Hearing on Examining Changes to Social Security's Disability Appeals Process

HEARING

BEFORE THE

SUBCOMMITTEE ON SOCIAL SECURITY

OF THE

COMMITTEE ON WAYS AND MEANS

U.S. HOUSE OF REPRESENTATIVES

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Hearing on Examining Changes to
Social Security's Disability Appeals Process

U.S. House of Representatives,
Subcommittee on Human Resources,
Committee on Ways and Means,
Washington, D.C

WITNESSES

Patricia Jonas
Deputy Commissioner, Analytics, Review, and Oversight, Social Security Administration
Witness Statement

Elizabeth Curda
Director, Education, Workforce, and Income Security Issues, Government Accountability Office
Witness Statement

Will Morton
Analyst in Income Security, Congressional Research Service
Witness Statement

Jeff Price
Legislative Director, National Association of Disability Examiners
Witness Statement

Lisa Ekman
Director of Government Affairs, National Organization of Social Security Claimants' Representatives, on behalf of the Consortium for Citizens with Disabilities Social Security Task Force
Witness Statement

Hon. Ronald A. Cass
President, Cass & Associates, PC
Witness Statement

WAYS AND MEANS
CHAIRMAN KEVIN BRADY

Chairman Johnson Announces Hearing on Examining Changes to Social Security's Disability Appeals Process

House Ways and Means Social Security Subcommittee Chairman Sam Johnson (R-TX) announced today that the Subcommittee will hold a hearing entitled "Examining Changes to Social Security's Disability Appeals Process." The hearing will focus on recent and planned changes affecting the Social Security Administration's (SSA's) disability appeals process, the metrics the SSA uses to evaluate process changes, and the progress the SSA has made to address the appeals backlog. **The hearing will take place on Wednesday, July 25, 2018, in 2020 Rayburn House Office Building, beginning at 10:00 AM.**

In view of the limited time to hear witnesses, oral testimony at this hearing will be from invited witnesses only. However, any individual or organization may submit a written statement for consideration by the Committee and for inclusion in the printed record of the hearing.

DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:

Please Note: Any person(s) and/or organization(s) wishing to submit written comments for the hearing record must follow the appropriate link on the hearing page of the Committee website and complete the informational forms. From the Committee homepage, http://waysandmeans.house.gov, select "Hearings." Select the hearing for which you would like to make a submission, and click on the link entitled, "Click here to provide a submission for the record." Once you have followed the online instructions, submit all requested information. ATTACH your submission as a Word document, in compliance with the formatting requirements listed below, **by the close of business on August 8, 2018.** For questions, or if you encounter technical problems, please call (202) 225-3625.

FORMATTING REQUIREMENTS:

The Committee relies on electronic submissions for printing the official hearing record. As always, submissions will be included in the record according to the discretion of the Committee. The Committee will not alter the content of your submission, but we reserve the right to format it according to our guidelines. Any submission provided to the Committee by a witness, any materials submitted for the printed record, and any written

comments in response to a request for written comments must conform to the guidelines listed below. Any submission not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

All submissions and supplementary materials must be submitted in a single document via email, provided in Word format and must not exceed a total of 10 pages. Witnesses and submitters are advised that the Committee relies on electronic submissions for printing the official hearing record.

All submissions must include a list of all clients, persons and/or organizations on whose behalf the witness appears. The name, company, address, telephone, and fax numbers of each witness must be included in the body of the email. Please exclude any personal identifiable information in the attached submission.

Failure to follow the formatting requirements may result in the exclusion of a submission. All submissions for the record are final.

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

Note: All Committee advisories and news releases are available at http://www.waysandmeans.house.gov/

EXAMINING CHANGES TO SOCIAL SECURITY'S DISABILITY APPEALS PROCESS

Wednesday, July 25, 2018
House of Representatives,
Subcommittee on Social Security,
Committee on Ways and Means,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:00 a.m., in Room 2020, Rayburn House Office Building, Hon. Sam Johnson [chairman of the subcommittee] presiding.

Chairman Johnson. Welcome, you all.

This hearing examines changes to Social Security's disability appeals process. And, you know, today is the 19th hearing that we have held on the Social Security Disability Insurance program.

And as the Chairman of the Social Security Subcommittee, over the years we have talked about the challenges facing the disability program and the need to make some real changes to improve how it works for claimants, beneficiaries, and taxpayers. And we have spent a lot of time talking about the program because it is so important.

Yet, since 2003 the disability program has been on the GAO's High Risk List primarily because it desperately needs to be modernized. America wants, needs, and deserves a disability appeals process that is fair, accurate, and timely. And the decisions should be the same no matter whether the claim is filed in Texas, Connecticut, or Michigan. Unfortunately, that is not always the case today.

Recently, Social Security announced its decision to reinstate reconsideration. For those not familiar, reconsideration is a full second review of a rejected claim by a different examiner. On average, the processing time for this step is about 100 days.

This move would make sure that the appeals process is the same throughout the country, but there are real questions about the value of reinstating reconsideration. While some people might get a decision sooner under reconsideration, for others this step is effectively a rubber stamp of the initial

decision, and it simply further delays their hearing with an Administrative Law Judge.

Reinstating reconsideration is a big decision to make, especially given that Social Security has been without a commissioner for more than 5 years. Isn't that terrible? We need to understand why Social Security thinks now is the time to make this change.

I am pleased that President Trump has put forward a nominee for Commissioner, however, he hasn't even had a hearing yet. I want to take this opportunity to call on my Senate colleagues to confirm the next Social Security Commissioner, I hope before Labor Day. And if you all will push that issue with me, I think we can get one.

Social Security needs leadership, and they need it now. And we need the leadership of a Commissioner to ensure Social Security has a consistent nationwide appeals process, and any change made needs to be backed up by data showing how any changes benefit both the claimant and the taxpayer. Americans deserve nothing less.

I thank our witnesses for being here today, and I look forward to hearing your testimony. And hopefully we will get some more people up here. We will note that too, won't we?

Mr. Larson. Yes, sir.

Chairman Johnson. I now recognize Mr. Larson for his opening statement.

Mr. Larson. Why, thank you, Mr. Chairman.

And may I say what a great feeling it is to be back in this room, but especially to be back in this new and renovated and newly named room after our distinguished chairman, Mr. Johnson, and whose portrait will gaze down on all of us and will continue to be timeless.

What an honor, and as a point of personal privilege, it is to be associated with and to serve with Sam Johnson, having most recently had the opportunity to be at both the portrait unveiling and the ribbon cutting of this room.

I think it is important and all too often in America and especially in our public school systems we don't know enough about history, nor the great sacrifice that

people have made on behalf of their country. Sam Johnson is a living legend and exemplifies everything about service above self and love of country. And it is always an honor to be in his presence.

And while we may disagree from time to time over things, mostly, as people might find this shocking, we agree on more than we would disagree. And I especially applaud him for this hearing and his dedication, especially when it comes to disability, to making sure that the programs of Social Security, the administration of Social Security is intact.

So it is great to be here, Mr. Chairman.

And I would also like to thank our witnesses for joining us here today, and especially to Lisa Ekman from the Consortium for Citizens With Disabilities.

Millions of Americans rely on Social Security for basic income when they are retired, if they become severely disabled and can no longer work, or for survivor's benefits. There is no private plan on the market that can compare to Social Security.

Since 2010, the number of beneficiaries has grown by 15 percent as the baby boomers reach retirement age, but Social Security's operating budget has fallen almost 10 percent when it is adjusted and accounting for inflation.

This has made it nearly impossible for the Social Security Administration to fulfill their core mission of serving beneficiaries. For example, the wait for a hearing is about 600 days. That is unacceptable, and the American people deserve better.

In addition, we are deeply concerned about the impact of some of the changes the Social Security Administration has been making without congressional approval. And, again, I applaud the chairman here and Members on both sides of the aisle with their concern about legislative oversight and review, specifically as it relates to regulations and administrative procedures.

For example, I have strong concerns about Social Security reinstating the flawed reconsideration appeals step in 10 States that currently do not have it. Rather, Social Security should instead work with Congress to get disability decisions right the first time so that the severely disabled workers who meet eligibility requirements can be approved without having to endure years of appeals.

I also want to object, I have strong objections to the administration's recent executive order that is likely to politicize the appointment of the judges who hear disability appeals.

The Social Security Administration employs the vast majority of Federal administrative law judges, or ALJs, as they are called. Last year they issued over 685,000 benefit eligibility decisions. It is my belief that the Americans who have contributed to Social Security throughout their working lives deserve an impartial hearing before a highly qualified and independent judge, rather than political appointees.

Finally, I would like to enter into the record a 2016 letter signed by the then-ranking members of all the committees with jurisdiction over Social Security objecting to a series of rules changes that were proposed and later adopted over the objection of the legislature.

Congress of the United States
Washington, DC 20515

October 28, 2016

The Honorable Carolyn Colvin
Acting Commissioner of Social Security
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235

Dear Commissioner Colvin:

We are writing about a series of recent and proposed changes to policies and procedures governing how the Social Security Administration (SSA) evaluates eligibility for disability benefits. We are concerned the changes will have the effect of limiting access to essential income support, including earned benefits, for individuals who meet the statutory eligibility criteria.

The combined effects of these changes would erect new, unwarranted barriers to benefits for severely disabled Americans. The changes are likely to result in individuals being denied benefits to which they are otherwise eligible. In some cases, the denials will be based solely on the inability of individuals struggling with severe illness or disability to navigate already-complex procedural obstacles, and in other cases, individuals will be denied benefits because SSA does not consider the most relevant medical evidence of their disability. This is not the intent of the Social Security Act and is not consistent with the purpose of Social Security and Supplemental Security Income, which is to provide basic economic support to those who, by reason of severe and long-term injury or illness, are unable to support themselves through work.

With hearing waiting times at an all-time high of 543 days, we appreciate that you and your team are making every effort to reduce the unprecedented backlog of pending disability hearings. It is undisputed that SSA requires an adequate number of Administrative Law Judges and support staff to conduct hearings. We understand that hiring has not been sufficient due to the 10-percent reduction in SSA's operating budget since 2010 (after adjustment for inflation). These new procedural barriers to benefits, however, are not an appropriate response to this problem.

These changes are also inconsistent with SSA's commitment to data-driven decision making. Little or no data has been presented to support the changes being proposed. There is no evidence that they will reduce delays or improve accuracy and fairness. In fact, making the process more formal, legalistic and adversarial – the result of adopting these changes – could increase delays, as claimants and their representatives would be forced to file additional appeals in order to have the evidence appropriately considered.

The specific changes of concern are:

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- **Proposed regulation to close the record for submission of evidence ("program uniformity").** This change creates an arbitrary 5-day deadline for the submission of evidence in disability appeals, which is counter to the clear language in the Social Security Act and penalizes claimants who, through no fault of their own, are unable to obtain and submit the evidence before the deadline. It is well known that SSA has difficulty obtaining medical evidence it requests from providers – claimants should not be penalized when they face the same difficulty. Further, experience with this policy in Region I reveals significant inconsistencies in the manner in which the 5-day deadline is implemented there. Finally, no evidence is presented that this policy has resulted in faster processing or more accurate decisions; its adoption is likely to result in further delays, as claimants are forced to pursue additional appeals or file new applications in order to have all relevant evidence considered. Program uniformity is a worthy goal and we recommend that SSA apply the evidence rules that exist in the rest of the country in Region I, rather than arbitrarily barring evidence needed to fully evaluate whether an individual meets the eligibility criteria.

- **Proposed revision to rules regarding evaluation of medical evidence** – This proposed rule makes a number of beneficial changes to expand the list of acceptable medical sources and to clarify and update some of SSA's terminology.

  However, the proposal also contains a radical, unwarranted and untested change: it would eliminate the longstanding recognition that evidence provided by medical providers who have examined and treated the claimant is generally of a higher value than medical opinions issued by those who have never examined the claimant, or have only examined them briefly.

  Existing regulations explain the strong rationale for giving significant weight to opinions from individuals who have examined the claimant, and especially those who provided ongoing medical care to them: "**since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations**." (Code of Federal Regulations, section 404.1527(c) (2))

  The proposed rule would regard evidence from a claimant's own medical providers as on par with one-time Consultative Examinations arranged by SSA, or paper file reviews by SSA consultants. Indeed, the proposal suggests that prior administrative medical findings by SSA consultants – which are essentially second-hand forms of evidence, based on whatever medical evidence is available in a claimant's application for benefits, even if incomplete – are equivalent in probative value to actual medical evidence provided by someone with an established, treating relationship with the claimant. A treating source is

far more likely to provide an accurate diagnosis, prognosis, and evaluation of the effect of the individual's impairment on their ability to function in the workplace than a generalist performing a brief exam, or a consultant reviewing and evaluating the often-incomplete medical file at SSA.

Furthermore, adoption of the proposed rule would result in less transparency and public confidence in SSA's decision making, because it eliminates a number of existing requirements for adjudicators to explain why they accepted or rejected conflicting evidence. Under the proposal, evidence from a claimant's own doctors could be summarily rejected, without explanation or justification, if there is other evidence in the file that the adjudicator is able to use. Without requirements for articulation, the public can have no confidence that all evidence will be fairly considered. The proposed rule gives adjudicators too much individual discretion to dismiss key evidence without providing a rationale, and will lead to increasing inconsistency in how claimants are evaluated by different decision makers.

It is well-documented that failure to fully comply with SSA's existing, sensible rules that require adjudicators to explain and justify how they weigh evidence, especially evidence from the applicant's own health care providers, is a common source of remands from the Appeals Council and the federal courts. However, the solution is not to abandon a long-established, clearly-structured, and transparent method of weighing multiple pieces of evidence. Instead, SSA should withdraw this portion of the proposed rule and focus on increased training and compliance with its existing policy -- adding clarifications where necessary but not abandoning the policy itself.

- **Social Security Ruling 11-1p** – This ruling changed a policy which had been in place since 1999, which permitted claimants to continue pursuing an appeal within SSA even if they also chose to file a new application for benefits. Appellants often do this in hopes of receiving at least some income to survive on while they wait for appeals to be heard. The ruling eliminated this option. The real-world effect of this was to force claimants to make the difficult choice between pursuing an appeal that could take several years but could eventually provide back benefits and retroactive medical coverage, or forgoing these potential benefits by filing a new application, with only the prospect of future benefits. We note that claimants whose appeals are in Federal court are not barred from simultaneously filing a new application. We urge the restoration of prior policy, in recognition of the lengthy delays at both the hearing level (543 days) and the Appeals Council (362 days), and the often desperate economic situation of a severely-disabled individual who has been unable to work for so long.

We expect that SSA will carefully consider all comments and concerns, without arbitrary deadlines due to the upcoming change in Administration. As you know, SSA disability programs support the most vulnerable. Great care, deliberation and substantial evidence should guide any changes that could impact full and fair adjudication.

We applauded other recent steps SSA has taken to improve accuracy, consistency and policy compliance in the disability programs, but these proposed regulations go too far. They are inconsistent with both the fundamental purpose of the programs – to provide income to those whose impairments render them unable to work – and the real world in which claimants live, with all the attendant challenges of obtaining evidence and navigating the complex application and appeals process.

Sincerely,

Ron Wyden
Ranking Member
Committee on Finance
U.S. Senate

Sherrod Brown
Ranking Member
Subcommittee on Social Security, Pensions, and Family Policy
Committee on Finance
U.S. Senate

Patty Murray
Ranking Member
Committee on Health, Education, Labor and Pensions, and
Subcommittee on Labor, Health and Human Services, Education, and Related Agencies
Committee on Appropriations
U.S. Senate

Sander M. Levin
Ranking Member
Committee on Ways and Means
U.S. House of Representatives

Xavier Becerra
Ranking Member
Subcommittee on Social Security
Committee on Ways and Means
U.S. House of Representatives

Lloyd Doggett
Ranking Member
Subcommittee on Human Resources
Committee on Ways and Means
U.S. House of Representatives

Rosa L. DeLauro
Ranking Member
Subcommittee on Labor, Health and Human Services, Education, and Related Agencies
Committee on Appropriations
U.S. House of Representatives

Mr. Larson. With that, I thank the chairman again and say what a great feeling it is to be here with you today in this new and renovated room. And the chairman is in an antique chair, as I learned, that they found the other day in the bowels of the Capitol, dating back to the early 1950s.

Chairman Johnson. That is why I am sitting so low.

Thank you.

As is customary, any member is welcome to submit a statement for the hearing record.

And before we move on to our testimony, I want to remind our witnesses to please limit your oral statements to 5 minutes. However, without objection, all of the written testimony will be made a part of the hearing record.

We have six witnesses today. Seated at the table are:

Patricia Jonas, Deputy Commissioner, Office of Analytics, Review and Oversight, Social Security Administration. They need some more words in there, I think.

Elizabeth Curda, Director, Education, Workforce, and Income Security Issues, Government Accountability Office.

Will Morton, Analyst in Income Security, Congressional Research Service.

Jeff Price, Legislative Director, National Association of Disability Examiners.

Lisa Ekman, Director of Government Affairs, National Organization of Social Security Claimants' Representatives, on behalf of the Consortium for Citizens With Disabilities Social Security Task Force. That is a mouthful.

The Honorable Ron Cass, President, Cass & Associates, PC.

Thank you for being here, all of you.

Ms. Jonas, welcome. Thanks for being here. And please proceed.

STATEMENT OF PATRICIA JONAS, DEPUTY COMMISSIONER, ANALYTICS, REVIEW AND OVERSIGHT, SOCIAL SECURITY ADMINISTRATION

Ms. Jonas. Chairman Johnson, Ranking Member Larson, and members of the subcommittee, I am Patricia Jonas, the deputy commissioner for the Office of Analytics, Review, and Oversight at the Social Security Administration. Thank you for inviting me to discuss our disability adjudication process.

Thirty-five years ago, I joined SSA as a hearing office attorney. Since then, I have served in various roles, including leading the administrative appeals judges who adjudicate cases at the final level of administrative review. Most recently, I agreed to lead the newly created Office of Analytics, Review and Oversight, OARO.

I dedicated my career to SSA because the link between our work and helping others is so clear. Social Security touches the lives of nearly every person in the Nation, whether after the loss of a loved one, at the onset of disability, or at the transition from work to retirement.

In fiscal year 2018, we expect to pay over $1 trillion in benefits to an average of over 70 million people. I certainly appreciate that how well we deliver our services matters.

Today, I will provide an overview of our disability adjudication process, including the return to a uniform process in those States that have not had the second level of appeal since 1999, and our efforts to improve service at the hearing level.

In order to frame our conversation, I will briefly explain the steps in the disability process. When an individual requests a disability benefit we send the case to a State disability determination service, or DDS, which makes the initial disability determination.

If an applicant is dissatisfied with an initial determination, there are up to three additional levels of administrative review: reconsideration, also handled by the state DDSs; a hearing before an administrative law judge; and review by our Appeals Council.

In nine States and part of one State we have been maintaining an artifact of a disability redesign prototype that eliminated the reconsideration step. Over the

next 3 years we will reinstate reconsideration to restore a uniform administrative review process that 75 percent of applicants already follow.

Our disability process is large, and making disability decisions is complex. We are guided by the principle of determining whether someone is entitled to disability benefits as early in our administrative process as possible.

Since 1999, we have continued to improve our process toward that goal. We converted from paper files to electronic files. We receive more and more electronic medical evidence. And we have developed case analysis tools that help ensure policy compliance.

All of these enhancements now allow us to use data analytics to improve service at all our levels of our disability process.

For instance, at the initial determination step we implemented the Compassionate Allowance process, a review that quickly identifies and prioritizes 228 medical conditions that qualify for disability under our rules.

At the reconsideration step we use a predictive model to conduct targeted denial reviews to identify the most error prone DDS denials that are likely to be allowances, preventing those cases from escalating to the hearing level.

At the hearings level we are expanding our use of software we call Insight, which helps us ensure policy compliance in our decisions, and we use data analytics to identify pending hearing requests that we should review again for possible allowance before a hearing is necessary.

Our increasing use of data analytics and information technology will help us reduce our claimants' wait for a hearing decision. In addition, we appreciate the dedicated funding that Congress provided to us in fiscal years 2017 and 2018. We have reduced the number of people waiting for a hearing in each of the last 18 months, and we expect to end fiscal year 2018 with approximately 900,000 pending hearings.

Based on our current efforts, which includes our plan to create a uniform adjudication process, we expect to reduce the average wait for a hearings decision to 270 days by the end of fiscal year 2021.

Returning to a uniform national process is one more effort to identify possible allowances at the earliest point, and now is the optimal time because disability applications are at the lowest they have been in some time and we will be

current with our continuing disability reviews. It provides some claimants the opportunity to receive their benefit more quickly and will help alleviate the hearings backlog.

I am proud to be a part of an agency that is dedicated to public service. Our employees understand what is at stake for our claimants, and we strive to thoughtfully evolve our policies and processes.

I am happy to answer any question you may have.

COMMITTEE ON WAYS AND MEANS

SUBCOMMITTEE ON SOCIAL SECURITY

U.S. HOUSE OF REPRESENTATIVES

July 25, 2018

STATEMENT FOR THE RECORD

PATRICIA JONAS
DEPUTY COMMISSIONER
FOR THE OFFICE OF ANALYTICS, REVIEW AND OVERSIGHT
SOCIAL SECURITY ADMINISTRATION

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

Introduction

Thank you for inviting me to discuss the Social Security Administration (SSA) disability adjudication process. My name is Patricia Jonas. I am the Deputy Commissioner for the Office of Analytics, Review, and Oversight (OARO) at SSA. Before I came to work at SSA, I was a private practice attorney and I would occasionally represent claimants before the agency. Thirty-five years ago, I joined SSA as a hearing office attorney, later becoming a manager before transitioning to headquarters where I was involved in implementing several initiatives while serving as a senior executive in our policy component. From that role, I became the Executive Director and Chair of the Appeals Council, managing the Administrative Appeals Judges who adjudicate cases at the final level of administrative review. After a brief time as the agency's acting General Counsel, I agreed to lead the newly created Office of Analytics, Review and Oversight. [1]

Today, I will provide an overview of our disability adjudication process, including the return to a uniform process in nine States and part of one State that have not had the second level of appeal since 1999, and our efforts to improve service at the hearings level.

Background

I chose to dedicate my career to SSA because the link between our work and helping others is so clear. Social Security touches the lives of nearly every person in the Nation, whether after the loss of a loved one, at the onset of disability, or at the transition from work to retirement. Our programs provide a safety net for the public and contribute to increased financial security for the elderly and disabled. SSA pays benefits to an average of over 70 million Social Security beneficiaries and Supplemental Security Income (SSI) recipients each month. During fiscal year (FY) 2018, we expect to pay over $1 trillion to Social Security and SSI beneficiaries. I certainly appreciate that how well we deliver our services truly matters.

Adjudicating Disability Claims

Statutory Definition of Disability

The Social Security Act (Act) defines disability as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can result in death or has lasted, or can be expected to last, for a continuous period of not less than 12 months. In making this determination, the Act requires us to consider how a claimant's condition affects his or her ability to perform previous work and, considering his or her age, education, and work experience, other work that exists in significant numbers in the national economy.

[1] The nine States are Alabama, Alaska, Colorado, Louisiana, Michigan, Missouri, New Hampshire, New York, and Pennsylvania. In most of California, claimants receive the second level of appeal (the reconsideration step), but a portion of claimants in that State would proceed from the initial determination level to an ALJ hearing.

Claimants must also meet non-disability factors including having enough covered earnings to be insured for Title II (Social Security) benefits and meeting resource and income criteria for Title XVI (SSI) benefits.

Overview of the Administrative Review Process

In order to frame our conversation, I will briefly explain the steps in the disability process. Initial applications for disability benefits may be filed online, by telephone, or in person at a Social Security field office. After receiving an application, we send the case to a State Disability Determination Service (DDS), which makes the initial determination of disability. If an applicant is dissatisfied with an initial denial of disability benefits by the DDS, our rules provide for three additional levels of administrative review – reconsideration (also handled by the DDS), a hearing before an administrative law judge, and review by our Appeals Council. In nine States, and part of one State, we have been running a prototype project that eliminated the reconsideration step. Our goal is to award benefits that meet the requirements of the Act as early in the process as possible. Indeed, of all the claims that we allow, about 75 percent are approved at the initial or reconsideration level.

Initial Determination Level

The State DDSs handle initial disability determinations. The DDSs develop medical evidence and determine whether a claimant meets the statutory definition of disability. Nationwide, in FY 2017, we received over 2.4 million initial disability applications.

A State DDS disability examiner works with a medical or psychological consultant, or both, to determine whether the claimant is disabled under our rules. When deciding the claim, the disability examiner and medical or psychological consultant must consider all of the evidence in the file, both medical and vocational, to make a determination.

We are using data analytics to improve service. We implemented the Compassionate Allowance (CAL) process, an automation that quickly identifies and prioritizes 228 medical conditions that invariably qualify for disability under our rules.

Our Quick Disability Determination (QDD) process uses a computer-based predictive model in the earliest stages of the disability process to identify and fast-track claims where a favorable disability determination is highly likely and medical evidence is readily available. Both QDD and CAL have helped us serve people who are severely disabled more timely.

We require our DDS examiners to use the Electronic Claims Analysis Tool (eCAT), a web-based application that helps the user through the complex disability adjudication process. The tool aids in policy compliance; documenting, analyzing, and adjudicating the disability claim according to our regulations. eCAT has led to improvements in our ability to collect and analyze data relating to the disability process. With this data, we now can study and revise policy based on evidence and develop more advanced models and analytics to improve our efficiency and ensure policy compliance.

In FY 2005, we replaced our paper disability claims files with electronic records, which increased our efficiency. We continue to modernize other parts of our process, including the ability to receive electronic medical evidence, which not only helps us more efficiently obtain the medical information we need to make a timely and accurate decision but also provides additional opportunities for data analytics. Currently, nearly 50 percent of initial disability claims contain some electronic medical evidence. We have other technology advances underway. For example, software called Intelligent Medical-language Analysis Generation, or IMAGEN, converts images of medical information to readable text, which allows us to apply data analytics to the information to improve policy compliance. In addition, using state-of-the-art Natural Language Processing (NLP) techniques, we are developing and will begin implementing by the end of the year, a new NLP application to provide decision support and enhanced quality control assistance in our disability claims process.

Policy compliance is essential and we provide oversight to ensure decisions are accurate. As required by the Act, we review at least 50 percent of all initial allowances before effectuating payment. To help ensure we are using our resources most effectively, we implemented a predictive model to identify the 50 percent most error prone cases for selection and review. These pre-effectuation reviews allow us to correct errors we find before we issue a final decision, and to provide instructional policy compliance feedback to DDS adjudicators. We also have a regulatory quality assurance program where we randomly select a certain number of favorable and unfavorable medical determinations made by each State DDS per calendar quarter. We return cases to the DDS for corrective action if the evidence in file does not support the proposed determination or does not contain all of the information needed to support the final determination.

Reconsideration Level

In most States, a claimant who is dissatisfied with our initial disability determination may request a reconsideration. At the reconsideration level, a different State DDS examiner reviews all evidence from the initial determination. The reconsideration step gives the claimant an opportunity to submit additional medical evidence. The claimant's case is also reviewed by a different medical or psychological consultant. In 2017, we allowed about 75,000 claims at the reconsideration level.

As with the initial determination level, we review policy compliance. Federal reviewers perform quality reviews of randomly selected favorable and unfavorable reconsideration State DDS determinations and provide feedback to the DDS to correct any errors before adjudication while also calculating accuracy.

We also use a predictive model to conduct targeted denial reviews (TDRs) of reconsideration determinations.[2] Our TDRs originated from a review the agency initiated called the Random Denial Study, which began in FY 2008. Historically, per the statutorily required pre-effectuation review, quality oversight had focused on allowances. The Random Denial Study collected and analyzed data points from cases denied by the DDSs. In FY 2010, this analysis enabled us to rollout the TDR, which identifies the most error-prone DDS denials that are likely to be

[2] In the Prototype States, these targeted denial review are of initial disability decisions.

allowances. This model allows us to catch allowances, preventing those cases from escalating to the hearing level. It also provides us with information that we can build into our IT planning and improve DDS adjudicator training to prevent errors in the future.

Hearing Review Level

A claimant who is dissatisfied with our reconsideration determination may request a hearing with an ALJ who performs a *de novo* review including evaluating evidence that may not have been available to prior adjudicators. The ALJ may call vocational and medical experts to offer opinion evidence, and the claimant or the claimant's representative may question these witnesses. Once the record is complete, the ALJ considers all of the evidence in the record and makes a decision. In FY 2017, approximately 47 percent of decisions at the ALJ were allowances.[3]

Claimants' wait for a hearing decision is a longstanding challenge. In January 2016, the Office of Hearings Operations introduced its Plan for Compassionate and REsponsive Service (CARES) to help the more than 1 million people who were waiting for a hearing with us. CARES, which we updated in August 2017, outlines a multipronged plan including modeling and data analytics, hiring and performance management and policy clarification and streamlining to improve wait times while ensuring decisional accuracy. Our complete CARES plan is available on SSA's website.[4]

The anomaly funding that Congress provided to us in FY 2017, as well as the dedicated funding we received as part of the Consolidated Appropriations Act of 2018, is helping us improve service. In March 2018, we reduced pending hearings to below 1 million cases for the first time since October 2014, and we have reduced the number of people waiting for a hearing in each of the last 19 months and expect to end FY 2018 with approximately 900,000 pending hearings. Based on our current plans, including the implementation of reconsideration in the prototypes States, we expect to reduce the average wait for a hearings decision to 270 days by the end of FY 2021.

Consistency helps with accuracy and efficiency. In December 2016, we published final rules that create nationally uniform hearing and Appeals Council procedures. Under the rules, we provide claimants with a 75-day advance notice of the hearing, which provides claimants more time to obtain updated medical and other records before the date of the hearing. We coupled that 75-day advance notice requirement with a policy that, generally, claimants must submit or inform us of written evidence at least five business days before a hearing. The changes we made

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[3] According to an internal quality study from 2016, there are several reasons why an ALJ may allow a case after it has been denied at the reconsideration (or initial determination) level. The study was a one-time, post-effectuation quality review of a certain number of claims denied by the DDS but subsequently allowed as fully favorable at the hearing level. According to the study, key factors why claims are reversed are: claimants move into a higher age bracket while waiting for a hearing; impairments worsen (nearly 60 percent of the claims reviewed included worsening at the hearing level); subsequent treatment provides a fuller record; ALJs may gain additional perspective by observing the claimants; and claimants are more likely to be represented at the hearing level (while 65 percent of the claims reviewed were represented at the DDS level, 95 percent were represented at the hearing level).

[4] Our CARES plan can be found at https://www.ssa.gov/appeals/documents/2017_Updated_CARES_Anomaly_Plan.pdf.

in these rules, coupled with rules changes we made in 2015 that require claimants to inform us about or submit all evidence known to the claimant that relates to his or her disability claim, make our hearings process more effective.

A quality decision is one that is both timely and accurate. We created better tools to provide individualized feedback to our adjudicators. For example, "How MI Doing?" not only gives ALJs information about their AC remands including the reason for remand but also information on their performance in relation to other ALJs in their office, their region, and the nation. We have developed training modules related to the most common reasons for remand that are linked to the "How MI Doing?" tool. ALJs are able to receive immediate training at their desks that is targeted to the specific reasons for the remand. We are also expanding the use of "Insight," a software tool that helps with policy compliance.

Regarding the hearings level, I also wanted to note the agency is evaluating the implications of the Supreme Court's decision in Lucia v. Securities and Exchange Commission, which concerned ALJs of the Securities and Exchange Commission, and the President's recent Executive Order that would prospectively require agencies to hire ALJs through the excepted service and not the competitive service.

Appeals Council Review Level

Furthermore, the Appeals Council (AC), which is a part of OARO, uses several methods to ensure the quality of ALJ decisions. In addition to handling the final level of the agency's appeals process, it conducts pre-effectuation reviews on a random sample of ALJ allowances and post-effectuation reviews that look at specific issues to help inform our training needs and potential policy changes.

Keeping Disability Policy Current

Our efforts to become more timely and policy-compliant with our disability decisions also depend on keeping our disability policy current. We strive to keep our rules and policies aligned with contemporary medicine, healthcare, and new technology, and to ensure policy decisions are evidence-based. We develop, in consultation with medical and other experts, new medical policies for the administration of the SSDI and SSI programs. These policy revisions reflect our adjudicative experience, advances in medical knowledge and treatment of disorders, recommendations from medical experts, and comments we receive.

Updated Listings

The Listings of Impairment describe for each major body system the impairments considered severe enough to prevent an adult from working, or for children, impairments that cause marked and severe functional limitations. We have been comprehensively updating our Listing of Impairments for nearly all body systems. For instance, in 2016, we updated the listings for Neurological Disorders (prior comprehensive update, 1986), Mental Disorders (prior comprehensive update, 1985), and Respiratory Disorders (prior comprehensive update, 1993). Earlier this year, we issued a Notice of Proposed Rulemaking on the last body system that

requires a comprehensive listing update, the Musculoskeletal System (prior comprehensive update, 1985 and minor updates, 2001). Our objective is to revise the listings' criteria on an ongoing basis, using a three to five-year update cycle.

Occupational Information System

Disability claims reaching the last two steps of the five step sequential process rely not only on an assessment of a person's functional abilities, but also on consideration of jobs that exist in the national economy and the vocational requirements and physical, cognitive, mental demands of those jobs. To make accurate decisions, we must have information that reflects current occupations and their requirements. The Department of Labor last updated the information we use to determine the availability of jobs, the Dictionary of Occupational Titles (DOT), in 1991. Our program needs to reflect changes that have occurred in the workforce since the last update. In addition, the DOT does not contain information about the mental and cognitive demands of occupations we need to make many determinations, so we rely on vocational experts. Working closely with the Department of Labor's Bureau of Labor Statistics, we are developing a new Occupational Information System that will be the primary source of occupational information used in our disability adjudication process.

Restoring a Uniform, National Process

The notion that the disability process is complex is not new. Over the years, we have made several attempts to improve the process. In the 1990s, we began testing a series of models under what was known as Disability Redesign. There were many initiatives considered at this time, including the Single Decision Maker (SDM) model, the Adjudication Officer model, introduction of a claims manager, eliminating the reconsideration level of appeal, and the incorporation of a pre-decision interview into the process. One of the models, Disability Redesign Prototype, tested the elimination of the reconsideration level, SDM and a pre-decision interview in one state in each of our 10 regions.

The redesign models had mixed results. We discontinued some initiatives very early on while others, like the Single Decision Maker continued for nearly 20 years before Congress ended it with the *Bipartisan Budget Act of 2015*.[5] The remaining piece of the prototype model – elimination of the reconsideration – was developed as an element of a larger overhaul and was not designed to stand on its own, nor did we intend to continue to run a different appellate process in 9 States, plus part of one State.

Over the next three years, we will end this Disability Redesign artifact and restore a uniform administrative review process. The timing is good: pending claims at the DDSs are at the lowest they have been in some time and the receipt of initial claims continues to be flat or decline, and we will soon be current with our continuing disability reviews. We may have taken this action

[5] Under section 832 of the *Bipartisan Budget Act of 2015* (BBA), we are required to end the single decisionmaker test. In light of this recent legislation, we are in the process of requiring that an MC or PC review the medical portion of a DDS-level disability claim. We have phased in this requirement in over half of the States that used single decisionmakers, and we expect to complete this requirement by the end of FY 2018.

sooner but for other circumstances including the Disability Service Improvement initiative, which planned for changes that would have addressed the appellate process. Reinstating reconsideration will restore uniformity to our national programs. It will also provide claimants the opportunity to receive a favorable decision more quickly and will aid in alleviating the hearings backlog. Further, as we improve our disability process, we are developing new systems and evolving our use of data analytics – for example, refining CAL at the initial level or the targeted denial reviews at the reconsideration level. Under a uniform, national process, we will make these systems and analytics updates more efficiently by writing policy and notices for, and training our employees on, a single process.

We are making this change now because it allows us to return to a uniform disability process for all claimants across the country; it is the most efficient and effective way to help disabled claimants get their benefits sooner; and with flat or declining disability applications and our ability to become current on working our continuing disability reviews, we can most efficiently return to a national process while maintaining service at the initial and reconsideration level and improving our service for people requesting a hearing. As mentioned above, serving Americans who have waited the longest for a hearing remains our biggest challenge. This decision supports our ability to achieve our wait time goals nearly a full year earlier, which is significant to the claimants waiting in line.

As part of our plan, we have had discussions with the State DDSs affected by the change, and there is significant consensus across the State DDSs that there is a need to create a uniform disability appeals process. Our staff worked directly with the State DDS Administrators and staff, and the State DDSs' parent agencies, to identify and address each State's needs including human capital and other resources to smoothly reinstate the reconsideration level of review. Throughout this process, our leadership will continue to work with State leadership to ensure a smooth transition.

We have contacted Subcommittee staff and the staffs of those Members from a prototype State, and we thank you for your interest and thoughtful questions. Our communication plan will also include notification to advocates and the public.

Conclusion

I am proud to say that we are an agency that is sincere about public service. Our employees understand what's at stake for our claimants and we strive to thoughtfully evolve our policies and processes. We look forward to continuing to work with you and your subcommittee.

Chairman Johnson. Thank you.

Ms. Curda, welcome again. Please proceed.

STATEMENT OF ELIZABETH CURDA, DIRECTOR, EDUCATION, WORKFORCE, AND INCOME SECURITY ISSUES, GOVERNMENT ACCOUNTABILITY OFFICE

Ms. Curda. Chairman Johnson, Ranking Member Larson, and members of the subcommittee, thank you for inviting me to discuss the Social Security Administration's efforts to manage its disability workloads.

SSA has faced longstanding challenges processing disability workloads, most recently at the appeals level. At the end of fiscal year 2017, SSA reported that more than 1 million claimants were awaiting a decision on disability benefits at the appeals level, and they waited on average 605 days, nearly 20 months.

We have issued several reports describing these challenges, SSA's efforts to reduce processing times, and its lack of a systematic evaluation to determine the impact of those efforts. We highlighted many of these issues in our testimony to this committee in March of this year.

At that time we noted the need for a sustained focus on the part of SSA's leadership to approach these challenges strategically and follow through with rigorous plans to improve disability programs.

Today, we build on this body of work with the release of a new report on SSA's efforts to manage its appeals workload by transferring cases from hearing offices with backlogs to offices with more capacity.

My testimony will touch on two areas: one, SSA's challenges managing disability workloads at the appeals level; and, two, the extent to which SSA has metrics to assess its efforts to reduce processing times.

Regarding SSA's challenges with managing workloads, we found that both processing times at the appeals level and pending caseloads have increased in recent years. Specifically, from fiscal year 2012 to 2017 average processing time climbed by approximately 70 percent, peaking at 605 days in fiscal year 2017. Pending caseloads followed a similar pattern, growing to over 1.1 million cases in fiscal year 2016; however, in 2017, pending cases declined by 6 percent to just over 1 million.

According to SSA officials and the OIG, several factors contributed to these trends, such as changes in hearings operation staff and regulations affecting judges' workloads.

In the report we are releasing today we examine one of SSA's efforts to reduce processing times at the appeals level by transferring appeals disability cases from offices with backlogs to those with more capacity. From fiscal years 2008 through 2017 the percentage of cases that were transferred increased from 14 to 43 percent.

But despite the rising use of transfers, SSA cannot assess the effectiveness of these efforts due to a weakness in its average processing time metric. In particular, the current processing time metric attributes the entire processing time for a case to the office that finishes the case.

Without an office-specific measure of timeliness for cases that are transferred, SSA cannot determine how individual offices contribute to processing times, information that is critical to assessing the effect of transferring cases on timeliness goals. We are recommending that SSA develop a timeliness metric or set of metrics that more accurately reflect offices' performance in light of case transfers. SSA agreed with this recommendation.

Our past work and the OIG's have also highlighted the need for SSA to evaluate its efforts designed to reduce the backlog or improve program integrity at the appeals level. Our 2017 report on consistency and decisionmaking at the appeals level, for example, found that SSA had five different quality assurance reviews of hearings decisions, several of which have similar goals and look at similar claims, but SSA had not evaluated the efficiency or effectiveness of these reviews. We recommended that SSA evaluate these reviews, and it agreed.

SSA has recently taken steps toward approving its evaluation that could enhance its ability to respond to our recommendations. Last October, it created a deputy commissioner-level office called the Office of Analytics, Review and Oversight, that Pat leads, which is intended to foster data analysis of SSA's programs and enhance oversight of the disability adjudication system. However, the effects of these changes remain to be seen.

In summary, we found that SSA has increasingly transferred cases between offices to help manage its appeals workloads. However, we also found that SSA does not have an accurate metric to assess how individual offices

contribute to processing times, which could hinder the agency's ability to identify and address problems.

We believe that by evaluating the effectiveness of this effort and others SSA could better ensure that it is using its resources for maximum benefit toward improving the timeliness and quality of its disability decisions.

This concludes my prepared statement, and I will be happy to address the committee's questions.

United States Government Accountability Office

Testimony
Before the Subcommittee on Social Security, Committee on Ways and Means, House of Representatives

For Release on Delivery
Expected at 10 a.m. ET
Wednesday, July 25, 2018

SSA DISABILTY PROGRAMS

Better Metrics and Evaluation Needed to Inform Decision-Making

Statement of Elizabeth Curda, Director,
Education, Workforce, and Income Security

GAO-18-677T

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

I am pleased to be here today to discuss the Social Security Administration's (SSA) efforts to manage its disability workloads. SSA provides cash benefits to Americans with disabilities who are unable to work through two main programs: Disability Insurance (DI) and Supplemental Security Income (SSI). Collectively, in fiscal year 2017, payments from these programs were about $200 billion to about 16 million individuals. SSA has faced long-standing challenges processing related workloads and has struggled to decide who is eligible for these benefits in a timely way. Partly because of these challenges, we included "Improving and Modernizing Federal Disability Programs" on our High-Risk List of agencies and programs that are most in need of transformation or are vulnerable to fraud, waste, abuse, and mismanagement.[1]

In recent years, SSA's challenges processing disability workloads are particularly evident when individuals appeal initial decisions on their claims and request a hearing before an administrative law judge (ALJ). At the end of fiscal year 2017, SSA reported that more than 1 million claimants who had appealed their decision to an ALJ were awaiting a decision on disability benefits, and they waited, on average, 605 days (or nearly 20 months). SSA's workloads overall may remain a challenge as 80 million members of the baby boom generation pass through their most disability-prone years and enter retirement.

We have issued several reports describing SSA's challenges with managing its disability workloads, efforts to reduce claims processing times, and lack of systematic evaluation to determine the efficacy of those efforts. We highlighted many of these issues in our testimony to this committee in March of this year.[2] We noted the need for a sustained

[1]GAO, *High-Risk Series: Progress on Many High-Risk Areas, While Substantial Efforts Needed on Others*, GAO-17-317 (Washington, D.C.: Feb. 15, 2017). We first designated improving and modernizing federal disability programs as high risk in 2003. In making and updating this designation, we considered actions of SSA and Department of Veterans Affairs as well as the Office of Management and Budget's efforts to create unified strategies and goals for federal programs that support employment for people with disabilities.

[2]GAO, *Social Security Administration: Continuing Leadership Focus Needed to Modernize How SSA Does Business*, GAO-18-432T (Washington, D.C.: March 7, 2018).

focus on the part of SSA leadership to approach these challenges strategically and follow through with rigorous plans to improve its disability programs. Today, we build on this body of work with the release of a new report on SSA's efforts to manage its appeals workload by transferring cases from hearing offices with backlogs to offices with more capacity.[3]

In summary, we found that SSA has increasingly transferred cases between offices to help manage its appeals workloads. At the same time, we found that SSA does not have an accurate metric to assess how individual offices contribute to processing times, which could hinder the agency's ability to identify and address problems. My testimony today will cover these new findings and the longstanding issues that surround them. Specifically, I will touch on three areas: (1) SSA's challenges managing disability workloads, especially at the appeals level, (2) the extent to which SSA has metrics to assess its efforts to reduce processing times, and (3) limitations in SSA's case processing systems that hinder its efforts to reduce backlogs. In our report being released today, we made recommendations in these areas, which SSA agreed to implement.

In developing this testimony, we primarily relied on the report that we are releasing today. We also included information from several recent GAO reports that are cited throughout this statement and which each include detailed information on the objectives, scope and methodology of our reviews. The work on which this statement is based was conducted in accordance with generally accepted government auditing standards. More details on our objectives, scope and methodology can be found in the issued report.

Background

SSA provides financial assistance to eligible individuals with disabilities through two major benefit programs:

- Disability Insurance (DI)—provides benefits to eligible workers who have qualifying disabilities, and their eligible family members; and
- Supplemental Security Income (SSI)—provides benefits for individuals with limited income and resources who are aged, blind, or have qualifying disabilities.

[3]GAO, *Social Security Disability: Better Timeliness Metrics Needed to Assess Transfers of Appeals Work*, GAO-18-501 (Washington, D.C.: July 19, 2018).

To apply for disability benefits through DI or SSI, an individual must file an application at a local SSA office. Local office staff forward most new claims to a state Disability Determination Services (DDS) office for a review of medical eligibility and an initial determination.[4] Individuals who do not agree with the initial determination can ultimately appeal by requesting a hearing before an administrative law judge (ALJ).

SSA's hearing operations are conducted by ALJs and other staff across the country. Hearing operations staff are organized in 164 hearing offices, with each office having a geographic area of responsibility. However, SSA can transfer appeals cases between offices in an effort to alleviate office backlogs. Staff use technology such as electronic case files and video conferencing to process transferred cases and hold hearings across locations.

SSA Faces Challenges Managing Disability Workloads, Especially at the Appeals Level

As we have noted in our High-Risk Series,[5] SSA has faced longstanding challenges managing its disability workloads, but has made some progress in recent years. For example, as highlighted in our 2017 High-Risk update, SSA has taken steps toward reducing its backlog of initial disability claims.[6] Specifically, SSA reduced the number of pending claims each fiscal year since 2010—from about 842,000 in fiscal year 2010 to about 523,000 in fiscal year 2017. Nonetheless, the 2017 update emphasized the need for SSA to address the growing backlog at the appeals level.

The report released today examines processing times and pending caseloads at the appeals level over the past decade and finds that both have grown in recent years. Specifically, average processing time (APT)—the average number of calendar days between a hearing request and case disposition for all dispositions during the period being analyzed—decreased by about 30 percent over fiscal years 2008 through 2012, but climbed by approximately 70 percent from fiscal years 2012

[4]Although SSA is responsible for the programs, initial determinations of disability are generally made by state agencies.

[5]In 1990, we began a program to report on government operations that we identified as "high risk." Since then, generally coinciding with the start of each new Congress, we have reported on progress to address high-risk areas and updated the High-Risk List.

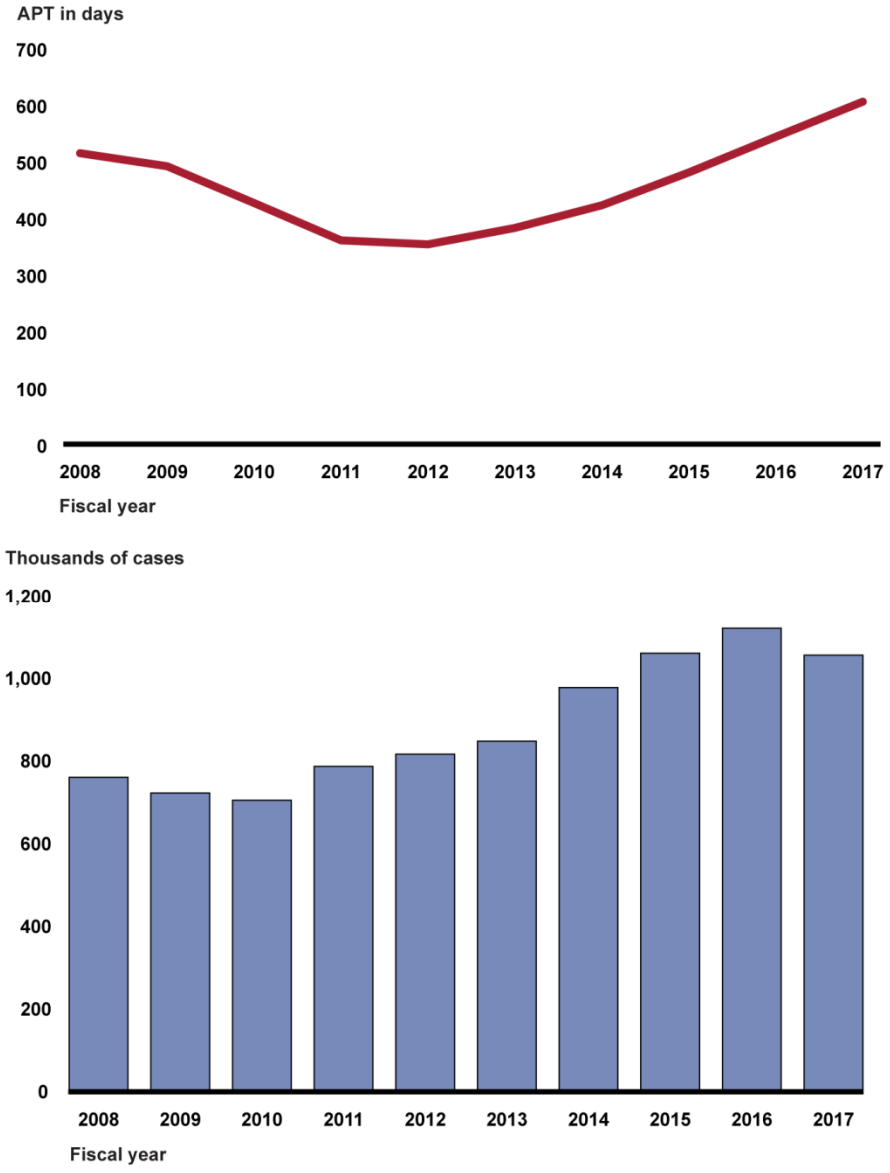
[6]GAO-17-317.

through 2017. APT peaked at 605 days, or about a year and eight months, in fiscal year 2017.

Pending caseloads followed a similar pattern.[7] Specifically, pending caseloads declined through fiscal year 2010 and then grew through fiscal year 2016 to over 1.1 million cases. However, the number of pending cases declined by six percent in fiscal year 2017, to just over 1 million cases. (See fig. 1.)

[7] Pending cases are appeals that have not yet had a disposition, and include cases at different stages of the appeals process.

Figure 1: Average Processing Time (APT) and Number of Pending Disability Appeals Cases, Fiscal Years 2008-2017



Source: GAO analysis of Social Security Administration data. | GAO-18-677T

Note: Pending case counts are as of the end of the fiscal year.

According to SSA officials and the agency's Office of Inspector General (OIG), factors contributing to rising processing times and numbers of pending cases include increases in the number of hearing requests after

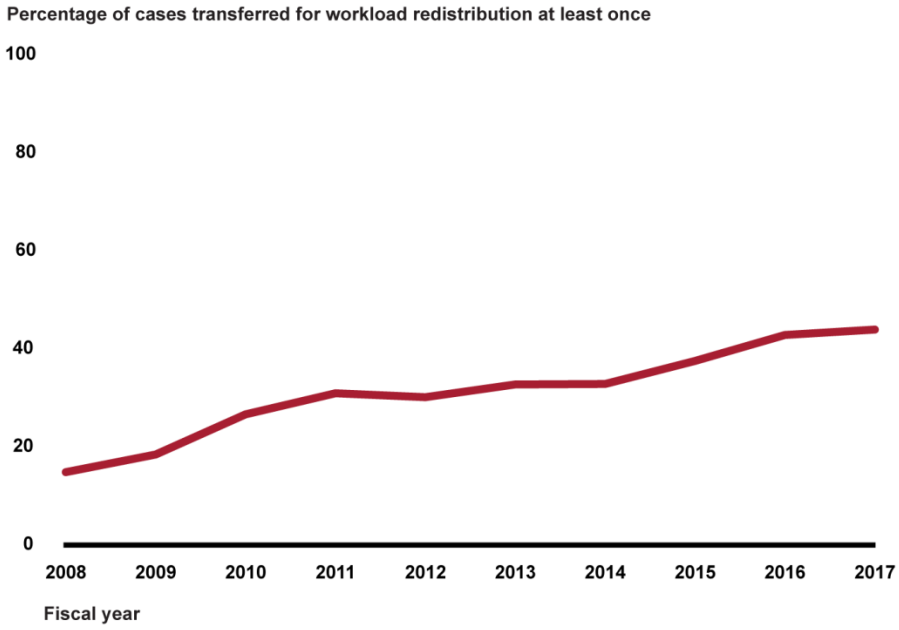
the 2007-2009 recession, recent declines in hearing operations staffing levels and imbalances in the ratio of support staff to judges, and regulatory changes that have affected judges' workloads.[8] For example, SSA officials highlighted a regulatory change which generally requires all claimants to submit all evidence known to them that relates to their disabling condition, resulting in potentially lengthier files for judges to review.

SSA Has Taken Steps to Reduce Processing Times, but Lacks Metrics to Assess its Efforts

In our recent work, we found that SSA has taken several steps to improve its processing of disability claims and appeals, but lacks metrics to determine the effect of some of these efforts. In the report we are releasing today, we examine one example. Specifically, one of SSA's key efforts to reduce processing times at the appeals level involves transferring appealed disability cases from offices with backlogs to offices with more capacity, but SSA lacks meaningful timeliness measures to assess its efforts. From fiscal years 2008 through 2017, the percentage of dispositions—decided or dismissed cases—that had been transferred increased from 14 to 43 percent, or from approximately 79,000 to more than 290,000 cases (see fig. 2).

[8]Social Security Administration, Office of the Inspector General, *Factors Related to Decreased Administrative Law Judge Productivity* (A-12-18-50289), Sept. 11, 2017.

Figure 2: Percentage of Disability Appeals Cases Transferred to Redistribute Work at Least Once, Fiscal Years 2008-2017



Source: GAO analysis of Social Security Administration data. | GAO-18-677T

Despite the rising use of transfers over the past decade, SSA cannot assess the effectiveness of these efforts due to weaknesses in its timeliness metrics on APT. In particular, SSA lacks office-specific timeliness measures for transferred cases. Instead, SSA's current APT metric attributes the entire processing time for a case to the office that finishes it, regardless of the time the case was held by another office before being transferred. Without an office-specific measure of timeliness for transferred appeals cases, SSA does not have an accurate metric to assess how individual offices contribute to processing times—information critical to assessing the effectiveness of transferring cases in meeting timeliness goals. Given the growing use of case transfers, in the report we are releasing today, we are recommending that SSA develop a timeliness metric or set of metrics that more accurately reflect offices' performance in light of case transfers, and SSA agreed.

We have also highlighted the need for SSA to evaluate other efforts designed to reduce the backlog or improve program integrity at the appeals level. For example, our 2017 report on consistency in disability decision-making at the appeals level found that SSA had adopted five types of quality assurance reviews of hearings decisions, several of which

have similar goals and may look at similar claims, but SSA had not evaluated the efficiency or effectiveness of these reviews.[9] In the same report, we found that SSA lacked publicly reported metrics on the accuracy and consistency of hearings-level decisions. SSA agreed with our recommendations to evaluate its quality assurance reviews and publicly report metrics and stated that it would be addressing them as part of a comprehensive assessment and refinement of its oversight roles and processes.

SSA's Office of Inspector General (OIG) has also called on SSA to evaluate several efforts related to reducing processing times and improving the quality of decisions at the appeals level. For example, it recommended that SSA evaluate an electronic application it developed for documenting and making decisions at the appeals level to determine whether it should be continued.[10] The OIG concluded that by evaluating the effectiveness of its efforts, SSA could better ensure that it is using its resources for maximum benefit toward improving the timeliness and quality of its disability decisions.

SSA has recently taken important steps toward improving its evaluation and metrics that could enhance its ability to respond to these recommendations and others. Specifically, in October 2017 SSA created a deputy commissioner-level Office of Analytics, Review and Oversight with five offices—including the Office of Quality Review and Office of Analytics and Improvements—whose functions were previously spread among multiple divisions of SSA. In announcing this reorganization, SSA's acting commissioner stated that it will foster data analysis of SSA's programs and enhance oversight of the disability adjudication system. However, the specific effects of this change remain to be seen. In response to our recommendation in today's report related to timeliness metrics, SSA stated that it will refine existing metrics to more accurately reflect timeliness of cases before and after being transferred. Furthermore, SSA stated that it may develop additional reporting tools to better measure the contributions of individual offices that receive transferred cases.

[9]GAO, *Social Security Disability: Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearings Decisions*, GAO-18-37 (Washington, D.C.: Dec. 7, 2017).

[10]SSA OIG, *Electronic Bench Book,* A-01-12-11217, (Baltimore, Md.: June 21, 2016).

Limitations in SSA's Case Processing Systems Hinder Efforts to Reduce Backlogs

While SSA has made strides in modernizing its information technology (IT) systems to address growing workload demands, it continues to face challenges with these modernization efforts in dealing with backlogs.[11] Our report being released today found that SSA staff faced challenges related to case processing software. Specifically, hearing office staff reported and we observed difficulties in efficiently and accurately identifying appeals cases to transfer because of software limitations. For example, the current case processing system restricts search queries to a 6-month time period to avoid slowing down the system. As a result, staff cannot retrieve the universe of potential transfer cases at one time to facilitate transferring large batches of cases. Such limitations impeded productivity for the staff selecting cases to transfer and also created the potential for error and misuse. We recommended in today's report that SSA evaluate the costs versus benefits of changing system limitations that hinder users' ability to correctly and efficiently identify and transfer batches of cases. SSA agreed and stated that it is developing a new case processing system that will eliminate the limitations we identified.

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Chairman Johnson, Ranking Member Larson, and Members of the Subcommittee, this concludes my prepared statement. I would be happy to answer any questions that you may have at this time.

GAO Contact and Staff Acknowledgments

For further information about this testimony, please contact Elizabeth Curda at (202) 512-7215 or curdae@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony are Erin Godtland (Assistant Director), Joel Green (Analyst-in-Charge), Susan Aschoff, James Bennett, Alex Galuten, Kristy Kennedy, Jessica Mausner, Almeta Spencer, and Shana Wallace.

[11]GAO, *Social Security Administration: Effective Planning and Management Practices Are Key to Overcoming IT Modernization Challenges*, GAO-16-815T (Washington, D.C.: July 14, 2016).

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Please Print on Recycled Paper.

Chairman Johnson. Thank you. I appreciate your testimony.

Mr. Morton, welcome. Please go ahead.

STATEMENT OF WILL MORTON, ANALYST IN INCOME SECURITY, CONGRESSIONAL RESEARCH SERVICE

Mr. Morton. Chairman Johnson, Ranking Member Larson, and members of the subcommittee, thank you for inviting me to testify on the Social Security Administration's planned changes to the disability appeals process. My name is Will Morton, and I am an analyst in income security with the Congressional Research Service.

Today, I will address the reconsideration level of the appeals process. These brief remarks summarize my written statement.

SSA adjudicates two disability programs, Social Security Disability Insurance and Supplemental Security Income. Disability claimants who are dissatisfied with SSA's initial determination may request further review under the agency's administrative appeals process. This three-part process consists of reconsideration, a hearing before an administrative law judge, and a request for review by SSA's Appeals Council.

Reconsideration is generally the first step of the process that a claimant must initiate in order to appeal an initial determination. Reconsideration involves a thorough review of all evidence from the initial determination, along with any additional evidence submitted as part of the appeal. It is effectively a new review of the claim by an adjudicator who did not participate in the original determination.

Reconsideration was created in 1940 for Social Security retirement and survivors' claims and predates SSA's disability programs. It was envisioned as a relatively low-cost method for addressing the majority of contested issues on retirement and survivors' claims without the need for evidentiary hearings. Although it was not designed with disability in mind, reconsideration was extended to SSA's disability programs following their enactment.

With respect to arguments for and against reconsideration, proponents contend that reconsideration prevents some, quote/unquote, "unnecessary appeals" from reaching the hearing level, resulting in lower administrative costs, as well as a

smaller hearings backlog. They also note that reconsideration results in some claimants being awarded sooner than they otherwise would be.

On the other hand, opponents argue that reconsideration's relatively low allowance rate makes it a, quote/unquote, "rubber stamp" of SSA's initial determination. Opponents view reconsideration as an unnecessary impediment that adds several months to the process for those claimants who go on to be approved at the hearing level.

In October 1999, SSA initiated the Prototype project in 10 States to test several modifications to the disability adjudication process, including the elimination of the reconsideration level. The goal of the Prototype was to make various improvements to the initial level of the adjudication process that would afford the same benefits of reconsideration but without the need for an additional level of review. These improvements included conferences between claimants and adjudicators at the initial level of the process.

In January 2001, SSA issued a notice of proposed rulemaking to implement the Prototype procedures nationally, however, several months later SSA halted its implementation plan, citing higher than expected costs. In 2002, SSA discontinued claimant conferences at the initial level, citing increased processing times.

Although the Prototype was originally scheduled to conclude at the end of 2001, SSA has extended the project 13 times. The last such extension was issued in August 2016 and extends the Prototype until the end of 2018.

In February of this year, SSA informed Congress of its plan to reinstate reconsideration in the 10 Prototype States over the next several years. SSA argues that reinstating reconsideration in these States will make its disability adjudication process more equitable nationally, as well as assist the agency in achieving its goal of eliminating the hearings backlog.

Evaluating the effects of reinstating reconsideration in the Prototype States is complex and challenging for two reasons.

First, it is an inherently complex undertaking because it requires analyzing nearly a dozen different measures, such as appeal and allowance rates, administrative and program costs, processing times, accuracy rates, and claimant satisfaction.

Second, the data analyses needed to evaluate the proposal are not readily available. SSA last released a detailed study of the Prototype in 2001. The subsequent elimination of claimant conferences at the initial level, coupled with the passage of 17 years, has made SSA's 2001 analysis less informative about the Prototype today. Without more recent data and analyses from SSA it is difficult to provide a complete picture of the plan's likely effects.

This concludes my brief remarks. Thank you for the opportunity to testify. And I look forward to your questions.

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TESTIMONY

Statement of

William R. Morton
Analyst in Income Security

Before

Committee on Ways and Means
Subcommittee on Social Security
U.S. House of Representatives

Hearing on

"Examining Changes to Social Security's Disability Appeals Process"

July 25, 2018

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

Thank you for inviting me to testify on the Social Security Administration's (SSA's) planned changes to the disability appeals process. My name is Will Morton, and I am an analyst in income security with the Congressional Research Service (CRS).

SSA's Disability Programs

SSA is responsible for administering two federal programs that provide income support to qualified individuals who have severe, long-term disabilities: Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI). SSDI is a work-related social insurance program that provides monthly cash benefits to nonelderly disabled workers who worked for a sufficient number of years in jobs covered by Social Security and to their eligible spouses and children.[1] In contrast, SSI is a needs-based public assistance program that provides monthly cash payments to aged, blind, or disabled individuals (including blind or disabled children) who have limited assets and little or no Social Security or other income.[2] Both programs use the same basic definition of disability to determine eligibility; however, by virtue of design, each program serves a somewhat different population. In 2017, SSDI and SSI combined paid an estimated $199 billion in federally administered benefits to 14.5 million qualified disabled individuals and 1.5 million non-disabled dependents of disabled workers.[3]

SSA's Disability Adjudication Process

SSA's disability adjudication process generally consists of four levels: an initial determination process and a three-part administrative appeals process.[4]

Initial Determination Process

The initial determination process begins when a claimant files an application with SSA. Claims representatives at SSA's field offices screen claimants to verify that they meet the relevant non-medical entitlement factors for benefits. If the agency requires more information to process the application, it may contact the claimant by phone or arrange for an in-person interview at the local field office.

Claimants who meet the relevant non-medical entitlement factors have their application forwarded to the state Disability Determination Services (DDS) office in the area that has jurisdiction for the medical determination. DDSs, which are fully funded by the federal government, are state agencies tasked with reviewing the medical and vocational evidence and issuing the disability determination for SSA. The disability determination is made based on evidence gathered in the claimant's case record. Disability examiners—with the help of licensed medical professionals—typically use evidence collected from the claimant's own medical sources to evaluate the existence and severity of the claimant's impairment(s). However, if the evidence from the claimant's sources is insufficient to make a determination, the disability examiner may schedule a consultative examination for the claimant in order to obtain the necessary information. The initial disability determination generally does not involve a face-to-face

[1] For more information, see CRS In Focus IF10506, *Social Security Disability Insurance (SSDI)*.

[2] For more information, see CRS In Focus IF10482, *Supplemental Security Income (SSI)*.

[3] Estimates calculated by the Congressional Research Service (CRS) based on a variety of data sources available on the Social Security Administration's (SSA's) website. For purposes of these estimates, the term *Social Security Disability Insurance (SSDI)* includes Social Security disability beneficiaries whose benefits are paid from the Old-Age and Survivors Insurance (OASI) trust fund. In addition, the term *qualified disabled individuals* excludes Supplemental Security Income (SSI)-only recipients aged 65 or older.

[4] For more information, see CRS Report R44948, *Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI): Eligibility, Benefits, and Financing*.

meeting between the claimant and the adjudicator, although the state DDS agency may contact the claimant by telephone or by mail in certain instances.

After considering all medical and other evidence, the state DDS agency issues a disability determination and returns the case to the SSA field office for appropriate action. If the claim is approved, then SSA sends the claimant an initial award notice and begins processing the claim. If the claim is denied, then SSA or the state DDS agency sends the claimant a denial notice explaining the rationale for the initial determination as well as the claimant's right to appeal it.

Three-Part Administrative Appeals Process

Claimants who are dissatisfied with SSA's initial determination may request further review under the Social Security Act's administrative and judicial review standards.[5] The appeals process affords claimants the opportunity to present additional evidence or arguments to support their case as well as to appoint a representative to act on their behalf, such as an attorney or a qualified non-attorney. In general, the request for further review must be made within 60 days of the date the claimant received notice of the prior determination or decision.

SSA's administrative appeals process is composed of three levels of review, which usually must be requested in the following order:

1. reconsideration of the case by a different adjudicator at the state DDS agency;
2. a hearing before an administrative law judge (ALJ); and
3. a request for review by SSA's Appeals Council.[6]

This three-part process is not specified in the Social Security Act but was established through agency regulations.[7] At each level of administrative review, the adjudicator bases his or her determination or decision on the provisions in the Social Security Act, SSA's regulations, and other agency guidance. If an individual is dissatisfied with the determination or decision, he or she may appeal to the next level. Once the individual has exhausted administrative review, the last determination or decision made by SSA becomes the agency's *final decision* on the matter. Only after SSA issues a final decision is an individual generally permitted to seek judicial review by filing a complaint against the agency in federal court.

Data on the Four Levels of the Disability Adjudication Process

Table 1 provides data on the disability adjudication process for FY2017. Although the data for a particular level of the process vary somewhat from year to year, the differences *between* the levels for a particular data measure (such as the allowance rate) have been fairly consistent over the last several years. During FY2017, the initial level of the disability adjudication process handled the largest number of claims, approving about a third of them. Claims at the reconsideration level were processed the fastest among the four levels and resulted in few allowances. On the other hand, claims at the hearing level took the longest to process and were more likely to result in an award. The Appeals Council approved the lowest percentage of claims among the four levels.

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[5] Sections 205(b), 205(d)-(h), and 1631(c) of the Social Security Act; 42 U.S.C. §§405(b), 405(d)-(h), and 1383(c).

[6] See 20 C.F.R. §§404.900 and 416.1400.

[7] Sections 205(b)(1) and 1631(c)(1)(A) of the Social Security Act (42 U.S.C. §§405[b][1] and 1383[c][1][A]) require the Commissioner of Social Security (Commissioner) "to make findings of fact, and decisions as to the rights of any individual applying for a payment" and to give dissatisfied individuals "reasonable notice and opportunity for a hearing." In addition, these sections provide the Commissioner with the authority "to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this title." Sections 205(a), 702(a)(5), and 1631(d)(1) of the Social Security Act (42 U.S.C. §§405[a], 902[a][5], and 1383[d][1]) provide the Commissioner with the authority to make rules and regulations necessary to carry out SSA's administrative responsibilities.

Table 1. Combined SSDI and SSI Disability Claims Data, by Adjudication Level, FY2017

Measure	Initial Determination	Appeals		
		Reconsideration	Hearing	Appeals Council
Claims Received During the Year	2,442,592	582,935	620,164	128,113
Claims Processed During the Year	2,485,100	595,588	685,657	160,776
Pending Claims at the End of the Year	522,869	105,022	1,056,026	94,471
Average Processing Time (Days)	111	101	605	[a]
Allowance Rate[b]	34%	13%	47%	1%

Source: Congressional Research Service (CRS), based on data from the following sources: Social Security Administration (SSA), *Justification of Estimates for Appropriations Committees, Fiscal Year 2019*, February 12, 2018, https://www.ssa.gov/budget/; and SSA, "Hearings And Appeals: Appeals Council Requests for Review FY 2017," https://www.ssa.gov/appeals/DataSets/archive/07_FY2017/07_September_AC_Requests_For_Review.html.

a. Not available.

b. Excludes claims where an eligibility determination was reached without a determination of disability because the claimant did not meet one or more non-medical entitlement factors.

The Reconsideration Level

In general, reconsideration is the first mandatory step of the administrative appeals process that an individual must initiate in order to appeal an initial determination.[8] Reconsideration involves a thorough review of all evidence in the case record from the initial determination, along with any additional evidence submitted as part of the appeal. Reconsideration is effectively a new review of the case by the same state DDS office that conducted the initial determination except that it is performed by an adjudicator who did not participate in the initial determination.[9] If the adjudicator requires additional medical evidence to make a disability determination, he or she may contact the claimant's medical sources or arrange for the claimant to undergo a consultative examination at SSA's expense.

As with the initial level, the reconsideration level generally does not involve a face-to-face meeting between the claimant and the adjudicator. However, if the individual contests a determination to terminate benefits based on a finding that his or her condition is no longer disabling, then the individual may request a *disability hearing*, which is a face-to-face meeting at the reconsideration level between the individual and a disability hearing officer to review the medical cessation determination.[10] (Disability hearings at the reconsideration level are distinct and separate from hearings before an ALJ.) In either case, once the review has been completed, the adjudicator makes a determination based on the preponderance of evidence in the case record. The individual is later notified of the decision in writing.

Purpose

Since its creation, the reconsideration level has been inextricably linked to the hearing level, serving as a tool for SSA to reduce the number of hearings that it adjudicates.[11] One way in which the reconsideration

[8] 20 C.F.R. §§404.907-404.922 and 416.1407-416.1422.

[9] In general, state DDS agencies review medical issues, while SSA's field offices, processing centers, and other support offices review all other issues.

[10] 20 C.F.R. §§404.914-404.918 and 416.1414-416.1418.

[11] For a more extensive discussion of the reconsideration level and its purpose, see CRS congressional distribution memorandum, *The Reconsideration Level of the Social Security Administration's Appeals Process: Overview, Historical Development, and*

level may achieve this reduction is by processing some awards earlier in the disability adjudication process, which reduces the need for hearings. A second way in which the reconsideration level may achieve this reduction is by increasing the acceptance among claimants that the state DDS agency has sufficiently adjudicated their claim, such that some who would otherwise appeal to the hearing level elect not to do so.

Historically, SSA's motivation behind the reconsideration level has stemmed, in part, from the fact that it costs the agency considerably more to process hearings than it does reconsiderations.[12] For example, in FY2012, the unit cost for SSA to process a case was $1,036 at the initial level, $666 at the reconsideration level, $2,771 at the hearing level, and $1,181 at the Appeals Council level.[13] In addition to cost, hearings are a more time-intensive undertaking for SSA, requiring hundreds of more days to complete, on average, than reconsiderations (**Table 1**). Consequently, hearings are prone to the development of backlogs. By reducing the number of appeals that reach the hearing level, the reconsideration level may also serve to ease the hearings backlog.

History

The origin of the reconsideration level dates back to 1940 with the creation of the administrative appeals process for Social Security retirement and survivors' claims.[14] At that time, SSDI and SSI did not exist. The reconsideration level, which was initially optional, was envisioned as an intermediate step that would sufficiently address most contested matters related to retirement and survivors' claims (e.g., earnings records, marital status).[15] As such, reconsideration was not designed with disability in mind.

With the establishment of SSDI in 1956,[16] SSA extended its existing administrative appeals process to disability claims. Shortly thereafter, SSA experienced a marked rise in the total number of appeals submitted to its offices, a large portion of which stemmed from disability claims.[17] In an effort to slow the growth in appeals to the hearing level, SSA issued regulations in 1959 making reconsideration a prerequisite before being granted a hearing.[18] In other words, SSA made reconsideration mandatory.

Demonstration Projects, July 17, 2018.

[12] See, for example, memorandum from division of field operations No. 73 (28059) (A), to all regional representatives, OASI and district managers, *Bureau emphasis on request for reconsideration prior to request for hearing—review on the record—other means of improving service to dissatisfied claimants*, April 20, 1959, in U.S. Congress, House Committee on Ways and Means, Subcommittee on the Administration of the Social Security Laws, *Administration of Social Security Disability Insurance Program*, 86th Cong., 1st sess., November 4, 5, 6, 9, 10, 12, 13, and December 7, 1959 (Washington: GPO, 1960), pp. 685-687, https://hdl.handle.net/2027/mdp.39015078169961.

[13] SSA's answers to questions from Rep. Sam Johnson, in U.S. Congress, House Committee on Ways and Means, Subcommittee on Social Security, *Social Security Disability Fraud Conspiracy In Puerto Rico*, 113th Cong., 1st sess., September 13, 2013, H.Hrg. 113-SS8 (Washington: GPO, 2016), p. 52, https://www.govinfo.gov/content/pkg/CHRG-113hhrg89581/pdf/CHRG-113hhrg89581.pdf.

[14] Social Security Board (SSB), 5 *Federal Register* 4169, October 22, 1940, https://cdn.loc.gov/service/ll/fedreg/fr005/fr005206/fr005206.pdf.

[15] Federal Security Agency (FSA), SSB, *Basic Provisions Adopted by the Social Security Board for the Hearing and Review of Old-Age and Survivors Insurance Claims with a Discussion of Certain Administrative and Legal Considerations*, January 1940, p. i, https://babel.hathitrust.org/cgi/pt?id=umn.31951d00462291g;view=1up;seq=159.

[16] P.L. 84-880.

[17] *Disability Insurance Fact Book: A Summary of the Legislative and Administrative Development of the Disability Provisions in Title II of the Social Security Act*, prepared by the staff of the Subcommittee on the Administration of the Social Security Laws for the use of the Committee on Ways and Means (Washington: GPO, 1959), Table A, pp. 74-75, https://hdl.handle.net/2027/mdp.39015022406915.

[18] Department of Health, Education, and Welfare (HEW), SSA, Bureau of Old-Age and Survivors Insurance (BOASI), "Formal Reconsideration of Determination by Bureau of Old-Age and Survivors Insurance as Condition Precedent to Hearing," 24

In 1972, lawmakers established the SSI program in the 50 states and D.C., effective January 1974.[19] SSA was tasked with administering SSI because of its experience with SSDI as well as its generally positive reputation for customer service.[20] The agency made reconsideration the first mandatory step of the administrative appeals process for most SSI claims, except for those in which the recipient contests a determination to terminate benefits due to a finding that his or her condition is no longer disabling (i.e., *medical cessation cases*), which were sent directly to the hearing level.

In 1983, lawmakers required SSA to provide SSDI beneficiaries who received a medical cessation determination with the opportunity for a face-to-face meeting at the reconsideration level.[21] Congress hoped that the establishment of disability hearings at the reconsideration level might "enhance claimant acceptance of the denial at the State agency level and reduce the number of appeals" heard by ALJs at the hearing level.[22] Using its regulatory authority, SSA extended disability hearings to SSI medical cessation cases in order to improve uniformity between the two programs.[23]

Arguments For and Against

Arguments for the reconsideration level generally center on its intended purpose of reducing appeals at the hearing level. By processing some awards at a relatively lower cost and by reducing the number of "unnecessary appeals" at the hearing level, proponents argue that the reconsideration level serves to reduce both administrative cost and the hearings backlog.[24] In addition, advocates point to the fact that the reconsideration level results in some claimants being approved sooner than they otherwise would be.[25]

Arguments against the reconsideration level typically focus on its relatively low allowance rate (13% in FY2017), which opponents say proves that reconsideration is simply a "rubber stamp" of SSA's initial determination.[26] Opponents often portray reconsideration as an unnecessary impediment that adds several months to the process for those claimants who go on to be approved at the hearing level.[27]

Federal Register 6869, August 25, 1959, https://cdn.loc.gov/service/ll/fedreg/fr024/fr024166/fr024166.pdf.

[19] P.L. 92-603.

[20] Edward D. Berkowitz and Larry W. DeWitt, *The Other Welfare: Supplemental Security Income and U.S. Social Policy* (Cornell University Press, 2013), p. 8.

[21] P.L. 97-455.

[22] U.S. Congress, House Committee on Ways and Means, Subcommittee on Social Security, *Disability Amendments of 1982*, to accompany H.R. 6181, 97th Cong., 2nd sess., May 26, 1982, H.Rept. 97-588, p. 13, https://hdl.handle.net/2027/coo.31924000089254.

[23] Department of Health and Human Services (HHS), SSA, "Federal Old-Age, Survivors, and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled; Disability Hearings at the Reconsideration Level," 51 *Federal Register* 288, January 3, 1986, https://cdn.loc.gov/service/ll/fedreg/fr051/fr051002/fr051002.pdf.

[24] See footnote 12.

[25] SSA, *Full Justification of Estimates for Appropriations Committees, Fiscal Year 2011*, February 1, 2010, p. 177, https://www.ssa.gov/budget/hist/FY2011/2011FullJustification.pdf (hereinafter "SSA FY2011 Budget Justification").

[26] Testimony of Nancy G. Shor, Consortium for Citizens with Disabilities (CCD), in U.S. Congress, House Committee on Ways and Means, Subcommittees on Social Security and Income Security and Family Support, *Social Security Disability Claims Backlogs*, 111th Cong., 2nd sess., April 27, 2010, p. 5, http://www.c-c-d.org/fichiers/CCD_House_W&M_Jt_Subcomm4-27-10_FINAL.pdf.

[27] Ibid.

The Prototype Demonstration Project and the Elimination of the Reconsideration Level

In October 1999, SSA initiated the Disability Redesign Prototype Model, which was one of several demonstration projects designed to test modifications to the disability adjudication process. The Prototype was designed to test multiple individual models in combination with each other, one of which involved the elimination of the reconsideration level.[28] At present, the Prototype applies to the following 10 states: Alabama, Alaska, California (Los Angeles North and West branches only), Colorado, Louisiana, Michigan, Missouri, New Hampshire, New York, and Pennsylvania.[29] Claimants who appeal an unfavorable initial determination in these states skip the reconsideration level and proceed directly to the hearing level.

The goal of the Prototype was to make various improvements to the initial level of the disability adjudication process that would "afford the same benefits" of the reconsideration level without the need for an additional level of administrative review.[30] Initially, the Prototype included a pre-decision interview model (later known as *claimant conferences*), which provided claimants with the opportunity for a conference with an adjudicator at the initial level. The reconsideration elimination and pre-decision interview models were designed to work in tandem, with the resources saved from eliminating the reconsideration level redirected towards establishing and conducting conferences at the initial level. However, SSA discontinued the conferences in 2002 because they increased case processing times.

Although the Prototype was originally scheduled to conclude on or about December 31, 2001, SSA has extended the project 13 times. The last such extension was issued on August 25, 2016, and extends the project until no later than December 28, 2018.[31]

History

In the 1990s, SSA developed the Disability Process Redesign, which was a comprehensive reform plan to fundamentally reengineer the disability adjudication process.[32] Among the plan's many initiatives were the reconsideration elimination model and the pre-decision interview model. The original Disability Process Redesign plan was made up of a total of 83 individual initiatives, 38 of which were to be completed or to be in the testing stage by September 30, 1996.[33] In September 1996, the General Accounting Office (GAO, now the Government Accountability Office) testified before this subcommittee

[28] 20 C.F.R. §§404.906 and 416.1406. The Prototype also includes a Single Decision-Maker (SDM) model, which provides qualified disability examiners with the authority to issue certain disability determinations without the sign-off of a medical or psychological consultant. Section 832 of the Bipartisan Budget Act of 2015 (P.L. 114-74) effectively requires SSA to end its testing of the SDM model.

[29] SSA, Program Operations Manual System (POMS), "DI 12015.100 Disability Redesign Prototype Model," January 16, 2014, http://policy.ssa.gov/poms.nsf/lnx/0412015100.

[30] Testimony of Kenneth Apfel, Commissioner, SSA, in U.S. Congress, House Committee on Ways and Means, Subcommittees on Social Security and Human Resources, *Management of Disability Cases*, 106th Cong., 1st sess., October 21, 1999, H.Hrg. 106-59 (Washington: GPO, 2000), p. 15, https://www.govinfo.gov/content/pkg/CHRG-106hhrg66024/pdf/CHRG-106hhrg66024.pdf.

[31] SSA, "Modifications to the Disability Determination Procedures; Extension of Testing of Some Disability Redesign Features," 81 *Federal Register* 58544, August 25, 2016, https://www.gpo.gov/fdsys/pkg/FR-2016-08-25/pdf/2016-20253.pdf.

[32] HHS, SSA, "Process Reengineering Program; Disability Reengineering Project Plan," 59 *Federal Register* 47887, September 19, 1994, https://www.gpo.gov/fdsys/pkg/FR-1994-09-19/content-detail.html.

[33] U.S. General Accounting Office (GAO, now the Government Accountability Office), *SSA Disability Reengineering: Project Magnitude and Complexity Impede Implementation*, T-HEHS-96-211, September 12, 1996, p. 3, https://www.gao.gov/products/T-HEHS-96-211.

that SSA's reform plan was overly ambitious and complex.[34] GAO recommended that SSA "select those initiatives most crucial to producing significant, measurable reductions in claims-processing time and administrative costs" and to "combine those initiatives into an integrated process, test that process at a few sites, and evaluate the results—before proceeding with full-scale implementation."[35]

Following GAO's recommendations, SSA revised its Disability Process Redesign plan in February 1997 and developed the Full Process Model (FPM), which was an integrated model designed to test several features, including the elimination of the reconsideration level and the establishment of pre-decision interviews at the initial level.[36] In testing the FPM, "SSA evaluated whether, and to what degree, the FPM improved the disability determination process by assessing the impact of the FPM on allowance rates, appeal rates, accuracy, administrative costs, processing time, program costs, and employee and customer satisfaction."[37] According to SSA, the data gathered from testing the FPM led the agency to conclude that eliminating the reconsideration level and conducting interviews at the initial level were generally sound approaches.[38]

In March 1999, SSA revised its Disability Process Redesign plan again[39] to include an initiative that "incorporates the results of the various pilots we conducted over the last two years in looking at how to improve the processing of the more than 2 million new disability claims per year."[40] In August 1999, SSA issued a notice in the *Federal Register* that it would combine certain ongoing modifications to the disability adjudication process (including the reconsideration elimination and pre-decision interview models) under a new Prototype model, which would be conducted in 10 states.[41] According to the agency, the intent of the Prototype was to "refine the process and learn more about potential operational impacts before moving to national implementation."[42] The Prototype went into effect in October 1999.

On January 19, 2001, which was the last full day of the Clinton Administration, SSA issued a Notice of Proposed Rulemaking (NPRM) to implement the principal elements of the Prototype on a nation-wide basis.[43] In its evaluation of the potential effects of the proposal, SSA said that it did not expect the

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[34] Testimony of Diana S. Eisenstat, Associate Director, Income Security Issues, GAO, in U.S. Congress, House Committee on Ways and Means, Subcommittee on Social Security, *Recommendations to Improve the Performance of the Social Security Administration as an Independent Agency*, 104th Cong., 2nd sess., September 12, 1996, H.Hrg. 104-94 (Washington: GPO, 1998), https://www.gpo.gov/fdsys/pkg/CHRG-104hhrg45808/pdf/CHRG-104hhrg45808.pdf.

[35] GAO, *SSA Disability Redesign: Focus Needed on Initiatives Most Crucial to Reducing Costs and Time*, HEHS-97-20, December 20, 1996, p.5, https://www.gao.gov/products/HEHS-97-20.

[36] The Full Process Model (FPM) was one of several demonstration projects conducted by SSA as part of the second iteration of its Disability Process Redesign plan.

[37] SSA, "History of SSA 1993-2000," Chapter 4: Program Changes, https://www.ssa.gov/history/ssa/ssa2000history.html.

[38] Ibid.

[39] See SSA, *Social Security and Supplemental Security Income Disability Programs: Managing for Today Planning for Tomorrow*, March 11, 1999.

[40] Testimony of John R. Dyer, Principal Deputy Commissioner, SSA, in U.S. Congress, House Committee on Appropriations, Subcommittee on Labor, Health and Human Services, and Education, *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 2000*, 106th Cong., 1st sess., March 23, 1999 (Washington: GPO, 1999), p. 455, https://www.ssa.gov/legislation/testimony_032399.html.

[41] SSA, "Modifications to the Disability Determination Procedures; Disability Claims Process Redesign Prototype," 64 *Federal Register* 47218, August 30, 1999, https://www.gpo.gov/fdsys/pkg/FR-1999-08-30/pdf/99-22421.pdf.

[42] Ibid. The Prototype Model was one of several demonstration projects conducted by SSA as part of the third iteration of its Disability Process Redesign plan. For more information, see SSA, Office of the Inspector General (OIG), *Status of the Social Security Administration's Disability Process Improvement Initiatives*, A-07-00-10055, June 18, 2002, https://oig.ssa.gov/status-social-security-administrations-disability-process-improvement-initiatives.

[43] SSA, "New Disability Claims Process," 66 *Federal Register* 5494, January 19, 2001, https://www.gpo.gov/fdsys/pkg/FR-2001-01-19/pdf/01-1442.pdf.

Prototype to produce any administrative or program savings.[44] Instead, the agency projected that the model would increase federal and state program outlays by $41.5 billion from FY2001 through FY2010.[45] In justifying the proposed changes, SSA stated,

> Based on the Full Process Model test and our experience with the prototype so far, we found that the proposed new process results in better determinations at the initial level, with more allowances of claims that should be allowed. Many claims that would have been allowed only after appeal under the old process, were allowed at the initial step of the new process. Eliminating the reconsideration step enables claimants who appeal to reach the hearing level sooner than under the old process, and the resources previously used at the reconsideration step can be used to ensure a more complete determination process at the initial level. These positive results support implementation of the redesigned claim process.[46]

However, in May 2001 (during the George W. Bush Administration), SSA's Office of Disability announced in a letter to state DDS administrators that the agency's plan to implement the Prototype nationally had been put on hold. The letter stated,

> SSA's original timeline for [the] Prototype called for a final implementation regulation by this September and then the first phase of States to start the new process in April 2002. This was based on results from full process model tests showing that more people who should be paid are paid at the DDS level, that the numbers of appeals to OHA [Office of Hearings and Appeals] after dropping reconsiderations are about the same as before, and people who do want to appeal get to OHA faster.
>
> However, preliminary data from the Prototypes presented last year have raised questions about the program costs of national implementation. Therefore, final decisions about rollout will be reserved until more complete data are available.[47]

Initial Results and Further Developments

In February 2002, GAO issued a report on the progress of SSA's disability redesign efforts.[48] GAO found SSA's initial data on the Prototype to be "promising," noting,

> 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.[49]

However, GAO cautioned that the Prototype could lead to higher spending and greater workloads, noting,

> Although the rate of awards at the ALJ level is lower under the Prototype than under the traditional process, SSA estimates that about 100,000 more denied claimants would appeal to the ALJ level under the Prototype. Because of this, additional claimants would wait significantly longer for final

[44] Ibid., p. 5500.

[45] Ibid., pp. 5500-5501. The estimate includes related Medicare and Medicaid costs.

[46] Ibid., p. 5501.

[47] Letter from Kenneth D. Nibali, to Disability Determination Services Administrators, *Status of Planning for the New Disability Process (Prototype)—Information*, No. 566, May 1, 2001, p. 1.

[48] GAO, *Social Security Disability: Disappointing Results from SSA's Efforts to Improve the Disability Claims Process Warrant Immediate Attention*, GAO-02-322, February 4, 2002, https://www.gao.gov/products/GAO-02-322.

[49] Ibid., p. 3.

> agency decisions on their claims. This would further increase workload pressures on SSA hearings offices, which are already experiencing considerable case backlogs. The additional appeals are also expected to result in more awards from ALJs and overall under the Prototype than under the traditional process.[50]

In June 2002, SSA issued a notice in the *Federal Register* that the agency would extend most of the Prototype's features (including the reconsideration elimination model) until no later than December 30, 2002, but would discontinue claimant conferences.[51] In justifying the decision to end conferences at the initial level, Commissioner Jo Anne Barnhart later remarked,

> The end-of-line conference added processing time (approximately 15 to 20 days in less than fully favorable cases), and was not as effective as we had hoped in helping claimants understand claims issues. Most States that had been doing the prototype found that early and ongoing contact with the claimant was more effective. Contacting the claimant early in the process helps to reduce processing time by clarifying information as early as possible, and assists the claimant in understanding the disability process up-front instead of waiting until the end of the process.[52]

In February 2010, the Obama Administration included a proposal in its FY2011 budget to reinstate the reconsideration level in the state of Michigan in order to reduce the number of appeals at the hearing level.[53] In April 2010, Commissioner Michael Astrue stated,

> We expected that eliminating the reconsideration step in the Prototype States would result in earlier decisions and reduced waiting times for claimants; however, we have found the opposite is true. In 1998, prior to the start of the Prototype test, the proportion of initial decisions that ended up at the hearings level was 1.4 percentage points higher in the Prototype States than in the non-Prototype States. By 2007, that difference between Prototype and non-Prototype States had grown to 7.5 percentage points. The 10 Prototype States generate approximately 25 percent of the disability applications nationwide, yet appeals from these States account for more than 31 percent of the decisions made at the hearings level.
>
> In Michigan, an economically hard-hit State, we have concluded that too many cases are needlessly going to the hearings level from the DDSs. Therefore, we plan to reinstate reconsideration in Michigan next fiscal year.
>
> Of all the Prototype States, Michigan has the highest percentage of hearing requests, not to mention some of the most backlogged hearing offices in the country. Reinstating reconsideration would allow a significant number of cases to be allowed at reconsideration, resulting in earlier payment to those claimants and a reduction in the number of hearing requests. Moreover, those cases that do go to hearing would be more thoroughly developed, having already been through the reconsideration step.[54]

Ultimately, the proposal to reinstate the reconsideration level in Michigan was never implemented.

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[50] Ibid., p. 19.

[51] SSA, "Modifications to the Disability Determination Procedures; Extension of Testing of Some Disability Redesign Features," 67 *Federal Register* 42594, June 24, 2002, https://www.gpo.gov/fdsys/pkg/FR-2002-06-24/pdf/02-15844.pdf.

[52] U.S. Congress, House Committee on Appropriations, Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies, *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 2004*, 108th Cong., 2nd sess., March 4, 2003, (Washington: GPO, 2003), p. 76, https://hdl.handle.net/2027/mdp.39015090414247.

[53] SSA FY2011 Budget Justification, p. 177.

[54] U.S. Congress, House Committee on Ways and Means, Subcommittees on Social Security and Income Security and Family Support, *Social Security Disability Claims Backlogs*, 111th Cong., 2nd sess., April 27, 2010, https://www.ssa.gov/legislation/testimony_042710.html.

Recent Proposals to Reinstate the Reconsideration Level in the Prototype States

The Trump Administration included a proposal in its FY2018 budget to reinstate the reconsideration level in the 10 Prototype states.[55] This proposal was offered again by the Administration in its FY2019 budget.[56] In addition, officials from SSA's Office of Budget informed CRS that the agency plans to use its regulatory authority to reinstate the reconsideration level in the Prototype states over the next several years.[57] In its FY2019 budget justification, the agency noted,

> We will implement the nationwide reinstatement of the reconsideration step in all DDSs, which we plan to accomplish over three years. While it will mean an increase in our DDS workloads, it will ultimately benefit the public. As a result, we will have a more unified, equitable disability program across the country. It will also yield program savings and reduce the number of claims waiting for an ALJ decision. Reinstatement of the reconsideration step will help us achieve our goal of eliminating the hearings backlog by the end of FY 2022.[58]

Reinstating the reconsideration level would cause some claimants to be awarded benefits sooner than they otherwise would be, resulting in fewer appeals at the hearing level. It would also increase the amount of time it takes to reach the hearing level for those claimants who are denied at the reconsideration level and go on to appeal compared to the current Prototype process. Adding several months to the adjudication process for such claimants would shift hearing workloads into the future, causing some claimants to be awarded benefits later than they otherwise would be.

The President's FY2019 budget projects that reinstatement of the reconsideration level in the Prototype states would reduce federal outlays by $3.4 billion from FY2019 through FY2028.[59] Using somewhat different assumptions, the Congressional Budget Office (CBO) projects that the proposal would reduce SSDI outlays by about $1.5 billion but increase SSI outlays by $265 million over this period.[60]

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[55] U.S. Office of Management and Budget (OMB), *Major Savings and Reforms, Budget of the United States Government, Fiscal Year 2018*, May 23, 2017, p. 111, https://www.gpo.gov/fdsys/pkg/BUDGET-2018-MSV/pdf/BUDGET-2018-MSV.pdf.

[56] OMB, *Major Savings and Reforms, Budget of the United States Government, Fiscal Year 2019*, February 12, 2018, pp. 114-115, https://www.gpo.gov/fdsys/pkg/BUDGET-2019-MSV/pdf/BUDGET-2019-MSV.pdf%20 (hereinafter "OMB FY2019 Major Savings and Reforms").

[57] Information presented to CRS by SSA on February 15, 2018.

[58] SSA, *Justification of Estimates for Appropriations Committees, Fiscal Year 2019*, February 12, 2018, pp. 9-10, https://www.ssa.gov/budget/.

[59] OMB FY2019 Major Savings and Reforms, p. 113.

[60] U.S. Congressional Budget Office (CBO), *Proposals for Social Security—CBO's Estimate of the President's Fiscal Year 2019 Budget*, May 24, 2018, https://www.cbo.gov/publication/53908. See also CBO, *Proposals for Supplemental Security Income—CBO's Estimate of the President's Fiscal Year 2019 Budget*, May 24, 2018, https://www.cbo.gov/publication/53909.

Chairman Johnson. Thank you, sir.

Mr. Price, welcome. Thanks for being here. Please proceed.

STATEMENT OF JEFF PRICE, LEGISLATIVE DIRECTOR, NATIONAL ASSOCIATION OF DISABILITY EXAMINERS

Mr. Price. Thank you, Chairman Johnson.

Chairman Johnson, Ranking Member Larson, members of the subcommittee, my name is Jeff Price, and I am the legislative director for the National Association of Disability Examiners, with 39 years' experience in the disability program. NADE appreciates this opportunity to comment on examining changes to the Social Security disability appeals process.

During fiscal year 2017, SSA paid nearly $1 trillion in Social Security and SSI benefits to 70 million beneficiaries, including 18 million who were paid disability benefits. One of four workers currently age 20 will become disabled prior to attainment of their expected retirement age. Among that group, 67 percent will have no private disability insurance and will depend on SSA as their only source of income, making it imperative that the determination of who is eligible for these benefits be made accurately and timely.

In 2017, DDSs processed 2.5 million initial claims and 600,000 reconsideration claims. DDSs' allowance rate was 33 percent at the initial level, 12 percent at the reconsideration level, and DDS allowance decisions accounted for 77 percent of all allowances in fiscal year 2017. Similar numbers are expected for fiscal year 2018.

The ability of the DDSs to adjudicate these cases timely and accurately carries enormous consequences to SSA and the citizens who rely upon the agency for assistance. Therefore it is extremely critical the individuals tasked with this responsibility be highly trained and able to perform their job duties in a professional environment.

If the claimant is dissatisfied with the initial determination, he or she has a right to appeal, reconsideration being the first level of appeal, which involves a thorough review of all evidence from the initial determination and any new evidence that is submitted at recon.

In 1997, SSA introduced the Prototype model for disability claims processing. Ten DDSs were selected for inclusion in this model that featured

the elimination of reconsideration and the introduction of the Single Decision-Maker, or SDM. The SDM was then expanded to 10 additional States in 1998. However, many pieces of the Prototype model over the ensuing years were abandoned, leaving the SDM and the elimination of reconsideration as the primary components in place.

SDM remained in place until the Bipartisan Budget Act of 2015 mandated its elimination. The elimination of reconsideration in the 10 DDSs has continued to this day, with the effect that SSA has lacked a unified process for the administration of its disability programs for more than 20 years.

Recently, SSA announced its intent to reintroduce reconsideration into those 10 DDSs. Unfortunately, we have yet to see any major changes that will make reconsideration a more meaningful appeals step.

More than 80,000 claimants were allowed in fiscal year 2017 at reconsideration, but we can do better. NADE recommended that disability decisionmaking should be made and should be equal across the Nation. We also believe that SSA should utilize the data collected over the past 20 years to determine if reconsideration is an effective model, and if so, what its future should look like.

NADE members are divided in their support for and opposition against reconsideration. However, when asked if they would support a more enhanced reconsideration step, the vast majority have signaled their strong support.

Currently, reconsideration remains mostly a second case, review-only scenario limited to claimant contact that is widely perceived as producing a rubber stamp of the initial decision. NADE believes there is a future for enhanced reconsideration that will ensure the rights of those who seek assistance and that the definition of disability is not compromised.

We believe there are viable options to enhance reconsideration, and we offer the expertise of our membership to determine how best to design the appeals step or, failing in that effort, how it should be eliminated.

There are many challenges to ensuring disability decisions are made accurately and timely. No challenge is currently more important to DDSs than the lack of hiring authority to address critical staff shortages. Attrition rates in the DDSs have soared, leading to high caseloads that can contribute to increased processing times and diminished accuracy.

It is in this environment that SSA has announced its decision to reintroduce reconsideration and to allocate much of its hiring authority to those DDSs. We believe the timing for this action is poor. DDS has lost over 1,600 employees in fiscal year 2017, including over 1,200 adjudicators. Fiscal year 2018 will have similar numbers.

It takes 2 to 3 years for a disability adjudicator to become proficient at making accurate and timely disability decisions. It is imperative that SSA recognize the need for DDSs to fill these vacant staff positions, and if necessary, delay its rollout of reconsideration until such time the agency has a more favorable budget.

In summary, SSA's plans to reintroduce reconsideration will require a significant investment of resources and comes at a time when the DDSs faced increased attrition and critical staffing shortages that have endangered their mission.

While NADE supports a unified process, we question if this is the most appropriate time for SSA to reintroduce reconsideration. We also believe reconsideration should be a true appeal step. We stand ready, willing, and able to assist SSA and other interested stakeholders in that endeavor.

Thank you.

The National Association of Disability Examiners

Testimony Before the

Subcommittee on Social Security

Committee on Ways and Means

House of Representatives

"Examining Changes to Social Security's Disability Appeals Process."

Jeffrey H. Price, Legislative Director

July 25, 2018

Chairman Johnson, Ranking Member Larson and Members of the Subcommittee on Social Security, Committee on Ways and Means: The National Association of Disability Examiners (NADE) sincerely appreciates the opportunity to offer comment and insight regarding the Social Security Administration's management of the federal disability programs. The stated purpose of this hearing is, *"Examining Changes to Social Security's Disability Appeals Process."* NADE believes the challenges facing this appeal step in the Social Security disability programs are numerous and we commend the Subcommittee for convening this hearing to explore them.

Who We Are

NADE is a professional association whose purpose is to promote the art and science of disability evaluation. The majority of our members work in the state Disability Determination Service (DDS) agencies where 15,000+ employees adjudicate claims for Social Security and/or Supplemental Security Income (SSI) disability benefits. Our members constitute the "front lines" of disability evaluation. Our membership also includes many SSA Central and Regional Office personnel, attorneys, physicians, non-attorney claimant representatives, and claimant advocates. The diversity of our membership, combined with our extensive program knowledge and "hands on" experience, enables NADE to offer a perspective on disability issues that is unique and which reflects a programmatic realism, which we believe, is a critical factor for Members of this Subcommittee to consider.

NADE members are deeply concerned about the integrity and efficiency of the Social Security and the SSI disability programs. Simply stated, we believe those who are entitled to disability benefits under the law should receive them; those who are not, should not. Many of the hearings held by this and other Congressional Committees and Subcommittees have, in recent years, focused on the challenges facing the Social Security disability program.

Program Scope

Perhaps no other governmental agency has a greater impact on the quality of life in America as the Social Security Administration (SSA) whose mission is: **"To promote the economic security of the nation's people through compassionate and vigilant leadership in shaping and managing America's social security programs."** We believe many, if not most, Americans will judge the ability of their government to meet their quality of life needs almost solely by the service provided by SSA. Therefore, it is imperative the services provided by SSA fulfill expectations of timeliness and quality. This includes the administration of the Social Security and SSI disability programs.

During FY 2017, SSA paid approximately $935 billion to nearly 61 million Social Security beneficiaries. SSA paid an additional $54 billion in benefits to about 8 million SSI (Supplemental Security Income) recipients. When FY 2018 data is made available in a few weeks, it is expected the numbers will show even larger payouts and a larger number of recipients. This is the program scope for the Social Security Administration – a realization of annual payouts from these two programs of nearly **$1 trillion to nearly 70 million beneficiaries!**

Every month, an average of 9 million workers and an additional 2 million dependents receive Social Security disability benefits from SSA. Every month an average of 6 million blind and disabled adults and more than 1 million blind and disabled children receive SSI disability benefits. That totals approximately 18 million people who rely on some form of disability benefit administered by the Social Security Administration. The enormity of these programs, and their impact on the lives of Americans, cannot be understated. Actuaries forecast that 1 in 4 workers, currently age 20, will become disabled prior to attainment of their expected retirement age. Among this group, 67% will have no private disability insurance and will depend on SSA as their only source of income. While some beneficiaries will collect disability for only a few years, others will collect benefits for much longer periods, making it imperative that the determination of who is eligible for these benefits be accurate.

The DDS Role in the Federal-State Partnership

Initial and reconsideration (first level appeal) claims for disability benefits are processed in the states by Disability Determination Services (DDSs). These are state agencies working in partnership with SSA to provide public service to individuals applying for disability benefits. The DDSs share a tremendous responsibility to help ensure the integrity of the disability program. Eligibility for disability benefits is difficult and determining eligibility for benefits is an equally difficult and complex task. The DDSs make complex medical determinations for the Social Security disability programs pursuant to Federal laws and regulations. The vast majority of DDS personnel are state employees subject to their individual state rules and mandates, personnel practices and other issues specific to their respective states. Within this climate of the federal-state partnership, the DDSs adjudicate disability claims at the initial, reconsideration, continuing disability review (CDR) and disability hearing levels.

The adjudication of claims for disability benefits must adhere to SSA's stringent definition of disability. This is defined as:

- ***Definition of disability for adults***
  Under title II and title XVI, we consider a person disabled under Social Security rules if he or she has a medically determinable physical or mental impairment (or combination of impairments):

  - that prevents him or her from doing any substantial gainful activity (SGA), and
  - has lasted or is expected to last for a continuous period of at least 12 months, or is expected to result in death.

  NOTE: The definition of disability also applies to persons applying for child's insurance benefits based on disability before age 22 and for disability benefits payable after December 1990 as a widow(er) or surviving divorced spouse.

- ***Definition of disability for children under age 18***
  Under title XVI, we consider a child under age 18 disabled under Social Security rules if:

  - the child has a medically determinable physical or mental impairment (or combination of impairments) that:
    - causes marked and severe functional limitations;
    - has lasted or is expected to last for a continuous period of at least 12 months, or is expected to result in death; and
  - the child is not doing any SGA.

At the initial and reconsideration levels, disability adjudicators follow a 5-point Sequential Evaluation approach that requires a determination be made at each step before the adjudicator can proceed to the next step.

Since the introduction of the Social Security Administration's Disability Insurance Program in 1956, the disability claims adjudication process has been a Federal-State venture. In the DDSs, an adjudicative team composed of a Disability Examiner (generic title) and/or a Medical Consultant and/or a Psychological Consultant in the DDSs make the initial medical-legal-vocational determination. That initial or reconsideration determination must follow complex and frequently changing Federal rules and regulations and it is essential that those making the determinations possess unique and specific knowledge, skills, and abilities in order to fairly and timely administer the programs.

The Social Security definition of disability differs markedly from any other public or private industry definitions of disability. While other disability programs focus primarily, or even exclusively, on the degree of impairment, the Social Security and SSI adult disability programs are work and function oriented. The SSI child disability program is also function oriented.

What this means is that an impairment is considered to be disabling only if it prevents an adult individual from working or a child from functioning in normal age-appropriate activities. The DDS adjudicative team is required, as a matter of routine, to deal with the interplay of abstract medical, legal, functional and vocational concepts.

In FY 2017, DDSs adjudicated over 2.5 million initial claims and about 600,000 reconsideration claims. DDSs also processed about 800,000 continuing disability review (CDR) claims. Similar numbers are expected to be reported for FY 2018. The DDS allowance rate was 33% at the initial level and 12% at the reconsideration level. The allowance decisions made by the DDSs account for nearly 77% of all allowances made in FY 2017 and the DDSs were able to achieve this level of service while maintaining an initial accuracy rate of 95%, including an allowance accuracy rate of 98.7%! DDS average processing time for an initial claim in FY 2016 was 85.6 days. Reconsideration claims were processed in 77.1 days. Quick Disability Determination (QDD) and Compassionate Allowance (CAL) claims had an average processing time of just 18.5 days! The ability of the DDSs to adjudicate these cases timely and accurately carries enormous consequences for SSA and the citizens who rely upon the Agency for assistance. Therefore, it is extremely critical the individuals tasked with this responsibility be highly trained and able to perform their job duties in a professional environment. The DDS adjudicators must be able to translate the medical concept of clinical severity into the legal concept of Social Security disability program severity and the resultant functional restrictions into vocational and/or age-appropriate assessments. In essence, the DDS adjudicators must appropriately and interchangeably, apply the "logic" of a doctor, a lawyer and a rehabilitation counselor (for a description of the job of the Disability Examiner as defined by NADE in 2004, please refer to https://www.nade.org/nade-board-approves-disability-examiner-position-paper/).

Focus of Hearing and Statutory Requirement for Reconsideration

The statutory requirement for reconsideration is codified in the SSRs in Social Security Act – Section 205(b)(2); Regulations – 20 CFR 404.901, 404.907 – 404.922, 416.1401, 416.1407-416.1413b, 416.1414-416.1422 and in POMS DI 27001.001.

These regulations specify that reconsideration is the first step in the appeals process for a claimant who is dissatisfied with the initial determination on his or her claim, or for individuals (e.g. auxiliary claimants) who show that their rights are adversely affected by the initial determination. A reconsideration involves a thorough review of all evidence from the initial determination and any new evidence that is obtained at reconsideration. A reconsidered determination is made by:

- An adjudicative team consisting of a disability examiner and a medical consultant or psychological consultant; or
- A disability hearing officer.

The medical or psychological consultant person(s) who makes the reconsidered determination must be a different decision maker than the initial level medical or psychological consultant.

It is important to note that, while the bulk of reconsideration claims include those claims denied at the initial level, some reconsideration claims involve initial allowances where the claimant is appealing the established onset date (EOD).

The Current State of Reconsideration As Viewed By NADE

Reconsideration is available to claimants who are dissatisfied with the initial determination made on their claim. At least this is the first level of appeal in most of the country. Since 1997, ten DDSs have been without the reconsideration appeal step. In an attempt to redesign the disability claims process, SSA launched what it called a Prototype model in 1997. Ten (10) DDSs were selected for inclusion in this model that featured the elimination of the reconsideration appeal step and introduced the concept of the Single Decision-Maker or SDM (please refer to GAO's report, *"SSA Disability redesign: Actions Needed to Enhance Future Progress,"* HEHS-99, March 12, 1999 for a complete description of the various components of the Prototype model). The SDM component was expanded to ten additional DDSs in 1998. Almost immediately, however, many pieces of the Prototype model were proven to be ineffective or unworkable and were abandoned, leaving Single Decision-Maker (SDM) and elimination of reconsideration as the existing components still in place.

The SDM component remained in place until the Bipartisan Budget Act of 2015 mandated its elimination. Thus, the 20-year experiment for SDM came to an abrupt end in FY 2017. NADE believes this to be an unfortunate decision and we would be interested to view any statistical data compiled by SSA that would reflect the impact of the abolition of SDM on DDS allowance rates and quality. We believe SDM was a viable component that demonstrated Disability Examiners were sufficiently competent to make accurate and timely decisions on most initial disability claims, saving the input of the DDS Medical Consultants for the more complex claims.

The elimination of reconsideration in the ten DDSs in 1997 has continued to this day with the obvious effect that SSA has lacked a unified process for the administration of its disability programs for more than 20 years! NADE endorsed the early attempts by SSA to redesign the disability claims process as a necessary means to devise the most effective model of processing these claims in a timely and accurate manner. For over a decade, SSA has indicated its intent to re-introduce the reconsideration appeal step in those ten DDSs. For over a decade, one reason or another has prevented them from doing so. In recent months, SSA has announced its intent to move forward with a national roll-out to re-introduce reconsideration into those ten DDSs.

We have yet to see the data SSA collected during the past 20 years that would show the impact of what the elimination of the reconsideration appeal step had for those DDSs involved and we have yet to see SSA introduce any major changes that would redesign the reconsideration step as a more meaningful level of appeal. NADE believes reconsideration should be a true appeal step and not just another bureaucratic roadblock for individuals who seek assistance from SSA.

Need for a Unified Process

More than 80,000 claimants were allowed in FY 2017 at the reconsideration appeal step and we have previously recommended SSA should move forward to re-introduce this appeal step in the ten DDSs where it has been absent for over 20 years or abandon this appeal step in the other DDSs. NADE repeatedly presented the argument that disability decision-making should be the same across the nation. If 40 states had reconsideration, the remaining 10 states should also have reconsideration. If the absence of reconsideration proved effective in 10 states, then the other 40 states should follow. Regardless of what direction the data suggests to be the most viable model, that model should be adopted nation-wide.

NADE has remained firm in its support that SSA should utilize the data collected over the past 20+ years to determine:

- If the reconsideration appeal step is an effective model, and
- What the future model of reconsideration should look like

In recent years, NADE has polled its membership twice to solicit input regarding reconsideration and whether our members supported maintaining this appeal step. The results led the NADE leadership to conclude our organization could not take a definitive position on reconsideration. Our members were evenly divided in their support for, and opposition against, maintaining the reconsideration as a viable appeal step. However, when asked if they would support a more enhanced reconsideration appeal step, the level of support within our membership soared with the vast majority signaling strong support for an enhanced reconsideration as a true appeal.

NADE was hopeful to review data collected by SSA during the 20+ year experiment in which reconsideration was not part of the disability claims process in ten states but it appears there is little reliable data available. That is an unfortunate outcome from such a lengthy test model.

Future of Reconsideration

The reconsideration appeal step has had a long and somewhat colorful history. SSA has made multiple attempts since the 1970's to redesign this appeal step. Yet, because of poor design choices, lack of adequate funding or any other of a multitude of reasons, the many attempts made between 1971 and today have produced little meaningful reform and the original design of reconsideration has changed little in 60 years. Today, reconsideration remains mostly a second case review only scenario with limited claimant contact that is widely perceived as producing a rubber stamp of the initial decision.

NADE believes there is a future for an enhanced reconsideration appeal step and we offer the expertise of our membership in any effort to redesign reconsideration to ensure that the rights

of those who seek assistance are protected and that the definition of disability, as written into the Social Security Act, is not compromised. We offer the following examples as suggestions on where to start with redesigning reconsideration:

1. SSA has put into place a special federal review of DDS disability decisions that target reconsideration determinations made on claimants age 55 and over. The purpose of this Targeted Denial Review (TDR) is an effort by the Agency to take a third look at those claims SSA has determined are likely to be approved at the Administrative Law Judge level and return those claims to the DDS for either additional development or an outright reversal of the denial decision. This Targeted Denial Review is based on a predictive computer model that the DDSs have consistently asked to see but which SSA has refused to share. Instead of working collaboratively with the DDSs, the Agency apparently prefers to take the "gotcha" approach and then claim credit for a substantial reversal rate for these special reviews. NADE believes that a more collaborative effort could ensure reconsideration determinations made at the DDS level are accurate and timely without the need for such special reviews.

2. SSA could effectively enhance the reconsideration step by providing specialized training for Disability Adjudicators in the DDSs who make these determinations to consider other facts and evidence in making these determinations and how to better understand the interaction of many different medical conditions and their impact on claimant function. In some situations where it could be considered pivotal, the claimant could be offered the opportunity for an informal conference, either in person or via telephone contact, in which the claimant could be allowed to submit additional facts or evidence they wish to have considered prior to the final reconsideration determination. NADE does caution, however, that the problem of high DDS caseloads will have to be addressed if this is to be presented as a viable option for reconsideration.

3. SSA currently utilizes Disability Hearing Officers (DHOs) to handle appeals of Continuing Disability Review (CDR) claims when the DDS has proposed a decision to cease benefits. If the claimant chooses to appeal the decision, the claim is returned to the DDS as a reconsideration CDR claim. If the new Disability Adjudicator concurs with the cessation decision, the claim is forwarded to the DHO. The DHO will conduct an independent case review and offer the claimant the option for a hearing at which the claimant can present witnesses and other evidence to support their claim. A similar option may represent a potential model for an enhanced reconsideration appeal step for initial claims.

We believe there are other options to enhance the reconsideration appeal step and we offer the expertise of our membership to engage in a national dialogue to explore these options to determine how best to design the reconsideration appeal step or, failing in that effort, how best to abandon this appeal step. Exploratory models, such as those we have recommended, could be piloted on a limited basis with specific parameters prescribed for the collection of valid data that can then be analyzed and used to determine if any such models have merit.

Reduced Budgets and Insufficient Funding

There are many challenges to ensuring that disability determinations are accurate and made in a timely manner, regardless of whether those determinations are made at the initial level or at the reconsideration level. No challenge is currently more important to DDSs than insufficient funding and the lack of hiring authority to address critical staff shortages. NADE is aware that there are many problems that can't be solved by throwing more money at the problem but, in the case of timely and accurate decision-making in the disability program, the lack of sufficient funding on a consistent basis has created a crisis of service delivery in the DDSs. Attrition rates in the DDSs have soared in the past few years and many DDSs report they are currently operating with one-third less staff than they had three years ago. This staffing shortage has led to extremely high caseloads that can subsequently contribute to increased processing times and diminished accuracy in decision-making at both the initial and reconsideration levels.

It is in this environment that SSA has announced its decision to re-introduce reconsideration to those 10 DDSs and to allocate much of the new hiring authority granted under the FY 2018 budget to those DDSs. NADE readily acknowledges the need for such hiring if SSA proceeds with the re-introduction of reconsideration but we believe the timing of this action is poor. The vast majority of DDSs throughout the country are struggling to keep sufficient staff to do the work required and many DDSs have to utilize staff in other DDSs and federal components to process claims. The DDSs have had to shift personnel and resources from such positions in the DDS as training, quality assurance, professional relations, and even supervision and management and direct all their resources to claim processing to ensure that the claims continue to be processed timely and accurately. This shift of resources within the DDSs cannot be sustained on a continuing basis without severe risk to decisional accuracy and timeliness and the performance of other functions within the DDS that are being delayed in order to maintain sufficient resources to process claims.

The investment in time and resources to train a disability adjudicator to the level at which they become proficient in disability decision-making is significant and the DDSs cannot afford to allow this commitment of resources to continue to walk out the door. As caseloads soar in the DDSs, more and more staff look for other jobs and the staffing shortages increase. The resulting work environment within the DDSs can become toxic as remaining staff have to process almost unimaginable workloads. The DDSs lost 1,623 employees in FY 2017, including 1238 adjudicators. The attrition for FY 2018 will be similar. It takes two to three years for a disability adjudicator to become proficient at making accurate and timely disability determinations. The DDSs cannot afford to expend the funds to train these adjudicators only to watch them walk out the door for higher paying, less stressful jobs in the private sector. It is imperative that SSA recognize this critical need in the DDSs and grant them the necessary hiring authority to fill vacant staff positions. If necessary, SSA should delay its roll-out of reconsideration until such time that the Agency has a more favorable budget outlook.

Summary

NADE believes SSA's ability to provide timely customer service is critical. **SSA is America's "Window" to its government** and it can ill afford to fail in its mission. Social Security can and must do better in fulfilling its promise to America and that includes the administration of its disability programs. People with disabilities, already burdened by the challenges of their illness/injury, are often in desperate need of benefits to replace lost income. They deserve, and should receive, timely and accurate decisions through a fair and understandable process. The challenge to SSA and its DDS partners is to ensure the disability determination claims process, including the appeals process and, specifically the reconsideration step, fulfills its mission.

SSA administers disability programs that pay nearly $1 trillion annually to 70 million Americans, including nearly 18 million blind and disabled adults and children. Decisions regarding eligibility for disability benefits are made in the DDSs as part of the federal-state partnership and the first level of appealed decisions, called reconsideration, are also made at the DDS. The DDSs process millions of claims annually with high accuracy and in a timely manner and nearly 77% of all allowance decisions for disability benefits are made by the DDS. Yet, the public perception continues to exist that reconsideration is a meaningless bureaucratic roadblock that only delays disabled individuals from obtaining their allowance decision at the next appellate level. For many decades, SSA has explored different designs for reconsideration but has continued to fall back on "The Old Reliable Model."

The Agency has announced plans to re-introduce this appeal step in ten DDSs where it has been absent for decades. This will require a significant investment of resources and comes at a time when other DDSs face increased attrition and critical staffing shortages that have endangered their ability to complete their work in a timely and accurate manner.

NADE supports a unified process where all disability claims are handled similarly and the appeals process is the same. However, we question if this is the most appropriate time for SSA to attempt to re-introduce the reconsideration appeal step in the ten states where it has been absent for over 20 years. We believe SSA and the DDSs have more critical needs for the limited funds available from the Agency's administrative budget and we believe SSA should consider waiting until such time that there are sufficient funds available for this purpose. We also believe the re-introduction of this appeal step should coincide with a national introduction of a newly designed reconsideration model that would alter the public's perception that reconsideration is a rubber stamp for the initial decision. NADE supports an enhanced reconsideration as a more effective and more efficient appeal step and we stand ready, willing and able to assist SSA and other interested stakeholders with this endeavor.

We commend the Subcommittee for exercising its oversight authority and we look forward to working with the Subcommittee to achieve the goals we have outlined.

Chairman Johnson. Thank you.

Ms. Ekman, welcome. Please proceed.

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

Ms. Ekman. Good morning, Chairman Johnson, Ranking Member Larson, and members of the subcommittee. Thank you for the opportunity to testify at today's hearing.

My name is Lisa Ekman, and I am the director of government affairs for the National Organization of Social Security Claimants' Representatives, or NOSSCR. I am here today on behalf of the co-chairs of the Social Security Task Force of the Consortium for Citizens With Disabilities, or CCD.

The Social Security disability programs provide modest but vital benefits to millions of people with disabilities so severe they are unable to perform substantial work, many of whom would live in abject poverty and be homeless without them.

The Task Force appreciates the efforts of the members of this subcommittee to provide SSA with funding dedicated to reducing the hearings backlog included in SSA's operating budgets for fiscal year 2017 and 2018. However, despite that funding, people are still waiting too long for a hearing decision, about 600 days. That has devastating consequences. Some people lose their homes, declare bankruptcy, and some even die.

Recent changes to the disability adjudication process purportedly designed to reduce the backlog have instead created procedural barriers to accessing benefits and tilted the playing field toward denials for even people who meet the statutory definition of disability contained in the Social Security Act.

SSA is in the process of making another highly controversial change to its disability process that will lead to greater delays and more inappropriate denials reinstituting reconsideration in 10 States.

The CCD Task Force has long supported the nationwide elimination of reconsideration. SSA generally takes no meaningful steps at this stage to ensure that additional evidence is obtained to help it reach the right decision.

Making all claimants go through this level of review adds an average of 101 days to the wait time of the vast majority of claimants before they can request a hearing before an ALJ, which is the first time a disability claimant ever talks to or meets an adjudicator.

Far more people will have to wait to receive their benefits than will get them earlier as a result of this proposed change. Seven out of eight people are denied during reconsideration.

Worse, thousands of claimants will not ever receive the benefits they are eligible for. Many who meet the statutory eligibility criteria will abandon their appeals because of this procedural hurdle.

SSA is making this change without conducting a thorough and publicly available evaluation of its 20-year disability Prototype experiment. The decision to reinstitute reconsideration is not based on data or evidence.

Rather than reinstituting reconsideration, SSA should eliminate reconsideration and dedicate the resources it uses for reconsideration in the 40 States to improving the initial determination process with a particular focus on better development of the evidentiary record. The CCD Task Force recommends the following steps be taken to improve initial determinations.

First, SSA should offer to have in-person meetings with as many claimants as possible, as soon as possible, to inform them about the process and what evidence is useful to SSA in making a determination. Previous pilots have found this simple step helps SSA arrive at the correct decision sooner, especially for unrepresented claimants.

Second, SSA should improve the forms and guidance provided to treating physicians and consultative examiners to better explain what evidence is useful to SSA and elicit that evidence.

Third, SSA should make claimants aware of the availability of representation at the initial level.

Reinstituting reconsideration would add another procedural hurdle to the tilted playing field that other recent changes to the disability process have

created. These are discussed more fully in my written testimony, but I will provide a few examples.

First, SSA changes longstanding and court-approved rules regarding how it weighs evidence from a claimant's own physician. Instead of giving the highest weight possible to the opinion of a doctor who has treated the claimant for years, SSA adjudicators can now give greater weight to the opinion of an SSA consultant who performed a cursory exam or even a paper file review by a doctor who never even met or examined the claimant.

A second example is requiring a claimant to submit all evidence that relates to his disability, even if that evidence is not relevant to the decision, creating huge files that increase processing time but not decisional accuracy.

Finally, SSA created arbitrary deadlines for the submission of evidence that results in the exclusion of relevant evidence from consideration leading to more appeals to Federal court and the Appeals Council.

To sum up, SSA has recently made regulatory changes that tilt the playing field against eligible claimants and create procedural hurdles to accessing benefits. Reinstituting reconsideration is a step in the wrong direction, harming significantly more people than it helps. When SSA tried previously to reinstate it, it had to withdraw its plan in the face of congressional opposition. I urge Congress to weigh in again.

Thank you, and I look toward to answering any questions you might have.

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

Examining Changes to Social Security's Disability Appeals Process July 25, 2018

Testimony of Lisa Ekman, Co-Chair Social Security Task Force Consortium for Citizens with Disabilities

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TESTIMONY OF LISA EKMAN ON BEHALF OF THE SOCIAL SECURITY TASK FORCE, CONSORTIUM FOR CITIZENS WITH DISABILITIES

Chairman Johnson, Ranking Member Larson, and Members of the Subcommittee, thank you for the opportunity to provide testimony for this hearing entitled "Examining Changes to Social Security's Disability Appeals Process."

I am the Director of Government Affairs for the National Organization of Social Security Claimants' Representatives (NOSSCR). I am also a Co-Chair of the Consortium for Citizens with Disabilities (CCD) Social Security Task Force. Today I am testifying on behalf of the Social Security Task Force (Task Force) Co-Chairs. CCD is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. The CCD Social Security Task Force focuses on disability policy issues in the Title II disability programs and the Title XVI Supplemental Security Income (SSI) program.

I. Social Security Benefits Are Vital to People with Disabilities

This hearing is extremely important to people with disabilities. The Title II and the SSI disability programs provide modest but vital income support to individuals with significant disabilities and their families. Although these benefits average only $1198 a month for Social Security Disability Insurance (SSDI) and $577 for SSI as of June 2018, they are often the difference between having a home and being evicted or homeless, or putting food on the table and going hungry, for beneficiaries and their families. More than 1 in 5 working age people with disabilities in the US lives in poverty, nearly twice the poverty rate of their non-disabled peers.[1] That rate would be significantly higher without the modest benefits that the Social Security disability programs provide.

The Task Force is pleased the amount of time claimants must wait from requesting a hearing to disposition of claims has finally begun to decline. The average number of days people waited for a disposition has declined from a high of 633 days in September 2017 to 594 days as of the end of June.[2] We thank the members of the Subcommittee for your support for adequate administrative funding for SSA and thank Congress for providing additional dedicated funding to SSA in both FY2017 and FY2018 to address the disability hearings backlog. The past two decades demonstrate that when SSA receives consistently adequate funding it can reduce both the number of people waiting for a hearing and the time it takes to receive a determination from an ALJ. When SSA does not receive adequate funding, wait times grow. No search for efficiencies, reprioritization of tasks, or technological improvements can substitute for adequate resources. Although the wait time for a hearing has decreased, it is still unacceptably long and can have devastating consequences for people while they await a decision about whether they meet the statutory definition for eligibility for Social Security disability benefits.[3] Left without income while awaiting a decision, some people lose their homes and become homeless, some have to declare bankruptcy, and some people (more than 10,000 during FY2017) die.[4]

The Task Force is also concerned about the significant variation in the average wait times throughout the country. The average wait time ranges from a low of 324 days in Providence, Rhode Island to a high of 780 days in the New York hearing office, a difference of <u>more than 15 months</u>.[5] The Task Force appreciates that SSA has limited resources and that it is often difficult to predict the geographic location of future applications and to adjust staffing accordingly (particularly in light of Continuing Resolutions and hiring freezes), but notes that there are sometimes large differences between offices in close geographic proximity. For example, claimants wait an average of 780 days for dispositions of their claims in the New York hearing office and 613 days in the New York Varick office, a difference of 167 days.[6] These offices are located only 1.1 miles apart. The 283-day difference (over nine months) between the average wait times of Houston North and Houston Bissonet is even more glaring.[7] Given these stark differences and the inequity they create for disability claimants, the Task Force is glad the

Subcommittee is looking more closely at how SSA endeavors to reduce the processing times for Social Security disability claims in ways consistent with the statute while retaining robust due process protections for claimants, including the right to choose an in-person hearing.

The Task Force appreciates the steps that SSA has taken to try to reduce the time people wait for a hearing as outlined in its Compassionate And Responsive Services (CARES) plan. Although the Task Force does not support all of the CARES initiatives, we believe that many are promising and could assist SSA to make more timely decisions on disability claimants' appeals to Administrative Law Judges (ALJ).[8] Unfortunately, SSA has also made a series of changes to the rules governing the disability adjudication process in recent years, especially since 2014, that have prevented many people with disabilities who meet the statutory requirements for eligibility for Social Security disability benefits from accessing those benefits. In addition, these changes, although often purportedly intended to increase the efficiency of the hearing process and the timeliness of decisions, are likely to have (or have already begun to have) the opposite effect. By increasing the formality and adversarial nature of the hearing process, these combined changes result in denials of people who should be found eligible for benefits because they meet the statutory definition of disability under the Social Security Act. Additionally, some denied claimants choose not to appeal their denials despite being inappropriately denied.

II. An Informal and Non-Adversarial Process

There is a long and broadly-held understanding that the disability adjudication process undertaken by SSA should be informal and non-adversarial and that the role of the disability adjudicator is to fairly determine an individual's eligibility for benefits in a nonbiased manner by applying the applicable statutory and regulatory rules. Many recent changes to the rules and procedure regarding the disability adjudication process at the hearing level formalize disability hearing procedures and make the process more adversarial. The Task Force outlined this concern in 2014 in comments responding to proposed changes about the submission of evidence:

> The longstanding view of Congress, the United States Supreme Court, and SSA is that the Social Security disability claims process is informal and nonadversarial, with SSA's underlying role to be one of determining disability and paying benefits. "In making a determination or decision in your case, we [SSA] conduct the administrative review process in an informal, non-adversary manner."[9] SSA's interpretation is consistent with United States Supreme Court decisions over the last thirty years that discuss Congressional intent regarding the SSA hearings process. Most recently in 2000, the Supreme Court stated:
>
>> The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although many agency systems of adjudication are based to a significant extent on the judicial model of decision-making, the SSA is perhaps the best example of an agency that is not ... Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits….[10]
>
> 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."[11]

The process to apply for and appeal a denial of disability benefits has become increasingly difficult for people with disabilities to navigate. Changes that make the process more formal and complicated, add more procedural rules and obligations for claimants, or appear to be inconsistent with one another (for example, requiring the submission of all evidence that relates to an individual's disability but not allowing the evidence to be considered in most circumstances if it is not submitted by a certain date) are nearly impossible for people with disabilities to even know about, let alone understand and comply with. This is especially true for people who have intellectual, cognitive, or mental impairments. Many of these recent changes have also made the process and how the adjudicator arrived at his or her decision more opaque. It can be very difficult to appeal a denial if one doesn't understand the rationale used to deny the claim in the first place.

III. Metrics to Evaluate Regulatory, Staffing, and Procedural Changes Designed to Decrease Wait Times

The Task Force believes that one question should be paramount when changes to the disability adjudication and appeals process are considered: Does the change increase the likelihood that people who meet the definition of disability outlined in the Social Security Act will be found eligible for benefits?[12] The Task Force appreciates that the Subcommittee is examining how SSA determines which backlog-reducing initiatives to pursue and how to allocate its limited resources. The metrics SSA elects to use to determine which new policy to pursue, or how it evaluates competing proposals and chooses one over another, are often unclear. Although improving efficiency and internal accuracy (e.g., making decisions consistent with the regulations and HALLEX) are important and appropriate goals, these must be subordinate to ensuring that SSA's regulations and sub-regulatory policy do not create procedural or other barriers to accessing benefits Congress intended that people who meet the statutory definition of disability be entitled to receive. Unfortunately, many of the changes that SSA has made in recent years in the name of reducing wait times for a decision from an ALJ are inconsistent with this principle.

SSA has also failed to justify many recent changes using one of its stated evaluation metrics: improving efficiency of the disability determination process and timeliness of decisions. Because the average wait time for a hearing is still an unreasonable 594 days, it is important that any changes be fully supported by the evidence and data the agency has available to it. Unfortunately, many changes made by SSA in recent years reverse long-standing SSA policy without providing data or evidence to support the change or explain why the previous policy was wrong or no longer appropriate. This is especially hard to understand when the changes were tested by multi-year pilots or demonstrations that were not comprehensively evaluated and no data from those experiments is made public. This lack of transparency makes it impossible to gauge how the change will affect the average processing time for hearings and the financial costs and benefits of the proposed change. Most importantly, however, SSA fails to use the evidence and data it has available to evaluate the impact of the changes on the ability of individuals to access Social Security disability benefits for which they meet the statutory definition of eligibility.

SSA's recent changes fall broadly into two categories: procedural barriers to being approved for benefits and changes that tilt the scales toward denials in disability adjudications. This testimony will now detail those changes and the impact they have had on the ability of people with disabilities to access Social Security disability benefits.

IV. Procedural Barriers to Accessing Social Security Disability Benefits:

The decision to apply for Social Security disability benefits often occurs at a very difficult time in claimants' lives. Claimants are often facing extreme financial stress, and even destitution, due to loss of income while also experiencing significant physical and/or mental impairments such as debilitating pain, overwhelming fatigue, or inability to concentrate. Every complex and unnecessary procedure, new step in the process, or tilt in the way evidence is evaluated creates a harmful roadblock that makes it more likely claimants will be unable to make it through the application and appeals process and will just give up – including claimants who meet the statutory eligibility requirements.

a. Procedural Barrier: Evidence Submission Rules: The "All Evidence Rule"

Since 2015, claimants must inform SSA about or submit "…all evidence known to you that relates to whether or not you are blind or disabled."[13] Although this might seem reasonable on its face, it is a substantial change from the previous regulations and greatly increased the burden on claimants related to the collection and submission of medical evidence. Furthermore, understanding what is required can be difficult, especially as it pertains to what evidence "relates" to a claimant's disability. Prior to this regulatory change, a claimant was only required to submit relevant evidence proving she was blind or disabled according to the statutory eligibility criteria. For the first time, SSA placed a burden on claimants to understand what part of their medical records "relates" to their disability and to collect and submit evidence that might disprove disability.

The regulations provide no scope or limits on what parts of one's medical, employment, educational, or other records must be submitted. It does not define "relates to" in a way that allows a claimant to easily understand what is expected or to feel confident that she is complying with this requirement. A prudent claimant (and her representative, if she has one) will chose to err on the side of caution and submit her medical records in their entirety, often thousands of pages. Hundreds of those pages might relate to her impairment, but not be in any way relevant to the decision an adjudicator is trying to make: whether she meets the statutory definition to be found blind or disabled under the Social Security Act. In addition, this change in evidence submission duties creates a financial hardship for claimants as it can cost hundreds of dollars to get copies of records, especially for claimants who might have been treated by numerous providers and at numerous facilities.

The Task Force urged SSA[14] not to move forward with finalizing this regulation in 2014 because, among other reasons, the regulation was likely to lead to extremely large evidentiary files including irrelevant information. As the Task Force feared, this new requirement is one reason file size and processing times have increased. SSA provided no evidence that this change has increased the consistency of the decisions with the statutory intent of who should be eligible for benefits.

The Task Force is unaware of any testing SSA performed about the impact this change might have on the disability adjudication process, especially in light of the long wait times and the impact that electronic medical records might have on the amount of evidence submitted pursuant to this new rule. Although the preamble in the Notice of Proposed Rulemaking (NPRM) did lay out the rationales for pursuing these changes,[15] those rationales did not provide an evidentiary basis for making such a drastic change, nor did they include any data or evidence that the existing evidence submission rules resulted in people who did not meet the statutory definition of disability being approved for benefits. The Task Force was disappointed that SSA appeared not to include the potential implications for the ability of people with disabilities to be found eligible for their earned benefits in its metrics for determining whether to move forward with this significant change.

b. Procedural Barrier: Evidence Submission Rules: The "5-Day Rule"

A rule proposed and finalized in 2016,[16]entitled "Ensuring Program Uniformity at the Hearings and Appeals Council Levels of the Administrative Review Process" (Program Uniformity), created significant new procedural barriers for disability claimants by creating arbitrary deadlines for the submission of evidence that leads to the exclusion of relevant evidence. The Program Uniformity rule was modeled after the rules that had been piloted in SSA's Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont) since 2006. The pilot provided more than a decade of data and evidence regarding its effects on people's ability to access their earned benefits, as well as its impact on timeliness and policy compliance of decisions. However, SSA released no evaluation of that pilot, nor did it rely on data from the pilot to justify the changes in the NPRM or final rule on Program Uniformity. Most importantly, SSA did not assess whether the changes better ensured that people who meet the statutory definition of disability are found eligible. Less importantly but still helpful in determining whether SSA ought to have made this change are efficiency and internal accuracy related questions such as: was there a noticeable difference in processing times or other measurable outcomes? What were the effects on due process for claimants? Were there more appeals to the Appeals Council or Federal Court? Did the rule lead to more complete files and therefore more accurate decisions? SSA might have such data and might even have relied upon it for its internal decision making, but the agency has not released it and did not provide it to the public or discuss it during the rulemaking process.

Some of the Program Uniformity rule's changes, such as increasing the amount of notice that claimants and representatives receive regarding the date of a hearing from 20 to 75 days,[17] are helpful. However, other changes made in this rule are extremely harmful to claimants because they allow ALJs (at their significant discretion) to exclude evidence that could prove eligibility under the statutory definition of disability, if it is submitted less than five business days before a hearing.[18]

The final rule requires claimants and their representatives to inform SSA about or submit all written evidence at least five business days[19] before a hearing for it to be considered (colloquially known as the "5-day rule"). Although the rule contains good cause exceptions that allow an ALJ to consider evidence submitted after that deadline, the rule also appears to contradict a basic premise of the Social Security Act and a stated SSA belief that "a complete evidentiary record is necessary for us to make an informed and accurate disability determination or decision."[20] It is impossible to understand how excluding from consideration evidence that SSA has in its possession is consistent with making a decision based on a complete evidentiary record. It is inefficient to exclude evidence at the ALJ hearing level when doing so could necessitate an appeal of the decision to the Appeals Council or ultimately to Federal court (if this procedural barrier does not cause the individual to abandon the appeal of this claim and file a new application entirely).[21]

This rule can also be quite confusing to claimants who are aware of it. A claimant might ask herself, "Am I required to submit this evidence? I am required to submit all evidence I have that relates to my disability, but this says the judge won't even consider it, so what am I supposed to do?"

The Task Force believes that these requirements are inconsistent with the provisions of the Social Security Act requiring the Commissioner to make decisions "…on the basis of evidence adduced at the hearing…"[22] On its face, any deadline for submission of evidence prior to the hearing appears inconsistent with this requirement in the Social Security Act. When changes to SSA rules creating deadlines for the submission of evidence were considered and rejected previously, members of Congress from both parties urged SSA not to require the submission of evidence prior to the hearing because it conflicted with the statute and ignored explicit provisions in the law.[23]

Finally, this prohibition on the consideration of evidence and pre-hearing briefs that are not submitted (or SSA has not been informed about) at least five business days before the hearing is one-sided. SSA has no deadline to exhibit the evidence in the file or add information from its databases. SSA also routinely calls medical and vocational experts to testify at hearings, but claimants and representatives lack prehearing access to the evidence these experts will present.

c. Procedural Barrier: Reinstituting Reconsideration in the Disability Prototype States

SSA's FY2019 Justification to Congress proposed reinstituting reconsideration in the ten states that do not currently have that stage of appeal .[24] Those states, referred to as prototype states, are Alabama, Alaska, California (Los Angeles North and West branches only), Colorado, Louisiana, Michigan, Missouri, New Hampshire, New York, and Pennsylvania.[25] In non-prototype states, reconsideration is the first step in the process of appealing an initial denial of a claim for disability benefits; it involves a different decisionmaker at the same disability determination office completing a review of the claim file.[26] Claimants can submit additional evidence for the decisionmaker to consider; however, the reviewing official generally does not make any efforts to obtain additional medical evidence or make any efforts to better develop the case file.[27]

The Task Force has long supported the nationwide elimination of reconsideration[28] and strongly opposes SSA's current plans to reinstitute reconsideration in the prototype states. Many claimants and representatives view reconsideration as a meaningless step, a "rubber stamp," of the decision of the original denial without any meaningful steps taken to ensure that the decision is made based on a more complete evidentiary record, as is envisioned in the Social Security Act. Although a small but not insignificant percentage of people nationwide are awarded benefits at the reconsideration level (13% in FY 2017),[29] this process adds yet another procedural hurdle and an average of 101 days[30] to the time the remaining 87% of claimants must wait before requesting a hearing before an ALJ. This procedural hurdle can cause many claimants to abandon their appeals despite the fact that they meet the statutory definition of disability.

Although the percentage of approvals at the reconsideration level nationally was 13% in FY 2017, a few states have noticeably higher approval rates. In Fiscal Year 2017 the reconsideration award rate was 21.3% in Massachusetts and approximately 18% in Wisconsin and Kansas.[31] Although many factors contributed, in 2010, a claimants' representative made the following observations about Massachusetts' award rate:

> I think the main reason for the higher rate of Massachusetts DDS reconsideration allowances is that the Massachusetts DDS is **serious about developing the evidence** necessary to make accurate determinations – at reconsideration, as well as at the initial level. Another reason is that the DDS has long specialized work in two areas that can be difficult to adjudicate – applications involving homeless individuals and HIV/AIDS claims. With specialization, the DDS examiners have developed both familiarity with the relevant treatment and expertise in the issues involved with the relevant medical conditions, providing for greater accuracy in adjudications. **A very experienced DDS examiner helps people at a large homeless shelter with applications and disability forms once a month. The DDS has found that this well-prepared documentation facilitates accurate and timely decision-making in these cases.**[32] (emphasis added)

In contrast, our understanding is that SSA has no plans to require better development of the record, claimant interviews, better training and/or specialization for disability examiners to make reconsideration meaningful. SSA's plan will add time to the disability adjudication process for the vast majority of claimants, delaying the hearing stage where ALJs have a duty to develop the record.[33]

SSA has completed many pilot projects and demonstrations regarding the initial and reconsideration phases of the disability determination process.[34] Contacting claimants early in the application process to inform them how the process works and what evidence can be helpful in proving disability can improve the ability of SSA to more quickly arrive at a statutorily-compliant decision is one common finding from those experiments.[35] Providing this assistance, however, would require SSA to either devote more resources to the first two steps of the application process or eliminate reconsideration and dedicate the resources currently used for reconsideration to better development of the evidentiary record at the initial level. The Task Force has consistently supported the latter approach.

SSA has focused its backlog-reduction measures on the ALJ hearings level. This is understandable given the historically long wait times to receive a decision from an ALJ, but another way to reduce hearing-level wait times is to prevent more people from having to appeal state agency denials. The Task Force has many recommendations on this topic, including: improving development of cases at the initial level by telling claimants and medical providers what evidence is useful; improving the quality of consultative exams (CE), including using treating physicians to perform CEs whenever possible and providing adequate resources to states agencies to order CEs when gaps in evidence exists; and performing additional targeted denial reviews (TDR) on initial denials.[36]

The Task Force also supports SSA resuming issuing on-the-record decisions (OTR), when appropriate. ALJs and attorney adjudicators can issue fully favorable decisions on the record where the evidence in a claimant's file is sufficient for a finding of disability and a hearing is not necessary. Examples of this include when claimants supply evidence that meets one of SSA's more quantitative listings (for example, pulmonary function test results for respiratory listings, blood pressure measurements for claimants with kidney disease, or body mass index measurements documenting weight loss for claimants with diagnosed impairments of the digestive system). OTRs can also be issued for claimants diagnosed with impairments that by definition meet a listing (such as non-mosaic Down Syndrome) or are considered a "compassionate allowance" condition (for example, early-onset Alzheimer's disease). There are also times that a claimant may not meet a listing, but the record clearly indicates that he or she lacks the residual functional capacity to perform substantial gainful activity. After applying the appropriate medical-vocational rules, an ALJ or attorney adjudicator can issue an OTR in such a case.

OTRs have helped reduce the hearing backlog in the past. As recently as Fiscal Year 2010, senior attorney adjudicators issued more than 54,000 OTRs, but this number decreased to 1,000 in Fiscal Year 2016[37]and 686 in Fiscal Year 2017. Not a single senior attorney OTR has been issued since July 2017. Attorney adjudicators have instead been assigned to other tasks, including writing decisions in cases where an ALJ hearing has already occurred. Although the Task Force is aware that concerns have been raised regarding issues with the policy compliance of some OTRs, the Task Force is not aware of any publicly available study or data regarding these concerns. It is important to remember that a non-policy compliant decision is not necessarily incorrect (i.e. awarded to someone not eligible based on the statutory definition) and to our knowledge SSA has never used the avenues it possesses to review or reverse decisions they believe to be incorrect. If any OTRs did not comply with policy, SSA should provide the training and oversight necessary to ensure program integrity within these initiatives (as they do with ALJs who issue policy non-compliant decisions) rather than abandoning a successful initiative.

d. Procedural Barrier: Requiring More Information Than Is Required by Regulation for Electronic Appeals

In March 2015, SSA updated its electronic appeals system. The new system involved a "single submission" practice in which appeals were only processed when applicants completed lengthy forms not required by SSA's regulations. These additional requirements were poorly communicated, leading to more than 61,000 people filing regulatorily compliant appeals that went unprocessed. SSA decided in early 2018, after several years of advocacy from CCD member organizations and other groups, to re-contact these claimants. Over 28,000 of these appeals are now being processed, some of them several years after they should have been, and more will be processed soon. Although we appreciate SSA's efforts, we remain concerned that the iAppeals system still requires more information than the regulations require and that SSA has no plans to change this. The agency's position is that because the paper process complies with regulations, it is acceptable to have an electronic process that violates them. This faulty reasoning deprives tens of thousands of claimants of due process.

V. Tilting the Playing Field Toward Denials

SSA has also changed rules governing how it weighs medical evidence, making it harder for a claimant to prove that her impairment meets the statutory requirements to be eligible for Social Security disability benefits.

a. Tilting the Playing Field: Elimination of the Treating Physician Rule: Revisions to Rules Regarding the Evaluation of Medical Evidence

These changes, proposed in 2016 and finalized in 2017,[38] contained a number of provisions that made it harder for a disability claimant to be approved for Social Security disability benefits. These changes included:

- Eliminating the long-standing rule that evidence from treating physicians be given more weight than evidence from consultative exams and state agency consultants who never examined the claimant.
- No longer requiring adjudicators to give any consideration to the disability determination of another entity, such as the Veterans Administration or a private disability insurer, and no longer requiring adjudicators to explain what, if any, consideration they gave to such determinations.

These changes upended longstanding SSA policy in ways that are inconsistent with both the Social Security Act and court interpretation of the Act. As Task Force members stated in comments responding to the proposed rules,

> As the Supreme Court noted in *Black & Decker v. Nord*, "The treating physician rule at issue here was originally developed by Courts of Appeals…"[39] based on the requirements in the Social Security Act itself. SSA would exceed its authority if it eliminated the need to give more weight to treating sources than to non-treating sources through the regulatory process. The Act's specific requirement that "the Commissioner of Social Security shall make every reasonable effort to obtain from the individual's treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination, prior to evaluating medical evidence obtained from any other source on

> a consultative basis" [40] indicates that Congress recognized special knowledge that a treating source can provide regarding a claimant's impairments and the inherent value in this medical evidence…Prior to the 1991 regulatory scheme enacted to codify the treating physician rule, courts certainly interpreted the statute that way. It is likely that courts would invalidate a regulatory change that places treating sources on equal footing with non-treating sources, given their consistent interpretations of the statute to impose a treating professional deference rule before the regulations codified that rule in 1991.[41]

The previous rules regarding what weight to give each piece of evidence when a claimants' file contained evidence from numerous sources required ALJs to give "controlling weight" (the highest weight possible) to evidence from treating physicians, if it was consistent and supported. The new rules allow ALJs to assign weight based on new factors, some of which inherently give more weight to evidence from a doctor who performed a brief consultative exam or even simply a review of the paper file. As the Task Force argued in its comments urging SSA not to adopt this rule change,

> SSA fails to provide a compelling rationale that treating source opinions should be placed on an even level with those of someone who completes a consultative examination or a file review, as the proposed rules would do. Even if a treating relationship is short, it is still longer than a consultative examination or a file review…our organizations strongly oppose two factors the NPRM would use to evaluate the persuasiveness of evidence: familiarity with SSA rules and having completed a review of the entire file. These factors tip the scale toward Consultative Examiner (CE) or Medical Consultant (MC) opinions and SSA does not provide a compelling rationale for including these factors. These two factors actually reflect the role of the adjudicator – being familiar with SSA rules and reviewing the entire file – and not the role of a medical source…SSA fails to provide any convincing reasons as to why being able to review the whole file and knowing SSA's policies should be considered on an equal level to the other factors. To the contrary, the opinion of a specialist who has an ongoing relationship with the claimant, on a condition within the specialist's area of expertise, is likely to be more accurate than the opinion of a generalist who knows SSA's policies and reviewed the whole file in regard to that particular impairment.[42]

The new regulation also changed how disability determinations made by other entities are considered and eliminated the requirement to articulate the weight given to those determinations. This regulation reversed a ruling issued in 2006 that argued exactly the opposite. In our comments on the proposed rule, the Task Force

> …oppose[d] the proposal to rescind Social Security Ruling (SSR) 06-3p and change how disability decisions from other governmental agencies and nongovernmental entities ("other agencies") are considered. SSR 06-3p was correct when it said "<u>These decisions, and the evidence used to make these decisions</u>, may provide insight into the individual's mental and physical impairment(s)" (emphasis added); the decisions themselves, and not just the evidence used to make the decisions, have value. Our organizations recognize that other agencies have different standards for determining disability and agree that SSA need not be bound by other agencies' determinations, but it is our position that SSA adjudicators should, as SSR 06-3p currently requires, "explain the consideration given to these decisions in the notice of decision for hearing cases and in the case record for initial and reconsideration cases." This is in keeping with the Social Security Act, which requires the agency to make determinations "on the basis of evidence adduced at the hearing." Allowing adjudicators to ignore this specific class of evidence does not comport with the Social Security Act.[43]

By devaluing the evidence that an individual provides from a treating physician and disregarding the findings of other entities that have assessed an individual's impairment, SSA made it much more difficult (and the Task Force believes much more difficult than Congress intended) for a claimant to prove she meets the statutory definition of disability. SSA did not appear to take this into account when making these regulatory changes.

One explanation for these changes is that the most common reason federal courts remand cases to SSA is inadequate explanations by ALJs of the weight given to treating source opinions.[44] SSA stated when proposing

the rule that due to voluminous case files (caused in no small part by the previously discussed "All Evidence Rule"), it is not practicable for ALJs to articulate how they considered all the evidence in the file. As the Task Force argued in its comments,

> Concerns about "voluminous case files" do not justify reducing adjudicators' responsibilities. The proposed rule could amount to a denial of a claimant's right to have his or her case decided on the totality of the evidence and a violation of the adjudicator's long-standing duty to make a decision based on all of the evidence in the record.…People with long claims files are no less likely to be disabled, and no less deserving of due process, than people with short claims files. …Instead of removing the articulation requirements, SSA should give adjudicators and their support staff the training and support they need to do their important work properly. Removing adjudicators' responsibility to "show their work" will not reduce appeals and remands. A federal judiciary that currently remands many cases to the Commissioner due to articulation errors is unlikely to be more deferential to an agency that simply stops articulating at all. In fact, the courts might even find these regulations to be impermissible.[45]

b. Tilting the Playing Field: Politicizing the Hiring of Administrative Law Judges

President Trump issued an *Executive Order (EO) Excepting Administrative Law Judges From The Competitive Service* on July 10.[46] The EO changed the hiring process for ALJs in agencies governmentwide from a merit-based system to a political one threatening the qualified judicial independence of these judges as is envisioned in the Administrative Procedures Act and potentially undermining the due process rights of people with disabilities and leading to denials of people who meet the statutory definition of disability as a result. Being licensed to practice law is now the only qualification an individual must have to be hired as an ALJ. ALJs hired through a politicized process are likely to be less independent from political pressure. These newly hired ALJs might feel compelled to decide matters before them in a manner preferred by the appointing agency, rather than in a neutral way that best applies the relevant provisions of the Social Security Act. It is our understanding that SSA has not yet created any guidance or policies regarding hiring ALJs under this new authority. We do not know what if any additional qualifications will be required or whether knowledge of the administrative process and litigation/hearing experience will continue to be required for newly hired ALJs under this new hiring authority. The Task Force urges SSA to put in place hiring procedures that protect the independence of ALJs and continue to require newly hired ALJs to have knowledge and experience that qualify them to make these decisions of critical importance to people with disabilities.

VI. A Note of Caution: The Impact of These Changes on Access to Representation

The disability adjudication process has become so challenging to navigate and hard to understand that it is very difficult for claimants, especially those with intellectual, cognitive, or mental impairments, to successfully navigate without the assistance of a professional attorney or non-attorney representative. Representatives provide services to claimants that are vital to the process and that SSA lacks the resources to do effectively. Representatives explain the disability adjudication process, give claimants personalized advice, help them gather and submit medical records and other evidence to SSA, and present their cases to adjudicators. These services are especially valuable to people whose severe health conditions present obstacles to navigating SSA's policies and procedures: the very people for whom SSI, SSDI, and related health care benefits are so vitally important. The Government Accountability Office (GAO) found that claimants with representatives were allowed benefits at a rate nearly three times higher than those without representatives.[47] The already long wait times disability claimants experience will worsen if claimants lack the ability to obtain professional representation to serve these functions.

In addition to helping claimants, representatives are also a valuable resource for SSA. Representatives gather evidence that SSA would otherwise need to collect. They explain the complexities of Social Security law and policies to their clients relieving SSA staff of that task. They point out the most critical portions of often lengthy files and identify cases that can be processed in an expedited fashion. These roles help SSA run more smoothly;

indeed, when SSA's Office of the Inspector General studied why certain hearing offices experienced delays in processing disability claims, staff in those offices attributed the long processing times to the additional challenges posed by processing applications from unrepresented claimants.[48]

Yet instead of recognizing the benefit to involving representatives in the disability adjudication process, SSA's new Rules of Conduct and Standards of Responsibility for Appointed Representatives (Rules of Conduct)[49] treat representatives as untrustworthy adversaries in a process where both the claimant and SSA should be working together to ensure that the correct decision is reached as expeditiously as possible.

The Task Force is particularly concerned that SSA's recent revisions to Rules of Conduct compromise professional representatives' ability to advise a claimant to seek needed medical treatment. Many claimants have no information about available medical clinics or treatment and look to their representatives for guidance. Should that provider become a source of opinion evidence, the new rules require representatives to disclose to SSA that they suggested the claimant seek treatment, likely tainting that evidence in the eyes of the adjudicator. Medical evidence, regardless of who recommended the evaluation, needs to stand on its own and be weighed against the totality of all the evidence in the case. Further, the revised rules create vague, new and unnecessary liability exposure for representatives and undermine the due process rights of claimants who may need or want the assistance of a representative - even a friend or family member - in filing their disability claims. A representative's ability to adequately advocate on behalf of his client is threatened when the representative is unclear whether his actions will lead to unnecessary sanctions.

VII. Conclusion

The cumulative effect of all these new rules - including submission of evidence, how medical opinions are evaluated, consideration of other agencies' determinations, the lack of transparency in ALJ decisions, reinstituting reconsideration, requiring a "single submission" appeal, and politicizing the hiring of ALJs, all with no study as to their effectiveness, might threaten the ability of claimants to find professional representation in the future. When the rules SSA creates prevent a person who meets the statutory definition of disability from being found eligible, she might have trouble finding someone to represent her. It also makes it harder to retain and recruit professionals in the field of practice. A lack of professional representatives will make the application and appeal process more difficult for both claimants and SSA, who must now ensure that all evidence is collected and evaluated and will lead to many people losing access to the benefits to which they are statutorily entitled.

Thank you again for the opportunity to testify. CCD looks forward to continuing to work with the Subcommittee to protect this vital program for people with disabilities.

Endnotes

[1] Rehabilitation Research and Training Center on Disability Statistics and Demographics, 2016 Disability Statistics Annual Report, p. 8, https://disabilitycompendium.org/sites/default/files/user-uploads/2016_AnnualReport.pdf.
[2] Social Security Administration, Monthly Caseload Statistics, received via a Freedom of Information Act Request, on file with author
[3] This testimony uses the phrase "Social Security disability programs" to include all benefits for individuals with disabilities under Title II of the Social Security Act (e.g. disabled workers, disabled adult children, survivors with disabilities) and benefits under Title XVI of the Social Security Act (e.g. benefits provided to adults and children provided through the Supplemental Security Income program on the basis of disability).
[4] See Lisa Ekman, Testimony for Hearing before the House Ways and Means Committee Subcommittee on Social Security Determining Eligibility for Disability Benefits: Challenges Facing the Social Security Administration September 6, 2017, pp. 3-6 for a complete discussion of the human toll of the long wait for disability determinations from ALJs, available at: http://c-c-d.org/fichiers/Ekman-Testimony-SS-Subcommittee-9-6-17-sign-on-final.pdf .
[5] Social Security Administration, Hearing Office Average Processing Time Ranking Report FY 2018 (For Reporting Purposes: 09/30/2017 through 06/29/2018) https://www.ssa.gov/appeals/DataSets/05_Average_Processing_Time_Report.html
[6] Id.
[7] Id. Houston North has the fourth fastest average processing time and Houston Bissonet has the 104th fastest processing time out of 164 hearing offices.
[8] See Ekman testimony, *supra* note 4, for a full discussion of the Task Force's positions regarding the initiatives contained in the CARES plan.
[9] 20 C.F.R. § 404.900(b), 416.1400(b). Note: The SSA regulations contain identical procedures for claimants for Supplemental Security Income benefits under Title XVI of the Social Security Act. These endnotes will reference the regulations for Title II claimants only throughout these endnotes for the sake of brevity.
[10] *Sims v. Apfel*, 530 U.S. 103, 110 (2000)(citations omitted).
[11] Consortium for Citizens with Disabilities Social Security Task Force, Comments RE: Docket No. SSA-2012-0068, Submission of Evidence in Disability Claims, April 21, 2014, p. 2-3, available at http://c-c-d.org/fichiers/CCD_Comments_evidence_NPRM4-21-2014FINAL.pdf.
[12] See 42 U.S.C. 223 (d)(1) The term "disability" means— (A) 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.
[13] 20 C.F.R. §404.152(a).
[14]See http://c-c-d.org/fichiers/CCD_Comments_evidence_NPRM4-21-2014FINAL.pdf for a full discussion of CCD's comments to these proposed regulatory changes.
[15] See 79 Fed. Reg. 9664.
[16] Rule proposed in 81 Fed. Reg. 45079 and finalized in 81 Fed. Reg. 90987.
[17] 20 C.F.R. §404.938(a)
[18] 20 C.F.R. §404.935(a).
[19] The final rule also required all pre-hearing briefs and objections to the issues in the hearing notice at least 5 days before the hearing. 20 C.F.R. §404.939. It also created a deadline of 10 business days prior to a hearing for subpoena requests for medical evidence 20 C.F.R §950(d)(2).
[20] 81 Fed. Reg. 45079.
[21] See Consortium for Citizens with Disabilities Social Security Task Force Comments, Notice of Proposed Rulemaking on Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process, 81 Fed. Reg. 45079 (July 12, 2016), Docket No. SSA-2014-0052, available at http://c-c-d.org/fichiers/CCD-SSTF-Ensuring-Program-Uniformity-comments-final.pdf. Of additional concern is another policy prohibits a claimant from filing a new claim while pursuing an appeal to the Appeals Council. If a claimant believes that SSA will approve their claim based on evidence excluded pursuant to the 5-day rule they might want to file a new claim to get benefits immediately but cannot do so with their claim pending at the Appeals Council. "…Social Security Ruling 11-1p requires most claimants to choose between appealing to the Appeals Council and filing a new application. Claimants who choose the Appeals Council route, but whose claims are denied, and then file new applications could lose months or years of retroactive benefits even if their new applications are approved. Claimants who reapply instead of requesting Appeals Council review will also lose retroactive benefits, and processing their cases will burden SSA field offices and state agencies." Id. at p. 4
[22] 42 U.S.C. §405(b)(1). That section also specifies that "Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedures," providing further support for the proposition that Congress envisioned that SSA would allow new evidence to be introduced at any point before the hearing as well as at the hearing.
[23] See CCD's comments regarding the Program Uniformity NPRM (id. 20, p. 2-3) for a more complete discussion of the statutory conflict and Congressional response to previous attempts to make this type of change.
[24] Social Security Administration, FY 19 Congressional Justification, p. 25, https://www.ssa.gov/budget/FY19Files/2019CJ.pdf.

[25] Social Security Administration, Program Operations Manual (POMS), DI 12015.100 Disability Redesign Prototype Model, https://secure.ssa.gov/apps10/poms.nsf/lnx/0412015100.
[26] 20 C.F.R. §404.913.
[27] See 20 C.F.R. §404.920.
[28] See Nancy Shor, Testimony for Joint Hearing on Social Security Disability Claims Backlogs Subcommittee on Income Security and Family Support Subcommittee on Social Security House Committee on Ways & Means, April 27, 2010, http://www.c-c-d.org/fichiers/CCD_House_W&M_Jt_Subcomm4-27-10_FINAL.pdf for a complete history of the Task Force's opposition to this change; see also http://c-c-d.org/fichiers/CCD-SSTF-re-SSDI-Program-Improvements9-1-15.pdf, p. 7.
[29] Social Security Administration, *supra n.* 24, p. 206.
[30] Social Security Administration, Annual Data for Disability Reconsideration Average Processing Time (in days), https://www.ssa.gov/open/data/disability_reconsideration_average_processing_time.html.
[31] Social Security Administration, Social Security Disability and Supplemental Security Income (SSI) Disability Claims Allowance Rates1/ Initial and Reconsideration Adjudicative Level Fiscal Year 2017 by Nation, Region and State, https://www.ssa.gov/foia/FY%202017%20SSDI%20&%20SSI%20Claims%20Allowance%20Rates%20by%20Nation,%20Region%20&%20State.pdf .
[32] Nancy Shor, *supra* note 28, p. 15.
[33] 20 CFR 404.1512(b) and 416.912(b).
[34] See William Morton, The Reconsideration Level of the Social Security Administration's Appeals Process: Overview, Historical Development, and Demonstration Projects, Congressional Research Service (July 17, 2018).
[35] See, e.g., GAO, Social Security: Demonstration Projects Concerning Interviews with Disability Claimants, HRD-87-35, February 19, 1987, https://www.gao.gov/products/HRD-87-35; GAO, Social Security: Observations on Demonstration Interviews With Disability Claimants, HRD-88-22BR, December 3, 1987, https://www.gao.gov/products/HRD-88-22BR; GAO, Social Security: Selective Face-to-Face Interviews with Disability Claimants Could Reduce Appeals, HRD-89-22, April 20, 1989, p. 4, https://www.gao.gov/products/HRD-89-22.
[36] See Ekman, *supra n*ote 4, pp. 8-10 for a full discussion of suggestions for preventing a claimant from needlessly having a hearing when she ought to be approved earlier or without the need for one.
[37] According to Social Security Administration data, there were 109,428 on the record decisions in FY2010: 55,261 issued by ALJs and 54,186 issued by senior attorneys. On the record decisions constituted 15% of all hearing level dispositions that year. In fiscal year 2016 (through 8/23/16) only 20,113 total on the record decisions were issued, 19,226 by ALJs and 1,187 issued by senior attorneys, constituting only 3% of dispositions. Source: Email correspondence with Social Security Administration Office of Disability Adjudication and Review, August 28, 2017; on file with author.
[38]81 Fed. Reg. 62559 (Sept. 9, 2016), 82 Fed. Reg. 5844 (Jan. 18, 2017).
[39] 538 U.S. 822, 828 (2003).
[40] 42 U.S.C. §223.
[41] CCD Social Security Task Force, Comments Re: Notice of Proposed Rulemaking on Revisions to Rules Regarding the Evaluation of Medical Evidence, 81 Fed. Reg. 62559 (September 9, 2016), Docket No. SSA-2012-0035, November 8, 2016, p.7, available at http://c-c-d.org/fichiers/CCD-SSTF-Treating-Physician-Comments.pdf. These comments outline all of the CCD Social Security Task Forces concerns about the rules proposed in the NPRM. This testimony only highlights two of them.
[42] Id, pp. 10-11.
[43] Id, p. 4.
[44] Social Security Administration, Top 10 Remand Reasons Cited by the Court on Remands to SSA, https://www.ssa.gov/appeals/DataSets/AC08_Top_10_CR.html,. Treating Source - Opinion Rejected Without Adequate Articulation was the top reason for the remand of cases in Federal Court every year since 2010, accounting for 15-17% of remands in each of those years. Failure to adequately articulate why weight was given to a consultative examiner or non-examining source also resulted in remands. Nearly one-third of remands back to SSA in 2017 were the result of failure to adequately articulate the weight given to medical evidence from a particular source.
[45] Nancy Shor, *supra* note 28, pp. 8-9.
[46] https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service.
[47] https://www.gao.gov/products/GAO-18-37.
[48] https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-17-50268.pdf.
[49] 83 Fed. Reg. 30859 (July 2, 2018). The effective date of these rules in August 1, 2018.

Chairman Johnson. Thank you, ma'am.

Mr. Cass, welcome. Please proceed.

STATEMENT OF HON. RONALD A. CASS, PRESIDENT, CASS & ASSOCIATES, PC

Mr. Cass. Thank you, Chairman Johnson, Ranking Member Larson, and members of the committee. I am here today in my capacity of a long-time professor of administrative and constitutional law, meaning that Committee staff were afraid too many of you would still be awake at this point.

The SSA appeals process, as you know, relies heavily on ALJs, and the Supreme Court in its recent decision in Lucia against the SEC ruled that the SEC's ALJs were not constitutionally appointed. That decision obviously has application to all ALJs, and it and follow-on actions, such as the executive order of July 10, raise a number of questions.

I am going to make five brief points so that you can get to the dialogue between the committee members and the panel.

First, Lucia itself is a fairly straightforward application of the Appointments Clause of the Constitution, Article II, section 2, clause 2, and should not be a controversial decision. It follows directly from precedent, as well as from the language and history of the Constitution.

Second, implementing Lucia requires a number of agency-specific and program-specific policy choices. It does not require a number of very difficult legal choices.

Third, the executive order doesn't answer most of the policy questions. It makes a fairly simple change in the appointment of ALJs, but leaves a great deal for decision on a case-by-case or program-by-program basis.

Fourth, the executive order, by placing ALJs in the excepted service rather than the competitive service, allows the constitutional hiring of ALJs, gives the opportunity to fix some issues that arose in the OPM (Office of Personnel Management) administration of the program.

I was the vice chairman of the International Trade Commission which has ALJs doing patent trials essentially. We had trouble getting ALJs with patent

experience because the OPM program for hiring ALJs didn't allow that sort of tailoring. That can be fixed going forward.

Fifth and finally, the questions addressing ALJs and their role in the disability hearing process are important questions. The way ALJs should be organized, integrated within the agency, or separated from other members of the agency are important questions.

But those questions should not be answered by a very simple analogy of ALJs to Article III judges. ALJs are doing administrative adjudication within the executive branch, and the questions regarding how they should be treated and how they should be organized within that branch ought to be addressed on their own, not by simple analogy.

I appreciate the opportunity to be here and look forward to answering any questions you may have.

STATEMENT OF RONALD A. CASS
SUBMITTED TO THE SUBCOMMITTEE
ON SOCIAL SECURITY OF THE
HOUSE COMMITTEE ON WAYS AND MEANS

"Administrative Adjudication after *Lucia v. SEC*"

Wednesday, July 25, 2018

Thank you, Mr. Chairman and Committee members, for giving me the opportunity to submit testimony on this important issue. Let me begin by emphasizing that this testimony reflects only my own, personal views, not those of any entity or organization with which I am affiliated.

Personal Qualifications.

I am President of Cass & Associates, PC, Dean Emeritus of Boston University School of Law, Chairman and Resident Scholar at the Center for the Rule of Law, and a Senior Fellow at the C. Boyden Gray Center for the Study of the Administrative State at Antonin Scalia Law School. I also serve as a Council member of the Administrative Conference of the United States.

I have been a lawyer for forty-five years, a judicial clerk, practiced law in Washington, D.C., and have served in various capacities in the federal government, having been honored with six presidential appointments spanning Presidents Ronald Reagan to Barack Obama. I taught law school classes over a period of forty years (and counting), including serving as a faculty member at the University of Virginia and at Boston University (where I held a chaired professorship and also served fourteen years as Dean) and as visiting professor or lecturer at other schools in the United States, Europe, Central and South America, and Australia.

I have taught and written about administrative law, constitutional law, the separation of powers (a course I have taught with Justice Antonin Scalia and Justice Clarence Thomas), the judicial process, and the performance and selection of judges. I have authored or co-authored more than 140 books, articles, professional papers, and chapters in edited anthologies. Some of these writings deal expressly with administrative law issues, with the manner in which judicial decisions are made and the relation between judicial decision-making and political decision-making, and with distinctions between the roles of judges and administrative officers.

I am a member of the bars of the Commonwealth of Virginia, the D.C. Circuit, and the United States Supreme Court, among others. I am a past President of the American Law Deans Association, past Chair of the Section of Administrative Law and Regulatory Practice of the American Bar Association, past Chairman of the Federalist Society's Practice Group on Administrative Law and Regulation, past Chair of the Administrative

Law Section of the Association of American Law Schools, a former member of the ABA's House of Delegates, and a life member of the American Law Institute.

These comments draw on my experiences in these different capacities but reflect only my own judgments. They have not been screened by and are not endorsed by any organization with which I am or have been associated.

Background on Administrative Adjudication

Administrative adjudication is very important. The vast majority of federal administrative decisions are classified as adjudications by the Administrative Procedure Act (which provides the background, general legal framework for federal administrative procedures). Administrative adjudications are determinations of how broad rules, directives, or legal principles apply to specific individuals and entities; and they are made by a wide variety of government officials respecting an array of different statutes, contentions, and subjects.

Among the relatively formal types of administrative adjudications — in which there are more or less court-like hearings based on evidence taken and evaluated by an agency official — hearings generally are conducted by one of two sorts of specially designated administrative officers: administrative law judges (ALJs) or administrative judges (AJs). The United States government employs roughly 2,000 officials designated as administrative law judges and approximately 10,000 other officials designated as administrative judges (or equivalent titles).

Administrative law judges are selected by a process that requires candidates to be screened by the Office of Personnel Management (OPM), and they enjoy statutory protections that limit agency officials' authority to remove or discipline them for various reasons related to their performance. Administrative judges, in contrast, are hired by agency personnel and are more broadly subject to agency supervision and control. The great majority of ALJs (more than three-fourths) are employed by the Social Security Agency, while the great majority of AJs (more than 70 percent) are employed by the Commerce Department's Patent and Trademark Office.

Academic commentators, practitioners, and government officials have debated what the right procedures are for particular administrative adjudications, including the right role for adjudicating officials, the right degree of independence of those officials from policy-making officials, and the right amount of separation or integration of adjudicating officials and officials engaged in enforcement activity or other activities. This includes debates over the degree to which hiring should be delegated to (or substantially constrained by decisions of) officials outside the normal line of agency control. Aspects of these debates have been subject to study by the Administrative Conference periodically over the past 40 years and occasionally to challenges in court.

Lucia v. SEC — Constitutional Constraint on ALJ Hiring

The most recent, notable challenge to administrative adjudication was decided by the Supreme Court this past Term in *Lucia v. Securities and Exchange Commission*, an ap-

peal from a finding that Mr. Lucia had engaged in deceptive conduct that violated the Investment Advisers Act. Prior to the *Lucia* case (and including the SEC's hiring of the ALJ who heard the administrative proceeding at issue in *Lucia* and submitted an initial decision), the SEC hired ALJs by having its Chief ALJ select one of the three ALJ applicants determined by the Office of Personnel Management to be at the top of its ranking of ALJ candidates and then having that selection confirmed by the SEC's Office of Human Resources (presumably to assure only that the hiring did not contravene specific agency rules, for example rules respecting unlawful discrimination).

Lucia challenged the finding against him (first before the SEC and subsequently in court) on the ground that this process violated the "appointments clause" of the Constitution, Art. II, § 2, cl. 2. This clause states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" all "Officers of the United States" whose appointments are "established by Law" (apart from those, such as the President and Vice President, whose selection process is provided for separately in the Constitution); it then adds "but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Traditionally, the Court has treated this clause as creating three categories of federal officials. First, *principal officers* of the United States must be appointed by the President and confirmed by the Senate. That includes ambassadors, heads of executive departments, Supreme Court justices and other federal judges appointed to lower courts created by Congress (the various circuits of the U.S. Court of Appeals and the U.S. district courts). Second, *inferior officers* may be appointed under the *excepting* part of the appointments clause by the President without Senate confirmation, by the Courts of Law, or by the Heads of Departments. Third, mere *employees* may be hired by lower-ranking officials. The clause has given rise to argument over identifying the dividing line between principal and inferior officers, over whether there is indeed a third "employee" category, and over what the dividing line would be between inferior officers and employees.

Lucia accepted the tripartite division of federal officials and decided that the dividing line between inferior officers and employees turned on two factors. To be an inferior officer, under *Lucia*, one must (1) have a continuing position established by law and (2) exercise significant authority under the law. Accepting much of what the Supreme Court had said in its earlier decision in *Freytag v. Commissioner of Internal Revenue* (decided in 1991), the Court in *Lucia* decided that an adjudicating official, like the ALJ in that case, could satisfy the two-part requirement for being an inferior officer without having final decisional authority. It concluded that the SEC's ALJs, like the officials (special trial judges) at issue in *Freytag*, are inferior officers. As such, they must be appointed by the Head of the Department for which they work, rather than by subordinate officials.[1] In that particular case, the appointment should have been made by the SEC Commissioners

[1] Although this is not, strictly speaking, what is required — for example, the President acting alone could make the appointment — but it is the most natural appointment process that would meet constitutional requirements. Argument about exactly what is required is more complicated but generally not of concern to the issues pertinent to this hearing.

(who collectively constitute the Head of that agency).

Although the *Lucia* decision, written by Justice Kagan, commanded a broad consensus, three separate opinions indicate potential avenues of dispute. Justice Thomas (joined by Justice Gorsuch) would not accept the construction of a category of employees that exercised continuing legal authority but whose responsibilities were not deemed sufficiently significant to rise to the "officer" category under the majority's approach. Justice Breyer (joined by Justices Ginsburg and Sotomayor) would favor an approach that gives more leeway to Congress to determine which officials exercise authority that requires appointment under the excepting part of the appointments clause and which should be treated as mere employees. Justice Sotomayor (joined by Justice Ginsburg) would require at a minimum that officials exercise final, binding decisional authority to constitute "officers."

After Lucia — ALJ Appointments

The *Lucia* decision should not be a cause for alarm. In a very important sense, it is an entirely predictable decision that confirms the most significant feature of ALJ-centric administrative adjudication.

The central premise of *Lucia* is that ALJ's exercise significant authority that is established by law. Every ALJ and every observer of administrative adjudication should agree to that premise. Because the appointments clause by its terms applies to *all* officers of the United States whose terms of appointment are not otherwise provided for in the Constitution — and because the term "officer of the United States" certainly was intended to cover everyone exercising legal authority apart from Congress, the President, and the Vice President — it follows fairly clearly that ALJs must be appointed under the terms of the appointments clause. That requires agency head appointments authorized by statute.

Lucia, of course, does not say that this is the requirement for *all* ALJs. The Court's decision only deals with the facts before it, those pertaining to the SEC's ALJs. But the logic of the decision does in fact apply to all ALJs as those positions are presently constituted (or, more accurately, all of the ALJs whose work assignments I know).

Appointment of ALJs, then must be done through a process that makes the agency head the appointing authority. As with most of what agency heads do, that does not require that the agency head perform all the acts — research into particular individuals' qualifications, ranking individuals to determine which is most qualified, interviews with the applicants, etc. — that might be useful to the ultimate act of appointment. Nor will courts probe the mind of an agency head to see what he, she, or they (where the agency is a multi-member organization with a collective "agency head") knew when making an appointment. But ultimate control over the appointment of each ALJ must rest in the agency head.

The President's July 10, 2018 Executive Order excepting ALJs from competitive service hiring rules permits agencies to adopt rules that comply with that command. Placing a position in the excepted service permits both control over hiring outside the standardized OPM processes and flexibility in pay and recruitment requirements that more fully

can align the person with the office. A very large number of positions — including a large number of professional positions — fall within the excepted service for just that reason.

Fairness, Efficiency, and Agency Control of Adjudications — Starting Points

The principal concerns after *Lucia* are not likely to be the increased impositions on agency heads' time and attention. Instead, the concerns will be with the implications of different selection methods for adjudications' *fairness* and *efficiency*. After all, the selling point for having ALJs was that they brought increased *efficiency* in being experts in the adjudication process (and, at least after a time, in the substance of the adjudications they oversaw) and that they brought increased *fairness* to administrative adjudications because of their separation from agency personnel whose jobs generated interests adverse to those of private litigants.

Before discussing those issues, it is important to understand the nature of *administrative* adjudications, because concepts such as fairness and efficiency require definition with respect to particular contexts. The first essential point to make in this regard is the difference between administrative adjudications and what almost all of us turn to as the template for understanding them.

Administrative adjudications naturally are analogized to *adjudications in court*. But judicial adjudications are critically different. Judicial adjudications at the federal level *only* take place under the auspices of Article III of the Constitution. The vesting clause of Article III, Art. III, § 1, cl. 1, declares: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The remainder of that section states that the judges of both the Supreme Court and the inferior courts established under Article III have life tenure (except for removal through impeachment) and irreducible pay. Art. III, § 1, cl. 2. These features are intended to assure that judges are insulated against political influence.

The subjects assigned to these courts and judges are set forth in the next section of Article III, which states that "The judicial Power shall extend to *all Cases, in Law and Equity*, arising under this Constitution, the Laws of the United States," or under treaties made pursuant to those laws, and to controversies involving the United States, two or more states, or citizens of different states (among other matters). Art. III, § 2, cl. 1. The Supreme Court has on several occasions insisted that only judges appointed pursuant to the appointments clause and having the specific protections of life tenure and irreducible pay can exercise the power to decide these matters *as an exercise of the federal judicial power*.

Adjudications that are not exercises of Article III power — of the *judicial* power of the United States — are exercises of other powers or of no federal power. For example, two private citizens who have a dispute that arises under the laws of the United States, that concerns rights created by those laws, could agree to private, binding arbitration of that dispute. Although the arbitration may be similar to a judicial proceeding and concern exactly the same legal issue, it is not an exercise of federal judicial power; the arbitrator's

appointment does not need to follow the same steps as the appointments clause of Article II would require, and the arbitrator does not need to have the same job protections as required of federal judges by Article III.

The same is true of adjudication that takes place as an adjunct to the exercise of powers that are vested by law in executive branch officials. Probably the best explanation of this is provided by Justice Scalia's dissent in *Mistretta v. United States* (a 1989 challenge to the constitutionality of the Sentencing Guidelines crafted by the United States Sentencing Commission). Justice Scalia explains that making rules to guide decisions is part of the natural *tool kit of administrators exercising executive power*, even though it looks similar to what the legislature does, and making decisions on individual matters based on resolution of disputed facts or on the specific application of rules to particular facts also is part of the natural tool kit of administrators exercising executive power, even though it looks similar to what courts do.

But in neither case is that activity the exercise of the power that looks similar, the legislative power (in the case of rule-making) or of the judicial power (in the case of adjudication).

The first of those powers is specifically committed to legislators selected in ways prescribed by the Constitution and using the law-making process prescribed by the Constitution.

The second of those powers is specifically committed to judges appointed under Article II's terms and given protections required by Article III. *Administrators* cannot be given authority to make decisions in constitutional cases and controversies; they *cannot exercise authority to compel acceptance of decisions* that look backward at conduct already undertaken or actions already performed and impose resolutions on them, apart from disposition of matters entirely within the discretion of the government.[2]

This means that what is needed for fairness and efficiency in *administrative adjudications* does not need to replicate what is required for courts. Administrative adjudicators do not need to have the same sorts of independence and insulation. A degree of independence and of insulation from policy-makers may be a good idea, but the goal should not be to make administrative adjudicators as close as possible to Article III judges.

Fairness, Efficiency, and Agency Control of Adjudications — Next Steps

For some types of administrative adjudication, efficiency is advanced by closer relationship between adjudicators and policy-makers. If adjudication is conceived not as a mechanism for neutral resolution of conflicts between agency and outsider but as a way of completing a task set for the agency under the framework of agency policy, separating

[2] A long line of court decisions distinguishes matters of public right from matters of private right, with administrative authorities having power (where directed by law) to make decisions on matters of public right (things like the terms for access to public lands and, traditionally, public benefits) but not on matters of private right. While decisions over the past 30 years have muddied the waters on the line between what matters can and what cannot be given to administrative adjudicators, the public right-private right division should be recognized as retaining importance to this division.

adjudicators from policy-makers may make it harder for adjudicators to gain a full understanding of agency policy and to apply agency policy correctly.

In other settings, the administrative adjudication seems more like a means of settling disagreements between an agency official and an outsider where there is no strong overriding agency policy interest. In these settings, an official pushing one side of the dispute might have no better understanding of agency policy than a neutral arbiter and the official's judgment might be biased against an outsider challenging the official's interpretation or application of policy. Think, for example, of a contest between an IRS auditor and a taxpayer, each of whom might have a strong background in the underlying legal rules but dramatically different goals in applying them. In those settings, a degree of separation of adjudicating officials from officials charged with enforcing the law — if not from officials charged with adopting rules to guide discretionary judgments under law — may advance both efficiency and fairness goals.

Nothing in the terms of the Supreme Court's decision in *Lucia* or in the President's Executive Order following *Lucia* directly constrains agencies from tailoring procedures (within the scope of an agency's specific legal mandate) to advance efficiency and fairness, either through greater integration of adjudicating officials with other agency officials or through greater separation and insulation of those officials.

Tailoring Adjudication Procedures and Assignments — A Cautionary Note

The use of the word "directly" in the preceding sentence recognizes a complicating factor that might indirectly constrain agencies. If officials are given broad authority over an adjudication, are separated from other agency personnel and insulated against control from other agency personnel, they may enjoy sufficient authority to move from being "*inferior Officers*" of the United States to being *principal officers*.

That dividing line has been at issue in some disputes over the legality of particular administrative assignments, including most notably in the dispute over the independent counsel's appointment and potential control from other officials, including through removal. Although the Supreme Court's decisions are not all in agreement on how to resolve the matter, a fairly clear test has now emerged that could put an expansive, insulated authority for adjudicators over the *principal* side of the divide.

The Supreme Court's general approval, in the 1989 decision in *Morrison v. Olson*, of a law granting broad power to the independent counsel and constraining presidential ability to instruct, control, or remove the independent counsel, should not be regarded as a statement of where the dividing line between principal and inferior officers would be located today. A strong majority of the Court (seven of the eight participating justices) determined that, notwithstanding the limitations on executive control — exercised directly by the President or by subordinates accountable to the President — the independent counsel was not a principal officer.

Justice Scalia, dissenting in *Morrison*, suggested that the absence of control was the essential attribute that made an official a principal officer. The Supreme Court adopted exactly that test eight years later in *Edmond v. United States*, in an opinion written by

Justice Scalia and joined in full by eight of the nine justices.

Even so, agencies have a range of options for more or less insulation of ALJs from other officials and more or less authority devolved to ALJs without turning them into principal officers. The exact degree of independence and of insulation and the specific mechanisms for review are matters that need to be addressed in the context of each particular agency and agency adjudication program — and doubtless will provide grounds for further study, consideration, and debate.

Conclusion

The status of ALJs after *Lucia v. SEC* should not be a matter of alarm. Administrative adjudication programs in general will continue to function as they did before. But the particular arrangements for ALJ appointment and the specific attributes of ALJ integration into their employing agencies will need attention in the months ahead.

Special attention should be paid to assuring that the appropriate steps are taken to have ALJs appointed consistent with constitutional commands and that the matters committed to ALJ decision are within the constitutionally limited scope of *administrative* adjudication. Concerns for fairness and efficiency in administrative adjudication can be accommodated within the constitutional framework laid down in *Lucia* and other cases.

I appreciate the opportunity to submit these remarks and would be happy to expand on any issue that interests the Committee.

Chairman Johnson. Thank you for your testimony. We appreciate it.

And we will now go to questions. And as is customary for each round of questions, I will limit my time to 5 minutes and will ask my colleagues to also limit their questioning time to 5 minutes, as well.

Mr. Morton, is it fair to say over the past 50 years that Social Security has tested out different changes to reconsideration? And what has Social Security learned from those tests?

Mr. Morton. Thank you, Chairman Johnson.

Over the last 50 years SSA has implemented a number of tests involving changes to the reconsideration level. Most of these tests have focused on adding predecisional interviews between claimants and adjudicators, whether at the reconsideration level or at the initial level and eliminating the reconsideration level.

By and large these tests have shown or suggest that interviews earlier in the process increase claimant satisfaction with their overall experience. However, they do lead to generally higher administrative and program outlays.

SSA in its last detailed study also noted that increased satisfaction does not necessarily have an effect on the appeal rate, so increased satisfaction may not decrease someone's likelihood of appealing.

Chairman Johnson. Thank you, sir.

Ms. Jonas, this isn't the first time that Social Security has made plans to reinstate reconsideration nationwide. In fact, Social Security planned to do that almost 10 years ago, but then thought better of it.

If it wasn't a good idea then, what has changed now?

Ms. Jonas. Thank you, Mr. Chairman.

I think one of the things we would begin to think about is that the past efforts, both with disability process redesign and disability service improvement efforts, were both efforts to eliminate the reconsideration level but have additional efforts, additional processes that would enhance either the initial or the hearings level. So we were maintaining different processes over the years.

You have asked what is different. So I think in 2010 we were talking about a significant number of initial new claims. In fact, the difference between initial receipts in 2011 versus today is about a million. So there are far fewer claims coming into the system. The actuary is estimating some reduction, as well.

So we have capacity at that level. Our CDRs are nearly current at this point. So the situation that we are looking at today looks different than it did the last time we were here.

I think there are some other differences, as well, and I think I alluded to them in my testimony. So we have more and better data to be able to take advantage of some data analytics and some tools.

I mentioned in my testimony the targeted denial reviews. So that really takes advantage of some advanced data analytics to be able to look at the most error prone, identify the most error prone cases that are happening at the reconsideration level, and to, without the claimant asking for that review, go back and review that. So we have been doing that nationwide since 2012.

Chairman Johnson. Well, okay. That is what I said almost 10 years. It is kind of a major decision. Why not wait for a Senate-confirmed commissioner to make the decision?

Ms. Jonas. So, Mr. Chairman, I think this is the time -- sort of an optimal time for us. We are looking, certainly concerned about and have been having these conversations about the extended time period that people wait for a hearing.

In those 42 States there are significant opportunities for claimants in those areas to have another look at their cases, and, in fact, 75,000 individuals are allowed at that level without having to wait in line for a hearing. And, in fact, about 21,200 people are sort of missing that opportunity in those 10 jurisdictions.

So with the lower receipts and I think the capacity at the DDS level and thinking about how we could take advantage of that, I think what I am concerned about again is that having this sort of disparate process sort of harms individuals who don't have that ability to submit that new information.

So I will give you maybe a concrete example of the harm that can have. So 60,000 individuals are denied at the initial level. They may have serious impairments, but the agency doesn't have the evidence to show that they meet what we call a duration requirement, that the condition is expected to last for 12 months.

With reconsideration they have the ability to submit additional evidence that updates the information. So those individuals don't have to wait in line for those 600 days to have a hearing to add that new information and get a new decision.

So I think we are looking at that opportunity. We think we have a meaningful process at this point in terms of being able to address those concerns about whether we are making the right decision at that level.

But I think we also see that this is an opportune time to address that and also to make a significant impact on reducing the average wait time at the hearings level by dropping that back an additional year, from 2022 to 2021, which would have a benefit across the board for all claimants.

Chairman Johnson. Thank you.

You are recognized.

Mr. Larson. Thank you, Mr. Chairman.

In my opening remarks I didn't ask that the letter that I suggested be submitted for the record. If I could do that.

And let me begin by saying, first of all, what a great panel. And I found the testimony incredibly informative.

I will say, Ms. Jonas, you must feel after listening to the testimony that old George Goebel line: Ever feel like you are a pair of brown shoes at a black tuxedo event? Because the testimony here is overwhelming, I think, with respect to reinstatement and the process here.

And the chairman's advisement in terms minimally of waiting until there is actually someone appointed and encouraging the Senate to act on that notwithstanding, let me go back and ask Ms. Ekman to review the proposals that rather than waiting on, that could be enacted.

Ms. Ekman. Thank you, Ranking Member Larson, for the question.

The CCD Task Force believes that the resources being used for reconsideration could much better be used to better develop the record at the initial level to get the decision right the first time.

Often, as Deputy Commissioner Jonas mentioned, there is evidence that exists that the SSA does not have in front of it when it makes its decision. It should get that evidence before it makes a denial because that is a waste of everybody's time and SSA's resources.

It is not that the DDS doesn't want to do this. It is, as Mr. Price said, it is because the DDSs don't have the resources to do that, they follow the regulatory requirements in terms of trying to get evidence.

But I don't know if you have ever tried to collect your own medical evidence, but it can take months, repeated attempts, and the DDSs just don't have the resources right now to do that.

If the resources used for reconsideration were reprioritized to get that evidence, have a complete file in front of those DDS examiners, everybody could get their decisions sooner and it would be a much better use of the resources for everyone. And instead of making seven out of eight claimants wait longer to ask for a hearing, everyone could get those decisions sooner.

And there are other things they can do like the claimant interviews. Although the SSA has previously found them to be expensive, administratively I am not sure they were comparing that to the cost of a hearing. I am not sure they were comparing that to the cost of going through the whole process.

Yes, it costs extra money up front, but it saves a lot of money on the back end and gets claimants their decision sooner, which benefits everybody, the claimants, SSA, and the public.

Mr. Larson. Ms. Jonas, I am going to ask you about the what I think is commonsense validity of what Ms. Ekman has laid out there, but I also would want you to respond. I know that you said in your remarks how 21,000 people would benefit, but about 106,000 disabled workers will have to wait longer for a hearing, and almost half of them will ultimately be found eligible by an ALJ. That is 50,000 people.

But under your plan as you propose, as I see it, these 50,000 people will have to wait even longer than they do now in order for the 21,000 people to get their benefits earlier. Moreover, an estimated 7,500 people will lose their benefits entirely.

My question is, does that seem fair? And what about Ms. Ekman's proposal?

Ms. Jonas. Mr. Larson, I think one of the things that is fundamental to this whole conversation across the panel here is about the importance of medical evidence, and that medical evidence and an individual's condition typically doesn't remain static. And what we have seen in our studies is that one of the reasons why individuals might be denied at a lower level but allowed later is because they have aged, they have gone into an older age category, which has vocational significance to that.

Mr. Larson. You could die in the time that you have to wait to get a disability hearing here, and it seems to me that we ought to be able to adjudicate this earlier. And notwithstanding, I think, the need to increase funding, but just money isn't the problem. There seems to me to be having to look at this for the long period of time, that, A, I don't disagree with the chairman that we ought to make sure that we have someone who is heading up Social Security.

But this ought to be a focus. The people at this table could come up with a solution, I think, in about a day that could benefit and help streamline this process to what I think is everybody's objective: to make sure that people who deserve disability get it in a timely fashion.

Ms. Jonas. Sir, and I think we are all in the same place about wanting the most efficient and effective process, something that works for all of this process.

Mr. Larson. That can't possibly be fair under this ruling, that you have to wait 600 days. And as the chairman says, we have been looking at -- you have been looking at this system. And just to arbitrarily reinstitute it in the face of all this evidence just seems to me to be a wrongheaded policy.

Ms. Jonas. We have good policy compliance in looking at these cases. And again, I will just sort of reinforce, I think this is a meaningful evaluation and assists people with this process.

And it seems, I think, one of the issues that my colleagues here are raising is there is a cost to this program, and we try to be efficient and effective, and nobody wants 600 days either. And I think with this process what we are suggesting is reinstituting reconsideration. Part of that will benefit individuals in advancing disability to get to reduce the backlog by 2021.

Mr. Larson. Well, my time is up, but you didn't answer the question with regard to Ms. Ekman's proposal and why they wouldn't have any greater impact than the reinstatement process.

Chairman Johnson. Thank you for your question. I think that is good advice.

Mr. Rice, you are recognized.

Mr. Rice. Ms. Jonas, you are seeing claims, initial claims decline, correct?

Ms. Jonas. Correct.

Mr. Rice. These figures here it looks like you had 1,122,000 in 2016, and in fiscal year 2017, 1,056,000. That is 70,000 down, and you are projecting 900,000 for 2018.

Ms. Jonas. Correct. And we are expecting some -- the actuary is suggesting some additional decline.

Mr. Rice. Lower than 900,000?

Ms. Jonas. I wouldn't speak for the actuary. We can certainly provide his information.

INSERT Page 47 Line 6

We expect to end FY 2018 with about 900,000 cases pending a hearing decision. In addition, we expect to end FY 2019 with approximately 717,000 hearings pending.

Mr. Rice. I guess the economy is working out and people are going back to work.

Let me ask you this. Why then are you not seeing similar declines in wait times?

Ms. Jonas. So as that process works through -- so those individuals in the wait times that we are addressing here -- so as those cases are working their way through the process, the pendings will be dropping, but it will take some time for the wait times to follow.

So we would anticipate, for example, at the hearings level where we are talking about 600 days, under this plan we would expect some diminishing in the number of the claims, but probably the wait time the next fiscal year to be about 500 days, but by the end of 2021 it would be at 270.

Mr. Rice. I am looking at the chart here, and it says that even though your number of claims declined by 70,000 from 2016 to 2017, your wait time went up by 10 percent, from 550 to 600 days.

Ms. Jonas. So, again, we are looking at -- in some cases this is the oldest cases that are calculated into this, trying to reduce those. We did have issues back in the last fiscal year with regard to having to move some work around or not being able to get to it because of the hurricanes, but not significantly.

Mr. Rice. This is a huge problem in my state. I mean, Columbia has about 6,000 cases backlogged, but Charleston has 10,000. Do you know if they are moving cases between Columbia and Charleston?

Ms. Jonas. I am not familiar with that specific.

Mr. Rice. I also read in here, quote: The SSA has not developed adequate metrics to determine how or if case transfers affect timeliness. That doesn't seem like it would be that complicated.

Ms. Jonas. The hearing offices are utilizing a case processing system that doesn't take advantage of the ability to identify that. This is an older case processing system and part of the --

Mr. Rice. Was it designed in the 1950s or something like that?

Ms. Jonas. Designed probably over 10 years ago, which was not anticipating the kind of workload transfers that we are talking about today.

Mr. Rice. It actually just seems so basic.

I am looking at these approval levels here. It says that 33 percent of cases are allowed at the initial level.

Ms. Jonas. Correct.

Mr. Rice. And then 13 percent at the reconsideration level.

Now, is that 13 percent of the remaining cases or 13 percent overall?

Ms. Jonas. Thirteen percent of the cases that are heard at the reconsideration level. About 75 percent of all the claims that are allowed by the agency are allowed at the DDS level initially in reconsideration.

Mr. Rice. DDS?

Ms. Jonas. The Disability Determination Services.

Mr. Rice. Okay. And then 26 percent are allowed at the hearing level?

Ms. Jonas. I am sorry, I think it is 46 percent.

Mr. Rice. Oh, 46 percent.

Ms. Jonas. I am sorry, that was their allowance rate. I think you are correct in terms of the number.

Mr. Rice. Okay. So overall what percentage of claims that are initially filed are ultimately accepted?

Ms. Jonas. I think I will have to get back to you on the record.

INSERT Page 49 Line 24

The most current complete data we have are for CY 2014, showing 2,672,581 initial determinations cases, with an overall allowance rate of 49.5 percent.

Mr. Rice. Gosh, okay. That seems pretty basic.

Professor Cass, you said that this SEC hearing or decision by the Supreme Court could yield benefits in terms of helping to streamline Social Security and, in fact, lower this backlog. How would that work?

Mr. Cass. When you have a change in the appointment of ALJs you can have the appointment process take place more quickly, you can have people hired whose ability to focus on what it is that you want them to do is greater, and you can integrate them, if you choose, into your system so that you have a more seamless way of communicating what needs to be done with them.

Now, I am not a specialist in Social Security, so I don't know --

Mr. Rice. Are you saying in a nice way that we can get more qualified people? Is that what you are saying?

Mr. Cass. Well, I am saying that you can get people whose qualifications fit more exactly each agency's need.

Mr. Rice. Thank you, sir. My time is up.

Chairman Johnson. Thank you. I appreciate those questions.

Mr. Pascrell, you are recognized.

Mr. Pascrell. Mr. Chairman, thank you.

Ms. Jonas, does the Social Security Administration have plans to fix the first step in the appeals process so that we reduce the need for severely disabled workers to have to wait for a hearing before a judge to assess the benefits that they have earned? And if so, tell us about it.

Ms. Jonas. So our plan does not call for any significant changes in the initial claim process. Again, I think we are looking here in terms of advancing the issues with regard to the reconsideration.

However, part of the Office of Analytics, one of the things we are looking at is this issue that I think I kind of alluded to earlier about what happens as time passes for individuals and claimants and what makes the difference. We may have a policy-compliant decision that was made initially, but then later another policy-compliant decision could be made with a different outcome.

So, again, things happen. Claimants' conditions worsen, new evidence is provided, and claimants age into these categories.

So although I think we have what we consider is good policy compliance at each of our steps, we do recognize that this is fundamentally an individual who comes to the Social Security Administration may not have the same condition on day one as they will 600 days later. We don't want anyone to wait for 600 days. We want to be able to make the right decision as early in the process as possible.

So when we established the disability process redesign efforts and the disability service improvement efforts, we had really three goals in mind. And I think they are still the same three goals.

The first one was for individuals who would be eligible, pay them as soon as we can in the process.

The second one, when you start looking at this question, is also reduce the wait times. And I think that the challenge that we have here with the Prototype process here and the elimination of reconsideration, it has not reduced those wait times. It has harmed individuals who have to sit and wait for that 600 days.

And the third element that we are looking for across the board is to make the process more efficient.

And I think that reflects, I think, again, whether it was disability process redesign, the disability service improvement, or any effort, I think those remain our three goals.

Mr. Pascrell. What do you mean by making the system more efficient? That sounds good. What do you mean?

Ms. Jonas. So I think it means, if we have got 2.5 million people coming to the table, we have got to have a process that works for everybody, works for people in terms of an efficient process.

Mr. Pascrell. Do you think this process is working efficiently for everybody?

Ms. Jonas. I don't think that, and especially with regard to this process where some individuals have the opportunity to submit information and some don't and have to get in that line. That seems inefficient. That seems unfair.

Mr. Pascrell. I had some questions about medical evidence, but let me go on to this.

I want to echo here what I have heard from members on this side. New Jersey is not 1 of the 10 States that will now require disability applicants to go through another appeal step. My constituents are already forced into the failed reconsideration process.

The Social Security Administration should fix the first appeals step rather than reinstating this flawed process in other States, period. And if you don't do that, you are working against yourself.

We know the problems. But for those who do not know, you should be aware that most of the people impacted by reinstating reconsideration -- or the courts doing that, whatever -- I think this is the first time that Social Security ever made such a dramatic change without the Congress. Can you recall another time?

Ms. Jonas. So, specifically, we have issued a number of regulations, which we are under authority to issue.

Mr. Pascrell. That experienced longer delays before getting their benefits, and some are expected to face a total loss of benefits. I mean, that is bizarre. Unacceptable. And I am sure it is unacceptable to you.

About 106,000 severely disabled workers will have to wait longer for a hearing, and almost half of them will ultimately be found eligible by an administrative law judge. That means disabled workers are going to wait longer to receive the benefits they earned, and some will lose benefits. Approximately 21,000 individuals could have gotten benefits sooner.

It doesn't make sense, the decision. It doesn't make sense to me. And you heard from the rest of the folks here, and you will hear from more. This administration must reverse course on this foolish idea now.

Let me add that the problem will be compounded by the new executive order that will politicize administrative law judges. We don't even have time to discuss that today.

Appointing these judges based on their politics as opposed to the longstanding merit-based procedures is wrong. Read the executive order. This process was

designed to protect impartiality. Adding the whims of being partisan, ideological, gives me great trepidation.

More judges can reduce average wait times that are already exceeding 600 days. But how much longer will people have to wait when politics is interjected into the process? And that is where we are going.

We saw the budget of 2019. And on page 32 of the budget, if you look, we are talking about a $64 billion cut in SSI.

So how are we going to do what is being recommended here? Forget about what I am saying. We are already hurt. How are you going to do that when you are going down that slippery slope -- to efficiency? Where are we going to wind up here?

Chairman Johnson. Wind it down. The time has expired.

Mr. Pascrell. I will yield back now, Mr. Chairman. You have been very generous with your time.

But we have a big, big problem and a mess. And you have seen it. You have worked on it. And the response has not been very good. But we are behind you, period.

Chairman Johnson. Thank you, sir. Thank you.

Mr. Bishop, you are recognized.

Mr. Bishop. Thank you, Mr. Chairman. Thank you for raising the issue.

Thanks to the panel for being here today to discuss the issue. It is obviously something that is important to all of us. We are engaged in constituent services every day, and this is an issue that is raised frequently by folks who contact our office, in every one of our offices. So finding ways to make it more efficient is a priority, and we want to do whatever we can to assist.

I want to reiterate the concern that has been raised about the decision to reinstate the reconsideration stage of the disability appeals process on a nationwide basis.

Since 1999, Michigan is 1 of those 10 Prototype States. So we have really appreciated that change. And the effect of the program has been that for the

last 20 years disability applicants in my home state have experienced shorter wait times. In fact, on average, it saved us about 100 days.

So that is a big deal, especially when we consider that the average wait time in this huge backlog is 600 days. That is 2 years. It is just unacceptable. And I know that you have heard that from all of us, and we are looking for ways to address that.

In my Lansing hearing office, in Lansing, Michigan, the average processing time is currently 575 days. That is less than the national average. But reinstatement of reconsideration could change that entirely, and so we are very concerned about it.

So, Ms. Jonas, I know that you are kind of in the focal point of this discussion today, and rightfully so.

I understand, Ms. Ekman raised the issue, and the others on the panel have raised the issue, too, only 10 percent of claimants who eventually receive benefits are granted benefits at the reconsideration level, and that is great for that 10 percent.

But while those 10 percent may get a decision faster, we know that the almost 50 percent who aren't allowed benefits until the final hearing are really in a very bad position having waited a long time for that process.

I am trying to understand. This is a significant decision on the part of your office. Who makes that decision? Is there an individual that makes the decision?

Ms. Jonas. It is an agency-led decision.

I want to just briefly address something, though. I think to put in context with this in terms of -- again, I think we all agree the 600 days processing time or wait time is not acceptable.

Part of the goal with having this uniform process put in place for all of the states, again, I think would benefit an initial 21,000 individuals along the way. It would also play a significant role in reducing that time period in which we can get to a 270-day wait time from the end of fiscal year 2022 to 2021. So I think it benefits all claimants across the board.

Mr. Bishop. Well, that is not the case when it comes to Michigan. By the way it looks and the national average, it appears as though it is going to hit Michigan and the claimants in Michigan very hard. And I am sure that is true for a number of our other Members who are part of these Prototype States.

But I am just interested, I asked a specific question, who makes the decision? You said it is an agency-level decision.

What does that mean? What is an agency-level decision?

Ms. Jonas. So that is a commissioner-led decision.

Mr. Bishop. Commissioner. So is there a person that made the decision, or is it a commission that makes that decision?

Because I am wondering, the question is, we are on the precipice of having someone placed there, appointed to that position, and I just wondered, wouldn't it make more sense -- and I know this question has been asked, but I want to reiterate it -- wouldn't it make more sense on something this significant to wait for that person?

Ms. Jonas. So, again, I think as we came to the table here, I think part of this conversation was what is different between then and now, and is it sort of an opportune time to take advantage of this.

I think where we are at, at this point is, again, that opportunity where we have got capacity in our DDSs to handle this because of the reduced receipts. It would reduce the number of cases going into the hearings backlog, which would assist us in reducing that average wait time sooner. So I think we saw this as the timing was appropriate.

Mr. Bishop. Okay. Boy, there is a number of different questions to ask here. I wish that I had more time, and we have limited time here. And I know there are other folks that are wishing to ask questions.

Chairman Johnson. Ask another question.

Mr. Bishop. Okay. Well, I will, then.

Ms. Ekman, I would like to ask you a question. Social Security spent $122 million last year to administrative services such as fee withholding and travel expenses for hired claimant representatives. However, the agency only

received $30 million reimbursement for those services. So in the end, that is $92 million lost to Social Security's trust funds.

The Office of Management and Budget has proposed that Social Security stop providing services to save money. It seems like that is a significant amount of money. It doesn't seem like it. It is.

I would like to know your opinion. And do you think that the funds could be put to better use?

Ms. Ekman. Thank you for that question, Representative Bishop.

First of all, I just want to make sure it is clear that the money that is paid to representatives doesn't come out of the trust fund separately. It comes out of past due benefits for the individuals.

So that is not costing the trust fund any money. It is because the claimant decided they needed a representative, so they hired them, and they agreed to pay them part of the past due benefits.

I think that the direct withholding of fees is vital.

Mr. Bishop. Can I --

Ms. Ekman. Yes?

Mr. Bishop. Can I ask a question? But paying it back, where is it paid back to?

Ms. Ekman. It comes out of the past due benefits. It goes to the representatives. So it is coming out of the claimant's past due benefits, not generally out of the trust fund. Those benefits would go to the claimant, to the person who is awarded benefits, if it didn't go to the representative.

But I think what is really important to keep in mind is those figures you state do not account for the amount of money SSA saves by the function that representatives play. If you look at recent SSA Office of Inspector General reports as well GAO reports, the representatives play very important functions for both claimants and the agency. They help get evidence. They decrease the number of hearings that are postponed significantly. And they also increase the development of the file.

So I think that if you were to eliminate the direct withholding of fees and the payment of those fees to representatives, many Social Security disability claimants would no longer be able to get representation. We know this is the case because they couldn't before the direct withholding of fees, SSA was forced to do that by Congress.

And no one is well served by increasing the number of unrepresented claimants. SSA benefits, as I said, from the development of the record and more hearings being held on time and not rescheduled, which is very costly for the agency.

Enacting this proposal would be expensive because it would actually cost the agency more than $300 million over 10 years based on the OMB proposal score, and it would be inefficient, and it would be bad for claimants.

So we urge Congress not to move forward with any change to the direct withholding of fees for representatives.

Mr. Bishop. Okay. Thank you.

I yield back my time.

Chairman Johnson. Thank you. Thank you.

Mr. LaHood.

Mr. LaHood. Thank you, Mr. Chairman. And thank you for having this hearing today.

I also want to thank the witnesses for your testimony and for being here today.

Ms. Curda, I wanted to ask you a question. The GAO report released today looks at whether or not shifting cases to other offices really helps with the case timelines. And the wait time, for instance, in the Chicago National Hearing Center is the second highest in the Nation at 825 days, which is simply unacceptable.

And so in looking at the report, what were your findings on this strategy of shifting cases to other offices? And can you elaborate on what the SSA would need to measure the strategy of shifting cases effectively?

Ms. Curda. Certainly. Thanks for that question.

In the past, a case would come into a field office and it would be processed, more or less, entirely by that office.

More recently, SSA has gone to transferring cases between offices to take advantage of capacity that might exist elsewhere in the system. So you have one office that is backlogged. You have another office that has capacity. I think it makes sense to take advantage of all the capacity in the system to process a case.

However, the timeliness measure has not kept pace with this change in operations and we now have something like 40 percent of cases being handled by more than one office. So the timeliness metric is being calculated based on the last office that processed the case.

So all of the time that was spent on the case is attributed to that office whether or not they handled all of the processing. So you still don't have the information about other offices that handled the case and may have added to the time and so forth.

So what we would like to see is, what we recommended, is that SSA reevaluate its measure of timeliness in light of its case transfer process and come up with a measure that more accurately reflects the contributions of each office to the processing of the case.

Without that, SSA cannot assess whether transfers are having their intended effects, and it can't hold individual hearing offices accountable for the time that they have spent on the case.

Mr. LaHood. And what is your confidence level on the implementation of that and it being successful?

Ms. Curda. They agreed with our recommendation. I believe they have the information they would need to do this kind of a measure. And so I am hopeful that it will be implemented.

Mr. LaHood. And what is the timeline on when we should know whether it is properly being implemented in an effective and efficient and accountable way?

Ms. Curda. Well, we track the implementation of our recommendations very closely, and we are in regular communication with the Social Security Administration. We are now meeting on a quarterly basis to talk about outstanding recommendations, and we update them at a minimum every

year. We will be tracking the implementation of this and in touch with SSA about their progress.

Mr. LaHood. Well, we would look forward to staying in touch with you on a quarterly basis to find out how this is tracking and making sure that those metrics are being fulfilled and are in compliance moving forward. So we look forward to working with you on that.

Thanks.

Mr. Cass, I wanted to switch. I know Mr. Rice had asked you about the recent Supreme Court decision. And I know there was a recent executive order on ALJ hiring also.

Can you talk a little bit about the Supreme Court decision and that executive order and whether they will have a negative impact on claimants' due process or the fairness of the ALJ proceedings going forward?

Mr. Cass. Certainly.

The Supreme Court decision simply says that under the Constitution an ALJ is an inferior officer, not somebody who is an employee, that an ALJ has enough responsibility to have to be appointed under the Appointments Clause, which means the agency head has to do the appointment.

It is a simple change, but it is one that is consistent with the Constitution. It doesn't have to have any impact, certainly it doesn't have to have any negative impact, on the fairness or the efficiency of the proceeding.

The same is true of the executive order. The executive order says that ALJs are hired through the excepted service. You can tailor the requirements to the needs of each agency and each ALJ being hired. That is all the executive order does. The executive order doesn't say these will be political appointees, or that they will be appointed in a way that will reduce the fairness of the process in any way.

All of the matters that have to do with the fairness and the efficiency of the process are not reduced or impaired by either the Supreme Court decision or the executive order.

Mr. LaHood. Okay. Thank you for that.

Thank you, Mr. Chairman.

Chairman Johnson. Thank you.

You know, Social Security needs a consistent nationwide appeals process and one that provides for fair, accurate, and timely decisions. Reinstating reconsideration is a big decision and one that should only be made by a Senate-confirmed Commissioner. I once again call on my Senate colleagues to act quickly to confirm the next Commissioner.

Do you think the Senate hears me?

We need strong leadership at Social Security now. Americans want need and deserve nothing less.

Thank you to all our witnesses for your testimonies and to our members for your questions. Thank you also for being here.

Mr. Larson. Mr. Chairman.

Chairman Johnson. With that, the subcommittee stands adjourned.

Mr. Larson. Mr. Chairman, I just wanted to thank you. This has been one of the most instructive hearings that we have had.

And I especially appreciated exhorting both what the House needs to do with regard to our Senators and also the legislative priorities of the House of Representatives, which you heard from all of our Members, that aren't being -- that don't get heard and just demonstrates again why we need a process like this. And I commend you for it.

Chairman Johnson. Thank you, sir.

Thank you all for being here.

[Whereupon, at 11:21 a.m., the subcommittee was adjourned.]

MEMBER QUESTIONS FOR THE RECORD

September 4, 2018

Elizabeth Curda
Director of Education, Workforce, and Income Security
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Ms. Curda:

Thank you for your testimony before the Committee on Ways and Means Subcommittee on Social Security at the July 25, 2018, hearing entitled "Examining Changes to Social Security's Disability Appeals Process." In order to complete our hearing record, we would appreciate your responses to the following:

1. The Social Security Administration's (SSA) disability programs have been listed on GAO's high-risk list since 2003. How does the SSA's failure to use metrics contribute to the programs' risk and how can the SSA improve to reduce this risk?

2. The last detailed study of the SSA's disability redesign prototype which eliminated the reconsideration stage of appeal in ten states was released 2001. If the SSA were to design a study today to determine the effectiveness of the reconsideration stage, how would that study need to be designed, and what data and metrics would the SSA need to use?

We would appreciate your response by **September 18, 2018**. Please send your response to the attention of Amy Shuart, Staff Director, Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, 2018 Rayburn House Office Building, Washington, DC 20515. In addition to a hard copy, please submit an electronic copy of your response in Microsoft Word format to amy.shuart@mail.house.gov.

Thank you for taking the time to answer these questions for the record. If you have any questions concerning this request, you may reach Amy at (202) 225-9263.

Sincerely,

Sam Johnson
Chairman
Subcommittee on Social Security

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

September 18, 2018

The Honorable Sam Johnson
Chairman
Subcommittee on Social Security
Committee on Ways and Means
House of Representatives

Thank you for the opportunity to testify before the Subcommittee on July 25, 2018 during the hearing on "Examining Changes to Social Security's Disability Appeals Process." The attached enclosure is GAO's response to the questions for the record you submitted. If you have any questions, please contact me at curdae@gao.gov or (202) 512-7215.

Sincerely yours,

Elizabeth H. Curda
Director
Education, Workforce
and Income Security

Enclosure

cc: Amy Shuart

Enclosure

Post-Hearing Questions for the Record
Submitted to Elizabeth Curda
Director, Education, Workforce, and Income Security Team
U.S. Government Accountability Office

From Chairman Johnson
Subcommittee on Social Security, Committee on Ways and Means, House of Representatives
July 25, 2018 hearing entitled
"Examining Changes to Social Security's Disability Appeals Process"

1. **The Social Security Administration's (SSA) disability programs have been listed on GAO's high-risk list since 2003. How does the SSA's failure to use metrics contribute to the programs' risk and how can the SSA improve to reduce this risk?**

   Response:

   Partly because of challenges SSA has faced in processing disability workloads and deciding who is eligible for these benefits in a timely way, we included "Improving and Modernizing Federal Disability Programs" on our High-Risk List of agencies and programs in 2003.[1] As a substantial and growing percentage of disability appeals cases are transferred between offices to reduce processing times at the hearings level, SSA has not adapted its metrics to take the transfer process into account. Consequently, its current performance metrics do not enable adequate oversight of individual offices' contributions to processing disability workloads. Although timeliness is just one dimension of hearing office performance, as it continues to monitor transfers, SSA would benefit from developing and using metrics that hold originating and assisting offices accountable for the time that they held cases. Without such metrics, SSA cannot accurately measure offices' performance and therefore may not be able to incentivize offices to process cases in a timely way. In addition, without metrics that reflect the time that individual offices held cases, SSA does not have key inputs for quantifying how case transfer efforts affect timeliness.

2. **The last detailed study of the SSA's disability redesign prototype which eliminated the reconsideration stage of appeal in ten states was released [in] 2001. If the SSA were to design a study today to determine the effectiveness of the reconsideration stage, how would that study need to be designed, and what data metrics would the SSA need to use?**

   Response:

   While GAO has not recently conducted work regarding the reconsideration process, in 1999 we made a number of recommendations on steps SSA should take as it proceeds with further exploration and testing of redesign initiatives and considers implementation options. Specifically, we recommended that SSA should develop a comprehensive set of performance goals and measures to assess and monitor changes in the disability claims

[1] In making and updating this designation, we considered actions of SSA and Department of Veterans Affairs as well as the Office of Management and Budget's efforts to create unified strategies and goals for federal programs that support employment for people with disabilities.

Enclosure

Post-Hearing Questions for the Record
Submitted to Elizabeth Curda
Director, Education, Workforce, and Income Security Team
U.S. Government Accountability Office

From Chairman Johnson
Subcommittee on Social Security, Committee on Ways and Means, House of Representatives
July 25, 2018 hearing entitled
"Examining Changes to Social Security's Disability Appeals Process"

process and explore feasible alternatives before committing significant resources toward the testing of specific initiatives. In addition, our past reports on SSA demonstration projects have highlighted key criteria that SSA should take into account in designing demonstration projects. These criteria include designing the demonstration project in accordance with professional research standards, such as applying a degree of methodological rigor, data analysis, and statistical modeling that is appropriate for the purpose of the research and the evaluation's design. For example, to evaluate the effectiveness of the reconsideration step, SSA might employ a quasi-experimental design to compare the combined processing times at the initial and hearings levels, accuracy rates, and administrative costs for claims that undergo reconsideration versus those that do not. To ensure that the project yields reliable information for making policy decisions, SSA should consult with external research professionals on designing, implementing and evaluating this demonstration and obtain stakeholder input on its plans. In addition, as our past work highlights, SSA should establish written policies, procedures, and mechanisms for managing and operating the demonstration project that are consistent with internal control standards in the federal government.[2]

[2]For further details on these criteria and past recommendations GAO has issued pertaining to SSA demonstration projects, see GAO, *Social Security Disability: Improved Processes for Planning and Conducting Demonstrations May Help SSA More Effectively Use Its Demonstration Authority,* GAO-05-19 (Washington, D.C.: Nov. 4, 2004) and GAO, *Social Security Disability: Management Controls Needed to Strengthen Demonstration Projects,* GAO-08-1053 (Washington, D.C.: Sept. 26, 2008).

SOCIAL SECURITY

The Commissioner

October 9, 2018

The Honorable Sam Johnson
Chairman, Subcommittee on Social Security
Committee on Ways and Means
House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your September 4, 2018 letter requesting additional information to complete the record for the July 25, 2018 hearing on "Examining Changes to Social Security's Disability Appeals Process." Enclosed you will find the answers to your questions.

I hope this information is helpful. If I may be of further assistance, please do not hesitate to contact me, or have your staff contact Royce Min, our Acting Deputy Commissioner for Legislation and Congressional Affairs, at (202) 358-6030.

Sincerely,

Nancy A. Berryhill
Acting Commissioner

Enclosure

Post-Hearing Questions for the Record
Submitted to Patricia Jonas
Deputy Commissioner
Office of Analytics, Review, and Oversight
U.S. Social Security Administration

"Examining Changes to Social Security's Disability Appeals Process."
July 25, 2018

United States House of Representatives, Committee on Ways and Means,
Subcommittee on Social Security

Questions from Representative Sam Johnson

1. **Please provide additional detail regarding the SSA's plans to conduct outreach to advocates and to the public about its plans to reinstate reconsideration as discussed in your testimony. When will this outreach start and how will it be done?**

   We intend to include the advocate community and the public in the process of reinstating reconsideration. Throughout the process, we will reach out through comprehensive communications to ensure that they are aware, understand, and support our plan to move forward. For example, we will seek input from stakeholders external to the agency so we can examine the feasibility of ideas such as those raised during the hearing on July 25, 2018. Our methods of collecting stakeholder input will include hosting a National Disability Forum on this topic later this year. We will also inform the public about our plan in the next few months through updates to our internet pages (including new frequently asked questions), Social Security Matters blog posts, social media updates, and SSTV alerts in our Field Offices.

   As you know, we have already started our congressional outreach efforts; for example, we have notified Subcommittee staff and the staffs of those Members from prototype States. We will continue those efforts. In fact, this month we have met with interested staffs of several Members.

   Finally, we recently established an executive-led cross agency workgroup to examine the reconsideration step, and we will seek input from stakeholders external to the agency as part of this examination. Throughout all of these communications, we will ensure that the proper groups, organizations, members of the public, and our employees, are informed about this change.

2. **What is the SSA doing to improve reconsideration and ensure it is a more meaningful step?**

   Restoring a uniform, national disability process is an important element of our efforts to reduce pending hearings. We also believe that a uniform process is a necessary first step in our efforts to improve the reconsideration appeals process. However, we hear your concerns about enhancing the reconsideration process, and identifying efficient and effective evidenced-based changes to improve the timeliness and accuracy of disability determinations. Since eliminating the reconsideration step in the 10 prototype states, the agency has made and continues to make process, policy, and systems improvements that improve the disability adjudicative process at each level, including at the reconsideration step.

   - eDIB – At the time we eliminated reconsideration in the 10 states, SSA was still using paper folders and the reconsideration step was much more labor intensive. Since that time, the agency now uses eDib, which replaced paper disability claims files with an electronic folder. This technology transformed the way we collect, store, and process claims data and has helped to facilitate and sustain DDS efficiencies.
   - eCAT – DDS examiners also now use eCAT, an automated tool to adjudicate disability claims. This tool uses intelligent pathing technology to support more consistent and better documented decisions and has contributed to improvements in productivity and policy compliant decisions. eCAT functionality is now being folded into the agency's development of DCPS, a national case processing system.
   - Health IT/Electronic Medical Evidence – SSA has been steadily expanding the use of electronic medical records and within the last year hired an Executive to lead the agency's Health IT initiatives across the agency. Use of electronic medical records supports the agency's mission to make the right decision in the disability process as early and efficiently as possible.
   - Policy Changes – The agency has modernized the disability program by making significant policy changes that help adjudicators streamline the decision-making process. Some policy changes include expanding the number of medical impairments that qualify for a compassionate allowance (i.e. an expedited allowance), expanding the list of acceptable medical sources, clarifying how to weigh medical source opinion evidence, and revising the representative conduct regulations to require representatives to report relevant medical and other information to SSA as early in the process as possible.
   - Outreach – SSA has convened an executive-led cross-agency workgroup that will be charged with identifying and testing processes designed to enhance the reconsideration step. We will provide more details about our study as they become available. We will also seek input from stakeholders external to the agency so we can examine the feasibility of ideas, such as those raised during the hearing on July 25, 2018. Our methods of collecting stakeholder input will include hosting a National Disability Forum on this topic later this year.

3. **The SSA's Appeals Council's Administrative Appeals Judges (AAJs) and many of the attorneys employed by the SSA are hired through the excepted service. How long has**

the SSA been hiring excepted service AAJs and attorneys? What are the qualifications and hiring processes that the SSA uses when hiring them?

SSA has always hired attorneys and Administrative Appeals Judges (AAJs) through the excepted service. AAJ positions are classified as attorney examiners in the 905 occupational series. All attorney positions government-wide are placed in the excepted service (see 5 CFR 213.3102(d)) and exempt from both the rules of competitive examining and the procedures for hiring in the excepted service laid out in 5 CFR part 302. See 5 CFR 302.101(c)(8). We also follow the principle of veteran preference as far as administratively feasible.

We utilize two methods for hiring attorneys. The first is to post a vacancy announcement on USAJobs to solicit applications from interested candidates. The other method is to use recruitment events, or outreach to law schools and professional organizations to solicit applications. The applications are then reviewed by our human resources staff to determine minimum qualifications. The qualifications for a GS-9 entry level attorney are simply membership in a bar. The qualifications for a GS-11 are bar membership plus one year of legal experience or superior law student work or activities including: moot court participation, Order of the Coif, or academic standing in the upper third of the class or work on the school's official law review. The qualifications for a GS-12 are bar membership and two years of legal experience. The qualifications for a GS-13 are bar membership plus three years of legal experience. After the applications are reviewed for minimum qualifications, the human resources office refers all qualified candidates to the selecting official.

AAJs are hired through internal vacancy announcements limited to SSA employees. The minimum qualifications for AAJs are a bar membership and seven years of experience as a practicing, licensed attorney. Each candidate undergoes a rigorous structured interview, which includes questions well-calculated to assess the candidate's expertise on disability law, ethics, integrity, and leadership. The interview panel, comprised of senior career AAJs, scores the candidates' responses to each interview question, and conducts extensive reference checks of the top-scoring candidates.

4. **What other SSA employees are part of the excepted service and what is the nature of their service?**

Until recently, attorneys were the only group of SSA employees placed permanently in the excepted service. SSA uses some excepted service hiring authorities such as Veterans Recruitment Appointments, Pathways Recent Graduate Appointments, and Schedule A Appointments for Individuals with Disabilities to initially appoint employees to positions that would otherwise be competitive service positions. After a trial period, these employees are converted to the competitive service or separated from the agency. SSA also uses some excepted service authorities to temporarily appoint expert consultants, when appropriate.

On July 10, 2018, the President issued Executive Order 13843, which placed administrative law judges (ALJs) hired after that date in the excepted service. We have not yet made any

excepted service ALJ hires, but we are in the process of determining the most efficient and effective manner for us to carry out our new responsibilities.

5. **The SSA has often found hiring ALJs off of the Office of Personnel Management's (OPM's) register to be a challenge. Can you describe the difficulties you have had with ALJ hiring in the past?**

We have a constructive relationship with OPM. However, the testing process often resulted in a complex and lengthy hiring process. As discussed above, however, as of July 10, 2018, this issue is moot. ALJs positions are now in the excepted service and we are responsible for hiring our own ALJs. Executive Order 13843 also eliminated the need for OPM to conduct a competitive examination or retain a standing register for ALJs.

6. **The July 10, 2018, Executive Order (EO) requires ALJ hires to be licensed to practice law, but is otherwise silent on ALJ qualifications. Prior to the EO, the SSA applied its own screening process to ALJs before they were hired off of the OPM register. Can you describe this process?**

Before making an offer to a candidate, we would take several important steps to ensure we made an informed hiring decision. In addition to checking a candidate's bar license status again, we also looked at a number of other aspects to ensure that a candidate was qualified and suitable for a position of significant public trust. We conducted a preliminary screening on key areas including education, state and national bar affiliations, credit, motor vehicle record, criminal record, and references. We also required a personal interview to assess the whether the candidate possessed the skills that we believed to be necessary for our high volume, non-adversarial hearings process.

As the largest employer of ALJs in the Federal Government, we have a hearings process that we believe is unique and different from most other ALJ-employing agencies, in that it is a high-production and non-adversarial hearings process, often with vulnerable, unrepresented claimants. In addition, we believe that successful candidates needed to be able to use technology proficiently and review significant volumes of medical evidence.

We believe that the nature of our high-volume, non-adversarial hearing process demanded that we ensure that we selected candidates who were a good fit in terms of generally-applicable qualifications, such as the following:

- current bar licensure;
- public trust suitability (including whether criminal and financial history is consistent with the integrity and efficiency of the service, job requirements, and business necessity);
- good interpersonal skills that support working well with others and the vulnerable members of the public;
- efficient organizational skills sufficient to manage a judicial docket timely;
- analytical thinking and decision making skills; and

- comfort with medical terminology and its application to work.

7. **Is there anything in the EO that would impede the SSA's ability to hire qualified candidates as SSA ALJs?**

   On July 10, 2018, the President's Executive Order (EO), Excepting Administrative Law Judges from the Competitive Service, changed the hiring process for filling ALJ positions across the executive branch. The EO modified the selection process for Federal ALJs. The order created a new "Schedule E" ALJ position in the excepted service. This change affords agencies more flexibility and responsibility in the selection of ALJs without affecting ALJ's qualified decisional independence after they are appointed. The Office of Personnel Management (OPM) issued guidance to all Federal agencies on July 10, 2018 and August 27, 2018 concerning the EO. SSA is currently assessing the EO and accompanying OPM guidance to determine our legal obligations and the process the agency will follow in making future ALJ hiring determinations.

   In addition to assessing our internal needs, we are also engaging with other agencies who employ ALJs to assess their implementation of the EO. Our goal is to develop an excepted service ALJ hiring process that aims to ensure the best quality candidates while adhering to government-wide merit system principles and applying veterans' preference to the extent administratively feasible. To that end, we will utilize our extensive experience in recruiting and hiring qualified employees via the excepted service. As we noted in response four, currently over 6,000 SSA employees, including attorneys and administrative appeals judges, entered the agency via the excepted service. There is nothing in the EO that would impede our ability to hire qualified ALJs.

8. **Under current law, hearing officers at DDSs can only conduct reconsideration hearings resulting from an initial disability cessation determination made by a DDS employee. How does this restriction limit the SSA's ability to manage DDS workloads?**

   We use workload balancing to assure all budgetary expectations are met each year. This balancing effort is accomplished by ensuring the workload is processed using available resources, regardless of their location. A mobile workload is paramount to our success. Under current law, our disability hearings workload is not as mobile as other workloads, such as initial and reconsideration-level disability claims. This immobility adds a layer of complexity to our workload balancing efforts.

   Extending to DDSs the authority to conduct reconsideration hearings on federally adjudicated initial disability cessation determinations would provide greater flexibility in our workload balancing, increasing our capacity to match workloads and resources, and ultimately providing more efficient service to our claimants and beneficiaries.

9. **Under current law, the SSA has the authority to share information about employment support services with denied Disability Insurance applicants. The Committee understands that the SSA currently provides this information to beneficiaries in certain**

states. Please provide a list of these states and explain why this policy has not been implemented consistently on a national level.

Prior to enactment of the Ticket to Work Act, SSA had the option to refer both applicants and beneficiaries to VR agencies. The extent to which we actually made referrals for applicants to VR agencies varied by region and state depending on local initiatives and VR capacity.

Today, DDS agencies may provide denied applicants information about employment services, but the practice varies by region. Consistent with the Federal-State partnership, each State has the discretion to include in denial notices information on available VR services. This discretion gives States the flexibility they need to best serve their residents based on their available resources. As of August 2018, the following states provide vocational rehabilitation information to denied disability applicants: New Hampshire, Missouri, Nebraska, California, and Nevada.

Question from Representative Mike Kelly

1. **A large part of the SSA's plan to reduce its disability appeals backlog relies on information technology investment and modernization, in particular, the modernization of the legacy case processing systems used by DDSs. Since 2008, the SSA has been developing a modern case processing system that has faced multiple delays and far exceeded budget estimates. What is the SSA doing to ensure that taxpayer dollars are being used effectively and to evaluate alternatives to in-house development?**

   Development of a national, modernized disability case processing system (DCPS) is a critical initiative that will replace independently operated, outdated legacy systems used by state agencies (Disability Determination Services or DDSs). DDSs make disability determinations for SSA as governed by statute. DCPS will provide the flexibility and high performance necessary to process disability claims in a timely, accurate, efficient, and public service centered environment. DCPS, as a common national system, will yield substantial benefits to the government and citizens, including more efficient case processing, improve citizen service, reduce administrative costs, ease sharing of workloads across processing sites, provide case analysis tools to support consistent policy-based decisions, and nationally implement software enhancements and modifications as required by evolving laws, regulations, and policy.

   Throughout DCPS development, SSA has remained cognizant of ensuring that taxpayer dollars are being used effectively. SSA’s stewardship includes consistently engaging independent research organizations to evaluate DCPS, as well as identify and evaluate any viable, alternative methods of development.

   In 2010, after a thorough, competitive solicitation process, SSA contracted with a highly qualified, commercial provider for DCPS software development. Development progressed, and from 2012 to 2014, the commercial provider delivered 4 Beta Releases for production testing at 4 DDS test sites.

In 2014, SSA contracted an independent research company to provide two independent analyses of the commercial provider's product development and any potential products in the commercial marketplace. SSA accepted the reports' recommendations and moved forward accordingly, including initiating a strategic reset of the DCPS program. Additionally, as recommended, SSA engaged another independent organization to conduct a proof-of-concept for a suggested commercial product as a potentially viable alternative.

Early in 2015, the independent organization reported that potential use of the commercial product for the enterprise, if chosen, would require customized software programming and necessitate a number of phases and years to implement. Later in 2015, SSA discontinued the services of the contracted commercial software provider and took over as the systems integrator in the development of DCPS2. As the systems integrator, SSA uses cutting-edge Agile development teams comprised of SSA and contract employees, closely supervised by the SSA's Chief Program Officer's teams. Since bringing the product development in-house, SSA consistently has provided timely, quality product increment releases steadily increasing DCPS2 functionality.

In 2016, the independent research company provided a final report, finding that in the previous 18 months SSA transitioned the DCPS program toward "a more modern, Agile technology endeavor, completely re-imagining how large technology programs are delivered in the Federal Government." In December 2016, DCPS2 released into production in DDSs for Delaware, Maine, and Ohio case processing support for Quick Disability Determination and Compassionate Allowances.

By April 2017, DCPS2 was rolled-out to DDSs in Iowa, Rhode Island, and Virginia and put into production support for processing initial adult allowance cases. Later in 2017, an independent research organization issued an Independent Market Research report finding that DCPS2 met or exceeded SSA's requirements at less cost and less risk than commercial product comparators. Thereafter, DCPS2 was rolled-out to DDSs in South Dakota, Washington, Nebraska, and the District of Columbia. Also, support for processing initial adult denial cases, adult reconsideration cases, and adverse onset/closed cases was released into production. Additionally, in 2017, SSA engaged the Government Services Administration's Technology Transformation Services for a technical assessment project to analyze DCPS2. That independent review of DCPS code found that "the DCPS codebase uses best practices in programming" and that SSA had "made remarkable progress in writing high-quality code in a modern technology stack using agile methods."

In January 2018, DCPS2 released into production support for processing initial and reconsideration of child cases – thus encompassing delivery of core case processing as scheduled. Throughout 2018, SSA has continued steady development and delivery of DCPS2 functionality. Further in 2018, DCPS2 will roll-out to DDSs in Vermont, Missouri, Louisiana, and West Virginia, while continuing development of processing capability.

In addition to the above mentioned DDS sites, 34 other states also have volunteered for deployment of DCPS2. The roll-out to these DDSs will occur while product development

continues. As scheduled on the DCPS roadmap, primary product development will be completed in September 2019.

Presently, at the request of Congress and to ensure that we continue to secure the most viable product utilizing the best available process, SSA is conducting market research (including contracting with independent research organizations) to analyze whether any alternative exists that has similar or better functionality as DCPS2 without imposing costs that are higher than using DCPS2. Our processes are in conformance with all Federal procurement rules and information technology security requirements, and will provide a detailed description of any challenges or legal barriers to implementing any option to modernize the disability case processing system.

September 4, 2018

Jeff Price
Legislative Director
National Association of Disability Examiners
PO BOX 243
2802 Mail Service Center
Raleigh NC, 27602-0243

Dear Mr. Price:

Thank you for your testimony before the Committee on Ways and Means Subcommittee on Social Security at the July 25, 2018, hearing entitled "Examining Changes to Social Security's Disability Appeals Process." In order to complete our hearing record, we would appreciate your response to the following:

Question from Rep. Mike Bishop

1. Since reinstatement of reconsideration will increase the wait time for the majority of constituents in prototype states like Michigan, how can it be improved to make it a more meaningful step?

We would appreciate your response to this question by **September 18, 2018**. Please send your response to the attention of Amy Shuart, Staff Director, Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, 2018 Rayburn House Office Building, Washington, DC 20515. In addition to a hard copy, please submit an electronic copy of your response in Microsoft Word format to amy.shuart@mail.house.gov.

Thank you for taking the time to answer these questions for the record. If you have any questions concerning this request, you may reach Amy at (202) 225-9263.

Sincerely,

Sam Johnson
Chairman
Subcommittee on Social Security

www.nade.org

Jeffrey H. Price, Legislative Director
National Association of Disability Examiners
(919) 814-2453
Jeff.Price@ssa.gov

September 7, 2018

The Honorable Sam Johnson, Chairman
Subcommittee on Social Security
Committee on Ways and Means
2304 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Johnson,

The National Association of Disability Examiners (NADE) recently had an opportunity to provide testimony before the Subcommittee on Social Security during its hearing on July 25 to examine changes to the Social Security disability appeals process. The hearing was conducted following the recent announcement from the Social Security Administrations (SSA) that it intended to re-introduce the reconsideration appeal step in the ten (10) states where it had eliminated reconsideration twenty (20) years ago as part of the Agency's efforts to redesign the Social Security disability claims process. SSA introduced a new design that was to be tested in these ten states. As we described in our testimony of July 25, the pieces of this new design fell apart very quickly, leaving only Single Decision-Maker (SDM) and the elimination of reconsideration as the two remaining pieces of the new design still in place. The Bipartisan Budget Act of 2015 mandated the elimination of Single Decision-Maker and SSA announced it would re-introduce reconsideration in 2019 as part of the Agency's efforts to put back into place a unified process.

In response to our Association's testimony of July 25, Representative Mike Bishop, representing the 8th congressional district of Michigan (and one of the states that will be impacted by the re-introduction of reconsideration), submitted the following question and we are happy to provide a response which follows:

Question from Representative Mike Bishop

Since reinstatement of reconsideration will increase the wait time for the majority of constituents in prototype states like Michigan, how can it be improved to make it a more meaningful step?

NADE's Response

As we pointed out in out testimony of July 25, the DDS allowance rate in FY 2017 was 33% at the initial level and 12% at the reconsideration level. The allowance decisions made by the DDSs account for nearly 77% of all allowances made in FY 2017. DDS average processing time for an initial claim in FY 2016 was 85.6 days. Reconsideration claims were processed in 77.1 days. Similar statistics are to be expected when FY 2018 ends on September 30. With about 600,000 reconsideration claims processed in FY 2017, this means that nearly 80,000 disabled Americans had their claim approved at reconsideration in FY 2017.

The allowance rate for claims appealed to the Administrative Law Judge (ALJ) level is higher and this can be attributed to an assortment of reasons that include:

1. The opportunity for the claimant to appear in person at the hearing and present their case, often with the assistance of legal counsel, to the ALJ, and

2. The fact that the ALJ is not bound by the strident regulations issued by SSA that often forces the Disability Determination Offices (DDSs) in the states to deny claims that are likely to be allowed at the ALJ level.

NADE firmly believes that SSA should pursue a unified process but we had hoped the Agency would do when it had sufficient funding and not when the DDSs around the country are faced with ever-increasing backlog of disability claims caused by years of limited hiring authority. Now, with initial receipts lower than expected, the Agency commits itself to the restoration of reconsideration in the ten impacted states while other DDSs continue to face overwhelming caseloads.

As we commented in our testimony on July 25, NADE had hoped SSA would use the twenty year experiment with prototype to gather sufficient data and other information that could be used to determine the best approach to a newly designed reconsideration step. We do believe the reconsideration step is necessary if for no other reason than to diminish the number of appeals to the ALJ level. ALJs, like DDSs, already face tremendous backlogs and an average wait time of nearly two (2) years from the time the claimant requests a hearing to when the hearing is held. One can only imagine what impact the elimination of reconsideration would have on ALJs if this appeal step was eliminated unilaterally.

For this reason, and perhaps for other reasons as well, we do believe in the future of the reconsideration appeal step as it does permit a significant number of claimants to receive favorable decisions on their disability claims within a few short months following their initial denial, rather than having to wait years for an ALJ decision.

Our testimony of July 25 did outline a few ways we believe the reconsideration appeal step could be made to be more effective. These are listed below:

1. SSA has put into place a special federal review of DDS disability decisions that target reconsideration determinations made on claimants who are age 55 and over (this special review does include some claimants who are under age 55). The purpose of this Targeted Denial Review (TDR) is an effort by the Agency to take a third look at those claims SSA has determined, based on predictive computer modeling, are likely to be allowed at the Administrative Law Judge level and return those claims to the DDS for either additional development or an outright reversal of the denial decision. The DDSs have consistently asked to have access to this predictive computer model but SSA has declined to share this information. NADE believes that a more collaborative effort could ensure reconsideration determinations made at the DDS level are accurate and timely without the need for such special reviews.

2. SSA could effectively enhance the reconsideration step by providing specialized training for Disability Adjudicators in the DDSs who make these determinations to consider other facts and evidence and how to better understand the interaction of many different medical conditions, medications, and other factors and how their impact on claimant function. Unfortunately, with soaring caseloads and limited hiring, many, if not most, DDSs have put even basic ongoing training on hiatus as they can ill afford the luxury of the time to allow their staff to attend training. The absence of ongoing training will have dire consequences for the future of SSA's disability program.

3. In some situations at the reconsideration level, especially in situations where it could be considered pivotal, the claimant could be offered the opportunity for an informal conference, either in person or via telephone contact, in which the claimant could be allowed to submit additional facts or evidence they wish to have considered prior to the final reconsideration determination. NADE does caution, however, that the problem of high DDS caseloads will have to be addressed if this is to be presented as a viable option for reconsideration. Even informal conferences, regardless of how they are conducted, take time and other resources.

4. SSA currently utilizes Disability Hearing Officers (DHOs) to handle appeals of Continuing Disability Review (CDR) claims when the DDS has proposed a decision to cease benefits. If the claimant chooses to appeal the CDR cessation decision, the claim is returned to the DDS as a reconsideration CDR claim. If the new Disability Adjudicator concurs with the cessation decision, the Disability Examiner prepares a "No Decision" determination and the claim is forwarded to the DHO. The DHO will conduct an independent case review and offer the claimant the option for a hearing at which the claimant can present witnesses and other evidence to support their claim. A similar option may represent a potential model for an enhanced reconsideration appeal step for initial claims.

Another option, which we did not include in our testimony, would eliminate the need for the claimant to file two appeals if their claim was denied at the initial level and they continued to believe their condition was disabling and they wanted to pursue their appeal rights. The need to file for reconsideration and, if denied again, to then have to file a new appeal asking for a hearing before an Administrative Law Judge, could be replaced with a process that would allow the claimant to request a hearing but allow the DDS to "reconsider" their initial decision on the claim while the hearing request is pending. This would require some changes in the federal statutes regarding jurisdiction of claims but we believe such changes can be easily addressed. While the claimant's request for a hearing is pending, the DDS would have an opportunity to review its initial decision, gather additional medical and other evidence if necessary and correct any mistakes made in the initial adjudicative process. The DDS could then propose a new determination that would either affirm or reverse the initial decision.

Overall, NADE members believe, as do just about everyone else, that the policies put into place by SSA that guide our adjudication of reconsideration claims, create a model that reinforce a perception among the public that reconsideration is a rubber stamp for the initial decision. While we believe this perception is inaccurate, it does persist and SSA's efforts to revise this appeal step have not been forthcoming. NADE members are increasingly frustrated by this situation. The current reconsideration appeals process was adapted six (6) decades ago from other existing administrative appeals processes and we believe the process needs to be brought into the 21st century. We offer our insight and wisdom for any effort that SSA would undertake to develop a reconsideration appeal step that would meld with the demands of the 21st century. We do believe the reconsideration appeal step can be designed to be more effective than the current process while also being at least as cost efficient.

We wish to reiterate our strong disagreement with SSA Deputy Commissioner Patricia Jonas' statement that SSA has sufficient staff to address its pending and expected future caseload and re-introduce reconsideration. We do not believe this to be true. SSA is committing nearly all new hires for the next fiscal year to the DDSs where reconsideration will be re-introduced. This will continue an existing pattern of leaving most DDSs without new hiring authority. Since most DDSs experience an attrition rate of at least 15% annually and have been unable to hire new staff for three (3) years, this is unsatisfactory! The investment in time and resources to train a disability adjudicator to the level at which they become proficient in disability decision-making is significant and the DDSs cannot afford to allow this commitment of resources to continue to walk out the door. The DDSs lost 1,623 employees in FY 2017, including 1238 adjudicators. The attrition for FY 2018 will be similar. It takes two to three years for a disability adjudicator to become proficient at making accurate and timely disability determinations. It is imperative that SSA recognize this critical need and grant the DDSs necessary hiring authority to fill vacant staff positions. This could be the most effective way to improve, not only the reconsideration appeal step, but the initial claims process as well.

NADE appreciates the opportunity to address the question of the Congressman from Michigan. If there are other questions, or if we need to elaborate further on our response, please do not hesitate to ask. Thank you.

PUBLIC SUBMISSIONS FOR THE RECORD

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Hearing before the House Ways and Means Committee Subcommittee on Social Security Examining Changes to Social Security's Disability Appeals Process

July 25, 2018

Written Testimony of Catherine M. Callery and Louise M. Tarantino
On behalf of the
Empire Justice Center

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Written Testimony of Catherine M. Callery & Louise M. Tarantino
Submitted to the U.S. House of Representatives, Ways and Means Committee,
Subcommittee on Social Security
July 25, 2018

Chairman Johnson, Ranking Member Larson, and members of the Subcommittee, thank you for this opportunity to submit written testimony on the major proposed changes to the Social Security disability appeals process in prototype states, including Pennsylvania, Alabama, California, Colorado, Louisiana, Michigan, Missouri, New Hampshire, and New York, by reintroducing the reconsideration level of review. The Empire Justice Center strongly opposes re-introducing reconsideration review in prototype states.

The Empire Justice Center is a statewide support center for legal services programs and the clients they serve. We undertake research and training, act as an informational clearinghouse, and provide litigation backup to local programs. We also undertake impact litigation and engage in legislative and administrative advocacy. In addition to our offices in Albany and Rochester, we also have offices in White Plains, Yonkers, and Central Islip (Long Island).

We also represent low income individuals, as well as classes of New Yorkers, in a wide range of poverty law areas including health, public assistance benefits, health and Medicaid, domestic violence, civil rights, housing and foreclosure, immigration, consumer law and **Supplemental Security Income (SSI) and Social Security Disability (SSD) benefits**. In particular, Empire Justice Center is a statewide coordinator of New York State's Disability Advocacy Program (DAP), which has provided legal assistance to over 4,000 low-income disabled New Yorkers each year that are denied federal SSI/SSDI benefits. We see first-hand the struggles faced by claimants and beneficiaries of these benefits.

We at the Empire Justice Center endorse the written testimony provided to the Subcommittee by Lisa Ekman, Director of Government Affairs, National Organization of Social Security Claimants' Representatives (NOSSCR) on behalf of the Social Security Task Force of the Consortium for Citizens with Disabilities (CCD); and Jennifer Burdick on behalf of Community Legal Services, Inc. (CLS). We echo their opposition to the reintroduction of reconsideration in New York and other states. Reintroducing reconsideration will harm the vast majority of claimants by extending their wait times for resolutions of their claims, and will result in bureaucratic disentitlement of otherwise eligible claimants by discouraging claimants from

pursuing their claims. It would be a far more efficient use of resources to invest in recommendations to increase the accuracy of decisions at the initial level, than to implement a duplicative level of review for all claimants.

We can recall when applicants for disability benefits in New York were required to go through the reconsideration step. As noted by Ms. Ekman and Ms. Burdick, this additional step resulted in very few changes in the outcome of disability determinations. Nor, in our experience, did the additional step enhance the adjudication process. Little or no additional evidence was collected. The reconsideration decisions were essentially replicas of the initial determinations. We see little in the Social Security Administration's (SSA's) latest proposal to convince us the reconsideration step would be any different this time around. We fear the additional step will simply discourage claimants from pursuing their appeals. And worse, it will increase the already lengthy wait times for final decisions that claimants experience in New York. Currently, average processing times from a request for a hearing until a final disposition range from 502 to 780 days in New York. https://www.ssa.gov/appeals/DataSets/05_Average_Processing_Time_Report.html. To add additional time by reintroducing the reconsideration stage would be unconscionable.

We support the proposed suggestion by the CCD Task Force to eliminate reconsideration nation-wide and devote the resources currently expended on reconsideration to improving initial determinations, with a particular focus on better development of the evidentiary process.

Thanks you for the opportunity to offer these comments.

Testimony of
Anthony M. Reardon, National President
National Treasury Employees Union

to the

House Committee on Ways and Means
Subcommittee on Social Security

"Examining Changes to Social Security's Disability Appeals Process"

July 25, 2018

USING SENIOR ATTORNEY ADVISORS AS ADJUDICATORS
A Proven Method to Reduce the Hearing Backlog, Expedite Decisions, and Improve Public Service.

Chairman Johnson, Ranking Member Larson and members of the Subcommittee, thank you for allowing NTEU to share its thoughts on methods to improve the Social Security Administration's disability process. NTEU represents 150,000 federal employees in 31 agencies including 1,900 attorneys and paralegals in the Social Security Administration's Office of Hearings Operations (OHO). I appreciate the opportunity to discuss these important issues.

INTRODUCTION

The Social Security Administration's Office of Hearings Operations (OHO) handles appeals of disability claims. OHO strives to issue legally sufficient decisions and award

benefits to disabled claimants "as early in the process as possible".[1] The decades-old disability hearings process, however, was not designed to process the unprecedented number of claims filed in the past ten years. The hearing process also was not designed to accommodate the increased participation of attorneys representing claimants. Adding to these challenges, the hearing process has been encumbered by insufficient resources, inadequate staffing, expanding case files, expansive changes in regulations, conflicting operational messages, and escalating internal tensions.[2]

These are some of the factors causing the most needy members of society to wait one to two years for a disability decision while they face life-altering medical and financial stressors. In September 2016, the Office of Inspector General (OIG) determined that almost half (45%) of pending disability claims languish in prehearing development.[3] Due to the huge number of pending claims, currently more just under 906,000, and lack of sufficient staff, a claim can sit in a hearing office queue for 6-9 months before it reaches an employee for processing. Average case processing time is currently 597 days while Administrative Law Judge (ALJ) productivity declined nationwide even as the Agency hired more ALJs.[4] Today, despite a host of initiatives outlined in the Agency's Compassionate And REsponsive Service (CARES) plan, OHO does not expect average wait times to improve substantially until 2020.[5]

And yet, OHO could begin to make a dent in the backlog immediately, reduce wait times, and bring relief to thousands of claimants simply by fully engaging its existing cadre of highly trained senior attorney advisors (SAAs). SAAs can screen, develop, and decide claims that do not require a hearing—and they can do it within a few months rather than a few years. SAAs can meet with unrepresented claimants to advise them about the hearing process. SAAs can also identify evidentiary needs and develop the record as well as meet with claimants' attorneys to resolve cases without a hearing or obtain stipulations to streamline cases that require hearings. *Crucially, this cadre of skilled and experienced attorneys is prepared to act immediately and requires no additional funding or hiring.*

The Agency proposed eliminating the Prototype Pilot, which will require eleven States to reinstitute the reconsideration level at the Disability Determination Service (DDS). The change will negatively impact claimants in these States. The proposed change does not make the process more efficient. Instead of focusing its focus on implementing changes that will make the process even longer, SSA needs to focus its efforts on making the process more efficient. NTEU proposes that SSA make better use of the resources and processes with a proven track record.

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[1] http://OHO.ba.ssa.gov/about-OHO/what-we-do/
[2] *See* Statement of Judge Marilyn Zahm, President, Association of Administrative Law Judges, Before the House Ways and Means Committee, Sept. 6, 2017.
[3] Characteristics of Claimants in the SSA's Pending Hearings Backlog, A-05-16-50207, Sept. 2016.
[4] OIG Sept. 2017 SAA Audit Report, A-12-18-50289.
[5] SSA 2017 Updated Compassionate And REsponsive Service (CARES) and Anomaly Plan, submitted to The Hon. John Larson on Aug. 9, 2017.

REINSTATING SAA ADJUDICATORY AUTHORITY WILL INCREASE OHO'S DECISIONAL CAPACITY

SAAs have regulatory authority to fully adjudicate fully favorable decisions. An SAA, "*instead of an administrative law judge*," can conduct prehearing proceedings and issue fully favorable on-the-record (OTR) decisions, eliminating the need for a hearing.[6] Even when SAAs determine that claims cannot be decided without a hearing, they play a pivotal role by initiating case development as soon as the claim enters the hearing office queue, significantly reducing the 6-9 month wait time. Further, SAAs can request additional evidence. They can hold conferences with claimants' attorneys to resolve procedural and evidentiary issues. SAAs also can hold conferences with unrepresented claimants to explain hearing requirements and procedures.

Unfortunately, SAAs are an underutilized resource at OHO; most do not perform any of these roles in the hearing process. This was not always the case. In years past, when the Agency allowed full use of adjudicatory authority, SAAs contributed significantly to decreasing the number of pending claims and the extent of claimants' wait times.

- From 1995 to 2000, 475 SAAs adjudicated over 200,000 decisions with an average processing time (APT) of 100 days compared to 386 days for ALJ hearing decisions.[7]

- In 2007, when the Agency reinstated the SAA adjudication program, it acknowledged SAA adjudications conserved ALJ resources for more complex cases that required hearings, reduced the backlog, and increased adjudication capacity.[8]

- From 2007 to 2012, SAAs adjudicated a significant number of decisions. For example, in FY 2010 SAAs issued 54,000 decisions, 7% of all Agency dispositions.[9]

SAA disposition numbers from 2008 to 2013 were striking:[10]

Year	***SAA dispositions***
2008	24,575
2009	36,366
2010	54,186

[6] 20 CFR § 404.942; § 416.943 (emphasis added). SAAs can exercise this authority if: new and material evidence is submitted; there is an indication that additional evidence is available; there is a change in the law or regulations; or there is an error in the file or some other indication that a wholly favorable decision could be issued. The Regulation currently extends to February 2018. 82 FR 34400.
[7] Statement of Jim Hill, NTEU President, Hearing Before the Subcommittee on Social Security, March 16, 2000, Serial 106-44. OHO did not compile an official final study of this SAA program. OIG July 2011 SAA Audit Report, A-12-10-11018, Appendix H.
[8] Chief Judge Bulletin 07-10.
[9] OIG July 2011 SAA Audit Report, A-12-10-11018.
[10] OIG July 2011 SAA Audit Report, A-12-10-11018.

2011	53,253
2012	37,422
2013	18,627

SAA decision processing time also improved claimant wait times. In FY 2010, SAA decisions took only 165 days to process compared with 462 days for all cases. [11]

The value of the SAA adjudicatory program has been widely accepted. OIG acknowledged in its 2013 audit report that the "SAA program has contributed to both an increase in adjudicative capacity and improved average processing time."[12] Hearing office managers reported that office goals were met or exceeded due to SAA dispositions. One manager reported that SAAs issued between 50 and 135 cases per month, and another reported that SAAs handled 20% of the office productivity goal.[13] The OIG acknowledged that "*SAAs' additional adjudicatory capacity is especially important when the Agency is struggling to reduce its pending hearings backlog.*"[14] The OIG recommended that OHO consider expanding the types of cases SAAs adjudicated and align SAA positions and promotions with predicted workloads.[15]

Nevertheless, in the face of surging hearing requests in 2014, OHO eliminated SAA adjudicatory authority and imposed an arbitrary cap of 7,500 SAA decisions. Currently, OHO prohibits nearly all of its 550 highly experienced SAAs from independently screening pending claims or adjudicating fully favorable OTR decisions. OHO recently announced its intent to revive the National Adjudication Team, which will allow approximately 25 SAAs to adjudicate cases that are subject to a higher level of scrutiny than that of a decision issued by an ALJ.

Additionally, hearing office supervisors (many of whom are not attorneys) select and assign cases to SAAs to review. If the SAA determines the case can be paid without a hearing, the SAA must write a detailed case analysis for an ALJ to review. If the ALJ agrees, the SAA writes the decision for the ALJ to review and sign (although the SAA has worked the case, the ALJ gets credit for the disposition). SAAs are allowed two hours to review cases assigned for OTR review, regardless of the size of the file or number of issues involved. SAAs may not independently obtain medical or vocational expert opinions or otherwise develop the claim. If the claim cannot be paid, the SAA completes a summary of the medical evidence and sends the case back to the queue—where the case will languish for 6-9 months before any development will be initiated. The case will not be scheduled for a hearing for another 2-3 months. By the time the hearing actually takes place, the claimant will have waited a year or more from the date he or she requested a hearing.

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[11] *Id.*
[12] OIG June 2013 SSA Audit Report, A-12-13-23002.
[13] OIG July 2011 SSA Audit Report, A-12-10-11018.
[14] OIG June 2013 SSA Audit Report, A-12-13-23002 (emphasis added).
[15] *Id.*

The Agency's arbitrary refusal to allow SAAs to fully adjudicate favorable OTR decisions needlessly slows down the disability hearing process. From 2007 to 2013, when SAAs had full adjudicatory authority, they produced a high number of quality OTR decisions and significantly reduced claimants' wait times. Since 2014, the Agency has restricted this talented and dedicated cadre of legal professionals from resolving cases early in the hearing process. The Agency could improve the disability determination process and expand decisional capacity—immediately and at almost no cost—by fully using SAAs' legal, analytical, and programmatic skills.

SENIOR ATTORNEY ADVISORS ARE POISED TO IMPROVE OHO'S PUBLIC SERVICE

OHO's SAA deal with the intricacies of the legal-medical aspects of the Social Security disability program every day. In fact, SAAs generally have two years of experience working as an attorney advisor (AA) before being promoted to SAA. Whereas an ALJ can be hired without any SSA experience and allowed to adjudicate cases. SAAs are experienced disability practitioners, well-versed in the law and possess a wealth of adjudicatory experience. Most have worked on thousands of cases and routinely advise ALJs. They are dedicated professionals who take pride in their work and are committed to the Agency's public service mission, a logical and reliable adjunct to the ALJ corps.

The public would be better served if OHO leveraged the skills of its SAAs to screen, develop, and adjudicate OTR decisions, conduct pre-hearing conferences, and work with claimants' representatives to simplify issues requiring a hearing. The public would be even better served if OHO expanded the role of SAAs to include deciding unfavorable decisions on the record as claims examiners.

A. OHO Should Restore SAA Full Adjudicatory Authority

Currently, there are 550 SAAs at OHO.[16] With full adjudicatory authority, this cadre would significantly streamline and expedite the disability hearing process at no additional taxpayer expense. Consider:

1. SAAs Increase Adjudication Capacity

The Agency has hired approximately 300 ALJs in the past few years at great taxpayer cost. Most of these ALJs are new to the Agency and require significant training (at significant cost) and initially work a reduced workload while they learn the job. SAAs, by comparison, are fully trained. Each SAA has at least three years' of experience at OHO; most have substantially more. SAAs are a ready and reliable decision-making resource that can decrease the backlog and claim processing time without additional expensive hiring. They have regulatory authority to fully adjudicate certain cases without a hearing. They also would

[16] Although OHO has 750 positions allocated for SAAs, instead of promoting GS-12 attorney-advisors, OHO has kept 200 of these positions unfilled since 2009. As a consequence, skilled GS-12 attorney-advisors have moved into non-legal management positions, or left the Agency.

continue to write the more difficult ALJ decisions, thereby providing management with flexibility to direct either decision-making or decision-writing resources, as needed.

2. SAAs Save ALJs Time

Under current regulations, ALJs are the only OHO employees who can hold hearings. Allowing SAAs to screen and adjudicate OTR decisions in cases that do not require hearings leaves more time for ALJs to prepare for hearings, hold hearings, and make decisions in cases that require hearings. ALJs are under pressure to dispose of 500-700 cases per year. Allowing SAAs to fully adjudicate OTR decisions will conserve ALJ time and redirect staff resources to support ALJ dispositions and goals.

3. SAAs Require Less Staff Resources

Hearing office staff must conduct extensive development for ALJ cases. However, no such staffing is needed to process cases that a SAA adjudicates on the record, significantly reducing administrative costs. In OTR cases, the staff does not have to implement standing ALJ orders for case development, organize voluminous and often duplicative evidence, or schedule medical or vocational experts. And, because most hearing offices are significantly understaffed, preserving staff to support ALJ needs will produce greater efficiencies at the ALJ level.

Senior attorney advisors are trained to quickly recognize serious disabilities and analyze sophisticated and voluminous medical evidence. They do not require a cadre of support staff. They easily can identify gaps in the record. They can move cases in two months instead of two years.

To address the hearing backlog effectively and immediately, the Agency can and must:

- Restore full adjudicatory authority to SAAs, including signatory authority.
- Allow SAAs to independently screen cases, including cases assigned to ALJs.
- Allow SAAs to fully develop cases, including obtaining medical and vocational opinions.
- Promote more GS-12 attorney-advisors to GS-13 SAA positions.

These are tried and proven processes in adjudicatory proceedings. Indeed, a similar federal agency, the HHS Office of Medicare Hearings and Appeals (OMHA), has implemented many of them. Like OHO, OMHA faces a daunting number of current pending claims. OMHA, however, recognizes the value of using its experienced attorneys to expand the pool of available adjudicators. To increase efficiency and streamline the appeals process, OMHA allows its attorneys to independently decide and issue OTR

decisions.[17] OMHA also allows attorneys to adjudicate claims on the record in which the claimant does not wish to appear at a hearing.[18] OMHA expressly recognizes that attorneys are as capable of processing these appeals as ALJs, but faster and at a lower cost.[19]

Implementing the proposed measures at OHO will optimize resources, increase adjudicatory capacity, increase dispositional productivity, and provide immediate and significant relief to claimants. These measures also will create a career ladder, and provide increased incentives and advancement opportunities for productive and valuable employees. Inexplicably, OHO is the only disability adjudication component that provides no career ladder after the initial GS-11 or 12 attorney advisor entry level position. The Office of Inspector General, the Office of General Counsel, and the Appeals Council all provide a career ladder to a GS-14. Rather than create a career ladder and incentivize legal and professional excellence in its ranks, OHO has told its skilled GS-12 attorneys who seek promotional opportunities that they can either find a managerial position or leave the agency. The practice of underutilizing and disincentivizing skilled attorneys in whom OHO has invested years of training serves no one, least of all the claimants who need their services.

B. The Agency Must Allow Senior Attorneys and Attorney Advisors to Conduct Pre-Hearing Conferences.

In October 2016, OHO began a pre-hearing conference pilot in some hearing offices. A few days per month, SAAs met with unrepresented claimants a few weeks prior to their scheduled hearings.[20] Following a uniform script, the SAAs told claimants about their right to an attorney and provided a list of attorneys and representatives. Because the SAAs had reviewed the cases prior to the conference, they were able to ask claimants specific questions about recent work activity and medical treatment. This enabled SAAs to resolve evidentiary gaps in the record and recommend specific additional development before the hearing.

OHO's data shows that pre-hearing conferences were productive and successful. Hearing postponements decreased. According to the Agency's 2017 Updated CARES and Anomaly Plan, claimants who attended prehearing conferences went on to complete their hearings without postponement 56 percent of the time, compared to 28 percent for those who did not participate in a prehearing conference.[21] Beyond this, claimants were happy to talk to someone about their case. Most were unaware they had a right to representation. Some withdrew their claims. ALJs benefitted from the pre-hearing conferences because claimants came to hearings informed about the right to representation and other

[17] 82 FR 4974, January 17, 2017; 42 CFR § 423.2038. OMHA will also allow attorneys to issue certain dismissals and decide specific remands that are not involved in the SSA disability claims process.
[18] 42 CFR § 423.2038.
[19] 82 FR 4974.
[20] The conferences were recorded.
[21] Postponing and rescheduling a hearing wastes a hearing slot, ALJ time and staff resources, and costs associated with reserving medical experts, vocational experts, and hearing reporters (who are paid regardless of whether the claimant appears or the hearing is held).

procedural matters. SAAs reported that conducting pre-hearing conferences improved morale because they knew they were making a difference and providing a service that claimants appreciated.

Despite proven benefits to claimants, OHO staff, and hearing office workflow, OHO discontinued pre-hearing conferences in January 2017 and redeployed SAAs to focus on what the Agency termed a decision writing "crisis."[22] OHO plans to reinstate pre-hearing conferences, but on a limited basis and only with unrepresented claimants.[23] Rather than restrict measures that yield proven results, OHO should expand pre-hearing conferences to provide even greater efficiencies by allowing SAAs to meet with claimants' attorneys and representatives to obtain stipulations and discuss evidence.

1. Stipulations.

SAAs and claimants' attorneys and representatives can use pre-hearing conferences to reach written stipulations as to uncontested issues. For example, there often is little dispute as to the onset date of disability or whether the severity of a claimant's impairments meets or equals a listing. These and other stipulations to facts not in dispute would simplify the ALJ's case review, reduce the number of issues to be addressed at the hearing, and eliminate the need for decision writers to revisit the same issues again when they draft ALJ decisions.

2. Evidence and On-The-Record Decisions

A pre-hearing conference is the ideal venue for SAAs and claimants' representatives to discuss and procure updated medical evidence and address gaps in the record. A pre-hearing conference is also the ideal venue to examine whether a hearing is needed, whether the claim can be decided on the record, what evidence would make that possible, and any other matters that might facilitate the expeditious processing of the claim, whether at hearing or on the record.

Again, OMHA has recognized the value of expanded pre-hearing conferences conducted by experienced attorneys. In OMHA's FY 2018 budget request, the Chief Administrative Law Judge said:

> OMHA will invest in the hiring [of] additional senior attorneys to support its administrative initiatives to address the pending workload. For example, the agency's settlement conference facilitation program for interested appellants having multiple claims pending at OMHA was established in June 2014. OMHA

[22] OHO has acknowledged that misaligned hiring practices (hiring judges without hiring support staff) is one reason for the burgeoning number of cases waiting to be written. However, we are not aware of any advance steps taken to mitigate the predictable increase in cases to be written. At the same time, OHO continued to press a quality initiative in which attorneys reviewed (rather than wrote) decisions and sent them back to the writing queue for corrections to minor mistakes that had no material effect on the decisional outcome. The number of unwritten decisions climbed steadily each month, from about 34,000 at the beginning of the fiscal year to 73,000+ by September 2017.

[23] SSA 2017 Updated Compassionate And REsponsive Service (CARES) Plan.

> has been encouraged by the results of the pilot program, *which has resolved 10,383 appeals or the equivalent of one year of work for 10 ALJ teams* (data as of February 28), and anticipates incorporating the program into its business model on a permanent basis.[24]

To make good on the CARES commitment to benchmark with other agencies and learn about successful strategies, OHO would do well to follow OMHA's example and expand its adjudicatory capacity by embracing its SAA cadre. OHO's SAAs have the skills to conduct pre-hearing conferences and resolve claims that do not require expensive and time-consuming hearings, and the ability to narrow issues and streamline the hearing process for those claims that do.

C. The Agency Should Create a Claims Magistrate Program

SAAs can quickly recognize serious disabilities and analyze sophisticated and voluminous medical evidence. They do not require a cadre of support staff. They easily can identify gaps in the record. They can move cases in two months instead of two years.

These skills easily support a new Claims Magistrate Program. Under this program, SAAs would screen the hearing office queue to identify cases that have fewer than 300 pages of medical evidence. Represented claimants would waive their right to a hearing but preserve the right to appeal. Representatives would submit a brief in support of the claim. The SAA claims magistrate would analyze the case and the entire record and issue a decision. This model is similar to the OMHA Settlement Conference program, in which claimants can waive a hearing and allow attorneys to adjudicate claims on the record without any ALJ involvement.[25]

Although a Claims Magistrate Program would require new regulatory authority, the Program would expand OHO's adjudicatory capacity and streamline the hearing process by creating another adjudicatory avenue. Claimants who waive a hearing would get a faster decision without forfeiting their appeal rights. And, the Program would increase productivity, create a career ladder where currently there is none, and provide increased incentives and advancement opportunities for productive and valuable employees.

CONCLUSION AND RECOMMENDATIONS

Every claimant is entitled to a disability claim decision, but not every disability claim requires an expensive and time-consuming ALJ hearing. The current OHO model, in which only ALJs can hold hearings and the Agency continually needs more ALJs, more support staff, and more funding, is not sustainable. Nor is the practice of introducing one

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[24] The Office of Medicare Hearings and Appeals (OMHA's) Fiscal Year (FY) 2018 Congressional Justification (Budget Request) with attached Plan (emphasis added).

[25] OMHA Regulations 42 CFR § 405.1038 and § 423.2038 provide mechanisms for deciding cases without an oral hearing or ALJ involvement based on the written record under certain circumstances, including the claimant's waiver. OMHA takes the position that ". . . well-trained attorneys can review the record, identify the issues, and make the necessary findings of fact and conclusions of law when the regulations do not require a hearing to issue a decision in the appealed matter." 42 FR 4982.

initiative after another only to halt them in order to redeploy resources to address one workload crisis after another (many of them predictable and months, if not years, in the making). The only business model realistically capable of providing mission-critical services on a sustained basis is a *permanent expansion of adjudicatory capacity*—but without the costs associated with hiring and onboarding new ALJs and more support staff. OHO would do well to recognize, as OMHA has, that the Agency has built-in capacity if only it would allow its talented and experienced senior attorneys to use their legal skills and program knowledge to process claims early in the hearing office process.

NTEU recommends:

1. Senior Attorney Advisors should be allowed to fully exercise their regulatory authority to screen, develop, and issue fully favorable decisions where the medical evidence supports disability.

2. Senior Attorney Advisors should be allowed to conduct comprehensive pre-hearing conferences with claimants and their attorneys with the goal of resolving cases as early as possible in the hearings process. Senior attorneys should be allowed to enter into wide-ranging stipulations with claimants' attorneys concerning procedural and evidentiary issues.

3. The Agency should establish a Claims Magistrate Program to allow Senior Attorney Advisors to review and decide claims without a hearing. In developing such a program, the Agency would have wide latitude to decide the types of cases suitable for magistrate decisions and the contours of the program.

4. Rather than hire more ALJs who require extensive training and additional support staff, the Agency should promote its trained and qualified GS-12 Attorney Advisors to fill all the available 200 Senior Attorney Advisor positions.

NTEU believes these recommendations will significantly increase the Agency's adjudicatory capacity, and thereby reduce the disability backlog, reduce case processing times, increase operational efficiencies, avert workload crises, and markedly improve the level of service the American public needs and deserves.

Thank you for the opportunity to provide our comments.

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July 25, 2018

The Honorable Sam Johnson
House Ways and Means Social Security
Subcommittee Chairman
House Ways & Means Committee
Washington, D.C.

Re: Hearing on Examining Changes to Social Security's Disability Appeals Process

Dear Representative Johnson:

I became aware only this morning of the Subcommittee's hearing on the examination of changes to Social Security's disability appeals process, and I am hopeful this letter reaches the Subcommittee prior to that hearing.

I am a 60-year-old single woman and a resident of Oklahoma who became disabled in September of 2017 as a result of neurological and physical disabilities that have made my ability to work in any meaningful capacity impossible. I spent 40 years working as a legal assistant and paralegal, and I greatly enjoyed my working life. My inability to work now is extremely distressing to me. Even more distressing is the Social Security disability process, which makes no sense to me at all.

Having been consistently and gainfully employed since the age of 15, and having definitely paid my fair share of taxes, I am incredulous that I cannot now obtain benefits under a system my tax dollars have funded. I have sold my home and all its belongings, as well as my automobile, to fund my medical care inasmuch as I apparently fall in the "gap" of insurance coverage. My lack of income disqualifies me for coverage under the ACA, Insure Oklahoma, or Sooner Care, and the state of Oklahoma did not expand Medicaid. I am therefore unable to work but somehow must find the money to continue my medical care. My good mother has provided me a home in which to live, and she has also financed my psychiatric care, which cannot go unattended.

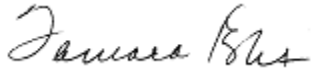
Although my neurological and physical conditions absolutely qualify me for Social Security Disability benefits, the recent determination by Social Security was that I do not meet whatever metrics are currently in place. SSA did make the finding that, although I am no longer able to perform the complex work of the legal field in which I spent 40 years, I am able to perform "simple and routine tasks". I have no idea what "simple and routine" work means, although it sounds like work that cannot possibly provide any meaningful living.

What is even more distressing is the apparently well-known fact that everyone's claims are initially denied, forcing them into the appeals process. That process, as you are aware, is a very lengthy one, further hindering my chances of obtaining the needed medical care and income.

I have read and re-read the language contained in the announcement of today's hearing and have no idea what "changes" are being examined. What I do know is that I am a citizen in need of immediate help. I wrote to Oklahoma Senator A.J. Griffin and Oklahoma Representative Jason Murphy to inquire how I could get help with medical insurance and the medical care I need, and both agreed that I have plumbed all sources currently available. I am therefore in need of Social Security disability benefits and am very hopeful that whatever changes are currently proposed to fix the "system" will be implemented so that formerly hard-working Americans such as myself can be helped.

Thank you for your consideration of this letter and for your public service.

Sincerely,



Tamara J. Burks

Written Testimony of
Jennifer Burdick
Community Legal Services, Inc.

Hearing Before the
U.S. House of Representatives,
Committee on Ways and Means
Subcommittee on Social Security

July 25, 2018

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Written Testimony of Jennifer Burdick
Submitted to the U.S. House of Representatives, Ways and Means Committee,
Subcommittee on Social Security
July 25, 2018

Chairman Johnson, Ranking Member Larson, and members of the Subcommittee, thank you for this opportunity to submit written testimony on the major proposed changes to the Social Security disability appeals process in prototype states, including Pennsylvania, Alabama, California, Colorado, Louisiana, Michigan, Missouri, New Hampshire, and New York, by reintroducing the reconsideration level of review. Community Legal Services of Philadelphia (CLS) strongly opposes re-introducing reconsideration review in prototype states. Reintroducing reconsideration will harm the vast majority of claimants by extending their wait times for hearings, and producing bureaucratic disentitlement of otherwise eligible claimants in its discouragement of claimants to pursue their claims. It would be a far more efficient use of resources to invest in recommendations to increase the accuracy of decisions at the initial level, than to implement a duplicative level of review for all claimants.

My name is Jennifer Burdick. I am a Supervising Attorney for the Supplemental Security Income (SSI) Unit at CLS, in Philadelphia, PA. CLS, a national leader in poverty law, provides free civil legal assistance to low-income adults and children with disabilities who seek to obtain or retain Supplemental SSI benefits. We advocate on behalf of hundreds of legal aid clients with severe disabilities that our community represents every year, and our advocacy is informed by their experiences. Since 1974, CLS has been a national leader in advocating for the Social Security disability program, bringing landmark litigation, winning significant improvements in benefits and policies, and leading a national advocates' workgroup. We also meet regularly with Pennsylvania's Director of the Bureau of Disability Determinations to discuss issues and process related to initial applications. CLS' individual legal representation directly informs our advocacy and makes us uniquely qualified to identify and address systemic issues that prevent vulnerable populations from accessing vital benefits and services.

The subject of this hearing is extremely important to people with disabilities. Title II and SSI cash benefits, along with related Medicaid and Medicare benefits, are essential for the survival of millions of individuals, including children, with severe disabilities. They rely on the Social Security Administration (SSA) to promptly and fairly adjudicate their applications for disability benefits. Unfortunately the system has been bogged down in serious, unprecedented delay. As the backlog in disability claims has ballooned claimants often experience more than two-year-waits for hearings before Administrative Law Judges (ALJ), with some of the longest waits in

Philadelphia where I practice. People with severe disabilities have been bearing the brunt of the delays. Behind these numbers CLS has had clients with disabilities whose lives have unraveled while waiting for decisions. One of my clients, a very young, medically fragile, two-year old, who has been repeatedly hospitalized for pneumonia on top of coping with near-blindness and significant congenital heart defects, has had to wait for more than two years for a hearing in her case. During that wait, her mother could not work due to her frequent medical treatment, and they fell into homelessness and had to live in a shelter while she awaited her hearing, which undermined her recovery. Many of our adult clients also face homelessness or live in abandoned and substandard housing and often face eviction or foreclosure during the wait. In other cases, I have watched as my client's medical conditions deteriorated, and just last month one of my clients died while waiting for a decision on her SSI claim. Numerous recent media reports across the country have documented the suffering experienced by these individuals. Your constituent service staffs are likely well aware of the situations faced by people living in your districts and they are extremely helpful, when they are there to assist.

Let me be unequivocal about several points on which I hope we all agree. First, the current backlog of individuals waiting to have their Social Security disability claims adjudicated is far too large, the waits are far too long, and such wait is causing catastrophic harm for individuals with disabilities across the country. Second, it is imperative for the long-term vitality of the Social Security disability adjudicatory system that entitled claimants receive benefit awards at the earliest opportunity to eliminate the long waits and avoid unnecessary and costly hearings, as well as to avoid the costs of the agency repeatedly evaluating claims for the same individuals. It is important that we take steps that will address the backlog and reduce the unacceptable delays that people are experiencing.

However, there have been no conclusive studies or reports that suggest that the reintroduction of reconsideration in the prototype states will achieve these goals. On the contrary, the reintroduction of the reconsideration stage will more likely increase the overall wait time that most of your constituents experience and serve as an administrative obstacle for entitled individuals to pursue their claims, and possibly increase administration costs throughout the program. Reconsideration should not be reintroduced in states that have piloted its elimination. In fact, it would make far more sense to eliminate reconsideration nationwide, than reintroduce a duplicative, time consuming process to the disability adjudicatory process, that comes with large costs for little benefit.

I. Reconsideration is an Ineffective Procedural Step and its Reintroduction Would Not Benefit Many Claimants.

In CLS's experience, the reconsideration level of review was a duplicative, time-consuming process that has little value. It essentially serves as an unnecessary a rubber stamp.[1] Although CLS is in a prototype state, several of my colleagues were practicing prior to that development, and we all continue to represent people who must go through the reconsideration process before they can present their case to an ALJ when their benefits are terminated subject to a continuing disability review. Reconsideration review is essentially an exact duplication of the initial application stage, except with separate personnel: a second DDS examiner re-reviews the file that the first DDS examiner reviewed and denied, subject to identical procedures as the initial application stage, without any additional evidence or a face-to-face meeting with the claimant.[2] It is unsurprising, considering the limited nature of this review, that almost 89% of cases are affirmed at this level.[3] As a result, very few claimants who were denied at the initial level receive any benefit from this level of review.

In most cases, if the claimant's case is too complicated to garner a favorable determination when a DDS examiner reviews the paper file during the initial review, nothing will change if another examiner re-considers this same file at the reconsideration stage, subject to the same procedures.[4] Although examiners at reconsideration may review additional evidence, most examiners do not and many claimants are not aware they can submit additional evidence. Indeed, because there is no electronic record system available to claimants or representatives at the reconsideration stage, it is quite difficult to submit additional evidence. As a result, reconsideration often is essentially a case-check by a peer examiner.[5] Some cases require face-to-face meetings to really understand how a combination of impairments that may not seem disabling a first blush, in fact, are. Absent that, this step is truly an inefficient use of time and resources except to help catch obvious mistakes.

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[1] SSA has long questioned the efficacy of continuing the reconsideration step and has piloted several alterations or eliminations of consideration since 1984. Dublin, Jon C., *Social Security Disability Adjudicative Reform: Ending the Reconsideration Stage of SSDI Adjudication after Sixteen Years of Testing and Enhancing Initial Stage Record Development,* COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET at 1, n. 2 (2016).

[2] William Morton, Cong. Research Service, RL 7-9453, The Reconsideration Level of Social Security's Administration Appeals' Process: Overview, Historical Development, and Demonstration Projects (2018) at 6 ("Most reconsiderations of initial application determinations are subject to a *case review* only, which involves a review of all the evidence in the claims file by an examiner who was not part of the initial determination. Case review does not involve a face-to-face meeting between the claimant and the adjudicator");(emphasis added); Dubin at 3 ("The reconsideration stage is handled under identical procedures as the initial application stage except that different personnel within the respective DDS offices makes the reconsidered decisions.").

[3] Dubin at 4

[4] Morton at 6.

[5] Dubin at 3, n. 13.

Data confirms that reconsideration review is ineffective. Nationwide, the reversal rate at the reconsideration level in non-prototype states is extremely low, at approximately11-13%.[6] Even assuming that the same reversal rate would apply in prototype states, the SSA only predicts that reintroduction of reconsideration would have benefitted 21,000 in 2017. That is a very small number.

Far fewer than 11 to 13% of claimants will benefit if reconsideration is reintroduced in prototype states.[7] Prototype states have higher accuracy rates with initial applications than non-prototype states. Thus, many of the cases reversed at reconsideration in non-prototype states would likely have been allowed during initial review in prototype states.

II. Reconsideration Will Increase Adjudication Wait Times for Most People.

The implementation of reconsideration in prototype states will hurt the vast majority of claimants by extending the amount of time it takes to adjudicate their Social Security disability claims. It takes an average of 101 days to process a reconsideration claim. Because the vast majority of claimants who are denied at the initial level, are also denied at the reconsideration level, that means the reintroduction of reconsideration will require most claimants to wait an additional 101 days for their Social Security claims to be processed. Such an additional delay is devastating, particularly considering that people are waiting on average about two years for a hearing right now.[8] Even by SSA's own estimates, while 21,000 people may have received a faster determination based on 2017 numbers, close to 106,000 would have been subject to an additional delay to accommodate the reconsideration step. Such additional wait time is untenable and will

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[6] Morton at 5.

[7] Although it is clear that the number of people who will benefit from the introduction of reconsideration is very small, it is unclear what that number is. SSA claims that in 2017, using the average reversal rate at reconsideration from reconsideration states, that 21,000 people who were denied, would have been granted benefits at the reconsideration level. But, that assumption does not take into account that in prototype states more people are given favorable decisions at the initial level than in states that have reconsideration. Morton at 50-51 (citing testimony from Commissioner Barnhart, U.S. Congress, House Committee on Appropriations, Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies, *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 2004,* 108th Cong. 2nd sess., March 4, 2003, pp 76-77, https://hdl.handle.net/2027/mdp.39015090414247). Accordingly, because prototype states are better at awarding benefits during the initial review, it is possible that there will be a lower reversal rate if reconsideration is introduced in those states. Thus, re-introduction of reconsideration may be of very little benefit.

[8] Notably, the additional wait-time will not be reflected in Social Security's data regarding the hearing backlog. Data regarding the backlog only includes individuals as of the time they request a hearing before an ALJ. Because the reconsideration step is before such an appeal, this time period will not be reflected in the national hearing wait times. However, constituents experiencing these additional delays will certainly consider these 101 days as part of the overall time they were pursing their benefits.

certainly add to the number of Americans with disabilities who die while waiting to have their disability claim adjudicated.

III. Reconsideration Will Hurt Vulnerable Americans By Discouraging Them From Pursuing Their Claims.

The Social Security disability claims process is confusing for many people. When applying for Social Security disability, one is interviewed in the local office, but will subsequently learn that their case is being evaluated hundreds of miles away (at least in Pennsylvania). Then they may talk by phone to an examiner who they will never meet, who will send them four or five sets of complicated forms expecting prompt completion. In some cases, claimants are also asked to attend appointments with consultative doctors who can be located as far as fifty miles away, who will, after a brief examination, sometimes as short at ten minutes, write a report the claimant will never see. Eventually the DDS examiner will write a decision that will be sent to the local office and then sent back to the claimant. The claimants will have only sixty days to appeal. In reconsideration states, if they do appeal, another reviewing process takes place that the claimant has very little involvement in. When a second examiner writes a decision sent to the local office denying the claim, the claimant needs to file a subsequent appeal to request a hearing on their claim before an ALJ.

For a variety of reasons, including the underlying disabilities that many claimants suffer, many claimants denied at the initial level do not appeal to the reconsideration level, even though they may be as likely to be entitled to benefits as those who did appeal. Even fewer will pursue their claims to the hearing level.

In our experience, many individuals who seek disability benefits are very confused by the Social Security adjudication system and have a hard time understanding their right to appeal and the processes required to effectuate that right. This system is drastically more confusing in non-prototype states, where claimants are required to undertake efforts to appeal their claim not one but **two separate times** in order to have it considered by an ALJ. That means individuals who may be unable to read or comprehend, or have physical difficulties getting to a Social Security office, or have frequent periods of near incapacitation due to mental illness, need to successfully receive the denial, learn its contents, and take steps to file an appeal in a timely fashion **twice**. Many people believe that once they appealed, and have been denied, that their claim is exhausted even though that is not the case. This is acknowledged by SSA, which has suggested that claimants are less likely to appeal after a denial on reconsideration. For example, on May 1, 2001, SSA Associate Commissioner for Disability Kenneth Nibali issued DDS Administrators' Letter No. 566 and acknowledged that "some of the people we are paying at the DDS level would not have appealed and been paid by OHA [now OHO] under the old process." In addition, Commissioner Astrue testified in 2010 that the ALJ appeal rate was higher in prototype

states than reconsideration states.[9] Higher appeal rates to ALJs in prototype states should not be seen as a problem, but an indication that the system is working to provide access to a population, that has self-identified as extremely vulnerable on the basis of disabilities. It is extremely important that a system that is designed to serve a vulnerable population diagnosed with impairments that range from extremely physically limiting, to intellectually incapacitating, is as procedurally simple to understand as possible.

IV. There Is No Research To Support SSA's Justifications For Reinstating Reconsideration in the Prototype States.

The President's FY 2018 and FY 2019 budget requests include a provision to reinstate the reconsideration state in 10 states, including Pennsylvania.[10] The budget justification is that it will "yield a program savings and reduce the number of claims waiting for an ALJ decision."[11] SSA claims that reintroduction of the "reconsideration" level of appeal is a strategy to reduce the backlog because it will allow more people to receive favorable determinations with less wait time.[12] However, there is no objective evidence that supports this claim.

Since 2000, SSA has tested the elimination of reconsideration in ten states: Alabama, Alaska, California (Los Angeles), Colorado, Louisiana, Michigan, Missouri, New Hampshire, New York (Albany and New York City), and Pennsylvania.[13] SSA planned to eliminate reconsideration nationwide, with a proposed regulation issued in January 2001.[14] The nationwide implementation plan was based on the preliminary results from the prototype states, which showed that claims were awarded earlier in the process in prototype states; that accuracy was comparable to non-prototype cases (i.e., with only initial review prototype states had the same accuracy as states employing both initial and reconsideration review); and that denied claims moved to the hearing level sooner.[15] **In other words, preliminary research showed that more individuals receive favorable determinations sooner in prototype states, than in states that still had the reconsideration stage.**

SSA has not released any studies or reports that support their argument that individuals receive faster decisions in reconsideration states. Indeed, the Congressional Research Service (CRS) found that SSA has never released a final report that evaluated the prototype model, despite its

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[9] Morton at 51.
[10] Morton at 51.
[11] SSA, *Justifications of Estimates for Appropriation Committees, Fiscal Year 2019,* Feb. 12, 2018, pp. 9-10.
[12] Letter from Nancy Berryhill, Acting Commissioner of the Social Security Administration, to Senator Casey (June 28, 2018).
[13] 74 Fed. Reg. 48797; Morton at 43.
[14] 66 Fed. Reg. 5494 (Jan. 19, 2001).
[15] Morton at 47 (showing that more claimants were allowed at the initial stage in prototype states than in non-prototype states considering both the initial and reconsideration rates combined).

status as an experiment for the last eighteen years.[16] As discussed above, the data that does exist indicates that the vast majority of claimants in reconsideration states will face longer total adjudicatory wait times because they will have to go through an additional process that takes 101 days.

Similarly, there is no data on the value, cost, or efficiency of the reconsideration level of review post 2002, with the exception of that provided in testimony by Commissioner Astrue in 2010.[17] In May 2001, SSA announced that the national rollout of prototype would be deferred because of increased program costs due to the higher allowance rate "since some additional people we are paying at the DDS level would not have appealed and had been paid by OHA [now OHO] under the old process."[18] This is concerning commentary. In effect, SSA stated that it is better to exhaust claimants and prevent appeals which might lead to the payment of life-sustaining benefits for a vulnerable population, than implement a system that leads to more eligible beneficiaries getting benefits sooner.

Moreover, SSA did not release any studies or reports explaining the basis of their belief that the prototype model increases program costs. There was no report that detailed how the increased administrative costs associated with additional hearings for a small percentage of claimants who would otherwise have been granted benefits through reconsideration, was not offset by the cost-savings from eliminating the personnel and resources required to undergo that entire step for a much larger pool of claimants.[19] Or whether when evaluating those costs, they factored in costs associated with frequent filers.[20]

SSA's claim that ending the prototype program will generate cost savings is belied by the fact that reintroduction of reconsideration will be quite costly to implement in prototype states. State DDSs in prototype states have reported that reintroduction of reconsideration will require them to hire hundreds of new government employees. For example, the Pennsylvania Bureau of Disability Determinations has requested to hire a hundred and thirty new examiners to implement reconsideration. Yet, this endeavor would benefit a maximum of about 21,000 individuals nationwide based on FY 2017 data, and probably far fewer. That means more than

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[16] Morton at 46 ("CRS found no reports that evaluated SSA's development or management of the Prototype model"), 51.
[17] Morton at 51.
[18] Disability Determination Services Administrators' Letter No. 566 from Associate Commissioner for Disability (May 1, 2001); *see also* Morton at 44 (quoting letter).
[19] Dublin at 15.
[20] In my experience, many claimants who are not able or do not understand that they can appeal a denial and request a hearing, will reapply, requiring SSA to expend resources to undergo subsequent (sometimes many) initial reviews. This sort of frequent filing at the initial level is very cost inefficient, particularly if the persons claim is hard to adjudicate at the initial level because it contains complexities hard to tease out through a paper review.

89% of the applicants who were denied initially, will not receive any relief through the costly re-introduction of reconsideration. Hiring hundreds of new government employees for a slightly faster adjudication for 11% or fewer cases is the epitome of wasteful government spending.

The dearth of data or research evaluating the prototype and reconsideration models is alarming. It means that no meaningful assessment can be performed as to whether making this drastic change, and reintroducing reconsideration review nationwide, can lead to the results the SSA claims. As discussed above, Social Security's justification that this step will save time for claimants does not bear scrutiny for the vast majority of claimants. Thus, the only rationale offered, that this step may save resources, appears to be premised on "bureaucratic disentitlement" of otherwise eligible claimants, or on harassing claimants to the point they abandon claims for benefits through unjustified, excessive, or unreasonable delay. This Committee should not promote a process with this purpose.

V. There Are More Effective Ways to Make Social Security Disability Adjudications More Efficient and Less Costly.

Most reversals at the reconsideration level result from the submission of new evidence that was not available to the initial adjudicator(s).[21] This fact is important: it indicates that the main value that reconsideration provides is to allow Social Security to re-evaluate individuals whose disabling impairments might have worsened or changed since their initial application in ways that now make them obviously eligible, thereby eliminating the need for a needless appeal for an Administrative Hearing. It is not efficient to re-review all applicants for this purpose. Many claimants who are denied at the initial level, and who will subsequently appeal, will not have evidence of new or substantially worsening conditions. Instead of implementing reconsideration for all claimants denied at the initial level, it would be much more efficient to create or expand upon pre-existing programs in the Social Security adjudicatory processes that allows for expedited re-processing at the DDS level of cases based on new evidence or obvious errors, to avoid those cases going to unnecessary hearings.

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[21] Morton at 10 (quoting *CM Part V: Temporary Instruction No. 257: D/O Contacts with Dissatisfied Claimants,* April 16, 1959)), 11, 13, 19 ("One-quarter of the reconsideration decision changes were the result of consultative examinations. Nearly one-half were based on the introduction of new medical evidence submitted by the claimant or obtained from a treating source, and the remainder were the result of additional vocational development or a combination of vocational development and evidence gleaned from the interview")(quoting U.S. Congress, House Committee on Ways and Means, *Committee Staff Report on the Disability Insurance Program*, 93rd Cong., 2nd sess., July 1974 (Washington: GPO, 1974), p. 240, https://hdl.handle.net/2027/umn.31951d03549096w)).

Expand Use of Pre-Hearing Conferences and Informal Remands: One example of a pre-existing policy which could be expanded upon is HALLEX 1-2-5-10. This policy provides that an ALJ can refer a case for a prehearing case review in certain circumstances, including that additional evidence is available that may be determinative. If appropriate, the agency can issue a favorable or partially favorable decision, saving resources required to have an unnecessary hearing. This policy is under-utilized, and should be expanded to improve efficiency.

SSA can also expand the use of HALLEX 1-2-5-12. This HALLEX encourages ALJs to send cases back to the state agency for review, prior to the hearing, in several circumstances where it is reasonably clear that a fully favorable determination is warranted based on circumstances including the receipt of new evidence. It also permits representatives to request the same. The DDS Director in Pennsylvania has informed CLS that ALJs and claimants representatives rarely, if ever, avail this policy to divert cases from expensive ALJ hearings to less-expensive reviews at the DDS level. This is likely because very few ALJ's and claimants' representatives are even aware of such policy. But in Pennsylvania, my office has begun using this policy regularly. With increased training and awareness of this policy, SSA and claimants could benefit from the time and cost savings of having obvious cases re-processed at the DDS level, avoiding the expense of a hearing, without subjecting all claims to this additional level of reconsideration.

Increase Accuracy of Initial Adjudications by Seeking Relevant Vocational Data: It is important to assess the frequency, intensity, and duration of the claimant's symptoms, as well as whether the claimant needs help performing the activities of daily living when symptoms are severe, to adjudicating a disability claim. Treating clinicians' notes are frequently insufficient because they emphasize diagnosis and treatment rather than the functional limitations and abilities of the patient. This emphasis often results in records stating that a patient is stable, improving, or at a baseline, without an adequate description of the effects on the patient's functional limitations or abilities. In our experience, testimony and records establishing that claimants impairments would cause them to be off-task a certain amount of the day or absent in the work setting, consistently leads to favorable determinations at the hearing level. SSA, however, does not solicit or request information about these metrics when developing claimants' files for initial review. Incorporating these sorts of questions in the initial requests to claimants treating doctors, and in the evaluations completed by Consultative Examiners, would likely increase the accuracy of initial adjudications, and thereby eliminate those cases from the hearing backlog.

Expand Use of On-The-Record Decisions: "On the Record" decisions, or OTRs, are disability findings issued without full hearings, when claimants' medical records show that they indisputably qualify for benefits. OTRs can be issued by ALJs before full hearings are held, or they can be issued by Senior Attorney Adjudicators (SAAs) before hearings are even scheduled. When SAAs issue OTRs, they prevent claimants from waiting as long as two years for hearings,

and save ALJ resources for more complex cases. In short, they are a "win-win": they get life sustaining benefits to qualified claimants faster, and conserve federal resources. Despite the benefits of OTRs, most SAAs have been reassigned in recent years to be decision writers. As a result, SSA OTRs fell from 54,000 decisions in 2010 to just 686 in 2017. While SSA does not publicize data on ALJ OTRs, advocates report they have declined as well. SSA recently committed to increasing OTRs to 15,000 for 2017, which is still just a tiny fraction of annual decisions. Further expanding the use of OTRs would enable SSA to avoid diverting time and resources to hold a hearing on a claim that could otherwise be decided based on the records in evidence. Expanding OTRs would not only save SSA resources but also enable eligible claimants to avoid unnecessary delay and obtain their much-needed benefits sooner.

Expand Use of Specialized Examiners: Social Security initial application accuracy could greatly benefit from expanding the use of specialized examiners. Certain populations benefit from particular regulations, like children and individuals battling substance abuse issues. People with mental illness who are homeless or housing insecure present difficult challenges for adjudication. One such program, the SOAR program, which assigns specialized adjudicators to initial applications from homeless claimants has been successful and should be expanded. Expanding the use of dedicated practitioners to adjudicate cases for similarly specialized claims, such as children's cases, age-18 redeterminations, compassionate allowance cases, or individuals battling active substance abuse issues would improve accuracy because the cases would be reviewed by individuals who are more knowledgeable about the challenges of these particular populations. More accurate assessments would lead to more accurate determinations, which would in turn decrease unnecessary appeals to the hearing level.

In summation, while CLS agrees that SSA needs to take steps to eliminate the harmful delay in Social Security disability adjudications, reintroducing a whole new level of review in prototype states will not meet the goal. Instead, it will extend wait-times for the vast majority of claimants in the system and discourage many of the most vulnerable Americans from pursuing their claims. SSA should focus instead on improvements in the initial application process and at administrative hearings. On behalf of the all the Pennsylvania clients with Social Security disability claims I represent, I thank you for the opportunity to provide written testimony.

HAP
HOMELESS ADVOCACY PROJECT
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August 7, 2018

TO: House Ways and Means Social Security Subcommittee

RE: Examining Changes to Social Security's Disability Appeals Process -
Hearing July 25, 2018
Written Comments

Dear Committee Members:

These comments are submitted by the Homeless Advocacy Project (HAP) and are focused on planned changes affecting the Social Security Administration's (SSA's) disability appeals process. Specifically, HAP will be addressing the proposed reintroduction of the Reconsideration step in the ten Prototype states, in which this step has been eliminated since the year 2000. HAP's home state of Pennsylvania is one of the ten prototype states that will be potentially affected by this change.

HAP is a Philadelphia-based nonprofit organization that provides free legal services to individuals and families, who are homeless or at risk of homelessness. Since its foundation in 1990, HAP has provided comprehensive legal assistance in a broad range of legal areas, including extensive representation of clients seeking to obtain Supplemental Security Income (SSI) and Social Security Disability (SSD) benefits. HAP provides disability representation at both the initial application level and at Administrative Law Judge appeal hearings.

In addition, in April 2007, HAP implemented Philadelphia's SOAR Project (SSI/SSD Outreach, Access and Recovery), a federally initiated program, developed by the Substance Abuse and Mental Health Services Administration (SAMSHA). The SOAR Project is an expedited SSI/SSD benefits application process for targeted disabled individuals who are homeless and mostly suffering from chronic severe mental illness.

These comments are being submitted subsequent to the Committee's July 25th hearing, which resulted in an issuance of a bipartisan press release and a letter to Acting Commissioner Berryhill, requesting that SSA *not* proceed with plans to reinstate the reconsideration level of appeal in the ten prototype states. HAP is in agreement with the Committee's position and stated reasoning contained therein, and wishes to add comments as detailed below.

1. Reconsideration is an Ineffective and Time Consuming Procedural Step.

The hearing testimony presented on July 25th and supporting documentation fully detail the lack of evidence in support of the effectiveness of the reconsideration stage in the SSA appeals process, and in fact demonstrate that reconsideration significantly increases wait time for the vast majority of claimants who are ultimately approved for benefits. The current national average wait time for an Administrative Law Judge (ALJ) hearing is close to 600 days. It takes an average of 100 days to process a reconsideration claim. Because the vast majority of claimants (close to 90%) who are denied at the initial claims level are also denied at the reconsideration level, the reintroduction of reconsideration will require most claimant to wait an additional 100 days for their SSI/SSD claims to be processed.

Long wait times are particularly burdensome for HAP clients, who are in especially vulnerable situations due to their homeless and/or transient housing situations. HAP represents SSA disability claimants who are street homeless, living in homeless shelters, doubled up with family or friends and who are otherwise in precarious living accommodations. Many of these individuals do not have reliable access to mail and telephones and, therefore, have an especially difficult time responding to correspondence from SSA and complying with the difficult and confusing claims process. In addition, the majority of HAP disability clients are suffering from severe mental illness, with various levels of accompanying inability to comprehend or process information and with periods of incapacitation. Many HAP clients cannot read. Others experience periodic hospitalizations or are lost for long stretches to the streets or other unknown locales. Adding an additional burdensome layer of procedure to an already overwhelming appeals process will hurt this population of disabled and particularly vulnerable Americans.

In HAP's experience, many individuals who are homeless or at risk of homelessness are unable to negotiate the SSA appeals process. Despite HAP's extensive outreach efforts and immersion in the community, many claimants remain unrepresented. In our experience, these individuals often are ill equipped to complete the initial SSI/SSD application process, respond to SSA correspondence, complete long SSA questionnaires, and attend scheduled SSA consultative examinations in unknown locations. If a person who is homeless does manage to make it through the initial application process and then obtains a denial (which may or may not be received), he or she is often unable to understand the appeals process and effectuate an appeal. Many are too discouraged, oftentimes related to the underlying disability (depression, anxiety, psychosis), to continue. In our experience, many of these individuals are unable to file a request for an administrative law judge hearing, the one-time appeal that is required in Pennsylvania and the other nine prototype states. To add an additional appeal level (reconsideration) would mean that these persons would be required to appeal their claim not one, but *two* separate times in order to have it considered by an ALJ.

In addition, it is important to note that the reconsideration level of appeal does not require a face to face meeting between the claimant and the adjudicator. (Reconsideration review is a documents-only review by an examiner who was not involved in the initial determination.) The ALJ hearing level stage is the first opportunity that a claimant has to appear in person to present his/her case before an adjudicator. This type of review can be especially critical for claimants who are psychiatrically impaired and whose low level of functioning may not be fully revealed in medical and other records, but is readily apparent upon meeting and interacting with the individual. This scenario is a common one with HAP clients.

Extensive data submitted to this Committee at the July 25th hearing and prior confirms that reconsideration review is ineffective and time consuming. HAP's clients and others who are homeless or at risk of homelessness are especially vulnerable and at risk of being unable to access essential SSI/SSD benefits when the process is too complicated, lengthy and confusing.

2. <u>There are More Effective Changes that Can be Implemented to Improve the Social Security Disability Appeals Process.</u>

It would be a far more efficient and effective use of resources to invest in improvements at the initial claims level, than to reinstate reconsideration in the ten prototype states, which would only add a duplicate level of review. These improvements should include the expansion of pre-existing SSA programs to expedite the processing of claims at the initial and hearing levels and with the goal of increasing the accuracy of decision making at these levels.

a. <u>Expand Quick Disability Determination and Compassionate Allowance Programs at the Intial Level</u>

The Quick Disability Determination (QDD) and Compassionate Allowance (CAL) programs allow for the quick processing of claims for people with the most severe disabilities and with certain diagnoses. These programs utilize specially designated examiners who are generally more knowledgeable and have additional training with regard to the challenges of specific client populations and the nuances of the SSA eligibility requirements. Expansion of these programs would result in more timely and accurate assessments at this initial level for clearly eligible individuals and would decrease unnecessary appeals to the ALJ hearing level.

b. <u>Expand the SOAR Program at the Intial Level</u>

SOAR (SSI/SSD Outreach, Access and Recovery) is a national program designed to increase access to SSI/SSD for eligible adults who are experiencing or at risk of

homelessness and who have serious mental illness or other medical impairments. Nationally only about 28% of individuals who apply for benefits are approved on initial application. Due to many of the specific challenges detailed above, for people who are homeless that percentage is cut by more than half to 10 – 15%. The SOAR program, which has been implemented in all 50 states, has a national initial level approval rate of 64%, and with an average wait time of 96 days from the date of initial application.

As mentioned above HAP implemented the Philadelphia SOAR Project in 2007. Since that time, HAP has utilized SOAR to secure SSI/SSD benefits for over 2,100 disabled men and women who are homeless or at risk of homelessness. Many of these individuals have been repeatedly denied benefits in the past. HAP SOAR clients realize a 98% success rate *at the initial level* and with an average 52 days application processing time. The majority of these clients are suffering from chronic severe mental illness and are unable to negotiate the SSA application or appeals process, let alone navigate two levels of appeal and wait several years for an ALJ hearing.

Similarly to the QDD and CAL programs, SOAR utilizes specially designated initial level examiners to assess claims. HAP's experience has been that the "SOAR adjudicators" are especially sensitive to the challenges facing this population. HAP advocates (attorneys and paralegals) work collaboratively with these adjudicators to provide extensive medical, vocational and functional limitation information to support these claims. HAP's SOAR Project provides for specific screening of claims, as well as vigorous advocacy and assistance throughout the process.

Currently, HAP's SOAR project provides initial level SSA claims representation for a number of especially vulnerable homeless or at risk of homeless populations including:

- Individuals suffering from serious mental and/or physical illness and who are chronically homeless or without case management;
- Disabled youth who are aging out of Philadelphia's foster care system;
- Criminal justice involved persons who are incarcerated and/or participating in one of Philadelphia's specialized, diversionary courts;
- Disabled veterans who are ineligible for Veterans Administration (VA) benefits or who are without income while navigating the slow VA claims process.

The SSI/SSD claims process outside of SOAR is long, complicated, and, generally unsuccessful, particularly for people who are experiencing homelessness and/or who are mentally ill. As with an expansion of the QDD and CAL programs, an expansion of SOAR would increase accurate assessments at the initial claims level, thereby decreasing the number of eligible (and vulnerable) people who are forced to appeal to

the ALJ level. It would also decrease the number of individuals who give up pursuing their claims due to discouragement and confusion. Rather than adding an additional layer of appeal by reinstating reconsideration, SSA should expand and invest in initial level claims programs such QDD, CAL and SOAR.

c. Expand the Use of On the Record Decisions at the Hearing Level

"On the Record" (OTR) decisions are disability findings issued based on medical records of evidence, without the need for a full hearing. OTRs can be decided by ALJs or by Senior Attorney Adjudicators based on the record, thereby decreasing the time and resources necessary to hold a full hearing. In HAP's experience, claims that have reached the ALJ level can be determined much more quickly through this process. In addition, for claimants that are clearly disabled pursuant to their medical records of evidence and particularly for extremely mentally ill individuals, avoiding the stress of a full hearing can be critical.

Expanding the use of OTRs would save SSA resources and would enable eligible claimants to avoid unnecessary delay and obtain their much needed benefits sooner. Implementing improvements such as expansion of OTRs at the hearing level and expansion of QDD, CAL and SOAR at the initial level makes much more sense than reinstating reconsideration, which adds an additional level of appeal.

In summary, HAP believes that a reintroduction of reconsideration in Pennsylvania and the other 9 prototype states will not meet the goal of increasing efficacy and decreasing harmful delays in the current Social Security appeals process. Instead, it will extend wait-times for the vast majority of claimants and will discourage many disabled individuals from pursuing their claims. Alternatively, HAP advocates for implementing changes at the initial and hearing levels of appeal. In addition, in order to achieve the goal of uniformity nationwide, it makes far more sense to eliminate the reconsideration level in the other 40 states.

On behalf of HAP and our clients, thank you for the opportunity to provide these comments.

Sincerely,

Patricia A. Malley

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Senior Staff Attorney

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July 20, 2018

United States House of Representatives
Committee on Ways and Means
Subcommittee on Social Security

Re: Statement of Professor and Associate Dean Jon C. Dubin, Rutgers Law School, for "Hearing on Examining Changes to Social Security's Disability Appeals Process," July 25, 2018

Dear Honorable Members of the Committee and Subcommittee:

I write this statement solely on my own behalf as a scholar of social security disability law, procedure and adjudication. You should read it with the understanding that I have served on the Administrative Conference of the United States (ACUS) Social Security Disability Adjudication Working Group, am an elected member of the National Academy of Social Insurance, and the co-author of the only hard cover, law school coursebook in Social Security Law, Policy and Practice as well as an annually updated treatise on Social Security Practice and Procedure in Federal Court. I have published law review articles on social security disability law and adjudication which have been cited by the U.S. Supreme Court and multiple U.S. Courts of Appeal. I have also maintained a law school clinical legal educational social security disability practice, supervising law student representation of real claimants in need, for nearly 30 years. I have appeared as counsel for clients with my program in social security disability cases before the U.S. Supreme Court, the U.S. Courts of Appeal for the Third and Fifth Circuits, multiple U.S. District Courts, and at each of the stages of the Social Security Administration's (SSA) four-stage adjudicative process.

I. Introduction

I write in opposition to the SSA's proposal to reinstate reconsideration in all states and instead urge the opposite—the complete elimination of the reconsideration stage of SSA adjudication in all states, together with a diversion of administrative resources to other stages in the administrative process. I was selected by the non-partisan, Committee for a Responsible Federal Budget's, SSDI Solutions Initiative to prepare a paper on the topic and have documented how such a restructuring of the four-stage adjudicative process to three-stages would avert wasteful bureaucratic duplication and promote a streamlined and more efficient process, and ultimately more timely and accurate decisonmaking. See *A Modest, Albeit Heavily Tested Social Security Disability Reform Proposal: Streamlining the Adjudicative Process By Eliminating Reconsideration and Enhancing Initial Stage Development*, 23 GEO. J. OF POVERTY. L. & POL'Y 203 (2016). The positon advocated herein, is not new and is one broadly held by public policy

actors with widely differing perspectives on the social security disability programs, from former Senator Tom Coburn's (R-OK) relatively recent, "Protecting Social Security Disability Act of 2014," § 201[1] to the recommendations of the former Director of the National Center for Administrative Justice, Milton Carrow, nearly 25 years ago.[2]

II. Reconsideration is the Least Meaningful of the SSA's Four-Stage Administrative Adjudicative Process and Is Repetitive of the Initial Stage

The SSA's system of administrative adjudication of disability claims has been referred to as "the largest adjudicative agency in the western world."[3] It processes nearly three million new claims and issues over four million decisions at various stages each year.[4] The SSA system contains a four-stage adjudication process. The original rationale for this multi-tiered administrative review system of claim denials for Social Security benefits is grounded in the program's mandatory contributory nature; because payment of benefits appears as the return of contributions, "the erroneous denial of benefits appears as a form of theft."[5] As Fordham Law Dean Matthew Diller has explained: "Extensive possibilities for administrative review were intended to assure claimants that denials of benefits would be carefully scrutinized in recognition of the contributions they have made."[6]

In the SSA's four-stage administrative adjudicative process for the disposition of claims under the Social Security Disability Insurance (SSDI) and Supplemental Security Income Disability (SSID) programs, a claimant initiates the process by filing an application online using the SSA's website or at one of the SSA's district or branch offices.[7] The SSA district office determines financial or non-disability eligibility and, if such eligibility is found, forwards the claim to a state agency operating as the state's federally funded Disability Determination Service (DDS) pursuant to SSA regulations.[8] The state DDS then proceeds to develop the claim by seeking medical records and reports from the claimant's treating sources, hospitals, and clinics.[9]

If those records or documents are unavailable or insufficient to make a determination, "the DDS will arrange for a consultative examination (CE) to obtain the additional information needed." [10] Although SSA regulations designate the claimant's treating physician as the preferred

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[1] S. 3003, 113th Cong. 2d Sess., §201, https://www.congress.gov/bill/113th-congress/senate-bill/3003/text.

[2] Milton M. Carrow, *A Tortuous Road to Bureaucratic Fairness: Righting the Social Security Claims Process*, 46 ADMIN. L. REV. 297, 297 (1994);

[3] JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM at XI (1978).

[4] SOC. SEC. ADMIN., OFFICE OF DISABILITY PROGRAM MGMT. INFO., JUSTIFICATION FOR ESTIMATES FOR APPROPRIATIONS COMMITTEES IN FISCAL YEAR 2016 at 143 tbl. 3.27 (Feb. 2015), https://www.ssa.gov/budget/FY16Files/2016FCJ.pdf.

[5] Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 383–84 & n.66 (1996); *see* Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings, 97 COLUM. L. REV. 1289, 1324 (1997).*

[6] Diller, *supra*, at n.66.

[7] *See* 20 C.F.R. §§ 404.611, 404.614, 422.505(a) (2018).

[8] *See* Disability Determination Process, SOC. SEC. ADMIN., www.ssa.gov/disability/determination.htm; see also 20 C.F.R. § 404.1620 (2018).

[9] See Disability Determination Process, *supra*.

[10] *Id*.

source for the CE,[11] the DDS rarely obtains the CE from other than non-treating sources.[12] After completing its development of the evidence, the DDS then usually employs a two-person team consisting of an internal medical or psychological consultant and a disability examiner to determine the DDS's initial disability decision.[13] After rendering its decision, the DDS returns the case to the SSA field office for appropriate action. If the DDS finds that the claimant is disabled, the SSA completes any outstanding non-disability development, computes the benefit amount, and begins paying benefits. If the DDS finds that the claimant is not disabled, the file is kept in the field office in case the claimant decides to appeal the determination to the next stage to obtain reconsideration.[14]

The reconsideration stage is handled under the identical procedures as the initial application stage, except that different personnel within the respective DDS offices make the reconsidered decisions. [15] The claimant can submit additional evidence at the reconsideration stage, although she is not required to do so. In addition, DDS does not inform the claimant of specific evidence which was lacking or ways to remedy those deficiencies through additional evidence.[16] Nor is the DDS mandated to solicit additional evidence to address identified deficiencies at the initial stage, and additional development is largely focused on obtaining evidence only in the relatively limited situations where there is significant worsening in condition, new ailments, or newly developed evidence.[17] With the exception of a pilot project conducted during the mid-1980s,[18] the claimant ordinarily does not appear in person before SSA or DDS decision-makers during reconsideration of initial applications.

The average processing time at the reconsideration level is approximately108 days.[19] To put this 108-day average reconsideration processing time in context, the SSA has acknowledged

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[11] *See* 20 C.F.R. §§ 404.1519(h), 416.919(h) (2018).

[12] *See* DAVID WITTENBERG, GORDON STEINAGLE, SHANE FROST & RON FINE, AN ASSESSMENT OF CONSULTANT EXAMINATION (CE) PROCESSES, CONTENT, AND QUALITY: FINDINGS FROM THE CE REVIEW DATA, FINAL REPORT 26 (NOV. 4, 2012), http://www.socialsecurity.gov/disabilityresearch/documents/CE%20Report%202.pdf (finding from a study of CE evaluations that treating sources were requested to perform a needed CE evaluation in less than 5% of cases and that none of the CEs in the study were ultimately performed by treating sources).

[13]Medical/Professional Relations, SOC. SEC. ADMIN., http://www.ssa.gov/disability/professionals/bluebook/general-info.htm .

[14] *Id.*

[15] *See* DI 27001.001 The Reconsideration Process, SOC. SEC. ADMIN., https://secure.ssa.gov/apps10/poms.nsf/lnx/0427001001 (noting the requirement of a different two-person DDS team than that used for the initial determination); see also DI 12005.020 Processing a Reconsideration Determination Following the Disability Determination Services (DDS) Review, SOC. SEC. ADMIN., https://secure.ssa.gov/poms.nsf/lnx/0412005020 (noting that the process is essentially the same for reconsideration as in initial application determinations except when there is a continuing disability review (CDR) in the case of a benefits termination decision, which triggers resort to a DDS hearing examiner at the reconsideration stage).

[16] *See id.*

[17] *See* DI 27001.001 The Reconsideration Process, *supra* ("Once a reconsideration case on an initial claim has been received . . . , the disability examiner is responsible for reviewing the case to determine if additional development is warranted. If further case development is warranted, the disability examiner: [1.] Obtains additional information needed to document new allegations or a worsening of the claimant's condition (e.g., SSA-3373 Function Report) [; and 2.] Contacts all medical sources from which the claimant received examination or treatment since the initial determination for any medical evidence they may be able to provide.").

[18] *See, e.g.,* Testing Modifications to the Disability Determination Procedures, 58 Fed. Reg. 54,532, 54,533 (proposed Oct. 22, 1993) (codified at 40 C.F.R. §§ 404.916, 416.1406) (describing the 1984–87 Personal Appearance Demonstration (PAD) Pilot).

[19] *See id.* at 108.

before the United States Supreme Court,[20] and a lower court has ruled,[21] that a reconsideration processing time in excess of ninety days is excessive and violates the Social Security Act's requirement in 42 U.S.C. § 405(b) that SSA agency action not be unreasonably delayed. Furthermore, the extended reconsideration processing times exacerbate significant delays in a four-stage process with time lapses at each stage. Adjudicative delays at the other stages are also substantial. For example, median adjudicative delays at the third stage (ALJ hearing) are over 400 days from hearing request to decision.[22]

Thus, by largely duplicating the initial application stage, the reconsideration stage is not designed to produce meaningful additional adjudicative benefits or results beyond those achieved at the prior stage. Its limited alteration rate is an inevitable byproduct of its limited design. As such, the reconsideration stage lacks meaningful or sound public policy justification. This additional adjudicative stage mandates devotion of agency personnel and administrative costs for approximately 750,000 annual reconsideration decisions,[23] imposes significant delays for the vast majority of claims initially denied, and produces limited tangible benefits.

III. Testing of Elimination of Reconsideration in Ten States for Nearly Two Decades Has Revealed Beneficial Results in Delay Reduction and Improvement in Decisional Accuracy

Apart from the manifest desirability of eliminating a largely repetitive and redundant administrative stage and reducing bureaucratic inefficiency and waste, the testing of elimination of reconsideration has revealed other positive benefits. Although smaller scale testing of the elimination of reconsideration commenced even earlier, in 1999, the SSA formally announced that it was selecting ten states, representing approximately 20% of all disability benefits applicants, for more focused testing of three aspects of the disability redesign process which included elimination of reconsideration.[24] Then, in 2001, the SSA issued a notice of proposed rulemaking indicating its intent to apply these three process modifications nationally, including elimination of reconsideration, over the following year until they were implemented in every state, with a "projected completion date" of no later than 2003.[25] The Agency went on to supply the rationale for making these changes permanent based on its analysis of the costs and benefits from the years of testing and identified benefits. It stated:

> We found that these actions resulted in better determinations at the initial level, with more allowances of claims that should have been allowed. We believe that many claims that would have been allowed only after appeal under the old process

[20] Heckler v. Day, 467 U.S. 107, 111 (1983) (The SSA conceded before the U.S. Supreme Court that a ninety-day or greater period between reconsideration request and reconsideration decision violates the Social Security Act's requirement in 42 U.S.C. § 405(b) that SSA agency action not be unreasonably delayed.).

[21] Barnett v. Bowen, 665 F. Supp. 1096, 1099, 1101–102 (D. Vt. 1987) ((a) finding that delays in reconsideration determinations exceeding ninety days from reconsideration request are unreasonable and violate § 405(b), and (b) ordering injunctive relief for delayed claimants).

[22] *See* SOC. SEC. ADMIN., FY 2016 BUDGET OVERVIEW 23 (2015), http://www.ssa.gov/budget/FY16Files/2016BO.pdf.

[23] *See id.* at 81.

[24] Modifications to the Disability Determination Procedures; Disability Claims Process Redesign Prototype, 64 Fed. Reg. 47,218 (Aug. 30, 1999).

[25] New Disability Claims Process, 66 Fed. Reg. 5,494 (Jan. 19, 2001).

> were allowed at the initial step under the new process. **These claimants were able to receive benefits months sooner than they otherwise would have, an important protection for individuals who are unable to work.** By eliminating the reconsideration step, claimants who appealed reached the hearing level an average of 2 months sooner than claimants who went through the reconsideration step and therefore had an opportunity to receive their hearing decisions sooner. **Also, the quality of our determinations improved. . . . [T]he new process improved the accuracy of initial decisions to deny claims from 92.6 percent to 94.8 percent.** If implemented nationally, this would translate to approximately **34,000 fewer disabled claimants being erroneously denied benefits and facing the prospect of a lengthy appeal**. We believe that these positive results were due to a number of factors. For example, **we know that removing the reconsideration step permitted the State agencies to redirect their resources so that the individuals who formerly worked on reconsideration claims could work on initial claims. This permitted increased contact with the claimants and improved documentation of the disability determinations.**[26]

The agency had also concluded that, "although the prototype is continuing and we continue to gather information and gain operational experience, we believe that we now have sufficient information to propose changes to our regulations."[27] Accordingly, further "public comments received on these proposed changes" would assist only to the extent of "fine-tuning these changes."[28]

However, rather than moving towards the promised national implementation, SSA Associate Commissioner for Disability Kenneth Nibali issued a DDS administrators' letter just five months later explaining that, because "preliminary data from the prototypes have raised questions about the program costs of national implementation[,] . . . final decisions about rollout will be reserved until more complete data are available," which was expected by the end of the year.[29] This letter further explained in somewhat ambiguous language that significant additional program costs for national rollout were anticipated, "since some of the people we are paying at the DDS level would not have appealed and been paid by OHA [now OHO] under the old process."[30]

In 2010, former SSA Commissioner, Michael J. Astrue, signaled a potential change in policy direction on the elimination of reconsideration. In his testimony before the House Ways and Means Committee at a hearing on the backlog of hearing-stage cases, Commissioner Astrue revealed that one way the agency was evaluating possible improvements in the disability process and hearing backlog concerns was by taking a "new look" at the disability caseloads in prototype states which have been testing elimination of reconsideration.[31] As a function of that "new look,"

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[26] *Id.* at 5,495. (emphasis added).
[27] *Id*. at 5,494.
[28] *Id.*
[29] Soc. Sec. Admin., Office of Disability, Disability Determination Services Administrators' Letter, No. 566 (May 1, 2001).
[30] *Id.*
[31] *Statement of Michael Astrue, Commissioner of Social Security Administration, before the House Ways and Means Committee Subcommittee on Income Security and Family Support and Subcommittee on Social Security*, SOC. SEC. ADMIN. (April 27, 2010), www.ssa.gov/legislation/testimony_042710.html.

the Commissioner proposed reducing the testing by removing Michigan and perhaps Colorado from the tests. He observed:

> We expected that eliminating the reconsideration step in the Prototype States would result in earlier decisions and reduced waiting times for claimants; however, we have found the opposite is true. In 1998, prior to the start of the Prototype test, the proportion of initial decisions that ended up at the hearings level was 1.4 percentage points higher in the Prototype States than in the non-Prototype States. By 2007, that difference between Prototype and non-Prototype States had grown to 7.5 percentage points . . . .
>
> In Michigan, an economically hard-hit State, we have concluded that too many cases are needlessly going to the hearings level from the DDSs. Therefore, we plan to reinstate reconsideration in Michigan next fiscal year. Of all the Prototype States, Michigan has the highest percentage of hearing requests, not to mention some of the most backlogged hearing offices in the country. Reinstating reconsideration would allow a significant number of cases to be allowed at reconsideration, resulting in earlier payment to those claimants and a reduction in the number of hearing requests. Moreover, those cases that do go to hearing would be more thoroughly developed, having already been through the reconsideration step . . . . In addition to Michigan, we are also looking at reinstating reconsideration in Colorado . . . .[32]

The only public rationale supplied for not nationally eliminating reconsideration stems from (1) concerns raised by the Associate Commissioner for Disability in his May 2001 DDS Administrators' Letter 566 and (2) the former Commissioner's 2010 testimony to Congress. However, a closer look at those statements and the rationales supplied for retaining the reconsideration stage demonstrates that they lack sufficiently supportable public justification. First, the May 2001 DDS administrators' letter did not attempt to reconcile (a) the somewhat cryptic and unelaborated "anticipation" that significant new net program costs would be generated from the prototype with (b) the agency's extensive contrary prior findings. Nor did the letter address the glowing accounts of prototype successes in the notice of proposed rulemaking, which had been issued just five months earlier in January 2001 based on the results of several years of testing.[33] More fundamentally, the letter did not explain how (a) the administrative costs of additional hearings for the small percentage of claimants who would have been granted benefits under the non-prototype reconsideration system were now calculated to significantly exceed (b) the costs of devoting personnel, resources, and time for a full reconsideration process for the much larger percentage of persons whose reconsideration would amount to little more than a rubber stamp denial at the initial stage.

Perhaps the ambiguous language of the DDS administrators' letter also meant to suggest that the agency could further escape the additional costs from hearings and eventual benefit awards in prototype states attributable to claim abandonment by otherwise eligible claimants. That is,

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[32] *Id.*

[33] Soc. Sec. Admin., Office of Disability, Disability Determination Services Administrators' Letter, No. 566 (May 1, 2001).

some claimants improperly denied at the initial stage, who in non-prototype states would also be denied benefits at both the initial and reconsideration stages, become discouraged or frustrated with the process after the second improper DDS denial and then abandon pursuit of a meritorious appeal to a hearing. However, an administrative process which is principally justified by its ability to produce "bureaucratic disentitlement" of otherwise eligible claimants produces neither cost-effective decisional accuracy nor fairness; is contrary to public policy;[34] and calls into question statutory and constitutional prohibitions against unjustified, excessive, or unreasonable delay in social security adjudication.[35]

Moreover, one month after the DDS administrators' letter, on June 25, 2001, the SSA's Management Information and Evaluation Workgroup issued a Draft Disability Prototype Interim Report that described successes and challenges identified by mid-2001. It stated:

> Perhaps the most significant observation regarding successful aspects of the Prototype at this time is that **generally there is a consensus among DDS managers and staff that the new process results in better initial determinations.** A common theme in Prototype discussions is the comment that the new process is 'the right way to do business.' [1] One of the goals of the Prototype is to allow claimants who should be allowed as early as possible in the process. The increased allowances in the DDSs under the Prototype are meeting that goal by processing as many allowances in one step as these States did in two steps under the old process. In addition, some claimants may be allowed under the process who might have been denied under the old but would never be allowed because of their not appealing to a higher level. [2] Quality Review data indicate that allowances being made under the Prototype are appropriate**. Prototype accuracy is better than the historical accuracy in Prototype sites.[**3] Customer survey data indicate that claimants are better satisfied with a process that offers a claimant conference and increased contact with the adjudicators who decide their claims. [4] For those claimants who appeal for a hearing, it is clear that their cases reach OHA considerably faster under the new process.[36]

Thus, whatever could be determined about the public policy desirability of the prototype by the middle of 2001 after issuance of DDS Letter 566, the quantified benefits in terms of increased initial decisional quality and accuracy; the significant reduction in unjustified delays for those

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[34] *See generally*, Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3 (1984).

[35] *See, e.g.*, Heckler v. Day, 467 U.S. 104, 111 (1984) (SSA concedes before the U.S. Supreme Court that a ninety-day or greater period between reconsideration request and reconsideration decision violates the Social Security Act's requirement in 42 U.S.C. § 405(b) that SSA agency action not be unreasonably delayed); Barnett v. Bowen, 665 F. Supp. 1096 (D. Vt. 1987) (excessive delays in reconsideration and hearing determinations defined, in the context of reconsideration determinations, as decisions exceeding greater than ninety days from reconsideration request, violates § 405(b) and entitles delayed claimants to various forms of injunctive relief); White v. Mathews, 434 F. Supp. 1252, 1259–61 (D. Conn. 1976) (excessive delays in SSA hearing decision times violate both the Fifth Amendment's Due Process Clause and the Social Security Act, 42 U.S.C. § 405(b)), *aff'd on other grounds*, 559 F.2d 852 (2d Cir. 1977), *cert. denied sub nom.* Califano v. White, 435 U.S. 908 (1978). *See generally* Gary L. Blasi, *Litigation Strategies for Addressing Bureaucratic Disentitlement*, 16 N.Y.U. REV. L. & SOC. CHANGE 591 (1987–88).

[36] Soc. Sec. Admin. Management Information and Evaluation Workgroup, Disability Prototype Interim Report-Draft 26 (June 25, 2001) (emphasis added).

proceeding to hearing; and the increased customer satisfaction appeared to outweigh any serious identified countervailing detriments.

Second, with respect to the Commissioner's 2010 Congressional testimony, the agency again failed to reconcile (a) its new conclusion on the waiting times for decision in prototype states with (b) the agency's earlier statistical and empirical findings and contrary conclusions after years of testing as documented in the 2001 NPRM or conclusions in the Interim Prototype Report. The Commissioner also failed to supply a basis for the conclusion that the mere 11% to 14% reversal rate for reconsideration would result in earlier payment to a number of claimants significant enough to justify the delays and administrative costs of continuing reconsideration for the other 86% to 89% of claimants, who would experience a rubber stamp of the initial denial decision from a reconsideration process and a delay from that process to an ultimate administrative decision.

Indeed, during the same April 27, 2010 hearing (on hearing level delays and backlog) at which the former SSA Commissioner testified, the SSA's Inspector General explained the delay issues alluded to by the Commissioner through the elimination of reconsideration.[37] The IG noted that the SSA had reassessed its policy on reconsideration elimination since commencing the prototype in 1999, "believing that reinstating this process will get benefits to deserving beneficiaries more quickly than an administrative hearing."[38] The IG assessed four scenarios from the planned reinstatement of reconsideration in Michigan in FY 2011, finding that: "[i]f SSA reinstates and fully funds the reconsideration process in Michigan, Initial claims will take 123 days; Reconsideration claims will take 276 days; and Claims requiring hearings will take 915 days."[39] However, "[i]f SSA does not reinstate the reconsideration process in Michigan, and there is no additional funding: Initial claims will take 123 days; and Claims requiring hearings will take 762 days."[40]

The IG then discussed the administrative opportunity costs or savings from reconsideration elimination by noting that **"[i]f SSA does not reinstate the reconsideration** process in Michigan, and the funding that would be used for reconsideration is instead devoted to processing initial claims: **The DDS could process 25,300 additional claims."[41]** Similarly, "[i]f SSA does not reinstate the reconsideration process in Michigan, and the funding that would be used for reconsiderations is instead devoted to processing hearings: **ODAR could process 17,600 additional hearings per year.**"[42] The IG concluded:

> In summary, by reinstating the reconsideration step, some individuals who appeal will get an allowance decision sooner and some would get an allowance decision later. For example, if SSA reinstates the reconsideration step in Michigan, the claimant denied at the initial level could get an allowance decision in 276 days, which is 486 days sooner than if they had to appeal to ODAR without going through

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[37] *Statement of the Honorable Patrick P. O'Carroll, Jr., Inspector General, Social Security Administration Before the U.S. House of Representatives, Committee on Ways and Means, Subcommittees on Social Security and Income Security & Family Support*, SOC. SEC. ADMIN. (2010), http://oig.ssa.gov/sites/default/files/04272010testimony.txt.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* (emphasis added).
[42] *Id.*

> the reconsideration step. However, if the claimant is denied at the reconsideration level and appeals to ODAR, it would take 915 cumulative days for a decision, which is 153 days longer than the current processing time (762 days) for cases that go to ODAR without a reconsideration step.[43]

As described above, there are eight to nine times as many claimants denied at the reconsideration level than approved, and therefore potentially subject to the latter delays, in comparison to the much smaller percentage benefited with a quicker final decision from the very low reconsideration approval rate.[44] Accordingly, it is hard to determine how or why the Commissioner quantified the delay factor as supporting the imposition of reconsideration based on the IG's data and conclusions.

Furthermore, the increase in the rate of hearing requests in prototype states which the Commissioner also identified in his testimony as a justification supporting the reconsideration stage, is explainable in part by the likelihood that most of those whose claims would have been approved at the reconsideration stage (persons in the 11% to 14% reconsideration approval rate) would request a hearing and become additional hearing appellants in prototype states. It is also likely that some persons, including those with meritorious claims, would have become discouraged and surrendered their pursuit of benefits when forced to endure the long delays culminating in yet another administrative denial decision at the reconsideration stage in non-prototype states. In addition, because of the only sixty-day appeal or limitations period for challenging decisions between each level, it is also likely that some claimants, perhaps understandably preoccupied with serious medical and mental health concerns or financial hardships and exigencies, would have simply failed to complete an appeal in that relatively short time-frame through this additional step and would therefore be barred from proceeding to the hearing stage in non-prototype states. In short, none of these likely explanations for an increased hearing rate in prototype states suggest end results or meaningful public policy justifications for continuing the reconsideration stage.[45]

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[43] *Statement of the Honorable Patrick P. O'Carroll, Jr., Inspector General, Social Security Administration Before the U.S. House of Representatives, Committee on Ways and Means, Subcommittees on Social Security and Income Security & Family Support*, SOC. SEC. ADMIN. (2010), http://oig.ssa.gov/sites/default/files/04272010testimony.txt.

[44] An argument could be made that the delays in successful hearing decision receipt attributable to the reconsideration stage, relative to those in prototype states where reconsideration has been eliminated, may be somewhat overstated because the reduction of the 11% of cases in which benefits are awarded at the reconsideration stage also reduces the flow of cases and the hearing backlog in such states relative to prototype states. However, the General Accounting Office (GAO) found that the approval rate in one stage (initial) in prototype jurisdictions (40.4%) was actually slightly higher than the approval rate after two stages (initial and reconsideration), in non-prototype jurisdictions (39.8%). *See* U.S. GEN. ACCOUNTING OFFICE, DISAPPOINTING RESULTS FROM SSA'S EFFORTS TO IMPROVE THE DISABILITY CLAIMS PROCESS WARRANT IMMEDIATE ATTENTION 16 (2002), http://www.gao.gov/assets/240/233481.pdf. Therefore, the increases in hearing requests in the prototype states are less likely attributable to claimants who otherwise would have prevailed earlier at reconsideration in non-prototype states and more likely due to the lesser attrition of claimants who would otherwise have been discouraged from appealing further due to the frustration of receiving two administrative denials after a longer pre-hearing process, if rejected after the reconsideration.

[45] If stealth or "under the radar" benefit reductions for trust fund savings were the governing rationale, it would undermine the Social Security Act's purposes to arbitrarily identify for the sole brunt of reduced benefits, an otherwise eligible class of claimants, disproportionately represented with persons too physically or mentally impaired or financially destitute to persevere through an extra and unnecessary stage of administrative review. It would also have a disparate deleterious impact on the most vulnerable claimants—working class laborers, educationally challenged, mentally impaired, lower income, and disproportionately, claimants of color. *Cf.* Jon C. Dubin, *The Labor Market Side of Disability-Benefits Law and Policy*, 20 S. CAL. REV. OF L. & SOC. JUST. 1, 50–51 (2011) (discussing the likely

Finally, the former Commissioner's only other suggestion of tangible benefit for continuing the reconsideration stage is the unexplained suggestion that cases that have proceeded to a hearing "would be more thoroughly developed having been through the reconsideration step."[46] However, this conclusion is questionable on two grounds. First, the reconsideration process does not generally compel meaningfully additional case development, but only a similar claim reevaluation by a different DDS team.[47] Second, as described above, the SSA has, on multiple occasions determined that prototype DDSs are diverting resources and personnel from the eliminated reconsideration stage to case development tasks at the initial stage. This produces ultimately better developed, more accurate and higher quality decisions in the one-stage DDS process than in the two-stage process in non-prototype cases. [48]

IV. Conclusion

Approximately twenty-five years ago, Milton Carrow, the former Director of the National Center for Administrative Justice, observed that "reforms recommended by congressional committees, the GAO, the Administrative Conference of the United States, the Advisory Committee to the Commissioner of Social Security, and the studies of responsible organizations such as the American Bar Association,"[49] **all** proposed the elimination of reconsideration and steps to enhance initial-stage record development.[50] Carrow decried the slow pace in implementing these needed and obvious reforms and argued that further proposed testing was unnecessary, as it was time for these changes simply and finally to be enacted.[51] He concluded that SSA "has been dilatory in implementing sound recommendations" and that it "is unconscionable to delay further."[52] The SSA's current proposal to reinstate reconsideration nationally, flies in the face of this long-acknowledged and widely held consensus supported by the results of years of testing, and should be discouraged.

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disparate impact on lower income and working class claimants and claimants of color from proposal to require all claimants to establish listing level impairments due to the need for expensive testing and medical procedures and extensive claimant produced documentation).

[46] *Statement of Astrue*, *supra* note 30, at 3.

[47] *See* SOC. SEC. ADMIN, *supra* note 15, and accompanying text.

[48] *See supra* notes 25 & 35 and accompanying text (describing the 2001 NPRM and draft Interim Prototype Report).

[49] Carrow, *supra* note 2, at 304.

[50] *Id.* at 302 ("[T]he studies recommend eliminating the entire reconsideration stage of the initial claims process."); *see also id.* at 297–301 (describing and summarizing those studies and reports). Indeed, as Professor Gay Gellhorn has observed, although one might have expected ALJs facing a hearing case backlog and pressures to adjudicate cases more rapidly to express opposition to "the removal of a buffer between them and disappointed claimants, in fact the National Conference of Administrative Law Judges favor[ed] abolition of Reconsideration." Gay Gellhorn, *Disability and Welfare Reform: Keep the Supplemental Security Income Program But Reengineer the Disability Determination Process*, 22 FORDHAM URB. L.J. 961, 989 (1995); *see also id.* at 990 n.150 (citing a former SSA ALJ's article, also recommending elimination of reconsideration which had reasoned that "under the current system, DDS is simply doing half the job, but doing it twice." (quoting Christine M. Moore, *SSA Disability Adjudication in Crisis!*, 33 JUDGES J. 2, 43 (Summer 1994)).

[51] *See* Carrow, *supra* note 2, at 304.

[52] *Id.*

EARLY INTERVENTION
USING
TICKET TO WORK MODEL
TO REDUCE
RECONSIDERATION PHASE AS A WAY OF MANAGING BACKLOG

Dear Chairman Johnson and the Ways and Means Sub-Committee.

As you convene and look at expanding reinstatement of reconsideration of disability appeals, "**Examining Changes to Social Security's Disability Appeals Process",** we would like you to consider expanding the Ticket To Work program to include persons who are entering this reinstatement of reconsideration phase as a ways of managing backlog and reducing overall numbers of people on disability.

BACKLOG PROBLEM:

- Application for benefits are over 1.1 million cases. Approval wait times 9-24 months.

- Applicants need income now and face severe personal consequences the longer they wait. This includes inability to pay for housing, medical care, food, and other essential living expenses.

- Personal consequences create costs to government in the form of homelessness, burdens on public medical resources among others.

UNDERSTANDING THE APPLICANT

- When faced with injury or illness, many people who file for disability are still capable of working and need and want to work.

- When faced with injury or illness, many people who file for disability are limited in:

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- Ability To Assess Current Skills & Abilities
- Knowledge of other types of Suitable Jobs including Work from Home
- Awareness of Job Related Disability Accommodations
- Have No Idea How To Approach Most Recent Employer With Accommodation Proposals

Ticket to Work

INTERVENE BEFORE RECEIVING BENEFITS USING SSA TICKET TO WORK MODEL

- SSA Ticket To Work Employment Networks currently help beneficiaries with same profile as the disability applicant successfully find work.
- Early Intervention could lead to jobs with income and benefits.

REDUCE BACKLOG NOW WITH TTW EARLY INTERVENTION

Ticket to Work

TICKET TO WORK EN MODEL MAKES SENSE

- Infrastructure In Place
- Trained SSA Authorized Employment Networks
- Government Staff and Procedures Currently Functioning Well
- Outcome Based Payment System Provides Incentive For Faster Placement
- SSA Portal Allows Providers To Upload Earnings & Ticket Assignments
- EN's Follow Beneficiaries For up to Six Years Aiding Retention

THE TICKET TO WORK MODEL WORKS

- Proven Ability to Be Self-Funding
- Operating In Black With 2017 With More Revenue Than Costs
- Program Has Broad Bipartisan Political Support
- Abundant TTW Success Stories Of Lives and Families Changed #TTWHelpedMe

TICKET TO WORK CURRENTLY SAVES GOVERNMENT MONEY

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- Reduces Cash Benefits.
  - Robert Pfaff (Title) in 2015 stated that TTW had been successful in getting 8% off cash benefits.
- Government Cost Limited To Program Operations & Administrations.
  - EN Paid Only AFTER Beneficiary Is Working & Meeting Program Guidelines Monthly 2018 Suitable Gainful Activity is $1,180 non-blind/$1,970 blind.
- EN's Provides Free Beneficiary Evaluations For Placement
- Reduce Formal Vocational Evaluation Costs as the Ticket to Work EN Screenings could be used as part of Reconsideration Assessment
  - Vocational Evaluation costs are now borne by the courts or public agencies
  - Employment Options has screened over 9,300 disabled individuals since 2013 estimates that tl have saved millions of dollars in assessment costs.

ADDITIONAL SAVINGS IF OFFERING TTW EN EARLY INTERVENTION

- Reduces need and cost of more judicial and auxiliary staff for hearings.
- Reduce potential for personal and financial crisis.
- Reduce the number of applicants who require benefits.

MINOR ADDITION TO TTW MODEL & PAYMENT SYSTEM

- Remains A Voluntary and Free Option To Applicants
- Outcome Based Payment System Remain As Is For Successful Placements
- E-Verify, Manual Payment Submission, And Automated Payment Process In Place

COST EFFECTIVENESS OF EMPLOYMENT NETWORKS

Tickets Used With EN's Produced Higher Dollar Savings

"However, SSA reported that beneficiaries who assigned their Tickets to ENs had higher average dollar savings than those who placed their Tickets in-use with an SVRA under the CR Option." *(Report Summary)*

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Employment Networks Are Often Successful Because:

- Have Better And More Diverse Employer Relationships
- Less Service Wait Times
- More Efficient Screening Processes To Evaluate Job Readiness
- Alternative Approach To Marketing Program, Placement & Benefits Counseling
- Outcome Based Payment System Provides Incentive For Faster Placement

ENs Provide Unique Motivational Impact

"In the executive summary of the seventh evaluation report, Mathematica concluded the Ticket Program had a limited, but positive, effect on the employment of disabled Social Security beneficiaries and motivated some beneficiaries to pursue Employment." *(Report Page 3 - Mathematica Report Done Between February 2014-July 2013)*

- 60% Increase From 2014-16 In Beneficiaries Working With EN Assistance
- 62% Increase in Beneficiaries Working w/EN Support And NOT Receiving Benefits Due To SGA Earnings **(***FROM ORDES 2106 REPORT)*

PUT EN'S TO WORK DURING APPLICATION AND RECONSIDERATION PROCESS

"It reported that, while relatively few beneficiaries were still enrolled in employment support programs through the Ticket Program, those who used the employment services had better employment outcomes and were more likely to Stop receiving benefits than those who did not." (*FROM ORDES 2106 REPORT)*

AUTHORIZED TTW EN'S PRIMED FOR EXPANSION

- Work At Home Job Sector Exploding - So many more virtual jobs are available in wide range of industries and occupations. These are excellent fits for those unable to seek work outside the home.

- Established EN - Employer Relationships.

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- Employers like hiring pre-screened ticket-holders for tax credit and diversity inclusion.
- More Accessibility Technology Enabling More People To Work
- Medical Advancements Enabling More People To Work While Disabled
- Increased Efficiency in Payment Collections Through E-Verify attracts new EN's and allows existing EN's to expand.

SUMMARY

Expanding the Ticket to Work to serve those persons who have applied for disability will reduce application backlogs and prevent needless beneficiary benefits assigned, personal and financial hardship, additional staff for processing and appeals, save additional money for the SSA Trust fund and most important, transform lives for the better, allowing those able to work to contribute to their financial self-sufficiency, family welfare and economic health community and country.

There are no downsides to this voluntary program.

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SOURCES

https://www.ssa.gov/budget/FY19Files/2019CJ.pdf

https://www.appropriations.senate.gov/news/minority/summary-senate-committee-approves-fy2018-labor-hhs-appropriations-bill

https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html

Dr. Jennifer Christian's Summary of ***Preventing Needless Work Disability by Helping People Stay Employed***" by American College of Occupational and Environmental Medicine's report http://www.60summits.org/pdfs/Introduction-to-New-Work-Disability-Prevention-Paradigm.pdf **and full report** http://www.60summits.org/pdfs/ACOEM-Work-Disability-Prevention-Whitepaper-2006.pdf

https://www.congress.gov/114/bills/hr2135/BILLS-114hr2135ih.pdf

TTW Success Stories: https://choosework.ssa.gov/success-stories/index.html
MEO Staff Featured: Lisa Seeley and Lori Adler

TYPICAL CASE:

A typical scenario would be a construction worker who can no longer lift more than 20 pounds. Most construction workers only know about jobs in their field but once they have spoken to a vocational counselor, they learn that there are other jobs that they can do that do not require lifting. Examples of jobs that a person with a lifting restriction could perform without much training include drivers, security guards, sales, estimating, supervision and the list goes on.

But most people are unable to see work options beyond what they already know and apply for disability. During the waiting period, many people often have no or limited income and no support system. They can't pay rent or their mortgage and many eventually become homeless and create another burden on system.

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But if this person had a voluntary opportunity to work with a TTW EN through Early TTW Intervention, they could get the kind of Vocational help that could get them back to work, earning income and may then no longer need the expanded benefits of an SSDI/SSI beneficiary.

Dear House Ways and Means Committee,

Thank you for the opportunity to provide comments on the present state and needed changes to the Social Security's Disability Appeals Process. I, Steven Roy Murphy, am commenting for myself and not on behalf of the Agency. The opinions and recommendations below are my, based upon my experiences.

I have been honored to serve as an Attorney Advisor, Senior Attorney Adjudicator, and Supervisory Attorney in the Office of Hearings Operations at three different locations, since September of 2007. Prior to that, I served over twenty years in the United States Marine Corps, before I went to law school. I am presently assigned to the Albuquerque, New Mexico hearing office.

In the Office of Hearings Operations, we need strong leadership from hearing office supervisors and higher level management, who are not self-serving. We also need Regional Office leaders that do not retaliate against hearing office supervisors and other hearings office employees who report fraud, waste, abuse and other civil rights violations. We also need supervisors in the Office of hearings operations who are familiar with and interested in learning all the hearing office duties of the employees that they supervise. Often, supervisors may be selected from other parts of Social Security and they are not interested in learning the "Nut's and Bolts" of the Appeal process, leaving them unable to train employees or step up and fill in as the Offices of Hearings Operations have been severely undermanned since at least 2013, severely limiting the hearings offices ability to serve the public in a timely manner.

Reinstatement or Elimination of the Reconsideration

Reinstatement or Elimination of the Reconsideration step in the Social Security Disability Adjudication process will not provide equitable service nationwide, unless the hearing local offices are properly staffed with at least 2.4 Senior Case technician's, 2.5 decision writing employees (2(Attorney Advisors and/or Paralegal Analysts) and ½ Senior Attorney) per Administrative Law Judge assigned to the local hearing office. It will however, mathematically improve the processing time numbers nationwide, at the expense those states whose cases now have to undergo reconsideration. Often, a claimant's record is better developed after reconsideration, than it is when coming from prototype states which lack the reconsideration step, better facilitating adjudication at the Hearings Office level.

I also suggest that the State Agency DDS be required to seriously consider issuing later onset decisions more frequently, especially if a claimant would "Grid Out" based upon the vocational rules (which also need to be revised). The State agency DDS's should also be allowed to contact the claimant or their representative when it is apparent on the record that amending the alleged onset date in their case would result in a favorable outcome, rather than just issuing an unfavorable determination to the claimant.

I do believe that the Agency needs to apply the same uniform steps nationwide, and to comply with the Administrative Procedure Act, instead of "picking and choosing" which parts of the Administrative Procedure Act that they will follow.

Senior Attorney Program and Decision Writing Understaffing

The Agency previously had a significant number of senior attorney's reviewing and issuing fully favorable decision on the record, before the case went to an administrative law judge. However, the Agency did not feel that all the senior attorney's were issuing policy compliant decisions, and the ALJ's union was complaining because they were now having to adjudicate more complex cases. So, the Agency has since severely curtailed the senior adjudicator program to protect the ALJ's interests, increase policy compliance, and return them to help reduce the decision writing backlog caused by the Agency's failure to hire decision writing support staff to support the large numbers of ALJ's that they had hired. In my experience adjudicating cases, in almost 20 percent of the cases I reviewed, I was able to find the claimant disabled based on the record, often with little additional development.

While policy compliance might have been a statistical issue for some senior attorney's, those same senior attorney's also drafted cases for ALJ's making the same policy mistakes. Therefore, policy compliance is a red herring being used to cover up for the true problem of woeful understaffing of hearing offices with decision writing employees and the prior evidence rules that enabled claimant's and representatives to not submit all relevant evidence. We now have new rules that require submission of all available evidence; however, representatives will frequently request on the record review and when a favorable decision is not rendered, they suddenly submit new and existing evidence that had been withheld.

I believe that Senior Attorney's were closing about 30,000 cases a year when the program was drastically cut back, due to the need for additional decision writing capability nationwide. The Agency should higher more attorney advisors and/or paralegals to draft decision in the local hearing offices, and allow senior Attorney's to return to adjudicating cases at least three days a week, as this program is capable of delivering favorable decisions to claimant's in a timely manner and should be expanded. The senior attorney's would still be available to advise ALJ's and draft complex decisions, but should spend the bulk of their time on adjudication via on the record reviews.

Understaffing and Case Assistance Centers

The Agency has repeatedly taken the approach of hiring more Administrative Law Judges, <u>without</u> hiring the hearing office employees required to support them over the last couple of years. The Agency has being removing decision writing and senior case technician support jobs from the local hearing offices by consolidating them at regional and national case/writing assistance centers that supposedly support the local offices. While the Agency thought this would help, it has decimated local hearings offices nationwide, as they receive far less support from these national and regional case

assistance centers, than they would have received from local employees, who live and spend their income in your local districts.

Additionally, these case assistance centers significantly limit the amount of work that they will accept, with the Office of the Chief Administrative Law Judge varying the amount of support each region receives from assistance centers each week, which is further limited by the regional offices varying distribution patterns. By limiting the amount of work accepted at these so called "Assistance Centers", OCALJ is able to generate Fake Numbers that make these Assistance Centers, look efficient. There is a measurable quality improvement in the decisional drafts and more uniformity in case workup from these assistance centers; however, due to their processing benchmarks, case assistance centers only exhibit the cases at workup, instead of completing development by requesting medical records from all relevant sources during workup and exhibiting it after receipt, placing that burden upon the understaffed local hearing offices. This results in large backlogs at local hearing offices that have a basically unlimited backlog of work, without the employees required to perform it.

Once an Administrative Law Judge issues decisions writing instructions, cases are presently held in an unassigned writing status at the local hearing offices, until such time as a local hearing office Attorney or Paralegal is available to draft the decision for the ALJ or until decision writing assistance trickles down to local hearing office and the case is sent to an decision writing assistance centers to be drafted. This time spent waiting in unassigned writing is starting to result in a three to six month delay after the ALJ has already decided the case, but the case is still waiting for the Agency to place it in front of a decision writer to draft the decisions for the ALJ to sign and send to the claimant.

This is totally unsatisfactory, as a claimant should not have to wait for six months after a hearing to receive the ALJ's decision, when they have already made it. As bench decisions are frowned upon by the Agency, ALJ's are not aggressively encouraged to issue them and when they do, additional scrutiny is needed and applicable since some ALJ's tend to take short cuts and not enter everything required into the record when issuing them.

To obtain true decision writing and statistics, the Agency needs to transfer all electronic cases awaiting decision writing to one national point of contact, who then assigns the cases for writing based upon priorities and the request for hearing date, instead of "First in, First Out" at the local hearing office. The Agency has also been gaming the decision writing backlog numbers by directing the local hearing offices to draft only fully favorable decision, for a couple of days each month. These fully favorable hearing decisions take less than half the time to draft than an unfavorable, resulting in a backlog that will take twice as long to complete on days that local hearings offices are allowed to work on them. The Agency's Dallas Region is also more worried about decision writers being assigned the same mix of cases, instead of allowing supervisors to assign cases to decision writer's based upon their strengths, skills, and knowledge. This ability is also something that would be lost with a national decision writing assignment regime.

The Agency is also allowing the front desk "Contact Representatives" positions to go unfilled, forcing offices to use their few remaining, higher paid employees to spend time answering the phones, process and distribute mail, etc., in addition to their already overwhelming duties of working up cases, managing their assigned dockets, and take care of the Administrative Law Judges, whims, instructions, and requests.

For example, while working as a supervisory attorney in a New Mexico hearing office, we met quarterly with the regional office and had a workload plan that stated a minimum need of 250 cases in writing support each month for over the last two years due to short staffing of at least 11 decision writers, yet we are lucky to get to send out 20 cases a week for writing. This has resulted in a backlog of 600 to 700 decisions awaiting writing that would take six months for the local attorney's and paralegals to draft, if no new cases came in each month. With 11 Judges, Albuquerque should be holding at least 550 disability hearings each month, resulting a corresponding increase in the local decision writing backlog. The Agency needs surplus decision writing capacity, instead of its current deficit as these decision writers are also supposed to be spending 25% of their time, doing other tasks such as research and case development, instead of just decision writing.

When I wanted to ask the hearing's office's ALJ's to sign up for 60 hearings a month when circulating the calendar, the Hearing Office Chief Administrative Law Judge, made me reduce it to asking ALJ's to hold only at least 50 hearings month, even though the Albuquerque hearing office has a high postponement rate, due to geography, weather, lack of video hearing reporters, and other factors.

We have claimant's traveling over 300 miles from the Navajo Nation in Arizona or southeastern Utah to receive a live hearing in Albuquerque, New Mexico, because San Francisco Region 9, has no approved live hearing (permanent remote sites) in Northern Arizona, and the Denver Region 8 does not have an active live hearing site in Durango, Colorado or southeastern Utah. Instead, some of these Arizona and Utah claimant's have to "beg, borrow, or trade" in order to get to a live hearing in Albuquerque, New Mexico, displacing New Mexican claimants, so that ALJ's do not have to be bothered to travel in those regions. Since we are here to serve claimant's, let's serve them instead of transferring them off to a different office to deal with.

The Agency no longer allows or requires ALJ's to travel and hold live hearings from hotel's event rooms, or Navajo chapter houses anymore. These are often claimant's with limited if any resources, who were opted out of a video hearing by national disability firms, who don't want to travel to these remote regions for their claimant's video hearings. Likewise, their disadvantaged claimant's are unable to make it to Albuquerque for a live hearing. As a result, their hearing are often cancelled or postponed when <u>sending an ALJ on a road trip to hold a live hearing closer to their residence, could have resulted in 30 hearings in a week being completed.</u> This needs fixed immediately with establishment of permanent remote sites or approved hotel ballrooms or use of empty Federal courtrooms in either: Chinle, Tuba City, or Winslow, Arizona; Farmington or Gallup, New Mexico; and/or Durango, Colorado.

While Agency policy in HALLEX I-2-3-10 A1a Note 2: states "A claimant's confinement in a prison or other institution may require an ALJ to schedule the hearing at the place of confinement, unless other arrangements can be made. " A Hearing Office Chief Administrative Law Judge (HOCALJ) instead postponed a claimant's hearing until after he retires in September, so that he would not have to travel to hold the claimant's hearing at a prison. This is an example of the type of self-interested and rogue ALJ that the prior Office of Personnel Management system has hired for us; in fact, this is one who the Agency has sent to interview and rate ALJ candidates for OPM in the past.

We need ALJ leaders that comply with Agency policy, instead of those who only ask for (and receives less than) the completion of a minimum 500 cases a year from ALJ's in the hearing office. Likewise, the a HOCALJ sought to minimize ALJ travel to our existing permanent remote sites to only two weeks a year, when they really need to travel far more often. The Agency needs leaders and ALJ's who are willing to accept and commit to higher expectations, instead of those who enable ALJ's to skate by with doing less than the bare minimum, and even failed to require some new ALJ's to draft 5 unfavorable decisions as part of their OCALJ directed training program, despite my protests. SSA ALJ's need higher docket expectations and the Agency needs a way to remove them if they are unable to keep up.

Post Huntington, the Agency caps the maximum case assignment expectation for its ALJ's to closing 720 cases a year, which is below the minimum standard for Immigration Judges. There is a statistical problem here in case assignment, as it is easily gamed by unassigning or reassigning unclosed cases to a different ALJ, so an ALJ may have clearly touched more than 720 cases a year. This assignment cap needs raised, and to be properly based on if an ALJ has touched a case, instead of allowing the system to be gamed as it can be currently.

Postponements due to Sole Source Video Hearing Reporter's Contractor Failures

Video hearing reporting used to be a duty of hearing office employees, however, it was contracted out to BPA holders and has since been moved to a sole source provider contracts based upon the hearing held location. The transition to sole source providers for Video Hearing Reporters has greatly increased postponements at remote sites as well as at local hearing offices.

Use of Sole Source Providers for Video Hearing Reporters has resulted in the cancellation of numerous hearings, when their employees fail to show up for hearings, and possibly as a result of a "sick out" because the contractor is not paying its employees in a timely manner for the hearings that they were scheduled for, further contributing to the backlog. I have heard that Albuquerque has been required by the Dallas regional office to pay sole source contractors for hearings, even when they fail to produce the required work product or a substandard work product from the hearing. Similar complaints exist with the other Sole Source Provider. **There is no effective penalty clause in these sole source contracts**, for video hearing reporters. When their fail to

perform causes claimant's long awaited for hearing to be cancelled, the Agency is forced to reschedule the hearings at additional cost and wait time for the claimant, while just hoping they will show up next time. We tried warning the Agency about these providers based upon prior experience with them under BPA's, yet the Agency went ahead and awarded them sole source contracts anyway.

What kind of business would contract for an essential person to appear and not have any effective penalty clause for failure to appear in the contract? The SSA Office of Hearings Operations believes contracts like this are the way of the future; however implementation and execution is very flawed and is being abused. In order to meet payment deadlines, contractors are paid without anyone checking their work product first, and apparently, even if we do and it is defective, resulting in the need for another hearing at least 75 days later. Imagine your constituent's disappointment after obtaining a ride from Tuba City, Arizona to Albuquerque, New Mexico, to only have your hearing cancelled because an ALJ has a migraine headache, a basketball game, or a contracted video hearing reporter fails to show up. Please have the Agency report on the number of hearings cancelled by location and in total, due to failure to appear by a sole source provider or other contract hearing reporter.

Lisa Ekman's comments on Trust Fund Expenses

To the Honorable Representative Bishop, witness Lisa Ekman appears to have omitted from her testimony that **Claimant's representatives are paid directly out of the trust fund for their air travel and other transportation to hearings at local hearing offices that are more than 75 miles one way from their office** (See HALLEX I-2-3-13 B3). Instead she diverted attention to the representative's fees that only come out of the claimant's past due benefits.

Although direct withholding for representatives fees comes from the claimant's past due benefits, the Agency also pays for their representatives to fly around the country on coach and first class flights paid for **out of the trust fund** so that they can attend hearings, whether or not the case is won for the claimants. Many representatives are not local representatives, and the up to $6000.00 that they get from claimants under a fee agreement when they win, is supplemented by all the expenses that they can charge the claimant and the free plane rides and hotels that come out of the administrative trust fund budget. I know of cases where the representative would double dip by charging both the claimant and the agency for their transportation to the hearings. Considering the limited time that claimant's representatives spend working on a case, they are already very well compensated, especially the ones from the national firms that fly around the country racking up airline miles at taxpayers expense, while doing little to develop the claimant's case. They often meet the claimant for the first time at the hearing, yet the Agency makes it prohibitively hard to discipline them or even report them to their State bar association for neglect of claimants if they are attorney's.

This travel benefit for representatives is a huge waste of taxpayers dollars, and they should be required to absorb it instead of draining the trust fund for flights that they book

at the last minute, or trimmed back to payment only for transportation booked and paid for 75 days prior to the hearing, as hearing notices have to be sent out at least 75 days before a hearing.

Case Transfers

There are transfers that occur when a claimant moves, and there are also case transfers for workload redistribution based upon the varying levels of capacity in the local and national hearing offices, as well as case assistance centers.

How do case transfers affect timeliness. In my experience, I have had to call other hearing offices, especially San Francisco Region 9, on the carpet for cancelling scheduled hearings, particularly on AGED cases, when the claimant moves to an area covered by a different hearing office instead of arranging to hold a hearing by video teleconference from the claimant's new nearest Social Security Field Office (or) even using an empty hearing room in the claimant's nearest Office of Hearing Operations from which to conduct a video teleconference.

HALLEX — the Hearings, Appeals and Litigation Law manual at I-2-3-11 Claimant Timely Objected to Appearing at Hearing by Video Teleconferencing but Has Changed Residences states that these VTC's should be attempted; however, with the skeleton staff that most hearing offices have, along with supervisors and ALJ's who don't want to bother with changing their schedule to accommodate these cases, many offices find it easier to just cancel the hearing and put the claimant at the back of the scheduling line again in a different hearing office, extending the claimant's wait for a hearing. OHO needs to enforce HALLEX in these situations and do everything to save a hearing, instead of transferring a problem to another hearing office. By allowing offices to dump their AGED cases on other offices, it further increases the processing time statistics of the receiving office, at the expense of the claimant who has already been waiting too long for a hearing. This creates a perverse incentive for offices to postpone a claimant's hearing and transfer their case when they move outside an office's service area.

Manpower – the Agency has created Regional and National Writing and Case Assistance centers at the expense of severely understaffing the local Hearing offices. Albuquerque, New Mexico's hearing office staff has been decimated and has less than half the employees that it should have, and this has been going on since relatively high paying attorney jobs were moved to Baltimore, MD, Richmond, CA, and St. Louis from local hearing offices around the country. In July of 2018, the Aa New Mexico hearing office was still finishing up drafting decisions that Administrative Law Judges had issued writing instructions for in February of 2018! They probably still have about 700 plus decisions waiting to be written and never receive the additional 250 to 300 cases in writing support monthly that are needed to stay current, because the Dallas region might get only 300 cases in writing support for the whole region in a week. This is totally unsatisfactory, when over half our work has to be sent out because the Agency will not replace employees.

Recently, this backlog and understaffing has increased to the point that the Albuquerque Office had to offload its scheduling to the Dallas regional office's Dallas Processing Center. I would like to commend the Dallas Processing Center for the support with the scheduling of cases, as well as the training and mentoring of new employees in the Albuquerque Hearing office.

The Agency needs to short staff the regional and national cases assistance centers instead of understaffing the local hearing offices. It also needs to reduce the amount of Telework that senior case technicians are entitled to each week. Yes, telework is treated like an entitlement at the expense of service, even when an office does not have 50% of the staff that it should have, almost totally eliminating the ability to have a senior case technician serve as a Video Hearing Reporter when the sole source contractor fails to appear.

Rouge ALJ's and Regional Office Managers

We need a confirmed Commissioner for Social Security to reign in rouge Administrative Law Judges and regional management officers, as leadership in Dallas Region 6, willfully engaged in the prohibited personnel practice of retaliation, because I reported fraud, waste, and abuse to the Agency.

I have served in the Office of Hearings and Appeals since September of 2007, after serving over 20 years in the United States Marine Corps. I have served as an attorney advisor drafting decisions for Administrative Law Judges in the Jacksonville, Florida Hearing Office, I helped standup the Moreno Valley, California as a one of two Senior Attorney Adjudicators in September of 2011, and served as a Supervisory Attorney (Group Supervisor) in the Albuquerque, New Mexico hearing office.

After making a report to "OHO's See Something, Say Something" while a supervisory attorney in the Albuquerque Hearing Office, I was constructively locked out of the Albuquerque Hearing Office for 30 days afterwards. I was allowed to return to the Albuquerque hearing office if I accepted a lateral move back to Senior Attorney Advisor position. I was told by my direct supervisor, that higher ups were going to make it extremely difficult for me to return to the office as a supervisor because I had "betrayed the management team" and that I could avoid that by requesting reassignment to my prior Senior Attorney position. The "Higher ups" were not named, but had to include members of the Dallas region executive management team.

After I made the report to Social Security's "See Something, Say Something", My Regional Chief Judge, and Region Management Officer on March 15, 2018, my office computer account was suspended and my computer was remotely disabled while I was teleworking on March 16, 2018, by the regional management officer. Once my computer was disabled, office door and gate codes were changed to prevent me from coming into the office and an Email was sent to the staff that I was on indefinite leave and should not be in the office. It took several days for the Dallas Regional Office and Albuquerque IT employees to return functional computer access to me, once I was allowed to return to the office on April 23, 2018. Rather than address the issues I raised, they chose to shoot the

messenger and forced my removal from the management, even though I was the group supervisor with the most OHO experience in the office.

Statistics and Invalid Data in Agencies Reports

While Deputy Commissioner Patricia Jonas, from Analytics, Review, and Oversight talked about the use of data analytics to help speed up the Appeals process, the Office of Hearings Operations, Case Processing Management System (CPMS) is full of invalid data due to a lack of understanding by most of the Office of Hearing Operations, Supervisors, Senor Case Technicians and Decision Writers. One problem, is that we use a two part code to classify whether an Administrative Law Judge is reversing the determination that was made at the State DDS level, that Hearings office employees often enter incorrectly into CPMS.

Many times, claimants will amend their onset date at the hearing level to a date after the date of the State agency's DDS determination. Unfortunately, almost all hearings office employees enter a code of "F""REV" instead of "F""AFF" into CPMS in this situation into CPMS's Hearing Level Disposition Summary Screen. This makes it appear that Administrative Law Judges are reversing the State agency DDS's at a much higher rate than they actually are. I have seen this occur in all the hearing offices that I have worked in. The Moreno Valley, California hearing office management team was dead set against entering it correctly after I raised the issue while there. Guidance in the hearing office's Electronic Business process actually states this is a rare situation, but in the ten plus years that I served with the Agency, this is far from rare and only in Albuquerque have I been able to have employees begin to enter it correctly. Once this statistic is correctly reported, I am sure that the public will see that hearing office ALJ's do not reverse the State Agency's determination's nearly as often as the data the Agency has been reporting suggests. This is very important because the Agency does "Focused Reviews" on outlier ALJ's, based upon invalid data to begin with and the Agency does not appear to be interested in getting it right the first time, if ever, based upon the resistance to inputting valid data that I have seen at various levels.

Another metric to ask the Agency about is how many claims have been decided by Administrative Law Judges without having the box for new evidence being checked on the same Hearing Level Disposition Summary Screen in CPMS. Failure to check this box indicates that the ALJ had received no additional evidence at the hearing level than existed at reconsideration, even though hearing testimony is new evidence. This is a box that should very rarely be unchecked, except in cases that were decided based upon res judicata. Ask the Agency for a breakdown of decided cases outcomes in which CPMS indicates no new evidence was received and cases and outcomes that were decided based upon res judicata at the hearing level to see this discrepancy. Based upon the data that the Agency reports, you will be astonished at how many cases the Agency decided without any new evidence.

Postponement reasons are often incorrectly reported in CPMS as many employees fail to grasp the difference between "a postponement to obtain representation" or "a

representative requested to postpone the hearing" to attend a March Madness playoff, or offers some other excuse to postpone the hearing due to the representative's inability choice not to make it to the hearing.

I, like most of the employees working in the Office of Hearings operations am dedicated to my job, because I could make far better wages elsewhere. I also wish to see those who are abusing their positions to hide scandals, understaff hearing offices, and retaliate against whistleblowers, or as the Green Arrow would say, "You have failed your [country]" held accountable.

Thank you for your time.

Gunnery Sergeant Steven Roy Murphy
United States Marine Corps Retired