



1983

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Recommended Citation

H. Mayo Smith, *Administrative Law—Social Security Disability Benefits—Adoption of Medical-Vocational Guidelines within Statutory Authority*, 6 U. ARK. LITTLE ROCK L. REV. 461 (1983).

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ADMINISTRATIVE LAW—SOCIAL SECURITY DISABILITY BENEFITS—ADOPTION OF MEDICAL-VOCATIONAL GUIDELINES WITHIN STATUTORY AUTHORITY. *McCoy v. Schweiker*, 683 F. 2d 1138 (8th Cir. 1982).

Loyce McCoy, Clifford Stack and James Desedare applied for Social Security disability benefits.¹ In determining their eligibility the Social Security Administration² found that although the claimants were not currently working and suffered from severe impairments that limited their ability to engage in basic work activities, the impairments were not included in the Administration’s Listing of Impairments.³ The claimants were also found unable to return to their past work but their claims were denied because they fell within certain vocational rules⁴ known as the vocational grid.

The vocational grid contains three tables setting out the vocational rules for persons who retain the residual functional capacity (RFC) to perform only sedentary work (Table 1), light work (Table 2) and medium work (Table 3).⁵ These tables are divided into rules

1. 42 U.S.C. § 423, Ch. 7, Subch. 11 (1976 & Supp. V 1981). Persons under sixty-five who are disabled within the meaning of the statute and who file an application are eligible for monthly benefits.

2. Initial claims and the first appeal are decided by state agencies under contract to the Social Security Administration. Social Security Act, 42 U.S.C. § 421(a) (1976 & Supp. V 1981). The second level of appeal is heard by an Administrative Law Judge (ALJ), 42 U.S.C. § 421(d) (1976 & Supp. V 1981) and is a claimant’s first opportunity for face-to-face contact with the decisionmaker. A third level of appeal is available before the Appeals Council. All the decisions are made in the name of the Secretary of Health and Human Services. After failing to obtain a satisfactory decision from these appeals through the Social Security Administration, a claimant may bring suit for judicial review in federal district court. 42 U.S.C. § 405(g) (1976 & Supp. V 1981).

3. 20 C.F.R. § 404 Subpt. P, App. 1 (1982). These medical listings describe in detail precise groups of clinical, laboratory and symptomatic findings for many disease processes. If a claimant is not working, a finding that his signs, symptoms and laboratory findings meet or equal a specific listing creates a presumption of disability.

4. 20 C.F.R. § 404 Subpt. P, App. 2 (1982). These rules postulate various combinations of age, education and work experience and direct a decision of disabled or not disabled for each possible combination. For example:

<u>Rule</u>	<u>Age</u>	<u>Education</u>	<u>Previous Work Experience</u>	<u>Decision</u>
202.11	Closely approaching advanced age	Limited or less	Skilled or semi-skilled skills not transferable	Not Disabled

5. 20 C.F.R. § 404 Subpt. P, App. 2 (1982). Rule 204 is listed separately and applies to those who can do either heavy or very heavy work.

which create categories based on age, education and work experience. For each combination of residual functional capacity, age, education and work experience, the rules direct a decision of disabled or not disabled. In this instance, the rules indicated that jobs were available in the national economy within the claimants' capabilities and therefore directed decisions of not disabled.

The claimants filed separate suits in district court to reverse the denials of benefits. In each case the district court set aside the administrative decisions on the ground that the vocational grid was an inadequate substitute for the testimony of a vocational expert in determining whether there were jobs which the claimant could perform.⁶ The Eighth Circuit Court of Appeals, *en banc*, reversed and remanded, upholding the use of the vocational grid but suggesting that the Secretary might wish to develop a notice procedure advising claimants of the contents and application of the challenged regulations. *McCoy v. Schweiker*, 683 F.2d 1138 (8th Cir. 1982).

Congress established the Social Security Act, a comprehensive system of health and welfare programs, in 1935.⁷ Under the program, states were given grants for old age assistance, unemployment compensation, aid to dependent children, maternal and child welfare and aid to the blind. The only program directly administered by the federal government concerned old age (retirement) and death benefits.

There was a gap in this comprehensive plan because retirement benefits were originally computed on the amount of earnings a worker had. If the worker became disabled and could no longer work, his earnings would drop to zero. Because a computation based on lack of earnings tended to reduce or eliminate retirement benefits, the Social Security Act was amended in 1954⁸ to "freeze" the earnings records of persons with extended total disability in order to preserve their retirement benefits. The amendment defined disability as the inability to engage in substantial work because of a medical impairment which was expected to last indefinitely or to result in death.⁹

A gap still remained because disabled workers had no income from Social Security until retirement age. Thus, in 1956 the Social

6. *Desedare v. Secretary of HEW*, 534 F. Supp. 21 (W.D. Ark. 1980). *McCoy v. Schweiker* and *Stack v. Schweiker* were unreported.

7. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935).

8. Social Security Amendments of 1954, Pub. L. No. 83-761, 68 Stat. 1052 (1954).

9. *Id.*

Security Act was amended again to make cash benefits available for the first time to disabled persons between the ages of fifty and sixty-five.¹⁰ The definition of disability remained exactly the same.

The 1965 amendments to the Social Security Act¹¹ shortened the requisite duration of those impairments which had lasted or could be expected to last for a continuous period of not less than twelve months. The definition of disability was amended in 1967 to amplify the meaning of "inability to engage in any substantial gainful activity."¹² Under this new definition Congress required that the impairment be medically determinable and that it not only prevent the claimant from returning to his past work but also prevent his performance of any other work in the national economy for which he was qualified by virtue of his age, education and work experience regardless of availability of work or of employers' hiring practices.¹³ The statutory mandate thus makes entitlement to disability benefits, dependent upon vocational as well as medical factors. This definition of disability has not been changed.

The resulting disability insurance program is one of the largest and most complex entitlement programs in this country with approximately 96,800,000 workers insured in 1981.¹⁴ As of August 1982, there were about 2,657,000 disabled workers receiving benefits.¹⁵ In view of the sheer number of claims, countless variations in types of impairments, and individual characteristics bearing on the ability to work, a need developed for more consistent assessments of eligibility.

Accordingly, the statutory guidelines have been supplemented and interpreted in administrative rules and regulations which were

10. Social Security Amendments of 1956, Pub. L. No. 84-880, 70 Stat. 807 (1956). The Act was amended again in 1960 to drop the age 50 requirement for cash benefits. Social Security Amendments of 1960, Pub. L. No. 86-778, 74 Stat. 924 (1960).

11. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965).

12. 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, regardless of whether such work exists in the immediate area in which he lives, or whether he would be hired if he applied for work . . . [W]ork which exists in the national economy means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821, 868 (1967).

13. *Id.*

14. 45 SOCIAL SECURITY BULLETIN, No. 81, at 5 (1982).

15. 45 SOCIAL SECURITY BULLETIN, No. 11, at 1 (1982).

designed to carry out the statutory definition of disability, including the crucial concept that a claimant may suffer from a severe medical impairment and yet still be able to engage in some work activity. The rules at issue in *McCoy* are the product of administrative proceedings which began with public hearings in 1976 and ended with the promulgation of the rules in 1978.¹⁶ The grid codified prior practices for the evaluation of age, education and past work experience.

In promulgating the rules, the Social Security Administration's intention was to clarify for the public how disability was determined when these vocational factors were considered in view of the statutory emphasis on inability to do any work. The rules were written to assure sound determination of disability in those cases where vocational factors were considered as well as to assure greater consistency and to advise the public, the adjudicative personnel in the Social Security Administration and the courts of the standards used.¹⁷

The rules take extensive administrative notice of the existence of unskilled work at the sedentary,¹⁸ light¹⁹ and medium²⁰ exertional levels,²¹ of the effect of age²² on the ability to transfer to new

16. 41 Fed. Reg. 51,437 (1976). Issues addressed in the hearings included whether: the Secretary had the authority to promulgate the rules; the rules represented a departure from the individualized determination required by the Act as interpreted by the courts; the data relied upon was accurate and a proper subject for administrative notice; the rules represented a rebuttable presumption or hard and fast categories; and the rules would result in less use of vocational experts. 42 Fed. Reg. 8,223 and 8,224 (1977). In the course of the meetings concerns were voiced over: the facts administratively noticed; that no other agencies were contacted in drafting the rules; that there were no vocational experts on the staff which drafted the rules; that the ALJ's were not consulted, and that there had been no long and detailed study of the rules. Transcript, Vocational Factors Meeting, March 21, 1977, Dallas, TX at 36, 44, 42.

17. 43 Fed. Reg. 9,284 and 9,285 (1978).

18. Sedentary work requires the ability to sit most of the day with occasional lifting and carrying of small items and occasional walking and standing. 20 C.F.R. § 404.1567(a) (1982).

19. Light work requires the ability to stand and walk most of the day with an occasional maximum lift of about 20 pounds and frequent lifts of 10 pounds, or sitting most of the day and operating arm or leg controls. 20 C.F.R. § 404.1567(b).

20. Medium work requires the ability to walk and stand most of the day with a maximum lift of about 50 pounds and a frequent lift of about 25 pounds. 20 C.F.R. § 404.1567(c). Heavy work requires the ability to lift a maximum of 100 pounds and a frequent lift of about 50 pounds. 20 C.F.R. § 404.1567(d).

21. The rules take notice that there are about 200 separate sedentary, unskilled occupations, 20 C.F.R. § 404 Subpt. P, App. 2, § 201.00 (1982); 1600 sedentary and light unskilled occupations, *Id.* at § 202.00; and 2500 sedentary, light and medium occupations. *Id.* at § 203.00.

22. Younger workers are those age 50 and under, subdivided into younger workers aged

work, and consider the effects of education²³ and past work experience as well.²⁴ In general, the greater the range of work a person can do, the younger a person is, the more education a person has and the more skilled work a person has done, the more likely it is that the rules will direct a decision of not disabled.²⁵

The Supreme Court has resisted efforts to require more than the bare minimum in rulemaking proceedings.²⁶ In promulgating a rule, the agency must only give notice of what it is doing and give the public an opportunity to comment, unless there are specific additional provisions in the substantive statute conferring rulemaking authority on the agency.²⁷

In fashioning the rules that were under attack in *McCoy*, the Secretary took administrative notice of the existence of jobs in the national economy and the effect of age, education and past work on the ability to transfer to new work. Administrative notice has been described as using facts from sources outside the case under consideration.²⁸

The Supreme Court has upheld agency use of administrative notice since at least 1913.²⁹ The Court has allowed the use of data not found in the formal record before administrative agencies in actions such as ratemaking procedures,³⁰ evaluation of applications for operating permits³¹ and formulation of labor remedies.³² Some

45-49 and those under age 45. Relative youth is considered a vocational asset. Workers approaching advanced age (50-54) are considered to have a moderately limiting factor, while workers of advanced age (55 and over) are considered to have a severely restricting factor. 20 C.F.R. § 404.1563 (1982).

23. The most adverse educational level is illiteracy. Still adverse, but less so, is a marginal education (up to the 6th grade). A limited education (7th through 11th grades) is considered consistent with the majority of unskilled work, while a high school education or more is considered a vocational asset. 20 C.F.R. § 1564 (1982).

24. Absence of work experience is a vocational liability while work which includes skills that can be used in jobs within the claimant's physical capacity is considered an asset. 20 C.F.R. § 1568 (1982).

25. In 1980 these regulations were amended to clarify language but no substantive change in meaning was effected. 45 Fed. Reg. 55,584 (1980).

26. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (reversing a judicial grafting of requirements beyond that required by the Administrative Procedure Act, *infra* note 29).

27. Administrative Procedure Act, 5 U.S.C. § 553 (1976).

28. See generally 1 *K. Davis*, ADMINISTRATIVE LAW TREATISE, § 6:17 (2d ed. 1978).

29. *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913) (proceeding to set rates).

30. The ICC could draw inferences based on its experience as to the presence or absence of competition. *Id.* *Market Street Ry. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 560 (1945) (allowed administrative inference on the probable effect of rates on traffic when the railway itself had submitted the evidence).

31. *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946) (it was not

limits on administrative notice have been established. These limits emphasize the need for administrative fairness, such as informing a party that certain evidence will be considered as a matter of administrative notice.³³

The Eighth Circuit, in evaluating agency regulations, has made detailed inquiries into the evidence available to the agency. In *C.P.C. International, Inc. v. Train*,³⁴ companies which were engaged in processing corn challenged EPA pollution regulations. The court noted that its review was "limited to a determination of whether the Administrator's decision was 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.'"³⁵ The court analyzed in detail the data upon which the EPA based its regulations and concluded that they were inadequate to support the standards promulgated. Yet, in *Independent Meat Packers Association v. Butz*,³⁶ the Eighth Circuit deferred to the expertise of the Department of Agriculture in revising grading standards. The full administrative record, with numerous studies and comments, was before

error for the ICC to look to the record of another applicant for operating permits when the evidence applied to both and prejudice was not shown).

32. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953) (approving the reinstatement of employees discharged in a discriminatory manner, the Court said "[I]n devising a remedy the Board is not confined to the record of a particular proceeding. 'Cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated." *Id.* at 349). The Court has also stressed the limited court review of agency action which "calls for the application of technical knowledge and experience not usually possessed by judges." *Federal Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492, 501 (1955).

33. *United States v. Abilene & Southern Ry.*, 265 U.S. 274 (1924), arose out of hearings held to set rates. In the course of the hearings the hearing officer noted a need for the annual reports of the affected carriers, but the reports were not formally introduced as evidence. This was held improper administrative notice. "The general notice that the Commission would rely upon the voluminous annual reports is tantamount to giving no notice whatsoever." *Id.* at 290. The Court explained why such notice was improper. "The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made." *Id.* at 289. In *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937), the Commissioner was required to determine the value of the phone company's property in order to revise rates. In doing so, it took evidence on valuation for a certain date. However, it also considered price fluctuations on the basis of administrative notice of trade journals. This was held improper. Cognizance of general trends would be appropriate, but the precise extent of a decline, when that was the point in controversy, would not. Without access to the facts noticed, the Court could not decide if the Commissioner's findings were supported by evidence. *Id.* at 307.

34. 515 F.2d 1032 (8th Cir. 1975), *cert. denied*, 430 U.S. 966 (1977).

35. *Id.* at 1043-44 (quoting *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

36. 526 F.2d 228 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976).

the court below.³⁷

The Eighth Circuit has extensive experience in evaluating Social Security disability claims and interpreting Social Security regulations. The burden of proof initially is on the claimant to prove he is disabled.³⁸ However, once he demonstrates that he is incapable of returning to his past employment, the burden of proof shifts to the Secretary to show that the claimant can engage in other kinds of work.³⁹ In meeting this burden the Secretary must demonstrate what kinds of work exist for a person with the claimant's capabilities. The proof must involve more than demonstrating mere theoretical ability to perform the work.⁴⁰

Prior to *McCoy* this proof ordinarily took the form of testimony of a vocational expert.⁴¹ Without the testimony of a vocational expert there was insufficient evidence for an Administrative Law Judge (ALJ) to find that there was substantial gainful employment available to claimants.⁴² Further, the testimony of the expert had to be based on hypothetical questions posed by the ALJ which precisely related the claimant's specific impairments to the vocational opportunities available. Failure to do so rendered the vocational expert's testimony fatally deficient.⁴³ The rules attacked in *McCoy* would appear largely to supplant the need for expert testimony.

In *McCoy v. Schweiker*⁴⁴ the court first looked to the Social Security Act for the congressional definition of disability.⁴⁵ The congressional definition emphasized the claimant's inability to do any form of substantial work and thus established a rigorous standard for eligibility.

37. *Cf.* National Renderers Ass'n v. EPA, 541 F.2d 1281 (8th Cir. 1976) (rejecting EPA standards on effluent discharges when the cost figures were stale).

38. *Voyles v. Harris*, 636 F.2d 228, 229 (8th Cir. 1980); *Dressel v. Califano*, 558 F.2d 504, 507 (8th Cir. 1977); *Lund v. Weinberger*, 520 F.2d 782, 785 (8th Cir. 1975); *Garrett v. Richardson*, 471 F.2d 598, 599 (8th Cir. 1972).

39. *Garrett*, 471 F.2d at 598.

40. *Cole v. Harris*, 641 F.2d 613, 614 (8th Cir. 1981); *Thompson v. Mathews*, 561 F.2d 1294, 1296 (8th Cir. 1977); *Brinker v. Weinberger*, 522 F.2d 13, 18 (8th Cir. 1975); *Celebrezze v. Bolas*, 316 F.2d 498, 501 (8th Cir. 1963).

41. *Boyer v. Califano*, 598 F.2d 1117, 1119 (8th Cir. 1979); *Dressel*, 558 F.2d at 507; *Garrett*, 471 F.2d at 603.

42. *Boyer*, 598 F.2d at 1119.

43. *Stephens v. Secretary of HEW*, 603 F.2d 36, 41 (8th Cir. 1979); *Daniels v. Mathews*, 567 F.2d 845, 848 (8th Cir. 1977).

44. 683 F.2d 1138 (1982).

45. *Id.* at 1142-43. The definition can be found at 42 U.S.C. § 423(d) (1976 & Supp. IV 1980).

The court next looked to the grant of authority conferred upon the Secretary to make regulations.⁴⁶ The court found that the congressional grant of power was twofold.⁴⁷ First, it granted power and authority to establish rules, regulations and procedures. The grant was more than the mere power to interpret the statute; it was power vested in the Secretary to establish rules and regulations. This power was limited only by the requirement that such rules and regulations be consistent with the provisions of the Act.⁴⁸ Second, the language beginning "and shall adopt"⁴⁹ was a congressional command. While the first part of the provision granted authority to make rules and regulations, the second part made the exercise of that power mandatory. This grant of power also described the kinds of rulemaking required. "[T]he description of the kinds of rulemaking that are required is significant: the rules and regulations are *both* 'to regulate and provide for the nature and extent of evidence' *and* to cover 'the method of taking and furnishing the same.'"⁵⁰ Thus, the congressional grant encompassed "both the quality ('nature') and quantity ('extent') of evidence necessary to support a finding of entitlement to disability benefits."⁵¹

From this analysis the court found support to show that the statutory grant of authority allowed the agency to use general rules, in the form of the grid, to make conclusions regarding disability. However, the court also expressed concern over the nature of the vocational rules. "[A]ny table that purports mechanically to determine whether an individual, unique human being can do a certain job must raise questions as to whether the fact-finding function is being so far simplified as to become unrealistic."⁵²

The court then turned to Supreme Court precedent. *Batterton v. Francis*⁵³ involved the challenge of a regulation which numeri-

46. 683 F.2d at 1143.

The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

Social Security Act, 42 U.S.C. § 405(a) (1976).

47. *McCoy*, 683 F.2d at 1143.

48. *Id.*

49. Social Security Act, 42 U.S.C. § 405(a) (1976).

50. *Id.* [emphasis in original].

51. *Id.*

52. *Id.*

53. 432 U.S. 416 (1977). *Herweg v. Ray*, 455 U.S. 265, 274-5 (1982), and *Schweiker v.*

cally defined unemployment. In upholding the regulation the Supreme Court noted that when Congress expressly delegates the power to prescribe standards to the Secretary, the primary responsibility for interpreting the statutory terms rests with the Secretary rather than with the courts.⁵⁴ From this Supreme Court decision the Eighth Circuit concluded "that in the case of legislative, substantive regulations promulgated with express congressional authority, the Secretary of Health and Human Services, not the courts, is the primary interpreter of the statute."⁵⁵ The court acknowledged that these regulations had been upheld by several other circuits.⁵⁶

The court then considered the manner in which the regulations were promulgated.⁵⁷ These rules were promulgated after notice and comment procedures which were not challenged. The rulemaking was based in part on the Secretary's experience in a large number of disability cases and on the same documentary sources that vocational experts use in testifying. "We doubt, as a practical matter, that vocational experts, who necessarily vary widely in their knowledge and experience, are a more reliable source in the general run of cases than the materials on which the Secretary relied in the rulemaking proceeding."⁵⁸

The court observed that the agency took official notice of the fact that jobs exist in the national economy which people with certain characteristics can perform.

[A]s Congress in passing a law may find that certain facts exist, so an agency in issuing a legislative or substantive regulation may take certain facts as irrebuttably established, so long as this finding is not arbitrary and capricious, is within the authority dele-

Gray Panthers, 453 U.S. 34, 44 (1981), are cited to the same effect. *McCoy*, 683 F.2d at 1144. *Herweg* and *Gray Panthers* both upheld a medicaid regulation which "deemed" income of a noninstitutionalized spouse available to meet the needs of the institutionalized spouse.

54. *Batterton*, 432 U.S. at 425-26.

55. *McCoy*, 683 F.2d at 1144.

56. *Id.* at 1144-45, citing *Santise v. Schweiker*, 676 F.2d 925 (3d Cir. 1982); *Cummins v. Schweiker*, 670 F.2d 81 (7th Cir. 1982); *Torres v. Secretary of Health & Human Serv.*, 668 F.2d 67 (1st Cir. 1981); *Kirk v. Secretary of Health & Human Serv.*, 667 F.2d 524 (6th Cir. 1981); *Gagnon v. Secretary of Health & Human Serv.*, 666 F.2d 662 (1st Cir. 1981); *Thomas v. Schweiker*, 666 F.2d 999 (5th Cir. 1982); *Geoffroy v. Secretary of Health & Human Serv.*, 663 F.2d 315 (1st Cir. 1981); *Salinas v. Schweiker*, 662 F.2d 345 (5th Cir. 1981); *Perez v. Schweiker*, 653 F.2d 997 (5th Cir. 1981); *Fraday v. Harris*, 646 F.2d 143 (4th Cir. 1981). The Second Circuit partially invalidated the rules in *Campbell v. Secretary of Dept. of Health & Human Serv.*, 665 F.2d 48 (2nd Cir. 1981), *rev'd sub nom.* *Hackler v. Campbell*, 103 S. Ct. 1952 (1983).

57. *McCoy*, 683 F.2d at 1145.

58. *Id.* at 1145-46.

gated to the agency by statute, and is not in violation of the Constitution.⁵⁹

The court stressed two points. First, each of the characteristics of residual functional capacity, age, education and past work experience was still open to litigation. Second, the opportunity to rebut the presumption of ability to perform certain work had already been given in the rulemaking proceeding.⁶⁰ The court then looked to the vocational rules themselves to determine when they apply and how they operate. According to the court, the rules are not to be used unless a claimant's residual functional capacity, age, education and work experience match a specific rule.⁶¹ "If a claimant's relevant characteristics differ in any material respect from those of the grid, the Guidelines cannot be applied, and all the pre-existing requirements of case law, including the customary insistence on the use of vocational experts, retain their full vigor."⁶² Thus, the Eighth Circuit, while upholding the use of the grid, gave the regulation a narrow reading.

The underlying facts upon which the rules operate must be determined before the rules can be applied and these facts are open to proof.⁶³ The grid establishes that jobs exist for people with specified characteristics, but it does not relieve the Secretary of the burden of showing that the claimant is a member of one of the groups described in the regulation. Moreover, the grid does not apply when the impairment is solely nonexertional, for example when it involves only mental, sensory or skin impairments.⁶⁴ Further, if the impairment consists of a combination of impairments resulting in both exertional and nonexertional restrictions, the rules do not apply.⁶⁵ Thus, as viewed by the Eighth Circuit *en banc*, the vocational rules have self-limiting features. The rules do not relieve the Secretary of the burden of proving that the claimant can do other work, and the

59. *Id.* at 1146.

60. *Id.*

61. *Id.*

62. *Id.*

63. 20 C.F.R. § 404 Subpt. P, App. 2, § 200.00(a) (1983) provides in part:

Where any one of the findings of fact does not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case and, accordingly, does not direct a conclusion of disabled or not disabled. In any instance where a rule does not apply, full consideration must be given to all of the relevant facts in the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations.

64. *Id.* at § 200.00(e).

65. *McCoy*, 683 F.2d at 1148.

adjudication of disability claims still requires a large measure of individualized handling.⁶⁶

Because of the complexity of the vocational rules and the various proofs necessary to use them, the court suggested that "[t]he Social Security Administration may wish to develop a pre-hearing notice so that a claimant can come to the hearing prepared to present testimony and evidence relevant to the Guidelines."⁶⁷

An analysis of this area of social security law shows that the vocational rules purport to take administrative notice of the existence of jobs in determining eligibility. Had the Social Security Administration not thought that such rules would have had widespread applicability, it is unlikely that it would have engaged in formal rulemaking procedures lasting for years. In view of the large number of potential claimants,⁶⁸ adoption of the vocational rules might have significantly changed the determination of eligibility. Such changes would not only have had an effect on the agency involved, but on the courts as well, since judicial review of Social Security disability decisions is an integral part of the program. The impact of judicial review on the caseload of the courts is substantial. In 1979 Social Security disability benefit cases were the most frequent form of administrative agency appeal heard before the Eighth Circuit.⁶⁹

Decisions handed down subsequent to *McCoy* already suggest that the Eighth Circuit takes a somewhat narrower view of the applicability of the vocational grid than do some other circuits.⁷⁰ However, *McCoy* was cited by the Fifth Circuit for the proposition that the use of the grid meets the Secretary's burden of proof without qualification.⁷¹ Later, the Eighth Circuit noted, in *Tucker v. Schweiker*⁷² that use of the grid was inappropriate when there was a mental impairment involved. The court again emphasized the nar-

66. See, e.g., *Streissel v. Schweiker*, 717 F.2d 1231 (8th Cir. 1983); *Hagan v. Schweiker*, 717 F.2d 1229 (8th Cir. 1983); *Baugus v. Secretary of Health & Human Services*, 717 F.2d 443 (8th Cir. 1983); *Haynes v. Heckler*, 716 F.2d 483 (8th Cir. 1983); *Hillhouse v. Heckler*, 716 F.2d 428 (8th Cir. 1983); *Nettles v. Schweiker*, 714 F.2d 833 (8th Cir. 1983); *Gates v. Secretary of Health & Human Services*, 712 F.2d 1282 (8th Cir. 1983); *Simonson v. Schweiker*, 699 F.2d 426 (8th Cir. 1983).

67. 683 F.2d at 1148.

68. Over a million disability decisions are made per year. 45 SOCIAL SECURITY BULLETIN No. 8 at 7 (1982).

69. *Brand v. Secretary of HEW*, 623 F.2d 523 (8th Cir. 1980).

70. See *supra* cases cited in note 66.

71. *Rivers v. Schweiker*, 684 F.2d 1144, 1155 (5th Cir. 1982) (upholding a denial of benefits based on the vocational grid).

72. 689 F.2d 777 (8th Cir. 1982).

row circumstances in which the vocational grid applies in *Powell v. Schweiker*⁷³ when the criteria of a rule were not precisely met. A district court has even held that pain is a nonexertional impairment precluding use of the vocational grid.⁷⁴

The limited circumstances in which the Eighth Circuit holds the vocational grid applicable are apparently at odds with the broad facial applicability of the regulations. At least one commentator thought the vocational regulations were designed to limit areas in which vocational experts could disagree about the availability of jobs.⁷⁵ The holding in *McCoy* essentially relegates use of the vocational grid to those few instances when a rule is precisely met, and, thus, the Eighth Circuit's prior emphasis on the use of vocational experts and the requirements of realistic vocational opportunity remains largely intact.

While upholding the vocational grid in form, the decision in *McCoy* clearly indicates to those representing disability claimants in the Eighth Circuit that the grid should pose little obstacle to obtaining benefits. The court's elaboration on nonexertional impairments and ranges of residual functional capacity which fall between the ranges specified in the rules suggests that there will be exceedingly few cases to which the grid will be held to apply upon appeal.

However, *McCoy* also stands as a judicial validation of the exercise of administrative notice in rulemaking. There is a fundamental tension between administrative convenience on the one hand and individual fairness on the other. The notice validated here suggests that great deference will be accorded to the agency when it takes administrative notice during rulemaking, even though the facts administratively noticed later became part of an individual adjudication as a substitute for evidence.

The vocational grid was promulgated after notice and comment procedures, but such procedures assume that the affected public will be aware of them and will participate in the process. There also appears to have been little study of the vocational rules. According to the Director of the Division of Regulations of the Social Security Administration, "We did not go into a long and detailed study of the regulation because we [did not] believe they were going to make

73. 691 F.2d 419 (8th Cir. 1982).

74. *Cornella v. Schweiker*, 545 F. Supp. 918 (D.C. S.D. 1982). See *supra* cases cited in note 66.

75. Goldhammer, *The Effect of New Vocational Regulations on Social Security and Supplemental Security Income Disability Claims*, 32 AD. L. REV. 501, 505 (1980).

any change in the process. . . .”⁷⁶

The most significant facts administratively noticed by the regulations are the presence of specific numbers of sedentary, light and medium occupations in the national economy. Of the sources listed in the regulation, only the *Dictionary of Occupational Titles* contains this type of national information.⁷⁷ This work was published in 1965 by the Department of Labor and is now dated.⁷⁸

The application of the vocational grid to disability claims is significantly limited by *McCoy*. However, the validation of administrative notice of rather dated materials suggests an expansion of the concept of administrative notice.

H. Mayo Smith

76. Transcript, Vocational Factors Meeting, March 21, 1977, Dallas, TX at 42.

77. 20 C.F.R. § 404 Subpt. P, App. 2, 200.00 (1983).

78. The fourth edition of the *Dictionary of Occupational Titles* was partially published in 1977, but the type of information relied upon for the regulations was not available in formulating the rules. Some of the other reference materials used to support the age classifications go back as far as 1957. 43 Fed. Reg. 9,289 (1978). Some of the material used to support the work experience classifications go back to 1956. *Id.*

