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Workmen's Compensation and the Social Security Disability Program: A Contrast*

Arthur Abraham**
Irwin Wolkstein***

Recently, concern has been expressed that the federal disability insurance program may expand and engulf state workmen's compensation systems; legislation aimed at eliminating this possibility has been introduced in Congress. The authors attempt in this article to shed some light on the controversy; after describing the various disability protection programs, they turn to a detailed discussion of the overlap, interrelationship, and differences between the protection offered by the federal social security and state workmen's compensation programs. They conclude by discussing the arguments which can be made both for and against an "offset" provision in the social security law.

There are today in the United States programs of many types dedicated to solution of a single problem—the protection of workers against the hazard of disability. Since these programs have different origins—in employers and unions, in state governments, and in the federal government—it can be readily understood that the solutions offered do not fit into a neatly interlocking pattern which exactly covers the area of the problem. Rather there is to some extent a tendency of solutions to overlap in part and to leave part of the problem unsolved. To discuss in detail all of the programs in the area would be beyond the scope of this article. We propose here to discuss in some detail only the interrelationship of a single federal program—the social security disability program—with a single set of state programs—workmen's compensation.

That there is a relationship between the two was recognized by the federal government as early as 1956, when the provisions for cash disability insurance benefits were added to the Social Security Act. Those provisions required, among other reductions, a reduction (with some exceptions) in the disability insurance benefits if workmen's compensation was also payable to the same individual. Later, in 1958, this offset provision was repealed. Recently, however, there has been some expression of concern that the federal disability insurance

*The views expressed herein by the writers are their own, and do not necessarily reflect the official views of the Department of Health, Education, and Welfare.

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program will expand and engulf the state workmen's compensation programs. As a consequence, legislation has been introduced in the current Congress designed to reinstate in one form or another, in whole or in part, an offset provision when there is payment of state workmen's compensation.¹ Thus there is a particular timeliness to a discussion of the ways in which the needs of disabled workers and their families are serviced by these two important social insurance programs.

To study the ways in which the social security disability insurance program and the state workmen's compensation program operate in partnership with each other, it is helpful to look at the picture of social insurance in general in the United States and at the way it has developed. It is important, also, to look at the programs themselves as they fit into the broad social insurance structure, both separately and together.

I. NATURE OF THE AMERICAN SOCIAL INSURANCE SYSTEM

Structurally and functionally, the American social insurance system—a term which includes all social insurance programs—is as complex as any system in our society. The protection these programs provide is by no means uniform or consistent throughout the country, nor do they reflect a single or fully agreed upon philosophy. However, the programs functioning together can be said to form a system, even if not a centralized or unified one. Diversity and decentralization more accurately characterize the American system. These diverse programs deal with different phases of social insurance, or with different aspects of the same phase. They are conducted independently at different levels of government and by private groups.

These characteristics reflect several features of the American approach to the overall problem of providing security against the major threats to work income. One is the belief that several techniques operating simultaneously and at different government levels, and under separate plans designed to cover different specific risks, more effectively work together to aid in accomplishing the overall benefit objective of social insurance. This objective is to replace earnings when the event insured against occurs and results in the loss of earnings. It is accomplished not only through programs generally considered to meet the definition of social insurance, but also through other government welfare programs and through private means. Such a pluralistic approach to security, it has been said, is consistent with

1. See H.R. 5210 (introduced by Rep. Herlong), H.R. 5211 (introduced by Rep. Thompson), and H.R. 6201 (introduced by Rep. Curtis), 88th Cong., 1st Sess. (1963). At the writing of this article, none of these bills has been reported out of committee.

and adequately reflects "the political organization of the United States and the historical distribution of responsibility for specific functions between the various levels of government, as well as the heterogeneity of economic conditions and social attitudes within the states . . ."²

Two perceptive observers have characterized the United States social security system in the following manner:

No one philosophy or coherent set of objectives runs through our social security legislation and practice. We are a nation of continental dimensions with highly diversified ethnic, cultural, economic and social influences. We have learned to live together with reasonable success, under a federal government, through continuous compromise and accommodation. Many contradictory and often clashing influences have participated in and affected our institutions.³

Another feature of the American approach is that social insurance programs have evolved and are continuing to evolve on a piecemeal, gradual, and pragmatic basis. This, too, leads to a diversity of protection—with separate programs for different risks included among both federal and state programs. This diversity arises not only out of a deliberate choice, on the federal level, to leave much of the protection to decentralized state and local initiative, but also out of the historical fact that some state programs were already on the scene when the federal social security program was established.⁴

Along with the evolution of the federal and state programs there has been a development and strengthening of individual, group, and employer-based economic security programs. There is, nevertheless, common recognition that the basic means for protecting workers and their families against economic insecurity due to the loss of work income is the federal social security program, with the other benefit plans playing important supplementary roles.⁵ Probably a principal reason why this view of federal social security has become accepted is that the social security program is the one program that protects substantially all of the families of the United States; the majority of retired and permanently and totally disabled workers (and their qualified dependents), and the widows and minor children of such workers, get social security benefits.

2. BURNS, *THE AMERICAN SOCIAL SECURITY SYSTEM* 46 (1949).

3. Somers & Somers, *Bulletin of the International Social Security Association*, in *SOCIAL SECURITY: PROGRAMS, PROBLEMS AND POLICIES* 44 (Haber & Cohen ed. 1960).

4. Cf. BROWN, *The American Philosophy of Social Insurance*, in *SOCIAL SECURITY: PROGRAMS, PROBLEMS AND POLICIES* 64 (Haber & Cohen ed. 1960).

5. *E.g.*, in 1955 the Committee on Ways and Means of the House of Representatives stated in its report recommending provision for cash disability benefits: "The old-age and survivors insurance system is the basic program which provides protection for America's families against the loss of earned income upon the retirement or death of the family provider." H.R. REP. No. 1189, 84th Cong., 1st Sess. 2 (1955).

This attitude toward a federal social security program was not always prevalent, however. In upholding the constitutionality of the old-age insurance provisions of the Social Security Act of 1935, the Supreme Court described the change in public philosophy that resulted largely from the depression of the 1930's. In *Helvering v. Davis*,⁶ Mr. Justice Cardozo, speaking for the Court, said:

The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from State to State, the hinterland now settled that in pioneer days gave an avenue of escape. . . . Spreading from State to State, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the Nation. . . . But the ill is all one, or at least not greatly different, whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.⁷

The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it effectively⁸

With this background, let us proceed to examine various parts of the social insurance system, as well as certain welfare programs, and the way they function together.

A. Social Security

The Federal Social Security Act of 1935 made a modest but important beginning in the direction of providing security against old age and unemployment. It provided a limited federal program of old-age insurance benefits for certain employees, and also, by use of grants-in-aid and of the taxing power, encouraged the states to provide assistance for needy aged people and at least minimal protection against loss of earnings due to unemployment.⁹ The federal program has since been expanded to provide insurance against loss of earnings resulting from death and, later, from disability, to broader classes of employees and to self-employed persons, and to their dependents and survivors. Today social security is by far the major program offering protection against insecurity due to loss of work income from old age, death, and long-term, severe disability.

6. 301 U.S. 619 (1937).

7. *Id.* at 641.

8. *Id.* at 644.

9. At the time the Social Security Act was enacted, only one state, Wisconsin, had enacted an unemployment insurance law.

B. *Other Programs*

Additional public and private programs that provide social protection may be classified as follows:

- (a) Social insurance programs covering special classes of workers or employees and their families, such as certain servicemen's benefit programs and National Service Life Insurance, railroad retirement and unemployment insurance programs, civil service retirement and related programs, programs providing retirement and other protection for civilian state and local governmental employees, and workmen's compensation and sickness and temporary disability insurance programs.
- (b) Federally-aided or established assistance programs designed to provide minimum security for needy persons or needy veterans not covered under social insurance programs or whose resources are inadequate to meet their needs despite eligibility under other programs.
- (c) Private, group or employer-sponsored insurance programs.

C. *Protection Against Earnings Loss Due to Disability*

Consistent with the perspective we have chosen from which to view two of the programs (social security disability insurance and workmen's compensation) which are part of the American social insurance system is an initial examination of the combined protection against disability.

The nation's programs afford less comprehensive protection against loss of earnings due to disability than they do against old age and death. The federal social security (old-age, survivors, and disability insurance) program has stricter qualifying earnings requirements for disability insurance benefits than for old-age or survivors insurance benefits; only about 51 million workers were insured for disability protection at the beginning of 1962, while a total of 89 million persons met the insured status requirements for old-age and survivors insurance benefits.¹⁰ More important, the disability protection offered under social security covers only very severe, long-term disabilities. This program provides no protection during the first six months of disability; further, it provides no insurance for disability which is not expected to last indefinitely (even though the worker's

10. A worker can qualify for old-age benefits with social security coverage for one-fourth the time between 1950 (or age twenty-one, if later) and retirement age (but not less than for one and a half years); to qualify for disability benefits a worker must, with rare exceptions, have social security coverage for five of the ten years before he is disabled and, additionally, be "fully insured" under the statute.

impairment has actually lasted six months). Also, a worker who is unable by reason of disability to continue to work at his usual occupation is not entitled to benefits if he can do other substantial gainful work; disability insurance protection is available only if he is unable to perform any substantial gainful activity. On the other hand, the temporary disability insurance programs, which are state programs, protect less than 12 million of the 80 million gainfully employed workers and workers available for work, and those only for the first six months.

The present workmen's compensation programs (which cover both long and short-term disabilities) are almost all state programs.¹¹ Although these programs cover an estimated 40 million employees, large numbers of workers and families are excluded. For example, self-employed persons are almost never included in these programs, and other large groups, such as household workers, people in casual employment, and farm workers, are generally excluded. As will be shown below, other government programs also apply only to limited groups of workers and families, except for the "back-up" assistance programs and programs for needy veterans, which provide minimal protection on the basis of need.

Therefore, while most families have a measure of protection against loss of earnings due to old age and death, many do not have adequate protection against such loss due to disability. On the other hand, as is to be expected, some disabled workers come under the protection not only of social insurance but of one or more other programs; infrequently benefits are received from more than one social insurance program.

This lack of complete protection under any one program against disability reflects what could be deemed a "supplementation approach" to protection against social risks. It is generally felt that public insurance programs, particularly Federal Old-Age, Survivors, and Disability Insurance, should provide basic protection against the major or catastrophic hazards to work income (such as permanent and total disability), and that supplemental protection should be provided by public assistance programs and by private insurance. The supplemental programs are intended (1) to augment the modest benefits payable under social security, *e.g.*, in cases of disability covered under that program, (2) to provide protection for those persons not covered under social security, and (3) to provide security against other types of disability.

Judged from the standpoint of adequacy, the disability benefits pat-

11. There are federal employees' compensation programs covering, among others, employees of the federal government and certain maritime workers.

terns are not fully consistent or complete in all respects; in our diversified and decentralized system, inadequacies and even occasional excesses are inevitable. Disability protection (other than under the Federal Old-Age, Survivors, and Disability Insurance program) varies with the type of disability, with the worker's occupation (or even his specific employer), and, in some programs, with the state in which he lives. While this lack of consistency may be regarded as a weakness, it does have the merit of providing a degree of flexibility and variety which would be difficult to achieve if only a single approach were taken.

II. DESCRIPTION OF PROGRAMS PROVIDING DISABILITY PROTECTION

We now turn to a brief description of the provisions of those plans and programs that provide disability protection for American workers and families.

A. *The Federal Social Security Program*

The Social Security Act of 1935, as pointed out above, represented a modest approach to a tremendous problem—insecurity due to old age and unemployment. The framers of the program did not assign to the federal government the sole responsibility for dealing with the problem. Rather, they proposed a division of responsibility—responsibility for the old-age insurance benefits program would be vested in the federal government, while the unemployment compensation and assistance programs were to be state-administered in accordance with certain basic federal requirements and, in the case of assistance programs, with substantial federal financial aid.

The federal social security insurance program as it exists today has evolved through a number of stages since the 1935 act. At the present time virtually all gainfully employed people, except those government employees who are under government staff retirement systems, and self-employed doctors of medicine, are covered.

The desirability of including in this social insurance program protection against earnings loss due to disability had been under consideration for a number of years before this risk was covered. Characteristically, the initial step, taken in 1954, was a modest one consisting of the so-called disability freeze. Under this provision, benefit rights of workers are preserved during periods of prolonged and serious disability—similar to the waiver of premiums provision included in some private life insurance policies.¹²

To promote rehabilitation of impaired workers, the statute required

12. 64 Stat. 510 (1950), 42 U.S.C. § 416(c) (1958).

that disability applicants be referred to a state vocational rehabilitation agency.¹³ Further, the law provided that determinations of disability under the provision were to be made under contract for the federal program by state agencies, ordinarily vocational rehabilitation agencies.¹⁴ Perhaps an underlying reason for the use of state agencies in administration of the disability program was the desire to make use of already established relationships between these agencies and the medical profession, the source of most of the evidence on which determinations of disability are based. This federal-state administrative arrangement was continued when the program was modified in 1956 to provide cash disability benefits.¹⁵ Such benefits are paid to disabled workers (supplementary family benefits for spouses and children of disabled workers are also payable) and to disabled sons and daughters of retired, disabled, or deceased insured workers, if the disability of such children began before age eighteen and continued thereafter.¹⁶

The law defines disability as "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 to be of long-continued and indefinite duration."¹⁷ This requirement is comparable with, but not identical to, permanent and total disability as used in other programs, *e.g.*, commercial insurance contracts. Disability insurance benefits are provided only after a waiting period of six consecutive full calendar months; the first payment is made for the seventh full calendar month of disability.¹⁸ The benefits terminate after the worker's disability ends, or when he attains age sixty-five, or becomes entitled to old-age insurance benefits, or dies.¹⁹

B. *Supplementary Government Programs*

As noted previously, there are a number of public programs which supplement the rather limited disability protection provided under old-age, survivors, and disability insurance.

1. *Public Assistance Programs.*—Perhaps the most important of these supplementary programs are the federal-state public assistance programs which provide aid to certain categories of needy persons: the blind, dependent children, and the permanently and totally disabled. These programs, unlike the social security disability insurance pro-

13. 68 Stat. 1082 (1954), 42 U.S.C. § 422(a) (1958).

14. 68 Stat. 1081 (1954), 42 U.S.C. §§ 421(a)-(b) (1958).

15. 70 Stat. 815 (1956), 42 U.S.C. § 423 (1958).

16. 64 Stat. 483 (1950), 42 U.S.C. § 402(d) (1958).

17. 70 Stat. 815 (1956), 42 U.S.C. § 423(c)(2) (1958).

18. 70 Stat. 815 (1956), 42 U.S.C. § 423(c)(3) (1958).

19. 70 Stat. 815 (1956), 42 U.S.C. § 423(a)(1) (1958).

gram, base eligibility for benefits on need, and thus are not social insurance. Nevertheless, they function as a very important "back-up" to the social security disability program. Some of these were established under the Social Security Act of 1935; others (such as aid to the permanently and totally disabled) have been established since that time.

Although these programs are administered in nearly every state and thus provide protection for many needy disabled persons, they provide only minimal benefits. They are financed in part through federal grants-in-aid.

At the end of 1962, 437,000 persons were receiving aid to the permanently and totally disabled and 100,000 were receiving aid to the blind; in that year 360 million dollars were paid in behalf of the former recipients and 94 million dollars in behalf of the latter.²⁰

2. *Veterans Programs.*—Three separate disability programs are administered by the Veterans Administration. About 22 million veterans are covered under the following programs: pension for non-service-connected disability; compensation for service-connected disability; and insurance benefits for "permanent and total" disability (as part of the government's National Service Life Insurance for veterans). The pension program resembles in some respects the federal-state assistance programs just described, because pensions are payable only to veterans with low incomes. The veterans insurance program is, except that it is provided under government auspices, similar in effect to individual private insurance which may be purchased to supplement social security protection. The compensation program is similar in some respects to a workmen's compensation program: it provides compensation for veterans with service-connected disability on much the same basis as the state workmen's compensation programs.

3. *Railroad Retirement Program.*—The Railroad Retirement Act²¹ provides annuities for disability, retirement, or death. There is a close coordination between the railroad program and the social security insurance program so that, in general, employees with less than ten years of railroad employment have their earnings treated as covered under the social security program, and such workers and their dependents cannot receive benefits under the railroad retirement program.²² Career railroad workers (with at least ten years of service) may in some instances (because of additional non-railroad work) be eligible for retirement or disability benefits under both programs.

20. U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, HEALTH, EDUCATION, AND WELFARE INDICATORS, AUGUST 1963, at 40-41 (1963).

21. 49 Stat. 967 (1935), 45 U.S.C. § 228 (1958).

22. 49 Stat. 967 (1935), 45 U.S.C. § 228e(k)(1) (1958).

Under the railroad program, disability annuities are payable to workers who are permanently disabled for their regular occupations (but not necessarily for other work), if they are at least sixty years of age and have ten years of service, or at any age if they have twenty-five years of service. Workers who are under age sixty and have at least ten years of service are eligible for a disability annuity if they are permanently and totally disabled.²³ In calendar year 1962, 750,000 workers were protected against disability under the railroad program. In June 1962, 42,000 under age sixty-five were receiving disability benefits.²⁴

4. *Programs for Federal Civilian and Armed Services.*—About 2.3 million civilian federal employees and their families are protected against disability under the Federal Civil Service Retirement program. Some few people whose working years are divided between work under civil service and work covered by social security can receive payments under both programs when they become disabled.

Members of the federal armed services are protected against disability by service retirement systems. They are also covered by social security, so that it was contemplated that in some cases they should receive disability benefits under both programs. Most employees of the Tennessee Valley Authority also have disability protection under two programs, being eligible for benefits under both the social security program and their own staff retirement system, which is coordinated with social security.

C. *State and Local Benefit Programs*

The Social Security Act permits state governments to obtain social security coverage for their employees, and employees of political subdivisions, by agreement with the Secretary of Health, Education, and Welfare.²⁵ Accordingly, many states have coordinated their programs so that they supplement the benefits under social security. Of the roughly 6½ million employees of state and local governments in January 1963, approximately 1¼ million were covered under social security alone, 3 million were covered under both social security and a state or local retirement system, and about 1¾ million were covered under a state or local retirement system alone.²⁶

23. 49 Stat. 967 (1935), 45 U.S.C. § 228b(a)(4) (1958).

24. Railroad Retirement Board Monthly Rev., Aug. 1963, p. 4; 1962 RAILROAD RETIREMENT Bd. ANN. REP. 4 (1963).

25. 64 Stat. 514 (1950), 42 U.S.C. § 418(a) (1958).

26. Published and unpublished data from the Social Security Administration and the Bureau of the Census.

D. *Sickness and Temporary Disability Insurance*

Four states (California,²⁷ New Jersey,²⁸ New York,²⁹ and Rhode Island³⁰) have laws providing benefits to replace, for a limited time, a part of the wages lost by insured workers unemployed because of sickness or injury. Under these state programs benefits are payable, commonly, for twenty-six weeks after a waiting period of seven days. These programs supplement the social security disability insurance program by providing protection against temporary disability for a period during which the social security disability insurance program does not.

E. *Private, Group, or Employer-Sponsored Insurance Programs*

Finally, in addition to the federal social security program, the public assistance programs, and the other public programs, protection against disability is obtained through private means.

A survey of disability beneficiaries under old-age, survivors, and disability insurance in the eight largest metropolitan areas in 1960 indicated that about one-fifth of those receiving disability insurance under the social security program were also receiving disability pensions under plans established by employers or unions. The survey also indicated that this was the largest type of insurance supplementation of social security disability insurance benefits.³¹ Of course, some persons receive liability payments for accidental injuries suffered in automobile accidents. These payments may be made under compulsory automobile insurance, which some authorities³² consider to have many of the attributes of social insurance and some similarity to workmen's compensation.

F. *Workmen's Compensation Programs*

All of the government programs discussed above have one thing in common—they are not intended to compensate for injury. Their goal is to replace loss of income due to disability, whether due to injury or sickness. We turn now to a type of program which, at least in part, is based on a different approach.

One purpose of state workmen's compensation programs is to com-

27. CAL. UNEMP. INS. CODE § 2601.

28. N.J. STAT. ANN. § 43:21 (1957).

29. N.Y. WORKMEN'S COMP. LAW § 200.

30. R.I. GEN. LAWS ANN. § 28-39 (1956).

31. Unpublished data from Social Security Administration, Survey of Disability Beneficiaries and Workers With a Disability Freeze Under Old-Age, Survivors, and Disability Insurance in the Eight Largest Metropolitan Areas, 1960, at Table E-5.

32. See, e.g., Williams, *Social Insurance—Proper Terminology?*, J. of Insurance, Sept. 1963, p. 114.

compensate an injured individual for the physical harm he has suffered. For example, if an individual loses a leg at work, he receives compensation for the loss of that leg. In a sense, he is compensated for the decrease in his earning power because of that loss, that is, he may be able to continue to work after the loss of the leg at a diminished income, and his compensation payments would help compensate for his lessened earnings. However, compensation is payable even if earnings continue or even increase. This is in direct contrast with the federal social security approach of replacement of income to some extent where the individual's income from earnings has ceased because of disability; he is not compensated for injury or for loss of use of a limb or physical function. He draws benefits only because he is no longer able to earn, whether because of industrial injury, other injury, or illness.

Herman and Anne Somers—both authorities in the workmen's compensation field—have stated the principle of workmen's compensation as being that “the cost of industrial accidents was to be socially allocated to the employer, not because of any presumption that he, or the corporation, was responsible for every accident which affected the employees, but because industrial accidents were recognized as one of the inevitable hazards of modern industry.”³³ They describe further objectives of workmen's compensation as (1) to provide predetermined, adequate, and prompt benefits; (2) to eliminate wasteful litigation and legal fees; (3) to make the payment certain regardless of the employer's personal financial status; (4) to promote safety and health activities; (5) to lower the overhead costs of insurance; (6) to assure medical services and rehabilitation to the injured workman; and (7) to reduce public and private relief burdens.³⁴

J. Douglas Brown, Dean of the Faculty and Professor of Economics at Princeton University, has summarized the philosophy of social insurance which underlies the old-age, survivors, and disability insurance program as having the following elements: (1) protection should be provided as a matter of right; (2) all citizens should be eligible for coverage; (3) benefits should vary with prior earnings and the individual's own contributions; (4) protection of the family should be offered against all economic hazards which threaten its continued existence; (5) provision should be made for joint contributions by employer and employee.³⁵ Behind such specific elements of American social insurance stands the objective of providing basic protection against those

33. SOMERS & SOMERS, *WORKMEN'S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY* 26-27 (1954).

34. *Id.* at 27-28.

35. Brown, *supra* note 4.

economic hazards which are thought to be sufficiently far-reaching as to require such protection for the good of society.

III. THE OVERLAP

So far we have described some features of the various programs that provide disability protection for workers and their families generally, or for special groups of workers. Despite the seeming prolixity of protection, the programs seem to mesh together surprisingly well.

Conclusive statistical information on the extent to which disabled workers and their families may become entitled to disability benefits under more than one government-sponsored program is not available. However, it appears from the available information that such dual eligibility occurs most frequently among disabled workers and families entitled to benefits under social security and under some program specifically designed to provide cash income to supplement the income of disabled workers or their families.

Supplementation seems to be provided most frequently under programs established through collective bargaining or through employer initiative. Probably almost one-fifth of the workers covered by social security have supplementary disability protection of this type. The situation where a disabled worker, entitled to social security disability insurance benefits, is covered by another government program probably occurs most frequently where the worker is eligible for a veteran's pension because of a non-service connected disability. Eligibility for such pensions is limited to permanently and totally disabled veterans with income (including social security benefits) below specified amounts; the amount of the veteran's pension may vary depending on the amount of the veteran's income, including other benefits. About thirteen per cent of the workers awarded social security disability benefits during the period July to December, 1957, were also entitled to veterans' pensions. The most recent information obtained from a survey of disability beneficiaries in 1960, previously mentioned, indicates that at present about the same percentage of beneficiaries are entitled to both social security and veterans' pensions as in 1957. Similarly, it is estimated that less than ten per cent of disabled workers and their families who are eligible under social security disability are receiving supplementation under a federal-state assistance program (aid to the disabled, aid to dependent children, aid to the blind) on the ground that their social insurance benefits and other resources are insufficient under state standards.

There are certain other situations in which disabled workers insured under social security have supplemental disability protection under another government program. The previously mentioned federal gov-

ernment programs which provide disability protection for some employees or members of the armed forces may provide such supplemental benefits, as do many states and state instrumentalities. These supplemental programs are specifically designed to fit in with the social security insurance program. These would seem to cover most of the situations in which there is eligibility under more than one government program.

However, there are some instances where uncoordinated overlapping benefits may be payable and the benefit amount may not in each instance be entirely logical. For example, there may be instances where a disabled worker has acquired insurance under more than one uncoordinated retirement or disability program and may receive undue advantages as a result. On the other hand, some workers who shift employment may as a result lose entitlement to certain benefits and be compensated too little if disability occurs. Some workers are entitled under workmen's compensation, on the basis of a work-related disability, and also to social security disability benefits.

For example, a fifty-eight-year-old coal miner caught in a mine cave-in is paralyzed from the waist down. He has a minimal education, and has done no work other than the heaviest manual labor. Clearly such an individual (if covered by workmen's compensation) would be entitled to workmen's compensation on the basis of his paralysis. Likewise, if he is insured for social security disability protection, he would be entitled to disability insurance benefits if he is no longer able to engage in any type of substantial gainful activity for which he is fitted by education, training, and experience.³⁶ Thus, he could collect benefits under both programs.

Take, as the next case, an individual who was caught in the same cave-in and suffered a fractured leg, which upon proper treatment healed cleanly and allowed him to return to work. He would be entitled to workmen's compensation for a temporary impairment. He would not, however, be entitled to social security benefits because, although he had a medically determinable physical impairment, it was not one that could be expected to be of long-continued or indefinite duration.

Finally, let us assume the same coal miner develops a serious heart ailment, unconnected with his work, which prevents him from engaging in activity of any type. Not being a work-connected impairment, it would not entitle him to workmen's compensation. Nevertheless, since it prevents him from engaging in any substantial gainful activity, it would serve to qualify him for social security benefits.

The difference in results comes, of course, from the different criteria.

36. 20 C.F.R. § 404.1502(c) (1961).

Eligibility for workmen's compensation benefits is based primarily on a work-connected injury or an occupational disease. Any impairment resulting from such an injury or disease is compensable, whether it is temporary or permanent, and whether the disability that arises from it is partial or total. Thus, generally, an individual can be awarded workmen's compensation on the basis of an impairment which is temporary and partial, temporary and total, permanent and partial, or permanent and total. Social security benefits, on the other hand, would be awarded only in those cases which most nearly approximate the last category, *i.e.*, permanent and total, that arise out of an industrial accident or disease. But such benefits also could be awarded based on comparable severe disabilities due to congenital causes, or disease having nothing to do with the individual's work, or nonoccupationally connected or aggravated injuries. The sole criterion is: Is the individual suffering a mental or physical disability which is medically determinable, and which is likely to be of long continued or indefinite duration or to result in death, which impairment, in the context of the individual's age, education, vocational experience, and training, precludes his engaging in any type of substantial gainful activity?

IV. COVERAGE AND QUALIFYING REQUIREMENTS DIFFER

A. *Social Security*

The coverage bases and qualifying requirements of the programs reflect the different areas with which each is concerned. The eligibility requirements for disability protection under social security are designed to give protection against earnings loss resulting from serious and extended disability, irrespective of the source of the disability, to workers who have had both long and recent dependence upon covered work.

Because the ultimate objective of the social security program is to insure substantially all gainfully employed people and their families, the disability insurance program is broad in its potential coverage. More than 90 out of 100 workers are in jobs covered by social security, and approximately 52 million workers are insured for disability protection. The disability insurance program protects the families of self-employed people as well as those of employees, and the families of farm people as well as of city workers. Because the objective is to provide earnings replacement only where there has been a long and recent dependence upon covered work, to qualify for disability protection under social security a worker must have the requisite disability insured status. This means, in general, that he must have worked in employment or self-employment covered under the statute for five

years in a ten-year period preceding the onset of his disability.³⁷

In addition, the worker must meet the statutory definition of disability discussed above³⁸ to be eligible for benefits. It should be noted that this is an individualized definition, *i.e.*, the issue is whether the particular claimant for benefits, in the light of *his* impairment and vocational qualifications, is able to engage in substantial gainful activity.³⁹ Finally, as also pointed out above, the worker's disability must have lasted for six full calendar months before benefits are payable.⁴⁰ He is not eligible for these benefits, notwithstanding that he otherwise meets the requirements, for months after he has attained age sixty-five or has previously become entitled to reduced old-age or survivor's benefits.⁴¹ Also eligible for benefits under the social security disability program, as previously stated, are the dependents of a disabled worker, including a disabled child age eighteen or over who has been continuously disabled since before reaching age eighteen.⁴²

B. Workmen's Compensation

To be eligible for workmen's compensation benefits, pre-existing employment need not be for any given length of time; a worker need have only a work-related disability, which need not necessarily be permanent or total. However, although the concept of disability is thus much broader under workmen's compensation laws than under the Social Security Act, the coverage base is much more restricted. Workmen's compensation programs cover only employees, not the self-employed. Generally covered or eligible for coverage are employees in commerce and industry. However, many workers are excluded from coverage. One reason is that in only twenty-six states, the District of Columbia, and Puerto Rico, are the laws mandatory; in the remaining states they are elective. Further, some state laws exclude specific occupations, usually domestic work, casual employment, agricultural employment, and employment for charitable, religious, or educational institutions. Coverage for employers of fewer than a specified number of employees (most frequently three to eight) is also usually excluded. In some states coverage is limited to "hazardous" or "extra-hazardous" employments.

Under workmen's compensation, protection against disability result-

37. 70 Stat. 815 (1956), 42 U.S.C. § 423(c)(1) (1958).

38. 70 Stat. 815 (1956), 42 U.S.C. § 423(c)(2) (1958).

39. Contrast this with other programs that apply the "average man" concept, *i.e.*, a claimant is awarded or denied benefits on the basis of whether his impairment would disable the average man, not on the basis of whether it actually disables claimant.

40. 70 Stat. 815 (1956), 42 U.S.C. § 423(c)(3) (1958).

41. 70 Stat. 815 (1956), 42 U.S.C. § 423(a) (1958).

42. 64 Stat. 483 (1950), 42 U.S.C. §§ 402(b)-(f) (1958).

ing from occupational disease is not as complete as that for occupational injury. Although the laws in forty-eight states and the District of Columbia, the Federal Employees' Compensation Act, and the Longshoremen's and Harbor Workers' Act now cover occupational diseases, eighteen states cover only enumerated diseases. Wyoming and Mississippi provide coverage for occupational diseases generally only if the disease constitutes an "injury," *i.e.*, arises from an accident occurring in the course of employment. Because of the varying coverage limitations and the fact that nearly half of the workmen's compensation laws are not compulsory, many thousands of workers remain outside the protection of these laws.

V. BENEFITS DIFFER

A. *Social Security*

Just as the differing objectives and structure produce differences in qualifying requirements under the two programs, so also are there differences in the benefit structure. Under the social security disability program, benefits are related to average earnings in work covered by social security. The amount payable to a dependent is proportionate to the amount of the worker's benefits. These benefits are not limited in duration, and are terminated only in the case of death, recovery, or attainment of age sixty-five, or when old-age insurance benefits become payable. The monthly benefit payable to a disabled worker now ranges from 40 to 127 dollars. The average monthly benefit to a worker, when no member of his family is entitled, is about 88 dollars. The maximum amount that can be paid to a worker with a family is 254 dollars a month.⁴³ Under social security the cash benefits are exclusive; neither hospital nor medical expenses are additionally provided.

B. *Workmen's Compensation*

Workmen's compensation benefits, although based on the worker's previous earnings like social security payments, are, on the other hand, limited in most cases by either a maximum period for which benefits are payable or by maximum total amounts. Only sixteen states make additional workmen's compensation allowances for wives and minor children—dependents who are protected under social security. In addition, workmen's compensation benefit amounts vary according to the type and extent of injury, while social security insurance benefits are payable only in the case of essentially permanent and total disability.

43. 64 Stat. 506 (1950), 42 U.S.C. § 415(a) (1958).

Under workmen's compensation, benefits for permanent and total disability generally amount to between three-fifths to two-thirds of the worker's weekly wage at the time he became disabled, but with minimum and maximum provisions. In almost three-quarters of the states the minimum benefit is 20 dollars weekly or less. In twenty-seven states the laws stipulate that the maximum benefit is 40 dollars or less per week, thereby very seriously limiting the extent to which compensation may reach the level of three-fifths to two-thirds of normal pay. In nine states the maximum benefit is from 41 to 50 dollars and in thirteen states the maximum exceeds 50 dollars.

The number of weeks for which benefits will be payable for specified permanent injuries varies from state to state. In fewer than half the states are benefits for permanent and partial disability payable for the entire duration of disability. For example, the duration of benefits for the loss of an arm at the shoulder ranges from 175 weeks in one jurisdiction to 500 in another, while the duration of compensation for the loss of a little finger ranges from nine weeks to twenty-eight weeks. Under the majority of programs, if the effects of the loss of a member extend to other parts of the body and interfere with their efficiency, the schedule allowance for the lost member is not the exclusive basis for determining the payments. In the jurisdictions which provide lifetime benefits for permanent and partial disability the amount of benefits (within limits) depends on the severity of impairment.

As was noted previously, in sixteen states provisions for additional payments for dependents (usually children and wives) are included in the workmen's compensation laws. Usually these provisions are limited to permanent and temporary total disability awards. However, in some of these states the additional allowances are limited by the fact that the same weekly maximum or the same aggregate maximum is payable whether or not there are dependents.⁴⁴ Finally, workmen's compensation benefits include not only cash disability benefits but also hospital and medical expenses.

C. Comparison of Total Benefits

Benefits paid under workmen's compensation averaged from 1 billion dollars to about 1.3 billion dollars per year in years 1956-1960. These benefits were distributed in the following manner: medical care—350-435 million dollars; disability benefits—577-754 million dollars; survivor benefits—75-105 million dollars.⁴⁵ There were about one mil-

44. BUREAU OF LABOR STANDARDS, U.S. DEP'T OF LABOR, BULL. No. 161, STATE WORKMEN'S COMPENSATION LAWS 48 (rev. ed. 1960).

45. Skolnik, *New Benchmarks in Workmen's Compensation*, Social Security Bull. XXV, No. 6, June 1962, p. 8.

lion awards made for disability under workmen's compensation in a year.

In July 1963, some 18.7 million people were receiving benefits under the social security insurance provision. This includes over 10 million retired workers, about 2.7 million wives or husbands of disabled or retired workers, and about 2 million widows, widowers, or parents over age sixty-two of deceased insured workers. About 800,000 of the beneficiaries were disabled workers; 600,000 were wives and children of such disabled workers.

Social security benefits were being paid to these beneficiaries at the rate of 1.3 billion dollars monthly. During the fiscal year 1963, a total of 15 billion dollars was paid in benefits of which a little over one billion dollars went to disabled workers and their dependents.

VI. METHODS OF FINANCING DIFFER

The methods of financing are also quite different under the two programs. The social security disability provisions are financed by a federal payroll tax assessed against the first 4,800 dollars of annual earnings from covered employment or self-employment. The taxes that are earmarked for disability benefits are shared by employers and employees: each pays one-fourth of one per cent of covered wages; self-employed people pay a tax of three-eighths of one per cent on their self-employment income. In recent years, these contributions have amounted to about one billion dollars per year.

Workmen's compensation programs are financed, generally, by the employer. The estimated total cost to employers in years 1956-1960 averaged between 1½ and 2 billion dollars per year, or between 0.91 and 0.94 per cent of payroll.⁴⁶

VII. EXTENT OF WORKMEN'S COMPENSATION—SOCIAL SECURITY OVERLAP

Although the number of persons with concurrent eligibility for social security and workmen's compensation is small (the metropolitan area survey, previously mentioned, indicated less than 1.7 per cent of those entitled to social security disability benefits were also receiving workmen's compensation), the question still arises: To what extent are a disabled worker's earnings replaced in the event he is eligible for benefits under both programs? In the relatively few cases where overlap occurs, payments usually do not reach the earnings the worker, if not disabled, would have received. One reason that benefits are below

46. *Id.* at 15.

earnings is that benefit amounts under workmen's compensation are subject to very substantial restrictions on the amount of wages replaced. These restrictions include limitations on weekly maximum rates used as a base for computing wage loss and limitations on the duration and total amount of benefits payable for a disability. In addition, in Colorado, the workmen's compensation benefits are reduced by one-half the old-age, survivors, and disability insurance benefit, and provision is made in Minnesota for reduction in workmen's compensation if the total of workmen's compensation exceeds 18,000 dollars. Similarly, social security benefits are subject to several restrictions on amounts paid, including the following: (1) the maximum creditable earnings for a year have been limited to 4,800 dollars a year since 1959 and even less in prior years; (2) there is a noncompensated waiting period for the first six months of disability; (3) the earnings considered are not limited to the most recent and usually higher wages, but instead generally include earnings received going back to 1950, except for a five-year dropout of low earnings. In addition, the workmen's compensation and social security disability benefits paid to a worker are not at a level that take fully into account increases in earnings that would have been paid had he continued working.

Social security benefit amounts are weighted in favor of low-earning workers; and workmen's compensation laws, through benefit maximums and minimums, tend to operate in the same fashion. Social security and certain state workmen's compensation laws also provide dependents' benefits for wives and children when they are qualified to receive them. Generally, the higher the worker's earnings and the shorter the period that his dependents qualify for benefits the smaller the proportion of wages replaced.

The Social Security Administration has made rough calculations regarding the proportion that combined workmen's compensation and social security disability benefits makes up of the earnings that a totally disabled worker could expect to have received if he lived to age sixty-five and had not become disabled. Even assuming that his earnings would not have increased after the date of disability, a worker with no dependents and with typical average earnings in his state, who became disabled at age fifty, would receive total combined benefits of less than 70 per cent of his assumed earnings in thirty-two states and more than 90 per cent of such earnings in only two states and the District of Columbia, but in no state would benefits equal or exceed 100 per cent of his estimated earnings. In twenty-six states, a worker with typical average earnings in his state who is disabled at age forty, with a wife and a child age eight, would receive total combined benefits amounting to less than 70 per cent of earnings; in four states and the

District of Columbia he might expect total combined benefits amounting to 100 per cent or over of the earnings he would have earned if he had not become disabled. However, even this calculated excess of benefits over earnings assumes he would live until age sixty-five and does not take into account reduction in life expectancy resulting from the injury.

All these calculations overstate the replacement ratio, too, by assuming (1) that there will be no rise in wages, although the forecasts are for continuing increases in wages in the future resulting from price level increases and increases in productivity, and (2) that the wages received are at average levels. The maxima applied in state and social security laws restrict benefits where wages are only slightly above average and, of course, benefits are smaller in absolute amount but higher in proportion to prior earnings for persons earning below the average.

It is understandable in view of the modest benefit levels under social security that the Congress made the decision in 1958 to repeal the offset and again permit a disabled worker to become eligible under social security disability *and* any other government program. It is the experience under the previous offset which we will now examine.

VIII. EXPERIENCE UNDER PREVIOUS OFFSET

Section 224 of the Social Security Act,⁴⁷ enacted in 1956, provided that if an individual was entitled to a disability insurance benefit for any month, and it was found that a periodic benefit was payable for any such month to the individual under a federal or state workmen's compensation law or plan on account of the individual's physical or mental impairment, then the federal insurance benefit was to be reduced by an amount equal to the compensation benefit (but not below zero) for that month. Further, if a monthly workmen's compensation benefit had been commuted to a lump sum, or the lump sum was substituted for the monthly payments, the federal benefits were to be reduced as though the amount paid in a lump sum had actually been paid as monthly payments. As a result, in a number of cases, payment of federal benefits was suspended pending determination whether the offset provision applied; and where it applied the federal benefits were reduced.

Section 224 remained in the law only thirteen months. Congress repealed it, effective September 1, 1958.⁴⁸ Concerning the repeal of this provision, the House Committee on Ways and Means stated:

47. Social Security Amendments of 1956, ch. 836, § 224, 70 Stat. 816.

48. Social Security Amendments of 1958, Pub. L. No. 85-840, § 206, 72 Stat. 1025.

Your committee is recommending also that the disability benefits offset provision of present law be eliminated. This provision requires that the monthly social security benefits payable to disabled workers (and those payable to persons disabled in childhood) be reduced by the amount of any periodic benefit payable on account of disability under other Federal programs (other than veteran's compensation) or a State workmen's compensation system.

The application of this requirement has produced inequitable effects.

Your committee believes that disability benefits payable under the national social security system should be looked upon as providing the basic protection against loss of income due to disabling illness, and we have concluded that it is undesirable, and incompatible with the purposes of the program, to reduce these benefits on account of disability benefits that are payable under other programs.⁴⁹

The Senate Finance Committee reported the following:

The committee has given further consideration to the disability insurance benefit offset provision, under which the social security disability insurance benefits are reduced by the amount of any periodic benefit payable to an individual on account of disability under certain other Federal programs or under State workmen's compensation laws. This offset provision was included in the law at the time that the provisions for social security disability benefits were enacted to prevent duplication between the new social security disability benefits and other disability payments pending the development of administrative experience under the new program.

In the light of experience in the operation of the offset provision, the committee has concluded that it can now be eliminated. Experience with the social security disability provisions indicates that the danger that duplication of disability benefits might produce undesirable results is not of sufficient importance to justify reduction of the social security disability benefits. The committee-approved bill, like the House bill, provides for the elimination of this offset provision.⁵⁰

Just what were some of the "inequitable effects" of the offset requirement which made it incompatible with the purpose of the social security program? In some instances—for example, where a worker took a lump-sum settlement under workmen's compensation—the worker had his social security benefits reduced not only on account of money paid to replace his earnings but also because of payments which went for medical costs and legal fees. In other instances, workers who had been getting a workmen's compensation award based on a partial disability and who subsequently became totally disabled from non-work-connected conditions had their social security benefits reduced even though these benefits were based on wages earned after, and in spite of, the partial disability which occasioned the workmen's com-

49. H.R. REP. No. 2288, 85th Cong., 2d Sess. 5 (1958).

50. S. REP. No. 2388, 85th Cong., 2d Sess. 11 (1958).

pensation payment.⁵¹ In other cases, a person working at two jobs who developed a work-connected disability on one of the jobs had all of his social security benefits taken away despite the fact that his social security benefit might have been based on earnings not connected with the job on which he was injured. In some cases, the effect of the offset was to reduce the replacement ratio of the total benefits a worker received under both programs to 30 per cent or less of his earnings prior to disability. In fact the earning replacement was sometimes so small that if the offset had been continued a number of workers and dependents now receiving social security disability and workmen's compensation would have had to receive aid from a veteran's pension or public assistance to supplement their social insurance benefits.

Besides causing inequities of the kind described above, the previous offset provision caused administrative problems. The provision dealing with lump-sum settlements of compensation cases gave particular difficulty. The question of whether the lump sum was a commutation of, or in substitution for, periodic payments had to be answered. Resolution of this question depended upon the state law under which the workmen's compensation was payable. In those cases in which this was resolved affirmatively, the question then arose as to how the offset was to be made. For operating purposes, the statutory periodic payments, which would have been made had there been no lump sum, were determined and assumed to be made until the total of assumed benefits paid equalled the amount of the lump sum.

This provision was the subject of judicial consideration in two cases. In *Walters v. Flemming*,⁵² the plaintiff was awarded disability insurance benefits of 93.30 dollars a month. At the time of the award he was receiving weekly workmen's compensation payments, and offset was made without objection. Subsequent to the award, the State of Massachusetts approved an agreement between plaintiff and the workmen's compensation insurer for a lump-sum settlement. The district court held that under state law the lump sum payment was a substitute for the periodic payments to which plaintiff had been entitled under the statute, and that consequently the decision of the Secretary offsetting the lump sum against the federal benefits was correct.

A similar result was reached in *Knapczyk v. Ribicoff*.⁵³ In that case the plaintiff contended that the offset provision did not apply because the impairment for which she received workmen's compensation—an injury to her left arm and shoulder as a result of a fall—was not the same as the impairment for which she was awarded social security

51. See *Knapczyk v. Ribicoff*, CCH UNEMPLOYMENT INS. REP. ¶ 14179 (N.D. Ill. Jan. 8, 1962).

52. 185 F. Supp. 288 (D. Mass. 1960).

53. *Supra* note 51.

benefits—a heart condition. The court pointed out that it was not necessary that both awards be made for the same impairment; that if the compensation award was based on a physical or mental impairment the offset provision was applicable. The Secretary's decision was accordingly affirmed.

Problems in determining whether a worker had been awarded workmen's compensation benefits and the amount of such benefits arose in a number of jurisdictions because there is no central point from which to obtain information as to whether a particular worker has been awarded workmen's compensation and, if so, the amount and basis of such award. In some states the pertinent records are located in local offices, and in other states the insurance carriers maintain the records.

If there are administrative difficulties in federal offset of workmen's compensation, the question arises whether, if some form of offset is decided to be required, it might not be simpler for the state workmen's compensation programs to reduce their benefits on account of social security. A provision to avoid excessive total benefits would lend itself to more simple and accurate administration if applied by the states than if applied by the federal program. Social security records for all workers in the country are permanent and centrally maintained. A state agency could learn definitely and by going only to one source whether a person getting workmen's compensation is also getting social security disability benefits and, if so, the amount of the social security benefit. The maintenance of a permanent record for practically every worker in the country gives social security the facility to mark the records of those who receive a workmen's compensation award and then to notify the state involved should the worker become entitled to social security disability benefits or should an entitled worker's status change. Workmen's compensation agencies do not appear able to provide a similar service.

One problem is that reducing social security benefits because of workmen's compensation benefits can be a deterrent to improvements in those provisions of state workmen's compensation laws affecting workers with permanent and total disability—provisions that limit the total amount of workmen's compensation payable or the number of weeks for which compensation is payable. The federal offset meant that an increase in cost to employers would go, in part, to save money for the social security system rather than to improve the benefits for the state's industrially disabled workers. Finally, a reduction in the federal benefit results in permanent loss of the offset benefits to the beneficiary. A reduction in compensation, however, may result in extending the period of compensation by postponing the time when the lifetime maximum is reached.

There are, of course, other questions, including philosophical ones, which are important in determining whether there should be an offset and, if so, what form it should take. The writers offer no general answer to this issue other than to say that it has been suggested that consideration of the need for and development of a plan to avoid excessive disability benefits would be a matter appropriate for study by the Advisory Council on Social Security. This council was recently appointed to study and report to the Congress its findings and recommendations with respect to "extensions of the coverage . . . the adequacy of benefits . . . and all other aspects of the [social security] program."⁵⁴

IX. FUTURE OUTLOOK

Those concerned about the ways in which our social insurance system in its totality (and its component parts separately) services the needs of the American people are always interested not only in the present situation, but, more important, in what lies ahead.

Study of our system reveals several gaps and possible excesses which an ideal system, protecting fully, but not excessively, against all hazards arising from injury and disease, would not contain. Hopefully one result of study which reveals such inadequacies will be change. In a dynamic society all institutions and all systems are subject to change. In a healthy society the changes will be in a positive direction; changes will be improvements. There seems no doubt that future developments and improvements can be expected to build on the past and safeguard the values of the diverse and fruitful American social order.

54. Social Security Amendments of 1960, Pub. L. No. 86-778, § 704(b), 74 Stat. 994.

