

## HEARING ON THE CHALLENGES OF ACHIEVING FAIR AND CONSISTENT DISABILITY DECISIONS

### Statement of Kathleen A. McGraw for the Record

There are few government programs more in need of a legislative overhaul and update than the Social Security Disability Program. Having watched the video of the March 20<sup>th</sup> hearing, I was disappointed by the failure of the witnesses with one or two exceptions—Judge Hatfield and Ms. Hart—to address the subject matter of the hearing. A problem has been identified with respect to the consistency of outcomes in disability decisions, and identifying the cause of the problem is critical to effecting change and improvement.

#### Why do I have something to contribute on this subject?

As a recently retired ALJ with the Social Security Administration (SSA), I have no organization affiliation; I am writing as a concerned citizen with considerable knowledge of the disability program. Before becoming the Deputy Regional Chief ALJ for the Atlanta Region of the Office of Disability Adjudication and Review (ODAR) in May 2006, I was an ALJ in the Atlanta North hearing office for 11 years. When the agency issued its 1996 rulings which have greatly impacted the disability program, I was a trainer for Process Unification training—SSA's first attempt to train its adjudicators both at the Disability Determination Services (DDS) and at the hearing level at the same time in the same room. I taught new ALJ's for 14 years, and I was also an instructor for writers and case technicians. For a number of years I was the Chair of the Social Security Section of the Federal Bar Association. In that capacity, on numerous occasions, I met with congressional staffers, GAO personnel, and the Social Security Advisory Board. I testified twice before the Ways and Means Subcommittee on Social Security. For the 3½ years before my retirement in March 2012, I was also the Chief Negotiator for SSA in the contract negotiations with the AALJ, the judges' union. Before joining SSA, I was an administrative judge with the Merit Systems Protection Board (MSPB) for 13 years.

Two areas for consideration of the Subcommittee on Social Security.

**1) The implementing rules and regulations promulgated by SSA for the evaluation of disability claims provide for too much subjectivity and require near impossible collection and weighing of subjective evidence by SSA adjudicators.**

The 1996 Process Unification rulings, along with subsequent rulings on obesity (SSR 02-1p) and opinion evidence (SSR 06-3p), are some of the best illustrations of the excessive burdens placed on adjudicators. Not only must the medical evidence be considered but also all other aspects of the claimant's life as they may relate to the credibility of his subjective complaints.

When SSA conducted Process Unification training on the 1996 rulings, the purpose was to make sure all adjudicators at all levels followed the same rules and regulations in evaluating disability claims. Talk to any DDS Administrator and she will tell you that doing so would bring the DDS's to their knees. There is simply no way given the number of claims they receive that they could apply all the provisions for evaluating a claimant's subjective complaints as dictated by SSA regulations and rulings. DDS adjudicators focus almost exclusively on the medical evidence. They pay lip service to subjective factors but for the most part nothing more than that. It is fairly safe to say that two claimants with the same set of objective medical findings for a back impairment will receive the same residual functional capacity (RFC) at the DDS level regardless of widely disparate assertions regarding their degree of pain and limitation of functioning.

At the hearing level, however, the ALJ is expected to apply all the regulations and rulings, and make an exhaustive inquiry into the claimant's subjective complaints—this allows for a wide variation in outcome from one ALJ to another. One ALJ may believe a claimant and another may not. On appeal, reviewing bodies hold the ALJ's feet to the fire when it comes to complying with the rulings and regulations; there is no concept of harmless error. Just take a look at a few federal court decisions and the demands on an ALJ become quickly apparent. Given the overwhelming disability work load that affords an ALJ about a total of 3 hours per case for review of the file, holding a hearing, and issuing a decision, it can come as no surprise that corners are cut.

At the hearing level, it is far easier to credit a claimant's subjective complaints and allow a case than it is to deny the case. The allowance requires a short sweet decision; the disallowance requires a decision that demonstrates compliance with all the requirements of Social Security's regulations and rulings. Given the complexity and demands of those rulings and regulations, any good representative can always find some error in a decision that will lead to reversal and remand of the case to the ALJ.

I have a vivid memory of a U.S. Magistrate's written recommendation to the U.S. District Court on an appeal of one of my cases. The Magistrate noted my failure to explicitly address some medical documentation and opinion evidence, and she then looked at that evidence and determined that it did not undermine my decision. While I had committed error by not explicitly addressing the evidence, it was clear from the record that my decision was supported by substantial evidence, and the Magistrate recommended affirming my decision. The District Court Judge, however, rejected the Magistrate's recommendation and remanded the case because I had failed to comply with the letter of SSA's regulations and rulings—never mind it was clear the claimant was not disabled. Since SSA has no harmless error doctrine, the court found the case had to be remanded.

The disability system cries out for a harmless error doctrine given the labyrinth of rulings and regulations adjudicators have to navigate to avoid remand of a case. In addition, there needs to be a reexamination of the rulings that pertain to evaluation of subjective complaints and opinion evidence.

## **2) The representative community has inordinate influence over SSA policy and procedure.**

While appearing to champion the interests of the claimants they represent, representative organizations are at root interested in paving the way for the financial success of their members. This is not in any way to disparage the good work that many individual representatives perform; rather, it is to acknowledge the underlying purpose of representative organizations. Their members do indeed make money, and as noted by members of the subcommittee, lots of money--sometimes with very little effort--but they do so only when claimants are awarded disability. Thus, representative

organizations have an overarching self-interest in preserving the claimant-friendly system that exists.

Just take a look at the aggressive opposition representative organizations mount whenever SSA even thinks about or pilots changes such as closing the record or setting deadlines for evidentiary submissions. Under the current regulatory scheme, representatives need only present the evidence the claimant wants SSA to consider. They have no obligation to assure the record is truly complete and comprehensive. That is the duty of the ALJ and representative organizations do not want that to change.

As Judge Hatfield testified, it is time to impose some affirmative obligations on representatives rather than the current exhortations to do the job for which they are well compensated.

### Closing

Achieving consistent disability adjudications at a minimum requires a reexamination into the consideration afforded a claimant's subjective complaints. This could be done at the threshold step of defining a severe impairment, and it could be further addressed by limitation of the expansive rulings on subjective complaints. The program also needs to adopt a harmful error doctrine for review of ALJ decisions. Entitlement to disability should not be dependent on the luck of the draw as to which adjudicator a claimant's case is assigned. This is an important national program, and it demands consistency of outcome without regard to where a claimant resides.

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