

## **Signifiers of Stereotyping**

In the real-life application of Social Security's uniform and affective procedures, safeguards such as the right to an opening statement, the right to representation, and the right to assistance in developing relevant evidence and testimony can be rendered empty formalities by adjudicators who neglect the mandates both for uniformity and for affectivity. The evidence presented in chapters 4 and 5 offers a glimpse of exactly how uniformity can operate prejudicially and how the veil of impartiality reveals bias. In addition, an institutionalized disdain for the emotive dimensions of judging can contribute definitively to judges' inability to appropriately engage claimants in the ways the rules require.

In this chapter, I expose more directly how Social Security ALJs, at least in the sample of cases I analyzed, seem predisposed to negative stereotyping of certain types of impairments; members of certain racial and ethnic groups; people who are illiterate or uneducated; members of both genders, but especially women; and people receiving benefits like workers' compensation and welfare. In this chapter, I draw on the qualitative evidence of bias found in the hearing transcripts and decisions I reviewed.

### **Qualitative Evidence of Stereotyping in ALJ Decision Making**

To illuminate exactly how and in what form bias specifically takes in ALJ decision making, my research concentrated on how judges stereotyped claimants during the hearing and decision-making process, particularly when denying these claims. Since all previous studies documented quantitatively the existence of bias in denied claims, as described in detail in chapter 3, I thought it useful to do a qualitative text analysis of how that bias mani-

festated in the day-to-day functioning of the judicial bureaucracy. I focused on five areas in which judicial prejudice was qualitatively indicated in transcripts and decisions: type of impairment, race and ethnicity, education/literacy, gender, and receipt of benefits like workers' compensation and welfare.

Before proceeding with a presentation of my findings, however, it is important to note three things. First, the stereotypes I identify do not actually fall into such neat categories as the five headings suggest. For example, because the cases in which assumptions about obesity surface happen to involve female claimants, it is difficult to determine whether the stereotypes identified actually apply to the impairments alleged by the applicants or to the claimants' gender. Although I categorize my findings in one way or another, stereotypes are actually fluid and, as such, call for a much larger-scale study to verify the tentative findings reported here.

Second, few of my findings of stereotypical ideas amount to signs of outward or direct bias; rather, they usually indicate that the prejudices, if operational, are subtle and in many if not most cases hidden from the judges themselves.

Also because stereotyping is difficult to detect, I rely not only on evidence of their potential operation from the ALJ hearing transcripts and decisions but also on the findings and conclusions of the federal courts reviewing these decisions. This additional evidence often bolsters my interpretation of the presence and negative effect of stereotyping on the outcome of the cases.

Finally, while many of the assumptions ALJs hold mirror assumptions held elsewhere in society, it is important to remember that under the current construction of impartiality, judges are mandated to put aside all such notions and to consider only the relevant facts and law of each case (42 U.S.C. § 405 (b) (1); 42 U.S.C. § 1383 (c) (1); SSA 1992, I-2-601). For the purpose of promoting a better understanding of the conditions that might give rise to bias in the Social Security hearing and decision-making process, these qualitative analyses clarify how deeply embedded prejudicial assumptions may be and the pressing need to address their unconscious effect on the hearing and decision-making process.

### **Type of Impairment**

More than with any other impairments alleged, ALJs seemed to hold the most preconceived assumptions about applicants who had alcohol or drug addictions, who were mentally ill, or who were obese. Qualitative analysis

of the transcripts and hearing decisions suggest, and the federal court decisions available in most of these cases confirm, that ALJs' stereotypical assumptions about these impairments may well have influenced the judges' decision-making process and the outcomes of some cases.

### Drug and Alcohol Addictions

Until 1996, when Social Security regulations eliminated benefits for people addicted to alcohol and drugs, alcoholism and drug addiction were considered disabling impairments within the meaning of the Social Security rules.<sup>1</sup> Eliminating benefits to people with drug and alcohol addictions may itself support my contention that some ALJs rejected the claims of these applicants simply because of their discriminatory attitudes regarding the nature of addiction as a disabling impairment. Indeed, it was the ALJ's complaints to Congress that addicts were misusing their benefits that motivated Senator William Cohen to investigate this issue which ultimately resulted in the passage of legislation eliminating benefits to people with drug and alcohol addictions (Mills and Arjo 1996).

Prior to the passage of the Amendments that eliminated these benefits, two requirements were necessary to obtain benefits: first, the alcohol or drug use was severe because it had caused a disabling impairment (rendering the claimant unable to do full-time work); second, the drug or alcohol use was beyond the claimant's control (Social Security Rulings 1982, 82-60). In practice, some judges required people addicted to alcohol or drugs to have become physically debilitated with evidence of a disease like pancreatitis. In other cases, judges required an underlying mental impairment. My research examined the cases for instances in which judges failed to comply with the old laws governing addictions, as these were the relevant rules at the time the study was undertaken.

The connection between drug or alcohol use and mental illness is well established in the medical literature. The need to drink or abuse drugs to alleviate the symptoms of trauma is quite common (Harrison, Hoffman, and Edwall 1989). Similarly, depression is often prevalent among drug addicts (Malow et al. 1990). Moreover, before the change in the law, it was well established in the Social Security cases (*Cooper v. Bowen*, 815 F.2d 557 (9th Cir. 1987))<sup>2</sup> and in the medical literature (American Psychiatric Association 1994), that drug and alcohol abuse is often involuntary and that it can affect both adults and children (Elliott and Coker 1991).

Thus, claimants who proved that they were alcoholics or drug addicts,

that the addiction caused a disabling impairment, and that the addiction was beyond their voluntary control should have been legally qualified for benefits. However, these rules presented sufficient difficulty for some judges who did not consider alcoholics and drug addicts to be “deserving” of benefits to disregard the rules and rely instead on prejudicial assumptions.

The ALJ who heard the case of Ms. Degryse (88-2082, MA), a 40-year-old white woman, revealed the stereotypical assumptions he held that alcoholism can only affect older people and was only deserving of benefits if it manifested in a physical illness. For example, the judge asked Ms. Degryse’s representative, “Why would I find your client disabled?” The representative responded, “She is a severe alcoholic.” The judge then asked, “She’s a younger worker?” and “Is there any impairment, physical impairment, which would prevent your client from working?” Then the paralegal stated, “Well the alcoholism.” And the ALJ asked, “Physical?”

During this exchange, the judge limited his inquiry to the age of the claimant and the presence of physical symptoms. Since stereotyping occurs in both what is and what is not said, in what is asked and what is not asked, I inferred that by not making a similar effort to inquire into the claimant’s mental illness as he made into her physical problems, the judge was prejudicially assuming that only physical illness was important when considering the severity of an alcohol addiction. Further, by asking whether the claimant was “younger,” I inferred that the claimant’s youth was relevant to his assessment that she was less deserving of benefits.

As noted, the medical-legal literature reports that claimants suffering from drug or alcohol abuse can be affected both physically and mentally (Social Security Rulings 1982, 82-60; Harrison, Hoffman, and Edwall 1989; Malow et al. 1990) and that people can be affected by a drug addiction as young as infancy (Dorris 1989; Elliott and Coker 1991). In Ms. Degryse’s case, the attorneys representing Social Security in federal district court believed something was amiss in the ALJ’s decision; they recommended that the federal district judge remand Ms. Degryse’s case and order the ALJ to issue her a fully favorable decision, and the judge complied.

In a similar case, a judge found the alcoholism of Mr. O’Connor (89-4412, IL), a 47-year-old African-American man, not disabling. The ALJ reasoned that because the claimant’s alcoholism had not impaired his brain function (Mr. O’Connor’s neurological tests were normal) and he could perform some daily activities, the claimant was not disabled. This decision erroneously disregarded Social Security Ruling 82-60, which pro-

vided that alcoholism or drug addiction is disabling when “anatomical, physiological, or *psychological* abnormalities can be shown . . .” (emphasis added). As in Ms. Degryse’s case, Mr. O’Connor’s case was remanded following an appeal to the Circuit Court of Appeals; the three-judge court held that the ALJ had considered Mr. O’Connor’s alcoholism “mechanically.” The inquiry, the court of appeals decision instructed, was not whether Mr. O’Connor had been brain damaged but whether he could work.

Two other cases illustrate the point that biased assumptions regarding claimants’ ability to control their alcoholism seemed to affect ALJs’ decision making. One case involved Mr. Harper (89-4374, IL), a 53-year-old African-American man who alleged that he was suffering from alcoholism. The ALJ concluded that despite a “level of depression [that] was notably elevated, he did not appear to be significantly depressed in manner and behavior.” In violation of rules prohibiting ALJs from making personal judgments and invoking the prejudicial assumption that all alcoholics can control their drinking, this ALJ found that the claimant’s alcoholism was “of his own choice” and that any mental limitations imposed by his alcoholism would be resolved should he stop drinking. The judge made these conclusions despite evidence in the record that Mr. Harper curtailed his alcohol use only when the “pain made him feel like something might bust” and that he continued drinking while taking Antabuse, a drug that induces nausea and vomiting when mixed with alcohol. The ALJ summarized his assessment and admitted to his biased attitude when he proclaimed, “it is not the purpose of the Social Security Act to support an alcoholic habit.”

The federal district court disagreed with the ALJ. The court considered the ALJ’s observations regarding Mr. Harper’s depression to be based on “selected portions of Harper’s psychological and psychiatric reports, ignoring those parts of these reports which contradict it.” Citing several instances in which Mr. Harper continued to consume alcohol despite severe physical problems, the court concluded that the claimant was unable to control his drinking, and it was not, as the ALJ interpreted, a matter of choice. The federal district court judge further found that the ALJ’s comment that “it is not the purpose of the Social Security Act to support an alcoholic habit” constituted a clear violation of the rules: “the ALJ must apply the law established by the Social Security Act and its underlying regulations . . . and it is beyond question that claimants who are alcoholics and who cannot control this problem may be disabled and entitled to benefits.”

Another case exemplifies how far afield the assumption that all addiction is controllable may lead a judge. Mr. James (88-1712, CA), whose case was described more fully in chapter 5, was a 48-year-old African-American applicant with chronic back pain who alleged that his drug and alcohol use was a means of managing pain. As discussed earlier, the judge lectured the claimant's wife, calling her an "enabler" and informing her of the importance of attending a program like Alanon. While it may be impossible to intuit with any certainty what role race, education, or class played in the latitude the judge took in lecturing Mrs. James (the judge was white, the claimant and his wife were black; the judge was a law school graduate, the claimant was a high school dropout, and his wife was a nurse; the judge earned \$120,000 a year, the claimant and his wife were fighting for an annual disability pension of \$12,000), the judge probably would not have felt such freedom in a case involving a claimant with heart disease or a brain tumor. It is as if an allegation of an alcohol, drug, or other addiction gives judges an opportunity to admonish claimants and their spouses for their lifestyles. Indeed, this judge even ventured the interpretation that Mr. and Mrs. James were "codependent," suggesting the stereotypical assumption that people addicted to alcohol or drugs and their partners are blameworthy and deserve to be lectured.<sup>3</sup> This judge ended his lecture to the claimant's wife with the comment, "I think I have much more insight into what's going on [than you do]."<sup>4</sup> The ALJ denied benefits in Mr. James's case, arguing that the claimant's drug use was controllable and a conscious choice. The federal district judge hearing Mr. James's appeal disagreed and remanded the case for further workup, holding that the claimant's "grossly exaggerated" pain justifying his related drug use signaled an uncontrollable addiction rather than a controllable one, as the ALJ had suggested.

### Mental Illness

Similarly, prejudicial assumptions also seemed to influence judges in several cases involving claimants who alleged mental impairments. Informed by the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association 1994), Social Security rules and regulations reflect current medical literature and clearly recognize mental illness as a disabling impairment (20 C.F.R. 404, subpt. P, app. 1, 12.00). However, some judges seemed to override or disregard the rules governing mental impairments in favor of prejudicial assumptions about mental illness reflective of cultural stereotypes.

In the case of Mr. Slevin (84-3092, CA), a 29-year-old white male suffering from manic depression, the ALJ concluded that the claimant's mental condition was not severe despite a well-documented history of the disorder, an extended history of drug and alcohol abuse, violent outbursts, extended periods with no social contact whatsoever (as previously noted, at one point Mr. Slevin locked himself in a hotel room for several days and refused to leave), and incarceration for possession of a weapon. Despite an assessment by his treating physician, Dr. Pappas, that the claimant's functioning "was moderately severe, interfering with his ability to perform basic work activities," the judge concluded that there was "no evidence of a 'severe' psychiatric problem in [the medical reports] aside from an underlying attitude problem."

The federal district judge who reviewed Mr. Slevin's case on appeal disagreed with the ALJ, concluding as follows:

[T]here is not substantial evidence to support the ALJ's finding that claimant's mental disorder was not severe. Dr. Pappas' assessments of Mr. Slevin's impairments, corroborated by senior therapist Kenneth Jones and Dr. Burke, show a significant limitation to his mental abilities. None of the evidence relied upon by the ALJ can overcome this diagnosis.

The ALJ's effort to override the views of the claimant's treating physician and the opinions of two other treating therapists with his own personal judgment clearly reflected the judge's penchant for prejudice, which disregarded both the law in question and the facts of the case. That this judge should interpret the claimant's severe mental problem as an "attitude" further reflected an uninformed, stereotypical perception of mental illness, one more to be expected of a layperson than of a judge who is trained to evaluate the severity of mental as well as physical impairments.<sup>5</sup>

While Mr. Slevin's case demonstrates one way that judges used stereotypes when evaluating mental illness, several cases demonstrated the use of a different assumption—namely, that if the mental illness stems from a social problem, it is less deserving of benefits. Notably, one claimant, Ms. Burr (87-10636, IL), wanted to discuss how a previous rape had caused her to fear leaving the house at night, but the judge asked no follow-up questions to this relevant testimony. Mr. James (88-1712, CA) attempted to explain how several deaths in his family and bankruptcy had deeply shaken his psychological stability, but the judge in this case, too, asked no

follow-up questions. The conclusion that mental illness cannot stem from such social problems as rape, death, and financial problems clearly runs contrary to the medical literature and to Social Security law (see American Psychiatric Association 1994; 20 C.F.R. 404, subpt. P, app. 1, 12.00).

## Obesity

Obesity is an impairment that ALJs tend more often to recognize in the cases of women than of men, but, like drug and alcohol addiction and mental illness, ALJs' response to obesity often seems fraught with biased assumptions. As previously noted, drug and alcohol addictions no longer render a claimant eligible for disability benefits under current rules. Similarly, the Social Security Administration is proposing to rescind the Obesity listing (20 C.F.R. 404, subpt. P, app. 1, 9.09) on the grounds that "there is no generally accepted current medical and vocational knowledge which establishes that even mass obesity, per se, has a defined adverse effect on an individual's ability to work . . ." (63 Fed. Reg. 11854 (1998, March 11)). As with drug and alcohol addictions, this proposed change in the law bolsters my finding that ALJs have difficulty applying the obesity rules. Moreover, this proposed change may reflect the biases of the culture at large, and the ways in which those attitudes creep into the hearing and decision-making process (Snow and Harris 1985; Unger and Crawford 1992). Nevertheless, under current rules, ALJs are mandated to evaluate claimant's obesity as a disabling impairment, recognized by the Listings of Impairments.

Without consulting claimants about their ability to lose weight, ALJs in the cases of several women—for example, Miss Plain (87-5258, IL), Ms. Petrie (87-9100, IL), and Mrs. Moore (89-6436, IL)—concluded that their obesity was remediable or should have been better controlled. This assumption regarding obesity is widely held in our culture (Wadden and Stunkard 1987; Rothblum et al. 1990).

In the case of Mrs. Moore, the ALJ concluded that the claimant's obesity was not only remediable but a significant cause of another physical limitation, the claimant's shortness of breath. His preconceived assumption that obesity caused shortness of breath (which it does in some but by no means all cases) made him overlook the possibility that she really did suffer from pulmonary disease. By assuming that her obesity was the sole cause of all her other impairments and adopting this stereotypical view, the ALJ overlooked a very important piece of evidence and denied her claim on that basis.



The federal district court remanded Mrs. Moore's case, stating, "The ALJ clearly overlooked the [pulmonary function] test [which revealed a listing-level pulmonary impairment]. . . . Instead, the ALJ expressed his opinion that plaintiff's shortness of breath was due to her being overweight." The court then cautioned, "An ALJ may weigh the medical evidence in the record in arriving at a conclusion on the ultimate issue of disability, but he may not make his own medical findings."

### **Race and Ethnicity**

Evaluating whether ALJs were biased with regard to race and ethnicity posed difficult problems because judges made few explicitly racist comments. Thus, when reading the transcripts and decisions for indicators and clues of such assumptions, relying on what is said and not said, asked and not asked, I used as my guide the mandate on judges to avoid even the suggestion or perception that bias entered the hearing and decision-making process. Comments made by Gwendolyn S. King, former commissioner of the SSA, who responded to the attacks on ALJs following the 1992 GAO race-bias study, convinced me that judges are currently mandated to avoid even "the mere suggestion of bias," which King believed "must be dealt with vigorously and decisively" (King 1992, 75).

Despite quantitative studies suggesting racial bias against African-American claimants, in my review of the records ALJs made few or no explicitly stereotypical comments about African-American applicants. However, ALJs' manner of addressing certain claimants, whether by "Miss," "Ms.," "Mrs.," "Mr.," or "Claimant," as noted in chapter 4, did seem based on negative connotations, particularly of African-American women, and suggested the possibility that nonblack claimants received more respect than African-American claimants in the hearing process. Cases conjured up essentialized images of African-American women as domestics, grandmothers, and mummies.

My finding that immigrants were often the target of biased assumptions, no matter how subtle or minor, is particularly troubling in light of social-science literature, which reflects the difficulty immigrants often have adapting to the American culture and lifestyle and to its expectations (Hulewat 1996; Padilla et al. 1988; Saldena 1995; Smart and Smart 1995; Thomas 1995). Judges' stereotypical ideas about Latinos clearly surfaced in at least three hearings involving interpreters, in which ALJs assumed

that claimants could or should speak English and, as a result, did not fully translate the proceedings for them (Acevedo 87-2767, CA 1 and 2; and Vatisas 88-6532, IL).

In Ms. Acevedo's case, for example, the ALJ asked the claimant's husband how long he had been working in the country, "about two years, three years, four years?" The husband responded, "22, 23 years." In asking this question it seems the ALJ erroneously assumed that Ms. Acevedo's husband's lack of English-language skills meant that he was a recent immigrant. Hidden in this judge's question was the assumption that someone who has lived in the United States longer than four years should be able to speak English.

In a case involving Ms. Mendoza (87-2376, CA), a 55-year-old Spanish-speaking applicant with a second-grade education, the ALJ concluded that the claimant's "activities and interests are essentially normal for her cultural and educational background," implying some unstated, preconceived idea of what is "normal" for a woman of a given educational and cultural background. This statement suggests that the ALJ, a well-educated white male who did not bother to familiarize himself in this hearing with the activities and interests of this particular claimant, probably imposed his own stereotypical assumptions about what constitutes the norm for a claimant of some unspecified, general type to formulate his conclusion. When evaluating whether such comments are biased, it must be remembered that judges are mandated to inquire "fully into the issues" (20 C.F.R. 404.944) and that the hearing process should be "consistently applied with the utmost integrity" (King 1992, 76). Given the lack of inquiry into this claimant's activities, this ALJ appears not to have honored that mandate. It is likely that his assumptions influenced the outcome of the case. The federal district court, persuaded that something went seriously awry in this case, ordered Social Security to pay the claimant benefits without a second hearing or further explanation of its action.

One other racial comment merits mention. In a case involving a Latina claimant, Ms. Alva (84-0167, CA), the ALJ noted that there are large numbers of Spanish-speaking people living "in this community." In no case did a judge state that there were large numbers of white people living in a particular geographical area, suggesting that this judge might hold some preconceived albeit incompletely articulated assumptions about the "Spanish-speaking people" who live in that community.

## Education and Literacy

To fully and adequately evaluate claimants' cases, the law requires ALJs, when and if appropriate, to inquire not only into claimants' level of education but also into their literacy (20 C.F.R. 404, subpt. P, app. 2, 201.00 (h)).<sup>6</sup> In several cases reviewed for this study, judges did not adequately investigate either of these issues and, as a result, some judges may have improperly assumed claimants' ability to read.

Individuals who cannot read or who have weak educational backgrounds are more likely to exaggerate than understate their ability to read and write, either for fear that their illiteracy will be used against them or because they will feel humiliated by such an admission (Kozol 1985). According to Social Security rules, however, illiterate and severely undereducated claimants are more entitled to benefits than literate and educated claimants because there are fewer jobs in the national economy for people who lack those skills. In any given case, then, where literacy and education are at issue, there is no telling without careful inquiry how claimants' testimony on their literacy may be slanted.

In some cases, ALJs did not inquire into claimants' ability to read. In other cases, judges made inadequate inquiries. For example, the ALJ made an incomplete inquiry in a case involving a Puerto Rican claimant, Mr. Rodriguez (87-878, IL), who spoke some English but who had failed the eighth grade while attending school in Germany. This ALJ asked, "How well do you read in English?" The claimant responded, "not to[o] good, but fairly I guess." The judge asked, "Well, if you had to give yourself a grade, concerning your ability to read in English. Would you give yourself A or a B or a C, or D or F?" The claimant answered, "To me I would say a B." The ALJ then asked about writing in English, and the claimant responded, "Like a C." This type of self-evaluative measure tells a judge or a reviewing court little or nothing about a claimant's ability to read in a work setting. Objective questions, like whether claimants took oral or written driver's license tests or whether they can fill out employment applications without assistance, would more fully inform adjudicators of claimants' abilities. In this case, the judge violates the Social Security mandate to investigate whether claimants are literate, suggesting the possibility that the judge dismissed Mr. Rodriguez (and his claim) by showing no particular interest in his true ability to read (20 C.F.R. 404.1564).

One theory is that using the claimant to judge his own capacity to read

may be predicated on the biased assumption that claimants who are uneducated or have difficulty reading will feel comfortable enough informing judges of their own ability. Research shows that just the opposite is true (Alfieri 1994; Kozol 1985; National Center for Education Statistics 1993).<sup>7</sup> Moreover, anecdotal evidence from literacy advocates reveals countless incidences where people who are illiterate go to great lengths to hide their limitations. In one case, an illiterate woman signed her children away to an adoption agency, in part because she was too afraid to admit to the agency that she did not know what she was signing (Adams 1994).

This was evidenced in Ms. Price's case (89-4298, IL, described in chapter 5) when the claimant seemed to cover up the fact that she could not read when she responded to the judge's question about whether she had any objections to the exhibit file by describing her impairments. In another case, the ALJ took this assumption one step further and imposed the expected answer on the claimant. Thus, the judge asked Ms. Smith (86-6054, IL), an African-American claimant with a ninth-grade education, "you can read and write, can you not?" She responded, "A certain amount, yes." When the judge asked whether she read the newspaper, she answered, "yes, I—I—yes, I can read." Then he asked, "If you were unable to come to the hearing because you were ill today, could you write me a note that I would understand about your absence?" The claimant said, "I think I could do that." With that response, the judge was satisfied that the claimant could read and write. What was prejudicial about this judge's statements was his assumption that the claimant would be forthcoming with the fact that she had trouble reading or writing—his lack of a full investigation into this issue seems to have been influenced by the biased assumption that all people should be able, without feeling stigmatized, to evaluate their ability to read and write.

## **Gender**

Several gender stereotypes emerged in the transcripts and decisions, including that gender or traditional gender roles are relevant to inquiries about daily activities or ability to do a particular job; caretaking or house-keeping activities constitute, without corroborating evidence, an ability to do paid work, and women who "look good" or men who "look fit" are likely not to be disabled.

In several cases, ALJs asked certain questions and not others depending on claimants' gender. For example, female applicants were asked

about their ability to knit and crochet while male applicants were asked about their hunting or fishing activities. Asking female applicants knitting questions and male applicants questions about hunting or fishing is not as benign as it may seem. Take for example, male and female claimants alleging musculoskeletal impairments. Chances are that a back condition would preclude any applicant, male or female, from hunting or fishing, but that condition would not necessarily preclude the more sedentary activities of knitting or crocheting. Judges who inquire only into male applicants' ability to perform strenuous activities such as hunting and fishing (which all such applicants, male and female, are unlikely to be able to do) may erroneously conclude based on incomplete information that male applicants' inability to fish or hunt constitutes an inability to work. Likewise, judges inquiring only into female applicants' ability to perform less strenuous activities like knitting and crocheting (which all such applicants, female and male, are probably able to do) may erroneously conclude that the female applicants' ability to knit or crochet constitutes an ability to work. In this regard, gender-specific questions are more likely to disadvantage female applicants.

In other cases, judges suggested jobs that claimants might be able to do based on traditional gender roles. Hence, a female claimant might be asked whether she could be a receptionist or a hearing assistant, while male claimants might be asked if they could do physical labor. When judges asked such questions of VEs or even of claimants based on gender stereotypes, female applicants were almost certain to be disadvantaged. An individual with a disability is much more likely to be able to do light jobs traditionally held by women, including clerical and sales positions, than heavier occupations traditionally performed by men. It seems, in other words, much more credible for claimants with back conditions to allege that they are unable to perform the work of a physical laborer than that of a receptionist or hearing assistant.

Judges also often imposed assumptions about gender roles when they inquired into claimants' ability to do housework or to take care of other people. For example, in denying benefits to Mrs. Karkar (89-3486, CA), a 56-year-old Jordanian woman, the ALJ considered the claimant's caring for her sick husband as evidence of capacity to work as a home health-care attendant; however, both the claimant and a witness testified in the hearing that Mrs. Karkar could move only very slowly while working in the house. The federal district court concurred with the claimant and remanded the case, holding that the ALJ had never established that the

claimant could work. Assumptions about caretaking and housekeeping abilities are more likely to exclude women than men from disability eligibility, for, regardless of their physical or mental impairment, most women continue to do light housework and family care.<sup>8</sup>

Several other cases had gender implications. For example, in general, I found that women who tended to do more day-to-day activities, despite their allegations of physical and mental impairments, were more likely not to be found disabled on this evidence than men; judges tended to interpret a female claimant's housework as evidence of her choice to be a homemaker—that is, in effect to regard her as employed and therefore ineligible for benefits, whereas judges tended not to use these assumptions in the cases of male claimants. On another gender-related case, a claimant's credibility with regard to her back impairment was questioned because she was noted to have attended the doctor in high heels (Davenport, 89-1268, MA). The judge erroneously but stereotypically assumed that she wore such attire by choice without questioning whether dressing up to go to the doctor may have been related to a deeply ingrained pressure on women to look good regardless of their physical or mental incapacity.<sup>9</sup> The stereotype inherent in this assumption is that attractive women must not be disabled and are not deserving of benefits. Such an assumption is fraught with biases; indeed, judges are mandated not to rely exclusively on their personal observations but are required to inquire beyond how claimants' look.<sup>10</sup>

### **Receipt of Workers' Compensation or Welfare Benefits**

Although the rules and case law limit the relevance of such factors (*Desrosiers v. Secretary*, 846 F.2d 573 (9th Cir. 1988)), claimants in my sample who received workers' compensation or welfare seemed fairly clearly disadvantaged in the Social Security hearing and decision-making process.

The ALJs hearing the cases of Ms. Curran (88-2459, MA) and Mr. LaPensee (89-2492, MA) articulate the disadvantage some workers' compensation recipients faced. In the case of Ms. Curran, a 50-year-old registered nurse alleging a back impairment, the ALJ wrote in his decision, "failure to improve [medically] may be based on reasons other than medical, such as receipt of workers' compensation benefits." Ms. Curran's treating physician believed so strongly in her case that he attended the hearing and testified on her behalf. The judge ignored the physician's tes-

timony and the treating-physician rule, concluding that a treating physician is required to accept a patient's symptoms at face value and therefore is less credible. The federal court reviewing this case rejected this interpretation of the treating-physician rule and the conclusion that the claimant's receipt of workers' compensation benefits hindered her desire to return to work, finding, "the observation . . . about a class of people [i.e., workers' compensation recipients] generally . . . is remarkably weak evidence."

The ALJ hearing the case of another workers' compensation recipient, Mr. LaPensee (89-2492, MA), a 32-year-old white male, appeared to hold the same view. He assessed the credibility of the claimant as follows: "[This claimant] is quite content to collect workers' compensation and . . . has no motivation for return[ing] to work." Mr. LaPensee's case, too, was remanded by federal district court for further workup.

The ALJ hearing the case of Mr. Davidson (88-0280, MA), a 59-year-old white male, did not articulate the presumption that workers' compensation beneficiaries are lazy and unmotivated to work. However, this judge's cross-examination of the claimant seemed relentless on one point; the ALJ became extremely aggressive and seemed to leave no stone unturned in his effort to discover whether Mr. Davidson had a workers' compensation appeal pending. The ALJ asked at least four times whether Mr. Davidson had hired a lawyer or filed a lawsuit.

Finally, the ALJ hearing the case of Ms. Galasso (88-0280, MA), a 55-year-old Italian woman, commented that the claimant had received a "nice Christmas present" when she received her workers' compensation settlement check on December 24. Such a sarcastic and irrelevant comment from a judge certainly suggests that he was prejudiced—assuming that workers' compensation is more like a present than a settlement owed as a result of an injury at work.

Receipt of welfare benefits also seemed to disadvantage certain applicants. Judges seemed eager to learn whether claimants depended on government benefits, and although never stated explicitly, the information gathered from such inquiries must have been useful or these very busy judges would not have bothered to ask. Speculating one step further, those who answered the welfare question in the affirmative may have been treated or judged prejudicially; this seems even more evident in the cases where the ALJs questioned claimants about whether other members of their families depended on welfare. It seems plausible that the people who are most likely to rely on such benefits, such as poor white women and

people of color, are at a distinct disadvantage when such factors are considered.

My findings seem to mesh with previous studies that suggest that judges' stereotypes emerge in the cases of claimants who are the target of prejudice in the culture at large. The fact that judges have difficulty managing their bias and that it reveals itself as often as it does provides support for my thesis that the ethos of impartiality as it is currently embraced must be reformulated to take account of the unrecognized and repressed bias that permeates hearing and decision texts and subtexts. The next chapter explores, theoretically and practically, how to resolve the problems these tensions suggest. Through calculated policies and trainings, these suggestions begin to imagine a more balanced and individualized process—one that resembles the uniform but engaged, rule-bound but passionate, justice that is the American ideal.