

**Comments of the
Association of Administrative Law Judges
International Federation of Professional
And Technical Engineers,
ALF-CIO (Judicial Council 1)**

**Regarding Notice of Interim Final Rule
Amendment to the Attorney Advisor Program
(72 FR 44763, Aug. 9, 2007)**

To: Michael J. Astrue, Commissioner, Social Security Administration

The Association of Administrative Law Judges (“AALJ”), IFPTE, AFL-CIO (Judicial Council 1) submits the following comments in response to the above-captioned Notice of Rulemaking. AALJ is the exclusive bargaining representative for approximately 1,000 federal administrative law judges (“ALJs”) who serve with the Social Security Administration (“SSA”).

The stated purpose of the Interim Final Rule which became effective August 9, 2007 is to modify on a temporary basis the Social Security Administration’s prehearing procedures allowing certain attorney advisors, under managerial oversight, to conduct prehearing proceedings and, where the record warrants, issue wholly favorable on-the-record (“OTR”) decisions. The necessity and cited justifications for the rule include:

- Significant agency challenges to providing high-quality, accurate and timely service to the American public.
- Increased number and complexity of benefit claims.
- The need for enhanced development of claims before a hearing is conducted.
- Reduction of the agency’s record-high number of pending claims.

AALJ would add the following implicit, unstated reasons:

- To “pay down” the backlog.
- To generate more dispositions per work day per attorney advisor without impacting the present and future productivity of ALJs.

The rule rests upon numerous unverified programmatic assumptions:

- The rule will not negatively impact average ALJ dispositions per work day.
- The rule will not impose net aggregate delay to claims processing and will not exacerbate the aging of pending claims.
- The rule will result in fully developed claims ready for ALJ hearing.
- An ALJ, upon receiving a case the attorney advisor determines should be heard, will incur little need to do additional development effort or prehearing review.
- In those cases required to be heard after prehearing review, the work product of the attorney advisor amounts to added value which the ALJ can tap and utilize without the necessity of time-consuming, duplicative claims review by the ALJ.

In rushing to rule first (and seek comments later), the policymakers are neglecting a number of inconvenient facts:

- SSA’s Disability Hearings Quality Review Process (DHQRP) data from 1997-2001 underscore that the Attorney-advisor decisional accuracy was judged to have a supportability rate of only 66% in 1999 and though that rate improved in subsequent years attorney advisors did not produce OTR decisions comparable in quality to decisions rendered by an ALJ after hearing.
- The Attorney-advisor program was carried out under a more-favorable-to-experimentation-congressional-funding-and-staffing climate than presently exists.
- Following termination of the attorney advisor program in 2001, the stated goals of reducing the Agency’s record-high number of pending claims and to provide “timely” service to the public were not realized. Pending claims rose as did the aging of the case load¹ while ALJ levels remained fairly constant:

<u>FY</u>	<u>SSA Hearings Processed</u>	<u>SSA Hearings Pending</u>	<u>Average Processing Time for Hearings</u>	<u>ALJs</u>
1998	618,578	384,313	341 days	1153
1999	596,999	311,958	316 “	1090
2000	539,426	346,756	297 “	1024
2001	465,228	435,904	308 “	974
2002	532,106	500,757	336 “	1082
2003	571,928	591,562	344 “	1035
2004	497,379	635,601	391 “	1034
2005	519,359	708,164	415 “	1096
2006	558,978	715,568	483 “	1082
2007	na	740,000	na	na

- In an October 2, 2007 Message to All Social Security and DDS Employees, Commissioner Astrue candidly acknowledged that the Agency was facing unprecedented workloads with the lowest staffing level in over 30 years. The workloads, he stated, will continue to grow at an increasing rate. The Agency had limited resources to maintain current levels of service needed to drive down the backlog. Funding shortfalls will mean that services will be scaled back, hiring will be frozen (except for up to 150 ALJs and some support staff) and the Agency will be unable to replace workers who leave or retire.
- The original attorney advisor program was judged to be a waste of resources² by Social Security’s own management.

¹ Source: FY 2002-06 SSA’s Performance and Accountability Reports <http://www.ssa.gov/finance/>

² Disappointing Results From SSA’s Efforts to Improve the Disability Claims Process, GAO-02-322 (Feb. 27, 2002) at 23-24

- There is an unbridgeable gulf between fiscal realities and limitations of resources besetting the agency in FY 2008, as conceded by the Commissioner, and the policymakers' restoration of a "temporary" program that will waste resources.

For reasons set out above and below, the AALJ strongly opposes the Interim Final Rule. An Executive Summary, below, is followed by detailed comments. It is the strongly held opinion of AALJ that instead of using Attorney-Advisors in the manner contemplated by the Interim Rule, which will constitute a knowing and reckless waste of valuable agency resources and funds, that the Agency boldly embrace a far better and permanent plan for its senior Attorney Advisors, namely, the "Government Representative Program" which was (1) reported to the Social Security Advisory Board in May 2003 by Frank Block, Jeffrey Lubbers and Paul Verkuil (*Published at: 25 Cardozo L. Rev 1 (2003)*); (2) adopted by the full Social Security Advisory Board as a recommended policy shift to SSA; (3) endorsed by the AALJ National Executive Board; and (4) recommended in person to the Commissioner by the AALJ National Executive Board at the July 2007 AALJ Conference in Providence, Rhode Island.

Executive Summary

AALJ's opposition to the restoration of the 1995-2001 attorney advisor program³ is based on our members' collective experience with the lofty rhetoric associated with the Agency's past efforts to curb its growing backlog of pending cases and the sobering reality of its repeated failures to deliver meaningful case processing reform to the American public⁴. It is a sorry legacy of one failed promise after another despite the best efforts and input of individual stakeholders and their organizational counterparts, Congress, the GAO, the Social Security Advisory Board, the American Bar Association, and members of academia.

The former program was not successful in large part because it was a "one-sided" process with the only mission being to "pay cases." It received low marks from the Agency's Quality Assurance Review (QAR) staff.⁵ To the extent that an attorney's review and development efforts resulted in a decision not to issue an OTR decision, the Agency derived little or no benefit or added value from the hours expended on the case by the attorney reviewer. All that was garnered was delay. Following the decision not to issue an OTR decision, the case was passed on to the ALJ who, as a requirement of his or her judicial independence, would be required to marshal the evidence anew and come to a fresh, impartial understanding of the longitudinal history and severity of the claimant's medically determinable impairments, work attempts, activities of daily living, treatment regimens and compliance, and functional capacity. More often than not, the seasoned

³ A different contemporaneous initiative – the "Adjudication Officer" program (the AO program) - was also launched on a test basis in June 1995. 60 Fed. Reg. 30482 (June 9, 1995). The AO program permitted adjudication officers to be a qualified employee of SSA or a State agency that makes disability determinations.

⁴ The "Hearings Process Improvement" Plan and the "Adjudication Officer" program being examples of misguided and unsuccessful reform efforts.

⁵ See, Part 2, *infra*.

judgment and analytical skills of ALJs led to overlooked development issues that would further delay the scheduling of the hearing. Following a hearing and issuance of decision writing instructions, ALJs experienced significant delays in receiving back from writers draft decisions as the better writers (the attorney advisors) were busy with their own “docket.” When, finally, a draft decision was received from a writer, the draft too often (in the case of non-attorney paralegal writers) reflected analytical and factual errors, legally insufficient findings, and deficiencies of spelling and grammar. Those drafts were either returned for editing or, in the worse case scenario, the ALJ elected to ignore unsalvageable drafts and to write a wholly new decision. More delay.

The new program lacks a valuable safeguard that is present in current review activities performed by attorney advisors. Under existing process, attorney advisors review cases and, where the review suggests that a fully favorable OTR decision can be made, draft recommended OTR decisions. Those decisions are then submitted to an ALJ for review, modification, approval or disapproval. The ALJ’s review constitutes a “feed back” system for attorney advisors and serves as a check on the accuracy and legal sufficiency of the decision recommended by the attorney advisor. Under the restored program, no such safeguard exists.

AALJ recommends that the Agency enhance the professionalism and training of its attorney advisors in order to take full advantage of the talents, skills and knowledge which these employees possess. Rather than divert this talent pool to a dead-end temporary assignment, the Agency should boldly embrace a Government Representative Program and look to the attorney advisors to carry out this important new function, one that will well-serve the American public.

Alternatively, AALJ recommends that the Interim Final Rule be terminated at the onset.⁶ Without the necessity for rulemaking, the Agency should direct forthwith that attorney advisors be assigned to work on cases of specific Hearing Office Administrative Law Judges and that every non-managerial Administrative Law Judge shall have the benefit of one or more attorney advisors dedicated to working solely on that judge’s docket of assigned cases from the prehearing phase through the decision drafting stages of case processing⁷. This will ensure that it is the work product and theory of the APA independent judge that guides each action taken toward the final disposition of the case. It will mean that the intellectual capital expended by an attorney advisor during development and pre-and-post hearing will not be lost to the ALJ and will not require duplicative or wasteful efforts by the judge.

Part 1 Background and Regulatory History of the Interim Rule

In attempting to understand the goals and objectives of SSA’s policymakers and to assess, independently, the amount of credence we ought to give to the asserted rationale

⁶ As of the date of the filing of these comments, no concrete implementation of the rule has taken place despite its August 9th effective date.

⁷ Each Hearing Office would have one Supervising Attorney responsible for the supervision of attorney advisors and paralegal writers working in that office.

and expectations of the restored attorney advisor program, AALJ has taken a careful and dispassionate look at the Agency's 1995 Federal Register statements justifying the original attorney advisor initiative, letting the policymaker's own words either convince us that this is now the proper course to follow again or lead us to an opposite conclusion. We submit that what follows is a cautionary tale, the lessons of which have not well been learned by the Agency through the years, thereby undermining any faith and hope we might have for the success of this venture.

On September 19, 1994, the Commissioner of Social Security published a *Plan for a New Disability Claim Process* in the **Federal Register** (59 FR 47887). The *Plan* set forth SSA's long term goal for redesigning and fundamentally improving the overall disability claim process. On a path separate from but parallel to the *Plan*, SSA developed a number of short term initiatives to process cases more efficiently and, therefore, to reduce the number of cases pending in our hearing offices. One such short-term initiative was the "Attorney Advisor Program." See, Notice of Final Rules, Administrative Review Process, Prehearing Proceedings and Decisions by Attorney Advisors, 60 Fed. Reg. 34126 (Jun. 30, 1995).

The Attorney Advisor Program was deemed a necessary but temporary change in SSA's administrative review procedures because, *inter alia*, the applications for disability benefits had risen "dramatically" in recent years resulting in over 540,000 requests for hearing filed in FY 1994. 60 Fed. Reg. at 34126.

As the June 30, 1995 Federal Register Background information to the Final Rules noted: "Despite management initiatives that resulted in a record increase in ALJ productivity in FY 1994, and the hiring of more than 200 new ALJs and more than 650 new support staff that year, the number of cases pending in our hearing offices has reached unprecedented (emphasis added) levels – more than 480,000 at the end of FY 1994 and more than 540,000 (a 12.5% increase) at the end of May 1995." 60 Fed.Reg. at 34126.

Under the Final Rules, attorney advisors were authorized in certain cases to "conduct prehearing proceedings", 20 CFR § 404.942(a)⁸, defined as "reviewing the existing record," "requesting additional evidence," and "schedul[ing] a conference with the parties" (to clarify the record to determine if a wholly favorable decision is warranted). 20 CFR § 404.942(c).

The category of cases to which the rules would be applicable would be those in which, *inter alia*, (1) new and material evidence is submitted (after the reconsideration determination) and (2) there is an "indication" that additional evidence is available. 20 CFR § 404.942 (b).

"If upon the completion of these proceedings, a decision that is wholly favorable to [the claimant] and all other parties may be made, an attorney advisor, instead of an administrative law judge, may issue such a decision." 20 CFR § 404.942(a)

⁸ Identical new rules, §§ 404.942 and 416.1442, were added to the Title II and Title XVI regulations.

“The conduct of the prehearing proceedings by the attorney advisor will not delay (emphasis added) the scheduling of a hearing.” 20 CFR § 404.942(a).

“The prehearing proceedings conducted under these provisions will not delay the scheduling of a hearing because these proceedings will be conducted before the case would be scheduled for hearing.” 60 Fed. Reg. 34130.

“[It is not our intent] that a case will have been assigned to an ALJ before an attorney advisor conducts prehearing proceedings under the authority contained in these rules.” 60 Fed. Reg. at 34130.

“If the prehearing proceedings are not completed before the date of the hearing⁹, the case will be sent to the administrative law judge unless (emphasis added) a wholly favorable decision is in process or [the claimant] and all other parties to the hearing agree in writing to delay the hearing until the proceedings are completed.” 20 CFR § 404.942(a)

“If the attorney advisor issues a wholly favorable decision under this section...an administrative law judge will dismiss the hearing request unless a party requests that a hearing proceed.” 20 CFR § 404.942(d)

“The attorney advisor’s functions are not designed to change in any significant way the overall rate at which we allow claims for benefits...”¹⁰ 60 Fed. Reg. at 34127.

“If there is evidence that the overall allowance rate increases or decreases unacceptably, the Commissioner will curtail use of, or make appropriate adjustments to the attorney advisor procedures, consistent with this regulatory authority.” 60 Fed. Reg. at 34127.

“We received 82 letters representing the views of over 125 individuals. Most of the comments we received were from individuals employed either as attorney advisors or ALJs in OHA.” 60 Fed. Reg. at 34127.

“In general, the comments either strongly supported or strongly opposed adoption of the proposed rule.” 60 Fed. Reg. at 34127.

⁹ This statement contemplates a hearing scheduled by an ALJ while the case is still on the docket of the attorney advisor, and as such, is flatly contradictory to the previous statement that ALJs, during the period of attorney advisor review and development, will not be assigned to such cases.

¹⁰ This statement is at odds with common sense. It is intended to be mis-read as an Agency assurance that the conduct of attorney advisors under the program will not result in any significant increase in overall allowance rate of claims. But what it literally says is that the “functions” of attorney advisors are not “designed” to lead to such result (even if the designers of the rules suspect (indeed, likely count on) that the natural tendency of most attorney advisors will be to endeavor to achieve their assigned task of finding and issuing wholly favorable on the record decisions in the quantities dictated by “managerial oversight” and performance quotas so as to justify management’s belief in their ability to step up to the challenge du jour and meet or exceed management’s goal).

“The comments from individuals employed as attorney advisors unanimously supported adoption of the proposed rule; all but one of the comments from individuals employed as ALJs recommended against adoption of the proposed rule.” 60 Fed. Reg. at 34127.

“The comments received from individuals who opposed adoption of the proposed rule reflected a number of common themes and views...(1) that the proposed rule violated the Administrative Procedure Act (APA) or the Act; (2) that it denied claimants their constitutional rights of due process and equal protection; (3) that it was impracticable; (4) that it is unnecessary because of the availability of preferable alternatives; (5) that it would result in decisions which inappropriately found that claimants were disabled and therefore would result in increased program costs; and (6) that the proposed rule violated the settlement agreement between the parties in ... *Bono, et al. v. United States of America Social Security Administration, et al.*, Civil Action No. 77-0819-CV-W-4 (W.D. Mo. 1979) regarding the rotational assignment of cases to ALJs.” 60 Fed. Reg. at 34128.

“No provision of the [Social Security] Act requires the Commissioner to utilize an ALJ when issuing a decision...”¹¹ 60 Fed. Reg. 34128.

“[Under *Bono*] OHA reserved the right to modify or change the agreed-upon policies after appropriate consultation with the ALJs. The *Bono* agreement also specified that the Agency could consider the number of cases pending before an ALJ in determining the extent to which the rotational assignment of cases to an ALJ immediately upon their receipt in the hearing office was practicable. Under our existing procedures, cases remain on the master docket of the hearing office until several prehearing procedures have been completed. The prehearing procedures we are adopting in these final rules represent further modifications to our procedures undertaken and proposed with appropriate consultation with our ALJs.” 60 Fed. Reg. 34128

“Some of the commenters stated that...the effect of the rule would be to divert needed resources away from ALJs. * * * Some of the procedures we are implementing under these rules are based on prehearing conference and screening procedures we fully tested...during a pilot study completed in 1993. The results of that study, which collected data from more than 40,000 cases, showed that hearing offices could significantly reduce average case processing time by more effectively identifying and processing claims in which a hearing decision could be issued “on-the-record” under our current regulations (i.e. without holding an oral hearing). * * * The results of the pilot study also demonstrated that the prehearing conference and screening procedures did not lower hearing office productivity. Further, we found that the considerable savings realized in ALJ and staff time by avoiding unnecessary hearings more than offset the time spent in prehearing analysis and development.” 60 Fed. Reg. at 34128.

¹¹ Commissioner Astrue should forthwith disavow this assertion and should publicly admit without qualification that the law requires his agency to appoint as many ALJs as are necessary to carry out the Agency’s mission of hearing and deciding its Due Process case load, a case load which cannot lawfully be adjudicated by non-APA decision-makers. See, AALJ’s Comments (10/25/2005) filed with SSA respecting SSA’s Notice of Proposed Rulemaking: Administrative Review Process for Adjudicating Initial Disability Claims (“DSI”) at pp 1-13 for a thorough discussion of the requirements of Due Process and applicability of the APA to SSA hearings.

“Although under these final rules some attorney advisors may draft fewer hearing decisions in cases in which a hearing before an ALJ is held, and provide less professional assistance to ALJs, there are a number of initiatives already underway that are designed to provide hearing offices with additional case preparation and decision writing support during the course of this initiative.” 60 Fed. Reg. 34128.

“Many attorney advisors, as well as our paralegal specialists, will be available to provide ALJs with research and decision drafting support.”
60 Fed. Reg. 34129.

“[The rule will address the issue of the increasing number of claims pending at OHA as] we are devoting appropriate, additional resources to provide staff support to the ALJs...to reduce the time required to process the cases awaiting a hearing.” 60 Fed. Reg. 34129.

“We are establishing an intensive quality assurance review program that will supplement own motion reviews by the Appeals Council in assuring the accuracy of the decisions made by the attorney advisors.” 60 Fed. Reg. 34129.

“[The regulations permitting attorney advisors to conduct certain prehearing proceedings and to issue decisions wholly favorable to a claimant] which are codified at 20 CFR §404.942 and 416.1442, included a provision stating that the rules would no longer be effective on June 30, 1997, unless the Commissioner of Social Security extended the expiration date.... [By previous published final rules] we extend[ed] the date on which these rules would no longer be effective ...to April 1, 2000. * * * [W]e have decided to extend the date on which these rules will no longer be effective from April 1, 2000 to April 2, 2001.

“[W]e will not extend these rules beyond April 2, 2001 [because we have] developed a comprehensive plan to improve the hearing process...called the “Hearings Process Improvement Initiative.” * * * We expect [HPI], once fully implemented, to result in an overall 21% reduction in processing time for hearings, a 16% increase in productivity per workyear and better service to the public (emphasis added).” 64 Fed. Reg. 51893 (Sep. 27, 1999).

AALJ Assessment of the Regulatory History of the Interim Rule

Having revisited the actual words of the policy makers in justifying the purposes and expectations for the attorney advisor program, we are not convinced that the Rule will restore a lawful or efficacious program. The plan is not a good use of scarce resources and is not likely to achieve its intended purposes.

AALJ submits that the 1995 Federal Register liturgy of Agency expectations and unfounded assertions concerning the temporary attorney advisor program are as untrustworthy today as they were in 1995. Neither that program nor its larger and more comprehensive replacement – HPI – were the successes that the Agency told us they

would be¹². As noted by the General Accounting Office (GAO) in its Report GAO-03-117 released in January 2003, the plan laid out in 1994 by SSA to address and improve the disability claims process and three subsequent revisions “have yielded only limited success” and “the results of efforts to improve the Disability Claims Process have been disappointing.” Report at 13-14. “Our review of SSA’s efforts found that the agency had accomplished little.”¹³ “During its existence, the [attorney advisor] program succeeded in reducing the backlog¹⁴ of pending disability cases at the hearing level by issuing some 200,000 hearing-level decisions. However, findings on the accuracy of Senior Attorney decisions are mixed. *** SSA management has expressed concern that the Senior Attorney program is a poor allocation of resources as it diverts attorneys from processing more difficult cases in order to process the easier cases.” *Disappointing Results From SSA’s Efforts to Improve the Disability Claims Process Warrants Immediate Attention*, GAO-02-322, Feb. 2002, at 23-24.

Despite the claims of programmatic success and reduction of the backlog, the Agency itself conceded in 2001 that “there are a few areas where we did not make progress, or in which we fell back, due to a variety of reasons. Specifically:

- Because of both external and internal factors, we continued to struggle to improve timeliness and productivity in our processing of hearing requests. The main barriers were [the Adzell litigation] and implementation of [HPI]. We do not expect much improvement in average processing time in FY 2002 as an unavoidable result of the steady rise in pending levels experienced during FY 2001 and a higher actual average processing time in FY 2001 than projected. However, recent hiring of ALJs should have a positive impact beginning in FY 2003.

SSA’s FY 2001 Performance and Accountability Report – Management Discussion and Analysis at 35.

As the Notice of Interim Final Rule, 72 Fed. Reg 44763 (Aug. 9, 2007), contains no new information that might lead one to expect that there are changed circumstances that might warrant a rehash of a failed inaccurate program, and in view of the ongoing reduced

¹² “It is our intent that, when fully implemented, HPI will reduce processing times from 316 days in FY 1999 to fewer than 200 days in FY 2002.” *Social Security FY 2001 Annual Performance Plan*, p. 96.

¹³ *SSA Disability Redesign: Focus Needed on Initiatives Most Crucial to Reducing Costs and Time*, GAO/HEHS-97-20 (Dec. 20, 1996); *SSA Disability Redesign: Actions Needed to Enhance Future Progress*, GAO/HEHS-99-25 (Mar. 12, 1999); and *Social Security Disability: Disappointing Results From SSA’s Efforts to Improve the Disability Claims Process Warrant Immediate Attention*, GA-02-322 (Feb. 27, 2002).

¹⁴ The program was in operation from 1995 through April 2002 (i.e. it ended FY 2002). The pending case data (or backlog data) for the last 5 years of the program show pending claims declining in only FY 1999: FY 1998 (384,313 pending), FY 1999 (311,958); FY 2000 (346,756); FY 2001 (435,904); FY 2002 (500,757). One suspects that the author(s) of the GAO report did not critically define what they intended to mean by “reducing the backlog.”

resources and staffing available to support ALJs (support which this Initiative will drain away), the AALJ has no confidence that the results of this restored program will be materially different from the original program and may even be worse.

Part 2 ALJ Peer Review IV (September 2001) – Findings of the Disability Hearings Quality Review Process

The Office of Quality Assurance and Performance Assessment (OQA) issued its “ALJ Peer Report IV” in September 2001. 2001 was the final year of the original attorney advisor program. The report’s authors found that “using the previous Peer III report as a comparative baseline, the findings for this current reporting period demonstrate little improvement that is statistically significant.” The “current” reporting period consists of data from reviewed decisions issued in FY 1999 through July 2000.

The report findings show that for “current” ALJ decisions, there was a national support rate (i.e. the decision of the ALJ was supported by substantial evidence) of 88%. Report at 15. By comparison OTR allowances only had an 81% support rate and OTRs issued by Senior Attorneys had only a 78% support rate.

OQA evaluates OTR cases in the same manner as it reviews Hearing Held (HH) cases except that the reviewers omit questions pertaining solely to the oral hearing procedures. There is no reference to any special review process designed to evaluate the accuracy of Senior Attorney OTR wholly favorable decisions. Only generalized comments suggest that issues identified with OTR decisions include documentation problems as a result of issuing OTRs prematurely; i.e. before completing all evidentiary development. Report at 51. At p. 52, the Report refers to the 1999 Peer Review findings that show Senior Attorney OTR wholly favorable decisions had a 66% substantial evidence support rate during the “baseline” period.

Part 3 Unfavorable Comments by Individual Non-Management ALJs

The following comments, or substantially similar ones, were made by one or more individual line judges¹⁵ during the period April 2007 (when the rule was first rumored) through September 19, 2007 (the deadline for submitting comments to the AALJ National Executive Board).

- The rule will mean that ALJ decisions following a hearing will be written primarily by paralegal writers instead of attorney advisors as the latter will be focused on generating wholly favorable “on-the-record” decisions.

¹⁵ A total of 49 comments by line judges concerning the Final Interim Rule have been gathered from April 2007 (when the rule was first rumored) through September 19, 2007. There were 3 favorable comments; 39 unfavorable comments; and 5 partially favorable comments recommending modifications to the rule. Two commenters suggested the creation of an alternative initiative similar to an Attorney Magistrate program which would consist of attorney advisors who would be supervised by ALJs.

- Less than 50% of the reviewed attorney advisor decisions were legally adequate or sufficient.¹⁶ Examples of clear error included cases which should have been denied at step one due to substantial gainful activity.
- When the Agency sets up a system like the attorney advisor program in which the attorneys are told that they are expected to achieve a certain number of cases per day (a quota), the attorneys, who lack an ALJ's independence, will deliver the number of cases expected (or more) to insure the program, and their job security under the program, continues.
- As word of the implementation of the Interim Final Rule spreads among the American public and correlative to the "success" of the program in generating ever higher numbers of pay cases, there will be a surge of new applications by those who feel that they have little to lose by playing the disability lottery.
- The Interim Final Rule is nothing more than a scheme to pay down the backlog.
- You cannot pay down the backlog because any attempt to do so creates a "subsidy" and whatever you "subsidize" you simply get more of it. It's economics 101.
- No plan to deal with the backlog will succeed absent meaningful procedural rules, time limits for filing evidence, rules for closing the evidentiary record, and other suggestions made by ALJs which have fallen on the deaf ears of Agency management for over ten years.
- With attorney advisors processing and writing the easiest claims, the Interim rule takes the most experienced and gifted writers away from the ALJs and leaves the most difficult decisions (affirmations) to be written by the least experienced staff (paralegals). Under the Interim rule, the Agency should not expect ALJ productivity to remain at its current level. Given the combined impact of the electronic folder, the loss of attorney advisor support staff and the lack of funding to hire replacements to fill existing support staff vacancies or future vacancies occurring when current staff retire or resign, ALJ productivity will fall dramatically. In this staffing and funding-perverse environment, the Agency may expect ALJs to take on more and more clerical functions but that expectation will not be realized.
- During the first attorney advisor program, the lack of sufficient senior attorneys to write the difficult decisions for cases heard by ALJs resulted in a case writing backlog. Many attorney advisors could not keep up with the flow of cases to be reviewed and had pending case loads exceeding 100 cases.
- In the period 1998-2001, the most egregious mistakes made by attorney advisors were in cases involving mental impairments, such as affective disorders, mental retardation cases and personality disorders. These cases generally are not readily

¹⁶ Independent comments from two (2) ALJs who served on QAR panels in the period 1998-2001.

susceptible to “on-the-record” dispositions. They require a hearing and medical expert testimony from a clinical psychologist or psychiatrist.

- The Agency’s FIT decision-writing tool is no answer to the loss of experienced attorney writers as the most difficult aspect of writing any legally sufficient unfavorable or partially favorable decisions is the rationale or the logical bridge(s) demanded by the Courts of Appeal. Paralegal writers generally are woefully under-trained and lack the skills essential to mastering this complex task.
- The attorney advisor program will have the practical effect of delegating judicial functions to persons who would have only temporary assignments and who lack the independence envisioned under the Administrative Procedure Act.
- The Interim Rule will create a bias in favor of approving claims and will work against protecting the “public fisc” by paying claims which are legally insufficient.
- The program – designed to more effectively utilize experienced attorney advisors - will be implemented at the same time that many of these very same attorney advisors will be placed on OPM’s register of qualified ALJ applicants and will, when appointed as ALJs, be unavailable to the Agency for this program work.
- The Agency lacks any meaningful, quality assurance program for the work product of attorney advisors (i.e. one that tracks and separately analyzes attorney advisor “on the record” wholly favorable decisions). Increasing Appeals Council own-motion review of attorney advisor decisions will only lead to a new Appeals Council pending case review backlog.
- The rule should be modified to require that the role of attorney advisors be limited to reviewing, developing the record and drafting recommended “on the record” wholly favorable decisions for an ALJ who will retain sole power and independence either to sign such decisions or to hear such cases, thereby preserving the integrity of a hearings process that is predicated on ALJ adjudicative independence under the APA.
- The concept of “managerial oversight” negates attorney advisor independence.
- This program will have no material effect on the 750,000 case backlog as the net gain in output by attorney advisors will be offset by a net loss of productivity by ALJs who will be forced to write more and more of their own decisions.
- The prior attorney advisor program was deficient because of inadequate training resulting in the issuance of too many fully favorable decisions which were not well supported.
- Without hiring more support staff, this program just shifts limited resources around without making any fundamental changes.

- Human nature being what it is, it is sheer folly to expect that paying more cases will result in fewer claims being filed.
- If an attorney advisor (or an ALJ) can look at a claim file and issue a fully favorable decision on the record with minimal or obvious development (such as ordering a consultative exam, obtaining an amended onset date that is consistent with medical evidence, or clarifying that posted earnings were in fact long-term disability insurance payments) then that case is one that should not be in ODAR but should have been decided at the DDS level. The Commissioner should ensure that DDS bears the burden of correcting their own errors, not ODAR.
- The proposed program results in one of three outcomes. If the attorney advisors are more conservative than the judges, they will waste a lot of time reviewing cases that they will not pay. In offices where the attorneys and the judges are similarly disposed to granting certain cases on the record, the pay rate will not change. In offices where the attorneys are measurably more sympathetic to the claimants than judges, many, many cases are paid without merit. In all cases, significant amounts of time away from complex case decision writing will be needed for the attorneys to review cases. In the first circumstance, the program does not produce the desired result. In the second, the program produces no difference in result. In the third, the higher number of favorable decisions is questionable. In all cases, the attorney advisor program delays the more difficult and complex decisions. The taxpayers are harmed because another level of process is triggered and highly-compensated employees are being used. The claimants are being harmed by the delay and because, if a representative is involved, delay increases the amount of fees the claimant must pay.
- While it is true presently that attorney advisors are under-utilized by the Agency, the Interim Rule neither addresses nor solves that problem. A better utilization of the skills and experience of senior attorney advisors would be for the Agency to implement a Government Representative Program.
- An ALJ's decision-making power and decisional independence are vested in the judge, upon appointment, directly under the APA. If you allow the Agency to split or give away any part of this power to a non-APA decision-maker, you have effectively given it all away. It is a zero sum game. These are either APA hearings or they are not. An attorney advisor cannot conduct an APA hearing. If the Agency's hearings are not APA hearings, SSA does not need APA ALJs.
- The attorney advisor program was not extended in 2001 because quality review data indicated that attorney advisor reversals were not well supported and were numerically disproportionate to the ALJ corps reversal rate.
- A rule requiring attorney advisors to function under "managerial oversight" (i.e. HOCALJs) is a rule which will ensure that those who have the most interest in boosting production numbers without regard for quality of the decisions are in charge. Hiring more ALJs who are independent would accomplish the goals of the Interim Rule while still protecting the American public.

- The attorney advisor program will erode the integrity of the independent due process hearing and the role of the ALJ in that process. Attorney advisors are subject to managerial oversight and performance evaluations. They may receive bonuses (pay for performance). They are not subject to the same financial disclosure rules that ALJs are subject to and the potential for abuse (even fraud) is enormous.

Conclusion

The Interim Rule will not provide “high-quality, accurate and timely service to the American public.” The Interim Rule is not going to be an answer to the growing “complexity of benefit claims.” The Interim Rule will, to some extent, provide “enhanced development of claims before a hearing is conducted” but that enhancement will come at the cost of significant delay and duplicative ALJ file review. Finally, the Interim Rule will not result in a “reduction of the agency’s record-high number of pending claims.” It will, instead, grow that number while extravagantly wasting limited agency resources.

For the foregoing reasons, AALJ urges the Social Security Administration to reconsider its Interim Final Rule and, as reconsidered, to terminate this ill-advised program. In its stead, SSA should develop and implement a Government Representative Program staffed by well-qualified and specially trained Attorney-Advisors. It is an alternative that the American public deserves and which is long overdue.

Date: October 9, 2007

Respectfully submitted,

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