

2003

Should a Disability Benefits Claimant Be Allowed to Show that Her Previous Occupation Is Obsolete?

Jay E. Grenig

Marquette University Law School, jay.grenig@marquette.edu

Follow this and additional works at: <https://scholarship.law.marquette.edu/facpub>



Part of the [Law Commons](#)

Publication Information

Jay E. Grenig, Should a Disability Benefits Claimant Be Allowed to Show that Her Previous Occupation Is Obsolete?, 2003-04 Term Preview U.S. Sup. Ct. Cas. 27 (2003). © 2003 American Bar Association. This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Repository Citation

Grenig, Jay E., "Should a Disability Benefits Claimant Be Allowed to Show that Her Previous Occupation Is Obsolete?" (2003). *Faculty Publications*. 442.

<https://scholarship.law.marquette.edu/facpub/442>

This Article is brought to you for free and open access by the Faculty Scholarship at Marquette Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

Should a Disability Benefits Claimant Be Allowed to Show That Her Previous Occupation Is Obsolete?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 27-30. © 2003 American Bar Association.

Jay E. Grenig is a professor of law at Marquette University Law School in Milwaukee, Wisconsin. Prof. Grenig is a co-author of *West's Federal Jury Practice and Instructions* (5th edition). He can be reached at (414) 288-5377 or at jgrenig@earthlink.net.

ISSUE

Can the commissioner of Social Security determine that a claimant is not "disabled" within the meaning of the Social Security Act (the Act) because the claimant remains physically and mentally able to do her previous work, without first determining whether that previous work exists in significant amounts in the national economy?

FACTS

Pauline Thomas worked as a housekeeper until 1988 when she had a heart attack. Thomas then worked as an elevator operator until she was laid off in August 1995. After her position was eliminated, Thomas applied to the Social Security Administration for Supplemental Security Income and Disability Insurance benefits, claiming that she had a heart condition and related medical problems. According to her July 11, 1996, application, she suffered from irregular heartbeat, high blood pressure, dizziness, and fatigue. Thomas also claimed that she suffered from low-

er-back problems caused by lumbar radiculopathy and asserted that she had fractured an ankle on July 8, 1996. She was 54 years old at the time of her application.

The commissioner of Social Security denied her application and an administrative law judge upheld the denial. The administrative law judge (ALJ) found that Thomas had hypertension, cardiac arrhythmia, cervical and lumbar strain/sprain, and a transient ischemic attack, but that she did not have an impairment listed in the list of impairments that are presumed to be severe enough to preclude any gainful work. The ALJ also found that Thomas had the residual functional capacity to perform at least light work, and therefore that she could perform her past relevant work as an elevator operator. The ALJ rejected Thomas's argument that her past relevant work as an elevator operator no longer exists in the

(Continued on Page 28)

BARNHART V. THOMAS
Docket No. 02-763

Argument Date:
October 14, 2003
From: The Third Circuit

Case at a Glance

Claimants seeking benefits under the Social Security Act need to show that their impairments are so severe that they can neither do their previous work nor engage in any other kind of "substantial gainful work" that exists in "significant numbers" in the "national economy." In this case, the Social Security Administration denied benefits on the grounds that the claimant is physically able to perform her previous job as an elevator operator. The claimant objects that that occupation has essentially vanished.

national economy. According to the ALJ, Social Security regulations excluded from Step Four of the sequential process for determining disability any inquiry into whether the past work actually exists. Holding that Step Four considers only whether a claimant can perform her previous job, the ALJ ruled that Thomas was not under a “disability” and ended the evaluation at that point without proceeding to the next step.

Thomas sought review by the U.S. District Court for the District of New Jersey. The district court also upheld the denial, ruling that Thomas was not disabled under the five-step sequential process for determining eligibility for disability benefits because it found that she could continue to perform her previous work as an elevator operator. The district court ruled that even if Thomas was unable to perform any job that exists in substantial numbers in the national economy and even if she met all the other requirements for Disability and Supplemental Security Income benefits, she still could not obtain benefits because the fact remained that she could perform a job serving as an elevator operator.

Thomas then appealed to the U.S. Court of Appeals for the Third Circuit. Reversing the district court, the Third Circuit agreed with Thomas that she should have been permitted to show that elevator-operator jobs no longer exist in substantial numbers in the national economy. 294 F.3d 568 (3d Cir. 2002) (*en banc*). Based on the relevant provisions of the Social Security Act and the broader statutory scheme, the Third Circuit held that for the purposes of Step Four of the evaluation process, a claimant’s previous work must be substantial gainful work that continues to exist

in the national economy. The Third Circuit determined that a claimant may proceed to Step Five by showing either that the claimant cannot perform her past work or that the previous work is no longer substantial gainful work that exists in the national economy.

Although the literal language of the regulation governing Step Four appears to support the ALJ’s decision to terminate the inquiry at Step Four, the Third Circuit said that this regulation should be read, if possible, so as not to conflict with the statute it implements. According to the Third Circuit, a literal reading of the regulation regarding Step Four would set up an artificial roadblock to an accurate determination of whether Thomas can “engage in any ... kind of substantial gainful work which exists in the national economy.” The court explained that if Thomas can show that elevator-operator positions really are obsolete, then the fact that she still possesses the physical or mental capability to perform the duties of an elevator operator would not establish that she can engage in any substantial gainful activity that actually exists.

The Third Circuit concluded that the ALJ should have allowed Thomas to present evidence on whether elevator-operator positions are obsolete. If Thomas had made such a showing, the court ruled that the ALJ then should have proceeded to Step Five of the sequential evaluation to ascertain whether Thomas’s medical impairments prevent her from engaging in any work that actually exists.

The Supreme Court thereafter granted the commissioner’s request that it review the Third Circuit’s decision. 123 S.Ct. 1251 (2003).

CASE ANALYSIS

Title II of the Social Security Act provides Social Security disability insurance benefits for individuals who are “under a disability” and meet other eligibility requirements. 42 U.S.C. § 423(a). The Act also provides Supplementary Security Income benefits for “disabled” indigent persons. 42 U.S.C. § 1382. The Act defines “disability” as follows:

(1) The term “disability” means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

(2) For purposes of paragraph (1)(A)—

(A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), “work which exists in the national economy” means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

42 U.S.C. § 423(d); see also 42 U.S.C. § 1382c(a)(3) (providing the same definitions for Supplemental Security income benefits).

The Social Security regulations provide a sequential evaluation process for determining whether a claimant is under a disability. At Step One, the commissioner determines whether the claimant is currently engaging in a "substantial gainful activity." If the claimant is engaging in a "substantial gainful activity," the claimant is not eligible for benefits.

At Step Two, the commissioner determines whether the claimant has a "severe impairment." If the claimant does not have a severe impairment, the claimant is not eligible for benefits. At Step Three, the commissioner determines whether the claimant suffers from an impairment on the list of impairments presumed to be severe enough to preclude gainful work. If he or she does not, the commissioner moves to Step Four.

At Step Four, the commissioner decides whether the claimant retains the residual functional capacity to perform the claimant's past relevant work. The claimant bears the burden of demonstrating an inability to return to past relevant work. If the claimant is unable to resume the former occupation, the evaluation moves to Step Five. At Step Five, the commissioner has the burden of demonstrating that the claimant is capable of performing other jobs existing in significant numbers in the national economy.

The commissioner argues that permitting a claimant to proceed to Step Five if the claimant can show that his or her past job does not exist in significant numbers in the national economy would convert disability benefits into unemployment benefits. Thomas disagrees, arguing that awarding disability benefits to a claimant who, as a result of a qualifying impairment, cannot perform any job that actually exists

is hardly the equivalent of providing unemployment compensation. According to Thomas, denying benefits because a claimant could perform a type of job that does not exist seems nonsensical.

According to the commissioner, the Social Security Administration's construction of the Act is entitled to great deference and is supported by the text of 42 U.S.C. § 423(d) and the Act's evolution and history. The commissioner contends that the Third Circuit's construction is inconsistent with Congress's intent in enacting that provision. She claims that the commissioner's long-standing construction serves sound purposes in the administration of the disability programs. The commissioner explains that the ability to perform a prior job is the most concrete and individualized measure of the individual's capabilities; consequently, if the claimant is in sufficient physical and mental condition to perform his or her previous work, the impairment is clearly not so severe as to preclude employment.

Rejecting this argument, Thomas contends that the Third Circuit's construction is superior to that of the commissioner because it is the only construction that harmonizes the intent, result, and plain meaning of the statute's defining provision in paragraph (1)(A) with its effectuating/describing provision in paragraph (2)(A). Thomas says that the Third Circuit's construction is the logical manner in which to link the remedial character of the Social Security Act with the realities of the workplace that need the remedy.

The commissioner argues that it is speculative to hypothesize about claimants who can do only one form of work (a particular past job) and no other, only to see that one form of work cease to exist in significant

numbers in the national economy. She states that no principle of statutory construction requires Congress to anticipate—or imposes a presumption that Congress is deemed to anticipate—such a remote hypothetical case and to fashion the definitions of disability, governing millions of claims each year, to accommodate it.

On the other hand, Thomas asserts that the commissioner's scientific, statistical study on the availability and existence of jobs for persons of differing ages, schooling, skills and physical capacities yields the empirical result that no jobs exist in significant numbers that can accommodate her residual capacity and vocational profile. Thomas says that the only job identified by the commissioner is Thomas's previous occupation—an occupation that no longer exists.

SIGNIFICANCE

The Supreme Court is called upon to resolve a disagreement among the circuit courts of appeals with respect to the proper construction of the Social Security Act. The Ninth and Sixth Circuits disagree with the Third Circuit's interpretation of the Act. See *Quang Van Han v. Bowen*, 882 F.3d 1453 (9th Cir. 1989) (indicating that the interpretation that the Third Circuit set out is a reasonable interpretation, but stating that it is "not the only one"); *Garcia v. Secretary of Health & Human Services*, 46 F.3d 552 (6th Cir. 1995) (same). The Eighth and Fourth Circuits also disagree with the Third Circuit's position. See *Rater v. Chater*, 73 F.3d 796 (8th Cir. 1996); *Pass v. Chater*, 65 F.3d 1200 (4th Cir. 1995).

In *Kolman v. Sullivan*, 925 F.2d 212 (7th Cir. 1991), the Seventh Circuit held that the ALJ should have continued to Step Five because

(Continued on Page 30)

the claimant's past job was a temporary position. In dicta, the court observed that even if a claimant's past job was a permanent position, an ALJ would be required to move to Step Five if that past job had disappeared. The Seventh Circuit noted that the fact a claimant could perform a past job that no longer exists would not be "a rational ground for denying benefits." The Seventh Circuit stated:

The failure of the regulations to require that the job constituting the applicant's past work exists in significant numbers probably just reflects an assumption that jobs that existed five or ten or even fifteen years ago still exist. But if the assumption is dramatically falsified in a particular case, the administrative law judge is required to move on to the next stage and inquire whether some other job that the applicant can perform exists in significant numbers today somewhere in the national economy.

A decision by the Supreme Court to uphold the commissioner's position in the *Thomas* case would mean that an inability to engage in substantial gainful activity is not "by reason of" the impairment if the claimant retains the physical and mental capacity to perform the claimant's former job. Because the Social Security Administration decides more than 2 million claims for disability benefits each year, it has been suggested that the Third Circuit's interpretation would introduce a significant and unnecessary new burden into the massive disability program. In addition, the Third Circuit's construction could preclude consideration of a claimant's ability to do the claimant's former work any time that job does not exist in "significant numbers" in the national econ-

omy, including cases in which the claimant's former position is available to the claimant.

On the other hand, if the Third Circuit's construction is upheld, it has been suggested that the Social Security Administration would not be overburdened by a "broader inquiry" because the Third Circuit's construction does not change the scheme of the sequential evaluation. The burden will still remain with the claimant at the Fourth Step. The commissioner still will not need to award disability unless it is satisfied that no other job existing in significant numbers can fit the claimant's residual capacity.

ATTORNEYS FOR THE PARTIES

**For Jo Anne B. Barnhart,
Commissioner of Social Security**
(Theodore B. Olson, Solicitor
General (202) 514-2217)

**For Pauline Thomas (Abraham S.
Alter (732) 499-9400)**