Calendar No. 899

NOTICE: In lieu of a star print, errata are printed to indicate corrections to the original report.

98TH CONGRESS 2d Session | SENATE | REPORT 98–466

ERRATA

MAY 18 (legislative day, MAY 14), 1984.—Ordered to be printed

Mr. DOLE, from the Committee on Finance, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 476]

CORRECTIONS

Page 2, line 1: delete "for a period of 3½ years" and insert "through December 31, 1987"; paragraph 4, line 2: insert comma after "eligibility"; last paragraph, line 3, add "s" to "require".

Page 7, next to last line: delete the word "currently".

Page 8, line 6: the word "lasted" is misspelled; paragraph 6, line 6, new paragraph before "(Benefits"; last paragraph, second line, insert "This" before "Burden".

Page 10, strike second sentence and insert: Only if the individual satisfies the burden of showing that his medical condition has not improved would the burden be upon the Secretary to show some other change in circumstances that would warrant terminating benefits. If the claimant cannot meet the burden of showing no medical improvement or the Secretary can show a change in circumstances, eligibility would be determined under the present law test of ability to engage in substantial gainful activity.

Page 13, line 2: delete "and"; line 3: the word "new" is misspelled; line 13: insert "a"; paragraph 2, line 15, the word "their" is misspelled; last line of paragraph 3: the word "for" should be "far".

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Page 18, line 6, indent Committee amendment; line 10 of second paragraph: delete comma after "administrative"; line 3 of fourth paragraph, insert apostrophe in Administration's; line 4 of fourth paragraph, delete comma after "(SSA's)".

Page 19, line 2: delete comma after "standards".

Page 21, paragraph 4, line 16: insert comma after "Mendosa,".

Page 22, line 3 of paragraph 1: the word "functional" is misspelled; line 2 paragraph 4: the word "cumulatively" is misspelled.

Page 23, paragraph 3, line 15: the word "guidelines" is misspelled.

Page 25, line 5 of paragraph 4: the word "contract" should be "contact".

Page 27, paragraph 2, line 2: the word "seven" should be "severe."; line 3: add "s" to impairment; line 9: delete the word "thus".

Page 28, paragraph 5: the word "temporary" is misspelled.

Page 30, line 4: the word "beneficiary" is misspelled; the word "periodically" is misspelled; next to last line delete the first "that" and insert "and".

Page 32, paragraph 2: insert the word "which" after "State".

Page 33, paragraph 4, line 7: the partial word "preli-" is misspelled.

Page 34, after the author's name and affiliation (on memo) add "Social Security Administration".

Page 43:

In the original printing of Senate Report 98–466, several paragraphs of the additional views of the Honorable Russell B. Long were misplaced. The additional views are correctly reprinted below.

ADDITIONAL VIEWS OF THE HONORABLE RUSSELL B. LONG

Although I continue to have reservations about S. 476, the Finance Committee has made important modifications in the bill:

The medical improvement standard in the committee bill is a less complete presumption of continuing eligibility for persons who were not disabled when they began receiving disability benefits.

A measure of protection of the disability insurance trust fund, if the cost of the bill far exceeds the estimates, is incorporated in a fail-safe provision which will scale back cost-of-living increases if the fund begins to deteriorate.

By incorporating a statutory definition of pain the committee bill re-emphasizes that legislative policy is set by the Congress and that the Congress expects the administration and the courts to interpret and apply that policy in the light of the congressional intent that the disability insurance program be carefully administered and nationally uniform.

By providing a mandatory expedited timetable for dealing with State failure to follow Federal rules in determining eligibility, the committee bill would prevent another protracted deterioration in State administration of this Federal program such as is now occurring.

THE MEDICAL IMPROVEMENT STANDARD

Under legislation enacted in 1980, the administration has conducted a large number of continuing disability reviews to see if persons on the disability insurance rolls are still disabled. A significant number of persons were removed from the rolls.

Under present law, when a recipient of disability insurance benefits is reviewed to determine whether he is still disabled, the same definition of disability applies to him as is used for a new applicant, namely: Is he able to engage in "substantial gainful employment?"

S. 476 as introduced would for the first time have set a different standard of continuing eligibility for a person already on the rolls. Finding him capable of engaging in substantial gainful activity would not have sufficed to end his benefits; the Secretary would also have had to show that he had undergone medical improvement since he was first determined to be disabled.

The committee bill amends and improves this provision. The original bill would have almost totally foreclosed the Secretary from removing from the rolls a person who was not disabled when he began receiving benefits. The committee bill instead lets the Secretary challenge the original disability determination, develop additional evidence and require the complainant to prove that his condition has not medically improved.

Even with this modification, the Social Security Act for the first time will have permitted persons who are able to engage in substantial gainful employment to continue receiving disability insurance benefits.

The committee bill is estimated to cost $2.5 billion over a 5-year period. Virtually this entire amount will be paid to persons who are able to work.

These very significant costs of this legislation are justified by the proponents of the bill on the basis of the need to deal with the current chaotic situation which prevails in the administration of the social security disability program. Even if this argument were to be accepted, it remains deeply troubling for us to expend $2.5 billion, at a time when we are struggling to cope with alarming Federal deficits, to provide benefit payments to individuals who would be unable, despite several levels of appeal, to establish their eligibility.

The situation will be much worse if the legislation, instead of resolving the current chaotic situation, simply serves as a signal for further efforts to broaden eligibility. The bill as reported by the Committee on Finance clearly does not intend such a result. However, the costs and caseloads of this program have over the years proven highly volatile and difficult to control. The adoption by the Congress of a dual standard of eligibility creates a tension which could be laying the groundwork for further expansion of the program. It may prove difficult to maintain a situation in which individuals are denied admission to the benefit rolls—even though equally or less disabled persons who managed to get on the rolls are allowed to keep receiving benefits.

Disability Program Needs Further Review and Revision

S. 476, as reported by the Committee on Finance, attempts to deal with major problems which now exist in the way the program is administered. I believe a number of the provisions of the bill will help in this regard. For example, the specific provision reaffirming the existing regulation on the evaluation of pain will resolve whatever confusion there may be on this issue. It emphasizes again the congressional view of the need to limit eligibility to cases where disability can be established by objective medical evidence. The timetable for dealing with State defiance of Federal rules should help the Secretary deal with such problems more forcefully. Even the medical improvement provision, though it is troublesome from a policy perspective, at least will resolve a large body of litigation according to a policy standard which is set, as it should be, by the Congress and not the courts.

While these features of the Finance Committee bill are desirable improvements in the program, I am concerned that there remain major problems in the structure of the disability program which are not adequately addressed by the pending legislation. If Congress is to bring this program back under control and restore the confidence of both taxpayers and beneficiaries in its evenhandedness, we will need to undertake stronger measures than those contained in this bill.

Consistency of decisionmaking.—One of the arguments most frequently advanced in support of the medical improvement standard is that many, or even most, of the benefit terminations as a result of the recent eligibility reviews were erroneous. The evidence offered in sup-

port of this argument is that more than half of the terminations appealed to an administrative law judge (ALJ) were overturned at that level.

While the statistic is correct, the conclusion drawn from it is not. The phenomenon of a reversal rate by ALJ's exceeding 50 percent is not peculiar to the recent review process. Both for continuing reviews and initial awards, the ALJs have consistently over the past 10 years reversed more than half of the cases appealed to them.

This prolonged pattern of high reversal rates indicates only that different standards are being applied at different levels of the administrative structure. This problem has been recognized for some time. The 1980 amendments attempted to address the problem by mandating a study of its causes and by requiring the Secretary to undertake to review a significant portion of cases which are reversed by ALJ's. In addition to these actions, the agency has undertaken to publish rulings aimed at providing a uniform set of basic eligibility guidelines for all levels of the administrative process.

Thus far, at least, there is no evidence that any of these measures are having a significant impact. It may be too early for any results to show up, particularly in the present confused administrative atmosphere. But if the present approach does not succeed in achieving consistent decisionmaking within the present program structure, the Congress may need to consider modifications in that structure.

The role of the courts.—In the 1956 hearings on the question of establishing a disability program, witnesses from the insurance industry predicted that the courts would be only too eager to broaden the scope of the program beyond what Congress intended. That prediction has proven to be quite accurate. In the 1967 amendments, the committee report cited several examples of ways in which the courts had broadened the original intent of the statute. The committee then directed the administration to report to the Congress on "future trends of judicial interpretation of this nature," and added to the statute provisions designed to counteract those court cases.

The situation has not noticeably improved. In a recent case (*Polaski* v. *Heckler*), a U.S. District Court judge excoriated the Secretary for following her own regulation in violation of what he deemed to be the "fundamental policies at the heart of the disability program." He found these fundamental policies embodied in a law review article by another judge to the effect that the disability statute "should be broadly construed and liberally applied." On the basis of his findings that the Secretary was not obeying what he calls "Eighth Circuit Law," this judge ordered the Secretary to substitute his policy judgment for hers (and that of the Congress) in carrying out the Social Security Act in an area covering seven States.

This case would not be so troubling if it were atypical. But apparently it is almost the judicial norm. Courts do, of course, have the responsibility to carry out the law and to resolve questions of interpretation. In so doing, however, they should be guided by the statute and its legislative history, not by abstract theories found in law review articles. If the judge in this case had bothered to examine the statute and legislative history, he would have ample evidence of Congress' concern not that the law be more broadly construed, but that it be

more narrowly construed. He would also have found great concern on the part of Congress that this law be administered more uniformly. This might have led him to give more weight to national law than to "Eighth Circuit Law." In the United States, the law is the law of the land and it is made by Congress. The courts, including the district and circuit courts, have an important role in carrying out and enforcing the law. But Circuit courts are not regional legislatures.

In its provision on the evaluation of pain, the Committee deals with one of the areas in which the Courts have been broadening the program. However, it is clear from the law review article quoted in the *Polaski* case that there are many other aspects of the program on the judicial agenda. If the regional courts are going to persist in ignoring the policy objectives expressed by Congress and persist in refusing to grant appropriate deference to the duly promulgated regulations of the Secretary, the Congress may be forced to find ways of dealing with this situation.

Federal-State relationship.—A troubling recent development in the disability program is the tendency of some States to defy Federal rules in carrying out this program which is wholly federally funded. Even more troubling is the fact that the Secretary took no action to bring the errant States back into line. The committee bill does attempt to deal with this for the future by establishing firm and mandatory time frames for proceeding to federalized operations in States which refuse to comply. This situation must be monitored, however, if it is not to recur.

The handicapped population.—One reason for the volatility of the disability program is that it is intentionally limited to only the most severely disabled—those who because of their impairment cannot engage in any substantial gainful work activity. This limitation is based not solely on the cost but on grounds of policy. The law should not encourage those who retain the capacity for self-support to become dependent.

Unfortunately, if society cannot provide employment opportunities for handicapped individuals who are not totally disabled, they will understandably seek to be found eligible for benefits under the disability programs. And it will be difficult for the administration of those programs to deny them eligibility.

If we are to succeed in controlling the cost of the disability insurance program, we must find more effective ways of opening up jobs to those handicapped people who have the capability to become productive members of society. While this problem is beyond the scope of the pending bill, our failure to solve this problem has a great deal to do with why this bill is needed. There would be no requirement for a medical improvement standard if we could offer a job to any handicapped person who could work.

I hope the Congress will turn its attention to this issue and that the administration will consider whether it cannot recommend to Congress some significant measures to increase the availability of job openings for the handicapped.

The Growth of the Disability Program

When the disability program was enacted in 1956, it was projected that the program could be permanently financed by a combined

employer-employee tax of 0.42 percent of payroll. After adjusting for the proportion of covered wages which are subject to tax, that is closer to a rate of 0.33 percent in today's terms. Since that time, the cost of the program has grown significantly. In the 1984 report of the Social Security trustees, the long-range costs of the program are estimated at 1.45 percent of payroll, some 4 times what was originally estimated. Expressed on a constant-dollar basis in relation to 1984 payroll levels, the long-range average cost of the program has increased from $5 billion per year to $23 billion per year.

There have, of course, been some changes in the eligibility requirements for disability benefits since 1956. These changes, however, explain only about one-third of the growth of the program (on the basis of the cost estimates made when they were added to the law). The bulk of the growth in the costs of the disability program cannot be adequately explained except on the basis that the program has been administered in such a manner as to pay benefits to a broader population than Congress intended the program to serve.

Even more troubling than the mere fact that program costs are greater than originally estimated is the evidence that it remains a highly volatile program. Its costs could easily expand well beyond present levels. At the time the program was first enacted, the experts estimated that by 1990 there would be a little more than a million disabled workers drawing benefits. Today there are 2.6 million workers drawing benefits. This is a large increase. But just a few years ago—in 1977—the benefit rolls were growing so rapidly that the actuaries projected they would exceed 5 million disabled worker beneficiaries by 1990. That is roughly 5 times the original estimate.

In dollar terms (using a constant dollar concept based on 1984 payroll levels), the projected long-range average costs of the program have increased from $5 billion in 1956 to $23 billion today—a fourfold increase. But today's projected costs are far from the historic high. That occurred in 1977, when instead of the original 0.33 percent of payroll or the present 1.45 percent of payroll, the long-range program costs were projected to require a tax (on a comparable basis) of about 3.4 percent of payroll—some 10 times as high as the original estimate. This extreme point in the cost of the program was partially caused by a problem in the benefit formula. But even after that problem was corrected by the 1977 amendments, the long-range average cost of the program was estimated to be 2.49 percent of payroll—over 7 times the original cost. In comparable constant dollar terms, this translates into a long-range annual average cost of $40 billion per year.

Viewed in this perspective, it is clear that this is a program with a serious potential for getting further out of control. It could easily add billions of dollars per year to the deficit and could endanger the stability of the social security system generally. It is particularly important to note that the program is now again showing a trend towards increased costs. As a result of the actions by the States and the courts and the various moratoria imposed by the administration, the rates of termination are on a downward trend. This is not surprising. But the program has also recently shown an upswing in the allowance rates and in application rates.

Just in the past year, the social security actuaries have been required to significantly increase their estimates of what this program will cost

even if there is no additional legislation. For the 10-year period ending 1992, the 1984 trustees report indicates that without any legislative change the projected disability program costs have increased by $5.5 billion. The estimates of the long-range average annual costs have similarly increased by over $1 billion per year.

For this reason, there are grounds for serious concern over the possibility that the enactment of disability legislation could be taken as a signal which would unleash another explosion of program costs. If that were to take place, the currently estimated costs of the bill, although they are substantial, would pale in comparison with the true costs of the bill. There is good reason to expect that the enactment of this legislation in the form it passed the House or in the form in which it was referred to the Finance Committee would produce just such results. The Finance Committee has modified this legislation and, in particular, has attempted to clarify it in several ways to limit the possibility that it could mistakenly be seen as the starting signal for another round of program growth. Even so, careful monitoring will be required, given the historic difficulty of controlling the program. In particular, it would be very difficult to responsibly support this legislation if the safeguards included by the Finance Committee were weakened in any significant degree.