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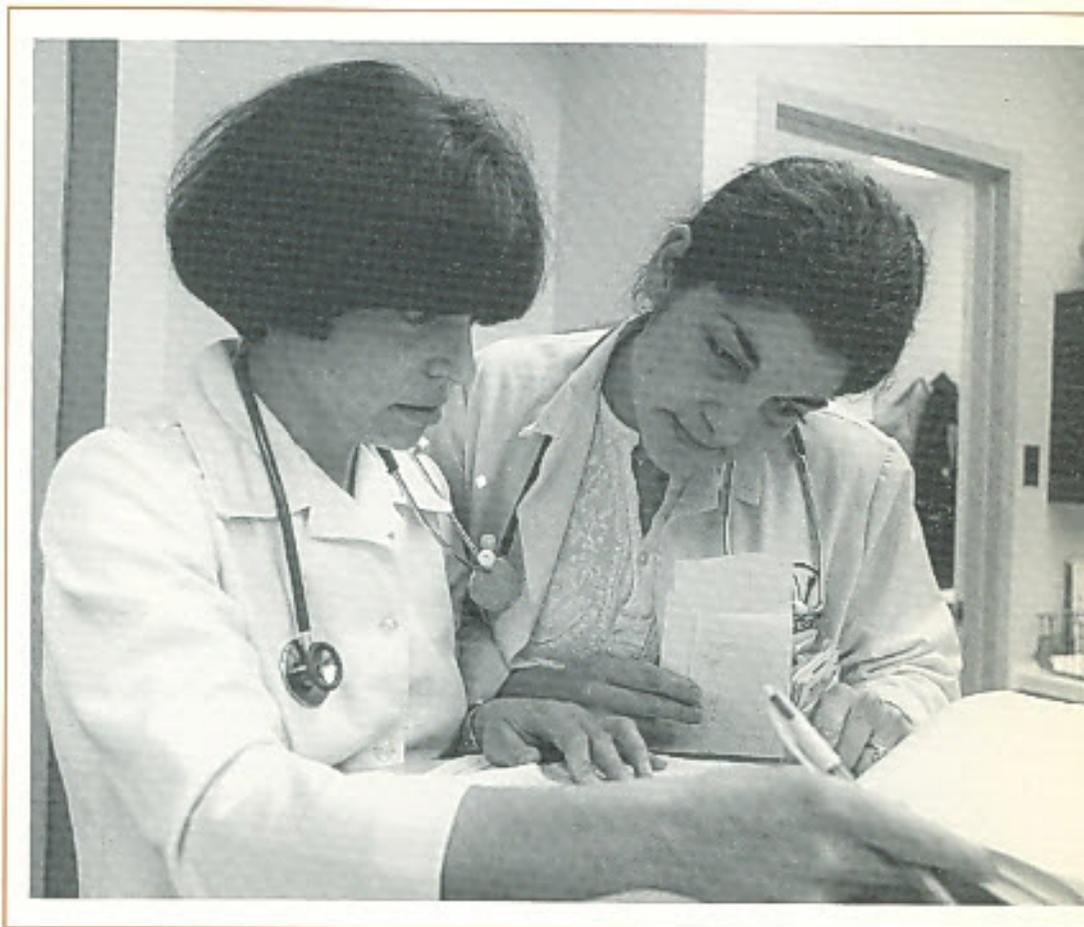
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Reengineering Social Security: Social Security Administration's Plan for a New Disability Claim Process

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I. Introduction

Beset by criticism on all sides, and challenged by Vice President Al Gore's quest to reinvent government, the Social Security Administration (SSA) has undertaken a reengineering of the disability claims process. /1/ It is far too early to tell which of SSA's latest proposals will ultimately be implemented and exactly what form those implemented will take. Nevertheless, it is important for advocates to keep a close eye on these proposals as they are likely not only to change the cumbersome process for obtaining disability benefits but also to change (and tighten) disability standards. /2/

II. Disability Process Reengineering Team -- Fall 1993

In late 1993, Social Security Commissioner Shirley S. Chater announced the creation of a Disability Process Reengineering Team whose mission was to examine the disability determination process and create a design for reengineering it. Unfortunately the team was composed entirely of state and federal employees within the social security system. The exclusion from the team of members of the private bar and legal services who regularly represent disability claimants, private advocacy groups that generally represent the interests of disabled persons, and medical and psychological specialists who provide treatment and counseling for persons with disabilities necessarily skewed the team's perception. The team undertook a study of the disability determination process, which included computer modeling, internal site visits, central office site visits, and external contacts. Notably, the team opined that the process to be reengineered was the administrative system, and it assured the public that the statutory definition of disability was beyond its scope. During its study, the team turned aside any discussion of the substantive methods of determining disability and stated that its focus was improving administrative procedures.

A. Initial Disability Process Reengineering Proposal -- April 1994

The initial product of this effort was the "Disability Reengineering Project Proposal" published in April 1994. /3/ That proposal, comprising roughly 50 pages in the Federal Register, complete with

charts and graphs, was noteworthy not only for some of its specific suggestions but also for the total vagueness of some of its more significant ideas. It is also particularly significant that, contrary to prior disclaimers, in fact the proposal would have changed not just the procedures for handling disability claims administratively but also the substantive definition of disability.

Among the most interesting of the procedural proposals was the creation of a "disability claim manager" who would have primary responsibility for handling most aspects of the initial disability claims process. This process would allow the claimant to request a personal interview with the disability claim manager. Since the disability claim manager would appear to work at the social security district office level, and since the reconsideration stage would be eliminated, perhaps the most intriguing aspect of the April 1994 proposal was its complete silence as to the future function, if any, of the state disability determination systems (DDS), which are currently responsible for decision making at the initial application and reconsideration levels.

Substantively, the initial proposal would substitute a new four-step evaluation process for the current five-step sequential evaluation of disability. At two of the steps in the new evaluation the claimant could prevail only if unable to engage in substantial gainful activity "regardless of any reasonable accommodations that an employer might make in accordance with the Americans With Disabilities Act [ADA]." /4/ Such use of the ADA as a weapon to deny disabled persons disability benefits was rejected by SSA in 1993. /5/

B. Disability Process Proposal (Revised Report) -- June 1994

On June 30, 1994, the Disability Process Reengineering Team formally presented its final recommendations to Commissioner Chater. /6/ In its introduction, the team noted that it had received over 6,000 written responses during the comment period from April 1 to June 14. Remarkably the team asserted in its final report, dated 16 days after the end of the comment period on the proposed report, that it had "read, analyzed, and collated every one of those six thousand comments so that no idea, reaction, or nuance would be overlooked." /7/

Analyzing the comments, the final report listed "most popular concepts" and areas of "greatest concern." Not surprisingly, the first most popular concept listed in the initial proposal was the elimination of the reconsideration step. A number of concepts were both popular and areas of concern. The team did make one significant change as a result of the comments. All references to the ADA were removed, as the team "concluded that the provisions of that statute are not directly related to individual determinations of disability." /8/ Certain issues raised by the various commentators were directly addressed in the final report. Others were not. Most noteworthy in the latter category was the future role of state DDSs. The introduction to the final recommendation states in pertinent part:

The Team's efforts resulted in considerable public and employee concern about the future role of the State DDSs. I would like to take this opportunity to clarify that the Team's silence on the role of the DDSs was not meant to be a de facto recommendation for the elimination of the Federal/State partnership in the disability process. Nor is their silence regarding the role of the SSA field offices meant to be an implicit recommendation that the primary disability claim manager activity will be

concentrated at these sites. Considering the current and projected workloads of the disability programs it would be difficult to foresee a time when there would not be a continued role for the DDSs in a redesigned disability determination process. The expertise and skill of the DDS employees remain vital to our goal of providing world class service to customers. /9/

Nevertheless, the team remained silent on exactly what the role of DDSs would be in the re-engineered world of social security disability processing.

C. Plan for a New Disability Claim Process -- September 1994

The first concrete result of the effort of the Reengineering Team was the issuance by Commissioner Chater of a "Plan for a New Disability Claim Process" in September 1994. /10/ Commissioner Chater's stated objectives of redesigning the process are:

- making the process "user friendly" for claimants and those who assist them;
- making the right decision the first time;
- making the decision as quickly as possible;
- making the process efficient; and
- making the work satisfying for employees. /11/

While these objectives appear laudable on their face, advocates must be concerned that making the "right" decision efficiently may translate into denying people benefits who are eligible under current standards, without any statutory amendment to the substantive law. The source of this concern is obvious. SSA could have performed a tremendous benefit for itself and the public by streamlining its procedures and applying the current law at all administrative levels. However, instead, the redesign plan purports to implement new standards for determining whether individuals are disabled under the Social Security Act.

The redesign plan sets forth a tripartite implementation strategy, or multiple-track approach. Implementation activities are divided into: immediate or near-term (those that can begin in FY 1995 to be fully implemented by the end of FY 1996), long-range (those requiring extensive research and development that cannot be tested fully before FY 1999 or cannot be fully implemented nationwide before FY 2001), and midterm (those that can be developed and tested in FYs 1997 and 1998 and/or fully implemented nationwide by FY 1998). /12/ Commissioner Chater appointed an "implementation manager" for the redesign plan. Interestingly, given the ambiguity as to the future role of state DDSs, the person appointed to this position was the director of one such state agency. /13/

In the descriptions of these implementation activities, two related matters become clear. First, SSA acknowledges that the plan would change substantive decision making, not merely streamline that decision making. /14/ Second, SSA acknowledges that in proposing these substantive changes, the

team failed to study their consequences adequately: "Additionally, because the decision methodology associated with the new process depends on significant amounts of research, consultation, development and refinement, SSA must identify the specific research needs, develop the appropriate scope of work and award research contracts as near-term activities." /15/

The immediate or near-term goals for implementation in FY 1995 and FY 1996 largely appear to be positive or - on their face - at least innocuous: "These activities include streamlining and simplification initiatives or other procedural elements of the new process that can be implemented using existing administrative or regulatory discretion. They also include client-service activities associated with improving the claimant's access and entry into the disability claim process; . . ." /16/

Query: does using existing "regulatory discretion" imply no change in SSA's regulations? This phrase is subject to differing interpretations. If these immediate or near-term goals relate mainly to reducing paperwork, allowing electronic transmission of data and other mechanisms for streamlining the application and appeal processes, SSA will find few critics. If, on the other hand, they include changing the evaluation of disability (undoubtedly to make standards more difficult), then there is cause for alarm.

When the redesign plan is taken at face value, it appears that the first implementation phase otherwise includes only testing and implementation of a streamlined appeals process and commencing research on a new decisional methodology. /17/

The streamlined appeals process purports to cut the administrative levels in half. Currently a claimant files an initial application (which is adjudicated by the state DDS); if rejected, the claimant may file for reconsideration (also performed by the state DDS); if rejected again, the claimant may file for a hearing before a social security administrative law judge (ALJ), and, if that request is rejected, the claimant may seek review by SSA's Appeals Council. /18/ All four administrative levels must generally be exhausted before seeking judicial review. /19/ SSA's Office of Workforce Analysis estimates that it currently takes a claimant almost two years, on average, to traverse this entire administrative road. /20/ (Of course, if a claimant should prevail at any stop along the way, the process normally ends and benefits are paid. However, even in these cases, the land mines of "quality assurance" and "own-motion review" are always lying in wait to snatch defeat from the jaws of victory.) /21/

SSA now proposes essentially to eliminate step 2, reconsideration, and -- for purposes of direct appeal -- step 4, the Appeals Council. A claimant's initial application will be taken, developed, and adjudicated by the disability claims manager. If the claim is rejected, the appeal goes straight to the ALJ level. At that point, an "adjudication officer" in the Office of Hearings and Appeals (OHA) interviews the claimant, provides information, identifies the issues in dispute, and determines whether additional evidence is needed. The adjudication officer "will have full authority to issue a revised favorable decision if the evidence so warrants." /22/ Otherwise the ALJ will hear the case de novo. /23/

Direct appeal from an unfavorable ALJ decision will lie in federal court, bypassing the Appeals Council. However the Appeals Council will not be eliminated. Rather, the

Appeals Council, working with Agency counsel, will evaluate all claims in which a civil action has been filed and decide, within a fixed time limit, whether it wishes to defend the ALJ's decision as the final decision of the Secretary. If the Appeals Council reviews a claim on its own motion, it will seek voluntary remand from the court for the purpose of affirming, reversing or remanding the decision. /24/

Streamlining the process is certainly desirable; compelling allegedly disabled persons to wait almost two years for a final administrative decision is unconscionable, as SSA itself recognizes. But a few cautionary notes must be sounded. The ALJs complain now that they are drowning in cases. There is a substantial drop-off of claims at the reconsideration level. If reconsideration is eliminated, will there really be such improved decision making at the initial level that the ALJs will be able to handle the appeals? Will the adjudication officers at the OHA level expedite handling of claims or become a roadblock, functioning much like the current reconsideration stage? Are claimants really benefited if they must (realistically) find an attorney to file a formal complaint in federal court to appeal an ALJ decision, as opposed to filling out a form at their local district office requesting Appeals Council review? /25/ Will the Appeals Council end up seeking voluntary dismissal of a large number of federal court appeals, so that after the effort of filing the appeal, the claimant is no further along than under the current system?

Finally we come to the crux of the matter: in the reengineered world of social security, by what standard will determinations of disability substantively be made? Perhaps the greatest accomplishment of this effort is SSA's honest acknowledgment of what every advocate realizes: under the current system, there are, in truth, different standards of decision making at different stages of the process. /26/ In the eyes of the adjudicators, a person properly can be found not disabled at the initial and reconsideration levels, and then found disabled by an ALJ on the same evidence, again properly. To use an analogy, it is as if someone is arrested for speeding on the interstate, and the lawful speed limit is 50 mph in traffic court but 55 mph on appeal de novo to county court. /27/

To their credit, SSA's reengineers propose that uniform standards be used throughout the process. This should hardly be a radical idea. One would think that the simplest solution would be to direct all state DDSs and ALJs and the Appeals Council to follow SSA's substantive regulations as written, and as interpreted at least by the Courts of Appeals. (Where there is a split between circuits, SSA can seek certiorari of the case it loses.) It is hard to imagine any lawful reason that SSA would not be doing this already. /28/

Instead, the reengineers have proposed a new four-step evaluation process for adults, replacing the familiar -- and well-litigated -- five-step sequential evaluation of disability. The current step 1 -- is the person engaging in substantial gainful activity? -- will remain essentially the same. So will step 2 -- does the person have a medically determinable physical or mental impairment? The plan states that the requirement of "severity" will be eliminated, but this is of doubtful practical significance. /29/

The first clear-cut substantive shift from the existing decisional methodology will come at step 3. At this step, SSA currently compares a claimant's physical and mental disabilities to its "Listing of

Impairments," a detailed compendium of diseases or conditions that affect various body systems. /30/ If the claimant is found to have a condition that meets or equals one in the Listings, at the severity set forth in the Listings, the claimant will be found disabled. /31/ SSA proposes to abandon the current Listings and replace them with a new Index of Disabling Impairments. /32/ As with the Listings, if a claimant's condition meets the Index, the claimant will be ruled disabled without regard to age, education, or prior work experience.

Many aspects of the new index may be cause for alarm, or at least puzzlement. It appears that the index will be more restrictive than the Listings. The plan asserts that the index will apply "to a relatively small number of claims with the most severe disabilities." /33/ The new index appears to take two opposite approaches to functional limitation. It will describe an impairment that "clearly restricts functional ability to a degree that the individual is unable to engage in substantial gainful activity." /34/ But it does this "without measuring the individual's functional ability." /35/ The application of this approach will be very interesting. How does, for example, a psychologist measure cognitive deficits other than by testing functional ability?

Equally confusing is the proposed medical content of the new index. While the index is not supposed to measure functional ability, neither is it supposed to be medically technical.

(I)t will only consist of descriptions of specific impairments and the medical findings that are used to substantiate the existence and severity of the particular disease entity. The medical findings . . . will be as nontechnical as possible and will exclude such things as calibration or standardization requirements for specific tests and/or detailed test results. . . ." /36/

Just how the severity of cardiac or pulmonary disease can be measured without either detailed medical findings or functional limitation findings remains a mystery.

Step 3 will also eliminate a fail-safe mechanism -- medical equivalence. Under the Listings, if a person's condition does not meet, but equals, that set forth in the Listings, there is a finding of disability at step 3. This will not be true with the new index.

The new step 4 will combine the current steps 4 and 5 covering the ability to perform past relevant work and ability to do other work. The only issue at the new step 4 will be the ability to engage in any substantial gainful activity. /37/ The plan calls for a "standardized approach to measuring functional ability to perform substantial gainful activity." /38/ SSA optimistically predicts: "The approach will be known and accepted in the medical community. It will be universally used by public and private disability programs in which benefits are based on the ability to perform work-related duties." /39/

This may be possible, but it surely does not exist today. Anyone who has ever dealt with the medical community, or public or private insurers, may well doubt that such consensus will ever exist. And, if it does exist at some point in the future, will it be so draconian as to defeat the benevolent purposes of the Social Security Act? If the true, underlying agenda of SSA's reengineering is to tighten standards for obtaining benefits, rather than, as claimed, to provide "world-class service," /40/ then SSA should forthrightly say so and open a policy debate as to which individuals are so physically or mentally disabled as to be entitled to income maintenance.

III. Disability Process Redesign: Next Steps in Implementation -- November 1994

Within a couple of months of Commissioner Chater's endorsement of the reengineering plan, SSA issued yet another report, this one entitled, "Disability Process Redesign: Next Steps in Implementation." /41/ This document sets forth in some detail (and no doubt with great optimism) implementation planning for key features of the redesign. Filled with agency jargon, it purports to outline "1) the implementation planning timetable, . . . 2) fundamental implementation tools, . . . 3) key implementation activities, . . . and 4) the strategy for internal and external communications throughout the course of implementation." /42/ Unfortunately, as its name suggests, this implementation scheme provides no new insight into the actual changes -- procedural and substantive -- envisioned by the agency.

Until SSA actually produces its new Index of Disabling Impairments and its "universally accepted methodology" for determining the ability to perform substantial gainful activity, observers and claimants can only wait, with some trepidation. In the interim, why does not SSA simply direct its employees and contractors at all levels to apply the law as it exists? /43/

Footnotes

/1/ Al Gore, *From Red Tape to Results: Creating a Government That Works Better and Costs Less*, Report of the National Performance Review (Sept. 1993). S/N 040-000-00592-7, available for \$14, from Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954. The "reengineering" theme was undoubtedly taken from Michael Hammer & James Champy, *Reengineering the Corporation* (1993).

/2/ The plan of the Social Service Administration (SSA) for a new disability claim process should not be confused with implementation of the Social Security Administrative Reform Act of 1994, P.L. 103-296, 108 Stat. 1464. See Ethel Zelenske, *The Social Security Administrative Reform Act of 1994*, 28 *Clearinghouse Rev.* 897 (Dec. 1994).

/3/ 59 *Fed. Reg.* 18188 -- 264 (Apr. 15, 1994).

/4/ *Id.* at 18221 -- 22.

/5/ Memorandum from Assoc. Commissioner Daniel L. Skoler, June 2, 1993 (reprinted in 15 *Social Security Forum* 8-9 (July 1993)).

/6/ Disability Process Reengineering Team, Social Security Admin., Dep't of Health & Human Servs, *Disability Process Proposal (Revised Report)*, SSA for Tomorrow, *Reengineering* (June 1994).

/7/ *Id.* at 1. If this assertion is to be taken at face value, the Administration could readily eliminate the backlog of disability cases by assigning the reengineering team to that project.

/8/ Disability Process Reengineering Team, *supra* note 6, at 4. For a thorough analysis of the rationale for excluding Americans with Disabilities Act considerations from social security determinations, see Frank S. Ravitch, *Balancing Fundamental Disability Policies: The Relationship Between the Americans with Disabilities Act and Social Security Disability*, 1 *Georgetown J. on Fighting Poverty* 240 (1994).

/9/ Disability Process Reengineering Team, *supra* note 6, at 6.

/10/ Social Security Admin., Dep't of Health & Human Servs., SSA Pub. No. 01-005, *Plan for a New Disability Claim Process* (Sept. 1994). Also published at 59 Fed. Reg. 47887 -- 940 (Sept. 19, 1994) The full report can be obtained by calling (410) 966-8255 or by writing to SSA, Disability Process Reengineering Project, P.O. Box 17052, Baltimore, MD 21235.

/11/ Social Security Admin., *supra* note 10, at ii; 59 Fed. Reg. 47888 (Sept. 19, 1994).

/12/ Social Security Admin., *supra* note 10, at 47 -- 48; 59 Fed. Reg. 47923 (Sept. 19, 1994).

/13/ Social Security Admin., *supra* note 10, at ii; 59 Fed. Reg. 47889 (Sept. 19, 1994).

/14/ Social Security Admin., *supra* note 10, at 21 -- 30; 59 Fed. Reg. 47910 -- 15 (Sept. 19, 1994).

/15/ Social Security Admin., *supra* note 10, at 47; 59 Fed. Reg. 47923 (Sept. 19, 1994).

/16/ Social Security Admin., *supra* note 10, at 47; 59 Fed. Reg. 47923 (Sept. 19, 1994).

/17/ Social Security Admin., *supra* note 10, at 47; 59 Fed. Reg. 47923 (Sept. 19, 1994).

/18/ 20 C.F.R. Secs. 404.900 -- .982, 416.1400 -- .1482.

/19/ There is a limited exception to this exhaustion requirement for "expedited appeals." 20 C.F.R. Secs. 404.923 -- .928, 416.1423 -- .1428.

/20/ Social Security Admin., *supra* note 10, at 8; 59 Fed. Reg. 47902 (Sept. 19, 1994).

/21/ See 20 C.F.R. Secs. 404.969, 416.1469.

/22/ Social Security Admin., *supra* note 10, at 34; 59 Fed. Reg. 47917 (Sept. 19, 1994).

/23/ Social Security Admin., *supra* note 10 at 13-21, 33-35; 59 Fed. Reg. 47,905-910; 47,916-17 (Sept. 19, 1994).

/24/ Social Security Admin., *supra* note 10, at 35 -- 36; 59 Fed. Reg. 47917 (Sept. 19, 1994).

/25/ Remember, either the claimant and claimant's advocate must do the paperwork to obtain in forma pauperis status, or pay the \$120 filing fee.

/26/ Social Security Admin., supra note 10, at 11; 59 Fed. Reg. 47904 (Sept. 19, 1994).

/27/ Except it often takes a year or more to get to the administrative law judge, and a lot more is at stake for the individual than a speeding ticket.

/28/ Much has been written on SSA's policy of nonacquiescence in court decisions with which it officially disagrees. See, e.g., Jody L. Davis, Comment, Nonacquiescence by the Social Security Administration as a Matter of Law: Using Stieberger v. Sullivan as a Model, 44 Mercer L. Rev. 1453 (1993), and comments and articles cited therein.

/29/ In *Bowen v. Yuckert*, 482 U.S. 137, 156 (1987) (Clearinghouse No. 41,780), Justice O'Connor joined by Justice Stevens, voted to uphold the severity regulations against a facial challenge but opined that they could not be used to deny benefits to claimants who meet the statutory standard of disability. Since an additional three justices voted to overturn the severity regulations, a majority, in effect, told SSA to cease using the severity test to deny benefits to eligible claimants.

/30/ 20 C.F.R. pt. 404, subpt. P, app. 1.

/31/ Id. Secs. 404.1520(d), 416.920(d).

/32/ Social Security Admin., supra note 10, at 22 -- 24; 59 Fed. Reg. 47911 -- 12 (Sept. 19, 1994).

/33/ Social Security Admin., supra note 10, at 23; 59 Fed. Reg. 47911 (Sept. 19, 1994).

/34/ Social Security Admin., supra note 10, at 22; 59 Fed. Reg. 47911 (Sept. 19, 1994).

/35/ See supra note 34..

/36/ Social Security Admin., supra note 10, at 23; 59 Fed. Reg. 47911 -- 12 (Sept. 19, 1994).

/37/ Social Security Admin., supra note 10, at 24; 59 Fed. Reg. 47912 (Sept. 19, 1994).

/38/ See supra note 37.

/39/ The Plan calls for parallel changes in the substantive methodology for determining disability in children under the SSI program, Social Security Admin., supra note 10, at 28 -- 30; 59 Fed. Reg. 47914 -- 15 (Sept. 19, 1994). Under the Social Security Act, indigent children are eligible for SSI if they have any impairment of "comparable severity" to an impairment that would make an adult unable to work. 42 U.S.C. Sec. 1382c(a)(3)(4). See *Sullivan v. Zebley*, 493 U.S. 521, 110 S. Ct. 885, 107 L. Ed. 2d 967 (1990) (Clearinghouse No. 43,127).

/40/ Social Security Admin., supra note 10, at i; 59 Fed. Reg. 47887 (Sept. 19, 1994).

/41/ Disability Process Redesign Team, Social Security Admin., Dep't of Health & Human Servs., SSA Pub. No. 01-006, Disability Process Redesign: Next Steps in Implementation (Nov. 1994).

/42/ Id. at 1.

/43/ This article was completed in February 1995. Since then there have been a number of related developments, although as this piece goes to final editing (late June 1995), SSA has still not published a proposed Index of Disabling Impairments or its "universally accepted methodology" for the new step 4. However, SSA did issue final rules in late April 1995 providing "authority to test procedures that modify the disability determination process we currently follow under titles II and XVI of the Social Security Act." 60 Fed. Reg. 20023 -- 29 (Apr. 24, 1995). These test procedures relate to procedural methods, rather than (apparently) substantive decision making. Additionally a number of "task teams" have issued reports on various components of reengineering. Finally, of great concern for the continuing involvement of the private bar in representing Title II claimants, Social Security Commissioner Shirley S. Chater issued a proposal in April 1995, as part of "Reengineering Government -- Phase II" (REGO II), to eliminate the social security attorney fee program. For a more in-depth discussion of efforts to reengineer social security in the context of overall welfare reform, see Gay Gellhorn, Disability and Welfare Reform: Keep the Supplemental Security Income Program but Reengineer the Disability Determination Process, 23 Fordham Urban Law Journal (Summer 1995).