

**NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)**

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**Written Statement for the Record
on behalf of the
National Organization of Social Security Claimants' Representatives**

Hearing on the Social Security Disability Appeals Process

**Subcommittee on Social Security
House Committee on Ways and Means**

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Submitted by:

Nancy G. Shor, Executive Director

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Founded in 1979, NOSSCR is a professional association of attorneys and other advocates who represent individuals seeking Social Security disability and Supplemental Security Income (SSI) disability benefits. NOSSCR members represent these individuals with disabilities in proceedings at all SSA administrative levels, but primarily at the hearing level, and also in federal court. NOSSCR is a national organization with a current membership of more than 4,000 members from the private and public sectors and is committed to the highest quality legal representation for claimants.

The Subcommittee's focus on issues related to Social Security disability claims is extremely important to people with disabilities. Title II and SSI cash benefits, along with the related Medicaid and Medicare benefits, are the means of survival for millions of individuals with severe disabilities. They rely on the Social Security Administration (SSA) to promptly and fairly adjudicate their applications for disability benefits.

NOSSCR is a member of the Consortium for Citizens with Disabilities Social Security Task Force and fully endorses the written statement and oral testimony of Ethel Zelenske who testified at the hearing on behalf of the Task Force. This Statement for the Record addresses additional issues for the record of the hearing.

I. THE REPRESENTATIVE FEE PROCESS

Testimony was presented at the hearing that was inaccurate regarding the SSA fee process for representatives.

The fee process for representatives in Social Security claims is highly regulated.

Fees at the administrative levels. Fees for representatives' services must be approved by the Social Security Administration. The Act sets out the two processes from which representatives can choose. 42 U.S.C. § 406(a). The processes are mutually exclusive:

(1) The fee agreement process. Most representatives choose to use the fee agreement process. Fees are 25% of past-due benefits or \$6,000, whichever amount is smaller. The statute gives claimants and adjudicators the opportunity to object to the amount of the fee. The statute does permit representatives to seek permission to charge more than \$6,000, but this happens rarely.

(2) The fee petition process. Some representatives will choose to use the fee petition process. They submit time records along with their fee requests. In fee petition situations, the adjudicator will set the fee in each individual case.

Fees at the federal court levels. In federal court, fees in Social Security cases are regulated pursuant to 42 U.S.C. § 406(b). They must be contingent, and they are set by the federal judge.

Fees in Veterans Administration (VA) cases. Professor Pierce stated that fees in VA cases are limited to \$10.00. That statement was true until 2006 when Congress enacted legislation that became effective in 2007 to amend the fee structure. Since 2007, fees in VA cases are tested for "reasonableness." Fees are 20% of past-due benefits if the representative asks for withholding and direct payment. See 38 U.S.C. § 5904; 38 C.F.R. § 14.636(h). There is no cap. If the representative does not ask for withholding and direct payment, the fee must meet the test for "reasonableness"; there is no cap. See 38 C.F.R. § 14.636(f).

II. THE IMPORTANCE OF MAINTAINING ALJ DECISIONAL INDEPENDENCE

A claimant's right to a *de novo* hearing before an administrative law judge (ALJ) is central to the fairness of the Social Security Administration (SSA) adjudication process. This right guarantees that individuals with disabilities have a full and fair administrative hearing by an independent decision-maker who provides impartial fact-finding and adjudication, free from any agency coercion or influence. The ALJ questions and takes testimony from the claimant and other witnesses, and considers and weighs the evidence, all in accordance with relevant law and agency policy. For claimants, a fundamental principle of this right is the opportunity to present new evidence to the ALJ, testify in person before the ALJ, and receive a decision based on all available evidence.

ALJs are appointed under the Administrative Procedure Act (APA), which guarantees their independence from undue agency influence, as demonstrated by the following requirements:

- The Office of Personnel Management (OPM) – not SSA – conducts the competitive ALJ selection process. While SSA ultimately appoints ALJs, it can only do so from a list of eligible candidates created by OPM.
- ALJs can be removed only for “good cause.”
- Most disciplinary actions may be taken only according to standards and procedures established by the Merit Systems Protection Board (MSPB).
- The pay classification system for ALJs is set by OPM, not by SSA, and is separate from the agency’s performance rating process.

The critical role that ALJ decisional independence plays in protecting the rights of claimants cannot be underestimated. In the early to mid-1980s, the SSA disability claims adjudication process was in turmoil. In the most detrimental example for beneficiaries, the agency had changed its policy regarding the cessation of disability. As a result, between 1981 and 1984, nearly 500,000 severely disabled beneficiaries who continued to meet the statutory eligibility requirements had their benefits terminated. Legal advocates represented thousands of individuals in appeals of SSA’s decision to terminate their benefits because their disabilities had allegedly “ceased.” Many ALJs agreed with their arguments that the agency’s policy was inconsistent with the Social Security Act and due process and reversed the termination of benefits. Thus, beneficiaries were able to retain the cash and medical benefits vital to their well-being.

There are other examples from this period of ALJs confronting agency policies they considered inconsistent with the Social Security Act, including a clandestine policy to deny and terminate benefits to tens of thousands of seriously mentally ill claimants who did not meet the then-outdated Listings of Impairments. Also at that time, the agency had a policy of non-acquiescence, i.e., not following precedential decisions issued by the U.S. Courts of Appeals in subsequent individual cases. ALJs frequently reversed the lower level administrative decisions because SSA’s policies, at that time, were not consistent with the Social Security Act and precedential case law.

During the same period in the mid-1980s, SSA was pressuring ALJs to reduce the rate of favorable decisions. “Bellmon Review” involved SSA targeting the performance of ALJs that it considered to have favorable decision rates that were too “high” and imposing quotas for allowances and denials. ALJs challenged the program in litigation and the agency eventually abandoned the program.¹

SSA no longer follows these policies. However, the importance of maintaining the APA-protected ALJs in the SSA adjudication process was brought to light within the past few years regarding actions at the U.S. Department of Justice (DOJ). Some federal agencies use non-ALJs as adjudicators and their independence, as a general rule, is less protected than ALJs. One example of non-ALJ adjudicators is Immigration Judges (IJs) in the DOJ. The process for

¹ See, e.g., *Association of Administrative Law Judges v. Heckler*, 594 F. Supp. 1132 (D.D.C. 1984).

selecting IJs provides a stark contrast to that for ALJs, since, as noted in a recent report by the DOJ Office of Inspector General, the Attorney General of the United States has the authority to manage the selection process and appoint IJs.² The report documented an investigation by the DOJ Office of the Inspector General and the DOJ Office of Professional Responsibility regarding possible political influence in the hiring of IJs. The Offices found that certain DOJ officials “violated federal law and Department [of Justice] policy ... by considering political and ideological affiliations in soliciting and selecting IJs, which are career positions protected by the civil service laws.”³

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CONCLUSION

The role of ALJs in the Social Security and SSI disability determination process has been critical to people with disabilities by ensuring their right to a full and fair hearing before an impartial and independent adjudicator. In addition, on behalf of people with disabilities, it is critical that SSA be given adequate funding to make disability decisions in a timely manner and to carry out its other mandated workloads. We appreciate your continued oversight of the administration of the Social Security programs and the manner in which those programs meet the needs of people with disabilities.

² *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (July 28, 2008), p. 71. Available at <http://www.usdoj.gov/oig/special/s0807/final.pdf>.

³ *Id.* at 137.