

ADDRESSING AN INDEFENSIBLE GOVERNMENT PROGRAM LIMITATION: IN SUPPORT OF ELIMINATING THE SSDI MEDICARE TWO-YEAR WAITING PERIOD

Randy Drewett

INTRODUCTION

Imagine that you have been a gainfully employed, productive American for your entire adult life. You have been relatively healthy and support yourself, your spouse and your two college-age children. You are paying for your home, two vehicles and have an average amount of credit card debt, along with regular college tuition. You have only a small amount of savings and a modest retirement plan. Your family has always been covered by your employer's health insurance plan. After a period of time when you are not feeling well, you go to see your physician. After running some tests, he says that you need surgery to correct a problem. While in the hospital, you suffer a sudden debilitating stroke. You are 45 years old. The permanent damage caused by the stroke means that you cannot return to your job.

It is well-documented that a man's self-esteem is often gauged by his ability to provide for his family.¹ But what happens when this ability is suddenly and tragically taken away? You are faced with (1) the loss of your job – your only source of income, (2) declining health and demanding medical needs, and (3) escalating expenses. The latter is caused by newly acquired medical costs and the fact that your health insurance just terminated or has transitioned into COBRA.

When it becomes apparent that you are no longer employable, you turn to the disability system for income and health coverage. After all, you have been employed for over 25 years and every one of your pay checks was reduced to contribute to (1) the Social Security system and (2) the Medicare system. Now it's time to start receiving the much-needed benefits that you have been funding for all of these years. This is the darkest period of your life. Imagine the shock when you learn that it will be many months before you receive any financial relief and even years before you will receive health care coverage.

An April 2007 study reported that “nearly 7 million people under age 65 qualify for Medicare due to severe and permanent disabilities.”² This article is about those disabled Americans and the devastation they face from a system which has failed them – and which continues to do so. It will address the issues of how the program started and what were its original goals. What was the basis of the law which has made disabled workers suffer without health coverage for the past 38 years? And if the law is so unconscionable, why hasn't it been changed?

In a day when billions or possibly trillions of dollars are handed out like so much candy to banks, insurance companies, large corporations, Wall Street and foreign countries to compensate for their dismal failures, greed and inability to properly and ethically conduct their business, one would think that some money could be set aside for those Americans who are unfortunate to become disabled while employed prior to reaching age 65. The purpose of this article is to garner public support for pending legislation targeted at eliminating the two-year waiting period forced upon disabled Americans who are approved for Social Security Disability Insurance (SSDI) benefits.

I. The Legal History

As a major part of his “Great Society” initiative, President Lyndon Johnson created the Medicare program in 1965 to meet the needs of aging Americans who were not able to afford private health insurance after the age of retirement.³ In 1972, Medicare was extended by President Richard Nixon to provide health coverage to younger Americans who had become unable to work due to disabilities.⁴ Unfortunately, the “doughnut hole” of SSDI is that this health coverage only becomes available to those approved for benefits after a waiting period of 24 months from the time they begin receiving benefits.⁵ Since SSDI benefits do not commence until more than five months after the onset of disability, the actual waiting period is at least 29 months.⁶

Both of these waiting periods have been controversial from the beginning. Advocacy groups have been conducting studies, writing articles and sponsoring elimination legislation continuously for many years as can be seen in the medical studies and articles discussed below. Newspapers publish human interest stories depicting the human tragedy of those who suffer without health care coverage to their detriment as a result of this law.⁷ 38 years later, little has changed. Although various authors have referred to the waiting period as “indefensible,”⁸ “cruel and arbitrary,”⁹ and “a means of cheating approved claimants,”¹⁰ only a small percentage of the newly disabled have obtained relief. In addition to the “end-stage renal disease exception” in the original legislation (waiting period of only 3 months),¹¹ the sole change occurred in 2000 (beginning in July 2001) when the law was amended to remove the waiting period for those benefit recipients suffering from amyotrophic lateral sclerosis (ALS, commonly referred to as Lou Gehrig’s Disease).¹²

Why were the waiting periods included in the original law? As with all major legislation, the bottom line was money and politics. The congressional committee reports from the 1972 legislation address the motivation surrounding implementation of the waiting period, as follows:

1. To keep program costs within reasonable bounds;
2. To avoid overlapping private insurance protection (particularly in those cases where a disabled worker may continue his membership in a group insurance plan for a period of time following the onset of his disability; and
3. To provide assurance that the protection will be available to those whose disabilities have proven to be severe and long-lasting.¹³

Since our entrance into the new millennium 10 years ago, it seems that every congressional session has entertained one or more bills proposing to eliminate the two year waiting period. Optimistic advocates publish articles calling for change. Thus far, money and politics have prevailed. As discussed in more detail below, there are currently billings pending in both the House¹⁴ and the Senate¹⁵ which would reduce the waiting period over a period of time.¹⁶

II. Comparing SSDI and SSI

Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) are the two primary public benefits programs which provide both financial and medical assistance to disabled Americans. While there are some similarities, there are also vast differences. Since the disabled participants are treated so differently, it is helpful to understand the basic eligibility requirements and the benefits of each program.

A. Social Security Disability Insurance

SSDI (also referred to as “SSD”) is the non-means-tested cash assistance program administered by the Social Security Administration for disabled individuals who have worked and

paid into the Social Security system.¹⁷ The cash benefit is calculated based upon the applicant's work record. To be fully insured, one must have been significantly employed for at least 10 years and for at least 20 of the preceding 40 quarters. The applicant's disability must meet the definition under the Social Security Act.¹⁸ As a non-means-tested program, eligibility is not contingent upon the resources owned by the applicant or by the unearned income received by the applicant. As discussed above, a disabled applicant who is approved under SSDI is entitled to receive medical coverage under Medicare, but only after having received cash benefits under SSDI for a period of 24 months. Since the cash benefits do not commence for a full five month period after the onset of disability, the beginning date for Medicare coverage is usually in excess of 29 months.¹⁹

B. Supplemental Security Income

SSI is a means-tested "welfare model" program for disabled individuals who meet certain strict requirements regarding (1) citizenship and residency, (2) be blind, disabled or over age 65, and (3) have limited income and very limited resources.²⁰ SSI pays a cash benefit which is set each year. For 2010, the maximum cash benefit is \$674 for an individual. In addition to the cash benefit, medical coverage is provided through Medicaid. Unlike SSDI, there is no waiting period to begin benefits. Both the cash payment and Medicaid coverage begins immediately upon qualification for the program. SSI beneficiaries will generally have either become disabled prior to age 18 or have had very limited employment history as an adult.

C. Qualification by Disabled Individuals

Failure by an SSDI applicant to obtain immediate medical coverage does not mean that he or she can obtain coverage through SSI and Medicaid. In most cases, the cash benefit received through SSDI will exceed the monthly maximum allowed by SSI (i.e. \$674 for 2010). Additionally, since

the applicant will have been working for at least 10 years, he or she has probably accumulated resources in excess of the allowed maximum (i.e. \$2,000 of countable resources).²¹ In most states, a retirement account standing alone will exceed the resource limit. This disqualifies the disabled individual from receiving SSI and Medicaid as well, leaving the SSDI recipient without medical coverage of any type in many cases.

Take the case of Erin (actual name of author's client used by permission). Erin is 25. She worked as a paralegal for a large law firm for a number of years after she graduated from high school. She decided to go back to college and worked her way through school. She graduated in May of 2009. One month after graduation, she was riding with a friend when they were involved in a terrible collision. Erin is now a quadriplegic, paralyzed from the neck down. She has extensive medical expenses. Initially, she qualified for SSI, since she had little savings, few countable resources and no income. When she was required to apply for SSDI as the primary program for the disabled, however, her cash award was \$678 – \$4 in excess of the SSI maximum income limit. As a result, she has now lost her SSI and her Medicaid. She is left with significant medical expenses, but no medical coverage.

As illustrated by Erin's experience, a disabled person cannot receive benefits under the SSI program on a permanent basis unless they do not qualify for SSDI with a cash payment of less than the maximum allowed by SSI. Since the income ceiling for SSI in 2010 is \$674 per month, a SSDI benefit award of \$675 or more will disqualify the applicant from receiving SSI and Medicaid, leaving only benefits under the SSDI program for medical coverage. Because Erin's cash award under SSDI exceeded the SSI maximum, she must now wait for two years before she can receive Medicare.

III. Impact of the Waiting Period Upon the Disabled

The obvious impact of the SSDI waiting period is the economic component and the natural resulting health care decisions. If one has medical needs, but has no ability to pay for medical care, then those needs are going to be unaddressed. Since a further decline of health will occur due to lack of care, when the individual finally obtains Medicare coverage – assuming they survive the two year waiting period, a component to be discussed below – their level of health will require more attention and thus cost Medicare more money. Studies have been conducted to analyze this issue. Between 1992 and 2006, a study was conducted to compare Medicare spending for previously uninsured and insured adults by using Medicare claims data. This study was reported in the *New England Journal of Medicine*,²² and in the *Journal of the American Medical Association* in 2003²³ and in 2007.²⁴ Of the 4,500 adults in the study, 2,951 were continuously insured and 1,616 were either continuously or intermittently uninsured before attaining age 65. Annual Medicare spending, including total cost and type of services required, were analyzed. The study revealed that adjusted annual total Medicare spending was significantly higher for the previously uninsured (\$5,796) as compared to those who had been continuously insured (\$4,773). Additionally, the rate of annual hospitalization for the previously uninsured for cardiovascular disease, diabetes and joint replacement was also higher. The conclusion of the study states: “The costs of expanding health insurance coverage for uninsured adults before they reach the age of 65 years may be partially offset by subsequent reductions in health care use and spending for these adults after age 65.”²⁵

The results of this study can be applied to the SSDI waiting period issue to support the argument that when disabled individuals remain uninsured for the 29 month period before the commencement of Medicare, their health will deteriorate to the point that Medicare costs will be

significantly higher once Medicare coverage is attained. Conversely, if the waiting period is eliminating, continuous medical coverage will result in overall healthier individuals who will not require as much medical attention.

In support of this argument, a study was conducted in 2004 by the Christopher Reeve Paralysis Foundation and The Commonwealth Fund to analyze the experiences of individuals with disabilities in the two year waiting period to “gain the freshest perspective on the barriers to receiving health care and living independent, productive lives.”²⁶ Study participants had a wide variety of disabilities, including physical and mental impairments and most were uninsured. Because of their uninsured status while within the two year period, resulting in the inability to afford medical coverage, participants reported skipping medications and putting off needed care which led to depression and anxiety regarding the future. This forced neglect of health care can only result in further deterioration which increases the negative impact in terms of human experience of the individual and financial cost to the public.

A more recent study was conducted in 2007 by the Medicare Rights Center where the experiences of 21 disabled individuals were analyzed. The participants were unable to afford private medical care. They related their experiences during the waiting period which is described in the study as “financial hardship, pain, and suffering.”²⁷

IV. Considerations Regarding the Cost

Irrespective of how many bills are introduced in Congress to eliminate the waiting period, none have been adopted. The reason is the anticipated cost of funding the additional coverage. This argument is short-sighted in several respects:

A. Additional Burden on State Medicaid.

When a disabled individual is not provided medical coverage through Medicare, they are going to obtain coverage elsewhere. The first stop is Medicaid. While Medicaid (through SSI or nursing care) is means-tested, some SSI applicants will meet the income and resource tests allowing them to qualify. Remember that Erin on exceeded the SSI income limit by four dollars. Otherwise, she would qualify for Medicaid coverage under SSI. When these individuals are accepted for Medicaid, this shifts the burden of providing medical coverage to the states.²⁸ In a time when many states are in financial crisis, removing this cost from state budgets would be some welcome relief.

B. Uninsured Individuals Require More Care Later

As discussed earlier, multiple studies have concluded that lack of Medicare coverage forces disabled individuals to neglect their health by not taking medications and not seeking medical care when needed. This failure to address medical needs results in the deterioration of the individual's health. Once Medicare is available, more medical attention is required because of the poor state of health and consequently, more cost is incurred..

C. The Actual Cost of Elimination

The cost of eliminating the SSDI Medicare waiting period has been the subject of multiple studies over the years. Estimates of the cost are not speculative; they have been well-documented. Most recently, a May 2009 report concludes that the annual cost would be \$7 billion if Medicare coverage was not retroactive to the entitlement month or \$12 billion if retroactive.²⁹ Although this is a significant cost, it represents less than 3% of all Medicare program expenditures.³⁰ An additional consideration is that the cost of eliminating the waiting period would be reduced by the substantial decrease in state Medicaid expenses of covering individuals awaiting Medicare under SSDI.

V. Potential Modifications of the Waiting Period

Numerous bills have been introduced in Congress to modify or eliminate the Medicare waiting period. The two methods most widely discussed have been (1) eliminating the waiting period at one time, or (2) phasing out the waiting period over a period of time.³¹

A. All at One Time

In order to afford the most immediate relief to disabled Americans in need of medical coverage, Congress could reduce the waiting period to five months which is the current period required before financial assistance begins. This would be the most costly as documented in various studies cited above. U.S. Representative Gene Green of Texas introduced H.R. 104 entitled "Medicare Disability Eligibility Improvement Act of 2003" which would have completely eliminated the waiting period beginning 90 days after the enactment of the bill.³² No action was taken on the bill. Representative Green's current bill, introduced on March 23, 2009, includes a phase out and is pending in the House (H.R. 1708).

B. Phasing Out the Waiting Period Over Several Years

Phasing out the waiting period could take several forms. One prominently discussed calls for an immediate elimination of the first 18 months with a two month reduction over the next nine years. In 2004, U.S. Senator Jeff Bingaman of New Mexico introduced S. 2566 entitled "Ending the Medicare Disability Waiting Period of 2004." This bill would phase out the waiting period over a 10 year period. No action was taken on this bill. On March 25, 2009, Senator Bingaman introduced S. 700 which would implement the formula described above over ten years to phase out and ultimately eliminate the waiting period.

C. Exempt Certain Categories of Disability from the Waiting Period

Congress has previously exempted end-stage renal disease and ALS from the waiting period. Another alternative would be to expand the exempt disabilities to additional classes of the disabled. Bills have previously been introduced in Congress to exempt those who are terminally ill under the age of 65 (H.R. 3382 in 2003) and those who had no insurance coverage 60 days before applying for SSDI (H.R. 2322 in 2003). No action was taken on either bill.

CONCLUSION

The goal of the Social Security Disability Insurance program is to provide a safety net for workers who must stop working because of a disability.³³ This goal is not being achieved for many uninsured, disabled Americans. Under current law, successful SSDI applicants must wait for at least 29 months from the onset of disability before Medicare coverage begins. During this period, many turn to Medicaid, others who can afford coverage are required to pay much higher COBRA insurance rates, while the majority live uninsured. Our government needs to reconsider its spending priorities. While the amounts required to fund the elimination of the Medicare waiting period are substantial, those amounts are well within the means of the federal budget if responsible federal spending through proper prioritization will be addressed. Congress has a recent history of addressing the financial problems of the wealthier class of citizens and big business while ignoring critical issues facing the less fortunate. The time has come for Congress to recognize the importance of all Americans, including the disabled. The elimination of the two year SSDI Medicare waiting period is a good place to start.

ENDNOTES

1. This illustration is not to infer that men are the only workers or are the only classification of disabled. Many of the Americans affected by the matters discussed in this article are women.
2. Robert M. Hayes et al., *Too Sick to Work, Too Soon for Medicare: The Human Cost of the Two-Year Medicare Waiting Period for Americans with Disabilities* (New York: The Commonwealth Fund, April 2007), at 1.
3. Id.
4. Public Law 92-603, October 30, 1972, §201(b).
5. Stuart Guterman and Heather Drake, *The Long Wait: The Impact of Delaying Medicare Coverage for People with Disabilities* (New York: The Commonwealth Fund, May 2009), at 1.
6. Id.
7. Julie Appleby, *Life in Medicare's Waiting Period*, USA Today, April 12, 2007.
8. Charles T. Hall, *The Twenty-Four Month Waiting Period For Medicare*, Social Security News, (<http://socsecnews.blogspot.com>, July 8, 2008). Mr. Hall is a past president of the National Organization of Social Security Claimants Representatives (NOSSCR).
9. Hayes et al., *Too Sick to Work, Too Soon for Medicare: The Human Cost of the Two-Year Medicare Waiting Period for Americans with Disabilities* (New York: The Commonwealth Fund, April 2007), supra.
10. Tim Moore, *The 24 Month Waiting Period and Social Security Disability* (www.disabilitysecrets.com, July 9, 2008).
11. Public Law 92-603, October 30, 1972, §2991. Added in the Senate.
12. Public Law 106-554, December 21, 2000, Appendix F; H.R. 5661, §115.
13. U.S. House of Representatives, Committee on Ways and Means, *Social Security Amendments of 1971*, House Report No. 92-231, May 26, 1971, p. 67. See also, Senate Report No. 92-1230, p. 178, Senate Committee on Finance).
14. H.R. 1708, introduced by Rep. Gene Green (D-TX).
15. S. 700, introduced by Sen. Jeff Bingaman (D-NM).
16. The bills would phase out the waiting period over a 10-year period, reducing it to 18 months for 2010 followed by a reduction of two months for each year until its final elimination in January of 2019.
17. MOLLY ABSHIRE ET AL., *TEXAS ELDER LAW* (Thompson Reuters / West 2009), at 185.
18. 42 U.S.C.A. § 1381.

19. Hall, *supra.* at 1.
20. 42 U.S.C.A. §§ 1381 et seq. and 20 C.F.R., Pt. 416.
21. ABSHIRE, *supra.*, at 199.
22. J.M. McWilliams et al., *Use of Health Services by Previously Uninsured Medicare Beneficiaries*, *New England Journal of Medicine*, July 12, 2007, 357(2): 143-53.
23. J.M. McWilliams et al., *Impact of Medicare Coverage on Basic Clinical Services for Previously Uninsured Adults*, *Journal of the American Medical Association*, Aug. 13, 2003, 290(6):757-64 and
24. J.M. McWilliams et al., *Health of Previously Uninsured Adults After Acquiring Medicare Coverage*, *Journal of the American Medical Association*, Dec. 26, 2007, 298(24): 2886-94.
25. McWilliams et al., *Use of Health Services by Previously Uninsured Medicare Beneficiaries*, at 143.
26. Bob Williams et al., *Waiting for Medicare: Experiences of Uninsured People with Disabilities in the Two-Year Waiting Period for Medicare* (New York: The Commonwealth Fund, October 2004)
27. Hayes et al., *Too Sick to Work, Too Soon for Medicare: The Human Cost of the Two-Year Medicare Waiting Period for Americans with Disabilities*, *supra.*
28. Stacy Berg Dale and James M. Verdier, *Elimination of Medicare's Waiting Period for Seriously Disabled Adults: Impact on Coverage and Costs* (New York: The Commonwealth Fund, July 2003), at 4.
29. Gina Livermore et al., *Health Insurance and Health Care Access Before and After SSDI Entry*, (The Commonwealth Fund, May 2009).
30. *Id.*; Guterman, *supra.* at 3.
31. Williams, *supra.* at 20.
32. *Id.*, at 22.
33. Livermore, *supra.*, at viii.

