

**Before the House Committee on Ways and Means
Subcommittee on Social Security
June 27, 2012 Hearing
“Securing the Future of the Disability Insurance Program”
Responses to Questions for the Record
by Richard J. Pierce, Jr.**

I was asked to respond to a series of questions related to my testimony before the subcommittee. The questions and responses follow.

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 Systems Protection Board. Another solution is to change the Social Security Act so that the Social Security Administration (SSA) can hire Administrative Law Judges (ALJ) directly, with term limits, and then give the SSA the authority to discipline them. The ALJ union believes that these hearings should be adversarial. What do you think about these options and are there other options you would suggest?

Answer:

The change suggested in the first sentence would have several advantages. First, it would reduce the costs of the decision making process, since Administrative Judges usually have significantly lower salaries than ALJs. Second, it would allow SSA to evaluate the performance of the decision makers and to implement quality control programs that are designed to ensure that decisions are made in a reasonably consistent manner and in a manner that is consistent with the Social Security Act.

The change suggested in the second sentence would have advantages similar to the advantages of the change suggested in the first sentence except that it would not reduce the costs of the decision making process. To be effective, such a change would have to give SSA authority broader than the power to “discipline” ALJs. Any such statutory amendment should confer on SSA the power to evaluate the performance of ALJs and to implement quality controls that are designed to ensure that decisions are made in a reasonably consistent manner and in a manner that is consistent with the statutory criteria.

The change to adversarial hearings suggested by the ALJ union would have severe adverse effects. It would increase significantly the length of the average hearing and increase significantly the cost of the decision making process by requiring SSA to hire a large number of staff trial attorneys and additional ALJs. It is important to remember that any increase in decision making costs reduces the funds available to SSA to provide benefits to disabled people. Thus, a change to adversarial hearings would constitute a transfer of funds from beneficiaries of the disability program to lawyers employed by SSA both as ALJs and as staff trial attorneys.

Other options that would yield major advantages include two I proposed in my testimony—eliminate appeals to ALJs and/or close the record at an earlier stage in the decision making process.

2. In your testimony, you refer to the incentive representatives may have to drag out cases since their fees are tied to the percentage of the claimant's past due benefits. What would happen if legal fees were fixed at some nominal amount?

Answer:

Such a change would reduce significantly the incentive to delay the decision making process and the incentive to sandbag by deferring submission of potentially important evidence until late in the decision making process. If such a change in the fees of representatives was coupled with a statutory amendment that authorizes SSA to close the record at an early point in the decision making process, as suggested in question 6, such a change would replace the incentive to delay and to sandbag with a powerful incentive to obtain and to submit relevant evidence at an early stage in the decision making process.

3. During calendar year 2011, the SSA withheld over \$1.4 billion from past due benefits to pay representatives their fees. What can Social Security employees do to help claimants minimize the need for representatives in the first place?

Answer:

Social Security employees can improve communication to claimants and prospective claimants of information about the kinds of evidence a claimant needs to produce to support a claim of disability. In addition, Social Security employees and their counterparts who are involved in the decision making process at the state level can establish and/or improve the process through which they provide individualized advice and guidance to claimants and prospective claimants.

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

Answer:

As I stated in my testimony, I do not believe that claimants need four levels of appeal. The record is not developed more fully earlier in the process partly because claimants and their representatives have no incentive to do so, as discussed in my answers to questions 2 and 6, and partly because claimants do not have enough information about the evidence they need to submit, as discussed in my answers to questions 3 and 7.

5. What are your views on the efficacy and fairness of video hearings?

Answer: I believe that video hearings can be effective and fair if they are conducted in accordance with the recommendations adopted by the Administrative Conference of the United States on June 17, 2011.

6. 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?

Answer:

The advantages of closing the record at a relatively early point in the decision making process include replacement of the present incentives to delay and to sandbag with incentives to obtain and submit all relevant evidence at an early stage in the process and resulting reductions in decision making costs. The disadvantage is the risk that meritorious claims will be denied because claimants do not submit relevant evidence in a timely manner. That risk can be reduced by improving the process of communicating with and advising claimants and prospective claimants as discussed in answer to question 3.

7. What more can be done to ensure that deserving claims are awarded as early in the process as possible, specifically at the State Disability Determination Services level?

Answer:

I do not have sufficient knowledge of the State Disability Determination process to make specific proposals for changes. I believe that it is crucial for the Subcommittee and SSA to study that process in detail and to make such changes as are required to maximize the probability that accurate decisions are made based on a complete record at an early stage in the decision making process.

Thank you for providing me the opportunity to expand on my testimony by answering these questions.

Respectfully Submitted,

Richard J. Pierce, Jr.

Lyle T. Alverson Professor of Law
George Washington University