

25 Theses in Social Security Disability Case Processing

REGARDING THE SOCIAL SECURITY DISABILITY ADJUDICATION PROGRAM [ODAR]

PART I: UNVALIDATED AGENCY ALJ PROCESSING QUOTAS LEAD TO BILLIONS OF DOLLARS IN UNWARRANTED ENTITLEMENT OBLIGATIONS

DID YOU KNOW?

1. Average case sizes in some regions require judges [ALJs] to read at a minimum, over a 400,000 pages of evidence per year just to meet the minimum disposition requirements of SSA? (This is the equivalent of more than 1333 novels per year).
2. Consequently, the data available strongly suggests that judges are not reading (and cannot possibly read) all the evidence? Many assume the decision drafting attorney-writer will.
3. The decision drafting attorney-writers DO NOT read all the evidence? They assume the judge did.
4. That SSA has never validated the workplace duties of ALJs with any objective metrics?
5. That SSA has never tested any ALJ to ensure that any given ALJ knows the regulations in this specialized area of law AND can apply those rules to a given set of facts?
6. These disconnects amount to billions of dollars in entitlement obligations based upon failure to read, let alone properly evaluate claims?

Metrics provided upon request.

PART II: ADJUDICATION AND EVIDENCE DEVELOPMENT RESTRICTIONS IMPOSED ON ALJS

DID YOU KNOW?

SSA Judges are expressly PROHIBITED from:

1. Ordering an \$89 malingering test [MMPI]? This is true even though:
 - a. The medical evidence contains significant evidence of malingering and the testing is expressly requested by the:
 - i. Medical expert;
 - ii. Consultative examiner;
 - iii. Treating source doctor, or the representative.
 - b. It can save \$300, 000 in lifetime benefits, and *is expressly provided for* in our regulations.
 - c. Experts note over 50% of adult Disability Determination Service (DDS) claimants fail some form of Symptom Validity Testing in every jurisdiction studied. Over 40% of adult DDS claimants are found to meet conservative guidelines for symptom *invalidity*. See, American Academy of Clinical Neuropsychology Response to Notice of Proposed Rulemaking for the Revised Medical Criteria for Evaluating Medical Disorders. November 2010.

2. Ordering an \$18 dollar, criminal history record on a claimant, but must rely upon the claimant's veracity about their criminal history? This is true even though their impairments may be expressly barred by regulation when they arise as part of the commission of a felony.
 3. Accessing public websites such as local court databases to access the claimant's criminal history or public SOCIAL MEDIA websites [FACEBOOK, MYSPACE] of claimants?
 4. Ordering a physical capacities exam, or PCE, even when expressly requested by a doctor, and even though it is the gold standard of evaluating an ability to perform work-like functions?
 5. Providing more than 40 pages from the medical file (that may be over 1000 pages) when ordering a consultative exam?
 6. Reporting attorney misconduct to the local bar no matter how egregious?
 7. Applying a sanction for any act or omission made during the hearing process – either against the claimant or their attorney?
 8. Drawing an adverse inference when claimants and representatives ignore specifically requested information requests?
 9. Reporting criminal activity of claimants, discovered during the hearing process to local authorities or other federal agencies – tax fraud, VA disability fraud, failure to carry mandatory auto insurance?
 10. Crosschecking third party witnesses' statements with the statements made by this same witness contained within their own pending application for disability benefits?
 11. Crosschecking a claimant's statements with a statement they made in the third party witness's pending disability claim? [Claimants often "cross-vouch" for each other in their respective pending applications].
 12. Ordering production of documents, timely discovery or request for admissions from the claimant – the person requesting disability?
 13. Directing the claimant take a drug test, even when the doctor recommends it, the claimant agrees, and even when the prominent feature in the case is substance abuse?
 14. Setting a deadline for submission of evidence in order to close the record of the proceeding?
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PART III: LACK OF STANDARDIZED PROCEDURAL SAFEGUARDS AND UNWARRANTED COSTS

DID YOU KNOW?

1. There are no real procedural rules in place to properly administer the adjudicatory hearing process?
2. SSA PAYS for attorney representatives to travel to the hearing regardless of whether the claimant is disabled or not?
3. SSA PAYS to buy the claimant's medical records even when the claimant has an attorney AND even when the claimant is not indigent?

4. It is not uncommon for representatives to withdraw at the 11th hour, triggering: delay, expense of experts (who are entitled to being paid, given the late notice), and mandatory continuances?
5. Medical experts get a flat fee of \$160. They are paid this fee to review the voluminous file AND to testify at the hearing. Considering the size of these files, it is very likely that many of these medical experts simply skim the record.

PART IV: SOLUTION:

Please exercise oversight responsibilities to restore/establish the integrity of these vital programs. The following solutions create the foundation for meaningful goals, permanent core competencies of ALJs, procedural accountability of representatives/claimants with timely processing, and significantly improve the likelihood that vital entitlement resources are directed to those who truly meet the criteria:

1. Amend the Act¹ to expressly direct the OPM and the SSA to conduct an objective validation study of the ALJ workplace procedures, including metrics **tied to case size and applying the applicable regulations/rules.** (ALJ's must read the entire record whenever a case cannot be approved based solely upon the objective medical evidence. *See, SSR 96-7p*). Validation is essential to establish a baseline production goal applicable across the country – as case size varies, (the volume of evidence to consider), so does the goal. The SSA has been setting policy and providing sworn testimony about case production based solely upon unvalidated anecdotal models – this is sophistry. The SSA keeps myriad metrics, but does not keep a single metric on average case size; this is a critical and fundamental flaw that undermines any attempt to reform the system. An annual quota of 500-700 cases per year *without any notion of individual disability case size* resolves to *reductio ad absurdum* in the face of even meager metrics demonstrating that actual case size in any given office is greater than about 180-200 pages. However, detailed metrics of the last 850+ cases demonstrate that the average case file is *four times this amount*.
2. Amend the Act to expressly direct the OPM and the SSA to begin objective testing of all ALJs to ensure they are competent to hold hearings and issue decisions. (Assuming a case value of \$300,000 and an individual ALJ SSA quota of 500 cases per year means a single ALJ has the potential to obligate 150 million dollars per year in entitlement obligations). The American people have a right to know that their ALJs are performing their jobs with competency. There is significant objective evidence that in many cases, competency is not the norm. *See, "Math for ALJs."* *See, the Senator Coburn study.* The Administrative Procedure Act does not prevent testing core competencies, only performance appraisals. Congress should direct through

¹ SSA is an executive agency. While Congress can provide oversight – that oversight has been ineffectual as these matters represent long-term dysfunction in the disability adjudicatory model. The most effective way to correct the root of these matters is through amending the Act. Both of the undersigned ALJs have significant leadership and litigation experience, but each has less than 5 years' experience with the SSA. Their outside experiences (military) and elsewhere bring fresh eyes to these matters and represent a view distinct from SSA management, the ALJ union, and academic commentators.

amendment that the passing of objective testing be a condition of employment. The testing should be based upon the work place validation above.

3. Amend the Act to expressly direct the SSA to provide for a cohesive and enforceable set of procedural rules.
4. Amend the Act to expressly direct the SSA to provide for the ordering of tests and evidence that enhance credibility analysis, and crosscheck statements contained in other disability files.

These suggestions are not discussed or raised by SSA management because the agency is not interested in objective validation because the true size of these cases will demonstrate that 500-700 cases per year is impossible in the vast majority of jurisdictions. **The ALJ union will not support** validation, as it will lead to objective measures by which ALJs can be held accountable – through objective testing and certification. Objective certification is not the same as performance evaluations; therefore, it would not violate the APA. Similar to security clearances, *objective certification can be a condition of employment*.

Validation is routinely done in the employment context;² OPM has the capacity to perform it with outside assistance. The military judicial model does have objective testing before certifying officers as competent to handle criminal trials. This model ensures that those ALJ unable to handle the validated core requirements of the job are no longer employed. This model certifies *objectively*, what is necessary to properly adjudicate a case in accordance with the regulations, AND ensures that ALJs who hold hearings, 1) know the law; and 2) can apply the law and procedures to reach just outcomes in disability hearings. These two steps, validation and certification, will drastically correct the unsustainable disparity between pay and deny rates of the ALJ corps. It will bring accountability. The individual ALJ must demonstrate (*objectively*) core competencies before holding hearings and committing taxpayers dollars. The agency is accountable in that the validation of the adjudicatory model will demonstrate that the various regulations, SSRs and policies, when applied against the volume of evidence, require significantly more than the suggested “2.75 hours per case” to properly adjudicate.

Procedural rules are essential to the functioning of any adjudicatory model. The failure to have binding procedural rules is the deepest failure of agency leadership. This is not a new program. Moreover, ALJs’ ability to ferret out credibility concerns continues to be more restricted, despite the overwhelming empirical evidence that shows that validity testing is essential. The ability to test credibility is essential to evaluating any case involving subjective statements of limitations.

These matters provided under 5 USC 7211. These are not unsubstantiated anecdotal allegations, citation to regulation and agency policy can be provided upon request, as can specific examples and metrics.

Although the undersigned are both ALJs in the SSA Tacoma WA office, these are made in the personal capacity, and do not represent the opinions of SSA or any other organization.

s/s Michael Gilbert;

s/s Scott Morris

² Judge Gilbert holds an LLM in Labor and Employment law, cum laude.