DISABILITY BENEFITS AND ADDICTION: RESOLVING AN UNCERTAIN BURDEN

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The prevailing medical consensus is that drug addiction and alcoholism are disabilities. Before 1996, SSI and SSDI, the nation's major disability benefits programs, recognized that consensus and provided benefits to people struggling with addiction. Then, the "DAA materiality" provision of Congress's 1996 welfare reform legislation revoked eligibility not only from people struggling with addiction, but also from people with addiction and another severe disability whose addiction contributes to the severity of the other disability. For this latter group of "dual-diagnosis" claimants, it is often impossible to determine which of a claimant's impairments would remain absent substance abuse. In such cases, the evidence is in equipoise, and whichever party bears the burden of proof of DAA materiality will lose. Despite its importance to many disability benefits claimants, the issue of who bears the burden of proof remains unresolved, with the Social Security Administration placing the burden on the government and a split among the federal appeals courts that have taken up the issue.

This Note argues that the burden of proof of DAA materiality should fall on the government. It shows that the DAA materiality provision creates an exception to the definition of disability in the Social Security Act that functions like an affirmative defense for the government to deny benefits to otherwise eligible claimants. It then contrasts the many obstacles facing dual-diagnosis claimants with the government's superior resources and expertise to offer proof on the complex DAA materiality issue.

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Introduction

Addiction is not a choice. The Diagnostic and Statistical Manual of Mental Disorders classifies both drug addiction and alcoholism as mental disorders.[1] Psychiatric studies have found that vulnerability to addiction, like most mental disorders, is based largely on genetic[2] and neurological[3] factors. From the mid-1970s to the mid-1990s, Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI), the federal programs that provide life-sustaining benefits to people with disabilities so severe that they are unable to work,[4] embraced the prevailing medical view of addiction as a disa-

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[1] *See* Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 481–588 (5th ed. 2013) (cataloging and describing addictions to various substances as mental disorders).

[2] *See, e.g.*, John C. Crabbe, *Neurogenetic Studies of Alcohol Addiction*, 363 Phil. Transactions Royal Soc'y B 3201, 3206–08 (2008) (reviewing "promising" links found between alcoholism and specific genes); Tatiana Foroud et al., *Who Is at Risk for Alcoholism?*, 33 Alcohol Res. & Health 64, 65 (2010) (estimating that 50–60% of variation in risk of developing alcoholism is attributable to hereditary differences).

[3] *See* George F. Koob & Eric J. Simon, *The Neurobiology of Addiction: Where We Have Been and Where We Are Going*, 39 J. Drug Issues 115, 119 (2009) ("A key element of drug addiction is how the brain reward system changes with the development of addiction . . . .").

[4] *See* Soc. Sec. Admin., Pub. No. 64-030, 2015 Red Book 7 (2015), https://www.ssa.gov/redbook/documents/TheRedBook2015.pdf (describing the purpose of the SSI and SSDI programs).

bility.[5] Both programs treated addiction the same as other mental and physical disorders, entitling individuals to benefits based solely on an addictive disorder if it was "severe enough to disable them from holding any job."[6] In addition to receiving cash benefits, recipients struggling with addiction gained access to medical coverage through Medicaid, which they could use to pay for treatment programs.[7]

The programs' treatment of addiction as a disability was short lived: on the heels of modest eligibility restrictions passed in 1994,[8] Congress and President Clinton eviscerated SSI and SSDI eligibility on the basis of addiction in their 1996 "welfare reform" package.[9] The package of legislation was the culmination of decades of conservative political rhetoric about "welfare queens driving Cadillacs" that characterized welfare recipients as "lazy, cheating the system," and even "to blame for much of what is wrong with America."[10] The "welfare reform" package entirely reshaped the purpose of welfare by making drastic across-the-board cuts to key public benefits programs, shortening maximum eligibility periods, and creating much more stringent work requirements.[11] Today, those that are unable to find work before

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[5] *See* Dru Stevenson, *Should Addicts Get Welfare? Addiction & SSI/SSDI*, 68 BROOK. L. REV. 185, 185 (2002) ("From 1972 until 1994, addicts could, with certain qualifications, receive benefits under Social Security Disability Insurance (SSDI) or its sister program, Supplemental Security Income (SSI)." (internal quotation marks omitted)).

[6] *Id.* at 185; *see* STAFF OF S. COMM. ON FIN. & H.R. COMM. ON WAYS & MEANS, 92D CONG., SUMMARY OF SOCIAL SECURITY AMENDMENTS OF 1972 AS APPROVED BY THE CONFEREES 28 (Comm. Print 1972) (describing how the bill would make people with drug addiction or alcoholism eligible for SSI or SSDI if they participated in treatment).

[7] SSI eligibility creates automatic eligibility for Medicaid in most states. *See* Stevenson, *supra* note 5, at 185 (describing how this was the case for eligible addicts from the mid-1970s to the mid-1990s); *Supplemental Security Income (SSI) and Eligibility for Other Government and State Programs*, SOC. SEC. ADMIN., https://www.ssa.gov/ssi/text-other-ussi.htm (last visited July 10, 2016) ("In most states, if you are an SSI beneficiary, you may be automatically eligible for Medicaid.").

[8] *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 201, 108 Stat. 1464, 1490–1506 (capping eligibility for SSI and SSDI recipients who qualified on the basis of addiction to thirty-six months and providing their benefits through another person with the power to withhold benefits rather than as direct cash payments); *see also* Stevenson, *supra* note 5, at 186 (describing those changes).

[9] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (making major changes to the nation's key public benefits programs).

[10] RUCKER C. JOHNSON, ARIEL KALIL & RACHEL E. DUNIFON, MOTHERS' WORK AND CHILDREN'S LIVES: LOW-INCOME FAMILIES AFTER WELFARE REFORM 3–4 (2010).

[11] The welfare reform package's signature piece of legislation, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), was designed to greatly reduce the number of people claiming public benefits. *See* STAFF OF H. COMM. ON WAYS & MEANS, 104TH CONG., SUMMARY OF WELFARE REFORMS MADE BY PUBLIC LAW 104-93 THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT AND ASSOCIATED LEGISLATION 3 (Comm. Print 1996) ("In place of the entitlement concept, the new law [is designed] to help families escape welfare."). Most significantly, it

benefits expire are very often left without any assistance. Since 1996, the number of American households living on less than $2 per day per person in cash income has increased from 636,000 to 1.65 million.[12]

The Contract for America Advancement Act[13] (CAAA) is the part of the 1996 welfare reform package that most directly altered the rights of disability benefits claimants struggling with addiction. The law, which remains in effect today, disqualifies any person from SSI and SSDI whose addiction is "a contributing factor material to the Commissioner's determination that the individual is disabled."[14] Throughout this Note, I will refer to this provision as the "DAA materiality" provision. "DAA" stands for "drug addiction or alcoholism." In effect, the provision revokes benefits from two groups of claimants: first, people whose only disorder is addiction, and second, people struggling with addiction and a co-occurring mental or physical disorder if the addiction causes or contributes to the persistence of the other disorder, even if the symptoms of the two together make the person unable to work.[15]

The statutory change aimed to eliminate what Congress saw as the "perverse incentive" of encouraging drug and alcohol abuse by providing benefits solely on the basis of addiction.[16] As one supporter of the amendment argued at the time it was passed: "That money should be going to teach [welfare recipients] some skill or something, instead of killing [them] on the installment plan."[17] Congress, however, also wanted to ensure that people struggling with addiction and another severe disability would continue to receive benefits.[18] In keeping with that goal, the Social Security Administration (SSA) esti-

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replaced Aid to Families with Dependent Children (AFDC), the main federal cash assistance program for the poor, with Temporary Assistance for Needy Families (TANF), a block grant given to states with a shorter maximum eligibility period and much more stringent work requirements to maintain eligibility. *See id.* at 3–8 (describing this and other changes made by the law).

[12] H. Luke Shaefer & Kathryn Edin, *The Rise of Extreme Poverty in the United States*, Pathways, Summer 2014, at 28, 28, https://web.stanford.edu/group/scspi/_media/pdf/pathways/summer_2014/Pathways_Summer_2014_ShaeferEdin.pdf.

[13] 42 U.S.C. § 423(d)(2)(C) (2012).

[14] *Id.*

[15] *See* Stevenson, *supra* note 5, at 186 ("Substance abusers and addicts may receive benefits, but only on the basis of other qualifying impairments, plus a demonstration that their other disabilities would continue even if their substance abuse stopped.").

[16] *See* H.R. Rep. No. 104-379, pt. 2, at 16–17 (1995).

[17] John Holliman, *Alcoholics, Advocates Wary of New Welfare Law*, CNN (Sept. 30, 1996, 10:30 PM), http://www.cnn.com/US/9609/30/welfare/.

[18] *See* H.R. Rep. No. 104-379, pt. 2, at 16–17 ("The intent of this proposal is to . . . ensure that beneficiaries with other severe disabilities who are also addicts or alcoholics are paid benefits . . . and to provide additional funding to States to enable recipients to continue to be referred to treatment sources.").

mated that, upon the enactment of the CAAA, 75% of the over 200,000 SSI and SSDI beneficiaries struggling with addiction would retain benefits on the basis of other impairments.[19]

Community advocates working with addicts who depended on disability benefits for basic survival needs and access to treatment were skeptical about the accuracy of this prediction.[20] This skepticism was confirmed in the years following the enactment of the CAAA. One study found that only about 40% of SSI and SSDI recipients struggling with addiction actually requalified for benefits on the basis of other impairments by 1999.[21] Another found the proportion of addicts who were payment-eligible dropped by 52.4 percentage points between December 1996 and January 1997.[22] The termination of benefits led to decreased enrollment in treatment programs,[23] and addicts who did not requalify for SSI were twice as likely to report experiencing hunger and homelessness as those who continued to receive SSI in the years following the enactment of the CAAA.[24]

Concerns about leaving addicts without basic life support and access to treatment by removing them from the SSI and SSDI rolls persist among scholars and advocates today.[25] These concerns are

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[19] Stevenson, *supra* note 5, at 186–87.

[20] *See, e.g.*, Joseph A. Califano, Jr., *Welfare's Drug Connection*, N.Y. TIMES (Aug. 24, 1996), http://www.nytimes.com/1996/08/24/opinion/welfare-s-drug-connection.html (noting that, while "substance abuse and addiction have changed the nature of poverty in America," the 1996 welfare reform package denies needed treatment to individuals struggling with addiction and denies basic life supports to children in households headed by caretakers struggling with addiction); Holliman, *supra* note 17 (interviewing a homelessness rights advocate who explained that the idea that addicts need a "swift kick" to get on their feet is divorced from the reality of living in extreme poverty and homelessness).

[21] James A. Swartz et al., *Termination of Supplemental Security Income Benefits for Drug Addiction and Alcoholism: Results of a Longitudinal Study of the Effects on Former Beneficiaries*, 78 SOC. SERV. REV. 96, 110 (2004).

[22] Paul Davies et al., *The Effect of Welfare Reform on SSA's Disability Programs: Design of Policy Evaluation and Early Evidence*, 63 SOC. SECURITY BULL., no. 1, 2000, at 3, 5.

[23] *See* Stevenson, *supra* note 5, at 198 (citing study finding steady decline in outpatient enrollment in the year following termination of benefits).

[24] Swartz et al., *supra* note 21, at 112.

[25] *See, e.g.*, Warnecke Miller & Rebecca Griffin, *Adjudicating Addicts: Social Security Disability, the Failure to Adequately Address Substance Abuse, and Proposals for Change*, 64 ADMIN. L. REV. 967, 978–79 (2012) ("[T]he more punitive approach toward drug addicts and alcoholics 'undermines the rehabilitative thrust of the SSI and SSDI programs' and will cause even greater administrative costs when addicts develop serious medical conditions and become chronic filers in the future." (quoting Dean Spade, *Undeserving Addicts: SSI/SSD and the Penalties of Poverty*, 5 HOW. SCROLL 89, 98 (2002))); *see also* Jason DeParle, *Welfare Limits Left Poor Adrift as Recession Hit*, N.Y. TIMES (Apr. 7, 2012), http://www.nytimes.com/2012/04/08/us/welfare-limits-left-poor-adrift-as-recession-hit.html (noting that many needy individuals who are excluded from welfare "have problems like addiction . . . which can make assisting them politically unpopular").

especially alarming given that the SSA's disability benefits programs are the "largest income support programs for people unable to work . . . in the 'Western world.'"[26] Despite these concerns and nearly twenty years of extensive adjudication of the DAA materiality provision since the enactment of the CAAA, an important question regarding the application of the DAA materiality provision remains unsettled: who has the burden of proof of DAA materiality—the individual claiming benefits (the claimant) or the government?

Case law and the SSA's interpretation of the issue are all over the map. The Second, Fifth, Ninth, and Eleventh Circuits place the burden of proof of DAA materiality on claimants, requiring them to prove that their addiction is *not* material to the determination that they are disabled in order to get benefits.[27] The Eighth and Tenth Circuits take the opposite approach and place the burden of proof of DAA materiality on the government.[28] The SSA first took the position that the burden is on the government.[29] More recently, the SSA took a more ambiguous position in a policy interpretation ruling,[30] but then reaffirmed that the burden lies with the government in a decision by the agency Appeals Council, the Agency's highest adjudicative body, interpreting that ruling.[31]

The allocation of the burden of proof of DAA materiality has important implications for "dual-diagnosis" claimants—those with addiction and a co-occurring mental or physical disorder. The majority of claimants struggling with addiction are likely to be dual-diagnosis claimants. Studies estimate that, among those with a substance abuse

[26] Jon C. Dubin, *The Labor Market Side of Disability-Benefits Policy and Law*, 20 S. Cal. Rev. L. & Soc. Just. 1, 5 (2011).

[27] *See infra* Section II.B.1 (summarizing the opinions of the federal appeals courts placing the burden of proof of DAA materiality on the claimant).

[28] *See infra* Section II.B.2 (summarizing the opinions of the federal appeals courts placing the burden of proof of DAA materiality on the government).

[29] *See* Dale Cox, Soc. Sec. Admin., EM-96, Emergency Teletype: Questions and Answers Concerning DAA from the 07/02/96 Teleconference ¶ 29 (1996), http://www.masslegalservices.org/system/files/library/daa-qa.htm [hereinafter 1996 Teletype] ("When it is not possible to separate mental restrictions and limitations imposed by the DAA and the various other mental disorders shown by the evidence, a finding of 'not material' would be appropriate.").

[30] Social Security Ruling, SSR 13–2p.; Titles II and XVI: Evaluating Cases Involving Drug Addiction and Alcoholism (DAA), 78 Fed. Reg. 11,939, 11,941, 11,944 (Feb. 20, 2013) (stating that "the claimant continues to have the burden of proving disability throughout the DAA materiality analysis," but that this burden is met when "the evidence does not establish that the claimant's co-occurring mental disorder(s) would improve to the point of nondisability in the absence of DAA").

[31] Order of the Appeals Council, Office of Disability Adjudication and Review, Soc. Sec. Admin., Claim for Period of Disability and Disability Insurance Benefits, at 2 (June 10, 2013) (on file with the *New York University Law Review*) [hereinafter Order of the Appeals Council].

disorder, approximately 50% to 70% also have a co-occurring mental disorder.[32] The Agency applies a "but for" test to determine DAA materiality in dual-diagnosis cases. It asks whether the claimant's co-occurring, nonaddictive disorder would be severe enough to prevent work if the claimant did not have a substance abuse disorder.[33] If the answer is yes, the claimant retains eligibility. If the answer is no, the claimant loses eligibility, even if the other disorder, alongside the addiction, is severe enough to make the claimant unable to work.

The party with the burden of proof of DAA materiality is therefore required to disentangle the causes and symptoms of an addictive disorder and a co-occurring mental or physical disorder, and then make a hypothetical assessment about which of a claimant's impairments would remain absent substance abuse. This is a difficult if not impossible task, even for medical experts.[34] The SSA has itself acknowledged that it knows of no reliable test that can prove or disprove DAA materiality.[35] Placing the burden on the claimant, as some courts have, requires people with no right to appointed counsel, multiple severe disabilities, incredibly meager resources, and no litigation experience[36] to make this complex, hypothetical showing without a reliable test to apply. Meanwhile, their access to life-sustaining benefits hangs in the balance.

This Note argues that a straightforward reading of the CAAA and its implementing regulations places the burden of proof of DAA materiality on the government, an interpretation that is supported by

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[32] *See, e.g.*, Denise Hien et al., *Dual Diagnosis Subtypes in Urban Substance Abuse and Mental Health Clinics*, 48 PSYCHIATRIC SERVICES 1058, 1062 (1997) (finding that 67% of study participants with a substance abuse disorder had an additional psychiatric disorder); Katherine E. Watkins et al., *Prevalence and Characteristics of Clients with Co-Occurring Disorders in Outpatient Substance Abuse Treatment*, 30 AM. J. DRUG & ALCOHOL ABUSE 749, 754 (2004) (finding that just over 50% of study participants in outpatient substance abuse treatment had a co-occurring mental disorder).

[33] *See* 20 C.F.R. §§ 404.1535, 416.935 (2015); *see also* Kangail v. Barnhart, 454 F.3d 627, 628 (7th Cir. 2006) ("When an applicant for disability benefits both has a potentially disabling illness and is a substance abuser, the issue for the administrative law judge is whether, were the applicant not a substance abuser, she would still be disabled.").

[34] See *infra* Section III.B for a full discussion of why the causes and symptoms of substance abuse disorders and co-occurring disorders are extremely difficult to disentangle.

[35] *See* Social Security Ruling, SSR 13–2p.; Titles II and XVI: Evaluating Cases Involving Drug Addiction and Alcoholism (DAA), 78 Fed. Reg. at 11,943 ("We do not know of any research that we can use to predict reliably that any given claimant's co-occurring mental disorder would improve, or the extent to which it would improve, if the claimant were to stop using drugs or alcohol.").

[36] *See* Mazin A. Sbaiti, Note, *Administrative Oversight? Towards a Meaningful "Materiality" Determination Process for Dual-Diagnosis Claimants Seeking Disability Benefits Under Titles II & XVI of the Social Security Act*, 35 COLUM. HUM. RTS. L. REV. 415, 456–60 (2004) (describing various obstacles that dual-diagnosis claimants face if they bear the burden of proof of DAA materiality).

the SSA's vastly superior resources and expertise to litigate this complex issue. Part I explains how the SSA determines whether a claimant is disabled and how the DAA materiality analysis fits into that process. Part II discusses the SSA's and the federal appeals courts' competing interpretations of who bears the burden of proof and then explains how the allocation of the burden is decisive of the outcome for many SSI and SSDI claimants. Part III explains why the burden should fall on the government. Here, the Part shows that the CAAA and its implementing regulations make the DAA materiality provision an exception to the definition of disability in the Social Security Act that functions like an affirmative defense for the government to deny benefits to otherwise eligible claimants. Part III also examines how the complex, counterfactual nature of the DAA materiality analysis and the SSA's monopoly on resources and expertise relative to SSI and SSDI claimants favor placing the burden on the government.

I
Proving Disability and the DAA Materiality Analysis

The SSA employs a five-step sequential evaluation to determine if a claimant is disabled for the purposes of SSI and SSDI eligibility.[37] This agency created this process through its own regulations. Claimants have the burden of proof in steps one through four. The burden shifts to the government in step five.[38] This Part first provides an overview of the five-step sequential evaluation. It then discusses the analysis the Agency uses to determine DAA materiality, emphasizing areas of uncertainty that remain in applying the provision. Understanding this framework is necessary to determine who bears the burden of proof of DAA materiality. Part III will show why the DAA materiality analysis cannot, as some courts argue, be part of the claimant's burden of proving disability in steps one through four.

A. The Five-Step Sequential Evaluation to Determine if a Claimant Is Disabled

At step one, the SSA considers whether the claimant is currently working.[39] If the claimant is working—which means engaged in "substantial gainful activity"—the SSA will determine that the claimant is

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[37] The implementing regulations for the SSI program are in 20 C.F.R. § 416. The implementing regulations for the SSDI program are found are in 20 C.F.R. § 404.

[38] *See* Bowen v. Yuckert, 482 U.S. 137, 146 n.5 (1987) (explaining that the burden will shift only if the analysis reaches step five).

[39] *See* 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

not disabled and will terminate his or her claim.[40] Factors used to determine whether a claimant is engaged in "substantial gainful activity" include whether the work is done for pay or profit,[41] whether it requires significant physical or mental activities,[42] and whether the worker can perform the job satisfactorily without more supervision or assistance than that which is usually given to others doing similar work.[43]

At step two, the Agency considers whether the claimant has a severe medical impairment.[44] If the claimant does not have a severe medical impairment, the SSA will determine that the claimant is not disabled and will terminate his or her claim.[45] There are nine diagnostic categories of mental disorders that count as severe medical impairments, including schizophrenia, intellectual disability, and anxiety-related disorders.[46] An impairment is considered severe if it significantly limits a claimant's ability to do basic work activities.[47] Basic work activities include physical exertions like lifting and walking, the use of sensory perceptions like seeing and hearing, and mental exertions like using judgment and remembering instructions.[48]

At step three, the Agency considers whether a claimant's medical condition is on the SSA's list of disabling conditions or is as severe as a condition on the list.[49] If the claimant's condition is listed or is as severe as a listed condition, the inquiry concludes and the claimant is determined to be disabled and is awarded benefits.[50] If the claimant's condition is neither on the SSA's list of disabling conditions nor as severe as a listed condition, the analysis moves to step four.[51]

At step four—which is only reached if the claimant's impairment is not listed in the SSA's list of disabling conditions or as severe as a listed condition—the Agency considers whether the claimant's med-

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[40] *Id.*

[41] 20 C.F.R. §§ 404.1572, 416.972.

[42] *See id.*

[43] *See* 20 C.F.R. §§ 404.1573(b), 416.973(b). For a full list of factors considered in determining whether a claimant is engaged in substantial gainful activity, see 20 C.F.R. §§ 404.1573–1575, 416.973–975.

[44] *See* 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

[45] *See id.*

[46] For a full list of the impairments that qualify as severe, see 20 C.F.R. § 404, subpt. P, app. 1 (2015).

[47] *See* 20 C.F.R. §§ 404.1520(c), 416.920(c).

[48] *See* 20 C.F.R. §§ 404.1521, 416.921(b).

[49] *See* 20 C.F.R. §§ 404.1520(a)(4)(iii), 404.1526(a), 416.920(a)(4)(iii), 416.926(a). The SSA will determine that a medical impairment is as severe as a listed impairment if it is "at least equal in severity and duration to the criteria of any listed impairment." 20 C.F.R. §§ 404.1526(a), 416.926(a).

[50] *See* 20 C.F.R. §§ 404.1521, 416.921(b).

[51] *See* 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

ical impairment prevents him or her from doing the same kind of work that he or she did during the past fifteen years.[52] If the impairment prevents the claimant from doing the same kind of work he or she did during the past fifteen years, the analysis moves to step five.[53] If it does not prevent the claimant from doing the same kind of work that he or she did during the past fifteen years, the SSA will determine that the claimant is not disabled and terminate the claim.[54]

At step five, the Agency considers whether the claimant can make an adjustment to other types of work based on his or her age, education, work experience, and functional abilities with the medical impairment.[55] Unlike the first four steps, where the burden of proof is on the claimant, the burden of proof here is on the Agency.[56] If the government is able to show that the claimant can make an adjustment to other work, the Agency will conclude that the claimant is not disabled and terminate his or her claim.[57] If the government fails to show that the claimant is able to make an adjustment to other work, the Agency will conclude that the claimant is disabled and eligible for benefits.[58]

B. The DAA Materiality Analysis

In addition to proving eligibility through the five-step sequential evaluation outlined above, dual-diagnosis claimants must meet the DAA materiality provision's requirement that their addiction is not a contributing factor material to the determination that they are disabled. The DAA materiality standard is a "but for" test. If the claimant would not be disabled enough to prevent work *but for* his or her addiction, the SSA will determine that he or she is not disabled and deny the claim. Thus, a claim can be denied even if the claimant

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[52] *See* 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). To make this determination, the SSA will analyze which basic work activities the claimant can perform despite their impairment—this is called "residual functional capacity"—and then compare that with the activities required to do the claimant's prior work. 20 C.F.R. §§ 404.1520(e)–(f), 416.920(e)–(f).

[53] *See* 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

[54] *See* 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

[55] *See* 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

[56] The Supreme Court and the SSA regulations disagree about whether the government's burden at step five is a burden of persuasion or burden of production. *Compare* Bowen v. Yuckert, 482 U.S. 137, 146 n.5 (1987) ("[T]he Secretary bears the burden of proof at step five . . . ."), *with* 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2) ("In order to support a finding that you are not disabled at this fifth step of the sequential evaluation process, we are responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that you can do . . . .").

[57] *See* 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

[58] *See id.*

would be sufficiently disabled to support a finding of disability under the five-step sequential evaluation when both the addiction and the co-occurring disability are considered.[59]

This rule creates two types of dual-diagnosis claimants. The first group comprises claimants whose addiction and nonaddictive disorder together are not disabling enough to prevent work. Such claimants will always be denied benefits under the CAAA. The second includes claimants whose addiction and nonaddictive disorder together are disabling enough to prevent work. These claimants' eligibility for benefits hinges on the application of the DAA materiality provision. Given the difficulty of disentangling the causes and effects of addiction and co-occurring disorders,[60] this is likely to be a large portion of dual-diagnosis claimants. This group inevitably requires the adjudicator to make a hypothetical assessment about which of a claimant's impairments would remain and how severe they would be absent substance abuse.[61] The analysis often lacks clarity because a claimant's non-addictive impairment can still be disabling enough to prevent work absent substance abuse even when substance abuse contributes to it or makes it worse.[62] Because of the inherently uncertain and counterfactual nature of the DAA materiality analysis, whichever party bears the burden of proof faces a significant hurdle to winning on the issue.

Adding to the uncertainty surrounding the determination of DAA materiality is substantial disagreement about when the analysis should take place within the disability benefits claim process. The SSA's regulations take the position that it is an independent analysis that occurs after the five-step sequential evaluation to determine disability.[63] Several federal appeals courts have suggested support for

[59] *See* 20 C.F.R. §§ 404.1535, 416.935 ("The key factor we will examine in determining whether drug addiction or alcoholism is a contributing factor material to the determination of disability is whether we would still find you disabled if you stopped using drugs or alcohol."); *see also* Stevenson, *supra* note 5, at 193 ("[I]f the applicant's disability would not exist *but for* continuing substance abuse . . . then Social Security will deny the claim.").

[60] *See infra* Section III.B for a full discussion of why the causes and symptoms of substance abuse disorders and co-occurring disorders are extremely difficult to disentangle.

[61] *See* Stevenson, *supra* note 5, at 194 (noting that the contributing factor analysis "invites the adjudicator to speculate regarding whether *each symptom or impairment* might improve without substance abuse"). For a full discussion of the uncertainty surrounding the DAA materiality analysis and how it favors placing the burden of proving DAA materiality on the government, see *infra* Section III.B.2.

[62] *See, e.g.*, Sousa v. Callahan, 143 F.3d 1240, 1245 (9th Cir. 1998) ("Just because substance abuse contributes to a disability does not mean that when the substance abuse ends, the disability will too.").

[63] *See* 20 C.F.R. §§ 404.1535(a), 416.935(a) ("If we find that you are disabled and have medical evidence of your drug addiction or alcoholism, we must determine whether your drug addiction or alcoholism is a contributing factor material to the determination of disability."); *see also* Social Security Ruling, SSR 13–2p.; Titles II and XVI: Evaluating

this approach, though it has not been central to any of their holdings.[64] This is not, however, a universally held view.[65] Other federal appeals courts have taken the view that the DAA materiality analysis is part of the claimant's burden of proving disability in the five-step sequential evaluation, though they do not specify when exactly in the process it must be proven.[66] Some federal district courts have conducted the DAA materiality analysis before the five-step sequential evaluation by separating out the claimant's addictive disorder from his or her other impairments and then running the hypothetical modified impairment through the five-step sequential evaluation.[67] Meanwhile, some administrative law judges have chosen to conduct the DAA materiality analysis at step three of the five-step sequential evaluation, where a claimant with both a listed impairment and an addictive disorder can have his or her eligibility revoked if the ALJ finds that the claimant would not have the listed impairment but for his or her substance abuse.[68] Courts adjudicating where the burden of proof of DAA materiality lies do so in the context of this ambiguity.

Cases Involving Drug Addiction and Alcoholism (DAA), 78 Fed. Reg. 11,939, 11,941 (Feb. 20, 2013) (describing how the DAA materiality analysis is conducted by "apply[ing] the steps of the sequential evaluation a second time").

[64] *See, e.g.*, Cage v. Comm'r of Soc. Sec., 692 F.3d 118, 123 (2d Cir. 2012) ("When there is medical evidence of an applicant's drug or alcohol abuse, the 'disability' inquiry does not end with the five-step analysis."); Kluesner v. Astrue, 607 F.3d 533, 537 (8th Cir. 2010) ("In the case of alcoholism and drug addiction, an ALJ must . . . determine if a claimant's symptoms, regardless of cause, constitute disability. If the ALJ finds a disability and evidence of substance abuse, the next step is to determine whether those disabilities would exist in the absence of substance abuse." (citations omitted)); Salazar v. Barnhart, 468 F.3d 615, 622 (10th Cir. 2006) ("The Contract with America Advancement Act of 1996 . . . added an extra step to the five-step sequential evaluation for claimants with DAA.").

[65] *See infra* Section III.B for a more detailed assessment of the arguments for incorporating the DAA materiality analysis into the five-step sequential evaluation of disability.

[66] *See* Doughty v. Apfel, 245 F.3d 1274, 1280 (11th Cir. 2001) ("[T]he regulations at 20 C.F.R. § 416.920 mandate a five-step disability determination, and that any addition of a 'sixth step,' which Doughty implies should be created, would require those regulations to be so amended—'something that the CAAA did not do.'" (quoting Brown v. Apfel, 192 F.3d 492, 498 (5th Cir. 1999))); *Brown*, 192 F.3d at 498 ("Unquestionably, proving disability is [claimant's] burden, and any amendment to the definition of disability logically impacts her burden. Second, the regulations at 20 C.F.R. § 416.920 mandate the five-part inquiry. Any addition of a sixth step would have to amend these regulations, something that the CAAA did not do.").

[67] *See, e.g.*, Ward v. Comm'r of Soc. Sec., No. 11 Civ. 6157(PAE), 2014 WL 279509, at *14 (S.D.N.Y. Jan. 24, 2014) ("[T]he ALJ must first separate out the effect of plaintiff's DAA and then conduct the five-step sequential evaluation . . . .").

[68] *See infra* notes 161–66 and accompanying text (describing the approach of an ALJ who conducted the DAA materiality analysis at step three of the five-step sequential evaluation).

II
Competing Approaches to the Burden of Proof of DAA Materiality and Their Impact

This Part will discuss the competing interpretations of the SSA and the federal appeals courts regarding where the burden of proof of DAA materiality lies and the impact that the allocation of the burden has on outcomes for dual-diagnosis claimants. The SSA weighed in on the burden of proof of DAA materiality in 1996 and again in 2013. In between 1996 and 2013, six federal appeals courts delivered opinions directly addressing the issue. For analytical clarity, the authorities discussed below are arranged chronologically.

A. The SSA's 1996 Interpretation

Immediately after the enactment of the CAAA in 1996, the SSA issued Emergency Teletype EM–96200[69] (1996 Teletype) an internal agency guideline, to its administrative hearing offices to clarify how they should adjudicate the DAA materiality issue.[70] It provided that "[w]hen it is not possible to separate mental restrictions and limitations imposed by DAA and the various other mental disorders shown by the evidence, a finding of 'not material' would be appropriate."[71] In other words, the tie goes to the claimant: DAA is not considered material where the evidence fails to show whether an individual's disability would persist or disappear absent substance abuse. Since the 1996 Teletype provides that the absence of proof one way or the other leads to a finding in favor of the claimant, district courts have interpreted it to place the burden of proof of DAA materiality on the government.[72] Rather than accepting the 1996 Teletype as controlling on the DAA materiality analysis, circuit courts have engaged in their own interpretations of DAA materiality burden of proof under the CAAA. The next subpart summarizes the circuit split.

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[69] 1996 Teletype, *supra* note 29.

[70] *See* McGill v. Comm'r of Soc. Sec., 288 F. App'x 50, 52 (3d Cir. 2008) (explaining that the 1996 Teletype is an "internal guideline generated by the Social Security Administration's Office of Disability . . . in response to questions concerning [42 U.S.C.] § 423(d)(2)(C)").

[71] 1996 Teletype, *supra* note 29.

[72] *E.g.*, Whitney v. Astrue, 889 F. Supp. 2d 1086, 1095 (N.D. Ill. 2012) (stating that the 1996 Teletype "dictates that the SSA bears the burden" of proving DAA materiality); Clark v. Apfel, 98 F. Supp. 2d 1182, 1185–86 (D. Or. 2000) (relying on EM–96200 to reverse an ALJ's finding of DAA materiality where the limitations imposed by addiction and the limitations imposed by other mental disorders could not be disentangled).

B. The Circuit Split

1. Circuits Placing the Burden on the Claimant

The Fifth Circuit was the first to weigh in on the issue of who bears the burden of proof of DAA materiality. In *Brown v. Apfel*, decided in 1999, three years after the enactment of the CAAA, the court held that the claimant bears the burden of proving that his or her drug addiction or alcoholism is not a contributing factor material to the determination of disability.[73] It provided four justifications for this interpretation.

First, the Fifth Circuit held that the CAAA amended the definition of disability for the purposes of SSI and SSDI eligibility when it revoked eligibility for individuals on the basis of addiction or an otherwise qualifying disability that would not be severe enough to make the claimant unable to work in the absence of substance abuse.[74] Thus, under the court's interpretation of the SSI and SSDI disability definition, the Act does not carve out a substance abuse exception where individuals who are otherwise sufficiently disabled and meet the disability definition—but only because of addiction or substance abuse, since the co-occuring (nonaddiction) disability is insufficient in isolation—then fall into an exception and are disqualified for benefits. Rather, dual-diagnosis claimants whose co-occurring disability would not be severe enough to prevent work but for their addiction cannot make a prima facie case that they are disabled for the purposes of SSI and SSDI eligibility.[75] The Fifth Circuit reasoned that since the claimant bears the burden of proving everything needed to make a prima facie case of disability in the five-step sequential evaluation, it should bear the burden of proof of DAA materiality.[76]

Second, and relatedly, the Fifth Circuit emphasized that placing the burden of proof of DAA materiality on the government would require adding a sixth step to the five-step sequential evaluation to determine disability, and that Congress did not intend to amend this process as set out in the regulations.[77] Again, because the claimant

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[73] 192 F.3d 492, 498 (5th Cir. 1999).

[74] *See id.*

[75] *See id.* at 499 ("[D]rug or alcohol abuse is material to a disability if the ALJ would not 'find [the claimant] disabled if [the claimant] stopped using drugs or alcohol.'" (quoting 20 C.F.R. § 416.935(b)(1) (1999))).

[76] *See id.* at 498 ("Unquestionably, proving disability is [the claimant's] burden, and any amendment to the definition of disability logically impacts his burden.").

[77] *See id.* ("Any addition of a sixth step would have to amend these regulations, something that the CAAA did not do."). Note, however, that the 2013 Ruling, published fourteen years after the Fifth Circuit's decision in *Brown*, explicitly creates a separate process outside of the five-step sequential evaluation for determining DAA materiality. Social Security Ruling, SSR 13–2p.; Titles II and XVI: Evaluating Cases Involving Drug

bears the burden of proof of a prima facie case of disability in the five-step sequential evaluation, incorporating the DAA materiality analysis into the five steps would logically place the burden on the claimant. However, despite its emphasis on incorporating the DAA materiality analysis into the five-step sequential evaluation, the court did not indicate where within the five steps the DAA materiality issue should be resolved.

The Fifth Circuit's remaining rationales are rooted in public policy. Addressing the third, the court stated that the government's burden should not be expanded without "compelling justification or the clear intent of Congress."[78] Fourth, the court emphasized that the claimant is "the party best suited to demonstrate whether she would still be disabled in the absence of drug or alcohol addiction" because the claimant has better access to medical records, the relevant evidence on the issue.[79]

The Eleventh Circuit weighed in two years later in 2001 in *Doughty v. Apfel*.[80] The court adopted the Fifth Circuit's four rationales nearly word-for-word to reach the conclusion that the burden of proof of DAA materiality is on the claimant.[81] The Ninth Circuit was next to place the burden of proof of DAA materiality on the claimant in 2007 in *Parra v. Astrue*.[82] Like the Fifth and Eleventh Circuits before it, the Ninth Circuit emphasized that the CAAA did not intend to add a sixth step to the five-step sequential evaluation to determine disability and that the claimant is the party in the best position to prove that he or she would still be disabled absent his or her substance abuse disorder.[83] It also reiterated that "Congress sought through the CAAA to 'discourage alcohol and drug abuse, or at least not to encourage it with a government subsidy.' [Placing the burden of proving DAA materiality on the government] provides the opposite incentive."[84]

The Ninth Circuit was, however, the first among the federal appeals courts placing the burden of proof of DAA materiality on the claimant to address the 1996 Teletype in detail. The court acknowl-

Addiction and Alcoholism (DAA), 78 Fed. Reg. 11,939, 11,941 (Feb. 20, 2013) (establishing a separate six-step process to determine DAA materiality).

78 *Brown*, 192 F.3d at 498.

79 *Id.*

80 245 F.3d 1274 (11th Cir. 2001).

81 *See id.* at 1280 (agreeing with the Fifth Circuit's reasoning and repeating its four rationales).

82 481 F.3d 742, 748 (9th Cir. 2007).

83 *See id.*

84 *Id.* at 749–50 (citations omitted) (quoting Ball v. Massanari, 254 F.3d 817, 824 (9th Cir. 2001)).

edged that the interpretation is "'entitled to respect,' but only to the extent that it has the 'power to persuade.'"[85] It found that placing the burden of proof of DAA materiality on the government was inconsistent with what it saw as the CAAA's intent, described above, to disincentivize drug use.[86] Thus the "respect" due to the 1996 Teletype did not preclude the court from placing the burden of proof on the claimant.[87]

The Second Circuit, the most recent circuit to rule on the issue, placed the burden of proof of DAA materiality on the claimant in 2012 in *Cage v. Commissioner of Social Security*.[88] The court mostly adopted the same justifications as the circuits before it.[89] It also rejected the claimant's argument that the House Committee Report for the CAAA supports placing the burden of proof of DAA materiality on the government.[90] That report states, in relevant part, that the Act was designed to prevent receipt of benefits by "individuals whose *sole* severe disabling condition is a drug addiction or alcoholism,"[91] but that "[i]ndividuals with [DAA] who have had another severe disabling condition . . . can qualify for benefits based on that disabling condition."[92] In other words, the report provides that dual-diagnosis claimants should presumptively get benefits based on their co-occurring disability. Placing the burden of proof of DAA materiality on the claimant creates the opposite presumption. The court, without elaboration, simply noted that this legislative history lacks the force of law and did not directly answer the question of who bears the burden of proof of DAA materiality.[93] The court also addressed the 1996 Teletype. Following the Ninth Circuit's lead in *Parra*, it acknowledged that the Teletype should be interpreted to place the burden of proof of DAA materiality on the government, but declined to follow it because, as internal agency guidance, it is entitled to minimal deference.[94]

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85 *Id.* at 749 (quoting Christensen v. Harris Cty., 529 U.S. 576 (2000)).

86 *See id.* at 749–50.

87 *See id.*

88 692 F.3d 118, 123 (2d Cir. 2012).

89 *See id.* at 123–24 (emphasizing that the CAAA amended the definition of disability, that claimants are in a better position to offer proof of DAA materiality, and that one of Congress's goals in passing the Act was to avoid incentivizing drug use).

90 *See id.* at 124.

91 H.R. REP. NO. 104-379, pt. 2, at 17 (1995) (emphasis added).

92 *Id.* at 16.

93 *See Cage*, 692 F.3d at 124.

94 *See id.* at 125 ("[A]s an unpromulgated internal agency guideline, [the teletype] does not have the force of law and is entitled to deference only insofar as it has the power to persuade.").

2. *Circuits Placing the Burden on the Government*

In 2006, the Tenth Circuit effectively placed the burden of proof of DAA materiality on the government in *Salazar v. Barnhart*.[95] The court relied directly on the direction given in the 1996 Teletype to reach this conclusion: "[T]he Commissioner's teletype instructs that where the record is devoid of any medical or psychological report, opinion or projection as to the claimant's remaining limitations if she stopped using drugs or alcohol, an ALJ should 'find that DAA is not a contributing factor material to the determination of disability.'"[96] Although the opinion never explicitly states that the government bears the burden of proof of DAA materiality,[97] courts interpreting *Salazar* outside the Tenth Circuit have uniformly concluded that it does so on the basis of the above-quoted language.[98]

The Eighth Circuit addressed the issue in 2010 in *Kluesner v. Astrue*.[99] In its decision, the court explicitly states that "[t]he claimant has the burden to prove that alcoholism or drug addiction is not a contributing factor."[100] However, in the very next sentence, the court states that "if the ALJ is unable to determine whether substance use disorders are a contributing factor material to the claimant's otherwise-acknowledged disability, the claimant's burden has been met and an award of benefits must follow."[101] This language is substantively identical to the tie-goes-to-the-claimant approach from the 1996 Teletype.[102] District courts in the Eighth Circuit applying *Kluesner* tend to repeat both the hollow statement placing the burden

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95 468 F.3d 615, 625 (10th Cir. 2006).

96 *Id.* at 624 (quoting 1996 TELETYPE, *supra* note 29).

97 District courts within the Tenth Circuit tend to repeat the tie-goes-to-the-claimant approach without explicitly stating the burden of proof is on the government. *See, e.g.*, Simpson v. Astrue, No. CIV–11–565–M, 2011 WL 7006100, at *2 (W.D. Okla. Dec. 21, 2011) ("[W]here a medical or psychological examiner cannot project what limitations would remain if the claimant stopped using drugs or alcohol, the disability examiner should find that DAA is *not* a contributing factor material to the disability determination[.]" (second alteration in original) (quoting *Salazar*, 468 F.3d at 623)); Elliot v. Astrue, No. 07–cv–01922–LTB, 2008 WL 2783486, at *7 (D. Colo. July 16, 2008) ("[I]f the effects of a claimant's mental impairments cannot be separated from the effects of substance abuse, the DAA is *not* a contributing factor material to the disability determination." (quoting *Salazar*, 468 F.3d at 623)).

98 *See, e.g.*, *Cage*, 692 F.3d at 123 (distinguishing the Tenth Circuit's opinion in *Salazar* from other circuits placing the burden of proof of DAA materiality on the claimant); Whitney v. Astrue, 889 F. Supp. 2d 1086, 1095 (N.D. Ill. 2012) ("The Tenth Circuit held that the SSA bears the burden [of proving DAA materiality] based on 'Emergency Teletype No. [EM–96200],' issued as an internal instruction by the SSA to its own examiners.").

99 607 F.3d 533 (8th Cir. 2010).

100 *Id.* at 537.

101 *Id.* (internal quotation marks omitted).

102 *See supra* notes 69–72 and accompanying text (describing the 1996 Teletype).

on the claimant and the tie-goes-to-the-claimant approach.[103] District courts outside the Eighth Circuit interpreting *Kluesner* are divided as to whether the decision in practice places the burden of proof on the government or the claimant.[104]

The courts interpreting *Kluesner* to place the burden of proof of DAA materiality on the government have the better argument. The claimant's initial burden of proving disability in steps one through four of the five-step sequential evaluation must be met by a preponderance of the evidence[105]—a "more-likely-than-not" standard.[106] Therefore, if the burden of proof of DAA materiality was on the claimant as a part of proving disability, the claimant would have to prove that it is more likely than not that disability would persist absent substance abuse. However, *Kluesner* states that a finding that DAA is not material is appropriate where the evidence makes it neither more likely than not nor less likely than not that a claimant's disability would persist absent substance abuse.[107] Thus, the opinion's otherwise unsupported statement that the burden of proof of DAA materiality falls on the claimant is wholly inconsistent with its tie-

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[103] *See, e.g.*, Montee v. Colvin, No. 2:14cv0028 TCM, 2015 WL 467521, at *17 (E.D. Mo. Feb. 2, 2015) ("'The claimant has the burden to prove that alcoholism or drug addiction is not a contributing factor.' The claimant meets this burden if the ALJ 'is unable to determine whether substance abuse disorders are a contributing factor to the claimant's otherwise-acknowledged disability . . . .'" (citations omitted) (quoting *Kluesner*, 607 F.3d at 537)); Higginbottom v. Astrue, No. C11–4009–MWB, 2011 WL 6936484, at *17 (N.D. Iowa Nov. 29, 2011) ("The claimant has the burden of proving that alcoholism or drug addiction is not a contributing factor. 'If the ALJ is unable to determine whether substance use disorders are a contributing factor material to the claimant's otherwise-acknowledged disability . . . an award of benefits must follow.'" (citations omitted) (quoting *Kluesner*, 607 F.3d at 537)).

[104] *Compare* Whitney v. Astrue, 889 F. Supp. 2d 1086, 1096 (N.D. Ill. 2012) (explaining that the "tie-goes-to-the-claimant approach" set out by the Eighth Circuit in *Kluesner* effectively places the burden of proving DAA materiality on the government), *with* Ittel v. Astrue, No. 2:12–CV–096 JD, 2013 WL 704661, at *12 (N.D. Ind. Feb. 26, 2013) (citing *Kluesner* for the point that "[t]he [c]laimant bears the burden of proving that alcoholism or drug addiction is not a contributing factor").

[105] *See* 70C Am. Jur. 2d *Social Security and Medicare* § 1878 (2016).

[106] The preponderance of the evidence standard means that the party with the burden of proof must show that the thing being proved is more likely than not to be true. *See* Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 622 (1993) (stating that proving something by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence'" (citations omitted) (quoting *In re* Winship, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring))); *see also* 1 Clifford S. Fishman, Jones on Evidence § 3:9 (7th ed. 1992) (describing three different definitions of "preponderance of the evidence" used by courts, all of which in practice amount to a more-likely-than-not standard).

[107] *See supra* note 101 and accompanying text (citing *Kluesner* for its tie-goes-to-the-claimant approach).

goes-to-the-claimant approach,[108] which in practice places the burden on the government.[109]

C. The SSA's 2013 Interpretation

After the 1996 Teletype, the SSA did not release further guidance addressing the burden of proof issue until 2013. That year, the Agency issued Social Security Policy Interpretation Ruling 13–2p. (2013 Ruling), which muddied its position on this question. Unlike the 1996 Teletype—an unpromulgated internal agency guidance that is "entitled to respect" but is nonbinding[110]—Social Security Policy Interpretation Rulings are binding on the Agency, even though they lack the force of law and may be superseded by judicial precedent.[111] The 2013 Ruling sets out an independent six-step process for evaluating DAA materiality.[112] The key step in that process is the final one, where the SSA determines whether the claimant's non-DAA impairments would "improve to the point of nondisability in the absence of DAA."[113] The Ruling indicates that this six-step analysis is independent from the five-step sequential evaluation to determine disability and should be conducted after the sequential evaluation is com-

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108 *See Whitney*, 889 F. Supp. 2d, at 1096 (explaining why the Eighth Circuit's opinion in *Kluesner* should be read to place the burden of proof of DAA materiality on the government).

109 The same issue of an explicit but otherwise unsupported statement that the burden of proof of DAA materiality is on the claimant followed by an endorsement of the tie-goes-to-the-claimant approach arises in the 2013 Ruling. For a detailed analysis of the language in the 2013 Ruling, see *infra* Section II.C.

110 Parra v. Astrue, 481 F.3d 742, 749 (9th Cir. 2007) (quoting Christensen v. Harris Cty., 529 U.S. 576, 587 (2000)).

111 *See* Heckler v. Edwards, 465 U.S. 870, 873–74 n.3 (1984) ("Once published, a [Social Security] ruling is binding on all components of the Social Security Administration . . . . Rulings do not have the force and effect of the law or regulations . . . . A ruling may be superseded, modified, or revoked by later legislation, regulations, court decisions or rulings." (second alteration in original)).

112 The six-step analysis for DAA materiality proposed by the 2013 Ruling is as follows: (1) Does the claimant have DAA? If no, a DAA materiality determination is unnecessary. If yes, go to step two; (2) Is the claimant disabled considering all impairments, including DAA? If no, the claim is denied. If yes, go to step three; (3) Is DAA the only impairment? If yes, the claim is denied. If no, go to step four; (4) Is the other impairment disabling by itself while the claimant is dependent upon or abusing drugs? If no, the claim is denied. If yes, go to step five; (5) Does the DAA cause or affect the claimant's other impairments? If no, DAA is not material and the claim is allowed. If yes, go to step six; (6) Would other impairments improve to the point of nondisability in the absence of DAA? If no, DAA is not material and the claim is allowed. If yes, DAA is material and the claim is denied. *See* Social Security Ruling, SSR 13–2p.; Titles II and XVI: Evaluating Cases Involving Drug Addiction and Alcoholism (DAA), 78 Fed. Reg. 11,939, 11,940 (Feb. 20, 2013).

113 *Id.*

plete.[114] On the burden of proof question, the Ruling states that "the claimant continues to have the burden of proving disability throughout the DAA materiality analysis."[115] On its surface, this language clearly places the burden of proof on the claimant, though it does so without any explanation of how the burden should be met.

This 2013 Ruling's otherwise unsupported statement that the claimant retains the burden of proof of DAA materiality was rejected by an order of the Social Security Appeals Council—the Agency's highest administrative decisional body[116]—handed down just four months after the Ruling was published. The order states that, while some courts have held that "the claimant has the burden of proving that he or she would remain disabled in the absence of DAA . . . [,] the Commissioner has not acquiesced in these court decisions."[117] Then, citing the 2013 Ruling directly in support, it endorses the tie-goes-to-the-claimant approach originally established in the 1996 Teletype.[118] Thus, the SSA's highest decisional body emphatically rejects reading the 2013 Ruling to place the burden of proof of DAA materiality on the claimant—a particularly meaningful interpretation given that the Ruling is binding on the SSA.

In short, when taken together, the Agency's regulations suggest that the SSA's dominant position is that the government, and not the claimant, bears the burden of proof of DAA materiality. The 2013 Ruling briefly obscured this position. However, the Appeals Council decision interpreting that Ruling reaffirms the Agency's view that the burden of proof is on the government. No federal appeals court has weighed in on the issue since the publication of the Ruling or the Appeals Council decision. Accordingly, the state of the law on the burden of proof of DAA materiality remains in flux. Even the federal appeals courts that have already decided the issue did so when the only relevant SSA input was an internal agency guideline. Today, the

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114 In other words, the independent six-step process to determine DAA materiality is itself a sixth and final step following the five-step sequential evaluation to determine DAA materiality. *See supra* note 63 and accompanying text (describing how the SSA's regulations and the 2013 Ruling make the DAA materiality analysis an independent sixth step).

115 Social Security Ruling, SSR 13–2p.; Titles II and XVI: Evaluating Cases Involving Drug Addiction and Alcoholism (DAA), 78 Fed. Reg. at 11,941.

116 *See generally Brief History and Current Information about the Appeals Council*, Soc. Sec. Admin., https://www.socialsecurity.gov/appeals/about_ac.html (last visited Jan. 3, 2016).

117 Order of the Appeals Council, *supra* note 31, at 2.

118 *See id.* ("[T]he policy of the [SSA is] that [when] . . . it is not possible to separate the limitations imposed by substance abuse from the limitations imposed by other impairments . . . a finding that substance abuse was not material would be appropriate.").

Agency's highest decisional body endorses the tie-goes-to-the-claimant approach.

D. Impact of the Allocation of the Burden

The allocation of the burden of proof will be decisive of whether claimants get benefits in cases where the evidence of DAA materiality is inconclusive, meaning the causes and effects of addiction and a co-occurring disorder cannot be separated. Such claimants consistently lose when they bear the burden of proof because they cannot establish that they would be disabled absent substance abuse.[119] Meanwhile, such claimants consistently win when the government bears the burden of proof because the government cannot establish that they would not be disabled absent substance abuse.[120]

A comparison of the Ninth Circuit's opinion in *Parra*, where the burden is on the claimant,[121] and the District of Kansas's opinion in *Bayer v. Astrue*, where the burden is on the government,[122] reveals how similar fact patterns can yield opposite results based on the allocation of the burden of proof. In both cases, one medical expert testified regarding DAA materiality. The expert in *Parra* testified that while cirrhosis caused by alcohol abuse is in many cases reversible, "'there is no way for me to know' whether [claimant's] cirrhosis was

[119] *See, e.g.*, Parra v. Astrue, 481 F.3d 742, 749–50 (9th Cir. 2007) (affirming ALJ's finding of DAA materiality where physician testified that there was insufficient evidence in the record to support a conclusion one way or the other regarding DAA materiality); Foster v. Astrue, No. H–08–2843, 2011 WL 5509475, at *10–11 (S.D. Tex. Nov. 10, 2011) (affirming ALJ's DAA materiality finding where "the objective medical evidence does not separate plaintiff's addiction-related impairments from any mental impairments that are *not* addiction-related"); Jenkins v. Astrue, 815 F. Supp. 2d 1145, 1151 (D. Or. 2011) (affirming ALJ's finding of DAA materiality where "the evidence is inconclusive as to whether plaintiff's mental impairments remained disabling after he stopped abusing substances"); Farwell v. Astrue, No. 08-004438 AJW, 2009 WL 2424216, at *11 (C.D. Cal. Aug. 4, 2009) (same).

[120] *See, e.g.*, Lewis v. Colvin, No. 13–CV–308–JHP–KEW, 2014 WL 4897219, at *4 (E.D. Okla. Sept. 30, 2014) ("[T]he ALJ expressly stated that he could not separate [c]laimant's substance abuse from his intellectual functioning. As such is the case, the ALJ's findings [of DAA materiality] and the evidence are irreconcilably in conflict." (citation omitted)); Abeyta v. Astrue, No. 09–cv–02437–WJM, 2011 WL 2531256, at *6 (D. Colo. June 24, 2011) ("There being no medical evidence in the record separating out the effects of DAA from other impairments, the ALJ should then have determined that [p]laintiff's psychological and cognitive impairments were severe and that [p]laintiff is disabled."); Bayer v. Astrue, No. 08–cv–02389–WYD, 2010 WL 1348416, at *6–7 (D. Colo. Mar. 31, 2010) (reversing DAA materiality finding because ALJ improperly interpreted doctor's opinion that he "could only 'guess' as to how the bipolar disorder, without the effects of alcohol, would limit [p]laintiff's mental health" to mean that claimant's bipolar disorder would not be severe absent substance abuse).

[121] *Parra*, 481 F.3d at 749–50.

[122] *See Bayer*, 2010 WL 1348416, at *7 (applying the tie-goes-to-the-claimant approach from the Tenth Circuit's opinion in *Salazar*).

irreversible . . . because the record is insufficient to support a conclusion either way."[123] The expert in *Bayer* testified that "for me to guess, and this is only a guess now, I don't think [the claimant] would have marked impairments if it is just based on the bipolar itself. . . . I don't think that would be marked in the absence of alcohol."[124] Thus, in both cases, the medical expert could not conclusively separate the claimant's addiction and co-occurring disorder, but speculated that the claimant's impairment might not be severe enough to prevent work absent substance abuse. The court in *Parra* affirmed the ALJ's materiality finding, rejecting the claimant's argument that "inconclusive testimony is sufficient to satisfy the claimant's burden of proof."[125] It reasoned that the claimant's view "effectively shifts the burden to the Commissioner to prove materiality."[126] Conversely, the court in *Bayer* reversed the ALJ's materiality finding, citing *Salazar* for the proposition that "where a medical examiner . . . cannot project what limitations would remain if the claimant stopped using drugs or alcohol, the disability examiner should find that substance abuse is not a contributing factor material to the disability determination."[127]

As *Parra* and *Bayer* suggest, medical evidence—"the cornerstone of the disability determination"[128]—often leads to the conclusion that the causes and effects of a claimant's addiction and co-occurring disorder cannot be separated.[129] This is unsurprising given that the SSA, after seventeen years of litigating the DAA materiality provision, stated in the 2013 Ruling that it knows of no reliable test to determine which of a claimant's impairments would remain absent substance abuse.[130] Because proof of DAA materiality is elusive and medical experts often find the hypothetical assessment of a claimant's impair-

[123] *Parra*, 481 F.3d at 748–49.

[124] *Bayer*, 2010 WL 1348416, at *5.

[125] *Parra*, 481 F.3d at 749.

[126] *Id.*

[127] *Bayer*, 2010 WL 1348416, at *7 (citing Salazar v. Barnhart, 468 F.3d 615, 623 (10th Cir. 2006)).

[128] *Disability Evaluation Under Social Security*, Soc. Sec. Admin., https://www.ssa.gov/disability/professionals/bluebook/evidentiary.htm (last visited Feb. 25, 2016).

[129] *See, e.g.*, *Parra*, 481 F.3d at 749 (providing testimony from doctor who could not separate the causes and effects of a claimant's addiction and co-occurring disability); Gordon v. Comm'r of Soc. Sec., No. 3:10–cv–00124 NPM, 2012 WL 669854, at *5 (N.D.N.Y. Feb. 29, 2012) (same); Lindstrom v. Astrue, No. C 09–3053–MWB, 2011 WL 1230279, at *22 (N.D. Iowa Mar. 28, 2011) (same); *Bayer*, 2010 WL 1348416, at *5 (same); Frankhauser v. Barnhart, 403 F. Supp. 2d 261, 274 (W.D.N.Y. 2005) (same).

[130] *See* Social Security Ruling, SSR 13–2p.; Titles II and XVI: Evaluating Cases Involving Drug Addiction and Alcoholism (DAA), 78 Fed. Reg. 11,939, 11,943 (Feb. 20, 2013) ("We do not know of any research data that we can use to predict reliably that any given claimant's co-occurring mental disorder would improve, or the extent to which it would improve, if the claimant were to stop using drugs or alcohol.").

ments absent substance abuse inconclusive, the allocation of the burden will determine whether a large number of dual-diagnosis claimants receive benefits. The next Part examines the legal question of who should bear the burden of proof of DAA materiality and shows why the burden should be placed on the government.

III
Assessing the Burden of Proof of DAA Materiality

Neither the Tenth Circuit nor the Eighth Circuit flesh out the reasons why the burden of proof of DAA materiality should fall on the government.[131] This Part will explain why placing the burden on the government is the correct approach based on the text of the CAAA, its implementing regulations, and public policy considerations.

A. The Text and Structure of the Statute

One of the main arguments set out by the courts placing the burden of proof of DAA materiality on the claimant is that the CAAA amends the definition of disability, which the claimant has the burden of proving in steps one through four of the five-step sequential evaluation described in Part I.A.[132] In contrast, the courts placing the burden of proof on the government construe the DAA materiality provision as a substance abuse exception to the definition of disability, which the government must prove as an affirmative defense as the party that benefits from the application of the exception.[133] The latter is a better reading of the CAAA.

1. The DAA Materiality Provision Creates an Exception to the Definition of Disability in the Social Security Act

A term that operates as an exception to a statutory regime, in contrast to a term that encompasses part of a statutory regime, is one where "[s]eparate provisos or exceptions curtail or restrict the operation of a statute in a case to which it would otherwise apply."[134] The DAA materiality provision functions in precisely this manner by excepting from benefits individuals who are otherwise disabled under

131 *See supra* Section II.B.2 (describing those opinions).

132 *See supra* notes 97–98 (discussing the view that the DAA materiality provision amends the definition of disability for the purposes of SSI eligibility).

133 *See, e.g.*, Whitney v. Astrue, 889 F. Supp. 2d 1086, 1094–95 (N.D. Ill. 2012) (explaining that the DAA materiality provision is "an exception to the general definition [of disability]" and, "[b]ecause the SSA is the party that seeks the benefits of the statutory exception, the SSA bears the burden of proving" the exception).

134 EEOC v. Chi. Club, 86 F.3d 1423, 1430 (7th Cir. 1996).

the statute's definition of disability but whose addiction is a contributing factor material to the determination of disability.

In *Whitney v. Astrue*, the Northern District of Illinois elaborated on why the DAA materiality provision—analyzed independently from the five-step sequential evaluation to determine disability—operates as an exception to the general definition of disability in the statute.[135] The court reasoned by analogy to the Supreme Court's construction of the National Labor Relations Act (NLRA) in *NLRB v. Kentucky River Community Care, Inc.*[136] That case dealt with whether certain employees are defined as "supervisors" under the NLRA, which would deprive them of particular bargaining rights conferred to other employees by the Act.[137] The Court construed "supervisors" as an exception to the definition of "employees" because the statute first "'reiterate[s] the breadth of the ordinary dictionary definition' of [employee]"[138] and then lists supervisors as a separate group that "would fall within the class of employees were they not expressly excepted from it."[139]

The DAA materiality provision and the supervisory exception to the definition of "employees" in the NLRA are structured in identical fashion. First, the Social Security Act sets out a general definition of "disability" just as the NLRA sets out a general definition of "employees."[140] It then carves out the DAA materiality provision, a substance abuse exception similar to the supervisory exception, in a separate provision.[141] The DAA materiality provision thus removes a group from eligibility that would otherwise qualify as disabled under the statute. As the court in *Whitney* explained, "[i]n both statutory frameworks, there is a general definition that would otherwise cover a situation and then an exception to the general definition."[142]

The House Committee Report discussing the DAA materiality provision lends additional support to understanding the provision as

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135 *See Whitney*, 889 F. Supp. 2d at 1094–96.

136 *Id.* (citing NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706 (2001)).

137 *Ky. River*, 532 U.S. at 708–09; *see also* 29 U.S.C. § 152(3) (2012) (explaining that supervisors are not included in the definition of "employee" under the National Labor Relations Act).

138 *Ky. River*, 532 U.S. at 711 (quoting NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 90 (1995)).

139 *Id.*

140 *See* 42 U.S.C. § 423(d)(1) (2012) (defining the term "disability").

141 *See id.* § 423(d)(2)(C); *see also Whitney*, 889 F. Supp. 2d at 1094 ("[T]he Social Security Act provides a general definition of 'disability' under 42 U.S.C. § 423(d)(1). Section 423(d)(2)(C) then carves out the substance abuse exception, just as the [NLRA] creates a separate supervisory exception.").

142 *Whitney*, 889 F. Supp. 2d at 1094.

an exception to the general definition of disability.[143] The report states that the provision's purpose is to prevent "individuals whose *sole* severe disabling condition is drug addiction or alcoholism" from getting benefits.[144] At the same time, the House wanted to "ensure that beneficiaries with other severe disabilities who are also addicts or alcoholics are paid benefits."[145] The report therefore illustrates Congress's intent to disqualify a specific group of individuals—those who are disabled solely because of substance abuse—from eligibility for benefits. Construing the DAA materiality provision to meet this goal makes it an exception to the general definition of disability rather than an amendment of that definition because it does not change what it means to be disabled under the Act, but rather excludes from eligibility a subset of individuals who would otherwise qualify for benefits.

2. *The Government Benefits from Proving the Exception*

In *Kentucky River*, the Supreme Court invoked "the general rule of statutory construction that the burden of proving justification or exemption under a special exception . . . of a statute generally rests on one who claims its benefits."[146] First articulated by the Court in the nineteenth century,[147] this rule has been affirmed in a wide variety of contexts since.[148] The Court in *Kentucky River* applied the rule to place the burden of proving the supervisory exception to the definition of "employees" on the employer, rather than the NLRB, because

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143 This report was addressed by the Second Circuit in *Cage*, which rejected the claimant's position that the report directly supported placing the burden of proving DAA materiality on the government. *See supra* notes 88–93 and accompanying text.

144 H.R. Rep. No. 104-379, pt. 2, at 17 (1995) (emphasis added).

145 *Id.*

146 *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) (internal quotation marks omitted) (quoting FTC v. Morton Salt Co., 334 U.S. 37, 44–45 (1948)).

147 *See* Ryan v. Carter, 93 U.S. 78, 83 (1876) ("The general rule of law is, that a proviso carves special exceptions only out of the body of the Act; and those who set up any such exception must establish it . . . .") (citing United States v. Dickson, 40 U.S. 141, 165 (1841)); *see also* EEOC v. Chi. Club, 86 F.3d 1423, 1430 (7th Cir. 1996) (citing these cases for the proposition that "[o]ur research reveals that the lineage of Supreme Court case law applying the burden of proof to those seeking the benefit of exceptions to statutes has its modern origins in two cases decided in the nineteenth century").

148 *See, e.g.*, United States v. First City Nat'l Bank of Hous., 386 U.S. 361, 366 (1967) (applying the rule to the burden of proving an exception to a prohibition on anticompetitive bank mergers); SEC v. Ralston Purina Co., 346 U.S. 119, 126 (1953) (applying the rule to a statutory exception to a registration requirement under the Securities Act of 1933); *Morton Salt Co.*, 334 U.S. at 44–45 (applying the rule to an exception to a prohibition against price discrimination in the antitrust context); Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co., 205 U.S. 1, 10 (1907) (applying the rule to an exception from a law requiring automatic train couplings); *cf.* Javierre v. Cent. Altagracia, 217 U.S. 502, 508 (1910) (applying the rule to a contract dispute to the party seeking the benefit of a provision in the contract).

the employer is the party who stood to benefit from the more limited rights guaranteed to "supervisors" as compared to nonsupervisory employees.[149] It reasoned that "[t]he burden of proving the applicability of the supervisory exception . . . should thus fall on the party asserting it" since "[s]upervisory status . . . is not an element of the [NLRB's] claim."[150]

Similarly, the government is the party that benefits from proving DAA materiality. If DAA is material, the claimant loses.[151] This pads the government's pocketbook by reducing the total number of individuals receiving SSI and SSDI. Thus, the government benefits from *proving* the claimant's substance abuse "is material to the determination of disability."[152] Under the Supreme Court's longstanding rule that the party benefitting from the application of an exception to a general definition of a statutory term bears the burden of proving that exception,[153] the government should bear the burden of proof of DAA materiality.

B. The Text and Structure of the CAAA's Implementing Regulations

Some of the federal appeals courts placing the burden of proof of DAA materiality on the claimant emphasize that placing the burden on the government would require adding a sixth step to the five-step sequential evaluation outlined in the regulations, which Congress did not intend to do.[154] Accordingly, they argue that the burden of proof of DAA materiality falls on the claimant because the claimant bears the burden of proving disability in steps one through four.[155] While Congress was silent as to whether the DAA materiality provision added an additional step to the five-step sequential evaluation, how-

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[149] *Ky. River*, 532 U.S. at 711–12.

[150] *Id.*

[151] *See supra* Section II.D (addressing the determinative impact of allocating the burden of proof of DAA materiality).

[152] *See* 20 C.F.R. §§ 404.1535, 416.935 (2015) ("If we find that you are disabled and have medical evidence of your drug addiction or alcoholism, we must determine whether your drug addiction or alcoholism is a contributing factor material to the determination of disability.").

[153] *See supra* note 147 and accompanying text (explaining this rule).

[154] *E.g.*, Doughty v. Apfel, 245 F.3d 1274, 1280 (11th Cir. 2001) (noting that placing the burden on the government would create a sixth step in the five-step disability determination, which the CAAA did not intend to do); Brown v. Apfel, 192 F.3d 492, 498 (5th Cir. 1999) ("[T]he regulations at 20 C.F.R. § 416.920 mandate the five part inquiry. Any addition of a sixth step would have to amend these regulations, something that the CAAA did not do.").

[155] *See supra* notes 77, 83 and accompanying text (summarizing the reasoning of the Fifth and Ninth Circuits).

ever, the regulations are not. They specifically denote the DAA materiality analysis as a separate, sixth step following completion of the five-step sequential evaluation to determine disability, discrediting the argument that the burden of proof must be borne by the claimant as part of his or her burden in steps one through four.

1. *Text of the Regulations*

The SSA's regulations implementing the CAAA also describe the DAA materiality analysis as a step that occurs *after* the determination that a claimant is disabled: "If we find that you are disabled and have medical evidence of your drug addiction or alcoholism, we must determine whether your drug addiction or alcoholism is a contributing factor material to the determination of disability."[156] This language demonstrates that the determination of disability is made first. The DAA materiality analysis only occurs if the ALJ finds the claimant to be disabled in keeping with the five-step sequential evaluation. Thus, the plain language of the CAAA's implementing regulations again undermines the argument that the claimant bears the burden of proving DAA materiality as part of the five-step sequential evaluation.

This language also supports reading the DAA materiality provision as an exception to the definition of disability in the statute. As described in Part III.A, understanding the DAA materiality provision as an exception places the burden of proof on the government. The five-step sequential evaluation of disability is a threshold analysis, operating to determine the general applicability of the statute to a given claimant.[157] Only then does the DAA materiality provision act to "curtail" the application of the statute in situations that it would otherwise apply by denying benefits to claimants who meet the SSA's definition of "disability" but have a concurrent drug or alcohol addiction.[158]

2. *Structure of the Regulations*

The procedural structure of the five-step sequential evaluation further weakens the position that the claimant should bear the burden of proof of DAA materiality—a position based solely on the fact that the claimant is allocated the burden of proving disability in the first

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[156] 20 C.F.R. §§ 404.1535, 416.935.

[157] *See supra* notes 139–42 and accompanying text (describing how the DAA materiality provision functions as an exception to the general definition of disability in the statute).

[158] *Cf.* EEOC v. Chi. Club, 86 F.3d 1423, 1430 (7th Cir. 1996) (describing exceptions to a general statutory term as "[s]eparate provisos or exceptions [that] curtail or restrict the operation of a statute in a case to which it would otherwise apply").

four steps. An examination of steps one through four reveals no logical place to conduct the DAA materiality analysis, thus rendering this distinction inapposite.

Step one focuses on whether the claimant is performing substantial gainful activity,[159] an analysis entirely unrelated to the question of DAA materiality. Step two focuses on whether the claimant has a severe medical impairment that significantly limits the claimant's ability to perform basic work activities.[160] Placing the DAA materiality analysis here would create a result plainly inconsistent with the analysis required by the regulations—a claim could be terminated where a claimant's disability is severe enough to significantly limit their ability to do basic work activities, the exact threshold that must be met to satisfy step two. The second step of the sequential evaluation simply requires a determination as to whether or not an impairment is severe, *not* whether an impairment is severe in the absence of addiction.

Step three examines whether the claimant's condition is listed as a disabling condition in the regulations or is otherwise as severe as a listed condition.[161] As the Second Circuit noted in *Cage*, the ALJ in the underlying administrative proceeding conducted the DAA materiality analysis at this step.[162] The ALJ found that the claimant was *per se* disabled because of three listed conditions, but nonetheless determined that the claimant would only be moderately disabled absent her substance abuse.[163] Instead of awarding automatic benefits to the claimant—the appropriate course where a claimant is found to be disabled by virtue of a listed impairment at step three[164]—the ALJ then proceeded to step four with the claimant's hypothetical impairments absent DAA as the benchmark.[165]

This approach is erroneous for two reasons. First, *Cage* arguably rejects the ALJ's approach by suggesting that the DAA materiality analysis should in fact be independent from the sequential evaluation to determine disability: "When there is medical evidence of an applicant's drug or alcohol abuse, the 'disability' inquiry does not end with

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159 *See supra* notes 39–43 and accompanying text (discussing step one in the five-step sequential evaluation).

160 *See supra* notes 44–48 and accompanying text (discussing step two in the five-step sequential evaluation process).

161 *See supra* notes 49–50 and accompanying text (discussing step three in the five-step sequential evaluation process).

162 *See* Cage v. Comm'r of Soc. Sec., 692 F.3d 118, 126 (2d Cir. 2012).

163 *See id.*

164 *See supra* note 49–50 and accompanying text (explaining how the ALJ proceeds when a claimant's disability is listed or is as severe as a listed condition).

165 *See Cage*, 692 F.3d at 126.

the five-step analysis."[166] District courts following *Cage* have chosen not to place the DAA materiality analysis at step three, but instead to make it a separate inquiry.[167] Second, and more importantly, conducting the DAA materiality analysis here is plainly inconsistent with the language of the regulations. At step three, the regulations dictate that the Agency consider whether a claimant's impairment "meets or equals" one of the listed impairments in Appendix 1 to Subpart P of 20 C.F.R. § 404.[168] The ALJ only proceeds to step four when the claimant is not found to be disabled by virtue of a listed impairment.[169] Even after the enactment of the CAAA, "substance addiction disorders" remain listed in Appendix 1.[170] A "substance addiction disorder" is sufficiently severe to qualify as a listed impairment when the totality of a claimant's symptoms meet the requirements of another listed impairment.[171] The focus of step three is to identify the severity of the claimant's impairment, including addiction. Conducting the DAA materiality analysis here would mean that a claimant with a listed impairment or equally severe impairment could improperly be denied benefits.

Step four of the sequential evaluation examines whether the claimant, despite his or her impairments, is capable of doing the same work he or she did during the last fifteen years.[172] Analysis of DAA materiality does not fit here either, both because the ALJ does not reach this step in every case[173] and because the central inquiry—whether the claimant's impairments are sufficiently severe to preclude

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166 *Id.* at 123.

167 *See, e.g.*, Piccini v. Comm'r of Soc. Sec., No. 13–cv–3461 (AJN)(SN), 2014 WL 4651911, at *13 (S.D.N.Y. Sept. 17, 2014) ("[T]he ALJ must *first* make a determination as to disability by following the five-step sequential evaluation process. . . . Once the claimant is found to be disabled, the ALJ then considers whether the drug addiction or alcoholism is a contributing factor . . . ."); Ward v. Comm'r of Soc. Sec., No. 11 Civ. 6157(PAE), 2014 WL 279509, at *14 (S.D.N.Y. Jan. 24, 2014) ("[T]he ALJ must first separate out the effect of plaintiff's DAA and then conduct the five-step sequential evaluation . . . ."); *see also* Milks v. Colvin, No. 3:13–CV–1571 (GTS), 2015 WL 58382, at *4 (N.D.N.Y. Jan. 5, 2015) (citing *Cage* for the point that, where there is evidence of DAA, the disability inquiry does not end with the five-step sequential evaluation); Gorea v. Colvin, No. 6:12–CV–0854 (GTS), 2013 WL 4832574, at *4 (N.D.N.Y. Sept. 10, 2013) (same).

168 20 C.F.R. §§ 404.1520, 416.920 (2015).

169 *See supra* note 51–54 and accompanying text (explaining how the ALJ proceeds when a claimant's disability is not listed and not as severe as a listed condition).

170 *See* 20 C.F.R. § 404, subpt. P, app. 1 § 12.09 (2015).

171 *See id.* (providing that the "required level of severity" for substance addiction disorders is met when a claimant has the symptoms of another listed impairment, including but not limited to depressive syndrome, anxiety disorders, liver damage, and seizures).

172 *See supra* notes 51–54 and accompanying text (discussing step four in the five-step sequential evaluation process).

173 Step four of the sequential evaluation only occurs when the claimant fails to meet her burden in step three. *See* 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4).

work that the claimant has done in recent years—focuses on the claimant's ability to perform certain types of work, not the underlying disabilities.

Step five considers whether the claimant is able to adjust to other work given her impairments as well as her education and work experience.[174] The DAA materiality analysis does not fit here because, as with step four, the central inquiry focuses on whether the claimant's impairments prevent work, not the cause or nature of the impairments themselves. Regardless, the burden of proof in step five shifts to the government,[175] so placing the DAA materiality analysis here would wholly undermine the position that avoiding the addition of a separate step to the sequential evaluation requires placing the burden on the claimant.

In sum, the CAAA's implementing regulations dictate that the DAA materiality analysis must be independent from the five-step sequential evaluation to determine disability. The regulations plainly describe it as a separate step that occurs after the determination of disability, and a close look at each step in the sequential evaluation where the claimant bears the burden reveals no logical place for it. Thus, the insistence of some courts that the burden of proof of DAA materiality must be on the claimant as part of his or her burden of proving disability in the five-step sequential evaluation[176] is inconsistent with the regulations themselves.

C. *Public Policy Considerations*

In addition to the legal basis for placing the burden of proof of DAA materiality on the government, compelling public policy concerns favor placing the burden on the government. The difficulty of disentangling substance abuse disorders from co-occurring mental and physical disorders means that the SSA—which has vastly superior resources and expertise to litigate such a complex issue—should bear the burden of proof. These concerns mitigate the argument made by the federal appeals courts placing the burden on the claimant that the claimant has better access to relevant evidence on the DAA materiality issue.[177]

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[174] *See supra* notes 55–58 and accompanying text (discussing step five in the five-step sequential evaluation process).

[175] *See supra* note 38 and accompanying text (describing the allocation of burdens of proof in the five-step inquiry to determine disability).

[176] *See supra* note 154 and accompanying text (describing the Eleventh Circuit's opinion in *Doughty* and the Fifth Circuit's opinion in *Brown*).

[177] *See supra* text accompanying notes 79 and 83 (explaining the access-to-information argument).

The rate of co-occurring mental disorders among individuals with substance abuse disorders is alarmingly high, with estimates ranging from 50% to 70%.[178] An extensive body of literature has attempted to analyze the connection between substance abuse disorders and other mental disorders. Three potential chains of causation between the two have emerged: (1) Primary psychiatric disorder, in which pre-existing mental disorders increase the risk of developing a substance abuse disorder;[179] (2) Primary substance abuse disorder, in which pre-existing substance abuse disorders contribute to the onset of other mental disorders;[180] (3) Dual primary disorders, in which simultaneous substance abuse and mental disorders coincide in onset and course, but do not themselves cause the other to exist or worsen.[181]

Answering the DAA materiality question for individuals already determined to be in one of these categories is simple. DAA is not material to the determination of disability for the first group, since a pre-existing mental disorder causes the substance abuse disorder. DAA is material for the second group, since the substance abuse disorder is the but-for cause of the co-occurring mental disorder. And DAA is not material to the third group, since both the substance abuse disorder and other mental disorder operate independently of one another, even as they coincide.

Determining which category individuals fall into, however, is much more complicated. One study required review of data over a ten-year period to separate the causes and symptoms of DAA and co-occurring mental disorders,[182] while another required training of predoctoral clinical psychology students in a specialized assessment method and independent review by experienced practitioners to

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[178] *See supra* note 32 (providing support for this data).

[179] *See, e.g.*, Hien et al., *supra* note 32 at 1059 (describing individuals with "primary psychiatric disorder," whose psychiatric disorder preceded their substance abuse disorder and helped to bring about the onset of the substance abuse disorder); Joel Swendsen et al., *Mental Disorders as Risk Factors for Substance Use, Abuse and Dependence: Results from the 10-Year Follow-up of the National Comorbidity Survey*, 105 ADDICTION 1117 (2010) (finding that pre-existing mental disorders are a statistically significant predictor of the onset of alcohol abuse and drug abuse, with particularly strong ties between the development of a substance abuse disorder and pre-existing behavior disorders and certain other mood and anxiety disorders).

[180] *See, e.g.*, Hien et al., *supra* note 32, at 1059.

[181] *See id.* (describing individuals with "dual primary disorders," whose substance abuse disorder and other mental disorder may never coincide with one another in onset or course, may have indistinct onsets and overlapping courses, or may have distinct onsets and independent but overlapping courses).

[182] *See* Swendsen et al., *supra* note 179 (analyzing data from the National Comorbidity Survey over a ten-year period).

determine the specific times of onset of addiction and other mental disorders.[183]

In keeping with the rigorous methods involved in those studies, legal scholars, the SSA, and courts have all recognized the immense complexity involved in the DAA materiality analysis. Section II.C showed that medical experts at disability benefits hearings are often unable to separate the causes and effects of a claimant's addiction and co-occurring disorder. As Dru Stevenson, a professor at the South Texas College of Law, explained, "[t]he claimant cannot easily 'prove' a claim [that her disability would persist absent substance abuse] without discontinuing substance abuse long enough to get medical documentation that the impairment is independent of the abuse."[184] Thus, placing the burden on the claimant "allows the adjudicator to deny the claim as a default position until the claimant successfully challenges the denial," a challenge which will in many circumstances be difficult, if not impossible, to make.[185] Denying benefits to individuals suffering from addiction and a co-occurring disability as a default position flies directly in the face of Congress's intent upon the enactment of the CAAA to ensure that this group remained eligible for benefits.[186]

Furthermore, the SSA has itself acknowledged that "[w]e do not know of any research data that we can use to predict reliably that any given claimant's co-occurring mental disorder would improve, or the extent to which it would improve, if the claimant were to stop using drugs or alcohol."[187] While courts have held that evidence of impairment (or lack thereof) at times when substance abuse was not ongoing can be especially probative,[188] they have also acknowledged that a conclusive determination that a claimant would or would not be dis-

[183] *See* Hien et al., *supra* note 32, at 1061 (describing the SCID-SAC method, an "ongoing reliability and training seminar" that interviewers were required to attend, and the independent review of the results by "[t]he two raters with the most clinical experience").

[184] Stevenson, *supra* note 5, at 194–95.

[185] *Id.* at 195.

[186] *See supra* notes 18, 91–92, 145 and accompanying text (quoting the House Committee Report on the CAAA for the proposition that the Act intended to preserve benefits for addicts with co-occurring disorders).

[187] Social Security Ruling, SSR 13–2p.; Titles II and XVI: Evaluating Cases Involving Drug Addiction and Alcoholism (DAA), 78 Fed. Reg. 11,939, 11,943 (Feb. 20, 2013).

[188] *See, e.g.*, Cage v. Comm'r of Soc. Sec., 692 F.3d 118 (2d Cir. 2012) (analyzing a claimant's behavior during periods of time in which she lacked access to drugs and alcohol in order to determine whether she would still be disabled absent her substance abuse); Salazar v. Barnhart, 468 F.3d 615, 624 (10th Cir. 2006) (noting that the 1996 Teletype instructs that "some of the most useful evidence in DAA cases 'is that relating to a period when the individual was not using drugs/alcohol . . . .'" (internal citation omitted)).

abled absent substance abuse is extremely difficult to make.[189] Reliable medical records from a time when a claimant was not using drugs or alcohol often do not exist.[190] Moreover, addicts—especially those suffering from poverty and a resultant lack of access to reliable medical care—may use drugs or alcohol to self-medicate pre-existing physical or mental impairments, a fact that may be impossible to tease out from the set of medical records before an ALJ.[191]

The complexity of the analysis necessary to establish or refute DAA materiality favors placing the burden of proving it on the government. First, the SSA's Office of Disability Adjudication and Review (ODAR) conducts well over 500,000 hearings on retirement, survivors, disability, and SSI benefits every year.[192] It has over 1400 ALJs and 8500 support staff nationwide.[193] An SSI or SSDI claimant, meanwhile, is one individual who is likely seeing the DAA materiality issue, if not a public benefits proceeding, for the first time in his or her

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189 *See, e.g.*, *Salazar*, 468 F.3d at 623 (noting that, especially in cases involving multiple mental impairments, medical practitioners frequently "cannot project what limitations would remain if the individuals stopped using drugs/alcohol" (quoting 1996 TELETYPE, *supra* note 29)); Whitney v. Astrue, 889 F. Supp. 2d 1086, 1097 (N.D. Ill. 2012) ("To be sure, it is difficult to disentangle the effects of substance abuse and the symptoms of severe mental disorders, such as bipolar disorder.").

190 *See, e.g.*, Suitt v. Comm'r of Soc. Sec., No. CIV S–09–1847–CMK, 2010 WL 4880671, at *9 (E.D. Cal. Nov. 23, 2010) ("Plaintiff has simply failed to carry his burden of showing that he was sober for any extended period of time let alone showing that, during such time of sobriety, he still had a disabling mental impairment."); Bayer v. Astrue, No. 08–cv–02389–WYD, 2010 WL 1348416, at *6 (D. Colo. Mar. 31, 2010) (providing doctor's testimony that he could not give an opinion on DAA materiality "until there's sobriety for 12 months").

191 *See* Sidhu v. Colvin, No. CIV–14–160–FHS–SPS, 2015 WL 5690602, at *4 (E.D. Okla. Sept. 10, 2015) ("[C]laimant's use of alcohol was noted in the record to be a form of self-medication when her prescriptions would run out . . . ."); Craig Reinarman & Harry G. Levine, *Crack in Context: America's Latest Demon Drug*, *in* CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 1, 12–13 (Craig Reinarman & Harry G. Levine eds., 1997) ("[T]he inner-city poor and working class are far less often employed and more often live at the margins of the conventional order. . . . [T]hey rarely have psychiatrists, but they sometimes self-medicate [because] they have far fewer resources to use to pull themselves out of trouble . . . ."); Spade, *supra* note 25, at 112 ("Common sense tells us that most people can self-medicate with drugs or use drugs socially and function in the world normally . . . ."); Stevenson, *supra* note 5, at 195 ("Because many symptoms from the [DAA] overlap those of other valid mental disorders, the question arises whether the claimant is self-medicating (through substance abuse) a pre-existing medical condition or whether the mental impairments are caused by the [DAA].").

192 *See* Office of Disability Adjudication and Review, *National Hearing Decisions (FY 2009 – FYTD 2016)*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/ (last visited July 13, 2016) (showing the number of hearings conducted by the ODAR in each of the last seven years).

193 *See* Office of Disability Adjudication and Review, *Hearing Office Locator*, SOC. SEC. ADMIN., http://www.ssa.gov/appeals/ho_locator.html (last updated June 2016).

life, and has no right to appointed counsel.[194] Furthermore, to be eligible for SSI, a claimant must have under $3000 in *resources*, which includes not only cash but also any other property that can be converted into cash.[195]

Second, the improvable, hypothetical nature of the DAA materiality analysis makes it much more like step five of the five-step sequential evaluation, where the burden of proof is on the government, than steps one through four, where the burden is on the claimant. Step one demands the claimant to prove that he or she is not working—an easily provable, non-hypothetical fact. Step two and three together demand the claimant to prove that he or she has a severe medical impairment—a non-hypothetical fact that the SSA provides detailed guidelines about how to prove.[196] Step four, if reached, demands the claimant prove that he cannot do his or her prior work as a result of his or her disability—an admittedly hypothetical fact, but one about which the claimant, who will know what it takes to do that prior work, has unique knowledge. In contrast, step five, if reached, demands the government to prove that the claimant has the capacity to make an adjustment to other work with his or her disability—like DAA materiality, a hypothetical fact about which the claimant has no special knowledge and about which proof requires special expertise.

Finally, without a guarantee of representation, SSI claimants face overwhelming inexperience in litigating complex issues relating to the SSA and meager resources. The courts' suggestion that, because claimants have better access to evidence, such individuals should bear the burden of proof of DAA materiality seems absurd in light of this reality. Evidence of both addiction and a co-occurring disorder must already be in the record for the DAA materiality question to arise.[197]

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[194] *See* SOC. SEC. ADMIN., PUB. NO. 05-10075, YOUR RIGHT TO REPRESENTATION (2015), https://www.socialsecurity.gov/pubs/EN-05-10075.pdf (maintaining that Social Security claimants can have an attorney or non-attorney representative assist with benefits claim, though such representation is not required and must be paid for by the claimant).

[195] *See* 20 C.F.R. §§ 416.1201–05 (2015) (explaining the resource cap, the types of resources that get counted, and the $2000/$3000 maximum for individuals and couples).

[196] *See* 20 C.F.R. § 404.1509 (2015) (providing duration requirements for "severe medical impairments" under step three); 20 C.F.R. § 404, subpt. P, app. 1 (2015) (providing a comprehensive list of "severe medical impairments" to satisfy step three).

[197] If there is no evidence of an addictive disorder in the record, the DAA materiality question is irrelevant to resolving the claim. If the only evidence of disability in the record is of an addictive disorder, the claim will be denied, since the CAAA eliminated eligibility for individuals based solely on addiction. *See supra* note 14 and accompanying text (explaining the changes to SSI made by the CAAA). Thus the DAA materiality issue will only arise if evidence of an addictive disorder and co-occurring disability are both already in the record.

Thus, proving or refuting DAA materiality will in most cases turn not on who is in the best position to produce evidence regarding the addiction and the co-occurring disability, but rather who is in the best position to apply that evidence to tease out whether the addiction is in fact the "but-for" cause of the co-occurring disability. The Agency, adjudicating hundreds of thousands of cases a year in thousands of offices nationwide, is unquestionably better positioned to apply its expertise and resources to this challenging question than the claimant, who is likely adjudicating his or her first SSI or SSDI case, in many instances without counsel, and with extremely limited financial resources to seek outside assistance.

Conclusion

For a twenty-year period from the mid-1970s to the mid-1990s, our nation's disability benefits programs recognized that punishment and social isolation were not an effective response to addiction. During that time, people struggling with substance abuse disorders could receive disability benefits under the same standard as those with other mental and physical disorders if their disorder was severe enough to prevent them from working. Then, in 1996, political forces turned a blind eye to the reality of living with addiction. Through the DAA materiality provision, Congress not only revoked SSI and SSDI eligibility on the basis of addiction, but also revoked eligibility from dual-diagnosis claimants whose addiction causes or contributes to the severity of their co-occurring disability. Broad legislative reform is necessary to restore access to life-sustaining benefits for people struggling with addiction so that they can get back on their feet. But such broad reform is unlikely in today's political climate.

Accordingly, this Note has advocated for courts and ALJs interpreting the DAA materiality provision to place the burden of proof on the government. More than sound public policy, placing the burden on the government is consistent with the DAA materiality provision's text and structure, which make it an exception to the definition of disability that the government benefits from proving. Interpreting the Act in this way—effectively as an affirmative defense for the government to deny benefits to otherwise eligible claimants—is consistent with the congressional intent underlying the CAAA and the SSA's implementing regulations since its enactment. Placing the burden of proof on the government will also enable disability benefits claimants struggling with addiction and a co-occurring disability to retain access to life-sustaining benefits without yet another burden in their paths.