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Disabling Social Security Beneficiaries by Limiting Attorney's Fees: Rodriguez v. Secretary of Health & Human Services

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DISABLING SOCIAL SECURITY BENEFICIARIES BY LIMITING ATTORNEY'S FEES: *RODRIGUEZ v. SECRETARY OF HEALTH & HUMAN SERVICES*

Pursuant to the disability insurance provisions contained in title II of the Social Security Act (the "Act"),[1] disabled workers and their families may qualify for and receive disability insurance benefits.[2] Although the Secretary of Health and Human Services (the "Secretary") exercises exclusive decisionmaking authority with respect to the initiation and termination of these benefits,[3] such de-

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[1] 42 U.S.C.A §§ 401-433 (West 1983 & Supp. 1988). Title II of the Social Security Act was originally enacted to provide for survivor's and retiree's benefits; however, in 1956, Congress amended title II to provide disability benefits for insured workers who became medically disabled. *See* Weinstein, *Equality and the Law: Social Security Disability Cases in the Federal Courts*, 35 SYRACUSE L. REV. 897, 902 (1984).

[2] *See* 42 U.S.C.A. § 402(b)-(d) (West Supp. 1988); 1 H. MCCORMICK, SOCIAL SECURITY CLAIMS AND PROCEDURES § 6, at 13 (3d ed. 1983). Disability insurance benefits are provided for insured workers, their spouses, and their children. *See id.*; R. MEYERS, SOCIAL SECURITY 38-48 (1975); *see also* 20 C.F.R. §§ 404.330, 404.350 (1988) (Secretary of Health & Human Services' definitions of eligible spouses and children). There are two titles within the Social Security Act which provide for disability benefits: title II and title XVI. *See* Schweiker v. Chilicky, 108 S. Ct. 2460, 2463 (1988); F. BLOCH, FEDERAL DISABILITY LAW AND PRACTICE 3 (1984). Title XVI provides disability benefits to disabled individuals and their families irrespective of insurance. *See id.* In contrast, title II disability insurance benefits are only granted to claimants who are insured by virtue of contributions made to the program, and who have demonstrated an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A) (1982); *see Chilicky*, 108 S. Ct. at 2463; F. BLOCH, *supra*, at 29. "Title II of the Social Security Act . . . provides for the payment of insurance benefits to persons who have contributed to the program and who suffer from a physical or mental disability." Bowen v. Yuckert, 107 S. Ct. 2287, 2290 (1987).

[3] 42 U.S.C § 405(a) (1982). Pursuant to section 205(a) of the Act, "the Secretary is given full authority to make rules and regulations and to establish procedures not inconsistent with the Act." 2 H. MCCORMICK, *supra* note 2, § 521, at 31; *see also* 20 C.F.R. § 404.902 (1988) (describing Secretary's decisionmaking authority with respect to benefit entitlement). Under the authority of the Secretary and the Social Security Administration, individual state agencies make the initial decision regarding the disability or nondisability of a claimant. *See id.* § 404.1503(c). This decision is actually a recommendation that is sent to a regional office of the Social Security Administration, which makes the conclusive determination of disability or nondisability for purposes of benefit entitlement. *See id.* § 404.1503(a), (d); F. BLOCH, *supra* note 2, at 236. The 1980 amendments to the Act, requiring a "continu-

terminations, when unfavorable to claimants, are nonetheless subject to administrative and judicial review.[4] Consistent with the need of ensuring adequate legal representation for claimants seeking review of unfavorable termination decisions, Congress, amending section 206 of the Act, established a contingency fee payment procedure pursuant to which attorney's fees are provided for in an amount not in excess of a fixed percentage of the total past-due benefits awarded a claimant.[5] Additionally, in recognition of the hardships often suffered by claimants as a result of wrongful ter-

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ing disability review" ("CDR") program to be maintained by the Social Security Administration, direct these state agencies to review claimants' disability status once every three years. *See Chilicky*, 108 S. Ct. at 2463.

[4] Social Security Act tit. II, § 205, 42 U.S.C. § 405(b)(1), (b)(2), (g) (1982 & Supp. IV 1986). Section 205(b)(2) reads in pertinent part: "In any case where—(A) an individual is a recipient of disability insurance benefits . . . and . . . is determined by the Secretary not to be entitled to such benefits," such person is entitled to reconsideration or review of such a decision at the administrative level, either by a state agency or the Secretary. 42 U.S.C. § 405(b)(2) (1982). When a claimant's benefits are initially denied or terminated under the authority of the Secretary, the appeal of such a decision begins with a *de novo* reconsideration by the state agency. 20 C.F.R. § 404.909(a) (1988). The claimant, upon an unfavorable reconsideration by the state agency, may then request a hearing before an administrative law judge within the Social Security Administration. *Id.* § 404.929. If this proves unsuccessful, the claimant may seek a review by the Appeals Council. *Id.* § 404.967. Finally, if the Appeals Council confirms the Secretary's determination of nondisability, the claimant may obtain judicial review in federal district court. *See* 42 U.S.C. § 405(g) (1982); *see also* Haberman v. Finch, 418 F.2d 664, 666-67 (2d Cir. 1969) (§ 205, remedial in purpose, should be broadly construed favoring award of benefits); Drafts v. Celebrezze, 240 F. Supp. 535, 536 (E.D.S.C. 1965) (judicial review of disability "limited to a determination of whether or not the Secretary's decision is supported by 'substantial evidence' ").

[5] *See* 42 U.S.C. § 406(a), (b) (1982). Section 206(b)(1) of the Act provides in pertinent part:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may . . . certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of past-due benefits.

Id. § 406(b)(1).

Section 206(a) provides for a similar payment procedure with respect to proceedings brought before the Secretary. *See id.* § 406(a). The purpose of section 206 is both to assure adequate compensation for attorneys and to prevent the excessive charging of attorney's fees. *See* Dawson v. Finch, 425 F.2d 1192, 1194-95 (5th Cir.), *cert. denied*, 400 U.S. 830 (1970); *see also* Davis v. Secretary of Health, Educ. & Welfare, 320 F. Supp. 1293, 1296 (N.D. Miss. 1970) (purpose of assuring attorney's fees to encourage capable representation of claimants). For an analysis depicting the importance of legal representation for claimants seeking review, see Bloch, *Representation and Advocacy at Non-Adversary Hearings: The Need For Non-Adversary Representatives at Social Security Disability Hearings*, 59 WASH. U.L.Q. 349, 368 (1981).

mination,[6] Congress added section 223(g) of the Act to allow claimants to receive interim benefits during the pendency of their appeals at the administrative level.[7] Furthermore, Congress provided interim benefits in the Social Security Disability Benefits Reform Act of 1984 (the "Reform Act")[8] for the then-pending post-administrative cases which were remanded to the Secretary for redetermination according to the Reform Act's new medical standard of review for disability.[9] However, Congress failed to address the is-

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[6] *See Chilicky*, 108 S. Ct. at 2463-64. The Social Security Amendments of 1980, calling for continuing disability reviews every three years, led to serious hardships for those individuals whose benefits had been wrongfully terminated. *See id.* at 2463; Weinstein, *supra* note 1, at 913. These hardships were classified as " 'unnecessary suffering [and] anxiety.' " *See Chilicky*, 108 S. Ct. at 2464 (quoting 130 CONG. REC. S11464 (daily ed. Sept. 19, 1984) (statement of Sen. Heinz)); *see also* H.R. REP. No. 618, 98th Cong., 2d Sess. 18, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3055 (recognizing severe financial and emotional hardships that disabled persons suffered as result of wrongful termination); Note, *Terminating Social Security Disability Benefits: Another Burden for the Disabled?*, 12 FORDHAM URB. L.J. 195, 197-98 (1983-84) (noting disabled individuals have died because of wrongful termination of benefits). The large number of wrongful termination cases seems to have been caused by excessive responsibilities placed upon the state CDR programs, resulting in low quality decisionmaking. *See* Collins & Erfle, *Social Security Disability Benefits Reform Act of 1984: Legislative History and Summary of Provisions*, SOC. SEC. BULL., Apr. 1985, at 5, 12; Sweeney, *Social Security/SSI: Disability Update*, 16 CLEARINGHOUSE REV. 1114, 1114 (1983).

[7] Act of Jan. 12, 1983, Pub. L. No. 97-455, § 2, 96 Stat. 2497, 2498 (1982) (codified as amended at 42 U.S.C. § 423(g)(1) (1982 & Supp. IV (1986)). Section 223(g) of the Act now provides in pertinent part:

> (1) in any case where—
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> (A) an individual is a recipient of disability insurance benefits . . .
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> (B) [and] . . . such individual is determined not to be entitled to such benefits, and
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> (C) a timely request for a hearing . . . or for an administrative review prior to such hearing, is pending . . .
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> such individual may elect . . . to have the payment of such benefits . . . continued [until the Secretary reaches a final determination].

Id. The purpose in enacting section 223(g) was to alleviate the financial burden on claimants during appeal. *See* Shoemaker v. Bowen, 853 F.2d 858, 860 (11th Cir. 1988). However, interim benefits are only provided during appeal at the administrative level—that is, the period between an initial determination of nondisability and the Secretary's final decision. *See* Thibodeau v. Heckler, 571 F. Supp. 524, 526 (D. Me. 1983).

[8] Pub. L. No. 98-460, 98 Stat. 1794, 1798-99 (codified as amended in scattered sections of 42 U.S.C.A.).

[9] *Id.* § 2(e) (codified at 42 U.S.C. § 423 note (Supp. IV 1986) (Election of Payments)); *see also id.* § 2(a) (codified at 42 U.S.C. § 423(f) (Supp. IV 1986)) (new medical standard of review for termination of disability benefits); *id.* § 2(d)(3) (codified at 42 U.S.C. § 423 note (Supp. IV 1986) (Effective Date of 1984 Amendments)) (remanding cases to Secretary). Section 2(e) of the Reform Act provides: "Any individual whose case is remanded to the Secretary pursuant to subsection (d) [of the Reform Act] . . . may elect, in accordance with section 223(g) . . . of the Social Security Act, to have payments made beginning with the

sue of whether interim benefits are considered past-due benefits for the purpose of computing attorney's fees.[10] The Second, Eighth, and Eleventh Circuits have maintained that interim benefits are considered past-due benefits for such purpose.[11] Recently, however, in *Rodriguez v. Secretary of Health & Human Services*,[12] the United States Court of Appeals for the First Circuit ruled that interim benefits are not considered past-due benefits for the calculation of attorney's fees under section 206 of the Act.[13]

In *Rodriguez*, the plaintiff-claimant sought judicial review of the Secretary's decision terminating her disability insurance benefits.[14] The district court remanded the case to the Secretary, who, in October 1986, reversed his prior decision and reinstated Rodriguez' benefits retroactively to January 1983.[15] While the case was on remand, however, Rodriguez had elected to receive interim benefits beginning in November 1984;[16] hence, the Secretary awarded

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month in which he makes such election, and ending as under . . . section 223(g) . . . . 42 U.S.C. § 423 note.

[10] *See* Condon v. Bowen, 853 F.2d 66, 71 (2d Cir. 1988). Congress' failure to address the issue is not surprising since section 206 was enacted before title II was amended to provide for interim benefits. *See id.* at 70. Furthermore, the definition of past-due benefits also preceded the enactment of interim benefits rights. *See id.* at 72; 20 C.F.R. § 404.1703 (1988). Section 404.1703 provides that " '[p]ast-due benefits' means the total amount of benefits payable under title II of the Act to all beneficiaries that has accumulated because of a favorable administrative or judicial determination or decision, up to but not including the month the determination or decision is made." *Id.*

[11] *See, e.g.*, Gowen v. Bowen, 855 F.2d 613, 618-19 (8th Cir. 1988) (where attorney represented claimants during administrative and judicial appeals process, court could take into account interim benefits for purposes of awarding attorney's fees for services rendered at judicial level); *Condon*, 853 F.2d at 72 (after remand to Secretary resulted in reinstatement of claimant's benefits, court included interim benefits in calculation of attorney's fees under § 206); *Shoemaker*, 853 F.2d at 861 (interim benefits received by claimant during redetermination could be considered in computing reasonable attorney's fees pursuant to § 206).

[12] 856 F.2d 338 (1st Cir. 1988).

[13] *Id.* at 341.

[14] *See id.* at 339. For a description of the procedures involved in granting or terminating a claimant's benefits, see *supra* notes 3-4 and accompanying text. *See generally* Note, *Administrative Law—Supreme Court Defers to Congressional Intent in Social Security Disability Benefit Delays*, 60 TUL. L. REV. 205, 206-07 (1985) (illustrating appeals process following termination).

[15] *See Rodriguez*, 856 F.2d at 339. The district court remanded the case to the Secretary pursuant to section 2(d) of the Reform Act. *Id.* at 339. Section 2(d)(3) provides in pertinent part: "In the case of a recipient of benefits under title II . . . (A) who has been determined not to be entitled to such benefits . . . and (B) who was a member of a class certified on or before September 19, 1984 . . . the court shall remand such a case to the Secretary." 42 U.S.C. § 423 note (Supp. IV 1986).

[16] *See Rodriguez*, 856 F.2d at 339. These interim benefits were received pursuant to the specific legislative grant in section 2(e) of the Reform Act. *Rodriguez*, 856 F.2d at 339; *see*

Rodriguez past-due benefits only for the period of January 1983 through October 1984.[17] The Secretary then calculated attorneys' fees as twenty-five percent of these past-due benefits, as authorized under section 206(a) and (b),[18] without taking into account the previously awarded interim benefits.[19] The claimant's attorneys petitioned the district court for increased attorneys' fees and were awarded an increase based on the interim benefits.[20] The Secretary appealed this decision to the United States Court of Appeals for the First Circuit, which reversed the district court's ruling and reinstated the Secretary's award.[21]

In an opinion by Judge Noonan, the *Rodriguez* court compared the Secretary's position regarding past-due benefits under other provisions of the Social Security Act[22] to his position regarding interim benefits under title II.[23] Moreover, analogizing to

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supra notes 8 & 9 and accompanying text.

[17] *See Rodriguez*, 856 F.2d at 339. After the Secretary declared Rodriguez disabled, he awarded her $5,317 in past-due benefits. *See id.* The Secretary did not award benefits to the claimant for the period of November 1984 to the month preceding the final decision since she already had received interim benefits for that period. *See id.*

[18] *See id.* at 339. The Secretary calculated the fees as twenty-five percent of $5,317, or approximately $1,300. *See id.* The Secretary then authorized payment of this amount to the claimant's counsel. *See id.*; *see also* 42 U.S.C. § 406(a), (b) (1982) (authorizing award of attorney's fees to be taken from claimant's past-due benefits).

[19] *See Rodriguez*, 856 F.2d at 339.

[20] *See id.* Claimant's attorneys demonstrated to the district court that they had worked a total of nine hours at the judicial level, incurring expenses of $425. *See id.* After modifying the magistrate's report, the court reduced the amount of expenses to $112 and the number of "judicial hours" spent to 3.25, to be calculated at a rate of eighty-five dollars per hour, for a total fee, in addition to the $1,300, of $388.25. *See id.*

[21] *See id.* at 340. The Secretary contended that past-due benefits, for the purpose of attorney's fees, did not include interim benefits. *See id.* The Secretary maintained that in granting the additional $388.25, the district court violated section 206(a) and (b) by giving more than twenty-five percent of past-due benefits. *See id.* Instead, the Secretary opined, the district should have only awarded an additional $29.95. *See id.*; *see also* 20 C.F.R. § 404.1703 (1988) (Secretary defines past-due benefits as "the total amount of benefits payable under Title II of the Act . . . that has accumulated because of a favorable administrative or judicial determination or decision").

[22] *See Rodriguez*, 856 F.2d at 340. The court was referring to the Secretary's interpretation of past-due benefits as provided for in title XVI of the Act, and the judicial acceptance thereof. *See, e.g.*, Motley v. Heckler, 800 F.2d 1253, 1254-56 (4th Cir. 1986) (court accepted Secretary's definition of past-due benefits, directing reduction of past-due benefits by amount equal to supplemental security benefits granted to claimant pursuant to title XVI); Detson v. Schweiker, 788 F.2d 372, 375-76 (6th Cir. 1986) (Secretary's definition maintained past-due benefits as net benefits payable to claimant after reduction of title XVI windfall); Wheeler v. Heckler, 787 F.2d 101, 104-07 (3d Cir. 1986) (Secretary defined past-due benefits as retroactive disability insurance benefits actually paid to beneficiary minus offsets and other deductions).

[23] *See Rodriguez*, 856 F.2d at 340. The Secretary reasoned that past-due benefits are

Bowen v. Galbreath,[24] a title XVI benefits case, the court reasoned that congressional silence indicated a legislative intent to deny the awarding of attorney's fees out of interim benefits.[25] Thus, in the absence of any overriding legislation, the court found that the language of section 206(a) accorded broad authority to the Secretary,[26] and held his definition of past-due benefits controlling, having legislative force stemming from the statutory delegation of power.[27]

In awarding attorney's fees for the representation of Social Security claimants, it is suggested that courts recognize not only the desire to protect beneficiaries from excessive legal fees, but also the need to provide effective incentives for attorneys in order to ensure claimants adequate legal representation. Although the *Rodriguez* court properly acknowledged the importance of considering the Secretary's definition of past-due benefits, it is submitted that the court was unduly deferential to his view, and consequently abrogated the intent and dual policy concerns of the legislature. This Comment will describe the policy repercussions likely to result from adoption of the *Rodriguez* court's view on interim benefits. It is suggested that implementation of the holding could frustrate the

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those benefits 'payable' and which have 'accumulated'; therefore, benefits which have already been paid out on an interim basis cannot be past-due. *See id.*; *see also* 20 C.F.R. § 404.1703 (1988) (Secretary's definition of past-due benefits). *But see* Condon v. Bowen, 853 F.2d 66, 72 (2d Cir. 1988) (noting that Secretary has not adopted any regulations explicitly addressing "issue of whether attorney's fees can be based on interim benefits"). The *Condon* court stated that while section 404.1703 defines past-due benefits, this definition was issued before interim benefits were incorporated into the Act. *Id.*

[24] 108 S. Ct. 892, 894 (1988). In *Galbreath*, an attorney sought fees of twenty-five percent of the total amount of title XVI past-due benefits awarded to his client. *See id.* at 893. The *Galbreath* Court held that Congress, by incorporating very similar provisions of title II into title XVI, but excluding section 206, did not wish to have attorney's fees deducted from supplemental security benefits. *See id.* at 894-95.

[25] *See Rodriguez*, 856 F.2d at 341. The court held that the *Galbreath* analogy controlled. *See id.*

[26] *Id.* at 341; *see* 42 U.S.C. § 406(a) (1982). Section 206(a) provides in pertinent part that "[t]he Secretary may, by rule and regulation, prescribe the maximum fees which may be charged." *Id.* However, the court did acknowledge that the explicit statutory authority of the Secretary regarding attorney's fees related only to fees for services rendered at the administrative level. *See Rodriguez*, 856 F.2d at 341.

[27] *Rodriguez*, 856 F.2d at 341; *see* Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981). In *Schweiker*, the Court evaluated the Secretary's authority with respect to medicaid plans. *Id.* at 43. The Court maintained that the Secretary was explicitly delegated substantial authority; "the Secretary's definition is entitled to 'legislative effect' because, '[i]n a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term.'" *Id.* at 44 (quoting Batterton v. Francis, 432 U.S. 416, 425 (1977)).

aforementioned goals and ultimately lead to the inequitable administration of the Social Security laws.

MISDIRECTED ACCEPTANCE OF SECRETARY'S DEFINITION

In promulgating title II of the Social Security Act, Congress delegated to the Secretary the power to make all rules, regulations, and procedures necessary to carry out the provisions of the subchapter.[28] Therefore, when resolving issues concerning the interpretation and execution of the attorney's fees and interim benefits provisions of title II, it is uncontroverted that courts must give deference to the views of the Secretary.[29] However, when the Secretary's position or interpretation contravenes the purpose and design of the statute, courts must look beyond the Secretary's interpretation in order to effectuate the policy concerns of the legislature.[30]

The *Rodriguez* court, in accepting the Secretary's position on interim benefits, held that benefits which are "payable" and have "accumulated" do not include benefits that have already been paid.[31] The court's basis for adopting such a view was derived from a comparison of title II interim benefits with title XVI interim assistance benefits.[32] In *Bowen v. Galbreath*,[33] the Supreme Court

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[28] *See* 42 U.S.C. § 405(a) (1982). Section 205(a) of the Act provides in pertinent part: "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 . . . ." *Id.*; *see also* 42 U.S.C. § 406(a) (1982) (Secretary may make rules governing recognition of agents and prescribe maximum fees for services rendered).

[29] *See, e.g.*, Wheeler v. Heckler, 787 F.2d 101, 104 (3d Cir. 1986) ("[B]ecause Congress has delegated to the Secretary the responsibility for administering the complex programs, we must defer to her construction."); Lugo v. Schweiker, 776 F.2d 1143, 1147 (3d Cir. 1985) ("[W]e must defer to the Secretary's interpretation so long as it is reasonable."); *see also* Chevron v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984) (describing agency's controlling weight in statutory construction); Detson v. Schweiker, 788 F.2d 372, 374-75 (6th Cir. 1986) (Secretary's interpretation of statute given great deference).

[30] *See* Shoemaker v. Bowen, 853 F.2d 858, 861 (11th Cir. 1988). Courts are not required to accept an agency's interpretation in situations where a frustration of congressional policy would result. *Id.* at 861; *see also* Fagner v. Heckler, 779 F.2d 541, 543 (9th Cir. 1985) (no requirement to defer to agency's interpretation since its "interpretation is not always infallible"). *See generally* Kovar v. Heckler, 622 F. Supp 967, 970 (N.D. Ohio 1985) (Secretary's regulation of past-due benefits not consistent with policy goals of giving attorneys incentive to represent claimants).

[31] *See Rodriguez*, 856 F.2d at 340-41. The Secretary has also taken this position without success in other similar cases. *See, e.g.*, Gowen v. Bowen, 855 F.2d 613 (8th Cir. 1988); Condon v. Bowen, 853 F.2d 66 (2d Cir. 1988).

[32] *See Rodriguez*, 856 F.2d at 341. The *Rodriguez* court considered Congress' silence on

reasoned that Congress' omission of a fee provision from title XVI clearly manifested a refusal to authorize the application of section 206.[34] Similarly, the *Rodriguez* court deemed Congress' omission from the Reform Act of a section 206 payment procedure indicative of a legislative intent not to authorize such a procedure with respect to the interim benefits received under it.[35] It is submitted, however, that the *Rodriguez* court erroneously predicated its assumptions about Congress' inaction on a cursory analysis of *Galbreath*. In *Galbreath*, the Supreme Court specifically stated that section 206 would have applied if a claim for title II benefits instead of title XVI benefits was involved.[36] Section 223(g), through which the Reform Act ultimately dispenses interim benefits,[37] is a title II provision; therefore, section 206 should have applied in *Rodriguez* if interim benefits are classified as past-due benefits.[38] Moreover, Congress' reason for not granting attorney's fees based on an award of title XVI benefits was founded upon an exclusive, specific intent to channel the funds elsewhere.[39] This was not the

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the issue of attorney's fees with respect to title XVI benefits analogous to its silence regarding title II interim benefits. *See id.*; Bowen v. Galbreath, 108 S. Ct. 892, 893 (1988).

[33] 108 S. Ct. 892 (1988).

[34] *Id.* at 895. The court reached its position by looking to the legislative history regarding attorney's fees and title XVI benefits. *See id.* at 894. The House of Representatives Report stated:

> Where an individual . . . is represented before the Secretary by an attorney, the provisions of the cash social security program (pertaining to attorney fees) would be applicable except that there would be no withholding of attorney fees from such individual's benefits. [This] would be contrary to the purpose of the program.

H.R. REP. No. 231, 92d Cong., 2d Sess. 3, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4989, 5142 [hereinafter HOUSE REPORT].

[35] *See Rodriguez*, 856 F.2d at 341; *see also* McCarthy v. Secretary of Health & Human Servs., 793 F.2d 741, 745 (6th Cir. 1986) (Congress never incorporated § 206 payment provision into title XVI).

[36] *Galbreath*, 108 S. Ct. at 894; *see also* 42 U.S.C. § 406(a) (1982) (attorney's fees to be deducted from past-due benefits awarded to claimant).

[37] *See supra* notes 8 & 9 and accompanying text (§ 2(e) of the Reform Act grants interim benefits "in accordance with" § 223(g) of the Social Security Act).

[38] *See* 42 U.S.C. § 406(a), (b) (1982); 20 C.F.R. § 404.1703 (1988).

[39] *See* Wheeler v. Heckler, 787 F.2d 101, 106 (3d Cir. 1986). The *Wheeler* court explained that SSI (title XVI) benefits which are awarded may be used to reimburse state agencies already providing claimants with assistance. *Id.* To do otherwise would contravene the Congressional intent of encouraging state assistance programs. *Id.*; *see also* HOUSE REPORT, *supra* note 34, at 3 (withholding attorney's fees from SSI benefits would defeat purpose of statute). *See generally* Rivers v. Schweiker, 692 F.2d 871, 872 (2d Cir. 1982) (describing procedures for state repayment from past-due benefits awarded), *cert. denied*, 460 U.S. 1088 (1983).

case with interim or past-due benefits under title II.[40]

The *Rodriguez* court further supported its acceptance of the Secretary's definition by finding that the language of section 206 delegated nearly absolute authority to the Secretary to prescribe attorney's fees.[41] However, it is suggested that the court failed to acknowledge more important language contained in the provision. Section 206 states in detail that the Secretary shall follow certain statutory guidelines in granting attorney's fees where past-due benefits are involved.[42] Thus, the Secretary's authority over attorney's fees is not absolute; rather, it is circumscribed in cases where past-due benefits have been awarded.[43]

REPERCUSSIONS OF NOT APPLYING FEE FORMULA TO INTERIM BENEFITS

Congress amended section 206[44] to resolve two significant problems concerning the legal representation of disability claimants seeking section 205 review.[45] First, the legislature sought to remedy a problem regarding excessive attorney's fees.[46] Congress

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[40] *See Galbreath*, 108 S. Ct. at 893. Title II is an insurance program and claimants receive benefits based on their insured status. *See id.*; 42 U.S.C. §§ 401, 423(a), (c), (d) (1982 & Supp. IV 1986).

[41] *See Rodriguez*, 856 F.2d at 341. The court, quoting section 206(a), stated that the Secretary may "'by rule and regulation, prescribe the maximum fees which may be charged.'" *Id.*

[42] 42 U.S.C. § 406(a), (b) (1982).

[43] *See* Guido v. Schweiker, 775 F.2d 107, 108-09 (3d Cir. 1985). Furthermore, the Secretary cannot award attorney's fees for services rendered at the judicial level since this is for the court's determination. *See id.*

[44] *See* Social Security Act tit. II, § 206(a), (b), 42 U.S.C. § 406(a), (b) (1982). The 1965 and 1968 amendments to the Act provided for the authorization of attorney's fees, not in excess of twenty-five percent, to be taken out of the total amount of past-due benefits owed the claimant due to a favorable judicial or administrative determination. *Id.*; *see also* 20 C.F.R. § 404.1720-30 (1988) (regulations promulgating payment procedures).

[45] *See Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess. 513 (1965) [hereinafter *1965 Hearings*].

> This amendment is designed to alleviate two problems that have arisen with respect to representation of claimants by attorneys. . . . [First, there exists a] need to encourage effective legal representation of claimants. . . . Another problem that has arisen is that attorneys have on occasion charged what appeared to be inordinately large fees for representing claimants . . . .

Id. (statement of Dep't of Health, Educ. & Welfare); *see also* Hopkins v. Cohen, 390 U.S. 530, 534 (1968) (addressing Congress' desire to reduce contingency fee arrangements); Davis v. Secretary of Health, Educ. & Welfare, 320 F. Supp. 1293, 1296 (N.D. Miss. 1970) (purpose of § 206 to dispense with excessive fees, but not to extent of causing disincentive among attorneys).

[46] *See* Watford v. Heckler, 765 F.2d 1562, 1566 (11th Cir. 1985). The *Watford* court

also acknowledged the need to assure claimants effective and adequate representation by counsel.[47]

With respect to the latter policy concern, Congress recognized some reluctance on the part of attorneys to represent disability claimants.[48] By amending section 206, Congress alleviated this disincentive problem by guaranteeing to attorneys reasonable compensation for services rendered.[49] This action furthered Congress' policy goals by enabling claimants to obtain adequate and effective representation by counsel.[50] Interim benefits, however, were created to serve a different purpose.[51]

Because of the 1980 amendments to the Social Security Act,[52] many claimants experienced wrongful termination of their disability benefits, only to have them reinstated after appeal.[53] The hard-

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acknowledged the legislature's concern about contingency fee arrangements between claimants and attorneys because they often resulted in the "inordinate" deprivation of benefits otherwise payable to the claimant. *Id.*

[47] *See* Condon v. Bowen, 853 F.2d 66, 70 (2d Cir. 1988). Congress was seeking to encourage effective legal representation of claimants "by assuring attorneys that they would receive adequate pay for representing social security claimants." *Id.* (citing *1965 Hearings*, *supra* note 45, at 513).

[48] *See* Guadamuz v. Heckler, 662 F. Supp. 1060, 1064 n.3 (N.D. Cal. 1986), *rev'd on other grounds*, 859 F.2d 762 (9th Cir. 1988). The difficulty encountered by attorneys in collecting fees from claimants prompted Congress to pass the direct payment provision under section 206. *See id.*

[49] *See* Dawson v. Finch, 425 F.2d 1192, 1194-95 (5th Cir.), *cert. denied*, 400 U.S. 830 (1970). In *Dawson*, the court alluded to the Department of Health, Education & Welfare's view concerning the need to guarantee attorney compensation, recognizing that since awards were sometimes made to claimants without the knowledge of their attorneys, the attorneys might never receive payment of their fees. *Id.*

[50] *See* Cora-Silva v. Secretary of Health & Human Servs., 642 F. Supp. 931, 933 (D. Mass. 1986).

> [I]ntent behind section [206(b)(1)] is to provide adequate compensation for attorneys handling disability claims, thereby ensuring that claimants are able to encourage competent counsel to press their claims. . . . Section [206(b)(1)] also reflects a Congressional judgment that SSA should administer the direct payment of attorney's fees, thereby avoiding problems of fee collection from the claimant.

Id.

[51] *See infra* notes 52-55 and accompanying text.

[52] *See* Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 (codified as amended in scattered sections of 42 U.S.C.). Faced with "unpredicted and extraordinary growth in costs and caseloads, disincentives for beneficiaries to return to work, and inadequate and sometimes inequitable administrative procedures," Congress attempted to "[strengthen] the integrity of the disability programs" through the 1980 amendments. S. REP. NO. 408, 96th Cong., 2d Sess. 3, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1277, 1312.

[53] *See* Weinstein, *supra* note 1, at 912. The burdensome review procedures thrust upon the states as a result of the 1980 amendments, as well as a stricter standard established for disability qualification, contributed to the vast increase in wrongful termination cases. *See*

ships which often accompanied these terminations prompted Congress to enact section 223(g), through which the 1984 Reform Act later funnelled interim relief to its special remand claimants.[54] This provision gave claimants the option to receive interim benefits while their cases were on appeal at the administrative level.[55] However, it did not address the issue of whether interim benefits are to be considered past-due benefits for the purpose of awarding attorney's fees pursuant to section 206.[56]

To deny the application of the section 206 fee formula to interim benefits would be to undermine the "spirit" of section 206, ultimately causing the inequitable administration of the interim benefits provisions.[57] Specifically, such a practice would cause the compensation rates of attorneys to be severely diminished,[58] thereby resurrecting the disincentive problems section 206 was originally intended to alleviate.[59] Additionally, it is submitted that

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id. at 913; *see also* Thibodeau v. Heckler, 571 F. Supp. 524, 526 (D. Me. 1983) (nearly 65% of all appeals resulted in claimants having benefits reinstated); Note, *Social Security Administration in Crisis: Non-Acquiescence and Social Insecurity*, 52 BROOKLYN L. REV. 89, 98-101 (1986) (new disability standard and zealous implementation of CDR legislation led to termination crisis).

[54] *See* Condon v. Bowen, 853 F.2d 66, 71 (2d Cir. 1988). By permitting the continuation of payments during appeals, Congress intended to mitigate the financial and emotional hardships that would otherwise be suffered by disabled persons. *Id.* The Reform Act provided for " 'a more humane and understandable application and appeal process for disability applicants and beneficiaries appealing termination of their benefits.' " Taddonio v. Heckler, 603 F. Supp. 1008, 1011 (E.D. Pa. 1985) (quoting H. REP. No. 618, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3039); *see also Thibodeau*, 571 F. Supp. at 526 ("Congress has attempted to minimize the disparate impact of wide decisional variations among the states and the ALJs"); Weinstein, *supra* note 1, at 913 (circumstances causing death and suicide because of loss of benefits).

[55] *See* 42 U.S.C. § 423(g) (1982 & Supp. IV 1986); *see also Thibodeau*, 571 F. Supp. at 525 (§ 223(g) applies only during administrative appeals process).

[56] *See Condon*, 853 F.2d at 71. The *Condon* court found the legislative history of section 223(g) silent with respect to attorney's fees. *Id.*

[57] *See* Gowen v. Bowen, 855 F.2d 613, 619 (8th Cir. 1988); Shoemaker v. Bowen, 853 F.2d 858, 860-61 (11th Cir. 1988); *Condon*, 853 F.2d at 70-71.

[58] *See, e.g., Condon*, 853 F.2d at 70. The *Condon* court calculated the attorney's effective awards under the Secretary's interpretation as being $40.51 per hour and $27.08 per hour in the attorney's respective cases when a reasonable rate of compensation would have been $100 per hour. *Id.*

[59] *See supra* notes 47-50 and accompanying text. " '[I]n cases where the Court eventually awards a fee to claimant's counsel, a procedure which artificially reduces the amount of benefits available from which to make such an award represents a strong disincentive for lawyers to represent Social Security claimants.' " Carlisi v. Secretary of Health & Human Servs., 583 F. Supp. 135, 138 (E.D. Mich. 1984) (quoting Burnett v. Secretary of Health & Human Servs., 563 F. Supp. 789, 793 (W.D. Ark. 1983), *aff'd sub nom.* Burnett v. Heckler, 756 F.2d 621 (8th Cir. 1985)).

the nonapplication of section 206 would create a new dilemma involving favoritism among claimants. Faced with a choice between representing claimants who have elected to receive interim benefits and claimants who have not, an attorney is likely to opt for the latter,[60] since the latter claimants have a larger pool of funds—past-due benefits—from which the attorney is to be granted his fixed percentage share.[61] In addition to these policy ramifications, the language of sections 206 and 223(g) further mandates the classification of interim benefits as past-due benefits.[62]

Interim benefits have been described as "loans" granted to claimants that need only be repaid if and when the Secretary confirms his initial decision of nondisability.[63] This analogy is logically consistent with section 206 and the regulations promulgated pursuant to it.[64] Section 206 provides that an attorney may receive a percentage of "the total amount of past-due benefits to which the claimant is *entitled*."[65] In light of the potential for recoupment, interim benefits given to a claimant are funds to which the claimant is not entitled until a favorable decision is granted.[66] There-

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[60] *See Gowen*, 855 F.2d at 619.

[61] *See Shoemaker*, 853 F.2d at 861. Moreover, the position held by the Secretary: (1) causes a conflict by putting an attorney in the position of jeopardizing his fiduciary duties when he advises his client not to accept the interim benefits; and (2) forces the claimant to forego receiving much needed interim benefits in order to ensure adequate representation. *See* Condon v. Bowen, 853 F.2d 66, 71 (2d Cir. 1988).

[62] *See* Shoemaker v. Bowen, 853 F.2d 858, 861 (11th Cir. 1988); *Condon*, 853 F.2d at 70.

[63] *See Condon*, 853 F.2d at 70. The *Condon* court viewed the repayment requirement of interim benefits as indicative of only a temporary right to these funds. *Id.* at 71; *see Shoemaker*, 853 F.2d at 858; 42 U.S.C. § 423(g)(2)(a) (1982). Section 223(g)(2)(a) of the Act provides in pertinent part:

> If an individual elects to have the payment of his benefits continued for an additional period under paragraph (1), and the final decision of the Secretary affirms the determination that he is not *entitled* to such benefits, any benefits paid under this subchapter pursuant to such election (for months in such additional period) shall be considered overpayments for all purposes of this subchapter . . . .

Id. (emphasis added).

[64] *See* Gowen v. Bowen, 855 F.2d 613, 619 (8th Cir. 1988); *Condon*, 853 F.2d at 70. The *Condon* court noted the persuasiveness of this argument with respect to section 206 and proceeded to resolve the ambiguity inherent in section 206—not inconsistent with the lower court's loan simile. *See id.*; *see also* 20 C.F.R. § 404.501 (1988). Section 404.501 provides in part: "As used in this subpart, the term 'overpayment' includes a payment in excess of the amount due under title II of the Act, . . . [and] a payment pursuant to section 205(n) of the Act in an amount in excess of the amount to which the individual is *entitled* under section . . . 223 of the Act . . . ." *Id.* (emphasis added).

[65] 42 U.S.C. § 406(a) (1982) (emphasis added).

[66] *See* 20 C.F.R. § 404.303 (1988). " 'Entitled' means that a person has applied and has proven his or her right to benefits for a period of time." *Id.* Therefore, a claimant is not

fore, when the claimant does become entitled to these benefits by way of a favorable decision, the attorney should then be granted his statutorily prescribed fee out of the total amount.[67]

CONCLUSION

Entitlement to interim benefits is appropriately factored into the calculation of attorney's fees under section 206 of the Social Security Act. To hold otherwise would promote an inequitable administration of the Act's interim benefits provisions, as well as ultimately disregard the legislature's intent to encourage adequate and effective representation of disability claimants. Due to the deleterious impact of the Secretary's view upon the individual claimant, it is suggested that the Supreme Court settle the existing conflict among the circuits expeditiously.

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"entitled" to interim benefits until he or she has proven a right to them. *See Shoemaker*, 853 F.2d at 861.

[67] *See* Shoemaker v. Bowen, 853 F.2d 858, 861 (11th Cir. 1988).