

From Crowdfunding to Crypto: The Changing Nature of Work and New Operational Challenges for Social Security's Disability Benefits Programs in the 21st Century

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ABSTRACT

The Social Security Administration's (SSA's) Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs provide economic support to individuals who are unable to work due to one or more medical disabilities. Amendments to the 1935 Social Security Act created the SSDI and SSI programs in the 1950s and 1970s, respectively. These programs define disability as the inability to perform work in the national economy at a substantial gainful level. For this reason, obtaining SSDI or SSI benefits involves proving to the SSA that the claimant, for medical reasons, is unable to perform jobs currently available in the national economy. Administering this type of program is understandably challenging, due not only to changes over time in medical practice, but also to changes in the ways that Americans work and earn money. This Article explores challenges to the SSDI and SSI programs posed specifically by the changing nature of work and income in the 21st century, including the advent of crowdfunding, online donation platforms, cryptocurrency, and new job titles and functions that change the way that Americans participate in the national economy. Clarification with respect to the SSA's treatment of these new job functions and income sources could help claimants and their representatives navigate the SSDI and SSI programs with greater ease, from the initial application stage to income reporting and maintenance of eligibility for benefits.

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I. INTRODUCTION

The Social Security Administration’s (SSA’s) Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) benefits programs have provided economic support to medically disabled individuals¹ since their addition to the Social Security Act in the 1950s and 1970s.² Both the SSDI and SSI programs require the SSA to “determin[e] whether a disabled individual [seeking benefits] has lost the capacity to work”³ due to one or more physical or

1. SOC. SEC. ADMIN., *Historical Background and Development of Social Security*, <https://www.ssa.gov/history/briefhistory3.html> (last visited Oct. 27, 2022) [hereinafter *Historical Background*].

2. *Id.* The Social Security Act originally “created a social insurance program designed to pay retired workers age 65 or older a continuing income after retirement,” and generally provided “a wide range of programs to meet the nation’s needs.” *Id.* The basic distinction between the SSDI and SSI programs today is that SSDI supports disabled individuals who have a qualifying work history (through their own employment or the employment of a family member), whereas SSI supports older adults and disabled individuals, regardless of age, who have limited income and resources. Brandy Bauer, *SSI vs. SSDI: the Differences, Benefits, and How to Apply*, NCOA (Mar. 16, 2022), <https://www.ncoa.org/article/ssi-vs-ssdi-what-are-these-benefits-how-they-differ>.

3. John R. Kearney, *Social Security and the “D” in OASDI: The History of a Federal Program Insuring Earners Against Disability*, 66 SOC. SEC. BULL. [iii] (2005-2006), <https://www.ssa.gov/policy/docs/ssb/v66n3/v66n3p1.html>. Generally, Social Security adjudications at the administrative level involve a five-part sequential evaluation considering (1) whether an individual has been working at a substantial gainful level, i.e., meeting an income threshold; (2) whether the individual has severe physical and/or mental impairments; (3) whether the individual’s medical conditions meet or equal a listed impairment, i.e., meet designated criteria; (4) whether the individual can perform their past relevant work; and (5) whether the individual can adjust to other work in the national economy. *See, e.g.*,

mental conditions. This determination dictates whether the individual is eligible for financial support from the government.

Given the inevitable complexity of this part-medical, part-vocational determination, the SSDI and SSI programs have always faced operational challenges.⁴ For example, in the 1980s, legislative changes to the medical listings⁵ used to evaluate benefits claims (applications) caused an increase the category of disability beneficiaries with mental impairments; then, in the 1990s, rapid growth in the disability program left program trustees concerned that the SSDI trust fund would soon be exhausted.⁶ In addition, given that the SSDI and SSI programs essentially define disability in terms of capacity to work and earn a living in the national economy,⁷ new questions and challenges inevitably arise as technology changes the ways that Americans work and provide for themselves.

This Article is focused specifically on operational challenges to the SSDI and SSI programs posed by the changing nature of work and income over the last 50+ years, particularly in light of the increasing role of digital technologies and online platforms in these domains. Part II provides a historical overview of the SSDI and SSI programs and suggests some of the ways work and income can impact program eligibility for disabled individuals (alternately SSDI/SSI “claimants”), from the initial application stage through continued maintenance of benefits after the claimant’s application is approved.

Part III discusses new income sources that can impact a claimant’s initial and continued eligibility for SSDI or SSI benefits. First, Part III.A explores online donation platforms, which allow individuals and their families to fundraise for medical expenses. Part III.B focuses on the SSA’s treatment of cryptocurrencies.

Part IV addresses some of the challenges raised by new forms of work—with the national economy gradually shifting away from industrial jobs of the 1930s, and toward technology-sector and service industry jobs of the late 20th and early 21st centuries—which have necessitated updates to the Dictionary of Occupational Titles (DOT), a United States Department of Labor publication used in SSDI and SSI adjudications. Part IV.A discusses the importance of relying on an up-to-date DOT when approving or denying claims, as well as ongoing

Tom Johns, SSA’s Sequential Evaluation Process for Assessing Disability, <https://www.ssa.gov/oidap/Documents/Social%20Security%20Administration.%20%20SSAs%20Sequential%20Evaluation.pdf> (Mar. 7, 2022).

4. Kearney, *supra* note 3, at 2.

5. The Social Security listings “represent the consensus in the medical community on what test results, features and/or symptoms for a given disease represent a medical condition that precludes the ability to work.” Stanley Denman, *The Social Security Disability “Listings”: So Important, Yet So Misunderstood*, DENMAN L. OFF. (Nov. 8, 2021), <https://www.disabilityapproved.com/social-security-disability-listings/>.

6. Kearney, *supra* note 3, at 17. John R. Kearney, a senior analyst with the Social Security Administration’s Office of Research, Evaluation, and Statistics, Office of Policy, attributes the rapid growth partly “to the expansive provisions in the 1984 Amendments,” which included “new mental impairment listings, consideration given to pain and other symptoms in disability determinations, and award of benefits for multiple non-severe impairments.” *Id.* at 18.

7. *Historical Background*, *supra* note 1.

efforts to keep the manual current through the Occupational Information System (OIS) project. Part IV.B discusses the development and purpose of the Occupational Information Network (O*NET), an earlier update effort that preceded the OIS project but did not succeed in replacing the DOT for the SSA's purposes.

Finally, Part V addresses remote work and other assistive technologies, both of which create new opportunities for disability claimants to remain in or re-enter the workforce—while potentially raising new questions and challenges in the SSA's adjudicative process. Part V.A discusses the increasing ubiquity of remote work, particularly in light of the COVID-19 pandemic. Part V.B addresses the place of remote work and assistive technologies in the adjudicative process. Part V.C covers the potential for technological developments to further disability programs' rehabilitative goals.

We conclude that clarification in a number of areas could help claimants and their representatives navigate the SSDI and SSI programs in today's technology-driven economy, from the initial application stage to income reporting and maintenance of eligibility for benefits.

II. THE HISTORY OF AN AMERICAN ECONOMIC SECURITY PROGRAM

Disability benefits were not a feature of the original Social Security Act President Franklin D. Roosevelt signed into law on August 14, 1935. Instead, a 1956 amendment to the Social Security Act introduced the SSDI program. A further 1972 amendment provided for the SSI program.⁸

Disability insurance had been omitted deliberately from the Social Security Act in 1935 due to concerns about cost and administrability of the program. For example, skeptics expressed concerns about the difficulty of determining whether or not any given applicant was too disabled to work and therefore entitled to benefits.⁹ Furthermore, private companies had already been offering disability insurance since the latter half of the 19th century and experiencing substantial losses doing so, particularly during the Great Depression of the 1930s. Given these losses, many companies stopped selling disability insurance, failed financially, or needed to change their rating or underwriting practices to make themselves less vulnerable to loss.¹⁰

Despite the predicted challenges of administering a federal disability insurance program, only three years after the Social Security Act passed without including such a program, disability insurance again became a topic of discussion

8. *Historical Background*, *supra* note 1; Kearney, *supra* note 3, at 1, 9.

9. Kearney, *supra* note 3, at 2. Social Security Board actuaries W.R. Williamson and Robert Myers "were concerned that disability insurance would be an expensive and uncontrollable program." In the 1920s, "reformers made little progress" toward this type of social insurance program due to opposition from "some business interests but also the skepticism of organized labor, which was suspicious of government intervention and the motives of middle-class reformers," though "the political climate became more favorable with the arrival of the Great Depression."

10. Kearney, *supra* note 3, at 3.

(and division) for the first Advisory Council¹¹ jointly chartered by the Social Security Board¹² and the Senate Finance Committee in 1938. Some Advisory Council members felt, on the one hand, that the administrative challenges of a disability insurance program might not be insurmountable. On the other hand, their opposition felt the experiences of private insurance companies offering similar coverage were discouraging. Ultimately, the Advisory Council's final report included a unanimous recommendation that a disability insurance program was "socially desirable."¹³ A subsequent Advisory Council report in 1948 made a strong case for extending Social Security to cover total and permanent disability, though the Council recommended a "highly circumscribed program" given the potential administrative difficulties.¹⁴

Over the following decade, adoption of a piecemeal implementation approach¹⁵ led up to the 1956 legislation that introduced SSDI, a cash benefits payment for disabled applicants between ages 50 and 64 who met certain requirements, and for adults whose disability had begun before age 18 and who were survivors or dependents of Social Security beneficiaries. Program coverage then expanded repeatedly with additional legislation in the following years.¹⁶ Notably Supplemental Security Income (SSI) was implemented as an additional disability program in 1974, providing benefits for "persons who have limited income and resources and who are disabled, blind, or aged 65 or older."¹⁷

The overarching goal of these disability programs—as with the original Social Security Act in 1935—was to increase Americans' economic security through a form of "social insurance," whereby individuals could pay into a work-related, contributory system through taxes while employed,¹⁸ and thus help to ensure their own future economic security. The original program was a response to the challenges of the Great Depression of the 1930s, when America had faced the worst economic crisis in the country's modern history, and millions of adults faced unemployment.¹⁹

11. *Id.* The purpose of the Social Security Advisory Councils was to conduct broad reviews of issues facing Social Security programs.

12. The Social Security Board was later renamed the Social Security Administration. SOC. SEC. ADMIN., Social Security History, <https://www.ssa.gov/history/orghist.html> (last visited Oct. 27, 2022).

13. Kearney, *supra* note 3, at 4.

14. *Id.* at 6–7.

15. *Id.* at 8.

16. *Id.* at 10–11 ("The legislation strongly expressed the intent to rehabilitate as many applicants as possible.").

17. *Id.* at 1.

18. Here it is important to make a technical distinction between SSDI, which ensures that an individual has paid into the Social Security system as a pre-condition of eligibility, and SSI, which is based on financial need and does not have the same requirement. *See* SOC. SEC. ADMIN., Disability Benefits How You Qualify, <https://www.ssa.gov/benefits/disability/qualify.html> (last visited Oct. 27, 2022); Farmer & Morris Law PLLC, Can You Get Social Security Disability If You Don't Have Enough Work Credits?, <https://www.farmermorris.com/faqs/can-you-get-social-security-disability-if-you-dont-have-enough-work-credits/> (last visited Oct. 27, 2022).

19. *Historical Background*, *supra* note 1.

Because the SSDI and SSI programs are employment-focused—defining disability based on the beneficiary’s ability or inability to work and provide for themselves at a substantial gainful level in the national economy²⁰—disability claimants, their representatives, and the Social Security Administration have been facing new questions and challenges over the years as new types of work in the service and technology sectors replace the largely industrial jobs of the mid-20th century. These new challenges arise at various stages of the eligibility determination or benefit-maintenance processes. For example, they can arise when determining eligibility for benefits, particularly for the SSI program, which includes limits on claimants’ income and assets;²¹ when, as part of the SSDI or SSI adjudication process,²² characterizing work performed by the claimant or available in the national economy; and, if a beneficiary begins to exceed a monthly income threshold,²³ when determining continued eligibility for benefits.

III. NEW INCOME SOURCES

New digital platforms and currencies can create opportunities for individuals to fundraise, invest, and supplement their income. At the same time, the SSA’s treatment of funds raised or exchanged by these means can be challenging for SSDI and SSI claimants and beneficiaries to predict. Under the existing rules, income from these sources may or may not impact eligibility for benefits depending on a number of factors. The following sections address the treatment of two specific technological developments—crowdfunding and donation platforms (III.A) and cryptocurrency (III.B)—by the SSDI and SSI programs.

A. Crowdfunding and Donation Platforms

The term “crowdfunding” refers to raising small amounts of capital from many sources. These transactions are enabled by access to networks of people through social media and specialized crowdfunding websites such as GoFundMe and Kickstarter that bring together investors, entrepreneurs,²⁴ and other individuals seeking funding for various purposes.

Potentially relevant to disability cases, crowdfunding has become a popular means for patients in the healthcare system to pay off costly medical bills.²⁵

20. See, e.g., 20 C.F.R. § 416.971 (2000).

21. See, e.g., Part III.A, *infra*.

22. See, e.g., Part IV, *infra*.

23. See, e.g., Part III.B, *infra*.

24. Tim Smith, *Crowdfunding*, INVESTOPEDIA (Jul. 14, 2022), <https://www.investopedia.com/terms/c/crowdfunding.asp>; *How Can a Crowdfunding Account Affect a Person on Medicaid and SSI?*, RUSSO L. GRP. P.C. (Dec. 14, 2016), <https://www.vjrussolaw.com/how-can-a-crowdfunding-account-affect-a-person-on-medicaid-and-ssi/>.

25. Megan Cerullo, *As medical costs soar, more Americans turn to crowdfunding*, CBS NEWS (Feb. 21, 2020, 7:10 PM), <https://www.cbsnews.com/news/health-care-costs-crowdfunding-medical-bills/> (“Medical bills are the No. 1 reason Americans file for personal bankruptcy,” according to a 2019 City University of New York and Harvard University study, while “consumers are becoming increasingly comfortable using tools and platforms like GoFundMe.”).

According to one report from the National Opinion Research Center at the University of Chicago in 2020, an estimated 8 million Americans had previously started a campaign for themselves or someone in their household to cover medical expenses, and more than 12 million Americans had started a similar campaign for someone else.²⁶

Because the Social Security Administration has not yet published rules that specifically address crowdfunding, this type of fundraising can be difficult to navigate for individuals seeking SSI benefits. Eligibility for SSI benefits is means-tested, meaning beneficiaries must have limited income and financial assets.²⁷ Large-scale fundraising can easily exceed these limits.²⁸ The SSA defines income as “any item an individual receives in cash (which includes checks, money orders, or electronic funds transfers) or in-kind that can be used to meet his or her needs for food or shelter.” Income can be earned, in the case of wages or earnings from work, or unearned, as in the case of funds raised via crowdfunding.²⁹ Funds raised by crowdfunding are income in the month(s) received and subsequently become resources, and, absent an express exclusion, any assets of an individual are countable resources that can impact eligibility for benefits.³⁰

Perhaps surprisingly, according to some sources, one way for beneficiaries to avoid the consequences of fundraising could be to avoid possessing the funds (for example by having someone else fundraise on their behalf).³¹ However, even if someone other than the SSI beneficiary creates and manages a crowdfunding account on their behalf, this does not necessarily eliminate the risk to the beneficiary. For example, if the beneficiary is a minor, then checks received by their parents could still impact the beneficiary’s eligibility. If an account is set up to benefit multiple individuals, a portion of money could still be counted as a resource of the SSI beneficiary.³²

26. Press Release, NORC at the University of Chicago, Millions of Americans Donate through Crowdfunding Sites to Help Others Pay for Medical Bills (Feb. 19, 2020), <https://www.norc.org/NewsEventsPublications/PressReleases/Pages/millions-of-americans-donate-through-crowdfunding-sites-to-help-others-pay-for-medical-bills.aspx>.

27. Thomas D. Begley Jr. CELA, *The Impact Of Fundraisers On Beneficiaries With Disabilities – Begley Report*, BEGLEY L. GRP. PC, <https://www.begleylawgroup.com/2021/01/the-impact-of-fundraisers-on-beneficiaries-with-disabilities/> (last visited Oct. 27, 2022). Unlike SSI, SSDI is not a means-tested program. *Id.*

28. Stephen W. Dale Esq., *Crowdfunding Should Be Handled with Care*, SPECIAL NEEDS ALL., <https://www.specialneedsalliance.org/blog/crowdfunding-should-be-handled-with-care/> (last visited Oct. 27, 2022); Shannon Laymon-Pecoraro CELA, *Yes, a GoFundMe Account is a Resource!*, HOOK L. CTR., <https://hooklawcenter.com/2021/02/15/yes-a-gofundme-account-is-a-resource/> (last visited Oct. 27, 2022).

29. *See generally* Laymon-Pecoraro, *supra* note 28.

30. *Id.*

31. *How to Fundraise Without Losing Your Benefits*, HOW TO GET ON, <https://howtogeton.wordpress.com/how-to-fundraise-without-losing-ssi-medicaid-or-food-stamps/> (last visited Oct. 27, 2022) [hereinafter HOW TO GET ON]. For example, sites like HelpHopeLive and Ugift can collect money on a beneficiary’s behalf and pay their bills directly, without a transfer of funds to the beneficiary, or collect donations into a beneficiary’s ABLE account. *Id.*

32. Dale, *supra* note 28.

ABLE accounts (tax-advantaged savings accounts for individuals with disabilities) or Special Needs Trusts (SNTs) can also be used as means to avoid the funds being considered when establishing eligibility for benefits.³³ These accounts and trusts are financial tools that allow disabled individuals to receive funds without disqualification from means-tested benefits programs.³⁴ Friends and family can deposit funds directly into the accounts,³⁵ which are then used for the benefit of the disabled individual.³⁶

However, ABLE accounts are not available to all beneficiaries. For example, the beneficiary's disability needs to have had an onset prior to their turning 26 years old; no more than \$16,000 can be deposited into the account each year; and if the beneficiary lacks the capacity to establish and manage the account themselves, the individual managing the account on their behalf must have a valid power of attorney or be their parent, guardian, or conservator.³⁷

With respect to SNTs, a beneficiary would need to consider which type of SNT to create (e.g., first party, third party, pooled), depending on factors such as who is managing their crowdfunding account.³⁸

Other strategies for handling the proceeds of a fundraiser can include performing a "spend down"³⁹ or alternatively taking advantage of flexible disbursement policies where the crowdfunding site pays a vendor directly for services.⁴⁰

In 2016, media coverage of one Washington State case highlighted the challenges that SSI beneficiaries face when receiving money through crowdfunding campaigns. In 2015, a Washington mother had been raising funds for a "sweet 16" birthday party for her daughter, who was receiving treatment for osteosarcoma. The mother learned from her Social Security caseworker and the state's Department of Social and Health Services that, if she accepted the crowdfunding donations, she could lose the SSI eligibility helping to cover her daughter's medical costs. The mother was advised to shut down her fundraising page and supply a list of all donors and amounts submitted to avoid losing her SSI benefits. Commenting on this family's story, the executive director of the National Organization of Social Security Claimants' Representatives noted this outcome

33. *Id.*; Julia Kagan, *ABLE (Achieving a Better Life Experience) Account*, INVESTOPEDIA (Mar. 22, 2022), <https://www.investopedia.com/terms/a/able-account.asp>.

34. *Special Needs Trust, ABLE Account, or Both?*, ALTHAUSLAW, <https://althauslaw.com/2021/10/21/special-needs-trust-able-account-or-both/> (last visited Oct. 27, 2022).

35. HOW TO GET ON, *supra* note 31.

36. Dale, *supra* note 28. When depositing crowdfunding proceeds into these accounts, "separate campaigns should be established if money is to be raised for caregivers, as well as individuals receiving public benefits." *Id.*

37. *Id.* The ABLE deposit limit generally reflects the value of the IRS's gift tax exclusion, which is \$16,000 in 2022. Michelle Diament, IRS Raises Limit For ABLE Accounts, DISABILITYSCOOP (Jan. 3, 2022), <https://www.disabilitycoop.com/2022/01/03/irs-raises-limit-for-able-accounts/29640/>.

38. Dale, *supra* note 28; Begley, *supra* note 27.

39. Begley, *supra* note 27.

40. Dale, *supra* note 28.

could have been avoided if a family friend had created the campaign and thrown the birthday party on the family's behalf.⁴¹

This news story illustrated the strategic challenges that SSI recipients can face when raising funds via crowdfunding platforms, as well as the possibility that well-intentioned charitable activity may put their benefits at risk.

Beyond crowdfunding, other increasingly commonplace technological developments, such as digital currencies, can pose additional strategic challenges and risks for beneficiaries.

B. Cryptocurrency

Virtual currency “is a digital representation of value, other than a representation of the U.S. dollar or . . . ‘real currency.’”⁴² Cryptocurrency is a decentralized form of a virtual currency that can be exchanged quickly between people anywhere and is mostly unregulated by governments.⁴³ Cryptocurrency gained popularity in 2009 with the advent of Bitcoin. Now there are thousands of different forms of cryptocurrencies used all over the world.⁴⁴ As of late 2021, the world's cryptocurrency market was estimated to have a value exceeding \$3 trillion.⁴⁵

As technology continues to evolve, cryptocurrency has been able to transcend online barriers and can now be converted into real currency.⁴⁶ Digital currencies are being used as an alternative payment method for the provision of goods and services by a growing number of companies across different industries.⁴⁷ The Internal Revenue Service (IRS) has even included virtual currency—if received as compensation for employment services provided—as a form of miscellaneous

41. Melinda Carstensen, *When GoFundMe goes wrong: Woman faced losing state assistance after raising money for daughter with aggressive cancer*, FOX NEWS (Feb. 4, 2016), <https://www.foxnews.com/health/when-gofundme-goes-wrong-woman-faced-losing-state-assistance-after-raising-money-for-daughter-with-aggressive-cancer>. “Social Security doesn’t always give the clearest information to the claimants, so it was possible that [asking a friend to create the campaign] wasn’t even explained as an option.” *Id.*

42. *Frequently Asked Questions on Virtual Currency Transactions*, IRS, <https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions> (last visited Oct. 27, 2022) [hereinafter *Virtual Currency Transactions*].

43. *Virtual Currency Transactions*, *supra* note 42; Scott D. Hughes, *Cryptocurrency Regulations and Enforcement in the U.S.*, 45 W. ST. L. REV. 1 (2017) (describing the current legal framework and regulation of cryptocurrency within federal and state laws).

44. Carla Tardi, *Understanding The Different Types of Cryptocurrency*, SOFI (Sept. 17, 2021), <https://www.sofi.com/learn/content/understanding-the-different-types-of-cryptocurrency/>.

45. Joanna Ossinger, *The World's Cryptocurrency Is Now Worth More Than \$3 Trillion*, TIME (Nov. 8, 2021, 8:23 PM EST), <https://time.com/6115300/cryptocurrency-value-3-trillion/>.

46. *Virtual Currencies*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/virtual-currencies> (last visited Oct. 27, 2022).

47. Zahra Tayeb, *More Companies, including PayPal and Xbox, are accepting bitcoin and other cryptocurrencies as payment. Others are weighing up their options*, INSIDER (May 7, 2021, 11:52 AM), <https://www.businessinsider.com/more-companies-accepting-bitcoin-cryptocurrency-paypal-starbucks-2021-4> (detailing Bitcoin's growing popularity and use with businesses such as Tesla, Burger King, and PayPal).

compensation that counts as taxable income for federal income tax purposes.⁴⁸ The IRS has also stated that virtual currency such as cryptocurrency is to be “treated as property . . . and . . . longstanding tax principles applicable to transactions involving property apply to virtual currency.”⁴⁹

In the context of needs-based welfare benefit programs, cryptocurrency poses a great challenge. Considering the government’s limited role in regulating cryptocurrency, it is no surprise that there is little to no specific guidance issued by agencies that administer economic benefits programs in terms of how to treat cryptocurrency within these programs.⁵⁰

Most needs-based benefits programs, including SSI, are “means tested,” such that a person’s income and assets must “fall below a pre-determined threshold (means test).”⁵¹ Assuming a recipient of welfare benefits such as SSI did not just become thousands of dollars richer with the receipt of a single Bitcoin,⁵² receipt of other lesser-valued forms of cryptocurrency may still cause complications in programs that have income or asset reporting duties.⁵³ For economic programs where a recipient must satisfy such eligibility guidelines, treatment of cryptocurrency becomes even more complex.⁵⁴

The Social Security Administration has struggled to modernize its longstanding regulations to catch up to advances in technology, including digital and cryptocurrencies.⁵⁵ One potentially challenging area is treatment of cryptocurrency by the SSA’s SSI and SSDI programs in determining eligibility.

48. I.R.S. Publication 525 Cat. No. 15047D (Jan. 13, 2022); *Virtual Currency Transactions*, *supra* note 42 (explaining that virtual currency should be recorded as the fair market value in dollars of the currency when received).

49. *Virtual Currency Transactions*, *supra* note 42.

50. See Hughes, *supra* note 43; Naomi Jagoda, *IRS chief: Agency needs more authority to regulate cryptocurrency*, THE HILL (June 8, 2021, 02:12 PM EDT), <https://thehill.com/policy/finance/557385-irs-chief-agency-needs-more-authority-to-regulate-cryptocurrency>.

51. *Means-Tested Programs*, UNIV. WIS-MADISON: INST. RSCH POVERTY, <https://www.irp.wisc.edu/research/economic-support/means-tested-programs/> (last visited Oct. 27, 2022).

52. See generally Alex Gailey & Megan DeMatteo, *Expert Bitcoin Price Predictions: From \$10K to \$28K in 2022, and Beyond*, NEXT ADVISOR: IN P’SHIP WITH TIME (Oct. 20, 2022), <https://time.com/nextadvisor/investing/cryptocurrency/bitcoin-price-predictions/>. The value of cryptocurrencies can be notoriously volatile, and these currencies can be prone to substantial price fluctuations. See, e.g., Vildana Hajric & Katherine Greifeld, *Bitcoin Went Mainstream in 2021. It’s Just as Volatile as Ever*, BLOOMBERG (Dec. 21, 2021, 5:30 AM EST), <https://www.bloomberg.com/graphics/2021-bitcoin-volatility/>.

53. See generally *Understanding Supplemental Security Income Reporting Responsibilities*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-report-ussi.htm> (last visited Oct. 27, 2022) [hereinafter *Understanding Reporting*]; *What You Need to Know When You Get Social Security Disability Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/pubs/EN-05-10153.pdf> (last visited Oct. 27, 2022) [hereinafter *What You Need to Know*].

54. *Understanding Reporting*, *supra* note 53; *What You Need to Know*, *supra* note 53.

55. See generally *Historical Background*, *supra* note 1; Mark J. Warshawsky, *Modernizing Social Security*, NAT’L AFF. (2016), https://www.mercatus.org/system/files/warshawsky_indiv1.pdf (describing deficiencies in SSA’s ability to effectively provide benefits due to lack of modernization and adaptation to changing times).

Once found eligible for SSI benefits, a recipient must report any changes in their employment, income, and/or assets.⁵⁶ The SSA may stop benefits for different reasons for SSI and SSDI recipients,⁵⁷ including when an individual's reported income gets to be too high. For SSI recipients, the reporting responsibilities are much greater because the program is based on need, and benefits may cease if the recipient is found to no longer meet the requirements for disability, income, or resources/assets.⁵⁸ For SSDI recipients, benefits may cease because work activity meets a certain threshold among other reasons.⁵⁹

Therefore receipt of cryptocurrency is likely more problematic for a recipient of needs-based support such as SSI due to the stricter reporting requirements.⁶⁰ The SSI program requires that a person's total assets for a household of one remain under \$2,000 to be and remain eligible for benefits throughout the participant's duration in the program.⁶¹ This asset calculation excludes certain resources such as the home the individual lives in, burial plots, and a single vehicle used for transportation.⁶² Income is another important facet of the SSI program, not only because of the income restrictions on eligibility, but because the more countable income a person receives, the less their SSI benefit will be.⁶³

For a potential SSDI recipient who may receive cryptocurrency in exchange for the frequent provision of goods or services, questions may arise as to whether that recipient's activity qualifies as substantial gainful activity (SGA).⁶⁴ SGA "describe[s] a level of work activity and earnings"⁶⁵ that, when sufficiently high, could potentially affect SSDI recipients' initial or continued eligibility for benefits.⁶⁶

Failure to accurately report certain changes in a beneficiary's financial circumstances can result in an overpayment from the SSA to the individual that

56. See generally SSA POMS SI 00501.001 (explaining basic eligibility requirements and exceptions for receipt of SSI benefits); *Income Reporting for Social Security Disability Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/disability/Documents/T2%20Reporting%20%20Disability%20doc%20final.pdf> (last visited Oct. 27, 2022).

57. *Red Book: A Summary Guide to Employment Supports for People with Disabilities Under the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) Programs*, SOC. SEC. ADMIN., 9, 10 (2020), <https://www.ssa.gov/pubs/EN-64-030.pdf> [hereinafter *Red Book*].

58. *Red Book*, supra note 57; *Supplemental Security Income (SSI) Resources*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-resources-ussi.htm> (last visited Oct. 27, 2022) [hereinafter *SSI Resources*].

59. *Red Book*, supra note 57. Benefits may also cease because the medical disability ends, i.e., the beneficiary experiences a medical improvement relating to their ability to work. See, e.g., 623. *When does disability end?*, SOC. SEC. ADMIN., https://www.ssa.gov/OP_Home/handbook/handbook.06/handbook-0623.html (last visited Oct. 27, 2022).

60. See *SSI Resources*, supra note 58.

61. *Id.*

62. *Id.*

63. *Supplemental Security Income (SSI) Income*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-income-ussi.htm> (last visited Oct. 27, 2022) (defining income as "the receipt of any item which can be applied, either directly or by sale or conversion, to meet basic needs of food or shelter").

64. See *Red Book*, supra note 57, at 5.

65. *Id.*

66. See *id.* at 5–6.

must be repaid to the SSA,⁶⁷ termination of benefits, or reduction in the amount of a beneficiary's monthly check.⁶⁸

This situation then begs two questions with respect to cryptocurrency: (1) how should the SSA treat income or assets received in the form of cryptocurrency, and (2) how should the SSA instruct individuals to report cryptocurrency? Because cryptocurrency is a mostly unregulated and decentralized form of currency, tracking receipt of digital currency is challenging for administrative agencies with already limited resources.⁶⁹ For example, the IRS has issued ambiguous guidelines as to how cryptocurrency will be treated for tax purposes, treating cryptocurrency as both income and an asset.⁷⁰

With the increasing popularity of cryptocurrency, some employers have begun to pay their employees in cryptocurrency, and there are applications that allow people to convert their paychecks directly into some form of digital currency.⁷¹ This speaks to the increasing ubiquity of digital currencies and the likelihood that they could become increasingly relevant to the SSA's various income-related determinations.

The Biden administration has responded to cryptocurrency's growing popularity with a recent bipartisan infrastructure bill that requires cryptocurrency exchanges to notify the IRS of crypto-transactions.⁷² This is a step forward in the regulation of cryptocurrency, and for administrative agencies that rely on or make determinations based on an individual's reporting of income and assets. It could lead to a better understanding of how to address the impact of technological advances on traditional conceptions of income.

IV. NEW FORMS OF WORK

Not only have income sources changed in the last century, but job functions have also evolved, posing additional challenges with respect to the Social Security Administration's SSDI and SSI adjudication processes.

When the SSA determines eligibility for SSDI or SSI, it evaluates both medical and vocational information, in many cases comparing an applicant's residual functional capacity (RFC)—what the applicant can and cannot do in a work

67. See *Overpayments*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-overpay-ussi.htm> (last visited Oct. 27, 2022).

68. See *Reporting Responsibilities*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-report-ussi.htm> (last visited Oct. 27, 2022).

69. See Hughes, *supra* note 43, at 3–4 (describing the current legal framework and regulation of cryptocurrency within federal and state laws); see Jagoda, *supra* note 50.

70. See I.R.S. Publication 525 Cat. No. 15047D (Jan. 13, 2022); *Virtual Currencies*, *supra* note 46; *Virtual Currency Transactions*, *supra* note 42.

71. Jazmin Goodwin, *Forget cash. Pay me in bitcoin*, CNN (Nov. 13, 2021, 10:19 AM) <https://www.cnn.com/2021/11/13/business/money/cryptocurrency-bitcoin-salary-feseries/index.html>.

72. John Puterbaugh, *Two Things Crypto Investors Should Know About the Infrastructure Bill President Biden Signed*, NEXT ADVISOR: IN P'SHIP WITH TIME (Nov. 29, 2021), <https://time.com/nextadvisor/investing/cryptocurrency/infrastructure-bill-crypto-taxes/>; U.S. OFF. OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2022 (2021).

setting—to the demands of their past work and the demands of jobs available in the national economy.⁷³ The Dictionary of Occupational Titles (DOT) is the SSA’s main source of occupational information for the purpose of determining job requirements in adjudication.⁷⁴

However, the DOT is largely out of date. The Department of Labor (DOL) stopped updating the DOT in 1991,⁷⁵ leaving questions as to whether the publication remains current in the 21st century, and how that might affect SSDI and SSI claims. With the changing economy in mind, different government projects have been making use of new data to better understand the nature and demands of work since the 1990s.⁷⁶ The Occupational Information System Project (addressed *infra* in Part IV.A) and O*NET (Part IV.B) are two examples of ongoing and past efforts to keep Social Security’s occupational information current.

A. Updating the Dictionary of Occupational Titles

The Department of Labor created the DOT in 1938⁷⁷ as a collection of definitions resulting from “comprehensive studies of how similar jobs are performed in different workplaces.”⁷⁸ In making disability determinations, the Social Security Administration relies primarily on the DOT for information about the requirements of work in the national economy.⁷⁹

1. The DOT and the Changing Labor Landscape

The Department of Labor stopped updating the DOT in 1991.⁸⁰ Because the context in which the DOT had been developed in the 1930s was largely blue-collar and industrial, the publication’s usefulness has become more limited as the focus of the national economy shifts from industry to information and services.⁸¹

73. See, e.g., *Program Operations Manual System (POMS) DI 25015.020 Determining Capability to Do Other Work – Implications of a Residual Functional Capacity for Less Than a Full Range of Sedentary Work (SSR 96-9p)*, SOC. SEC. ADMIN., <https://secure.ssa.gov/poms.NSF/lrx/0425015020> (last visited Oct. 27, 2022).

74. *Occupational Information System Project*, SOC. SEC. ADMIN., https://www.ssa.gov/disabilityresearch/occupational_info_systems.html (last visited Oct. 27, 2022) [hereinafter *OIS Project*].

75. *Id.*

76. *Id.*; Matthew Mariani, *Replace with a database: O*NET replaces the Dictionary of Occupational Titles*, OCCUPATIONAL OUTLOOK Q. 3, 3–4 (1999), <https://www.bls.gov/careeroutlook/1999/Spring/art01.pdf>.

77. *OIS Project*, *supra* note 74.

78. SSR 00-4p (Dec. 4, 2000), https://www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html.

79. *Id.* The SSA also relies on testimony from vocational experts to resolve complex vocational issues at administrative hearings. *Id.*

80. *OIS Project*, *supra* note 74.

81. Marc Whitehead, *What Is the Dictionary of Occupational Titles in LTD Claims?*, MARC WHITEHEAD & ASSOCS. (Oct. 26, 2016), <https://disabilitydenials.com/blog/dictionary-of-occupational-titles/> [hereinafter Whitehead]; Mariani, *supra* note 76. In 2007, the Assistant Commissioner of the Office of Occupational Statistics and Employment Projections at the Bureau of Labor Statistics, Dixie Sommers, wrote regarding the DOT: “The DOT is no longer in use by the Bureau of Labor Statistics, and

2. The Effect of an Outdated DOT on Disability Claims

An outdated DOT can have negative consequences for claimants if adjudicators rely on information that no longer accurately captures the realities of the employment landscape. For example, in 2021 a North Carolina news outlet determined through its own investigation that “thousands of people” were being “denied disability claims every year because of jobs that [were] out-of-date” in the DOT.⁸² The outlet told the story of one claimant whose denial for benefits included a finding that there were jobs he could perform in the national economy—as a document preparer, addresser, or envelope stuffer—“[b]ut none of them were from the 21st Century.”⁸³ According to the claimant’s representative, outdated jobs were often causing claimants to lose their cases.⁸⁴

A similar problem was noted in a Social Security Administration report in 2011. A study of denials based on “jobs that might be obsolete” found that the specific job title ‘addresser’ “was cited in nearly 10 percent of denial cases during Step 5,”⁸⁵ and other obsolete jobs were frequently used.⁸⁶

3. The Occupational Information System Project

To adapt its practices to the changing economy, the Social Security Administration has been working since the early 2010s to develop an Occupational Information System (OIS) to replace the DOT as the main source of occupational information in the disability benefits adjudication process. The SSA envisions that the OIS will be an online tool, updated every five years, that better captures, for example, the cognitive and mental demands of work.⁸⁷

In terms of its history, the OIS project entered a research and development phase in the early 2010s,⁸⁸ and in 2012 the SSA entered into an inter-agency agreement with the Bureau of Labor Statistics (BLS) to collect new occupational data for use in disability adjudications. Data collection began in 2015. The SSA stated that, for the new OIS to be useful for adjudicators, they would need three

we do regard it as obsolete since much of the information contained in the most recent version is based on research conducted at least two decades ago.” Letter from Dixie Sommers (Nov. 19, 2007), https://skilltran.com/pubs/DixieSommers_2007.pdf.

82. David Hodges, “*Obsolete jobs*” prevent people from receiving disability payments, WBTV (June 11, 2021, 5:14 PM), <https://www.wbvtv.com/2021/06/11/obsolete-jobs-prevent-people-receiving-disability-payments/>.

83. *Id.* (“‘Common sense would tell you that job doesn’t exist as it’s described,’ attorney George Piemonte told WBTV.”).

84. *Id.* (“Over the millions of claims that [Social Security is] reviewing, you’re . . . talking about hundreds of thousands of people being denied based on these nonexistent jobs.”).

85. *Id.*

86. *Id.*

87. *OIS Project*, *supra* note 74.

88. OCCUPATIONAL INFO. DEV. ADVISORY PANEL, FINDINGS REPORT: A REVIEW OF THE NATIONAL ACADEMY OF SCIENCES REPORT A DATABASE FOR A CHANGING ECONOMY: REVIEW OF THE OCCUPATIONAL INFORMATION NETWORK (O*NET) (June 28, 2010), <https://www.ssa.gov/oidap/Documents/COMPLETE%20FINAL--Findings%20Report%20OIDAP%20062810.pdf>.

years of production data from BLS, a Vocational Information Tool, and revised policy and regulations.⁸⁹

According to the SSA, one OIS project goal has been to provide information on the mental and cognitive requirements of different occupations. (The DOT, conversely, focused on “discrete and well-established descriptions of the physical demands” of work.)⁹⁰ To achieve this aim, the SSA enlisted the help of disability vocational policy experts, and psychiatric and psychological consultants to identify appropriate mental and cognitive occupational descriptors.⁹¹

The SSA’s intent had been to finish the OIS project by 2020.⁹² According to currently available published updates on the administration’s website, as of FY 2019, BLS was continuing to collect and publish data, work was ongoing on the Vocational Information Tool platform, and the SSA was still engaged in analysis of Occupational Requirement Survey data to determine regulatory and policy changes needed for implementation.⁹³ In FY 2020–2022, data collection and publication were ongoing.⁹⁴

B. *The Development and Role of O*NET*

It is worth noting that, historically, the OIS project was not the first attempt to update the information used in Social Security disability adjudications—though the earlier attempt did not ultimately succeed in producing a DOT replacement. In the late 1990s,⁹⁵ keeping in mind “[w]hat it takes to perform an occupation changes at the speedy pace set by new technologies,” a team of public and private sector organizations led by the U.S. Department of Labor’s Employment and Training Administration created a database called O*NET.⁹⁶ In contrast with the DOT, which is a fixed-format publication, O*NET was designed to be a flexible database that could be reconfigured as necessary.⁹⁷ Reflecting the time of its publication, in 1998, O*NET also began shifting the focus toward “IT and other contemporary and service-related industries.”⁹⁸

89. *OIS Project*, *supra* note 74. The SSA and BLS tested the feasibility of using the latter’s National Compensation Survey (NCS) to collect occupational data, and BLS used the NCS infrastructure to develop the Occupational Requirement Survey, which would provide the OIS with information on the requirements of work. *Id.* The SSA envisions that a Vocational Information Tool (VIT) would combine BLS ORS data with information from O*NET, the Military Occupational Classification, and BLS’ Occupational Employment Statistics into a web-based platform. *Id.*

90. *Id.*

91. *Id.*

92. *Status of the Dictionary of Occupational Titles; use in Social Security disability adjudications*, OFF. ADMIN. L. JUDGES, <https://www.dol.gov/agencies/oalj/topics/libdot> (last visited Oct. 27, 2022) [hereinafter OFF. ADMIN. L. JUDGES].

93. *OIS Project*, *supra* note 74.

94. *Id.* In FY 2020, BLS published data including revised mental and cognitive elements of occupations. *Id.*

95. Mariani, *supra* note 76; Whitehead, *supra* note 81.

96. Mariani, *supra* note 76, at 3; *see also* Whitehead, *supra* note 81.

97. Mariani, *supra* note 76, at 4.

98. Whitehead, *supra* note 81.

These advances notwithstanding, the DOT has remained in use in disability adjudications, as concern was raised in the early 2000s regarding O*NET's suitability for disability adjudication purposes, leaving a need for further efforts such as OIS.⁹⁹ Today, the Social Security Administration explains on its website that, although the DOL stopped updating the DOT in 1991 and replaced it with O*NET in 1998, O*NET is not in use in Social Security disability adjudications because the SSA "studied whether O*NET could take the DOT's place" and ultimately found that it did "not describe the physical requirements of occupations at the level of detail needed for claims adjudication."¹⁰⁰

V. THE IMPACT OF REMOTE WORK AND ASSISTIVE TECHNOLOGIES

Throughout history, the employment landscape has often been limited for those with disabilities.¹⁰¹ This is due in part to the ability of a person with a disability to integrate themselves into work environments which depends on various factors including but not limited to the size of the employer,¹⁰² nature of the disability,¹⁰³ the availability of accessible employment opportunities, and the accommodations provided by a prospective employer.¹⁰⁴

The COVID-19 pandemic has radically shifted the employment landscape for all people, but especially for those with disabilities, because it has provided flexibility in employment that was not thought possible before, primarily through the normalization of remote work.¹⁰⁵ Although remote work was not a pandemic-era invention, the pandemic forced online many tasks, roles, and activities that were once deemed impossible to do remotely.¹⁰⁶ As the pandemic continues to wane

99. OFF. ADMIN. L. JUDGES, *supra* note 92. "[T]he O*NET would not meet the SSA's needs . . . without major reconstruction. And . . . if there [is]n't any resolution to this problem [the] SSA would be left with no objective basis for justifying . . . decisions." OCCUPATIONAL INFO. DEV. ADVISORY PANEL, *supra* note 88.

100. *Benefit Offset National Demonstration*, SOC. SEC. ADMIN., https://www.ssa.gov/disability_research/ois_project_faqs.html (last visited Oct. 27, 2022).

101. See ALAN M. JETTE ET AL., THE PROMISE OF ASSISTIVE TECHNOLOGY TO ENHANCE ACTIVITY AND WORKPLACE PARTICIPATION: COMMITTEE ON THE USE OF SELECTIVE ASSISTIVE PRODUCTS AND TECHNOLOGIES IN ELIMINATING OR REDUCING THE EFFECTS OF IMPAIRMENTS I (2017), https://www.ncbi.nlm.nih.gov/books/NBK453289/pdf/Bookshelf_NBK453289.pdf; Morgan Smith, *People with disabilities still face barriers finding work during the pandemic—here's how companies can help*, CNBC (Oct. 29, 2021, 2:23 PM EDT), <https://www.cnbc.com/2021/10/29/people-with-disabilities-still-face-barriers-finding-work-during-the-pandemicheres-how-companies-can-help.html>.

102. See William A. Erickson et al., *Disability-Inclusive Employer Practices and Hiring of Individuals with Disabilities*, 28 REHAB. RSCH. POL'Y & EDUC. 309, 323 (2014).

103. See Vidya Sundar et al., *Striving to Work and Overcoming Barriers: Employment Strategies and Successes of People with Disabilities*, 48 J. VOCATIONAL REHAB. 93, 94 (2018).

104. Smith, *supra* note 101.

105. Lisa A. Schur, Mason Ameri & Douglas Kruse, *Telework After COVID: A "Silver Lining" for Workers with Disabilities?*, 30 J. OCCUPATIONAL REHAB. 521–22 (Nov. 6, 2020), <https://link.springer.com/content/pdf/10.1007/s10926-020-09936-5.pdf> (confirming that the "increased availability of home-based work may create more employment opportunities for workers with disabilities").

106. Brandy L. Wagstaff & Jacob Quasius, *The ADA, Telework, and the Post-Pandemic Workplace*, REG. REV. (Sep. 7, 2020), <https://www.theregreview.org/2020/09/07/wagstaff-quasius-ada-telework-post-pandemic-workplace/>.

and employees return to in-person work, the question then becomes whether arrangements that were made in light of the pandemic, such as remote or telework, will remain the norm and continue to improve employment prospects for persons with disabilities.

A. COVID-19 and the Normalization of Remote Work

The Americans with Disabilities Act (ADA) prohibits discrimination on the federal level on the basis of disability in various areas, including the employment context (“Title I”).¹⁰⁷ The ADA specifies that a covered employer may not discriminate against a qualified individual on the basis of disability.¹⁰⁸ The ADA considers discrimination to include the failure to make reasonable accommodation¹⁰⁹ to an individual with a disability, unless such an accommodation imposes an undue hardship on the employer.¹¹⁰ The U.S. Equal Employment Opportunity Commission (EEOC), the regulatory entity responsible for the enforcement of federal antidiscrimination laws like the ADA, has issued relevant guidance for employers and employees recognizing telework and other assistive technologies as a reasonable accommodation, and has provided guidance to employers regarding the basics of providing telework as a reasonable accommodation to employees with disabilities.¹¹¹

Despite the EEOC’s guidance, prior to the pandemic, employees were largely unsuccessful in challenging employers’ denial of telework as a reasonable accommodation.¹¹² A significant rationale behind the court’s denying telework a reasonable accommodation was the belief that literal, physical presence at work on-site is necessary.¹¹³

There is no doubt that the COVID-19 pandemic has weakened this belief. The pandemic made in-person performance of many jobs nearly impossible and advanced the normalization and increased the availability of remote work.¹¹⁴

107. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111–12117.

108. 42 U.S.C. § 12101.

109. Examples of reasonable accommodations include “job restructuring, part-time or modified work schedules. . . or other similar accommodations for individuals with disabilities.” 42 U.S.C. § 12111 (9)(B).

110. *Id.* at § 12111(10).

111. *Work at Home/Telework as a Reasonable Accommodation*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation> (last visited Oct. 27, 2022); *Overview*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/overview> (last visited Oct. 27, 2022).

112. Robert Iafolla, *Work at Home Gets Skeptical Eye From Courts as Disability Issue*, BLOOMBERG L. (Feb. 21, 2019, 6:15 AM), <https://news.bloomberglaw.com/daily-labor-report/work-at-home-gets-skeptical-eye-from-courts-as-disability-issue> (“Employers won 70 percent of the rulings over the past two years on whether they could reject workers’ bids for telework as an accommodation . . . according to a Bloomberg Law analysis of cases.”); Erin Mulvaney, *Coronavirus Telework Tests Disability Accommodation Defense (2)*, BL (Mar. 16, 2020, 12:49 PM), <https://news.bloomberglaw.com/daily-labor-report/coronavirus-telework-challenges-disability-accommodation-defense>.

113. *EEOC v. Ford Motor Co.*, 782 F.3d 753, 761 (6th Cir. 2015) (en banc); Iafolla, *supra* note 112; Mulvaney, *supra* note 112.

114. Mulvaney, *supra* note 112.

Now, alternatively, an employer would likely have a difficult time explaining why a job *must* be performed in person, especially if the job was already performed successfully remotely during the pandemic.

B. Challenges for the Adjudicative Process

The normalization of remote work and increased access to assistive technologies can immensely benefit persons with disabilities who receive income support. The treatment, however, of these technologies by programs like SSI and SSDI could raise new questions at various stages in the application and adjudication process. Both SSI and SSDI require, among other requirements, a determination of disability to be eligible for benefits.¹¹⁵ The SSA goes through a five-step disability determination process for both of its disability programs, which includes consideration of the claimant's current work activity, the presence of a severe impairment, and an applicant's capacity for work.¹¹⁶

Step one in determining an applicant's ability to work includes assessing whether they are able to engage in "substantial gainful activity" (SGA).¹¹⁷ The SSA requires an initial determination of disability as well as periodic redeterminations.¹¹⁸ In general, SGA is defined as earning more than a pre-set threshold (\$1,350 per month in 2022) from work. Exceptions can be made in the case of sheltered employment, where income earned during a specialized training or evaluation period would not be considered income for SGA purposes.¹¹⁹ Could the SSA potentially disregard certain income earned through a remote or technology-assisted arrangement, due to viewing this type of arrangement as sheltered work?

A reasonable accommodation in the employment context is a change or modification to an employer's policies or processes or even physically restructuring the way a job is performed to ensure that people with disabilities "have an equal opportunity not only to get a job, but successfully perform their job tasks to the same extent as people without disabilities."¹²⁰ The SSA does not "consider an individual's ability to work *with the assistance of reasonable accommodations* in its determination of whether that individual is disabled and unable to engage in SGA or work."¹²¹ However, in eligibility determinations for SSI, "the reasonable cost of items, devices, or services needed by applicants to enable work with their

115. *Red Book*, *supra* note 57, at 5.

116. Bernard Wixon & Alexander Strand, *Identifying SSA's Sequential Disability Determination Steps Using Administrative Data*, SOC. SEC. ADMIN.: OFF. RET. & DISABILITY POL'Y (June 2013), <https://www.ssa.gov/policy/docs/rsnotes/rsn2013-01.html>.

117. *Red Book*, *supra* note 57, at 5.

118. *Id.*

119. Melissa Linebaugh, *How Sheltered Work Affects Social Security Disability*, DISABILITYSECRETS, <https://www.disabilitysecrets.com/resources/disability/how-sheltered-work-affects-social-security-dis> (last visited Oct. 27, 2022).

120. 42 U.S.C. § 12111(9); *Accommodations*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/odep/program-areas/employers/accommodations> (last visited Oct. 27, 2022).

121. JETTE ET AL., *supra* note 101, at 13. In this regard, the ADA and SSA standard for disability are different. *Id.* ("[U]nder the ADA, if a person can perform his or her job with reasonable accommodations, that individual is considered disabled but able to work."). This source provides the

impairment is subtracted from eligible earnings, even when those items or services are used for activities of daily living in addition to work.”¹²² Thus the use of assistive technology can have some impact on claims at step one of the five-step sequential evaluation process.¹²³

Remote work and assistive technology could also conceivably impact disability determinations at later steps—though cases like these are hypothetical, and the authors have not yet seen them in practice. At step four of the sequential evaluation process,¹²⁴ for example, could changes that incorporate the ability to work remotely result in a claimant’s past work being deemed less physically demanding than typical, e.g., resulting in work ordinarily considered “medium” as typically performed being deemed “light” or “sedentary”¹²⁵ as actually performed, by virtue of going remote? Conceivably, a claimant then assessed to have the residual functional capacity for light work with additional restrictions could face a denial at step four, whereas they would not have been denied based on their past position’s typical requirements.¹²⁶

In general, remote arrangements and assistive technologies have the potential to change job descriptions in many ways that range from the predictable—increasing accessibility for individuals unable to stand or sit at a desk for extended periods of time—to the unpredictable. It will be up to efforts such as the Occupational Information System project (Part IV.A.3, *supra*) and Vocational Experts providing testimony at disability hearings to keep the Social Security Administration current in the face of job descriptions that could vary widely and deviate significantly from what the Dictionary of Occupational Titles captures today.

C. Rehabilitation and the Ticket to Work Program

Advances in technology can create more availability and ease in securing a job.¹²⁷ This can increase the likelihood that persons with disabilities can engage

example of *Cleveland v. Policy Management Systems Corporation*, as a case where these differing standards can result in “a conundrum.” *Id.*

122. *Id.* at 2.

123. Impairment-Related Work Expenses (IRWE)—items or services needed to work due to a disability—are deducted from countable income when determining eligibility for benefits in both the SSDI and SSI programs. *Impairment-Related Work Expenses*, SOC. SEC. ADMIN., <https://choosework.ssa.gov/library/2018-11-28-faq-impairment-related-work-expenses> (last visited Oct. 27, 2022).

124. *See, e.g.*, 20 C.F.R. § 404.1520(a)(4); John L. Roberts, *The 5 Step Social Security Disability Claims Process*, <https://www.disabilitydecision.com/disability-claims-process/> (last visited Oct. 27, 2022). At step four, the evaluator considers whether the claimant can perform their past work. Johns, *supra* note 3.

125. *See, e.g.*, 20 C.F.R. § 404.1567.

126. The authors have seen an analogous case, where a client received a denial at step four due to their past work being deemed light as actually performed by the claimant (whereas the same job would ordinarily be considered medium work).

127. *See* Mulvaney, *supra* note 112.

in SGA and not need to rely on economic benefits programs to survive—consistent with the SSDI and SSI programs’ rehabilitative goals.¹²⁸

Both SSI and SSDI currently provide incentive programs for benefit recipients to return to work in some capacity.¹²⁹ The SSA’s “Ticket to Work” program offers services at no cost to SSI and SSDI recipients that are designed to incentivize and facilitate an individual’s transition back to work, if possible.¹³⁰ The SSA is committed to reintegrating persons with disabilities into the workforce, providing the needed tools to succeed, while allowing for the temporary retention of the economic benefits of SSI and SSDI.¹³¹ Within its Ticket to Work program, the SSA recognizes the importance of assistive technology in the workplace and even provides guidance and information about the different ways that individuals can obtain assistive technology.¹³²

Programs like Ticket to Work can help persons with disabilities face fewer barriers in the workplace, by helping them seek innovative accommodations.¹³³ People who receive needs-based disability benefits may also be more likely to have difficulty implementing and maintaining assistive technology “despite the impairment-mitigating effects of these products and technologies.”¹³⁴ This is due to the costs associated with financing, maintaining, and training on how to appropriately maintain and use these devices.¹³⁵ Issues like these make it clear that provision of an assistive device alone may not be sufficient to mitigate other barriers like socioeconomic status and education that a person with a disability may encounter in trying to secure work.¹³⁶ Addressing this reality can help programs like Ticket to Work expand the tools they can provide to beneficiaries of the program.¹³⁷

VI. CONCLUSION

The Social Security Administration has long recognized a need to maintain up-to-date guidance considering changes in the economy, and the ways that SSDI and SSI applicants work and earn income through increasingly technology-driven means. New scenarios posed by fundraising via online platforms, the increased accessibility to income and assets with rapidly fluctuating value, changing job descriptions across the economy, the increasing ubiquity of remote work, and new

128. See, e.g., *Red Book*, *supra* note 57, at 13.

129. *About Ticket to Work*, SOC. SEC. ADMIN., <https://choosework.ssa.gov/about/index.html> (last visited Oct. 27, 2022).

130. *Id.*

131. *Work Incentives*, SOC. SEC. ADMIN., <https://choosework.ssa.gov/about/work-incentives/> (last visited Oct. 27, 2022).

132. *Money Mondays: 4 Ways to Obtain Assistive Technology*, SOC. SEC. ADMIN. (Aug. 25, 2014), https://choosework.ssa.gov/blog-archive/blog-post?post_id=346.

133. *About Ticket to Work*, *supra* note 129.

134. JETTE ET AL., *supra* note 101, at 4.

135. *Id.*

136. *Id.* at 5.

137. *Id.*

and innovative assistive technologies can all challenge the existing framework for determining whether or not an individual is able to participate in the workforce and provide for themselves in the economy.¹³⁸ Further guidance can help to ensure that beneficiaries can make use of the opportunities created by new technologies without undue risk to their disability benefits.

138. Though beyond the scope of this paper, these new developments could also include the growth of the “gig economy.” See, e.g., Paul Harper & Peter Blanck, *Gig Workers with Disabilities: Opportunities, Challenges, and Regulatory Response*, 30 J. OCCUPATIONAL REHAB. 511 (2020) (“The gig economy provides new prospects, as well as challenges, for people with disabilities to engage in meaningful work.”).