FOURTH IN A HEARING SERIES ON SECURING THE FUTURE OF THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM

HEARING

BEFORE THE

SUBCOMMITTEE ON SOCIAL SECURITY

OF THE

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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FOURTH IN A HEARING SERIES ON SECURING THE FUTURE OF THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM

WEDNESDAY, JUNE 27, 2012

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON SOCIAL SECURITY,
Washington, DC.

The subcommittee met, pursuant to call, at 2:00 p.m., in Room B–318, Rayburn House Office Building, the Honorable Sam Johnson [Chairman of the Subcommittee] presiding.

[The advisory of the hearing follows:]

HEARING ADVISORY

Chairman Johnson Announces the Fourth in a Hearing Series on Securing the Future of the Social Security Disability Insurance Program

Wednesday, June 27, 2012

U.S. Congressman Sam Johnson (R–TX), Chairman of the House Committee on Ways and Means Subcommittee on Social Security today announced the fourth hearing in the series entitled, "Securing the Future of the Disability Insurance Program." This hearing will focus on the disability appeals process. **The hearing will take place on Wednesday, June 27, 2012, in room B–318 Rayburn House Office Building, beginning at 2:00 p.m.**

In view of the limited time available to hear witnesses, oral testimony at this hearing will be from invited witnesses only. However, any individual or organization not scheduled for an oral appearance may submit a written statement for consideration by the Subcommittee and for inclusion in the printed record of the hearing.

BACKGROUND:

Applications for disability benefits have reached historic levels resulting from more women in the workforce, the recession and slow recovery, and baby boomers reaching their disability-prone years. The 2012 Annual Report of the Board of Trustees projects that the Disability Insurance (DI) program will be unable to pay full benefits beginning in 2016.

In fiscal year (FY) 2011, the examiners at the State Disability Determination Services (DDS) made an initial determination on almost 3.3 million disability claims. According to the Social Security Administration's (SSA) longitudinal data, 79 percent of all disability benefit awards are made at the DDS.

Claims that are not approved by the DDS, whether at the initial or reconsideration level, can be appealed to the hearing level, where the claimant has the opportunity for a face-to-face hearing before an Administrative Law Judge (ALJ). In FY 2011, 662,765 hearing requests were completed with 58 percent of requests awarded, 29 percent denied, and 13 percent dismissed. The average waiting time for an ALJ decision is 354 days. Today, 77 percent of ALJs are meeting the agency's annual productivity expectation of 500–700 cases. Currently, individual ALJ award rates vary from 1 to 99 percent.

Individuals whose claims are denied by an ALJ may appeal to the SSA's Appeals Council (AC), which is the final step in the administrative process. In addition, the AC may on its own motion review an ALJ decision. In FY 2011, the AC made 103,681 decisions, awarding benefits in 2 percent of its cases, denying benefits in 74 percent, and remanding 21 percent back to the ALJ level. Individuals who are denied at the AC may pursue an appeal through the federal district court, the federal court of appeals, and the U.S. Supreme Court. In FY 2011, the federal courts decided 13,271 cases, awarding benefits in 3 percent of cases, denying benefits in 42 percent, and remanding back to the SSA 46 percent of cases. Of those remanded cases, 67 percent were subsequently allowed by an ALJ.

Further, over years the federal circuit courts have issued decisions that conflict with the SSA's interpretation of the Social Security Act (Act). In response, the SSA may appeal the decision or implement the circuit court's decision through an acquiescence ruling. While such rulings allow cases to be treated similarly within the circuit, the result is that claimants are treated differently in different circuits. There are currently 42 acquiescence rulings in effect.

Under the Act, the ALJ decides on behalf of the Commissioner whether benefits are due, and is required to apply the SSA's regulations and policies; under the Administrative Procedure Act (APA), the ALJ is an independent decision-maker whose

work product cannot be questioned. This tension between the Act and the APA makes program oversight and quality review of outcomes difficult for the agency to assess and manage.

In announcing the hearing, Social Security Subcommittee Chairman Sam Johnson (R–TX) said, **"Those sidelined from working because of a disability must be able to count on a fair and timely hearing by a Social Security judge. Americans need to know that the same rules apply to everyone. This hearing will tell us whether the appeals process we have today works and if not, what changes ought to be made."**

FOCUS OF THE HEARING:

The hearing will focus on the Social Security appeals process including its history, legal requirements, and the degree to which the current process provides fair, accurate, and consistent outcomes while balancing the needs of claimants and taxpayers.

DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:

Please Note: Any person(s) and/or organization(s) wishing to submit for the hearing record must follow the appropriate link on the hearing page of the Committee website and complete the informational forms. From the Committee homepage, *http://waysandmeans.house.gov*, select "Hearings." Select the hearing for which you would like to submit, and click on the link entitled, "Click here to provide a submission for the record." Once you have followed the online instructions, submit all requested information. ATTACH your submission as a Word or WordPerfect document, in compliance with the formatting requirements listed below, **by the close of business on Wednesday, July 11, 2012**. Finally, please note that due to the change in House mail policy, the U.S. Capitol Police will refuse sealed-package deliveries to all House Office Buildings. For questions, or if you encounter technical problems, please call (202) 225–1721 or (202) 225–3625.

FORMATTING REQUIREMENTS:

The Committee relies on electronic submissions for printing the official hearing record. As always, submissions will be included in the record according to the discretion of the Committee. The Committee will not alter the content of your submission, but we reserve the right to format it according to our guidelines. Any submission provided to the Committee by a witness, any supplementary materials submitted for the printed record, and any written comments in response to a request for written comments must conform to the guidelines listed below. Any submission or supplementary item not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All submissions and supplementary materials must be provided in Word or WordPerfect format and MUST NOT exceed a total of 10 pages, including attachments. Witnesses and submitters are advised that the Committee relies on electronic submissions for printing the official hearing record.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. All submissions must include a list of all clients, persons and/or organizations on whose behalf the witness appears. A supplemental sheet must accompany each submission listing the name, company, address, telephone, and fax numbers of each witness.

The Committee seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202–225–1721 or 202–226–3411 TTD/TTY in advance of the event (four business days notice is requested). Questions with regard to special accommodation needs in general (including availability of Committee materials in alternative formats) may be directed to the Committee as noted above.

Note: All Committee advisories and news releases are available on the World Wide Web at *http://www.waysandmeans.house.gov/*.

Chairman JOHNSON. Welcome to the committee. Good afternoon. It is our fourth hearing on Securing the Future of the Social Security Disability Insurance Program. Today we will focus on how Social Security disability claims are appealed and whether the process works as well as claimants and taxpayers have a right to expect.

In earlier hearings, we have highlighted the explosive growth of the program. At a time when the number of workers paying into the system has increased nearly 70 percent between 1970 and 2011, the number of people receiving disability benefits has increased by over 300 percent, from 2.6 million people to 10.4 million. By 2021, the number of beneficiaries will exceed 12 million. By then, total benefits paid will reach $196 billion. That is a 52 percent increase over the $129 billion paid in benefits over the last year.

Besides the overall workforce, more women in the workforce, aging of the baby boomers into their disability-prone years, and relaxed eligibility requirements have all contributed to this growth.

The continued growth is putting a real strain on Social Security disability. As we heard from the Public Trustees at our hearing last week, without Congressional action the Disability Insurance Trust Fund will only be able to pay 79 percent of benefits beginning 2016, just 4 years away. The path we are on is unsustainable.

Further, disability applications have spiked even higher than expected due to recession and the snail's pace recovery, reaching an unprecedented 3.3 million last year. Resulting appeals have further increased pressure on an appeals process that is struggling to keep up.

Americans are also paying more for Social Security to administer its programs. Costs are up 68 percent compared to 10 years ago, and last year administering disability programs cost nearly $7 billion, two-thirds of Social Security's operating budget of $11.4 billion.

Turning to the appeals process, those whose initial claims for benefits have been denied have the right to appeal through four levels of appeal: Reconsideration by the State agency, hearing by an Administrative Law Judge, review by the Appeals Council, and Federal court review. An open record allows claimants to add new evidence to the file through every step of the appeals process. Even though about 79 percent of all awards are made at the State Disability Determination Services, according to Social Security, last year about 860,000 claimants filed appeals to appear before an Administrative Law Judge.

Americans are rightly paying attention to the hearing process. Even though claimants are waiting close to a year on average for a decision, almost 12 percent of ALJs decide 200 or fewer cases per year. This is in spite of the fact that Social Security has asked these judges to do 500 to 700 cases annually. Also, the decisions of so-called outlier judges who deny or allow most of the cases they hear can't be questioned.

The claimants' representatives are part of a billion dollar-plus a year industry encouraging appeals and making a living by collecting their fees from benefits awarded their clients. Further, when cases are appealed to Federal courts, the courts have taken

it upon themselves to reinterpret what the Social Security Act requires, resulting in varying policies applied in different parts of the country in what is supposed to be a national program.

Now, I know some of my colleagues believe that all of these problems can be solved if we will just give Social Security more money. In fact, over the last 6 years, funds have been poured into the hearing level for ALJ hiring, staff hiring, new offices, and technology fixes. And while service has improved, it seems success is always just a little further down the road and depends on even more resources.

Yet, in these tough fiscal times, Social Security has done well. Its operating budget increased this year compared to last year despite a 1.5 percent decrease in the discretionary spending cap. In fact, while Social Security is subject to the same long-term domestic spending limit enacted in the Budget Control Act, that same bill authorized an additional $11 billion over the budget caps for Social Security to increase continuing eligibility reviews in its disability programs. There were 95 Democrats, including the minority leader and the ranking member of the full committee, who supported the bill.

Understanding why the appeals process works the way it does is just as important as making sure that those who deserve benefits receive them. So let us ask the hard questions to determine if we can fundamentally do better. Why do over 20 percent of the claimants who are ultimately awarded benefits have to wait at least a year for a decision? How can benefits be awarded to those who qualify as soon in the process as possible, and why does Social Security channel so many of its resources to the most expensive step in the appeals process, even when the cost to process a case before an ALJ is more than twice what it costs a State agency to make the same decision?

Why aren't claimants' attorneys doing a better job of submitting all of the evidence earlier? Should representatives be able to encourage a client who has waited months for a hearing to wait even longer so they will get a judge who is more likely to award them benefits? And why do some judges hold hearings for 10 minutes and others for 2 hours? And some of them don't even hold them.

Today, we have a number of outstanding witnesses before us, including the Commissioner who has done more to engage the attention of Congress on a wide array of needed improvements to the appeals process than any other Commissioner in decades. So, let us take a good look at all sides of this process and find out what we can do better for everyone. I want to thank you again for being here.

And I now recognize the ranking member, Mr. Becerra, for his opening remarks.

Mr. BECERRA. Mr. Chairman, thank you very much, and thanks for calling this fourth hearing in our series focusing on Social Security's Disability Insurance Program. Before we delve into the details of Social Security's appeal process, I want to first take a step back and look at the big picture.

Social Security is vital to millions of severely disabled American workers and their families. The benefits are modest, averaging just over $13,000 a year or about $35 a day for a typical disabled work-

er. These benefits, however, are a lifeline for the more than half of the disability insurance recipients, the DI recipients, who would live in poverty without Social Security.

DI recipients are only a small fraction of the most vulnerable Americans with disabilities and serious illness. The eligibility criteria to qualify for Social Security disability are tough. Social Security's appeals process helps ensure that all workers who are eligible and who have earned DI receive it.

The disability application process begins with the State Disability Determination Service, or DDS, which makes a decision on the application. The DDS is an important part of the disability determination process, but alone, it is not always sufficient to ensure that individuals get the disability benefits that they have earned. The decision about whether an individual is disabled enough to qualify for benefits can be a difficult one.

In addition, there can be complicating factors in individual cases. For example, some people with disabilities do not have access to medical care and therefore they do not have the medical records needed to prove their case. Recognizing these realities and challenges, Congress and the Social Security Administration created an appeals process to help ensure that everyone who meets the eligibility requirements gets the benefits that they have earned.

The current appeals process has a number of strengths, and of course there is always room for improvement. It is designed to be fair and accessible. It is non-adversarial so judges can focus on fact finding and applying the law. It is impartial because independent judges take a fresh look at the case, and their decisions are not based on meeting certain allowances or denial rates, and it is face to face, and that may be the first time that a person who is claiming disability may see an evaluator face to face and actually be able to talk to that particular evaluator.

We are going to hear a number of ideas today about how to improve the appeals process. I will be evaluating those different ideas using a very simple standard. Will it ensure that Americans who are eligible for benefits are able to get them or will it create procedural hurdles or other obstacles that would deny access to benefits that they have otherwise earned?

Budget decisions by Congress also affect whether Social Security is fair to hardworking Americans and their families. We have seen how the Social Security Administration can reduce waiting times when Congress provides adequate funding for SSA to process claims quickly and accurately. In 2008, waiting times for appeals hearings were at an all-time high of 535 days of waiting. In fiscal year 2009 and 2010, Congress, then under Democratic control, provided SSA with a total of $2.2 billion worth of new resources to reduce backlogs, and waiting times dropped to 340 days. Still a lot, but compared to 535 days, far better.

This current Congress has cut the Social Security Administration's budget in 2011 and 2012. With less funding and fewer employees, it is inevitable that hardworking Americans will have to wait longer to receive the benefits that they have earned. We are already starting to see the negative effects of these budget cuts. Waiting times for initial benefit decisions are on the rise and are likely to go from 111 days to over 130 days by the end of this year.

Waiting times for appeals hearings have crept up from the 340 days in October of 2011 to the current wait time of 350 days. So once again, we are heading in the wrong direction when it comes to Americans getting the benefits they have earned.

SSA is now facing an even bigger cut under what is called sequestration, the automatic cuts scheduled by the Budget Control Act passed last year. Although Social Security benefits are protected, under sequestration if Congress doesn't act soon, SSA's operating budget will be cut by more than $1 billion on January 2 even though 100 percent of the costs of administering Social Security is paid for by workers through their Social Security taxes that they pay and put into the trust fund. A billion dollar cut to SSA would translate into 40 days where SSA offices would be closed over the course of a year. No one should be surprised if these harsh cuts to SSA's budget damage Social Security's well-earned reputation and undercut SSA's ability to continue to capably serve Americans as it has for over 77 years.

Mr. Chairman, the most immediate threat to the Social Security disability appeals process is the budget cuts that would prevent appeals from being heard at all. I hope we can work together to make sure Americans get the Social Security benefits that they have earned and deserved, and I today look forward to our witnesses' comments on how the appeals process itself can be improved.

And with that, I yield back.

Chairman JOHNSON. Thank you. As is customary, any member is welcome to submit a statement for the record. And before we move to our testimony, I want to remind our witnesses to please limit your oral statement to 5 minutes. However, without objection, all the written testimony will be made part of the hearing record.

We have two panels today. The first one is a single witness, Commissioner of Social Security, Michael J. Astrue. Welcome, Commissioner. You may proceed.

STATEMENT OF THE HONORABLE MICHAEL J. ASTRUE, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION

Mr. ASTRUE. Thank you, Mr. Chairman.

Mr. Chairman, Ranking Member Becerra, Members of the Subcommittee. During my first week as Commissioner in February of 2007, I testified before this subcommittee about the hearings backlog. To put it mildly, you were extremely upset about the delays your constituents faced while waiting for a disability decision. The backlogs had steadily risen throughout the decade, and the plan I inherited to fix those backlogs was draining resources and making the problem worse.

At that time, over 63,000 people had been waiting over 1,000 days for their hearing, some of them were waiting as long as 1,400 days. We were failing the public.

Rather than devise yet another signature initiative that would not stand the test of time, we went back to the basics. We developed an operational plan that focused on the nitty-gritty work of truly managing the unprecedented hearings workload. We made hundreds of incremental changes, using video more widely, improving information technology, simplifying regulations, standardizing business processes, and establishing ALJ productivity expectations

to name just a few. We also committed the resources our employees needed to get this work done and done right.

This plan has worked. Average processing time which stood at 532 days in August of 2008 steadily declined for more than 3 years, reaching its lowest point of 340 days in October 2011.

In 2007, filing rates had been stable for some time. So looking at the number of pending cases was a reasonable, if imperfect, method to measure progress. As the recession hit and the number of requests for a hearing dramatically increased, we steadily improved our performance when measured by average processing time, the best metric for tracking progress, particularly in times when filings were changing rapidly.

Like a line in a store, the customer's experience depends not on how many other people are waiting, but on how quickly we help them. In August 2008, people waited an average of 532 days. Today, that is about 350 days.

Average processing times also became more uniform around the country. The most dramatic improvements have occurred in the most backlogged offices. Average processing time in Atlanta North dropped from 900 days to 351 days. Oak Park, Michigan, improved from 764 days to 254 days. Columbus, Ohio, went from 881 days to 351 days. Currently, no office in the country has an average processing time greater than 475 days. Fifteen offices have hit our ultimate goal of 270 days or less, and many others are getting close.

These numbers are even more impressive because we have given priority to the oldest cases which are generally the most complex and time consuming. Five years ago, we defined an aged case as one waiting over 1,000 days for a decision. Through the steady work of our employees, we now define an aged case as one taking over 725 days to complete. Next fiscal year, our management goal is to raise the bar on ourselves again by focusing on completing all cases over 675 days. This emphasis on eliminating aged cases increases average processing times. So we also look ahead to see how long people in the queue have been waiting for a hearing. Today, that number is just 208 days, and we are hopeful that figure will drop again next year. By contrast, the average wait was 324 days at the beginning of fiscal year 2007.

Despite our employees' hard work, the progress in addressing our hearings backlog is happening more slowly than the public deserves. If we are not adequately funded and we cannot timely hire enough qualified ALJs and support staff, our progress will erode. We have already had to make decisions that have slowed progress such as canceling our plans to open eight new hearing offices in Alabama, California, Indiana, Michigan, Minnesota, Montana, New York, and Texas.

Amid huge economic and budgetary unpredictability, we have stayed focused on eliminating the causes of your moral outrage in 2007. Now we need Congress to enact the President's budget request so that we can meet our commitments to the American public.

Thank you, and I will be happy to answer any questions you may have.

[The prepared statement of Mr. Astrue follows:]

HEARING BEFORE

THE COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON SOCIAL SECURITY

UNITED STATES HOUSE OF REPRESENTATIVES

JUNE 27, 2012

STATEMENT
OF
MICHAEL J. ASTRUE
COMMISSIONER
SOCIAL SECURITY ADMINISTRATION

Chairman Johnson, Ranking Member Becerra, and Members of the Subcommittee:

Thank you for this opportunity to discuss our appeals process, which is one of the largest administrative adjudicative systems in the world. We are committed to continuing to improve this process for our disability claimants. Today, I will provide an overview of the appeals process, update you on our efforts to eliminate the hearings backlog, and discuss the President's fiscal year (FY) 2013 funding request.

General Administrative Review Process

The Supreme Court has accurately described our administrative process as "unusually protective" of the claimant.[1] Indeed, we strive to ensure that we make the correct decision as early in the process as possible, so that a person who truly needs disability benefits receives them in a timely manner. In most cases, we decide claims for benefits using an administrative review process that consists of four levels: (1) initial determination; (2) reconsideration determination; (3) hearing; and (4) appeals.[2] At each level, the decision-maker bases his or her decisions on provisions in the Social Security Act (the Act) and regulations.

In most States, a team consisting of a State disability examiner and a State agency medical or psychological consultant makes an initial determination at the first level. The Act requires this initial determination.[3] A claimant who is dissatisfied with the initial determination may request reconsideration, which is performed by another State agency team.

A claimant who is dissatisfied with the reconsidered determination may request a hearing.[4] The Act requires us to give a claimant "reasonable notice and opportunity for a hearing with respect to such decision."[5] Under our regulations, an administrative law judge (ALJ) conducts a *de novo* hearing unless the claimant waives the right to appear in person, or the ALJ can issue a fully favorable decision without a hearing; in these cases, the ALJ issues a decision based solely on the written record.[6] If the claimant is dissatisfied with the ALJ's decision, he or she may request Appeals Council (AC) review.[7] The Act does not require administrative review of an ALJ's decision. If the AC issues a decision, it becomes our final decision. If the AC decides not to review the ALJ's decision, the ALJ's decision becomes our final decision. A claimant may request judicial review of our final decision in Federal district court.[8]

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[1] *Heckler v. Day*, 467 U.S. 104 (1984).
[2] 20 C.F.R. §§ 404.900, 416.1400. My testimony focuses on disability determinations, but the review process generally applies to any appealable issue under the Social Security programs.
[3] Sections 205(b) and 1631(c)(1)(A) of the Act, 42 U.S.C. §§ 405(b), 1383(c)(1)(A).
[4] For disability claims, 10 States participate in a "prototype" test under 20 C.F.R. §§ 404.906, 416.1406. In these States, we eliminated the reconsideration step of the administrative review process. Claimants who are dissatisfied with the initial determinations on their disability cases may request a hearing before an ALJ. The 10 States participating in the prototype test are Alabama, Alaska, California (Los Angeles North and West Branches), Colorado, Louisiana, Michigan, Missouri, New Hampshire, New York, and Pennsylvania.
[5] Sections 205(b)(1), 1631(c)(1)(A) of the Act, 42 U.S.C. §§ 405(b)(1), 1383(c)(1)(A). A claimant has 60 days after the date he or she receives notice of the determination to request a hearing before an ALJ.
[6] 20 C.F.R. §§ 404.929, 416.1429.
[7] 20 C.F.R. §§ 404.967-404.968, 416.1467-416.1468.
[8] Sections 205(g), 1631(c)(3) of the Act, 42 U.S.C. §§ 405(g), 1383(c)(3).

The Administrative Appeals Process

Our administrative appeals process consists of three levels: reconsideration, hearing, and appeal. My testimony will focus primarily on the hearings and appeals process; however, I will first briefly describe the reconsideration level of review.

Reconsideration

The reconsideration stage is the first level of appeal in our disability claims process. A team consisting of a State agency disability examiner and a medical or psychological consultant, neither of whom were involved in making the initial determination, reviews the claimant's case.[9] If necessary, the team will request additional evidence or a new consultative examination.

The reconsideration determination is a thorough and independent examination of all evidence on record. The team is not bound by the determination made at the initial level.

If the claimant is dissatisfied with the reconsidered determination, the claimant has 60 days after the date he or she receives notice of the determination to request a hearing before an ALJ, unless we extend the deadline for good cause. A claimant may request an extension of time to file an appeal at every level of agency review and may request an extension of time to file a civil action in Federal court.

Hearings and Appeals Process

We have over 70 years of experience in administering the hearings and appeals process. Since the passage of the *Social Security Amendments of 1939* (1939 Amendments), the Act has required us to hold hearings to determine the rights of individuals to old-age and survivors' insurance benefits.

To hold the hearings required by the 1939 Amendments, we established the Office of the Appeals Council (OAC) in 1940. The OAC consisted of 12 "referees" and a Central Office staff.[10] The referees, who heard cases and issued decisions, were located in each of the then-12 regional offices across the country.[11] The Central Office consisted of a three-member AC and a consulting referee (whose role eventually developed into the Office of General Counsel). The Chairman of the AC also served as the head of the OAC. To promote uniformity and ensure correct decisions, the AC reviewed all referees' decisions. The 1939 Amendments allowed claimants to appeal our final decisions to Federal court.

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[9] A disability beneficiary who is appealing an initial-level determination that his or her impairment has medically ceased may request a disability hearing before a disability hearing officer at the reconsideration level.

[10] In August 1959, we changed the title of referee to "hearing examiner." In 1972, the Civil Service Commission changed this title to "Administrative Law Judge."

[11] We have increased our adjudicatory capacity to address rising workloads. By 1957, we had 75 referees. In 1973, our ALJ corps exceeded 500 judges for the first time. Currently, there are 1,472 judges in our ALJ corps.

After establishing the OAC, we changed the name of that component several times. Since 2006, we have called it the Office of Disability Adjudication and Review (ODAR). ODAR manages the hearings and AC levels of the administrative review process.

Over the years, the numbers of ALJs and hearing offices rapidly grew as the Social Security program grew. Recently, we added staff to help us meet growing demand and allow us to focus our resources on those parts of the country that need our services most. In addition, we have expanded the use of video hearings, opened five national hearing centers, and realigned the service areas of some of our offices. However, the essential attributes of the hearings and appeals process have remained essentially the same since 1940. When it established the hearings and appeals process in 1940, the Social Security Board sought to balance the need for accuracy and fairness to the claimant with the need to handle a large volume of claims in an expeditious manner.[12] Those twin goals still motivate us. As the Supreme Court has observed, the Social Security hearings system "must be fair – and it must work."[13]

Hearing Level

When a hearing office receives a request for a hearing from a claimant, the hearing office staff prepares a case file, assigns the case to an ALJ and schedules a hearing. The ALJ decides the case *de novo*, meaning that he or she is not bound by the determinations made at the initial and reconsideration levels. The ALJ reviews any new medical and other evidence that was not available to prior adjudicators. The ALJ will also consider a claimant's testimony and the testimony of medical and vocational experts called for the hearing. If a review of all of the evidence suggests that we can issue a decision that is fully favorable to the claimant without holding a hearing, an ALJ or attorney adjudicator may issue an on-the-record, fully favorable decision.[14] If an on-the-record decision is not possible, an ALJ holds a hearing.

As I have testified before this subcommittee previously, the *Administrative Procedure Act* (APA) contains provisions that ensure qualified decisional independence for our ALJs and places certain limits on the performance management of our ALJs. For example, by law ALJs are exempt from performance appraisals and cannot receive awards based on performance.[15] We support Congress' intent to ensure the integrity of the hearings process.[16] A key component of the

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[12] *Basic Provisions Adopted by the Social Security Board for the Hearing and Review of Old-Age and Survivors Insurance Claims*, at 4-5 (January 1940).

[13] *Richardson v. Perales*, 402 U.S. 389, 399 (1971).

[14] Under the Attorney Adjudicator program, our most experienced attorneys spend a portion of their time making on-the-record, disability decisions in cases where enough evidence exists to issue a fully favorable decision without waiting for a hearing. 20 C.F.R. §§ 404.942, 416.1442.

[15] 5 U.S.C. §4301. Although the APA prevents us from rating the performance of our ALJs, it does not preclude us from setting expectations for them. As the Court of Appeals for the Second Circuit has observed, "The setting of reasonable production goals, as opposed to fixed quotas, is not in itself a violation of the APA....[I]n view of the significant backlog of cases, it was not unreasonable to expect ALJs to perform at minimally acceptable levels of efficiency. Simple fairness to claimants awaiting benefits required no less." *Nash v. Bowen*, 869 F.2d 675, 680-681 (2d. Cir.), cert. denied, 493 U.S. 812 (1990). We currently set an expectation of 500 to 700 dispositions every year, or 42 to 58 dispositions a month.

[16] To ensure the integrity of the hearings process, we assign cases to ALJs in rotation. This procedure promotes fairness and reduces manipulation of judicial assignment.

integrity of our hearings process is that ALJs act as independent adjudicators — who fairly apply the standards in the Act and our regulations. We respect the qualified decisional independence that is integral to the ALJ's role as an independent adjudicator. Indeed, the Supreme Court has recognized that Congress modeled the APA on our hearings process.

In contrast to Federal court proceedings, our ALJ hearings are non-adversarial. Formal rules of evidence do not apply, and the agency is not represented.[17] At the hearing, the ALJ takes testimony under oath or affirmation. The claimant may elect to appear in-person at the hearing or consent to appear via video. The claimant may appoint a representative (either an attorney or non-attorney) who may submit evidence and arguments on the claimant's behalf, make statements about facts and law, and call witnesses to testify. The ALJ may call vocational and medical experts to offer opinion evidence, and the claimant or the claimant's representative may question these witnesses.

If, following the hearing, the ALJ believes that additional evidence is necessary, the ALJ may leave the record open and conduct additional post-hearing development; for example, the ALJ may order a consultative exam. Once the record is complete, the ALJ considers all of the evidence in the record and makes a decision. The ALJ decides the case based on a preponderance of the evidence in the administrative record. A claimant who is dissatisfied with the ALJ's decision generally has 60 days after he or she receives the decision to ask the AC to review the decision.

Appeals Council

Upon receiving a request for review, the AC evaluates the ALJ's decision, all of the evidence of record, including any new and material evidence that relates to the period on or before the date of the ALJ's decision, and any arguments the claimant or his or her representative submits. The AC may grant review of the ALJ's decision, or it may deny or dismiss a claimant's request for review. The AC will grant review in a case if there appears to be an abuse of discretion by the

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Along these lines, we now withhold the name of the ALJ assigned to a hearing. We have experienced some opposition to this practice. In *Lucero v. Astrue*, No. 12-cv-274-JB-LFG (D. N.M.), plaintiffs sought mandamus and injunctive relief that would have barred us from withholding the names of the ALJs assigned to the plaintiffs' cases. On May 4, 2012, the plaintiffs voluntarily withdrew their motion for a preliminary injunction. The district court entered a final judgment dismissing, without prejudice, all of plaintiffs' claims against us on May 18.
In its report accompanying the FY 2013 Labor-HHS appropriation bill, the Senate Appropriations Committee expressed its concern that our practice could have unintended consequences. The committee directed the agency to submit a report by November 1, 2012 on this issue. However, the committee also noted that attempts by claimant representatives to manipulate the hearing process to find favorable judges challenge the integrity of our process, and supported our goal of reducing this manipulation.

[17] During the 1980s, we tried to pilot an agency representative position at select hearing offices. However, a United States District Court held that the pilot violated the Act, intruded on ALJ independence, was contrary to congressional intent that the process be "fundamentally fair," and failed the constitutional requirements of due process. *Salling v. Bowen*, 641 F. Supp. 1046 (W.D. Va. 1986). We subsequently discontinued the pilot due to the testing interruptions caused by the *Salling* injunction and general fiscal constraints.
Congress originally supported the project; however, we experienced significant congressional opposition once the pilot began. For example, members of Congress introduced legislation to prohibit the adversarial involvement of any government representative in Social Security hearings, and 12 Members of Congress joined an *amicus* brief in the *Salling* case opposing the project.

ALJ; there is an error of law; the actions, findings, or conclusions of the ALJ are not supported by substantial evidence; or if there is a broad policy or procedural issue that may affect the general public interest.

If the AC grants a request for review, it may uphold part of the ALJ's decision, reverse all or part of the ALJ's decision, issue its own decision, remand the case to an ALJ, or dismiss the original hearing request. When it reviews a case, the AC considers all the evidence in the ALJ hearing record (as well as any new and material evidence), and when it issues its own decision, it bases the decision on a preponderance of the evidence.

If the claimant completes our administrative review process and is dissatisfied with our final decision, he or she may seek review of that final decision by filing a complaint in Federal district court. However, if the AC dismisses a claimant's request for review, he or she cannot appeal that dismissal.

We also rely on the AC to improve the quality of our hearing decisions. In September 2010, we established the Division of Quality (DQ) within the AC, in order to expand our quality assurance role and to help maintain appropriate stewardship of the Trust Fund. Currently, DQ reviews a statistically valid sample of un-appealed favorable ALJ hearing decisions before those decisions are effectuated (i.e., finalized). In FY 2011, DQ reviewed 3,692 partially and fully favorable decisions issued by ALJs and attorney adjudicators, and took action on about 22 percent, or 812, of those cases.[18]

DQ also conducts focused reviews on specific hearing offices, ALJs, representatives, doctors, etc.[19] ODAR identifies potential subjects for focused reviews from a variety of sources, including data collected through our systems, findings from pre-effectuation reviews, and internal and external referrals received from various sources regarding potential non-compliance with our regulations and policies. One way we use these reviews is to identify common errors in ALJ decisions. The results of these reviews show common errors to be failure to adequately develop the record, lack of supporting rationale, and improper evaluation of opinion evidence. Furthermore, we use the comprehensive data and analysis provided by DQ to provide feedback to other components on policy guidance and litigation issues.

Federal Level

If the AC makes a decision, it is our final decision. If the AC denies the claimant's request for review of the ALJ's decision, the ALJ's decision becomes our final decision. A claimant who wishes to appeal an AC decision or an AC denial of a request for review has 60 days after receipt of notice of the AC's action to file a complaint in Federal District Court.

In contrast to the ALJ hearing, Federal courts employ an adversarial process. In District Court, an attorney usually represents the claimant and attorneys from the United States Attorney's office or our Office of the General Counsel represent the Government. When we file our answer

[18] In those instances, the AC either remanded the case to the hearing office for further development or issued a decision that modified the hearing decision.
[19] Since these focused reviews are post-effectuation reviews, they do not change case outcomes.

to that complaint, we also file with the court a certified copy of the administrative record developed during our adjudication of the claim for benefits.

The Federal District Court considers two broad inquiries when reviewing one of our decisions: whether we correctly followed the Act and our regulations, and whether our decision is supported by substantial evidence of record. On the first inquiry – whether we have applied the correct law – the court typically will consider issues such as whether the ALJ applied the correct legal standard for evaluating the issues in the claim, such as the credibility of the claimant's testimony or the treating physician's opinion, and whether we followed the correct procedures.

On the second inquiry, the court will consider whether the factual evidence developed during the administrative proceedings supports our decision. The court does not review our findings of fact *de novo*, but rather, considers whether those findings are supported by substantial evidence. The Act prescribes the "substantial evidence" standard, which provides that, on judicial review of our decisions, our findings "as to any fact, if supported by substantial evidence, shall be conclusive." The Supreme Court has defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[20] The reviewing court will consider evidence that supports the ALJ's findings as well as evidence that detracts from the ALJ's decision. However, if the court finds there is conflicting evidence that could allow reasonable minds to differ as to the claimant's disability, and the ALJ's findings are reasonable interpretations of the evidence, the court must affirm the ALJ's findings of fact.

If, after reviewing the record as a whole, the court concludes that substantial evidence supports the ALJ's findings of fact and the ALJ applied the correct legal standards, the court will affirm our final decision. If the court finds either that we failed to follow the correct legal standards or that our findings of fact are not supported by substantial evidence, the court typically remands the case to us for further administrative proceedings, or in rare instances, reverses our final decision and finds the claimant eligible for benefits.

History of Hearing Workloads and Initiatives

We have made great strides in reducing the hearings backlog in recent years. To provide some context, I will sketch the history of our hearing workload and our prior attempts to manage its increases.

Hearing Workloads

When we established the hearings process in 1940, we designed it to handle a larger number of cases, relative to other hearing processes.[21] However, hearings originally constituted a small workload compared to today's numbers. In FY 2007, we received nearly 580,000 hearing requests; last fiscal year, we received over 859,000 hearing requests, which was a record number.

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[20] *Consolidated Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197 (1938).

[21] *Basic Provisions Adopted by the Social Security Board for the Hearing and Review of Old-Age and Survivors Insurance Claims*, at 4 (January 1940).

Legislative activity is one of the catalysts for this growth. Over time, Congress expanded the scope and reach of the Act, and these legislative changes resulted in increasing dockets. For example, the *Social Security Amendments of 1954* created the first operational Social Security disability program; it instituted the disability freeze for workers who met the law's definition of disability.[22] Due to this legislation, hearing requests increased from approximately 3,800 in 1955 to 8,000 in 1956. After the implementation of the *Social Security Amendments of 1972*, which created the Supplemental Security Income (SSI) program, and the *Black Lung Benefits Act of 1972*, hearing requests more than doubled from FY 1973 to 1975.[23]

As our workloads drove pending levels and processing times up, the courts took notice. In the 1970s, several Federal District Courts entered judgments in statewide class actions requiring us to hear cases in their States within specific timeframes.

Previous Initiatives

Over the years, we tried to find ways to meet the demand for hearings. For example, in 1975 we started our first decision-writing program. Under this program, staff attorneys wrote the ALJ decisions based on instructions they received from the judges.[24] By lessening the decision-writing burden for our ALJs, we enabled them to issue more decisions. While this change took hold, other well-intentioned initiatives have fallen short.

Disability Process Reengineering

In 1993, the agency established a task force to reengineer the disability claims process. The task force devised a plan "to dramatically improve the disability claim process," and the agency released this plan in September 1994.[25] As a part of this redesign, the plan contemplated two changes to the hearings and appeals level. First, the plan created a new position, the adjudication officer (AO). The AO would explain the hearings process to the claimant, conduct personal conferences, prepare claims, and schedule hearings. Moreover, the AO could allow the claim at any point prior to the hearing if sufficient evidence supported a favorable decision. The plan would also allow claimants unsatisfied with their hearing decisions to appeal them directly to Federal district court, rather than requesting AC review.

The plan included 83 initiatives. Interested parties criticized the scope and complexity of these initiatives. For example, in September 1996 the Government Accountability Office testified before this subcommittee that the number of complex initiatives would likely delay the plan's

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[22] We compute retirement benefits based on earnings; therefore, a disabled worker with a period of disability could have experienced reduced or no retirement benefits due to his or her lost earnings. The 1954 amendments established the disability freeze, under which we could exclude a disabled worker's periods of disability when calculating his or her retirement benefits.

[23] For a brief period in the 1970s, the SSI hearing examiners hired to handle SSI cases could hear only SSI cases; the ALJs hired to handle Black Lung cases could hear only Black Lung cases; and the ALJs hired to hear disability insurance (DI) cases could hear only DI cases. The lack of an integrated ALJ corps denied flexibility that could have helped with the increasing workloads more efficiently.

[24] Currently, both attorneys and non-attorney specialists may write these decisions.

[25] 59 Fed. Reg. 47887 (September 19, 1994).

completion, and that the agency should focus its efforts on fewer initiatives.[26] Consequently, the agency never fully implemented this plan.

Hearings Process Improvement (HPI)

In March 1999, the agency released a plan to improve the agency's management of the disability program. As a part of this plan, in June 1999 the agency implemented HPI. This initiative sought to improve hearing process efficiency by addressing the following problems: 1) the high number of hearing office staff involved in preparing a case for a hearing; 2) the "stove pipe" nature of employees' job duties; and 3) inadequate management information necessary to monitor and track each case through the process. HPI sought to create a process that fully prepared the cases for adjudication by first determining the necessary actions early in the process and ensuring that case development or expedited review occurred. A few of the changes HPI made to hearing office organization, such as creating the position of hearing office director, are still in place today. However, Congress would not fund HPI as originally conceived, and in its truncated form it failed to increase the efficiency of our hearing process to the extent envisioned.

Disability Service Improvement (DSI)

In August 2006, the agency began the roll out of DSI. This initiative sought to streamline the entire disability claims process and ensure that the agency made the right decision as early in the process as possible. At the hearing level, the record would close after an ALJ decision, and the Decision Review Board would gradually replace the AC. DSI also created a new position, the Federal Reviewing Official (FedRO), to review State agency determinations upon the request of the claimant; this level would replace the reconsideration level of review. The Quick Disability Determination initiative, which we use today, originated under DSI. However, the administrative costs of other features of DSI, such as the FedRO, were more than expected. Moreover, the staffing requirements under DSI had very little connection to reducing the hearings backlog.

Hearings Backlog Reduction Plan

Despite these well-intentioned efforts, the disability backlogs continued to rise. During my first week as Commissioner in February 2007, I testified before this Subcommittee about the hearings backlog. To put it mildly, you were extremely upset about the hardships your constituents faced while waiting for a disability decision. The backlogs had steadily risen, and the plan I inherited to fix those backlogs, DSI, was draining precious resources and making the problem worse. The numbers tell the story. At the time, over 63,000 people waited over 1,000 days for a hearing, and some people waited as long as 1,400 days. We were failing the public. Rather than devise yet another signature initiative that would not stand the test of time, we went back to the basics.

We developed an operational plan that focused on the gritty work of truly managing the unprecedented hearings workload. We made dozens of incremental changes, including using video more widely, improving IT, simplifying regulations, standardizing business processes, and

[26] Testimony before the House Ways and Means Subcommittee on Social Security, September 12, 1996.

establishing ALJ productivity expectations, to name just a few. Importantly, with your support, we also committed the resources employees needed to get this work done.

We have hired additional ALJs for the offices with the heaviest workloads. We expanded the Senior Attorney Adjudicator program, which gives adjudicators the authority to issue fully favorable on-the-record decisions in order to conserve ALJ resources for the more complex cases and cases that require a hearing.

We opened five National Hearing Centers (NHCs) to further reduce hearings backlogs by increasing adjudicatory capacity and efficiency with a focus on a streamlined electronic business process. Transfer of workload from heavily backlogged hearing offices is possible with electronic files, thus allowing the NHC to target assistance to these areas of the country. We implemented the Representative Video Project (RVP) to allow representatives to conduct hearings from their own office space with agency-approved video conferencing equipment. [27]

In 2010 and 2011, we opened 24 new hearing offices and satellite offices. While a lack of funding forced us to cancel plans for additional offices, those we did open are making a substantial difference in communities that were experiencing the longest waits for hearings.

We increased usage of the Findings Integrated Templates (FIT) that improves the legal sufficiency of hearing decisions, conserves resources, and reduces average processing time. We introduced a standard Electronic Hearing Office Process, also known as the Electronic Business Process, to promote consistency in case processing across all hearing offices. We also built the "How MI Doing" tool that allows ALJs and support staff to view a graphical presentation of their up-to-date individual productivity as compared to others in their office, their region, and the Nation.

We expanded automation tools to improve speed, efficiency, quality, and accountability. We initiated the Electronic Records Express project, which provides electronic options for submitting health and school records related to disability claims. This initiative saves critical administrative resources because our employees burn fewer CDs freeing them to do other work. In addition, appointed representatives with e-Folder access have self-service access to hearing scheduling information and the current Case Processing and Management System (CPMS) claim status for their clients, reducing the need for them to contact our offices. We have registered over 9,000 representatives for direct access to the electronic folder. We also implemented Automated Noticing that allows CPMS to automatically produce appropriate notices based on stored data. We implemented centralized printing and mailing that provides high speed, high volume printing for all ODAR offices. We implemented Electronic Signature that allows ALJs and Attorney Adjudicators to sign decisions electronically.

We have Federal disability units that provide extra processing capacity throughout the country. In recent years, these units have been assisting stressed State disability determination agencies. After evaluating our limited resources, our success in holding down the initial disability claims

[27] Unfortunately, only a small number of representatives have participated in the RVP. Increased participation, which may be happening as the cost of the equipment declines, would make our process much more efficient and allow us to save money on office space.

pending level, and a further spike in hearings requests, we redirected these units in February 2012 to assist in screening hearings requests. Our Federal disability units can make fully favorable allowances, if appropriate, without the need for a hearing before an ALJ.

We also listened to criticism from you and others. We have tried to make the right decision upfront as quickly as possible. For instance, we are successfully using our Compassionate Allowance and Quick Disability Determination initiatives to fast-track disability determinations at the initial claims level for over 150,000 disability claimants each year, while maintaining a very high accuracy rate. Currently about 6 percent of initial disability claims qualify for our fast-track processes, and we expect to increase that number as we add new condition to our Compassionate Allowance program. This helps keep these cases out of our appeals process altogether.

Results

This plan has worked. Average processing time, which stood at 532 days in August 2008, steadily declined for more than three years, reaching its lowest point of 340 days in October 2011.

I want to talk about measuring the hearings backlog. In 2007, filing rates had been stable for some time, so looking at the number of pending cases was a reasonable, if imperfect method to measure progress.

As the recession hit and the number of requests for a hearing dramatically increased, we steadily improved our performance when measured by average processing time, the best metric for tracking progress, particularly in times when filings are changing rapidly. When people request a hearing, they want to know how long it will take to get a decision. Much like a line in a store, the customer's experience depends not on how many other people are waiting, but on how quickly we help them. Nobody wants to get bumped and jostled; nobody wants to stand in a line that does not move; and everyone becomes frustrated when there are not enough cashiers to handle the customers. With grocery stores, we can choose where we get our groceries and decide if we are willing to accept a particular store's customer service, but Americans seeking Social Security benefits have only one place to go. With your help, we are working to make their experience fair, accurate, and timely.

The most important metric for claimants is how long they will have to wait for a hearing decision; consequently, our primary goal is now average processing time, which is the average number of days it takes to get a hearing decision (from the date of the hearing request). In August 2008, people waited an average of 532 days. Today they are waiting only 350 days.

Average processing times also became more uniform across the country. The most dramatic improvements have occurred in the most backlogged offices. To provide concrete examples, average processing time in Atlanta North dropped from 900 days to 351 days in May 2012. Oak Park, Michigan improved from 764 days to 254 days. Columbus, Ohio went from 881 days to 351 days. Currently, *no* office has an average processing time greater than 475 days. Fifteen offices have hit our goal of 270 days or less, and many others are getting close. While our goal

is to reach an average processing time of 270 days by the end of next fiscal year, that number depends on our ability to timely hire judges and support staff.

These numbers are even more impressive because we have given priority to the oldest cases, which are generally the most complex and time-consuming. Five years ago, we defined an aged case as one waiting over 1,000 days for a decision. At that time, 63,000 people waited over 1,000 days for a hearing, and some people waited as long as 1,400 days, which is a moral outrage. Since 2007, we have decided over 600,000 of the oldest cases. Each year we lower the threshold for aged cases to ensure that we continue to eliminate the oldest cases first. We ended FY 2011 with virtually no cases over 775 days old. Through the steady efforts of our employees, we now define an aged case as one that is 725 days or older, and we have already completed over 90 percent of them. Next year, our management goal is to raise the bar on ourselves again by focusing on completing all cases over 675 days old.

This emphasis on eliminating aged cases increases average processing times, so we also look ahead to see how long people in the queue have been waiting for a hearing. At the beginning of FY 2007, the number was 324 days. That number today is just 208 days, a 36 percent decrease, and we are hopeful that figure will drop again next year. Also, at the beginning of FY 2007, nearly 40 percent of pending hearing requests were older than one year. We reduced this figure to 14 percent at the end of May 2012.

To reduce the hearings backlog, we set an expectation that our ALJs should decide between 500 and 700 cases annually.[28] When we established that productivity expectation in late 2007, only 47 percent of the ALJs were achieving it. By the end of May 2012, 72 percent met the expectation, and we expect that percentage to continue to rise throughout this fiscal year. I thank them for their hard work.

This improvement in productivity has helped us make progress despite the significant increase in requests for hearings. In FY 2011, we received over 859,000 hearing requests, which is about a 19 percent increase from what we received in FY 2010.

Our ALJs are not meeting our productivity goals by "paying down the backlog," as has sometimes been alleged. Instead, over this time period, outcomes across ALJs have become more standardized, reflecting an emphasis on quality decision making. There are now significantly fewer judges who allow more than 85 percent of their cases than there were in FY 2007 (see the chart at the end of my testimony).

We have created new tools to focus on quality. Each quarter we train our adjudicators on the most complex, error-prone provisions of law and regulation. We provide feedback on decisional quality, giving adjudicators access to their remand data. We also make available specific training to address individualized training needs.

Moreover, since we are handling more hearings, the number of new Federal court cases filed challenging our denials has gone up. In FY 2007, dissatisfied claimants filed 11,951 new cases. That number rose to 14,236 in FY 2011, and we project that there will be about 19,100 new

[28] In addition, we limit the limit the number of cases assigned per year to an ALJ.

cases filed in FY 2013. Although the actual number of civil actions increased, the ratio of civil actions filed versus our denials has declined. Our success in the courts has also improved. In FY 2011, courts affirmed our decisions in 51 percent of the cases decided, up from 49 percent in FY 2007, and court reversals have decreased from 5 percent to under 3 percent of cases over this time.

President's FY 2013 Budget Request

I am concerned that despite our employees' hard work, we will begin to move drastically backwards on most of our key service goals. In fiscal years 2011 and 2012, the difference between the President's Budget and our appropriation was greater than in any other year of the previous two decades. Also, last year Congress rescinded $275 million from our IT carryover funding, which will damage our efforts to maintain our productivity increases through IT innovation.

We are starting to see the consequences of these decisions. Not letting you know the consequences of Congress' decision would be a disservice to you, the American people, and the agency. Despite our employees' hard work, the progress in addressing our hearings backlog is happening more slowly than the public deserves. It has slowed in the last year, and we lost our margin for error when, for budgetary reasons, we cancelled our plans to open eight new hearing offices in Alabama, California, Indiana, Michigan, Minnesota, Montana, New York, and Texas.[29]

We are doing what we can to compensate. We are hiring additional ALJs, albeit fewer than we had planned, and using our reemployed annuitant authority to bring back experienced judges who have recently retired. We are maintaining a high support staff-to-ALJ ratio to ensure cases are ready to hear, and we are allowing the hearing offices to work overtime to try to keep up with the surge in hearings.

We need your support and we need a timely and adequate supply of well-qualified judicial candidates from the Office of Personnel Management (OPM). If we are not appropriately funded and we cannot timely hire enough qualified ALJs and support staff, our progress will erode. We also need our projections for the number of initial claims and hearing requests to be on target if we are to achieve our goal of an average processing time of 270 days by the end of next year.

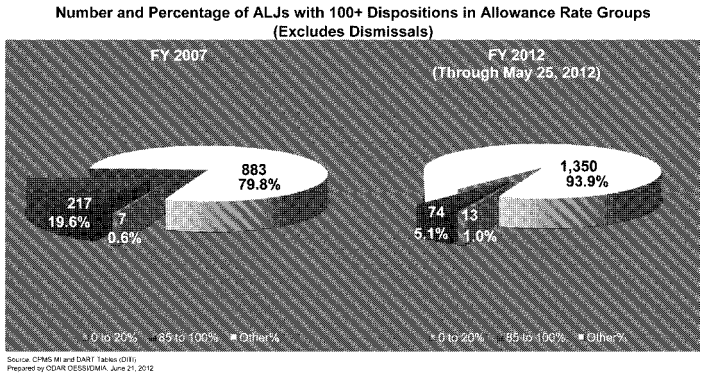
I urge Congress to support the President's request because we have proven that we deliver when we are properly resourced. Through the hard work of our employees and technological advancements, we have increased employee productivity by an average of about four percent in each of the last five years, a remarkable achievement that very few organizations—public or private—can match.

Conclusion

Congress made eliminating the hearings backlog our top priority. If you told me in 2007 that we would have to contend with budget cuts for two straight years and the most severe economic downturn since the Great Depression, I would have said that it would be impossible to eliminate

[29] We have also closed most of our remote hearing sites.

the backlog. The fact that we are still in a position to realize this goal is a testament to our employees' dedication and skill. Amid huge economic and budgetary unpredictability, we have stayed focused on eliminating the causes of your moral outrage in 2007. Now we need Congress to enact the President's Budget request so that we can meet our important commitments to the American people.



Chairman JOHNSON. Thank you, sir. Appreciate your testimony. And since this may be your last meeting with us, we thank you for your service to Social Security and to the government.

Mr. ASTRUE. Thank you very much. I have been actually waxing a little sentimental. I realized it has been 27 years since I first testified before the Ways and Means Committee, and it is a real privilege to work with an institution that touches the American public in so many ways from taxes to health care to Social Security to trade.

Chairman JOHNSON. Thank you. As is customary, for each round of questions, I will limit my time to 5 minutes and ask my colleagues to also limit their questioning to 5 minutes as well.

Options that would allow Social Security to better manage the hearing process, Commissioner, protections are included in the Administrative Procedures Act to ensure that Administrative Law Judges are able to make decisions without agency interference. In our next panel, Judge Frye testifies that using an APA official protects a claimant's constitutional right to due process, but Professor Lubbers from our next panel says the Supreme Court has not agreed with this rationale in the case of hearing for benefits. Also, Professor Lubbers testifies that ALJs are not required by Social Security law.

You have said that ALJ decisional independence places limits on your ability to manage the performance of judges even when some judges process far fewer or far more cases than peers or award or deny far more or fewer cases than their peers. And you have also discussed your challenges with the Office of Personnel Management providing you with qualified ALJ candidates, including the fact that they don't do background checks, even for lifetime appointments.

And you have also told us that disciplinary action against an ALJ takes up to 2 years to process while the judge can stay home with full pay and benefits. Given all of this, why do we need ALJs at all to do the work?

Mr. ASTRUE. I was trying to figure out what the question was going to be.

I think the question has been asked several times before, and I know we got Professor Lubbers' testimony right before the hearing so I did take a quick look at the statute. The general authorizing language for conducting hearings doesn't specify administrative law judges. That didn't stop me from trying to look at the statute, and I think there is some—we will get back to you on the record, but it looks to me, and I will be interested in what my friend, Mr. Lubbers, and what Judge Frye have to say, it does look to me in other places in the statute that Congress has assumed that the ALJs are now part of the process, and I think we will have to go back and give you a formal opinion for the record on that. But I am looking specifically at 42 USC 423(h) as one example where Congress seems to assume that they are in fact embedded in the process at this time.

[The information follows: Transcript Insert 1]

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The Administrative Procedures Act (APA) formal adjudication procedures contained in 5 U.S.C. §§ 556 and 557 apply, with some exceptions, "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ." 5 U.S.C. § 554(a). In an "APA hearing" under section 554, one requirement is that the presiding official at the hearing shall either be "the agency; . . . one or more members of the body which comprises the agency; or . . . one or more administrative law judges. . . ." 5 U.S.C. § 556(b).

The issue of whether a Social Security hearing is a formal adjudication over which an ALJ is required to preside has never been definitively resolved. Neither the text nor the legislative history of the Social Security Act (Act) itself explicitly requires that the hearing under the Act be held "on the record." Rather, sections 205(b) and 1631(c)(1)(A) of the Act state that if a hearing is held, the Commissioner "shall, on the basis of evidence adduced at the hearing, affirm, modify or reverse the Commissioner's findings of fact and such decision." In Richardson v. Perales, 402 U.S. 389, 409 (1971), the Supreme Court agreed with the Government's position that it need not address the broad issue of whether the APA applies to our hearings process. Instead, the Court stated that, "We need not decide whether the APA has general application to Social Security disability claims, for the Social Security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social Security Act."

Congress itself has made differing statements over the years regarding the applicability of the formal adjudication provisions of the APA to our hearing process. Congress has sometimes indicated its belief that our hearings are formal adjudications under the APA and has explicitly referred to the use of ALJs in some provisions in the Act. See section 206(a)(3) of the Act (referring to a review of attorney fee awards under section 206(a) of the Act by the ALJ); section 223(h)(1) of the Act (referring to the award of interim benefits in certain cases "in which an administrative law judge has determined after a hearing" that an individual is disabled.) On the other hand, Congress has also stated in legislative history that our use of ALJs is not required by law. See H.R. Rep. No. 103-670, at 98, 103rd Cong., 2nd Sess.

Chairman JOHNSON. Yeah. I don't think it is mandatory at all under congressional edict. Professor Pierce on our next panel recommends eliminating the role of ALJs as decision makers or at least amending the law to make it clear that Social Security has the power to evaluate the performance of judges and take needed action. And in my opinion, you don't have that.

What are the pros and cons of changing the law to make clear that Social Security has the power to hire their own judges and evaluate their performance?

Mr. ASTRUE. Well, I certainly think that when this committee was regularly reviewing the performance of the Office of Personnel Management regarding the ALJ process, that was very constructive from my point of view. We saw real progress that we had not seen in the previous decade. Since the last time that we testified together, I think that it has not—that change has disappeared. And so I do think—Commissioners have been testifying since 1977 before this committee about difficulties with OPM on the administrative law judge process. I think that you need to look at this with some intensity and say has that agency consistently and timely provided quality judges, not only for us, but for all Federal agencies.

And I think that the definition of qualified that they use is totally inappropriate because in order to be a judge, there is a high level of professional accomplishment and a high level of moral character that should be required. And when we say well qualified, we are using a different standard from what the Office of Personnel Management has been using, and I think the fact that we have made so much progress in the last 5 years comes from using that higher standard.

Something that I think you should be pleased about, Mr. Johnson, because I know it has been one of your concerns, is the number of outliers has been reduced dramatically in the last 5 years. If you look, you have used the 85 percent standard. We have gone from almost 20 percent to about 5 percent that are allowing more than 85 percent of those cases, and that is largely the influence of hiring right. A judge who is arrogant, who behaves badly, is also not going to apply the statute that you have enacted faithfully.

So I think the emphasis on quality in the judges is important, and I have to say, over decades I don't think the standard of the Office of Personnel Management has been high enough.

Chairman JOHNSON. Well, I think they have no requirements for judges, and we need to get some in. I am going to ask one more question.

Last December, the Wall Street Journal published an article entitled "Two lawyers strike gold in U.S. disability system." The article is about a law firm, Binder & Binder, which collected $88 million in fees, all paid from claimants' past-due benefits. In their testimony, Professors Pierce and Lubbers of our next panel refer to the incentive representatives may have had to drag out cases since the fees are a percentage of the client's past-due benefits.

Is it true that the longer it takes to get a decision, the higher the representatives' fee will be?

Mr. ASTRUE. Yes, it is, Mr. Chairman.

Chairman JOHNSON. And you don't agree with that, do you?

Mr. ASTRUE. Well, I think it has been a concern for many years. In I think it was 1987 when this subcommittee took up the attorney fee matter, I was part of the team on the other side that raised some concerns about the economic incentives of the current system. So it is clearly a risk.

I think most of the attorneys and representatives most of the time are very honorable about not abusing the system, but the incentive is there, and I think we do see a significant minority of representatives abusing the system from time to time, both in this and manipulation of assignment of judges.

Chairman JOHNSON. Part of the problem is they are appointed for life. You can't get rid of them.

Mr. Becerra, you are recognized for 5 minutes.

Mr. BECERRA. Mr. Chairman, thank you, and Commissioner, thank you for being here and also thank you for your years of service to the people of this country.

Let me make sure, I want to be clear on something. The FICA tax, which everyone pays when they get their paycheck every week or month, they see a deduction for FICA, that is the money that goes into Social Security and Medicare, the FICA tax that we see, the contribution that workers make and have been making for 77 years to the Social Security Trust Fund and the Social Security system.

That FICA tax money, which is used to cover Social Security, covers benefits and also your operating expenses.

Mr. ASTRUE. Yes. It is a specific appropriation. We can't just tap that money. It is a specific appropriation that is then drawn from the trust fund, yes.

Mr. BECERRA. So Congress sends you money, it is appropriated money, and ultimately Congress gets reimbursed by the trust fund for the money it has given to you to operate.

Mr. ASTRUE. I am not sure I fully follow the question, Mr. Becerra.

Mr. BECERRA. So the money for you to pay your employees and to cover all of your overhead, your lights, your computers, you don't get extracted directly from the trust fund. The trust fund has the money. You get an appropriated amount, then Congress makes sure that the trust fund covers what the appropriation was?

Mr. ASTRUE. Yes, I think that is essentially right.

Mr. BECERRA. So essentially workers, when they make that tax contribution, the FICA tax contribution, they are paying for the cost not just of the benefits for today's Americans who are retired and getting a pension benefit through Social Security or who are disabled and getting a benefit, those workers through their FICA taxes are also paying for the cost of administering all of the Social Security program?

Mr. ASTRUE. Yes, that is right.

Mr. BECERRA. Yet, we are finding that Congress, and I think you said something in your testimony, that Congress so far this year is—you are going to be getting a lower amount than you requested in your budget. I think you said something in your testimony. I was struck by it. Something over the past 2 years, the gap between what the Social Security Administration needs to serve the American public and the resources actually appropriated by

Congress was the biggest, the gap was the biggest it had been in 20 years. So as I say, it has been more than $2 billion short of what it needed to process all claims promptly, reduce wait times for disability cases, answer its phones and perform all of the other work it does to serve the American public.

So no matter how hard your employees at SSA work or how well you prioritize, eventually Americans are going to be paying the price for the shortchanging of your agency when it comes to the budgetary needs that you have. And so when you mentioned the wait times for these appeals hearings or the wait times to have your initial application processed, that is the consequence of not having the resources to get the work done.

Mr. ASTRUE. Yes, and let me stress that I think we are different from most other Federal agencies in that because of demographics and because of the recession our workloads have gone up dramatically. You know, we are not like certain other agencies that can simply prioritize things differently. When people come and apply for benefits we have to process those claims, we have to process the appeals. We are taking in more than a million applications more each year between disability and retirement than what we had originally projected driven by the recession, and I think in fact if this recession had been less deep and less long, it would have made a huge impact on the hearings backlog. I think we would be at the 270 by now if the recession hadn't been so deep and long.

Mr. BECERRA. So the recession is making the problem deeper and more people are applying but you are getting less money to try to operate and provide those services. My understanding is that you have already had to close a case processing center and that you have had to cancel the opening of eight new hearing offices and a telephone service center that could have served quite a few of these folks who are applying for services and benefits.

Let me ask one other question with regard to your ALJ policy, the policy for these judges, and thank you, by the way, for your commitment to review some of the policy changes that you are trying to move forward with, and in this case with regard to the disclosure of the names of these judges at the hearing level in advance of the hearing, we had a conversation about that. Can you real quickly, and my time is going to expire soon, just give me a sense of the status of your review and when do you expect to take steps to revise this policy in light of the concerns that have been raised about the perhaps over broad nature of the policy itself and how it might be detrimental to those applicants for disability benefits.

Mr. ASTRUE. Right. We viewed the policy, I think, and have from the get-go really as a stopgap until we come up with a broader, more effective solution. I think this is an issue that caught us a little bit off guard. I don't think until our management information got better we didn't realize how much the system was being manipulated and in how many ways and at what cost to the integrity of the system.

We have a team working on this. I have met with the team. We are meeting again the second week in July. I think on the initial reaction, we don't think—the good news is we don't think that we need to come to Congress for statutory changes. We think that we can address this with a pretty complicated mix of administrative

initiatives and regulatory initiatives. What the exact mix of those are and whether the administrative things that we could do more quickly make sense without some of the regulatory initiatives, we are not sure yet. So we have, to say we have a plan at the moment would be overstated. I think we have more of a plan to have a plan. But I think we will have a better sense late July, early August. But it would have to go through the rulemaking process on key parts of it. That will mean it will be a little slow. It is a particularly difficult time of the year to get things through the rulemaking process but we are working on it. We will do the best we can as fast as we can.

Mr. BECERRA. Thank you. Thank you, Mr. Chairman.

Chairman JOHNSON. Thank you. Mr. Marchant, you are recognized.

Mr. MARCHANT. Thank you, Mr. Chairman. Welcome, Commissioner. Thank you for your visit last week. We had a good visit.

Mr. ASTRUE. It was indeed.

Mr. MARCHANT. I appreciate it. State Disability Determinations award roughly 79 percent of all awards at a cost of about a third of what it costs a judge to process a request for a hearing. Beyond compassionate allowances and quick determination screenings that you already have in place, what can be done, what more can be done to resolve the deserving claims at the State level?

Mr. ASTRUE. I think that is a great question. I think—and very timely. We just issued a press release I believe on Monday on what I think is one of the most significant things will change the basic paradigm of how we do business.

An enormous amount of our administrative budget is spent chasing down, collecting, and organizing stray, generally paper medical records. And we often don't know for sure that we have them all. So it is not only a big cost, a big source of cost and delay but also of inaccurate decisions. When we move to a world where most Americans have a completely electronic medical record, it will enormously improve what we are doing. We have done some small pilots with a few of the providers and insurers who are already there. What we have started now with Kaiser Permanente is our first large-scale effort in this area, and I think this is going to be tremendously important, and it is going to take probably 3 to 5 years to work out the arrangements, and the private sector is moving slowly for a variety of reasons. But we are going to get there, and you will see 3 to 5 years from now a dramatic improvement I think in our costs, our speed, and our quality when we can essentially push a button and in most cases get a complete medical record electronically.

Mr. MARCHANT. And during the entire process, the medical record stays open throughout the entire appeals process?

Mr. ASTRUE. Yes, that is right.

Mr. MARCHANT. So is there any merit to closing the records at some point so that somebody that is making the decision can actually make a decision without having to the next day take in new information and make another decision? Is there a fair process where you close the case?

Mr. ASTRUE. Well, we thought so, and in the New England region, we still have closure of the record before the ALJ 5 days before the hearing.

To use the phrase from the testimony, to put it mildly, this subcommittee took umbrage when we tried to propose that notice and comment rulemaking and made it extremely difficult for the agency to pursue that. But we proposed that and had to withdraw that in 2008, I believe.

Mr. MARCHANT. Okay. And the last question I have for you, and I come from a State legislative background, and I believe that the local, State determinations are probably the most efficient ones. But with the rise of disability claims that we have seen in the last few years and with the State having an integral part of the qualification for unemployment benefits and the State also having an escalating Medicaid expense, have you noticed, or is there a trendline where States are trying to shift people from unemployment into disability and then from disability where they stay on disability, I think it is 2 years, and then they go from Medicaid to Medicare, and the State then basically can shift them from the Medicaid element where they are putting a match in over into the Medicare element? Do you see States that are developing a philosophy towards that?

Mr. ASTRUE. Anecdotally, we think the answer to that question is yes to some extent. Maybe not so much unemployment as TANF. We actually brought in an academic expert a few years ago to help us try to track and document that. It has been very difficult to provide hard evidence of that. But we do think that there are States that for their own budget reasons are putting up barriers to State benefits and requiring an application to us for disability even though there is no reason to believe that the person is disabled. So we do see some of that. How big, how big a factor that is, I don't think that we know. I think it is relatively small, but it is an abuse that exists and we wish that States would not do that.

Mr. MARCHANT. Thank you, Mr. Chairman.

Chairman JOHNSON. Thank you. Mr. Brady, you are recognized.

Mr. BRADY. Thank you for the discussion, Representative Marchant, about the need to make these determinations as early as possible. But Commissioner, thank you for your service and leadership of the agency and wish you well.

Mr. ASTRUE. Thank you.

Mr. BRADY. Going forward.

You have a great servant's heart. So thanks for what you are doing.

Mr. ASTRUE. Thank you.

Mr. BRADY. Two questions. One dealing with fraud both at the front end and those applying for it at the back end. There are people who are capable of working but—and do but defraud us in the process of continuing disability reviews. What is the status of our efforts to fight fraud within disability and what more can we do again to capture the money we really need for people who are truly disabled?

Mr. ASTRUE. Sure. So, I know that I and other Commissioners have been through this in the past. And I know that there have

been efforts to come up with a mechanism that would allow us to do this that hasn't been successful yet. But the single most important thing is timely review of existing beneficiaries. We all know that there is an enormous payback to the taxpayer from timely continuing disability reviews. Those have dropped dramatically in the years before I got here. They have gone up dramatically. But remember, I don't set them. I come and I plead and I beg here in Congress, and I have been somewhat successful so the number has gone up pretty significantly and substantially but it is not where it should be. And this past year we had to reverse, we were geared up, we thought, both committees in appropriations passed 582,000 and then at the last minute the bill passed and the number was 435. And we had to not only not hit a more appropriate level, we had to reallocate a lot of resources halfway through the fiscal year.

Coming up with a mechanism so that the agency has the resources to do that work is, I think, tremendously important. I think some of the new technologies that we have put in place have very high returns as well. We have ways now of checking assets with banks. The early returns were 20 to 1 return. We don't think we are going to see that on an ongoing basis. We don't know yet what the return is, but the return on that is very high. We are trying to come up with a similar system for other types of assets, real estate assets, and things like that.

Also, I put in a pitch for the Inspector General for budget reasons, the number of CDI units which are these joint SSA, IG, local law enforcement units which have been very successful, I think, on the whole. The number of those that we have are going down rather than up, and I think that is penny wise and pound foolish.

Mr. BRADY. How about at the front end? One, thank you for that comment on timely reviews. How about on the front end and through the process, not just those who are hiding assets but those, and providers who are enabling those to try to defraud the system with medical disabilities. What percentage of applicants are we now identifying through the process on the front end?

Mr. ASTRUE. Right.

Mr. BRADY. You know, who are attempting to defraud the system?

Mr. ASTRUE. It is relatively small, but the disability examiners are actually quite good about being alert on these things and they do do a significant number of referrals. Some of our administrative law judges have been very sharp about this, too. One of the more spectacular ones that we are working on now came because of a very alert ALJ.

I would say if you were going to focus on one thing, I think that the treating physician rule historically, you know, relied on a different paradigm. You know, there was a time when we all had a Marcus Welby as a personal physician, and that is not true anymore. In fact, we are increasingly seeing physicians who are essentially extensions of the lawyers doing the representation, I mean often sometimes physically housed within those complexes.

I don't know that those kinds of physicians should be given the same deference that the court interpretations of your statute require us to do, and the courts are also all over the place in terms of treating physician.

I know there is always a lot of skepticism about the agency's view on this. So what I would say to you is get some good outside advice on that. At least reconcile the conflicting court interpretations so that we do this uniformly and fairly around the country. But I think it is also a fair question to ask, given how the world has changed, is the rule that struck people as appropriate 34 years ago still appropriate today.

Mr. BRADY. Are there significant resources and are there insignificant punishments for either physicians who are complicit or complainants' reps who are complicit? Do you think we have what is needed in place to prevent that type of fraud?

Mr. ASTRUE. Probably not. I think we have tried to do more. I will be candid with you. I think that there is probably more we can do administratively. We are struggling with the resources, I think, but we are trying to do that. I think there probably are some places where we could use some more help from the Congress. So if I could get back to you on the answer for the record on that I think it would be a better response.

[The information follows: Transcript Insert 2]

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There is an emerging trend in private disability practice in which attorneys hire doctors to work within their practices as in-house suppliers. These types of associations, sometimes called multi-disciplinary practices ("MDP") or Alternative Business Structures ("ABS"), are becoming more prevalent in the States where they are permitted as a way to provide clients "one-stop shopping." However, in the disability programs, the close association of claimant representatives and doctors can foster the proliferation of questionable medical evidence. For example, in one case, a claimant's law firm had a practice of obtaining medical reports from a small group of physicians; in many instances, the wording of the reports was often identical to those submitted in previous cases. The court found that, while the ALJ may consider the boilerplate nature of a report as one factor in determining the appropriate weight to afford the report, the ALJ may not summarily reject a report solely because it contains some language repetitive of portions of a previously submitted report. Miller v. Commissioner of Social Security, 172 F.3d 303, 305-306 (3d Cir. 1999).

Our regulations prohibit representatives from knowingly making or presenting false or misleading oral or written statements, assertions or representations about a material fact or law. The regulations do not, however, specifically address some of the emerging issues related to MDPs or ABSs, and they do not prevent a representative from repeatedly using the same doctor to provide medical opinions, as long as the representative does not violate our rules on making false or misleading statements. We have the authority to regulate further in this area than we have, but the administrative costs of monitoring these MDPs and ABSs for questionable opinions would be extremely burdensome.

The Act permits us to prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys, who represent claimants before us. However, an attorney in good standing who is admitted to practice before the highest court of his State or residence or a Federal court "shall be entitled to represent claimants before" us. If Congress authorized us to set rules for recognizing practicing attorneys in the same way that we can for non-attorney representatives, we could better regulate the use of MDPs, ABSs, or similar arrangements by attorneys, and thereby diminish the opportunity for the kind of questionable activity that these types of associations may foster.

Congress may also find it appropriate to study the general issue of whether and under what circumstances it may be appropriate to accord weight to a physician's opinion regarding the nature and extent of an individual's limitations. For example, in a related context, the Supreme Court has found that the *Employee Retirement Income Security Act of 1974* does not require plan administrators to

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accord special deference to the opinions of treating physicians in administering disability plans under that statute. Black and Decker Disability Plan v. Nord, 538 U.S. 822 (2003). In light of the changes in health care practice in recent years, it would also be appropriate to review that issue in the context of Social Security disability programs.

Mr. BRADY. Great. Thank you, Mr. Chairman.

Chairman JOHNSON. Thank you. Mr. Doggett.

Mr. DOGGETT. Thank you, Mr. Chairman. And thank you, Commissioner.

I have a follow-up on the same two concerns that Mr. Becerra raised.

Mr. ASTRUE. Sure.

Mr. DOGGETT. First with reference to your budget, the moneys that finance your budget are from taxes that have already been paid and are being paid. Those taxes are not going down. It is a question of whether we provide the resources to Social Security to effectively and efficiently provide the services that a worker who has the misfortune of disability would expect. And you mentioned some goals on appeals, for example.

Is it correct that currently, that you do not have the resources to replace Social Security Administration employees who retire or depart to another job?

Mr. ASTRUE. As a general matter, Mr. Doggett, yes, that is correct. We have got a hiring freeze in place with some very limited exceptions that relate to backlog reduction.

In addition, we have, and I will give you the exact number for the record, probably slightly over a thousand temporary employees that basically we are waiting to see what happens with sequestration. We have gone up to the 1 percent statutory limit more or less on the retired annuitants. We have also, to the extent that we have made exceptions in the hiring over a lot of objections from some of my people, I have said the people that have been with us the longest, that is where our obligation is first. So to the extent that we have done hiring in the last 6 months it has been temporary so that if we have a deep cut under sequestration, we will let those people go and take less out of the people that have been working for us for 20, 30 years. So we have got a large group of people who are hanging in the balance waiting to see what happens with sequestration.

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We currently have over 1,100 temporary employees. Due to the uncertainty of the budget situation in FY 2013, we do not know whether we will be able to retain these employees.

Mr. DOGGETT. And while your oral testimony referred to the significant progress you have made in reducing the backlog on the time that an appeal takes, those numbers are beginning to trend back up, aren't they? In recent months they have gone up from the low that you talked about last October?

Mr. ASTRUE. Slightly. And I think statistically I would call it approximately level. And there is some wobble. I am swearing in 40 judges tomorrow and we have got some more coming. So I think

that by the end of the year there is a good chance that we will be essentially level for most of the year.

Mr. DOGGETT. Is it unlikely that you can meet your objective of 270 days unless your budget is fully funded?

Mr. ASTRUE. Yes. So let me, let me be totally forthcoming. I think we were making extremely good progress on the 270. There were doubters. So Congress asked GAO to look at it and they gave us a 78 percent probability a couple of years ago of hitting it. I will be honest with you, it is very unlikely we are going to hit the 270 on time now. And it is a combination of the recession, timely judges from OPM, and funding for staff. I am doing all I can on each of those three things, but those are the critical factors.

Mr. DOGGETT. Let me turn to my second concern, and that is the question of the change that was made last December so that someone who is coming to bring an appeal can find out who the judge is.

Mr. ASTRUE. Right.

Mr. DOGGETT. And I have been a judge before coming to Congress and I have also been a litigator, and it was always important to me whether I was bringing a claim or defending a claim to know who I would be presenting that claim to. As it relates to in-person conferences, not video conferences, is there any good reason why the practice that Social Security has followed in the past of letting someone know before they walk in the hearing room who the judge is, why that ought not to be continued?

Mr. ASTRUE. Yes. So I think in fact it embodies a fairly important principal of justice. And again, I think if we had realized the extent to which random assignment was being manipulated, we would have acted sooner, and that is because when you have as much manipulation as we are concerned that we have, the consequence of that is that the 15 percent of the claimants who are not represented are, by definition, getting the stingiest judges. And I don't think, I mean, these tend to be the people who are the least sophisticated and tend to be the people who are the most impoverished. And I don't know how you can say——

Mr. DOGGETT. If it is in fact random assignment, why can't you announce who the judge is before you walk in the room?

Mr. ASTRUE. But Mr. Doggett, it is not random assignment. What we have discovered is that claimants' reps have found a number of ways to manipulate the system and that the principle of random assignment has been violated in any of a number of ways. This is why it is taking us so long to come up with a fix. It is not just the video hearings, it is not just, you know, the particular problem we had at Huntington. As we have dug into this, there are a variety of problems around the system that come from nonrandom, you know, the random assignment being violated. And what we are trying to do is get a handle on that as best we can with a permanent solution. But in the meantime, I don't think it is fair or appropriate that the people who are, as a general matter, on the bottom end of the spectrum get the judges that are least likely to award them benefits. I just don't—I mean, we are supposed to be representing these people, too. And that is what judges are supposed to do when they come into hearings. They are not supposed to be——

Mr. DOGGETT. I hope you will supplement the record on specifically what—if there is random assignments, specifically what has occurred that you can't resolve in some other way than denying an opportunity to find out who the judge is before you walk in the room and on video conferences specifically so long as there is agreement that if you agree to a video conference, you get the judge that is assigned in the video conference, what is wrong with that?

Mr. ASTRUE. If you allow a friendly amendment to your request, what I would like to do is come up and brief staff because several of these issues that have come up which are not public have or potentially have a law enforcement dimension to them. So I would rather not lay that out in the record. And I also would rather not—to the extent that we are being defrauded or the system is being abused, I would rather not lay out publicly how it is done as a roadmap for others until we can do this. So what I would like to do, and hopefully we can do this on a friendly, bipartisan basis with the majority and minority staff, is come up and go through some of these other things that we have come across that have given us the basis for significant concern.

Mr. DOGGETT. Thank you.

Chairman JOHNSON. There is a little bit of manipulation among the law firms, too, that represent some of these people. They are in it for the money.

Mr. BECERRA. I think that is more on the video.

Mr. DOGGETT. And that is why because he really didn't respond on the video part. If you agree to a video hearing and you get whatever judge is to be assigned at random from one of the national centers, why isn't that sufficient protection on video?

Mr. ASTRUE. Well, because under the current rules, you are allowed to manipulate and pick and choose. You can see who you get on the video and then you could decide to decline.

Mr. DOGGETT. But if you are restricted and your only choice, and you change it and your only choice is to get the judge assigned on the video, why isn't that sufficient?

Mr. ASTRUE. Well, we are looking exactly at doing that, but I believe that my, at least interim advice from general counsel is that I need to do that through notice and comment rulemaking. The other thing, again without compromising what is happening, the other technique, and I am concerned also about this on some other levels from a claimant's perspective, is that a number of reps who have gotten into the practice of simply withdrawing an appeal and then refiling. And that is another way in which random assignment has been manipulated in some part. And some of this is our fault. Some of this, you know, I don't know that we have been entirely consistent even in applying our own rules. So it is a difficult problem. It is an important principle of justice to get this right. And we are trying to take the time to do this right. And in the interim I think what we are doing we acknowledge it is not perfect and we have not represented that we want to continue to do it indefinitely. I would be delighted to go back to telling people who the judge is. I don't think it is the—I think the criticism is a little bit overwrought in that, you know, it is the same, VA, NLRB, I don't believe you get notice of the judge. Most worker's comp you don't get notice.

I, too, was a trial attorney in my reckless youth. In the Massachusetts Superior Court, at least in 1985, when I tried my first case, you didn't know who your trial judge was until you walked in and then it changed on a monthly basis. So you know you couldn't really design a case for the predilections of a judge because a judge would change multiple times over the course of a trial.

So again, I am not defending what we are doing. And I have been, I think, straightforward. I don't want to continue. I would be perfectly happy to put the judge's name back on. But I don't want to do it until I fix things that are important for the integrity of the system.

Mr. DOGGETT. Thank you. Thank you, Mr. Chairman.

Chairman JOHNSON. That was a good answer. Thank you so much. And, you know, during your term you have worked with two different administrations and your dedication to doing the job to the best of your ability has never wavered in my view. The American people and we are grateful for your focus on the disability program. During these challenging times and along with your achievements, thanks for your service, your leadership.

I have one final question. Based on your experience, what advice would you give your successor?

Mr. ASTRUE. Buy a flak jacket. I think that the most important thing is to realize that you do take a lot of criticism in this job. And it is because Social Security is such an important institution to the public and the expectations are very high. We are in a world where it is going to be very hard to satisfy those expectations in the coming years.

What I would urge my successor to do would be in part to urge all of you, you know there are several ways to try to do this better. You know, one is to spend more money on the status quo. The other is simplification, and we have tried to do what we can from a regulatory point of view. This committee I don't think has ever gone systematically back through the Social Security Act and say, well, is what we made sense in 1964, 1977, 1992, doesn't make sense today. And it is an extraordinarily complicated act. And I think that there are opportunities where we shouldn't come—any kind of partisan divide where we can say look, let us just make it simpler. I mean, one of the things that saved us the first year, we did administratively, is we realized for 30 years we have been requiring original birth certificates brought into the office or mailed to us with every retirement application and we did not need that because we could authenticate through other more modern needs. It made sense in 1965, but it did not make sense in 2007.

I think there are a lot of opportunities to straighten out. This is only one small part. This is probably only about 10 percent of the Social Security Act right here, and I think that we can find opportunities—maybe you should get some outside expert advice, but I think you could find a lot of ways to simplify it that would lower our administrative costs. So if you don't want to give us the money, there are other ways to do it. And I think that, I actually regret that I hadn't given this speech a little bit earlier and asked you to consider doing that. And I think for the next person I think it is good advice.

Chairman JOHNSON. Modernize the system. We can do that.

I forgot Mr. Smith. I apologize. I forgot Mr. Doggett first. So you are the second one. You are recognized.

Mr. SMITH. Thank you, Mr. Chairman, and thank you, Commissioner, for your service, and certainly for your time here today.

Going back to I think what Mr. Doggett was talking about a little bit, my office has worked with a situation where it is our understanding that an applicant's attorney recommended the applicant request a delay of their hearing because they felt they would get a different, perhaps a more favorable hearing from a different ALJ. Obviously this raises questions and some were touched on a bit earlier, certainly about the uniformity of the system and perhaps what you could point to in addressing that uniformity. But I would say even more so when we talk about the workload, if one judge has prepared to hear a case and then ends up not doing anything with it and then someone else has to prepare and who knows what circumstances will surround that as well. How should we address this? What would you have to say about moving forward and perhaps on the judge anonymous policy that was touched on earlier as well?

Mr. ASTRUE. I think the thing to do is to work with us to try to get some consensus on particularly the things that we need and notice and comment rulemaking. I have been surprised at least a few times where things that looked like there was consensus and not very controversial became very controversial in the rulemaking process, and sometimes the Congress contributed to that.

So I think what we are trying to do is to try to figure out as much of a consensus approach as possible, and I do want to give some credit to the, to NOSSCR, the attorneys group, because they have already come to us and put some things on the table which I think we would have thought were unlikely to try to help us to fix this problem. And I want to commend them for you know taking that step in the public interest. And I think if we can all work together on this to try to devise a combination of administrative and regulatory approaches to straighten this out and just get it done and get it over with as quickly as possible, then I think the world will be better off.

Mr. SMITH. Okay. Thank you. I yield back.

Chairman JOHNSON. Thank you. Thank you for your testimony.

We will proceed to our second panel now.

And will the witnesses please on the second panel take your seats?

Ethel Zelenske, Director of Government Affairs, National Organization of Social Security Claimants' Representatives, on behalf of the Consortium for Citizens with Disabilities Social Security Task Force on the left, or your right.

The Honorable Randall Frye, President, Association of Administrative Law Judges. Welcome back.

Jeffrey Lubbers, who is Professor at American University Washington College of Law.

And Richard Pierce, who is Professor at the George Washington University Law School.

Thank you all for being present.

And Ms. Zelenske, you are recognized. Please go ahead with your testimony.

STATEMENT OF ETHEL ZELENSKE, DIRECTOR OF GOVERNMENT AFFAIRS, NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES, ON BEHALF OF THE CONSORTIUM FOR CITIZENS WITH DISABILITIES SOCIAL SECURITY TASK FORCE

Ms. ZELENSKE. Chairman Johnson, Ranking Member Becerra, and Members of the Subcommittee. Thank you for inviting me to testify today on behalf of the CCD Social Security Task Force.

Title II and SSI cash benefits are the means of survival for millions of individuals with severe disabilities. In the past, I represented claimants at all administrative levels and in Federal court. My experience made me all too aware that behind the numbers are individuals whose lives have unraveled while waiting for decisions.

I recently received an email from a gentleman who appealed to the hearing level. This is how he described the appeals process from a claimant's perspective: "I just don't understand why everyone is denied two times and forced to wait to have a hearing. I was very prepared from the onset with my documents. SSA was sent letters from my neurosurgeon, neurologist and two separate pain management doctors who I have been going to on a monthly basis for the past 8 years. Being denied was mind numbing. We lose everything we worked for over the years during the waiting process. I am currently over $100,000 in debt and have sold everything of value, including our wedding rings. My car was repossessed, and now my home of 18 years is in jeopardy.

The pressures of my medical issues have caused our marriage of 18 years to collapse. I have never been a fragile man. I am educated with a university degree. I have been active in my community and even own my own small company. It is hard enough for a family or a person just to deal with an illness, but it is harder when the government can keep your life on hold while you are ill."

While the wait for a hearing is still too long, processing times have been significantly reduced over the past few years, now around 350 days, dropping more than 6 months. We support the Commissioner's goal of reaching 270 days by the end of next year. However, we are deeply concerned that any progress will be stymied due to a lack of adequate resources for SSA, thus putting that goal and other critical workload benchmarks at risk. We appreciate the subcommittee's past support to provide SSA with adequate funding and urge support for the President's fiscal year 2013 request that will allow SSA to continue to move forward.

Central to the fairness of the SSA appeals process is a claimant's right to a hearing before an ALJ. While ALJs have recently come under increased scrutiny, it is important to recognize several points. Favorable ALJ decisions account for only about one in five allowances with the vast majority made by DDSs. The overall ALJ allowance rate has been dropping, and it is at the lowest level in years. There are many legitimate reasons why ALJs reverse DDS decisions, as detailed in my written statement. And favorable ALJ decisions are being reviewed by SSA to determine compliance with agency rules and policies but in a manner consistent with the law ensuring the independence of ALJs.

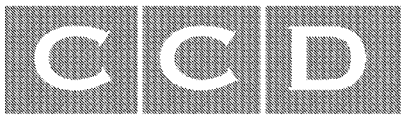
We do not support proposals to have the government represented at hearings. The longstanding view of Congress, the Supreme Court and SSA is that the process is informal and not adversarial. SSA had a previous pilot where the agency was represented. I represented clients at a hearing office in the pilot and can confirm Congress' findings at the time that the pilot did not achieve its purported goals. It led to longer processing times, did not improve the quality of decisions and did not result in better prepared cases. While radically changing the process, the expense was enormous, costing more than $1 million per year in 1986 dollars for just five hearing offices. Today there are more than 140 hearing offices.

We support many of the Commissioner's initiatives to reduce processing times and make the process more efficient, including technological improvements, such as online access to electronic claims folders and the ability to file appeals and submit evidence electronically. Also, there are a number case screening mechanisms that expedite decisions without sacrificing accuracy.

I am glad to report that the gentleman I described earlier was found eligible through one of these hearing level screening initiatives. My written statement discusses our recommendations for improving the process for people with disabilities, such as increasing the time for hearing notices and helping claimants to obtain representation earlier in the process to assist with development of the claim. We also provide recommendations to better develop claims at the initial levels so that the correct decision can be made at the earliest point possible and then the unnecessary appeals can be avoided. Thank you and I would be happy to answer any questions.

Chairman JOHNSON. Thank you.

[The prepared statement of Ms. Zelenske follows:]



CONSORTIUM FOR CITIZENS WITH DISABILITIES

Hearing before the
House Ways and Means Committee
Subcommittee on Social Security

The Social Security Disability Appeals Process

June 27, 2012

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

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ON BEHALF OF:

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Community Access National Network
Community Legal Services of Philadelphia
Easter Seals
Health & Disability Advocates
National Alliance on Mental Illness
National Association of Councils on Developmental Disabilities
National Association of Disability Representatives
National Multiple Sclerosis Society
National Organization of Social Security Claimants' Representatives
Paralyzed Veterans of America
The Arc of the United States
United Spinal Association

TESTIMONY OF ETHEL ZELENSKE ON BEHALF OF THE SOCIAL SECURITY TASK FORCE, CONSORTIUM FOR CITIZENS WITH DISABILITIES

Chairman Johnson, Ranking Member Becerra, and Members of the Subcommittee, thank you for the opportunity to provide testimony for this hearing on the Social Security disability appeals process.

I am the Director of Government Affairs for the National Organization of Social Security Claimants' Representatives (NOSSCR). I also am a Co-Chair of the Consortium for Citizens with Disabilities (CCD) Social Security Task Force. CCD is a working coalition of national consumer, advocacy, provider, and professional organizations working together with and on behalf of the 54 million children and adults with disabilities and their families living in the United States. The CCD Social Security Task Force focuses on disability policy issues in the Title II disability programs and the Title XVI Supplemental Security Income (SSI) program.

The focus of this hearing is extremely important to people with disabilities. Title II and SSI cash benefits, along with the related Medicaid and Medicare benefits, are the means of survival for millions of individuals with severe disabilities. They rely on the Social Security Administration (SSA) to promptly and fairly adjudicate their applications for disability benefits.

As the backlogs in disability claims have grown over the years, people with severe disabilities have been bearing the brunt of the delays. Behind the numbers are individuals with disabilities whose lives have unraveled while waiting for decisions – families are torn apart; homes are lost; medical conditions deteriorate; once stable financial security crumbles; and many individuals die.

Title II disability benefits are modest and do not present a strong disincentive to work: Benefits average about $1,100 per month, which is less than a minimum-wage job. Yet, the benefits help to keep tens of thousands of people with disabilities and their families out of poverty and from being destitute and homeless. The majority of Social Security Disability Insurance (SSDI) beneficiaries tend to be older. In 2010, about 70% were age 50 or older and about 30% were age 60 or older. The majority also have low educational attainment. Two-thirds of beneficiaries have only a high school or less education and about one-third did not finish high school. About 45% of SSDI beneficiaries qualified based on age-related impairments, which are likely to worsen rather than improve over time.

Demographic factors have been the primary factor for the increase in applications for disability benefits such as the baby boomers reaching their "peak disability years" and more women in the workforce who are now insured for benefits. As a result of the increase in applications, SSA finds itself at a critical crossroads. The wave of new claims is having a very significant impact at the state Disability Determination Services (DDSs) where processing times are on the rise.

The news has been more positive at the hearing level where processing times have been significantly reduced. The average processing time at the hearing level was at a record high of 532 days in August 2008. In May 2012, the average processing time had dropped to 353 days – a reduction of nearly 6 months. Commissioner Astrue has set a goal of 270 days by the end of FY 2013. However, we are deeply concerned that any progress in eliminating the hearings level backlog and reducing the average processing time will be delayed due to a lack of adequate resources, thus putting the Agency's 2013 goal and other critical workload benchmarks at risk.

SSA'S NEED FOR ADEQUATE RESOURCES

For many years, SSA did not receive adequate funds to provide its mandated services. Between FY 2000 and FY 2007, the resulting administrative funding shortfall was more than $4 billion. The dramatic increase in the hearing level disability claims backlog coincided with this period of significant underfunding.

We want to thank the Subcommittee for its efforts to provide SSA with adequate funding for its administrative budget. Between 2008 and 2010, Congress provided SSA with the necessary resources to start meeting its service delivery needs. With this funding, SSA was able to hire thousands of needed new employees, including additional Administrative Law Judges (ALJs) and hearing level support staff. There can be no doubt that this additional staff led to SSA's ability to make the dramatic progress in reducing the hearings level backlog.

Unfortunately, that trend did not continue and the recent reduction in funding threatens to undo all of the progress SSA has made. SSA has received virtually no increase in its Limitation on Administrative Expenses (LAE) since 2010. In FY 2011, SSA's appropriation was a small decrease from the FY 2010 level and the FY 2012 appropriation was only slightly above the FY 2010 level.

The budget shortfall has already impacted the Agency, which in turn affects the public, including people with disabilities. The current funding situation has led to a number of actions by SSA including: continuation of the hiring freeze (except for the hearing level) that began in July 2010; delaying the opening of 8 new hearing offices; closing 160 temporary remote hearing sites that serviced claimants in communities distant from permanent hearing sites; diverting resources from information technology projects that would have improved productivity in the future; and closing field offices to the public 30 minutes early each day. By the end of this year, SSA will have lost 9,000 employees in three years.

A concrete example of the budget shortfall's impact on claimants at the hearing level is SSA's decision to close 160 temporary remote hearing sites. Although "temporary," many had been used for years, if not decades. My organization received passionate complaints from our members about the serious difficulties and hardships that claimants now face with the closure of these sites. In most of these locations, there is no public transportation to the nearest ODAR hearing office. Many of the claimants are unable to sit for a long car ride. Many do not drive and cannot find someone to drive them. Also, there has been conflicting and confusing information about the availability of travel reimbursement.

The reduction in staffing at the field office and DDS levels will certainly impact the workload at the hearing level. Disability claims may be less developed, leading to incorrect decisions earlier in the process and more appeals. We are very concerned that the significant progress made in reducing hearing processing times and the disability claims backlog will be stymied due to the lack of needed resources. At a Senate Finance Committee hearing in May 2012, Commissioner Astrue noted that "progress on backlog reduction [at the hearing level] has slowed in the last year …."[1]

We support the President's FY 2013 Budget request of $11.76 billion for the Social Security Administration. This is the minimum amount needed to continue to reduce key backlogs and increase deficit-reducing program integrity work and is only a very modest increase over the $11.46 billion

[1] "The Social Security Administration: Is it Meeting its Responsibilities to Save Taxpayer Dollars and Serve the Public?," Hearing before the United States Senate Committee on Finance, May 17, 2012, Statement of Michael J. Astrue, Commissioner, Social Security Administration. Available at http://www.finance.senate.gov/imo/media/doc/SSA-%20Testimony-%20Astrue-FINAL.pdf.

appropriated in FY 2012. With this level of funding, SSA could continue to build on the progress achieved thus far, progress that is vital to millions of people who depend on their services, including people with disabilities. We strongly urge Congress to provide SSA with sufficient administrative funding so that there are enough personnel in the SSA field office, the DDSs, and the hearing offices, to adequately process, develop, and determine disability claims in a timely manner. This funding level will allow SSA to continue working down disability backlogs, to implement efficiencies in its programs, and to increase program integrity work.

THE DISABILITY APPEALS PROCESS

An Informal and Nonadversarial Process

The longstanding view of Congress, the United States Supreme Court, and SSA is that the Social Security disability claims process is informal and nonadversarial, with SSA's underlying role to be one of determining disability and paying benefits. "In making a determination or decision in your case, we [SSA] conduct the administrative review process in an informal, nonadversary manner."[2] SSA's interpretation is consistent with United States Supreme Court decisions over the last thirty years that discuss Congressional intent regarding the SSA hearings process. Most recently in 2000, the Supreme Court stated:

> The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although many agency systems of adjudication are based to a significant extent on the judicial model of decision-making, the SSA is perhaps the best example of an agency that is not ... Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits....[3]

The Supreme Court relied on another decision that was then nearly 30 years old, emphasizing Congress' intent to keep the process informal and nonadversarial:

> There emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure and these hearings should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair.[4]

The value of keeping the process informal should not be underestimated. It encourages individuals to supply information, often regarding the most private aspects of their lives. The emphasis on informality also has kept the process understandable to the layperson and not strict in tone or operation.

The process should not be adversarial. Proponents of making the process adversarial by having SSA represented at the ALJ hearing believe that the Agency is not fairly represented in the disability determination process. It is important to note that SSA and the claimant are not parties on opposite sides of a legal dispute. Further, SSA already plays a considerable role in setting the criteria and procedures for determining disability, which the claimant must follow.

The issue of having SSA represented at the ALJ hearing was raised at a July 2011 House hearing held by this Subcommittee and the House Judiciary Subcommittee on Courts, Commercial and Administrative

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[2] 20 C.F.R. § 404.900(b), 416.1400(b).
[3] *Sims v. Apfel*, 530 U.S. 103, 110 (2000)(citations omitted).
[4] *Richardson v. Perales*, 402 U.S. 389, 400-401 (1971).

Law.[5] Agreeing with Commissioner Astrue's testimony at that hearing, we do not support proposals to have SSA represented at the ALJ hearing.

SSA previously tested, and abandoned, a pilot project in the 1980s to have the agency represented – the Government Representation Project (GRP). First proposed by SSA in 1980, the plan encountered a hostile reception at public hearings and from Members of Congress and was withdrawn. The plan was revived in 1982 with no public hearings and was instituted as a one-year "experiment" at five hearing sites. The one-year experiment was terminated more than four years later following Congressional criticism and judicial intervention.[6]

Based on the stated goals of the GRP experiment, i.e., assisting in better decision-making and reducing delays, it was a failure. Congress found that: (1) processing times were lengthened; (2) the quality of decision-making did not improve; (3) cases were not better prepared; and (4) the government representatives generally acted in adversarial roles. In the end, the GRP experiment did nothing to enhance the integrity of the administrative process. The GRP caused extensive delays in a system that was overburdened, even then, and injected an inappropriate level of formality, technicality, and adversarial process into a system meant to be informal and nonadversarial.

In addition to radically changing the nature of the process, the financial costs of representing the agency at the hearing level would be very high. In 1986, SSA testified in Congress that the cost was $1 million per year for only five hearings offices in the Project (there currently are more than 140 hearing offices).

The Important Role of the Administrative Law Judge

ALJs and their decisional independence play a critical role in protecting the rights of claimants. A claimant's right to a *de novo* hearing before an ALJ is central to the fairness of the SSA adjudication process. This right guarantees that individuals with disabilities have a full and fair administrative hearing by an independent decision-maker who provides impartial fact-finding and adjudication, free from agency coercion or influence. The ALJ questions and takes testimony from the claimant and other witnesses, and considers and weighs the evidence, all in accordance with relevant law and agency policy. For claimants, a fundamental principle of this right is the opportunity to present new evidence to the ALJ, testify in person before the ALJ, and receive a decision based on all available evidence.

Recently, the SSA ALJ corps has come under increased scrutiny. It is important to emphasize that the vast majority of the more than 1400 SSA ALJs perform their jobs consistent with the Social Security Act, SSA regulations and policy, and conduct themselves in a professional and judicially appropriate manner. Key points to recognize include the following:

- Allowances at the ALJ level account for only a small percentage of overall allowances, less than 25%. The overwhelming majority of favorable disability determinations are made by DDSs at the initial and reconsideration levels.

- Despite the increase in the number of disability applications and appeals to the hearing level, the overall ALJ allowance rate has been dropping and is at the lowest level in many years. In FY 2011, the ALJ

[5] Joint Oversight Hearing on the Role of Social Security Administrative Law Judges, July 11, 2011, http://waysandmeans.house.gov/Calendar/EventSingle.aspx?EventID=249734.

[6] In *Sallings v. Bowen*, 641 F. Supp. 1046 (W.D.Va. 1986), the federal district court held that the Project was unconstitutional and violated the Social Security Act. In July 1986, it issued an injunction prohibiting SSA from holding further proceedings under the Project.

allowance rate was 58%, four percentage points lower than in FY 2010. SSA statistics show that most ALJs fall within close range of the average.

- There are a number of reasons why ALJs reverse DDS disability determinations. By law, ALJ hearings are *de novo* and the ALJ is not bound by previous determinations. Claims are often better developed at the hearing level, in part due to the fact that claimants are represented and the representative is able to obtain more specific medical evidence tailored to the SSA disability criteria. In addition, claimants' conditions change and deteriorate with the passage of time. Also, ALJs are able to call expert witnesses – medical experts and vocational experts – to provide hearing testimony on complex issues and who can better explain the claimant's impairment(s), treatment, how functional limitations affect the ability to work, etc. And a critical difference from the earlier levels is that the ALJ hearing is the first opportunity for the claimant to meet the adjudicator face-to-face, which can be especially important in cases involving nonexertional impairments such as mental illness and pain.

- ALJ decisions are reviewed by SSA in a manner consistent with law. While ALJs have decisional independence, they must follow SSA law and policies. SSA has implemented a quality review process for ALJ decisions. In FY 2011, the SSA Office of Disability Adjudication and Review (ODAR) established a Quality Review (QR) initiative and opened four new Branches in the Office of Appellate Operations. The QR Branches review a computer-generated sample of unappealed favorable ALJ decisions (almost 3700 in FY 2011) before they are effectuated. Cases are then referred to the Appeals Council for possible review. If the Appeals Council accepts review, it can remand or issue "corrective" decisions, which may involve changing the favorable ALJ decision to a "partially" favorable decision or to an unfavorable decision. There also is some post-effectuation review of ALJ decisions. While these ALJ decisions cannot be changed, post-effectuation review looks for policy compliance and can focus on cases where there is a recurring problem and on specific situations. Policy guidance can then be provided.

RECENT IMPROVEMENTS AT THE HEARINGS AND APPEALS LEVELS

To address the hearing level backlog, Commissioner Astrue has implemented a number of initiatives, which we believe have improved the appeals process for all parties involved: claimants, their representatives, and SSA.

Caution Regarding the Search for Efficiencies. While we generally support the goal of achieving increased efficiency throughout the adjudicatory process, we caution that limits must be placed on the goal of administrative efficiency for efficiency's sake alone. The purposes of the Social Security and SSI programs are to provide cash benefits to those who need them and have earned them and who meet the eligibility criteria. While there may be ways to improve the decision-making process from the perspective of the adjudicators, the critical measure for assessing initiatives for achieving administrative efficiencies must be how they affect the very claimants and beneficiaries for whom the system exists.

Technological Improvements

Commissioner Astrue has made a strong commitment to improve and expand the technology used in the disability determination process. CCD generally supports these efforts to improve the disability claims process, so long as they do not infringe on claimants' rights. SSA has implemented a number of significant technological improvements that have helped claimants and their representatives and have made the process more efficient for SSA employees. Some of these improvements include the following:

1. Submitting evidence electronically. Under Electronic Records Express (ERE), registered claimants' representatives are able to submit evidence electronically through an SSA secure website or to a dedicated

fax number, using a unique barcode assigned to the claim. Evidence submitted through ERE is automatically "placed" in the claimant's electronic disability claims folder. As a result, submitted evidence is in the claimant's file sooner and is almost never lost or misplaced.

2. Online access to claimants' electronic folders. SSA has implemented the Appointed Representative Suite of Services (ARSS) that provides direct access to a claimant's electronic folder for authorized representatives. To have access, the appointed representative must go through a strict enrollment and authentication process. Once authorized, the representative has access to view and download the claims file at the hearings and Appeals Council levels. As a result, hearing office staff and Appeals Council staff do not need to copy the claims file for the representative. SSA has recently expanded ARSS to allow access to the hearing level status report, which allows an authorized representative to view the status of a specific claimant's case at the hearing office, without the need to contact hearing office staff. ARSS is a very significant improvement that has led to concrete efficiencies for all parties.

3. Electronic appeals. Appeals can now be filed electronically when requesting reconsideration and requesting a hearing. In fact, SSA has recently made use of "iAppeals" an affirmative duty under its Rules of Conduct and Standards of Responsibility for Representatives[7] if the representative requests direct payment of fees.[8] The "mandate" requires an appointed representative to file these appeals electronically along with the associated Disability Report-Appeals (Form SSA-3441). When filed electronically, the information in the appeals form and SSA-3441 becomes data, which is used by the SSA system to screen cases for possible expedited decisions, e.g., compassionate allowances, Office of Disability Adjudication and Review (ODAR) virtual screening by senior attorneys, selection for the "informal remand project." While we had a number of questions and concerns when the requirement was first announced, SSA has been very cooperative in meeting with us and responding to issues we have raised.

4. Use of video hearings. Video hearings allow ALJs to conduct hearings without being at the same geographical site as the claimant and representative and have the potential to reduce processing times and increase productivity. We support the use of video hearings so long as the right to a full and fair hearing is adequately protected; the quality of video hearings is assured; and the claimant retains the absolute right to have an in-person hearing as provided under current regulations[9] and SSA policy.

The claimant makes the ultimate decision whether to accept the video hearing. In general, representatives report that video hearings are usually accepted, primarily because they lead to faster adjudication. However, there are a number of reasons why a claimant may decline and choose to exercise the right to an in-person hearing, e.g., the claimant's demeanor is critical (e.g., respiratory impairments, fatigue caused by impairment); the claimant has a mental impairment with symptoms of paranoia; the claimant has a hearing impairment.

Several years ago, SSA established National Hearing Centers (NHCs) to help reduce the hearings backlog. Cases are transferred from "brick and mortar" hearing offices to the five NHCs, where hearings are handled exclusively by video. If claimants exercise their right to an in-person hearing, the claim is transferred back to the geographic hearing office where a local ALJ will hear the case. However, we have recently heard that NHC ALJs, in some cases, will travel to the local hearing offices to hear cases in person.

The Representative Video Project (RVP) is another initiative that has been instituted to help reduce the disability claims backlog. Under RVP, the representative purchases video equipment that allows the claimant and representative to be in the representative's office with the ALJ in a hearing office location.

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[7] 20 C.F.R. §§ 404.1740(b)(4) and 416.1540(b)(4).
[8] 77 Fed. Reg. 4653 (Jan. 31, 2012).
[9] 20 C.F.R. §§ 404.936 and 416.1436.

Some representatives and their clients who have participated in RVP have found it to be very satisfactory. However, others have been less enthusiastic due to the inability to resolve technical issues and ALJ refusal to accept use of RVP (the ALJ has the ultimate authority to decide whether to allow its use). As a result, there has been limited use of RVP, with representatives hesitant to invest in purchasing the equipment unless they know that ALJs will accept its use.

Screening Initiatives

We support SSA's efforts to accelerate decisions and develop new mechanisms for expedited eligibility throughout the application and review process, without sacrificing accuracy. We encourage the use of ongoing screening as claimants obtain more documentation to support their applications.

1. The Senior Attorney Program. This program allows senior staff attorneys in hearing offices to issue fully favorable decisions in cases that can be decided without a hearing (i.e., "on the record"). This cuts off many months in claimants' wait for payment of benefits. In FY 2011, senior attorneys decided more than 53,000 cases. In FY 2012, nearly 28,000 cases have been approved through May 2012 by senior attorneys.

2. Virtual Screening Unit. Related to the Senior Attorney Program, the Virtual Screening Unit (VSU) is made up of about 100 ODAR senior attorneys who remain in their local hearing offices and screen electronic folder cases identified by the national ODAR office for possible favorable decisions. Cases they screen may come from hearing offices throughout the country. (In contrast, senior attorney advisors in local hearing offices review cases in their own respective locations.) VSU attorneys have a limited time period to screen cases for fully favorable decisions. Claimants do not lose their place in the hearing queue if the case is returned to the ALJ.

3. Informal Remand Project. Earlier this year, ODAR announced a new Informal Remand Project. While similar to previous informal remand projects, this one is bigger in scope, involving hundreds of federal disability examiners (not DDS employees and not ODAR senior attorneys) around the country. If a case is selected for this project, the goal is to complete review within 45 days of the case transfer. Only electronic folder cases are selected according to agency profiles. Examiners can only issue fully favorable decisions. If partially favorable or unfavorable (in their opinion), the case will be returned to the hearing office. The examiner can make the fully favorable decision, based on the evidence already in the file, or with additional evidence from the representative. Like VSU cases, claimants do not lose their place in the hearing queue.

We have not yet seen statistics on the number of cases transferred and the number of cases decided favorably by the federal examiners in the Project. Representatives have reported some issues with cases that have been remanded, such as: (1) limited time to provide additional evidence, which is difficult to meet; (2) inability to access the electronic folder through ARSS while the case is in the Remand Project so that it is unknown what evidence is already in the file if the claimant is a recent client; and (3) difficulties contacting the examiner.

4. Compassionate Allowances. This initiative allows SSA to create "an extensive list of impairments that we [SSA] can allow quickly with minimal objective medical evidence that is based on clinical signs or laboratory findings or a combination of both...." In April 2012, Commissioner Astrue announced that the current list of 113 conditions will be increased to 165 conditions, effective August 13, 2012. The conditions on the list involve very serious diagnoses, for which there is unanimous agreement that the severity of the impairment meets the disability standard. The list includes cancers, neurological and immune system disorders, and other impairments affecting adults and children. Unlike the Quick

Disability Determination (QDD) screening,[10] which occurs only when an application is filed, screening for compassionate allowances can occur at any level of the administrative appeals process, including the ALJ and Appeals Council levels.

RECOMMENDATIONS FOR IMPROVING THE DISABILITY DETERMINATION PROCESS

We have numerous suggestions for improving the disability claims process for people with disabilities. We believe that these recommendations can go a long way towards reducing the disability claims backlog and making the process more efficient for all parties involved.

1. Increase the time for hearing notices. We recommend that the time for providing advance notice of the hearing date be increased from the current 20 days[11] to 75 days. We believe that this increase will allow more time to obtain medical evidence before the hearing and make it far more likely that the record will be complete when the ALJ reviews the file before the hearing. The 75-day time period has been in effect in SSA's Region 1 states since August 2006[12] and, based on reports from representatives, has worked well.

2. Improve development of evidence earlier in the process. We support initiatives to improve the process at the initial levels so that the correct decision can be made at the earliest point possible and unnecessary appeals can be avoided. Improvements at the front end of the process can have a significant beneficial impact on preventing the backlog and delays later in the appeals process. Inadequate case development at the DDS level means that ALJs will need to spend more time reviewing cases prior to the hearing. This leads to longer processing times at the hearing level. Our recommendations include the following:

- Provide more assistance to claimants at the application level regarding necessary and important evidence so that all impairments and sources of information are identified, including non-physician and other professional sources.
- DDS examiners should obtain necessary and relevant evidence. The DDSs generally do not use questionnaires or forms that are tailored to the specific type of impairment or ask for information that addresses the disability standard as implemented by SSA. This "language" barrier causes delays in obtaining evidence, even from supportive and well-meaning doctors.
- Electronic records, like paper records, need to be adapted to meet the needs of the SSA disability determination process. Many providers are submitting evidence electronically but these records are based on the providers' needs but often do not address the SSA disability criteria.
- Increase reimbursement rates for providers. To improve provider response to requests for records, appropriate reimbursement rates for medical records and reports need to be established. Appropriate rates should also be paid for consultative examinations and for medical experts who testify at hearings.
- Provide better explanations to medical providers. SSA and DDSs should provide better explanations to all providers, in particular to physician and non-physician treating sources, about the disability standard and ask for evidence relevant to the standard.
- Improve the quality of consultative examinations. Steps should be taken to improve the quality of the consultative examination (CE) process. There are many reports of inappropriate referrals and short perfunctory examinations. In addition, there should be more effort to have the treating physician conduct the consultative examination, as authorized by SSA's regulations.[13]

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[10] See 20 C.F.R. §§ 404.1619 and 416.1019.
[11] 20 C.F.R. §§ 404.938(a) and 416.1438(a).
[12] 20 C.F.R. § 405.315(a).
[13] 20 C.F.R. § 404.1519h and 416.919h.

3. Help claimants obtain representation earlier in the process to assist with development.
Representatives play an important role in obtaining medical and other information to support their clients' disability claims and helping SSA to streamline the disability determination process. They routinely explain the process and procedures to their clients with more specificity than SSA. They obtain evidence from all medical sources, other treating professionals, school systems, previous employers, and others who can shed light on the claimant's entitlement to disability benefits. Given the importance of representation, the Social Security Act requires SSA to provide information on options for seeking legal representation, whenever the agency issues a notice of any "adverse determination."[14] In reality, this statutorily required information is rarely provided.

Most representation occurs at the hearing level. A major reason is that it is only at that level, after the request for hearing is filed, that claimants are given concrete information regarding local and national resources to contact. However, many claimants' representatives represent claimants prior to the hearing level, by helping them file their applications, obtain medical evidence in support of the application, and assist in appealing if their applications are denied. My organization recently conducted a survey of our members regarding their representation of claimants prior to the hearing level. Although a limited and non-scientific measure, more than 500 of our members responded that they do represent claimants at the initial and reconsideration levels, in addition to the hearing level.

Unfortunately, the rate of representation at the initial and reconsideration levels is extremely low when compared to the hearing level because little or no information is provided that is specific or targeted to the area where claimants live. We also receive reports that claimants are in fact actively discouraged from obtaining representation by SSA claims representatives or telephone representatives.

Given the statutory requirement, we recommend that SSA include more information on options for representation in initial and reconsideration denial notices similar to that provided at the hearing level.

OTHER ISSUES REGARDING THE HEARING AND APPEALS PROCESS

1. Keep the record open for new evidence.
Over the years, there have been frequent proposals to limit the ability to submit evidence within a set number of days before the hearing and/or to close the record entirely after the ALJ hearing is held. We believe that these proposals are neither beneficial to claimants nor administratively efficient for the Agency.

Under current law, new evidence can be submitted to an ALJ and it must be considered in reaching a decision.[15] Contrary to assertions by some that there is an unlimited ability to submit new evidence after the ALJ hearing, the current regulations and statute are very specific in limiting that ability at later levels of appeal. At the Appeals Council level, new evidence will be considered, but only if the Appeals Council determines it relates to the period before the ALJ decision and is "new and material."[16] While the Appeals Council remands a little over one-in-five appeals filed by claimants, the reason for most remands is not the submission of new evidence, but rather legal errors committed by the ALJ, including the failure to consider existing evidence according to SSA regulations and policy and the failure to apply the correct legal standards.

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[14] 42 U.S.C. § 406(c); 42 U.S.C. § 1383(d)(2)(D).
[15] 42 U.S.C. § 405(b)(1). Current regulations comply with the statute by providing that the claimant may submit new evidence at the hearing. 20 C.F.R. §§ 404.929 and 416.1429.
[16] 20 C.F.R. §§ 404.970(b) and 416.1470(b).

At the federal court level, the record is closed and the court will not consider new evidence. The court does have the authority to remand the case for SSA to consider the additional evidence, but only if the new evidence is (1) "new" and (2) "material" and (3) there is "good cause" for the failure to submit it in the prior administrative proceedings.[17] Because courts hold claimants to the stringent standard in the Act, remands occur very infrequently under this part of the statute. The vast majority of court remands are not based on new evidence, but are ordered under the statute due to legal errors committed by the ALJ.

We strongly support the submission of evidence as early as possible, since it means that a correct decision can be made at the earliest point possible. However, there are many legitimate reasons why evidence is not submitted earlier and thus why closing the record is not beneficial to claimants, including: (1) worsening of the medical condition which forms the basis of the claim; (2) factors outside the claimant's control, such as medical provider delay in sending evidence; and (3) the need to keep the process informal and focused on determining whether the individual is eligible for disability benefits to which he or she is statutorily entitled.

2. Policy to keep the ALJ's identity undisclosed.
In late 2011, SSA implemented a new policy that removes the ALJ's name from the hearing notice and precludes ODAR hearing office staff from disclosing the ALJ's identity until the claimant and his/her representative enter the hearing room. We have been very concerned about the negative impact of this policy on claimants, on the ability of representatives to effectively represent claimants, and on the efficient operation of ODAR hearing offices. We have communicated our concerns to the Commissioner and look forward to working with him to find ways to address the Agency's reasons for making the policy change.

CONCLUSION

Delays in making decisions on eligibility for disability programs can have devastating effects on people already struggling with difficult situations. On behalf of people with disabilities, it is critical that SSA be given substantial and adequate funding to make disability decisions in a timely manner and to carry out its other mandated workloads. We appreciate your continued oversight of the administration of the Social Security programs and the manner in which those programs meet the needs of people with disabilities.

Submitted on behalf of:
Association of University Centers on Disabilities
Bazelon Center for Mental Health Law
Community Access National Network
Community Legal Services of Philadelphia
Easter Seals
Health & Disability Advocates
National Alliance on Mental Illness
National Association of Councils on Developmental Disabilities
National Association of Disability Representatives
National Multiple Sclerosis Society
National Organization of Social Security Claimants' Representatives
Paralyzed Veterans of America
The Arc of the United States
United Spinal Association

[17] 42 U.S.C. § 405(g).

Chairman JOHNSON. Randall Frye you are recognized.

STATEMENT OF THE HONORABLE D. RANDALL FRYE, PRESIDENT, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES

Judge FRYE. Thank you very much.

Mr. Chairman, Ranking Member Becerra and Members of the Subcommittee, thank you very much for the opportunity to be here this afternoon to talk about some very important issues with respect to the disability adjudicatory system at the Social Security Administration.

I am president of an organization that represents 1,400 judges, and I feel like the weight of all 1,400 are on me every day because I hear from them on a regular basis, and I understand the trauma that is ongoing dealing with a rather significant backlog.

There are some good things, however, that are happening at the agency, good things that result from your actions: 3 years ago you responded favorably in a budget context that permitted the agency to appoint several hundred additional judges and staff, and we have dealt with the backlog. We have worked exceptionally hard.

It is troubling to hear or to think that come January, the bottom may fall out of this progress. So I urge you on behalf of all of the American people to, please, do what you can to ensure that this agency is funded so we can continue with the disability backlog.

While I think the judges and the staff have worked well, there are some things that haven't worked so well, and we have some ideas that we would like to share with you. What isn't or hasn't worked well, quite frankly, is that—and believe me, we understand the importance and need for goals in everyone's life, personal and professional. Goals have driven this democracy to the highest levels. What we have been faced with as judges, however, are not goals; they have been quotas. Quotas are destructive, and they force decisions before they are ready. If you understand the process, as you most certainly do, under the present structure, judges have the responsibility of wearing three hats, incredible responsibilities in wearing three hats, representing the government or the people, representing the claimant's interest and of course ensuring that the law is applied correctly to a decision. That is a heck of a burden if you think about it.

It requires the judge to engage in rather aggressive and vigorous examination of a claimant. Oftentimes that puts one at loggerheads with the claimants and claimant's represent—it almost places the judge in truly an adversarial relationship in the process. That is not a healthy judicial environment. It is not good in my view to have the judge wear three hats.

It is certainly good that the record is developed. Indeed, without record development, we cannot make a decision.

An answer we think to this problem and an answer that at long term would save money is to have the government represented. If you think about it, and I have said this before, how many corporations or companies that you know of would go to court, facing a lawsuit where the plaintiff is seeking $300,000, without representation? That is what is happening in our courtrooms. The government comes without representation.

Indeed, I recognize part of my responsibility is to represent the government, but what I am trying to communicate to you is that it is a very difficult process. It is a balance that sometimes gets skewed.

We believe the advocacy of a government rep would be important, but even more important from the claimant's perspective, a government representative would be assigned the cases early in the process. The government representative would develop or ensure development of evidence is in the record. The government representative would work with the claimant and the claimant's attorney to pay the case as early as possible, without a hearing. Thus

saving the more expensive time for conducting a hearing and having to issue a written decision after a hearing.

The government rep has a lot of value. It is the individual that would be designated in a hearing office that the attorney on behalf of a claimant could call and talk to about a case to find out the status of a case. Right now, if you talk to many representatives, it is quite difficult to talk to anyone in a hearing office; not because we are unfriendly, it is just that everybody is swamped with work.

The problem with the quotas is particularly perplexing to I think anyone, any professional who has to have time to consider important and complex issues. What has happened to us is because with all of the wonderful programs the agency has established over the last few years, the easier cases are getting addressed before a hearing or many of them are. The cases we hear are far more difficult.

Chairman JOHNSON. Can you close? Your time has expired.

Judge FRYE. I am sorry, I will indeed. I have other points that I made in my statement. And I would like if at all possible to submit a statement on the APA and its applicability to our hearings at the close of hearing.

Chairman JOHNSON. Sure.

Judge FRYE. Thank you very much.

Chairman JOHNSON. Thank you, sir.

[The prepared statement of Judge Frye follows:]

STATEMENT OF THE ASSOCIATION OF ADMINISTRATIVE LAW JUDGES

COMMITTEE ON WAYS AND MEANS, SUBCOMMITTEE ON SOCIAL SECURITY

June 27, 2012

ADMINISTRATIVE LAW JUDGES PROTECTING JUSTICE AND DUE PROCESS FOR THE AMERICAN PEOPLE

Statement of the Honorable D. Randall Frye, President,
Association of Administrative Law Judges
Protecting Due Process for the American People

Chairmen Johnson, Ranking Member Xavier Becerra and members of the Subcommittee:

Thank you for providing the Association of Administrative Law Judges (AALJ) the opportunity to submit this statement. My name is D. Randall Frye. I am a United States Administrative Law Judge (ALJ or Judge) assigned to the Social Security Administration (SSA). I have been hearing Social Security Disability cases in Charlotte, North Carolina for about 15 years. I have also served as Administrative Law Judge for the National Labor Relations Board for one and one-half years. I am currently President of the AALJ, which represents the approximately 1400 Administrative Law Judges employed at the SSA. One of the stated purposes of the AALJ is to promote and preserve due process hearings in compliance with the Administrative Procedure Act (APA) and the Social Security Act for those individuals who seek adjudication of program entitlement disputes within the SSA. It is the longstanding position of the AALJ that ensuring full and fair due process *de novo* hearings brings justice to the American people. The AALJ represents most of the approximately 1600 administrative law judges in the entire Federal government.

Some criticism has been recently levied against the world's largest adjudicatory system. However, the concerns raised do not present issues that are insurmountable. In this statement, the AALJ proposes changes we believe are necessary to make the federal disability administrative judiciary more efficient and effective as well as addresses some of the issues raised during the past year. In addition, the AALJ believes the proposed changes, most of which are not new, would be cost effective and would well serve the American people. For example, the AALJ has advocated for over a decade that our government be represented in cases before Administrative Law Judges with the full right to appeal. We are extremely pleased that such a program is now supported by Senator Coburn.[1]

THE NEED FOR AN INDEPENDENT ADMINISTRATIVE JUDICIARY

In 1946, the Congress enacted the Administrative Procedure Act (APA) to reform the administrative hearing process and procedures in the Federal government and to protect, *inter alia*, the American public by giving ALJs decisional independence. "Congress intended to make hearing examiners (now ALJs) 'a special class of semi-independent subordinate hearing officers' by vesting control of their compensation, promotion and tenure in the Civil Service Commission (now the Office of Personnel Management) to a much greater extent than in the case of other Federal employees." [*Ramspeck v. Federal Trial Examiners Conference*, 345 US 931 (1953)]. The agencies employing them do not have the authority to withhold the powers vested in Federal ALJs by the APA.

Prior to the enactment of the APA, the tenure and status of these hearing examiners were governed by the Classification Act of 1923, as amended. Under that Act, the classification of the hearing examiners was determined by ratings given to them by the Agency and their compensation and promotion depended upon their classification. This placed the hearing examiners in a dependent status with the Agency employing them. Many complaints were voiced against this system alleging that hearing examiners were "mere tools of the Agency" and thus subservient to Agency heads when they decided and issued decisions on issues involving Agency determinations appealed to them. With the adoption of the APA, Congress intended to correct these problems. As earlier noted, this rather significant reform was undertaken to protect the American public by giving ALJs decisional independence. Indeed, the Act's legislative history makes abundantly plain that the APA was

[1] ***Back in Black*** – **Preserving Social Security for Future Generations**, U.S. Senator Tom Coburn, M.D. (R-OK), July 18, 2011.

intended to be broad sweeping legislation designed to restore to American government fundamental freedoms for the American people, freedoms which had become clouded in the murky waters of unregulated administrative organizations that were not contemplated by the nations' founders, and whose conduct in the realms of investigation, prosecution and adjudication had become so burdensome as to all but undo what was thought preserved in the Constitution. The widespread concern regarding the absence of an independent federal administrative judiciary to hear and decide complex administrative issues was underscored by the President's Committee on Administrative Management in 1937.[2]

While the APA codified, *inter alia,* decisional independence of ALJs, it is not inconsistent with the Social Security Act. Thus in *Richardson v. Perales,* 402 U..S. 389, 91 S.Ct. 1420 (1971) the Court found that the Social Security Act conforms with and is consistent with the APA. Specifically, the Court found that the APA provisions do not differ from nor supersede the authority given "the Secretary…by section 205(a) and (b) to establish procedures." The broad sweep of the APA must not be minimized. The APA extends its reach to agency rulemaking and adjudications. No court has found that the Social Security Act stands apart from the APA. To the contrary, many courts have found that the two statues stand *in pari material*---to be considered together.

The APA was enacted to ensure that the American people were protected from arbitrary decision making by government bureaucrats. The grant of decisional independence to federal administrative law judges is fundamental to the ability of the ALJ to bring justice to the American people. When federal agencies overreach and encroach on our decisional independence, the promise of Constitutional due process to the American people is broken. In our view, there is absolutely no tension between the Social Security Act and the APA. The tension that does exist at SSA has arisen ONLY when unenlightened bureaucrats unlawfully interfere with the duties and responsibilities of the ALJ. The fact that the APA provides some degree of protection to members of the federal administrative judiciary should not be viewed as a negative. Indeed, the minimal employment protection offered be the APA is absolutely essential to due process and the ability of the judge to correctly adjudicate cases filed pursuant to the Social Security Act.

HIGH VOLUME ADJUDICATIONS

Federal ALJs at SSA work in a stressful, high volume adjudicatory environment. In recent years, the Agency has placed far too much emphasis on numerical performance rather than on correct judicial decision making. According to Agency officials, Judges should spend no more than 2 ½ hours on each case. At the same time, hearing office staff attorneys are allotted 8 hours to prepare a draft denial decision for the judge's review.

To be sure, federal ALJs with conditional lifetime appointments and decisional independence are essential to ensure that the American people, who file approximately 700,000 to 800,000 cases each year, will be provided full and fair due process hearings. In this context, due process and justice can only be accomplished if the judge has sufficient time to develop and review each case, provide a

[2] The Committee observes of the so-called 'fourth branch' of government, the administrative agencies: "They are vested with duties of administration . . . and at the same time they are given important judicial work . . . The evils resulting from this confusion of principles are insidious and far-reaching . . . Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible. Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness."

thorough hearing, deliberate and decide the case and issue a well-reasoned decision which is fully consistent with the facts of the case and the relevant law. While numerical goals are useful tools, these goals must not be used as quotas, as to do so would likely deny due process to the claimant and impair the judge's ability to bring justice to the American people. The current production line mentality robs the judge of one of the most important elements of due process…time. Time is necessary for ALJs to develop and review the evidence, conduct a full and fair hearing, deliberate, and prepare and issue a correct decision. Again, goals are important; quotas violate the Social Security Act, the Administrative Procedure Act and the U.S. Constitution. In addition, and most detrimental to the American people, is the Agency's application of constant pressure on judges to continue to increase the number of cases they adjudicate. The pressure of quotas is forcing judges to hear cases before they are prepared to do so. This impairs the judge's ability to adequately and thoroughly adjudicate cases. While some judges may be forced to hear and decide a higher volume of cases, higher producing judges tend to pay a higher percentage of claims.

> As one Hearing Office Chief Judge pointed out, "*If goals are too high the corners get cut and the easiest thing to do is to grant a case.*"[3]

While it may be true that over 75 percent of judges are meeting the goal-quota of 500-700 decisions annually, what is not present in the data is the fact that most of those judges would appear before you and tell you that in order to meet this level of production, they simply cannot adequately review all of the evidence in the cases they decide. In our view, the current misplaced emphasis on numbers has perverted our system of justice. At an estimated value of $300,000 per case, the AALJ believes the American people are entitled to have a judge who is given adequate time to develop and review all of the evidence in each case, conduct a thorough hearing and issue a correct decision.

As you know, SSA ALJs have adjudicated cases at record levels in each of the past ten years. However, the AALJ believes the SSA adjudicatory system could be made more efficient, effective and economical with changes and modifications that will improve the process. On many prior occasions, the AALJ has urged consideration by the Agency of significant changes to the disability adjudication system.

GOVERNMENT REPRESENTATION

When sued, insurance companies proceed to trial represented by the best law firms in the nation. When a claim is filed for disability benefits, the government (SSA) proceeds to trial without legal representation. When an ALJ rules against a claimant in a disability case, the claimant can (and usually does) file an appeal with the Appeals Council. When an ALJ rules against the government in a disability case creating a $300,000 liability, the government does not have a right of appeal. There is clearly something wrong with this picture. In the context of disability adjudication, the government is the trustee of billions of taxpayer dollars. In our view, it is irresponsible to place these funds at risk at hearing without legal representation.

The AALJ has advocated for well over a decade that the SSA be represented at administrative hearings by attorneys. This representation should be provided by attorneys from the Office of General Counsel, with authority to advocate the American people's interest and with the authority to compromise, settle, and appeal cases which the government believes were erroneously decided. The

[3] See statement of the Hon. Patrick O'Carroll, Inspector General, SSA, before the Subcommittee on Social Security of the House Committee on Ways and Means, September 16, 2008, p.5.

cost of such representation could easily be funded by resources saved by eliminating or restructuring the Regional Offices of the Office of Disability Adjudication and Review (ODAR).

The Social Security Advisory Board (SSAB) has called for the government to be represented as well. In its 2001 report, the SSAB made the following statement:

> [T]he fact that most claimants are now represented by an attorney reinforces the proposition, which has been made several times in the past, that the agency should be represented as well. Unlike a traditional court setting, only one side is now represented at Social Security's ALJ hearings. We think that having an individual present at the hearing to defend the agency's position would help to clarify the issues and introduce greater consistency and accountability into the adjudicative system. It would also help to carry out an effective cross-examination of the claimant. Many ALJs have told us that they are sometimes reluctant to conduct the kind of cross-examination they believe should be made because, upon appeal, the record may make them appear to have been biased against the claimant. Consideration should also be given to allowing the individual who represents the agency at the hearing to file an appeal of the ALJ decision.

This issue has not escaped the analysis of academic commentators. Two professors made the following caustic observation in the *Journal of Economic Perspectives* (*Volume 20. Number 3. Summer 2006. pages 71–96 at page 93*):

> A second promising step would be for the Social Security Administration to consider attorney representation at Administrative Law Judge hearings, as the independent Social Security Advisory Board (2001) has ***repeatedly recommended*** [emphasis added]. At present, claimants are typically represented at appeal by legal and medical advocates who have a financial stake in the claimant's success. The Social Security Administration, by contrast, is entirely dependent on the Administrative Law Judge to protect the claimant's and the public's interests simultaneously (U.S. GAO, 1997). Permitting the Social Security Administration to provide a representative or attorney to the hearings would ameliorate this almost ***comically lopsided setting*** [emphasis added] in which the Social Security Administration currently loses nearly three-quarters of all appeals.

The overriding purpose of the hearing is "fact-finding." The AALJ believes that the model used by SSA to conduct hearings is a relatively poor fact-finding model as compared to the adversarial model. We believe that the center of any change at SSA should include, at a minimum, conversion from the inquisitorial model to the adversarial model. The adversarial system of adjudication is fundamental to our American judicial system. The AALJ knows of no state or Federal court that uses the inquisitorial model to adjudicate issues. SSA uses a model unheard of throughout our land to find facts in a judicial-type setting.

THE BURDEN OF WEARING 3 HATS

Federal ALJs who hear and decide cases at SSA have an unusually complex job. As a fact-finding system, it is difficult for one person to perform all three functions imposed on ALJs: to represent the interest of the claimant; to represent the interest of the Trust Fund; and to serve as an impartial decision maker ("three hats"). To function and appear as an unbiased fact-finder and at the same time to examine a claimant vigorously and thoroughly, as one would expect a lawyer defending the trust fund to do, is not possible. In fact, having the judge defend the Trust Fund as well as the claimant's interest, places the judge in an untenable situation. Oftentimes vigorous examination of the claimant by the judge leads to allegations against the judge of bias and prejudice. Some judges have even been subjected to discipline by the Agency because of aggressive examination of the claimant, done in pursuit of truth and justice.

The benefit of having a lawyer representing the government with the authority to settle cases should not be minimized. In fact, this benefit may be even greater to the administration of justice than the government's role as an advocate. One of the factors contributing to SSA's high volume jurisdiction is the fact that the vast majority of cases are tried. However, nowhere else in our judicial system is a judge required to take to hearing such a high percentage of cases compared to the total docket. Were the state and Federal courts required to actually conduct trials in the same proportion as disability judges are forced to do with their dockets, those courts would abruptly crash under the weight of trying virtually all of their dockets. Having a lawyer with authority to negotiate and settle cases has the potential to drastically reduce the number of cases that are tried, and conceivably reduce the number of judges and support staff.

Having government representation would also ensure that the evidentiary file is complete and that all necessary development has been conducted prior to the hearing. This would permit the judge to become fully informed about the nature and extent of the claimant's alleged impairments prior to the hearing. This type of prehearing preparation is necessary for the judge to understand complex medical evidence and to evaluate the facts, as found at hearing, in the context of relevant the law and agency regulations.

The AALJ believes an adversarial model would far better serve the claimants' and the public's interests by being a better fact-finding system and by more efficiently disposing of cases through compromise and settlement. With a lawyer representing the government, the government can then decide which cases to defend. Instead of hearing 90% of the cases (assuming 10% are awarded on the record without a hearing), far fewer cases would go to hearing because of the ability to settle the case without a hearing. This process would also serve to drive down the backlog quickly.

Another efficiency, which should accrue to having government representation, lies in the shepherding of cases through the appeals process. Identifying those claims that are likely to prevail before the judge and agreeing with the claimant's position to enter a favorable award, means one fewer case that has to be scheduled and tried. The government lawyer can then focus resources on defending those cases which ought to be defended, rather than spend time on perfunctory hearings.

As above noted, the pressure on judges to produce an ever increasing number of cases has reached intolerable levels. In evaluating our concerns, it is essential that members of the Subcommittee understand the role of staff in the disability claims process. When case files arrive in a hearing office, they must be "worked up" or "pulled," that is, electronically organized for use in the hearing. This is a significant task, which if done properly, requires skill and one to three hours of time, as the

contents of a given file arrive in the hearing office in random sequence, unidentified, without pagination, with duplications and without any numbered exhibits or table of contents to locate the exhibits. A staff member must identify and eliminate duplicate exhibits from the same source, label the remaining exhibits, arrange the exhibits in chronological order, number and paginate the exhibits and prepare the list of exhibits. After a case is worked up, it is ready for the assigned judge to review.

In this process, the AALJ believes it important for members of the subcommittees to consider how much time ALJs should be spending on each disability case. At an estimated value of $300,000 per case, we respectfully suggest that this is not a rhetorical question. A judge must invest sufficient time to understand all of the facts in each case as well as applicable law and regulations. It is imperative for the judge to review all evidence in the file, averaging 600 pages, and then direct staff to obtain any missing evidence including consultative medical examinations. When the record is fully developed, the judge determines if a hearing is needed or whether a favorable decision can be made on the evidence of record, without a hearing. In most cases, a hearing is required and the judge then determines which expert witnesses will be required for the hearing and if additional courtroom security is necessary. After this review, the staff secures the expert witnesses and schedules the case for hearing. Once the hearing is scheduled, the judge continues to be involved with the case reviewing newly submitted evidence and considering and resolving pre-hearing motions and issues. Typically, a day or two before the hearing, the judge will conduct another review of the file to evaluate additional evidence and to insure familiarity with the facts and issues for the hearing. Many times, last minute evidence is submitted at the hearing which unnecessarily delays or otherwise impedes the adjudication of the case. When the hearing is concluded, the judge must deliberate, prepare thorough decisional instructions for the writing staff and later review and edit the draft decision before signing it. Sometimes, additional evidence is submitted after the hearing, or even after the decision has been drafted but not yet signed by the judge, causing the expenditure of additional judge time. As can be gleaned from this brief overview, the disability adjudicatory process is complex and time consuming.

As earlier noted, in courts and other agencies, trials and adjudications are conducted under the adversarial process in which the case is developed during trial by evidence introduced by opposing counsel. The judge studies and reviews the evidence as the trial progresses. However, in Social Security disability hearings, ALJs preside over an inquisitorial process, in which the judge develops the facts and the arguments both for and against granting benefits. In large part, this is required because the SSA is not represented at the hearing and the courts are sympathetic to unrepresented claimants. Therefore, ALJs are required to wear the so-called three hats as referenced above. After reviewing the record evidence, the judge often determines that additional evidence must be obtained. This inquisitorial system places more responsibility on the judge. Hearings based on this model are more time consuming and labor intensive for the judge.

Certainly, there is variance in the number of decisions issued by each judge. Such a distribution is normal in all human activities, and is usually graphed as a "bell curve." However, the number of decisions issued by a judge is dependent on numerous factors such as adequate and well trained staffing, the complexity of the cases, the number of unrepresented claimants and the sophistication of the bar. These are factors clearly beyond the control of the judges.

Quite compelling is data from SSA's last study on the issue of numerical goals for ALJs, *Plan for a New Disability Claim Process*. This study was conducted in 1994 and projected a time line for a disability claim at all levels of the process. The study, based on an average month, concluded that a

reasonable disposition rate for an ALJ should be in the range of 25 to 55 cases per month. The study also revealed that a judge would spend a range of 3 to 7 hours adjudicating each case. Consistent with this study is the following testimony of former SSA Chief ALJ Frank Cristaudo before the House Ways and Means Committee, Subcommittee on Social Security, on September 6, 2008, in response to questions from Congressman Xavier Becerra:

> Mr. Becerra. Do me a favor. I am going to run out of 5 minutes real quickly. I am just asking, do you believe that they [ALJs] can get to upwards of 600 to 700 dispositions on an annual basis?
>
> Judge Cristaudo. Well, what we are asking the judges to try to do—we haven't mandated, we are asking—is to get to 500. The 700 was more of an indication to this other group that are doing thousands of cases that at some point there may be a limit as to how many cases a Judge can actually do and still do quality work. That is what the 700 was about.

There have been changes in the process since 1994, but most of those serve to slow down, not speed up, the process. The average file size grows every year. Reviewing electronic files (eFiles) takes more time than reviewing paper files. Even electronic signing (eSigning) of decisions takes longer than using a pen. While technology may have reduced the Agency's overall processing time for claims, it has not reduced the amount of time most judges must spend in adjudicating a case.

In considering numerical performance, it is important to understand that a judge must carefully review the voluminous documentary evidence in the claimant's file to effectively prepare and conduct the hearing and to issue a correct decision. With an average estimated cost to the trust fund of $300,000 per case, a judge hearing 40 cases per month is entrusted to correctly decide cases valued at $10,000,000 per month, or $120,000,000 annually. Nonetheless, judges are being subjected to various pressures to meet ever-increasing production "goals" which in many cases become *de facto* quotas in violation of the APA and infringes on the constitutional requirement for ALJs to provide a full and fair due process hearing.

As a result of SSA's pressure to meet or exceed goals-quotas, many judges are forced to give cases less thorough reviews; adequate evidentiary development may not be undertaken; facts may go unseen; and incorrect assessments may be reached. In some offices, judges are being pressured to accept un-worked cases that have not been organized by staff which is inconsistent with the APA requirement that hearings be held with an identifiable record. The judge must waste substantial time in reviewing un-worked files that may have many duplicate records, records out of sequence and exhibits which are neither identified nor paginated. This lost time should be, instead, spent on reviewing, hearing and deciding more cases.

Reviewing a 600 page case file is not unlike reading a 600-page novel. In both instances, one must read carefully in order to understand the story being presented. Skipping pages in either distorts one's understanding of the whole story. If a judge skips evidentiary pages in a case file, the judge could make incorrect decisions in that case, harming either the claimant or costing the American taxpayers $300,000 for the incorrect decision. Selectively reviewing evidence is a short cut that must cease; otherwise fairness and justice disappear from our adjudicatory system.

PEER REVIEW

The AALJ has advocated for an ALJ Peer Review Program at SSA for approximately twenty years. The AALJ believes that such a system would efficiently and effectively address ALJ performance and conduct issues in a manner that would be beneficial to the Agency, the Judge and the American people. Instead, the Agency continues to address these issues in a manner that always leads to costly and time consuming litigation. The Agency has not only consistently opposed the establishment of a Peer Review Program but also any similar program. This past year, the AALJ proposed a joint workgroup to study and evaluate establishing an ALJ Peer Review Program. The Agency strongly opposed the creation of such a work group.

ADJUDICATORY TRANSPARENCY

In our democratic form of government, the need for transparency in federal administrative hearings is essential. Conducting hearings in secret fosters suspicion and creates misunderstandings about our system of justice. To build and maintain trust in our adjudicatory system by the American people, we must conduct our hearings in the light of day. The AALJ has long advocated that hearings be open to the public. We believe there is a substantial public interest in how disability adjudication is conducted. We believe that the public's interest is generally paramount to a claimant's interest in keeping the hearing closed to the public. Open hearings would lend transparency to our administrative adjudication system and instill confidence regarding our disability system of justice. Moreover, should the case be appealed to the Federal courts, the entire record is open to the public. Also, we believe the Notice of Hearing should include all relevant information, not only the issues to be heard, but also other information such as the time, date and place of the hearing and the name of the assigned judge.

ARE THE MEDICAL VOCATIONAL GUIDELINES RELEVANT TODAY

For many reasons, Americans are living longer and healthier lives. The nature and scope of work performed by the American people is significantly different than 40 years ago. There are far fewer unskilled jobs in the market place and few jobs that require significant physical activity. As a result, application of the Agency's Medical Vocational Guidelines (grid rules) oftentimes forces the ALJ to award benefits when jobs are available that claimants could perform. In our view, this approach to evaluating disability is out of date and should be eliminated. Rather than using these outdated guidelines, judges should rely on vocational testimony. At a minimum, the grid rules should be revised to reflect the increased life span of Americans.

RULES OF PROCEDURE AND CLOSING THE RECORD

The AALJ has advocated for the adoption of procedural rules, however, the Agency has consistently refused to do so. No other judicial system functions without rules of procedure. Further, no other judicial system operates by permitting the record to remain open continuously throughout the adjudicatory and appellate process. For example, medical evidence could be withheld from the ALJ and later submitted to the Appeals Council in order to secure a remand of the case and another hearing. There is no incentive under the current system to submit evidence in a timely fashion.

Procedural rules would ensure an efficient, effective and orderly judicial system. Like a road map, procedural rules would aid litigants by giving specific guidance on how to navigate the adjudicatory process. At SSA such rules could cover, *inter alia,* submission of evidence, dismissals, prehearing

conferences, subpoenas, oral argument, representatives' responsibilities, ex parte communications, continuances and prehearing development.

Perhaps one of the most important areas ripe for procedural rules is closing the record. The AALJ has long advocated that the record should be closed at the conclusion of the hearing unless the ALJ directs otherwise. Any post hearing evidence submitted to the ALJ prior to the issuance of a decision would be admitted into the record upon a showing that such evidence is material and could not have been submitted prior to the close of hearing. If a party waives a hearing, the record would be closed on the date the decision is issued.

THE VALUE OF MEDICAL EXPERT WITNESSES

Medical expert witnesses serve an important role in the adjudicatory process in that their testimony assists the ALJ in reaching the correct decision in a given case. Presently, the Agency has a dearth of medical expert witnesses because their pay has not increased in more than a decade. Pay rates need to rise, and the SSA needs to develop a national pool of medical specialists who can appear at hearings by way of video. In most cases, courts are more likely to uphold a decision if a knowledgeable medical expert witness testifies at a disability hearing. The cost for using a medical expert witness is less than the cost of holding another hearing if the case is remanded as a result of the lack of medical expert testimony.

REDIRECTED RESOURCES TO REDUCE THE BACKLOG

The SSA expends a great deal of money on maintaining ten Regional Offices within ODAR. Since ODAR Regional Offices do not directly contribute to the processing and adjudication of cases, as they handle few, if any, cases, Regional Offices are merely another layer of bureaucratic administration that deprives ODAR hearing offices of personnel. Over the last fifteen years, the Regional Offices have added substantial staff, which could have been better deployed in the hearing offices. The AALJ advocates the elimination of the ODAR Regional Offices and the reassignment of Regional Office staff to hearing offices to handle the backlog, with the savings from office rental costs being redirected to the hearing offices. The overall responsibility for the disability adjudication system, including current Regional functions, should be consolidated in the Office of the Chief Administrative Law Judge and under the management of the Chief Administrative Law Judge.

VIDEO HEARINGS

Face to face hearings provide the best method of delivering due process to the American people. While there may be some instances where video hearings are advisable (such as handling cases in remote areas that would require excessive travel), widespread use of the National Hearing Centers (NHCs) reduces the ability of the SSA to provide due process to the American people. Video hearings should be kept to a minimum in order to preserve the right of every American to have the opportunity to make their case in person to the Judge. No video hearing can provide the same experience and the same contact between a claimant and Judge as an in-person hearing. Moreover, video hearings require the use of a second courtroom; one for the judge and one for the claimant who appears at the hearing by video. This requirement for additional space imposes significant additional costs for the American taxpayer.

INDEPENDENT CORPS NEEDED

Critically important to any successful democracy is an independent judicial system. At the SSA, ALJs do not have the independence envisioned by the APA, the Social Security Act, or the United States Constitution. Agency officials are now imposing daily, weekly, monthly and yearly production quotas. The imposition of these quotas, often euphemistically referred to as goals, has had a deleterious impact on case adjudication. Placing disability judges in an organization separate from SSA would better ensure justice for the American people.

For two decades, the disability adjudication at SSA has suffered from numerous failed management initiatives. With the exception of changes undertaken by former Commissioner Joanne Barnhart, all other initiatives were established and implemented by the Agency without the involvement of the AALJ, whose members are the most knowledgeable about disability adjudication. It is no surprise that those initiatives failed, with great cost to the American people.

The establishment of an independent corps of disability judges would better serve the public than the current system which has a long history of failures.

CONCLUSION

The Social Security Program is absolutely vital to the American people. Our judges are working extremely hard to address the backlog of cases under very adverse circumstances. We are most hopeful that you will further pursue the issues we raise to ensure that claimants receive a full and fair due process hearing by administrative law judges and, at the same time, that the American public receives justice.

Thank you for the opportunity to submit this statement and to present our views on these important issues.

Respectfully submitted,

D. Randall Frye
President, AALJ

Chairman JOHNSON. Mr. Lubbers you are recognized.

STATEMENT OF JEFFREY LUBBERS, PROFESSOR, AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW

Mr. LUBBERS. Thank you, Mr. Chairman, Ranking Member Becerra, for inviting me to be here today. I am a Professor of Practice in Administrative Law at American University Washington College of Law where I have taught since 1996. As I note in my biography from 1975 to 1995, I worked at the Administrative Conference of the United States, ACUS, and am now serving as special counsel at the revived Administrative Conference. However, I want to emphasize that my views I am expressing today are just my own and as an administrative law professor and should not be ascribed in any way to the Administrative Conference.

The growth of the SSA disability adjudication program has been phenomenal.

Chairman JOHNSON. Is your mike on?

Mr. LUBBERS. The growth of SSA disability adjudication has been phenomenal. In 1973, the then president——

Chairman JOHNSON. I forget mine, too.

Mr. LUBBERS [continuing]. Of the Association of ALJs reported that the number of disability proceedings reaching the hearing level had, quote, "jumped to an unbelievable 56,000." That year the per judge disposition rate was 143 cases per year. Today those numbers seem miniscule.

Commissioner Astrue has said that he expects the case load to reach 832,000 in fiscal year 2012 with about 1,400 ALJs. The per judge disposition rate has more than quadrupled to 594. And this rise in caseload shows no sign of slowing down.

Now to sketch out the legal context of the program, I would mention that although SSA benefits once received are an entitlement, which means that the government cannot terminate benefits without a formal hearing. It is not so clear, based on Supreme Court case law, whether that level of due process applies to initial applications and denials of benefits. The Supreme Court has never held that an applicant for public benefits possesses a property interest protected by due process.

Another unresolved issue is whether the formal adjudication provisions of the APA are applicable to SSA disability adjudications. While this is an interesting legal and historical question, it is one that I don't think is all that crucial to resolve because, ultimately, the issue of the APA's applicability is up to Congress, and the APA itself gives both Congress and the agency a lot of flexibility.

But to clarify my own answer to this question that you mentioned, I think that if you just look at the language of the Social Security Act, an APA hearing would not be mandatory, but that analysis is probably trumped by the clear message Congress and this subcommittee sent in the 1970s when it converted the temporary SSI judges into full-fledged ALJs.

Now, over the years, I have urged a number of key process reform proposals that I summarize in my testimony, many of these ideas were included in SSA's 2006 DSI reform proposal. However, other than a couple of the proposals, the rest of the DSI program was prematurely terminated apparently due to resource constraints caused by the crush of caseload pressures that worsened after 2006.

I would like to see a renewed effort to implement these process reforms. However, that may not be possible now. So I have suggested some possible options and approaches in dealing with some of these caseload pressures. Some of them are incremental, such as increasing the use of rulemaking and increasing the use of video communications technology, and some more fundamental. Some of the more fundamental change options might include modifying the role of Appeals Counsel to increase the quality control review of grant cases and to use selected appeals counsel decisions as systemwide precedents; second, replacing both the Appeals Counsel and the district court stages with a Social Security court; third, making SSA hearings adversarial, although I am not convinced that that would be cost beneficial; and fourth, taking advantage of

the APA provision that allows specially designated administrative judges, even in APA hearings.

Now this last option requires a bit more explanation. If Congress does become persuaded that circumstances require that hiring more ALJs is no longer the tenable answer, Congress could specially provide for or designate another type of adjudicator under the APA. Congress has done this occasionally. A prime example is the special authority given to the Nuclear Regulatory Commission to use atomic safety and licensing board panel members to hear nuclear licensing cases. In those cases, Congress wanted to provide the agency with the flexibility to not only use law trained judges to hear licensing cases, but also scientists. Now some have suggested using doctors as adjudicators. I am not sure that is a good idea, but I do think that there are enough problems with the ALJ program to perhaps lead Congress to suggest that there is a need for a specially tailored SSA ALJ program. And in doing that, Congress could allow SSA to basically hire its own judges, using the OPM process. They have done that with the NRC and with boards of contract appeals.

Congress could also consider departing from the current ban on performance appraisals for ALJs. I know there are arguments on the other side of that issue.

So there are a number of things Congress could do if they specially designated Social Security ALJs. My overall point here is that the SSA's ALJ program size and perhaps the character of its cases may now require some special treatment. By providing the menu in my testimony with some commentary along the way, I hope I can assist this committee in performing its historical role in protecting the viability of this historic program.

Chairman JOHNSON. Thank you, sir.

[The prepared statement of Mr. Lubbers follows:]

(Revised June 29, 2011)

Testimony of Jeffrey S. Lubbers
Before the Social Security Subcommittee
House Ways and Means Committee
June 27, 2012

Chairman Johnson and Members of the Committee:

I am pleased to testify before the Subcommittee at today's hearing—the fourth in a series on "Securing the Future of the Social Security Disability Program."

I am Professor of Practice in Administrative Law at American University's Washington College of Law, where I have taught since 1996. As noted in my biography, from 1975-1995 I worked as an attorney and then as Research Director at the Administrative Conference of the United States (ACUS) and am now also serving as Special Counsel at the revived ACUS. However, I want to emphasize that the views I am expressing today (unless otherwise noted) are my own as an administrative law professor and should not be ascribed in any way to ACUS. Even more specifically, although as part-time Acting Research Director from January 1–June 15, 2012, I helped ACUS launch its current, SSA-requested study of ways to reduce the decisional inconsistency of SSA ALJs, the researchers are still engaged in preliminary fact-finding, and my testimony today is not informed by that study in any way, nor have I formed any conclusions about that study.

I. Growth of the SSA Adjudication System

The growth of the SSA disability adjudication program has been phenomenal. In 1973, the President of the Association of Administrative Law Judges (ALJs) in the Department of Health, Education and Welfare (HEW), made a presentation to a Civil Service Commission Advisory Committee on Utilization of Administrative Law Judges in which he said, "Administrative Law Judges in the Department of HEW have experienced a dramatic increase in the number of disability proceedings reaching the hearing level. There were 27,972 proceedings in 1969, 34,901 in 1970, 40,712 in 1971, and by fiscal year 1972 the total had jumped to an unbelievable 56,346."[1] A July 30, 1974 report of that Civil Service Commission indicated that the Social Security Administration (SSA) employed 430 ALJs at the time, and that the per-judge disposition rate had fluctuated between 114.1 and 143.6 cases per year between 1969 and 1973.[2]

A few years later, in 1978, a team of scholars led by Jerry Mashaw, studying the SSA disability adjudication system described the SSA Bureau of Hearings and Appeals as "probably the largest

[1] Statement of Frank B. Borowiec, presented to the Advisory Committee on Utilization of Administrative Law Judges, Civil Service Commission at 5 (July 11, 1973).

[2] U.S. CIVIL SERVICE COMMISSION, REPORT OF THE COMMITTEE ON THE STUDY OF THE UTILIZATION OF ADMINISTRATIVE LAW JUDGES 58 (July 30, 1974).

administrative adjudication agency in the western world" with its 625 administrative law judges (ALJs) disposing of 180,000 cases in fiscal year 1976.[3]

Today those numbers seem miniscule. The SSA Commissioner has said that he expects the caseload to reach 832,000 in fiscal year 2012 with about 1400 ALJs.[4] One obvious by-product of this huge influx of cases is that the per-judge disposition rate has more than quadrupled from 114 per year in 1969, to 288 per year in 1976, to 594 in 2012.

This rise in the caseload will likely continue as higher number of "baby boomers" retire,[5] (2) the economic downturn drives unemployed workers to seek other sources of income,[6] and (3) private insurance companies increasingly require, as a condition of payments, that claimants pursue offsetting SSA disability benefits.[7]

II. The Legal Context

A. The Constitutional dimension

The Disability Insurance program was authorized in 1956 by Title II of the Social Security Act to provide benefits to disabled insured workers who no longer can work, and it was supplemented in 1972 by the Title XVI Supplemental Security Income (SSI) program for aged, blind, or disabled persons whose income and resources fall below a certain threshold. These programs thus have created statutory "entitlements" of benefits for eligible claimants, which means of course that the government cannot terminate benefits without due process. See *Mathews v. Eldridge*, 424 U.S. 319.[8]

But it is not so clear, based on Supreme Court caselaw, whether due process applies to *initial* applications and denials of benefits. In fact, "the Supreme Court has never held that an applicant

[3] JERRY L. MASHAW, ET AL., SOCIAL SECURITY HEARINGS AND APPEALS 1 (1978).

[4] Statement of Michael J. Astrue, Commissioner, Social Security Administration, before the House Committee on Ways and Means, Subcommittee on Social Security and the House Committee on the Judiciary Subcommittee on the Courts, Commercial and Administrative Law (July 11, 2011), *available at* https://www.socialsecurity.gov/legislation/testimony_071111.html.

[5] Baby boomers began to reach the age of 65 in 2011 and will finish reaching 65 in 2030. When they begin to retire in 2011, there will be 40.4 million seniors (or 13% of the population) and will grow to 70.3 million (20% of the population) by 2030. *See* Press Release, U.S. Census Bureau, Census Bureau Projects Doubling of Nation's Population by 2100 (Jan. 13, 2000).

[6] It is well known that while the disability program is not an employment scheme, applications rise when the economy falters. In April 2000, the national unemployment rate was 3.8%; today it is 8.3%.

[7] *Cf.* D. Gregory Rogers, *The Effects of Social Security Awards on Long-Term Disability Claims*, 1 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 1117, 1117 (July 2001).

[8] *See id.* at 332: "The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment." (citation omitted).

for public benefits possesses a property interest protected by due process."[9] In the social security context, in *Richardson v. Perales*, 402 U.S. 389, 406-407, an applicant for benefits contended that SSA violated due process by relying on the written reports of examining physicians who were not available for cross-examination, but the Court was not convinced that he, as an initial applicant, had such a claim. In dicta, the Court said:

> Perales relies heavily on the Court's holding and statements in *Goldberg v. Kelly*, . . . particularly the comment that due process requires notice "and an effective opportunity to defend by confronting any adverse witnesses * * *." 397 U.S., at 267–268. *Kelly*, however, had to do with termination of AFDC benefits without prior notice. It also concerned a situation, the Court said, "where credibility and veracity are at issue, as they must be in many termination proceedings.". . . The *Perales* proceeding is not the same. We are not concerned with termination of disability benefits once granted. Neither are we concerned with a change of status without notice.

Even in *Mathews*, where the beneficiary's benefits were being terminated due to a "continuing disability review"(CDR), the Court found that, unlike in the welfare context of *Goldberg v. Kelly*, a pre-termination hearing was not constitutionally required. Congress, of course, has elected to continue allowing pre-termination ALJ hearings in initial denial cases.

B. Applicability of the Administrative Procedure Act (APA)

One often debated issue is whether the formal adjudication provisions of the APA are applicable to SSA disability adjudications. Twelve years ago I was asked to facilitate a session of the SSA's Executive Leadership Conference[10] on this very issue and a set of materials on this issue was prepared for this occasion by the organizers, which I would be happy to share with the Committee. I will provide some background about this issue, but will not dwell on it because, while an interesting legal and historical question, I think it is somewhat beside the point—because ultimately the issue of the APA's applicability is up to Congress, and moreover, even if the APA's procedures continue to be required in these cases, the APA itself gives both Congress and the agency sufficient flexibility to provide for hearings and hearing officers suitable for deciding such cases.

This issue arose in *Richardson v. Perales* because the claimant also claimed "that the Administrative Procedure Act, rather than the Social Security Act, governs the processing of claims and specifically provides for cross-examination."[11] The Court's response was, "We need not decide whether the APA has general application to social security disability claims, for the

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[9] AM. BAR. ASS'N, A GUIDE TO FEDERAL AGENCY ADJUDICATION, 2D ED. 25–27 (Jeffrey B. Litwak, ed. 2012). Many courts of appeals have so held, however; *see* Jeffrey S. Lubbers, *Giving Applicants For Veterans' And Other Government Benefits Their Due (Process)*, 35 ADMIN. & REG. L. NEWS 16 (spring 2010).

[10] The session was held on November 2, 2000 in Berkeley Springs, WV.

[11] 402 U.S. at 408.

social security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social Security Act."[12]

The SSA Act, 42 U.S.C. § 405(b), sets forth the hearing provision applicable to disability cases:

> The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. Upon request by any such individual . . . the Commissioner shall give such applicant and such other individual reasonable notice *and opportunity for a hearing* with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision. . . . The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure (emphasis supplied).

Under prevailing administrative law doctrine, unless Congress clearly requires the use of a formal APA adjudication, by using "magic words" such as "hearing on the record," agencies are free to interpret the simple "hearing" requirement as not triggering the APA's formal procedures.[13] Under this principle, based on the above language alone, SSA would be allowed to interpret the Act as allowing less formal procedures than the APA and use of non-ALJ adjudicators. However, some related legislative history cuts the other way. This is the story of the saga of the hearing officers appointed to hear the new cases created when the SSI program was enacted in 1972.[14]

Originally, when SSA requested the authority to hire additional ALJs to hear these cases, the Civil Service Commission (CSC, OPM's predecessor) determined that SSI hearings did not require APA-appointed ALJs to hear such cases. The Department of HEW (within which SSA operated at the time) challenged this view and the Chairman of the CSC "granted SSA's request to establish registers for [ALJs]." A group of ALJs "from 'old line' agencies" objected and was granted a hearing before the CSC. The then-SSA Commissioner "urged that full APA

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[12] *Id.* at 409.

[13] *See* AM. BAR. ASS'N, A GUIDE TO FEDERAL AGENCY ADJUDICATION, 2D ED. 41–45 (Jeffrey B. Litwak, ed. 2012).

[14] The following recounting is drawn from Comm. Staff Report on the Disability Program, House Comm. on Ways and Means, 93d Cong., 1st Sess. (1974)

procedures be applied under SSI as under SSA." But the CSC Chairman reversed his position once more again finding that ALJs were not required in SSI hearings, because that program is not under the APA."

In January 1976, Congress then acted to confer "temporary ALJ" status to these SSI hearing officers for two years.[15] The saga ended when, in December 1977, Congress enacted legislation "deeming" these temporary ALJs to be full-fledged, permanent ALJs.[16]

This legislative history does seem to indicate that Congress, and this Subcommittee specifically, clearly expressed its intent that hearing officers presiding over SSA DI and SSI cases be Administrative Law Judges. Obviously, however, this decision is up to Congress to make or maintain, and, as I will mention below, the APA itself specifically provides that Congress can specially provide for other types of designated presiding officers, even in APA proceedings.

III. SSA DI Adjudication Reform Proposals

As this committee well knows, there are four levels of administrative decisionmaking for Social Security claims—and for most claims, they must pass through all four before a decision is subject to judicial review.[17] The process begins at local SSA offices, where the all-important initial disability determinations are contracted out to state-run Disability Determination Service (DDS) offices. SSA, together with the DDSs, makes the initial decision on an application and the initial decision to terminate benefits in CDR cases; in case of appeal, SSA and DDS also handle the first level of review, known as "reconsideration." Further administrative appeals are handled by SSA, but through its Office of Disability Adjudication and Review (ODAR), which houses the Office of the Chief Administrative Law Judge and approximately 1400 ALJs who are responsible for administrative hearings, along with the Appeals Council (with a chair and 70 "Administrative Appeals Judges"),[18] which reviews administrative hearing decisions on appeal by a claimant or, in a few cases, on its own initiative.

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[15] *See* Pub. L. No. 94-202 § 3:

> The persons appointed . . . to serve as hearing examiners in hearings under section 1631(c) of such Act may conduct hearings under titles II, SVI, and XVIII of The Social Security Act if the Secretary of Health, Education, and Welfare finds it will promote the achievement of the objectives of such title, notwithstanding the fact that their appointments were made without meeting the requirements for [ALJs] appointed under section 3105 of title 5, United States Code; but their appointments shall terminate not later than at the close of the period ending December 31, 1978, and during that period they shall be deemed to be hearing examiners appointed under such section 3105 and subject to all of the other provisions of such title 5 which apply to [ALJs].

[16] Pub. L. No. 95–216, tit. III, § 371, 91 Stat. 1559. *See also* Subcomm. of Soc. Sec. of the House Comm. Ways and Means, 96th Cong. "Social Security Administrative Law Judges: Survey and Issue Paper" (Comm. Print 1979).

[17] *See, e.g.*, Johnson v. Shalala, 2 F.3d 918, 920 (9th Cir. 1993) (Social Security Act, 42 U.S.C. § 405(g), "requires each Social Security claimant to exhaust his administrative remedies before appealing to a federal district court"). There are special rules for expedited appeals where the only issue is the constitutionality of an applicable provision of the Social Security Act.

[18] See http://www.socialsecurity.gov/appeals/about_ac.html. These judges are not ALJs and lack the statutory independence and APA protection enjoyed by ALJs.

Over the years, I have supported a number of program-specific improvements to the SSA adjudication process.[19] These are most fully set forth in the study that Paul Verkuil, Frank Bloch and I did originally for the Social Security Advisory Board (SSAB) in 2003.[20]

We were originally asked by the SSAB to examine the options of introducing some form of government representative and closing the record at a pre-ordained time. We decided not to propose a revival of the SSA's experimental program involving a government representative as an advocate. Instead we suggested a somewhat different approach to improving the record for decision at ALJ hearings: introducing a nonadversary "Counselor" into the disability adjudication process whose central role would be to monitor the process of developing the evidentiary record. This Counselor would work closely with all of the key actors—the claimant (and the claimant's representative, if there is one), the ALJ, and SSA (most likely through DDS)—in order to identify any gaps in the record and to fill them as quickly and efficiently as possible. The idea was that these Counselors would remove much of the development work from the ALJ, including the second- and third-hat roles of assuring that the claimant's and SSA's (or DDS's) positions are fully supported, and would serve a much-needed administrative liaison function between the DDS and ODAR.

We also recommended that the Counselors be given the resources and authority necessary to move claims quickly, especially those where benefits can be granted without a full administrative hearing. Consistent with the concept of nonadversarial representation, we noted that SSA Counselors need not—and perhaps should not—be lawyers. Most importantly, they should be qualified and trained to assure that they understand the relevant medical, vocational, and legal issues involved in Social Security disability adjudications.

Another central recommendation was that "SSA should revise its regulations to close the evidentiary record after the ALJ hearing," with a proviso that ALJs may extend the time to submit evidence after the hearing and before deciding the claim, and that claimants be allowed to request a reopening to submit new and material evidence (within a certain time period) if they can demonstrate good cause.[21]

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[19] *See* Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, report to the Social Security Advisory Board (Mar, 1, 2002); *available at* http://www.ssab.gov/Publications/Disability/VerkuilLubbers.pdf; *also published at* 55 ADMIN. L. REV. 731 (2003); Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *Introducing Nonadversarial Government Representatives to Improve the Record for Decision in Social Security Disability Adjudications*, Report to the Social Security Advisory Board (March 2003), *available at* http://www.ssab.gov/documents/Bloch-Lubbers-Verkuil.pdf; *also published as Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1 (2003); Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *The Social Security Administration's New Disability Adjudication Rules: A Significant and Promising Reform*, 92 Cornell L. Rev. 235 (2007).

[20] See *id.*

[21] Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 62 (2003).

We also made a number of other specific recommendations; I have appended to this testimony the full set of our proposed recommendations.

In 2005, SSA proposed, and in 2006 finalized, a revised set of procedures for disability adjudication known as the Disability Service Improvement (DSI) process.[22] We were pleased to see that a number of our recommendations were incorporated into the DSI process, including the introduction of a Quick Disability Determination (QDD) process for certain types of claims where an initial finding of disability can be made within twenty days; the creation of a Medical and Vocational Expert System (MVES), designed to improve the quality and availability of medical and vocational expertise throughout the administrative process; the addition of a Federal Reviewing Official (FRO) (somewhat similar to our proposed Counselor), who would review appealed initial decisions before such decisions are scheduled for an administrative hearing; and rules implementing the closing of the record at the ALJ stage that were consistent with our recommendation.[23] In addition, the DSI also eliminated the reconsideration level of review following an initial denial of disability benefits; and replaced the Appeals Council with a new Decision Review Board (DRB) charged with broader responsibility for identifying and correcting systemic decision errors. But in a sign that that the agency was not completely confident about these changes, the plan was only implemented in the Boston region to start with.

In our review of the new program, we lauded Commissioner Barnhart for having "undertaken a much-needed, comprehensive reform of the SSA disability adjudication process."[24] We did, however, disagree with aspects of the DSI, most significantly the rule's authorizing the FRO to issue decisions to deny benefits. Our concern was that this would "excessively formalize this stage of the process, canceling out the streamlining provided by eliminating the reconsideration stage."[25]

Since the establishment, in 2006, of the DSI program in the Boston region, however, much of the program has fallen by the wayside. Although the QDD process was implemented nationally in September 2007,[26] shortly after Commissioner Astrue took over, and is apparently working

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[22] Administrative Review Process for Adjudicating Initial Disability Claims, 70 Fed. Reg. 43,590 (proposed July 27, 2005); Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424 (Mar. 31, 2006) (to be codified at 20 C.F.R. pts. 404, 405, 416 & 422).

[23] *See* Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *The Social Security Administration's New Disability Adjudication Rules: A Significant and Promising Reform*, 92 Cornell L. Rev. 235, 246 (2007) (explaining that SSA had revised its proposed closing-of-the record rule to "markedly improve" it by "retain[ing] the policy of closing the record after the ALJ stage while allowing the ALJ sufficient discretion—with somewhat more liberal guidelines than the proposed rules—to hold the record open at the time of the hearing or reopen it after the hearing").

[24] *Id.* at 236.

[25] *Id.* at 243.

[26] Social Security Administration, final rule, Amendments to the Quick Disability Determination Process, 72 Fed. Reg. 51,173 Sept. 6, 2007).

well,[27] he also, about the same time, issued a new notice of proposed rulemaking, proposing to suspend the MVES and FRO provisions of the Boston region pilot DSI procedures.[28]

He explained:

> Our experience over the last year in the Boston region demonstrates that the administrative costs associated with [FRO] and its consequent use of the [MVES] to develop medical and vocational evidence is [sic] greater over the foreseeable future than originally anticipated. We do not yet have sufficient results to fully evaluate the potential improvements in program efficacy that are the goals of the [FRO] and [MVES]. Therefore, we propose to suspend new claims going through the [FRO] and [MVES], so that we can reallocate resources to reduce the backlog at the hearing level, while we evaluate the [FRO] and [MVES] through the processing of claims already received.[29]

When this proposed suspension was finalized, in January 2008,[30] he further explained:

> The staffing levels for these organizations have been approximately 50% of the levels we believed would be needed to handle the Boston region workload. With the reduced staffing at the [MVES office], [the FRO office] has experienced delays in getting required medical evidence, consultative exams, and medical expert input. Budget constraints precluded us from hiring a full staff.[31]

A month after he proposed to end the FRO/MVES program, in October 2007, he also proposed extending the rest of the DSI program procedures nationwide and apply them to hearings on both disability and non-disability matters.[32] Changes were also proposed to the final level of the administrative review process "to make proceedings at that level more like those used by a Federal appellate court when it reviews the decision of a district court, to establish procedures for appeals to that level, and to change the name of the body that will hear such appeals" to "Review Board," and to limit "the circumstances in which new evidence may be added to the record during the appeals process."[33]

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[27] *See, e.g.*, Social Security Administration, notice of proposed rulemaking, Disability Determinations by State Agency Disability Examiners, 75 Fed. Reg. 9821, 9822 n.4 (Mar. 4, 2010) ("Our data demonstrate that the [QDD] model is working as we intend.").

[28] Social Security Administration, notice of proposed rulemaking, Proposed Suspension of New Claims to the Federal Reviewing Official Review Level, Changes to the Role of the Medical and Vocational Expert System, and Future Demonstration Projects, 72 Fed. Reg. 45,701 (Aug. 15, 2007).

[29] *Id.* at 45,702.

[30] Social Security Administration, final rule, Suspension of New Claims to the Federal Reviewing Official Review Level, 73 Fed. Reg. 2411 (Jan. 8, 2008).

[31] *Id.* at 2412.

[32] Social Security Administration, notice of proposed rulemaking, Amendments to the Administrative Law Judge, Appeals Council, and Decision Review Board Appeals Social Security Administration, notice of proposed rulemaking, 72 Fed. Reg. 61,218 (Oct. 29, 2007).

[33] *Id.* at 62,218 (summary).

No further action has been taken on this rulemaking; in fact the agency reversed course in December 2009, by proposing to terminate the DSI program by ending its application in the Boston region.[34] This proposal was partially finalized in May 2011, when SSA issued a final rule eliminating the Decision Review Board aspect of the DSI program in the Boston region.[35] However, that rule did announce SSA was continuing to use the DSI's closing-of-the-record provision, and in fact announced that the October 2007 proposal to extend those specific rules nationally is still alive.[36]

It seems from this history that only the QDD and the closing-of-the-record provisions of the DSI have survived. The rest of the changes, even in terms of the pilot process in the Boston region have not—apparently due to the crush of the caseload and pressures and resource constraints that worsened after 2006. But I continue to believe that the "Counselor" and DRB ideas are good ones and that the closing-of-the-record procedures, that apparently are still alive in the Boston region, should be extended nationally as well.

IV. Current Pressing Problems

Turning to the pressing problems that have at least partially led to today's hearings—the crushing caseload pressure, persistent backlogs, and strikingly inconsistent decisional rates among ALJs, I will first outline the problems:

A. Backlogs

Although there has been some significant recent progress in reducing the pending caseload and concomitant processing delays, the problem is persistent. In March 2010, Commissioner Astrue, announced:

> that the number of disability hearings pending stands at 697,437 cases—the lowest level since June 2005 and down more than 71,000 cases since December 2008, when the trend of month-by-month reductions began. In addition, the average processing time for hearing decisions has decreased to 442 days, down from a high of 514 days at the end of fiscal year (FY) 2008.[37]

The press release mentioned that

> The agency hired 147 Administrative Law Judges (ALJs) and over 1,000 support staff in FY 2009, and has plans to hire an additional 226 ALJs this year. The

[34] Social Security Administration, notice of proposed rulemaking, Reestablishing Uniform National Disability Adjudication Provisions, 74 Fed. Reg. 63,688 (Dec. 4, 2009).

[35] Social Security Administration, final rule, Eliminating the Decision Review Board Reestablishing Uniform National Disability Adjudication Provisions, 76 Fed. Reg. 24,802 (May 3, 2011).

[36] *Id.* at 24,804.

[37] Social Security Administration, News Release, Social Security Hearings Backlog Falls to Lowest Level Since 2005 (Mar. 2, 2010), *available at* http://www.ssa.gov/pressoffice/pr/hearings-backlog-0310-pr.htm.

> agency now has four National Hearing Centers to help process hearings by video conference for the most hard-hit areas of the country. The agency also has aggressive plans to open 14 new hearing offices and three satellite offices by the end of the year.[38]

However, in September 2011, according to a Syracuse University analysis, "The number of disability cases awaiting a hearing and decision by [SSA] continued to climb during the most recent quarter, from July 1 to September 30, 2011. Pending cases rose to 771,318 at the end of this period, up 9.3 percent from 705,367 one year ago."[39]

B. Inconsistent decisions and high grant rates

There have been widely reported decisional inconsistencies in the SSA disability adjudication system.[40] As the SSA Inspector General reported in a letter to Chairman Johnson of this Committee in February of this year, among the 1,256 ALJs with 200 or more dispositions in FY 2010, the average decisional allowance rate was about 67 percent, but the 12 ALJs with the highest allowance rates averaged between 96.3 and 99.7 percent, and the 12 ALJs with the lowest allowance rates averaged between 8.55 and 25.1 percent.[41] The disuniformity is troubling, but lost in those headlines is the fact that the two-thirds overall national average allowance rate is strikingly high given that in granting claims, ALJs are in effect reversing prior decisions by the decisionmakers at both the DDS and reconsideration levels.

SSA is aware of the inconsistency problem and has commissioned ACUS to study the fairness, efficiency, and accountability issues raised by these inconsistencies; the study is ongoing and I hope that it will ultimately be useful to both SSA and this Committee when it is completed later this year. I am not going to prejudge the ACUS study, but I will note that in today's testimony Professor Pierce makes a good point when he points to perverse incentives that make it easier and less of a "hassle" for ALJs to grant cases than to deny them. But even so, that doesn't account for the rather extreme tails of the bell curve among individual decisionmakers, some of which, at first blush at least, appear to be based on the location of the hearing office. That latter point may be related to a desire for popularity in the community by being known as a "generous" judge. Moreover, claimants' representatives may also have an unfortunate incentive to drag out cases, since their fees are tied to a percentage of the back pay provided to successful applicants in order to cover the time between their claim and the decision. As a *USA Today* editorial noted,

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[38] *Id.*

[39] *See* "SSA Disability Cases Continue to Climb—Rise in Backlog as of September 2011," Transactional Records Access Clearinghouse (Nov. 3, 2011), http://trac.syr.edu/tracreports/ssa/266/.

[40] *See e.g.*, Damian Paletta, *Disability Claim Judge Has Trouble Saying 'No,'* WALL ST. J. (May 19, 2011), *available at* http://online.wsj.com/article/SB10001424052748704681904576319163605918524.html.

[41] *Congressional Response Report, Oversight of Administrative Law Judge Workload Trends*, at 4–5, No. A-12-11-01138 (Feb. 2012), transmitted by letter to Hon. Sam Johnson, Chairman, Subcomm. on Social Security, House Comm. on Ways and Means (Feb. 14, 2012), *available at* http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-11-01138_0.pdf.

"This gives the lawyers a potent incentive to drag the process out, to the detriment of everyone but themselves."[42]

V. Possible New Approaches

As mentioned above, I would like to see aspects of the DSI program revived. But since the reason for abandoning many of them was that the apparently long-term and growing caseload problem makes it impossible to devote enough resources to test them properly, it would seem that this fundamental caseload problem needs to be addressed with some new approaches.

1. Doing more rulemaking

While not a new initiative, one that I would at least like to see explored more is the use of rulemaking by SSA to reduce the number of issues that must be heard in individual adjudications. The Supreme Court blessed this approach in *Heckler v. Campbell*, in which the Court upheld agency's use of its "medical-vocational guidelines," which determined "the types and numbers of jobs that exist in the national economy" so that the issue did not have to be re-determined in every individual adjudication.[43] To be sure, the Court also noted that "Respondent does not challenge the rulemaking itself, and . . . respondent was accorded a *de novo* hearing to introduce evidence on issues, such as physical and mental limitations, that require individualized consideration."[44]

The simple question I have is whether there might be other general factual issues that could be resolved as fairly and more efficiently through rulemaking as through case-by-case adjudication.

2. Expanding and enhancing video teleconferencing technology

Another existing initiative that might bear more fruit is the use of video teleconferencing technology (VTC) to conduct hearings. As reported in the Administrative Conference recommendation urging greater use of VTC:

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[42] USA TODAY, *Editorial: Disability claims swelling in recession* (Feb. 22, 2012), online at http://www.usatoday.com/news/opinion/editorials/story/2012-02-02/disability-Social-Security-recession/52940278/1. But see the opposing letter to the editor responding to this editorial by Jim Allsup, CEO; Allsup Inc.; Belleville, Ill., a nationwide disability representation company:

> According to the OIG, having a representative can help eligible applicants receive an allowance decision earlier in the process. Experienced representatives help claimants navigate the complicated system and avoid common pitfalls that lead to unnecessary delays and denials that later get reversed at an expensive hearing. Claimants analyzed in an OIG report could have saved 500 days by engaging a third-party representative when they applied.

Http://www.usatoday.com/news/opinion/letters/story/2012-02-08/Social-Security-Disability-offshore-investments/53014844/1.USA Today, *Editorial: Disability claims swelling in recession* (Feb. 22, 2012), online at http://www.usatoday.com/news/opinion/editorials/story/2012-02-02/disability-Social-Security-recession/52940278/1.

[43] 461 U.S. 458, 459, 461 (1983). The so called "grid rules" are codified in 20 C.F.R. pt. 404, subpt. P, appx. 2.

[44] *Id.* at 470 n.14.

> [I]n 2010, ODAR conducted a total of 120,624 video hearings, and a cost-benefit analysis conducted for the agency by outside consultants found that ODAR's current use of video hearings saves the agency a projected estimated amount of approximately $59 million dollars annually and $596 million dollars over a 10-year period. A study by the agency has also determined that the use of VTC has no effect on the outcome of cases.[45]

This shows the potential magnitude of savings of time and money in such a huge program. Of course, it is necessary to remain vigilant in maintaining the fairness and acceptability of such hearings and to continue to improve the technology. Moreover, there is at least a hypothesis—worthy of examination—that use of VTC (in the sense of "distance judging") may help eliminate some of the decisional variations among ALJs—especially if an ALJ might otherwise be thinking about his or her popularity within a particular community.

3. Modifying the role of the Appeals Council

Not surprisingly, the caseload of the Appeals Council is growing along with the rest of the adjudicative system. SSA reported that the Appeals Council received over 173,000 requests for review in the year ending September 30, 2011. During that period it processed about 127,000 cases, with an average processing time of 360 days, leading to a pending caseload of 153,000 at the end of that year.[46] Requests for review are up significantly—from 106,965 in FY 2009 and 128,703 in FY 2010.[47]

The DSI process as promulgated in 1996 (only implemented in the Boston region) would have substituted a Decision Review Board for the Appeals Council. This proposal was rescinded in 2011—primarily due to caseload pressures. But it is worth revisiting the announced purpose of the change.[48]

The DRB would have substituted for the appeal process used by the Appeals Council an expanded "own-motion" type of review that covered review of both allowances and denials. Claims were to be reviewed before the ALJ decision was effectuated. The DRB could affirm, modify, or reverse the ALJ's decision or remand the claim to the ALJ.

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[45] ACUS Recommendation 2011-4, "Agency Use of Video Hearings: Best Practices and Possibilities for Expansion" (June 17, 2011), *available at* http://www.acus.gov/acus-recommendations/agency-use-of-video-hearings-best-practices-and-possibilities-for-expansion. [Note, however, that after this testimony was delivered, SSA notified ACUS that it had corrected the ten-year savings figure to $52-109 million. Office of the Inspector General, SSA, *Congressional Response Report, Current and Expanded Use of Video Hearings* at 3, No. A-05-12-21287 (June 2012), transmitted by letter to Hon. Dave Camp, Chairman, Comm. on Ways and Means (June 18, 2012), *available at* http://oig.ssa.gov/audits-and-investigations/audit-reports/A-05-12-21287.]

[46] SSA, General Appeals Council Statistics, http://www.ssa.gov/appeals/ac_statistics.html.

[47] Social Security Administration, final rule, Eliminating the Decision Review Board Reestablishing Uniform National Disability Adjudication Provisions, 76 Fed. Reg. 24,802, 24,803 (May 3, 2011).

[48] Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424, 16,437–39 (Mar. 31, 2006).

The DRB was also to be charged with selecting claims for review after the ALJ's decision was effectuated for purposes of studying the decisionmaking process, but in such cases the DRB would not change the ALJ's decision except in limited circumstances.

If the DRB did not complete its action within the 90-day time frame, the ALJ's decision would become final, subject to judicial review. The DRB was to apply a substantial evidence standard to questions of fact and to consider only the record that was closed at the time that the ALJ issued the decision (subject to a good cause exception).

The DRB was to be composed of experienced and highly knowledgeable ALJs and administrative appeals judges, serving on a rotational basis, with staggered terms, and supported by a highly qualified staff. To enhance accountability and to provide feedback in the decisionmaking process, DRB decisions that were in disagreement with ALJ hearing decisions were to be sent to the ALJ who issued the decision.

SSA explained that it had decided to have the DRB rely on own-motion review and not to allow claimants to initiate appeals to the DRB (unless the ALJ had dismissed the claim entirely) because claimants already "have two levels of Federal administrative review after the initial determination, and the [ALJ] level of review allows the claimant the opportunity for a face-to-face hearing. Neither the Social Security Act nor due process requires further opportunities for administrative review."[49]

It also said in response to public comments on its proposal that it did not believe the new process would be more complicated for the claimant, because the claimant would simultaneously receive notice of the ALJ's decision and whether the DRB would be reviewing the case. The claimant would not have to take any further action until such time as the DRB issued its decision, although the claimant could submit a written statement to the DRB. SSA concluded that the new process would benefit the claimant by providing an opportunity for further administrative review in problematic cases or, otherwise, with a quicker final decision so that the claimant can proceed judicial review if so desired.

A key to the success of this process, obviously, is appropriate selection of cases for review by the DRB. Although SSA declined in its rule to include "a specific statement regarding the method and range of sample sizes," because "our methods of selecting cases for review will change over time as we gain experience and knowledge in the use of our computer-based tools," it said that it would select cases in different ways so as to "efficiently identify problematic cases without unfairly targeting any specific category of claimant." SSA also pledged not "to review claims based on the identity of the administrative law judge who decided the claim." But it did say that "the claims that the DRB will review may include claims where there is an increased likelihood of error, or claims that involve new policies, rules, or procedures in order to ensure that they are being interpreted and used as intended."[50]

In 2011, when SSA abandoned the DRB in the Boston region, it explained:

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[49] 71 Fed. Reg. at 16,438.

[50] *Id.* at 16,437.

> The DRB has not functioned as we originally intended; its workload has grown quickly and become overwhelming. We had intended to use an automated predictive model to select the most error-prone cases for DRB review. However, because we were unable to implement this predictive model, the DRB processed 100% of the unfavorable and partially favorable decisions, requiring significantly more resources than we had anticipated.[51]

I think it is unfortunate that the DRB experiment foundered because SSA was unable to implement an appropriate predictive model, though it is understandable that nationwide caseload pressures on the Appeals Council made it difficult to fully carry out its proposal in a single region.

I hope, however, that if the Appeals Council is maintained in its current form, some way can be found to increase the "quality control" review of grant cases, and to use selected Appeals Council decisions as system-wide precedent so that recurrent issues can be settled at that level. This, of course, would also require some mechanism to enforce (or at least strongly encourage) compliance with such precedential decisions at the lower levels.

This is consistent with ACUS's 1987 recommendation, where ACUS recommended an enhanced role for the Appeals Council in making systemic improvements:[52]

> a. Focus on System Improvements. SSA should make clear that the primary function of the Appeals Council is to focus on adjudicatory principles and decisional standards concerning disability law and procedures and transmit advice thereon to SSA policymakers and guidance to lower-level decisionmakers. Thus the Appeals Council should advise and assist SSA policymakers and decisionmakers by:
>
> > (1) Conducting independent studies of the agency's cases and procedures, and providing appropriate advice and recommendations to SSA policymakers; and
> >
> > (2) Providing appropriate guidance to agency adjudicators (primarily ALJs, but conceivably DDS hearing officers in some cases) by: (a) Issuing, after coordination with other SSA policymakers, interpretive "minutes" on questions of adjudicatory principles and procedures, and (b) articulating the proper handling of specific issues in case review opinions to be given precedential significance. The minutes and opinions should be consistent with the Commissioner's Social Security Rulings. Such guidance papers should be distributed throughout the system, made publicly available, and indexed.

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[51] 76 Fed. Reg. at 24,803.

[52] ACUS Recommendation 87–7, "A New Role for the Social Security Appeals Council" ¶ 1 (Dec. 18, 1987) *available at* http://www.acus.gov/acus-recommendations/a-new-role-for-the-social-security-appeals-council.

ACUS closed its recommendation by saying: "If the reconstituted Appeals Council does not result in improved policy development or case-handling performance within a certain number of years (to be determined by Congress and SSA), serious consideration should be given to abolishing it."[53]

That statement retains its force and, with the demise of the DRB experiment, it is up to SSA and the Congress to consider something beyond simply increasing the size of the Appeals Council to massive proportion.

4. Considering the Establishment of a Social Security Court

When SSA proposed the DRB, one of the prominent commenters was the Administrative Office of the U.S. Courts, which "thought that the shift of the Appeals Council's functions to the DRB would have an adverse effect on the Federal court system and would result in an increase in the number of cases appealed to the Federal courts."[54]

This is not a new concern; various federal court study commissions have noted the high proportion of SSA cases in the high proportion and burdensome nature of SSA cases in the federal district courts.[55] Not surprisingly, appeals of SSA decisions to the district courts continue to be at high levels in 2011 with 15,705 appeals to the district court (many of which are first handled by Federal Magistrate Judges), and 577 to the courts of appeals.[56]

Another problem is that there is also a lack of uniformity among the district court decisions. A study I worked on found that in FY 2000, there was a wide range of outright allowances (not including the numerous remands) among the 48 district courts that had over 100 appeals, with a high of about 28% and a low of zero.[57]

These problems, along with the seeming ineffectuality of the Appeals Council, led Professor Verkuil and me to recommend the creation of an Article I Social Security Court which would substitute for both the Appeals Council and the federal district courts. Appeals from that Court would then go the regional courts of appeals. Following a suggestion of the Association of ALJs, we also suggested that perhaps the ALJ stage could be reconstituted into a two-tier stage with a possible appeal of a single ALJ decision to a panel of three ALJs in some cases. This is similar to the two-tier bankruptcy judge panels authorized in bankruptcy cases.[58]

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[53] *Id.* at ¶ 2.

[54] 71 Fed. Reg. at 16,439.

[55] *See* Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 752–54 (2003) (discussing the studies).

[56] ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, 2011 ANN. REPORT OF THE DIRECTOR, tbls. B-IA, C-10, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf. These reflect all appeals, but the vast majority are most are disability cases.

[57] Verkuil & Lubbers, *supra* note 55, at 783–84 (Appendix A).

[58] *See* 28 U.S.C. 158(b), discussed, *id.* at 747–48.

We concluded that a Social Security Court would not only reduce the burdens on the federal district courts, but would also produce more uniformity in the decisions, thus providing more guidance to the agency decisionmakers as well. It would also have the potential benefit of being a vehicle for potentially consolidating judicial review of other benefit program decisions into a single court.[59]

5. Introduce Government attorneys/adversarial hearings

SSA cases have traditionally been non-adversary in nature—with no government representative and with the ALJ often having to wear "three hats"—making a decision on the record while also ensuring that the record reflects the best arguments for unrepresented claimants and protecting the overall public interest (the public fisc). This can make the ALJ's job more difficult and there have been some well-intentioned suggestions to institute government representation, especially as claimant representation has increased now to levels of about 80%. SSA experimented with a government representation project from 1982-1986, but it was shut down prematurely after a district court judge issued an injunction against continuation of the program, which for some reason was not appealed by SSA.[60]

Allowing government representation might make sense in some cases. For example, a former President of the Association of ALJs, recommended that adversary hearings be used in (a) all court remand cases and (b) in cases where an applicant seeking SSI funds "has created corporations or other legal devices that might mask his true income."[61] But as a general matter, I am not convinced that the benefits of transforming the program from an inquisitorial to an adversary program would outweigh the considerable costs of doing so. These costs would include: (1) the upfront costs of hiring a cadre of highly paid government litigators, (2) the probable increase in complexity and combativeness of the hearings, and (3) the resulting applicability of the Equal Access to Justice Act's attorney fee provisions to SSA administrative proceedings (which only apply to "adversary adjudications" in which the position of the United States is represented by counsel or otherwise").[62]

For those reasons I continue to prefer the deployment of government "Counselors" to help the ALJ and the parties develop the record instead of assigning government litigators to these cases.

6. Options Regarding ALJs and Specially Designated AJs

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[59] For an expansion of this argument and a comparison with the Australian Social Security Appeals Tribunal, see Michael Asimow & Jeffrey S. Lubbers, *The Merits of "Merits" Review: A Comparative Look at the Australian Administrative Appeals Tribunal*, 28 WINDSOR Y.B. ACCESS JUST. 261 (2010).

[60] Salling v. Brown, 641 F. Supp. 1946 (W.D. Va. 1986). This project and the injunction that ended it is discussed in Bloch, Lubbers, & Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 45–52 (2003).

[61] Statement of Frank B. Borowiec, presented to the Advisory Committee on Utilization of Administrative Law Judges, Civil Service Commission at 12 (July 11, 1973).

[62] 5 U.S.C. § 504(b)(1)(C). This issue is discussed at Bloch, Lubbers, & Verkuil at 38–42 (estimating a potential additional annual cost of $100 million that would have to come out of SSA's budget).

As discussed above, in the 1970's, Congress seemed to ratify the SSA's long-standing position favoring the use of ALJs in disability adjudication. Whether that might change if SSA changes *its* position is an open question. But as a legal matter, the APA certainly permits such a re-evaluation. Section 556, after providing for the use of ALJs in formal adjudications, states: "This subchapter does not supersede the conduct of specified classes, of proceedings, in whole or in part, by or before boards or other, employees specially provided for by or designated under statute."

Thus, if Congress became persuaded that circumstances require that the long-standing model of using ALJs is no longer tenable, it could "specially provide for or designate" another type of adjudicator, even as it maintains the APA procedures. Congress has done this occasionally. For example, once was when it designated the temporary SSI judges described above. Another example is the special authority given to the Nuclear Regulatory Commission (NRC) to use Atomic Safety and Licensing Board Panel members (lawyers and scientists) to hear nuclear licensing cases.[63] Of course there are also numerous non-APA hearing provisions (such as immigration cases, public employee disciplinary cases, and government contract appeals) where Congress has specially designated the use of non-ALJ adjudicators.[64]

In the case of the NRC adjudicators, Congress wished to provide the agency with the flexibility to not only use law-trained judges to hear licensing cases, but also scientists. While there might be some basis to open up SSA adjudicators to medical experts, I think the general consensus among commentators is that it is preferable to have legally trained judges in such cases.[65] However, there are well documented problems with the government-wide ALJ program that might lead Congress to introduce more flexibility into the process of hiring SSA judges in the future (of course, any change would almost certainly require the grandfathering in of current ALJs).

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[63] 42 U.S.C. § 2241:

> Notwithstanding the provisions of sections 556(b) and 557(b) of Title 5, the Commission is authorized to establish one or more atomic safety and licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this chapter, any other provision of law, or any regulation of the Commission issued thereunder. The Commission may delegate to a board such other regulatory functions as the Commission deems appropriate. The Commission may appoint a panel of qualified persons from which board members may be selected.

[64] *See* Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L. J. AM. U. 65, 70–71 (1996) (regarding use of non-APA judges).

[65] *See e.g.*, ACUS Recommendation 89-10, "Improved Use of Medical Personnel in Social Security Disability Determinations" (Dec 15, 1989), *available at* http://www.acus.gov/acus-recommendations/improved-use-of-medical-personnel-in-social-security-disability-determinations (which notably did not recommend using medically trained adjudicators at the hearing stage, but did urge SSA to "encourage its administrative law judges to call on an independent medical expert in appropriate cases to assess the need for any additional medical evidence and to explain or clarify medical evidence in the record"). *Id.* at ¶ 5.

Perhaps the biggest frustration for agencies with the ALJ program is the inflexibility in hiring ALJs. While designed as a merit selection program, the OPM process for assembling the register of eligible applicants and the statutory restrictions on how agencies can hire judges off the register, has led most agencies to hire existing ALJs laterally from other agencies, most often SSA, which employs over 85% of the overall ALJ corps. SSA, for its part, has also experienced frustrations in hiring the large number of ALJs it needs.[66] I have supported some government-wide changes in the ALJ selection program, but given the predominance of SSA in the overall program, I would also support tailoring a special selection process for SSA ALJs. This could be done in two ways—either by ordering OPM to provide for specialized hiring of SSA ALJs, or by specially designating them as "Social Security Judges" and allowing SSA to fashion its own hiring process that uses the OPM process as a model. This latter suggestion is essentially what has happened with the NRC panel members. For example when NRC hires a lawyer member for its panel, it posts a notice of an opening and conducts an OPM-like hiring process.[67] I understand that the two Boards of Contract Appeals also conduct a tailored OPM-like hiring process as well when they hire Administrative Judges.[68]

Creating a specially designated category of Social Security Judges would not require, but could allow for, adding some other specially tailored attributed for these judges as well. For example, given the high degree of importance of caseload management in this huge program, Congress could consider departing from the extant prohibition of performance ratings for ALJs. While I know there are legitimate arguments on the other side of this issue,[69] I have advocated for this in the past for all ALJs[70] and the Administrative Conference has formally so recommended.

I think it is worth quoting in detail the ACUS Recommendation on this point:

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[66] See the position paper of Ronald Bernoski, President, Association of Administrative Law Judges, "Recommendations on the Social Security Case Backlog" at p. 30 (January 2008):

> We agree with a statement of the Social Security Advisory Board (SSAB), that "the fact that a new ALJ register has not yet been established in and of itself raises questions about whether the ALJ recruitment process, as currently constituted, serves the best interests of the Social Security program and the public who look to the program for adjudication that is both impartial and efficient." To paraphrase another SSAB conclusion, OPM has shown that it is incapable of providing the American public with the "best qualified" administrative law judges.

Judge Bernoski's proposed solution is to remove the government-wide ALJ program from OPM and give it to a separate ALJ-run conference. I would prefer an approach that is more limited to dealing specifically with the SSA ALJ corps.

[67] See, e.g., the extensive requirements detailed in this job opening notice for a lawyer panel member, http://www.usajobs.gov/GetJob/ViewDetails/2284269#.

[68] See 42 U.S.C. § 7105, providing that the members of the Armed Services and Civilian Boards of Contract Appeals are to be appointed by DOD and GSA using a process that mirrors the one used for ALJs, except that they must have five years of experience in public contract law. They also have their own statutory salary provision.

[69] James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN. L. J. AM. U. 629, 641 (Fall 1993/Winter 1994).

[70] Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589 (1994).

Chief ALJs should be given the authority to:

> 1. Develop and oversee a training and counseling program for ALJs designed to enhance professional capabilities and to remedy individual performance deficiencies.
>
> 2. Coordinate the development of case processing guidelines, with the participation of other agency ALJs, agency managers and, where available, competent advisory groups.
>
> 3. Conduct regular ALJ performance reviews based on relevant factors, including case processing guidelines, judicial comportment and demeanor, and the existence, if any, of a clear disregard of or pattern of non-adherence to properly articulated and disseminated rules, procedures, precedents, and other agency policy.
>
> 4. Individually, or through involvement of an ALJ peer review group established for this purpose, provide appropriate professional guidance, including oral or written reprimands, and, where good cause appears to exist, recommend disciplinary action against ALJs be brought by the employing agency at the Merit Systems Protection Board (MSPB) based on such performance reviews.[71]

In the SSA context, it would be appropriate for the Chief ALJ and the Hearing Office Chief ALJs to undertake this role. I would also suggest that once such appraisals are permitted, then probationary status for new ALJs could also be considered as well as bonuses for high-performers—both of which are barred in the overall ALJ program.

Finally, and perhaps even more controversially, I think that it might be possible to establish specialized standards for what constitutes the sort of "good cause" that is necessary for SSA to show before the MSPB can discipline or remove a Social Security Judge. Given the relative fungability of SSA cases, at least over time, "good cause" should encompass unjustified low productivity, and for that matter, repeated failures to follow authoritative agency rules or precedential decisions.

My overall point here is that the SSA ALJ program's size and perhaps the character of its cases requires some special treatment, and given the informality and lack of adversarial nature of it, there is ample reason to rethink the role and attributes of these ALJs—at least going forward.[72]

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[71] ACUS Recommendation 92–7, "The Federal Administrative Judiciary" ¶ III(B) (Dec. 10, 1992) *available at* http://www.acus.gov/acus-recommendations/the-federal-administrative-judiciary.

[72] This would not be unprecedented. Until the early 1980s, OPM maintained a distinction between GS-15 and GS-16 ALJs with two separate hiring registers. SSA ALJs were in the GS-15 category. *See* Jeffrey S. Lubbers *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 112–15 (1981). I note here that a member of the SSAB has advocated limiting SSA ALJs' terms to 15 years "to ensure turnover." Mark J.

VI. Conclusion

There have been many studies of the disability adjudication process, from the initial claim stage to the judicial review stage and every stage in between. But the dramatic caseload pressures on the process has seemingly overwhelmed the ability or willingness of the Social Security Administration to experiment with procedural reforms. A case in point is the abandonment of most of the recent promising set of reform proposals instituted in 2006 in the Disability Service Improvement project.

I would like to see a renewed effort to implement these process reforms. However, Congress may wish to consider some more fundamental structural reforms due to the caseload pressures which appear to be steadily worsening. It may not be enough or tenable to simply keep enlarging the existing organizational structure of ALJs and the Appeals Council.

Therefore, I have suggested some possible approaches to dealing with these caseload pressures—some incremental, such as increasing the use of rulemaking and video communications technology—and some more fundamental such as modifying the role of the Appeals Council, considering the establishment of a Social Security Court, making SSA hearings adversarial, and creating specially designated Social Security Judges in place of regular ALJs to allow for more flexible and tailored selection and management of the judges in this high volume program.

By providing this menu, with some commentary along the way, I hope I can assist this Committee in performing its historical role of protecting the viability of this historic program.

Warshawsky, *Administrative Problems With Social Security Disability Programs: Some Solutions* at 2, BLOOMBERG BNA PENSIONS AND BENEFITS DAILY (April 2, 2012).

Appendix to Lubbers Testimony

Recommendations in Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *Introducing Nonadversarial Government Representatives to Improve the Record for Decision in Social Security Disability Adjudications*, Report to the Social Security Advisory Board 76-78 (March 2003), *available at* http://www.ssab.gov/documents/Bloch-Lubbers-Verkuil.pdf; *also published as Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO. L. REV. 1, 60-63 (2003).

Recommendations Relating to Development of a Complete Record for Decision by the ALJ.

1. SSA should concentrate its efforts in the disability adjudication process on improving the record for decisions.
2. SSA should consider implementing administrative and personnel reforms aimed at identifying and obtaining key information as quickly as possible, such as:
    a) Requiring that the DDSs communicate clearly and fully the rationale of their disability decisions and the evidence on which they are based.
    b) Developing specific guidelines for transmitting key medical information, such as the data necessary to assess residual functional capacity.
    c) Providing adequate funding to pay for requested medical records, including but not limited to those from claimants' treating sources.
    d) Encouraging ALJs to use their subpoena power when needed to obtain relevant information, and providing the DDSs with comparable mechanisms for enforcing similar requests.
    e) Requiring DDSs and [ODAR] to make the existing record for appealed claims available to claimants and their representatives as quickly as possible, and requiring [ODAR] to set the date for ALJ hearings at least two months in advance.
3. SSA should consider creating a new administrative position, called a "Counselor," with the express mandate of overseeing and facilitating the development of the evidentiary record for decision. As part of this process, the Counselor position should have the following characteristics and responsibilities:
    a) It should be charged with developing a full and complete record as quickly as possible, in cooperation with claimants (and their representatives), DDS, [ODAR], and other SSA personnel.
    b) It should have direct access to key DDS personnel in order to question and clarify the DDS's rationale for its disability decisions.
    c) It should have independent authority to obtain information for the record, including access to any available funds and enforcement mechanisms.
    d) It should have a formal role, either independently or in cooperation with ALJs and other OHA staff, to narrow and resolve particular issues and, when appropriate, to recommend to an ALJ a fully favorable, on-the-record decision.
    e) It should be designated nonadversarial, even if attorneys fill some of the positions.

Recommendations Related to Closing the Record

SSA should revise its regulations to close the evidentiary record after the ALJ hearing, subject to the following qualifications:

1. ALJs may extend the time to submit evidence and/or written argument for a reasonable period after the hearing and before deciding the claim.
2. Claimants may request that the record before the ALJ be reopened for the submission of new and material evidence and a new decision, if the claimant demonstrates good cause for failing to present the evidence before the record closed and if the request is made within one year after the ALJ issued the decision on the claim or before a decision is reached on appeal by the Appeals Council, whichever is later.

Implementing these Recommendations

The above recommendations should be implemented as soon as feasible. This can be done by regulation or other administrative action; no legislation is required. Moreover, the SSA Counselor position can be created without need for experimentation. The regulations should address closing the record at the ALJ stage and articulate a standard for a good cause exception drawn from the current standard at the district court. *See* 42 U.S.C. § 405(g). The regulations relating to the Counselor function should also include a code of conduct that emphasizes the nonadversarial nature of the position.

Chairman JOHNSON. Mr. Pierce you are welcome aboard. Go ahead.

STATEMENT OF RICHARD J. PIERCE, JR., PROFESSOR, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. PIERCE. Chairman Johnson, Ranking Member Becerra, and other Members of the Committee, thank you for giving me the opportunity to share my views on this important topic. To me, there are two major problems at present with the present Social Security disability program. One is that it is increasingly and unsustainably generous. The proportion of the population that has been deter-

mined to be disabled has doubled. The cost of the program has more than quadrupled, and that is primarily due to ALJ grants after two denials by State agencies.

The other problem is related to that; there is massive variation in the ALJ grant rates. The latest numbers I have seen were 8.6 percent grant rate for one judge; 99.7 percent for another judge. This is a problem that has been extremely well documented for over 35 years. A book written by six reachers in 1968–1978, excuse me, concluded that the identity of the judge is far more important than facts of the case in determining the outcome of the case. If you don't address that problem in some way, 35 years from now, someone else is going to be telling you that it still exists.

I think there are three sources of the problem. First of all, let me back up and say that one of the reasons this is so difficult is most of the cases that are in the subject of dual denials at the State level and grants at the ALJ level involve one of two disabilities, mental disease and pain. And the National Institute of Medicine and the National Institute of Mental Health tell us that over half the population suffers from one of those conditions. Obviously, we cannot have a situation in which over half of the population is qualified as permanently disabled.

What judges have to do, and it is difficult for any decisionmaker, judge or not, is to figure out whether someone is so severely mentally ill or so severely subject to chronic pain that they are not able to work. And when you look at the variation in the ALJ grant rates and you look at the overall increase in the grant rates over time, it is quite obvious that while some judges are continuing to grant disability only to those with severe mental illness or severe pain, some now grant them routinely to people with minor mental illness and minor chronic pain.

And by the way, I fit in both categories, so I suppose I should have applied a while back. The sources of the problem are three: First of all that the administrative law judges cannot be subjected to any process of evaluation or system of quality control. You are in a position to correct that problem and I hope you will.

The second is that this whole system of decision making was designed to operate without lawyers. Well, today, 85 percent of the applicants are represented by lawyers or other professional representatives. This has changed the nature of the process dramatically and certainly as a contributor both to the wide variation in grant rates and to the increase in the number of people who are determined to be disabled. Something needs to be done about that.

What I think you need to do, what I would urge to you do, is reduce the extremely generous fees that are now available that, as I read a report the other day, amounted to $1.5 billion last year and change the method of calculating the fees to eliminate this problem of a major economic incentive to delay cases.

The third source is, frankly, the courts. The courts pay no attention to what you say in your statutes about scope of review. I have in my testimony citations to studies that show the courts absolutely do not pay any attention. What I would urge at least initially there is that the Social Security Administration start taking cases, more cases, to the United States Supreme Court. It has shown over the years far more respect for your views about scope of review

than have the district courts and the circuit courts. It may take two or three cases, but I think that is what has to be done.

And to help that along, I am going to file a petition for rulemaking at SSA next week to urge them to take an action that most certainly will get them into court. And I hope the United States Supreme Court will then get the lower courts back doing what you have told them to do. Thank you.

Chairman JOHNSON. Thank you, sir. I appreciate that.

[The prepared statement of Mr. Pierce follows:]

Testimony of Richard J. Pierce, Jr.
Before the Social Security Subcommittee
of the House Ways and Means Committee
June 27, 2012

My name is Richard J. Pierce, Jr. I am Lyle T. Alverson Professor of Law at George Washington University. I have taught and written about administrative law for 35 years. I have written over 20 books and over 120 articles on administrative law. The Supreme Court has relied on my books and articles in over a dozen opinions. One of the topics I have addressed in my teaching, research and writing is disability decision making by the Social Security Administration (SSA). My most recent writing on that subject is "What Should We Do About Social Security Disability Appeals?" 34 Regulation 34 (2011).

There are two major problems with the social security disability decision making process. First, the SSA disability program has become increasingly and unsustainably generous. Over the past four decades, the proportion of the population that has been determined to be permanently disabled has doubled. The cost of the program has increased four-fold over the past two decades. During that period, the cost of disability benefit awards has increased from 10% of SSA's total budget to 18% of its budget. The trust fund from which disability benefits are paid is projected to be exhausted in 2016, long before the projected dates for exhaustion of the Social Security or Medicare trust funds.

Second, there is a large disparity in the rates at which benefits are granted by the Administrative Law Judges (ALJs) who have the final say in the SSA decision making process in the vast majority of cases. Thus, for instance, the SSA Office of Inspector

General found that, while the average grant rate for SSA's 1400 ALJ's was 67%, the range of grant rates was 8.6% to 99.7%. An applicant in San Juan has an 87.92% probability of obtaining a favorable decision from an SSA ALJ, while an applicant in Shreveport has only a 37.42% probability of getting a favorable decision from an SSA ALJ. In every case in which an ALJ grants benefits, a team consisting of a disability examiner and a medical advisor has determined that the applicant is not disabled. In most cases, two such teams have determined that the applicant is not disabled.

The root of these two problems is the inherent difficulty of the decision making process in the cases in which one or two examiner/medical advisor teams have determined that an applicant is not so disabled that he can not work and that decision is appealed to an ALJ. Most such cases involve claims that the applicant is unable to work because of one of two conditions—mental illness or chronic pain. These conditions are extremely common in the population that is potentially eligible for disability benefits. The National Institute of Medicine (NIM) has determined that 116,000,000 Americans suffer from chronic pain, while the National Institute of Mental Health (NIMH) has determined that 61,000,000 Americans suffer from mental illness. The incidence of chronic pain is higher in the relatively older population that accounts for most disability applications than in the total population. Thus, over half of the relevant population suffers from one or both of the two health conditions that account for most of the ALJ decisions to reverse denials of benefits by disability examiner/medical advisor teams.

Given the prevalence of mental illness and chronic pain in the population that is potentially eligible for disability benefits, it would make no sense to say that anyone who suffers from one of those conditions is eligible for permanent benefits without

considering the severity of the condition. Thus, the task for the decision maker is to determine whether the applicant suffers from mental illness or chronic pain so severe that he should be classified as permanently disabled. Determining the severity of an individual's mental illness or chronic pain is extremely difficult. Chronic pain illustrates the problem. Pain is completely subjective. The same underlying physical condition can cause one person to suffer an unbearable level of chronic pain, while another person with the same physical source of pain experiences only minor and sporadic pain.

In this difficult context, all that a decision maker can do is to attempt, however imperfectly, to determine the severity of an applicant's pain or mental illness and to grant benefits only to applicants who fall on the severe end of the spectrum of the population of applicants. The large increase in the per cent of the population that has been determined to be disabled in recent years demonstrates that ALJs, on average, have granted benefits to many applicants with less severe mental illness or pain than ALJs considered sufficient to qualify for disability benefits in the recent past. That is the primary cause of the first problem I identified—an increasingly and unsustainably generous rate of granting disability benefits. The large variation in the grant rates of individual ALJs demonstrates that ALJs vary greatly in the place on the spectrum of severity of mental illness or chronic pain where each draws the eligibility line. Some ALJs grant benefits to applicants who suffer minor mental illness or pain, while other ALJs grant benefits only to applicants with severe mental illness or pain.

The task of managing the SSA disability decision making process is greatly complicated by three factors—the decisional independence of SSA ALJs, the new role of

lawyers for disability applicants, and the attitude of the courts that review the ALJ decisions. I will discuss each in turn.

The roughly 1400 SSA ALJs have complete decisional independence. By statute, their performance cannot be evaluated, and their decision making can not be subjected to any form of quality control. When SSA attempted to implement modest quality assurance programs in the past, ALJs enjoyed a great deal of success in persuading district courts to block SSA's attempts to implement quality controls of any type. In a recent survey, SSA staff attributed the large disparity in ALJ grant rates primarily to ALJs' decisional independence. By statute, SSA can not take any action against an ALJ without persuading another ALJ, who works at the Merit Systems Performance Board, that it has "good cause" to take some action against the ALJ. Without some major change in applicable law, it would be impossible for SSA to establish "good cause" to take any action against an ALJ based on the ALJ's pattern of decisions. Thus an ALJ can, if he chooses, grant benefits in 100% of the cases that come before him without any concern that SSA will take any action against him.

In my opinion, the institutional structure in which SSA ALJs can take final actions and can only be removed for cause by someone who, in turn, can only be removed for cause, violates both the Appointments Clause and the Take Care Clause of the Constitution. I recommend that Congress eliminate the role of ALJs in the disability decision making process. The ability to appeal a denial of benefits by two disability examiner/medical advisor teams to an ALJ introduces far more errors in decision making than it eliminates. At a minimum, Congress should amend the statute that limits SSA's ability to act against ALJs by making it clear that SSA has the power to evaluate the

performance of ALJs and to take such actions as SSA considers necessary to insure that ALJs are not unduly generous in their grant rates and do not grant or deny benefits at a rate that diverges significantly from the rate at which most SSA ALJs grant or deny benefits.

As the Supreme Court has recognized, the SSA disability decision making process is designed to be implemented by SSA without any involvement of lawyers or other professional advocates either for applicants or for the government. Today, however, over 80% of applicants are represented by lawyers or other professional advocates, while the government is never represented. This systemic imbalance between applicants and the government undoubtedly has contributed to the increase in the rate at which ALJs grant benefits. Lawyers and other professional advocates for disability applicants have devised systems for maximizing the probability of a decision granting benefits to their clients by soliciting and emphasizing medical evidence favorable to their clients while withholding medical evidence that is unfavorable to their clients. The government is helpless to stop these abusive practices, since the ALJ has a statutory duty to help the applicant develop the record and the government is not represented. This gaming of the system by lawyers and other professional advocates has become extremely lucrative. One firm made $81,000,000 in a single year representing disability applicants. When the role of lawyers and other professional advocates is combined with the statutorily-based rule that allows an applicant to supplement his application and the evidence in support of his application with additional claims and evidence at any time, the results are awful, measured by any criteria. Lawyers and other professional advocates regularly sand bag SSA and its ALJs by declining to present important evidence until late in a proceeding.

I recommend that Congress limit the fees that can be earned by lawyers and other professional advocates for SSA disability advocates. The Supreme Court has upheld a fee limit of $10 for advocates for VA disability benefits, so Congress has broad discretion to limit the fees of advocates for SSA disability benefits. I also recommend that Congress amend the Social Security Act to empower SSA to issue rules that govern the time when claims can be made and evidence can be submitted in support of an application for SSA disability benefits. Virtually all other federal agency decision making processes have rules that require parties to submit all of their claims and all of the evidence in support of their claims no later than a point relatively early in the decision making process.

Federal courts are required by statute to engage in deferential review of SSA disability decisions, but courts routinely ignore that statutory command. Courts are required by statute to uphold SSA findings of fact if they are supported by substantial evidence. The Supreme Court has characterized the substantial evidence test as highly deferential. In the Supreme Court's words, a court must uphold any agency finding that is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Paul Verkuil, a well-respected scholar who is now Chairman of the Administrative Conference of the United States, published the results of his careful empirical study of judicial review of social security disability decisions in "An Outcomes Analysis of Scope of Review Standards," 44 William & Mary Law Review 679 (2002). Verkuil's findings were surprising. He expected to find that courts applying the deferential substantial evidence standard would uphold 75-85% of SSA decisions denying benefits. He also expected the rate of affirmance of decisions denying disability

benefits to be higher than the rate of affirmance of a class of agency decisions that are subject to de novo review. His findings were inconsistent with both of those expectations. He found that courts uphold less than 50% of decisions that deny social security disability benefits and that courts reverse a much higher proportion of disability decisions than of agency decisions that are subject to de novo judicial review. Verkuil expressed doubt that "Congress wants judicial scope of review to be an irrelevant labeling exercise," but his findings demonstrate that it is "an irrelevant labeling exercise" in the context of judicial review of social security disability decisions. District courts and circuit courts routinely pay lip service to the deferential substantial evidence standard while actually applying a standard more demanding even than de novo review.

A sequence of events that took place between 1978 and 2003 illustrates the extreme tendency of district courts and circuit courts to refuse to apply the substantial evidence standard and to apply instead a much more demanding standard of their own choosing. Beginning in 1978 and extending through the 1980s, several circuit courts adopted the "treating physician rule," a rule that required SSA to make a decision consistent with the opinion of a physician who treats a disability applicant unless SSA can amass a great deal of evidence that contradicts that opinion. The treating physician rule was obviously inconsistent with the deferential substantial evidence test, but that blatant inconsistency had no apparent effect on the courts. After over a decade of unsuccessful attempts to persuade the courts to accord it the deference that Congress required, SSA capitulated and issued a rule in which it codified the treating physician rule and instructed its ALJs to apply the rule.

After successfully persuading the courts to defy Congress and to force SSA to adopt the treating physician rule, disability advocates embarked on efforts to require other agencies with responsibility to implement other disability programs to adopt the treating physician rule. They enjoyed initial success in that effort when they persuaded the Ninth Circuit to require the Department of Labor to adopt the treating physician rule in the context of the disability programs it implements under ERISA. The Ninth Circuit concluded that "there is no reason why the treating physician rule should not be used under ERISA . . . ." The Supreme Court *unanimously* reversed the Ninth Circuit in Black & Decker Disability Plan v. Nord, 538 U.S. 822 (2003). Justice Ginsburg explained:

> The question whether a treating physician rule would "increase the accuracy of disability determinations" under ERISA plans, as the Ninth Circuit believed it would . . . seems to us one the Legislature or superintending administrative agency is best positioned to address. As compared to consultants retained by a plan, it may be true that treating physicians, as a rule, "have greater opportunity to know and observe the patient as an individual." Nor do we question the Court of Appeals' concern that physicians repeatedly retained by benefits plans may have an "incentive to make a finding of 'not disabled' in order to save their employers money and to preserve their own consulting arrangements." But the assumption that the opinions of a treating physician warrant greater credit than the opinions of plan consultants may make scant sense when, for example, the relationship between the claimant and the treating physician has been of short duration, or when a specialist engaged by a plan has expertise the treating physician lacks.

> And if a consultant engaged by a plan has an "incentive" to make a finding of "not disabled," so a treating physician, in a close case, may favor a finding of "disabled." Intelligent resolution of the question whether routine deference to the opinion of a claimant's treating physician would yield more accurate disability determinations, it thus appears, might be aided by empirical investigation of the kind courts are ill equipped to perform.

An experienced SSA ALJ explained to me the effects that lawless judicial decisions like those that require SSA to apply the treating physician rule have on the behavior of SSA ALJs. Congress and the Social Security Commissioner impose a great deal of entirely appropriate pressure on SSA's ALJs to decide a large number of disability cases promptly. ALJs know that they can write a brief opinion explaining a decision to grant benefits with little risk of reversal. Courts can not review decisions that grant benefits, and the Social Security Appeals Council reviews only a tiny proportion of ALJ decisions to grant benefits. By contrast, ALJs know that they must write an extremely long and detailed opinion explaining a decision to deny benefits to have any chance of surviving judicial review.

The incentive effects of such an unbalanced system of judicial review are obvious. My academic colleagues understand the bizarre incentive effects immediately when I analogize to a grading system in which a school gives a professor complete discretion to choose the grade he awards each student but couples that unlimited discretion with a rule that requires the professor to write a three page explanation for every A he awards and a twenty page explanation for every grade he awards that is less

than A. Such a bizarre asymmetric set of grading rules would produce a pattern of grades in which the vast majority of students receive an A. ALJs respond to the asymmetric system of review of disability benefit decisions in a similar manner.

It is hard to identify a promising means of persuading reviewing courts to apply the deferential scope of review standard Congress requires them to apply to SSA disability decisions. Congress always has the option of amending the Social Security Act to preclude all judicial review of SSA decisions in disability cases except the exceedingly rare case in which an applicant makes a plausible claim that the denial violates his constitutional rights. If the courts persist in their pattern of lawless behavior in this context, Congress will have no choice but to take that step.

I recommend an alternative approach initially, however. Congress should encourage SSA to take two actions. First, SSA should rescind the treating physician rule. That would be a major step in the right direction. Second, SSA should choose one of the many circuit court opinions that exhibit judicial defiance of the congressional command to engage in deferential review of disability decisions as the basis for filing a petition for writ of certiorari from the Supreme Court. As the Court's unanimous opinion in *Black and Decker* illustrates, the Supreme Court is far more respectful of congressional commands to engage in deferential review of SSA disability determinations than are most district courts and circuit courts. It makes sense to provide the Supreme Court the opportunity to do its job of keeping the lower courts within statutory bounds before Congress gives up completely on the ability and willingness of the judicial branch to perform its review function in a manner consistent with law.

Thank you for the opportunity to share my views on this important topic. I would be pleased to answer any questions you may have.

Chairman JOHNSON. Judge Frye, the agency has published its expectations to do 500 to 700 cases a year. In your testimony, you say the current misplaced emphasis on numbers has perverted our system of justice. So are you saying there should be no expectations?

Judge FRYE. No.

Chairman JOHNSON. That judges should take as much time as they like as claimants wait in line?

Judge FRYE. Absolutely not, as I indicated earlier, I strongly believe in goals, but the better standard a wider range. If you just do the numbers, if you can look at a paper file of 600 pages of med-

ical evidence, do you want a judge to spend 2 hours on that or do you want a judge to spend whatever time he or she needs to understand the case? That is the problem with you have to do 500; you have to do 700. Judges work hard—to do those numbers, they are working 7 days a week. I get emails every week complaining and asking for some help. So, no, we are working hard, and we believe in goals, and judges are responding to goals. Most professionals don't work well with unreasonable quotas.

Chairman JOHNSON. How many did you do last year?

Judge FRYE. You know, I don't know. I have—I am 90 percent on official time, but I honestly don't know, probably somewhere around 50 to 100.

Chairman JOHNSON. Okay. Well, I was in the office in Dallas, and I can tell you that one judge out of 12 was working a normal day.

I understand one of the ALJ union vice presidents in the Buffalo hearing office told judges not to process more than 300 cases a year. Is the union pushing that?

Judge FRYE. I have never heard that statement, and I honestly find it incredible.

Chairman JOHNSON. Thank you.

And earlier this year, after the Inspector General reported that claimants or their representatives were declining video hearings so that a case would be assigned to a judge who allowed more cases, Social Security is now not identifying the ALJ until the day of the hearing. Do you think that is right or wrong?

Judge FRYE. I think all of our hearings should be transparent, should be open to the public. I think our notice of hearing should clearly set forth all of the issues of the hearing, including the judge's name. The government can't do its business in secret.

Chairman JOHNSON. I hear you.

Ms. Zelenske, do you know why claimant representatives would cancel hearings for their clients who had been waiting months to see a judge?

Ms. ZELENSKE. There are many legitimate reasons why people ask for a continuance if that is what you are asking. I mean, the claimant may be ill and unable to travel to the hearing that day. I mean that is usually the most typical reason that people ask for a continuance of the hearing. I mean, I get from the reports we get from our members, it wouldn't normally be because the evidence——

Chairman JOHNSON. What percentage of them are done by TV nowadays, do you know? Any of you?

Ms. ZELENSKE. SSA has that information. I think I saw—I think it may be around 5 percent.

Chairman JOHNSON. So, is that all?

Ms. ZELENSKE. I could be wrong.

Chairman JOHNSON. They have it rigged for more than that.

Professor Lubbers, with a program this large and this complex, does it make sense that Social Security can't oversee the performance of judges for consistency? And are there any other programs that you know of that do it right?

Mr. LUBBERS. I think, and I have written on this government wide, that I think that administrative law judges should be subject

to some sort of performance appraisal in a peer review way conducted by the chief judges at the agencies. And doing that properly would not infringe on their independence.

I think in this particular program where the caseload pressures are so great and efficiency is such an important value, I think there is even a stronger reason do it in a Social Security Administration program.

Chairman JOHNSON. Thank you.

Mr. Becerra, you are recognized.

Mr. BECERRA. Chairman, thank you.

And to the witnesses, thank you very much for your testimony.

Judge Frye, I want to ask you about some of your comments about this current informal process that is used. I have deep concern with what you said about moving toward an adversarial system. Let me tell you why, we just heard the commissioner tell us that he has a very tight budget, a budget that doesn't allow him to do everything he needs to do, which is putting a greater load on many of your fellow judges.

Where would we get the money to pay for the new now government attorneys that you would want to have conduct these adversarial hearings where now you would have a more formal presentation of documents, and it seems to me, not only do you increase the cost of going through that administrative appeals process now, but you probably prolong it to the point of maybe having appeals to the appeals hearing to the different stages going up to the Federal courts, in which case now Social Security is now having to pay for representation at the court level, Federal court level as well.

I would think that we would want to recognize that, one, we are talking about typically the poorest folks in America who are the sickest, probably the frailest, who probably do not have money to hire really high-powered attorneys, maybe hire an attorney, but we are not talking about hiring, you know, the Jones & Jones law firm. My sense is that it would be better to give you quite a bit of power to conduct the informal hearing to try to extract as much information as you can from the individual or his or her representative. And therefore, you feel comfortable that you can go at that individual if have you to go at them pretty harshly or treat them with a little bit more care because they may be very ill, in which case what you are trying to do is extract the information as best you can, so you can come out with the decision. Ultimately, that individual still can go above you if he or she is not satisfied with your decision, but at least what we do is give you quite a bit of discretion to try to come up with a good decision and then, of course, deal with the outlier judges who are granting too many or too few.

Judge FRYE. I could give you so many different answers to each of the points you make.

I think, however, with respect to government representation and the cost, there would be so much savings from the appeals of cases at the higher range that was mentioned earlier, 99 percent, I suspect you would save billions ultimately. Now, there is another built-in savings——

Mr. BECERRA. Do me a favor, send me whatever you can to corroborate what you just said.

Judge FRYE. We will do the math. And I would be most happy to.

[The information follows: Transcript Insert 4]

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/CHRG
111hhrg50764.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.

The other savings, quite frankly, and it is a huge savings, we are one of the—my background is with the National Labor Relations Board. And I well know the regional office structure there and how they function. This agency also has a regional office function, the district offices. But in addition, we have ODAR, Office of Disability Adjudication, having regional offices that performed no direct case adjudications. These are very expensive. They are in the most expensive cities in the government, occupying the most expensive space. Maybe 30 years ago, that layer of management and that layer of bureaucracy was okay. I don't think we can afford it anymore. Those resources should be in direct——

Mr. BECERRA. Now, you are going into a little beyond what I asked, but fair. I think anything you can tell us that will help us reduce cost, I—we would love to hear it. I am concerned about moving what is an informal hearing process into a very formal adversarial process.

And Ms. Zelenske, let me see if I can ask you the same question because you represent or your organization helps represent a lot of claimants that go before the Social Security agency for these benefits, disability benefit hearings. What is your opinion about moving toward, from an informal non-adversarial hearing process to a more formal adversarial process, where you would have attorneys on each side going at it in front of a judge?

Ms. ZELENSKE. I did have experience with that in the pilot in the mid-1980s, and it didn't really work out the way it was intended. It was cases weren't allowed more, and they weren't better developed, which I think was one of the bigger issues about it.

If you think about it, the people, the claimants going into a hearing are asked very personal questions about their lives and what is going on in their lives. And I think you want to keep it more as informal as possible. It is still nerve-wracking for them when they

go into a hearing. It is their day in court. It is their day dealing with the government. And you want to try to keep it informal.

I mean, I have to say that from my experience, when I did hearings, most of the ALJs weren't adversarial with the claimants. They were trying to elicit the information or have the representative help get the information out that is necessary to make the determination to see if they are eligible under the statutory definition of disability. And I think that this is why you don't want to turn it into an adversarial process.

Mr. BECERRA. Mr. Chairman, thank you very much. And thank you all for your testimony. Please, any information you can provide us to help guide us, we would very much appreciate it.

Chairman JOHNSON. Mr. Marchant, you are recognized.

Mr. MARCHANT. Thank you, Mr. Chairman.

Mr. Pierce, can you explain to this member of the committee the disincentive or the incentive for a lawyer that takes a disability case to resolve the case quickly as opposed to over a period of a year or two?

Mr. PIERCE. As I understand it, there is no incentive to resolve it quickly. There is the opposite incentive because the fee is dependent on the amount of the past benefits that are awarded. And so there is a natural incentive to delay as long as possible in order to maximize the potential fee.

Mr. MARCHANT. So it is just a pretty simple math equation for most of the lawyers?

Mr. PIERCE. That is my understanding.

Perhaps Professor Lubbers has looked at it in more detail than I have.

Mr. LUBBERS. No, but I think Mr. Astrue reaffirmed that position when he talked about most claimants' representatives didn't do this, but that some minority did.

Mr. MARCHANT. And Judge, what was the average age or what is the average age of a case once you sit down and begin to focus on it? What is the time that has elapsed from the time the person called the State, made the claim from that date, and then what is the average time of the mature claim, once they get to the appeal process?

Judge FRYE. Of course, it varies depending on the office staffing and so forth, but the typical case that I have been hearing is somewhere close to 2 years old from the time it was filed. And what typically happens once the process that the State agencies process the case and they come to the hearing level, usually that is when the attorneys get involved and far more development is done at that point. I think that is also a reason that you see judges' decisions that disagree with some of the DDS. It is not because they made a bad decision; it is just that there is more evidence at the time the hearing is conducted. I think, in most cases, I think you are looking at 2 years by the time you file the application.

Mr. MARCHANT. So that person either has a support system in place, are the claimants allowed to advance fees, advance expenses to the claimants?

Judge FRYE. No, no. They may in certain circumstances, such as I know some lawyers will assist the claimant in getting an exam-

ination by a medical doctor, for example. But I don't know about any direct payment.

Mr. MARCHANT. Is it legal or illegal?

Judge FRYE. That is a very good question. I have never had it come up before.

Mr. MARCHANT. That is a very common practice in other parts of law. I wondered if it had pervaded this element.

Judge FRYE. I——

Mr. MARCHANT. You talk about—what would be the claim amount at 2 years?

Judge FRYE. What would be the attorney's fee at 2 years?

Mr. MARCHANT. No, the claim.

Judge FRYE. It would depend on the earnings of course of the claimant. It would be the monthly benefit times the—whatever number of months back benefits would be payable, so there could be a lump payment of $10,000. I have had it as high as $30,000 and $40,000.

Mr. MARCHANT. So we are talking in the $10,000 to $40,000 range, usually?

Judge FRYE. Right.

Mr. MARCHANT. So that is not enough of a financial incentive for a lawyer to go out and advance living expenses to someone while their case was developing?

Judge FRYE. I am not sure I can answer that. I don't know. If wouldn't be for me, but I am not sure. I couldn't answer for all lawyers.

Mr. MARCHANT. Do any of you know of any situations where that is the case?

Ms. ZELENSKE. I don't think attorneys would be allowed to advance, I guess, what you are talking about sort of the cost, the benefits, the possible benefits.

What does happen and I used—my practice was with legal services so I never charged claimants fees. And what we would do—I think attorneys do that now is there is an agreement if you are going to get an independent examination or you have to pay for medical records, you have an agreement with the claimant that if they win the claim, that they will pay you back. We do that even at my Legal Aid office. We didn't have a lot of money, but we wanted to get that examination. But I don't think you would be allowed to advance living costs like you described.

Mr. MARCHANT. So most lawyers that appear before you, Judge, are they single practitioners? Are they in law firms that advertise on Sunday nights, late, that have hats on?

Judge FRYE. All of the above. I think typically it is a boutique, small law firm. There are a number of solo practitioners, but usually a small firm of three to four to five individuals. Oftentimes, it is combined with workers' comp practice because they kind of overlap to some extent. For the most part, they are highly skilled and competent attorneys who appear before us in cases.

Mr. MARCHANT. I have a sister that I assisted through this process years ago, and I found that to be the case. It was a sole practitioner. This was his practice. He certainly could not have become rich off of this process and seemed sincere in trying to get it

resolved as quickly as possible, yet it took 2 years, and it was finally resolved.

And a big part of our case work still in our district offices is this, referring people and assisting people.

Judge FRYE. I am sure.

Mr. MARCHANT. After they have been turned down.

Thank you, Mr. Chairman.

Chairman JOHNSON. Thank you.

Professor Lubbers, it is my understanding that the district courts should uphold the agency decision if there is evidence in the file that supports the decision. Do you believe magistrate justices are applying that standard of review?

Mr. LUBBERS. Well, the APA standard is that if there is substantial evidence to support the agency's decision, it should be upheld, the substantial evidence test. And I think the statistics show that in the Social Security caseload area, the district courts are either remanding or reversing at a much higher rate than in other programs.

So why that is, many of these cases do go to the magistrate judges first and then to the Social Security judge. Professor Pierce made some comments about the courts not holding the statutory standard. It may be that these judges don't see that many cases individually, so they feel sorry for the claimants in those cases.

Chairman JOHNSON. Is that right?

Mr. LUBBERS. I think the statistics do show that they do not affirm the agency as often as courts do in other programs.

Chairman JOHNSON. How much fraud do you reckon is in this system? Do you have any estimate at all?

Mr. LUBBERS. I think you should ask the IG.

Chairman JOHNSON. Yeah, the IG is into it.

What is the role of the appeals council in setting procedural decisions or establishing quality control?

Mr. LUBBERS. Well, as I understand it, the appeals council does mostly hear cases where the claimant has been denied and makes an appeal to the Appeals Counsel. But in a small number of cases, very small number of cases, the appeals counsel does review granted cases, just for quality control purposes. But because of their caseload and the denied cases, they can't do much of that. So I would like to see them do more of that, and I would also like to see them write some decisions that would be used as precedent decisions and that those precedent decisions would be circulated throughout the administrative law judge——

Chairman JOHNSON. So all the judges could follow them?

Mr. LUBBERS. Follow it. They would be supposed to follow them. And that is, for example, the way—not that this is the greatest comparison—but the Board of Immigration Appeals does have certain decisions that they make precedential and are supposed to be followed by the immigration judges.

Chairman JOHNSON. Professor Pierce, how is Social Security supposed to balance the fact that ALJ decisions should not be interfered with as the Administrative Procedure Act requires with ensuring consistent outcomes and productivity needed to administer this national program?

Mr. PIERCE. Well, I would start by saying I certainly don't think that anybody in the Social Security Administration should attempt to influence the outcome of any individual case.

But it is pretty easy to do what, for instance, the vast majority of law schools do to their law professors and say that your grades have to be in a particular range, and it is pretty easy to conform to those norms. And if the alternative is what we now have, an 8.6 percent probability of a yes before one judge and a 99.7 percent probability before another, I don't think there is any question that due process and equal protection of law would be served very well by establishing some boundaries within which we expect judges to have grant rates.

Chairman JOHNSON. I appreciate that comment, thank you.

Mr. Becerra, you have another question.

Mr. BECERRA. Yeah, a couple questions.

I want to make sure I dispel any notion that there aren't—judges, Judge Frye don't you have some template that you get to use? We have Federal district court decisions that have been handed down that give you some guidance. My understanding is the Social Security Administration also tries to provide you with a template where there are screens where you all can sort of go through some threshold questions that you have to get—you have to answer yourself through these hearings to figure out if the claimant has answered those adequately to be able to get to the point of saying yes or no, that they should be entitled to benefits. So I think the point that Mr. Lubbers makes, which I think is a good one, is to try to standardize this more so that judges aren't left to their own devices. And I think Mr. Pierce has gone to that as well. So you have some way of evaluating when a judge does or doesn't grant these benefits.

But I want to stress something, and I think it came out in some of the earlier testimony, we are not talking about rich folks. And even if these folks win these benefits, we are not talking about them getting millions of dollars. As you mentioned, it is maybe $10,000 a year, and maybe because they didn't get the benefits for the longest time because the process took a year or two to finish, they are getting $20,000. But most of that is money that they probably have to use to pay back family and friends and others that they borrowed money from to provide for their assistance while waiting to see if the Social Security Administration would grant their disability claim.

The reason I point that out is because I fear that we are going to start to treat this the way we treat the regular legal system, where we have attorneys going at it, and you figure you better get the higher priced attorney who does this all the time and you better be prepared to go after them really hard because you want to win your case. This is the not the case where you are going to come down with a six figure judgment. This is very basic benefits, and the folks we are talking about are the frailest of the frail.

And I asked staff to get me some information on the whole process itself, and this is from the Social Security Administration, where they go through and give their—this is 2011's disability workloads. They can't give us 2012 because it is still ongoing. So, at the initial level, how many people submit an application for dis-

ability benefits? Excuse me, 3,295,806 disability decisions were issued by the Social Security Administration in 2011. How many of those decisions were to allow benefits? Thirty-four percent. Two-thirds, 66 percent, were to disallow at that initial stage. So, right away, two-thirds of all those applicants were denied benefits. Of those two-thirds that are denied, some of them say, okay, you deny it, that is it. Many will say, wait a minute, I that you made the wrong decision, I want you to reconsider. So they go to the next level of appeal, which is in many cases reconsideration; not every jurisdiction has that interim level of reconsideration.

Appeals to reconsideration—how many of those appeals to reconsideration did the Social Security Administration receive—853,142. They issued 819,710. Of the 819,710 decisions on reconsideration, how many of those were to grant benefits at that stage now? Twelve percent; 88 percent of those individuals who sought benefits after that initial rejection at the second level, how many at the second level of 819,000 decisions, how many were allowed? Only 12 percent. So now have you 88 percent that is denied. They say, wait a minute, we still think you are wrong; what can I do to appeal that? Now you can get to that ALJ. This is now at the administrative appeal level. So you are now at the third level where you are constantly narrowing down the universe of folks who are appealing, and by the way, you are now probably getting to the more complicated cases, where it is not a simple clear fact of whether you get the benefits or not. At the administrative judge level, the hearing level, 662,775 cases were decided. How many were allowed? Fifty-eight percent of those cases were allowed; 13 percent were dismissed; 29 percent were denied. There are still two other levels of appeals, the so-called appeals council, which is much smaller, only 103,000 in decisions. Only 2 percent of the individuals got allowance of benefits, and then, of course, you go to the Federal court from there, where the allowance rate for 13,271 decisions was 3 percent.

My point here is to say this: There are different steps along the way and every time you narrow the number of folks who are appealing because the cases are probably more complicated, more severe, and so you have a lot of work, Judge Frye, to do because you are dealing with folks that after two stages of being told no, they still believe yes, and so you are making some very important decisions. That is why some of us believe you should be able to be aggressive through an informal process, where you can do all the questioning, as Ms. Zelenske mentioned, of that individual, the personal questions. Try to make it as easy as possible for SSA to come out with a decision. But it is a tough process, and I hope we recognize that we are dealing with folks who are for the most part very poor and very frail. We appreciate your testimony and anything you can do to help enlighten us on how to move forward would be appreciated.

Mr. Chairman, it has been a great hearing, as have been the previous hearings on this matter. With that, I yield back.

Chairman JOHNSON. Thank you. I would like to ask unanimous consent to enter into the record a report by the Congressional Research Service which provides an overview of Administrative Judges and how they differ from ALJs and some examples of how

administrative judges are used by other agencies. Everybody has received a copy of that.

Without objection, so ordered.

[The information follows: Transcript Insert 5]

MEMORANDUM June 25, 2012

To: House Committee on Ways & Means
Attention: Lisa deSoto

From: Daniel T. Shedd, Legislative Attorney, 7-8441 (Administrative Law)
Sidath Viranga Panangala, Specialist in Veterans Policy, 7-0623
Kate M. Manuel, Legislative Attorney, 7-4477 (Government Contracts)
Jody Feder, Legislative Attorney, 7-8088 (Civil Rights)
Thomas J. Nicola, Legislative Attorney, 7-5004 (Civil Service)
Todd Garvey, Legislative Attorney, 7-0174 (Nuclear Energy)
Barbara L. Schwemle, Analyst in American National Government, 7-8655
Emily Lanza, Law Clerk, 7-7876
Julia Taylor, Head of ALD Section and Information Research Specialist, 7-5609
Carrie Newton Lyons, Section Research Manager, 7-7199

Subject: **Administrative Judges: Overview and Selected Examples**

We are forwarding this memorandum in response to a request for information about administrative judges, how they may differ from Administrative Law Judges, and examples of administrative judges in selected agencies.

I. Introduction

In 1946, Congress enacted the Administrative Procedure Act (APA), establishing the procedures that administrative agencies must follow when exercising their delegated powers.[1] The APA breaks down the powers of administrative agencies into two categories, rulemaking and adjudication. This memorandum focuses on a narrow aspect of the administrative agencies' adjudication powers: the role of administrative judges (AJ).

This memorandum first provides background information on administrative judges. The introduction will briefly discuss adjudications under the Administrative Procedure Act, explain when certain formal hearing procedures are required, and describe the kind of hearings an administrative judge is permitted to preside over and which hearings must be heard by an Administrative Law Judge (ALJ). The memorandum will provide a brief section on ALJs, in order to compare them to AJs. The introduction will then explain what an administrative judge is, define the various roles of administrative judges, and explain the general process for hiring and supervising administrative judges.

[1] Note that the APA generally applies to all agencies. However, if an agency's organic statute specifically departs from APA practices, the organic statute controls.

Following the introduction, the memorandum will then provide examples from selected administrative agencies and describe the role of AJs in those agencies. The five selected agencies are the Board of Veterans Appeals (BVA), the Civilian Board of Contract Appeals (CBCA), the Equal Employment Opportunity Commission (EEOC), the Merit System Protection Board (MSPB), and the Nuclear Regulatory Commission (NRC). For each of these agencies the memorandum will address the number of administrative judges within the agency, provide information on their pay and evaluation, explain the legal authority for their positions, and describe their jurisdiction and hearing procedures. This section will illustrate how the role of AJs varies from agency to agency.

Finally, the memorandum concludes with a selection of literature for further information on the subject.

A. Adjudication

Under the APA, an adjudication is defined as "agency process for the formulation of an order."[2] An "order" is defined as "a final disposition ... of an agency in a matter other than rule making but including licensing."[3] Therefore, whenever an agency reaches a determination on a particular issue, other than through the creation of a rule, it is performing an adjudication. Agencies adjudicate a wide range of subjects that can generally be broken down into four categories: (1) enforcement cases; (2) entitlement cases (e.g., benefits claims); (3) regulatory cases (e.g., licensing or ratemaking); and (4) certain cases involving federal procurement contracts.[4] Although the term adjudication is not necessarily limited to a decision reached in a trial-type hearing,[5] this memorandum will focus on adjudications that occur in these trial-type settings. Both ALJs and AJs may preside over adjudication procedures. However, in some instances an agency's enacting statute may require an ALJ, and not an AJ, to preside over a hearing.

Sections 554, 556, and 557 of the APA establish requirements for formal adjudications that are heard within an agency.[6] These formal hearings must be heard by an Administrative Law Judge or the head of an agency.[7] AJs cannot preside over these formal agency adjudications and, therefore, necessarily preside over "informal" hearings.[8] However, under the APA, formal hearing procedures only need to be followed when the agency's enacting statute calls for an administrative hearing to be held "on the record."[9] Many statutes do not contain this triggering language and, therefore, numerous agency adjudications are not required to follow these formal APA hearing procedures. In these situations, administrative judges (AJs) are able to preside over the hearing and make a determination on the case heard before the agency.

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[3] 5 U.S.C. § 551(7).

[4] 5 U.S.C. § 551(6).

[5] PAUL R. VERKUIL ET AL., ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS, VOLUME II, at 784 (1992) (hereinafter ACUS 1992).

[6] For example, if an employee from the Department of Veterans Affairs (VA) reviews an application for benefits and grants the benefits sought, the employee has performed an adjudication—the agency has created an order to provide benefits to the claimant.

[7] 5 U.S.C. §§ 554, 556–57.

[8] *Id.* However, "[a]gency heads seldom have the time to preside as trial tribunals." Harold Levinson, *The Status of the Administrative Judge*, 38 Am. J. of Comp. Law 523, 526 (1990).

[9] "Informal" hearings may occur in a similar fashion to formal hearings under the APA. The term informal hearing only indicates that the hearing is not subject to the APA requirements in 5 U.S.C. §§ 554, 556–57. However, informal hearings do have to abide by some provisions of the APA, 5 U.S.C. §§ 555, 558. These sections require that an agency permit parties to be represented by counsel, if they are compelled to appear before the agency, require decisions to be reached in a reasonable time, require an agency to provide transcripts of any testimony, and require an agency to give prompt notice when denying an application. *Id.*

[10] 5 U.S.C. § 554.

According to a count from 1992, the number of AJs in the administrative judiciary nearly doubled the number of ALJs.[10] This illustrates that many administrative cases are held according to "informal" hearing procedures in front of AJs.

B. What is an Administrative Law Judge?

Although this memorandum focuses on the role of AJs in administrative law, it may also be helpful to understand how they differ from ALJs. When the APA was enacted in 1946, Congress created the position of the ALJ within the federal government. The reason for creating this unique position was to ensure that the presiding officer at formal administrative hearings was free from agency influence or coercion. In order to ensure that these ALJs are able to render independent decisions, the APA provides for their protection in numerous ways.

First, ALJs are selected through a centralized process run by the Office of Personnel Management (OPM).[11] There are certain qualifications that applicants must meet in order to be considered for a position of ALJ. ALJs must be "authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court."[12] Furthermore, applicants for ALJ positions must have at least seven years of "experience as a licensed attorney preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law at the Federal, State, or local level."[13] Applicants, assuming they pass the OPM examination, are then assigned a score and placed on the register of eligible hires. Agencies in need of an ALJ are then permitted to select an ALJ from the top three available candidates. This hiring process keeps the ALJs from being too connected with their employing agencies.

Following the selective hiring process, ALJs are provided with job security in order to promote independent decision making. ALJs are hired as career positions, and there is no set term for their appointments. Furthermore, they can only be removed for good cause[14] or through a reduction in force.[15] A Senate committee report states that "individuals appointed as [ALJs] hold a position with tenure very similar to that provided for Federal judges under the Constitution."[16] ALJ salaries are also protected and cannot be reduced unless good cause is shown.[17]

The APA also requires that ALJs remain insulated from agency influence during their tenure. The APA expressly states that an ALJ may not "be responsible to or subject to the supervision or direction of an

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[10] ACUS 1992, *supra* note 4, at 788. This ACUS report similarly limits the concept of administrative judges to those agency employees that actually preside over a hearing of some kind. *Id.* at 785.

[11] 5 U.S.C. § 1302; 5 C.F.R. §§ 930.201–930.211.

[12] OPM, Qualification Standard for Administrative Law Judge Positions, http://www.opm.gov/qualifications/alj/alj.asp.

[13] *Id.*

[14] In order to remove an ALJ for good cause, there must be "good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing." 5 U.S.C. § 7521.

[15] Reductions in force occur "when there is a surplus of employees at a particular location in a particular line of work." 5 C.F.R. § 351.201(a)(1). ALJs that are cut due to a reduction in force may receive priority on OPM's referral list as well as the agency's own reemployment priority list. 5. C.F.R. § 930.210.

[16] S. REP. NO. 95-697, at 2 (1978).

[17] 5 C.F.R. § 930.211; However, according to an OPM rule, agencies may reduce the pay of an ALJ if the ALJ "submits to the employing agency a written request for a voluntary reduction due to personal reasons" and OPM approves. 5 C.F.R. § 930.205(j).

employee or agent engaged in the performance of investigative or prosecuting functions for an agency."[18] OPM regulations further establish that agencies have "[t]he responsibility to ensure the independence of the administrative law judge."[19] Additionally, employing agencies may not conduct performance evaluations in order to modify the behavior or decisions of ALJs, and OPM regulations state that an "agency may not rate the performance of an administrative law judge."[20]

Finally, the APA grants certain powers that ALJs may exercise while presiding over administrative hearings. ALJs may issue subpoenas, take depositions, receive evidence, and administer oaths.[21] Unlike AJs, as discussed below, these powers are granted to ALJs by the APA and not by the employing agency. As such, agencies are not permitted to withhold any of these powers from an ALJ,[22] whereas the powers of AJs are dependent on the types of hearings and procedures the employing agencies establish. As such, procedures for ALJ hearings are more uniform while adjudication procedures for AJ hearings vary from agency to agency.

All of these statutory mechanisms were designed to ensure that ALJs are free from undue agency influence or coercion during the adjudication process.

C. What is an Administrative Judge?

Administrative judges are perhaps best defined by their negative. An administrative judge (AJ) is an agency employee who makes an adjudicatory decision and is not an ALJ. Therefore, although an ALJ is a specific position,[23] the term administrative judge is not specific, but rather describes a whole class of adjudicators across numerous administrative agencies. Hearing examiners, hearing officers, administrative judges, immigration judges, veterans law judges, and numerous other agency officials with varying titles are considered to be AJs. That is, they make adjudicatory decisions within an agency, but they are not ALJs. For the purposes of this memorandum, the concept of an AJ will be limited to an agency official who presides over a hearing within the agency.[24]

Because AJs are not confined to a specifically defined position, there is no cross-agency uniformity in AJ hiring practices, salaries, or jurisdiction. Instead, all of these elements may be unique to each agency within the federal government that employs AJs. Furthermore, because AJs are presiding over "informal adjudications," the types of hearings they preside over vary from agency to agency as well.

First, AJs differ from ALJs in the selection process. Unlike ALJs, AJs are not hired through the OPM; instead, the employing agency is in charge of the hiring process.[25] Furthermore, AJs are not necessarily

[18] 5 U.S.C. § 554(d).

[19] 5 C.F.R. § 930.201(f)(3).

[20] 5 C.F.R. § 930.206(a).

[21] 5 U.S.C. § 556(c).

[22] These are subject to an agency having the statutory authority to exercise these powers generally. *Id.*

[23] OPM regulations state that "The title 'administrative law judge' is the official title for an administrative law judge position. Each agency must use only this title for personnel, budget, and fiscal purposes." 5 C.F.R. § 930.201(c).

[24] Thus, the report excludes agency employees who often are the principal point of contact with those who are seeking a benefit. For example, a veteran may apply to receive disability compensation from the Department of Veterans Affairs (VA) by sending an application to a VA Regional Office (RO). An agency employee at the RO will make an initial determination on the claim. However, if dissatisfied with that determination, the veteran may appeal the decision and receive a hearing in front of a member of the Board of Veterans' Appeals. This report excludes the initial decision maker and focuses on the administrative judges that preside over some form of hearing.

[25] Various agencies' qualification requirements for AJs, are provided below, outlining what these agencies seek when making (continued...)

required to be attorneys or experienced in legal practice. The requirements for the various positions are determined by the hiring agency.[26] In fact, in some agencies, AJs do not necessarily come from a legal background. In the Nuclear Regulatory Commission (NRC), some of the AJs are required to be physicists or engineers, though at least one member of the presiding panel must be qualified in the conduct of administrative proceedings.[27] Other agencies do employ experienced attorneys as their AJs. Members of the Board of Veterans' Appeals, for example, are attorneys with experience in the field of veterans affairs law. Still other administrative agencies require their AJs to meet similar qualifications as ALJs. Immigration Judges from the Executive Office for Immigration Review, which are not ALJs, are required to have an LL.B or a JD degree, must be licensed to practice law as an attorney, and must have seven years of legal experience after passing the bar.[28]

Second, an AJ is not necessarily guaranteed the same job security as an ALJ. Because they are hired through their employing agencies, the terms and conditions of their employment are controlled by the hiring agencies. Thus, they may have less statutorily required insulation from agency influence. For example, in the NRC, AJs do not necessarily enjoy a career appointment; instead, they may be appointed to five-year terms with the possibility of renewal. However, other agencies, such as the Civilian Board of Contract Appeals, provide their AJs with the same protections as ALJs.[29] Furthermore, an agency may promulgate regulations that provide for some degree of independence from agency policy-making officials, and Congress can separate the adjudicative functions of an agency from the policy branches of the agency through statute.[30]

Third, although an OPM regulation states that agencies "may not rate the performance of" an ALJ, agencies may rate the performance of their AJs. AJ's performance may be evaluated objectively (e.g., timeliness) and subjectively (e.g., quality). The MSPB, for example, provides both objective and subjective review of their AJs work.

The adjudicatory processes that AJs oversee vary from agency to agency as well. As mentioned above, AJ's can only preside over informal administrative hearings. Informal agency hearings are conducted by varying methods, "some resembling what is traditionally thought of as adjudication and others not resembling adjudication at all."[31] For example, during NRC adjudications a panel of three adjudicators will accept written testimonies, hear witness testimony, provide for cross-examination by counsel, and then render written opinions.[32] This resembles the traditional concepts of a trial-type hearing. However, when the Board of Veterans' Appeals (BVA) hears an appeal from a veteran, the process is far less formal and not as similar to a trial.[33] A hearing with the BVA member

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(...continued)

hiring decisions.

[26] *Id.*

[27] *See infra*, section on NRC AJ qualifications.

[28] *See* Immigration Judge Job Announcement from the Department of Justice, Executive Office for Immigration Review, Job Announcement Number: EOIR-12-0018, *available at http://www.usajobs.gov/GetJob/ViewDetails/313261500*.

[29] Various agencies' tenure provisions for AJs are provided below.

[30] *See* John H. Frye, III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 Admin. L. Rev. 261, 342–43 (1992).

[31] Michael Asimow, A Guide to Federal Agency Adjudication 146 (2003). Informal agency hearings, though not governed by they APA's formal hearing procedures from 5 U.S.C. §§ 554, 556–557, must meet certain minimal requirements as set out in the APA, 5 U.S.C. §§ 555, 558.

[32] *See infra.*

[33] *See* BVA, How Do I Appeal? 7–10, *available at http://www.bva.va.gov/docs/Pamphlets/010202A.pdf*.

and the claimant (and the claimant's representative) in attendance. The BVA member listens to the evidence presented by the claimant and even receives new evidence that has not been previously included in the record. So, although some AJs are performing more trial-type adversarial hearings, not all administrative hearings are conducted in this manner. Similarly, rules of evidence, rules on witnesses, and various other procedural rules vary from agency to agency.[34]

AJs also provide decisions at varying stages of the administrative adjudication process. For example, at the NRC, AJs preside over hearings that are subject to review by the Commission. Meanwhile, AJs from the Board of Veterans' Appeals have the final say during the appeals process within the agency, subject to review by the U.S. Court of Appeals for Veterans Claims. In some agencies, AJs will have the power to review decisions issued by ALJs. In the Social Security Administration (SSA), for example, a claimant may seek review of an SSA determination by an ALJ. If the claimant is dissatisfied with the ALJ's decision, the claimant may appeal to the SSA Appeals Council. The Appeals Council is staffed by 70 Administrative Appeals Judges, not ALJs.

AJs, therefore, vary greatly from agency to agency. Hiring practices, levels of independence, hearing procedures, and the types of decisions that AJs make are different throughout the federal government.

D. ALJs versus AJs

Congress has granted both ALJs and AJs authority to preside over agency adjudications. The Administrative Conference of the United States (ACUS) noted that:

> it is quite clear that similar types of determinations made in different agencies are being made by different types of decision makers. For example, disability benefits adjudications at the Social Security Administration are handled by ALJs, at the Department of Veterans Affairs, AJs adjudicate similar types of cases.[35]

Congress, however, seemingly did not intend for ALJs to preside over all agency adjudications. When Congress enacted the APA, Congress "intended to leave the decision to employ ALJs to agency-specific legislation by stating that ALJs would only be required where statutes called for 'on the record' hearings."[36] Since that time, Congress has not acted to require the use of ALJs in all administrative hearings.

Although ALJs enjoy the protections provided by the APA, AJs greatly outnumber ALJs in the administrative judiciary, and AJs continue to "preside over relatively formal proceedings and perform functions virtually indistinguishable from those performed by ALJs."[37] Many proponents of using ALJs suggest that the institutional independence of ALJs makes an ALJ better qualified to preside at administrative hearings. However, others point to the fact that AJs have successfully presided over administrative hearings throughout the years. Furthermore, agencies can and often do provide their AJs with protections similar to those granted to ALJs.[38]

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[34] *See* Assimow, *supra* note 30, at 147-48.

[35] ACUS, Recommendation 92-7, The Federal Administrative Judiciary 3 (1992), *available at* http://www.acus.gov/wp-content/uploads/2011/10/92-7.pdf.

[36] ACUS 1992, *supra* note 4, at 790.

[37] Charles H. Koch, Jr., Administrative Law and Practice § 5.24 (3d ed. 2010).

[38] *See infra*.

The following section provides examples of how AJs are used in a select set of administrative agencies.

II. Selected Examples

A. Board of Veterans' Appeals[39]

1. *Legal Authorization*

The authority and functions of the Board of Veterans' Appeals (BVA) are codified in statute at Chapter 71 of Title 38, United States Code (U.S.C.),[40] and in regulations found in 38 Code of Federal Regulations (C.F.R.) Part 19.[41]

2. *Jurisdiction*[42]

The BVA is a component of the Department of Veterans Affairs (VA) with the authority for making final decisions on behalf of the Secretary of Veterans Affairs (VA Secretary) for claims for veterans benefits that are presented for appellate review. The BVA issues final decisions on all appeals for entitlement to veterans benefits, including claims pertaining to: service connection; increased disability ratings; total disability ratings; pensions; insurance benefits; educational benefits; home loan guaranties; vocational rehabilitation; and waivers of indebtedness, fee basis medical care, dependency and indemnity compensation, among other benefits and services.[43]

3. *Number and Distribution*[44]

The BVA is lead by a Chairman, appointed by the President and confirmed by the Senate, and a Vice-Chairman, designated by the VA Secretary. Additionally, the BVA consists of a Principal Deputy Vice Chairman, 64 Veterans Law Judges (VLJ),[45] twelve Senior Counsel, more than 300 staff counsel, and other administrative and clerical staff. The Chairman reports directly to the VA Secretary.

The BVA is comprised of four Decision Teams with jurisdiction over appeals arising from the VA Regional Offices (RO), Medical Centers, and the National Cemetery Administration, in one of four geographical regions: Northeast, Southeast (including Puerto Rico), Midwest, and West (including the Philippines). Each Decision Team includes a Deputy Vice Chairman, two Chief VLJs, 13 line VLJs, two Senior Counsel, and approximately 75 staff counsel. The Deputy Vice Chairmen are members of the BVA who are appointed to that office by the VA Secretary upon the recommendation of the Chairman. Staff counsel review the record on appeal, research the applicable law, and prepare comprehensive draft

[39] For the purposes of this memorandum, the AJs employed by the BVA will be referred to as Veterans Law Judges (VLJs), as they are known within the agency.

[40] 38 U.S.C. §§ 7101-7112.

[41] 38 C.F.R. §§ 19.1-19.102.

[42] 38 U.S.C. §7104 and 38 C.F.R. § 20.101.

[43] Department of Veterans Affairs, *Congressional Submission, FY 2013, Benefits and Burial Programs and Departmental Administration,* Volume 3 of 4, Washington, DC, February 2012, pp. 5C-1.

[44] This section was drawn from Department of Veterans Affairs, *Annual Report of the Board of Veterans for FY2011*, Washington, DC, February 1, 2012, p. 3.

[45] According to the VA, BVA currently has 59 VLJs on board with 5 nominations pending with the President for a total of 64.

decisions or remand orders for review by a VLJ who reviews the draft and issues the final decision or appropriate preliminary order in the appeal.

The BVA also has an Appellate Group, which consists of the Principal Deputy Vice Chairman, the Chief Counsel for Policy and Procedure, the Chief Counsel for Operations, the Chiefs of Litigation Support, the Quality Review Team, the Training Office, a Medical Advisor, a Counsel for Labor Relations, several Special Counsel covering a variety of legal specialty areas, and numerous legal support personnel. The Office of Management, Planning, and Analysis is the administrative directorate of the Board, consisting of the Director, the Deputy Director, the Administrative Support Division, the Decision Team Support Division, and the Financial Management Division.

4. Qualifications

Requirements for VLJs include: knowledge of veterans' law and of specialized areas of medicine and law; ability to conduct hearings; ability to manage attorneys; ability to participate in training activities. A candidate also must be a member in good standing of the bar of a state.[46] Generally, two or more years at the GS–14 or GS–15 level of experience is needed.[47]

5. Tenure

The BVA Chairman is appointed by the President with advice and consent of the Senate. The Chairman serves for six years and may serve for more than one term. The Chairman may be removed by the President alone for "misconduct, inefficiency, neglect of duty, or engaging in the practice of law or for physical or mental disability which, in the opinion of the President, prevents the proper execution of the Chairman's duties. The Chairman may not be removed from office by the President on any other grounds."[48] The VA Secretary appoints the other BVA members based on recommendations of the Chairman subject to approval of the President.[49] VLJs are not career appointed positions and must be recertified pursuant to evaluations.[50]

6. Pay and Promotion

Board Members are compensated at rates equivalent to the rates payable to ALJs.[51] The Deputy Vice Chairman positions of the BVA are appointed at the AL-2 level. All other VLJs are placed into the AL-3 pay scale. For that pay scale, the waiting period between AL-3A and AL-3B is 52 weeks; between AL-3B

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[46] 38 U.S.C. 7101A(a)(2).

[47] Department of Veterans Affairs, "Appeals Regulations: Title for Members of the Board of Veterans' Appeals," 68 *Federal Register* 6622, February 10, 2003.

[48] 38 U.S.C. § 7101(b)(2).

[49] 38 U.S.C. § 7101A(a) (1).

[50] See "Supervision and Evaluation" infra for more information on recertification.

[51] 38 U.S.C. 7101A(b). The ALJ pay system has three levels of basic pay: AL-1, AL-2, and AL-3. Pay level AL-3 is the basic pay level for ALJ positions filled through competitive examination. Pay level AL-3 has six rates of basic pay: A, B, C, D, E, and F. Pay levels AL-2 and AL-1 are established by agencies subject to U.S. Office of Personnel Management (OPM) approval..ALJ positions are placed at levels AL-2 and AL-1 when they involve significant administrative and managerial responsibilities. See http://www.opm.gov/oca/pay/html/ALJ-PaySystem.asp for details on the ALJ pay system.

and AL-3C is 52 weeks; between AL-3C and AL-3D is 52 weeks; between AL-3D and AL-3E is 104 weeks; and, between AL-3E and AL-3F is 104 weeks. Currently, the Board has two AL-2 (Deputy Vice Chairman (DVC)); one AL-3C; eight AL-3D; eight AL-3E; and forty AL-3F.

There is no "promotion policy" per se for VLJs. If they are performing at a fully successful level, they progress between the various AL steps (AL-3A through AL-3F) depending upon their initial pay levels at their appointments. To be promoted to the AL-2 would require that they compete for the Deputy Vice Chairman position.

7. *Adjudication Procedures*

In general, a veteran wishing to receive a benefit begins the process by submitting an application with one of the VA's 57 regional offices (RO). If the veteran is satisfied with the benefits decision, the process ends. However, there may be a number of reasons why the veteran may be dissatisfied with the RO's decision. When the veteran is dissatisfied with the RO's decision, the veteran has the option to pursue an appeal within the VA by filing a "Notice of Disagreement" (NOD) with the RO. The NOD triggers the RO's obligation to prepare a "Statement of the Case" (SOC) that tells the veterans how and why it came to the decision that it did. If the veteran wishes to pursue an appeal after receiving the SOC, the veteran must file a specific form (VA Form 9) with the RO indicating the desire that the appeal be considered by the BVA. Current law provides that veterans are entitled to one appeal to the BVA when denied benefits.

The BVA bases its decision "on the entire record of the proceeding and upon consideration of all evidence and material of record and applicable law and regulation."[52] In addition to the material developed at the RO, the BVA may also conduct personal hearings with the veteran at which new evidence may be added to the record. An appellant may request that a hearing before the BVA be held at its principal location or at a facility of the VA located within the area served by a RO of the VA. A final BVA decision generally concludes the administrative process.

8. *Internal Review and Appeals*

The BVA allows the claimant or the BVA itself to seek reconsideration of a final decision. There are possible situations where the final decision could be reconsidered: 1) revision on the grounds of clear and unmistakable error;[53] 2) discovery of new and material evidence; [54] and 3) false or fraudulent evidence presented in the initial appeal.[55] The BVA is to decide all such requests on the merits, without referral to any adjudicative or hearing official acting on behalf of the VA Secretary.

If a veteran is dissatisfied with a final BVA decision, the veteran may appeal that decision to the U.S. Court of Appeals for Veterans Claims (CAVC), which has exclusive jurisdiction to review such matters. The VA Secretary or any other VA official may not appeal an adverse BVA decision.

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[52] 38 U.S.C. § 7104(a).

[53] 38 C.F.R. § 20.1000. *I.e.*, error of law or fact.

[54] *Id.*

[55] *Id.*

9. *Supervision and Evaluation*

The Chairman of the BVA is required to appoint a performance review panel. The panel is comprised of the Chairman and two other members of the BVA (other than the Vice Chairman). The Chairman periodically rotates membership on the panel so as to ensure that each member of the BVA (other than the Vice Chairman) serves on a panel for and within a reasonable period.[56] The performance review panel determines, with respect to each member of the BVA (other than the Chairman or a member who is a member of the Senior Executive Service) – including VLJs – whether that person's job performance meets the performance standards established by the BVA. If the determination of the performance review panel is that the person's job performance meets the performance standards, the Chairman shall recertify the person's appointment as a member of the BVA. However, if the performance review panel determines that the person's job performance does not meet the performance standards, the Chairman shall, based upon the individual circumstances, either grant the individual a conditional recertification or recommend to the VA Secretary that the member be noncertified.[57]

[56] 38 U.S.C. § 7101A (c)(1)(A).

[57] 38 U.S.C. § 7101A (c)(B)(2)-(3).

B. Civilian Board of Contract Appeals[58]

1. Legal Authorization

The Civilian Board of Contract Appeals (CBCA) was established within the General Services Administration (GSA) in 2006 to hear appeals from the decisions of contracting officers of civilian agencies.[59] Prior to the creation of the CBCA, these agencies generally had their own boards of contract appeals, established pursuant to the Contract Disputes Act (CDA) of 1978.[60] However, even before the enactment of the CDA, some agencies had established boards to hear certain appeals relative to their contracts under other authority,[61] or had required contractors to consent to a board's jurisdiction over such appeals as a term of their contracts.[62]

Federal procurement contracts currently include terms indicting that the contract is subject to the CDA and that, except as provided in that act, all "disputes arising under or relating to th[e] contract shall be resolved under this clause."[63] These terms further require that "claims" by contractors shall be made in writing and, unless otherwise provided for in the contract, shall be submitted within six years of accrual to the contracting officer for a written decision.[64] Contractor claims in excess of $100,000 must be certified.[65] Claims by the government against a contractor are also to be submitted to the contracting officer.[66] Once any claims are submitted, the contracting officer is required, if requested to do so in writing by the contractor, to render a decision on claims of $100,000 or less within 60 days of the request.[67] For certified claims in excess of $100,000, this decision must be rendered within 60 days, or the contracting officer must notify the contractor of the date by which the decision will be made.[68] Claims that are not decided within the prescribed time frames are deemed to have been denied.[69] Once the

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[58] For the purposes of this memorandum, all of the members of the Civilian Board of Contract Appeals are considered AJs.

[59] National Defense Authorization Act for FY2006, P.L. 109-163, div. A, tit. VIII, § 847(d)(3), 119 Stat. 3394 (Jan. 6, 2006) (codified, as amended, at 41 U.S.C. § 7105(b)(1) & (e)(1)(B)). There are separate boards of contract appeals for the Department of Defense and military departments; Tennessee Valley Authority; and Postal Service. *See* 41 U.S.C. § 7105(a), (c), & (d).

[60] P.L. 95-563, 92 Stat. 2383 (Nov. 1, 1978). The CDA authorized the establishment of such boards if the "volume of contract claims justifie[d] the establishment of a full-time agency board of at least three members." *Id.*, at § 8(a)(1), 92 Stat. 2385. Agencies that did not have a sufficient volume of claims, or that opted not to establish a board for other reasons, could arrange for appeals from their contracting officers to be heard by other agencies' boards. *Id.*, at § 8(c), 92 Stat. 2386. The proliferation of such boards under the CDA prompted calls for consolidation, which ultimately resulted in the creation of the CBCA. *See, e.g.*, Jeri Kaylene Somers, *The Board of Contract Appeals: A Historical Perspective*, 60 AM. U. L. REV. 745, 755 (2011).

[61] *See, e.g.*, United States v. Adams, 74 U.S. (7 Wall.) 463, 477 (1868) (finding that the Secretary of War's statutory authority to administer the War Department permitted him to appoint a board to hear and decide certain claims relative to payment under agency contracts).

[62] *See, e.g.*, *Board of Contract Appeals*, *supra* note 60, at 749-50 (standard clauses used in War Department contracts).

[63] 48 C.F.R. § 33.215 (governing use of the standard contract clause); 48 C.F.R. § 52.233-1 (standard "Disputes" Clause).

[64] 48 C.F.R. § 52.233-1(d)(1). A "claim" is any "written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to th[e] contract." 48 C.F.R. § 52.233-1(c).

[65] 48 C.F.R. § 52.233-1(d)(2)(i). The standard contract clause prescribes the terms of this certification, as well as specifies who may certify a claim on behalf of a contractor.

[66] 48 C.F.R. § 52.233-1(d)(1).

[67] 48 C.F.R. § 52.233-1(e).

[68] *Id.*

[69] 41 U.S.C. § 7103(f)(5). *See also* Pathman Constr. Co., Inc. v. United States, 817 F.2d 1573 (Fed. Cir. 1987).

contracting officer makes a decision, that decision is final unless the contractor appeals to a board of contract appeals within 90 days, or files suit, as discussed below, within 12 months.[70]

2. Jurisdiction

The CBCA generally has jurisdiction over "contract disputes," or appeals of contracting officers' final decisions regarding claims submitted by contractors against the government, or by the government against a contractor, relative to an express or implied contract for the procurement of services, construction, or personal property, or for the disposal of personal property.[71] In such cases, it may grant any form of relief that would be available to a litigant asserting a claim in the U.S. Court of Federal Claims, including monetary or other relief arising from or related to a contract.[72] However, the CBCA's jurisdiction over contract disputes is non-exclusive, and contractors may opt to bring actions on contract claims directly in the U.S. Court of Federal Claims, instead of with a board of contract appeals.[73]

The CBCA may also, if the agencies affected concur, exercise jurisdiction over any additional category of laws or disputes over which an agency board of contract appeals exercised jurisdiction prior to the establishment of the CBCA, or any other function a board performed on behalf of an agency prior to the CBCA's establishment.[74] At present, this means that the CBCA exercises jurisdiction over: (1) cases arising under the Indian Self-Determination Act; (2) certain disputes between insurance companies and the Department of Agriculture's Risk Management Agency; (3) claims by federal employees for reimbursement of expenses incurred while on official temporary duty travel or in connection with relocation to a new duty station; (4) certain claims by carriers or freight forwarders regarding payment for services; and (5) requests for arbitration involving public assistance applications arising from damage from Hurricanes Katrina and Rita.[75]

3. Number and Distribution

The CBCA currently has 15 members,[76] but has reportedly had as many as 18 members in the past.[77] The Board is located in Washington, D.C., but the Board could potentially order hearings in other places, and parties may submit their case on the record without a hearing.[78]

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[70] 48 C.F.R. § 52.233-1(f).

[71] 41 U.S.C. §§ 7102-7105. Claims by the government against a contractor that are based on fraudulent claims by the contractor are excluded from the Board's jurisdiction, as are claims in certain other cases. 41 U.S.C. § 7102(c) (contracts with foreign governments or international organizations); 41 U.S.C. § 7102(d) (maritime contracts); 41 U.S.C. § 7103(a)(4)(B) (certain claims involving fraud).

[72] *See, e.g.*, 41 U.S.C. § 7105(e)(2); Todd Construction, L.P. v. United States, 88 Fed. Cl. 235, 243-44 (2009).

[73] 41 U.S.C. § 7104(b)(1).

[74] 41 U.S.C. § 7105(b)(4)(B)(i)-(ii).

[75] *See* Civilian Board of Contract Appeals, Cases Heard by the Board, Jan. 4, 2011, *available at* http://www.cbca.gsa.gov/Filing%20Cases%20at%20the%20Board/Filing%20Cases%20at%20the%20Board.htm.

[76] Civilian Board of Contract Appeals, Judges, Jan. 12, 2012, *available at* http://www.cbca.gsa.gov/judges/judges.htm.

[77] Ralph C. Nash, Jr., Steve L. Schooner, Karen R. O'Brien-DeBakey, and Vernon J. Edwards, THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT 66 (3d ed., 2007).

[78] U.S. Civilian Board of Contract Appeals, Rules of Procedure, Rule 19, Aug. 17, 2011, *available at* http://www.cbca.gsa.gov/RULES%20OF%20PROCEDURE/index.htm.

4. Qualifications

Board members are appointed based solely on the "professional qualifications required to perform the duties and responsibilities of a Civilian Board member," and must have at least five years experience in public contract law.[79] These are statutory requirements. However, additional qualifications have been imposed in the hiring process, and recently include the requirement that at least two years of the qualifying experience in public contract law must have been "at a level of difficulty and responsibility comparable to the GS-15 grade level or above."[80]

5. Tenure

CBCA members serve until they are removed for cause, resign, or retire.[81]

6. Pay and Promotion

There are three levels (or "pay rates") of members:

- CA-1 Chairman (1 incumbent)
- CA-2 Vice Chair (1 incumbent)
- CA-3 Board Judge (13 incumbents).

The total pay of each CBCA member (Chairman, Vice Chair, and Board Judges), including locality pay, equals $165,300 per year (rate limited to the rate for level III of the Executive Schedule). There is no promotion policy for Board Judges.

7. Adjudication Procedures

The CBCA decides appeals of contracting officers' final decisions pursuant to rules of procedure that it has adopted. These rules address time limits for filing, pleadings and amendment of pleadings, service of papers other than subpoenas, motions, conferences, discovery and exhibits, and hearing procedures, among other things.[82] For example, any hearings are to be held at the time and place ordered by the Board, and will be scheduled at the discretion of the Board based on its rules, the need for orderly management of the Board's caseload, and the stated desires of the parties.[83] All hearings on the merits "shall be open to the public and conducted insofar as is convenient in regular hearing rooms," except when necessary to maintain the confidentiality of protected material or testimony, or material submitted *in camera*.[84] Hearings are generally recorded and transcribed.[85] Except at the Board's order, no proof shall be received in evidence after a hearing is completed, or in cases submitted on the record without a

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[79] 41 U.S.C. § 7105(b)(2)(A)-(B).

[80] *See, e.g.*, Procedures for Selection of Civilian Board of Contract Appeals Members, *available at* http://www.cbca.gsa.gov (last accessed: June 21, 2012).

[81] *See* 41 U.S.C. § 7105(b)(3) (providing that CBCA members may be removed in the same manner as administrative law judges, as provided in 5 U.S.C. § 7521).

[82] *See generally* Rules of Procedure, *supra* note 78.

[83] Rules of Procedure, *supra* note 78, at Rule 20.

[84] *Id.*, at Rule 21.

[85] *Id.*, at Rule 22(a).

hearing, after the Board has notified the parties that the record is closed and the case is ready for decision.[86] Except in the case of small claims, decisions shall be made in writing upon the record.[87]

Board procedures generally parallel those of the Federal Rules of Civil Procedure and Federal Rules of Evidence, although they do depart from these Rules in certain ways, such as by generally allowing the admissibility of hearsay.[88] As required by statute, the CBCA provides for the use of accelerated procedures, simplified procedures for small claims, and alternative dispute resolution.[89] "Small claims" are those where the amount in dispute is $50,000 or less, or in the case of a small business, $150,000 or less.[90]

8. Internal Review and Appeals

Decisions are generally made by a panel of three board members.[91] Parties may move for reconsideration, amendment, or new hearings on any or all of the issues addressed in a CBCA decision. However, such relief will generally only be granted on one of the grounds specified in the CBCA rules (e.g., the decision is void),[92] or for "reasons established by the rules of common law or equity as between private parties in the courts of the United States."[93] Decisions may also be appealed to the U.S. Court of Appeals for the Federal Circuit by either the contractor or the government within 120 days from the date when a copy of the decision is received.[94]

9. Supervision and Evaluation

The CA-3 Board Judges are supervised by the CA-2 Vice Chair, who is supervised by the CA-1 Chairman. The Chairman of the Board reports to the Administrator of General Services.

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[86] *Id.*, at Rule 24(a).

[87] *Id.*, at Rule 25(a).

[88] *Id.*, at Rule 10.

[89] 41 U.S.C. § 7103(h) (alternative dispute resolution); 41 U.S.C. § 7106 (a) & (b) (accelerated and small claims procedures).

[90] 41 U.S.C. § 7106(b)(1).

[91] Consideration by the full Board may be requested, but such requests are "not favored" and generally will only be granted when "it is necessary to secure or maintain uniformity of Board decisions, or the matter to be referred is one of exceptional importance." Rules of Procedure, *supra* note 78, at Rule 28. A majority of judges may also initiate full Board consideration at any time while the case is before the Board. *Id.*

[92] *Id.*, at Rule 27.

[93] *Id.*, at Rule 26.

[94] 41 U.S.C. § 7107(a)(1)(A)-(B). The Attorney General must approve any appeal taken by a contracting agency. *Id.*

C. Equal Employment Opportunity Commission

1. Legal Authorization

The Equal Employment Opportunity Commission (EEOC or Commission) is a federal agency, established by statute,[95] that is responsible for enforcing a variety of federal laws prohibiting employment discrimination. In addition to investigating complaints regarding employment in the private sector, the EEOC conducts administrative hearings and issues appellate decisions regarding employment discrimination complaints filed by federal employees. These latter duties are handled by EEOC AJs, which are authorized under the various statutory provisions governing procedures for federal employees who file discrimination charges.[96] In addition, the EEOC has extensive regulations that address AJ responsibilities and procedures.[97]

2. Jurisdiction

In general, EEOC AJs do not have jurisdiction to adjudicate matters involving allegations of discrimination by private employers.[98] Instead, they conduct hearings and issue decisions regarding the discrimination complaints of federal employees. A federal employee who believes he is a victim of discrimination must first file a complaint with his agency, which then conducts an investigation. At that point, the employee may request a hearing before an EEOC AJ or a final decision from the agency. If an employee requests a final decision from an agency and wishes to contest that decision, the individual may file an appeal with the EEOC. EEOC AJs also have jurisdiction to adjudicate such appeals.[99]

3. Number and Distribution

According to the EEOC,[100] the agency employs 108 AJs at the following District Office (DO), Field Office (FO), Area Office (AO), and Local Office (LO) locations:

- Atlanta DO(5)
- Birmingham DO(4)
- Charlotte DO(3)
- Norfolk LO (1)
- Raleigh AO (2)
- Chicago DO (2)

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[95] 42 U.S.C. § 2000e-4.

[96] *See, e.g.*, 42 U.S.C. § 2000e-16(b), (c); 29 U.S.C. § 633a(b); 29 U.S.C. § 794a(a).

[97] *See, e.g.*, 29 C.F.R. §§ 1614.106 et seq.

[98] The EEOC's role with respect to private employees is to receive and investigate complaints of discrimination and attempt to mediate a resolution, but the EEOC does not adjudicate such complaints. Instead, individuals who are unsatisfied with the agency's attempts at resolving their complaints may file in federal court. 42 U.S.C. § 2000e-5.

[99] For more information, see Equal Employment Opportunity Commission, *Overview of Federal Sector EEO Complaint Process*, http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm.

[100] This information was provided to CRS by the EEOC on June 20, 2012.

- Milwaukee AO (3)
- Minneapolis AO (1)
- Dallas DO (5)
- San Antonio FO (3)
- Houston DO (3)
- New Orleans FO (2)
- Detroit FO (2)
- Indianapolis DO (3)
- Los Angeles DO (7)
- Memphis DO (2)
- Miami DO (8)
- San Juan LO (1)
- Boston AO (1)
- New York DO (5)
- Baltimore FO (6)
- Cleveland FO (5)
- Philadelphia DO (3)
- Albuquerque AO (1)
- Denver FO (2)
- Phoenix DO (3)
- San Francisco DO (9)
- Seattle FO (2)
- Oklahoma City AO (1)
- St. Louis DO (3)
- Washington (State) FO (10)

4. Qualifications

According to an AJ position description provided by the EEOC, the qualifications necessary to be an EEOC AJ include the following: (1) admission to the Bar; (2) a demonstrable knowledge of current employment law, as well as EEOC regulations and policies; (3) a comprehensive knowledge of the legal system and processes; (4) knowledge of the organization, policies, regulations, and procedures of the federal government; (5) ability to interpret laws, analyze facts, and issue a decision; (6) ability to deal

with parties under pressure; and (7) possession of a high-level of judicial temperament and skill to preside over hearings.[101]

More detailed qualification requirements may appear in vacancy announcements that are periodically published on the USAJOBS website.

5. Tenure

EEOC AJs appear to be serving in permanent appointments that enjoy certain civil service protections. The do not appear to be subject to any tenure restrictions.

6. Pay and Promotion

Currently, of the total number of AJs, 5 AJs are paid at the GS-13 level, and 103 AJs are paid at the GS-14 level.[102] EEOC AJ positions have a career ladder to the GS-14 level. Therefore, AJs can be promoted to that level without competition, and the position does not have to be posted.

7. Adjudication Procedures

In general, a federal employee who files a discrimination claim with her federal agency has two choices once the agency has completed its investigation: (1) request a hearing before an EEOC AJ; or (2) request a final decision from the agency.

Under the first option, the EEOC AJ conducts a hearing, issues a decision, and orders relief if discrimination is found. The federal agency must then respond by issuing a final order that accepts or rejects the AJ's decision. If that final order rejects the AJ's decision, then the agency must simultaneously file an appeal with the EEOC AJ. A federal employee may appeal the agency's final order to the EEOC's Office of Federal Operations, at which point EEOC appellate attorneys will review the entire file, including the agency's investigation, the AJ's decision, the hearing transcript, and any appeal statements. Alternatively, the employee may file a lawsuit challenging the agency's order in federal district court.

Under the second option, a federal employee may request a final decision from the agency. If the employee is dissatisfied with the agency's decision, he may appeal it to the EEOC. This appeal is heard by an EEOC AJ. Alternatively, the employee may file a lawsuit challenging the agency's decision in federal district court.

More details about the EEOC's adjudication procedures regarding federal employment discrimination complaints are available on the agency's website.[103] The Commission has also published detailed guidance regarding adjudication procedures in a handbook for its AJs.[104]

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[101] Equal Employment Opportunity Commission, *Position Description, Administrative Judge*, July 19, 2002 (on file with CRS).

[102] The GS-13 AJs are in Atlanta DO (1), Birmingham DO (2), Memphis DO (1), and New York DO (1). The GS-14 AJs are in all of the DO, FO, AO, and LO offices listed above. The 2012 salary tables for the General Schedule (GS), by locality pay area, are available on the Office of Personnel Management website at http://www.opm.gov/oca/12tables/indexGS.asp.

[103] *See* http://www.eeoc.gov/federal/fed_employees/index.cfm.

[104] Equal Employment Opportunity Commission, *U.S. Equal Employment Opportunity Commission Handbook for Administrative Judges*, July 1, 2002, http://www.eeoc.gov/federal/ajhandbook.cfm.

8. Internal Review and Appeals

Appeals procedures are described in the preceding section.

9. Supervision and Evaluation

The EEOC's position description for AJs describes supervision of AJs as follows:

> The incumbent works under the general supervision of a Supervisory Attorney-Examiner (CR) or Lead Administrative Judge who assigns cases without preliminary instructions. The incumbent is independently responsible for case processing and adjudicatory activities and retains signatory authority for his/her assigned cases. The incumbents decisions are seldom reviewed prior to issuance for conformance with commission policy, precedential effect and overall quality. Decisions delivered orally from the bench following the hearing, if reviewed, are reviewed only after they are rendered. Conclusions of law such as whether or not discrimination is proven by a preponderance of the evidence, is an independent function of the Attorney-Examiner (CR). Work is considered technically authoritative.[105]

CRS was unable to find information regarding evaluation of EEOC AJs.

[105] Equal Employment Opportunity Commission, *Position Description, Administrative Judge*, July 19, 2002 (on file with CRS).

D. Merit Systems Protection Board

1. Legal Authorization

The Merit Systems Protection Board (MSPB or Board) is a federal entity – created by statute – that itself hears or adjudicates, or provides for a hearing or adjudication via other adjudicators, all matters within the jurisdiction of the Board under title 5 of the U.S. Code, chapter 43 of title 38 relating to veterans, or any other law, rule, or regulation relating to federal merit systems. Subject to otherwise applicable provisions of law, the MSPB takes final action on any such matter. It can order any federal agency or employee to comply with its order or decision and enforce compliance with any such order. The Board also can conduct, from time to time, special studies relating to the civil service and review rules and regulations of the Office of Personnel Management. Any member of the Board and any employee of the Board designated by the Board, including AJs, may administer oaths, examine witnesses, take depositions, and receive evidence. These individuals also may issue subpoenas requiring attendance and presentation of testimony and production of documentary or other evidence.[106] An employee or applicant for employment may submit an appeal to the MSPB from any action which is appealable to the Board under any law, rule, or regulation.[107]

2. Jurisdiction

The Board itself has original jurisdiction including actions brought by the Special Counsel under 5 U.S.C. §§ 1214 (investigation of prohibited personnel practices; corrective action), 1215 (disciplinary action for prohibited personnel practices), and 1216 (other matters within the jurisdiction of the Special Counsel such as enforcing the Hatch Act); requests for informal hearings from persons removed from the Senior Executive Service for performance deficiencies; and actions against ALJs under 5 U.S.C. § 7521.[108]

The Board has appellate jurisdiction in various categories: appeals from agency actions including reduction in grade or removal for unacceptable performance or for such cause as will promote the efficiency of the service, i.e., adverse actions; appeals under the Uniformed Services Employment and Reemployment Rights Act (P.L. 103-353) and the Veterans Employment Opportunities Act (P.L. 103-353); and appeals involving an allegation that was the result of whistleblowing (5 C.F.R. § 1201.3). The AJs may hear, adjudicate, and issue initial decisions in appellate jurisdiction cases. The MSPB employs no ALJs.

3. Number and Distribution

The MSPB currently employs 59 AJs in career ladder positions that begin at the GS-13 pay grade and end at the GS-15 pay grade. Currently, the staff includes 3 AJs at the GS-14 level and 56 AJ at the GS-15 level. There are currently no AJs at the GS-13 level.

The AJs by regional office (RO) and field office (FO) location follow: Atlanta RO (8), Chicago RO (8), Dallas RO (6), Denver FO (5), New York FO (5), Philadelphia RO (7), San Francisco RO (10), Alexandria (VA) (RO) (9) and the Washington, DC, Headquarters office (1).

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[106] 5 U.S.C. § 1204.

[107] 5 U.S.C. § 7701.

[108] 5 C.F.R. § 1201.2.

4. Qualifications

To qualify as an AJ, the individual must be duly licensed and authorized to practice as an attorney under the laws of a state, Territory, or the District of Columbia and meet the following requirements within 30 days of the closing date.

GS-905-13: The first professional law degree (LL.B. or J.D.) plus one of the following:

a. Superior law student (i.e, academic standing in the upper 1/3 of an accredited law school graduating class; work or achievement of significance on the law school's official law review or moot court board; special high-level honors for academic excellence in law school-such as, election to Order of the Coif; winning of a moot court team which represent the law school in competition with other law schools, full-time or continuous participation in a legal aid program-as opposed to intermittent or casual participation; significant summer law clerk experience) or other evidence of clearly superior work achievement; plus two years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at a level of difficulty comparable to the GS-905-12;

b. Three years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at level of difficulty comparable to the GS-905-12; or

c. Second professional law degree (LL.M.) plus two years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at the level in difficulty comparable to the GS-905-12.

GS-905-14: The first professional law degree (LL.B. or J.D.) plus one of the following:

a. Superior law student work plus three years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at a level of difficulty comparable to the GS-905-13;

b. Four years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at level of difficulty comparable to the GS-905-13; or

c. Second professional law degree (LL.M.) plus three years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at the level in difficulty comparable to the GS-905-13.

GS-905-15: The first professional law degree (LL.B. or J.D.) plus one of the following:

a. Superior law student work plus four years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at a level of difficulty comparable to the GS-905-14;

b. Five years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at level of difficulty comparable to the GS-905-14; or

c. Second professional law degree (LL.M.) plus four years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at the level in difficulty comparable to the GS-905-14.

5. Tenure

All AJs within the MSPB serve in permanent appointments and enjoy the protection of 5 U.S.C. § 4303 (actions based on unacceptable performance). Moreover, because they are in the MSPB Professional Association's bargaining unit, they are covered by the grievance and arbitration provisions of the agreement, Articles 14-16, as well as the articles that relate to adverse and disciplinary actions and performance based actions, Articles 21 and 22, respectively.

Section 1201.12 (Appeals by Board employees) of title 5 of the Code of Federal Regulations provides, in relevant part, that, "The Board's policy is to insulate the adjudication of its own employees' appeals from agency involvement as much as possible. Accordingly, the Board will not disturb initial decisions in these cases unless the party shows that thee has been harmful procedural irregularity in the proceedings before the administrative law judge or a clear error of law."

6. Pay and Promotion

The promotion policy for AJ is governed by the MSPB's Personnel Manual and the Collective Bargaining Agreement Between the MSPB Professional Association and the agency. Under the provisions of the Personnel Manual, an MSPB attorney may receive a "career ladder" promotion to the next higher nonsupervisory grade in the same location and MSPB organization without competition when:

- Nonsupervisory higher grade duties are available in the same location and organization where the attorney works;
- The attorney meets the applicable requirements for the next higher grade and has completed one year of federal attorney service at the present (or higher) grade;
- The attorney has received an MSPB summary rating of "Fully Successful" or better in a performance appraisal which was completed since acquiring the current grade and has demonstrated the ability to adequately perform at the next higher grade level; and
- The immediate supervisor submits a Request for Personnel Action (Standard Form 52) through the approving manager to the Director of Human Resources.

The Collective Bargaining Agreement provides that the time-in-grade requirement for promotion from the GS-13 to the GS-14 level is 18 months. The Agreement specifies that the time-in-grade requirement for promotion from the GS14 level to the GS-15 level is 24 months. However, the Personnel Manual permits an "accelerated career ladder promotion" for an AJ who:

- Is within 6 months of completing one year of federal attorney service at the present (or higher) grade;
- Has received an MSPB summary rating of "outstanding" in a performance appraisal completed since acquiring the current grade; and
- Is recommended for an accelerated career ladder promotion by the immediate supervisor with the concurrence of the Director of Regional Operations.

7. Adjudication Procedures

An appellant has a right to a hearing for which a transcript will be kept and to be represented by an attorney or other representative. The Board itself may hear any case appealed to it or refer it to an AJ. In any case involving a removal from the civil service, the case shall be heard by the Board or an employee

experienced in hearing appeals.[109] While an appellant has a right to a hearing under 5 U.S.C. § 7701, if a request for it is not filed in a timely manner, that right is waived.[110]

AJs have the authority in hearings to administer oaths and affirmations, issue subpoenas, and issue final decisions. They also may initiate attempts to settle appeals informally at any time. If parties agree to settle their dispute, the settlement is the final and binding resolution of the dispute and the AJ dismisses the appeal with prejudice.[111]

In actions involving discrimination, the Board must, within 120 days of filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under 5 U.S.C. § 7702.

Decisions of the Board are subject to the judicial review by the U.S. Court of Appeals for the Federal Circuit, except for those involving discrimination which are subject to judicial review in U.S. district courts.[112]

An initial decision of an AJ becomes final 35 days after it is issued. It is not precedential. An initial decision does not become final if any party files a petition for review in a timely manner or if the Board reopens the case on its own motion. It also becomes final if the Board denies all petitions for review.[113]

8. Internal Review and Appeals

Any party to a proceeding, the Director of the Office of Personnel Management, or the Special Counsel may file a petition for review of an AJ's initial decision to the MSPB.[114] If the Board grants a petition for review or a cross petition for review, or reopens or dismisses a case, the decision of the Board is final if it disposes of the entire action.

9. Supervision and Evaluation

AJs are supervised and evaluated by their Regional Directors, who interact with them on a regular, if not daily basis. Regional Directors review AJs' written products and, from time to time, observe their conferences and hearings. AJs in the Board's two field offices are supervised by the Chief Administrative Judge in the office, who also evaluates them subject to the formal agreement of the Regional Director. All evaluations of AJs are reviewed and concurred on by the Director of Regional Operations before they become final.

The AJs are evaluated in accordance with their work performance standards. These standards are intended to measure all the significant components of their work, both the objective aspects of timeliness and production, and the more subjective aspects of quality. To gauge the quality of their performance, skills such as the management of their cases, the competence with which conferences and hearings are

[109] 5 U.S.C. § 7701.

[110] 5 C.F.R. § 1201.24.

[111] 5 C.F.R. § 1201.41.

[112] 5 U.S.C. § 7703.

[113] 5 C.F.R. § 1201.113.

[114] 5 C.F.R. § 1201.114.

conducted, the manner in which they interact with the parties in their cases and with their colleagues, and the legal and factual soundness and completeness of their decision are all considered. Each of these aspects of their performance is a critical part of an AJ's job, and several indicia of how well each one is performed are prescribed in the performance standards. These standards do not vary between GS-13, -14, and -15 grade levels because each is a critical component of an AJ's job. Nevertheless, the degree of difficulty and complexity of the cases assigned, as well as the amount of review afforded, vary at the different grade levels and based on the experience of the AJ.

E. Nuclear Regulatory Commission

1. Legal Authorization

The Atomic Energy Act of 1954 (specifically 42 U.S.C. § 2241(a)) authorizes the Nuclear Regulatory Commission (NRC or Commission) "to establish one or more atomic safety and licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided."

2. Jurisdiction

The Atomic Safety and Licensing Board Panel (ASLBP) conducts hearings for the Commission and other regulatory functions as the Commission authorizes with respect to the "granting, suspending, revoking, or amending of any license or authorization."[115]

3. Number and Distribution

At this time, the NRC employs 16 full-time AJs and 25 part-time Special Government Employee (SGE) AJs.[116] The NRC Chairman, subject to the approval of the Commission, initiates the appointment of NRC AJs to the Atomic Safety and Licensing Board Panel. The Panel conducts the hearings through three-person boards. The Commission or Chief Administrative Judge appoints the members of these three-person boards from the Panel. Currently, 41 individuals are Panel members and may serve on these boards.[117] The Panel members include individuals who are engineers, scientists or lawyers and may serve as "legal judges" (lawyers) or "technical judges" (scientists or engineers), and some members who may serve as both.[118]

One member of the board must be qualified in the conduct of administrative proceedings (legal), and at least two members shall have technical or other qualifications as deemed appropriate for the Commission regarding the issues being decided.[119]

The NRC Chairman, subject to the approval of the Commission, initiates the appointment of the Chief Administrative Judge. The Chief Administrative Judge designates the Associate Chief Administrative Judge (legal) and the Associate Chief Administrative Judge (technical).

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[115] 42 U.S.C. § 2241(a); 10 C.F.R. § 1.15 (2002).

[116] SGE AJs are employees appointed under one-year, temporary – but potentially renewable – intermittent work schedules. For a list of ASLBP members, see http://www.nrc.gov/about-nrc/organization/panel-members.html.

[117] *Id.*

[118] *Id.* Although the NRC has employed ALJs in the past, *see* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-93-6, ALLEGATIONS OF INTERFERENCE BY THE DEPARTMENT OF THE INTERIOR (1992), the agency has told CRS that it does not currently utilize ALJs in adjudications. Authority exists, however, that would permit the agency to hire ALJs and allow those judges to preside over certain NRC hearings or adjudications.

[119] 42 U.S.C. § 2241(a).

4. Qualifications

AJs may be lawyers, physicists, engineers, or environmental scientists. A review committee screens candidates for full-time and part-time positions on the Panel. In order to qualify for membership on the Panel, the candidate must have a background in law, engineering, or science, including at least 7-10 years of work experience in fields related to the Panel. A security clearance is also required.[120]

5. Tenure

Full-time AJs are appointed under a career (permanent) or a term appointment (typically five-years). Part-time AJs are appointed under one-year, temporary appointments – which are renewable indefinitely – with intermittent work schedules.[121]

6. Pay and Promotion

The Commission approves the pay system for full-time NRC AJs and establishes the pay of SGE AJs. The 16 full-time AJs are all currently paid at a rate of $165,300 per year. The 25 SGE AJs are all currently paid at a rate equivalent to EX-IV ($74.51 per hour).[122]

Board members may be appointed by the Commission from the private sector or from Commission staff or another federal agency. Board members appointed from the private sector receive per diem compensation for each day spent in meetings or conferences. All members of a board, regardless of appointment, receive traveling and other expenses accrued while engaged in the work of a board.[123]

The NRC does not have different grade levels for full-time or SGE AJs. An SGE AJ can be appointed as a full-time AJ if she is competitively selected for a full-time AJ position, or if the vacancy announcement from which the SGE employee was selected indicated the possibility of conversion to a full-time position without further competition.

7. Adjudication Procedures

The NRC's regulations outline the different types of hearing procedures, informal and formal.[124] The Commission's formal hearing procedures conform to the APA. Proceedings of the boards involve typical, civil trial practices such as pleadings, motions, and mandatory document disclosure. The hearings rely extensively upon pre-filed written testimony as often found in administrative proceedings. Evidentiary proceedings entail public hearings with sworn witnesses questioned by the board members and sometimes cross-examined by counsel. The board then produces written decisions.[125]

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[120] Nuclear Regulatory Commission, DT-93-07, Administrative Judges – Compensation and Staffing, Directive 10.153 (March 2, 1993).

[121] *Id.*

[122] *Id.*

[123] 42 U.S.C. § 2241(b).

[124] 10 C.F.R. § 2.1200 (2011) (informal); 10 C.F.R. § 2.700 (2006) (formal).

[125] *See* 10 C.F.R., part 2, subpart C; *ASLBP Responsibilities*, available at, website http://www.nrc.gov/about-nrc/regulatory/adjudicatory/aslbp-respons.html.

The Chief Administrative Judge develops and applies procedures governing the activities of the boards, AJs, and ALJs and makes appropriate recommendations to the Commission concerning the rules governing hearing procedures. The Commission then determines the appropriate procedures for hearings, whether informal or formal.[126]

8. Internal Review and Appeals

The Commission shall hold a hearing upon request of any person whose interest may be affected by a board proceeding. The hearing shall occur 30 days after publication of notice in the *Federal Register.*[127] All decisions are reviewable by the Commission. Final decisions by the Commission are subject to judicial review available under chapter 158 of title 28.[128]

9. Supervision and Evaluation

The Chief Administrative Judge, who reports to the Commission, supervises the Panel and its members.[129] AJs are excluded from the NRC's performance appraisal system for Senior Level System (SLS) employees.[130]

10. Miscellaneous

Members of the Panel are subject to the conflict of interest laws and regulations regarding ethical standards for federal judges. An AJ cannot participate in any proceeding that could affect the interests of any party funding the judge's activities.[131]

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[126] 42 U.S.C. § 2239(a)(1)(B)(iv).

[127] 42 U.S.C. § 2239(a)(1)(A).

[128] 42 U.S.C. § 2239.

[129] NRC Manual 0106-01.

[130] Senior Level Performance Appraisal System Directive 10.148-01.

[131] *See* 10 C.F.R. § 7.20 (2002).

III. Appendix: Administrative Judges -- A Selected Review of the Literature

The following is a selected bibliography of recent articles and surveys on administrative judges ("AJs"). Materials have been selected from various CRS databases and the Library of Congress online catalog.

James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 Wake Forest L. Rev. 1191 (2006).

> Review of ALJ and administrative judges in various agencies and issues surrounding their independence. Also addresses ethics and whether administrative judges are "judges".

Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 Ala. L. Rev. 693 (2005).

> Article on administrative adjudications as part of the policymaking process. Covers various types of administrative judges and their role in applying policy and influencing the development of future policies.

Michael Asimow, *Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 Admin. L. Rev. 1003 (2004).

> Discussion of evidentiary hearings that fall outside the scope of the Administrative Procedure Act, which the author calls "Type B" evidentiary hearings. He refers to those presiding over these hearings as "presiding officers". Discussing the meaning of evidentiary proceedings in the administrative context and discusses issues such as due process and procedural regulations.

Jeffrey A. Wertkin, *A Return to First Principles: Rethinking ALJ Compromises*, 22 J. Nat'l Ass'n Admin. L. Judges 365 (2002).

> Reviews the legislative history of the Administrative Procedure Act and includes a discussion of the role of "hearing examiners".

Jeffrey S. Lubbers, *Symposium on the 50th Anniversary of the APA: APA-Adjudication: Is the Quest for Uniformity Faltering*, 10 Admin. L.J. 65 (1996).

> Discussion of "non-ALJ adjudicators". Cites John Frye's 1989 study identifying 2,692 non-ALJ adjudicators and developments since that survey. Gives number of administrative judges and hearings officers at the Boards of Contract Appeals, Department of Commerce, Department of Defense, Board of Veterans Appeals, the MSPB, the EEOC, and the Atomic and Safety Licensing Board members.

Bernard Schwartz, The Fiftieth Anniversary of the Administrative Procedure Act: Past and Prologue: Adjudication and the Administrative Procedure Act, 32 Tulsa L.J. 203 (1996).

> Brief discussion of non-APA administrative judges. Discusses pre-APA adjudication processes and APA reforms. Offers suggestions for adjudicatory process improvements.

Charles Koch, *Administrative Presiding Officials Today*, 46 Admin. L. Rev. 271 (1994).

> Discusses the results of several surveys done on ALJs and AJs. Offers proposals for those positions going forward based on the results of those studies. The AJs represented in the study were from the Board of Veterans Appeals (BVA), Equal Employment Opportunity Commission (EEOC), Merit System Protection Board (MSPB), Board of Patent Appeals/Interferences (BPA), Department of Immigration and Naturalization Services (INS), Defense Department (DISCR), Armed Services Board of Contract Appeals (ASBCA), Trademark Trial and Appeal Board (Trademark), and the Nuclear Regulatory Commission.

William Robie, Contemporary Issues in Administrative Adjudication: Article and Commentary: A Response to Professor Verkuil, 39 UCLA L. Rev. 1365 (1992).

> Commentary in response to Professor Verkuil's article on ALJs and AJs. Discusses determinations on whether to have an ALJ or non-ALJ to make a particular type of administrative decision. Uses the Nuclear Regulatory Commission and the Special Inquiry Officers (also known as Immigration Judges) at the Department of Justice as an example of AJs with a high degree of independence. Cites the Board of Veterans Appeals as an example of AJs in non-adversarial proceedings.

Paul R. Verkuil, Contemporary Issues in Administrative Adjudication: Article and Commentary: Reflections Upon the Federal Administrative Judiciary, 39 UCLA L. Rev. 1341 (1992).

> Overview of the two types of judges in the "hidden judiciary": ALJs and AJs. Assessment of their qualifications, how they are selected, compensation, the types of proceedings over which they preside, and their independence. References case load information from the 1989 survey conducted by the Administrative Conference of the United States (ACUS). Notes the selection and appointment of AJs is by the agency rather than the Office of Personnel Management, in the case of ALJs. Compares decisions by ALJs in the Social Security Administration (SSA) with AJs in the Department of Veterans' Affairs. Highlights the independence of AJs at the EOIR.

William R. Robie and Marvin H. Morse, The Federal Executive Adjudicator: Alive (and) Well Outside the Administrative Procedure Act?, 33 Fed. B. News & J. 133 (1986).

> Raises questions on issues concerning non-ALJ executive branch adjudicators such as independence, selection, review of decisions, and performance appraisal. Contains a table listing full-time adjudicator positions by GS level.

Surveys

Paul R. Verkuil et al., The Federal Administrative Judiciary, 1992 ACUS 771 (1992).

> A 368-page study commissioned by the Administrative Conference of the United States at the request of the Office of Personnel Management. The focus of the study was the selection and appointment process for ALJs, however, it also examined the current and future role of ALJs in the administrative process. Sections include historical background of ALJs and the evolution of administrative ajudications over time, the variety of administrative adjudicators, empirical study of the roles and attitudes of the federal administrative judiciary, the selection of agency adjudicators, the scope and degree of ALJ and non-ALJ independence, effects of ALJ and non-ALJ decisions, and the developing standards for when to use ALJs as presiding officers. The report includes an appendix detailing the survey findings and a bibliography of relevant books, articles, and government material.

John H. Frye III, Survey *of Non-ALJ Hearing Programs in the Federal Government*, 44 Admin. L. Rev. 261 (1992).

> A 94-page article on a survey launched by the Administrative Conference "designed to identify those adjudications conduction by federal agencies that are presided over by officials who are not Administrative Law Judges (ALJs)." Agencies identified 129 types of cases, however, a substantial number of the case types were inactive, so only 83 case types were analyzed. The annual caseload was in the neighborhood of 343,200. It showed the largest category of cases arose in the Executive Office of Immigration Review (EOIR) of the Department of Justice (44%), followed by Health and Human Services (20%), the Department of Veterans Affairs (17%), the Coast Guard (6%) and the Department of Agriculture (4%). These five agencies accounted for 91% of the total caseload. Case types were divided into five general subject areas: enforcement matters (51%, mostly immigration and Coast Guard civil penalty proceedings), entitlements (37%, mostly insurance carriers in programs administered by HHS and the VA), economic (10%, mostly Farmers Home Administration), employer-employee relations (5%, mostly MSPB and EEOC), and health safety and environmental (EPA and NRC). The article goes on to specific AJ duties and case types in detail.

Chairman JOHNSON. Again, I want to thank you all for being here today and for your testimony. I look forward to continuing this discussion on ways to secure the future of this important program at our next hearing. You know, Social Security is a vital part of this Nation, so we need to protect it, and I thank you all for being here. With that, the committee stands adjourned, thank you very much.

[Whereupon, at 3:53 p.m., the subcommittee was adjourned.]

[Submissions for the Record follow:]

David McCaskey

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RE: **Fourth in a Hearing Series on Securing the Future of the Social Security Disability Insurance Program**

In my opinion, there is a grave problem in the administration of Social Security Disability appeals in that the Administrative Law Judges appear to either have had no guidance or choose to ignore whatever policy standards, unknown to the public, may have been provided to them. I say this because of the significant disparity in awards granted among our several local judges and what I understand to be an enormous disparity between judges in different regions. It should be made clear whether or not this small branch of the judiciary is charged with conserving public funds at the expense of those who are least able to bear it or with applying the disability statutes as written, taking into consideration the legislative intent of providing assistance for those who cannot afford proper medical care.

The problem does not stop at the ALJ level. The Appeals Council, the next step in the hierarchy, is so grossly overloaded with work that it often takes a year or more to receive a ruling on appeal from the ALJ decision.

There is, no doubt, some abuse of the system by claimants. The good liars get approval "out of the chute." My clients, however, are folks who have either worn their bodies out through hard work or have suffered some disabling trauma and then usually have to survive in some way, obtain medical care in some way, during the year and a half or two years that it takes to progress from application to hearing. I do not believe that the analysts who do the initial screening of these cases are either evil or ignorant. They can probably define a list of medical terms more quickly than I. My suspicion is that, as lower-level employees, they lack the life experience to understand the consequences of health conditions such as diabetes. They see the diagnosis, see that insulin is prescribed, know that insulin treats diabetes, and conclude that there is no impairment. They fail to understand that a person whose blood sugar has spiked is so impaired that it is impossible for them to test their blood and calculate the required dosage. Examining cases of chronic pain or depression, they again know what medicines "do the trick" and interpret a physician's note "doing well" as proof that a person is employable, failing to take the time to read the medical record chronologically and realize that "doing well" likely means that a person no longer needs hospitalization because of suicidality or that relief from is not the absence of pain, and is often achieved at the cost of constant sedation.

I ask that you do what you can to provide consistency throughout the ranks of the Administrative Law Judges and that you do what you can to add some training about the practical import of listed

disorders to the analysts' curriculum.

Thank you for your attention to these matters.

Sincerely,
David I. McCaskey

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Hearing before the
House Ways and Means Committee
Subcommittee on Social Security
June 27, 2012

The Social Security Disability Appeals Process

Statement of Linda Landry
Disability Law Center
July 11, 2012

Chairman Johnson, Ranking Member Becerra, and Members of the Subcommittee, thank you for this opportunity to provide a written statement for the record of the June 27, 2012, hearing on the Social Security disability appeals process.

I write to urge you to seriously consider the thoughtful testimony presented at the hearing by Ethel Zelenske for the Consortium for Citizens with Disabilities.

I am a Senior Attorney at the Disability Law Center where I have worked for 22 years. My practice has focused primarily on Social Security matters and the related health benefits. I have also served on the Advisory Committee of the Massachusetts Disability Determination Service for over 20 years. The Disability Law Center (DLC) is a non-profit 501(c)(3) organization functioning both as a public interest law firm, and as the designated Protection and Advocacy ("P&A") system for the Commonwealth of Massachusetts under federal authority. DLC's mission is to promote the fundamental rights of all people with disabilities to participate fully, equally and independently in the social and economic life of Massachusetts. Access to Social Security disability benefits and the related health coverage through Medicare and Medicaid is crucial for many to achieve this goal, as are the work incentives associated with the disability benefits.

During my time at the DLC, and before that in a legal services program, I have observed the severe hardships that result when individuals who cannot work due to disability encounter delays in accessing the safety net of disability benefits. Often, individuals have struggled to hold onto jobs or have tried to manage with part-time work until they can no longer do it – or are let go. Without higher education or very desirable skills, individuals with disabilities often cannot get jobs that allow work at home or the flexibility in scheduling that may be needed to remain employed. Often, they've had no or inadequate health coverage and have not received optimal treatment. The stress of being unable to make ends meet also impacts health.

A case in point is "Joan." Joan survived aggressive treatment for advanced cancer as a young woman. The treatment damaged her lungs, kidneys, and other internal organs. She recovered enough to eke out a living with her high school education in low level work in her small town, with occasional set backs, but was never again strong. The aging process exacerbated the damage to her organs such that, by her early fifties, she no longer had the stamina to tolerate even the part-time work to which she had had to resort. The work was worsening her condition and her doctor told her to stop. She had little financial cushion and was worried about how she would manage. She applied for Social Security disability benefits – but there was a delay in obtaining sufficiently explicit medical evidence of the nature of her condition. Fortunately for Joan, the delay did not outlast her modest resources or result in homelessness. Her benefit is just under $1000 per month, less than what she had been earning, but she is grateful and her health has stabilized. Many applicants are not so lucky.

I agree with but will not reiterate all of Ms. Zelenske's points about the importance of retaining a full and fair administrative appeals process that is informal and non-adversarial for disability benefit applicants. I will emphasize that it is critical that the Social Security Administration have sufficient resources to properly manage its important and beneficial services. Social Security's disability standard is restrictive, difficult to meet, and requires complex analysis. Commissioner Astrue has made efforts to address capacity issues at the Administrative Law Judge hearing level, but budget cutting has also resulted in a lack of sufficient staffing at earlier levels. Many of Social Security's field offices are too short staffed to adequately meet service needs, including providing the assistance many individuals need in completing benefit applications. This gap is not being met by short-staffed state and other human service organizations. A complete and well prepared application is important to the ability of the Disability Determination Services (DDS), to properly obtain and analyze all the evidence against the disability standard. The DDSs are also trying to do more with fewer resources, but adjudication delays are growing at the Initial and Reconsideration levels. The DDSs need resources for fully developing the medical evidence, for sufficient, well-trained adjudication staff, for medical evaluations, and for the important outreach to hospitals, schools, and other sources of evidence. The earlier in the process that the evidence is fully developed and a well- considered decision is made, the better for both the applicant and the agency.

The Social Security Administration provides an important safety net for people with disabilities. It is critical that its application, adjudication and administrative appeals process be timely, fair, and well-functioning. Thank you for your consideration of these issues.

Respectfully Submitted,

/S/

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Federal Administrative Law Judges Conference

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P.O. Box 1772 • Washington, DC 20013 • www.faljc.org

Office of the President July 11, 2012

Statement of J. Jeremiah Mahoney submitted to the House Ways and Means Subcommittee on Social Security (Fourth Hearing in a Series on Securing the Future of the Social Security Disability Insurance Program):

May it please the Committee; I have served as a federal Administrative Law Judge ("ALJ") for 4 years, and am currently employed as the Acting Chief ALJ for the U.S. Department of Housing and Urban Development. In 2000, I retired from the U.S. Air Force as the longest-serving Military Judge in U.S. history.

My comments today are my own, in my role as President of the Federal Administrative Law Judges Conference, which is a professional organization composed of over 260 federal ALJs appointed under 5 U.S.C. § 3105. ALJs conduct formal, "on-the-record" administrative hearings, which are governed by the Administrative Procedure Act of 1946 ("APA"). Congress passed the APA to ensure the integrity of the administrative adjudication process, and FALJC seeks to preserve those APA guarantees.

One of the issues raised at the Committees' hearing on June 27, 2012, centered on the question of whether ALJs are required by law to decide Social Security Administration ("SSA") disability appeals. Judge Randy Frye indicated he would address that issue in written comments.

However, whether or not ALJs are required by law to adjudicate SSA disability appeals, as a matter of legislative policy the committee should carefully consider whether disability appeals should be decided by ordinary agency employees—or by judges whose independence is guaranteed by statute. As is well known, ordinary agency employees are subject to incentives and sanctions that may bear upon the speed and outcome of their decision on each appeal. ALJs, on the other hand, are free of such extraneous agency influence in arriving at the correct decision based upon a complete record.

The APA requires that on-the-record agency proceedings be presided over by the head of the agency, a member of the body (*e.g.*, a commission) heading the agency, or ALJs. "Congress contemplated that "agency heads, unable personally to conduct hearings, would be forced to delegate that duty", permitted such delegation only to ALJs, and enacted provisions assuring that such ALJs would be "qualified" and "impartial".

The APA and its implementing regulations subject all ALJ applicants to the rigors of the competitive civil service, and thereby remove any hint of cronyism or agency politics from the

ALJ appointment process. The Office of Personnel Management ("OPM") exercises exclusive government-wide authority to evaluate and qualify ALJ candidates through the maintenance of a certified register, which ranks the candidates based on their ability to meet rigorous, objective, merit-based criteria. These criteria include a review of the candidate's career accomplishments, performance on a lengthy written examination and performance in a structured interview before a panel of three professionals. Under the "Rule of Three," OPM must refer only the three highest-ranking ALJ candidates to each agency seeking to hire from the certified register. In addition, OPM must approve all transfers of ALJs between agencies. These rules assure that agencies will hire only the most qualified applicants.

Equally critical, the APA and its implementing regulations prevent agencies from influencing ALJs' decisions by shielding ALJs from the scheme of rewards and punishments to which other federal employees are subject. The APA precludes federal agencies from subjecting ALJs to performance standards for federal agency employees, and from granting ALJs monetary awards or incentives (*e.g.*, bonuses). Unlike other competitive-service federal employees, ALJs are subject to removal, suspension, reduction in grade or pay, or a furlough under 31 days, "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." In addition, agencies must assign cases to each ALJ on a rotational basis to the maximum extent practical.

The Committee has heard comments from academic witnesses who suggest that claimant's appeals can be adequately handled by ordinary agency employees. As one consequence dissatisfied claimants—seeking an independent decision maker—would have recourse only to the Article III courts. There are respected academics who oppose that suggestion, and believe that ALJ decision-makers are an essential part of the process. Such opposing views should be carefully considered by the Committee. As an example please see, *Scapegoating Social Security Disability Claimants (and the Judges Who Evaluate Them)*, by Professors Jon C. Dubin and Robert E. Rains. http://www.acslaw.org/publications/issue-briefs/scapegoating-social-security-disability-claimants-and-the-judges-who-evalu Additionally, two Social Security ALJs have responded to a critical article by Professor Richard Pierce, who appeared before the Committee. ALJ Jeffrey S. Wolfe and ALJ Dale D. Glendening, *What We Should Do About Social Security Disability*, REGULATION, Spring 2012, at 16.

Many of the members of the Federal Administrative Law Judges Conference have previously served as Social Security ALJs, and many other members are still employed as ALJs by SSA. We believe that ALJ decisions on disability appeals are an important part of the SSA Disability Insurance process because the ALJ exercises decisional independence from the agency. That fact enhances the perception of fairness that is essential to the credibility of the administrative process at SSA, and the acceptance of decisions by your constituents.

There were several matters raised and discussed at the hearing—aside from expensive resources—that may help alleviate the current disability appeal adjudication problems and case backlog. Closing the record at a specific point in the process; providing incentive for

STATEMENT OF THE
SOCIAL SECURITY LAW SECTION
FEDERAL BAR ASSOCIATION

COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON SOCIAL SECURITY

SECURING THE FUTURE OF THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM

JULY 11, 2012

Chairman Johnson, Ranking Member Becerra, and Members of the Subcommittee:

These remarks are exclusively those of the Social Security Law Section of the Federal Bar Association and do not necessarily represent the views of the Federal Bar Association as a whole. Moreover these remarks are not intended to nor do they necessarily reflect the views of the Social Security Administration.

Unlike other organizations associated with Social Security disability practice that tend to represent the interests of one specific group, the Federal Bar Association's Social Security Law Section embraces all attorneys involved in Social Security disability adjudication. Our members include:

- Attorney representatives of claimants
- Administrative Law Judges
- Administrative Appeals Judges
- Staff attorneys in the Office of Disability Adjudication and Review (ODAR)
- Attorneys in the Social Security Administration's Office of General Counsel
- U.S. Attorneys and Assistant U.S. Attorneys

The common focus of the FBA's Social Security Law Section is the effectiveness of the adjudicatory process at all phases, including hearings in the Office of Adjudication and Disability Review (ODAR), the appeal process before the Appeals Council, and judicial review through the Federal courts. Our highest priority is ensuring the integrity, fairness, independence, and effectiveness of the Social Security disability adjudication process to those it serves -- both Social Security claimants themselves and the American taxpayers who have an interest in ensuring that only those who are truly disabled and entitled to benefits receive these benefits.

We appreciate the continuing commitment that this Subcommittee has shown for fair and effective adjudication of disability claims. As will be discussed in more detail below, your support has enabled Social Security to reverse the long-standing trend toward increased backlogs and longer wait times. Most importantly, this is being done without sacrificing due process. We strongly believe that the growing disability claims workload can, and indeed must, be addressed without limiting claimants' opportunity for full due process. In fact, we believe that affording due process is essential to fulfilling the Commissioner's objective of reaching the right decision at the earliest possible stage of the process. The ODAR hearing before an impartial judge is the method by which claimants have an opportunity to tell their story. It is also essential to meet our Constitutional obligations. This right should never be abridged.

This Subcommittee has considerable knowledge and depth of understanding of the decision-making process applicable to disability applications. This depth of knowledge is demonstrated in the information set out in the Committee's notice of these hearings and has been clearly shown in this Section's experience in testifying before the Committee. In these remarks, we will not set out the procedural information of which the Committee is clearly aware, but will address some of the concerns that were raised by the Committee in announcing the current hearings as well as a few other areas that have been the subject of comment. We also will respond to some of the specific questions raised by the Chairman in his opening statement, as well as address several other issues.

Concerns Expressed by the Committee

Processing Time

In setting these hearings, the Chairman noted that the average waiting time for an administrative law judge decision (average processing time) is currently 354 days. As the Subcommittee is aware, this waiting period is dramatically shorter than that which claimants faced just a few years ago. At the end of fiscal year 2008, the average processing time was 514 days. This improvement has been achieved through determined efforts by the Commissioner, Chief ALJ, and thousands of dedicated employees. Some of the key elements in this success are: 1) Increased funding to provide for more staff including ALJs and support staff; 2) Additional hearing offices so all areas of the country are served; 3) National Hearing Centers to handle areas where there is a substantial increase in workload; 4) Administration of the program on a national level so the workload is balanced among the hearing offices rather than the prior local administration where there were substantial variations in workload and waiting times; and 4) Increased screening initiatives so that favorable cases are paid without the need, expense and delay for a ALJ hearing. Despite the hard work of these individuals, this reduction would not have been possible without the support of this Subcommittee in ensuring that the Agency received necessary resources.

The Section applauds this progress, but we strongly believe that wait times remain far too long. It must be remembered that the time counted as average processing time only begins after the claimant has completed a sometimes lengthy administrative process. Even with the improvements, the average claimant must still wait nearly a year between requesting an administrative law judge decision and getting the decision. Of course, many claimants wait far longer than the average. For a person with no income and limited or no access to medical care, this wait seems interminable.

Progress has been made through both increased personnel and improved technology. The Section believes that continued technological improvement is important and will be useful. However, every indication is that there are few major efficiency gains remaining to be achieved from technology. We can foresee efficiencies from technology that, for example, would digitize medical records and permit searches for words or phrases. However, even if the Agency does pursue such technology, it is unlikely to bear fruit in the near future.

The Social Security Law Section would oppose any increase in ALJ disposition goals. We believe that any increase in the current goals would undermine the adjudicatory process. Judges attempting to meet such goals would simply not have enough time to fully analyze and consider the voluminous medical records in each case.[1] These decisions are far too important to each claimant and to the taxpayer for anything less than a full and thorough consideration of all of the evidence.

We are fully cognizant of the difficult economic times that our nation faces. Despite this, we must urge that the Agency be provided the maximum feasible resources to ensure, at a minimum, that the progress that has been made is not lost and that waiting time is further reduced. Disability claimants are among our most vulnerable citizens. Whether their claims are eventually deemed meritorious or not, claimants deserve thorough consideration of the merits of their claim. In struggling to meet our serious budgetary issues, it is important that we not neglect the needs of the claimants and the taxpayers for a prompt, fair decision based on a full due process hearing.

ALJ Productivity and Disparity in ALJ Decision Outcomes

The Committee correctly notes a disparity among administrative law judges in terms of the rates at which they award benefits. While we share the Committee's concern in this area, we would note that the magnitude of this problem has been exaggerated by the media, which have focused on one West Virginia ALJ who has now resigned. It is important, however, that any solution not create a problem of even greater magnitude. We believe that any solution to this concern must preserve these judges' adjudicatory independence. Claimants depend on these judges to issue fair and impartial decisions. Without this independence, it would be all too easy for one administration to reduce expenditures and for another to try to put more money in the economy, by forcing judges to issue fewer or more awards.

In a recent article by Professor Richard Pierce in the Cato Institute's Fall 2011 issue of *Regulation,* it was suggested that the solution to this "problem" is the abolition of the due process ALJ hearing. We believe that such an action would deprive claimants of Constitutionally mandated due process. The factual, legal and logical flaws in Professor Pierce's article are well refuted in two articles:

1. See Dubin and Rains, Scapegoating Social Security Disability Claimants (and the Judges Who Evaluate Them), American Constitution Society (March 2012) https://www.acslaw.org/sites/default/files/Dubin__Rains_-_Scapegoating_Social_Security_Disability_Claimants.pdf
2. What We Should Do About Social Security Disability. A response to Richard J. Pierce, Jr. By Jeffrey S. Wolfe and Dale D. Glendening http://www.cato.org/pubs/regulation/regv35n1/v35n1-3.pdf

[1] There are approximately 50 workweeks in a year (52 weeks minus 10 Federal holidays), which is 250 days. If we allow for only 20 days per year for vacation, sick leave, etc., an ALJ deciding 600 cases would only have three hours per case to review the evidence, hold a hearing, issue decisional instructions, and edit a draft decision. Would you want the Judge to spend less than 3 hours on a case involving your loved one?

Further, the Commissioner submitted an attachment to his testimony that compares all ALJs with more than 100 dispositions in Fiscal year 2007 and fiscal year 2012 through May 25, 2012. There were 7 ALJs in 2007 that awarded benefits in 20% or less of their cases and 13 in 2012. This is shown as 1% or less of the ALJs with 100 or more dispositions. The Commissioner's attachment also shows that in 2007, 217 ALJs (19.6%) allowed benefits between 85 to 100%, while in 2012 the number declined to only 74 ALJs (5.1%). We are not suggesting that the Commissioner should not consider issues of "outliers," but the small magnitude of these awards clearly does not justify abolishing a hearing process that has stood the test of time and judicial review.

One of the witnesses raised the issue of disparity in outcomes among offices. The commenter noted that San Juan, Puerto Rico ODAR had an approval rate of 87.92% whereas Shreveport, Louisiana ODAR's rate is only 37.42%. Such statistics tell us little standing alone without further analysis. This is particularly true in the cited examples. The Medical-Vocational Guidelines direct finding disability for those who are illiterate when even those with marginal education would not be found to be disabled. These Guidelines define illiterate as unable to read or write in English. In Puerto Rico, this could include educated Spanish-speaking individuals who are not literate in English. To illustrate, a 50-year-old high school graduate capable of light exertional-level work who is fluent in Spanish but not English would be found to be disabled under Medical-Vocational Rule 202.09 even though he lives in Puerto Rico. An individual who is who is literate in English but with only limited education would be found not to be disabled under Medical-Vocational Rule 202.10.

In contrast, Shreveport obtained fame in a 1995 Reader's Digest article that discussed near universal application by poor parents for Supplemental Security Income for their children. It is not surprising that denial rates would be high in such an environment.

We believe that before deciding how to address this issue, the Agency should use valid statistical means to determine the nature and extent of the problem. It is easy enough to note that there are a few judges whose award rates seem to be out of line with the norm. It is another matter altogether to identify any significant group which might legitimately be considered "outliers."

We cannot know how many judges are true "outliers" without an appropriate statistical model analyzing the distribution of outcomes of the judge corps as a whole. Arbitrary cutoff points for favorable or unfavorable outcomes are of no value without such an analysis. Even a basic statistical model must consider relevant factors. For example, some state disability adjudication services award benefits at much higher rates than others. For example, in Fiscal year 2010, the state agency in Mississippi granted 24.9% of all claims at the initial determination level, whereas the state agency in New Hampshire granted 49.5% of all claims at the initial level. It seems likely then that the mix of cases a judge in New Hampshire receives may very well be different from that received by his counterpart in Mississippi.

Even after identifying statistical outliers, individual cases must be reviewed. The possible legitimate explanations are myriad, e.g., Hearing Office Chief Judges who help office

productivity by issuing on-the-record decisions identified by senior attorneys who did not have the authority to issue some types of decisions.

In a limited number of cases, SSA makes initial claims itself. In 2010, the Atlanta Region Disability Program Branch awarded benefits in 18.4% of initial claims, while the New York Region awarded benefits in 58.4% of initial claims. Disparity exists at all levels of the disability program and further individual study is required to determine those cases that present an actual issue. Abolishing the due process hearing does not address the problem.

If and when the Agency identifies problems with "outliers," it then must address these in ways that do not disturb adjudicatory independence. This likely would be best done by training, mentoring, etc. To avoid the pitfalls that come with diminishing judicial independence, other measures should only be considered in extreme cases and under carefully crafted rules.

Remands

Almost one ALJ decision in six is appealed to the Appeals Council with about one in ten of these being further appealed to the federal courts. Annually, there are over 25,000 cases remanded to administrative law judges for new hearings and decisions. We note that this is only 4% of all ALJ adjudications and that remands occur in only approximately 9% of all unfavorable ALJ decisions. While remands constitute a relatively small percentage of the ODAR workload, they still amount to the equivalent of the full time work of 50 – 60 judges. The right to appeal is obviously important and must be preserved. We believe, however, that there can be a notable reduction in this workload without sacrificing claimant's rights.

In a number of remands the Appeals Council seems to be expressing a significant inclination that benefits should be awarded. These cases return to the same ALJ for another hearing. Occasionally they then go back to the Appeals Council where they are then remanded to a different ALJ for a third hearing. Much effort could be avoided and claimants could receive a much faster resolution if, in these cases, the Appeals Council either awarded benefits or set out a specific factual finding which it believes to be established. If the Appeals Council needs additional staff support to enable it to take such actions, the costs would pale compared to the current avoidable expenses.

Chair's Questions

We now respond to some of the specific questions raised by the Chair in his Opening statement:

Why are almost 12% of ALJs are deciding 200 or fewer cases per year?

We do not know the basis of this figure. The Commissioner testified that 72% of the ALJs were on course to meet the goal of 500 – 700 dispositions in 2012 and that the percentage was expected to rise as the year goes on. However, we believe certain ALJs should be excluded from any such calculation:

1) Management ALJs and union officials who are assigned to non-adjudicatory responsibilities either in whole or the majority of their time. If this is a large number of ALJs, it might suggest that SSA may have too many ALJs assigned to non-adjudicatory responsibilities.

2) ALJs who do not work an entire year because they were hired or retired during the year or were absent for military leave, extended sick leave, etc.

If an individual review is conducted of the ALJs and if it identifies some ALJs who are assigned to adjudicate cases and, without good reason, are not doing so, then the Commissioner should take action. This may be in the form of additional training on relevant issues to increase the ALJs productivity. If this is not successful, we believe that low productivity can result in disciplinary action. *Nash v. Bowen*, 869 F2d 675, 680-681 (2nd Cir), cert. denied, 493 U.S. 812 (1990). The Commissioner has taken disciplinary action in the past where warranted and we have no doubt that he will continue to do so.

It was stated that the decisions of so-called "outlier judges," who deny or allow most of the cases they hear, cannot be questioned. The Appeals Council can and does hear appeals of claimants who are dissatisfied with the decision in their case. Furthermore, the Appeals Council can and does take "own motion" review of favorable or partially favorable decisions. The Commissioner has also recently established a Quality Review initiative and opened four new Branches in the Office of Appellate Operations to address these concerns.

It was stated that "claimant's representatives are part of a billion dollar plus a year industry, encouraging appeals and making a living by collecting their fees from the benefits awarded their claimants." We believe representatives play a vital role in the disability application and appeals process. For many years, claimants were rarely represented. As a result, the Administration routinely expended tremendous resources contacting treating sources to obtain treating records. In a large percentage of cases, the claimant then disclosed additional treating sources or more recent tests that had not been obtained. This resulted in delays in issuing a decision.

Representatives now undertake this role, taking on a tremendous amount of work Social Security would otherwise be required to do. With the complexity of HIPPA and Privacy Act concerns, this is more than many claimants can accomplish without a representative or Social Security doing it for them. As Vice President Hubert Humphrey once said, "(t)he moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; those who are in the shadows of life, the sick, the needy and the handicapped." We strongly believe that claimants must retain the procedural protections they have had for decades. These protections are provided by representatives who usually take the cases on a contingency fee basis and get paid nothing if the claimant is not successful.

Other Issues

Hearings Open to the Public

It has been suggested that disability hearings be open to the public. We strongly oppose such a move. Disability hearings inherently involve discussion of highly personal mental and physical health issues and medical records. Such information should not be made available to the public without an extremely compelling reason or consent of the claimant in an individual case. The certainty of causing stress and embarrassment to claimants far outweighs any theoretical benefit to the public.

In addition, we would anticipate that, if hearings were open to the public, there would be frequent motions by claimants to close specific hearings or portions thereof when there is discussion of particularly sensitive issues. The added time consumed in adjudicating such motions would simply add to the resources required in each case and exacerbate the hearing backlog.

Medical-Vocational Guidelines

For many years Social Security has used Medical-Vocational Guidelines to enhance uniformity and efficiency in decision-making. These Guidelines direct outcomes in certain cases depending on the claimant's age, education, skill level, and functional ability. It has been suggested that these Guidelines be abolished or modified to take into account longer life expectancies. As discussed below, the Social Security Law Section does not oppose updating these Guidelines but strongly opposes these particular suggestions.

The Subcommittee has correctly noted its concern about the significant variation in outcomes depending on the assigned judge. Abolishing these Guidelines will geometrically increase the variability in outcomes. Judges must consider each of these factors and without the Guidelines, each judge will be left to do so without clear rules or directions to follow. Many may seek to resolve this dilemma by increased reliance on vocational expert opinion. The system will clearly not be improved by reliance on the opinions of thousands of vocational experts, as opposed to reliance on one set of regulatory guidelines.

The suggestion that the Guidelines be updated to account for increases in life expectancy is fundamentally flawed. Nothing in law or regulation allows consideration of how long the claimant may live to collect benefits. Age is a factor in decision-making because of its vocational effect. The guidelines consider the ability to make occupational adjustment to diminish with age. Life expectancy is simply irrelevant to this factor.

The Section would not oppose updating the Guidelines based upon a study of the current effect of age and all of the other factors on employability. It is entirely possible that a study would show changes in the effects of these factors since the Guidelines were established. If a valid study demonstrates a need for the Guidelines to be updated, then they should be updated. However, unless and until such a study is done, we oppose modification of the Medical-Vocational Guidelines.

Medical Experts

Other commenters have noted the importance of medical experts in the adjudicatory process. Medical experts often serve invaluable roles when testifying or responding to interrogatories for disability hearings. Consultative examiners can provide direct evaluations of claimants' functional abilities that generally are not found in treatment notes. Judicious use of medical experts can assist judges in reaching the right decision as early as possible. Pre-hearing consultative examinations or interrogatories may eliminate the need for a hearing. Medical testimony reduces the number of remands and expedites the process. The cost of the medical experts is offset by the savings in time and resources.

Despite the advantages of the use of medical experts and consultative examiners, the agency has a dearth of such individuals. It is often impossible for the Agency to find experts in many specialties. The cause of this is simple: compensation rates are too low. Rates have not increased in over a decade. The Section supports increased compensation for consultative examiners and medical experts. We do not, however, feel that increased compensation is the whole answer.

Many claimants allege that, when they went to consultative examinations, they received only very cursory examinations by someone in the physician's office and barely met the physician. There have been far too many complaints for these to be dismissed out-of-hand. This problem will not be solved by merely giving the same providers more money for doing the same thing. Social Security must enhance its efforts to ensure that examiners are providing the full examination for which they are being paid. This is essential for fairness to both the claimants and the taxpayers who are compensating the consultative examiners.

Continuing Disability Reviews

SSA has a process of Continuing Disability Reviews (CDRs). These CDRs are conducted in order to determine if a recipient of disability benefits continues to meet the disability and other criteria related to the benefits they are receiving. CDRs serve two important purposes. First, they save taxpayer money. As Commissioner Astrue noted in his March 24, 2009 testimony before this committee, every $1 spent on CDRs yields $10 in program savings. Secondly, CDRs provide benefit recipients an additional incentive to fully utilize available medical care, vocational rehabilitation services, and job training to enable them to re-enter the workforce.

Because of inadequate funding levels for over a decade, SSA has accumulated a significant backlog of medical Continuing Disability Reviews. It has been estimated that, if these CDRs had been conducted, the long-term program savings would be over $20 billion. Failure to conduct the full complement of these reviews has adverse consequences for the federal budget and the deficit.

The Social Security Law Section supports full funding of CDRs. As the SSA's 2013 Budget Request Report notes on pages 7, 16, and 17, billions of dollars have been saved by these

programs and admirable progress has been made by the Commissioner in expanding them. The limiting factor has been budget cuts to SSA that prevent these programs from achieving their full potential.

To be clear, funding of CDRs will not reduce the hearing backlog and, in fact, it may add to it. When benefit recipients are found no longer to be eligible for benefits, many will seek a hearing. This is an important due process right that should not be abridged. Thus, full funding for CDRs must include additional funding for ODAR to adjudicate CDR appeals. This would require funding above that needed to eliminate the backlog of initial claims. When considering this additional funding, it is important to keep in mind the savings created by CDRs. Conducting continuing disability reviews is the right thing to do for the taxpayers and for the recipients of benefits.

Mr. Chairman, thank you once again for the opportunity to provide this statement. The Social Security Law Section of the Federal Bar Association looks forward to working with you and the Social Security Administration in improving he disability adjudication process.

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House Ways and Means Committee
Subcommittee on Social Security

June 27, 2012 Hearing Concerning Disability Appeals Process
Fraudulent Job Numbers Testimony

In a February 28, 2012 hearing in Salem, Oregon, the vocational expert testified that she had been instructed by specific ALJs to provide false job numbers testimony, exaggerating the numbers of jobs existing within specific occupations. She further testified that she had consulted with other vocational experts and confirmed the practice. I reported this to Patrick P. O'Carroll Jr., Inspector General, Social Security Administration, on March 9, 2012, and asked that he take immediate protective action to safeguard the integrity of the disability adjudication process from what appears to be an ongoing and deeply ingrained local practice of fraud and perjury.

On June 21, 2012, Mr. O'Carroll informed Representative Kurt Schrader that he had requested that SSA account for any actions taken with respect to these concerns, and that he had directed his Office of Audit to review and consider this issue in planning future audits of SSA's hearings and appeals process.

This is the problem. At the end of most Social Security hearings, the ALJ calls a vocational expert to describe the claimant's past work and to identify occupations that could be performed under various hypothetical sets of limitations. The vocational expert is then asked the numbers of jobs in each identified occupation, because to deny the claim based on the existence of other jobs, those jobs must exist in "significant" numbers. Hence, the job numbers testimony is often outcome determinative of the claim. In the Ninth Circuit, to deny at Step 5, the ALJ usually has to have testimony identifying a significant number of jobs.

At this hearing, the vocational expert gave job numbers testimony that seemed grossly exaggerated in response to the ALJ's questions. When challenged, she readily admitted that she had provided the numbers of jobs for a group of occupations and not the individual occupation, and further testified under oath:

> "When I spoke with judges, the specific judges told me, 'Ms. Ruck, all of the other VE's give the numbers for the OES grouping. If you don't give those numbers, you're stepping out of bounds, or not complying with other vocational experts', and so in order to be in compliance with what the judges have requested, I have stuck with the initial numbers for the OES grouping, but when questioned further I've given the reduced number, which is the number for the specific DOT code."
>
> "When I became a vocational expert, I consulted with other vocational experts as to how they convey the employment numbers, and most of my colleagues do use Job Browser Pro and they do give the employment numbers in the way that I just gave them."

This vocational expert was very innocent and open about all of this. I think that she was doing what she had been told to do and did not realize how wrongly she was being coached. But if this vocational expert's testimony is correct, and I believe it is, countless claimants have been cheated out of their claims as a result of exaggerated job numbers testimony.

This is not an isolated occurrence. Most recently, in a hearing on June 19, 2012 involving a different vocational expert and different ALJ, essentially the same thing happened. I knew that the vocational expert had misrepresented job numbers by stating the numbers for a group of occupations when asked for the numbers of jobs for an individual occupation. I knew because I had the same data source on my laptop at the hearing that the vocational expert testified she was drawing upon. When I challenged the vocational expert for providing the job numbers for an OES statistical group containing 1587 separate occupations when asked for numbers for one particular occupation, she simply responded that she had followed what she understood to be the way it is to be done at these hearings.

I asked the Inspector General to take the following actions:

1. Contact the vocational expert from the February 28, 2012 hearing for specific information. She testified that specific judges had told her to provide group numbers as though they were the numbers for specific occupations. Those judges need to be identified and immediately suspended from conducting further adjudications until a full investigation can be completed.

2. Contact all vocational experts serving the Oregon ODAR offices and advise them that the practice of providing job numbers for a group of occupations when asked for the numbers for an individual occupation is perjury, not accepted agency practice.

3. Investigate and identify those with responsibility for this fraud, and impose appropriate sanctions.

4. Identify all claims where false job numbers testimony may have formed part of the basis for denial, and grant those claimants the opportunity for a new hearing before an ALJ not affected by this pattern of misconduct, and with a new vocational expert. This screening process would not be difficult. The vocational expert demonstrated at the February 28, 2012 hearing how Job Browser Pro software produces job numbers for individual occupations almost instantly upon typing in the reference code from the Dictionary of Occupational Titles. Since ALJs typically include in their decisions both the DOT codes and the job numbers upon which they have relied, any clerk with this software could make the necessary comparison very easily.

I am especially concerned for those claimants who have been wrongly denied without any way of knowing that false job numbers have been stated in their hearings. I am outraged that the misconduct has not been stopped.

Please direct Social Security to take immediate and effective action to identify the victims of this abuse and restore the integrity of our disability adjudication system.

Thank you.

Very truly yours,
s/ Max Rae
Max Rae
Attorney

Organization of Social Security Claimants' Representatives

NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)

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Executive Director
Nancy G. Shor

Written Statement for the Record
on behalf of the
National Organization of Social Security Claimants' Representatives

Hearing on the Social Security Disability Appeals Process

Subcommittee on Social Security
House Committee on Ways and Means

June 27, 2012

Submitted by:

Nancy G. Shor, Executive Director

* * *

Founded in 1979, NOSSCR is a professional association of attorneys and other advocates who represent individuals seeking Social Security disability and Supplemental Security Income (SSI) disability benefits. NOSSCR members represent these individuals with disabilities in proceedings at all SSA administrative levels, but primarily at the hearing level, and also in federal court. NOSSCR is a national organization with a current membership of more than 4,000 members from the private and public sectors and is committed to the highest quality legal representation for claimants.

The Subcommittee's focus on issues related to Social Security disability claims is extremely important to people with disabilities. Title II and SSI cash benefits, along with the related Medicaid and Medicare benefits, are the means of survival for millions of individuals with severe disabilities. They rely on the Social Security Administration (SSA) to promptly and fairly adjudicate their applications for disability benefits.

NOSSCR is a member of the Consortium for Citizens with Disabilities Social Security Task Force and fully endorses the written statement and oral testimony of Ethel Zelenske who testified at the hearing on behalf of the Task Force. This Statement for the Record addresses additional issues for the record of the hearing.

I. THE REPRESENTATIVE FEE PROCESS

Testimony was presented at the hearing that was inaccurate regarding the SSA fee process for representatives.

The fee process for representatives in Social Security claims is highly regulated.

Fees at the administrative levels. Fees for representatives' services must be approved by the Social Security Administration. The Act sets out the two processes from which representatives can choose. 42 U.S.C. § 406(a). The processes are mutually exclusive:

(1) The fee agreement process. Most representatives choose to use the fee agreement process. Fees are 25% of past-due benefits or $6,000, whichever amount is smaller. The statute gives claimants and adjudicators the opportunity to object to the amount of the fee. The statute does permit representatives to seek permission to charge more than $6,000, but this happens rarely.

(2) The fee petition process. Some representatives will choose to use the fee petition process. They submit time records along with their fee requests. In fee petition situations, the adjudicator will set the fee in each individual case.

Fees at the federal court levels. In federal court, fees in Social Security cases are regulated pursuant to 42 U.S.C. § 406(b). They must be contingent, and they are set by the federal judge.

Fees in Veterans Administration (VA) cases. Professor Pierce stated that fees in VA cases are limited to $10.00. That statement was true until 2006 when Congress enacted legislation that became effective in 2007 to amend the fee structure. Since 2007, fees in VA cases are tested for "reasonableness." Fees are 20% of past-due benefits if the representative asks for withholding and direct payment. See 38 U.S.C. § 5904; 38 C.F.R. § 14.636(h). There is no cap. If the representative does not ask for withholding and direct payment, the fee must meet the test for "reasonableness"; there is no cap. See 38 C.F.R. § 14.636(f).

II. THE IMPORTANCE OF MAINTAINING ALJ DECISIONAL INDEPENDENCE

A claimant's right to a *de novo* hearing before an administrative law judge (ALJ) is central to the fairness of the Social Security Administration (SSA) adjudication process. This right guarantees that individuals with disabilities have a full and fair administrative hearing by an independent decision-maker who provides impartial fact-finding and adjudication, free from any agency coercion or influence. The ALJ questions and takes testimony from the claimant and other witnesses, and considers and weighs the evidence, all in accordance with relevant law and agency policy. For claimants, a fundamental principle of this right is the opportunity to present new evidence to the ALJ, testify in person before the ALJ, and receive a decision based on all available evidence.

ALJs are appointed under the Administrative Procedure Act (APA), which guarantees their independence from undue agency influence, as demonstrated by the following requirements:

- The Office of Personnel Management (OPM) – not SSA – conducts the competitive ALJ selection process. While SSA ultimately appoints ALJs, it can only do so from a list of eligible candidates created by OPM.
- ALJs can be removed only for "good cause."
- Most disciplinary actions may be taken only according to standards and procedures established by the Merit Systems Protection Board (MSPB).
- The pay classification system for ALJs is set by OPM, not by SSA, and is separate from the agency's performance rating process.

The critical role that ALJ decisional independence plays in protecting the rights of claimants cannot be underestimated. In the early to mid-1980s, the SSA disability claims adjudication process was in turmoil. In the most detrimental example for beneficiaries, the agency had changed its policy regarding the cessation of disability. As a result, between 1981 and 1984, nearly 500,000 severely disabled beneficiaries who continued to meet the statutory eligibility requirements had their benefits terminated. Legal advocates represented thousands of individuals in appeals of SSA's decision to terminate their benefits because their disabilities had allegedly "ceased." Many ALJs agreed with their arguments that the agency's policy was inconsistent with the Social Security Act and due process and reversed the termination of benefits. Thus, beneficiaries were able to retain the cash and medical benefits vital to their well-being.

There are other examples from this period of ALJs confronting agency policies they considered inconsistent with the Social Security Act, including a clandestine policy to deny and terminate benefits to tens of thousands of seriously mentally ill claimants who did not meet the then-outdated Listings of Impairments. Also at that time, the agency had a policy of non-acquiescence, i.e., not following precedential decisions issued by the U.S. Courts of Appeals in subsequent individual cases. ALJs frequently reversed the lower level administrative decisions because SSA's policies, at that time, were not consistent with the Social Security Act and precedential case law.

During the same period in the mid-1980s, SSA was pressuring ALJs to reduce the rate of favorable decisions. "Bellmon Review" involved SSA targeting the performance of ALJs that it considered to have favorable decision rates that were too "high" and imposing quotas for allowances and denials. ALJs challenged the program in litigation and the agency eventually abandoned the program.[1]

SSA no longer follows these policies. However, the importance of maintaining the APA-protected ALJs in the SSA adjudication process was brought to light within the past few years regarding actions at the U.S. Department of Justice (DOJ). Some federal agencies use non-ALJs as adjudicators and their independence, as a general rule, is less protected than ALJs. One example of non-ALJ adjudicators is Immigration Judges (IJs) in the DOJ. The process for

[1] *See, e.g., Association of Administrative Law Judges v. Heckler*, 594 F. Supp. 1132 (D.D.C. 1984).

selecting IJs provides a stark contrast to that for ALJs, since, as noted in a recent report by the DOJ Office of Inspector General, the Attorney General of the United States has the authority to manage the selection process and appoint IJs.[2] The report documented an investigation by the DOJ Office of the Inspector General and the DOJ Office of Professional Responsibility regarding possible political influence in the hiring of IJs. The Offices found that certain DOJ officials "violated federal law and Department [of Justice] policy ... by considering political and ideological affiliations in soliciting and selecting IJs, which are career positions protected by the civil service laws."[3]

* * *

CONCLUSION

The role of ALJs in the Social Security and SSI disability determination process has been critical to people with disabilities by ensuring their right to a full and fair hearing before an impartial and independent adjudicator. In addition, on behalf of people with disabilities, it is critical that SSA be given adequate funding to make disability decisions in a timely manner and to carry out its other mandated workloads. We appreciate your continued oversight of the administration of the Social Security programs and the manner in which those programs meet the needs of people with disabilities.

[2] *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (July 28, 2008), p. 71. Available at http://www.usdoj.gov/oig/special/s0807/final.pdf.
[3] *Id.* at 137.

ScottDaniels

To The Committee On Ways and Means:

My name is Scott Daniels and I am disability lawyer in the state of New York. The below piece is my response, in part, to some of the testimony provided in last week's hearing. I will note that it is published on my firm's blog at www.nydisabilityattorneyblog.com.

Last Wednesday, June 27th 2012, the Committee on Ways and Means held their 4th hearing on "Securing the Future of the Social Security Disability Insurance Program." The point of these hearings is to get a better understanding about the disability program, how it works, it's shortcomings and to get ideas on how to fix it's ongoing solvency problem.

Among others, speakers at this hearing included Michael Astrue, Commissioner of Social Security; Honorable Randall Frye, President of the Association of Administrative Law Judges; and Richard Pierce, Jr., law professor at George Washington.

Commissioner Astrue was questioned at length about his highly controversial policy to no longer inform attorneys or representatives about the Judges they will be appearing in front of. For the most part, Commissioner Astrue attempted to justify the policy by explaining that too many attorneys were manipulating the system by declining video conference hearings if they didn't like the Judge they were appearing in front of. This excuse went nowhere with the committee.

The reality is, while attorneys did (and still do) have the opportunity to decline a video conference hearing after they saw who the Judge was on the case, SSA still randomly selected a new Judge to perform the live hearing. Therefore, the attorney is not choosing their Judge, nor is he/she partaking in any forum shopping since SSA is still assigning the Judge.

My favorite part of the hearing came when Commissioner Astrue expressly stated, "some of this is our fault," while dodging questions from the committee on the legitimacy and logic his new "secret Judge" policy. Well Commissioner, you are absolutely right. SSA has created the rules whereby you allow claimants and their attorneys to decline a video conference hearing if they choose to do so. And since claimants have exercised this right, whether represented by an attorney or not, is it fair to cry foul and claim fraudulent practices by attorneys because they simply played by the rules you created?

Commissioner Astrue made it very clear that he wants to fix the integrity of the system - and I appreciate that. But the integrity of the system will not come by hiding who the Judge is for a disability hearing.

In what appeared to resemble a blatant smear campaign against disability lawyers, Richard Pierce, esteemed law professor at George Washington University, practically blasted the Administration's policy governing attorneys fees stating that lawyers have figured out ways to "game" the system and that one particular firm made 81 million dollars last year.

What Mr. Pierce failed to mention is that attorneys fees, for the most part, which are regulated by the federal government, allow for attorneys to earn 25% of a claimant's "back-pay" or a maximum of $6,000, whichever number is less. Therefore, if an individual is entitled to "back-pay" from the government, the government is shelling out the same amount of money REGARDLESS of whether that claimant is represented by an attorney. If in fact, the person did receive representation, their total "back-pay" check is reduced by the attorneys fee. Mr. Pierce also failed to recognize that SSA takes an $83 fee on every check they write to an attorney or licensed representative.

Here is a direct quote from Mr. Pierce's written testimony, which you can see by CLICKING HERE:

"Lawyers and other professional advocates for disability applicants have devised systems for maximizing the probability of a decision granting benefits to their clients by soliciting and emphasizing medical evidence favorable to their clients while withholding medical evidence that is unfavorable to their clients."

Not only is this statement out of line, but Mr. Pierce outlandishly implies that all highly qualified disability lawyers actively misrepresent the court by withholding evidence that is unfavorable to a claimant's case. Funny how one story in the Wall Street Journal about Binder & Binder allegedly withholding medical evidence on certain cases can be translated to mean that the entire legal community partakes in this activity.

Coincidentally, the one firm that made $81 million last year was Binder & Binder - information also extracted from another Wall Street Journal piece. I resent Mr. Pierce's negative statements and as a highly ethical disability attorney in the state of New York, I have never withheld evidence that might

have been unfavorable to my client. Mr. Pierce's arrogance and overall lack of awareness within the disability sphere is evident in his testimony.

As for Mr. Pierce's implication that lawyers have devised systems of maximizing the probability of a favorable decision, I'm pretty sure most people call that good lawyering. Isn't it the lawyers job to zealously represent their clients and make every effort within the scope of the law to successfully secure a favorable decision on behalf of their client? Of course lawyers "solicit and emphasize medical evidence" - how are else are we supposed to prove our client's case?

I hope that the federal government sees right through Mr. Pierce's utter disregard for the disability legal profession. We exist because the national denial rate of disability claims is hovering around 75%. Individuals seeking disability benefits are not in a position to take their cases lightly. More importantly, the alleged actions of one firm is not representative of an entire market.

MATERIAL SUBMITTED FOR THE RECORD

Questions for the Record:

The Honorable Michael J. Astrue 1

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

The Honorable Michael J. Astrue 2

SOCIAL SECURITY
The Commissioner

December 5, 2012

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

Dear Mr. Becerra:

Thank you for your July 16, 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

Enclosures

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

Questions from Representative Becerra

1. **Does SSA use objective diagnostic criteria in determining whether non-exertional impairments or limitations are of such severity that the individual meets the eligibility criteria to receive disability benefits? Please discuss.**

   Yes we do. Allegations of pain or other non-exertional (i.e., non-strength related) impairments or limitations are not sufficient for us to award disability benefits. We require objective medical evidence and laboratory findings that show: 1) a claimant has a medical impairment that could reasonably be expected to produce the pain or other symptoms alleged, and 2) when considered with all of the other evidence, meets our disability requirements.

2. **How extensive is the variability in allowance and denial rates between Administrative Law Judges (ALJs) - that is, do the majority of judges cluster within a middle range, or are they widely distributed? Might there be legitimate circumstances where an ALJ could have allowance rates that are higher or lower than the average? What steps is SSA taking to address concerns that some judges may not be properly following SSA's criteria and procedures for weighing evidence and making determinations?**

   The majority of ALJs cluster within a narrow range of the mean, with a reduction in the significant outliers in the last few years. Some variance is expected in decision-making because of the variation expected in the random allocation of claims each judge reviews and judicial independence required to adjudicate a claim. Our main concern with outliers is whether their decisions are policy compliant and accurate.

   To ensure adjudicators issue policy compliant decisions, we continue to improve training programs and create better individual feedback tools, such as "How MI Doing?" This resource gives adjudicators information about their remands, including the reasons for remand, as well as information on their performance in relation to other ALJs in their office, their region, and the Nation. Currently, we are developing training modules related to each of the 170 identified reasons for remand that we will link to the "How MI Doing?" tool. Further efforts to promote policy compliance include a test pilot of the Electronic Bench Book (eBB) later this year. The eBB is a policy compliance web-based tool that aids in documenting, analyzing, and adjudicating a disability case in accordance with our regulations to improve decisional accuracy and consistency.

   Our Office of Appellate Operations created the Division of Quality (DQ) to perform focused, post-effectuation reviews of hearing offices, ALJs, representatives, doctors, and other subjects. We identify potential subjects for focused reviews from data collected through our systems, findings from pre-effectuation reviews, and internal and external referrals received from various sources regarding potential non-compliance with our regulations and policies. Focused reviews allow us to examine how ALJs and hearing offices adjudicate cases, and, if

necessary, help develop training programs, materials, tools, and software to support ALJs and hearing offices. A focused review also allows us to provide feedback regarding our findings.

3. **What fraction of all allowances are made at each decisional level - DDS, reconsideration, ALJ, Appeals Council, and federal court? Are ALJs responsible for the recent growth in the number of disability beneficiaries? What are the reasons that an ALJ would allow benefits that have been denied previously by the DDS?**

   The longitudinal data for claimants who filed claims in a given year provides the most accurate information on the percentage of total allowances at each level. It can take several years for a cohort of claimants to move through the appeals process; therefore, the most recent cohort for which we have the most complete data are claimants who applied for disability benefits in 2007. We tracked those claims through October 2011, and the breakdown of allowances is:

   - Initial level (DDS): 69.4 percent of all allowances
   - Reconsideration: 5.6 percent of all allowances
   - Hearing level (ALJ): 24.9 percent of all allowances
   - Appeals Council and Federal Court levels: 0.1 percent of all allowances

   Our ALJs are not responsible for the growth in the number of beneficiaries. Allowance rates have dropped at the initial and ALJ levels. The growth in beneficiaries is not surprising as the Baby Boom generation enters its most disability prone years and the increase in women working has increased the size of the workforce that may be eligible for benefits.

   There are several reasons why ALJs allow previously denied claims. For example, claimants' conditions worsen over time; claimants may submit new medical evidence at the hearing level that was not previously available; they may hire an attorney or non-attorney to represent them; and a claimant's age at the time of the decision may require different evaluation criteria. In addition, hearing cases involve complex issues with conflicting evidence.

4. **What is SSA's view on the question of whether the ALJ process is constitutional?**

   It is constitutional.

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

   Changes regarding any of these complex issues would require Congressional action. Some relevant citations include 5 U.S.C. § 7521, 42 U.S.C. § 423(d), and 42 U.S.C. § 405(b).

6. **How many requests for review does the Appeals Council receive each year? What is the average length of time to log a request for review into the system, and once logged, to make a determination on that request for review? What safeguards are in place to ensure that all requests for review are indeed logged and processed? Given that all other administrative appeals must now be filed electronically, have electronic requests for review been considered?**

   In recent years, the Appeals Council has experienced a substantial increase in requests for review. In FY 2011, the Appeals Council received 173,332 requests for review, nearly 35 percent more than the 128,703 requests received in FY 2010. Through June 2012, the Appeals Council received 128,750 requests for review, an increase of 15.5 percent over the same time period in FY 2011.

   Despite this significant increase in the Appeals Council's workload, the average processing time (APT) at the Appeals Council increased only 15 days from 345 days in FY 2010 to 360 days in FY 2011 and another 18 days to 378 days through June FY 2012 because we focused on adjudicating our most aged, complex cases first, which increases the APT.

   We recently improved our business process to ensure that once we receive a request for review it is logged into our system within five business days. We agree that electronic requests for Appeals Council review would be beneficial; however, we must prioritize our limited resources, and we have many other higher priority initiatives that will help us better fulfill our responsibilities to serve the public.

7. **What is the average length of time that a case spends at the Appeals Council? In responding to these questions, please provide yearly data for the prior 10 years to date. What is the longest a case has spent at the Appeals Council? Are there any goals or processes in place to reduce the length of time for Appeals Council proceedings? Once a case is at the Appeals Council, how long has that claimant typically been in the application and appeals process?**

   Below is a chart with the APT for Appeals Council decisions for the last ten fiscal years.

Fiscal Year	APT
2002	412
2003	294
2004	251
2005	242
2006	203
2007	227
2008	238
2009	261
2010	345
2011	360
2012 (though 6/29/12)	378

Currently, the oldest request for review pending before the Appeals Council is from October 18, 2007. Although our business process does not support electronic filing of requests for review, we accepted this request for review using the process for accepting evidence electronically, which misfiled the request in the closed hearing folder. Once we realized that this type of misfiling could happen, we developed a computer program to search for such lost requests and found this one. We discovered this particular case on November 2, 2012, and we are expediting the case. Of the more than 160,000 requests for review currently pending, we have only 30 pending requests for review dated prior to 2010.

We have implemented changes in our business processes, systems, and training, and as noted above, we are continuing to evaluate other ways to improve our processes. For example, we are currently developing clustering analysis technologies to identify cases that involve similar issues. Assigning cases with similar issues concurrently will help improve training and consistency while providing quicker decisions for all claimants. In FY 2012, our goal is to handle 80 percent of the cases pending over 365 days and 99 percent of the cases pending more than 545 days. We are currently on pace to achieve these goals.

At each level of adjudication, the processing time ends when we make a decision; therefore, we do not currently capture the information on the average time between initial application and an appeal to the Appeals Council.

8. **What percentage of requests for review are granted by the Appeals Council and what percentage of requests for review are denied? What percentage of reviewed cases are affirmed? What percentage of reviewed cases are overturned or remanded? In the event a case is overturned or remanded, what are the most common reasons that the Appeals Council makes that decision?**

The enclosed chart provides the requested information.

The Appeals Council captures data on approximately 170 reasons for remand, but the most common reasons for Appeals Council remands are: improper evaluation of treating source opinions; inadequate evaluation of exertional and mental limitations; failure to discuss the required factors when assessing credibility; improper dismissal of a hearing request; inadequate consideration of mental impairments; and new evidence presented at the Appeals Council.

The most common reasons for Appeal Council reversals relate to improper evaluation of the listings and misapplication of the Medical-Vocational Guidelines.

9. What percentage of denials of review result in a civil action? Are there any estimates regarding the change in number of civil actions filed (increase or decrease) if the Appeals Council were eliminated? Is there any evidence regarding the cost of an Appeals Council denial versus a civil action?

As the data below indicate, the percentage of Appeals Council denials resulting in a civil action has decreased in recent years.

Fiscal Year	Number of denials issued	Number appealed to Federal court	Percentage of denials appealed
2002	81,208	16,431	20.2
2003	71,053	18,191	25.6
2004	68,216	15,053	22.1
2005	66,596	14,455	21.7
2006	66,159	13,006	19.7
2007	59,511	11,868	19.9
2008	59,781	12,257	20.5
2009	63,891	12,167	19.0
2010	73,879	12,420	16.8
2011	92,145	13,955	15.1
2012 (thru March 30, 2012)	55,892	7,648	13.7

The data above suggest that eliminating the Appeals Council would negatively affect Federal courts. Some of the cases that the Appeals Council remands or reverses (i.e., issues a favorable decision) would be directly appealed to Federal District Court. In FY 2011, the Appeals Council remanded 26,909 cases and reversed 3,122 cases. In the absence of an Appeals Council review, we estimate that Federal District Courts could receive at least 15,000 more cases a year, which would more than double Federal District Court case filings.

Eliminating the Appeals Council would also negatively affect claimants. The Appeals Council protects the integrity of a national disability program, thus ensuring consistent treatment for claimants residing in different areas of the country. Further, the Appeals Council's oversight of the ALJ hearing process provides an appellate review for all claimants, without the cost of court filing fees. In FY 2011, the Appeals Council review provided a more favorable administrative action (remand or favorable decision) for claimants in over 30,000 cases.

The Appeals Council has several other crucial roles. It is the only administrative body that can reverse, reopen, or revise hearing-level decisions on behalf of the Commissioner. Appeals Council review not only ensures that ALJs apply appropriate policies, but also provides structured data to evaluate agency disability processes and policies. The Appeals Council also performs focused reviews of hearing-level decisions to ensure policy compliance and identify possible ALJ training needs. Appeals Council feedback and review has resulted in several policy and procedural changes, thereby saving resources and improving our disability process.

In FY 2011, the average cost of an Appeals Council review was $1,405. We do not know all costs involved with a civil action in Federal court.

10. Statistics from 2011 kept by the National Organization of Social Security Claimants Representatives show that 49% of appeals to federal court result in a remand for either payment of benefits or a new hearing. Given this statistic, are there any goals or processes in place to improve the quality of Appeals Council review and reduce the number of cases filed in federal court?

We have seen a decline in the percentage of cases remanded to the Appeals Council from Federal District Courts. In FY 2004, the remand rate was nearly 63 percent. By contrast, the remand rates for FY 2011 and the first half of FY 2012 were 42 percent and 39 percent, respectively. We continue to work in a variety of areas to maintain this trend by ensuring that our decisions are factually accurate and procedurally adequate and that the courts understand the rules we follow.

For example, last year we assigned administrative appeal judges to the Division of Civil Actions to analyze court remands and requests for voluntary remands, provide feedback, and conduct trend analyses. Additionally, we reinstituted the quality assurance sample review conducted by the Appeals Council so that we can offer training to improve quality and reduce the number of court cases remanded from district courts.

For several years, we have collected data on the reasons for remand from the Appeals Council and Federal District Courts. With innovative techniques that arrange data in heat map formats, we can identify variances and areas of concern. Heat maps for FY 2010 and FY 2011 show inconsistencies among the Federal District Courts regarding the percentage of cases remanded, showing the need to further evaluate how certain courts apply our policies. These maps suggest trends in the reasons for remand. In Federal District Courts, the top two reasons for remand are: 1) evaluation of the claimant's credibility; and 2) treating physician opinions. These reasons also rank high among remands from the Appeals Council.

To address the evaluation of credibility issue, we formed a workgroup to revise decisional language addressing credibility and the decisional templates that ALJs and decision writers use to evaluate credibility. We anticipate these revisions will be available early in 2013.

We are also considering how Federal Courts' interpretations of our treating physician policy affect remands. The courts have influenced our rules in this area. While courts generally agreed that adjudicators should give special weight to treating source opinions, they have formulated differing rules about how adjudicators should evaluate treating source opinions. In 1991, we issued regulations that articulate how we evaluate treating source opinions. However, the courts have continued to interpret this rule in conflicting ways.

The Administrative Conference of the United States (ACUS) is currently studying the treating physician rules. We have asked ACUS to analyze the effect of these rules on Federal Courts' reviews of disability decisions and consider measures that we could take to reduce

the number of cases remanded to the Appeals Council. We have also requested that ACUS study the role of the Appeals Council in reviewing cases to reduce any observed variances in adjudication. This study will consider issues such as expanding the Appeals Council's existing authority to conduct reviews of ALJ decisions. We will be happy to work with the Subcommittee on this issue.

While we wait for the report from ACUS, the Appeals Council is evaluating the consistency of its actions and performing quality assurance reviews. Using these initiatives, we will be able to offer training to improve quality and reduce the number of cases remanded from district courts.

11. What is the annual cost of the Appeals Council stage of the Social Security claims process? What fraction does this represent of the entire amount spent by SSA on adjudicating disability claims?

For FY 2011, Appeals Council costs were $178 million. This amount represents 3 percent of the total amount spent on our disability process.

Despite having a relatively small percentage of the agency workforce, the Appeals Council handles critical functions in addressing the most complex cases pending with the agency and performing a variety of other responsibilities to assure quality. Many of the cases pending at the Appeals Council involve very difficult and complex issues that were unable to be resolved at a lower level of adjudication. Especially in regards to cases involving non-disability issues, the Appeals Council frequently encounters issues that are novel and require extensive research. Notwithstanding the complexity of these issues, however, the Appeals Council is on pace to meet the FY 2012 processing goal of clearing 80 percent of the cases pending over 365 days, and 99 percent of the cases pending over 545 days. Due to significant improvements in the process, the Appeals Council has continued to increase the number of dispositions.

For many years, the Appeals Council was not adequately staffed or funded to perform its oversight responsibilities, and there were significant efforts to eliminate the Appeals Council altogether. Recently, with additional staffing, the Appeals Council was able to implement quality assurance initiatives and improve judicial training, both of which have had a substantial positive impact on the agency. By utilizing more of its oversight role, the Appeals Council has been instrumental in driving a dramatic decline in programmatic errors, unexpected outcomes, and the allowance rate, resulting in substantial costs savings and a decrease in overpayments to claimants.

Enclosure

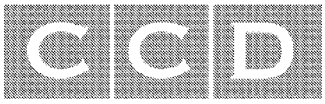
Enclosure for Question 8

APPEALS COUNCIL GRANT REVIEW RATES 1999-2012									
Fiscal Year	Receipts	Pending	Dispositions						Grant Review Rates*
			Total	Deny	Remand	Dismissal	Reversal	Affirm	
1999	115,150	144,525	91,173	66,100	20,135	2,794	1,824	320	24.44%
2000	106,358	127,687	125,235	93,746	26,012	3,257	1,923	297	22.54%
2001	78,833	95,355	110,666	80,235	25,417	2,720	2,064	230	25.04%
2002	83,063	59,781	115,467	81,208	27,636	3,066	2,619	938	27.01%
2003	92,047	51,078	100,750	71,053	24,801	2,526	2,164	206	26.97%
2004	92,540	45,911	97,701	68,216	24,811	2,362	2,072	240	27.76%
2005	89,430	41,258	94,083	66,596	22,739	2,357	2,173	218	26.71%
2006	94,755	44,032	93,538	66,159	23,083	2,117	2,009	170	27.01%
2007	96,260	53,163	87,129	59,511	23,121	2,131	2,070	296	29.25%
2008	93,423	62,210	83,407	59,781	18,765	2,365	2,001	495	25.49%
2009	106,965	80,040	89,066	63,891	19,700	2,840	2,094	541	25.08%
2010	128,703	106,664	102,062	73,879	22,215	2,726	2,591	651	24.94%
2011	173,332	153,004	126,992	92,145	26,909	3,828	3,122	988	24.43%
2012**	128,750	159,924	119,545	89,917	22,099	4,588	2,170	771	20.95%

*The grant review rate includes the remands, reversals, and affirmations divided by the total number of dispositions (including dismissals)

** Through June 29, 2012

Ethel Zelenske 1



CONSORTIUM FOR CITIZENS
WITH DISABILITIES

July 30, 2012

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

Dear Chairman Johnson:

Thank you for your Questions for the Record in follow-up to the Subcommittee's June 27, 2012 hearing on "Securing the Future of the Disability Insurance Program" looking at the Social Security Disability Appeals Process.

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 any other options you would suggest?

SSA should continue to use ALJs. We believe that ALJs and their decisional independence play a critical role in protecting the rights of claimants. A claimant's right to a *de novo* hearing before an ALJ is central to the fairness of the SSA adjudication process. This right guarantees that individuals with disabilities have a full and fair administrative hearing by an independent decision-maker who provides impartial fact-finding and adjudication, free from agency coercion or influence. The ALJ questions and takes testimony from the claimant and other witnesses, and considers and weighs the evidence, all in accordance with relevant law and agency policy. For claimants, a fundamental principle of this right is the opportunity to present new evidence to the ALJ, testify in person before the ALJ, and receive a decision based on all available evidence.

The critical role that ALJ decisional independence plays in protecting the rights of claimants cannot be underestimated. In the early to mid-1980s, the SSA disability claims adjudication process was in turmoil. In the most detrimental example for beneficiaries, the agency had changed its policy regarding the cessation of disability. As a result, between 1981 and 1984, nearly 500,000 severely disabled beneficiaries who continued to meet the statutory eligibility requirements had their benefits terminated. Legal advocates

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represented thousands of individuals in appeals of SSA's decision to terminate their benefits because their disabilities had allegedly "ceased." Many ALJs agreed with their arguments that the agency's policy was inconsistent with the Social Security Act and due process and reversed the termination of benefits. Thus, beneficiaries were able to retain the cash and medical benefits vital to their well-being.

There are other examples from this period of ALJs confronting agency policies they considered inconsistent with the Social Security Act, including a clandestine policy to deny and terminate benefits to tens of thousands of claimants with serious mental illness who did not meet the then-outdated Listings of Impairments. SSA no longer follows these policies. However, the importance of maintaining the APA-protected ALJs in the SSA adjudication process was brought to light within the past few years regarding actions at the U.S. Department of Justice (DOJ).

Some federal agencies use non-ALJs as adjudicators and their independence, as a general rule, is less protected than ALJs, for example, Immigration Judges (IJs) in the DOJ. The process for selecting IJs provides a stark contrast to that for ALJs, since, as noted in a recent report by the DOJ Office of Inspector General, the Attorney General of the United States has the authority to manage the selection process and appoint IJs.[1] The report documented an investigation by the DOJ Office of the Inspector General and the DOJ Office of Professional Responsibility regarding possible political influence in the hiring of IJs.[2]

ALJs should continue to be selected by the Office of Personnel Management. ALJs in federal agencies are appointed under the Administrative Procedure Act (APA), which guarantees their independence from undue agency influence, as demonstrated by the following requirements:

- The Office of Personnel Management (OPM) – not SSA – conducts the competitive ALJ selection process. While SSA ultimately appoints ALJs, it can only do so from a list of eligible candidates created by OPM.
- ALJs can be removed only for "good cause."
- Most disciplinary actions may be taken only according to standards and procedures established by the Merit Systems Protection Board (MSPB).
- The pay classification system for ALJs is set by OPM, not by SSA, and is separate from the agency's performance rating process.

The process should not be adversarial. The issue of having SSA represented at the ALJ hearing was raised at a July 2011 House hearing held by this Subcommittee and the House Judiciary Subcommittee on Courts, Commercial and Administrative Law.[3] Agreeing with Commissioner Astrue's testimony at that hearing, we do not support proposals to have SSA represented at the ALJ hearing.

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[1] *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (July 28, 2008), p. 71. Available at http://www.usdoj.gov/oig/special/s0807/final.pdf.
[2] *Id.* at 137.
[3] Joint Oversight Hearing on the Role of Social Security Administrative Law Judges, July 11, 2011, http://waysandmeans.house.gov/Calendar/EventSingle.aspx?EventID=249734.

In the 1980s, SSA tested, and abandoned, a pilot project to have the agency represented - the Government Representation Project (GRP). First proposed by SSA in 1980, the plan encountered a hostile reception at public hearings and from Members of Congress and was withdrawn. The plan was revived in 1982 with no public hearings and was instituted as a one-year "experiment" at five hearing sites. The one-year experiment was terminated more than four years later following congressional criticism and judicial intervention.[4]

Based on the stated goals of the experiment, i.e., assisting in better decision-making and reducing delays, it was a failure. Congress found that: (1) processing times were lengthened; (2) the quality of decision-making did not improve; (3) cases were not better prepared; and (4) the government representatives generally acted in adversarial roles. In the end, the GRP experiment did nothing to enhance the integrity of the administrative process.

The GRP caused extensive delays in a system that was overburdened, even then, and injected an inappropriate level of formality, technicality, and adversarial process into a system meant to be informal and non-adversarial.

The longstanding view of the courts, Congress, and the agency is that the Social Security claims process is informal and non-adversarial, with SSA's underlying role to be one of determining disability and paying benefits. Proponents of representing the agency believe that SSA is not being fairly represented in the determination process. It is important to note that SSA and the claimant are not parties on opposite sides of a legal dispute. SSA already plays a considerable role in setting the criteria and procedures for determining disability by establishing regulations, Rulings, and other policy guidance; by providing more detailed internal guidance for SSA and DDS workers; and by hiring ALJs. To establish disability, the claimant must follow the rules set by SSA.

In the current non-adversarial process, SSA's role is not to oppose the claimant. SSA's role is to ensure that claimants are correctly found eligible if the statutory definition of disability, as contemplated by Congress, is met, whether or not a representative is involved. ALJs, like all adjudicators, have a duty to develop the evidence and investigate the facts. Nevertheless, they should view the claimant's representative as an ally in collecting necessary and relevant evidence and focusing the issues to be addressed.

In addition to radically changing the nature of the process, the financial costs of representing the agency at the hearing level would be very high. In 1986, SSA testified in Congress that the cost was $1 million per year for only five hearings offices in the Project (there currently are more than 140 offices). Also, given that the hearings would be adversarial, SSA would be subject to paying attorneys' fees under the Equal Access to Justice Act in appropriate cases.

Given the past experience with government representation and the enormous cost, we believe that the limited dollars available to SSA could be put to better use by assuring adequate staffing at field offices, at the DDSs, and at hearings offices, and developing

[4] In *Sallings v. Bowen*, 641 F. Supp. 1046 (W.D.Va. 1986), the federal district court held that the Project was unconstitutional and violated the Social Security Act. In July 1986, it issued an injunction prohibiting SSA from holding further proceedings under the Project.

better procedures to obtain evidence, including reasonable payment for medical records and examinations.

Other options. We support Agency review of ALJ decisions in a manner that is consistent with the Administrative Procedure Act. While ALJs have decisional independence, they must follow SSA law and policies. SSA has implemented a quality review process for ALJ decisions. In FY 2011, the SSA Office of Disability Adjudication and Review (ODAR) established a Quality Review (QR) initiative and opened four new Branches in the Office of Appellate Operations. The QR Branches review a computer-generated sample of unappealed favorable ALJ decisions (almost 3,700 in FY 2011) before they are effectuated. Cases are then referred to the Appeals Council for possible review. If the Appeals Council accepts review, it can remand or issue "corrective" decisions, which may involve changing the favorable ALJ decision to a "partially" favorable decision or to an unfavorable decision. There also is some post-effectuation review of ALJ decisions. While these ALJ decisions cannot be changed, post-effectuation review looks for policy compliance and can focus on cases where there is a recurring problem and on specific situations. Policy guidance can then be provided.

The Agency could expand its review of ALJ decisions, so long as that expansion is consistent with the law. For instance, a significant percentage of claimants, for the most part unrepresented, do not appeal their unfavorable ALJ decisions. SSA could review a sample of these cases to see whether these claimants differ from those who do request review by the Appeals Council. It is quite possible that *pro se* claimants who do not appeal their unfavorable ALJ decisions are as disabled as those claimants who do appeal.

Much of the recent media and Congressional scrutiny of variations in ALJ decisions has been on ALJs with what are considered "high" allowance rates. However, there are many ALJs with extremely low allowance rates, undoubtedly resulting in "errors," which in many cases, are never reviewed. In order to be even-handed, SSA could look at extreme deviations from the average on both ends of the "bell curve" for ALJ allowance rates.

Finally, we want to mention that variations in allowance rates are not in and of themselves "wrong." We recognize that in our system of justice, where judges are human beings, variations in favorable decision rates, whether in the judicial or administrative process, are a given.

2. 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?

We support initiatives to improve the process at the initial levels so that the correct decision can be made at the earliest point possible and unnecessary appeals can be avoided. Improvements at the front end of the process can have a significant beneficial impact on preventing the backlog and delays later in the appeals process. Often, claimants are denied not because the evidence establishes that the person is not disabled, but because the limited evidence gathered cannot establish that the person is disabled. Inadequate case development at the DDS level means that ALJs will need to spend more time reviewing cases prior to the hearing. This leads to longer processing times at the hearing level.

We strongly support full development of the record at the earliest point possible. This benefits the claimant and avoids unnecessary appeals, which contribute to the backlog. As detailed in our testimony before the Subcommittee, there are a number of ways that SSA and the state agencies could improve the process, none of which requires regulatory changes:

- Provide more assistance to claimants including: better explanation of the evidence that is necessary and relevant to the claim; and assistance with completing application paperwork so that all impairments and sources of information, including non-physician treating sources, are identified.
- DDS examiners should obtain necessary and relevant evidence. The DDSs generally do not use questionnaires or forms that are tailored to the specific type of impairment or ask for information that addresses the disability standard as implemented by SSA. This "language" barrier causes delays in obtaining evidence, even from supportive and well-meaning doctors.
- Electronic records, like paper records, need to be adapted to meet the needs of the SSA disability determination process. Many providers are submitting evidence electronically but these records are based on the providers' needs and often do not address the SSA disability criteria.
- Increase reimbursement rates for providers. To improve provider response to requests for records, appropriate reimbursement rates for medical records and reports need to be established. Appropriate rates should also be paid for consultative examinations and for medical experts who testify at hearings.
- Provide better explanations to medical providers. SSA and DDSs should provide better explanations to all providers, in particular to physician and non-physician treating sources, about the disability standard and ask for evidence relevant to the standard.
- Improve the quality of consultative examinations. Steps should be taken to improve the quality of the consultative examination (CE) process. There are many reports of inappropriate referrals and short perfunctory examinations. In addition, there should be more effort to have the treating physician conduct the consultative examination, as authorized by SSA's regulations.[5]
- Provide more training and guidance to adjudicators. This training and guidance should focus on policies that are frequently misapplied, e.g., standards for weighing medical evidence, the role of nonphysician evidence, evaluation of subjective symptoms, etc.
- Expand use of existing methods of expediting disability determinations. SSA already has in place a number of procedures including "Quick Disability Determinations," Presumptive Disability" in SSI cases, Compassionate Allowances, and terminal illness ("TERI") cases.

3. Last December, the Wall Street Journal wrote an article entitled "Two Lawyers Strike Gold in U.S. Disability System." The article is about the law firm of Binder and Binder, which collected $88 million in fees, all paid from awarded claimant benefits. Is it true that the longer it takes to get a decision for a

[5] 20 C.F.R. § 404.1519h and 416.919h.

claimant, the higher the representative's fee will be? What would happen if legal fees were fixed at some nominal amount per case?

Providing that claimants' representatives will be paid a fee for successful work on a claimant's behalf helps to ensure that a knowledgeable, experienced pool of representatives is available to represent claimants.

The fee process for representatives in Social Security claims is highly regulated. Under the most frequently used "fee agreement" process (described below), there is a cap on the amount of fees. In addition, a user fee is charged when SSA withholds and pays the fee ($86 per case in calendar year 2012).

• **Fees at the administrative levels.** Fees for representatives' services must be approved by the Social Security Administration. The Act sets out the two processes from which representatives can choose. 42 U.S.C. § 406(a). The processes are mutually exclusive.[6]

(1) The fee agreement process. Most representatives choose to use the fee agreement process. Fees are 25% of past-due benefits or $6,000, whichever amount is smaller. The statute gives claimants and adjudicators the opportunity to object to the amount of the fee. The statute does permit representatives to seek permission to charge more than $6,000 under the fee petition process, but this happens rarely.

(2) The fee petition process. Some representatives will choose to use the fee petition process. They submit time records along with their fee requests. In fee petition situations, the adjudicator will set the fee in each individual case.

• **Fees at the federal court levels.** In federal court, fees in Social Security cases are regulated pursuant to 42 U.S.C. § 406(b). They must be contingent, and they are set by the federal judge.

If an ALJ believes that a representative has acted contrary to the interests of the client/claimant, remedies exist to address the representative's actions. SSA's current "Rules of conduct and standards of responsibility for representatives" set both affirmative duties and prohibited actions. For example, the Rules require representatives to act with "reasonable diligence and promptness in representing a claimant" and "provide competent representation to a claimant." A representative may not "[t]hrough his or her own actions or omissions, unreasonably delay or cause to be delayed, without good cause ... the processing of a claim at any stage of the administrative decisionmaking process."

The Rules of Conduct establish a procedure for handling violations, which can result in suspension or disqualification from practice before the SSA. 20 C.F.R. §§ 404.1740 and 416.1540. If a representative acts to unreasonably delay the proceedings against the

[6] At the hearing, Professor Pierce stated that fees in VA cases are limited to $10.00. That statement was true until 2006 when Congress enacted legislation that became effective in 2007 to amend the fee structure. Since 2007, fees in VA cases are tested for "reasonableness." Fees are 20% of past-due benefits if the representative asks for withholding and direct payment. See 38 U.S.C. § 5904; 38 C.F.R. § 14.636(h). Unlike Social Security and SSI claims, there is no cap in VA cases. If the representative does not ask for withholding and direct payment, the fee must meet the test for "reasonableness"; there is no cap. See 38 C.F.R. § 14.636(f).

claimant's interests, we believe that it is rare and unjustifiable. But SSA has the tools to penalize a representative for this behavior. In addition to the SSA Rules of Conduct, attorneys are subject to the Professional Rules of Conduct of their respective State Bars and, ultimately, could be sanctioned, leading to the suspension of the right to practice law.

4. Why are lawyers needed to assist claimants? Could law school clinics and legal services provide representation to claimants?

Claimants' representatives, both attorneys and nonattorneys, play an important role in assisting claimants for Social Security and SSI disability benefits.

The Social Security Administration's disability determination system is a complex, multi-level process. Appealing the denial of an application for disability benefits can be a daunting task for anyone who does not have experience with the process, but for individuals who are in poor health or disabled, the procedural hurdles that must be cleared in order to obtain disability benefits can seem insurmountable. As a result, many individuals applying for Title II or SSI disability benefits choose to obtain a representative to help with the appeal.

It is not surprising that individuals seek representation, given the individual challenges in each case and the undeniable importance of the outcome. Exactly why a claim has been denied is frequently a mystery to the claimant who receives an initial denial notice. Claimants often have been out of work for many months and have no income other than the financial support they receive from their friends, family, or non-profit organizations. Most have no health insurance and cannot pay for the medical treatments necessitated by their disability. They also understand that their family's welfare may be dependent on receiving disability benefits and the accompanying Medicare or Medicaid health insurance coverage.

The ability to have an experienced professional provide legal assistance is certainly valuable for claimants. SSA's own statistics show that claimants who are represented have a significantly higher allowance rate at the hearing level than claimants who do not have representation. Given the importance of representation, the Social Security Act requires SSA to provide information on options for seeking representation, whenever the agency denies a claimant's application for benefits.[7]

Most representation occurs at the hearing level. A major reason is that it is only at that level, after the request for hearing is filed, that claimants are given concrete information regarding local and national resources to contact. However, many claimants' representatives represent claimants prior to the hearing level, by helping them file their applications, obtain medical evidence in support of the application, and assist in appealing if their applications are denied.

We believe the main reason for the higher allowance rate of represented claimants is due to the assistance of a knowledgeable representative who is familiar with the sequential evaluation process set forth in the regulations and Social Security Rulings. The representative marshals evidence from doctors and hospitals, other treating professionals

[7] 42 U.S.C. §§ 406(c) and 1383(d)(2)(D).

(e.g., therapists, social workers, nurse practitioners), school systems, vocational testing centers, previous employers, and others who can shed light on the claimant's entitlement to disability benefits.

These trained and experienced representatives can also thoroughly examine vocational and medical witnesses during the hearing before the Administrative Law Judge (ALJ). These are daunting tasks for *pro se* claimants, especially when we consider that they are in poor health and many often have only a limited education.

Experienced representatives also are a valuable resource for SSA by helping to streamline the disability determination process. Attorneys and other representatives routinely explain the disability determination process and procedures to their clients with more specificity than SSA. In addition, they ensure a more efficient system by developing an accurate and complete medical and vocational record and presenting the supporting documentation and statements that the adjudicators require for a full and fair evaluation of the claim. Often, the evidence obtained by representatives and the legal briefs they prepare on behalf of their clients contain the requisite evidence to support a finding of disability by an ALJ without the necessity of a hearing, thereby saving time and expense for both the Social Security Administration and the claimant.

Legal services and law school clinics cannot provide wide-scale representation to claimants. Legal services programs provide civil legal assistance to low income individuals. Funding to local legal services programs has been reduced drastically, despite the fact that those eligible for services has increased significantly. Between FY 2010 to 2012, federal funding was reduced by 18 percent and is now at the same level as in FY 2007, even though the population eligible for services has grown by more than 15 million people since 2007. In addition, funding from state and local government appropriations and private donations has decreased. As a result of the funding reduction, legal services around the program are experiencing significant reductions in staffing and operations, including office closures.[8] Local legal services programs rely on private attorneys and nonattorneys to represent claimants in Social Security and SSI disability claims. That allows the programs to allocate their limited resources to areas where there are no options available.

Law school clinic programs do provide limited representation to claimants. However, that representation is not extensive and cannot substitute for representation by claimants' representatives who practice in this area: Not all law schools have clinical programs; even if they have programs, they may not represent individuals in Social Security and SSI cases; law schools are not located in widespread geographic areas; and clinic programs may be limited by the academic year.

5. Earlier this year, the agency established a new policy of not identifying the ALJ who would be holding the hearing until the day of the hearing because representatives were declining hearings before certain ALJs. According to the

[8] See Legal Services Corporation FY 2013 Budget Request, available at: http://www.lsc.gov/congress/lsc-funding/lscs-fiscal-year-2013-budget-request.

Social Security Inspector General, declined hearings create processing delays and extra work for the hearing office staff. Why would your members decline or even cancel hearings for claimants who have been waiting in line to be heard?

Claimants' representatives are encouraged to seek postponements as infrequently as possible because of the length of time claimants must wait for a hearing date and because of the potential disruption to the overall hearings process. However, there are circumstances when a postponement is necessary to adequately represent the claimant. One of the main reasons that a representative may seek a postponement of a scheduled hearing is when the claimant seeks and obtains representation shortly before the hearing or after receiving the hearing notice, frequently fewer than 20 days before the hearing date.[9] Based on the experience of representatives, this is not an uncommon occurrence since the ALJ hearing is the claimant's first in-person contact with an adjudicator. It should be noted that the current regulations state that a good reason for requesting a postponement is when the representative is appointed within 30 days of the scheduled hearing date and needs additional time to prepare.[10]

Under this circumstance, whether a representative and claimant decide to proceed with the scheduled hearing or request a postponement will normally depend on the quality of the records already in the hearing record file. After representation is obtained, the representative will need time to review the file in order to formulate legal arguments and, most importantly, develop additional evidence. If further evidence is needed to fully develop the claim, which is typically the case, then additional time will be required to request and obtain the records and other information.

The other most frequent reason for requesting a hearing postponement is that the claimant is ill or hospitalized. SSA's regulations require the ALJ to reschedule the hearing in this circumstance.[11] Other reasons for requesting a postponement include:

- Serious illness or death of a family member.
- Lack of transportation to the hearing site. This is a problem not only in urban areas where there is mass transportation but the claimant lacks funds to pay the fare, but also is a problem for claimants who reside in rural areas and small towns and must travel some distance to a hearing site.
- The claimant is homeless or is being evicted.
- The representative has a scheduling conflict.
- The claimant cannot be located.

SSA's regulations[12] provide a nonexhaustive list of reasons, including many listed above, for requesting that the hearing be rescheduled.

Factors considered by representatives in deciding whether to seek a postponement include:

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[9] Under current regulations (in all areas of the country except for SSA Region I), only a 20-day notice is required. 20 C.F.R. §§ 404.938(a) and 416.1438(a).
[10] 20 C.F.R. §§ 404.936(f)(2) and 416.1436(f)(2).
[11] 20 C.F.R. §§ 404.936(c)(1) and 416.1436(c)(1).
[12] 20 C.F.R. §§ 404.936 and 416.1436.

- The length of time the claimant has waited for a hearing.
- The claimant's medical condition.
- The claimant's financial situation.
- Whether further development is needed.
- The impact on the system.
- What the client/claimant wishes to do.

Decisions will not necessarily depend on a single factor but will involve a discussion with the claimant. Ultimately, the decision rests with the client, after the benefits and risks have been explained.

6. Do claimant's representatives present all evidence to ALJs, including evidence that might not be supportive of an allowance?

Under current regulations, a claimant is required to disclose material facts in his or her claim for benefits and to prove disability.[13] This duty extends to the representative under SSA's "Rules of conduct and standards of responsibility for representatives."[14] We believe that the current regulations regarding the duty of claimants and representatives to submit evidence work well, especially when combined with the duty to inform SSA of all treatment received.

A requirement to provide "all" evidence may conflict with state bar ethics rules which limit the submission of evidence that could be considered adverse to a client. In every state, attorney representatives are currently bound by state bar rules that forbid an attorney from engaging in professional conduct involving dishonesty, fraud, deceit, or willful misrepresentation. SSA's Rules of Conduct for all representatives impose similar prohibited actions.[15]

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

Eliminate reconsideration. For many years, the CCD Social Security Task Force has been on record as supporting elimination of the reconsideration level and providing more time and effort to better develop disability claims at the initial level. As long ago as May 1994, in response to SSA's "reengineering" proposal,[16] the Task Force submitted comments in favor of eliminating reconsideration, while urging SSA to "collect the correct information at the earliest possible time in the process to ensure that correct decisions are made the first time. SSA must improve the collection of medical and nonmedical evidence by explaining what is needed and asking the correct questions, with appropriate variations for different sources."

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[13] 20 C.F.R. §§ 404.1512(a) and 416.912(a).
[14] 20 C.F.R. §§ 404.1740(b)(1) and 416.1540(b)(1).
[15] SSA previously proposed adding a requirement 20 C.F.R. §§ 404.1512(a) and 416.912(a) that the claimant submit all evidence "available to you." 70 Fed. Reg. 43590 (July 27, 2005). This proposed change was rejected when the final rule was published. 71 Fed. Reg. 16424 (Mar. 31, 2006).
[16] 59 Fed. Reg. 18188 (Apr. 15, 1994).

These comments, made 18 years ago, still remain true today. While the 1994 reengineering proposal was not implemented, it seems to have evolved into a ten-state prototype, which eliminates reconsideration. The prototype was announced in 1999 and started in October 2000. It continues in those ten states and was recently extended into September 2013.[17]

Over the years, the Task Force has continued to support elimination of the reconsideration level. We have stated many times in testimony before this Subcommittee[18] and in comments to SSA that elimination of reconsideration with better development of evidence and some type of pre-decision contact with the claimant will create a more streamlined process and better serve individuals with disabilities applying for benefits.

Retain claimant-initiated review by the Appeals Council. We recommend retention of a claimant's right to administrative review of an unfavorable ALJ decision. The Appeals Council currently provides relief to over twenty percent of claimants who request review, either through outright reversal or remand back to the ALJ. While the vast majority of Appeals Council actions are remands back to the hearing level, claimants clearly benefit from Appeals Council review – over 60 percent of remands result in favorable decisions.

The Appeals Council has made significant improvements in reducing its backlog and processing times. When it is able to operate properly and in a timely manner, the Appeals Council provides claimants with effective review of ALJ decisions. A major basis for remand is not the submission of new evidence, but rather legal errors committed by the ALJ, including the failure to consider existing evidence according to SSA regulations and policy, the failure to apply correct legal standards, and the failure to follow procedural requirements. By providing relief in these cases, the Appeals Council allows the Commissioner to rectify errors administratively, rather than relying on review in the federal courts. The Appeals Council can act as an effective screen between the ALJ and federal court levels and prevent a significant increase in the courts' caseloads.

In addition, the procedure to request review is relatively simple. SSA has a one-page form that can be completed and filed in any Social Security office, sent by mail or faxed. In contrast, the procedure for filing an appeal to federal district court is much more complicated and, unless waived, there is a filing fee, which may be cost-prohibitive for a claimant. Under the current process, there is a large drop-off in appeals from the Appeals Council to federal court. There are a number of factors contributing to this lower rate of appeal, including the fact that some attorneys do not take cases to federal court; some representatives are not attorneys; many attorneys do not take cases to federal court if they did not represent the claimant at the hearing; and *pro se* claimants are intimidated by the process. As a result, having an administrative mechanism to correct injustices is essential.

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[17] 77 Fed. Reg. 35464 (June 13, 2012).

[18] For a more detailed discussion of our reasons supporting the elimination of reconsideration, see Testimony of Nancy G. Shor, On Behalf of the CCD Social Security Task Force, "Joint Hearing on Social Security Disability Claims Backlogs," House Ways and Means Subcommittees on Income Security and Family Support (now the Human Resources Subcommittee) and on Social Security, April 27, 2010.

Why evidence is not developed earlier in the process. The answer to question two addresses gaps in collection of evidence earlier in the process and recommendations for ways to improve the process.

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

Video hearings allow ALJs to conduct hearings without being at the same geographical site as the claimant and representative and have the potential to reduce processing times and increase productivity. We support the use of video hearings so long as the right to a full and fair hearing is adequately protected; the quality of video hearings is assured; and the claimant retains the absolute right to have an in-person hearing as provided under current regulations[19] and SSA policy.

The claimant makes the ultimate decision whether to accept the video hearing. In general, representatives report that video hearings are usually accepted, primarily because they lead to faster adjudication. However, there are a number of reasons why a claimant may decline and choose to exercise the right to an in-person hearing, e.g., the claimant's demeanor is critical (e.g., respiratory impairments, fatigue caused by impairment); the claimant has a mental impairment with symptoms of paranoia; the claimant has a hearing impairment.

Several years ago, SSA established National Hearing Centers (NHCs) to help reduce the hearings backlog. Cases are transferred from "brick and mortar" hearing offices to the five NHCs, where hearings are handled exclusively by video. If claimants exercise their right to an in-person hearing, the claim is transferred back to the geographic hearing office where a local ALJ will hear the case. However, we have recently heard that NHC ALJs, in some cases, will travel to the local hearing offices to hear cases in person.

The Representative Video Project (RVP) is another initiative that has been instituted to help reduce the disability claims backlog. Under RVP, the representative purchases video equipment that allows the claimant and representative to be in the representative's office with the ALJ in a hearing office location.

9. 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?

Closing the record before the hearing or at the close of the hearing before the ALJ issues a decision conflicts with the goal of ensuring that there is a complete record, especially since the evidence provided may be valuable and probative in determining disability.

There are many legitimate reasons, often beyond the claimant's or representative's control, why evidence is not submitted earlier and thus why closing the record or creating unreasonable procedural hurdles is not beneficial to claimants. We have many concerns – both legal and practical – if the record is closed at any point before the ALJ issues a decision, which is the current rule.

[19] 20 C.F.R. §§ 404.936 and 416.1436.

Closing the record before the hearing is inconsistent with the Social Security Act. The Act provides the claimant with the right to a hearing with a decision based on "evidence adduced at the hearing."[20] Current regulations comply with the statute by providing that "at the hearing" the claimant "may submit new evidence."[21]

Closing the record is inconsistent with the realities of claimants obtaining representation. As discussed above in the response to question 5, many claimants seek and obtain representation shortly before, or even after, the ALJ hearing date. Many claimants do not understand the complexity of the rules or the importance of being represented until just before their hearing date. Many are overwhelmed by other demands and priorities in their lives and by their chronic illnesses. As a practical matter, when claimants obtain representation shortly before the hearing, the task of obtaining medical evidence is even more difficult.

Closing the record is inconsistent with the realities of obtaining medical evidence. We strongly support the submission of evidence as early as possible, since it means that a correct decision can be made at the earliest point possible. However, representatives have great difficulty obtaining necessary medical records due to circumstances beyond their control. There are many legitimate reasons why the evidence is not provided earlier. There is no requirement that medical providers turn over records within a set time period. In addition, cost or access restrictions may prevent the ability to obtain evidence in a timely way.

Another factor, often outside the claimant's control, is the problem with obtaining records and information from medical sources. Legitimate reasons why evidence is not submitted earlier include:

- DDS examiners fail to obtain necessary and relevant evidence. Further, the DDSs do not use questionnaires or forms that are tailored to the specific type of impairment or ask for information that addresses the disability standard as implemented by SSA. Witnesses at the Compassionate Allowances hearing noted this "language" barrier and how it causes delays in obtaining evidence, even from supportive and well-meaning doctors.

- Neither SSA nor the DDS explains to claimants or providers what evidence is important, necessary and relevant for adjudication of the claim.

- Claimants are unable to obtain records either due to cost or access restrictions, including confusion over HIPAA requirements. We have heard from representatives that medical providers have different interpretations of HIPAA requirements and as a result require use of their own forms for authorization to disclose information. Frequently, if the medical records staff finds a problem with the request for information, e.g., it is not detailed enough or a different release form is required, the new request goes to the end of the queue when it is resubmitted.

Claimants -- and many representatives -- also face difficulties accessing medical evidence due to the cost charged by providers. Medical facilities often require upfront payment for

[20] 42 U.S.C. § 405(b)(1).
[21] 21 20 C.F.R. §§ 404.929 and 416.1429.

medical records, which many claimants cannot afford. Some states have laws which limit the charges that can be imposed by medical providers; however, many states have no limits. And while some representatives have the resources to advance the costs for their clients, some representatives and many legal services organizations do not.

- Medical providers delay or refuse to submit evidence. Disability advocates have noted that requests for medical evidence are given low priority by some providers. The primary reasons are inadequate reimbursement rates and lack of staff in non-direct care areas, such as medical records. Despite extensive efforts by representatives, such as hiring staff whose sole job is to obtain medical evidence, numerous obstacles and lengthy delays are still encountered in a significant number of cases. Even those representatives who have staff solely dedicated to obtaining medical evidence encounter problems.

- Reimbursement rates for providers are inadequate.

Closing the record is inconsistent with the realities of claimants' medical conditions. Claimants' medical conditions may worsen over time and/or diagnoses may change. Claimants undergo new treatment, are hospitalized, or are referred to different doctors. Some conditions, such as multiple sclerosis, autoimmune disorders or certain mental impairments, may take longer to diagnose definitively. The severity of an impairment and the limitations it causes may change due to a worsening of the medical condition, e.g., what is considered a minor cardiac problem may be understood to be far more serious after a heart attack is suffered. It also may take time to fully understand and document the combined effects of multiple impairments. Further, some claimants may be unable to accurately articulate their own impairments and limitations, either because they are in denial, lack judgment, simply do not understand their disability, or because their impairment(s), by definition, makes this a very difficult task. By their nature, these claims are not static and a finite set of medical evidence does not exist.

Also, as with some claimants who seek representation late in the process, their disabling impairments make it difficult to deal with the procedural aspects of their claims. Claimants may have difficulty submitting evidence in a timely manner because they are too ill, or are experiencing an exacerbation, or are simply overwhelmed by the demands of chronic illness, including the time and logistical demands of a caregiver or advocate to help submit evidence.

Current law sets limits for submission of new evidence after the ALJ decision is issued and these rules should be retained. Under current law, an ALJ hears a disability claim *de novo*. Thus, new evidence can be submitted and will be considered by the ALJ in reaching a decision. However, the ability to submit new evidence and have it considered becomes more limited at later levels of appeal.

At the Appeals Council level, new evidence will be considered, but ***only*** if it relates to the period before the ALJ decision and is "new and material."[22] While the Appeals Council remands about one-fourth of the appeals filed by claimants, it is important to note that a major basis for remand is not the submission of new evidence, but rather legal errors

[22] 20 C.F.R. §§ 404.970(b) and 416.1470(b).

committed by the ALJ, including the failure to consider existing evidence according to SSA regulations and policy and the failure to apply the correct legal standards.

At the federal district court level, the record is closed and the court ***will not consider*** new evidence. Under the Social Security Act,[23] there are two types of remands:

(1) Under "sentence 4" of 42 U.S.C. § 405(g), the court has authority to "affirm, modify, or reverse" the Commissioner's decision, with or without remanding the case; and

(2) Under "sentence 6," the court can remand (a) for further action by the Commissioner where "good cause" is shown, but only before the agency files an Answer to the claimant's Complaint; or (b) at any time, for additional evidence to be taken by the Commissioner (***not*** by the court), but only if the new evidence is (i) "new" and (ii) "material" and (iii) there is "good cause" for the failure to submit it in the prior administrative proceedings.

While there is a fairly high remand rate at the court level, the vast majority of court remands are not based on new evidence, but are ordered under "sentence 4," generally due to legal errors committed by the ALJ. Because courts hold claimants to the stringent standard in the Act, remands under the second part of "sentence 6" for consideration of new evidence submitted by the claimant occur very infrequently.

On the other hand, remands under the first part of "sentence 6" occur with some frequency. In these cases, SSA may move for a voluntary remand before it has filed an Answer to the claimant's Complaint because a file or hearing tape is lost and the administrative record cannot be completed. Or, SSA may reconsider its position on the merits of the case, realizing that the Commissioner's final administrative decision is not defensible in court.

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

Ask discussed in our response to question 2, CCD supports initiatives to improve the process at the initial levels so that the correct decision can be made at the earliest point possible and unnecessary appeals can be avoided. Improvements at the front end of the process can have a significant beneficial impact on preventing the backlog and delays later in the appeals process.

Screening Initiatives. We support SSA's efforts to accelerate decisions and develop new mechanisms for expedited eligibility throughout the application and review process. We encourage the use of ongoing screening as claimants obtain more documentation to support their applications. However, SSA must work to ensure that there is no negative inference when a claim is not selected by the screening tool or allowed at that initial evaluation. Initiatives include:

[23] 42 U.S.C. § 405(g).

- **Quick Disability Determinations.** We have supported the Quick Disability Determination (QDD) process since it first began in SSA Region I states in August 2006 and was expanded nationwide by Commissioner Astrue in September 2007. The QDD process has the potential of providing a prompt disability decision to those claimants who are the most severely disabled. Since its inception, the vast majority of QDD cases have been decided favorably in less than 20 days, and sometimes in just a few days.

- **Compassionate Allowances.** This initiative allows SSA to create "an extensive list of impairments that we [SSA] can allow quickly with minimal objective medical evidence that is based on clinical signs or laboratory findings or a combination of both...." SSA published an initial list of 50 conditions on its website. There are currently 113 conditions on the list, with 52 to be added in August 2012. Unlike the QDD screening, which occurs only when an application is filed, screening for compassionate allowances can occur at any level of the administrative appeals process. SSA has held seven Compassionate Allowance outreach hearings with expert panels to consider additional impairments including autoimmune disorders, schizophrenia, early onset Alzheimer's Disease, and cardiovascular disorders.

Improve development of evidence earlier in the process. In testimony for this hearing and many previous hearings, CCD has made a number of recommendations to ensure that disability claims are properly developed at the beginning of the process. Claimants' representatives are often able to provide evidence that we believe could have been obtained by the DDSs earlier in the process. Our recommendations include:

- **Provide more assistance to claimants at the application level.** At the beginning of the process, SSA should explain to the claimant what evidence is important and necessary. SSA should also provide applicants with more help completing the application, particularly in light of electronic filings, so that all impairments and sources of information are identified, including non-physician and other professional sources.

- **DDSs need to obtain necessary and relevant evidence.** Representatives often are able to obtain better medical information because they use letters and forms that ask questions relevant to the disability determination process. However, DDS forms usually ask for general medical information (diagnoses, findings, etc.) without tailoring questions to the Social Security disability standard. One way to address this would be for SSA to encourage DDSs to send Medical Source Statement forms to treating and examining doctors. These simple forms translate complex, detailed medical source opinions into practical functional terms useful to the vocational professionals at DDSs and hearing offices.

Increase reimbursement rates for providers. To improve provider response to requests for records, appropriate reimbursement rates for medical records and reports need to be established. Appropriate rates should also be paid for consultative examinations and for medical experts.

Provide better explanations to medical providers. SSA and DDSs should provide better explanations to all providers, in particular to physician and non-physician treating sources, about the disability standard and ask for evidence relevant to the standard.

Provide more training and guidance to adjudicators. Many reversals at the appeals levels are due to earlier erroneous application of existing SSA policy. Additional training should be provided on important evaluation rules such as: weighing medical evidence, including treating source opinions; the role of non-physician evidence; the evaluation of mental impairments, pain, and other subjective symptoms; the evaluation of childhood disability; and the use of the Social Security Rulings.

Improve the quality of consultative examinations. Steps should be taken to improve the quality of the consultative examination (CE) process. There are far too many reports of inappropriate referrals, short perfunctory examinations, and examinations conducted in languages other than the applicant's.

Incorporate vocational expertise into the DDS levels. This could have the effect of providing a more complete evaluation at the DDS level than currently occurs. A significant number of ALJ decisions are based on medical-vocational factors, i.e., step 5 of the sequential evaluation process. A certain percentage of these cases could be allowed earlier in the process if the medical-vocational rules were applied properly. Also, it may result in greater agreement between DDS and ALJ decision-making, as ALJs already generally consider vocational evidence and expertise in making their decisions.

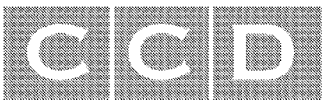
* * *

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

Sincerely,

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

Ethel Zelenske 2



CONSORTIUM FOR CITIZENS WITH DISABILITIES

July 30, 2012

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

Dear Ranking Member Becerra:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As discussed above, ALJs play a critical role in protecting the rights of claimants. A claimant's right to a *de novo* hearing before an ALJ is central to the fairness of the SSA adjudication process. This right guarantees that individuals with disabilities have a full and fair administrative hearing by an independent decision-maker who provides impartial fact-finding and adjudication, free from agency coercion or influence. The ALJ questions and takes testimony from the

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[3] 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505(a)("... inability to engage in any substantial gainful activity by reason of any medically determinable physical *or mental impairment*....).
[4] Dubin and Rains, *supra* note 2, at 7 (footnote omitted)
[5] *Id.* at 9 (footnote omitted).

claimant and other witnesses, and considers and weighs the evidence, all in accordance with relevant law and agency policy. For claimants, a fundamental principle of this right is the opportunity to present new evidence to the ALJ, testify in person before the ALJ, and receive a decision based on all available evidence.

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

- Eliminating the ALJ appeal would not remove the significant variation in allowance rates by the State Disability Determination Services (DDSs). "There are dramatic and unexplained variations among the state agencies …."[6] For instance, in FY 2011, the initial level allowance rate was 24.6 percent in Mississippi but 49.4 percent in New Hampshire.
- Because they do not have decisional independence like ALJs, DDSs have "greater vulnerability to restrict awards at the state level."[7] Allowance rates have declined at the DDS levels over the past few years: 33.5% (initial) and 11.6% (reconsideration) in FY 2011; 35.4% and 12.7% in FY 2010; and 36.9% and 13.8% in FY 2009.[8]
- There are a number of legitimate reasons why ALJs reverse DDS disability determinations. By law, ALJ hearings are *de novo* and the ALJ is not bound by previous determinations. Claims are often better developed at the hearing level, in part due to the fact that claimants are represented and the representative is able to obtain more specific medical evidence tailored to the SSA disability criteria. In addition, claimants' conditions change and deteriorate with the passage of time. Also, ALJs are able to call expert witnesses – medical experts and vocational experts – to provide hearing testimony on complex issues and who can better explain the claimant's impairment(s), treatment, how functional limitations affect the ability to work, etc. And a critical difference from the earlier levels is that the ALJ hearing is the first opportunity for the claimant to meet the adjudicator face-to-face, which can be especially important in cases involving nonexertional impairments such as mental illness and pain.

* * *

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

Sincerely,

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

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[6] *Id.* at 4.
[7] *Id.* at 5.
[8] The source for these statistics is the "Social Security Disability and Supplemental Security Income (SS) Disability Claims Allowance Rates – Initial and Reconsideration Adjudicative Level," produced by the SSA SSA State Agency Operations Report for each respective Fiscal Year.

The Honorable D. Randall Frye

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

July 30, 2012

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 in 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-111hhrg50764/pdf/CHRG 111hhrg50764.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

[3]Robert 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).
[4]POMS, *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).
[5]Rains, *supra* note 1, at 363.
[6]74 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 electrically. 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

[7] Damian 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..
[8] 42 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 system[9], 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

Richard J. Pierce, Jr.

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