

OVERSIGHT OF RISING SOCIAL SECURITY DIS- ABILITY CLAIMS AND THE ROLE OF ADMINIS- TRATIVE LAW JUDGES

HEARING

BEFORE THE
SUBCOMMITTEE ON ENERGY POLICY,
HEALTH CARE AND ENTITLEMENTS
OF THE
COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES
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OVERSIGHT OF RISING SOCIAL SECURITY DISABILITY CLAIMS AND THE ROLE OF AD- MINISTRATIVE LAW JUDGES

Thursday, June 27, 2013,

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENERGY POLICY, HEALTH CARE &
ENTITLEMENTS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:32 a.m., in Room 2154, Rayburn House Office Building, Hon. James Lankford [chairman of the subcommittee] presiding.

Present: Representatives Lankford, Gosar, Jordan, Walberg, DesJarlais, Woodall, Massie, Speier, and Horsford.

Also Present: Representative Kelly.

Staff Present: Alexia Ardolina, Majority Assistant Clerk; Brian Blase, Majority Senior Professional Staff Member; Caitlin Carroll, Majority Deputy Press Secretary; John Cuaderes, Majority Deputy Staff Director; Linda Good, Majority Chief Clerk; Christopher Hixon, Majority Deputy Chief Counsel, Oversight; Michael R. Kiko, Majority Staff Assistant; Mark D. Marin, Majority Director of Oversight; Emily Martin, Majority Counsel; Scott Schmidt, Majority Deputy Director of Digital Strategy; Sharon Meredith Utz, Majority Professional Staff Member; Peter Warren, Majority Legislative Policy Director; Jaron Bourke, Minority Director of Administration; Nicholas Kamau, Minority Counsel; Adam Koshkin, Minority Research Assistant; and Safiya Simmons, Minority Press Secretary.

Mr. LANKFORD. The committee will come to order.

I would like to begin this hearing by stating the Oversight Committee mission statement. We exist to secure two fundamental principles: first, Americans have the right to know that the money Washington takes from them is well spent and, second, Americans deserve an efficient, effective Government that works for them.

Our duty on the Oversight and Government Reform Committee is to protect these rights. Our solemn responsibility is to hold Government accountable to taxpayers, because taxpayers have the right to know what they get from their Government. We will work tirelessly in partnership with citizen watchdogs to deliver the facts to the American people and bring genuine reform to the Federal bureaucracy. This is the mission of the Oversight and Government Reform Committee.

Before we proceed to our opening statements, I would like to hear from Senator Coburn. He is a guest of this committee today.

The Honorable Dr. Coburn is the Ranking Minority Member of the Senate Committee on Homeland Security and Governmental Affairs. He is also a fellow Oakie with me as well, and he has done extensive research on this issue, and I would like to ask Dr. Coburn to do a quick statement and then we will allow you to get back to your senatorial duties. You are recognized.

WITNESS STATEMENTS

STATEMENT OF HON. TOM COBURN, M.D., A UNITED STATES SENATOR FROM THE STATE OF OKLAHOMA

Senator COBURN. Well, thank you, Mr. Chairman. I appreciate the opportunity to come before you.

Several years ago we started, in the Permanent Subcommittee on Investigations, an in-depth study of the Social Security disability system, and we started that because what looks like the trust fund is now less than 15 months until those with true disabilities are going to see a reduction in the payments that they get from the disability trust fund.

We looked at both the manner, the method, and the lack of oversight that Congress has had over the last 30 years over this program, and what we found were some significant flaws, both in the management and the valuation. We saw significant delay in bringing the factors with which you would make this decision up to date, and I am talking about the vocational grid program.

What we know is 1 in 17 Americans today collect a disability check through the Social Security system, and for those that are truly disabled, their ability to survive on not a great amount of money is going to be further limited if in fact we don't make some rather significant changes.

Interestingly enough, our committee looked at 300, randomly selected by Social Security, cases from three different offices throughout the Country. One of those was Oklahoma City. I asked to have one in Oklahoma done so we would have the pressure to not be biased against the system, but yet see a reflection of what happens in Oklahoma as well.

Through that assessment we found that 25 percent of the cases at the ALJ level were decided in appropriately. It could be noted that Social Security's own internal assessment is at 22 percent, so we weren't far off, and we weren't aware of that at the time.

So there is a large agreement, both by Social Security Administration and the Permanent Subcommittee on Investigations in the Senate, Government Affairs Committee, that we have a real problem, and the problem is manifest in several ways.

One is because of the extreme backlog, the requirements placed on ALJs to try to hit 500 to 700 cases a year is really an impossibility to do it properly; two, the default position is to approve rather than to find the facts, and it is to approve because it is much easier and quicker to write an approving decision than it is a disapproval decision. The average case has over 600 pages in it, so if you think about what a judge would have to do to actually truly look at the whole case, the whole file, you can see that doing 700 cases a year, and doing it well, is an impossibility.

The second thing we found is judges actually changing dates of disability so they can use the grid, so they can get a case out, when in fact they would change the date at which an injury occurred so they could utilize the grid, so they wouldn't have to make a determination.

The other thing we found, and we can't comment to a great extent now because it is going to the Justice Department for prosecution, is a tremendous amount of collusion between some ALJs and lawyers representing claimants. And you will see that come out in the future. But a pretty significant malfeasance in that area. And it is understandable because of the economic benefits to those that are representing those individuals who may in fact not be disabled, but in fact the economic benefit for those representing those that are not in fact disabled nearest to those that are representing them.

Finally, significant decisions within Social Security to abandon the use of well-proven and well-recognized standards in the medical community to diagnose and ascertain malingering have been eliminated from ALJs. For example, the Minnesota Multiphasic Personality test, which is something physicians use all the time. It is a well known standard in the disability community, as well as in the medical community. Within the last two years that is no longer a tool available to ALJs, so the bias has shifted.

The other points I would make for your consideration as you look at this is continuing disability review is a joke. It is not happening to any significant extent.

And then the final point I would make is we need to reform the process. We have great people working in Social Security. They actually know their job, they actually read all the data, and they make a determination about whether somebody is disabled or not. When somebody comes before an ALJ, they have already been denied two times by professionals at Social Security who actually have looked at all the data, so when you have a nationwide approval rate of 60 percent after that, you have to ask yourself why.

And the real answer is that ALJs don't look at all the information and that there is nobody representing the taxpayer, i.e., Social Security in the courtroom to present the other side of the case. So you have a finder of fact and an ALJ, you have a claimant and their attorney, but you have nobody representing Social Security, who has actually gone through the fine twice to look at it.

We also have a significant number of problems with gaming the system, where lawyers withhold real information and buy, through the medical community, the result they want.

Now, I will just give you an anecdote. When I first went into medical practice, I had a very well known lawyer in my hometown send me a candidate that he was representing before an ALJ, and I used the guideline book to assess the candidate and the candidate was not disabled. I got a call after that from the attorney saying he could never refer any patients to me again because I didn't find his patient disabled. So it tells you the bias is not to find fact, the bias is to find disability; and what we need to do is rebalance that.

And I leave you with a final thought: We all know people who are truly disabled, and we have a system that is designed to really help them. That system now has been put at risk and the amount

of money those individuals will collect two years from now, if we don't reform this, will be significantly less. We cannot move money, we do not have the capability to move money to this trust fund. Nor do we have the ability to draw money and borrow money for this trust fund.

So what will happen is, about 17 months from now, people who are collecting a disability check are going to get a much smaller check. So the very people in the disability community who are worried about us reforming this, when they really think about it, what they really want us to do is truly reform it so that the people who are truly disabled.

Last anecdotal story. Oklahoma had a significant winterized storm about five years ago, and in my home, which is loaded with trees, I lost big trees, snapped and everything else, and I made an agreement with an individual to come and clear those trees, trim those trees; and when I went to pay him, I asked him for his Social Security Number to pay him and he said, really, I really want you to make the check out to my mom, and I said, well, why? I said, I need to withdraw Social Security earnings and the FICA taxes on what I am paying you because this is labor.

Come to find out three years prior to that he had fallen out of a tree and broken his ankle and was on full disability, but had been working the last three years after his ankle healed; and nobody from Social Security ever contacted him. He was still collecting. He knew if he reported the income, and he was making about \$50,000 a year trimming trees, that in fact he would not continue to collect this money. Well, he didn't deserve the money; he was no longer disabled.

So we have the problem of continuing disability that is not reviewed; we have the problem of putting people on disability that aren't, all putting at risk the people who are truly disabled in this Country for what we have promised and should be there to supply to them.

I thank you for hearing me.

[Prepared statement of Senator Coburn follows:]

Opening Statement of Senator Tom A. Coburn, M.D.

Oversight of Rising Social Security Disability Claims
and the Role of Administrative Law Judges

Subcommittee on Energy Policy, Health Care and Entitlements
Committee on Oversight and Government Reform
United States House of Representatives

June 27, 2013

Chairman Lankford, Ranking Member Speier, and Members of the Subcommittee:

As a doctor, the issue of providing medical care to the disabled is personal. I have cared for thousands of disabled patients, many of which have received support at one time or another through the Social Security Disability Insurance program. That is why for the past two-and-a-half years my office has undertaken a massive investigation of the program to find its problems and, hopefully, to fix them.

Last September we released a report, which I will detail below, that gave a look into the program few have seen before. In fact, throughout our investigation we were told repeatedly by top SSA officials that our inquiry was “unprecedented” in its scope. They intended this as a criticism, though we accepted it as a compliment. Even still, we were only able to look at part of the program and I applaud this Committee for its work in this area. As the need for reform grows in the coming years, we will all benefit by a thorough understanding of the facts.

When Congress enacted the Social Security Disability Insurance (“SSDI”) program in 1956, the goal was to create a safety net for individuals who, after working for a time, became disabled and could no longer provide for themselves. Today, it has become something much different. Applications are on the rise and the Trust Fund that pays benefits is scheduled for exhausted in just a few years. All the while, Congress has ignored evidence the program is in dire need of modernization and reform.

As a result of Congress failing to act, the program rolls are growing at an unsustainable rate. At the end of 2012, 11 million people were receiving SSDI with beneficiaries receiving a total of \$136.9 billion (up 6.2 percent from 2011) according to the most recent Social Security Trustees Report.¹ In 2012, the need-based disability program Supplement Security Income (“SSI”) paid out over \$44 billion in benefits.² In April 2013, 6.24 million people were receiving SSI disability benefits.³

Not surprisingly, as more people are accepted to the program, more people apply. Just last year alone, the Social Security Administration (“SSA”) received almost three million applications for

¹ The 2013 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds.

² Information provided by the Congressional Research Service.

³ Social Security Administration, Supplemental Security Income Recipients, April 2013.

disability benefits.⁴ The agency has to carefully consider each of these claims given each decision to award disability benefits is estimated to cost the taxpayer \$300,000 in federal lifetime benefits.

Given the state and the cost of these programs, it is clear that something has to change.

The Agency Pressures ALJs to Decide a High Number of Cases. The need for reform is most evident at the Administrative Law Judge level (“ALJ”) of appeal. Here, ALJs are under pressure from several forces. First, in 2007, the agency imposed its “Plan to Eliminate the Hearing Backlog,” which asked each ALJ to decide 500 to 700 cases each year. In practice, that means each ALJ is expected to decide two cases a day.

However, a single case file can easily reach 500 pages – with many topping 1,500 pages, which is more than many people can read in a week. The majority of these files are detailed medical records that take time to understand. The notion that every ALJ is expected not only to read two of these each day, but also write detailed, multi-page decisions about them is unrealistic.

While we all want to see disabled applicants dealt with quickly, blindly imposing a quota creates huge problems. Most of all, it removes the ability of ALJs to give claimants the personal attention each deserves, and instead reduces people to statistics.

Agency Rules Give ALJs Incentives to Approve Cases. With the pressure to decide such a high number of cases, SSA makes it easier to approve a case than deny it. While this generates the fewest complaints from Congress and from claimants, it does not always mean the cases are decided *accurately*. An example of how this works is seen in the time SSA gives an ALJ to write a favorable case versus what is required for a denial. The agency has estimated it should only take an ALJ four hours to prepare a decision approving benefits. On the other hand, the agency believes writing a denial should take eight hours. With a 500 case minimum goal, ALJs have incentives to approve a lot of those cases just to keep up with the workload and avoid trouble.

This pressure needs to be counterbalanced at the appeals level by allowing an agency representative into the hearing process. By the time most claimants appeal to an ALJ, they are represented by an attorney or representative. This creates an unbalanced hearing where the claimant is represented, but no one is representing the Government, and in turn, the American taxpayer.

Some attorneys take advantage of the situation and attempt to manipulate ALJs into approving a high number of cases. Many claimant attorneys submit medical evidence created by doctors who they know will find claimants disabled and, at times, withhold medical evidence counter to a finding of disability, such as evidence the claimant’s health is improving. At the same time, attorneys have incentives to keep appealing cases, because the older a case gets, the larger the possible payout for attorneys. Under program rules, attorneys can receive up to \$6,000 out of a claimant’s back-pay, which is larger for older cases.

⁴ Social Security Administration, Selected Data from Social Security’s Disability Program, <http://www.ssa.gov/OACT/STATS/dibStat.html>.

The result is 60 percent of claims, on average, are approved at the ALJ level of appeal. This number is shocking given these claimants have already been denied benefits twice at lower levels in the appellate process. This creates a culture where claimants are encouraged to appeal, since your chances to be approved increase the more your appeal.

Senate Investigation Finds A Quarter of ALJ Decisions Reviewed Were Problematic.

Beginning in 2011, our office undertook a review of 300 case files for claimants approved to receive disability benefits. One hundred each came from separate regions of the country, including 100 from my own state of Oklahoma. We hoped to see if there were things we could learn about how the agency was deciding its cases. In our September 2012 report, we came to a startling conclusion: a quarter of the cases reviewed relied on questionable evidence and practices.

While we did not attempt to determine whether or not those approved for benefits were disabled or not, we felt certain that the agency's decision-making process was deeply flawed. And this was true in all three regions we reviewed. The problems we uncovered included:

- *Attorney Procured Medical Opinions.* Some ALJs awarded benefits based solely on a doctor's opinion the claimant's attorney purchased. Many attorneys send their claimants to be reviewed by a doctor the attorney knows will provide a disabling medical opinion. A trend we found was for attorneys to send their clients to doctors who would examine them for some form of physical pain, but then add a mental disability as well, such as developmental disorders, depression, bi-polar disorder, etc. Many times the claimant never mentioned a mental problem, but suddenly, they had one.
- *Insufficient and Contradictory Medical Evidence.* In many cases, the ALJ issued a decision approving benefits without citing adequate, objective medical evidence to support the finding or addressing contradictory evidence.
- *Poor Hearing Practices.* Some ALJs held perfunctory hearings lasting less than five minutes where they failed to ask the claimant any questions.
- *Improper Reliance on Medical-Vocational Guidelines.* The majority of claims approved by ALJs utilized the medical-vocational grid rules – a process they refer to as “gridding” – which the agency has determined ALJs use at a rate of 4 to 1 compared to awards made due to medical listings. Often, claimant representatives and ALJs would negotiate an award of benefits by changing the disability onset date to the claimants' 50th or 55th birthday.
- *Late-Breaking Evidence.* Some case files showed disability applicants, usually through their representatives, submitted medical evidence immediately before or on the day of an ALJ hearing or after the hearing's conclusion, a practice leading to confusion about the supporting evidence and inefficiencies in case analysis. In one case a single page of evidence was both created and submitted just hours before an 8:00 a.m hearing, but it became the sole basis for an ALJ awarding benefits.

- *Ignoring Evidence the Claimant is Working.* Some ALJs failed to review the medical file for evidence the claimant is working and should be denied benefits. In a number of cases, the claimant told their physician (who wrote it in their file) they were working, which would make them ineligible for benefits. The ALJ never asked the claimant if they were working at the hearing, or addressed the work in awarding the claimant benefits.

When we presented these findings to the Social Security Administration, they not only agreed with them, but informed us that they had found similar problems. During the course of our investigation SSA conducted its own internal review and found 22 percent of ALJ awards across the country merited further scrutiny. This was nearly identical with our findings that a quarter of ALJ decisions were problematic.

The Disability Programs Are in Dire Need of Reform. It is clear that something has to change to protect this program for disabled Americans who find themselves with no other option. At the ALJ level, the most obvious answer is including a representative for the Government at the ALJ hearing level to explain why the government denied the claimant twice before and create a balanced hearing. Further, including a government representative would make both the claimant and their attorney think twice about pursuing an appeal. Such as reform is supported by both the Social Security Advisory Board and the Association of Administrative Law Judges.

In the past, I have outlined a number of other commonsense reforms to update and modernize the disability programs. I urge Congress to take a hard look at this program. Otherwise, in just a few short years, it will not be available for those Americans who have no other choice but to rely on it.

Mr. LANKFORD. Thank you.

We will take a short recess to be able to reset the panel.

Dr. Coburn, thank you for being here and the work that you have done on the Senate side on this issue for a very long time.

[Recess.]

Mr. LANKFORD. I recognize myself for an opening statement.

The Social Security Administration oversees Federal disability programs, the Social Security Disability Insurance Program and the Supplemental Security Income Program. Over the past 25 years, the number of people enrolled in the Disability Insurance Program has tripled and the number of people enrolled in the SSI program has doubled.

Today's hearing focuses on the large growth in Federal disability programs. Growth has implications for the national economy, national character, and, as has already been mentioned, for those that desperately need the help the most. The rapid growth in these programs corresponds to a period of time when a typical job became less physically intensive and the health of Americans nearing retirement improved.

The consensus of expert, academics, and researchers from across the political spectrum attributes a large part of growth to a broader constituency attracted to the programs since claims are increasingly judged on subjective criteria. A large number of individuals who are able to work who are now receiving Federal disability benefits represents a large threat to disabled individuals who cannot work.

When the Disability Insurance Trust Fund is insolvent, in three years or less, benefits will be cut by 20 percent across the board. According to a 2010 paper published jointly by the Liberal Center for American Progress and the left-of-center Brookings Institution, SSDI is ineffective in assisting workers with disabilities to reach their employment potential or maintain economic self-sufficiency. Instead, the program provides strong incentives to applicants and beneficiaries to remain permanently out of the labor force.

Government policy that encourages permanent separation of an individual from the workforce is bad for the individual and for society. The Social Security Administration has failed to take steps to address the problem of the rapid disability growth, probably because the agency has failed to recognize many of these problems.

At today's hearing, four administrative law judges employed currently or formerly by the agency will testify about significant problems in the disability determination process at the appeal stage and how SSA rules and policies might be a part of the problem.

First, it is important to emphasize that disability cases typically only reach ALJs after applicants have been denied at the local disability determination level twice. Despite this, many ALJs have historically approved a vast majority of cases presented to them.

In 2010, the average rate at which ALJs awarded benefits in cases they decided was 67 percent. Nearly 100 ALJs awarded benefits in over 90 percent of the decisions, while 29 ALJs awarded benefits in over 95 percent of the decisions. The excessive approval rates by hundreds of judges over the past few years means there are probably millions of people receiving disability benefits who are able to work in this economy.

Second, it is important to emphasize the significance of the ALJs in the process. According to program expert Richard Pierce, as a practical matter, ALJs' decisions that grant disability benefits are final and irrevocable commitments of taxpayer funds. Less than 1 percent of individuals who are awarded benefits ever leave the rolls as beneficiaries. Part of the reason ALJ decisions are final is because the Social Security Administration has failed to prioritize continuing disability reviews since 2006. Despite its legal requirement to perform timely CDRs, the agency has allowed a backlog of over 1.3 million medical CDRs to develop.

The ALJ role is complicated by the increasingly subjective nature of criteria used to award benefits. The emergence of a profession earning immense profits from enrolling people in disability programs and several outdated and unwise agency policies, including the fact that the agency has failed for 35 years to update a vocational and medical grid used to determine eligibility, despite the significant change in the economy, health care, and life span. A treating physician rule gives disproportionate weight to the applicant's treating physician, even if the applicant has only seen that physician once. The agency does not require applicants and their representatives to include complete medical evidence. Almost all applicants are represented at hearings by attorneys or other advocates, while no one represents the Government or taxpayers at those hearings, so the ALJs only hear evidence from one side. The agency has failed to adequately address attorney misconduct that games the appeals process and the agency prevents ALJs from acquiring information about applicants from social media sources and other outside sources.

Today's hearing will examine these topics. It is also going to try to explore the effects of SSA's decision to decide cases more quickly to try to reduce the growing backlog.

In November 2011, The Wall Street Journal reported the agency was pressuring and incentivizing doctors to conduct quicker medical reviews. One doctor was quoted that the implication was that you really didn't have to be that careful to study the whole thing.

Some reforms to correct the broken disability determination process will need congressional action, but there are many steps the agency can unilaterally take to better protect American taxpayer dollars and those most in need, the truly disabled who will suffer most from a continuation of the excessive growth in disability claimants. I look forward to hearing about some of those steps today and try to find some resolution and ideas of how we are able to move forward.

With that, I recognize the gentlelady from California, Ms. Speier.

Ms. SPEIER. Mr. Chairman, thank you, and I thank the witnesses for being here today to participate in the hearing.

Disability insurance benefits are a lifeline program for people who can no longer work because of a serious disability. It is an all or nothing program; either you can work doing something, not necessarily what you used to do, or you can't work at all. It is not a generous program.

Average benefits are about \$1,130 for an individual and \$1,915 if you have a spouse and children. You are in or you are out. This is a benefit that American employees pay for through their FICA

taxes, and when disabled workers reach full retirement age they switch to Social Security and stop drawing disability insurance. Again, these are benefits that are earned.

For many years this was a system with poor leadership and no accountability. In 2007, more than 63,000 disabled claimants had to wait more than 1,000 days to have their claims adjudicated. The average wait time for a hearing in 2007 was 512 days. People died waiting for a decision. Many of these were the sole bread winners of their families.

In response to criticism from members of Congress who were hearing horror stories from their constituents, and some additional funding, the Social Security Administration undertook a massive task to improve its performance. They hired hundreds of additional administrative law judges and other support employees, utilized new technology and video hearings, and set preference goals to reduce the enormous backlog and processing time for claims.

There have been significant improvements. The backlog has been reduced and the average wait time is now down to 375 days. That is still too high, but certainly an improvement. At the same time, hearing level approval rates have gone down, from a high of 61 percent in 2008 to 47 percent in 2013.

Mr. Chairman, these numbers are significant. And there are a lot of numbers that we are throwing around. I think it would be helpful to us as a committee to get the actual numbers. If in fact the numbers have dropped to 47 percent, that is something for us to applaud. If they are still at 61 percent, then we have a problem. But from my understanding it has dropped to 47 percent.

The national approval rate for disability claims is the lowest it has been since the 1970s. I have been a vociferous critic of the VA for its backlog, and I think the SSA still has work to do to lower the current backlog and time delays. However, it must have the support of this body to do it.

The committee of jurisdiction, the Ways and Means Committee, held four hearings in the past year examining these changes and improvements, and approved of them. Now, some have decided months ago that the Social Security Administration was allowing the widespread, improper payment of disability insurance benefits.

I don't think it is proper to make up our minds before we hold a single hearing or initiate an investigation in this matter. Now, some have already stated the Federal disability claims are often paid to individuals who are not legally entitled to receive them. Well, there is fraud and abuse in virtually every system. Our job is to make sure we reduce it to the smallest amount possible.

Now, I am sure that there is some fraud in the system. In fact, the Social Security Administration had 1400 convictions in fraud last year. Continuing disability review to ensure that those receiving benefits are still eligible must be performed on schedule and the Social Security Administration must have the resources to do it. This is where I think we need to spend a lot more time. Many people are justifiably disabled for a period of time and then become capable of doing other work, and I don't think we have enough accountability on the back end, and that is where I think we should be spending a great deal of our time.

No one wants to hold any agency of Government accountable to the taxpayer or to uncover fraud and abuse more than I do, but I wish the committee would actually perform its oversight role by asking questions and considering answers before asking loaded questions or drawing such broad conclusions. If we did that, we would listen to the testimony of witnesses today and consider what they have to say in light of some facts. We would also recognize that some of the issues under discussion today are the subject of ongoing litigation. And I remind the members of this committee that we are prohibited from interfering in ongoing litigating.

There are some basic facts we should acknowledge before we begin. It is a fact that more people are applying for disability benefits than ever before. That is true in the veterans system as well. When we have a downturn in the economy, there is typically more access made to these programs. Those collecting disability insurance is also larger than ever before.

Is that evidence that the system is broken? Not necessarily. Because it is also true that it was known more than 20 years ago that the number of applicants and beneficiaries would significantly increase by 2016. An actuary already predicted this some 20 or 30 years because of us, the baby boomer, who have been growing older, and as we grow more feeble we need to access some of these services.

It is a fact that most ALJs meet or exceed the goals established by management's work plan, 79 percent of them, and there are few repercussions for ALJs who do not meet their targets. There are no performance reviews and they are appointed for life. Nobody is telling an ALJ how to decide a case, and I think it is important to point out that these ALJs are appointed for life. There are no performance reviews; there is no judicial council, as most States have for their judges, and that is something I think that is worth looking at as well.

It is also a fact that funding for the Social Security Administration has fallen dramatically in the past two fiscal year and we are likely to see backlogs grow again if this continues. Drawing conclusions before evaluating the evidence, before even asking any questions is not a credible way to conduct an oversight and Government reform.

I respect the work that administrative law judges do every day, as well as the work of State hearing officers, claimant representatives, and the management of the Social Security Administration, but I think accountability is part of this. And while there has been a lot of discussion and we are going to spend a lot of time today on the workload and the so-called goals that each ALJ is to make, let's make it very clear: they have the ability to handle as many cases or as few cases, and nobody, nobody can remove them from their position unless they conduct themselves in a manner that is immoral.

With that, I close.

Mr. LANKFORD. With that, we will have your admonition there to let's ask questions first, before we assume what the ALJs are going to say on it, and I definitely agree that the CDRs are an important, that is why I included it in my opening statement as well. We have a series of issues that have to be dealt with here. This is also not

the first hearing that has ever been done on this; we are joining a stream that is in motion. We are building on several hearings and then there are several more still to come.

Members may have seven days to submit opening statements for the record.

We will now recognize our panel today. Thank you for being here, all of you.

The Honorable Drew Swank is an administrative law judge for the Pittsburgh Office of Administrative Law Judges for the Department of Labor; the Honorable Larry Butler, the only one without an S in your last name, I may say, so you stand out there today on our panel, is an administrative law judge for the Ft. Myers Office of Disability Adjudication and Review for the Social Security Administration; Mr. Glenn Sklar is the Deputy Commissioner for the Office of Disability Adjudication and Review for the Social Security Administration. Thank you for being here, sir.

The Honorable J.E. Sullivan is an administrative law judge for the Office of Hearings with the Department of Transportation; the Honorable Thomas Snook is an administrative law judge for the Miami Office of Disability Adjudication and Review with the Social Security Administration; and Mr. Thomas Sutton is the past President and current member of the Board of Directors of the National Organization of Social Security Claimants' Representatives.

Thank you all for being here.

Pursuant to committee rules, all witnesses will be sworn in before they testify. Ironically enough, I need to ask all the witnesses, including the judges, to stand to be sworn in.

Please raise your right hand. Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you, God?

[Witnesses respond in the affirmative.]

Mr. LANKFORD. Thank you.

Let the record reflect the witnesses answered in the affirmative. You may be seated.

In order to allow time for discussion, we would ask you to limit your testimony to about five minutes. If you have not testified before, there is a little clock in front of you which we ask you to pay attention to, and we will sometimes pay attention to as well in the times ahead. That will count down from five to zero. You will see the lights go from green to yellow to red. If you get as close to five minutes as you can. You get bonus points for getting under five. And then we will allow the conversation to go after that when we do a round of questioning.

With that, I would like to recognize Judge Swank for the first statement.

STATEMENT OF THE HONORABLE DREW A. SWANK

Judge SWANK. Thank you, Mr. Chairman. I thank you for inviting me and the other honorable members of the subcommittee for inviting me to be here today.

I spent six years as an administrative law judge with the Social Security Administration. Based on questions of law and public policy I encountered, I wrote a series of Law Review articles. I have been asked to come here today to share some of the results of my

research and analysis. I would like to make clear that I am testifying in my personal capacity and my views do not necessarily reflect those of the Administration or the Department of Labor.

In my research, I discovered two reoccurring themes: first, the agency's overriding priority is to reduce the massive backlog of pending disability applications; second, the Social Security Administration has been going about this, at least in part, by improperly awarding benefits.

From 2000 to 2010, the number of disability applications grew over 25 times more than the growth of the Country's population. A common explanation for this has been the dismal state of the economy. Social Security disability programs were designed to assist adults who are unable to work due to a physical or mental impairment. They were never designed to be a substitute for unemployment insurance compensation.

Furthermore, there is an inherent inconsistency with the notion that a person can switch back and forth between working when the economy is good and collecting disability benefits when the economy is bad, irrespective of any disability. With this huge influx of disability applications from people who were working and lost their jobs just due to the economy, awards of disability benefits should have plummeted in the last few years. Instead, they have risen by 28 percent between 2007 and 2010.

Since 2009, twice as many people have applied for disability benefits as have started new jobs. Despite improvements in health care and shifts towards less physically intensive labor, the percentage of Americans receiving disability benefits has risen in the last 20 years. Something other than being disabled is encouraging individuals to apply for Social Security disability benefits. Working or not, disabled or not, people are increasingly seeing Social Security disability benefits as a relatively easy means of earning a lifetime of Government payments and a gateway to a host of other Government entitlement programs.

Because of this, a variety of observers have concluded that the agency's disability programs have become unsustainably generous. Furthermore, the agency's leadership, being most concerned with the ever-growing backlog of disability cases, has prioritized the speed of processing cases over accuracy. It has become increasingly clear that the agency, instead of only awarding benefits to adults who are unable to work, is effectively handing out money for free.

By even the agency's own analysis, 15 percent, or \$21 billion worth a year, of its administrative law judge decisions are improperly granting disability benefits. Even by Government standards, \$21 billion a year is real money.

Of course, the agency does not care if undesired benefits are granted; it is not the agency's money. If a claimant is paid, the case disappears, the backlog shrinks, and nobody ever complains. This is obviously not true if a case is denied. Denials lead to appeals or new applications, both of which increase the backlog.

In a shortsighted approach to the backlog problem, the agency's command climate is to pay the case so it goes away. This approach not only makes a mockery of the administrative disability adjudication process that Congress has created, but it harms the disabled public the agency is supposed to serve.

These problems are not merely academic. The trust fund that pays for the Social Security disability programs will exhaust its money in 2016, only three years away. Furthermore, improperly paying disability benefits harms the economy as a whole. Once awarded disability benefits, individuals will almost never return to the active workforce.

Beyond the cost to the taxpayer and to the economy, improperly paid disability benefits undermine the integrity of the entire system and stigmatizes the people who truly deserve their disability benefits, as the validity or degree of their disability will undoubtedly be called into question. The agency's improperly awarding disability benefits harms the very same people the agency is supposed to be helping and the taxpaying public that supports them.

Thank you.

[Prepared statement of Judge Swank follows:]

***MONEY FOR NOTHING: FIVE SMALL STEPS TO
BEGIN THE LONG JOURNEY OF RESTORING
INTEGRITY TO THE SOCIAL SECURITY
ADMINISTRATION'S DISABILITY PROGRAMS***

*Judge Drew A. Swank**

I. FROM THE BEGINNING¹: AN INTRODUCTION

The population of the United States grew by 9.7% from the years 2000 to 2010.² During the same period, the number of disability applications filed with the Social Security Administration (the "Agency") grew by 230%—over 25 times the growth of the country's population.³ Why? During those ten years there was Hurricane Katrina and other storms, tornados, and floods. Other decades, however, have also had severe weather that caused deaths, injuries, and losses. There were the terrorist attacks of September 11, 2001, and the wars in Afghanistan and Iraq in which our service members continue to courageously fight. There has not been, however, any pandemic or other

* Judge Drew A. Swank is a graduate of the Marshall-Wythe School of Law at the College of William and Mary and is a member of the Virginia Bar. A retired U.S. Army judge advocate and combat veteran, he has worked for both the Attorney General and Supreme Court of the Commonwealth of Virginia. From 2006 to 2012, he served as a Social Security administrative law judge adjudicating disability cases. In 2012, he was competitively selected to serve as an administrative law judge for the Department of Labor. The views expressed herein do not reflect those of the Social Security Administration, Department of Labor, or U.S. government.

1 EMERSON, LAKE & PALMER, *From the Beginning, on TRILOGY* (Atlantic Records 1972).

2. U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010, at 2 tbl.1 (Mar. 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>. The population of the United States in the year 2000 was 281,421,906. As of 2010, the population of the United States was 308,745,538. *Id.*

3. In the year 2000, 1,364,323 disability applications were filed with the Agency. OFFICE OF RESEARCH, EVALUATION, & STATISTICS, SOC. SEC. ADMIN., PUB. NO. 13-11827, ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2010, at 142 tbl.59 (2011), available at http://www.ssa.gov/policy/docs/statcomps/di_asr/2010/di_asr10.pdf. In 2010, 3,161,314 applications for disability benefits were filed. SOC. SEC. ADMIN., SUMMARY FISCAL YEAR 2010, at 3 (2011), available at <http://www.ssa.gov/pgm/FY2010SummaryOfPerformanceAndFinancialInformation-508Final.pdf>.

mass-disabling event affecting large portions of the United States' population.

A common explanation for the recent increase in Social Security disability applications has been the economy's unprecedented sustained unemployment—the worst since the Great Depression.⁴ Unemployed workers have increasingly given up looking for jobs and instead have sought Social Security disability payments.⁵ Since 2009, the number of people who have signed up for disability benefits is twice the number of people that have started new jobs.⁶ The Congressional Budget Office attempted to explain this by stating, “[w]hen opportunities for employment are plentiful, some people who could qualify for [disability] benefits find working more attractive . . . when employment opportunities are scarce, some of these people participate in the [disability insurance] program instead.”⁷

Social Security disability programs, however, were never designed to be a safety net for the jobless or a substitute for unemployment insurance compensation.⁸ Furthermore, there is an inherent inconsistency with the notion that a person can switch back and forth between working when the economy is good and collecting disability benefits when the

4. See, e.g., *Disability Payments: The Elephant in the Waiting-room*, ECONOMIST, Mar. 10, 2011, at 36, 36 [hereinafter *Disability Payments*]; Damian Paletta, *Insolvency Looms as States Drain U.S. Disability Fund*, WALL. ST. J., Mar. 12, 2011, at A1 [hereinafter Paletta, *Insolvency Looms*]; Lisa Rein, *Increase in Claims for Social Security Clogged by Denials*, WASH. POST, Mar. 29, 2011, at B4; Press Release, Gilda Mehraba, Disability Grp., The SSA's New Methods for Improving the Disability Claim Backlog (Feb. 2, 2011), <http://www.prweb.com/pdfdownload/8104909.pdf>; Brian Faler, *New Use Draining Social Security Disability Fund*, BOSTON GLOBE, May 30, 2012, <http://www.bostonglobe.com/news/nation/2012/05/29/social-security-disability-insolvent-unless-congress-votes/wmG61sP4AUS0Ep28oKobJN/story.html>; Russell Grantham, *Some Gains Made on Social Security Backlog*, ATLANTA J.-CONST., Nov. 1, 2010, <http://www.ajc.com/news/business/some-gains-made-on-social-security-backlog/nQmZh/>; John Merline, *5.4 Million Join Disability Rolls Under Obama*, INVESTOR'S BUS. DAILY (Apr. 20, 2012, 8:02 AM), <http://news.investors.com/article/608418/201204200802/ssdi-disability-rolls-skyrocket-under-obama.htm> [hereinafter Merline, *5.4 Million Join Disability*]; John Merline, *Labor Force Shrinks As Jobless Swell Disability Ranks*, INVESTOR'S BUS. DAILY (May 4, 2012, 9:31 AM) <http://news.investors.com/article/610306/201205040931/labor-force-shrinks-as-disability-grows.htm> [hereinafter Merline, *Labor Force Shrinks*].

5. Merline, *5.4 Million Join Disability*, *supra* note 4.

6. *Id.*

7. *Id.*

8. See, e.g., *Disability Payments*, *supra* note 4, at 36; Paletta, *Insolvency Looms*, *supra* note 4, at A1; Rein, *supra* note 4, at B4; Mehraba, *supra* note 4; Grantham, *supra* note 4; Merline, *5.4 Million Join Disability*, *supra* note 4. Since the ultimate question in a Social Security disability decision is whether or not an individual can work, the fact that many of these individuals are applying for disability benefits because they had been working but lost their job due to the downturn in the economy, and not their disability, would seem to answer the question as to whether or not they can work.

economy is bad. Merely losing a job is not in itself a reason to file for disability benefits. The Social Security Act (the “Act”)⁹ defines a disability as an “inability to engage in any substantial gainful activity [e.g., work] by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”¹⁰

The ultimate question in an adult Social Security disability case is whether an individual can work.¹¹ Unless the person loses his or her job due to a “medically determinable physical or mental impairment” or develops one subsequent to losing the job, there is no better proof he or she can work than the fact that they were working. In other words, if a person with back pain has been working for years and his or her place of employment closes due to the economy, absent the worsening of the back problem or a new medical issue, the very best evidence as to whether the person can work despite his or her back pain is the fact they had been working for years. With the huge influx of Social Security disability applications from people who were working and lost their jobs due to the economy, awards of disability benefits should have plummeted in the last several years. Instead, they have consistently risen.

Between 2007 and 2010, the number of Social Security disability benefits awarded has risen 28%.¹² The Social Security Administration claims the rise in the approval rate of disability claims arose from the hiring of more people to process applications, which in turn expedites the process.¹³ While an increase in staff could explain more cases being paid, as more cases are being processed overall, it does not logically explain an increase in the *approval rate* or percentage of cases being awarded benefits. Increases in staff or improved efficiency should have no effect whatsoever on the *rate* at which disability cases are approved, but rather should merely result in more cases being processed overall. Clearly, there must be some other reason for the 28% rise in the approval rate of Social Security disability cases in just a few years. “More Americans receive disability benefits than 20 years ago though people are less likely to have physically demanding jobs, health care has improved, and the Americans with Disabilities Act bans discrimination

9. Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–1397mm (2006)).

10. 42 U.S.C. § 423(d)(1)(A).

11. Heckler v. Campbell, 461 U.S. 458, 460 (1983).

12. *Disability Payments*, *supra* note 4, at 36; Jeffrey S. Wolfe & Dale D. Glendening, *What We Should Do About Social Security Disability: A Response to Richard J. Pierce, Jr.*, REGULATION, Spring 2012, at 16, 16.

13. See Grantham, *supra* note 4.

against the handicapped.”¹⁴ Something more than being unemployed is encouraging individuals to apply for Social Security disability benefits.

Working or not, disabled or not, people are increasingly seeing Social Security disability benefits as a relatively easy means of earning a lifetime of government payments, and a gateway to a host of other government entitlement programs.¹⁵ Because of this, a variety of commentators have reached the conclusion that the Social Security Administration’s disability programs have become unsustainably generous.¹⁶ In addition, over the years, Congress and the Social Security Administration “have gradually expanded the availability of entitlements to greater and greater numbers of persons.”¹⁷ Critics charge that “[t]he Social Security Act itself and the outdated jurisprudence underlying the current hearings and appeals system are the problem.”¹⁸ Furthermore, the Social Security Administration leadership, being most concerned about the ever-growing backlog of disability cases, has prioritized the speed of processing cases over accuracy.¹⁹ It has become increasingly clear the Social Security disability programs, instead of only awarding benefits to adults who are unable to work, is granting benefits to those who can work—effectively giving away money for nothing.

These problems are not merely academic. In fiscal year 2011, the Social Security Administration paid over \$175 billion in disability benefits to approximately 15 million recipients.²⁰ The trust fund that pays for the Social Security disability programs will exhaust its money in 2016—only four years away.²¹ This situation has led to calls for a massive overhaul of the Social Security disability programs, ranging

14. Faler, *supra* note 4.

15. See Drew A. Swank, *Welfare, Income Detection, and the Shadow Economy*, 8 RUTGERS J.L. & PUB. POL’Y 614, 633 (2011) [hereinafter Swank, *Welfare*]; Drew A. Swank, An Argument Against Administrative Acquiescence 9-11 (unpublished manuscript) (on file with author) [hereinafter Swank, *Administrative Acquiescence*]; Merline, *5.4 Million Join Disability Rolls*, *supra* note 4.

16. See Richard J. Pierce, Jr., *What Should We Do About Social Security Disability Appeals?*, REGULATION, Fall 2011, at 34, 34; Wolfe & Glendening, *supra* note 12, at 22; see also Merline, *5.4 Million Join Disability*, *supra* note 4 (discussing the loosening of Social Security disability rules).

17. Wolfe & Glendening, *supra* note 12, at 22.

18. *Id.* at 16.

19. See Damian Paletta, *Disability-Benefits System Faces Review*, WALL ST. J., Dec. 15, 2011, at A8 (“[S]peeding cases through the system has allowed, and in some cases encouraged,” disability benefits to be awarded in cases with less scrutiny.). For a discussion of the Social Security Administration’s backlog of cases, see Drew A. Swank, *The Social Security Administration’s Condoning of and Colluding with Attorney Misconduct*, 64 ADMIN. L. REV. 508, 517-19 (2012) [hereinafter Swank, *Condoning and Colluding*].

20. *Securing the Future of the Social Security Disability Insurance Program: Hearing Before the H. Comm. on Ways & Means*, 112th Cong. 1 (2012) [hereinafter *SSDI Program*] (statement of Michael J. Astrue, Comm’r, Social Security Administration).

21. Faler, *supra* note 4.

from eliminating entire aspects of the program to fundamentally changing how disability hearings are conducted.²² Only by such a top-to-bottom review and revision of the Act and the Agency's disability programs, critics argue, can the integrity be restored to the process.²³

These are intriguing arguments, worthy of further consideration. They have just one fundamental flaw: the Congress of the United States. Massive overhauls of government disability programs require massive amounts of legislation and Congress has not been able to pass a budget in years, let alone undertake comprehensive entitlement reform.²⁴ Furthermore, Social Security disability benefits are big business. Representing Social Security disability claimants is a multi-billion dollar industry.²⁵ Claimant representatives, who only get paid if their client is awarded disability benefits, have no incentive to change the system and kill the proverbial goose that lays the golden egg.²⁶ Likewise, individuals who are awarded benefits for which they do not qualify would not want any changes to the system that benefits them. Members of Congress, dependent upon campaign donations as much as on votes, are highly unlikely to advocate for disability program reform, as such efforts could label them as being against the "disabled."²⁷ Reform efforts, such as tightening eligibility rules for Social Security disability benefits, have failed before.²⁸

That is why this Article is different. It does not call for a complete restructuring of the Social Security disability programs which Congress will not do. As each journey begins with a single step, this Article advocates five small steps to start the very long journey of restoring the legitimacy and integrity of the Social Security disability programs, and in the process, ultimately reducing the growing disability case backlog. Only one of the five small steps requires any legislative change to the Social Security Act; the rest merely require following existing regulations or slight modifications to the current regulations that can be made by the Social Security Administration. The goal of these five small

22. Pierce, *supra* note 16, at 39 (recommending, *inter alia*, eliminating non-exertional impairments, such as mental illnesses, from being a basis for disability benefits to eliminating hearings before Social Security administrative law judges); Wolfe & Glendening, *supra* note 12, at 21 (advocating for an independent administrative law judge corps and formalized "rules of evidence" and "civil procedure" for use in hearings).

23. See generally Pierce, *supra* note 16.

24. *Where's the Budget? How the Dems Plan to Win*, UNION LEADER (Jan. 24, 2012, 7:39 PM), <http://www.unionleader.com/article/20120125/OPINION01/701259989/-1/opinion>.

25. Damian Paletta & Dionne Searcey, *Two Lawyers Strike Gold in U.S. Disability System*, WALL ST. J., Dec. 22, 2011, at A1.

26. See 20 C.F.R. § 404.1720(b)(4) (2012).

27. See Faler, *supra* note 4.

28. Merline, *5.4 Million Join Disability*, *supra* note 4.

steps is not to make it harder for individuals to get disability benefits, but rather to restore integrity to and confidence in the taxpayer-funded disability programs. Two of the suggested changes involve updating rules that are over 34 years old. Two of the other suggested changes advocate merely following existing rules and regulations, which Social Security Administration leadership has thus far been unwilling to do. The final suggestion is a regulatory change to remove one of the most glaring logical and legal inconsistencies of the Social Security disability programs. While taking these five small steps will not solve all of the problems with the Social Security disability programs, my solution demonstrates a willingness to restore at least part of the legitimacy of taxpayer-funded entitlement programs.

II. “WILL YOU STILL NEED ME, WILL YOU STILL FEED ME,
WHEN I’M SIXTY-FOUR?”²⁹: REALIGNING THE AGE CATEGORIES IN THE
MEDICAL-VOCATIONAL GUIDELINES TO MATCH REALITY

In a Social Security adult disability case, the ultimate issue is determining whether or not an individual can work: either in their previous job or any other job.³⁰ Prior to 1978, the Agency exclusively used vocational experts to provide evidence of “suitable jobs in the national economy” which a person with certain physical and/or mental impairments could perform.³¹ Due to inconsistencies in vocational expert testimony from claimant to claimant, the Social Security Administration implemented the medical-vocational guidelines in 1978 in an effort to improve both uniformity and efficiency.³² The medical-vocational guidelines consist of a matrix of four factors—physical ability, age, education, and work experience—which are used to determine eligibility for disability benefits.³³ The age factor is further subdivided into four categories: younger individual (age 18 to 49), closely approaching advanced age (50 to 54), advanced age (55 to 60), and closely approaching retirement age (over 60).³⁴

Things have changed, however, in the thirty-four years since the implementation of the medical-vocational guidelines. One change has been that the full retirement age for Social Security retirement benefits rose after the implementation of the medical-vocational guidelines from

29. THE BEATLES, *When I’m Sixty-Four*, on SGT. PEPPER’S LONELY HEARTS CLUB BAND (Parlophone Records 1967).

30. *Heckler v. Campbell*, 461 U.S. 458, 460 (1983).

31. *Id.* at 461.

32. *Id.*, see also *SSDI Program*, *supra* note 20, at 9-10.

33. *Heckler*, 461 U.S. at 461-62.

34. 20 C.F.R. pt. 404, subpt. P, app. 2 §§ 201(f)-(h), 203(c) (2012).

65 years of age to age 67 for individuals born after 1959.³⁵ One of the reasons Congress cited for this change in the benefits retirement age is the increase in the average life expectancy.³⁶ In 1978, when the medical-vocational guidelines were implemented, the average life expectancy in the United States was 73.5 years of age.³⁷ By 2012, the average life expectancy in the United States had risen to 78.7—over five years more than the average in 1978.³⁸ Another change in addition to a higher full Social Security retirement age and longer life expectancy has been the fact that people have begun working longer into old age.³⁹ While individuals polled in 1996 expected to retire at age 60, by 2012 the expected retirement age of individuals polled had increased to age 67.⁴⁰

One thing that has not changed, however, is the age categories of the medical-vocational guidelines despite the fact Americans live longer, work longer, and collect Social Security retirement benefits later. At the very least, the upper age in each category should be increased two years to match the increase in the retirement age for individuals born after 1960. More realistically, given the increase in life expectancy and the age at which individuals expect to retire, the age in each category for all individuals should be increased five years: younger individual (age 18 to 54), closely approaching advanced age (55 to 59), advanced age (60 to 64), and closely approaching retirement age (over 65). The medical-vocational guidelines were not written in stone; they need to evolve as lifespans change. The purpose of such a change is not to increase or decrease the likelihood of any one individual receiving disability benefits, but rather to have the medical-vocational guidelines reflect the reality of today, and not the reality of over three decades ago.

The age categories used in the medical-vocational guidelines are a construct of the Social Security Administration; they are not specified in the Social Security Act passed by Congress.⁴¹ No legislation would be

35. *Retirement Age Calculator*, SOC. SECURITY ADMIN., <http://www.ssa.gov/pubs/ageincrease.htm> (last updated June 6, 2012).

36. *Id.*

37. *Life Expectancy – United States*, DATA360, http://www.data360.org/dsg.aspx?Data_Set_Group_Id=195 (last visited Feb. 7, 2013).

38. *Id.*

39. Alicia Munnell, *8 Reasons Older People Are Working Longer*, MSN MONEY (Aug. 12, 2011, 7:45 AM), <http://money.msn.com/retirement/article.aspx?post=11024ee3-c635-4d6d-9f2d-336f5b850247>; see also Andrea Orr, *Americans Work Longer*, ECON. POL'Y INST. (Apr. 27, 2012), http://www.epi.org/publication/americans_work_longer

40. Allison Linn, *Americans Expect to Work Longer, Retire Later*, NBC NEWS (Apr. 30, 2012), http://lifeinc.today.com/_news/2012/04/30/11433757-americans-expect-to-work-longer-retire-later

41. *Compare* 20 C.F.R. pt. 404, subpt. P, app. 2 § 200(a) (detailing the medical-vocational guidelines), *with* Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42

required to change them beyond the Commissioner issuing a modification to the existing regulations.⁴² Criticism of the medical-vocational guidelines age categories is not new; over a decade ago it was suggested the Agency extend the definition of “advanced age” to age 60.⁴³ Given the additional passage of time since that argument was made, modifying the various age categories in the medical-vocational guidelines is long overdue.

III. “YOU DON’T UNDERSTAND ME”⁴⁴: ELIMINATING ENGLISH LANGUAGE ABILITY AS A FACTOR OF THE MEDICAL-VOCATIONAL GUIDELINES

The age categories of the medical-vocational guidelines are not the only factor that is outdated. An individual’s ability to communicate in English is included in the medical-vocational guidelines as a vocational factor.⁴⁵ “Because English is the dominant language of the country, it may be difficult for someone who doesn’t speak and understand English to do a job, regardless of the amount of education the person may have in another language.”⁴⁶ Accordingly, the claimant’s ability to communicate in English is considered when determining what work, if any, he or she can do.⁴⁷ For example, an individual who knows enough English to communicate as a hotel maid may not be able to communicate in English for purposes of other jobs.⁴⁸ As stated in the Social Security regulations:

While illiteracy or the inability to communicate in English may significantly limit an individual’s vocational scope, the primary work functions in the bulk of the unskilled work relate to working with things (rather than data or people) and in these work functions at the unskilled level, literacy and ability to communicate in English has the least significance. Similarly the lack of relevant work experience

U.S.C. §§ 301–1397mm (2006)) (making no mention of medical-vocational guidelines as part of the Social Security Act).

42. 42 U.S.C. § 902(a)(5).

43. Hon. John Marshall Meisburg, Jr., *Ten Ways to Improve the Social Security Disability Law and Save Billions of Dollars*, FED. LAW., May 2000, at 38, 40.

44. THE RACONTEURS, *You Don’t Understand Me*, on CONSOLERS OF THE LONELY (Third Man Records 2005).

45. 20 C.F.R. §§ 404.1564(b)(5), 416.964(b)(5) (2012); see Kathleen Pickering, Note, *Social Security Disability Determinations: The Use and Abuse of the Grid System*, 58 N.Y.U. L. REV. 575, 589 (1983).

46. 20 C.F.R. §§ 404.1564(b)(5), 416.964(b)(5); see Pickering, *supra* note 45, at 609.

47. 20 C.F.R. §§ 404.1564(b)(5), 416.964(b)(5).

48. Pickering, *supra* note 45, at 609 (citing *Minuto v. Sec’y of Health & Human Servs.*, 525 F. Supp. 261, 265-66 (S.D.N.Y. 1981)).

would have little significance since the bulk of unskilled jobs require no qualifying work experience. Thus, the functional capability for a full range of sedentary work represents sufficient numbers of jobs to indicate substantial vocational scope for those individuals age 18-44 even if they are illiterate or unable to communicate in English.⁴⁹

What is interesting is that the Social Security Administration merely asks the individual if they are able to speak or understand English; there is no burden of proof placed on the individual to demonstrate an inability to communicate in English.⁵⁰ At least in certain circumstances, a claimant asserting an inability to communicate in English increases his or her likelihood to receive disability benefits under the medical-vocational guidelines circumstances as compared to an individual with the same impairments who can communicate in English.⁵¹ At the sedentary exertion level of work,⁵² the inability to communicate in English only benefits claimants who have either no work experience or merely unskilled work experience who are between the ages of 45 to 49.⁵³ At the light exertion level of work,⁵⁴ the inability to communicate in English only benefits claimants who have either no work experience or merely unskilled work experience who are under the age of 55.⁵⁵ At all other exertion levels and age categories, the ability to communicate in English is not an enumerated factor of the medical-vocational guidelines.

But is the issue of English language ability as relevant in contemporary America as when the medical-vocational guidelines were introduced? Just as people are living longer and retiring later, the demographics of the United States have undergone a dramatic transformation since 1978. From 1980 to 2007, the percentage of individuals in the United States predominantly speaking a language other than English has grown by 140%, while the nation's overall population

49. 20 C.F.R. pt. 404 app. 2, § 201(h)(4)(i).

50. See, e.g., *GN 00203.011 Special Interviewing Situations: Limited English Proficiency (LEP) or Language Assistance Required*, SOC. SECURITY ADMIN., <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200203011> (last visited Feb. 7, 2013); *DI 11005.023 Completing the Disability Report Adult Form SSA-3368*, SOC. SECURITY ADMIN., <https://secure.ssa.gov/apps10/poms.nsf/lnx/0411005023> (last visited Feb. 7, 2013).

51. Pickering, *supra* note 45, at 609.

52. In the medical-vocational guidelines, sedentary work is defined as that work generally requiring lifting less than ten pounds and requires two hours or less of standing or walking and six hours or more of sitting. See 20 C.F.R. § 404.1567.

53. See 20 C.F.R. pt. 404, subpt. P, app. 2 tbl.1.

54. In the medical-vocational guidelines, light work is defined as that work generally requiring lifting up to twenty pounds occasionally and up to ten pounds frequently and requires six hours or more of standing or walking and two hours or less of sitting. See 20 C.F.R. § 404.1567.

55. See 20 C.F.R. pt. 404, subpt. P, app. 2 tbl.2.

only grew by 34%.⁵⁶ The number of people age 5 and older who speak a language other than English at home has more than doubled in the last three decades and grew at a pace four times greater than the nation's population growth—now totaling 20% of the population.⁵⁷ The use of Spanish as the predominant language in the home has risen the fastest in the United States; from 1980 to 2007 its use rose by 211%.⁵⁸ The longer a non-English speaker resides in the United States, the more likely they will communicate in English regularly, with 75% doing so after ten to fifteen years in the United States.⁵⁹

While the age categories used in the medical-vocational guidelines are not mentioned in the Act, English language ability is specifically addressed in two different parts of the Act. The first reference, found at 42 U.S.C. § 423(f), relates to terminating Title II disability benefits.⁶⁰ The “lack of facility with the English language” is a factor the Agency must consider along with the physical, mental, and educational limitations of a claimant when terminating his or her disability benefits.⁶¹ The second reference, found at 42 U.S.C. § 1383(c)(1)(A), relates to granting Title XVI disability benefits. That provision of the Act, just as with the Title II provision, states the Agency will take into account a claimant's “physical, mental, educational, or linguistic limitation of such individual (including any lack of facility with the English language) in determining” the award of disability benefits.⁶² Because these references to English language competency are in the actual Social Security Act, legislation would be required to remove them. The purpose of the change, as with changing the age categories of the medical-vocational guidelines, is not to make it more or less likely that a claimant receive disability benefits, but rather to make the factors considered in the disability adjudication process reflect the America of today and how it has changed since 1978.

As a pragmatic matter, the inability to speak or understand English while trying to find a job could certainly make it more difficult. By the

56. Press Release, U.S. Census Bureau, New Census Bureau Report Analyzes Nation's Linguistic Diversity (Apr. 27, 2010), http://www.census.gov/newsroom/releases/archives/american_community_survey_acs/cb10-cn58.html.

57. *Id.*, see also U.S. CENSUS BUREAU, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY 2000, at 2 (Oct. 2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>.

58. Charlie Jolly, *Number of Non-English-Speaking Households Rises in the US*, K-INT'L (May 27, 2012), <http://www.k-international.com/blog/non-english-speakers-in-us>.

59. Stina Santiestevan, *Use of the Spanish Language in the United States: Trends, Challenges, and Opportunities*, ERIC DIGS. (May 1991), <http://www.ericdigests.org/pre-9221/spanish.htm>.

60. 42 U.S.C. § 423(f) (2006). For a discussion of the types of Social Security disability programs, see Swank, *Welfare*, *supra* note 15, at 618-19.

61. 42 U.S.C. § 423(f).

62. *Id.* § 1383(c)(1)(A).

same token, having a felony conviction, being unattractive, or living in Detroit can all make it more difficult to find a job.⁶³ At least one commentator has even claimed the inability to communicate in English may itself be a non-exertional impairment—a disability.⁶⁴ The Social Security Act, however, defines a disability as an “inability to engage in any substantial gainful activity [e.g., work] by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”⁶⁵ Utilizing this definition, the test to determine if an individual qualifies for Social Security disability benefits is by deciding if the claimant’s:

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), “work which exists in the national economy” means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.⁶⁶

Furthermore, a “‘physical or mental impairment’ is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.”⁶⁷ The inability to communicate in English would not qualify under these definitions as a “disability” unless the individual had a mental or physical impairment that prevented communication in any language, and not just English. Twelve years ago the argument was raised to abolish the inability to communicate in English as a factor in awarding disability benefits.⁶⁸ Since then, the number of non-English speaking workers in the United States has

63. See Jamie Barrand, *Felony Records Make Job Hunt Difficult*, J. REV. (Apr. 27, 2011, 1:15 AM), http://www.journalreview.com/news/article_063933ae-706e-11e0-9750-001cc4c03286.html; Marty Nemko, *Working While Ugly: Career Advice for the Unattractive*, JEWISH WORLD REV. (May 25, 2006), <http://www.jewishworldreview.com/0506/nemko052506.php3>; John Zaphyr, *Worst Cities in the U.S. to Find a Job*, eHow, http://www.ehow.com/print/info_7931810_worst-cities-job.html (last visited Feb. 7, 2013).

64. Pickering, *supra* note 45, at 609.

65. 42 U.S.C. § 423(d)(1)(A).

66. *Id.* § 423(d)(2)(A).

67. *Id.* § 423(d)(3).

68. Meisburg, *supra* note 43, at 42, 44.

dramatically increased. Just as with the arguments for realigning age categories in the medical-vocational guidelines, the argument for eliminating considerations of linguistic abilities from the adjudication of disability benefit awards is even stronger a decade later.

IV. “EVERY BREATH YOU TAKE, EVERY MOVE YOU MAKE,
EVERY BOND YOU BREAK, EVERY STEP YOU TAKE, I’LL BE WATCHING
YOU”⁶⁹: THE FAILURE OF THE SOCIAL SECURITY ADMINISTRATION TO
DO MANDATORY CONTINUING DISABILITY REVIEWS

The Act provides a mechanism to ensure that the approximately fifteen million current disability benefit recipients continue to be eligible to receive their benefits.⁷⁰ A Continuing Disability Review is “a review of continued eligibility for disability benefits previously awarded” by the Social Security Administration.⁷¹ The Act requires Continuing Disability Reviews of all beneficiaries with nonpermanent impairments at least once every three years.⁷² This three-year review requirement also applies to children receiving disability benefits whose impairments are likely to improve.⁷³ Additionally, if there are earnings reported for the individual above substantial-gainful activity levels, a Continuing Disability Review must be conducted.⁷⁴ For a small investment of administrative resources, Continuing Disability Reviews save billions of taxpayer dollars.⁷⁵ For each dollar spent on a Continuing Disability Review, an average of \$15 in improperly paid benefits is saved.⁷⁶

69. THE POLICE, *Every Breath You Take*, on SYNCHRONICITY (A & M Records 1983).

70. See *SSDI Program*, *supra* note 20, at 1.

71. *Social Security’s Payment Accuracy: Joint Hearing Before the Subcomm. on Oversight & Social Sec. of the H. Comm. on Ways & Means*, 112th Cong. 3 (2011) [hereinafter Statement of Ann P. Robert] (statement of Ann P. Robert, President Elect, National Council of Disability Determination Directors), available at <http://waysandmeans.house.gov/uploadedfiles/robert222.pdf>; see also OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., SEMI-ANNUAL REPORT TO CONGRESS: OCTOBER 1, 2009–MARCH 31, 2010, at 22 (March 2010) [hereinafter SEMI-ANNUAL REPORT], available at http://oig.ssa.gov/sites/default/files/semiannual/sar102009032010_0.pdf.

72. Statement of Ann P. Robert, *supra* note 71, at 3 (citing sections 221(i) and 1614(a)(3) of the Social Security Act).

73. 42 U.S.C. § 1382c(a)(3)(H)(ii) (2006).

74. OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., FOLLOW-UP ON DISABLED TITLE II BENEFICIARIES WITH EARNINGS REPORTED ON THE MASTER EARNING FILE 2 & n.10 (April 15, 2009) [hereinafter TITLE II BENEFICIARIES AUDIT] (citing 20 C.F.R. § 404.1590(b)(5) (2012)), available at <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-08-28075.pdf>.

75. *Hearing Before the S. Fin. Comm.*, 112th Cong. 11 (2012) [hereinafter *Hearing Before Fin. Comm.*] (statement of Michael J. Astrue, Comm’r, Social Security Administration), available at <http://www.finance.senate.gov/imo/media/doc/SSA-%20Testimony-%20Astrue-FINAL.pdf>.

76. TITLE II BENEFICIARIES AUDIT, *supra* note 74, at 7 & n.25.

Unfortunately, the Agency does not conduct Continuing Disability Reviews as required by the Act, despite, for example, the proven effectiveness of Childhood Continuing Disability compared with 163,768 in fiscal year 2002.⁷⁷ In a 2006 audit conducted by the Agency's Office of Inspector General, 39% of these Childhood Continuing Disability Reviews were not conducted in accordance with the requirements of the Act.⁷⁸ The failure to conduct the Childhood Continuing Disability Reviews resulted in \$194.7 million in disability payments to 205,900 individuals that should not have been paid.⁷⁹ Because of its failure to comply with the specific requirements of the Act, the Agency agreed to perform all Childhood Continuing Disability Reviews as mandated in the statute.⁸⁰

Five years later, the Agency did not complete 78.5% of the required Childhood Continuing Disability Reviews as required by the Act—two times worse than in 2006.⁸¹ The failure to conduct these Childhood Continuing Disability Reviews resulted in \$1.4 billion in disability payments—seven times the 2006 amount—to approximately 513,300 recipients who should not have been paid, and will continue to cost approximately \$462 million per year in improper disability payments until the reviews are conducted.⁸² Even though five years earlier the Agency agreed to comply with the requirements of the Act and conduct appropriate Childhood Continuing Disability Reviews, the Agency in 2011 asserted that “budget constraints and other priority workloads” continue to be responsible for its failure to comply with the specific requirements imposed upon it by the statute, but that it hopes to comply “as its budget and other priority workloads will allow.”⁸³ There is, however, no provision in the Act that allows the Agency to ignore the specific requirement to conduct Childhood Continuing Disability Reviews because of “other priority workloads.”⁸⁴ Instead, the Agency seems to have determined when it will, and will not, comply with the specific requirements of the Act. Its legal basis for doing so is unknown.

77. OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., FOLLOW-UP: CHILDHOOD CONTINUING DISABILITY REVIEWS AND AGE 18 REDETERMINATIONS 7 tbl.5 (2011) [hereinafter CHILDHOOD CONTINUING DISABILITY AUDIT], available at http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-11-11118_0.pdf.

78. *Id.* at 2.

79. *Id.*

80. *Id.*

81. *Id.* at 3 tbl.1. Of the 78.5% of the childhood continuing disability reviews not done in accordance with the Act, 93% were never done and 7% were late. *Id.* at 4.

82. *Id.* at 3.

83. *Id.* at 8.

84. See 42 U.S.C. § 1382c(a)(3)(H)(ii) (2006); CHILDHOOD CONTINUING DISABILITY AUDIT, *supra* note 77, at 8.

The “budgetary constraints” excuse of the Agency is particularly interesting. Since fiscal year 2009, the Agency has requested and received from Congress special additional funding solely for the purpose of conducting Continuing Disability Reviews.⁸⁵ Despite the Agency receiving over 1.2 billion additional dollars for this purpose since 2009, the current number of Continuing Disability Reviews is nowhere near the level in fiscal year 2003 when the Agency received no additional funding.⁸⁶ In fiscal year 2010, with the additional funding, the Agency conducted almost eight times fewer Childhood Continuing Disability Reviews as compared to the number conducted in fiscal year 2003—when there was no additional funding.⁸⁷ With over a billion more dollars given to the Agency specifically to do Continuing Disability Reviews, it conducted 87% fewer Childhood Continuing Disability Reviews than when it was not given any additional money. Childhood Continuing Disability Reviews are not the only types of reviews that have decreased with the additional funding; the number of adult medical Continuing Disability Reviews for both Title II and adult Title XVI recipients in fiscal year 2010 was only 47% of the number completed in fiscal year 2004—when there was no additional funding.⁸⁸ Had these reviews been performed as required by the Social Security Act, between \$1.3 billion and \$2.6 billion in improper payments could have been saved.⁸⁹

Given the inverse results, “budgetary constraints” does not seem to be the real reason for the Agency’s failure to abide by the Act and conduct the required Continuing Disability Reviews. If the Agency is not doing Continuing Disability Reviews due to “budgetary constraints,” then the sole remaining reason is its emphasis on “other priority workloads.”⁹⁰ According to the Commissioner of the Social Security Administration, eliminating the backlog of disability cases awaiting a hearing is the Agency’s top priority.⁹¹ In fiscal year 2011, the Social Security Administration received approximately 877,000 hearing

85. CHILDHOOD CONTINUING DISABILITY AUDIT, *supra* note 77, at 6 & tbl.4.

86. *Id.* at 6 & tbl.4, 7 tbl.5.

87. *Id.* at 7 tbl.5. In fiscal year 2010, the Agency conducted 16,677 Childhood Disability Reviews. In fiscal year 2003, it had conducted 127,444. *Id.*

88. See *Hearing Before Fin. Comm.*, *supra* note 75, at 12 tbl.1.

89. SEMI-ANNUAL REPORT, *supra* note 71, at 22.

90. CHILDHOOD CONTINUING DISABILITY AUDIT, *supra* note 77, at 5.

91. *Hearing Before Fin. Comm.*, *supra* note 75, at 3; *SSDI Program*, *supra* note 20, at 18; see, e.g., Damian Paletta, *Disability-Claim Judge Has Trouble Saying “No”: Near-Perfect Approval Record; Social-Security Program Strained*, WALL ST. J., MAY 19, 2011, at A1 [hereinafter Paletta, *Disability-Claim Judge*]; Amy Reifenrath, *Cheaters Cost Social Security Billions*, OREGONIAN (Dec. 6, 2008, 8:36 PM), http://www.oregonlive.com/news/index.ssf/2008/12/disability_fraud_saps_social_s.html.

requests, about 22% more than it received in fiscal year 2010.⁹² Congress has consistently investigated, criticized, and publicly chastised the Agency for this backlog.⁹³ In response to this criticism, the Agency has repeatedly stated the elimination of the backlog—and the source of public and congressional disapproval—is its top priority.⁹⁴

The fact the Social Security Administration does not want anything to impede the quick processing of the backlogged cases has previously been exposed to both Congress and the media.⁹⁵ Conducting Continuing Disability Reviews, irrespective of their requirement in the Act, takes administrative, personnel, and monetary resources away from the foremost goal of eliminating the hearing backlog. Even worse, conducting Continuing Disability Reviews actually makes the hearing backlog grow. If claimants' benefits are terminated due to a Continuing Disability Review, they can always file a new application for benefits. The new application for disability benefits will need to be processed and decided like any other disability case, and if it goes to a hearing, it adds to the backlog. As there is no limit to how many applications a person may file and there is no cost to the person to do so, there is no reason why a person whose benefits have been terminated due to a Continuing Disability Review would not file a new application.⁹⁶ With each new application for disability benefits that is filed, whether resulting from a Continuing Disability Review or not, the backlog grows. Of course, if no Continuing Disability Review is ever conducted, more taxpayer money will continue to be improperly spent.⁹⁷

92. *Hearing Before Fin. Comm.*, *supra* note 75, at 5; Rein, *supra* note 4, at B4.

93. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-667T, SOCIAL SECURITY DISABILITY: MANAGEMENT OF DISABILITY CLAIMS WORKLOAD WILL REQUIRE COMPREHENSIVE PLANNING 4 (2010) (statement of Daniel Bertoni, Director of Education, Workforce, and Income Security); Ed Madrid, *Benefits Backlog Swells as Social Security Slims*, OREGONIAN (Aug. 4, 2008, 3:35 PM), http://www.oregonlive.com/special/index.ssf/2008/08/benefits_backlog_swells_as_soc.html.

94. See, e.g., *Funding Social Security's Administrative Costs: Will the Budget Meet the Mission: Hearing Before the S. Fin. Comm.*, 110th Cong. 3 (2007) (statement of Michael J. Astrue, Comm'r of Social Security Administration); Press Release, Soc. Sec. Admin., Social Security Administration Attacks Disability Backlog (Oct. 9, 2007), <http://www.ssa.gov/pressoffice/pr/disability-backlog-pr.htm>.

95. Paletta, *Disability-Claim Judge*, *supra* note 91 "Critics blame the Social Security Administration, which oversees the disability program, charging that it is more interested in clearing the giant backlog than ensuring deserving candidates get benefits." *Id.*

96. Beginning July 28, 2011, a claimant who has a claim pending in the Agency's administrative review process may not file a new claim of the same benefit type until the previous claim is adjudicated. There is no prohibition on filing a different type of claim (for instance, filing a Title XVI claim if there is already a Title II claim) nor any limit on the total number of claims that may be filed during a person's lifetime. Titles II and XVI: Procedures for Handling Requests to File Subsequent Applications for Disability Benefits, 76 Fed. Reg. 45309 (July 28, 2011).

97. As opposed to a private insurer, because someone else pays the bills (e.g., the taxpayer),

Unlike the other four suggestions in this Article to restore the integrity to the Social Security disability process, conducting Continuing Disability Reviews requires no statutory or regulatory changes. The Act already requires the Agency to conduct a variety of Continuing Disability Reviews. All that is needed is for the Agency to do what it is required to do, what it has stated it must do, and what it has been given extra money to do. Unfortunately, because these reviews do not reduce the backlog, the Social Security Administration is unlikely to ever conduct Continuing Disability Reviews as required.

V. “TELL ME EVERYTHING”⁹⁸: INTENTIONALLY CONCEALING ADVERSE MEDICAL AND VOCATIONAL INFORMATION AND FRAUD

The Social Security Administration’s disability hearings are non-adversarial in which the government is not represented.⁹⁹ There is no opposing party at the hearing to introduce evidence contrary to the application for disability benefits. The Agency relies on the claimant and his or her representative for information on which health care providers the claimant has seen.¹⁰⁰ This disparity of knowledge creates 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.¹⁰¹ As the average claimant’s lifetime award is over \$300,000 and the representative being paid either 25% of the back benefits (or \$6000, whichever is less) only if the claimant is awarded benefits, there is a strong incentive for both the representative and the claimant to not disclose adverse vocational or medical information to the Agency.¹⁰²

there is no incentive for the Social Security Administration to keep the number of cases paid low. See Paletta, *Insolvency Looms*, *supra* note 4, at A16 (discussing the common belief of claimants’ that “big, rich Uncle Sam’s money” pays for their Social Security disability benefits where in reality it is the American taxpayer).

98. CHEAP TRICK, *Tell Me Everything*, on *WOKE UP WITH A MONSTER* (Warner Bros. Records 1994).

99. See 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); Swank, *Administrative Acquiescence*, *supra* note 15, at 12-13.

100. *DI 2250.006 Requesting Evidence – General*, SOC. SECURITY ADMIN., <https://secure.ssa.gov/poms.nsf/lnx/0422505006> (last visited Feb. 7, 2013) (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).

101. Rains, *supra* note 99, at 364.

102. Paletta, *Insolvency Looms*, *supra* note 4, at A16. The \$300,000 amount is merely for the average of Social Security disability benefits, and not the total amount, which could include additional government benefits that can become available—such as Medicaid—with a grant of Social Security benefits. See *Maximum Dollar Limit in the Fee Agreement Process*, 74 Fed. Reg. 6080, 6080 (Feb. 4, 2009); Paletta & Searcey, *supra* note 25, at A16.

Companies that specialize in representing Social Security disability applicants have allegedly even institutionalized the process of withholding any information that might make it more difficult for their client—and their firm—to be paid.¹⁰³

The purpose of a Social Security Act, however, is to provide assistance for those who cannot work due to a medically determinable impairment.¹⁰⁴ Just as with any other welfare program, the goal is to determine eligibility for benefits.¹⁰⁵ The only way to do this is to consider all of the medical and vocational information, not just the favorable information. The goal of the Social Security disability programs should not be to reward those who cheat or hide evidence the most successfully.¹⁰⁶ At least one commentator has concluded that Social Security representatives have a duty to disclose adverse information. In *Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance with Federal Rules on Production of Evidence*,¹⁰⁷ Professor Robert Rains examines and ultimately rejects the arguments against disclosure of all evidence by Social Security claimant representatives.¹⁰⁸ Tracing a series of federal statutes, he concludes that the Social Security Protection Act of 2004 (the “Protection Act”)¹⁰⁹ mandates full disclosure of all evidence—good and bad—by claimant’s representatives and trumps any state bar ethics rules.¹¹⁰ The provisions of the Protection Act have been incorporated into the Social Security Act, and provide for a five-year felony sentence for making or causing to be made “any false statement or representation of a material fact in any application for any payment” for disability benefits.¹¹¹ Furthermore, the Protection Act permits the Social Security Administration to impose monetary penalties for failing to disclose material facts relevant to the determination to grant disability benefits.¹¹²

103. Paletta & Searcey, *supra* note 25, at A16. In 2011, one company that supposedly withholds medical information from the Social Security Administration received \$88 million in fees, more than any other disability representative company. *Id.*

104. Heckler v. Campbell, 461 U.S. 458, 460 (1983).

105. See generally Swank, *Welfare*, *supra* note 15.

106. See *id.* at 639.

107. Rains, *supra* note 99.

108. *Id.* at 390-91.

109. Social Security Protection Act of 2004, Pub. L. No. 108-203, 118 Stat. 493, 493-541 (2004) (codified as amended in scattered sections of 26 & 42 U.S.C.).

110. Rains, *supra* note 99, at 391-94.

111. 42 U.S.C. § 408(a) (2006); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-849, SUPPLEMENTAL SECURITY INCOME: PROGRESS MADE IN DETECTING AND RECOVERING OVERPAYMENTS, BUT MANAGEMENT ATTENTION SHOULD CONTINUE 13 (2002), available at <http://www.gao.gov/assets/240/235391.pdf>.

112. Rains, *supra* note 99, at 377.

The Commissioner of the Social Security Administration delegated this sanction power to the Agency's Office of the Inspector General.¹¹³

The Social Security Act also allows for the Commissioner to suspend or disqualify a claimant representative who refuses to comply with the Agency's rules and regulations.¹¹⁴ The Code of Federal Regulations, mirroring the Act, forbids making or participating in the making of false or misleading statements, assertions, or representations regarding a material fact or law, with claimant representatives who do so liable to suspension or disqualification from serving as a representative.¹¹⁵ Additionally, both the Social Security Administration's hearing manual and policy manual reiterate these same requirements and likewise provide for the suspension or disqualification of representatives who violate "the affirmative duties of a representative or engaged in actions prohibited by the Commissioner's rules and regulations."¹¹⁶ The Agency's Office of General Counsel is responsible for issues of representative suspension or disqualification.¹¹⁷ However, Social Security administrative law judges, attorneys, and staff are prohibited by Agency policy from reporting representative misconduct to anyone other than agency management—a ban which includes reporting the suspected misconduct to the representative's state bar or the Agency's own Office of the Inspector General or Office of General Counsel.¹¹⁸ If any action is to be taken, it is up to management to forward it to the Office of General Counsel for investigation.¹¹⁹

Unfortunately, the Agency has a very poor record of sanctioning representative misconduct.¹²⁰ On average, each year 5.56 of the estimated total 31,000 attorney and non-attorney representatives—or

113. *Id.* at 378.

114. 42 U.S.C. § 406(a)(1).

115. 20 C.F.R. §§ 404.1740(c)(3), 404.1745, 416.1540(c)(3), 416.1545 (2012).

116. See OFFICE OF DISABILITY ADJUDICATION & REVIEW, SOC. SECURITY ADMIN., HALLEX: HEARINGS, APPEALS AND LITIGATION LAW MANUAL § I-1-1-40 (2011), available at http://ssa.gov/OP_Home/hallex/I-01/I-1-1-40.html; GN 03970.010 *Rules of Conduct and Standards of Responsibility for Representatives*, SOC. SEC. ADMIN., <https://secure.ssa.gov/apps10/poms.nsf/lnx/0203970010> (last visited Feb. 7, 2013).

117. OFFICE OF DISABILITY ADJUDICATION & REVIEW, SOC. SEC. ADMIN., HALLEX: HEARINGS, APPEALS AND LITIGATION LAW MANUAL § I-1-1-50(B) (2011), available at http://ssa.gov/OP_Home/hallex/I-01/I-1-1-50.html.

118. *Id.* § I-1-1-50(A) (requiring any staff person who observed or detected suspected violations of the rules pertaining to a representative's conduct to provide that information to their office management).

119. *Id.* § I-1-1-50(A)(4).

120. Swank, *Conditioning and Colluding*, *supra* note 19, at 519; Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. U. L.J. 223, 242 (2012).

.018%—are suspended or disqualified by the Agency.¹²¹ “The average number of attorneys (as opposed to non-attorneys) suspended or disqualified each year by the Agency is 2.4, or .009% of the estimated total number of attorney representatives.”¹²² This percentage of suspended or disqualified attorneys is sixteen times less than the number of attorneys disbarred in an average year in either Georgia or Maryland.¹²³ Considering that disbarment or other punishment by a state bar has been historically very rare, the fact that the Agency does the equivalent sixteen times fewer than state bars is incredible.¹²⁴ Furthermore, the few attorneys the Agency suspends or disqualifies each year have normally already been disbarred—and in some cases convicted of a crime and even incarcerated—prior to the Agency taking any action.¹²⁵ Because of management’s refusal to take misconduct seriously, the laws intended to prohibit concealing or misrepresenting adverse material facts are rendered meaningless.

Accordingly, the commissioner of the Social Security Administration should modify the regulations and additionally delegate to the administrative law judges who preside over the disability hearings

121. OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., CLAIMANT REPRESENTATIVES BARRED FROM PRACTICING BEFORE THE SOCIAL SECURITY ADMINISTRATION 1 n.3 (Sept. 28, 2007), available at <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-07-17057.pdf>; Swank, *Condoning and Colluding*, *supra* note 19, at 519-20. Attorneys represent 63% of Social Security disability claimants, 11% are represented by non-attorneys, and the remaining 26% of claimants are *pro se*. OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., DEMONSTRATION PROJECT FOR NON-ATTORNEY REPRESENTATIVES 3 (June 5, 2006), available at <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-06-16013.pdf>; Swank, *Condoning and Colluding*, *supra* note 19, at 519-20; see also Rains, *supra* note 99, at 370.

122. Swank, *Condoning and Colluding*, *supra* note 19, at 520.

123. See, e.g., THE ATTORNEY GRIEVANCE COMM’N OF MD., 33RD ANNUAL REPORT: JULY 1, 2007 THRU JUNE 30, 2008, at 4-13, available at <http://www.courts.state.md.us/attygrievance/pdfs/annualreport.pdf> (demonstrating that in Maryland in fiscal year 2008, 45 of the approximately 33,400 attorneys in the state were disbarred or suspended, or 0.13%); BD. OF GOVERNORS, STATE BAR OF GA., 2010 REPORT OF THE OFFICE OF THE GENERAL COUNSEL 9 (2010), available at http://www.gabar.org/barrules/ethicsandprofessionalism/upload/OGC_Report_09_10.pdf. Fifty-nine attorneys were either disbarred or suspended out of a total of 36,500 (or 0.16%). BD. OF GOVERNORS, *supra*; Swank, *Condoning and Colluding*, *supra* note 19, at 520 & n.74.

124. Derek A. Denckla, *Responses to the Conference: Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2594 (1999) (suggesting that studies of the lawyer discipline system demonstrate that lawyers rarely suffer any consequences for incompetence or other failings); see also *National Affairs: Disbarred*, TIME, Nov. 27, 1939, at 15 (demonstrating that this observation had been previously made over seventy years ago).

125. Of those attorneys suspended or disqualified by the Social Security Administration, the majority were already sanctioned by their own state bar, and the Agency’s disciplinary action was merely to prohibit those individuals from representing claimants before it based on the action of their respective state bar, and not because the agency had pursued its own misconduct investigations regarding the conduct of those attorneys. AALJ Education Conference: Labor Management Meeting, NEWSL. & PRESIDENT’S REP. (Ass’n Admin. Law Judges), June 13, 2011, at 8-9.

the authority to ensure that all material evidence is submitted to the Agency.¹²⁶ Social Security administrative law judges are unusual in that they have no authority to sanction misconduct. Other federal agencies' administrative law judges are routinely allowed to sanction representative misconduct. For example, administrative law judges with the International Trade Commission are authorized to impose monetary penalties and non-monetary sanctions for representative misconduct.¹²⁷ Federal Trade Commission and Department of Labor administrative law judges can discharge representatives from cases for misconduct.¹²⁸ Federal Trade Commission, Department of Labor, and International Trade Commission administrative law judges are selected and appointed from the same pool as Social Security administrative law judges.¹²⁹ For some reason, while these agencies authorize their administrative law judges to sanction representatives who appear before them for misconduct, the Social Security administrative law judges are only allowed to report misconduct to Agency management.

Just as with actually performing the Continuing Disability Reviews, however, there is almost no likelihood the Agency will either enforce the requirement that all evidence be submitted to it or authorize its administrative law judges to sanction representatives' failure to do so, as neither would be perceived as means of reducing the backlog of disability hearings. As the requirement to submit adverse evidence is never enforced, there is no need for claimants' representatives to comply with the requirement. As the available evidence demonstrates that Social Security claimant representatives are no more ethical than any other type of attorney, and regardless of the requirement to produce adverse evidence, some Social Security disability claims will not be adjudicated on their merits, but will rather be decided by deceit and falsehood to the detriment of both the taxpayer and the truly disabled.¹³⁰

126. See 42 U.S.C. § 902(a)(5) (2006).

127. 19 C.F.R. § 210.4(d) (2012).

128. See, e.g., 16 C.F.R. § 3.42(d) (2012); 29 C.F.R. § 18.36(b) (2012).

129. See 5 U.S.C. § 3105 (2006).

130. Swank, *Condoning and Colluding*, *supra* note 19, at 520 & n.77; Swank, *Welfare*, *supra* note 15, at 638-41.

VI. “WELL I’VE BEEN LOOKIN’ REAL HARD, AND I’M TRYIN’ TO FIND
A JOB, BUT IT JUST KEEPS GETTIN’ TOUGHER EVERY DAY”¹³¹;
THE INCONSISTENCY OF RECEIVING STATE UNEMPLOYMENT
INSURANCE COMPENSATION WHILE SEEKING SOCIAL SECURITY
DISABILITY BENEFITS

F. Scott Fitzgerald was quoted as saying, “[t]he test of a first-rate intelligence is the ability to hold two opposing ideas in mind at the same time and still retain the ability to function.”¹³² Psychologists refer to this phenomenon of attempting to reconcile two conflicting ideas as cognitive dissonance.¹³³ Whether by genius or psychosis, many Social Security disability claimants applying for benefits due to an alleged inability to work are at the same time already collecting state unemployment compensation benefits by asserting they are able to work. Both assertions—one made to the federal government that the person is unable to work while at the very same time asserting to a state government that they can work—cannot be true.

When a person applies for Social Security disability benefits, he or she is asserting that due to “medically determinable physical or mental impairment[s],” he or she is unable to work for at least twelve months either in his or her past jobs or, considering his or her age, education, and work experience, any other jobs at substantial gainful activity levels.¹³⁴ This assertion is time specific; there is a specific alleged onset of disability date.¹³⁵ The problem arises when a person collects unemployment benefits for a period of time overlapping the alleged onset of disability date. In all fifty states, a person must certify they are able to work in order to collect unemployment benefits.¹³⁶ A few states,

131. STEVE MILLER BAND, *Rock’n Me*, on FLY LIKE AN EAGLE (Capitol Records 1976).

132. *F. Scott Fitzgerald Biography*, BIOGRAPHYBASE.COM, http://www.biographybase.com/biography/Fitzgerald_F_Scott.html (last visited Feb. 7, 2013).

133. Kendra Cherry, *What Is Cognitive Dissonance?*, ABOUT.COM, <http://psychology.about.com/od/cognitivepsychology/f/dissonance.htm> (last visited Feb. 7, 2013).

134. 42 U.S.C. § 423(d)(1)(A), (d)(2)(A) (2006).

135. *DI 25501.001 Onset of Disability and Blindness*, SOC. SECURITY ADMIN., <https://secure.ssa.gov/poms.NSF/0/d1e09a50c224cb678525754c0006ac5b> (last visited Feb. 7, 2013).

136. ALA. CODE § 25-4-77(a)(3) (2007); ALASKA STAT. § 23.20.378(a) (2010); ARIZ. REV. STAT. ANN. § 23-771(A) (2012); ARK. CODE ANN. § 11-10-507(3)(A) (2012); CAL. UNEMP. INS. CODE § 1253(b)–(c) (Deering 2012); COLO. REV. STAT. ANN. § 8-73-107(1)(c)(I) (West 2003); CONN. GEN. STAT. ANN. § 31-235(a)(2) (West 2011); DEL. CODE ANN. tit. 19, § 3315(3) (West 2012); FLA. STAT. ANN. § 443.091(1)(c)(1) (West 2012); GA. CODE ANN. § 34-8-195(a)(3)(A) (2008); HAW. REV. STAT. § 383-29(a)(3) (2007); IDAHO CODE ANN. § 72-1366(4)(a) (2012); 820 ILL. COMP. STAT. ANN. 405/500(C) (West 2011); IND. CODE ANN. § 22-4-14-3(b)(1) (West 2012); IOWA CODE § 96.40(5) (West 2010); KAN. STAT. ANN. § 44-705(c) (West 2011); KY. REV. STAT. ANN. § 341.350(4) (West 2011); LA. REV. STAT. ANN. § 23:1600(3)(a) (2011); ME. REV. STAT. ANN. tit. 26, § 1192(3) (2011); MD. CODE ANN., LABOR AND EMPLOYMENT § 8-903(a)(1) (West

such as Alabama, Arkansas, Connecticut, Indiana, Kentucky, and Rhode Island, go further and actually require the individual be “physically and mentally able to work” in order to be qualified to collect unemployment compensation.¹³⁷

Receipt of unemployment compensation and any effect on a contemporaneous application for Social Security disability benefits is not mentioned in either the Act or the Code of Federal Regulations. Instead, the Agency has announced its position on receiving unemployment benefits while also seeking Social Security disability benefits in an “Adjudication Tip” issued by the Social Security Administration Office of Disability Adjudication and Review to which the Agency’s administrative law judges are assigned. Issued in April 2012, “Adjudication Tip #34 – Receipt of Unemployment Benefits” states:

How do you deal with a claimant who is applying for disability but is receiving unemployment? It is SSA’s position that individuals need not choose between applying for unemployment insurance and Social Security disability benefits.

The receipt of unemployment benefits is only one of many factors that must be considered in determining whether the claimant is disabled. See 20 CFR 404.1512(b) and 416.912(b). Therefore, when evaluating this issue, look at the underlying circumstances rather than the mere application for and receipt of benefits. Has the claimant looked for jobs with physical demands beyond his alleged limitations, during the alleged period of disability? Has the claimant performed various mental and physical activities in order to continue receiving

2002); MASS. GEN. LAWS ANN. ch. 151A, § 24(b) (West 2004); MICH. COMP. LAWS ANN. § 421.28(1)(c) (West 2012); MINN. STAT. ANN. § 268.085-1(4) (West 2012); MISS. CODE ANN. § 71-5-511(c) (West 2009); MO. ANN. STAT. § 288.040-1(2) (West 2012); MONT. CODE ANN. § 39-51-2104(b) (2011); NEB. REV. STAT. ANN. § 48-627(3) (LexisNexis 2012); NEV. REV. STAT. ANN. § 612.375(1)(c) (West 2000); N.H. REV. STAT. ANN. § 282-A:31-c(1)(b) (2012); N.J. STAT. ANN. § 43:21-4(c)(1) (West 2012); N.M. STAT. ANN. § 51-1-5(A)(3) (West 2011); N.Y. LAB. LAW § 591(2) (McKinney 2011); N.C. GEN. STAT. ANN. § 96-13(a)(3) (2011); N.D. CENT. CODE § 52-06-01(3) (2011); OHIO REV. CODE ANN. § 4141.29(A)(4)(a)(i) (West 2011); OKLA. STAT. ANN. tit. 40, § 2-205A (West 2012); OR. REV. STAT. ANN. § 657.155(1)(c) (West 2012); 43 PA. CONS. STAT. ANN. § 801(d)(1) (West 2012); R.I. GEN. LAWS ANN. § 28-44-12 (West 2011); S.C. CODE ANN. § 41-35-110(3) (2011); S.D. CODIFIED LAWS § 61-6-2(3) (2009); TENN. CODE ANN. § 50-7-302(a)(4) (2012); TEX. LAB. CODE ANN. § 207.021(a)(3) (West 2008); UTAH CODE ANN. § 35A-4-403(1)(c) (LexisNexis 2012); VT. STAT. ANN. tit. 21 § 1457(2) (West 2007); VA. CODE ANN. § 60.2-612(7)(a) (2006); WASH. REV. CODE ANN. § 50.20.010(1)(c) (West 2012); W. VA. CODE ANN. § 21A-6-1(3) (West 2011); WIS. STAT. ANN. § 108.04(2)(a)(1) (West 2012); WYO. STAT. ANN. § 27-3-306(a)(iii) (2011).

137. ALA. CODE § 25-4-77(a)(3); ARK. CODE ANN. § 11-10-507(3)(A); CONN. GEN. STAT. ANN. § 31-235(a)(2); IND. CODE § 22-4-14-3(b)(1); KY. REV. STAT. ANN. § 341.350(4); R.I. GEN. LAWS ANN. § 28-44-12 (specifying “physically” able to work).

unemployment benefits, such as going on interviews, filling out applications, etc.? These activities may also be relevant factors when evaluating the credibility of the claimant's allegations. 20 CFR 404.1529 and 416.929, and SSR 96-7p.¹³⁸

While there is an inherent logical inconsistency of the two positions—saying to one government agency “I can work so I should receive money” while at the same time saying to another government agency “I cannot work so I should receive money”—from a legal standpoint, there is no bar to *applying* for both for the same time. The problem, from a legal perspective, arises upon the *receipt* of one or the other benefits. Known in the common law as the Doctrine of the Election of Remedies, it is “[a] claimant’s act of choosing between two or more concurrent but inconsistent remedies based on a single set of facts.”¹³⁹

The beginning of the “Adjudication Tip” is therefore completely accurate; there is no inconsistency in *applying* for both state unemployment compensation and Social Security disability benefits; the inconsistency arises upon receipt of one and then continuing to pursue the other in violation of the Doctrine of the Election of Remedies. While the Social Security disability programs are clearly not governed by common-law doctrines, the logic of the doctrine is irrefutable.¹⁴⁰ Ultimately, an individual needs to choose his or her remedy for any given period of time. If the individual chooses to receive unemployment compensation, it should preclude him or her from collecting Social Security disability benefits for the same period of time.

As this policy is merely in the “Adjudication Tip,” all that would be needed to preclude collecting both state unemployment compensation and Social Security disability benefits at the same time would be for the Commissioner to issue a modification to the existing regulations as allowed by the Act.¹⁴¹ With such a prohibition, individuals would be free to pursue both remedies, but limited to accepting only one. This prohibition would eliminate not only the logical inconsistency of collecting both state unemployment compensation and Social Security disability benefits but also the violation of the Doctrine of Election of Remedies.

138. Social Security Administration, Office of Disability Adjudication and Review, *Adjudication Tip # 34 – Receipt of Unemployment Benefits* (April 2012) (on file with author).

139. BLACK’S LAW DICTIONARY 558 (8th ed. 2004).

140. See Swank, *Administrative Acquiescence*, *supra* note 15, at 13-15.

141. See 42 U.S.C. § 902(a)(5) (2006).

VII. "THIS IS THE END"¹⁴²: CONCLUSION

What is the likelihood of the Social Security Administration taking just one of these five proposed steps? The leadership of the Social Security Administration would probably not want to institute any of the proposed changes, because none of them—in the short term at least—would reduce the backlog of pending disability hearings. In fact, actually conducting Continuing Disability Reviews, requiring all of the medical and vocational evidence to be submitted in an application for disability benefits, and updating age and language factors to represent the United States of today and not the 1970s, might result in more cases being denied, absolutely guaranteeing the Agency leadership would not want to institute any of the proposed changes. Denying disability applications only leads claimants to appeal or apply for benefits over and over again—both of which further add to the hearing backlog.

As long as the Agency's goal is merely to process cases as quickly as possible, preferably awarding benefits so they do not come back as new applications or appeals, the backlog of disability cases will only continue to grow.¹⁴³ During the "height of the jobs crisis," 117,000 Americans received both Social Security disability and unemployment benefits.¹⁴⁴ "Pay so they go away" has been an unsuccessful strategy in reducing the hearing backlog, and it will never work. For every individual improperly awarded disability benefits, there will be an incentive for others who likewise do not qualify to apply for them as well—adding to the backlog. As there is no cost to apply and no limit on the total number of times an individual can apply, there is no incentive not to apply even if the person is currently working, has no disability, or is able to work despite his or her disability.¹⁴⁵ As the average benefit amount of the disability payments alone is over \$300,000, and it serves as a gateway to additional benefits such as Medicaid or Medicare, what is lost by trying?¹⁴⁶ The odds of winning are astronomically higher than

142. THE DOORS, *The End, on THE DOORS* (Elektra Entertainment Group 1967).

143. Paletta, *Disability-Claim Judge*, *supra* note 91, at A14.

144. Josh Boak, *117,000 Americans Get Jobless and Disability Benefits*, FISCAL TIMES (Sept. 12, 2012), <http://www.thefiscaltimes.com/Articles/2012/09/12/117000-Americans-Get-Jobless-and-Disability-Benefits.aspx>.

145. Beginning July 28, 2011, a claimant who has a claim pending in the Social Security Administration's administrative review process may not file a new claim of the same benefit type until the previous claim is adjudicated. There is no prohibition on filing a different type of claim (for instance, filing a Title XVI claim if there is already a Title II claim) nor any limit on the total number of claims that may be filed during a person's lifetime. Titles II and XVI: Procedures for Handling Requests to File Subsequent Applications for Disability Benefits, 76 Fed. Reg. 45,309, 45,309 (July 28, 2011).

146. See Paletta, *Insolvency Looms*, *supra* note 4, at A16.

any lottery, and it does not even cost a dollar to play. As long as eliminating the hearing backlog is the single, overriding concern of the Agency, Social Security disability programs will continue awarding money for nothing.

In the long run, however, the only way to actually reduce the backlog is to have a program that truly determines the issues of disability and ability to work on the merits, and does not merely try to process cases as quickly as possible so that they go away. A Social Security disability program that is run strictly according to its rules and regulations, whose goal is accuracy above speed, would deter unqualified individuals from applying. Why would a person bother applying if he or she either has no qualifying disability or is able to work despite a disability if such applicants are never awarded benefits? With changes making the system more accurate, the backlog would eventually be eliminated. The proposed five small steps are the first that can be taken to restore the integrity and legitimacy of our Social Security disability programs. The Social Security Administration's leadership will need to determine if they want to have a program that merely awards disability benefits very quickly, or one that actually does the job that the American taxpayer pays them to do.

"Ultimately, the taxpaying, voting public will only support need-based welfare programs if they believe that those actually in need of aid are the ones actually receiving the aid."¹⁴⁷ The expectation of the taxpayers who fund the disability programs is that the decision to grant benefits will be correct, not just fast. Each disability case which is improperly paid has huge monetary consequences for the taxpayer: If merely 10% of all Social Security disability benefits are being improperly paid, that amounts to more than \$17 billion last year alone.¹⁴⁸ Even by government standards, that is real money. Furthermore, improperly paying disability benefits harms the economy as a whole. Once awarded disability benefits, individuals will "almost never return to the active workforce."¹⁴⁹ Instead they will continue to receive disability benefits until death or when they become able to collect retirement benefits instead.¹⁵⁰ "This is straining already-stretched

147 Swank, *Welfare*, *supra* note 15, at 639-40.

148. See *SSDI Program*, *supra* note 20, at 1

149. Merline, *5.4 Million Join Disability*, *supra* note 4; Merline, *Labor Force Shrinks*, *supra* note 4.

150. Merline, *5.4 Million Join Disability*, *supra* note 4.

government finances while posing a long-term economic threat by creating an ever-growing pool of permanently dependent working-age Americans.”¹⁵¹

Beyond the monetary cost to the taxpayer, the improper payment of Social Security disability cases undermines the legitimacy and integrity of the entire system. Improperly paid disability claims stigmatize the people who properly receive disability benefits, as it calls into question the validity or degree of their own disability.¹⁵² “[T]he fact that some people cheat the welfare system can lead to suspicion that anyone or even everyone receiving benefits is likewise cheating, which is clearly not true.”¹⁵³ Also harmed by improperly awarded disability benefits are those individuals whose attorneys did not cheat. “It is fundamentally unfair that individuals who intentionally cheat can get benefits, while those who follow the rules may not.”¹⁵⁴ The consequences of benefits being improperly paid are even more dire due to the financial insolvency of the Social Security disability program. In 2005, the Title II program began spending more money than it brought in through tax receipts.¹⁵⁵ The Title II trust fund that had been accruing for years is projected to expire in 2016.¹⁵⁶ By improperly paying benefits in the name of backlog reduction, the leadership of the Social Security Administration harms the very same people the Agency is supposed to be helping. By taking the five small steps advocated *supra*, the Agency leadership can begin the long journey of restoring the integrity of the Social Security disability program.

151. *Id.*

152. Swank, *Welfare*, *supra* note 15, at 638; see Grantham, *supra* note 4.

153. Swank, *Welfare*, *supra* note 15, at 639.

154. *Id.*

155. Paletta, *Insolvency Looms*, *supra* note 4, at A16.

156. Faler, *supra* note 4.

Mr. LANKFORD. Thank you.
Judge Butler?

STATEMENT OF THE HONORABLE LARRY J. BUTLER

Judge BUTLER. My name is Larry Butler, and I am very pleased and honored to have the opportunity to be invited to talk to you today.

I agree with Judge Swank, for the most part. I think you have to keep in mind, when you are talking about this program, some important facts. One, every decision that I make or any Federal ALJ makes as a judge, a disability judge, has been valued at probably \$300,000. So when I make 500 decisions in a year, I am dealing with \$150 million worth of taxpayer funds. And I don't look at them exactly as just a general tax; these are FICA funds that are paid by people who are working out there day after day, that is where the money is coming from.

The second thing you have to realize is right now Social Security is paying out almost \$2 billion a year for attorney and representative fees. This program has changed. When these regulations and grids and everything were put in place originally, this was supposed to be an informal program where a person could apply for disability and not have to go to an attorney or anybody else to figure out how to do that. We don't have that anymore; that is not the reality. Two billion a year for attorney fees and non-attorney representatives are withheld from the claimant's benefits.

The third thing you have to realize is that just about everybody out there, except that person paying that FICA tax, wants to see this claim paid. Now, the ranking minority member mentioned that an average award may be worth \$1500, approximately, or whatever. I am not sure of the exact amount myself, but the point is that is just the tip of the iceberg. Like Judge Swank said, we are talking about payment after two years on Medicare, or earlier than that on Medicaid with the SSI, Supplemental Security Income, program. Those monies go to doctors, they go to hospitals, they go to clinics, and all these third parties are interested in seeing that claim paid. Nobody is representing the person paying the FICA tax that supports this entire program.

There have been recommendations made for a long time, including Senator Coburn mentioned this morning that we need a representative in these hearings. We need a representative not to represent the Government, represent the taxpayers. It would stop some of these paid out billion dollar judges who have paid these cases, a number of them, I can go through them, if you want me to, one by one, pay thousands of cases.

One of them that was mentioned by Senator Coburn was a judge in Oklahoma City. He is 87 years old. He paid 5,000 cases in less than two years, I believe it was, over \$1 billion worth of claims. Paid 90 percent of the cases the agency put before him to review. Now, he got those cases from the agency. If you take a look at his testimony when they took the judge's interview by the staff with the committee took his interview, those cases were provided by the agency from all over the Country

And the one I remember was 500 cases from Little Rock, Arkansas, because that is a whole year's work for an average judge, even

by the standards the agency applies. The agency sat there and let him pay those cases. You don't have a judge problem. You have 1400 judges out there, and 9 out of 10 of them are great judges; they work hard, they do the best they can. The ones that are not should have been dealt with years ago. Years ago.

There is an action pending in New York, a class action involving five judges at a particular office up there. The claim is that these judges have been generally biased against claimants, I guess, because general bias, I don't even understand exactly what that means. The original complaint was back to 2005. Well, my question is if they have been doing that, if that is true, where was the agency? Why are those judges even sitting there for somebody to bring a class action against them?

I have run out of time, very close to it.

Two points: I think you need to look at this issue of paying down the backlog. It has been called in testimony over here by agency personnel anecdotal and innuendo. That is what is behind it. It is media hype. It is not media hype; it is real. And for six years it has been going on.

The second thing I think you need to focus on is not disclosing evidence. The agency has allowed these attorneys to take the position, and the agency has done nothing about it, that they can conceal evidence if it doesn't support a claim for disability. I don't need a judge or anybody else to tell me that is fraud. I don't care what the agency says or what Chief Judge Bice says. If you are going to sit there and let somebody withhold evidence from me, and I pay a claim worth \$300,000 that some taxpayers have paid for to a person who is not disabled, that is fraud. To me, I can't see anything clearer than that; and this agency has perpetuated that for years.

Thank you.

[Prepared statement of Judge Butler follows:]

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM (113th CONGRESS)
SUBCOMMITTEE ON ENERGY POLICY, HEALTH CARE, AND ENTITLEMENTS

SUBCOMMITTEE HEARING JUNE 27, 2013

HON. REPRESENTATIVE JAMES LANKFORD, CHAIRMAN (OK)
HON. REPRESENTATIVE JACKIE SPEIER, RANKING MEMBER (CA)

STATEMENT OF:

LARRY J. BUTLER
U.S. ADMINISTRATIVE LAW JUDGE
SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION & REVIEW
FORT MYERS, FL SATELLITE HEARING OFFICE

I am honored and pleased to have been invited to present testimony to the Subcommittee.

The opinions I express during my testimony and in this Statement are solely my personal opinions. I do not speak for the Social Security Administration (SSA), the Office of Disability Adjudication & Review (ODAR) or for any judicial or attorney organization.

I am not affiliated with any political party.

Since my appointment as a U.S. administrative law judge (ALJ) in December 1996, I have served as a SSA ALJ at the Shreveport, LA Hearing office (13-years) and the Fort Myers, FL Satellite Hearing Office (3-years). The Social Security disability administrative appeal process is often described as being an "inquisitorial" legal system (that is, the judge is actively involved in investigating and determining facts).

From 1988 until my appointment as an ALJ during December 1996 (8-years), I served as an Industrial Appeals Judge (IAJ) for the State of Washington. The Washington State industrial appeals process is an "adversarial" legal system (that is, parties are represented and formal rules of evidence and procedure are applicable).

From 1976 until my appointment as a Washington State IAJ during 1988 (12-years), I was in the private practice of law with one other attorney in Spokane, WA.

I served as National Grievance Chair of the Association of Administrative Law Judges (AALJ) from June 2004 until June 2007. AALJ originally organized as a professional association in 1971. In 1999, AALJ unionized. At present, more than 80% of the approximately 1,500 SSA ALJs are active members of AALJ.

I have been involved in the medico-legal field my entire legal career.

The Social Security disability programs are bankrupt.

To assess what potential remedies might be available to Congress in addressing this crisis, Congress must understand what caused the problem—what were the operative factors during the past several years?

- (1) The current average value of a disability award is approximately \$300,000. That \$300,000 amount includes monetary benefits for the disabled individual and dependents, medical coverage by the Medicare or Medicaid programs, automatic eligibility for other types of government financial assistance such as the Food Stamp Program, housing or rental assistance and phone subsidies.
- (2) The SSA management currently stated “goal” or “expectation” is that every ALJ should issue from 500 to 700 legally defensible decisions per year. When an ALJ issues 500 decisions valued at approximately \$300,000 each, that ALJ on an annual basis is determining the disposition of in excess of \$150,000,000 in taxpayer funds.
- (3) Representatives (attorneys and non-attorney representatives) involved in the disability system are paid in excess of \$1,000,000,000 (\$1 billion dollars) annually by SSA directly from funds withheld from claimant’s retroactive benefit awards. Since January 1, 2013, attorney and non-attorney representative fees paid from claimant’s retroactive disability benefit awards has averaged \$110,000,000 per month.
- (4) All of the “stakeholders” identified above (claimants, attorneys, non-attorney representatives, Medicare and Medicaid providers, and others) have a stake in seeing a disability applicant paid. None of these “stakeholders” will object if an individual capable of employment is erroneously awarded disability benefits.
- (5) A disability award is in reality a pension for life. Only 3% of claimants placed on disability ever return to employment.
- (6) Almost all claimants are now represented in the disability determination process by attorneys or non-attorney representatives. Representation commonly starts with the

attorney or representative going to a claimant's home and completing the claimant's disability application and supplemental documentation using the Internet.

- (7) There is no economic reason for a claimant and representative not to file a disability application. The cost of initially processing the claimant's application, developing the record (wage and resource development, vocational history, and similar information), obtaining medical records and procuring consultative medical examinations is paid for by taxpayers.
- (8) For the past six (6) years¹, SSA has focused on reducing the backlog of disability applications to the exclusion of almost every other program consideration, including correct application of the law in the disability determination process and Continuing Disability Reviews (CDRs) (both medical and work related) that recover \$10 - \$14 of taxpayer funds for every \$1 expended.

The operative factors during the past several years described above suggest several questions that should be asked:

- (1) Is SSA managing the disability system for the primary benefit of genuinely disabled individuals and taxpayers or has the disability system become a "cash cow" for other "stakeholders" (attorney and non-attorney representatives, medical providers paid through the Medicare and Medicaid programs, pharmaceutical companies, and others)?
- (2) If a single "disability advocacy" business can collect in excess of \$80,000,000 annually in fees from claimant's retroactive benefit awards, a question is raised as to whether the current contingency fee allowed by statute is too generous?²
- (3) Did SSA management intentionally adopt or implicitly approve a policy now referred to as "paying-down-the-backlog" in order to reduce the backlog?
- (4) Was the development of "billion dollar judges" in the disability system supported and encouraged by SSA management as a means to "pay-down-the-backlog"?

During 2006, three attorneys and a supervisor in the Des Moines, IA Hearing Office were assessed \$3.8 million in civil fraud fines by the SSA OIG (Office of Inspector General³) for assisting the Hearing Office Chief Administrative Law Judge (HOCALJ) (now deceased) in fraudulently paying thousands of disability cases. The SSA OIG eventually dismissed the

¹ Commissioner of Social Security (COSS) Michael J. Astrue was appointed for a term from February 12, 2007 to January 19, 2013. When COSS Astrue resigned on February 12, 2013, Carolyn W. Colvin was appointed Acting COSS.

² Currently, the contingency fee authorized by statute is a maximum of \$6,000 based on a fee agreement and a maximum of 25% of retroactive benefits (including awards to dependents) based on a fee petition.

³ Patrick P. O'Carroll, Jr., SSA OIG.

civil fraud action⁴ against the three attorneys and the supervisor at the direction of SSA management. However, SSA OIG established an important precedent that civil fraud actions can be pursued where SSA ALJs or staff are involved in fraudulently paying disability claims.

SSA OIG Audit Report A-12-07-27091 (September 2007) disclosed that over a 6-year period of time the Fort Lauderdale, FL HOCALJ had operated a “pilot” program where four (4) local representatives had over 50 percent of their caseloads assigned to the HOCALJ (in violation of 5 USC 3105 rotational assignment requirements). The cases were “unpulled” and the representatives drafted proposed favorable decisions for the HOCALJ. During a 25-month period, the Ft. Lauderdale, FL HOCALJ and one other ALJ in the Hearing Office decided 2,722 cases (12 ALJs assigned to the Fort Lauderdale, FL Hearing Office had a total of 10,474 dispositions during that period).

The September 2007 OIG Audit Report concluded that the “pilot” program “...could be perceived as an unfair advantage for these [four] representatives” who received favorable decisions in 80% of their cases. The OIG Audit Report recommended that SSA: “Remind HOCALJs about their duties of assigning claims on a rotational basis unless an exception from official policy is properly authorized.” Apparently, neither SSA nor the SSA OIG took any disciplinary action against the Fort Lauderdale, FL HOCALJ.

- (5) With knowledge of SSA OIG authority to address fraudulent payment of claims, why did SSA management not curtail the activities of the “billion dollar judges” who were revealed during the past several years issuing thousands of pay cases?

(A) HOCALJ Charles Bridges, Harrisburg, PA, paid 2,285 cases in 2007. From 2005 to 2007, HOCALJ Bridges only denied 3% of the cases that he decided. See http://www.oregonlive.com/special/index.ssf/2008/12/paying_out_billions_one_judge.html.⁵

(B) During 2010, SSA management assigned David B. Daugherty, ALJ, Huntington, WV Hearing Office, 1,284 cases—of which 1,280 were paid by ALJ Daugherty. In 2011, SSA management assigned ALJ Daugherty 1,003 cases—of which 1,001 were paid by

⁴ See 42 U.S.C. 1320a-8 and 20 CFR Part 498.

⁵ The Oregonian in its December 30, 2008 article stated that it became aware of ALJ Bridges when “[S]tories about an unnamed judge who pays 2,000-plus cases a year arose in a congressional hearing in February, but the agency has never named him. The Oregonian identified Bridges through internal Social Security records obtained under the Freedom of Information Act.” Around the end of 2009, SSA began to publish ALJ statistics on the Internet. See http://mwww.ba.ssa.gov/appeals/DataSets/03_ALJ_Disposition_Data.html (ATTACHMENT 1). Prior to the publication by SSA of ALJ statistics on the Internet around the end of 2009, neither the public nor other ALJs had any idea of production or pay rates for ALJs though out the country.

ALJ Daugherty before ALJ Daugherty was placed on administrative leave. See http://online.wsj.com/article/SB10001424052970203764804577056490750827440.html?mod=topic_rss_6859 (ATTACHMENT 2).

- (C) During 2011, SSA management assigned Gerald Krafur, ALJ, Kingsport, TN Hearing Office, 800 cases—of which 792 were paid by ALJ Krafur. In 2012, SSA management assigned ALJ Krafur 339 cases—of which 338 were paid by ALJ Krafur before ALJ Krafur was placed on administrative leave while management “looked into complaints about his demeanor during hearings.” See <http://online.wsj.com/article/SB10001424052702304192704577404933989242596.html> (ATTACHMENT 3).

- (D) News sources during May 2012 reported that in the Charleston, WV Hearing Office:

“...from 2005 to 2008, Charleston ALJ Harry Taylor decided twice the number of cases compared to his counterpart judges. And, many of his decisions were made without ever conducting hearings. Taylor decided a total of 4,091 cases over the 4-year consecutive time period noted above. Out of that, he only denied 173 of those appeals or 4.25%. Now, in the most recent published ALJ Disposition Data from October 1, 2011 to March 30, 2012 (6 months) Taylor has already decided twice the caseload as any other Charleston ALJ. He has rendered 428 decisions and denied 34 or 8%.

Reportedly, like former ALJ Daugherty’s [Huntington, WV Hearing Office] high approval ratings that were questioned, Charleston management allegedly condoned Taylor’s high caseload decisions because his totals made the overall office numbers look good. Also, after the Huntington SSA scandal was exposed in 2011, Taylor was reportedly instructed to hold a minimum of 40 hearings each month.”

- (E) During Fiscal Year (FY) 2011, SSA management assigned ALJ Frederick McGrath, Atlanta, GA (Downtown Hearing Office) (Region IV – Atlanta) 3,541 cases. During FY 2010, SSA management assigned ALJ McGrath 3,620 cases. With respect to these cases, ALJ McGrath conducted in-person and video hearings at the following Hearing Offices: Atlanta, GA (North), Lexington, GA, Montgomery, AL, Charlotte, NC, Greensboro, NC, Jackson, MS, Miami, FL, Jacksonville, FL, St. Petersburg, FL, Tupelo, MS and Fort Myers, FL. See <http://www.disabilityjudges.com/state/georgia/atlanta-downtown/frederick-mcgrath> (ATTACHMENT 4).

- (F) On September 13, 2012, Senator Tom A. Coburn, M.D., Ranking Member, Permanent Subcommittee on Investigations, Committee on Homeland Security & Government Affairs, issued a 136-page Minority Staff Report (based upon 635 pages of exhibits) entitled “*Social Security Disability Programs: Improving the Quality of Benefit Award Decisions.*” See

<http://www.hsgac.senate.gov/subcommittees/investigations/hearings/social-security-administrations-disability-programs> (ATTACHMENT 5).

At the Subcommittee hearing, Patricia A. Jonas, Office of Appellate Operations (OAO) Executive Director, stated in her written testimony:

“Allegations both of “paying down the backlog” and fraud in the disability system have appeared in the media from time to time. These allegations are based mostly on anecdote and innuendo, and unfairly diminish our accomplishments the past five years.” Emphasis added. See page 3 and page 8 of written testimony.

However, Senator Coburn’s Minority Staff Report stated that a single ALJ, Howard O’Bryan, in the Oklahoma City, OK Hearing Office, age 87, awarded more than \$1.6 billion in lifetime benefits in three years from 2007 to 2009, ALJ O’Bryan decided more than 5,400 cases and paid benefits in over 90% of the cases--most of the cases paid “on-the-record” (OTR) without hearings. ALJ O’Bryan informed the Subcommittee investigators during his interview:

“I was trying to keep up the number of dispositions for the office,” Judge O’Bryan went on, noting, “I wrote all of them myself.” He was able to dispose of so many cases during this time, he said that SSA began shipping him cases from around the nation. He said that, at one point, he was sent 500 cases from Little Rock, Arkansas – equivalent to a single judge’s workload for a whole year. “I was asked to review those cases to see if they could be allowed,” he said. According to Judge O’Bryan, he was able to get through so many cases, that SSA sent him huge blocks of cases from such cities as Houston, Texas; Atlanta, Georgia; Baton Rouge, Louisiana; Greenville, South Carolina; and Yakima, Washington. He said he also received cases from Missouri.” See page 75 of Subcommittee Report.

In the decisions issued by ALJ O’Bryan, “...instead of precisely identifying a claimant’s disabling condition, ALJ O’Bryan typically wrote a long list of maladies, followed by “*etc., etc., etc.*” See page 73 of Subcommittee Report.

- (6) Why does SSA apparently continue to inform attorneys and non-attorney representatives that withholding material evidence that may be adverse to the claimant (that is, suggest the claimant is not disabled) is permissible?

ADVERSE EVIDENCE

In both 1995 and 1997 the ABA opined that these rules are overly broad with regards to the duty to submit evidence. "The ABA believed that the rules continue to include provisions that could give rise to serious ethical conflicts." 63 FR 41407

Advise from SSA in 2004:

The regulations require claimants to prove their *disability*, not their *ability*.

The representative stands in the same position as the claimant.

If faced with a request for information that is adverse, decline to provide it because it does not support the claim for disability.

But don't make a false or misleading statement.

Sarah Humphreys, Office of General Counsel ODAR/SSA, 2004 FOSSCR, Austin, TX.



Suzanne Valentin Hinojosa
1-800-481-0302

svhdisabilityhelp@gmail.com
www.southtexasdisabilitylawyer.com

SSA is absolutely incorrect. An attorney cannot conceal material evidence indicating that a claimant is not disabled and permit an ALJ--based on an incomplete and misleading record--to erroneously award \$300,000 of taxpayer funds to an individual who is not disabled. See attached: (1) discussion commencing at page 21 of "SANITIZED Rxx-3396 RECOMMENDED DECISION" (ATTACHMENT 6), (2) Florida State Bar Association (FSBA) ethics opinion request and response (ATTACHMENT 7), and (3) Memorandum addressing withholding of adverse evidence by attorneys (ATTACHMENT 8).

On December 22, 2011 the Wall Street Journal (WSJ) published an article (authored by Damian Paletta and Dione Searcey) "*Two Lawyers Strike Gold In U.S. Disability System*" <http://online.wsj.com/article/SB10001424052970203518404577096632862007046.html> (ATTACHMENT 9).

Senator Tom A. Coburn, M.D., Oklahoma, Ranking Member, Permanent Subcommittee on Investigations, Committee on Homeland Security and Government Affairs, recommended in letters dated December 22, 2011 directed to Commissioner Michael J. Astrue and to Senator Max Baucus, Chairman, and Senator Orrin Hatch, Ranking Member, Senate Committee on Finance that Binder & Binder be investigated for fraud for failing to disclose material evidence regarding a claimant's alleged disability. Senator Coburn's letters to

Commissioner Astrue and Senators Baucus and Hatch can be reviewed at http://www.coburn.senate.gov/public//index.cfm?a=Files.Serve&File_id=815eb4ab-09d0-4626-a906-885f6ac5abde (ATTACHMENT 10).

Senator Coburn stated in his December 22, 2011 letters:

"...Binder & Binder firm withheld medical evidence from SSA that could prove their clients should not receive disability benefits. Binder & Binder allegedly engaged in this practice, even though making false statements and misrepresentations or omissions to receive disability benefits are prohibited by the Social Security Act and subject to civil and criminal penalties. See *Social Security Act*, 42 U.S.C. 1320a-7a; 42 U.S.C. 408."

...

"Therefore, I request that SSA perform full medical continuing disability reviews ("CDRs") on all current disability beneficiaries—both Social Security Disability Insurance ("SSDI") and Supplemental Security Income ("SSI")—that were represented by the Binder & Binder law firm. These individuals should receive a full medical CDR whether they are currently scheduled to receive one or not."

- (7) Why did SSA agree to a proposed settlement agreement in the *Padro, et al v. Astrue, Civ. No. 11-1788 (E.D.N.Y.) (CBA) (RLM)* (filed April 12, 2011) "class action" that will involve rehearing in excess of 4,000 cases?

On May 24, 2013, I filed a U.S. Office of Special Counsel (OSC) complaint related to the *Padro, et al v. Astrue, Civ. No. 11-1788 (E.D.N.Y.) (CBA) (RLM)* "class action." The *Padro, et al v. Astrue* "class action" alleges five (5) Queens, NY administrative law judges (ALJs) were "generally biased" with respect to over 4,000 decisions the five (5) ALJs issued from and after January 1, 2005 [*Amended Class Action Complaint (Document 4), Page 9, Paragraph 31*].

The Department of Justice (DOJ) (representing SSA) and SSA have preliminarily agreed with plaintiff's counsel [a Urban Justice Center (UJC) attorney and a "pro bono" attorney from Gibson, Dunn & Crutcher, LLP] that SSA will rehear in excess of 4,000 of the five (5) Queens, NY ALJ's unfavorable and partially favorable decisions issued from January 1, 2008, to the present. Even unfavorable and partially favorable decisions of these five (5) Queens, NY ALJs that were affirmed by the Appeals Council (AC) and became final will be reheard.

If ALJs become the subject of "class action" litigation (not only directly against the ALJs but indirectly against the agency as proxy) asserting "general bias" based on allegedly lower-than-average ALJ allowance rates, similar "class actions" will be filed all over the country--at both federal and state levels. The five (5) Queens, NY ALJs were not joined as necessary parties in the *Padro, et al v. Astrue* litigation. Both DOJ and SSA counsel refused to provide any information to the five (5) Queens, NY ALJs concerning negotiations that occurred and purported evidence the preliminary Settlement Agreement was based on.

For your convenience, I have pasted immediately below the substantive portion of my May 24, 2013 OSC complaint:

COMPLAINT DESCRIPTION

Padro, et al v. Astrue, Civ. No. 11-1788 (E.D.N.Y.) (CBA) (RLM) is a "class action" alleging "general bias" by five (5) Queens, NY federal administrative law judges (ALJs) during the adjudication of over 4,000 Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) disability cases from and after January 1, 2008.

The Urban Justice Center (UJC), a non-profit corporation, represents plaintiffs in *Padro, et al v. Astrue*. Gibson, Dunn & Crutcher, LLP—a Park Avenue New York firm with over 1,000 attorneys located in 17-offices worldwide with revenues exceeding \$1 billion per year—is pro bono co-counsel for plaintiffs.

The stated purpose of UJC as expressed on its website is as follows:

"For 29 years, the Urban Justice Center has served New York City's most vulnerable residents through a combination of direct legal service, systemic advocacy, community education and political organizing."

As far as "systemic advocacy" is concerned, UJC states on its website "[W]e assist our clients on numerous levels, from one-on-one legal advice...to filing class action lawsuits to bring about systemic change." See <http://www.urbanjustice.org/ujc/about/hub.html>.

The UJC 2012 Annual Report posted on its website indicates that the Department of Justice (DOJ)—which represents the defendant in the *Padro, et al v. Astrue* litigation [Michael J. Astrue, Commissioner of Social Security (COSS)]—donated between "\$100,000 - \$299,999" to UJC during 2012:

\$100,000 – \$299,999

Booth Ferris Foundation
The Ford Foundation
Goldman Sachs Gives
H. van Ameringen Foundation
NYC Criminal Justice Coordinator
NYC Department of Health & Mental Hygiene
NYC Department of Housing Preservation & Development
NYS Division of Housing and Community Renewal – Foreclosure
NYS Office of Court Administration
NYS Office of Temporary & Disability Assistance HIP/SHIP

NYS Office of Victim Services
 Oak Foundation
 Skadden Fellowship Foundation
 US Department Of Justice
 U.S. Department of Housing and Urban Development

See page 6 at http://www.urbanjustice.org/pdf/publications/2012_Annual_Report.pdf.

The UJC 2011 Annual Report posted on its website indicates that the DOJ "Legal Assistance for Victims" donated in excess of \$300,000 to UJC during 2011. The U.S. Department of Housing (HUD) donated between "\$100,000 - \$299,000" to UJC during both 2011 and 2012. See page 4 at http://www.urbanjustice.org/pdf/publications/2011_Annual_Report.pdf.

Why are DOJ, other federal agencies like the U.S. Department of Housing and Urban Development (HUD) and New York State, County and City agencies making six-figure contributions of taxpayer funds year-after-year to UJC which is an organization with stated principal purposes of "political organizing" and "systemic advocacy"--primarily by the filing of class actions lawsuits.

The *Padro, et al v. Astrue* proposed settlement agreement provides that SSA will pay UJC \$125,000 in attorney fees. The financial relationship between DOJ and UJC is significant and recurring.

"Systemic advocacy" as practiced by UJC appears to involve repeated and overtly officious encouragement of litigation resembling barratry. "Political organizing" and "systemic advocacy" as practiced by UJC serves no discernible non-political public purpose and bestows no general benefit justifying significant and recurring contributions of taxpayer funds by DOJ to UJC.

The financial relationship between DOJ and UJC represents a direct and patent conflict of interest, or--at minimum--creates an inference and appearance of impropriety requiring full disclosure of the financial and business relationship of DOJ and UJC to the court, all parties involved in this "class action" litigation, the five (5) Queens, NY federal ALJs who were the target of this litigation and the taxpaying public.

Padro, et al v. Astrue is a class-action in which the proposed settlement agreement of the parties: (1) will impose significant costs upon taxpayers and the disability system by requiring the rehearing of approximately 4,000 cases decided by these five (5) Queens, NY ALJs since January 1, 2008 [including cases denying disability benefits that were affirmed by the Appeals Council (AC)], and (2) has destroyed the reputation of five (5) Queens, NY ALJs who were not directly represented in this litigation and were totally excluded by both parties from receiving any information regarding settlement negotiations or the purported evidentiary basis of the proposed settlement agreement.

My complaint is based on alleged violation of law, regulation or rule, gross mismanagement, gross waste of taxpayer funds and abuse of authority by both SSA and DOJ management officials.

...

CORRECTIVE ACTION REQUESTED

The U.S. Office of Special Counsel (OSC) should investigate the financial relationship (and any other relationship) between DOJ (counsel for defendant) and UJC (counsel for plaintiffs) in the *Padro, et al v. Astrue*, Civ. No. 11-1788 (E.D.N.Y.) (CBA) (RLM) "class action" alleging "general bias" from and after January 1, 2008 by five (5) Queens, NY federal ALJs during the adjudication of over 4,000 SSDI and SSI disability cases.

Once the relationship of DOJ and UJC has been thoroughly investigated:

(1) OSC should take whatever action is warranted to remedy any violation of law, regulation or rule, gross mismanagement, gross waste of taxpayer funds or abuse of authority by SSA and DOJ management officials, and

(2) OSC should report the findings of its investigation to all parties involved in the *Padro, et al v. Astrue* "class action" litigation, the five (5) Queens, NY federal ALJs who were the target of this litigation, the taxpaying public, and:

The Honorable Carol Bagley Amon
U.S. District Court Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

It should be noted that a "fairness hearing" as required by *Fed. R. Civ. P. 23(c)* related to the proposed settlement agreement entered into between the parties in this "class action" litigation is scheduled for July 24, 2013 (02:30 PM) in Courtroom 10D South.

All counsel in the *Padro, et al v. Astrue* "class action" were served with a copy of my May 24, 2013 OSC complaint: GAIL A. MATTHEWS, ESQ., Assistant U.S. Attorney; JUDRY SUBAR, ESQ., Assistant Director Federal Programs Branch, Senior Trial Counsel, DOJ; "OF COUNSEL" (SSA): Office of Regional Chief Counsel, Region II; Office of the General Counsel, Office of Program Law; COUNSEL FOR PLAINTIFFS: IAN F. FELDMAN, ESQ., Urban Justice Center; JIM WALDEN, ESQ., pro bono counsel, Gibson, Dunn & Crutcher, LLP.

- (8) Why did SSA agree to the publication of *SSR 13-1p* as part of the proposed Settlement Agreement entered into in the *Padro, et al* litigation?

SSR 13-1p [6168 Fed. Reg. Vol. 78, No. 19 (January 29, 2013)] “Agency Processes for Addressing Allegations of Unfairness, Prejudice, Partiality, Bias, Misconduct or Discrimination by ALJs” provides for three different complaint processes which a claimant and/or representatives (attorney or non-attorney) can pursue simultaneously against an ALJ for the identical alleged misconduct. *SSR 13-1p* was the direct result of the *Padro v. Astrue*, Civ. No. 11-1788 (E.D.N.Y.) (CBA) (RLM) (filed April 12, 2011) “class action” alleging “general bias” against five (5) Queens, NY ALJs (discussed further below).

Commissioner of Social Security (COSS) Michael J. Astrue authorized the publication and implementation of *SSR 13-1p* while holding-over as COSS after expiration of his term on January 19, 2013. *SSR 13-1p* can be located at <http://www.gpo.gov/fdsys/pkg/FR-2013-01-29/pdf/2013-01833.pdf> (ATTACHMENT 11).

On March 18, 2013, the Association of Administrative Law Judges (AALJ) Newsletter & President’s Report reported that Chief Administrative Law Judge (CALJ) Debra Bice had established a new precedent for disgruntled representatives and/or claimants by filing an ethics complaint against an ALJ with the ALJ’s state bar association. As previously discussed, the agency prohibits ALJs from filing an ethics complaint against an attorney with the attorney’s bar association—no matter how egregious the attorney misconduct may be. The March 18, 2013 AALJ Newsletter & President’s Report stated in pertinent part:

AGENCY DISCIPLINE THEN BAR REFERRAL

Recently, one of our administrative law judges recommended a relative to a disability law firm for a non-paid internship. The disability law firm has had cases before the judge and will likely have future cases before the judge. The internship was intended to provide experience to the relative to enhance his qualifications for a contract hearing reporter position with the agency. Ultimately, this matter was investigated and the judge was disciplined by the agency. Although some of the facts are in dispute, the judge believed the matter was closed and intended to move forward. Thereafter, however, the Chief Judge apparently felt that the government’s punishment was not severe enough. Thus, she filed a Memorandum of Complaint with the judge’s state bar asking that they investigate the matter. In a letter attached to the complaint, the Chief Judge set forth arguments as to how the judge’s alleged conduct violated specific sections of the Code of Judicial Conduct. What is not said in the letter is that some of the facts are in dispute...

Finally, the "class action" lawsuit involving five (5) ALJs assigned to the Queens, NY Hearing Office alleging "general bias" establishes that an ALJ can be sued directly (or indirectly using the agency as a proxy) based upon alleged "Unfairness, Prejudice, Partiality, Bias, Misconduct or Discrimination."

The Model Code of Judicial Conduct (MCJC) should be adopted by the agency as the standard of conduct applicable to ALJs.

I would be glad to provide specific long-term and short-term recommendations to address the issues raised herein if requested.

The *Model Code of Judicial Conduct (MCJC)*, Canon 1 provides "A Judge Shall Uphold the Integrity and Independence of the Judiciary." The American Bar Association (ABA) *Model Rules of Professional Conduct (RPC)* applicable to attorneys imposes similar ethical responsibilities on attorneys in the "Preamble and Scope: A Lawyer's Responsibilities" and RPC 8.1, *et seq.* ("Maintaining the Integrity of the Profession").

I am here today because of those ethical responsibilities.

Thank you.

Larry J. Butler
U.S. Administrative Law Judge
Social Security Administration
Office of Disability Adjudication & Review
Fort Myers, FL Satellite Hearing Office

Mr. LANKFORD. Thank you.
Mr. Sklar?

STATEMENT OF GLENN E. SKLAR

Mr. SKLAR. Chairman Lankford, Ranking Member Speier, and members of the subcommittee, my name is Glenn Sklar. I have had the distinct honor to work for Social Security for over two decades now. In January 2010, I was asked to serve as the Deputy Commissioner for the Office of Disability Adjudication and Review. In this capacity I currently oversee the hearings and appeals levels at SSA. While I have previously held various other posts during my 21-year tenure at SSA, including leadership posts in the anti-fraud component, policy component, and quality component, I will limit my testimony today strictly to the hearings and appeals process.

Our disability program has been described as one of the largest adjudication systems in the free world. This year we will handle a staggering 800,000 requests for hearings. To accomplish this, highly trained adjudicators follow a complex process for determining disability according to the requirements in the law as designed by Congress.

In 2007 there was widespread dissatisfaction with backlogs and delays at the appellate levels. The numbers were pretty stark. The average wait time for a hearing was over 500 days. Over 60,000 people waited over 1,000 days for a hearing decision, with the most extreme cases being waits of nearly four years. The cause could be directly tied to decades of chronic under-funding and under-investment. There was an urgent call to action. As we all know, justice delayed is justice denied.

We developed an operational plan that focused on the gritty work of truly managing the unprecedented hearings workload. We made dozens of critical changes, such as improving our IT infrastructure, enhancing quality checks and feedback, simplifying policies, standardizing business processes, establishing clear expectations and expanding our use of video hearings. With the support of the Congress, we committed the resources to get this job done.

The plan has worked exceptionally well. We have significantly improved the quality and timeliness of our hearing decisions. Our appropriators offered the following words of encouragement in Senate Report 112-176: "The committee applauds the work SSA has done in recent years to reduce the disability backlog and the time it takes to process disability hearings. SSA has reduced the average time it takes to process a disability hearing from 532 days in 2008 to 354 days in 2012, despite a record increase in disability hearings over that period. SSA has also greatly improved the parity of processing times across the Country. In fiscal year 2008, some hearing offices that averaged processing times over 900 days, but this year no hearing office had a processing time over 475 days."

Additionally, we have enhanced the quality of our decisions over the last several years. The rate at which our reviewing body, the Appeals Council, is remanding cases to our judges for re-review has declined. The percentage of Federal Court review requests is also declining.

So how did we approve our quality while moving more work? We improved our quality by, among other things, hiring over 800 highly skilled ALJs, all of whom have received in-depth national training; emphasizing and reemphasizing the need for policy compliance; hiring attorneys, support staff, and decision writers to help ALJs obtain and organize evidence and write decisions; providing quarterly training on error-prone topics for all adjudicators at the hearing level and annual training for a significant percentage of the ALJ corps each year; giving ALJs access to real-time data that highlights where they might be making mistakes and encouraging them to self-correct; standardizing business processes and encouraging all ALJs to work electronically; establishing a brand new Division of Quality that reviews a statistically valid sample of favorable determinations for accuracy and policy compliance before the money goes out the door; reducing the maximum number of cases that our ALJs may decide each year to less than 1,000 per ALJ; and, finally, collecting substantial amounts of national data to determine how we can get better in the hearings process each and every day.

Making disability decisions for Social Security is a challenging and complicated task. I am truly proud that our ALJ corps rises to the challenge each and every day, making timely and legally sufficient decisions for the American public.

Thank you for inviting me to be here today, and I stand ready to answer any questions you may have.

[Prepared statement of Mr. Sklar follows:]



HEARING BEFORE

THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

SUBCOMMITTEE ON ENERGY POLICY, HEALTH CARE AND ENTITLEMENTS

UNITED STATES HOUSE OF REPRESENTATIVES

JUNE 27, 2013

STATEMENT

OF

GLENN SKLAR

DEPUTY COMMISSIONER

OFFICE OF DISABILITY ADJUDICATION AND REVIEW

Chairman Lankford, Ranking Member Speier, and Members of the Subcommittee:

Thank you for this opportunity to discuss our hearing process. Today, I will talk about our recent public service improvements, explain the way we manage our administrative law judges (ALJ), describe the disability evaluation process, and describe the hearings and appeals process.

Introduction

At the Social Security Administration (SSA), we do everything within our power to meet the public's expectation of exceptional stewardship of program dollars and administrative resources. We strive to preserve the public's trust in our program and ensure that the correct benefits go toward assisting only the appropriate people.¹

Our administrative review process for deciding claims for benefits consists of four levels: (1) initial determination; (2) reconsideration determination; (3) hearing before an ALJ; and (4) review by the Appeals Council (AC). At each level, the decision-maker bases his or her decisions on provisions in the Act and regulations. My testimony focuses on the hearings and appeals process (levels 3 and 4).²

Improving Public Service and Oversight

I would like to provide some context about our recent improvements to the appeals process.

Improving Public Service

In fiscal year (FY) 2007, the average wait for a hearing decision was over 500 days, and over 63,000 people waited over 1,000 days for a decision. Some people even waited as long as 1,400 days.

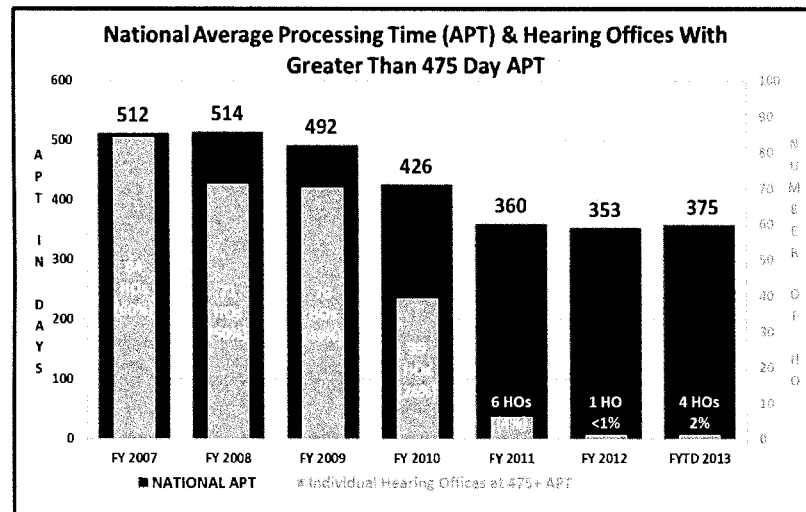
In developing efficient and effective solutions to the hearing backlogs and delays, we implemented a comprehensive operational plan to better manage our unprecedented workload. We made dozens of significant changes, including expanding video conferencing to conduct hearings, improving information technology, simplifying regulations, and standardizing business processes, to name just a few. Congress provided additional resources, which were critical to supporting our improvements.

¹ Under the Social Security Act (Act), we administer two major programs that provide cash benefits to persons who are disabled and unable to sustain work: the Social Security Disability Insurance (SSDI) program and the Supplemental Security Income (SSI) program. The SSDI program provides benefits to disabled workers and to their dependents.

² Today, our Office of Disability Adjudication and Review (ODAR) manages the hearings and AC levels of the administrative review process. Currently, we employ 1,504 ALJs, who work in over 160 offices across the Nation.

Today, the results are clear—our plan has worked exceptionally well. We have significantly improved the timeliness and quality of our hearing decisions. We steadily reduced the wait for a hearing decision from a high of 512 days in FY 2007, to 375 days in FY 2013.

Figure 1: National Average Processing Time (APT) & Hearing Offices (HO) with Greater Than 475 Days APT

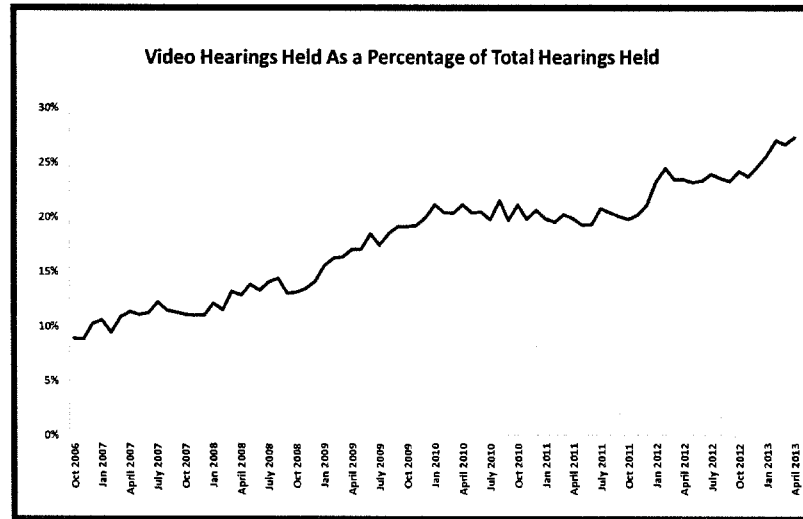


We have made tremendous improvement in our service to the public by focusing on our most aged cases.³ We have decided nearly a million aged cases since FY 2007, and today we have virtually no hearing requests over 700 days old, with the vast majority of our cases falling between 100 to 400 days old. The most dramatic improvements have occurred in the most backlogged offices.

Our improvements include modernizing our information technology infrastructure in the hearing operation. We successfully implemented an electronic record system that gives us more flexibility in managing our workloads. We currently hold over 25 percent of our hearings using state-of-the-art video conferencing equipment; in October 2006, we used this equipment for less than ten percent of our hearings. Not only do we work in a fully electronic processing environment, but many claimants and third parties interact with us electronically as well.

³ Six years ago, we defined an aged case as one waiting over 1,000 days for a decision; we have since lowered the threshold to 700 days.

Figure 2: Video Hearings Held As a Percentage of Total Hearings Held



Improved technology has helped us balance our work across hearing offices. In FY 2007, some hearing offices' and regions' backlogs were exceptionally high. Since FY 2007, we have opened five national hearing centers which use video technology to hold hearings to assist the most backlogged offices. We also created a national case assistance center to help offices prepare cases for a hearing. These national resources along with our realignment initiatives have helped us balance our work so that no hearing office faces excessive delays (see Figure 1). We continue to monitor workload trends closely so that we can quickly redirect resources as necessary to prevent micro-backlogs from forming in local areas. In addition to making us more efficient, we use this technology to collect and analyze trends, develop training, and clarify policy to improve the consistency and quality of our appeals process.

We have improved the training we provide to our ALJs to help ensure that our hearings and decisions are consistent with the law, regulations, rulings, and agency policy. Since FY 2007, our new ALJs have undergone rigorous selection and have participated in a two-week orientation, four-week in-person training, formal mentoring, and supplemental in-person training. We provide ALJs with easy access to information on the reasons for their AC remands and other data through an electronic tool. Because we can now gather and analyze common adjudication errors, we provide quarterly continuing education training to all adjudicators that targets these common errors. In addition, we have continued our training program that provides in-person technical training for 350 of our ALJs each year.

Our plan to improve service has allowed us to reduce our hearings backlog and increase the efficiency of our organization, while improving the quality of our decisions. The AC is remanding fewer cases to our ALJs for re-review, and the percentage of Federal court review requests is declining.

We could not have realized these improvements without the dedication of our ALJ corps and all of our employees. I thank them for their hard work.

Despite the tremendous advancement we have made, I am concerned that our improvements will erode. The number of hearing requests we receive each year remains high, and we are losing many ALJs and support staff, whom we are unable to replace. We are doing what we can to hold steady on our progress despite the loss of employees. However, our progress has slowed in the last year, and we were unable to open eight new hearing offices planned for Alabama, California, Indiana, Michigan, Minnesota, Montana, New York, and Texas.

I will now briefly discuss the steps we take to ensure ALJs issue timely and legally sufficient hearings and decisions, and to address ALJ personnel issues.

ALJ Management Oversight

ALJs have qualified decisional independence.⁴ That qualified decisional independence allows ALJs to issue decisions consistent with the law and agency policy, rather than decisions influenced by pressure to reach a particular result. The primary purpose of an ALJ's qualified decisional independence is to enhance public confidence in the essential fairness of an agency's adjudicatory process. We support Congress' intent to ensure the integrity of the hearings process, and we note that the Supreme Court has recognized that Congress modeled the Administrative Procedure Act after our hearings process.

The mission of our hearing operation is to provide timely and legally sufficient hearings and decisions. For our hearing process to operate efficiently and effectively, we need ALJs to treat members of the public and staff with dignity and respect, to be proficient at working electronically, and to be able to handle a high-volume workload in order to make swift and sound decisions in a non-adversarial adjudication setting. Let me emphasize that the vast majority of the ALJs hearing Social Security appeals do an admirable job. They handle the complex cases in a timely manner, while conforming to the highest standards of conduct and quality.

However, when ALJ performance or conduct issues arise, agencies such as SSA are more limited in the manner in which they can attempt to correct the issues. Federal law precludes management from using some of the basic tools applicable to the vast majority of Federal employees. For example, agency managers may take certain corrective

⁴ The phrase "qualified decisional independence" comes from case law interpreting the Administrative Procedure Act. See e.g., *Nash v. Califano*, 613 F.2d 10, 15 (2nd Cir. 1980) ("It is clear that these provisions confer a qualified right of decisional independence upon ALJs.").

measures, such as informal counseling or issuing a disciplinary reprimand, to address ALJ underperformance or misconduct. However, the agency cannot take stronger disciplinary measures against an ALJ, such as removal or suspension, reduction in grade or pay, or furlough for 30 days or less, unless another agency—the Merit Systems Protection Board (MSPB)—finds that good cause exists.⁵

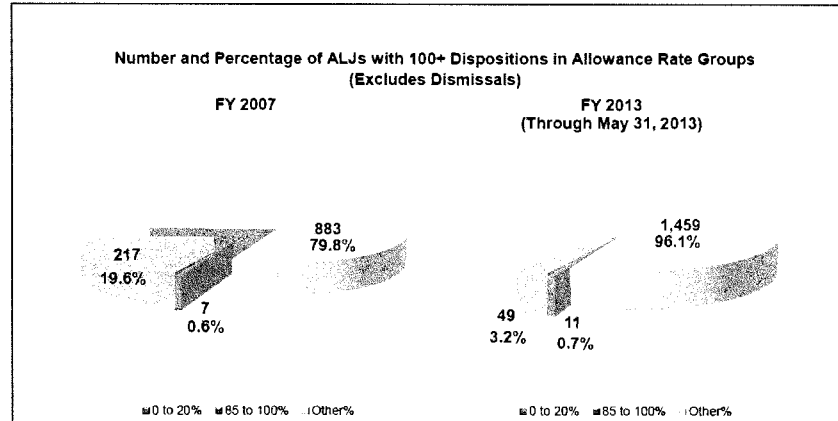
Historically, an ALJ's qualified decisional independence has been misunderstood; qualified decisional independence does not empower ALJs to disregard the applicable law, regulation, or agency policy. The law is clear that, on matters of law and policy, our ALJs are required to comply with the agency's interpretations. Since FY 2007, we have been working diligently to improve management oversight of our ALJs to ensure that they adhere to policies, regulations, and laws, while maintaining the ALJs' qualified decisional independence. Simultaneously, we have pursued a much more proactive track to address conduct and performance issues of all employees, including ALJs. In many instances, we accomplished a great deal by simply communicating our expectations.

Ensuring Legally Sufficient Decisions

Our ALJs are not “paying down the backlog,” as has sometimes been alleged. These reports ignore the reality that we are making quicker, higher quality disability decisions. Over the past 6 years, the allowance and denial rates have become more consistent throughout the ALJ corps, reflecting an emphasis on quality decision making. There are now significantly fewer ALJs who allow more than 85 percent of their cases than there were in FY 2007. Meanwhile, there is less than one percent of the ALJ corps that pays fewer than 20 percent of their cases.

⁵ The MSPB makes this finding based on a record established after the ALJ has an opportunity for a hearing. 5 U.S.C. § 7521

Figure 3: ALJ Allowance Rate Groups



Some observers have raised concerns about the variations in ALJ allowance rates. The agency expects some variation because of a variety of factors, such as Congressionally-required case rotation, geographical differences, and qualified decisional independence. I would like to note that the majority of ALJs cluster within a narrow range of the mean. Whether an ALJ falls within or outside of the mean, our focus is on the timeliness and legal sufficiency of his or her decisions.

The quality of our benefit decisions is a paramount concern for the agency. We took aggressive steps to institute a more balanced quality review in the hearings process. Our first effort in this area was to develop serious data collection and management information for the Office of Disability Adjudication and Review (ODAR). We then revived development of an electronic policy-compliance system for the AC. Because the Office of Appellate Operations (OAO) handles the final level of administrative review, it has a unique vantage point to give feedback to decision and policy makers. OAO developed a technological approach to harness the wealth of information the AC collects, turning it into actionable data. These new tools permitted the OAO to capture a significant amount of structured data concerning the application of agency policy in hearing decisions.

Using these data, we provide feedback on decisional quality, giving adjudicators real-time access to their remand data. We are creating better tools to provide individual feedback for our adjudicators. One such feedback tool is "How MI Doing?" This resource not only gives ALJs information about their AC remands, including the reasons for remand, but also 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. ALJs will be able to receive immediate training at their desks that is

targeted to the specific reasons for the remand. We develop and deliver specific training that focuses on the most error-prone issues that our judges must address in their decisions. Data driven feedback informs business process changes that reduce inconsistencies and inefficiencies, and simplify rules.

In FY 2010, OAO created the Division of Quality (DQ) to focus specifically on improving the quality of our disability process. While AC remands provide a quality measure on ALJ denials, prior to the creation of DQ, we did not have the resources to look at ALJ allowances. Since FY 2011, DQ has been conducting pre-effectuation reviews on a random sample of ALJ allowances. Federal regulations require that pre-effectuation reviews of ALJ decisions must be selected at random or, if selective sampling is used, may not be based on the identity of any specific adjudicator or hearing office. Currently, DQ reviews a statistically valid sample of un-appealed favorable ALJ hearing decisions.

DQ also performs post-effectuation focused reviews looking at specific issues. Subjects of a focused review may be hearing offices, ALJs, representatives, doctors, and other participants in the hearing process. The same regulatory requirements regarding random and selective sampling do not apply to post-effectuation focused reviews. Because these reviews occur after the 60-day period a claimant has to appeal the ALJ decision, they do not result in a change to the decision.

These new quality initiatives have given us a new opportunity to improve our policy guidance. The data collected from these quality initiatives identify for us the most error-prone provisions of law and regulation, and we use this information to design and implement our ALJ training efforts. To ensure that all of our ALJs comply with law, regulations, and policies, we provide considerable training including both new and supplemental ALJ training. We train our ALJs on the agency's rules and policies, and that training is vetted thoroughly by various components, including the component that is responsible for disability policy. For the past several years, our new ALJ training also has included a session that explains the scope and limits of an ALJ's authority in the hearing process, including the ALJ's obligation to follow the agency's rules and policies. We also have implemented the ALJ Mentor Program, which pairs a new ALJ with an experienced ALJ, who provides advice, coaching, and expertise. Additionally, we provide regular guidance to ALJs through Chief Judge memoranda and bulletins, Interactive Video Teletraining sessions, and in responses to specific queries from the field.

Additional efforts to promote policy compliance include a pilot of the Electronic Bench Book (eBB) for our adjudicators. The eBB is a policy-compliant web-based tool that aids in documenting, analyzing, and adjudicating a disability case in accordance with our regulations. We designed this electronic tool to improve accuracy and consistency in the disability evaluation process.

These efforts are testing some longstanding traditions within ODAR. We are moving from training based primarily on anecdotal information as to our most significant

problems to a data-driven identification of training, guidance, and policy gaps. We now develop training materials and automated tools designed to improve both the adjudicator's efficiency and accuracy in case adjudication. We are transparent with the information that we are collecting so that the ALJs can more readily make use of the information.

Ensuring Timely Decisions

We are concerned with timeliness as well as quality. As one court noted, "Simple fairness to claimants awaiting benefits require[s] no less."⁶

I spoke earlier about some of the initiatives the agency has employed to address the backlog since FY2007. Another one of those initiatives involved articulating a disposition goal for the ALJs. Specifically, we informed the entire ALJ corps of our expectation that they should issue between 500 and 700 legally sufficient dispositions annually. Our previous Chief ALJ established this expectation after consulting with a number of managers and ALJs about the reasonableness of the expectation. The goal of 500 to 700 dispositions was consistent with a prior goal set in 1981. At that time, the agency asked ALJs to complete 45 dispositions a month, or 540 a year. With significant advances in technology over the last 26 years, it was not surprising that when the agency articulated the 500-700 expectation, almost 50 percent of ALJs were issuing at least 500 dispositions a year. From the start, the 500 to 700 expectation was a goal—it is not a quota; it is not a mandate. However, it has been a useful tool for individual ALJs to manage their dockets and improve their timeliness. For example, in FY 2012, approximately 78 percent of our ALJs met the expectation.

I want to be very clear that our agency expects that all dispositions will be legally sufficient, and we are demonstrating that we are serious about quality with our investments.

Moreover, in a survey conducted last year 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 the agency's expectation, many respondents cited their status as new ALJs. We account for the learning curve for new ALJs. We reiterate the importance of making the right decision; consequently, we do not ask our newly-hired ALJs to meet the full workload expectation during the first year on the job.

When workflow issues arise that may affect an ALJ's performance, the agency works with the ALJ on an informal basis to determine whether there are any hindrances to performance and to assist the ALJ in improving his or her performance.

If issues cannot be remedied informally, then we take affirmative, and typically progressive, steps to address underperforming ALJs, including counseling, training,

⁶ *Nash v. Bowen*, 869 F.2d 675, 680 (2nd Cir. 1989), *cert. denied*, 493 U.S. 812 (1989).

mentoring and, as a last resort, disciplinary action. With the promulgation of our “time and place” regulation, we have eliminated arguable ambiguities regarding our authority to manage scheduling, and we have taken steps to ensure that ALJs are deciding neither too few nor too many cases. By management instruction, we are limiting assignment of new cases to no more than 960 cases annually.

Disciplinary Action

Again, I must emphasize that the vast majority of our ALJs are conscientious and hard-working employees who take their responsibility to the public very seriously. For these ALJs, we can rely on current agency measures including training to address any performance issues they may have. Generally, the informal process works, but when it does not, management has the authority to order an ALJ to take a certain case processing action or explain why he or she cannot take such case processing actions. ALJs rarely fail to comply with these orders. In those rare cases where the ALJ does not comply and where appropriate, we pursue disciplinary action.

The current system makes it challenging to address the tiny fraction of ALJs who hear or decide only a handful of cases, fail to decide cases in a legally sufficient manner, allow cases under their control to languish, or otherwise engage in misconduct. A few years ago, we had an ALJ who failed to inform us, as required, that he was also working full-time for the Department of Defense. Another ALJ was arrested for committing a serious domestic assault. More recently, an ALJ failed to follow his managers’ orders to process his cases. We removed these ALJs, but only after completing the lengthy MSPB disciplinary process that lasts several years and can consume over a million dollars of taxpayer resources. In each of these cases, unlike disciplinary action against all other civil servants, the law required that ALJs receive their full salary and benefits until the case was finally decided by the full MSPB—even though the agency could not allow them in good conscience to continue deciding and hearing cases. We remain open to exploring different options to address this matter, while ensuring the qualified decisional independence of ALJs.

I will now explain how our ALJs evaluate disability claims.

How We Determine Disability—The Sequential Evaluation Process

The Act generally defines disability as the inability to engage in any substantial gainful activity (SGA) due to a physical or mental impairment that has lasted or can be expected to last at least one year or to result in death. SGA is defined as significant work, normally done for pay or profit. Under this very strict standard, a person is disabled only if he or she cannot work due to a medically determinable impairment. Even a person with a severe impairment cannot receive disability benefits if he or she can engage in any SGA. Moreover, the Act does not provide short-term or partial disability benefits.

Our process for determining disability is admittedly complicated, but it is necessarily complex to meet the requirements of the law as designed by Congress.

We generally evaluate adult claimants for disability under a standardized five-step evaluation process (sequential evaluation), which we formally incorporated into our regulations in 1978. At step one, we determine whether the claimant is engaging in substantial gainful activity (SGA). The Act establishes the SGA earnings level for people who are blind and requires us to establish the SGA level for other people who are disabled. If the claimant is engaging in SGA, we generally deny the claim without considering medical factors.

If a claimant is not engaging in SGA, at step two, we assess the existence, severity, and duration of the claimant's impairment or combination of impairments. The Act requires us to consider the combined effect of all of a person's impairments, regardless of whether any one impairment is severe; throughout the sequential evaluation, we consider all of the claimant's physical and mental impairments individually and in combination.

If we determine that the claimant does not have a medically determinable impairment or that the impairment or combined impairments are "not severe" (i.e., they do not significantly limit the claimant's ability to perform basic work activities), we deny the claim at the step two. If the impairment is "severe," we proceed to the step three.

Listing of Impairments

At step three, we determine whether the impairment "meets" or "equals" the criteria of one of the Listing of Impairments (Listings) in our regulations.

The Listings describe for each major body system the impairments considered so debilitating that they would reasonably prevent an adult from working at the level of SGA regardless of his or her age, education, or work experience. The listed impairments are permanent (i.e., expected to result in death or last for a period greater than 12 months).

Using the rulemaking process, we revise the Listings' criteria on an ongoing basis. The Listings are a critical factor in our disability determination process, and it is our goal to update the Listings every five years. When updating a listing, we consider current medical literature, advances in medicine, information from medical experts, disability adjudicator feedback, and research by organizations such as the Institute of Medicine. As we update the Listings for entire body systems, we also make targeted changes to specific rules as necessary.

If the claimant has an impairment that meets the criteria in the Listings or equals the criteria of any listed impairment in both severity and duration, we allow the disability claim.

Residual Functional Capacity

A claimant who does not meet or equal a listing may still be disabled. The Act requires us to consider how a claimant's condition affects his or her ability to perform past relevant work or, considering his or her age, education, and work experience, other work that exists in the national economy. Consequently, we assess what the claimant can still do despite physical and mental impairments (i.e., we assess his or her residual functional capacity (RFC)). We perform that RFC assessment after step three and use it in the last two steps of the sequential evaluation.

We have developed a regulatory framework to assess RFC. An RFC assessment must reflect a claimant's ability to perform work activity on a regular and continuing basis (i.e., eight hours a day for five days a week or an equivalent work schedule). We assess the claimant's RFC based on all of the evidence in the record, including but not limited to treatment history, objective medical evidence, opinions, and activities of daily living.

We must also consider the credibility of a claimant's subjective complaints, such as pain. Such decisions are complex. Under our regulations, in evaluating credibility, disability adjudicators must first determine whether medical signs and laboratory findings show that the claimant has a medically determinable impairment that could reasonably be expected to produce the pain or other symptoms alleged. If the claimant has such an impairment, the adjudicator must then consider all of the medical and non-medical evidence to determine the credibility of the claimant's statements about the intensity, persistence, and limiting effects of symptoms. The adjudicator cannot disregard the claimant's statements about his or her symptoms simply because the objective medical evidence alone does not fully support them. However, a claimant's statements about pain or other symptoms, will not alone establish that he or she is disabled.

The courts have influenced our rules about assessing a claimant's disability. For example, when we assess the severity of a claimant's medical condition, we historically have given greater weight to the opinion of the physician or psychologist who treated that claimant. While the courts generally agreed that adjudicators should give special weight to treating source opinions, the courts formulated different rules about how adjudicators should evaluate treating source opinions. In 1991, we issued regulations that explain how we evaluate treating source opinions.⁷ However, when assessing whether we properly applied the treating source rule, Federal courts have continued to apply varying standards. We focus a significant amount of training on RFC to help ensure that adjudicators follow our policies, regulations, and the law.

⁷ Under those regulations, we will give controlling weight to a treating physician's opinion regarding the severity of the claimant's medical condition if it is well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record. If these conditions are met, a disability adjudicator must adopt a treating source's medical opinion regardless of any finding he or she would have made in the absence of the medical opinion. However, the determination of disability is an issue reserved for the agency, and we will not adopt a treating source's opinion that a claimant is disabled.

Once we assess the claimant's RFC, we move to the next steps of the sequential evaluation.

Medical-Vocational Decisions

At step four, we consider whether the claimant's RFC prevents the claimant from performing any past relevant work. We consider a claimant's past work relevant only if the claimant performed it within the last 15 years, it lasted long enough for the claimant to learn to do it, and it was SGA. If the claimant can perform his or her past relevant work, either as he or she previously performed it or as generally performed in the national economy, we deny the disability claim.

If the claimant cannot perform past relevant work or if the claimant did not have any past relevant work, we move to the fifth step of the sequential evaluation. At step five, we determine whether the claimant, given his or her RFC, age, education, and work experience, can do other work that exists in the national economy. If a claimant cannot perform other work, we will find that the claimant is disabled. If he or she can perform other work that exists in significant numbers in the economy, we deny the claim.

We use detailed vocational rules to minimize subjectivity and promote national consistency in determining whether a claimant can perform other work that exists in the national economy. The medical-vocational rules in our regulations are rooted in the statutory definition of disability and its requirement that we consider age, education, and work experience in conjunction with RFC. When we issued these rules in 1978, we noted that the Committee on Ways and Means in its report accompanying the Social Security Amendments of 1967 said that:

It is, and has been, the intent of the statute to provide a definition of disability which can be applied with uniformity and consistency throughout the nation, without regard to where a particular individual may reside, to local hiring practices or employer preferences, or to the state of the local or national economy.⁸

The medical-vocational rules, set out in a series of "grids," relate age, education, and past work experience to the claimant's RFC to perform work-related physical and mental activities. Depending on those factors, the grid may direct us to allow or deny a disability claim. For cases that do not fall squarely within a vocational rule, we use the rules as a framework for decision-making. In addition, an adjudicator may rely on a vocational specialist or vocational expert to identify other work a claimant has the capacity to perform.

As this description of our evaluation process makes clear, a claimant cannot receive disability benefits simply by alleging pain or other non-exertional limitations. We

⁸ 43 Fed. Reg. 55349, 55350 (1978) (quoting H.R. Rep. No. 544, 90th Congress, 1st Sess., at 30 (1967)).

require objective medical evidence and laboratory findings that show the claimant has a medical impairment that: (1) could reasonably be expected to produce the pain or other symptoms alleged; and (2) when considered with all other evidence, meets our disability requirements.

Hearings and Appeals Process

The Supreme Court has described the administrative process established by SSA and Congress as “unusually protective” of the claimant.⁹ Additionally, the Supreme Court has noted that our hearing system is “probably the largest adjudicative agency in the western world.”¹⁰ We have over 70 years of experience in administering the hearings and appeals process.

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 reviews the case *de novo*, meaning that he or she considers the case anew. The ALJ considers 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 any medical and vocational experts called for the hearing.

In contrast with Federal court proceedings, our ALJ hearings are non-adversarial. Formal rules of evidence do not apply, and the agency is not represented.¹¹ At the hearing, the ALJ serves as fact-finder and decision-maker, and 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 who may submit evidence and arguments on the claimant’s behalf 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 (e.g., the

⁹ *Heckler v. Day*, 467 U.S. 104 (1984).

¹⁰ *Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983).

¹¹ During the 1980s, we piloted an agency representative position at select hearing offices. However, a United States District Court held that the pilot violated the Act, intruded on qualified decisional 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.

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 may order a consultative exam). Once the record is complete, the ALJ considers all of the evidence in the record and 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

ODAR's Office of Appellate Operations (OAO) is composed of both adjudicators on the AC and support staff. 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: (1) there appears to be an abuse of discretion by the ALJ; (2) there is an error of law; (3) the actions, findings, or conclusions of the ALJ are not supported by substantial evidence; or (4) there is a broad policy or procedural issue that may affect the general public interest. The AC will also grant review if there is new and material evidence relating to the period on or before the date of the hearing decision that results in the ALJ's action, findings, or conclusion being contrary to the weight of the evidence currently in the record.

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 of the evidence in the ALJ hearing record (as well as any new and material evidence), and when it issues its own decision, the AC bases the decision on a preponderance of the evidence.

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. 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.

Federal Court Level

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.

Federal district courts consider two broad inquiries when reviewing one of our decisions: (1) whether we correctly followed the Act and our regulations; and (2) 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 explained that substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹² 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.

Conclusion

Making disability decisions for Social Security programs is a challenging task. Our highly-trained disability adjudicators follow a complex process for determining disability according to the requirements of the law as designed by Congress.

Our appeals process is one of the largest administrative adjudicative systems in the world. The ALJ corps is at the heart of our hearing process, and the vast majority of our ALJs are dedicated public servants who strive to provide the excellent, high-quality service the American public deserves. As I have explained in my testimony, we have made huge strides in the last few years to improve the quality and timeliness of our hearing decisions. Nevertheless, we understand that there is more to do. We are continuing our efforts to ensure that our policy guidance is clear and the application of policy is consistent and uniform as we administer our disability programs.

I thank you for your interest in this matter.

¹² *Richardson v. Perales*, 402 U.S. 389 (1971).

Mr. LANKFORD. Thank you.

Before I recognize Judge Sullivan, if anyone else has their microphone on, you might want to turn it off, because we are getting a little bit of ringing feedback. It will change a little bit when we do the questions, but during the opening statement just have one at a time on.

Judge Sullivan, pleased to recognize you.

STATEMENT OF THE HONORABLE J. E. SULLIVAN

Judge SULLIVAN. Thank you, Chairman Lankford, Minority Member Speier, members of the committee for holding this hearing and for the opportunity to testify before you.

From April 2008 to June 2011, I served as a United States administrative law judge in the Social Security Administration's Disability Program. My testimony today is in my individual capacity and not as a representative of the United States Department of Transportation, where I am currently employed as a judge.

In my testimony today, I want to focus on the SSA management's mistaken emphasis on production goals and speed of production within the adjudication offices.

Production is the code word for when a judge signs a disability decision. Speedy and high volume production by a judge in a short period of time, i.e., "making goal," is the prism lens through which all SSA management decisions regarding adjudication of disability are made.

A judge's production, or "making goal" is SSA management's singular and exclusive focus in its administration and oversight of SSA's disability hearings process. For SSA management, "making goal" is more important than the adjudicatory process, the quality of a judge's work, and any considerations in making that decision.

Instead of managing a meaningful Federal adjudication program, SSA management has substituted a factory-type production process. Judging is not a factory work process, but SSA has taken that approach for speed and high volume results.

As a result, SSA management can present to Congress and the American people with some impressive production statistics, but these statistics have been achieved by causing incalculable damage to the adjudication process at SSA.

You will be hearing today and in the future from a wide variety of individuals who can give you statistics, formulas, production numbers, mathematical calculations, and other such material. My testimony today is focused on two things: my personal experiences working for three years as a Social Security administration law judge and interacting with local, regional, and national SSA managers during that process; and, number two, my 24 years of State and Federal service as a trial and hearings judge.

My resume is attached to the back of my materials, but I just want to highlight that before I joined the SSA family, I had already served as a judge for 19 years in the State of Washington; 10 years as a State trial court judge part-time on the Court of General Jurisdiction, 9 years as a State industrial insurance appeals judge. I had also five years of experience working both as a criminal defense lawyer and as a deputy prosecuting attorney, so I brought

with me my experience, and that basically addresses why I have reached the opinions I am presenting today.

There are seven primary points in my testimony that I want to make sure that I get out before my time is up.

Number one, SSA management measures the adjudication program solely by a judge's speedy issuance of a very high number of decisions, and that I would be calling "making goal."

Number two, the SSA's high volume and speedy production goals result in management perceiving that the only value to a judge's work is that final decision; nothing else matters.

Number three, the process of a judge's work, which I call meaningful adjudication, takes time and involves complex, difficult work processes.

Number four, the SSA management's prism lens of management, which is "making goal," is incompatible with a judge's meaningful adjudication work.

Number five, the SSA management's high volume and speedy production goal agenda results in management pressuring judges to stop all meaningful adjudication work.

Number six, the high volume and speedy production goals result in production of a large number of disability decisions that have not been properly reviewed, analyzed, or decided.

Number seven, the production mandate by SSA management and the pressure for high volume and speedy disability decisions results in high rates of error in judicial decisions. As a result, you see the loss of billions of dollars incorrectly expended from the trust fund and in hardship for countless American citizens.

My time is up, sir. Thank you.

[Prepared statement of Judge Sullivan follows:]

Testimony before the Committee on Oversight and Government Reform
Subcommittee on Energy Policy, Healthcare and Entitlements
June 27, 2013 Congressional Hearing

Statement of Judge J. E. Sullivan
U.S. Administrative Law Judge

Chairman Langford, Minority Member Speier, and Members of the Committee: thank you for holding this hearing and for the opportunity to testify before you. I appreciate your interest in federal administrative judicial work and with the problems occurring in the Social Security Administration's (SSA) disability adjudication program.

From April 2008 to June 2011 I served as a U.S. Administrative Law Judge in the SSA disability adjudication program. I currently sit as a U.S. Administrative Law Judge with the U.S. Department of Transportation, where I preside over formal litigation involving transportation regulatory hearings. My testimony today is in my individual capacity, and not as a representative of the U.S. Department of Transportation.

In my testimony today, I want to focus on the SSA management's mistaken emphasis on "production goals" within the adjudication offices.

"Production" is the code word for when a Judge signs a disability decision. Speedy and high volume "production" by a Judge in a short period of time (e.g., "making goal") is the prism lens through which all SSA management decisions regarding adjudication are made.

A Judge's "production" or "making goal" is SSA management's singular and exclusive focus in its administration and oversight of SSA's disability appeals adjudication program. For SSA management, "making goal" is more important than the adjudicatory process, the quality of work, and any considerations in decision-making.

Instead of engaging in responsible stewardship and management of a meaningful federal adjudication program, SSA management has substituted a factory-type "production" process. This mistaken approach has allowed SSA management to present Congress and the American public with some impressive "production" statistics. But these statistics have been achieved by causing incalculable damage to a meaningful adjudication system.

But in reality, SSA management is failing in its adjudication stewardship. That failure is costing all of us American citizens millions of dollars in the issuance of poorly considered and

rushed decisions granting disability benefits. It also creates terrible individual consequences because of poorly considered and rushed decisions denying disability benefits.

You'll be hearing today and in the future from a wide variety of individuals who will be giving you statistics, formulas, mathematical calculations and citing to all manner of caselaw and studies.

My testimony is primarily based on two things: 1) my personal experiences working for 3 years as a U.S. Administrative Law Judge for SSA and interacting with local, regional, and national SSA management regarding the adjudication and issuance of disability decisions, and 2) my 24 years of state and federal service as a trial and hearings Judge.

A brief summary of my own legal background has been filed with this statement. In brief, when I joined SSA in April 2008, I had already served as a Judge for 19 years in Washington State. I had substantial judicial experience presiding over high-volume, complex litigation. I had served for 10 years part time as a Judge and Commissioner on the state trial court of general jurisdiction, and 9 years as an Industrial Insurance Appeals Judge (in which I held formal hearings equivalent to the trial court of general jurisdiction). I also had 5 years of experience serving as a criminal defense trial lawyer and as a deputy prosecuting attorney.

In April 2008 I began working as a U.S. Administrative Law Judge in the SSA disability adjudication program. From April 2008 through June 2011 I served in two different SSA disability offices (West Virginia and Oregon), under the management of two different SSA regional offices (Region 3 and Region 10). When I was located in West Virginia, I presided over disability cases in a four state area (West Virginia, Maryland, Pennsylvania, and Ohio) for almost 2 years (April 2008 - January 2010). In February 2010 I was assigned to work full-time as 1 of 8 SSA Judges representing all the SSA Judges during the Association of Administrative Law Judges' (AALJ) collective bargaining negotiations with national SSA management.

In providing this testimony today, it is not my intent to personally disparage or publicly shame any SSA manager. There are many SSA managers and Judges who truly believe that their participation in "production" and "making goal" means that they are pursuing the will of Congress and "protecting" the claimants who file for disability benefits. I strongly disagree with this perception. Nevertheless, I don't need to name an individual SSA manager to explain what is happening. As a result, in my testimony I refer to individual managers by their title, and to Judges and other individuals by their initials.

SEVEN (7) PRIMARY POINTS IN TESTIMONY

These are seven (7) primary points I wish to make in my testimony today:

1. SSA Management measures the adjudication program solely by a Judge's speedy issuance of a high number of disability decisions (i.e., "production" or "making goal").
2. The SSA's high volume and speedy production goals result in SSA management perceiving the Judge's final decision as the only valuable and necessary part of a Judge's work.
3. In reality, meaningful adjudication (i.e., the totality of a Judge's work) takes time and involves complex work processes.
4. SSA management's high volume and speedy production goals are incompatible with a Judge's meaningful adjudication work.
5. The SSA management's high volume and speedy production goals agenda result in SSA management pressuring Judges to stop engaging in meaningful adjudication.
6. The SSA management's high volume and speedy production goals result in the "production" of a large number of disability decisions that have not been properly reviewed, analyzed, and decided.
7. SSA management's "production" mandate, and pressure for high volume and speedy disability decisions, results in high rates of error in Judges' decisions. In turn, this results in the loss of billions of dollars incorrectly expended from the Trust Fund, and in hardship for countless American citizens throughout the country.

In my statement today, I will be briefly reviewing some of the examples contained in my written statement that support these points.

1. SSA Management measures the adjudication program solely by a Judge's speedy issuance of a high number of disability decisions (i.e., "production" or "making goal")

- a) SSA's "production" goal is linked solely to the Judge, and is a mathematical calculation.
 - (i) The "goal" per year: SSA management has set a minimum of 500-700 decisions issued per Judge per calendar year as the production "goal".
 - The goal per month: The production "goal" assigned to each Judge is always a minimum of 50 decisions per month, but often will be higher, depending on the regional office.
 - Goal compliance tracking: SSA management closely tracks (e.g., daily, weekly, monthly, yearly) each Judge's "production" and encourages and supports any Judge willing to "produce" even more than 700 decisions per year.
 - (ii) The goal calculation:
 - In a 4 week month, a Judge must "produce" 2.45 case decisions per day x 20 work days = 49 decisions per month.
 - In a 5 week month, a Judge must "produce" 2.45 case decisions per day x 25 workdays = 61.25 decisions per month.
- b) The SSA's "production" goal focuses exclusively on the existence and speed of a Judge's final work product, and ignores the totality of a Judge's adjudication work.
 - (i) Goal Ignores Actual Judicial Work: SSA management's calculation of the "production goals" ignores all the factors inherent in a Judge's workload that precede the issuance of a final decision (e.g., reading and analyzing evidence in the file, researching and reading the law, creating work product notes, ordering development on a case, holding a hearing, communicating with staff and other Judges about the case, writing instructions for a decision-writer, editing the decision, etc).
 - (ii) Goal Ignores Judicial Experience and SSA Study: The production goal is also contrary to actual judicial experience regarding meaningful adjudication work, and contrary to an SSA study of judicial work.¹

¹ See, e.g., The 1994 study in SSA's *Plan for a New Disability Claim Process*. This study, performed by SSA management at a time when disability claim applications were not as complex, showed an average disability case could take 3 to 7 hours of judicial time. A Judge presiding over 24 hearings per month was within the average bell curve.

- (iii) Goal Ignores Judge's Actual Available Work Hours: The SSA regional management "production" calculation does not give any consideration for a Judge's actual available time. Judges are not machines, charged and operating for 24 hours each day. Like everyone else, Judges have the right to go home at night, take a day of sick leave, or go on vacation with family. Judges also have professional obligations that are separate from managing a case from start to finish. The SSA management "production" number does not consider any of these factors. As a result, even if you believe that SSA's imposition of production goals for a Judge's work is acceptable, SSA management's current "production" required from Judges is presumptively unreasonable.
- c) The SSA "production" goals demonstrate SSA management's failure to understand, support, and manage a meaningful adjudication program

2. The SSA's high volume and speedy "production" goals result in SSA management perceiving the Judge's final decision as the only valuable and necessary part of a Judge's work

For SSA management, speedy production of decisions is everything. Thus, SSA management works very hard to pressure Judges into accepting SSA's vision that the only judicial work that matters is "making goal." Here are some examples:

2008 SSA New Judge Mentor Guide: In the SSA's 2008 New Judge Mentor Guide, SSA management recommended to SSA mentors that every new Judge schedule a minimum of 20 cases the first month of work. Each month thereafter, the SSA mentor was to "encourage" a new Judge to add at least 5 cases every month to his hearing docket. Thus, within eight (8) months of hire, the new Judge would be scheduling and hearing "a minimum" of 50 cases a month. The Guide repeatedly referred to this plan as "achieving" full productivity."

New Judge Training: During my initial nine month SSA "judicial training" period (April 2008-December 2008), the Hearing Office Chief Administrative Law Judge ("HOCALJ") was my designated "judicial mentor." He "mentored" me by referring me to an attorney in the office for any disability adjudication questions I might have. He then monitored how many cases I was scheduling per month for hearing and "producing" as final decisions. He repeatedly urged me to keep adding cases to my hearing docket, so that I could "get up to speed" and "start making goal." Every new Judge I met while at SSA experienced the same monitoring and pressure for case production from their local SSA management.

Making Goal is Everything: Half-way through my nine-month SSA "judicial training" period, I asked the HOCALJ if he would give me a few words of feedback and encouragement about my SSA judicial work. In response, the HOCALJ told me that he had nothing positive to say, since I wasn't "making goal." According to the HOCALJ, the only thing that mattered was whether or not I was going to produce "the numbers" the office needed to "make goal." He told me that my adjudication work was meaningless if I wasn't going to help the office "make the numbers." The HOCALJ and other SSA managers maintained this perception and approach to my judicial work (as well as every other Judge's work) throughout the time I worked in the West Virginia disability adjudication office.

RCALJ Pressures For Production: In October 2009, when I met the Regional Chief Administrative Law Judge ("RCALJ") for the first time, he repeated that message. During a private meeting with the RCALJ in my office, he told me he was "very concerned" about my low "production." He wanted me to increase my hearing caseload. It was very important. He wanted me to "produce" more case decisions per month.

All Other Adjudication Work Irrelevant: Neither the HOCALJ nor the RCALJ expressed any interest in the time I spent working, the quality of my adjudication work, or the analysis that I provided to support my decision-making. It was irrelevant that I diligently spent hours each day reading and analyzing complex medical records. It was irrelevant that I was fully developing and preparing cases, and holding meaningful hearings. It was irrelevant that the denial decisions I issued were repeatedly affirmed by the SSA Appeals Council and the U.S. District Courts. The only thing that mattered to SSA management was my monthly "production" numbers.

No Work Value If You're Not Making Goal: In approximately July 2010 I accepted a transfer from the WV hearing office to an Oregon hearing office. After accepting the transfer, I telephoned the HOCALJ at the Oregon hearing office to introduce myself. I explained that I was currently off caseload, because I was on the national collective bargaining assignment. The HOCALJ expressed dismay about my joining the office at a time when I wasn't producing decisions. In his opinion, I had no value if I wasn't helping the office "make goal."

That same day, I also telephoned the RCALJ for SSA's northwestern region to introduce myself. He too, expressed dismay about my transfer. He told me that it was wasted space if I occupied an Oregon Judge's office when I wasn't producing cases.

"Making Goal" is the Job: National representatives of SSA management repeatedly expressed these same beliefs while we Judges were negotiating with them at the collective bargaining table. "Making goal" was very important. It was easy if you "worked hard." Anyone who "cared" about the backlog would have "no trouble" issuing at least 500 decisions per year, if not more, for the agency.

3. In reality, meaningful adjudication (i.e., the totality of a Judge's work) takes time and involves complex work processes

The work of a Judge providing meaningful adjudication is complex, difficult, and time-consuming. On occasion a Judge may be assigned an "easy" case (e.g. a dismissal), but that is the exception. This is a brief description of what meaningful adjudication work encompasses, and why it takes time.

A claimant seeking approval of disability payments (i.e., payment from the Trust Fund) must prove that his inability to work (i.e., inability to sustain continuous gainful employment for 1 year or more) is related to one or more physical or mental medical conditions.

Disability cases are Not Easy: By the time most disability cases reach the SSA adjudication division, they have been through two levels of SSA medical review and been denied twice. Most of these cases are not "easy."

Multiple and Complex Medical Conditions: Most claimants filing disability applications will allege multiple medical conditions in support of their request for disability payments. (Exhibit A, page 2). These medical conditions are often complex. As a result, most claimants will also file multiple medical records to support their allegation of an alleged disabling condition. (Exhibit B).

Multiple Medical Experts = Multiple and Voluminous Medical Records: This means that the test records and notes of multiple medical experts (e.g., physicians, psychiatrists, therapists, etc.) need to be requested and added to the file (either by the Judge or the claimant). It is not unusual for a file to contain 30-50 exhibits, with each exhibit containing multiple medical records. (Exhibit B). Just one medical exhibit may contain up to 4000 pages of medical records.

Reading the Evidence and Learning and Applying Facts and Law: Part of a Judge's adjudicatory work is reading these medical records, and learning about all kinds of different medical conditions. (Exhibit C). A Judge must learn how medical conditions are expressed in symptomology and how those conditions might be treated. The Judge must know the law about disability. (Exhibit A, page 1-2). The Judge must then apply that knowledge to analyzing the facts in each case.

Testing and/or Resolution of Conflicting Evidence: When an American citizen seeks disbursement from the Trust Fund on the grounds of disability, there must be a proper review of the evidence, as well as a testing of evidence to ensure that if payment from the Trust Fund is authorized, such payment is necessary. The Judge must resolve any conflicts and/or inconsistencies in the evidentiary record, as well as determine if the citizen is credible in alleging medical disability. (Exhibit D). Medical disability, and the time span of such disability, must be proved by the evidence.

Difficult Issues are Complex and Time Consuming: Many disability cases involve a combination of medical conditions (physical or mental or both), drug and alcohol abuse, and non-compliance with treatment. (Exhibits B and C). In meaningful adjudication on the question of disability, these applications are particularly time-consuming and difficult to analyze.

Every Disability Applicant Needs Help: Every single American citizen who files a disability application needs help. A Judge who is engaged in meaningful adjudication must seek the truth behind the disability application and determine whether authorizing disability payments is the correct answer to that cry for help. Oftentimes, no matter how heart wrenching the problems, the Judge must deny the claimant's application because the citizen's need for help is for reasons other than medical disability (Exhibit D).

List of Basic Meaningful Adjudication Tasks (not exclusive): A Judge who is performing meaningful adjudication of disability appeals will engage in these basic tasks:

- a) Reading Evidence Takes Time
- b) Identify poverty cluster issues
- c) Analyze any secondary gain motivations
- d) Learn about the medical conditions and symptoms
- e) Take time to read and apply the law and regulations
- f) Hold meaningful hearings (Exhibit E)
 - i) Be prepared
 - ii) Rule on motions
 - iii) Allow a claimant to present his evidence
 - iv) Allow a claimant representative to ask questions
 - v) Ask the claimant about evidentiary inconsistencies
 - vi) Call and examine any needed experts
- g) Grant continuances when needed
- h) Read and edit draft decisions before signing
- i) Issue a disability decision on the case

Disability applications aren't just about medical conditions: As part of my litigation experience, I learned to work with the full panoply of issues that are related to poverty (e.g., scarce resources, lack of education, homelessness, etc.), as well as mental illness, mental limitations, and/or drug/alcohol addiction (much of which also occurs within the poverty cluster). If one is educated to that complex cluster of poverty problems, then one can identify them, and also potentially separate such issues from the issue of work disability.

Many Claimants Have "Poverty Cluster" Problems: In my caseload at SSA, the majority of claimants had problems with poverty, mental illness, and/or addiction. But that didn't mean this same claimant was functionally disabled from working. Indeed, in my years of litigation experience, virtually every person for whom I advocated, every person I prosecuted, and every

person over whom I presided in litigation had one or more of these poverty problems to deal with in their lives. But that didn't mean they couldn't work. (Exhibit D).

SSA Management Ignores Poverty Cluster and Need for Education If an individual hired by SSA to be a Judge (or attorney reviewer) doesn't have the knowledge, education, and experience to identify and understand these clusters of human problems, such a decision-maker can easily fall into the trap of perceiving an individual who suffers from any of these problems as "disabled." And of course, a decision to pay someone is not only easy, but it is a "feel-good" decision impacting someone "in need" (e.g., "I've helped someone have a better life today"). Far too many claimants are getting paid, in part because there is a lack of SSA institutional support for understanding and identifying these "cluster" issues as potentially separate from work function and capacity.

Unfortunately, SSA management actively discourages SSA Judges from discussing poverty cluster problems with claimants. There is absolutely no SSA training on it.

Secondary Gain Motivations are not Relevant: According to SSA management, the only relevant material any Judge should be considering was medical information. It was "inappropriate" to ask a claimant about secondary gain motivations (e.g., outstanding debts, a missing spouse, a dependent parent, lack of child care options, lack of a driver's license, etc.). Any factual inquiry beyond the claimant's medical complaints and allegations was "irrelevant."

This SSA management blindness to the realities of American poverty, and failure to encourage Judges to learn about it and address it, helps to explain the high pay rate (i.e., 60% of all appeals) in the SSA adjudication system.

4. SSA management's high volume and speedy production goals are incompatible with a Judge's meaningful adjudication work.

According to SSA management, speedy and high volume production is everything. Thus, SSA management persistently seeks to reduce or eliminate any adjudication work process that involves time. SSA management trains Judges to stop meaningful adjudication. In pursuit of "making goal," SSA management pressures Judges to engage in a superficial "guessing" process to decide disability cases. Here are the steps SSA management recommends (not exclusive):

- a) Don't develop the case before hearing
- b) Stop reading the evidence – Most of it is irrelevant
- c) Decide the issues before reading the evidence
- d) Poverty cluster issues are irrelevant
- e) Secondary gain motivations are irrelevant
- f) Use an Egg Timer - Limit evidence review to 20-60 minutes
- g) Use 50 Thumbnails to skim
- h) Guess about the evidence
- i) Find a reason to pay a case
- j) Stop holding meaningful hearings
 - i) Don't test the evidence
- k) Don't grant continuances - Speedy production is more important
- l) Don't bother reading and editing decisions
- m) Issue a disability decision on the case

The best example of SSA management's abandonment of meaningful adjudication is a special "training" session that the RCALJ set up for me and my judicial colleagues in January 2010, to teach us how "efficiently" review files so we could "increase" our monthly production. This training covered a majority of the SSA management work practices listed above. This is a summary of the SSA management "training:"

Meeting with RCALJ: In October, 2009 the RCALJ came to our office. As part of that visit, the RCALJ met privately with me, and said he wanted me to "produce" more case decisions per month. I told him I was working more than full-time, and I asked how I could add to what I was doing.

The RCALJ offered me computer training. In response, I told him I was competent on the computer. I also used Dragon Speak. My caseload production wasn't an issue that could be fixed with a computer program. I was working more than full-time hours, and doing the very best I could. The issue, in my opinion, was that I was reading the evidence, which took time. I knew that some Judges had opted not to read evidence, but I was not willing to do that.

I asked the RCALJ what he thought I could do differently to produce more case decisions per month, and yet still ethically do my job, which included reviewing the evidence?

The RCALJ said he really did not know. He recalled that when he was a hearings Judge, he had chosen not read all the Veteran's Administration (VA) records. Instead, he just would read the VA admission/discharge hospital summaries. [I did not respond to his choice not to read evidence].

I explained to the RCALJ that this issue involved more than just VA records. We had lots of medical evidence filed in our cases. I was already taking shortcuts. Even then, there were still hundreds of pages often filed in every case. It was not unusual to have 25 - 50 new medical exhibits filed in just one case after the last state agency denial. The medical issues and medical evidence involved difficult, complex material. It simply took time to read and analyze.

The RCALJ replied he did not personally have any other suggestions. He did know, however, several Judges who seemed to be able to read the evidence more quickly, and produce large decision numbers. The RCALJ then offered to put me "in touch" with 1 or 2 Judges that he knew who produced large numbers, who might be able to help me. I accepted the offer.

RCALJ Arranges Special "Production" Training

The next month, in November 2009, I received an e-mail from Judge H---, who served as a "Special Assistant" to the RCALJ. Judge H--- did not conduct hearings full-time, in part because she was a designated SSA management trainer, traveling to different offices each month to train Judges on how to use SSA's new eBP (electronic business process) computer program. Judge H--- offered to meet by video with me and other Judges in my office to show us how to read evidence more quickly.²

In January 2010, Judge H--- appeared by live video to explain her method of file review. I attended with two other Judges from my office. Judge H--- did not ask us any questions about

² In my first email, I specifically noted:

"We are primarily interested to know if you have a technique or style in which to read new medical material. We typically have 100s of pages of new Exhibits filed after the DDS reconsideration. We know some Judges who have just stopped reading material, or who choose to only read 1 page out of every 50, but that is not our goal. So we would be most interested in your techniques. Thank you in advance."

Judge H--- responded: "I have a hearing scheduled for Thurs. that has 4134 pages in the F section alone. There are strategies and approaches. I will be glad to share with you."

our backgrounds, our work, or what we were interested in discussing. Judge H--- had a specific presentation about file review, and provided it in a lecture format for approximately 1.5 hours. We occasionally interrupted her during the 1.5 hours to ask a question.

a) SSA Management Training: Don't Develop the Case Before Hearing

At the beginning of the January 2010 video presentation, Judge H--- stated that when she read a case file, she only worked on and reviewed "un-pulled" cases. That meant none of the evidentiary documents had been sorted or exhibited or worked up. Judge H--- also did not look at the file until 24 hours before the hearing.

(Comment: Judge H--- limited her work load, because she did not review the file in time to develop any medical evidence for the record before the hearing. By working with unmarked evidence, she "helped" SSA management by agreeing to hear the case without any pre-hearing file assembly. The witnesses at the hearing would not be able to refer to exhibits if there was a challenge to the evidence at the hearing or on appeal).

b) Stop Reading The Evidence – Most Of It Is Irrelevant

Judge H--- began her January 2010 presentation by stating that she didn't know any Judge who spent more than one (1) hour reading evidentiary material and reviewing exhibits. She explained that "Judges don't read all the exhibits. They just pick and choose." Judge H--- acknowledged that "some" Judges read every document in the evidentiary file, but asked us, "Who has the time?" She said: "Don't be afraid" to stop reading the evidence.

c) Decide the Issues before Reading Evidence

Judge H--- repeatedly urged us to stop reading all the evidence in the file, since much of it was "irrelevant." Judge H--- emphasized for an "efficient" file review, we simply needed to know what we were looking at. She advised us that it was essential for us first to decide what the issues were. Once we decided what the issues were, we only needed to look for information on those issues. If we used this method, we could pick and choose what to read, and even ignore PCP (primary care physician) notes.

Judge H--- gave us multiple examples of evidence that she did not read or consider. For example, Judge H--- didn't read anything in the E-section of the file (e.g., claimant lay reports, etc). She did, however, quickly glance at the E-section, to make sure that she knew about any third-party report, since failing to mention it in a denial decision could result in a reversal. Judge H--- did not read physical therapy notes or chiropractic notes. She did skim them, however, to make sure there weren't any MS statements in them. She did not read most of the hospital records. She read only the hospital admission/discharge reports and the laboratory reports. She did not read most of the VA records. We were "reading way too much" if we were reading all of the VA records.

d) Use An Egg Timer - Limit Evidence Review To 20-60 Minutes:

Judge H--- repeatedly told us: "Most Judges use no more than one hour to review a file." Judge H--- gave herself very strict time limits to review any case. She only spent 15-20 minutes reviewing "regular" cases. At the very most, she would only spend one hour reviewing any case, including "a bear" of a case (e.g. her case involving 4000 pages in one exhibit). Like "most Judges," she never spent more than one hour preparing any case.

- Use Egg Timer and Just Move On

We asked Judge H--- how could she limit her review to one hour, especially when she had just had a case that had 4000 pages in just one exhibit? Judge H--- explained that she would often use an egg timer at her desk to ensure that she kept to her time limits. When the timer bell rang, she would stop reading and go on to the next case. She encouraged us to set similar time limits, and to use an egg timer at our desks. This would help "force" us to move on (i.e., stop all case review when the egg timer bell rang).

e) Use 50 Thumbnails to Skim

Judge H--- explained that for her file review, she skimmed the exhibits electronically to look only for certain things. She did that by using the computer's "thumbnail" feature in the E-file. This allowed her to look at up to 50 Exhibit pages on one page. The thumbnails were obviously too tiny to actually read any of the material on the page, but she had learned to know what certain medical records looked like.

(Comment: a "thumbnail" is a miniature reproduction of an 8.5" x 11" document page on the computer screen. It is reduced to the size of a 1" x 1" postage stamp.)

f) Guess about the Evidence

Based on the 50 page thumbnail feature, Judge H--- stated that she could accurately guess what the Exhibit was about, and then choose which pages she would then enlarge and skim. She also used a double-page feature on the computer, so that she could quickly compare a lab result or test result with a medical treatment note, to see if it was consistent.

g) Stop Holding Meaningful Hearings:

Given her case preparation, we asked Judge H--- to describe her hearings. She told us that she scheduled hearings every 30 minutes. Despite that schedule, sometimes her hearings actually took 45 minutes (except for when she paid a case, at which point the hearing lasted no more than 10 minutes). She did not allow the attorney or representative to ask questions until after she was finished with her inquiry. She had a list of boilerplate questions and she asked those same boilerplate questions to every claimant. If needed, she would ask a question about inconsistencies in the file.

This type of 30 minute hearing is typical for Judges who set 50 hearings or more per month on their calendar. In 2008, when I sat and watched the HOCALJ do several hearings, this was the process he used to conduct hearings.

This type of “speedy” hearing process eliminates all meaningful discussion and testing of the evidence, and does not provide a genuine forum for the claimant and his witnesses to present testimony. In contrast, I have provided a sample of a very short hearing (1 hour 16 minutes) that involve the testimony of the claimant, and one expert witness. (Exhibit A).

SSA management’s attacks on meaningful adjudication are also demonstrated by the attempts to pressure Judges to hold hearings without the medical evidence, and to stop granting continuances in cases.

Continuances Are A Part Meaningful Adjudication: Judges and lawyers with litigation experience know that a hearing may need to be continued (i.e., postponed) for many different reasons. People are not machines, and many events or problems may occur during the dispute process that support the need for a brief postponement of a scheduled hearing. Continuances are part of meaningful adjudication, which is a process that allows flexibility in each individual case.

A Continuance Takes Time: A continuance, by its nature, requires time. As a result, such a common legal process during litigation is antithetical to SSA management’s speedy “production” mandate.

The examples here demonstrate SSA management’s attempts to control and limit a Judge’s responsibilities to provide meaningful adjudication. The first 3 examples show that SSA management is willing to engage in inappropriate advocacy on behalf of claimants, as well as to encourage the Judges to abandon their duty to be prepared for a case (i.e., obtain and read medical evidence before taking testimony at the hearing). SSA management is also encouraging unethical behavior, because the RCALJ is pressuring the Judges to pre-decide continuances in favor of one litigant (e.g. the claimant) over another (e.g. the American public).

The fourth and last example shows that the real reason behind the SSA management’s lobbying against continuances is because continuances take time, and thereby interfere with their speedy production agenda.

1. The Claimant Shouldn’t Have to Wait:

When the RCALJ visited our office in October 2009, he specifically told us Judges that continuing cases was “not preferred” by SSA management, no matter what the reason. The RCALJ explained it was not “good practice” for any Judge to continue a case, even if an attorney or litigant filed lots of new medical evidence at the last minute or had failed to file evidence. It did not matter what the medical evidence was, or the amount of evidence that was filed or that was promised to be filed in the future (after the hearing). It also did not matter if the attorney had

been newly retained, and asserted he had not had time to prepare. The claimant had a right to a hearing, and shouldn't have to wait. Continuances were unfair to the claimant.

2. Hold the Hearing without Evidence: The RCALJ explained that the "preferred practice" was to hold the hearing without the evidence, read the evidence if it was submitted later, and then decide if a supplemental hearing needed to be scheduled.

3. Don't Believe the Claimant's Attorney: If an attorney had been retained even 2 weeks prior to the hearing, then Judges should presume, regardless of what the attorney said, that the attorney had had adequate time to file all needed documents, and could appear and adequately represent the claimant at the hearing. If the attorney asserted, prior to the hearing, that he had a conflict on his/her schedule, Judges should not presumptively believe the attorney.

The RCALJ did not explain how any Judge could competently question the claimant or any other witnesses at the hearing, while remaining completely ignorant about the missing or late-filed medical evidence. The RCALJ also did not explain why an attorney, who is an officer of the court, should be presumptively disbelieved when asserting a need for more time, or a calendar change. (Comment: It is noteworthy that the RCALJ advocated for the claimant only to the extent that a continuance should not be granted. Obviously, if SSA managers were truly concerned about the claimant, they would be advocating for the claimant's attorney to have time to be prepared, and be able to attend the hearing.

4. It's Really about SSA Management's Scheduled-To-Heard Production Ratio:

Two weeks later, during the November 9, 2009 meeting with the HOCALJ and the HOD, the HOCALJ stated that it was simply "not acceptable" cases for Judges to continue cases. He explained that the office was given a "schedule-to-heard" ratio set by regional management. Scheduled cases had to be heard in order to meet monthly and yearly regional goals of production. The national level for case continuances was approximately 20%. Any Judge who continued more than 20% of his/her cases was continuing cases above the national average. That was unacceptable.

The HOCALJ told us that cases should not be continued unless it involved a pro se claimant needing to get an attorney. Any Judge who granted continuances beyond the 20% national average, or for reasons other than for a pro se claimant, would be watched very carefully. Postponing cases resulted in fewer case decisions being issued, which meant that the office might not meet the regional production goals. In addition, the HOCALJ stated that any Judge who did grant a continuance might be required to add additional hearings to his/her dockets so that the office could retain the ability to meet its monthly production goals.

5. The SSA management's high volume and speedy production goals agenda result in management pressuring Judges to stop engaging in meaningful adjudication

SSA management utilizes all kinds of different pressures to "push" Judges to issue decisions. "Making goal" is the beginning, middle, and end of all discussions with management about adjudication work. Here are just a few examples, which I personally experienced.

a) A Judge who can't "make goal" is a problem

For me, the pressure to produce volume decisions began before I even started work. In February 2008 I accepted a position with SSA, with a start date of Sunday, April 13, 2008 in a West Virginia (WV) office. Before driving across the country, I telephoned the Hearing Office Chief Administrative Law Judge (HOCALJ) of the WV office to introduce myself. The HOCALJ knew that I had been hired. He expressed dismay and disappointment about my hiring. He was not interested in hearing about my legal background. He explained that I was an "outside" hire with no specific SSA experience. My hire created a problem for the office. He explained that each SSA disability office had monthly "production goals" to meet. There was a backlog of disability cases, and the SSA Commissioner wanted each Judge to produce a minimum of 500 case decisions a year. Because I did not have an SSA background, I would not be able to immediately help the office "meet the numbers." The HOCALJ would have to "allow" me a nine-month learning curve before expecting me to reach "full production." The HOCALJ hoped I would be able to "get up to speed" as soon as possible.

b) The "goals" are actually a quota

On Monday, April 14, 2008 I started my first day of work. The HOCALJ met with me to discuss my judicial work. He focused exclusively on how I was supposed to help the office meet its mandatory monthly production quota (Note: The HOCALJ repeatedly used the word "quota" during this meeting). This production quota had to be met by the last Friday of each month.

The HOCALJ provided me with the following judicial quota formula: In a four-week month I was required to produce 2.45 case decisions per day x 20 work days. This meant I needed to produce 49 case decisions per month. In a five-week month the formula changed to 2.45 case decisions per 25 workdays. This equaled 61.25 case decisions I needed to produce each month. If any month had a federal holiday, I would be allowed to subtract that one day from the quota formula.

The HOCALJ did not explain how I was supposed to conduct meaningful adjudication and still meet these production numbers. We didn't discuss adjudication at all.

c) Make the goal so you can get back home:

On my first day, the HOCALJ also warned me that if I didn't "make the numbers" I would likely never get a transfer back to my home state. You had to "make goal" to get back

home. He advised me to try and schedule 72 cases each month, so that I could “always make goal.”

d) You are “lazy,” “uncaring,” and not a “team player” if you don’t “make goal”

On my first day in the office, the HOCALJ explained to me how to “make goal.” He then warned me to avoid two of the Judges in the office. The HOCALJ described these two Judges as “lazy” Judges, who “failed to help” the office reach its production requirements. They were “low producers” who were “not team players.” They “did not care” about the office numbers.

The HOCALJ was correct that these two Judges did not “make goal.” But in all other aspects, he was profoundly mistaken. Both of these Judges were dedicated, hard-working, public servants. They were ethical professionals who cared deeply about their work, and who spent hours and hours of time poring over medical records and holding hearings, trying to analyze and correctly decide cases.

Nevertheless, SSA management has reduced the value of all judicial adjudication work to a monthly production number. A Judge must “produce” the monthly number. Thus, according to SSA management, only the SSA Judges who “make goal” are “hard-working” and “care” about the American people. Any SSA Judge who fails to “make goal” is automatically defined by SSA management in a variety of negative ways (e.g., “inefficient,” “nonproductive,” “wasting time,” “lazy,” “malcontent,” “uncaring,” “disruptive,” etc).

In October 2009, the Regional Chief Administrative Law Judge (RCALJ) made a rare visit to our office to re-emphasize that “production” was absolutely imperative. During an all staff meeting, the RCALJ gave a PowerPoint presentation in which he asserted that 80% of SSA Judges throughout the country were “producing” 500 or more decisions per year. The RCALJ explained to the staff, in front of us Judges, that any “hard-working” SSA Judge could produce at least 500 or more decisions per year. He then excused the clerical staff from the meeting, and met solely with the Judges to expand on that message.

The following month, in November 2009, I was trying to persuade the HOCALJ to meet with Judge J--- and me so we could discuss certain concerns the Judges had about management directives. The HOCALJ repeatedly refused. He said he knew the difference between his caseload and mine. He knew that he, at least, worked hard. He was concerned about the backlog. Unlike me, he didn’t have time for meetings. When I showed the HOCALJ that his calendar for the next week was exactly the same as mine, he expressed shock. He then agreed to meet with Judge J--- and me for 20 minutes.

The following week, Judge J--- and I met with the HOCALJ about multiple judicial concerns on behalf of all the Judges in my office. During this meeting, the HOCALJ personally attacked me for failing to “make goal.” He accused me of not working “full-time”, and not meeting my case “obligations.” I reminded the HOCALJ that I and all the other Judges in the

office all worked full-time. In fact, all of us were routinely working at least 55-60+ hours per week, and more. I pointed out that Judge A---, who was supposed to be on vacation all month, had actually been in the office next door, working "off the clock" for most of the week (including while we were meeting), in order to prepare cases before he "officially" returned from vacation. (Comment: In essence, Judge A--- had failed to take his vacation because of the relentless pressure by management on Judges in the office). The HOCALJ replied that Judge A-- - obviously "cared" about his job, and was willing to put in the hours that "were needed."

This disparagement and shaming of Judges who do not "make goal" or who challenge the SSA management "goal" agenda is pervasive on all levels (i.e., locally, regionally, and nationally). As a member of the AALJ's national bargaining team, I repeatedly heard SSA management representatives talk about how any "hard-working" Judge could easily "make" the 500 per year production goal. Any Judge who was not "producing" was negatively labeled. Although this type of shaming tactic should be beneath any adult in the workplace, it is pervasively utilized by SSA management to pressure Judges into production compliance.

e) It's easy to issue decisions with a "pay" decision form

When I began work in April 2008, the HOCALJ gave me his SSA Mentor Guide ("Guide") to use. This Guide instructed SSA mentors to encourage new Judges to write fully favorable decisions ("pay" decisions), in order to expose them to the use of bench decisions as well as the help them learn how to use electronic "FIT" fully favorable ("pay") decision tool. It was noteworthy that SSA provided no electronic boilerplate forms for issuing "denial" decisions. SSA management repeatedly discussed this "FIT" pay form with Judges at every judicial training session I attended.

f) It's Just a Game – Play Along

One of the ways that the HOCALJ in my office tried to "encourage" us Judges to produce more cases decisions per month was to characterize our judicial work as a competitive sport. We received constant emails throughout the week (sometimes up to 3 emails in one day), in which the HOCALJ gave us an updated report on our "production" numbers. In these e-mails, the HOCALJ would characterize the Judges as a sports "team" playing against the attorney-reviewer sports "team" to "make goal" for the office. At the end of each month the HOCALJ would send an email reporting on whether the office had made or exceeded "goal," and congratulating the sports "team" that had won the completion (i.e., had produced the most decisions to "make goal"). Not surprisingly, many of the clerical staff began to refer to the Judges by last name only, as if we all football players (e.g., "How many has Sullivan signed this week?").

g) We Must Help the RCALJ to Win

On November 9, 2009 the HOCALJ and the Hearing Office Director ("HOD") convened a meeting with 3 of the 6 judges in my office. During this meeting the HOCALJ mandated that all Judges in the office were to start traveling more, as well as increase the number of hearings set and heard per day at the remote travel site. We questioned the need for this mandate,

especially without any objective justification, or without any input from us about our cases or our personal schedules.

The HOCALJ and the HOD admitted that our office was well ahead of the national average for hearing and deciding older cases. However, they explained that our RCALJ had just issued a new "regional" production goal for issuing more case decisions (i.e. "production"). The RCALJ's new regional goal exceeded the nationally mandated target goal, because our RCALJ wanted to make sure that his region was the "Number 1" region in the country in "making goal." The HOCALJ and HOD needed to make sure that our office met the RCALJ's new "regional goal." As a result, the HOCALJ was mandating us Judges to travel more, set more hearings during travel, and produce more decisions per month on all travel cases.

h) Help "make goal" by paying some cases

In November 2009 the HOCALJ reminded me (as he often reminded all of us Judges) that when SSA manager R--- was in the office, R--- always went through the master docket before the end of the month, and then paid enough cases OTR (on the record) so that the office always made its monthly goal. The HOCALJ stated that if I was so concerned about the backlog, and the cases in the office, he would be happy to give me the master docket, and let me start looking through so I could pay cases OTR the way SSA manager R--- used to. That way I could help the office continue to make the monthly goal. I advised the HOCALJ that even if he gave me the master docket for review, it was unlikely that I would authorize cases to be paid OTR the way R--- had done.

i) The RCALJ's regional goals are mandatory

At the November 9, 2009 meeting with the HOCALJ and the HOD, the HOCALJ stated that meeting the RCALJ's regional "target goals" was mandatory. As a result, all Judges (except himself) would be required to travel for one full week every month. All travel dockets had to be set during the first 3 weeks of the month, so that every Judge would be physically in the office during last week of the month, in order to sign and issue as many decisions as possible so that the office could "make goal."

j) Scheduling travel is easy if you "make goal"

At the same November 9, 2009 meeting, the HOCALJ agreed that scheduling travel dockets was difficult enough (especially in December and other holiday months) without such a 3 week limitation. He emphasized, however, that "making goal" was paramount. If a Judge was helping to meet Regional goals, both as an individual and for the office, then the HOCALJ would allow that Judge flexibility in scheduling travel. But, any Judge who failed to "make goal" would be denied the ability to set any travel docket during the last week of any month. Judges who were not complying with the goals would not be allowed flexibility in setting travel dates.

h) Stop reading your decisions to help make goal: The HOCALJ also told us that he would allow a Judge to travel during the last week of the "goal" month only that Judge gave up editing and signing his pending decisions for that month. The Judge would be required to authorize the HOCALJ to "edit" and sign the Judge's pending decisions while the Judge traveled, so that the office production levels were met. The HOCALJ also warned us that he would be closely watching the production of each Judge in the office.

k) It's not a quota -- but "making goal" is mandatory

In late November 2009 Judge J--- and I again met with the HOCALJ about multiple concerns the office Judges were raising. One of those concerns was that the HOCALJ was mandating that the Judges travel to a remote hearing site with no E-file (electronic file) access, and hear a minimum of 24 hearings in 5 days or less.

During this meeting, the HOCALJ denied he was mandating judicial caseload quotas. He admitted, however, that he had certain monthly "target goals" set by the RCALJ that he had to meet. As a result of these management "goals," the HOCALJ insisted he could force Judges in the office to hear a minimum of 5 hearings per day, and travel for at least one week at a time, regardless of each Judge's personal commitments, the complexities of the cases on each Judge's docket, or the physical inadequacies of the travel site location.

Judge J--- and I asked the HOCALJ to explain to us what the difference was between a "target goal" on a hearing docket and a case "quota." The HOCALJ explained that the difference was that he wasn't calling it a "quota." He would never call it a "quota." He was simply stating that he had an obligation to meet regional "target goals" of production. As a result, he had the authority to require that Judges meet "target goals" on travel dockets. He refused to explain how this was any different from setting a caseload quota, other than to say that he would never call his requirements a "quota." If we Judges did not set our schedules as he mandated, so that we met the office "target goals," then he would refuse the travel docket on the grounds that it was not cost-effective. The HOCALJ said that he would not be authorizing Agency expenditures so that we Judges could be "on vacation" when we traveled. The HOCALJ refused to describe what he meant. He simply repeated that he had regional "target goals" that our office had to meet. Any Judge's travel docket that did not set a minimum of 24 hearings per week at the travel site, in order to meet "the goals," was not "cost-effective" and would not be approved.

6. The SSA management's high volume and speedy production goals result in the "production" of a large number of disability decisions that have not been properly reviewed, analyzed, and decided

It is impossible to measure the number of SSA disability applications that have been issued based on poorly adjudicated and rushed decisional output. But the inescapable reality is that a large number of disability decisions are being produced in the absence of any meaningful judicial adjudication, based on SSA management's mandate for production. For SSA management, "making goal" has replaced all meaningful adjudicatory process.

As part of my testimony, I am including two examples of real SSA disability cases that were reviewed by two different SSA Judges. (Exhibit F).

In both of the two examples, the first Judge reviewed the case under a meaningful adjudication standard. The second Judge reviewed the case under SSA management's "making goal" standard.

Both cases were removed from the first Judge after she had spent time reviewing the records, ordering development, and holding a hearing. The cases were removed from the first Judge on the grounds the cases were "aged" (e.g., an SSA management time calculation that includes the amount of time SSA had the case before assigning it to a Judge) and needed to be "processed."

The second Judge issued a "pay" decision on each case a few days after the cases were reassigned to him. Each "pay" decision helped the office "make goal" for the month.

In addition, I am providing an example of SSA's management's secret, unilateral re-assignment of the same case to three Judges in my office. It demonstrates SSA management's lack of understanding and support for meaningful adjudication. (Exhibit G).

7. SSA management's "production" mandate, and pressure for high volume and speedy disability decisions, results in high rates of error in Judges' decisions. In turn, this results in the loss of billions of dollars incorrectly expended from the Trust Fund, and in hardship for countless American citizens throughout the country

For SSA management, "making goal" trumps the adjudicatory process, the quality of work, and the correctness in decision-making.

Instead of engaging in responsible stewardship and management of a meaningful federal adjudication program, SSA management has substituted a factory-type "production" factory production agenda. This mistaken approach has allowed SSA management to present Congress and the American public with some short-term "production" statistics. But these statistics have been achieved by causing incalculable damage to a meaningful adjudication system.

In reality, SSA management is failing in its adjudication stewardship. That failure is costing all of us American citizens millions of dollars in the issuance of poorly considered and rushed decisions granting disability benefits. It also creates terrible individual consequences because of poorly considered and rushed decisions denying disability benefits.

Mr. LANKFORD. Thank you.
Judge Snook?

STATEMENT OF THE HONORABLE THOMAS W. SNOOK

Judge SNOOK. Thank you. Chairman Lankford and Ranking Member Speier, thank you for inviting me to present testimony to the subcommittee. I am honored to report to you what has happening in the trenches from the perspective of one who has been a Social Security line judge for 16 years.

Although I feel the majority of line judges share my views, I am testifying in my individual capacity. I paid my own expenses to attend the hearing and am on personal leave.

Shortly before I was appointed a Social Security judge, I represented an uncle who had applied for disability benefits on his own. He was awarded benefits posthumously, five years after he applied. I think I understand how the system does not work.

I am going to focus on the authority of the judges and the disability hearing itself from the perspective of a line judge.

I am a judge in Miami. I hear many SSI cases; I only hear about two or three disability insurance benefits cases a month; I hear some concurrent cases. So the cases that I am talking about the taxpayers are paying for.

Mr. Chairman, I want to congratulate you on the quality of your staff. I have been very impressed with their knowledge and dedication. However, Mr. Chairman, what if Speaker Boehner selected all your staff and you could not direct them to do any work, you could only request that they perform a task because they all worked for the speaker? That is my position as a judge with the Social Security Administration. Although we also have excellent staff, nobody works for me. I have no authority over the staff, nor can I direct them to do anything.

Not only do I not have any authority over the support staff, I have no authority over the attorneys who appear before me. I cannot direct them to submit evidence before the hearing. I cannot direct them to submit all relevant evidence, not just evidence favorable to the claimant. I can impose no sanctions when they withdraw the day of the hearing. I can impose no sanctions when they show up at the hearing with hundreds of pages of new evidence, even if the hearing has to be postponed because the medical expert does not have time to read the new evidence.

Let me shortly describe what happened to three judges in Cleveland who had the temerity to issue a prehearing order 10 years ago.

It was a typical generic order using all judicial systems to make the hearing run more efficiently. However, the order directed the evidence be submitted before the hearing to a staff supervisor. The judges were charged with insubordination because they had no authority to direct the supervisor to accept the evidence.

The resulting litigation lasted several years. While the case was on appeal, one of the judges died. Let me tell you how compassionate this agency is with regard to insubordinate judges. They made his widow a party to the lawsuit. To her credit, when Commissioner Barnhart learned about the facts, she immediately had the widow dismissed from the lawsuit.

Now, I don't want a misunderstanding with regard to the attorneys representing claimants. We have outstanding attorneys representing claimants. My remarks are directly mainly towards these mega-firms. The Wall Street Journal has had several articles about that and Binder and Binder was bought out by a hedge fund. Now, is this really what Congress intended, that disability law firms be owned by hedge funds?

Let me make some proposed recommendations. I propose five procedural steps to make the hearings more efficient, reduce staff, and save taxpayer money. They are based on the Disability Service Improvement plan proposed by former Commissioner Barnhart, except I propose a Trust/Treasury Representative as recommended by the American Bar Association in 1995.

One, require that the claimants develop the record. They are making probably \$2 billion. The last data was \$1.7 billion.

Two, require claimant's attorney to submit all relevant evidence. Unlike other judicial systems, under Social Security regulations they only have to submit evidence favorable to the claimant.

Require the claimant's attorney to timely submit evidence and to timely withdraw. It is the only judicial system where the claimant's attorney may submit hundreds of pages of new evidence the day of the hearing or withdraw the day of the hearing.

Close the record after the disability hearing. You can't have a moving target. I make mistakes, but I have one of the lowest remand rates in the corps. I don't mind a judge telling me I made a mistake on my record, but if the record changes and it is remanded.

Lastly, appoint a trust or public representative. How many companies would issue a check for \$300,000 without having two signatures? Having a representative in the hearing room will solve many problems. One, let's abandon pay and chase. CDRs aren't the answer. Making the correct decision at the beginning of the process is a correct answer. That is where the money should be put. A trust representative would also prevent abusive judges. We know there are some abusive judges, there are articles about them. These are secret proceedings, and having two government officials in the proceedings would be beneficial.

And let me just end with a phrase attributed to President Reagan: Let judges be judges in the Social Security disability system, sir.

Thank you, ma'am.

[Prepared statement of Judge Snook follows:]

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM (113th CONGRESS)
SUBCOMMITTEE ON ENERGY POLICY, HEALTH CARE, AND ENTITLEMENTS**

SUBCOMMITTEE HEARING JUNE 27, 2013

**HON. REPRESENTATIVE JAMES LANKFORD, CHAIRMAN (OK)
HON. REPRESENTATIVE JACKIE SPEIER, RANKING MEMBER (CA)**

STATEMENT OF:

**THOMAS W. SNOOK
UNITED STATES ADMINISTRATIVE LAW JUDGE
SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION & REVIEW
MIAMI, FL**

Chairman Lankford and Ranking Member Speier, thank you for inviting me to present testimony to the Subcommittee. I am honored to be able to report to you what is happening in the trenches from the perspective of one who has been a Social Security line judge for sixteen years.

My biography is attached. I have been a career military officer, litigator, manager, and judge. I would only like to highlight three points in my military career. I am a Viet Nam combat veteran. I am a 1967 graduate of the United States Coast Guard Academy. I was the Chief Trial Judge of the Coast Guard before I retired in 1993.

My father was a World War II veteran, my brother served as an MP in Berlin before the Wall came down; and my wife recently retired as the Victim Witness Coordinator for the United States Attorney's Office for the Southern District of Florida.

I was in private practice for three years after I retired from the Coast Guard. However, most of my professional career has been in the public service. I have a combined forty-two years of military and civil service experience serving the American public. I have been a United States Administrative Law Judge (ALJ) with the Social Security Administration in Miami since 1997.

I had the second highest qualifying score among the sixty appointed judges in my training

Thomas W. Snook, United States Administrative Law Judge
House Comm. on Oversight & Gov. Reform, Health Subcomm. (June 27, 2013)

group. Judge Patrick McLaughlin, a line judge in Jacksonville, had the highest score and, along with many other line judges, assisted me in preparing my remarks.

Although I feel a majority of line judges share my views, I am testifying in my individual capacity. I paid my own expenses to attend the hearing and am on personal leave.

Shortly before I was appointed a Social Security judge, I represented an uncle who had applied for disability benefits on his own. He was awarded benefits posthumously five years after he applied.

I think I understand how the system does not work and am well qualified to recommend changes to ensure worthy claimants are awarded disability benefits as soon as possible, at the least cost to them and the American public.

This is what Congress intended sixty years ago when they set up the program.

I am going to focus on the authority of the judges and the disability hearing itself, from the perspective of a line judge.

Mr. Chairman, I want to congratulate you on the quality of your staff. I have been very impressed with their knowledge and dedication. However, Mr. Chairman, what if Speaker Boehner selected all your staff and you could not direct them to do any work? You could only "request" that they perform a task because they all worked for the Speaker. That is my position as a judge with the Social Security Administration. Although we also have some excellent staff, none of them works for me. I have no authority over them nor can I direct them to do anything.

The agency says the support staff ratio is 4.5 support staff to every one judge. The agency made the same argument to Congress almost twenty years. At that time, they argued the support staff ratio was 5 to 1. The American Bar Association after analyzing the data, issued a report presented to the ABA House of Delegates by United States District Court Judge Norma L. Shapiro that the actual support staff ratio was zero to one. To quote from the report:

Thus it is no longer meaningful to speak of support staff ratio to judges, and this has been true for over a decade. The staff do not exist to support the judges' work, but that of management. The true support staff ratio of office personnel to individual judges is now zero to one, . . . a situation that is quite contrary to the agency's representations to the Congress.¹

Not only do I not have any authority over the support staff, I have no authority over the

¹ 1995 AM 115, American Bar Association Resolution 12 (August 1995) (Attachment C)

attorneys who appear before me. I cannot direct them to submit evidence before the hearing; I cannot direct them to submit all relevant evidence,² not just evidence favorable to the claimant. I can impose no sanction when they withdraw the day of the hearing. I can impose no sanction when they show up at the hearing with hundreds of pages of new evidence, even if the hearing has to be postponed because the medical expert does not have time to read the new evidence.

Last year our Chief Judge, Debra Bice met with the National Organization of Social Security Claims Representatives (NOSSCR). They complained to her that line judges were issuing prehearing orders that contained mandatory requirements or sanctions. She immediately issued a memorandum to "all judges" as a "reminder" that such orders were "inconsistent with Agency law and policy."³ This is our boss letting the attorneys who appear before us know that we have been warned not to order them to do anything.

Let me describe what happened to three judges in Cleveland who had the temerity to issue a prehearing order ten years ago. The order was a generic prehearing order commonly found in all judicial systems.⁴ The intent is to conduct hearings more efficiently at a savings to the public. However, this order directed that the evidence be submitted before the hearing to a staff supervisor. The judges were charged with insubordination because they had no authority to direct the supervisor to accept the evidence. The resulting litigation lasted several years. While the case was on appeal one of the judges, a close friend, Judge Rob Isbell died. Let me explain how compassionate this agency is if they feel a judge has been insubordinate. After Rob died, they named his widow a defendant in the lawsuit. When I found out, I was for the only time in my life ashamed to be working for the Federal Government. To her credit, when we notified Commissioner Barnhart what had happened, she immediately ordered the General Counsel at the time, Lisa De Soto to dismiss Judge Isbell's widow from the lawsuit.

Therefore, I am a Judge in name – but no one works for me. Moreover, I am judge who, according to our Chief Judge, has no authority over the personnel in my courtroom. In fact, I cannot even set the time and place of a hearing. Former Commissioner Astrue took this authority away from me.

What is the major problem facing me and the American public?

The present system is not serving deserving claimants or the American public.

² In Alabama, by State Bar Association rule, attorneys must submit all relevant evidence at all proceedings. Alabama is the only state known to have this rule.

³ Use of Prehearing Orders-REMINDER, 12-992 (April 16, 2012)(Attachment C)

⁴ Attachment D

A few years ago, an excellent staff member, and you know she was good because HHS hired her away from us, asked me, "Judge, do you know what the problem is with the system?" I said, no Betty, what is the problem with the system? She replied the problem with the system is that we have so many unworthy claimants filing claims that we cannot get to the worthy claimants in a timely manner.

An outstanding attorney who practices before me recently phrased it differently: "The disability system has turned into a cottage industry for certain claimants' representatives." He was referring to large firms who use TV advertising and other methods to sign up clients. Claimants' representatives collectively make \$1.7 billion in fees annually. That is a large cottage industry. The largest claimants' firm Binder and Binder was according to the Wall Street Journal was bought by a hedge fund.

Is that what Congress intended when you set up the disability system in 1956?

So after forty-two years of federal service, I no longer feel that I am serving the American public. I feel I am serving the claimants' representatives, especially a few large law firms; and I am powerless to do anything about it. Too many of them do no work until they receive the Notice of Hearing. If it is bad case, they withdraw shortly before the hearing or the day of the hearing and suffer no penalty. If it is a good case they submit new evidence the day of the hearing.

A few months ago, I had hearings but I was out by our front desk where there is a glass partition. One of the attorneys asked if he could speak to me. I said, "Sure Matt, what's up?" He told me that his law firm was withdrawing the Request for Hearing for a case that was scheduled for hearing the following day. This case was one of my own remands. For a brief moment, I felt a sense of personal vindication. However, do you think I spent extra time preparing for this hearing and had a medical expert and a vocational expert scheduled to testify, either because the Appeals Council ordered me to do so or because I wanted to make sure the second hearing would be properly conducted? If I were a state court judge, two blocks away from our office, I would have said, "Thank you, Matt. I really appreciate the heads-up. That will be \$1500 in court costs, but I appreciate the heads-up." However, I am not a state court judge so all I could say was "Thanks, Matt for the heads-up." The withdrawal the day before the hearing cost the law firm nothing, but the American public had to pay for the expert witnesses and I could have spent my time preparing for the hearing of a worthy claimant.

In another recent case in which I had both a medical expert and a vocational expert scheduled to testify, the attorney showed up at the hearing with more than 50 pages of new evidence. The medical expert was testifying by telephone and did not have a fax machine. I had to

postpone the hearing. The postponement cost the law firm nothing but the American public had to again pay for the experts and an interpreter.

Two weeks ago, I had a full day of hearings. At my 10:00 am hearing the claimant appeared but the attorney was not present. I recessed so I could talk with the staff to see if the attorney had called, I was told the attorney had not called, but had faxed in a Notice of Withdrawal of Representation at 7:40am that morning. I had to continue the hearing because the claimant wanted additional time to find another attorney. This late withdrawal cost the attorney nothing.

The final example is also a case I had this month. It was the last hearing of the day. The attorney was present but the claimant was not. I lack the authority to dismiss a claim if either the attorney or the claimant appears. I asked the attorney if she knew where the claimant was. She told me that they had not heard from the claimant in three months. But then told me, I think a little too smugly: "I guess, Judge, you will have to issue a Notice to Show Cause."

What is the solution?

I have proposed five procedural steps to make the hearings more efficient, reduce staff and save the taxpayers money. They are based on the Disability Service Improvement (DSI) plan proposed by former Commissioner Barnhart, except I propose having a Trust/Treasury Representative as recommended by the American Bar Association in 1995.

1. REQUIRE THAT THE CLAIMANT'S ATTORNEY DEVELOP THE RECORD⁵

Claimants' attorneys and non-attorney representatives make \$1.7 billion a year in fees and are not required to develop the record. Under regulations in effect for fifty years the judge is required to develop the record, whether the claimant is represented or not.

2. REQUIRE CLAIMANT'S ATTORNEY TO SUBMIT ALL RELEVANT EVIDENCE

Unlike other judicial systems, an attorney only has to submit evidence favorable to a claimant.

3. REQUIRE CLAIMANT'S ATTORNEY TO TIMELY SUBMIT EVIDENCE AND WITHDRAW

It is the only judicial system where a claimant's attorney may submit 100's of pages of new evidence the day of the hearing, preventing adequate review by the judge and experts, or

⁵ A fuller explanation and citations are found in Attachment B.

withdraw from the case the day of the hearing requiring the public to pay the additional cost of any experts retained.

4. CLOSE THE RECORD AFTER A DISABILITY HEARING

An attorney may submit evidence on appeal which was withheld at the hearing.

5. APPOINT A REPRESENTATIVE TO PROTECT THE TRUST FUND AND PUBLIC

With a combined nearly 19.5 million adults and children receiving benefits, the disability system is a \$201 billion annual program.

NPR recently reported this is more than is spent on food stamps and welfare combined. They also reported: "In the past three decades, the number of Americans who are on disability has skyrocketed."

Each SSA judge is expected at a minimum to annually award \$75.6 million in present and future benefits without a second federal official in the hearing room to protect the trust fund and public.

A recent Senate report cited an agency finding that 22% of favorable decisions had legal "errors or were insufficient".

The trust representative would be charged with insuring justice is done; the record is complete and worthy claimants are awarded benefits as early as possible; not with defending the agency decision below.

If the trust representative prevented one erroneous payment, the investment in placing him or her in the hearing room would be paid back three-fold. If it were an erroneous denial, the payback may not be as high, but it would achieve the overarching goal of awarding worthy claimants benefits as early as possible and prevent possibly years of appeals.

A representative in the hearing room would also prevent judges from being abusive to claimants and from abusively awarding or denying benefits.

HHS has abandoned "Pay and Chase," after fifty years so should SSA. Errors should be prevented before a final decision is issued, not corrected after the fact.

OPEN HEARINGS

Congress should question the agency as to why the hearings are secret. They may be the only mass secret hearings conducted in the United States involving the public. Many personal injuries trials involve medical evidence. They are conducted in courtrooms open to the public. What is so shameful about applying for disability? The judge can always conduct an in camera session, if sensitive evidence should not be disclosed to the public.

GOALS

An important trait of military leadership and leadership in general is that you never ask a subordinate to do something that you could not do. If the goal is 500 - 700 dispositions, (dispositions include dismissals) neither Chief Judge Bice nor Deputy Chief Allen achieved that goal as a line judge. They only achieved that goal as Hearing Office Chief Administrative Law Judges by receiving hundreds of administrative dismissals. (Chief Judge Bice received 637 dismissals in one year.) If the goal is 500 - 700 decisions, neither Chief Bice nor Deputy Chief Allen ever made this goal as a line judge or HOCALJ.

DISABILITY SERVICE IMPROVEMENT (DSI)

Social Security is an Agency that doesn't listen to its judges. In fact, the line judges are union members because the Agency refused to talk to us. When I became a judge, the judges had a professional association. In 1999, the Agency was planning yet another reorganization called: Hearing Process Improvement (HPI). The president of the Association went to talk to Associate Commissioner, Rita Gier. She told him, "I don't have to talk to you, you are not a Union." Until that time there had been discussion about forming a union, but it never had majority support among the judges. Shortly after Ms. Gier made that statement, 90 percent of the judges voted to form a union.

An exception to the Agency not listening to the judges was former Commissioner Jo Anne B. Barnhart, appointed by President George W. Bush. She spent the first two years of her term meeting and talking to the employees, including the judges. She then came up with a reorganization plan called: Disability Service Improvement or DSI. It was being piloted in Region I when her term ended on January 19, 2007. It had the following features:

- The State Disability Determination Services (DDS) will continue to make the initial determination.
- Individuals who are clearly disabled will have a process through which favorable

determinations can be made within 20 calendar days after the date the DDS receives the claim.

- A Medical and Vocational Expert System (MVES) will enhance the quality and availability of the medical and vocational expertise that our adjudicators at all levels need to make timely and accurate decisions.
- A new position at the Federal level – the Federal Reviewing Official, or FedRO – will be established to review state agency determinations upon the request of the claimant. We intend to have well-trained attorneys serve as FedROs and we expect that this level of review will help ensure more accurate and consistent decision making earlier in the process.
- The right of claimants to request and be provided a de novo hearing conducted by an administrative law judge is preserved.
- The record will be closed after the administrative law judge issues a decision, with provisions for good cause exceptions.
- A new body, the Decision Review Board (DRB), will be created to identify and correct decisional errors and to identify issues that may impede consistent adjudication at all levels of the process.
- And, the Appeals Council will be gradually phased out as the new process is implemented throughout the nation.⁶

A year after Commissioner Astrue took office, he abandoned the implementation of DSI stating it would cost too much.

I am only going to focus on two aspects of DSI – the five-day rule and the Disability Review Board. Claimants' representatives make collectively \$1.7 billion a year in fees. Commissioner Astrue never explained how requiring them to submit all relevant evidence five days before the hearing and closing the record at the end of the hearing would cost the American public more money.

The genius of the Disability Review Board is that it would make the Agency smaller by phasing out the Appeals Council and it would solve a major complaint of many of the judges. Most ALJs complain about remands from the Appeals Council, arguing that the members of the Appeals Council are not ALJs and have never conducted a hearing and, therefore, do not fully understand the hearing process from the perspective of the ALJ. The DRB would consist of three member panels, two of the members being ALJs and the other member being an Appeals

⁶ A full description of DSI by Commissioner Barnhart may be found at http://www.ssa.gov/legislation/testimony_061506.html

Council judge. However, no new Appeals Council judges would be appointed so eventually the DRB panels would consist solely of ALJs. Therefore, rather than having permanent members, like the present Appeals Council, the DRB would consist of a flexible number of three ALJ panels. The number of panels could be increased or decreased, depending on the workload.

Once again, Commissioner Astrue never explained how this would cost the American public more money.

HEARING ROOM PERSONNEL

The hearing room personnel supporting the judge consist of a hearing reporter/monitor who records the hearing and takes limited notes. They used to be independent contractors, but the agency has tried to enter into a master contract for all hearing reporter/monitor. This is also true with interpreters. The judges feel these small business, independent contractors provide a better more reliable service than a national master contract would provide.

The most important expert is the medical expert. When I arrived in Miami it was common to have medical experts testify in person at hearings. However, although fees awarded to claimants' representatives have been increased several times in the sixteen years I have been a judge, the medical expert fees have not increased in more than a quarter of a century. In fact, no one knows the last time the medical expert fees were increased. Therefore, it is rare to have a medical expert attend a hearing, most medical experts testify by telephone.

The last expert is the Vocational expert. Their fees have been increased.

ACUS

The Administrative Conference of the United States (ACUS) just completed a study and adopted recommendations considering the Social Security Disability System.

Achieving Greater Consistency in Social Security Disability Adjudication: An Empirical Study and Suggested Reforms, Harold J. Krent, IIT Chicago-Kent College of Law, Scott Morris, IIT College of Psychology (April 3, 2013)
http://www.acus.gov/sites/default/files/documents/Achieving_Greater_Consistency_Final_Report_4-3-2013_clean.pdf

ACUS has also surveyed all the judges to determine if the DSI Region I pilot should be extended and expanded. The results of the survey have not yet been published.

ABA 1995AM115 REPORT AND RESOLUTION

After rereading the ABA report and resolution, it rings as true today as it did twenty years ago. There has been a systemic procedural problem for more than thirty years since the agency divorced the staff from the judges. Having been a trial judge before coming to the Agency, I agree with the ABA, a judge should not wear three hats, except in pro se cases.⁷ The ABA recommendations should be given serious consideration by the agency. If they are rejected the agency should explain why they were rejected.

CONCLUSION

Social Security Disability system is long overdue for change. I applaud the Subcommittee for focusing on this important issue. I want to thank Chairman Lankford and Ranking Member Speier again for inviting me to appear before the Subcommittee, and I look forward to answering the Subcommittee's questions.

⁷ The full report and resolution may be found at Attachment C.

Mr. LANKFORD. Mr. Sutton.

STATEMENT OF THOMAS D. SUTTON

Mr. SUTTON. Thank you, Mr. Chairman, Ranking Member Speier, members of the subcommittee. My name is Thomas D. Sutton and I am here as a member of the Board of Directors and a past President of the National Organization of Social Security Claimants' Representatives. I represent the disability claimants before Social Security and in the Federal courts, and I have done so for 25 years. I appreciate your invitation today so that I may bring the perspective of claimants, the people who should be the focus of our concerns here, to the witness table.

We believe the Social Security disability program is fundamentally sound in that it implements a strict but fair standard of disability established by statute. Individuals claiming benefits must prove that their severe medical impairments prevent them from performing not only the work they have done in the past, but any other work which exists in significant numbers in the economy. The severity of this standard is illustrated by the fact that one in five men and one in six women who are awarded disability benefits die within five years of the award.

While no system is perfect, Social Security's administration of the disability program is not broken and the system is not in crisis. Unfortunately, some of the proposals for change, while well meaning, would not improve the system and, in fact, would cause real harm to deserving individuals who are unable to work and have nowhere else to turn. Some of these proposals are in fact based on myths which need to be exposed as such.

The primary myth here is that Social Security is awarding disability at high rates to people who are able to work. In reality, approval rates for disability applicants have fallen significantly over the last few years. In fact, while the ALJ union has complained in court that the production goals which Social Security has attempted to impose on them have caused them to cut corners and award benefits to undeserving claimants just to "keep up with the flow," the facts simply do not support this idea. The national average allowance rate at the ALJ level has declined, from 62 percent in 2007, the year in which the agency announced its production goals, to 52 percent in fiscal year 2012, and appears to be declining even more so far this year.

A study by Dean Harold Krent for the Administrative Conference of the United States found no evidence of any bias toward allowance of cases caused by the agency's production goals. Moreover, Dean Krent's study revealed that the ALJ corps contains more outliers, defined as two standard deviations above or below the mean, in the low range of allowance rates, 3 percent of judges awarding fewer than 24 percent of claimants, then there are outliers in the high range, 2 percent awarding more than 82 percent of claimants.

Our experience in the representation of claimants informs us that there is no rush to award benefits to claimants in response to increased applications or production goals. If anything, the actual data is trending in the opposite direction. This is tragic for claimants whose claims are allowed by the State agencies less than one-

third of the time and who have always relied on the ALJ court to provide a fair hearing with consideration of all the evidence, much of which was never obtained by the State agencies as it should have been from the start, and some of which has emerged later in the process when new illnesses have arisen and more tests have been done to confirm their severity.

Understood in this context, it should not be surprising that ALJs reach different conclusions than State agencies, who never lay eyes on a claimant and often fail to obtain all available evidence before denying claims.

A second myth that has been repeated incessantly is that the standards for disability have been loosened over time, resulting in higher numbers of beneficiaries. Nothing could be further than the truth. For example, Social Security has abolished its listing of impairments for conditions like diabetes and obesity, leaving claimants suffering from such conditions at a serious disadvantage. Regulatory criteria for other impairments such as liver disease have not been abolished outright, but have been changed to make them virtually impossible to meet.

The increase in applicants and awards is due almost entirely to two demographic factors, the age of the population and the advent of women as full participants in the labor force who have achieved the insured status they lacked historically. These factors obviously have nothing to do with the standards contained in the statute and regulations or the judges applying those standards.

I see that my time is about to expire. I will conclude to say this: The disability adjudication system of Social Security provides a thorough and fair means of determining, through face-to-face hearings conducted by ALJs with assistance from vocational and medical experts, whether claimants meet the strict definition of disability in the Social Security Act. Claims that the system is "rife with corruption" and "biased toward allowing claims" are ill-founded and not supported by the evidence.

We urge the subcommittee to ensure that any changes it contemplates are based on facts and evidence, not conjecture and supposition. The disability program is too important to the American people, both those it currently serves and those it will help in the future, to make wholesale changes which could deprive truly disabled people the benefits they have paid for with payroll taxes all their working lives.

Thank you for your consideration of our views.

[Prepared statement of Mr. Sutton follows:]

**NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)**

560 Sylvan Avenue • Englewood Cliffs, NJ 07632
Telephone: (201) 567-4228 • Fax: (201) 567-1542 • email: NOSSCR@att.net

Executive Director
Nancy G. Shor

Written Statement for the Record

By Thomas D. Sutton, Esq., Past President

on behalf of the

National Organization of Social Security Claimants' Representatives

Hearing on:

**Rising Social Security Disability Claims and the Role of Administrative Law
Judges**

Subcommittee on Energy Policy, Health Care and Entitlements

House Committee on Oversight and Government Reform

June 27, 2013

Chairman Lankford, Ranking Member Speier, and Members of the Subcommittee, thank you for the opportunity to provide testimony for this hearing on "Rising Social Security Disability Claims and the Role of Administrative Law Judges."

Social Security Disability Insurance (SSDI) provides vital economic security, as well as access to health care for individuals whose impairments are so severe that they preclude substantial, gainful work. This income support program is an integral component of our nation's Social Security system, reflecting the core American value of assisting those in need. We appreciate your interest in and attention to this critical program.

I offer testimony here today on behalf of NOSSCR, the National Organization of Social Security Claimants' Representatives. Founded in 1979, NOSSCR is a professional association of attorneys and other advocates who represent individuals seeking Social Security Disability Insurance (SSDI) 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.

We believe that the Social Security disability program is fundamentally sound, in that it implements a strict but fair standard of disability established by statute. Individuals claiming disability benefits must prove that their severe medical impairments prevent them from performing not only the work they have done in the past, but any other work which exists in significant numbers in the economy. While no system is perfect, Social Security's administration of the disability program is not broken, and the system is not in crisis. Unfortunately, some of the proposals for change, while well-meaning, would not improve the system and, in fact, would cause real harm to deserving individuals who are unable to work and have nowhere else to turn. Some of these proposals are, in fact, based on myths which need to be exposed as such.

I. SSDI: A Vital System for People with Significant Disabilities

About 57 million, or 1 in 5 Americans, live with disabilities, and about 38 million or 1 in 10 have a severe disability.¹ The Social Security disability programs provide vital support to only those with the most significant disabilities—about 14 million children and working-age adults. Most people who apply for benefits are denied, and only about 40 percent of applicants are awarded benefits under the strict Social Security definition of disability—even after all stages of appeal.²

SSDI benefits are modest, averaging only about \$1,129 per month in May 2013,³ just over the Federal Poverty Level for a single person—but they play a vital role in helping people meet their basic needs. For the vast majority of beneficiaries, SSDI benefits make up at least 75 percent of income, and for nearly half of non-institutionalized beneficiaries SSDI makes up over 90 percent of income.⁴ Beneficiaries report that SSDI helps them pay for essentials such as housing, utilities, food, transportation, clothing, medications, and out-of-pocket expenses for medical care. Additionally, SSDI benefits play a central role in helping people with significant disabilities live in the community, rather than in restrictive, costly institutions. SSDI benefits keep millions of people with significant disabilities from deep poverty and homelessness, and for many beneficiaries the alternatives would be unthinkable.

1 U.S. Census Bureau, Current Population Reports, Americans with Disabilities: 2010 (July 2012), available at <http://www.census.gov/prod/2012pubs/p70-131.pdf>.

2 Ruffing, Kathy A. (2012). Social Security Disability Insurance is Vital to Workers with Severe Impairments. Washington, DC: Center on Budget and Policy Priorities.

3 Social Security Administration, Table 2, Monthly Statistical Snapshot, Released June 2013, available at http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot.

http://www.ssa.gov/policy/docs/statcomps/di_asr/2011/sect01b.html#table4.

4 Ruffing, *supra* note 2.

SSDI is an earned benefit targeted to people with the most severe disabilities. As part of the Social Security system, SSDI is an insurance program designed to provide modest income support to Americans with significant disabilities, who have paid into the system during their working lives, as well as to their survivors and dependents. To qualify for SSDI, an individual must have worked for long enough and recently enough to have earned sufficient FICA credits to qualify.

An individual must also meet Social Security's strict disability standard, by establishing one or more medically determinable impairments that are "expected to last 12 months or result in death" and are so severe that they preclude substantial gainful activity (SGA)—defined as the inability to work and earn more than \$1,040 per month for 2013)—given the individual's current circumstances. In light of these strict standards, it is unsurprising that only a small fraction of the total number of people with disabilities across the U.S. is found eligible for SSDI each year.

Diagnoses of SSDI beneficiaries cover the full range of disabilities, from significant physical and sensory disabilities, to mental disorders such as intellectual disability or schizophrenia, to sensory disorders including visual impairments and deafness, to diseases such as advanced cancers, multiple sclerosis, Huntington's disease, advanced heart disease, or early-onset Alzheimer's disease. Many beneficiaries are terminally ill. In fact, about 1 in 5 male SSDI beneficiaries and nearly 1 in 6 female SSDI beneficiaries die within the first five years of receiving benefits.⁵ Furthermore, the health of many SSDI beneficiaries worsens over time. Nearly 1 in 2 beneficiaries reported in a recent National Beneficiary Survey that their health had declined over the past year.⁶

Additionally, the Social Security Act requires that a person not only must be unable to perform his or her own past work at or above SGA, but also must be unable to perform any kind of work that exists in the national economy, considering the person's age, education, and work experience. Prior to applying for SSDI, the typical claimant held an unskilled or semi-skilled job with moderate or light strength requirements.⁷ The most common jobs held by SSDI claimants include jobs such as nurse assistant and home attendant, cashier, fast food worker, laborer, and construction worker.⁸

Many SSDI beneficiaries have made repeated attempts to work, often exacerbating their impairments, before finally turning to the Social Security system as a last resort. In addition, the majority of beneficiaries have a combination of adverse vocational characteristics. Nearly 70 percent of SSDI beneficiaries in 2010 were age 50 or older and nearly 1 in 3 was age 60 or older. Low educational attainment limits employment opportunities for many beneficiaries: about 67 percent of SSDI beneficiaries have a high school diploma or less (and 30 percent did not finish

⁵ *Ibid.*

⁶ Livermore, G. et al. (2009). Work Activity and Use of Employment Supports Under the Original Ticket to Work Regulations: Characteristics, Employment, and Sources of Support Among Working-Age SSI and DI Beneficiaries, Final Report. http://www.ssa.gov/disabilityresearch/documents/TTW5_2_BeneChar.pdf.

⁷ Social Security Administration (2010). Occupational and Medical-Vocational Claims Review Study, Preliminary Results as of August 30, 2010.

⁸ *Ibid.*

high school). As discussed above, many have acquired few if any skills in their most recent employment to transfer to other work. Finally, while recent technological advancements and stronger civil rights laws have been very beneficial in helping some people with disabilities work, others with significant disabilities face diminishing opportunities as the modern work environment becomes more demanding and less forgiving.⁹

II. The Social Security Disability Standard Is Strict, and Most Applications Are Denied Even After All Levels of Appeal

A common misconception is that the Social Security Administration (SSA) awards disability benefits at high rates to people who are able to work. In reality, the definition of disability is incredibly strict, requiring an individual to prove the inability to do *any* job that exists in significant numbers in the national economy, as described in greater detail above. As previously noted, only about four in 10 applications are approved under this strict definition, even after all stages of appeal. The definition of disability is appropriate and ensures that only those individuals with the most severe disabilities receive benefits. Many SSDI beneficiaries have made repeated attempts to work, often exacerbating their impairments, before finally turning to the program as a last resort.

Contrary to some assertions, while applications have increased in the past few years, approval rates for disability applicants have *fallen* significantly at every administrative level. The allowance rate for initial applications was 33% in fiscal year (FY) 2012, down from 37% in FY 2009. The decrease in the national allowance rate at the ALJ level has been even more dramatic. The national average allowance rate at the ALJ level has declined from 62% in 2007 (the year in which SSA announced its production goals for ALJs) to 52% in FY 2012, and appears to be declining even further so far this year.

Some have alleged that the agency's production goal has caused the allowance rate to increase (which is flatly contradicted by the statistics cited above). A recent study by Dean Harold J. Krent, IIT Chicago-Kent College of Law, for the Administrative Conference of the United States (ACUS) found, "when considering the entire distribution of ALJs, the data do not support the general proposition that ALJs achieve higher productivity by allowing more claims."¹⁰

It is important to note that nearly *two-thirds* of beneficiaries granted benefits are allowed at the initial and reconsideration levels by the state Disability Determination Services agencies, and just about one-third are allowed at the ALJ stage and subsequent levels of appeal. Moreover, there are

⁹ Statement of Virginia P. Reno, Vice President for Income Security Policy, National Academy of Social Insurance, on Securing the Future of the Social Security Disability Insurance Program, before the Committee on Ways and Means, Social Security Subcommittee, December 11, 2012.

¹⁰ Harold Krent & Scott Morris, *Achieving Greater Consistency in Social Security Disability: An Empirical Study and Suggested Reforms* (2013), at 24, available at http://www.acus.gov/sites/default/files/documents/Achieving_Greater_Consistency_Draft_Report_3-3-2013.pdf.

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 typically 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 relevant to the SSA disability criteria.

In addition, claimants' conditions often change and may 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.

Indeed, given that ALJs generally do not write their own decisions, but rather issue instructions to staff decision-writers after reviewing and hearing cases, it is hard to imagine that any judicial officer would respond to production goals by slanting the outcomes of cases in one direction or another; the very premise of such a scenario would violate the fundamental principles of any ethical judicial officer. In my experience representing claimants, there is hardly a rush to award benefits to claimants in response to increased applications or production goals; if anything, the data, as discussed above, show a trend in the opposite direction.

III. The Statutory Definition of Disability Has Not Changed

A second misconception is that the Social Security definition of disability has been "loosened" over time, resulting in higher numbers of beneficiaries. Nothing could be further from the truth. Rather, SSA has abolished its listing of impairments for conditions like diabetes and obesity, leaving claimants suffering from such conditions at a serious disadvantage. Regulatory criteria for other impairments such as liver disease have not been abolished outright, but have been changed to make them virtually impossible to meet. Since statutory amendments in 1996, individuals disabled by drug or alcohol addiction have been barred from receiving disability benefits. Such changes have obviously not increased the numbers of claimants or awards of disability benefits.

1. The Disability Benefits Reform Act of 1984

The Social Security Disability Benefits Reform Act of 1984 (DBRA) is frequently mischaracterized as relaxing the disability standard. DBRA was passed by a unanimous, bipartisan vote in both the House of Representatives (402-0) and the Senate (99-0) in September 1984, and signed into law by President Reagan. Importantly, the legislation did not change the statutory definition of disability. It did require SSA to issue new listings of impairments for mental disorders and develop new procedures for evaluating residual functional capacity for individuals with mental disorders whose impairments did not meet the listings. Before DBRA, SSA relied upon

outdated concepts of mental impairment and terminology that did not reflect current medical practice. There was no individualized, realistic evaluation of ability to work, for people with mental impairments. DBRA led to the issuance of new mental listings that were more closely tailored to follow the edition of the American Psychological Association's Diagnostic and Statistical Manual current at that time. DBRA also required SSA to consider the combined effects of multiple impairments in evaluating disability, in recognition of the fact that many people suffer from multiple medical conditions, each of which is not on its own severe enough to prohibit someone from working, but which in combination are totally disabling.

DBRA also led to clarifications about consideration of pain in assessing disability. Specifically, for pain to contribute to a finding of disability, an individual must first establish through medical evidence, the presence of a medically determinable physical or mental impairment that could reasonably be expected to produce the pain or other symptoms alleged. Once such an impairment is established, allegations about the intensity and persistence of pain or other symptoms must be considered in addition to medical evidence in evaluating the extent to which the impairment may affect the individual's capacity for work. Allegations of pain, on their own, are not sufficient to establish disability.

2. Demographics explain most of the growth in SSDI

So what explains the increase in the number of disabled workers receiving SSDI benefits? According to SSA's Chief Actuary, the rise in SSDI beneficiaries is primarily attributable to three key factors: 1) the aging of the baby boomers, 2) the advent of women as full participants in the labor force who have achieved the insured status they formerly lacked, and 3) the increase in the Social Security retirement age from 65 to 66.¹¹ When disabled workers reach full retirement age, they begin receiving Social Security retirement benefits rather than DI. The increase in the retirement age has delayed that conversion. In December 2012, more than 450,000 people between 65 and 66 — over 5 percent of all DI beneficiaries — collected disabled-worker benefits; under the rules in place a decade ago, they would have been receiving retirement benefits instead.¹²

Some have pointed to the recent economic downturn as a potential driver of growth. Applications for Social Security disability benefits do tend to rise during economic downturns, and the recent economic recession was no exception. However, research finds that while economic downturns significantly boost *applications* for benefits, they have a much smaller effect on *awards*.¹³ In fact, available data indicate that the percentage of applicants awarded benefits has actually declined during the recent economic recession, showing that individuals who did not meet Social Security's

11 Stephen Goss, Chief Actuary, Social Security Administration, Statement before the House Ways and Means Committee (March 2013). http://waysandmeans.house.gov/uploadedfiles/goss_testimony.pdf.

12 Kathy Ruffing, Center on Budget and Policy Priorities, Statement before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on the Challenges of Achieving Fair and Consistent Disability Decisions (March 20, 2013). http://waysandmeans.house.gov/UploadedFiles/Ruffing_Testimony32013.pdf.

13 Ruffing, *supra* note 3.

strict disability standard were screened out.¹⁴

3. The ALJ Hearing Process is Fair and Appropriate

A third misconception is that the procedural rules governing ALJ hearings are in need of radical overhaul.

An informal and nonadversarial process. ALJ hearings were designed to be nonadversarial for good reason: *They must be fair and available to all claimants regardless of whether they are represented.* This has been confirmed repeatedly by the longstanding view of Congress, the United States Supreme Court, and SSA, 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, nonadversarial manner."¹⁵ 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....¹⁶

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.¹⁷

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

¹⁴ Social Security Advisory Board, Aspects of Disability Decisionmaking: Data and Materials (Feb. 2012), Chart B.7 at 12, http://www.ssab.gov/Publications/Disability/GPO_Chartbook_FINAL_06122012.pdf.

¹⁵ 20 C.F.R. § 404.900(b), 416.1400(b).

¹⁶ *Sims v. Apfel*, 530 U.S. 103, 110 (2000)(citations omitted).

¹⁷ *Richardson v. Perales*, 402 U.S. 389, 400-401 (1971).

operation.

The process should not be adversarial. Proponents of making the process adversarial by having SSA represented at the ALJ hearing believe that SSA 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.

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.¹⁸

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 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 hearing offices, and developing better procedures to obtain evidence, including reasonable payment for medical records and examinations.

In the current nonadversarial 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 established by Congress, is met, whether or not a representative is involved. ALJs, like all

¹⁸ 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.

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.

The record should not be closed. In light of the nonadversarial nature of ALJ hearings, we do not support proposals to adopt procedural rules to exclude evidence by, for example, closing the record five days before a hearing. Technical procedural and evidentiary rules have their place in an adversarial system, but they should not dominate the nonadversarial system of adjudication administered by Social Security.

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 additional 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—with closing the record at any point before the ALJ issues a decision, which is the current rule.

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.”¹⁹ Current regulations comply with the statute by providing that “at the hearing” the claimant “may submit new evidence.”²⁰

Closing the record is inconsistent with the realities of claimants obtaining representation. As discussed above, 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 may not be 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.

¹⁹ 42 U.S.C. § 405(b)(1).

²⁰ 20 C.F.R. §§ 404.929 and 416.1429.

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. NOSSCR frequently hears 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 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.”²¹ 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 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,²² 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.

21 20 C.F.R. §§ 404.970(b) and 416.1470(b).

22 42 U.S.C. § 405(g).

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.

IV. Strengthening SSDI for People with Disabilities

Because of the importance of SSDI to people with significant disabilities, over the years NOSSCR has made a number of recommendations for strengthening SSDI to improve the system’s processes and outcomes for workers with disabilities.

1. Provide adequate administrative resources for the Social Security Administration (SSA).

The Social Security Administration (SSA) requires adequate administrative resources to effectively administer the SSDI program. For many years, SSA did not receive adequate funds for its mandated administrative services. Between FY 2000 and FY 2007, the resulting administrative funding shortfall was more than \$4 billion. 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. There can be no doubt that this additional staff greatly enhanced SSA program operations. Unfortunately, SSA’s administrative budget (Limitation on Administrative Expenses or LAE) has been inadequate in recent years. SSA has received virtually no increase in its 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. Former SSA Commissioner Astrue and current Acting Commissioner Colvin have both testified about the negative effects of cutbacks in SSA’s administrative funds for FY 2012 and 2013 on the agency’s staffing, services, and program integrity.²³ We urge Congress to provide SSA with adequate resources to carry out all necessary program functions.

23 Statement of Michael J. Astrue, Commissioner, Social Security Administration, before the Finance Committee of the U.S. Senate, May 17, 2012; Statement of Carolyn Colvin, Acting Commissioner, Social Security Administration, before the Committee on Appropriations, Subcommittee on Labor, Health, and Human Services, Education and Related Agencies, U.S. House of Representatives, March 14, 2013.

2. Extend SSA's Title II demonstration authority.

SSDI beneficiaries face a complex set of rules regarding earnings, and, if concurrently eligible for SSI, assets. Demonstrations allow SSA to test additional ways to help beneficiaries navigate the system and can provide important information about assisting beneficiaries to attempt or to return to work. Currently, SSA has demonstration authority for its Title XVI programs, but demonstration authority for the Title II programs expired in 2005. Congress should extend SSA's Title II demonstration authority.

3. Ensure continuation of the Work Incentive Planning and Assistance (WIPA) and Protection and Advocacy for Beneficiaries of Social Security (PABSS) programs.

The WIPA and PABSS programs, established in 1999, provide critically important employment services that help beneficiaries of Social Security's SSDI and SSI disability programs attain greater economic self-sufficiency. WIPA grants go to local non-profits and other agencies to support outreach, education, and benefits planning services for SSI and SSDI beneficiaries about work incentives and services for finding, maintaining, and advancing in employment. WIPA grantees inform beneficiaries about the impact that employment will have on their disability income and medical coverage, and address many of the real fears that individuals have about going to work at the risk of losing health coverage. PABSS provides a wide range of services to SSI and SSDI beneficiaries. This includes information and advice about obtaining vocational rehabilitation and employment services, information and referral services on work incentives, and advocacy or other legal services that a beneficiary needs to secure, maintain, or regain gainful employment. The continued existence of the WIPA and PABSS programs is under serious threat. Although authorization for both programs expired on September 30, 2011, SSA was able to set aside funding to sustain the PABSS program until September 30, 2012 and the WIPA program until June 30, 2012. The recent expiration of funding for the WIPA program already has resulted in the layoffs of many well-trained employees. The impending expiration of funds for the PABSS program will be a loss of vitally important services to beneficiaries. NOSSCR supports measures to continue the WIPA and PABSS programs.

4. Improve program navigation and remove barriers to work.

Over the years, NOSSCR has supported a number of proposals to make it easier for beneficiaries to navigate the SSDI system, particularly when attempting work. NOSSCR supports efforts to improve the disability claims process, including through the use of technology, so long as the changes do not infringe on claimants' rights. SSA has already implemented a number of significant technological improvements that have helped claimants and their representatives and have made the process more efficient for SSA employees. We strongly recommend that SSA develop a better wage reporting and recording system and promptly adjust benefit payments to reduce overpayments. Many individuals with disabilities are wary of attempting a return to work out of fear that this may give rise to an overpayment when reported earnings are not properly

recorded and monthly overpayments are not properly and promptly adjusted.

5. Additional recommendations for strengthening the SSDI program include the following:

- **Establish an earnings offset in the SSDI program.** One of the most difficult and enduring barriers to work for SSDI beneficiaries is the sudden termination of cash benefits when someone crosses the substantial gainful activity (SGA) threshold after the trial work period. This affects both the individual's benefits as well as those of any dependent(s). We recommend establishing a \$1 for \$2 earnings offset in SSDI to parallel the provision in the SSI program. An earnings offset would eliminate the "cash cliff" for beneficiaries who are able to work, and would help ensure that individuals are financially better off by earning wages than by not earning. This long-overdue proposal is currently being tested. The disability community has been advocating for this change for decades.
- **Provide a "continued attachment" to SSDI and Medicare, as long as a beneficiary's impairments last.** Beneficiaries who are sometimes able and other times unable to be employed should have continued attachment to cash and medical benefits that can be activated with a simple and expedited procedure that is as "seamless" as possible. For example, SSA has proposed the Work Incentives Simplification Pilot (WISP). Under the WISP, work would no longer be a reason for terminating SSDI benefits. SSA would continue to pay cash benefits for any month in which earnings were below the established threshold, but would suspend benefits for any month in which earnings were above the threshold. SSA would evaluate whether this pilot simplification reduces the number of improper payments due to work, and allows the agency to redirect those administrative resources to other areas.
- **Support and strengthen programs designed to allow flexibility for people with disabilities to return to work, including programs authorized under the Ticket to Work and Work Incentives Improvement Act (TWWIIA).** These programs offer people with disabilities the options to try different work opportunities without risk of losing their benefits should a return to work be unsuccessful. Providing individuals with disabilities opportunities to work up to their capacity without risking vital income support and health care coverage promotes their independence and self-sufficiency.
- **Revise the rules for impairment-related work expenses (IRWE).** Under current rules, beneficiaries can deduct from earned income the costs of IRWEs; IRWE deductions are made for SGA determinations. The IRWE deduction can be a significant work incentive by allowing individuals with disabilities to obtain services, medical items, and other assistance that allow them to engage in work activity. CCD proposals for revising IRWE include:
 - Applying the current SSI blindness rule to SSDI disability claimants and beneficiaries to allow the consideration of all work expenses, not only those that are

“impairment-related.” Currently, for Title II and SSI disability claimants and beneficiaries, only those work expenses that are “impairment-related” are considered. However, the SSI income counting rules for individuals who qualify based on statutory blindness are more liberal because all work expenses can be deducted, not only those that are “impairment-related.” There is no public policy basis for this continued disparate treatment of people with different significant disabilities.

- Allowing beneficiaries to include their health insurance premiums as IRWEs. This would recognize the higher costs incurred by workers with disabilities who must pay premiums for the Medicaid Buy-In or for continued Medicare after the termination of free Part A benefits.
- Increase the SGA level for all beneficiaries to be the same as the SGA level for beneficiaries who are blind, and maintain annual indexing of the SGA.

6. Caution is warranted in considering reform proposals.

An array of proposals have been put forward to reform SSDI. While some proposals focus on improving the experiences and opportunities of SSDI beneficiaries, some are driven by desired cost savings, with an eye toward addressing the DI Trust Fund’s solvency. Many SSDI reform proposals are in the early stages of development and have yet to be evaluated in terms of their impact on current and future beneficiaries or on the solvency of the DI Trust Fund. In fact, the Congressional Budget Office (CBO) recently reviewed proposals for fundamental reforms to SSDI, such as moving to a partial disability system or refocusing SSDI on rehabilitation and reemployment. The CBO found that such changes are unlikely to produce significant short-term savings that would address DI Trust Fund solvency by 2016 (and may in some cases increase short-term costs) and that “only limited evidence is available on the potential impact of such changes.”²⁴

NOSSCR believes that any reforms to our Social Security system must be evaluated in terms of their impact on current and future beneficiaries. Any reforms must maintain the current structure based on payroll taxes, preserve Social Security as a social insurance program for everyone who is eligible, guarantee monthly benefits adjusted for inflation, preserve Social Security to meet the needs of people who are eligible now and in the future, and restore Social Security’s long-term financial stability. We believe that any reforms to Social Security’s disability programs, including SSDI, should conform to the following core principles:

1) Preserve the basic structure of Social Security’s disability programs, including the definition of disability.

2) Efforts should be made to increase employment opportunities and improve employment

²⁴ Congressional Budget Office (2012). Policy Options for the Social Security Disability Insurance program.

outcomes for Social Security disability beneficiaries, but those efforts should not be achieved through any tightening of eligibility criteria for cash benefits and/or narrowing of health care benefits.

3) Given that Social Security disability program beneficiaries have already been found unable to perform substantial gainful activity, participation in work or activities to prepare for work should remain voluntary.

4) Eligibility and cash benefits should not be subject to time limits.

5) Fully fund the administrative expenses of the Social Security Administration.

7. Reallocation is urgently needed.

Finally, with the DI Trust Fund reserves projected to be depleted in 2016, Congress should act expeditiously, as it has done nearly a dozen times in the past, to reallocate payroll taxes between the DI and OASI programs. Both the OASI and DI trust funds would be able to pay full scheduled benefits through 2033 by temporarily raising the 1.8 percent DI share of the 12.4 percent Social Security payroll contribution by 1.0 percent in 2014 and 2015, and then by amounts that gradually shrink to 0.2 percentage points in 2020-2025.²⁵ Over the years, Congress has reallocated funds between the OASI and DI Trust Funds eleven times, roughly equally in both directions, to keep the Social Security programs on an even reserve ratio.²⁶ Reallocation is a sensible administrative adjustment that will maintain the confidence of workers that the DI system that they have built up over the years will remain available for them and their families, if needed. Surveys consistently show that Americans value Social Security and are willing to pay for it because of its importance to workers and their families. Reallocation will also allow time for Congress to carefully develop, consider, and evaluate options for assuring the long-term solvency of both the OASI and DI Trust Funds for generations to come.

In closing, thank you for the opportunity to testify today. I am happy to take any questions that you may have.

²⁵ Virginia P. Reno, Elisa A. Walker, and Thomas N. Bethell, National Academy on Social Insurance, Social Security Disability Insurance: Action Needed to Address Finances, Social Security Brief No. 41 (June 2013).

²⁶ *Ibid.*

Mr. LANKFORD. Thank you to all of you for bringing the testimony. What I would like to have is a conversation that will happen. There will be several of us that will come in and out and be able to ask questions. We will have about five minutes apiece. We will probably do a couple rounds of questions just to be able to answer them, and we will have that ongoing dialogue and try to see whether we can be able to pull the facts out as we walk through this process. Today is not a day to try to determine everything; today is the day to get as much information as we can out, and then we will follow up in the days ahead to say what do we need to do to be able to resolve some of these things.

Judge Swank, let me ask you a question. You began all this. You mentioned that ALJs have felt some pressure before to approve disability requests, and several of you have mentioned that.

Judge Sullivan, you also mentioned the production goals and such.

How is that manifested? How is there a sense that there is a push to produce approvals rather than denials?

Judge SWANK. If I may, Mr. Chairman, if I can slightly change the question.

Mr. LANKFORD. Sure.

Judge SWANK. Because in the articles that I wrote and published, my focus was more on systemic factors with the program that encourage approvals.

Mr. LANKFORD. Okay.

Judge SWANK. And, secondly, restrictions on the judges that limit their ability to serve as judges.

Mr. LANKFORD. Okay, so let's talk through a couple of those.

Judge SWANK. Sure. I think one of the most glaring, and it was the focus of the article that American University Law School was kind enough to publish, deals with the Social Security administrative law judges' inability to report attorney misconduct to their State bars.

Per Social Security regulations, a Social Security judge is prohibited from reporting attorney misconduct to their State bar. They can only report it to agency management, and the Office of General Counsel of the Social Security Administration then will determine whether or not to pursue the misconduct.

It creates a situation in which an administrative law judge, who is required to be a member of a State bar, and I went through in my article, looked at every single State bar's requirements, whether you are in judicial status or attorney status, to report misconduct, because the legal profession is self-policing. And it puts the administrative law judge in some States, as I cite in my article, in the position that they are conducting misconduct themselves by not reporting attorney misconduct to the bar. And since the administrative law judge cannot even report it to the Office of General Counsel, it has to go through the filter of management, whether or not to pursue the attorney misconduct.

Mr. LANKFORD. So it is basically an oversight issue. It is the same thing Judge Snook was mentioning; you don't actually oversee your own staff, which, by the way, just to let you know, Judge Snook, everyone here does work for Speaker Boehner, so that is a whole different issue as well.

[Laughter.]

Judge SWANK. But it also, sir, is something that goes a little bit beyond that from the standpoint that the administrative law judge can't police his own courtroom.

Mr. LANKFORD. Are other courts run that way? Is this run different than a typical court?

Judge SWANK. Well, again, sir, I am here in my personal capacity, but, for instance, in the Department of Labor, an administrative law judge can report misconduct directly to the bar, and they do. Misconduct I don't want to say is rife, but the odds of an attorney being suspended or removed as their ability to appear before the Social Security Administration is the exact same odds of any given service member in the United States Army, Marines, Navy, Air Force, and Coast Guard, of winning the Congressional Medal of Honor.

The Social Security Administration, as shown by my articles and as the minority member stated, there are many statistics. My articles have 788 footnotes combined. You can check my statistics, and if you draw a different conclusion from them, great. I have documented everything from open source documents. But the agency pursues misconduct against attorneys 16 times fewer than State bars do, on average, and State bars are very hesitant to remove someone's law license.

Mr. LANKFORD. Let me ask you several questions, as well, because we are running out of time and I want to be able to honor everyone's time to go through the questions.

What is the best way to determine if someone can work? It seems that ultimately you have had two reports that have come in to you that this person has been denied for disability saying, no, this person is capable of working somewhere in the economy. Then they are standing in front of you with counsel there and additional documents. What is the best way to determine if this person can work?

Judge SWANK. The regulations are actually very good. The agency has done a good job creating the regulations. You have to have the complete record, and not merely those pieces of the record that people want you to see.

Mr. LANKFORD. Do you feel confident you are getting the complete record?

Judge SWANK. No, sir.

Mr. LANKFORD. Can you subpoena additional records or additional requests?

Judge SWANK. Luckily, sir, when I was serving as an ALJ, I have a partial photographic memory, and I can go through the records that the doctor provided and the records that the attorney provided, and if there are records missing there is a problem there, and also from the attorney's records I would note that the visit from September of 2009 wasn't in there because the doctor said I saw him in September 2009. You subpoena that. And I also had instances where attorneys and non-attorney representatives actually changed records.

Mr. LANKFORD. Just a quick statement. Do you have the ability to be able to ask people when is the last time you did work and what was that work, or do I have records from every doctor you

have seen? Is that a typical question or are you only getting the information in from the last doctor that approved everything?

Judge SWANK. I would always ask that question, and I always required the attorneys, I asked them provide the rest of the information; and if they chose not to, I would subpoena.

Mr. LANKFORD. Okay. Thank you.

Judge SWANK. Yes, sir.

Mr. LANKFORD. Ms. Speier.

Ms. SPEIER. Thank you, Mr. Chairman.

First of all, thank you all for your service and thank you for your testimony this morning. I think we have so many issues here that we could spend a couple of hearings on them.

First of all, I want address this issue of the backlog and the impression that is being given that somehow you have to pay it down, and that you are pressured to take on between 500 and 700 cases a year. I am just going to read from fiscal year 2010, because that is the last year that all of you were in the Social Security Administration as ALJs.

Judge Swank, you disposed of 604 cases that year and your denials represented about 78 percent. Judge Sullivan, you handled 158 cases that year and you had an 83 percent denial rate. Judge Snook, you handled 111 cases that year and you had a 39 percent denial rate. Judge Butler, you had a 68 percent denial rate and you handled 659 cases.

So two of you handled a workload that exceeded what was the goal; two of you did not. And your denial rates, for the most part, were very high. Judge Snook was the only one where yours was very low.

So one of the statements made by Chairman Issa in March of 2013 stated that Federal disability claims are often paid to individuals who are not legally entitled to receive them.

And I guess my question to you, Mr. Sklar, is it true that most applicants for disability are declined?

Mr. SKLAR. Let's talk a minute about what happens at the State agency level. And I think it has been noted earlier that three out of four cases that are paid happen at the State agency level, so 75 percent of all allowances happen before you even get to the administrative law judge level. Their actual allowance rate at the State agency is about 33 percent right now. For fiscal year 2013, when cases do get to the administrative law judge level, the allowance rate has been less than 50 percent. So I think the data kind of speaks for itself.

Ms. SPEIER. All right.

Can we put up on the screen there?

[Slide.]

Ms. SPEIER. Here is the other problem I see. Since 2007 the number of support staff added for ALJs has dramatically increased. The ALJs do not write their own opinions, their staff does, attorneys on their staff do. They have support staff.

Judge Snook suggested that he can't appoint the staff, but he does have 3 to 4 staff persons at his disposal, is that correct, Judge Snook?

Judge SNOOK. I don't think that is correct, Congresswoman.

Ms. SPEIER. Well, how many staff do you have?

Judge SNOOK. I have one clerk that does the exhibits and such for my cases. The writers are pooled, so we submit our decision instructions and then they go with management and sometime later we get them back. But I have no control on how long it takes to get my draft decisions back to me, ma'am.

Ms. SPEIER. But you don't write the decision or the opinion, someone else does.

Judge SNOOK. Normally not. Normally somebody else does, Congresswoman.

Ms. SPEIER. All right.

If you look here, we have a situation where the total claims are up dramatically and we in Congress have reduced the funding dramatically. So, on the one hand you have ALJs saying, you know what, we are being pushed to handle more claims and we shouldn't have to do that, and on the other hand we are saying we are going to continue to reduce your funding. We can't have it both ways, in my view.

I think that we have augmented funding dramatically since 2007. Mr. Sklar, is that correct?

Mr. SKLAR. There was an infusion of funding around 2010, 2011, and that was incredibly helpful in helping us get down the backlog and improve quality throughout the organization.

Ms. SPEIER. And has that been steady or has that now been declining, as this suggests it is?

Mr. SKLAR. Unfortunately, since October 2011 we have been declining, and nationwide at Social Security we are down about 10,000 employees.

Ms. SPEIER. So you are down 10,000 employees, the amount of revenue that you have to operate has declined, and the number of claims that are being processed are increasing. Is that correct?

Mr. SKLAR. Yes.

Ms. SPEIER. Is that a recipe for disaster?

Mr. SKLAR. Again, I prefer not to offer an opinion on the disaster point. We are trying to do the best we can with what we have, but we are in a really tough spot. We have made tremendous progress bringing down the backlog and improving quality, and I do believe our progress is somewhat jeopardized and the numbers reflect that, and processing times are going back up and we are trying to hold the line on quality, but it has been really tough.

Ms. SPEIER. Thank you.

Mr. Chairman, my time has expired, and I realize that we have very few members on the minority side here, so I am hopeful that you might allow me to be someone else at some point in time to ask some additional questions. Thank you.

Mr. LANKFORD. Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chairman, and thank you for this hearing; it is illustrative of a number of things that we have to deal with.

Let me ask a question going back to Mr. Sutton, just to make sure that I understand where he is coming from in relationship to the work that is being done and concerns about involvements.

Is the executive director of your organization, Nancy Shore, married to Charles Binder?

Mr. SUTTON. Congressman, I believe the answer to that is yes, but I am really not at all clear why I am being asked that question.

Mr. WALBERG. Well, the only reason I am asking the question is that what we are hearing today about ALJs and their ability to get accurate information. We want to make sure that there is not only accurate information, but the process is appropriate. I understand that Charles Binder is a partner in the firm of Binder and Binder, which made \$88 million in 2010, supplying claimant representatives for ALJ hearings. He personally, according to The Wall Street Journal, made over \$22 million in that year.

Doesn't it financially benefit your organization, and you personally, to keep the system functioning, or malfunctioning, the way it is now?

Mr. SUTTON. Again, I don't really accept the premise of the question, Congressman.

Mr. WALBERG. Well, you may not accept the premise of the question, but the fact of the matter is there seems to be some involvement for personal gain, significant gain, with policies that are promoted that really don't give the taxpayer an opportunity to benefit by having information put out.

Mr. SUTTON. Well, let me put it this way: I have been involved with the National Organization of Social Security Claimants' Representatives, a membership organization of over 4,000 attorneys nationwide, since 1997 as a member of the Board of Directors and as a past president. I have never seen any influence by the firm you reference or any other particular individual or firm that is undue or improper, in any way, shape, or form.

Mr. WALBERG. Thank you. I appreciate that. And, for the record, we have the record.

Mr. Sklar, are claimants and claimants' representatives required by law to provide complete and accurate evidence, medical, financial or other that bears on the case, whether or not the information is adverse, unfavorable to their claim?

Mr. SKLAR. Congressman, right now there is some ambiguity in that area. That is why we have asked the Administrative Conference of the United States to take a look at this very tricky issue. There have been prior attempts at regulatory reform, and we ran into fierce congressional opposition. This is at least two prior commissioners. For the third time we decided to go to the experts, and the experts have actually written up a very thoughtful roadmap for how we can begin to regulate in this area. We are taking their recommendations very seriously and we are certainly going to be putting something together in fairly short order.

Mr. WALBERG. What was the basis for the fierce opposition that you indicated?

Mr. SKLAR. Actually, I was certainly not in this position at that time, but I suspect it was highly controversial, and there was certainly push-back from Congress as well.

Mr. WALBERG. If claimants and their representatives don't represent all relevant evidence, I guess the question is how are ALJs expected to fully develop the record to make a fair decision.

Mr. SKLAR. Again, I think a lot of these points are very legitimate. I think the regulations right now are ambiguous and I think they need to be fixed, and we will be moving to fix them. We

haven't decided precisely which route we are going to take, we are discussing them back at Social Security with my boss, the acting commissioner of Social Security, and you can be sure we are going to take that recommendation very seriously.

Mr. WALBERG. Well, I appreciate that. On the issue of malingerer, why is it the policy that the testing for malingering isn't allowed?

Mr. SKLAR. It is our thought that there is no magic bullet, so to speak, that can determine whether a person is actually malingering, so it really goes to the validity of the test. Those particular tests are also not available for individuals with low IQ or lower education levels, so our current position is that if it is in the file, the judge can certainly look at it and consider it as one piece of evidence, but we are not going to pay for that test.

Mr. WALBERG. I see my time has expired. Thank you.

Mr. LANKFORD. Mr. Horsford.

Mr. HORSFORD. Thank you, Mr. Chairman. Thank you for scheduling this very important topic around Social Security benefits.

And I want to thank Mr. Sutton for his opening statement because, for me, it is really about focusing on the beneficiaries first, and then making sure that the system, which is there to serve the beneficiaries, is doing the right thing and has the resources necessary to do it. So this is a very important topic.

In Nevada, I hear from my constituents all the time that their Social Security disability claims take months, even years, before receiving a determination. Applying for disability is a great hardship for many people. The family who has lost an income source, so their money is tight. People, in my opinion, want to work, but are unable to do so. The disability application process becomes even more disheartening when you find out how long Social Security takes in the processing of these claims.

And I know in our backup it indicated that in 2007 63,770 disabled workers had to wait 1,000 days or more for a determination on their disability claims.

So, Mr. Sklar, I want to ask you is that the proper pronunciation?

Mr. SKLAR. Yes.

Mr. HORSFORD. Okay. First is, based on the investments by the Obama Administration and the hiring of 550 support staff and the additional administrative law judges since 2009, what is the current number of people, disabled workers, and what is the current amount of time people are waiting for a claims determination?

Mr. SKLAR. Okay, in terms of wait times, they have dropped from an average of about 530 days back in 2007 to roughly 375 to 380 days today. So it is about a 30 percent reduction in processing time. And, yes, the infusion of resources was absolutely critical. We hired over 800 judges; we actually hired a lot of support staff, actually, more than 400 or 500, quite a bit more; and it has really made a difference in turning the ship around. And we did take a good bit of those resources and pump them right back into quality, making sure we are getting the right answer, making sure we are looking at both pay cases and deny cases, because otherwise you get some very weird distortions in the system, and we didn't like that.

Mr. HORSFORD. So what accounts for the backlog generally?

Mr. SKLAR. SSA has developed backlogs on multiple occasions, and typically it is directly tied to the funding levels we received. If you do graph out how we fared compared to the President's budget, and that spans over multiple administrations, typically we did not receive the level of funding recommended in the President's budget, and in some years, like the last two years, we were hundreds of millions of dollars below that level.

Mr. HORSFORD. So what is currently being done now to address this, and are there regional places where you see improvement over others? We have been focused on the veterans backlog issue and we are starting to see some improvement there now based on our focus, so have you seen areas of the Country or centers that have historically done a better job than others?

Mr. SKLAR. One really nice thing is that we have invested a lot in IT and we have a fully electronic system, so we really move our work around a lot. So if you have an office that has really high processing times, we will send their work out to a different office so that they can begin to work down those cases. So we really smoothed out the variations, and if you do look at the chart in my written testimony you will see that there were only a handful of offices with processing times over 475 days, and that is largely a function of having a fully electronic workload, which is really, really important for us.

Mr. HORSFORD. So by the time it gets to the administrative law judge step, there are steps before that.

Mr. SKLAR. Correct.

Mr. HORSFORD. So what is the bottleneck? Because today we are talking about really the third and last step, but it is the steps prior to it that, if we are making progress and improvement, then by the time it gets to the administrative law judges, some of the issues that are being raised today should be addressed, or at least aware.

Mr. SKLAR. Typically they are very efficient, the State agencies, but they suffer from the same realities we do in that SSA funds the State agencies at 100 percent level, and if our budget is cut, effectively their funding is going to be cut too. So right now those State agencies are also starting to build up backlogs in stage cases. That basically means they have cases that they really can't work that they logged in. So if you look ahead down the road, they are going to be having problems too, and it is just beginning.

Mr. HORSFORD. Thank you, Mr. Chairman. I know my time is expired. I just want to say that I know the Social Security Administration is facing a lot of difficulties in ensuring that no one is gaming the system, and I know that that is the intent with the hearing today, but we need to find a way to address the backlog issue because there are honest, hardworking Americans waiting for their disability claims to be processed in order to provide for themselves and their families, and I just hope that throughout this process and the subsequent ones that we will keep the beneficiaries of SS programs at the forefront. These are people with disabilities, some of them young, some of them older; they are people who have paid into the system and they are entitled to these benefits. So we shouldn't be setting up an unnecessarily burdensome process for them to get the benefits that they have earned. Thank you.

Mr. LANKFORD. Thank you, Mr. Horsford.

Dr. Gosar?

Mr. GOSAR. I appreciate the gentleman's comments and kind of want to take along that because we are tasked with looking at the flawed process.

Judge Sullivan, I want to ask you a number of questions because I am very process oriented. I am a dentist; I like process. Were you told to look through cases to pay them without a hearing?

Judge SULLIVAN. No.

Mr. GOSAR. Were you told to set an egg timer so not to spend so much time with any one case?

Judge SULLIVAN. Yes.

Mr. GOSAR. How much time were you supposed to spend on a typical case?

Judge SULLIVAN. I received special training in January 2010 within a month of being taken off caseload.

And just as an aside, Congresswoman Speier, the statistics you have about my particular caseload are slightly incorrect. I did not work on adjudication for most of the fiscal year 2010; I was off caseload as of February 2010. So what you have identified as a full year's caseload is actually less than a half year's caseload for me, and it does not count all the cases that were taken out of my calendar before final decision was reached. So it is a little bit, the reality of my work and other judges' work is different from the statistic you have.

In terms of your question, Congressman, I was given special training in January 2010, set up by the regional chief of the region in which I was working, and a special judge in his regional office provided training for me and two other judges in my office so that we could increase our goal, and I was told at that time that I should spend no more than 20 minutes reviewing all the medical evidence in the file on a regular case and no more than an hour reviewing any file, regardless of how much evidence was in that case, including cases that included over 4,000 pages of medical reports.

Mr. GOSAR. So were you told to put 50 exhibit pages on a single screen to quicken your review?

Judge SULLIVAN. Yes.

Mr. GOSAR. Were you told that the only thing that mattered was whether you produced and met agency goals, correct?

Judge SULLIVAN. Repeatedly.

Mr. GOSAR. Were you told that the careful review of applicants' files were not necessary?

Judge SULLIVAN. Yes.

Mr. GOSAR. Were you told not to spend more than one hour reading any applicant's file?

Judge SULLIVAN. Yes.

Mr. GOSAR. Were you told you could ignore primary care physicians' notes?

Judge SULLIVAN. Yes.

Mr. GOSAR. Wow. You received the same direction in West Virginia and Oregon?

Judge SULLIVAN. I did not receive that direction in Oregon because by that time I was off adjudication caseload, but I was also

told, when I moved to Oregon, that I was not welcome and not valued as a member of the office because I was not making goal.

Mr. GOSAR. So were you told not to continue a case even if an attorney filed lots of new medical evidence at the last minute?

Judge SULLIVAN. Yes, repeatedly.

Mr. GOSAR. Were you told to hold hearings without evidence?

Judge SULLIVAN. Yes, repeatedly.

Mr. GOSAR. Were you threatened by senior management that if you didn't meet goals, that you would likely not be able to transfer to a preferred office?

Judge SULLIVAN. That was one of many threats, yes. There is tremendous pressure on judges to avoid all meaningful adjudication in order to make the numbers.

Mr. GOSAR. Were you told by senior management that judges who failed to meet the quota were lazy?

Judge SULLIVAN. Yes, all the time. Let me just say that that is a very, very common response by SSA management officials to any complaint that a judge who is trying to do meaningful work, that the judges are lazy, they don't care, they are not hardworking, they are not efficient, they are not productive, and so forth. There is this tremendous vision by Social Security management that the only thing that matters in the adjudication process is signing that final decision, and if you do not make those numbers, then all negative labeling begins to occur, and other things too.

Mr. GOSAR. So kind of going along this—

Ms. SPEIER. Mr. Chairman?

Mr. GOSAR. I do not yield.

Ms. SPEIER. Mr. Chairman, I have a point of order.

Mr. GOSAR. When judges that met productivity goals would find it easier to schedule travel?

Judge SULLIVAN. Yes.

Mr. GOSAR. This is to all the judges.

Mr. LANKFORD. Can we hold on the time for just a moment? Excuse the gentleman there.

What is the point of order?

Ms. SPEIER. Mr. Chairman, isn't it true that if a case is in litigation, it should not be the topic of discussion at a committee hearing?

Mr. LANKFORD. The conversation as a whole here doesn't imply that we are trying to gain additional evidence. These are things that are also all out there, and we not trying to litigate a case at this point, we are trying to deal with what are the realities for judges, what are the pressures that are there. So I think it was the line of questioning. We are not trying to gain anything for litigation.

Ms. SPEIER. Well, but the questions that were being asked of the judge would suggest that it was on point for the issues that are before the court in litigation right now. So I would like to suggest that we be a little more introspective about raising questions and asking questions that would impact ongoing litigation, because that is not something that we should be engaged in doing.

Mr. LANKFORD. No, I would agree that we should not try to impact any kind of litigation; we should try to get to the facts of what do within a typical work day with an ALJ and how they function,

and is that an operation that is helping them get to the end goal of actually helping the disabled.

I yield back to Dr. Gosar.

Mr. GOSAR. And I would agree this is about process, and we have a problem with process; and any time you want to have a fix, you need to understand the process.

To all the judges, I would like to have your answers. Would you agree that the agency has actually curried ALJs to decide cases based on a flawed case file? Judge Swank?

Judge SWANK. Yes, sir. As I wrote in my articles, that is actually quite common in that, statistically, 93 percent of the cases came before me were incomplete. So to be able to make a determination on an incomplete file is very difficult. In all fairness, though, because you are having to wait on doctors and the records aren't instantaneously available, sometimes if a person saw the doctor a month ago, those records might not be available, and that is understandable.

But many times, sir, it is the same exact evidence that was before the State disability determination service that denied it one time and two times, done by professionals using the exact same rules and regulations that the administrative law judge must follow. So it calls into question why are there so many reversals of those State agency determinations if there is the same exact evidence, unless the individual crossed a grid line, in case a new impairment has come, which would justify a later onset determination.

But if it is the same exact evidence, granted, there would be some times when the State determination system was wrong, and I saw it. I did over 4,000 cases; I saw it. But for the most part they are right on, so, if there is no new evidence, how could you have a different determination unless they were wrong or something else has changed.

Mr. GOSAR. Mr. Chairman, I would like to have the other judges please respond. I think it is important to the hearing.

Mr. LANKFORD. Quick response.

Mr. GOSAR. Judge Butler, would you agree with Judge Swank?

Judge BUTLER. Yes, it is true. Part of the problem, as we have discussed before, I don't get complete information, and I have letters, responses from attorneys where they have told me that Judge Bice and different agency representatives have formed NOSSCR and other groups in meetings, conferences that they don't have to produce evidence. That leaves me in a difficult position. A lot of the evidence, for instance, will deal with worker compensation records, and they don't want to produce them. Personal injury type cases, they don't want to produce them for various reasons.

But when you talk about using a subpoena to subpoena records, we can't enforce our subpoenas. And if you are doing with anybody who has an attorney or has some idea how this program works, they totally ignore you. So you don't have any avenue to close this gap. If you don't put an obligation on attorneys to participate in this system openly and honestly, and not conceal evidence, you are in a very difficult situation, and that is why, one of the reasons, you have had so many people possibly put on disability that shouldn't be there.

Mr. GOSAR. Judge Sullivan?

Judge SULLIVAN. The answer to the question in terms of the medical record file is I was encouraged and pressured to decide cases without medical evidence in the file.

I would also amend my answer to your earlier question, Congressman. No one ever suggested to me or told me to pay a specific case, but I was strongly encouraged, in my recommended 20 minutes of review, to look for evidence in which I could pay the case and then stop reading it. I was also encouraged by management to simply pay cases.

Mr. GOSAR. Judge Snook?

Judge SNOOK. The answer is yes, Congressman. And with regard to incomplete files, we also get cases where the DDS has insufficient evidence. They will say the claimant didn't attend the consultative examination; incomplete evidence, pass it on to the ALJ.

Now, I have to develop the entire record, and I don't understand why they send it to the ALJ. There is a regulation that says if the claimant doesn't cooperate, you can dismiss the claim. These type cases should never come to the ALJs; the DDS should handle it themselves, and if they don't attend the CE, dismiss the case.

My colleague Judge Butler, it might be good to ask Commissioner Sklar how many subpoenas have been enforced. None of my subpoenas over 16 years have ever been enforced.

Mr. GOSAR. I thank the chairman's indulgence because I think it was very valuable to the testimony.

Mr. LANKFORD. Mr. Woodall.

Mr. WOODALL. Thank you, Mr. Chairman. You know, one of the great responsibilities and, really, privileges that we have is going to bat for folks who are going through this process too. I think about your work. Mr. Sutton, I confess that at most town hall meetings I tell folks don't call an attorney, call your congressman, because you have already paid our salary ahead of time. So trying to take some business away from you, but knowing that business is good already, and I consider that a failure that business is good. Business shouldn't have to be good.

But I am thinking about Judge Swank's concern that he couldn't get a full picture of the case. Why can't we ask our attorneys operating before these ALJs to give us both sides of the story? You can advocate for your client without concealing the truth from the judge. Tell me about that.

Mr. SUTTON. Absolutely, Congressman. I appreciate the question and a chance to respond. The statute that Congress wrote requires that all material facts be disclosed and that no material fact be withheld from the tribunal. Judge Swank talked about seeing cases where his partial photographic memory told him that a page was missing or he averted to altered records.

I will tell you that any attorney who would do such a thing should not only be barred from practicing before the Social Security Administration, they should be disbarred in their home State. In my State of Pennsylvania, that attorney would be disbarred for such activity.

Mr. WOODALL. Well, I want to focus on those things on which we agree, because so often here we end up focusing on things we disagree about. But I think you are absolutely right. Judge Swank

would agree those folks ought to be disbarred; you would agree those folks ought to be disbarred.

Mr. Sklar, why is it that we can't report those, why your judges can't report those things directly to the State bars? Is that something we have done wrong in Congress? Is that a Social Security regulation? What is the reason that we can't move directly from a judge's learned opinion directly to a State bar?

Mr. SKLAR. Okay, to sort this out, to be clear, if the allegation is some type of criminal allegation, it is going to go right to the inspector general; if it is a State bar type allegation, those typically will be routed through our general counsel's office. They are very experienced; they look at the full breadth of referrals.

Mr. WOODALL. But is that a Social Security Administration decision to route them that way or have we directed you to route them that way?

Mr. SKLAR. No, that is our decision, and part of the reason is if everybody is sending cases, claimant information and other potentially privacy unprotected material over to the State bar, it is really dangerous both to claimants and the judges; and in many ways it is for the protection of individual privacy of claimants and to make sure that judges don't run afoul of the Privacy Act. I mean, we have had situations where people just turn things over to the State bar and they give them the whole case file, and they can't do that; that is a Privacy Act violation, with potential criminal and civil violations.

Mr. WOODALL. As a good conservative from the south, Judge Swank, I am always concerned when someone tries to protect me from myself, even if they do in the best possible sense of the word. I think that Commissioner Sklar is absolutely right, I think he is protecting some judges from themselves. Do we need to protect you from yourself?

Judge SWANK. Well, if I may, Congressman, I worked directly on this topic in my article before with the American University published the Social Security Administration's condoning of and colluding with attorney misconduct, and with all due respect to Deputy Commissioner Sklar, we are not talking about reporting information on claimants to the State bar. And I wrote about this very explicitly in my article.

We are talking about the conduct of an attorney; and that is not protected by the Privacy Act. I can merely report to the State bar saying this is what has occurred in a case before me, and I meet my requirement. But I can't do that because of their regulation. Nor can I report it to the Office of General Counsel.

Mr. WOODALL. Commissioner Sklar, I tend to be sympathetic with Judge Swank. I have those same obligations to my State bar. Certainly, he would not be allowed to turn over things that implicate Privacy Act issues, but does have an obligation to report behavioral issues as they relate to attorneys that appear in his court. Does the Social Security Administration regulation intend to prevent attorneys, folks with bar obligations, like Judge Swank and myself, from fulfilling those obligations, or would you support a change in the regulation to allow us to fulfill those bar obligations?

Mr. SKLAR. I believe any administrative law judge that informed whatever appropriate authority that the disclosure is made

through the General Counsel's Office would hardly be in jeopardy. I do think it is a complicated issue, because we have seen instances in the past where folks are not as thoughtful as you are representing, and in a perfect world it would probably be fine, but sometimes judges are frustrated and they decide I am just going to send the whole file over, and then the disaster starts and nobody is happy.

Mr. WOODALL. I know my time has expired, Mr. Chairman, but I hope in the next round I will be able to pursue why it is we have judges on the bench who aren't thoughtful enough to at least make an accurate reporting to the bar. That may be a secondary issue that we need to confront.

I thank the chairman.

Mr. LANKFORD. Thank you.

Dr. DesJarlais?

Mr. DESJARLAIS. Thank you, Mr. Chairman.

And thank you all for being here today. Let's shift gears just a little bit and talk about the priority of continuing disability reviews. The law requires that the SAA perform regular continuing disability reviews for people who are expected to be able to return to work.

Coming to Congress from a 20-year primary care practice, I have seen a lot of various disability claims cases and what-not from the physician standpoint, and I will tell you I know that every year I will have a patient who comes in who is a quadriplegic in a wheelchair that we have to go through the paperwork and renew the application for his disability or her disability. To me it is painfully obvious that they are never going to work again, but we can't seem to expedite that process. But then there are other cases, too, where I don't see the same people who went in for their disability and they seem to get lost in the system.

Judge Swank, you were very critical of the Social Security Administration for allowing a huge backlog of medical continuing disability reviews to compile. Can you explain why CDRs are so important?

Judge SWANK. Yes, sir, and thank you for the question. First and foremost, as I wrote in my Hofstra University Law Review article, pursuant to the Social Security Administration's own statistics from the inspector general reports, for every \$1 spent on a continuing disability review, it saves \$15. That is a great return.

I worked specifically at childhood continuing disability reviews and, for instance, in 2002, 163,768 childhood disability reviews were done by the agency. In 2007 the agency did 4,440. The inspector general of the agency has pointed out that the Administration is not doing what is required by law; not by choice, it is required by law.

And the agency and Deputy Commissioner Sklar had referenced this earlier. In all due respect to him, he refers to it as being a budgetary issue, and I point out in my Law Review article that since 2009 Congress has given additional money merely for continuing disability reviews, \$1.4 billion worth through the date of my article; and yet the agency was doing 87 percent fewer with more money than they did in 2003 when they had no additional funding.

Mr. DESJARLAIS. I think that would be a good point to stop and ask Commissioner Sklar does the Social Security Administration decide how much of its resources to allocate to medical CDRs?

Mr. SKLAR. I guess the answer to that really is it depends. At times there has been dedicated funding exclusively for CDRs, and that has been incredibly helpful. In fact, we got caught up, so I would say maybe about 10 years ago there was dedicated funding. We are very happy to do the CDRs, in fact, we want to do the CDRs, and we had the money and those were completed.

More recently, from fiscal year 2007 through fiscal year 2012 we have increased the number of CDRs we have done, but our budget has been cut severely. We lost over 10,000 employees and it is becoming exceedingly difficult to stay on pace with all the continuing disability reviews in light of the lack of adequate and sustained funding.

Mr. DESJARLAIS. So he is saying that there is a \$15 return for each \$1 spent. Do you disagree with that?

Mr. SKLAR. I wouldn't want to get into a jousting match with the IG or the actuary, but I have heard about nine to one for each \$1.

Mr. DESJARLAIS. Sounds like a money maker.

Mr. SKLAR. Yes. Yes, indeed, and we agree, and we think it is really, really important for Congress to fund these important activities.

I will say in our fiscal year 2014 budget proposal, there is a proposal to increase our funding by \$1.5 billion.

Mr. DESJARLAIS. But you can divert resources now to this, so why don't you divert some of those resources? He just said there was extra resources allocated.

Mr. SKLAR. Sir, when our Acting Commissioner Colvin testified before our appropriators, she brought some pictures with her, and they were pictures of folks in Florida, elderly folks standing outside a field office in the heat with a line like opening day for a Harry Potter movie. It was unbelievable, two blocks long. We have just unbelievable lines outside our field office now.

Mr. DESJARLAIS. Okay, so it is more important to get more people on than to get people back to work. I just want to tell you, as a physician, I have seen a lot of people who are handicapped and become dependent on this system. The chairman was saying that only one percent leave Social Security disability. I have seen a lot of young people who have an injury and there is no doubt they can get back in the workforce, but the longer they are on this disability insurance, they become dependent on the system; and I have seen it ruin marriages, lives, and careers, and I think it is very important that we do that.

Mr. Sutton, you seemed very frustrated as Judge Sullivan was talking about the pressures that are put on judges. Do you think her testimony is inaccurate?

Mr. SUTTON. I wouldn't say that any judge's testimony is inaccurate, but I would say this: I note, not just with Judge Sullivan, but all the judges here, the answer to the direct question from any of the members have you ever been told to pay a case, the answer is no. I would say that the actual data, the statistics about allowance rates at every level, at the State agencies, the initial decisions and re-considerations, and the ALJ considerations, over the last

five years has shown a significant decline in the number of allowances.

Mr. DESJARLAIS. Well, what she is saying has got to be very alarming to you. It is to me. If that is happening at all, that is wrong, isn't it?

Mr. SUTTON. Dr. DesJarlais, I do not know all the ins and outs of this. I do know that the union, of which I guess all these ALJs are a member, has filed a lawsuit making allegations along these lines, and I assume that the court is going to resolve those allegations.

Mr. DESJARLAIS. I guess you have probably gone to the court and at sat with some of these judges and watched their typical day to get this opinion you have. Have you spent quite a bit of time in the courtroom watching them?

Mr. SUTTON. Not these particular ALJs, but I am before ALJs many days of the week, all the time. I work in their courtrooms. They do an excellent job, by and large, of adjudicating these cases. They do make some mistakes on either side of the line, but they are doing yeoman's service. And as Commissioner Sklar has pointed out, the backlog has come down very significantly in the last five years with the additional resources they have been able to throw at the problem. People really need decisions on these cases and they need the right decisions.

Mr. DESJARLAIS. And I think we have established that your drive is to get more people on the disability than to possibly get them off and get them back to work.

Mr. SUTTON. I would tell you that, for myself and for our organization, doing CDRs, continuing disability reviews, is appropriate and should be done. Some people do improve. In fact, some people do go back to work. Other people are disabled so significantly that they pass away from their conditions.

Mr. DESJARLAIS. Right. And I have seen them both, but I want you to agree with me that it is essential to do these CDRs, because we are handicapping these folks by not doing them.

And I yield back. Thanks for the extra time.

Mr. LANKFORD. Thank you.

Let's start a second round of questions in just conversation as we try to walk through some of these things as well.

Mr. Sklar, let's talk a little bit about the grid. It has come up a couple times. I am sure there is an ongoing process to be able to evaluate the grid. My understanding is that the grid has not had a major redo since the 1970s. What is the process right now to be able to evaluate some of the issues on how do we evaluate disability, and is that current; deal with age, occupations? There have been a few changes that have happened since the 1970s.

Mr. SKLAR. That is a fair assessment. We have partnered with the Department of Labor and the Bureau of Labor Statistics to try to get the grid updated. They are collecting occupational information. They are doing some testing. But it will be a little bit longer before they are done. It is a very complicated task. As you well understand, anything we do is subject to scrutiny both from Congress and from the legal community.

Mr. LANKFORD. I have noticed, yes.

Mr. SKLAR. And the commissioner is probably the most sued person in America, sustaining 10,000 lawsuits annually. So we know as soon as we do it, we will be challenged, so we want to make sure that we do it right and we do it with a good research base.

Mr. LANKFORD. Sure. But there are obvious changes in occupational abilities there that have happened since the 1970s, so it is well past updates. Just a couple questions as I run through it. It hasn't really changed dealing with age. Obviously, life expectancy is longer now than it was in the 1970s. Working age is typically longer now.

The type of occupations are more sedentary occupations than they were in the 1970s, a lot more computer driven with this wonderful thing called the internet that has come onboard. There is a lot of economic activity. It also has a listing for English proficiency as one of the issues, whether you have proficiency in English, you get a different score with a disability. Is that true in Puerto Rico as well, by the way? Because I know we have benefits all over. Is that true whether you are in the 50 or in one of the territories as well?

Mr. SKLAR. There are two parts to your question. Can I just take each piece, if I may?

Mr. LANKFORD. Sure.

Mr. SKLAR. The first part was about the age grids and perhaps the need to bump up the age categories.

Mr. LANKFORD. Just to evaluate them.

Mr. SKLAR. Sure. Sure. And I would just offer that was attempted back in 2005. There was not a research base under it and it was highly controversial and was pulled back at the time.

On the second issue, nobody gets paid because they can't speak English. That is correct, it is one of the factors; age, education, work experience. Overall, in the grand scheme of things, it is a very small number of cases, probably less than 5 percent, maybe even less than 2 percent. We could try to pull the figures for you. But, yes, that is a factor that in some cases does tilt somebody's way as a claimant.

Mr. LANKFORD. Is that true of Puerto Rico as well?

Mr. SKLAR. Yes.

Mr. LANKFORD. In Puerto Rico there are a lot of folks who don't speak English, a lot there. So obviously employment is fairly easy in Puerto Rico if you are speaking a non-English language. Is that something that can be evaluated and changed fairly soon or is this a broader piece, everything has to be done all at once?

Mr. SKLAR. It really all hangs together. There is a second work stream. We are talking to a different group, research group, the Disability Research Consortium, and we asked them to look at age, education, work experience, and so on.

Mr. LANKFORD. Okay, so give me a guess on time. Are we talking about six years or are we talking about six months?

Mr. SKLAR. Somewhere in between, I would say.

[Laughter.]

Mr. LANKFORD. Five and a half?

Mr. SKLAR. Probably closer to the six months, but maybe about two, three years for the full grid. It is a massive project. It is a huge amount of work.

Mr. LANKFORD. Sure, I understand that. How can we help in that journey for that? Because that is obviously important. That has hung out there through multiple administrations. That is something that needs to be done over time. How can we help in the process? Is there a way that we can engage to get draft documents of that and to be able to evaluate time lines? Is there a time line that has been set with metrics to say we are going to have this part of it done by this, this part of it done by this, we are going to put it out to comment by this point? Has that time line been established?

Mr. SKLAR. There is a very fair offer. I should add that our oversight committees have been incredibly helpful in joining us with the Department of Labor. For a while we were going down different paths, and now those paths have come together and I think we are making much faster progress, and I would hope it is closer to the six months than six years.

Mr. LANKFORD. Is there a way that we can request to get the time line of those and the metrics of what are the standards, what are you trying to accomplish by when so at least we will have a good, accurate time line?

Mr. SKLAR. Again, my day job is running the hearings and appeals operation, and the policy component is a little closer to the details as to where they are on time frames. But I generally have awareness because it is very important to the job we do and I know there is a lot of frustration about the fact that Internet jobs and anything modern is not included in the DOT.

Mr. LANKFORD. And we will follow up with the Administration to be able to make that request formally of them by letter so we can get the time lines and the metrics and what you are trying to achieve by that.

Here is part of my struggle on it, and everyone has their own biases and issues as they approach this: I have a very close family member that lost her leg to cancer in the early 1980s. She retired a month ago, after working another 30 years. She is blind in one eye. She lost her right leg and has been confined to a wheelchair. But you won't find anyone that works harder than her. It is not possible to find anyone that works harder than her. By every part of the grid she would have qualified. The challenge that she has is she has a passion to actually be productive and to set the tone.

I want people that are disabled and can't work to be able to get disability. We have a safety net for a reason, and we have intense compassion for people, and that is what sets us apart from many nations around the world. But if the criteria is they can work in any part of the economy that we can transition into it, I don't want to lose what that person brings to the economy and to their family and to the next generation.

My family member's example will never be forgotten by her children. Never. Will never be forgotten by me. And we will pass that on year after year, generation after generation, and tell our children, because my children have watched her. There is no doubt that will be a part of our family conversation for a long time.

I want that gift to be given to other individuals, but I also want to make sure we, as a Nation, still stand by people and have the safety net. Reforming the grid becomes very important to me be-

cause I want that safety net to be there. But I also don't want people to be automatic, to be able to go through the process.

And you have articulated extremely well that only a third of the individuals that come through the State process are actually approved, and you said just under half that go through the ALJs are. We understand it is not automatic, which is another part of our conversation that we can have if possible we have a moment as well, and that is to try to figure out how do we keep so many people from getting in the pipeline that it clogs up the pipeline. If it looks like the pipeline is wide open and go ahead and give it a shot, you may have a good shot to get this, go ahead and try.

We are discouraging people from working because immediately their counsel will say, well, the first thing you need to do if you are going to get disability insurance is don't work now, stop working and wait. Don't work. And then once you get to that spot, then we will go before the judge and tell them you are already not working. If you stand before the judge and say I am working already, that is going to be a whole different issue. So we have some issues.

Mr. Sklar, you wanted to be able to mention something as well? Then I need to move on.

Mr. SKLAR. First, thanks so much for sharing that story, and it is a story we hear every day about folks with disabilities really wanting to work and not wanting to be on the disability rolls.

Second point that is really important, we really want to get to a place where everybody has an opportunity, and what we don't want to do is clog up the rolls with folks who shouldn't be going through the system. And one area where this committee could be helpful, we do have States actually giving out finder's fees to bring people to us.

Mr. LANKFORD. That is a problem.

Mr. SKLAR. In other words, if you can't cost shift from State government, sometimes there are finder's fees for bringing—

Mr. LANKFORD. Do you have recommendations on how we fix that?

Mr. SKLAR. I do not, but I think your point of a lot of people showing up to apply for benefits, a lot of people later abandon those claims.

Mr. LANKFORD. Right. But it just clogs up the system as we go.

Mr. SKLAR. But we share the same goal that you do, that only the right people get on and that we do get a quality decision as well.

Mr. LANKFORD. Thank you.

Ms. Speier.

Ms. SPEIER. Thank you, Mr. Chairman.

I would like to have each of you express whether you support a more robust continuing disability review. And just very briefly, if you would.

Judge SWANK. Yes. I will elaborate a little bit.

Ms. SPEIER. I don't have time for that, so yes will be great.

Judge BUTLER. Yes.

Ms. SPEIER. Mr. Sklar?

Mr. SKLAR. I am sorry. I apologize, I thought that was a question for the judges.

Ms. SPEIER. No, I am asking you as well.

Mr. SKLAR. I am sorry. Could you please re-ask the question?

Ms. SPEIER. Sure. So do you believe that we should have a more robust continuing disability review?

Mr. SKLAR. Absolutely.

Judge SULLIVAN. Congresswoman Speier, I am so sorry, I am not quite sure what that question encompasses. Are you talking about just the adjudication review or the program as a whole?

Ms. SPEIER. I am talking about whether, after someone has been on disability for a period of time.

Judge SULLIVAN. Okay, after the decision to grant benefits.

Ms. SPEIER. Whether or not there should be a review to see if they still qualify.

Judge SULLIVAN. I would say, wholeheartedly, yes.

Ms. SPEIER. Okay.

Judge Snook?

Judge SNOOK. Absolutely.

Ms. SPEIER. Mr. Sutton?

Mr. SUTTON. Yes. With funding, of course.

Ms. SPEIER. Okay, so, Mr. Sklar, let's talk about that a little bit more. How would we make it more robust in terms of making it effective? Because, as I understand it now, it is fairly catch-as-catch-can or kind of informal in nature.

Mr. SKLAR. Well, the first part really is the funding part. We have been funded about a billion below the President's budget for the last few years, so it really has to start with funding. We do do these reviews; we like to do them timely, and we do need sustained funding to make it happen. In the past, when we have had dedicated funding, we have done the reviews.

Ms. SPEIER. So what would dedicated funding amount to?

Mr. SKLAR. I believe, again, the Administration is asking for \$1.5 billion next year to get us caught up. I think that would buy about a million CDRs and get us back in the game and get us pretty close to up on track, and I think everybody certainly at Social Security would be very happy to get caught up.

Ms. SPEIER. Is that one year funding, is that what you are referring to?

Mr. SKLAR. I know it is in the fiscal year 2014 budget. I believe it is \$1.5 billion.

Ms. SPEIER. \$1.5 billion would give you sufficient funding to do the kinds of reviews we are talking about, or is that more inclusive of everything that you want to do?

Mr. SKLAR. No, no, that is for CDRs, to get us caught up to where we need to be.

Ms. SPEIER. Okay, so that would be just for CDRs, \$1.5. Now, in your experience historically, when CDRs are done, what percentage of those who have been receiving disability no longer qualify?

Mr. SKLAR. It is actually quite small. Once you actually get through the entire process, I believe it is somewhere between 4 and 7 percent. They do have multiple levels of appeal and in the end it is a fairly small number, but it is still absolutely cost-effective. And, as mentioned earlier, the return could be somewhere in the neighborhood of \$9 to \$1 or so.

Ms. SPEIER. Okay, so it would be prudent to do it.

Mr. SKLAR. It is certainly cost-effective, prudent, and it goes to good government and integrity of the process.

Ms. SPEIER. All right, great. So that is something, certainly, we can get our arms around and in a bipartisan fashion probably support. All right.

Secondly, final date for evidence. I mean, it makes sense to me, but let's hear from each of you very quickly. Final date for evidence.

Judge SWANK. I would not make a decision, ma'am, until I did get all the evidence, so if I didn't have all the evidence at the time of the hearing, I was going to hold the record open until I did get it, whether it was from the attorney or from the doctor. It is certainly more cost-effective to have it before the hearing, all the evidence.

Ms. SPEIER. Judge Butler?

Judge BUTLER. At least five days. I think NOSSCR wanted 75 days. Excuse me, I am sorry. At least five days, maybe two weeks. There is no reason you can't put that information together and get it to the judge so the judge has an opportunity to look at it before they go and have a hearing, and that is important.

Ms. SPEIER. And you can always ask for a continuance.

Judge BUTLER. Well, that is a problem. It costs a lot of money to continue these cases.

Ms. SPEIER. I see.

Judge BUTLER. And there is no reason, generally, for an attorney that is doing their job, and they are getting paid a lot of money to do this job, to get that information to the judge and in the record so we can make a decision.

Ms. SPEIER. All right.

Mr. Sklar?

Mr. SKLAR. I am really not in a position to offer a formal agency position, but I will say we are running a pilot in our Boston region where we do have soft closure of the record five days before the hearing, and it appears to be working reasonably well. We have asked the Administrative Conference to study that and report back sometime over the summer, and they will do that.

Ms. SPEIER. All right.

Judge Sullivan?

Judge SULLIVAN. Thank you. I would say two to four weeks before the hearing. And I will adopt Deputy Commissioner Sklar's language a little bit, to have a hard closure, which means that that is a final closure of the record. And I would simply also say that records should be summarized by the proponent, the person who is moving, so that the records are identified as why they are relevant and probative to the issue before the court, as opposed to, for example, just dumping into the electronic file 2,000 to 4,000 pages of material and saying, here you go, good luck, which is what is happening now.

Ms. SPEIER. Judge Snook?

Judge SNOOK. I would say 10 business days, Congresswoman. The Disability Service Improvement Act for formal rulemaking came up with the five business day rule, but most of the medical experts in Miami testify by telephone. So it is not just a question of the judge reviewing the record, we have to get the record to the

medical experts and the vocational experts. Most courts require more than 10 days before, but my recommendation is 10 business days.

Ms. SPEIER. Mr. Sutton?

Mr. SUTTON. I don't agree with Judge Swank on a lot of things, but I agree with him on this. The record should close when the record is complete. That is how we do business now. We endeavor to get all the records well in advance of the hearing, but even with lots of resources in terms of my staff's time and lots of money paid in cost to medical records providers, there are often cases where they simply are not provided on time.

I will also tell you that medical providers decide when my client is going to be sent for an MRI, and if that happens to be 10 days or two weeks before the hearing has been scheduled, we are just not going to have that report by the day of the hearing. So there has to be some understanding that the full record, if meaningful adjudication is the standard, to use Judge Sullivan's term, we have to have a complete record.

Ms. SPEIER. Well, Mr. Sutton, this is someone who has been through the process. This is not like an initial case. This is a case that has been reviewed twice before within the Social Security system, has now come up to the ALJ. There has been a long period of time to cull together the information necessary.

Mr. SUTTON. Congresswoman, if I may, remember that when the case is coming up to the ALJ, on average, it is 380 days since the last determination was made by a State agency. That is over a year. Things change in people's medical portfolio, in their medical file, and often these are people with multiple conditions, physical and/or mental. They may be seeing five, six, seven different providers, specialists; they may be being sent for tests all over the place. We have filed where we have 12 and 15 different providers to try to get updated records on. It is not an easy process. We want to provide all the relevant and probative evidence of disability as soon as possible.

Ms. SPEIER. All right, thank you. My time has expired.

Mr. Sklar, one last question. Attorney misconduct. Makes sense that you should be able to report attorney misconduct. Can you comment on that?

Mr. SKLAR. So we do have procedures for handling attorney misconduct. We are looking at those at this time as well. I know there is some degree of frustration about evidence not getting into the record quick enough or right before a hearing. I suspect if you do travel around the Country talking to judges, you would find that there is tremendous frustration about evidence coming in late.

I actually met with the NOSSCR group, 1,000 representatives from across the Country, and basically begged and pleaded and said we need the evidence in, we need the evidence before the hearing, and please don't drop 600 pages on us the day before the hearing, it is just not fair. So we have a little bit of work to do. I am hoping we can do it voluntarily. I am hoping Mr. Sutton and others can help us get to the right answer; otherwise, we do have a code of conduct and certainly that is something we think about.

Mr. LANKFORD. I am going to go to Mr. Woodall in a second, but I want to make a quick follow-up question. Can you define your

term soft closure that you used before, that you are experimenting with? Because I am still struggling with the responsibility to get your paperwork in.

Mr. SKLAR. Right. In classic administrative law practice you have hard closure of the record; there is a date, boom, that is it, you can't submit any more evidence. But the closure provision up in the Boston region that we are working with right now gives the judges in Boston a little bit more discretion to allow in critical pieces of evidence that they think should come in, so it is not the classic administrative law closure, it is a little bit softer than that; and it seems to be working out pretty well.

Mr. LANKFORD. But the judge is making the decision at that point whether this is relevant and needs to be added in, rather than just it is an automatic, it gets dumped in, is that what you are saying?

Mr. SKLAR. There is actually some legal language. And if anybody wants to jump in and rescue me on this, what the exact provision says, you are welcome to.

Mr. LANKFORD. Well, the concern for me is that in the past SSA has allowed this to come in, that there is not a rule that has been set. Obviously, you see what is going on as well. You are beginning to move on it, that is good. But it is disconcerting to me to say that decisions have been made when hundreds of pages of documents have landed the day of, or even after, the hearing was done.

Mr. SKLAR. Typically, those cases wind up getting postponed and everybody is frustrated. The claimant is frustrated with us, they think we are the responsible party. Often the representative doesn't even self-identify as the person who dropped the records at the last minute and the records were from two years ago. It is a problem we need to work on together and I have really tried to join forces with the attorney groups to fix this problem, and I am hopeful we can get there.

Mr. LANKFORD. Thank you.

Mr. Woodall.

Mr. WOODALL. Thank you, Mr. Chairman. I am sympathetic to what Mr. Sutton said about cases coming up a year later, new medical records have appeared. You absolutely want a thorough and complete record.

Judge Butler, let me ask you, because I can feel your frustration. You care about the tax dollars who are paying in, you care about the needy folks who would be getting these dollars. As Senator Coburn laid out, we are really at risk in less than a year and a half from now. What is the challenge with scheduling that we can't require the record to be complete before we schedule the hearing? Is there something special about the process that we have to schedule those hearings so far out in advance? Why can't we ask Mr. Sutton's folks to have the record complete before you all schedule the hearing?

Judge BUTLER. The hearings are scheduled months and months in advance; the notices go out. They are entitled to a 20-day notice according to the regulation in most parts of the Country. In prototype areas they have a 75-day notice that they have allowed, and NOSSCR likes the additional time. But, in my opinion, in most situations, there are going to be unusual ones where somebody is sent

for an MRI or something, and there is no problem dealing with that.

Mr. WOODALL. Well, I guess I want to demand even more accountability from my folks who are getting paid a hefty sum of money to represent me and my constituents. What is the reason we can't refuse to schedule a hearing until that record is complete? Now, I try to respond to constituents who ask me a question. Now, sometimes I get 20 days behind, but the same number of inquiries come in. If I could respond to them all on day one, if I respond to them all 20 days later, it is the same number of inquiries coming across my desk. What is the metric that we are trying to achieve by not going—

Judge BUTLER. Let me make sure I understand your question. You are asking me, as a judge, could I refuse to schedule that case until I feel like that record is complete and the case is ready to hear? Well, in my opinion, yes, I could do it, but the practical matter is, if I did that, I would have some real difficulties with this agency, who focuses on moving the cases, moving the cases, and to use the term pay down the backlog, I think that is what has driven a lot of these. It has gotten the backlog down, but you have paid a tremendous number of people, in my opinion, who are not disabled. The APA I think gives a judge that discretion, but, as a practical matter, if I did that, I would have real problems.

Mr. WOODALL. Absolutely. We are talking about two different things. You are talking about using your discretion on which folks are going to bring pressure to bear on you. I am not. I am talking about changing the way we do business to tell folks that we want you to get your money as fast as you can, and we want you to get your money, if you deserve it, in the most timely fashion possible; and the way we are going to improve the system is by saying we are not going to bog down the system with attorneys who are doing what Mr. Sutton and I would both agree they should not be doing, serving their clients poorly. We are going to schedule those cases for those attorneys and those clients who are doing it right first, and not delay those with the process.

Let me ask you, Mr. Sklar, I remember Senator Coburn testified that his research showed about a 25 percent error rate. He quoted a Social Security report quoting about a 21, 22 percent rate. Is that granting benefits when they shouldn't be granted, or does that include both benefits denied that should have been and benefits granted that should have been denied?

Mr. SKLAR. I see the challenge. It is very difficult to articulate that report precisely, so let me try. So you are correct, the statistic was 22 percent "error rate" in fiscal year 2011, and that was cited PSI minority report basically citing Social Security's own internal report on pay cases.

Now, let's take a minute and talk about what is in error, per se. A lot of the items classified as an error were not necessarily outcome-based, they were really about technical issues. Let me give you a good example. Let's say a judge finds somebody disabled as of October 2011 and it was really November 2012, the onset date. Not that they weren't disabled; maybe they got the onset date wrong, something like that.

So some errors fall into that category. Others are a reviewing body basically looking at the case and saying, you know, the judge probably should have gotten a vocational expert here, they shouldn't have paid this case without a vocational expert. The judge will go get a vocational expert and still wind up paying the case.

Mr. WOODALL. And did they then cite a number for cases that were paid that shouldn't have been paid, or the entire report was on these—

Mr. SKLAR. I think we are pretty close to that now. Obviously, we recognize Senator Coburn's enduring interest in that report and the ideas expressed therein, so we have been tracking those cases to see what happened, and, again, don't hold me to this number, but I would say probably the true wrong case rate would be less than 10 percent.

Mr. WOODALL. And thinking about Ms. Speier's question about going back and doing that aggressive re-certification, if our re-certification reviews are only denying 4 to 7 percent of cases, yet we have an 8 or 9 percent error rate in granting cases, I wonder why those numbers wouldn't come into sync.

I know my time has expired, Mr. Chairman, but I just wanted to ask one more question of Mr. Sklar.

I don't know if you remember a November 2011 article on The Wall Street Journal cover talking about the Baltimore office and a great shakeup among physicians there working for Social Security. Do you recall that article?

Mr. SKLAR. I think I do, yes.

Mr. WOODALL. Or that episode even less than the article. In that article they quoted doctors as saying they had been pressured, doctors who were being paid by Social Security, but they were being pressured to change their medical opinion in order to meet some of the Social Security Administration's goals. Do you recall that statement and can you speak to that?

Mr. SKLAR. The best I recall, representative, is that there was a shift from an hourly wage to a paper case model, and I believe the State agencies largely follow a paper case model, and now the Federal unit moved to a paper case model and there was quite a bit of unhappiness there.

Mr. WOODALL. Absolutely. Though, in expressing that unhappiness, some of those physicians said they were pressured, and I will quote it: "Pressured by a supervisor to change his medical opinion and award benefits to someone he didn't believe had disabilities that would prevent the person from working." Two other doctors said they were pressured to award benefits in cases where they were reluctant. Those were front-page accusations on The Wall Street Journal. Do you know if SSA investigated those doctors' statements that they had been pressured by Social Security officials?

Mr. SKLAR. Actually, I would be very surprised if that was the case. I don't have first-hand knowledge.

Mr. WOODALL. Surprised if it was the case that it was investigated or surprised if it was the case that it happened?

Mr. SKLAR. Surprised if it actually happened.

Mr. WOODALL. Well, do you know if it was investigated? Because it is a serious accusation.

Mr. SKLAR. Again, that is certainly outside of the purview of my operational area, so I don't know the answer to that question.

Mr. WOODALL. Could you direct me who to ask or ask that question on my behalf and get an answer for the record?

Mr. SKLAR. For the record, we will certainly get you the appropriate person to send that information to. And I will obviously go back and talk to the IG and try to find out whether they have ever gotten a formal referral.

Mr. WOODALL. I appreciate that.

Thank you, Mr. Chairman, for your indulgence.

Mr. LANKFORD. Mr. Horsford.

Mr. HORSFORD. Thank you, Mr. Chairman.

You know, I have to say I am rather frustrated by the prior speaker and the gentleman from Tennessee. Somehow the discussion went from how do we make this work better to how do we prevent people who are entitled to benefits from getting them. And as the chairman shared his experience with a family member, let me share mine.

My grandmother, who had a stroke in her fifties and came out of a coma and was paralyzed on the left side of her body relied on Social Security disability benefits to live in a nursing home for 27 years of her life, until she passed away.

While we want to encourage those who can return to work to return, there are some people who cannot, and that is what Social Security disability benefits are about. So if we are here to create some adversarial role between administrative law judges and the beneficiaries, then I think we have to question what the purpose of this is to begin with.

I would like to point to the facts. I would like to request that a chart be displayed which shows, in fact, in aggregate, ALJs have approved fewer disability claims since they were expected to decide 500 to 700 cases a year. Sometimes the judges talked about feeling pressure to award benefits to claimants that are not actually injured. But the facts, however, show a different picture.

Judge Butler, I am sure you would concede the cases of poorly decided disability eligibility determinations do exist, correct?

Judge BUTLER. Yes, they do, a lot of them.

Mr. HORSFORD. Do you believe that it is a widespread practice among administrative law judges to intentionally engage in professional malfeasance and fraud by awarding disability benefits to people who they don't believe are in fact disabled, yes or no?

Judge BUTLER. No.

Mr. HORSFORD. That would be a violation of the law, subjecting them to termination and disbarment, wouldn't it?

Judge BUTLER. Yes, it would.

Mr. HORSFORD. So improper decisions do happen. But you do not believe that there is a systematic problem of illegal eligibility decisions.

Judge BUTLER. Not with the judges.

Mr. HORSFORD. So, Mr. Sklar, can judges avoid review of their decisions by rubber-stamping applications for disability benefits, since those cases are not appealed.

Mr. SKLAR. We recently started a statistically valid nationwide sample of favorable cases. We started that about two years ago. It is certainly not going to sweep up 100 percent of the cases, but it gives us enough information to determine where the problems might be; and we do feed that information back to the judges.

Mr. HORSFORD. So there is a quality review process that is not dependent upon a claimant appealing a decision alone?

Mr. SKLAR. Correct, as of 2011.

Mr. HORSFORD. So can we administer disability insurance better?

Mr. SKLAR. Absolutely. There are always opportunities to get better, and one of the areas where we have really spent a lot of time is on communication. And we do have new electronic tools, actually tools called How Am I Doing?, where the oversight body, the Appeals Council looks at the statistically valid sample, then they feed the data back right to the judges, and they can go right into this tool and see why their case was remanded; and they can actually get training right on the spot. We also do that for unfavorable cases that came up to the Appeals Council that the Appeals Council is remanding back.

So we are trying a lot of different things. We are looking at a lot of data to try to find areas where there might be systemic problems or policy weaknesses. And the fact that we do have this electronic folder gives us lots of opportunities. So we are really trying to bore down into why cases are improperly decided.

Mr. HORSFORD. And that is where I hope that we can focus. The ranking member, Ms. Speier, talked about three things that we could work on in a bipartisan manner to give administrative law judges and the system tools to better do your job. That is what I am here for. I am not here to come up with rationale to justify my position about how to keep someone in or out of a program. The program is here, people are entitled to it, and we need to make it work better. But the evidence before this committee refutes Chairman Issa's assertion of a widespread, systematic problem. The evidence we have received would not support a wholesale dismantling of the disability system and the laws that created it. I hope that we can focus on making it work, and not tearing it down.

Thank you, Mr. Chairman.

Mr. LANKFORD. Mr. Horsford, I would agree with you that this is designed, was written in by Congress and is to be carried out by the Social Security Administration to take care of people that qualify and that need it, and that is the right position for us to do as a Nation.

But when we have any increase in anything, we have to be able to ask the questions the why and the what, and is it something we can fix and process, and things we have already spoken about, things like the grid not being updated since the 1970s. That is something that is already in process and we can try to figure out how we can evaluate that and what can we do; the CDRs that we have spoken about.

We have to find out if we are not funding those correctly or if there is a different shift that needs to occur. Some of the studies that have been done to try to evaluate why so many people are included in—the Federal Reserve Bank of San Francisco put out a statement about Social Security disability insurance and tried to

list—and I will add this to the record. I don't think I added your chart earlier to the record, your chart. Let me include that as well, unless there is any disagreement. There is not. Let's include that.

Mr. LANKFORD. But to be able to include some of the facts of the case, and it is very difficult to get the numbers here because there are so many different studies and so many different reviews and so many years and qualifications.

But this particular piece tried to evaluate is it because we have more people that are senior adults? Is it because we have more women in the workforce? They broke down all those different factors and by the end of it they said they can break down all those different factors, but they still have about 44 percent of the people they actually could identify why there was the increase.

So those are just questions I think that are reasonable questions to ask and say how can we try to resolve this. The last thing I want is, three years from now, Social Security disability to struggle with insolvency and the people that need it have a reduced payment because we have people that don't qualify in the system.

Let me just run through a couple questions. I think we need to close out, unless there are any additional final statements here as well from anyone else.

I want to try to resolve just a couple other things.

Mr. Sklar, a couple years ago it looked like there was some intent to go to high-producing judges and to send them additional cases, some of them up to over 2,000 cases in a year. You had mentioned in your earlier statement you are trying to limit that now, to set a cap of how many cases can actually head to them. Are you familiar with that process in the past and what happened with so many cases being directed towards judges that are putting out a tremendous number?

Mr. SKLAR. I guess my comment would be not on my watch. I started in this position in January 2010 and that certainly has not been my position. And I would add that first we dropped the cap down to 100 cases a month, and then this fiscal year it is 80 cases a month. And some of the judges are actually upset because they like to do large numbers of cases, and we had taken a hard look at the data and said, you know what, quality starts to suffer when you get up over about 1,000 cases.

Mr. LANKFORD. Is that something you could share with us as well, just the metrics that you all used for that and how you evaluate as far as setting the number, the low number and the high numbers? Is that something that our committee could request?

Mr. SKLAR. Again, part of this is, let me just parse the question. Your first question on the high cap, absolutely. The second part I would have to consult with counsel because, again, this is an interesting panel where four of the people at the table are on one side of the litigation and the agency is on a different side.

Mr. LANKFORD. All right. We will follow up with a letter. We will both get a chance to visit with counsel. But I would like to know just the metrics of how that decision is made. Obviously, you all put a lot of research and study into it, and it would be helpful to us to be able to see some of that and to be able to know the process.

Mr. SKLAR. And just to give you a really quick answer, too, previously, the study by ACUS that Dean Krent from Chicago-Kent Law School had done, they looked at this issue of when does quality begin to deteriorate, and basically their cut point was the top 1 percent of what we call super-producers, actually.

Mr. LANKFORD. Yes. Two thousand cases in a year seems to be a super-producer on that one.

Let me run through a couple things here. We mentioned before the treating physician rule and this issue about basically putting a higher priority on a treating physician or maybe other physicians or a family physician. Is that something that is under conversation right now, to be able to evaluate the effectiveness? Several folks have made comment on that. Outside research has made comment on that as well.

Mr. SKLAR. Right. There was an outside research stream going right now. The Administrative Conference also recently rendered a report on that issue, and we can be sure to get you a copy.

Mr. LANKFORD. Agree or disagree with that report, for you?

Mr. SKLAR. Again, too early to take a position; we are analyzing it. We just received it. In fact, it just made it out of the full committee of ACUS.

Mr. LANKFORD. Okay. Can we also get the timing on that, when that is going to move? We will follow up with a letter to request that as well, formally, but we will get the timing on when that is moving.

We talked about updating the grid and already where we are on that.

We talked about trying to get complete medical evidence as a big issue. You are already experimenting in Boston with doing a soft close on that and trying to work through that. Those are things we need to try to correct in the process.

I mentioned earlier about the issue of social media and allowing judges to be able to pull up, for instance, a Facebook page of the person that is in front of them to evaluate are they working, do they have pictures. Is that under consideration at all?

Mr. SKLAR. Not at this time. It is really mostly about our computer network. We are really worried that somebody might introduce malware into our system. We are a fully electronic body, one of the largest recordkeeping system probably in the public or private sector.

Mr. LANKFORD. So they don't have Internet access at all?

Mr. SKLAR. They do, but not to go onto social media sites. And we are very nervous about that. The other issue is it does compromise the role of the judge as the judge, and now they are judge and investigator; and we would prefer that those allegations go right to the IG.

Mr. LANKFORD. Okay. Yes, the challenge still is another person to try to figure out how to advocate for this to be able to get full evidence. The full evidence is still the need. We can have an ongoing conversation about that, but some way to be able to garner full evidence and to make sure that we actually have that, getting complete files on it.

The mention of subpoenas came up earlier. We didn't really have a conversation about that, but how many subpoenas are enforced

by the U.S. attorney that come out? Is that a common practice, are there a lot of subpoenas that are coming out? When they do come out, are they enforced?

Mr. SKLAR. I will have to get back to you on the record for that, it is really outside my domain. I will say, though, that the U.S. attorney's offices are really, really busy, and enforcing subpoenas from us is not their highest priority.

Mr. LANKFORD. I understand that.

Mr. Sutton, you had a quick comment on that?

Mr. SUTTON. Yes, Congressman. The issue of enforcement doesn't even arise if the subpoena by the ALJ is complied with by the medical provider or whomever it may be, and many of these subpoenas are complied with. So it shouldn't just be focused on enforcement by the U.S. attorney's office.

Mr. LANKFORD. If one is not complied with, though, we do have enforcement issues.

Mr. SUTTON. It is an issue for the U.S. attorney's office and a workload issue. And if they don't have the horses to take care of, enforcement is not going to happen.

Mr. LANKFORD. And that is part of our issue on this and why I come back to Mr. Sklar on it as well, is the issue of trying to reduce people in the pipeline. That is the great unknown. Are there recommendations that you have? I mentioned that before, but if there are ideas that are out there that we can have an ongoing conversation, whether it is legislation we need to fix or whether it is regulations that are out there in the process.

But we want people that qualify to get in the pipeline, but people that are clogging up the pipeline that don't qualify, and it is clear and they are just trying to take the shot because it is free to take the shot, we need to find some way to make it clear from the beginning you don't have a shot on this and you are slowing down the whole process for everybody. So we can have an ongoing conversation.

Then the issue of dealing with inappropriate conduct from counsel and how we are going to resolve that. We will follow up on that as well in the days ahead.

Ms. Speier?

Ms. SPEIER. Thank you, Mr. Chairman.

A couple of peripheral questions. Who pays for the attorney?

Judge SNOOK. The claimant does, Congresswoman. And if I may expand on that, one of the basic problems with the whole system is the attorneys get paid on past due benefits. They have no incentive—let me stop for a moment. Mr. Sutton and I work together on the ABA. I am not talking about attorneys. But for some of these large firms they sign that 1696; it is money in the bank if they win. They don't start working on the case until they get the notice of hearing. Why? That is profit. I mean, you are not going to update a case if it is going to take a year or two to get to the judge. So somebody should look at a different formula, because we do need attorneys to assist us. They do a tremendously good job.

Ms. SPEIER. All right, let me just ask this. What percentage of the cases, when they get to the ALJ level, are represented by attorneys?

Judge SNOOK. In Miami, I would say more than 80, close to 90 percent.

Ms. SPEIER. Mr. Sklar, what is it countrywide?

Mr. SKLAR. Nationwide, if you include both attorneys and non-attorney representatives, probably somewhere between 80 to 90 percent.

Ms. SPEIER. And non-attorneys are typically persons in a law firm providing that service, whether it is a paralegal, or it could be the next door neighbor?

Mr. SKLAR. They have to pass a test administered by SSA, but they are non-attorneys.

Ms. SPEIER. All right. And who pays for the doctor consult?

Mr. SKLAR. Typically, if there is a consultative exam, the agency would pay for that.

Ms. SPEIER. So I would like to learn more about that, and I think it would be advantageous to the committee; how much money we spend on physician consults, how they range, and how comprehensive they are. I think unless you have doctors that have been approved by the Social Security Administration, you could have wildly different kinds of reports being provided. You could have boilerplate reports. I mean, we just need to make sure we are getting our money's worth from those physician consults.

Mr. SKLAR. Just for the record, to be clear, we do have a fairly stable cadre of consultative examiners, and we do do oversight. There is a professional responsibility group that goes out, they will visit and they will make sure that they do it in a format that is useful to the agency.

Ms. SPEIER. But you don't limit how much they can be paid?

Mr. SKLAR. Actually, they are not paid very much, to be honest. There is a set fee for a consultative exam.

Ms. SPEIER. Oh, there is?

Mr. SKLAR. Yes.

Ms. SPEIER. All right. Okay.

Mr. SKLAR. When we are paying. And, again, also recognize that representatives could go out and introduce additional medical evidence at their choice. They would then pay for that.

Ms. SPEIER. All right, so Social Security pays for one consult.

Mr. SKLAR. Typically.

Ms. SPEIER. And it is typically a set fee.

Mr. SKLAR. That is correct.

Ms. SPEIER. All right. Okay, that takes care of that.

All right, performance review of ALJs.

Mr. SKLAR. Can't happen. Not legal under the Administrative Procedures Act.

Ms. SPEIER. Okay, that is a problem.

Mr. SKLAR. That is the law.

Ms. SPEIER. That is the law that Congress has passed?

Mr. SKLAR. Yes, indeed.

Ms. SPEIER. It wasn't done by regulation; it was done by Congress? So if you really have someone who is showing malfeasance, isn't doing their job, there is nothing you can do because they are appointed for life?

Mr. SKLAR. Okay, let me be a little bit more precise. In terms of an actual performance review where you sit down with somebody

and say, hey, you are doing a great job or this is an area you need to work on, we can't do that. But, there are avenues for both potentially misconduct cases brought before the Merit Systems Protection Board, as well as performance cases for somebody. Under certain circumstances that could happen, but all these cases must be processed by an entity outside of SSA. We do not impose discipline directly on judges; we can't. It has to go to a second agency on the Merit Systems Protection Board.

Ms. SPEIER. Does that operate like a judicial counsel, then?

Mr. SKLAR. It is a second set of administrative law judges, yes, presiding over those proceedings.

Ms. SPEIER. So do you feel comfortable that if there are bad performers, that there is a process by which they can be terminated?

Mr. SKLAR. It does take a long time.

Mr. SPEIER. So how many judges have fallen into that category? How many have been recommended to this board?

Mr. SKLAR. I can get the number for the record. I don't want to guess, but somewhere in the neighborhood of 25 to 35.

Ms. SPEIER. A year?

Mr. SKLAR. I think in the last five years, since fiscal year 2007.

Ms. SPEIER. What percentage of the ALJs are retired judges?

Mr. SKLAR. I would have to get that information for the record. I am sure we have it in our personnel files, but I don't know it off-hand.

Ms. SPEIER. Could you provide that for us?

Mr. SKLAR. Yes.

Ms. SPEIER. So this one judge in Oklahoma, I guess, who was handling 2,000 cases a year and was approving 90 percent of them, or more, at any point in time was there any effort made to have him reviewed by this independent board?

Mr. SKLAR. I will just add for the record that he no longer works for the agency.

Ms. SPEIER. No, I understand that. We want to make sure we have competent people providing services, and there should be a means by which, if someone isn't competent or isn't doing their job, that action can be taken. So I am just interested in making sure we have a robust system to do that. So are you suggesting we have one?

Mr. SKLAR. I am suggesting there is a system. Whether it is robust, speedy, and efficient is another matter.

Ms. SPEIER. Judge Snook, you raised your hand.

Judge SNOOK. Yes, Congressman. The reason why the APA says no performance appraisals for judges is not for the judges, it is to protect the American public. If this agency said, judge, get your production up, there is a history of the Government directing, before the APA was enacted, the result, and Congress, after it took many years to pass the Administrative Procedure Act, made a determination: no performance appraisals so the agency couldn't influence our decisions.

Ms. SPEIER. Judge, are you a retired judge?

Judge SNOOK. I was the chief trial judge of the Coast Guard, so in that sense, yes, I am a retired judge.

Ms. SPEIER. Because I think at some point we have to assess whether we want this to be a full-on judicial environment that is

adversarial or is this an administrative procedure that works differently. And I think we have historically felt that this was different and, as such, is not going to have the adversarial relationships and is not going to be a full-on judicial proceeding. So that is why I was asking those questions.

I want to thank you all again for your participation, and I have concluded my questions.

Mr. LANKFORD. Thank you.

I am going to allow anyone just to make a quick statement if they need to be able to close up anything on that as well.

One thing. Mr. Sklar, we had mentioned about numbers earlier in my conversation with Mr. Horsford, about how difficult it is to be able to get numbers together. Is there a record of the regional local office production goals for the different judges or the different groups? Is that a scheduled record that has existed in the past? Was that a formal or was that an informal kind of production goal?

Mr. SKLAR. It is fairly informal. Again, we do have a national goal for the agency, and typically that is just chopped into pieces.

Mr. LANKFORD. If we can get a copy of that for as far back as you may have, let's say 10 years or so, if that is out there. I know that is prior groups as well, I get that, but that would help us get accurate numbers, because a lot of what we are looking at are different numbers and types, and to see the ebb and the flow, that would be helpful; and any kind of schedule to heard ratio that is in that as well, so that we get a feel of how that is actually ebbing and flowing, and we will know it is the accurate data coming from you. That would be extremely helpful.

Any final closing comment? You don't have to make a comment, but any final closing comment from anyone? Yes, Ms. Sullivan.

Judge SULLIVAN. Thank you, Congressman. I would simply thank, again, everyone here on the committee and encourage you to pursue that agenda that Congresswoman Speier talked about in terms of making a decision about what kind of system we want to have for our people in terms of addressing and reviewing disability applications on appeal. And I would urge all members of Congress to consider reimplementing a meaningful adjudication system into the Social Security Office of Disability Adjudication to replace what I consider to be an incredibly failed experiment of a factory-line production process that is in the offices now.

Thank you so much.

Mr. LANKFORD. Judge Snook?

Judge SNOOK. Mr. Chairman, I wholeheartedly agree with what you said recently about I want to get to the worthy claimants in a timely manner.

Mr. LANKFORD. Right.

Judge SNOOK. Several years ago, a very good staff member asked me, judge, do you know what the problem with the system is? And I said, no, Buddy, what is the problem? We have so many unworthy claimants filing, we can't get to the worthy claimants in a timely manner.

So that is why I think you need to look at how the attorneys are compensated. Some of the large firms, once the claimant signs a 1696, they have it filed. They don't do any work on the case until they get the notice of hearing, and then if it is a bad case, they

withdraw the day of the hearing; if it is a good case, they bring in new evidence. Something has to be done at that end, rather than why isn't the judge moving along.

Mr. LANKFORD. Okay.

Mr. Sutton?

Mr. SUTTON. Mr. Chairman, you talked about your relative, and I have relatives like that too, and I get calls from clients frequently; they have been out of work a year, two years, they have been hurt, they have been ill. Whether because they are feeling a little better or because they are completely desperate, they want to try to go back to work, and I encourage them to do so, without fail. That is my position; that is my firm's position. That is any attorney's position. We are fiduciaries for our clients. They are better off working; not just theoretically or not just in terms of a work ethic, but because they can make more money in the economy working. And there is no guarantee that I am ever going to be able to win their disability case. So we encourage people to go back to work.

But what I will tell you about your relative is she is heroic. That is why she is a role model for your whole family for generations to come. And there are people like that, but they are unusual. And this system has to be calibrated toward average folks. That is just the reality. Not everybody who is confined to a wheelchair with the kind of impairments it sounds like your relative has can really manage to work. She did and God love her, and we need people like that, and we should all look up to them. But I don't think we can calibrate a system for millions of people that is predicated on heroes, because they are off the distribution.

Mr. LANKFORD. And I will pass on your word of relic to her in the most encouraging of ways.

I made that comment earlier because I talked this week with some family members back in Oklahoma that are going through the process and asked them personally how is this going, because it is an awful long wait. I mean, everybody here knows that; it is a terrible process for them. They said consistently to me that they were advised at the very beginning make sure you are not working; live off relatives, live off family individuals, don't work.

Because if you work, you are going to have to walk in and explain why you are asking for disability while you are still working. And I am glad you are counseling people like that. I said that from family members that I talked to them; that it wasn't them applying, it was their family member, and their family member was living off of them.

Mr. SUTTON. Look, there may be bad advice going on, but it doesn't really make sense to tell anybody that. If they are able to work, they should. And if they try and can't do it, that becomes an unsuccessful work attempt; it tends to prove that they really meet the definition of disability.

Mr. LANKFORD. The issue is just systemic reform, if it is needed. Let's fix it and make sure it is clear and it is what you are talking about on that.

Ladies and gentlemen, thank you for being here. It is a long morning and I really appreciate your time and all the effort.

Mr. Sklar, we gave you a tremendous amount of homework. For that, I apologize, but you will help this committee tremendously as

we try to pursue the facts, and we are here to help you in this process. This is not adversarial for us; we want to help in the process because this is going to be right of people for a long time.

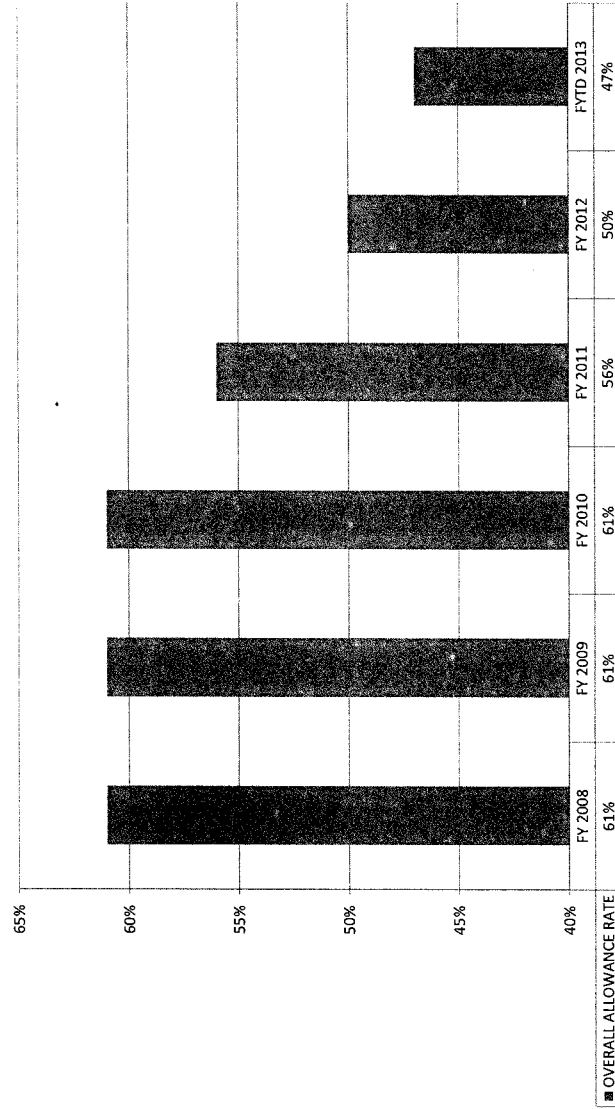
With that, this hearing is adjourned.

[Whereupon, at 12:15 p.m., the subcommittee was adjourned.]

APPENDIX

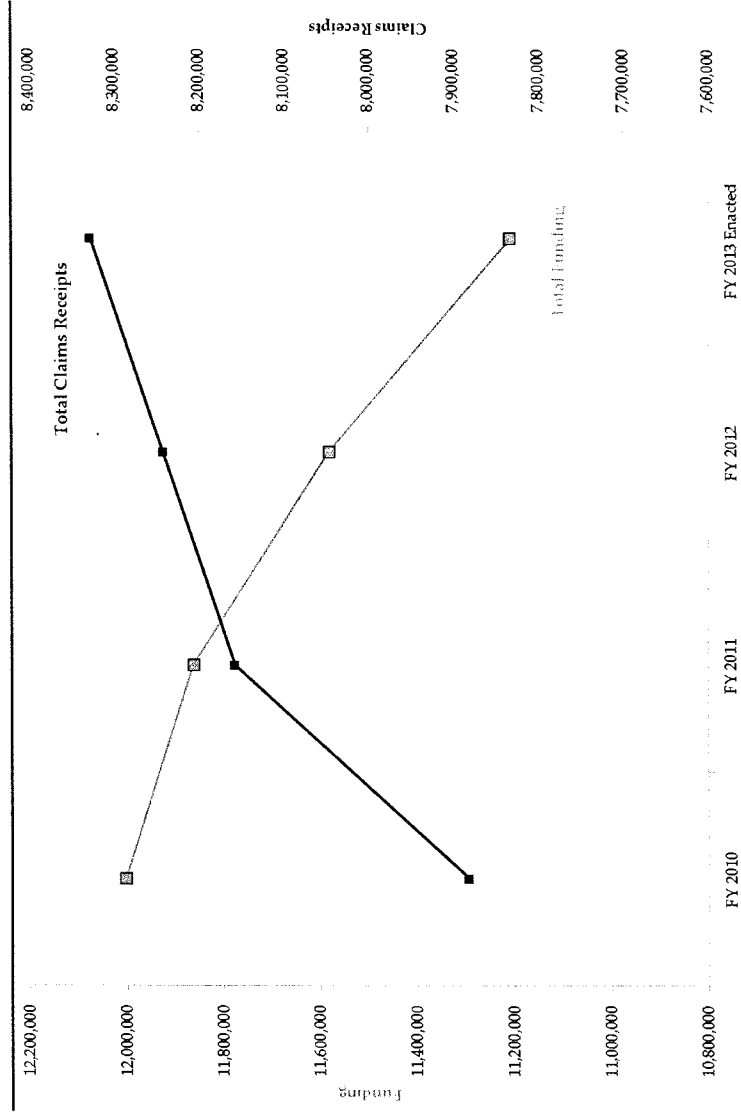
MATERIAL SUBMITTED FOR THE HEARING RECORD

OVERALL ALLOWANCE RATE AT THE HEARING LEVEL
FY 2008 - FYTD 2013 (through May 31, 2013)

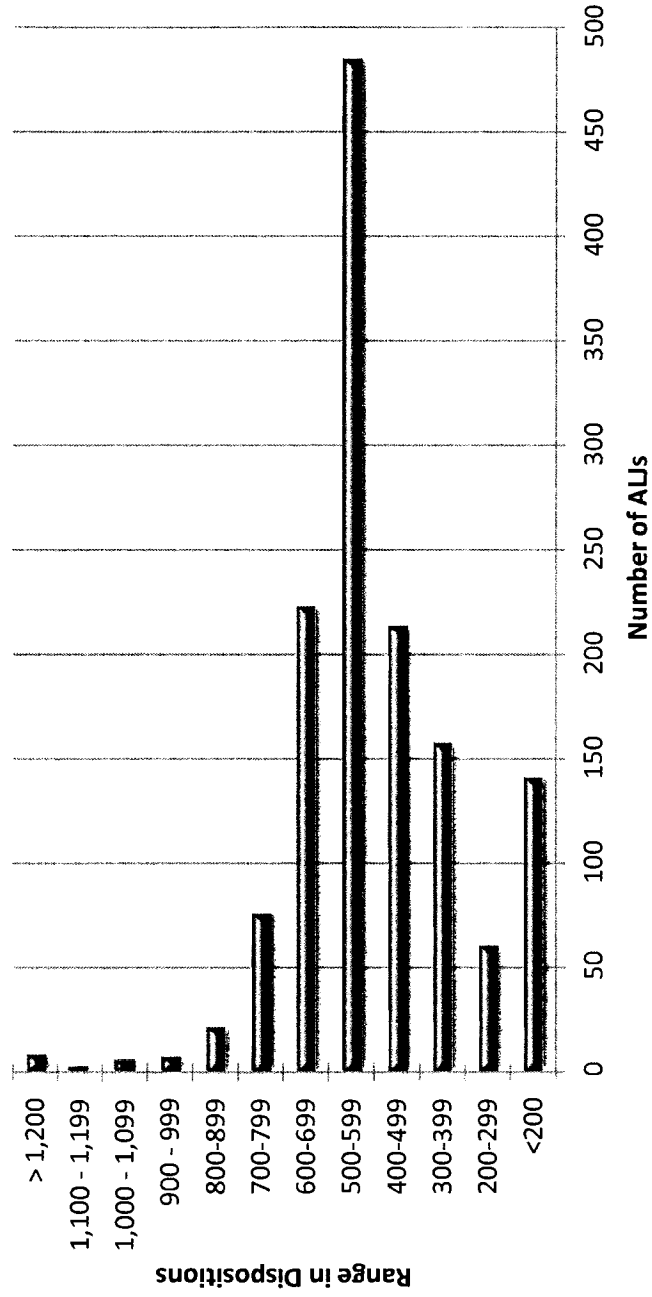


Source: CPMS MI
 Prepared by ODAP, OESSI, DMIA 6/20/13

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**Figure 1: FY 2010 ALJ Dispositions
(Relates to 1,398 ALJs)**



Note: FY 2010 CPMS closed case data and ODAR's ALJ Disposition Data.