



**STATEMENT OF THE ASSOCIATION OF
ADMINISTRATIVE LAW JUDGES**

**COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON SOCIAL SECURITY
AND
THE HOUSE COMMITTEE ON THE
JUDICIARY, SUBCOMMITTEE ON COURTS,
COMMERCIAL AND ADMINISTRATIVE LAW**

July 22, 2011

**THE ROLE OF ADMINISTRATIVE
LAW JUDGES AT THE SOCIAL
SECURITY ADMINISTRATION**

**Statement of the Honorable D. Randall Frye, President,
Association of Administrative Law Judges
Protecting Due Process for the American People**

July 22, 2011

Chairmen Johnson and Coble, Ranking Members Xavier Becerra and Steve Cohen and members of the Subcommittees:

Thank you for providing the Association of Administrative Law Judges (AALJ) the opportunity to submit this statement. My name is D. Randall Frye. I am a United States Administrative Law Judge (ALJ or Judge) assigned to the Social Security Administration (SSA). I have been hearing Social Security Disability cases in Charlotte, North Carolina for about 15 years. I have also served as Administrative Law Judge for the National Labor Relations Board for one and one-half years. I am currently President of the AALJ, which represents the approximately 1400 Administrative Law Judges employed at the SSA. One of the stated purposes of the AALJ is to promote and preserve due process hearings in compliance with the Administrative Procedure Act (APA) and the Social Security Act for those individuals who seek adjudication of program entitlement disputes within the SSA. It is the longstanding position of the AALJ that ensuring full and fair due process *de novo* hearings brings justice to the American people. The AALJ represents most of the approximately 1600 administrative law judges in the entire Federal government.

The AALJ is most grateful for the oversight of the Social Security disability program provided by the Congressional subcommittees, particularly during the recent past when budgeted resources were inadequate to address the mounting backlog of disability cases. We, too, find it most painful that the American people involved in the disability hearing process are disadvantaged by long delays in the adjudication of their cases.

Although grateful for the opportunity to submit this statement, the AALJ is extremely disappointed that we were not given an opportunity to testify at this important hearing. I respectfully submit that there is no individual or organization that has greater knowledge and insight into the role of the ALJ in this nation's disability adjudication system than the AALJ. To preclude our testimony and interaction with members of the subcommittees denies the American people the benefit of our many years of experience that includes substantial knowledge of the APA and the disability adjudication system.

In this statement, the AALJ offers views regarding changes we believe are necessary to make the Federal disability administrative judiciary corps more efficient and more effective. In addition, the AALJ believes the proposed changes, most of which are not new, would be cost effective and would well serve the American people. For example, the AALJ has advocated for over a decade that our government be represented in cases before Administrative Law Judges with the full right to appeal. We are extremely pleased that such a program is now supported by Senator Coburn.¹

¹ *Back in Black – Preserving Social Security for Future Generations*, U.S. Senator Tom Coburn, M.D. (R-OK), July 18, 2011.

THE ADMINISTRATIVE JUDICIARY

In 1946, the Congress enacted the Administrative Procedure Act (APA) to reform the administrative hearing process and procedures in the Federal government and to protect, *inter alia*, the American public by giving ALJs decisional independence. “Congress intended to make hearing examiners (now ALJs) ‘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 ALJs by the APA.

Prior to the enactment of the APA, the tenure and status of these hearing examiners were governed by the Classification Act of 1923, as amended. Under that Act, the classification of the hearing examiners was determined by ratings given to them by the Agency and their compensation and promotion depended upon their classification. This placed the hearing examiners in a dependent status with the Agency employing them. Many complaints were voiced against this system alleging that hearing examiners were “mere tools of the Agency” and thus subservient to Agency heads when they decided and issued decisions on issues involving Agency determinations appealed to them. With the adoption of the APA, Congress intended to correct these problems. As earlier noted, this rather significant reform was undertaken to protect the American public by giving ALJs decisional independence.

Federal ALJs with conditional lifetime appointments and decisional independence are essential to ensure that the American people, who file approximately 700,000 to 800,000 cases each year, will be provided full and fair due process hearings. In this context, due process and justice can only be accomplished if the judge has sufficient time to develop and review each case, provide a thorough hearing, deliberate and decide the case and issue a well-reasoned decision which is fully consistent with the facts of the case and the relevant law. While numerical goals are useful tools, these goals must not be used as quotas, as to do so would likely deny due process to the claimant and impair the judge’s ability to bring justice to the American people. The current production line mentality robs the judge of one of the most important elements of due process...time. Time is necessary for ALJs to develop and review the evidence, conduct a full and fair hearing, deliberate, and prepare and issue a correct decision. Again, goals are important; quotas violate the Social Security Act, the Administrative Procedure Act and the U.S. Constitution. In addition, and most detrimental to the American people, is the Agency’s application of constant pressure on judges to continue to increase the number of cases they adjudicate. The pressure of quotas is forcing judges to hear cases before they are prepared to do so. This impairs the judge’s ability to adequately and thoroughly adjudicate cases. While some judges may be forced to hear and decide a higher volume of cases, higher producing judges tend to pay a higher percentage of claims.

As one Hearing Office Chief Judge pointed out, “*If goals are too high the corners get cut and the easiest thing to do is to grant a case.*”²

While it may be true that over 70 percent of judges are meeting the goal-quota of 500-700 decisions annually, what is not present in the data is the fact that most of those judges would appear before you and tell you that in order to meet this level of production, they simply cannot adequately review all of

² See statement of the Hon. Patrick O’Carroll, Inspector General, SSA, before the Subcommittee on Social Security of the House Committee on Ways and Means, September 16, 2008, p.5.

the evidence in the cases they decide. In our view, the current misplaced emphasis on numbers has perverted our system of justice. At an estimated value of \$300,000 per case, the AALJ believes the American people are entitled to have a judge who is given adequate time to review all of the evidence in each case.

As you know, SSA ALJs have adjudicated cases at record levels in each of the past ten years. However, the AALJ believes the SSA adjudicatory system could be made more efficient, effective and economical with changes and modifications that will improve the process. On many prior occasions, the AALJ has urged consideration by the Agency of significant changes to the disability adjudication system. The AALJ remains committed to working with the SSA to implement improvements in our process; however, SSA does not have a similar sentiment to work with AALJ.

While the nation's present disability program has well served the nation for over five decades, the AALJ respectfully urges the subcommittees to consider the following recommended changes.

GOVERNMENT REPRESENTATIVE

When sued, insurance companies proceed to trial represented by the best law firms in the nation. When a claim is filed for disability benefits, the government (SSA) proceeds to trial without representation. When an ALJ rules against a claimant in a disability case, the claimant can file an appeal with the Appeals Council. When an ALJ rules against the government in a disability case creating a \$300,000 liability, the government does not have a right of appeal. There is clearly something wrong with this picture. In the context of disability adjudication, the government is the trustee of billions of taxpayer dollars. In our view, it is irresponsible to place these funds at risk at hearing without legal representation.

The AALJ has advocated for well over a decade that the SSA be represented at administrative hearings by attorneys. This representation should be provided by attorneys from the Office of General Counsel, with authority to advocate the American people's interest and with the authority to compromise, settle, and appeal cases which the government believes were erroneously decided. The cost of such representation could easily be funded by resources saved by eliminating or restructuring the Regional Offices of the Office of Disability Adjudication and Review (ODAR).

The Social Security Advisory Board (SSAB) has called for the government to be represented as well. In its 2001 report, the SSAB made the following statement:

[T]he fact that most claimants are now represented by an attorney reinforces the proposition, which has been made several times in the past, that the agency should be represented as well. Unlike a traditional court setting, only one side is now represented at Social Security's ALJ hearings. We think that having an individual present at the hearing to defend the agency's position would help to clarify the issues and introduce greater consistency and accountability into the adjudicative system. It would also help to carry out an effective cross-examination of the claimant. Many ALJs have told us that they are sometimes reluctant to conduct the kind of cross-examination they believe should be made because, upon appeal, the record may make them appear to have been biased against the claimant. Consideration should also be given to allowing the individual who represents the

agency at the hearing to file an appeal of the ALJ decision.

This issue has not escaped the analysis of academic commentators. Two professors made the following caustic observation in the *Journal of Economic Perspectives* (Volume 20, Number 3, Summer 2006, pages 71–96 at page 93):

A second promising step would be for the Social Security Administration to consider attorney representation at Administrative Law Judge hearings, as the independent Social Security Advisory Board (2001) has *repeatedly recommended* [emphasis added]. At present, claimants are typically represented at appeal by legal and medical advocates who have a financial stake in the claimant's success. The Social Security Administration, by contrast, is entirely dependent on the Administrative Law Judge to protect the claimant's and the public's interests simultaneously (U.S. GAO, 1997). Permitting the Social Security Administration to provide a representative or attorney to the hearings would ameliorate this almost *comically lopsided setting* [emphasis added] in which the Social Security Administration currently loses nearly three-quarters of all appeals.

The overriding purpose of the hearing is "fact-finding." The AALJ believes that the model used by SSA to conduct hearings is a relatively poor fact-finding model as compared to the adversarial model. We believe that the center of any change at SSA should include, at a minimum, conversion from the inquisitorial model to the adversarial model. The adversarial system of adjudication is fundamental to our American judicial system. The AALJ knows of no state or Federal court that uses the inquisitorial model to adjudicate issues. SSA uses a model unheard of throughout our land to find facts in a judicial-type setting.

As a fact-finding system, it is difficult for one person to perform all three functions ("three hats") imposed on ALJs: to represent the interest of the claimant; to represent the interest of the Trust Fund; and to serve as an impartial decision maker. To function and appear as an unbiased fact-finder and at the same time to examine a claimant vigorously and thoroughly, as one would expect a lawyer defending the trust fund to do, is not possible. In fact, having the judge defend the Trust Fund as well as the claimant's interest, places the judge in an untenable situation.

The benefit of having a lawyer representing the government with the authority to settle cases should not be minimized. In fact, this benefit may be even greater to the administration of justice than the government's role as an advocate. SSA is generally regarded as conducting a high volume of cases. What makes SSA a high volume jurisdiction is the fact that the vast majority of cases are tried. However, nowhere in our judicial system is a judge required to take to hearing such a high percentage of cases compared to the total docket. Were the state and Federal courts required to actually conduct trials in the same proportion as SSA does with its dockets, those courts would abruptly crash under the weight of trying virtually all of their dockets. Having a lawyer with authority to negotiate and settle cases has the potential to drastically reduce the number of cases that are tried, and conceivably reduce the number of judges and support staff.

The AALJ believes an adversarial model would far better serve the claimants' and the public's interests by being a better fact-finding system and by more efficiently disposing of cases through

compromise and settlement. With a lawyer representing the government, the government can then decide which cases to defend. Instead of hearing 90% of the cases (assuming 10% are awarded on the record without a hearing), far fewer cases would go to hearing because of the ability to settle the case without a hearing.

Another efficiency, which should accrue to having government representation, lies in the shepherding of cases through the appeals process. Identifying those claims that are likely to prevail before the judge and agreeing with the claimant's position to enter a favorable award, means one fewer case that has to be scheduled and tried. The government lawyer can then focus resources on defending those cases which ought to be defended, rather than spend time on perfunctory hearings.

PEER REVIEW

The AALJ has advocated for an ALJ Peer Review Program at SSA for approximately twenty years. The AALJ believes that such a system would efficiently and effectively address ALJ performance and conduct issues in a manner that would be beneficial to the Agency, the Judge and the American people. Instead, the Agency continues to address these issues in a manner that always leads to costly and time consuming litigation. The Agency has not only consistently opposed the establishment of a Peer Review Program but also any similar program. This past year, the AALJ proposed a joint workgroup to study and evaluate establishing an ALJ Peer Review Program. The Agency strongly opposed the creation of such a work group.

OPEN HEARINGS

The AALJ has long advocated that hearings be open to the public. We believe there is a substantial public interest in how disability adjudication is conducted. We believe that the public's interest is generally paramount to a claimant's interest in keeping the hearing closed to the public. Open hearings would lend transparency to our administrative adjudication system and instill confidence regarding our disability system of justice. Moreover, should the case be appealed to the Federal courts, the entire record is open to the public.

MEDICAL VOCATIONAL GUIDELINES

For many reasons, Americans are living longer and healthier lives. As a result, application of the Agency's Medical Vocational Guidelines (grid rules) oftentimes forces the ALJ to award benefits when jobs are available that claimants could perform. In our view, this approach to evaluating disability is out of date and should be eliminated. At a minimum, the grid rules should be revised to reflect the increased life span of Americans.

RULES OF PROCEDURE

For many years, the AALJ has advocated to the Agency that it adopt a set of procedural rules, however, the Agency has consistently refused to do so. No other judicial system functions without rules of procedure. Further, no other judicial system operates by permitting the record to remain open continuously throughout the adjudicatory and appellate process. For example, a representative can withhold medical evidence from the ALJ and submit it to the Appeals Council in order to secure a reversal of the Judge's decision. There is no incentive under the current system to submit evidence in a timely fashion.

NEED FOR MEDICAL EXPERT WITNESSES

The Agency has a dearth of medical expert witnesses because their pay has not increased in more than a decade. Pay rates need to rise, and the SSA needs to develop a national pool of medical specialists who can appear at hearings by way of video. In most cases, courts are more likely to uphold a decision if a knowledgeable medical expert witness testifies at a disability hearing. The cost for using a medical expert witness is less than the cost of holding another hearing if the case is remanded as a result of the lack of medical expert testimony.

FURTHER REDUCE THE BACKLOG WITH REDIRECTED RESOURCES

The SSA expends a great deal of money on maintaining ten Regional Offices within ODAR. Since ODAR Regional Offices do not directly contribute to the processing and adjudication of cases, as they handle few, if any, cases, Regional Offices are merely another layer of bureaucratic administration that deprives ODAR hearing offices of personnel. Over the last fifteen years, the Regional Offices have added substantial staff, which could have been better deployed in the hearing offices. The AALJ advocates the elimination of the ODAR Regional Offices and the reassignment of Regional Office staff to hearing offices to handle the backlog, with the savings from rental costs being redirected to the hearing offices. The overall responsibility for the disability adjudication system, including current Regional functions, should be consolidated in the Office of the Chief Administrative Law Judge and under the management of the Chief Administrative Law Judge.

NATIONAL HEARING CENTERS

Face to face hearings provide the best method of delivering due process to the American people. While there may be some instances where video hearings are advisable (such as handling cases in remote areas that would require excessive travel), widespread use of the National Hearing Centers (NHCs) reduces the ability of the SSA to provide due process to the American people. Video hearings should be kept to a minimum in order to preserve the right of every American to have the opportunity to make their case in person to the Judge. No video hearing can provide the same experience and the same contact between a claimant and Judge as an in-person hearing. Moreover, video hearings require the use of a second courtroom; one for the judge and one for the claimant who appears at the hearing by video. This requirement for additional space imposes significant additional costs for the American taxpayer.

FUNDING AND RECORD SETTING ADJUDICATIONS BY JUDGES

The additional funding over the past two years provided by the Congress to the Agency has well served the American people. Additional judges have been appointed and support staff hired, with increasing per judge productivity year after year. This is a tribute to the continuing commitment and effort of SSA ALJs. In FY 2009, ODAR issued 658,600 dispositions; in FY 2010, ODAR issued 737,616 dispositions; and in FY 2011, over 800,000 decisions. However, the AALJ disagrees with using numerical per-judge dispositions to measure the performance of a particular hearing office or judge. For the most part, SSA ALJs cannot control the number of monthly dispositions. Factors beyond an ALJ's control include staffing ratios, availability of cases to schedule, complexity of the cases, quality and training of staff, whether claimants are represented, whether claimants request postponements or fail to appear for their scheduled hearing, whether interpreters are required, whether expert witnesses are necessary, and whether the bar is skilled, cooperative, and timely

submits evidence. Thus, a more accurate gauge of performance would be to measure the work output of each hearing office rather than individual judges. Also, measuring discrete units of work for all groups of employees in a hearing office would result in a more precise and accurate reflection of productivity for each hearing office.

SSA ALJs have worked very hard at reducing the huge backlog of cases. Our success is directly related to the budgetary resources provided by the Congress. We urge your continued support so that we may continue reducing the backlog of cases.

PRODUCTIVITY AND STAFFING

As above noted, the pressure on judges to produce an ever increasing number of cases has reached intolerable levels. In evaluating our concerns, it is essential that members of the Subcommittee 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, electronically organized for use in the hearing. This is a significant task, which if done properly, requires skill and one to three hours of time, as the contents of a given file arrive in the hearing office in random sequence, unidentified, without pagination, with duplications and without any numbered exhibits or table of contents to locate the exhibits. A staff member must identify and eliminate duplicate exhibits from the same source, label the remaining exhibits, arrange the exhibits in chronological order, number and paginate the exhibits and prepare the list of exhibits. After a case is worked up, it is ready for the assigned judge to review.

In this process, the AALJ believes it important for members of the subcommittees to consider how much time ALJs should be spending on each disability case. At an estimated value of \$300,000 per case, we respectfully suggest that this is not a rhetorical question. A judge must invest sufficient time to understand all of the facts in each case as well as applicable law and regulations. It is imperative for the judge to review all evidence in the file, averaging 600 pages, and then direct staff to obtain any missing evidence including consultative medical examinations. When the record is fully developed, the judge determines if a hearing is needed or whether a favorable decision can be made on the evidence of record, without a hearing. In most cases, a hearing is required and the judge then determines which expert witnesses will be required for the hearing and if additional courtroom security is necessary. 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 reviewing newly submitted evidence and considering and resolving pre-hearing motions and issues. Typically, a day or two before the hearing, the judge will conduct another review of the file to evaluate additional evidence and to insure familiarity with the facts and issues for the hearing. Many times, last minute evidence is submitted at the hearing which unnecessarily delays or otherwise impedes the adjudication of the case. When the hearing is concluded, the judge must deliberate, prepare thorough decisional instructions for the writing staff and later review and edit the draft decision before signing it. As can be gleaned from this brief overview, the disability adjudicatory process is complex and time consuming.

As earlier noted, in courts and other agencies, trials and adjudications are conducted under the adversarial process in which 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, ALJs preside over an inquisitorial process, in which the judge develops the facts and the arguments both for and against granting benefits. In large part, this is required because the SSA is not represented at the hearing and the courts are sympathetic to unrepresented

claimants. Therefore, ALJs are required to wear the so-called three hats as referenced above. After reviewing the record evidence, the judge often determines that additional evidence must be obtained. This inquisitorial system places more responsibility on the judge. Hearings based on this model are more time consuming and labor intensive for the judge.

Certainly, there is variance in the number of decisions issued by each judge. Such a distribution is normal in all human activities, and is usually graphed as a “bell curve.” However, the number of decisions issued by a judge is dependent on numerous factors such as adequate and well trained staffing, the complexity of the cases, the number of unrepresented claimants and the sophistication of the bar. These are factors clearly beyond the control of the judges.

Quite compelling is data from SSA’s last study on the issue of numerical goals for ALJs, *Plan for a New Disability Claim Process*. This study was conducted in 1994 and projected a time line for a disability claim at all levels of the process. The study, based on an average month, concluded that a reasonable disposition rate for an ALJ should be in the range of 25 to 55 cases per month. The study also revealed that a judge would spend a range of 3 to 7 hours adjudicating each case. Consistent with this study is the following testimony of former SSA Chief ALJ Frank Cristaudo before the House Ways and Means Committee, Subcommittee on Social Security, on September 6, 2008, in response to questions from Congressman Xavier Becerra:

Mr. Becerra. Do me a favor. I am going to run out of 5 minutes real quickly. I am just asking, do you believe that they [ALJs] can get to upwards of 600 to 700 dispositions on an annual basis?

Judge Cristaudo. Well, what we are asking the judges to try to do—we haven’t mandated, we are asking—is to get to 500. The 700 was more of an indication to this other group that are doing thousands of cases that at some point there may be a limit as to how many cases a Judge can actually do and still do quality work. That is what the 700 was about.

There have been changes in the process since 1994, but most of those serve to slow down, not speed up, the process. The average file size grows every year. Reviewing electronic files (eFiles) takes more time than reviewing paper files. Even electronic signing (eSigning) of decisions takes longer than using a pen. While technology may have reduced the Agency’s overall processing time for claims, it has not reduced the amount of time most judges must spend in adjudicating a case.

In considering numerical performance, it is important to understand that 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. With an average estimated cost to the trust fund of \$300,000 per case, a judge hearing 40 cases per month is entrusted to correctly decide cases valued at \$10,000,000 per month, or \$120,000,000 annually. Nonetheless, judges are being subjected to various pressures to meet ever-increasing production “goals” which in many cases become *de facto* quotas in violation of the APA and infringes on the constitutional requirement for ALJs to provide a full and fair due process hearing.

As a result of SSA’s pressure to meet or exceed goals, many judges are forced to give cases less thorough reviews; adequate evidentiary development may not be undertaken; facts may go unseen; and incorrect assessments may be reached. In some offices, judges are being pressured to accept unworked cases that have not been organized by staff which is inconsistent with the APA requirement that hearings be held with an identifiable record. The judge must waste substantial time in reviewing

un-worked files that may have many duplicate records, records out of sequence and exhibits which are neither identified nor paginated. This lost time should be spent on reviewing, hearing and deciding more cases.

Reviewing a 600 page case file is not unlike reading a 600-page novel. In both instances, one must read carefully in order to understand the story being presented. Skipping pages in either distorts one's understanding of the whole story. If a judge skips evidentiary pages in a case file, the judge could make incorrect decisions in that case, harming either the claimant or costing the American taxpayers \$300,000 for the incorrect decision. Selectively reviewing evidence is a short cut that must cease; otherwise fairness and justice disappear from our adjudicatory system.

INDEPENDENT CORPS NEEDED

Critically important to any successful democracy is an independent judicial system. At the SSA, ALJs do not have the independence envisioned by the APA, the Social Security Act, or the United States Constitution. Agency officials are now imposing daily, weekly, monthly and yearly production quotas. The imposition of these quotas, often euphemistically referred to as goals, has had a deleterious impact on case adjudication. Placing disability judges in an organization separate from SSA would better ensure justice for the American people.

For two decades, the disability adjudication at SSA has suffered from numerous failed management initiatives. With the exception of changes undertaken by former Commissioner Joanne Barnhart, all other initiatives were established and implemented by the Agency without the involvement of the AALJ, whose members are the most knowledgeable about disability adjudication. It is no surprise that those initiatives failed, with great cost to the American people.

The establishment of an independent corps of disability judges would better serve the public than the current system which has a long history of failures.

CONCLUSION

The Social Security Program is absolutely vital to the American people. Our judges are working extremely hard to address the backlog of cases under very adverse circumstances. We are most hopeful that you will further pursue the issues we raise to ensure that claimants receive a full and fair due process hearing by administrative law judges and, at the same time, that the American public receives justice.

Thank you for the opportunity to submit this statement and to present our views on these important issues.

Respectfully submitted,

D. Randall Frye
President, AALJ