Developments in Social Security Law

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I. INTRODUCTION

On June 8, 1987, the Supreme Court, in *Bowen v. Yuckert*,[1] decided whether the Department of Health and Human Services' "severe impairment" regulation[2] is valid under the Social Security Act.[3] Before *Yuckert*, all eleven circuits had either ruled that the regulation is invalid or narrowed its application.[4] The Supreme Court upheld the regulation and did not narrow its application.[5]

Yuckert has important and far-reaching effects upon every American who applies for disability. This article will review the legislative, regulatory, and case law history that preceded *Yuckert*, analyze the *Yuckert* decision itself, and predict the effect *Yuckert* will have upon the disability claims process.

II. STATUTORY FRAMEWORK

After *Yuckert* it is clear that the Secretary of the Department of Health and Human Services may consider only medical factors and refuse to consider the applicant's age, vocational background, or educational experience in order to decide that a non-working applicant is not disabled. In order to understand why this decision convoluted Congress's definition of disability, it is necessary to review the legislative and regulatory history of the Social Security Act.

When it first passed the Act in 1935, Congress did not include a disability insurance program. After several aborted attempts to enact

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[1]107 S. Ct. 2287 (1987).

[2]20 C.F.R. § 404.1520(c) (1987).

[3]Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-1397f (1982 and Supp. III 1985)).

[4]McDonald v. Secretary of Health & Human Servs., 795 F.2d 1118 (1st Cir. 1986); McCruter v. Bowen, 791 F.2d 1544 (11th Cir. 1986); Williamson v. Secretary of Health & Human Servs., 796 F.2d 146 (6th Cir. 1986); Brown v. Heckler, 786 F.2d 870 (8th Cir. 1986); Hansen v. Heckler, 783 F.2d 170 (10th Cir. 1986); Yuckert v. Heckler, 774 F.2d 1365 (9th Cir. 1985), *rev'd sub nom.* Bowen v. Yuckert 107 S. Ct. 2287 (1987); Johnson v. Heckler, 769 F.2d 1202 (7th Cir. 1985); Baeder v. Heckler, 768 F.2d 547 (3d Cir. 1985); Stone v. Heckler, 752 F.2d 1099 (5th Cir. 1985); Evans v. Heckler, 734 F.2d 1012 (4th Cir. 1984); Chico v. Schweiker, 710 F.2d 947 (2d Cir. 1983).

[5]Bowen v. Yuckert, 107 S. Ct. 2287 (1987).

disability provisions, Congress passed a disability freeze program in 1954.[6] This program allowed a wage-earner who was unable to work because of a "disability" to continue to be insured under the Act for a period of up to one year. This freeze was likened to a "waiver of premium" of an insurance policy. Congress defined "disability" 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 to be of long-continued and indefinite duration . . . ."[7]

In 1956, Congress created the Federal Disability Insurance Trust Fund.[8] Under the Trust Fund, if an insured worker met the definition of disability from the 1954 Act and was at least 50 years of age or older, the worker would be entitled not only to a wage freeze, but also to a monthly benefit.[9]

In 1961, the Secretary promulgated a regulation allowing the Department to deny disability claims on the basis of medical considerations *alone*: "[M]edical considerations alone may justify a finding that the individual is not under a disability where the only impairment is a slight neurosis, slight impairment of sight or hearing, or other similar abnormality or combination of slight abnormalities."[10]

In 1965, Congress redefined disability so that the length of the disability impairment changed from "long-continued and indefinite duration" to "a continuous twelve-month period of time or result in death."[11]

By 1967, Senate data showed a rapid increase in the number of disability recipients.[12] This, as well as a handful of court decisions[13] which some viewed as an unwarranted judicial expansion of "disability," motivated Congress to further refine the definition of disability. McCormick explained this refinement as follows:

> For more than a quarter-century, disabled workers and their dependents have been provided monetary benefits under the Social Security Act. Originally, the Social Security Act defined

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[6]Social Security Amendments of 1954, Pub. L. No. 83-761, § 106, 68 Stat. 1052, 1079-81 (1954).

[7]*Id.* § 106(d), 68 Stat. at 1080.

[8]Social Security Amendments of 1956, Pub. L. No. 84-880, § 201(b), 70 Stat. 807, 820 (1956).

[9]*Id.* § 106(d), 68 Stat. at 1080.

[10]20 C.F.R. § 404.1502(a) (1961).

[11]Social Security Amendments of 1965, Pub. L. No. 89-97, §§ 108(a) 305, 329, 79 Stat. 338, 370, 400 (1965).

[12]S. REP. No. 744, 90th Cong., 1st Sess. 46-51 *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2834, 2880-84.

[13]*E.g.*, Leftwich v. Gardner, 377 F.2d 287 (4th Cir. 1967).

a disabled worker, or disability, in purely medical terms, without reference to vocational factors. In 1967, however, Congress amended the statute to require explicitly that a decision as to an individual's disability take into account that person's potential for employment. According to the amended Act, which remains in force today, a claimant is to be adjudged disabled

> only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.[14]

In 1968, in response to Congress's more precise definition of disability, the Secretary amended the regulations so that agency judges could consider vocational as well as medical factors:

> Whether or not an impairment in a particular case constitutes a disability . . . is determined from all facts of that case. Primary consideration is given to the severity of the individual's impairment. Consideration is also given to such other factors as the individual's age, education, training and work experience. However, medical considerations alone may justify a finding that the individual is not under a disability where the only impairment is a slight neurosis, slight impairment of sight or hearing, or similar abnormality or combination of slight abnormalities. . . .[15]

The regulation provided a "threshold" screening standard: if the claimant was unable to show more than a "slight" impairment the Department would deny his claim without considering vocational factors.

III. Implementation by the Secretary

By 1975, only 8.3 percent of the disability applications were denied because the claimed impairment was "slight."[16] As Stein and Weishaupt observed:

> In 1976, SSA also began encouraging denials under the "slight impairment" rubric. State administrators also criticized this policy on the grounds that it was subject to abuse by staff wishing to

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[14]1 H. McCormick, Social Security Claims & Procedures § 410 at 449-50 (3d ed. 1983) (quoting 42 U.S.C.A. § 423(d)(2)(A) (1982)) (footnotes omitted).

[15]20 C.F.R. § 404.1502(a) (1968).

[16]Stein & Weishaupt, *A Sign of the Times, or Why We Are Winning Fewer Disability Cases*, 15 Clearinghouse Rev. 24, 24 (1981).

> avoid vocational development of cases and the ensuing detailed vocational history and forms required. Use of this summary code "[r]eflects an absence of sequential analysis since the claim is prejudged to be a denial and then the absence of functional loss is ascribed."[17]

By 1978 almost one third of all denials were based on the "slight impairment" standard.[18]

In 1978, the Secretary promulgated new regulations for evaluating disability claims.[19] Under these regulations, claim evaluation is a five step process:

> *Step 1.* If the claimant "is [doing] substantial gainful activity [he is] not disabled regardless of [his] medical condition or [his] age, education, and work experience."[20] This ends the review.
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> *Step 2.* If the claimant does not have a "severe impairment," that is, "any impairment or combination of impairments which significantly limits [his] physical or mental ability to do basic work activities," then the claimant is not disabled, and the review ends.[21]
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> *Step 3.* If the claimant's impairment meets the duration requirements and is a listed impairment or equal to a listed impairment, then the claimant is disabled, and the review ends.[22]
>
> *Step 4.* The agency then reviews the claimant's "residual functional capacity and the physical and mental demands of the work [the claimant] ha[s] done in the past."[23] If the claimant can do this work, he is not disabled, and the review ends.
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> *Step 5.* The agency then "consider[s] [the claimant's] residual functional capacity and [his] age, education, and past work

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[17] *Id.* at 25 (quoting SUBCOMMITTEE ON SOCIAL SECURITY OF THE HOUSE COMMITTEE ON WAYS & MEANS, 96TH CONG., 1ST SESS., ACTUARIAL CONDITION OF DISABILITY INSURANCE (Comm. Print 1979)).

[18] *Id.* at 24.

[19] *See* 20 C.F.R. § 404.1520 (1987).

[20] *Id.* § 404.1520(b).

[21] *Id.* § 404.2510(c).

[22] *Id.* § 404.1520(d).

[23] *Id.* § 404.1520(e).

experience to see if [he] can do other work." If he cannot, the agency will find that he is disabled.[24]

In addition, the Secretary replaced the phrase "slight abnormality" with the phrase "severe impairment." Under the new regulation, "[a]n impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities."[25] "Basic work activities" means "the abilities and aptitudes necessary to do most jobs."[26] These include:

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
(2) Capacities for seeing, hearing, and speaking;
(3) Understanding, carrying out, and remembering simple instructions;
(4) Use of judgment;
(5) Responding appropriately to supervision, co-workers and usual work situations; and
(6) Dealing with changes in a routine work setting.[27]

The Secretary offered a reasonable purpose for the changes, an attempt to achieve "greater program efficiency" by "limiting the number of cases in which it would be necessary to follow the vocational evaluation sequences."[28] Promoting efficiency in a department that is "probably the largest adjudicative agency in the western world" is desirable. At first, at least one critic thought that the step 2 "severe impairment" standard would not change the law regarding whether the claimant has a "medically determinable physical or mental impairment."[29]

The efficiency plan worked well. By 1982, 40.3 percent of the disability claims were denied because the agency found no severe impairment.[30] This meant that of the approximately 2,300,000 claims filed in 1981,[31] agency judges were able to avoid analyzing the vocational history of approximately 1,007,500 wage-earners. This also meant that these wage-earners' applications were evaluated without regard to whether they could do their former work or other available work.

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[24]*Id.* § 404.1520(f). There is a different test for claimants who "have only a marginal education, and long work experience . . . where [the claimant] only did arduous unskilled physical labor . . . ." *Id.*

[25]*Id.* § 404.1521(a).

[26]*Id.* § 404.1521(b).

[27]*Id.*

[28]*Id.*

[29]Welch, *New Social Security Disability Regulation*, 58 MICH. B.J. 330, 331 (1979).

[30]Baeder v. Heckler, 768 F.2d 547, 552 (3d Cir. 1985).

[31]*See* Heckler v. Campbell, 461 U.S. 458, 461 n.2 (1983).

The Secretary based her justification for this policy upon three grounds: (1) her broad authority to regulate permits her to adopt the step 2 "severe impairment" requirement, (2) step 2 is necessary to promote efficiency and, (3) Congress, through the 1984 Amendment to the Act, has endorsed this sequential evaluation process.[32]

Not everyone accepted the Secretary's reasoning. Some thought it was reprehensible that the agency could find a claimant "not disabled" where the agency also found that the claimant was unable to work because of an impairment. Slowly, claimants began to challenge the validity of step 2 in the courts.

IV. Response of the Courts

In 1981, the Fifth Circuit Court of Appeals, in *Lofton v. Schweiker*,[33] criticized the step 2 practice,[34] but upheld the Secretary's decision because substantial supporting evidence existed.[35] The court also noted that the Secretary had represented that this practice was under consideration for revision.[36] The following year, Chief Judge Morton did not bury his disdain for step 2 in a footnote. In *Scruggs v. Schweiker*,[37] Judge Morton found that a 52 year old former coil winder and garment inspector, Beatrice Scruggs, was disabled under the Grids.[38] Judge Morton reversed the Appeals Council's finding of "non-severe impairment."[39] Judge Morton held that the step 2 process of the Secretary did not comply with the statutory definition of disability:

> In this case the AC arrived at step (2) . . . and found plaintiff did not have a severe impairment, and thus was not disabled. The AC terminated further consideration of the claim. One may infer that the AC concluded plaintiff could return to her previous jobs, which were coil winder, cementer in the footwear manufacturing industry, and inspector in the garment manufacturing

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[32]Johnson v. Heckler, 769 F.2d 1202, 1211 (7th Cir. 1985).

[33]653 F.2d 215 (5th Cir. Unit A Aug. 1981).

[34]*Id.* at 217-18 n.1.

[35]*Lofton*, 653 F.2d 215.

[36]*Id.* at 217-18 n.1.

[37]559 F.Supp. 100 (M.D. Tenn. 1982).

[38]Scruggs v. Schweiker, 559 F. Supp. 100 (M.D. Tenn. 1982). The "Grids" are the regulations at 20 C.F.R. §§ 404.1501 - 404.1599 and §§ 416.901 - 416.998. *See generally* McCormick, *supra* note 14, at § 447.

[39]*Scruggs*, 559 F.Supp 100. After the court had remanded the case for a supplemental hearing, the Administrative Law Judge found that the complainant was disabled. *Id.* at 101. The Appeals Council found that under the sequential procedures required by the regulations the claimant's impairment was not severe. Thus, "she could not be found disabled." *Id.* at 102.

industry. But this inference in all cases may be unfair. For example, a less than severe hearing loss to an individual may prevent that individual from continuing in his present occupation requiring better hearing than the individual retains. In another example, an individual who has worked at heavy work may be restricted from continuing in heavy lifting by a less than severe muscular strain, or by some other non-severe health problem. Undoubtedly, many other examples could be conceived. Termination of sequential consideration at step (2) leaves the reviewing court with a record which is lacking a definitive finding on the issue of what job the individual can do unless it may be inferred that an individual without a severe impairment may perform at any job at any level of physical activity. This, of course, is absurd.

Furthermore, the Act does not speak of a non-severe impairment, by definition or otherwise. The Act provides for consideration of clinically established impairments in relation to the individual's ability to perform a job. Section 423(d) does contain the word "severity," but in the context of determining whether the individual's impairments "are of such severity that he is not only unable to do his previous work but cannot, considering [vocational factors] engage in any other kind of [work]." Elsewhere, it is provided that impairments must be demonstrated by "clinical and laboratory diagnostic techniques." Thus, it appears Congress fully intended that the severity of clinically established impairments be considered in relation to the vocational prospects of the individual. A non-severe finding, with nothing more, does not comply with this statutory requirement.[40]

Judge Morton indicated that when future claims that have terminated at step 2 come before the court, the court will assume that had the investigation continued, the fact finder "would have found that the impairments were neither listed nor prevented the individual from returning to previous work."[41]

By 1984, several circuits found the issue of the validity of the regulation squarely before them. In that year, the Sixth Circuit Court of Appeals upheld the validity of the severity regulation.[42] The Fifth,[43] Seventh,[44] and Eleventh[45] Circuits narrowed the implementation of the

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[40]*Id.* at 103 (citations omitted).

[41]*Id.* at 104.

[42]Gist v. Secretary of Health & Human Servs., 736 F.2d 352 (6th Cir. 1984).

[43]Estron v. Heckler, 745 F.2d 340 (5th Cir. 1984).

[44]Taylor v. Schweiker, 739 F.2d 1240 (7th Cir. 1984).

[45]Brady v. Heckler, 724 F.2d 914 (11th Cir. 1984).

regulation. As the court in *Estran v. Heckler* reasoned, the non-severe impairment definition

> must be read in light of the earlier regulations defining severe impairment adopted in 1968, for, as explained by the Secretary in the Federal Register, the new terminology was intended solely to clarify, not to change, the definition of "severe impairment." The change in language was not accompanied by "an intention to alter the levels of severity for a finding of disabled or not disabled." In the 1968 regulations, non-severe impairment is described as, ". . . a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or combination of abnormalities."[46]

These courts did not rule on the actual validity of the non-severe impairment; they only narrowed the implementation of the regulation to the pre-1978 regulation of "slight impairment."

In 1985 there were three important circuit court decisions. These decisions by the Third Circuit,[47] the Seventh Circuit,[48] and the Ninth Circuit[49] ruled invalid step 2 of the evaluation process.

The Third Circuit case, *Baeder v. Heckler*,[50] involved the disability claim of Paul H. Baeder, a fifty-five year old worker who had worked in a glass packing plant for nearly 30 years. By his twenty-seventh year at the plant, he began to experience constant headaches, dizziness, and difficulty moving his joints. He switched to a less demanding job at the plant. Unable to experience adequate relief from his symptoms, he retired. His treating physician opined he was totally disabled due to significant pulmonary obstructive disease, osteoarthritis, diabetes, and diabetic peripheral neuropathy. The Administrative Law Judge, using step 2, found Mr. Baeder's impairment "not severe" and denied his application.[51] The U.S. District Court for New Jersey invalidated the step 2 regulation and ordered the case remanded[52] and the Secretary appealed.

The Third Circuit upheld the district court's finding that the regulation was invalid.[53] Judge Hunter's opinion found that the regulation was inconsistent with the statute. The court rejected the Secretary's

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[46]745 F.2d at 340-41 (citations omitted).
[47]Baeder v. Heckler, 768 F.2d 547 (3d Cir. 1985).
[48]Johnson v. Heckler, 769 F.2d 1202 (7th Cir. 1985).
[49]Yuckert v. Heckler, 774 F.2d 1365 (9th Cir. 1985).
[50]768 F.2d 547 (3d Cir. 1985).
[51]*Id.* at 550.
[52]Baeder v. Heckler, 592 F.Supp. 1489 (D.N.J. 1984).
[53]*Baeder*, 768 F.2d at 553.

argument that the legislative history of the Social Security Act supports the contention that disability applicants may be rejected by medical factors alone. The court discovered that the 1954 legislative history supported the notion that disability claims must be evaluated by both medical *and* vocational factors. The court also noted that the regulation

> allows the Secretary to bypass a full-scale evaluation, which would consider and relate both medical and vocational factors, of an applicant who might actually be entitled to benefits were his age, education, and work experience considered.[54]

By way of example, the court noted in a footnote that the district court found that had Mr. Baeder's claim been evaluated by the vocational grids, there would have been a finding of disability.[55]

The Seventh Circuit Court of Appeals reviewed a class action from the Northern District of Illinois in which the district court invalidated the step 2 regulation.[56] There were two named plaintiffs. The first was Edna Johnson, a former nurses' aide who had two years of high school education. Mrs. Johnson proved at the administrative hearing by unrebutted evidence that she was unable to perform her past job due to anxiety neurosis, duodenal ulcer, Schatzki's ring of the esophagus, lumbago and diabetes mellitus. The Administrative Law Judge, considered each of her impairments separately and found that each impairment was not severe under step 2.[57]

The second named plaintiff was James Montgomery, a butcher of some 28 years whose disability benefits were terminated after having received disability benefits for six years. Mr. Montgomery had a sixth grade education. The Secretary found him disabled due to diabetes and heart condition. Six years later the Appeals Council reversed the Administrative Law Judge's finding of continuing disability, ruling that his impairments were non-severe.[58]

In a well written opinion, Circuit Judge Bauer called the Social Security Act "one of the most important and far-reaching enactments ever passed by Congress, affecting the life of almost every American."[59] After reviewing a very important part of this Act, the disability provisions,

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[54]*Id.* at 553.

[55]*Id.* n.4.

[56]Johnson v. Heckler, 769 F.2d 1202 (7th Cir. 1985), *aff'g* 593 F. Supp. 375 (N.D. Ill. 1984).

[57]769 F.2d at 1206. The Seventh Circuit noted that after December 1, 1984, the Secretary must consider the combined effect of non-severe impairments at step 2. *Id.* at 1213.

[58]*Id.* at 1206.

[59]*Id.* at 1209.

the court ruled that the step 2 non-severity regulation was invalid under the Act.[60] The court carefully reviewed the legislative history of the Act together with the comments of Congress. After this examination, the court rejected the contention of the Secretary that both the Act and its history support a denial of disability benefits on medical factors alone. The court convincingly dispelled the assertion of the Secretary that the 1984 Disability Reform Act[61] gave indirect approval of the step 2 regulation. Instead, the court found that not only was there no approbation by Congress of step 2 but there was constrained criticism by Congress of its use.[62] The Seventh Circuit repudiated the Secretary's efficiency argument as justification for her threshold requirement: "[E]fficiency arguments provide absolutely no basis for the Secretary to violate Congressional mandates to implement properly the disability benefits program of this nation."[63]

The Ninth Circuit, citing the "lack of symmetry" between the Act and the regulation, held with the Third and Seventh Circuits that the regulation was invalid.[64] Each of these three circuits reasoned that case law clearly established that once a claimant has shown his inability to perform his past relevant work the burden of proof shifts to the Secretary. The Secretary must prove, while considering the age and vocational background of the claimant, that there are jobs available in significant numbers that the claimant is capable of performing. To allow the Secretary to deny claims as "non-severe," the courts found, would permit the Secretary not to consider the age and vocational history. In addition to altering the burden of proof, the courts found that the Social Security Act simply did not require that the claimant's impairment be "severe."[65]

Notably, the courts refused to accept the invitation to narrowly construe step 2 to permit only a "*de minimus*" type of threshold assessment. The courts could find nothing in the regulation that limited the Secretary to a "*de minimus*" review. Further, the courts could not find authority in the Social Security Act allowing implementation of a threshold requirement. Perhaps a more significant factor in the courts' refusal to narrow the regulation and accept step 2 as a "*de minimus*" standard was the indiscriminate manner in which the Secretary employed step 2. As demonstrated by the facts in the Third and Seventh Circuit

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[60]*Johnson*, 769 F.2d 1202.

[61]Social Security Disability Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984).

[62]*Johnson*, 769 F.2d at 1212.

[63]*Id.* at 1213.

[64]Yuckert v. Heckler, 774 F.2d 1365 (9th Cir. 1985).

[65]*See supra* notes 47-49.

cases, the courts viewed the threshold argument of the Secretary incredulously.[66]

By 1986, eleven circuits had either ruled the regulation invalid or narrowed its construction so that it would only apply as a threshold standard.[67] The stage was now set for the final battleground, the Supreme Court.

V. The *Yuckert* Case

It is of no great surprise that the case chosen by the Supreme Court to review was that of a young individual (45 years old) with a high school education, two years of business college and real estate training.[68] Equally predictable was the fact that the impairments alleged by the claimant in the selected case were more subjective than objective (episodes of dizziness and vision problems). No reader should be surprised to learn that the claimant was attending a two year computer program course, drove a car 80 to 90 miles per week, and was denied her claim throughout the administrative process and at the district court level. In a five to three decision, the Supreme Court decided that the Secretary had the ability to require Janet Yuckert to make a threshold showing that her impairments were medically "severe" without regard to her age or vocational factors.[69] In support of this ruling, the Supreme Court cited the language of the Act and legislative history.

Justice Powell, who wrote the unconvincing majority decision for the divided Court, compared the statutory definition of "disability" with the definition in the regulation.[70] The Court did not begin its comparison

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[66]*See* Baeder v. Heckler, 768 F.2d 547 (3d Cir. 1985); Johnson v. Heckler, 769 F.2d 1202 (7th Cir. 1985).

[67]*See* cases cited *supra* note 4.

[68]Bowen v. Yuckert, 107 S. Ct. 2287 (1987).

[69]*Yuckert*, 107 S. Ct. 2287.

[70]This statute provides in pertinent part:

> The term "disability" means
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> (A) 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; or
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> (B) in the case of an individual who attained the age of 55 and is blind . . .
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> (2) For purposes of paragraph (1)(A)-
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> (A) An individual except a widow, surviving divorced wife, widower, or surviving divorced husband for purposes of section 402(e) or (f) of this title shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists

of the regulation with the statute by laying the statute and the step 2 regulation side by side. Rather, the Court began its comparison by first bifurcating the statute. The first part of the bifurcated statute was passed in 1954. The second part of the statute was passed in 1967. In addition to dividing the statute, the Court edited a significant portion of the 1967 amendment.[71] Having cut and spliced the statute, the Court was ready to compare.

The Court ruled that the regulation did not conflict with that portion of the Act which was passed in 1954. In fact, the Court found that the 1954 statutory scheme and the regulation were similar in their approach. That is, both the statute and the regulation dealt with "functional impairments." To support this conclusion, the Court cited a part of the legislative history accompanying the passage of the 1954 statute and found that this history anticipated the creation of a "threshold" level of review by the Secretary.[72]

Next, the Court considered Yuckert's argument that the severity regulation was inconsistent with the 1967 amendment's requirement that the Secretary consider her impairment not in a vacuum, but in relation to her age and other vocational factors to determine whether she had an impairment which prevented her from performing substantial gainful activity. Justice Powell dealt with this position by using a type of judicial sleight of hand; he quoted only the edited version of this now bifurcated statute:

> [A]n individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work. . .[73]

The Court said, "The words of this provision limit the Secretary's authority to grant disability benefits, not to deny them."[74]

> in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual) "work which exists in the national economy" means work which exists in significant numbers either in the regions where such individual lives or in several regions of the country. 42 U.S.C. § 423(d).

[71] *Yuckert*, 107 S. Ct. at 2294. The Court omitted the portion of the statute that says "For purposes of paragraph (1)(A)."

[72] *Id.* at 2293-94.

[73] *Id.* at 2294 (quoting Social Sec. Amendments of 1967, Pub. L. No. 90-248, §158(b), 81 Stat. 821, 868 (1968)).

[74] *Id.*

The weakness in the Court's comparison of the statute and regulation is that its version of the statute is deficient. The Court ignored the key phrase: "For purposes of paragraph (1)(A)." This phrase, written by Congress in 1967, means that the age and vocational factors are to further define the meaning of "disability." Justice Blackmun, in his dissenting opinion, wrote that a "straight forward" reading of the statute leads to the conclusion that the age and vocational factors are to be considered at the time the issue of disability is decided and not afterward.[75]

Justice Powell attempted to bolster this interpretation of the 1967 amendment by citing a portion of the 1967 legislative history. As Justice Blackmun noted in his dissent, the section of the legislative history used by the majority is incomplete.[76] Both the majority and dissent claim the legislative history favors its particular interpretation of the statute; that is, vocational factors should/should not be considered initially when deciding disability. A careful review of the 1967 history beckons the reviewers to conclude that the legislative history is at best equivocal.

Justice Powell concluded his analysis of the regulation by reference to the Social Security Disability Benefits Reform Act of 1984.[77] He found that this Act, even though it was meant as remedial legislation to aid disability recipients who had been terminated, supported the severity regulation which had been promulgated some six years earlier.[78] Ignoring the efficacy of employing legislative history made subsequent to the passage of an act, Justice Powell was incorrect to characterize the 1984 legislative history as supportive of the severity regulation.

There are three reasons why the 1984 legislative history pertaining to the Disability Reform Act cannot be construed to support the severity regulation. First, nowhere in the 1984 Act's legislative history does Congress expressly approve the step 2 regulation. Second, step 2 was criticized, not approved.[79] Third, the legislators at the time of the hearings were painfully aware of two factors. First, new legislation was being created to make review of cessation cases fairer in light of the Secretary's earlier, almost arbitrary, terminations.[80] Second, over one million constituents had been denied disability at step 2 alone in 1982.[81] These two

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[75]*Id.* at 2300-11 (Blackmun J., dissenting).

[76]*Id.* at 2302.

[77]*Id.* at 2296 (Citing Pub. L. No. 98-460, 98 Stat. 1794 (1984)).

[78]*Id.* at 2295-96.

[79]*See, e.g.*, HOUSE COMM. ON WAYS AND MEANS, SOCIAL SECURITY DISABILITY BENEFITS REFORM ACT OF 1984, H.R. Rep. No. 98-618, 98th cong., 2d Sess. 6-8, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3043-46.

[80]*Id.*

[81]*Id.*

factors led Congress to view the Secretary and her regulations with, at best, caution. To assert that congressional committees, charged with overseeing the Secretary, would give blanket approval to step 2 ignores not only what was said, but also the atmosphere in which the comments were made.

Justice O'Connor filed a concurring opinion in which Justice Stevens joined.[82] Justice O'Connor felt compelled to address the issues that Yuckert and the rather large number of *amici curia* raised concerning the Secretary's implementation of step 2. Justice O'Connor found that there was evidence, unrebutted by the Secretary, that proved that the Secretary had employed the step 2 regulation "in a manner inconsistent with the statutory definition of disability."[83] Justice O'Connor concluded her opinion by stating that step 2 was only a threshold step: "Only those claimants with slight abnormalities that do not significantly limit any 'basic work activity' can be denied benefits without undertaking this vocational analysis."[84]

Justice Blackmun, joined by Justices Brennan and Marshall, dissented.[85] The dissent, written in a clear and convincing manner, expressed precisely the practical problem of allowing step 2 to exist:

> The § 423(d)(2)(A) inquiry furthers the purpose of the disability benefits program by ensuring an individualized assessment of alleged disability in cases of insured workers. The inquiry takes into account the fact that the same medically determinable impairment affects persons with different vocational characteristics differently. A relatively young, well educated, and experienced individual who can no longer perform his past work due to a medical impairment may be able to transfer his skills to another job and perform substantial gainful work. The same medical impairment may have a much greater effect on a person's ability to perform substantial gainful work if the person is of advanced age and has minimal education and limited work experience. Thus, a particular medical impairment may not be disabling for the first individual while it could be for the second.[86]

VI. Future Effects of *Yuckert*

Although it has been only a short time since the *Yuckert* decision, some experts have already expressed their opinions about its effect. Some

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[82]107 S. Ct. at 2298-2300 (O'Connor J., concurring).

[83]*Id.* at 2299.

[84]*Id.*

[85]*Id.* at 2300 (Blackmun, J., dissenting).

[86]*Id.* at 2303.

believe that whatever harm the Court created by upholding the facial validity of the regulation has been "tempered" by the convincing opinion of Justice O'Connor. Other Supreme Court observers declared that the ruling was only a "partial defeat for disability claimants." They suggested that the impact was difficult to gauge because it would depend upon how broadly the decision is interpreted by the government and lower courts.[87]

Bar predictions are optimistic, but as long as the "severe impairment" requirement exists, agency rank-and-file are free to continue to use this provision to deny claimants a full and fair evaluation.

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[87]*See* Taylor, *Justices Uphold Regulation Limiting Disability Benefits*, New York Times, June 9, 1987, at A23, col. 1.