

THE WEIGHTING GAME: DO GOVERNMENT AGENCIES CONSIDER OBESITY A DISABILITY?

JASMINE N. LITTLE†

American culture struggles with an ironic personality crisis. Although inculcated in the culture is a worship of good looks, America's skyrocketing obesity cannot be ignored.

Obesity is a disorder in which an individual has an excessive amount of body fat, which increases the risk of, among other things, heart disease, high blood pressure, and diabetes.¹ Calculating body mass index ("BMI"), which is an individual's height-to-weight ratio squared,² "correlate[s] with more direct measures of body fat"³ and is an effective indicator of obesity.⁴ A BMI of thirty or more is considered obese and a BMI of forty or more is considered morbidly obese.⁵ According to Centers for Medicare and Medicaid Services, "1 in 3 U.S. adults and 1 in 6 children and adolescents are obese."⁶

Individuals suffering from obesity in America are readily scrutinized in print, on screen, and in daily life. In contemporary literature, Peter Hedges's *What's Eating Gilbert Grape* chronicles the title character's shame in having a morbidly obese mother,⁷ while

† Jasmine Little graduated from Wake Forest University School of Law in 2016 and plans to practice in North Carolina.

1. *Obesity*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/obesity/basics/definition/con-20014834> (last updated June 10, 2015).

2. *Why Use BMI?*, HARV. SCH. PUB. HEALTH, <http://www.hsph.harvard.edu/obesity-prevention-source/obesity-definition/obesity-definition-full-story> (last visited Feb. 6, 2016).

3. *About Adult BMI*, CTNS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi (last updated July 11, 2014).

4. *Id.*

5. *See id.* (stating that an individual with a BMI over thirty is classified as obese); *see also What is Morbid Obesity?*, U. ROCHESTER MED. CTR., <https://www.urmc.rochester.edu/highland/bariatric-surgery-center/Questions/morbid-obesity.aspx> (last visited Jan. 22, 2016) (classifying individuals with a BMI over forty as morbidly obese).

6. *Reducing Obesity*, MEDICAID, <http://www.medicaid.gov/medicaid-chip-program-information/by-topics/quality-of-care/reducing-obesity.html> (last visited Jan. 22, 2016).

7. PETER HEDGES, *WHAT'S EATING GILBERT GRAPE* (1991).

The Fresh Prince of Bel-Air viewers laughed along with Will at his Uncle Phil fat jokes.⁸ Ultimately, filmmakers and sitcom directors alike often use obese characters as the butt of jokes or for comic relief.⁹

Beyond the television screen, America's obese endure public scrutiny, which can have negative psychological effects. In 2010, a study by Julie Lumeng indicated that "obese 8- to 11-year-old US children were more likely to be bullied as compared with their [non-overweight] peers independent of the child's gender, race, family [socioeconomic status], school demographic profile, social skills, or academic achievement."¹⁰ In addition, depression among obese adults is significant.¹¹ In 2010, "forty-three percent of adults with depression were obese, and adults with depression were more likely to be obese than adults without depression."¹²

The effects of the high obesity rate have galvanized the government to enforce regulations to protect and accommodate the needs of America's heaviest citizens. The United States Equal Employment Opportunity Commission ("EEOC"), in keeping with the intent of the Americans with Disabilities Act Amendments Act ("ADAAA"), has broadened the disability spectrum to protect America's heaviest citizens from employment discrimination. This protection will revolutionize the American perception of obesity, to the chagrin of a culture that looks disdainfully upon those whose appearance fails to fit the slender mold of the cultural criteria.

This comment examines the EEOC's and the Social Security Administration's ("SSA") changes to their respective definitions of obesity as a disability and explores the effects of the

8. *The Fresh Prince of Bel-Air* (NBC television broadcast 1990–96).

9. See MICHAEL S. BERMAN & LAURENCE SHAMES, *LIVING LARGE: A BIG MAN'S IDEAS ON WEIGHT, SUCCESS, AND ACCEPTANCE* 36 (2006) (stating that a "hero's sidekick may be portrayed as fat, for comic relief; the hero will, of course, be lean"); THE BOY DETECTIVES: *ESSAYS ON THE HARDY BOYS AND OTHERS* 138 (Michael G. Cornelius ed., 2010) ("Fat boys are usually sidekicks and comic relief characters rather than 'leading' characters."); 2 THE ENCYCLOPEDIA OF HUMOR STUDIES 660 (Salvatore Attardo ed., 2014) (describing the overweight characters as "stock figures in Sanskrit comic literature").

10. Julie C. Lumeng et al., *Weight Status as a Predictor of Being Bullied in Third Through Sixth Grades*, 125 *PEDIATRICS* 1301, 1304 (June 2010), <http://pediatrics.aappublications.org/content/early/2010/05/03/peds.2009-0774.full-text.pdf>.

11. LAURA A. PRATT & DEBRA J. BRODY, *DEPRESSION AND OBESITY IN THE U.S. ADULT HOUSEHOLD POPULATION, 2005–2010*, NAT'L CTR. FOR HEALTH STAT., NCHS DATA BRIEF NO. 167 (Oct. 2014).

12. *Id.*

transformations. Part I explores the newfound clarity of the ADAAA, which succeeds the Americans with Disabilities Act (“ADA”), and the EEOC’s reformation of “disability”; Part II introduces the SSA’s contrasting interpretation of obesity as a disability; Part III analyzes whether Medicaid’s increased coverage of obesity-related services through the Affordable Care Act (“ACA”) demonstrates a broad view of obesity as a disability; Part IV juxtaposes the EEOC and the SSA views; Part V predicts the likelihood of the SSA to broaden its scope of disability; and Part VI concludes with comment on the residual effects of the EEOC’s redefinition.

I. EEOC’S INTERPRETATION OF “DISABILITY” BURGEONS IN RESPONSE TO THE ADAAA

Unlike race, sex, or national origin, weight is not a federally protected class under Title VII, which prohibits employers from discriminating on the basis of those protected classes.¹³ However, the ADAAA protects the civil rights of disabled persons and ensures they have equal opportunities in employment.¹⁴ It provides an alternative basis under which obese individuals can pursue action against employers for wrongful termination—using the ADAAA’s classification of obesity as a disability.

The ADA’s ambiguous statutory language encouraged lawmakers to create the ADAAA in 2008 with the twofold purpose of clarifying the definition of disability and instructing that it be applied to the fullest extent allowed under law.¹⁵ Under the ADAAA, an individual must satisfy one of three prongs to determine whether her impairment qualifies as a disability.¹⁶ A person may claim to be disabled under either the first prong, in which she must have “a physical or mental impairment that substantially limits one or more . . . major life activities”;¹⁷ under

13. Civil Rights Act of 1991 § 703, 42 U.S.C. § 2000e-2 (2012).

14. Americans with Disabilities Act of 1990 § 102, 42 U.S.C. § 12112 (2012).

15. *EEOC Announces Final Bipartisan Regulations for the ADA Amendments Act*, U.S. EQUAL EMP’T OPP. COMM’N (Mar. 24, 2011), <http://www.eeoc.gov/eeoc/newsroom/release/3-24-11.cfm> [hereinafter *EEOC Announcement*].

16. ADA Amend. Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (2008) (codified as amended at 42 U.S.C. § 12102).

17. *Id.*

the second prong, which requires “a record of such an impairment”;¹⁸ or the third prong by “being regarded as having such an impairment.”¹⁹ The EEOC defines “impairment” as:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as an intellectual disability . . . organic brain syndrome, emotional or mental illness, and specific learning disabilities.²⁰

Specifically relevant in the ADAAA definition of “disability” is the first prong—a person has a “physical or mental impairment that substantially limits one or more major life activities.”²¹ This language requires both an impairment *and* substantial limitation of a major life activity in order for one to claim the protection of the ADAAA based on disability.²² Prior to the ADAAA, the EEOC interpreted the phrase “substantially limits” to mean “significantly restrict,” but Congress stated that the EEOC’s definition did not communicate Congress’s intended meaning of the terms.²³ In the spirit of honoring congressional intent, the EEOC now broadly interprets “disability” to include an impairment that does not necessarily “significantly restrict” the individual’s abilities.²⁴

18. *Id.*

19. *Id.*

20. 29 C.F.R. § 1630.2(h)(1), (2) (2011).

21. ADA Amend. Act of 2008 § 3(1)(A).

22. Shannon Liu, Note, *Obesity as an “Impairment” for Employment Discrimination Purposes Under the Americans with Disabilities Act Amendments Act of 2008*, 20 B.U. PUB. INT. L.J. 141, 145 (2010).

23. See ADA Amend. Act of 2008 § 3(1)(A); 29 C.F.R. § 1630.2(j)(1)(i) (2011) (“[S]ubstantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. ‘Substantially limits’ is not meant to be a demanding standard.”).

24. Lawrence Z. Lober & Fredric C. Leffler, *EEOC’s New ADAAA Regulations and Their Implications for the Workplace*, PROSKAUER, <http://news.acc.com/accwm/downloads/Proskauer.040811.pdf> (last visited Feb. 6, 2016).

Impairments “need not prevent or severely or significantly restrict performance of a major life activity to be considered a disability.”²⁵ The agency’s determination as to “whether an impairment is a disability”²⁶ is now “construed broadly, to the maximum extent allowable under the law.”²⁷

For the EEOC, disability, under the maximum allowable extent, now includes obesity.²⁸ With this new construction in mind, the agency has begun a pivotal transformation to fulfill its promise to Congress. The change has caught employers unaware of the new effects of the law. The 2014 *Whittaker v. America’s Car-Mart, Inc.* decision is indicative of the EEOC’s enforcement of its new rule.²⁹ There, Whittaker was terminated and sued claiming wrongful termination on the basis of his obesity. The car dealership, America’s Car-Mart, defended its decision to terminate Whittaker, citing the outdated ADA law, arguing that Whittaker “fail[ed] to allege that his obesity [was] related to an underlying physiological disorder or condition.”³⁰ The Eastern District Court of Missouri held, however, that under the ADAAA, which supersedes the ADA, Whittaker need not have established that a physiological disorder was related to his obesity because “[he] pleads that he has severe obesity, which he alleges is a physical impairment within the meaning of the [ADAAA].”³¹ Thus, the EEOC’s relaxation of “disability” allows obese persons to claim disability benefits without a showing of an underlying condition causing the obesity.

Similarly, in 2009, BAE Systems Inc. (“BAE”) terminated Ronald Kratz, a morbidly obese materials handler.³² The EEOC filed a disability discrimination claim against Kratz’s employer, alleging he was discharged because of his morbid obesity, while BAE claimed that he was terminated due to his difficulty walking,

25. *EEOC Announcement*, *supra* note 15.

26. *Id.*

27. *Id.*

28. Michael Kraemer, *Is Obesity Considered a “Disability” Under the ADA?*, LAW.COM (Nov. 11, 2014), <http://www.law.com/sites/michaelkraemer/2014/11/11/is-obesity-considered-a-disability-under-the-ada/?sreturn=20160020110734>.

29. *Whittaker v. Am.’s Car-Mart, Inc.*, No. 1:13CV108 SNLJ, 2014 U.S. Dist. LEXIS 56919, at *5 (E.D. Mo. Apr. 24, 2014).

30. *Id.* at *4.

31. *Id.* at *5.

32. Amended Complaint at 3, *Equal Emp’t Opp. Comm’n v. BAE Sys. Tactical Vehicles Sys. LP*, No. 4:11-CV-03497, 2012 LEXIS 16782 (S.D. Tex. 2012).

moving about, and stooping.³³ In its complaint, the EEOC asserted “morbid obesity is a disability under the ADAAA,”³⁴ and while not literally defined as a disability in the Act, the EEOC’s interpretation includes obesity.³⁵ The lawsuit reached a settlement in which BAE awarded Kratz \$55,000 and six months of outplacement services.³⁶

The EEOC’s burgeoning definition of “disability,” at the behest of Congress, has begun dramatic shrinkage in employers’ termination power over employees who happen to have a BMI over thirty.

II. SSA’S VIEW ON OBESITY AS A “DISABILITY” HAS DIMINISHED

The SSA provides American citizens with Supplemental Security Income (“SSI”) and Social Security Disability Insurance (“SSDI”), two programs established to provide income assistance or benefits to disabled persons.³⁷ While SSI is available only to low-income disabled persons, SSDI is available to disabled persons who have worked for a certain number of years, determined by the age of the onset of the disability, and have paid Social Security taxes.³⁸ Many individuals collect concurrent benefits by receiving both SSI and SSDI simultaneously because the agency checks persons for eligibility in both programs once they apply to one.³⁹

The ADAAA does not serve to alter the functioning of either of these SSA programs.⁴⁰ In fact, the Act makes clear that “nothing in this [Act] alters the standards for determining eligibility for benefits under . . . [f]ederal disability benefit programs,” such as the Social Security Disability Insurance program.⁴¹

33. *Id.* at 4.

34. *Id.* at 3.

35. *EEOC Announcement*, *supra* note 15.

36. Consent Decree at 4, *BAE Sys. Tactical Vehicles Sys. LP*, 2012 LEXIS 16782 (No. 4:11-CV-03497).

37. *Benefits for People with Disabilities*, SOC. SEC. ADMIN., <http://www.ssa.gov/disability> (last visited Feb. 6, 2016).

38. *Id.*

39. *2015 Red Book*, SOC. SEC. ADMIN., <http://www.socialsecurity.gov/redbook/eng/supportsexample.htm> (last visited Feb. 6, 2016).

40. 29 C.F.R. § 1630.1(c)(3) (2011).

41. *Id.*

The SSA, therefore, continues its independent operation, and its interpretation of disability is far narrower than that of the EEOC.⁴² The Federal Register contains the listings of impairments that the SSA defines as disabilities for which an applicant can receive benefits.⁴³ In 1979, obesity was added to the list under Section 10.10 of adult impairments without hope from the public that its addition would have much effect on the already comprehensive list of impairments constituting disability.⁴⁴ Under Section 10.10 (later moved to 9.09 in 1993),⁴⁵ a plaintiff meeting a specified height and weight requirement “would meet the criteria for the disabling impairment of obesity.”⁴⁶

Until 1999, the Secretary of the SSA used a two-step framework in which a person could receive disability benefits for being obese (hereinafter referred to as the “obesity-plus” test).⁴⁷ In the first step, the individual’s weight needed to exceed a specified amount, and in the second step, the individual must also have suffered one of five complications to include: “(1) history of pain and limitation of motion in a weight bearing joint or spine; (2) hypertension with a diastolic blood pressure persistently in excess of 100 mm; (3) a history of congestive heart failure; (4) chronic venous insufficiency; or (5) respiratory disease.”⁴⁸

The second step of the obesity-plus test was cumbersome for the SSA. Obese plaintiffs could wriggle out of benefit denials

42. *Compare Disability Planner: What We Mean by Disability*, SOC. SEC. ADMIN., <https://www.ssa.gov/planners/disability/dqualify4.html> (last visited Jan. 28, 2016) (explaining how disability is defined narrowly to only apply in cases of total disability), with *Fact Sheet on the EEOC’s Final Regulations Implementing the ADA*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm (last visited Jan. 28, 2016) (explaining how disability is defined more broadly to include substantial limits on major life activities).

43. 20 C.F.R. § 404 (P) app. 1 (2012).

44. ALAN L. COWLES, A HISTORY OF THE DISABILITY LISTINGS 17 (Mar. 2, 2005), http://www.ssa.gov/history/pdf/Listings_History.pdf (citing a comment saying that “the criteria for obesity would have little effect because the required findings are sufficient to establish disability without obesity”).

45. *Id.* at 18.

46. *Fulbright v. Apfel*, 114 F. Supp. 2d 465, 475 (W.D.N.C. 2000).

47. See *Ivy v. Sullivan*, 898 F.2d 1045, 1048 (5th Cir. 1990); COWLES, *supra* note 44 (explaining that once the obesity listing was deleted, obesity plus one of five other impairments were required to show a disability).

48. *Ivy*, 898 F.2d at 1048. See generally *Combs v. Comm’r of Soc. Sec.*, 459 F.3d 640, 643–44 (6th Cir. 2006); *Hughes v. Shalala*, 23 F.3d 957, 959 (5th Cir. 1994); *Pearson v. Bowen*, 866 F.2d 809, 810 (5th Cir. 1989) (setting out and discussing the five-part test).

by appealing on technicalities.⁴⁹ For instance, the requirement that the applicant have a “history of pain . . . in a weight bearing joint”⁵⁰ did not require “that the pain be severely limiting,”⁵¹ and thus obese applicants only needed to show a history of pain as their qualifying impairment.⁵² In October 1999, the SSA removed obesity from Section 9.09,⁵³ and since then, utilizing “height and weight alone as a basis for disability”⁵⁴ is no longer sufficient. The SSA defended its decision to delete obesity by asserting “the criteria . . . did not represent a degree of functional limitation that would prevent an individual from engaging in any gainful activity.”⁵⁵

Now, a plaintiff claiming SSA disability must meet the elements of a *prima facie* test in which his disability must appear in the list provided in the Federal Register (hereinafter referred to as “the listings”), or if not on the listings, must be equivalent to that of “a listing-level impairment or combination of impairments.”⁵⁶ If the SSA finds disability or lack thereof at any step of the test, it will not review the claim further.⁵⁷ Under the test:

[1] At the first step, the agency will find nondisability unless the claimant shows that he is not working at a “substantial gainful activity.” [2] At step two, the SSA will find nondisability unless the claimant shows that he has a “severe impairment,” defined as “any impairment or combination of impairments which significantly limits [the claimant’s] physical or mental ability to do basic work activities.” [3] At step three, the agency

49. COWLES, *supra* note 44, at 19–20.

50. *Ivy*, 898 F.2d at 1048.

51. *Hughes*, 23 F.2d at 959 (citing *Carnes v. Sullivan*, 936 F.2d 1215, 1219 (11th Cir. 1991)).

52. *Id.*

53. *Hulbert v. Comm’r of Soc. Sec.*, No. 06-CV-1099, 2009 U.S. Dist. LEXIS 77508 at *31 (N.D.N.Y. Aug. 6, 2009).

54. *Fulbright v. Apfel*, 114 F. Supp. 2d 456, 475 (W.D.N.C. 2000).

55. *DI 24570.001, Evaluation of Obesity*, SOC. SEC. ADMIN. (Sept. 12, 2002), <https://secure.ssa.gov/poms.nsf/lnx/0424570001>.

56. 20 C.F.R. § 404, Subpt. P, app. 1, Pt. A, § 2 (Q) (2015).

57. *Hopkins v. Colvin*, No. 13-CV-4803 (AT) (AJP), 2014 U.S. Dist. LEXIS 7742, at *35 (S.D.N.Y. June 5, 2014) (citing *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003)).

determines whether the impairment which enabled the claimant to survive step two is on the list of impairments presumed severe enough to render one disabled; if so, the claimant qualifies. [4] If the claimant's impairment is not on the list, the inquiry proceeds to step four, at which the SSA assesses whether the claimant can do his previous work; unless he shows that he cannot, he is determined not to be disabled. [5] If the claimant survives the fourth stage, the fifth, and final, step requires the SSA to consider so-called "vocational factors" (the claimant's age, education, and past work experience), and to determine whether the claimant is capable of performing other jobs existing in significant numbers in the national economy. . . . The claimant has the burden of proof as to the first four steps.⁵⁸

Despite its flowchart nature, within the test at step two, the SSA must balance the effects of non-listings impairments and determine whether their effects rise to the level of "a listing-level impairment or combination of impairments."⁵⁹ Since obesity is no longer a disability in the listings, the SSA must always conduct a balancing test within the prima facie test to determine its viability in rendering a plaintiff disabled.⁶⁰ An additional consequence of the removal of obesity from the listings also means that an obese plaintiff will never satisfy step three of the test and will proceed to step four, where the administrative law judge must consider whether despite the plaintiff's obesity, she can do her previous work.⁶¹ Obesity is now only a contributing factor in determining disability and no longer an element of a two-step framework that almost always guaranteed obese plaintiffs disability benefits.⁶²

58. *Id.* at *35–36 (citing *Barnhart*, 540 U.S. at 24–25).

59. § 404, Subpt. P, app. 1, Pt. A, § 2 (Q).

60. *Hopkins*, 2014 U.S. Dist. LEXIS 7742 at *38.

61. *Id.* at *24.

62. *Id.* at *59.

III. MEDICAID DEFERS TO THE SSA TO DETERMINE WHETHER OBESITY IS A DISABILITY

Medicaid is a social health insurance program within the Department of Health and Human Services established to provide healthcare to low-income families.⁶³ Since its inception with the Social Security Amendments of 1965, Medicaid now covers sixty-five million Americans.⁶⁴ While eligibility is targeted at low-income families, Medicaid also offers eligibility on a categorical eligibility basis; thus, in addition to low-income families, it also affords enrollment to low-income children, pregnant women, and low-income seniors.⁶⁵ Recently, Medicaid coverage increased with the passage of the ACA. It now offers coverage to “millions of low-income Americans and makes numerous improvements to . . . Medicaid.”⁶⁶

Medicaid coverage of obesity-related healthcare has increased since the passage of the ACA, indicating a movement towards more vigilant management of obesity.⁶⁷ In its report to Congress in 2010, the Department of Health and Human Services stated its focus is to ensure that states provide children and adults with health education and obesity awareness, as well as screenings and nutritional therapy.⁶⁸ Some of the obesity-related prevention that states can provide include “[l]icensed nutritionists who provide . . . nutrition assessment and counseling”⁶⁹ and fitness programs for children and adults with obesity-related symptoms.⁷⁰

63. *What is Medicaid?*, SOC. SEC. ADMIN., <http://www.ssa.gov/disabilityresearch/wi/medicaid.htm> (last visited Feb. 6, 2016).

64. Louis Radnofsky, *How Many People Got Medicaid from Obamacare? It's Complicated*, WALL STREET J. (June 4, 2014, 6:28 PM), <http://blogs.wsj.com/washwire/2014/06/04/how-many-people-got-medicaid-from-obamacare-its-complicated>.

65. *List of Medicaid Eligibility Groups*, MEDICAID, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/Downloads/List-of-Eligibility-Groups.pdf> (last visited Feb. 6, 2016).

66. *Affordable Care Act*, MEDICAID, <http://medicaid.gov/affordablecareact/affordable-care-act.html> (last visited Feb. 6, 2016).

67. KATHLEEN SEBELIUS, DEP'T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS: PREVENTIVE & OBESITY-RELATED SERVS. AVAILABLE TO MEDICAID ENROLLEES 3 (2010), http://medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Quality-of-Care/Downloads/RTC_PreventiveandObesityRelatedServices.pdf.

68. *Id.* at 5.

69. *Id.* at 9.

70. *Id.*

While Medicaid's increased coverage of obesity-related services is indicative of its view of obesity as a medical condition, this is not relevant to determine whether it views obesity as a disability under the law. This determination is outside the agency's scope.⁷¹ Medicaid makes a clear delineation between its powers and those of the SSA.⁷² The SSA's definition of disability is controlling on whether Medicaid recipients can also receive disability benefits.⁷³ Typically, an individual who is first eligible for disability benefits under SSI automatically qualifies for Medicaid.⁷⁴ The reverse is not always true. If an obese individual qualifies for Medicaid coverage and is treated for obesity-related symptoms, he is not considered disabled, unless it can be proven that he meets the SSA *prima facie* test for disability.⁷⁵ Medicaid defers to SSA to make determinations about whether a condition rises to the level of disability.⁷⁶

IV. DISCUSSION OF SSA'S VIEW OF OBESITY AS A DISABILITY COMPARED WITH THE EEOC'S VIEW

As discussed previously, the SSA shifted to a narrow interpretation of disability under which obesity in and of itself now fails to qualify as a disability.⁷⁷ The agency's new focus is not whether a plaintiff seeking disability benefits is obese, but rather whether the severity of the plaintiff's pain prevents her from doing her previous work. Thus, the SSA considers many plaintiffs who are obese to still be able-bodied despite their weight.⁷⁸ If the SSA can determine that a plaintiff is able to continue to do her previous work, impairments such as carpal tunnel syndrome, in

71. *Hopkins v. Colvin*, No. 13-CV-4803 (AT) (AJP), 2014 U.S. Dist. LEXIS 7742, at *35 (S.D.N.Y. June 5, 2014) (citing *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003)).

72. *What is Medicaid?*, *supra* note 63.

73. *Individuals with Disabilities*, MEDICAID, <http://www.medicaid.gov/medicaid-chip-program-information/by-population/people-with-disabilities/individuals-with-disabilities.html>, (last visited Feb. 6, 2016).

74. *Id.*

75. *Hopkins*, 2014 U.S. Dist. LEXIS 7742 at *52.

76. *Id.*

77. *See Hulbert v. Comm'r of Soc. Sec.*, 2009 U.S. Dist. LEXIS 77508, at *30–31 (N.D.N.Y. Aug. 31, 2009) (interpreting the change narrowly).

78. *See id.* at *35 (holding that “the ALJ’s failure to specifically address her obesity does not warrant a remand”).

combination with obesity, are not sufficient to rise to the level of disability.⁷⁹

While this is a high threshold, it is one that is needed to prevent plaintiffs from frivolously appealing SSA benefit denials. The SSA requires an obvious demonstration of factors that show clear diminution of ability.⁸⁰ However, this high threshold, while necessary, is in some cases arbitrary. Even if obesity is a compounding factor of a plaintiff's overall disability, if it can be found that she can still do previous work, the prima facie analysis ends, and the agency does not disburse disability benefits.⁸¹ This is unfair to some plaintiffs. For example, if the plaintiff has mobility problems or other complications, but her previous work was a job that was sedentary in nature, the SSA will surely dismiss the case because the sedentary work requires little or no need for great mobility.

The plaintiff in *Hopkins v. Colvin* suffered this dilemma. Prior to the onset of her obesity, Hopkins's previous work included processing bank data, which "required her to sit and type for eight hours each day."⁸² When the administrative law judge applied the prima facie test for disability, the sedentary nature of Hopkins's previous work prevented her from passing the test, although she often needed assistance grocery shopping and doing household chores and testified that "she could not stand or walk for one to two hours during an eight-hour day" because of "excruciating pain in her knees and back."⁸³

Outside of employment, plaintiffs like Hopkins are still unable to do basic activities such as grocery shopping, cooking, and cleaning, but because the test is based on ability to work and not overall demonstrated ability to move or function well, some plaintiffs will never receive disability benefits under this analysis.⁸⁴ To provide benefits to these plaintiffs, the prima facie test should not rely so heavily upon the plaintiff's ability to perform previous work, but rather rely on expert medical opinion to determine such

79. *Id.* at *12 (holding that Hulbert was not entitled to SSI benefits despite her obesity and carpal tunnel syndrome).

80. *Id.* at *36.

81. *Hopkins*, 2014 U.S. Dist. LEXIS 7742, at *35–36 (citing *Barnhart v. Thomas*, 540 U.S. 20, 24–25 (2003)).

82. *Id.* at *3.

83. *Id.* at *4–5.

84. *See id.* (describing Hopkins's difficulties with basic activities and extreme pain).

a decrease in ability to perform basic household functions. Based on the reasoning in *Hopkins* and *Hulbert*, the SSA prides itself on its comprehensive prima facie test that supposedly considers contributing factors to disability.⁸⁵ In practice, however, the analysis the agency utilizes to find disability is applied narrowly in some cases.

By contrast, the EEOC's test for disability lacks the comprehensive nature of the SSA's, but in its application, the threshold is more forgiving. To bring a successful wrongful termination claim on the basis of disability, the agency only requires the plaintiff to have a BMI over thirty, which is sufficient to warrant disability.⁸⁶ The simplicity of this threshold relieves the agency of tangling with several unwieldy factors, as the SSA must do. Additionally, the EEOC's approach easily allows an employee to become an EEOC plaintiff and submit a complaint to the agency for representation.⁸⁷ This aligns with the EEOC's purpose as an agency that advocates for potential injustice in the workplace, and it should be as open as possible to hearing the complaints of the people and advocating for them. This approach truly reflects the agency's purpose and keeps the congressional spirit of the ADAAA.

While the EEOC adheres faithfully to the ADAAA, the openness of the law creates opportunity for obese employees to take unfair advantage. The BMI-only threshold is dangerously low. Because the EEOC adheres to the ADAAA, which does not require plaintiffs to provide medical expert reports to show diminution of mobility, an able-bodied obese plaintiff could claim employment discrimination due to disability without proving he is restricted in his ability.⁸⁸ The ADAAA's definition assumes that *all* obese individuals suffer compounding factors due to the condition. The definition accounts for obese individuals whose physical ability is hindered, but overcompensates for those whose physical ability is

85. *Id.* at *20–22; *Hulbert*, 2009 U.S. Dist. LEXIS 77508, at *35–37.

86. *See* *Whittaker v. Am.'s Car-Mart, Inc.*, No. 1:13-CV-108 SNLJ, 2014 U.S. Dist. LEXIS 56919, at *5 n. 1 (E.D. Mo. Apr. 24, 2014) (citing *EEOC v. Res. for Human Dev., Inc.*, 827 F. Supp. 2d. 688, 692–94 (E.D. La. 2011)).

87. *See id.* at *3 (denying defendant's motion to strike plaintiff's amended complaint because plaintiff had made a clear request to add a charge of retaliatory discrimination).

88. *Id.* at *5. While *Whittaker* “fail[ed] to allege that his obesity [was] related to an underlying physiological disorder or condition,” judgment was granted in his favor because the ADAAA does not require any such showing. *Id.*

comparable to one of a normal BMI.⁸⁹ In other words, it provides protection for all obese individuals, even those who do not demonstrate a need for protection.

Since the ADAAA took effect in 2009, the EEOC has yet to reach litigation on a wrongful termination claim due to obesity because the cases have settled. However, with the transformation of “disability,” the ADAAA has created a slippery slope for all obese individuals to take advantage of Congress’s intent that the ADAAA be executed to the fullest extent under the law.

V. SUCCESS UNDER ITS CURRENT DEFINITION AND BUDGET ISSUES MAKE THE SSA UNLIKELY TO RETURN TO ITS BROAD DEFINITION OF DISABILITY

The SSA is unlikely to revert to its pre-1999 definition of disability under which obesity in and of itself was sufficient to show entitlement to benefits. Currently, the SSA’s strong *prima facie* test eliminates insubstantial claims that could survive under the old two-step framework. While in some instances the *prima facie* test is overly strong, as discussed in Section IV, the agency has successfully defended appeals from applicants who attempt to rely on their obesity to secure them disability benefits.⁹⁰

Cruz v. Barnhart exemplifies the SSA’s ability to screen for inappropriate reliance. On appeal from the administrative law judge’s decision, Cruz used her obesity as a last-ditch effort to obtain Social Security benefits and made no reference to her condition when first applying for the benefits.⁹¹ In fact, “Cruz did not raise her obesity as an impairment . . . until she filed her brief.”⁹² She argued that the administrative law judge failed to give proper consideration to her obesity as a disabling factor, but the administrative law judge had already “made specific mention of Cruz’s obesity in his findings of fact.”⁹³ Cruz wanted her obesity to

89. A BMI between 18.5 and 24.9 is considered normal; a BMI between 25 and 29.9 is overweight; and a BMI of 30 and above is obese. *About Adult BMI*, CTNS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/index.html (last visited Feb. 7, 2016).

90. *Cruz v. Barnhart*, No. 04-CV-9011, 2006 U.S. Dist. LEXIS 26914, at *25 (S.D.N.Y. May 8, 2006).

91. *Id.*

92. *Id.*

93. *Id.* at *27.

be the focus of her claim, but since it was already considered a factor, she essentially desired for the judge to double-count obesity in the analysis.⁹⁴ However, this would have imposed a duty upon the administrative law judge to “single out” her obesity when rendering the decision. This contradicts the agency’s goal of providing comprehensive analysis of a plaintiff’s conditions to determine disability.⁹⁵

The SSA’s exclusion of obesity in its current definition of disability is sufficient to properly filter meritless appeals against the agency. However, its strictness is also necessary due to budgetary constraints. Generally, SSI and SSDI claims have higher administrative costs than other programs, which burden the SSA’s administrative resources.⁹⁶ To exacerbate the financial tension, the agency is still recovering from budget strain due to the increased volume in the number of SSI and SSDI claims from the unemployment increase in 2008 and 2009.⁹⁷ Since this time, the SSA has also worked to decrease its hearings backlog and continues to require additional funding to hire administrative law judges.⁹⁸ Even as the agency must battle these problems, it still must disburse ample funds to states for its disability benefits recipients. The commissioner of the SSA reported that the agency would pay almost 59 billion dollars in SSI benefits to 8.5 million recipients in fiscal year 2014.⁹⁹ Thus, the agency cannot afford to return to its broad definition of disability, inclusive of obesity, because it would have to disburse SSI or SSDI benefits to many more plaintiffs. The conservative nature of its current definition is the most reliable filter at its disposal to avoid taking on additional and unnecessary costs.

94. *See id.* at *24–25. Not only did the administrative law judge account for Cruz’s obesity in his fact-findings, but he also wrote that “Cruz’s obesity was noted by her treating physician, Dr. Lau.” *Id.* at *27.

95. *See id.* at *22–24.

96. SCOTT SZYMENDERA, CONG. RES. SERV., R 41716, SOC. SEC. ADMIN.: BUDGET ISSUES 7 (2013), <http://fas.org/sgp/crs/misc/R41716.pdf>.

97. *Id.*

98. *See id.* at 8 (discussing the backlogs and budgetary restraints); SOC. SEC. ADMIN., FY 2014 BUDGET OVERVIEW 3 (2014), <http://ssa.gov/budget/FY14Files/2014BO.pdf>.

99. SOC. SEC. ADMIN., *supra* note 98, at 3.

VI. CONCLUSION

Despite the SSA's restrictions on disability benefits, concluding that obesity in and of itself is not a disability, America's obesity problem will not necessarily be curbed just by the difficulty in receiving disability benefits. The shift in the ADAAA's definition of disability to include obesity cripples the desire of heavy Americans to change their lifestyle habits for the better. It begs Americans to take advantage of the leniency with regard to wrongful termination claims through the EEOC, while the SSA definition of disability provides the only backstop to prevent obese Americans from receiving disability benefits simply for being large enough.

The ADAAA's redefinition of disability also perpetuates the notion that obese people are lazy and gluttonous.¹⁰⁰ While the societal connotation of "disability" is often one that garners sympathy, obesity has historically been considered a laughable, self-inflicting condition, and Liz Neporent calls it "the last acceptable prejudice."¹⁰¹ To legally define obesity as a disability will not stand to change the societal perception of obesity for the better, but instead will worsen the stigma associated with obese individuals. Although obese individuals may receive sympathy under the law through wrongful termination suits, the ADAAA's recasting of obesity as a disability will do nothing to abate the societal condescension associated with the condition.

Despite society's condescension, not all obese Americans suffer the condition as a result of bad lifestyle choices. Rapid weight gain, which can lead to obesity, is often a symptom of medical conditions such as hypothyroidism and Cushing syndrome.¹⁰² The stark contrast between the SSA's and the EEOC's treatment of obesity as a disability provides little

100. Liz Neporent, *Stigma Against Fat People the Last Acceptable Prejudice*, *Studies Find*, ABC NEWS 2 (Jan. 22, 2013), <http://abcnews.go.com/Health/stigma-obese-acceptable-prejudice/story?id=18276788> (describing the media's characterization of overweight persons).

101. *Id.* at 1.

102. See *Cushing Syndrome*, MAYO CLINIC (Nov. 10, 2015), <http://www.mayoclinic.org/diseases-conditions/cushing-syndrome/basics/symptoms/con-20032115> (citing weight gain and fatty tissue deposits as symptoms of Cushing Syndrome); *Hypothyroidism: Symptoms and Causes*, MAYO CLINIC (Mar. 28, 2013), <http://www.mayoclinic.org/diseases-conditions/hypothyroidism/basics/symptoms/con-20021179> (citing unexplained weight gain as a symptom of hypothyroidism).

advancement for the advocacy of those who suffer from obesity as a result of a more debilitating condition such as Cushing syndrome, which, if not treated, is fatal.¹⁰³ Since the SSA and EEOC have contrasting views as to whether obesity is a disability, the law does not fully recognize obesity as a disability if only one government agency interprets the ADAAA to do so. For sufferers of these serious, albeit rare,¹⁰⁴ medical conditions, they will only be able to obtain government assistance by way of wrongful termination action and are unlikely to receive disability benefits if the SSA finds that despite their rare condition, they are still able to do previous work.

While American worship of body image and its daunting obesity statistics present a sharp dichotomy, this contradiction is also present between the black-letter law of the ADAAA and how it is applied regarding obesity. Although the law is clear that disability should be interpreted to “the maximum extent allowable under the law,”¹⁰⁵ government agencies still exercise their independent discretion as to how to apply the phrase. The SSA’s and EEOC’s contrasting views leave the state of obesity as a disability in limbo, neither completely accepted nor completely rejected, but only halfway and sympathetically recognized as a disabling condition. Just as a slow, sweeping change in societal perception has galvanized the increase in same-sex marriage rights,¹⁰⁶ full recognition of obesity as a disability under the law

103. *Cushing Syndrome: Symptoms*, MAYO CLINIC (Nov. 10, 2015), <http://www.mayoclinic.org/diseases-conditions/cushing-syndrome/basics/symptoms/con-20032115>; Kate Snow, *After Gaining 120 Pounds in 1 Year, Rare Diagnosis Saves Man’s Life*, NBC NEWS (Mar. 4, 2015, 8:19 AM), <http://www.today.com/health/after-massive-weight-gain-cushings-disease-diagnosis-saves-mans-life-2D80527683>.

104. While weight gain can be a result of these more serious conditions, the number of people who suffer from these conditions is small. In fact, “only two to three people per million are identified as having [Cushing’s syndrome] each year.” *How Many People are Affected by or at Risk for Cushing’s Syndrome?* NAT’L INST.’S HEALTH, <http://www.nichd.nih.gov/health/topics/cushing/conditioninfo/Pages/risk.aspx> (last visited Feb. 6, 2016). While hypothyroidism is more common, only 4.6% of the U.S. population over the age of twelve has the condition. *Hypothyroidism*, NAT’L INST. HEALTH, <http://endocrine.niddk.nih.gov/pubs/hypothyroidism/index.aspx#hypothyroidism> (last updated Mar. 13, 2013). Thus, most obese Americans are victims of their own lifestyle choices.

105. *EEOC Announcement*, *supra* note 15.

106. *Justice Ginsburg: US Ready to Accept Ruling Approving Gay Marriage*, NEWSMAX (Feb. 12, 2015, 6:49 AM), <http://www.newsmax.com/Newsfront/ruth-bader-ginsburg-gay/2015/02/12/id/624306> (“The change in people’s attitudes on that issue has been enormous.”).

will require a change in the societal perception of the condition. But for now, society will continue to vilify America's heaviest as sufferers of their own demise, while government agencies' differing applications of the law neither fully supports nor fully rejects society's cultural criteria.