



624 Chestnut Ridge Road
Kings Mountain, NC 28086
fryely@aol.com

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The Honorable Sam Johnson, Chair
Subcommittee on Social Security
U.S. House of Representatives
Longworth House Office Building
Washington, D.C. 20515

Dear Congressman Johnson,

This is in response to your July 17, 2012 letter in which you request that the Association of Administrative Law Judges respond to various issues regarding the disability adjudicatory system at the Social Security Administration. The role of the federal administrative judiciary to insure due process to litigants and to bring justice to the American people is as vital and important today as it was when these administrative judicial positions were created with the enactment of the Administrative Procedure Act in 1946. Please accept our appreciation for the opportunity to address the questions you raise.

The responses set forth below are in the numerical order as presented in your July 17 letter. Please note, however, that there are two “number five” questions in your letter; thus, our reply includes two “number five” responses.

Your questions reflect the fundamental importance of evaluating whether a new direction for disability adjudication is warranted. The members of the Association of Administrative Law Judges (AALJ) are keenly aware of the critical nature of your inquiry on behalf of the Social Security Subcommittee as affecting the potential course of such adjudications. My responses, made after deliberation with my colleagues – who are learned jurists with long and distinguished careers, as federal administrative law judges, former state judges, and in some cases, former federal judges as well as former attorneys with exemplary careers in private and corporate practice as well as government and military service – are intended as objective responses to your questions. We do not seek to further our own interests to the exclusion of what the “right” thing is that we must do. Our response to these critical questions focuses on what we believe is required to insure justice and due process for the American people. We recognize that good people – people who have the best interests of the American people in their hearts – who work in many different positions, whether they be legislators, judges, administrators, lawyers and representatives in private practice or government service, must all come together as a ‘brain trust’ of invaluable experience and insight, and in so doing, strive to achieve a lasting solution to the issues before us, as did the framers of the Administrative Procedure Act.

Our responses, which follow in detail below, are not intended to stake out political positions or stand as challenges. Instead, we offer what we hope are answers which shed light on the pathway before us and that will provoke meaningful discussion.

We ask that you consider our responses in the spirit in which they are offered. This is not a contest between ‘bureaucrats’ and judges and should not be a question of control or even of political persuasion, but of what is ‘right’ in contemplation of our collective history and our ideals as Americans. In responding, we invoke this high standard. The Constitution yet stands as our guiding light, a shining beacon once thought shrouded in the days before the passage of the Administrative Procedure Act. We are all in this together; and nothing less than the hopes, dreams and ideals of the American people are at stake.

Question One.

1. One suggested solution to improve the disability process is to hire Social Security Judges who are Administrative Judges, like those on the Appeals Council, at the Veterans Administration and at the Merit System Protection Board. Another solution is to change the Social Security Act so that the Social Security Administration (SSA) can hire Administrative Law Judges directly, with term limits and then give the Social Security Administration the authority to discipline them. What do you think about these options and are there any other options you would suggest?

Response

Reading this question, one might reasonably infer that a question is being raised as to whether the administrative law judges are the problem. If so, then we must proceed to identify the nature of ‘the problem’ and ask whether the alternatives posed in your question as potential solutions effectively address the true nature of ‘the problem.’ Your question squarely assumes that the current adjudicatory system has at its core a personnel problem as opposed to a problem of entitlement standards, civil procedure or a problem in the underlying jurisprudence.

In our view, ‘the problem’ is not one of judicial personnel. As you recognized in your opening statement at the hearing on July 11, 2011 on the “Role of Social Security Administrative Law Judges” “many, if not most ALJs are conscientious, hardworking people who process their dockets efficiently while giving each claimant the full attention he or she deserves.” I would add this further caveat, for it is not simply “many judges” who so act, but the overwhelming majority of all administrative law judges appointed to the Social Security Administration are “conscientious, hardworking people” and history has shown this to be case for literally decades. For example, the GAO Report of April 27, 2010, entitled, “*Management of Disability Claims Workload Will Require Comprehensive Planning*” the statement to this Subcommittee is that the Social Security Administration’s planned “productivity” goals for administrative law judges stood at 570 case decisions per year. These goals were prefaced by the following statistics: In fiscal year 2008 the number of pending claims stood at some 760,000 nationally. The stated goal was to reduce that number to 446,000 “by the end of fiscal year 2013.” Despite the widespread economic downturn beginning in 2008, which led to a significant increase in disability filings, the Social Security Administration announced in a March 2010 news release “*that it had reduced the number of pending hearings-level cases to 697,437 – the lowest number since June 2005.*”

Interestingly, the increase in dispositions of cases did not wholly or even in any significant measure depend upon a simple increase in the number of judges; for even the appointment of an increased number of judges in 2009 did not see these new judges come to full productivity for many months after their training; and certainly not in sufficient time to affect statistics in March 2010. The import of this is a straightforward realization that the March 2010 announcement reflects a shouldering of the burden by the *then-existing* cadre of administrative law judges, who responded to the mandate for increased numerical production. And, while serious legal questions remain as to whether such a pace can or should be sustained; and whether, as the GAO Report of April 27, 2010 points out, there would be an adverse effect on “the accuracy and quality of ALJ decisions themselves,” the fact is, the cadre of administrative law judges did respond, and have continued to respond, with increased productivity.

Given sustained productivity increases there does not appear to be a widespread systemic ‘problem’ regarding judicial personnel and productivity such that there should be a change in the type of decision maker. Indeed, as noted, the Social Security Administration has regularly increased the number of administrative law judges over time – a simple fact which is in stark opposition to eliminating judges and the call for their replacement with a different type of decision maker.

I have, however, answered only part of your question. I agree with your observation in July 2011 that the judicial conduct evinced by the circumstances in the Huntington, West Virginia, Hearing Office reasonably gives one pause for thought. However, as is evident from my foregoing response, this circumstance is not the norm and in no way reflects the ideals, commitment and professionalism of the cadre of administrative law judges who serve within the Social Security Administration. To paraphrase an old saying, “one bad apple should not spoil the barrel.”

The Huntington scenario was limited to one judge and reflects a failure on several levels. While it may posit the ‘hard case’ because it arguably demonstrates a lack of accountability by an administrative law judge, such is not and cannot be the whole story. No judge functions in a vacuum despite the assertions that administrative law judges are “unaccountable.” The Huntington example is not, nor, if history is any teacher, will it be the norm for judicial decision making in Social Security’s cadre of administrative law judges. If anything, it appears from what we know that case assignment procedures, among other things, were potentially compromised in that instance – a procedural deficit which arguably should have been addressed by management in that office. Further, the administrative law judges in that office brought the facts of this unfortunate situation to the attention of the highest levels of the agency, yet nothing was done **until years later** when the story appeared on the front page of a national newspaper. Thus, it is not the administrative law judges who are unaccountable.

Overwhelming decisional data since the inception of the disability program reflect even-handed decision making by Social Security administrative law judges. Indeed, the United States Supreme Court in *Richardson v. Perales*, 402 U.S. 389, 410; 91 S. Ct. 1420; 28 L. Ed. 2d 842 (1971) concluded that the disability adjudicatory system was fair and then working well, noting “[t]he 44.2% reversal rate for all federal disability hearings in cases where the state agency does not grant benefits” and concluding that such data reflected a fundamentally fair adjudicatory process. That this number has crept upwards – in the claimant’s favor – in the ensuing three decades is not an indication of any change in due process so much as it is a reflection that unlike in 1971, where only 19% of all claimants were represented by counsel, now more than 80% are so represented. The Social Security administrative law judge remains now, as then, a fundamentally fair decision-maker. So, while an established mechanism for judicial discipline stands ready if needed, such that the agency may proceed with discipline through the Merit System Protection Board, history has shown that there has been little

call for such action as the vast majority of administrative law judges have shown themselves to be dedicated, hardworking persons of integrity.

Should We Amend the Social Security and Administrative Procedure Acts?

The imposition of term limits is consistent with appointment of various Article I judges in the federal courts. Magistrate Judges serve an 8-year term; while Bankruptcy Judges serve a 14-year term. Other Article I special courts are also term limited. However, amendment of the Social Security and Administrative Procedure Acts to impose term limits and direct discipline raises two distinct issues.

First, the Article I judges in the federal court system who serve under term limits also receive enhanced pension benefits. These benefits are the trade off for term limits. Therefore, these Article I judges are not similarly situated with federal administrative law judges who receive no special pension benefits. Further, the reappointment of an Article I judge is subject to approval by the federal judiciary, not by Agency bureaucrats who may wish to influence the decisional outcome of judges who are subject to their power of reappointment. This evil was a significant factor which led the visionary Congress in 1946 to pass the Administrative Procedure Act. However, before the AALJ could take a position on term appointments we would have to know and understand the details of any proposed legislation. For example, we would likely oppose appointments which place judges under the control of bureaucrats and we are convinced that an overwhelming majority of Americans would also oppose such a system.

Second, *amendment of either the Social Security Act or Administrative Procedure Act* to allow the agency to engage in direct discipline of administrative law judges undermines the legislative intent inherent in the creation of the Hearing Examiner, now Administrative Law Judge. *See, e.g., "ADMINISTRATIVE PROCEDURE ACT, Proceedings in the House of Representatives May 24 and 25, 1946 and Proceedings in the Senate of the United States March 12 and May 27, 1946."* http://www.justice.gov/jmd/ls/legislative_histories/pl79-404/proceedings-05-1946.pdf.

The Administrative Law Judge position was created as a semi-independent actor to assure the American people of a full, fair and complete hearing when challenging Executive branch agency action. Even-handed treatment by an impartial, independent decision maker is a critical and inviolable hallmark of the Administrative Procedure Act.

As discussed below, amendment of the Social Security or Administrative Procedure Act to allow imposition of discipline by the agency tied to productivity, quotas or even decisional outcomes, erodes fundamental dictates of due process. We stand opposed to such amendments as due process and justice cannot be achieved without an independent administrative judiciary as provided for in the Administrative Procedure Act. Moreover, as recounted above, the issue at the heart of the question now before us is the disability *process* and not whether there should be a change in judicial personnel. Disability claimants should not have their cases heard by inferior hearing officers in a decidedly inferior system controlled by bureaucrats and political appointees. That is not justice and that is not the American way.

Administrative Judges

You ask whether the suggested solution "to improve the disability process" is to hire Social Security Judges who are administrative judges. Administrative judges are not appointed under the aegis of the

Administrative Procedure Act, but are, instead, directly hired by the agency, and are, therefore, subject to performance evaluations, to the imposition of performance quotas, to the imposition of decisional outcome and discipline at the whim of the agency. Would adoption of these measures “improve the disability process?” We submit that it would not.

First, there is no inherent improvement of the disability process *per se* by employing administrative judges, as opposed to appointing, judges. The ability to more quickly discipline judges, to impose quotas or otherwise evaluate performance does not correlate with an increase in case dispositions. The high profile “outlier” at the far ends of the bell curve whose actions unfortunately garner significant public scrutiny, does not define the work standard of the vast majority of administrative law judges who now serve the American people. **Again, the core issue here is the *process*, not the personnel.**

The question, therefore, is what measures should be taken to update, revise and replace a 1950’s non-adversarial disability appeals process, often termed the “Three Hat” jurisprudence, with a 21st century jurisprudence designed to address the realities of modern disability proceedings? The single most radical change between then and now is the presence, in more than 80% of all hearings, of a claimant’s lawyer or representative.

Second, imposing quotas ignores the varied complexity of the claims being adjudicated and would clearly violate the Administrative Procedure Act. In *Social Security Administration v. Goodman*, 19 M.S.P.R. 321 (1984), the Social Security Administration sought to remove a judge whose dispositions were less than half the national average, effectively attempting to enforce a quota. The Merit Systems Protection Board found that “the SSA’s evidence that the ALJ’s case dispositions were half the national average was not enough to show unacceptably low productivity “[i]n the absence of evidence demonstrating the validity of using its statistics to measure comparative productivity.” The board reasoned that “SSA cases were not fungible and that SSA’s comparable statistics did not take into sufficient account the differences among the different types of cases.” *Id.* at p. 331. An unanswered question is to what extent has there been damage to justice and due process by the arbitrary imposition of apparent quotas on judges by the current SSA bureaucracy.

In testimony before the Subcommittee for Consumers of the Committee on Commerce, Science, and Transportation in 1980, Reuben Lotner, an ALJ with the Federal Communications Commission, foretold the later MSPB finding. He testified that statistical studies have little or no value in analyzing judges’ productivity. “He reasoned that unless a study accounts for factors such as the nature of the case, the number and complexity of the issues involved, the length of prehearing proceedings, evidentiary and post hearing proceedings, and the problems encountered in writing the decision, the study arguably has little meaning as a real measure of a judge’s workload.” *See*, Administrative Law Judge System: Hearings Before the Subcommittee For Consumers of the Committee On Commerce, Science, and Transp., 96th Cong., 2nd Sess. 67 (1980) (statement of Judge Reuben Lozner, ALJ, FCC), as cited by L. Hope O’Keeffe, Note, “Administrative Law Judges, Performance Evaluations, and Production Standards: Judicial Independence Versus Employee Accountability,” 54 GEO. WASH. L. REV. 591,592 (1986).

This same reasoning would apply whether the judge is appointed under the Administrative Procedure Act or serves as an employee of the agency. The critical difference is, in the latter case, the judge who fails to meet his or her quota because he or she has devoted the time necessary to properly adjudicate more complex claims, would be penalized, potentially receiving poor performance reviews. Successful imposition of such penalties would eventually result in an erosion of due process as judges

consider the fate of colleagues and in an effort to avoid a similar fate, devote less than the time required to properly address more complex cases. The result would be inadequate, incorrect and potentially unfair decisions issued to accommodate a quota or a poor performance review or adverse discipline.

Tying a judge's compensation to performance reviews and quotas can only lead to an erosion of due process. For example, consider the case of an individual who claims to be disabled beginning at a remote point in time, perhaps a decade or more in the past. Such cases often involve testimony of a medical doctor or a psychologist or both, as well as a vocational expert. Social Security Ruling 83-20 contemplates just such an undertaking. Common sense, however, dictates that such proceedings will – by definition – require more time, effort and thought than a simpler case and which would not require the use of such experts. If an administrative judge were to fail to employ such experts in an effort to avoid a time-consuming hearing, and thus allowing him or her to meet the quota, who suffers?

I am not in a position to evaluate the use of administrative judges at the MSPB and at the Veterans Administration, except to note that the claims in each of these agencies involve those who have been or who are presently in government service. By definition, the scope of the claims is restricted, based in some measure on the claimant's status either as a civilian government employee or military member.

Social Security benefits, whether they are retirement or disability benefits, potentially affect every American, regardless of their status. As such, a fundamental question must be asked, independent of the consideration of quotas – what defines 'due process?' Is due process a fungible, tangible element able to be negotiated as part of a quota? We respectfully submit that it is not and that it must be assessed independently, on a case-by-case basis by an impartial decision maker who is able to address the issues raised by complex claims without fear of loss of income or even his or her job?

In summary, the real issue in your first question is not whether the right personnel are present – for that is a given at this point, but whether the underlying jurisprudence, and by extension the processes flowing from such jurisprudence is tailored to meet the demands of the current disability caseload. As discussed in response to your second question, we believe a fundamental change in jurisprudence should be considered, transforming the 1950's decisional model from "the judge wears-three-hats" non-adversarial undertaking, to an adversarial model, in recognition of the overwhelming percentage of claimants who are now represented by attorneys or specialized representatives.

Finally, it may be appropriate to consider changes in the definition of disability. Various suggestions have been made when exploring the definition of disability, but no one can ignore the fact that the definition of Social Security disability has been markedly expanded over the past fifty-eight (58) years since the inception of the program. Careful, creative alternatives could be explored as part of any top-to-bottom review of the disability determination and appeals process.

Some of the ideas that have been publicly debated include the following:

- Childhood disability awards without a concomitant monetary benefit;
- Fundamentally changing adult disability, such that adults under age 50 must demonstrate entitlement based only on the Listings;

- Phased or partial disability awards for adults which provide only an insurance benefit during the first two years, followed by an application for full disability provided the individual has shown compliance with medical or other prescribed treatment; and
- Giving judges the authority to award term benefits for a set duration.

Question Two.

2. In your testimony you discussed your proposal for adversarial hearings. Please provide a cost estimate.

Response

The AALJ does not have access to budgetary information. However, we believe that significant funding should come from redirecting resources from the ODAR regional offices. The ODAR regional offices are redundant as SSA already has regional offices across the country.

To be sure, there has been criticism of fundamentally changing the jurisprudence underlying the disability appeals process by balancing the presence of claimant's counsel with government representation, primarily because of cost. Those who question such a change estimate that the cost of doing so would be "fatal." See, "Reply" by Professor Richard Pierce, "What We Should Do About Social Security Disability," Jeffrey S. Wolfe, Dale D. Glendenning, Regulation, Spring 2012.

In this I suggest they are wrong. There has been a mirror image reversal in the percentage of claimants who are now represented in appeals before administrative law judges. Between 1966 and 1968 only 19% of claimants were represented. See, Robert M. Viles, "The Social Security Administration versus the Lawyers . . . and Poor People Too, Part II," 40 Miss. L. J. 25, 75 (1968). So, in the slightly more than 80% of hearings held then, no lawyer appeared – either for the claimant or for the government. This was in keeping with the drafters' original expectations in the 1935 Social Security Act, which was entirely silent on the question of representation. *Id.* Put simply, the 1935 jurisprudence did not envision any lawyers in Social Security proceedings. Is it any wonder that this jurisprudence is now so different from that which guides hearings of every other sort in American legal proceedings? Even when representation was acknowledged in the 1939 amendments to the Social Security Act, the expectation was as before: *'While it is not contemplated that the services of an agent or attorney will be necessary in presenting the vast majority of claims, the experience of other agencies would indicate that where such services are performed the fees charged therefore should be subject to regulation by the [Social Security] Board [now, Administration], and it is so provided.'* *Id.* No change was made in the underlying jurisprudence and this same 1930's mindset pervades a 21st century system in which the overwhelming numbers of claimants are now, in fact, represented.

Of approximately 560,000 appeals hearings in 2006, 439,000 claimants were represented by an attorney or a specialized non-attorney "representative." See, Social Security Administration website: www.socialsecurity.gov/oig/ADOBEPDF/A-12-07-17057.pdf. This means that in approximately 80% of administrative appeals hearings an attorney or non-attorney representative appeared, advocating for the claimant. No government lawyer or representative was present. Now, more than 700,000 administrative appeals are pending before federal administrative law judges. See *Eliminating the Social Security Disability Backlog: Joint Hearing Before the Subcommittee on Social Security and*

Subcommittee on Income Security and Family Support of the H. Comm. on Ways and Means, 111th Cong. 134(2009), <http://www.gpo.gov/fdsys/pkg/CHRG-111hrg50764/pdf/CHRG111hrg50764.pdf> (statement of the Honorable Ronald G. Bernoski, President of the Association of Administrative Law Judges) (“Towering over SSA is a backlog of over 765,000 cases claiming disability benefits under Title II and Title XVI of the Social Security Act.”) Still, no lawyer or representative appears for the Government.

The presence of claimant’s counsel in more than 80% of all hearings introduces a fundamental change upon the underlying jurisprudence. The need for one of the “Three Hats” is minimized in the presence of claimant’s counsel as counsel should adequately prepare the claimant’s case. Inclusion of a government representative would eliminate the need for the second “Hat”, returning the judge to his or her traditional role as a neutral, impartial decision maker; no longer charged with the primary responsibility of developing the evidence for either the government or the claimant. Indeed, the duty to develop the record would shift to the agency, now represented by counsel. This would reduce a significant portion of the current ODAR workload, as judges by and through ODAR personnel would have a far reduced need to obtain documents or compile records for the benefit of the claimant. Of course, in those cases where the claimant remains unrepresented, it is clear that the judge must discharge the responsibilities of each of the ‘Three Hats’ jurisprudence model.

Nevertheless, the presence of government counsel in an adversarial setting would immediately accomplish two critical things. First, claimant’s counsel would have someone with whom they can speak in hopes of resolving the claim before a hearing. Second, as a result, the number of hearings actually held would drop dramatically, reducing the backlog as claims would be resolved by agreement with the claimant’s attorney or representative.

The presence of government counsel would enable claimant’s counsel to address the question of potential resolution at the outset, thus reducing the time necessary for a judge to dispose of the matter, and which would potentially eliminate a vast number of pending claims well before judicial disposition under the current jurisprudence. Put simply, this means that a vast number of cases, given the current national reversal rate of approximately 60%, would never go to hearing, thus dramatically reducing the current caseload. This is consistent with the function of the adversarial system in the courts, where only 10 – 15% of all cases are actually tried to conclusion. In the courts, 85 – 90% of all cases are resolved between counsel before trial. The presence of government representation would work a similar result in the disability appeals process. A fundamental change in jurisprudence would not necessarily require an overwhelming number of new lawyers, but could draw heavily upon the current cadre of attorneys and senior attorneys currently employed by the agency.

Addressing the process through to conclusion, if a significant percentage of cases were resolved by agreement between counsel without hearing by submission of an agreed upon order to the administrative law judge for approval, the work now performed by attorneys and senior attorneys in the hearing office, would largely be done by claimant’s counsel – that is, preparation of the decision awarding benefits. The number of “decision-writers” needed in the hearing office would decline, with agreed upon orders, much as is now seen in many state Worker’s Compensation systems. The net effect would be that a number of cases, each of which are now tried to conclusion in hearings, would be resolved without a hearing, by agreement, leaving only the most difficult or most highly contested cases for resolution following a hearing by an administrative law judge. This is consistent with the adversarial system. In outlining such a system, I am keenly aware of the duty of government counsel –

not to win, but to do justice – to do the right thing, because he or she represents the people of the United States, and has as his or her primary calling, the duty to ensure that the right result is obtained.

In summary, and as above noted, I cannot directly answer your question as to cost, as the AALJ does not have access to agency budgetary information. I have, however, sketched out the functional attributes of an adversarial system – one in which government counsel serves in his or her traditional role, representing the interests of the people of the United States and working to ensure that justice is done. With the passage of enforceable rules of procedure, I anticipate far fewer hearings and more cases decided at the earliest stage with a concomitant reduction in the amount of time it takes for a claimant to receive a decision.

As a result of this fundamental jurisprudential change, the pending backlog will drop and only those cases which are truly challenged will be tried in hearings. So, while I cannot provide exact numbers, it seems clear from our long experience with the Anglo-American system of adversarial jurisprudence that a significant number of cases that are now heard in a hearing will be decided instead by submission of an agreed order, reducing the number hearings, changing ODAR's fundamental role and concomitantly, reducing costs.

Question 3

3. The Supreme Court has noted Congress's original intent to keep the Social Security disability process informal and "understandable to the layman claimant, not...stiff and comfortable only for the trained attorney." The statute charges the Commissioner with making "findings of fact and a decision on evidence adduced at the hearing" with ALJs in the role of making sure this statutory requirement is met (as did hearing examiners before them). In your testimony, you state that ALJs should play a different role and the hearing should adversarial. Please explain what concerns you have with ALJs helping claimant develop the record at the hearing.

Response

In the 1960's, only 19% of claimants were represented.¹ By 2006, claimants were represented in approximately 80% of hearings before ALJs.² While the disability process may have started out as informal for the benefit of the unrepresented claimant, there is little need for such informality now.

ALJs are willing to help claimants and their lawyers/representatives develop the record, although this takes time away from the judge and seems imprudent given that representatives collect a fee if the appeal is reversed by an ALJ. The problem is that under current law, claimants and their lawyers/representatives naturally are only interested in developing evidence favorable to the claimants' side of the case. They have no interest, nor any legal obligation, to fully and fairly develop all the evidence, including adverse evidence, because that will endanger claimants' interest in receiving benefits. In fact, claimants and their lawyers/representatives have every incentive to try to prevent full development of all the evidence, including adverse evidence, because to do so would endanger their benefits/fees. Further, if the Judge attempts to fully and fairly develop all the evidence, the Judge's efforts are often met with blistering objections and accusations that the Judge is biased, prejudiced,

¹ Robert M. Viles, *"The Social Security Administration Versus the Lawyers ... and Poor People Too, Part II,"* 40 Miss.L.J. 25, 75 (1968).

² Social Security Office of Inspector General, Audit Report A-12-7-17057; September 2007.

anti-claimant, or “trying to find a way” to deny the claim. Claimants and their lawyers have also filed complaints in Federal Court and with the Commissioner claiming that some Judges do not reverse enough cases. Currently, our hearings are, to a great extent, adversarial and the American taxpayers deserve a government representative who will advocate for a full and fair hearing. Further, as is true with civil and criminal litigation, with full and fair development of the facts before the hearing, the two sides may often be able to settle the case with no need for a hearing, thus resolving the case faster and conserving precious judicial resources. Given the volume of claims pending at the hearing level, judicial time and energy should not be spent developing the record.

Question 4

4. During calendar year 2011, the SSA withheld over \$1.4 billion from past due benefits to pay representatives their fees. Beyond what ALJs are currently charged with doing, what other ways can Social Security employees help claimants more and minimize the need for representatives in the first place?

Response

Social Security disability hearings are different from what we think of as “normal” courtroom litigation. The Social Security Administration’s disability hearings are based on an inquisitorial model, which are non-adversarial meaning that the government is not represented.³ At these hearings, as noted *supra*, claimants are represented by attorneys and non-attorney representatives in approximately 80% of the hearings, with the remaining 20% of claimants appearing *pro se*. Because it is an inquisitorial system, attorney “advocacy” plays a much smaller role than it does in a traditional adversarial system, where competing parties are attempting to influence the Judge or jury to rule in their respective favors. Instead, the representative’s role at a Social Security disability hearing often focuses on two areas: ensuring that favorable medical evidence is submitted and explaining the disability process to the claimant.

Perhaps the most important role for a claimant’s representative in a Social Security disability hearing is to ensure that all medical evidence is submitted. As there is no attorney for the Agency present at the hearing, there is no opposing party to introduce evidence contrary to the application for disability benefits. The Agency relies on the claimant and his or her representative for information from healthcare providers whom the claimant has seen.⁴ This disparity of knowledge could create a huge potential problem as the claimant, and/or his or her representative, can be selective as to what medical or vocational evidence is submitted at the hearing.⁵ As the average claimant’s lifetime award is valued at about \$300,000, with the representative being paid either twenty-five percent of the back benefits or \$6,000, whichever is less,⁶ only if the claimant is awarded benefits, there is a strong incentive for both

³Robert E. Rains, *Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance with Federal Rules on Production of Adverse Evidence*, 92 CORNELL L. REV. 363, 364 (2007) (citations omitted).

⁴POMS, *supra* note 52, DI 2250.006, *Requesting Evidence – General* (1)(a), (May 31, 2012) (*discussing* how that the Social Security Administration employees should develop the evidence in the case file from all sources identified by the claimant or that can be discovered from the records of the health care providers identified by the claimant).

⁵Rains, *supra* note 1, at 363.

⁶74 Fed. Reg. 6080 (Feb. 4, 2009).

the representative and the claimant to not disclose adverse vocational or medical information to the Social Security Administration.⁷

One way to increase the likelihood that all medical evidence has been submitted, is through the use of automated electronic systems such as MEGAHIT. Launched in August 23, 2008, the system allows for healthcare providers to electronically submit all medical records for an individual to the Social Security Administration electronically. These records, termed Health Information Technology Medical Evidence of Record (HITMER), are then displayed in the Social Security's electronic claimant folder. Additionally, the Agency has a statutory requirement to ensure that the claimant's medical evidence is complete. When required, agency staff members would continue to request medical information on behalf of claimants to ensure this statutory requirement is met.

The second primary role of a claimant's representative, serving as a source of information regarding the Social Security disability programs, could be performed by an Agency "ombudsman." The Social Security Act already requires of its Medicare programs a "Medicare Beneficiary Ombudsman" to help individuals who are appealing decisions or determinations with regard to Medicare benefits,⁸ by providing information regarding the Medicare programs. Likewise, Ombudsmen could be provided to assist Social Security disability claimants with information and resources to assist with their claims. While the individual would not "represent" the claimant, they nevertheless could provide invaluable assistance in educating claimants about the Social Security disability programs. While there would be a cost attendant to providing such an ombudsman, the potential cost-savings that could result in disability applications that fail to meet minimum statutory requirements (for example, a disability that lasts less than twelve months) not being filed could justify the expenditure.

Question 5

5. What ideas do you have for better development of the record? How will these ideas assist the claimants getting the right decision as early in the process as possible?

Response

Full development of the record, including consultative examinations, must occur at the initial stage of the application process. DDS should require claimants to submit a printout from drug providers of all medications taken within two years of the date of the disability application is filed. With a complete record, the DDS can make a more informed decision at the earliest time in the process, oftentimes obviating the need for an appeal.

The regulations should be changed to impose deadlines and consequences for failing to timely provide a complete list of treatment providers and signed authorizations for SSA/ODAR to obtain medical records from them.

At the ALJ level, a staff member should confer with the claimant and representative to obtain updated medical authorizations, to obtain an updated list of medical treatment and to narrow the medical

⁷Damian Paletta & Dionne Searcey, *Two Lawyers Strike Gold in U.S. Disability System*, THE WALL ST. J., Dec. 22, 2011, available at <http://online.wsj.com/article/SB10001424052970203518404577096632862007046.html>.

⁸42 U.S.C. 1395(c) (2012).

conditions and issues, with binding stipulations entered into. Once this is done, the staff can obtain updated medical records, unless the regulations can be changed so as to require the claimant/representative to submit all medical records, including those adverse to the claimant's position.

Psychological tests such as MMPI-II and other commonly recognized tools should be used to fully assess a claimant's condition. Although the MMPI-II was recognized as an acceptable tool for personality assessment purposes, [See Listing 12.00 (D) (5), (6), (7), (8) and (9)], the Agency has recently prohibited such testing. The reliability of these tools has been well established and they have been used in treatment environments as well as in the civil and criminal areas for decades. When one considers the fact that the value of each paid claim averages \$300,000, the cost of \$500 to administer an MMPI-II or other psychological test to obtain information to insure that a correct decision is made is wholly warranted and financially justified.

Question 5

5. The structure of the Social Security hearing is fairly loose and designed to accommodate the claimant. What procedural challenges does this informal structure create for ALJs?

Response

The lack of procedural rules and the fact that the government is not represented at the hearing, places the entire burden on the judge of ensuring that the record is complete and that the correct decision is rendered, who is deprived of the appropriate tools to perform this job.

There are no consequences to the claimant/representative for failing to provide medical documentation, as it is the Judge's ultimate responsibility to ensure the completeness of the record.

There are no consequences to the claimant/representative for failing to provide adverse medical information with regard to the claim.

Similarly, there are no consequences to the claimant/representative when medical documentation is not provided in a timely manner. Hundreds of pages of records can be submitted at the hearing, necessitating a cursory review by the Judge prior to the hearing (with the possibility that some vital information may be missed) or, if a more thorough review is needed, significantly delaying the rest of the day's hearings. In some instances, a postponement may be necessary to permit the judge to review and evaluate the additional evidence.

Given current regulations, the claimant/representative may submit documentary evidence at any stage of the process – before the hearing, on the day thereof, after the hearing, or after the Judge has issued a decision. In essence, the record can be developed throughout the process of the administrative adjudication. Because there is no incentive for the claimant/representative to submit evidence as early in the process as possible, new documents are continually added to the record at each stage, necessitating a new review. This is not an efficient way to operate.

Every other Federal Agency with an adjudicatory component has rules for conducting its business. Given the importance of the decisions and the cost involved, SSA should as well.

Question 6

6. When a claimant requests a new hearing date, what impact does that have on the ALJ's workload? Does the same ALJ preside over the new hearing?

Response

Having to reschedule hearings creates inefficiencies and delays, both for the Judge and the hearing staff. Scheduling a hearing is time consuming; it requires contacting representatives, experts and hearing monitors for availability and insuring that an appropriate hearing room is available. When a claimant cancels a hearing, the whole scheduling process must commence again. As important, the cancelled time slot is lost forever as is the staff time that was devoted to scheduling the case. The Judge, who has prepared for the hearing by reviewing the file and having the case fresh in his or her mind, must again review the file prior to the rescheduled date as the rescheduled date may well be months later. The same Judge presides over the new hearing, unless the hearing is part of a travel docket, in which case the claim may be transferred to the next Judge who travels to that location.

Question 7

7. Why do claimants need four levels of appeal? Why is the record not developed more fully earlier in the process?

Response

The four levels of appeal are:

- (1) Reconsideration [conducted by Disability Determination Services (DDS) staff], a "paper" review of the evidence supporting the initial denial.
- (2) Administrative Law Judge (ALJ) Hearing, the claimant's opportunity to appear before a Judge and plead his or her case.
- (3) Appeals Council (AC) Review, an intra-Agency "paper" review of the record, and
- (4) Federal District Court review, judicial review of the documentary record.

In our view, four levels of appeal are unnecessary. The DDS Reconsideration level of appeal could be eliminated without great harm to the system⁹, although this would initially exacerbate the hearing backlog by more quickly moving the cases to the hearing level.

The Appeals Council (AC) level of appeal could also be eliminated without destroying the system, as the AC is another "paper" review of evidence, i.e., there is no in-person contact between the decision maker and the claimant. SSA could use the significant amount of money saved by eliminating the AC, by transferring its personnel to ODAR to assist at the hearing level. This assistance would allow Judges sufficient time and resources to issue correct decisions and provide for attorney advisers to

⁹ The reconsideration step rarely results in the DDS determination being overruled.

defend ALJ decisions in Federal District Court. Current procedure permits a claimant or representative to initiate a very costly administrative appellate review by the Appeals Council with a one-line sentence on a pre-printed form. The number of claimant appeals to Federal District Court would likely be 1/20 of the number of Petitions for Review (PFR) submitted to the Appeals Council.

As to the issue of early development of the case, under the present system the DDS is under time constraints to move the case. They simply need more guidance on how to thoroughly develop a case and the time to follow that guidance. Further, claimants are not provided with access to the information collected by the DDS so that they do not know if some of their medical evidence has not been obtained. Representatives (both attorney and non-attorney) are generally not involved in the disability process until the claimant's appeal has been referred for hearing. So, until the hearing stage, it is not always apparent that all medical documentation has not been obtained.

Because of the lag between the times the DDS has made a decision and the case is scheduled for hearing before a Judge, the claimant is likely to have accrued additional medical evidence. All of this evidence must be obtained to complete the record.

Question 8

8. What are the pros and cons of closing the record either just before the hearing or at the close of the hearing before an ALJ issues a decision?

Response

The record (i.e., all documentary evidence that an ALJ will consider in making a decision) should be closed *before* the hearing commences, and claimants and representatives should be required to submit all documentary evidence at least five (5) business days prior to the scheduled date of hearing.

A Judge's ability to make a correct decision and prepare accurate decision writing instructions is at its most effective when the documentary evidence is complete and the facts of the case are fresh and can be recalled in detail. When relevant documentary evidence is received within a reasonable time period prior to the hearing, a Judge will have the opportunity to review and consider the same prior to the hearing. If there are expert witnesses scheduled to testify, they, too, often must review these documents. When a Judge has an opportunity to review and consider all extant documentary evidence prior to conducting a hearing, examination of the claimant and witness will be informed and thus, more effective. Such a process would substantially enhance a Judge's ability to correctly decide the case.

Allowing submission of additional documentary evidence at a hearing, as it is the case now, delays commencement of the hearing and may impede effective examination of witnesses because of inadequate time to review the same and an inability to ask pertinent questions or explore inconsistencies in the record. Routinely in most hearing offices, representatives and claimants submit records shortly (hours or minutes) before a hearing is to commence or at the hearing itself, despite the fact that ODAR is now scheduling cases between 30 to 90 days in advance of hearing; this is more than sufficient time for a representative or claimant to obtain and submit evidence well before the hearing date.

Current regulations authorize submission of evidence at anytime during the pendency of the case. This includes submission before, during, and after a hearing; it also permits submission of evidence after a

Judge has rendered a decision. Documentary evidence with written arguments may be submitted to the Appeals Council (AC) post hearing; the AC has authority to return the case to a hearing office for another hearing based upon newly submitted evidence. While this practice may be consistent with the “non-adversarial” concept of SSA disability adjudication, it is at best ineffective if Judges are to issue final decisions after a hearing and at worst inefficient and uneconomical and delays the claimant’s decision.

The absence of procedural rules requiring claimants/representatives to submit documentary evidence within any specified time period prior to a hearing clearly impedes the timely processing of cases, resulting in a waste of resources, time, material and money. Procedural rules should be adopted requiring, *inter alia*, (a) representatives, the vast majority of whom are licensed attorneys, and claimants to fully develop the record prior to a hearing; (b) certify that all relevant and material documentary evidence has been submitted; and (c) certify that the case is ready for hearing; and, (d) identify the impairments alleged as severe and cite the evidence which supports a finding of disability. With regard to (c), procedures should be changed to condition scheduling a hearing upon certification that the record is complete and the case is ready to be heard. Processing time should not be tabulated to include delays occasioned by the claimant or representative.

Question 9

9. You have testified that the “grid” often forces an ALJ to award benefits even when there are jobs in the economy the claimant could perform. You also stated that using the “grid” to evaluate disability is out of date and should be revised or eliminated. Do you know how many claimant received benefits because of these outdated guidelines?

Response

The AALJ does not have access to information regarding the number of claimants who have received benefits because of the outdated grids; however, the Social Security Administration does have the requested data.

The Congressional Budget Office (CBO) issued a report earlier this month that addressed this issue. It estimated the budgetary impact of a modest shift (2 years) upwards in the age ranges for granting disability insurance benefits to those with certain limitations, known as vocational factors, and the elimination of the vocational guidelines for those over 60 and under 47 years of age. The CBO determined that the number of disability insurance recipients would fall by about 50,000 in 2022, with expenditures falling by \$1 billion in that year. The CBO did not estimate the effect of this change on the Medicare, Medicaid or SSI programs. The full discussion is found on page 14 of the CBO publication.¹⁰

The issue of modernizing the SSA’s disability programs is not limited to the grids. After a recent study, the U.S. Government Accountability Office (GAO) found that six of the fourteen categories of medical conditions addressed in SSA medical Listings had not been revised by SSA in from 19 to 33

¹⁰ U.S. Congressional Budget Office, “Policy Options for the Social Security Disability Insurance Program,” http://www.cbo.gov/sites/default/files/cbofiles/attachments/43421-DisabilityInsurance_print.pdf; July 16, 2017.

years.¹¹ Two of these Listing categories--mental and musculoskeletal which account for almost 65 percent of individuals receiving disability benefits--have not been comprehensively revised for 27 years. Listings reflecting the current state of medical knowledge would be of immeasurable assistance to MEs, CEs and everyone else involved in the disability determination process.

Question 10

10. One of the benefits the union has acquired for ALJs at the SSA is Flexi-Place, which allows them to work at home. Under the Collective Bargaining Agreement, how many days a month are ALJs allowed to work at home? When an ALJ is working at home, he or she isn't holding hearings. What kind of work can an ALJ do from home? Does this work contribute to overall productivity? Why is it important for ALJs to be able to work at home?

Response

Flexi-place is the Social Security Administration's name for telework. In order to promote efficiency and reduce traffic congestion and pollution, the Federal Government has been encouraging initiatives for its employees to work at home for decades.¹² In 2010, Congress passed the Telework Enhancement Act to further these aims.¹³

Under our agreement with SSA, Judges have a right to work at home four days a month. Additional days may be granted at the discretion of the Hearing Office Chief Administrative Law Judge.

Most of a Judge's work is not performed in the courtroom. Prior to the hearing, a Judge must read all of the evidence in the file, give directions to the staff to obtain additional information and documents, determine if expert witnesses are needed, issue subpoenas when required, and draft interrogatories, if necessary. After the hearing, the Judge must hold the record open for any additional evidence, review that evidence when it is submitted, determine if anything else is needed to complete the record (interrogatories or a supplemental hearing), draft decisional instructions covering all issues and all of the claimant's medical conditions for a decision writer, review and edit the draft decision when it has been prepared to insure that it is legally sufficient, and review and sign the final decision. The hearing itself generally takes from 15% to 35% of the time necessary to properly adjudicate a case. The rest of the work on a case must all be done outside of the courtroom. This is work that can be done efficiently and effectively from a telework location.

In fact, there are fewer distractions at home and more is accomplished there, as this is work that requires uninterrupted concentration by the Judge. Moreover, our collective bargaining agreement requires that duties performed on telework must be performed with the quality, consistency and in the same manner as in the office; this means that productivity must not fall. In this regard, the Judges have increased their productivity in every year since having the option of telework. In a November 2010

¹¹ U.S. Government Accountability Office, "Modernizing SSA Disability Programs: Progress Made, but Key Efforts Warrant More Management Focus" (GAO-12-420); <http://www.gao.gov/assets/600/591701.pdf>; June 19, 2012

¹² Wendell Joice, Ph.D., "The Evolution of Telework in the Federal Government", Office of Governmentwide Policy, U.S. General Services Administration; <http://www.gsa.gov/graphics/ogp/Evolutiontelework.doc>; February 2000.

¹³ 5 U.S.C Chapter 65; <http://www.gpo.gov/fdsys/pkg/BILLS-111hr1722enr/pdf/BILLS-111hr1722enr.pdf>

address to a joint Committee of the Senate, the Commissioner himself reported that from FY 2007 to FY 2010, Judge increased their productivity “by an astounding average of nearly 3.7 percent per year.”

Again, thank you for the opportunity to provide this response. Should you need any additional information, I would be happy to provide it.

Respectfully,

Randy Frye,
President