
ASSOCIATION OF ADMINISTRATIVE LAW JUDGES

STATEMENT
HOUSE COMMITTEE ON WAYS AND MEANS

March 24, 2009

JOINT HEARING ON
ELIMINATING THE
SOCIAL SECURITY DISABILITY
BACKLOG



House Committee on Ways and Means

Statement of the Honorable Ronald G. Bernoski, President, Association of
Administrative Law Judges

Testimony before the Subcommittee on Social Security and
Subcommittee on Income Security and Family Support
of the House Committee on Ways and Means

March 24, 2009

Chairman Tanner, Chairman McDermott and members of the Subcommittees;

Thank you for inviting us to testify at this hearing. My name is Ronald G. Bernoski. I am an administrative law judge (ALJ) who has been hearing Social Security Disability cases in Milwaukee, Wisconsin, for about 28 years. I also serve as President of the Association of Administrative Law Judges (AALJ), a position I have held for over a decade. AALJ represents the administrative law judges employed at the Social Security Administration (SSA) and some administrative law judges at 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 the SSA and to promote judicial education for administrative law judges. The AALJ represents about 1100 of the approximately 1400 administrative law judges in the entire Federal government.

The Association of Administrative Law Judges is most grateful for the oversight of the Social Security disability program provided by the Subcommittee. We too find it most painful that the American people, who are in the disability hearing process, have been disadvantaged by long delays in their cases.

History of Administrative Law Judges

The 1946 Administrative Procedure Act was enacted to protect, *inter alia*, the American public by giving administrative law judges decisional independence. "Congress intended to make hearing examiners (now administrative law judges) '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 Office of Personnel Management) to a much greater extent than in the case of other federal employees". [*Ramspeck v. Federal Trial Examiners Conference*, 345 US 931 (1953)]. The agencies employing them do not have the authority to withhold the powers vested in Federal administrative law judges by the Administrative Procedure Act.

The Roles of Administrative Law Judges and Support Staff in Hearing Offices

The Social Security Administration's adjudication system is in the Office of Disability Adjudication and Review (ODAR), formerly the Office of Hearings and Appeals (OHA). It is one of the largest adjudication systems in the world.

Since much of the disability problem involves staff shortages it is critical that members of Congress understand the role of staff in the disability claims process. When case files arrive in a hearing office, they must be "worked up" or "pulled", that is 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 the claim is 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.

The judge reviews all the evidence in the file, an average of around 400 pages, and many of the administrative pages, then requests the staff obtain such additional medical evidence as may be needed. When fully developed the judge then needs to determine whether a favorable decision can be made on the record presented, without a hearing. In most cases a hearing is required and the judge then determines what expert witnesses will be required for the hearing. After this review, the staff secures the expert witnesses and schedules the case for hearing. Once the hearing is scheduled, the judge continues to be involved with the case to review newly submitted evidence and to consider and resolve prehearing motions and issues. Typically, a day or two before the hearing, the judge will conduct another review of the file to insure familiarity with the facts and issues for the hearing. When the hearing is concluded the judge must prepare thorough decisional instructions for the writing staff, review and edit the draft decision and sign the decision.

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, administrative law judges preside over an inquisitorial process, in which it is the duty of the judge to develop the facts and develop the arguments both for and against granting benefits. This is in large part required because the Social Security Administration is not represented at the hearing. Therefore, Social Security judges are required to wear the so-called three hats (to protect the interests of the claimant, of the trust fund and to render a decision based on the evidence in the hearing record). 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. The inquisitorial system places more responsibility on the judge. Hearings based on this model are more time consuming and labor intensive for the judge.

Need for Large Additions to Support Staff

SSA has the lowest staffing level in decades. SSA acknowledges the need for qualified personnel but not 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.

It is critical to understand that currently, of the 765,000 total pending cases, over 455,000 of them, 60% of the total backlog, are waiting in the hearing offices to be worked up for a judge to review. This is the precise location of the blockage causing the backlog.

That blockage in the flow, the lack of Senior Case Technicians, is upstream from the judges and the hearing process. Adding hundreds of judges downstream from this blockage will have no effect on the blockage. It will however actually decrease the productivity per judge; the number of cases worked up will not increase and will be divided among a larger number of judges

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.

As the SSA Inspector General correctly noted in testimony before this Subcommittee, a sufficient number of competent and well trained staff is critically important to the ability of a judge to process his or her caseload.¹

The number of cases being pulled each month is less than that requested by the judges for their dockets and less than the number of dispositions each month. Judges in many, if not most, offices are unable to get the number of pulled cases to fill the dockets they have established.

We would like to discuss support staff to judge ratios as these are occasionally quoted by SSA officials. However, the formula is not available. Further, managers have informed us that in 2007 SSA changed the formula for calculating the staff to judge ratio, adding in administrative and supervisory staff who do not actually support the adjudication process. The current staff to judge ratios therefore may show a false increase since 2006 and are no longer a valid measure of staff support.

The Backlog

Towering over SSA is a backlog of over 765,000 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.

A December 2007² GAO report on the Social Security disability case backlog concluded that the increases in the case backlog during the last decade were caused by a substantial growth in initial applications, staff losses (including administrative law judges), and **management weaknesses** evidenced by the number of failed reform initiatives [emphasis added].

The SSA OIG has confirmed there are a number of factors outside of the control of the judge that affect productivity: the ratio of staff to judge; quality and composition of the staff; State Agency Disability Determination Service (DDS) allowance rates and quality of case development; and the availability of worked-up cases for hearings. Additional factors are: continued inadequate funding for Social Security; the failure of SSA to hire adequate support staff for judges; the failure of Social Security to manage and forecast the impact of the baby boomers and the increased case receipts during the mid-1990's; the failure of the agency to implement a plan to address the same; and the failure of many of SSA's reform initiatives.

Higher staff ratios allow a judge to be more productive. More cases can be scheduled for hearing in offices where there are sufficient numbers of support staff to prepare the files; there are times when ALJs do not have as many hearings scheduled as requested because there is insufficient support

¹ Statement of the Hon. Patrick O'Carroll, Inspector General, SSA, before the Subcommittee on Social Security of the House Committee on Ways and Means, Sep 16 2008., page 5.

² *Better Planning, Management and Evaluation Could Help Address the Backlog*, (GA O-08-40) , Government Accountability Office, December 2007.

staff to prepare the cases. The Agency's failure to hire sufficient support staff should be questioned as this has a direct impact on productivity and increased processing times.

The quality of staff will affect the number of cases a Judge can handle; some decision writers are attorneys and others are former clerical employees. Resources may be distributed unequally to the Judges within an office, which will impact the ability to issue decisions.

ALJ Productivity History and Overview of ALJ Productivity

The Commissioner of Social Security (COSS) has complained 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 was confirmed by a recent SSA OIG report³ which specifically addressed factors affecting hearing office productivity. From FY 2005 to FY 2007 the average number of case dispositions issued per ALJ increased 13%. Because of this progress, less room remains to increase the level of ALJ productivity.

Much is made of Agency "expectations" as if these expectations had any basis in fact. They do not. The Agency's expectation is five hundred to seven hundred dispositions per year. It is not based on any time study of how long it takes for a Judge to handle a case.

SSA's last study on the matter, *Plan for A New Disability Claim Process*, conducted in 1994, projected a time line for a disability claim at all levels of the process, including the administrative law judge level. The study, based on an average month of 4 and 1/3 weeks, concluded that a reasonable disposition rate for a judge should be 25 to 55 cases per month. The monthly disposition rate, according to the study, should average 40, or 480 per year. The judges are averaging over 500 dispositions per year.⁴

The study results revealed that a judge would spend 3 to 7 hours of time in processing each case. The Agency allows writers to spend four hours just drafting a favorable decision and eight hours to draft an unfavorable one.

It is acknowledged that there have been changes in the process since 1994, but, at the present time, most of those serve to slow down not speed up the process. The average file size grows every year. The review of electronic files (eFiles) at present is considerably slower than use of paper files. Even electronic signing (eSigning) of decisions takes about four times as long as using a pen.

In considering numerical performance it is important that the Congress understand a judge must carefully review the voluminous documentary evidence in the claimant's file to effectively prepare and conduct the hearing and to issue a correct decision. Each case carries an average cost to the trust fund of \$250,000. A judge hearing 40 cases per month is entrusted to correctly decide on \$10,000,000 of cases per month, \$120,000,000 annually.

³ *Congressional Response Report: Administrative Law Judge and Hearing Office Performance*, Office of the Inspector General, Social Security Administration, A-07-08-28094.

⁴ See Appendix, Table 2

AALJ strongly supported the reform effort known as DSI. We still believe the Federal Reviewing Officer (FEDRO), or a similar reform, would provide an unbiased method to award benefits earlier in the process and prevent these cases from going to an administrative law judge hearing.

The Administrative Procedures Act (APA) seeks to insulate administrative law judges from their agencies' dictating their decision-making to satisfy a certain goal *du jour*. We saw this in the early 1980's when SSA wanted to cut people off the rolls and we have seen it again in recent years when various measures have been taken which create a perverse incentive to pay cases to get them out the door as quickly as possible without regard to the effect on the trust fund, known as "paying down the backlog". In both periods the judges have been a moderating influence in not rigidly adhering to SSA's policies, but rather trying to judge each case on its merits. This has created tension between the judges and SSA management, with management complaining that the judges do not follow SSA's current policies. This was precisely the aim of the APA and it is precisely why the APA must not be stretched or cut to permit federal agencies to impose policies on their administrative law judges which would affect decisional independence and deprive claimants of their right to due process under the law.

These are not isolated incidents. SSA has a long history of interference in the functioning of its administrative law judges. In another instance, in the early 1980's, for political reasons, SSA embarked on a review of only allowance decisions of only those ALJs who had a high rate of allowances. The program, called Targeted Ongoing Review or Bellmon review, was specifically designed to effect behavioral change in the high allowance judges. If no such change occurred the judge's file was turned over to the Office of Special Counsel for "appropriate action".⁵

ALJs have increased their dispositions thirteen percent from FY 2005 to FY 2007 – this in spite of insufficient resources and an electronic file system that slows the processing of cases for the judges. This increased productivity comes on the heels of increases in ALJ productivity for the several years prior to 2005 as well.

Examining the productivity of judges for FY 2007⁶ shows this in more detail.⁷ There is variance in the number of decisions issued by each judge, however, such a distribution is normal in all human activities, usually graphed as a "bell curve"⁸ and here is further dependent on the numerous factors noted above which are outside of the control of the judges. Note that most of the judges are in the center of the curve. Note there are but 12 Judges out of 1,100 – 1% – who issue a very low number of decisions and who are full time judges.⁹ Some of these judges may have had extended illnesses, themselves or in the family, or may need assistance in the skills involved. This is discussed further in Standards for Administrative Law Judges, below.

Systemic Problems

Reports of the GAO and SSA's OIG show the Social Security disability process is plagued with serious systemic problems and that "silver bullet" solutions or attempts to scapegoat one or more classes of employees will not address, let alone solve, the problems confronting the Agency.

⁵ *AALJ v. Heckler*, 594 F.Supp 1132, (D.D.C. 1984)

⁶ Total for FY 2008 show still more improvement, but AALJ has not yet obtained 2008 detailed data.

⁷ See Appendix, Table 1

⁸ See Appendix, Chart 1

⁹ Statement of the Hon. Patrick O'Carroll, Inspector General, SSA, before the Subcommittee on Social Security of the House Committee on Ways and Means, Sep 16 2008.,

Over-reliance on future technology. A careful review of SSA's plans to reduce the backlog discloses an over-reliance on future gains from technology. Social Security has consistently over-estimated the benefits of technology and has often implemented the technology before it has been ready for general use. Further, technology does little to assist the judges or reduce the time they spend doing their work. They still need to review the case before the hearing, conduct the hearing, prepare the hearing decision instructions, and edit the draft decision. The Agency has been claiming that technology, ePulling and other software, will reduce the number of staff employees needed to support administrative law judges. This claim too has proved false. The ePulling software, said to be able to do most of the "pulling" of claim files, has not succeeded. Meanwhile the refusal to hire new staff has now left the Agency with its lowest levels of staff in decades.

Paying Down the Backlog. Several Agency policies actually work to increase the backlog. The Agency's policies act to encourage "paying down the backlog", that is paying cases to get rid of them as quickly as possible. Higher producing judges pay a higher percent of claims.¹⁰

*As one HOCALJ pointed out, If goals are too high the corners get cut and the easiest thing to do is to grant a case."*¹¹

The first result is that some claims are paid which should not be paid. For decades judges have paid an average of 65-70% of claims. The judges doing up to 600 dispositions per year are still in that range. However the judges doing more than 600 dispositions per year pay considerably more; 6,500 claims more in 2007 at an annual cost to the trust fund of 1.6 billion dollars.¹²

But it does not stop there. Even if SSA conducted integrity reviews of such cases to cease the benefits, that would add several thousand more cases per year to the backlog.

At best, the net result is that SSA permits overpaying of claims then adds to its own burden by adding cessation claims to its case load. At worst, as in recent years, SSA has not reviewed the cases and the benefit hemorrhage continues, even though it is well-known that every dollar spent on integrity reviews returns ten dollars.¹³

Top-Heavy Management. Another major problem and irony in ODAR is that in addition to a chronic shortage of clerical support staff, it is "top heavy" with managers. In this time of declining resources, we recommend that the number of managers in the ODAR regional offices be reduced and instead be transferred to the hearing offices to work on disability cases. We have further recommended that the ODAR regional offices be closed and the staff personnel be transferred to the hearing offices. There is a hearing office in each regional office city and this reform will not cause a change of location for any of the employees. In this electronic age, the functions of the ODAR regional offices can be more efficiently handled by the Office of the Chief Administrative Law Judge who can now easily communicate with all hearing offices without delay.

Other Management Problems. Replacing paper files with electronic files (e-Files), begun under former Commissioner Jo Anne Barnhart, is an initiative that the AALJ endorses and supports. What is unacknowledged is that the system, like virtually all new systems, has difficulties. It needs some

¹⁰ Statement of the Hon. Patrick O'Carroll, Inspector General, SSA, before the Subcommittee on Social Security of the House Committee on Ways and Means, Sep 16 2008., page 5.

¹¹ *Id.*

¹² Appendix, Chart 2

¹³ Statement of the Hon. Patrick O'Carroll, Inspector General, SSA, before the Subcommittee on Social Security of the House Committee on Ways and Means, Sep 16 2008

additions and it is slower to use in reviewing the file and in conducting a hearing. SSA's expectation is that once the system has matured it will require fewer people to do the same work. That may be true some day, but it is not yet true. When the system will be fully de-bugged and running smoothly is unknown. SSA's rigid adherence to this doctrine in failing to replace lost staff has resulted in serious shortage of staff.

While we embrace the use of technology in the future, current Agency initiatives do little to reduce the disability case backlog. For administrative law judges, electronic files slow down the process because pages take longer to "load" and view. Electronic organizing of files has not yet been perfected. Equipment failures cause delays, some for long periods, because the system is often not strong enough to handle peak work loads.

Dial-A-Judge. The use of desktop monitors to conduct hearings and conducting video hearings from the offices of attorneys, termed Dial-A-Judge by some commentators, is fraught with dangers. The first is that the claimant can easily be prompted by an unscrupulous representative out of sight of the camera. Most important is that the administrative law judge hearing is the first time in the Social Security disability process where the American citizen has a chance to meet face-to-face with a high ranking government official and be permitted to explain the elements of his/her case. A major part of due process is making the claimant feel that he/she had a day in court and received a full and fair hearing. This basic reassurance of fairness is essentially lost if a government official is not present at the hearing site. Is it also more difficult to assess credibility using a computer monitor and hence more problematic in delivering a full and fair hearing to both the claimant and the trust fund.

"Shortcuts" are more often counterproductive. A "streamlined" claim file is one which is not worked up, i.e., prepared for hearing. Duplicates of often hundreds of pages of exhibits are not removed. Exhibits are not identified, placed in chronological order or even numbered. This allows the senior case technician to spend less time in preparing a case record. However it requires that the judge, the decision writer, medical experts and the representative, all of whom are at a higher pay grade, to spend far more time reviewing the record. There are also serious questions of whether or not the "streamlined" file violates due process when the claimant is handed an unorganized mass of evidence and whether or not the "streamlined" file preserves an adequate record for subsequent reviews.

Another Agency initiative, the "rocket docket" changes scheduled hearings to a "cattle call" in which unrepresented claimants are told to appear at the beginning of the day. The purpose is to determine which ones will not appear. Their claims are dismissed. Those who appear are told their hearings will be held in the near future. This discriminates against unrepresented claimants who may have to travel long distances to the hearing office on more than one occasion to have their cases heard.

Smoke and Mirrors

Many of SSA's highly publicized "Initiatives to Reduce the Backlog" in fact have little if any effect on actually reducing the backlog. A few examples:

The National Hearing Center took five judges from several offices and put them together in a new office in Falls Church. Moving five judges does nothing to reduce the backlog.

As explained above, hiring 150 new judges without adding adequate staff is a hollow gesture. It is equivalent to purchasing 150 new trucks and fuel for 20.

SSA has expended approximately 50,000 hours of overtime to aid ODAR in getting its work done. The faults are that the money was spent on non-ODAR personnel who do not know the ODAR work and the overtime was viewed as a benefit and thus rotated among field office personnel. The personnel who learned the job this week were replaced the following week by new personnel who did not know the job. With time lost for on-the-job training plus overtime premium, the cost to SSA has been excessive and the production sub-standard.

Even the initiative to clear out all cases more than 1,000 days old, while very commendable, did not reduce the backlog. Dozens of pages in releases and reports have been devoted to hailing this as reducing the backlog when in fact it merely shifted the production effort from one group of claims to another.

SSA's Public Relations machine is endeavoring to convince Congress and the public that it is reducing the backlog but a review of the initiatives discloses that, while they may give the appearance of reducing the backlog, in fact most do not.

Standards for Administrative Law Judges

The judges are not the problem. The judges did not cause the backlog and as a group have worked hard, with ever-decreasing resources, to contain the backlog. The Commissioner has at times acknowledged that the judges in Social Security are "producing at record levels" as they have year after year. Nonetheless criticisms are being leveled at SSA's judges. It is undisputed that judges work at different levels of efficiency and varying levels of diligence. That is equally true of any group of working people including SSA employees generally.

Accountability. The Commissioner argues that there must be accountability for the judges. The judges accept accountability but not simply measured by the number of decisions produced. Judges are accountable to the claimants to ensure they get a full and fair hearing. They are also accountable for the trust fund to ensure that it is not abused.

Pay Rates. Judges must be responsible for the percentage of claims paid as discussed above under Paying Down the Backlog. Although pay rates are subject to external variables such as the regional work ethic, unusually high or low percentages of certain types of cases, local unemployment rates, among others, pay rates at the very high and low extremes should be suspect. AALJ is unaware of any effort by SSA to review this important issue.

Judges with Lower Dispositions. The Association of Administrative Law Judges has repeatedly offered its assistance to the Social Security Administration to meet with the judges the Agency contends have the lowest case production to attempt to determine the reasons for the work production, and to attempt to address any existing problems. SSA has refused to give us the data to identify judges with lower dispositions. Recently AALJ was able to obtain the data from the website of a newspaper which was given the data by SSA. As a result AALJ initiated a program of contacting those judges with lower dispositions and offering to provide assistance of other judges to help those judges who may be having problems handling as many claims as they would like.

SSA is currently proposing an amendment of the current and longstanding regulatory practice that authorizes the administrative law judge to set the time and place for hearing in an attempt to force

administrative law judges to hear and decide more cases. Not only do the data show this is unnecessary, it is well-established that production quotas not only violate the APA, but also are inconsistent with 5 USC 4301& 4302. See *Nash v Bowen*, 869 F.2d 675 (2d Cir 1989) which holds that while production goals are a permissible exercise of Agency management, dispositional quotas are not permissible.

Rules of Conduct for Administrative Law Judges. AALJ has long recommended that the American Bar Association's Model Code of Judicial Conduct be adopted for administrative law judges. It should be noted that the last American Bar Association model judicial code specifically included administrative law judges. However, since the 1970's, the Agency has consistently refused to work with us in this effort.

AALJ is concerned with the lack of appropriate standards of conduct for administrative law judges. Currently some judges are being charged with "conduct unbecoming an administrative law judge" which is nowhere defined and can mean whatever the Agency wishes it to mean in a given case.

Needs.

From SSA and AALJ, communication and cooperation are almost absent and both are needed. Carrots and sticks are not needed.

From the Congress, adequate funding to bring the *support staff* to a sufficient level before more judges are hired, with oversight to ensure it is fully accomplished. Additionally AALJ believes more oversight is needed to ensure that the systemic changes discussed herein are fully effected including responsibly reducing the number of claims which go to hearing; conducting integrity reviews; reviewing extremely high and low pay rates; adoption of the ABA's Model Code of Judicial Conduct; and review of management needs in the Agency, among others.

Conclusion

We thank you very much for this opportunity to address you on these issues that are literally vital to many Americans. Social Security judges are working hard to attempt to address the disability case backlog. The AALJ had an excellent relationship with former Commissioner Barnhart, and worked hard with her to reform the hearing process. The AALJ and its members stand ready to do their best to reduce the backlog, reduce the hemorrhaging of benefits and to adopt proven new technologies.

We are not the problem and we are prepared to be part of the solution.

Appendix

ALJ Dispositions, Decisions, Paid Rates 2007

Dispositions per year per Judge	0-200	201-300	301-400	401-500	501-600	601-700	701-800	801-900	901-1000	Over 1000	Totals
Number of Full Time Judges	12	84	189	286	262	124	59	15	17	17	1,065
Total Dispositions	2,172	21,506	67,187	128,920	143,070	79,319	44,020	12,684	16,056	22,312	537,246
Total Dismissals	190	3,330	11,106	19,116	21,806	11,705	7,128	2,393	2,765	2,819	82,358
% of Dismissals	9%	15%	17%	15%	15%	15%	16%	19%	17%	13%	
Total Decisions	1,982	18,176	56,081	109,804	121,264	67,614	36,892	10,291	13,291	19,493	454,888
Total Decisions Paid	1,268	12,409	37,729	77,104	84,910	49,666	28,001	8,267	10,033	16,571	325,958
Average Paid Rate	64%	68%	67%	70%	70%	73%	76%	80%	75%	85%	

Table 1

Mean Dispositions Per Year	504
Median	498
No. Judges Under 500 per year	642

Table 2

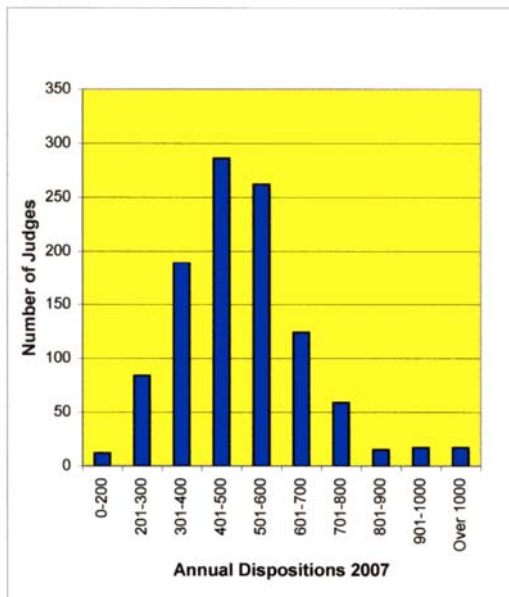


Chart 1

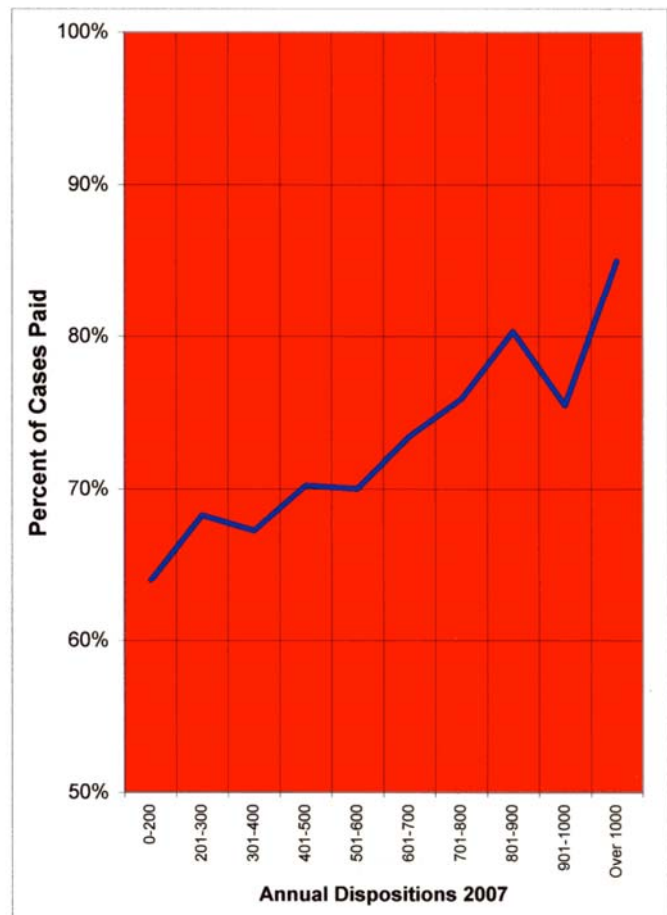


Chart2

Sources: The Oregonian, as reported by SSA.
OIG SSA, report of Sep 16 2008.

Every 10% increase in the percent of Paid decisions costs the trust fund an additional \$ 11.5 billion per year.