

Developments in Social Security Law

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I. INTRODUCTION

This survey period witnessed four stunning victories for disabled persons seeking Social Security benefits. The landmark United States Supreme Court decision of *Sullivan v. Zebley*¹ greatly expands the ability of poor disabled children to obtain Supplemental Security Income (SSI). *Zebley*, a large class action suit, was the first loss on the merits for the Social Security Administration (the Administration) since 1979 and the first public benefits victory in any program before the Rehnquist Court.² *Zebley* affects hundreds of thousands of children and class members whose applications for benefits have been denied in the past. The decision also has far-reaching implications into other areas of Social Security disability law.

Widows, widowers, and surviving divorced spouses scored substantial victories in their quest for disability benefits in four circuit court decisions during the survey period.³ In two of these decisions, the rationale of

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The authors would like to acknowledge Nancy G. Shor, Executive Director of the National Organization of Social Security Claimants' Representatives, who served as a consultant to the authors in the preparation of this Article. Ms. Shor has been the Executive Director of the National Organization of Social Security Claimants' Representatives for the past ten years. She frequently lectures on Social Security disability issues. She edits the monthly publication *Social Security Forum*, which is devoted to developments in the disability program and the law. She is also the co-editor of Matthew Bender's *Social Security Practice Guide*. She is a graduate of Boston University School of Law.

1. 110 S. Ct. 885 (1990).

2. Weishaupt & Stein, *Supreme Court's Zebley Decision Will Greatly Expand Eligibility for SSI Childhood Disability Benefits and Medicaid*, 12 SOC. SECURITY F. 1, 3 (May 1990).

3. Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246, 1255 (10th Cir. 1990) (the Secretary must consider any medical evidence that is relevant to the residual functional capacity of the claimant for widows' disability benefits); Ruff v. Sullivan, 907 F.2d 915, 919 (9th Cir. 1990) (the Secretary must consider whether a surviving spouse's residual functional capacity precludes her from gainful employment); Cassas v. Secretary of Health & Human Servs., 893 F.2d 454, 458 (1st Cir. 1990) (functional capacity cannot be ignored in considering medical equivalence and, ultimately, disability); Kier v. Sullivan, 888 F.2d 244, 247 (2d Cir. 1989) (district court properly ordered the Secretary to consider widow's residual functional capacity in determining her eligibility for benefits).

Zebley was relied on in part.⁴ Also, Congress has intervened in this area in the 1990 Omnibus Budget Reconciliation Act⁵ by lowering the standard that widows and widowers are required to meet to establish disabilities after January 1, 1991. Considering the sound rationale of *Zebley*, the circuit court decisions, and the statutory amendment by Congress, soon widows and widowers will have greater access to benefits nationwide.

The survey period also contained *Hyatt v. Sullivan*,⁶ a huge class action victory in the Fourth Circuit regarding the assessment of disabling pain and other subjective symptoms. The relief granted by the Fourth Circuit Court represents a bold move in judicial activism and promises to provide more uniformity throughout the circuit courts in this most difficult area of Social Security disability law.⁷

Finally, the Second Circuit's class action suit of *New York v. Sullivan*⁸ is an important development for persons with disabilities resulting from cardiac ischemia. In this decision, the Second Circuit invalidated the Secretary of Health and Human Services' (the Secretary's) practice of exclusive reliance on treadmill test results to deny disability claims.⁹ The decision has national implications because the Secretary's policy regarding reliance on treadmill tests has been implemented nationwide.¹⁰

II. DISABLED CHILDREN - INDIVIDUALIZED ASSESSMENTS

The United States Supreme Court ruled in *Zebley* that the Social Security Administration's refusal to consider functional limitations when evaluating the severity of the physical or mental impairments of children applying for Supplemental Security Income benefits was manifestly contrary to the statutory scheme of the Supplemental Security Income Program.¹¹

4. *Davidson*, 912 F.2d at 252 (*Zebley* makes clear that the function of the listings is to establish a description of impairments that are conclusively presumptive of disability); *Ruff*, 907 F.2d at 919 (relying on the *Zebley* Court's reasoning that the child disability listings do not cover all disability illnesses).

5. Omnibus Budget Reconciliation Act, Pub. L. No. 101-508, § 5703, 104 Stat. 1388 (1990).

6. 899 F.2d 329 (4th Cir. 1990).

7. For a discussion of the law regarding the assessment of pain as a disability, see Ruppert, *Developments in Social Security Law*, 22 IND. L. REV. 401 (1989).

8. 906 F.2d 910 (2nd Cir. 1990).

9. *Id.* at 918.

10. *Evaluating Cardiovascular Impairments: A Focus on Treadmill Tests*, 12 Soc. SECURITY F. 1, 11 (Aug. 1990) [hereinafter *Cardiovascular Impairments*].

11. *Zebley*, 110 S. Ct. at 897. The Supplemental Security Income Program, Title XVI of the Social Security Act, is a social welfare program for the aged, blind, and disabled. See 42 U.S.C. § 1382c(a)(1) (1983 & Supp. 1990). The purpose of the Supplemental Security Income Program is to ensure that the recipient's income is maintained at a subsistence level. Eligibility is based on need. *Whaley v. Schweiker*, 663 F.2d 871, 873 (9th Cir. 1981).

In January of 1984, the district court certified the *Zebley* class including persons "who are now, or who in the future will be, entitled to an administrative determination . . . as to whether supplemental security income benefits are payable on account of a child who is disabled, or as to whether such benefits have been improperly denied, or improperly terminated, or should be resumed."¹² The *Zebley* court noted that every year about 2,000,000 claims for SSI benefits are adjudicated.¹³ Of these, approximately 100,000 are child disability claims.¹⁴ The Supreme Court ruled in *Zebley* that the Administration's child disability regulations have been contrary to the statutory standard for the evaluation of children's disabilities since the inception of the SSI program.¹⁵ Thus, applicants whose claims are denied because the Administration applied illegal standards have the right to reopen their claims.¹⁶ Clearly, the Administration will have to review all denied claims for children's SSI benefits going back at least to 1983.¹⁷ Potentially, any denied claim dating back to the program's inception in 1974 could be reopened.¹⁸ In any event, the Administration will be required to readjudicate hundreds of thousands of claims.

A disabled person is eligible for SSI benefits if his or her income and financial resources is below a certain level.¹⁹ The relevant portion of the statute defining disability reads:

An individual shall be considered to be disabled . . . if he is unable to engage in *any substantial gainful activity*²⁰ by reason

12. *Zebley*, 110 S. Ct. at 889.

13. *Id.* at 888. See also SOCIAL SECURITY ADMINISTRATION, OFFICE OF DISABILITY, PRELIMINARY STAFF REPORT: CHILDHOOD DISABILITY STUDY B-1 (Sept. 20, 1989).

14. *Zebley*, 110 S. Ct. at 888.

15. See *id.* at 894-95.

16. *Bowen v. New York*, 476 U.S. 467, 486 (1986).

17. At a minimum, the Administration will be ordered to go back and examine the cases of children who were denied benefits after May 10, 1983 (sixty days before the filing of the *Zebley* case). *Zebley: New Standards for SSI Benefits for Poor Disabled Children*, 12 Soc. SECURITY F. 1, 4 (Feb. 1990).

18. *Id.*

19. For the income test used to define this level, see 42 U.S.C. § 1382(a) (1983 & Supp. 1990).

20. Substantial gainful activity is work activity that is both substantial and gainful:

(a) *Substantial work activity*. Substantial work activity is work activity that involves doing significant physical or mental activities. Your work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.

(b) *Gainful work activity*. Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually

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 twelve months (or in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of *comparable severity*).²¹

The Secretary promulgated a five-step test to determine whether an *adult* claimant is disabled.²² The five-step test can be summarized as follows:

- 1) Whether the claimant is engaged in substantial gainful activity. If he or she is, the disability claim is denied.²³ If he or she is not, the decisionmaker proceeds to step two.
- 2) Whether the claimant has a medically severe impairment or combination of impairments.²⁴ If he or she does not, the disability claim is denied.²⁵ If he or she does, the decisionmaker proceeds to step three.
- 3) Whether the claimant's disability meets or equals one of the listed impairments²⁶ that the Administration acknowledges are so severe as to preclude *any gainful activity*. If the disability meets or equals one of the listed impairments, the claimant is con-

done for pay or profit, whether or not a profit is realized.

(c) *Some other activities*. Generally, we do not consider activities like taking care of yourself, household tasks, hobbies, therapy, school attendance, club activities, or social programs to be substantial gainful activity.

20 C.F.R. § 416.972 (1990). For further definition of substantial gainful activity, see 20 C.F.R. §§ 416.910, 416.971 (1990).

21. 42 U.S.C. § 1382c(a)(3)(A) (emphasis added).

22. 20 C.F.R. § 416.920 (1990). In addition to the five-step test, a special procedure is required for mental disabilities. *Id.* § 416.920(a). The definition of disability is the same for adults under Title II and for children under Title XVI. See 42 U.S.C. §§ 401-33 (1983 & Supp. 1990) (Social Security disability), 42 U.S.C. §§ 416(i)(1), 1382c(a)(3)(A) (1983 & Supp. 1990) (SSI). The primary distinctions between the two programs are the purposes and the amount of benefits payable. Social Security disability benefits are unrelated to need and are designed to provide the wage earner and the dependent members of the family with protection against the hardship occasioned by the wage earner's loss of earnings. *Califano v. Jobst*, 434 U.S. 47, 52 (1977). Social Security disability is not simply a welfare program. *Id.* Instead, Social Security disability benefits are based on the disabled person's past earnings. 42 U.S.C. §§ 402, 415.

23. 20 C.F.R. § 416.920(a), (b).

24. The existence of a "severe" impairment must be shown by medical evidence alone. This means that the impairment must have medically demonstrable anatomical, physiological, or psychological abnormalities. 20 C.F.R. § 404.1508 (1990).

25. 20 C.F.R. § 416.920(c).

26. The listed impairments are found at 20 C.F.R. pt. 404, subpt. P, app. 1 (1990).

clusively presumed to be disabled.²⁷ If not, the decisionmaker proceeds to step four.

4) Whether the impairment prevents the claimant from performing work he or she has performed in the past. If the claimant is able to perform his or her previous work, he or she is not disabled.²⁸ If he or she is not able to perform his or her previous work, the decisionmaker proceeds to step five.

5) Whether the claimant is able to perform other work in the national economy in view of his or her residual functional capacity, age, education, and work experience.²⁹ If he or she is

27. 20 C.F.R. § 416.920(d). The meets or equals analysis is conducted upon medical evidence alone without consideration of a claimant's vocational or functional capacity. For a claimant to show that his impairment matches a listing, "the impairment must meet *all* of the specified medical criteria. An impairment that manifests only some of those criteria, no matter how severely, does not qualify." *Zebley*, 110 S. Ct. at 891 (emphasis in original). For a claimant to qualify for benefits by showing that his unlisted impairment, or combination of impairments, is "equivalent" to a listed impairment, he must present medical findings equal in severity to *all* the criteria for the one most similarly listed impairment. See 20 C.F.R. § 416.926(a) (1990). "A claimant cannot qualify for benefits under an 'equivalence' analysis by showing that the overall functional impact of his unlisted impairment or combination of impairments is as severe as that of a listed impairment." *Zebley*, 110 S. Ct. at 892. A claimant cannot qualify if his symptoms, signs, and laboratory findings are not at least equivalent in severity to *all* the criteria of one of the listed impairments regardless of how severely impaired that individual actually is. *Zebley*, 110 S. Ct. at 891-92; [1982-1983 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 14,540 [hereinafter SSR 83-19].

28. 20 C.F.R. § 416.920(e). The fourth step in determining a claimant's disability requires an assessment by the administrative law judge of the claimant's residual functional capacity (RFC). RFC is defined as "what you can still do despite your limitations." *Id.* § 404.1545(a) (1990). RFC is a medical assessment of how much the claimant's ability to function on a job is limited by his or her severe impairments. RFC is measured by the claimant's physical and mental ability to function adequately in a work situation for eight hours a day. Physical RFC is determined by the ability to walk, stand, sit, bend, lift, etc. In addition to these "exertional" limitations, the effects of pain, fatigue and other "nonexertional" limitations are considered in the determination of physical RFC. Mental RFC involves memory, psychological adjustment to work, and other factors that might influence the ability to perform basic work activities. R. GILBERT & J. PETERS, SOCIAL SECURITY DISABILITY CLAIMS § 1:7 (1990) [hereinafter SOCIAL SECURITY DISABILITY CLAIMS].

29. This step is primarily an administrative decision. The administrative law judge is guided by the medical-vocational guidelines and tables known as the "grids." See 20 C.F.R. Pt. 404, subpt. P, app. 2 (1990). The grids are used in addressing the question of whether there is work in the national economy that the claimant can perform. See 20 C.F.R. § 404.1566 (1990). The three tables of the grids correspond to a claimant's RFC defined in terms of the exertional level the claimant is deemed capable of performing on a sustained basis. The categories of RFC are sedentary, light, medium, heavy, and very heavy. *Id.* § 404.1567; SOCIAL SECURITY DISABILITY CLAIMS, *supra* note 28, § 1:8. Resources

able to perform other work, benefits are denied. If not, the claimant is entitled to benefits.³⁰

For the crucial step three analysis, the Secretary has promulgated 125 listed impairments for adults³¹ and 57 additional listed impairments for children.³² The listings are descriptions of "various physical and mental illnesses and abnormalities, most of which are categorized by the body system they affect."³³ Each impairment is defined in terms of several specific medical signs, symptoms, or laboratory test results.³⁴ The Secretary sets the disability criteria for the children's disability listings at the same level of medical severity used for adults.³⁵

Because the listings are examples of medical conditions that ordinarily prevent a person from working or engaging in *any gainful activity*, rather than the statutory standard of *any substantial gainful activity*, they set a higher level of severity than the statutory standard which allows for a finding of disability depending upon the vocational impact of a condition that does not rise to the level of severity of a listed impairment.³⁶ Thus, an adult or child whose impairment meets or equals one of the listed impairments is conclusively presumed to be disabled and entitled to benefits.³⁷

The *Zebley* Court observed that for an adult, if the impairment fails to meet or equal a listing, the evaluation proceeds to the fourth and fifth steps, as set out above, which involve an individual assessment of the claimant's residual functional capacity (RFC).³⁸ These steps are included in what is commonly known as the "vocational factors."³⁹ The

are available that define work which exists in the national economy and that take notice of national patterns of job availability and job requirements: (1) *Dictionary of Occupational Titles*, published by the Department of Labor; (2) *County Business Patterns*, published by the Bureau of the Census; (3) *Census Reports*, also published by the Bureau of the Census; (4) *Occupational Analyses*, prepared for the Social Security Administration by various state employment agencies; and (5) *Occupational Outlook Handbook*, published by the Bureau of Labor Statistics. The grid rule that corresponds to the claimant's RFC, age, education, skills, and prior work experience dictates a decision of disabled or not disabled. See 20 C.F.R. pt. 404, subpt. P, app. 2.

30. See 20 C.F.R. § 416.920(f).

31. 20 C.F.R. pt. 404, subpt. P, app. 1 (pt A).

32. 20 C.F.R. pt. 404, subpt. P, app. 1 (pt B).

33. *Sullivan v. Zebley*, 110 S. Ct. 885, 891 (1990).

34. *Id.*

35. 42 Fed. Reg. 14,705 (1977).

36. *Zebley*, 110 S. Ct. at 892. For a discussion of disability standards, see *supra* note 22 and accompanying text.

37. *Zebley*, 110 S. Ct. at 892.

38. *Id.* (a claimant who does not qualify for benefits under the listings still has the opportunity to show that his impairment prevents him from working).

39. *Davidson v. Secretary of Health & Human Servs.*, 912 F.2d 1246, 1253 (10th Cir. 1990).

evaluation of a disabled adult's claim does not end at the listings because the claimant still has the opportunity to show that his or her impairment in fact prevents the claimant from working.⁴⁰ If a claimant suffers from a less severe impairment than one of the listed impairments, the Secretary must determine whether the claimant retains the ability to perform either his or her former work or some less demanding employment.⁴¹

The Secretary's regulations for a child claimant, however, ended at step three above.⁴² A child only qualifies for benefits if his or her impairment matches or is medically equal to a listed impairment.⁴³ The *Zebley* Court noted that because the listings are set at a higher level of dysfunction than the inability to perform substantial gainful activity, the "listings only" approach also excluded children:

whose impairments are not quite severe enough to rise to the presumptively disabling level set by the listings; children with impairments that might not disable any and all children, but which actually disable *them*, due to symptomatic effects such as pain, nausea, side effects of medication, etc., or due to their particular age, educational background, and circumstances.⁴⁴

The Court noted further that the listed impairments, as a finite set of medical conditions, are necessarily underinclusive.⁴⁵ Finally, the Court noted that the Secretary described the child disability lists as including only the "more common impairments" affecting children.⁴⁶ Several well-known childhood impairments including spina bifida, Down's syndrome, muscular dystrophy, autism, AIDS, infant drug dependency, and fetal alcohol syndrome were omitted from the listings.⁴⁷

The *Zebley* Court, in noting that the child disability statute provides that "SSI benefits shall be provided to children with 'any . . . impairment of comparable severity' to an impairment that would make an adult 'unable to engage in any substantial gainful activity,'"⁴⁸ held that the Secretary's regulations and rulings requiring children to meet or equal one of the listings in step three, which uses the higher severity standard regardless of how functionally disabled the child might actually be, is

40. *Zebley*, 110 S. Ct. at 893.

41. *Id.*

42. See 20 C.F.R. § 416.924(b)(2), (3) (1990).

43. *Id.*; *Zebley*, 110 S. Ct. at 894.

44. *Zebley*, 110 S. Ct. at 894 (emphasis in original). See also Weishaupt & Stein, *supra* note 2, at 4-5.

45. See *Zebley*, 110 S. Ct. at 893.

46. *Id.*

47. *Id.* at 893 n.13.

48. *Id.* at 897.

“manifestly contrary to statute.”⁴⁹ The *Zebly* Court held that if a child fails to qualify for benefits at the third step, the Administration must use an individualized *functional* (rather than vocational) analysis in assessing the impact of an impairment on the child’s age-appropriate normal daily activities.⁵⁰ The Secretary’s analysis must determine the functional impact of the child’s impairment upon the normal daily activities of a child of the claimant’s age, including skills related to speaking, walking, washing, dressing, eating, going to school, and playing.⁵¹

The Secretary responded quickly to the *Zebly* decision. On February 26, 1990, SSI adjudicators were instructed “to award benefits to any child whose impairment [meets] the old invalidated standard, and to hold, but not deny, any case which would have been denied under the invalidated standard.”⁵² On March 23, 1990, the Administration issued “Interim Standards For Disabled Children” designed to implement the *Zebly* decision.⁵³ Also, the Administration rescinded Social Security Ruling 83-19 entitled “Finding Disability on the Basis of Medical Considerations Alone - The Listing of Impairments and Medical Equivalency.”⁵⁴ Because this ruling applies to both adults and children, its implications go beyond *Zebly*.⁵⁵ Some of these implications will be discussed in the next section regarding widows’ and widowers’ Social Security disability benefit eligibility.

The Interim Standards change the Secretary’s analysis in determining whether a child is entitled to benefits in at least two important respects. First, in the step three “meets or equals” analysis, the SSI adjudicator “*must* consider the overall functional consequences of the impairment upon the child’s daily living activities and age-appropriate behavior” in determining whether the child’s impairment is equivalent in severity to any listed impairment.⁵⁶ As noted above, the former invalid analysis permitted only medical evidence at step three and no evidence regarding a claimant’s functional capacity.⁵⁷ Secondly, the Interim Standards provide for a fourth step for children whose impairments do not meet or equal a listing. In this step, the adjudicator must determine whether the

49. *Id.*

50. *Id.*

51. *Id.*

52. *Interim Standards for Disabled Children Underway*, 12 SOC. SECURITY F. 1, 1 (Mar. 1990) [hereinafter *Interim Standards*].

53. *See id.* at 15.

54. *Id.* at 1.

55. *Id.*

56. *Id.* at 16 (emphasis in original).

57. *See supra* notes 26-27 and accompanying text.

impact of the impairment on the child's ability to function is comparable in severity to that which would make an adult unable to engage in substantial gainful activity.⁵⁸ The adjudicator must make an individualized functional assessment of the child's residual functional capacity incorporating factors such as environmental limitations, pain, treatment that interferes with daily living activities, side effects of medication, periods of incapacity, and hospitalization.⁵⁹ If the adjudicator determines that the individualized functional assessment shows that the child is comparably restricted in his or her ability to engage in activities of daily living or behaviors appropriate to the child's age, the child will be considered disabled.⁶⁰

III. SOCIAL SECURITY DISABILITY BENEFIT ELIGIBILITY TO WIDOWS AND WIDOWERS

During the survey period, four circuit court decisions attacked the Secretary's regulations for adjudicating a widow's or widower's disability benefit eligibility.⁶¹ A widow, widower, or surviving divorced spouse of a deceased wage earner may seek Social Security disability benefits as part of Title II of the Social Security Act on the basis of the deceased worker's earnings record.⁶² The surviving spouse must prove that he or she is between fifty and sixty years old and that the disabling impairment is of a level of severity deemed to be sufficient to preclude an individual

58. *Interim Standards*, *supra* note 52, at 16.

59. *Id.*

60. *Id.*

61. See cases cited *supra* note 3. The analysis in all four opinions is quite similar. For the sake of simplicity, we will discuss the most recent decision, *Davidson v. Secretary of Health & Human Services*, 912 F.2d 1246 (10th Cir. 1990), which incorporated the analysis of the other three opinions.

62. See 42 U.S.C. § 423(d)(2)(B) (1983 & Supp. 1990); 20 C.F.R. § 404.1577 (1990). For the purposes of this discussion, the terms "widow," "widower," and "divorced surviving spouse" will be used interchangeably. A person seeking these benefits must prove his or her status as a widow or widower of a deceased worker as defined under 20 C.F.R. §§ 404.345, 404.347 (1990). A surviving person who was married to an insured worker and was later divorced may qualify for disabled widow[er]'s benefits. The basic rule is that the widow[er] and the insured must have been married for ten years just before the date the divorce became effective and the widow[er] must not be currently married. *Id.* § 404.336.

Benefits for widows and widowers with disabilities provide income for persons who might otherwise fall between the cracks of society's more traditional safety nets. When an insured worker dies, benefits may be available to a surviving widow or widower without work credits of his or her own if certain conditions are met. If the widow[er] is not age sixty and does not have a minor child qualified on the deceased worker's record, benefits will not be payable until the widow[er] reaches age sixty unless the widow[er] is at least fifty years old and is disabled. 42 U.S.C. § 402(e)(1)(B)(i) (1990).

from engaging in *any gainful activity*.⁶³ The standard for widows and widowers is stricter than the standard applied to disabled wage earners because disabled wage earners only need to show an inability to participate in *any substantial gainful activity*.⁶⁴ Further, the regulations explicitly preclude consideration of vocational factors such as the claimant's age, education, and work experience.⁶⁵

For the purposes of this discussion, the Secretary's regulations defining disability are identical to those applied to disabled workers for Social Security disability benefits as explained in the *Zebley* analysis above.⁶⁶ In order to effect the stricter severity standard, however, the analysis of a surviving spouse's eligibility ends at step three. In other words, a surviving spouse is entitled to benefits only if his or her impairment is one contained in, or equivalent to one contained in, the step three regulatory listings of impairments.⁶⁷ As discussed under the *Zebley* analysis, to meet a listing, the claimant must establish *all* of the specified medical criteria.⁶⁸ To equal a listing, the claimant must establish medical findings equal in severity to *all* the criteria for the most similar listed impairment.⁶⁹ A surviving spouse cannot qualify for benefits under the "equivalence" step by showing that the overall functional impact of his or her unlisted impairment or combination of impairments is as severe as that of a listed impairment.⁷⁰

In *Davidson v. Secretary of Health & Human Services*,⁷¹ the Tenth Circuit noted the exquisite irony that a surviving spouse could satisfy the statutory requirement by suffering from a disability that precludes "any gainful activity" and yet fail to qualify for benefits because he

63. A widow, surviving divorced wife, widower, or surviving divorced husband shall not be determined to be under a disability . . . unless his or her physical or mental impairment or impairments are of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity.

42 U.S.C. § 423(d)(2)(B). As the reader may have noticed, this is the identical standard at which the step three listings have been set. See *supra* notes 26-27 and accompanying text. The *Zebley* Court noted that under the Secretary's unlawful regulations, disabled children were required to meet the higher standard reserved for determining the eligibility of disabled widows and widowers under Title II. *Zebley*, 110 S. Ct. at 895.

64. *Ruff v. Sullivan*, 907 F.2d 915, 916 (9th Cir. 1990).

65. 20 C.F.R. § 404.1577.

66. The Secretary has defined more specific procedures for surviving spouses' benefits in 20 C.F.R. §§ 404.1577-78.

67. 20 C.F.R. § 404.1578.

68. See *supra* note 27 and accompanying text.

69. *Davidson v. Secretary of Health & Human Servs.*, 912 F.2d 1246, 1252 (10th Cir. 1990).

70. *Id.*; SSR 83-19, *supra* note 27.

71. 912 F.2d 1246 (10th Cir. 1990).

or she cannot meet or equal a listing.⁷² Therefore, like the *Zebley* Court, the *Davidson* court held that the Secretary's regulations are "manifestly contrary to statute."⁷³

In so holding, the *Davidson* court noted that "[t]he Secretary himself has described residual functional capacity as a medical evaluation."⁷⁴ Accordingly, the Secretary must supplement the mechanical application of the listings or their medical equivalents with medical evidence regarding the claimant's residual functional capacity in determining whether he or she is capable of performing any gainful activity.⁷⁵ In terms of the higher standard applicable to widows and widowers, the Administration must consider RFC in determining whether a severe physical or mental condition is the medical equivalent of a step three listed impairment.⁷⁶

As noted above, the Secretary has instituted Interim Standards for disabled children in the wake of the *Zebley* decision.⁷⁷ One part of this reform was the repeal of SSR 83-19 which applies to both children and adults.⁷⁸ SSR 83-19 contained many restrictions on the Administration's ability to find that an impairment or combination of impairments is medically equivalent to a listed impairment.⁷⁹ For example, it provided that

[i]t is incorrect to consider whether the listing is equaled on the basis of an assessment of overall functional impairment The mere accumulation of a number of impairments also will not establish medical equivalence The functional consequences of the impairments (i.e., RFC), irrespective of their nature or extent, cannot justify a determination of equivalence.⁸⁰

Obviously, the rescission of SSR 83-19 opens the door for widows and widowers nationwide to receive individual assessments of their residual functional capacities in the determination of their eligibility for disability benefits that are now only available in the four above-mentioned circuits. The authors of this Article are of the opinion that, considering the rationale of the *Zebley* decision and the rescission of SSR 83-19, all circuits will soon provide that the Secretary must, upon reaching the third step in the evaluation of a surviving spouse's claim, consider RFC

72. *Id.* at 1254.

73. *Id.*

74. *Id.* at 1253 (citing 45 Fed. Reg. 55,566 (1981)).

75. *Id.* at 1255.

76. *See id.*; *Ruff v. Sullivan*, 907 F.2d 915, 919 (9th Cir. 1990).

77. *See supra* note 54 and accompanying text.

78. *Interim Standards*, *supra* note 52, at 1; SSR 83-19, *supra* note 27.

79. SSR 83-19, *supra* note 27.

80. *Id.* *See also* Weishaupt & Stein, *supra* note 2, at 15.

in determining whether a surviving spouse's severe physical or mental condition is the medical equivalent of a step three listed impairment.

The impact of this new case law, however, is overshadowed by Congress's action in this area. As part of this year's Omnibus Budget Reconciliation Act, Congress has eliminated the stricter disability test for widows' and widowers' claims.⁸¹ Widows and widowers will no longer be required to meet the present strict standard of demonstrating a disability that precludes any gainful activity. Beginning January 1, 1991, the new standard for widow and widower disability claims will be identical to the worker's disability standard.⁸² Widows and widowers who are unable to engage in *substantial* gainful activity because of a disability will qualify for benefits.⁸³

IV. ASSESSMENT OF PAIN

During the survey period, the Fourth Circuit of the United States Court of Appeals handed down *Hyatt v. Sullivan*,⁸⁴ a class action decision of enormous importance in the area of the assessment of pain as a disabling condition. The *Hyatt* decision is an exciting example of courageous judicial activism. The *Hyatt* court referred to the Secretary's persistence in refusing to follow the Fourth Circuit's case law concerning pain assessment as "flout[ing] binding precedents."⁸⁵ The Secretary's policy of nonacquiescence in the circuit court's precedents in this area was the subject of congressional criticism.⁸⁶ The *Hyatt* court set out in its opinion specific language to be used by Fourth Circuit Social Security benefit adjudicators in defining the standard to be applied in the assessment of pain as a disabling condition.⁸⁷

The *Hyatt* class was certified in 1984 and involved the denial and termination of Social Security disability benefits for claims involving diabetes mellitus, hypertension, and pain.⁸⁸ The scope and economic

81. Omnibus Budget Reconciliation Act, Pub. L. No. 101-508, § 5703, 104 Stat. 1388 (1990).

82. *See id.*

83. *Id.*

84. 899 F.2d 329 (4th Cir. 1990). The *Hyatt* decision has a long procedural history: 579 F. Supp. 1154 (W.D.N.C. 1984), *vacated*, 757 F.2d 1455 (4th Cir. 1985), *vacated sub nom.* *Hyatt v. Bowen*, 476 U.S. 1167, *aff'd sub nom.* *Hyatt v. Heckler*, 807 F.2d 376 (4th Cir.1986), *cert. denied sub nom.* *Bowen v. Hyatt*, 484 U.S. 820 (1987), *on remand sub nom.* *Hyatt v. Heckler*, 711 F. Supp. 837 (W.D.N.C. 1989), *aff'd sub nom.* *Hyatt v. Sullivan*, 899 F.2d 329 (4th Cir. 1990).

85. *Hyatt*, 711 F. Supp. at 839.

86. *See Hyatt*, 757 F.2d at 1459-60. H.R. REP. NO. 1039, 98th Cong., 2d Sess. 36-38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3096.

87. *See Hyatt*, 899 F.2d at 337.

88. The class included applicants for and former recipients of disability benefits under both Titles II & XVI of the Social Security Act. *Hyatt*, 711 F. Supp. at 837.

impact of *Hyatt* is staggering.⁸⁹ As of July 28, 1988, the Secretary identified and sent notices to approximately 77,000 class members in North Carolina.⁹⁰ According to one Social Security Administration Office, the average monthly disability benefit in 1988 was \$509.⁹¹ A conservative estimate of the potential liability of the Administration to North Carolina class members, for the year 1988 alone, is \$470,316,000.⁹²

The *Hyatt* lawsuit involved the Administration's adherence to SSR 82-58 in nonacquiescence in Fourth Circuit case law establishing that SSR 82-58 was an erroneous statement of the law regarding the assessment of disabling pain.⁹³ In addition to objective medical evidence of an underlying condition that could reasonably produce the pain alleged, SSR 82-58 and related Social Security rulings and regulations require a claimant to demonstrate objective medical findings that can be used to draw reasonable conclusions about the validity of the intensity, persistence, and effect of the alleged pain on the claimant's work capacity.⁹⁴

The Fourth Circuit, as well as every other Circuit except the D.C. Circuit, has rejected the Secretary's position on pain.⁹⁵ Fourth Circuit case law is well settled that the requirement of objective evidence of the pain's intensity is improper.⁹⁶ Fourth Circuit courts have consistently held that administrative law judges are required to evaluate "the effect of pain on the claimant's ability to work when the pain results from a medically diagnosed physical ailment even though the pain's intensity is shown only by subjective evidence."⁹⁷

The *Hyatt* court granted the class injunctive relief by ordering the Secretary to implement certain instructions.⁹⁸ The pertinent part of the order reads as follows:

89. *Id.* at 838 n.1.

90. *Id.*

91. *Hyatt*, 899 F.2d at 334.

92. *Id.* at 838.

93. *Hyatt*, 899 F.2d at 331.

94. *Id.* at 333. *See also* [1982-1983 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 14,358.

95. *Hyatt*, 899 F.2d at 333 n.3. The precise method for the assessment of pain as a disability, however, has been an on-going subject of controversy. *See Ruppert, supra* note 7.

96. *Hyatt*, 899 F.2d at 334.

97. *Id.* *See also* Walker v. Bowen, 889 F.2d 47, 49 (4th Cir. 1989); Foster v. Heckler, 780 F.2d 1125, 1128-29 (4th Cir. 1986).

98. *Hyatt*, 899 F.2d at 336. The *Hyatt* court vacated the district court's decision in part. The district court had gone even further by ordering the Secretary to assist the plaintiff's counsel in monitoring the Secretary's compliance with circuit court law for five years. In addition, the *Hyatt* court ordered the Secretary to issue a specific regulation that is nearly identical to the district court's order. *Id.*

On or before 30 days after the entry of this order, the Secretary will distribute immediately to all administrative law judges and all others within this circuit who look to the Secretary for authority or advice in the decision of social security cases with respect to pain as a disabling condition, the following circuit law with respect thereto. The precise means of distributing the same or of giving effect to the same are left to the Secretary, however the Secretary will make it clear that there will not be any variation from the terms thereof in decision-making in this circuit, absent an order of a court of competent jurisdiction or Act of Congress.

Once an underlying physical or mental impairment that could reasonably be expected to cause pain is shown by medically acceptable objective evidence, such as clinical or laboratory diagnostic techniques, the adjudicator must evaluate the disabling effects of a disability claimant's pain, even though its intensity or severity is shown only by subjective evidence. If an underlying impairment capable of causing pain is shown, subjective evidence of the pain, its intensity or degree can, by itself, support a finding of disability. Objective medical evidence of pain, its intensity or degree (i.e., manifestations of the functional effects of pain such as deteriorating nerve or muscle tissue, muscle spasm, or sensory or motory disruption), if available, should be obtained and considered. Because pain is not readily susceptible of objective proof, however, the absence of objective medical evidence of the intensity, severity, degree or functional effect of pain is not determinative.⁹⁹

In the authors' opinion, this order is the most understandable, most accurate statement of Social Security law regarding the assessment of pain. The authors predict that if the Secretary refuses to adopt regulations recognizing the above standard across the nation, the other circuit courts will eventually adopt the order as law. Thus, the nation will enjoy uniformity in this most difficult area of Social Security law.

V. CARDIAC IMPAIRMENTS

In *New York v. Sullivan*,¹⁰⁰ the Second Circuit examined the Administration's practice of relying exclusively on treadmill tests in the

99. *Id.* at 336-37.

100. 906 F.2d 910 (2nd Cir. 1990).

evaluation of cardiac ischemia¹⁰¹ both to determine whether a claimant's impairments meet the listings and, if not, to determine the claimant's residual functional capacity in disability adjudications pursuant to Titles II and XVI of the Act.¹⁰² The *Sullivan* court criticized the Secretary's listings which state that when a treadmill test is available and ischemia is the only ailment alleged, the results of the treadmill test control the analysis to the exclusion of all other medical findings, including the opinions of the treating physician and other diagnostic tests of an applicant's functional capabilities.¹⁰³

The *Sullivan* court noted that the evidence indicated that the treadmill test resulted in misdiagnosis of ischemic heart disease more than one-third of the time, and that persons who do not show signs of heart disease during a treadmill test may still be severely disabled from ischemia.¹⁰⁴ The court noted further that, in certain circumstances, other widely used procedures, including nuclear tests and angiography, are more reliable than the treadmill test in measuring the severity of ischemic heart disease.¹⁰⁵

Citing *Zebley*, the court held that the Secretary's sole reliance on the treadmill test to the exclusion of other available relevant evidence, violated Congress's requirement that claimants receive individualized disability assessments in the evaluation of their disability claims.¹⁰⁶ The *Sullivan* court held that the Secretary's reliance on the treadmill test also violated the statutory mandate that the Secretary "adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in disability cases."¹⁰⁷ The court concluded that the Secretary must consider all available relevant evidence when evaluating claims of disability based on ischemic heart disease.¹⁰⁸

This class action suit is the first to successfully challenge and invalidate the Administration's treadmill policy.¹⁰⁹ The Administration is

101. Cardiac ischemia is an affliction caused by the narrowing of the arteries, usually because of coronary atherosclerosis, which is the pathological process whereby deposits of cholesterol and other substances narrow and obstruct the artery walls of the heart. When the coronary arteries are blocked, not enough blood, and therefore not enough oxygen, reaches the heart muscle resulting in chest pain or angina upon exertion. *Id.* at 913 (citing E. BRAUNWALD, *HEART DISEASE: A TEXTBOOK OF CARDIOVASCULAR MEDICINE* 1191, 1314 (3rd ed. 1988)).

102. *Id.* at 913-14. See also *Cardiovascular Impairments*, *supra* note 10, at 11.

103. *Sullivan*, 906 F.2d at 914-15.

104. *Id.* at 914.

105. *Id.*

106. *Id.* at 919.

107. *Id.* at 915-16 (quoting 42 U.S.C. § 405(a) (1983 & Supp. 1990)).

108. *Id.* at 919.

109. *Cardiovascular Impairments*, *supra* note 10, at 11.

required to re-examine cases as far back as June 1, 1980.¹¹⁰ Because the Secretary has adopted its treadmill policy nationwide for the evaluation of ischemic heart disease as a disability, this decision has obvious national implications.¹¹¹

VI. CONCLUSION

This survey period saw the Secretary corrected by the courts regarding the application of statutory standards determining disability benefit eligibility in four important areas. The United States Supreme Court's decision in *Zebley* greatly expands the ability of poor disabled children to obtain SSI, and will require the Secretary to readjudicate hundreds of thousands of claims made by disabled children and to promulgate new regulations accurately articulating the statutory standard. The decision of four circuit courts, the rescission of SSR 83-19, and the enactment of the 1990 Omnibus Budget Reconciliation Act will undoubtedly expand the ability of widows and widowers to obtain Social Security disability benefits. The huge Fourth Circuit *Hyatt* class action case involving hundreds of millions of dollars in wrongfully denied benefits should lead to greater uniformity among the circuits in the area of the assessment of disabling pain. Finally, the Second Circuit's decision in *New York v. Sullivan*, which relied in part on *Zebley*, has national implications because it struck down the Secretary's nationwide arbitrary practice of exclusive reliance on treadmill tests in the determination of disabilities based on cardiac ischemia, and requires the Secretary to provide individualized functional assessments of claimants's disabilities in that circuit.

Trends may be impossible to predict in this complex area of law. Perhaps the next survey period will bring more decisions that force the Secretary to amend its practices to comply with Congress's statutory mandates. In the next survey period, perhaps other circuit courts will follow the Fourth Circuit's excellent example of judicial activism in *Hyatt* by imposing far-reaching and significant injunctive relief in ameliorating other unfair and illegal practices by the Secretary. Regardless of what the future may hold, this survey period undisputably witnessed enormous reform in Social Security law.

110. *Id.*

111. *Id.*