

MISSING PIECES OF THE BENEFITS PUZZLE: ANALYZING SSA’S DISABILITY BENEFITS FRAMEWORK AND ITS EXCLUSION OF AMERICANS WITH SUBSTANCE USE DISORDERS

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INTRODUCTION

The Social Security Administration (SSA) provides disability benefits to Americans who meet its definition of “disabled”¹ and have limited income and resources.² SSA administers disability benefits through two programs: Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI).³ While SSA provides benefits to many Americans with disabilities who need assistance,⁴ SSA currently excludes a large population in policy and practice: people suffering from a substance use disorder.⁵

SSA derives the authority to appropriate federal funds to provide monthly benefits to Americans with disabilities from the Social Security Act.⁶ The Social Security Act, a New Deal federal program first enacted in 1935, was

1. This Comment uses the term “disabled” in the limited context of referring to individuals who meet the limited definition of the Social Security Administration (SSA). It is understood and recognized, as this Comment argues, that not all individuals with disabilities fit within this definition and that a disability can exist without SSA’s recognition of the individual as “disabled.”

2. See *Disability Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/disability/> (last visited Nov. 11, 2023).

3. *Id.*

4. *SSI Monthly Statistics, December 2022*, SOC. SEC. ADMIN. (Dec. 2022), https://www.ssa.gov/policy/docs/statcomps/ssi_monthly/2022-12/table03.html (showing that approximately 6.4 million Americans received Supplemental Security Income (SSI) in December 2022); *Number of Social Security Recipients at the End of Dec. 2022*, SOC. SEC. ADMIN., <https://www.ssa.gov/cgi-bin/currentpay.cgi> (last visited Nov. 11, 2023) (showing that approximately 7.6 million Americans received monthly Social Security Disability Insurance (SSDI) payments in December 2022).

5. See generally 20 C.F.R. § 416.935 (2023) (stating an individual whose substance use disorder is a “contributing factor material to the determination of disability” is not eligible to receive disability benefits). This Comment uses the phrase “substance use disorder” to refer collectively to individuals suffering from drug or alcohol use disorder or addiction. Other variations of this term that appear throughout this Comment, in the discussion of legislation surrounding SSI and SSDI benefits and substance use disorder, include “drug addiction and alcoholism” and “drug and/or alcohol use” (DAA). The phrase substance use disorder will be used in place of the dated DAA statutory language. The terminology of substance use disorder (SUD) is preferred to other terminology—including substance abuse disorder—as it is less stigmatizing and is an accepted diagnostic term, meaning it more precisely reflects current criteria and reinforces the medical nature of the disability. See *Words Matter: Preferred Language for Talking About Addiction*, NAT’L INST. ON DRUG ABUSE (June 23, 2021), <https://nida.nih.gov/research-topics/addiction-science/words-matter-preferred-language-talking-about-addiction>; *Words Matter: The Language of Addiction*, P’SHIP TO END ADDICTION (June 2017), <https://drugfree.org/article/words-matter/>.

6. See 42 U.S.C. § 401(b) (authorizing the creation of the Federal Disability Trust Fund, which distributes monthly benefit payments).

initially intended to eliminate financial hardships for the elderly and create a minimum standard of living.⁷ The program also provides benefits to Americans with disabilities, regardless of financial need.⁸ Now known as the Federal Old-Age Survivors and Disability Insurance Program (OASDI) under Title II of the Social Security Act, it is the program from which SSA derives its authority to disburse SSDI benefits.⁹

In 1972, Congress amended the Social Security Act to include benefits for Americans with disabilities who face financial hardship.¹⁰ This amendment, the SSI Program, is a means-based program designed to create a floor of income for the provision of basic needs.¹¹ SSI appears under Title XVI of the Social Security Act.¹²

To be eligible for either SSI or SSDI, a person's disability or condition must meet SSA's qualifying definition of disability.¹³ SSA's definition of disability is strict; to qualify for SSI or SSDI, an individual must be unable 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."¹⁴ The person's disability must be so severe that they are unable to do their previous work and cannot "engage in any other kind of substantial gainful work which exists in the national economy . . ."¹⁵ A person who has a severe substance use disorder may very well be unable to engage in substantial gainful work and thus would fit into this definition of disability.¹⁶ However, the Act goes on to state that "[a]n individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would . . . be a contributing factor material to the

7. H.R. REP. NO. 74-615, at 1 (1935).

8. Social Security Act Amendments of 1956, Pub. L. No. 84-880, § 223, 70 Stat. 807, 815-24.

9. *See* 42 U.S.C. § 401(b).

10. Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1465.

11. *See* 42 U.S.C. § 1382 (establishing specific income levels for SSI recipients). *See generally id.* §§ 1381-85 (describing the purpose of SSI and its eligibility requirements).

12. 42 U.S.C. §§ 1381-85

13. *See id.* § 423(a)(1).

14. *Id.* §§ 423(d)(1)(A), 1382c(a)(3)(A); *see also* 20 C.F.R. § 404.1505(a) (2023).

15. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

16. Comparatively, under the Americans with Disabilities Act (ADA), a federal statute enshrining the civil rights of Americans with disabilities, a person is legally disabled if they have "a physical or mental impairment that substantially limits one or more major life activities . . ." *Id.* § 12102(1)(A). This includes people who have a history of an impairment that substantially limited one or more major life activities and people who are regarded as having such an impairment. *Id.* § 12102(2)-(3).

Commissioner’s determination that the individual is disabled.”¹⁷

It was not always this way for beneficiaries with substance use disorders.¹⁸ Until 1996, individuals whose primary impairment was a substance use disorder *were* eligible to receive SSI or SSDI on a conditional basis.¹⁹ This is because, in 1996, Congress enacted the Contract with America Advancement Act,²⁰ which terminated SSI and SSDI eligibility for beneficiaries whose primary disability was “drug addiction or alcoholism” (DAA).²¹ In the wake of this Act, over 120,000 beneficiaries became immediately ineligible to receive SSI or SSDI.²² As of 2021, 46.3 million people age twelve or older—about 17% of the population—have or have had a substance use disorder,²³ meaning it is likely that many Americans who once would have qualified for disability benefits are no longer eligible to receive them.²⁴

17. 42 U.S.C. §§ 423(d)(2)(C), 1382c(a)(3)(J).

18. *See generally* MIKKI D. WAID & SHERRY L. BARBER, SOC. SEC. ADMIN., NO. 2001-02 FOLLOW-UP OF FORMER DRUG ADDICT AND ALCOHOLIC BENEFICIARIES (2001), <https://www.ssa.gov/policy/docs/rsnotes/rsn2001-02.pdf> (discussing previous eligibility for SSI and SSDI beneficiaries with substance use disorders). This Comment uses the term “beneficiaries” to refer to individuals who are eligible for and receive either SSI or SSDI benefits.

19. *See id.* at 1 (explaining that the 1996 amendments placed a three-year time limit on SSI and SSDI benefits for beneficiaries whose primary impairment was substance use disorder.)

20. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847.

21. § 105, 110 Stat. at 852–55. Historically, laws and regulations governing SSI and SSDI eligibility have referred to medically documented substance use disorders as “drug addiction and alcoholism” or “DAA.” This Comment refers to this disability as a “substance use disorder” and other related iterations. *Supra* note 5.

22. *See* WAID & BARBER, *supra* note 18, at 2.

23. DOUGLAS RICHESSON, IVA MAGAS, SAMANTHA BROWN & JENNIFER M. HOENIG, DEPT. OF HEALTH & HUM. SERVS., SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2021 NATIONAL SURVEY ON DRUG USE AND HEALTH 31 (2022), <https://www.samhsa.gov/data/sites/default/files/reports/rpt39443/2021NSDUHFRRRev010323.pdf> [hereinafter 2021 NSDUH ANNUAL REPORT].

24. The recent opioid crisis has “dramatically changed the drug landscape in America,” and overdose-related deaths are at an all-time high as of May 2023. *See Addiction in America*, SHATTERPROOF, <https://www.shatterproof.org/learn/addiction-basics/addiction-in-america> (last visited Nov. 11, 2023). Substance use disorders, which are now recognized as “mental illnesses,” are treatable with medication which increases a person’s odds of long-term recovery. *See id.* In addition, substance use disorders surged during the COVID-19 pandemic, after about ten years of increased alcohol use and the aforementioned opioid crisis. *See* Grace Sparks, Alex Montero, Ashley Kirzinger, Isabelle Valdez & Liz Hamel, *KFF Tracking Poll July*

Although SSA outright disqualifies claimants for SSI and SSDI whose sole disability is a substance use disorder, SSA does not automatically disqualify people who have a “dual diagnosis”—that is, SSA will not disqualify a person’s disability because of a substance use disorder or dependency, so long as it is not a contributing factor to the disability.²⁵ The evaluation process outlined by SSA considers whether a substance use disorder—legislatively defined as a DAA—is a material contributing factor when determining whether a claimant has a disability.²⁶ The key factor SSA examines in concluding whether a claimant’s substance use disorder is a material contributing factor to its determination of disability is whether SSA would still find the claimant disabled if they stopped using drugs or alcohol.²⁷ If SSA finds that a claimant’s substance use disorder is material to the determination of disability, then SSA finds the claimant is not disabled by its definition and is thus disqualified from receiving SSI or SSDI.²⁸

Part I of this Comment analyzes the historic treatment of people claiming SSI and SSDI benefits who suffer from substance use disorders. Part I continues by examining SSA’s qualifying definition of disability, as well as the legislative and cultural changes leading to SSA’s current exclusion of individuals with substance use disorders. Part II assesses SSA’s evaluation process for SSI and SSDI claimants who have a dual diagnosis of a substance use disorder and another disability, concluding that the evaluation process unfairly excludes claimants with substance use disorders from receiving SSI and SSDI benefits. Part III provides recommendations for how SSA should update its definition of disability to include substance use disorders and argues that Congress should reinstate conditional SSI and SSDI eligibility for beneficiaries with substance use disorders.

2023: *Substance Use Crisis And Accessing Treatment*, KFF (Aug. 15, 2023), <https://www.kff.org/other/poll-finding/kff-tracking-poll-july-2023-substance-use-crisis-and-accessing-treatment/>. This increase in substance use disorders has become evident in major cities across the United States, where open-air drug use has become common. See, e.g., Jordan Gale & Jan Hoffman, *Scenes From a City That Only Hands Out Tickets for Using Fentanyl*, N.Y. TIMES (July 31, 2023), <https://www.nytimes.com/2023/07/31/health/portland-oregon-drugs.html> (describing the impact of increased substance use disorders in Portland, Oregon); Jan Hoffman, *Tranq Dope: Animal Sedative Mixed With Fentanyl Brings Fresh Horror to U.S. Drug Zones*, N.Y. TIMES (Jan. 7, 2023), <https://www.nytimes.com/2023/01/07/health/fentanyl-xylazine-drug.html> (describing the opioid crisis’s crushing impact in Philadelphia).

25. See 20 C.F.R. § 416.935(a)(b)(1)–(2) (2023).

26. SSR 13-2p.; Titles II and XVI: Evaluating Cases Involving Drug Addiction and Alcoholism (DAA), 78 Fed. Reg. 11,939 (Feb. 20, 2013).

27. SSR 13-2p., 78 Fed. Reg. at 11,941.

28. *Id.*

I. SSA'S DEFINITION OF DISABILITY

A. SSA's Historical Definitions of Disability

The Social Security Act defines “disability” for SSI and SSDI eligibility purposes as the “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.”²⁹ Substantial gainful activity is defined as “work that [] (a) [i]nvolves doing significant and productive physical or mental duties; and (b) [i]s done (or intended) for pay or profit.”³⁰ Further, the person’s disability must be so severe that they are unable to do their previous work and cannot “engage in any other kind of substantial gainful work which exists in the national economy.”³¹

Prior to 1996, SSA recognized a substance use disorder as a qualifying disability under its operating definition of disability.³² However, the Social Security Act restricted—but did not declare ineligible—beneficiaries whose primary disabilities were substance use disorders.³³ The Social Security Act Amendments of 1972 explicitly addressed beneficiaries with substance use disorders in the SSDI program.³⁴ The 1972 amendments required SSDI beneficiaries with substance use disorders to receive monthly benefits through a representative payee and participate in appropriate treatment for their substance use disorder.³⁵ In addition to these new provisions governing

29. 42 U.S.C. §§ 423(d)(1)(A) (SSDI definition), 1382c(a)(3)(A) (SSI definition); *see also* 20 C.F.R. § 404.1505(a) (explaining that the person’s severe impairment(s) must prohibit them from doing their past work or any other substantial work in the national economy).

30. 20 C.F.R. § 404.1510.

31. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

32. *See* WAID & BARBER, *supra* note 18, at 1.

33. *See* Social Security Act Amendments of 1972, Pub. L. No. 92-603, § 1611, 86 Stat. 1329, 1467 (providing no person with drug or alcohol use disorder may receive SSDI unless they are receiving appropriate treatment at an institution approved by statute).

34. *Id.*; *see also* *The Development of the Disability Program Under Old-Age Survivors Insurance, 1935-74*, SOC. SEC. ADMIN., at 119, 122, <https://www.ssa.gov/history/pdf/dibreport.pdf> (providing that new legislation renders beneficiaries with drug or alcohol use disorders ineligible for disability benefits unless the beneficiary is seeking appropriate treatment).

35. § 1611, 86 Stat. at 1467. Representative payees are third party managers of an individuals’ benefits, appointed when an individual is considered unable to manage their own benefits as a result of their disability—a determination made separately from their legal competence. 42 U.S.C. § 405(j)(1)(A); *see also* 20 C.F.R. § 416.601 (discussing how SSA determines whether a beneficiary requires a representative payee). This Comment will not discuss SSA’s Representative Payment Program or representative payees at length. However, recent amendments to the Social Security Act warrant concern regarding the lack of

SSDI, Congress also established SSI through the 1972 amendments and placed the same restrictions on beneficiaries with a substance use disorder.³⁶ Responding to a surge in claimants asserting a substance use disorder as a primary disability, Congress enacted the Social Security Independence and Program Improvements Act in 1994.³⁷ The legislation provided that a beneficiary's SSI or SSDI benefits would be terminated after thirty-six months if their substance use disorder remained a material factor in their disability at the end of that period.³⁸

B. The Contract with America Advancement Act of 1996

Eligibility for SSI and SSDI changed drastically for beneficiaries with substance use disorders in 1996 when Congress passed the Contract with America Advancement Act (CAAA).³⁹ The CAAA contained very restrictive provisions affecting beneficiaries with substance use disorders.⁴⁰ Beginning on March 29, 1996—the day the CAAA was enacted—SSA ceased to provide SSI and SSDI benefits to new claimants with substance use disorders.⁴¹ The legislation required SSA to notify SSI and SSDI beneficiaries who already received benefits due to a substance use disorder that their benefits would be terminated within ninety days of the CAAA's enactment unless they sought reassessment.⁴² Beneficiaries with a dual diagnosis, a substance use disorder and another disability, could remain eligible for SSI or SSDI under the CAAA so long as SSA found that their other disability, on its own, qualified under SSA's strict definition of

accountability measures for certain types of representative payees and the resulting potential for misuse and abuse of benefits. *See* Strengthening Protections for Social Security Beneficiaries Act of 2018, Pub. L. No. 115-165, 132 Stat. 1260 (removing the annual reporting requirement for representative payees who are parents of SSI and SSDI beneficiaries who live in the same household as the beneficiary).

36. § 1611, 86 Stat. at 1467–75.

37. Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464; *see* WAID & BARBER, *supra* note 18, at 1 (“Because of the rising number of persons with [a substance use disorder] receiving disability benefits, Congress included several provisions for them in the Social Security Independence and Program Improvements Act of 1994 . . .”).

38. § 101, 108 Stat. at 1496–97.

39. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, 852–55.

40. *See* § 105, 110 Stat. at 853.

41. *See id.*

42. § 105, 110 Stat. at 853, 855; *see also* Carole Roan Gresenz, Katherine Watkins & Deborah Podus, *Supplemental Security Income (SSI), Disability Insurance (DI), and Substance Abusers*, 34 CMTY. MENTAL HEALTH J. 337, 339–40 (1998).

disability.⁴³ SSA sent notification of this change to beneficiaries, representative payees, and family members in June and July of 1996, and beneficiaries were required to respond by July 29, 1996 to have a re-determination made before January 1, 1997—the official termination date of benefits for beneficiaries with substance use disorders.⁴⁴ The SSA distributed these notification letters to 209,374 previously eligible individuals.⁴⁵

On January 1, 1997, SSA officially terminated SSI and SSDI eligibility for beneficiaries whose primary disability was a substance use disorder.⁴⁶ Sixty-four percent of the beneficiaries who received notification letters appealed the termination of their benefits, and 35% of beneficiaries who appealed were reclassified.⁴⁷ Despite the number of appeals that were timely filed to SSA, over 141,000 of these 209,374 beneficiaries had their SSI or SSDI benefits terminated, either because they did not appeal the termination of their benefits or their appeals were denied.⁴⁸ Because of the CAA, individuals are ineligible for SSI or SSDI benefits if SSA finds that their substance use disorder is a material factor in determining the existence of an independent qualifying disability.⁴⁹

The effects of the CAAA quickly flooded the federal courts. In *Brown v. Apfel*,⁵⁰ the Court of Appeals for the Fifth Circuit upheld an administrative ruling that Brown, a claimant for SSI, was nondisabled—and therefore ineligible for SSI—because her documented history of a substance use disorder was deemed a contributing factor material to a determination of disability,⁵¹ even though the claimant also experienced chronic back pain and had been diagnosed with severe depression.⁵² The Court in *Brown* also held that a claimant for SSI and SSDI benefits bears the burden of proving that their substance use disorder is not a contributing factor material to their

43. See Gresenz, Watkins & Podus, *supra* note 42, at 339–40.

44. *Id.*

45. *Id.*

46. *Id.*

47. See Katherine E. Watkins & Deborah Podus, *The Impact of Terminating Disability Benefits for Substance Abusers on Substance Use and Treatment Participation*, 51 PSYCHIATRIC SERVS. 1371, 1371 (2000).

48. See, e.g., *id.*; WAID & BARBER, *supra* note 18, at 2; Gresenz, Watkins & Podus, *supra* note 42, at 339–40.

49. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, 852–53; see *infra* Part II.A (explaining that SSA uses a six-part test to determine if substance use disorder is a material factor in determination of a disability, the key factor being whether a person would still have a disability if they ceased drug or alcohol use).

50. 192 F.3d 492 (5th Cir. 1999).

51. See *id.* at 495–96.

52. See *id.*

disability.⁵³ Several circuits followed suit in cases where a claimant for SSI or SSDI benefits with a substance use disorder appealed their denial of benefits, holding that the claimant held the burden of proving they would still meet SSA's strict definition of disability without the contributing factor of a substance use disorder.⁵⁴

The termination of SSI and SSDI benefits for people with substance use disorders was the product of data indicating a rise in the number of beneficiaries with substance use disorders and uncertainties surrounding those beneficiaries.⁵⁵ First, the number of SSI and SSDI beneficiaries with dual diagnoses—a substance use disorder and another qualifying disability—had rapidly grown from about 24,000 beneficiaries in 1990 to 131,000 beneficiaries in 1995.⁵⁶ The annual cost of providing SSI and SSDI to people with substance use disorders was about \$1.4 billion in the mid-1990s.⁵⁷ Second, SSA could not accurately account for whether a majority of beneficiaries with substance use disorders were receiving rehabilitative treatment.⁵⁸ According to SSA, only about 9% of SSI and SSDI beneficiaries for whom addiction treatment was a requirement were actually in treatment in 1993.⁵⁹ Members of Congress were most concerned with SSA's inability to account for the treatment status of a large majority of beneficiaries with substance use disorders and even questioned whether SSA's data was accurate at all.⁶⁰

53. *Id.* at 498.

54. *See* *Mittlestedt v. Apfel*, 204 F.3d 847, 852 (8th Cir. 2000) (holding that claimant with a heart condition, epilepsy, and alcoholism did not have a qualifying disability because claimant failed to show alcohol use disorder was not a material factor); *Ball v. Massanari*, 254 F.3d 817, 821 (9th Cir. 2001) (finding that claimant failed to show alcohol use disorder was not a material factor and therefore claimant's reduced bone mass did not fall under SSA's definition of disability); *Doughty v. Apfel*, 245 F.3d 1274, 1276, 1280–81 (11th Cir. 2001) (holding that claimant with anxiety disorder, dizziness, and alcohol use disorder did not have a qualifying disability under SSA's definition because he failed to show alcohol use disorder was not a material factor).

55. *See* Gresenz, Watkins & Podus, *supra* note 42, at 339–40.

56. *Id.* at 339. The total number of SSI and SSDI recipients who had a substance use disorder was approximately 250,000 in 1994, according to the Government Accountability Office (GAO). *Disability Benefits for Drug Addicts and Alcoholics are Out of Control: Hearing Before the Subcomms. on Soc. Sec. and Hum. Res. of the Comm. on Ways and Means*, 103d Cong. 1–2 (1994) (statement of Jane L. Ross, Assoc. Dir., Health, Educ., & Hum. Serv.'s Div.) [hereinafter 1994 Hearing on Disability Benefits for Drug Addicts and Alcoholics].

57. *See* 1994 Hearing on Disability Benefits for Drug Addicts and Alcoholics, *supra* note 56, at 1.

58. *See id.*

59. *Id.* at 4.

60. *Id.* at 3–4 (explaining that SSA did not require treatment for three-fourths of SSI and

Because SSA's data on treatment was unreliable, the Inspector General of the Department of Health and Human Services (HHS) surveyed a sample of beneficiaries with substance use disorders and representative payees in 1994.⁶¹ The data collected in this survey was varied, but one general takeaway was that enrollment of beneficiaries with substance use disorders in rehabilitative treatment was low.⁶² Finally, several reports indicated that the representative payee requirement for beneficiaries with substance use disorders was ineffective.⁶³ All three of these concerns led Congress to push for SSI and SSDI reform.⁶⁴

The most crucial underpinning of the CAAA was an increasingly popular anti-drug campaign fueled by conservative politics: the War on Drugs.⁶⁵ The War on Drugs is "a phrase used to refer to a government-led initiative that aim[ed] to stop illegal drug use, distribution and trade by dramatically increasing prison sentences for both drug dealers and users."⁶⁶ The War on Drugs was officially declared by Republican President Nixon in 1971, who avowed drug abuse as "public enemy number one."⁶⁷ Presidents Nixon and Reagan, two of the most prominent Republican presidents of the era, strongly urged the passage of strict laws that criminalized drug use and possession.⁶⁸ Politicians who supported anti-drug policy and urged the passage of the CAAA usually argued that beneficiaries with substance use disorders used their monthly SSI or SSDI payments to purchase illicit drugs and alcohol.⁶⁹

SSDI beneficiaries with a substance use disorder; eighty-four percent of SSI beneficiaries who were required to be in treatment for a substance use disorder had an unknown treatment status and seven percent were not in treatment at all).

61. See Gresenz, Watkins, & Podus, *supra* note 42, at 340.

62. *Id.* ("Data from the representative payees indicated that 31 percent of recipients were in treatment. Data from the recipients indicated that 47 percent were in treatment . . .")

63. See generally *id.* at 341–42 (describing four different studies from 1994 and 1995 that raised concerns about the identities, monitoring, and qualifications of representative payees for beneficiaries with substance use disorders).

64. See *id.* at 340.

65. *War on Drugs*, HIST. CHANNEL (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs>.

66. *Id.*

67. *Id.*

68. See *id.* Still, it is of note that, while largely a Republican-led effort, the War on Drugs garnered strong support from politicians on both sides of the political aisle. See Leslie Maitland, *U.S. Plans a New Drive on Narcotics*, N.Y. TIMES, Oct. 9, 1982, at 8 (detailing then-Senator Joe Biden's strong support for anti-drug policy during the Reagan administration).

69. For example, Senator Bill Cohen, a Republican from Maine, claimed in 1994 that "[h]undreds of millions of scarce Federal dollars are flowing directly to drug addicts, who are turning around and buying heroin, cocaine and other illegal drugs on the street the very same

The War on Drugs disparately—and intentionally—impacted Black and low-income communities in the United States by disproportionately punishing Black and low-income Americans who used drugs.⁷⁰ Black Americans were (and still are) more likely than white Americans to be arrested and charged with drug-related crimes, sentenced more harshly, incarcerated, and subjected to violations of their rights by law enforcement seeking to unfairly enforce strict drug laws.⁷¹ Decades after the War on Drugs first commenced, John Ehrlichman—a top adviser to President Nixon—admitted in an interview that much of the Nixon Administration’s anti-drug stance was steeped in racism against Black Americans.⁷² Ehrlichman’s now-infamous comment on the racist motives behind the War on Drugs marked “the first time the [W]ar on [D]rugs ha[d] been plainly characterized as a political assault designed to help Nixon win, and keep, the White House.”⁷³

This intentional punishment of and discrimination against poor and Black Americans was almost immediately evident in the aftermath of the CAAA’s passage.⁷⁴ Of the beneficiaries with substance use disorders whose SSI or

day.” *Addicts Found to Use Federal Cash for Drugs*, N.Y. TIMES, Feb. 7, 1994, at A15

70. See Dan Baum, *Legalize It All*, HARPER’S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/>.

71. See generally Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the ‘War on Drugs’ Was a ‘War on Blacks,’* 6 J. OF GENDER, RACE & JUST. 381 (2002) (discussing the several avenues through which War on Drugs policy has deliberately targeted and negatively impacted Black communities throughout the United States); see also Ezekiel Edwards, Emily Greytak, Brooke Madubonwu, Thania Sanchez, Sophie Beiers, Charlotte Resing, et al., *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, AM. CIV. LIBERTIES UNION 37 (2020), https://www.aclu.org/wp-content/uploads/legal-documents/marijuanareport_03232021.pdf (“In 2018 . . . Black people were still nearly 4 times more likely than white people to get arrested for marijuana possession, despite similar usage rates.”).

72. When questioned on the War on Drugs in a 1994 interview, John Ehrlichman, who served as one of President Nixon’s top advisers, revealed that:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and [B]lack people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or [B]lack, but by getting the public to associate the hippies with marijuana and [B]lacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

Baum, *supra* note 70.

73. Tom LoBianco, *Report: Aide Says Nixon’s War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016, 3:14 PM), <https://www.cnn.com/2016/03/23/politics/john-ehrichman-richard-nixon-drug-war-blacks-hippie/index.html>.

74. See WAID & BARBER, *supra* note 18, at 3.

SSDI benefits were revoked in January 1997, the majority—79%—received SSI, meaning they met the low-income threshold to qualify for SSI.⁷⁵ Many were men between the age of forty and forty-nine.⁷⁶ Additionally, a “disproportionately large share” of beneficiaries whose SSI or SSDI benefits were revoked were Black—about 40%.⁷⁷ The CAAA’s exclusion of people with substance use disorders from SSA’s definition of a qualifying disability for SSI and SSDI had an immediate and disparate impact on Black, low-income Americans—and it is possible that this was the intended effect.⁷⁸

Today, SSA’s denial of SSI and SSDI benefits for claimants with substance use disorders arguably impacts many more Americans than it did in 1996. As of 2021, about 46.3 million Americans aged twelve or older—nearly 17% of the United States’ population—have or have had a substance use disorder.⁷⁹ This means SSA is more than likely excluding a large number of Americans who previously would have qualified, and should presently qualify, as disabled and eligible for SSI and SSDI benefits.

C. *Current Clinical Definitions of Substance Use Disorder and Inclusion into SSA’s Definition of Disability*

The Centers for Disease Control and Prevention (CDC) defines substance use disorders as “treatable, chronic diseases characterized by a problematic pattern of use of a substance or substances leading to impairments in health, social function, and control over substance use.”⁸⁰ The American Psychiatry Association (APA) defines substance use disorder as “a complex condition in which there is uncontrolled use of a substance despite harmful consequences . . . to the point where the person’s ability to function in day-

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.* (providing that “Black[] [people] made up 28 percent of the entire blind/disabled SSI population in June 1996 . . . [and] [o]f [beneficiaries] who received SSI payments, 98 percent received no earned income and 66 percent received no unearned income.”).

79. 2021 NSDUH ANNUAL REPORT, *supra* note 23, at 31. Ten years earlier, in contrast, the 2011 NSDUH Annual Report showed that an estimated 20.6 million Americans aged twelve or older had a substance use disorder. *See* DEPT. OF HEALTH & HUM. SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2011 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 7 (2011).

80. *Substance Use Disorders (SUDs)*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/featured-topics/substance-use-disorders/index.html> (last visited Nov. 11, 2023).

to-day life becomes impaired.”⁸¹ The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), outlines eleven criteria for substance use disorder.⁸² These criteria are divided into four distinct subcategories: impaired control, social problems, risky use, and physical dependence.⁸³ The DSM-5 also proscribes that demonstrating “[t]wo or three symptoms indicate a mild substance use disorder; four or five symptoms indicate a moderate substance use disorder, and six or more symptoms indicate a severe substance use disorder.”⁸⁴ Finally, the DSM-5 recommends a chronic care model over several years for people with severe substance use disorders in order to safely effectuate treatment and recovery.⁸⁵

Recall that SSA’s definition of disability requires a beneficiary to be unable 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.”⁸⁶ According to the above clinical definitions of substance use disorder, people with severe substance use disorders are significantly impaired both mentally and physically to the point where it negatively impacts their daily lives.⁸⁷ Likewise, people with severe substance use disorders often require years of treatment to fully recover.⁸⁸

Current clinical definitions of severe substance use disorder fit neatly into SSA’s definition of a qualifying disability. A severe substance use disorder impairs both a person’s ability to engage in substantial gainful activity and can be expected to last for a continuous period of not less than twelve months.⁸⁹ Therefore, SSA’s definition of disability should be updated to include substance use disorder in conformity with the DSM-5’s current definition of and standards relating to substance use disorder.

81. *What Is a Substance Use Disorder?*, AM. PSYCHIATRY ASS’N (Dec. 2020), <https://www.psychiatry.org/patients-families/addiction-substance-use-disorders/what-is-a-substance-use-disorder>.

82. *DSM-5 Criteria for Addiction Simplified*, ADDICTION POL’Y F., <https://www.addictionpolicy.org/post/dsm-5-facts-and-figures> (Oct. 19, 2022).

83. *See id.*

84. *See id.*

85. *See id.*

86. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(J).

87. *See* 2021 NSDUH ANNUAL REPORT, *supra* note 23, at 29–31.

88. *See* *DSM-5 Criteria for Addiction Simplified*, *supra* note 82.

89. *See* WAID & BARBER, *supra* note 18; *Substance Use Disorder (SUD)*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/16652-drug-addiction-substance-use-disorder-sud> (last visited Nov. 11, 2023) (“According to the American Psychiatric Association’s [DSM-5], a person must have at least two signs in the symptoms section over 12 months to be diagnosed with substance use disorder.”).

II. SSA'S EVALUATION PROCESS FOR CLAIMANTS WITH SUBSTANCE USE DISORDERS

A. SSA's Sequential "Differentiating Out" of Disabilities to Determine Eligibility

SSA does not outright deny every SSI or SSDI claimant who has a substance use disorder.⁹⁰ If SSA finds that a claimant for SSI or SSDI benefits is disabled and has medical evidence of their substance use disorder, SSA "must determine whether [the claimant's] drug addiction or alcoholism is a contributing factor material to the determination of disability."⁹¹ The key factor in determining whether a claimant's substance use disorder is material is whether SSA would still find the claimant disabled if they ceased their drug or alcohol use.⁹² SSA has outlined a six-step process it uses to determine whether a person applying for SSI or SSDI benefits has a substance use disorder that is a material contributing factor to their disability.⁹³

First, SSA considers whether the claimant has a substance use disorder.⁹⁴ To determine whether the claimant has a substance use disorder, SSA considers all medical evidence it either receives, or obtains, regarding the claimant.⁹⁵ This evidence may include objective medical evidence, medical opinions, evidence from non-medical sources, and other administrative findings related to the claimant's disability status.⁹⁶ If SSA determines the claimant has a substance use disorder, then SSA proceeds to the second step: determining whether the claimant is disabled considering all impairments, including the claimant's substance use disorder.⁹⁷ If SSA finds that the person is not disabled considering all of their documented impairments, then the claimant is denied SSI or SSDI benefits at this step.⁹⁸

90. See generally 20 C.F.R. § 404.1535(b) (2022) (describing SSA's determination process for SSI and SSDI claimants who have a documented substance use disorder).

91. *Id.* § 404.1535(a).

92. *Id.* § 404.1535(b)(1). SSA's standard for materiality has been described to "function[] as a but-for test[;]" in other words, "if the applicant's disability would not exist *but for* continuing substance abuse, e.g., inability to concentrate or persist in tasks, then Social Security will deny the claim." Dru Stevenson, *Should Addicts Get Welfare? Addiction & SSI/SSDI*, 68 BROOK. L. REV. 185, 193 (2002).

93. SSR 13-2p.; Titles II and XVI: Evaluating Cases Involving Drug Addiction and Alcoholism (DAA), 78 Fed. Reg. 11,939, 11,941-43 (Feb. 20, 2013).

94. SSR 13-2p., 78 Fed. Reg. at 11,941.

95. See 20 C.F.R. § 404.1513(a).

96. See *id.* (defining the different types of evidence SSA considers to determine whether a claimant is disabled).

97. SSR 13-2p., 78 Fed. Reg. at 11,941.

98. SSR 13-2p., 78 Fed. Reg. at 11,941-42.

However, if SSA finds that the claimant is disabled considering all impairments (including their substance use disorder), SSA then proceeds to the third step: determining whether substance use disorder is the claimant's only impairment by applying its sequential evaluation process.⁹⁹ If SSA determines substance use disorder is the claimant's only impairment, the claimant is denied SSI or SSDI benefits at this step, since substance use disorder alone does not render a person eligible for SSI or SSDI.¹⁰⁰

If a substance use disorder is not the claimant's only impairment, SSA proceeds to the fourth step: determining whether the claimant's other impairments are independently disabling while the claimant is dependent on drugs or alcohol.¹⁰¹ In other words, the claimant's other impairments must be sufficiently severe on their own to establish that the claimant would have a qualifying disability even if they did not have substance use disorder.¹⁰² However, if SSA finds that a claimant's other impairments are not independently disabling, then SSA determines at this step that the claimant's substance use disorder is material, and thus, the claimant is denied SSI or SSDI benefits.¹⁰³

If the claimant's other impairments are independently disabling, SSA moves onto the fifth step: considering whether the claimant's substance use disorder causes or affects the claimant's other impairments.¹⁰⁴ SSA outlines three basic scenarios where a claimant's other impairments are not caused or affected by substance use disorder: (1) the other impairment exists independent of substance use disorder;¹⁰⁵ (2) the claimant developed a separate disabling impairment while using substance(s);¹⁰⁶ or (3) the claimant's substance use disorder "*caused the other disabling impairment(s), but the other impairment is irreversible or could not improve to the point of nondisability in the absence of [a substance use disorder].*"¹⁰⁷ If none of the above scenarios apply to the claimant, SSA will determine that the claimant's substance use

99. *Id.*

100. *Id.*

101. *Id.*

102. *See id.*

103. *Id.*

104. *Id.*

105. SSR 13-2p., 78 Fed. Reg. at 11,942 (“[F]or example, a degenerative neurological disease, a hereditary kidney disease that requires chronic dialysis, or intellectual disability . . . since birth.”).

106. *Id.* In this scenario, “the claimant acquired the impairment because of an activity related to substance use, but the *Substance Use Disorder* did not medically cause or exacerbate the impairment.” *Id.* (emphasis in original).

107. SSR 13-2p., 78 Fed. Reg. at 11,942 (emphasis in original).

disorder is material and deny the claimant benefits at this step.¹⁰⁸

However, if any of the above scenarios apply, SSA moves on to the sixth and final step, which requires determining whether the claimant's other impairments would improve to the point of nondisability in the absence of their substance abuse disorder.¹⁰⁹ If it would not, then SSA determines the claimant's substance use disorder is not material, and the claimant qualifies under its definition of disability for SSI or SSDI benefits.¹¹⁰

Courts have embraced a similar multi-step analysis.¹¹¹ In *Hardwick v. Astrue*,¹¹² the District Court for the Eastern District of Washington upheld an Administrative Law Judge's determination that a person with alcohol use disorder who applied for SSDI benefits would be able to perform substantial gainful activity without the effects of alcohol dependency or abuse, and therefore, was not eligible for SSDI benefits.¹¹³ Further, courts have held that if an SSI or SSDI claimant is found to be disabled even considering their substance use disorder, the claimant bears the burden to prove their substance use disorder is not a contributing factor material to their disability.¹¹⁴ SSA's six-step analysis, combined with the claimant's burden of proof, essentially requires SSA to differentiate between the claimant's two or more disabilities—their substance use disorder and their other qualifying impairment(s)—and choose a disability as the claimant's primary disabling condition.¹¹⁵ If substance use disorder as defined by the DSM-5 fits into SSA's definition of disability, concerns arise regarding whether SSA is permissibly differentiating between two or more disabilities in determining whether certain beneficiaries and claimants are eligible for SSI or SSDI.¹¹⁶

108. *Id.*

109. SSR 13-2p., 78 Fed. Reg. at 11,941–42.

110. *Id.*

111. *See Hardwick v. Astrue*, 782 F. Supp. 2d 1170, 1180–81 (E.D. Wash. 2011).

112. 782 F. Supp. 2d 1170 (E.D. Wash. 2011).

113. *See id.* at 1180–81 (finding that although claimant successfully established that he had both a severe mental disability and substance use disorder, he was ineligible for benefits because he “failed to meet his burden [at the second step of the evaluation process] to show his mental impairments are not caused by the severe [substance use disorder] reflected throughout the medical record”).

114. *See Cage v. Comm’r of Soc. Sec.*, 692 F.3d 118, 122–23 (2d Cir. 2012); *Parra v. Astrue*, 418 F.3d 742, 748 (9th Cir. 2007); *Zarlengo v. Barnhart*, 96 Fed. Appx. 987, 989 (6th Cir. 2004).

115. *See Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001).

116. *See infra* Part II.B. (discussing the holdings in *Moore v. Texas*, 581 U.S. 1, 5–6 (2017), and its implications on disability determinations by courts).

B. Differentiation of Disabilities After Moore v. Texas

The Supreme Court is silent on the specific issue of whether SSA may permissibly differentiate between two or more disabilities, and then distinguish a primary disability to determine whether a claimant for SSI or SSDI is eligible for benefits.¹¹⁷ However, the Supreme Court has ruled on the issues of how disabilities should be adjudicated, the standards that are appropriate for courts to utilize in such adjudications, and the appropriateness of differentiating between a person's disabilities in such adjudications.¹¹⁸ In *Moore v. Texas*,¹¹⁹ the Supreme Court ruled that the Texas Court of Criminal Appeals improperly rejected the finding that the petitioner was disabled despite evidence that the petitioner had an intellectual disability according to current medical diagnostic standards.¹²⁰ The Court reasoned that the state appellate court's application of judicially created, non-clinical standards for intellectual disability that are based on lay stereotypes was inappropriate when it assessed the petitioner's intellectual disability.¹²¹ Additionally, the Court explained that in determining whether a person has an intellectual disability, courts must consider what the medical community has set as its current clinical standards, not how other state courts have previously defined intellectual disability.¹²²

Further, the Court ruled that the state appellate court erred in requiring the petitioner to show that his adaptive deficits were not related to a second

117. See Michael Ashley Stein, Anita Silvers, Bradley A. Arehart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. R. 689, 720–21 n.183 (2014) (discussing the lack of binding Supreme Court precedent addressing inconsistency in the Americans with Disabilities Act Amendments Act where plaintiffs no longer must show that they are “substantially limited in a major life activity” which is apposite to Congress’s intent); Katherine L. Moore, *Pain Is Enough: Chronic Pain as Disability*, 69 BUFF. L. R. 1471, 1505–06 (2021) (discussing *Cleveland v. Pol’y Mgmt. Sys. Corp.*, 526 U.S. 795, 797 (1999), where the Supreme Court held that a disability could make an individual “totally disabled” under SSDI but still able to “perform essential functions” of their job with appropriate accommodations, but remained silent on the topic of multiple disabilities).

118. See *Hall v. Florida*, 572 U.S. 701, 723 (2014) (holding a state statute characterizing intellectual disability by a strict IQ number was unconstitutional because the statute contradicted clinical guidance defining intellectual disability); see also *Moore v. Texas*, 581 U.S. 1, 5–6 (2017) (overturning a state appellate court’s decision that petitioner was not disabled because it inappropriately considered other state courts’ definitions of disability instead of current clinical standards).

119. 581 U.S. 1 (2017).

120. See *id.* at 13–15.

121. See *id.*

122. See *id.* at 5–6 (stating that courts must heed “the force of the medical community’s consensus” when determining whether a person is intellectually disabled).

disability—specifically, a personality disorder.¹²³ The Court reasoned that it was inappropriate to require the petitioner to differentiate between his personality disorder and intellectual disability because “[t]he existence of a personality disorder or mental-health issue . . . is ‘not evidence that a person does not also have [an] intellectual disability.’”¹²⁴ In essence, the Supreme Court held that the existence of one disability does not negate the existence of another in a given individual, and it is inappropriate to make such a determination.¹²⁵ Although this decision in *Moore v. Texas* arose from a criminal case in which an intellectually disabled person was facing capital punishment,¹²⁶ this holding reaches farther than the sphere of criminal law, as it provides a guideline that courts should adopt in determining whether a party in a case—criminal or civil—is disabled.¹²⁷

Fortunately, lower courts have begun to defer to current clinical standards and the opinions of medical experts rather than judicially created, non-clinical standards for intellectual disability in the wake of *Moore v. Texas*, although this has primarily occurred in criminal cases.¹²⁸ For example, in *Ex parte Lane*,¹²⁹ a trial court convicted an intellectually and developmentally disabled criminal defendant, Lane, of capital murder.¹³⁰ After consulting

123. *See id.* at 16–17.

124. *Id.* at 17.

125. *See id.*

126. *See id.* at 5.

127. Alexander Updegrave, *The Development of Intellectual Disabilities in United States Capital Cases and the Modern Application of Moore v. Texas to State Court Decisions*, 16 U. MASS. L. REV. 2, 31 (2021) (providing that thirteen states cite *Moore v. Texas* to demonstrate that they are required to consider current medical diagnostic criteria when evaluating whether a criminal defendant sentenced to capital punishment is intellectually disabled). This Comment argues that courts should also extend their application of *Moore* to evaluations of persons involved in all types of cases.

128. *See, e.g., In re Cathey*, 857 F.3d 221, 238–39 (5th Cir. 2017) (finding petitioner was intellectually disabled after considering current medical standards and tests); *Jackson v. Kelley*, 898 F.3d 859, 865 (8th Cir. 2018) (emphasizing that “the existence of additional personality disorders or mental-health issues is not evidence weighing against an intellectual disability determination”); *Ex parte Lane*, 286 So. 3d 61, 63, 67–68 (Ala. 2018) (reversing trial court’s determination that defendant was not disabled because trial court failed to consider extensive medical evidence showing defendant was intellectually and developmentally disabled); *Woodall v. Commonwealth*, 563 S.W.3d 1, 6 (Ky. 2018) (holding a state statute that provided a test for ascertaining intellectual disability was unconstitutional under the Eighth Amendment because it “lack[ed] the additional consideration of prevailing medical standards . . . [and] potentially and unconstitutionally expose[d] intellectually disabled defendants to execution.”).

129. 286 So. 3d 61 (Ala. 2018).

130. *Id.* at 62.

with several of Lane's family members and reviewing his medical records, diagnoses, and history, Lane's clinical psychologist concluded that Lane exhibited the requisite deficits to be classified as intellectually disabled.¹³¹ Despite extensive medical evidence supporting a finding of intellectual disability, the trial court rejected the clinical psychologist's determination that Lane had an intellectual disability and sentenced him to death.¹³² The Supreme Court of Alabama, however, reversed the trial court's determination that Lane had an intellectual disability and held that the trial court erred in sentencing Lane to capital punishment because it did not defer to current clinical standards or the opinion of a medical expert.¹³³

Since substance use disorder is a disability, as Part I of this Comment argues, it would be inappropriate under *Moore v. Texas* for SSA to differentiate between a beneficiary's disabilities just because one of the beneficiary's disabilities is a substance use disorder.¹³⁴ To do so would, in effect, negate the existence of a beneficiary's first disability because they also have a second disability that happens to be a substance use disorder. The existence of a substance use disorder, in many cases, does not negate the existence of another disability; in fact, it is common for substance use disorder to coincide with another disability.¹³⁵ Unfortunately, SSA's policy and practice of distinguishing substance use disorder from other disabilities in its eligibility evaluation process has the effect of negating many people's genuinely disabling substance use disorders and, in turn, disqualifying claimants who should be eligible under SSA's own definition of disability from receiving SSI or SSDI benefits.¹³⁶ If SSA defines "disabled" to mean a person having a condition that keeps them from contributing to the national economy and maintaining financial independence, then SSA's eligibility criteria and evaluation process for SSI and SSDI should reflect that.

III. RECOMMENDATIONS

SSA's definition of disability, in the context of qualifying for disability benefits, should be expanded to once again include substance use disorders. Congress's enactment of restrictions on beneficiaries with substance use

131. *Id.* at 66–67.

132. *Id.* at 63.

133. *Id.* at 65–67.

134. *See supra* Part I(C).

135. *What Is a Substance Use Disorder?*, *supra* note 81 (“Many people experience substance use disorder along with another psychiatric disorder. Oftentimes another psychiatric disorder precedes substance use disorder, or the use of a substance may trigger or worsen another psychiatric disorder.”).

136. 42 U.S.C. §§ 423 (d)(2)(C), 1382c(a)(3)(J) (stating SSA's definition of disability).

disorders may have been the correct response to an increase in drug and alcohol abuse among Americans, but almost thirty years later, it is time to reevaluate whether this is still the correct approach. Current medical diagnostic standards—namely, the DSM-5—are more expansive and explicitly describe substance use disorder as a disability, whereas they did not when the CAAA was enacted.¹³⁷ The clinical standards for substance use disorder at the time the CAAA was enacted are found in the DSM-IV, which was published in 1994 and, until the DSM-5 was published in 2013, described substance use disorders as within an abuse-and-dependence paradigm, which had “significant limitations.”¹³⁸ As a result, SSA’s definition of disability can and should change to include substance use disorders through one of two processes. The SSA Commissioner should use their regulatory authority, as provided in the Social Security Act,¹³⁹ to promulgate an amendment to the federal regulations governing how disability determinations are made for SSI and SSDI claimants. Alternatively, Congress should act to strike the 1996 amendments to the Social Security Act that excluded substance use disorders as a qualifying disability.¹⁴⁰

Once SSA’s definition of disability is adapted to re-recognize substance use disorders as a disability, SSA must adapt its evaluation process to do the same since differentiation between a beneficiary’s multiple disabilities would be inappropriate under *Moore v. Texas*.¹⁴¹ In addition to the current six-step approach, which requires SSA to determine whether a beneficiary would be disabled without the comorbid or co-occurring substance use disorder,¹⁴² SSA should require beneficiaries to include the medical opinions of their treating doctor or another qualified medical professional so that SSA can make a determination based on the medical expertise and opinions of each claimant’s individual medical providers. This may prove difficult, however, since many Americans with disabilities face financial and programmatic barriers to accessing healthcare.¹⁴³ Still, despite this potential hurdle, it is

137. Sean M. Robinson & Bryon Adinoff, *The Classification of Substance Use Disorders: Historical, Contextual, and Conceptual Considerations*, 6 BEHAV. SCI. 12–13 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5039518/pdf/behavsci-06-00018.pdf>.

138. *Id.*

139. *See* 42 U.S.C. § 421(a)(2) (2018).

140. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 105, 110 Stat. 847, 852–54.

141. 581 U.S. 1, 17 (2017).

142. SSR 13-2p.; Titles II and XVI: Evaluating Cases Involving Drug Addiction and Alcoholism (DAA), 78 Fed. Reg. 11,939, 11,939–40 (Feb. 19, 2013).

143. *See Common Barriers to Participation Experienced by People with Disabilities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 16, 2020), <https://www.cdc.gov/ncbddd/disabilityandhealth/disability-barriers.html> (discussing attitudinal, communication, physical,

important for SSA to attempt to align its policies with Supreme Court jurisprudence on disability determinations. Further, although *Moore v. Texas* makes recommendations for how the courts should treat disability determinations, SSA should consider adopting the standards set forth in *Moore* in its own disability determination process since SSA's SSI and SSDI framework almost entirely impacts disabled beneficiaries and claimants.¹⁴⁴

CONCLUSION

Since the inception of SSA's disability benefits framework, SSI and SSDI benefits have acted as a safety net for Americans with disabilities facing financial hardship across the United States.¹⁴⁵ Whether a claimant for SSI or SSDI has a substance use disorder should not be the determining factor in SSA's decision to deny them potentially lifesaving financial assistance.¹⁴⁶ SSA recognized the needs of people with substance use disorders once, and although it may not be able to correct the damage done by Congress's 1996 decision to revoke SSI and SSDI eligibility for people with substance use disorders, SSA does have the power to adjust its current evaluation process to include more people with disabling addictions in its benefits framework.¹⁴⁷

Therefore, SSA should issue a regulation amending its definition of a qualifying disability to include substance use disorders and amend its disability determination process to recognize that the existence of one disabling condition does not negate the existence of another.¹⁴⁸ In the alternative, Congress should act to amend the Social Security Act and re-recognize substance use disorder as a qualifying disability. As the United States continues to confront the consequences of the War on Drugs, and millions of Americans with disabilities continue to grapple with financial hardship at twice the rate of their nondisabled peers,¹⁴⁹ it is now more

policy, programmatic, social, and transportation barriers that people with disabilities face).

144. See *Moore*, 581 U.S. at 5.

145. See Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1465.

146. Cf. SOC. SEC. ADMIN., WHEN A REPRESENTATIVE PAYEE MANAGES YOUR MONEY 2 (2021) (explaining that disability benefits must be used to pay for the beneficiary's needs, such as housing, food, medical and dental expenses, personal care items, clothing, and rehabilitation services).

147. See 42 U.S.C. § 405(a) (granting the SSA Commissioner the "full power and authority to make rules and regulations" necessary to make decisions regarding the rights of individuals applying for a payment).

148. See *Moore*, 581 U.S. at 17.

149. See Rebecca Vallas, *7 Facts About the Economic Crisis Facing People with Disabilities in the United States*, THE CENTURY FOUND. (Apr. 21, 2022), <https://tcf.org/content/commentary/7-facts-about-the-economic-crisis-facing-people-with-disabilities-in-the-united-states/> ("In 2019,

imperative than ever for SSA to reevaluate its historic treatment of individuals with substance use disorder, reconsider its definition of qualifying disability in a modern social context, and consider bringing them back into the pool of eligible beneficiaries.

21.6 percent of disabled people were considered poor under the Census's Supplemental Poverty Measure, compared with just over 10 percent of people without disabilities.").