# INTRODUCING NONADVERSARIAL GOVERNMENT REPRESENTATIVES TO IMPROVE THE RECORD FOR DECISION IN SOCIAL SECURITY DISABILITY ADJUDICATIONS

*A Report to the Social Security Advisory Board*

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## I. Introduction

This report was commissioned by the Social Security Advisory Board ("SSAB").[1] It is the second report commissioned by the SSAB from Strategem, Inc.[2] In the first report, the authors (Paul Verkuil and Jeffrey Lubbers) evaluated administrative alternatives to the present system of judicial review of social security disability decisions and recommended consideration of an Article I disability court to handle appeals from the SSA.[3]

For this report, the SSAB asked Strategem to consider two issues that arise from the Administrative Law Judge (ALJ) stage in the proceeding: (1) whether (and when) to close the record upon which the decision concerning eligibility is based; and (2) whether (and how) the government should be represented in the SSA decision process—in particular, whether a government representative should appear before the ALJ. This report explains and answers those questions and provides extensive background explaining their significance.

### A. About the Authors

Paul Verkuil and Jeff Lubbers are legal academics who have a long standing professional interest in the disability process: Verkuil is on the faculty of the Cardozo Law School, Yeshiva University, and Lubbers is at the Washington College of Law, American University. Both have participated in numerous studies of the disability process for organizations like the National Institute of Administrative Law and the Administrative Conference of the United States. For this

[1] Contract # 0440-02-50581.

[2] Strategem, Inc. is a Florida corporation formed in 2001 by Judith Rodin and Paul Verkuil, academics with training in psychology and law. Its purpose is to find solutions to public and private problems through the use of data-based solutions and insights.

[3] Paul Verkuil and Jeffrey Lubbers, ALTERNATIVE APPROACHES TO JUDICIAL REVIEW OF SOCIAL SECURITY DISABILITY CASES: A REPORT TO THE SOCIAL SECURITY ADVISORY BOARD (Mar. 1, 2002).

project, the authors have been joined by Frank Bloch of the Vanderbilt University Law School, who has well-established expertise in the clinical practice of disability law as well as numerous scholarly publications in the field.

**B. How the Report was Researched**

While the three authors have extensive academic and even practical experience with the disability process, they did not rely upon their insights alone. Recognizing that this is a complicated and contentious area of administrative law, the authors and the SSAB sought a variety of views that could be considered and evaluated before any conclusions were drawn.

The process employed was designed to be inclusive and open. Aided by the Chair of the SSAB, Hal Daub, its former Chair, Stan Ross, and the staff of the SSAB, the authors held a series of informal sessions at the SSAB offices during October and November 2002. These sessions were open to a broad range of interests groups as well as representative ALJs and OHA personnel. At those sessions, Mr. Ross indicated that this was an informal process and the participants would not be identified by direct quotation. This report, therefore, does not do so. Instead, a list of the participants and a summary of the views expressed is attached as Appendix I. In addition, one of the authors attended a meeting of the National Organization of Social Security Claimants' Representatives (NOSSCR) at which he presented the topics covered in this report and solicited the views of NOSSCR members on the issues. A summary of the views expressed at that meeting is attached as Appendix II.

The authors also took note of the views expressed on the topics covered in this report by various interested parties at a hearing held on July 20, 2002, before the House Subcommittee on Social Security of the House Committee on Ways and Means (E. Clay Shaw, Jr., Chair). A compilation of excerpts from testimony at that hearing is attached as Appendix III. Finally, the

Lewin Report evaluating SSA's quality assurance systems,[4] earlier commissioned by SSA, was also considered. This report, among other things, promoted a change to an adversary process and also criticized the impacts of the "open record" system.[5]

**C. Organization of the Report**

The questions we have been asked to address lie at the heart of the disability decisionmaking process at the federal administrative level.[6]

At first blush, it might seem odd why matters like closing a record or providing government representation are at all controversial. After all, if one views government decisionmaking from a judicial or formal administrative law (APA) perspective, these conditions are basic to the process. But SSA disability decisions take place in a different world, where the claimant is viewed as a potential beneficiary and the government as a supportive force. SSA hearings are one of the few such proceedings where the agency is, as a rule, unrepresented and where the record is left open throughout the administrative appeals process to ensure the claimants file is complete. Despite the use of administrative law judges at SSA hearings, the issue of adversary versus non-adversary decisionmaking remains a live one in the world of administrative adjudication,[7] and we have sought to respect these different approaches while exploring possible changes in current practice relative to government representation and closing the record.

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[4] EVALUATION OF SSA'S DISABILITY QUALITY ASSURANCE (QA) PROCESSES AND DEVELOPMENT OF QA OPTIONS THAT WILL SUPPORT THE LONG-TERM MANAGEMENT OF THE DISABILITY PROGRAM, Report to the Social Security Administration by The Lewin Group, Inc., Pugh Ettinhger McCarthy Associates, L.L.C, and Cornell University (Mar. 16, 2001) (hereinafter cited as LEWIN REPORT ).

[5] *Id*., at 22-23.

[6] The role of state deciders at the intake and recommendation (DDS) level is not within the area of this study, although the question of whether to close the record after those stages is. *See* Part IV(B), *infra*.

[7] *See, e.g.*, Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 323-26 (1985) (extolling the virtues of the Veterans' Administration's system of non-adversary, "paternalistic" adjudication).

The report proceeds as follows:

- Part II explains why this report is timely and how it fits in against the background of prior studies and reports from the SSAB, the SSA and other organizations.
- Part III provides an overview of the Social Security disability determination process. *This part can be skipped by those knowledgeable about the process*.
- Part IV describes current regulations and practices that relate to compiling the record for decision.
- Part V discusses the SSA's government Representation Project (SSARP) and the federal district court case (*Salling v. Bowen*) that enjoined it as a violation of due process. This part provides important background for several reasons. For one thing, those who oppose any further SSA experimentation with representatives rely on the SSARP experience and the *Salling* case. For another, the SSARP involved an adversarial approach to representation that we seek to distinguish from the approach recommended in this report.
- Part VI presents our analysis of the primary problem that gives rise to questions about whether the government should be represented at Social Security hearings and when the record should be closed: Social Security disability decisions are often made on the basis of an incomplete and ever-changing evidentiary record. It also explains how this problem can be

reduced most effectively in the context of examining the issues raised by government representation and closing the record.

- Part VII describes and supports our specific recommendations. It also addresses the question whether any statutory change or new regulations might be required to implement our recommendations.

## II. Background

The proposals discussed in this report are not new. The Social Security Administration conducted a controversial "government representation" experiment in the mid-1980s and, notwithstanding its termination after an unappealed district court injunction,[8] knowledgeable observers have expressed renewed interest in this idea. Similarly, the idea of changing the SSA's "open file" system[9] has been suggested many times over the years by various advisory bodies and academics.[10] The SSAB recommended recently that both ideas be given serious consideration.[11]

### A. The Timeliness of This Report

These suggestions deserve renewed attention due to an increasing administrative caseload and the rise in private representation of claimants seeking disability benefits. The number of disability claims is expected to increase substantially in the future for several reasons: (1) the

[8] *Salling v. Bowen*, 641 F. Supp. 1046 (W. D. Va. 1986). *See* Part IV(C) *infra*.

[9] Currently, additional evidence can be added to the record, with only limited restrictions, throughout the administrative appeals process. *See* Part IV(B), *infra*.

[10] *See, e.g.,* LEWIN REPORT, *supra* note 4, at 23; Administrative Conference of the U.S., Recommendation 90-4, *infra* note 28, at ¶ 4.

[11] *See, e.g.*, Social Security Advisory Board, CHARTING THE FUTURE OF SOCIAL SECURITY'S DISABILITY SYSTEM: THE NEED FOR FUNDAMENTAL CHANGE 19-21 (Jan. 2001), *available at* http://www.ssab.gov/disabilitywhitepap.pdf.

impending retirement of Baby Boomers,[12] (2) the downturn of the economy in the last several years,[13] (3) the resumption of continuing disability reviews ("CDRs") by the SSA,[14] and (4) the increasing tendency of private insurance companies to require, as a condition of payments, that claimants pursue offsetting SSA disability benefits.[15] In addition, these figures don't reflect the 75,000 Medicare cases a year heard by SSA,[16] a figure that may increase markedly due to changes in the Medicare laws, which will make certain coverage determinations subject to review by administrative law judges (ALJs) in the SSA Office of Hearings and Appeals (OHA).[17] Recent caseload figures show that receipts by SSA ALJs are increasing. After falling to a six-year low of 455,192 in FY 1999 the caseload was 491,404 in FY 2000 and 525,383 in

[12] *See* Statement of Stanford G. Ross, Chairman Social Security Advisory Board at the Tenth National Educational Conference, Association of Administrative Law Judges (Oct. 3, 2001) ("SSA actuaries project continued rapid growth as the baby boomers reach the greater likelihood of disability."); SSAB, AGENDA FOR SOCIAL SECURITY: CHALLENGES FOR THE NEW CONGRESS AND THE NEW ADMINISTRATION, at 1, 2, 16 & 37 (Feb. 2001), *available at* http://www.ssab.gov/Overview1.pdf. Baby Boomers will begin to reach the age of 65 in 2011 and finish reaching 65 in 2030. When they begin to retire in 2011, there will be 40.4 million seniors (or 13% of the population) and will grow to 70.3 million (20% of the population) by 2030. *See* Press Release, U.S. Census Bureau, Census Bureau Projects Doubling of Nation's Population by 2100 (Jan. 13, 2000).

[13] It is well known that while the disability program is not an employment scheme, applications rise when the economy falters. In April 2000, the national unemployment rate was 3.8%; in December 2002, it was 6.0%—an increase of 58%. U.S. Department of Labor, Bureau of Labor Statistics, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY *available at* http://data.bls.gov/cgi-bin/surveymost.

[14] The SSA has completed its seven-year CDR plan, commenced in 1996. The plan is part of the agency's response to the Government Performance and Results Act of 1993, Pub. L. No. 103-62. It calls for increasing annual CDRs from 603,000 in 1997 to 1.7 million in 2002 with a peak year of 1.8 million in 2000. *See* OFFICE OF INSPECTOR GENERAL, SOCIAL SECURITY ADMINISTRATION, REPORT # A-01-99-91002, AUDIT REPORT: PERFORMANCE MEASURE REVIEW: RELIABILITY OF THE DATA USED TO MEASURE CONTINUING DISABILITY REVIEWS (June 2000), at A-5-A-6. Our report takes no position on revisions to the CDR program.

[15] *Cf.* D. Gregory Rogers, "The Effects of Social Security Awards on Long-Term Disability Claims," 1 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 1117, 1117 (July 2001). Conversations with the SSAB have also created a suspicion that private insurance policies are beginning to require appeals through the ALJ stage before payment of insurance benefits, but the situation is too recent for data to have been compiled.

[16] *See* Social Security Administration, Office of Hearings and Appeals, KEY WORKLOAD INDICATORS (Fiscal Year 2002) at 8.

[17] *See generally* GUIDE TO MEDICARE COVERAGE DECISION-MAKING AND APPEALS (Eleanor D. Kinney, ed. 2002) (Section of Administrative Law and Regulatory Practice, American Bar Association 2002).

FY 2002.[18] These caseload realities create make it more difficult for the SSA to achieve decisions that are more uniform, fair, and timely.

In addition to the pressure of mounting caseloads, the Social Security disability adjudication process has been affected by dramatic increases in the percentage of claimants represented by counsel over the last 30 years. According to the SSAB, the percentage of claimants that are represented by counsel has nearly doubled since 1977, when the percentage was approximately 36%.[19] It then began a rather rapid rise, reaching 48% in 1980[20] and 65% by fiscal year 1986.[21] It now is around 70%, with 18% of claimants assisted by nonattorney representatives. It is rare today for the claimant who wants representation to lack it at the hearing stage. (It should be noted, however, that SSI claimants are represented by attorneys at a significantly lower rate (45.9%) than DI claimants (74.9%).)[22]

This increase in claimant representation has a bearing on whether the government should also be represented at some point during the administrative appeals process; it also introduces questions about whether the administrative record should be closed at a pre-ordained time (and, if so, when).

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[18] *See* KEYWORKLOAD INDICATORS (Fiscal Year 2002), *supra* note 13 at 5.

[19] *See* , Social Security Advisory Board, DISABILITY DECISION MAKING DATA AND MATERIALS 73 (Jan. 2001).

[20] HHS, Operational Report of the Office of Hearings and Appeals 25 (Sept. 30, 1986) (reporting that 48% of claimants were represented by counsel and 15% by nonattorneys).

[21] *Id.* The corresponding figure for nonattorneys was 18%.

[22] These figures are attributed to SSA by the Federal Bar Association, Letter from Hon. Kathleen McGraw, Chair, Social Security Section, Federal Bar Association to Hon. Clay Shaw, Jr., Chairman, Subcommittee on Social Security, U.S. House of Representatives, (Jan. 7, 2002), re: H.R. 3332, the "Attorney Fee Payment System Improvement Act of 2001" at. p.2. However, this figure was for attorney representation, and no figure was given for mixed DI/SSI cases. Nevertheless it seems clear that pure SSI cases are far less attractive for attorneys.

**B. Related SSAB Studies**

The SSAB has already made general recommendations on the two topics of this study. In its 2001 report, CHARTING THE FUTURE OF SOCIAL SECURITY'S DISABILITY SYSTEM: THE NEED FOR FUNDAMENTAL CHANGE, it suggested the following reforms:

> Have the agency represented at the hearing.—First, the fact that most claimants are now represented by an attorney reinforces the proposition, which has been made several times in the past, that the agency should be represented as well.
>
> Unlike a traditional court setting, only one side is now represented at Social Security's ALJ hearings. We think that having an individual present at the hearing to defend the agency's position would help to clarify the issues and introduce greater consistency and accountability into the adjudicative system. It would also help to carry out an effective cross-examination of the claimant. Many ALJs have told us that they are sometimes reluctant to conduct the kind of cross-examination they believe should be made because, upon appeal, the record may make them appear to have been biased against the claimant. Consideration should also be given to allowing the individual who represents the agency at the hearing to file an appeal of the ALJ decision.
>
> If the agency is represented at the hearing there are issues that would have to be addressed, for example, who would have the responsibility for performing that function. Whoever had the responsibility would need substantially increased resources, at least in the short run. However, if government representation resulted in better-reasoned and justified decisions at the front end of the process, as many believe would be the case, then over time the number of appeals should go down, with savings to both the system and to claimants. The problem of representation for claimants who do not have it would also have to be addressed, but this is an issue that with a good faith effort should be able to be worked out.
>
> Close the record after the ALJ hearing.—Second, Congress and SSA should review again the issue of whether the record should be fully closed after the ALJ decision. Following legislation in 1980, SSA issued a regulation that bars the submission of new evidence that pertains to a period after the ALJ hearing decision, but allows new evidence to be submitted if it relates to the period on or before the date of the decision.
>
> Leaving the record open means that the case can change at each level of appeal, requiring a *de novo* decision based on a different record. SSA has no data on the percentage of cases that are remanded back to ALJs that involve new evidence, but many ALJs have told us that in their observation it is more than half and that it adds substantially to their workload. They argue that leaving the record open

> provides an incentive for claimants' representatives to withhold evidence in order to strengthen an appeal at a later stage. They also believe that it gives representatives an incentive to prolong the case in order to increase their fees. Other ALJs do not believe that representatives hold back evidence for these reasons. If evidence is held back, they maintain, it is because the rules for presenting evidence are lax and representatives do not take the time or spend the money to obtain additional evidence unless required to do so as a result of an unfavorable hearing decision.
>
> Closing the record would heighten the need to develop the record as fully as possible before the decision is made in order to ensure that claimants are not unfairly penalized. Closing the record would not preclude filing a new application.[23]

The following year, the General Accounting Office (GAO) reacted favorably to the SSAB report by recommending that SSA "consider [] some of the fundamental, structural problems as identified by the Social Security Advisory Board."[24]

**C. Other Relevant Studies (ACUS)**

The former Administrative Conference of the United States (ACUS) undertook numerous studies relating to the appeals process in the Social Security disability program and issued several recommendations specifically involving the various levels of review.[25] In 1978, ACUS issued a recommendation that addressed primarily the administrative hearing stage of the

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[23] SOCIAL SECURITY ADVISORY BOARD, CHARTING THE FUTURE OF SOCIAL SECURITY'S DISABILITY SYSTEM: THE NEED FOR FUNDAMENTAL CHANGE 19-21 (Jan. 2001), *available at* http://www.ssab.gov/disabilitywhitepap.pdf. *See also* Statement of the Hon. Hal Daub Chairman, Social Security Advisory Board, and former Member of Congress, Before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on Social Security Disability Programs' Challenges and Opportunities, (June 11, 2002), *available at* http://waysandmeans.house.gov/socsec/107cong/6-11-02/6-11daub.htm (reiterating the recommendation on closing of the record).

[24] GAO, Report to the Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives, SOCIAL SECURITY DISABILITY DISAPPOINTING RESULTS FROM SSA'S EFFORTS TO IMPROVE THE DISABILITY CLAIMS PROCESS WARRANT IMMEDIATE ATTENTION 29 (Feb. 2002) [hereinafter, GAO REPORT—DISAPPOINTING RESULTS].

[25] These recommendations can be found at "Recommendations of the Administrative Conference of the United States," *available at* http://www.law.fsu.edu/library/admin/acus/acustoc.html. Professor Verkuil was a member of ACUS, Professor Lubbers was ACUS's Research Director from 1982-95, and Professor Bloch served as a consultant to ACUS on two research projects. ACUS's operations ceased in October 1995. *See Symposium* in 30 ARIZ. ST. L.J. 1-204 (1998).

disability benefit claim processing and appeals process.[26] It reaffirmed the need for continued use of ALJs, but it also made suggestions concerning the development of the evidentiary hearing record. Those suggestions included recommendations that ALJs take more care in questioning claimants, seek to collect as much evidence prior to the hearing as possible, make greater use of prehearing interviews, and make better use of treating physicians as sources of information. Of most relevance to the present study, ACUS also recommended closing of the record at the ALJ stage, before review by the SSA Appeals Council:

> The Appeals Council should exercise review on the basis of the evidence established in the record before the administrative law judge. If a claimant wishes to offer new evidence after the hearing record has been closed, petition should be made to the administrative law judge to reopen the record. Where new evidence is offered when an appeal is pending in the Appeals Council, the Appeals Council should make that evidence a part of the record for purposes of the appeal only if a refusal to do so would result in substantial injustice or unreasonable delay.[27]

In a 1990 supplementary recommendation, ACUS addressed the need to have the evidentiary record be as complete as possible, as early in the process as possible.[28] That recommendation advocated an increased use of subpoenas to make this possible and, in conjunction with a provision in an earlier recommendation, that physicians asked to provide medical information in disability proceedings be compensated adequately.[29] ACUS also

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[26] ACUS Recommendations 78-2, *Procedures for Determining Social Security Disability Claims*, 43 Fed. Reg. 27,508 (June 26, 1978). This recommendation was based largely on Jerry L. Mashaw, Charles L. Goetz, Frank I. Goodman, Warren F. Schwartz, Paul R. Verkuil & Milton M. Carrow, SOCIAL SECURITY HEARINGS AND APPEALS (Lexington 1978). (This study was done through the National Center for Administration Justice, Milton Carrow, Director, and was led by Professor Mashaw of the Yale Law School.)

[27] ACUS Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*, ¶ C(1).

[28] ACUS Recommendation 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendation*, 55 Fed. Reg. 34,213 (Aug. 22, 1990).

[29] *See* ACUS Recommendation 89-10, *Improved Use of Medical Personnel in Social Security Disability Determinations*, ¶ 5(c), 55 Fed. Reg. 34,212 (Aug. 22, 1990). This recommendation also urged enhanced use of medical personnel at the initial decision level, better identification of conflicts over medical evidence, and heavier reliance on medical experts at the ALJ stage. It also suggested that if these reforms were instituted, the initial determination level should be a single step—with the elimination of the separate reconsideration stage.

reiterated, in 1990, that the record before the ALJ should be closed at a set time after the hearing and set forth a specific recommended procedure, as follows:

> 4. *Closing of the Administrative Record:* The administrative hearing record should be closed at a set time after the evidentiary hearing. Prior to this, the ALJ should set forth for the claimant what information the claimant needs to produce to complete the record, issue any necessary subpoenas, and provide the claimant adequate time to acquire the information. Requests for extension should be granted for good cause, including difficulty in obtaining material evidence from third parties. The ALJ should retain the discretion to accept and consider pertinent information received after closure of the record and before the decision is issued.
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> 5. *Introduction of New Evidence After the ALJ Decision:*
>
> a. Upon petition filed by a claimant within one year of the ALJ decision or while appeal is pending at the Appeals Council, the ALJ (preferably the one who originally heard the case if he or she is promptly available) should reopen the record and reconsider the decision on a showing of new and material evidence that relates to the period covered by the previous decision. An ALJ's denial of such a petition should be appealable to the Appeals Council.
>
> b. Appeals Council review of an ALJ's initial decision should be limited to the evidence of record compiled before the ALJ. Where the claimant seeks review of an ALJ's refusal to reopen the record for the submission of new and material evidence, the Appeals Council should remand the case of the ALJ (preferably the one who originally heard the case if he or she is promptly available), if it finds that the ALJ improperly declined to reopen the record. The Appeals Council should not review the merits itself or issue a decision considering the new evidence, unless remand would result in substantial injustice or unreasonable delay.[30]

**D. Related SSA Initiatives**

In October 1982, the SSA began an "Adjudicatory Improvement Project" (AIP) at the OHA. As discussed more fully in Part V, a centerpiece of this project was the SSA's government representation experiment, known as the Social Security Administration Representation Project (SSARP), which lasted until a district court injunction was issued against

[30] ACUS Recommendation 90-4, *supra* note 25 at ¶¶ 4-5. In a footnote, the Conference noted that "Congress may at some time in the future need to consider whether it may want to provide for judicial review of Appeals Council determinations not to reopen the record." *Id.* at n. 2.

the project in 1986. SSA decided not to appeal the decision, and revoked the regulations governing the SSARP in May of 1987.

A more substantive project known as the Process Unification Initiative was begun in 1996. As described by SSA in 1997, the aim of "Process Unification" was to foster use of the same adjudicative standards by disability adjudicators at all levels of adjudication. More specifically, the agency attempted to (1) define the specific weight to be given to DDS medical consultant opinions in hearing decisions, (2) clarify the guidelines in its regulations used in determining whether an individual lacks the capacity to perform less than a full range of sedentary work, and (3) provide for pre-effectuation review of hearing-level decisions made by the Office of Hearings and Appeals (OHA). Favorable decisions that appear to be unsupported by the evidence of record were to be forwarded to the OHA Appeals Council for review.[31]

A recent assessment of the initiative by the Federal Bar Association concluded that it was not accomplishing its purpose:

> SSA's process unification initiative was intended to have everyone using the same legal standards to decide the issue of disability. That still is not happening. At the DDS, decisions are driven solely by the objective medical findings, with mere lip service paid to the requirements of the law that claimants' subjective complaints such as pain and fatigue be assessed.[32]

Another set of four procedural projects designed to improve the disability decisionmaking process was started by SSA in 1994. A 2001 report by the GAO summarized

[31] *See* SSA Statement of Regulatory and Deregulatory Priorities, Unified Agenda of Regulatory and Deregulatory Actions, (October 1997), *available at* http://ciir.cs.umass.edu/ua/October1997/priority/pfile-23.html.

[32] Oral Statement of Hon. Kathleen McGraw, Chair, Social Security Section, Federal Bar Association before Subcommittee on Social Security, U.S. House of Representatives, (June. 18, 2002), p. 1, *available at* http://www.fedbar.org/McGraworalremarks6-18-02.pdf.

those projects and concluded that although SSA had spent more than $39 million over seven years on the various initiatives, the results had "in general been disappointing."[33]

Two of the projects, the Disability Claim Manager and the Prototype, attempted to improve the initial claims process. The Disability Claim Manager initiative created a new position intended to perform the duties of both SSA field office claims representatives and state Disability Determination Service (DDS) disability examiners. These managers were responsible for processing all aspects of a claim for disability benefits, both medical and nonmedical, and were expected to explain relevant program requirements and the disability adjudication process to claimants and to serve as the claimants' primary point of contact on their claims. The Prototype initiative attempted to ensure that all legitimate claims were approved as early in the process as possible. It required disability examiners to document and explain the basis for their decisions more thoroughly and it gave them greater decisional authority for certain claims. It also eliminated reconsideration of denials at the DDS level. The SSA has extended the Prototype a number of times; most recently, it announced that the Prototype would be continued at least through June 30, 2003 in order to test various initiatives further, including the elimination of the reconsideration level of review.[34]

The other two initiatives—Hearings Process Improvement (HPI) and Appeals Council Process Improvement—were aimed at changing the processes for handling appeals of claims denied by the DDS after initial decision and reconsideration. Both initiatives were designed to speed decisions made by ALJs and by the Appeals Council, and thereby to reduce their backlogs of appealed claims. HPI attempted to reduce the time it takes to get a decision on an appealed

[33] GAO REPORT—DISAPPOINTING RESULTS, *supra* note 10 at 1-2.

[34] *See* 67 Fed. Reg. 75,895 (Dec. 10, 2002).

claim by increasing the amount of analysis and screening done on a case before it is scheduled for a hearing with an ALJ. In addition, the initiative reorganized hearing office staff into small groups, called "processing groups," to try to attain more accountability and control in the handling of each claim.

The GAO summarized its studies of the four initiatives as follows:

- The Disability Claim Manager Initiative. This initiative was completed in June 2001. Results of the pilot test, which was done at 36 locations in 15 states beginning in November 1999, were mixed; claims were processed faster and customer and employee satisfaction improved, but administrative costs were substantially higher. An SSA evaluation of the test concluded that the overall results were not compelling enough to warrant additional testing or implementation of the Disability Claim Manager at this time.

- The Prototype. This initiative was implemented in 10 states in October 1999 and continues to operate only in these states. Preliminary results indicate that the Prototype is moving in the direction of meeting its objective of ensuring that legitimate claims are awarded as early in the process as possible. Compared with their non-Prototype counterparts, the DDSs operating under the Prototype are awarding a higher percentage of claims at the initial decision level, while the overall accuracy of their decisions is comparable with the accuracy of decisions made under the traditional process. In addition, when DDSs operating under the Prototype deny claims, appeals reach a hearing office about 70 days faster than under the traditional process because the Prototype eliminates the reconsideration step in the appeals process. However, according to SSA, more denied claimants would appeal to ALJs under the Prototype than under the traditional process. More appeals would result in additional claimants waiting significantly longer for final agency decisions on their claims, and would increase workload pressures on SSA hearings offices, which are already experiencing considerable case backlogs. It would also result in higher administrative costs under the Prototype than under the traditional process. More appeals would also result in more awards from ALJs and overall and higher benefit costs under the Prototype than under the traditional process. Because of this, SSA acknowledged in December 2001 that it would not extend the Prototype to additional states in its current form. During the next several months, SSA plans to reexamine the Prototype to determine what revisions are necessary to decrease overall processing time and to reduce its impact on costs before proceeding further.

- The Hearings Process Improvement Initiative. This initiative was implemented nationwide in 2000. The initiative has not improved the timeliness of decisions on appeals; rather, it has slowed processing in hearings offices from 318 days to

336 days. As a result, the backlog of cases waiting to be processed has increased substantially and is rapidly approaching crisis levels. The initiative has suffered from problems associated with implementing large-scale changes too quickly without resolving known problems. SSA is currently studying the situation in hearing offices to determine what changes are needed.

- The Appeals Council Process Improvement Initiative. This initiative was implemented in fiscal year 2000 and has resulted in some improvements. While it fell short of achieving its goals, the time required to process a case in the Appeals Council has been reduced by 11 days to 447 days and the backlog of cases pending review has been reduced from 144,500 (fiscal year 1999) to 95,400 (fiscal year 2001). Larger improvements in processing times were limited by, among other things, automation problems and policy changes.[35]

Because, according to GAO, the results of the HPI initiative have been to add 18 days to the time required for a decision in an appealed claim,[36] it is not surprising that the number of appealed Social Security cases processed decreased since the initiative's implementation. In fiscal year 1999, 524,738, cases were decided; in fiscal year 2001, this number had decreased 24.6% to 395,565 cases. This led to a backlog in cases pending a decision from 264,978 cases September 1999 to 392,387 in September 2001. This increase of 48.1% far exceeded the 5.7% rise in cases received by hearing offices during the same period.[37] Fiscal Year 2002 figures show that dispositions have increased again to 454,718, but the pending caseload has jumped by over 70,000 to 463,052.[38]

GAO attributed this failure of the HPI initiative to an attempt to implement these large-scale changes too quickly. This led to delays, poorly timed and insufficient staff training, and the absence of important automated functions. Specifically, there was a problem with the

[35] GAO REPORT—DISAPPOINTING RESULTS, *supra* note 10 at 3-4.

[36] *Id.* at 20.

[37] *See* WORKLOAD INDICATORS (Fiscal Year 2002), *supra* note 13 at 5. Note that these figures differ from GAO's because GAO includes Medicare cases.

[38] *Id.*

slowing of the organization of case evidence (referred to as "case pulling"), which reduced the number of case files ready for ALJ review. This case-pulling backlog was due to personnel changes that were a result of the initiative. These changes created a void of experienced staff to organize and prepare case files for ALJ review.[39] Another problem identified by GAO was "poorly timed and insufficient staff training" of the 2000 individuals assigned new responsibilities under the HPI.[40] Finally, problems encountered during the initiative's implementation were exacerbated by the fact that the automated functions necessary to support initiative changes never materialized.[41]

GAO reported also that there was only mixed support for the initiative among ALJs. Many ALJs indicated that the ALJ union was organized in 1999 in response to the perception that SSA excluded them in the formation of the HPI initiative. However, SSA officials disagreed with this assertion and said that ALJs were included during the formation of the initiative.[42]

Finally, the difficulties SSA is experiencing under the HPI initiative may also have been made worse by a freeze on ALJ hiring. Since April 1999, this hiring freeze has prevented SSA from hiring new ALJs to replace those who have retired. However, the hiring freeze was temporarily lifted in September 2001, thereby allowing SSA to hire 126 ALJs.[43] At this writing, an appellate court has just reversed the administrative decision that led to this hiring freeze, but it is unclear how and when the hiring of ALJs by SSA will be reopened.[44]

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[39] GAO REPORT—DISAPPOINTING RESULTS, *supra* note 10 at 21.

[40] *Id.*

[41] *Id.* at 22.

[42] *Id.*

[43] *Id.*

[44] On February 20, 2003, the Court of Appeals for the Federal Circuit reversed a decision by the Merit Systems Protection Board in which the Board concluded that the scoring formula used by the Office of Personnel Management (OPM) in 1996 to evaluate candidates for the position of ALJ violated OPM's regulations and the

SSA also introduced a temporary initiative in fiscal year 1995 to reduce OHA's backlog of appealed cases , known as the Senior Attorney Program. Under this program, which was phased out in 2000, selected attorneys reviewed pending claims in order to identify those cases in which the evidence already in the case file supported a fully favorable decision. Senior Attorneys had the authority to approve those claims without ALJ involvement. During its existence, the program succeeded in reducing the backlog of pending disability cases at the hearing level by issuing some 200,000 hearing-level decisions. However, GAO reported that studies differed on the accuracy and quality of Senior Attorney decisions.[45] Moreover, SSA management has expressed concern that the Senior Attorney program was a poor allocation of resources as it diverted attorneys from processing more difficult cases in order to process the easier cases.[46] One interviewee acknowledged that the program moved cases but raised questions about the quality of the determinations, suggesting that some senior attorneys approved questionable cases to justify their role. Another said the quality was variable but that in his experience senior attorneys failed to develop the cases they did not approve as they were supposed to do.

On the other hand, the National Treasury Employees Union has advocated a retention and expansion of the Senior Attorney Program. It argues that:

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Veterans' Preference Act, because it gave too much weight to veterans preference. The MSPB Chief Administrative Law Judge initial decision in *Azdell v. OPM*, Docket No. DC-300A-97-0368-N-1, which ordered OPM to discontinue use of its 1996 scoring formula for the ALJ examination, led OPM on April 22, 1999 to suspend the ALJ examination and stop processing all pending ALJ applications. On October 20, 2000, in response to cross-appeals, the Board ordered OPM to "reconstruct the ALJ registers and all certificates of eligibles that were issued while the 1996 scoring formula was in effect." *Azdell v. Office of Pers. Mgmt*., 87 M.S.P.R. 133 61 (2000), reconsideration denied, 89 M.S.P.R. 88 (2001). This is the decision that was reversed by the Court of Appeals for the Federal Circuit in *Meeker v. Merit Sys. Prot. Bd*., 319 F.3d 1368 (Fed. Cir. 2003.).

[45] GAO REPORT—DISAPPOINTING RESULTS, *supra* note 10 at 23.

[46] *Id*. at 23-4.

> [I]t is unreasonable to expect an Administrative Law Judge to produce more than 500 dispositions in a year if an acceptable level of quality is to be maintained. If ALJs are the only decision-makers, unless the Agency is prepared to accept a much greater number of ALJs than currently are employed, the simple arithmetic mandates an ever increasing backlog and skyrocketing processing times. The solution is more decision makers.[47]

It argued that the Senior Attorney program was a "resounding success,"[48] noting the following statistics and conclusion:

> Senior Attorneys issued approximately 220,000 decisions during the course of the Program. The average processing time for Senior Attorney decisions was approximately 105 days. During its pendency the OHA backlog fell from over 550,000 to as low as 311,000 at the end of FY 1999. The correlation is obvious.[49]

According to the NTEU, In July 1998 the Senior Attorney Program was significantly downsized with approximately one-half of the senior attorneys returned to the GS-12 attorney adviser position: "Unfortunately, the number of Senior Attorneys was not increased which led to a significant decline in the Program's productivity. This decrease in productivity led to the rise in unpulled cases and the beginning of the increase in the backlog and average processing time." . . . Had the Senior Attorney Program not been downsized, and then eliminated, there would be about 90,000 fewer cases waiting to be "pulled."[50]

The NTEU also rebutted the criticisms relating to decisional accuracy, and claimed that the Senior Attorneys were "experienced OHA Attorney Advisors who have many years experience dealing with the intricacies of the legal-medical aspects of the Social Security

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[47] Statement of James A. Hill, President, Chapter 24, National Treasury Employees Union, Raleigh, North Carolina, and Attorney-Advisor, Office of Hearings and Appeals, Social Security Administration, Before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on Social Security Disability Programs' Challenges and Opportunities 4-5, (June 20, 2002) *available at* http://waysandmeans.house.gov/socsec/107cong/6-20-02/6-20hill.htm.

[48] *Id.* at 6.

[49] *Id.* at 5.

[50] *Id.* at 5-6.

disability program."[51] The National Organization of Social Security Claimants' Representatives (NOSSCR) expressed support for reinstating the Senior Attorney Program in a recent position paper on improving the disability determination process, noting that the program "was well received by claimants' advocates because it presented an opportunity to present a case and obtain a favorable result efficiently and promptly."[52] In that paper, NOSSCR observed more generally: We support reinstating senior attorney authority to issue decisions in cases that do not require a hearing and expanding ways that they can assist ALJs. For instance, they also can provide a point person for representatives to contact for narrowing the issues, pointing out complicated issues, or holding prehearing conferences.[53]

More recently, the SSA has taken additional steps to reduce backlogs and to streamline the hearings process, subject to negotiation with union officials. These include creating a law clerk position for ALJs, allowing ALJs to issue decisions from the bench immediately after a hearing, and including them in the early screening of cases for immediate allowances.[54]

## III. Disability Determination Process

In order to understand fully the issues addressed in this report, some background on the Social Security Act's disability standard and the Social Security Administration's process for adjudicating disability claims and appeals is needed. This part begins with a brief analysis of the

[51] *Id*. at 6.

[52] National Organization of Social Security Claimants' Representatives, Position Paper: Improving the Disability Determination Process While Protecting Claimants' Rights 6-7 (Nov. 2002) (*available at* http://www.nosscr.org/dibpaper.html).

[53] *Id*. at 7.

[54] Statement of the Hon. Jo Anne B. Barnhart, Commissioner, Social Security Administration, Before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on Challenges Facing the New Commissioner of Social Security, May 2, 2002, *available at* http://waysandmeans.house.gov/socsec/107cong/5-2-02/5-2barn.htm (reporting on these modifications to HPI).

statutory disability standard, including a description of how the Social Security Administration implements that standard, and then describes disability claim processing and the administrative appeals process in some detail. [Readers knowledgeable about the SSA process may skip ahead to Part IV.]

**A. The Statutory Disability Standard**

The Social Security Act defines disability for purposes of DI and SSI claims as the "inability to engage in any substantial gainful activity 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."[55] The disability standard for SSI claims has slightly different introductory language, so that the standard is phrased in terms of an individual who is "unable to engage in any substantial gainful activity."[56] However, the substance of the two standards is the same and they are interpreted consistently as being essentially identical.[57] This standard has three separate components: a severity requirement (the "inability to engage in any substantial gainful activity"); an origin requirement (the disability must be based on a "medically determinable physical or mental impairment"); and a duration requirement (qualifying impairment must last at least one year or be expected to result

[55] 42 U.S.C. § 423(d)(1)(A) (2000).

[56] *Id.*§ 1382c(a)(3)(A). There is a different disability standard in the SSI program for children under the age of 18 that is not discussed separately in this report. Originally, the standard was "any medically determinable physical or mental impairment of comparable severity [to that of a disabled adult]." *See* 42 U.S.C. § 1382c (3)(A)(1974). In 1996, following controversial litigation that culminated in *Sullivan v. Zebley*, 493 U.S. 521, 532 (1990) and equally controversial regulations implementing the Court's decision in *Zebley*, Congress amended the standard to its current language: "[a]n individual under the age of 18 shall be considered disabled . . . if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations." 42 U.S.C. § 1382c(a)(3)(C)(i) (2000).

[57] *See, e.g., Bowen v. Yuckert*, 482 U.S. 137, 140 (1987) (stating that both titles of the Social Security Act define "disability" as the inability to engage in substantial gainful activity); *Perez v. Chater*, 77 F.3d 41, 46 (2d Cir. 1996).

in death). Each of these requirements must be met; for example, a short-term disability, no matter how severe, is not sufficient to establish eligibility under the Act.

The severity requirement is defined further, so that an individual is disabled "only if his 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."[58] In other words, the inability to perform work that one has done in the past is not sufficient; a claimant must be unable to do any other work in the national economy, taking into account his or her age, education, and prior work experience. Moreover, the issue is not the claimant's ability to obtain employment, so long as there are jobs in the national economy that he or she can perform. As stated in the Act, the ability to perform substantial gainful activity is to be determined "regardless of whether such work exists in the immediate area in which [the claimant] lives, or whether a specific job vacancy exists . . ., or whether [the claimant] would be hired."[59]

1. "Sequential Evaluation Process"

SSA uses a five-step "sequential evaluation process" to determine if a claimant is disabled.[60] This evaluation process is used for all DI claims, and for all adult claims under the SSI program. A somewhat different process—effectively, a truncated version of the regular process—is used for claims by children for SSI benefits.[61]

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[58] 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (2000).

[59] *Id.* The phrase "work which exists in the national economy" is defined further as "work which exists in significant numbers either in the region where [the claimant] lives or in several regions of the country." *Id.*

[60] 20 C.F.R. §§ 404.1520, 416.920 (2002). Earlier regulations had used the term "sequential evaluation process" to describe this procedure and that term is still widely used.

[61] *See* 20 C.F.R. § 416.926a (2002). The disability standard for children under the age of 18, a group eligible for disability benefits uniquely thorough the SSI program, is substantively different as well. 42 U.S.C. § 1382c(a)(3)(C)(i) (2000). Although this difference is highly significant relative to the ultimate decision on eligibility, the same basic disability determination process is followed and therefore child's SSI claims will not be discussed separately here.

The sequential evaluation process is used throughout the administrative process, including appeals, and is fully accepted by the courts as the framework for analysis of a Social Security disability claim.[62] It is designed to test a claimant's evidence of disability at different levels, each of which raise different factual and legal issues relative to a finding of disability. The process operates somewhat like a flow chart; at each level, depending on the facts, the claim is either resolved (depending on the level, either with a finding that the claimant is disabled or that the claimant is not disabled), or, if that finding cannot be made, then the process continues to the next step. For evaluations that reach the fifth and final level, the process dictates, again, depending on the facts, a conclusion whether the claimant is disabled or not.

In effect, the sequential evaluation process asks a series of questions. The first question is whether the claimant is performing substantial gainful activity. If so, the claimant is considered not disabled, regardless of his or her medical condition, and the process ends.[63] If the claimant is not currently engaging in substantial gainful activity, the process moves to the second question, which is whether the claimant has a "severe" impairment that significantly limits his or her ability to perform work. If not, the claimant is considered not disabled and the process ends there.[64] If the claimant does have a severe impairment, the evaluation process continues on to a

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[62] As one court stated, "[i]t is important for the [administrative law judge] to follow the orderly framework set out in the [sequential evaluation regulations] to ensure uniformity and regularity in outcome as well as fairness to the claimant"). *Mitchell v. Schweiker*, 551 F. Supp. 1084, 1087-88 (W.D. Mo. 1982).

[63] 20 C.F.R. §§ 404.1520(b), 416.920(b) (2002) ("If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience").

[64] 20 C.F.R. §§ 404.1520(c), 416.920(c) (2002) ("If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled"). A denial at Step 2 is warranted only for claimants "with slight abnormalities that do not significantly limit any 'basic work activity.'" *See Bowen v. Yuckert*, 482 U.S. 137, 158 (1987) (O'Connor, J. concurring) (citing Soc. Sec. Ruling 85-28 (1985)). *See also Chevalier v. Shalala*, 874 F. Supp. 2, 5 (D.D.C. 1994) (citing same language and upholding denial of benefits for failure to show a severe impairment).

third question, which asks whether the claimant's medical condition meets or equals the requirements of SSA's Listing of Impairments. If so, the claimant is considered disabled and the process stops.[65] If the claimant's impairment does not meet the requirements of the Listing, the claim continues to a fourth question, which asks a medical-vocational question: is the claimant prevented from performing his or her past relevant work. If not, the claimant is considered not disabled and, once again, the process stops.[66] If the claimant is prevented from performing past relevant work, the process reaches the final question, which addresses the ultimate medical-vocational standard for disability benefits: considering the claimant's age, education, and prior work experience, can he or she perform other substantial gainful work that exists in significant numbers in the national economy. If such other work exists, the claimant is not disabled; if such work does not exist, then he or she is disabled.[67]

Generally, claimants have the burden of proof on the issue of disability.[68] However, neither the Social Security Act nor the Social Security regulations specify how the claimant's burden operates in the context of the sequential evaluation process. Nonetheless, case law makes it clear that upon

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[65] 20 C.F.R. §§ 404.1520(d), 416.920(d) (2002) ("If you have an impairment(s) which meets the duration requirement and is listed in [the Listing of Impairments] or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience"). For a discussion of the Listing of Impairments and the concept of "medical equivalence" to a listed impairment, see note 67, *infra*.

[66] 20 C.F.R. §§ 404.1520(e), 416.920(e) (2002) ("If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled".)

[67] 20 C.F.R. §§ 404.1520(f)(1), 416.920(f)(1) (2002) ("If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled".) A different rule is applied at this step for claimants who did only "arduous unskilled physical labor" for 35 years or more and with only a "marginal" education. 20 C.F.R. §§ 404.1520(f)(2), 416.920(f)(2). *See also* 20 C.F.R. §§ 404.1562, 416.962.

[68] *See* 20 C.F.R. §§ 404.1512(a), 416.912(a) (2002); *see also* 42 U.S.C. § 423(d)(5)(A) (2000) ("An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Commissioner of Social Security may require".)

proof by a claimant that he or she cannot perform prior work, the burden shifts to SSA to prove that the claimant can perform other work available in the national economy.[69]

The first two steps are designed to identify the most obvious denials: claimants who are working and therefore are, by definition, not "unable to perform substantial gainful activity" (Step 1) and those with no impairments that significantly restrict their capacity to work (Step 2). The third step is designed to simplify decisionmaking for the most obviously eligible claimants: those with impairments that match (or equal) the strict criteria set forth in the Listing of Impairments (Step 3).[70] The last two steps take on the closer cases—those that cannot be resolved through the first three steps—and address the more complex medical-vocational aspects of the disability standard. Step 4 is still relatively focused; claimants who can perform jobs that they held in the past—jobs that, by definition, they are within their vocational competence—are denied benefits on that ground. Only at Step 5 does the process deal with the open-ended, ultimate question of whether the claimant can perform any jobs at all, given his or her age, education, and work experience.

For claims that reach Steps 4 and 5, the claimant is assigned a residual functional capacity (often referred to as RFC), which represents the level of work, if any, the claimant has the capacity to perform.[71] Then, SSA decides whether, given the claimant's RFC, he or she can perform prior

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[69] *See, e.g., Bowen v. Yuckert*, 482 U.S. 137, 146-48 (1987).

[70] The Listing sets out physical and mental impairments that are "severe enough to prevent a person from doing any gainful activity." 20 C.F.R. §§ 404.1525(a), 416.925(a) (2002). The claimant has the burden of proof in providing the medical findings necessary to show that his or her impairment meets a listing. 20 C.F.R. §§ 404.1512(a), 416.912(a) (2002). In order to show that an impairment (or combination of impairments) equal the requirements of the Listing, a claimant must present "medical findings . . . at least equal in severity and duration to the listed findings." 20 C.F.R. §§ 404.1526(a), 416.926(a) (2002). For a recent discussion of the Administration's position on medical equivalence, see Soc. Sec. Ruling 96-6p (1996).

[71] A claimant's RFC is based on his or her physical and mental limitations and measures how they affect the claimant's ability to work; it is an evaluation of "what [the claimant] can still do despite [those] limitations." 20 C.F.R. §§ 404.1545(a), 416.945(a) (2002). There are five levels of RFC: sedentary, light, medium, heavy, and very heavy work. *See* 20 C.F.R. §§ 404.1567, 416.967 (2002). For a recent discussion of the Administration's view on Residual Functional Capacity assessments, *see* Soc. Sec. Ruling 96-8p (1996).

relevant work and, if not, whether, considering in addition his or her age, education, and prior work experience, a significant number of jobs exist in the national economy that the claimant can perform.

2. The Medical-Vocational "Grid" Rules

Many claims are resolved at Step 5 through the use of a special set of rules and tables, known as the Medical-Vocational Guidelines.[72] The heart of the Guidelines are the so-called "grids," which consist of three tables.[73] Based on data from various government publications,[74] each table has a set of "rules" consisting of three columns that account for a claimant's age, education, and previous work experience, and a fourth column that directs a decision of disabled or not disabled. Thus, provided a claimant's vocational factors and residual functional capacity coincide with all of the criteria of a particular rule, that rule directs a conclusion that the claimant is or is not disabled. For example, if a claimant is limited to light work, is closely approaching advanced age (defined as between the ages of 50 and 54), is illiterate, and has either no previous work experience or previous work experience limited to unskilled labor, the grids would direct a finding that the claimant is disabled.[75] On the other hand, if that same claimant were at least literate, then the grids would direct a finding that the claimant is not disabled.[76]

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[72] *See* 20 C.F.R. Part 404 Subpart P Appx 2.

[73] A claimant's residual functional capacity determines which table of the Medical-Vocational Guidelines is to be used: Table 1 applies to individuals whose residual functional capacity limits them to sedentary work; Table 2 to those limited to light work; and Table 3 to those limited to medium work. No tables exist for individuals still able to perform heavy or very heavy work because the Guidelines state, in effect, that regardless of their age, education, or work experience, sufficient jobs exist in the national economy for such individuals to pursue substantial gainful activity. *See* 20 C.F.R. Part 404 Subpart P Appx 2 §§ 201.00, 202.00, 203.00, 204.00 (2002). On the other hand, if it is found that an individual is unable to perform work at even a sedentary level, he or she will be assumed to be disabled, absent specific evidence to the contrary.

[74] These include, most notably, the DICTIONARY OF OCCUPATIONAL TITLES and the OCCUPATION OUTLOOK HANDBOOK, both published by the Department of Labor. *See* 20 C.F.R. Part 404 Subpart P Appx 2 § 200.00(b) (2002).

[75] *Id.* § 202.09.

[76] *Id.* § 202.10.

The Supreme Court upheld the Guidelines in 1983 as valid rules for determining disability.[77] The Court made it clear, however, that the Guidelines' grids can be used to determine disability only where the claimant's particular circumstances match each of the component parts of the particular rule.[78] When a claimant's RFC or relevant vocational factors are different from those reflected in a particular grid rule, the Guidelines cannot be used to meet the Administration's burden of proof.[79] In such cases, there must be proof that specific jobs exist in significant numbers in the national economy that the claimant can perform, given his or her impairments, age, education, and prior work experience. Typically, this proof comes from a vocational expert, either in a written report or, at the administrative hearing level, through live testimony.

3. Other Special Rules

Apart from the sequential evaluation process and the Medical-Vocational Guidelines, there are a number of special rules governing medical evidence and how that evidence should be weighed in making disability decisions. The most important of these rules are noted here because they can have a significant impact on the disability determination process. For example, SSA regulations provide that a treating physician's opinion concerning the nature and severity of a claimant's medical condition must be given "controlling" weight if the opinion "is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record."[80] If not given controlling weight, the opinion may still be entitled to special weight according to a series of factors,

[77] *Heckler v. Campbell*, 461 U.S. 458 (1983).

[78] 461 U.S. at 462 n. 5.

[79] This policy is reflected in the Guidelines themselves. *See* 20 C.F.R. Part 404 Subpart P Appx 2 § 200.00(a) (2002).

including some that focus on the treating relationship and others that are directed more generally at all medical sources.[81] Regulations also provide that SSA may arrange for a consultative examination if it is unable to obtain enough current medical information from the claimant's medical sources to decide the claim. These regulations include detailed provisions that outline when a consultative examination can be purchased and when a treating physician should be used to conduct the examination.[82]

**B. Disability Claim Processing and Appeals**

Determining disability is but one component of an eligibility decision on an application for benefits. Depending on the type of benefit involved, various criteria unrelated to disability and common to non-disability benefit claims—age, insured status, income and resources, etc.—must be documented and evaluated before a final eligibility decision is made. At the same time, SSA must, and does, process claims for disability benefits differently than it does claims for other types of benefits. This is the case, for example, at the very beginning of the process: all claims for DI or SSI benefits start with an application form that calls for general information intended to indicate what type of benefits the claimant is most likely to be eligible for. Although the initial application form asks for some information specifically relevant to disability claims that may lead to a decision on eligibility,[83] a separate form, known as the "disability report," is added to the file once the issue

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[80] 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2) (2002).

[81] *See* 20 C.F.R. §§ 404.1527(d)(2)-(6), 416.927(d)(2)-(6) (2002).

[82] *See* 20 C.F.R. §§ 404.1519a, 404.1519b, 404.1519h, 416.919a, 416.919b, 416.919h (2002).

[83] Information obtained on the initial form is used to determine the nature of the claimant's physical and mental impairments, the date of onset of the alleged disability, and whether the claimant performed any work after the alleged date of onset. If the claimant performed any work after the onset date and that work is determined to be substantial gainful activity and is continuing, the claim can be denied at the local office without having to evaluate the alleged disability. *See* 20 C.F.R. §§404.1520(b), 416.920(b) (2002) ("If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience".)

of disability surfaces. Similar accommodations to the special needs of disability determinations are found throughout the application and appeals process, most notably with respect to the gathering of expert medical and vocational evidence.

The current Social Security decisionmaking process is complex, in part because of the large numbers of claims and appeals but also because the vast majority of disputed claims involve disability determinations. Deciding whether any one claimant is unable to engage in "substantial gainful activity" in light of not only his or her physical and mental impairments but also any effects of age, education, and prior work experience, can be difficult; making disability determinations fairly and accurately for millions of claims (and in hundreds of thousands of appeals) is a daunting task. Some of the work is facilitated by the disability regulations discussed above; the "sequential evaluation process" and its components, including the Listing of Impairments and the Medical-Vocational Guidelines, provide important structure. The rest is left to the administrative process.

There are four levels of administrative decisionmaking for Social Security claims—and for most claims, they must pass through each before a decision is subject to judicial review.[84] The process begins at local Social Security Administration offices, but the all-important disability decisions are then contracted out to state-run Disability Determination Service (DDS). SSA, together with the DDSs for disability claims, makes the initial decision on an application and the initial decision to terminate benefits; in case of appeal, SSA and DDS also handle the first level of review, known as "reconsideration." Further administrative appeals are handled by SSA, but through the Office of Hearings and Appeals, which houses the Office of the Chief Administrative

[84] *See, e.g., Johnson v. Shalala*, 2 F.3d 918, 920-21 (9th Cir. 1993) (Social Security Act, 42 U.S.C. § 405(g), "requires each social security claimant to exhaust his administrative remedies before appealing to a federal district court"). There are special rules for expedited appeals where the only issue is the constitutionality of an applicable provision of the Social Security Act. *See* 20 C.F.R. §§ 404.923-.928, 416.1423-.1428.

Law Judge who oversees approximately 1100 ALJs[85] who are responsible for administrative hearings; and the Appeals Council (with a chair and 25 Administrative Appeals Judges),[86] which reviews administrative hearing decisions on appeal by a claimant or on its own initiative.

1. Initial Decision on Application or Termination of Benefits

A claim for DI or SSI benefits must begin with an application filed with the Social Security Administration.[87] Most applications are filed in person or by telephone; however, the Administration also allows applications to be filed on-line via the Internet.[88] Most Social Security Administration offices have "specialists" who assist claimants with the application process and make sure that the applications are complete. However, the most important work on a disability claim—determining whether the claimant is disabled—is done at the state DDS.

When a claim is received by DDS, it is assigned to a disability examiner who works together with a medical consultant to determine whether the claimant is disabled and, if so, the date the disability began (or, in termination cases, the date the disability ended). Disability examiners do most of the evaluation; however, they must consult with the medical consultant on medical equivalence and residual functional capacity (RFC).

Although disability evaluations are made by the state DDS, the final decision on eligibility for benefits is made at the local Social Security Administration office.[89] DDS's disability assessment is followed in virtually all cases, but certain administrative findings are identified as

[85] Latest figures show 1082 ALJs on duty, KEY WORKLOAD INDICATORS (Fiscal Year 2002), *supra* note 13, at 1.

[86] The number comes from a listing in the FEDERAL YELLOW BOOK, p. III-335 (Leadership Directories, Inc., Summer 2002). These judges are not ALJs and lack the statutory independence and APA protection enjoyed by ALJs)

[87] 20 C.F.R. §§ 404.610, 416.310 (2002).

[88] This practice began in 2002. *See* https://s00dace.ssa.gov/pro/isba3/wwwrmain.shtml (Social Security Online: Social Security Benefit Application).

[89] Technically, the Disability Determination Section's decision is a recommended decision that need not be followed by the Administration. *See* 20 C.F.R. §§ 404.1503(d), 416.903(d) (2002).

specially "reserved" to the Commissioner of Social Security, including whether an impairment meets or equals a listing in the Listing of Impairments and the claimant's RFC.[90] Moreover, SSA reviews a certain percentage of claims before any action is taken to implement the eligibility decision.[91] If approval is recommended, the file is returned to the local SSA office for processing payment. If the decision is to deny the claim, SSA sends a notice explaining to the claimant why the claim was denied and that a request for reconsideration must be filed within 60 days of the denial.

2. Reconsideration

The first step in appealing an adverse decision is to request "reconsideration."[92] Reconsideration is an internal examination of all the evidence in the file at the time of the initial decision, together with any additional evidence submitted subsequent to the initial decision. Reconsideration takes place at the same DDS where the initial decision was made; however, the disability examiner and medical consultant who were involved in the initial determination cannot be involved at the reconsideration stage. Only about 16% of DDS decisions are reversed at reconsideration,[93] and all reconsideration reversals are reviewed at the appropriate Regional Office. Many reversals are based on new medical evidence submitted subsequent to the initial decision; sometimes, claims that were denied because the duration requirement was not met are reversed on reconsideration simply because of the passage of time. A reversal may also result because of a better definition or progression of the claimant's disability.

For denials of initial applications, reconsideration consists of a review of the paper record, supplemented perhaps with additional evidence, but without any face-to-face contact

[90] 20 C.F.R. §§ 404.1527(e), 416.927(e) (2002).

[91] 42 U.S.C. § 421(c)(1) (2000). Decisions not reviewed are implemented as recommended by the DDS; those reviewed are either approved for implementation or returned to the DDS for a new decision.

[92] *See* 20 C.F.R. §§ 404.907, 416.1407 (2002).

between the claimant and the decisionmaker. There is, however, a separate reconsideration procedure in CDR cases where existing benefits are terminated upon a finding of nondisability based on medical factors.[94] For these cases, reconsideration includes a "disability hearing" held by a "disability hearing officer."[95]

3. Administrative Hearing

The next level of appeal is an administrative hearing before an administrative law judge. A claimant has 60 days from the date of receipt of a reconsideration notice to request an administrative hearing, unless the time limit is extended for good cause.[96] If the claimant requests a hearing, one will be held unless the ALJ decides to issue a fully favorable decision without a hearing, or to remand for further administrative action because the ALJ believes that a revised decision will be favorable to the claimant. The ALJ may also dismiss the request for a hearing on certain specified grounds.[97]

The ALJ is the only decisionmaker in the entire application and appeals process that sees the claimant in person.[98] Before the hearing takes place, the ALJ decides whether the evidence in the file is adequate to resolve the issues or whether factual development of some type is necessary. The ALJ also decides what additional evidence is necessary, if any, and whether a vocational expert or medical expert should be called to appear at the hearing. As part of this process, the ALJ can order a consultative examination of the claimant through the DDS, and

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[93] *See* SOCIAL SECURITY ADVISORY BOARD, DISABILITY DECISION MAKING: DATA AND MATERIALS 86 (Jan. 2001).

[94] *See generally* 42 U.S.C. §§ 405(b)(2), 1383(a)(7)(A) (2002).

[95] According to information provided by Mike Brennan of the SSAB staff, such hearings last about an hour and are conducted by non-ALJ adjudicators, chosen for their medical and vocational knowledge who have been sent to a training program offered by McGeorge School of Law.

[96] 20 C.F.R. §§ 404.933(b), 416.1433(b) (2002).

[97] *See* 20 C.F.R. §§ 404.957, 416.1457.

[98] Except in certain cases where benefits were terminated. *See* text at notes 91-91, *supra*.

must do so if such an examination is necessary to complete the medical record.[99] The ALJ may also refer the case for prehearing proceedings.[100]

The hearing itself is informal and non-adversarial. Although the practice varies by hearing office, most SSA ALJs do not wear robes. Typically, the ALJ will ask a series of questions and then, if the claimant is represented, the claimant's representative will continue the questioning. Most hearings last approximately one hour; however, they can range from as little as 30 minutes to more than two hours. Typically, an ALJ will schedule about six hearings in a full day. Following the hearing, the ALJ must issue a formal written decision that includes a recitation of the evidence considered, findings of facts, and detailed reasons for the decision.[101]

4. Appeals Council

A claimant who is dissatisfied with the decision of the ALJ following an administrative hearing has one final opportunity for administrative review at the SSA's Appeals Council. A request for review by the Appeals Council must be filed within 60 days of receipt of the hearing decision, unless the time limit is extended for good cause.[102] The Appeals Council also reviews decisions on its "own motion," through both random and selective sampling that identifies cases "that exhibit problematic issues or fact patterns that increase the likelihood of error."[103]

The Appeals Council can grant or deny the request for review; if the petition for review is granted, the Council will either issue a decision or remand the case for further administrative

[99] *See, e.g., Baca v. Shalala*, 907 F. Supp. 351, 355 (D.N.M. 1995).

[100] *See* 20 C.F.R. §§ 404.942, 416.1442 (2002).

[101] 20 C.F.R. §§ 404.953, 416.1453 (2002).

[102] 20 C.F.R. §§ 404.968, 416.1468 (2002).

[103] 20 C.F.R. §§ 404.969(b), 416.1459(b) (2002). Social Security regulations provide further that "[n]either our random sampling procedures nor our selective sampling procedures will identify cases based on the identity of the decisionmaker or the identity of the office issuing the decision." 20 C.F.R. §§ 404.969(b)(1), 416.1459(b)(1).

action.[104] Social Security regulations list four grounds for review: an abuse of discretion by the administrative law judge; an error of law in the administrative hearing decision; the decision is not supported by substantial evidence; or the decision presents a "broad policy or procedural issue that may affect the general public interest."[105] The Appeals Council denies review in 74% of the appeals.[106] If review is granted, a claimant may request an oral argument; however, in most cases a decision or remand order is issued at the same time the Council grants review. The Council can also dismiss an appeal if not timely filed or under other limited circumstances.[107]

When a claimant seeks Appeals Council review of an ALJ decision, the entire claim is subject to review. This is certainly the case where the claimant requests a general review of an unfavorable decision. Full review by the Appeals Council is also appropriate where the claimant has requested review on certain issues in a partially-favorable decision, so long as the claimant was notified that requesting review of a partially favorable decision could lead to a full-scale review.[108]

As discussed in more detail later in this report,[109] a claimant may submit "new and material" evidence to the Appeals Council together with a request for review. If "new and material evidence" is submitted, the Council will evaluate the entire record—consisting of the record from the administrative hearing and any new and material evidence submitted with the

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[104] 20 C.F.R. §§ 404.967, 416.1467 (2002).

[105] *See* 20 C.F.R. §§ 404.970(a), 416.1470(a) (2002).

[106] *See* SOCIAL SECURITY ADVISORY BOARD, DISABILITY DECISION MAKING: DATA AND MATERIALS 73 (Jan. 2001).

[107] *See* 20 C.F.R. §§ 404.971, 416.1471 (2002).

[108] *See, e.g., Williams v. Sullivan*, 970 F.2d 1178, 1183 (3d Cir. 1992) (claimant sought review only of onset date; Appeals Council reviewed entire record and denied benefits altogether).

[109] *See* Part IV(B)(2), *infra*.

notice of appeal—and will grant a request for review if the ALJ's decision is "contrary to the weight of the evidence currently of record."[110]

A decision by the Appeals Council, either to deny a request for review or, following the granting of a request for review, to affirm, modify, or reverse the hearing decision, is a final decision by the Social Security Administration, subject to judicial review. However, if the case is remanded for further action by an ALJ, there is no final decision and the administrative process continues.

## IV. Compiling the Record for Decision: Overview of Current Regulations and Practices

The key to fair and accurate disability determinations lies in the quality of the record on the basis of which disability decisions are made. Developing a high-quality record for Social Security disability claims is difficult because the Social Security disability standard requires an assessment of often-complex and frequently changing medical and vocational evidence. Moreover, the information most relevant to a disability decision may be subjective and in dispute, requiring the decisionmaker to weigh and resolve conflicting evidence. It is not surprising, therefore, that some of the most important rules and regulations governing disability determinations address the development of the record for decision and that much of the controversy about the current multi-level disability determination process and the personnel involved in that process revolves around the same concern.

This part of the report provides an overview of current SSA regulations and practices relative to the evidentiary record for disability claims and appeals. The first two subsections discuss the process for developing the record and the rules on closing the record to additional

[110] 20 C.F.R. §§ 404.970(b), 416.1470(b), 416.1470(b).

evidence. These two aspects of regulating the evidentiary record reflect sometimes-competing policy interests: if a full and complete record is the key to fair and accurate disability decisions, agency procedures should facilitate the development of all relevant evidence and continue to do so until a final decision is reached; however, if record-based disability decisions are to be subject to review, then review of those decisions should be based on the same evidentiary record as was the decision under review. This tension would not pose a problem if there were a clear line between making a decision and reviewing a decision on appeal. That line is blurred, however, in the Social Security disability determination process—particularly at the later stages of administrative review. Thus, federal regulations provide: "In each step of the review process, [claimants] may present any information [that claimants] feel is helpful to [their] case. Subject to the limitations on Appeals Council consideration of additional evidence . . ., [SSA] will consider at each step of the review process any information [claimants] present as well as all the information in [SSA's] records."[111]

A third subsection discusses the rules on attorney's fees for Social Security cases and how they relate to the matters covered in this report.

**A. Developing the Record**

Overall, SSA regulations and practices are aimed at compiling a full and complete record. Certainly many individual claim files are developed as fully as needed, often with little difficulty. However, when a claim is developed poorly it affects not only the quality of the decision at that level but it also burdens the process at the next level of decision or appeal. Because the Social Security disability determination process is spread out over up to four levels

[111] 20 C.F.R. §§ 404.900(b), 416.1400(b) (2002). The rules concerning the consideration of additional evidence at the Appeals Council mentioned in this regulation are discussed below. *See* Part IV(B)(2), *infra*.

of administrative decision and appeal, there is a tendency to spread out development of the evidentiary record as well. The rules and practices relative to development of the record at each of these levels – initial decision and reconsideration, administrative hearing, and Appeals Council – are described below.

1. Initial Decision and Reconsideration: The Disability Determination Service (DDS) Stage

Although the Social Security claim process begins at local SSA offices, relatively little work is done there on a disability claim file. The initial application form requires that claimants identify the medical basis for any disability, state how any impairments affect their ability to perform work and to participate in daily activities, and provide information about relevant medical records and various sources of medical evidence. However, the local office staff looks only at the first step of the sequential evaluation process; unless the claim can be denied because the claimant is currently engaging in "substantial gainful activity," the file is forwarded to the state Disability Determination Service where the serious record development work begins.

Initially, the responsibility for developing the evidentiary record rests with the claimant.[112] This is consistent with the basic notion that claimants have the burden of proof on the issue of disability, which means that claimants must identify their impairments and provide the evidence necessary for SSA to determine whether those impairments establish that the claimant is disabled.[113] At the same time, SSA recognizes that it has a responsibility to develop

[112] *See* 20 C.F.R. § 404.704 (2002) ("When evidence is needed to prove your eligibility or your right to continue to receive benefit payments, you will be responsible for obtaining and giving the evidence to us".)

[113] *See* 20 C.F.R. §§ 404. 1512(a), 416.912(a) (2002) ("In general, you have to prove to us that you are blind or disabled. Therefore, you must bring to our attention everything that shows that you are blind or disabled. This means that you must furnish medical and other evidence that we can use to reach conclusions about your medical impairment(s) and, if material to the determination of whether you are blind or disabled, its effect on your ability to work on a sustained basis. We will consider only impairment(s) you say you have or about which we receive evidence".) *See also* 20 C.F.R. §§ 404. 1512(c), 416.912(c) (2002) ("You must provide medical evidence showing that you have an impairment(s) and how severe it is during the time you say that you are disabled".)

the record once a claimant provides the basic information. Regulations provide that the agency will develop a claimant's "complete medical history" for the relevant time period.[114] Thus, although claimants are responsible for providing their own evidence, SSA is expected to participate in developing the record.

In particular, SSA will obtain medical records from a claimant's identified medical sources and will pay for records it requests.[115] This practice follows from a series of statutory and regulatory provisions that require SSA to "make every reasonable effort" to obtain medical information from claimants' treating sources and to weigh treating source opinions appropriately.[116] SSA is also authorized to order a consultative examination if the claimant's medical sources cannot, or will not, provide the evidence needed to make a decision on the claim, and SSA will pay for any such examination it orders.[117] SSA retains the right, however, to decide a claim on the basis of whatever information is available if the claimant does not provide information requested.[118]

As noted earlier,[119] DDS disability examiners work together with medical or psychological consultants. Although the disability examiner and the consultant share the responsibility for making the disability decision, the disability examiner usually takes the lead with respect to record development. After reviewing the file, the examiner decides if additional

[114] 20 C.F.R. §§ 404. 1512(d), 416.912(d) (2002).

[115] *See* 20 C.F.R. §§ 404.1512(d), .1514, 416.912(d), .914 (2002).

[116] *See* 42 U.S.C. § 423(d)(5)(B) (2000); the rules on weighing medical source opinions are discussed in Part III(A)(2), *supra*.

[117] 20 C.F.R. §§ 404.1517, 416. 917 (2002).

[118] *See* 20 C.F.R. §§ 404.1516, 416.916 (2002) ("If you do not give us the medical and other evidence that we need and request, we will have to make a decision based on information available in your case. We will not excuse you from giving us evidence because you have religious or personal reasons against medical examinations, tests, or treatment".)

[119] *See* Part III(B)(1), *supra*.

evidence is needed, and if so, from which medical sources additional information will be requested. Most requests are made to traditional medical sources, such as doctors and medical facilities; however, depending on the nature of the claim, requests may also be made to nonmedical sources, such as family members, social workers, and, for disabled children's SSI claims, teachers and daycare workers.[120] Although disability examiners usually decide whether to contact a particular medical source, examiners will seek advice from the medical consultant if the claim presents unusual evidentiary issues.

SSA follows essentially the same procedures for reconsideration as for the initial decision, except that the process begins with a more complete file and different examiners and consultants are used. There is, however, one major difference in termination cases where a beneficiary is found no longer disabled due to medical reasons. Under those circumstances, the beneficiary can request a face-to-face "disability hearing" as part of the reconsideration process.[121]

2. Administrative Hearing: The ALJ Stage

The administrative hearing record begins with the evidence compiled by the DDS during the initial processing of the claim, including reconsideration, which it forwards to the Office of Hearings and Appeals (OHA). The ALJ, working together with OHA staff, then reviews and develops the record independently and without assuming that the DDS obtained all of the information available at the time it made its decision. In addition to new material submitted by the claimant, OHA staff can obtain existing medical reports from treating sources or hospitals

[120] *See generally* 20 C.F.R. §§ 404.1513, 416.913 (2002) (identifying sources that can provide evidence of an impairment.) Non-medical sources are particularly appropriate for Child's SSI claims where is issue is "functional equivalence" of a listed impairment. See 20 C.F.R. § 416.926a (2002.)

[121] *See generally* 20 C.F.R. §§ 404.914, 416.1416 (2002).

and can order consultative examinations. Sometimes the evidence obtained at the administrative hearing stage could not have been obtained earlier, either because the claimant was not aware of a previously existing condition or the claimant's condition changed since the last DDS decision was made; however, very often OHA obtains medical records and reports that could have been obtained by the DDS in time for the initial decision.

Once the claimant's file has been completed, the case is set for hearing unless the ALJ decides to issue a favorable decision without a hearing or to remand the claim for further evaluation at the agency level. At the hearing itself, claimants, on their own or through their representatives, can present any testimony and additional documentary evidence they wish. As mentioned earlier, the rate of claimant representation by attorneys is now about 70% with 18% of claimants represented by non-attorneys.[122]

3. Final Administrative Appeal: The Appeals Council Stage

The Appeals Council reviews factual findings only to assure that they are supported by substantial evidence; however, if additional evidence is submitted to the Council, it will review findings to determine if they are "contrary to the weight of the evidence" in the record, including the new evidence.[123] As discussed below in the context of closing the record, additional evidence can be submitted to the Appeals Council only if it is "new and material" and only if it relates to the claimant's condition up to the date of the administrative hearing decision.

Apart from evidence submitted by the appellant, there is very little additional development of the evidentiary record at the Appeals Council level. The Appeals Council disposes of virtually all cases on the basis of the written record, even when cases are accepted for

[122] *See* Part II(A), *supra*.

[123] 20 C.F.R. §§ 404.970(b), 416.1470(b) (2002).

review. There is a small medical support staff that may be consulted about further development of the medical record; however, if serious medical questions are raised, the Council usually will remand the claim back to the ALJ.[124] Moreover, even where a claim is remanded back to the ALJ for additional development and a new decision, the Council may remand the claim a second time if it appears that new evidence is still needed following the remand.[125]

**B. Closing the Record and Reopening Decisions**

The concept of "closing" a record arises in two very different contexts: preparing a record for decision and preserving a record of decision for review. The process of preparing a record for decision usually continues until the decision is reached; the record is closed at the time (or just before) the decision is made. This is what happens at the first two levels of disability claim processing: the initial decision and reconsideration. As described above, the DDS is charged first with developing the record to the point that a competent disability decision can be made. Then, once the record is complete, the DDS makes its decision based on the record it compiled. Closing the record doesn't become a real issue, then, until the ALJ stage.

1. Closing the Record at the ALJ Stage

If a reconsideration decision is appealed, the record compiled at the DDS is sent to the OHA and becomes the core record for the administrative hearing. As noted above, the

[124] *See* 20 C.F.R. §§ 404.977(a), 416.1477(a) (2002) ("The Appeals Council may remand a case to an administrative law judge so that he or she may hold a hearing and issue a decision or a recommended decision. The Appeals Council may also remand a case in which additional evidence is needed or additional action by the administrative law judge is required".) *See also* 20 C.F.R. §§ 404.726(b)(2), 416.1426(b)(3) (2002) ("If additional evidence is needed, the Appeals Council may remand the case to an administrative law judge to receive evidence and issue a new decision. However, if the Appeals Council decides that it can obtain the evidence more quickly, it may do so, unless it will adversely affect your rights".)

[125] *See* 20 C.F.R. §§ 404.977(e)(2), 416.1477(e)(2) (2002) (After receiving a recommended decision on remand, "if the Appeals Council believes that more evidence is required, it may again remand the case to an administrative law judge for further inquiry into the issues, rehearing, receipt of evidence, and another decision or recommended decision. However, if the Appeals Council decides that it can get the additional evidence more quickly, it will take appropriate action".)

administrative and OHA staffs then continue developing the record, as needed. In addition, the claimant-appellant is also free to submit additional evidence both before the hearing[126] and at the hearing itself.[127] This must be so, as the administrative hearing is a *de novo* review of the claim and the ALJ is directed specifically to decide the claim "based on evidence offered at the hearing or otherwise included in the record."[128] Moreover, the ALJ has an affirmative duty to assure that the record, including any live testimony offered by claimants and their witnesses, includes all of the information necessary to decide the case.[129] Thus, Social Security regulations provide that "[a]t the hearing, the administrative law judge looks fully into the issues, questions [the claimant] and the other witnesses, and accepts as evidence any documents that are material to the issues."[130]

Although less clearly stated and perhaps subject to some conditions, the record may still remain open even after the hearing. Sometimes, the claimant will request additional time to obtain evidence and the ALJ will simply hold the record open for a set numbers of days after the conclusion of the hearing in order to give the claimant time to do so. The ALJ may also continue

[126] Indeed, claimants are expected to identify additional evidence that will be submitted already at the time they request the hearing. *See* 20 C.F.R. §§ 404.933(a)(3), 416.1433(a)(3) (2002) ("You should include in your request . . . [a] statement of additional evidence to be submitted and the date you will submit it".)

[127] *See* 20 C.F.R. §§ 404.950(a), 416.1450(a) (2002) ("Any party to a hearing has the right to appear before the administrative law judge, either personally or by means of a designated representative, to present evidence and to state his or her position".)

[128] 20 C.F.R. §§ 404.953(a), 416.1453(a) (2002).

[129] *See, e.g.*, *Washington v. Shalala*, 37 F.3d 1437, 1442 (10th Cir. 1994) ("Even when a claimant is represented by counsel, an ALJ 'has a basic obligation in every social security case to ensure that an adequate record is developed during the disability hearing consistent with the issues raised.'") (quoting Henrie v. U.S. Dept. of Health & Human Services, 13 F.3d 359, 361 295 (10th Cir. 1993.))

[130] 20 C.F.R. §§ 404.944, 416.1444 (2002).

the hearing to a later date, pending receipt of additional evidence, or may reopen the hearing if additional evidence becomes available before the decision is issued.[131]

2. Submitting New Evidence at the Appeals Council

A claimant may submit additional evidence to the Appeals Council that will be considered together with the record from the hearing; however, the evidence must be "new and material" and it must relate to the time period relevant to the administrative hearing decision.[132] New evidence that is relevant only to the claimant's condition after the date of the hearing decision can be considered only in relation to a new application covering a new period of disability.[133] It can be very important for a claimant to be able to submit additional evidence concerning the time period covered by the administrative hearing decision because under the doctrine of administrative res judicata, any new application covering the same time period will be bound by an earlier finding of nondisability for that period.[134]

Although it seems clear that the Appeals Council must include any properly submitted new evidence that meets the "new and material" standard when deciding whether to grant a request for review, there is some disagreement as to whether such evidence can be considered by the courts when the Appeals Council refuses to grant review. Some circuits have held that such

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[131] *See* 20 C.F.R. §§ 404.944, 416.1444 (2002) ("The administrative law judge may stop the hearing temporarily and continue it at a later date if he or she believes that there is material evidence missing at the hearing. The administrative law judge may also reopen the hearing at any time before he or she mails a notice of the decision in order to receive new and material evidence".) *See also* HALLEX § I-2-680 (C) ("If an ALJ decides to admit additional evidence into the record of a case, or to conduct a supplemental hearing, he or she must reopen the record".)

[132] *See* 20 C.F.R. §§ 404.976(b), 416.1476(b).

[133] *See* 20 C.F.R. §§ 404.976(b)(1), 416.1476(b)(1) (2002) ("If you submit evidence which does not relate to the period on or before the date of the administrative law judge hearing decision, the Appeals Council will return the additional evidence to you with an explanation as to why it did not accept the additional evidence and will advise you of your right to file a new application".)

[134] *See Bogle v. Sullivan*, 998 F.2d 342, 346 (6th Cir. 1993) (earlier final decision is basis for denying subsequent applications involving the "same facts and the same issues" existing at the time of the first decision).

evidence is not part of the administrative record because the decision reviewed in the courts is the decision of the ALJ based only on the evidence that was submitted at the hearing. According to this position, the district court may consider new evidence even for this purpose only if it satisfies a stricter standard, mentioned below, for submitting "new and material" evidence to the court.[135] Other courts have ruled that any additional evidence submitted to the Appeals Council is properly part of the administrative record before the court, which means that the court can consider that evidence for purposes of substantial evidence review.[136]

By contrast, federal court review of SSA's final decision is based exclusively on the record developed at the administrative hearing or before the Appeals Council; new evidence in support of the claim cannot be introduced at the district court. However, if a claimant comes across "new and material evidence" after the administrative process is complete and can show "good cause" for failing to submit it earlier, the evidence can be presented to the court as a basis for remand.[137]

3. Reopening a Decision

As noted earlier, one can always file a new application for a new period of disability despite a final adverse decision on an earlier claim. Rather than simply reapply for benefits, a claimant can request that an earlier application be reopened. It is important to note, however, that filing a new application leaves the earlier decision in place. Therefore, to the extent that the new application overlaps with the earlier one, such as where the claimant's insured status has

[135] *See, e.g., Matthews v. Apfel*, 239 F.3d 589, 593 (3d Cir. 2001) ("when the Appeals Council has denied review . . . [and] . . . when the claimant seeks to rely on evidence that was not before the ALJ, the district court may remand to the Commissioner but only if the evidence is new and material and if there was good cause why it was not previously presented to the ALJ").

[136] *See, e.g., Cunningham v. Apfel*, 222 F.3d 496, 500 (8th Cir. 2000) ("The newly submitted evidence thus becomes part of the 'administrative record,' even though the evidence was not originally included in the ALJ's record").

[137] 42 U.S.C. § 405(g) (2000).

lapsed and he or she must prove onset during part of the period covered in the earlier application, the claimant can be bound by the earlier finding of nondisability through the operation of administrative res judicata.[138] An application can be reopened on SSA's own initiative, as well.[139]

There are three separate sets of criteria for reopening, defined by the time period within which a request to reopen is filed or the decision to reopen is made by SSA: within one year of the date of the decision, "for any reason"; within four years for Disability Insurance benefits or within two years for Supplemental Security Income, upon a showing of "good cause" (that includes the furnishing of "new and material" evidence[140]); and at any time, if the decision "was obtained by fraud or similar fault" or under certain other specific, limited circumstances dealing primarily with errors unrelated to disability determination.[141] However, SSA is not required to reopen a claim; the regulations state only that SSA "may" reopen a claim under one of the prescribed conditions. Moreover, a refusal to reopen is not subject to either administrative or judicial review.[142]

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[138] *See, e.g., Drummond v. Commissioner*, 126 F.3d 837, 842-43 (6th Cir. 1997).

[139] *See* 20 C.F.R. §§ 404.987, 416.1487.

[140] 20 C.F.R. §§ 404.989(a)(1), 416.1489(a)(1) (2002).

[141] 20 C.F.R. §§ 404.988, 416.1488 (2002). A mis statement on an application can constitute "fraud or similar fault" for these purposes where the claimant knew that the information was incorrect. *See Heins v. Shalala*, 22 F.3d 157, 161-62 (7th Cir. 1994). Until recently, there was some doubt as to whether SSA can reopen claims according to the same criteria as claimants; however, 1994 regulations make it explicitly clear that SSA may reopen claims on its own initiatives according to the same criteria as those applicable to requests by claimants. *See* 59 Fed. Reg. 8,532 (1994); 20 C.F.R. §§ 404.987(b), 416.1487(b) (2002).

[142] There is an exception for judicial review, if the refusal gives rise to a "colorable" constitutional claim. *See Califano v. Sanders*, 430 U.S. 99, 109 (1977).

A reopened application is reviewed and revised, if appropriate, based on the evidence in the record and any supplemental evidence submitted by the claimant or obtained by the Administration. A revised decision can be appealed in the same manner as any other decision.[143]

**C. Attorney's Fees**

There are several sources of attorney's fees in Social Security cases. Most awards by far are paid out of the claimant's benefits pursuant to the Social Security Act and federal regulations.[144] Another significant source of fees is the Equal Access to Justice Act (EAJA), a government-wide fee-shifting statute that authorizes the payment of fees out of agency funds under limited circumstances. Congress chose to regulate the payment of attorney's fees by claimants for several reasons, the two most important of which were potentially conflicting goals of encouraging capable attorneys to represent Social Security claimants and preventing attorneys from receiving excessive contingent fees.[145] The EAJA has a different purpose: to hold the government accountable for the cost of representation when a citizen or small business successfully litigates against the government on an issue that probably shouldn't have been litigated in the first place.

The rules concerning both types of fees are relevant to the issues covered in this report. Fees paid by claimants are tied to a significant degree to the amount of part-due benefits awarded when a claim is granted; as delay will increase the amount of past-due benefits, this can add a perverse incentive to the process. EAJA fees are available currently in Social Security cases only if the claimant prevails against SSA in court. With respect to the administrative process, the

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[143] *See* 20 C.F.R. §§ 404.993, 416.1493 (2002).

[144] *See generally* 42 U.S.C. §§ 406, 1383(d)(2) (2000); 20 C.F.R. §§ 404.1720-.1735, 416.1520-.1535 (2002).

[145] *See generally Pappas v. Bowen*, 863 F.2d 227, 230-31 (2d Cir. 1988); *Dawson v. Finch*, 425 F.2d 1192 (5th Cir. 1970).

EAJA applies only to "adversary" proceedings; therefore, introducing a government representative (a potential adversary) at the administrative hearing could increase substantially the awarding of EAJA fees in Social Security cases.

1. Fees Available under the Social Security Act

A request for fees under the Social Security Act for representation of a claimant at an administrative hearing or before the Appeals Council must be made in writing; the request must be detailed, and must include a complete list of services performed and the amount of time spent.[146] Another option is for a claimant and his or her representative to agree on a fee, which cannot exceed 25% of the claimant's past-due benefits or $5,300, whichever is less. The agreed fee will be awarded automatically unless objected to by the claimant, the representative, or the agency.

SSA will withhold up to 25% of past-due benefits for direct payment to attorneys in DI cases.[147] Effective February 1, 2000, Congress imposed a "user fee" on attorneys whose fees are paid out of withheld past-due benefits; the user fee comes out of the approved attorney's fee and is not an additional cost to the claimant.[148] SSA's authority to set the amount of an attorney's fee award operates separately from the direct payment program. Thus, a fee can be authorized for an amount greater or smaller than the amount that can be withheld and paid directly; indeed, SSA can authorize a fee even when no past-due benefits would be due. There is no authority for withholding benefits for fees in SSI cases.[149]

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[146] The factors included in evaluating a fee request are the type and amount of services performed, the difficulty of the case, including the skill required of the representative, and the results achieved. *See generally* 20 C.F.R. §§ 404.1725, 416.1525.

[147] *See* 42 U.S.C. § 406(a)(2)(A) (2000); 20 C.F.R. §§ 404.1720(b)(4), .1725 (2002).

[148] *See* 42 U.S.C. § 406(d) (2000).

[149] *See* 20 C.F.R. § 416.1520 (2002).

Courts can also award fees for representation in judicial proceedings in DI cases. The Social Security Act limits the amount of an attorney's fee for court litigation in DI cases to a maximum of 25% of past-due benefits.[150] Fees for SSI cases in court are governed by SSA regulations, but not by the Social Security Act.[151]

2. Fees Available under the Equal Access to Justice Act

The Equal Access to Justice Act (EAJA) permits prevailing parties to obtain awards of attorney fees and other expenses against the United States in certain administrative proceedings and judicial actions, if the government's action is found not to be substantially justified.[152]

The Act applies to cases where the SSA claimant prevails in federal court.[153] But with limited exceptions, it has not applied to the SSA administrative hearing process because the Act limits coverage to "adversary adjudications," which are defined to include adjudications "under [5 U.S.C. §554] in which the position of the United States is represented by counsel or otherwise . . . ." This raises the question whether the use of government attorneys in SSA disability proceedings would trigger broader EAJA applicability in SSA administrative adjudication.

Attorney's fees may now be awarded under the EAJA for representation in administrative hearings in social security disability proceedings only in certain limited situations—involving

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[150] 42 U.S.C. § 406(b)(1) (2000).

[151] *Compare* 20 C.F.R. § 416.1540(b) (2002) with 42 U.S.C. § 1383(d)(2) (2000).

[152] *See* 5 U.S.C. § 504(a)(1) (2000):

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

[153] *See* 28 U.S.C. § 2412(d)(3) (2000).

cases remanded by the federal courts. In *Sullivan v. Hudson*,[154] the Supreme Court held that while EAJA attorney's fees may not be recovered for typical SSA administrative proceedings—since such proceedings are not adversarial—attorney's fees may be granted when a social security disability denial has been appealed to federal court and then remanded to the agency. The Court said:

> We conclude that where a court orders a remand to the Secretary in a benefits litigation and retains continuing jurisdiction over the case pending a decision from the Secretary which will determine the claimant's entitlements to benefits, the proceedings on remand are an integral part of the "civil action" for judicial review, and thus attorney's fees for representation on remand are available subject to the other limitations in the EAJA."[155]

In these instances, the proceeding has become an "adversarial adjudication" for purposes of the EAJA.[156]

In 2002, the Supreme Court resolved the question of the possible overlap of the EAJA and the Social Security Act's attorney fee provisions. *Gisbrecht v. Barnhart*[157] held that Congress had provided that EAJA fees for claimants prevailing in court supplement the fees

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[154] 490 U.S. 877 (1989).

[155] 490 U.S. at 892.

[156] *Id*. Justice White, writing for four dissenters, criticized the majority for ignoring the "plain language" of EAJA's definition of "adversary adjudication," which requires the presence of government representation. *Id.* at 893.

Subsequently, in *Melkonyan v. Sullivan*, 501 U.S. 89, 102 (1991), the Supreme Court clarified the timing of when EAJA fees may be sought following social security disability proceedings. The Court said:

> In sentence four [of 42 U.S.C. § 405(g)] cases, the filing period begins after the final judgment ("affirming, modifying, or reversing") is entered by the court and the appeal period has run, so that the judgment is no longer appealable. . . . In sentence six cases, the filing period does not begin until after the postremand proceedings are completed, the Secretary returns to the court, the court enters a final judgment, and the appeal period runs.

*See also Shalala v Schaefer*, 509 U.S. 292, 293 (making clear that "a Social Security claimant who obtains a sentence four judgment reversing the Secretary's denial of benefits meets the description of a 'prevailing party,'" given that not only do sentence four remands terminate the litigation with victory for the plaintiff, but a judgment authorized by sentence four becomes a "final judgment" when the time for appeal has expired); and *Arisitzabal v. Chater*, 1998 WL 426634 1, 1, 57 Soc. Sec. Rep. Serv. 411 (E.D.N.Y. 1998).

[157] 535 U.S. 789, 122 S. Ct 1817 (2002).

payable to attorneys out of the claimants past-due benefits under § 406(b) of the Social Security Act: "Fee awards may be made under both prescriptions, but the claimant's attorney must 'refun[d] to the claimant the amount of the smaller fee.'"[158]

The question of whether the injection of government representatives into SSA administrative hearings would, perforce, make them all covered by EAJA was raised in the comments submitted to SSA's original proposed rule setting up the SSARP. SSA responded:

> There are several reasons why we do not believe the EAJ Act will appreciably affect SSA proceedings under this project. First, it remains to be determined whether the circumstances of the SSA representative project render the adjudication adversarial for purposes of the EAJ Act. Second, there is some question as to whether the existing attorney fee provisions of the Social Security Act preempt the provisions of the EAJ Act.[159] Finally, there will presumably be few cases in which the position taken by the SSA representative will not be "substantially justified," since the SSA representative will have the authority to propose allowance of those claims which present a clear case for entitlement or eligibility for benefits.[160]

Subsequently, after the end of the project, SSA addressed this issue again when it issued rules implementing amendments made to EAJA [Pub. L. No. 99-80] that became effective on August 5, 1987, because some cases decided under the project that were still pending could have been eligible for EAJA fees.[161] SSA explained why it decided to include these cases in its list of adversary adjudications:

> The legislative history of Pub. L. 99-80 contains several references to the [SSARP]. . . . HHS halted the project in response to a district court order on July 16, 1986, and we subsequently discontinued the project and revoked the above-cited regulatory provisions. HHS has taken the position that proceedings in this project were not within the scope of the EAJA as originally enacted, and thus Appendix A to the regulation does not list them. The legislative history of Pub. L.

[158] 122 S. Ct. at 1822, citing Pub. L. 99-80, (1985) § 3.

[159] Authors' note—this was resolved in 1985, *see Gisbrecht v. Barnhart*, *supra* note157.

[160] Proposed rule, *infra* note 167, 47 Fed. Reg. at 36,121.

[161] Department of Health and Human Services, Office of the Secretary, Notice of Proposed Rulemaking, *Implementation of the Equal Access to Justice Act in Agency Proceedings*, 52 Fed. Reg. 23,311 (June 19, 1987).

> 99-80 evidences the intent of some current members of Congress that the EAJA as revived and amended should apply to cases in this project. HHS has determined that the EAJA should be applied to all cases in this project where the project representative, at a hearing, represented an agency position opposing entitlement to benefits and where there was no final agency decision on the underlying merits before August 5, 1985, the effective date of Pub. L. 99-80. Thus, the proposed regulation would add these proceedings to Appendix A. Because the project has been discontinued, this reference in Appendix A will cover only those proceedings in which hearings were held while the project was still in effect.[162]

Given this history and the recent caselaw extending EAJA coverage to some non-APA administrative adjudications,[163] it would be difficult for SSA to argue that its ALJ hearings would not be covered by EAJA if its representatives were to participate as advocates in the hearings.

Under current law, with EAJA primarily covering only court litigation against the SSA, the Supreme Court has ruled that fee awards may be made under both statutes, but that claimant's attorneys must refund to claimants the amount of the smaller fee.[164] Fees awarded under EAJA are paid from the agency's budget,[165] unlike fees awarded under the Social Security Act which are payable to attorneys out of the claimants past-due benefits. This means that claimant's attorneys would have the incentive to seek fees under both statutes so that their client's benefits are reduced as little as possible. If EAJA coverage were expanded to all SSA

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[162] *Id.* at 23,312 [internal citations omitted].

[163] *See e.g., Lane v. USDA*, 120 F.3d 106 (8th Cir. 1997) (Adjudication conducted by hearing officers in the USDA's National Appeals Division are "adversary adjudications" covered by EAJA), and *Collord v. U.S. Dept. of Interior*, 154 F.3d 933 (9th Cir. 1998) (although statute governing extinguishing of mining patent did not expressly call for formal APA adjudication, an APA hearing was constitutionally required; thus under *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), the hearing was governed by § 554 of the APA, thus making plaintiffs eligible for EAJA reimbursement).

[164] *Gisbrecht v. Barnhart*, *supra* note 157.

[165] *See* 5 U.S.C. § 504(d) (2000).

administrative adjudications by virtue of the addition of government representatives, the potential budget implications for SSA could be quite significant, due to the high volume of cases.

This is true notwithstanding the fact that EAJA awards in individual SSA cases are relatively small, when compared to such fees in other court litigation against the government. In 1993 Harold Krent analyzed data on SSA EAJA fee applications between June 1989-June 1990, drawn from SSA's own reports and data collected by the Administrative Office of the U.S. Courts (AO). The AO's data on 385 EAJA applications in social security cases showed that 350 (91%) were granted (thus showing that the substantial justification defense does not pose much of a hurdle). For those 350 cases the mean award was $3346. More complete data compiled by SSA showed 2007 applications for EAJA fees resolved, with 1700 (85%) granted. Of the applications granted, the mean request was $3584, and the mean award was $3244. These figures compared to a mean of $48,000 in non-SSA court litigation and $10,305 for all (non-SSA, of course) agency adjudications during the same period.[166] Even so, with over 250,000 SSA ALJ reversals of initial denials a year, if 200,000 of these resulted in awards of $5000 (taking into account inflation since 1990), that could easily result in another $100 million drain on SSA's budget (since EAJA fees must be paid from agency appropriations according to 5 U.S.C. § 504(d)).

This potential drain on the public fisc, if broad EAJA coverage of administrative hearings were to be triggered, while perhaps not a determinative consideration, is certainly another reason for not casting the government "representative" in an adversarial role, when providing additional governmental resources to the development of the record for decision.

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[166] *See* Harold J. Krent, *Fee Shifting Under The Equal Access To Justice Act -- A Qualified Success*, 11 YALE L. & POL'Y REV. 458, 485-89 (1993).

## V. Social Security Administration's Representation Project (SSARP)

### A. Background

The Social Security Administration's Representation Project (SSARP), begun in 1982, was described as follows:[167]

> SSA has decided to undertake a limited test using special SSA representatives in connection with disability hearings in selected hearing offices. We wish to determine whether the participation of SSA representatives will sharpen factual issues, improve case record development and contribute to improved quality, consistency and timeliness of case dispositions at the hearing level.[168]
>
> When the case file is received at the hearing office, the SSA representative will examine it to determine whether it is ready for a hearing. If necessary the SSA representative will initiate further case record development. After the case is fully prepared for a hearing it will be assigned to an administrative law judge who will review the record and conduct the hearing.
>
> During the prehearing stage, the SSA representative may contact the claimant's representative to clarify the issues in dispute. In addition, the SSA representative may meet with witnesses who will appear at the hearing. The SSA representative may recommend to the administrative law judge that the issues in dispute, as agreed to by the SSA representative and the claimant's representative, be considered as the issues at the hearing. The SSA representative may also petition the ALJ to include new issues, or to dismiss the case for jurisdictional reasons or may ask that the administrative law judge disqualify himself or herself when appropriate under the regulations. On the other hand, where the evidence clearly establishes the claimant's entitlement, the SSA representative may recommend that the administrative law judge issue a favorable decision without the need for a hearing.
>
> If the claimant is represented at the hearing, the SSA representative will also appear at the hearing. The SSA representative will be able to carry out all of the functions of a party to the hearing. . . . After the hearing, the SSA representative will not participate in any proceedings before the Appeals Council, although the

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[167] Department of Health and Human Services, Social Security Administration, Federal Old Age, Survivors and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled*; Final Rule: Project To Improve the Hearing Process Through the Involvement of SSA Representatives*, 47 Fed. Reg. 36,117 (Aug. 19, 1982). The regulations were initially proposed on January 11, 1980 (45 Fed. Reg. 2345). That proposal was withdrawn, after public hearings, in a notice published on July 14, 1980 (45 Fed. Reg. 47,162). On February 18, 1982, SSA published a notice reinstating the proposed rules (47 Fed. Reg. 7261).

[168] 47 Fed. Reg. at 36,118.

> Appeals Council may exercise its authority to review any case on its own motion. The SSA representative may be involved in cases which are remanded by the Appeals Council if the SSA representative participated in the prior proceedings which are the basis for the Appeals Council remand order.[169]

In the preamble to this final rule, the agency explained how the final rules differed from the proposed rules.[170] It listed a number of changes made after the comment periods.

- The SSA representative will participate in the hearing whenever the claimant has an appointed representative at the hearing, whether an attorney or a nonattorney.
- The SSA representative's role will not be limited to the issue of disability.
- The SSA representative will be directly employed by SSA's Office of Hearings and Appeals (OHA).
- All disability cases in the participating hearing offices will be subject to the provisions of these regulations.
- The SSA representative will not be prohibited from meeting with the claimant's witnesses, subject to the consent of the claimant and his or her representative.
- The SSA representatives will be permitted to refer cases to the Appeals Council for possible own-motion review.

The project commenced in October 1982 in five hearing offices located in Baltimore, MD; Brentwood, MO; Columbia, SC; Kingsport, TN; and Pasadena, CA. The Brentwood hearing office ceased to participate in October 1983.

In 1984, the SSA issued a notice continuing the project for at least another year.[171] It explained that the reason for the extension was "[d]ue to the limited duration of the project to date, the normal start-up problems in implementing such a change in the usual hearing process, and the limited Appeals Council and court experience to date."

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[169] *Id.*

[170] *Id.* at 36,118-36,120.

[171] Department of Health and Human Services, Social Security Administration, Federal Old Age, Survivors and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled; Project To Improve the Hearing Process Through the Involvement of SSA Representatives, *Notice of Continuance of the SSA Representation Project*, 49 Fed. Reg. 13,872 (April 9, 1984).

In 1986, the SSA issued a notice of continuance and restructuring of the SSA representation project under auspices of the adjudicatory improvement project (AIP).[172]

It stated that under the AIP:

> [A]n agency-wide task force that will manage all aspects of the field testing of the Social Security Administration (SSA) Representation Project and conduct all data collection, evaluation, and planning activities required to determine whether (1) permanent implementation of SSA representation should be proposed; (2) restructuring of the operational format of the SSA Representation Project; and (3) evaluation of testing under this restructured format after 1 year beginning April 30, 1986.

The agency also explained that:

> Operational experience under the SSA Representation Project as conducted to date indicates that representation may result in improvement in the hearing process. However, reaching a sound decision on whether to propose permanent implementation of SSA representation requires that testing be continued in a restructured format and evaluated under agency-wide auspices.
>
> Based on these considerations, we are restructuring the operational format of the SSA Representation Project as follows:
>
> (1) Organizational separation of the representatives from OHA will be tested by physically separating their offices from participating ALJ hearing offices, by providing necessary staff and by placing them under the management of the Adjudicatory Improvement Project.
>
> (2) To determine the full effectiveness of SSA representation, case processing procedures will be revised so that after a request for hearing is filed, the SSA component having the claim file(s) will forward it directly to the office of the SSA representative. Claim files will be available for inspection in those offices, and copies of the evidence will be made available to the claimants or their appointed representatives.
>
> (3) To determine the cost effectiveness of SSA representation, we will: (a) test the efficiency with which a single office of representatives can service more than one ALJ hearing office by relocating our project office in Pasadena to Upland, from

[172] Department of Health and Human Services, Social Security Administration, Federal Old Age, Survivors and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled; Project To Improve the Hearing Process Through the Involvement of SSA Representatives, *Notice of Continuance and Restructuring of the SSA Representation Project Under Auspices of the Adjudicatory Improvement Project*, 51 Fed. Reg. 21,156 (June 11, 1986).

which it will service both the Pasadena and the San Bernardino ALJ hearing offices; and (b) include cases in the project that require travel by the ALJ and the SSA representative.

(4) Administrative procedures are being established to allow assessment of how SSA representation could contribute to improved communication and feedback by establishing liaison functions between the offices of the SSA representatives and the State agencies, district offices, hearing offices and SSA central office components.

(5) To improve the way in which SSA representation is assessed—

(a) Statistical sampling and assessment methodologies will be applied to data derived from participating hearing offices and matched comparison hearing offices:

(b) Enhanced data and management information will be collected;

(c) An end-of-line sample of cases from both participating and comparison offices will be reviewed to determine decisional consistency and uniformity;

(d) A comprehensive cost analysis study will be made to determine the impact of SSA representation on the SSA appeals process; and

(e) The use of opinion polls to help us determine participant reaction to SSA representation is being explored.

Following the close of 1 year of testing, we will evaluate test results to determine whether SSA representation should be continued or terminated. The number of participating hearing offices will not be increased except by amending the existing regulations through the notice and public comment procedures required for rulemaking. No proposal to permanently implement SSA representation will be made without consultation with Congress.

In July 1986, the federal district court in *Salling v. Bowen*,[173] issued an injunction against continuation of the program. While an appeal was pending with the Fourth Circuit, the SSA decided to end the program, and revoked the regulations "pertaining to all aspects of the field testing of the [SSARP]" and the appeal was never heard.[174]

[173] 641 F. Supp. 1046 (W.D. Va. 1986).

[174] Department of Health and Human Services, Social Security Administration, Federal Old Age, Survivors and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled; Final Rule, Discontinuance of the SSA Representation Project., 52 Fed. Reg. 17,285 (May 7, 1987).

The agency gave a rather terse explanation for this decision:

> After consideration of all the factors involved, we have decided that the Project will not be resumed, regardless of the ultimate disposition of the litigation. The decision to terminate is based on managerial, administrative, and budgetary considerations, and was made only after careful consideration of all factors, including the fact that SSA had to stop the Project to comply with the district court's injunctive order. Additionally, SSA had made commitments to Congress that the Project and the agency's evaluation of government representation in Social Security hearings would be concluded by April 1987. Resumption of the Project so as to generate sufficient information on which to evaluate government representation in Social Security hearings prior to that date is not possible. With increasing workloads before SSA, it was decided that the administrative resources which would have had to have been committed to the resumption of the Project and further testing of the concept of government representation can best be utilized in other ways.
>
> The Department has since chosen to discontinue the Project, regardless of the outcome of the lawsuit, is no longer holding hearings under these regulations, and so informed the Court of Appeals for the Fourth Circuit, where the district court's order was on appeal. Repeal of these regulations is therefore merely a formality and use of notice and public comment procedures is unnecessary.

**B. SSA's Interim Report on the SSARP.**

In June 1986, SSA, under the auspices of the Adjudicatory Improvement Project, prepared a report on the SSARP covering the period from its inception (October 12, 1982) to September 30, 1985.[175] It was called an interim report because a final report was to have been issued after further testing—but with the termination of the project, no such report was made.

Data were compiled on 15,552 SSARP case dispositions. In 60.7% of these cases, SSA representatives undertook prehearing case development. By contrast, ALJs undertook this responsibility in only 2% of the cases, thus leading the study to conclude that there was "a high degree of ALJ acceptance of SSA representative evidence development."[176]

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[175] Social Security Administration, Office of Hearings and Appeals, *Interim Report SSA Representation Project* (June 1986) (hereinafter "Interim Report").

[176] *Id.* at 2.

More specifically, the study found that SSA representatives primarily initiated case development from treating physicians—requesting information from such sources in 47% of all project dispositions. This compared to requests for consultative examinations in 11.5% of the cases. Other existing medical evidence was sought in 22% of the cases.[177] To some extent this emphasis was affected by the practices of the various state agency development practices—which reflected consultative examinations in over 50% of the cases and widely different rates of providing additional medical evidence.[178]

In addition, SSA representatives recommended dismissals in 2.8% of the cases (which were accepted by the ALJs 74.3% of the time). They also recommended "fully favorable" decisions in 7% of the cases (which were approved by ALJs in 90.7% of the time). This represented 17.5% of all fully favorable decisions. These "favorables" were recommended at the same rate for represented and unrepresented claimants.[179]

SSA representatives also made recommendations to the ALJs for calling expert medical or vocational witnesses. They did so in 18.9% of the cases involving unrepresented claimants and in 28.6% of the cases involving represented claimants. The great majority of these experts were vocational experts.[180]

Once the case made it to the hearing stage, SSA representatives only participated when the claimant was represented. This was the case in 66.3% of the project dispositions, and in 72.1% of hearings held in project cases (a total of 8,519 hearings). In such hearings, SSA representatives submitted additional evidence in 2.6% of these hearings, while claimant

[177] *Id.* at 3.

[178] *Id.* at 4.

[179] *Id.* at 5.

[180] *Id.* at 6.

representatives did so in 80% of the hearings. Postponements or continuances were requested in 22% of these cases, but 85.2% of these requests were filed by claimant's counsel, compared to 2.3% by the SSA rep.[181]

As for hearing length, those involving unrepresented claimants averaged 39 minutes, while those involving represented claimants (and SSA representatives) averaged 53 minutes.[182]

The overall hearing stage processing time for project cases (including cases decided without an oral hearing) averaged 178 days and was further broken down by stages: (1) the time from the request for hearing to the receipt of the case in the Social Security Representation Office (SSARO) averaged 49 days; (2) from receipt to assignment to the ALJ averaged 12 days; (3) from assignment to the hearing date averaged 59 days; and (4) from the hearing to date of disposition averaged 68 days. Only the time spent in the second stage (12 days) was solely attributed to actions by the SSA representatives.[183]

With respect to post hearing development, claimants' representatives requested additional record development after the hearing in 16.6% of the represented dispositions, compared to requests by SSA representatives in 5.6% of those dispositions.[184]

Represented claimants achieved a fully or partially favorable decision in 57.6% of the decisions (or in 51.9% of the cases when dismissals are included); while unrepresented claimants did not fare as well—49% fully or partially favorable decisions (38.5% when dismissals are

[181] *Id.* at 7.

[182] *Id.*

[183] *Id.* at 9.

[184] *Id.* at 7.

included). Since unrepresented claimants were not opposed by SSA representatives once the case is assigned for hearing, this result is significant for the claimant's ability to recover.[185]

At the Appeals Council (AC) stage, data for 1983 and 1984 showed that claimants had requested AC review in 72.3% of the unfavorable ALJ decisions, but that such review was granted in only 6.7% of the cases. Under the Project, SSA representatives could also refer a case for possible "own motion" review by the AC. They did this in 10.2% of the favorable decisions. Almost half of these requests (47.8%) were granted.[186]

With respect to judicial review in the federal district court, 27% of final unfavorable SSA determinations in project cases (AC request of a denial of review, affirmation of an ALJ unfavorable decision, or reversal of an ALJ favorable decision) were appealed in 1983-September 1984. This was 16% lower than the national appeal rate of about 32%.[187]

Judging from the figures contained in this report, the SSARP did have some success in freeing the ALJs from having to undertake case development (in all but 2% of the cases), but it is harder to identify any overall case processing efficiencies. Also, although SSA representatives only rarely took the initiative to recommend fully favorable decisions before the hearing, on the other hand, neither did they take a particularly aggressive approach to preparing for the hearing. For example, they initiated case development primarily from treating physicians rather than from consultant physicians. They also submitted additional evidence at the hearings and sought continuances much less frequently than claimant's counsel. While hearings with both claimant and SSA representatives took longer than hearings involving unrepresented claimants (where no

[185] *Id.* at 8. It should be noted that unrepresented claimants may have weaker cases to present, since claimants' attorneys presumably screen cases to decide whether they are worth taking.

[186] *Id.* at 10.

[187] *Id.* at 11.

SSA representative was present), represented claimants still fared significantly better than unrepresented claimants notwithstanding the presence of SSA representatives. Finally, although SSA representatives did have significant influence in initiating Appeals Counsel review, the percentage of appeals to the courts by losing claimants in SSARP cases was significantly lower than usual. In sum, while the SSA's own report shows a mixed picture, the figures statistics disclosed above do not indicate that the government representatives overreached by opposing claimants' counsel in an unduly adversarial way.

### C. The Federal District Court Injunction in *Salling v. Bowen*

In November 1982, just one month into the experiment, the SSARP was challenged in the Western District of Virginia by seven applicants for Social Security benefits, seeking injunctive and declaratory relief. In 1986, *Salling v. Bowen*,[188] Judge Glen M. Williams granted the relief and this decision ultimately led to the ending of the project.

In his introductory paragraphs to his treatise-like opinion, Judge Williams indicated his rather jaundiced view of the SSA disability process:

> [T]he administrative processes in the SSA should be the fairest in any of the various administrative procedures of government. It should be simple, efficient, streamlined and speedy within due process limitations. In actuality, the administrative procedures for obtaining Social Security are the most cumbersome, unfair, contradictory, inefficient to be found in all the various government agencies in all the bureaucracy. . . . The administrative processes which are conducted in Social Security cases should be designed to seek out the truth; instead, the hearing processes from the time a person applies for disability Social Security benefits through the Appeals Council procedures are geared to deny claims rather than pursue truth wherever it leads. . . . Of course, perfect justice is elusive, but something is wrong in this society where this particular process is so lengthy, the procedures so cumbersome, and the rules and regulations so subject to change.[189]

[188] 641 F. Supp. 1046 (W.D. Va. 1986).

[189] *Id.* at 1051-52.

One of Judge Williams' main concerns was ALJ independence. He was concerned about the SSARP's provision for extensive case development by the SSA representative (SSAR) and late involvement by the ALJ:

> Instead of going to the OHA in Kingsport, the claim file goes directly to the SSARP office and remains under its control until such time as the case is ready for hearing. Only then will the ALJ see the file and have anything to do with the case. The SSARP offices do all the prehearing screening, case docketing, control, selection of documents to be included in the hearing exhibit, preparation of the exhibit list, preparation and release of development requests, contact with the attorney if there is one, and contact with the claimant where there is no attorney and direct intervention on the part of an SSAR where the person is not represented, by communication with the claimant. Indeed, the ALJ who will eventually try the case will not know that he is assigned to the case until the case has been received in the OHA for hearing. . . . This again acts as a halter on the independence of the ALJs in the handling of cases, and places the file not in the hand of an independent person but in the hands of an advocate of the government.[190]

More critically, Judge Williams also found that the project increased delays in case handling:

> In some instances, the time for hearing a case is three times as long; there is a longer delay between the request for a hearing and the hearing: the number of cases disposed of by the ALJs has decreased; more cases are being referred to the Appeals Council for own-motion reviews by the SSARs, many of which should not have been sent to the Appeals Council for own-motion review: which cumulatively has resulted in great harm to claimants by causing delay in their receipt of benefits.[191]

He also determined that there were fewer decisions favorable to the claimants in the participating OHA offices, that uniformity in decisionmaking in those offices did not improve, that in at least one case the SSAR failed in his duty to develop the evidence, and that the SSAR's improperly referred favorable decisions to the Appeals Council for review.[192]

Finally, he also noted a report on the use of SSARs to present oral argument in 25 Social Security appeal cases before a United States Magistrate, stating that "The court appearances by the SSARs is completely outside the scope of the Secretary's regulations for the SSARP and are

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[190] *Id*. at 1060.

[191] *Id*. at 1060-61.

in violation of the provision that SSARs will not participate in claims beyond the ALJ hearing stage."[193]

In the end Judge Williams's distrust of SSA's motives in regard to its ALJs is apparent in the following scathing passage:

> This court finds that both the SSARP and the AIP are simply nothing more nor less than an attempt by the bureaucracy to control the independence of the ALJs. Their mission is to employ people who will have control of the files before they go to the ALJ. This program began in an announced purpose of having the representatives develop the case and permit the judge to sit and objectively hear and, if necessary, further develop and decide the case. By giving the file to the SSAR instead of to the ALJ it permits the government a second chance to defeat the claim by new medical evidence without the claimant knowing anything about it. It affords the opportunity for the SSARs to go fishing for additional evidence to support the government's position. In essence, there are persons in the administration who do not trust judges and in particular, do not trust ALJs and who want to destroy their independence, and have used the SSARP and AIP process to aid in their efforts.[194]

Judge Williams held that the procedures used in the SSARP were not "fundamentally fair" as required by *Richardson v. Perales*,[195] and violated the three-pronged test for due process as propounded by *Mathews v. Eldridge*.[196]

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[192] *Id.* at 1063, citing his own decision in *Darnell v. Bowen*, 631 F. Supp 96 (W.D. Va. 1986).

[193] *Id.* at 1067, n. 12.

[194] *Id.* at 1067.

[195] 402 U.S. 389, 401 (1971).

[196] 424 U.S. 319 (1976). The test requires: "consideration of three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 321. The *Mathews* test, of course, only comes into play where there is a threatened deprivation of life, liberty, or property. Judge Williams finds it "obvious that, in a Social Security context, a person has a property interest to protect." *Salling v. Bowen, supra* note 188, at 1068. This is certainly true where the government is seeking to take away existing benefits, but is less obvious where the government is denying an initial claim for benefits.

**D. Evaluation of Judge Williams' Decision in *Salling*.**

The government prepared an appeal of *Salling v. Bowen* but decided not to pursue it. So the decision stands unreviewed. However, despite Judge Williams's exhaustive review of the program and the context in which it was operating, there are a few assumptions made by the court that should not go unchallenged.

One fallacy is the assumption that the favorable cases decided prior to the institution of the SSARP were all correctly decided. For example, he stated:

> The statistics show that in the five OHAs originally involved in the experiment prior to the adversarial proceeding beginning, about five out of ten claimants had strong enough cases to justify the granting of benefits, however, since the SSARs entered the picture, they have recommended that only one out of ten claimants has a strong enough case. Thus, the SSARs are opposing ninety percent of all the claimants with strong enough cases to win.[197]

He also suggested that the SSARs were improperly referring cases to the Appeals Council for review:

> The SSARs, using their authority to refer cases to the Appeals Council have adopted an adversary appellate process as shown by the undisputed evidence in this case. They, therefore, refer decisions favorable to the claimant 20% of the time according to the statistics which have been presented. . . . Without the SSARs, it is probable that none of these cases would have been before the Appeals Council for its own-motion review.[198]

These observations seem to assume that the SSAR's role was to be the *claimant's* advocate. However, given that claimants have their own representatives, the SSAR's role was to provide objective advice to the ALJ and to the Appeals Counsel about the need for review. It is hardly surprising that the SSARs did not recommend grants of benefits before hearing at the same rate that benefits were previously granted by the ALJs. Nor should it be surprising that the SSARs recommended Appeals Council review of 20% of the cases granted by ALJs. Judge

[197] *Salling v. Bowen*, 641 F. Supp. at 1069.

Williams did not find an overall reduction in benefits; what he did find was an improper delay in payments.[199] Delay is a concern, of course, but whether it rises to the level of a due process violation that justifies permanent termination of any type of government representation is a doubtful proposition.[200]

Judge Williams' decision is clearly affected by his concern about ALJ independence within the SSA. He concluded by stating that the "administrative procedures used in making Social Security disability determinations are a cumbersome 'Rube Goldberg' process at best, which have been further encumbered by a threat to the independence of the ALJs who are the only people in the entire system who are oriented toward the main goal which should be the seeking of truth and ultimate triumph of justice."[201] This concern was understandable given what became SSA's illegal actions against its ALJs in the 1980's.[202] Those actions have been roundly criticized and the agency is unlikely to repeat them. Moreover, the ALJ community now favors government representation in SSA disability cases. In testimony to the House Social Security Subcommittee, the President of the Association of Administrative Law Judges stated:

> The past pilot program of the government representation project was not an adequate test of this system. The SSA should implement a new test program for agency representation at the hearing. This pilot project should be implemented with the claimants' bar, SSA employee organizations, our Association, and other

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[198] *Id.*

[199] In its brief to the Fourth Circuit, in addition to questioning the judge's statistical analysis, the government argued the district court's finding that there had been no drastic reduction in favorable decisions in the Kingsport office was a "telling indicator of the fairness of the project." *See* Reply Brief for the Appellant, *Salling v. Bowen*, No. 86-2121 (4th Cir. 1986) (appeal withdrawn) (on file with authors) at 4.

[200] It should be noted that the permanent injunction issued by Judge Williams in this case only extends to "any further proceedings using the SSARP or the AIP in any of the remaining five participating OHAs throughout the United States." *Salling v. Bowen*, 641 F. Supp. at 1074. In its brief to the Fourth Circuit, the government argued that since no class was certified in this case, the judge erred in granting relief beyond the one OHA office over which it had jurisdiction. *See* Reply Brief for the Appellant, *supra* note 199, at 2, 16-18.

[201] 641 F. Supp. at 1073.

[202] *See Ass'n of Administrative Law Judges v. Heckler*, 594 F. Supp. 1132 (D.D.C 1984).

> interested groups. The pilot program should address the issues raised by the court in Salling. The objective is to establish a hearing process that provides a full and fair hearing for all parties who have an interest in the case.
>
> In addition, in the current non-adversarial setting, the SSA ALJ has the legal responsibility to "wear three hats" in each case. The ALJ legally is bound to ensure that all of the claimant's relevant and material evidence is made part of the record and the claimant's interests are protected, to protect the interests of the government in the hearing, and to make a fair decision which is based on the evidence in the record. Additionally, the judge must take care not to become overly protected of the interest of the government for fear that the case will be reversed on appeal on a claim of bias against the claimant. The inherent conflict in all of these roles is patent and would be resolved by having the government represented at the hearing.[203]

Our conclusion is that while the *Salling* decision did illuminate some significant problems with the SSARP, it went too far (even in its own terms and time) by holding the use of government counsel to be a violation of due process. *Salling* should not be seen as an obstacle to a renewed experiment concerning the use of government "advocates," if SSA wishes to attempt one. Any such experiment should draw lessons from the SSARP, and avoid some of its pitfalls. For example, such an experiment should not be limited to five locations. Nor should it simply involve inserting SSA attorneys into the process as advocates without adequate orientation and training, and without adjusting other aspects of the process to take account of this change. Also the use of such attorneys to present oral argument in federal district court against the claimant's award should be avoided as well, since that is clearly an adversary role.

We believe, however, that the goals of the SSARP can be met with an alternative, non-adversary approach that involves both procedural changes and changes in the deployment of personnel. This alternative approach not only would avoid the applicability of EAJA to SSA

[203] Statement of the Hon. Ronald G. Bernoski, President, Association of Administrative Law Judges, Milwaukee, Wisconsin, and Administrative Law Judge, Office of Hearings and Appeals, Social Security Administration, Before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on Social Security Disability Programs' Challenges and Opportunities 24 (June 20, 2002) *available at* http://waysandmeans.house.gov/socsec/107cong/6-20-02/6-20bernoski.htm.

hearings, it could be (and should be) used in all cases, including those cases where the claimant is unrepresented. In fact, since building a complete record is one of its main purposes, the approach is even more beneficial when a claimant is unrepresented. Finally, we believe the suggested reforms, unlike another re-tooled SSARP, can and should be implemented directly without the need for experimentation.

## VI. Identifying the Problem: Incomplete and Ever-Changing Record for Decision

Based on our review of the current process, including input from the key parties interested in these issues, we believe that one fundamental problem has led the SSAB and others to raise questions concerning government representation and closing the record: *disability decisions, including, but not limited to, those made by ALJs following an administrative hearing, are made on the basis of incomplete and ever-changing evidentiary records.* In this section of the report, we analyze the issue of incomplete and ever-changing records based upon our own and other informed commentary. In the final section, we propose recommendations to remedy this central problem.

It is apparent from the remarks of representatives of two key groups present at the June 2002 House Subcommittee hearings—claimant advocates on the one hand and SSA and OHA personnel, including ALJs, on the other—that most claimant advocates oppose government representation and closing the record while some SSA officials, and some ALJs in particular, favor both initiatives. However, when questioned more specifically on these issues during interviews with the authors, representatives of these same two groups of interested parties (a number of whom also testified earlier at the Subcommittee hearing) presented more qualified views.

To be sure, the advocacy group representatives were uniformly opposed in general to government representation; they see such an effort as inevitably becoming highly adversarial and citing the problems with the experiment in the 1980s. Although most of the ALJs interviewed favored the concept of government representation, other SSA personnel expressed doubts about SSA adopting an adversarial position on claims before a full record had been developed and a decision reached at the administrative hearing. Moreover, many SSA personnel pointed out the high cost of implementing a full-blown government representative program, both financially and politically. However, when asked to consider the question functionally—what would someone in the role of government representative (or some other, similar role) add to the process—virtually all of the persons interviewed pointed to the need for better development of the evidentiary record. They also agreed on what "better" means in this context: obtaining all relevant medical and vocational information from the appropriate sources, and doing so as soon in the process as possible. When asked what sort of a person is needed to fill that role, there were various suggestions, but an advocate for the government's position was far down the list.

As for closing the record, the difference in views among the people interviewed depended to a large extent on their confidence about the record development process. A minority of the ALJs interviewed suggested that even under current circumstances the record could be closed at the DDS level (after reconsideration), so that ALJs could act more like appellate judges. This is also the position of the National Association of Disability Examiners (NADE), which has urged that the process be changed so that claimants receive a medical hearing at the DDS level followed by a "legal review to ensure that the medical decision correctly followed the laws."[204]

[204] Statement of Jeffrey H. Price, President, National Association of Disability Examiners, before the House Before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on Social Security Disability Programs' Challenges and Opportunities, p. 4, (June 11, 2002).

Everyone else agreed that the time to close the record was ordinarily after the administrative hearing was over and before the ALJ makes a decision. Those who were the most confident about the record development process were more likely to suggest a "bright line" cut-off; those more concerned about the quality of the record, even after the hearing has been held, were more likely to suggest some sort of safety valve, such as a "good cause" requirement for submitting additional evidence along the lines of the requirement for submitting additional evidence at the district court.[205]

The persons interviewed disagreed as to whether the current attorney's fee structure acts as a disincentive for claimant lawyers to submit all evidence in a timely manner. Claimant lawyers insist that they develop their cases as quickly as they can, and point to administrative problems—such as late availability of claim files and last-minute scheduling of hearings—as contributing to any delay. Some ALJs go so far as to suggest that claimant lawyers withhold evidence at the ALJ hearing and wait to submit it to the Appeals Council in order to increase past-due benefits and, as a result, their fees. There is no more than anecdotal evidence that claimant lawyers delay the process deliberately and the authors have concluded that this practice is not a systemic problem.[206] Nonetheless, establishing a reasonable rule for closing the record at the ALJ hearing level would help eliminate this tension and reduce the potential for "gaming" the system.

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[205] *See* LEWIN REPORT, *supra* note 4, at 169:

> "Although [the] argument for closing the record has merit, given the length of the initial determination and appeals process, it seems very inequitable to only let applicants who have new evidence use it if they return to the beginning and start again. If the process were much faster, the inequity of a closed process would not be such an issue. SSA could also consider a limited open record policy, in which new evidence is only accepted if it meets standards that have been designed to encourage submission of evidence earlier in the process."

[206] The Lewin Report reported that some judges and others had made allegations to this effect. LEWIN REPORT, at 23.

If the key problem is an often incomplete record, the question becomes how to overcome that problem. Whether introducing a government representative should be part of the solution depends on how such a position might be structured. With respect to closing the record, the goal should be to get to the point with record development where closing the record becomes a non-controversial matter. Closing the record after the ALJ hearing is opposed by claimants' advocates mainly because the current system for developing the record up to and at the hearing does not do the job.

**A. Factors Related to Government Representation**

One of the most consistently stated arguments in favor of introducing a government representative is that the process has become "imbalanced" in favor of claimants. The most important consequence of this, the argument goes, is that the record becomes one-sided; claimants have their representative, who look out for their interest and fill the record with information favorable to their claim, while SSA sits passively. To the extent that SSA's interests are looked after by the ALJs, their ability to do that effectively is muted or hindered by the three-hat role of the ALJ that divides their attention.[207] Claimant representatives do not dispute the first part of this characterization—that they look out for their client's interests and seek evidence to support their claims—but see it instead as an indication that they are doing their job well.[208] Claimant representatives also acknowledge the lack of corresponding development by SSA in

[207] *See Richardson v. Perales*, 402 U.S. 389, 410 (1971) ("three hat" role defined). Indeed, some ALJs interviewed expressed the view that the "three hat" role has become increasingly unbalanced by the presence of claimant representatives. In this view, the presence of a government representative "rebalances" the decision system and allows the ALJ to use the most important of his or her three hats—impartial decider. *See* LEWIN REPORT, at 23 (suggesting that under an adversary system, "[t]he adjudicator's role is limited to conducting a fair process and judging the relative merits of the arguments. The adjudicator is not distracted by irrelevant information and need not have extensive programmatic expertise; the adjudicator specializes in judging").

[208] Indeed, many observers have noted that the most important "lawyering" in a disability benefits case is developing the evidentiary record. *See, e.g.*, Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989 (1977).

many cases, but they see this more as an extension of the poor development practices at the DDS level than as a matter of competitive advantage. Regardless of how it is characterized, the result is that ALJs must either take up the slack themselves or decide the claim on less than a full and complete record. Although some ALJs assume this record-development responsibility regularly and without objection, as many courts have indicated they must,[209] this does not seem to be the optimal solution. Objectivity of ALJs is their most important asset and the entire system benefits from reinforcing it.[210]

Assuming, then, that the "imbalance" problem should not be handed off to the ALJs, this raises the question of the kind of representative that the government should provide. It is not at all clear that inserting an SSA counterpart to the claimant representative is the answer. SSA and claimants are in different positions and have different roles in the disability adjudication process. SSA is not just the administrating agency for Social Security benefits; while the claim is pending in the administrative process, it is also Congress' partner in carrying out the social goals of the Social Security Act.[211] As such, the SSA does not need a lawyer to represent it in the traditional (i.e., adversary) sense. Even claimant representatives, most of whom are lawyers who tend to function as traditional advocates, are subject to special rules governing representation before the

[209] *See Richardson v. Perales*, *supra* note 207, at 410; Henrie v. U.S. Dept. of Health & Human Services, 13 F.3d 359, 360-61 (10th Cir. 1993) ("ALJ has a basic obligation in every social security case to ensure that an adequate record is developed during the disability hearing consistent with the issues raised").

[210] To the extent that district courts view the SSA disability system with a jaundiced eye, they do so because of qualms about the objectivity of the SSA decision system (which includes ALJs). *See* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 702-709 (2002) (documentation).

[211] An argument can be made that once a claim moves on to judicial review in the federal courts, SSA is in a traditional adversary position vis-à-vis a claimant appealing a final agency decision denying benefits. Indeed, at that point SSA is represented by the local US Attorney and the proceedings are essentially adversarial.

SSA that take into account the unique aspects of public benefits practice.[212] In our view, the roles of a claimant's representative and any SSA representative should both be affected by the special nature of the Social Security application and appeals process. This leads us to conclude that the roles of SSA and claimant representatives should be complementary and largely cooperative. SSA needs better representation, but that representation need not and should not be adversarial in the traditional sense.[213]

Nor would inserting an adversary SSA representative—whether a lawyer or nonlawyer—into disability adjudications address directly the most important functional needs of the disability adjudication process. To be sure, a traditional litigation setting benefits from having opposing advocates; however, the main deficiency in the disability adjudication process is the lack of full and timely development of the evidentiary record. Although the adversary system may ultimately produce a supportable version of the "truth," producing a full evidentiary record is not the system's most important value.[214] By contrast, most of the all-important record development work on a Social Security disability claim—obtaining existing medical and vocational records, measuring existing information against alleged impairments and applicable eligibility criteria, ordering additional medical and/or vocational evaluations—are essentially neutral tasks that

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[212] The rules "set forth certain affirmative duties and prohibited actions which shall govern the relationship between the representative and the Agency, including matters involving [SSA's] administrative procedures and fee collections." *See* 20 C.F.R. §§ 404.1740, 416.1540 (2002).

[213] *See generally* Frank S. Bloch, *Representation and Advocacy at Non-Adversarial Hearings: The Need for Non-Adversary Representatives at Social Security Hearings*, 59 WASH. U. L.Q. 349 (1981). Of course, it is one thing to declare a representative "nonadversarial" and another to have him or her perform that way. To the extent these representatives are attorneys, they may have a professional inclination to be adversarial. On the other hand, a statutory mission that eschews adversariness and a regulatory culture that ensures nonadversariness presents an opportunity to carve out a category of representatives that are truly helpful and impartial.

[214] The adversary system often obscures and extends records. This is one reason why its role is best seen in private litigation between two individuals, not in the government benefit context. *See* Paul R. Verkuil, *The Adversary System, Liberalism and Beyond*, 60 SOUNDINGS 54 (1977) (distinguishing private from public litigation on this basis).

would not benefit from an adversarial setting. Instead, both claimant and SSA interests could be served better by introducing a nonadversarial "Counselor" (described more fully below) charged with the responsibility to assure the development of a timely, full, and fair record for decision to the ALJ.[215]

Moreover, a substantial number of proposals have been advanced that aim directly at the record development problem in the disability adjudication process. Some focus on existing administrative practices and procedures while others suggest deployment or redeployment of personnel—all with the idea of improving SSA's performance relative to developing the record for decision. One of these in particular—the SSA's own Senior Attorney Project, which received support even from groups generally opposed to a resurrection of the government representation experiment—also lends support to our SSA Counselor recommendations below, consistent with the concept of non-adversarial representation.

A number of the important proposals in this area were made by the Administrative Conference of the U.S. (ACUS). For example, ACUS urged SSA to require that the DDSs communicate clearly and fully the rationale of their disability decisions and the evidence on which they are based. ACUS also recommended expanded use of prehearing conferences to frame the issues involved in the ALJ hearing, identify matters not in dispute, determine whether subpoenas might be necessary, consider witnesses that might need to be called, and also decide appropriate cases favorable without hearings.[216] All of these functions could be orchestrated by the Counselor in advance of the ALJ hearing with the cooperation of the DDS and with the

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[215] This point is developed in Frank S. Bloch, *supra* note 213, at 400-01. *Cf*. JERRY L. MASHAW, *et al*., *supra* note 26, at 97-98 (discussing the need for government representation at ALJ hearings and concluding: "If there is a respect in which a more adversary perspective may be required, it is in the prehearing development of the facts, not the questioning of the witnesses at the hearing").

[216] ACUS Recommendation 90-4, *supra* note 28 at ¶¶ 2-3.

participation of the ALJ as appropriate. Other ACUS recommendations urged SSA to develop specific guidelines for transmitting key medical information, such as the data necessary to assess residual functional capacity, and to provide adequate funding to pay for requested medical records, including but not limited to those from claimants' treating sources.[217]

It should be noted also that use of nonadversarial representatives such as the SSA Counselors we propose has another important practical advantage—it should not trigger attorney fees under the EAJA. While it is true that on occasion courts have found informal, non-APA adjudications to be covered by EAJA, those cases are distinguishable because in each of those proceedings government attorneys acted as advocates.[218] The essence of the Counselor function is nonadversarial.[219]

Finally, we conclude that even though we believe that the district court's rhetoric and reasoning in the *Salling* case went too far, the results of the 1980's experiment were mixed, at best, and the perception of it has been quite negative. Were SSA to decide to once again to try to introduce a government advocate into the process, it would first have to undertake another lengthy and carefully designed experiment with due regard for lessons learned in the first attempt. This is an extremely difficult task—made even more difficult due to the inevitability of due process complaints by disappointed claimants who find themselves to be participants in an experiment.

Given the potential downsides of introducing or experimenting with the adversary process in this setting and our judgment that such a step would fail to advance the crucial need to

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[217] *See* ACUS Recommendation 89-10, *supra* note 29 at ¶ 5.

[218] *See* cases cited in note 163, *supra*.

[219] We believe a neutral, record-building government official could serve the interest of the claimant as well as the government in this sense of nonadversariness.

improve the record development process, we conclude that the best SSA "representative" would be a non-adversary Counselor who could help provide the ALJ with a timely and complete record for decision.

**B. Factors Related to Closing the Record**

Once steps like those discussed above are taken to allow the ALJ to decide cases based on a full and complete record, then there should be no hardship in closing the record after the hearing (or at a later designated time set by the ALJ). Claimants' representatives can play their part along with the Counselor to produce everything that is needed for decision in a timely fashion. Any perverse incentives to withhold evidence so as to lengthen the case and increase the amount of fees would also thereby be removed. However, we recognize that in some cases key information—key to both SSA and the claimant in their shared desire to produce a correct decision—cannot always be obtained in time. In such situations, a "good cause" exception for reopening the record before the ALJ should be available as a safety valve.[220]

## VII. Solving the Problem and Recommendations

As noted above, we believe that the key problem with the current disability adjudication process is the prevalence of incomplete and ever-changing evidentiary records. Therefore, our recommendations are aimed directly at improving the record for disability decisions. Since our charge was to examine the options of introducing some form of government representative and closing the record at a pre-ordained time, we will present our recommendations along those lines

[220] One difficulty with proposing changes in the rules for closing the record after the ALJ hearing is that any such changes depend on the status and purpose of the Appeals Council. What is clear is that the current rule of allowing the submission of any "new and material" evidence to the Appeal Council, coupled with often-deficient record development before and at the ALJ hearing, results in many time-consuming remands back to the ALJ with little use of Council expertise.

in order to address the issues raised by our charge. We have chosen not to propose a revival of the experimental program involving a government representative as an advocate. Instead our recommendations related to government representation introduce a somewhat different concept: a "Counselor" charged with the responsibility to take the lead in developing as complete a record as possible for decision by the administrative law judge.

**A. Overview of Recommendations**

Our key recommendation is that SSA concentrate its efforts on improving the record for decision at ALJ hearings. We believe that the best way to achieve this goal is by introducing a nonadversary Counselor into the disability adjudication process whose central role would be to monitor the process of developing the evidentiary record and to work closely with all of the key actors—the claimant (and the claimant's representative, if there is one), the ALJ, and SSA (most likely through DDS)—in order to identify any gaps in the record and to fill them as quickly and efficiently as possible. These Counselors would remove much of the development work from the ALJ, including the second- and third-hat roles of assuring that the claimant's and SSA's (or DDS's) positions are fully supported, and would serve a much-needed administrative liaison function between the DDS and OHA.

We also recommend that the Counselors be given the resources and authority necessary to move claims quickly, especially those where benefits can be granted without a full administrative hearing. Consistent with the concept of nonadversarial representation, we note that SSA Counselors need not—and perhaps should not—be lawyers. Candidates for these positions can be drawn from staff working already in the disability determination process—at SSA, DDS, OHA, or the Appeals Council—or from the outside. Most importantly, they must be qualified and trained to assure that they understand not only the relevant medical, vocational, and

legal issues involved in Social Security disability adjudications, but also to appreciate their unique role in the disability determination process.

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

1. SSA should concentrate its efforts in the disability adjudication process on improving the record for decisions.
2. SSA should consider implementing administrative and personnel reforms aimed at identifying and obtaining key information as quickly as possible, such as:
    a) Requiring that the DDSs communicate clearly and fully the rationale of their disability decisions and the evidence on which they are based.
    b) Developing specific guidelines for transmitting key medical information, such as the data necessary to assess residual functional capacity.
    c) Providing adequate funding to pay for requested medical records, including but not limited to those from claimants' treating sources.
    d) Encouraging ALJs to use their subpoena power when needed to obtain relevant information, and providing the DDSs with comparable mechanisms for enforcing similar requests.
    e) Requiring DDSs and OHA to make the existing record for appealed claims available to claimants and their representatives as quickly as possible, and requiring OHA to set the date for ALJ hearings at least two months in advance.
3. SSA should consider creating a new administrative position, called a "Counselor," with the express mandate of overseeing and facilitating the development of the

evidentiary record for decision. As part of this process, the Counselor position should have the following characteristics and responsibilities:

a) It should be charged with developing a full and complete record as quickly as possible, in cooperation with claimants (and their representatives), DDS, OHA, and other SSA personnel.

b) It should have direct access to key DDS personnel in order to question and clarify the DDS's rationale for its disability decisions.

c) It should have independent authority to obtain information for the record, including access to any available funds and enforcement mechanisms.

d) It should have a formal role, either independently or in cooperation with ALJs and other OHA staff, to narrow and resolve particular issues and, when appropriate, to recommend to an ALJ a fully favorable, on-the-record decision.

e) It should be designated nonadversarial, even if attorneys fill some of the positions.

**C. Recommendations Related to Closing the Record**

In connection with taking the steps called for in Part A of these Recommendations, SSA should revise its regulations to close the evidentiary record after the ALJ hearing, subject to the following qualifications:

1. ALJs may extend the time to submit evidence and/or written argument for a reasonable period after the hearing and before deciding the claim.
2. Claimants may request that the record before the ALJ be reopened for the submission of new and material evidence and a new decision, if the claimant demonstrates good

cause for failing to present the evidence before the record closed and if the request is made within one year after the ALJ issued the decision on the claim or before a decision is reached on appeal by the Appeals Council, whichever is later.

**D. Implementing these Recommendations**

The above recommendations should be implemented as soon as feasible. This can be done by regulation or other administrative action; no legislation is required. Moreover, the SSA Counselor position can be created without need for experimentation.[221] The regulations should address closing the record at the ALJ stage and articulate a standard for a good cause exception drawn from the current standard at the district court.[222] The regulations relating to the Counselor function should also include a code of conduct that emphasizes the nonadversarial nature of the position.[223]

[221] If SSA were to initiate a renewed program for use of government "advocates," it should do so only after an experiment that draws lessons from the SSARP. See the discussion at Part V, *supra*.

[222] *See* 42 U.S.C. § 405(g).

[223] The regulations, while procedural in nature and thereby exempt from notice and comment, 5 U.S.C. § 553(b)(A), might still benefit from comments from the affected claimant community.

## APPENDIX I

### Interviews with interested parties
### Social Security Advisory Board, Washington, DC
### October 3-4, 2002

Panel I. SSA Regional Chief Administrative Law Judges: Jo Ann Anderson, Dallas; Frank Cristaudo, Philadelphia;Paul Lillios, Chicago; James Rucker, Denver.

Panel II. SSA Regional Chief Counsels: Jack Sacchetti, Associate General Counsel; Janis Walli, San Francisco; Jim Winn, Philadelphia.

Panel III. Claimant representatives: Nancy Coleman, ABA Commission on Law and Aging; Toby Golick, Cardozo Law School; Jonathan Stein, Community Legal Services of Philadelphia; Ethel Zelenske, National Organization of Social Security Claimants' Representatives.

Panel IV. Advocacy groups: Cheryl Bates-Harris, National Association of Protection in Advocacy Systems; Marty Ford, The Arc.

Panel V. SSA Office Hearings and Appeals Personnel: Pete Gilmore, Project Director for Government Representation Pilot; Larry Mason, Executive Assistant; Frank Smith, Kansas City Regional Chief Counsel (was Associate Commissioner at OHA during Government Representative Pilot); Bill Taylor, Deputy Associate Commissioner.

Panel VI. SSA judges: Bob Johnson, Administrative Appeals Judge, Appeals Counsel; David Hatfield, ALJ, Pittsburgh; Michael Heitz, ALJ, Denver.

Panel VII. Association of ALJs: Ron Bernoski, President; Kevin Dugan, Vice-President.

Telephone conference with Larry Massanari, SSA Philadelphia Commissioner.

### General Comments

The current system is "out of step" and "obsolete." The most "dysfunctional" aspect is the case development responsibility of the administrative law judge. This shouldn't be the work of an administrative law judge.

Overall, the process is "too loose," especially for claimant representatives. More structure, such as closing the record after the hearing and using some sort of "judicial officer" to move the case forward to the hearing, is what is needed.

Under the current system, claimant lawyers are acting as adversaries in an inquisitorial setting; they can choose whether to act as a partner with the agency or as a full-blown advocate for the claimant. By contrast, ALJs have to "walk on eggshells."

The greatest problem is development of evidentiary record. One option would be to push development back to the DDS level; however, in that case there would probably have to be a full hearing at that level. If that happens, then ALJ would have to act as appellate judges.

The current process can be improved with additional funding.

Key to reform must be the intent of Congress: to provide fair decisions through timely, high-quality, and cost-effective decisions.

Real problem is delay caused by making different decisions at different levels based on different records.

Best use of any additional resources at the ALJ level would be to support better development of the evidentiary record.

Improving training and increasing supply of staff at OHA would be a better use of additional resources. ALJ could be used more productively if the OHA resources were moved to the front end of the process, before cases reach the ALJ. Could improve the quality of staff by having individual law clerks instead of a pool of decision writers.

Must acknowledge that part of the problem at OHA has nothing to do with the disability determination process but has to do with labor-management issues, with different bargaining units concerned about their own parochial issues.

Simple elimination of the Appeals Council is not the answer. Federal courts are afraid of eliminating the Appeals Council because that would increase the number of district court filings. Also, the Appeals Council benefits disadvantaged claimants who need a simple and fair appeal process.

The real problem with delays at the ALJ level is poor development at the front end. There should be some mechanism for communicating to claimants what key evidence is needed and which providers should be consulted.

Any "imbalance" in favor of claimants on record development has occurred because OHA spends less time and resources on development than in the past. OHA has reduced its involvement and has put the burden on claimants' representatives.

Some OHA staff are helpful. In some offices, they send specific instructions to providers about the type of information needed, or tell the claimants what type of information they should obtain from their doctors. OHA can play a role in bridging the gap between the type of information SSA needs to make a decision and the type of information doctors are used to providing.

The major delays are caused by problems at the front end. The key is asking the right questions early in the development of a record. Also, SSA must pay for necessary reports.

If there are problems with attorneys holding back in order to increase their fees, this can be dealt with through SSA standards for representation and through bar association disciplinary procedures.

If there is a difficulty obtaining evidence, ALJs should use their subpoena power more often.

The ALJ must have a complete record to reach a decision. This should be done even before the case gets to the ALJ, either at the DDS level or at OHA during prehearing development. The question is where is the right place to insert additional staff and resources.

Something needs to be done about the "imbalance" that exists today. It is often hard to understand why SSA denied benefits initially and the only one developing the record the ALJ hearing is the claimant.

ALJs can wear their "three hats" more easily if the claims are fully developed at the time of the hearing.

The question is who should shoulder the responsibility of moving the claims along after they are appealed to the ALJ. Whoever takes control of developing the record should have cooperation both at the DDS level and the ALJ level.

Under the current system, the government is not accountable for its initial decision when the case gets to the ALJ. There must be some accountability between the DDS and ALJ levels.

Seems that cases are much better developed when they went through a disability hearing following a termination decision. The issues are framed more clearly and the relevant evidence has been obtained.

There should be incentives to get the as much evidence as possible in the record before the hearing, which would speed up the process.

Experience shows that much more evidence is provided early in the process if the hearings are scheduled in advance. Three months advance notice seems to work well.

Most of the delay problems result from cases waiting to be prepared for a hearing. Once again, the key is record development. SSA cannot simply turn an adjudicatory process into a management process; it must combine management improvements with the needs for a full due process hearing.

The most important type of assistance needed is to develop the record. The person doing that job must have the authority to get whatever evidence is needed. This should include authority to request and use subpoenas and otherwise to get the necessary medical sources to provide the information.

ALJs need help not only in developing the record but also in explaining the government's position on the claim. This explanation could come from the agency at any level, including DDS.

Claimant's attorneys must be required to submit all of the evidence that they have relevant to the case, including evidence that may not necessarily support the claimant. Otherwise, someone else will have to be put into the process to provide evidence that the claimant's attorney withholds.

It becomes more difficult for ALJs to perform their "three hat" role when claimants are represented; ALJs can go only so far because the courts look closely when an ALJ "goes too far."

The adversarial aspect of the hearing is most helpful when the evidentiary record has to be completed. If all of the evidence has been compiled, then cross examination is not really necessary.

Poor management at hearing offices is part of the problem.

Clerks who might be able to help with developing the record are not allowed to do so.

The hearing process is broken and needs significant repair. Cannot just tinker around the edges, the system needs far-reaching change.

The key is to limit the number of cases that get before an ALJ.

Closing the record and having a government representative could reduce the work load, but will require another demonstration project. The project will be hard to market and should not be pursued without the political will to pull it off.

Should not underestimate the difficulty in selling such a "cultural shift" at both SSA and with claimants. Can get most of what is needed without going to the extent of having someone cross examine claimants at the hearing. Although cross examination adds credibility, most ALJ don't feel comfortable with cross examination.

Could redirect resources at OHA. Some offices have eight ALJs with up to 50 support staff.

**Comments on Government Representation**

Government representatives can be helpful, but need to be called something else – such as a Social Security Counsel. Also, SSA must make it clear if it is moving from an inquisitorial to adversarial system. Must avoid the problem of "false advertising" if representatives are said to be nonadversarial but, in fact, act as adversaries.

The main value of a government representative is to move cases forward. Needed to develop the record, narrow the issues (for example, on set date), and settle cases without a hearing.

With the current high percentage of represented claimants, there is no longer a balance in developing the record. System relies on claimant representatives; no comparable development by the agency.

Could have a "magistrate" or "special master" working under the ALJ. This would introduce some judicial-like formality in the process but it would still be nonadversarial: to oversee development of the record and to narrow the issues for the ALJ.

Concept of government representation is not clear. SSA's obligation is to make a correct decision on the evidence; the agency shouldn't have a position on the claim until all the evidence is in. Therefore, SSA doesn't have a position to advocate at the ALJ level as long as new evidence is allowed at that level.

SSA adopting and advocating a position at the ALJ hearing is incompatible with having a *de novo* hearing at that level. The place for the SSA to begin advocating is at the district court.

Creating an adversary role for SSA runs the risk of proliferating agency personnel to support that role. Government representation will make the current process heavier; may get better decisions, but not clear that adding extra resources will produce the result.

Confusion exists because SSA "outsources" to DDS, spends a lot of money on the record development and reaching a decision at the DDS level, and then doesn't stand by that decision. Respective roles of DDS and ALJs (including the *de novo* hearing at ALJ level), need to be clarified.

ALJ should not be "claims adjusters" but should act as judges.

ALJs should not be at the front line of record development, but they can and should be consulted in the process.

Key is to have someone responsible for making sure that the record is developed as well as it can be done.

There should not be a government representative at the ALJ hearing. The experiment in the 1980s showed that adding a government representative is expensive, slowed down decision making, and the outcomes were not improved.

Seen properly, these are not "cases." They are "claims" that must be allowed if the best evidence shows that the claimant is entitled to receive the benefits.

High quality staff at OHA can improve the process. They can help ALJs narrow the issues and can increase the number of on-the-record decisions.

SSA can be more helpful in developing necessary evidence. For example, SSA created a uniform form to be sent to teachers for SSI child's benefit claims.

The public perception of a government representative would be negative and shouldn't be taken lightly. Social Security is a system that helps people; SSA should not be put in a position where they are fighting the people they are suppose to be helping.

Any type of government representation would inevitably turn the parties into adversaries. Focus should be on getting eligible people benefits, not on an adversarial system.

There would be a tremendous administrative cost with government representatives because functions would have to be separated between OHA and the representatives.

If there is to be a new government representative project, it should start with a clean slate rather than a restructuring of the 1980s project.

It would be a mistake to add a representative to the existing process without some reforms at or before the ALJ level. Otherwise, it will simply upset the ALJs and advocates without necessarily providing a benefit. The original government representative project was conceived as part of a package of reforms and it needs to be conceived of that way again.

Any new project would need a clear legislative mandate and adequate funding.

Someone is needed to ask the "hard questions," which is hard for the ALJ to do. This can involve a critical examination of the claimant's medical evidence or questioning the claimant or the claimant's witnesses about daily activities, subjective symptoms, etc.

Need to have someone with responsibility who can resolve cases that do not have to go to the ALJ.

Also need to have someone in the process who can explain the rationale for the original DDS decision.

The burden of developing the record must be removed from the ALJ and placed on the government and the claimants.

Ultimately, the ALJ has to know the file. Therefore, a well-organized file with issues narrowed through a prehearing type of process could be most helpful.

Many of the problems with the current hearing process could be resolved with better use of a "senior attorney" type of position. Good senior attorneys can move cases along and can work with claimant representatives to make sure that there is sufficient evidence concerning all of the issues in the case.

Training is the key to adding staff with responsibility for case development and settlement. They must have a clear understanding of their responsibilities and should be supported in that work. Some untrained senior attorneys thought their job was to deny as many cases as possible instead of supporting the ALJ so that the ALJ could make the correct decision on the basis of the best record possible.

Process worked better when ALJs had their own clerks. Although some smaller pool systems have worked in the past, current system breaks down when the pool clerks become anonymous.

One problem with the current model is that district courts don't have confidence in ALJ decisions. Perhaps with a full-blown adversarial hearing, district court judges will apply the substantial evidence rule properly.

Whether a government representative or a senior attorney, help is needed to narrow the issues.

It is difficult to cross-examine claimants and claimants' witnesses when necessary.

The opinion at SSA is mixed concerning government representation, especially if that means moving to a full adversarial model.

Rather than government representation it would be better to have more fundamental changes in the process. ALJs should be able to use "lay hearing examiners" on certain issues of fact. In appropriate cases, a "Social Security Counsel" could authorize the granting of benefits through the DDS rather than continue with an appeal.

If necessary, a case should be sent back to the DDS to clarify their position and to obtain additional evidence. This would allow DDS also to present the government position at the hearing, without being a separate "government representative."

It may not be necessary for SSA to participate at the hearing itself beyond presenting the government's position. Could be an expert/master as opposed to a litigating advocate.

Government representatives had two roles: to help develop the record, and to represent the "public interest" when claimants were represented before an ALJ.

There were two major problems with the project: (1) judges were not comfortable with the project because staff was drawn from OHA and many judges had prior relationships with them; (2) representatives did not have their own staff for developing the record.

Another problem with the original experiment was that it was introduced into a controversial system at a time when there was much concern about the output of administrative law judges. It was perceived as taking control of ALJ output and was "set up to be attacked."

The government representative project did not stay true to the original idea: the representatives went from being in a known, traditional role as an adversary to something orthodox. They "fell between two stools."

Development doesn't have to be adversarial; could have rules and regulations that require all persons involved in the process, including claimant representatives, to get all of the evidence in and to do so in a timely manner. If well done, proper record development will take care of "80% of the problem."

One option might be to have an "adjudication officer plus." These adjudication officers could have the authority to go out and get additional evidence on their own, in addition to working with and organizing evidence already in the file.

Ultimately, it is a question of resources. SSA's recent adjudication officer project produced a good result, but it was very time consuming and expensive. That project, however, could be the starting point for considering what type of personnel could be added to the process.

Another option is the use of a "chambers" for the ALJ, including a hearing assistant, clerk, and staff attorney.

**Comments on Closing the Record**

Record must be closed after the ALJ hearing so that the ALJs know that they are dealing with a complete record when they make their decision.

A major problem with allowing additional evidence the Appeals Council is extremely long delays.

Keeping the record open at the Appeals Council level results in too many cases being remanded back to the ALJ.

Some ALJs would like to see record closed before ALJ level (at district office after initial decision or reconsideration); ALJ would act as an appellate judge.

The problem with the Appeals Council is that it doesn't deal well with new evidence. Better to close the record sometime after the ALJ hearing and before the ALJ reaches a decision.

It is too easy to submit additional evidence at the Appeals Council level. It would probably be sufficient to add a "good cause" requirement similar to that required for submitting new evidence in support of a remand at the district court.

The problem with keeping the record open throughout the process is that SSA is looking at a "moving target." Closing the record at the ALJ hearing allows a fixed time period for decision and review.

If the record is to be closed after the ALJ hearing, it must be made clear to claimants that this is their one opportunity to have the relevant time period adjudicated. There should also be an opportunity to reopen the record at the ALJ level, perhaps with "a good cause" requirement.

Closing the record after the ALJ hearing is not a problem if every opportunity has been given to develop the record in advance and to there is a "good cause" opportunity to submit new and material evidence after the record has been closed – preferable as part of a reopening of the case at the ALJ level.

It is unfair to close the record at the ALJ hearing because many people, especially those with disabilities, have difficulty getting the necessary evidence. Many are unrepresented and don't have access to all the records before the hearing takes place.

Record should be closed at the end of the ALJ hearing.

The door is "cracked wide open" at the Appeals Council with the "new and material" evidence standard. It would be helpful to add a "good cause" requirement for submitting additional evidence at the Appeals Council level.

The record should be closed at the ALJ level before the decision is made, with a "good cause" requirement for any new and material evidence after that time.

Rules on closing the record must be coordinated with the rules about reopening.

Must also reconcile the closing of the record with SSA's responsibility for record development, including the "reasonable effort" requirement and the rules on obtaining medical evidence from treating sources.

Closing the record at the ALJ hearing has very strong support. Although some at SSA would like to close the record after reconsideration, it should be done only after the full ALJ hearing. After that, new evidence should be allowed only with "good cause."

## APPENDIX II

**"Roundtable discussion" on government representation and closing the record with members of the National Organization of Social Security Claimants' Representatives (NOSSCR)**

**NOSSCR Social Security Disability Law Conference**
**November 1, 2002**
**San Francisco, California**

### Statements Concerning Government Representation

The approach taken by the government representatives under the SSARP varied widely and seemed to depend on where the representatives worked before joining the project. Most of the representatives came from the Appeals Council, and they were overly zealous advocates. They saw their role as defending the original denial, not as part of a process to reach a correct decision. They rarely developed evidence if they thought that they could justify the denial on the existing record. By contrast, the few representatives who were former staff attorneys at OHA were more balanced and some worked hard to create a full and fair record, regardless of whether the original denial would be upheld or not.

SSARP representatives were left on their own to decide what their approach would be. They were not trained specially as government representatives; therefore, those who were adversarial-minded or who thought that SSA's original decisions should be upheld brought that to the job

SSA does not have to advocate against claimants to be helpful to the appeals process. Real problem is that DDS doesn't do a good job and doesn't explain its decisions. OHA, in turn, not set up to do the work the DDSs should have done. OHA staff can be helpful if they have some more resources and if they work with claimant representatives, not against them

### Statements Concerning Developing and Closing the Record

SSA should be more active in obtaining necessary medical evidence. This could include paying for medical care and medical records for low-income claimants during the application period. The real reason for delay in completing the record is the claimant's inability to pay for necessary examinations and reports.

DDSs are underfunded. Some DDSs send doctors $10-15 for a report; that is why the doctors do not respond.

Claimants cannot compile the necessary evidence in time because the district offices are biased against claimant representatives; it is almost impossible to find a file at the DDS after a denial

and before the file is sent to OHA. Then, OHA holds the file until all the exhibits are numbers and recorded. By the time the claimants and their representatives get to see the file, there isn't enough time left to do adequate development.

Problems of access to the record at OHA are getting worse. Often, cannot get to the file until just before the hearing. These problems are exacerbated for rural practitioners.

The record cannot be closed at or just after the hearing if the claimants don't get access to the file until just before the hearing. There should be at least two months advance notice before the hearing, with unlimited access to the file during that period. One option would be to allow access when the 20-day letter is sent; however, a better approach would be to set the hearings 2 months in advance.

OHA offices should process the records as soon as they get them and make the records available to representatives 3-4 months in advance of the hearing date.

OHA needs to schedule the hearings in a reasonable manner. Some offices set hearings 8-10 months after the 20-day letters are sent. Representatives don't want to develop the final record that far in advance – but when the 20-day letter comes, there isn't enough time left.

OHA should make more use of subpoenas, especially for SSI claimants. The ALJs do not appreciate the problems SSI claimants have in getting medical information without insurance.

The access problem would be solved if SSA went to electronic records

If the record is to be closed after the ALJ hearing, there should be an opportunity to reopen the record for good cause.

Some states require doctors and hospitals to provide medical records at low cost. This should be a national policy.

Problem with closing the record too soon is that claimants don't know what is in it. DDS should attach a complete list of the evidence in the record to the decision itself, if not the original decision then at least to the reconsideration decision.

OHA doesn't do enough to develop the record. In fact, they "trick" the claimants by making the claimants think that they will get the necessary information when they do not.

Much of the problem with delays and insufficient records stems from labor/management conflicts at OHA and with institutional interests of the AALJ.

## APPENDIX III

## Excerpts from Congressional Testimony on Proposals for a Government Representative and Closing of the Record

### A. Critiques of Government Representative

Marty Ford, Co-Chair, Social Security Task Force, Consortium for Citizens with Disabilities[224]

We do not support efforts to have SSA represented at the ALJ hearing because past experience shows that it does not result in better decision-making and reducing delays, but instead injects a level of adversity, formality and technicality in a system meant to be informal and non-adversarial. In the 1980's, SSA tested, and abandoned, a pilot project to have the agency represented. It was terminated following Congressional criticism and a judicial finding that it was unconstitutional and violated the Social Security Act. In the end, the pilot did not enhance the integrity of the administrative process.

In the discussions above regarding maintaining an informal process and representation of SSA in the ALJ hearing, an important underlying issue is the role of the agency in determining disability and paying benefits. There seems to be a sentiment among some that SSA is not being fairly represented in the determination process.

We believe that it is important, however, to note that SSA and the claimant are not parties on opposite sides of a legal dispute. SSA already has a very heavy say in what goes on: SSA implements the law through development and publication of regulations, including the medical listings; provides guidance to claims workers and Disability Determination Services staff through its Program Operations Manual System (POMS); contracts with the states for determinations made in accordance with its regulations and POMS; and hires the ALJs. The claimant's role is to show that he/she has an impairment with limitations that fit within the parameters constructed by Congress and implemented by SSA.

Very few claimants would have the wherewithal to know and understand all of the things that could or should pertain to their cases. SSA has a vital role in helping the claimant through a very complex process. SSA's role is not to "oppose" the individual's claim; but rather to ensure that people who are eligible as contemplated by Congress are enabled, as a result of the claims process, to receive the benefits to which they are entitled. Where an individual has representation, whether legal or lay representation, SSA is not placed in a weaker or unfair position requiring its own representation. SSA has still written all the regulations and POMS and contracted with the DDSs and hired the ALJs. Rather, SSA should see the individual's

[224] Statement of Marty Ford, Co-Chair, Social Security Task Force, Consortium for Citizens with Disabilities, Before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on Social Security Disability Programs' Challenges and Opportunities, (June 20, 2002), available at http://waysandmeans.house.gov/socsec/107cong/6-20-02/6-20ford.htm.

representative as an ally in facilitating the collection of relevant evidence and highlighting the important questions to be addressed in making the disability determination.

We believe that all the discussions about the formality/informality of the process and whether SSA should/should not be represented should be viewed from this perspective

Nancy G. Shor, Executive Director, National Organization of Social Security Claimants' Representatives[225]

*SSA should not be represented at the ALJ level.*
We do not support proposals to have SSA represented at the ALJ hearing. In the 1980's, SSA tested, and abandoned, a pilot project to have the agency represented, the Government Representation Project (GRP). First proposed by SSA in 1980, the plan encountered a hostile reception at public hearings and from Members of Congress and was withdrawn. The plan was revived in 1982 with no public hearings and was instituted as a one-year "experiment" at five hearing sites. The one-year experiment was terminated more than four years later following congressional criticism and judicial intervention.

Based on the stated goals of the experiment, i.e., assisting in better decisionmaking and reducing delays, it was an utter failure. The GRP caused extensive delays in a system that was overburdened, even then, and injected an inappropriate level of adversity, formality and technicality into a system meant to be informal and nonadversarial. In the end, the GRP experiment did nothing to enhance the integrity of the administrative process.

**B. Support for Government Representative**

James A. Hill, President, Chapter 24, National Treasury Employees Union, Raleigh, North Carolina, and Attorney-Advisor, Office of Hearings and Appeals, Social Security Administration[226]

NTEU believes that it is time for the Social Security Administration to seriously consider fundamentally altering the nature of ALJ hearings by introducing an Agency representative, the Social Security Counsel, who will be responsible for presenting the Agency's case to the Administrative Law Judge. The Counsel would be responsible for developing the record and

[225] Statement of Nancy G. Shor, Executive Director, National Organization of Social Security Claimants' Representatives, Midland Park, New Jersey, DC, Before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on Social Security Disability Programs' Challenges and Opportunities (June 20, 2002) *available at* http://waysandmeans.house.gov/socsec/107cong/6-20-02/6-20shor.htm.

[226] Statement of James A. Hill, President, Chapter 24, National Treasury Employees Union, Raleigh, North Carolina, and Attorney-Advisor, Office of Hearings and Appeals, Social Security Administration, Before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on Social Security Disability Programs' Challenges and Opportunities, (June 20, 2002) *available at* http://waysandmeans.house.gov/socsec/107cong/6-20-02/6-20hill.htm.

presenting it at the hearing. It is the responsibility of the Counsel to present the adjudicator with a balanced and complete record upon which a fair and just decision can be based. The Counsel, in concert with the claimant's representative, will resolve issues and propose settlement agreements that would be presented to the adjudicator for approval.

The role of the adjudicator would be reduced to oversight of the pre-hearing process, conducting hearings, and preparation of written decisions based on evidence presented at hearing. The ALJ would be relieved of the responsibility of representing the agency and the represented claimant, and would act as a trier of fact.

Ronald G. Bernoski, President, Association of Administrative Law Judges[227]

The SSA Should Have a Representative at the ALJ Hearings: After conducting a pilot program to work out the details in practice, the SSA should amend its regulations to provide for a government representative at the ALJ hearing. This change would permit SSA to complete the documentary record faster, enter into settlements without the need for a hearing in some cases, and present the government's position on each case. SSA representation will allow the SSA to present its evidence, present the type of expert witnesses it deems necessary, and advance its legal theories in the case. The government representative also should provide assistance and advice to claimants in unrepresented cases.

In order to meet the requirements of due process, the APA provides that "[a] party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding." 5 U.S.C. § 555(b). Therefore, the SSA, as a party, has the right to appear on its own behalf at the proceedings before the OHA. However, the Social Security Administration is not represented at the disability hearing before an administrative law judge. SSA regulations long have stated that it "conducts the administrative review process in an informal, nonadversary manner," 20 C.F.R. § 404.900(b), so SSA thus has waived its right to appear at the ALJ hearings. The present system worked well when most claimants in Social Security cases were not represented at the hearing. However, there has been a dramatic rise in the number of claimants who are represented at the hearing. Presently, well over 80% of the claimants are represented at the hearing. The Social Security Advisory Board has noted that "[t]he percentage . . . of claimants represented by attorneys at ALJ hearings has nearly doubled [between] 1997 [and 2000]." SSAB, *Disability Decision Making: Data and Materials*, Chart 56—Attorney and Non-attorney Representatives at ALJ Hearings Fiscal Years 1997-2000, p. 73 (January 2001).

In its recent report, the SSAB recommended that the SSA have representation at the Social Security disability hearing: "We think that having an individual present at the hearing to defend the agency's position would help to clarify the issues and introduce greater consistency and

[227] Statement of the Hon. Ronald G. Bernoski, President, Association of Administrative Law Judges, Milwaukee, Wisconsin, and Administrative Law Judge, Office of Hearings and Appeals, Social Security Administration, Before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on Social Security Disability Programs' Challenges and Opportunities (June 20, 2002) *available at* http://waysandmeans.house.gov/socsec/107cong/6-20-02/6-20bernoski.htm.

accountability into the adjudicative system." *Charting the Future of Social Security's Disability Programs: The need for Fundamental Change*, January 2001, p. 19.

The SSA had a pilot program for its representation at the hearing in 1982. This pilot program was discontinued after an unfavorable court decision on the project. *Salling v. Bowen*. The past pilot program on the government representative project was not an adequate test of this system. The SSA should implement a new test program for agency representation at the hearing. This pilot project should be implemented in coordination with the claimants' bar, SSA employee organizations, our Association, and other interested groups. The pilot program should address the issues raised by the court in *Salling*. The objective is to establish a hearing process that provides a full and fair hearing for all parties who have an interest in the case.

In addition, in the current non-adversarial setting, the SSA ALJ has the legal responsibility to "wear three hats" in each case. The ALJ legally is bound to ensure that all of the claimant's relevant and material evidence is made part of the record and the claimant's interests are protected, to protect the interests of the government in the hearing, and to make a fair decision which is based on the evidence in the record. Additionally, the judge must take care to not become overly protective of the interests of the government for fear that the case will be reversed on appeal on a claim of bias against the claimant. The inherent conflict in all of these roles is patent and would be resolved by having the government represented at the hearing.

*If the SSA Provides for a Government Representative at the Hearing, Require Issue Exhaustion at the Appeals Council Level for Represented Claimants*: As the Supreme Court stated in Sims v. Apfel, 120 S. Ct. 2080 (2000), there is no statute or regulation that requires that a claimant must list the specific issues to be considered on appeal on the request for review by the Appeals Council of an ALJ's decision, in order to preserve those issues for judicial review. Although agencies often issue "regulations to require issue exhaustion in administrative appeals," which are enforced by the courts by not considering unexhausted issues, "…SSA regulations do not require issue exhaustion." *Id.* at 2084. The Supreme Court refused to impose a judicially inferred issue exhaustion requirement in order to preserve judicial review of the issues upon a claimant for Title II and Title XVI Social Security Act benefits because the issues in SSA hearings are not developed in an adversarial administrative proceeding and the "[Appeals] Council, not the claimant, has primary responsibility for identifying and developing the issues." *Id.* at 2086. However, the Court, deferring to the agency, noted that "…we think it likely that the Commissioner could adopt a regulation that did require issue exhaustion." *Id.* at 2084. The Supreme Court thus explicitly invited SSA to draft new regulations.

Unrepresented claimants should be excepted from the requirement to show good cause. Expecting unrepresented claimants to bear the burden of preserving specific legal issues for judicial review does not comport with a sense of fair play and keeping the claims process claimant-friendly.

Issue exhaustion would bring finality to the administrative process and it is consistent with the general principles of administrative law and the procedure of other agencies in the Federal government

## C. Critiques of Closing the Record

Marty Ford, Co-Chair, Social Security Task Force, Consortium for Citizens with Disabilities[228]

*Keep the Record Open for New Evidence*
Many recent proposals to change the disability determination process recommend that the record be closed to new evidence either after the DDS or, at least, after the ALJ level. In the past, both Congress and SSA have recognized that such proposals are neither beneficial to claimants nor administratively efficient for the agency.

We strongly support the submission of evidence as early as possible. Full development of the record at the beginning of the claim means that the correct decision can be made at the earliest point possible. The benefit is obvious: the earlier a claim is adequately developed, the sooner it can be approved and the sooner payment can begin.

Despite the obvious benefit to claimants, the fact that early submission of evidence does not occur more frequently indicates that factors beyond the claimant's control contribute to this problem. In attempting to find a solution, Congress and SSA should be careful not to make the process less "user-friendly" or more problematic for SSA.

There are several reasons why closing the record is not beneficial to claimants:

> *(1) Conditions change over time.* Claimants' conditions may worsen or improve over time and diagnoses may change. Claimants may undergo new treatment, be hospitalized or referred to different doctors. Some conditions, such as multiple sclerosis, take longer to diagnose. Some claimants mischaracterize their own impairments, either because they are in denial or lack judgment or understanding about their illness.
>
> By their nature, these claims are not static and a finite set of medical evidence does not exist. Think for a minute about your own and your family's situation. How often has someone received a diagnosis, only to have it change later as more tests are conducted or as more symptoms begin to appear? How often has the original assessment of a condition's severity changed, for the better or the worse? At what point can the individual affected say that he/she now has all of the information about the condition and how it will affect his/her life? And how sensible is it to refuse to receive new information, especially if the disability determination process itself creates such a time lag that changes in condition are possible, if not likely?
>
> If the record is closed, individuals will be forced to file new applications merely to have new evidence reviewed, such as reports from a recent hospitalization or a report that

[228] Statement of Marty Ford, Co-Chair, Social Security Task Force, Consortium for Citizens with Disabilities, Before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on Social Security Disability Programs' Challenges and Opportunities, (June 20, 2002), available at http://waysandmeans.house.gov/socsec/107cong/6-20-02/6-20ford.htm.

finally assesses and diagnoses a condition. Closing the record to such evidence does not serve either the claimant or the agency well. It would merely ensure that a decision will be made based on a snapshot that may be significantly out of date.

Finally, the system already imposes restrictions on new evidence submitted after the initial DDS decision. These limitations prevent the process from being entirely open-ended and serve to encourage claimants and their representatives to gather as much relevant information as possible as early in the process as possible.

*(2) The ability to submit evidence is not always in the claimant's control.* Claimants always benefit by submitting evidence as soon as possible. However, there are many reasons why they are unable to do so and for which they are not at fault. Closing the record punishes them for factors beyond their control, including situations where:

- DDS examiners fail to obtain necessary and relevant evidence.
- Neither SSA nor the DDS explains to the claimant what evidence is important and necessary for adjudication of the claim.
- Claimants are unable to obtain medical records either due to cost or because state laws prevent them from directly obtaining their own medical records.
- Medical providers, especially treating sources, receive no explanation from SSA or the DDS about the disability standard and are not asked for evidence relevant to the claim.
- Medical providers delay or refuse to submit evidence.

So that claimants are not wrongly penalized for events beyond their control, the current system provides a process to submit new evidence if certain conditions are met. This exception should not be eliminated in the name of streamlining the system.

*(3) The process should remain informal.* For decades, Congress and the United States Supreme Court have recognized that the informality of SSA's process is a critical aspect of the program. Imposing a time limit to submit evidence and then closing the record is inconsistent with the legislative intent to keep the process informal and inconsistent with the philosophy of the program.

The value of keeping the process informal should not be underestimated: it encourages individuals to supply information, often regarding the most private aspects of their lives. The emphasis on informality also has kept the process understandable to the layperson, and not strict in tone or operation. SSA should be encouraged to work with claimants to obtain necessary evidence and more fully develop the claim at an earlier point.

Further, filing a new application is not a viable option because it does not improve the process and may in fact severely jeopardize, if not permanently foreclose, eligibility for benefits. A claimant should not be required to file a new application merely to have new evidence considered where it is relevant to the prior claim. If such a rule were established, SSA would need to handle more applications, unnecessarily clogging the front end of the process.

Worse yet, individuals applying for Title II Disability Insurance benefits could permanently lose their entitlement to benefits if they are unable to re-apply before their recent connection to the workforce ends (DI beneficiaries must have worked 20 out of the last 40 quarters). Contrary to statements made in oral testimony during last week's hearing, great harm could be done to an individual who is forced to re-apply and who, due to the Title II time limits, loses his/her eligibility permanently.

Many people will wait some time before applying for benefits as they try to see if their impairments can be overcome or if they can make it in their changed circumstances. Added to the delays in the process as described by the Commissioner, the individual could be beyond the 5-year "recency of work" test before facing the need to re-apply. Those who do not have problems with recency of work may still lose benefits for the time period between the first and second applications. Forcing re-application merely to consider new evidence is clearly unfair to the claimant.

Nancy G. Shor, Executive Director, National Organization of Social Security Claimants' Representatives[229]

*Keep the record open for new evidence.*
Many recent proposals to change the disability determination process recommend that the record be closed to new evidence either after the DDS or, at least, after the ALJ level. In the past, both Congress and SSA have recognized that such proposals are neither beneficial to claimants nor administratively efficient for the agency.

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." At the federal district court level, the record is closed and the court will not consider new evidence. However, the court may remand the case to allow SSA to consider new evidence, but only if it is "new and material" and there is "good cause" for the failure to submit it in the prior administrative proceedings.

As noted earlier, NOSSCR strongly supports the submission of evidence as early as possible. Full development of the record at the beginning of the claim means that the correct decision can be made at the earliest point possible. The benefit is obvious: the earlier a claim is adequately developed, the sooner it can be approved and the sooner payment can begin. However, there are many legitimate reasons why evidence is not submitted earlier and thus why closing the record is not beneficial to claimants including: (1) worsening of the medical condition which forms the

[229] Statement of Nancy G. Shor, Executive Director, National Organization of Social Security Claimants' Representatives, Midland Park, New Jersey, DC, Before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on Social Security Disability Programs' Challenges and Opportunities (June 20, 2002) *available at* http://waysandmeans.house.gov/socsec/107cong/6-20-02/6-20shor.htm.

basis of the claim; (2) the fact that the ability to submit evidence is not always in the claimant's or representative's control, e.g., providers delay sending evidence; and (3) the need to keep the process informal.

Proponents of closing the record note that claimants could file a new application. This does not improve the process and may in fact severely jeopardize, if not permanently foreclose, eligibility for benefits. By reapplying rather than appealing: (1) benefits could be lost from the effective date of the first application; (2) in SSDI cases, there is the risk that the person will lose insured status and not be eligible for benefits at all when a new application is filed; and (3) if the issue to be decided in the new claim is the same as in the first, SSA will find that the doctrine of *res judicata* bars consideration of the second application.

In the past, SSA's notices misled claimants regarding the consequences of reapplying for benefits in lieu of appealing an adverse decision. Congress addressed this serious problem and, in legislation enacted in 1990, required SSA to include clear and specific language in its notices describing the adverse effect on possible eligibility to receive payments by choosing to reapply in lieu of requesting review.

Apart from these harsh penalties, which have been recognized and addressed by Congress, a claimant should not be required to file a new application merely to have new evidence considered where it is relevant to the prior claim. If such a rule were established, SSA would need to handle more applications, unnecessarily clogging the front end of the process. Further, there would be more administrative costs for SSA by creating and then developing a new application.

John H. Pickering, Past Chair, Senior Lawyers Division, and Commissioner Emeritus, Commission on Legal Problems of the Elderly, American Bar Association[230]

Several proposals over the past few years have suggested closing the record at some point during the administrative appeal process to provide a measure of finality. While we hope that evidence would be submitted as early in the process as possible, we urge that proposals to close the record be carefully considered. Certainly, the record should not be closed until the conclusion of the hearing at the earliest. Even then, claimants who show good cause, such as newly discovered evidence or a material change in condition, must be permitted to reopen the record within one year of an adverse decision. To close the record without allowing reopening under those circumstances would penalize claimants who may have been unable through no fault of their own to gather the evidence necessary for a full and fair hearing. It would also create additional costs for the agency, because claimants would file new applications simply to submit new evidence.

[230] Statement of John H. Pickering, Past Chair, Senior Lawyers Division, and Commissioner Emeritus, Commission on Legal Problems of the Elderly, American Bar Association, Before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on Social Security Disability Programs' Challenges and Opportunities, (June 20, 2002) *available at* http://waysandmeans.house.gov/socsec/107cong/6-20-02/6-20pickering.htm.

## D. Support for Closing the Record

Ronald G. Bernoski, President, Association of Administrative Law Judges[231]

*Close Record as of the Administrative Law Judge decision date*: The amendment of SSA's regulations to close the record after the ALJ hearing and as of the date of the ALJ decision would reduce the number of cases that ALJs must hear upon remand from the Appeals Council and courts based upon new evidence. New evidence is one of the most common reasons for remand of cases. This adds to the ALJ caseload and greatly delays a final administrative decision for the claimants. This change will place the responsibility upon the claimants' representatives for producing all relevant and material evidence at the hearing.

By SSA regulation, the hearing record in the Social Security disability system is not closed at any stage in the appeals process. This system precludes administrative finality and allows the claimant to introduce new evidence at each step of the process, including the Appeals Council level. 20 C.F.R. §§ 404.900(b), 404.976(b). This is true even when the evidence was in existence and available during the prior stage of the appeal. The reason the SSA keeps the record open at the administrative levels is that the Social Security Act authorizes the courts to remand a case to SSA when a claimant shows that there is material new evidence and there is good cause for not including it in the record earlier. 42 U.S.C. § 405(g).

In a recent report, the Social Security Advisory Board ("SSAB") stated that "Congress and SSA should review again the issue of whether the record should be fully closed after the ALJ decision." *Charting the Future of Social Security's Disability Programs: The Need for Fundamental Change*, January 2001, p. 20. This change will bring administrative finality to the Social Security disability case and will encourage all known relevant and material evidence to be produced at the hearing.

New documentary medical evidence of disability based upon treatment that occurred before the date on which the ALJ hearing closed should be admitted into evidence by the Appeals Council only upon a showing that the new evidence is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding. This standard is in keeping with the standard that the Social Security Act allows for the courts. Unrepresented claimants should be excepted from the requirement to show good cause.

[231] Statement of the Hon. Ronald G. Bernoski, President, Association of Administrative Law Judges, Milwaukee, Wisconsin, and Administrative Law Judge, Office of Hearings and Appeals, Social Security Administration, Before the Subcommittee on Social Security, House Committee on Ways and Means, Hearing on Social Security Disability Programs' Challenges and Opportunities (June 20, 2002) *available at* http://waysandmeans.house.gov/socsec/107cong/6-20-02/6-20bernoski.htm.