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COMMITTEE ON WAYS AND MEANS

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Background Material on
Social Security Hearings and Appeals



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BACKGROUND MATERIAL ON SOCIAL SECURITY HEARINGS AND APPEALS

Introduction

This print is designed to provide Members with background information for the hearings which will be held before the Subcommittee on Social Security on September 19 and 26 and on October 3, 1975. The information and discussion of issues up-dates and expands upon the material on the social security appeals process contained in the "Committee Staff Report on the Disability Insurance Program," July 1974 (hereinafter called the Committee Staff Report). In its findings and recommendation section the Committee Staff Report stated:

In view of the "appeals crisis" which will grow in coming months, the Committee may wish to reexamine the complex structure of the appeals procedures and attempt to obtain answers to the following difficult questions: Can the Appeals Council be restructured in order to provide more definitive and supportable administrative determinations? Can the system continue to provide both a full administrative reconsideration and a hearing under the Administrative Procedure Act (APA)? Are certain of the administrative and judicial remand procedures causing undue delay for claimants? Can the District Courts withstand the flood of new cases, particularly where many of them ignore the substantial evidence rule and try the case de novo? The staff has, in a preliminary manner, examined some alternative approaches to these problems and they are presented in Part II, section D, Disability Appeals Procedure, in this document (pp. 31-44).

The Civil Service Commission has interpreted the 1972 Amendments in such a manner as to exclude SSI hearings from the applicability of the APA and has decreed that the SSI "hearing examiners" must be appointed by the Secretary of HEW rather than by the Commission and classified at a lower grade than those who conduct Social Security disability hearings. The Commission's conclusion with respect to the applicability of the APA to SSI hearings is clearly contrary to the intent of the Committee and the Congress. In Part II, section F, Status of the SSI Program Under the Administrative Procedure Act (pp. 55-75), the staff makes certain recommendations in this area which are intended to make clear the Committee's intent concerning the SSI hearings procedures (page 6).

In July of 1975 Social Security Commissioner Cardwell transmitted a progress report on action directed toward the issues raised by the Committee Staff Report. The portion of this transmittal dealing with the social security appeals procedure appears in the appendix on page 19.

Attention is also called to the committee print issued August 1, 1975, entitled, "Staff Survey of the State Disability Agencies Under Social Security and SSI Programs." This survey, which is based on a questionnaire sent by the subcommittee staff to the 54 State agencies that determine disability under the social security and SSI programs, contains expressions of the views of the State agencies concerning some of the issues that will be before the subcommittee during its hearings.

Hearings and Appeals Process in Brief

Since most of the hearings pending are in the disability area (both Social Security and SSI) the process described will be for that type of claim. The application for disability is made at the Federal social security district office where the claimant is interviewed and the sources of medical evidence are recorded. The case is then sent to the State agency which, operating under contract with the Social Security Administration, makes the initial determination of disability. If a claimant is dissatisfied with an initial denial of disability by the State agency he can request a reconsideration within 6 months of notice of denial. The reconsideration is also carried out by the State agency but by personnel other than those who made the initial determination. If upon reconsideration the claimant is again denied benefits he will be given a hearing before an administrative law judge (ALJ) providing he files a request within 6 months of notice of the denial. Under SSI this period is 30 days at both levels. (Prior to 1960 an individual could request either a hearing or a reconsideration.) If the claim is denied by the administrative law judge, the claimant has 60 days to request review by the Appeals Council. The appeals council may also, on its own motion, review a decision within 90 days of the ALJ's decision. The Appeals Council may review, affirm, modify, or reverse the decision of the ALJ or it may remand it to the ALJ for further development. The claimant is notified in writing of the final action of the Appeals Council, and is informed of his right to obtain further review by commencing a civil action within 60 days in a district court of the United States.

Issues Explored

The present "crisis" in the social security appeals process is linked to the tremendous backlog of disability hearing cases and the resultant delay that beneficiaries encounter in going through the process of exhausting their administrative¹ remedies. A recent study indicates that the average time for a disability case from application to award or final administrative denial is over a year and a half, and roughly half of this time is attributable to the hearing process. The result has been many complaints from affected parties, which engendered a letter to the chairman of the full committee from 73 Members of Congress requesting the hearings which will be held during September and October before the Subcommittee on Social Security on this subject. The appeals crisis is not new, however, and its growth has roughly paralleled the growth of the social security disability program and the addition, in recent years, of black lung appeals and the establishment of an SSI disability program. Social security retirement and survivors and medicare cases play a relatively minor role in terms of number of cases requiring hearings (see table 8 for breakdown of hearings by type of claim).

As will be seen from table 1, the median time for disability hearings has been lengthy in the past as well as in recent years.²

Equally important aspect of processing of cases, is the question of the quality of adjudication. The rate of reversal of initial denials of disability has become so substantial in recent years that it has been cited by the Administration as one of the reasons for the growing actuarial deficit in the disability insurance system. Moreover, questions continue to be raised as to the uniformity of decisionmaking throughout the various elements of the system.

This paper will attempt to outline some of the main issues in the appeals process. Areas covered will include the applicability of the Administrative Procedure Act (APA) to hearings under the Social Security Act so far as it affects the appointments and control of hearing officers with particular emphasis

¹ A growing number of social security and black lung cases have been appealed to district courts and the median time for their disposition is over a year and increasing.

² During the period 1957-59 the average processing time for hearing varied between 250-300 days.

on the APA coverage for SSI hearings and the legislation that has been recently reported out by the Public Assistance Subcommittee which overrides an interpretation of the Civil Service Commission. Other areas dealt with are various mechanisms—ad hoc and otherwise—for dealing with the hearing backlog: (1) the wholesale remanding of cases to the State agencies where a hearing has been requested—a re-reconsideration (2) the institution of face-to-face contact with claimants on reconsideration by the State agency and (3) the reducing the time that a social security claimant has to appeal an adverse decision. Also under consideration is the increased use of paralegal personnel in the hearings process, a topic which was discussed in the Committee Staff Report of July 1974. Also there will be discussion of the impact of social security cases on the Federal courts and some very important pending cases before Federal courts which could greatly increase the number of appeals. In the *Eldridge* case the Supreme Court will determine the applicability of *Goldberg v. Kelly* to social security disability cases and conceivably require a hearing before any termination of social security benefits. The administration in its brief before the Supreme Court in the *Eldridge* case has stated that an adverse decision would require about 11,000 additional hearings a year. Finally, some of the problems of reconciling the need for speed in adjudication with uniformity and quality of adjudication will be discussed.

Application of the APA to Social Security Cases

The social security appeals procedure which was established in 1939 antedates the Administrative Procedure Act (APA) which was enacted in 1946. In fact, the Attorney General's committee which was primarily responsible for the form of the APA used Social Security Act procedures as a model and considered the APA "largely declaratory" of its provisions.

The Ways and Means Committee and the executive branch in past years have always assumed that social security appeals were under the APA. The Administrative Law Section of the American Bar Association recently has taken this position in a brief filed before the Supreme Court in *Richardson v. Perales*, (1971) 402 U.S. 410:

The Administrative Procedure Act applies to social security cases. It permits consideration of hearsay evidence while preserving the right of cross-examination. The case before this Court can and should be decided through application of the Administrative Procedure Act.

The bar association brief stated that the APA applies in "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. 554(a)) and hearings on social security claims do not come under any of the six exceptions to this statutory requirement. A court of appeals had held in the *Perales* case that the APA was inapplicable on the ground that 5 U.S.C. 556(b) states that the act "does not supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other employees specifically provided for by or designated under statute." On appeal, the Supreme Court held that "we need not decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA. * * * Hearsay, under either Act, is thus admissible up to the point of relevancy." It then held that the social security procedures comply with the due process requirements of the Constitution.

Encouraged by the Supreme Court decision to avoid taking a position on whether the APA applies and other Supreme Court decisions in recent years which have given more weight to administrative ramifications of hearing requirements, some commentators have stated that the APA should not be applied to social security cases. These recent Supreme Court cases are somewhat at odds with earlier cases such as *Wong Yang Sung*. In that case Justice Jackson refused to accord weight to the argument that an APA hearing would cause the

Government inconvenience and added expense, stating "of course it will, as it will to nearly every agency to which it is applied. But the power of the purse belongs to Congress which has determined that the price for greater fairness is not too high." *Wong Yang Sung v. McGrath* (1950) 339 U.S. 33.

Others, who are not so certain that their position can be sustained on legal grounds, believe that wise public policy may call for the exemption of the growing number of social welfare cases from APA coverage. Opposed to this view are those who believe APA hearing safeguards are as necessary for adjudication of individual program rights as they are for corporations affected by regulatory agency action. The panel which will appear before the subcommittee on September 26, 1975 will include administrative law experts on both sides of this issue.

Briefly, what does APA coverage mean and how does it affect the right to and nature of the hearing? A large body of case law seeking to answer these questions has developed since both the Social Security Act and the APA were enacted. The Supreme Court has held in a series of cases that the due process clause of the Constitution protects an individual from final denial of a substantial benefit without opportunity for a hearing. *Flemming v. Nestor*, (1960) 363 U.S. 603; *Goldberg v. Kelly*, (1960) 397 U.S. 603. Moreover, these cases and others have spelled out the procedural components of the hearing which must be present to meet due process requirements. Such elements as adequate notice, access to evidence, right to cross examination, right to counsel and written finding and reasons for decision, etc. Also due process requires that the person who takes evidence and makes the decision be impartial, that the trier of fact cannot be prosecutor in the same matter, and that he cannot have been involved in the matter previously as an agency staff person. These also are requirements of the APA but there are other requirements in the APA which go beyond the due process requirements. It is in the area of the qualification of the hearing officer and his relationship to the agency adjudicating the claim that the APA imposes requirements which are unique from those the courts have thus far stated are required by due process.

Hearing Officer Qualifications

The qualifications of hearing officers are established by the Civil Service Commission. Initially, in 1947, the CSC prescribed 6 years of experience in legal proceeding to qualify for appointment but bar membership was not required. This remained unchanged until 1964. However, to meet an earlier "appeals crisis" following establishment of the social security disability program the Congress enacted legislation in 1959 to allow the appointment of temporary hearing examiners "who have been admitted to practice before a Federal or State court of record who have had a minimum of 3 year's experience in the adjudication of claims for retirement, survivors, or disability benefits." (Public Law 85-766 extended through December 31, 1960, by Public Law 86-158). In the transmittal of the draft language for the temporary examiners the Commissioner of Social Security stated:

* * * we would propose to comply with all provisions of the Administrative Procedure Act except those related to initial appointment. In other words, the classification and salary of the hearing examiner positions would be determined by the Civil Service Commission and all hearings would be conducted in strict compliance with the Administrative Procedure Act. Further, we would assure administratively that the persons appointed would exercise complete independence of judgment and would not be subject to any control or influence of the administrative agency—the Bureau of Old-Age and Survivors Insurance.

The American Bar Association's Administrative Law Section at that time opposed in principle the use of temporary examiners, although they acknowledged the problem of the work load crisis. This also was the stance of the Harrison subcommittee of Ways and Means which in its 1960 report was

concerned with the fact that the "temporary examiners came almost exclusively from the administering agency:

The subcommittee was concerned by the use of "temporary" hearing examiners recruited from the Bureau under a temporary suspension of the full requirements of the Administrative Procedure Act. In view of the tremendous backlog of cases awaiting hearings, this action may have been necessary. As a matter of principle, however, it does not seem desirable that hearing examiners be taken from the agency whose decisions they are reviewing and to which they will ultimately return. *The subcommittee is, therefore, gratified to learn that all these examiners will be separated from the staff by the end of the fiscal year and that such authority will not be requested from the Appropriations Committee in the future.* We have no reason to believe that the "temporary" examiners have treated claimants unfairly, but agree with the American Bar Association testimony that the principles of the Administrative Procedure Act should not continue to be disregarded through annual exceptions to its provisions.

In 1962, the Administrative Conference recommended the evaluation of candidates on the basis of training and experience and oral and written examination with lawyers participating in the evaluation of qualifications. After issuance of these recommendations, an Advisory Committee on Hearing Examiners established by the CSC reviewed all aspects of the personnel program. The qualification standards, including bar membership, and the examining procedures adopted by the CSC as a result of this study were issued in 1964. In 1970, the CSC adopted a recommendation of the Administrative Conference which gave added weight to trial experience in order to broaden the base of recruitment.

Currently, ALJ's must have 7 years of "qualifying experience," at least two of which must be within the 7-year period immediately preceding the date of his application; must consent to having confidential questionnaires (referred to by CSC as "vouchers") sent to employers, supervisors, law partners, judges, co-counsel and opposing counsel in cases in which he has participated; must demonstrate writing ability by preparing, under CSC supervision, a sample opinion which is examined for clarity, conciseness and legal soundness; and must participate in an oral interview by a board composed of a CSC official, a practicing attorney from the ABA and a Chief ALJ or an ALJ.

"Qualifying experience," as this term is used in the CSC Announcement for ALJ, means, inter alia, (1) judicial experience; (2) the preparation, trial, hearing or review of administrative law cases at the Federal, State, or local level; or (3) the preparation and trial of cases in courts of unlimited and original jurisdiction or appeals therefrom.

Mr. Edwin Yourman, a panelist for the September 26 hearing, has recently completed a report for the Social Security Administration on the hearings and appeals process which questions whether the limitation of "regulatory" or qualifying administrative law experience described in the Civil Service announcement for ALJ's is of "rational relevance", as required by regulation (5 C.F.R. 3000.103(b)), for the selection of ALJ's for beneficiary-type hearings. He believes that "a different and broader concept of qualifying experience for those recruited as ALJ's to conduct SSA beneficiary hearings would more clearly comply with CSC regulations. The requirement of seven years of experience in the trial or of adjudication of cases, without permitting the substitution or other experience for a portion of the period, seems excessive." He also notes that the CSC office of ALJ's will not always certify names for needed SSA ALJ positions and questions whether the Civil Service Commission has authority to exercise this control. He cites 5 U.S.C. 3105³ and *Ramspeck v. Federal Trial*

³ 5 U.S.C. § 3105 states:

"§ 3105. Appointment of hearing examiners.

"Each agency shall appoint as many hearings examiners as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Hearing examiners shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as hearing examiners."

Examiners Conference (1953) 345 U.S. 128, where the Supreme Court, in another connection, stated that the APA "does not reduce the responsibility of the (administrative) agency to see that it has a sufficient number of competent examiners to handle its business properly." Other commentators have argued that in the recent APA-SSI dispute, discussed in more detail later in this print, that once the Department of Health, Education, and Welfare had determined that the APA was applicable the Civil Service Commission should have provided the registers requested in that it has only ministerial responsibility in this area. Yourman would, however, retain Civil Service supervision of ALJ's to avoid actual or potential agency control but suggests the establishment of a separate register for ALJ's which will provide personnel for beneficiary hearings. He states:

* * * There are sufficient differences between regulatory and beneficiary hearings to call for careful development of separate sets of qualification standards. Thus the personality, experience and skill necessary to preside over and evaluate the issues in a complex case involving trade or transportation economics, in which several parties and the government are represented by highly specialized counsel, bears little resemblance to the characteristics needed for a social security beneficiary hearing, where it is essential that the presiding officer's actions reassure the claimant that his case will be fully presented and considered. The economic case seems to call for an aloofness from involvement with either side, while a beneficiary hearing requires a warm and sympathetic approach and even a certain involvement to make sure that the claimant's case has been fully developed and presented.

Robert G. Dixon, Jr., another panelist at the September 26 hearing, has written in a similar vein "that the most creative thought is needed to work out models for future welfare adjudication, which has—and should—a distinctively different ethic from the hard-nosed economic regulatory adjudication ethic which produced the APA in the first place". Professor Dixon, of course, is speaking in a broader context than Mr. Yourman who is only speaking of separate registers.

As a caveat Mr. Yourman states that "we make our recommendation on the assumption that the ALJ's selected to conduct beneficiary hearings will not have a second-class status, and that standards and recruitment for this type of ALJ will be adequate to ensure a register of quality applicants".

Agency Control of Hearing Officers

The question of agency control over hearing officers is a fundamental issue of Administrative Procedure Act coverage. It is here that the major difference exists between the SSI hearing officer and the social security administrative law judge (ALJ). The APA was designed to insure the independence of a hearing examiner (now called ALJ's) from the agency in which he operates, by placing his pay, promotion, and tenure under the Civil Service Commission. The sections of the APA which carry out this purpose have been codified in sections 5362 and 7521 of title 5, United States Code.⁴

Under SSI, however, the regulations provide that no such appointment shall be made without the prior approval of the Secretary and that the agency will also review the work of the hearing examiners to determine whether it is of "an acceptable level of competence." In addition, the regulations provide that the Secretary "may promote a hearing examiner," and the Secretary is also

⁴ 5 U.S.C. § 5362 states:

"Hearing examiners appointed under section 3105 of this title are entitled to pay prescribed by the Civil Service Commission independently of agency recommendations or ratings and in accordance with subchapter III of this chapter of this title and chapter 51 of this title."

5 U.S.C. § 7521 states:

"A hearing examiner appointed under section 3105 of this title may be removed by the agency in which he is employed only for good cause established and determined by the Civil Service Commission on the record after opportunity for hearing."

permitted to withhold in-grade pay increases. Finally, examiner removal is placed in the agency's hands to be decided by a Secretary appointee.

The problem of insulating the Bureau of Hearings and Appeals (BHA) from the Social Security Administration itself has sometimes been difficult and BHA attempts at supervising the procedural and substantive aspects of ALJ performance have on occasion been resisted by them and their organizations. For example, what are the proper limits on agency attempts to control the productivity of their hearing officers? Current statistics shows a rather dramatic variation in the number of cases that individual ALJ's decide on an annual basis. The question then arises, how does the BHA deal with this situation if at all under the APA, and how might it deal with the situations if such hearing were not under the APA?

The independence of hearing examiners and their immunity from ordinary agency personnel controls has been found as inhibiting to Federal administrators in the past. Then Assistant Attorney General Robert Dixon, now a professor of law at Washington University, has recently articulated these complaints. In writing on the broad policy issues of whether the APA should govern beneficiary type hearings, Dixon noted that "due process" does not require a complete divorce from agency control. He then stated that "it is now becoming clear in any event that the APA and especially its concept of life-tenure judges substantially immune from any effective Executive control is not well adapted to the newer situations of welfare adjudication. Insofar as standards are most difficult to formulate and consistently apply in 'need' and 'disability' areas and similar situations, a virtual life-tenure low-level cadre of highly independent claims determiners reviewable only by the regular judiciary may in the ultimate sense boomerang, and be undemocratic as well as unequal and inconsistent in operation." (Views of Office of Legal Counsel on kind of hearing officers required under SSI program, memorandum October 5, 1973).

Applicability of APA to SSI cases

An interpretation by the Civil Service Commission, opposed initially but finally very reluctantly accepted by the Department of Health, Education, and Welfare, of Public Law 92-603 which instituted the SSI program declared that SSI hearings are not under the Administrative Procedure Act. The "incredible series of developments" leading to the CSC opinion, the legislative background of the 1972 provisions, and the policy and administrative ramifications of the CSC action are outlined in detail in the Committee Staff Report (pages 55-78).

On November 16, 1972, HEW requested the Commission to establish registers of qualified administrative law judges to serve as SSI hearing officers. The Office of Administrative Law Judges of the Civil Service Commission declined to do so saying that the APA did not apply to SSI. The dispute raged on for almost a year and on October 12, 1973 Secretary of Health, Education, and Welfare Weinberger appealed to the Chairman of the CSC in the strongest terms citing "a crisis * * * in HEW's preparations to implement the new supplemental security income program * * *" On October 30, 1973, upon recommendation of the Commission's Deputy Executive Director, Chairman Hampton dispatched a letter to Secretary Weinberger saying the Commission was ready to establish ALJ's positions for SSI and to initiate a recruitment program. At this stage representatives of three ALJ organizations—the Conference of Administrative Law Judges, the Federal Administrative Law Judges Conference, and the ALJ Committee of the Federal Bar Association—protested the Chairman's decision and demanded a reconsideration by the full Commission and an opportunity to be heard. This hearing took place on December 3, 1973. Judge Ohlbaum of the NLRB presented representative views of those ALJ's who opposed having the APA apply to SSI. The minutes of the meeting show that:

He said the Federal Government has two kinds of ALJs: those in the "model agencies" such as NLRB, FCC, FTC, etc., who are full APA instruments in that under APA they make decisions awarding large sums of money, radio and TM licenses, rights-of-way, etc. Then, he said, there is the "other kind"—namely the ALJs under the SSA program whose cases are vastly different from those handled in the model agencies. He said the SSA ALJs review files and rule on the record unless the claimant submits a request for a hearing. A key distinction, he said, is that under SSA, the Government is never represented. He said it was a mistake long ago when the decision was made that hearings would be presided over by ALJs and that SSI ALJ authorization would further compound the "classification error."

Deputy Social Security Commissioner Arthur Hess was the principal spokesman for HEW and for the coverage of SSI under the APA. The minutes of the meeting summarize his views as follows:

He agreed that the law is ambivalent and that the manner of handling SSI claimant hearings is "profoundly a matter of policy." He urged the full Commission to adhere to the earlier agreement to go the APA route with ALJs presiding. To do otherwise, he said, would be to deny essential rights to claimants.

* * * * *

Commissioner Hess urged that full APA procedures be applied under SSI as under SSA—that the Department and the Commission should not create artificial distinctions between types of due process accorded claimants under the two programs. Sometimes a claimant will have a claim filed under both programs and separate adjudicatory processes would be administratively unsound and confusing to the claimant. Also, HEW wants SSI under APA in order to assign the entire corps of ALJs freely wherever the workload peaks. If a separate system is installed under SSI, then the SSA ALJs may not be interchangeable with the SSI hearing officers—and vice versa.

* * * * *

In summary, he urged the Commissioners to endorse HEW's determination to accord a lowly private citizen—a welfare recipient—the same rights as the Government accords a powerful corporation in contested matters: namely, the right to appear before an administrative law judge under the full rights and protection of the Administrative Procedure Act.

Then on December 14, 1973, the decision of the full Commission which reversed the Chairman's action of October 30 was sent to HEW declaring that the APA was not applicable to SSI and that the Secretary should go ahead under his own appointing authority to appoint SSI hearing examiners at GS-13 and an appropriate number of supervisory examiners at GS-14.

It is the opinion of the staff that APA coverage was originally intended by the Congress and that the CSC opinion was not only erroneous as a matter of legal interpretation but it also has exacerbated the appeals crisis. The Public Assistance Subcommittee has reported out H.R. 8911, 94th Congress, a bill which would amend the hearings and review provisions of SSI so that they are on all fours⁵ with those for social security, including the adoption of the substantial evidence rule for judicial review. Moreover, the legislation would give the Secretary of Health, Education, and Welfare authority to make temporary appointments (which cannot extend later than December 31, 1978), of hearing examiners who do not meet the requirement of the appointment section

⁵ The 30 day period for an individual to appeal is retained for SSI: social security's period is 6 months.

of the APA (5 U.S.C. 3105). These hearing officers would have to be admitted to the bar and have at least 5 years experience in the adjudication or consideration of Social Security Act claims or have engaged in the general practice of law for at least 5 years.

Unlike the current SSI examiners, they would also be authorized to conduct hearings under social security (title II) and medicare (title XVIII). This will create a common corps of examiners and enable the Bureau of Hearings and Appeals to effectively utilize all its resources. Currently, the approximately 100 SSI examiners cannot hear social security cases and inasmuch as almost half of the disability cases are concurrent cases (applications under both social security and SSI) this has made it much more difficult for the Bureau of Hearings and Appeals to manage the backlog of cases. The legislation will also do away with the anomolous situation whereby disability adjudications of equal difficulty under the same definition and procedures are made by hearing officers two grades below those who are authorized to do social security cases.

Measures to Reduce the Backlog

1. *Remand to State Agency*

An obvious solution to the appeals backlog is the remand of cases back to the State agency for, in theory at least, their speedy disposition. This has been going on with a two-stage effort. First, social security regional office personnel have examined backlogged hearing cases in "development centers" or in ALJ offices to identify cases which might be reversed by the State agency. Roughly, 12,000 cases were remanded this year and about half of them were reversed using this procedure. Second, under a new procedure just getting underway, district office personnel will examine files of individuals who request a hearing and route those that possibly can be reversed back to the State agency rather than to BHA development centers or ALJ offices. This latter process may involve in the neighborhood of 60,000 cases. Through August 27, 1975, about 2,000 such cases have been again reviewed by the agencies with 5.9 percent being reversed on the record transmitted from the district office and another 11.6 percent reversed after further record development. Thus, about 82 percent of these remanded cases where a decision has been made have been sent back to the BHA hearing process as still denied but half of these have had more documentation added to the file.

The advantages to the claimant who is awarded a benefit without waiting through the hearing backlog is clear. The effects on claimants who still are denied benefits are not so clear. Will the re-reconsideration mean a longer waiting period before a hearing is ultimately held? The so-called mandatory reconsideration itself is not a procedure set forth in the statute but in the regulations and there are those who have criticized it as exhausting the individual in "exhausting his administrative remedies."

There are also some administrative ramifications of these remand procedures. State agencies have had to take on workloads they were not budgeted for and presumably this affected their processing of initial determinations. Presumably these steps were taken because State agency workloads were such that they were in a better position to process the cases than the ALJs. This is a matter of dispute and representatives of the State agencies protested the lack of notice on the remand operation. Also, there is a question of how effective it is to have a State agency look at the same case three times within what could be a relatively short period of time—is this paper-shuffling rather than disability adjudication? Change of condition is often the determinant of a case reversal but if the adjudication is on the same record is the process being advanced very much? These questions will be taken up with administration witnesses and the panel of State agency administrators who will be before the committee on October 3.

2. Face-to-Face Contact with Claimant on Reconsideration

Many of the commentators who have studied the system in recent years and have noted that the rising reversal rates of social security hearing officers have laid heavy emphasis on the fact that the hearing is the first time that an adjudicator has face-to-face contact with the claimant. An interesting study entitled "State Agency Reconsideration Interview Study" (SARIS) was carried out by the Social Security Administration in 1971 to determine if a personal interview between the claimant and disability examiner at the State agency reconsideration level would result in more complete development of cases, better claimant acceptance of the decision, and a subsequent reduction in the number of appeals. Although the experiment was marred by different procedures used by the five State agencies participating and certain biases in the selection of the cases, the results did show a rather significant increase in the allowances rate for the cases with a personal interview and lower reversal rate on appeal for this type of case. On the other hand, almost as high a percentage of the interviewed cases requested a hearing as those who were not interviewed. The following table gives a breakdown of the 1,255 randomly sampled cases which had been through the regular reconsideration procedures and whose initial denial was ready to be affirmed by the State agency:

	Interview cases		Noninterview cases	
	Number	Percent	Number	Percent
Total number of denials-----	671		584	
Denials changed to allowances-----	132	19. 6	8	1. 3
Denials upheld-----	539		576	
Requested hearing-----	214	39. 7	241	41. 8
Decision changed at hearing-----	46	22. 2	73	37. 2
Decision change—total cases, reconsideration and hearing-----	178	26. 0	81	14. 0

The Social Security Administration rejected this procedure on a "nation-wide, mandatory basis" although it stated that "most States are now using the telephone to contact reconsideration claimants where there is a question unanswered or it appears that additional sources may exist." The administrative implications of such a system were described by SAA as follows:

Most optimistically, a State agency examiner might review the file and interview four claimants each day, provided these claimants could be scheduled for their interview at a central location. If travel to several locations were necessary, this figure would be correspondingly lower. Projections as a result of SARIS show that a minimum of 254 additional examiner-years would be necessary for each 100,000 reconsideration interviews to conduct interviews only in the metropolitan areas. Should States conduct the interviews Statewide, this projection might be increased by as much as 50 percent because of travel time and other time-consuming factors.

Since the publication in 1974 of the Committee Staff Report where considerable attention was directed to SARIS and the issue of face-to-face contact, generally, the Social Security Administration has done some rethinking in this area and initiated a new study. This 16-State study which encompasses about 30 percent of their reconsideration workload has been endorsed by the Report of the Disability Claims Process Task Force (Boyd report). This internal study stated "We had previously recommended a test of this procedure, and suggest only that success be measured by whether the system results in significant improvement in correct decisions, rather than whether it reduces the incidence of hearings." As opposed to SARIS the new process will be conducted

statewide rather than primarily in metropolitan areas. There will be no exclusions because of the type of disability involved as under SARIS. In addition, the State agency examiner will attempt to contact the claimant over the phone immediately upon receipt and review of the folder, if there is insufficient evidence for a reversal, rather than waiting till the end-of-line interview for the first contact. Greater latitude will be given the examiner as to when the face-to-face interview should take place. While most will take place after the telephone developmental interview and following all necessary development on the case, the personal interview could be held immediately after the telephone call where, in the judgment of the state agency examiner or the claimant, an immediate interview is desirable. In either case, the claimant would receive at least one telephone call and, at least in denial cases, one face-to-face interview with a trained disability examiner during the reconsideration process. Moreover, the face-to-face interview, regardless of when held, will be developmental in nature—an evidentiary hearing, rather than a denial interview as SARIS was supposed to be.

In the questionnaire sent to the State agencies by the staff it is indicated that an overwhelming number of them are in favor of a face-to-face conference at the reconsideration level. Only two States did not like the idea of such a procedure. One State agency believed that face-to-face contact would undermine the objectivity of decisionmaking while the other did not want to see such procedures unless the disability determination units are federalized. A majority of the State agencies believed that appeals would be reduced by such a procedure but a few States thought they might be increased. The latter reasoned that many claimants do not appeal through ignorance and that when the process is explained face-to-face more of them will appeal. ("Staff Survey of State Disability Agencies Under Social Security and SSI Programs," pp. 15-16, 174-186.)

Quality of Adjudication

Although the current hearings were called primarily because of complaints of delays in the appeals process, the issue of the quality of adjudication must be considered. Over recent years the number of cases reversed on appeals has been increasing and the Social Security Administration has stated that it is playing a growing role in the actuarial deficiency in the disability insurance program. SSA states "While this higher rate of increase in the appeals process does not, of course, completely explain the increases (in allowances) in recent years, we feel that these increases do contribute substantially to the total increase." As is shown in table 9 the ALJ reversal rate was just under 20 percent in 1960 but now stands at around 50 percent.

In this situation the incentive to seek a hearing seems substantial and one has to wonder whether some of the less aggressive individuals who do not appeal are any less disabled than some who prevail at the hearing level.

There is also a rather significant variation in the reversal rate by ALJ's which a number of commentators believe indicates a weakness in the system. Edwin Yourman writes:

Variations in ALJ decisions for which no explanation has been found other than differences in individual ALJ judgment and evaluation indicate the necessity of innovative action to improve adjudication quality. The decisions (not including Black Lung) of 418 ALJ's for most of the first half of calendar year 1974 show that about 27 percent of the ALJ's had an allowance rate between the 51st and 60th percentiles; almost half had an allowance rate between the 46th and 65th percentiles. Thus, slightly more than half of the ALJ's had allowance rates outside this 20 percentile spread: 32 percent allowed fewer than 46 percent of their cases and 21 percent allowed more than 65 percent of their cases.

Heavier work loads and efforts to increase individual ALJ production place more strain on the quality of adjudication. Thus

it is important to have a method of knowing how well the ALJ's perform—not just how much they produce.

And Professor Dixon writes:

Production statistics reveal that there are extreme disparities among an appreciable number of hearing examiners, not only nationally but within the same region, regarding their rate of reversal of SSA decisions. Such data provides a further basis for questioning the uncertainty of the standards and the resultant large amount of examiner discretion and also for questioning the adequacy of present Appeals Council review as a centralizing, standardizing force. (p. 76, "Social Security Disability and Mass Justice" (1973).)

Moreover, since Professor Dixon wrote his book the amount of Appeals Council review has significantly decreased. Yourman points out that "at one time, an (Appeals Council) analyst reviewed each hearing allowance to determine whether to recommend own-motion review. This has now been reduced to the extent that only about 5 percent of ALJ allowances, on the average, are reviewed." In the past there was program agency review (Bureau of Disability Insurance primarily) but Yourman states that is now "infrequent because a combination of volume of work and the 90-day limit within which the Appeals Council can take own-motion review frequently makes it impractical for the program bureaus to identify decisions for which they believe a review is important". Both the Committee Staff Report and Yourman suggest possible reinstitution of program agency review but with such a request for review clearly on the record so that APA safeguards of an independent adjudication are preserved.

Some of the same questions which exist at the hearing level exist on reconsideration though there are significant differences. The percent of reversals by the State agencies on reconsideration over the years have been relatively stable—between 30 and 40 percent. The variation in rates between State agencies—like that on initial determinations—was quite substantial in calendar 1974, varying from a low of 19.5 percent in Kentucky to 45.9 percent in New Jersey with a national average of 30.5. Opinions differ as to the significance of these statistics. Like Appeals Council review, Federal agency review of State decisions has changed in recent years from a 100-percent check before the decision was effectuated to a small sample after the decision has been communicated to the claimant.

Finally, mention should be made of the dearth of precedent material which is available to ALJ's. They must adjudicate their cases on the law, regulations, and whatever pertinent social security rulings are published. As is noted in chapter E of the Committee Staff Report (pp. 45-50) the development of regulations has been slow and they still lack specificity. The social security rulings have not been too useful in the disability area and the Appeals Council does not publish precedent opinions of ALJ's. Some commentators have suggested that in this situation one can only expect highly individualized and nonuniform decisions. The inherent difficulty of providing precedent material with respect to such a highly subjective concept as the social security definition of disability must, however, be recognized.

Impact of Social Security Litigation

The number of social security cases which are appealed to the courts have been steadily increasing. The first sizable flow of the supplemental security income (SSI) cases will soon reach the judicial review stage and a large number of black lung cases are being appealed to the courts. In this section, attention will be placed both on the workload aspects and the impact on the Federal judiciary. Also the implications on the hearings process of the *Eldridge* case, which is pending before the Supreme Court, are briefly discussed.

CASELOAD

In the fiscal 1960, 618 social security cases were filed in district courts; in fiscal 1973, 2,267 were filed. Disability filings for the last quarter of 1972 were 444. They had increased to 631 for the third quarter of 1973. The great majority of social security cases (75 to 80 percent) are disability claims. The following table shows the growth in terms of pending cases at the end of the fiscal year.

*End-of-year growth in pending cases*¹

Calendar year	Total social security cases	Disability cases
1960-----	337	-----
1968-----	1, 751	1, 307
1969-----	2, 370	1, 748
1970-----	2, 769	2, 001
1971-----	3, 148	2, 251
1972-----	3, 775	2, 676
1973-----	4, 033	3, 018
1974 (June 17)-----	² 5, 092	4, 187
1974-----	² 6, 191	4, 301
1975 (end of August)-----	² 9, 226	4, 723

¹ These statistics have been supplied by the Office of General Counsel.

² Including black lung cases. 384 black lung cases were pending on June 17, 1974; 1,200 were pending on Jan. 1, 1975; and 3,338 were pending on Aug. 31, 1975.

The statistics of the Administrative Office of the U.S. Courts for fiscal 1973 shows a median time of 3 months for disposal of social security cases, but that at the other extreme, 10 percent requiring 29 months (Annual Report, p. A-28). Perhaps related to these statistics are those of the backlog of cases facing social security and regional attorneys. An indication of the impact of social security cases on the Department of Health, Education, and Welfare is the fact that this August they prepared 502 social security and black lung court briefs.

Social security court workload is very uneven throughout the country. More claimants seem to apply for benefits and to appeal denials with more frequency in certain parts of the country than in others. For instance of the 2,595 pending social security cases at the end of fiscal 1973, 887 (34 percent) were before the following five district courts:

Puerto Rico-----	252
South Carolina-----	182
West Virginia-southern-----	111
Kentucky-eastern-----	297
Kentucky-western-----	42

The jurisdictions noted account for considerably less than 10 percent of the disabled workers receiving benefits, even though all these jurisdictions have an extremely high incidence of disability compared to the national average.

In terms of court workload by circuit the same disparity existed. The fourth and fifth circuits have had 47 percent of all the disability court cases. The fourth, fifth, and sixth circuits taken together have had 69 percent of the cases and they will be even harder hit when the black lung cases mature. On the other hand, New York and California which have had roughly 20 percent of the disability caseload have had only 6 percent of the court cases.

IMPACT ON JUDICIARY

Finally, there is the question of the effect on the Federal court system of a growing disability caseload which will be greatly accelerated in the next few years by black lung appeals and, more importantly over the long run, by cases coming up under the supplemental security income program.

It can be argued that in the recent past the impact of social security was not particularly significant in that it constituted, as late as fiscal 1973, only 2.5 percent of Federal district court civil filings. Pursuing this line of argument, it could also be noted that although the number of cases may be large, they are

nearly all decided on motions for summary judgment and presumably take relatively little of the court's time.³ It might also be pointed out that the volume of social security disability litigation in fiscal 1973 was only twice that arising under the Federal Employers' Liability Act (applicable to about three-quarters of a million railroad employees) and only slightly more than half of the number of cases filed under the Jones Act (applicable to a million seamen). On the other hand, these latter statutes are not analogous to the social security, SSI, and black lung programs with their many layers of administrative review nor do they have the potentialities for growth of the latter. Social Security, SSI, and black lung cases are now approaching 10 percent of all civil filings.

Obviously, the impact of the social security disability caseload on various courts in the country is uneven and, undoubtedly, will be of crisis proportions in certain judicial districts in the next few years. For instance, in the second and tenth circuit social security cases constituted only 1 percent of civil caseloads; but in the fourth circuit they made up 5 percent. In the District Court for Eastern Kentucky they were 22 percent of the civil caseload.

EMERGING CASE LAW ON HEARINGS BEFORE TERMINATION OF BENEFITS— *ELDRIDGE V. WEINBERGER*

Persons who are denied social security or SSI benefits upon initial consideration are not paid benefits pending appeal. There is no particular controversy about these provisions of the law. However, the law and regulations regarding termination of benefits under both social security and SSI have become increasingly controversial because of the decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970). In this decision the Supreme Court held that under due process requirements federally aided public assistance payments could not be suspended or terminated without first giving the recipient adequate notice and an effective opportunity to confront adverse witnesses and to present his own evidence and arguments orally. The Department of Health, Education, and Welfare has substantially adopted the *Goldberg* decision standards for the SSI program. In contrast to SSI, the Department of Health, Education, and Welfare has not fully adopted *Goldberg* for social security cases and is terminating benefits without an evidentiary hearing. Whether this can be done constitutionally will be squarely presented to the Supreme Court in the October term in the case of *Eldridge v. Weinberger*, 361 F. Supp. 520 (1973).

Some of the major arguments of the Administration in opposition to the application of *Goldberg* to social security terminations are the fiscal ramifications of continuing benefit payments during the appeal period and the impact of further rights to appeal on an extremely hard-pressed appeals process. The Administration estimates that an adverse decision would require about 11,000 additional hearings a year. Currently there are over 110,000 hearing cases pending before the Bureau of Hearings and Appeals—about a year's backlog. Of course, it is not altogether clear how the Social Security Administration might conduct *Goldberg v. Kelly* hearings since presumably the requirements of the Administrative Procedure Act, which are followed in title II (social security) cases and are imitated in title XVI (SSI) cases, would not necessarily have to be followed under the due process requirements of the *Eldridge* opinion. Thus, as a contingency measure in the event the Government loses the *Eldridge* case before the Supreme Court, the Social Security Administration has launched a "due process" project to test the feasibility of the state agencies conducting "hearings" or "conferences" to meet *Kelly v. Goldberg* requirements. If after such a hearing the initial determination of cessation of disability is affirmed, benefits then are stopped, but the individual is still entitled to request a hearing before an ALJ. The test is being conducted in Indiana, Iowa, Kentucky, Michigan, Montana, Pennsylvania, and Washington. The ramifications of such a procedure on the State agency operation is a subject which will be discussed by the panelists on October 3, 1975.

³ This means that there are no jury trials which may be time consuming. On the other hand, the examination of the often voluminous record in disability cases can be time consuming and most cases require written opinions of substantial length.

Pending Legislation—Appeals Procedure

H.R. 8018 (Mr. Sisk) and similar bills introduced by him and other Members involves a basic rewriting of the social security appeals process to make a number of significant changes. Section 205(b) of the Social Security Act which contains hearing procedure requirements would be expanded by H.R. 8018 into nine separate paragraphs. Section 205, as amended by the bill, will be discussed paragraph by paragraph to show the changes in existing law and possible ramifications.

SEC. 205(b)(1)—HEARING ON TERMINATION OF BENEFIT

The Secretary of HEW is directed to make findings of fact, and decisions as to rights of any individual applying for a payment under this title II (social security). This is identical to existing law. The subcommittee may also wish to consider whether the statute should spell out the hearing rights for beneficiaries whose benefits are terminated, suspended, or reduced and the status of benefits during the hearing. Cases, however, are not pending before the U.S. Supreme Court and U.S. courts of appeals which will probably further delineate constitutional requirements in this area.

SEC. 205(b)(2)—MANDATORY RECONSIDERATION—TIME OF APPEAL

Gives statutory support to certain administrative procedures that have been utilized for many years, i.e., a mandatory reconsideration before a hearing is authorized. Most commentators believe that this reconsideration which is undertaken by the State agency that conducted the initial determination is a useful procedure. Roughly a third of the reconsidered cases result in an allowance of benefits. The issue is more fully discussed in the Committee Staff Report, pp. 35-38, and Mr. Yourman has endorsed mandatory reconsideration in his recent report. The staff survey indicates that a large majority of the State agencies do not want mandatory reconsideration eliminated (see pp. 47-48, 415-422).

This paragraph also requires the claimant to file for a reconsideration within 30 days from the date of the mailing of notice of the initial determination. Some administrators of the program have suggested that reducing the time period of appeal would have a beneficial effect on the social security disability program in speeding up the appeals process. In the SSI program the time for a claimant to appeal is 30 days. They point out that in social security an individual has a full 6 months to decide whether to request reconsideration and then another 6 months to decide whether to appeal to an administrative law judge. The law states merely that "any such request with respect to such a decision must be filed within such period after such decision as may be prescribed by regulations of the Secretary, except that the period so prescribed may not be less than 6 months after notice of such decision is mailed to the individual making such request." The possible double 6-month period is the inevitable result of the imposition of the mandatory reconsideration requirement for, as the Social Security Administration puts it, "if the claimant had less than 6 months in which to exercise his right to reconsideration and, failing to exercise this right, was thereby precluded from exercising his right to hearing, he would in effect be deprived of right to a full 6-month period after notice of SSA's decision in which to request a hearing." Thus, the problem of the length of time and mandatory reconsideration are closely linked. Statistics show that about 80 percent of persons appealing both for a reconsideration and a hearing do so by 120 days and about 44 percent have done so within 30 days. A listing of the elapsed days before filing of appeals, based on an analysis done in 1972, follows:

Internal	Reconsideration		Hearing	
	Percent	Cumulative	Percent	Cumulative
Elapsed days from date of denial notice to date of filing of appeal:				
0 to 5-----	5.9	5.9	4.0	4.0
6 to 10-----	13.2	19.1	15.4	19.4
11 to 15-----	9.1	28.2	5.3	24.7
16 to 20-----	6.5	34.7	9.1	33.8
21 to 25-----	4.7	39.4	7.0	40.8
26 to 30-----	5.4	44.8	3.7	44.5
31 to 60-----	17.0	61.8	16.0	60.5
61 to 90-----	11.3	73.1	12.4	72.9
91 to 120-----	8.1	81.2	6.4	79.3
121 and over-----	18.8	100.0	20.7	100.0
Mean (days)-----		60.9		65.6
Median (days)-----		36.0		39.0

SEC. 205(b)(3)—FACE TO FACE CONTACT ON RECONSIDERATION

This language makes the current face-to-face experiment on reconsideration a statutory requirement (see pages 10 and 11) which the claimant may take advantage of or waive as he desires. Probably the biggest issue in this area is how would it be effectuated administratively since in most of the reconsidered cases the issue will be disability and thus, State agency personnel skilled in evaluating disability would be involved. Most State agencies are not decentralized and such a development may make rather major changes in their current operation. This subject will be addressed by the panel of State agency administrators scheduled to testify on October 3.

SEC. 205(b)(4)—RECONSIDERATION REQUIRED IN 90 DAYS

This language appears to be a spelling out of administrative practice with the exception of the requirement that the reconsideration be accomplished within 90 days. The latest statistics available (May 1975) indicate that the median time for reconsideration is 43 days on affirmances and 86 days for reversals.

This is also a provision whose ramifications should be discussed with the State agency administrators.

SEC. 205(b)(5)—DEFINING THE ISSUE FOR HEARING

This language is a spelling out of current administrative practice to notify the claimant in writing of the denial of benefits on the reconsideration. It goes beyond present practice in requiring that he be provided with:

- (i) a summary of the evidence pertinent to the issues,
- (ii) a citation and discussion of the pertinent law and regulations,
- and
- (iii) the determination made on the issues and a summary of the reasons therefor.

Under existing practice only very generalized statements are sent to the claimant. Moreover, the trend in recent years have been for briefer and more generalized denial notices.

SEC. 205(b)(6)—HEARINGS

Gives the claimant 30 days to file for a hearing. Unlike the current practice where a hearing can be obtained on simple request in writing, the bill would require that the request shall set forth specific allegations of error of fact or law related to specific items in the statement of the case; and failure to do so shall be grounds for dismissal of the claim. The claimant shall be presumed to

be in agreement with any statement of fact contained in the statement of the case with respect to no allegation of error is made.

Paragraphs (b) (5) and (6) are obviously an attempt to provide by statute a pointing up of the issues for the hearing process so that they can be carried out expeditiously. Many ALJ's have complained about the quality of the records that are sent to them and the inordinate amount of their time that is spent on case development. On the other hand the State agency may argue that they have been pressed to make speedy adjudications and the statement of the case required by (b) (5) may be quite burdensome. From the claimant viewpoints some may consider the requirement of specific allegations of error of fact or law or dismissal of the claim as burdensome and to necessitate legal representation. Probably one of the advantages and disadvantages of the current social security appeal process is the open record concept where new evidence is continually solicited and entered in the record and the facts and issues are continually changing. The administration witnesses, the administrative law experts, and the State agency administrators should all have opinions on this subject.

H.R. 5276 (and similar bills) introduced by Congressman Seiberling would provide time limitations for decisions concerning social security benefit claims at each of the determination levels, i.e., the initial determination (90 days), reconsideration (90 days), ALJ hearing (120 days), and Appeals Council (120 days). This bill also provides that if any decision is not made within the time periods specified, a claimant shall be paid monthly benefits determined solely on the basis of his application and wage records, and that such payments will not be considered overpayments for purpose of recovery.

SEC. 205(b)(7)—HEARINGS UNDER APA AND GS-16 CLASSIFICATION FOR ALJ's

This provision is similar to the Duncan bill (H.R. 2995) and similar bills which say that hearings on social security claims shall be "conducted on the record" and shall be subject to all the operative sections of the Administrative Procedure Act for "adjudications." Under existing law, coverage under the Administrative Procedure Act has been assumed under language which provides for an on the record adjudication but does not use the actual words "on the record." However, the Attorney General's Manual on the APA which was issued in 1947 states that hearings under social security were the type of "adjudications" which were envisioned by the Administrative Procedure Act. Be that as it may this provision would resolve any controversy about the matter and furnish a very explicit and unequivocal congressional declaration that full APA treatment is to be afforded to social security hearings. This paragraph under the other sections of the bill apply only to title II (social security) and title XVII (medicare). The status of SSI procedures and its coverage under the APA are not affected.

The paragraph also provides that the administrative law judge conducting hearings under these provisions shall be not less than a GS-16. At present, the Civil Service Commission has classified social security ALJ's at GS-15 while most of the ALJ's of the other departments and the regulatory agencies are classified at GS-16. The reason for the grade differential is not particularly well-articulated by the Civil Service Commission. Those who defend it speak of more "complex and difficult" cases in the regulatory agencies and the fact that they are adversary proceedings. Other commentators point to a Civil Service bias toward the "pure" ALJ's who conduct regulatory hearings and point out that there is no objective evidence of the greater difficulty in regulatory agency cases. Moreover, it can be argued that the fact that the social security hearing is nonadversary puts a greater burden on the ALJ in that he must develop the case as well as make the ultimate decision. Perhaps a more basic reason for Civil Service opposition to GS-16 for social security ALJ's is the numbers involved.

There are now over 300 GS-16 ALJ's primarily in regulatory agencies. There are, however, over 400 social security ALJ's and if difficulty of the case is a criterion for the grade of hearing officers it will be extremely difficult to rationalize the GS-13 for SSI hearing examiners.

It should be recognized that the grade level of ALJ's throughout the Federal Government is rather chaotic. In recent years there has been a tendency on the part of Congress when it passes a new program to stipulate grade GS-16 for its hearing examiners. An example of this is the legislation on the occupational health and safety program. On the one hand it can be argued that inasmuch as there is very little evidence that adjudications under these programs are more difficult than social security, medicare, or SSI, the GS-16 should be established for Social Security Act ALJ's by statute. On the other hand, some would argue that perhaps Congress should not be in the job classification business on an individual program basis. But this then brings us back to the question of whether the alternative to this—classification by the Civil Service Commission—is being done in a fair and equitable manner. These questions can be explored with representatives of the Commission when they appear before the subcommittee on September 19.

SEC. 205(b)(8)—HEARINGS ON SECRETARY'S MOTION

This paragraph restates existing law which authorizes the Secretary, on his own motion, to hold hearings and conduct investigations. The following provision of Section 205(b) in existing law is not included in H.R. 8018:

* * * In the course of any hearings, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under the rules of evidence applicable to court procedure.

SEC. 205(b)(9)—REGULATIONS

Authority is given to issue regulations with respect to hearings and appeals.

APPENDIX

[Excerpt from status report by Social Security Commissioner Cardwell on Ways and Means Committee Staff Report on Disability Insurance Program]

3. SOCIAL SECURITY APPEALS PROCEDURE

Summary

The staff expresses considerable concern about the appeals process, not only in terms of volume and delay, but also in terms of the question of whether the same disability standards are applied at each level of adjudication and review. Referring to the "appeals crisis," the staff recommends that the Committee may wish to reexamine the complex structure of the appeals procedure to determine what changes would be appropriate. Reference is also made to the staff's belief that the conclusion of the Civil Service Commission with respect to the applicability of the Administrative Procedure Act (APA) to supplemental security income (SSI) hearings is clearly contrary to the intent of the Committee and the Congress. It is suggested that action be taken to clarify Congressional intent in this respect.

Action:

In-house work groups have reviewed the appeals process and have made numerous suggestions for improvement which have either been implemented or are being considered. For example, SSA has put into effect an experimental procedure authorizing informal remand of disability claims awaiting hearing upon the presentation of new evidence. This should act to reduce the hearing backlog in cases where adverse decisions can be reversed on the basis of the new evidence and to speed up determinations in general.

Among the initiatives that have been or soon will be instituted to help reduce the hearing backlog are:

1. Allocation of additional support staff to backlogged hearing field offices.
2. Appointment of permanent assistant chief administrative law judges in all regions.
3. Creation of a strong hearings management capability.
4. Creation of a hearings staff attorney support program to assist individual presiding officers.
5. Assignment of trained analysts from central office to hearing offices on a temporary basis.
6. Acquisition of more sophisticated equipment by the Bureau of Hearings and Appeals for recordkeeping/processing purposes.
7. Counseling program in improved judicial techniques modeled after the Federal court system for low producers.

We are continuing to expand our cadre of administrative law judges which in turn has increased our capacity to hear and dispose of cases.

Backlogs of disability hearings requests, which constitute the great majority of hearings, are being reviewed and screened in the regions to determine if additional documentation is needed or whether favorable action can be recommended.

In addition, we have contracted with an outside consultant, Mr. Edwin Yourman, to conduct an independent study of the SSA hearings, appeals and judicial review process. The findings and recommendations from this study have just been released and are undergoing review and analysis.

Professor William D. Popkin of the Indiana University School of Law has been authorized by the Committee on Grant and Benefit Programs of the

Administrative Conference to prepare an analysis of the role of representatives in administrative decisionmaking based on a study of five disability programs, one of which was the social security disability program. This report should be released sometime this summer and should provide an independent appraisal of certain aspects of the appeals process.

We have initiated a Reconsideration Interview Study which is aimed at obtaining face-to-face or at least telephone contact between the claimant and State agency adjudicator at the reconsideration level. Also, the HEW Audit Agency has reviewed the disability reconsideration operations. This report has not yet been issued.

We favor the HEW efforts to make the APA applicable to title XVI hearings.

TABLE 1.—Median processing time in calendar days for social security disability cases, by type of determination: selected months¹

Month and year	Initial determinations ²	Reconsideration requests		Hearing requests
		Affirmed	Reversed	
June 1967-----	90	87	(3)	98
December 1967-----	95	(3)	(3)	87
June 1968-----	91	(3)	(3)	92
December 1968-----	80	(3)	(3)	91
June 1969-----	63	(3)	(3)	90
December 1969-----	66	(3)	(3)	97
June 1970-----	62	62	72	106
December 1970-----	77	59	73	112
June 1971-----	88	93	70	112
December 1971-----	69	72	68	124
June 1972-----	61	71	64	142
December 1972-----	75	85	69	165
June 1973-----	68	86	71	177
November 1973-----	75	64	95	163
April 1974-----	71	74	105	163
December 1974:				
Allowance-----	104	-----	-----	-----
Denials-----	(3)	55	92	⁴ 203
May 1975:				
Allowance-----	72	-----	-----	-----
Denials-----	47	43	86	⁴ 209

¹ Processing time is measured from receipt of an initial application (or request for reconsideration or hearing) to disposition.

² Rates for initial determinations relate to State jurisdiction claims only. Beginning in June 1968, rates were determined from a 2 percent sample.

³ Not available.

⁴ Affirmances and reversals combined.

TABLE 2.—Comparative processing times based on a sample of 427 cases

Period measured	Reversals		Affirmances	
	Average days	Range	Average days	Range
Initial application to receipt of decision by BDI.....	530.6	-----	606.79	168-1314
Initial application to award notice.....	578.9	176-1,364	-----	-----
Initial application to hearing request.....	298.0	50-924	290.58	63-798
Initial application to recon notice.....	231.7	47-830	221.04	51-756
Recon notice to request for hearing.....	66.4	0-377	68.17	0-343
Request for hearing to receipt of decision by BDI.....	232.6	66-690	315.33	150-824
Request for hearing to receipt of C/F by BHA.....	26.1	3-145	25.38	6-199
Request for hearing to request for C/F.....	6.43	0-105	5.7	0-185
Request for C/F to release from BDI.....	13.25	1-132	12.59	0-98
C/F received by BHA to case assigned to ALJ.....	48.0	0-282	35.58	0-440
Case assigned to ALJ to hearing.....	79.0	0-435	68.16	8-394
Hearing to ALJ decision.....	55.0	0-304	60.03	0-274
ALJ decision to receipt by BDI.....	27.2	-----	136.65	-----
ALJ decision to receipt by BHA.....	3.4	0-33	4.09	1-90
Receipt by BHA to release by BHA.....	¹ 18.1	0-413	129.00	2-498
Release by BHA to receipt by BDI.....	4.3	1-24	3.56	0-105
Request for hearing to hearing.....	152.78	35-572	128.15	21-410
Request for hearing to ALJ decision.....	205.35	52-587	177.66	21-493
Receipt by BDI to award notice.....	46.0	16-412	-----	-----
Receipt by BDI to receipt in Recon.....	7.1	0-31	-----	-----
Receipt in Recon to date 831 signed.....	7.4	0-41	-----	-----
Receipt in Recon to date 101 signed.....	13.6	0-202	-----	-----
Date 101 signed to date 107 signed.....	11.2	0-79	-----	-----
Date 107 signed to award notice.....	13.3	3-374	-----	-----
ALJ decision to award notice.....	70.3	25-451	-----	-----
Request for hearing to award notice.....	275.6	-----	-----	-----

¹ If 7 Appeals Council cases were excluded, average would be 7.3 days.

TABLE 3.—Time from date initial application filed to date of award notice

214 Case Study - Reversals

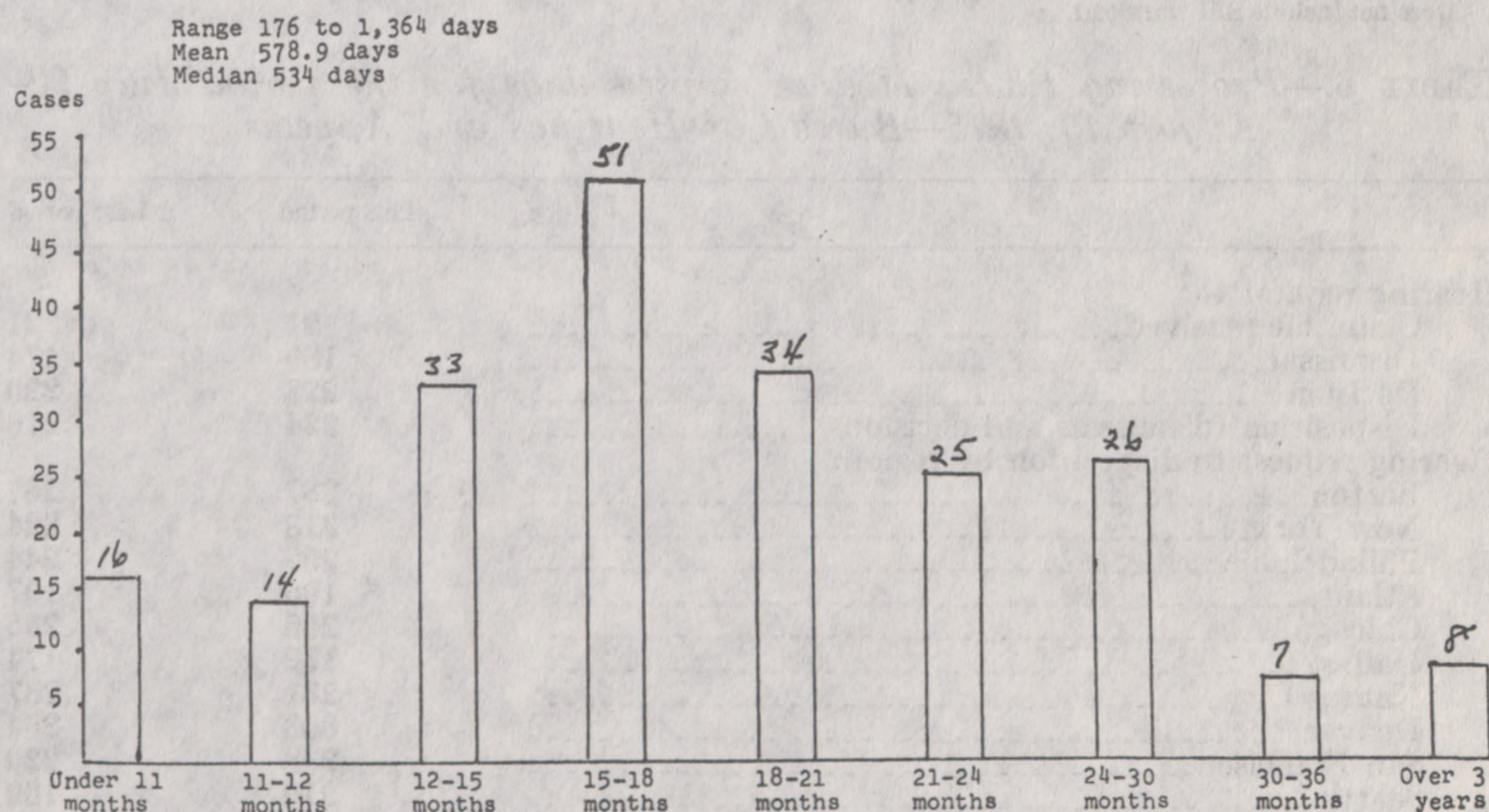
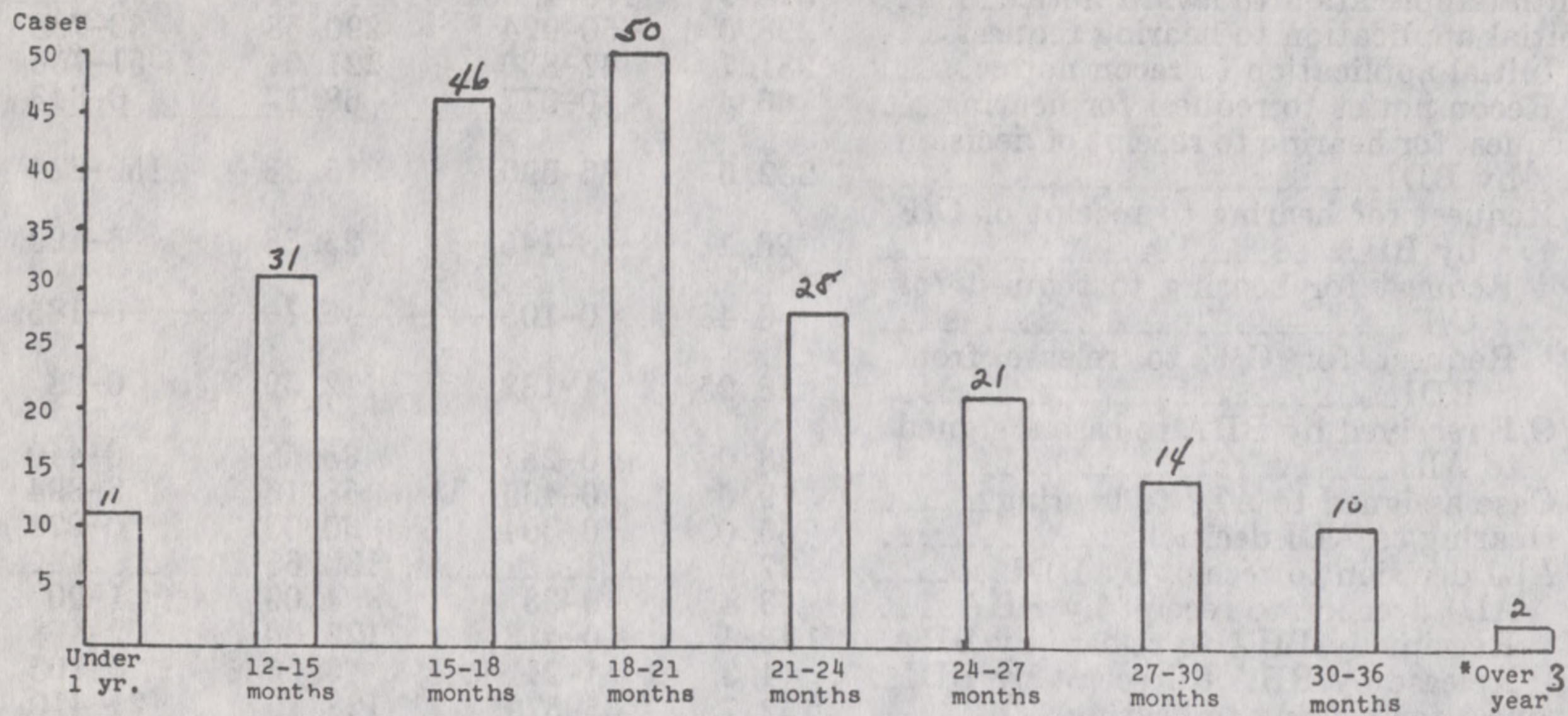


TABLE 4.—Time from date initial application filed to receipt by BDI after BHA review

213 Case Study - Affirmances

Range 168 to 1,314 days
 Mean 606.79 days
 Median 579 days

TABLE 5.—Processing time¹—Bureau of Hearings and Appeals

Month/year	Request for hearing ²	Request for review ²
June 1971	118	42
December 1971	133	41
June 1972	172	62
December 1972	171	52
June 1973	184	68
December 1973	161	52
June 1974	170	60
December 1974	203	92
June 1975	217	82

¹ Median processing time in calendar days from receipt of request for hearing, or review, to disposition.² Does not include SSI workload.

TABLE 6.—Processing times: Median elapsed days for the period July 20–August 16, 1975—Bureau of Hearings and Appeals

	This period	Last period
Hearing request to:		
Claim file received	21	21
Dismissal	189	174
Decision	228	220
Disposition (dismissals and decisions)	224	216
Hearing request to disposition by region:		
Boston	287	267
New York	218	224
Philadelphia	258	244
Atlanta	196	197
Chicago	266	265
Dallas	172	174
Kansas City	231	237
Denver	303	264
San Francisco	238	220
Seattle	210	169

NOTE: SST processing times are not available and are not reflected in totals.

TABLE 7.—*Request for hearing: Receipts, processed, and pending—total cases—Bureau of Hearings and Appeals*

Fiscal year	Receipts	Processed	Pending
1970-----	42, 573	38, 480	13, 747
1971-----	52, 427	45, 301	20, 873
1972-----	103, 691	61, 030	63, 534
1973-----	72, 202	¹ 68, 356	36, 780
1974-----	121, 504	² 80, 783	77, 233
1975-----	154, 945	121, 009	111, 169

¹ Excludes 30,600 black lung cases transferred back to BDI.

² Excludes 268 black lung cases transferred back to BDI.

TABLE 8.—*Disposition of requests for hearing*¹—*Fiscal year 1975*²

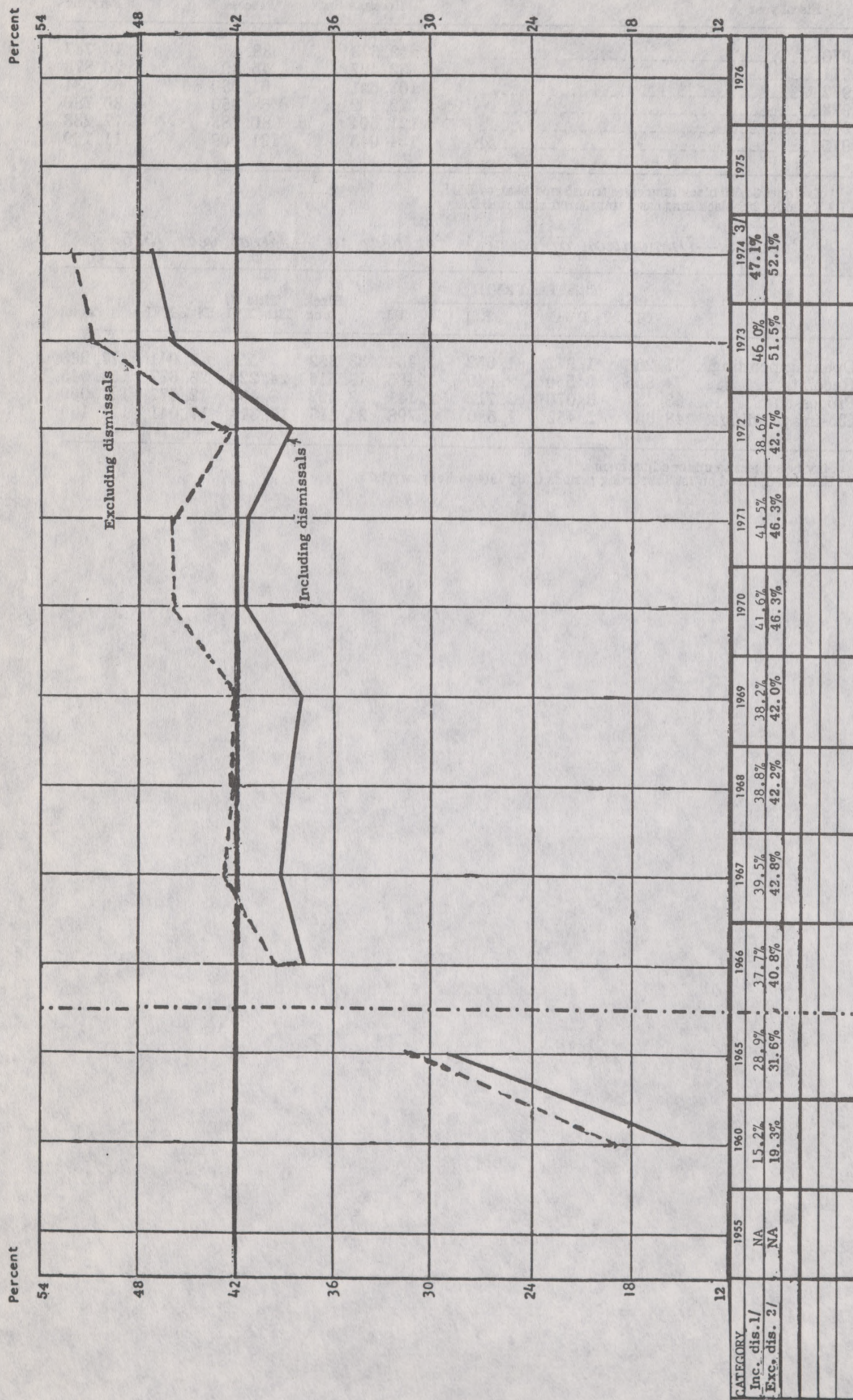
	Title II and XVIII				Black lung	Title II/ Title XVI	Title XVI	Total
	DIB	DWIB	RSI	HI				
Opening pending--	37, 268	1, 972	1, 652	1, 454	33, 292	554	1, 041	77, 233
Receipts-----	74, 855	3, 550	2, 640	1, 485	19, 515	24, 223	28, 677	154, 945
Processed-----	63, 454	3, 070	2, 712	2, 141	28, 492	8, 463	12, 677	121, 009
Closing pending---	48, 669	2, 452	1, 580	798	24, 315	16, 314	17, 041	111, 169

¹ May be subject to minor adjustments.

² Estimated, based on 1st 8 reporting periods (July 1974 to February 1975).

TABLE 9.—Administrative law judge hearings—percent favorable to claimant actions

[Fiscal years 1955-74]



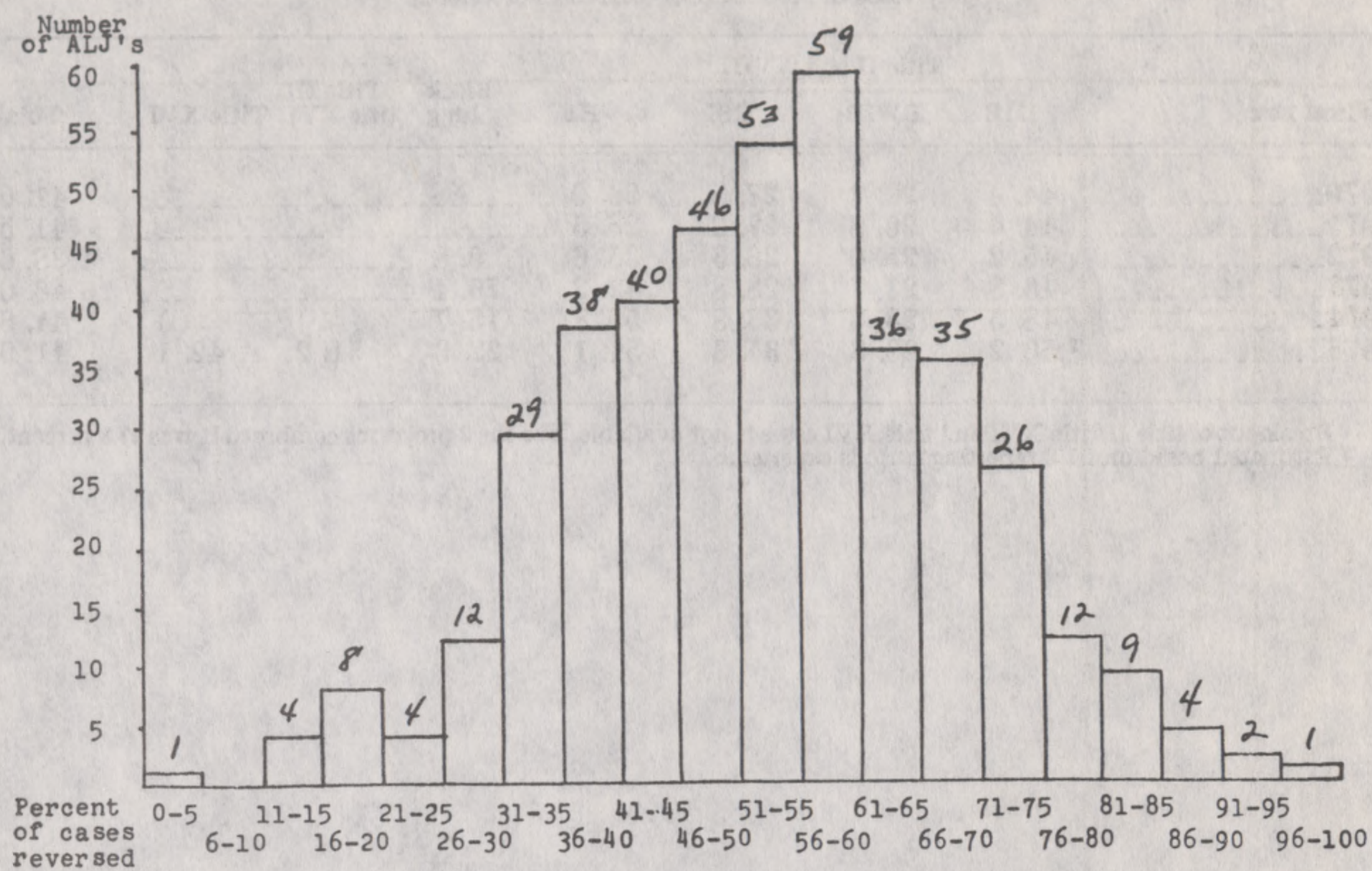
SOURCE: Budget Management Section NA-Not Available

1/ Reversals as a percent of the total cases decided and dismissed.

2/ Reversals as a percent of the total cases decided, but excluding cases dismissed.

3/ 1974 figures exclude 14,781 Black Lung cases and 121 SSI cases.

TABLE 10.—*Nationwide title II reversal rate of 419 GS-15 ALJ's*—From January 6, 1974, to June 22, 1974*



*Full time, fully trained.

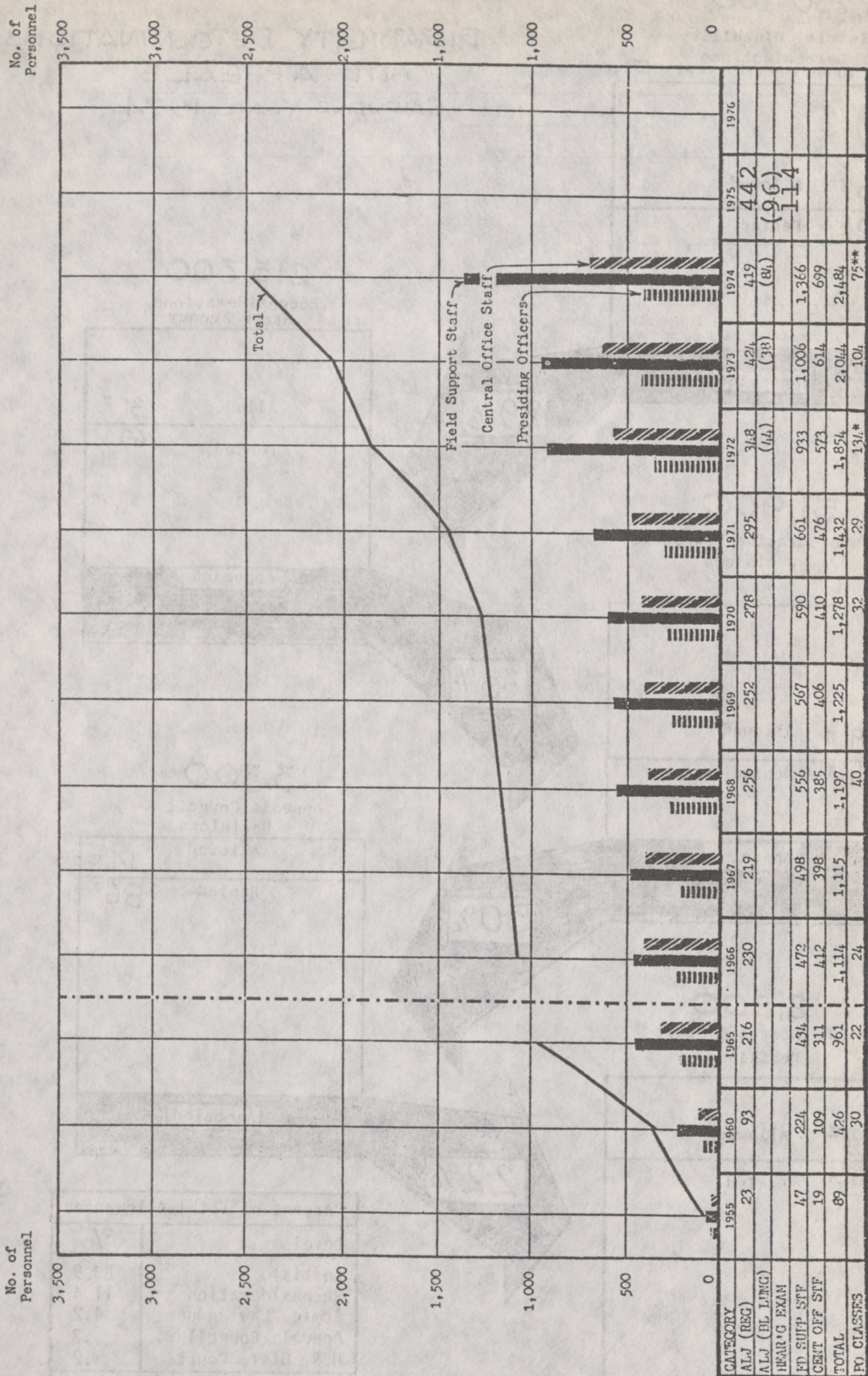
TABLE 11.—*Request for hearing: Reversal rate—Bureau of Hearings and Appeals*

[Expressed in percentage of total cases processed]

Fiscal year	DIB	Title II and XVIII		HI	Black lung	Title II/ title XVI	Title XVI	Total
		DWIB	RSI					
1970-----	44.4	29.7	27.8	29.0	-----	-----	-----	41.6
1971-----	44.4	26.8	27.2	28.5	-----	-----	-----	41.5
1972-----	45.2	25.0	26.3	35.6	9.8	-----	-----	38.6
1973-----	46.8	27.7	28.8	42.2	76.4	-----	-----	46.0
1974-----	48.5	28.3	33.8	50.8	16.7	(1)	(1)	41.6
1975-----	² 50.2	² 29.8	² 35.3	² 51.1	22.3	51.2	42.1	41.9

¹ Break-out of title II/title XVI and title XVI cases is not available. For the 2 programs combined it was 27.3 percent.² Estimated based on 1st 8 reporting periods experience.

TABLE 12.—Personnel on duty—Bureau of Hearings and Appeals



SOURCE: Staffing Report, Financial Management Branch

NOTE 1. Personnel are defined as permanent, full-time, on-duty personnel and include LMOPs.

NOTE 2. Black Lung ALJs are in parentheses to designate them as temporary and not included in the total.

NOTE 3. Data for presiding officer classes are not plotted.

* Includes 44 temporary and 90 permanent positions.

** Includes 54 temporary and 21 permanent positions.

1,250,400
Initial Disability
Determinations
State Agency - District Office

40 %	Allowed
60 %	Denied

Appealed

29%

DISABILITY DETERMINATIONS AND APPEALS CALENDAR YEAR 1974

215,300
Reconsiderations
State Agency

Allowed	31 %
Denied	69 %

Appealed

35%

51,900
Administrative Law Judge
Decisions

49 %	Allowed
51 %	Denied

Appealed

50%

13,300
Appeals Council
Decisions

Allowed	14 %
Denied	86 %

Appealed

22%

2,500
US District Court
Decisions

28 %	Allowed
72 %	Denied

Percent of Total Allowances

Level	%
Initial	83.9
Reconsideration	11.4
Admin. Law Judge	4.2
Appeals Council	.3
U.S. Dist. Court	.2
TOTAL	100.0