



**STATEMENT OF
JUDGE MARILYN ZAHM
PRESIDENT
ASSOCIATION OF ADMINISTRATIVE LAW JUDGES
BEFORE THE

HOUSE WAYS AND MEANS COMMITTEE
SOCIAL SECURITY SUBCOMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES**

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

Thank you for this opportunity to appear before you to discuss the Social Security Administration's disability process.

I am Marilyn Zahm, an Administrative Law Judge assigned to the Buffalo, New York hearing office since 1994. I also serve as president of the Association of Administrative Law Judges (AALJ), a group of 1,400 Administrative Law Judges (ALJs, Judges) employed by the Social Security Administration across the country. The views I express today are those of the Association. I do not speak for the Agency.

The Social Security Administration (SSA) has an unprecedented number of cases pending at the hearings level. There are over 1.1 million people waiting for a hearing and decision. No one is more aware of the seriousness of this problem than the ALJs. Every day in our courtrooms, we see the toll that waiting up to two years for a hearing and a decision takes on those who appear before us.

I thank Congress for allocating an additional \$90 million to SSA in this year's budget. SSA leadership is using some of these resources under the CARES II plan for much needed technology improvements and hiring in the hearings operation.

However, the CARES II plan will not appreciably reduce the backlog of cases anytime in the foreseeable future. With the exception of the additional hiring, not one of these initiatives – either singly or in combination – focuses on the real reasons why we have a backlog crisis.

There are structural problems with the adjudicatory process that must be addressed if the disability program is to be efficient and effective. My goal today is to address these problems and offer constructive solutions that will improve service and reduce the backlog.

The culture of the organization must change if the system is to work well. The tension between the ALJ Corps and the Agency, while longstanding, has been exacerbated by the backlog crisis, as the Agency frantically tries to reduce the pending cases by improperly coercing Judges into issuing more decisions. The Agency's actions are counterproductive; management should be cooperating with its Judges rather than threatening and browbeating them.

The Agency's quota, demanding Judges adjudicate 500 to 700 cases annually, is not based on any study, not based on any rational analysis of the amount of work involved, and not based on anything other than the desire to have more decisions issued; it was created years ago by dividing the number of pending cases by the number of Judges. Please remember that each case involves a living, breathing person who is likely desperate after waiting up to two years for a hearing. And, it is important to understand that each claim paid has an approximate value of \$300,000 in government resources. Judges need to carefully and thoroughly evaluate each case before us.

A basic element of any adjudicatory system is that Judges have sufficient time and resources to do their jobs. Right now, SSA allots Judges an average of only 2.5 hours to adjudicate a case. This includes reviewing hundreds (sometimes thousands) of pages of medical documents, holding a full and fair hearing at which the claimant and expert witnesses testify, and issuing a decision which thoroughly addresses multiple complex medical and legal issues. I doubt there is anybody in this room who could read 1,000 pages of dense medical records, hold a hearing, write instructions, and edit the draft decision in 2.5 hours. I know I can't. Still, SSA insists ALJs adjudicate 500-700 cases per year.

Congress is rightfully concerned about accurate decisions being issued, and your inquiry must start with realistic dispositional goals for the ALJ Corps. AALJ commissioned a work analysis study (www.aalj.org) conducted by industrial experts that revealed that, if a Judge follows all of the Agency's policy dictates, it would take over seven hours to adjudicate an average case. The difference between the 7 hours to adjudicate a case and the 2.5 hours SSA allocates is serious.

This disparity has generated significant tension between the AALJ and SSA management. Judges who take the time to follow all of the rules, regulations, and policies are often bullied and harassed by SSA with threats of discipline and loss of benefits for not adjudicating more cases. As we all have learned from the Wells Fargo banking scandal, unrealistic quotas lead to bad results. The pushing of Judges to issue more decisions without adequately evaluating the claims created the environment that allowed the illegal actions in the Huntington, West Virginia hearing office to flourish.

SSA's adjudication procedures are upside down. ALJs have an average of 2.5 hours to fully adjudicate a case if they are to issue 500 dispositions annually, while SSA decision writers are allotted a minimum of 3 hours and up to more than 14 hours per case, depending on complexity, to produce a draft decision. Those in the Division of Quality who conduct reviews of

ALJ decisions spend multiple hours on their tasks. At the federal court level, the magistrate's law clerk can spend at least 8 hours reviewing an appeal from a single ALJ decision.

Why do those who evaluate our work have appreciably more time to spend assessing it than we have to complete it?

Simply ordering Judges to increase the number of hearings they schedule to 50 a month - as the Agency boasts it has done - does absolutely nothing to improve the system. Rather, it increases the chance that the decision issued will be neither well supported nor accurate, especially since the amount of medical evidence for each case has increased dramatically even as our support staff has shrunk and the Agency has placed more policy and procedural demands on the Judges. Furthermore, this dictate is insulting and ignores the fact that Judges are the hardest working group of SSA employees. In fact, at the insistence of our Judges, the AALJ negotiated the right to remain in the office after hours from 6:00 pm until 10:00 pm, without pay, to continue working.

So, what can Congress and SSA do? SSA must allow Judges sufficient time to adjudicate cases and must act to remove roadblocks that impede efficient adjudication. The Agency has burdened Judges with unnecessary policies and procedures and has hindered the smooth functioning of the system by poor management practices and poorly drafted regulations. These actions, together with the massive increase in the size of case files, the emphasis on quality – which the AALJ agrees with but notes that good work takes longer - and the reduction in staff assistance are what has driven down the number of decisions Judges can issue.

Modern corporate management seeks the advice of those who perform the actual work to solve problems, as they know best how to do the job. Unfortunately, the culture at SSA is top down, management-knows-best. SSA managers should listen to the Judges who perform the work that forms the core mission of the disability process. Hopefully, the new management team coming into SSA will bring a different attitude and will look to the AALJ as a partner in solving the backlog.

Let me outline a few changes that will help reduce the backlog while maintaining quality decisions. A normal adjudicatory system is organized to provide support to the Judge, as it is the Judge who is the point of production. Judges are most efficient when they work consistently with the same staff. In many hearing offices, management has stripped Judges of their assigned clerical support, causing them to have to spend time and energy following up on case-handling directives and searching for a staff member to provide needed assistance with such matters as equipment malfunctions, missing documents, phone numbers of experts who will be testifying at the hearing, etc. – in short, non-judicial work. Moreover, management has reduced the number of attorneys and decision writers assigned to the local hearing offices and placed this support in centralized locations. As a result, Judges do not know who is drafting their decisions, have little to no contact with writers, and at times must spend hours editing decisions. I note also that accountability decreases in direct proportion to the distance of the support staff from the Judges.

I see that the updated CARES II plan provides for a “virtual hallway” with writers in centralized writing units – communication between the writers and the local offices will be conducted via

Skype, email, instant messaging, or other electronic technology. Centralized writing units are not the best way to deliver service, but we acknowledge that, since they already exist, they should be made to work as efficiently and effectively as possible. The virtual hallway will be successful only if the writers are assigned to the Judges and have the ability to communicate directly with them. The AALJ has made similar suggestions over the past few years – however, while the Agency promises to implement the idea, nothing has been done to improve the process.

Because of hiring freezes and attrition, SSA lacks sufficient clerical and writing staff. With adequate staff providing necessary clerical and writing support, Judges can focus on their core function of hearing and deciding cases. The Agency should be hiring clerical employees and attorneys to assist Judges until we are adequately staffed.

AALJ has made numerous recommendations to the Agency to make the hearings operation more efficient. The Agency has taken some steps recently toward accepting one of our suggestions, the streamlined fully favorable template idea, which transforms the current, lengthy decision into a concise and legally sufficient shorter document by including only necessary information. For instance, there is no need to discuss all impairments, only the ones that are the basis for the disability. If management fully adopts our recommendations, we will be able to save half a million work-hours annually to spend working on the backlog.

There are many other suggestions that we have advanced that also can save time and money if implemented.

Another AALJ proposal is an expedited dismissal procedure. About 17% of Social Security disability cases are dismissed because the individual— usually unrepresented - has abandoned the case, having returned to work, lost interest, or moved and left no forwarding address. In many urban hearing offices, the dismissal rate is significantly higher. If, despite our best efforts and good intentions, we cannot find the claimant, then we cannot hold a hearing and adjudicate the case. Any work put into these cases – obtaining evidence, organizing the file, reading the file – is a waste of time and scarce resources. If these cases were to be resolved earlier in the process, before significant resources were expended on them, we could save almost 400,000 work hours annually. If the regulations and policies were changed so as to allow us to dismiss abandoned cases without scheduling a hearing, there is potential for even more savings.

SSA holds approximately 700,000 hearings a year - a staggering number - yet has no rules of procedure for those who practice in front of us. A lack of rules of practice impedes the smooth operation of the adjudicatory process. The submission of evidence in a timely fashion to permit the Judge and expert witnesses proper time to review the evidence and the closure of the record are two critical measures that are missing. Recently, SSA issued a regulation setting forth a rule for the submission of evidence five days prior to the hearing. This rule was based on a very lengthy and successful demonstration project in New England. The five-day rule, while better than the prior situation in the rest of the country (which allowed hundreds of pages of documents to be submitted at the hearing and post-hearing), is poorly drafted. The intent of the rule can be undermined, as it also indicates that it is sufficient if, five days before the hearing, the Judge is merely notified about what evidence is outstanding and the attempts made to obtain it. This “inform option” totally defeats the purpose of the 5-day rule, which is to ensure a fully

developed record prior to the hearing. A Judge is most efficient when he or she has all of the documents and can review them prior to the day of the hearing so that the decision can be made at the conclusion of the hearing, while the evidence is fresh in the Judge's mind. So, instead of taking what worked in practice in New England, SSA changed the rule and greatly reduced its impact.

In addition, rules need to be enacted to prevent the submission of duplicative documents or exhibits that are not organized in chronological order. Sometimes as much as 20% percent of the medical evidence consists of duplicate documents. Because medical evidence in a case may consist of thousands of pages, duplicates bulk up the record and lengthen the Judge's review. These rules will assist the claimants and the adjudicatory process by facilitating the Judge's review of the record and saving Judge and staff time.

Judges receive policy updates on a daily basis that set out changes that must be read, absorbed and applied – an impossible task. Many of these changes wind up as part of the Agency's Hearings, Appeals, and Litigation Law Manual (HALLEX) that Judges are required to follow. Since 2011, the Agency has imposed more and more policies and procedural requirements for case adjudication– we estimate 1,000 changes to HALLEX during this period - most of which are unnecessary and simply add to the time that it takes to hear and decide cases. For example, HALLEX I-2-5-13B requires the staff, once informed about medical evidence, to ask the claimant to obtain it, wait a mandatory 30 days before asking the claimant why it is not submitted, and then ask the ALJ if the staff should send for the documents. Since unrepresented claimants rarely obtain medical evidence, and when they do, it is often incomplete, the staff almost invariably has to obtain it. This HALLEX requirement, and many others, creates extra work and delay.

AALJ has presented the Agency with a significant number of specific changes to HALLEX to streamline procedures, with little result. HALLEX needs to be thoroughly reviewed and its dictates simplified so that the adjudicatory process becomes efficient. Moreover, Agency personnel crafting these changes could be better utilized to assist in the hearings operation.

This brings me to case record size. The size of our files has increased 55% from FY 2011 to FY 2016. While the Agency is developing software to identify duplicate evidence, which they expect will shrink the files by about 17%, and even if this initiative is as successful as predicted, this modest reduction in documents – in the face of the ever increasing file size - will not do much to reduce the backlog. Any real impact on the backlog will come from more staff and better policies.

As for more staff, technology facilitates direct dissemination of information without the need for bureaucratic middlemen. Eliminating the ten Regional Offices – most of which are located in expensive real estate – could deploy about 400 employees to the hearings operation to perform the real work of the Agency. Many of the functions performed by the Regional Offices are duplicative of those performed in the central office. The central office can more efficiently manage the hearing offices directly, rather than through the regions. Similarly, flattening the management structure in the hearing offices would allow for over 400,000 additional staff hours per year to be utilized directly in case adjudication.

There are a number of other measures that can improve the disability process, including establishing an SSA Medical Expert Corps, initiating an early continuing disability review upon the recommendation of the Judge, using social media and the internet, authorizing symptom validity testing, and reducing the occasions when closed cases can be re-litigated.

ALJs are required to adjudicate cases based on complex medical evidence without the timely benefit of medical experts. The Agency has a lack of experts in many specialties, which causes delay in adjudicating cases. A corps of medical experts will provide Judges with unbiased expert opinions that will assist in issuing medically and legally supported adjudications.

Having reviewed all of the medical evidence, Judges are in a good position to know the earliest time for SSA to conduct a Continuing Disability Review (CDR). SSA should implement ALJ recommendations for timing CDRs to determine medical improvement so that claimants can return to the work force as soon as they are able.

AALJ also recommends that SSA use social media and the internet to review an individual's activities prior to hearing (reports put in each file) so that Judges can question the claimant to better assess credibility. For example, in the New York City disability scandal, had the Agency reviewed Facebook postings, it would have discovered photos documenting claimants riding a motor scooter, fishing off the coast of Costa Rica, working as a martial arts instructor and holding a job as a helicopter pilot. A Judge should not be barred from asking questions about information that is disseminated to a wide audience.

Other federal agencies, including the Veterans Administration, use Symptoms Validity tests – psychological testing and assessment - in evaluating symptoms. SSA should also authorize such tests when requested by the ALJ so that the Judge can have access to an independent expert's opinion on malingering and exaggeration.

Regulatory changes to cut down on reopening closed cases and re-litigating periods of time for which the Agency has already made a determination should be implemented. It makes no sense and is unfair to make people wait in the queue for two years to have an initial hearing when others are permitted to have a second, third or fourth bite of the apple.

Finally, we must always keep in mind that workers have paid into the Social Security system and should expect to have that system treat them fairly when they have a need for its benefits. There are two recent developments that strike at the heart of the American public's entitlement to a full and fair due process hearing before an independent adjudicator.

First, the Agency plans to erode the right to an in-person hearing by restricting the ability of individuals to opt out of video hearings. While video hearings, under some circumstances, can be beneficial – such as providing timely service to those in remote areas – as a general rule, in-person hearings are preferable and ought to be the norm. When the Agency eliminates the right to an in-person hearing, community based hearing offices will likely be phased out over time. Besides avoiding the inevitable technology problems, in-person hearings have the benefit of allowing the Judge the opportunity to view individuals up close and interact with them directly

instead of on television. Furthermore, community hearing offices permit familiarity with local treatment providers. For claimants who are already under a great deal of stress, dealing with a screen rather than a human being can interfere with their ability to interact effectively with the Judge when making their case.

Second, the Agency continues to push an initiative that permits non-ALJs to hear and decide cases, which is inconsistent with the Administrative Procedure Act (APA) and its own regulations and is not in the best interests of the American people.

Last year, the Agency sought to hire 65 new Attorney Examiners (with the internal organizational title of Administrative Appeals Judges), together with almost 300 support staff, to augment the current 70 Attorney Examiners in the Appeals Council. These new appeals council attorneys, according to SSA, would hold hearings and issue decisions on two subsets of cases: non-disability and remanded cases. Non-disability cases are a specialized group of cases involving issues such as overpayments, underpayments, workers' compensation offsets, paternity, fraudulent retirement, selection of representative payee, and matters of income and resources. There are approximately 10,000 non-disability cases appealed to the hearings level annually, and about 30,000 remands pass through the Appeals Council each year.

Under pressure from Congress the Agency backed away from this proposal.

Recently, SSA has revived its interest in shifting hearings from Judges to Attorney Examiners at the Appeals Council, as the Agency has announced its plan to solicit public comment to "best utilize the Appeals Council to hold hearings to address the pending service crisis."

Using Appeals Council Attorney Examiners violates the Agency's own regulatory policy that evidentiary hearings on appeals from adverse Agency determinations are to be presided over by ALJs appointed pursuant to the Administrative Procedure Act (APA). Administrative law expert Dean Harold Krent has provided us with a legal analysis that concludes that this plan is *ultra vires* (www.aalj.org). Not only does SSA's agenda starkly depart from the law and regulations, it is poor public policy, as it strips the American people of their right to an independent APA adjudicator and also their right to an appeal before the Appeals Council.

For decades, and currently, ALJs have conducted evidentiary hearings on appeals made from adverse Agency determinations. SSA has over 1,600 ALJs located in 166 hearing offices throughout the country. ALJs are selected by federal agencies through the Office of Personnel Management (OPM) after a rigorous hiring process, the requirements of which include years of trial experience, a full-day written examination, and a structured interview conducted by, among others, sitting ALJs and law professors. The applicants' qualifying experience, together with the results of the test and interview, are scored and the names of the top candidates are sent to any Agency seeking to appoint an ALJ.

ALJs are appointed pursuant to the APA, the law passed by Congress in 1946 to ensure that federal agencies could not improperly influence their adjudicators. In order to assure judicial independence, ALJs are forbidden by law from having ex-parte communications with certain Agency personnel. They cannot receive bonuses or undergo performance appraisals.

Suspension and removal for good cause must be accomplished by filing charges at the Merit Systems Protection Board, where an independent Judge will preside over the hearing. All of these safeguards are imbedded in the law to protect the American people by ensuring that ALJs can exercise their judicial independence in applying the law.

The chart below highlights the differences between ALJs and the Agency’s Attorney Examiners.

INDEPENDENCE OF ADMINISTRATIVE LAW JUDGE COMPARED TO AGENCY ATTORNEY EXAMINER

	ADMINISTRATIVE LAW JUDGE (ALJ)	ATTORNEY EXAMINER/ ADMINISTRATIVE APPEALS JUDGE
HIRING PROCESS	<ul style="list-style-type: none"> OPM recommended; Rigorous screening, testing; and A minimum requirement of 7 years trial experience 	<ul style="list-style-type: none"> Agency determines qualifications; No independent OPM review; No required testing or trial experience
DISCIPLINE	Discipline imposed only for "good cause" determined by MSPB after formal administrative hearing	Subject to agency discretion
HEARING AUTHORITY	Statutory authority for formal hearing on the record under the Administrative Procedure Act (APA)	No APA statutory authority
AGENCY CONTACT	Statute prohibits Ex-Parte contacts	No statutory prohibition on Ex-Parte contacts
PERFORMANCE REVIEWS AND BONUS	<ul style="list-style-type: none"> Ineligible for Agency Bonus; Pay set by OPM and not tied to performance reviews; Exempt from Civil Service Reform Act performance appraisal requirements 	<ul style="list-style-type: none"> Agency awards bonus, reviews performance and sets employee pay
CLAIMANT'S APPEAL RIGHTS	<ul style="list-style-type: none"> Appeal from an ALJ decision to the Agency's Appeals Council is accomplished by a letter. The next level of appeal is to Federal Court 	<ul style="list-style-type: none"> Loss of one level of appeal as no appeal to the Appeals Council. Only appeal is to Federal Court

What SSA is again attempting to do is to divert a subset of cases from ALJs and have them heard by non-independent SSA employees. Instead of an ALJ presiding over the evidentiary hearing and issuing a decision, an appeals council attorney will be adjudicating the case. SSA argues that having appeals council attorneys hold regulatory evidentiary hearings is not a violation of the claimants’ rights as, it contends, appeals council attorneys are equivalent to ALJs. This is simply not true.

These appeals council attorneys are directly selected by the Agency and promoted, demoted, and disciplined by their Agency supervisors. They receive bonuses and performance evaluations. In short, the Agency has direct control over these adjudicators who do not have statutorily-protected judicial independence.

These appeals council attorneys, who have never held SSA hearings or issued decisions after hearings, will have to undergo training to perform this work. Since the official learning curve for a new ALJ is nine months, this training will take at least several months even if the individuals involved are familiar with the disability program. Moreover, they will all be located in Baltimore, Maryland and Falls Church, Virginia, and time and travel costs will be required because these appeals council attorneys will be obligated to travel across the country to hold hearings for any claimant who declines a video hearing.

Last year, SSA asserted that it was too time consuming to hire more ALJs through the OPM process and that this new program would be a temporary measure, to end in one year. It is not productive or cost effective, however, to spend the time and money to train non-ALJs to hold hearings and issue decisions if they are going to only be assigned to handle this work for one year - unless, of course, SSA intends to continue to transfer more types of cases from ALJs to appeals council attorneys. Furthermore, it does not appear that there is an ALJ hiring crisis any longer. If the appeals council attorneys do not have enough work to keep them busy, the Agency should deploy them to write decisions, as there is currently an all-time high backlog of 73,000 decisions waiting to be written for Judges to review and issue.

Furthermore, under the SSA's plan, claimants who appear before these appeals council adjudicators will lose their right to a level of appeal. Currently, if a claimant is unhappy with the decision of the ALJ, an appeal can be commenced by a simple letter that will trigger the process of a complete review of the evidence, the hearing recording, and the ALJ's decision by the Appeals Council. Decisions of the Appeals Council are then appealable to Federal Court. A claimant having their case heard and decided by an appeals council attorney will not thereafter be able to appeal to the Appeals Council, but must seek redress directly in Federal Court, a much more expensive and difficult course. Moreover, claimants with non-disability cases, particularly overpayments, are often unrepresented as they do not have sufficient resources to hire an attorney and therefore would be particularly disadvantaged in filing an appeal.

The regulations relied on by SSA to justify its plan to divert these cases do not provide sufficient legal support for the Agency's position.

Title 20 Code of Federal Regulations, Part 404 §900 vests in all claimants:

- the right to a hearing before an administrative law Judge if dissatisfied with the determination of the state Agency, and
- the right to a review before the Appeals Council if dissatisfied with the decision of the administrative law Judge.

Sections 929 and 930 affirm the right to a hearing before an ALJ. Section 970 also provides that claimants may seek review of any adverse ALJ decision before the Appeals Council.

The Agency cites Part 404.956 for Title 2 cases, and the corresponding Title 16 regulation, 416.1456, for its authority to remove the non-disability caseload from ALJs. However, those regulations, which state that the Appeals Council may assume responsibility for holding a hearing by requesting that the Administrative Law Judge send the hearing request to it, give the Appeals Council only a limited power to hear particular cases. In fact, this is the manner in

which the Agency has interpreted these regulations in the past, as only individual cases, such as those involving novel issues, have been escalated from the ALJ level to the Appeals Council level. These regulations have not been used to subsume whole categories of cases to be heard by the Appeals Council. Any attempt to do so flies in the face of the longstanding regulatory scheme that clearly contemplates that individuals have the right to have ALJs hold their evidentiary hearings. Interpreting these regulations in the way SSA asserts would result in allowing SSA to replace ALJs with appeals council attorneys in any or all cases.

The Agency also argues that Parts 404.983 and 416.1483 authorize the Appeals Council to hold hearings on Federal Court remands. However, those regulations, which state that the Appeals Council may make a decision on the case or remand it to an ALJ to take action and issue a decision, including the holding of a hearing, make plain that the Appeals Council may act if it can make a decision without a further evidentiary hearing. SSA's initiative to remove the non-disability and remand hearings from ALJs and have the cases heard by appeals council attorneys is a dramatic change that is not contemplated or supported by the law or regulations.

With regard to remanded cases, the AALJ agrees that if the Appeals Council can make a determination on the record before them, it should do so; the existing regulations are clear in this regard. If an evidentiary hearing is necessary, it is more cost effective and efficient for the case to be sent back to the ALJ in the local hearing office to hold the hearing and issue a decision. Again, no additional travel costs or time will be required and no additional training is necessary. And, the right to an appeal of the ALJ decision to the Appeals Council would be preserved.

In conclusion, it is important for this Committee to understand the implications of SSA's initiative to supplant Judges with appeals council attorneys. This program is a thinly veiled attempt to eliminate APA protections for the American public in the name of reducing the backlog. Not only is this plan ill advised, it will barely impact the backlog of pending cases. More likely, it will result in a court challenge that will necessitate the rehearing of all of these cases by ALJs.

The Social Security Disability Program is an essential part of the safety net for the American people. And, it is likely to be the only opportunity they have to appear before a federal judicial official. We have a good system of providing full and fair in-person hearings to the public if it is properly managed. The Agency's difficulty with the backlog needs to be addressed with systemic changes that will result in an efficient adjudicatory process and good public service. Let us not erode this system by sanctioning poor management.

Thank you for the opportunity to address you, who have the stewardship of this vital program in your hands.