The Evaluation of Children's Impairment in Determining Disability Under the Supplemental Security Income Program

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INTRODUCTION

In 1972, Congress amended the Social Security Act to provide for a single federal assistance program.1 These amendments restructured the disability insurance benefits program to provide nationwide uniformity in eligibility requirements and benefit payments.2 Disability beneficiaries now include children in low-income households who have impairments of "comparable severity" to any impairment that would render an adult disabled.3 The regulations, however, do not provide comparable means of assessment to adults and children. An adult seeking benefits essentially has two chances to prove the disability—either by demonstrating an impairment listed in the regulations4 or through an individualized assessment.5 A child claimant, however, must rely solely on the impairments listed in the regulations and may not demonstrate disability through an individualized assessment.6

Congress conferred on the Secretary of Health and Human Services7 (the "Secretary") the power to promulgate regulations to determine whether a person, either an adult or a child, has an impairment or combination of impairments that would render the person "disabled" and, thus, eligible for disability benefits.8 When a statute directs the Secretary to implement provisions by regulation, courts must give deference to the regulations unless they exceed the Secretary's authority or are arbitrary or capricious.9 The Third Circuit recently struck down the regulations

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5. See infra notes 37-38 and accompanying text.
as inconsistent with congressional intent because they make it harder for children to prove that their impairments are disabling by not affording children an individualized assessment of their impairments.\textsuperscript{10} Most circuits, however, have upheld the regulations as a valid exercise of the Secretary's authority.\textsuperscript{11}

This Note examines whether the Secretary's regulations are consistent with the statutory mandate. Part I of this Note reviews the legislative history surrounding the Social Security provisions which grant disability benefits to children. This part also outlines the Secretary's regulations for determining disabilities in adults and children. Part II analyzes the Secretary's regulations and argues that the regulations are inconsistent with the statutory mandate that every “disabled” person, whether an adult or a child, is entitled to benefits.\textsuperscript{12} This Note concludes that the regulations for children must permit an individualized assessment to determine whether their impairments are of “comparable severity” to any impairments that render an adult disabled.

I. DISABILITY UNDER THE SOCIAL SECURITY ACT

A. Legislative History

Congress amended the Social Security Act\textsuperscript{13} to simplify and streamline the unwieldy welfare system by introducing uniformity in eligibility requirements and benefit payments.\textsuperscript{14} By establishing this new federal program for the aged, blind and disabled, Congress intended to provide adequate assistance to those who, because of old age or disability, are unable to support themselves.\textsuperscript{15}

The federal government provides benefits to disabled persons under two distinct programs administered by the Social Security Administration ("SSA").\textsuperscript{16} The Social Security Disability Insurance Benefits Pro-

\textsuperscript{10} See Zebley, 855 F.2d at 73-74.
\textsuperscript{11} See, e.g., Burnside ex rel. Burnside v. Bowen, 845 F.2d 587, 590-91 (5th Cir. 1988) (noting that impaired children are evaluated only under the analysis for children set out in the regulations); Hinckley ex rel. Martin v. Secretary of Health and Human Servs., 742 F.2d 19, 23 (1st Cir. 1984) (holding that the regulations for children constitute a reasonable interpretation of the statutory definition of disability); Powell ex rel. Powell v. Schweiker, 688 F.2d 1357, 1363 (11th Cir. 1982) (holding that the regulations for children are not an abuse of discretion by the Secretary or inconsistent with the law).
\textsuperscript{14} See id. The new federally-administered system replaced the three state-administered programs of assistance to the aged, blind and disabled, instituting "uniform requirements for such eligibility factors as the level and type of resources allowed and the degree of disability or blindness." H.R. Rep. No. 231, 92d Cong., 1st Sess. 4, \textit{reprinted in} 1972 U.S. Code Cong. & Admin. News 4989, 4992.
gram ("SSD") grants benefits to physically and mentally disabled individuals who have contributed to the disability insurance program. Because most children do not work and thus do not contribute to SSD, they are not included in this program. The Supplemental Security Income Program ("SSI") grants benefits to indigent disabled persons.

Before Congress restructured the SSA in 1972, disabled children were not eligible for benefits under the federal-state program of welfare assistance for the disabled. In the 1972 amendments, however, Congress specifically stated that poor, disabled children are especially deserving of SSI. The House Report observed that "disabled children who live in...

& Supp. IV 1986); see also Bowen v. City of New York, 476 U.S. 467, 469-70 (1986) (describing the two federal disability programs).

18. See id.
21. See Bowen v. City of New York, 476 U.S. 467, 470 (1986). The following provisions of Title XVI of the Social Security Act define disability for both adults and children:

An individual shall be considered to be disabled for purposes of this subchapter if he is unable 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 twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).


For purposes of subparagraph (A), an 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 .

Id. § 1382c(a)(3)(B).

For purposes of this paragraph, a physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

Id. § 1382c(a)(3)(C).


Indigent disabled children are included in the SSI program because Congress realized that the needs of these doubly disadvantaged children are so great that they deserve special assistance from the federal government. See H.R. Rep. No. 231, 92d Cong., 1st Sess. 147-48, reprinted in 1972 U.S. Code Cong. & Admin. News 4989, 5133-34.

22. See H.R. Rep. No. 231, 92d Cong., 1st Sess. 147-48, reprinted in 1972 U.S. Code Cong. & Admin. News 4989, 5133-34. The amount of benefits given as supplemental security income is based on need. See 42 U.S.C. § 1382(a) (1982). Thus, income and other resources are taken into account when determining the amount of the award. See Bormey v. Schweiker, 695 F.2d 164, 168 (5th Cir.), cert. denied, 462 U.S. 1121 (1983); Kollett v. Harris, 619 F.2d 134, 136 (1st Cir. 1980). Benefits are given only to the extent...
low-income households are certainly among the most disadvantaged of all Americans and that they are deserving of special assistance in order to help them become self-supporting members of our society." While other federal welfare programs exist for disabled children, such as The Education for All Handicapped Children Act of 1975 ("EAHCA"), and for non-disabled children of needy families, such as Aid To Families With Dependent Children ("AFDC"), Congress considered such programs inadequate in providing for the extensive needs of disabled children.

B. The Evaluation Process

Under the Secretary's regulations, an adult claimant is evaluated under a five-step sequential analysis to determine whether the claimant is disabled and, thus, eligible for SSI benefits. Under the sequential analysis, the SSA uses medical and vocational guidelines, known as the "Grid System," to establish the claimant's ability to perform substantial gainful activity. The grid system is bifurcated. If the disability falls into certain categories, the claimant is presumed to be disabled; if the disability does not fall within an enumerated category, an adult claimant may be deemed disabled after an individualized assessment of the disability. A claimant who does not reach the requisite threshold at any step in the


24. See 20 U.S.C. §§ 1401-1485 (1982 & Supp. IV 1986); see also Note, Limitations Period For Actions Brought Under § 1415 of The Education for All Handicapped Children Act of 1975, 56 Fordham L. Rev. 725, 727-30 (1988) (describing the statutory scheme of EAHCA). This program provides federal assistance to states that guarantee all handicapped children the right to a free public education. Id. at 725. Yet, because the EAHCA provides funding for education of disabled children directly to the states, the program does not lessen the need for SSI benefits, which are paid directly to the beneficiary, for disabled children of low-income families. SSI benefits are paid directly to the disabled child's indigent family and are used for the special needs involved in caring for a disabled child. See generally H.R. Rep. No. 231, 92d Cong., 1st Sess. 147-48, reprinted in 1972 U.S. Code Cong. & Admin. News 4989, 5133-34 (needs of disabled children are greater than those of nondisabled children); infra note 68 (uses of SSI benefits).


process is not considered disabled and is denied benefits.29

The first step of the process is designed to determine whether the claimant is currently engaged in substantial gainful activity.30 The second step determines whether the claimant's impairment is severe, thereby significantly limiting the claimant's ability to perform basic work related activities.31 When the claimant's impairment is severe, the evaluation proceeds to the third step to determine whether the impairment is one specifically listed in the regulation or is its medical equivalent.32 If a claimant satisfies the first three steps of the five-step sequential analysis, he is then entitled to a presumption of disability.33 The individualized

29. See Stone, 752 F.2d at 1102.
30. See 20 C.F.R. § 404.1520(b) (1988); id. § 416.920(b). If the claimant is currently employed, then he is not disabled under the Act.
31. See 20 C.F.R. § 404.1520(c) (1988); id. § 404.1521(a); id. § 416.920(c). Since age, education and work experience are not considered at this step, see 20 C.F.R. § 404.1520(c) (1988); id. § 416.920(c), this step does not provide the claimant with a comprehensive individualized assessment of the claimant's actual functional capabilities.
32. See 20 C.F.R. § 404.1520(d) (1988); id. § 416.920(d). Medical equivalence to a listed impairment must be based on medical findings that show the impairment to be equal in severity and duration to the listed findings. See 20 C.F.R. § 416.926(a) (1988). If the claimant is a child, then the listings include the supplemental listings, which are designed to give consideration to the particular effects of the disease process in childhood. See 20 C.F.R. § 416.925(b)(2) (1988). These listings are broken down into broad general categories of impairments, according to body functions (e.g., Musculoskeletal System, Special Senses and Speech, Respiratory System, Cardiovascular System, and so forth). Within each category, impairments that are considered disabling are described in more detail. See 20 C.F.R. § 404, subpt. P, app. 1 (1988). For example, in the Neurological category in Part A, the listed disability of Cerebral Palsy is described as:

   Cerebral Palsy. With:
   A. IQ of 69 or less; or
   B. Abnormal behavior patterns, such as destructiveness or emotional instability;[sic] or
   C. Significant interference in communication due to speech, hearing, or visual defect; or
   D. Disorganization of motor function as described in 11.04B

33. See Burt v. Bowen, No. 85-1033, (E.D. Wash. May 12, 1988) (LEXIS, Genfed library, Dist file); see also Zebley ex rel. Zebley v. Bowen, 855 F.2d 67, 73 (3d Cir. 1988), cert. granted, sub nom. Sullivan v. Zebley, 109 S. Ct. 2062 (1989) (because the listings are not an exhaustive compilation of medical conditions which impair functioning to the extent necessary to find that a claimant is disabled, the listings merely entitle a claimant to a presumption of disability).

The Supreme Court has recognized a presumption of disability inherent in the first three steps of the sequential evaluation process. See Bowen v. Yuckert, 482 U.S. 137, 141 (1987). Noting that the Secretary decides more than two million claims for disability each year, of which more than 200,000 are reviewed by Administrative Law Judges ("ALJ"), the Court recognized that steps two and three of the sequential analysis increase efficiency and reliability by streamlining the decision process. The first three steps iden-
The individualized assessment of a claimant’s actual functional capabilities is designed to determine whether the claimant is able to engage in any substantial gainful activity. For claimants who are not presumptively disabled, the individualized assessment is the most important aspect of the sequential evaluation process. 38

The regulations for determining disabilities of children differ from those used for adults in that children are not entitled to an individualized assessment if their impairments do not meet or equal the listed impairments. 39 Because children usually do not engage in substantial gainful activity, in 1972 Congress provided for a comparative analysis in determining disabilities in children: a child will be considered disabled if his impairments are of “comparable severity” to those impairments that render an adult disabled. 40 Thus, their sequential evaluation terminates
at step three.

The Secretary did, however, recognize the different effects certain diseases have on children, and provided an additional listing of impairments for use solely when the claimants for disability benefits are children. The criteria used here are designed to give appropriate consideration to the particular effects of the disease process in children. Specifically, the evaluation focuses on a child's activity, growth and development because children are not expected to engage in work activity. Although there is no consideration of a child's theoretical capacity to engage in work activity, the supplemental listings give consideration to functional limitations caused by the impairments, as well as departures from developmental norms.

II. THE PROPER PROCESS OF EVALUATION FOR CHILDREN

A. The "Comparable Severity" Standard

In the 1972 amendments to the Social Security Act, Congress mandated that an impaired child should be considered "disabled" and, thus, eligible for SSI benefits, if he "suffers from any medically determinable physical or mental impairment of comparable severity" to an impairment that would render an adult disabled. Pursuant to the congressional directive to develop standards for finding disabilities in children, the Secretary set forth regulations for children that differ significantly from the five-step sequential analysis used to determine disabilities in

41. See 20 C.F.R. § 416.925(b)(1)-(2) (1988). When evaluating disability for a child, the additional listings are used first. If these medical criteria do not apply, then the listings for adults are used. See 20 C.F.R. § 416.925(b)(2) (1988); see also 42 Fed. Reg. 14,705 (1977) (additional listings applicable only to evaluating a child's impairment where regular listings do not give appropriate consideration to particular effect of disease process in childhood).


44. See id.


46. When discussing the criteria to be developed by the Secretary in determining disabilities in children, Senator Hathaway noted that the current definition of disability should be implemented by standards that take into account both the medically determinable physical or mental impairment and the comparable severity of the child's disability in terms that are relevant to a child. See 122 Cong. Rec. 34,026 (1976).


47. See 42 U.S.C. § 1383(d)(1) (1982 & Supp. IV 1986) (this section adopts section 405(a), which gives the Secretary broad power to promulgate regulations for Social Security disability determinations.)
While the impact of a disability on an adult is examined in light of the claimant's ability to engage in substantial gainful activity, the impact of a disability on a child has a different focus. A child's disability is evaluated in terms of the "comparable severity" of its impact on the child's ability to function successfully within age-appropriate expectations. The Secretary did consider these factors in promulgating the supplemental listings. Yet these listings merely determine whether the claimant is presumptively disabled. Moreover, because the listings include only the most severe impairments, it is "practically impossible" to qualify under the supplemental listings. The regulations do not afford children the opportunity for an individualized assessment of their functional capabilities. The Secretary, however, claims that the regulations inherently contain a consideration of medical factors which relate to physical, mental and emotional development and, therefore, the child is provided with the equivalent of an individualized assessment.

Significantly, Senator Hathaway noted, during debates on additional amendments to SSI, that a child's vocational ability is irrelevant to the disability determination. Moreover, the definition of disability in adults, which is used to determine eligibility for SSI benefits, "relates to employability . . . a concept obviously irrelevant to children." Senator Hathaway argued that the test of comparable severity should be based on criteria more relevant to a child's social, educational and physical development, such as a consideration of the child's actual functional capacity.

50. See id. ("The child's functional capacity within the areas of learning, language, self-help skills, mobility and social skills are decidedly more meaningful in determining both the severity of the impairment and the developmental potential of the child.")
52. Dealing with a mentally impaired claimant, the court in Mental Health Association v. Schweiker, 554 F. Supp. 157 (D. Minn. 1982), aff'd in part and modified in part, 720 F.2d 965 (8th Cir. 1983), noted that the listings include only the most severe psychiatric impairments. As such, it is difficult to meet or equal the listings. See id. at 162. Thus, if a claimant meets this high threshold requirement based on the listings, the claimant's disability may fairly and uniformly be presumed. See supra note 33 and accompanying text.
53. Mental Health Association, 554 F. Supp. at 162; see also Burt v. Bowen, No. 85-1033 (E.D. Wash. May 12, 1988) (LEXIS, Genfed library, Dist file) ("The vast majority of awards for SSI benefits proceed beyond the third step.")
56. Indeed, certain developmental needs, such as counseling, special education, training, rehabilitation and guidance, are not considered by the regulations, because the Secretary has concluded that these criteria are not within the scope of the law. See id. at 14,706.
57. See 122 Cong. Rec. 34,026 (1976) (statement of Senator Hathaway).
58. Id. at 33,301 (statement of Senator Bentsen).
to engage in age-appropriate activities, as well as consideration of the child's departure from normal development in both education and social skills.\(^5\) In short, such an evaluation must be based on a realistic assessment of the child's capacity to function in the world.\(^6\)

The courts that have upheld the regulations as entirely consistent with the statutory mandate\(^6\) rely on the reasoning that the regulatory purpose of the individualized assessment of adult claimants at steps four and five is solely to assess a claimant's vocational limitations. These limitations render the claimant qualified to receive SSI disability benefits because the claimant is unable to engage in substantial gainful activity.\(^6\) Since children do not work, these courts reason, the same vocational criteria should not apply to their disability determinations.\(^6\) Thus, the Secretary's omission of an individual assessment of the actual functional capabilities of impaired children constitutes a reasonable interpretation of a statute that is primarily concerned with the ability of a claimant to engage in substantial gainful activity.\(^6\) These courts further reason that the SSA's interpretation of the statute should be accorded "great deference"\(^6\) because it is the agency charged by Congress with implementing the statutory mandate.

Although deference should be given to an administrative agency's interpretation of a statute, the agency may not improperly exercise its authority by promulgating regulations that are inconsistent with the intent of Congress.\(^6\) Congress was fully aware that children do not engage in substantial gainful activity. Nevertheless, it deliberately included needy, impaired children in the SSI program,\(^6\) provided their impairments are of comparable severity to impairments which would render an adult disabled. SSI disability benefits for children furnish low-income families with the resources needed to care for and rehabilitate disabled children.\(^6\)

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59. See id. at 34,026 (statement of Senator Hathaway).
61. See Hinckley ex rel. Martin v. Secretary of Health & Human Servs., 742 F.2d 19, 23 (1st Cir. 1984); Powell ex rel. Powell v. Schweiker, 688 F.2d 1357, 1363 (11th Cir. 1982).
62. See Hinckley, 742 F.2d at 23.
63. See id. at 22.
64. See id.; Powell, 688 F.2d at 1360.
65. Powell, 688 F.2d at 1361; see also Hinckley, 742 F.2d at 23 ("Nevertheless, the fact that we are able to devise broader standards for measuring disabilities in children does not permit us to strike down the reasonable standard promulgated by the Secretary pursuant to her statutory authority.").
68. SSI benefits are used "for special diets, for transportation to clinics, physicians and rehabilitation facilities, for special services not covered by any medical assistance program, for skilled child care" as well as other individual needs. Brief for the American Academy of Child and Adolescent Psychiatry as Amicus Curiae at 5, Zebley ex rel. Zebley v. Bowen, 855 F.2d 67 (3d Cir. 1988) (No. 87-1692) (footnote omitted).
Motivated by the extraordinary needs of indigent, disabled children, Congress included these children in a statute which would otherwise not apply to them. Regulations that restrict the ability of impaired children to receive SSI benefits do not fully comply with Congress' policy of providing disabled children with SSI benefits. Therefore, the Secretary's regulations are not a reasonable interpretation of the statutory mandate and are inconsistent with the intent of Congress.69

While the disability standards contemplated by Congress for children need not conform exactly to the standards used for adults, Congress did envision the use of comparable standards.70 Because a vast majority of adult claims for SSI benefits proceed beyond the third stage of the disability analysis,71 the regulations, in effect, require a child to have an impairment of "greater severity" than an adult.72 The listings offer a presumption of disability for obviously disabling impairments. Children do not have the same opportunity as adults to prove that their less obvious impairments render them functionally disabled. The regulations, therefore, mandate that a child reach the high threshold of presumptive


70. "Of course, the Secretary must be mindful that 'the Social Security Act is a remedial statute, to be broadly construed and liberally applied.'" Williams ex rel. Williams v. Bowen, 859 F.2d 255, 260 (2d Cir. 1988) (quoting Gold v. Secretary of Health, Educ. and Welfare, 463 F.2d 38, 41 (2d Cir. 1972)). Thus, the term "comparable severity" should also be broadly and liberally construed, since the legislation is ameliorative and designed to protect children.

71. See Burt v. Bowen, No. 85-1033 (E.D. Wash. May 12, 1988) (LEXIS, Genfed library, Dist file) ("The vast majority of awards for SSI benefits proceed beyond the third step. In the experience of this court, very few awards are granted because the claimant's impairments meet or equal the listings.").

72. See id.

An impairment considered disabling for an adult on the basis of an individualized evaluation would probably not result in a finding of a "disability" in the case of a child. A good example of this incongruity can be found in Wills v. Secretary of Health & Human Services, 686 F. Supp. 171 (W.D. Mich. 1987). While still a minor, the claimant sought disability benefits based on impairments resulting from Ornithine Transcarbamylase Syndrome, a disease in which a rare genetic enzyme is deficient in the claimant's liver. As a result of this condition, claimant suffered brain damage, which caused mild retardation, central nervous system defects, and learning and behavioral defects. The child was denied benefits by the SSA because her defects did not meet or equal the listing of impairments. By the time her childhood disability claim reached the district court, the claimant was nineteen years old. In adjudicating the claim for benefits that the claimant should have received as a minor, the court noted that, in the meantime, the claimant was given social security benefits as an adult upon her 18th birthday. See id. at 172 n.1. Ironically, the claimant's impairments, which did not meet the threshold presumption of disability because they did not meet or equal the listings when the claimant was a minor, suddenly became disabling when the claimant legally became an adult and was afforded a more extensive evaluation of her actual functional limitations in which she was deemed incapable of work. See id. at 176. Such a situation exemplifies the inequity of the different standards applied to adults and children. The presumption of disability, based upon the listings as the sole standard for an impaired child, is a more restrictive and stringent test than that applied to adults. See Burt v. Bowen, No. 85-1033 (E.D. Wash. May 12, 1988) (LEXIS, Genfed library, Dist file). A congressional mandate for a standard of comparable severity can never be adequately satisfied under such inequitable standards.
disability before that child will be considered disabled, even if a comparable impairment in an adult would render the adult disabled.\textsuperscript{73}

In \textit{Hinckley ex rel. Martin v. Secretary of Health \& Human Services},\textsuperscript{74} the First Circuit reasoned that because an individualized assessment of adults involved an evaluation of vocational factors for the purpose of determining ability to engage in substantial gainful activity, this identical assessment was obviously inapplicable to children who do not work even if they are not impaired.\textsuperscript{75} Such non-medical, vocational criteria cannot be applied to children.\textsuperscript{76} While the court in \textit{Hinckley} recognized that identical standards could not apply to both adults and children,\textsuperscript{77} it accepted a more restrictive standard—one that restricted a child's disability determination to the first three steps.

While the standards used in the first three steps of the sequential analysis are identical for adults and children, the process as a whole does not

\textsuperscript{73} Without an individualized assessment, children with impairments that do not reach the presumptive level of disability in the listings cannot qualify for disability benefits based on their actual degree of functional impairment. Indeed, although poor children with disabilities have been estimated to number between 435,000 and 1.3 million, see Brief for the American Academy of Child and Adolescent Psychiatry as Amicus Curiae at 10, Zebley \textit{ex rel.} Zebley v. Bowen, 855 F.2d 67 (3d Cir. 1988) (No. 87-1692) (citing P. Breen, \textit{Participation of Disabled Children In The Supplemental Security Income Program}, unpublished report, Bush Institute for Child and Family Policy, University of North Carolina, Chapel Hill (1980)), as of 1986 the Secretary had determined that only 280,137 children were eligible for SSI benefits. \textit{See} 1987 Annual Statistical Supplemental, Soc. Sec. Bull. 283 (table 200).

\textsuperscript{74} 742 F.2d 19 (1st Cir. 1984).

\textsuperscript{75} See \textit{id.} at 22; \textit{see also} Williams \textit{ex rel.} Williams v. Bowen, 859 F.2d 255, 260 (2d Cir. 1988) (comparable severity suggests that adults and children cannot be judged by identical standards).

In upholding the Secretary's regulations for impaired children in Powell \textit{ex rel.} Powell v. Schweiker, 688 F.2d 1357, 1363 (11th Cir. 1982), the Eleventh Circuit noted that the Secretary satisfied the Congressional mandate for comparability by providing identical standards for adults and children in three important ways. First, both adults and children are considered disabled if their impairments are listed in appendix I, part A. Second, both adults and children are considered disabled if their impairments are the equivalent of the listings in part A. Third, both adults and children must meet the duration requirement of 12 months. \textit{Id.} at 1360. The court noted that the Secretary went even further for impaired children by providing an additional listing of impairments for children. \textit{See id.}

In a recent case dealing with the denial of benefits to a child with sickle thalassemia, an illness related to sickle cell anemia, the Eighth Circuit declined to decide whether the regulations as a whole are valid, yet determined that the regulations, as applied in the case before the court, were not invalid. \textit{See Nash ex rel. Alexander v. Bowen, 882 F.2d 1291, 1293 (8th Cir. 1989).} The court stated that the statute did not require the Secretary to determine whether a child had the functional capacity to perform substantial gainful activity, since such an inquiry would be highly speculative. \textit{See id.} Also, the court found that the child claimant in this case was afforded an individual assessment of his impairment, because "the listing for childhood sickle cell anemia differs greatly from the listing for adult sickle cell anemia and appears to provide for a finding of disability in a broader range of cases." \textit{Id.} (citations omitted).

\textsuperscript{76} \textit{See Hinckley}, 742 F.2d at 23. But \textit{see} J. Mashaw, \textit{Bureaucratic Justice} 114 (1983) (statutory definition of disability is concerned with capacity, not just employability).

\textsuperscript{77} \textit{See Hinckley}, 742 F.2d at 22.
provide children with an adequate opportunity to prove comparable severity. The supplemental listings available to assess children's impairments do not adequately substitute for individualized assessments because they require a threshold level that constitutes a presumption of disability. Individual evaluation for children would, of course, focus on different aspects from those considered in adult assessments. For example, it would take into account the impact of the child's impairment on his ability to function successfully within age-appropriate expectations, as well as the impact on the child's future development.78

Moreover, consideration of these factors will enable the Social Security Administration to determine the actual level of need for rehabilitative services or special education in order to make these children productive members of society,79 which is the very purpose of Social Security benefits for children. Thus, individualized assessments are necessary for children.80 In Zebley ex rel. Zebley v. Bowen,81 the Third Circuit correctly held that by denying children an individualized assessment of their actual functional capacity resulting from their impairments, the regulations promulgated by the Secretary conflict with the intent of Congress.82

Since present disability may limit future vocational capacity, an individualized assessment of the child's impairments allows a prognosis of the future impact of the disability on employment.83 In addition, the Secretary may properly consider whether the child has impairments that would prevent an adult from working.84

78. See 122 Cong. Rec. 34,026 (1976) (statement of Sen. Hathaway describing the proper criteria for disability determinations in children); see also Baxter v. Schweiker, 538 F. Supp. 343, 351 (N.D. Ga. 1982) (“The mere presence of medical problems does not constitute disability; there must also be disabling effects.”)

An individualized assessment of the child's RFC, age and education and its impact on his growth, learning and development is necessary to evaluate and uncover impairments of "comparable severity" to an impairment that would render an adult disabled. An adult claimant is considered disabled when the claimant is unable to engage in substantial gainful activity. See supra note 21 and accompanying text.

79. See 122 Cong. Rec. 34,026 (1976) (“[A] child may have a severe medical disability which may, in childhood, be able to be brought under control through proper treatment. . . . If there is no intervention at this stage, and needed services are not provided that child, then he may well not be able to develop the skills needed to become a productive adult . . . . [T]he cycle of disability, failure to develop to potential, and a future of welfare dependency may never be broken.” (statement of Senator Hathaway)). Thus, developmental needs of impaired children must be considered in determining whether they are disabled and in need of benefits.


82. See id. at 76.


Ironically, the Social Security Administration used this assessment in Thompson ex
B. Comparison With Widow's Disability Benefits

One argument the courts have used for not allowing individual assessments for children relies on a comparable provision for disability entitlements for widows and widowers. In determining the eligibility of dependent widows and widowers for disability benefits, the Secretary's regulations require that the widow's impairments meet or equal a listed impairment. The Secretary, under Congressional authority, promulgated these regulations to establish the severity of impairments which would preclude an individual from engaging in substantial gainful activity. This is the same criterion employed for children seeking disability benefits, although children are evaluated under two different listings.

In 1977 the Senate Finance Committee Staff reported the publication of the regulations relating to disabilities in children. The report noted that the non-medical vocational factors were not applied to disabled chil-

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rel. Thompson v. Secretary of Health & Human Servs., 559 F. Supp. 548, 551 (E.D.N.Y. 1983), when an ALJ denied disability benefits to a child claimant based on the determination that the claimant's impairments did not meet or equal the listings, as well as the fact that the claimant could work if he was an adult. See id. at 551; see also Weir ex rel. Weir v. Heckler, 734 F.2d 955, 963 n.7 (3d Cir. 1985) (consideration of child's capacity to work, if an adult, useful). The court remanded the case to the ALJ for a new hearing, in which there would be further consideration of whether the claimant's impairments were equivalent to a listed impairment. If not, the court directed the Secretary to reconsider the question of whether the child could work if he was an adult. See Thompson, 559 F. Supp. at 552. Such an individualized consideration would include the child's exertional capacity to perform sedentary work, but also any other environmental restrictions and nonexertional impairments (such as the child's ability to climb stairs and use mass transit) that would prevent the child from engaging in substantial gainful activity if he were an adult. See id. at 551-52.

Another variation on the determination of comparability was utilized by the court in Winfield v. Mathews, 571 F.2d 164 (3d Cir.), cert. denied, 439 U.S. 869 (1978). The Third Circuit upheld a denial of disability benefits to a 5 year old who suffered from a congenital eye defect, because no Social Security Administration physician had concluded that the child's eye impairment was equivalent or "comparably severe" to the listings of impairments. See id. at 169-70. Thus, the court viewed comparability as a determination of the severity of the child's condition. No consideration, however, was given to whether the child could work if he were an adult.

86. At that time, the Secretary's title was Secretary of Health Education & Welfare. Now, however, the Secretary's title has changed to Secretary of Health & Human Services. See supra note 4.
89. See Hinckley ex rel. Martin v. Secretary of Health & Human Servs., 742 F.2d 19, 22 (1st Cir. 1984); Powell ex rel. Powell v. Schweiker, 688 F.2d 1357, 1361 (11th Cir. 1982); 20 C.F.R. § 416.924 (1988).
dren for the same reasons they had not been applied to disabled wid-
ows. 91 For example, as a group, both children and widows do not have
enough attachment to the labor force to make application of vocational
factors feasible. 92 However, this explanation is not conclusive on the
matter. The finance committee report was written five years after the
statute entitling disabled children to SSI benefits was enacted, and “post-
enactment comment by a legislative committee generally does not serve
as a reliable indicator of congressional intent.” 93 Further, even if the
report does indicate congressional approval of the Secretary’s failure to
use vocational factors in determining disabilities in children, the Secre-
tary still must utilize criteria comparable to vocational factors for
adults. 94

In contrast to the express congressional directive for disability deter-
minations in widows, Congress never instructed the Secretary to restrict
the criteria for determining disabilities in children to the level of severity
of their impairments. Rather, Congress provided that a child be deemed
disabled if he suffers from any impairment of “comparable severity” to
an impairment that would render an adult disabled. 95 Therefore, Con-
gress did not preclude an individualized assessment of functional capabil-
ities in children as it did in disability determinations of widows and
widowers.

In addition, in Tolany v. Heckler, 96 the Second Circuit held that even
in disability determinations for widows, there should still be a considera-
tion of the claimant’s Residual Functional Capacity. 97 The court noted
that the regulations were ambiguous concerning the extent to which the
regulations required consideration of a widow’s RFC. 98 Thus, the court
recognized that even for widows, there must be some individualized as-
sessment of actual capacity to engage in gainful activity. This important
recognition was made in spite of the fact that Congress sought to restrict
widows from an assessment of non-medical factors.

CONCLUSION

Congress has provided for a disability program in which poor, im-
paired children will be deemed eligible for SSI disability benefits if their

91. Staff of Senate Comm. on Finance, 95th Cong., 1st Sess., The Supplemental Se-
92. See id.
tary of Health & Human Servs., 742 F.2d 19, 22 (1st Cir. 1984) (neither widows nor
children have enough attachment to the labor force to utilize vocational factors); Powell
ex rel. Powell v. Schweiker, 688 F.2d 1357, 1362 (11th Cir. 1982) (same).
94. Zebley, 855 F.2d at 75 (emphasis in original).
96. 756 F.2d 268 (2d Cir. 1985).
97. See id. at 271.
98. See id. (“The special procedure for widows does not mention residual functional
capacity, but this does not necessarily mean it may be ignored.”)
impairments are of "comparable severity" to those impairments that render adults disabled. The Secretary, however, has promulgated different criteria to be used in determining disabilities in impaired adults and children. If a child's impairment does not meet the high threshold of presumptive disability, the child is not afforded the same individualized assessment of actual functional capabilities as adult claimants receive and the child's claim for benefits is denied.

These regulations are inconsistent with the congressional mandate for determining disabilities in impaired children. Thus, the Secretary has not exercised his delegated authority in accordance with congressional intent. The regulations must, therefore, be amended to provide for an individualized assessment of a child claimant's impairments to comport with the Social Security Act.

_Rachelle Lombardi_