

April 30, 2013

Representative Samuel Johnson
Chair, Subcommittee on Social Security
House Ways and Means Committee
Ways and Means Committee Office
1102 Longworth House Office Building
Washington D.C. 20515

Dear Chairman Johnson:

I thought long and hard about writing this letter to you. However, I thought that you might appreciate input from someone with my background. I am writing in my personal capacity as a concerned citizen who is a federal employee exercising his rights under 5 U.S.C. §7211, and I am not representing any organization or constituency.

I am a new Social Security Administrative Law Judge, having been appointed in August 2011, with almost 27 years in continuous federal service. I write this letter from a completely different perspective than those who have spent the vast majority of their careers within this organization. For starters, I am not currently, nor have I ever been, a member of the union. I served about 14 ½ years on active duty as an Army Judge Advocate, 28-years of total service, including being recalled to active duty on two occasions Post 9-11. While in the military, I served as a prosecutor, defense counsel, appellate counsel, taught at the Army's law school at the University of Virginia, and was recalled to active duty to serve as a Deputy Legal Advisor to the Chairman, Joint Chiefs of Staff. Prior to joining the Social Security Agency, I had spent the previous 12 years as an enforcement attorney for the Federal Aviation Administration representing it before NTSB and DOT Administrative Law Judges. In short, I have a significant amount of trial and administrative hearing experience with other Agencies in the federal government.

Your Committee has routinely heard from members of the social security hierarchy about the virtues of the system and their on-going efforts. You have heard from the National Organization for Social Security Claimant's Representatives (NOSSCR) about its views on how to further promote the system, frankly in a manner that would be even more limiting on those that have to implement it. You have heard from members of the ALJ union about its perception about the issues it confronts for its members. You have heard from the social security leadership about their views and how they are marching towards reducing the backlog. You have heard from social security judges that have spent most of their careers within the social security system. You have heard from law professors that pontificate about the system with really little insight into how the disability system is actually run at the ground level. But the people that you have not heard from are the field judges (non-management) that are in the trenches day in and day out trying to implement a system that is long due for overhaul.

When the average person hears about reforming Social Security, they frequently focus on the benefits to those who have worked their entire lives and have reached those Golden Years hoping to have funds to sustain them for the relatively few years they have left on this Earth. But there is a troubling phenomenon festering within this benefit system and that is the current construct for disability benefits. As Judge Hatfield pointed out to the Committee in his March 20, 2013, testimony, the concept of providing safety nets for those who become disabled earlier in life is a noble and honorable one, one that reflects our society's values. However, the system that I am working within is not such a system. The system is not designed to be an adversarial one. However, in the cases that come before me, I would estimate that 85-90% of the claimant's have a representative. So on one side of the table I have an advocate. As you know, the current system does not provide an advocate to represent the Agency. This in itself presents a challenge.

However, not only must a Social Security ALJ deal with a counsel on one side, but the current Agency rules and procedures put tremendous pressure on Social Security Judges in a variety of ways affecting the quality of decisions. I think that it is important that you understand these pressures and the Agency's actions, whether by choice or tacit ignorance, and the impact this has on Social Security ALJs and their adjudication process. In this light I want to point out two areas of concern and propose a way ahead:

- Quotas, called goals and the practical consequences are costing the American taxpayer tens of billions of dollars in erroneous payments.
- Judges are denied the authority to control their proceedings and to gather necessary evidence to make informed decisions.

In the military tradition of the bottom line up front, I make the following recommendations:

- I join Judge Hatfield, who testified before you in March 2013, in advocating that the Agency have a representative at these hearings. It makes no sense that one of the highest paid employees in the Agency is required to sift thru a mountain of paper or electronic documentation to find the salient facts to make a decision. I am paid to make decisions and have no difficulty doing this. An Agency representative would return balance to these proceedings. If this is not possible, then implement a regulation that states with clarity that the claimant's representatives are required to provide all evidence, not just favorable evidence, for review.
- Empower ALJs with more formal procedural rules, such as: requiring all documents to be considered in a claim must be provided at least 5 days prior to the hearing; authorizing use of pre-hearing orders; if appropriate, requiring claimants to complete questionnaires prior to the hearing; authorize judges when they deem appropriate, to require briefs; authorize the use of other evaluative tools such as the MMPI, access to social media and access to the claimant's criminal conviction history. However, also provide and require latitude in these rules when claimants are pro se
- Require validation of this 500-700 annual decision quota by requiring the Agency to track not just the number of cases, but the quantity of documents within the case files themselves.

Underlying rationale for these recommendations.

1. Problems with the Agency's quota euphemistically called goals for its ALJs.

A. The math does not add up.

The Agency posits that each ALJ is expected to issue between 500-700 legally sufficient decisions annually.¹ There is constant pressure by Agency management to obtain this quota to the point that the Agency has promulgated a database available to the ALJs entitled "Am I on Pace?"² This diagram tracks how the judge is progressing. If the ALJ is on track to achieve 500-700 decision in the fiscal year, then they are in the "Green" zone. If the ALJ is in the 700-900 range, they are in the "Gold" zone. What is interesting about these quotas are how the Agency pursues those that either issue more decisions than 900 or less than 500. Are you aware of the Agency taking disciplinary action against any ALJ that has issued more than 900 decisions, unless that judge's proclivity becomes a newsworthy event? Contrary, there are lots of adverse actions against ALJs whose productivity is less than 500 cases. I ask that the Committee simply look at the numbers.

The problem is the Agency keeps an incredible array of data, except that which can justify this arbitrary and capricious 500-700 quota. Chief Judge Bice has previously indicated that they have "limited" an ALJ to no more than 1,200 hearings annually. I ask the Committee to consider applying basic math as well as common sense as to whether these numbers make any sense. I submit that the fact that the Agency has "limited" an ALJ to just 1,200 cases per year is powerful evidence of its mindset about quantity over quality once one does the math.³

¹ See generally, Testimony of Chief Judge Bice, HEARING BEFORE THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS PERMANENT SUBCOMM. ON INVESTIGATIONS, UNITED STATES SENATE, SEPTEMBER 13, 2012.

² This is in the program "How am I doing?"

³ See generally footnote 9, *infra*, and accompanying text.

The critical piece of data missing from this quota is how large are these files that the judges are required to read, not skim, but read? Frankly, I do not know. Sadly, neither does the Agency. Recently the Regional Chief Judge for Region X testified that, in this region, the average size of the files range from around 1,000 to 1,500 pages.⁴ Senator Coburn indicated during the hearings in September 2012 that their review indicated that the average size of the evidence was 500 pages.⁵ This is a critical piece of evidence to determine whether it is reasonable for an ALJ to conduct 500 hearings or 200 hearings. I have seen files with as few as 100 pages and I have cases where the medical evidence exceeds 3,000 pages. Two weeks ago I had fifteen hearings in one week where I had approximately 8,000 pages of evidence. One cannot expect an ALJ to read this amount of evidence under the productivity quota established by the Agency. Senator Coburn rightly questioned the feasibility of doing this given this volume.

I cannot say with certainty what the average size is for other ALJs, but I became interested in how large the cases are that I have been reviewing so I started keeping records since March of this year. My figures are only based on 2 of 5 of the sections contained within CPMS, called the E and F sections. During the period March 6, 2013 through April 22, 2013, I prepared 77 cases for hearing. I discovered that my average number of pages in the E and F sections of the file alone was 638.13. The smallest file had only 113 pages in the E&F sections, but the largest file (at this stage of the proceedings) was 3,244 pages. Twelve of these files were over 1,000 pages and another 10 were over 800 pages. I still have 10 cases in post-hearing development where additional documents will be generated. My hearing with the largest file (consisting of 3,244

⁴ Testimony of Regional Chief Judge DeLaitre on October 11, 2012.

⁵ See videocast of the hearing at <http://www.hsgac.senate.gov/subcommittees/investigations/hearings/social-security-administrations-disability-programs>. He makes this statement at time tac 43:16-43:40 (last visited on April 12, 2013). I note that this number comes from a state with far less robust indigent health care access than my own.

pages) had to be postponed because I received over 1,800 pages the weekend prior to the hearing. However, even if one were to entirely delete this file from the calculation (and ignore that I had read about 900 pages of that case thus far), my average case size would still be 603.84 pages for these portions of the case file! This is an important point because I ask how does one read this volume of evidence day in and day out in the time the Agency allows? The dirty little truth is, in order to avoid the scrutiny of Agency management, many ALJs are donating many hours without compensation⁶ or more troubling they may not be reading all of the evidence, and the Agency promotes this approach, although not in writing.⁷ So how much time does the Agency allot to read the average file, in my case, of approximately 600 pages (E and F sections only) per case, to make the quota of 500 cases per year?

An ALJ is paid for a 40-hour work week. There are 52-weeks in a year so that's 2080 hrs. For those of us who have served a substantial period in federal service, we are entitled to 208 hrs of annual leave. That leaves 1,872 hrs. In addition, there are 10 federal holidays thus reducing the total number of hours available to 1,792 hrs. Judge Bice has previously testified that it is reasonable that each hearing should take about 1 hour.⁸ That leaves 1,292 hours left to review the record to see if additional records or evidence is needed, read the record before the hearing, conduct any supplemental hearings or gather and read any post-hearing documents, prepare instructions for the writers to draft the decision, and then read and edit the decision once prepared. 1,292 hours divided by 500 cases, means that to accomplish this quota in a perfect work environment, the ALJ is allotted 2.58 hours per case. Now this does not include time taken away for mandatory training, sick leave, administrative errors (read computer problems), or any

⁶ As an aside, the volunteering of services arguably creates an Anti-deficient Act issue.

⁷ During a meeting with the local ALJs, the RCALJ told judges that they were not required to read the entire file.

⁸ Minority Report, *infra*, at 36. The report states Judge Bice indicated that “[w]ith few exceptions, a good hearing takes 45 to 60 minutes to conduct, sometimes longer.”

other of a dozen other possible additional duties. Nor does it include either of the two-15 minute breaks that any federal employee is entitled to during an 8-hr work day. Now assume the most conservative figure that each case averages just 500 pages. *If reading the file was the only task an ALJ was to perform, other than conducting a hearing itself, that requires relentlessly reading over 193 pages per hour.*⁹

Do you really believe that these judges that are deciding over 700 cases are actually reading all of the evidence or providing the individual claimant (or the public) a fair evaluation of their claim? Of course, some will say that they have more time because they use less time in their hearings. How much time do they allow this claimant to be heard after they have waited two years or more to have their case heard? My point is the Agency quota is unrealistic. Each decision we make has a profound impact on the claimant and can have a significant impact to the public fisc. Isn't it better that we give the claimant and the public an evaluation of the evidence that they both deserve? We have an obligation not only to the claimant but to the public.

The Agency covers itself in its incessant requests for faster case processing by providing videos telling the judges to read the evidence, but this is done with a clear undertow that you do so as long as you meet the quota. The administrative staff is reminded almost daily to about where the office is in meeting the arbitrary goal given to the office for any given month. To

⁹ Now, let's look at the math if an ALJ falls at the high end of the "Green" zone and issues 700 decisions. Assuming the same seasoned federal employee, one starts with 2080 available hours, minus 208 hours for annual leave, minus 80 hours for federal holidays, minus 700 hours for hearing time. That leaves this judge just 1,092 hours to perform all the remaining tasks for these 700 cases. In other words, this judge supposedly can do all this using just over 1.5 hours per case. Again, if the judge is only reading the file, and we assume the more conservative number provided by Senator Coburn's research, this judge would have to read on average 320 pages per hour. Again, this ignores all of the other requirements other than holding hearings and just reading the case file. Finally, let's assume the number that the Agency has "limited" an ALJ to: 1,200 cases. Given this number, this judge is supposedly able to read the evidence, conduct substantive hearings, issue instructions, edit and sign their decisions, and do the other administrative actions averaging 1.08 hours per claimant. Even if one assumes this super judge only uses 30 minutes for their hearings, this leaves this judge just over 30 minutes to read 500 pages, and do all the other tasks required of them. *Finally, even if this judge conducted no hearings, but merely issued on-the-record decisions which are only authorized in fully favorable decisions, this super judge would still have to read on average 463 pages per hour.* I find this incredible and hopefully you will as well.

accomplish this quota, I have heard on numerous occasions both at training (informally of course) and from fellow judges that you don't need to read all the evidence. One can merely skim it, picking out certain exhibits, and then let the writers weed through the details. But that is not what the oath of office that I took told me to do. And it is not what the Agency's own regulations or policy tells me to do. 20 C.F.R. §404.1529 as well as SSR 96-7p time and again point out the ALJs obligation to read all of the evidence.¹⁰ If the Agency leadership wants the

¹⁰ 20 C.F.R. §404.1529. How we evaluate symptoms, including pain.

(a) *General.* In determining whether you are disabled, **we consider all your symptoms**, including pain, and the extent to which your symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence. By objective medical evidence, we mean medical signs and laboratory findings as defined in [§ 404.1528](#) (b) and (c). By other evidence, we mean the kinds of evidence described in [§§ 404.1512\(b\)\(2\)](#) through (8) and [404.1513\(b\)\(1\)](#), (4), and (5), and (d). **These include statements or reports from you, your treating or nontreating source, and others about your medical history, diagnosis, prescribed treatment, daily activities, efforts to work, and any other evidence showing how your impairment(s) and any related symptoms affect your ability to work. We will consider all of your statements about your symptoms**, such as pain, and any description you, your treating source or nontreating source, or other persons may provide about how the symptoms affect your activities of daily living and your ability to work. However, statements about your pain or other symptoms will not alone establish that you are disabled; there must be medical signs and laboratory findings which show that you have a medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all of the other evidence (including statements about the intensity and persistence of your pain or other symptoms which may reasonably be accepted as consistent with the medical signs and laboratory findings), would lead to a conclusion that you are disabled. **In evaluating the intensity and persistence of your symptoms, including pain, we will consider all of the available evidence, including your medical history, the medical signs and laboratory findings and statements about how your symptoms affect you.** (Section [404.1527](#) explains how we consider opinions of your treating source and other medical opinions on the existence and severity of your symptoms, such as pain.) We will then determine the extent to which your alleged functional limitations and restrictions due to pain or other symptoms can reasonably be accepted as consistent with the medical signs and laboratory findings and other evidence to decide how your symptoms affect your ability to work.

And (c)

(c) *Evaluating the intensity and persistence of your symptoms, such as pain, and determining the extent to which your symptoms limit your capacity for work—*(1) *General.* When the medical signs or laboratory findings show that you have a medically determinable impairment(s) that could reasonably be expected to produce your symptoms, such as pain, we must then evaluate the intensity and persistence of your symptoms so that we can determine how your symptoms limit your capacity for work. In evaluating the intensity and persistence of your symptoms, **we consider all of the available evidence**, including your history, the signs and laboratory findings, and statements from you, your treating or nontreating source, or other persons about how your symptoms affect you. We also consider the medical opinions of your treating source and other medical opinions as explained in [§ 404.1527](#). Paragraphs (c)(2) through (c)(4) of this section explain further how we evaluate the intensity and persistence of your symptoms and how we determine the extent to which your symptoms limit your capacity for work, when the medical signs or laboratory findings show that you have a medically determinable impairment(s) that could reasonably be expected to produce your symptoms, such as pain

(4) *How we determine the extent to which symptoms, such as pain, affect your capacity to perform basic work activities.* In determining the extent to which your symptoms, such as pain, affect your capacity to perform basic work activities, **we consider all of the available evidence described in paragraphs (c)(1) through (c)(3) of this section.** We will consider your statements about the intensity, persistence, and limiting effects of your symptoms, and **we will evaluate your statements in relation to the objective medical evidence and other evidence**, in reaching a

ALJs to just skim the evidence, it has the power to change the rules. As the Agency is so willing to point out, ALJs are required to follow Agency policy. But our own rules require us to consider all of the evidence and to not just skim the file or to make a gut decision.

B. The review process itself favors ALJs issuing favorable decisions.

The second part of this burden comes after a decision is made. If an ALJ issues a favorable decision, that decision is normally 5-7 pages long, the vast majority of it being boilerplate. Until the Huntington, West Virginia scandal, the Agency essentially did no quality review about the accuracy of favorable decisions. Further, favorable decisions are never appealed. On the other hand, an unfavorable decision normally ranges from 11 to more than 30 pages, and must be defended vigorously by the ALJ. These decisions are subject to appeal and are remanded for a variety of reasons, many being meritorious. However, many decisions are remanded for minor omissions that have no bearing on the ultimate outcome of the decision. Unfortunately, there is no deference given to the trier of fact in these proceedings nor is there an evaluation for harmless error.¹¹ Merely failing to mention a tangential lay witness statement that would have no impact on the outcome of the decision can be grounds remanding a case.¹²

conclusion as to whether you are disabled. We will consider whether **there are any inconsistencies in the evidence and the extent to which there are any conflicts between your statements and the rest of the evidence, including your history**, the signs and laboratory findings, and statements by your treating or nontreating source or other persons about how your symptoms affect you. Your symptoms, including pain, will be determined to diminish your capacity for basic work activities to the extent that your alleged functional limitations and restrictions due to symptoms, such as pain, can reasonably be accepted as consistent with the objective medical evidence and other evidence.

SSR 96-7p

“Assessment of the credibility of an individual's statements about pain or other symptoms and about the effect the symptoms have on his or her ability to function must be based on a consideration of all of the evidence in the case record.”

¹¹ On this point see the testimony of retired Judge David Hatfield, before the Social Security Subcom., House Ways and Means Committee on March 20, 2013, available at <http://waysandmeans.house.gov/uploadedfiles/hatfield-testimony32013.pdf> (last visited April 12, 2013)

¹² In the Ninth Circuit, the ALJ's failure to address lay witness testimony generally is not harmless. *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1991). In failing to address a lay witness statement, the error is harmless only if "a reviewing court . . . can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination." *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1056

Therefore, the writing and editing necessary to defend unfavorable decisions is far more labor intensive. When one adds the not so subtle pressure to make quota, from simply a human factors perspective, there is a bias to issue a favorable decision: they are less work, no one really looks at the quality of the judge's analysis in light of the evidence,¹³ and it is far easier to make this arbitrarily imposed quota. The effect of this constant pressure to produce with little oversight of favorable decisions was recently discovered by Congress,¹⁴ and results in essentially paying down the backlog.¹⁵

My point about this pressure for quantity over quality is that taxpayers that are paying for this mindset. The recent report sponsored by Senator Coburn indicated that 22% of the favorable decisions in its random survey of 300 cases were erroneous awards. Each favorable decision on average costs the taxpayer \$300,000¹⁶ because once on the social security rolls, very few are ever removed. Twenty-two percent of 300 is 66 claimants that could have been receiving benefits erroneously. I say "could have been" because these are cases were caught by the Agency's

(9th Cir. 2006); *see also* Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006). This standard is markedly different than the harmless standard applied to other administrative proceedings.

¹³ During the September 2012 Senate Committee hearings, one of the HOCALJs looked at the reversal rate of his judge's unfavorable decisions and took the position that if one of his judge's has a low reversal rate for unfavorable decisions, he believed that it was just as likely that his favorable decisions were equally valid. This is flawed logic because it ignores the fact that a person with a high pay rate is only going to deny the most egregious cases where it is clearly an unfavorable decision. If a Judge just pays any close case, and favorable decisions are not subject to any real scrutiny, there is little risk of criticism. As has been evidenced by the Agency's actions, high volume judges are really not subject to scrutiny until something occurs that is newsworthy. Finally, I point out that the Agency says that it now "limits" judges to 1200 cases per year, but they have yet to explain how it is possible to do that many cases given the data that currently exists as to the size of these files.

¹⁴ *See*, U.S. Senate, Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, *Social Security Disability Programs: Improving the Quality of Benefit Award Decisions, Minority Staff Report* (2012), released in conjunction with the Permanent Subcommittee Investigations September 13, 2012 hearings (hereafter *Minority Report*).

¹⁵ Recall that a claim has already been denied twice previously by medical professionals versed in Social Security regulations and policies. When individual judges have high pay rates one really has to ask themselves who is not applying the correct standard. It is true that frequently additional evidence comes to light after these two prior denials. However, it seems improbable that that would occur 80 or 90 percent of the time, consistent with some ALJs fully favorable pay rates.

¹⁶ This figure comes from Senator Coburn's webpage, http://www.coburn.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=c95d5151-e697-4eb8-9bad-2121ecbe4690 (last visited April 12, 2013).

quality control system during its random sampling of cases. Sixty-six times \$300,000 equals \$19.8 million dollars. However, the Agency only reviews about 1% of the fully favorable decisions for quality control purposes.¹⁷ Even if one was to cut that figure by fifty percent, we are talking about significant funds. If we were to extrapolate that error rate to all fully favorable decisions issued by the Agency annually we are talking immense sums of public funds, literally tens if not hundreds of billions of dollars over the life of these claimants.¹⁸

2. Agency rules and policies obstruct the judge's ability to assess credibility and to control their proceedings.

When I was going thru the ALJ application process I read about the theory of the roll of the social security judge and the three-hat rule.¹⁹ I found the theory of an inquisitorial system admirable. What I was not prepared for was the reality of being a judge confronted by an advocate on one side and apathy, or at least passivity, on the other. As I mentioned, probably 85-90% of the cases that come before me have a representative. As a general rule, the bar has been professional and forthright. However, the tension arises where the ALJ inquires about evidence that may not be favorable to the claimant's application. These proceedings are not supposed to be adversarial.²⁰ However, many attorneys do not treat this as a non-adversarial process. This is not to be unexpected as our entire judicial system is designed around an adversarial process.

¹⁷ In FY 2011, the Agency's quality control division reviewed 3,962 cases. *See*, Minority Report, *supra*, at 14, n. 31. However, Social Security Judges issued over 400,000 favorable decisions.

¹⁸ According to the Minority Report, Social Security ALJs issue 700,000 decisions per year. *See* Minority Report, *supra*, at 20. In FY 2010 the average allowance rate for Social Security ALJs was 67%. *See* U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Social Security, Statement for the Record Challenges Facing the Next Commissioner of Social Security by The Honorable Patrick P. O'Carroll, Jr., Inspector General, Social Security Administration, April 26, 2013, at 4. Sixty-seven percent of 700,000 cases equates to issuing 469,000 favorable decisions (paying a claim). The Agency reported an error rate of 22% in the favorable decisions during its random review for quality control purposes. Minority Report, *supra*, at 22. If the error rate is just 10%, for fully favorable decisions that the Agency did not discover, that equates to about 46,900 erroneous decisions times \$300,000 in benefits over the life of the claimant, or \$14.07 billion dollars annually in potential future exposure to erroneously granted benefits over the life of those claimants. If one used the 22% error rate, this number climbs to approximately \$35 billion.

¹⁹ *See generally*, *Richardson v. Perales*, 404 U.S. 389, 410 (1971).

²⁰ *See* 20 C.F.R. §§404.900(b) and 404.1740.

What is exceedingly frustrating is what few rules or policies the Agency has promulgated concerning the hearing process and procedures; they essentially strip the ALJ of any real authority to regulate these proceedings.²¹ Further, the Agency impedes the judge from finding potentially salient facts. For example, I remain astonished that the Agency will not provide an ALJ with a claimant's criminal conviction history.²² I have asked why and been given two different reasons: privacy rights of the claimant and that it's not relevant to our decisionmaking process. Both reasons are patently in error. No person has a privacy right to their criminal convictions. With rare exceptions, when someone is convicted of a crime in a United States courtroom, it is a public event. The record of the conviction is a public record, and anyone can go to a court clerk's office and search the files for records of any conviction, especially felony convictions, for a certain person. These are publically available records; they are just not easily accessible public records. Additionally, the claimant affirmative waives their right to privacy when they make an application to the extent that the Agency believes is necessary to adjudicate their case. Further, the Agency itself on its application asks if the claimant has been accused of or convicted of a felony.²³

The credibility of the claimant is a key component when evaluating a claim. Because so much of what the medical records contains are the subjective statements by the claimant, and the doctors' opinions resulting there from, the assessment of the claimant's credibility is usually the

²¹ The rules for conducting hearings are set for at 20 C.F.R. §404.944 *et seq.* These procedures are further restricted by the Agency's Hearings, Appeals and Litigation Law Manual (HALLEX). *See generally*, HALLEX, Chapter I-2-6.

²² The one exception that I am aware of is if the case is referred to the Cooperative Disability Investigations Unit (CDIU). These units are comprised of OIG, SSA, DDS, and State or local law enforcement personnel. They investigate Social Security disability claims that come under suspicion for fraud or similar fault actions by claimants or current beneficiaries. However, an ALJ cannot merely ask the CDIU office for just a criminal history; criminal histories are generated as part of the CDIUs comprehensive investigation of a claimant. Because this organization is a scarce resource, ALJs must request their services with care. For an understanding of the consequences of a finding of fraud or similar fault, *see* SSR 00-2p.

²³ *See* the SSA electronic application form for Supplement Security Income (SSI). Ironically, the question is asked in the context of Title 16 applications when the exclusion for impairments committed in furtherance of a felony are limited to Title 2 claims only.

single most important factor in deciding a case. So evidence of a claimant's prior crimes may well be a key piece of evidence. Even a first year law student that has taken an evidence course understands that certain convictions are probative of that individual's credibility. *Crimen falsi* offenses by their very nature are probative of a claimant's credibility. Although the Federal Rules of Evidence do not apply to these proceedings, they are a guide we should consider when weighing the relevance of any evidence. If a criminal history is relevant and probative in criminal and civil trials with their more restrictive rules,²⁴ why are they less relevant and less probative in these informal administrative proceedings? In my short time on the bench, I have discovered claimant's with prior convictions for Medicare fraud, forgery, and false statements. Second, Congress has specifically directed that impairments resulting from injuries suffered while committing a felony are not to be considered in these proceedings.²⁵ Third, this information can be probative in drug and alcohol addiction cases because it aides the factfinder in understanding the extent of problem as well as the longevity of the problem. Finally, I find it valuable in understanding a claimant's prior criminal conviction history because I want to know if they'll tell me the truth about it. I frequently have claimant's minimize their criminal history when I ask them about it. Since I don't have access to their actual history, my inquiry is really limited to what doctors' report in medical records.

In a related but different issue, I routinely have witnesses or statements from witnesses about the claimant's activities of daily living. Frequently, there will be evidence that another person supposedly does all of the day-to-day activities for the claimant. Yet upon further inquiry I learn that this person is also on disability. Many times this creates a question about this other person's true condition. Yet we are precluded from getting access to statements made either by

²⁴ Compare 20 C.F.R. 404.950(c) with Federal Rule of Evidence 609.

²⁵ See 20 C.F.R. §404.1506 as well as SSR 83-21.

the claimant before me, or by the witness before me, during the witnesses' social security disability file. In short, we cannot cross-check the credibility of their statements using files we already possess. We may be established as an inquisitorial hearing process, but in many respects the Agency doesn't allow us to inquire.

Second, the ALJ cannot establish procedural rules in their own hearings.²⁶ It is not at all unusual that I receive over 100 or more pages of new evidence the morning of the hearing, or at the hearing. *In a recent case, I received over 1800 pages of new medical evidence dating back to 2011, on top the current 1600+ pages in the record, over the weekend prior to the hearing.* The only remedy for such late submittal was a continuance which required that case being re-scheduled six months later. I have no authority to close the record, or to order all evidence be submitted in a timely fashion. Further, I have no authority to impose any kind of sanction for late submittals without good cause, failing to get evidence that may not support the claimant's application, or to even require a representative to submit a brief explaining with specificity where the evidence is within the file that substantiates their claim. This last point is important because I spend an inordinate amount of time reading duplicate records, or medical records that are not really germane to the decision. Unfortunately, I don't know that the document is duplicative until I see the exhibited documents. The Agency refuses to remove duplications, there is no advocate for the agency that allows me to focus on the key documents to make a decision, and I have no authority to require briefs from representatives prior to the hearing to help me focus on the issues. The "exhibits" are really nothing more than an assembly of a claimant's medical records from various providers. It is not at all unusual to have a 300-page "exhibit" merely described as "X hospital ER records". There is no effort by the staff to identify

²⁶ See Chief Judge Bice's Memorandum 12-992, subj: Use of Prehearing Orders-**Reminder** (April 16, 2012); Memorandum 14-303-5128, subj: Prehearing Orders (Jan. 28, 2003). According to HALLEX I-2-5-85, ALJs cannot even require a claimant to complete a questionnaire to gather information they deem of potential value in a case.

key pages within these documents because it will slow down the process, thus leaving the judge to find the salient facts themselves by combing through the record.

The Agency policies limit access to certain evidence. For example, we are denied access to the Minnesota Multi-phasic Personality Inventory (MMPI), social media sites, a criminal history as mentioned above, or to request a urinalysis test in the appropriate case, as examples.²⁷

The MMPI is a peer reviewed, well recognized test, which can be an invaluable tool in helping to

²⁷ See Disability Determination Services Administrator's Letter No. 866 (Jan. 26, 2012) and DAA SSR 13-2p. The recent guidance on the implementation of this letter and the prohibition on drug testing is contained in POMS Section: DI 22510.006 (eff. 4/8/13) which provides in pertinent part:

D. For the purpose of evaluating credibility or malingering

Do not purchase symptom validity tests (SVT) to address issues of credibility or malingering as part of a CE. Tests cannot prove whether a claimant is credible or malingering because there is no test that, when passed or failed, conclusively determines the presence of inaccurate self-reporting.

Examples of SVT include, but are not limited to:

- Rey 15 Item Memory Test (Rey-II),
- Miller Forensic Assessment of Symptoms Test (M-FAST),
- Millon Clinical Multiaxial Inventory,
- Minnesota Multiphasic Personality Inventory (MMPI),
- Malingering Probability Scale,
- Structured Interview of Reported Symptoms,
- Test of Memory Malingering, and
- Validity Indicator Profile.

EXCEPTION: The Office of Disability Programs may approve rare exceptions to this prohibition on a case-by-case basis (for example, testing ordered pursuant to a court order). When necessary, the Office of Disability Adjudication and Review will email ^ODP OMLI Controls for pre-approval.

REMINDER: Consider referring a case with evidence suggestive of fraud or similar fault to the Office of Inspector General for investigation. See [DI 23025.015](#).

NOTE: When the results of SVT are part of the medical evidence of record, we consider them along with all of the relevant evidence in the case record.

E. For drug or alcohol testing

Do not purchase drug or alcohol testing to evaluate an issue of drug addiction or alcoholism (DAA). A single drug or alcohol test is not sufficient to establish DAA as a medically determinable impairment, nor does it provide pertinent information that can help us determine whether DAA is material to a finding of disability. For details on evaluating cases involving DAA, see SSR13-2p.

Within the past week I reviewed a case where the psychologist initially indicated that the claimant indicated significant mental health issues. However, for some reason, this doctor again evaluated this claimant and the doctor this time used TOMMs. Based on this new evaluation and the results of the TOMMs testing, the psychologist concluded that his own prior diagnosis and testing was no longer valid.

evaluate the credibility of a claimant, particularly when malingering is an issue. Ironically, the MMPI is even mentioned in the Agency's own regulations as recognized tool,²⁸ yet for some policy reason it chooses to perform informal rulemaking via policy as opposed to providing notice and comment to changes in its own regulations. The prohibition upon ALJs preventing access to a claimant's publically available social media is frankly without merit. We are not talking about asking for passwords or hacking into these forums, but looking at material that claimant's have put forth to the world. Information from these sites could be highly probative of one's physical abilities as well as mental abilities. The Agency precludes the ALJ from asking for a drug test purportedly because the test alone does not establish materiality of the impairment.²⁹ I agree with this point, but what this policy ignores is that it is a factor to consider given the longitudinal record. Any person that has dealt with a substance rehabilitation program understands two things: it is not unusual that a person with an addiction will misrepresent their sobriety and most rehabilitative programs trust but verify through the use of a urinalysis.³⁰ Just

²⁸ 20 C.F.R. Part 404, Appendix I to subpt P, section 12.00D7 states:

7. *Personality measures and projective testing techniques.* Results from standardized personality measures such as the [MMPI], . . . , may provide useful data for evaluating several types of mental disorders. Such test results may be useful for disability evaluation when corroborated by other evidence, including results from other psychological tests and information obtained in the course of the clinical evaluation....

²⁹ See, e.g., SSR 13-2p, fn 25 which states: We will not purchase drug screening or testing to determine the validity of psychological testing. The examining psychologist or other professional who performs the test should be able to provide an opinion on the validity of the psychological test findings without drug testing." So even if the psychologist suspects that the claimant may be lying to them about their drug use, or even if they suspect they may be under the influence, the Agency will not allow an objective test to corroborate this. See also, footnote 27, *supra*.

³⁰ The American Society of Addiction Medicine has the following in its Public Policy Statement On Drug Testing as a Component of Addiction Treatment and Monitoring Programs and in other Clinical Settings the following:

ASAM recommends the following practices and procedures for drug testing:

A. The use of drug testing in diagnostic settings.

When patients are initially assessed to determine if there is a diagnosis of a substance-related disorder, it is essential for the health care professional to have objective evidence about the recent substance use status of the patient. Drug testing can provide evidence of current or recent exposure to intoxicants which could affect the patient's current

last week I reviewed a consultative examination report prepared by a psychiatrist. He specifically recommended drug testing of the claimant to rule out whether the claimant was still using a powerful illegal drug. Such a recommendation is not at all uncommon, yet the Agency precludes the ALJ or the consultative examiner from acquiring this objective data.

Finally, the Agency has represented to the Senate Committee that the judges have resources to assist us in reviewing files. Frankly, that is a half truth. It is true that documents are exhibited with cursory titles such as X Hospital Health care records. However, as mentioned earlier, this one exhibit could be 300 pages long. These documents are not exhibited in any fashion like one would find in the typical adjudicatory format. VA records are notoriously thick and disorganized. These exhibits are filled with extraneous information and duplicates. The Agency makes little or no effort to remove duplicates. Has the Agency actually shown you what an Agency file looks like? I would invite you to come (preferably unannounced) and see for yourself how these files are presented to the field judges immediately prior to a hearing.³¹ Unlike other judicial systems the Social Security ALJ has to find the relevant evidence within these files before they can even assess it. In every other system that I have been exposed to the judge is presented with the relevant facts upon which to make a decision. Senator Coburn's committee also heard testimony about access to senior advisory attorneys. They are advisors in name only. Unless they have reviewed a case for a possible On the Record (OTR) determination, we do not get an evaluation in a file by a senior attorney, and when we do there is no memorandum or brief focusing on exhibits.³² The senior attorneys do help the writing staff;

status, and can serve as an objective means of verifying the patient's substance use history as reported by the patient or collaterals.

³¹ Obviously, the privacy issues of claimant's would have to be addressed in some fashion.

³² Yet, in the senior attorney advisor position description, GS-905-13, Agency position number 672600, as amended on August 6, 2007, specifies that 25% of their time is to be devoted to advising the ALJs.

however, the ALJ does not even have supervisory oversight of the individuals that are drafting their decisions. Having said that, I have found that the staff writers in my office are very hard working conscientious individuals that try to produce a quality draft decision for me to review in the time they are allotted to draft a decision.

Senator Coburn was spot on in his questioning about how 500-700 decisions can be expected from the ALJs given the sheer volume of evidence. There is another field judge that has gathered data concerning how large his files are and how long it takes him to process a case. This information has been shared with Senator Coburn and I strongly encourage you to obtain that information for your review. The Agency's vague responses to the Senate Committee's questions about how this is accomplished should be really looked in to because it would be enlightening.

Conclusion.

Having identified several issues with the current system, I propose the following solutions to these identified shortcomings.

- I join Judge Hatfield in advocating that the Agency have a representative at these hearings. It makes no sense that one of the highest paid employees in the Agency have to sift thru a mountain of paper or electronic documentation to find the salient facts to make a decision. I am paid to make decisions and have no difficulty doing this. An Agency representative would return the balance to these proceedings. If this is not possible, then implement a regulation that states with clarity that the claimant's representatives are required to provide all evidence, not just favorable evidence, for review.
- Empower ALJs with more formal procedural rules, such as: requiring all documents be provided at least 5 days prior to the hearing; authorizing use of pre-hearing orders; if appropriate, requiring claimant's to complete questionnaires prior to the hearing; authorize judges when they deem appropriate to require briefs; authorize the use of other evaluative tools such as the MMPI, access to social media or to access to the claimant's criminal conviction history. However, also provide and require latitude in these rules when claimants are pro se.
- Require the Agency to validate this 500 to 700 quota by requiring it to keep track of not only the number of cases, but the actual size of the cases as well. The Agency should explain how

it expects an ALJ to read and evaluate the volume of evidence before them in the time allotted for this quota. The Agency has set forth the task, but has not validated the time it actually takes to accomplish the task given the rules and procedures that currently exist, as measured against the size of these file.

In my limited experience with this Agency, it is my belief that the issue is not with the ALJs but with a culture of quantity over quality. The attitude is if a case gets reversed it's just an opportunity to get another bean towards making the quota. The Agency talks about increasing the quality, but there is zero consideration that an increase in quality may mean a decrease in quantity. The focus is on faster, and little focus on better. There is also no consideration for the diversity of the size of the files within each of the Agency's Regions.³³ For example, offices in States that have robust public assistance for health care, those files have much more medical evidence. How can you give a quota when you don't even know the size of the files? Finally, there is really no consideration for the burden placed upon each Region by the associated Court of Appeals.

As a public servant, I truly believe that we owe it to the public to provide quality service. However, quantity does not equal quality. In the Agency's commendable attempt to remove the backlog of claims, the Agency leadership has gone too far towards quantity at the expense of quality, and it has knowingly turned a blind eye to those that produce unusually large numbers of decisions per year; Huntington and the recent Senate Minority Report demonstrate this. Judges that conduct 15 minute hearings do a disservice to this Agency and the public. Like it or not, the ALJs are the face of the Agency in many respects. While I may not rule in a claimant's favor, I want that claimant to know two things when they leave one of my hearings. First, I want them to

³³ There is also the issue of the types of cases. While I don't have hard data, a cursory review of Agency data does indicate to me that the ALJ in any given office that has the highest or one of the highest number of dismissals tends to be HOCALJ. For example, Chief Judge Bice testified that she had no trouble adjudicating 500 cases per year. However, I would encourage the Committee to look at the number of dismissals she issued while serving as a HOCALJ. This comment is not meant to be disparaging to the Chief Judge, but to point out that all files are not created equal.

know that I have taken the time to read their entire file. Second, I want them to have an opportunity to tell me their story. We owe them this just as much as we have an obligation to make a decision as best we can.

As I mentioned at the beginning, I really struggled with writing this letter. However, after serving 27 years in federal public service, I have come to the conclusion that someone has to step forward and tell you that with this organization, don't just talk with management. I am comforted by the fact that in discussions with fellow field judges across the country, they experience similar frustrations. To truly understand what is going on with this organization, you need to talk to the field judges, especially those that have not spent their career in this Agency's culture, and I'm talking about judges outside of the beltway. This pressure is resulting in erroneous decisions that are having a significant adverse impact on the expenditure of the public's funds.

Respectfully submitted,

Scott R. Morris