face, headache, nausea, vomiting, chest pain, weakness, blurred vision, mental confusion, sweating, choking, breathing difficulty, and anxiety. These effects begin about ten minutes after alcohol enters the body and last for one hour or more. Disulfiram is not a cure for alcoholism, but discourages drinking.

See Disulfiram, U.S. NAT'L LIBRARY OF MED., http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000726/ (last updated Feb. 11, 2012).

tolerance for the abused substance, and evidence of end organ damage, such as alcoholic neuropathy, alcohol withdrawal seizures, and other related conditions.[115] This is not an exhaustive list of factors establishing that a person has a relevant substance abuse problem despite being otherwise disabled, but such factors are appropriate for consideration.

Other evidence that could be used to administratively determine the existence of a substance abuse problem includes statements from the claimant or other witnesses at a hearing. While such statements need to be "treated cautiously" because individuals tend to deny substance abuse problems,[116] an admission would support a finding of DAA Relevant Despite Being Otherwise Disabled. This would be akin to a "statement against interest"[117] in that the claimant would not willingly admit use of illegal substances or excessive use of alcohol unless such a statement was true. Such an admission mandates a DAA analysis that could possibly result in a DAA Material finding and a denial of financial disability benefits. Therefore, if the claimant makes such a statement at a hearing, it is likely to be true as it is an admission against interest. Likewise, as the witnesses testifying at a disability hearing are chosen by the claimant and his representative, the statement against interest theory is equally applicable.

It would also be prudent to consider medical records when determining if a person is DAA Relevant Despite Being Otherwise Disabled. When evaluating a claimant, a statement from a medical care professional that a claimant is unable to prudently manage funds because of a substance abuse issue would be relevant. Such an evaluation would demonstrate an impact on daily functioning that directly correlates to the substance abuse, indicating a need for treatment. It is also prudent to consider statements from a medical professional notifying the claimant that the claimant will suffer physical or psychological complications if substance use continues, followed by evidence of continued use. Statements from a medical professional showing that the claimant has continued substance abuse, regardless of its negative impact on his health, would support the need for substance abuse treatment. Likewise, the medical record may plainly contain a diagnosis of "alcoholism," "drug abuse," or "drug addiction." Medical records should be used as conclusive evidence that substance abuse treatment is warranted for a claimant receiving disability benefits.

The adjudicator should be vested with the authority to use any record evidence available to logically support her conclusion classifying an

115. *See* Farris, *supra* note 31, at 43–44.
116. *See id.* at 44.
117. *See* FED. R. EVID. 804(b)(3).

individual as DAA Relevant Despite Being Otherwise Disabled and mandated to treatment. The adjudicator should be required to support this finding with a citation to the relevant evidence. However, the required legal analysis should be simple and the evidentiary threshold should be low.

The supported analysis should require only a citation to a claimant's admission of addiction or abuse, a medically acceptable source's diagnosis of abuse or addiction, *or* a brief explanation of the evidentiary rationale that led the adjudicator to the conclusion that the claimant is DAA Relevant Despite Being Otherwise Disabled.

A more detailed requirement would be counterproductive for two reasons: First, clarity and simplicity prevent confusion and avoid grounds for appeal. A simple and clear analysis will decrease administrative costs and support the finality and reliability of issued decisions. Second, a complicated analysis would create a burden of proof on the adjudicator that would be so high that the analysis would likely be avoided whenever possible. The production requirements within the disability adjudication system are already high, and a complicated evidentiary analysis represents additional work that would be sidestepped. An overly complicated analysis would potentially result in finding that substance abuse does not impact a claimant, even if the evidence suggests otherwise. Overall, a high standard of proof is not necessary, as mandated substance abuse treatment should be considered a provision of needed services, rather than a punishment.

If an individual classified as DAA Relevant Despite Being Otherwise Disabled fails to appropriately participate in substance abuse treatment, it would be necessary to terminate benefits. As discussed above, termination procedures are fraught with administrative challenges, and there is no persuasive public policy that merits this type of cost and effort for individuals who would not otherwise receive financial disability benefits because they are classified as DAA Material. However, in cases where a substance abuser is determined to be disabled based on another unrelated ailment, implementing this monitoring and termination procedure would motivate recipients to continue participation in their required substance abuse treatment program. Even if benefit termination procedures were not swiftly administered, the potential for loss of benefits would still exist and could prompt compliance with substance abuse program requirements.

In determining if a DAA Relevant Despite Being Otherwise Disabled claimant is appropriately participating in substance abuse treatment, the adjudicator must consider the availability of the treatment program and the claimant's participation effort. A treatment program would be considered "available" if the government has notified the claimant of the program's location and schedule and has allocated appropriate resources to allow the claimant to be seated in such a program. Once such notice has been

provided, the claimant could refute a finding of "program availability" only by obtaining a substantiated statement from a treating medically acceptable source[118] that the claimant's other medically determinable ailments prevent participation in the particular program offered by the government.

The claimant's appropriate participation in a substance abuse program would also be considered during a benefits termination decision. Evidence of participation would be garnered from the records kept by the treating facility. Also, the adjudicator would give substantial weight to any determination that the claimant is being dismissed from the program due to noncompliance with treatment. In addition, medical opinions from acceptable sources[119] will be considered, and records showing anything other than complete abstinence from the substance of abuse will be given weight in the termination decision. This evidence may be in the form of blood or urine test results, observations relating to continued use garnered from examination of the claimant, or admissions from the claimant during treatment. Other evidence may also be considered as appropriate, such as arrest records for public intoxication, driving under the influence, or possession of illegal drugs or drug paraphernalia.

The modification and implementation of 20 C.F.R. § 404.1536 may be an effective tool in America's "War on Drugs." As outlined above, a program that affords treatment options may allow substance abusers an opportunity to attain sobriety. This could potentially return individuals to the workforce and prevent costs associated with awarding these individuals lifetime disability benefits when their addiction issues culminate in irreversible physical or psychological damage. At the very least, Congress and the SSA should seek to remove the C.F.R. provisions that are no longer in effect because inaccuracies contradict the purpose of plain language conventions and confuse the public.[120] This clarification would not address the needs of claimants with substance abuse issues, but it might help decrease the "errors in the adjudication of drug addiction, and alcoholism [that] continue to be noted by peer review study, appeals counsel, and the federal courts."[121]

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118. 20 C.F.R. § 404.1527(c)(2) (2012).

119. *Id.* §§ 404.1527(a)(2), .1513(a).

120. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011). Under the current system, 20 CFR § 404.1536 through § 404.1541 and § 416.936 through § 416.941 remain in the Code of Federal Regulations as a vestige of the programs that were eliminated in 1996. Their enduring presence in the Code confuses individuals trying to understand how disability benefits are administered and reflects the unfinished nature of Social Security's stumbling attempt to address this serious problem.

121. DVD: OHA Hour, *supra* note 4.

CONCLUSION

The federal government needs "a comprehensive proposal on drugs . . . designed to say that we want to minimize drug use in America and we're very serious about it."[122] Without an investment in the treatment of substance abuse among Social Security disability applicants and benefit recipients, the long-term social and financial costs will continue to rise. The first step toward a comprehensive drug policy can be found in the revision and implementation of 20 C.F.R. § 404.1536.

122. Moody, *supra* note 6.