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DISABLED ADULT CHILDREN

Thomas E. Bush*

Payment of Social Security benefits to children is well known. When a wage earner receives Social Security disability or retirement benefits¹ and has paid more than a minimum amount of Social Security taxes,² the Social Security Administration (SSA) will also pay benefits to the wage earner's minor children. In addition, when an insured wage earner dies, a child receives survivor benefits. Whether the parent is retired, disabled, or deceased, a minor child, whom SSA calls an auxiliary, receives benefits until age eighteen, or until age nineteen if the child is a full-time elementary or secondary school student.

Less well known is that a disabled *adult* child of a retired, disabled, or deceased wage earner may also receive benefits on

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1. See 20 C.F.R. §§ 404.101-.146 (2004). A wage earner must have "insured status" in order to be eligible for retirement or disability benefits on his or her own account. For retirement benefits, referred to as "old age" benefits in the Social Security Act and regulations, in order to have insured status, a wage earner must have paid a sufficient amount in Social Security taxes over a sufficiently long period of time. 20 C.F.R.

§ 404.310(b) (2004). For disability insured status, sufficient payments also must be made in recent years. 20 C.F.R. §§ 404.130, .315(a)(1) (2004). A wage earner must have insured status for survivors to receive benefits after the death of a wage earner. 20 C.F.R. § 404.101(a) (2004). Different rules apply for insured status for disability, retirement, or survivor benefits.

2. See 20 C.F.R. §§ 404.403-.411 (2004). In addition to the requirement that a retirement or disability beneficiary have insured status for children or spouses to receive payments on the wage earner's account, the wage earner must have paid in more than the minimum amount necessary for the wage earner to receive his or her own benefits. That is, the "family maximum" benefit must exceed the benefit for the wage earner.

the account of a parent. It comes as a complete surprise to many people that it is possible for an adult disabled claimant of *any* age, who has never paid any Social Security tax, to receive disabled adult child benefits on a parent's account beginning when that parent retires, becomes disabled, or dies. Knowledge of the rules that allow a disabled adult child to receive benefits on a parent's account is important not only for lawyers who represent claimants in Social Security disability cases, but also for attorneys involved in retirement and estate planning for the parents of disabled children.

SOCIAL SECURITY REGULATIONS

Social Security regulations treat disabled adult children as one category of children entitled to benefits on the earnings record of a wage earner parent. Childhood disability benefits (CDB), also known as disabled adult child benefits (DAC),³ are a type of auxiliary benefits subject to all the same rules applicable to other auxiliaries. The regulations provide:

§ 404.350 Who is entitled to child's benefits.

(a) General. You are entitled to child's benefits on the earnings record of an insured person who is entitled to old-age or disability benefits or who has died if—

(1) You are the insured person's child, based upon a relationship described in §§ 404.355—404.359;

(2) You are dependent on the insured, as defined in §§ 404.360—404.365;

(3) You apply;

(4) You are unmarried; and

(5) You are under age eighteen; you are eighteen years old or older and have a disability that began before you became twenty-two years old; or you are eighteen years or older and qualify for benefits as a full-time student as described in § 404.367. . . .⁴

3. The Social Security Administration's Programs Operations Manual System (POMS), available at <http://policy.ssa.gov/poms.nsf/aboutpoms> (last visited Apr. 13, 2005), uses the term "childhood disability benefits" to refer to these benefits, which are usually referred to colloquially at SSA as DAC (pronounced dak) benefits. Neither term appears in the statute or regulations.

4. 20 C.F.R. § 404.350(a) (2004).

Each separate requirement for entitlement to these auxiliary benefits must be met. The insured parent must be entitled to benefits or deceased. The child must be "dependent" but, as we shall see, in most situations, proof of dependency does not present a problem, because the child is "deemed" to be dependent if determined to be disabled. There must be an application, but sometimes an application for other benefits may be treated by SSA as an application for childhood disability benefits. A claimant must be unmarried at the time of application, and the claimant's disability must have begun before age twenty-two.

A PUBLIC EDUCATION PROBLEM

The biggest problem with receipt of adult child disability benefits is that potential claimants do not apply because they do not know the program exists. This is a public education problem for SSA, a problem that lawyers cannot significantly alleviate. Indeed, most disabled adult children never need lawyers for their disability cases.

A typical situation without problems arises when a disabled child's parents are alive, not disabled, and not retired. When the child is under age eighteen, he or she may not be eligible for the Supplemental Security Income Program (SSI),⁵ because of the parents' income and assets. At age eighteen, the child applies for SSI because the parents' income and assets are no longer considered. The child is found disabled using the same definition of disability that applies to all the disability programs operated by SSA, except children's SSI. Thus, the adult child is found to be entitled to SSI, and the child receives SSI for years. When a parent retires or becomes disabled, SSA advises the adult child, who now may be middle-aged, to apply for disabled adult child benefits on the parent's account. Because the child was found disabled and has been receiving SSI since before age twenty-two, SSA simply adopts the earlier decision that the child is disabled. In this scenario, receipt of disabled adult child's benefits is virtually automatic.

SSA does a good, but not perfect, job of identifying disabled

5. The Supplemental Security Income Program is a welfare program operated by the Social Security Administration for disabled children, disabled adults, and the elderly who are not otherwise eligible for SSA benefits.

adult children who may apply for benefits on the account of retired or disabled parents. When retirement or disability applications are taken, SSA representatives generally inquire about whether there are any disabled adult children who might be eligible on the parent's account.⁶ SSA is supposed to do the same after the death of a parent when it takes an application for the \$255 lump sum death payment; however, local office officials admit that there may be disabled adult children who are not identified in this process, including some who are receiving SSI at the time the parent dies.

REPRESENTING DISABLED ADULT CHILDREN

Disability cases for disabled adult children handled by lawyers tend to be those in which SSI applications were never filed or were filed much later than age twenty-two. Sometimes the legal issue is the need for proof of ancient history, such as proof that a middle-aged client, who never applied for SSI, has been disabled since before age twenty-two. Or, a lawyer could have a fifty-year-old client, who began receiving SSI at age thirty. In such a case, the lawyer usually does not need to prove more than that the client was disabled from before age twenty-two until the client was found disabled for SSI. Sometimes, periods of what look like substantial gainful activity will need investigation. Lawyers also have become involved in disabled adult child cases after a beneficiary marries and loses benefits, though, as we shall see, the options for solving this problem are limited.

If an attorney has a client who is between eighteen and twenty-two years old and has applied for childhood disability benefits, once an attorney has made sure there is no special dependency requirement, proof of the case is the same as in any other adult Social Security disability or SSI case.

After an attorney wins a disabled adult child case, as we shall see, calculating the first month of entitlement is different from calculating the first month of entitlement under the regular Social Security disability program. Also, there are some differences between the programs pertaining to termination of benefits and reentitlement. Otherwise, recipients of childhood

6. Social Security Administration, *POMS GN 00204.022, Explore Entitlement on Another Earnings Record or to Another Class of Benefits* (Sept. 27, 2000), available at <http://policy.ssa.gov/poms.nsf/lnx/0200204022!opendocument> (last visited Apr. 13, 2005).

disability benefits are treated the same way as those entitled to the regular Social Security disability benefits, and the same rules apply to Medicare eligibility that apply to adult Social Security disability eligibility.

DISABILITY

The definition of disability is the same for childhood disability cases as for any other Social Security disability case⁷ with one additional requirement. In addition to using the five-step sequential evaluation process to prove that the claimant is disabled,⁸ a disabled adult child is required to show that he or she has been continuously disabled since before age twenty-two.⁹ Given the odd way SSA treats people as reaching a birthday on the day before,¹⁰ a childhood disability claimant must become disabled no later than two days before his or her actual twenty-second birthday.

Proof of continuous disability since before age twenty-two presents problems for claimants who have worked.¹¹ As a rule, you will need to show that any work:

7. 20 C.F.R. § 404.1505(a) (2004).

8. 20 C.F.R. § 404.1520(a)(4) (2004). Under the five-step sequential disability evaluation process, the following must be proved by a claimant in order to be found disabled:

1. the claimant is not engaging in "substantial gainful activity"; *and*
2. the claimant has a "severe" physical or mental impairment; *and*
3. the impairment meets or "equals" one of the impairments described in the social security regulations known as the Listing of Impairments; *or*
4. considering the claimant's "residual functional capacity," that is, what the claimant can still do even with his or her impairments, the claimant is unable to do "past relevant work"; *and*
5. other work within the claimant's residual functional capacity, considering age, education, and work experience, does not exist in the national economy in significant numbers.

(The terms identified by quotation marks above have precise meanings in the regulations and rulings that are not necessarily the meanings one would expect.)

See also THOMAS E. BUSH, SOCIAL SECURITY DISABILITY PRACTICE §§ 113 – 118 (2005).

9. 20 C.F.R. § 404.350(a)(5) (2004).

10. 20 C.F.R. § 404.102 (2004); Social Security Administration, *POMS DI 25501.055(B), Onset in Childhood Disability Benefits (CDB) Claims* (Dec. 9, 2004), available at <http://policy.ssa.gov/poms.nsf/lnx/0425501055!opendocument> (last visited Apr. 13, 2005).

11. 20 C.F.R. § 404.1571 (2004).

- was an unsuccessful work attempt,¹²
- was not substantial work activity,¹³
- was not gainful work activity¹⁴ after deducting impairment related work expenses¹⁵ and averaging earnings,¹⁶
- was done under special conditions,¹⁷ or
- was subsidized.¹⁸

Instructions to SSA employees concerning applications advise them to take a disabled adult child's application if there "are lengthy gaps in the claimant's recent work history" or there is "a pattern of low and irregular earnings following a period of substantially higher earnings."¹⁹ Note that if a claimant has "worked only 'off-and-on' or for brief periods of time during the fifteen-year period," which SSA evaluates for considering whether a claimant can perform past relevant work, SSA generally considers that such work experience does not apply as a vocational factor.²⁰ Thus, there is a precedent in the regulations for treating sporadic work as no work.

It is SSA policy that claimants for disabled adult child's benefits must show that they have been continuously unable to work since before age twenty-two. It is not sufficient to argue that an impairment, which began before age twenty-two and became disabling later, qualifies a claimant for childhood disability benefits.²¹

But does it have to be the same disability, that is, the same impairment that disables a claimant all along? Or is it possible to have two different successive impairments that render a claimant continuously unable to work since before age twenty-two? There is no clear statement of SSA policy on this issue, and

12. 20 C.F.R. § 404.1574(c) (2004).

13. 20 C.F.R. § 404.1572(a) (2004).

14. 20 C.F.R. § 404.1572(b) (2004).

15. 20 C.F.R. § 404.1576 (2004)

16. 20 C.F.R. § 404.1574a (2004). *See also* S.S.R. 85-5c (West 1983-1991) (adopting *Anderson v. Heckler*, 726 F.2d 455 (8th Cir. 1984)).

17. 20 C.F.R. § 404.1573(c) (2004).

18. 20 C.F.R. § 404.1574(a)(2) (2004).

19. Social Security Administration, *POMS GN 00205.035(B) RSDI Applications—Disability Questions* (May 8, 2002), available at <http://policy.ssa.gov/poms.nsf/lnx/0200205035!opendocument> (last visited Apr. 13, 2005).

20. 20 C.F.R. § 404.1565(a) (2004).

21. *Reyes v. Sec'y of Health, Ed. & Welfare*, 476 F.2d 910, 914 (D.C. Cir. 1973); *Reading v. Matthews*, 542 F.2d 993, 997 (7th Cir. 1976).

courts have never been presented with a case in which an Administrative Law Judge (ALJ) found that a claimant was not entitled to childhood disability benefits because he had two successive disabling impairments – that is, the current disabling impairment did not exist before age twenty-two. Nevertheless, the issue has been addressed by courts in *dicta*.²² The *Reading* court stated that the statute "requires that the [current] disability exist as a disability at age [twenty-two]."²³ The *Reyes* court required a showing that the current condition was "the same condition that began in 1933 and which at that time and at all times subsequent thereto was equally disabling to such a degree that appellee was prevented from engaging in substantial gainful work."²⁴ *Reyes* was once issued as Social Security Ruling 74-20c. The SSA summary for the ruling, which was rescinded in 1984, discussed other issues.

The *Reading* and *Reyes* courts came to their conclusions based on statutory construction of the requirement that a disabled adult child be "under a disability (as defined in section 423(d) of this title) which began before he attained the age of [twenty-two]."²⁵ Disability is defined as the "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 [twelve] months."²⁶ Does "under a disability" mean under one disability that began before age twenty-two, or does it simply mean that a claimant must be disabled since before age twenty-two? What possible public policy could be served by requiring that the continuous disability was always caused by the same impairment?

RELATIONSHIP TO THE INSURED WAGE EARNER

A claimant can be a natural child, legally adopted child, stepchild, grandchild, step grandchild, or equitably adopted child of the wage earner. It is necessary to know the precise nature of the relationship in order to figure out if there are any

22. *Reading*, 542 F.2d at 997.

23. *Id.*

24. *Reyes*, 476 F.2d at 914.

25. 42 U.S.C. § 402(d)(1)(B) (2000) (*emphasis added*).

26. 42 U.S.C. § 423(d) (2004).

special dependency requirements.

For a natural child, who could inherit from the wage earner under applicable state law, there are no special dependency requirements.²⁷ For a natural child who could not inherit under state law, you will need to find out if paternity has been adjudicated by a court, whether a court has ordered the parent to contribute to the support of the child, or whether the father has acknowledged, in writing, that the child is his.²⁸ For all of these situations, there are no special dependency requirements either; but for most other situations involving a natural child, you will need to look carefully at the circumstances.

For an adopted child, an attorney will need to look at when the child was adopted, how old the child was when adoption proceedings were started, whether the adoption took place in the United States, when the wage earner became entitled to benefits or died, and whether the child was the insured's stepchild before adoption. For a stepchild, determine the date of the wage earner's marriage to the child's parent and the length of the marriage before the wage earner became entitled to benefits or died. For a grandchild, examine not only the relationship between the child and grandparent, but also whether the parent, that is, the child of the grandparent, was deceased or disabled.

DEPENDENT

For most natural and legally adopted children, dependency is deemed. That is, an attorney does not need to show that the child was dependent on the wage earner at any time. For a few natural children, some children for whom adoption proceedings were started after they turned age eighteen *and* after the wage earner became entitled to disability or retirement benefits, and all stepchildren, grandchildren, and step grandchildren, proof of the dependency requirement, which was designed to limit eligibility for benefits, may be a challenge. A chart detailing dependency requirements can be found in Appendix A.

27. 20 C.F.R. § 404.355(a)(1) (2004).

28. 20 C.F.R. § 404.355(a)(3) (2004).

APPLICATION

In order to receive disabled adult child benefits, an application is required. Whenever an attorney is presented with a case in which the application for disabled adult child benefits is filed long after the parent died, became entitled to disability benefits, or became entitled to retirement benefits, the attorney needs to ask his or her client why the client did not apply earlier and what prompted the current application. In particular, the attorney should explore any earlier contacts with SSA. The attorney may find some transaction with SSA that can be treated as a protective filing (a mechanism designed to prevent the loss of benefits for claimants) or even as an actual application. Alternatively, the attorney may find that SSA provided incorrect information to the client, which may allow for a deemed filing date as of the date of the misinformation.²⁹

An SSI application may be treated as an actual application, not a protective filing, for disabled adult child benefits under Title II of the Social Security Act.³⁰ Unless that Title II "application" is closed out or adjudicated, it is possible that the application will remain open indefinitely.³¹

An SSI redetermination, which must be done periodically to make sure an SSI beneficiary is receiving the correct amount of benefits, is treated under SSA policy as a protective filing for all possible benefits under Title II of the Social Security Act, not just Title II benefits on the claimant's own Social Security Number.³²

As a rule, a protective filing requires a written statement indicating intent to claim benefits; but, SSA is supposed to prepare a statement if a claimant states intent to file an application in a telephone call to SSA.³³ After such contact with a claimant, SSA is supposed to send the claimant a notice stating

29. 20 C.F.R. § 404.633 (2004). See BUSH, *supra* note 8, at § 176.5.

30. Social Security Administration, *POMS SI 00601.035, Adjudicating Title II When a Title XVI Application Is Filed* (Sept. 30, 2003), available at <http://policy.ssa.gov/poms.nsf/lnx/0500601035!opendocument> (last visited Apr. 13, 2005).

31. Social Security Administration, *POMS GN 00204.025, Open Applications* (Feb. 26, 2004), available at <http://policy.ssa.gov/poms.nsf/lnx/0200204025!opendocument> (last visited Apr. 13, 2005).

32. Social Security Administration, *POMS GN 00204.015, Title XVI Redeterminations (RZs) as Protective Filings for Title II Benefits* (May 16, 2002), available at <http://policy.ssa.gov/poms.nsf/lnx/0200204015!opendocument> (last visited Apr. 13, 2005).

33. 20 C.F.R. § 404.630(b) (2004). Protective filing is designed to prevent the loss of benefits for claimants.

that if the claimant files an actual application within six months of the date of the notice, SSA will use the date of receipt of the claimant's written statement of intent to file or telephone contact as the date of application.³⁴ When SSA fails to send such a notice, filing protection will remain open indefinitely.³⁵

There may be other kinds of written statements that may constitute protective filings, which apply to disabled adult child benefits. Such protective filings include a statement filed with the Railroad Retirement Board³⁶ or a statement filed with a hospital.³⁷ There also may be the possibility of reopening an earlier application that was closed out or adjudicated.³⁸

RETROACTIVITY

If the wage earner is disabled, the application for childhood disability benefits, like all applications for disability benefits, will pay benefits for twelve months before the date of application if all other requirements are met as of that date.³⁹ If the wage earner is deceased or retired, the application will pay benefits for only six months before the date of application if all other requirements are met as of that date.⁴⁰

NO WAITING PERIOD

Unlike the regular Social Security disability program, there is no five-month waiting period for entitlement to childhood disability benefits.⁴¹ However, the child cannot become entitled before the parent if the parent is alive or before the month the parent died, if the parent is deceased, unless the parent was receiving disability or retirement benefits before death.⁴²

34. 20 C.F.R. § 404.630(c) (2004).

35. Social Security Administration, *POMS GN 00204.010(A)(5), Protective Filings* (Dec. 5, 2003), available at <http://policy.ssa.gov/poms.nsf/lnx/0200204010!opendocument> (last visited Apr. 13, 2005).

36. 20 C.F.R. § 404.631 (2004).

37. 20 C.F.R. § 404.632 (2004). See Social Security Administration, *POMS GN 00204.010*, *supra* note 35 (providing an extended discussion of protective filings).

38. See BUSH, *supra* note 8, at §§ 370-379.

39. 20 C.F.R. § 404.621(a)(1) (2004).

40. 20 C.F.R. § 404.621(a)(2) (2004).

41. Social Security Administration, *POMS DI 00115.035(A)(3), Eligibility for Child's Benefits Based on Disability* (Jan. 23, 1990), available at <http://policy.ssa.gov/poms.nsf/lnx/0400115035!opendocument> (last visited Apr. 13, 2005).

42. 20 C.F.R. § 404.350(a) (2004).

MONTH OF ENTITLEMENT

If the parent wage earner is deceased, the disabled child's first month of benefits is the month in which all of the requirements for entitlement are met during any part of the month.⁴³ When there is a living wage-earner parent, with certain extremely limited exceptions,⁴⁴ the requirements for entitlement (other than the application requirement) must be met throughout the entire month.⁴⁵ Thus, if a child becomes disabled on the fifteenth of the month and the wage earner is deceased, then the first month of benefits can be the month in which the child became disabled—assuming all other requirements are met. But if the wage earner is alive, the first month of benefits is the next month.

FAMILY MAXIMUM

A retired or disabled wage earner must have paid enough social security taxes so that the wage earner's "family maximum" benefit amount, a special calculation done by SSA, exceeds the benefits that the wage earner receives.⁴⁶ Otherwise there are no social security benefits left to be paid to a disabled adult child.

People with low lifetime earnings tend to have a family maximum benefit amount that is equal to the "primary insurance amount," which is the amount of benefits paid to a disabled person or to someone who retires at full retirement age. Thus, it is possible for a disabled adult child to meet the disability criteria for entitlement and still not receive any benefits. When the parent dies, though, the disabled adult child would receive benefits on the parent's account, because the parent is no longer using up the family maximum benefit amount.

43. 20 C.F.R. § 404.352(a)(1) (2004).

44. See Social Security Administration, *POMS RS 00203.010, Child's Benefits - First Month of Entitlement (MOET) in Life Cases* (June 26, 2002) available at <http://policy.ssa.gov/poms.nsf/lnx/0300203010!opendocument> (last visited Apr. 13, 2005).

45. 20 C.F.R. § 404.352(a)(2) (2004); Social Security Administration *POMS DI 10115.025, First Month of Entitlement (MOET)* (Jan. 23, 1990) available at <http://policy.ssa.gov/poms.nsf/lnx/0410115025!opendocument> (last visited Apr. 13, 2005).

46. See 20 C.F.R. §§ 404.403-411 (2004).

BENEFIT AMOUNT

If the wage earner is alive, the disabled adult child is entitled to fifty percent of the wage earner's primary insurance amount, subject to the family maximum. If the wage earner is deceased, the disabled adult child receives seventy-five percent of the wage earner's primary insurance amount, subject to the family maximum. When the family maximum is reached, benefits for auxiliaries are equally divided between them.⁴⁷

TERMINATION OF BENEFITS AND REENTITLEMENT MARRIAGE

Marriage is a terminating event for a disabled adult child's benefits. The only exception is when a disabled adult child marries someone who is also receiving Title II benefits (except child's benefits unless they are childhood disability benefits).⁴⁸ Although marriage does not affect benefits for the regular social security disability program, marriage terminates benefits for someone who is receiving disabled adult child's benefits,⁴⁹ and, unless that marriage is voided or annulled, a person cannot become entitled to those benefits again on the same record.⁵⁰ A divorce is not sufficient, neither is death of the spouse.⁵¹

Although marriage is a *terminating* event for disabled adult child's benefits, for *initial entitlement* the statute requires only that the claimant be unmarried.⁵² Thus, before applying, a claimant may be married and divorced. It is also possible, where benefits of a disabled adult child are terminated because of marriage and that marriage ends, that the disabled adult child, now unmarried, can apply for benefits on the other parent's account. In addition, a claimant who is married when the application is filed may be entitled to benefits in the retroactive period before the month of marriage.⁵³

47. 20 C.F.R. §§ 404.353(a), 404.304(d), 404.403 (2004).

48. See 20 C.F.R. § 404.352(b)(2) (2004).

49. 42 U.S.C. § 402(d) (2000); Social Security Administration, *POMS RS 00203.015 Child's Benefits - Reentitlement Requirements* (June 26, 2002), available at <http://policy.ssa.gov/poms.nsf/lnx/0300203015!opendocument> (last visited Apr. 13, 2005).

50. Social Security Administration, *POMS DI 10115.001, Requirements for Entitlement* (May 5, 1999), available at <http://policy.ssa.gov/poms.nsf/lnx/0410115001!opendocument> (last visited Apr. 13, 2005).

51. 42 U.S.C. 402 (2000).

52. 42 U.S.C. § 402(d)(1)(B) (2000); 20 C.F.R. § 404.350(a)(4) (2004).

53. Social Security Administration, *POMS DI 10115.001, Requirements for Entitlement* (May 5, 1999), available at <http://policy.ssa.gov/poms.nsf/lnx/0410115001!opendocument>

TERMINATION

Benefits of a disabled adult child will end for all the same reasons an adult beneficiary's benefits end, such as the end of a disability or death. In addition to terminating when a disabled adult child marries, benefits for a disabled adult child end if the insured person's disability or retirement benefits end for a reason other than death. However, if the insured lost benefits because drug addiction or alcoholism was found to be material to the insured's disability, as long as the insured remains disabled, the disabled adult child can continue receiving benefits.⁵⁴

REENTITLEMENT

If entitlement to childhood disability benefits ends because the child's disability has ceased, a child may be reentitled to benefits on the same earnings record if the child again becomes disabled before eighty-four months (seven years) after benefits ended. However, in order to encourage work, Congress established an exception: the seven year time limit was removed for those whose benefits ceased because of performance of substantial gainful activity, effective October 1, 2004.⁵⁵

To be reentitled, a child must not have married unless that marriage is void or was annulled.⁵⁶ A marriage that ends because of divorce or death precludes reentitlement.⁵⁷ Note that this is different from the requirement for initial entitlement, which requires only that the child not be married when he or she applies.

Reentitlement rules do not apply when the child's benefits end because the parent's disability ended. If the parent becomes entitled to disability benefits again, retires, or dies, the initial entitlement provisions apply.⁵⁸

Of course, the initial entitlement rules apply if the child

(last visited Apr. 13, 2005).

54. 20 C.F.R. § 404.352(b)(5) (2004).

55. Section 420A of Public Law 108-203, the Social Security Protection Act of 2003.

56. See S.S.R. 84-1, available at http://www.ssa.gov/OP_Home/rulings/oasi/09/SSR84-01-oasi-09.html (last visited Apr. 13, 2005).

57. Social Security Administration, *POMS DI 10115.035, Requirements for Reentitlement* (Dec. 9, 2004), available at <http://policy.ssa.gov/poms.nsf/lnx/0410115035!opendocument> (last visited Apr. 13, 2005).

58. *Id.*

applies for benefits on the other parent's account. For example, when a child marries, loses benefits on one parent's account, and the marriage ends, the disabled adult child can apply for benefits on the other parent's account.

AN ODD RESULT

The reentitlement rules highlight an odd result. For illustration, consider two equally disabled adult children, each with a deceased parent. The only difference between the two children is that one applies for and receives disabled adult child's benefits. When they both get better and go to work for two years at the substantial gainful activity level, the one who had disabled adult child's benefits, of course, loses the benefits because of work activity. But then say they both get worse and are disabled again. The one who received benefits before can apply for reentitlement to disabled adult child's benefits. The other, because he cannot show continuous disability since before age twenty-two, will never be entitled to disabled adult child's benefits.

Citing the reentitlement provisions, a Pennsylvania district court held that if a claimant was disabled by an impairment at age twenty-two and again disabled by the same impairment when he applied for childhood disability benefits, he was entitled to benefits.⁵⁹ The court remanded the case for further findings of fact.⁶⁰ On remand, SSA found that the claimant was disabled before age twenty-two and again disabled when he applied, but that he was not disabled from May 1964 until December 1972, a period of eight and one-half years.⁶¹ Given this, SSA found that the claimant was not entitled to benefits.⁶² When the case went back to court, without mentioning the reentitlement provisions, the court held that the plaintiff was entitled to benefits because the statute did not require that a claimant be continuously disabled.⁶³

Although the first *Axe* decision is interesting because it mentions the reentitlement provisions, the second decision is virtually useless. It stands as the sole case holding that the

59. *Axe v. Harris*, 503 F.Supp. 1049, 1051 (E.D. Pa. 1980).

60. *Id.*

61. *Axe v. Dep't of Health & Human Serv.*, 564 F. Supp. 789 (E.D. Pa. 1983).

62. *Id.*

63. *Id.*

statute does not require continuous disability since before age twenty-two. It has never been followed by another district court in a published decision. It was relied on once by the district court in Puerto Rico in an unpublished opinion, but that decision was reversed by the First Circuit Court of Appeals.⁶⁴

MEDICARE AND MEDICAID

Medicare works the same for disabled adult children as for recipients of social security disability benefits. Both groups have a twenty-four month waiting period. Both groups are required to pay a Medicare premium to receive Part B, which pays for doctor visits, among other things.

The Social Security Act also provides for special Medicaid (Title 19) eligibility for some disabled adult children. Recall that, before receiving disabled adult child benefits, a typical beneficiary may receive SSI for many years, including automatic Medicaid eligibility in most states. The amount of disabled adult child benefits is great enough to disqualify many beneficiaries from receiving SSI. Others receive both SSI and disabled adult child benefits for a time and then lose SSI when DAC benefits are increased upon the death of a parent or sometimes with a cost of living increase. Without a special provision in the Social Security Act, Medicaid benefits would be lost when SSI is lost.

The Social Security Act provides that, when a beneficiary loses SSI because of receipt of childhood disability benefits, for purposes of Medicaid eligibility, the DAC beneficiary is to be treated as if he or she were still receiving SSI benefits and, thus, eligible for Medicaid "so long as he or she would be eligible for [SSI benefits] in the absence of such child's insurance benefits or such increase."⁶⁵ Note that to continue Medicaid eligibility, 1) the DAC beneficiary would have to meet the SSI asset limitations, and 2) income from sources other than DAC benefits could not be so great as to disqualify the person for SSI.

64. *Suarez v. Dep't of Health & Human Serv.*, 755 F.2d 1 (D. P.R. 1985).

65. 42 U.S.C. § 1383c(c) (2000).

APPENDIX A

Relationship	Standard	Dependency Requirement	Citations
Natural child	Could inherit under state inheritance laws.	Deemed dependent.	20 C.F.R. §§ 404.355(a)(1), 404.361 (2004).
Natural child	Invalid marriage of parents because of legal impediment.	Deemed dependent.	20 C.F.R. §§ 404.355(a)(2), 404.361 (2004).
Natural child	Parents never married. Insured 1) acknowledged paternity in writing, 2) decreed by court to be parent, or 3) was ordered by court to contribute to support before death of insured.	Deemed dependent.	20 C.F.R. §§ 404.355(a)(3), 404.361 (2004).
Natural child	Parents never married, but evidence exists other than above that shows insured is parent.	Parent was living with child or contributing to support at time child applied for benefits or at time insured died.	20 C.F.R. §§ 404.355(a)(4), §404.366(a) (defining "contribution for support"), §404.366(c) (defining "living with") (2004).
Natural child	Adopted by someone else during insured's lifetime but after child applies for benefits.	Deemed dependent.	20 C.F.R. § 404.361(b)(2)(i) (2004).
Natural child	Adopted by someone else during insured's lifetime but after beginning of insured's period of disability.	Deemed dependent.	20 C.F.R. § 404.361(b)(2)(ii) (2004).

Natural child	Adopted by someone else at some other time during insured's lifetime.	Parent was living with child or contributing to support 1) at time child applied for benefits, 2) at time insured died, 3) when insured became entitled to retirement benefits, or 4) at beginning of insured's period of disability.	20 C.F.R. § 404.361(b)(1) (2004).
Legally adopted child.	Adopted by insured <i>before</i> insured became entitled to disability or retirement benefits.	Deemed dependent.	20 C.F.R. § 404.362(a) (2004).
Legally adopted child <i>after</i> insured became entitled to disability or retirement benefits.	Child applies for benefits <i>after</i> death of insured.	Deemed dependent.	20 C.F.R. § 404.362(a) (2004).
Legally adopted child <i>after</i> insured became entitled to disability or retirement benefits.	Child is natural child or stepchild of insured.	Deemed dependent.	20 C.F.R. § 404.362(b)(2) (2004).
Legally adopted child <i>after</i> insured became entitled to disability or retirement benefits.	Child had not attained the age of 18 before adoption proceedings began and adoption issued by a court in U.S.	Deemed dependent.	20 C.F.R. § 404.362(b)(1)(i) (2004).

<p>Legally adopted child – adopted <i>after</i> insured became entitled to disability or retirement benefits.</p>	<p>Child had attained the age of 18 before adoption proceedings were started, <i>and</i> adoption was issued by a court in U.S.</p>	<p>Child must be living with insured or receiving 1/2 support from insured for year preceding adoption.</p>	<p>20 C.F.R. § 404.362(b)(1)(ii) (2004).</p>
<p>Legally adopted child – adopted after insured's death by surviving spouse.</p>	<p>Insured started adoption before death <i>or</i> surviving spouse completed adoption within two years of insured's death.</p>	<p>Child must be living with insured or receiving 1/2 support from insured at time of death.</p>	<p>20 C.F.R. § 404.362(c)(1) (2004).</p>
<p>Legally adopted child – adopted after insured's death by surviving spouse.</p>	<p>Child is grandchild or step grandchild of insured <i>and</i> adoption took place in U.S. <i>and</i> at time of insured's death, the natural, adopting or stepparent was not living in insured's household <i>and</i> not making regular contributions toward support.</p>	<p>Child must have begun living with insured before age 18 and living with insured in U.S. and receiving 1/2 of support from insured for the year before insured became entitled to disability or retirement benefits or died, or, if the insured had a period of disability before becoming entitled to benefits or died, for the year immediately before the month in which the period of</p>	<p>20 C.F.R. §§ 404.362(c)(2), 404.364 (2004).</p>

		disability began. If the child was born during the one year period, the child must have lived with the insured and received at least 1/2 support for substantially all of the period that begins with the date of birth.	
Stepchild – insured alive when child applies.	Child must have been stepchild for one year immediately before applying.	Child must be receiving 1/2 support when child applies, or, if insured had period of disability that lasted until entitlement to disability or retirement then at the beginning of the period of disability or at the time the insured became entitled to benefits.	20 C.F.R. §§ 404.357, 404.363 (2004). ⁶⁶ 42 U.S.C. § 402 (2000).

66. 20 C.F.R. § 404.363 is out of date. It was not revised following passage of Section 104 of P.L. 104-121 (Contract with America Advancement Act of 1996), which applies to a stepchild becoming initially entitled in July 1996 or later. This Act removed the opportunity for a stepchild to meet the dependency requirements by living with the stepparent. The regulation still states that the dependency requirement for a stepchild may be met if the child was living with the stepparent at the crucial time. See Social Security Administration, *POMS GN 00306.232, Dependency Requirements Stepchild* (December 12, 2003), available at <http://policy.ssa.gov/poms.nsf/lnx/0200306232!opendocument> (last visited Apr. 13, 2005).

Stepchild – insured not alive when child applies.	Child must have been stepchild for nine months before insured died unless death was accidental or occurred in the line of duty while in the U.S. armed services.	Child must be receiving 1/2 support when insured died or if insured had period of disability that lasted until entitlement to disability or retirement, then at the beginning of the period of disability or at the time the insured became entitled to benefits.	20 C.F.R. §§ 404.357, 404.363 (2004), ⁶⁷ 42 U.S.C. § 402 (2000).
Grandchild or stepgrandchild	Natural or adoptive parents must have been either deceased or disabled at time grandparent or stepgrandparent became entitled to retirement or disability benefits or died; or if the grandparent or stepgrandparent had a period of disability that continued until entitlement to benefits or death, at the time the period of disability began.	Child must have been living with insured before age 18 and living with insured in U.S. and receiving 1/2 of support from insured for the year before insured became entitled to disability or retirement benefits or died; or, if the insured had a period of disability before becoming entitled to benefits or died, for the year	20 C.F.R. §§ 404.358, 404.364 (2004).

67. *Id.*

		<p>immediately before the month in which the period of disability began. If the child was born during the one year period, the child must have lived with the insured and received at least 1/2 support for substantially all of the period that begins with the date of birth.</p>	
<p>Equitably adopted child – equitable adoption occurred <i>before</i> insured's entitlement to benefits.</p>	<p>Insured agreed to adopt child, but adoption did not occur. Agreement, valid under state law, would allow child to inherit if insured died intestate.</p>	<p>Child must be living with insured or receiving contributions for support at time of insured's death or when child applied, or, if insured had period of disability that lasted until insured became entitled to retirement or disability benefits, then at the beginning of the period of disability or at the time the insured became entitled to benefits.</p>	<p>20 C.F.R. §§ 404.359, 404.365 (2004).</p>

Equitably adopted child – equitable adoption occurred <i>after</i> insured's entitlement to benefits.	Insured agreed to adopt child, but adoption did not occur. Agreement, valid under state law, would allow child to inherit if insured died intestate.	Dependency cannot be established during insured's life. Child must be living with insured or receiving contributions for support at the time of the insured's death.	20 C.F.R. §§ 404.359, 404.365 (2004).
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