

## Statement for the Record

*Accompanying the Protecting Social Security Disability Act of 2014*

*Senator Tom A. Coburn, M.D.*

*December 11, 2014*

### **I. Background**

As a father, grandfather, and doctor, there are few issues that are more important to me than making sure Social Security benefits are protected for both current and future generations. While both the Social Security Disability Insurance program and the Social Security Insurance program will be exhausted during my kids' lifetime, the disability program's finances are particularly dire.

Since 2005, the disability trust fund has paid out more in benefits each year than taxpayers pay back in. Last year alone the shortfall was \$32 billion.<sup>1</sup> As a result, the trust fund will run out of money by 2016, after which the Social Security Administration (the "Agency") will only be able to pay 81 percent of disability benefits to the 11 million Americans currently dependent on them.<sup>2</sup> This outcome is unacceptable.

#### **A. The Program's Growth Is Controllable**

Faced with the impending insolvency of the disability program, politicians have debated the principal causes of the trust fund's rapidly-expanding shortfall. Some argue the program does not need reform, believing that the increase in the disability rolls is due to factors beyond our control. Citing aging baby-boomers and the rise of women in the workplace, opponents of reform argue that dramatically rising disability spending was and is unavoidable.

That is simply wrong. Since 1989, the percentage of working-age Americans receiving disability benefits has more than doubled,<sup>3</sup> while the percentage of Americans reporting a work limitation has remained fairly stable.<sup>4</sup> A paper published by the Center for American Progress and the Brookings Institution noted that even among middle-aged men, the fraction receiving disability benefits has risen by 45 percent since 1988.<sup>5</sup>

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<sup>1</sup> *The 2014 Annual report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds*, 32 (July 28, 2014), available at <http://www.ssa.gov/OACT/tr/2014/tr2014.pdf>.

<sup>2</sup> *Id.* at 2-3.

<sup>3</sup> David H. Autor and Mark Duggan, *Supporting Work: A Proposal for Modernizing the U.S. Disability Insurance System*, Center for American Progress and the Hamilton Project, 2 (Dec. 2010) available at <http://cdn.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/autordugganpaper.pdf>.

<sup>4</sup> Richard V. Burkhauser and Mary C. Daly, *The Declining Work and Welfare of People with Disabilities*, 38, Figure 3-2b (American Enterprise Institute for Public Policy Research 2011).

<sup>5</sup> David H. Autor and Mark Duggan, *Supporting Work: A Proposal for Modernizing the U.S. Disability Insurance System*, Center for American Progress and the Hamilton Project, 2 (Dec. 2010) available at <http://cdn.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/autordugganpaper.pdf>.

## **B. Fraud, Waste, and Abuse Are Driving Up Program Costs**

A significant driver of the program's increased cost is fraud, waste, and abuse. For the past four years, the U.S. Senate Committee on Homeland Security and Governmental Affairs (the "Committee") and the U.S. Senate Permanent Subcommittee on Investigations (the "Subcommittee") have conducted several bipartisan investigations into aspects of the Agency's disability programs and uncovered significant problems with the program that Congress and the Agency need to correct.

In 2012, the Subcommittee looked at a random sample of 300 disability cases and found that a quarter of the decisions made by the Agency were not supported by the medical record. Much of this was the result of the Agency's poor supervision of its 1,500 Administrative Law Judges (hereinafter, ALJs).<sup>6</sup> This was not just the Subcommittee's judgment; the Agency agreed. After conducting its own study, SSA similarly found that 23 percent of ALJ decisions nationally were not supported by the record.<sup>7</sup>

In 2013, the Committee issued a report showing how the disability programs could be gamed by attorneys, doctors, and ALJs.<sup>8</sup> The report detailed how attorney Eric C. Conn, ALJ David Daugherty, and several doctors conspired to manufacture fraudulent medical evidence to award benefits. Mr. Conn got rich and also paid a few doctors millions of dollars to sign fraudulent medical evidence, which Judge Daugherty then used to approve claims without a hearing. The result of their plan was millions in potentially fraudulent disability awards. Mr. Conn became the third highest-paid disability attorney in the country, and we found a number of large, unexplained cash deposits in Judge Daugherty's bank accounts that were not reported on his taxes or his public disclosures.

Both reports highlighted how the Agency's push to reduce the hearings backlog came with significant costs: the Agency paid little regard to the quality of decisions being made by ALJs, and focused only on encouraging ALJs to decide as many cases as possible.

The Agency's Office of Inspector General recently issued a report estimating that a group of high-approving judges granted at least \$2 billion in improper benefits.<sup>9</sup> As a result, the Agency will pay out another \$273 million in improper benefits each year.<sup>10</sup>

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<sup>6</sup> See generally, Permanent Subcommittee on Investigations, United States Senate, Minority Staff Report, *Social Security Disability Programs: Improving the Quality of Benefit Award Decisions* (Sept. 13, 2012), available at [http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=6f2d2252-50e8-4257-8c6f-0c342896d904](http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=6f2d2252-50e8-4257-8c6f-0c342896d904).

<sup>7</sup> See *Social Security Administration Fiscal Year 2011 Final Action Report*, Division of Quality, February 8, 2012.

<sup>8</sup> See generally, Committee on Homeland Security and Governmental Affairs, United States Senate, Staff Report, *How Some Legal, Medical, and Judicial Professionals Abused Social Security Disability Programs for the Country's Most Vulnerable: A Case Study of the Conn Law Firm* (Oct. 7, 2013), available at [http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=0d1ad28a-fd8a-4aca-93bd-c7bf9543af36](http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=0d1ad28a-fd8a-4aca-93bd-c7bf9543af36).

<sup>9</sup> *Administrative Law Judges with Both High Dispositions and High Allowance Rates*, Office of the Inspector General, Social Security Administration, A-12-14-24092 (Nov. 2014), available at [http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-14-24092\\_0.pdf](http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-14-24092_0.pdf).

<sup>10</sup> *Id.*

This is only a sample of the work the Committee and Subcommittee have done in the last few years, and it does not crack the surface of the excellent work done by the Agency's Office of Inspector General, including uncovering huge fraud schemes in New York<sup>11</sup> and Puerto Rico.<sup>12</sup>

### C. Weakened Eligibility Criteria and Manipulated Rules

The program's antiquated, subjective, and ambiguous rules make it easier for lawyers, doctors and claimants to game the system.

Changes in program criteria used to determine eligibility for benefits has made determinations less objective. Researchers at the National Bureau of Economic Research attributed 53 percent of growth for men and 38 percent of growth for women not to age, workforce participation, or economic factors, but to weakened eligibility criteria.<sup>13</sup>

Since Congress' changes in 1984, the Social Security Administration no longer makes benefit decisions based strictly on medical evidence, but instead determines whether vocational factors such as age, education, and skills prevent an individual from working "any job in the national economy," a standard that should be hard to meet. But the number of applicants approved based on this standard has more than doubled.<sup>14</sup>

Eligibility criteria are not the only rules that can be gamed. Most recently, I examined how some claimant representatives systematically withhold medical evidence from the Agency to help their clients win benefits and engage in other misconduct to pad their pockets and clog the disability program.

What I found is a program that offers backward incentives for everyone from the applicant, representatives to the beneficiaries. Because the program accepts applicants only after they quit their job, and provides them with rehabilitation services only after they start receiving benefits, applicants must leave their job and often go years before they receive services they need. Because applicants will lose their benefits if they make too much money, there are an estimated 25 to 40 percent that would work but choose not to.<sup>15</sup> And because the program rewards

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<sup>11</sup> *Another Former NYC Police Officer Pleads Guilty to Role in Widespread Disability Fraud Scheme*, Office of the Inspector General, Social Security Administration (Sept. 12, 2014), available at <http://oig.ssa.gov/audits-and-investigations/investigations/sept12-minerva>.

<sup>12</sup> *First Sentences Handed Down in Puerto Rico Disability Fraud Scheme*, Office of Inspector General, Social Security Administration (Mar. 26, 2014), available at <http://oig.ssa.gov/newsroom/blog/march26-post>.

<sup>13</sup> Mark Duggan and Scott A. Imberman, *Why Are the Disability Rolls Skyrocketing? The Contribution of Population Characteristics, Economic Conditions, and Program Generosity*, University of Chicago Press, 339 (Jan. 2009), available at <http://www.nber.org/chapters/c11119.pdf>.

<sup>14</sup> *Id.*

<sup>15</sup> Maestas, N., Mullen, K., and Strand, A., *Does Disability Insurance Receipt Discourage Work? Using Examiner Assignment to Estimate Causal Effects of SSDI Receipt*, University of Michigan Retirement Research Center Working Paper, WP 2010-241, 29, available at <http://www.mrrc.isr.umich.edu/publications/papers/pdf/wp241.pdf>; Eric French and Jae Song, *The Effect of Disability Insurance Receipt on Labor Supply: A Dynamic Analysis*, Federal Reserve Bank of Chicago, 1 (Dec. 6, 2012), available at [http://www.chicagofed.org/digital\\_assets/publications/working\\_papers/2012/wp2012\\_12.pdf](http://www.chicagofed.org/digital_assets/publications/working_papers/2012/wp2012_12.pdf); Gina A. Livermore, *Social Security Disability Beneficiaries with Work-Related Goals and Expectations*, U.S. Social Security

representatives only if they win, and awards greater fees the longer the case sits, representatives hide bad evidence, delay decisions, and provide poor representation to disabled Americans.

#### **D. Helping working, disabled Americans**

For most Americans, disability benefits should not continue indefinitely for one's lifetime. Yet only one half of one percent of individuals on disability rolls leave because they have returned to work and earned over the amount allowable by the Agency.<sup>16</sup>

Additionally, scholars believe 23 percent of applicants are on the margin of program entry – that is, whether they are awarded benefits depends on who reviews their case.<sup>17</sup> Accordingly, there is a relatively high percentage of beneficiaries that can work, but choose not to, either because they do not want to lose their benefits (both monetary and Medicare), or because they need supports that are not currently offered to them.

Our federal laws, including the Americans with Disabilities Act and dozens of federal work programs, are designed to assist disabled Americans in leading integrated, self-sufficient lives. Yet we have failed to target and coordinate the resources they need *before* they have to leave their jobs. The Social Security Advisory Board (SSAB) attributes Ticket to Work's low success rate to the fact that intervention "comes too late in the process – after the individual's connection to employment has been severed and frequently after the individual has undergone a lengthy process of proving inability to work."<sup>18</sup>

According to the SSAB, "focusing all of the return-to-work efforts inside the structure of the disability program seems to be too late for many individuals. In order for the intervention to be effective, it needs to occur before the individual comes to SSA, before he applies for SSDI or SSI, and before the attachment to the workforce is lost." The SSAB has advocated for comprehensive front-end services, arguing they are "a real chance to access tailored services that can enhance return to work efforts."

#### **E. Legislative Reforms Are Needed**

When the trust fund is exhausted in 2016, many Members of Congress will say we just need to move funds from the Social Security retirement program. Let me be clear: this is not a solution;

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Administration Office of Retirement and Disability Policy, Social Security Bulletin Vol. 71 No. 3 (2011), *available at* <http://www.ssa.gov/policy/docs/ssb/v71n3/v71n3p61.html>.

<sup>16</sup> *Audit Report: Ticket to Work and Self-Sufficiency Program Cost Effectiveness*, Office of the Inspector General Social Security Administration, 9 (Aug. 2008), *available at* [http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-02-07-17048\\_0.pdf](http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-02-07-17048_0.pdf).

<sup>17</sup> Maestas, N., Mullen, K., Strand, A., *Does Disability Insurance Receipt Discourage Work? Using Examiner Assignment to Estimate Causal Effects of SSDI Receipt*, American Economic Review (June 20120).

<sup>18</sup> Social Security Advisory Board, "A Disability System for the 21<sup>st</sup> Century," *available at* <http://www.ssab.gov/documents/disability-system-21st.pdf>.

it is a Band-Aid, a temporary fix that takes money away from seniors and will eventually hurt taxpayers when both funds go broke in 2033.<sup>19</sup>

I hope there will be a rigorous debate in the next year about how we can better serve disabled Americans with a program that gives them the resources they need to work to the extent they are able and protects benefits for those who are forced to rely on them. The disability program is an important safety net, but it does not serve the disabled or the taxpayers to treat it like an early retirement program or long-term unemployment.

This is a conversation that will take place after I have left the Senate. Accordingly, after four years of research, investigations, and thoughtful meetings with other interested, engaged parties, today I am offering a bill I believe can be used as a blueprint to shore up the fund before its exhaustion in 2016, fix systemic problems with the program, and provide targeted resources for the millions of disabled Americans who want to work to the best of their abilities.

The *Protecting Social Security Disability Act of 2014* was drafted with three goals in mind: first, to make systemic changes to the program that preserve it for future generations; second, to ensure benefits are adequate and quickly available for those who need them by adding program integrity measures that root out fraud, waste and abuse; and third, to provide resources and incentives to those disabled Americans who prefer to work and have the ability to do so.

## **II. Section-by-Section Summary of the Bill**

*Title: To protect the Social Security Disability Insurance program and provide other support for working disabled Americans, and for other purposes.*

*Short Title: Protecting Social Security Disability Act of 2014*

### **Title I – Ensuring the Long-Term Solvency of the Disability Insurance Trust Fund**

#### **Sec. 101. Application of actuarial reduction for disabled beneficiaries who attain early retirement age.**

- Requires that disabled worker beneficiaries be converted to retired worker status at the Earliest Eligibility Age.
- Any individuals who are categorized as Medical Improvement Not Expected (see below) are exempt.

#### **Sec.102. Reviews and time-limiting of disability benefits.**

- Disability Classifications. Mandates that all beneficiaries be classified as follows when they are admitted on to the rolls:
  - o Medical Improvement Expected (MIE, improvement within 1-2 years);
  - o Medical Improvement Likely (MIL, improvement within 3-5 years);
  - o Medical Improvement Possible (MIP, improvement not likely to be within 5 years, but improvement is possible); and

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<sup>19</sup> *Id.* at11.

- Medical Improvement Not Expected (MINE, there is no known effective treatment). Age may not be used as a factor to categorize someone in the MINE category who otherwise would not be.
- Continuing Disability Reviews.
  - MILs and MIPs will have mandatory full medical continuing disability reviews during the 5<sup>th</sup> year and 7<sup>th</sup> year of benefits, respectively.
  - Any individual may be subject to an earlier review if the Commissioner of Social Security has reason to believe the individual is not under a disability, but such a review cannot be initiated on the basis of income earned under Section 301 (below).
  - Reviews under this paragraph are in addition to, and do not substitute for, other reviews required by the Social Security Act.
  - The standard of review will be the same as conducted for an initial determination, rather than the medical improvement standard, except that any income the individual is now earning under Section 301 (below) will not be considered.
- Time-limiting Disability Benefits for MIE Individuals.
  - Benefits will be time-limited to 3 years for MIEs.
  - MIEs may file a timely reapplication for benefits during the last twelve to fourteen months of their benefit period.
  - Notwithstanding the above, a reapplication may be deemed timely if the individual can show good cause for failure to submit during the period described above and it is submitted no later than 6 months before the end of the termination month applicable.
  - There will be no waiting period for benefits/Medicare if an individual's timely reapplication is approved.
  - If an initial decision has not been made on a timely reapplication when the individual's benefit term ends, the individual's benefits will continue until an initial determination is made.
  - If an final decision has not been made on a timely reapplication when the individual's benefit term ends, and the individual requests a hearing to review an unfavorable initial decision, the individual may request to have benefits extended until a hearing decision is made. If the individual is determined not to be disabled, any benefits paid after benefit term has ceased will be considered overpayments.
  - A previous award of benefits shall have no bearing on the reapplication, and the continuing disability review rules do not apply.

Sec.103. Adjustment of age criteria for social security disability insurance medical-vocational guidelines.

- Age cannot be considered as a factor using the grids for any individual aged less than the Normal Retirement Age minus 12 years. This means every time the Normal Retirement Age is increased, so too will the age for disability purposes.
- SSA must consider the share and ages of individuals currently participating in the labor force and the number and types of jobs available in the current economy when considering vocational factors.

- Starting in two years, and every year thereafter, SSA must keep a current jobs list so examiners are considering the current economy when determining whether an individual can work any job in the national economy.

Sec.104. Mandatory collection of negotiated civil monetary penalties.

- Mandates SSA collect the penalties negotiated by the Inspector General in cases of fraud by beneficiaries.

Sec.105. Required electronic filing of wage withholding returns.

- Requires that all W-2s be submitted electronically but provides a hardship exemption for small businesses with 25 employees or less for the first five years, and then moving to 5 employees or less after that.

**Title II – Program Integrity: Reforming Standards and Procedures for Disability Hearings, Medical Evidence, and Claimant Representatives**

Sec.201. Elimination of reconsideration review level for an initial adverse determination of an application for disability insurance benefits.

- Removes the reconsideration review in the remaining states that still have it so cases can move quickly to a hearing before an ALJ.

Sec.202. Deadline for submission of medical evidence; exclusion of certain medical evidence.

- Closing the Record. Prevents SSA from considering evidence submitted less than 5 days before a hearing with an ALJ, and provides a “good cause” standard for failing to meet that deadline that is the same as used in federal court. In no case can evidence be submitted if it was obtained after the ALJ’s decision or submitted 1 year after an ALJ’s decision.
- Applicants, their representative, or a disability hearing attorney (defined in section 203 below) may request that a hearing be postponed to complete the record for no more than 30 days if it is made at least 7 days prior to the hearing date and if the party shows good cause.
- Exclusion of Medical Evidence. Makes it clear that claimants and their representatives must submit all known, relevant medical evidence to SSA, whether the evidence is favorable or unfavorable, and requires that claimants certify to the ALJ at a hearing that they have done so. Evidence may not be considered otherwise. There is an exception for attorney-client privileged communications. It also provides clear civil and criminal penalties for the failure to follow these rules.
- Prohibits SSA from considering evidence furnished by a physician who is not licensed, has been sanctioned, or is under investigation for ethical misconduct.

Sec.203. Non-adversarial disability hearing attorneys.

- Creates a disability hearing attorney position to develop the record, represent the government in hearings where the claimant has representation, recommend on the record decisions where clearly warranted, and to refer cases to the Appeals Council if they disagree with the ALJ’s grant of benefits.
- Requires the Agency to properly vet and train the staff.

Sec.204. Procedural rules for hearings.

- Requires SSA to create and publish procedural rules for hearings.
- Allows ALJs to impose certain fines and other sanctions for failure to follow these rules.

Sec.205. Prohibits attorneys who have relinquished a license to practice in the face of an ethics investigation from serving as a claimant representative.

- Any representative seeking payment for their services has an affirmative burden of certifying to SSA they meet the rules.
- Attorneys must certify to SSA they have never been disbarred or suspended from any court or relinquished a license to practice in the face of a misconduct investigation.

Sec.206. Applying judicial code of conduct to administrative law judges.

- This makes ALJs subject to the Judicial Code of Conduct.

Sec.207. Evaluating medical evidence.

- Removes the controlling weight standard given to opinion evidence provided by treating physicians.
- For any healthcare providers filling out a Residual Functional Capacity form, the claimant has to provide them with a Medical Consultant Acknowledgement Form (created by SSA) that discloses how medical evidence will be used by SSA, instructions on filling out RFC forms, and information on the legal and ethical obligations of a practitioner providing such an assessment. The practitioner must sign and certify they read and understand the contents of the form and include it with the RFC or the evidence cannot be considered by SSA. This also provides penalties for forging the certification.
- Allows ALJs to request and use Symptom Validity Tests and social media and requires SSA provide training on how to weigh such evidence.

Sec.208. Reforming fees paid to attorneys and other claimant representatives.

- Representatives must account for work performed on a case even if there is a valid fee agreement
- SSA can no longer reimburse representatives for travel expenses.
- The IG must perform annual reviews of the highest-earning claimant representatives that look for repetitive language in their evidence, any licensing problems, and whether there is a disproportionate number of the representatives' cases being determined by a particular ALJ.
- Representatives cannot receive fees from the Equal Access to Justice Act for: (1) hearings before an ALJ; and (2) if they submitted new evidence after the hearing.

Sec.209. Strengthening the administrative law judge quality review process.

- The Division of Quality shall conduct an annual review on a sample of cases by "outlier" ALJs (those with 85% or higher approvals and 700 or more cases that year) and report to SSA on its findings.
- Any cases determined to be granted in error must have a continuing disability review within six months.

Sec.210. Permitting data matching by the Inspector General of the Social Security Administration.

- Exempts Inspectors General from the applicable Computer Matching and Privacy Protection Act of 1988 restrictions, which mandate cumbersome rules to approve agreements with other agencies to share records for investigations.

Sec.211. Accounting for Social Security Program Integrity Spending.

- Amounts made available for program integrity spending shall be in a separate account within the federal budget and funded in a separate account in the appropriations bill.

Sec.212. Use of the National Directory of New Hires.

- Mandates that SSA consult the National Directory of New Hires when determining whether an individual is making above the substantial gainful activity limits.

**Title III – Providing Support For Working, Disabled Americans**

Sec.301. Encouraging work through the Work Incentive Benefit System

- Removes Ticket to Work.
- Implements the Work Incentive Benefit Program created by Dr. Jagadeesh Gokhale, member of the Social Security Advisory Board. The program incentivizes disability beneficiaries to go back to work to the extent they are able by allowing them to keep more of what they earn while receiving diminished benefits. The program is different from the Benefit Offset National Demonstration (BOND) in that it uses a sliding scale (similar to the Earned Income Tax Credit) to encourage beneficiaries to maximize their earnings.
- Puts in place a reimbursement structure for state vocational rehabilitation agencies that shares the savings accrued when a beneficiary returns to work under the Work Incentive Benefit Program and thus receives a lower benefit. The share of these savings state VR agencies are entitled to will increase based on the severity of the disability, to ensure VR agencies are targeting those who need the most help.

Sec.302. Early-intervention demonstration project and study. Requires SSA to implement two projects to:

- Identify disability applicants who have not yet entered the program but who are highly likely to be approved, yet who would have some work capacity if given the appropriate supports. Directs the Commissioner to provide targeted vocational rehabilitation, as well as the possibility of health benefits and cash stipends, to selected individuals who voluntarily suspend their disability application in exchange for these supports; and
- Study the feasibility of incentives for employers to provide private disability insurance and other support services by reimbursing a portion of payroll taxes when employers can reduce their disability rates (voluntary experience rating).

