North Carolina Central Law Review

Volume 14
Number 2 *Volume 14, Number 2*

Article 12

4-1-1984

An Evaluation of Self-Employed Disability Claimants: Penalized or Rewarded for Entrepreneurship

Rhonda L. Brauer

An Evaluation of Self-Employed Disability Claimants: Penalized or Rewarded For Entrepreneurship?

I. INTRODUCTION

The Industrial Revolution changed the American work force by creating large-scale industrial environments. Related changes included a steady decrease in the percentage of self-employed workers and an increased role for the government in the national economy. The Social Security Act and disability insurance (DI) eventually emerged to aid workers who had contributed their labor to the nation's work force, but who could no longer contribute because of disability, old age, or death.[1] This article will examine the types of risks which the disability program was designed to cover[2] and will consider how self-employed workers have been treated under the program.[3] It will then argue that the Social Security Administration (SSA) and the courts, although seemingly harsher on self-employed workers than on wage and salaried ones, are actually recognizing the ability of each group of claimants to cope with the types of risks each may encounter.

II. PROCEDURAL ASPECTS OF THE DISABILITY INSURANCE PROGRAM

Disability determinations have a detailed review process.[4] A claimant begins by applying at a district SSA office. If he has worked enough hours to be eligible for Social Security benefits, he is referred to a state agency which makes an "initial determination" based on federal guidelines.[5] The agency may be a vocational rehabilitation service, which employs both doctors and vocational specialists.[6] The SSA may

1. As discussed *infra* text accompanying notes 22-26, disability insurance was not included in the Social Security System until 1956.

2. *See infra* text accompanying notes 22-52.

3. *See infra* text accompanying notes 53-95.

4. Note that the SSA also administers the Supplemental Security Income (SSI) program. Established in 1972, SSI provides benefits to the aged, blind, and disabled "who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level." 20 C.F.R. § 416.110 (1983). SSI has the same disability definition as that of the DI program. *Id.* § 416.905(a) (1983). For an excellent discussion of SSI and its relationship to the Old Age Survivors Disability and Health Insurance Program, see P. GRIMALDI, SUPPLEMENTAL SECURITY INCOME (1980).

5. 42 U.S.C. § 414 (1976 & Supp. V 1981); 20 C.F.R. §§ 404.902-.1503(a) (1983). *See also id.* §§ 404.1505-.1575.

6. Popkin, *Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989, 999 (1977).

make the initial determination if a state declines to do so or if the Secretary of Health and Human Services (HHS) decides that a state has "substantially failed" to make the determination according to the federal guidelines.[7] The SSA may also reverse a state agency's finding that a claimant is or is not disabled.[8]

A disappointed claimant may begin the informal and non-adversary administrative review process; new evidence may be added at every stage.[9] Approximately thirty percent of the unsuccessful claimants proceed to the first stage and seek a reconsideration by state agencies.[10] Claimants may next appeal for a hearing with an administrative law judge (ALJ) in the Bureau of Hearings and Appeals.[11] The last administrative stage is the Appeals Council Review in Washington, D.C.[12] Claimants may seek review themselves or the Appeals Council may initiate a review on its own. The Appeals Council may decide the claim itself or remand the claim to the ALJ.[13]

After the Appeals Council review, the SSA's decision is final and review must be taken to a federal district court.[14] Judicial review is limited to the substantial evidence test and federal judges are not supposed to substitute their judgment for that of the Secretary.[15] In 1980 district courts affirmed eleven percent of the claims and remanded forty-one percent to the Appeals Council; forty-eight percent were denied.[16] Claimants may also obtain judicial review through an Expedited Appeals Process at any time after the initial determination and before the SSA's final decision.[17] Expedited appeals, however, are lim-

7. 20 C.F.R. § 404.1503(a) (1983).

8. *Id.* § 404.1503(d).

9. *Id.* § 404.900(b). *See also* J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS at xvi (1978) [hereinafter cited as J. MASHAW].

10. 20 C.F.R. §§ 404.907-.921 (1983); Popkin, *supra* note 6, at 999. This stage in the appeals process was not mandatory until 1959. Note that the Bureau of Disability Insurance selects 10% for quality control review. *Id.* In 1980 15% of the reconsiderations were successful. STAFF OF THE SUBCOMM. ON SOCIAL SECURITY OF THE HOUSE COMM. ON WAYS AND MEANS, 97TH CONG., 1ST SESS., REPORT ON STATUS OF THE DISABILITY INSURANCE PROGRAM 31 (Comm. Print 1981) [hereinafter cited as 1981 REPORT ON STATUS OF THE D.I. PROGRAM].

11. 20 C.F.R. §§ 404.929-.961 (1983). In 1980 65% of the reconsideration losses were appealed; 58% of the claimants receiving hearings were successful. 1981 REPORT ON STATUS OF THE D.I. PROGRAM, *supra* note 10, at 31.

12. 20 C.F.R. §§ 404.967-.983 (1983). In 1980 five percent were allowed; eight percent were remanded to the ALJ. Of the 85% denied, 20% of the claims were appealed to U.S. district courts. 1981 REPORT ON STATUS OF THE D.I. PROGRAM, *supra* note 10, at 31.

13. 20 C.F.R. §§ 404.976-.977 (1983). All of the decision makers at this stage are lawyers. Popkin, *supra* note 6, at 1001.

14. 42 U.S.C. § 405(g) (1976 & Supp. V 1981).

15. 20 C.F.R. §§ 404.981-.983 (1983). This is the same test which the Appeals Council applies. J. MASHAW, *supra* note 9, at 125.

16. 1981 REPORT ON STATUS OF THE D.I. PROGRAM, *supra* note 10, at 31.

17. 20 C.F.R. §§ 404.923-.928 (1983).

ited to constitutional challenges; they are not for review of findings of fact or conclusions of law.[18]

Upon claimant request, the SSA may also reopen or revise its determinations or decisions.[19] Within twelve months of the initial determination, a claim may be reopened for any reason. Within four years, it may be reopened for "good cause"; this includes discovery of "new and material" evidence or clerical errors in computing benefits.[20] A claim may be reopened at any time for fraud.[21]

III. TYPES OF RISKS WHICH DISABILITY INSURANCE COVERS

Historically, the DI program was included in the 1956 amendments of the Social Security Act.[22] The Social Security Act was passed in 1935 as part of Franklin Roosevelt's response to high unemployment and to the inability of various elements in society to support themselves.[23] Although the 1935 Act did not include disability insurance, executive committees and Congress continued to study the issue.[24]

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18. *Id.* § 404.900(a)(6).
19. *Id.* §§ 404.987-.995.
20. *Id.* §§ 404.988-.989.
21. *Id.* § 404.988(c)(1).
22. Social Security Amendments of 1956, PUB. L. NO. 84-880, §§ 223-225, 70 Stat. 807, 815-17 (codified at 42 U.S.C. § 416).
23. In addition to unemployment compensation, the Social Security Act provided old age benefits for workers in industry and commerce, health care services for pregnant women and young children, and public assistance for the blind and children under 16 who were without other means of support. M. DERTHICK, POLICYMAKING FOR SOCIAL SECURITY 11 (1979). The benefits were initially financed by a one percent payroll tax on employees and employers who had a minimum base wage of at least $3000. *Id.* at 429. Revenues were deposited in a trust fund, from which payments began on January 1, 1937. *Id.* To administer the programs, a three-member Social Security Board (SSB) was established. In 1946 the SSB was abolished and the Social Security Administration (SSA) took over its function. *Id.* at 433. Arthur J. Altmeyer, who had been chairman of the SSB since 1937, became the first commissioner of the SSA, a position he held until 1953. *Id.* at 433-34. When the SSA came under the supervision of the Department of Health, Education, and Welfare (HEW) in 1953, the commissioner was henceforth appointed by the President with the advice and consent of the Senate. *Id.* at 433. A further reorganization in 1963 created the Welfare Administration which took over the public assistance programs and left the SSA responsible for only the insurance program. *Id.* at 18 n.1, 433. As the insurance program expanded, additional subunits were added to the SSA. As of 1972, the SSA included the following: Office of the Commissioner, Office of the Actuary, Office of Administration, Office of Public Affairs, Office of Program Evaluation and Planning, Office of Research and Statistics, Bureau of Disability Insurance, Bureau of District Office Operations, Bureau of Data Processing, Bureau of Hearings and Appeals, Bureau of Health Insurance, Bureau of Retirement and Survivors Insurance, and Office of the General Council. *Id.* at 18 n.1.
24. The Committee on Economic Security, the cabinet-level group that planned the President's social welfare proposals in 1934, recommended that such a program receive additional study. M. DERTHICK, *supra* note 23, at 296. A trickle of congressional support began in 1939, but a disability program did not receive serious attention until the early 1950s. In response to congressional conservatives who felt that states should have sole responsibility for handling "total disability" cases, Congress went only as far as providing assistance grants to states in 1950. *Id.* at 299-300. Note that the assistance grants were based on state determinations of individual need. Social Security Amendments of 1950, Pub. L. No. 81-734, § 351, 64 Stat. 477, 555.

Congress enacted "disability freezes" in 1952 and 1954 to protect disabled workers from losing their eligibility for Old Age and Survivors Insurance benefits during periods of disability.[25] DI finally became law in 1956; it was financed by a .025% increase in the payroll tax and maintained through control of a separate trust fund.[26]

To evaluate the current administration of DI, it is first necessary to understand the types of risks which the program was designed to cover at both the societal and the individual levels.

A. *Societal Level*

Industrialized societies often decide to provide disability insurance when industrial workers become an increasingly important factor in the production of national wealth.[27] In the United States between 1911 and 1920, most states adopted worker's compensation laws—somewhat foreshadowing the federal disability program.[28] Industrial accidents had become "inevitable hazards of modern industry"; hence, employers gradually assumed their employees' expenses as a "legitimate cost of production."[29] At the same time, the federal government began providing benefits and rehabilitation programs for veterans who, after serving to defend their country, had become disabled.[30] The position of industrial workers was analogous to the veterans' position; the workers braved technically-complicated and often dangerous environments to help build up and maintain the nation's economic strength. To insure continuing economic growth, it was reasonable for society to absorb the costs of industrial accidents and eventually to provide disability insurance for its work force.[31]

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25. Due to a congressional battle involving lobbyists from the American Medical Association (AMA), the insurance industry, and the Chamber of Commerce, the initial disability freeze was severely limited in application; it expired on June 30, 1953, and applications from disabled workers were not received until July 1, 1953. M. DERTHICK, *supra* note 23, at 300-02. The AMA feared that the freeze would involve direct involvement with the federal government and eventually lead to socialized medicine; the debate on health insurance had already made socialized medicine an issue at the time. *Id.* at 301-02. A less stringent freeze was passed in 1954. Social Security Amendments of 1954, Pub. L. No. 83-761, § 106, 68 Stat. 1052, 1079 (codified at 42 U.S.C. §§ 413-417).

26. M. DERTHICK, *supra* note 23, at 308, 431. It is interesting to note that although the Eisenhower administration had supported the disability freeze because of its emphasis on rehabilitation, it initially opposed outright cash benefits. *Id.* at 304.

27. C. SAFILIOS-ROTHSCHILD, THE SOCIOLOGY AND SOCIAL PSYCHOLOGY OF DISABILITY AND REHABILITATION 15 (1970).

28. *Id.* at 19.

29. *Id.* at 20.

30. *Id.* at 19-20.

31. There were nevertheless elements in society, such as the AMA and the insurance industry, which were initially very hostile to DI. *See supra* note 25. Faced with limited lobbying resources and more pressing issues such as national health insurance, these groups subsequently had less incentive to lobby against the incremental changes in the DI program. Physicians, who already had established working relationships with state agencies, gradually realized that they could

Providing for the disabled was also necessary because of the social changes which accompanied the Industrial Revolution. In the pre-industrial agricultural society, extended families could take care of the sick and disabled. A more urbanized society with nuclear families, however, could not provide all the traditional services. Consequently, social institutions had to assume many of the extended family's functions.[32]

Finally, an industrialized society may be less tolerant of disabilities than its pre-industrial ancestors. High production levels and efficiency are continually stressed today. Both physical and mental behavioral deviations could disrupt the otherwise smooth functioning of the production line.[33] Due to this intolerance for disabling characteristics, one commentator has suggested that "disability" more accurately represents the low value an individual's labor merits in the market, given alternatives such as machines and healthy workers.[34] Disability is now "as much a function of social choices as it is a result of illness or injury."[35]

B. *Individual Level*

Although the scope of the DI program was initially restricted,[36] subsequent amendments expanded the program to protect additional individuals against the risk of disability.[37] Currently, disability is defined

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live with the DI system without feeling "socialized or regimented." M. DERTHICK, *supra* note 23, at 311-14.

32. C. SAFILIOS-ROTHSCHILD, *supra* note 27, at 21.

33. *Id.* at 127.

34. Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833, 852 (1976).

35. *Id.*

36. Disability was defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration." Social Security Amendments of 1956, Pub. L. No. 84-880, § 223(c)(2), 70 Stat. 807, 815 (codified at 42 U.S.C. § 416). Thus temporary or short-term disability was not covered, even if the disability was total. The benefits were also limited to claimants aged 50 and older, with no benefits going to their dependents. The benefits would be further reduced by the amount received from other sources, such as workmen's compensation. Claimants must have worked six out of the last 13 employment quarters, so as to demonstrate their attachment to the work force. Lastly, there was a six month waiting period before benefits would be dispersed. M. DERTHICK, *supra* note 23, at 308.

37. As the originally hostile groups lost interest in DI, new pressure groups began influencing Congress. Even though they remained unorganized, beneficiaries and potential claimants complained to their Congressmen about delays, restrictions, and denials in their program. M. DERTHICK, *supra* note 23, at 311-14. In 1958 dependent benefits were added, the prior work requirement was modified, and the offset for income from other programs was dropped (although partially restored in later years). Social Security Amendments of 1958, Pub. L. No. 85-840, §§ 201-205, 72 Stat. 1013, 1020-25 (codified at 42 U.S.C. §§ 401-423). The age requirement was eliminated in 1960. Social Security Amendments of 1960, Pub. L. No. 86-778, § 401, 74 Stat. 924, 967 (codified at 42 U.S.C. § 423). Temporary disability was added in 1967. Although the definition always included disability which could be expected to result in death, the duration was

as:

> the inability to do any substantial gainful activity by reason of any medically determinable 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 twelve months. . . . To determine whether you are able to do any work, we consider your residual functional capacity and your age, education, and work experience.[38]

This definition includes three elements relating to the types of disability covered by the DI program.

First, individual claimants must have participated in the nation's work force.[39] This prior work requirement not only demonstrates a claimant's willingness to work; it also assures the claimant, if he achieves a certain level of income, that the government will insure him against losing that level because of disability.[40] In a limited way, the DI program protects one's achieved social status.

Second, the DI program provides benefits to only claimants who lose their employment because of a "medically determinable" disability.[41] Originally, the DI program covered only claimants who were at least 50 years old because they were less likely to be rehabilitated.[42] The program now protects workers of all ages against the risk of losing their employment because of the onset of a disability. Consequently, the medical factor currently serves to distinguish between disability and either unwillingness to work for non-medical reasons or unemployment due to voluntary causes, such as laziness, early aging, or drinking.[43]

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changed from "long-continued and indefinite duration" to "can be expected to last for a continued period of twelve months." Social Security Amendments of 1967, Pub. L. No. 90-248, § 158(b), 81 Stat. 821, 868. In 1972 the waiting period was reduced from six to five months. M. DERTHICK, *supra* note 23, at 309.

One should note that the 1967 amendments called for a more precise definition of disability and are generally considered more restrictive. *See infra* text accompanying notes 107-08; S. REP. No. 2, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2880-83.

38. 20 C.F.R. § 404.1505(a) (1983). Note that individual workers contribute to the DI trust fund through a payroll tax, with the understanding that they will receive DI benefits if they become "disabled" under the law.

39. *Id.* §§ 404.110-.146 (discussing how a claimant obtains insured status). One should note that the Supplemental Security Income (SSI) program does not have a prior work requirement. *See* 20 *Id.* § 416.202.

40. Liebman, *supra* note 34, at 842.

41. Note that Appendix 2 to Subpart P of Regulation No. 4 and Subpart I of Regulation No. 16 list impairments which are considered so severe that claimants with such impairments will automatically be considered disabled for DI and SSI benefits, unless the record includes evidence to the contrary. *See* 20 C.F.R. §§ 404.1517, 416.917 (1983).

42. M. DERTHICK, *supra* note 23, at 341.

43. Liebman, *supra* note 34, at 843. The medical disability requirement also attempts to deal with claimants who have the same physical ailment, but who claim differing degrees of pain. *Id.* at 844. Currently the SSA evaluates pain "on the basis of a medically determinable impairment which can be shown to be the cause of the [pain];" pain alone cannot be the only basis of finding disability unless a "medical condition . . . could be reasonably expected to produce [the pain]." 20 C.F.R. § 404.1529 (1983).

Finally, a claimant's disability must be total. Even though an individual cannot engage in his former employment, he may have to take different or lower-paying work if he is able.[44] The total disability requirement can be attributed to various factors. Procedurally, it helps the SSA distribute a limited number of funds by insuring that the most needy—or the most disabled—receive benefits.[45] It further eliminates the problem of determining "partial" disability—a process which could greatly increase the cost of the DI program.[46] One commentator has also suggested that this requirement is an attempt to treat partially disabled workers like workers who have always had lower paying jobs.[47] As some individuals must perform "disagreeable and low-paid jobs" in our economy, it may be inequitable to treat the partially disabled as having a greater "claim on society."[48] Unless they are totally disabled, claimants should not receive benefits as an alternative to accepting lesser paying jobs.[49]

Although the insurance theme often dominates discussion of DI, there is also a quasi-welfare aspect of the program.[50] By requiring total disability, DI assures that completely disabled workers will have at least a minimum income. As discussed below,[51] a claimant may even earn a maximum amount per month and still be eligible for DI. The welfare aspect is also demonstrated by the fact that there is no relationship between a claimant's benefits and the amount of his individual contribution, as there is in private insurance programs.[52]

IV. Guidelines For Self-Employed Disability Claimants

The DI program aids both self-employed and wage and salary workers who have contributed their labor to the nation's work force, but who can no longer contribute because of disability.[53] To establish disability, claimants must show that they are not only disabled from engaging in their known occupations, but that they also cannot engage in any other "substantial gainful activity" (SGA) which "exists in the national economy."[54] There are two independent components of SGA: sub-

44. 20 C.F.R. §§ 404.1560(b)(3), .1574-.1575 (1983).

45. Liebman, *supra* note 34, at 848. This will not apply for claimants with impairments that are automatically considered disabling. *See supra* note 41.

46. Liebman, *supra* note 34, at 848.

47. *Id.* at 849.

48. *Id.*

49. *Id.*

50. *Id.* at 848-49.

51. *See infra* text accompanying notes 68-69.

52. Liebman, *supra* note 34, at 841.

53. S. Rep. No. 2133, 84th Cong., 2d Sess. (1956).

54. 42 U.S.C. § 423(d)(2)(A) (1976 & Supp. V 1981).

stantial and gainful.[55] Through the authority granted to the Secretary of Health, Education, and Welfare by Congress,[56] the Social Security Administration has promulgated regulations to explain these components further.[57]

In addition to the general regulations which apply to all claimants, there are separate regulations which specifically cover self-employed workers.[58] In order to be substantial, a self-employed worker must perform "significant" mental or physical services for his business.[59] The activity must also be gainful in that the worker receives "substantial" income from his business.[60] In reviewing disability cases, the courts have expanded the meaning of these guidelines and even added criteria of their own.

A. *Hours*

The SSA considers any services performed by a claimant to be significant if the claimant works entirely by himself.[61] If other persons are involved in the business, the claimants' services are significant if they either account for more than one-half of the management time or total over forty-five hours per month.[62]

The courts give considerable weight to hours spent at work; however, they also consider other factors. For example, the claimant in *Icenhour v. Weinberger*[63] spent fifteen to twenty hours per week (i.e., *over* forty-five hours per month) at his dry goods store; however, the court held that he was not engaging in SGA because he made only ten percent of the management decisions. Similarly, in *Scanlon v. Richardson*[64] the claimant performed only small irregular tasks at his auto repair shop. The court found that he was not engaged in SGA even though he came to work every day. In *Wesley v. Secretary of Health, Education and Welfare*[65] the claimant was engaged in SGA when working only three hours per day. Although he worked fewer hours than before his disability, Wesley nevertheless performed significant "supervisory and advisory services."[66] The same reasoning applied to the claimant in *Price*

55. 20 C.F.R. § 404.1572 (1983).
56. 42 U.S.C. § 423(d)(4) (1976 & Supp. V 1981).
57. In the 1983 regulations, SGA is defined in 20 C.F.R. §§ 404.1571-.1575 (1983).
58. *Id.* § 404.1575 (covering self-employed workers).
59. *Id.* § 404.1575(a)(3), .1575(b).
60. *Id.*
61. *Id.* § 404.1575(b)(1).
62. *Id.*
63. 375 F. Supp. 312 (E.D. Tenn. 1973).
64. 370 F. Supp. 1141 (W.D. Pa. 1972). As discussed *infra* text accompanying notes 83-89, claimant only performed such tasks at the advice of his doctor.
65. 385 F. Supp. 863 (D.D.C. 1974).
66. *Id.* at 865.

v. Richardson[67] who contributed "significant management expertise" six days per week to his business. Thus, the courts generally follow the hours regulations unless the work performed is too insignificant to be considered SGA.

B. *Income*

The SSA also examines employee earnings to determine whether a claimant is capable of SGA. Since 1979, a self-employed disability claimant has been allowed to earn up to $300.00 per month.[68] When a claimant's earnings exceed this $300.00 per month total, his ability to engage in SGA is sufficiently established.[69] These income guidelines become inapplicable in two distinct types of situations.

At one end of the spectrum are claimants who draw substantial income from their businesses, but who nevertheless maintain that their income does not reflect their ability to work. SSA regulations specifically provide that income will not be considered alone when it can be attributed to other factors, such as capital investments or profit sharing agreements.[70] The claimant in *Tucker v. Schweiker*[71] averaged $800.00 per month from his transportation business. The court, however, held that Tucker was disabled because the income reflected earnings on capital assets: ownership of a truck and business relationships established before the onset of his disability.[72] In *Icenhour v. Weinberger* the court found that the claimant's half of a $20,000 partnership income could be attributed to a profit-sharing agreement with his wife—*not* to his own significant work activities.[73]

At the other end of the spectrum are the claimants whose incomes do not exceed the established amount, but whose activities still reflect an ability to engage in SGA. In *Smith v. Weinberger*[74] the claimant realized a net annual loss of $165.00 from selling gems on a part-time basis.

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67. 443 F.2d 347, 348 (5th Cir. 1971).

68. 20 C.F.R. § 404.1574(b) (1983). The earnings limit remains $300.00 per month as of 1983.

69. *Id.*

70. *Id.* § 404.1575(a).

71. 650 F.2d 62, 63 (5th Cir. 1981). Although the claimant spent only two to three hours per month involved with this business, his services were the only managerial duties performed for the business.

72. *Id.* at 64.

73. 375 F. Supp. 312, 317 (E.D. Tenn. 1973). *See also* Krumme v. Califano, 451 F. Supp. 941 (W.D. Mo. 1978) ($15,174.81 annual earnings reflected income from capital assets where claimant supplied money for farm equipment and grain in sharecropping arrangement with his son); McCleery v. Finch, 332 F. Supp. 1116 (S.D. Tex. 1971) (large annual income resulted from sale of inventory in claimant's welder shop); Scanlon v. Richardson, 370 F. Supp. 1141 (W.D. Pa. 1972) (income reflected return on capital invested in auto garage business which claimant had built up over his life; therefore, income "in the nature of repayment of capital invested in the business in the nature of loans" was analogized to stock dividends). *Id.* at 1142.

74. 381 F. Supp. 407 (E.D. Wis. 1974), *aff'd*, 525 F.2d 695 (7th Cir. 1975).

Nonetheless, the court found that Smith had demonstrated a "functional capacity to engage in SGA" by grossing over $8,000.00.[75] Similarly, in *Beasley v. Califano* the claimant apparently earned no profits in his small real estate business.[76] The court denied his appeal for disability benefits, emphasizing a gap in the record due to claimant's refusal to disclose his actual income and his "persistent" efforts to run the business.[77]

The income regulations are applied unless a claimant's income, whether above or below the $300.00 limit, does not adequately reflect his ability to engage in SGA. If income is either too high because of investment earnings or too low despite significant work activity, the guidelines will not be followed.

C. *Sheltered Work Environments*

Regardless of a claimant's earnings or the number of hours he spends at work, a "sheltered" work environment may negate his ability to engage in SGA.[78] If a claimant is "incapable of securing and maintaining a competitive job . . . in the absence of close supervision," the work activity will not constitute evidence of SGA.[79] Although sheltered work environments generally arise only for wage and salary workers, they may also be relevant for self-employed workers. At least one court allowed benefits for a blind claimant whose work exceeded the regulatory requirements, because he worked in a sheltered environment. In *Cox v. Cohen*[80] the court held that the claimant was disabled even though he operated his vending machine ten hours per day, five days per week, and earned more than the regulatory maximum.[81] The claimant's work was "sheltered" because he received assistance from his suppliers and customers in arranging and operating his vending stand.[82] Thus, neither the hour nor the income regulations will be applied if a disability claimant works in a sheltered work environment.

D. *Doctor's Orders*

The SSA will consider statements by a claimant's physician that a claimant is "disabled," but it reserves the right to look at other medical

75. *Id.* at 409.
76. 608 F.2d 1162 (8th Cir. 1979).
77. *Id.* at 1167.
78. 20 C.F.R. §§ 404.1573(c), .1574(a)(3) (1983).
79. Woodhead v. Califano, 479 F. Supp. 1084, 1087 (D. Neb. 1979).
80. 321 F. Supp. 534 (N.D. Cal. 1971).
81. *See supra* text accompanying notes 68-69. *See also* 20 C.F.R. § 404.1574(b)(2) (1983).
82. 321 F. Supp. at 537. The court also noted a congressional intent to "make it *easier* for aging blind person(s) to obtain disability benefits." *Id.* at 538 (citing 42 U.S.C. § 423(d)(1)(B) (1976)).

evidence to support such statements.[83] Some courts go further and show explicit deference to doctors' recommendations to particular claimants. The court in *Icenhour* noted that the claimant could not engage in SGA "without gravely endangering his health."[84] By contrast, the *Wesley* court partially based its denial of benefits on the fact that the claimant's doctor said he *could* perform administrative work.[85] In both *Scanlon*[86] and *Rivas v. Weinberger*,[87] the courts emphasized that the claimants worked at their businesses only because their physicians had advised them to keep busy. When other factors are predominant, however, the doctor's recommendation may not be followed.[88] For example, in *Beasley*[89] the claimant was found able to engage in SGA even though his doctor had advised him not to work. In reviewing disability claims, the courts thus may take it upon themselves to emphasize a doctor's opinion.

E. *Burden of Proof*

Some courts have devised their own procedural guidelines by allocating the burden of proof in DI cases.[90] Generally, the courts require claimants to prove that they can no longer engage in their known occupations because of their disabilities.[91] The burden then shifts to the Secretary of Health and Human Services to show that there is nonetheless SGA in the national economy which the claimant can perform.[92] To support its denial of DI benefits, the SSA may bring in vocational experts to discuss the types of jobs which exist for workers with the particular claimant's capacities.[93] As of February 26, 1979, the SSA

83. For list of "Medical Considerations" for determining disability and blindness, see 20 C.F.R. §§ 404.1525-.1530 (1983).

84. 375 F. Supp. at 318. *See supra* note 63.

85. 385 F. Supp. at 865-66. *See supra* note 64.

86. 370 F. Supp. at 1142. *See supra* note 65.

87. 475 F.2d 255, 258 (5th Cir. 1973).

88. Another interesting problem arises because of the "traditional patient-doctor relationship" where the doctor is encouraged to act on his patient's behalf. Accordingly, the reports of "attending physicians" may be given less weight than those of "consultant specialists"; the attending physicians can be expected to protect their clients' interests when providing disability reports. *See* S. NAGI, DISABILITY AND REHABILITATION 78-79 (1969).

89. 608 F.2d at 1166. *See also supra* text accompanying notes 76-77.

90. A few courts placed both burdens on the claimant. Storyk v. Secretary of Health, Educ. & Welfare, 462 F. Supp. 152, 153-55 (S.D.N.Y. 1978). Others only discussed a general definition of disability which the claimant had the burden of establishing. Kutchman v. Cohen, 425 F.2d 20 (7th Cir. 1970); Harris v. Richardson, 450 F.2d 1099, 1101 (4th Cir. 1971).

91. *See* Camp v. Schweiker, 643 F.2d 1325, 1332 (8th Cir. 1981); Salas v. Califano, 612 F.2d 480, 482 (10th Cir. 1979); Johnson v. Harris, 612 F.2d 993, 997 (5th Cir. 1980); Diabo v. Secretary of Health, Educ. & Welfare, 627 F.2d 278, 283 (D.C. Cir. 1981); Stark v. Weinberger, 497 F.2d 1092 (7th Cir. 1974).

92. *Id.*

93. For a discussion of the use of vocational experts in administrative hearings, see J. MASHAW, *supra* note 9, at 74-79.

has also been able to use vocational regulations to prove that a claimant still has the residual functional capacity to engage in some form of SGA.[94]

Using both SSA and their own guidelines, courts have reviewed disability claims for self-employed workers. As noted above,[95] the DI program emerged in the Industrial Revolution to protect employees in large industrial workplaces. It is, therefore, important to consider whether self-employed claimants are accorded the same treatment as their wage and salary counterparts in industry and commerce.

V. Comparison of Self-Employed and Wage and Salary Claimants

At first glance the DI cases seem to draw the line fairly between disabled claimants and those capable of SGA. When comparing self-employed workers with wage and salary employees, however, the courts seem stricter with self-employed claimants.

Due to intrinsic differences in the two work situations, the self-employed worker may be penalized for continuing to work part-time after the onset of disability. For example, the *Wesley* claimant had the same "Class III" heart condition as the wage and salary claimant in *Meneses v. Secretary of Health, Education and Welfare*,[96] but Meneses was found to be disabled. The *Wesley* court distinguished the cases because Wesley was able to return to his work part-time as landlord of a building he owned; Meneses, on the other hand, was completely discharged from military service and was unable to secure new employment because of his heart trouble.[97] A wage and salary worker may not have the option to continue working part-time because his technical, industrial work environment cannot tolerate the inefficiency which his disability creates.[98] It seems inequitable, however, to award this worker DI benefits when a self-employed worker with the same disability would be denied benefits.

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94. *See* Appendix 2 to Subpart P of Regulation No. 4 of the Social Security Regulations (Title II, 1983). *See also* Goldhammer, *The Effect of New Vocational Regulations on Social Security and Supplemental Security Income Disability Claims*, 32 AD. L. REV. 501 (1980) (Goldhammer, an administrative law judge, considers the effect that these new regulations will have on the individualized adjudicative process); Welch, *New Disability Insurance Regulations*, 58 MICH. B.J. 330 (1979). Note that on June 21, 1982, the Supreme Court agreed to hear Campbell v. Secretary of Dept. of Health & Human Servs., 665 F.2d 48 (2d Cir. 1981), *appeal docketed*, No. 81-1983, to decide whether the Secretary may rely on the medical-vocational guidelines, as opposed to individualized proof, in disability determinations. 102 S. Ct. 2956 (1982).

95. *See supra* text accompanying notes 27-35.

96. 442 F.2d 803 (D.C. Cir. 1971).

97. 385 F. Supp. at 866. The *Meneses* claimant was discharged from a position as a Scout in the Philippines. Perhaps the court was influenced by a concern for the veteran's role in society. *See supra* text accompanying note 30.

98. *See supra* text accompanying notes 33-35.

The ability to continue working part-time also translates into a procedural disadvantage for self-employed workers. When a wage and salary worker can no longer perform in his industrial setting, he may lose his job and then apply for disability benefits. This worker can meet his burden of proof simply by showing that his disability prevents him from engaging in his known occupation.[99] The burden of proof then shifts to the Secretary of HHS who must show that the claimant can still perform some form of SGA in the national economy.[100] The burden of proof, however, never shifts to the Secretary in a self-employed worker's case, if the worker can continue to work part-time at his known occupation. Consequently, wage and salary workers may have a better chance of obtaining DI benefits.

When interpreting the income regulations, the courts and the SSA generally treat the two types of workers alike. As his own boss, a self-employed worker takes the additional risk that his business will not be profitable. Although he may earn less than the regulatory amount or realize a loss in his business, the self-employed worker will not receive disability benefits unless he is totally disabled.[101] If he cannot support himself and his family, he may have to turn to social welfare benefits.

A problem arises because self-employed workers often have capital investments in their businesses. For DI purposes, income earned from capital investments is not considered evidence of SGA.[102] A self-employed claimant may be penalized, however, when his capital investments overlap with or cannot be clearly distinguished from his employment. If he becomes disabled and still spends time in his former workplace managing "investments," he may be considered capable of engaging in SGA. He could still be legally disabled if he was simply looking after unrelated personal investments in real estate or securities. A wage and salary claimant, on the other hand, is more likely to separate clearly his investment and employment activities and may be awarded benefits for doing so. A similarly disabled self-employed claimant could be denied benefits because his investments are in his business.

On the societal level, there is a simplistic reason for distinguishing between self-employed and wage and salary workers. Worker's compensation laws and disability insurance were not developed for self-employed workers. Rather, they were developed for wage and salary workers, who had to work in the new technically dangerous factories.[103] The self-employed may not be deemed as important to the eco-

99. *See supra* text accompanying notes 91-95.
100. *Id.*
101. *See supra* text accompanying notes 74-77.
102. 20 C.F.R. § 404.1575(a) (1983).
103. *See supra* text accompanying notes 27-32.

nomic strength of the country, or they may simply not be as important to Congress because they lack the organization of unionized industrial workers. This explanation is inadequate for those who maintain that an adequate number of self-employed workers is necessary for a nation to remain competitive internationally.[104] In addition, both types of claimants may suffer if their nuclear families cannot provide for them as well as the extended families provided for disabled members in pre-industrialized society.[105]

On the individual level, there may be a better explanation of the different treatment accorded the two groups. Although both types of claimants know that they will receive benefits only if they are totally disabled, they are able to react differently to the risks of partial disability. Since the 1967 amendments to the Social Security Act, all DI claimants risk being caught in the "job gap."[106] Claimants may be unable to perform their known occupations or any other occupation in their localities; but if there is any SGA which they can perform in the *national* economy, they may be denied DI benefits.[107] All workers risk having to accept different or lower-paying work if they are only partially disabled.[108]

Self-employed workers may avoid the "job gap" predicament because of the nature of their occupations. Like their wage and salary counterparts, partially disabled self-employed workers may not be able to do the same work which they did previously; however, self-employed workers may not be plunged into the "job gap" if they can restructure their businesses to cope with their impairments. They may be able to work part-time, do less strenuous tasks, or capitalize on investments in their businesses. In addition to adapting financially to disability, self-employed workers may also be better situated to deal psychologically with their disability if they can remain present at their businesses.[109]

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104. *See* Salowsky, *The Decline in Self-Employed in Industrial Countries*, INTERECONOMICS Nov./Dec. 1978, at 306.

105. *See supra* text accompanying note 32.

106. Social Security Amendments of 1967, Pub. L. No. 90-248, § 158(d)(2)(A), 81 Stat. 821, 868 (codified at 42 U.S.C. § 423(d)(2)(A) (1976 & Supp. V 1981)); Liebman, *supra* note 34, at 853-54.

107. *Id.*

108. *See supra* text accompanying note 44.

109. *See supra* text accompanying notes 86-87. As their doctors had recommended that these claimants continue going to work, the courts permitted their presence in their former workplaces without penalizing them. Unlike claimants who are capable of working part-time, the "Doctor's Orders" claimants can neither compete for jobs in the national work force nor contribute their labor to the nation's economy. The courts perhaps acknowledged the psychological benefits gained from simply being present at the business they had built up over a lifetime. The situation is similar to that of self-employed workers who can partially retire and thereby soften the "psychological and financial trauma that often accompanies sudden and complete retirement." *Retirement Patterns for Self-Employed Workers*, 43 SOC. SECURITY BULL. 24 (Oct. 1980).

Wage and salary workers do not have the advantage of being able to restructure their work environments. In technically efficient production lines, their ability to continue working is dependent on the alternative labor sources in the marketplace, such as machines and healthy workers.[110] Although they are only partially disabled, they may nevertheless have to change their occupation and look for alternative work in the national economy. Partially disabled wage and salary workers consequently run a greater risk of being caught in the "job gap."

VI. CONCLUSION

Unless the SSA is prepared to make partial disability determinations,[111] the DI program may be functioning as adequately as possible by allocating the limited resources to the neediest claimants. In certain circumstances,[112] the courts seem harsher on self-employed claimants because the self-employed may be in a position to continue working part-time. The more stringent treatment, however, may be explained by the fact that self-employed workers are generally better able to deal with the risks of partial disability.[113]

RHONDA L. BRAUER*

110. *See supra* text accompanying note 34.

111. For a discussion of countries which make partial disability determinations, see INTERNATIONAL SOCIAL SECURITY ASSOCIATION, SIXTEENTH GENERAL ASSEMBLY REPORT VII. INSURANCE FOR SELF-EMPLOYED PERSONS AGAINST EMPLOYMENT ACCIDENTS AND OCCUPATIONAL DISEASES (1968).

112. *See supra* text accompanying notes 96-102.

113. *See supra* text accompanying notes 106-09.

* Class of 1984, Indiana University School of Law.