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ASSOCIATION OF ADMINISTRATIVE LAW JUDGES

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Report to:  
The President-Elect of the United States;  
The Social Security Subcommittee of the  
House Ways and Means Committee

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PRESERVING DUE PROCESS IN  
SOCIAL SECURITY DISABILITY

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White Paper: AALJ Recommendations on the Social Security Disability Case Backlog, January 2008.

AALJ, Statement before the House Committee on Ways and Means: Hearing on Clearing the Disability Backlog, April 23, 2008.

Social Security Advisory Board, A Disability System for the 21<sup>st</sup> Century, September 2006, <http://ssab.gov/documents/disability-system-21st.pdf>.

AALJ, Comment to Notice of Proposed Rulemaking, Setting the Time and Place of Hearings, January 9, 2009.

## **The Role of Administrative Law Judges in Social Security**

Federal administrative law judges adjudicate claims citizens have brought against various federal agencies involving laws and regulations related to subject matter such as agriculture, banking, labor, transportation, Medicare and social security benefits.

The role of administrative law judges in the federal government was formalized by the Administrative Procedures Act (APA) in 1946. The APA mandates that adjudicators employed by federal agencies to conduct APA proceedings must be independent, impartial, qualified and fair.

The administrative law judges in SSA decide over 550,000 cases per year. Unlike the administrative law judges in many other federal agencies, the administrative law judges in SSA have the responsibilities of developing a complete record for both parties; to protect the trust fund as well as the due process rights of the claimant; and render a legally defensible decision based on the evidence in the hearing record. SSA's administrative law judges' decisions impact the lives of millions of Americans every year.

## **The Association of Administrative Law Judges (AALJ)**

The AALJ represents the administrative law judges employed at the Social Security Administration (SSA) and the Department of Health and Human Services. One of the stated purposes of the AALJ is to promote and preserve full due process hearings in compliance with the Administrative Procedure Act for those individuals who seek adjudication of program entitlement disputes within SSA. The AALJ represents the majority of the approximately 1500 administrative law judges in the entire Federal government.

The AALJ was established as a professional association in 1971. In 1999, in the face of SSA misdirected management initiatives, it was determined that the AALJ needed to have the legal standing of a union and became an affiliate of the International Federation of Professional and Technical Engineers (IFPTE) AFL-CIO.

## **The Monumental Backlog of Social Security Disability Cases; Attempts to Shift the Blame to Others**

Towering over SSA is a backlog of over 770,000 cases claiming disability benefits under Title II and Title XVI of the Social Security Act. SSA has blamed the backlog on insufficient appropriations from Congress, the aging of the baby boomers and at times on the ALJs who decide these cases.

The Government Accountability Office (GAO) reviewed the backlog in depth in December 2007 and issued an extensive report, SOCIAL SECURITY DISABILITY: Better Planning, Management, and Evaluation Could Help Address Backlogs, GAO-08-40. The report concluded the principal causes of the backlog were “growth in claims, staff losses and **management weaknesses**.” [Emphasis added].

The Commissioner of Social Security (COSS) has been complaining to Congressional committees that some ALJs are underproductive and a contributing cause of the backlog. However SSA’s own statistics show SSA’s ALJs have each year produced steadily increasing numbers of decisions with decreasing numbers of staff and of judges. There is no evidence to support laying the blame for the backlog on the SSA ALJs.

This has been confirmed by a recent SSA OIG report which specifically addressed factors affecting hearing office productivity, *Congressional Response Report: Administrative Law Judge and Hearing Office Performance*, [www.ssa.gov/oig/ADOBEPDF/A-07-08-28094.pdf](http://www.ssa.gov/oig/ADOBEPDF/A-07-08-28094.pdf).

## **Threats to Claimants’ Due Process Rights**

Under the law and the regulations each claimant has a right to a *de novo* hearing before an ALJ. This right guarantees that individuals with disabilities have a full and fair administrative hearing by an independent decision-maker who provides impartial fact-finding and adjudication, free from any agency coercion or influence.

The importance of that independence has been seen at least twice in the last 30 years. In the early 1980’s SSA cut off benefits of hundreds of thousands of claimants who had previously been found disabled, sometimes 10 or 15 years earlier. ALJs confronted these policies and reversed thousands of improper terminations and denials. More recently there have been unwritten, unspoken policies effected to “pay down the backlog”, that is to simply pay cases to get rid of the files. Again the corps of ALJs has resisted those pressures and continued to decide each case on its merits.

SSA is endeavoring to create a high speed assembly line of the hearing process; introducing short cuts and unproven automation; substituting video hearings for in-person hearings and reducing the time for hearings; all in an effort to drive the adjudicatory process faster and faster to produce more decisions and thereby reduce the backlog.

The Social Security bar has noted a gradual decline in the quality of ALJ hearings and decisions. The ALJs themselves are aware of the decline but feel highly pressured to keep increasing the numbers of decisions produced. As the process is pushed to go faster and faster it is in danger of going out of control.

## **Need: Change of Management Philosophy**

**Spin over substance.** In an effort to convince the public, the press and ultimately Congress that it is achieving successes, SSA has utilized its public relations machine at an unprecedented level to try to show the many ways in which it is reducing the backlog. However simple inquiries show that nearly all of the Agency's "initiatives to reduce the backlog" do not reduce the backlog at all. They simply shift resources from one area to another, then the new area is touted as a gain in productivity.

### **Current SSA management has demonstrated an anti-union animus.**

- Periodic meetings of union officers and SSA management to work on mutual problems have ceased. The officers of the AALJ, the NTEU and AFGE have all been essentially ignored in decision making processes.
- For 17 years, the AALJ sponsored an annual educational conference for the ALJs because SSA provided virtually no training for the judges. Recently for quite a few years, in recognition of the AALJ's contribution, SSA has provided a subsidy of around \$100,000 to defray AALJ's expenditures. In 2008, the subsidy which had been promised was discontinued. Further SSA spent an estimated \$2,000,000 on hastily organized educational conferences of its own which were mandatory for all ALJs and held just a few weeks before the AALJ's conference. This significantly cut into attendance at the AALJ's conference. Additionally, where the COSS and some deputy commissioners, regularly attended and addressed these educational conferences, they now boycott them.
- SSA has determined, based on no objective data, that every judge should produce a minimum of 500 decisions per year without regard to the staff available in each hearing office. Thinly veiled threats have been made that judges who fail to produce at least 500 cases per year will be disciplined in some fashion.
- National Hearing Centers are being constructed in which the judges are nominally "supervising" the staff attorneys which effectively prohibits those judges from being union members.
- Currently the COSS has proposed changing the regulations providing that the administrative law judge sets the time and date of the hearing to provide that the Agency will have that authority. The purpose is to permit the Agency to schedule more hearings for the judges in an effort to get judges to hold more hearings. This also would permit the Agency to

increase the number of hearings held to any number it wished. The dangers of this proposal are discussed above.

**The National Labor-Management Partnership Council should be restored.**

In 1993 President Clinton established the National Labor-Management Partnership Council. In 2001, President Bush abolished the council. The partnership council helped not only to ease relationships between labor and management but to keep civil service work attractive to prospective employees.

The partnership was a recognition that employees often have good ideas on how to do things better for the public and the taxpayer. Labor-management partnerships provide a process for them to participate in helping their agencies better accomplish their missions.

A council, with representatives from agencies and employee groups, would advise the president and local labor-management partnership councils, and would be responsible for promoting the formation of partnerships throughout the executive branch.

**Restructuring of Agency management.** The Obama administration critically needs a new commissioner whose philosophy would be consistent with that of the new administration. We also believe a strong Principal Deputy Commissioner should be appointed who would re-establish and maintain cooperative relationships with the unions representing SSA's work force and execute policies and changes that are implemented by the new administration.

**Need: More and Better-Allocated Funding**

SSA needs not only additional funds but more oversight to insure the funds are effectively spent.

**The staffing problem.** SSA does not acknowledge the need for qualified personnel in sufficient numbers, apparently believing that automation will replace experienced personnel. GAO, SSA's OIG and numerous other observers have all noted that ALJs could decide many more cases if only they received more processed claim files. This is the specific locus of the backlog, the pileup of cases waiting for the senior case technicians to prepare the claim files. The judges have not seen these files. Over 60% of all the claim files awaiting hearings, half a million files, are waiting to be prepared to be given to the judges.

Over the last decade, concurrent with the marked increase in the disability claims backlog, claimants' representatives have noted the loss of ALJs and support staff in hearing offices around the country. In 2008, SSA hired about 150 new judges and plans to hire another 150 in 2009. Few staff have been added and many of

those have gone to various headquarters areas. What has been and is still needed first is more staff to support the current judges and then to provide adequate support to any new judges added.

Since much of the disability problem involves staff shortages it is critical to understand the role of staff in the disability claims process. When case files arrive in a hearing office, they must be “worked up”, prepared for use in the hearing. This is a significant task requiring skill and one to three hours of time. The task is done only by *Senior Case Technicians*. Whether a paper file or electronic file, the contents arrive in random sequence, unidentified, unpaginated, with duplications and without any numbered exhibits or table of contents to locate the exhibits. The Senior Case Technician identifies and eliminates duplications, identifies exhibits from the same source, labels them, arranges them in chronological order, numbers and paginates the exhibits and prepares the List of Exhibits. After it is worked up, the file goes to the assigned judge for review.

In many offices now, there are not enough cases worked up for the judges to fill the dockets they have requested. Productivity is not related solely to the number of judges, but also to the number of support staff. The OIG found a direct correlation between staffing ratios and hearing office productivity.

Testimony by SSA’s Chief Administrative Law Judge (Chief ALJ) at a September 2008 House Ways and Means Social Security Subcommittee hearing corroborates the OIG Report findings. The Chief ALJ testified that to reach a goal of 500 annual dispositions per ALJ the staffing ratio in hearing offices would need to be increased by at least 500 support staff.

As the OIG also points out, in addition to having sufficient quantity of staff, the quality and composition of staff also impacts productivity. Much of the job description of the Senior Case Technicians has been waived to permit them to work up more cases.

The OIG corroborated that fewer hearings are scheduled than requested by the ALJ. ALJs told the OIG that “the main reason not enough hearings were scheduled was because of insufficient support staff to prepare cases. OIG’s analysis of staff ratios confirmed this. Hearing office staff interviewed by the OIG corroborated the ALJs’ concerns.

There was a consensus among the witnesses at the September 16, 2008, Congressional hearing that insufficient numbers of cases were being worked up and ready to be scheduled for hearing due to insufficient support staff.

**Other funding issues.** Budget constraints might warrant that consideration be given to allocating some of Trust Fund to be used for specific needs, e.g., to upgrade and expand SSA's computer systems.

### **Need: Systemic Change**

Each person who is capable of returning to gainful work should be provided with resources and training to accomplish a successful return to the workplace. We are aware that Congress would likely oppose a program that simply cuts off benefits to those who do not meet the new criteria. Those persons will need special attention to make the transition from passive beneficiary to active rehabilitation participant.

The system also needs new vocational criteria. The present system relies on the Dictionary of Occupational Titles originally based upon the workplace of the 1970's. Although it has become more out of date each year, SSA has added a requirement that judges specifically ask the vocational expert witnesses to affirm that their testimonies are consistent with the Dictionary of Occupational Titles. The SSAB also advocates new vocational criteria.

### **Need: Reduce the Number of Administrative Law Judge Hearings.**

The Social Security administrative hearing system has too many cases going to an administrative hearing. SSA has one of the largest claims adjudication systems in the world, but it is administered like a social work agency. In the Social Security adjudication system about 90% or more of the Requests for Hearing continue on to an administrative hearing. Social Security must correct this serious flaw in its process and develop a system where the cases are completely developed prior to the administrative law judge hearing and the appropriate cases are concluded by either settlement or awarding benefits without a hearing.

Efforts have been made in this direction but discontinued. A Disability System Improvement plan (DSI) was introduced by former Commissioner Barnhart. It attempted to address this problem by eliminating "Reconsideration" at the state DDS level and replacing it with an attorney position known as the "FEDRO". This position was to be filled with an attorney who had the primary responsibility of developing the record for the administrative law judge hearing and awarding benefits "on the record" where appropriate. However, shortly after the change in commissioners in early 2007, this reform was abandoned, allegedly because of budgetary considerations, without an adequate "pilot" to test its effectiveness. To take its place, SSA reinstated a failed program employed in the 1990's known as the Senior Attorney program. Its fundamental

flaws are that it takes the best writers away from their primary function of writing decisions. These attorneys have considerable experience and talent and would be more effectively used to support the judges in writing decisions.

The elimination of DSI leaves us functioning under a Social Security disability process that has been discredited over the past 20 years with many failed reform efforts. However, the basic fact remains that the Social Security disability process must be reformed to address the changes that currently confront the disability hearing system. As stated hereinabove, the Social Security disability system must adapt to meet the challenges of about 80% of the claimants being represented at the hearing, increasing numbers of Requests for Hearing, more complex medical issues and a more developed body of disability law. The system must provide a process in which the norm is settling cases without a hearing as is the general rule in other adjudicatory systems. Claimants' representatives should be treated as "officers of the court" and be given the responsibility of producing all evidence in the case. The administrative law judge hearing must be more structured with rules of practice and procedure to provide adequate notice to claimants and their representatives.

Another model could be employed using a "Fund representative". This position would be filled by an attorney who has the authority to develop the medical evidence for the record and either settle the case or award benefits when appropriate without a hearing. The Fund representative could also appear at the administrative law judge hearing to explain the position of the government in the case. In unrepresented cases, the Fund representative could advise/assist the claimant in developing his/her case for hearing.

Changes such as these are imperative. The Social Security Administration can no longer afford the luxury of trying every case before an administrative law judge.

### **Need: Improve the Social Security Administrative Law Judge Hearing.**

Even before systemic change is made, the administrative law judge hearing of the Social Security Administration must be improved and made more structured. This change can be accomplished by the Agency adopting rules of practice and procedure for the Social Security hearing. This change will provide both claimants and their representatives notice of the requirements of the Social Security hearing process. It would expedite the hearing which would favorably impact the case backlog. A Joint Rules Committee (consisting of both Agency and AALJ representatives) prepared proposed rules of procedure for the Social Security hearing. The rules were presented to the prior Commissioner for review, but the complete reform was not adopted by the Agency. Instead, some

of the rules were included in the DSI reform plan which has since been discarded.

We recommend that the Joint Rules Committee be reconvened to prepare rules of practice and procedure for the Social Security hearing. These procedural rules can be completed in a relatively short time because much of the work has been done and they do not require notice and comment under the Administrative Procedure Act.

### **Need: Rules of Practice**

The Agency should promulgate meaningful rules of practice for claimants' representatives. The rules should regulate conduct and ensure professional competency for the representatives. Claimants' representatives should be considered to be "officers of the court", in the manner customary in the American judicial system. The objective of the Agency should be to take advantage of this pool of skilled talent provided by claimants' representatives. In this capacity, the claimants' representatives should have the responsibility to provide all relevant and material evidence for the hearing. The representatives should also have the responsibility to provide evidence that is in existence for the claim and which has been requested by the administrative law judge.

The AALJ also believes that SSA should have a code of conduct for the judges as do most other adjudicatory bodies. We have requested several times in recent years that SSA adopt, with appropriate modifications, the ABA Model Code of Judicial Conduct, but the requests have been ignored.

### **Need: Eliminate Regional Hearing Offices.**

Within the structure of Office of Disability Adjudication and Review (ODAR) are ten Regional Hearing Offices. These offices are based on an obsolete business model which is part of a past era before networked computers providing instant communication between offices. The Agency should close its ODAR Regional offices and assign the personnel from these offices to local hearing offices where they can devote their time to working on case files in support of the hearing process. In this time of very tight budgets, the Agency can not be spending its resources on functions that do not contribute directly to hearing and deciding cases. Too many precious resources are wasted as ODAR Regional Offices become bloated bureaucracies. We recommend that the responsibilities of the Office of the Chief Judge be enhanced and that the Regional Office functions be centralized and placed within the Office of the Chief Judge. With the advance of technology and electronic communications, central management authority is, in our opinion, a more efficient and effective method of managing the hearing

function. This change will provide for a more efficient use of resources by mandating that most Agency adjudication component resources be used for case processing. An added benefit will be to eliminate expensive brick and mortar costs or at least to convert them to hearing facilities and staff needs.

## **A New Threat: Proposed Regulation on Agency Scheduling Hearings.**

As mentioned above, the COSS has proposed changing the regulations to provide that the Agency, rather than the administrative law judge will schedule hearings.

The proposed regulations violate the Administrative Procedures Act.

The primary purpose of the APA was to insulate administrative law judges from undue influence exerted by the employing federal agencies. The Act provided that administrative law judges be given independence and tenure. Congress made them “a special class of semi-independent subordinate hearing officers” by vesting control of their compensation, promotion and tenure in the Civil Service Commission (now the U.S. Office of Personnel Management). This change transferred some of the Agency controlled functions (pay, promotion and tenure) to the Civil Service Commission. This reform was made to protect the American public by giving administrative law judges decisional independence.

The administrative law judge must decide when the case is ready for hearing, In some other Agencies, such as the FLRA and NLRB, the ALJs do have their cases scheduled by management without any related problems. However, there is very fundamental difference between those hearings and Social Security disability hearings; their judges are not responsible for evidentiary development of the cases.

In courts and other agencies, trials and adjudications are conducted under the adversarial process. Under this system the case is developed during trial by evidence introduced by opposing counsel. The judge studies and reviews the evidence as the trial progresses. However, in Social Security disability hearings, the adjudications are conducted under the inquisitorial process in which it is the duty of the judge to develop the case. Nearly all the evidence is gathered and entered into the record before the hearing begins. After reviewing the evidence, the judge often sees a need for additional evidence which must be obtained. If, at that point, the case has already been scheduled for hearing, then it will have to be rescheduled to allow time to obtain the new evidence. If the judge has insufficient time to develop the evidentiary record, as required by law, the case

will be remanded on appeal for another hearing to complete the hearing record. The result will be an increase of the Social Security disability case backlog.

A further danger is that the Agency would be put in a position in which it can impose quotas on the judges. This is precisely the type of influence the APA was designed to prevent.

Additionally, the proposed regulations do not provide any solution to the principal problem: insufficient staffing, as discussed above.

## **Conclusions**

The Social Security Administration is an agency in crisis. Immediate and long-term systemic changes need to be made, particularly in the severally backlogged disability adjudication arm.

Social Security provides significant, sometimes the sole, support to millions of disabled or retired Americans. It must continue to provide support where it is truly needed and it needs to do so at an affordable cost to the nation. It simply cannot fail.

We, the judges who have worked in this arena for decades and who have brought with us experience from other agencies, other court systems and from the private sector have much insight to offer to the management of the Agency. We have offered our assistance to the commissioners over the years. It has been gratefully accepted by some and rejected by others.

We have highlighted here the most pressing problems which exist in the Agency and offered some considered solutions to those problems. We stand ready to assist the new administration and the new Congress in any way we can.

Please feel free to call on us.

Respectfully,

A handwritten signature in cursive script that reads "Ron Bernoski".

Ronald G. Bernoski  
President  
Association of Administrative Law Judges