The Social Security Administration's Medical-Vocational Guidelines: Permissible Standardization of the Disability Adjudication Process, or a Threat to Individualization?

Rebecca Barkey

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NOTES
The Social Security Administration’s Medical-Vocational Guidelines: Permissible Standardization of the Disability Adjudication Process, or a Threat to Individualization?

INTRODUCTION

The Social Security Act provides disability benefits to an individual no longer able to work because of his medical condition. The claimant must provide proof that he has a serious impairment which prevents him from doing his previous job. Once he does so, the burden shifts to the Secretary of Health and Human Services to prove that there are other jobs the claimant can perform despite the impairment. In considering the availability of suitable jobs, the Secretary considers the claimant’s age, education, and work experience as well as his impairment.

To help the Secretary meet this burden, the Social Security Administration has promulgated Medical-Vocational Guidelines.

2. The Act covers several types of disability benefits: Title II of the Act provides benefits for fully insured individuals having sufficient quarters of coverage, 42 U.S.C. § 423, and provides benefits for the disabled widows, widowers, and surviving divorced wives of covered workers, 42 U.S.C. § 402 (e)-(f), Title XVI, 42 U.S.C. §§ 1381-1383, provides Supplemental Security Income (SSI) benefits to those meeting income eligibility guidelines, regardless of quarters of coverage. Both Title II and Title XVI also cover benefits for the blind. Since the definition of disability is different for individuals who are blind or who are widows, widowers, or surviving divorced wives, this article will not discuss those types of benefits.
4. See infra notes 49-51 and accompanying text.
5. 42 U.S.C. § 423(d)(2)(A) (1976). This section states also that in determining the availability of jobs for a claimant who has a serious impairment, the existence of job vacancies in the claimant’s locality, and whether the claimant would actually be hired, are not relevant. The job need only exist “in significant numbers either in the region where such individual lives or in several regions of the country.” This part of the disability definition was added by Congress in 1967 because of a concern that courts were requiring the Secretary to prove too much, and were imposing too many local variations onto the disability decision. See S. REP. NO. 744, 90th Cong., 1st Sess., reprinted in 1967 U.S. CODE CONG. & AD. NEWS 2848, 2880.
which became effective in February of 1979. These regulations attempt to streamline and standardize the adjudication process for disability claims by taking administrative notice of jobs in the national economy that claimants in specified age, educational, experience, and impairment categories can perform.\(^7\) The Guidelines perform this function by establishing for each combination of factors determinative rules by which an adjudicator must conclude whether a claimant is or is not disabled.\(^8\)

Pre-Guideline cases\(^9\) required the Secretary to meet her burden of proof by producing specific evidence of the particular claimant’s abilities and by specifying jobs which the claimant could perform. The latter requirement often necessitated the testimony of a vocational expert.\(^10\) Since their enactment, the Guidelines have been used by the Secretary as a substitute for this requirement, and claimants have challenged this procedure as well as the legality of the Guidelines themselves. Nine federal courts of appeals have heard challenges to the regulations. Only one, the Second Circuit, has held this use of the regulations inconsistent with prior case law.\(^11\) That case is currently before the Supreme Court. The other courts of appeals have concluded that carefully limited use of the Guidelines is a proper exercise of administrative authority.\(^12\)

This note will first examine the procedural steps in the adjudication of disability claims. It will then examine the statutory definition of disability and detail the operation of the Medical-Vocational Guidelines. The note will review the Second Circuit’s decision and contrast it with the decisions of other circuits upholding use of the regulations. The rationales used in support of both outcomes will be analyzed and evaluated, and a possible alternative to irrebuttable use of the Guidelines will be proposed. Finally, the note will suggest precautions that must be taken in conjunction with use of the Guidelines to ensure that each individual’s claim is adequately considered.

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7. Guidelines, supra note 6, at § 200.00(b); 20 C.F.R. § 404.1566(d), .1569 (1982).
8. Guidelines, supra note 6, at §§ 201.01-204.00 (1982).
9. See infra notes 49-57.
10. See infra note 56 and accompanying text.
12. See infra note 74 and accompanying text.
BACKGROUND

Overview of the Disability Adjudication Process

If a Social Security claimant's initial application for disability benefits is denied by a claims adjudicator, the claimant is entitled to reasonable notice and an opportunity for a hearing. The hearing is nonadversary and is held before an Administrative Law Judge (ALJ). The ALJ's decision initially may be appealed to the Appeals Council, the final level of administrative review, and then to a United States district court. The ALJ's decision will be affirmed unless it is not supported by substantial evidence.

The ALJ has major responsibility in the adjudication process. He does not merely rule on evidence already in the claimant's file, or on evidence produced by the claimant and by the Secretary. Instead, he has an affirmative duty to fully develop the evidence himself, especially if the claimant is without counsel.

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13. There are actually two steps in the disability adjudication process before the hearing. The first is the initial determination. If the claimant is denied benefits at that stage, he may request reconsideration of his claim. Both determinations are based on the claimant's written application and on written reports from doctors and hospitals listed on the application. A medical adviser and an adjudicator review the information in the claimant's file and determine whether he is entitled to benefits. Schwarz, Adjudication Process Under U.S. Social Security Disability Law: Observations and Recommendations, 32 AD. L. REV. 555 (1980).


16. 20 C.F.R. § 404.967 (1982). The Appeals Council may affirm or reverse the ALJ, or it may hear new evidence and issue a separate decision. The Council actually reverses very few of the ALJs' denial decisions; some commentators give a figure as low as 4%. See Schwarz, supra note 13, at 564.

17. 42 U.S.C. § 405(g) (Supp. IV 1980).

18. Id. Substantial evidence has been defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

19. See, e.g., Cox v. Califano, 587 F.2d 988, 991 (9th Cir. 1978); Landess v. Weinberger, 490 F.2d 1187, 1189 (8th Cir. 1974); Gold v. Secretary of HEW, 463 F.2d 38, 43 (2d Cir. 1972). See also STUDY, supra note 15, at 71-74 (discussion of the important role of the ALJ in questioning the claimant in order to develop relevant evidence and to prevent misadjudication of claims).
The ALJ may order consultative examinations\textsuperscript{20} and obtain the testimony of medical or vocational experts at the hearing.\textsuperscript{21} Since his findings must be supported by substantial evidence,\textsuperscript{22} the ALJ’s failure to develop the record properly may subject his decision to reversal or remand.\textsuperscript{23} The issue of whether the ALJ has properly developed the record has become particularly significant now that the ALJ’s have begun to rely on the Medical-Vocational Guidelines as proof of available jobs which a claimant can perform.\textsuperscript{24}

The adjudication process begins with the Social Security Act itself, wherein the definition of disability is found.\textsuperscript{25} The claimant, according to the statute, must be unable to do any substantial gainful activity,\textsuperscript{26} because of a “medically determinable physical or mental impairment” expected to result in death or lasting more than twelve months.\textsuperscript{27} The statute requires the ALJ to consider the claimant’s age, education, and work experience, as well as his physical and mental impairments, in determining whether the claimant is able to work.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{20} 20 C.F.R. § 404.1517(a) (1982).
\item \textsuperscript{21} 20 C.F.R. § 404.1566(e) (1982).
\item \textsuperscript{22} See supra note 18.
\item \textsuperscript{23} 42 U.S.C. § 405(g) (Supp. IV 1980). See, e.g., Parker v. Harris, 626 F.2d 225, 235 (2d Cir. 1980).
\item \textsuperscript{24} See infra notes 61-64 and accompanying text.
\item \textsuperscript{26} 42 U.S.C. § 423(d)(4) (Supp. IV 1980) authorizes the Secretary to prescribe the criteria for determining what level of services and earnings will be considered substantial gainful activity. Those regulations are found at 20 C.F.R. § 404.1571-.1575 (1982).
\item \textsuperscript{27} 42 U.S.C. § 423(d)(1)(A) (1976). The full text of this section defines 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 which has lasted or can be expected to last for a continuous period of not less than 12 months.”
\item \textsuperscript{28} The statute provides:
\begin{quote}
\textsuperscript{[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 which exists 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 region where such individual lives or in several regions of the country.
\end{quote}
\item \textsuperscript{20} 42 U.S.C. § 423(d)(2)(A) (1976). See supra note 5 for an explanation of why this section was added to the statute.
\end{itemize}
To aid ALJ’s and other adjudicators in determining whether a claimant’s medical impairments should be considered disabling, the Social Security Administration has promulgated regulations, called the Listing of Impairments.\(^{29}\) If the claimant’s impairment is as severe as those found in these Listings, he will be considered disabled regardless of the vocational factors of age, education, or work experience.\(^ {30}\) If the claimant’s impairment does not meet the Listings, however, the vocational factors must be taken into consideration.\(^ {31}\)

Prior to 1979, neither the statute nor the regulations provided ALJ’s any guidance in according the proper weight to each of the vocational factors of age, education, and experience. ALJ’s considered them on an ad hoc basis and frequently sought vocational expert testimony to determine what jobs might be available for a person with the claimant’s particular medical and vocational profile.\(^ {32}\) The ultimate question remained the same—whether the claimant was able to engage in any substantial gainful activity.

The Medical-Vocational Guidelines\(^ {33}\) became effective in 1979. These regulations are based on the Social Security Administration’s study of the jobs available in the national economy at various exertional levels as well as the educational and skill levels required for these jobs.\(^ {34}\) They provide not merely guidance, but, in specific situations, irrebuttable rules which the ALJ must follow in applying vocational factors to the disability determination.\(^ {35}\)

The disability regulations establish a sequence of steps which the ALJ must follow for each claim. If he finds that the claimant is not working,\(^ {36}\) has a severe impairment\(^ {37}\) which is nonethe-
less insufficient to meet the Listings, and cannot perform his past work because of that impairment, the ALJ must apply the Guidelines’ rules, commonly called “the grid.” The grid consists of three tables representing three levels of “residual functional capacity,” defined as the claimant’s ability to perform basic work activities despite his impairment. On each table, the three vocational factors of age, work experience, and education are matrixed. Each of these factors is also broken down into subcategories or levels.

To use the grid, the ALJ must determine what levels of residual functional capacity, age, education, and work experience

40. 20 C.F.R. § 404.1560, .1569 (1982). The regulations emphasize that the rules are not to be applied in all situations. See infra notes 46-48 and accompanying text.
41. Residual functional capacity (RFC) is defined at 20 C.F.R. § 404.1545 (1982), and takes into consideration all of a claimant’s impairments. For use of the grid, however, which is limited to claimants with exertional impairments (see infra notes 46-48 and accompanying text), only the claimant’s physical capacities are taken into consideration in determining RFC. The three relevant levels of RFC are the ability to perform sedentary work, light work, or medium work. (The category of heavy work also exists, but a claimant able to perform heavy work will not be found disabled.) The regulations define the various levels of RFC in terms of the claimant’s ability to lift weight, to stand and sit for a certain length of time, to push, pull, and so on. See 20 C.F.R. § 404.1567 (1982).
42. 20 C.F.R. § 404.1563 (1982) describes the three age categories: 1) a younger person, under age 50 (this is further subdivided at times into individuals under 45 and those aged 45-49); 2) a person approaching advanced age, aged 50-54; and 3) a person of advanced age, 55 or over. The regulations state that “we will not apply these age categories mechanically in a borderline situation.” 20 C.F.R. § 404.1563(a) (1982).
20 C.F.R. § 404.1564 (1982) describes the educational categories: 1) illiteracy, defined as the inability to read or write a simple message (generally including those who have had little or no formal schooling); 2) marginal education, defined as some ability in reasoning, arithmetic, and language skills sufficient to do simple, unskilled jobs (generally including those with a 6th grade education or less); 3) limited education, defined as ability in reasoning, arithmetic, and language skills, but not sufficient for most semi-skilled or skilled jobs (generally including those with a 7th to 11th grade education); 4) high school education and above, sufficient to do semi-skilled through skilled work; and 5) inability to communicate in English. The regulations emphasize that formal schooling is not the only measure of educational level, but, “if there is no other evidence to contradict it, we will use your numerical grade level.” 20 C.F.R. § 404.1564(b) (1982).
20 C.F.R. § 404.1568 (1982) describes the categories of work experience: 1) unskilled work, needing little or no judgment to do simple duties that can be learned on the job in a short period of time; 2) semi-skilled work, needing some skills, such as alertness, close attention, coordination, or dexterity, but not requiring performance of complex tasks; and 3) skilled work, requiring a person to use judgment, make precise measurements or computations, or deal with people, facts, figures or abstract ideas. Only work experience from the past 15 years is considered relevant. 20 C.F.R. § 404.1565(a) (1982). A determination must be made whether a claimant’s skills from past work experience are transferable. 20 C.F.R. § 404.1568(d) (1982).
Social Security Guidelines

apply to a claimant. He then merely locates the proper combination of factors, and the grid mandates a conclusion of either disabled or not disabled. For instance, a claimant may be found to have the residual functional capacity to perform sedentary work. If he is fifty years-old (closely approaching advanced age), has a limited education, and unskilled work experience, the applicable rule mandates a finding of disabled. If he has the same education and work experience, but is only forty-nine, he will be found not disabled.

The text of the Guidelines limits the applicability of the grid. It is not to be used to direct a determination of disability or non-disability unless the claimant’s profile fits precisely into one of the rules. If the claimant’s functional capacity, education, or work experience fall in between the categories provided, the Guidelines may not be automatically applied. For example, if a

<table>
<thead>
<tr>
<th>Rule</th>
<th>Age</th>
<th>Education</th>
<th>Previous Work Experience</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>201.09</td>
<td>Closely approaching advanced age.</td>
<td>Limited or less.</td>
<td>Unskilled or none.</td>
<td>Disabled.</td>
</tr>
<tr>
<td>201.10</td>
<td>[ditto]</td>
<td>[ditto]</td>
<td>Skilled or semiskilled—skills not transferable</td>
<td>[ditto]</td>
</tr>
<tr>
<td>201.11</td>
<td>[ditto]</td>
<td>[ditto]</td>
<td>Skilled or semiskilled—skills transferable</td>
<td>Not disabled.</td>
</tr>
<tr>
<td>201.17</td>
<td>Younger individual age 45-49</td>
<td>Illiterate or unable to communicate in English.</td>
<td>Unskilled or none.</td>
<td>Disabled.</td>
</tr>
<tr>
<td>201.18</td>
<td>[ditto]</td>
<td>Limited or less—at least literate and able to communicate in English.</td>
<td>[ditto]</td>
<td>Not disabled.</td>
</tr>
<tr>
<td>201.19</td>
<td>[ditto]</td>
<td>[ditto]</td>
<td>Skilled or semiskilled—skills not transferable.</td>
<td>[ditto]</td>
</tr>
<tr>
<td>201.20</td>
<td>[ditto]</td>
<td>[ditto]</td>
<td>Skilled or semiskilled—skills transferable.</td>
<td>[ditto]</td>
</tr>
</tbody>
</table>

Guidelines, supra note 6, at § 201.09-201.20.

43. A portion of the sedentary table is set out below:

44. Id. § 201.09.
45. Id. § 201.18.
46. Id. § 200.00(d).
claimant can perform some sedentary jobs, but not a wide range of sedentary jobs, the ALJ may not use the sedentary table. Since residual functional capacity is a measure of exertional ability, the grid will also not direct a conclusion if the claimant suffers from only non-exertional impairments, or from a combination of exertional and non-exertional impairments. In such cases, the regulations are to be used only as guides.

The Conflict Between Prior Case Law and Use of the Grid

Prior to 1979, courts imposed certain burdens of proof on the Secretary in disability hearings. Once a claimant had introduced sufficient evidence to prove that he could no longer perform his former job, the burden shifted to the Secretary to prove that the claimant could do other substantial gainful work. Known as the Kerner doctrine, this requirement meant that if the ALJ failed to produce adequate vocational evidence of such a claimant’s ability to do other work, courts would find that a decision denying benefits was not supported by substantial evidence.

Courts also imposed explicit standards for defining what constituted adequate vocational evidence. The ALJ was not an expert and could take official notice of the existence of jobs at a given level only if such information was common knowledge or was derived from an official source made part of the record. He

47. Id. § 200.00(e)(1).
48. Id. § 200.00(e)(2).
49. See, e.g., Perez v. Schweiker, 653 F.2d 997, 999 (5th Cir. 1981); Allen v. Califano, 613 F.2d 139, 145 (6th Cir. 1980); Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979); Cox v. Califano, 587 F.2d 988, 990 (9th Cir. 1978). The phraseology is somewhat misleading because it implies that the hearing is an adversary proceeding. In practice, the phrase means that once the claimant has shown he cannot do his prior job, the ALJ is responsible for obtaining evidence that the claimant can do other jobs.
50. Kerner v. Fleming, 283 F.2d 916 (2d Cir. 1960) (holding that if the claimant, although having the ultimate burden of proof, raises a serious question as to his ability to work, the Secretary may not deny the claim unless there is a sufficient basis in the record to do so). The rationale for this shift in the burden of going forward is that “it would be beyond the realm of reason to further require the claimant . . . to produce a vocational counselor to testify that there are no jobs in the national economy which he can perform.” Garrett v. Richardson, 471 F.2d 598, 603 (8th Cir. 1972).
51. See, e.g., Garrett v. Richardson, 471 F.2d at 604; Parker v. Harris, 626 F.2d 225, 233-34 (2d Cir. 1980); Meneses v. Secretary of HEW, 442 F.2d 803, 809 (D.C. Cir. 1971).
52. See, e.g., Wilson v. Califano, 617 F.2d 1050, 1053-54 (4th Cir. 1980). Often courts permitted the ALJ to take administrative notice of the existence of jobs. This was permitted, however, only after there was specific evidence in the record concerning the claim-
must in any case produce evidence at the hearing to show that
the particular claimant had the specific skills and capacity to
perform a specific job or kind of job.53 This requirement served
three purposes: it ensured that the ALJ would perform his affirm-
ative duty of properly developing the record, rather than basing
his decision on unsupported conclusions;54 it provided claimants
with notice of the reasons for a denial of benefits, and with the
opportunity to rebut evidence of their ability to work at the hear-
ing; and, most importantly, it ensured that each claimant
would get an individualized hearing in which his own particular
impairments would be considered.55 The preferred form of voca-
tional evidence was expert testimony. Although courts did not
establish a per se rule requiring such testimony, most found it
highly desirable and certainly necessary absent other substan-
tial evidence of the claimant's ability to work.56

Frequent objections were made to the ALJ's case-by-case appli-
cation of vocational factors. Critics claimed that such disability
adjudications were inconsistent, depending to a large degree on
the particular ALJ and the particular vocational expert who
happened to be involved in each case.58 The Medical-Vocational
Guidelines replace such individual determinations with manda-

53. Compare, e.g., Chavies v. Finch, 443 F.2d 356, 358 (9th Cir. 1971) with Hall v. Secretary of HEW, 602
F.2d 1372, 1375-77 (8th Cir. 1979).

54. See, e.g., Hephner v. Mathews, 574 F.2d 359, 362-63 (6th Cir. 1978) ("A claimant's capacity to perform work must be evaluated in light of his age, his education, his work experience, and his impairments, including his pain. This requires a finding of capacity to work which is expressed, not in terms of a vague catch-all phrase such as 'light work,' but in terms of specific types of jobs." (emphasis in original)). See also Hall v. Secretary of HEW, 602 F.2d at 1375-77; Bastien v. Califano, 572 F.2d 908, 912-13 (2d Cir. 1978); Taylor v. Weinberger, 512 F.2d 664, 668 (4th Cir. 1975).


56. See, e.g., Garrett v. Richardson, 471 F.2d at 603-04 ("In the absence of substantial evidence from other sources bearing directly on the issue of 'substantial gainful activity,' the testimony of a vocational counselor is essential for the affirmance of an examiner's findings."). See also Decker v. Harris, 647 F.2d at 298; Hall v. Secretary of HEW, 602 F.2d at 1377; O'Banner v. Secretary of HEW, 587 F.2d 321, 323 (6th Cir. 1978).

tory rules which presumably will engender more consistent results. In essence, however, the grid removes the final determination of disability from the ALJ. The relevant issues at the hearing become not ability or inability to work, but residual functional capacity, age, education, and experience.

The grid takes administrative notice of the existence of jobs, and of the qualifications for jobs. Because this was the primary information provided by vocational experts, the Secretary now argues that such testimony is no longer required and that the ALJ need not name specific jobs that the claimant can perform. Once the claimant's residual functional capacity, age, education, and work experience are known, the grid operates to determine whether or not he is disabled. If the grid says the claimant is not disabled, that means there is a wide range of suitable jobs available to him. The Secretary thus interprets the grid as simply an alternate way for her to meet her burden of proving the existence of available work suitable for a person with the claimant's functional and vocational characteristics.

Not all courts have accepted the Secretary's interpretation of the grid as an appropriate replacement for vocational evidence. They maintain that the grid fails to tie specific proof of a claimant's residual skills with specific suitable, available jobs, and therefore cannot be considered substantial evidence to support a conclusion of non-disability. Some courts have held that the grid impermissibly alters the statutory definition of disability and significantly undermines individualized adjudication of each claim required by the Social Security Act. Both defenders and critics of the Guidelines agree, however, that when the rules apply, they change the focus of the adjudication process from the determination of disability per se, to the determination of the four factors now controlling the disability decision. The issue

59. See, e.g., Cummins v. Schweiker, 670 F.2d 81, 83 (7th Cir. 1982); Kirk v. Secretary of Health & Human Servs., 667 F.2d 524, 530 (6th Cir. 1981).
60. Guidelines, supra note 6, at § 200.00(b); 20 C.F.R. §404.1566(d), 1569 (1982).
61. See, e.g., Broz v. Schweiker, 677 F.2d 1351, 1356 (11th Cir. 1982).
62. See, e.g., Torres v. Secretary of Health & Human Servs., 677 F.2d 167, 168 (1st Cir. 1982).
65. See infra notes 91-92, 100 and accompanying text. See also Santise v. Schweiker, 501 F. Supp. at 276-77.
presently facing the courts is whether this curtailment of adjudication is a permissible exercise of administrative authority, or an impermissible revision of the adjudication process and a redefinition of disability itself.

THE DECISIONS

The Second Circuit's Approach

Although nine circuit courts of appeals have considered the validity of the Medical-Vocational Guidelines, only the Second Circuit has decided that the grid may not be used as a substitute for specific vocational evidence. That court, relying on its own prior case law, held that, at the hearing, the Secretary must identify specific available jobs and show those jobs to be suitable for the particular claimant. According to the court, use of the grid instead of specific evidence fails to preserve "an adequate record for review" and deprives the claimant "of any real chance to present evidence showing that she cannot in fact perform the types of jobs that are administratively noticed by the guidelines." The Second Circuit concluded, therefore, that the grid alone is not substantial evidence of non-disability. Having found use of the grid inconsistent with its prior case law, the

66. See infra note 74.
68. Decker v. Harris, 647 F.2d 291, 298 (2d Cir. 1981) (dicta stating that the Secretary must name specific jobs to ensure procedural fairness and an adequate record for review); Parker v. Harris, 626 F.2d 225 (2d Cir. 1980) (holding that the Secretary must show the existence of specific jobs); Bastien v. Califano, 572 F.2d 908, 912-13 (2d Cir. 1978) (the Secretary must identify specific alternative occupations, supported by a "job description clarifying the nature of the job, and demonstrating that the job does not require" skills the claimant does not have).
69. Campbell v. Secretary of Health & Human Servs., 665 F.2d at 54.
70. Id. at 53 (quoting Decker v. Harris, 647 F.2d at 298).
71. Campbell v. Secretary of Health & Human Servs., 665 F.2d at 53.
72. Id. at 54.
court did not reach the broader issue of whether the grid redefines the statutory disability standard itself.\textsuperscript{73}

\textbf{The Other Circuits}

All the other circuits that have faced the issue have concluded that the Guidelines, when used properly, may replace specific vocational evidence in determining disability claims.\textsuperscript{74} Since these holdings are clearly a departure from former case law requiring specific evidence,\textsuperscript{75} most of the courts have carefully justified their decisions. In so doing, they have answered statutory and constitutional challenges to the use of the grid, and have attempted to fit the grid into the requirements of prior case law.

\textbf{The Statutory Justification}

The courts begin\textsuperscript{76} by emphasizing the limited role the judiciary plays in reviewing regulations promulgated by the Social Security Administration. The Social Security Act grants the Agency broad rulemaking powers to determine both the procedures to be followed in disability adjudications and "the nature and extent of the proofs and evidence" required to establish a right to benefits.\textsuperscript{77} Relying on the Supreme Court cases of \textit{Bat-}

\begin{itemize}
  \item \textsuperscript{73} Nor was the court asked to consider whether use of the grid violates the Administrative Procedure Act, \textit{see infra} note 93, or the Constitution, \textit{see infra} notes 102-10 and accompanying text.
  \item \textsuperscript{74} Rivers v. Schweiker, 684 F.2d 1144 (5th Cir. 1982); McCoy v. Schweiker, 683 F.2d 1138 (8th Cir. 1982); Torres v. Secretary of Health & Human Servs., 677 F.2d 167 (1st Cir. 1982); Broz v. Schweiker, 677 F.2d 1351 (11th Cir. 1982); Santise v. Schweiker, 676 F.2d 925 (3d Cir. 1982); Cummins v. Schweiker, 670 F.2d 81 (7th Cir. 1982); Kirk v. Secretary of Health & Human Servs., 667 F.2d 524 (6th Cir. 1981); Frady v. Harris, 646 F.2d 143 (4th Cir. 1981).
  \item \textsuperscript{75} \textit{See supra} notes 51-57 and accompanying text.
  \item \textsuperscript{76} The following analysis is a distillation of the various arguments made in all the circuit court opinions, rather than a description of the analysis followed by each of the courts.
  \item \textsuperscript{77} 42 U.S.C. § 405(a) (1976). The full text of the section states:

  The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall 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 order to establish the right to benefits hereunder.

  Also relevant is 42 U.S.C. § 423(d)(5) (Supp. IV 1980): "An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require."
\end{itemize}
terton v. Francis and Schweiker v. Gray Panthers, the courts have held that Congress entrusted to the Secretary, rather than to the courts, the primary responsibility for interpreting the statute. The regulations must therefore be accorded legislative effect and be upheld by the courts unless the Secretary exceeded his statutory authority or unless the regulation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Accordingly, claimants arguing that the Guidelines are inconsistent with the statute have a very great burden.

Courts upholding the Guidelines have found them rationally related to the purposes of the Social Security Act and therefore a reasonable exercise of rulemaking authority granted by the statute. They do not violate either the statute's substantial evidence requirement or the requirement for individual determination of disability claims, implicit in both the definition of disability in the Act and in the statute's hearing provisions. The courts justify this holding on two grounds. First, they emphasize that the Guidelines are based on "legislative" rather than "adjudicative" facts. This distinction, accepted in administrative law theory and recognized in a number of judicial decisions, distinguishes between facts which are general and

78. 432 U.S. 416 (1977) (holding that the Secretary did not exceed his statutory authority in defining unemployment for the AFDC-Unemployed Fathers program).
79. 453 U.S. 34 (1981) (holding that the Secretary did not exceed his statutory authority in setting standards for when a spouse's income must be deemed available to an applicant for Medicaid).
81. Id. (quoting the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976)).
82. McCoy v. Schweiker, 683 F.2d at 1144.
85. 42 U.S.C. § 405(b) (1976 & Supp. IV 1980). If a claimant requests a hearing, the Secretary must decide the case "on the basis of evidence adduced at the hearing."
86. For a particularly lucid explanation of the distinction and its application to the Guidelines, see Broz v. Schweiker, 677 F.2d at 1357-61. Not all the circuits use this particular language. The distinction is often implicit in the courts' holdings, however. See, e.g., Santise v. Schweiker, 676 F.2d at 935, where the court emphasizes that the information on which the grid is based is derived from the same sources on which vocational experts would rely (e.g., Department of Labor studies) and suggests that the rules will be more accurate than the ad hoc judgments of ALJ's.
88. See, e.g., United States v. Florida E. Coast Ry. Co., 410 U.S. 224, 245 (1973) (no adjudicatory hearing required for a railroad ratemaking procedure); WBEN, Inc. v. United States, 396 F.2d 601, 618 (2d Cir.), cert. denied, 393 U.S. 914 (1968) (no separate evi-
broadly applicable and facts which apply specifically to the immediate parties to a controversy. The first type are appropriate subjects of legislation or rulemaking; the second type must be ascertained in an individual hearing. The courts upholding the Guidelines' validity conclude that the regulations take administrative notice only of legislative facts: the existence of various types of jobs in the national economy, and the requirements—in terms of exertional capacity, education, and skills—of each of those jobs. The facts concerning disability which are adjudicative, namely the claimant's functional capacity, age, education, and work experience, remain subject to individualized determination in the hearing.

The courts thus acknowledge that the regulations remove the final step in the disability determination from adjudication. However, since the facts involved in that final step are legislative, and are therefore appropriate subjects for rulemaking, the courts accept the Guidelines as a legitimate exercise of the Social Security Administration's rulemaking authority. The claimant still receives an individualized hearing as required by the Act, and the Agency is permitted to make rules that promote consistent and efficient adjudications.

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89. This rulemaking refers to that authorized by § 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1976). See infra note 93.
90. 5 U.S.C. §§ 556 & 557 (1976); see also infra note 93.
91. See, e.g., Cummins v. Schweiker, 670 F.2d at 83; Rivers v. Schweiker, 684 F.2d at 1156-57; Torres v. Secretary of Health & Human Servs., 677 F.2d at 169.
92. But see Broz v. Schweiker, 677 F.2d at 1360-61, where the court found the age factor not subject to proper adjudication under the Guidelines. Under the regulations, 20 C.F.R. § 404.1563(a) (1982), age is intended to be a measure of the claimant's ability or inability to adapt to new work situations. But a claimant is not permitted to adjudicate the issue of his adaptability, or to rebut the regulations' assumption that his chronological age is an accurate measure of his adaptability. The Broz court contrasted the age factor with the education issue, where a claimant may prove his actual level of education regardless of how many years he attended school. The court then held that the age-adjustment factor must be individually determined. See supra note 42.
93. The courts used the same legislative/adjudicative fact distinction to answer another of claimants' challenges: that the grid violates § 556(e) of the APA. That section requires that a party be given notice of, and be allowed to rebut, any material facts, officially noticed in a hearing. 5 U.S.C. § 556(e) (1976). The courts held that § 553 rule-
her burden of proving disability by substantial evidence; but instead of using a vocational expert for the final step she may now utilize the Guidelines.

The second ground the courts use to justify their holding that the grid does not violate the Social Security Act is that the regulations are carefully limited. They govern only exertional impairments, measurable in terms of ability to lift weight, sit, stand, etc. Additionally, the Guidelines mandate a conclusion only if a claimant's profile fits precisely into one of the rules. Otherwise, prior case law requiring specific vocational evidence remains applicable. Because the Guidelines limit themselves to specific, measurable situations, they do not endanger individualized determinations of disability. Several decisions caution, however, that courts must exercise care to ensure that the Secretary uses the grid only when appropriate.

When the grid is applied, the courts acknowledge that the focus of the adjudication changes from determination of disability per se to determination of age, education, experience, and functional capacity. A few courts express concern that the claimant ought to be given notice of this change, because without such notice, the claimant has no opportunity to present an adequate case or to rebut the relevant adjudicatory facts.

making applies to the grid because it is based on legislative facts properly the subject of rulemaking. The hearing requirements of § 556 therefore do not apply. Claimants have the opportunity to rebut all evidence properly in issue at the hearing (age, education, work experience, and residual functional capacity). See, e.g., Sherwin v. Secretary of Health & Human Servs., 685 F.2d 1, 4 (1st Cir. 1982); Rivers v. Schweiker, 684 F.2d at 1156-57; Broz v. Schweiker, 677 F.2d at 1362-63.

94. See, e.g., Santise v. Schweiker, 676 F.2d at 938-39; Kirk v. Secretary of Health & Human Servs., 667 F.2d at 530.
95. See, e.g., McCoy v. Schweiker, 683 F.2d at 1146-48; Santise v. Schweiker, 676 F.2d at 934-35; Kirk v. Secretary of Health & Human Servs., 667 F.2d at 528.
96. See supra note 41.
97. See supra notes 46-48 and accompanying text.
98. See, e.g., McCoy v. Schweiker, 683 F.2d at 1146; Torres v. Secretary of Health & Human Servs., 677 F.2d at 170.
99. See, e.g., Torres v. Secretary of Health & Human Servs., 677 F.2d at 169-170; Broz v. Schweiker, 677 F.2d at 1364; Santise v. Schweiker, 676 F.2d at 935.
100. See, e.g., Broz v. Schweiker, 677 F.2d at 1356; Kirk v. Secretary of Health & Human Servs., 667 F.2d at 534.
101. McCoy v. Schweiker, 683 F.2d at 1147; Hall v. Harris, 658 F.2d 260, 267 n.3 (4th Cir. 1981). See also STUDY, supra note 15, at 60-61 (emphasizing the importance that at every stage of the adjudication process the issues be clearly understood). See also infra notes 147-49 and accompanying text. But see Broz v. Schweiker, 677 F.2d at 1364.
The Constitutional Justification

In some circuits, claimants challenged the constitutionality of applying the Medical-Vocational Guidelines. They argued that the grid violates due process by creating irrebuttable presumptions, by making arbitrary and capricious distinctions, by failing to provide claimants with notice and the opportunity to rebut evidence in the hearing, and by failing to provide an individualized hearing. The courts answer these challenges by asserting that no fundamental right or interest is involved in the disability adjudication, but only a “noncontractual claim to receive funds from the public treasury [which] enjoys no constitutionally protected status.” When that is the case, due process requires only that the classifications be rationally related to a reasonable legislative purpose. The courts then hold that the Guidelines easily meet the rational relationship test because they promote consistent and efficient disability determinations. The issue of what process is constitutionally due to the claimant does not arise at all because “there is no constitutional property inter-

103. Kirk v. Secretary of Health & Human Servs., 667 F.2d at 531, 533. The court examined the irrebuttable presumption doctrine extensively, citing various critiques and arguing that a statutory classification, not an irrebuttable presumption, is involved. Id. at 533-35.
104. Id. at 531-32. The claimant argued that the age distinctions were arbitrary, but the court found them rational.
106. Id. at 1157. Plaintiffs based this challenge on structural due process, a doctrine suggested in Tribe, Structural Due Process, 10 HARV. C.R.-C.L. L. REV. 269 (1975), which would require individualized hearings in certain circumstances. Tribe limits the doctrine to situations “where mandatory, per se rules are either too insensitive to personal differences in matters of great moment, or too impervious to changing values and conceptions to represent a fair expression of the continuing consent of the governed.” L. Tribe, AMERICAN CONSTITUTIONAL LAW 1145 (1978). Only “important interests in liberty,” or “fundamental concerns” trigger structural due process. Tribe, Structural Due Process, 10 HARV. C.R.-C.L. L. REV. 269, 307, 311 (1975).
est in the types of benefits [claimed] which would trigger the question what process is due."\textsuperscript{110}

Prior Case Law

The Second Circuit invalidated use of the Medical-Vocational Guidelines without specific proof of suitable available jobs, relying on prior cases requiring such specific proof.\textsuperscript{111} The other circuits argue that use of the regulations does not seriously conflict with those cases. The courts conclude that the Guidelines merely provide another method for the Secretary to meet her burden of proof, that the claimant can still rebut all the issues properly in controversy, that a great deal of individual adjudication remains, and that the Guidelines are by no means universally applicable.\textsuperscript{112} The Eighth Circuit also states explicitly what is implicit in the other decisions:

If "[a] reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner," . . . it must also be true that a reviewing court may not set them aside simply because it has, in the pre-Guidelines past, interpreted the statute in a different manner.\textsuperscript{113}

Thus, even though several of the courts express reservations about the fairness of the grid,\textsuperscript{114} all but the Second Circuit conclude that the Guidelines are a valid exercise of administrative authority, which can be used to mandate conclusions of non-disability. The strong precedents supporting individualized adjudication and specific findings, which the courts acknowledge exist in their circuits, are an insufficient basis for invalidating the Secretary's exercise of authority.

ANALYSIS

In light of recent Supreme Court due process decisions, claimants will have a difficult task convincing the Court that use of

\textsuperscript{110} Rivers v. Schweiker, 684 F.2d at 1158. Such a property interest exists in the context of public benefits only when a termination of benefits is involved. \textit{Id.} n.16

\textsuperscript{111} See supra note 68.

\textsuperscript{112} See, e.g., Rivers v. Schweiker, 684 F.2d at 1155, 1157; Santise v. Schweiker, 676 F.2d at 934-35.

\textsuperscript{113} McCoy v. Schweiker, 683 F.2d at 1149.

\textsuperscript{114} See, e.g., Hall v. Harris, 658 F.2d at 268; McCoy v. Schweiker, 683 F.2d at 1145.
the grid violates the Constitution. Because no fundamental right or interest is at stake, the regulations need only bear a rational relationship to the purposes of the Social Security Act. While an imperfect fit between the regulations and the statutory purpose does not violate the Constitution, however, it may violate the statute. Most of the courts of appeals have refused to hold that the Guidelines contain such a violation. If the Supreme Court relies on the same case law and theoretical arguments, it could easily reach the same conclusion. But the arguments of the courts of appeals are not unassailable, and a strong case can be made that the Guidelines do violate the purposes of the Social Security Act.

The Delegation Issue

In *Batterton v. Francis* and *Schweiker v. Gray Panthers*, the Supreme Court held that the Secretary's interpretation of the Social Security Act must be given legislative effect if she acted within the statute's grant of authority. However, those cases need not be interpreted as requiring the courts to validate the Medical-Vocational Guidelines. The statutes at issue in *Batterton* and *Gray Panthers* contain a very specific delegation of authority, requiring the Agency to set standards for defining a particular statutory term. This mandate is unlike the broad and unspecific delegation applying to the disability statute, which authorizes the Secretary to adopt regulations necessary or appropriate to carry out the Act's provisions, and to "provide for the

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115. See supra note 108.
116. See supra note 107 and accompanying text.
117. See supra notes 77-98 and accompanying text.
120. Batterton v. Francis, 432 U.S. at 425. See supra notes 80-81 and accompanying text.
121. In *Batterton*, the relevant statute provided benefits for a dependent child "deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father." 42 U.S.C. §607(a) (1976).

In *Gray Panthers*, the relevant statute authorized funds to states for medical assistance and required that the state programs base assessment of a claimant's financial need only on "such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient ...." 42 U.S.C. §1396a(a)(17)(B) (1976).
nature and extent of the proofs and evidence.”122 Nowhere does that delegation authorize the Secretary to define disability; the statute itself does that.123 Nor does the statute give the Secretary authority to require “proofs and evidence” of disability which in reality change the operative definition of what constitutes disability.

The lower courts have not always deferred to the Secretary’s position on the issues involved in disability adjudications.124 They have on several occasions rejected the Secretary’s interpretation of what medical conditions constitute disability, when that interpretation conflicted with the courts’ view of the statutory definition.125 They have repeatedly refused to follow the Secretary’s view of what level of proof should be required before pain may be taken into account in a disability decision.126 Finally, the circuits have imposed burden-of-proof requirements of their own, shifting the burden to the Secretary after a claimant proves he can no longer do his past work.127 As these examples128


125. See, e.g., Marion v. Gardner, 359 F.2d 175 (8th Cir. 1966) (holding invalid, if conclusively applied, a regulation stating that a personality disorder, without an associated severe psychoneurosis or psychosis, does not by itself result in the inability to engage in substantial gainful activity); Nickles v. Richardson, 326 F. Supp. 777 (D.S.C. 1971) (invalidating a regulation requiring diabetes mellitus to progress to the amputation stage before disability could be found).

126. See, e.g., Hayes v. Celebrezze, 311 F.2d 648 (5th Cir. 1963); Whitt v. Gardner, 389 F.2d 906 (6th Cir. 1968); Stark v. Weinberger, 497 F.2d 1092 (7th Cir. 1974). See also STUDY, supra note 15, at 142-46 and cases cited.

127. See supra notes 49-51 and accompanying text. A literal reading of the statute, that the claimant will not “be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require” appears to put the burden squarely on the claimant to prove his case, and to allow the Secretary to define that burden. See 42 U.S.C. § 423(d)(5) (Supp. IV 1980). But no court has accepted that interpretation, even after the Guidelines became effective; and were the Secretary to promulgate a regulation putting the burden wholly on the claimant, it is highly unlikely that any court would uphold it.

128. There are other examples. For instance, several courts have found that delays in hearings have become unreasonable and thus violate 42 U.S.C. § 405(b) (1976 & Supp. IV 1980), which requires “reasonable notice and an opportunity for a hearing,” and have imposed their own time limits. See, e.g., White v. Mathews, 559 F.2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978); Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978). But see Wright v. Califano, 587 F.2d 345, 353 (7th Cir. 1978) (timing of hearings has been left to agency discretion, therefore courts should hesitate to impose time limits absent a due
illustrate, courts in the past have retained considerable oversight over disability adjudication, having on numerous occasions imposed their own interpretation of what the “nature and extent of the proofs and evidence” should be. Neither Supreme Court precedents nor other case law prevent courts from examining the Medical-Vocational Guidelines to determine whether they conform to the meaning and purpose of the Social Security Act’s disability provisions.

The Legislative/Adjudicative Fact Distinction

The major argument the courts of appeals make to support the Guidelines is that they are based only upon legislative facts—the existence of jobs in the national economy, and the exertional and skill requirements of those jobs. The regulations therefore do not curtail individualization or change the statutory definition of disability. They merely aid the Secretary in proving that there are available jobs that the claimant can perform.

The courts’ characterization of the existence of and the qualifications for jobs as “legislative facts” may not be appropriate, however. The requirements of jobs vary significantly over time and among employers, as does the availability of unskilled jobs. Some generalizations concerning job requirements are necessary in the disability adjudication process. But it must be questioned whether regulations which fix such generalizations at a single point in time and then impose those generalizations as irrefutable rules to determine non-disability are an appropriate exercise of rulemaking authority.
Assuming that the courts are correct in characterizing the factual issues of job availability and job qualifications as legislative facts, that conclusion does not necessarily support the courts' holdings that the grid itself is based only on legislative facts. The Guidelines take administrative notice of more than those two issues. The step between plugging a claimant into the proper categories and the appropriate rule, and finding whether that claimant is disabled, is a significant one not clearly acknowledged by the courts. The Guidelines assume, without actually proving, that a claimant with a specific functional capacity, age, education and skill level, if the rule pronounces him not disabled, can perform a wide range of jobs that are available in the national economy. In other words, the rules take administrative notice of the connection between the four factors and the claimant's ability to work.

In many cases, the regulations may be correct in assuming that a person whose profile fits a rule that proclaims him not disabled can in fact work, since the categories in which claimants are slotted are without question related to job requirements. But the rules are not foolproof. In a significant number of cases, claimants who are pronounced not disabled by the rules may truly be unable to work. People do not react in the same way to supposedly identical impairments; some are considerably less able to tolerate pain and stress than others; and people differ in the effect that age has on their ability to adapt to new jobs.

grid, and because the fourth edition, published in 1981, did contain a substantial number, though fewer (approximately 130 as opposed to 200), unskilled sedentary jobs. The decision leaves open the possibility that when the grid's "facts" become outdated, a challenge might succeed. But the court did not say when that point would be reached. Courts had frequently permitted use of information from the Dictionary in disability adjudications, even before the Guidelines took effect. Such information had always been rebuttable, however. See supra note 52 and accompanying text.

133. See STUDY, supra note 15. The authors found:

There is no foolproof basis for predicting the individual's response to medical difficulties. As one ALJ put it to us, even if the medical problems seem controllable and the claimant's vocational characteristics are reasonably strong, one is dealing with a certain percentage of people in whom 'the mainspring is broken, and when that happens the fellow is disabled, although others with the same complaints are not.'

Id. at 25-26.

134. This is presumably the reason courts have refused to allow the Secretary to limit consideration of pain to objective proof. See supra note 126.

135. See supra note 92. It is true that the Guidelines require cases in which claimants have non-exertional impairments, including pain and stress, to be decided without reliance on grid rules. See supra notes 47-48 and accompanying text. In order for the grid
In effect, the Guidelines impose an average-man standard on the disability determination. The rules say essentially that a claimant whose profile fits into one of the rules ought to be able to perform a wide range of jobs at a given functional level; the claimant is given no opportunity to prove that he cannot in fact perform them. Use of the grid therefore prevents full adjudication of disability claims. This practice goes beyond merely taking administrative notice of legislative facts. It takes notice also of a clearly adjudicative fact—whether or not a claimant of a certain category of age, education, work experience, and physical capacity is able to work.

The Social Security Act requires more than that the grid's categories be rationally related to the purposes of the Act. It mandates that the disability determination be based on the claimant's inability to work, not on the inability of a hypothetical person, supposedly endowed with the claimant's characteristics, to perform substantial gainful activity. The Act also

not to apply, however, the claimant's non-exertional impairment must be severe, significantly limiting his ability to work at a given functional level. See, e.g., Kirk v. Secretary of Health & Human Servs., 667 F.2d at 537; Broz v. Schweiker, 677 F.2d at 1363 (the court refused to "say with certainty" that a claimant's non-exertional impairments—four hours of traction per day, mental effects of medication, pain, and numbness—prevented a full range of sedentary work, and therefore remanded the case for findings to determine whether a decision outside the grid was necessary).

The grid will also not be applied if a claimant falls in between categories of the grid. See supra note 46 and accompanying text. However, cases frequently have conflicting medical evidence that the ALJ is permitted to weigh (with some limitations: see, e.g., supra notes 125-28). His conclusion need only be based on substantial evidence. See supra note 18. Even if a considerable amount of the available evidence indicates that a claimant cannot perform all the functional skills at a given level, she may still be plugged into the grid and presumed to be able to perform jobs requiring skills she does not have.

136. This irrebuttable presumption was attacked in the Sixth Circuit case as unconstitutional. See supra note 103. See supra notes 102-10 and accompanying text for a general discussion of the constitutional issues involved.

See also Mashaw, supra note 58, at 199-200. Professor Mashaw, in examining three distinct models of administrative decision-making, see infra note 143, suggests that the Social Security Administration, in avoiding capitulation to a "professional treatment" mode of decision making, in favor of its own preferred "bureaucratic-rationality" mode, has made a value choice: "It ultimately must decide not whether a particular claimant can work—there is no direct evidence on that question—but whether that claimant should be expected to work" (emphasis in original). Mashaw is referring to the inadequacies of the medical and vocational evidence in disability determinations, a problem which certainly predated adoption of the Guidelines. Use of the grid, however, clearly exacerbates the problem, and conflicts with another of Mashaw's suggested models, the "moral judgment" model. See infra note 143.

137. An individual is "under a disability" if his impairments are so severe "that he is
requires that each claimant be given an individualized hearing where he has the opportunity to prove that he is unable to work.\textsuperscript{138} Use of the grid to take notice of a claimant's ability to work, once he is slotted into the right categories, undermines this individualized determination and redefines the highly individualized statutory meaning of disability.

This result is not only a departure from the mandate in the Act for individualization. It is also a departure from the approach of the other disability regulations, in which ability to work is the ultimate issue.\textsuperscript{139} The result is in conflict with past case law holding that the ultimate issue in the disability adjudication must be the individual's ability or inability to work.\textsuperscript{140} Such a redefinition of the statutory standard makes the grid inconsistent with the statute and therefore a violation of the Secretary's administrative authority.\textsuperscript{141}

\textit{The Conflict Between Individualization and Consistency}

The Secretary and most of the courts of appeals also defend the Medical-Vocational Guidelines as necessary standardization which promotes consistent and efficient adjudication of disability claims.\textsuperscript{142} Since, however, the statutory standard for determining disability is highly individualized, there must be strict limits on attempts to make the results of the determination more consistent. The greater the push toward consistency, especially through the use of irrefutable rules, the more likely that individual characteristics and differences will be ignored in the adjudication process.\textsuperscript{143}

\textsuperscript{139} See, e.g., 20 C.F.R. §§ 404.1520(e), (f) (1982) (a claimant whose impairments do not meet the Listings still has the opportunity to show that he cannot work); 20 C.F.R. § 404.1520(b) (1982) (a claimant who is currently performing substantial gainful activity is not disabled, regardless of the severity of his impairments). This latter section is statutorily mandated: 42 U.S.C. § 423(d)(4) (Supp. IV 1980) states that an individual performing substantial gainful activity shall be found to be not disabled.
\textsuperscript{140} See supra notes 53-56, 125 and accompanying text.
\textsuperscript{141} Batterton v. Francis, 432 U.S. at 426 (the regulation "can be set aside only if the Secretary exceeded his statutory authority."); 5 U.S.C. §706(2)(C) (1976).
\textsuperscript{142} See, e.g., supra notes 58-59, 109.
\textsuperscript{143} STUDY, supra note 15, at 25: "We cannot have it both ways. The trade-off between individualization and uniformity is real when the technique for achieving uniformity is standard-setting."
A logical compromise between the two conflicting goals would be to make the Guidelines advisory only, and to permit claimants to rebut the rules' conclusions. The Guidelines would still promote more consistent results, while at the same time leaving the final issue of ability to work open to rebuttal.\textsuperscript{144} A compromise essentially the same in substance was reached by the Second Circuit when it held that the Secretary, regardless of the grid, must identify specific jobs a claimant can do, in order to provide the claimant with the opportunity to prove she could not do those jobs.\textsuperscript{145}

The Third Circuit uses the Study as support for its contention that the grid is a rational and acceptable way of enhancing consistency in disability adjudications. Santise v. Schweiker, 676 F.2d at 930 n.14, 938 n.27. The Study, published before the grid took effect but after it had been proposed, suggests that a possible solution to the inconsistency problem would be the establishment of standards ALJ's must follow. But the Study points out the political difficulties of such a solution, difficulties it calls "unacceptability" costs (clearly illustrated by the objections now made to the grid). STUDY, supra note 15, at xxiii, 25. Instead, the Study opts for a different solution—panels of ALJ's to hear each case. Id. at 26.

The Study also supports the use of official notice. The authors are not referring, however, as the Third Circuit implies, to use of irrebuttable notice like that taken in the grid, but instead to notice which provides the opportunity for effective rebuttal: In its present form, vocational expert testimony is of little help to claimants, and use of official notice "would permit a more focused response [by claimants] than is likely with respect to VE testimony in the form it is now offered. (We recommend, of course, that this testimony be made more specific.)" Id. at 82.

See also Mashaw, supra note 58, at 185-97. Professor Mashaw suggests a theoretical framework for considering the necessarily conflicting goals involved in administrative decision-making. He describes three models which must be reconciled: 1) the "bureaucratic-rationality" model, whose goal is "to minimize the sum of error costs and administrative costs"; 2) the "professional-treatment" model, whose goal is to serve the client through personal examination and counseling, so that professional judgment is applied to each case; and 3) the "moral-judgment" model, whose goal is to decide "who deserves what," and which must therefore focus on providing "a full and equal opportunity to obtain one's entitlements." Id. at 188-89.

Mashaw examines the disability system in light of these models. The bureaucratic-rationality and moral-judgment models are the main competitors (the professional-treatment model has never come close to reflecting the reality of disability adjudications; see supra note 136). The greater the opportunity for individual hearings and the greater the role of ALJ's in making independent decisions, the less control the Social Security Administration has on error and administrative costs. "The logic of one cannot be played out without destroying the other; blending them necessarily produces stress—and perhaps incoherence." Id. at 197.

144. In terms of Professor Mashaw's models, the compromise would balance the need of the bureaucratic-rationality model to reduce costs, with the need of the moral-judgment model to ensure that each claimant has the opportunity to prove that he is entitled to benefits. See supra note 143.

Use of the grid rules as rebuttable instead of irrebuttable presumptions should not mean, however, that the claimant has the burden of proving that there is no job he can perform at his particular functional level. As the Second Circuit suggested, the Secretary may still be expected to meet her burden of proof: "[I]t would not be too great a burden for the Secretary or the ALJ to specify a few suitable alternative types of jobs so that a claimant is given an opportunity to show that she is incapable of performing those jobs."\textsuperscript{146}

**Preserving Individualization**

In the event that the Supreme Court disagrees with the Second Circuit's conclusion, and use of the Medical-Vocational Guidelines to replace vocational evidence is upheld, claimants must be particularly vigilant to ensure that the requirements for use of the Guidelines are followed: 1) that the grid should be used only when a claimant's profile fits a rule exactly; and 2) that the claimant should be given notice of and an opportunity to rebut the facts which do remain part of the adjudication.

The danger with any classification scheme is that individuals may be molded to fit it, especially when categorizing is easier and cheaper than individual consideration. The ALJ's responsibility to develop all the evidence\textsuperscript{147} should therefore be strictly enforced, especially when a claimant is unrepresented. Courts should not permit the Secretary or the ALJ to ignore or minimize non-exertional factors or conflicts in the evidence which, if significant, should remove the case from the Guidelines' rules.\textsuperscript{148}

Claimants must also have notice of the relevant issues in the disability determination, as well as of the Secretary's findings on those issues. They must be given the opportunity to rebut these findings at each stage of the adjudication, and be made aware that non-disability is presumed once the four grid categories are established.\textsuperscript{149} If a claimant does not understand that these grid categories are the relevant issues, any opportunity for him to rebut his own classification is of little value.

\textsuperscript{146} Id. at 54.

\textsuperscript{147} See supra note 19.

\textsuperscript{148} See supra note 135.

\textsuperscript{149} See supra note 101 and accompanying text.
Claimants also must insist that the courts establish their own guidelines for overseeing use of the grid. Only by continually reminding the courts of the grid’s limitations and dangers can claimants ensure that the supposedly individualized adjudication process does not become overly standardized at the expense of consideration of individual differences.

CONCLUSION

The circuit courts’ view that the Medical-Vocational Guidelines do not reduce individualization in the adjudication of disability claims is mistaken. Any attempt to create greater uniformity will have such a result. Courts have the responsibility to examine the statute to determine whether such a result is allowable, considering the underlying purposes of the disability program and the provisions of the Social Security Act. In this case, the statute provides for an individualized standard of disability and an individualized adjudication process in which ability or inability to work is the ultimate issue. Any rule that tends to undermine the goal of providing benefits to those who are medically unable to work undermines the purposes of the Act. Courts should not defend such irrebuttable rules by invoking goals subordinate to the Act’s overriding mandate for individualized adjudication.

REBECCA BARKEY