
ASSOCIATION OF ADMINISTRATIVE LAW JUDGES

STATEMENT
HOUSE COMMITTEE ON WAYS AND MEANS

April 27 2010

JOINT HEARING
ON THE
SOCIAL SECURITY DISABILITY
CLAIMS BACKLOGS



House Committee on Ways and Means

Statement of the Honorable D. Randall Frye, President,
Association of Administrative Law Judges

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

April 27, 2010

Chairman Pomeroy, Chairman McDermott and members of the Subcommittees;

Thank you for inviting us to testify at this hearing. My name is D. Randall Frye. I am an administrative law judge who has been hearing Social Security Disability cases in Charlotte, North Carolina for about 14 years. I have also served as administrative law judge for the National Labor Relations Board for 1 ½ years. I am President of the Association of Administrative Law Judges (AALJ). The AALJ is Judicial Council Number 1 of the International Federation of Professional and Technical Engineers, AFL-CIO-CLE. 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 (APA) 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 most of the approximately 1600 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 the adjudication of their disability cases. Our testimony today will address the President's FY 2010 budget, the status of the backlog, restoration of reconsideration, rotational assignment of cases, setting the time and place of hearing and the negative impact of Agency initiations on the backlog and on the ability of judges to provide due process to the American people.

The Administrative Judiciary

In 1946, the Congress enacted the Administrative Procedure Act to reform the administrative hearing process and procedures in the Federal government and 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.

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. Indeed, this reform was undertaken to protect the American public by giving administrative law judges decisional independence.

The Support of Congress has Enabled Needed Restoration in Staffing

AALJ members deeply appreciate the recent support of Congress through the increases in the budget of the Social Security Administration. These increases have resulted in much-needed hiring to fill the many support staff vacancies and to appoint new administrative law judges. New judges are being appointed to offset normal retirements and add to the total of judges hearing cases. Additional hearing offices are being created to help reduce the backlog of disability cases. For all of this we are sincerely grateful as are the American people as a whole. The shortfalls in funding by the past Administration created Agency wide staffing shortages which played a significant role in preventing SSA from addressing the developing backlog at a much earlier point in time. The additional resources provided by the Congress have permitted the judges to reduce the backlog of hearings by 73,000 and to reduce the average processing time to 437 days, a level unseen since 2004.

Without question, the Congress of this great nation saved the disability adjudication system by its recent increases of financial resources to SSA. In so doing, the American people have been better and more timely served.

Continued Support is Needed

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

Although we have made progress on the backlog, additional resources are badly needed. At the current rate of reduction seen in CY 2009, without considering any increase in applications, it would still take over five years, to the first of CY 2015, to reduce the backlog to a level of under 400,000 cases, the number SSA says it needs to keep the processing pipeline filled. However, that level will not be reachable as applications are actually continuing to rise moving the date of “zero backlog” farther back in time,

Although the average age of cases is being reduced, it is still far too long a wait for those in need of benefits.

More judges and commensurate staff are needed. New applications for disability benefits have increased and will continue at a high level as long as we have high unemployment and until the last of the baby boomers reach retirement age. The current level of judges available, about 1150, is not sufficient to significantly increase the rate of reduction of the backlog nor even enough to prevent the backlog from increasing.

The current level of staff is still not sufficient. The judges in some offices are not getting cases in sufficient numbers to fill their schedules. Additionally the quality of preparation of the cases by staff has suffered significantly as a result of shortcuts permitted by management before Congress increased SSA's budget. Insufficient preparation increases the amount of time required for the judges to review the case and increases the amount of time required for the decision writer to draft the decision. The amount of time saved by staff is more than doubled in time wasted by the judge and the decision writer, both of whom are paid at higher levels. For every dollar saved, several are spent.

In addition to a new national computer center, a major systems and programming effort is needed to make the present computer system less cumbersome and more efficient to operate.

Finally, resources are badly needed to perform Continuing Disability Reviews to insure that those receiving benefits are still disabled. This effort has nearly ceased even though it has historically returned ten dollars for every dollar spent.¹

As you know, the President's FY 2011 budget request for Social Security is \$12.528 billion, which includes \$12.379 billion in administrative funding through the Limitation on Administrative Expenses (LAE) account. This budget increases SSA's staffing by only 614 positions over FY 2010. To effectively and efficiently discharge our responsibilities under the Social Security Act, we respectfully submit that the President's budget is inadequate. As you also know, the Commissioner of Social Security submitted an independent budget which proposed \$13.1 billion for the LAE account which would increase SSA's staffing level by 3758 positions over FY 2010. This level of funding, if so directed, could add at least 100 more administrative law judge positions and 500 support staff. This additional staffing is needed to address the increasing number of requests for hearing. As of March 2010, the number of requests for hearing is up 7.2% over FY 2009 and 13.1% over FY 2008.

The Administrative Judiciary is Again Achieving Record Levels of Productivity

The judges and support staff in ODAR have been increasing productivity per judge year after year. The productivity of the judges alone, not including staff attorney dispositions, is a tribute to the continuing effort of the administrative law judge corps. In CY 2009, the judges issued 658,600 dispositions, an average of 614 dispositions per available judge. That exceeds the average production in CY 2008 of 569 dispositions per judge by 45, an increase in average productivity per judge of 8%. However, it must be recognized that there is a limit on the number of cases judge can adjudicate and still provide justice to the American people.

Reconsideration

The Constitution and federal law guarantee Social Security disability claimants a full and fair due process hearing before an unbiased adjudicator. In the past, the Social Security Administration contracted with the various states to take make an initial decision on the claim and then review adverse decisions, referred to as reconsideration. If the claimant was not awarded benefits after this two level process, he/she could request a hearing before an administrative law judge. That process

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

was replaced in the Boston Region by Commissioner Barnhardt, who eliminated reconsideration and replaced it with a federal determination. Currently ten states have no reconsideration.

Reconsideration is an inherently flawed process. State disability determination services have already made a disability decision as contractor to the SSA. Little changes medically between the time the disability application is denied and the time the reconsideration is filed. According to recent statistics, in Mississippi, 92.9 percent of reconsiderations are denied again. In California, the statistic is 80.7 percent, for Texas it is 84.2 percent, for New York it is 84.6 percent,. Nationally, the percentage of social security disability and SSI disability claims denied again at the reconsideration level is 84.9 percent. Reconsideration by the same agency a few months later results in so few changes, about 15%, it is not justified economically. In human terms the cost is horrendous as 85% of the claimants will simply have their claims delayed for additional months.

The hearing before a judge is the first chance for a claimant to meet in person with the decision-maker and present his/her case. Here, the claimant is afforded a full and fair due process hearing pursuant to the Administrative Procedures Act. The administrative law judge hearing has been and remains the gold standard for disability determination.

Reinstating reconsideration simply adds time to the ultimate adjudication of claims and squanders vital resources within the state agencies. It is difficult to find a plausible rationale to support re-instituting reconsideration. The sole advantage noted thus far is that, while cases are in reconsideration, another agency is responsible for determination, and it is not until they are appealed to the hearing level that SSA must add the cases to its backlog. Thus, re-instituting reconsideration would give the appearance of reducing the backlog without changing the painful reality of delay for those claimants who will have to wait much longer for a hearing.

Reconsideration should not be reinstated. Rather, it should be eliminated in its entirety.

Assignment of Cases in Rotation

Currently, administrative law judges who are assigned to the Office of Disability Adjudication and Review (ODAR) are appointed under the APA, which guarantees individuals that appear before the agency "decisional independence" from undue Agency influence. In order to ensure "decisional independence," an Agency must provide its administrative law judges the full opportunity to provide a fair, impartial, and independent adjudication of the claims and grievances.

Federal agencies have an affirmative duty to ensure that the judges are assigned to the cases in a fair and equal manner. This mandate was not enacted to protect the judges - but rather to protect the claimants and the adjudicatory process from abuse or the appearance of impropriety. An essential and important element in rotational assignment is that cases are assigned on a first in, first out basis. Such a procedure insures a random but fair assignment of cases to administrative law judges.

In order to provide fundamental fairness to these citizens who appear before federal administrative agencies, the APA provides in pertinent part: *To the extent practicable, judges shall be assigned to the cases in a strict rotational manner.*

In enacting this legislation, Congress wanted to ensure that each citizen had a fair opportunity to present his grievance or claim to an impartial administrative law judge. In enacting a strict rotational system, each citizen must have an equal opportunity to appear before an impartial

adjudicator - not one handpicked by the agency which may have its own agenda in selecting a particular adjudicator to hear and decide a particular case.

Prior to enactment of this statute, the agency selected the adjudicator in any manner or for any reason it saw fit. In having such a random or unspecified policy for assigning judges to cases, a suspicion often endured that the citizen was being assigned to a judge for reasons other than impartiality.

The salutary language "to the extent practicable" permits the agency to make out of rotation assignments to accommodate certain compelling circumstances. The burden has been always on the agency to fully explain its departure from strict rotational assignment if the issue materializes, and the judges' careful scrutiny and review of these agency departures from strict rotation protects the bench, the bar, the citizens and the adjudicatory process from an agency's misuse of the statutory mandate.

We are presently informed that in some hearing offices cases are assigned out of rotation and reassigned from one judge to another. We believe such a practice must be discontinued as it is inconsistent with the APA and legal precedent and is detrimental to the American people.

Setting The Time and Place of the Hearing, Cutting Corners and Due Process

Social Security Commissioner Astrue has submitted a final rule to the Office of Management and Budget (OMB) based on the Notice of Proposed Rulemaking (NRPM) regarding Setting The Time And Place for a hearing before an Administrative Law Judge, 73 Fed. Reg. 66564 (November 10, 2008), Docket No. SSA-2008-0033.

The AALJ strongly objects to this proposal. While the AALJ supports initiatives that will reduce the disability claims backlog, we strongly oppose making this proposal a final rule: It violates the Administrative Procedures Act; it will have a negative impact on the right of claimants to a full and fair hearing; and it will not increase productivity or reduce the adjudicatory backlog, but will likely further exacerbate the situation. The rule would impair the judge's ability to develop and review the record before conducting a hearing. It is respectfully submitted that should a judge be precluded from developing and reviewing the record prior to hearing, he or she cannot provide a due process hearing to claimants. Finally, if this proposed rule is promulgated, it will lead to costly and time consuming litigation.

As earlier noted, the protections of the APA were enacted to level the playing field for thousands of individuals who sought relief from Agency decisions with which they disagreed. These protections have well served the American people for decades by ensuring full and fair due process hearings. However, we believe that important aspects of the APA, the U.S. Constitution and legal precedent are suffering from bad management decisions at SSA. The unfortunate reality is that administrative law judges at SSA are facing incredible work loads with unreasonable goals. Management pressure to meet these goals is, at times, unbearable. Judges are admittedly cutting corners in an effort to meet these unreasonable goals. Managers are instructing judges that they need not review all of the evidence in their cases and that the decisions prepared by staff will only be presented to the judge in final form rather than as a draft. As incredible as it may sound, judges, among the highest paid government officials, are being forced to make data entries into the computer system, work formerly performed by lower paid staff.

Judges are appointed under the APA, which guarantees “decisional independence” from undue Agency influence. The proposed rule clearly encroaches on judicial independence. In order to ensure “decisional independence,” an Agency must insure that its judges have full opportunity to provide a fair, impartial, and independent adjudication of the claims brought by citizens. Social Security administrative law judges have an affirmative duty to assure that the hearing record is fully developed and legally sufficient to resolve the matters before them. In accomplishing this mandate, the judges have the legal responsibility to determine when a case is ready for hearing. Among the things that a judge must consider when setting the time and place of a hearing are: (1) the need for pre-hearing conferences; (2) availability of parties, witnesses, and representatives; (3) motions and discovery issues; (4) types and availability of expert witnesses; (5) issues to resolve; (6) development, admission and suitability of evidence; and (7) conduct of the hearing. The substitution of a judge’s judgment in these matters may deeply impact the fundamental fairness of a hearing. Centralizing scheduling, by non-lawyer management bureaucrats, even by the local hearing office management, cannot replace a judge’s discretion in considering these matters. The matter becomes even more serious and potentially abusive should the scheduling of hearings be performed by a distant management official, by a hearing clerk, or in the worst case by a computer.

Important also, Social Security hearings are not conducted as an adversary system. Social Security administrative law judges have multiple responsibilities [See *Sims v. Apfel*, 530 US 103 (2000)]. Social Security administrative law judges wear the proverbial “three hats” which requires the judge to develop the record for the claimant, protect the interests of the government and render an impartial decision based on evidence in the hearing record. Their responsibilities are more demanding than those of a judge in an adversarial hearing. I have observed this first hand as an administrative law judge for the National Labor Relations Board. During the past 60 to 70 years, Social Security cases have become more multifaceted and the nature of the hearing has undergone significant changes. Cases now present the judge with complicated fact situations consisting of multiple medical impairments, conflicting medical opinions and a myriad of subjective complaints. Also, the law has become more complex as a result of numerous court decisions.

Some other Agencies, such as the Federal Labor Relations Authority and the National Labor Relation Board, do schedule hearings for their judges. However, as noted above, there are fundamental differences between those hearings and Social Security disability hearings. Judges at these other agencies do not have the responsibility for developing the record. Moreover, they have procedural rules to bring order to the proceeding case and their cases are conducted under the adversarial process where the case is developed before the trial, and the evidence introduced by opposing counsel during the trial. However, in Social Security disability hearings, the adjudications are conducted under the inquisitorial process, and it is the duty of the judge to develop the record. After reviewing the evidence in the file from the decision being appealed, 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, it will have to be rescheduled to allow time to obtain the new evidence. If the judge fails to develop the 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.

If ultimately promulgated, this rule would permit the SSA to thwart the mandates of the APA and would be used as an alternative disciplinary tool or as a means to coerce judges to pay more cases solely to provide more case production for the SSA. It is clearly a blatant attempt to unlawfully use scheduling authority to accomplish what SSA has unsuccessfully tried to do in other ways - to impose *de facto* dispositional quotas. To control the production schedule is to control production by automatically creating production quotas. It is well-established that production quotas not only

violate the APA, but also are inconsistent with 5 USC Sec. 4301-02. See e.g. *Nash v Bowen*, 869 F.2d 675 (2d Cir 1989) (holding that while production goals are a permissible exercise of Agency management, dispositional quotas are not permissible). The new rule clearly establishes that SSA intends to enforce its scheduling goals with mandates and discipline converting the goals to quotas which are clearly unlawful under the *Nash* case and the APA. Moreover, promulgation of this rule would work in tandem with Agency managers who are putting pressure on judges to cut corners, i.e.; no case development or thorough case review. With this rule, the Agency simply schedules hearings without regard to the requirement that judges develop and review the record before hearing.

For all of these reasons, it is imperative that the proposed rule be withdrawn by the SSA, or alternatively, rejected by the OMB.

Negative Impact of Certain Agency Actions

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.

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 organizing of claim files, has failed.

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.²

*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."*³

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 issuing 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 additional annual cost to the trust fund of 1.6 billion dollars.

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

² 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.

³ *Id.*

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 significant change of location for 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 which can now easily communicate with all hearing offices without delay.

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 additions and it is slower to use in reviewing the file and in conducting a hearing. The system lacks many simple tools commonly found in commercial programs which put unnecessary obstacles in the path of the user and slow the processing. For judges, electronic files slow down the process because pages take longer to “load” and view. Electronic organizing of files has not yet been perfected. Electronic signing of cases requires 5-10 times as much time as signing with a pen. Equipment failures cause delays, some for long periods, because the system is often not strong enough to handle peak work loads. Judges spend too much of their work day making computer entries, work that should be assigned to staff.

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 will not be true until the faults in the system have been eliminated and it is running smoothly. That appears to be years away and may never be fully accomplished.

The Agency’s use of streamlined case files in hearing offices is counter-productive. A “streamlined” claim file is one which is not worked up, i.e., prepared for hearing. Duplicate pages of evidence, often numbering in the hundreds of pages are not removed. Exhibits are not identified, placed in chronological order or even numbered. This allows the support staff to spend less time in preparing a case record. However, it requires the judge, the decision writer and medical experts, all of whom are at higher pay grades, to spend far more time reviewing the record. It is questionable if a streamlined file meets due process requirements when the claimant is handed an unorganized mass of evidence and when evidence in the record is not adequately identified 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 so as to dismiss their claims. Those who appear will be required to travel, often a long distance, to the hearing office another day for the actual hearing or may be given a perfunctory hearing. This discriminates against unrepresented claimants and is hardly the full and fair due process hearing required by the Administrative Procedures Act.

It is critical that members of Congress understand the role of staff in the disability claims process as lack of staff is a major reason for the backlog. When case files arrive in a hearing office, they must be “worked up” or “pulled”, that is organized for use in the hearing. This is a significant task

which, if done properly, requires skill and one to three hours of time. 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. A staff member must identify and eliminate duplications, identify exhibits from the same source, label them, arrange them in chronological order, number and paginate the exhibits and prepare the List of Exhibits. After it is worked up, the file is ready for the assigned judge to review.

The judge must review all the evidence in the file, an average of around 400 pages, and many of the administrative pages, and direct staff to obtain missing documentation. 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 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 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 review whatever additional evidence has been added and 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 and later review and edit the draft decision. Once satisfied with the decision, the judge signs it.

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, administrative law judges preside over an inquisitorial process, in which the judge develops the facts and develops the arguments both for and against granting benefits. In large part, this is required because the Social Security Administration is not represented at the hearing and the courts have been sympathetic to unrepresented claimants. Therefore, Social Security judges are required to wear the so-called three hats, referenced earlier. 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.

The APA sought to insulate administrative law judges from the decision-making dictates of agencies that wish to satisfy a certain goal *du jour*. We saw this in the early 1980's when SSA wanted to cut people off the rolls. We have seen it again in recent years when various agency policies have created 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, "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 interfering in the functioning of its administrative law judges. In yet 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".⁴

More recently, the Commissioner of Social Security has complained to Congressional committees that some judges are underproductive and a contributing cause of the backlog. However SSA's own statistics show the judges 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 SSA's judges.

Certainly, 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", and here it is further dependent on the numerous factors noted above which are outside of the control of the judges. Most of the judges are in the center of the curve.

This was confirmed by a recent SSA OIG report⁵ 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 in the range of 25 to 55 cases per month. The monthly disposition rate, according to the study, should average 40, or 480 per year

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. The judge's tasks of reviewing the record, obtaining necessary evidence, holding a full and fair due process hearing, drafting decisional instructions and editing the draft decision are more time consuming than that of simply drafting a decision from instructions.

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 several times as long as using a pen. While technology may have reduced overall processing time for claims, it has done nothing to reduce the amount of time a judge must spend in adjudicating a case. It has increased it.

In considering numerical performance it is important that the Congress understand not only 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. Additionally, each case

⁴ *AALJ v. Heckler*, 594 F.Supp 1132, (D.D.C. 1984)

⁵ *Congressional Response Report: Administrative Law Judge and Hearing Office Performance*, Office of the Inspector General, Social Security Administration, A-07-08-28094.

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.

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. Judges 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. As noted above, the judges increased their productivity by another 8% in CY 2009.

Nonetheless, judges are being subjected to various pressures to meet production "goals" which in many cases become *de facto* quotas. Judges are sometimes required to provide written explanations for not meeting the goals and written plans on how they intend to meet the goal, taking valuable time away from adjudicating the case. Some middle managers have actually written that judges "must" make the "goals".

The result of the pressures to meet or exceed goals often is that some judges consciously or unconsciously take shortcuts. Cases get shorter reviews, facts go unseen and incorrect decisions are reached. In many offices judges are being asked, or told, to accept unworked cases, cases which have not been organized by staff. These case will have many duplicate records, records out of sequence, exhibits unidentified and unpaginated. This results in a large amount of judge hours wasted; hours which could be spent on reviewing and hearing more cases.

SSA has probably the largest adjudicatory system in the world. It can have the best.

Conclusion

I want to thank you on behalf of the AALJ for this opportunity to be heard today and present you our views on these important issues. 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. The Social Security Program is absolutely vital to the American people. Our judges are working extremely hard to address the backlog of cases under the most adverse of circumstances. We truly appreciate your support.