Statutory Significance of the Use of Occupational Information in SSA's Disability Programs

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Development of the Disability Program

- **Social Security Act originally did not provide for the payment of disability benefits**
- **Consideration given to providing benefits to those who were totally and permanently disabled as early as 1938**
- **Uncertainty in costs of the program delayed enactment**

Development of the Disability Program

- **During 1940s and 1950s, agency and Congress developed overarching principles of program**
  - **Recent and substantial attachment to the labor market (quarters of coverage)**
  - **Waiting period (6 months)**
  - **Vocational rehabilitation for beneficiaries**
  - **Strict definition of disability**

Statutory Background

- **1954 Disability Amendments established "disability freeze", not payment of benefits**
- **Key points to definition of disability**
  - **"inability to engage in any substantial gainful activity"**
  - **"by reason of any medically determinable impairment";**
  - **"long-continued and indefinite duration"**
- **Disability determinations made by State agencies**
  - **Encouraged vocational rehabilitation**
  - **Took advantage of State-level contacts with medical professionals**

Statutory Background

- **1956 Disability Amendments**
- **First authorized payment of disability benefits**
- **Only made payments to workers between 50 and 65**
- **Retained insured status requirement, definition of disability, and determinations by State agencies**
- **Established a six month waiting period, additional provisions for vocational rehabilitation**

Implementation of the Definition of Disability

- **Legislative history provides indication of Congress' intent**
  - **Physical or mental impairment must be sufficiently severe to be considered the cause of the inability to work**
  - **Individual must be disabled from "his usual work" and any type of substantial gainful activity**
  - **Standards for evaluating severity would be developed in consultation with States**

Administrative Implementation

- **In February 1955, the Commissioner appointed a Medical Advisory Committee to provide technical assistance in formulating disability policy.**
- **The panel recommended the issuance of evaluation guides and standards setting forth medical criteria for the evaluation of specific impairments.**
- **The panel also suggested that factors such as age, education, training and experience may be important in the evaluation of disability.**

First Regulation

- **22 Fed. Reg. 4362 (June 20, 1957)**

- **Key points**
  - **Primary consideration given to the severity of the impairment**
  - **"Consideration is also given to such other factors as the individual's education, training and work experience."**
  - **Medical evidence must establish that the impairment results in such a lack of ability to perform significant functions that applicant cannot, with his training, education and work experience, engage in any kind of substantial gainful activity.**

First Regulation

- **Regulations did not have a lot of detail**
- **Only one regulation that took up two-thirds of a page printed in the Federal Register**
- **Compare to current Subpart P regulations**
- **Repeated key concepts from legislative history of the 1954 and 1956 Amendments**
- **Language of Act and regulations left a lot of room for judicial interpretation**

Judicial Interpretations

- **Key focus on phrase "inability to engage in any substantial gainful activity."**
- **Courts read phrase to mean what is "reasonably possible," not what is conceivable.**
- **"It was not the intention of Congress to impose a test so severe as that required by the Secretary and to exact as a condition precedent to the maintenance of a claim the elimination of every possibility of gainful employment.' (Kohrs v. Flemming, 272 F.2d 731, 736 (8th Cir. 1959))**

Additional Judicial Interpretations

- **What did it mean to be "unable" to do any substantial gainful activity?**
- **Courts used an "employability" standard—could the individual obtain work with his background, education and training?**
- **If the answer was no, the claimant could be found disabled.**

Jacobson v. Folsom, 158 F. Supp. 281 (S.D. N.Y. 1957)

- **Claimant could be found disabled because performance of a clerical job might be "unrealistic and irreconcilable with his training and experience. Furthermore, his ability to obtain such employment, in view of his selling background, might be doubtful. In any event these are matters that should have been considered by the referee."**

- **In response to decisions like this, agency amended its regulations in August 1960 to clarify that person would not be considered disabled if he was unable to work because of hiring practices or technological changes in industry**

Burdens of Proof—Kerner v. Flemming, 283 F.2d 916 (2d Cir. 1960)

- **Landmark early case in the disability program**
- **Part of decision focused on employability—"Mere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available."**
- **Kerner also formulated the "shifting burden of proof"**

Kerner's Shifting Burden

- **"It should not be hard to provide better medical evidence as to what work plaintiff can and cannot do, and the Secretary's expertise should enable him readily to furnish information as to the employment opportunities (including those in sheltered workshops), or the lack of them, for persons of plaintiff's skills and limitations. We recognize that the Department must process many thousands of disability applications annually and that it is impracticable to treat even the relatively small proportion that go to hearing with the elaboration of the trial of a personal injury case. We do not insist upon anything approaching that. . . ."**

Agency Reaction

- **Agency attempted to meet Kerner requirements by citing selected government and industrial studies that showed the results of surveys reflecting how individuals with certain impairments could work.**
- **Some courts rejected agency's approach as being too far in the "realm of conjecture and theory" to support the denial of benefits (Stancavage v. Celebrezze, 323 F.2d 373 (3rd Cir. 1963))**
- **Agency then decided to employ VEs at hearings to address individual claimant's situation**
- **Agency also developed a task force to study vocational issues**

Additional Statutory Developments

- **1967 Disability Amendments reacted to trend in court decisions**
- **Congress was concerned with the way the definition of disability had been interpreted**
  - **Increased tendency of courts to place burden on agency to identify jobs for which claimant could be hired**
  - **Narrowing of the geographic area in which jobs must exist to a specific distance from the claimant's home**
  - **Whether a claimant could be found disabled even if he was doing substantial gainful activity**

1967 Disability Amendments

- **Made several key changes to the definition of disability**
  - **Requires explicit consideration of vocational factors--age, education, and work experience**
  - **Ability to be hired irrelevant**
  - **Defines "work which exists in the national economy"**
  - **Clarifies that agency gets to determine what constitutes substantial gainful activity, and person who engages in SGA is not disabled**

Medical-Vocational Guidelines

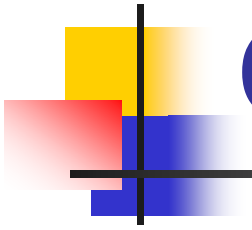
- **During the 1970s, agency's use of vocational experts to identify jobs in the national economy criticized**
  - **Testimony was based on standardized guides, including the DOT and Occupational Outlook Handbook**
  - **VEs were "frequently criticized for their inconsistent treatment of similarly situated claimants"**

Medical-Vocational Guidelines

- **Agency addressed issue of inconsistency in 1978 Medical-Vocational Guidelines**
- **Directs a conclusion of disabled/not disabled in cases in which they apply without need for VE testimony**
- **Promulgation of Guidelines lead to further litigation**
- **Supreme Court upheld agency's authority to issue the Guidelines in 1983 (Heckler v. Campbell, 461 U.S. 458 (1983))**

Current Situation

- **Agency still uses VEs in many cases, and relies on occupational information**
- **Guidelines don't apply in a significant number of cases**
- **Much litigation over SSR 00-04p and DOT**
- **We've also seen plaintiffs try to develop challenges to VE testimony based on failure to update the DOT**



Questions and Discussion