



SOCIAL SECURITY

The Commissioner

December 5, 2012

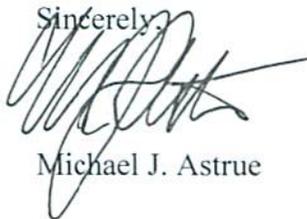
The Honorable Sam Johnson
Chairman, Subcommittee on Social Security
Committee on Ways and Means
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your July 17, 2012 letter requesting additional information to complete the record for the hearing on the disability appeals process. Enclosed you will find the answers to your questions.

I hope this information is helpful. If I may be of further assistance, please do not hesitate to contact me, or your staff may contact Scott Frey, our Deputy Commissioner for Legislation and Congressional Affairs, at (202) 358-6030.

Sincerely,



Michael J. Astrue

Enclosure

**Questions for the Record
For the June 27, 2012 Hearing
On the Disability Appeals Process**

Questions from Chairman Johnson

- 1. If medical evidence is sufficiently developed prior to the hearing, are there other reasons to leave the record open?**

The main reason to leave the record open is to allow an administrative law judge (ALJ) to consider, without requiring a new application, a new condition (e.g., the individual suffers a heart attack the day after the hearing but before the decision is issued) or undiagnosed conditions existing at the time of the determination or decision (e.g., the claimant had been diagnosed with Hepatitis C at the time of the hearing but a month later is diagnosed with Stage 4 liver cancer).

- 2. What are the pros and cons of closing the record either just before the hearing or at the close of the hearing before an Administrative Law Judge (ALJ) issues a decision?**

A closed record would provide the ALJ with all the necessary information to fully consider the claim prior to the hearing, and the ALJ would have the necessary information to adequately question the claimant or witnesses at the hearing. Furthermore, a significant number of ALJ decisions are remanded because new and material evidence (i.e., relevant to the time adjudicated by the ALJ, not previously considered, and may change the outcome) available at the time of the ALJ decision is submitted after the ALJ issues a decision. Some have argued that closing the record at the time of the ALJ's decision would encourage claimants to develop and present such evidence in time for the hearing (where possible), leading to a timelier and lower-cost resolution of the claim.

As previously stated, the main reason to leave the record open at the hearing level is procedural. Should a claimant's condition worsen or a new condition arise, there are fewer administrative steps if the ALJ record remains open. For example, the claimant would not have to file a new application if a new condition arose the day after the hearing but before the decision was issued, assuming the ALJ became aware of the condition.

The same protections afforded under the current process can be incorporated into a closed record provision, like the provision our Boston Region hearing offices use. In the Boston Region (as noted in 20 CFR 405.331), absent certain criteria, evidence must be submitted no later than five business days before the date of the scheduled hearing. However, to protect claimants, the rules do allow for the acceptance of evidence after this time period if our action misled the claimant, the person had a limitation that prevented submission of the evidence earlier, or some other unusual, unexpected, or unavoidable circumstance beyond the claimant's control prevented submission of the evidence. This provision encourages the timely submission of evidence while still allowing for the late receipt of evidence in appropriate circumstances. We are continuing to evaluate use of these procedures in the Boston Region.

- 3. The expectation for judges to produce between 500-700 cases per year has been in place since October 31, 2007. Judge Randall Frye believes this focus on "numerical quotas" does not provide sufficient time for the ALJ to do the proper job and issue a correct decision. Do you believe that this is still the right expectation?**

The following chart shows the percentage of ALJs (excluding newly-hired ALJs) meeting our 500 to 700 case expectation since fiscal year (FY) 2007:

Percent of Tracked ALJs Disposing of 500 or More Cases	
2007	46
2008	56
2009	71
2010	74
2011	77

The vast majority of ALJs are meeting this expectation. Since 77 percent of ALJs met this expectation in FY 2011, while maintaining a high level of decisional quality, we believe the expectation is reasonable.

Moreover, in a recent survey conducted by the Association of Administrative Law Judges, nearly three out of four respondents found it “not difficult at all” or only “somewhat difficult” to meet the expectation. When given an opportunity to explain why they had not met our expectation, many respondents cited their status as new ALJs. We do take into account the learning curve for new ALJs. We reiterate the importance of making the right decision; consequently, we excluded newly-hired ALJs from the data shown above.

- 4. What percent of judges are meeting this expectation and what will it take to get the remaining judges to meet this expectation?**

In FY 2011, 77 percent of ALJs achieved the expectation of 500 to 700 dispositions per year. We have initiated a number of measures to help ALJs achieve this goal and to identify any impediments to achieving this goal. To that end, we regularly monitor whether ALJs are on pace to achieve the dispositional goal. When ALJs are not on pace, we discuss it with them to determine the root cause of the problem. When appropriate, we offer assistance in the form of docket management, mentorship, policy training, and technology-related support.

We have also developed an online tool, “How MI Doing,” which provides ALJs with current real-time statistical information about their individual productivity and quality of their decisions. Accordingly, ALJs are now able to track their performance and take self-corrective measures when necessary. Additionally, we are developing another automated tool, the electronic bench book (eBB), which we believe will help ALJs increase their efficiency and productivity.

5. What new authorities, if any, do you need to address ALJ conduct and performance issues?

We constantly strive to improve our ALJ hearings and are guided by the principles that they must be fair, accurate, and efficient. We are continuing to evaluate if any statutory measures would enable us to better to meet these goals.

6. According to an April 2012 Inspector General Audit Report, "The Role of National Hearing Centers in Reducing the Hearing Backlog," ALJs in the National Hearing Centers had a disposition rate 15 percent higher than the average national disposition rate with 2.77 cases per hearing center ALJ compared to 2.42 cases per hearing office ALJ. The Inspector General attributed some of this increase to productivity, at least in part, to the supervisory relationship between the ALJs and the attorney writers. Would this be a good model for all hearing offices?

We agree that the model for our National Hearing Center (NHC) offices is conducive to productivity and certainly has some advantages. We are continuing to study which aspects of NHC model warrant expansion to our broader hearing offices.

7. A recent Social Security Inspector General (IG) report, "Current and Expanded Use of Video Hearings," requested by the Appropriations Committee, noted that video hearings helped to reduce backlogs, improve case processing times, and decrease ALJ travel to remote sites, generating savings ranging from \$52 to \$109 million over a ten-year period. The ALJs at the National Hearing Centers use video hearings exclusively. Do you plan to expand their use?

Yes. So far this fiscal year, we have installed an additional 108 video units, bringing our national total to 1,339. We plan to install an additional 76 units by the end of the calendar year.

8. You were asked several questions about your decision not to reveal the presiding ALJ's identity until the day of the hearing. In a recent report, the IG reported that claimants or their representatives were declining video hearings so that their case would be assigned to a judge with a higher award rate. To prevent this, the IG recommended that the agency establish regulations to prevent claimants and their representatives from declining a video hearing close to the day of the hearing and to remove the ALJ's name from hearing notices as well as not revealing the ALJ's name when asked by the representative. The Senate Fiscal Year 2013 Labor-HHS Appropriation bill includes language supporting your actions, saying that efforts by claimants or their representatives to manipulate the hearing process to find favorable judges challenges the integrity of the process.

a. Tell us more about the abuses you were trying to correct in deciding not to reveal the ALJ's name until the day of the hearing and how the process is working.

We prefer not to identify specific abuses because we do not want to give a road map. In general terms, the decision to remove the names of ALJs from pre-hearing notices limits the potential for forum shopping, prevents decisional delays, helps maintain the integrity of our decision-making, and is a part of our ongoing effort to ensure that all claimants (including those who are not represented and are less likely to be aware of ALJ rates) receive a fair, consistent, and timely disability hearing. This process has only been in place for a few months, but we are not aware of any new instances of forum shopping similar to what we had discovered. Therefore, the process seems to be helping.

However, given the disquiet about this process, we hope that removing ALJ's names from the notice is a temporary fix and that the representative community will work with us to ensure the integrity of our system. Since the hearing, I have had very positive interactions with both the National Organization of Social Security Claimants' Representatives and the National Association of Disability Representatives about options to address forum shopping.

b. The IG's report focuses on video hearings. Could you have instituted your "Judge Anonymous" policy only for video hearings and not for in person hearings?

While the IG's report focused on video hearings, forum shopping is not limited to those hearings. Under the current regulatory authority that was in effect at the time the "Judge Anonymous" policy was implemented, claimants are assigned the first available slot for a hearing, which may be in person or by video teleconference. We schedule the hearing and notify the claimant and his or her representative of the time and place of hearing. If a claimant is scheduled for a video hearing, then he or she can decline to appear by video when he or she acknowledges receipt of the notice of hearing. Because we cannot determine under the existing system who will and will not decline a video hearing prior to scheduling a hearing, we could not have instituted the "Judge Anonymous" policy for only video hearings and not for in-person hearings.

9. What changes have you made to help the Appeals Council reduce its backlogs and how often does the Appeals Council use own motion review to consider ALJ decisions?

The Appeals Council backlog has grown primarily because of the unprecedented number of requests for review filed in the past four years. In FY 2011, the Appeals Council received 173,332 requests for review, an increase of nearly 35 percent from FY 2010 (128,703 requests for review). Through June 2012, the Appeals Council received 128,750 requests for review, an increase of 15.5 percent from the same time period in FY 2011. The Appeals Council issued 126,992 dispositions in FY 2011 and 119,545 in FY 2012, through June.

In recent years, the Appeals Council has made great strides in systems automation and capturing data on case adjudication. The Appeals Council developed, and is now using, the Appeals Review Processing System (ARPS), an Intranet case processing system. ARPS helps staff identify errors, prepare recommendations for review, identify trends, and provide

feedback to adjudicators and staff. This process allows us to decide cases more quickly and accurately.

In addition to the data collected in ARPS, Appeals Council management developed numeric productivity standards for analysts who review and prepare recommendations for the Appeals Council. The Appeals Council tracks staff performance and provides additional training in areas where analysts do not meet productivity standards.

In the last few years, the Appeals Council developed an interactive training model that received the prestigious W. Edwards Deming Training Award from the Graduate School USA in 2011.

The Appeals Council is creating a new case assignment model that will group cases with similar issues and assign those cases concurrently. This change will improve consistency and help identify areas for future training, while also decreasing processing times for all claimants.

Regarding own motion reviews, the Appeals Council reviews fully favorable cases and bureau protests (i.e., cases that our employees bring to the Appeals Council's attention because they cannot effectuate the ALJ decision). The Appeals Council exercised own motion review on 812 fully favorable cases (22 percent of cases reviewed) and 326 bureau protests (55 percent of cases referred) in FY 2011. Through June FY 2012, the Appeals Council exercised own motion review on 1,449 cases (26 percent of cases reviewed) and 156 bureau protests (44 percent of cases referred).

10. Do all decision makers, whether at the State Disability Determination Services, or the hearing level, or the Appeals Council, use the same criteria for deciding claims? If not, how can we correct this problem?

Yes. The Act and our regulations set forth the criteria all decision makers must use. We have developed tools at the disability determination services (DDS) and hearing levels to ensure that adjudicators follow our policies consistently.

At the DDS level, we have the Electronic Claims Analysis Tool (eCAT), which will be mandatory as of October 1, 2012. eCAT is a policy compliant web-based application designed to assist the user throughout the sequential evaluation process. The tool aids in documenting, analyzing, and adjudicating the disability claim according to our regulations. eCAT utilizes "intelligent pathing" and quality checks to assist the user in addressing critical policy issues relevant to the claim. The output from eCAT is the "Disability Determination Explanation (DDE)," which is a detailed record of the documentation and analysis supporting the determination. The DDE is uploaded to the electronic folder so it is available for subsequent reviewers.

At the hearing level, we are working on a pilot of the eBB for hearing level adjudicators later this year. The eBB is a web-based tool that aids in documenting, analyzing, and adjudicating a disability case according to our regulations. Wherever possible, we reuse data to limit the

need to re-enter information. eCAT and eBB are designed to pull in and display information entered from various sources. We designed these electronic tools to improve accuracy and consistency in the disability evaluation process. Additionally, our tool “How MI Doing?” gives adjudicators extensive information about the reasons their cases were subsequently remanded and allows them to view their performance in relation to the average of other ALJs in the office, region, and Nation. Currently, we are developing training modules for each of the 170 bases for remands that eventually will be linked to this tool.

11. The new partnership between the Social Security Administration and Kaiser Permanente will electronically transmit complete medical records of Kaiser Permanente patients to the agency with appropriate consent. What are your views on the impacts health information technology will have on the disability process?

Health IT has enormous potential. Providers and our agency spend considerable time trying to track down, copy, and mail medical records. The use of Health IT will dramatically improve the speed, accuracy, and efficiency of this process, reducing the expense of making a disability decision for both the medical community and taxpayers while improving service to the public.

On an annual basis, we send more than 15 million requests for medical records to healthcare providers—and we count on those providers to take time from their busy practices to respond. This mostly paper-based, manual workload is a time-consuming part of the disability process. By fully automating the process for requesting and obtaining electronic medical records, we can receive medical records within a matter of minutes as opposed to days, weeks, or months.

In addition, electronic records lend themselves to computerized analysis, which alerts disability examiners of an impairment that may meet our medical criteria. We look forward to the standardization of electronic records because that will give us other opportunities to provide decisional support for examiners. It will also help us collect data that may influence our policies and training.

Unfortunately, we must wait for Health IT to become the standard before we can truly realize its potential. In FY 2012 (through July), only about 16,500, or .11 percent, of our 15 million requests for medical evidence utilized Health IT. We now can quickly obtain electronic medical records from 14 organizations, which continue to expand their use of Health IT and add facilities. We estimate receiving an additional 10 percent of electronic medical records each year. We are excited that Kaiser Permanente has agreed to help us move this needle.

Currently, the average time for initial disability decisions is 21 percent lower in cases with electronic medical evidence obtained through Health IT. In fact, we decided 3 percent of those cases within 48 hours.

12. Social Security's policy clearly states that the substantial gainful activity earnings criteria is not applied to applicants who are in the military and who continue to receive active duty pay. I have heard that despite the agency's efforts to educate staff about this policy, members of the military are sometimes still denied disability benefits on the basis of earnings. Please describe the efforts you have taken to date to educate the field office staff, State Disability Determination Services, and ALJs regarding this policy. Given that the policy is still being incorrectly applied, what steps do you plan to take?

We apply the substantial gainful activity (SGA) criteria to all disability cases, including military cases. When evaluating for SGA, we take into consideration that a member of the military may continue to receive active duty pay but may not be able to perform job duties. We remind our staff that it is not appropriate to evaluate SGA under the earnings guidelines alone. Instead, we use additional criteria to evaluate the level and type of work activity performed by a service member receiving treatment, working in a designated therapy program, or on limited duty. We regret that our employees sometimes fail to correctly apply our policy.

The following policy guidance materials educate our field offices, State DDSs, and our hearing offices regarding this issue:

- “Evaluating Military Wages in the Trial Work Period (TWP).” This policy reminder includes guidance on properly evaluating earnings and determining TWP months when a claimant is receiving Title II benefits and military pay.
- “Evaluating Internships in Wounded Warrior Cases to Determine TWP.” This policy reminder includes instructions for correctly applying TWP service months and reminders on evaluating work activity for military service personnel who continue to receive full pay while recuperating from injuries.
- “Interim Processing Instructions for Incentive Therapy and Compensated Work Therapy (CWT) Programs for Title II Benefits,” which clarifies the exclusion of income received while veterans are participating in these programs from the definition of wages and provides guidelines for evaluating CWT and Incentive Therapy program income for SGA and TWP.
- “Processing Wounded Warrior claims.” These reminders covered a wide range of policy areas, including information addressing military pay and SGA.
- “Evaluating Military Pay.” This training video focuses on SGA and TWP determinations for military personnel who may still be receiving full military pay. We also produced a second training video to provide Military Service Casualty/Wounded Warrior case interviewing and claims handling reminders to our field office employees. The video specifically addresses developing SGA.

We also developed a checklist for use in wounded warrior disability claims. The checklist includes reminders to fully develop and evaluate work activity since military personnel may continue to receive active duty pay although their job duties have changed.

We have an expedited policy that applies to military service members claiming disability that occurred on or after October 1, 2001 while on active duty status. We flag these cases as having military casualty or wounded warrior case involvement. This flag assures priority status. We have developed training materials to explain this policy.

Enclosures