

**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 Challenges of Achieving
Fair and Consistent Disability Decisions**

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

Hearing date: March 20, 2013

Submitted by:

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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.

At the March 20, 2013, hearing and at previous hearings held by the Subcommittee, much has been said about the Social Security Disability Benefits Reform Act of 1984 (“DBRA”), Pub. L. No. 98-460. The Act has been frequently mischaracterized and inaccurately describes what it did – and did not – legislate. We are submitting this Statement for the Record to provide information regarding key provisions of DBRA and to provide background regarding the policies that were in effect at SSA prior to DBRA’s passage.

BACKGROUND

The Social Security Disability Benefits Reform Act of 1984 was passed by a unanimous, bipartisan vote in both the House of Representatives (402-0) and the Senate (99-0) in September 1984. President Reagan signed the law on October 9, 1984, when it became Pub. L. No. 98-460.

The bill was described by Members of Congress from both parties as a necessity to end the chaos then swirling around the Social Security disability determination process. On the day the bill was passed, then Rep. J. J. Pickle (D-TX), a previous Chairman of this Subcommittee, stated on the floor of the House: "... [T]oday the program is in a state of chaos and if we do not act immediately to restore order, it will utterly collapse. Perhaps my cry of alarm sounds exaggerated. It is not."

In the early 1980s, the process was in crisis. Hundreds of thousands of disabled individuals, including tens of thousands with mental impairments, had their benefits improperly terminated; thousands of claimants with mental impairments were improperly denied benefits; 29 States refused to follow the Social Security Administration's (SSA) instructions for termination of benefits; federal courts were clogged with appeals; 200 federal courts across the country threatened the government with contempt of court citations for refusing to pay benefits when ordered.

Representatives and Senators, on a bipartisan basis, noted the need for the legislation. A key Republican Conference Committee member, Rep. Willis Gradison (R-IA), stated that the bill "makes necessary reforms in the administration of the social security disability program ... I am hopeful that these initiatives will make significant strides toward reestablishing the integrity of the disability program and ending beneficiary trauma."

Floor statements in the Senate upon passage of the conference report were no less fervent. Sen. Robert Dole (R-KA), the Chairman of the Senate Finance Committee at the time, stated: "In my view, the conference report is a major accomplishment, representing the culmination of more than 2 years of congressional deliberation on the very difficult and emotional issue of disability insurance reform. It ... is intended to clear up the chaotic situation in the State disability agencies and the Federal courts.

In this Statement, we will discuss the major provisions of DBRA, addressing what the Act provided and the background necessitating the change.

MENTAL IMPAIRMENTS

Section 5 of DBRA had two main provisions regarding mental impairments: (1) SSA was required to revise the listings of impairments for mental disorders; and (2) "The revised criteria and listings, "alone and in combination with assessments of the residual functional capacity of the individuals involved, shall be designed to realistically evaluate the ability of a mentally impaired individual to engage in substantial gainful activity in a competitive workplace environment."

Explanation. After years of litigation, GAO investigations, and Congressional hearings, Congress passed Section 5 of DBRA, requiring SSA to overhaul its procedures for adjudicating Title II and SSI disability claims based on mental impairments. The legislation did not change the basic statutory definition of disability, namely, that “disability” is the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A).

DBRA did require SSA to issue new listings of impairments for mental disorders and develop new procedures for evaluating residual functional capacity for individuals with mental disorders whose impairments did not meet a listing.

Before DBRA, SSA relied upon outdated concepts of mental impairment and terminology that did not reflect current medical practice. SSA policy focused on current signs and symptoms and relied only on activities of daily living, which are not good measures of the ability to function in a work-setting for an individual with a mental impairment. This prejudiced (1) individuals whose signs and symptoms were in remission or were controlled by treatment, but who still were unable to work and (2) individuals who had the requisite current signs and symptoms but could engage in simple activities of daily living.

SSA’s policies and procedures in the early 1980s were exemplified by its psychiatric review form used to decide disability claims based on mental impairments. The form used a numerical severity rating of 17 signs and symptoms, supplemented only by reports of activities of daily living. It had no space for consideration of evidence relevant to the ability to work. A separate assessment of residual functional capacity, as required by the regulations, was not performed because it was considered “redundant.” As a result, there was no individualized, realistic evaluation of the ability to work. The courts found SSA’s procedures unlawful.¹

SSA’s procedures for assessing mental impairments had an extremely harmful impact on claimants. In two years (1981 and 1982), more than 80,000 beneficiaries with mental illness had their benefits terminated, for many, their only source of income. Tens of thousands new claimants had their applications denied. The 1984 legislation was a response to correct this terrible situation.

Even before enactment of Pub. L. No. 98-460, SSA convened a work group of representatives from national professional organizations focused on mental disabilities. Most of the group’s recommendations were adopted by SSA to implement the provisions of section 5(a). For example, the new listings were more closely tailored to follow the edition of the American Psychiatric Association’s Diagnostic and Statistical Manual current at that time. The changes reflected current thinking about mental impairments and included: (1) expanding the diagnostic categories (the “A Criteria”) from just four to eight; (2) revising the functional criteria (the “B

¹ *City of New York v. Heckler*, 578 F. Supp.1109 (E.D.N.Y. 1984); *Mental Health Ass’n of Minn. V. Schweiker*, 554 F. Supp. 157 (D.Minn. 1982). Both decisions were affirmed on appeal. *City of New York* was appealed to the U. S. Supreme Court by SSA and was affirmed on other grounds (related to the class action).

Criteria”) to include criteria related to the requirements of work; and (3) giving greater importance to the overall degree of limitation, rather than the number of individual activities.

For those individuals who did not have a listing-level impairment, SSA revised its procedures for assessing residual functional capacity, i.e., what the individual could do in light of his/her limitations. The statute requires an individualized assessment of ability to work. As noted above, in the early 1980s, a separate assessment of residual functional capacity (RFC), as required by the regulations, was not performed because it was considered “redundant.” SSA policies had a presumption that a claimant with a mental impairment under the age of 50 who did not have a listing-level impairment would likely retain the RFC for unskilled work.

The policy guidance issued in response to litigation and Pub. L. No. 98-460,² which is still in effect, emphasizes the importance of the RFC assessment and that the failure to meet a listing does not equal the ability to perform at least unskilled work. Significant changes related to the RFC assessment include:

- The loss of key work-related capacities can be disabling, which are the ability to: (1) understand, carry out, and remember instructions; (2) respond appropriately to supervisors and co-workers; and (3) respond appropriately to pressures in a work setting.
- The role of stress. The guidance rejects the notion that individuals with mental impairments are able to engage in low stress, unskilled work. Since the response to work pressures is highly individualized, no assumptions can be made. Some individuals may have difficulty adjusting to even low stress work.
- New forms, drafted by the same group that worked on the listings, which require the reviewing psychiatrist or psychologist to evaluate 20 separate components of work functioning, including specific aspects of work, e.g., ability to perform within a schedule, to maintain regular attendance and to be punctual, and to accept instructions and respond appropriately to supervisors.

MULTIPLE IMPAIRMENTS

Section 4 of DBRA provided that SSA shall consider combined effect of all impairments to determine severity, “without regard to whether any such impairment, if considered separately, would be of such severity.” This provision has been codified at 42 U.S.C. § 423(d)(2)(B).

Explanation. Prior to passage of DBRA, SSA did not consider the combined effects of multiple impairments in evaluating disability. SSA went so far as to state, in a 1982 policy statement,³ that it would not consider the combined effects of “non-severe” impairments. This policy resulted in serious inequities for individuals suffering from a variety of serious problems, where a single one did not meet the test as a “severe” impairment under the regulatory sequential evaluation of disability. The federal courts rejected this approach in a number of individual and class actions.

² Social Security Rulings (SSR) 85-15 and 85-16.

³ SSR 82-55.

Upon passage of the law, floor statements further clarified the need for this provision. Rep. Pickle stated: “Under the conference agreement, the effect of a combination of impairments, not one of which alone may be disabling, may now be considered when determining whether the person’s impairment is medically severe enough to qualify him for benefits.”

Rep. Silvio Conte (R-MA) stated: “There are many individuals, particularly the elderly, who suffer from a variety of medical conditions. Though each separate impairment might not be severe enough to prohibit someone from working, the combination of conditions can be totally disabling.”

EVALUATION OF PAIN

Section 3(a)(1) of DBRA amended 42 U.S.C. § 423(d)(5) by adding the following:

An individual’s statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability.

Explanation. Under the policy in effect at the time, pain and other subjective symptoms, such as dizziness or numbness, were taken into account *only* if fully explained by laboratory or other diagnostic procedures. If not fully explained, debilitating pain, even where corroborated and credible, was discounted. Pain and other symptoms cannot always be fully explained by conventional diagnostic techniques. Rep. Conte, on the floor of the House the day the Conference Report was voted out, stated: “Another problem with present law is the fact that many disability recipients allege pain that cannot be found using regular medical techniques. That does not mean, however, that these people are not suffering pain”

Section 3(a)(1) technically expired on December 31, 1986. The conferees in 1984 stated that the standard in DBRA was only intended to codify SSA’s policy on pain at the time. During the same period, there were multiple court cases challenging the standard that SSA used in evaluating pain, which was not well-articulated and did not, in practice, follow the standard in DBRA. As a result, the courts stepped in to fill the void caused by SSA’s failure to promulgate comprehensive rules for evaluating subjective symptoms like pain. Case law precedent in different federal circuits shared a basic view: (1) If there is an underlying medical condition and the person’s pain is “reasonably related” to that condition, then it must be considered; and (2) If the person’s statements are found not credible, then the adjudicator must state the reasons.

The extensive circuit case law played an important role in development of SSA's comprehensive regulations, issued in November 1991.⁴ These regulations drew from the body of case law in providing a detailed framework for evaluating subjective symptoms, including pain. In the summary to the final rule, SSA states:

These expanded regulations incorporate the terms of the statutory standard for evaluating pain and other symptoms contained in section 3 of the Social Security Disability Benefits Reform Act of 1984 (Pub. L. 98-460).

The preface to the final rule further explains:

The policy for the evaluation of pain and other symptoms, as expressed in the statutory standard and clearly set forth in these final rules, requires that: (1) For pain or other symptoms to contribute to a finding of disability, an individual must first establish, by medical signs and laboratory findings, the presence of a medically determinable physical or mental impairment which could reasonably be expected to produce the pain or other symptoms alleged; and (2) once such an impairment is established, allegations about the intensity and persistence of pain or other symptoms must be considered in addition to the medical signs and laboratory findings in evaluating the impairment and the extent to which it may affect the individual's capacity for work.

Under this standard currently used by SSA, allegations of pain alone are not sufficient to establish disability. As noted by Arthur Spencer, SSA Associate Commissioner for Disability Programs, in his written statement for the March 20, 2013 hearing:

... I would like to remind the Subcommittee of a salient feature of the DI program. An applicant (claimant) cannot receive disability benefits simply by alleging pain or other non-exertional impairments or limitations. We require objective medical evidence and laboratory findings that show the claimant has a medical impairment that: 1) could reasonably be expected to produce the pain or other symptoms alleged, and 2) when considered with all other evidence, meets our disability requirements.

CONCLUSION

During the early 1980s, the Social Security and SSI disability determination process was in chaos. Congress held numerous hearings and considered a number of bills to address the situation, deliberating over the course of several years. It finally passed – unanimously in both Houses of Congress – the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460. As this Congress considers the challenges facing the process today, it is important to keep in mind the circumstances that led to the passage of the 1984 legislation.

⁴ 56 Fed. Reg. 57928 (Nov. 14, 1991). The notice of proposed rulemaking was published in September 1988. 53 Fed. Reg. 35516 (Sept. 14, 1988).