



CONSORTIUM FOR CITIZENS
WITH DISABILITIES

July 30, 2012

The Honorable Xavier Becerra
Ranking Member
Subcommittee on Social Security
Committee on Ways and Means
U. S. House of Representatives
Washington, DC 20515

Dear Ranking Member Becerra:

Thank for your Question for the Record in follow-up to the Subcommittee's June 27, 2012, hearing on "The Social Security Disability Appeals Process."

What is your perspective on some of the proposals made by Professor Pierce in his testimony – such as revising the ALJ discipline process, eliminating non-exertional impairments as a basis for qualifying for benefits, and eliminating appeals before an ALJ? Would these require statutory changes?

As discussed below, we do not agree with Professor Pierce's proposals. In addition, we do believe that each of these proposals would require statutory changes.

We also would like to point out that most of the proposals in Professor Pierce's testimony previously appeared in a recent article he wrote in the Fall 2011 issue of the Cato Institute's *Regulation* magazine.¹ An Issue Brief, written in response to Professor Pierce's article by two Professors of Law, responds to his proposals and explains how his solutions are misguided.²

1. The ALJ discipline process should not be revised. We believe that ALJs and their decisional independence play a critical role in protecting the rights of claimants. A claimant's right to a *de novo* hearing before an ALJ is central to the fairness of the SSA adjudication process.

¹ Richard J. Pierce, Jr., *What Should We Do About Social Security Disability Appeals? Administrative law judges, overruling SSA rejections of disability claims, contribute heavily to federal spending.* REGULATION, Fall 2011, p. 34. <http://www.cato.org/pubs/regulation/regv34n3/regv34n3-3.pdf>.

² Jon C. Dubin and Robert E. Rains, *Scapegoating Social Security Disability Claimants (and the Judges Who Evaluate Them)*, American Constitution Society Issue Brief (Mar. 8, 2012). http://www.acslaw.org/sites/default/files/Dubin_Rains_-_Scapegoating_Social_Security_Disability_Claimants.pdf

ALJs employed by SSA should continue to be appointed under the Administrative Procedure Act (APA), like other federal agency ALJs, which guarantees their independence from undue agency influence: (1) The Office of Personnel Management (OPM) – not SSA – conducts the competitive ALJ selection process, with SSA able to appoint ALJs from a list of eligible candidates created by OPM (2)ALJs can be removed only for “good cause”; (3) Most disciplinary actions may be taken only according to standards and procedures established by the Merit Systems Protection Board (MSPB); and (4) The pay classification system for ALJs is set by OPM, not by SSA, and is separate from the agency’s performance rating process.

We believe that adopting a proposal that allows SSA to have a separate register or that eliminates the use of ALJs poses the most danger to infringing, or being perceived as infringing, ALJ independence and impairing the fairness of the process.

2. Non-exertional impairments should not be eliminated as a basis for qualifying for benefits. The Social Security Act and SSA regulations require that all impairments, both physical and mental, be considered in determining disability.³ All impairments must be supported by clinical and objective medical evidence.

In his testimony, Professor Pierce mistakenly states that a mere diagnosis of mental illness and/or pain is sufficient to support a claim for disability. Any medically determinable impairment, whether physical or mental, must be of the requisite severity to meet the disability standard. As noted in the Issue Brief written in response to Professor Pierce’s proposal, which appeared previously in *Regulation* magazine:

The Social Security Act and agency regulations require that all impairments be supported by appropriate clinical and objective methodologies. [Professor] Pierce confuses and mislabels nonexertional limitations and impairments as entirely subjective and undocumentable in contrast to exertional conditions. This contrast is falsely drawn. Nonexertional limitations can be objectively and clinically evaluated; exertional limitations and impairments can be supported by subjective symptomatology.⁴

After discussing how both exertional and nonexertional impairments and limitations are documented under current law and agency policy, the authors conclude: “In short, [Professor] Pierce’s assertion that a claim for disability benefits for claimants with mental impairments or pain may neither be refuted nor supported through accepted diagnostic criteria and professional evaluation is erroneous.”⁵

3. Appeals before ALJs should be retained. We disagree with Professor Pierce’s recommendation to “eliminate the role of ALJs in the disability decision making process.”

As discussed above, ALJs play a critical role in protecting the rights of claimants. A claimant’s right to a *de novo* hearing before an ALJ is central to the fairness of the 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 agency coercion or influence. The ALJ questions and takes testimony from the

³ 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505(a)(“... inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment....”).

⁴ Dubin and Rains, *supra* note 2, at 7 (footnote omitted)

⁵ *Id.* at 9 (footnote omitted).

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.

The Dubin/Rains Issue Brief addresses – and rejects - the same recommendation by Professor Pierce and provides a number of reasons why the right to appeal to an ALJ should be retained, including the following:

- Eliminating the ALJ appeal would not remove the significant variation in allowance rates by the State Disability Determination Services (DDSs). “There are dramatic and unexplained variations among the state agencies . . .”⁶ For instance, in FY 2011, the initial level allowance rate was 24.6 percent in Mississippi but 49.4 percent in New Hampshire.
- Because they do not have decisional independence like ALJs, DDSs have “greater vulnerability to restrict awards at the state level.”⁷ Allowance rates have declined at the DDS levels over the past few years: 33.5% (initial) and 11.6% (reconsideration) in FY 2011; 35.4% and 12.7% in FY 2010; and 36.9% and 13.8% in FY 2009.⁸
- There are a number of legitimate reasons why ALJs reverse DDS disability determinations. By law, ALJ hearings are *de novo* and the ALJ is not bound by previous determinations. Claims are often better developed at the hearing level, in part due to the fact that claimants are represented and the representative is able to obtain more specific medical evidence tailored to the SSA disability criteria. In addition, claimants’ conditions change and deteriorate with the passage of time. Also, ALJs are able to call expert witnesses – medical experts and vocational experts – to provide hearing testimony on complex issues and who can better explain the claimant’s impairment(s), treatment, how functional limitations affect the ability to work, etc. And a critical difference from the earlier levels is that the ALJ hearing is the first opportunity for the claimant to meet the adjudicator face-to-face, which can be especially important in cases involving nonexertional impairments such as mental illness and pain.

* * *

Thank you again for the opportunity to testify at the hearing on June 27, 2012. If you or your staff would like further information or discussion on any issues involving the Social Security disability appeals process, I would be happy to respond, as would my co-chairs from the Consortium for Citizens with Disabilities (CCD) Social Security Task Force. Please let us know if we can be of further assistance. I can be reached directly at (202) 457-7775 or nosscrdc@att.net.

Sincerely,

Ethel Zelenske
Co-Chair, Social Security Task Force, Consortium for Citizens with Disabilities

⁶ *Id.* at 4.

⁷ *Id.* at 5.

⁸ The source for these statistics is the “Social Security Disability and Supplemental Security Income (SS) Disability Claims Allowance Rates – Initial and Reconsideration Adjudicative Level,” produced by the SSA SSA State Agency Operations Report for each respective Fiscal Year.