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TERMINATING SOCIAL SECURITY
DISABILITY BENEFITS: ANOTHER BURDEN
FOR THE DISABLED?

I. Introduction

Between March, 1981, and September, 1983, more than 374,000 people were removed from the Social Security disability benefit rolls.¹ Recent procedural changes which the Reagan Administration has introduced for terminating Social Security disability benefits have added uncertainty to the lives of thousands of physically and mentally disabled individuals.² A recipient of disability benefits can no longer be certain that his or her benefits will continue for the duration of the disability.

The Social Security Act³ (the Act) never provided that an individual, once found to be disabled⁴ and thus entitled to receive benefits, necessarily retains the right to continue collecting those benefits for life. The Act and the Regulations promulgated by the Secretary of Health and Human Services⁵ (the Secretary) contemplate periodic investiga-

1. N.Y. Times, Sept. 29, 1983, at A18, col. 1. The two types of benefits for which disabled persons may qualify under the Social Security Act are Social Security Disability (SSD) and Supplemental Security Income (SSI). 42 U.S.C. §§ 423, 1382 (1976). SSI eligibility depends upon financial need while SSD eligibility does not. Id. However, since this distinction is not significant for the purposes of this Note, which deals with termination procedures governing both types of benefits, only the words “disability benefits” will be used.

2. For a discussion of these changes, see infra text accompanying notes 10-15.


4. According to the Act, “disabled” means “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 . . . .” Id. § 423(d)(1)(A).

[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.

Id. § 423(d)(2)(A).

tions of beneficiaries' continuing eligibility and, where appropriate, termination of benefits.

Prior to 1980, however, the provisions in the Act and Regulations relating to continuing eligibility were vague. In the absence of fixed statutory requirements, Social Security Administration officials apparently relied on internal regulations concerning procedures for investigating possible ineligibility. In 1980 a major change took place. In response to a government study revealing that a significant percentage of beneficiaries were not actually entitled to Social Security disability payments, the Act was amended to provide for mandatory and fre-

Secretary full power and authority to make rules and regulations and establish procedures "not inconsistent" with the Act. See 42 U.S.C. § 405(a) (1976). In fact, the Act mandates the Secretary's adoption of reasonable and proper rules and regulations. Id.

An investigation will be started if—

1. We need a current medical report to see if you are able to do substantial gainful activity;
2. You return to work and successfully complete a period of trial work;
3. Substantial earnings are reported to your wage record;
4. You tell us that you have recovered from your disability or that you have returned to work; or
5. Your State Vocational Rehabilitation Agency tells us that—
   (i) You have completed your training;
   (ii) You have returned to work;
   (iii) You are able to return to work; or
6. Someone in a position to know of your physical or mental condition tells us that you are not disabled or that you have returned to work and it appears that the report could be substantially correct.

7. Id. §§ 404.1594, 1597.
8. See H.R. REP. No. 944, 96th Cong., 2d Sess. 60 (1980). The report indicates that administrative procedures only provided for continuing eligibility investigations under a limited number of circumstances, such as when there was a reasonable expectation that the beneficiary would show medical improvement. Id.


10. Letter from Gregory J. Ahart, Director of Human Resources Division of the U.S. General Accounting Office to the Secretary of Health, Education and Welfare (April 18, 1978) (outlines results of GAO study). See also Comptroller General's Report, supra note 9, at 5-12.
quent review of all but a very narrow class of individuals receiving benefits. The amendment, which mandates a minimum of one review every three years, was to become effective on January 1, 1982.

The Reagan Administration acted swiftly, however, and the new accelerated continuing disability investigations were under way ten months ahead of schedule in March of 1981. Between March 1, 1981, and March 31, 1982, the Social Security Administration selected approximately 368,500 cases for investigation compared with the 100,000 cases reviewed in 1980. Of 748,000 beneficiaries investigated in 1981 and 1982, 340,000 have had their benefits terminated.

The fairness of many of these termination decisions has been questioned. There has been extensive media coverage of mentally and


In any case where an individual is or has been determined to be under a disability, the case shall be reviewed by the applicable State agency or the Secretary (as may be appropriate), for purposes of continuing eligibility, at least once every 3 years; except that where a finding has been made that such disability is permanent, such review shall be made at such times as the Secretary determines to be appropriate. Review of cases under the preceding sentence shall be in addition to, and shall not be considered as a substitute for, any other reviews which are required or provided for under or in the administration of this subchapter.

Id. For a discussion of what constitutes a "permanent" disability within the meaning of this section, see D. Keenan & C. Ashman, Social Security Disability Claims 58-9, n.2 (1983).

It should be noted that the Social Security Administration administers disability benefit programs in conjunction with state agencies pursuant to sections 421 and 1383b of the Act.


17. Between January 1, 1981, and August 31, 1982, reviews of mentally disabled recipients constituted 27.5% of all continuing disability investigations. Although the
physically disabled individuals who have died while fighting for reinstatement of terminated benefits.\textsuperscript{18} New York City Council President Carol Bellamy concludes that an overriding concern for cutting or shifting costs has led to a federal policy of terminating benefits of the truly disabled.\textsuperscript{19}

Removing large numbers of disabled individuals from the disability rolls\textsuperscript{20} shifts the responsibility for their care from the federal to the

percentage of individuals who receive benefits on the basis of a mental disability is not known, it is estimated that 11% to 18% of Social Security beneficiaries' primary disability is a mental impairment. \textit{Hearings on Social Security Reviews of the Mentally Disabled}, supra note 16, at 164-65. The special problems faced by mentally disabled beneficiaries are also discussed. \textit{Id.} at 101-12 (statements of Dr. Arthur T. Myerson).

18. \textit{See Work or Die}, N.Y. Times, May 23, 1983, at A18, col. 1; \textit{The Disability Nightmare}, Newsday, March 22, 1983, at R1 (profiles cases of several individuals who died while appealing termination decisions). A television program entitled "Who Decides Disability?" was broadcast on Public Broadcasting Service in New York on June 20, 1983. Interviews with surviving spouses of terminated beneficiaries were highlighted, as were discussions with Social Security Administration officials and numerous state and federal government officials. \textit{See Transcript, Who Decides Disability?}, Frontline #121, 1983 (available in Fordham Law School Library).


Despite this criticism, the Secretary of Health and Human Services recently commented on the accelerated review program:

\begin{quote}
It's not a revenue issue. It is a people issue, a fairness issue, an equity issue. It is also an issue that [this is] ... a program that is costing $18 billion that became very loose in the 70s, according to the [Government Accounting Office] and the Carter Administration, a program that required review.
\end{quote}

\textit{Transcript, Who Decides Disability?}, supra note 18, at 29.

Amendments to the Social Security Act which were passed in January, 1983, were apparently instituted to counteract some of the harsh effects of the 1980 amendment. 1982 U.S. CODE CONG. & AD. NEWS 4377, 4384 (additional views of Senator Long on H.R. 7093). The Amendments (1) provide for the continuation of disability payments through the appeals process, subject to the government's collection if the ultimate decision is to terminate benefits and (2) give the Secretary authority, on a state-by-state basis, to decrease the flow of cases sent to state agencies for review of continuing eligibility. Pub. L. No. 97-455, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 2498-99. The Secretary is authorized to slow reviews only in states that demonstrate a good faith effort to meet staffing requirements and process claims. \textit{Id.} at 2499. The amendments require the Secretary to present semiannual reports to the Senate Finance Committee and the House Ways and Means Committee, showing how many eligibility reviews, termination decisions and reconsideration requests were overturned at the reconsideration or hearing level. \textit{Id.} at 2500-01. \textit{See also} 42 U.S.C.A. §§ 421(h)(2), (3), 423(g) (West Supp. 1983).

There is little if any indication, however, that these amendments have actually made the continuing disability investigation process more of a "people" and "equity" issue and less of a revenue issue. For a discussion of reforms which are currently being urged, see \textit{infra} notes 134-41 and accompanying text; \textit{see also} U.S. Plans to Ease Disability Criteria in Social Security, N.Y. Times, June 7, 1983, at A1, col. 3.

20. The overwhelming frequency with which termination decisions are reversed on appeal demonstrates that many of those individuals whose benefits are terminated
municipal level. At April, 1983, hearings before the Special Committee on Aging, New York City Council President Bellamy commented on the increased burdens which cities and states suffer as a result of the Reagan Administration's termination policy. The Council President pointed to increased expenditures for home relief and legal representation. In addition, the City is faced with the problem of more homeless people who turn to the streets.

Other cities and states share these concerns, particularly with respect to the mentally disabled. Philadelphia and Pennsylvania officials estimate that the cost of general assistance, medical assistance, mental health services and home care for many of the recipients terminated from the disability rolls between March, 1981, and August, 1982, was at least ten million dollars. A Michigan report projected that states could expect the number of recipients of general assistance and aid to families with dependent children to increase by approximately 730,000

are still in fact disabled. 1982 U.S. CODE CONG. & AD. NEWS 4373, 4377 (legislative history of Public Law Number 97-455, 97th Congress, 2d Session) (on appeal, benefits are reinstated by Administrative Law Judge in 65% of cases); N.Y. Times, Aug. 7, 1983, at 29, col. 1 (in New York, benefits are reinstated for 50% of appellants and for 85% of appellants who are represented by counsel); see also Joint Hearing on the Effects of the Accelerated Review, supra note 13, at 5.

The four steps of the appeals process are as follows: (1) an application for reconsideration; (2) a hearing before an Administrative Law Judge; (3) an appeal to the Social Security Administration Appeals Council; and (4) an action in federal district court. See generally 20 C.F.R. §§ 404.907-.983 (1983) (detailed discussion of appeals process). It seems likely that the complicated nature of the 12 to 18 month appeals process prevents many disabled individuals whose benefits are terminated from pursuing their claims. Joint Hearing on the Effects of the Accelerated Review, supra note 13, at 3, 5.

21. See Hearings on Social Security Reviews of the Mentally Disabled, supra note 16, at 91-101. According to the Council President, "[w]hat began as a laudable effort to insure the proper expenditure of [f]ederal dollars has instead become a ploy to shift responsibility and program costs from the Federal Government to States and localities." Id. at 95.

22. Id. at 95-96; Office of the City Council President, Passing the Buck: Federal Efforts to Abandon the Mentally Disabled 1 (Jan. 1982) [hereinafter cited as Passing the Buck]. See also Legal Aid Measure to Help Disabled, N.Y. Times, Aug. 7, 1983, § 1, at 29, col. 1 (bill signed by Governor Cuomo allocates up to $1 million for legal representation for disabled whose benefits have been terminated).

23. See Hearings on Social Security Reviews of the Mentally Disabled, supra note 16, at 95; Passing the Buck, supra note 22, at 2.

In July, 1983, Council President Bellamy estimated that at least 50,000 New York City residents are in danger of losing benefits at a potential cost of $75 million to the City and State. Release from President of the Council, City of New York (July 22, 1983).


25. Id. at 280. See generally id. at 279-331 (report discusses how and why the Social Security Administration has reduced the number of disability benefit recipients).
persons nationwide. According to the report, if the current termination policy continues, Michigan will be called upon to replace $123 million in benefit payments "which should rightfully be paid from federal monies."

II. Burden of Proof in Termination Proceedings

The increased number of individuals whose cases are reviewed, and who will ultimately have their benefits terminated, accentuates the need to consider what occurs after the Secretary determines that a beneficiary is ineligible for continued benefit payments. It is unclear whether it is the claimant who must prove that he or she continues to be disabled or the Secretary who must prove that the claimant is no longer eligible for benefits.

A. Alternative Approaches

The burden of proof question in Social Security disability cases has been referred to as "elusive" and "confusing." The non-adversarial

26. Id. at 291. The report was prepared by the State of Michigan Interagency Task Force on Disability.

State and local government officials are not alone in criticizing the federal government's termination policy for its cost shifting. Recently, a Minnesota district court stated: "There is no public interest in shifting financial responsibility for the psychiatrically disabled from a solvent disability fund to state and local government." Mental Health Ass'n of Minnesota v. Schweiker, 554 F. Supp. 157, 167 (D. Minn. 1982). Similarly, the Ninth Circuit has acknowledged that termination of benefits causes "a shift of the welfare burden from one program to another, from primarily federal to primarily state sources of funds." Leschniok v. Heckler, 713 F.2d 520, 524 (9th Cir. 1983).

27. It is estimated that the rate of review will increase by more than 500% from 1980 to 1984. Release from President of the Council, City of New York (January 21, 1982). For statistics on past reviews, see supra text accompanying notes 14 and 15.

28. For statistics on past terminations, see supra text accompanying note 15.

29. The procedures to be followed after the Secretary has made a determination that an individual's disability has ended are outlined in 20 C.F.R. §§ 404.1594, .1595, .1597 (1983). Generally, the Secretary has a duty to contact the recipient and to allow him or her to explain why benefits should not be stopped. Lack of cooperation in supplying information about one's disability is grounds for stopping payments. Id. § 404.1594(a).

30. The term "claimant" refers to the plaintiff in Social Security proceedings.

31. In Matthews v. Eldridge, 424 U.S. 319 (1976), the Court stated that claimants in disability cases bear "the continuing burden" of showing that they are disabled. Id. at 336. Although this statement was dictum, the Matthews decision is often cited for the proposition that the claimant in a termination proceeding bears the burden of proving continuing disability. For examples of cases which cite Matthews in this capacity, see Torres v. Schweiker, 682 F.2d 109, 111 (3d Cir. 1982), cert. denied, 103 S. Ct. 823 (1983); Schauer v. Schweiker, 675 F.2d 55, 58 (2d Cir. 1982); Gonzalez v. Harris, 631 F.2d 143, 145 (9th Cir. 1980). But see Cassiday v. Schweiker, 863 F.2d 745, 749 (7th Cir. 1981) (Secretary burdened with justifying termination of benefits).

32. See Schauer, 675 F.2d at 57.
nature of the proceedings is usually cited as the difficulty in applying
traditional burden of proof concepts.\textsuperscript{34} It is well settled, however, that
when a claimant seeks disability benefits for the first time, he bears
the burden of proving that his disability prevents him from returning
to his former occupation.\textsuperscript{35} Once the claimant has met this burden,
the Secretary must prove "that there is some other type of substantial
gainful activity that the claimant can perform."\textsuperscript{36}

When termination of benefits is considered, there is no established
rule regarding who bears the burden of proof. Three possible approaches
can be identified. First, eliminating the distinction between initial
disability determinations and termination proceedings for the purpose
of burden of proof questions would require a claimant who has already
proved his disability\textsuperscript{37} to prove it again when the Secretary seeks to termi-
nate his benefits.\textsuperscript{38} Such a requirement attaches no presumption to the
initial determination of disability.

\textsuperscript{33} See Miranda v. Secretary of Health, Education and Welfare, 514 F.2d 996, 998 (1st Cir. 1975) ("[t]hese [burden of proof] responsibilities resist translation into absolutes, especially because [S]ocial [S]ecurity proceedings are not strictly adversarial").

\textsuperscript{34} Id. See also Schauer, 675 F.2d at 57 (elusiveness stems from fact that Social Security proceedings are not designed to be adversarial; Secretary is not even represented by counsel); Northrup v. Schweiker, 561 F. Supp. 1240, 1242 (W.D.N.Y. 1983) (Social Security proceedings are not strictly adversarial; burden of proof questions are confusing and elusive).

\textsuperscript{35} See, e.g., Martin v. Harris, 666 F.2d 1153, 1155 (8th Cir. 1981) (individual claiming disability benefits has burden of proving that medically determinable physical or mental impairment precludes performance of prior work); Perez v. Schweiker, 653 F.2d 997, 999 (5th Cir. 1981) (burden in initial disability case is on claimant to prove he can no longer perform prior occupation); Gonzalez v. Harris, 631 F.2d 143, 145 (9th Cir. 1980) (burden on claimant to establish that physical or mental impairment prevents him from engaging in previous occupation); Parker v. Harris, 626 F.2d 225, 231 (2d Cir. 1980) (claimant establishes prima facie case by showing that he cannot return to prior employment because of impairment); Hepnher v. Matthews, 574 F.2d 359, 361 (6th Cir. 1978) (prima facie case established if claimant shows medical basis for impairment that prevents him from engaging in his occupation); Gonzalez Perez v. Secretary of Health, Education and Welfare, 572 F.2d 886, 887 (1st Cir. 1978) (to qualify for disability benefits, plaintiff must meet initial burden of showing disability that precludes return to former employment).

\textsuperscript{36} Martin, 666 F.2d at 1155. For similar descriptions of the Secretary's burden of proof, see Perez, 653 F.2d at 999; Gonzalez, 631 F.2d at 145; Parker, 626 F.2d at 231; Hepner, 574 F.2d at 362.

\textsuperscript{37} According to the Fifth and Eleventh Circuits, the claimant's burden in an ini-
tial determination case "is so stringent that it has been characterized as bordering on
the unrealistic." Walden v. Schweiker, 672 F.2d 835, 838 (11th Cir. 1982) (citing Williams v. Finch, 440 F.2d 613, 615 (5th Cir. 1971)).

\textsuperscript{38} For examples of cases which impose this "double burden," see Myers v. Richardson, 471 F.2d 1265, 1267 (6th Cir. 1972) (claimant in termination case bears burden of establishing continuing disability); Marker v. Finch, 322 F. Supp. 905, 909-10 (D. Del. 1971) (in termination proceeding, claimant has burden of proving continuation of disability).
A second approach gives weight to the initial disability determination by requiring the Secretary to prove that the claimant is no longer disabled. This designation of the burden of proof rests on the assumption that the initial disability determination makes it very likely that the claimant’s disabling condition has persisted, and the Secretary must therefore prove otherwise before terminating the claimant’s benefits.

Finally, it is possible to favor the initial disability determination without placing the entire burden on the Secretary. Imposing a presumption of the continuation of the claimant’s disabling condition requires the Secretary to come forward with evidence, generally of a recipient’s improved condition. Alternatively, such evidence might demonstrate clear error in the initial disability determination or improvements in technology which enable the claimant to engage in substantial gainful activity at the time of the review. Despite the Secretary’s obligation to produce evidence under the presumption approach, the claimant may nevertheless be required to prove that he is still disabled. The presumption approach would affect the burden of production without altering the underlying burden of proof.

B. The Circuit Split

Circuit courts of appeals have addressed the burden of proof issue. In Cassiday v. Schweiker, for example, the Seventh Circuit expressly

39. See Cassiday, 663 F.2d at 749 (Secretary is burdened party in termination proceeding). Other circuits have cited Cassiday as standing for the proposition that in a termination proceeding, the Secretary bears the burden of proving that the claimant is no longer disabled. See, e.g., Torres v. Schweiker, 682 F.2d 109, 111 (3d Cir. 1982), cert. denied, 103 S. Ct. 823 (1983); Schauer, 675 F.2d at 58.

40. See Simpson v. Schweiker, 691 F.2d 966, 969 (11th Cir. 1982) (termination proceeding should focus on whether claimant’s condition is so improved that he is no longer disabled).

41. See Musgrove v. Schweiker, 552 F. Supp. 104, 110-11 (E.D. Pa. 1982) (termination proceeding where there is prior valid disability determination, claimant is entitled to presumption of disability in absence of evidence amounting to showing of either improvement in claimant’s condition or clear error in prior disability determination).

42. See infra note 136 and accompanying text for discussion of bill which might require such a showing before benefits may be terminated.

43. See Patti v. Schweiker, 669 F.2d 582, 587 (9th Cir. 1982) (“when a claimant is entitled to the benefit of a presumption that her disability still exists, the burden is still on her to prove her case”). See also Musgrove, 552 F. Supp. at 106 (notwithstanding the presumption, claimant has burden of proving case).


45. 663 F.2d 745 (7th Cir. 1981).
stated that it is the Secretary who is "the burdened party" in a termination proceeding. The Sixth Circuit has stated that the burden of establishing continuing disability is on the claimant. The answers which other courts have provided to the burden of proof question have been less precise. In *Miranda v. Secretary of Health, Education and Welfare*, the First Circuit held that both the claimant and the Secretary have responsibilities in a termination proceeding. In particular, the *Miranda* court stated that the claimant must exercise reasonable diligence in furnishing the Secretary with relevant evidence, and that the Secretary's investigation of the claimant's disability must be one which is not "wholly inadequate" under the circumstances. The court stressed that the Secretary may not terminate benefits without substantial evidence to justify the termination. The First Circuit explained that the Secretary's justification will normally consist of current evidence of an improvement in the claimant's condition which enables him to engage in substantial gainful activity. Alternatively, the Secretary's evidence may show that the claimant's condition is not as serious as it was first believed to have been. *Miranda*, 46. Id. at 749.

47. See Myers v. Richardson, 471 F.2d 1265, 1267-68 (6th Cir. 1972). But see Hayes v. Secretary of Health, Education and Welfare, 656 F.2d 204 (6th Cir. 1981). *Hayes* indicates that a proper termination of benefits must rest on an improvement in the claimant's condition. Id. at 206. Although *Hayes* thus suggests that the Sixth Circuit may have deviated from the rigid rule it articulated in *Myers*, recent cases in other circuits cite *Myers* as the Sixth Circuit rule. See, e.g., Schauer v. Schweiker, 675 F.2d 55, 58-59 (2d Cir. 1982); Northrup v. Schweiker, 561 F. Supp. 1240, 1242 (W.D.N.Y. 1983); Musgrove v. Schweiker, 552 F. Supp. 104, 112 (E.D. Pa. 1982).

48. 514 F.2d 996 (1st Cir. 1975).

49. Id. at 998.

50. Id. See also 20 C.F.R. § 404.1588 (1983) (general obligation of beneficiary to notify Secretary of improvement in condition or increase in earnings or work); id. § 404.1594 (following Secretary's determination that beneficiary is no longer disabled, beneficiary may give reasons that benefits should not be stopped; failure to cooperate in supplying information is grounds for stopping payments); id. § 404.1595(c) (additional or new information which beneficiary seeks to give Secretary in support of contention that benefits should not be stopped is due within 10 days of receipt of notice of termination).

51. See *Miranda*, 514 F.2d at 998.

52. On judicial review, the Secretary's factual findings are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g) (1976).

53. 514 F.2d at 998 ("once having found a disability, the Secretary may not terminate the benefits without substantial evidence to justify so doing . . ."). Id. (emphasis added).

54. Id.

55. Id. The *Miranda* court rejected the broad rule . . . that the Secretary cannot take into account medical evidence considered earlier when the disability was first established. It would
often cited for the proposition that the burden of proof in a termination case is on the Secretary,\textsuperscript{56} appears to suggest that the Secretary has at least the primary responsibility of coming forth with evidence justifying the decision to terminate the claimant’s benefits.\textsuperscript{57} The claimant must cooperate, however, by supplying the Secretary with relevant evidence.\textsuperscript{58}

In \textit{Benko v. Schweiker},\textsuperscript{59} the district court of New Hampshire discussed the \textit{Miranda} criteria for justifying termination decisions.\textsuperscript{60} Although the \textit{Benko} court expressly agreed that the Secretary’s showing of an improved condition would constitute grounds for terminating benefits,\textsuperscript{61} it qualified its acceptance of reassessment of the claimant’s condition as discussed by the \textit{Miranda} court.\textsuperscript{62} The \textit{Benko} court stated that \textit{res judicata} prevents the Secretary from terminating benefits on the ground that the claimant’s impairment is not as serious as was first believed, unless there is (1) an affirmative showing that the impairment was difficult to diagnose\textsuperscript{63} and (2) new and material evidence demonstrating the condition to be less severe than originally thought.\textsuperscript{64} According to the \textit{Benko} court, if these two requirements are not met,

\begin{quote}
be wrong for the Secretary to terminate an earlier finding of disability on no basis other than his reappraisal of the earlier evidence. However, many impairments are difficult to diagnose; a proper diagnosis may require a reference to the cumulative medical history. The Secretary may grant a disability on the basis of a subjective complaint and tentative diagnosis pending the accumulation over time of sufficient indicia for a more complete evaluation. At a termination hearing, the Administrative Law Judge may appropriately contrast the relative strength or weakness of earlier medical evidence and relevant earlier events with claimant’s current condition.
\end{quote}


57. \textit{See supra} notes 52-55 and accompanying text. The Secretary’s duty to show improvement or evidence that the claimant’s condition is not as serious as was first believed, as compared to the claimant’s continuing responsibility to be diligent in furnishing relevant evidence, suggests that it is the Secretary who has the “burden” of coming forth with evidence. For a discussion of the imposition of a burden of production on the Secretary, see \textit{infra} text accompanying notes 74-94.

58. 514 F.2d at 998.


60. \textit{Id.} at 702.

61. \textit{Id.}

62. \textit{Id.}

63. \textit{Id.} The difficulty in diagnosis, stated the \textit{Benko} court, “must not be related to some factor, such as consultative examinations or clinical testing, over which the Secretary has control. It must be predicated on some factor inherent in the disease, rather than in the administrative process.” 551 F. Supp. at 702 (citations omitted).

64. \textit{Id.}
an improvement in the recipient's condition must be shown. The First Circuit may adopt Benko's standards, or it may continue to adhere to the more easily satisfied requirements set forth eight years ago in Miranda.

Just as the Miranda court resisted "deciding abstractly" who bears the burden of proof in a termination proceeding, the Second Circuit expressly declined to rule on the issue in Schauer v. Schweiker. The Schauer court noted, however, that two district court cases in the Second Circuit support the proposition that the Secretary is not the burdened party. In discussing the split among the circuit courts of appeals, the court further observed that none of the courts that have placed the burden on the claimant have done so in a holding. Reiterating its reluctance to decide unnecessarily the burden of proof issue, the Schauer court cautiously concluded that, "notwithstanding the various courts' statements, we are unaware of any case in which the Secretary's ter-

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65. Id. The Benko court is not alone in expressing concern about the statement in Miranda that a termination may be based upon the fact that the claimant's condition is not as serious as was first supposed. In Shaw v. Schweiker, 536 F. Supp. 79 (E.D. Pa. 1982), the court stated that "it is logically impossible for a claimant to become non-disabled without a change amounting to improvement ...." Id. at 82. The Shaw court then stated that Miranda's sanction of terminations based upon evidence that the condition is less serious than first supposed must be interpreted to "pertain only to situations involving newly discovered evidence or a clearly erroneous interpretation of evidence in the initial granting of benefits." Id. According to the court, a contrary reading would permit redeterminations of issues already resolved. Id. See also Simpson v. Schweiker, 691 F.2d 966, 969 & n.2 (11th Cir. 1982) (citing Shaw for proposition that terminations not based on showing of improvement or newly discovered evidence violate res judicata); Musgrove, 552 F. Supp. at 106 (termination of benefits without showing of improvement or newly discovered evidence constitutes an "impermissible relitigation of facts and determinations already finally decided").

66. 514 F.2d at 998.

67. 675 F.2d at 59. Because Schauer was not a termination case, the court did not have to affirmatively decide where it stood in relation to "the apparently confused state of the law as to who bears the burden in a termination case." Id.

68. Id. at 58. The two cases were Magee v. Califano, 494 F. Supp. 162, 166 (W.D.N.Y. 1980) (claimant has burden of proving disability in first instance and "must shoulder the same burden of persuasion when challenging a termination of benefits granted previously ...."), and Memoli v. Califano, 463 F. Supp. 578, 582 (S.D.N.Y. 1978) (claimant bears continuing burden of proving disability).

69. 675 F.2d at 58-9. The Schauer court cited Matthews v. Eldridge, 424 U.S. 319 (question was proper timing of termination proceeding); Crosby v. Schweiker, 650 F.2d 777 (5th Cir. 1981) (substantial evidence supported finding that claimant's disability had ended); Magee, 494 F. Supp. 162 (claimant satisfied burden and should therefore continue to receive benefits); Memoli, 463 F. Supp. 578 (appeal from initial denial on ground that end date was erroneous); Myers, 471 F.2d 1265 (same); Marker v. Finch, 322 F. Supp. 905 (D. Del. 1971) (substantial evidence supported finding that claimant's disability had ended).
mination of benefits previously awarded has been upheld in the absence of substantial evidence that the recipient's disability had ended."\textsuperscript{70}

A year after \textit{Schauer} was decided, the burden of proof issue was addressed by the Western District of New York in \textit{Northrup v. Schweiker}.\textsuperscript{71} Acknowledging the lack of uniformity among the circuit courts of appeals, the \textit{Northrup} court expressed its preference for a rule that would give some weight to the Secretary's original finding that the claimant was disabled.\textsuperscript{72} The district court held that the Secretary bears the burden of coming forth with relevant evidence of a change in the claimant's condition.\textsuperscript{73}

This view, most clearly articulated by the Ninth Circuit in \textit{Patti v. Schweiker},\textsuperscript{74} presumes an ongoing disability.\textsuperscript{75} The presumption imposes "on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption."\textsuperscript{76} Yet in spite of the reference to the Secretary as the burdened party,\textsuperscript{77} the rule means only that \textit{in the absence of proof to the contrary}, claimant's condition is presumed to continue.\textsuperscript{78} The presumption affects only the burden of coming forward with evidence.\textsuperscript{79} It does not change the ultimate burden of proof which, according to the Ninth Circuit, remains on the claimant.\textsuperscript{80}

\textsuperscript{70} 675 F.2d at 59.
\textsuperscript{71} 561 F. Supp. 1240 (W.D.N.Y. 1983).
\textsuperscript{72} \textit{Id.} at 1242 ("I cannot turn a blind eye to the Secretary's original finding that Ms. Northrup was disabled").
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} 669 F.2d 582 (9th Cir. 1982).
\textsuperscript{75} "We are unable to discern any reason why the familiar principle that a condition, once proved to exist, is presumed to continue to exist, should not be applied when disability benefits are at stake." \textit{Id.} at 587 (citing \textit{Rivas v. Weinberger}, 475 F.2d 255, 258 (5th Cir. 1973)). For a general discussion of the presumption of continuity, see L. Hammon, \textit{Hammon on Evidence} 145-46 (1907).
\textsuperscript{76} 669 F.2d at 587 (quoting Rule 301 of Federal Rules of Evidence).
\textsuperscript{77} 669 F.2d at 586-87.
\textsuperscript{78} \textit{Id.} at 586 (citing \textit{Rivas}, 475 F.2d at 258).
\textsuperscript{79} 669 F.2d at 587.
In accordance with this Ninth Circuit view, the Eleventh Circuit in Simpson v. Schweiker explained that although in an initial disability case the sole question on appeal is whether the Secretary's finding is supported by substantial evidence, in a termination situation the principles of res judicata dictate a different inquiry. In particular, the Simpson court stated that the relevant question is whether there is substantial evidence to support "improvement [in the claimant's condition] to the point of no disability . . . ." The Eleventh Circuit embraced the presumption of ongoing disability, but maintained that the ultimate burden of proof remains on the claimant. The Simpson court concluded:

If . . . the evidence in a continuation case is substantially the same as the evidence had been in the initial disability benefits request case, benefits must be continued. Otherwise, termination of benefits will often depend not on a finding of changed condition, but simply on the whim of a changed [Administrative Law Judge].

In September, 1982, in Musgrove v. Schweiker, the Eastern District of Pennsylvania adopted a presumption of ongoing disability notwithstanding Torres v. Schweiker, a Third Circuit case explicitly stating that the burden of proof in a termination proceeding is on the claimant. Significantly, the Musgrove court explained that imposing

81. 691 F.2d 966 (11th Cir. 1982).
82. Id. at 969.
83. 691 F.2d at 969 (citing Shaw, 536 F. Supp. 79). For a discussion of Shaw, see supra note 65.
84. 691 F.2d at 969 (emphasis in original). Although it is not clear whether the Simpson court completely rejected the possibility that a termination may properly be based on a finding that the claimant's condition is not as serious as was first thought, it appears likely that the Eleventh Circuit will require at least a showing of newly discovered evidence.
85. 691 F.2d at 969.
86. Id.
87. Id.
88. 552 F. Supp. at 104.
89. Id. at 106. In adopting the presumption approach, the Musgrove court stated that such a view was consistent with both Miranda and an earlier district court case, Shaw v. Schweiker, discussed supra at note 65.
91. 552 F. Supp. at 111. When the Musgrove decision was first written, the opinion in Torres had not been issued. Musgrove, 552 F. Supp. at 111.

In Torres, the Third Circuit gave three reasons for adopting the view that the burden of proof in termination proceedings is on the claimant. 682 F.2d at 111. First, the Torres court found support for such a view in the language of Matthews v. Eldridge, 424 U.S. 319 (1976). See supra note 31. Second, the court found support in the language of the Act. 682 F.2d at 111 (citing 42 U.S.C. § 423(d)(5) (1976)) (individual shall not
a presumption of continuing disability is not inconsistent with imposing a burden of proof on the claimant, the view set forth by the Third Circuit in *Torres*. Elaborating on the Ninth and Eleventh Circuits’ discussions of the relationship between the presumption and the overall burden of proof, the district court emphasized that the presumption ceases to have any effect once the Secretary comes forth with persuasive evidence of either improvement of the claimant’s condition or prior error in the disability determination.

Eleven months after *Musgrove* was decided, the Third Circuit again addressed the question of the burden of proof in termination cases in *Kuzmin v. Schweiker*. In *Kuzmin*, the Third Circuit adopted a presumption approach, pointing to principles of fairness and the need for consistency in the administrative process. The presumption as ar-

be considered disabled unless he furnishes medical and other evidence as required by the Secretary). But see infra notes 110-16 and accompanying text for the view that the Act and Regulations support the presumption approach. Third, the *Torres* court reasoned that although considerations of fairness and policy require the Secretary to bear the burden of introducing evidence when it is easier for him to do so, no such considerations are present in the context of termination proceedings. 682 F.2d at 112. There is no discussion in *Torres* about what consideration, if any, is to be given to the fact that the claimant was once determined to be disabled.

In *Musgrove*, subsequent to the issuance of the *Torres* opinion, the Secretary moved for relief contending that *Torres* precluded adoption of the presumption approach. The *Musgrove* court concluded that the two decisions were “not inconsistent” and reaffirmed the presumption of ongoing disability. 552 F. Supp. at 111.

92. 552 F. Supp. at 111.

93. Both *Patti* and *Simpson* held that (a) there is a presumption of ongoing disability and (b) the ultimate burden of proof remains on the claimant. See supra notes 79-80 and 85-86 and accompanying text.


without substantial evidence of the termination of appellant’s disability, *i.e.*, improvement, or a showing of error in the initial determination of disability, the termination of benefits by the Secretary must *of necessity* be based on whim, caprice, or an impermissible relitigation of facts and conclusions already finally decided.

552 F. Supp. at 112 (emphasis in original).

95. See *Kuzmin v. Schweiker*, No. 82-5705, slip op. (3d Cir. Aug. 18, 1983) [hereinafter cited as *Kuzmin*, slip op.]. Although *Kuzmin* involved payment of benefits for a closed period, the court explained that the case “raises an important legal issue as to the standard to be applied when disability termination is at issue.” *Id.* at 6.

96. *Id.* at 8. The *Kuzmin* court explained that both the appearance and fact of consistency in the administrative process are important. It added that a presumption approach “will help avoid the disconcerting picture presented by the triple administrative flip flop in this case.” *Id.* Presumably, the court was referring to the fact that the claimant was initially found disabled, subsequently notified that her disability had ceased and then found disabled again. *Id.* at 4-6.
ticated by the *Kuzmin* court, however, does not operate until the claimant has introduced some evidence that his impairment remains essentially unchanged.\(^{97}\) The court indicated that the claimant's duty to produce evidence would be easily fulfilled.\(^{98}\) For example, claimants can introduce evidence from previous disability determinations supplemented by their own testimony as to the continuing nature of their condition.\(^{99}\) Having produced this evidence, the court concluded that a claimant would be entitled to the benefit of a presumption of continuing disability.\(^{100}\) This presumption, which does not alter the underlying burden of proof, imposes the burden of coming forward with evidence on the Secretary.\(^{101}\)

Although the practical effect of the Third Circuit's modified presumption approach might not differ from the effect of the full presumption approach embraced by the Ninth and Eleventh Circuits,\(^{102}\) the Third Circuit's approach requires the initial burden of production to be met by the claimant.\(^{103}\) *Kuzmin* does not suggest, however, that the

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\(^{97}\) *Id.* at 8.

\(^{98}\) *Id.* at 9. The *Kuzmin* court explained that claimants are likely to remain under medical care and stated that requiring the claimant to introduce evidence "should not impose any undue hardship." *Id.*

\(^{99}\) *Id.*

\(^{100}\) *Id.* at 8.

\(^{101}\) *Id.*

\(^{102}\) For discussions of the Ninth and Eleventh Circuits' full presumption approaches, see *supra* text accompanying notes 74-87.

\(^{103}\) *Kuzmin*, slip op., *supra* note 95, at 8-9. The court noted that the presumption approach which it adopted differs from the full presumption approach in *Patti*, which does not require the claimant to come forth with evidence in order to be entitled to a presumption of ongoing disability. *Id.* at 8-9. Two rationales were offered for adopting a modified presumption approach. First, the *Kuzmin* court stated that there was a distinction to be made between the existence of a medical condition and the existence of a statutory disability, because

[There is no policy reason to presume the continuation of a medical condition. Since such conditions may and do change, no consideration of administrative consistency is implicated. On the other hand, the Secretary's prior determination that a particular medical condition has resulted in a statutory disability does implicate administrative consistency.]

*Id.* at 9. Second, the *Kuzmin* court stated that a presumption of a continuing disability was precluded by its earlier holding in *Torres v. Schweiker*. *Id.* See discussion of *Torres*, *supra* note 91. The court's attempt to distinguish between presuming the continuation of a condition and presuming the continuance of a disability seems illogical. Any condition which is presumed to continue for purposes of applying the full *Patti* presumption is by definition one which was found to constitute a statutory disability. Perhaps the *Kuzmin* court was simply resisting imposing a presumption in cases where a claimant might not attempt to show that his condition has persisted. It appears, however, that appeals by this type of claimant would be rare. As to the court's concern about the implications of *Torres*, it should be noted that the *Musgrove* decision
Musgrove court’s reasoning as to the consistency between a full presumption and an underlying burden of proof on the claimant was infirm.\textsuperscript{104} The Fifth Circuit demonstrated in Crosby v. Schweiker\textsuperscript{105} that a full presumption of ongoing disability is consistent with a burden of proof on the claimant.\textsuperscript{106} Although it expressed doubt that “traditional concepts of burden of proof” have a place in Social Security appeals,\textsuperscript{107} the Crosby court agreed with the Sixth Circuit rule that the claimant bears the burden in termination proceedings.\textsuperscript{108} Nevertheless, the court maintained that such a position did not conflict with the general Fifth Circuit rule that, in the absence of proof to the contrary, a claimant’s disability is presumed to continue.\textsuperscript{109}

III. The Secretary’s View on Burdens

A. Statutory Guidance

Although the Act and the Secretary’s Regulations lack specific guidelines regarding burden of proof and presumption issues, it is well settled that the Act is remedial and beneficent in nature\textsuperscript{110} since it is designed to aid the disabled. In addition, the Regulations governing procedures to be followed by the Secretary in terminating benefits\textsuperscript{111} are consistent with the presumption of ongoing disability approach.

\textsuperscript{104} For a discussion of the Musgrove court’s reasoning, see supra notes 91-94 and accompanying text.

\textsuperscript{105} 650 F.2d 777 (5th Cir. 1981).

\textsuperscript{106} id. at 778.

\textsuperscript{107} id.

\textsuperscript{108} id. (citing Myers, 471 F.2d at 1286).

\textsuperscript{109} 650 F.2d at 778. The Crosby court cited Rivas, 475 F.2d at 258, for the proposition that once evidence has been presented in support of a finding that a condition exists, it is presumed in the absence of proof to the contrary that such condition has not changed. See Crosby, 650 F.2d at 778. The Rivas court cited Hall v. Celebrezze, 314 F.2d 686, 688 (6th Cir. 1963) and Prevette v. Richardson, 316 F. Supp. 144, 146 (D.S.C. 1970) for this proposition. Rivas, 475 F.2d at 258. Although the Fourth Circuit has applied the presumption of continuity to the context of disability termination proceedings, the Sixth Circuit’s position is unclear. See supra notes 47 and 80.


In fact, the language in the Regulations suggests such a presumption.\footnote{112} The requirement that the Secretary’s notification of the decision to terminate benefits include a summary of the information upon which the decision was based\footnote{113} indicates that the burden is on the Secretary to come forth with evidence of a change in the recipient’s condition.\footnote{114} This burden is the equivalent of a presumption of continuing disability.

The Regulations also permit the Secretary to reopen a case within four years of the date of the notice of the initial determination where good cause is shown.\footnote{115} Review of initial disability determinations must occur within three years of the date of determination,\footnote{116} and the Secretary may reopen a case within four years to show that the determination was erroneous. Thus, the Secretary’s decision not to reopen implies that the initial determination was correct. The credence which the Regulations lend to the Secretary’s initial determination supports a presumption of ongoing disability.

B. Non-acquiescence in the Presumption Approach

Despite judicial and statutory support for the presumption of ongoing disability in termination reviews, the Social Security Administra-
tion remains opposed to this approach. The Administration officially announced in 1982 that it did not acquiesce in the Ninth Circuit's decision of *Patti v. Schweiker*. Rejecting the proposition that in a termination proceeding the Secretary must show medical improvement or other change, the Administration criticized the *Patti* court for failing to adhere to a prior Social Security Ruling which rejected the requirement that the Secretary show such improvement. The Administration stated, without specific reference, that other circuit courts do not require a showing of improvement. The Social Security Administration then directed that "*Patti* does not provide a judicial interpretation of the disability regulations which should be followed."

### IV. Forced Adoption of the Presumption Approach?

#### A. Judicial and State Agency Challenges to Non-acquiescence

The Social Security Administration's non-acquiescence has been challenged. On June 16, 1983, in *Lopez v. Heckler*, a California district court granted relief to a Ninth Circuit class by enjoining and

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117. *See S.S.R. 82-49C (Oct. 1982).* *Patti* is discussed *supra* at text accompanying notes 74-80.

118. The Social Security Administration also refused to acquiesce in *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir. 1981). *See S.S.R. 82-10C (Jan. 1982).* The *Finnegan* decision mirrors *Patti*, except that it involved a recipient of benefits under the “grandfather clause” of the Act. The grandfather clause provides that an individual who is disabled pursuant to certain approved state plans may be considered disabled within the meaning of the Act. 42 U.S.C. § 1382c(a)(3)(E) (1976).

119. *Id.* The Social Security Administration stated that "even if current medical or other evidence does not show 'medical improvement' or other change, the disability of a...recipient is subject to cessation if such evidence shows that the recipient is able to engage in substantial gainful activity..." *S.S.R. 82-49C (Oct. 1982).*

120. *S.S.R. 82-49C (Oct. 1982).*

121. *Id.*

122. *See infra* notes 123-28; *see also Judge Orders Review of Disability Cuts in 9 States*, N.Y. Times, June 19, 1983, § 1, at 19, col. 1.


124. The *Lopez* court certified a class of plaintiffs who lived in the Ninth Circuit and were Social Security disability benefits recipients who had been or would be considered for termination after August 30, 1981. *Lopez*, *supra* note 123, Memorandum of Decision at 8. *See also Trujillo v. Schweiker*, 558 F. Supp. 1058, 1064 (D. Colo. 1983). The *Trujillo* court certified a class representing all Social Security disability beneficiaries in Colorado who have been or are receiving disability benefits and who have presented a claim to the Secretary that their disabilities have continued and whose entitlements have been terminated without the application of the improve-
restraining the Secretary (1) from failing to "follow, implement or accord" precedential effect to *Patti v. Schweiker* and (2) from implementing the non-acquiescence policy contained in Social Security Rulings pertaining to the Secretary's obligation to show an improvement or change in the claimant's condition. Moreover, the *Lopez* court, accusing the Secretary of operating outside the law, ordered reinstatement of benefits to a wide class of terminated beneficiaries. The court

ment standard to their case, or who have been or may be terminated due to the failure of the [Secretary] to give presumptive effect to the prior determination of disability.

Id. See infra note 128 for a further discussion of *Trujillo*.

126. Id. See also supra note 119.
127. In particular, the court ordered that within 60 days the Secretary notify each class member who had been terminated after a certain date of his right to apply for reinstatement if he believed there had not been a medical improvement in his condition following the granting of benefits. *Lopez*, supra note 123, Memorandum of Decision at 6; Order at 2-3. The Secretary was ordered to reinstate and pay benefits upon receipt of applications for reinstatement. The amount to be paid was set at that which the individuals would have received if their benefits had not been discontinued. Order at 3.

On September 1, 1983, however, Supreme Court Justice William Rehnquist temporarily postponed the effect of the *Lopez* court's order, stating that the government need not restore benefits to members of the Ninth Circuit class, pending determination of the Secretary's appeal by the Ninth Circuit. *Heckler v. Lopez*, 52 U.S.L.W. 3187 (9th Cir. Sept. 9, 1983). See also *N.Y. Times*, Sept. 2, 1983, at A17, col. 1. Justice Rehnquist's action came after the Ninth Circuit considered and denied the Secretary's motion for a partial stay pending appeal of the preliminary injunction ordered by the California district court. Noting that a restoration of benefits as required by the injunction could lead to the Secretary's being forced to give back benefits to between 28,000 and 78,000 individuals, the Ninth Circuit stated:

[p]laintiffs do not attempt to match in dollars and cents the monetary harms that will allegedly be suffered by the government. Yet the physical and emotional suffering shown by plaintiffs in the record before us is far more compelling than the possibility of some administrative inconvenience or monetary loss to the government... Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor.


Any financial or administrative inconvenience suffered by the Secretary cannot outweigh, or even approach, the human suffering that has been imposed on those disabled recipients of Social Security benefits who have been wrongfully terminated. And as the courts below noted, the potential payment of retroactive benefits after final decision in this case will do little to compensate the recipients for their current deprivations.

Id.
mandated that their cases be reviewed according to the "current law and regulations."  

Challenges to the Social Security Administration's non-acquiescence in the presumption of ongoing disability have come from government officials as well as benefit recipients. On July 22, 1983, New York State Social Services Commissioner Cesar Perales ordered that no disabled New Yorkers be removed from the disability rolls until the federal government promulgates "appropriate" medical standards for assessing whose benefits should be discontinued. Mr. Perales challenged the Social Security Administration's non-acquiescence policy and stated that his department would continue to review cases as required by the federal government but would not terminate benefits until proper standards are set.

Massachusetts, Arkansas, Kansas, West Virginia and North Carolina have also protested the Social Security Administration's termination policy. In September, 1983, North Carolina Governor James B. Hunt, Jr. ordered a moratorium on removing recipients from the disability rolls, except in cases involving fraud. In Kansas, there will be a re-

128. Lopez, supra note 123, Order at 3-4.

In August, 1983, in Trujillo v. Heckler, 569 F. Supp. 631 (D. Colo. 1983), the District Court of Colorado granted summary judgment in favor of the Trujillo class, discussed supra at note 124. Having defined the improvement standard to include both (1) material improvement in the claimant's condition and (2) newly discovered evidence establishing that the prior determination of disability was clearly erroneous, the court held that "benefits may not be terminated without showing that the recipient's medical condition has improved." Id. at 631, n.1, 636. The court acknowledged that its holding was tantamount to imposition of a presumption of ongoing disability. Id. at 636.


130. N.Y. Times, July 23, 1983, at 25, col. 4. Although Mr. Perales subsequently received a letter from the Regional Commissioner of Social Security stating that New York was not in compliance with federal law, no indication was given as to what action, if any, the federal government might take. New York and Other States Defy U.S. Rules for Disability Benefits, N.Y. Times, Sept. 12, 1983, at A1, col. 3. It has been suggested that the failure of federal officials to penalize states for deviating from the federal rules is due to: (1) the awkwardness that would result from such action in view of the Administration's pledge to be more humane and (2) the difficulty implicit in upsetting the partnership that has existed between federal and state agencies in administering the Social Security program over the years. Id.


examination of all cases in which benefits have been terminated in the
last year, and the "unreasonably strict" federal guidelines will no longer
be utilized.133

B. Legislative Reform

Proposed legislative reform134 addresses the need in termination cases
for procedural guidelines which are both fair and administratively ef-

cient. A bill referred to as the Social Security Disability Benefits Reform
Act of 1983 has been approved by the House Ways and Means Com-

mittee.135 The bill would amend the Act to require termination of
benefits to be based on substantial evidence that: (1) the recipient's con-
dition has improved so that he or she can now engage in substantial
 gainful activity; or (2) the recipient is the beneficiary of advances in
medical or vocational therapy or technology which enable him to engage
in substantial gainful activity regardless of the lack of improvement
in the condition; or (3) new or improved diagnostic techniques
demonstrate that the recipient's impairment is not as disabling as it
was thought to be at the time of the most recent disability
determination.136 The bill further provides for continuation of benefits
during appeals,137 establishment of an advisory council on the medical
aspects of disability138 and a moratorium on mental impairment re-

views.139

Another provision of the Social Security Disability Benefits Reform
Act of 1983 would end the Social Security Administration's policy on
non-acquiescence.140 The Administration would be statutorily required

135. See id. The bill was approved by the House Ways and Means Committee on
136. See H.R. 3755, 98th Cong., 1st Sess. § 101 (1983). The section further provides:

Nothing in this subsection shall be construed to require a determination that
an individual is entitled to disability benefits if evidence on the face of the
record shows that any prior determination of such entitlement to disability
benefits was either clearly erroneous at the time it was made or was
fraudulently obtained or if the individual is engaged in substantial gainful
activity.

Id.
137. Id. § 203(a)(1).
138. Id. § 304.
139. Id. § 201. In essence, the moratorium would prevent the Secretary from carry-
ing out the continuing eligibility review established by the 1980 amendment until the
criteria used in assessing mental disorders have been revised. Id.
140. Id. § 302.
to either acquiesce in circuit courts’ decisions or appeal to the United States Supreme Court.\textsuperscript{141} Although such a statutory requirement would hinder the Administration’s ability to enforce uniform national guidelines for determining disability, allowing non-acquiescence results in a double standard. In particular, only those who litigate enjoy the advantage of judicially created rules which are favorable to claimants, such as the rule in \textit{Patti}. Less favorable Social Security Administration rules are determinative for those who do not go to court.\textsuperscript{142} The fact that the Act provides for judicial review of agency decisions suggests that the Social Security Administration’s non-acquiescence policy should not be permitted.\textsuperscript{143} The most serious objection to non-acquiescence,

\begin{enumerate}
\item \textit{Id.} In particular, the Act would be amended to include the following:

\textbf{COMPLIANCE WITH CERTAIN COURT ORDERS} Sec. 234. In the case of any decision rendered by a United States court of appeals which—
\begin{enumerate}
\item involves interpretation of this title or any regulation prescribed under this title;
\item involves a case to which the Department of Health and Human Services or any officer or employee thereof is a party; and
\item requires that such department, or officer or employee thereof, apply or carry out any provision, procedure, or policy under this title with respect to any individual or circumstance in a manner which varies from the manner in which such provision, procedure, or policy is generally applied or carried out,
\end{enumerate}
the Secretary of Health and Human Services, or such other officer or employee of the Department of Health and Human Services as may be a party to such case, or such other officer of the United States as may be appropriate, shall acquiesce in such decision with respect to all beneficiaries whose appeals would be within the jurisdiction of such court of appeals, unless the Secretary makes a timely request for review of such decision by the United States Supreme Court pursuant to section 1254 of title 28, United States Code. If the United States Supreme Court denies such a request for review, the Secretary shall so acquiesce in such decision on and after the date of such denial of review until such time as the United States Supreme Court rules on the issue involved and reaches a different result.


\item \textit{Id.} Social Security Hearings and Appeals, supra note 142, at 112. With respect to this judicial review argument, it has been suggested that:

If the role of the courts of appeals in social security matters were simply to decide a small number of cases and provide guidance for the district courts in a somewhat larger number of others, without any influence on the great mass of cases decided by officials at the administrative level, there is serious question whether that limited office would justify the labors of multi-member panels of eminent judges.

\textit{Id.}
however, is "the unfairness in absolute terms of withholding from citizens the rights to which the courts have held them entitled, forcing them to pursue costly judicial remedies in order to cash those rights in."\textsuperscript{144}

V. Conclusion

The circuits do not have a unified view of the burden of proof in disability benefit termination proceedings. Recent district court cases, however, suggest that the trend is toward a presumption of ongoing disability. This approach imposes on the Secretary the burden of coming forward with evidence of a change in the claimant's condition.\textsuperscript{145} The ultimate burden of proof may nevertheless remain on the claimant.

Despite the Social Security Administration's attempt to encourage Administrative Law Judges to circumvent the presumption of continuing disability, such an approach is consistent with every circuit court of appeals decision and with the purposes of the Act.\textsuperscript{146} The presumption approach is both inferable from the Secretary's Regulations and required by considerations of fairness. Non-acquiescence in the judicial requirements of the presumption standard imposes an unjustified burden on the disabled.

\textit{Beth S. Glassman}

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} This evidence may also consist of other limited and narrowly defined reasons for terminating benefits. \textit{See supra} text accompanying note 136.

\textsuperscript{146} \textit{See supra} note 110 and accompanying text.