

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-111hhrg50764/pdf/CHRG111hhrg50764.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.