STATEMENT OF THE
SOCIAL SECURITY LAW SECTION
FEDERAL BAR ASSOCIATION

COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON SOCIAL SECURITY

SECURING THE FUTURE OF THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM

JULY 11, 2012

Chairman Johnson, Ranking Member Becerra, and Members of the Subcommittee:

These remarks are exclusively those of the Social Security Law Section of the Federal Bar Association and do not necessarily represent the views of the Federal Bar Association as a whole. Moreover these remarks are not intended to nor do they necessarily reflect the views of the Social Security Administration.

Unlike other organizations associated with Social Security disability practice that tend to represent the interests of one specific group, the Federal Bar Association's Social Security Law Section embraces all attorneys involved in Social Security disability adjudication. Our members include:

- Attorney representatives of claimants
- Administrative Law Judges
- Administrative Appeals Judges
- Staff attorneys in the Office of Disability Adjudication and Review (ODAR)
- Attorneys in the Social Security Administration's Office of General Counsel
- U.S. Attorneys and Assistant U.S. Attorneys

The common focus of the FBA's Social Security Law Section is the effectiveness of the adjudicatory process at all phases, including hearings in the Office of Adjudication and Disability Review (ODAR), the appeal process before the Appeals Council, and judicial review through the Federal courts. Our highest priority is ensuring the integrity, fairness, independence, and effectiveness of the Social Security disability adjudication process to those it serves -- both Social Security claimants themselves and the American taxpayers who have an interest in ensuring that only those who are truly disabled and entitled to benefits receive these benefits.

We appreciate the continuing commitment that this Subcommittee has shown for fair and effective adjudication of disability claims. As will be discussed in more detail below, your support has enabled Social Security to reverse the long-standing trend toward increased backlogs and longer wait times. Most importantly, this is being done without sacrificing due process. We strongly believe that the growing disability claims workload can, and indeed must, be addressed without limiting claimants' opportunity for full due process. In fact, we believe that affording due process is essential to fulfilling the Commissioner's objective of reaching the right decision at the earliest possible stage of the process. The ODAR hearing before an impartial judge is the method by which claimants have an opportunity to tell their story. It is also essential to meet our Constitutional obligations. This right should never be abridged.

This Subcommittee has considerable knowledge and depth of understanding of the decision-making process applicable to disability applications. This depth of knowledge is demonstrated in the information set out in the Committee's notice of these hearings and has been clearly shown in this Section's experience in testifying before the Committee. In these remarks, we will not set out the procedural information of which the Committee is clearly aware, but will address some of the concerns that were raised by the Committee in announcing the current hearings as well as a few other areas that have been the subject of comment. We also will respond to some of the specific questions raised by the Chairman in his opening statement, as well as address several other issues.

Concerns Expressed by the Committee

Processing Time

In setting these hearings, the Chairman noted that the average waiting time for an administrative law judge decision (average processing time) is currently 354 days. As the Subcommittee is aware, this waiting period is dramatically shorter than that which claimants faced just a few years ago. At the end of fiscal year 2008, the average processing time was 514 days. This improvement has been achieved through determined efforts by the Commissioner, Chief ALJ, and thousands of dedicated employees. Some of the key elements in this success are: 1) Increased funding to provide for more staff including ALJs and support staff; 2) Additional hearing offices so all areas of the country are served; 3) National Hearing Centers to handle areas where there is a substantial increase in workload; 4) Administration of the program on a national level so the workload is balanced among the hearing offices rather than the prior local administration where there were substantial variations in workload and waiting times; and 4) Increased screening initiatives so that favorable cases are paid without the need, expense and delay for a ALJ hearing. Despite the hard work of these individuals, this reduction would not have been possible without the support of this Subcommittee in ensuring that the Agency received necessary resources.

The Section applauds this progress, but we strongly believe that wait times remain far too long. It must be remembered that the time counted as average processing time only begins after the claimant has completed a sometimes lengthy administrative process. Even with the improvements, the average claimant must still wait nearly a year between requesting an administrative law judge decision and getting the decision. Of course, many claimants wait far longer than the average. For a person with no income and limited or no access to medical care, this wait seems interminable.

Progress has been made through both increased personnel and improved technology. The Section believes that continued technological improvement is important and will be useful. However, every indication is that there are few major efficiency gains remaining to be achieved from technology. We can foresee efficiencies from technology that, for example, would digitize medical records and permit searches for words or phrases. However, even if the Agency does pursue such technology, it is unlikely to bear fruit in the near future.

The Social Security Law Section would oppose any increase in ALJ disposition goals. We believe that any increase in the current goals would undermine the adjudicatory process. Judges attempting to meet such goals would simply not have enough time to fully analyze and consider the voluminous medical records in each case.[1] These decisions are far too important to each claimant and to the taxpayer for anything less than a full and thorough consideration of all of the evidence.

We are fully cognizant of the difficult economic times that our nation faces. Despite this, we must urge that the Agency be provided the maximum feasible resources to ensure, at a minimum, that the progress that has been made is not lost and that waiting time is further reduced. Disability claimants are among our most vulnerable citizens. Whether their claims are eventually deemed meritorious or not, claimants deserve thorough consideration of the merits of their claim. In struggling to meet our serious budgetary issues, it is important that we not neglect the needs of the claimants and the taxpayers for a prompt, fair decision based on a full due process hearing.

ALJ Productivity and Disparity in ALJ Decision Outcomes

The Committee correctly notes a disparity among administrative law judges in terms of the rates at which they award benefits. While we share the Committee's concern in this area, we would note that the magnitude of this problem has been exaggerated by the media, which have focused on one West Virginia ALJ who has now resigned. It is important, however, that any solution not create a problem of even greater magnitude. We believe that any solution to this concern must preserve these judges' adjudicatory independence. Claimants depend on these judges to issue fair and impartial decisions. Without this independence, it would be all too easy for one administration to reduce expenditures and for another to try to put more money in the economy, by forcing judges to issue fewer or more awards.

In a recent article by Professor Richard Pierce in the Cato Institute's Fall 2011 issue of *Regulation, i*t was suggested that the solution to this "problem" is the abolition of the due process ALJ hearing. We believe that such an action would deprive claimants of Constitutionally mandated due process. The factual, legal and logical flaws in Professor Pierce's article are well refuted in two articles:

1. See Dubin and Rains, Scapegoating Social Security Disability Claimants (and the Judges Who Evaluate Them), American Constitution Society (March 2012) https://www.acslaw.org/sites/default/files/Dubin__Rains_-_Scapegoating_Social_Security_Disability_Claimants.pdf
2. What We Should Do About Social Security Disability. A response to Richard J. Pierce, Jr. By Jeffrey S. Wolfe and Dale D. Glendening http://www.cato.org/pubs/regulation/regv35n1/v35n1-3.pdf

[1] There are approximately 50 workweeks in a year (52 weeks minus 10 Federal holidays), which is 250 days. If we allow for only 20 days per year for vacation, sick leave, etc., an ALJ deciding 600 cases would only have three hours per case to review the evidence, hold a hearing, issue decisional instructions, and edit a draft decision. Would you want the Judge to spend less than 3 hours on a case involving your loved one?

Further, the Commissioner submitted an attachment to his testimony that compares all ALJs with more than 100 dispositions in Fiscal year 2007 and fiscal year 2012 through May 25, 2012. There were 7 ALJs in 2007 that awarded benefits in 20% or less of their cases and 13 in 2012. This is shown as 1% or less of the ALJs with 100 or more dispositions. The Commissioner's attachment also shows that in 2007, 217 ALJs (19.6%) allowed benefits between 85 to 100%, while in 2012 the number declined to only 74 ALJs (5.1%). We are not suggesting that the Commissioner should not consider issues of "outliers," but the small magnitude of these awards clearly does not justify abolishing a hearing process that has stood the test of time and judicial review.

One of the witnesses raised the issue of disparity in outcomes among offices. The commenter noted that San Juan, Puerto Rico ODAR had an approval rate of 87.92% whereas Shreveport, Louisiana ODAR's rate is only 37.42%. Such statistics tell us little standing alone without further analysis. This is particularly true in the cited examples. The Medical-Vocational Guidelines direct finding disability for those who are illiterate when even those with marginal education would not be found to be disabled. These Guidelines define illiterate as unable to read or write in English. In Puerto Rico, this could include educated Spanish-speaking individuals who are not literate in English. To illustrate, a 50-year-old high school graduate capable of light exertional-level work who is fluent in Spanish but not English would be found to be disabled under Medical-Vocational Rule 202.09 even though he lives in Puerto Rico. An individual who is who is literate in English but with only limited education would be found not to be disabled under Medical-Vocational Rule 202.10.

In contrast, Shreveport obtained fame in a 1995 Reader's Digest article that discussed near universal application by poor parents for Supplemental Security Income for their children. It is not surprising that denial rates would be high in such an environment.

We believe that before deciding how to address this issue, the Agency should use valid statistical means to determine the nature and extent of the problem. It is easy enough to note that there are a few judges whose award rates seem to be out of line with the norm. It is another matter altogether to identify any significant group which might legitimately be considered "outliers."

We cannot know how many judges are true "outliers" without an appropriate statistical model analyzing the distribution of outcomes of the judge corps as a whole. Arbitrary cutoff points for favorable or unfavorable outcomes are of no value without such an analysis. Even a basic statistical model must consider relevant factors. For example, some state disability adjudication services award benefits at much higher rates than others. For example, in Fiscal year 2010, the state agency in Mississippi granted 24.9% of all claims at the initial determination level, whereas the state agency in New Hampshire granted 49.5% of all claims at the initial level. It seems likely then that the mix of cases a judge in New Hampshire receives may very well be different from that received by his counterpart in Mississippi.

Even after identifying statistical outliers, individual cases must be reviewed. The possible legitimate explanations are myriad, e.g., Hearing Office Chief Judges who help office

productivity by issuing on-the-record decisions identified by senior attorneys who did not have the authority to issue some types of decisions.

In a limited number of cases, SSA makes initial claims itself. In 2010, the Atlanta Region Disability Program Branch awarded benefits in 18.4% of initial claims, while the New York Region awarded benefits in 58.4% of initial claims. Disparity exists at all levels of the disability program and further individual study is required to determine those cases that present an actual issue. Abolishing the due process hearing does not address the problem.

If and when the Agency identifies problems with "outliers," it then must address these in ways that do not disturb adjudicatory independence. This likely would be best done by training, mentoring, etc. To avoid the pitfalls that come with diminishing judicial independence, other measures should only be considered in extreme cases and under carefully crafted rules.

Remands

Almost one ALJ decision in six is appealed to the Appeals Council with about one in ten of these being further appealed to the federal courts. Annually, there are over 25,000 cases remanded to administrative law judges for new hearings and decisions. We note that this is only 4% of all ALJ adjudications and that remands occur in only approximately 9% of all unfavorable ALJ decisions. While remands constitute a relatively small percentage of the ODAR workload, they still amount to the equivalent of the full time work of 50 – 60 judges. The right to appeal is obviously important and must be preserved. We believe, however, that there can be a notable reduction in this workload without sacrificing claimant's rights.

In a number of remands the Appeals Council seems to be expressing a significant inclination that benefits should be awarded. These cases return to the same ALJ for another hearing. Occasionally they then go back to the Appeals Council where they are then remanded to a different ALJ for a third hearing. Much effort could be avoided and claimants could receive a much faster resolution if, in these cases, the Appeals Council either awarded benefits or set out a specific factual finding which it believes to be established. If the Appeals Council needs additional staff support to enable it to take such actions, the costs would pale compared to the current avoidable expenses.

Chair's Questions

We now respond to some of the specific questions raised by the Chair in his Opening statement:

Why are almost 12% of ALJs are deciding 200 or fewer cases per year?

We do not know the basis of this figure. The Commissioner testified that 72% of the ALJs were on course to meet the goal of 500 – 700 dispositions in 2012 and that the percentage was expected to rise as the year goes on. However, we believe certain ALJs should be excluded from any such calculation:

1) Management ALJs and union officials who are assigned to non-adjudicatory responsibilities either in whole or the majority of their time. If this is a large number of ALJs, it might suggest that SSA may have too many ALJs assigned to non-adjudicatory responsibilities.

2) ALJs who do not work an entire year because they were hired or retired during the year or were absent for military leave, extended sick leave, etc.

If an individual review is conducted of the ALJs and if it identifies some ALJs who are assigned to adjudicate cases and, without good reason, are not doing so, then the Commissioner should take action. This may be in the form of additional training on relevant issues to increase the ALJs productivity. If this is not successful, we believe that low productivity can result in disciplinary action. *Nash v. Bowen*, 869 F2d 675, 680-681 (2nd Cir), cert. denied, 493 U.S. 812 (1990). The Commissioner has taken disciplinary action in the past where warranted and we have no doubt that he will continue to do so.

It was stated that the decisions of so-called "outlier judges," who deny or allow most of the cases they hear, cannot be questioned. The Appeals Council can and does hear appeals of claimants who are dissatisfied with the decision in their case. Furthermore, the Appeals Council can and does take "own motion" review of favorable or partially favorable decisions. The Commissioner has also recently established a Quality Review initiative and opened four new Branches in the Office of Appellate Operations to address these concerns.

It was stated that "claimant's representatives are part of a billion dollar plus a year industry, encouraging appeals and making a living by collecting their fees from the benefits awarded their claimants." We believe representatives play a vital role in the disability application and appeals process. For many years, claimants were rarely represented. As a result, the Administration routinely expended tremendous resources contacting treating sources to obtain treating records. In a large percentage of cases, the claimant then disclosed additional treating sources or more recent tests that had not been obtained. This resulted in delays in issuing a decision.

Representatives now undertake this role, taking on a tremendous amount of work Social Security would otherwise be required to do. With the complexity of HIPPA and Privacy Act concerns, this is more than many claimants can accomplish without a representative or Social Security doing it for them. As Vice President Hubert Humphrey once said, "(t)he moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; those who are in the shadows of life, the sick, the needy and the handicapped." We strongly believe that claimants must retain the procedural protections they have had for decades. These protections are provided by representatives who usually take the cases on a contingency fee basis and get paid nothing if the claimant is not successful.

Other Issues

Hearings Open to the Public

It has been suggested that disability hearings be open to the public. We strongly oppose such a move. Disability hearings inherently involve discussion of highly personal mental and physical health issues and medical records. Such information should not be made available to the public without an extremely compelling reason or consent of the claimant in an individual case. The certainty of causing stress and embarrassment to claimants far outweighs any theoretical benefit to the public.

In addition, we would anticipate that, if hearings were open to the public, there would be frequent motions by claimants to close specific hearings or portions thereof when there is discussion of particularly sensitive issues. The added time consumed in adjudicating such motions would simply add to the resources required in each case and exacerbate the hearing backlog.

Medical-Vocational Guidelines

For many years Social Security has used Medical-Vocational Guidelines to enhance uniformity and efficiency in decision-making. These Guidelines direct outcomes in certain cases depending on the claimant's age, education, skill level, and functional ability. It has been suggested that these Guidelines be abolished or modified to take into account longer life expectancies. As discussed below, the Social Security Law Section does not oppose updating these Guidelines but strongly opposes these particular suggestions.

The Subcommittee has correctly noted its concern about the significant variation in outcomes depending on the assigned judge. Abolishing these Guidelines will geometrically increase the variability in outcomes. Judges must consider each of these factors and without the Guidelines, each judge will be left to do so without clear rules or directions to follow. Many may seek to resolve this dilemma by increased reliance on vocational expert opinion. The system will clearly not be improved by reliance on the opinions of thousands of vocational experts, as opposed to reliance on one set of regulatory guidelines.

The suggestion that the Guidelines be updated to account for increases in life expectancy is fundamentally flawed. Nothing in law or regulation allows consideration of how long the claimant may live to collect benefits. Age is a factor in decision-making because of its vocational effect. The guidelines consider the ability to make occupational adjustment to diminish with age. Life expectancy is simply irrelevant to this factor.

The Section would not oppose updating the Guidelines based upon a study of the current effect of age and all of the other factors on employability. It is entirely possible that a study would show changes in the effects of these factors since the Guidelines were established. If a valid study demonstrates a need for the Guidelines to be updated, then they should be updated. However, unless and until such a study is done, we oppose modification of the Medical-Vocational Guidelines.

Medical Experts

Other commenters have noted the importance of medical experts in the adjudicatory process. Medical experts often serve invaluable roles when testifying or responding to interrogatories for disability hearings. Consultative examiners can provide direct evaluations of claimants' functional abilities that generally are not found in treatment notes. Judicious use of medical experts can assist judges in reaching the right decision as early as possible. Pre-hearing consultative examinations or interrogatories may eliminate the need for a hearing. Medical testimony reduces the number of remands and expedites the process. The cost of the medical experts is offset by the savings in time and resources.

Despite the advantages of the use of medical experts and consultative examiners, the agency has a dearth of such individuals. It is often impossible for the Agency to find experts in many specialties. The cause of this is simple: compensation rates are too low. Rates have not increased in over a decade. The Section supports increased compensation for consultative examiners and medical experts. We do not, however, feel that increased compensation is the whole answer.

Many claimants allege that, when they went to consultative examinations, they received only very cursory examinations by someone in the physician's office and barely met the physician. There have been far too many complaints for these to be dismissed out-of-hand. This problem will not be solved by merely giving the same providers more money for doing the same thing. Social Security must enhance its efforts to ensure that examiners are providing the full examination for which they are being paid. This is essential for fairness to both the claimants and the taxpayers who are compensating the consultative examiners.

Continuing Disability Reviews

SSA has a process of Continuing Disability Reviews (CDRs). These CDRs are conducted in order to determine if a recipient of disability benefits continues to meet the disability and other criteria related to the benefits they are receiving. CDRs serve two important purposes. First, they save taxpayer money. As Commissioner Astrue noted in his March 24, 2009 testimony before this committee, every $1 spent on CDRs yields $10 in program savings. Secondly, CDRs provide benefit recipients an additional incentive to fully utilize available medical care, vocational rehabilitation services, and job training to enable them to re-enter the workforce.

Because of inadequate funding levels for over a decade, SSA has accumulated a significant backlog of medical Continuing Disability Reviews. It has been estimated that, if these CDRs had been conducted, the long-term program savings would be over $20 billion. Failure to conduct the full complement of these reviews has adverse consequences for the federal budget and the deficit.

The Social Security Law Section supports full funding of CDRs. As the SSA's 2013 Budget Request Report notes on pages 7, 16, and 17, billions of dollars have been saved by these

programs and admirable progress has been made by the Commissioner in expanding them. The limiting factor has been budget cuts to SSA that prevent these programs from achieving their full potential.

To be clear, funding of CDRs will not reduce the hearing backlog and, in fact, it may add to it. When benefit recipients are found no longer to be eligible for benefits, many will seek a hearing. This is an important due process right that should not be abridged. Thus, full funding for CDRs must include additional funding for ODAR to adjudicate CDR appeals. This would require funding above that needed to eliminate the backlog of initial claims. When considering this additional funding, it is important to keep in mind the savings created by CDRs. Conducting continuing disability reviews is the right thing to do for the taxpayers and for the recipients of benefits.

Mr. Chairman, thank you once again for the opportunity to provide this statement. The Social Security Law Section of the Federal Bar Association looks forward to working with you and the Social Security Administration in improving he disability adjudication process.